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To Sell or Not to Sell, That Is the Question: The Rescission of Sale on the Basis of Lesion and Its Applicability to Mineral Rights

I. A BRIEF INSIGHT— LESION, MINERALS, AND THE PROBLEMS WITHIN

One of the most sacred possessions held by man is his property.¹ Imagine that you own a tract of land. After much contemplation, you decide to sell this tract for \$28,000. A short time after completion of this sale, you are informed that the purchaser discovered significant amounts of gravel beneath the surface of the tract. This gravel is valued at approximately \$100,000.00, nearly four times the original selling price. Objectively, it looks like a bad deal. You may be thinking that you have just been scammed; you are likely angry that you lost out on a fortune. Is there anything you can do?

The above facts simulate the issue in *Hornsby v. Slade*,² where Ms. Hornsby filed suit to set aside the sale of a certain tract of land because of lesion beyond moiety.³ Similar to Ms. Hornsby, your immediate reaction may be to file suit against the purchaser. Do you have a cause of action to file such a suit? This article delves into that issue.

One course of action in such a scenario is found within the Louisiana Civil Code, which establishes a cause of action for lesion beyond moiety.⁴ Lesion beyond moiety is the act of an individual rescinding the sale of an immovable on the basis of lesion due to the price being less than one-half of the fair market value of that immovable.⁵ Only the seller can claim

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1. See James Madison, *Property*, Papers 14:266-68 (1792).
2. *Hornsby v. Slade*, 854 So. 2d 441 (La. Ct. App. 2003).
3. *Id.* at 442. The sale of an immovable may be rescinded for **lesion** when the price is less than one half of the fair market value of the immovable. **Lesion** can be claimed only by the seller and only in sales of corporeal immovables. It cannot be alleged in a sale made by order of the court. The seller may invoke **lesion** even if he has renounced the right to claim it. LA. CIV. CODE art. 2589 (2017) (emphasis added). The definition of *moiety* is commonly referred to as “a half of something.” *Moiety*, BLACK’S LAW DICTIONARY (10th ed. 2014).
4. LA. CIV. CODE art. 2589 (2017). **Lesion** is defined as “[l]oss from another’s failure to perform a contract” or “the injury suffered by one who did not receive the equivalent value of what was bargained for.” *Lesion*, BLACK’S LAW DICTIONARY (10th ed. 2014) (emphasis added).
5. LA. CIV. CODE art. 2589 (2017).

lesion in the sale of corporeal immovables, such as land.⁶ Lesion cannot be alleged in a sale made by order of the court. The seller may invoke lesion even if he has renounced the right to claim it.⁷ Additionally, parties giving corporeal immovables in exchange⁸ may demand the value of the thing from which he was evicted or the return of the thing he gave, with damages available as awarded in either case.⁹

Unfortunately, your question does not have a straightforward answer. The Louisiana Civil Code allows rescission on the grounds of lesion beyond moiety.¹⁰ However, under the Louisiana Mineral Code, the sale of a mineral right is not subject to rescission for lesion beyond moiety.¹¹ To address the obvious legislative conflict, the Mineral Code provides that in the event of any conflict between the provisions of the Mineral Code and any provision of the Civil Code, the provisions of the Mineral Code will prevail.¹²

While a literal reading would show that the Mineral Code's preclusion applies only to mineral rights as a simple exception to the Louisiana Civil Code's allowance of lesionary actions, perhaps Mineral Code article 17 should not only apply to mineral interests, but also land sales functioning practically the same as the sale of a mineral interest. Consider a situation where the value of a piece of land is an absolute zero. If that piece of land is sold for a value according to the value given to the minerals beneath, but the contract terms only express the sale of the land itself with the underlying motive of the value of the minerals, the differing code articles provide differing solutions with a meritless economic distinction.

Regarding the sale of a tract of land, the sale of all rights is included with the land, unless clearly separated in an instrument. Therefore, it is necessary to draw a teleological extension from the legislative purpose in applying Mineral Code article 17 not only to mineral rights, but also to the sale of land functioning practically the same as the sale of the mineral interest. Courts have avoided such a necessary extension thus far;

6. *Id.* “[T]here are only two kinds of immovables: corporeal immovables and incorporeal immovables. Corporeal immovables are tracts of land with their component parts” A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE: PROPERTY § 7:8 (5th ed. 2015) [hereinafter YIANNOPOULOS, TREATISE].

7. *Id.*

8. “Exchange is a contract whereby each party transfers to the other the ownership of a thing other than money.” LA. CIV. CODE art. 2660 (2017).

9. LA. CIV. CODE art. 2662 (2017).

10. LA. CIV. CODE art. 2589 (2017).

11. LA. REV. STAT. § 31:17 (1975).

12. LA. REV. STAT. § 31:2 (1975).

however, it is crucial to the proper application of the differing lesion articles within the Civil and Mineral Codes.

So, turning back to the original hypothetical, is your cause of action precluded by the Mineral Code? Perhaps not. The current jurisprudential interpretation of the application of lesion pertaining to minerals is unclear; Louisiana courts both preclude and allow successful actions for lesion beyond moiety pertaining to minerals found beneath land post-sale.¹³ These jurisprudential inconsistencies may allow claimants a method of circumventing the Mineral Code's preclusion of lesion beyond moiety. This article will discuss how these inconsistencies can be resolved through a hybrid approach drawn from the foundational case pertaining to this issue, *Wilkins v. Nelson*. Thereafter, it will discuss the subsequent *Hornsby v. Slade* dissenting opinion and propose a practical application drawn from the case that exemplifies how the Mineral Code's preclusion of lesion pertaining to mineral rights should be applied.¹⁴ An examination of Louisiana cases pertaining to lesion beyond moiety reveals the need for a new application of the law that will clarify the jurisprudential disparities.

Part II of this article will provide the historical background of lesion for a better understanding of the historically different applications of lesion, including and explaining all relevant legislation, language, and methodologies. Part III will discuss the issues presented by notable cases and discussions surrounding rescission based on lesion pertaining to minerals. Finally, Part IV will propose an analytical framework detailing how the differing coded lesion articles should be applied when an action based on lesion beyond moiety is brought.

II. A LOOK INTO THE PAST:

THE CIVIL LAW, THE MINERAL CODE, AND SURROUNDING POLICIES

[F]or over eighty years, it has been the law of Louisiana that a sale of mineral rights 'cannot be regarded as . . . falling within the terms of the law which affords relief on the score of lesion; its inherent nature and character being such as not to be susceptible of having an intrinsic definite and fixable value.'¹⁵

13. It is important to note that the Louisiana Law Institute formed a committee in 2016 to answer the questions raised by this article, chaired by Professor John Trahan, faculty of the Paul M. Hebert Louisiana State University Law Center.

14. *Hornsby*, 854 So. 2d at 446 (McClendon, J., dissenting).

15. *Thomas v. Pride Oil & Gas Properties, Inc.*, 633 F. Supp. 2d 238, 243 (W.D. La. 2009) (citing *Wilkins v. Nelson*, 99 So. 607, 608 (La. 1924)).

While a straightforward reading of this statement appears to set a firm legal principle, Louisiana courts' recent analyses vary greatly as to whether lesion beyond moiety should be applied to the sale of minerals. It is unclear why such an inconsistency has developed; however, one may consider the limited amount of legal scholarship available to the courts pertaining to this area, in conjunction with the low volume of jurisprudence to draw from, in understanding the numerous applications for lesion pertaining to minerals.

A. *The Prevailing Law*

Louisiana's legal system is civilian, based heavily on its French and Spanish heritage which prioritizes legislation above judge-made law. The Louisiana Civil Code states in its first article that the sources of law in Louisiana are legislation and custom.¹⁶ In the *absence* of legislation or custom, the court is bound to proceed according to equity.¹⁷ Even where a court proceeds according to equity, that single decision is not considered binding upon later courts, because Louisiana does not recognize the doctrine of *stare decisis*.¹⁸ Instead, a long line of judicial decisions may be considered mere guidance for the courts to follow according to the doctrine of *jurisprudence constante*.¹⁹

The guiding statutory provisions pertaining to lesion are drawn from the Louisiana Civil Code and the Mineral Code. The phrase "lesion beyond moiety" stems from the Latin *laesio enormis*, a legal doctrine developed according to the ideals of "just price" found in the Corpus Juris Civilis.²⁰ The Civil Code's lesion article specifically applies only to those things considered *corporeal immovables*.²¹

In Louisiana, things are divided into common, public, and private things; corporeals and incorporeals; and movables and immovables.²² Corporeals are things that have a body, whether animate or inanimate, and

16. LA. CIV. CODE art. 1 (2017).

17. LA. CIV. CODE art. 4 (2017).

18. See *Ardoin v. Hartford Acc't & Indem. Co.*, 360 So. 2d 1331, 1334 (La. 1978); *Carter v. Moore*, 248 So. 2d 921, 959 (1971); *Johnson v. St. Paul Mercury Ins. Co.*, 236 So. 2d 216, 218 (1970), *overruled on other grounds*.

19. See *Heinick v. Jefferson Parish School Bd.*, 701 So. 2d 1047, 1050 (La. Ct. App. 1997); *City of New Orleans v. Treen*, 421 So. 2d 282, 285 (La. Ct. App. 1982).

20. DIAN TOOLEY-KNOBLETT & DAVID GRUNING, *LOUISIANA CIVIL LAW TREATISE: SALES* § 13:3 (2017).

21. LA. CIV. CODE art. 2589 (2017).

22. LA. CIV. CODE art. 448 (2017).

can be felt or touched.²³ Incorporeals are things that have no body but are comprehended by understanding. Rights of inheritance, servitudes, obligations, and rights of intellectual property are incorporeal things.²⁴ Tracts of land, with their component parts, are immovables.²⁵ Importantly, mineral rights are not considered component parts of tracts of land but are rather considered incorporeal immovables.²⁶

To establish a cause of action for lesion, the immovable sold must be evaluated according to the condition in which it was at the time of the sale.²⁷ If a sale is deemed to be lesionary, the buyer has two choices: (1) return the immovable to the seller, or (2) keep the immovable and give the seller a supplement equal to the difference between the price paid and the fair market value.²⁸ The action for lesion must be brought within a peremptive period of one year from the time of the sale.²⁹

Conversely, the Mineral Code provides that the sale of a mineral right may not be rescinded based on lesion beyond moiety.³⁰ In the 1924 case *Wilkins v. Nelson*, the Louisiana Supreme Court established that the Louisiana Civil Code article for lesion does not apply to mineral interests.³¹ This decision was later codified into the current Louisiana Mineral Code article 17, which precludes lesion for mineral rights.³² Herein lies a major disparity among the Codes.

Mineral Code article 4 states that the Code “is applicable to all forms of minerals, including oil and gas.” The Code is also “applicable to rights to explore for or mine or remove from land the soil itself, gravel, shells, subterranean water, or other substances occurring naturally in or as a part of the soil or geological formations on or underlying the land.”³³ The Mineral

23. LA. CIV. CODE art. 461 (2017).

24. *Id.*

25. LA. CIV. CODE art. 462 (2017). Buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops or ungathered fruits of trees, are component parts of a tract of land when they belong to the owner of the ground. LA. CIV. CODE art. 463 (2017).

26. Rights and actions that apply to immovable things are incorporeal immovables. Immovables of this kind are such as personal servitudes established on immovables, predial servitudes, mineral rights, and petitory or possessory actions. LA. CIV. CODE art. 470 (2017).

27. LA. CIV. CODE art. 2590 (2017).

28. LA. CIV. CODE art. 2591 (2017).

29. LA. CIV. CODE art. 2595 (2017).

30. LA. REV. STAT. § 31:17 (1975).

31. 99 So. 607 (La. 1924).

32. LA. REV. STAT. § 31:17 (1975).

33. LA. REV. STAT. § 31:4 (1975).

Code does not attempt a firm definition of the term “minerals;” however, the comment to article 4 provides some guidance:

The purpose of including oil and gas within the meaning of the term minerals is solely to indicate the applicability of the code to those substances and has no relationship whatsoever to the problem of construing particular conveyances to determine whether specific substances are included or excluded from the terms of an instrument. Insofar as construction of instruments for this purpose is concerned, the Supreme Court has stated in *Holloway Gravel Co. v. McKowen*, 200 La. 917, 925, 9 So. 2d 228, 231 (1942), that the term “mineral” is not a definite one . . . but is susceptible of limitation according to the intention of the parties using it and in determining its meaning, regard must be had not only to the language of the deed in which it occurs, but also to the relative positions of the parties interested and to the substance of the transaction which the deed embodies.³⁴

A focus on the particularity required by the legislature of the property sold being a corporeal immovable, the fact that the right to produce minerals is considered an incorporeal, and how such applications should be interpreted and applied to the sale of minerals is crucial to determining whether there is a cause of action for lesion.

B. The Lack of Guidance from Secondary Sources

Jurisprudence in Louisiana is considered a secondary source of law, following the primary sources of law: legislation and custom.³⁵ Therefore, jurisprudence and doctrine may guide a court in reaching a decision only in the absence of legislation and custom. As the legislation in this area appears contradictory, our attention must turn to the jurisprudence available.

The study of lesion beyond moiety pertaining to minerals has been neglected within the civilian legal field, specifically with reference to the inconsistencies within this line of jurisprudence. The most applicable secondary source to this discussion is Patrick H. Martin’s *Louisiana Mineral Law Treatise*,³⁶ however, the treatise contains a mere four paragraphs, which are not helpful in interpreting the proper application as set by the Louisiana courts. This short rendition discusses the preclusion of a

34. LA. REV. STAT. § 31:4 cmt. (1975).

35. LA. CIV. CODE art. 1 (2017).

36. PATRICK H. MARTIN, LOUISIANA MINERAL LAW TREATISE (2012).

lesionary action according to the Mineral Code, supporting a bar on the speculative value of mineral rights.³⁷

While this short statement is a proper beginning to the analysis, the treatise moves away from proper application by providing *Thomas v. Pride Oil & Gas Properties, Inc.* as an illustration, a case that instead focused on misrepresentations and fiduciary duties surrounding the sale of mineral rights.³⁸ These pages lack guidance of the proper application of rescission for mineral discovery on the basis of lesion.

Professor A. N. Yiannopoulos provides that “Louisiana courts have allowed the action for lesion beyond moiety in connection with the sales of immovables by nature or destination, but have refused to allow it in cases involving sale of mineral interests.”³⁹ While this statement is factually correct, it is outdated and recent jurisprudence has upset this once-settled premise.

III. THE CURRENT CONFUSING CASE LAW APPLICABLE TO LESION ACTIONS FOR MINERALS

Multiple applications, interpretations, and conclusions of the law pertaining to rescission based on lesion beyond moiety may be drawn from the select cases that have made their way through the Louisiana court system. While each case on its own may not provide an accurate depiction of the law, when explained and picked apart according to civilian legal principles derived from the Civil Code and the Mineral Code, the cases provide a workable framework for future application.

A. *Wilkins v. Nelson* (1924)

The foundational case for the issue of lesion in the context of mineral sales is *Wilkins v. Nelson*, where the Louisiana Supreme Court determined that when the Louisiana Civil Code “restricted the action of lesion to immovables, it meant immovables which are such by their *nature* and not such as are made immovables by *disposition of the law*.”⁴⁰ The question of whether the preclusion of an action for lesion to immovables in Louisiana Civil Code article 1862 applied to minerals arose when J.D. Wilkins commenced an action for rescission on the basis of lesion beyond moiety to

37. *Id.* at 88.

38. *Id.* at 89.

39. A. N. Yiannopoulos, *Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517, 555 (1962) [hereinafter Yiannopoulos, *Movables*].

40. *See Wilkins*, 99 So. at 608 (emphasis added).

set aside a sale of all of the oil, gas, and minerals in, to, and under 120 acres of land situated in the Parish of Ouachita.⁴¹

The sale at issue was executed between J.D. Wilkins and Oscar Nelson for \$900 cash and one-eighth interest in and to all of the oil produced or saved from the tract of land.⁴² Mr. Wilkins alleged that the mineral rights on and under the land were worth \$50,000 but that he was ignorant of this fact at the time of the sale and had no experience in land development or minerals, unlike Mr. Nelson, who had spent his entire life doing such work.⁴³

The Court relied on two separate rationales to determine that the lesionary action was properly precluded:

First, because the thing, the subject of the sale, cannot be regarded as one falling within the terms of the law which affords relief on the score of lesion; its inherent nature and character being such as not to be susceptible of having an *intrinsic definite* and *fixable value*. Second, because the plaintiff's petition alleges that his vendee had parted with all of his interest in the mineral rights to a third party.⁴⁴

Focusing on the first sentence, the Court reiterated the well-established rule of law that ownership of land does not include a separate and distinct ownership of those minerals beneath the land, but that the landowner has the right to explore for and reduce those minerals to possession and ownership.⁴⁵ In conveying the right to Nelson, "no title of ownership to any specific thing, separate and distinct from the soil" was transferred, "but merely the right to drill and capture, and reduce to possession such quantities of the oil and gas as might be found under the ground."⁴⁶ The Court determined such a transfer is most similar to a transfer of a real or incorporeal right, such as the right of servitude.⁴⁷

The Court opined that although servitudes are considered immovables under the Louisiana Civil Code, "it by no means follows that such a

41. *Id.* Note that in 1924, Louisiana Civil Code article 1862 was the current article pertaining to the application of lesion. Lesion can be alleged by persons of full age in no other sale than one for immovables, in which is included whatever is immovable by destination.

42. *Id.*

43. *Id.*

44. *Id.* Defendant transferred his rights in the property to Cosmos Carbon Company, which happened to be his own company, not at issue for this article's purposes.

45. LA. REV. STAT. §§ 31:5-31:6 (1975).

46. *Wilkins*, 99 So. at 608.

47. *Id.*

servitude as here involved which is also declared to be a real and incorporeal right – is to be regarded as an immovable in the sense in which the word immovable is used in article 1861 of the code.”⁴⁸ The Court stated that it was established long ago that not “every kind of immovable is brought under or falls within the terms of the article conferring the action of lesion upon a vendor.”⁴⁹

In its decision, the Court emphasized the words “speculative” and “intangible,” counter to “fixed” and “dependable,” stating that an opposite view would provide the seller with a win-win situation, in effect, placing the entirety of the risk upon the buyer.⁵⁰ The Court stated, “Had there been no gas found in the land in question the plaintiff would doubtless have been perfectly satisfied with the cash price he received, but, gas having been discovered, he now seeks an additional profit.”⁵¹

The *Wilkins* Court’s interpretation precludes the action of lesion to mineral rights that are deemed incorporeal immovables.⁵² Fifty years later, in 1974, the *Wilkins* rule was codified into Louisiana Mineral Code article 17, *supra*.⁵³ However, since *Wilkins*,⁵⁴ lower Louisiana courts have taken multiple approaches on the issue of how minerals should be considered in an action for lesion beyond moiety, moving distinctly away from this overarching ruling.

B. Hornsby v. Slade (2003)

In 2003, the First Circuit Court of Appeal chose to steer away from the nearly eighty-year-old jurisprudence. The court upheld a district court decision that “the value of sand and gravel or solid mineral deposits in the land sold could be considered in determining the fair market value of the land and, thus, subject the sale to a cause of action for lesion beyond moiety.”⁵⁵

This dispute arose when Ms. Hornsby sold her 5/18ths undivided interest in 364 acres of immovable property in East Feliciana Parish to the

48. *Id.*

49. *Id.*

50. *Id.* at 609.

51. *Id.* at 608.

52. *Id.* at 607.

53. *Id.*

54. *Id.*

55. *Hornsby*, 854 So. 2d at 445.

defendant Slade. Four years after the completion of the sale, Ms. Hornsby filed suit for rescission based on lesion beyond moiety.⁵⁶

The parties stipulated that the purchase price of the property was \$28,000.00, and the value of the raw land was between \$26,750.00 and \$37,387.60. The parties also stipulated that the value of the gravel itself would add \$97,417.50 to the value of the land. Therefore, if the court allowed sand and gravel evidence (to the value of the raw land), the sale was lesionary.⁵⁷ The sale price of the tract of land amounted to a little less than one-fourth of the value of the gravel itself. Slade then filed a motion in limine to exclude appraisal information based on results of gravel testing and inspection reports made after the date of the sale.

The district court found the sale subject to rescission for lesion. The district court opined that “the gravel constituted a solid mineral which was an inseparable component of the ground and, therefore, the data and information as to the gravel deposits could be used to determine the value of the land as of the date of the sale.”⁵⁸ Slade appealed. A divided First Circuit Court of Appeal affirmed the decision, determining that the “value of sand and gravel or solid mineral deposits in the land sold could be considered in determining fair market value of the land and, thus, subject the sale to [a] cause of action for lesion beyond moiety.”⁵⁹

The majority focused on the distinction between incorporeal and corporeal immovables. It found that land with mineral deposits is considered corporeal immovables, which are subject to lesion, while those mineral rights in the land are incorporeal immovables, which are not subject to lesion.⁶⁰ This distinction is crucial to the determination and application of lesion. The court then turned to the distinction between solid minerals which are inseparable component parts of the ground, and non-solid minerals, commonly referred to as fugacious minerals, which are in theory *res nullius*.⁶¹ Due to the free-flowing nature of fugacious minerals,

56. At this time, the preemptive period for an action based on lesion was four years. Louisiana Civil Code article 2595 established a prescriptive period of four years for actions for the rescission of sales based on lesion beyond moiety. “Acts 1993, No. 841, section 1, eff. Jan. 1, 1995, changed Article 2595 to provide a preemptive period of one year in actions for lesion.” *Id.* at 442 n.2.

57. *Id.* at 442.

58. *Id.*

59. *Id.* at 445.

60. *Id.* at 446.

61. “Deposits of solid minerals are inseparable component parts of the ground, whereas fugacious minerals are in theory *res nullius*.” However, the right to possession belongs to the owner of the ground. The owner of the ground may segregate the mineral rights from the ownership of the land and either retain them

fugacious minerals are not considered owned by the landowner above, but this landowner is given the exclusive right to explore for, develop, and reduce to possession those fugitive minerals.⁶² The minerals here, however, are solid minerals (sand and gravel), considered naturally owned by the landowner but insusceptible of ownership apart from the ground until reduced to possession.⁶³ This distinction was not clearly referenced in accordance with the decision; however, these solid minerals must be treated the same as mineral interests for this article's purposes since their ownership may not be transferred separately from ownership of the ground itself.

Ms. Hornsby argued that sand and gravel are naturally corporeal solid minerals, and lesion only lies in cases of corporeal immovables, as distinguished from mineral rights that are classified as incorporeal immovables under Louisiana Civil Code article 470.⁶⁴ Therefore, the value of the gravel and sand that lay beneath the land should be considered in the fair market value of the land, resulting in an inequitable sale subject to rescission.

Mr. Slade argued that it has been the doctrine of Louisiana that one does not own mineral interests until they are reduced to possession, but that one simply owns the right to produce those minerals beneath the land.⁶⁵ Slade emphasized that there is "little or no intrinsic value" in the gravel and sand due to the "speculative nature" of minerals.⁶⁶ When such minerals are "left in place, the sand and gravel add no extra value to the land," and therefore an action for rescission based on lesion should be precluded, as is stated within Louisiana Mineral Code article 17.⁶⁷ This argument resembles that of the *Wilkins* court.⁶⁸

The court found Mr. Slade's argument to be without merit and found that the statutory schemes have distinguished (1) the classification of land

himself or convey them to another person. Accordingly, rights in minerals may be regarded as separable component parts of the ownership of land. Mineral rights segregated from the ownership of land ordinarily take the form of the mineral servitude, a mineral lease, or a mineral royalty. YIANNOPOULOS, TREATISE, *supra* note 6, at § 118, π. 276–277. "[R]es nullius, under the French law, the source of Louisiana's occupancy law . . . refers specifically to such things as wild game and fish, which are originally without an owner." *Charrier v. Bell*, 496 So. 2d 601, 605 (La. Ct. App. 1986).

62. LA. REV. STAT. § 31:6 (1975).

63. LA. REV. STAT. § 31:5 (1975).

64. *Hornsby*, 854 So. 2d at 445.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*; *Wilkins*, 99 So. 607.

with mineral deposits and (2) the classification of the alienation of component parts called mineral rights.⁶⁹ The court held that the former are corporeal immovables subject to lesionary inquiry, and the latter are incorporeal immovables not subject to a lesionary inquiry.⁷⁰ Therefore, “lands with known mineral deposits may be valued as an entity and the trial judge was correct in permitting that testimony.”⁷¹

Justice McClendon stated in a notable dissent that the provisions of the Mineral Code do apply and that the rescission based on lesion beyond moiety should *not* have been permitted.⁷² The dissenting opinion discussed a major flaw in the majority’s argument: their failure to distinguish between the actual sand and gravel beneath the land that is a corporeal immovable, and the underlying mineral right, which is clearly an incorporeal immovable.⁷³ This distinction is based on the idea that solid minerals are insusceptible of ownership apart from the land until reduced to possession.⁷⁴ “Minerals in their natural state cannot be ‘owned’ separately from the land.”⁷⁵

With ownership of the land, Ms. Hornsby also held ownership to the minerals beneath the land. However, she is not able to transfer her ownership of those minerals separately from her ownership of the ground; the minerals are considered inherently connected to the ownership of the land itself and may not be conveyed and valued separately until reduced to possession and ownership as a movable.⁷⁶ Therefore, “the unproduced minerals beneath the surface have little or no intrinsic value” apart from the land.⁷⁷ Justice McClendon’s dissent focuses on the fact that the added value to the land comes from *the right* to explore, mine, or remove the minerals beneath it. Since “the added value of the land is based simply on the right to remove the gravel below the surface, the Mineral Code clearly applies,” precluding such an action under Mineral Code article 17.⁷⁸

69. *Hornsby*, 854 So. 2d at 446.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 447.

74. LA. REV. STAT. § 31:5 (1975).

75. 854 So. 2d at 447 (McClendon, J., dissenting).

76. *Id.* at 448.

77. *Id.*

78. *Id.*

C. Thomas v. Pride Oil & Gas Properties (2009)

In 2009, the Western District of Louisiana weighed in on the issue when an oil and gas lessor brought an action in state court seeking rescission of a contract with the lessee; his initial claim was for fraud, and in the alternative, on the grounds of lesion beyond moiety.⁷⁹ In 2007, Mr. Thomas and Pride Oil entered into a lease for oil, gas, and minerals.⁸⁰ The lease provided that Mr. Thomas would lease the property to Pride Oil for a term of three years in exchange for \$100.00, royalties of 3/16 of the market value for oil and gas “produced and saved” from the land, and other valuable consideration.⁸¹

Mr. Thomas filed an action in state court thereafter to rescind the sale, alleging that “one of the largest natural gas deposits in the world” was located beneath the leased property and that “at the time of the lease [he] did not know of the existence of . . . deposits or of the[ir] extreme value.”⁸² Mr. Thomas stated that had he been aware of the valuable deposits below his land, he would never have agreed to the lease at that price.⁸³ Following removal to federal court, the lessee filed a motion to dismiss.⁸⁴ The district court granted the motion and held that the allegations were insufficient in several ways: to establish fraud, to state a claim that consideration paid was out of proportion to value received, and for mistake as to cause of the contract.⁸⁵

The district court found that Mr. Thomas’s claim for rescission based on lesion beyond moiety warranted a finding of no cause of action.⁸⁶ Citing *Wilkins*, the court discussed Louisiana’s long-standing rule that “a sale of mineral rights ‘cannot be regarded as . . . falling within the terms of the law which affords relief on the score of lesion; its inherent nature and character being such as not to be susceptible of having an *intrinsic definite* and *fixable* value,” thereafter applying the same logic in the facts of *Thomas*.⁸⁷

79. *Thomas*, 633 F. Supp. 2d at 240.

80. *Id.* at 239.

81. *Id.*

82. *Id.*

83. *Id.* at 240.

84. *Id.* at 239.

85. *Id.*

86. *Id.* at 243.

87. *Id.*

D. Harruff v. King (2014)

In 2014, the Third Circuit Court of Appeals addressed the question of “whether Louisiana law allows for the inclusion of the speculative value of mineral interests or rights in and to immovable property in determining the fair market value of such property for the purpose of rescinding the sale of the property on the basis of lesion beyond moiety.”⁸⁸

The plaintiffs, Harruff and Bildeau (hereafter referred to as “the Sisters”), were siblings and heirs of decedent Bobby Carlisle. Mr. Cason, also a plaintiff/appellee, was the subsequent purchaser of the property.⁸⁹ The Sisters inherited an undivided interest in two tracts of land in Natchitoches and Red River Parishes.⁹⁰ About one year after the inheritance, the Sisters sold their undivided interest in one of the two tracts of land to Defendants Richard King, Renee King, and Kyle King (hereafter referred to as “the Kings”).⁹¹ The sale included a cash sale deed transferring ownership interests in the property the Kings for \$175,000.00, including the Sisters’ undivided interests in timber and minerals.⁹² Around six months after the King deal, the Sisters sold the Natchitoches tract to plaintiff Cason for \$375,000.00, which was also a cash sale deed.⁹³ Thereafter, Plaintiffs filed suit alleging the sale of property the Kings should be rescinded due to lesion beyond moiety.⁹⁴

After a trial on the merits, the trial court granted a rescission of the sale based on lesion beyond moiety.⁹⁵ The trial court cited *Jones v. First National Bank, Ruston, Louisiana*, wherein the Louisiana Supreme Court held that mineral interests or rights are to be included in the value of the property, so long as both the land and mineral interests are sold together.⁹⁶ The trial court focused heavily on the “unsevered” nature of the minerals, and stated that:

The calculation of the value of the Property for purposes of lesion beyond moiety should include the value of the *unsevered* mineral rights as long as the transaction is not a transfer of mineral rights alone . . . Unsevered mineral interests, or mineral rights, are owned

88. Harruff v. King, 139 So. 3d 1062, 1064 (La. Ct. App. 2014).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1065.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1067.

as part of the ownership of the land and constitute a part of the corporeal immovable. If they increase the value of the land alone, they should be considered.⁹⁷

The appellate court agreed with the reasoning pertaining to the “unsevered” nature of the mineral; however, instead of approaching the analysis similar to those courts before it, the court seemingly overlooked the issue of lesion applying to minerals and focused instead on the burden required by a rescission on the basis of lesion, effectively finding that the burden to prove the fair market value of the mineral interests in the property had not been met.⁹⁸

In this step, the court made a crucial mistake: allowing lesion to apply to the sale of minerals and thereafter finding the obstacle that this allowance creates. The court recognized that the minerals were unsevered, and therefore, subject to no one’s ownership, but instead of drawing out this crucial factor, the court moved forward to establish a value of those minerals. This analysis overlooks the key determination of the speculative nature of minerals not reduced to possession.

The court then turned to the testimony of the expert witness for the plaintiff, who failed to prove the fair market value of the mineral interests of the property at issue. The court appeared to stumble upon the problem at this point. The land and mineral expert was unable to produce evidence of the value of the minerals beneath the land. Therefore, since the landowner had not yet reduced the minerals to possession, there was no proof of their value; rather, there was merely “unsubstantiated assumptions and rank speculation.”⁹⁹

It is important to note not only what the court did discuss, but also what the court failed to discuss, that being Louisiana Mineral Code article 17 and the Civil Code’s distinction between movables and immovables, corporeal and incorporeal. While recognizing the speculative nature of minerals beneath the land, the court took yet another approach towards the specific issue. This crucial error creates further bad precedent for the proper analysis for an action for lesion beyond moiety and moves away from the original intent of the Mineral Code’s preclusion for actions of lesion beyond moiety.

IV: WHAT SHOULD THE PROPER ANALYSIS LOOK LIKE?

The rulings in *Wilkins*, *Hornsby*, and *Harruff* come to differing conclusions and interpretations and take different paths in reaching them.

97. *Id.*

98. *Id.* (citing *Pierce v. Roussel*, 79 So. 2d 567, 571 (La. 1955)).

99. *Id.* at 1070.

It is likely that these particular issues will arise again in the future, even more so with the recent discovery of the Haynesville Shale in Northwest Louisiana. The addressing court will be faced with the challenge of discerning between multiple indefinite and unsure approaches to a similar problem, each of which provides a different solution. It appears that both sides of the argument have valid precedent to support an argument both *for* lesion beyond moiety, and also *against* an action for lesion beyond moiety.

A. The Current Analytical Flaws in the Jurisprudence

Recalling *Hornsby*, the court held that solid minerals are integral parts of the land; therefore, a tract of land is more valuable when the value of those solid minerals beneath the surface are included.¹⁰⁰ While this may be equitably and objectively true, this argument is weak because it completely ignores the civilian distinction between corporeal immovables and incorporeal immovables. In addition to moving away from civilian application, the court ignores the legislatively created law precluding lesionary actions within the Mineral Code, effectively holding powerless law created by the legislature. This ruling creates a system of prejudice against purchasers, while favoring the seller in his pursuit of a win-win situation. It effectively places all chance of loss upon the purchaser and decreases the economic benefit of immovable sales and leases.

The *Thomas* court ruled on the facts of a mineral lease, reiterating the *Wilkins* ruling that mineral rights are speculative in nature and that a sale of minerals may not be rescinded on the grounds of lesion beyond moiety.¹⁰¹ The court's ruling is similar to the proposed solution that this article offers; however, clarification as to the difference between corporeals and incorporeals, and how this distinction applies in the aspect of minerals, mineral servitudes, and mineral leases, is necessary for clarity and punctuality.

The *Harruff* ruling further confused matters. It focused on the issue of the burden of proof in a cause of action for lesion beyond moiety, and simultaneously dodged the discussion of lesion's application to minerals.¹⁰² While this ruling is the most recent voice of the Louisiana courts, it sets a bad precedent for legal scholars, courts, and individuals bringing similar claims to understand the civilian principles involved in this cause of action. The analysis in this case is flawed, off point, and effectively convolutes the actual issues.

100. See, e.g., *Hornsby*, 854 So. 2d at 445-46.

101. See, e.g., *Thomas*, 633 F. Supp. 2d 238.

102. See, e.g., *Harruff*, 139 So. 3d at 1067.

For the just application of the law, clarification and clear application of these principles is required. A bright-line rule for the application of the law of minerals, mineral rights, and mineral leases in accordance with the cause of action for lesion is needed. A concise analytical framework must be set forth to establish both reliable guidance for the benefit of the courts and attorneys; such a framework should provide consistent results that may be relied upon in the future.

Section D of this part provides a guideline for analyzing a cause of action for lesion pertaining to minerals. This framework makes clear: (1) the distinction between a corporeal immovable and an incorporeal immovable, (2) how this distinction affects the outcome and analysis of cases involving minerals and lesion, (3) the proper analysis for such an action, and (4) why the Mineral Code's preclusion of lesion should apply.

B. The Distinction: Corporeal and Incorporeal Immovables

Think back to Ms. Hornsby's case.¹⁰³ Ms. Hornsby's previously owned tract of land is clearly a corporeal immovable; therefore it is subject to the Louisiana Civil Code article 2663's claim for rescission on the grounds of lesion beyond moiety.¹⁰⁴ There is a clear distinction between a corporeal immovable and those minerals beneath the immovable,¹⁰⁵ with the latter being precluded from an action based on lesion under the Mineral Code's article 17.

Louisiana is one of the many states classified as a "non-ownership" state.¹⁰⁶ This means that while the ownership of land includes all minerals occurring naturally in their solid state, those minerals are *insusceptible of ownership apart from the land until reduced to possession*.¹⁰⁷ The *Wilkins* Court established this rule of law, finding that the original Louisiana Civil Code article 1862 for lesion "restricted the action of lesion to immovables . . . which are such by their nature and not such as are made immovable by disposition of law."¹⁰⁸ Such a disposition of law is clear from the Louisiana Legislature's "Act 205 of 1938, which defined and classified mineral leases as real rights and as incorporeal immovable property."¹⁰⁹ The

103. *Hornsby*, 854 So. 2d 441.

104. LA. CIV. CODE art. 2589 (2017).

105. *Wilkins*, 99 So. at 608 (1924).

106. A. N. YIANNPOULOS, CIVIL LAW OF PROPERTY § 99 (1966); *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207 (1922).

107. LA. REV. STAT. §§ 31:5, 31:7 (1975) (emphasis added).

108. *Wilkins*, 99 So. at 608; *see also* Yiannopoulos, *Movables*, *supra* note 39, at 518.

109. Yiannopoulos, *Movables*, *supra* note 39, at 551.

purpose of this Act “would seem . . . to classify mineral leases as real rights and incorporeal immovables for *all* purposes.”¹¹⁰

At the time of the sale, Ms. Hornsby had yet to reduce any minerals from her land to possession. She was not even aware of the presence of minerals beneath her land until after the sale of the property.¹¹¹ While she did own those solid minerals beneath her land according to Mineral Code article 5, those solid minerals could not be conveyed through the sale of the property because they had not yet been discovered and reduced to her possession. In this situation, the land (corporeal immovable) should be considered and valued distinct and separate from the value, if any, of the minerals beneath the land.

In granting the rescission to Ms. Hornsby, the court implied recognition of this distinction by valuing the sand and gravel separately from the value of the land itself.¹¹² The courts recognized this distinction in each of the previously mentioned cases, with each court struggling to apply a monetary value to subsurface minerals due to their “speculative” and “unfixable” value.¹¹³ This determination is vital for maintaining the unified civilian system of law in Louisiana and following the intent and will of the legislative body. Recognizing that a tract of land and those minerals found beneath it are distinctly classified, the focus turns to how this distinction affects the analysis for a lesionary action.

C. Incorporeal Immovables Are Not Subject to Rescission Based on Lesion

Upon sale of any tract of land, the seller conveys ownership of the tract of land itself, including the attached real right to those minerals found beneath the surface of the land, to the purchaser. However, the purchaser does not convey “title of ownership to any specific thing, separate and [distinct] from the soil, but merely the right to drill, capture, and reduce to possession” any minerals that *might* be found beneath the surface.¹¹⁴ If minerals were included in the valuation of the land, the courts would be faced with valuing “an assumption of production which clearly illustrates . . . ‘the speculative nature of mineral exploration.’”¹¹⁵ Such a determination is

110. *Id.* at 552.

111. 854 So. 2d at 445.

112. *Id.*

113. *See, e.g., Wilkins*, 99 So. 607; *Hornsby*, 854 So. 2d at 445; *Thomas*, 633 F. Supp. 2d at 244; *Harruff*, 139 So. 3d 1062.

114. *Wilkins*, 99 So. at 608.

115. *Harruff*, 139 So. 3d at 1070 (citing *Cascio v. Twin Cities Dev., LLC*, 48 So. 3d 341 (La. Ct. App. 2010)).

extremely difficult and highly susceptible to manipulation by the numerous factors that play into any evaluation, which has been shown clearly in *Harruff*.¹¹⁶

Ms. Hornsby's undeveloped property was sold within the range of the appraised value.¹¹⁷ At the time of the sale, the value of this property was approximately \$28,000.00.¹¹⁸ Any minerals beneath the property were purely speculative due to their undeveloped and undiscovered nature, making a fixed value inherently indeterminable. Any value added to the tract of land "resulting from the sand and gravel in the land arises from the right to explore, mine, or remove these minerals."¹¹⁹

Louisiana Civil Code article 2590 states that the immovable sold is evaluated according to the state in which it was at the time of the sale. Once discovered, "removed, and reduced to possession, the sand and gravel can then be valued subject to the law of movables."¹²⁰ Such an application follows this code article's legislative intent that the evaluation should occur at the time of the sale.

The Legislature's enactment of the Mineral Code's preclusion for lesion was with these circumstances in mind.¹²¹ Allowing rescission of such a sale would effectively reward zero risk on behalf of Ms. Hornsby, and whisk away the valued investment of the purchaser. This placement of risk on the investor/purchaser places an inequitable burden on the party, placing the selling party in the ultimate position to take advantage of the selling process. This inequity must not be permitted to continue, as the legislature has noted and which is the intent behind the Mineral Code's preclusion for lesion.

D. The Proper Analysis for an Action for Lesion Beyond Moiety Involving Minerals

The first issue the court should address when considering an action for lesion is whether the sale involved a corporeal immovable, an incorporeal immovable, or both. If the action discusses minerals, the sale included both a corporeal immovable and an incorporeal immovable. In the case that the sale included both a tract of land and considerations of the minerals thereunder, the court must then factually determine whether the seller and buyer were both cognizant of such minerals and their inclusion in the sale.

116. 139 So. 3d 1062.

117. *Hornsby*, 854 So. 2d at 442.

118. *Id.*

119. *Id.* at 448 (McClendon, J., dissenting).

120. *Id.*

121. LA. REV. STAT. § 31:17 (1975).

In that situation, the action must be dismissed due to the recognition, weighted value, and consideration of the minerals included within the sale.

If neither the seller nor purchaser were made aware of minerals beneath the land at the time of the sale, the action would fall under the Louisiana Civil Code's allowance for an action for lesion beyond moiety, assuming the immovable was sold at a value less than half of that which it is valued for.¹²² However, since minerals (incorporeal immovables) are involved, the action should be effectively precluded due to the preclusion of lesionary actions under Mineral Code article 17. Thus far, courts have failed to apply this simple methodology.

E. The Mineral Code's Preclusion of Lesion Should Be Applied to All Such Actions as Pertaining to Minerals

For over ninety years, "it has been the law of Louisiana that a sale of mineral rights 'cannot be regarded as . . . falling within the terms of the law which affords relief on the score of lesion; its inherent nature and character being such as not to be susceptible of having an intrinsic definite and fixable value.'"¹²³ The incorporeal nature of mineral rights is too speculative to affect the valuation of the price of a tract of land.¹²⁴ Upon purchase of land, both the buyer and the seller understand the value of everything above the surface. The seller is consciously committing to the sale of his land for a value that he believes the land is worth to him at the time of the act. Prior to and thereafter, "the price may be at the very lowest today . . . and reach the very peak of prices tomorrow, dependent on the production or nonproduction of oil and gas in the neighboring territory." If courts allow the discovery of minerals subsequent to the sale of an immovable to provide for rescission of such sale, an inequitable shift would be applied to only the purchasing party.

Lesion is considered "an instrument of public policy that, with certain limitations, allows the judicial policing of certain contracts that, because of unfairness that can be objectively shown, are inconsistent with the welfare of the community and therefore contrary to the public order."¹²⁵ Recall the situation Ms. Hornsby was in previously and consider the practical difference that the interpretation and application of the lesionary principles this article has discussed could mean for landowners.

122. In the instance that the seller knew of the minerals beneath the land, and the purchaser was not aware, the purchaser may have a cause of action based on fraud, which was more thoroughly explored in the case of *Thomas*, 633 F. Supp. 2d at 241.

123. *Id.* at 243 (citing *Wilkins v. Nelson*, 99 So. 607, 608 (La. 1924)).

124. 99 So. at 609.

125. *Hornsby*, 854 So. 2d at 443.

The law on sales of immovables, and sales in general, could be substantially altered if lesion *is* applied to minerals. For instance, unknowing landowners will have no incentive to survey and test their property before selling the land. Individual purchasers are investing their money in tracts of land, thereby burdening themselves with the risk against the prior owner's reward if minerals are later discovered that significantly raise the value of the land. Increased litigation over these disputes would substantially increase the court's docket. Jury determinations of the value of certain minerals and if those values are adequate for the lesion article to apply would be considerably speculative and unpredictable.

By *not* applying lesion to minerals, Louisiana would have a bright-line rule to follow, litigation would decline, and landowners will look to develop their own land and have the land's value assessed prior to the sale or transfer of the land. Recognizing the fallacies of a possible draw-back on the economic trade of property, the policy-implicated scale appears to tilt in favor of *not* applying *lesion* to minerals.

CONCLUSION

Returning to the hypothetical at the beginning of this article, does a cause of action exist against the purchaser of your land when minerals have been discovered beneath the land post-sale? Under the current jurisprudence of the state of Louisiana, perhaps. Under the correct application of the legislation and civilian system of Louisiana, however, no cause of action would exist.

Courts should apply a hybrid approach drawn from the *Wilkins* majority opinion, the *Hornsby* dissenting opinion, and the *Thomas* court's discussion. This proposal provides a practical application that accurately portrays how the Mineral Code's prohibition on lesion pertaining to mineral rights should be applied. If courts are to consider the right to produce minerals separately for the purposes of lesion, then as such, and as declared by the legislature, that right is to be considered an incorporeal immovable separately from the corporeal nature of the tract of land when considered on the basis of rescission post-sale, being effectively precluded from such an action per the Mineral Code's article 17.

While this approach may be inequitable on its face, the underlying principle is supported by just reasoning and policy. Minerals beneath a tract of land are inherently speculative with an unknown value until removed from therein. If courts place a value on inherently speculative minerals beneath the ground, an inequitable result will consistently occur. To upset a contract established with consideration on behalf of the seller who has used his or her personal judgment in valuing land, and a

speculative purchaser of the land taking a risk in purchasing undeveloped property, provides ill precedent for further interpretations.

The Mineral Code's preclusion should remain in effect. This preclusion should be rigidly applied to all rescission actions based on lesion beyond moiety that involve the speculative nature of minerals.

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