

3-20-2017

The Professors Who Control The Oil Patch: A Case Study On The Virility Of Legal Scholarship

Chase J. Edwards

Justin C. Ward

Follow this and additional works at: <http://digitalcommons.fairfield.edu/nealsb>

Recommended Citation

Edwards, Chase J. and Ward, Justin C. (2017) "The Professors Who Control The Oil Patch: A Case Study On The Virility Of Legal Scholarship," *North East Journal of Legal Studies*: Vol. 36 , Article 2.

Available at: <http://digitalcommons.fairfield.edu/nealsb/vol36/iss1/2>

This Article is brought to you for free and open access by DigitalCommons@Fairfield. It has been accepted for inclusion in North East Journal of Legal Studies by an authorized administrator of DigitalCommons@Fairfield. For more information, please contact digitalcommons@fairfield.edu.

**THE PROFESSORS WHO CONTROL THE OIL
PATCH: A CASE STUDY ON THE VIRILITY OF
LEGAL SCHOLARSHIP**

by

Chase J. Edwards*
Justin C. Ward**

Judge Richard Posner of the U.S. Seventh Circuit Court of Appeals recently made headlinesⁱ in legal news publications because of commentsⁱⁱ he made regarding the role of the legal academy in the nation's court system. In typical Posner style, he pulled no punches: "I don't doubt that law professors are frequently active outside the classroom and that their academic work sometimes addresses practical issues, but what I'd like to see is evidence of impact. Amicus briefs? Working for nonprofits? Blogging? 'Speaking truth to power?' Absurd: speak all you want, professors, power doesn't listen to the likes of you."ⁱⁱⁱ

*Chase J. Edwards is an Assistant Professor of Law & Galloway Endowed Professor of Business Administration at the University of Louisiana at Lafayette

**Justin C. Ward is an Associate at the Baton Rouge office of Jones Walker, LLP.

Nevertheless, Louisiana courts have recently used treatises from ancient scholars Jean Domat (1625-1696) and Marcel Planiol (1853-1931) alongside commentary from contemporary civil law scholars such as A. N. Yiannopoulos and Alain Levasseur to decide the cases of *Eagle Pipe & Supply, Inc v. Amerada Hess Corp* in 2011 and its progeny *Regions Bank v. Questar Exploration & Production Corp*⁴ in 2016, likely the most important cases in recent history for the oil and gas industry of Louisiana.

Despite a century of jurisprudential and scholarly analysis of the rights and obligations that exist between landowners and oil producers, no case law addressed the possibility that the language of certain mineral “leases” could actually transfer partial ownership of the land. The arguments for and against the proposition were each cogent, valid, and feasible. “Oil and gas production in Louisiana commenced on a significant scale just over a century ago. Most mineral leases expire as production ends before they reach the 99-year mark. [These] leases may be the first time that this issue has arisen.”⁵ The court was forced to go back to the basics, and lean on the treatises that all Louisiana lawyers cut their teeth on and the principles of textual interpretation that they established.

Often considered the platypus of jurisprudence, Louisiana operates a “bijural” legal system that has evolved to incorporate many characteristics of the common law while maintaining its civil law roots. However, the lessons of these cases apply equally to all states that recognize “secondary sources” of law.

Section One of this paper recounts the first major battle over mineral rights in Louisiana which sought to dispose of leases

by asserting that reconduction of a lease based on continued production violated the requirement for leases to have a term.

Section Two delves into the intervening years of scholarship that addressed the general requirements and prohibitions of the Louisiana Mineral Code. It explores their basis in public policy, and the subtle differences between mineral leases and mineral servitudes in light of the ancient dismemberments of ownership that are inherent in most civil law systems. More importantly, it exemplifies the role of the professorate in developing official Comments to the various codes which are used by judges to interpret the meaning of the law as it is written by the legislature.

Section Three analyzes the doctrine of real and personal rights as expressed in several leading treatises from active and emeritus professors which build on the works of ancient commenters and scholars. These scholarly contributions form the basis of the rulings in both *Eagle Pipe v. Amerada Hess* and *Regions v. Questar*, which represent the first jurisprudential acknowledgments of the doctrinal tenants that have governed Louisiana's billions of barrels of oil and trillions of cubic feet of natural gas for more than a century, and which set critical precedent for the next wave of mineral lease litigation that will attempt to invalidate leases based on the seemingly impenetrable prohibition against leases over 99 years.

The conclusion of this paper recounts the contributions of treatise writers, professors, and practicing academics who help shape the legal landscape, and presents opportunities for professors to prove Judge Posner wrong by affecting change in the law through their work.

LEASES HAVE LIMITS

The first successful oil well in Louisiana was drilled in September of 1901 outside the town of Jennings. This discovery occurred just months after the famous “Spindletop” gushers were drilled less than 100 miles away in Beaumont, Texas. The oil boom that followed has produced more than 25 billion barrels of oil and 200 trillion cubic feet of natural gas from more than 1 million wells. The impact of the mineral industry on Louisiana’s economy cannot be overstated. Thus, there is no shortage of litigation regarding ownership of the minerals themselves.

The first wave of litigation came ten years into the boom. Landowners who signed the first mineral leases sought to be released from their agreements in order to re-sign under the more favorable terms that became common as the industry became less speculative. To do this, landowners attacked the various terms⁶ included in the leases.

IDENTIFYING PERPETUAL LEASES

Louisiana law has always required that a lease have a term. It may not be perpetual or perpetually extendable.⁷ This principal, now embodied in Civil Code Article 2678, is derived from Article 2674 of the Civil Code of 1870 – which required a lease be for a “certain time” – and from a long line of Louisiana case law which held that a perpetual “lease” is *nadum pactum*. This line of jurisprudence⁸ maintained that any stipulation which allowed a grantee to hold a grantors property under a perpetual lease or option would “take the property out of commerce and be violative of the doctrine of ownership.”⁹ This principle was ultimately codified in both the Louisiana Civil Code and the Mineral Code.¹⁰ This ended the need for jurisprudential analysis of this requirement, but a study of its

reasoning is essential back story for the modern day fight over long-term leases wherein property owners seek to regain control of ancestral land that has been mined for close to a century.

Bristo v. Christine Oil & Gas Company is one of the earliest Louisiana decisions addressing a “perpetual lease.”¹¹ At issue in *Bristo* was a contract purporting to be a sale of the minerals on or in the plaintiff’s property and a lease of the land for mining purposes.¹² The contract stipulated that, if a well could not be commenced within a year from the date of the contract and “prosecuted with due diligence, the grant was to become null and void, provided that the grantee might prevent the forfeiture from year to year by paying to the grantor the sum of 10 cents per acre annually until a well was commenced or until shipments from the mines had begun.”¹³ In considering the validity of the contract, the Court held:

It may be assumed that the grantee could have acquired a mineral lease for 25 years by drilling a well on the plaintiff’s land within the year stipulated in the contract. It is not disputed that the grantee’s rights, if he had any, under the contract, were forfeited by his failure to commence drilling a well on the plaintiff’s land within the year, unless it be held that the defendant could prevent the forfeiture and keep the option in force indefinitely by paying the stipulated annual rental of 10 cents an acre...Our opinion is that that stipulation in the contract is null for want of a fixed or definite term. Whether it be regarded as a lease or an option, it would be an anomalous contract without a definite term or limitation. To recognize that the defendant has the right, without any obligation, to hold the plaintiffs

land under a perpetual lease or option, would take the property out of commerce, and would be violative of the doctrine of ownership defined in the second title of the second book of the Civil Code.¹⁴

The holding of *Bristo* was recited a number of times in cases immediately following its rendition.¹⁵ Hence, judges have adopted the following definitions as indicative of the nature of a perpetual lease. As to a mineral lease, “[t]he lease in perpetuity reprobated by the law is the mere holding by the lessee, indefinitely, of an option to exploit the property, without production of any kind, since the lessee must either develop with reasonable diligence or give up the lease.”¹⁶ As to a surface lease, a perpetual lease should be considered as an instrument that would allow the lessee the option of retaining his interest in the property indefinitely without the lessor having the right to terminate the contract by operation of a term.¹⁷

*HABENDUM CLAUSES BECOME STANDARD ACROSS THE OIL & GAS
INDUSTRY*

The purpose of the habendum clause in an oil and gas lease is to fix the ultimate duration of the interest granted to the lessee.¹⁸ A habendum clause essentially predicates the term of the lease based upon the occurrence of a resolutive condition¹⁹ – i.e. the cessation of production in paying quantities. While the Louisiana Mineral Code has long prohibited leases in perpetuity, leases which have stipulated to continue during the existence of a certain condition have been held to be valid.²⁰ This rule has been applied to both surface leases and mineral leases.²¹

Both *Poole v. Winwell, Inc.* and *Cain v. GoldKing Properties Company* involved surface leases with terms tied to the continued production of oil and gas on property not included within the leased area.²² In *Poole*, the Louisiana Third Circuit Court of Appeal, which covers the oil-rich southwest portion of the state, turned to the Louisiana Supreme Court's decision in *Busch-Everett Co. v. Vivian Oil Co.*²³ (wherein the Court upheld a mineral lease under a habendum clause) and concluded that "our Supreme Court has upheld a lease with a production term similar to those in the instant case, holding that it is not necessary that the term of a lease be expressed in terms of time, for the lease may be stipulated to continue only during the continuation of a given condition. Accordingly, the term provisions of the leases involved in the instant suit are not at variance with codal requirements." *Cain* was decided soon thereafter in another oil-producing area of the state.²⁴

The same concept has long applied specifically to mineral leases. In *Busch-Everett*, the Supreme Court considered the validity of a mineral lease which provided that, should the lessee succeed in "bringing in a second well in paying quantities, then the contract was to continue in full force for two years, *and as much longer as oil, gas, or other minerals can be produced in paying quantities.*"²⁵ (emphasis added) In upholding the lease agreement, the court stated:

Now as relates to a term:

It was really more of a condition than a term. The contract was to continue in force as long as the wells produced. That was a condition, which, it may be, plaintiffs could have terminated by obtaining a judicial order to that effect. But a contract of lease (and in this respect we consider the contract one of lease) may be entirely legal without a term, or a term

may be so indefinite that only the court can determine its date.²⁶

The Court expressed a similar opinion in *Sam George Fur Company v. Arkansas-Louisiana Pipeline Company*.²⁷ At issue therein was a mineral lease with the following provision:

If the Lessee shall sink a well or shaft and discover oil, gas or sulphur in paying quantities in or under the above described land, then this lease shall remain in full force and effect for ten years from such discovery and as much longer as oil, gas or sulphur shall be produced therefrom in paying quantities.

The Plaintiff challenged the validity of the lease and sought to have the contract canceled on the grounds that the above quoted language essentially established a perpetual lease, and was thus null and void.²⁸ The Court responded to this argument by stating: “[s]uch a lease is by no means a lease in perpetuity, as the main consideration of the lease is the development of the land, and it is a matter of common knowledge that oil and gas fields cease to produce in paying quantities after the lapse of a certain number of years. The lease in perpetuity reprobated by the law is the mere holding by the lessee, indefinitely, of an option to exploit the property, without production of any kind...”²⁹

So, in the first great battle of remorseful landowners versus oil producers, landowners clearly lost. Courts ruled so consistently, during the first decades of oil litigation, that mineral production extended the lifetime of a lease that the Mineral Code was amended to say just that. And, for the rest of the first century of oil production, that was the standard mineral lease.

BUT, SOMETIMES, A LEASE ISN'T A LEASE

The Louisiana Civil Code's first article states that "[t]he sources of law are legislation and custom."³⁰ Custom, in turn, "results from practice repeated for a long time and generally accepted as having acquired the force of law."³¹ Custom is most often developed and cited in the writings of professors who document the year-to-year happenings of business and legal dealings in their scholarly journal articles and treatises.

The concept of prescription³², which is analogous to a "statute of limitations" in other states, is naturally well-litigated due its dispositive nature in litigation. Provisions in the various codes (Civil, Civil Procedure, Criminal Procedure, etc.) govern the lifetime of a right's existence and the actions that can extend or exterminate that right. The Louisiana Mineral Code supplements the state's Civil Code and covers issues regarding mineral law, including mineral leases.³³

Article 115 of the Louisiana Mineral Code imposes certain term limitations on the typical mineral lease. The provision provides in relevant part:

The interest of a mineral lessee is not subject to the prescription of nonuse, but the lease must have a term. Except as provided in this Article, a lease shall not be continued for a period of more than ten years without drilling or mining operations or production. Except as provided in this Article, if a mineral lease permits continuance for a period greater than ten years without drilling or mining operations or production, the period is reduced to ten years.³⁴

Each Code within Louisiana Law has Comments, the text of which are not law, but are persuasive authority when judicial interpretation of the law is needed. The Comments do not come from the lawmakers who write the legislation. Instead, they come from the Louisiana State Law Institute which is comprised of law professors, jurists, and practicing academics³⁵ who meet regularly to provide commentary on existing and pending legislation. In other words, the work of professors is printed alongside the words of legislators. In the recent cases discussed herein, the official Comments played an important role.

The Comments to Article 115 explain that the article generally preserves established law and custom by providing that the interest of the lessee is not subject to prescription; that a lease must contain a term; and that the standard habendum³⁶ clause will generally satisfy the term requirement. However, the Comments go further in explaining that the requirement that a mineral lease not contain a primary term of more than 10 years is somehow related to the prescription of nonuse applicable to mineral servitudes, which are real rights. The Comments provide:

[T]here has always lurked in the background of the law applicable to mineral leases the possibility that the court might hold that although a mineral lease is not subject to the prescription of nonuse, it cannot be granted for a primary term greater than ten years. Customarily, primary terms do not exceed ten years... Placing this limitation on the primary term is consistent with the public policy underlying the system of prescription applicable to other mineral rights. The net effect of this limitation in combination with the first sentence [of Article 115] is to free the mineral lease of

the use rules applicable to servitudes while accomplishing the end of prohibiting all basic forms of mineral rights from remaining outstanding for periods greater than ten years without some form of development...

Previously, it was not established that the mineral lease either could or could not be granted for a primary term greater than ten years. The danger of providing expressly that they could be granted for primary terms greater than ten years lay in the possibility that there might be widespread evasion of the public policy embodied in the prescriptive rules applicable to other forms of mineral rights. In selling land, the vendor might reserve a paid-up mineral lease with a primary term of thirty years rather than a mineral servitude. Previously, the threat that the court might impose the sort of limitation provided for by Article 115 had a deterrent effect on the widespread granting of long term leases. The removal of that threat might have resulted in subversion of the entire system of prescription. It is therefore provided that the ten-year limitation be imposed. This is viewed as essential to preservation of the mineral property system as a whole.

*SCHOLARS DEVELOP THE MINERAL SERVITUDE DOCTRINE INTO A
REAL RIGHT FOR LEASEHOLDERS*

The Louisiana Supreme Court adopted the Mineral Servitude Doctrine in *Frost-Johnson Lumber Co. v. Salling's Heirs* in 1922.³⁷ This doctrine precludes the creation of a mineral estate distinct from, and independent of, the full title to the land, and is perhaps the most unusual feature of Louisiana

mineral law when compared to the mineral regimes of other states.³⁸ A mineral servitude conveys the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to ownership.³⁹ The Supreme Court has described the conveyance of a servitude as a “dismemberment of the title insofar as it creates a secondary right in the property separate from the principal right of ownership of the land...[and]...effectively fragments the title such that different elements of ownership are owned by different owners.”⁴⁰

The works of professor-written treatises are essential to developing an understanding of this subtle, but critical, distinction. “While the jargon of the industry often speaks in reference to the ‘term’ of a mineral servitude or to a mineral servitude having a ‘life’ of ten years, in actuality, *a servitude is a real right of unlimited duration*, provided that it does not extinguish in some manner recognized by law.”⁴¹ The Mineral Code provides for various modes of extinction of a mineral servitude; however, the most significant cause for extinction is “prescription resulting from nonuse for ten years.”⁴² Prescription begins to accrue from the date on which the servitude is created, and if the servitude is to be maintained beyond ten years, some use of the right must be made.⁴³ However, there is *no limitation on the successive 10-year periods which can be triggered by successive use*.⁴⁴

The scholarship clearly indicates that, other than the 10-year prescription of non-use, there is no legally imposed temporal limit on the existence of a mineral servitude yet no cases have ever been cited for this proposition, only the work of scholars.⁴⁵

Leaseholders also found support in the Comments on Mineral Code Article 74, again written by the scholars and

professors of the Louisiana State Law Institute, which provide that parties may either fix the term of a mineral servitude or shorten the applicable period of prescription of nonuse or both.⁴⁶ If a period of prescription greater than ten years is stipulated, the period is reduced to ten years.⁴⁷ The Comments to Article 74 explain:

In the event of silence as to the term of a mineral servitude, *the right created is permanent or perpetual*, but it is subject to loss by accrual of prescription of nonuse.

It is established by *Hodges v. Norton* and *Bodcaw Lumber Company of Louisiana v. Magnolia Petroleum Company*, that if a term greater than ten years is specified, this fixes the duration of the interest created. It is however, still subject to the prescription of nonuse and will expire prior to the running of the specified term if not used within the legal prescriptive period.⁴⁸

The principals espoused in Article 74 and the comments thereto were, to an extent, addressed in *Hodges v. Norton* and *Bodcaw Lumber Company of Louisiana v. Magnolia Petroleum Company*. In *Hodges v. Norton* the Court dealt with a mineral reservation “for a period of 15-years from and after” the date of its granting.⁴⁹ The Court noted that the servitude was “limited in its duration to fifteen years and that, even though the course of prescription was interrupted” the servitude would prescribe at the expiration of the fifteen year term.⁵⁰ In *Bodcaw Lumber Co. of Louisiana v. Magnolia Petroleum Company*.⁵¹ The Court considered a mineral servitude “for the term of fifteen years.”⁵² The Court explained:

The time limit of fifteen years, within which Bodcaw Lumber Company, or its successors or assigns, might have extracted or removed the oil

and gas from the land, was inserted in the contract, not for the purpose of extending the time within which the right might be enjoyed, but for the purpose of limiting the time in which it might be enjoyed.

Neither *Hodges* (1942) nor *Bodcaw* (1929) contain an affirmation that a mineral servitude, without some contractual limitation, is a perpetual interest subject to the incidents of extinction set forth in the Mineral Code. In both cases, the Louisiana Supreme Court was addressing conflict over leases in an industry that was still in its infancy. However, commenters and treatise writers adopted these cases as exemplary of how the law should treat these agreements. *Seventy years after Hodges, when the courts had to decide whether or not leases which extended beyond 99 years were valid, it was the inclusion of these cases in scholarly writings which gave them the force of law.*

DESPITE BEING CALLED A “LEASE”, SCHOLARSHIP DICTATES THAT A MINERAL LEASE IS A REAL (PROPERTY) RIGHT

According to the rigorous civilian classification system, all rights are either *personal* or *real*.⁵³ Real rights are referenced throughout the Code, and, while no legislative definition exists, this type of interest is generally described as ownership and its various forms of dismemberment based on the writings of ancient and modern professors and scholars. In the most basic terms, a real right is a right that a person has *in a thing* – i.e. a matter of property law – while a personal right is a right that a person has *against another person* to demand a performance – i.e. a matter of the law of obligations.⁵⁴ As explained by Professor Yiannopoulos:

[D]espite certain similarities, the two species of rights appear to be of a different nature. According to appearances, a usufructuary⁵⁵ and a lessee seem to have the use and enjoyment of a house in much the same way. But, technically, the usufructuary has a right in the enjoyment of a house; the lessee has a right against the owner of a house to let him enjoy it. One has a *real right* and the other a *personal right*.⁵⁶

The Mineral Code and its Comments now identify mineral leases as a real right.⁵⁷ And while this classification may have been questioned by early Louisiana Supreme Court decisions,⁵⁸ the classification of a mineral lease as a real right has become a fixture in Louisiana law.⁵⁹ In contrast, it is well settled in Louisiana that under the “civil law concept, a lease does not convey any real right or title to the property leased, but only a personal right.”⁶⁰ This is a material distinction between mineral leases and surface leases.

The classification of an interest as a “real” or “personal” right is fundamental in civil law systems.⁶¹ Real rights are property rights that confer direct and immediate authority over a “thing” to be enforced against the world.⁶² Without a “thing” to which the real right may attach, a real right cannot exist. A personal right does not attach to any particular “thing,” it is merely the right of a particular obligee to enforce a particular obligation against a particular obligor. All real rights, including mineral leases, have certain common characteristics that are not exhibited by personal rights absent some special provision to the contrary. These characteristics may be summarized as follows:

1. Real rights always attach to a thing. Personal rights however do not require a specific thing to exist.⁶³
2. Real rights may be enforced against the world. Personal rights may only be enforced by the obligee against the obligor who legally or conventionally assumed the obligation sought to be enforced.⁶⁴
3. Real rights follow the thing to which they are attached, thus anyone who takes ownership of a thing encumbered by a real right takes it subject to that right. Personal rights remain with the obligor, they do not follow the thing because they do not attach to the thing.⁶⁵
4. Real rights may be created unilaterally by the holder. Personal rights necessarily require a certain obligee and a certain obligor.⁶⁶
5. Real rights can be abandoned unilaterally by the holder. Personal rights because they involve both a certain obligor and a certain obligee, cannot be abandoned by the obligor without the consent of an obligee.⁶⁷
6. The obligations correlative to real rights can be avoided by dispossession of the thing to which they are attached. Personal rights are not necessarily affected by the transfer of a particular thing.⁶⁸

The division of patrimonial rights into personal and real is inherent in the structure of the Louisiana Civil Code.⁶⁹ A personal right is the legal power that a person, the obligee, has to demand from another person, the obligor, a performance consisting of giving, doing, or not doing.⁷⁰ As explained by the

Louisiana Supreme Court, a personal right “defines man’s relationship to man and refers merely to an obligation one owes to another which may be declared against the obligor.”⁷¹ Personal rights are governed by the law of obligations found in Book III of the Louisiana Civil Code, entitled “Of the Different Modes of Acquiring the Ownership of Things.”⁷²

Personal rights must be contrasted with real rights. A real right should be understood as ownership and its various forms of dismemberment.⁷³ As explained by the Court, “a real right is synonymous with proprietary interest, both of which refer to a species of ownership. Ownership defines the relationship of man to things and may, therefore, be declared against the world.”⁷⁴ The various dismemberments of ownership allowed under Louisiana law each confer real rights on the owner or holder of that interest.⁷⁵

Planiol spoke at length on the primary distinction between real rights and personal rights, which he refers to as “right of credit.”⁷⁶ He explained the importance of the characteristics inherent in real rights by reference to the following examples:

There are considerable practical differences between [real rights and rights of credit]. Two examples will bring out the nature of the differences.

- (1) **INSOLVENCY OF A TRADER.** All the creditors of an insolvent trader are in the same position. Each of them has his claim to assert against the insolvent, but none of them has special rights to advance against the others. They are all therefore upon a plane of equality. No one of them can prevail over the others. And if we assume, as is the ordinary case, that they are all of them creditors for sums of money, the loss resulting from the insolvency of the common debtor must be divided

among them. Each of them will receive merely a dividend, so much per cent upon the sum due. This result is expressed by saying that the creditors are governed by the law applicable in competitive proceedings, and they are paid, in case of insolvency, *pro rata*.

But another person appears who has a real right. An owner for example, claims as his property merchandise deposited in the insolvent's store; or a second creditor asserts in addition to his claim, a special real right called a pledge or mortgage. These persons have a real right that can be set off against all persons, including the insolvent's creditors. They will, therefore, be able to exclude all these creditors, and keep for themselves either in kind or in value the things that belong to them or which had been pledged to or mortgaged to them. The competitive rule therefore does not apply. They have, as regards the others, a right of preference.

- (2) THEFT OF A MOVABLE. When a thing has been stolen, he who is its owner may lay claim to it, that is to say, follow the thief or any other detainer of the thing to reclaim his property. He who is merely a creditor has solely an action in restitution or in indemnification against the person who owed it to him or who permitted it to be stolen. He has no real action that can be set off against everybody. He has a more personal action against the debtor, who alone is responsible to him. *The difference is expressed by saying that the real right confers a right of pursuit which a right of credit does not.* The owner follows, pursues the thing into whatever hands it passes. A creditor cannot follow the thing. He can attack nobody other than his debtor.

Right of Pursuit and Right of Preference: these are the great advantages of real rights over rights of credit. These are not, as is often said, special attributes, something extrinsic, attached to real rights. They are the very essence of its realness, that is to say the nature opposable to all persons.⁷⁷

CONCLUSION AND PREDICTIONS FOR UPCOMING LITIGATION

LAWSUITS 99 YEARS IN THE MAKING

Landowners will continually seek ways to end longstanding mineral leases and servitudes. The latest and greatest hope to wipe the slate clean and regain control of their oil, gas, and minerals is the Louisiana Civil Code's prohibition of leases over 99 years. At stake are thousands of oil and gas leases blanketing a state that has produced over 25,000,000,000 barrels of oil and 200,000,000,000,000 cubic feet of natural gas. Despite the gravity of the situation, the law is silent on whether or not mineral leases are limited by the 99-year prohibition.

However, courts have begun to adopt the writings of legal scholars who assert that these mineral leases, under certain circumstances, may not be leases at all, but, in fact, create an ownership interest in favor of the leaseholder in the form of a mineral servitude. Thus, to apply Louisiana Civil Code Article 2679's conventional 99-year lease limit to a mineral lease would be to completely disregard the structure of the code and the inherent distinction between real rights and personal rights.

The scholarly commentary clearly indicates that a mineral lease is a real right, and it exhibits the major characteristics of such: the mineral lease may follow the land, regardless of

transfers of ownership; the mineral lessee may assert his rights against the world just as the proprietor of any real right; the lessee may enjoy directly and draw from the land a part of its economic advantages by appropriating a wasting asset; the lessee has certain rights of preference; and the lessee holds a right that is, in reality, susceptible of a type of possession through exercise.⁷⁸

The first major adoption of this concept was *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.*, a towering 40-page recitation of civil law tradition written by the Louisiana Supreme Court which contains *24 citations to treatises, one law review citation, and 22 citations to the Comments of the Law Institute.*⁷⁹

LAW TEACHERS STILL SERVE AS LAW MAKERS

“[Legal scholars] share a language of discourse with important decision makers in the real world, such as judges and legislators. Standard legal scholarship often self-consciously seeks to prescribe real world solutions to real problems.”⁸⁰

Contrary to the words of Judge Posner, law professors have an exciting and influential role to play in the development of jurisprudence. Technological advances in the 21st century move far too quickly to await the opinions of an appellate court. In the short term, the work of scholars in trade journals, law reviews, treatises, symposia, and in the media has a direct impact on the business world and helps shape the future of commerce. Over the long arc of time, some bodies of legal scholarship gain the force of law, as happened in the cases above, but every legal scholar has an opportunity to publish work that will inform, educate, and persuade the legislatures and jurist across the nation.

ⁱ Above the Law; "Posner And The Law Professor's Search For Meaning". <http://abovethelaw.com/2016/06/posner-and-the-law-professors-search-for-meaning/>. Last accessed 12/27/16.

ⁱⁱ Posner, Richard A.; "The Academy is Out of Its Depth." (June 24, 2016); http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2016/supreme_court_breakfast_table_for_june_2016/the_bob_mc_donnell_ruling_resulted_in_some_absurd_analogies.html. Last accessed 12/27/16.

ⁱⁱⁱ *Id.*

⁴ The Plaintiffs in *Regions Bank v. Questar*, alleged that the Benedum Leases had terminated by operation of law as of December 2, 2006. The argument was centered on Louisiana Civil Code Article 2679 which limits the term of a lease to ninety-nine years. Thus, it was alleged, the Benedum Leases terminated ninety-nine years after the date of execution in 1907.

⁵ *Regions Bank v. Questar Exploration & Production Corp.*, 184 So.3d 260, 265 (La. App. 2d Cir. 2016).

⁶ In this paper, "term" is used as it is used in Civil Law systems to denote the lifetime of a right or obligation.

⁷ LSA-C.C. Art. 2678 and Comment(a).

⁸ It is a common misconception that Louisiana law does not give weight to jurisprudence. Although Louisiana rejects the concept of *stare decisis*, the civil law concept of *jurisprudence constante*, although rarely seen, serves a similar purpose. See *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.*, 79 So. 3d 246, 256. ("Under our civilian tradition, we recognize instead that 'a long line of cases following the same reasoning within this state forms *jurisprudence constante*.' This concept has been explained, as follows: '[w]hile a single decision is not binding on our courts, when a series of decisions form a 'constant stream of uniform and homogenous rulings having the same reasoning,' *jurisprudence constante* applies and operates with 'considerable persuasive authority.' Thus, 'prior holdings by this court are persuasive, not authoritative, expressions of the law.')

(internal citations omitted)

⁹ *Bristo*, 71 So. 521, 522; see also, *Norris v. Snyder & McCormick*, 71 So. 522 (La. 1916); *Liner v. LaCroix*, 588 So. 2d 404 (La. App. 2 Cir. 1991).

¹⁰ LSA-C.C. Art. 2678; La. R.S. § 31:115.

¹¹ *In re: Bristo*, 71 So. 521 (La. 1916).

¹² *Id* at 521.

¹³ *Id.*

¹⁴ *Id* at 522.

¹⁵ *Norris v. Snyder & McCormick*, 71 So. 522 (La. 1916) (“In all other respects the facts of this case are the same as in the case of *Bettie Bristo v. Christine Oil & Gas Co.*”); *Calhoun v. Christine Oil & Gas Co.*, 71 So. 522 (La. 1916) (The defendant has appealed from a judgment annulling a contract purporting to be a mineral lease similar to the contract declared null in the case of *Bettie Bristo v. Christine Oil & Gas Co.*, 71 South. 521, decided today.”) *Williams v. McCormick*, 71 So. 523 (La. 1916); *Nervis v. McCormick*, 71 So. 523 (La. 1916); *Parrott v. McCormick*, 71 So. 523 (La. 1916); *Dunham v. McCormick*, 71 So. 523 (La. 1916).

¹⁶ *Sam George Fur Co. v. Arkansas-Louisiana Pipeline Co.*, 148 So. 51, 52 (La. 1933) (At issue was a mineral lease that provided: “If the Lessee shall sink a well or shaft and discover oil, gas, or sulphur in paying quantities in or under the above described land, then this lease shall remain in full force and effect for ten years from such discovery and as much longer as oil, gas or sulphur shall be produced therefrom in paying quantities.” The Court held “such a lease is by no means a lease in perpetuity, as the main consideration of the lease is the development of the land, and it is a matter of common knowledge that oil and gas fields cease to produce in paying quantities after the lapse of a certain number of years.”)

¹⁷ *Bristo*, 71 So. 521, 522; *Leslie v. Blackwell*, 370 So. 2d 178 (La. App. 3rd Cir. 1979); LSA-C.C. Art. 2679, Comment (a).

¹⁸ Summers, W.L., *The Law of Oil and Gas*, § 14:2 (3rd ed. 2006).

¹⁹ Suspensive and resolutive terms in a lease create an obligation that is conditional. If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive. If the obligation may be immediately enforced but will come to an end when the uncertain event occurs, the condition is resolutive. LSA-C.C. Art. 1767. For example, when Exxon agrees to hire a turnaround company to refurbish a refinery *if* the price of oil drops below \$50 per barrel, a suspensive condition exists. Therefore, the obligations created by the contract are suspended and have no force or effect unless and until the price trigger of \$50 per barrel occurs. By contrast, Exxon could contract for a company to manage the operations of its refinery *until* the price of oil drops to the same trigger price. In this case, the obligations created in the contract are immediately

in force and exist in perpetuity until the trigger price is reached. This would be a resolatory condition.

²⁰ *Sam George Fur Co.*, 148 So. 51, 52 (La. 1933); *Poole v. Winwell, Inc.* 381 So. 2d 926, 930 (La. App. 3rd Cir. 1980); *Cain v. GoldKing Properties Co.*, 408 So. 2d 1364, 1366 (La. App. 1st Cir. 1981).

²¹ *Id.*

²² *Poole*, 381 So. 2d 926 (In *Poole*, the Plaintiff executed two separate surface leases for the purpose of operating an oil and gas gathering facility. The leases provided: "This lease shall continue in force and effect so long as oil, gas, and other minerals are being produced from Sections 9, 16 and/or 41, Township 9, North, Range 6 East, Catahoula Parish, Louisiana.") *Cain*, 408 So. 2d 1364 (In *Cain*, the Plaintiff executed a surface lease allowing the defendant to drill a directional well on certain property and conduct other oil and gas related activities thereon to obtain production from under a neighboring parcel. The leases provided that "[t]his agreement shall terminate six (6) months after Lessee no longer needs the surface location or the facilities to be located on the tract therein leased and upon request, Lessee shall execute an agreement formerly terminating and revoking this agreement.")

²³ *Busch-Everett Co. v. Vivian Oil Co.*, 55 So. 564 (La. 1911).

²⁴ *Cain*, 408 So. 2d 1364, 1366. (Relying on *Poole* the court reasoned, "[i]n this case, the only reasonable interpretation to be placed on the language fixing the term is "so long as Lessee needs the location to produce, treat and market the production from the well drilled thereon." This is a condition, the existence of which may be easily determined, and which is not entirely dependent on the will of either party. The record reflects GoldKing's present "need" for the location, and that the lease money was timely tendered to plaintiffs. We therefore find that the lease remains in effect and that plaintiffs are not entitled to the relief sought.")

²⁵ *Busch-Everett Co.*, supra note 23.

²⁶ *Id* at 566.

²⁷ *Sam George Fur Co.*, 148 So. 51 (La. 1933).

²⁸ *Id* at 52.

²⁹ *Id* (It should be noted that the lease at issue in *Sam George Fur Company* did not obligate the lessee to conduct oil and gas operations on the property. Like the lease agreement in *Saunders v. Busch-Everett Co.*, 71 So. 153 (discussed above) the lessee was allowed the option of paying a certain price to maintain the lease within a certain period without actually

conducting operations on the property. This raises concerns regarding the existence of a potestative condition that could render the contract null. However, even where the lease contains clearly potestative conditions, a different condition arises when the lessee discharges its obligation and the lessor accepts the advantage conferred thereby. For example, in *Sam George Fur Company*, the lessees had developed the property and were operating six producing gas wells at the time suit was brought, and royalties had been paid properly in accordance with the contract. The Court thus held that, the Plaintiff, after retaining such advantages, could not be allowed to repudiate the obligations assumed in the agreement.)

³⁰ LSA-C.C. Art. 1.; See *Doerr v. Mobil Oil Corp.*, 774 So.2d 119, 128 (La. 2000).

³¹ LSA-C.C. Art. 3.

³² See LSA-C.C. Art. 3446-3447. (Prescription is the extinction of a title or right by failure to claim or exercise it over a long period. Acquisitive prescription, similar to “adverse possession”, applies to property rights while liberative prescription, similar to a “statute of limitations”, extinguishes the right to bring a suit or other civil action.

³³ LSA-R.S. 31:2.

³⁴ LSA-R.S. 31:115.

³⁵ LSA-R.S. 24:201 *et seq* (“The Louisiana State Law Institute, organized under authority of the Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College, domiciled at the Law School of the Louisiana State University, is chartered, created and organized as an official advisory law revision commission, law reform agency and legal research agency of the state of Louisiana.”).

³⁶ Summers, *supra* note 18.

³⁷ *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207 (La. 1922).

³⁸ McCollam, John M., *A Primer for the Practice of Mineral Law under the New Louisiana Mineral Code*, 50 Tul. L. Rev. 732, 739 (1976).

³⁹ LSA-R.S. 31:21.

⁴⁰ *Steele v. Denning*, 456 So. 2d 992, 998 (La. 1984).

⁴¹ Patrick H. Martin, *Louisiana Mineral Law Treatise*, §408 (2012).

⁴² LSA-R.S. 31:27 & Comments (The first ground stated for extinction of mineral servitudes is prescription resulting from nonuse for ten years. The evolution of a system of terminable mineral interests was one of the principal purposes of the original servitude analogy.)

⁴³ LSA-R.S. 31:28.

⁴⁴ McCollam, John M., *A Primer for the Practice of Mineral Law under the New Louisiana Mineral Code*, 50 Tul. L. Rev. 732, 745 (1976).

⁴⁵ *Id.*; Patrick H. Martin, *Louisiana Mineral Law Treatise*, §408 (2012); McDougal III, Luther L., *Louisiana Mineral Servitudes*, 61 Tul. L. Rev. 1097, 1116 (1987).

⁴⁶ LSA-R.S. 31:74.

⁴⁷ *Id.*

⁴⁸ *Id.*, Comments.

⁴⁹ *Hodges v. Norton*, 8 So. 2d 618, 619 (La. 1942).

⁵⁰ *Id.* at 622.

⁵¹ *Bodcaw Lumber Co. v. Magnolia Petroleum Co.*, 120 So. 389 (La. 1929).

⁵² *Id.* at 389.

⁵³ See *CLK Co., LLC v. CXY Energy, Inc.*, 719 So. 2d 1098, (La. App. 4 Cir. 1998); A. N. Yiannopoulos, 2 La. Civ. L. Treatise, Property § 201 (4th ed.).

⁵⁴ A. N. Yiannopoulos, 2 La. Civ. L. Treatise, Property § 201 (4th ed.); *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.*, 79 So. 3d 246 (La. 2011).

⁵⁵ See generally A. N. Yiannopoulos, *Usufruct: General Principles - Louisiana and Comparative Law*, 27 La. L. Rev. (1967). (In civil law systems that trace their lineage to ancient Roman law, full ownership is actually a bundle of three rights. The owner of the *usus* owns the right to use the property as she sees fit. The owner of the *fructus* enjoys the fruits of the property. This includes literal fruits, such as crops, and civil fruits, such as land rent. She who owns the *abusus* has the right to abuse, destroy, sell, or otherwise alienate the property. A person who owns both the *usus* and *fructus* owns a “usufruct” and is referred to as a “usufructuary”. The person who is left with only the *abusus* is referred to as the naked owner”.)

⁵⁶ A. N. Yiannopoulos, 2 La. Civ. L. Treatise, Property § 201 (4th ed.).

⁵⁷ LSA – R.S. 31:16 (Stating that the “basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease” and providing that “[m]ineral rights are real rights and subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence.”)

⁵⁸ *Reagan v. Murphy*, 105 So. 2d 210, 212-15 (La. 1958) (In *Gulf Refining Co. of Louisiana v. Glassell*, 171 So. 846 (La. 1936), the Court initially held that mineral leases produced only personal rights and obligations between the parties. Following this decision, the legislature enacted LSA-R.S. 9:1105, which classified oil and gas leases as real rights. In considering the

application of this law, the Court maintained its original position – that a mineral lease produces only personal rights – in *Arnold v. Sun Oil Co.*, 48 So. 2d 369. In light of the *Arnold* decision, the legislature enacted an amendment to 9:1105 which reemphasized the treatment of a mineral lease as a real right and added that the legislative intent was that the provision be applied as a substantive law conveying the benefits relating to the owners of real rights in immovable property to mineral lessees. In response to the argument that the statute affirmatively classified mineral leases as real rights, the Court stated: “[t]his proposition cannot be sustained as there is nothing contained in the amendatory section to indicate such an aim. It is noted, *imprimis*, that the original law does not say that mineral leases are real rights. It declares in substance, that they are to be *classified* as real rights and may be asserted, protected, and defended in the same manner as may be the ownership or possession of other immovable property...Indeed, it is perfectly evident from even a casual reading of the amendment that the Legislature did not intend to change the essence of the contractual rights and obligations between mineral lessees and lessors but only that it sought to place mineral lessees on the same level as landowners in conferring on them ‘benefits’ of the laws relating to owners of immovable property.” The Court went on, “[v]iewed in this light and applied to mineral leases, it is seen that to say the Legislature intended to change the true essence of a mineral lease from a personal contract into a real right would necessarily require the conclusion that the mineral lessee owns the right to explore for the minerals. The corollary of this proposition is that a mineral lessor divests himself of all proprietary interest in the minerals and has only a personal right to enforce the terms of the lease...It becomes obvious, then, that to uphold plaintiffs’ claims would serve only to confuse the fundamental law and, perhaps, place many contractual obligations and rights in a state of uncertainty. This we will not do.”)

⁵⁹ LSA – R.S. 31:16; *Eagle Pipe and Supply, Inc.*, 79 So. 3d 246, 259.

⁶⁰ *Richard v. Hall*, 874 So. 2d 131, 145 (La. 2004).

⁶¹ A. N. Yiannopoulos, 2 La. Civ. L. Treatise, Property § 203 (4th ed.).

⁶² Ciolino, Dane S., *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors*, 69 Tul. L. Rev. 935, 963 (1995).

⁶³ *Id* at 964 (“For example, a person may obligate himself to deliver a truckload of river sand to the obligee for a fixed sum of money. That obligation, however, does not relate to any particular truckload of sand

and presumably can be satisfied merely through the delivery of any sand of acceptable quality. In contrast, if a person owns a particular truckload of sand, he owns *that* truckload of sand and not merely any similar quantity of sand. The sand owner's real right of ownership is attached to the sand.")

⁶⁴ *Id* at 965 ("For example, if the obligor promised but failed to deliver sand to the obligee, the obligee could sue only his obligor for breach of the obligation. The obligee could not sue the obligor's neighbor or his brother in Paris. In contrast, if anyone absconded with a truckload of river sand owned by another, the owner of that sand could assert his real right of ownership against any possessor.")

⁶⁵ *Id* ("For example, if the obligor who promised to deliver a quantity of sand sells a particular truckload to another person, the purchaser of that truckload does not then become obligated to deliver it to the obligee. The personal obligation to deliver a quantity of sand remains with the obligor who failed to perform. In contrast, the owner of a particular truckload of sand has a real right of ownership that follows the sand wherever it may go.")

⁶⁶ *Id* at 966 ("For example, neither a conventional obligation assumed voluntarily through a contract, nor a delictual obligation imposed by law as a result of the obligor's tortious conduct, can come into being without a certain obligor and a certain obligee. In contrast, the owner of a tract of land can unilaterally execute a juridical act that places building restrictions on his property that will obligate even unknown future owners. Such restrictions can obligate future owners not only to conform to a general building plan, but also to perform reasonable affirmative acts for the maintenance of that plan.")

⁶⁷ *Id* ("For example, a usufructuary can unilaterally abandon his real right in the property and thereby release himself from the obligation to make repairs to the property. In contrast, the holder of a personal right to collect on a debt cannot remit the debt without the consent of the debtor.")

⁶⁸ *Id* at 966-67 ("For example, a person who purchases a truckload of sand on credit remains obligated to pay the seller even after he transfers the sand to another. In contrast, the purchaser of a tract of land burdened by a servitude or a building restriction is not obligated to the holder of the real right after he sells the land to another.")

⁶⁹ A. N. Yiannopoulos, 2 La. Civ. L. Treatise, Property § 203 (4th ed.).

⁷⁰ *Id.*

⁷¹ *Reagan*, 105 So. 2d 210, 214.

⁷² *Eagle Pipe and Supply, Inc.*, 79 So. 3d 246, 260.

⁷³ *Id.* at 258-59.

⁷⁴ *Id.* at 258.

⁷⁵ *Id.* at 258.

⁷⁶ 1 PLANIOL & RIPERT, TREATISE ON THE CIVIL LAW pt. 2, no. 2157, at 276 (La. St. L. Inst. Trans., 12th ed. 1939) (Explaining that the right of credit is very often called a “personal right.”)

⁷⁷ *Id.*

⁷⁸ LSA-R.S. 31:16 and Comments.

⁷⁹ *Eagle Pipe and Supply, Inc.*, 79 So. 3d 246, 262.

⁸⁰ Robert C. Bird, *Special Report: Legal Scholarship in Business Schools*, 53 Am. Bus. L.J. 9, 28 (2016) (citing Jordan H. Liebman, *The 1990 ABLA Research Committee Report: A First Step in the Search for an Organizing Principle*, 9 J. Legal Stud. Educ. 265, 290-91 (1991).)