Land & Water Law Review

Volume 7 | Issue 1 Article 4

1972

Legislation, Existing and Proposed, concerning Market-Ability of Mineral Titles

Ronald W. Polston

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Polston, Ronald W. (1972) "Legislation, Existing and Proposed, concerning Market-Ability of Mineral Titles," *Land & Water Law Review*: Vol. 7 : Iss. 1 , pp. 73 - 102.
Available at: https://scholarship.law.uwyo.edu/land_water/vol7/iss1/4

This Article is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

University of Wyoming
College of Law
LAND AND WATER
LAW REVIEW

VOLUME VII 1972 NUMBER 1

The author of this article drafted a statute for Indiana which sought to resolve certain problems caused by dormant mineral interests. Even though Indiana adopted his draft, Professor Polston's continuing concern that such mineral interests interfere with land marketability and his dissatisfaction with portions of the Indiana statute led him to reconsider his draft. After studying different methods which seek to free land from dormant mineral interests, he proposes the Indiana statute, with certain revisions, as a model.

LEGISLATION, EXISTING AND PROPOSED, CONCERNING MARKET-ABILITY OF MINERAL TITLES

*Ronald W. Polston**

It is becoming increasingly apparent in jurisdictions which have a long established coal or oil and gas industry that something must be done to eliminate title problems stemming from mineral conveyances executed in years gone by.[1] The problem results from the fact that perpetual or very long term mineral interests may be created during a period of activity in a particular industry, and these interests do not termniate when the activity ceases. Ownership of the minerals may thus be lodged in individuals who have long disappeared from the area, leaving no trace, and making it impossible to further develop the mineral estate at this time.

The problem is inherent in our common law system in which a separate estate, which may be in fee simple absolute,

* Associate Professor of Law, Indianapolis Law School; B.S., Eastern Illinois University; L.L.B., University of Illinois; Member of the Illinois and Indiana Bar Associations.

1. The problem is discussed in the following: SIMES & TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 239 (1960); Dupuy, *Clouds on Title*, 18 TEXAS B.J. 275 (1955); Street, *Need for Legislation to Eliminate Dormant Royalty Interests*, 42 MICH. ST. B.J. 49 (1963); Note, *Severed Mineral Interests, A Problem Without A Solution*, 46 N. DAK. L. REV. 451 (1970).

Copyright© 1972 by the University of Wyoming

may be created in the minerals.[2] Such a mineral interest has all the sanctity of an estate in land generally in that title to it cannot be lost by abandonment,[3] and yet it is virtually immune to the various title curative devices, such as adverse possession, the tax deed, and the marketable title act, which keep land in the stream of commerce.

ADVERSE POSSESSION

Adverse possession is for practical purposes inapplicable to the severed mineral estate because it is generally held that possession of the surface does not carry with it possession of the severed mineral interest.[4] The only way one can obtain title to the severed mineral interest by adverse possession is by actually producing the minerals for the requisite number

2. *See* Annot., 66 A.L.R.2d 978 (1957).

3. The statement in the text appears to be universally true with respect to solid minerals (see note 2 *supra*) but not so with respect to oil and gas. Because of the fluid nature of oil and gas, courts have had difficulty deciding whether or not they may be the subject of ownership in place, some courts giving an affirmative answer and classifying interests therein as corporeal. *See, e.g.*, Bodcaw Lumber Co. v. Goode, 160 Ark. 48, 254 S.W. 345 (1923); Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S.W. 296 (1923). Other courts answer in the negative, terming the interests incorporeal. *See, e.g.*, Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968); Transcontinental Oil Co. v. Emmerson, 298 Ill. 394, 131 N.E. 645 (1921). The principal consequence of this dispute seems to be its effect on the question of abandonment. Theoretically, if it is classified as incorporeal, title to it may be lost by abandonment; otherwise, it may not be. The last statement appears to be true in theory only, however, for while a jurisdiction which classifies the interest as incorporeal may apply principles of abandonment to it, other such jurisdictions may not. *Compare* Gerhard v. Stephens, *supra*, *with* Jilek v. Chicago, Wilmington & Franklin Coal Co., 382 Ill. 241, 47 N.E.2d 96 (1943). Not only are the cases confusing on this matter, the writers on the subject seem to also disagree. In 1A SUMMERS, THE LAW OF OIL & GAS § 139, at 320 (1954) it is said: "[I]n all states, except Louisiana . . . such [an] estate or interest is not subject to termination by nonuser or abandonment." In 1 WILLIMS & MEYERS, OIL & GAS LAW § 210.1, at 107 (1970) it is said: "In states which classify a mineral interest or leasehold . . . as incorporeal in character, it has been held that such interest may be extinguished by abandonment." It would appear that the only decision cited by Williams and Meyers which clearly holds that a severed mineral interest, as opposed to an oil and gas leasehold estate, is subject to abandonment is Gerhard v. Stephens, *supra*. *See Discussion Notes*, 31 OIL & GAS REP. 84-85 (1969). That decision cited as its principal authority the quoted statement from Williams and Meyers. Even if oil and gas interests were held to be subject to abandonment, problems of marketability of title would not thereby be ended. No title could be cleared without litigation in which the outcome would never be certain.

4. Claybrooke v. Barnes, 180 Ark. 678, 22 S.W.2d 390 (1929); Ward v. Woods, 310 S.W.2d 63 (Ky. 1958); Wilson v. Eckles, 232 Miss. 577, 99 So. 2d 846 (1958); Meiners v. Texas Osage Cooperative Royalty Pool Inc., 309 S.W.2d 898 (Tex. Civ. App. 1958). Possession of the surface commenced prior to severance will, however, result in the acquisition of title to both surface and minerals, despite a subsequent severance by the record owner. Huddleston v. Peel, 238 Miss. 798, 119 So. 2d 921 (1960); Rio Brava Oil Co. v. Staley Oil Co., 138 Tex. 198, 158 S.W.2d 293 (1942).

of years,[5] and, of course, no one is going to expend the money necessary to produce minerals unless he has title.

MARKETABLE TITLE STATUTES

The Model Marketable Title Act[6] and statutes based thereon provide little relief. Those statutes operate upon record title and render it marketable as against defects arising prior to the root of title. Root of title, under the Model Act, must be an instrument that has been of record at least forty years prior to the date on which marketability becomes an issue.[7] Such a statute could and probably will, where adopted, eliminate many dormant mineral interests.[8] The weakness of the statute in this regard, however, is that it does not eliminate any "defects which are inherent in the muniments of which such chain of record title is formed."[9] Thus if the land has been conveyed expressly subject to outstanding mineral interests within the prescribed period, as it most likely will be if such interests exist,[10] the statute will not affect them.[11] Marketable title statutes, therefore, simply do not reach the real problem involved in marketability of mineral interests. Mineral titles are likely to become unmarketable after the activity has played out in a given area. Those who acquired the interests will have moved on to other sites of mineral activity, perhaps even to that great oil well in the sky. Thus the key factor in regard to marketability of mineral interests is activity. Some method of terminating mineral interests after a period of inactivity seems the best means of insuring marketability of mineral interests. The marketable title statutes, which seek to eliminate claims that have become stale of record, do not meet the problem because mineral titles have a way of staying fresh of record. What is needed is a statute that will

5. Uphoff v. Trustees of Tufts College, 351 Ill. 146, 184 N.E. 213 (1932); Lyles v. Dodge, 228 S.W. 316 (Tex. Civ. App. 1921).
6. For a copy of the act see SIMES & TAYLOR, *supra* note 1, at 6.
7. In Indiana the period is fifty years. IND. ANN. STAT. § 56-1102 (Supp. 1970). In Oklahoma it is thirty years. OKLA. STAT. ANN. tit. 16, § 72 (Supp. 1970).
8. For a discussion of the effect of the act on mineral interests and the need for further legislation in the area see SIMES & TAYLOR, *supra* note 1, at 239.
9. SIMES & TAYLOR, *supra* note 1, at 7 (Model Marketable Title Act § 2).
10. STREET, *supra* note 1, at 52.
11. The Oklahoma version of the Model Marketable Title Act is expressly inapplicable to mineral interests. OKLA. STAT. ANN. tit. 16, § 76 (Supp. 1970).

eliminate dormant mineral interests regardless of the state of record title.

TAX SALES

The tax sale may in some areas provide a means of clearing title, but it is certainly not a universal nor entirely satisfactory solution to the problem. It is totally unavailable unless the tax laws provide for separate assessment of the mineral estate,[12] and even in those states where separate assessment is permitted tax assessors do not always do so.[13] If there is no separate assessment, there is, of course, no tax sale. Even if there is a separate assessment and a tax sale, there is no assurance that the problems created by separate ownership will be ended. In addition to the infirmities of tax titles generally, there is the problem that it may be purchased by one other than the surface owner who may thereafter lose interest in maintaining his ownership. It would seem that the best solution to this problem would be to find a means of ultimately reuniting surface and mineral ownership. Not only would the ends of marketability be better served thereby, but it would also seem to more nearly fulfill the expectations landowners generally have in this regard. These expectations seem justified not only on the basis that the common law rule, i.e., property extends from the center of the earth to the heavens, reflects popular beliefs, but also on the basis that development of the mineral estate will be a burden upon the surface owner and if anyone is to have control of it, as a windfall, it should be him.[14]

THE SEVERED MINERAL FEE

Not only is the mineral estate thus immune to the various means evolved for keeping real estate in the stream of commerce, it is by its nature more likely to fall into an unmarket-

12. *See, e.g.*, Cornelius v. Jackson, 201 Okla. 667, 209 P.2d 166 (1948); ALA. CODE tit. 51, § 16 (Supp. 1969).

13. *See* STREET, *supra* note 1, at 51. *See also* the facts in Failoni v. Chicago & North Western Ry. Co., 30 Ill. 2d 258, 195 N.E.2d 619 (1964) which illustrate that assessors do not always assess nonproductive mineral interests.

14. *But cf.* DuPuy, *supra* note 1 (suggesting that the problem can be solved by means of taxation).

able state, being concealed and out of mind except during periods of exploration or production. The existence of such interests may create no physical inconvenience during periods of inactivity, but they do cause inconvenience every time there is a transfer of the property. In fact there are no doubt instances in which the existence of such interests has prevented transfer of the property. It is unlikely, for example, that one who was contemplating building a luxury motel would take title if there was the potential of an oil well being drilled in the front lawn.

One possible solution to the problem would be to prohibit separate ownership in fee of mineral interests. Such a solution would appeal to those who find their titles burdened by dormant mineral interests. Any attempt, however, to terminate existing fee ownerships would no doubt be met by constitutional objections.[15] Further than that, however, the real evil of severed ownership is that which results from ownership being outstanding in persons who have no interest in or, perhaps, knowledge of their ownership. It would not seem necessary to abandon the concept to alleviate that evil. The concept of ownership in fee of severed mineral interests has become an integral part of the various mineral industries, and is utilized extensively in at least the coal and oil and gas industries.

Actually the coal industry is more dependent on being able to own mineral deposits in fee than is the oil and gas industry, and the difference is due to the mechanics of production in the two industries. In the coal industry it is possible by test drillings to determine the extent of a deposit before making the expenditure necessary to develop it. If it is determined that it would not be economical to develop the deposit at any given time, the coal company may nevertheless want to hold it pending new developments in mining technique or changes in the market. Furthermore, once a mine is opened it may be many years before the deposit is exhausted, and it will therefore be more convenient to the developer to own in fee the coal under all the tracts overlying the seam. Thus coal

---

15. For a discussion of the constitutionality of legislation of this sort affecting property interests see SIMES & TAYLOR, *supra* note 1, at 255.

is typically developed on the basis of fee ownership, and any rule of law which prohibited such ownership would be unduly burdensome to the coal industry.

In the oil and gas industry, on the other hand, development is typically under a determinable interest— the oil and gas lease. Such an instrument is typically for a short term and as long thereafter as oil or gas is produced from the premises. This is no doubt due to the fact that the oil and gas developer is never sure that oil and gas exists until he drills. Once he drills he has already expended a major part of developmental costs, and, if oil and gas exist in sufficient quantities to justify completion of the well, he produces it. There is no thought of acquiring ownership of the deposit and keeping it in reserve for the future. However, ownership in fee does have a place in the oil industry but it is largely used by the investor, speculator, or transferring landowner who wishes to reserve to himself a part of the mineral potential.

Thus the problem of severed ownership remains, and the question must be faced as to possible solutions. Remembering that the objective is to keep ownership of such interests in a marketable state, the best answer seems to be to find some means of reuniting surface and mineral ownership in those situations where it is likely to become unmarketable, without at the same time unduly limiting the ownership concepts upon which the developmental industries depend.

SOME STATUTORY APPROACHES

Thus far five jurisdictions have attacked the problem directly, and none of them have come up with a completely satisfactory solution. Statutes adopted in Tennessee,[16] Michi-

16. TENN. CODE ANN. § 64-704 (Supp. 1970) provides in pertinent part as follows:

> Any lease of oil or natural gas rights or any other conveyance of any kind separating such rights from the freehold estate of land shall expire at the end of ten (10) years from the date executed, unless, at the end of such ten (10) years, natural gas or oil is being produced from said land for commercial purposes. If, at any time after said ten (10) years' period, commercial production of oil or natural gas shall be terminated for a period of six (6) months, all such rights shall revert to the owner of the estate out of which said leasehold estate was carved. . . .

gan,[17] and Illinois,[18] for example, affect only oil and gas interests and do not apply to coal and other minerals. In at least one of those jurisdictions a major part of the problem results from ancient conveyances of coal and other minerals,

17. MICH. STAT. ANN. §§ 26.1163(1)-(2) (1970) provides in pertinent part as follows:

> Section 1. Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged or transfered by instrument recorded in the register of deeds office for the county where such interest is located for a period of 20 years shall, in the absence of the issuance of a drilling permit as to such interest or the actual production or withdrawal of oil or gas from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operations therewith, or the use of such interest in underground gas storage operations, during such period of 20 years, be deemed abandoned, unless the onwer thereof shall, within 3 years after the effective date of this act or within 20 years after the last sale, lease, mortgage or transfer of record of such interest or within 20 years after the last issuance of a drilling permit as to such interest or actual production or withdrawal of oil or gas, from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized, or included in unit operations therewith, or the use of such interest in underground gas storage operations, whichever is later, record a claim of interest as hereinafter provided. Any interest in oil or gas deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership. . . .
>
> . . . .
>
> Section 2. Any interest in oil or gas referred to in this act may be preserved by the recording within the period specified in this act a written notice in the register of deeds office for the county where such interest is located. . . .

18. ILL. ANN. STAT. ch. 30, §§ 197, 198 (Smith-Hurd Supp. 1971) provides in pertinent part as follows:

> Any interest in oil, gas, or associated hydrocarbons, liquid or gaseous, in any land owned by anyone other than the owner of the surface, which has not been devised, sold, leased, mortgaged or transferred b yinstrument recorded in the office of the recorder of deeds in the county where such interest is located for a period of 25 years shall, in the absence of the actual production of oil, gas or associated hydrocarbons, liquid or gaseous, from such land, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operations therewith, during such period of 25 years, be deemed abandoned, unless the owner thereof, within 3 years after the effective date of this Act or within 25 years after the last devise, sale, lease, mortgage or transfer of record of such interest or actual production of oil, gas or associated hydrocarbons, liquid or gaseous, from such land, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized, or included in unit operations therewith, whichever is later, records a claim of interest as provided in this Act. Any interest in oil, gas or associated hydrocarbons, liquid or gaseous, deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner of the surface.
>
> . . . .
>
> Any interest of oil, gas or associated hydrocarbons, liquid or gaseous, referred to in this Act may be preserved by the recording within the period specified in this Act a written notice in the recorder's office for the county where such interest is located. . . .

which have been construed in that jurisdiction to include oil and gas.[19] A fourth statute, that of Virginia,[20] while covering

19. Nance v. Donk Bros. Coal and Coke Co., 13 Ill. 2d 399, 151 N.E.2d 97 (1958).

20. VA. CODE ANN. § 55-154 (Supp. 1970) provides:

In any case when a claim to minerals, coals, oils, ores or subsurface substances, in, on or under lands in the Commonwealth, except lands lying west of the Blue Ridge mountains other than in counties having a population of more than sixteen thousand five hundred but less than sixteen thousand nine hundred, or more than thirty-two thousand but less than thirty-two thousand nine hundred fortly, or more than thirty thousand but less than thirty-one thousand, of more than fifteen thousand seven hundred but less than sixteen thousand, of more than sixty thousand but less than seventy thousand, or more than five thousand but less than five thousand three hundred fifty, and of more than twenty-six thousand six hundred and [sic] seventy but less than twenty-six thousand eight hundred, of more than twenty-six thousand three hundred but less than twenty-seven thousand five hundred twenty-five or in any county having population of more than twenty-one thousand nine hundred fifty but less than twenty-two thousand, or in the case of manganese ores only in counties having a population of more than twenty-one thousand three hundred and less than twenty-one thousand nine hundred or in any county having a population of more than forty-three thousand but less than fifty thousand, or the right to enter such land for the purpose of exploring, mining, boring and sinking shafts for such minerals, coal, oil, ores or subsurface substances is derived or reserved by any writing made thirty-five years or more prior to the institution of the suit hereinafter mentioned, and

(a) Such right to explore or mine has not for a like period been exercised and for a like period the person having such claim or right has never been charged with taxes thereon but all the taxes on the land have been charged to and paid by the person holding the land subject thereto, and for a like period no deed of bargain and sale of such claim or reservation in such mineral rights in the lands embraced in such claim has been recorded in the clerk's office of the county wherein the lands are located; or

(b) When the right to explore and mine has been exercised and the minerals, coals, oil, ores and subsurface substances in or on the land have been exhausted and the right of mining or boring has been abandoned for a like period;

It shall be prima facie presumed that no minerals, coals, oil, ores or subsurface substances exist in, on or under such land.

VA. CODE ANN. § 55-155 (Repl. 1969) provides:

The owner or owners of the land subject to such claim or right separately or jointly may bring a suit in equity in the circuit court of the county wherein the land, or a part thereof, is situated praying for the extinguishment of such claim or right, to which suit shall be made party defendant the person by whom such claim by such writing was derived or reserved, or his successors in title, by name so far as known, and as defendants unknown, so far as such successors in title are unknown. The court shall allow a period of not less than six months from the time the cause is docketed and set for hearing to elapse within which time the defendant may explore and discover commercial minerals, cials, oils, ores or subsurface substances, if any, and in the absence of satisfactory evidence to the contrary, it shall be presumed that there are no commercial minerals, coals, oil, ores or subsurface substances in or on the land, and the court shall enter a decree declaring the claim or right to be a cloud on the title and releasing the land therefrom and extinguishing the same; but if the defendant or defendants shall thereupon prove that there are commercial minerals, coals, oils, ores or subsurface substances in or on the land, the court shall require such minerals, coals, oils, ores or subsurface substances to be charged with taxes according to law.

coal, contains such peculiar geographical limitations that one wonders how it ever passed the test of constitutionality.[21]

The fifth attempt to cope with the situation, and the one upon which the other four seem to be based, is found in Louisiana. In Louisiana existing code provisions[22] relating to incorporeal interests generally have for sometime been applied to mineral interests.[23] Those code provisions, which incorporate the doctrine of liberative prescription, provide essentially that an incorporeal interest which is unused for a period of ten years shall prescribe in favor of the owner of the land. Thus a mineral interest which is nonproductive for a period of ten years terminates, and ownership reverts to the owner of the surface. While seemingly a simple doctrine, the attempt to apply it to the complexities of mineral ownership has produced volumes of decided cases that incorporate a body of law that is on many questions confusing and inconsistent, and, on others, harsh and burdensome on the mineral interests involved. The mere fact that it has spawned hundreds of decided appellate cases[24] is of itself enough to give pause to any jurisdiction considering it as a model for legislation.

One of the frequently litigated questions in Louisiana relates to the failure of the code provisions to define the geographical extent of the interest upon which the doctrine will operate. Thus if two or more noncontiguous tracts of land are covered by a single instrument which transfers a mineral interest to a single grantee, the question arises as to whether the instrument creates one or more mineral interests. The question becomes critical when there is production from only one of such tracts. If more than one mineral interest is created, then those tracts upon which there is no production are liberated by prescription. The Louisiana courts have held that such an instrument creates as many mineral interests as there are noncontiguous tracts and that liberative prescription

21. Love v. Lynchburg Nat'l Bank & Trust Co., 205 Va. 860, 140 S.E.2d 650 (1965) held the statute to be constitutional.
22. LA. CIV. CODE ANN. art. 789, 3546 (West 1953).
23. Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1920).
24. *See* Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute* (pts. 1-2), 25 TULANE L. REV. 30, 155, 303, 485 (1951); *Id.* (pts. 2-3), 26 TULANE L. REV. 23, 172, 303 (1952).

applies to each of them separately.[25] This has been carried to the point where a tract of land that is divided by a highway, railroad, or stream[26] is considered to be two tracts, but one divided by a private easement[27] is only one tract. In a similar manner it has been held that, if two contiguous tracts are transferred in separate instruments, two mineral interests are created.[28] While the result of these cases would not seem particularly objectionable, it would seem that any legislation on the subject should define the geographical extent of a mineral interest sufficiently to avoid the prospect of the extensive amount of litigation which has resulted from a failure to do so in Louisiana.

Another problem that would exist if the Louisiana doctrine were adopted in toto in other jurisdictions lies in the fact that no exception is made in favor of the owner of coal interests[29] to the requirement that every tract must produce or prescribe. While Louisiana is apparently not a coal producing state,[30] the failure to make such an exception could cause problems in a jurisdiction that is a coal producer. Production from a seam of coal may not reach some of the tracts overlying the seam within the ten year period. Thus a developer of the coal might find that his interest in portions of the seam had expired before he reached them. While it might seem possible to alleviate this objection to the Louisiana doctrine by either providing for a longer prescriptive period or providing that any production from a seam of coal would be deemed production from the entire seem, the Louisiana doctrine even if so modified would still not be conducive to the operation of the coal industry in that it would be inconsistent with their practice of maintaining deposits in reserve.

25. For list of cases see 1A SUMMERS, OIL AND GAS, 331 (1954).

26. *Id.* at 332-34.

27. *Id.* at 334.

28. *Id.* at 332.

29. That liberative prescription applies to solid minerals is well established. Wemple v. Nabors Oil & Gas Co., 154 La. 483, 97 So. 666 (1923); Huie Hodge Lumber Co. v. Railroad Lands Co., 151 La. 197, 91 So. 676 (1922); Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute* (pt. 2), 25 TULANE L. REV. 155, 170 (1951). While no cases have been found directly on the question, there is nothing in the doctrine to suggest that any exceptions would be made in favor of solid minerals.

30. STATISTICAL ABSTRACT OF THE U.S. 654 (1970).

Another major problem with the Louisiana doctrine is illustrated by cases dealing with the question of divisibility of the mineral interest. It arises when there has been a subdivision of the mineral interest. A grantee of the minerals may convey all or part of his interest to others by creating undivided interests, interests in only a portion of the tract, or interests in a given strata. The situation may be further complicated by each of those subdividees further subdividing, creating several levels of ownership in the mineral estate. If, in such a situation, there is production from the land in which only part of the subdividees are entitled to participate, the question is then raised as to whether those mineral interests which are not participating in production are being "used" so as to prevent their prescribing under the provisions of the doctrine. In other words, the question is whether a subdivision of the mineral interests creates several new mineral interests upon which the doctrine will operate separately. The issue is difficult to resolve under the Louisiana doctrine and all the statutes based on it, none of which expressly cover the matter because of the fact that under all of them the reversion, when an interest is terminated, operates only in favor of the surface owner. If a court holds that a subdividee's interest is terminated, the rights of the surface owner are thus increased solely because of the fact that the interest was subdivided. In the absence of subdivision, production from any part of the tract would have preserved the entire mineral interest. It seems unfair and illogical to hold that the surface owner should benefit from subsequent conveyances of the mineral interest to which he was not a party and in which he was not intended to be benefited.[31] On the other hand, unless subdivisions of the mineral interest are separately subject to termination for nonuser, the policy of the doctrine is to that extent unfulfilled. It might happen, for example, that a subdividee who was not

31. In Ohio Oil Co. v. Ferguson, 213 La. 183, 34 So. 2d 746 (1946) the Louisiana court seemed troubled by this aspect of its decision but resolved the issue by saying:

> But the fact that the landowner was not a party to that transaction does not distinguish the instant case. . . . In fact the division of the advantage of the servitude was a matter to which the landowner had no interest in objecting, because it was essentially advantageous to the landowner, in that it required each one of the owners of the servitude thereafter to develop that part of the land on which he acquired or retained the servitude, in order to prevent its being lost by the prescription of 10 years. *Id.* at 752.

entitled to share in production would disappear from the scene, making title to the portion of the tract which was subject to his interest unmarketable. To resolve this apparent dilemma it would seem logical to make the doctrine applicable to each subdividee's interest separately, but to provide for it to revert to his subdivider upon termination. While it may be desirable policy to ultimately reunite the surface and mineral estate and thereby bestow a windfall on the surface owner, there would seem to be no justification for doing so in those situations where others have a better claim to it. To award the terminating interest to the immediate subdivider would be to regard each level of ownership as a single unit except as between the parties to the transaction which resulted in the subdivision, thus obviating the unfair and illogical result that persons other than those who are parties to the transaction are being benefited by it.

The Louisiana legislature and courts have struggled for years with the divisibility versus indivisibility question. No small part of the enormous number of litigated cases relating to liberative prescription have involved this question.

Initially the Louisiana courts held that the mineral interests were indivisible.[32] The case involved was one in which one of several co-owners of the mineral interest was a minor during a portion of the prescriptive period. Under the applicable code provision, the running of the period was held to be suspended not only as to the minor but also as to all of the co-owners in a decision in which the court said:

> [A]s to an indivisible real right or servitude, where the prescription applicable to it is suspended as to one of several joint owners of the right, it is suspended as to all of them, and this necessarily so, because an indivisible right or obligation cannot be extinguished in part and exist in part.[33]

Suspension of the period is, of course, possible by means of "use" of the mineral interest as well as by the minority of the owner, and the language of the case would suggest that suspension in favor of one co-owner by that means would also

32. Sample v. Whitaker, 172 La. 722, 135 So. 38 (1931).
33. *Id.* at 40.

preserve the interest of all co-owners. In *Hodges v. Norton*[34] that question was presented. In that case, A (Hodges) sold a 440 acre tract in 1915 to B, reserving ½ the minerals under the land. A in 1923 sold ½ of her reserved interest, or ¼ of the minerals, to C who in the same year sold his ¼ under a particular 220 acres of the 440 to D. Production on portions of the 440 acre tract other than the 220 acres in which D had an interest commenced in 1924 and continued until 1931. There was no production on D's 220 acres until the production involved in the suit was obtained in 1939. It was contended in the suit that D's interest had prescribed because there had been no production on the tract to which D's interest related for more than ten years after its creation. The court reaffirmed the rule of indivisibility announced in *Sample v. Whitaker*[35] and held that D's interest had not prescribed. It was reasoned that a single mineral interest had been created when A reserved ½ the minerals and that the entire mineral interest was preserved or prescribed as a unit, regardless of subsequent transfers of part of it.

Indivisibility seemed well established in Louisiana law until the two cases of *Ohio Oil Co. v. Ferguson*[36] and *Byrd v. Forgotson*[37] were decided. In *Ohio Oil Co. v. Ferguson* an undivided ¼ interest in 240 acres was transferred to A in 1921. In the same year A transferred to B his ¼ interest in 40 acres of the 240 acre tract. Oil was produced until the time of the suit from the portion in which B did not have an interest. Oil had not been produced from B's 40 acres since 1929. The court held that B's interest prescribed in 1939, and in doing so said:

> The decision [in *Hodges v. Norton*[38]] is reconcilable with the judgment rendered in the instant case . . . by the fact that in *Hodges v. Norton*, Mrs. Augusta Ann Hodges and her ten children, who were colessors with the landowner . . . in the lease under which the drilling operations were conducted, retained a one-

34. 200 La. 614, 8 So. 2d 618 (1942).
35. 172 La. 722, 135 So. 38 (1931). *See* text accompanying notes 32 and 33 *supra*.
36. 213 La. 183, 34 So. 2d 746 (1946).
37. 213 La. 276, 34 So. 2d 777 (1945), *rev'd on rehearing*, 34 So. 2d 781 (La. 1947).
38. 200 La. 614, 8 So. 2d 618 (1942). *See* text accompanying note 34 *supra*.

> fourth mineral interest in the whole 440 acres conveyed by the original mineral servitude. In the instant case there was no such joint ownership of the mineral rights by Clark and the Toklan Royalty Corp. [A and B].[39]

Byrd v. Forgotson[40] was similar to *Ohio Oil Co. v. Ferguson*, except that in the *Byrd* case it was contended that the minority of a co-owner of minerals under a part of the tract would preserve the interests of those who had interests in other parts of the tract. In its first opinion[41] the court followed its original holding in *Sample v. Whitaker*[42] and preserved all interests. On rehearing,[43] however, the opinion was changed to make it consistent with *Ohio Oil Co. v. Ferguson* by holding that only the interest of the minors were preserved.

While the court in *Ohio Oil Co. v. Ferguson* stated that its decision was consistent with *Hodges v. Norton*, it quite clearly was not with respect to the question of divisibility of interests. Subsequent cases have done nothing to clear up the conflict. In fact in *Gunby v. Commercial Solvents*[44] the confusion was compounded. In that case O was the owner of a large tract of land that consisted of three contiguous tracts, A, B, and C. In 1939 O transferred a ¼ interest in tract C to Gunby. In 1952 O sold the whole plantation to Commercial Solvents, reserving all the oil and gas and other minerals. Production was obtained on tracts A and C. Commercial Solvents contended that tract B had prescribed on the basis that Gunby's purchase and a lease on tract A had resulted in the division of the plantation into three tracts for purposes of prescription. While the application of the doctrine to Gunby's interest separately was not involved and the issue in *Hodges v. Norton* and *Ohio Oil Co. v. Ferguson* was therefore not present, the court said:

> Our courts have repeatedly held that a mineral servitude which covers the whole of a tract of land is one

39. 213 La. 183, 34 So. 2d 746, 754 (1946).
40. 213 La. 276, 34 So. 2d 777 (1945), *rev'd on rehearing*, 34 So. 2d 781 (La. 1947).
41. 213 La. 276, 34 So. 2d 777 (1945).
42. 172 La. 722, 135 So. 83 (1931). *See* text accompanying notes 32 and 33 *supra*.
43. 34 So. 2d 781 (La. 1947).
44. 170 So. 2d 259 (La. App. 1964).

> servitude subject to one user and continues to exist as such even though fractional mineral interests are outstanding on portions of the property subject to the single servitude.[45]

The Louisiana legislature resolved one of the questions frequently involved in the divisibility cases by first providing that suspension of prescription in favor of a minor would not result in suspension in favor of his co-owners;[46] subsequently the legislature provided that prescription would not be suspended because of minority of the owner.[47]

Another frequently litigated issue in Louisiana, and one which is often involved in discussions of divisibility, concerns the question as to when production will interrupt prescription on tracts other than that from which the production is obtained. While related to the question of divisibility, it arises in the situation in which a portion of the tract is included in a voluntary or compulsory production unit. When unitization occurs production is divided among the owners of interests in all the land covered by the unit, regardless of where the wells may be located. When only a portion of a tract which is subject to a mineral servitude is included in a unit and there is production only on other land in the unit, the question arises as to whether prescription is interrupted as to all or any part of the servitude. The Louisiana courts have held that only that part of the servitude which is included in the unit is preserved by production from other lands in the unit,[48] but that if production is from the land covered by the servitude, the entire servitude is preserved.[49] These decisions are, of course, consistent with the doctrine of divisibility as developed by the Louisiana court. Whatever position is taken on this doctrine, however, any legislation on the subject should expressly cover the effect of pooling and unitization. Only the Michigan[50] and Illinois[51] statutes do so.

45. *Id.* at 263. For this proposition the court cited Gulf Oil Corp. v. Clement, 239 La. 144, 118 So. 2d 361 (1960); Hodges v. Norton, 200 La. 614, 8 So. 2d 618 (1942); Ohio Oil Co. v. Ferguson, 213 La. 183, 34 So. 2d 746 (1946).
46. No. 232 [1944] La. Acts 687.
47. No. 510 [1950] La. Acts 935. This statute and No. 232 [1944] La. Acts 687 are now incorporated in LA. REV. STAT. ANN. § 9:5805 (1950).
48. Elson v. Mathews, 224 La. 417, 69 So. 2d 734 (1953); Spears v. Nesbitt, 197 La. 931, 2 So. 2d 650 (1941).
49. Fontenot v. Texaco Inc., 271 F. Supp. 753 (W.D. La. 1967).
50. MICH. STAT. ANN. §§ 26.1163 (1)-(2) (1970).
51. ILL. ANN. STAT. ch. 30, §§ 197, 198 (Smith-Hurd Supp. 1971).

The four statutes that have been adopted relating to this problem are all patterned, generally speaking, on the Louisiana doctrine in that all of them terminate an interest after a period of nonuser, and they incorporate, for the most part, the weaknesses of the Louisiana system. One exception to the latter statement lies in the fact that all of them, except the Tennessee statute, provide for a means of extending the interest other than by production, such as by execution and recording of a conveyance of the interest or by recording a claim within the prescriptive period. Thus the policy approach in those statutes is somewhat different than that of the Louisiana doctrine. They are aimed at the problem of marketability while the Louisiana doctrine is a limitation on the duration of ownership of mineral interests.

None of the four statutes, in a manner similar to the Louisiana doctrine, however, defines the geographical extent of a mineral interest. Thus in a period of oil activity all of them would be likely to produce litigation concerning the effect of contiguous and noncontiguous tracts being included in a single conveyance.

Nor do any of the four statutes deal with the question of divisibility of mineral interests, and all of them seem to operate only in favor of the surface owner. Thus, built into all of them is the same problem with which the Louisiana courts have so long struggled. The only possible exception to this statement is the Tennessee statute. Under that statute it is provided that the reversion will operate in favor of "the owner of the estate out of which said leasehold was carved."[52] While the use of the quoted phrase would seem to indicate that the statute could operate in favor of a subdividing mineral owner, the balance of the statute would not seem to support such a conclusion. In the first portion it is made applicable only to "[a]ny lease of oil or natural gas rights or any other conveyance of any kind *separating such rights from the freehold estate of land.*"[53] (emphasis added). If the statute only affects mineral interests created by the initial severence deed, then quite obviously it would not be available to the subdividing mineral owner, and therefore "the owner of the estate out

52. TENN. CODE ANN. § 64-704 (Supp. 1970).
53. *Id.*

of which said leasehold was carved"[54] will always be the surface owner. Furthermore, as is obvious from the quoted language, there is some question as to whether the Tennessee statute would apply to anything other than oil and gas leases. While in the first sentence it is made applicable to "any other conveyance," the reverter clause ("out of which said leasehold estate was carved") seems more restrictive. If it applies only to oil and gas leases then it will not only have failed to eliminate questions relating to subdivisions, it will not have had much effect at all. It provides for termination at the end of ten years in the absence of production, and further provides that the cessation of production for a period of six months after the end of ten years shall also result in termination. Most oil and gas leases have a primary term of less than ten years and provide for termination upon cessation of production. The statute would therefore not affect them.

The Virginia statute has many peculiarities other than its unusual geographical limitations.[55] Essentially it provides that when a mineral interest has not been transferred or separately taxed or when exploration has not been conducted thereunder for a period of thirty-five years the land covered thereby shall be *prima facie* deemed to contain no minerals.[56] The surface owner is thereafter entitled to bring a suit to quiet title to such mineral interest. If the mineral owner defends, he is given six months from the date of the hearing in which to explore for minerals. If he can, within that six month period, establish that there are minerals, the court will order the mineral interest to be separately taxed. If he fails to establish the existence of minerals, the interest is extinguished.[57] How the statute would affect a nonexecutive mineral interest (one in which there is no right to explore for minerals) is not clear. Perhaps the most serious objection to the statute, however, is its requirement of a lawsuit in every case in which title is to be cleared. This being true, it is unlikely that the statute can ever be completely effective. It may be availed of in those few instances when title to the minerals becomes criti-

54. *Id.*
55. VA. CODE ANN. § 55-154 (Supp. 1970).
56. *Id.*
57. VA. CODE ANN. § 55-155 (Repl. 1969).

cal enough to warrant the expense of litigation, but it seems unlikely that it will clear any substantial number of clouded titles.

A MODEL STATUTE

A statute which attempts to avoid the deficiencies in existing legislation on the subject was enacted in Indiana in 1971.[58] With some modification[59] it is offered herewith as a model:

> Sec. 1. Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section four hereof, and the ownership shall revert to the then[60] owner of the interest out of which it was carved. The owner of the interest out of which another interest was carved shall be deemed to have been the transferor who created the interest except that if a transferor, in a single transaction shall have transferred his entire interest to more than one transferee, whether by divided or undivided interests, the grantees shall collectively be deemed to have been the owners of the interest out of which each of their interests were carved.[61]
>
> Sec. 2. A mineral interest is that interest created in favor of an individual, corporation or other legal entity, in a single transaction. A transaction shall be taken to include a transfer by grant, reservation, exception, or assignment or by will or inte-

58. Pub. L. No. 423, [1971] Ind. Laws 1970, *amending* IND. CODE § 32-5-11 (1971).

59. The Indiana statute was drafted by this writer at the request and with the assistance of Indiana General Assemblyman, M. K. Phillips. During the writing of this article it was assumed that the statute had not passed the Indiana Legislature. After the article was completed, it was discovered that the statute had gone through the Indiana Senate just before midnight the last day on which it could have passed. This writer had been erroneously informed by the legislative council the next day that the statute had not passed. In the preparation of this article substantial improvements were therefore made in the statute, and they are reflected in the proposed draft. It is anticipated that the changes will be introduced in the next session of the Indiana Legislature as amendments to the Indiana statute.

60. The word "then" is used to insure that the reversion will operate in favor of the current owner of the interest "out of which the mineral interest was carved." The balance of the section uses the past tense to harmonize with such an intent.

61. The last sentence of this section was not included in the Indiana statute. For an explanation of the necessity for this change see pp. 94-95 *infra* and hypotheticals (c) and (d) pp. 96-97 *infra.*

state succession, or any other means, of an interest of any kind, in coal, oil and gas, or other minerals.[62]

Sec. 3. A mineral interest shall be deemed to be used when there are any minerals produced thereunder, or when operations are being conducted thereunder for injection, withdrawal, storage, or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof on a regular basis in intervals no greater than one year, or when there is production on any tract with which such mineral interest, or any part thereof, may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or or seam by the owner of such mineral interest, or when taxes are paid on such mineral interest by the owner thereof, or when natural gas is injected and stored underground pursuant to an instrument authorizing such use.[63]

Sec. 4. The statement of claim provided in section one above shall be filed by the owner of the mineral interest prior to the end of the twenty year period set forth in section one or within two years after the effective date of this act, whichever is later, and shall contain the name and address of the owner of such interest, a description of the land, on or under which such mineral interest is located, and a statement of the intended use of such mineral interest. Such statement of claim shall be filed in the office of the Recorder of Deeds in the county in which such land is located. Upon the filing of the statement of

62. This section differs from the Indiana staute which defines a mineral interest as that which is created "by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals." Pub. L. No. 423, § 2, [1971] Ind. Laws 1970. The Indiana statute could be construed as creating a single mineral interest when an instrument transfers minerals to several persons. The intent was to define a mineral interest as the interest created in an individual by an instrument so that when an instrument runs in favor of more than one grantee, each will have a mineral interest, the extent of which is determined by the instrument. The proposed statute more clearly reflects that intent. Furthermore, the Indiana statute by emphasizing the instrument would seem to exclude intestate transfers which should be held to create mineral interests in the takers.

63. The Indiana statute, instead of containing an express exception with regard to gas storage, contained a sentence on this point as follows: "Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument." Pub. L. No. 423, § 3, [1971] Ind. Laws 1970. It is suggested that the language used in the Indiana statute is too broad and that the last clause of the proposed draft of this section is a more desirable way of handling that situation.

Land & Water Law Review, Vol. 7 [1972], Iss. 1, Art. 4

claim within the time provided, it shall be deemed that such mineral interest was being used on the date on which the statement of claim was filed.

Sec. 5. Failure to file a statement of claim within the time provided in section four shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

1) was at the time of the expiration of the period provided in section four, the owner of ten or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten years prior to the expiration of the period provided in section five preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

3) failed to preserve such interest through inadvertance, and

4) filed the statement of claim herein required, within sixty (60) days after publication of notice as provided in section six herein, if such notice is published, and if no such notice is published within sixty (60) days after receiving actual knowledge that such mineral interest had lapsed.

Sec. 6. Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the Recorder of Deeds in the county wherein such land is

https://scholarship.law.uwyo.edu/land_water/vol7/iss1/4

> located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given.
>
> Sec. 7. Upon the filing of the statement of claim, provided for in section four of this Act or the proof of service of notice as provided in section six of this Act in the Recorder's office for the county where such interest is located, the Recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice.
>
> Sec. 8. The provisions of this act may not be waived at any time prior to the expiration of the twenty year period provided in section two.

The proposed statute eliminates the troublesome questions which have resulted in so much litigation in Louisiana and which have not been resolved by existing legislation on the subject.

It provides, for example, in section two that the geographical limitations upon a mineral interest are determined by reference to the instrument in which the interest is created. If the parties treat two or more tracts of land, whether they be contiguous or noncontiguous, as a unit in a transaction which results in the transfer of a mineral interest, the transferee will receive a single mineral interest. If a single transaction creates interests in more than one transferee, then as many mineral interests are created as there are transferees. Thus are obviated all the issues relating to contiguity of tracts.[64]

While the statute operates on coal and other minerals as well as oil and gas, it does not interfere with present operational methods in those industries. It allows the interest to be preserved beyond the twenty year period by several means, including filing of a statement of claim, payment of taxes on the interest, or production, and it defines production as including production from any part of a common seam or vein

64. *See* note 62 *supra.*

of coal. Also eliminated are questions arising from pooling and unitization in that the statute defines production as including production from any part of a unit with which the land or any part thereof may be pooled.

The question of divisibility is resolved in favor of complete divisibility, but at the same time the unfairness that results from divisibility under the Louisiana doctrine is eliminated by making the reversion operate in favor of the owner of the interest out of which the terminating interest was carved. The operation of these two related aspects of the statute require some explanation and illustration.

The phrase "out of which it was carved" was taken from the Tennessee statute where, as already indicated, it probably has no special meaning. Here, however, it is meant to indicate the subdivider or person who created the mineral interest. Since there may be many subdivisions of a mineral interest subsequent to severance, each of which will create new mineral interests, there may in a given situation be many subdividers. The terminating interest will always operate in favor of the immediate subdivider, so long as his interest is being preserved. If the immediate subdivider's interest is not being preserved, the reversion will operate in favor of the subdivider at the next highest level. The only difficulty with this scheme, and the one that requires elaboration on the phrase "out of which it was carved," arises out of the situation in which a mineral interest owner transfers his entire interest to two or more persons at the same time. In that situation it would be difficult to determine which grantee was the owner of the interest out of which all were carved. The problem would arise if only one of the interests lapsed under the statute. In that situation it could be argued that, in the absence of elaboration upon the phrase "out of which it was carved," the reversion should operate in favor of the surface owner (or the next higher subdivider as the case may be) because the subdivider who carved out the interests at the same time disposed of all his interest. Here, however, as in any other case, there is no reason why the surface owner (or next higher subdivider) should profit merely because of a subdivision. The subdividees here collectively received the whole interest, and each should be considered to own a portion of the interest out of which each of their interests were carved. If one of their interests lapses, it should accrue to the benefit of those who remain. The problem does not occur, of course, if a given subdivider retains part of his interest even for a short time for he will be considered to be the owner of the interest out of which the rest have been carved. If he subsequently transfers the balance of his interest, he will at the same time be transferring the potential reversion in the interests of his previous subdividees.

The operation of the statutory provisions relating to the reversion of an interest upon termination can best be illustrated by a series of hypotheticals involving the various methods by which a mineral interest may be subdivided.

(a) X, the owner of the entire fee interest in Blackacre, conveys the coal, oil and gas, and other minerals to Y. Thereafter, Y conveys to Z all of the coal lying between 500 feet and 600 feet beneath the surface. Y has mined coal from a seam lying more than 600 feet below the surface, and that operation has continued to date. Z has never mined any coal at all. Assume that no statements of claim will be filed by either Y or Z in the future.

Under the proposed statute, Y's interest will be kept alive as long as production continues and for twenty years thereafter (and for successive twenty year periods if Y should file a statement of claim as provided in the act). On the other hand, Z's interest which is a mineral interest as defined in the act, will terminate at the end of twenty years if no statement of claim is filed by Z. There is no reason why it should revert to the surface owner since, if there had been no conveyance to Z, none of the mineral interests would be terminated. (Y would be keeping the entire mineral interest alive by his production.) When Z's interest terminates it would seem logical and fair that it would revert to Y, who has the residual interest in the whole of the mineral estate.

(b) Assume the same facts as in the last hypothetical, except that production is by Z rather than Y.

In this situation since Y and Z both have mineral interests, as defined in the act, both must be kept alive either by production or by filing. Y's interest (assuming again that nothing is done to keep it alive) will terminate after twenty years. Z's interest, however, will be kept alive for the duration of his production and twenty years thereafter (and for successive twenty year periods providing the filing requirements are met). When and if Z's interest terminates, it will revert to the then owner of the surface because the surface owner will have then succeeded to the ownership of the interest out of which Z's interest was carved (the mineral estate previously owned by Y). An objection might arise on the basis that if production by one of the owners in hypothetical (a) will keep the whole interest alive, why doesn't it have the same effect in hypothetical (b). To ask the question, however, is to confuse two issues: (1) when does the interest terminate; and (2) in whose favor does the reversion operate? In both hypotheticals the two interests are being treated separately for purposes of determining whether they are kept alive by production. Only production under the particular interest will keep it alive, and in each hypothetical the nonproducing interest terminated. After determining that an interest terminates, it then becomes necessary to identify the reversioner. In hypothetical (a) the owner of the interest out of which it was carved was the mineral owner, Y. In hypothetical (b) the surface owner occupied that position.

(c) X, the owner of the entire fee interest in Blackacre, conveys all "the coal, oil and gas, and other minerals" to Y. Y thereafter conveys an undivided ½ interest therein to Z.

In this hypothetical, if Y is producing minerals, he will be required to account to Z for ½, and Z will probably have to contribute ½ the costs of production. Thus, if Y's interest is kept alive by producing, that same production would keep Z's interest alive also. If, however, there is no production and Y keeps his interest alive by filing a statement of claim within the time provided in the Act, it might be argued, in the absence of a definition of the phrase "out of which it was carved" contained in Section one of the act, that Z's interest would terminate and further that it would revert to the surface owner rather than to Y. The argument would be that this was not a situation in which an interest was carved out; the subdivider simply split his interest in two parts. In response to this, however, it should be pointed out that the surface owner was not a party to the conveyance from Y to Z and should not profit from it. This is the approach taken by the statute, and under the statute Z's interest will terminate in favor of Y.

Again, as in hypothetical (b), if Z's interest rather than Y's is preserved this time by filing and Y's is extinguished because of a failure to file, the ownership of the extinguished interest will revert to the surface owner for the same reasons. In this situation the owner of the interest out of which Y's interest was carved is the surface owner.

(d) X, the owner of the entire fee interest in Blackacre, conveys all the coal, oil and gas, and other minerals to Y. Y thereafter, in a single transaction, conveys all his interest to A, B and C as tenants in common.

In this hypothetical, if there is no production and A fails to preserve his interest by filing, the reversion will operate in favor of his co-owners, B and C, equally. Such a result follows from the last portion of section one of the act. Since Y transferred his entire interest in one transaction, his grantees collectively become owners of the interest out of which their interests were carved. Had Y transferred undivided ⅓ interests to A and B in one transaction and then subsequently transferred his retained one-third to C, a different result would have obtained. In the latter situation C would have succeeded to the interest out of which the interests of A and B were carved, and, if one of them failed to preserve, the reversion would be to C.

(e) X, the owner of the entire fee interest in Blackacre, a 100 acre tract, conveys all the coal, oil and gas, and other minerals to Y. Thereafter, Y conveys to Z all the coal, oil and gas underlying the west fifty acres of Blackacre.

If there is production from neither of the tracts, it seems clear that both Y and Z will have to file statements of claim in order to preserve their interests. If only Y files, then the reversion of Z's interest should be in favor of Y. If only Z files, the reversion of Y's interest should be in favor of the surface owner. The arguments in this situation would seem to be a little different than those involved in the situation in which the subdivision was by conveyances of undivided interests. If there is production from either of the halves of the tract, the result is somewhat different than in the hypothetical involving undivided interests. Since Y and Z do not have a joint or common interest, production by one of them will not be considered production by both. Thus it would seem that production by only one of the two mineral owners would not operate to preserve the interest of the other. The nonproducing interest would have to be preserved, if at all, by filing a statement of claim. If it is not preserved by filing, however, there is no reason why the identity of the reversioner should not be the same as it would have been in the situation where there was no production, i.e., Y, if the expiring interest is Z's; the surface owner, if the expiring interest is Y's. If in this hypothetical, instead of conveying part of his interest to a single grantee, Y had in a single transaction conveyed his entire interest to two grantees by giving one of them the minerals under the south half of the property, and the other the minerals under the north half, the result would be the same as that obtained when the entire interest was transferred to two or more persons in the form of undivided interests in the whole. Each of the grantees would hold part of the reversion and, if one failed to preserve his interest, the other would succeed to it upon its termination.

In any of the above hypotheticals the situation will be greatly complicated if the transfers involved are term mineral deeds rather than conveyances of interests perpetual in duration. Consider for example the following:

(f) In 1950 X, the owner of the entire fee interest in Blackacre, a 100 acre tract, conveyed the oil

> and gas and other minerals to Y for a term of twenty years and as long thereafter as oil and gas are produced from the premises. In 1952 Y conveyed to Z all the oil and gas and other minerals underlying the west fifty acres of Blackacre for twenty years and as long thereafter as oil and gas are produced from the premises.

In this situation, if there is no production from any part of the premises during the twenty year period after the execution of the deed to Y, both mineral interests would expire pursuant to the provisions in the deed to Y. There would be no occasion for the statute to operate. If Y obtained production on his fifty acres within the twenty year term of his deed and it continued thereafter but there was no production from the fifty acres transferred to Z within the twenty year term of that deed, Z's interest would terminate in favor of Y. Again the statute would not be involved. If, however, the production was from the fifty acres transferred to Z and it continued beyond the twenty year term in Z's deed, a more difficult problem arises. The production by Z will extend the term of Y's mineral deed.[65] Will it prevent Y's interest from lapsing? The problem lies in the fact that Y has, under the terms of the deed to Z, a reversionary interest in Z's tract. When production ceases, Z's interest reverts to Y *under the terms of the deed* and quite apart from the operation of the statute. It might be argued that Z's production inures to the benefit of Y for that reason. Since Y is not sharing in that production, however, it would seem that his interest should terminate at the end of twenty years—his interest in the reversion of Z's tract as well as his interest in the tract retained by him. Thus after twenty years nonuser of Y's tract, the reversion *under the deed to Z* would be owned by X. This problem might become critical if after Z has produced for more than twenty years and Y had failed to preserve his interest by filing, production was obtained after the twenty year period on Y's retained tract. It would seem that such production would belong to the landowner, X, and, if Z's production terminated

65. Dickerson v. Ray, 20 Ill. 2d 107, 169 N.E.2d 341 (1960).

Land & Water Law Review, Vol. 7 [1972], Iss. 1, Art. 4

thereafter, the whole of the mineral interest would revert to the landowner.

While mineral titles may present more complicated fact situations than those contained in the foregoing hypotheticals,[66] it will usually be possible in any given controversy to break the problem down into several hypotheticals similar to those presented. In any given situation the result of applying the statute will be to terminate the rights of those who have failed to demonstrate a continuing interest in the property and to leave unimpaired the rights of those who have done so. While the result will not always be to return the title immediately to the surface owner, it will be to place it in the hands of one who is actively attempting to preserve his interest. When no one who has a right thereto is interested in maintaining ownership of the severed mineral interest, it will then return to the surface owner. The ends of marketability are thus served in every instance, and at the same time the concept of separate mineral ownership, even in perpetuity, is preserved.

In the drafting of the statute representatives of coal companies were asked to participate. They unanimously objected to any provisions which would automatically terminate their interests merely because of the failure to file a statement of claim. The basis of their objection was the fact that their reserves in a given area may cover a great many surface tracts and the title transactions creating the coal companies' interests may be very complex and based upon documents of great antiquity. In short, their files are in such shape that they fear that they might neglect to file with respect to some of the tracts in a given area, even though they might make diligent effort to do so. If they failed to file with respect to a given tract, it would leave a hole in the middle of an area they might desire to mine. They were, therefore, prepared to oppose any statute which did not make an "inadvertance" exception to the filing requirement. In the alternative, they desired that the statute contain a requirement that the surface owner bring suit to terminate the interest, after which they would be given the opportunity to cure their default (some-

66. *See, e.g.*, Union Sulphur Co. v. Campbell, 207 La. 514, 21 So.2d 626 (1945).

thing similar to the Virginia statute). It was realized, however, that any general exception to the filing requirement based on inadvertance would destroy the effect of the statute. No title would ever be cleared without a lawsuit. The requirement of a lawsuit under the Virginia-type statute was, of course, the objection to that statute. As a result, a compromise was reached which makes a narrow exception in favor of the owner of a large number of mineral interests in a given area who has made diligent effort to preserve all of them by filing but has omitted through inadvertance to file as to one or more of such interests. Realizing that even that kind of an exception would leave titles in an uncertain state, a provision was added whereby the reversioner could publish notice of the lapse of the mineral interest, and if no statement of claim was filed within sixty days after such publication the defense of inadvertance would be cut off. Filing by the reversioner of proof of publication would afford a means of automatically clearing title. It is realized that publication of notice will entail some expense, and the effectiveness of the act is thereby somewhat reduced. However, it is felt that this method is far preferable to requiring litigation in every instance. While it might be argued that no exception at all should be made in favor of the coal companies, it is no doubt true that their position has been responsible for the emasculation of the Virginia statute and the failure of the other statutes to include coal rights within their operation. It was thus deemed that a compromise statute would be better than no statute at all or a statute that only affected interests in oil and gas.

CONCLUSION

While the statutory scheme proposed herein may seem complex, the complexity is not in the statute but in the transactions which the statute seeks to govern. One need only read a few of the Louisiana cases on this subject to realize just how complicated mineral ownership can get. The Louisiana cases make amply clear, however, that there can be no simple solution to the problem, or at least not one which produces a set of consistent and desirable results. It is submitted that the proposed statute does deal effectively and fairly with the problem without at the same time operating with undue harshness upon any of the interests involved. While there may arise unforeseen problems under it, most of the cases litigated heretofore have been obviated.