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Mines and Minerals - Reversionary Interest - Prescription

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general jurisprudence of Louisiana on the subject,[14] although the accuracy of the suggestion that the purchaser is being allowed "fruits and revenues" from the property is open to question.[15]

S. W. J.

MINES AND MINERALS—REVERSIONARY INTEREST—PRESCRIPTION—The defendant landowner after selling one-half the mineral rights upon his land and leasing the other half, granted a mineral deed to plaintiff. By this deed there was sold to plaintiff "all interest and ownership of the vendor . . . in and to all mineral rights" and the right of ingress and egress to and from the land. More than ten years after any of these grants, defendant entered into another lease and production was secured. The plaintiffs, contending there had been a sale of the "reversionary interest," claimed ownership of the minerals. *Held,* that there had not been a sale of this interest although "It is clear that the reversionary mineral interest of the owner of the fee simple title is a 'certain object' which can be legally sold." *Gailey v. McFarlain,* 193 So. 570 (La. 1940).

The present case confirms intimations in previous opinions[1] that the owner, after *selling* the mineral rights on his land, has an interest with which he may deal. That he may sell mineral rights subject to an existing *lease* is more definitely settled.[2]

Two approaches to the reversionary interest have been suggested:[3] (1) Under the articles treating of the sale of a hope or things not *in esse*[4] and (2) under the article stating that a ser-

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14. Gauthier v. Greene, 14 La. Ann. 788 (1859). Arts. 1930, 1934, La. Civil Code of 1870. Art. 1930: "The obligations of contract, extending to whatsoever is evident to such contracts, the party who violates them, is liable, as one of the incidents of his obligation, to the payment of the damages, which the other party has sustained by his default." Elder v. Ellerbe, 135 La. 990, 66 So. 337 (1914).

15. Art. 499, La. Civil Code of 1870. See Elder v. Ellerbe, 135 La. 990, 66 So. 337 (1914); Lesseigne v. Cedar Grove Realty Co., 150 La. 641, 91 So. 136 (1922) (*rent notes* properly called *fruits* and *revenues* of the land).

1. Standard Oil Co. of Louisiana v. Webb, 149 La. 245, 253, 88 So. 808, 811 (1921); Gayoso Co. v. Arkansas Natural Gas Corp., 176 La. 333, 340, 145 So. 677, 679 (1933).

2. In Coyle v. North Central Texas Oil Co., 187 La. 238, 174 So. 274 (1937), the mineral rights were bought subject to an existing mineral lease. In the present case *(Gailey v. McFarlain)* the purchasers were held to have knowledge of leases recorded prior to the sale. Is the distinction between the "sale" and "lease" of minerals sufficient to make any difference in the time that prescription would begin?

3. Daggett, Mineral Rights in Louisiana (1939) 42-43.

4. Arts. 2450, 2451, La. Civil Code of 1870.

vitude may be established on a building not yet built.[5] Even without these articles the codal provisions allowing the fullest freedom of contract should be sufficient.[6]

Under any approach, a contract purporting to sell the reversionary interest would provide in effect that upon the lapse of the existing servitude, there would exist a servitude in favor of the purchaser. In the light of the jurisprudence, and more particularly Act 205 of 1938,[7] such a contract should be classed as a real obligation. Since it is dependent upon a condition, the rules of real suspensive conditional obligations would be applicable. The important question is one of prescription. Generally, where the right is dependent upon the happening of a future event, prescription is suspended until the occurrence of that condition.[8] Is this also true in real obligations?

In *Vincent v. Bullock*,[9] it was held that the reservation of royalty—the right to a proportion of the minerals produced—by the vendor of land, created a real suspensive conditional obligation. It was stated that " 'the condition is considered as broken, when the time [10 years] has expired without the event having taken place.' "[10] Applying this ruling to the sale of a reversionary interest, the prior servitude must lapse within ten years of the sale, or the right will be lost. If, however, the condition happens within the prescriptive period, when does prescription begin to run? Will the owner of the reversionary interest, having acquired the right to the servitude, have the usual ten year non-user period? If he has, it will be possible to burden the land with real rights, which are not exercised, beyond the usual ten years provided in Article 3529.[11] May he sell the interest to the owner of

5. Art. 747, La. Civil Code of 1870.

6. Arts. 491, 1764, 2011, 2013, La. Civil Code of 1870.

7. Dart's Stats. (1939) §§ 4735.4-4735.5.

8. Landry v. L'Eglise, 3 La. 219 (1832); Gueno v. Soumastre, 1 La. Ann. 44 (1846); Gasquet v. Board of Directors, 45 La. Ann. 342, 12 So. 506 (1893); Succession of Kretzer, 187 La. 247, 174 So. 345 (1937). These cases concerned personal actions and not real rights. See note 18, infra.

9. 192 La. 1, 187 So. 35 (1939).

10. 192 La. 1, 22-23, 187 So. 35, 42. This may mean simply that the condition must happen within the period, a limitation only upon Article 2038. It might however be based on the theory that since, under Article 2028, in suspensive conditional obligations it is only the exercise of the right which is suspended, the prescription of Article 3529 will run if the right is not exercised within ten years.

Article 2028 should be compared with Articles 2041 and 2043, which are taken from the French Civil Code. See note 16, infra.

11. Art. 3529, La. Civil Code of 1870: "This prescription has also the effect of releasing the owner of an estate from *every species of real rights*, to which the property may have been subject, if the person in possession of

the existing servitude and so evade the stringent policy which the court has followed?[12]

Had the reversionary interest been sold in the present case, the plaintiff would have had a right to the minerals, for the existing servitude lapsed within ten years of the grant to him. Apparently these questions disturbed Chief Justice O'Niell, for in a short concurring opinion, he concluded that it made no difference whether the reversionary interest was sold for "if that interest was so conveyed it was subject to the prescription of ten years. . . ."[13] The implication is that whether the reversionary interest is regarded as a servitude, the exercise of which is suspended until the happening of a condition, or as a right to a servitude, which may only be preserved by user of the servitude, the prescription of Article 3529 will run from the date of granting.[14] Such a view would certainly be in accordance with the tendency shown to apply this prescription in every case.

It is submitted that this result is justified by the codal provisions. Article 3529 is broad enough to cover *every species of real rights* which are "evidenced and preserved by their exercise."[15] In obligations containing a suspensive condition, while the obligation does not exist for all purposes, still the obligee has a *right* from the moment of contract.[16] Moreover, since the condi-

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the right has not exercised it during the time required by law." (Italics supplied.)

12. The objections to such a sale could be based on the prohibition against renouncing prescription in Article 3460. If the right is held to be one which must be exercised, by use of the servitude, within ten years of its grant, the question will not be raised. If sold to the owner of the existing servitude, he would be renouncing only that prescription which had already been acquired. The argument should apply with equal validity against any vendee.

13. Gailey v. McFarlain, 193 So. 570, 579 (La. 1940).

14. See note 10, supra. In royalty, the happening of the condition should be held an exercise of the right.

15. Smith v. Johnson, 35 La. Ann. 943, 944 (1883).

16. Art. 2028, La. Civil Code of 1870. In agreement, although the French Civil Code contains only Article 2043, and does not contain Article 2028, are: 2 Baudry-Lacantinerie et Barde, Traité Théorique et Pratique de Droit Civil, Des Obligations (3 ed. 1907) 54-65, nº 830 et seq.; 25 Demolombe, Cours de Code Napoléon, 2 Traité des Contrats (5 ed. 1877) 352, nº 360 et seq.; 2 Larombière, Théorie et Pratique des Obligations (Nouvelle ed. 1885) 498, nº 16; 17 Laurent, Principes de Droit Civil Français (2 ed. 1876) 108, 113, nºs 89, 95. Cf. 11 Duranton, Cours de Droit Français (3 ed. 1834) 86-87, nº 74, 76; Pothier, Traité des Obligations (Merlin, 1830) 58, nºs 218, 222. The Louisiana Code does not contain an article similar to Article 2257 of the French Civil Code, providing for suspension of prescription. Moreover, the French Civil Code does not contain Article 3529 or 2028 of the Louisiana Civil Code, and the French distinctions are therefore not necessarily applicable. Especially should this be true because the problem is peculiarly our own. See note 10, supra.

tion suspending the exercise of the right is one to which the obligee has agreed, there should be no reason to apply the maxim *contra non valentem.*[17] Personal obligations containing a suspensive or resolutory condition[18] would not be affected and the general rule of suspension of prescription would be applicable. If the result of the present policy as to mineral rights is desirable, the implication of Chief Justice O'Niell's opinion should be adopted.

J. M. S.

MINES AND MINERALS—SUSPENSION OF PRESCRIPTION—OBSTACLE TO EXERCISE OF SERVITUDE—Plaintiffs inherited their mother's half interest in a tract of land which had belonged to the matrimonial community. Subsequently, their father sold a fourth interest in the mineral rights, reserving the exclusive right to lease. This interest was later acquired by the defendants. The plaintiffs contend that the defendants' rights have been lost by the prescription of ten years, *liberandi causa. Held,* that there was no obstacle preventing the exercise of the servitude which would suspend the non-user prescription of Article 792 of the Civil Code.[1] *Hightower v. Maritzky,* 195 So. 518 (La. 1940).[2]

The principle of Article 792 has been invoked in several cases involving mineral rights. Where one co-owner of mineral rights was prevented from going upon the property by the other co-owner who was at the same time the landowner, the court pointed out that the landowner could have been forced to permit entry[3] and that therefore the non-user prescription had not been

17. For a discussion of "obstacle," see Note (1940) 2 LOUISIANA LAW REVIEW 755; notes 2, 12, supra; Comment (1938) 12 Tulane L. Rev. 244.

18. As to resolutory conditions, it was stated in DeMontluzin Co. v. New Orleans & N.E. Ry., 166 La. 822, 828, 118 So. 33, 35 (1928) that: "The [resolutory] action, although it may result in the recovery of immovable property, is regarded as a *personal action,* and as barred by the prescription, liberandi causa, of ten years established by Article 3544 of the Civil Code, by which all personal actions not otherwise provided for are prescribed. . . . This prescription begins to run the moment the cause of action to enforce the condition arises." (Italics supplied.) See cases cited therein, and State v. Fontenot, 192 La. 95, 187 So. 66 (1939).

1. Art. 792, La. Civil Code of 1870: "If the owner of the estate to whom the servitude is due, is prevented from using it by any obstacle which he can neither prevent nor remove, the prescription of nonusage does not run against him as long as this obstacle remains."

2. Other problems are presented in the report of this case, but the present discussion is limited to the points indicated.

3. Art. 655, La. Civil Code of 1870. Clark v. Tensas Delta Land Co., 172 La. 913, 136 So. 1 (1931).