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Civil Code and Related Subjects: Mineral Rights

Harriet S. Daggett

genious manipulation" to diminish the value of the estate of the wife and mother. The strong statement by the court in approving the commissioner's action follows:

> "We refuse to sanction and approve the method or scheme adopted by the defendant in his efforts to retain control and management of the property which rightfully belonged to his wife's estate, although such procedure may have been legal, or to sanction and approve his failure to account therefor after his usufruct had been terminated by his remarriage."[32]

The case entitled *Succession of Dielmann*[33] held that a perfect usufruct of bank stock was converted into an imperfect usufruct of the proceeds therefrom when the change was brought about by liquidation of the bank, a matter over which the usufructuary had no control. This situation was clearly distinguished from the one under discussion where the usufructuary wrought the changes himself.

MINERAL RIGTHS

*Harriet S. Daggett**

Article 552

Gulf Refining Company v. Garrett[1] arose as a concursus proceeding to determine ownership of royalties. The Court of Appeal of the Second Circuit reached a judgment in *Gulf Refining Company v. Garrett*[2] in 1943, which was reversed by the supreme court and remanded to the district court in 1946. Three dissents are listed on the first hearing by the supreme court and two upon the rehearing, the last upon the matter of remanding without request. While it might be said that no definite conclusions were reached under these circumstances, the discussions by various members of the court are most interesting and important since the underlying question is one of interpretation of the old "mine and quarry article," 552 of the Civil Code, which appears as follows:

> "The usufructuary has a right to the enjoyment and proceeds of mines and quarries in the land subject to the usufruct, if

* Professor of Civil Law, Louisiana State University.

32. 26 So.(2d) 829, 836 (La. 1946).
33. 119 La. 101, 43 So. 972 (1907).
1. 209 La. 674, 25 So. (2d) 329 (1945).
2. 24 So. (2d) 632 (La. App. 1943).

they were actually worked before the commencement of the usufruct; but he has no right to mines and quarries not opened."

All of the old doubts and fears regarding this article have been freshly stirred by the case which presented for immediate consideration a contract between the widow, second wife of Garrett, and his children and grandchildren by a previous marriage. The original leases were made upon property of the second community by the husband. The first was not in question. The second expired after his death and an extension was signed by the widow and heirs after which a producing well was drilled. The husband left a will in which he apparently tried to bequeath the usufruct of the land upon which the oil lease rested to his widow. The widow and heirs, in doubt about the validity of the testamentary bequest, agreed not to probate the instrument and entered into a contract whereby the widow was to have "the use of the property . . . during her entire lifetime, and from which she shall have the revenues." Did the contract mean that the widow was to have the usufruct or more than usufruct and, if usufruct, were royalties from the mineral leases included. Obviously, the words of the contract, which caused the greatest trouble were "use" and "revenues." The district court interpreted the instrument to mean a conveyance of the usufruct which under 552 would not give the widow enjoyment of revenues accruing from the well drilled after the death of the husband. The Court of Appeal, Second Circuit, found the words of the contract clear and explicit, deplored the unnecessary complexity introduced by injection of usufruct and found that since revenues= rents which=royalties that the widow was entitled to the oil production from the land.

On the first hearing by the supreme court evidence to show the intention of the parties as disclosed by actions indicating their original interpretation was evaluated. The rule that a gratuitous contract should be construed against the recipient was stated. Having concluded that the contract should rule and that usufruct was intended, the court proceeded to a discussion of whether the usufructuary was entitled to the royalties from the leases. Article 552 was applied and royalties from a shallow well producing before the usufruct began, about which there was really no dispute, were given to the usufructuary while the royalties from the well drilled after the death of the husband under the lease extension, really a new lease, to which the usu-

fructuary's consent has been procured, were given to the naked owners. On second hearing, the majority decided to remand for further evidence regarding the intention of the parties to the contract.

It seems fortunate to the writer at least, that the case turned on an interpretation of the contract with remand to ascertain intention. Thus was avoided a definitive decision involving application of this article which is well known to have been in disrepute and considered obsolete by most French advisors at the time of the drafting of the Code Napoleon.[3] It is of Roman origin and evolved during a period when mines and quarries were worked by hand and were considered inexhaustible. Article 551, which immediately precedes the "mine and quarry" article and is clearly the companion, reads as follows:

> "The usufructuary has the right to draw all the profits which are usually produced by the thing subject to the usufruct.
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> "Accordingly he may cut trees on land of which he has the usufruct, take from it earth, stones, sand and other materials, but for his use only, and for the amelioration and cultivation of the land, provided he act in that respect as a prudent administrator, and without abusing this right."

Earth, stone, sand—taken from the earth—are certainly like oil, likewise taken from the earth and in no case fruits, which are "born and reborn of the soil." In perfect accord is Article 533, emphasized by Chief Justice O'Niell, which denies the usufructuary, owner of a perfect usufruct, to *change the substance.* It seems clear to the writer at least that the usufructuary has no ownership of commercial quantities of oil or gas produced from a lease, in existence when the usufruct begins, whether in production or not but does have *imperfect usufruct* of the oil or gas, a consumable, the rules concerning which are explicit in the Code. The second paragraph of 533 especially excepts the prohibition of the first paragraph from imperfect usufruct.

The right of the usufructuary to production from the lease in existence before the term of usufruct began was not at issue in this case as production was small and the ownership was conceded.

The second stipulation of the "mine and quarry" article, 552,

3. See Daggett, Mineral Rights in Louisiana (1939) 226 et seq., and French authorities cited therein.

was the one under discussion, dealing with the mine, which obviously is *not* a mine, *not* open at the beginning of the term of the usufruct. The widow and heirs, signed the extension of the lease after the death of the husband and father. Without consent of the usufructuary who could prevent entry upon the land under usufruct, a valid lease or extension could not have been given. If the "sole motive" of her signing was in erroneous belief that she was entitled to returns from the land under her usufruct, then the validity of the lease would be in doubt. Perhaps a review of the facts regarding the understanding of the parties when the lease extension was signed, as applied to the previously made contract, will give more light on the subject. Whatever criticism might be made of the procedure adopted by the court, certainly its earnest effort to prevent valuable substantive rights being fixed by use of superficial words of convenience is most heartening. The word "mine" as applied to an oil or gas well and the word "rent" as applied to royalties, percentages of oil and gas production, were used to phrase a new pattern and should not be permitted to determine the nature of the fabric. Should that be done it would be but a submission to the Tyranny of Words as expounded by Stuart Chase and authorities on semantics, the science of meaning.

Interpretation

Three suits were consolidated in *Dobbins v. Hodges.*[4] Plaintiffs, landowners, asked to have certain mineral deeds cancelled as prescribed for ten years non-use. The defendants relied upon a lease wherein the landowners and mineral owners had joined which was alleged to bind all parties. It was so held. The owners of the several interests had unitized and integrated or pooled their holdings under the common lease and agreed to divide the royalties proportionately and were bound by their contract as indicated in *Robinson v. Horton.*[5] The one holder who had not signed the pooling agreement was also bound by it as he had accepted his part of the royalty as allocated under the terms of the lease contract.

Another unitization agreement was under interpretation in *Jackson v. Hunt Oil Company.*[6] Defendant has been given the option in the agreement to which plaintiffs were parties to unit-

4. 208 La. 143, 23 So.(2d) 26 (1945).
5. 197 La. 919, 2 So.(2d) 647 (1941).
6. 208 La. 156, 23 So.(2d) 31 (1945).

ize its forty acre tract with either of the two forty acre tracts owned by plaintiffs. After election and compliance plaintiffs urged that the agreement had the effect of creating two separate leases, one of which had lapsed. A specific clause of the agreement negated this plea. The following clause was under interpretation in *Krauss v. Fry;*[7] "It is understood and agreed by and between the vendor and vendees herein that the said vendor does hereby reserve one-half (½) of all the oil, gas and other mineral rights in, under and that may be produced from the above described lands."[8]

The vendor owned an undivided one-half of the land sold. The court decided that he meant to reserve and did reserve unto himself one-half of the minerals in the one-half conveyed, that is, but one-fourth of the whole.

A plea for cancellation of a lease for non-compliance with its terms or in the alternative for additional compensation was heard in *Rudnick v. Union Producing Company.*[9] The clause under consideration appears as follows:

> "... as *additional* consideration, lessee agrees that if *any* well drilled on the above described property makes or produces not less than fifty (50) barrels and not over one hundred (100) barrels of oil per day, to pay to lessor four thousand dollars ($4,000.00); if *any* well drilled on said property makes or produces over one hundred (100) barrels and not over two hundred fifty (250) barrels of oil per day, to pay to lessor ten thousand dollars ($10,000.00); if *any* well drilled on said property makes or produces over two hundred fifty (250) barrels of oil per day, to pay lessors twenty thousand dollars ($20,000.00); to be more explicit whichever of the above sized well(s) should come in *first,* that *special size well* shall set the money consideration to be paid . . . ."[10]

The first well to come in never produced as much as fifty barrels per day but the second well did. Defendants took the position that the last, "to be more explicit," part of the quoted provision released them from the additional compensation since the first well never reached the fifty barrel bracket. The court decided that the *any well* phrase ruled and the last statement meant that the *first* well to reach *any* of the three categories

7. 209 La. 250, 24 So.(2d) 464 (1945).
8. 209 La. 254, 24 So.(2d) 466 (1945).
9. 209 La. 943, 25 So.(2d) 906 (1946).
10. 209 La. 943, 945, 25 So.(2d) 906-907.

should set the amount of the additional compensation. In refusing to cancel the lease the court said:

> "In Louisiana, the right to dissolve a lease is subject to judicial control according to the circumstances. *Brewer v. Forest Gravel Company, Incorporated,* 172 La. 828, 135 So. 372, and cases there cited. In this case there were grounds for honest doubt as to the rights of the parties. This Court has not, and will not, penalize a litigant lessee by dissolving a lease held technically in default when there is a bona fide defense."[11]

The additional compensation was said to be "in the nature of a promise to pay a definite amount on the happening of one of the contingencies listed"[12] and hence was ruled by the ten year prescription of Article 3544 and not lost under the three year rule.

The dispute in *Book v. Schoonmaker*[13] arose over interpretation of a drilling contract and centered upon the following clause: "Owner shall furnish to contractor gas for fuel from owner's well on the Anders farm, about 1½ miles West of the location herein, contractor to lay line and make connections to said gas well at his own risk and expense."[14] The gas well on the Anders farm had failed and other fuel had to be supplied. The contractor maintained that the owner should furnish it under the above clause while the owner's position was that his obligation to furnish was limited to production from the well on the Anders farm. The court decided that the latter view was correct particularly in light of the parties' actions showing that to have been their original interpretation. Article 1956 provides that: "When the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation."[15]

Farrell v. Simms[16] reiterates well established principles of contract. Dispute arose over payment of royalties under a joint lease and pooling agreement. The fact that certain lands were non-contiguous and had not been drilled within ten years did not

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11. 209 La. 943, 949, 25 So.(2d) 906, 908.
12. 209 La. 943, 949-950, 25 So.(2d) 906, 908.
13. 210 La. 94, 26 So.(2d) 366 (1946).
14. 26 So.(2d) 366, 368.
15. Art. 1956, La. Civil Code of 1870.
16. 209 La. 1072, 26 So.(2d) 143 (1946).

affect the indivisible contract alive under its terms. The court stated that:

> "The rights of the parties in this suit are not governed by the law of servitude but by the law the parties made for themselves in a joint and indivisible contract. They provided in their contract that the production on any part of the land would keep the lease alive as to the whole. Having so contracted, they are bound by their own agreement."[17]

Prescription

The purpose of suit in *Allison v. Wideman*[18] was to interrupt the running of the ten years acquirendi prescription. Defendants, in possession of the land under title containing no mention of the outstanding mineral servitude were held to be in possession of the mineral rights and could be pursued in a petitory action under Article 43 of the Code of Practice, as the mineral interest of plaintiff was an incorporeal real right under Act 205 of 1938.[19] Suit was originally filed by those persons, coproprietors of the mineral interest, under the indivisibility theory of the *Sample v. Whitaker* cases[20] that suspension for minority of the liberandi prescription would also suspend as to major co-owners. The hearing of the suit was delayed because one of the attorneys was in the armed forces and during the interval Act 232 of 1944[21] was passed, depriving co-owners of the advantage of suspension by virtue of the right of another. The statute provided for effect against existing rights, and gave but one year within which those rights could be exercised. Attorneys conceded that the suit had abated as to the major co-owners.

The minor had filed two days before her twenty-second birthday and hence was in time to interrupt the ten year acquirendi prescription under the provisions of Article 3478 as amended by Act 161 of 1920 and Act 64 of 1924. Under the liberative prescription of ten years non-user, the minor's right was suspended, apparently for ten years from her twenty-first birthday. Facts are not recited in the opinion as to how the minor originally acquired the interest nor at what age. The suggested period smacks of interruption but probably would be clarified if all facts were stated. Since attorneys for plaintiff conceded that

17. 209 La. 1072, 1082, 26 So.(2d) 143, 146.
18. 210 La. 314, 26 So.(2d) 826 (1946).
19. Dart's Stats. (1939) §§ 4735.4, 4735.5.
20. 172 La. 722, 135 So. 38 (1931) and 174 La. 245, 140 So. 36 (1932).
21. Dart's Stats. (Supp. 1946) §§ 4826.3-4826.4.

the mineral interests of the major co-owners had abated, the court's interpretation of the second section of Act 232 of 1944[22] is not available to interested persons. The implication here is that the only way to have "exercised" rights under the saving clause would have been by user, since this suit had been filed even before the passage of the act.[23]

Compulsory Pooling

Suit to cancel a mineral lease on the ground that the five year primary term had elapsed for failure to drill or produce failed in *Crichton v. Lee*.[24] The lease was confected prior to the effective date of the compulsory pooling statute, Act 157 of 1940,[25] but was included in an order of the commissioner of conservation directing unitization of certain lands for the purpose of recycling of gas and extraction of liquid hydrocarbons. Returns to all owners had been increased by the operation of the plant. Plaintiffs had been tendered their proportionate shares of the royalties but had refused them. Their pleas of having been deprived of their property without due process of law by exercise of the police power without public interest were denied under the line of cases establishing the constitutionality of compulsory pooling for conservation whether affecting past or future leases. Two interesting issues as to the commissioner's having exceeded his power and as to whether an order limited to two sands could hold all sands, could not be passed upon by the supreme court as they had not been urged below or raised by the pleadings.

Privilege

A producing well was attached in *Standard Supply and Hardware Company, Incorporated, v. Humphrey Brothers*[26] under Act 232 of 1916.[27] Defendants had failed to record a bond after a contractor drilling their leases had filed a lien in November 1941 and plaintiffs maintained that this failure made them liable for the value of the supplies furnished. Defendants had also failed to formally accept the work in compliance with 232 of 1916 and hence the filing of plaintiff's lien on September 7, 1943, was alleged to have been in time. Defendants moved to dissolve the attachment on the ground that Act 100 of 1940[28] superceded 232

22. Ibid.
23. Art. 3518, La. Civil Code of 1870 and La. Act 39 of 1932.
24. 209 La. 561, 25 So.(2d) 229 (1946).
25. Dart's Stats. (Supp. 1946) §§ 4741.11, 4741.13-4741.31.
26. 209 La. 979, 26 So.(2d) 8 (1946).
27. Dart's Stats. (1939) §§ 5091-5097.
28. Dart's Stats. 5101.1-5101.5, 5101.20.

of 1916 and that the plaintiff's lien had not been filed in time under 100 of 1940. Apparently influenced by the statute dealing with liens in connection with building contracts, an interpretation of which was handed down on the same day, the court decided that the pertinent provision of the 1916 act had not been superseded by Act 100 of 1940.

The court said, "We cannot believe the Legislature ever intended to grant less protection to furnishers of materials under drilling contracts than that granted to furnishers of materials under building contracts."[29] The purport of Act 161 of 1932 appeared to have been to unify the previously existing acts[30] on the subject matter with slightly different treatment. Acts 145 of 1934 and 100 of 1940 followed and were then replaced by 68 of 1942[31] which specifically repeals 145 of 1934 and 100 of 1940. Greater protection, rather than less, has been marked in the evolution of the statutes. This decision indicating the continued life of 232 of 1916 again instances the value of specific repeal by number, if, indeed, the legislature intended the previous series of statutes to be contained in one act dealing with a full coverage of subject matter.

Damages

Three items were allowed and three refused in *Layne Louisiana Company v. Superior Oil Company*,[32] a damage suit, arising out of the defendants illegal entry upon plaintiff's land and the making of a geophysical survey of the land, which was adjacent to lands leased by defendant. The first item allowed was five dollars per acre, loss of value for leasing purposes. It was clear that the survey was deliberate and for purpose of obtaining information valuable to defendant in making its proposed lease block. During the six months elapsing after the survey and before filing of suit, plaintiff received no offers for lease and defendant abandoned the contemplated block. All of this news quickly circulated and was of unquestionable damage to plaintiff as it was of value to defendant. Since five dollars per acre had been paid for leases in the area prior to this episode and indeed had been paid by defendant for the very privilege which it purported to take from plaintiff for nothing, the sum was considered fair in compensation. The second item allowed was for value

29. 209 La. 979, 987, 26 So.(2d) 8, 11 (1946).
30. Dart's Stats. (1939) §§ 5101.1-5101.4.
31. Dart's Stats. (Supp. 1946) §§ 5101.6-5101.12.
32. 209 La. 1014, 26 So.(2d) 20 (1946).

of cattle which had escaped from the fenced area by virtue of defendant's trespass and the third item was for damage to woods, gates, et cetera.

The court refused to allow damages for the acreage already under lease as the reversionary value for releasing was too speculative both as to whether it would ever revert in the first place and second as to possible leasing value if and when it did. Royalty value was also refused as no appreciable market value could be proved nor could it be shown that the survey had affected the value in any way. The court pointed out that "the price of royalty is controlled solely by the demand."[33]

PERSONS

*Robert A. Pascal**

Marriage

State v. Golden[1] presented the issue whether a marriage celebrated in violation of Article 92 of the Civil Code is null. The article forbids priests, ministers, and magistrates to marry males under eighteen or females under sixteen years of age. It does not contain language indicating nullity of such marriages. Nor does it contain within itself any reference which would lead to that conclusion, such as a declaration that the ages listed are the minimum ages for marriage. The only reason for inferring nullity of the marriage celebrated in violation of Article 92 would be the article's position in the same chapter with other articles on causes of nullity of marriage. The supreme court interpreted the article literally as no more than a prohibition on celebrants and accordingly decided the marriage was valid.[2] It was affirmed by implication in *State v. Priest*.[3]

The marriage issue in *Cameron v. Rowland*[4] was one of fact only, whether the plaintiff's mother and alleged father, both deceased, had ever married. There being no direct proof of the fact of marriage, the court relied on the general reputation which the parties enjoyed and numerous acts of the parties indicative of

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33. 209 La. 1014, 1027, 26 So.(2d) 20, 24.

* Assistant Professor of Law, Louisiana State University.

1. State v. Golden, 26 So. (2d) 837 (La. 1946).

2. The case will be more fully discussed in a note in the March issue of the Review.

3. 27 So. (2d) 173 (La. 1946). See discussion of case infra, page 226.

4. 208 La. 663, 23 So. (2d) 285 (1945).