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Mineral Rights - Unauthorized Exploration

Lawrence E. Donohoe

selves to the legislature,[15] because they are highly detailed and technical problems involving weighty policy decisions. Be that as it may, it is urged that until the legislature does so act, the court should modify its single publication rule in order to achieve the purposes for which it was adopted.

KENNETH RIGBY

MINERAL RIGHTS—UNAUTHORIZED EXPLORATION—The defendant, with the consent of the state highway commissioner, conducted a geophysical exploration from the public roads traversing the lands of the complainant. The facts show that the soil in this roadbed was owned by the complainant and that the state possessed a mere right of passage. The defendant was indicted for unauthorized exploration of private land in violation of the provisions of Act 212 of 1934.[1] The defendant was found guilty, and his conviction was affirmed on appeal, Justice Hamiter dissenting. On rehearing, the supreme court reversed the decision and remanded the case, holding that the indictment and the proof were at variance. The indictment charged the unauthorized exploration of *private lands,* but the proof showed that the defendant had conducted his exploration from *public roads,* the soil of which belonged to the complainant. *Held,* defendant not guilty on the theory that the roads in question were not "private lands" within the meaning of the 1934 statute. *State v. Evans,* 38 So.(2d) 140 (La. 1948).

During the course of the trial, the defendant pleaded that the 1934 statute had been impliedly repealed by Act 77 of 1940,[2] which does not mention private lands, but which declares "public lands" to be land "belonging to the state of Louisiana, or the title to which is in the public," and specifically includes "rights of way" within this definition. The second section of this statute states that "the Commissioner of Conservation is hereby vested with sole, exclusive and full authority to grant permits to any person, firm, association, or corporation to conduct geophysical and geological surveys on public lands." From the holding of the

15. Desmond, J., dissenting, 81 N.E. (2d) 45, 50.

1. La. Act 212 of 1934, § 1 [Dart's Stats. (1939) § 4826.1]. "It shall be unlawful for any person, firm or corporation, . . . to prospect, by . . . any mechanical device, . . . for oil, gas or other minerals . . . on the public lands of the state without the consent of the register of the state land office, or on the public highways of the state without the consent of the Louisiana highway commission, or on private property without the consent of the owner; . . . ."

2. Dart's Stats. (Supp. 1947) § 4719.10.

court that the lands on which the defendant prospected were not *private lands* as contemplated by the 1934 act, it seems to follow that they would fall within the definition of *public lands* as defined in the 1940 act. Hence, the highway commissioner acted without authority when he granted defendant permission to conduct surveys along such roads.

The right of servitude of passage carries with it no rights of ownership to the soil beneath.[3] He who exercises the right of servitude is bound to so use that right as not to increase the burden of the landowner.[4] Furthermore, the owner of the servitude must use it according to his title, and is without liberty to make alterations.[5] For example, authority to establish private railroads along rights of way over lands privately owned cannot be granted by a police jury.[6] The right to explore the sub-surface for minerals is a valuable one, and not available to the owner of a mere right of passage. A person who violates this right incurs civil liability, and the owner may collect damages for the loss in mineral lease value caused by the unlawful acquisition of information concerning the possible presence of minerals.[7] When the state does not have full ownership of the land upon which the road is located, it exceeds its authority when it purports to grant permission to carry on sub-surface exploration. Moreover, it is well known that explorations conducted along public roads have as their main object the discovery of minerals in the adjacent lands, rather than in the land under the roadway. Act 283 of 1942[8] was passed as a legislative recognition of these facts. By this statute, the consent of the *abutting* property owner is required prior to the issuance of any permit to conduct geophysical operations from land over which the state exercises a mere "right of way." It is to be noted that this 1942 statute was not mentioned in the instant case.

As it was pointed out by the supreme court on appeal, the only portion of the 1934 statute not abrogated by subsequent legislation is the provision making it a misdemeanor to conduct geophysical surveys on private lands without the consent of the

3. Art. 658, La. Civil Code of 1870; Goree v. Midstates Oil Corp., 205 La. 988, 18 So.(2d) 591 (1944).

4. Art. 776, La. Civil Code of 1870.

5. Art. 778, La. Civil Code of 1870.

6. Bradley v. Pharr, 45 La. Ann. 426, 12 So. 618 (1893); Farmer v. Myles, 106 La. 333, 30 So. 858 (1901).

7. Shell Petroleum Corp. v. Scully, 71 F.(2d) 772 (C.C.A. 5th, 1934); LeBleu v. Vacuum Oil Co., 15 La. App. 689, 132 So. 233, 776 (1931); Angelloz v. Humble Oil & Refining Co., 196 La. 603, 199 So. 656 (1940).

8. Dart's Stats. (Supp. 1947) § 4735.6].

owner. The defendant did not get the consent of the complainant as required by this statute. He did not receive the consent of the commissioner of conservation, who under the 1940 act had the sole authority to grant permission to conduct explorations on public roads, and who under the 1942 statute cannot issue such a permit without the consent of the abutting property owner. It would appear that within the meaning of these statutes the defendant might have been properly indicted for unauthorized exploration of either public or private lands.

LAWRENCE E. DONOHOE

SALES—SPECIFIC PERFORMANCE—OUTSTANDING POSSIBLE CLAIM IN FAVOR OF A THIRD PERSON—The First National Bank of Shreveport, as tutor of minor children, petitioned the district court for permission to sell at private sale some land belonging to the minors. To this petition were attached the verifying affidavit of the tutor's acting trust officer and an affidavit executed by the minors' undertutor concurring in the tutor's recommendations and prayer and stating that he considered it to the evident advantage of the minors that the property be thus sold. On this showing judgment issued, pursuant to which the sale was made. Plaintiff purchased from the vendee of this sale and entered into a contract to sell with defendant, under which it was agreed that defendant would receive merchantable and valid title. Defendant refused to accept title and plaintiff sued for specific performance. *Held,* since the undertutor had not been ruled into court to show cause why the prayer of the tutor's petition should not have been granted, as required by the statute regulating the sale of minor's property by private act,[1] the title was burdened with a possible claim in favor of the minors. The validity of this claim could not be inquired into, as the minors were not parties to the suit; therefore, the title was "suggestive of serious future litigation" and defendant was not required to accept it. *Schaub v. O'Quin,* 38 So.(2d) 63 (La. 1948).

In the instant case the court did not hold that the proceedings by which the minors' property was sold were in fact invalid. The court held that it was not possible in this suit to inquire into the validity of the proceedings, as the minors were not parties to the action and would be unaffected by the judgment. It might well be, as the court pointed out, that in a proper proceeding, with the minors duly represented, the court would find that the

1. La. Act 209 of 1932 [Dart's Stats. (1939) §§ 4844-4847].