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## Incompetent Persons - Liability of Curator - Custodian Distinguished

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The conclusion that the "rents" of real property in Article 545<sup>19</sup> applies to the ordinary predial lease and not to royalties from a mineral lease is undoubtedly sound. In arriving at this result Judge Lee relied in part upon the following expressions in the recent case of *Gulf Refining Company v. Garrett*:<sup>20</sup>

"But the word 'rents' as used in that paragraph (Article 545) means the rent of a farm or house,—not the royalty stipulated in a mining lease. . . .

"Notwithstanding the royalty stipulated in an oil or gas lease may be considered as rent for certain purposes, or in some aspects, it is well settled now that the royalty stipulated in an oil or gas lease is not to be compared with the rent of a house or a farm."<sup>21</sup>

These statements of the chief justice in the original opinion were not challenged in the dissenting opinions or in the opinion on rehearing. This seems to indicate that our supreme court would arrive at the same conclusion as did the federal court in the case under consideration.

Since the execution of an oil and gas lease is a "dismemberment of the property amounting to a partial alienation thereof,"<sup>22</sup> the court logically concluded that the bonus paid in part consideration therefor belonged to the separate estate of the husband. It is conceded that if the taxpayer had made an outright sale of his mineral interest, the proceeds therefrom would have been his separate property. Since the granting of a mineral lease alienates the landowner's right to search, as does the outright sale of the minerals, it would be difficult to justify a different disposition of the proceeds from the two contracts.

LAWRENCE B. SANDOZ, JR.

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INCOMPETENT PERSONS—LIABILITY OF CURATOR—CUSTODIAN DIS-  
TINGUISHED—Guidry, "a high grade moron," was released from a

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19. La. Civil Code of 1870.

20. 209 La. 674, 25 So. (2d) 329 (1945). For a discussion of this case see Daggett, *The Work of the Louisiana Supreme Court for the 1945-1946 Term, Mineral Rights* (1947) 7 *LOUISIANA LAW REVIEW* 208.

21. 209 La. 674, 689, 25 So. (2d) 329, 333 (1945).

22. *Wiley v. Davis*, 164 La. 1090, 1092, 115 So. 280, 281 (1927); *Federal Land Bank of New Orleans v. Mulhern*, 180 La. 627, 157 So. 370 (1934).

state institution to the defendant on a "work" agreement. While defendant was in Missouri, Guidry located the keys to the employer's automobile, in a bedroom drawer. Guidry used the car on several occasions, the plaintiff accompanying him. On one of these trips plaintiff was injured due to the negligent operation of the vehicle by Guidry. *Held*: (1) There was no negligence on the part of the defendant. (2) Plaintiff could not recover on the theory of a master and servant relationship.<sup>1</sup> (3) Defendant was not Guidry's curator; therefore Article 2319 of the Civil Code was not applicable. (4) Plaintiff assumed the risk or was guilty of contributory negligence in riding with Guidry. *Scott v. McCrocklin*, 29 So. (2d) 619 (La. App. 1947).

In interpreting Article 2319,<sup>2</sup> the court stated, "There is no evidence in the instant case which would substantiate a finding of any relationship as between . . . curators and insane persons: . . . there is nothing in this case which would impose liability upon the defendant, McCrocklin, under any of the relationships [of master and servant or curator and insane person] noted."

Only two cases involve Article 2319 directly. *Beaubeauf v. Reid*,<sup>3</sup> held by implication<sup>4</sup> that the curator would not be liable for torts of the interdict requiring a malicious intent as a basis for liability. The court in *Yancey v. Maestri*<sup>5</sup> said that the article gave the victim

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1. In holding that the defendant was not liable under the doctrine of respondeat superior, the court cited the concluding paragraph of Article 2320 of the Civil Code, which provides that "responsibility only attaches, when the masters or employers . . . might have prevented the damage. . ." It is true that in a number of early cases this clause was relied upon to narrow the field of recovery from the employer. *Palfrey v. Kerr*, 8 Mart. (N. S.) 503 (La. 1830); *Strawbridge v. Turner & Woodruff*, 8 La. 537 (1835); *Id.*, 9 La. 213 (1836); *Burke v. Clark*, 11 La. 206 (1837); *Wave v. Barataria & Lafourche Canal Co.*, 15 La. 169, 35 Am. Dec. 189 (1840); *Duncan v. Hawks*, 18 La. 548 (1841). Since the *Duncan* case, however, the Louisiana courts have entirely disregarded the limitation of liability to damage which the employer might have prevented. *Hart v. New Orleans & Carrollton Railroad Co.*, 1 Rob. 178, 36 Am. Dec. 689 (La. 1841); *McCubbin v. Hastings*, 27 La. Ann. 713 (1875); *Nelson v. Crescent City Railroad Co.*, 49 La. Ann. 491, 21 So. 635 (1897); *Anderson v. Elder*, 105 La. 672, 30 So. 120 (1900); *Weaver v. W. L. Goulden Logging Co.*, 116 La. 468, 40 So. 798 (1906); *Regas v. Douglas*, 139 La. 773, 72 So. 242 (1916). Reliance upon this clause to relieve the defendant of liability under Article 2320 is therefore questionable. The issue could have been disposed of more consistently with the prevailing trend of Louisiana cases by a finding that Guidry was outside the scope of his employment, *Oliphant v. Town of Lake Providence*, 193 La. 675, 192 So. 95 (1939), noted in (1940) 3 LOUISIANA LAW REVIEW 300, since the facts without doubt would have supported such a finding.

2. La. Civil Code of 1870, which provides: "The curators of insane persons are answerable for the damage occasioned by those under their care."

3. 4 La. App. 344 (1926).

4. Case was actually disposed of because of a defective petition.

5. 155 So. 509 (La. App. 1934).

a right of action against the curator personally which did not mean that the curator should pay the judgment from the insane person's estate.

The majority of courts hold an insane person liable for his torts.<sup>6</sup> The Louisiana rule is to the contrary.<sup>7</sup> In most jurisdictions the custodian of an insane person is not responsible for the tortious acts of such person, unless he is negligent.<sup>8</sup> Article 2319 apparently imposes a greater liability. However, the scope of that article is not entirely clear. Does it apply to a curator only or to anyone having custody of an insane person?

There is no counterpart in the French Civil Code for Article 2319.<sup>9</sup> It was first inserted in the Louisiana Code of 1825, as was the second paragraph of Article 2318, making the tutor liable for the torts of the minor.

Since Articles 2318 and 2319 are very similar in construction, the interpretation of the two articles should proceed along the same line. The court has held that the liability imposed by Articles 2317 through 2322, being "in derogation of a common right," should be strictly construed, and not extended by analogy.<sup>10</sup>

*Davis v. Shaw*<sup>11</sup> involved an interpretation of Article 2318 under facts similar to those arising in the instant case under Article 2319. In that case the plaintiff was injured by the negligence of the minor who was residing with the defendant, his aunt. The court refused recovery because the aunt had not qualified as tutrix. Following this

6. Restatement, Torts (1934) § 887, comment (a) states the general rule: "the common law regards persons of whatever age or physical condition as being subject to tort liability." Bohlen, *Liability in Tort of Infants and Insane Persons* (1924) 23 Mich. L. Rev. 9.

7. *Yancy v. Maestri*, 155 So. 509 (La. App. 1934).

8. *Bollinger v. Rader*, 153 N. C. 488, 69 S. E. 497 (1910); *Emery v. Littlejohn*, 83 Wash. 834, 145 Pac. 423, Ann. Cas. 1915D, 767 (1915); *Prudential Society v. Ray*, 202 N. Y. Supp. 614, 207 App. Div. 496 (1924), affirmed 239 N. Y. 600, 147 N. E. 212 (1924); *Fisher v. Mutimer*, 293 Ill. App. 201, 12 N. E. (2d) 315 (1937).

9. It is believed that the liability of the tutor or curator in France is governed by general principles of law rather than any specific provisions of the code. Therefore those French commentators who wrote after the redaction of the code can be of little assistance in an attempt to interpret Article 2319. Demolombe, *Cours de Code Napoleon XXXI, Des Contrats VIII* (1882) 519, no 594; *Surveyer, A Comparison of Delictual Responsibility in Law in the Countries Governed by a Code* (1933) 8 Tulane L. Rev. 53, 62. But see Larombiere, *Code Napoleon, Des Contrats VII* (1885) 599, Art. 1384, no 6.

10. *Cusimano v. Durrin*, Teiss. Dig. 62 (Orl. App. 1917-1922); *Globe Indemnity Co. v. Quesenberry*, 1 La. App. 364 (1924); *Davis v. Shaw*, 142 So. 301 (La. App. 1932); *Adams v. Golson*, 187 La. 363, 174 So. 876 (1937).

11. 142 So. 301 (La. App. 1932).

reasoning would lead to the conclusion that Article 2319 applies to curators only and not to anyone having mere custody of an insane person.

Still unsettled in Louisiana, however, is the question of the grounds on which recovery can be had under Article 2319. Does the curator care for the interdict at his peril, or is he liable only when at fault? By express codal provisions the majority of civil law jurisdictions render the curator liable only if he is negligent.<sup>12</sup>

The liability of the parent for torts of the minor is imposed regardless of fault.<sup>13</sup> The parent escapes this responsibility only when the residence of the minor has been legally changed.<sup>14</sup> Applying the same rule to Article 2319, the curator should be liable regardless of fault where the insane person is residing with him or is under his care. Whenever the court authorizes the interdict to reside elsewhere,<sup>15</sup> the curator should not be liable. However, if the curator, without the protection of a court order, permits the interdict to reside elsewhere he should remain responsible for the acts of the interdict even though he be free of fault.

The court's refusal to apply Article 2319 in the instant case because the defendant was not the curator appears entirely correct. For an action to be successful under Article 2319 the plaintiff should allege that the defendant is the curator and that the insane person<sup>16</sup> is under his care. In such a case there should be recovery without the necessity of showing fault on the part of the curator unless the tort is one that requires malice or intent.

OTHO L. WALTMAN, JR.

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NATURAL SERVITUDE OF DRAINAGE—EXTENT OF BURDEN UPON OWNER OF SERVIENT ESTATE—ARTICLE 660, LOUISIANA CIVIL CODE OF 1870—Plaintiff and defendant were adjacent landowners. As plain-

12. German Civil Code, Art. 832; Civil Code of Japan, Art. 714; Spanish Civil Code, Art. 1903; Civil Code of the Province of Quebec, Art. 1054.

13. *Mullins v. Blaise*, 37 La. Ann. 94 (1885); *Taylor v. Doskey*, 1 La. App. 399 (1925); *Maloney v. Goelez*, 12 La. App. 33, 124 So. 607 (1929). But see *Miller v. Meche*, 111 La. 143, 147, 35 So. 491, 492 (1903).

14. *Taylor v. Doskey*, 1 La. App. 399 (1925).

15. Art. 417, La. Civil Code of 1870.

16. Another problem raised relative to Article 2319 is why did the redactors use the words "insane person" instead of the word "interdict." An analysis of this problem is beyond the scope of this note, however see Arts. 31, 32, 389, and 422, La. Civil Code of 1870.