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Mineral Rights - Oil Royalties As Fruits

William C. Bradley

expelled, he is deprived of these rights and therefore entitled to the protection of the court. To further protect the union member, a few courts have required the provisions in union constitutions and by-laws to be consistent with public policy[13] and natural justice.[14] Thus, whenever a member is expelled because of a provision which is opposed to public policy, the courts will render their protection.[15] Under any of these theories, the judicial remedy is usually reinstatement in the union and damages caused by the improper expulsion.[16] Once the court has found an improper expulsion, it holds the union liable to the injured party for any damages sustained as a result of the wrong committed.[17] If wrongful expulsion was in bad faith or malicious, the courts in some instances have also awarded punitive damages.[18] In some cases unwarranted discharge of union members by union officials has been prevented in advance through injunctive process.[19]

The preceding not only illustrates the jurisdiction, but also the power and duty of the courts to review and rule upon matters pertaining to reinstatement of discharged union members in a union and damages for wrongful expulsion therefrom.

Darrell Daniel DesOrmeaux

MINERAL RIGHTS—OIL ROYALTIES AS FRUITS

The appellee received royalty payments from oil and gas leases, entered into prior to his marriage, upon his separate prop-

13. Schneider v. Local Union No. 60, United Ass'n Journeymen Plumbers, 116 La. 270, 40 So. 700 (1905).

14. Gilmore v. Palmer, 109 Misc. 552, 179 N.Y. Supp. 1 (Sup. Ct. 1919).

15. Schneider v. Local Union No. 60, United Ass'n Journeymen Plumbers, 116 La. 270, 40 So. 700 (1905).

16. See cases cited notes 5 and 10, supra.

17. See cases cited note 5, supra; Johnson v. International of the United Brotherhood of Carpenters and Joiners, 54 Nev. 332, 16 P. 2d 658 (1932).

18. Schneider v. Local Union No. 60, United Ass'n Journeymen Plumbers, 116 La. 270, 40 So. 700 (1905); Grand International Brotherhood of Locomotive Engineers v. Green, 210 Ala. 496, 98 So. 569 (1923); Walker v. Grand Int'l Brotherhood of Locomotive Engineers, 186 Ga. 811, 199 S.E. 146 (1938); Kinane v. Fray, 111 N.J.L. 553, 168 Atl. 724 (1933).

19. Otis Loney v. Wilson Storage and Transfer Co., 8 Labor Cases 66,663 (1944). Subsequent to the decision in the subject case the Supreme Court of Louisiana in Jones v. Hansen, 57 So. 2d 224 (La. 1952), affirmed the dismissal of a suit for compensatory and exemplary damages against a number of members of a local union (including one charged with having acted in his official capacity as secretary) for allegedly having wrongfully disciplined the plaintiffs to their monetary damage in employment relationships. The defense was apparently not urged nor did the court consider the question

erty. Subsequent to his marriage and upon additional separate property, wherein no oil had yet been discovered or produced, he granted similar mineral leases, and received from some a bonus or portion of the original consideration and from others a part of the annual rent to keep the lease in effect. The state board of tax appeals ordered the appellee to pay additional taxes for the years 1946 and 1947 on the ground that the income received from the above leases and for the years in question was separate income for tax purposes. The civil district court reversed. *Held*, judgment of the district court affirmed. Royalties and bonuses from mineral leases on the husband's separate property, paid during the existence of the marriage, are civil fruits or rents and fall into community of acquets and gains. *Milling v. Collector of Revenue*, 57 So. 2d 679 (La. 1952).

This note will discuss, first, the holding itself, followed by at least a cursory glance at several ancillary problems and considerations which suggest themselves as a result of the decision.

The cases most often cited as authority for the statement that royalties and bonuses are rents are *Logan v. State Gravel Company*[1] and *Board of Commissioners of Caddo Levee District v. Pure Oil Company*.[2] In the *Logan* case the court decided that the contract under which the defendant was allowed to remove sand and gravel was one of lease, and the fact that the word "royalty" was used instead of "rent" was held to be inconsequential. The *Pure Oil* case cited the *Logan* case and held that royalties due under a mineral lease were rents and that it made no difference that the royalties were one-eighth of the oil produced since, under Article 2671 of the Civil Code,[3] rent could consist of a certain portion of the fruits from the thing leased.

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of exclusiveness of the board's jurisdiction to hear and redress wrongdoing on the part of the union which may conceivably have constituted an unfair labor practice within the meaning of the National Labor Relations Act, as amended.

1. Logan v. State Gravel Co., 158 La. 105, 103 So. 526 (1925). See also Roberson v. Pioneer Gas Co., 173 La. 313, 137 So. 46, 82 A.L.R. 1264 (1931); Shell Petroleum Corp. v. Calcasieu Real Estate & Oil Co., Inc., 185 La. 751, 170 So. 785 (1936); Parker v. Ohio Oil Co., 191 La. 896, 186 So. 604 (1939); Robinson v. Horton, 197 La. 919, 2 So. 2d 647 (1941).

2. Board of Commissioners of Caddo Levee Dist. v. Pure Oil Co., 167 La. 801, 120 So. 373 (1928).

3. Art. 2671, La. Civil Code of 1870, says that the price in a lease "may consist in a certain quantity of commodities, or even in a portion of the *fruits* yielded by the thing leased." (Italics supplied.) Attention is directed to subsequent portions of this paper wherein the intention that fruits be something capable of production and reproduction is shown.

The leading case stating the contrary view is *Elder v. Ellerbe*,[4] in which the defendant sought to retain royalties on the ground that he was a good faith possessor. The court held that oil is not a fruit, relying on French authorities[5] to the effect that "fruits must be things which are born and reborn of the soil." The first[6] and principal case on all fours with the facts of the *Milling* case is *Commissioner of Internal Revenue v. Gray*,[7] decided in the United States Court of Appeals. Judge Lee, speaking for the court, stated that an oil and gas lease contains elements of both an ordinary lease and a sale, that the word "profits" in Article 2402 of the Civil Code[8] is an erroneous translation from the French text and should be read as "fruits," but that oil in the earth is not a "fruit." It is instead a part of the realty itself, and therefore royalties and bonuses received from these leases are not rents in the usual sense of the word and are not "civil fruits."

One case, *Wright v. Imperial Oil and Gas Products Company*,[9] seems to fall somewhere between these extremes. The court discussed both the *Logan* case and the *Pure Oil* case and stated, ". . . while . . . [in those cases] the Court treated royalty as rent, it does not follow that when the question of who is liable for a severance tax arises, the Court will not examine particularly into the facts, involving liability for the tax, and rule that the owner of the royalty is liable for the tax thereon." This would appear to support the view that "royalties" are not to be classified as "rents" for all purposes.

This early jurisprudence becomes vastly important when considered in the light of Article 2402 of the Civil Code and the various decisions which have firmly established that *rents* from the separate property of the husband received during the com-

4. Elder v. Ellerbe, 135 La. 990, 995, 66 So. 337, 338 (1914). See also Jackson v. Shaw, 151 La. 795, 92 So. 339 (1922); Wright v. Imperial Oil & Gas Products Co., 177 La. 482, 148 So. 685 (1933); Gulf Refining Co. v. Garrett, 209 La. 674, 25 So. 2d 329 (1945). The *Garrett* case was subsequently set aside when a rehearing was granted and the case remanded. 209 La. 674, 702, 25 So. 2d 329 (1946).

5. 1 Baudry-Lacantinerie, Précis de Droit Civil 754 (14 ed. 1926).

6. United States v. Harang, 165 F. 2d 106 (5th Cir. 1947), was on all fours with the instant case except the plaintiff was married prior to the tax years in question. Held, oil royalties from the husband's separate property constitute separate income for tax purposes.

7. 159 F. 2d 834 (5th Cir. 1947).

8. Art. 2402, La. Civil Code of 1870: "This partnership or community consists of the *profits* of all the effects of which the husband has the administration and the enjoyment. . . ." (Italics supplied.)

9. Wright v. Imperial Oil and Gas Products Co., 177 La. 482, 487, 148 So. 685, 687 (1933).

munity are *profits* and therefore belong to the community of acquets and gains.

Perhaps the largest hurdle to be cleared in order to accept the idea that royalties are rents or civil fruits is the very physical nature of oil and gas. It is elementary that they were deposited in the earth countless centuries ago, and as a physical fact they constitute part of the land. This fact is recognized in Louisiana's conservation laws,[10] our allowance for depletion,[11] and again in our severance tax law.[12] It is apparent that the product now being withdrawn will not be reproduced within the lifetime of any living man, if at all. It is true that the court in the instant decision held royalty to be a civil and not a natural fruit. However, it is submitted that the physical nature of oil and gas removes royalties from the class of civil fruits as well as that of natural fruits.

Article 545 of the Civil Code says, "Civil fruits are rents of real property, the interest of money, and annuities." When a house is rented and rent is paid, even though there is gradual depreciation, there is no piecemeal removal of the thing itself as there is in an oil and gas lease. The situation would be analogous if the tenant were allowed to pay rent to his landlord in the form of so many feet of lumber, which he had taken from the rented house. It is true that in many instances royalties have been considered as rents under Louisiana law,[13] but there are some royalties which are not considered to be rents.[14] In the instant case reference is made to the case of *King v. Harper*,[15] wherein it was held that rent (by whatever name called) is a certain profit in money, provisions, chattels, or labor issuing out of the land and tenements in retribution for the *use*. (Italics supplied.) The only difficulty is that the "use" now under consideration amounts to a full and complete consumption of the thing.

The lease is the legal vehicle which is commonly used to deal with oil and gas royalties. But likening royalties to rent for the convenience of using the lease pattern has nothing to do with the substantive rights of the parties. Under Louisiana law the

10. La. R.S. (1950) 30:1-63.
11. La. R.S. (1950) 47:55, 158(C).
12. La. R.S. (1950) 47:631 et seq.
13. See cases cited supra note 1.
14. See cases cited supra note 4.
15. 33 La. Ann. 496 (1881).

owners of mineral contracts may mortgage them.[16] They may also be pledged,[17] and in one case it was held to be a waste of the land for the mortgagee to produce oil under a lease granted subsequent to the mortgage.[18] All of this simply points to the fact that a real right is being dealt with.[19] When a mineral "lease," as distinguished from a predial lease, is granted, it amounts to an actual alienation for all intents and purposes.[20] The consequence of carrying the analogy between a mineral lease and a predial lease too far is seen in at least two instances of clear expression by the legislature. In 1936, in deciding the case of *Gulf Refining Company v. Glassell*,[21] the court said that the lessee of oil and gas leases received only a personal right. Immediately following this decision, the legislature, by Act 205 of 1938,[22] stated that the right was a real one. In two cases which followed, *Tyson v. Surf Oil Company*[23] and *Payne v. Walmsley* (a case from the court of appeal),[24] it was held that the above statute did not change any substantive rights, but was procedural only. In 1950, at the Second Extra Session,[25] the legislature said that the act was to be considered substantive as well as procedural.

Several collateral questions which have suggested themselves as a result of the *Milling* decision are:

Usufructuary Rights. Since the principal case classified royalties as civil fruits, will such royalties go to a usufructuary? The

16. La. R.S. (1950) 30:109.

17. La. R.S. (1950) 9:4301-4304.

18. Federal Land Bank of New Orleans v. Mulhern, 180 La. 627, 157 So. 370 (1934).

19. Hanby v. Texas Co., 140 La. 189, 72 So. 933 (1916); Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922); Wiley v. Davis, 164 La. 1090, 115 So. 280 (1928).

20. Wiley v. Davis, 164 La. 1090, 115 So. 280 (1928), wherein a lease granted by the tutrix without authority from the probate judge, upon land held in indivision with her minor children, was held null as to them. The court said the granting of a mineral lease was the granting of a servitude on property and constituted a dismemberment amounting to a partial alienation.

21. 186 La. 190, 171 So. 846 (1936).

22. La. R.S. (1950) 9:1105: "Oil, gas, and other mineral leases, and contracts applying to and affecting these leases or the right to reduce oil, gas, and other minerals to possession, together with the rights, privileges, and obligations resulting therefrom, are classified as *real* rights and incorporeal immovable property. . . ." (Italics supplied.)

23. 195 La. 248, 196 So. 336 (1940).

24. 185 So. 88 (La. App. 1938).

25. La. R.S. (1950) 9:1105. La Act 6 of 1950 (2 E.S.), § 1, amending La. Act 205 of 1938, §§ 1, 2, added the concluding sentence: "This section shall be considered *substantive* as well as procedural so that the owners of oil, gas and other mineral leases and contracts within the purpose of this section shall have the benefits of all laws relating to the owners of real rights in immovable property or real estate." (Italics supplied.)

appellant presented this question to the court, but the latter declined to answer it since it was not then before the court. For added perspective we might first examine the common law's determination of this question. At common law the closest approximation to the usufruct of the civil law is the life tenant.[26] The general rule seems to be that the intention of the creator of the life estate, as manifested by the instrument creating the estate, is controlling in determining whether the life tenant is entitled to the royalties accruing under mineral leases upon the estate.[27] In the absence of such manifestation the question is settled under either the open or unopened mine rule, that is, if the mine is already opened the life tenant is entitled to the royalty, if not then all that he is allowed is the interest therefrom.[28]

In the civil law of Rome[29] the usufructuary was held not entitled to open new mines since this would alter the character of the property. However, when a mine was already opened, he was allowed to work it and lease it. In this last case the minerals were considered as fruit, the organic produce of the property, and were apparently regarded as being capable of replenishment.

In Louisiana civil law, outside of the general article defining usufruct,[30] Article 552 of the Civil Code[31] is probably the most important in its bearing upon the question. The effect of this article of course depends upon whether or not drilling an oil or gas well is considered mining or quarrying.[32] Another complication is the fact that the Louisiana courts have never passed upon the question of when a mine or quarry is opened. Is it when the lease is granted or does it become such with the first penetration of the drill-bit into the earth?

The French counterpart of Article 552 is Article 598 of the French Civil Code. Laurent,[33] in commenting upon the article,

26. Daggett, Louisiana Mineral Rights 319 (rev. ed. 1949).
27. 18 A.L.R. 2d 104 (1951).
28. 18 A.L.R. 2d 106, 115 (1951).
29. Buckland and McNair, Roman Law and Common Law 101 (1936).
30. Art. 533, La. Civil Code of 1870.
31. Art. 552, La. Civil Code of 1870: "The usufructuary has a right to the enjoyment and proceeds of mines and quarries in the land subject to the usufruct, if they were actually worked before the commencement of the usufruct; but he has no right to mines and quarries not opened."
32. See Guffey Petroleum Co. v. Murrell, 127 La. 466, 53 So. 705 (1910), where the court held drilling operations not to be mining in the true sense. Later decisions, however, classify drilling as mining. See Etchison Drilling Co. v. Flournoy, 131 La. 442, 59 So. 867 (1912); Rives v. Gulf Refining Co. of La., 131 La. 178, 62 So. 623 (1913).
33. 6 Laurent, Principes de Droit Français 563, nº 448 (2 ed. 1878).

says, ". . . to be sure, the usufructuary enjoys like the proprietor, but he enjoys the fruits, and not the capital. *Now, the products of mines and quarries are certainly not a friut, but a part of the ground.* It is therefore the substance of the thing which the exploiter successively depletes." The *Milling* case is quite compatible with the first part of Laurent's comment, but is clearly contrary to the latter part. It must be remembered that at the time this mining and quarrying article was written, and for that matter at the time of Roman law also, the methods of production and exploitation were not developed to their present day state. A mine or quarry, which was worked by hand, generally would not be exhausted in the lifetime of men then living. Today an oil deposit valued at hundreds of thousands or even millions of dollars can be completely depleted in a relatively few years. The theory that minerals are fruits of the earth is quite understandable and compatible with the methods that existed in the past. However, in these days of high production drilling and mining, the concept would no longer seem to be valid.

Two other articles should be considered. Article 544 says that the civil fruits produced by the thing subject to the usufruct belong during its existence to the usufructuary. Article 545 defines civil fruits as the "rents of real property." In light of the *Milling* decision it would seem that the court in the future will be forced to grant to the usufructuary the royalties from oil and gas leases upon land subject to the usufruct. If this is a perfect usufruct the naked owner would thereby be deprived of all this revenue accruing from such leases during the time of the usufruct.

Wife's Separate Property. The *Milling* case also raises certain questions with respect to the paraphernal property of the wife. Article 2385 of the Civil Code states that, "The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband." This is followed by Article 2386, which states that unless the wife records her intention to retain for herself the fruits of her separate property, those fruits fall into the community of acquets and gains.[34]

Through ignorance or delay, a wife owning separate property may fail to record her intention that the fruits therefrom shall

34. The necessity for the wife to record her intention to retain the fruits from her separate property is brought out in K. & M. Store, Inc. v. Lewis, 22 So. 2d 769 (La. App. 1945); Trorlicht v. Collector of Revenue, 25 So. 2d 547 (La. App. 1946).

be retained by her alone. The husband by virtue of his power of administration under Article 2385 could grant oil and gas leases thereon. With the *Milling* case holding that royalty is a civil fruit, the benefit from this lease would be thrown into the community by virtue of Article 2386 and the husband would be entitled to one-half thereof.

Possessor in Good Faith. Article 502 of the Civil Code declares that the products of the land belong to the good faith possesor, and Article 3453 says that such a possessor "may gather for his benefit the *fruits* of the thing until it is claimed by the owner." (Italics supplied.) The word "products" in the former article has been held to be synonymous with "fruits." [35] As mentioned, *Elder v. Ellerbe* held that the good faith possessor was not entitled to retain the proceeds from oil and gas extracted during his possession. In view of the direct holding in the instant case that oil royalties are fruits, the continued validity of the *Ellerbe* case would seem to be uncertain.

A comparison is made, in regard to the possessor in good faith, between minerals and forest timber.[36] Heretofore they were regarded in much the same manner. The important point is that they were not regarded as "fruits of the soil" and hence the possessor had to repay the owner for their removal.[37]

Depletion Allowance. The Revised Statutes of 1950[38] sets the depletion allowance for oil and gas wells at 27½ per cent of the gross income. The significant factor to consider in relation to the *Milling* case is the basis upon which the depletion is allowed. This is simply that oil and gas are removed, whether it be by virtue of sale or lease thereof, and there takes place a gradual depletion of the taxpayer's capital investment in the property. As was stated in the case of *United States v. Ludey*, the depletion allowance "represents the reduction in the mineral content of the reserve from which the product is taken." [39] This depletion

35. Commissioner of Internal Revenue v. Gray, 159 F. 2d 834 (5th Cir. 1947); United States v. Harang, 165 F. 2d 106 (5th Cir. 1947).

36. See J. F. Ball & Bro. Lbr. Co. v. Simms Lbr. Co., 121 La. 627, 46 So. 674, 18 L.R.A. (N.S.) 244 (1908); Elder v. Ellerbe, 135 La. 990, 66 So. 337 (1914). See also for comparative inclusion La. Const. of 1921, Art. X, § 21, and La. R.S. (1950) 47:66.

37. Harang v. Bowie Lbr. Co., 145 La. 96, 81 So. 769 (1919); Elder v. Ellerbe, 135 La. 990, 66 So. 337 (1914).

38. La. R.S. (1950) 47:158(C).

39. 274 U.S. 295, 302 (1927). See also Walker v. Commissioner of Internal Revenue, 65 F. 2d 97 (5th Cir. 1933), certiorari denied, 290 U.S. 651 (1933); Goldstein v. Commissioner of Revenue, 290 U.S. 651 (1933).

deduction is granted to every person who owns an economic interest in the oil and gas[40] and compensates for the day when all the oil and gas will be exhausted. Even with this cursory examination of depletion the contrasting picture is plainly evident. The rationale of the *Milling* case and the theory of depletion allowance are clearly antithetical.

The *Milling* case seems to refute this idea of a diminishment when it cites the *Logan* case saying that royalty is rent "in the form of the produce of the land." [41] It would clearly appear that royalty oil is not a product of the land, but a part of it which is basic and will not be reproduced.

Conservation Act. The *Milling* case is based squarely on the non-ownership theory. However, there is a possible qualification of the strictness of that theory.

It is noted that when the Louisiana courts first began to deal with matters of oil and gas, they were apparently very much concerned with the alleged fugacity of oil and gas.[42] This early regard for the volatile nature of the thing, with its comparison to animals ferae naturae, was later dispelled by more scientifically accurate investigations.[43]

The point which might begin to compromise the strict position of non-ownership is found in the conservation laws,[44] where repeated reference is made to the "pools" and "fields" of oil and gas. This is expressive of an idea that is clearly at odds with one of great fugacity. The picture that is conveyed by these words is similar to that done by the words "vein" and "deposit," when the latter are used in reference to a solid material. The words "pool" and "field" clearly suggest dimension, position, and measurability.

The effect of such a modification upon the doctrine of non-ownership would be to cause a reconsideration of the effect of the mineral lease of oil and gas. Any such modification of the non-ownership theory would be to question whether an oil and gas lease is simply a lease after all, and whether royalty is rent under all circumstances.

40. Palmer v. Bender, 287 U.S. 551 (1933).
41. 57 So. 2d 679, 682 (La. 1952).
42. See Frost-Johnson Lbr. Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922).
43. See Summers, Oil and Gas 4-16 (perm. ed. 1938).
44. La. R.S. (1950) 30:1-63.

In addition to the considerations discussed, particularly those relating to taxation, there are additional tax questions raised. Unfortunately these are without the intended scope of this note, and perhaps warrant individual treatment themselves.

In view of the well-known *Ellerbe* and *Gray* cases, it would seem that the law on this phase of mineral rights was fairly well settled. The instant decision is important as it relates to the particular facts involved. More important, probably, is the effect it may have on connected areas of law.

William C. Bradley

PROCEDURE—APPELLATE JURISDICTION, COURT OF APPEAL

Plaintiff brought suit to recover $25,025 for personal injuries allegedly sustained from an assault and battery and from certain defamatory statements. The district court rendered judgment for defendant on the assault and battery charge and for the plaintiff on the slander charge, and both appealed. *Held*, that although slander is an offense separate and distinct from assault and battery, since the former arose "out of the same circumstances" as the physical injuries, the court of appeal had appellate jurisdiction over both claims for damages. The cases of *Newsom v. Starns* and *Applewhite v. New Orleans Great Northern Railway Company* were expressly overruled. *Cavalier v. Original Club Forrest*, 56 So. 2d 147 (La. 1952).[1]

Article VII, Section 10, of the Louisiana Constitution of 1921 provides, "the Louisiana Supreme Court has appellate jurisdiction in civil suits where the amount in dispute, or the fund to be distributed, irrespective of the amount therein claimed, shall exceed $2000 exclusive of interest, *except in suits for damages for physical injuries to or for the death of a person, or for other damages sustained by such persons, or his heirs or representa-*

1. The problem presented in the principal case arises only when separate and distinct causes of action are joined in the same suit, and is attributable primarily to the freedom of cumulation of actions permitted under Louisiana procedure. Cf. Arts. 148-152, La. Code of Practice of 1870. If the two claims are merely separate items of damages claimed for the same cause of action, of necessity these separate items would arise "out of the same circumstances," that is, claim for property damage to plaintiff's automobile and a claim for damages for physical injuries to plaintiff, resulting from the same negligent acts of defendant. In such cases, clearly the appeal would lie to the court of appeal.