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Civil Code and Related Subjects: Mineral Rights

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hicle covered by a collision policy, the court held that coverage extended to a loss that occurred during an authorized use notwithstanding that theretofore the limitations on regular or frequent use had been violated. There was nothing in the contract as evidenced by the opinion to support the insurer's contention of forfeiture of the right to make an authorized use of the vehicle in consequence of the prior violation, and the position of the court seems to have been completely sound.

A putative wife who had collected the proceeds of an insurance policy payable to the deceased's "widow" was held under a quasi-contractual obligation to pay one-half thereof to the lawful wife in *Succession of Fields*.[11] Other interesting angles to this litigation are dealt with elsewhere in this REVIEW under their appropriate headings.

The case of *Crifasi v. Houston Fire & Casualty Ins. Co.*[12] involved only the question of whether the plaintiff, claimant in a burglary loss, had kept accurate books and records from which the loss could be determined. The careful analysis of plaintiff's evidence by the trial court was adopted by the Supreme Court and the judgment below was affirmed.

In *Fireside Mut. Life Ins. Co. v. Martin*[13] the petitioning insurer was held bound by a statutory requirement that after a stated date its policies would be subject to the laws and regulations relative to industrial insurers. Its claim that its charter contract was being impaired by the enactment was rejected. The statute merely dealt with the form of policy petitioner could write in the future and constituted a valid exercise of the police power.

MINERAL RIGHTS

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LEASE

In *Esso Standard Oil Co. v. Nesbitt*[1] interpretation of a so-called assignment, which was in reality a sublease since

11. 222 La. 310, 62 So. 2d 495 (1952).
12. 222 La. 247, 62 So. 2d 395 (1952).
13. 66 So. 2d 511 (La. 1953).

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1. 222 La. 661, 63 So. 2d 417 (1953).

an overriding royalty was reserved, turned on the meaning of the term "oil well," as understood by the contracting parties in 1940. A well was being dually produced from two sands. Under the agreement between the parties wells producing over one hundred barrels per day would owe to the transferor three-sixteenths of the oil while wells producing less than one hundred barrels per day would owe only two-sixteenths. If under dual production two wells were said to be in production, each, being under one hundred barrels per day, would owe but one-eighth while if one well was involved, production was exceeding one hundred barrels per day and three-sixteenths would be due. The court found that since completion dual producing was not officially recognized in Louisiana until 1942, it could not have been within the contemplation of the parties at the time of the confection of the instrument, and they must be thought to have contemplated one hole in the ground. Thus, the well owed three-sixteenths to the transferor. Even if technical terms were to be honored, the profession itself had not evolved this understanding at the time of the contract. Obviously recognition later by the conservation department could not retroactively affect a private contract. The court's reasoning under the code articles is clear, vigorous and convincing.

Another chapter in the long controversy over certain acreage in Claiborne Parish was caused to be written in *Ascher v. Midstates Oil Corp.*,[2] where a suit was brought by a top lease holder to have a preceding lease declared invalid. The court had previously decided that a transfer affecting the acreage in question was a sublease and not an assignment because of a reservation of overriding royalty below a certain depth. The present suit was based on three contentions: one, that the royalty dependent on future production had prescribed in ten years because the event had not happened; two, that the royalty interest had been expressly relinquished by the reservor; three, that in either case the original sublease had become an assignment, with result that the unproductive portion was not held by production on the other part. The court found most logically in the writer's opinion that the life of the royalty having issued out of and being dependent upon the lease was unaffected by prescription during the life of the lease. After a most thorough and careful review and analysis of the *several*

2. 222 La. 812, 64 So. 2d 182 (1953).

wordy documents bearing upon the subject of voluntary relinquishment of the royalty, the court found that the reservor had not surrendered it. Thus, the question of whether a sublease may be converted into an assignment in this manner did not require answering.

In *Acadian Production Corp. v. Tennant*[3] a corporation brought suit to have an assignment of 5.484004 per cent of the seven-eighths working interest in a mineral lease set aside on the ground that its representative making the assignment was unauthorized. The court found otherwise after thorough analysis of corporation rules discussed elsewhere in this Journal. The assignee had successfully defended a suit for the corporation for which the interest was consideration. An additional fraction was claimed by the assignee which was denied as the alleged transfer had been verbal. The court remarked that "it is well settled that the transfer of an interest in a mineral lease cannot be the subject of a verbal agreement and cannot be proved by parol evidence."[4]

In *Godfrey v. Lowry* the lessor,[5] relying on *Fite v. Miller*,[6] sued for $30,000, the estimated cost of a well which was allegedly promised and not drilled. The court found no absolute promise to do but a promise to do or forfeit. The court observed that the instrument had been inartistically drawn.

The provision interpreted follows:

> " 'Notwithstanding any other provisions contained herein it is understood and agreed that this lease shall be forfeited and rendered null and void unless (1) on or before sixty days from the date lessee commences the actual drilling of a well at some point within one mile of the above described property and prosecutes such drilling with due diligence to a depth of 3,300 feet unless oil or gas is discovered in paying quantities at a lesser depth, and (2) if said well is completed as well capable of producing oil or gas in paying quantities, then, in the event, lessee shall commence the actual drilling of a well on some part of the land covered by this lease within 90 days after the completion of said first well and drill the same with due diligence to

3. 222 La. 653, 63 So. 2d 343 (1953).
4. 222 La. 653, 656, 63 So. 2d 343, 344 (1953).
5. 223 La. 163, 65 So. 2d 124 (1953).
6. 196 La. 876, 200 So. 285 (1941).

at least the depth where the oil or gas is found in paying quantities in the said first well. A well capable of producing 25 barrels of oil in 24 hours shall be considered as capable of producing in paying quantities.' "[7]

In denying cancellation of certain leases in the Delhi field, the court in *Sohio Petroleum Co. v. V. S. & P. R. R.*[8] found that failure to drill or pay delay rentals in specific plots was not a breach since a unitization privilege to lessees had been specifically granted by the terms of the lease agreement which also stipulated that the lease should continue as long as minerals were being produced from any land within the pooled area, a condition which had been fulfilled. Moreover, had the stipulation been absent, the order of the Commissioner of Conservation for spacing and drilling units would under the police power have produced the same result.[9] The first well drilled was capable of producing gas but was shut in. Nevertheless, the area forming the drilling unit was a developed area within the meaning of the conservation act. It could not be drilled again without a special order which indeed was secured in order to drill a second well, which produced oil. Thus, no delay rentals were due. Shut in rentals provided for in the lease were said to be optional with the lessee if it wanted to consider the well as producing and thus bring the lease within the clause continuing the primary term of lease for ten years or as long as minerals were produced from the "land or land with which said land is pooled."[10] Since the lessor failed to furnish tanks for storage as the lease provided he might do, the lessee, also in accord with the lease, sold to the pipe line company servicing the area and the latter credited the amounts due to lessor. They waited to distribute funds as the matter was in dispute and hence could not be charged with interest nor should the lessee be charged with costs of the suit. The fund paid into court by the pipe line company was distributed on the basis of the acreage included by the commissioner in the second and special order from which the oil well was producing and not from the original forty acres where the shut in gas well was located.

7. 65 So. 2d 124, 125 (La. 1953).
8. 222 La. 383, 62 So. 2d 615 (1952).
9. See LeBlanc v. Danciger Oil & Refining Co., 218 La. 463, 49 So. 2d 855 (1950).
10. 222 La. 383, 387, 62 So. 2d 615, 617 (1952).

In *Noel Estate, Inc. v. Murray*[11] a lease had an express provision for divisibility in whole or in part. Thus the lessee was within her rights in disposing of ten acres with a producing well thereon and since the transfer reserved no interest in the lessee an assignment was created instead of a sublease. Hence production on the part assigned would not hold the fifty acres remaining from the original lease upon which no production occurred. The settled rule that the clause "production in paying quantities" means profit to both parties to the contract was again applied. It was clearly stated in determining profit to the lessor that the original amount paid together with delay rentals are to be compared with royalty receipts in determining adequate consideration for continuing a lease under the production clause. Cases were reviewed where the test was applied with varying conclusions determined by these facts.

In *Baker v. Potter*[12] an example of logical and just interpretation of the ultra strict rule on time of receipt of delay rentals appeared this year. The lease provided that payment might be mailed to the lessor on or before the due date. The payment was sent by telegram on the morning of the critical day. The receiving telegraph office notified the bank that the money had come but could not be paid until information regarding origin of the message had been discovered. This took so much time that the operator was unable to transfer the money until the next day, a Saturday, and the sum was not credited to lessor's account until the following Monday. The court refused to cancel the lease stating that had a check or draft been mailed on the due date, it might well have reached the bank no sooner. The essence of the court's reasoning was that the parties to the lease contract were concerned with safe delivery rather than "a particular mode of transmission," namely, by mail. The fault of the telegraph company was not permitted to invalidate the lease. Indeed, had a check mailed on the proper date been missent by a postal clerk doubtless a much longer delay might have occurred. On rehearing the court also accepted the settled view that a lessee is entitled to an extension of time of the primary term of the lease equal to that lost by the hindrance of the law suit.

11. 223 La. 387, 65 So. 2d 886 (1953).
12. 223 La. 274, 65 So. 2d 598 (1953).

SERVITUDE

In a most important case in successions, *Bishop v. Copeland*,[13] discussed under that heading in this resumé of the year's cases, a most interesting question in mineral law was posed. The matter was not at issue, could not have been under the pleadings and obviously was not disposed of or even discussed by the justice. It is presented here since it was set forth and because the provisions indicated are reported to be in fairly frequent use in the state. Several heirs inherited real property which they partitioned in kind but only affecting the surface. They declared in the deed that they did not wish to partition the mineral rights and especially reserved these rights to themselves purporting to create a servitude on the whole tract. Whether this form of creating of a servitude is of legal validity is interesting and of practical importance.

Under the apparently settled jurisprudence, emphatic statements are found to the effect that an acknowledgment without express intention to interrupt prescription of a mineral servitude will not be held to have that effect. Thus, in *Wise v. Watkins*[14] prescription had run despite strong statements found in documents dealing with land and minerals, while the disputed servitude was in existence. After prescription of the original servitude for nonuser, the landowner, having full ownership, entered into a lease agreement with the original servitude owner and others wherein he stipulated that it was " 'his intention as the owner of the fee simple title, to admit ownership and extend the duration thereof' " to the original servitude owner. This provision was claimed to have renounced the prescription already acquired[15] or to have created a new title.[16] The court observed that prescription already accrued to a mineral servitude could not be renounced as this servitude is a discontinuous one which may only be established by title and that the provision relied upon in the lease did not show intent to establish title.[17] To these two points a vigorous dissent is recorded. The thought expressed in the dissent is to the effect that "title" to a discontinuous servitude may be granted by other evidence of

13. 222 La. 284, 62 So. 2d 486 (1952).
14. 222 La. 493, 496, 62 So. 2d 653, 654 (1952).
15. Art. 3460, La. Civil Code of 1870.
16. Art. 770, La. Civil Code of 1870.
17. Wise v. Watkins; Wise v. Gleason, 222 La. 493, 62 So. 2d 653 (1952).

ownership than a deed under the specific language of the code.[18] The "acknowledgment" spoken of in the article referred to was thought to have been found in the lease, which might also have been said to have been a stipulation for the benefit of the original servitude owner, binding upon the grantor landowner, plaintiff, successful in the suit.

Presupposing under the majority opinion in the *Wise* case that a mineral servitude once prescribed may not be renounced, and that a title, such as a deed, is needed to create a new one, it would appear that this contract should be supported by consideration, or clearly qualify as a donation. If this be true, why should not an acknowledgment with intent to interrupt the prescriptive period, certainly creative of a longer term, be supported by consideration, or qualify clearly as a donation?

A ten year lease was granted by a landowner and others deriving mineral interests from him, it being thought that the minerals previously reserved had reverted. Later, the same lessee obtained a two year lease from other persons in whom it was discovered the original servitude by reservation still remained with about a year to run. A voluntary pooling agreement was then entered into between the owner of the two leases and those having mineral rights in the area to be pooled, the latter owners not being named in the instrument or the specific interests they purportedly had set forth. The two year lease by the servitude owners of the tract in question lapsed, no drilling occurred on it, and the servitude would have reverted unless the dry hole drilled preceding the reversion of the original servitude was an interruption under the pooling agreement even though not drilled on the tract in question or the language in the pooling agreement signed by both landowner and servitude owner was such an acknowledgment as would interrupt the prescription of the servitude. On first hearing the court found in *Arkansas-Louisiana Gas Co. v. Thompson*[19] an express acknowledgment and on rehearing found that there was no intention by the landowner to acknowledge the outstanding servitude. The author of the opinion in the first hearing dissented on the second. Thus, under the Uniform Declaratory Judgment Act the lease from the original landowner and his transferees was found valid with no participation in production

18. Art. 770, La. Civil Code of 1870.
19. 222 La. 868, 64 So. 2d 202 (1953).

due the original servitude owners. This case exhibits another instance of the court's continued effort to delimit most stringently the doctrine of acknowledgment as applied to mineral servitudes.

A most interesting sequel to the *Long-Bell - Tritico* case[20] appeared in the year's decisions. It will be recalled that in the *Tritico* case, it was made clear that one presently owning a servitude may not validly purchase it.[21] In the *Long-Bell Petroleum Co. v. Granger*[22] case, "oversale" of minerals said to derive from the doctrine of after acquired title was argued. The court distinguished the cases cited for the vesting of a servitude under the doctrine as having been situations where identical minerals were not purchased by their then owner but by a third party. Again, the reservation in the instant case was distinguished factually from the reservation in the *Tritico* case where the attempted reservation was held invalid because the mineral servitude was outstanding and the purported reservor could not deal with something he did not own. In the instant case the reservor owned the land and the minerals and had a right to reserve for a third party[23] which was effectively done where deeds were signed reciting that the minerals are "expressly reserved unto the Long-Bell Petroleum Co., Inc., its successors and assigns." In declaring the doctrine of after acquired title inapplicable where the grantee already owned the minerals at the time of transfer, the court used the following words: "even assuming that it is applicable to mineral sales in some instances."[24] Thus, the doctrine might yet be said to be uncertain in this connection. Moreover, can it be said that the "oversale" idea is identical? It would appear that the notion might be said to apply only to a situation where a valid sale of part is in evidence. Certainly, the reservation or sale of the much discussed "reversionary" right or interest, however valuable it may be, is barred. It is interesting that the words were not even used in the opinion under discussion.

The court held in *Mays v. Hansbro*[25] that since a mineral servitude is interrupted by bona fide drilling even though en-

20. Long-Bell Petroleum Co. v. Tritico, 216 La. 426, 43 So. 2d 782 (1949).
21. Art. 2443, La. Civil Code of 1870.
22. 222 La. 670, 63 So. 2d 420 (1953).
23. Art. 1890, La. Civil Code of 1870.
24. 222 La. 670, 677, 63 So. 2d 420, 422 (1952).
25. 222 La. 957, 64 So. 2d 232 (1953).

tirely unsuccessful, a fortiori would it be interrupted by production, even if not in paying quantities.

ROYALTY

Vendors of land reserved a fractional portion of the *minerals* but granted full leasing power to their vendees. Provision was made that if a lease was granted and production ensued that the royalties should be proportioned according to the *mineral rights* owned by the parties. A lease was confected providing for a cash consideration and delay rentals. Vendors of the land claimed a proportion of these emoluments and upon careful analysis and comparison with a similar provision interpreted in *Mt. Forest Fur Farms, Inc. v. Cockrell*[26] were denied, in *Ledoux v. Voorhies.*[27] The instrument having reserved only royalties from production and having granted full leasing power, it appeared that regardless of the confused wording of the document, full consideration for the lease unless and until it became dependent on production belonged to him who had the power to grant it. The use of the word *minerals* in the reservation was stressed by the plaintiffs but since apparently all searching rights had been sold and only royalty from production under future leases reserved, it would appear that only *Vincent-Bullock*[28] type royalty was to be contemplated dependent on production only and that within ten years, whatever terms were found.

SURVEYS

The principle that the right to make a geophysical survey is a valuable one not to be exercised without consent without incurring award of damages was fully recognized not only by the court but by the litigants. Thus, in *Picou v. Fohs Oil Co.*[29] the issue became one of fact as to whether or not permission merely to pass over the land or actually to conduct seismographic operations upon it had been given. After careful review of the conflicting evidence weighed "in the light of surrounding circumstances"[30] the court agreed with the trial judge that permission had been given and while there may

26. 179 La. 795, 155 So. 228 (1934).
27. 222 La. 200, 62 So. 2d 273 (1952).
28. Vincent v. Bullock, 192 La. 1, 187 So. 35 (1939).
29. 222 La. 1058, 1075, 64 So. 2d 434, 436 (1953).
30. 222 La. 1068, 64 So. 2d 434 (1953).

have been a misunderstanding of the exact nature and limits, there had been "no subterfuge or misrepresentation" whereby access had been gained for an extended purpose. Moreover, the proof clearly showed that information was desired and gained not from the land of the plaintiff but from adjoining lands and hence no harm could have come to the plaintiff in loss of potential leasing value. The evidence of the number of trees cut or damaged was so widely divergent that the court in reaching an estimate was forced to use their discretion specifically given them by law.[31]

CONSERVATION

An attack was made in *Roussel v. Digby*[32] upon the validity of certain orders of the Commissioner of Conservation said to have been capricious, arbitrary and unconstitutional. Preceding the seeking of relief in court, the complainant asked for and obtained a hearing before the commissioner at which he sought reformation of an order for 160 acre spacing in drilling units. Exclusion of a certain area upon which a dry hole had been drilled was desired. Certain sands were excluded but others were added and the drilling unit area was increased from 160 to 190 acres. Complainant then sought relief in court pleading that since allocation of production was upon a surface acreage basis instead of upon an estimate of actual minerals in place, he was being deprived of his rightful share of the hydrocarbons deposited in his land. Exceptions were filed grounded on the requirement that administrative remedies must be exhausted before relief in court could be sought. The court overruled the exception and remanded for trial on the merits. The opinion points out that reformation had been sought and not granted as requested and that under the facts of this case a commissioner might continue to "exclude certain lands and include others"[33] so that the administrative remedies would never be exhausted. The answer to the question of what *method* of measuring the fair share of minerals in a reservoir below the surface of the lands of two or more persons will meet constitutional requirements is yet to be answered, has many facets and seems to be growing in interest.

31. Art. 1934, La. Civil Code of 1870.
32. 222 La. 779, 64 So. 2d 1 (1953).
33. 222 La. 779, 783, 64 So. 2d 1, 2 (1953).