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Civil Code and Related Subjects: Mineral Rights

Harriet S. Daggett

the merits.[3] The present decision follows the holding in the recent Louisiana case of *State* ex rel. *Girtman v. Ricketson.*[4]

Although the wife's modified Tennessee custody decree was obtained in the absence of the husband and the children, the order may well have been considered in Tennessee as a further proceeding in the original action, so that the court would be deemed to have continuous jurisdiction.[5] Under such circumstances there would be no point in citing *May v. Anderson,*[6] where the court which awarded the custody to one parent had no personal jurisdiction whatsoever over the other parent.

If, in either of the two cases here discussed, the Louisiana Supreme Court had felt that it would be in the best interests of the administration of justice to recognize the foreign custody decree, their action might have been surprising but it would not be subject to any constitutional review for accepting voluntarily a foreign judgment which they were not compelled to recognize under the Full Faith and Credit Clause.

MINERAL RIGHTS

*Harriet S. Daggett**

In *Smith v. Holt*[1] it was most logically decided that when the same lessee, owner, under definition given in the Conservation Act, was operating a drilling unit established by the commissioner, an order for pooling was unnecessary. Thus, drilling on one part of the unit was user as to all, though two different servitudes were involved, and the land covered by one had not been used.

In *Barnsdall Oil Co. v. Succession of Miller,*[2] the evidence disclosed no intention on the part of the landowners to sign a joint contract of lease with the servitude owners. Indeed, it was found that the landowners did not know that the servitude owners were to be parties to the lease. Thus, there was no

3. New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).
4. 221 La. 691, 60 So.2d 88 (1952). See *The Work of the Louisiana Supreme Court for the 1951-1952 Term—Conflict of Laws,* 13 LOUISIANA LAW REVIEW 230, 234 (1953); Note, 27 TULANE L. REV. 361 (1953).
5. Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913).
6. 345 U.S. 528 (1953), 14 LOUISIANA LAW REVIEW 683 (1954).

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1. 223 La. 821, 67 So.2d 93 (1953), 14 LOUISIANA LAW REVIEW 438 (1954).
2. 224 La. 216, 69 So.2d 21 (1953).

extension of the life of the servitude, under a well-settled line of cases.

Elson v. Mathewes[3] has been discussed in an article entitled "Brief Comment and Speculation re Elson v. Mathewes" which appeared in this Journal in April, 1954, beginning at page 547 of Volume XIV. Thus, further comment by this writer would be superfluous.

In *Arkansas Fuel Co. v. Sanders*,[4] the question was posed whether landowner or servitude owner would benefit by the lapse by prescription of a royalty right while a servitude on the land was still extant. The decision that the servitude owners were entitled to the proceeds from production, which were in dispute, seems eminently correct. The court's observation that there was nothing to "revert" after prescription had run against the royalty seems perhaps to be an over-simplification of the situation. Certainly the debtor gains and the creditor loses in every case of a like nature so that something of value passes whether the word "revert" is accurate or not. When the burden or debt of the land to the servitude owner is wiped away by prescription the word "revert" has been acceptable. In the instant case, the servitude owner having assumed the debt to the royalty owner obviously gained when the royalty right prescribed.

Bourg v. Hebert[5] involved the following facts. Over a period of about six years twenty separate servitudes were created by reservations of all minerals in various parcels of land sold to the plaintiffs. With one negligible exception the tracts of land were contiguous. Before any interruptions by drilling had occurred and before any of the servitudes had prescribed, the twenty servitude owners and the owner of the lands which they burdened entered into a wordy agreement which purported to renew the expiring mineral interests in their then owners and transfer one-half of these mineral interests to the landowner. Thereafter, there was development on certain of the tracts. Suit was brought by the landowner ten years after the date of the agreement to declare the tracts upon which there had been no

3. 224 La. 417, 69 So.2d 734 (1953).
4. 224 La. 448, 69 So.2d 745 (1953).
5. 224 La. 535, 70 So.2d 116 (1953). This case and the following cases were reported by the writer in 3 OIL AND GAS REPORTER (1954), sponsored by the Southwest Legal Foundation of Dallas, Texas, published by Matthew Bender and Company. Permission has been granted by Matthew Bender and Company to use portions of that material here.

development free of mineral servitudes because of their prescription. Defendants pleaded that the agreement purported to resolve all of the twenty servitudes into one covering the entire contiguous area. Thus, development anywhere on the land involved would have interrupted prescription on the whole tract. The court held that no new single servitude was created by the contract and that prescription for non-user had run on the undeveloped tracts. It was also held that agency for leasing did not pass to transferee.

The contract presented to the court for interpretation was not questioned for validity. Though the wording of the contract and the principles of servitude do not justify it, in preceding years the idea of absolute indivisibility of servitude might have been argued since the parties to the contract halved the minerals then extant in the twenty mineral servitudes. The recent case of *Elson v. Mathewes*[6] in a logical and practical decision made it clear that landowner and servitude owner may modify their existing contract with the view of dividing the servitude first created. It was noted in the instant case that the district judge had spoken of the parties' purpose being to revise their position created by the original sales of land with reservation of minerals.

The several steps taken by the parties in the formulation of their agreement present interesting questions. The landowner waived or renounced his "accrued prescription." The Louisiana Revised Civil Code of 1870 provides that a prescription may not be renounced until it has accrued. After full accrual the servitude would expire and no longer burden the land. In this type of servitude, discontinuous non-apparent, a re-creation would have to be by title which one Justice has indicated would not necessarily have to be by ordinary deed.

In the instant case the full prescriptive period had not run on any of the twenty servitudes. The amount of accrual against each servitude varied. When all accruals against the twenty servitudes were renounced at the same time, apparently the equivalent of an interruption by acknowledgment was effected and each was given a new term of ten years.[7] Otherwise, their lengths of term would have maintained the same variation as had hitherto been the case, which does not appear to have been

6. 224 La. 417, 69 So.2d 734 (1954).

7. See Art. 3460, LA. CIVIL CODE OF 1870; Segond v. Landry, 1 Rob. 335 (La. 1842); Carraby v. Navarre, 3 La. 262 (1832).

the contemplation of the contenders. Consideration was obtained for this interruption by the landowners' acknowledgment which in the writer's judgment makes the application of the acknowledgment principle, really a re-creation of the servitude, a stronger and more logical concept, since no moral consideration exists, as it does in ordinary use of the acknowledgment principle.

If the consideration given by the servitude owners was co-ownership in the twenty separate servitudes, the question of indivisibility might be argued despite the recent decision that landowner and servitude owner may revise, re-create and thus divide because a landowner may not own a servitude upon his own land. Thus, the consideration must have been one-half of the divisible benefits of the servitude, since a servitude owner may not create a servitude and even if that were possible could not create one to be owned by the landowner upon whose land it was to bear as it would immediately be extinguished by confusion. Hence, under the analysis of the contract given by the court, it was unnecessary to rely upon the theory of revision of contract whereby the landowner purported to create twenty new servitudes carrying but half the benefits of the originals. This process would have involved almost as great departure from the principles of servitude and the words of the contract as the defendants urged when pleading that a new single servitude had been created presumably by the servitude owners as consideration for the landowners' renunciation of accrued prescription.

The idea of conveyance of benefits of the retained servitude is further borne out by the court's decision regarding the leasing powers set forth in the contract. The servitude owners retained the full leasing power over all of the land. When their interest was conveyed to a third party the court found the leasing provision to have created a mere agency in the servitude owners. The word *royalty* was used and the court might have taken the view that the consideration given to the landowner was only a *Vincent-Bullock*[8] type royalty in which case the full leasing power would have passed to the purchaser of the servitudes.[9]

Settled rules of servitude were followed as were guides to contract interpretation. Renunciation of accrued prescription

8. Vincent v. Bullock, 192 La. 1, 187 So. 35 (1939).
9. See DAGGETT, MINERAL RIGHTS IN LOUISIANA 264 *et seq.* (rev. ed. 1949).

as applied in the contract is not usual but does not violate legal provisions. The contract, formulated seventeen years ago, a relatively long time in the fast-moving jurisprudential history of mineral rights, was drawn with singular astuteness and would apparently have avoided the many pitfalls of its day preceding the more advanced decisions of the interlude.

In *Berman v. Brown*[10] sublessors transferred their holding with the following stipulation:

> "The one-sixteenth (1/16) part of the eight-eights (8/8) of all the oil, gas and other minerals excepted and reserved by assignors herein shall apply and be a part of all future renewals, extensions and new leases made by assignee on the lands covered by the herein described lease or leases for a period of one year from the date of the expiration of said lease or leases."

It was also provided that this stipulation would extend to "heirs, executors, administrators, successors, and assigns" of the parties to the sublease. After judgment for cancellation of the original lease in a suit brought by the landowner-lessor a second lease on the same property was obtained within the year by a sublessee of one who had obtained from the first sublessor. Suit was brought by the original sublessors against the holder of the new lease for the royalty reserved by the stipulation set forth above. It was held on rehearing that the obligation bound personally only the original sublessee and his assigns who had not broken the covenant but did not extend to a second sublessee as there is no contractual relation between a lessor and a subtenant.

On the first hearing the author of the majority opinion found for the plaintiffs having recognized the purpose of the stipulation, the legality of which was unquestioned, to be to insure "fair play." The judgment cancelling the first lease was examined and found to have been a release for the plaintiff-landowner only, not affecting the parties to the stipulation in question. The plea of res adjudicata was rejected as the facts did not meet the well-settled rules. The three grounds of estoppel were carefully examined and the defendant found not to have

One Justice felt that the estoppel plea should be sustained. Two Justices dissented, one of whom, the Chief Justice, wrote

10. 224 La. 619, 621, 70 So.2d 433, 434 (1953).

sustained the double burden of proving the facts and to have been misled to his detriment.
an opinion wherein he differed in the analysis of the judgment of cancellation and in rejection of the third ground of estoppel which involved interpretation of instruments of release which the majority had found to be mere quitclaims in favor of the landowner and to which the defendant was not even a party.

While the ground of the majority decision on first hearing cannot be said to rest expressly upon equitable fair play or good public policy in the oil business, an impression comes through to the reader that these considerations underlie the stated reasons. Certainly the Louisiana Code article on equity[11] and the so-called Golden Rule article[12] and some of their previous applications would have supported the decision, if called upon.

The recent case of *McCormick v. Phillips Petroleum Co.*[13] upheld a stipulation somewhat similar to that of the instant case, finding something of a fiduciary relationship between assignor and assignee, and feeling that it would be an unfair contract which would allow a deliberate termination of an overriding royalty without chance for protection.[14] Certainly the manifest intent of the stipulation in the instant case was to prevent exactly what happened. The evidence clearly showed that the defendant had intentionally failed to develop his lease inviting cancellation so that he could terminate the heavy overrides by securing another lease clear of them in all of which he was successful.

On rehearing, a Justice who had silently concurred in the first decision wrote the majority opinion of reversal. The major ground of the reversing decision seems to be one of distinction between an assignment and sublease and obligations of each. The Louisiana rule of distinction is that a transfer retaining an overriding royalty is a sublease while one not retaining an overriding royalty or other form of control is an assignment. Parties to the stipulation or their assigns were said to be bound personally but a sublessee could not be held. The future contingency, taking a new lease by one bound by the condition, was said not to have happened, thus no one could be held and the attempt to prevent a top lease being taken by one in the chain

11. Art. 21, LA. CIVIL CODE of 1870.
12. Art. 1965, LA. CIVIL CODE of 1870.
13. See 3 OIL AND GAS REPORTER 29 *et seq.* (1954).
14. See Discussion Notes of Case, 3 *id.* at 38-39.

of title failed, though the intent was clear that all succeeding owners would be bound. It is notable that the discussant of the *Phillips* case cited above indicated the reverse idea in connection with duties of one who "retains no interest" in Louisiana an assignor as distinguished from a sublessor.

The Justice who wrote the majority opinion on the first hearing naturally dissented from the majority opinion on the second hearing. He stated that the differences of opinion probably grounded on the equities involved and he supported his view with a list of authorities who believed that lessees should be prevented from using "inequitable and unconscionable" actions to destroy overriding royalties. Moreover, the dissenting Justice pointed out that under the settled jurisprudence of Louisiana an overriding royalty to continue under future leases is a real obligation running with the land and that the recent case of *Wier v. Glassell*[15] had been overruled *sub silentio* by the instant decision.

In *Horn v. Skelly Oil Co.*[16] certain minerals were held to have been reserved by a vendor of land and thus a servitude created which prescribed in ten years for non-user, returning the reserved minerals to the plaintiff, transferee of the land. Had a royalty been found to have been reserved by the basic deed of transfer, reservations of minerals in subsequent transfers of the land would have been valid, placing ownership of certain percentages of minerals in the defendants including a lessee.

The interpretation by the majority of the court of the key paragraphs of the basic instrument involved seems sound under all of the general rules of guidance. The initial statement vests one-half of the minerals in the vendor of the land, rendering following verbiage subsidiary. The best evidence of the intention of the parties, namely their own interpretation by subsequent acts, is present. The date of the deed in question was previous by a year to the decision which gave royalty as such, not dependent upon a lease, its definite place in Louisiana law.[17] Indeed, had this case already been decided, a draft of like nature, the purpose of which being clearly for security purposes until deferred land payments had been made would certainly have more closely tracked the language of the interpreted in-

15. 216 La. 828, 44 So.2d 882 (1950).
16. 224 La. 709, 70 So.2d 657 (1954).
17. Vincent v. Bullock, 192 La. 1, 187 So. 35 (1939).

strument, had royalty rather than servitude been truly intended. Moreover, any bank and surely the Federal Land Bank would not have given over entire control to the credit purchaser, as does a reservor of royalty only, but would have established for leasing purposes an agency only, as the court found that they had done, which, coupled with the interest which the land purchaser on credit certainly had, would better secure the debt. Moreover, the court has stated that royalty is a lesser right than servitude.[18] The public should be able to assume that, in arranging security for a credit sale, the bank's attorney would reserve the greater right in minerals or other possible assets. Thus, if intention is the criteria of interpretation, it would appear in the light of all the surrounding facts, that a reservation of minerals and not royalty was made.

A learned and interesting discussion of the disturbing words "Provided however" appears in the opinion of the dissenting Justice. Without the several elements previously mentioned, these words might indeed have been thought to indicate a limitation upon the opening sentence of the reservation rather than an establishment of agency.

In *Hicks v. Clark*[19] the reservation of a right of reversion of minerals was held not to be valid as it could result in a circumvention of the law and public policy of the state that a mineral servitude must be exercised or become extinguished in ten years. The reversionary interest in minerals in Louisiana, like an illegitimate child, has been copiously discussed but never really recognized. The instant case in clear cut and unmistakable language declares this reversion to be an illegal object of commerce because of the public policy against prolonging the life of a servitude without exercise of the right to explore.

The handling of the question of reversion by the court has been most interesting. Initially, it was indicated that the object was a valuable one, which, since there was no law against it and at that time no declared public policy against it, might be bought and sold. In that case, however, it was found that there had been no intention to deal with it. Later, the court found consistently that an attempt to deal with *minerals* at a time when they were vested elsewhere as servitudes was but an attempt to create title to a thing not owned and hence invalid.[20]

18. See Continental Oil Co. v. Landry, 215 La. 518, 41 So.2d 73 (1949).
19. 225 La. 133, 72 So.2d 322 (1954), 15 LOUISIANA LAW REVIEW 229.
20. DAGGETT, MINERAL RIGHTS IN LOUISIANA 134 *et seq.* (rev. ed. 1949).

The corollary to this situation was an attempt to buy a thing already owned, again invalid.[21]

The instant case deals squarely not with *minerals*, not owned or already owned, but with the *reversionary right* to these minerals, an expectancy, a *hope*, a presently existing thing, which presumably could be dealt with if not illegal or against public policy. The court strongly and logically asserted the public policy and hence a reversion could not under this decision be an object of commerce.

Does this decision finally dispose of and put to rest the troublesome question in all of its aspects?

It might be argued that the doctrine of after-acquired title has not been squarely put at issue in a situation where the vendor of *minerals* not owned became the owner thereof by virtue of his ownership of the land at the time of loss of an outstanding servitude by prescription.[22] It might be argued that the doctrine of oversale, a different approach to but possibly a strained blend of the concept of the doctrine of after-acquired title has been recognized.[23]

The strong words of the opinion under discussion to which there was no dissent make it seem likely at present that another approach, whatever the labelled doctrine, would be said to be "an effort to circumvent the public policy" and make it possible for mineral rights to be "outstanding for more than 10 years without exercise of the right to explore."[24]

The court's attitude toward a so-called top lease, which might be termed a reversion of the right to search under a different legal pattern, that of a contract to lease instead of a sale contract, creating a servitude, is of particular interest in contrasting analogy to the announced public policy regarding "reversions" of mineral rights. Space allocated for these notes does not permit extended discussion of the allied topic at this time.

Delta Refining Co. v. A. J. Bankhead[25] arose from a concursus proceeding brought to determine ownership of several mineral interests. A certain document was pleaded as an acknowledgment interrupting prescription of the mineral servi-

21. Long-Bell Petroleum Co. v. Tritico, 216 La. 426, 43 So.2d 782 (1949).
22. See Long-Bell Lumber Co. v. Granger, 222 La. 670, 63 So.2d 420 (1952).
23. See Bates v. Monzingo, 221 La. 479, 59 So.2d 693 (1952).
24. 72 So.2d 322, 325 (La. 1954).
25. 225 La. 422, 73 So.2d 302 (1954).

tude but found to be a mere statement of interests without intent to interrupt prescription. A second written agreement was found not to affect the mineral interests as the servitude had lapsed and could only be re-created by title, which the document could not be interpreted to pass as no consideration was found nor was such a purpose indicated. A third agreement was found to be a valid compromise. The minors involved were granted their royalty interests as prescription had been suspended as to them. Well-settled rules are applied in this decision: that a bare acknowledgment or recitation of present interest without a clearly expressed intent to interrupt prescription of a mineral servitude will not have that effect; that an expired servitude cannot be dealt with—a new one must be created and that by title; that minority will suspend the running of prescription unless the law provides otherwise, which at the critical date at issue, it did not;[26] that a compromise to avoid litigation has the force of a judgment.[27] The interpretation of the several documents involved seems satisfactory to the reader and follows the guides of the Code and of the jurisprudence.

Eota Realty Co. v. Carter Oil Co.[28] was a suit for cancellation of an assigned portion of acreage of original lease for failure to develop over a period of ten years and for attorney's fees. The defense was that lease was indivisible and lessee had not been put in default. The court held that under terms of lease contract itself, lands under lease might be surrendered in part and that certain acreage around the producing well was to be held in case of cancellation of lease on remainder; that proper demand had been made and refused, hence putting in default would be a vain thing. The statute granting attorney's fees upon cancellation had been complied with and hence a reasonable fee was allowed.

The court stated that this issue was to be ruled by its facts and the specific terms of the lease contract. Cases cited in support of the indivisibility of a lease, notably *LeBlanc v. Danciger*[29] and *Hunter Co. v. Shell Oil Co.*,[30] were said not to be applicable. That ten years, the term of an unused servitude, had elapsed

26. But see La. Acts 1950, No. 510, p. 935.
27 Art. 3078, LA. CIVIL CODE of 1870.
28. 74 So.2d 30 (La. 1954).
29. LeBlanc v. Danciger Oil & Refining Co., 218 La. 463, 49 So.2d 855 (1950).
30. 211 La. 893, 31 So.2d 10 (1947).

without development on the area for which cancellation was asked may have been an influential factor though it was not stated to have been. The fact that by the terms of the contract the lessee might discard unwonted acreage and reduce land rentals while keeping what it wanted without development is well stressed. Again, that upon cancellation in whole or in part for any reason, a producing well and 160 acres of land might be held is a convincing answer to the lessee's plea of indivisibility of lease. The facts of the former cases holding for indivisibility of lease, under theory of indivisibility of obligation to drill a well are easily distinguished in fact but not so readily in doctrine. Be that as it may, this decision is most heartening, particularly to those who have had difficulty in assimilating the mysteries of indivisibility of lease in some previous cases—when met with others dealing with assignment of part of the acreage.

Active breach by refusal to comply with demand, requiring no putting in default, is well illustrated by the instant case. Revised Statutes 30:102 having been complied with by lessor, award of reasonable attorney's fees obviously followed.

Torts and Workmen's Compensation

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TORTS

Negligence

Standard of care. Courts generally agree that it is the duty of the physician, surgeon or dentist to exercise the degree of skill ordinarily employed, under similar circumstances, by the members of his profession in good standing in the same locality, and to use reasonable care and diligence, along with his best judgment, in the application of his skill to the case. Two ideas are implicit in this definition of the professional standard of conduct: First, the standard of skill is that of a complex and erudite profession. It is conceded that the medical layman, including even the judge, is incapable of passing an intelligent judgment on such matters and that there must be resort to medically expert opinion which will likely be determinative in each controversy. Second, the element of care and diligence

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