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Civil Code and Related Subjects: Mineral Rights

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If the tax deed were completely regular in all respects, there would be real ownership and no need to consider prescription. Merely because the original error originated in a public office is no reason why the general principles and rules of acquisitive prescription should not apply.

MINERAL RIGHTS*

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In *Union Oil Company of California v. Touchet*,[1] a landowner sold a 1/32 royalty interest. About five years later he leased the land. Thereafter, the lease was amended to give the lessee the right to pool the tract without further consent from the lessor and to allocate production on an acreage basis. A gas well was brought in in the vicinity within ten years from the royalty sale but was shut in for lack of market. A unit was then created and recorded, including this well and the tract affecting the royalty in question. The lands of a third person were also included but not listed in the recorded instrument. After ten years from the royalty sale, permission to include the lands of the third person was secured. A declaration of unitization, reciting the tract of the third person but otherwise identical with the first declaration, was then recorded. The Commissioner of Conservation authorized production from the shut-in gas well and dispute arose regarding ownership of the 1/32 royalty. Had production occurred within the ten year period on the tract carrying the royalty, the vendees would have been unquestionably entitled to their share. Since that event had not happened, their claim must rest upon the first unit declaration. The court found that despite the very broad power given by the amended lease provision on pooling, the provision could only mean that the lessee might unitize with other leases over which similar power had been given. As outlined above, the unit declaration upon which the royalty claim depended included the land of a third person who had not at that time given consent and thus the

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1. 229 La. 316, 86 So.2d 50 (1956).

unitization was invalid under the terms of the lease. Hence, the royalty was lost by prescription of ten years.

Strong argument was advanced to support an estoppel. After the formation of the invalid unit, lessees started paying a percentage of land rentals to the lessor as provided in the lease in event of a shut-in well. One such payment was made before the expiration of ten years from the royalty sale. The argument advanced was that these were "shut-in royalties," receipt of which estopped the lessor from urging prescription of the royalty, which the court stated was tantamount to pleading estoppel against urging the invalidity of the unitization. The court, after stressing the fact that estoppel is not favored in the jurisprudence, found that the lessor did not have knowledge of all the facts and of his rights when he accepted the shut-in payments. Particularly, it was not shown that he knew that an area had been unitized without consent of the lessor. Thus, there was no estoppel.

The third argument advanced was that because lessor and royalty owners had signed the lease amendment authorizing unitization that the royalty prescription had been interrupted or extended. The court stated the well-established doctrine in regard to acknowledgment of a servitude that express intent must be found. Here, there was mere recitation of existence of outstanding royalty which had no effect on the prescriptive period.

Two Justices dissented mainly on the ground that the consent of the third person to unitize was a ratification of the invalid declaration which was retroactive to the date of its confection and thus within the necessary ten-year period from the sale of the royalty. These Justices also seemed favorable to the plea of estoppel.

Adherence to the doctrine of limited application of the troublesome and perhaps dangerous principle of estoppel, particularly in mineral rights, should meet with approbation. There was no knowledge by the lessor and no detrimental move by claimants because of apparent assent.

Ratification by the third party to the original unitization agreement certainly could not affect the interests of others. Doubtless, had it been attacked, the unitization could not have stood until subsequent ratification by all parties, which indeed later occurred.

Ratification of the unitization or estoppel of its attack would seem necessarily to be differentiated from consequences between vendor and vendee of royalty, separate contractors. How could the fact that the royalty owners and their vendor, a subequent lessor, signed the amended lease incorporating the unitization agreement, without mention of a change in the original royalty sale, affect the law of prescription for this type of royalty? What did the signatures of the royalty owners add to the lease in any event? What complaint could they have advanced against the unitization clause when they could not complain of any other clause or could not complain even if the land was never leased?

A dissenting Justice advances the thought that an implied condition existed in the unitization clause of the lease that the lessee have authorization from all parties subject to the unitization and that having met the condition by subsequently securing consent from the third party, the unitization was validated. Thus, the implied condition, if it may be labeled a condition, is stated as a future condition rather than a present requisite of essential power to unitize.

To amplify further the powers of the lessee specified in most leases would seem to be both unnecessary and unwise. Economic factors are recognized by the Conservation Act in the proper interest of the industry. Similar cognizance in the interest of the lessor rather than that of the royalty buyer, a knowing purchaser of a most speculative interest without active responsibility, may also be in the interest of the industry and the public.

It might be said that perhaps the most significant and maybe most far-reaching indication of the majority opinion is the application of one of the prescription doctrines, that of acknowledgment with express and clear intent to interrupt and that of clear intent to extend the life of a servitude. The policy of holding the application of these doctrines to a minimum in royalty prescription as has been done in servitude is most heartening. When other parallels are advanced, as well they may be, as for example to interruption by user, by second production within ten years of exhaustion of first strike, the court's reaction will indeed be interesting.[2]

2. See Note, 16 TUL. L. REV. 154 (1941). Also see Jones, *Non-Participating Royalty*, 26 TEXAS L. REV. 569 (1948). Also see Note, 4 LOYOLA L. REV. 194 (1948), and Moses, *The Prescriptibility of Royalties in Louisiana*, 15 TUL. L. REV. 516 (1940).

In *Amos v. Waggoner*[3] plaintiff purchased a tract of land in which the vendor retained one-half of the minerals. He also retained the full power to lease. Nonetheless plaintiff granted a lease to the defendant, a broker. The vendor of the land learned of the transaction though it had not been recorded, notified the broker that the landowner had no power to lease and returned the cash paid. After the expiration of the servitude retained by the vendor of the land, the defendant recorded his lease instrument and deposited a check for delay rentals, which was returned. Suit was filed for failure to pay delay rentals. The court decided that the lease was invalid and that defendant had recognized it to be by accepting the check in return for the cash payment. The lease was cancelled and award for attorney's fees confirmed.

The theory of the defense was interesting, namely, that since the lessor could not give possession, during the life of the outstanding servitude and leasing right, the obligation was in full force and effect, but its operation merely suspended. Thus, no delay rentals were due until the servitude prescribed whereupon lessee promptly recorded the lease and paid the rentals.

The court pointed out that the decisions recognizing a suspension were clearly distinguishable as they dealt with situations where suit had been filed by lessee and successfully pursued.

Herein, not only was the lessor without power to lease but defendant had acquiesced to the invalidity of the lease by accepting though not cashing the check which covered the initial payment. Also, the court stated that the payment was bonus and not delay rental as claimed by defendant.

In *Johnson v. Houston Oil Company of Texas*[4] a sublessee sued to have his lease declared in effect and to enjoin interference with his operations. A clause in the sublease provided that in absence of production or drilling, a reworking operation must be in existence on a certain date or reversion of the sublease would occur. Thus, the case turned on the factual question of whether or not reworking of a plugged hole was actually in progress on the critical date and was begun and continued in good faith. The court found the trial judge to have been correct

3. 229 La. 134, 85 So.2d 58 (1956).
4. 229 La. 446, 86 So.2d 97 (1956).

in finding in his evaluation of the evidence that this was the case.

A salutary rule, that the trial judge's finding of fact may usually be relied upon, was followed. That the sublessor had materially important reasons for desiring cancellation appeared and may have further influenced the court to depend upon the trial judge's conclusions.[5]

In *Nunley v. Shell Oil Company*[6] the sole question presented in this chapter of the litigation is whether or not attorney's fees under a special statute should be allowed for a partial cancellation. After review of jurisprudence with but a federal decision in clear conflict, the fees were allowed. A concurring Justice felt that the question turned upon whether or not the statute was penal requiring strict construction or compensatory for expenditure not otherwise recoverable. He adjudged the latter to be the intent of the statute.

The decision seems eminently correct, salutary, and within the bounds of reasonable statutory interpretation. The statute as applied seems to be a useful deterrent against negligence or indifference by the party primarily responsible.[7]

In *Childs v. Washington*[8] a landowner sought to have a servitude declared extinguished by prescription of non-user. The servitude had been created in 1937. In 1941 the landowner had acknowledged the servitude with intent to interrupt prescription. At no time was any land actually covered by the servitude drilled. However, in 1950, while the servitude was still alive by virtue of its interruption by acknowledgment, the Commissioner of Conservation issued orders including part of the land burdened by the servitude in units previously established. Thereafter, shares of production from the unit were allocated to the servitude owners.

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5. For a discussion of what constitutes reworking operations within the meaning of lease provisions, see Braly, *Problems Presented by Operations During the Primary Term of an Oil and Gas Lease*, SIXTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 189, 226-228 (Southwestern Legal Foundation 1955). Also see Note, 32 TEXAS L. REV. 240 (1953), which discusses the case of Rogers v. Osborn, 2 Oil & Gas Reporter 304 and 1439 (Tex. Sup. Ct. 1953), pointing out that reworking operations commenced after the primary term will not extend the lease.

6. 229 La. 349, 86 So.2d 62 (1956).

7. See 4 Oil and Gas Reporter 242 for discussion notes regarding the substantive law in this case.

8. 229 La. 869, 87 So.2d 111 (1956).

There was no question but that the servitude covering that part of the land within the unit was preserved under clear language of the Conservation Act. The issue was regarding the servitude on land lying outside of the unit which was alleged to have also been preserved under the indivisibility of servitude theory. The court decided that since the landowner and servitude owner could by contract divide the servitude, the Commissioner of Conservation acting for the state could do likewise.

This decision should put to rest some troublesome questions that have been breeders of discontent with the conservation program. That an unused servitude covering a large tract should be maintained indefinitely by virtue of a part of the land in a unit appeared inequitable and impractical under the purposes of the Conservation Act. The technical theory of indivisibility of servitude was a slender and unforeseen and unintended corollary. The result achieved here is just and follows the true purpose of the Code and the act. The flexibility of the civil law, enabling adjustment to changed conditions, social, economic or scientific, was commented upon by the Chief Justice, author of this opinion. In *Elson v. Mathewes*,[9] and in this case, the court has again demonstrated the art of creation in the best interests of individual and state-wide rules for the orderly development of one of the most important endeavors of Louisiana.

In *Boddie v. Drewett*[10] twelve acres of land burdened by a servitude were included in a drilling unit ordered by the Commissioner of Conservation. The first well drilled was unproductive and was abandoned. Another permit was secured from the Commissioner that a well might be drilled off center of the unit. Production was secured. This case is an action for a declaratory judgment to determine whether the servitude was interrupted or suspended.

The court found that the dry hole drilled within the unit but not on the land burdened by the servitude did not interrupt prescription on the servitude but that the servitude was suspended by the obstacle of the Commissioner's drilling unit order until the unsuccessful well was plugged and abandoned. Thus, the servitude had not prescribed before the second, successful well was drilled, which did interrupt prescription of the servitude.

9. 224 La. 417, 69 So.2d 734 (1954).
10. 229 La. 1017, 87 So.2d 516 (1956).

Since the idea of user of servitude within a unit though not on land covered by the servitude is predicated on production from the land, it seems entirely logical that an unproductive well in the unit would not constitute an interruption of prescription. It is also logical under the servitude theory that suspension by obstacle should result if user is impossible because of the Commissioner's drilling unit order.

In *Jumonville Pipe & Machinery Co. v. Federal Land Bank of New Orleans*,[11] certain lands were sold and one-half of the minerals reserved, thus creating a servitude. Orders of the Commissioner of Conservation included portions of the land burdened with the servitude within a unit from which production was secured during the life of the servitude. The question presented was whether this production from the unit maintained the servitude upon the land outside of the unit. The court held that it did not do so.

This case presented in essence the same question as that posed in *Childs v. Washington*,[12] and the decision is grounded upon the reasoning of that case. Again, the court held that production within the unit will hold the servitude on undrilled lands within the unit but not upon undrilled lands outside of the unit.

In *Viator v. Haynesville Mercantile Co.*[13] a landowner sold a royalty interest in his land without searching rights. Eight years later he leased the land. The lease authorized pooling of the land. The next year a producing gas well was completed but shut in for lack of market. More than ten years from the royalty sale, a market became available and gas was produced. Prior to ten years from the royalty sale, lessee had created a unit containing part of the land covered by the royalty interest but other leased land was comprehended in the unit for which authorization was lacking, rendering the unit invalid. This defect was not cured until after ten years from the date of the royalty sale. There having been no production in commercial quantities from a legally valid unit during the ten years following the royalty sale, the royalty owner's right was held to have prescribed. Attorneys' fees under a statute dealing with cancellation of a lease were not allowed as the statute, being punitive, had to be strictly construed.

11. 230 La. 41, 87 So.2d 721 (1956).
12. 229 La. 869, 87 So.2d 111 (1956).
13. 230 La. 132, 88 So.2d 1 (1956).

The reasoning of this case tracks a previous decision dealing with servitude and in both situations the validity of the unit rules as to land in the unit though not drilled. The physical actualities seem to be denied but terminal points for these prescriptions need to be fixed with certainty and doubtless the decisions are wise and in the public interest. It is interesting to note that again prescription on royalty is discussed as one that may be "interrupted." If the body of law on interruption and suspension is to be applied, many problems may arise in this connection.

In *LeBlanc v. Haynesville Mercantile Co.*[14] landowners sold royalty, retaining leasing rights on March 19, 1940. On February 16, 1945, landowners leased. The instrument contained a clause permitting lessee to pay certain sums instead of royalty in the event a gas well was brought in and had to be shut in for lack of market. Power to unitize was also granted to the lessee. On February 13, 1950, lessee exercised the right to unitize and part of the land covered by the royalty in question was combined with land upon which a gas well had previously been successfully drilled but had been shut in for lack of market. In lieu payments were made until January 18, 1951, when the well was put into production. Landowners insisted that the royalty had expired by lapse of ten years. The court held that prescription had not run. A well, capable of producing in commercial quantities and within a valid unit of which the land covered by the royalty was a part, maintained the royalty. These incidents happened within ten years from the sale of the royalty. The fact that the well was not put into production until after the original ten-year period was provided for in the lease and did not affect the legal life of the royalty.

It would appear that this decision is logically in line with decisions dealing with servitude and unitization, cited therein.[15] It is interesting and somewhat strange that it was argued by landowners that the royalty owners not having agreed to the unitization clause of the lease could not profit thereby when a royalty sale of this nature is marked by the utter lack of power in the royalty buyer to lease. The court again explained and emphasized the nature of the contract of sale of royalty as de-

14. 230 La. 299, 88 So.2d 377 (1956).
15. Union Oil Co. of California v. Touchet, 229 La. 316, 86 So.2d 50 (1956); Sohio Petroleum Co. v. V. S. & P. R. R., 222 La. 383, 62 So.2d 615 (1952).

cided in the foundation case of *Vincent v. Bullock.*[16] It should again be emphasized that the court used the word "interrupted" with regard to this type of royalty while reiterating the doctrine that the contract of sale depends upon the happening within ten years of the future uncertain event of production. The question of whether the entire royalty was preserved or only that upon the land included in the unit was improperly raised and could not be passed upon. Thus, another important point is left for future settlement.

In *Southwest Gas Producing Co. v. Hattie Brothers*[17] a landowner claimed a larger percentage of royalty on the ground that when certain mineral deeds were signed they thought they were dealing only with interests inherited from grandparents and were unaware that their father from whom they also inherited had owned a part. The court decided that the words of the deed, "all of his rights, title and interest," ruled regardless of what understanding the sellers had in regard to the sources of their ownership.

The court declared the issue to be one of fact as to what had been sold and clearly it was *all* of the interest. Moreover, it appeared that the vendors believed that they owned *all,* but from their grandfather only and not from two sources. The rule was set forth that parties to a contract may have an instrument corrected that it may express the true intent of the parties. An extended list of authorities were cited in suppose of this doctrine. However, the burden of proof here was not sustained to show that the intent was other than that expressed in the instruments.

16. 192 La. 1, 187 So. 35 (1939).
17. 230 La. 339, 88 So.2d 649 (1956).