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Mineral Rights - Improper Payment of Delay Rentals - After-Acquired Title - Assumption of Vendor's Obligations by Vendee

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pany to its policy holders. Such dividends are not taxed as ordinary income, but rather reduce the taxpayer's investment in the policy.[30] The effect of this special treatment would seem to encourage the furnishing of venture capital to insurance companies for reinvestment by them, for an insurance company will have greater freedom to reinvest premiums when it is not obligated to pay a fixed return to its policy holders. Therefore, the special treatment of insurance company dividends appears to be in accord with the major purpose of the capital gains provisions, which is to encourage the free flow of investment capital.[31] Thus it would seem that a gain on the sale of an annuity or an endowment policy prior to its maturity should be accorded capital gains treatment where the policy holder has furnished the insurance company with venture capital. The mere fact that a particular policy is an endowment or an annuity should not be controlling in itself. In *Phillips*, taxpayer purchased term life insurance of a stipulated amount plus a promise to pay a fixed future sum, the net cost of these rights being determined by the company's profits. It seems that his purchase is like an investment in the insurance company, and that his position is analogous to that of an owner. But in *Arnfeld* the amount of cash surrender value and term insurance, and the sum to be applied to the future annuity all depended upon the fixed rate of return on the deposit made under the contract. The purchaser of this type of contract is in a position similar to that of a creditor of the insurance company, for the gain on disposal of his policy is a realization of an accrued return allowed for the use of money deposited with the company. Thus it seems that the instant cases are distinguishable, and that the decision in each is sound.[32]

Charles B. Sklar

MINERAL RIGHTS — IMPROPER PAYMENT OF DELAY RENTALS — AFTER-ACQUIRED TITLE — ASSUMPTION OF VENDOR'S OBLIGATIONS BY VENDEE

Landowner, owning only one-fourth of the minerals, executed a mineral lease to defendants' predecessor in title. Although

30. See note 28 *supra*.

31. S. Rep. No. 1631, 77th Cong., 2d Sess. 49, 50 (1942); S. Rep. No. 1567, 75th Cong., 3d Sess. 6 (1938); H.R. Rep. No. 2333, 77th Cong., 2d Sess. 29 (1942).

32. However, since life insurance and annuity contracts have been held to be in the same class as bonds, it could be argued that a contrary result could have been reached in the *Arnfeld* case. See text accompanying notes 20-22 *supra*.

the lease was not expressly limited to cover only a one-fourth interest, delay rentals were paid on that basis, and the lessor agreed in a special clause that any additional interests thereafter acquired in the leased premises would be subject to the lease. It was also specially agreed that all conditions in the lease would bind the parties' successors or assigns. Landowner sold the property and his one-fourth mineral interest to plaintiff. Believing that the original lease had expired due to improper payment of delay rentals, plaintiff granted a second lease to a third person on the entire mineral interest, and production was obtained. Defendant had timely deposited a delay rental proportionate to plaintiff's increased mineral ownership subsequent to the prescriptive return of the outstanding three-fourths interest to the land. Six months later, after granting the second lease, plaintiff refused the deposit. Plaintiff brought suit for a declaratory judgment upholding this second lease as to the entirety of the minerals. Defendant claimed that the first lease was in force not only as to one-fourth of the minerals, but also as to the other three-fourths because of the doctrine of after-acquired title and the additional interest clause of the lease contract. The district court held that defendant's lease was valid as to the one-fourth mineral interest owned by the lessor at the time the lease was granted and plaintiff's lease was valid as to the remaining three-fourths of the minerals. On appeal, *held*, affirmed. Plaintiff would not be heard to say that the delay rentals on defendant's lease were improperly paid because of plaintiff's delay in rejecting the payment. The doctrine of after-acquired title was not applicable because defendant's lessor had not purported to lease more than he owned. The original lessor's obligation to lease any additional interests he might acquire was a personal obligation not binding upon a subsequent purchaser of the land. *Calhoun v. Gulf Refining Co.*, 235 La. 494, 104 So.2d 547 (1958).

This case presents three distinct problems. The first of these is the forfeiture of leases for improper payment of delay rentals. There is a very strict obligation to make such payments to the proper party within the stipulated time and without underpayment in order to avoid forfeiture of a lease.[1] However, a lessor will not be heard to complain of late payment of a delay

1. Atlantic Refining Co. v. Shell Oil Co., 217 La. 576, 46 So.2d 907 (1950) (payment to the wrong person made on the basis of the public records forfeited the lease); LeRosen v. North Central Texas Oil Co., 169 La. 973, 126 So. 442 (1930) (depositing payment to the joint account of the lessor and his wife for-

rental where he had accepted the payment when offered and allowed the lessee to develop.[2] The court has also refused to declare a lease forfeited where the amount of the payment was delivered to Western Union on the day specified and transmitted the next day.[3] When there is a mutual mistake as to the amount due, the lessee must be informed of the mistake and allowed to pay the amount due.[4]

In the instant case, plaintiff was estopped by the delay of six months to assert that an overpayment had forfeited defendant's lease. If defendant had been given early notice, he might have tendered the proper sum.[5] It is questionable if overpayment would have been held to forfeit the lease even if the court had found no estoppel.[6]

The second problem raised in this case concerned defendant's unsuccessful contention that his lease included the entirety of the mineral rights under the doctrine of after-acquired title. This doctrine is not expressly stated in the Civil Code, but was judicially derived as a means of enforcing the warranty against eviction from the thing sold.[7] When a person purports to sell property he does not own and later acquires valid title, that title inures to the benefit of his vendee. Although the doctrine was first applied in cases involving the sale of corporeal property,[8] it has since been extended to cover the sale of a greater

feited the lease); Dickerson v. Texana Oil and Refining Co., 147 La. 341, 84 So. 896 (1920); Rowe v. Atlas Oil Co., 147 La. 37, 84 So. 485 (1920); Jennings-Heywood Oil Syndicate v. Houssiere Latreille Oil Co., 119 La. 793, 44 So. 481 (1907).

2. Dellinger v. Smith, 142 La. 1009, 77 So. 947 (1918).

3. Baker v. Potter, 223 La. 274, 65 So.2d 598 (1952).

4. Jones v. Southern Natural Gas Co., 213 La. 1051, 36 So.2d 34 (1948).

5. It seems that the court's finding of an estoppel is correct. One may be estopped by his silence if he had a duty to speak and if another acts or fails to act because of that silence. E. C. Taylor Co. v. New York and Cuba Mail S.S. Co., 159 La. 381, 105 So.379 (1925). One cannot stand by silently and allow himself to be damaged when by his acts or words he could have prevented the damage. Swain v. Louisiana Light and Power Co., 128 So. 538 (La. App. 1930).

6. However, there would seem to be some merit to the contention that such an overpayment would cause injury since the amount was increased in proportion to plaintiff's increased mineral interest. Payment on that basis would seem to indicate that the parties considered the newly acquired minerals as subject to the lease.

7. White v. Hodges, 201 La. 1, 9 So.2d 433 (1942); Brewer v. New Orleans Land Co., 154 La. 446, 97 So. 605 (1923); Wolf v. Carter, 131 La. 667, 60 So. 52 (1912); New Orleans v. Riddell, 113 La. 1051, 37 So. 966 (1905); Lee v. Ferguson, 5 La. Ann. 532 (1850); Stokes v. Shackleford, 12 La. 170 (1838); Feen v. Rils, 9 La. 95 (1836); Woods v. Kimbal, 5 Mart.(N.S.) 246 (La. 1826); McGuire v. Amelung, 12 Mart.(O.S.) 649 (La. 1823); Bonin v. Eyssaline, 12 Mart.(O.S.) 185 (La. 1822). See Comment, 18 LOUISIANA LAW REVIEW 312 (1958).

8. Bonin v. Eyssaline, 12 Mart.(O.S.) 185 (La. 1822). The court relied on a

mineral interest than was actually owned[9] as well as conventional and mineral leases.[10] The doctrine, as generally stated, comes into play only when the vendor (or lessor) himself acquires valid title to the property he purported to sell (or lease). However, it has been applied to cases where the vendor died, and his heirs, who were personally liable for their ancestor's obligations, later acquired valid title.[11] The application of the doctrine in the field of mineral rights raised the question of whether the purchaser of land from one who had granted a mineral servitude or lease might be bound by his vendor's warranties in a previous agreement of lease or sale. There appears to be only one case in which this problem was considered.[12] The landowner's vendee was declared to be the owner of the minerals when the outstanding mineral servitude prescribed. The rationale of the court's holding was that public policy would not permit an outstanding mineral interest for a period greater than ten years.[13] The court indicated by way of dictum that the after-acquired title doctrine would have been applicable had the owner not sold the land. It

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principle stated in LeClercq's work on Roman law. 5 LECLERCQ, DROIT ROMAIN 279.

9. Bates v. Monzingo, 221 La. 479, 59 So.2d 693 (1952); McDonald v. Richard, 203 La. 155, 13 So.2d 712 (1943); White v. Hodges, 201 La. 1, 9 So.2d 433 (1942).

The doctrine has been held inapplicable, however, to sales of minerals by the landowner who does not own them to the real mineral owner because of the public policy against having minerals outstanding for longer than ten years in the absence of interruption of prescription. Long-Bell Lumber Co. v. Granger, 222 La. 670, 63 So.2d 420 (1952).

See Comment, 18 LOUISIANA LAW REVIEW 312 (1958), where it was argued that the public policy would not be violated by its application to such a transaction since the landowner could accomplish the same thing by acknowledgment.

10. The same reasons for the rule in sales cases are present here, because the lessor warrants the lessee against eviction from the thing leased. Jackson v. United Gas Public Service Co., 196 La. 1, 198 So. 633 (1940); Gayosa Co. v. Arkansas Natural Gas Corp., 176 La. 333, 145 So. 677 (1933); St. Landry Oil and Gas Co. v. Neal, 166 La. 799, 118 So. 24 (1928).

11. White v. Hodges, 201 La. 1, 9 So.2d 433 (1942); Stokes v. Shackleford, 12 La. 170 (1838). In both of these cases the heir acquired his interest in the property by inheritance from the vendor. The basis for this holding is the fact that heirs accepting unconditionally are liable for all the obligations of the decedent. See LA. CIVIL CODE art. 1056 (1870). Even if the heir accepts with benefit of inventory he is liable for the obligations of the deceased up to the amount of the assets. See LA. CIVIL CODE art. 1032 (1870).

12. McDonald v. Richard, 203 La. 155, 13 So.2d 712 (1943). In this case the landowner sold a greater mineral interest than he owned, and subsequently sold the land to a third party. When the outstanding mineral servitude prescribed, the purchaser of the minerals claimed ownership, contending that there had been a valid sale of a reversionary interest.

13. Language in this case indicated that there could be a sale of a "reversionary interest" under some circumstances. The case of Hicks v. Clark, 225 La. 133, 72 So.2d 322 (1954) finally settled that issue in holding that any sale of a reversionary interest would offend the public policy against having mineral rights outstanding for longer than ten years in the absence of interruption of prescription.

has been assumed by one writer that the doctrine would not apply to mineral leases where the lessor had sold the land before the minerals reverted,[14] but there appear to be no cases on this point.

In the instant case, defendant contended that when the outstanding servitude on three-fourths of the minerals prescribed, those minerals became included in its lease by the doctrine of after-acquired title although the original lessor no longer owned the land. It was argued that Article 2015[15] supports this proposition since it provides that servitudes and leases are real obligations which accompany the land into the hands of whoever acquires it. The court held the doctrine inapplicable on the grounds that defendant's lessor did not purport to lease all of the minerals. The inclusion of a clause in the lease to the effect that the lessor would lease any additional mineral rights he acquired in the land indicated that there were outstanding minerals. Although not given as a reason for the court's holding, the amount paid as delay rentals showed that the parties regarded the lease as including only one-fourth of the minerals.[16] It was not necessary for the court to consider defendant's contention that the doctrine of after-acquired title would apply where the original lessor had sold the land prior to the time that the mineral servitude prescribed.

The final problem raised in this case concerned the effect of the clause requiring the lessor to include in the lease any additional mineral rights in the land which he might thereafter acquire, and purporting to bind his successors and assigns. Such a clause has been commonly found in leases for some time, but this is the first Louisiana Supreme Court case interpreting it.[17] The court indicated that such a clause would be binding on the orig-

14. Comment, 18 LOUISIANA LAW REVIEW 312, 319 (1958).

15. LA. CIVIL CODE art. 2015 (1870): "Not only servitudes, but leases and all other rights, which the owner had imposed on his land before the alienation of the soil, form real obligations which accompany it in the hands of the person who acquires it, although he have made no stipulation on the subject, or they be not mentioned in the act of transfer." Since the after-acquired title doctrine was held to be inapplicable, the court did not decide on the merits of defendant's argument. Article 2015 was also cited by defendant in reference to the additional interest contract clause. For the court's ruling on this argument, see page 543 *infra*. It appears a similar conclusion would have been reached here had the court decided this issue.

16. Rentals were set at one dollar per acre of minerals. The lease covered 298.19 acres. Delay rentals were paid to the original lessor at $74.55 or one-fourth of the rental payable on the whole tract.

17. A federal district court applying Louisiana law held a similar clause binding on the lessor and his heir. Dees v. Hunt Oil Co., 123 F. Supp. 58 (W. D. La. 1954).

inal lessor, since it imposes only a conditional obligation dependent upon the happening of an uncertain event.[18] The clause also presents the question of whether the obligation, if binding on the original lessor of the land, is also binding on the purchaser of the land. It was argued in the instant case that Civil Code Article 2015[19] would cause subsequent purchasers of the land to be bound by the clause. Several cases interpreting this article contain language to the effect that the vendee assumes all of the vendor's obligations under a prior lease agreement, but such statements were not essential to the holdings.[20] On the other hand, it has been squarely held that the vendee does not assume all of the lessor's obligations under the lease, but merely takes the land subject to the lease.[21] This latter holding seems to be the proper interpretation. On its face Article 2015 seems to refer only to servitudes and leases which the owner has placed upon the land and not to any incidental obligations which he may have assumed.

Defendant contended that the outstanding three-fourths mineral interest became included in its lease by virtue of this lease provision and Article 2015. The court held that the clause established an obligation depending on the acquisition of additional mineral interests in the land *by the original lessor* during the existence of the lease and fell when the situation did not materialize. The implication is that had the original lessor continued to own the land, he would have been bound by the lease provision, but the plaintiff by purchasing the land subject to the lease did not assume the lessor's obligation under the clause. A mineral lease is not a *jus in re* but is rather a *jus ad rem*, a

18. LA. CIVIL CODE art. 2021 (1870): "Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happen, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition."

Id. art. 2043: "The obligation contracted on a suspensive condition, is that which depends, either on a future and uncertain event, or on an event which has actually taken place, without its being yet known to the parties.

"In the former case, the obligation can not be executed till after the event; in the latter, the obligation has its effect from the day on which it was contracted, but it can not be enforced until the event be known."

19. See note 15 *supra*.

20. Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate, 115 La. 107, 38 So. 932 (1905) (all that was at issue was whether the land was still subject to a prior lease); Walker v. Vanwinkle, 8 Mart.(N.S.) 560 (La. 1830) (all that was at issue was whether the vendee could exercise the rights of a lessor under the statutory eviction procedure).

21. Ernest A. Carrere's Sons v. Levy, 191 So. 747 (La. App. 1939). The lessor had agreed to pay a commission to the broker in the event the lessee exercised his option to renew the lease. The lessor sold the property and the lessee later renewed. The purchaser of the property was not required to pay the commission.

right upon thing. The court's meaning in the use of this term is shown by its opinion in *Reagan v. Murphy*[22] where it was held that a mineral lease creates only personal rights. Defendant's right to after-acquired minerals being personal against the lessor could not be asserted against the plaintiff, the new landowner. The court found nothing in Civil Code Article 2015 which imposed such an obligation on the vendor.

In summary, the instant case indicates that there is a duty on the part of a mineral lessor to inform the lessee within a reasonable time of an error in payment of delay rentals even where that error is unilateral on the part of the lessee. It shows that the doctrine of after-acquired title will not be applied where the language of the contract or the surrounding circumstances show that the lessee has already received everything for which he bargained. It indicates that lease clauses binding the lessor and his successors to include future-acquired minerals in the lease will be given effect as between the parties to the lease, but squarely holds that they have no effect on future purchasers of the land.

William M. Nolen

MUNICIPAL ZONING ORDINANCES — LAX ENFORCEMENT A BAR TO INJUNCTIVE RELIEF

The City of New Orleans, seeking removal of artifices in violation of an ordinance passed for the preservation of the "architectural and historical value"[1] of the Vieux Carré in New Orleans, sought a mandatory injunction against the defendant restaurant owner, who had previously been fined for the same violation.[2] The city had made no attempt to enjoin others for similar violations. In addition, some violators were fined while still others went totally unmolested.[3] The lower court issued the injunction. On rehearing on appeal the Supreme Court *held*, reversed. Failure of the city to prosecute others did not deny equal protection of the law under the Federal Constitution be-

22. 235 La. 529, 105 So.2d 210 (La. 1958), 19 LOUISIANA LAW REVIEW 207.

1. LA. CONST. art. XIV, § 22A, implemented in New Orleans City Code, §§ 1-6 (1956). See also New Orleans v. Impastato, 198 La. 206, 3 So.2d 559 (1941) (legislation held constitutional).

2. New Orleans v. Levy, 223 La. 14, 64 So.2d 798 (1953).

3. The city had not attempted to enjoin other violators of the zoning ordinance, and, in addition, permits had been issued to others in the zoned area, which permits allowed construction of artifices which otherwise would have violated the ordinance. Defendant had been denied such a permit.