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Royalty Per Se - Who Benefits Upon Its Prescription

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Another change in the present law will be a broadening of intervention to include Louisiana's present third opposition.[22] Under the proposed Code of Civil Procedure an intervener may join with the plaintiff "in demanding the same or similar relief against the defendant," unite with the defendant "in resisting the plaintiff's demand," or oppose both the plaintiff and defendant.[23] These rules will probably provide a more definite test of the interest required to intervene without taking away the trial judge's right to use his discretion in certain cases.[24]

The adoption of the federal rule allowing the intervention to stand even though the main demand has been dismissed will effect a legislative overruling of cases which the court found it necessary to distinguish in the instant case. At the same time it will very appropriately result in the legislative adoption of the rule of the instant case without retaining the restriction imposed by the court.

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ROYALTY PER SE — WHO BENEFITS UPON ITS PRESCRIPTION

In 1943, Niblett Farms, owner of a tract of land with the minerals thereon, conveyed a 1/24th royalty interest to various persons. In 1948, Niblett Farms sold the land to the defendant Broussard, retaining a 3/32nd royalty interest which included the outstanding 1/24th royalty interest, and reserving 1/2 of all the minerals. The act of sale stipulated that in the event of production 2/3 of the total royalty interest was payable out of the mineral interests held by the vendor and 1/3 out of that held by

intervention, and there need be no independent ground of federal jurisdiction." *Id.* paragraph 24.07 at 32. Intervention of right is provided for the case in which a person will be "adversely affected by a distribution or other disposition of property in the custody of the court." *Id.* paragraph 24.08 at 35; paragraph 24.09 at 45. An applicant may be permitted to intervene if his claim has some question of law or fact in common with the main suit. *Id.* paragraph 24.10 at 59. The court exercises its discretion in these cases to determine whether the intervention will unduly delay or prejudice the adjudication. As regards the problem considered in the instant case, under the federal rules, the intervention does not fall with the dismissal of the plaintiff's action. Federal Rule 41(a)(2). This source was partially relied on for the rule of the Louisiana Law Institute in the Proposed Louisiana Code of Civil Procedure.

22. Proposed Louisiana Code of Civil Procedure art. 1092; LA. CODE OF PRACTICE art. 396 (1870), now LA. R.S. 13:396 (1950).

23. Proposed Louisiana Code of Civil Procedure art. 1091.

24. *Id.* art. 1091, comment (a).

the vendee. The act further provided that the 1/24th royalty would revert to its grantor upon its termination. Defendants designated as the "Hawthorne Group" now hold all mineral interests formerly owned by Niblett Farms. Plaintiff completed a producing well on the property in 1955 and instituted a concursus proceeding to determine the disposition of funds accruing to the disputed 1/24th royalty interest. It was conceded that ten years elapsed without production since the sale of the 1/24th royalty interest. Broussard contended that as owner of the land he was entitled to the funds. The "Hawthorne Group" claimed the funds, arguing that reversionary royalty rights were legal and even if not, that they were entitled to either: (a) 2/3 of the funds on the premise that the interest must be divided in proportion to the burden of payment imposed on the parties by their agreement;[1] or (b) 1/2 of the funds on the premise that the interest must be divided in proportion to the mineral ownership. The trial court held that there could be no reversionary royalty rights in Louisiana and apportioned the fund in proportion to the burden of payment. On appeal, the Supreme Court on original hearing, *held,* reversed as to the distribution of the fund. Broussard, as owner of the land was entitled to the full interest. On first rehearing, *held,* reversed. The 1/24th royalty interest upon termination passed out of the picture and left the "Hawthorne Group" with a full 3/32nd royalty interest and therefore they were entitled to the funds. On second rehearing, *held,* reversed. The 1/24th royalty was a charge on the entire mineral estate, and the fund must therefore be divided in proportion to the mineral ownership of the parties. *Union Oil and Gas Co. v. Broussard,* 112 So.2d 96 (La. 1959).

Louisiana recognizes various interests in connection with minerals underneath the surface of the soil. The instant case deals with two of these interests — the "mineral servitude" and the so-called "royalty per se." The "mineral servitude" interest arises under sale or reservation of the minerals by the landowner when he sells the land. It is in the nature of a servitude granting the owner thereof the right to explore for and extract minerals from the land subject thereto.[2] It is well-settled law that this servitude is subject to the ten-year prescription liberandi

1. Pertinent portions of the agreement are quoted in Union Oil & Gas Corp. v. Broussard, 112 So.2d 96, 97 (La. 1959).

2. Horn v. Skelly Oil Co., 224 La. 709, 70 So.2d 657 (1954); Wemple v. Nabors Oil and Gas Co., 154 La. 483, 97 So. 666 (1923); Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922).

causa for nonuse.[3] In the absence of interruption or suspension,[4] this liberative prescription extinguishes the servitude; and the mineral rights flowing therefrom are accordingly returned to the land.[5] The second type interest dealt with is of chief concern in this Note. This interest has, among others, been termed "royalty per se,"[6] "landowner's royalty,"[7] and "royalty properly so-called."[8] The term "royalty" in itself is susceptible to diverse application. Thus, Professor Daggett states:

> "It is the price paid for the privilege of exercising the right to explore. If that right is granted by a lease contract, it is the whole or part of the consideration for the lease. If that right is granted or reserved by a sale, it is the consideration in part or whole of the sale. Royalty in itself cannot be used to designate the fundamental right which is being dealt with but only to indicate the *percentage*, the *price*, the *rent*, the *consideration* attached to or proceeding out of the right or that may proceed from it during its existence. The royalty depends upon the continued existence of the right to which it is an appendage."[9] (Emphasis added.)

This description has been approved by the Louisiana Supreme Court.[10] Thus, it seems clear that the nature and type of royalty being dealt with must be dependent upon the contract in which it appears. In connection with the royalty here concerned, hereafter designated as royalty per se, the same writer above stated in 1939 that "If the word is used in the contract to indicate a passive interest in possible production, without the leasing or

3. LA. CIVIL CODE arts. 783, 789 (1870); Palmer Corp. v. Moore, 171 La. 774, 132 So. 229 (1930), and authorities there cited. See also DAGGETT, LOUISIANA MINERAL RIGHTS 53 (rev. ed. 1949).

4. Prescription can be interrupted by user. Taylor v. Dunn, 233 La. 617, 97 So.2d 415 (1957) (user by whom); Mays v. Hansboro, 222 La. 557, 64 So.2d 232 (1953) (non-contiguous tracts); McMurrey v. Gray, 216 La. 904, 45 So.2d 73 (1949) (good faith user — dry hole). Prescription can also be interrupted by acknowledgment. Union Oil Co. v. Touchet, 229 La. 316, 86 So.2d 50 (1956); Wise v. Watkins, 222 La. 493, 62 So.2d 653 (1952). As to the possibility of interruption by acceptance of benefits or ratification, see Goree v. Sanders, 203 La. 859, 14 So.2d 744 (1943). For possibility of interruption of prescription by suit, see LA. CIVIL CODE art. 3518 (1870); Perkins v. Long-Bell Petroleum Co., 227 La. 1044, 81 So.2d 389 (1955). For the suspension of prescription, see LA. R.S. 9:5805 (1950); Boddie v. Drewitt, 229 La. 1017, 87 So.2d 516 (1956).

5. LA. CIVIL CODE arts. 789, 3546 (1870); Palmer Corp. v. Moore, 171 La. 774, 132 So. 229 (1930); Lee v. Giauque, 154 La. 491, 97 So. 669 (1923).

6. See the discussion of all three terms in DAGGETT, LOUISIANA MINERAL RIGHTS 258 (rev. ed. 1949).

7. *Ibid.*

8. *Ibid.*

9. *Id.* at 247.

10. Vincent v. Bullock, 192 La. 1, 15, 187 So. 35, 39 (1939).

production privilege usually inherent in the right, *then a new and as yet uninterpreted situation appears upon which the court has not declared itself fully.*"[11] Soon thereafter, however, as pointed out by the Supreme Court,[12] the identical situation referred to by the writer above was presented in *Vincent v. Bullock.*[13] The royalty right there involved was a passive interest in possible production, and the court held that this reservation of the right to share in the proceeds only as distinguished from the right to explore was (1) a "real obligation" which passed with the property into the hands of the present owner;[14] and (2) a real right imposed upon the land subject to the prescription of ten years under the Civil Code. The court further held that the obligation was subject to a suspensive condition, i.e., that the event — production — had to happen within the ten-year period.[15] The distinction between this royalty per se interest and a mineral servitude seems clear under the cases. Unlike the servitude owner, the royalty per se owner does not possess the right of ingress or egress, nor does he have the right of exploration.[16] Indeed, he may not even force the landowner to lease the land for development so as perhaps to realize his expectations.[17] Hence, it can be said that the royalty per se interest merely imparts to its owner a right to share in the production if and when obtained.[18] The court has stated that the royalty right is but an appendage of the right of the mineral owner,[19] and may be granted by either the landowner, or the mineral owner when the minerals have been sold.[20] It is also settled that the royalty

11. DAGGETT, LOUISIANA MINERAL RIGHTS 176 (1939).

12. St. Martin Land Co. v. Pinckney, 212 La. 605, 615, 33 So.2d 169, 172 (1947).

13. Vincent v. Bullock, 192 La. 1, 187 So. 35, 39 (1939).

14. *Ibid.*

15. *Ibid.*

16. The distinction between the two types of interests affecting minerals is now well settled. Strictly speaking, the "mineral right" interest is in the nature of a servitude granting the owner thereof the right to explore for and extract minerals from the land subject thereto; whereas a "royalty" right or interest merely imparts to its owner a right to share in production if and when obtained by the owner or lessee of a mineral right affecting land. Horn v. Skelly Oil Co., 224 La. 709, 70 So.2d 657 (1954); Union Sulphur Co. v. Andrau, 217 La. 662, 47 So.2d 38 (1950).

17. Spiner v. Phillips Petroleum Co., 94 F. Supp. 273 (W.D. La. 1950).

18. Vincent v. Bullock, 192 La. 1, 187 So. 35 (1939).

19. "Of these two rights it has been correctly said by one of the authorities on the oil and gas law of this state that the royalty right is but an appendage of the right of the mineral owner." Continental Oil Co. v. Landry, 215 La. 518, 526, 41 So.2d 73, 75 (1949). See also Wier v. Glassel, 216 La. 828, 44 So.2d 882 (1950).

20. The owner of land under the usual form of lease is entitled to a share of

right is an inferior and lesser right than the mineral servitude.[21]

Two new and as yet uninterpreted situations faced the court in the instant case. First, should parties be allowed to deal in reversionary royalty rights? Second, who is to benefit and to what extent upon prescription of the royalty per se — the landowner or the mineral servitude owner? These two issues will be discussed in the order presented.

The court had less difficulty in disposing of the first issue. It pointed out that in *Hicks v. Clark*[22] it had refused to recognize and give effect to the reservation of a reversionary right in a mineral right or servitude. The reason assigned for the rejection of reversionary interests in mineral rights in the *Hicks* case was that it "would cause the land to be burdened with a mineral servitude for a longer period than 10 years without user, contrary to the public policy of this state that the right to explore for oil, gas and other minerals in the absence of use reverts to the land in a period of 10 years."[23] The court in the instant case reiterated the fact that the royalty right was but an appendage to the mineral servitude and that the mineral servitude by its nature is superior to the royalty right. They then concluded that: "If the reservation of a reversionary interest in the superior right is contrary to the public policy of this state, it follows that the reservation of the reversion of the inferior right is likewise contrary to public policy."[24] As added emphasis, the court cited an earlier holding[25] to the effect that when royalty prescribes it ceases to exist, and there is nothing to revert. This, in the writer's mind, merits reproduction of the following statement:

> "The Court's observation that there was nothing to 'revert' after prescription had run against the royalty seems

production termed landowner's royalty or *Vincent v. Bullock* royalty. He may alienate a part of his royalty to set up a right in a person not a party to the lease which the owner of the new right loses in the event of failure of production in ten years. The same right may be granted by a mineral owner, and its loss by unsuccessful drilling, which maintains the servitude of the mineral owner, benefits the mineral owner rather than the landowner. Arkansas Fuel Oil Co. v. Sanders, 224 La. 448, 69 So.2d 745 (1953).

21. Humble Oil & Refining Co. v. Guillory, 212 La. 646, 33 So.2d 182 (1947); St. Martin Land Co. v. Pinckney, 212 La. 605, 33 So.2d 182 (1947); Union Sulphur Co. v. Lognion, 212 La. 632, 33 So.2d 178 (1947); Vincent v. Bullock, 192 La. 1, 187 So. 35 (1939).

22. Hicks v. Clark, 225 La. 133, 72 So.2d 322 (1954).

23. *Id.* at 142, 72 So.2d at 325.

24. Union Oil & Gas Corp. v. Broussard, 237 La. 660, 711, 112 So.2d 96, 114 (1959).

25. Arkansas Fuel Oil Co. v. Sanders, 224 La. 448, 69 So.2d 745 (1953).

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."[26]

The second issue proved much more difficult than the first and necessitated five hearings[27] for its final disposition. This was due in part to the difficulty involved in interpreting the pertinent parts of the act of sale between Niblett Farms and Broussard. This deed (after providing that the vendor retained a 3/32nd royalty including an outstanding 1/24th royalty and that the vendor reserved 1/2 of all minerals) further stipulated that: "(c) Two thirds (2/3) of the amount of outstanding royalties hereinabove excepted from this conveyance or a total of 2/32nds of all of the oil, gas and other minerals produced from said land shall be chargeable to and deducted from the rights of the vendor in the land herein described." A recapitulation of the court's various holdings relative to the effect of the above provision will prove helpful. In the original hearing, the Supreme Court interpreted the provision to mean that the 1/24th royalty was meant to be a portion of the 3/32nd royalty reservation. Thus, when the 1/24th royalty prescribed and passed out of the picture, the vendor was left with only a 5/96th royalty; and all funds attributable to the 1/24th royalty went to Broussard as landowner. On first rehearing, the court stressed the fact that parties are to be given utmost freedom of contract. Consequently they held that the above provision meant that the 1/24th royalty was included in the royalty interest chargeable against the vendor's servitude. The court then concluded that when the 1/24th royalty prescribed, it ceased to be a burden on the immovable to which it was attached, namely, the servitude reserved by Niblett Farms. Therefore, the interest which bore the burden of the royalty per se should benefit upon its prescription; and accordingly the fund was given to the mineral owners. On second rehearing, the court after a careful review of all pertinent facts ar-

26. *The Work of the Louisiana Supreme Court for the 1953-1954 Term — Mineral Rights*, 15 LOUISIANA LAW REVIEW 301 (1955).

27. The writer includes the trial court hearing, the hearing in the court of

rived at what seems to be a correct decision. The court held that at the time the 1/24th royalty interest was sold Niblett Farms owned *all* of the minerals and, therefore, the 1/24th royalty became an appendage of *all* of the minerals. Consequently *all* of the minerals were relieved of its charge upon prescription. The stipulation relative to payment of the 1/24th royalty interest was held entirely without effect in the determination of the case. Two reasons were given by the court for this result. *First*, the stipulation was ineffective as to the royalty owners due to the absence of privity of contract. *Second*, the court pointed out that in the event of production prior to the accrual of prescription Niblett could recover only a 3/32nd royalty minus the 1/24th royalty. Hence, to allow Niblett (or its successors) to receive a full 3/32nd royalty after the accrual of prescription would in effect require a recognition of a reversionary right in Niblett as to the 1/24th. This, the court felt, would be against the public policy of the state, and therefore, the provision must be ignored. Thus, the court held that each was to profit in accordance with his mineral ownership, which left Broussard with 1/2 of the funds and the "Hawthorne Group" with 1/2 of the funds.

The court's reasoning relative to the disposition of the funds appears sound. Royalty per se is a right created *out of the mineral estate*[28] and achieves fruition only upon the discovery of minerals. It is an appendage of the right of the mineral owner and is dependent upon the continued existence of the right to which it is appended.[29] It may seem axiomatic that an appended, subsidiary right will, upon termination, revert, accrue, or accrete to the primary right from which it was derived. Indeed, language in an earlier case is in accord with this premise with respect to royalty.[30] Even if it is deemed advisable to adhere to the "passing out of the picture" theory rather than talk in terms of reverting, it is equally clear that the practical effect is to allow benefits resulting from prescribed royalty to return to the

appeal, and the three hearings in the Supreme Court.

28. Vincent v. Bullock, 192 La. 1, 15, 187 So. 35, 39 (1939) quotes DAGGETT, LOUISIANA MINERAL RIGHTS 247 (1939) on this approvingly.

29. See note 19 *supra*.

30. "If that agreement did create or grant a royalty interest in Adler Company it was only a conditional obligation effective in event of production and this obligation lapsed on July 28, 1937. Not being a servitude, no production having been realized, there was nothing to revert to the land owner and the Louisiana Investment Company and its assigns continued to be the sole owners of the whole mineral servitude." Delta Refining Co. v. Bankhead, 225 La. 422, 438, 73 So.2d 302, 308 (1954).

source from which the royalty was derived. The source being established as the mineral estate, it follows that the ultimate recipients will be the owners of the minerals, and not the landowner. This is so because they were burdened by the royalty while alive and of necessity reap the advantages when the burden passes out of the picture. To say that the prescribed royalty right reverts to the owner of the land simply because he is owner of the land would lead to unnatural and inconsistent results. For example, as pointed out by the court, suppose *A* is owner of the land and all minerals, and sells all minerals to *B*. One year later *B* sells royalty per se to *C*. Eight years after the creation of the servitude, a bona fide drilling operation is conducted which results in a dry hole. This drilling would of course interrupt prescription as to the mineral servitude but not as to the royalty per se. Now, ten years after the royalty per se sale, could it logically be said that the royalty would then revert to *A who owns no minerals*? The very creation and continued existence of royalty per se is absolutely dependent on the presence of a mineral estate to which it is appended. Therefore, when there is an independent termination of the royalty per se by reason of prescription, any benefit to be derived due to such termination must inure to the mineral owner because it is the mineral interest which is relieved of the charge, not the land. To rule overwise would in effect be to regrant to the landowner that which he has already sold, viz., all his minerals.

There remains one issue to be decided once it is accepted that only the mineral owners are to benefit upon the prescription of royalty per se. This is the determination of, in what proportion the benefit returns when several persons own the mineral estate against which the royalty was charged. In the absence of contrary agreement between the parties, it would appear elementary that the mineral owners would benefit in accordance with their percentage of mineral ownership. In the instant case, when the royalty was first sold, the owner of the land by reason of ownership of the minerals owed the duty to pay in the event production was realized. When the land was subsequently sold, the mineral estate was equally divided, the vendor reserving 1/2 and the vendee acquiring 1/2. Therefore, the duty of payment on these facts would rest in equal proportion on the vendor and the vendee. However, in the instant case, an agreement was present which affected the burden of payment. Leaving aside possible

questions relating to the interpretation of the agreement, it can be assumed that the "Hawthorne Group" did in fact carry 2/3 of the burden of payment of the 1/24th royalty with Broussard having the remaining 1/3 burden. Under the writer's appreciation of the decision in this respect, the court held the agreement ineffective insofar as the determination of the question of who was to benefit. But, they did not hold the agreement void *ab initio*. To the contrary, the court expressly stated that the parties would have been bound in that respect had production been obtained within the prescriptive period. This seems to present an inconsistency in the court's reasoning. For, if it be said that the benefits must return in proportion to the burden cast on the parties, it could easily be said that the burden here was 2/3 and 1/3 on the "Hawthorne Group" and Broussard respectively, rather than an equal 1/2. Be that as it may, it is submitted that the *burden imposed on the mineral estate* by the royalty as an appended right, as contra-distinguished from the *burden of payment* imposed on the parties by agreement, should be controlling. To be sure, the parties' intentions should be controlling when at all possible. However, when such intent is contrary to the public policy of the state, then that intent must be subordinated. As postulated by the court, to allow the parties to alter the manner of benefits springing from prescribed royalty by simply adopting different burdens of payment would be in effect to recognize reversionary rights. Therefore, it is suggested that any statement made by the court not necessary to the holding and which is inconsistent with this principle should be considered mere obiter dictum. It is submitted that the court in its final opinion rendered a satisfactory and desirable decision. Having already held that reversionary mineral interests in mineral servitudes were prohibited, and being mindful of the fact that royalty was a lesser right than the mineral interest, the court soundly struck down the attempted reversionary royalty interest presented in this case. Next, relying on the well-settled rule that royalty is an appendage to the mineral servitude, the court correctly concluded that, upon its prescription, any benefit as a result thereof must of necessity flow to the owners of the mineral servitude.

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