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Civil Code and Related Subjects: Mineral Rights

George W. Hardy III

title was sustained. It does not necessarily follow from this decision that a demand by the transferee (of the strip unintentionally included in the deed description), before the lapse of thirty years, could not be met successfully by other defenses to prevent him from obtaining the extra strip which was not intended for him in the first place.[8]

Tacking

Another problem involving an "extra strip" of land was dealt with in *Stutson v. McGee*.[9] The defendant pleaded the thirty-year acquisitive prescription against the plaintiff's recorded claim of title. The defendant's own possession was just a little short (29 years and 10 months) but he proposed to supplement this with the additional possession of his predecessor from whom he had purchased the adjacent land. However, while there was chronological continuity in the physical possessions, there was no juridical link or privity between the possessors because the strip in question was not included in the conveyance description. Accordingly, the previous possessor was not the defendant's author in title, and tacking of the possessions was not permitted.[10] With only 49 days left to complete a thirty-year prescription, it could not be much consolation for the defendant to recognize the truth of *lex dura lex*.

MINERAL RIGHTS

*George W. Hardy, III**

Rights of Usufructuary and Naked Owner

The decision rendered in *Gueno v. Medlenka*[1] left many questions unanswered.[2] Fundamentally that decision applied Article 552[3] of the Civil Code governing the rights of a usufructuary in mines and quarries as determinative of the relative rights of a

8. *Cf.* LA. CIVIL CODE arts. 1819, 1842 *et seq.*, 1861, 2494-5, 2589 *et seq.*, 2665 (1870). Also, the possibility of reformation for mutual error, Wilson v. Levy, 234 La. 719, 101 So.2d 214 (1958), and Ker v. Evershed, 41 La. Ann. 15, 6 So. 566 (1889).

9. 241 La. 646, 130 So.2d 403 (1961).

10. LA. CIVIL CODE arts. 3493-4 (1870).

*Associate Professor of Law, Louisiana State University.

1. 238 La. 1081, 117 So.2d 817 (1960).

2. For a discussion of some of the problems raised by *Gueno v. Medlenka*, see 34 TUL. L. REV. 784 (1960) and 20 LOUISIANA LAW REVIEW 773 (1960).

3. LA. CIVIL CODE art. 552 (1870): "The usufructuary has a right to the enjoyment and proceeds of mines and quarries in the land subject to the usufruct,

naked owner and usufructuary to oil and gas underlying land subject to a usufruct. Concluding that the production of oil and gas constitutes a mining operation, the Supreme Court held that the naked owner is entitled to the oil and gas produced from property subject to usufruct when the lease was executed and the production effected subsequent to creation of the usufruct. Further, the court held that the naked owner necessarily has a right to go on the land for the purposes of exploration and production, subject to the right of the usufructuary to indemnification for disturbance of his use of the surface of the land.[4]

The recent decision rendered in *King v. Buffington*[5] follows the earlier case and furnishes an answer to at least one of the questions raised by it. In the more recent case, the naked owner and the usufructuary were both parties to the lease in question, which had been executed subsequent to the creation of the usufruct and signed on behalf of the naked owner by the usufructuary, acting under power of attorney. Defendant, owner of an undivided one-half interest in the property and usufructuary as to the remainder, received and retained the bonus and delay rentals payable under the terms of the lease. Upon refusal by defendant to deliver to plaintiff any part of the bonus or rental money, plaintiff filed an action seeking a declaratory judgment decreeing her to be entitled to a proportionate share of the bonus and delay rental payments and to all future royalties attributable to her undivided interest.

It was conceded by counsel for defendant usufructuary that under the authority of *Gueno v. Medlenka*[6] defendant had no right to share in any production royalties. However, it was urged that the court was bound to apply Articles 544,[7] 545[8] and

if they were actually worked before the commencement of the usufruct; but he has no right to mines and quarries not opened."

4. The court predicated the usufructary's right to indemnification upon the provisions of *id.* art. 601, which prevents the owner from interfering with the usufructary's use of the surface by alteration, demolition, repair, or erection of works and provides that in the event of such interference, the owner shall be bound to make good the losses and damages which may result.

5. 240 La. 955, 126 So.2d 326 (1961).

6. 238 La. 1081, 117 So.2d 817 (1960).

7. LA. CIVIL CODE art. 544 (1870): "All kinds of fruits, natural, cultivated or civil, produced, during the existence of the usufruct, by the things subject to it, belong to the usufructuary."

8. *Id.* art. 545: "Natural fruits are such as are the spontaneous product of the earth; the product and increase of cattle are likewise natural fruits. The fruits, which result from industry bestowed on a piece of ground, are those which are obtained by cultivation. Civil fruits are rents of real property, the interest of money, and annuities. All other kinds of revenue or income derived from property by the operation of the law or private agreement, are civil fruits."

547[9] of the Civil Code entitling the usufructuary to gather civil fruits produced as a result of the right to "lease to another" granted to a usufructuary in Article 555[10] of the Code. Attempting to distinguish the *Gueno* case on the ground that the earlier controversy put at issue the validity of two separate leases, and arguing that in the case before the court the usufructuary was party to a lease jointly executed by her and the naked owners, counsel urged that the authority of the *Gueno* decision should not be extended to cover the particular situation facing the court.

Rejecting defendant's arguments, the court held that the decision in *Gueno v. Medlenka*[11] was dispositive of the questions presented and that as bonus payments are a part of the consideration for the granting of a mineral lease, the exclusive authority to execute which is in the naked owner, such payments, made as compensation for the right of exploration, necessarily inure to the benefit of the naked owner. Delay rentals, perforce, fall in the same category. The court further declared that any statements contained in *Milling v. Collector of Revenue*[12] could have no bearing on the questions presented by the case at bar as that decision related solely to Article 2402[13] concerning property forming part of the marital community.

A cursory examination of the *Milling*, *Gueno*, and *King* decisions does present an apparent conflict. *Milling v. Collector of Revenue*[14] undoubtedly held that bonuses and royalties derived from a mineral lease are civil fruits or rents and thus fall within the community existing between husband and wife even

9. *Id.* art. 547: "Rents and income of property, interest of money, and annuities, and other civil fruits, are supposed to be obtained day by day, and they belong to the usufructuary, in proportion to the duration of his usufruct, and are due to him, though they may not be collected at the expiration of his usufruct."

10. *Id.* art. 555: "The usufructuary may enjoy by himself or lease to another, or even sell or give away his right; but all the contracts or agreements which he makes in this respect, whatever duration he may have intended to give them, cease of right at the expiration of the usufruct."

11. 238 La. 1081, 117 So.2d 817 (1960).

12. 220 La. 773, 57 So.2d 679 (1952).

13. LA. CIVIL CODE art. 2402 (1870): "This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. . . ."

14. 220 La. 773, 57 So.2d 679 (1952).

though such income may flow from the husband's separate property.

The court indicated in the recent *King* opinion that it felt language appearing in *Milling v. Collector of Revenue*[15] might be not only inconsistent but perhaps irreconcilable with the principles enunciated in the case under consideration. Also, the court seemingly manifested a willingness to separate the ruling concerning community property from that relating to mineral leases on land subject to usufruct, thus creating a conceptual unconformity while retaining the effects of each decision in its own sphere of operation. However, if the usufruct cases and the *Milling* decision are to remain vital, existing side by side, it seems desirable that there be a conceptual reconciliation.

Of primary importance in reaching such a reconciliation is the fact that in *Gueno v. Medlenka*[16] the court gave utterance to a concept not previously articulated in Louisiana — the idea that when there have been no "mines actually worked"[17] prior to creation of the usufruct, the naked owner actually retains certain rights to use the land — the rights to explore for and to reduce to possession and appropriate to himself the income from production of oil and gas. Conceptually, in the framework of the Louisiana mineral servitude, this might be taken to mean that the mineral rights remain united with the naked owner's interest when there has been no "actual working" of any oil or gas wells prior to creation of the usufruct. In any case, the principle of retention of certain rights by the naked owner in this situation is established by the *Gueno* decision.

Accepting this principle, without here delving into the propriety of it, it is highly reasonable to say that the usufructuary has no interest in money paid as consideration for the lease of rights which do not belong to him — the effective result of *King v. Buffington.*[18] The mere fact that bonuses and rentals stemming from such a lease do not belong to the usufructuary does not of necessity prevent classifying them as "civil fruits." It is consistent to hold that though they are civil fruits, they are not among those to which the usufructuary is entitled. Such

15. *Ibid.*

16. 238 La. 1081, 117 So.2d 817 (1960).

17. See note 10 *supra.* Many of the problems raised by *Gueno v. Medlenka* will turn upon an interpretation of what is meant by the phrase "if they were actually worked before the commencement of the usufruct" as used in Article 552. Exactly what the courts will require for an oil "mine" to have been worked prior to commencement of the usufruct remains to be seen.

18. 240 La. 955, 126 So.2d 326 (1961).

conceptual reasoning would permit a complete adherence to the language of *Milling v. Collector of Revenue*[19] when the question of community property is involved.

This conclusion may be buttressed by provisions of the Civil Code. Article 544 states that all kinds of fruits produced during existence of the usufruct "by the things subject to it" belong to the usufructuary. The court has effectively held in *Gueno* that the right to use the land for exploration and production of minerals and to appropriate the income therefrom remains in the naked owner when there has been no development prior to creation of the usufruct. Mineral rights are not, therefore, "things subject to" the usufruct, and the usufructuary has no right to any civil fruits — if bonuses, rentals, and royalties are to be considered as such — produced by lease or exercise of these rights.

Article 555 provides that the usufructuary may "enjoy by himself or lease to another, or even sell or give away *his right.*" (Emphasis added.) This, too, lends substance to the view that the usufructuary's right to enjoy civil fruits derived from the property should be limited to those fruits emanating from a lease, sale, or other use or disposition of the rights which are his and should not include fruits resulting from transactions involving rights which did not pass to him upon creation of the usufruct.

The writer feels that the logic of the *King* opinion flows inevitably from the result reached in *Gueno v. Medlenka.*[20] Furthermore, these decisions can and, perhaps in the interest of consistency, should be reconciled with *Milling v. Collector of Revenue.* One means of so doing would be to adopt the course of conceptual reasoning outlined above.

Rights of Mineral Lessee — Nature of Mineral Lease

Harwood Oil & Mining Co. v. Black[21] reflects the court's steadfast adherence to the position that a mineral lease is a "contract of letting and hiring within the meaning of the codal articles, and that the lessee in such a mineral lease obtains an obligatory or personal right only and not a servitude on the realty or a real right in the land."[22] Plaintiff, mineral lessee

19. 220 La. 773, 57 So.2d 679 (1952).
20. 238 La. 1081, 117 So.2d 817 (1960).
21. 240 La. 641, 57 So.2d 679 (1960).
22. Arnold v. Sun Oil Co., 218 La. 50, 48 So.2d 369, 145 (1950), as cited by the court in *Hardwood Oil and Mining Co. v. Black, supra* note 21.

of the bed of Castor Bayou, held a surface lease to adjacent property by which it was permitted to locate equipment for directional drilling operations beneath the stream bed. Defendant, holder of a mineral lease on the same adjacent property on which plaintiff had surface rights, had constructed on the property roads which passed through it to and along the bank of the bayou. Defendant refused plaintiff access to its roads.

Among other issues, the court was required to dispose of plaintiff's claim, upheld by the two lower tribunals, that it was owner of an estate such as would entitle it to a right of access under Article 699 of the Civil Code, granting to the owner of an enclosed estate a right of passage to a public road over his neighbor's estate, subject to the neighbor's right to indemnity for any damage occasioned.

Pointing to the decisions[23] rendered interpreting what is now R.S. 9:1105, both before and after amendment in 1950,[24] and quoting at some length from *Reagan v. Murphy*,[25] a recent pronouncement in this regard, the court reversed the decision of the lower courts. It declared that the right of passage established by Article 699 is a predial servitude which cannot be claimed by the mineral lessee of one estate as against the mineral lessee of an adjacent estate.[26]

This opinion falls readily into the pattern established by earlier cases.[27] Since the initial interpretations of Act 205 of 1938 (R.S. 9:1105),[28] the court has refused to grant character-

23. Arnold v. Sun Oil Co., 218 La. 50, 48 So.2d 369 (1950); Reagan v. Murphy, 235 La. 529, 105 So.2d 210 (1958).

24. One result of *Arnold v. Sun Oil Company*, *supra* note 23, was an amendment to Act 205 of 1938, now LA. R.S. 9:1105 (1950), by the addition of the following sentence: "This section shall be considered as substantive as well as procedural so that the owners of oil, gas and other mineral leases and contracts within the purpose of this section shall have the benefit of all laws relating to the owners of real rights in immovable property or real estate."

25. 235 La. 529, 105 So.2d 210 (1958).

26. Assuming that the estate involved in the case under discussion was actually enclosed, its owner could, apparently, have claimed a right of passage against the owner of the adjacent property. There was no attempt to establish the right of the plaintiff to utilize its lessor's right of passage. Such a claim might have raised additional interesting problems concerning the interpretation of LA. R.S. 9:1105 (1950).

27. Tinsley v. Seismic Explorations, Inc., 239 La. 23, 117 So.2d 897 (1960); Reagan v. Murphy, 235 La. 529, 105 So.2d 210 (1958); Arnold v. Sun Oil Co., 218 La. 50, 48 So.2d 369 (1950); Wier v. Grubb, 215 La. 967, 41 So.2d 846 (1949); Amerada Petroleum Corp. v. Reese, 195 La. 359, 196 So. 558 (1940); Tyson v. Surf Oil Co., 195 La. 248, 196 So. 336 (1940); Gulf Refining Co. v. Glassell, 186 La. 190, 171 So. 846 (1936).

28. See cases cited in note 27 *supra*.

istics of a real right to the mineral lease,[29] except for the recognition of the procedural rights of the lessee.[30] Specific legislative enactments have been necessary to give the mineral lessee substantive rights sufficient to protect his interest in the event of judicial partition,[31] either in kind or by licitation, and to entitle him to rely upon the public records.[32]

Without entering into a discussion of the merits of the controversy as to whether the course which the jurisprudence has taken is the best one, it is sufficient to recognize that the *Harwood* decision is consistent with its forerunners. Further, it may be noted that the present classification of a mineral lease does have possible effects which do not seem desirable, as, for example, its impact on the distribution of a decedent's estate when he is a non-domiciliary with Louisiana lease holdings. Acceptance of the fact that the jurisprudence has developed in this manner leads to the suggestion that, if it is advisable to grant to the mineral lease individual characteristics of a real right, there should perhaps be some concerted and intensive effort to discern these individual characteristics and incorporate them into the statutory law. On the other hand, if the proper definition of the rights accorded by mineral leases should be as real rights, appropriate and effective action should be taken. In any case, it seems desirable that some means be seized upon to end the continuing difficulties raised by failure to secure definitive legislation.

Effect of Conservation Order on Voluntary Unit

The factual situation presented by *Humble Oil & Refining Co. v. Jones*[33] sets the scene for another of the skirmishes in the long conflict between contractual rights and conservation orders. In 1955 Humble, acting under authority granted in a group of mineral leases, established by recorded declaration a voluntary unit comprising 160 acres. Production was obtained on the unit

29. See cases cited in note 27 *supra*.

30. See cases cited in note 27 *supra*.

31. Following the decision rendered in Amerada Petroleum Corp. v. Reese, 195 La. 359, 196 So. 558 (1940), Article 741 of the Civil Code was amended for the specific purpose of granting to a mineral lessee, as well as those with other types of mineral interests, protection in the event of judicial partition either by licitation or in kind.

32. The holding of Arnold v. Sun Oil Co., 218 La. 50, 48 So.2d 369 (1950), was legislatively overruled by passage of LA. R.S. 9:2721-24 (1950), subjecting oil, gas and mineral leases as well as all other instruments of "writing relating to or affecting immovable property," to the registry laws.

33. 241 La. 661, 130 So.2d 408 (1961).

shortly thereafter, and royalties were paid on the basis of this contractually established unit until 1958. In that year the Department of Conservation, after hearings on application of Humble, issued an order creating a forced production unit comprising 177.60 acres. The same well which had been the source of production for the voluntary unit was designated as the unit well in the forced order of the commissioner. The order also directed that the tracts included should share in production in the proportion that the surface acreage of each bore to the entire acreage within the unit.

The forced and voluntary units were not coextensive, the former overlapping the latter as to only 101.13 acres. Approximately 58 acres in the voluntary unit lay outside the forced unit, and the forced unit included approximately 76 acres of land not encompassed by the voluntary unit. As a result of the conservation order, the unit operator was required to pay royalties in the proportion directed without regard to obligations incurred by it under the contractual or voluntary unit.

The court did not find it necessary to render a decision on the merits in this instance.[34] However, the questions raised as to the effect of the conservation order on the contractually established unit are significant. The court of appeal solved the problem by declaring that the conservation order superseded the voluntarily established unit.[35]

The problems raised by this type of situation are numerous. It will be interesting to observe the manner of their resolution.

PARTICULAR CONTRACTS

*J. Denson Smith**

In the case of *Prevot v. Courtney*[1] it was held that the pur-

34. The original action was a suit by the lessee-unit operator against one lessor who had refused tendered royalties after establishment of the conservation unit. The court decided that the rights of parties to the voluntary unit, especially those of owners of the property not included in the forced unit, would be under direct consideration in any decision on the merits. If the decision of the court of appeal were followed, those persons owning mineral and royalty interests on the land within the contractual unit but not within the forced unit would no longer be entitled to share in royalties according to the court. Therefore, it was concluded that those mineral and royalty owners interested in the contractual unit in addition to the defendant-lessor were indispensable parties to the action, and the suit was remanded to allow plaintiff-lessee to implead any indispensable parties.

35. Humble Oil & Refining Co. v. Jones, 135 So.2d 640 (La. App. 3d Cir. 1960).

*Professor of Law, Louisiana State University.

1. 241 La. 313, 129 So.2d 1 (1961).