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Private Law: Mineral Rights

Frederick W. Ellis

MINERAL RIGHTS

*Frederick W. Ellis**

LEASE TERMINATION AND CANCELLATION CLAIMS

In *Huhn v. Marshall Exploration, Inc.*,[1] the supreme court held that the setting up of a rig and drilling a cement plug of an old well on the last day of a primary term constituted "drilling operations" which maintained an oil and gas lease beyond the primary term. The *Huhn* decision also involved several other unsuccessful efforts to cancel a lease, employing various theories of lease clauses. *Force majeure* was recognized as including vandalism which was "beyond the control of lessee."[2] Thus failure to produce caused by vandalism did not terminate the lease under the habendum clause. Delays in production royalty payments were not an active breach of the lease, under the facts of the case.[3] Similarly, delays in shut in payments, under a 14BR 1-Bath lease form (which treats shut in payments as royalties) were not sufficient to warrant cancellation.

In the *Huhn* opinion, the court ignored the Mineral Code,[4] but the results of the decision would not have been changed by its use. By the analysis of the court, problems of retrospective application of the Mineral Code, discussed hereinafter, were made moot. Relevant Mineral Code provisions should, however, be considered by anyone hereafter employing the case as precedent.[5]

Notwithstanding the nonuse of the Mineral Code, the case has some importance to supplement the code. In treating a *force majeure* problem, it furnishes a precedent on a matter not explicitly covered by the Mineral Code. In summarizing the pre-code jurisprudence, the opinion distilled several factors which determine whether an active breach of a lease has occurred due to delay or nonpayment of rent.[6] The case may also portend

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* Professor of Law, Louisiana State University.

1. 337 So. 2d 561 (La. App. 2d Cir.), *writ denied*, 339 So. 2d 854 (La. 1976).
2. *Id.* at 564.
3. *Id.* at 564-66.
4. LA. R.S. 31:1-214 (Supp. 1974).
5. *See, e.g., id.* 31:137-141 (Supp. 1974) on notice and other rules governing the consequence of delay in payment of royalty.
6. 337 So. 2d at 566. These factors were said to include: (1) length of time; (2) amount of royalties; (3) special circumstances outside of a lessee's control; (4)

continued significance of the active breach doctrine for limited purposes still imaginable under the Mineral Code.[7]

SERVITUDE CO-OWNER LESSEES—RIGHTS OF OPERATION; RETROACTIVE APPLICATION OF THE MINERAL CODE

The Second Circuit Court of Appeal, in *GMB Gas Corp. v. Cox*,[8] obliquely faced the issue of retroactive application of the Mineral Code by judicially adopting a rule of the Mineral Code to cover a pre-code question not theretofore decided by the jurisprudence. The basis of decision was that although the prior jurisprudence had not squarely decided the exact factual question at bar, concerning the power of a lessee of a co-owner of a single mineral servitude, a policy of maintaining stability in the law called for an interpretation of prior law consistent with those adopted by the legislature.

Allowing new legislation to control interpretations of prior law is a delicate matter. It is possible to demonstrate that within limits there is theoretical justification in civilian theory for giving weight to legislative interpretation of prior law. However, continental civilians operating in parliamentary systems never had to worry about American constitutional restraints on the power of the legislature. If the legislature may too freely interpret prior law, then the old adage that no man's life or property is safe while the legislature is in session would be a serious reality.

An inquiry into the meaning of the old law should be guided by article 1 of the Civil Code which states, "Law is the solemn expression of the legislative will." Therefore, in seeking to ascertain whether new law has destroyed rights under old law, courts must do more than merely examine whether there is a four square case in point. Rights long established under the Civil Code or legislation are often so clearly vested that there is no need for controversy or litigation. Legislation, as much as any case, indeed more so than any case, can vest rights. Therefore, future decisions ought to analyze Civil Code regimes antedating the Mineral Code, irrespective of jurisprudence or the absence thereof.

This is not to say that every right afforded by legislation creates a vested right and cannot be legislatively changed. It is to say, however, that the determination of whether rights previously existed should involve an analysis of relevant legislation, not merely whether a case treated the

motive of lessee; (5) circumstances of lessor inquiry or demands; (6) equality or inequality of the lessor and lessee, as to knowledge about the industry.

7. *See, e.g.*, LA. R.S. 31:135-140 (Supp. 1974).

8. 340 So. 2d 638 (La. App. 2d Cir. 1976).

point. The question of the vested or nonvested character of the right is a separable matter.

Turning to the particular substantive results of the *GMB* decision, one may question whether the prior jurisprudence pertaining to co-owners of land should have been extended to co-owners of a mineral servitude. It is also doubtful whether parties who intended a co-ownership mineral servitude status and who reserved mineral rights in a partition of land were truly co-owners of a mineral servitude.[9] However, the court employed articles 175, 176, 66 and 67 of the Mineral Code[10] to hold that such a partition created a single mineral servitude and a co-ownership, and that there was no independent right of operation by a co-owner or his lessee.

Judge Marvin, in a concurring opinion, was somewhat bothered by apparent inconsistencies in the law of co-ownership as suggested by the comment to article 175. He also noted other inconsistencies in commentary material. His concern is justified. The problems could be clarified by an exposition of the legislative history, which warrants fuller analysis in a separate article. Let it be briefly noted now, however, that the original proposal of the Reporter for the Mineral Code, to recognize an independent right of operation among all co-owners, was rejected.[11] Original commentary supporting the rejected proposal was carried over into the *unofficial* comments explaining the substitute enactments. The comments are not official and should be cautiously read in subject matter areas, such as co-ownership, where final versions were opposite to original proposals.

STATE DIVESTITURE OF MINERALS

Both the 1921 constitution[12] and the 1974 constitution[13] require the state to reserve mineral rights on the property it sells. *Shell Oil Co. v. Board of Commissioners of the Pontchartrain Levee District*[14] applied the 1921 constitution and held that a levee district was the "state" under article IV, section 2, and that mineral rights must therefore be reserved on property sold by that body. The First Circuit found these constitutional provisions applicable notwithstanding an earlier decision of the Louisiana

9. *See* authorities cited in 340 So. 2d at 639-40.

10. LA. R.S. 31:66-67, 175-176 (Supp. 1974).

11. *See, e.g.*, Recommendation No. 62 of the Exposé Des Motifs entitled *Suggested Principles of Louisiana Mineral Law—A Basis for Reform*, Louisiana State Law Institute, George W. Hardy, III, Reporter, 1971.

12. La. Const. of 1921, art. IV, § 2.

13. LA. CONST. art. IX, § 4.

14. 336 So. 2d 248 (La. App. 1st Cir.), *writ denied*, 338 So. 2d 1156 (La. 1976).

Supreme Court in which the mineral reservation requirement had not been applied to a school board.[15] Quoting the concurring opinion of then Judge Tate in *Rycade Oil Corp. v. Board of Commissioners*,[16] Judge Sartain reasoned that levee boards are arms of the executive branch of state government, and distinguished the school board decision on the ground that school boards are "purely local subdivisions."[17] The major conclusion of an extensive review of levee district jurisprudence was that the prior cases involved the deeding and sale of land prior to the 1921 adoption of the Louisiana Constitution. Thus, the case at bar was *res nova*.

DESCRIPTION CLARITY AND THE PUBLIC RECORDS DOCTRINE

Valvoline Oil Co. v. Krauss[18] involved a divorce property settlement which contained an omnibus description of certain tracts of land. According to the agreement each spouse recognized that property owned jointly or separately would thereafter be owned by the party "in whose name the title now stands, or is taken of record." Individual tracts were not specifically described. The tract which was the subject of dispute in *Valvoline* had been acquired by the husband while married. The Third Circuit Court of Appeal, in a concursus suit, ruled in favor of a mineral lessor whose title was derived from the ex-husband, rejecting the ex-wife's claim to the forty acres. The court decided that the tract had stood in the husband's name, and gave effect to the omnibus conveyance. Several decisions reflecting the inadequacy of omnibus descriptions, such as "all property owned by vendor" in a given parish, were distinguished, as relating only to prescription or third party public records doctrine circumstances.[19] Here, the court reasoned, the question was whether the conveyance was effective as to a party to the transaction.

The decision was well justified by several precedents reviewed by the court. Since the opinion applied relatively settled principles of sales law, one might hesitate to review the case in a discussion of recent mineral rights jurisprudence. However, the seemingly minor fact that the controversy—a concursus—involved two mineral leases taken from adverse claimants, raises interesting questions concerning the practical significance to mineral transactions of rules which treat the original parties to a transaction differently than third parties.

15. Stokes v. Harrison, 238 La. 343, 115 So. 2d 373 (1959).
16. 129 So. 2d 302, 305 (La. App. 3d Cir. 1961).
17. 336 So. 2d at 253.
18. 335 So. 2d 64 (La. App. 3d Cir. 1976).
19. *See id.* at 71-72.

The stimulation of dormant title claims often occurs in a mineral leasing context. A mineral lessee of an apparent owner will often try to protect his leasehold title by taking leases from remote claimants. Curiously, the very taking of such a protection lease, as in the *Valvoline* case, is the factual circumstance that may defeat the adverse title claim, if that claim is by an original party to a transaction. Where there is a common lessee of conflicting title claimants, as in the *Valvoline* case, the mineral lessee is normally a neutral party, and will not assert the public records doctrine. If the mineral lessee is not a neutral party, he will be apt to assert his rights under article 18 of the Mineral Code, making the laws of registry applicable.[20] Thus only if there were not a common lessee of two adverse claimants would the laws of registry de facto govern. The question might then arise, would the lease granted by a lessor who is *not* entitled to the benefit of the laws of registry be ineffective as to the lessor, but effective as to the lessee? That result would seem to be ordained by the reasoning in *Valvoline*.

If this is so, the functional result is to give a kind of executive right to a person who is not the true owner of mineral rights or land—a de facto power to grant a mineral lease affecting the land or mineral rights of another.[21] Indeed, the power is not limited to the granting of mineral leases but might even involve conveyance of the whole ownership.

The attorney representing such a title claimant, with a de facto executive right, can accidentally destroy his client's rights if he concurs in a mineral lease which is silent as to the rule of article 121 of the Mineral Code. That article authorizes the taking of protection leases. Prudent landowner counsel will always seek explicitly to negate that article of the Mineral Code and expressly to prohibit the taking of protection leases. Otherwise, his client may end up a loser in a title litigation precipitated by a mineral lessee, who may even add insult to injury by seeking refund of the bonus paid for the lease.[22]

THE LEASING OF REVERSIONARY INTERESTS

Article 144 of the Mineral Code modified the rules recognized in prior jurisprudence interpreting the after-acquired title doctrine. Article 144 provides "that a mineral right that terminates during the existence of the lease and becomes owned by the lessor *or his successor* in title, shall

20. LA. R.S. 31:18 (Supp. 1974).
21. *See id.* 31:105-113 (Supp. 1974).
22. *See id.* 31:120 (Supp. 1974) (warranty liability of mineral lessors).

be subject to the lease. If the lease is filed for registry, the provision is binding on all subsequent owners of the land or mineral rights leased."[23] This binding effect on subsequent owners of the land is different from the personal character of the obligation of warranty underlying pre-Mineral Code after-acquired title jurisprudence.[24]

A reading of the comments to articles 56, 144 and 145 suggests that the problem attacked by article 144 was to clear the legal air of any question of possible applicability of the old *Hicks v. Clark*[25] prohibition against dealing in reversionary interests. That rule was continued in the prohibition of articles 76 and 104 against *selling* or *reserving* the expectancy of extinction of a mineral servitude or royalty. Broader language of the article 76 comment indicating that *Hicks v. Clark* provided that the reversionary interest "is not an object of commerce" was not in fact used in the text, which only explicitly prohibited sale or reservation of reversionary interests, thus implicitly permitting leasing of reversionary interests.

Thus, while the comments to articles 56, 144 and 145 point to background that suggests that article 144 was designed for mineral leases granted by a landowner to cover a reversionary interest, the actual text of article 144 is not so limited. There is a reason. After-acquired title circumstances could arise even where a purported servitude owner perfected a defective title to a servitude after transactions related thereto. Therefore, there is a need for article 144 to apply to servitude owner leases.[26] Thus article 144 was presumably intended also to cover successors in title of mineral servitude owners.

If the term "successor in title" in article 144 is viewed broadly to include the party who acquires mineral rights upon the accrual of prescription, then a servitude owner could grant a lease binding the landowner after accrual of prescription. Considering that article 144 apparently was intended to cover leases granted by servitude owners or claimants, there would then arise a conflict with the purpose of article 144 as revealed in the comments to the code—to permit a reversionary interest lease by a landowner.

This problem was not clearly identified in *Wahlder v. Roy O. Martin*

23. *Id.* 31:144 (Supp. 1974) (emphasis added).

24. *See* cases discussed in comments to LA R.S. 31:144, 145 (Supp. 1974).

25. 225 La. 133, 72 So. 2d 322 (1954).

26. *See* LA. R.S. 31:77-79 (Supp. 1974) and cases discussed in comments thereto.

Lumber Co.,[27] where a mineral servitude had been outstanding and a landowner granted a lease without warranty, but with the usual clause that the lease would cover any reversionary mineral interests. The servitude owner sued the landowner claiming the right to the bonus payment. After the lease was granted, prescription accrued. Relying upon article 144, the court rejected the claim.

It is submitted that article 144 was not intended to cover claims for damages due to allegedly wrongful usurpations of others' property rights. The purpose of article 144 was not to insulate lessors, but to protect lessees, by securing their titles. This is not to quarrel with the result of the decision, for a non-warranty lease can be likened unto a quit claim title, which generally conveys only such right as the grantor has. To lease only what you may have, if anything, should not constitute a cloud on another's title. It is submitted that this is the real import of the decision—non-liability to a true owner of mineral rights for mere leasing of such right as one may have or thereafter acquire. Such a decision facilitates leasing and development.

The case may be incorrectly construed to support the view that article 144 does not apply to leases granted by purported servitude owners, or that a landowner is not a "successor in title" of a servitude owner. The case did not truly reach these points, which are problems that await legislative or judicial clarification.

CASES FOR FUTURE REFERENCE

In closing, two cases should be mentioned for future reference when similar problems arise, though their holdings and analyses cannot now be given extensive discussion: *Forest Oil Corp. v. Superior Oil Co.*,[28] interpreting an expenditure approval clause in a joint operating agreement; and *Succession of Rugg*,[29] reviewing and distinguishing mineral jurisprudence relative to the classification of mineral lease proceeds as rent and the question whether they are fruits.

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27. 337 So. 2d 669 (La. App. 3d Cir. 1976).

28. 338 So. 2d 758 (La. App. 4th Cir. 1976).

29. 339 So. 2d 519 (La. App. 2d Cir. 1976), *writ denied*, 341 So. 2d 897 (La. 1977). This case posed the question of whether the proceeds of the sale of timber rights comprised "fruits."