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this situation, Congress should enact legislation giving EPA a veto power over all projects in navigable waters including water resource development projects proposed by federal agencies (especially the Corps of Engineers) and private power companies under federal permit. The President's Advisory Council on Executive Reorganization has recommended that this veto power be given to the proposed Department of Natural Resources. However, EPA with its mission-oriented structure is more suited to evaluate such problems free from the pressures of special interest groups.

Robert B. Nichols, Jr.

A SELECTED APPROACH TO ELECTION OF REMEDIES
IN MINERAL TRESPASS CASES

Plaintiffs brought suit for recovery of the value of minerals produced under a mineral lease granted to defendant on property claimed by plaintiffs. After a determination that plaintiffs were in fact the owners of the land in question, the court of appeal *held*, that plaintiffs' suit for the value of the oil produced from their property was an action in tort, subject to the prescription of one year, and that the only damages recoverable by plaintiffs were for the value of the oil produced during the year immediately preceding the filing of suit, less their proportionate share of drilling and operating costs for that period. *White v. Phillips Petroleum Co.*, 232 So.2d 83 (La. App. 3d Cir. 1970), *cert. denied*, April 20, 1970.

Before the advent of the 1960 Code of Civil Procedure, a party entitled to recover damages under alternative theories was held to have elected one remedy over others according to the legal theory upon which his pleadings were based and the remedy prayed for.¹ Thus, the theory of plaintiff's pleadings determined the applicable prescriptive period, cause of action, and measure of damages.² For example, if a suit involving a taking of movables could be brought alternatively under Civil Code article 2315 and the quasi-contractual concept of unjust enrichment, the prescriptive period would be one year for the former cause of action and ten years for the latter. Furthermore, damages would be measured by the value of the thing

1. See *Importsales v. Lindeman*, 231 La. 663, 92 So.2d 574 (1957).

2. *Kramer v. Freeman*, 198 La. 244, 3 So.2d 609 (1941).

taken under article 2315³ or by the amount by which the defendant had been enriched under the quasi-contractual theory.⁴ This theory of election of remedies had its origins in the common law writ system, according to which, if the commission of a tort resulted in the enrichment of defendant at plaintiff's expense, plaintiff might "waive his tort" and sue in *assumpsit*.⁵

Louisiana jurisprudence has long recognized the availability of alternative remedies in cases involving the unauthorized taking of movables.⁶ However, the practical impact of this right to alternative remedies was somewhat curtailed by the previously discussed "theory of the case" doctrine which prevailed under the Code of Practice. Early cases involving the unauthorized taking of minerals acknowledged the election possibility;⁷ however, when the wording of the petition expressed the demand in terms of the *value* of oil taken for the purpose of measuring damages, the courts, in holding the language to be controlling,⁸ invariably concluded that the party had elected to proceed in tort. Classification of the action as one in tort was based on the theory that a demand for the value of the thing taken was in fact a demand for damages⁹ and, as such, was controlled by the principles of article 2315 and subject to the prescription of one year.¹⁰

It is along the lines of these earlier cases that *White v.*

3. *Liles v. Producers' Oil Co.*, 155 La. 385, 99 So. 339 (1924).

4. *Rosenthal-Brown Fur Co. v. Jones-Frere Co.*, 162 La. 403, 110 So. 630 (1926).

5. Nicholas, *Unjustified Enrichment in Civil Law and Louisiana Law, Part II*, 37 TUL. L. REV. 49, 51-52 (1962). *Assumpsit* was originally based on a fictitious implied-in-law promise, but was substantially an action for unjust enrichment. Nevertheless, the quasi-contractual relationship was still based on the tort and had no existence independent of it.

6. *Kramer v. Freeman*, 198 La. 244, 3 So.2d 609 (1941); *Liles v. Barnhart*, 152 La. 419, 93 So. 490 (1922); *Morgan's La. & T.R. & S.S. Co. v. Stewart*, 119 La. 392, 44 So. 138 (1907).

7. *Liles v. Texas Co.*, 166 La. 293, 117 So. 229 (1928).

8. *Martin v. Texas Co.*, 150 La. 556, 90 So. 922 (1921).

9. *Liles v. Producers' Oil Co.*, 155 La. 385, 99 So. 339 (1924); *Martin v. Texas Co.*, 150 La. 556, 90 So. 922 (1921); *Harper v. Municipality No. 1*, 12 La. Ann. 346 (1857).

10. *Liles v. Producers' Oil Co.*, 155 La. 385, 99 So. 339 (1924); *Liles v. Barnhart*, 152 La. 419, 93 So. 490 (1922). According to language in *Liles v. Barnhart*, this result followed naturally from analogizing the wrongful extraction of oil to the unauthorized cutting of timber. See *Davis v. Ruddock Orleans Cypress Co.*, 132 La. 985, 62 So. 114 (1912); *Shields v. Whitlock & Brown*, 110 La. 714, 34 So. 747 (1903). Of course, these latter cases, unlike their mineral counterparts, have explicit code authority in LA. CIV. CODE art. 3537, which specifically applies the one-year prescriptive period "where land, timber, or property has been injured, cut, damaged or destroyed."

*Phillips Petroleum Co.*¹¹ was decided. The demand was for the value of the minerals wrongfully taken, and the majority used the prior jurisprudence to classify plaintiffs' action as one in tort. In a concurring opinion, however, Judge (now Justice) Tate stated that there are now valid reasons for not holding plaintiff to an election governed by his petition, and for allowing him to recover under any available theory, if he has alleged and proved the facts substantiating relief, regardless of the remedy originally prayed for. His opinion was based on pleading changes in the 1960 Code of Civil Procedure; his conclusions appear valid. Under the new Code, courts are required to "grant the relief to which the party in whose favor it [the judgment] is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief."¹² Technical rules of pleading no longer exist,¹³ and the characterization of a pleading by the litigant is no longer controlling.¹⁴ All that is required is that the plaintiff allege material facts constituting a cause of action.¹⁵ The net result is a reinforcement of the principle implicit in the Code that the theory of the case doctrine is not applicable in Louisiana.¹⁶

"In cases such as this one, a property owner who pleads and proves the necessary facts should be allowed to recover under any available theory, whether tort, quasi-contract, or even revendication. To bar recovery simply by strictly construing the pleadings is to abandon the spirit of the 1960 Code of Civil Procedure."¹⁷ This expression by Justice Tate appears to be the major weakness of the holding of the instant case. Even though the plaintiffs' remedy in tort in this case was barred by the prescription of one year, it should have been possible for plaintiff to have alleged and proved that the defendant had acquired a valuable property right and had been unjustly enriched at plaintiff's expense.

11. 232 So.2d 83 (La. App. 3d Cir. 1970).

12. LA. CODE CIV. P. art. 862.

13. *Boudreaux v. Allstate Fin. Corp.*, 217 So.2d 439 (La. App. 1st Cir. 1968).

14. *Bellow v. New York Fire & Marine Underwriters, Inc.*, 215 So.2d 350 (La. App. 3d Cir. 1968).

15. *White v. Phillips Petroleum Co.*, 232 So.2d 83, 91 (La. App. 3d Cir. 1970).

16. LA. CODE CIV. P. art. 862, comment (b). *See also Poynter v. Fidelity & Cas. Co.*, 140 So.2d 42 (La. App. 3d Cir. 1962).

17. *White v. Phillips Petroleum Co.*, 232 So.2d 83, 92 (La. App. 3d Cir. 1970) (concurring opinion).

Admitting that the wording of the petition should not now be the controlling factor, it may still be of some importance in determining whether plaintiffs should have been allowed to amend their petition on appeal to pray for relief grounded in restitution based upon defendant's unjust enrichment. Basically, this would have involved a determination of what new evidence would have been required to sustain the demand. As Justice Tate noted, "[c]haracterization of the plaintiffs' action was neither briefed nor argued by counsel."¹⁸ It might be inferred, therefore, that the record on appeal did not substantiate this latter theory of recovery. Under the old Code of Practice, this situation would have precluded amendment on appeal,¹⁹ but the liberalized procedures under the new Code would allow amendment to conform to the evidence contained in the record. Justice Tate, in commenting on the Code of Civil Procedure, has said that "[t]he court must balance the injustice of amendment to one against the injustice to the other by denial, taking into consideration the ultimate ideal of our Code that procedural rules exist only to facilitate substantive justice and the decision of the cases on the merits."²⁰ If motion for leave to amend the pleadings on appeal were allowed, then, clearly, under article 2164 of the Code of Civil Procedure, an appellate court could render judgment based upon the amended petition.²¹

Granted that the court in *White* did not reach the substantive issue of recovery, the case hypothetically poses at least three possible theories under which relief might have been granted—revendication, tort, or quasi-contract.²² Notwithstanding certain theoretical anomalies,²³ the availability of a real action for the recovery of movables in kind is well recognized in the jurisprudence.²⁴ However, its application in cases involv-

18. *Id.* at 91 (concurring opinion).

19. *Cf. White v. Davis*, 173 La. 558, 138 So. 101 (1931).

20. Tate, *Amendment of Pleadings in Louisiana*, 43 TUL. L. REV. 211, 240 (1969).

21. LA. CODE CIV. P. art. 2164 authorizes the appellate court to render "any judgment which is just, legal, and proper upon the record." The "record" includes the pleadings as made in the trial court. *See Tate, Amendment of Pleadings in Louisiana*, 43 TUL. L. REV. 211, 239 n.177 (1969).

22. *White v. Phillips Petroleum Co.*, 232 So.2d 83, 92 (La. App. 3d Cir. 1970) (concurring opinion).

23. LA. CODE CIV. P. art. 422 defines a real action as "one brought to enforce rights in, to or upon immovable property," and thus leaves room for speculation as to the nature of actions brought concerning movables. *See 2 A. YIANNPOULOS, CIVIL LAW TREATISE* § 135 at 405 (1966).

24. *Lusco v. McNeese*, 86 So.2d 226, 228 (La. App. 1st Cir. 1956), citing *Donnell v. Gray*, 215 La. 497, 41 So.2d 66 (1949); *Fontenot v. Johnson*, 77 So.2d 82 (La. App. 1st Cir. 1954); *Schutzman v. Munson*, 51 So.2d 125 (La. App. 1st Cir. 1951); *Crain v. Crain*, 29 So.2d 404 (La. App. 1st Cir. 1947).

ing minerals is somewhat dubious because the things involved are consumable, refinable for future consumption, and, therefore, impossible to return. A possible avoidance of the problem here is the use of the power of the court to issue writs of sequestration,²⁵ thus preserving the movables in question in order that a plaintiff may later avail himself of the action in revendication. According to the jurisprudence, this procedure is available in actions involving minerals.²⁶ If the revendicatory action is utilized, the courts would probably apply the ten-year liberative prescription provided for actions in contract or quasi-contract,²⁷ although the French sources²⁸ and better-reasoned considerations point more correctly toward the imprescriptibility of the action. Title may be lost by good or bad faith acquisitive prescription, but the real action to vindicate title does not prescribe.²⁹

More conventionally, recovery for the movables taken can be had in a delictual action under Civil Code article 2315 which prescribes after one year from discovery of the damage according to articles 3536 and 3537. The measure of recoverable damages includes the value of the property taken³⁰ less expenses if the mineral operations were conducted in good faith.³¹ Credit to the good faith tortfeasor in the latter cir-

25. Article 3571 of the Code of Civil Procedure provides that "when one claims the ownership or right of possession of property . . . he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action."

26. See *Jennings & Heywood Oil Syndicate v. Houssiere-Latrielle Oil Co.*, 127 La. 971, 54 So. 318 (1911); *Kellar v. Victoria Lumber Co.*, 45 La. Ann. 476, 12 So. 511 (1893).

27. *Kramer v. Freeman*, 198 La. 244, 3 So.2d 609 (1941).

28. 2 A. YIANNPOULOS, CIVIL LAW TREATISE § 125, at 381 (1966).

29. According to article 3509 of the Civil Code, a bad faith possessor of a movable acquires title after ten years uninterrupted possession. As his possession may well not run concurrently with an owner's loss of possession, the interpretation given to the article by the jurisprudence may create a situation where the action is barred even if the bad faith possessor has yet to acquire title.

30. See *Importsales v. Lindeman*, 231 La. 663, 92 So.2d 574 (1957).

31. *Huckabay v. Texas Co.*, 227 La. 191, 78 So.2d 829 (1955); *Martel v. Jennings-Heywood Oil Syndicate*, 114 La. 351, 38 So. 253 (1906). Deduction of expenses has not been allowed for bad faith mineral operations: *State v. Jefferson Island Salt Mining Co.*, 183 La. 304, 163 So. 145 (1935). *But see* Chief Justice O'Niell's dissent in *Leopold v. Bradford-Hutchinson Lumber Co.*, 172 La. 110, 133 So. 379 (1931), where the Chief Justice argues that the refusal to deduct expenses for bad faith—involving here timber operations—was in fact an award of punitive damages, which are unrecoverable in Louisiana. He argued that the court's opinion had been based on a faulty interpretation of article 525 of the Civil Code, plus references to cases decided at a time when the courts had allowed punitive damage awards under certain circumstances.

cumstance has been held to be a consequence of both "the moral maxim of the law that no one ought to enrich himself at the expense of another,"³² and an interpretation of Civil Code articles 501 and 502 which equate minerals to fruits in this area of the law.³³

Damages, moreover, should not be limited to the value of the thing wrongfully taken. Their measure "ought to be any pecuniary prejudice suffered by the plaintiff as the result of wrongful possession."³⁴ Thus, in addition to the value of the oil itself, it is possible to consider the right to search for oil as a valuable property right protected by more than the usual award of nominal damages for a non-injurious trespass. This possibility has already been recognized by the Louisiana courts in the analogous area of the so-called "geophysical trespass" cases involving unauthorized entry upon land for the purpose of conducting seismographic and other geophysical surveys. The courts here have recognized that these intrusions involve the unlawful taking of a property right and have awarded damages.³⁵ Early cases used the extent of the loss of the mineral leasing desirability of plaintiff's property, after the defendant's unauthorized geological survey showed the unlikelihood of profitable production, as the measure of damages.³⁶ This would not be a suitable measure in the unauthorized drilling situation on productive property. Nevertheless, this right to explore is analogous to the right to drill situation of *White*. Therefore, the use of the leasing value of comparable adjacent property at the time of the trespass as the measure of damages, an approach approved in the more recent geophysical trespass cases,³⁷ would also be appropriate in instances of unauthorized drilling.

"Where the unlawful act of one person not only damages

32. *Huckabay v. Texas Co.*, 227 La. 191, 197, 78 So.2d 829, 831 (1955).

33. *See Martel v. Hunt*, 195 La. 701, 197 So. 402 (1940); *cf. Jackson v. Shaw*, 151 La. 795, 92 So. 339 (1922).

34. 2 A. YIANNPOULOS, CIVIL LAW TREATISE § 144, at 436 n.310 (1966).

35. *Picou v. Fohs Oil Co.*, 222 La. 1068, 64 So.2d 434 (1953); *Layne La. Co. v. Superior Oil Co.*, 209 La. 1014, 26 So.2d 20 (1946). The holder of a mineral servitude has the same action available to him as does the owner of the land. *Holcombe v. Superior Oil Co.*, 213 La. 684, 35 So.2d 457 (1948).

36. *See Angelloz v. Humble Oil & Ref. Co.*, 196 La. 604, 199 So. 656 (1940).

37. *Cf. Franklin v. Arkansas Fuel Oil Co.*, 218 La. 987, 51 So.2d 600 (1951); *Layne La. Co. v. Superior Oil Co.*, 209 La. 1014, 26 So.2d 20 (1946), where the court recognized the amount paid to neighboring landowners for the privilege of conducting geological surveys as a proper measure of damages where a value depreciation award would be overly speculative.

another but enriches the wrongdoer, there is an action both ex-delicto and ex-contractu and the action to recover the unlawful gain is barred only by the prescription of 10 years."³⁸ Thus, the relationship of quasi-contract and the unjust enrichment of the defendant must be considered as a third theory of recovery, based on the "moral maxim" expressed in Civil Code article 1965 that "no one ought to enrich himself at the expense of another."³⁹ The quasi-contractual relationship involved in the unauthorized taking of another's movables may be implied directly from article 2294⁴⁰ or indirectly from the language of articles 2301 and following. Although it has been noted that, technically, article 2301⁴¹ refers merely to a mistaken payment by the plaintiff to the defendant,⁴² the Louisiana jurisprudence has widened its meaning by considering receipt without payment as sufficient and by treating a wrongful taking as a receipt.⁴³

The courts have thus established a line of reasoning which allows them to view an unauthorized taking of another's property as a case of unjustified enrichment without any legal relationship between the parties other than the act itself. Consequently, they are able to apply article 1965 to the broadened interpretation of article 2301. In other words, the unjustified enrichment establishes the quasi-contractual connection. Thus, even if the facts of the case do not relate an ulterior contractual demand of the plaintiff, such as ratification of a lease,⁴⁴ or acknowledgment of a servitude,⁴⁵ the quasi-contractual relation will have been established through the defendant's overt

38. *Liles v. Barnhart*, 152 La. 419, 444, 93 So. 490, 499 (1922) (concurring opinion), citing *Burney v. Ludeling*, 47 La. Ann. 73, 16 So. 507 (1894); *McKnight v. Calhoun*, 36 La. Ann. 408 (1884); *Gaty, McCune & Co. v. Barbers*, 32 La. Ann. 1091 (1880); *Normand v. Edwards*, 23 La. Ann. 142 (1871); *Devot v. Marx*, 19 La. Ann. 491 (1867); *Pickerel v. Fisk*, 11 La. Ann. 277 (1856); *Kohn v. Carrollton*, 10 La. Ann. 719 (1855).

39. LA. CIV. CODE art. 1965.

40. *Id.* art. 2294. The article lists two principal kinds of acts which give rise to the relationship: "[T]he transaction of another's business, and the payment of a thing not due." It does not, however, say that these are the only situations from which the relationship may be derived.

41. LA. CIV. CODE art. 2301: "He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he had unduly received it."

42. Nicholas, *Unjustified Enrichment in Civil Law and Louisiana Law*, Part II, 37 TUL. L. REV. 49, 51 (1962).

43. See *Standard Oil Co. v. Sugar Prod. Co.*, 160 La. 763, 107 So. 566 (1926); *Roney v. Peyton*, 159 So. 469 (La. App. 2d Cir. 1935).

44. *Liles v. Barnhart*, 152 La. 419, 93 So. 490 (1922).

45. *Nelson v. Young*, 255 La. 1043, 234 So.2d 54 (1970).

act. Cases involving the unauthorized trapping of animals⁴⁶ point to the propriety of this interpretation. Faced with the same dilemma as in *White*—an unauthorized taking of a thing not classifiable as a “fruit”—the courts relied upon the “moral maxim” of article 1965 to condemn the defendants to return to the plaintiffs the rewards of their ill-gotten gains.

In computing the measure of damages in the action for unjust enrichment, it is readily apparent that recovery will be of a limited nature. Its extent will be the undue gain of the party or parties against whom the action is brought, without the possibility of recovery in solido from any party, as in the joint tortfeasor-type situations. Recovery would be merely the amount of enrichment—the thing itself if still in the defendant's possession, or his gains from its disposal if not, measured by the gross income produced less expenses. The latter measure is a necessary result of the principle itself, for failure to allow the deduction of costs would unjustly enrich the plaintiff by that amount at the expense of the defendant.⁴⁷

In conclusion, it should be realized that the procedural aspects of the holding in *White* are the paramount considerations of the case, and, if drawn to their logical conclusion, would signal, as Justice Tate indicated in his concurring opinion, “a reversion to an outmoded and expressly discarded procedural concept.”⁴⁸ The holding should be narrowly construed, based on the absence of any characterization, by brief or argument, of the plaintiffs' action.⁴⁹ To do otherwise would suggest a return to a “theory of the case” approach to pleadings entirely inconsistent with the 1960 Code of Civil Procedure. Nevertheless, it should also be recognized that, in order to take advantage of the liberalized procedures, a plaintiff must allege and prove facts that will show the existence of a given cause of action, and that a demand for damages and presentation of a case in strictly delictual terms, with no reference to the defendant's unjust enrichment, would still preclude any recovery under quasi-contract and the prescriptive advantages arising therefrom.

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46. See *Curran v. Jones*, 163 La. 579, 112 So. 492 (1927); *Rosenthal-Brown Fur Co. v. Jones-Frere Fur Co.*, 162 La. 403, 110 So. 630 (1926).

47. See *Huckabay v. Texas Co.*, 227 La. 191, 78 So.2d 829 (1955); *Scott v. Hunt Oil Co.*, 152 So.2d 599 (La. App. 2d Cir. 1963).

48. *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Mineral Rights*, 31 LA. L. REV. 363, 364 (1970).

49. *White v. Phillips Petroleum Co.*, 232 So.2d 83, 92 (La. App. 3d Cir. 1970) (concurring opinion).