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Income Taxes - Mines and Minerals - Separate and Community Property

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nature is not directed solely at the secular phase of the school's general program. A possible compromise would be to make transportation payments to church school children only a percentage of that granted to public school children in recognition of the school's mixed character. The question of whether state transportation to a parochial school constitutes "support" in law involves a question of fact and might well have gone either way.[20] The majority, while affirming that the Court could not approve the slightest breach of the high and impregnable wall erected between church and state by the First Amendment, concluded that New Jersey had not breached it here. To the minority the decision was an only too vivid reminder of Julia who, according to Byron's reports, "whispering 'I will ne'er consent'—consented."

Delineation of the boundary line between state aid which constitutes "support" in law and that which does not must await further decisions involving varying degrees of aid in fact.

JOSEPH H. STEPHENS

INCOME TAXES—MINES AND MINERALS—SEPARATE AND COMMUNITY PROPERTY—Oil bonuses and royalties were received from a lease on the separate property of the husband. The husband and his wife divided these items equally in their tax returns. No prenuptial agreement existed concerning the income from separate and community property. Held, an oil and gas lease is a dismemberment of the realty amounting to a partial alienation, and the bonus, paid in part consideration therefor, belongs to the separate estate of the husband. As royalty is a share of the product reserved by the lessor, it is not a "civil fruit" and hence does not become a community asset.[1] *Commissioner of Internal Revenue v. Gray,* 159 F. (2d) 834 (C. C. A. 5th, 1947).

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20. Perhaps the majority were partially motivated by the possibility that a contrary decision might place the court in an embarrassing position should the constitutionality of the G. I. Bill of Rights, a popular and beneficial federal law, be similarly attacked. It is common knowledge that the federal measure is a substantial aid to many denominational colleges. Payment of tuition, fees, cost of textbooks and living expenses is clearly a more active, direct and material aid to a college than free bus fare is to a parochial school. Since higher education is not compulsory, the argument that the college is discharging a public function is not as strong as in the case of parochial schools. Possible distinctions might be the comparative emphasis on religion in the two types of schools, or the emergency character of the G. I. Bill of Rights.

1. In two recent cases the Federal District Court for the Eastern District of Louisiana reached a result contrary to the decision of the present case by

Oil and gas leases have never been definitely classified in Louisiana either by statute or by the courts.[2] The jurisprudence has consistently recognized that it is a contract *sui generis,* not only "containing elements of both ordinary leases and sales," but also containing "features that are not applicable to either."[3] Several Louisiana decisions have recognized that an oil and gas lease constitutes a dismemberment of the property.[4] It is considered "more as a sale of a real right than as an ordinary lease for the occupancy of a house or land."[5] The decision in *Federal Land Bank of New Orleans v. Mulhern*[6] classifying minerals in the ground as real estate has never been seriously questioned. Necessarily in applying the lease pattern to mineral leases the court has drawn an analogy between royalty and rent and has stated many times that the payment of royalty is the payment of rent.[7] Since rent from land is a civil fruit,[8] under a "tyranny of words" we would arrive at the anomalous result that royalty is a fruit. The Louisiana Supreme Court, however, has never failed, when its attention was focused on the problem of fruits *per se,* to adhere to the proper concept that fruits are the things that are "born and reborn of the soil."[9]

Royalty is that portion of the production reserved by the lessor

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holding that royalty is rent and therefore falls into the community. Harang v. United States, 68 F. Supp. 227 (D. C. La. 1946); Hebert v. United States, 68 F. Supp. 230 (D. C. La. 1946). The tax court decision of the *Gray* case was cited with approval in the *Harang* case. The holding of the tax court was reversed in the decision under consideration. In the absence of a state court decision to the contrary, this decision of the circuit court of appeal will be binding on all the federal district courts within the fifth circuit.

2. Stringfellow v. Murphy, 195 So. 844 (La. App. 1940).

3. Rives v. Gulf Refining Co. of Louisiana, 133 La. 178, 62 So. 623 (1913); Cooke v. Gulf Refining Co., 135 La. 609, 65 So. 758 (1914); Spence v. Lucas, 138 La. 763, 70 So. 796 (1916); Nabors Oil & Gas Co. v. Louisiana Oil Refining Co., 151 La. 361, 91 So. 765 (1921); Sparks v. Dan Cohen Co., Inc., 187 La. 830, 175 So. 590 (1937); Tyson v. Surf Oil Co., 195 La. 248, 196 So. 336 (1940).

4. Hanby v. Texas Co., 140 La. 189, 72 So. 933 (1916); Wiley v. Davis, 164 La. 1090, 115 So. 280 (1927); Federal Land Bank of New Orleans v. Mulhern, 180 La. 627, 157 So. 370 (1934).

5. Sparks v. Dan Cohen Co., Inc., 187 La. 830, 175 So. 590 (1937).

6. Federal Land Bank of New Orleans v. Mulhern, 180 La. 627, 157 So. 370 (1934).

7. Logan v. State Gravel Co., 158 La. 105, 103 So. 526 (1925); Board of Commissioners of Caddo Levee Dist. v. Pure Oil Co., 167 La. 801, 120 So. 373 (1928); Roberson v. Pioneer Gas Co., 173 La. 313, 137 So. 46, 82 A. L. R. 1264 (1931); Shell Petroleum Corp. v. Calcasieu Real Estate & Oil Co., 185 La. 751, 170 So. 785 (1936); United Gas Public Service Co. v. Barrett, 179 So. 506 (La. App. 1938); Robinson v. Horton, 197 La. 919, 2 So. (2d) 647 (1941); Hatch v. Morgan, 12 So. (2d) 476 (La. App. 1942).

8. Art. 545, La. Civil Code of 1870.

9. Elder v. Ellerbe, 135 La. 990, 66 So. 337 (1914); Jackson v. Shaw, 151 La. 795, 92 So. 339 (1922); Wright v. Imperial Oil & Gas Products Co., 177 La. 482, 148 So. 685 (1933); Daggett, Louisiana Mineral Rights (1939) 179.

for granting the privilege of development.[10] Although this share may be labeled "rent" for convenience in applying the codal articles on lease, the fact remains that royalty represents a component part of the realty which has been served. While rent from a predial lease is the consideration for the *use* of the land, rent-royalty as applied to the mineral lease is payment "not for the use but for consumption."[11]

The conflict in the decisions as to the nature of royalty appears to be one of terminology rather than of substance. The court in the instant case in attempting to reconcile the apparent conflict in the decisions very wisely observed that the law applied in a given case depended upon the issue under consideration. In one case the law applicable to letting and hiring might be applied, whereas another case might involve the sale or alienation feature.

Article 2402[12] provides that the community is entitled to the profits of all the effects administered by the husband. It is believed that the word "profits" is an erroneous translation from the French text and should be read "fruits."[13] However, if there had not been a mistranslation, the result of the instant case would probably not have been altered since neither "profits" nor "fruits" affect the substance of the thing.

It is well settled that the fruits from the separate property of the husband fall into the community,[14] and that the rights of the community to this income are the same as those of the usufructuary.[15] Article 533[16] grants to the usufructuary the right to draw from the property subject to the usufruct all the "profits, utility and advantages" which it may produce, *"provided it be without altering the substance of the thing."* Adhering to the decision of *Elder v. Ellerbe,*[17] the court in the instant case decided that "oil in the earth is not a 'fruit' but a part of the realty itself; its removal, therefore, alters the substance of the thing of which it is a part."[18]

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10. Daggett, op. cit. supra note 9, at 204.
11. Daggett, Royalty in Louisiana (1941) 13 Miss. L. J. 323, 325.
12. La. Civil Code of 1870.
13. 3 Louisiana Legal Archives, Compiled Edition of the Civil Codes, Part II (1942) 1318-1320.
14. Crouch v. Richardson, 158 La. 822, 104 So. 728 (1925); Daggett, The Community Property System of Louisiana (1945) 31.
15. Wimbish v. Gray, 10 Rob. 46 (La. 1845); Succession of Andrus, 131 La. 940, 60 So. 623 (1913).
16. La. Civil Code of 1870.
17. 135 La. 990, 66 So. 337 (1914).
18. 159 F. (2d) 834, 839 (C. C. A. 5th, 1947).

The conclusion that the "rents" of real property in Article 545[19] applies to the ordinary predial lease and not to royalties from a mineral lease is undoubtedly sound. In arriving at this result Judge Lee relied in part upon the following expressions in the recent case of *Gulf Refining Company v. Garrett*:[20]

> "But the word 'rents' as used in that paragraph (Article 545) means the rent of a farm or house,—not the royalty stipulated in a mining lease. . . .
>
> "Notwithstanding the royalty stipulated in an oil or gas lease may be considered as rent for certain purposes, or in some aspects, it is well settled now that the royalty stipulated in an oil or gas lease is not to be compared with the rent of a house or a farm."[21]

These statements of the chief justice in the original opinion were not challenged in the dissenting opinions or in the opinion on rehearing. This seems to indicate that our supreme court would arrive at the same conclusion as did the federal court in the case under consideration.

Since the execution of an oil and gas lease is a "dismemberment of the property amounting to a partial alienation thereof,"[22] the court logically concluded that the bonus paid in part consideration therefor belonged to the separate estate of the husband. It is conceded that if the taxpayer had made an outright sale of his mineral interest, the proceeds therefrom would have been his separate property. Since the granting of a mineral lease alienates the landowner's right to search, as does the outright sale of the minerals, it would be difficult to justify a different disposition of the proceeds from the two contracts.

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INCOMPETENT PERSONS—LIABILITY OF CURATOR—CUSTODIAN DISTINGUISHED—Guidry, "a high grade moron," was released from a

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19. La. Civil Code of 1870.

20. 209 La. 674, 25 So. (2d) 329 (1945). For a discussion of this case see Daggett, The Work of the Louisiana Supreme Court for the 1945-1946 Term, Mineral Rights (1947) 7 LOUISIANA LAW REVIEW 208.

21. 209 La. 674, 689, 25 So. (2d) 329, 333 (1945).

22. Wiley v. Davis, 164 La. 1090, 1092, 115 So. 280, 281 (1927); Federal Land Bank of New Orleans v. Mulhern, 180 La. 627, 157 So. 370 (1934).