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# Private Law: Mineral Rights

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Justice Hamiter dissented on the ground that the proximate cause of the accident and injury was not the stack of lumber with its galvanized iron covering but the fact that the child tripped during play on some other and disconnected object. He felt that if an iron chair had been at the same place the injury could have happened just as easily.

## MINERAL RIGHTS

*Harriet S. Daggett**

### REVERSIONS—SERVITUDE AND LEASE

One of the interesting developments in the jurisprudence since the last resumé involves what the court in *Gailey v. McFarlain*[1] termed a "reversionary interest." In that case the court expressed the opinion that such an interest could be dealt with, but under the test of intention had not been dealt with in the contract under consideration.

In later cases, apparently because of obvious difficulties of application of prescription and possible dangers to settled principles of public policy, the court strengthened resistance to the concept by deciding that a vendor dealing with the possibility of reversion was simply selling something that he did not own. During the past year, in at least three important decisions, the court has adhered to the non-recognition policy. *Long-Bell Petroleum Company v. Tritico*[2] may be said to stand for a denial under the theory of the sale of a thing not owned; it was cited by the court for this principle in *McMurrey v. Gray*.[3] The latter case is emphatic on the point and grounds strongly on the public policy argument advanced by Chief Justice O'Niell in *McDonald v. Richard*,[4] wherein, incidentally, the idea was further blighted by the word "so-called" consistently prefixing the phrase "reversionary interest" used by the court in *Gailey v. McFarlain*.[5]

In *Liberty Farms v. Miller*,[6] the court again in no uncertain terms negates the reservation, termed a reversionary "right" in this case, grounding in part on the theory of sale of property not

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1. 194 La. 150, 193 So. 570 (1940).
2. 216 La. 426, 43 So. 2d 782 (1949).
3. 216 La. 904, 45 So. 2d 73 (1949).
4. 203 La. 155, 13 So. 2d 712 (1943).
5. 194 La. 150, 193 So. 570 (1940).
6. 216 La. 1023, 45 So. 2d 610 (1950).

owned, citing *McDonald v. Richard*,[7] *Gulf Refining Company v. Orr*,[8] and *Long-Bell Petroleum Company v. Tritico*.[9]

It is clear that the court feels an evolution of this concept is inimical to the best interests of the state. If it should occur that a landowner with clear intent had sold the reversion and upon the lapse of the original servitude still retained the land, the court might experience difficulty in maintaining denial of the rights of the vendee under the sale-of-a-thing-not-owned doctrine and cases cited in *Gailey v. McFarlain*.[10]

In *Vincent v. Bullock*[11] the court faced up to the proposition that the owner of a valuable, merchantable right may deal with it if not prohibited by the law or the public policy of the state. They proceeded to find an available legal pattern by which the new material might be governed in an orderly and useful manner. A reasonable prescriptive period was then applied.

Certainly the expected reversion, particularly in the declining years of an outstanding servitude, is a thing of value to the landowner and might be a very useful purchase for a prospective producer in making pooling agreements or other contracts securing an area for development. There are several existing legal patterns into which the idea might fit, more convenient, perhaps, than those available for the justices who dealt with *Vincent v. Bullock*.[12] Because considerations of public policy prevent the practical use of the doctrine, however, it may well be that this "certain object" of commerce disappeared concurrently with its announcement of being.

As suggested above, the situation wherein a landowner, having sold his hope of the expiration of an outstanding servitude, retains the land until the date of the extinction of the original servitude has not yet been definitely litigated. For the decision in *Gailey v. McFarlain*,[13] in which this hope of extinguishment was said to be an object of commerce, the court relied on *Gayoso Company v. Arkansas Natural Gas Company*.[14] This case, decided in 1933, stated that a lease granted by a landowner eight and one-half years after his vendor of the land had reserved all of the minerals was valid and the transaction a proper one, no use

7. 203 La. 155, 13 So. 2d 712 (1943).
8. 207 La. 915, 22 So. 2d 269 (1945).
9. 216 La. 426, 43 So. 2d 782 (1949).
10. 194 La. 150, 193 So. 570 (1940).
11. 192 La. 1, 187 So. 35 (1939).
12. Ibid.
13. 194 La. 150, 193 So. 570 (1940).
14. 176 La. 333, 145 So. 677 (1933).

of the servitude having been made during its life term by its owners, or of course, by the landowner's lessee. In this connection the recent case of *Wier v. Glassell*[15] is of interest. Therein, recognition is incidentally given to the validity of a so-called top lease, obtained by a sublessee from the landowner while the original lease from which the sublessee derived his title was in existence. Here we find an interesting parallel to the servitude situation where the landowner deals with his hope of expiration of a lease while an outstanding lease is still valid.

The public policy of the one situation seems hardly more inimical to the general welfare than that of the other. The legal groove into which the new type of royalty was placed in *Vincent v. Bullock*[16] might also fit dealings with hope of extinction of servitude even better than it does royalty as the happening of the future uncertain condition, extinguishment of an outstanding servitude, clearly is beyond the sole control of the landowner. These comparisons are entertaining to the writer, at least, and it is always an uncertainty as to whether they may sometime have a practical value.

### VINCENT-BULLOCK ROYALTY

Further development of the theory of royalty per se, as first postulated in *Vincent v. Bullock*[17] is found in *Union Sulphur Company, Incorporated v. Andrau.*[18] A short but most interesting opinion by Chief Justice Fournet clearly and logically proceeds to the conclusion that production of minerals in paying quantities must occur within the ten year period to effect an interruption of prescription. The time element creates an unusual quality of dramatic suspense as drilling had ceased, oil and gas had been found and efforts to complete the well as a producer met with success only three days too late.

### SERVITUDE

*Liberty Farm v. Miller* is again most interesting for its discussion and holding on the use of a mineral servitude as security. The contention was made that a certain agreement set forth a security title only, by which actual title to the servitude did not pass but was pledged. The court agreed that there was a clear intention to give security only but stated that this intention did not hinder title from passing. Furthermore, the court decided

15. 216 La. 828, 44 So. 2d 882 (1950).
16. 192 La. 1, 187 So. 35 (1939).
17. Ibid.
18. 47 So. 2d 38 (La. 1950).

that pledge of a servitude was impossible since delivery, real or symbolic, could not be made. Moreover, the court indicated that if counsel's argument prevailed the bank would have the pledge of a non-existent security since title to a servitude must be in one other than the landowner.

Act 97 of 1938,[19] providing for the pledging of certain mineral rights without delivery, is not mentioned in the case as it was not on the statute books at the time of the execution of the agreement in question and it does not appear that the legislature intended it to have retroactive effect. The statute does not use the word servitude but it conceivably might be included under the broad language "other contracts relating to minerals" and the like. However, the case by its analysis raises a doubt as to whether the landowner, even under this interpretation of the act could pledge his minerals. Regardless of the non-ownership theory, Act 96 of 1938[20] might be said to purport to permit a *mortgage* of the landowner's minerals separately from his land. Support by the court for this interpretation of the act seems unlikely.

### Creation of Servitude

On rehearing, the court in *Long-Bell Petroleum Company v. Tritico*[21] adhered to the generally accepted rules of creation of servitude by sale or reservation of the landowner. The theory of the first hearing was that a new servitude had been created by the vendees by virtue of the reservation made by the vendor of the land since a "sale of land with reservation of the minerals is equivalent, in other words, to the sale of land and the simultaneous reconveyance of the minerals."[22]

### Acknowledgment to Interrupt

The court continued in *Long-Bell Petroleum Company v. Tritico*,[23] as in other recent cases, to adhere to the "expressed and certain intention to interrupt" theory in matters of acknowledgment of servitude. A "mere" or "bare" acknowledgment is not enough, having as its purpose no more than a declaration of existing fact for protection against warranty or for clarity and exactness.

19. La. R.S. (1950) 9:4301-4304.
20. La. R.S. (1950) 9:5101.
21. 216 La. 426, 43 So. 2d 782 (1949).
22. 216 La. 426, 438, 43 So. 2d 782, 786.
23. 216 La. 426, 43 So. 2d 782 (1949).

USER

*McMurrey v. Gray*[24] contains another interesting discussion, that of user. The court indicated, without deciding,[25] that drilling to the Nacatosh sand was not a valid user of plaintiff's servitude and hence did not interrupt prescription. However, the court found that there had been no intent to abandon when defendants stopped operations and that plaintiff should be permitted to continue his efforts for a reasonable time by going on to a deeper sand, the relief for which he asked. Prescription of the servitude would have accrued on March 29, 1947. Actual drilling operations were not started until March 16, 1947. The Nacatosh sand was reached on March 26, 1947. The defendant was not interfered with until April 4, 1947. Thus, no obstacle was placed in the way until after the date of accrual of prescription; hence no ordinary suspension theory would seem to be involved. A reasonable time for continuance might seem fair and proper under the facts and pleadings, but a certain rule would be desirable in the writer's judgment. Doubt may now exist as to the depth which must be reached as of the date of expiration of the servitude. Proof must be adduced of intent to continue to the proper depth at which user sufficient to interrupt prescription would be established. The date of commencement here seems late in the ten year period—a matter of only thirteen days before accrual. Would commencement on the last day be enough if equipment, et cetera, indicated intent to drill to a depth at which it might be reasonably expected that oil could be found in the area? Should the rule be flexible? Here the Nacatosh sand was reached within the term of the servitude. Oil had been found there and might have been discovered, but was not. The court stated that this operation was *not* sufficient to constitute user but an extension of time was given since there was no abandonment or cessation of activities. To shade any further the time in a ten year period for *completion* to the proper depth would seem an unwarranted extension of the life of the servitude unless bona fide *commencement* within the period is to be the criterion of user for interruption, if operations are continued to a proper depth. The clear and definite rule announced for date of production to interrupt prescription for royalty per se in the hard fact case[26] discussed gives the satisfaction of certainty. Doubt is raised in this user case, under discussion, even though interruption as such was said by

24. 216 La. 904, 45 So. 2d 73 (1949).
25. See Per Curiam, 216 La. 904, 922, 45 So. 2d 73, 79.
26. Union Sulphur Co., Inc. v. Andrau, 47 So. 2d 38 (La. 1950).

the court on application for a rehearing, not to have been raised by the pleadings.

### Suspension by Minority

The executor of S. G. Sample, of the famous *Sample v. Whitaker* suits,[27] was sued in *Davidson v. Bolton*[28] for damages for failure to cancel a mineral lease upon land held by the plaintiff. The youngest of the Sample heirs came of age on July 31, 1937, when prescription began to run again on the servitude involved, which would have been valid under the original decision until August 20, 1946. Act 232 of 1944 cut off the right on July 26, 1945. The letter to defendants demanding cancellation of the lease was sent on September 6, 1944, and hence defendant was not liable in damages since at that date, and incidentally also as of the date of filing suit, the rights were in effect and refusal to renounce and cancel was justified. Since suspension of prescription for incapacity has been wiped out,[29] this method of prolonging the life of the servitude will cease to trouble the court.

### Sublease and Rent Royalty

The case of *Wier v. Glassell*[30] also stands for the settled proposition that a sublease and not an assignment results regardless of label on the instrument if control evidenced by retention of overriding royalty or otherwise is retained by the original lessee. The further point is logically made that the overriding royalty thus attached falls with the lease and does not follow future leases made by the sublessee. In this case the sublessee without fraud or estoppel obtained a top lease from the landowner while the lease under which he held but which he had not developed was in existence. The first lease expired at the end of its primary term; and after the erstwhile sublessee became lessee under the top lease, he then developed. The original lessee naturally was anxious to retain by some means a one-sixteenth royalty, which the original sublessee sloughed off by his foresight, legitimately exercised.

### Cancellation

Suit was instituted to cancel a mineral lease in *Hunter Com-*

27. 171 La. 949, 132 So. 511 (1930); 172 La. 722, 135 So. 38 (1931); 174 La. 245, 140 So. 37 (1932).
28. 216 La. 677, 44 So. 2d 700 (1950).
29. La. Act 510 of 1950 (La. R.S. [Supp. 1950] 9:5805).
30. 216 La. 828, 44 So. 2d 882 (1950).

*pany, Incorporated v. Vaughn.*[31] The land under lease was pooled by order of the Commissioner of Conservation during the primary term of the lease and no minerals were produced from the specific land or from any of the lands within the pool during the primary term of the lease in question. The *Crichton v. Lee*[32] case was distinguishable on one fact, that production from the pool ensued during the primary term of the questioned lease, though not from the land covered by the lease. The instrument in litigation here took cognizance of the possibility of state intervention, as it contained a provision to cover such a contingency. Because of this clause and since the situation in principle was the same as that of *Crichton v. Lee,*[33] the court refused to cancel the lease. No delay in beginning and continuing construction of the cycling plant and pressure maintenance system had occurred.

A careful and conscientious survey of evidence occupied the court in *Angelloz v. Southwestern Oil & Refining Company*[34] in attempting to ascertain the intention of the parties to a mineral lease. Admission of extrinsic evidence was approved since the wording of the document was ambiguous.

## OBLIGATIONS

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The most interesting case under this heading was *Lakeside Dairies v. Gregersen,*[1] where the court affirmed a position it had previously taken that the value of property at the date an option to purchase is exercised rather than at the date it is originally given is controlling for purposes of the action of lesion beyond moiety. The option in question was contained in a lease originally made in 1942 and was exercised in 1945. The court also took the sound view that lesion beyond moiety may be urged as a defense to an action for specific performance brought by the buyer. In addition to the purchase money to be paid by the buyer, the seller was to be granted the so-called privilege of rebuying from the buyer certain of the lots making up the entire property. The court recognized that this was simply a conditional option to be available to the vendor if and when the vendee exercised his option and said that if the vendor should have purchased the lots, the action of lesion would have been

31. 217 La. 459, 46 So. 2d 735 (1950).
32. 209 La. 561, 25 So. 2d 229 (1946).
33. Ibid.
34. 215 La. 1056, 42 So. 2d 753 (1949).
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1. 217 La. 510, 46 So. 2d 752 (1950).