

Mines and Minerals - Suspension of Prescription - Obstacle to Exercise of Servitude

J. T. B.

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tion suspending the exercise of the right is one to which the obligee has agreed, there should be no reason to apply the maxim *contra non valentem*.¹⁷ Personal obligations containing a suspensive or resolutive condition¹⁸ would not be affected and the general rule of suspension of prescription would be applicable. If the result of the present policy as to mineral rights is desirable, the implication of Chief Justice O'Niell's opinion should be adopted.

J. M. S.

MINES AND MINERALS—SUSPENSION OF PRESCRIPTION—OBSTACLE TO EXERCISE OF SERVITUDE—Plaintiffs inherited their mother's half interest in a tract of land which had belonged to the matrimonial community. Subsequently, their father sold a fourth interest in the mineral rights, reserving the exclusive right to lease. This interest was later acquired by the defendants. The plaintiffs contend that the defendants' rights have been lost by the prescription of ten years, *liberandi causa*. Held, that there was no obstacle preventing the exercise of the servitude which would suspend the non-user prescription of Article 792 of the Civil Code.¹ *Hightower v. Maritzky*, 195 So. 518 (La. 1940).²

The principle of Article 792 has been invoked in several cases involving mineral rights. Where one co-owner of mineral rights was prevented from going upon the property by the other co-owner who was at the same time the landowner, the court pointed out that the landowner could have been forced to permit entry³ and that therefore the non-user prescription had not been

17. For a discussion of "obstacle," see Note (1940) 2 LOUISIANA LAW REVIEW 755; notes 2, 12, supra; Comment (1938) 12 Tulane L. Rev. 244.

18. As to resolutive conditions, it was stated in *DeMontluzin Co. v. New Orleans & N.E. Ry.*, 166 La. 822, 828, 118 So. 33, 35 (1928) that: "The [resolutive] action, although it may result in the recovery of immovable property, is regarded as a *personal action*, and as barred by the prescription, *liberandi causa*, of ten years established by Article 3544 of the Civil Code, by which all personal actions not otherwise provided for are prescribed. . . . This prescription begins to run the moment the cause of action to enforce the condition arises." (Italics supplied.) See cases cited therein, and *State v. Fontenot*, 192 La. 95, 187 So. 66 (1939).

1. Art. 792, La. Civil Code of 1870: "If the owner of the estate to whom the servitude is due, is prevented from using it by any obstacle which he can neither prevent nor remove, the prescription of nonusage does not run against him as long as this obstacle remains."

2. Other problems are presented in the report of this case, but the present discussion is limited to the points indicated.

3. Art. 655, La. Civil Code of 1870. *Clark v. Tensas Delta Land Co.*, 172 La. 913, 136 So. 1 (1931).

suspended.⁴ Likewise, a landowner's lease of mineral rights prior to the expiration of the ten year prescription period did not give a right to explore while the servitude was in existence and was therefore not an obstacle which could suspend the prescription.⁵ In one case, mineral rights had been purchased subject to an existing lease and it was contended that the lease was an obstacle sufficient to "interrupt"⁶ the running of prescription against the servitude; however the court found that the lease was the factor which induced the defendants to purchase the mineral rights and held that the servitude had been extinguished by prescription.⁷ In another case, purchasers of mineral rights were held to have legal knowledge of prior recorded leases which could not be urged as an obstacle to the prescription against their servitude.⁸

From the wording of Article 792, it seems clear that to suspend prescription the *obstacle* must be one to which the owner of the servitude has not consented.⁹ In the instant case, the vendor's reservation of the exclusive right to lease was held not to be an obstacle which would suspend prescription. The court described the transaction as a sale of a "limited servitude,"¹⁰ because the obstacle or restriction had been consented to by the vendee. The court pointed out that parties may impose any restriction or regulation upon the enjoyment of a servitude, but they cannot dispense with the running of prescription.¹¹

In the principal case, the defendants also invoked the rule

4. *Clark v. Tensas Delta Land Co.*, 172 La. 913, 136 So. 1 (1931). See also *Myers v. Cooke*, 175 La. 30, 142 So. 790 (1932). The court stated, however, that the contention might have been sustained under the rule "*Contra non valentem agere nulla currit praescriptio*" if the landowner had prevented the servitude owner from exercising his right. But in both the *Clark* case and the *Myers* case it was clear that no attempt had been made to exercise the servitudes.

5. *Gayoso Co. v. Arkansas Natural Gas Corp.*, 176 La. 333, 145 So. 677 (1933).

6. Art. 792, La. Civil Code of 1870, clearly indicates a *suspension* and not an *interruption* of prescription. This point was not discussed by the court, since the lease was found not to be an *obstacle* at all.

7. *Coyle v. North Central Texas Oil Co.*, 187 La. 238, 174 So. 274 (1937).

8. *Gailey v. McFarlain*, 193 So. 570 (La. 1940).

9. The Article refers to an obstacle which the owner of the estate can neither *prevent* nor *remove*. See *Sarpy v. Hymel*, 40 La. Ann. 425, 4 So. 439 (1888).

10. It seems, however, that the servitude was "so limited" that there was in fact no servitude established, as the vendee had no right at all to explore the land for minerals. Would it not have been more logical and more in line with the apparent intention of the parties to have treated this sale as one of "royalty"?

11. This exception is based on the rule that one cannot renounce a prescription not yet acquired. Art. 3460, La. Civil Code of 1870.

that under Article 738¹² the right to exercise a servitude was suspended when the servitude had been granted by only one of the co-owners of the land. The court indicated that Article 738 provides only for suspension of the right to exercise a servitude, and not for a suspension of the prescription. Here the defendants could have removed the obstacle by demanding a partition under Article 740.¹³ This Article seems to provide for the situation where one co-owner has granted a servitude on his part of the estate only; but it may possibly be taken to cover the situation where one co-owner has granted a servitude purporting to be on the whole property, because such a grant might be interpreted as existing on a part only. It is the policy of the courts to prevent the inactive preservation of mineral servitudes for indefinite periods, and the present decision is in line with that policy.

J. T. B.

TEACHER TENURE—REDUCTION IN POSITION AND SALARY—Plaintiff, a public schoolteacher of ten years' experience and who had served as a high school principal for the past three years, was demoted by defendant school board to a grade school position at a salary substantially less than that which he had formerly received. The board preferred no charges against him and failed to allow him an opportunity for a hearing. Plaintiff seeks by mandamus to compel his reinstatement at the salary paid him during the prior session. *Held*, that reinstatement be granted and plaintiff be awarded back pay. The action of the board was in derogation of the Teacher Tenure Act.¹ The purpose of this Act is to guarantee security to teachers in the position, grade, or status which they have attained, and removal to a position of lower grade and rank is a violation thereof. *State ex rel. Bass v. Vernon Parish School Board*, 194 So. 74 (La. App. 1940).

Although the Teacher Tenure Act has been construed on sev-

12. Art. 738, La. Civil Code of 1870: "The coproprietor of an undivided estate can not impose a servitude thereon, without the consent of his coproprietor."

"The contract of servitude, however, is not null; its execution is suspended until the consent of the coproprietor is given."

13. Art. 740, La. Civil Code of 1870: "If the coproprietor has established the servitude for his part of the estate only, the consent of the other owners is not necessary, but the exercise of the servitude must be suspended, until his part be ascertained by partition. In this case, he to whom the servitude has been granted, may compel the coproprietor from whom he received it, to sue for a partition, or may sue for it himself."

1. La. Act 58 of 1936 [Dart's Stats. (1939) §§ 2267, 2267.1].