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Lumber Company case be subsequently modified, we are justified in concluding that this migration of authority is practically complete. Whatever else be the implications of this recent pronouncement of our highest tribunal, it has certainly met the criticism that the American constitutional system is too inflexible to operate in an evolving world.

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DIVISIBILITY OF THE MINERAL SERVITUDE

The development of the concept of the mineral servitude in Louisiana has given rise to the application of many legal doctrines and rules. Of all of these, perhaps the most controversial is the doctrine announced in *Sample v. Whitaker*¹ that the mineral servitude is indivisible. Some writers felt very strongly that this doctrine of indivisibility ought not be applied to the mineral servitude,² and consequently most of the argument has been concerned with this. However, any belief that the court would reverse itself was abandoned after a very recent decision,³ which followed the doctrine to its logical extreme. With approval by the court now clearly established, a re-examination and analysis of the doctrine, and an inquiry as to how it should be applied, would appear to be appropriate, for upon this doctrine rests a great deal of the law of prescription as applied to the mineral servitude.

The first type of situation in which the doctrine of indivisibility occurs is that in which a mineral servitude created on a particular tract of land is acquired by A and B as co-owners. Does the interruption or suspension of prescription on the servitude as to A also interrupt or suspend it as to B? To this the Louisiana Supreme Court gave an affirmative answer in *Sample v. Whitaker*. In so doing the court rejected the contention of the landowner that Article 538⁴ of the Civil Code, which states that a

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1. 172 La. 722, 135 So. 38 (1931).

2. See Comment (1940) 14 Tulane L. Rev. 246.

3. *Ohio Oil Co. v. Cox*, 198 So. 902 (La. 1940).

4. Art. 538, La. Civil Code of 1870: "Usufruct is divisible; for if this right is vested in several persons at a time, there is but one usufruct, which is divided among them, each having his portion. The reason is because the object of this right is the receiving the fruits of the thing, which are corporeal and divisible."

usufruct is divisible as between co-owners, should also be applied to the mineral servitude. Instead the court adopted the rule applicable to predial servitudes contained in Article 656 that: "The rights of servitudes, considered in themselves, are not susceptible of division. . . ." ⁵ The court next applied Article 802 ⁶ which, it pointed out, was "the logical sequence of the principle that the rights of servitude are indivisible. . . ." ⁷ Since that time the principle has been followed in many cases of this type. These cases have been collected and analyzed very ably, ⁸ and require no further treatment here.

The second type of case in which divisibility of the mineral servitude becomes important is this: *A* purchases or reserves all the mineral rights under a section of land, and then sells *all* his mineral rights in the northern half of this section to *B*. In this situation, will *B*'s user of the servitude on the northern half interrupt prescription running against the southern half? It is submitted that it will not, since the servitude has been divided by the sale from *A* to *B*. However, an almost total lack of pertinent jurisprudence makes it difficult to predict what the supreme court will hold when this point is presented.

In *Arent v. Hunter* ⁹ a situation similar to the above was before the supreme court. In that case, *A* and *B* bought a block of land in fee. They then granted to *X* Company a mineral lease on five noncontiguous tracts thereof. Sometime later, in 1917, *A* and *B* sold the entire block to *C* reserving all the minerals. In September, 1918, *X* Company drilled on one of the leased tracts and completed a well which it immediately capped. In 1923 *A* and *B* sold to *C* all their mineral rights under the tracts of land not under lease. In January, 1928, *X* Company reopened the capped well

5. Art. 656, La. Civil Code of 1870: "The rights of servitudes, considered in themselves, are not susceptible of division, either real or imaginary. It is impossible that an estate should have upon another estate part of a right of way, or of view, or any other right of servitude, and also that an estate be charged with a part of a servitude.

"The use of a right of servitude may be limited to certain days or hours; but thus limited, it is an entire right, and not part of a right.

"From thence it follows that a servitude existing in favor of a piece of land, is due to the whole of it, and to all the parts of it, so that if the land be sold in parts, every purchaser of a part has the right of using the servitude in toto."

6. Art. 802, La. Civil Code of 1870: "If among the coproprietors there be one against whom prescription can not run, as for instance a minor, he shall preserve the right of all the others."

7. *Sample v. Whitaker*, 172 La. 722, 729, 135 So. 38, 40 (1931).

8. *Daggett, Mineral Rights in Louisiana* (1939) 24 et seq; *Comment* (1940) 14 *Tulane L. Rev.* 246.

9. 171 La. 1059, 137 So. 157 (1931).

and started production. This suit was brought by C, more than ten years after the original drilling in 1918, to have himself declared owner of the mineral rights under the entire block of land. The court held that the reservation of all the minerals in 1917 created one servitude in A and B. When they sold to C the mineral rights on the tracts not subject to the lease, the servitude on them became extinguished by confusion and five new servitudes in favor of A and B were created on the five noncontiguous tracts under lease. Hence, the production in 1928 interrupted prescription only as to the tract on which the well was located and the mineral rights on the other four noncontiguous tracts were lost by nonuser.

There can be no doubt that if A and B had not sold to C the mineral rights on the tracts not covered by the lease, the production would have interrupted prescription as to the entire block of land since there was then but one servitude.¹⁰ Moreover, unless the sale to C did divide the servitude rather than make C a co-owner, it would not have been extinguished by confusion,¹¹ as to the part not under lease. Therefore, the writer concludes that this case holds the mineral servitude to be divisible by surface area.

Is this in conflict with the doctrine of the *Sample* case—that the rights of a mineral servitude are indivisible? A close examination of that case reveals that the court intended to convey only the idea that as between co-owners the mineral servitude is indivisible. The unqualified use of the word “indivisible” by the court to describe the mineral servitude is quite understandable in view of the argument of counsel that a mineral right, being a personal servitude, was divisible among co-owners under Article 538. Obviously the court was using *indivisibility* as opposed to *divisibility* in that sense. This is further clarified by Article 656, upon which the court relied. The article explains the concept of indivisibility by pointing out that it is impossible to have upon an estate part of a right of way, or of view. However, the “use of the right of

10. *Levy v. Crawford, Jenkins & Booth*, 194 La. 757, 194 So. 772 (1940). Although the court in *Arent v. Hunter* referred to the leases as servitudes, a practice to which Chief Justice O'Neill dissented specifically, it is clear that they were in fact ordinary mineral leases as in the *Levy* case. It should be particularly noticed that the court awarded the royalties from the lease to Hunter and McCormick, the original grantees and holders of the single mineral servitude preserved by the drilling of the well by the lessee.

11. Art. 805, La. Civil Code of 1870 states: “Every servitude is extinguished, when the estate to which it is due, and the estate owning it, are united in the same hands.”

“But it is necessary that the whole of the two estates should belong to the same owner; for if the owner of one estate only acquires the other [in] part or in common with another person, confusion does not take effect.”

servitude may be limited to certain days or hours; but thus limited, it is an entire right, and not part of a right."¹² Here the use of the mineral servitude was limited to certain areas; as thus limited it was an entire right or servitude and not part of a right.

One objection to this theory has been made upon the ground that all the original servitude owner obtains is a single servitude and he therefore has no right to create additional ones at the expense of the landowner. Such an objection might be tenable if it could be shown that by so doing the servitude owner would increase the burden on the land.¹³ As a matter of fact, the creation of additional servitudes, instead of increasing the burden, actually decreases it. This was recognized by the Louisiana Supreme Court, which stated that a division of the servitude would "lessen the value of the servitude or . . . make it less burdensome to the servient estate. . . ." ¹⁴ Moreover, any theoretical objection can be answered by pointing out that although the servitude owner creates additional servitudes, these are created out of the rights of servitude granted to him in the original deed or reservation and do not go beyond the terms of that instrument.¹⁵

This view of mineral servitude will explain the seeming anomaly in the two *Sample v. Whitaker* cases.¹⁶ A single fact situation gave rise to both suits. Sample sold to York Whitaker two contiguous tracts of land and reserved all the mineral rights. This, it can be observed, created a single servitude. Later York sold one of the tracts to Isaac Whitaker, not mentioning the reservation. In the suit against York Whitaker the court held that ownership of a fraction of this servitude by a minor suspended prescription liberandi causa as to all his co-owners, since the servitude was indivisible. In the other suit the court held the servitude to be extinguished as to the tract bought by Isaac Whitaker because of the running of prescription acquirendi causa in his favor. It cannot be denied that as a result of this holding

12. Art. 656, La. Civil Code of 1870.

13. This idea is embodied in Art. 776, La. Civil Code of 1870.

14. *Connell v. Muslow Oil Co.*, 186 La. 491, 496, 172 So. 763, 765 (1937).

15. Saunders, *Lectures on the Civil Code* (1925) 181, seems to indicate the possibility of this in a negative way when he says:

"Persons having a qualified right in property cannot establish servitudes extending beyond their rights—as, where usufructuary of an estate established a servitude on the estate of which he has the usufruct, the servitude comes to an end when the usufruct terminates."

16. It was pointed out in *Daggett*, op. cit. supra note 8, at 80, that in these cases in which the Supreme Court first expounded the indivisibility of the mineral servitude it allowed that part of the servitude resting on Isaac Whitaker's land to be extinguished and the other part to continue in existence.

there was a division of the mineral servitude. Nevertheless, there was no division of the rights of the servitude or of the servitude itself as between co-owners.¹⁷ The rights of the servitude *as to the tract bought by Isaac* were complete rights and these were extinguished. On the other hand, because the servitude was indivisible as between co-owners, the minority of one co-owner suspended prescription liberandi causa as to the entire rights of servitude on the tract retained by York.¹⁸

The holding of the *Arent* case discussed above is clearly distinguishable from that of *Connell v. Muslow Oil Company*.¹⁹ In the latter case the owner of land sold it and reserved all the mineral rights. Thereafter the purchaser sold a portion of the land to a third person without mentioning the mineral servitude. For some time prior thereto there had been a producing well on the tract retained by the original purchaser. The third person claimed that the servitude had been extinguished on the tract purchased by him by prescription acquirendi causa. The court held that it was not extinguished inasmuch as there was only one servitude and it had been continually exercised. The third person thus was never in possession of that right as had been Isaac Whitaker in the *Sample* case. It was pointed out that the landowner after divesting himself of the mineral servitude could not divide that servitude by a superficial division of the estate. This is quite logical since the landowner who has alienated a servitude no longer has any interest in it.

On the other hand, in the *Arent* case the division of the servitude was made by the servitude owner. In effect the servitude owner also divided the servitude in the *Sample* case. The method there was by allowing prescription acquirendi causa to run against part of the land covered by the servitude. This was just as effective an alienation as if the servitude owner sold to another all his mineral rights in that part of the land.

The third type of situation was presented in *Clark v. Tensas Delta Land Company*.²⁰ There the defendant bought one-half of the mineral rights from the owner of a certain tract of land. Suit was brought by the landowner's assignor more than ten years after the date of that mineral deed. In answer to the plea of pre-

17. Compare the concepts of divisibility in Arts. 656, 776, 803, La. Civil Code of 1870.

18. A very similar situation explainable in the same manner occurred in *Palmer Corporation of Louisiana v. Moore*, 171 La. 774, 132 So. 229 (1931).

19. 186 La. 491, 172 So. 763 (1937).

20. 172 La. 913, 136 So. 1 (1931). For another case where the same facts were involved see *Myers v. Cooke*, 175 La. 30, 142 So. 790 (1932).

scription liberandi causa, the defendant company argued that it was a co-owner of the mineral rights with the landowner and could not act without his consent; hence prescription should not run against it. The court very properly pointed out that the defendant was not a co-owner but rather the full owner of a complete servitude and could exercise that servitude without the permission of the landowner.²¹ A proper analysis²² of this case calls for an examination of the rights of mineral servitudes. Certainly among the most valuable of these are the right to search and explore for minerals and the right to reduce them to possession. These are indivisible, and whoever owns a mineral servitude owns a full right to explore for and to reduce to possession the minerals. The minerals reduced to possession are the advantages resulting from the servitude and hence are divisible.²³ Thus a landowner may create different mineral servitudes in several individuals each of whom would have a full and complete right to explore for and reduce to possession the minerals on the land. However, all these individuals would be under the common obligation to distribute the advantages so obtained according to the ownership thereof.²⁴

In the opinion the court pointed out that the defendant had never attempted to exercise the mineral servitude and that the mineral deed expressly stated that the defendant should have a right to use the "land in any manner whatsoever in mining." However, these factors appear to be but makeweight and should not be regarded as detracting from the broadness of the decision.²⁵ From the opinion it seems clear that if the defendant had

21. "What the Delta Land Company owned was not half of the right to the minerals, but the right to half the minerals, in Clark's Land."

"The right which the Tensas Delta Land Company acquired from the Kimball Lumber Manufacturing Company was a servitude on the latter's land . . . therefore the Kimball Lumber Manufacturing Company was obliged, and so was each subsequent owner of the land subject to the servitude obliged, to permit the Tensas Delta Land Company to go upon the land and explore for oil, gas, and other minerals, and to reduce them to possession, and account to the owner of the land for half of such oil, gas, or other minerals." 172 La. 913, 915-916, 136 So. 1, 2 (1931).

22. For an exhaustive analysis of this case see Daggett, *op. cit.* supra note 8, at 82 et seq.

23. Art. 657, La. Civil Code of 1870: "Though the right of servitude be indivisible, and must be established for the whole, and not for a part, nothing prevents the advantage resulting from it from being divided, if it be susceptible of division; as, for example, the right of taking a certain number of loads of earth from the land of another, or of sending to pasture a certain number of animals on the land of another."

24. *Clark v. Tensas Delta Land Co.*, 172 La. 913, 916, 136 So. 1, 2 (1931).

25. However, the court seemed to place a great deal of stress on the failure to try to exercise the servitude in *Myers v. Cooke*, 175 La. 30, 142 So. 790 (1932).

been found to be a co-owner of the *servitude*, prescription could not have run against him under the doctrine that as between co-owners the mineral rights are indivisible and their mutual consent is necessary in order to exercise them.²⁶

In conclusion, the foregoing may be restated as follows: As between co-owners of a mineral servitude, that servitude is indivisible. This is merely another way of saying that the rights of servitudes are indivisible under Article 656 of the Civil Code. However, the servitude itself may be divided by designating the superficial area to which the rights alienated are to apply. This act creates another servitude out of the original one granted. The sale by the landowner of a fractional part of the minerals creates an entire and distinct servitude carrying with it all the rights necessary for its exercise, and also the obligation of distributing to the other owners of mineral rights their just proportion of the minerals.

WILLIAM M. SHAW

JURISDICTION AND VENUE OF THE ACTION OF NULLITY IN LOUISIANA

Articles 604 to 608 inclusive of the Code of Practice of 1870 contain the provisions of our law relative to the annulment of judgments. The causes for which the nullity of a judgment may be demanded fall into two classes—vices in the form of proceeding and vices which go to the merits of the case.¹

The vices of form which render a judgment null are listed in Article 606 of the Code of Practice:

“1. If a judgment has been rendered, even contradictorily, against a person disqualified by law from appearing in a suit, as a minor without the assistance of his curator or tutor. . . .²

“2. If the defendant, although qualified to appear in a cause, have been condemned by default, without having been cited;

“3. When the judgment, though clothed with all the necessary formalities, has, nevertheless, been given by a judge in-

26. *Gulf Refining Co. v. Carroll*, 145 La. 229, 82 So. 227 (1919); *Gulf Refining Co. v. Hayne*, 148 La. 340, 86 So. 891 (1921).

1. Art. 605, La. Code of Practice of 1870.

2. The last clause of this subdivision, which reads “or a married woman without the authorization of her husband or of the court” has been rendered obsolete by La. Act 283 of 1928.