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## Is a Mineral Servitude Divisible?

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## Comments

### IS A MINERAL SERVITUDE DIVISIBLE?

The answer to the question of whether or not a mineral servitude is divisible seems again to be yes and no. The Civil Code<sup>1</sup> answers the servitude question in the negative, so of course for some years the judiciary has been definite in giving the question the same

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

answer so far as the flat theory of the *rights* is concerned.<sup>2</sup> However, as is well known, the mineral servitude presents many new problems unanswered by the Code; hence, the courts have of necessity as well as for policy reasons taken a realistic attitude in their creation of the private mineral law of the state. Obviously the path cannot always follow without deviation the old groove of the theory of the law, laid down without reference to the problems of mineral law which were un contemplated by the redactors of the theories now to be adjusted to the new substances and the new scientific methods for their recovery. For example, the *Sample v. Whitaker* cases<sup>3</sup> dealing with good and bad faith prescription stated the original precept of the law of indivisibility in private mineral rights and at one and the same time divided the mineral servitude by weighting the balance in the good faith case<sup>4</sup> with the special statute<sup>5</sup> on prescription acquirendi in such cases when minors are involved. The legislature of 1944<sup>6</sup> might be said to have further divided the servitude by vitiating as to major co-owners the effect of the *Sample v. Whitaker*<sup>7</sup> case dealing with bad faith and minority where minority was held to have suspended as to all except the good faith landowner. The contiguous estate doctrine evolved by the court might be said to have divided the servitude granted as a single right upon several non-contiguous tracts.<sup>8</sup> Recently, the court in *Lenard v. Shell Oil Company*<sup>9</sup> rebolstered the theory of indivisibility by holding in favor of a servitude owner on eighty thousand acres of land against a good faith purchaser of thirty acres, distinguishing the good faith *Sample v. Whitaker*<sup>10</sup> case by the fact that the original overall servitude owner had used his right, while in the *Sample v. Whitaker* case he had not. Thus the doctrine of interruption by user weighted the balance against the statute<sup>11</sup> on good faith acquirendi prescription. These statements obviously are made in regard to the indivisibility

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2. Daggett, *Mineral Rights in Louisiana* (1 ed. 1939) 24, § 6.

3. *Sample v. Whitaker*, 171 La. 949, 132 So. 511 (1930); *Sample v. Whitaker*, 172 La. 722, 135 So. 38 (1931); *Sample v. Whitaker*, 174 La. 245, 140 So. 36 (1932).

4. *Sample v. Whitaker*, 171 La. 949, 132 So. 511 (1930); and 174 La. 245, 140 So. 36, 37 (1932).

5. La. Act 64 of 1924, amending Art. 3478, La. Civil Code of 1870.

6. La. Act 232 of 1944 [Dart's Stats. (1939) §§ 4826.3, 4826.4].

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

8. Daggett, *op. cit. supra* note 2, at 79, 80, § 21.

9. *Lenard v. Shell Oil Company*, 211 La. 265, 29 So. (2d) 844 (1947).

10. *Sample v. Whitaker*, 171 La. 949, 132 So. 511 (1930); and 174 La. 245, 140 So. 36 (1932).

11. La. Act 64 of 1924, amending Art. 3478, La. Civil Code of 1870.

idea per se. The decisions on rehearing of the cases of *Ohio Oil Company v. Ferguson*<sup>12</sup> and *Byrd v. Forgotson*<sup>13</sup> have now been rendered and give rise to this brief discussion on indivisibility vel non of the mineral servitude.

In each of these cases the original grantee of the mineral servitude from the landowner sold *all* mineral rights in a certain area of the land covered by the servitude and designated this acreage by the usual descriptions for the surface of the land. The *Ohio Oil*<sup>14</sup> case dealt with the question of whether user of the servitude on the land without the boundary of the area disposed of preserved the right on the specified portion sold which had not been developed. The *Byrd*<sup>15</sup> case posed the same problem as to divisibility with the distinguishing feature of suspension by virtue of minority-owners of fractional interests on the land outside of the tract in which *all* the minerals had been sold. The court decided in both cases that the causes, that is, user and minority which prolonged the life of the servitude under the over-all grant, did not preserve it upon the surfacely designated plot which had been disposed of by the original owner of the right. The court emphatically preserved the theory of the indivisibility of the servitude while in effect dividing it, just as they did in the *Sample v. Whitaker* cases.<sup>16</sup> In *Sample v. Whitaker*<sup>17</sup> the realistic result at variance with the theory as such, was reached by application of the special statute<sup>18</sup> on good faith acquirendi prescription. In the cases under discussion the realistic result at variance with the theory as such was reached by analogous application of the articles of the code dealing with predial servitudes, when the dominant estate is partitioned.<sup>19</sup> The owner of the mineral servitude was likened unto the dominant predial estate and when he partitioned his estate, that is, his mineral right, by voluntary sale of *all* his minerals in a certain specified tract, it then behoved the vendee to use or lose his right on the servient estate, the land, just as would the owner of any part of a partitioned dominant estate under Article 803. The author of the majority opinion

12. *Ohio Oil Co. v. Ferguson*, La. Sup. Ct. Docket No. 37458 (Dec. 15, 1947).

13. *Byrd v. Forgotson*, La. Sup. Ct. Docket No. 37457 (Dec. 15, 1947).

14. *Ohio Oil Co. v. Ferguson*, La. Sup. Ct. Docket No. 37458 (Dec. 15, 1947).

15. *Byrd v. Forgotson*, La. Sup. Ct. Docket No. 37457 (Dec. 15, 1947).

16. *Sample v. Whitaker*, 171 La. 949, 132 So. 511 (1930); 172 La. 722, 135 So. 38 (1931); 174 La. 245, 140 So. 36 (1932); Daggett, op. cit. supra note 2, at 79, 80, § 21.

17. *Sample v. Whitaker*, 174 La. 245, 140 So. 36, 37 (1932).

18. La. Act 64 of 1924, amending Art. 3478, La. Civil Code of 1870.

19. Arts. 656, 776, and 803, La. Civil Code of 1870.

in *Ohio Oil Company v. Ferguson*,<sup>20</sup> Justice Hawthorne, "concedes" that the analogy "is somewhat difficult"! Justice Fournet in his dissenting opinion terms it "impossible"! It is notable that the four justices concurring in the result reached the goal by different routes. This point is made by Justice Fournet, with whom Justice Ponder concurred in his dissenting opinion.

The outstanding fact upon which the cases are distinguished by the court from others<sup>21</sup> containing expressions maintaining indivisibility of the servitude is that the owner of the original servitude sold *all* his minerals in the circumscribed tract. In other cases<sup>22</sup> where an area was marked out for the vendee, only a part of the minerals in the area was sold so the vendor disposed of a part of the *benefits* of his *right* to search, which he retained, though he limited the area from which these benefits were to issue. Since the court strenuously maintains in the instant cases that the servitude was not and could not be divided, that the servitude owner did not and could not sell a part of his *right*, then presumably if the vendor kept a one-millionth part of the benefit in the acreage he would still have the right to search. He would have little more motive for doing so than when as in the instant case, he had sold *all* his minerals in the acreage. The cases under discussion hold that the mineral rights in question reverted to the landowner, since there had been no user or minor co-ownership of a fractional interest. Who *could* have used the right? If the right is indivisible and a part of the *right* could not be sold, then presumably the vendee would have had no right to use by search so how could he protect himself? If he *could* search, which was indicated, then it would appear that a mineral servitude owner could dispose of a part of his *right* and thus divide it *or* he had the power to create a new servitude, a privilege understood to belong only to the landowner. The court made it clear that there was no co-ownership as would have been the case had a fractional interest in the *benefits* been disposed of. If the right to search had remained with the vendor servitude owner with accrual of all benefits to the vendee in the designated area, then it would appear that something in the nature

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20. *Ohio Oil Co. v. Ferguson*, La. Sup. Ct. Docket No. 37458 (Dec. 15, 1947).

21. *Lee v. Giauque*, 154 La. 491, 97 So. 669 (1923); *Patton v. Frost Lumber Industries, Inc.*, 176 La. 916, 147 So. 33 (1933); *Connell v. Muslow Oil Co., Inc.*, 186 La. 491, 172 So. 763 (1937); *Hodges v. Norton*, 200 La. 614, 8 So. (2d) 618 (1942).

22. *Patton v. Frost Lumber Industries, Inc.*, 176 La. 916, 147 So. 33 (1933); *Connell v. Muslow Oil Co., Inc.*, 186 La. 491, 172 So. 763 (1937); *Hodges v. Norton*, 200 La. 614, 8 So. (2d) 618 (1942).

of royalty per se—the *Vincent v. Bullock* type—would have been sold by the servitude owner.

As a matter of pure realism, the right seems to have been divided without damage to the theory of indivisibility, which was linguistically preserved. This is nothing new as evidenced by the well known examples cited in the first paragraph of the comment, dealing with settled rules where division might be said to have actually occurred.

On the policy question, the dissenting justices seem to have felt that a settled property rule had been violated, that parties to the contract had depended on the thought that the right would hold for the part as long as its life was preserved for the original whole. Of two innocent parties, certainly the buyer of the part suffered. The seller did not suffer as he had his remuneration and even if his faith was good he, by selling, had caused the loss to happen. Another policy of the state,<sup>23</sup> to frown upon tying up property, was preserved though it does not appear to have been a factor in the decision and the recent *Lenard* case<sup>24</sup> is diametrically opposed both on this policy point and the divisibility theory.

The members of the court have recently indicated a marked individualism, in finding different reasons for like conclusions. This has ever marked a transitional stage, which often evolves a more fundamental analysis, stimulating to the healthy progress of the law. It also encourages other students to evaluate the various theories advanced. It may be that the conclusion of the two recent cases under discussion, whether warranted or not, might have been reached by a more intellectually satisfying course than that pursued by the author of the majority opinion in the *Ohio Oil Company* case.<sup>25</sup> The words partition and division are interchangeable. After the mineral servitude has been likened unto a dominant estate, obviously it is subject to partition or division, ergo a mineral servitude is divisible. Little has been accomplished by the tortuous mental journey. Certainly the lands of *both* estates needed for a predial servitude are subject to partition or division and rules are laid down regarding the effect if any of this division upon the *use* of the right bearing upon both estates. It is agreed that the mineral servitude is *sui generis*, that it does not fit exactly into old legal

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23. Daggett, *op. cit.* *supra* note 2, at 15, 16, 17, 18, § 3; 34, § 11; 186, 188, 190, § 60.

24. *Lenard v. Shell Oil Co.*, 211 La. 265, 29 So. (2d) 844 (1947).

25. *Ohio Oil Co. v. Ferguson*, La. Sup. Ct. Docket No. 37548 (Dec. 15, 1947).

patterns. However, since only one estate is involved, the "like unto" a personal servitude category better fits the facts and is more convincing even to a layman than the "like unto" a dominant estate picture. The rooted ideas of the personal servitude and the indivisibility of a right might have received less jar. The royalty analogy has been suggested above. The sale of *benefit* rule might have been applied to the new set of facts. The contractual limitation of the use of the original servitude might have been said to have produced the result. A less extensive use idea mentioned in Article 790<sup>26</sup> of the Code might have been worked out without great harm, under the facts of this case, to the contiguous estate doctrine. Under the new set of facts where the servitude owner had disposed of *all* his benefits in the plot and apparently had relieved himself of all responsibilities in connection with the area, a direct statement of divisibility by this method might have been less disconcerting than the rationalization of this result with attendant fears of future consequences by the introduction of the dominant estate analogy. The solution under the lease pattern for distinction between assignment and sublease and attendant consequences parallels the result achieved under these new cases on servitude. The criteria in each pattern seems to be whether the lessor or servitude owner in disposing of a distinct acreage under his right retained any power over or benefit from the land marked out in the conveyance.<sup>27</sup>

A prolonged discussion of these cases and the decisions cited and distinguished would be repetitious of the materials already carefully outlined by the opinions. The important high points are the use of the new analogy, the continued preservation of the ideal of indivisibility, the realistic result under a new set of facts. The life of the law is said to be in its change and hence new approaches, whether they are the chosen ones or otherwise, are ever welcome to students of the law however disturbing they may be to at least part of the profession dealing with conveyancing and other every day duties. Upon the court lay the difficult task of belling this cat. That bystanders without responsibility proclaim what to them seem better methods of accomplishing the necessary job is usual! In creating the rule of these cases, the court seems to have been less "artistic" than usual but the rule is *new* and after the profession has

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26. "The time of prescription for non-usage begins for discontinuous servitudes, from the day they ceased to be used; for continuous servitudes, from the day any act contrary to the servitude has been committed." Art. 790, La. Civil Code of 1870.

27. Daggett, *op. cit.* supra note 2, at 124, § 33 et seq.

become accustomed, it may rank in the same high place given to other work of the court in its painstaking creation of the law of mineral rights.

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### LONG-TERM LEASES AFFECTING MINERALS

There has recently materialized a new type of contract affecting minerals, which on its face purports to be a sale and long-term lease of timber, but in actuality entails far-reaching consequences upon the mineral future of the state. This hybrid contract falls into the category of neither sale nor lease but partakes of the nature of both, while embodying many extraneous elements. The fate of such an agreement is uncertain since the courts have as yet had no occasion to pass upon its validity. However, the nature and extent of the problem and the possible means of coping with it can be appreciated beforehand.

Any attempt to categorize this new contract should be preceded by an understanding of its provisions and of the general procedure followed. A typical situation involves extensive tracts of land originally purchased primarily for the purpose of timber cuttings. After the timber has been cut one or more times, the corporate landowner in order to derive revenue from the land grants long-term leases thereon, conveying at once a sale of the standing timber and the right to repeated cuttings during a period ranging from sixty to ninety-nine years. The primary purpose of the lessee might be otherwise than for timber cuttings and may involve cultivation of the soil, cattlegrazing or trapping. The lessor, however, derives manifold benefits from the contract—he not only secures a considerable revenue from the transaction, but he is relieved from the responsibility of paying taxes on the property, retains the title to the land and, most important of all, exerts the greatest precautions to reserve all minerals and mineral rights unto himself, including the paramount rights of ingress, egress, construction and operations. The corporate holder may retain these minerals, either for prospective user, speculation on the mineral market, or an indefinite holding; or he may transfer them to subsidiary companies organized solely for the purpose of securing the mineral development of these lands. In the latter case, in the event of nonuser during the statutory or prescribed

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