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Harriet S. Daggett

Repository Citation

Harriet S. Daggett, *Forum Juridicum: Brief Comment and Speculation re Elson v. Mathewes*, 14 La. L. Rev. (1954)
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Forum Juridicum

Brief Comment and Speculation re

Elson v. Mathewes

Harriet S. Daggett*

Another landmark decision on mineral rights has recently been rendered by the Louisiana Supreme Court in the case of *Elson v. Mathewes*.¹ The court has again attested its superior ability to deal skillfully without assistance of legislation with the intricacies of mineral law. It has furnished a new tool which will enable the legal profession to pursue a most important business of the state with greater certainty and satisfaction to all.

The facts of the case are these: A landowner sold in 1937 one-half of his minerals in a ninety-one acre continuous tract, consisting of one parcel of forty acres and another contiguous one of fifty-one acres. His vendee sold one-half of the interest acquired to a third party, who thereby became a co-owner of the servitude. In 1943, the landowner separately granted a lease covering the entire ninety-one acres. In 1944, the servitude owners separately granted a lease to the same lessee covering forty acres. In the same year the lessee in the course of forming a six hundred and forty acre unit for gas exploration caused a voluntary pooling agreement to be signed by the landowner and the servitude owners. The agreement covered the forty acres which had been separately leased in 1943 and 1944, but excluded the fifty-one acre tract. The pooling agreement acknowledged the holdings of the several parties and expressed in clear and unmistakable language their intention to interrupt the running of prescription against all servitudes in the pooled lands. A producing well was drilled in 1944 within the unit but not upon the tract of forty acres mentioned before.

There was no issue between the litigants that the servitude on the forty acre tract was still held beyond its original term. The major issue pleaded by plaintiff servitude owners was that

* Professor of Law, Louisiana State University.
1. 69 So.2d 734 (La. 1954).

on the basis of the indivisibility doctrine the servitude was still unextinguished upon the entire ninety-one acres. While recognizing the theory of indivisibility when its applicability was sound, the court held in clear and unequivocal language that there was no legal prohibition against division of the servitude by contract between the original parties to its creation and that thus the mineral servitude on the fifty-one acres not included in the agreement had prescribed since there had been no development of it within the original term of ten years.

The servitude owners pleaded in the alternative for a share in benefits accrued to the fifty-one acres not included in the unitization agreement. They based their claim on the separate lease granted by the landowner in which their servitude was alleged to be necessarily included and which they claimed to have ratified and made their own. The court finding "no merit in the claim" stated that while the landowner's lease was not "specifically limited" to his interest in the minerals, the lease was not granted "for the benefit" of the then servitude owners and that the latter had not produced evidence of ratification of the lease during the life of the servitude.

No dissenting voice is recorded in connection with this decision. The Chief Justice expressed a concurrence. Only one case, *Spears v. Nesbitt*,² was cited in support of the court's conclusion, and in which the court declared had "in effect" decided that a servitude might be divided by contract, in that case by two leases, one by the landowner and the second by the servitude owner.

The question of divisibility *vel non* has plagued the courts and the legal profession since it arose definitely for decision in the *Sample v. Whitaker* cases³ where indivisibility was firmly recorded while it was in reality denied by the triumph of one public policy, that of good faith acquisition of land,⁴ over another which then existed, suspension of the running of prescription of servitude against minors.⁵ Thus was blocked the grooving of the definitely personal mineral servitude into the usufruct category which by provision of the Code is susceptible to divi-

2. 197 La. 931, 941, 2 So.2d 650, 654 (1941).

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. La. Acts 1924, No. 64, p. 91, amending Art. 3478, LA. CIVIL CODE of 1870.

5. Art. 3554, LA. CIVIL CODE of 1870.

sion.⁶ The court created the contiguous estate doctrine⁷ perhaps born of the acquisitive prescription theory of possession by boundaries, and supported *sub silentio* by Louisiana's accepted public policy against holding devices, thus realistically dividing the servitude. Legislative denial of the indivisibility doctrine is evidenced by the enactment of the statute whereby minors could continue to enjoy suspension of prescription but would cease thereby to benefit their major co-owners.⁸ Another judicial edict is found in the *Ohio Oil* case,⁹ in which the court for no doubt excellent reasons but with much seemingly contradictory verbiage decided that the servitude being indivisible and only able to emanate from the landowner-creator, could nonetheless by virtue of the sale of all mineral rights in a designated tract by the servitude owners create a situation whereby user of one tract would not hold the other tract. What type of interest was created by the servitude owner alone has remained somewhat cloudy since the court so firmly stated that the servitude could not be divided and that such a right could emanate from the landowner only. Perhaps this troublesome question will be clarified by the instant case. Here the court stated that the indivisibility concept could not be violated by the grantor landowner alone,¹⁰ the implication being that the grantee could divide and lighten the burden although, of course, he could not increase it.¹¹ This notion is well supported by articles of the Code when they bespeak, for example, the curtailment of use enjoyed by the owner which may reduce the servitude.¹² Thus, it might be reasoned that a servitude owner, selling all of his minerals in a designated tract of land, part of the area burdened by the original grant, may alone place the responsibility upon his vendee to preserve the right to search for minerals upon the mentioned tract. If that responsibility is sustained, might it not now be boldly stated that the servitude has been divided and a new one created by the servitude owner alone since the original grantor's burden would not be increased? If the responsibility is not sustained by the vendee,

6. Art. 538, LA. CIVIL CODE of 1870.

7. *Lee v. Giaugue*, 154 La. 491, 97 So. 669 (1923).

8. La. Acts 1944, No. 232, p. 687. See *Davidson v. Bolton*, 216 La. 677, 44 So.2d 700 (1950). See also La. Acts 1950, No. 510, p. 935, amending LA. R.S. § 9:5805 (1950), negating suspension of a mineral right for any incapacitated person.

9. *Ohio Oil Co. v. Ferguson*, 213 La. 183, 34 So.2d 746 (1947). See also *Byrd v. Forgotson*, 213 La. 276, 34 So.2d 777 (1947).

10. 69 So.2d 734, 735 (La. 1954).

11. Art. 797, LA. CIVIL CODE of 1870.

12. Art. 798, LA. CIVIL CODE of 1870.

obviously the landowner grantor has profited by the reduction of the land area over which the original servitude ranged.

Moreover, it might be stated that the prohibition against dividing a servitude applies only to predial servitudes. Excellent reason for such a position is found in the very language of Article 656: "[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*." On the other hand, the usufruct, a personal servitude, is divisible, as explained by Article 538 of the Code: "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." Loads of earth or sand are not fruits but are mentioned as a possible object of a rural servitude.¹³ Minerals, solid, liquid, or gaseous substances, are not fruits under the long-accepted doctrine that fruits are subject to reproduction by the original investment of land or money.¹⁴ It is hopefully believed that the judicial declaration to the contrary will be limited to the issue involved in that case,¹⁵ an issue no longer important under adjusted rulings regarding taxation of marital property.¹⁶ The taking of minerals usually accompanying the right to search for them is very near to the taking of earth or sand.

It was certainly fortunate that the usufruct category was not applied to the mineral servitude since the limitation of the usufruct¹⁷ to a life term and its many detailed provisions would have been a doubtful guide for governance of the mineral servitude. The opening article¹⁸ of the title dealing with predial servitudes is misleading, as it seems to indicate that usufruct,

13. Art. 721, LA. CIVIL CODE of 1870. See also Art. 657, LA. CIVIL CODE of 1870 on division of advantages.

14. Art. 545, LA. CIVIL CODE of 1870. See *Elder v. Ellerbe*, 135 La. 990, 66 So. 337 (1914). See also *Jackson v. Shaw*, 151 La. 795, 92 So. 339 (1922).

15. *Milling v. Collector of Revenue*, 220 La. 773, 57 So.2d 679 (1952).

16. Revenue Act of 1948, 62 STAT. 110 (1948). See also § 351 (eliminating community property provisions of § 811(e) of the Internal Revenue Code); § 361 (adding the marital deduction provision to § 812 of the Internal Revenue Code); and §§ 104(c) and 301 (providing for the splitting of income between spouses by amending § 12 of the Internal Revenue Code); Rubin & Champagne, *Some Community Property Aspects of the 1948 Revenue Act*, 9 LOUISIANA LAW REVIEW 1 (1948).

17. Art. 606, LA. CIVIL CODE of 1870. *But see* Art. 610, LA. CIVIL CODE of 1870.

18. Art. 646, LA. CIVIL CODE of 1870.

use and habitation are the only personal servitude. Other articles in the chapter dealing with conventional servitudes¹⁹ indicate several other kinds of possible personal servitudes, which doubtless could also be created as predial if the contracting parties so desire. Ingress and egress,²⁰ right of taking water are listed as possible personal servitudes.²¹ One article of the Code,²² enumerating the principal (not all, it will be observed) rural servitudes mentions passage, way, aqueduct, watering, pasturage, burning brick or lime and, most important of all to our topic, that "of taking earth or sand from the estate of another." It is noteworthy that the life term is indicated in the urban ingress and egress example "unless otherwise expressed in the title."²³ Furthermore, there is a general provision that servitudes "personal to the individual" terminate with his life "unless the contrary has been expressly stipulated."²⁴ Under the sale form used to establish the mineral servitude, the grant is made usually to the vendee, his heirs and assigns. Since the mineral servitude is definitely personal, only one tract of land being involved, it may be logical to apply to it the divisibility granted to personal servitudes.²⁵

The whole confusion which arose in the past while the concept of mineral servitudes was being painfully evolved by the court might presently be cleared. Obviously under the original grant, a contract, the vendee may not appropriate more benefits than his contract called for,²⁶ but if he or his vendee of a part elects to take less, that would seem to be their privilege. Since the mineral servitude is discontinuous and therefore may only be acquired by title,²⁷ a landowner is protected against third persons claiming it by acquisitive prescription.

The contract in the instant case was drafted as an acknowledgment with intent to interrupt the running of the prescription against the servitude. Thus it would appear that a new term would ensue even without any further drilling and *a fortiori* when a dry hole has been drilled. The acknowledgment in the instant case was a contract for the mutual benefit of the parties,

19. Art. 709 *et seq.*, LA. CIVIL CODE of 1870.

20. Art. 719, LA. CIVIL CODE of 1870.

21. Art. 720, LA. CIVIL CODE of 1870.

22. Art. 721, LA. CIVIL CODE of 1870.

23. Art. 719, LA. CIVIL CODE of 1870.

24. Art. 758, LA. CIVIL CODE of 1870.

25. Art. 647, LA. CIVIL CODE of 1870.

26. Art. 797, LA. CIVIL CODE of 1870.

27. *Savage v. Packard*, 218 La. 637, 50 So.2d 298 (1950).

unitization, and thus carried consideration. In other cases the lack of consideration has been a disturbing factor in the application of an acknowledgment theory unsupported by the usual natural consideration accompanying other applications of this theory.²⁸ The legal term of right to search for minerals is part of the value of the original grant and the vendor has no obligation, moral or otherwise, to increase the term. Obviously, the landowner has a right to grant what in effect is a new servitude; but such a grant, if recognized as a donation, would be subject to the principle of reduction²⁹ established for protection of forced heirs and to the few limitations³⁰ upon the power of the husband over community property including prohibition against donations of immovables.³¹ Under recognition of acknowledgment of a mineral servitude without consideration these limitations doubtless may not apply though an attack as of a donation in disguise is a speculative possibility.³²

In the instant case question has arisen concerning the effect had drilling occurred upon the forty acres included in the unit during the life of the original servitude. It would appear under the court's analysis of the specific contract involved that the original servitude might have been preserved; but under the broad rule announced, certainly a contract might be drawn to prevent such a contingency.

The doctrine of extension of the term of the servitude by joint lease has left unanswered questions. The use of phrases indicating the life of the lease³³ leave debatable, for example, the effect of a bona fide drilling without production or user occurring after the original servitude has expired but during its extended term. If the lease were abandoned, would the user be an interruption of the running of the prescription against the servitude or would it die with the lease which had extended its original term? Under the doctrine of the instant case this question may perhaps be answered with greater certainty and landowners with proper counsel and conveyancers in general may

28. *James v. Noble*, 214 La. 196, 36 So.2d 722 (1948). See Smith, *The Principle of Mutuality of Obligation and its Juridical Utility in Enforcing Contractual Fair Dealing*, 1 Festschrift für Ernst Rabel 279 (1954).

29. Art. 1502 *et seq.*, LA. CIVIL CODE of 1870.

30. Art. 2404, LA. CIVIL CODE of 1870.

31. La. Acts 1938, No. 205, p. 491; La. Acts 1950(2 E.S.), No. 6, p. 14. See LA. R.S. § 9:1105 (1950).

32. Arts. 2444, 2464, LA. CIVIL CODE of 1870; *Bertucci v. Bertucci*, 69 So.2d 502 (La. 1953).

33. *Barnsdall Oil Co. v. Miller*, 69 So.2d 21 (La. 1953).

find advantage in these apparent opportunities for avoidance of litigation.

The author of the opinion in the instant case was also responsible for the strong and convincing dissent in the much discussed case of *Hunter Co. v. Shell Oil Co.*³⁴ It may well be that his unsuccessful efforts in that struggle with lease indivisibility helped to make possible the present decision regarding divisibility of the servitude. Certainly, forced pooling is beyond the import of the instant decision grounded squarely on voluntary joint contract. On the basis of the equitable principle, however, the landowner has a stronger case for servitude division when forced into a pooling arrangement than in case of a voluntary contract. Since the back of the indivisibility theory seems to have been broken it might be possible that the court, taking advantage of the freedom offered by our civilian system,³⁵ can make adjustments in the landowner's favor to compensate him for unduly lengthening the term of the servitude or lease under an order by the Commissioner. Such an order was issued to conserve the resources of the state and not with intent to affect unduly the operation of previous private contracts. Had the indivisibility principle been applied in the instant case, the original grant would have been made more burdensome, extended far beyond its intended scope, and estimated value by, an outside purpose, unitization, not in reasonable contemplation of the original contract or directly related to it. The query left by the *Sanders-Flowers* case,³⁶ namely, suspension or interruption, might be solved without reference to either of those doctrines under the division principle carrying out both the purpose and intent of an order under the police power and the original scope of the contract between the parties.

However the many hypothetical situations may be resolved, there can be no doubt that the decision under discussion will have far-reaching effect. It may lead to more certain dealing and may also be instrumental in warding off too hastily considered legislation in an ever-moving field necessarily calling for a reasonably flexible legal pattern amenable to proper and equitable adjustment.

34. 211 La. 893, 31 So.2d 10 (1947); *LeBlanc v. Danciger Oil & Refining Co.*, 218 La. 463, 49 So.2d 855 (1950). See also *LeBlanc v. Southern Production Co.*, 202 F.2d 245 (5th Cir. 1953); *Smith v. Carter Oil Co.*, 104 F. Supp. 463 (W.D. La. 1952).

35. *Lee v. Jones*, 69 So.2d 26 (La. 1953).

36. *Sanders v. Flowers*, 218 La. 472, 49 So.2d 858 (1950).

Modification of contracts by the original parties thereto is a common occurrence in every branch of the law. It would be indeed strange to deny it to the contractual relationship between landowner and servitude owner. Articles 748 and 752 of the Code clearly contemplate adjustments by the original contracting parties. The following brief statement from the highest court of the state should brave logical contradiction in law and equity and give heart particularly to the landowner. "[T]here is no law prohibiting the landowner and the mineral owner from entering into a contract with each other, as was done by and between these litigants, whereby a division or a reduction of the servitude results."³⁷

Legal Aid

ITS CONCEPT, ORGANIZATION AND IMPORTANCE

*John S. Bradway**

Legal aid work¹ essentially is a state of the individual lay mind, an individual professional point of view, and the answer of the organized bar to a public demand for a means for implementing some of the basic legal principles undergirding the American way of life. This activity is carried on generally in a material framework of law office, bricks, mortar, desks, filing cabinets, and books. But at the center of the concept there are always a client asking help and a lawyer giving it. Functionally

37. 69 So.2d 734, 735 (La. 1954).

* Professor of Law, Duke University; Director Legal Aid Clinic, Duke University.

1. Elihu Root, writing in 1919 the Foreword to Reginald Heber Smith, *Justice and the Poor*, CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, Bull. No. 13, p. ix (1919), saves us the trouble of a long series of references by summarizing the circumstances which in this country brought the need for legal aid to public attention. He says: "We have had in the main just laws and honest courts to which people—poor as well as rich—could repair to obtain justice. But the rapid growth of great cities, the enormous masses of immigrants (many of them ignorant of our own language), and the greatly increased complications of life have created conditions under which the provisions for obtaining justice which were formerly sufficient are sufficient no longer."

Vance, *The Historical Background of the Legal Aid Movement*, 124 ANNALS 6 (1926), makes clear that the need was one continuing through the development of Western Civilization.