Louisiana Law Review

Volume 17 | Number 3
Golden Anniversary Celebration of the Law School
April 1957

Mineral Rights - Horizontal Division of a Servitude

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The holding in the instant case seems to be sound. The statutory language that plaintiff "may assert" his demand against the third-party defendant neither indicates that it is mandatory that the assertion be made, nor that a judgment is to be rendered between the third-party defendant and the plaintiff in the absence of such an assertion. The rule requiring the plaintiff in the principal action to assert a demand against the thiry-party defendant in order to recover a judgment directly against him was probably intended by the Louisiana State Law Institute in the interest of orderly procedure. Orderly procedure requires that a judgment adjudicate only the legal issues raised by the pleadings. A contrary practice might preclude a third-party defendant from asserting a valid defense such as set-off or compensation which would be available against the plaintiff in the principal action, but which would not be available against the third-party plaintiff.

Chester A. Eggleston

MINERAL RIGHTS — HORIZONTAL DIVISION OF A SERVITUDE

Plaintiff landowner sued to cancel a one-fourth mineral servitude, specially pleading prescription of ten years for non-usage. The servitude had been created on an eighty-acre tract of land by a sale of minerals to defendant in 1939. No exploration occurred on the premises during the ten-year prescriptive period following the sale, but in 1947 the tract was included in a drilling unit established by the Commissioner of Conservation which was restricted to the Kilpatrick Zone. A producing well was located in the unit but not on the tract. The landowner contended that since there had been no drilling on the tract during the prescriptive period the entire servitude was lost because of non-user, or, alternatively, that the conservation order created a horizontal division or restriction of the servitude and therefore any interruption of prescription should be limited to the Kilpatrick Zone. The district court rejected these contentions, ruling that the prescription of the servitude on the entire tract had been interrupted. On appeal to the Supreme Court, *held*, affirmed. Production from a well in a compulsory drilling unit is a user of the mineral servitudes on all tracts of which the unit is comprised, and therefore interrupts the prescription of every mineral servitude within the unit. As to the alternative claim, since the user of

the servitude was consistent with the intentions of the parties, the interruption was not horizontally restricted to the unitized zone. *White v. Frank B. Treat & Son,* 230 La. 1017, 89 So.2d 883 (1956).

Legal theories relative to oil and gas rights in the United States are based on two different concepts:[1] (1) that there may be ownership of a separate estate in minerals,[2] and (2) that there may be no such mineral estate, the purchaser of oil and gas acquiring merely a right to search for minerals and keep those reduced to possession.[3] Louisiana has adopted the non-ownership theory,[4] the right to search resulting from the sale or reservation of minerals being classified as a real right in the nature of a servitude.[5] As such, it is subject to the liberative prescription provisions of the Civil Code.[6] One way that prescription of a mineral servitude may be interrupted is by a *user* of the servitude, that is, good faith exercise of the right to search.[7] In order to explain the fact that drilling on any part of the tract interrupts the running of prescription on the servitude over the whole

1. SULLIVAN, HANDBOOK OF OIL AND GAS LAW 41 (1955). Some authors use a three-fold classification of oil and gas rights: ownership in place, non-ownership, and a correlative rights theory. See, for example, Summers, *The Modern Theory and Practical Application of Statutes for the Conservation of Oil and Gas* in LEGAL HISTORY OF CONSERVATION OF OIL AND GAS: A SYMPOSIUM 1 (1938); KULP, OIL AND GAS RIGHTS 513 (1954).

2. The ownership in place doctrine is recognized in the following jurisdictions: Arkansas—Bodcaw Lumber Co. v. Goode, 160 Ark. 48, 254 S.W. 345 (1923); Kansas—Moore v. Griffin, 72 Kan. 164, 83 Pac. 395 (1905); Michigan—Attorney General v. Pere Marquette Ry., 263 Mich. 431, 248 N.W. 860 (1933); Mississippi—Cook v. Farley, 195 Miss. 638, 15 So.2d 352 (1943); Montana—Gas Products Co. v. Rankin, 63 Mont. 372, 207 Pac. 993 (1922); Ohio—Kelly v. Ohio Oil Co., 57 Ohio St. 317, 49 N.E. 399 (1897); Pennsylvania—Westmoreland and Cambria Nat. Gas Co. v. DeWitt, 130 Pa. 235, 18 Atl. 724 (1889); Tennessee—Murray v. Allard, 100 Tenn. 100, 43 S.W. 355 (1897); Texas—Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S.W. 290 (1923); West Virginia—Musgrave v. Musgrave, 86 W.Va. 119, 103 S.E. 302 (1920).

3. The non-ownership doctrine is adopted in the following jurisdictions: Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900); California—Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788 (1935); Illinois—Watford Oil and Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53 (1908); Indiana—Monon Coal Co. v. Riggs, 115 Ind. App. 236, 56 N.E.2d 672 (1944); Kentucky—Gray-Mellon Oil Co. v. Fairchild, 219 Ky. 143, 292 S.W. 743 (1927); New York—Hathorn v. Natural Carbonic Gas Co., 194 N.Y. 326, 87 N.E. 504 (1909); Oklahoma—Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86 (1918); Wyoming—Denver Joint Stock Land Bank v. Dixon, 57 Wyo. 523, 122 P.2d 842 (1942).

4. Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922).

5. Long-Bell Petroleum Co. v. Tritico, 216 La. 426, 43 So.2d 782 (1949). See DAGGETT, MINERAL RIGHTS IN LOUISIANA 20 (rev. ed. 1949).

6. LA. CIVIL CODE arts. 789, 3516 (1870).

7. DAGGETT, MINERAL RIGHTS IN LOUISIANA 96 (rev. ed. 1949); Louisiana Petroleum Co. v. Broussard, 172 La. 613, 135 So. 1 (1931); Lee v. Giaugue, 154 La. 491, 97 So. 669 (1923).

tract, the jurisprudence adopted the principle that a mineral servitude is indivisible.[8] This principle, firmly established prior to the enactment of the present Conservation Act,[9] has been somewhat altered. The pooling provisions of the act[10] require the Commissioner of Conservation to establish drilling units in order to prevent waste and the drilling of unnecessary wells. Tracts of land burdened by mineral servitudes are often included only partially within a drilling unit, and when no drilling occurs on such a tract, even though a servitude is normally indivisible, it has been held that the effect of the unit is to divide the servitude vertically.[11] The result is that production from a well drilled in a unit but not on such a tract interrupts the prescription of the servitude only on the part of the tract included in the unit.[12]

The court disposed of the plaintiff's primary contention by application of the well-settled rule that production from a well in a compulsory drilling unit interrupts prescription of mineral servitudes on all tracts which make up the unit.[13] However, the alternative contention, the horizontal restriction of the interruption, presented a novel question.[14] The court reasoned that since

8. Hodges v. Norton, 200 La. 614, 8 So.2d 618 (1942); Connell v. Muslow Oil Co., 186 La. 491, 172 So. 763 (1937); Patton v. Frost Lumber Industries, 176 La. 916, 147 So. 33 (1933). See Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute*, 26 TULANE L. REV. 23 (1951). Although the Civil Code specifically provides that a servitude is indivisible in Article 656, the principle of indivisibility as applied to a mineral right was established even prior to the time that the right was regarded as a servitude. See Murray v. Barnhart, 117 La. 1023, 42 So. 489 (1906).

9. La. Acts 1940, No. 157, now LA. R.S. 30:1-20 (1950).

10. LA. R.S. 30:9 (1950) defines a drilling unit as the maximum area which may be efficiently and economically drained by one well. The Commissioner of Conservation is required to establish drilling units for each pool in order to prevent waste and the drilling of unnecessary wells. In such cases the owners may validly agree to combine their interests and develop their lands as a single unit, and in the absence of such agreement the Commissioner is authorized to order the development as a single unit, affording each owner the right to his pro rata share in any development of the unit. See Smith v. Holt, 223 La. 821, 67 So.2d 93 (1953) for an interpretation of these provisions.

11. Childs v. Washington, 229 La. 869, 87 So.2d 111 (1956); Jumonville Pipe and Machinery Co. v. The Federal Land Bank of New Orleans, 230 La. 41, 87 So.2d 721 (1956).

12. The reasoning followed by the court in the *Childs* and *Jumonville* cases (note 11 *supra*) was that if the advantages arising out of a mineral servitude are divisible [Ohio Oil Co. v. Ferguson, 213 La. 183, 34 So.2d 746 (1947); Byrd v. Forgotson, 213 La. 276, 34 So.2d 777 (1947)] and the parties who created the servitude may effect a division thereof [Elson v. Mathewes, 224 La. 417, 69 So.2d 734 (1954)] the conservation orders could have the same effect.

13. Boddie v. Drewett, 229 La. 1017, 87 So.2d 516 (1956); Union Oil Co. v. Touchet, 229 La. 316, 86 So.2d 50 (1956); Smith v. Holt, 223 La. 821, 67 So.2d 93 (1953); Sanders v. Flowers, 218 La. 472, 49 So.2d 858 (1950).

14. The instant case mentions, in dicta, that a drilling unit was alleged to present an obstacle to but one formation and thereby effect a horizontal division

the contractual right of the servitude owner was not limited to a single formation, the drainage of minerals was a user of the servitude as contemplated in the original conveyance, and therefore interrupted the prescription as to the entire right.

The problem created by unitization of a tract of land affected by a mineral servitude had been formerly approached on the ground that a unit may divide a servitude when the boundaries do not coincide.[15] In the instant case the court did not apply this concept of divisibility, but based the decision on a theory of user as contemplated by the parties. Had the decision been predicated on the theory of divisibility, an opposite result could have been reached.[16] Under a concept of user[17] a servitude may not be divided every time it is partially unitized, but only when the exploration within the unit is accomplished in a manner other than that contemplated by the parties. In such a case the interruption of prescription is restricted to the unitized acreage. However, when the user on a particular tract within a unit is accomplished in accordance with the original intention of the parties, the interruption is not restricted by the unit but extends to the whole of the servitude. The reliance on the intentions of the parties is a sound basis for the solution of such problems. Conservation orders supersede conventional rights only when

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of the servitude in Boddie v. Drewett, 229 La. 1017, 87 So.2d 516 (1956). However, the rejection of this contention does not appear in the *Boddie* opinion, and such a holding seems contrary to the language of the Conservation Act, which provides that "the commissioner shall establish a drilling unit or units *for each pool.*" (Emphasis added.) LA. R.S. 30:9B (1950). Since the unit is specifically limited to a single pool, it is difficult to see how it could present an obstacle to any other formation. See Wilcox v. Shell Oil Co., 226 La. 417, 76 So.2d 416 (1954).

15. See note 11 *supra.*

16. A factual situation which could present conflicting results under the two theories occurs when a tract subject to a mineral servitude is partially unitized and a well is drilled on that part of the tract within the unit. Under the *Childs* and *Jumonville* reasoning (see note 12 *supra*) the effect of the unit could be to divide the servitude and therefore the drilling within the unit would not interrupt the prescription of the servitude on that part of the tract without the unit. However, under the user theory of the instant case, the interruption could extend to the whole of the servitude and would not necessarily be restricted by the unit. It is believed that the latter result would be the more equitable because it would be more in accord with the intention of the parties. Also, it is difficult to reconcile the instant case with the *Childs* and *Jumonville* decisions on the basis of the divisibility concept.

17. The user theory is expressed by Justice McCaleb in a concurring opinion in Childs v. Washington, 229 La. 869, 881, 87 So.2d 111, 115 (1956). In Boddie v. Drewett, 229 La. 1017, 87 So.2d 516 (1956), the problem was approached from the concept of user as contemplated by the parties. The instant case is a further expression of this idea of user, and indicates a trend away from the decisions holding that a unit effects a division of a mineral servitude.

the two conflict,[18] and in the absence of such a conflict the rights of the parties should be governed by the contract. Therefore, as to a particular tract, if the user of the servitude is accomplished according to the intentions of the parties, the interruption of prescription should not be limited by a unit. In the instant case the user was found to be consistent with the intentions even though no drilling occurred on the tract. There was an actual drainage of minerals from the extremities of the tract; therefore, the production was as effective as any which the servitude owner could have accomplished even had he been allowed to drill to the unitized zone. In this sense the user was in keeping with the contemplation of the parties and the servitude was properly maintained to all depths by drainage from the single horizon. The mention that the parties could have contractually limited the servitude is noteworthy. The implication is that if the contract had limited the servitude horizontally, the effect of the unitization would have been so restricted.

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SUSPENSION OF LAWS BY CONCURRENT RESOLUTION OF THE LEGISLATURE

In each of the last two sessions of the Louisiana Legislature concurrent resolutions have been passed which purport to suspend the operation or enforcement of regularly enacted statutes.[1] This procedure presents two problems: first, the legal effectiveness of a concurrent resolution to suspend a statute; and, second, the desirability of allowing this practice, if legal, to continue.

The only case in which a Louisiana court has ruled on the effectiveness of a concurrent resolution to suspend the operation of a law is *State* ex rel. *Porterie v. Grosjean.*[2] In 1934 the Legislature had placed an occupational tax of five cents per barrel on petroleum refiners,[3] but before the first payment of the tax

18. Arkansas Louisiana Gas Co. v. Southwest Natural Production Co., 221 La. 608, 60 So.2d 9 (1952).

1. La. H. Con. Res. 4, 5, 6 (E.S. 1955), all relative to the suspension of LA. R.S. 32:341 (1950), as amended, La. Acts 1954, No. 501, p. 922. La. H. Con. Res. 4 (E.S. 1955), also relative to the partial suspension of LA. R.S. 48:345 (1950), as amended, La. Acts 1954, No. 501, p. 922. La. H. Con. Res. 43, 19th Reg. Sess. (1956), suspending LA. R.S. 32:281(D), 32:282 (1950).

2. 182 La. 298, 161 So. 871 (1935).

3. La. Acts 1934 (3 E.S.), No. 15, p. 304.