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COMMENTS ON MIRE v. HAWKINS

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BACKGROUND

In 1956, the Louisiana Supreme Court considered the case of *Boddie v. Drewett*,[1] in which it was determined (a) that a dry hole drilled on a compulsory unit including a servitude tract but at a location off the servitude tract would have no effect on the running of prescription on the servitude; and (b) that if a compulsory unit were established which included the entire servitude tract and completely excluded the tract from the permissible drilling area, the unitization order would constitute an obstacle to the exercise of the servitude from the effective date of the order to the time the unit well was capped and abandoned, if unsuccessful, and for a reasonable time thereafter.

The refusal to apply the good faith dry hole concept to unit operations was met with some disapproval in that it was felt that within the contemplation of the conservation statutes the unit operations should be considered as operations on all parts of the unit and therefore as operations on the servitude, effective as an interruption at least as to the portion included in the unit if not as to the entirety of the servitude. The obstacle theory was also subject to criticism by some in that there have been numerous unit orders issued which have never been rescinded and which have created units never drilled. Thus, there arose the possibility that prescription might remain suspended by the presence of such obstacles for many years, a serious complication of titles.

On the other hand, there were arguments which were made in support of the *Boddie* decision's refusal to apply the dry hole rule. One is that particularly in the developmental stage when temporary units are established the unit boundaries frequently do not coincide with subsurface limits of a reservoir. Thus, it would be quite within the realm of possibility for a servitude owner to be given credit for a use when there was no reasonable chance, in fact, that a well could be completed which would drain his property. Also, it is to be observed that, without any implication of impropriety, the unitization process is a rather

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1. 229 La. 1017, 87 So. 2d 516 (1956).

dynamic and inexact one and is subject to a certain amount of manipulation, which might open the way for struggles to include servitude tracts in drilling units with the hope of securing an interruption of prescription by drilling operations. A further motivation for the refusal to apply the dry hole rule might have been found in the possibility that the owner of the servitude tract might be an involuntary participant in the unit and might, therefore, be in a position to escape any liability for the cost of drilling the hole under present law.[2] Thus, the servitude owner would have failed to participate in the "use" for which he sought to receive credit.

Insofar as the obstacle theory was concerned, there was some basis for arguing in support of the decision in that it gave recognition to the fact that the servitude owner's use rights, particularly the freedom to choose the timing and location of wells (perhaps a theoretical freedom in many instances) are substantially inhibited by the conservation laws permitting the Commissioner of Conservation to control the location and number of wells in a particular field by establishing units and selecting unit operators. Additionally, even though most conservation orders are applicable to only a single sand, the effect of the obstacle to drilling might be quite real as the affected sand might be the only potentially productive horizon or, even though more potentially productive horizons might exist, it might be difficult to secure development of any other sands without the right to test all potential sands.

THE DECISION IN MIRE V. HAWKINS

In *Mire v. Hawkins*,[3] the Louisiana Supreme Court reversed its prior decision in *Boddie v. Drewett*,[4] in what may be termed a

2. In Superior Oil Co. v. Humble Oil & Refining Co., 165 So. 2d 905 (La. App. 4th Cir. 1964), it was held that an "owner" as defined in R.S. 30:3(8) who provokes a conservation hearing and seeks to acquire an interest in a proposed unit can be made liable for its proportionate share of drilling costs in cash. Thus, the unit operator's right to recover costs is not limited to withholding production, the method pursued in Hunter Co. v. McHugh, 202 La. 97, 11 So. 2d 495 (1942). Thus far, the Commissioner of Conservation has taken no formal steps to alleviate the problem of the nonconsenting owner in a drilling unit on which a dry hole is drilled. The holding in the *Superior Oil Co.* case was carefully limited, and thus it seems that under present law there is no means for forcing a nonconsenting owner to pay the costs of a dry hole. With a similar statute, Oklahoma has worked out several alternative solutions to this problem. See Curlee, *The Problem of the "Free Riding" Lessee and Some Suggested Solutions*, NINTH ANNUAL INSTITUTE ON MINERAL LAW 21 (1962).

3. 249 La. 278, 186 So. 2d 591 (1966).

4. 229 La. 1017, 87 So. 2d 516 (1956).

rather startling opinion. The central question presented on appeal was whether a unit order including only a portion of the servitude tract and designating a small portion of the tract as lying within the permissible drilling area would create an obstacle to the use of all or any part of the servitude. The court of appeal[5] had refused to apply *Boddie v. Drewett*,[6] distinguishing it on the ground that the unit in question had included only a portion of the servitude tract, leaving the remainder open for development and also on the basis that the order in question had designated a portion of the servitude tract as lying within the permissible drilling area.

The Supreme Court, however, chose to overrule *Boddie*, both as to its refusal to apply the dry hole rule and as to its application of the obstacle theory. The new decision is far reaching. Its basic import is clear in that the dry hole rule now may be applied to unit operations and the obstacle concept is apparently dead insofar as it was applied to the effect of unitization orders. However, this does not mean that all questions have been answered. Like the old decision in *Boddie* it leaves many problems to be pondered.

Of passing interest regarding the *Mire* decision is the fact that Chief Justice Fournet and Justice McCaleb dissented from the *Mire* opinion in strong terms. The Chief Justice had concurred in the decree in *Boddie v. Drewett*[7] and Justice McCaleb wrote the opinion in the earlier case. However, Justice Hawthorne, who signed the *Boddie* opinion, concurred in the *Mire* case and handed down a short opinion in which he noted that he concurred "fully in the views of the majority."[8] Justice Hamiter, who had concurred in the decree in *Boddie* joined in the majority opinion in *Mire v. Hawkins*.[9]

EVALUATION OF MIRE V. HAWKINS

Of course, the primary matters to be evaluated in the *Mire* opinion are its disavowal of the obstacle concept articulated in *Boddie v. Drewett*[10] and its recognition of the dry hole rule as applicable to unit operations. The majority opinion seems to

5. Mire v. Hawkins, 177 So. 2d 795 (La. App. 3d Cir. 1965).
6. 229 La. 1017, 87 So. 2d 516 (1956).
7. *Ibid.*
8. Mire v. Hawkins, 249 La. 278, 186 So. 2d 591, 597 (1966).
9. 249 La. 278, 186 So. 2d 591 (1966).
10. 229 La. 1017, 87 So. 2d 516 (1956).

have based its rejection of the obstacle concept on the idea that the servitude owner's use rights are not taken from him by a unitization order. Rather, the unit operator is deemed to become some sort of agent for the participants in the unit, with the result that any operations conducted by him are operations for all concerned. Thus, the court reasoned, the servitude owner's use rights are not taken away; they are transformed so that rather than operating through his own lessee, as would normally be the case, he now operates through the unit operator. This means, of course, that the application of the dry hole rule becomes a necessary concomitant of doing away with the obstacle concept, which is based upon the notion that the servitude owner is effectively deprived of the use rights inherent in his servitude and thus should be given credit for a suspension of prescription during the period of deprivation. If it is asserted that the servitude owner is not deprived of his use rights, he must obviously be given credit for such use as takes place by unit operations. The majority felt the result reached in its opinion to be more in keeping with the policy and concepts underlying the conservation laws than the obstacle concept utilized in *Boddie v. Drewett.*[11]

The rejection of the obstacle concept was heavily criticized by the dissenting Justices. Justice McCaleb urged that there was nothing in the conservation laws which demanded the result reached by the majority and that the result of the majority was to refuse to apply the articles of the Civil Code[12] which should govern the property system in the absence of direct conflict with conservation laws or orders requiring that private rights yield. Chief Justice Fournet relied heavily on the argument that as the servitude owner was being deprived of his development rights by the conservation order it would be an unlawful taking of property without just compensation to hold that the order did not create an obstacle suspending the accrual of the prescription of nonuse.[13]

11. *Ibid.*

12. LA. CIVIL CODE art. 792 (1870).

13. "The legislature, in adopting its comprehensive statute in this field . . . and aware of the danger of having it declared unconstitutional if it unduly or unjustly impinged on valuable property rights in these resources, or unreasonably restricted the contractual rights of the owners with respect thereto, was careful in fixing the powers and duties of the commissioner to so limit them as to not deprive the owners of their private and contractual rights. Consequently, the power and authority vested in the commissioner under this law is not limited to the conservation of these natural resources and the prevention of their waste. The commissioner is also compelled to protect the rights of all owners that are affected by his actions under the statute. Any order of the commissioner that

Reflection on the opinions rendered in the *Mire* case produces a strong reaction that the problem most certainly has more than one side to it. The majority opinion seems to adopt the notion that the obstacle theory and the dry hole rule as applicable to unit operations are necessarily inconsistent. This is not true. It would be quite possible to sustain the existence of an obstacle and to apply the dry hole rule. Certainly under the previous law there was a use of the obstacle theory in combination with the rule that use occurs by unit production. The only difference between the two situations is that recognizing the dry hole rule is simply the addition of another mode of use by unit operations. There is nothing mutually inconsistent between the two concepts. On the other hand, it does seem that adoption of the dry hole rule is essential if the obstacle theory is not to be recognized. As noted, if it is to be said that the servitude owner has not lost his use rights but has merely had them transformed so that he operates through the unit operator, he must clearly be given the benefit of any operations conducted by the unit operator. Otherwise there would certainly be an injustice, and perhaps, as suggested by the Chief Justice, a taking of property rights without just compensation.

It is to be admitted that the result of the *Mire* decision is consonant with the concept of the conservation act in the sense that unit operations benefit all interests within the unit boundaries.[14] However, as suggested, there is nothing to prohibit retaining the obstacle concept and *also* applying the dry hole

unnecessarily deprives any owner of his private property rights *for a purpose other than the conservation of the natural resources* is, therefore, in violation of the Fifth Amendment to the Constitution of the United States and Section 2 of Article I of the Constitution of Louisiana, which clearly provide that *private property shall not be taken for public use or purposes unless just and adequate compensation is paid,* and, further, in violation of Section 10 of Article I of the Constitution of the United States which prohibits the states from passing any law that impairs the obligation of contracts, and of Section 15 of Article IV of the Constitution of Louisiana, which provides that *no law shall be passed 'impairing the obligation of contracts' and that 'vested rights' cannot be divested, 'unless for purposes of public utility, and for just and adequate compensation previously paid.'* (The emphasis has been supplied.)" Mire v. Hawkins, 249 La. 278, 186 So. 2d 591, 603 (1966).

14. It is to be observed that the Conservation Act does not specifically provide that drilling operations conducted on a drilling unit shall be considered as if they were conducted on all portions of the unit. Yet it is specific in other instances. In R.S. 30:9B it is provided that the presence of a unit well capable of production in commercial quantities constitutes every part of the unit a "developed area." In R.S. 30:10A(1)(b) it is provided that production allocable to a tract included in a unit shall, when produced, be "considered as if it has been produced from [the] tract by a well located thereon." The fact that the act is specific in these particular instances lends support to the notion that the legislative intent was to the contrary in the case of drilling operations and that

concept. As has been observed by the author elsewhere,[15] in considering all cases involving the effects of unitization or unit operations on prescription of mineral interests the court is basically engaged in legislating rules of use applicable to unit operations just as it originally did in evolving the rules of use applicable to operations on the servitude premises. In the *Mire* case there is some evidence of a recognition of the real meaning of the unitization cases. One may question, however, whether the better part of wisdom lay in taking the course chosen.

The Obstacle Theory

Considering a case such as *Boddie v. Drewett*,[16] in which the entire servitude was included in the unit in question, there is merit to the view that the servitude owner is deprived of his use rights. There is also merit to the suggestion that it is somewhat unrealistic to say that the unit operator in reality becomes the agent for the servitude owner in using the servitude by unit operations. One must consider the fact that the servitude owner may be an involuntary participant in the unit, which might mean that there would be no liability whatsoever for the cost of drilling a dry hole on the unit. In realistic terms, it does not seem reasonable to believe that under such circumstances the unit operator would act in any fashion as an agent in the sense of acting for the benefit of the servitude owner in protecting the property interest of such a "principal." Thus, the concept on which the majority opinion is based, the idea that the servitude owner's use rights are transformed rather than taken, though theoretically supportable, may not be functionally sound.

Considering the merits of the obstacle theory itself, there were, as observed in the beginning, sound bases for criticism

such operations would not be considered as operations on all parts of the unit in the same manner as production. However, it seems that the court is correct in the basic philosophy which it derives from the act. Everything in the provisions relating to unitization points toward the idea that operations conducted by a unit operator are in a material sense for the benefit of all parties entitled to participate in the unit. This is perhaps even more true under present administrative procedure because the commissioner of conservation now accomplishes the functions of establishing a drilling unit, pooling all property interests involved, and appointing a unit operator in a single order whereas the act contemplates the issuance of a unitization order followed by a pooling order. See R.S. 30:9 and R.S. 30:10. Administrative practice was for a number of years harmonious with the procedure contemplated by the act. However, it has since been changed to achieve greater efficiency. The present administrative practice lends some support to the court's view.

15. Hardy, *Ruminations on the Effect of Conservation Laws and Practices on the Louisiana Mineral Servitude and Mineral Royalty*, 25 LA. L. REV. 824 (1965).

16. 229 La. 1017, 87 So. 2d 516 (1956).

of it. It is certainly true that the *Boddie* case has caused substantial title problems in those situations in which unitization orders have been issued but no drilling has ever taken place. However, the solution to this problem might have been reached by administrative regulations, by judicial decision, or legislatively without dispensing entirely with the obstacle concept, which has some decent foundations in terms of the realities of petroleum development.

As to the problem of servitudes only partially included in the unit, it appears that the court of appeal's position was reasonable. Basically, it was held that if the unitization order were not deemed to "divide" the servitude in a technical sense, then no obstacle existed as drilling was still permissible on the acreage outside the unit. On the other hand, if the unitization order were deemed to divide the servitude, the court of appeal held that there was no obstacle as to the outlying acreage and also that there was none as to the included acreage as a portion of the included acreage was at all times within the permissible drilling area. The two dissents in the Supreme Court both appear to have been based on the notion that such a division did take place. However, they departed from the court of appeal's approach in that neither opinion gave any effect to the fact that a portion of the servitude premises lay within the drilling area.[17] Whether the fact that the unit operator was or was not the servitude owner's lessee might be of significance does not appear from the opinions.

Insofar as the rejection of the obstacle theory is concerned, then, there is at least some question whether the *Mire* case was the wisest possible decision. Certainly it solves some substantial title problems created by the *Boddie* case, but these might well have been cared for by other means. On the whole, the approach of the court of appeal seems to the author to have been preferable.

The Dry Hole Rule

Turning to the problem of the dry hole rule, it has already been observed that if the obstacle theory was to be disposed of on the theory that the servitude owner was not deprived of his

17. Chief Justice Fournet's opinion is express in this regard. Justice McCaleb's opinion is not quite clear. However, it seems necessarily based upon the same idea.

operating rights by the unitization order but merely had them transformed, it was imperative to give him credit for unit operations otherwise sufficient to interrupt prescription if conducted on the servitude premises. As to the wisdom of the dry hole rule itself, there is some room for argument in that, as noted, the servitude owner may not be contributing to the "use" which takes place. The servitude owner may be given credit for a use without ever being liable to contribute to the cost of exploration, the only manner in which an actual use can take place under the circumstances, unless, of course, the drilling is successful and the operator can withhold production to secure payment of well costs.[18] Thus, the *Mire* decision opens up the possibility that under present law a servitude owner may be given credit for a use when he has in no sense of the word exercised his rights, even in the changed form in which he finds them as a result of the unitization order. Certainly the new rule is beneficial in that it places the law relative to maintenance of mineral servitudes by unit operations more in line with that applicable to mineral leases (in the absence of a "Pugh clause").[19] This in itself can be seen as a substantial benefit to the law. There has never seemed to the author to be any logical reason for distinguishing between the effect of unit operations on lease maintenance and the effect of such operations on prescription accruing against servitudes. After all, the leases in question are often taken on mineral servitudes, and it makes little sense to say that the unit operations maintain the lease if they do not maintain the servitude.

SOME UNANSWERED QUESTIONS

There are some distinct problem areas presented by the *Mire* decision. First, what is the extent to which the dry hole rule will be applicable? If a servitude tract is partially included in a unit on which drilling operations sufficient to interrupt prescription are conducted, will the interruption extend only to the included portion or to the entire servitude? There are indications in the opinion that only the included portion will be affected. The court cites and relies on *Jumonville Pipe & Machinery Co.*

18. Hunter Co. v. McHugh, 202 La. 97, 11 So. 2d 495 (1942). *But see* Superior Oil Co. v. Humble Oil & Refining Co., 165 So. 2d 905 (La. App. 4th Cir. 1964).

19. Delatte v. Woods, 232 La. 341, 94 So. 2d 281 (1957); LeBlanc v. Danciger Oil & Refining Co., 218 La. 463, 49 So. 2d 855 (1950); Hunter Co. v. Shell Oil Co., 211 La. 893, 31 So. 2d 10 (1947).

v. Federal Land Bank[20] in reaching its decision. This can be taken as a strong indication that the concept of "division" of the servitude will be continued in application to unit operations taking place off the servitude premises. This concept of divisibility has been criticized by the writer.[21] To enter into further criticism of the concept at this point seems unnecessary; however, it can be observed that the divisibility concept has caused title problems of substantially greater magnitude than those created by the *Boddie* decision. Perhaps reconsideration is warranted in this area. Further, it is noteworthy that in its recent decision in *Trunkline Gas Co. v. Steen*,[22] the court has refused to apply the divisibility concept when unit operations occur on the servitude premises. Thus, even though the unit includes only a part of the servitude tract, unit operations conducted on the servitude premises will interrupt prescription as to the whole. It is of interest in this regard that Chief Justice Fournet, who dissented in *Mire v. Hawkins* and strongly supported the divisibility concept in that and prior decisions, wrote the opinion of the majority in the *Steen* case.[23]

Another problem arises on consideration of the court's statement that a compulsory unitization creates a "common property," and that the unit operator becomes a representative or agent of those entitled to participation in the unit, whether they are voluntary or involuntary participants. This language leads one to conjure up many specters. By using the term "common property," does the court intend that the unitization shall have the effect of a cross-conveyance? This would clearly be contrary to prior jurisprudence.[24] Further, if the operator is a representative or agent, does this import any form of fiduciary relationship? Will the operator, for example, be bound to act in the best interest of his "principals" and to protect their property interests by drilling expeditiously to avoid the accrual of prescription? Will this "agency" relationship have any impact

20. 230 La. 41, 87 So. 2d 721 (1956).

21. Hardy, *Ruminations on the Effect of Conservation Laws and Practices on the Louisiana Servitude and the Mineral Royalty*. 25 LA. L. REV. 824 (1965).

22. 249 La. 520, 187 So. 2d 720 (1966).

23. The court displayed rather remarkable harmony of views in the *Steen* case in that five members of the court joined in the majority opinion. Justice Hamiter concurred in the result and Justice Summers dissented with written reasons.

24. Arkansas-La. Gas Co. v. Southwest Natural Prod. Co., 221 La. 608, 60 So. 2d 9 (1952); *cf.* Martel v. A. Veeder Co., 199 La. 423, 6 So. 2d 335 (1942); Shell Petroleum Corp. v. Calcasieu Real Estate and Oil Co., 185 La. 751, 170 So. 785 (1936). See also Whitwell v. Commissioner of Internal Revenue, 257 F.2d 548 (5th Cir. 1958).

on the question of liability for development costs? What is its impact on questions of liability for royalty payments and rights of participants in cases of split-stream sales or sales by an operator who has a gas contract when other participants do not.

One may also speculate whether the participation or nonparticipation of the servitude owner or his lessee in development costs will be of significance in the application of the dry hole rule. If a servitude owner or his lessee has not contributed or is not liable to contribute to development costs, should he be given credit for a use when he has done nothing to contribute to the operation for which he seeks to receive credit as an interruption of prescription? Certainly the administrable solution is to decide that contribution to development costs is of no significance, but this does have its shortcomings.

A fourth area of difficulty is the problem of retrospective effect. The decision involves a change in a rule of prescription, which, though it affects all existing rights, is not deemed to be any sort of deprivation of property. It is certainly retrospective in that all previously created servitudes will be affected by it.[25] However, the matter of whether all prior suspensions will now be wiped out is left untreated.

These are perhaps rather far-fetched extensions of the language of the court and the problems created by the decision. Nevertheless, the potential implications in the court's language cannot be overlooked, and the consequences of this decision clearly include the creation of some significant problems.

CONCLUSION

The decision in *Mire v. Hawkins*[26] can certainly be characterized as unexpected. Such reversals of established rules of property are rare indeed, and the decision may be criticized on that ground alone, as indeed it was by the Chief Justice.[27] On its merits, the decision does eliminate the title problems which emanated from *Boddie v. Drewett*.[28] However, there is

25. *Cf.* United States v. Nebo Oil Co., 190 F.2d 1003 (5th Cir. 1961); Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So. 2d 845 (1961); Whitney National Bank of New Orleans v. Little Creek Oil Co., 212 La. 949, 33 So. 2d 693 (1947).

26. 249 La. 278, 186 So. 2d 591 (1966).

27. 186 So. 2d at 607.

28. 229 La. 1017, 87 So. 2d 516 (1956).

at least some foundation for arguing that the obstacle concept, despite its troublesome consequences, was a reasonable recognition of the limitations which the conservation regime places upon mineral servitude owners' use rights, even accepting the theory that such rights are not completely emasculated but are transformed as to the manner of their exercise. Further, as already observed, the reversal creates as many problems as it solves. Insofar as the dry hole rule is concerned, its application can be said to be logical in view of the conservation act and necessary in the absence of the obstacle theory, but if it is applied in conjunction with the concept of divisibility in cases of partial unitization, there is little doubt that it will create some very serious title problems, compounding the difficulty already caused by the finding of a "division" in cases of production from an off-premises unit well serving only a portion of the servitude tract. In the writer's opinion, the basic principle of indivisibility of servitudes should be applied in cases involving the effect of unit drilling operations or production on partially unitized mineral servitudes, with the result that operations interrupting prescription will interrupt as to the whole of the servitude, and not merely the unitized portion. Otherwise, the title system becomes highly, and needlessly, complex. This, however, is a separate problem, and seems unlikely to be the subject of judicial reconsideration. Of *Mire v. Hawkins*[29] it can be said that if it eliminated some problems, it brought an equal number of new ones.

29. 249 La. 278, 186 So. 2d 591 (1966).