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Mineral Law - Effect of Compulsory Unitization Orders on the Use Requirements of a Mineral Servitude

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assuming a single servitude reduced to that part actually preserved by possession during ten years, the court treads on dangerous ground when the unconsidered nature of the servitude appears to be discontinuous, for this could lead to most undesirable consequences, as previously pointed out. It is the method used to reach the result which offends, not the result itself.

If this discontinuous servitude was in fact a single right extending over the entire tract, the use made by the plaintiff should have preserved the entire servitude, and enabled him to lay additional pipelines according to the terms of the agreement between the parties. It is submitted that in future cases the Louisiana courts should decide the effect of such multiple line agreements, establish definitively the nature of the gas pipeline servitude, and recognize the wisdom of the Court of Cassation in limiting the effect of the rule contained in Civil Code article 798 to continuous servitudes and those discontinuous servitudes whose full use is prohibited by some physical obstacle.

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MINERAL RIGHTS — EFFECT OF COMPULSORY UNITIZATION ORDERS ON THE USE REQUIREMENTS OF A MINERAL SERVITUDE

On September 22, 1949, an undivided one-half mineral interest affecting a 340-acre contiguous tract was granted to Group One. In 1956, the landowner granted the remaining one-half interest to Group Two. In 1959,[1] less than ten years after creation of the 1949 servitude, a dry unit well was drilled on a part (96 acres) of the servitude premises included within a 1959 compulsory unit. Production was thereafter obtained on two other units formed in 1960 which included a part of the servitude premises outside the original unit. Group One claimed that prescription on the whole tract was interrupted in 1959 by the dry-hole unit well drilled on the servitude premises. Group Two, which allegedly purchased an additional one-half mineral interest from the landowner September 23, 1959, on the part of the

1. There are apparent minor discrepancies between the statement of facts in the Supreme Court opinion here noted and in the recitation of facts in the opinion of the Third Circuit Court of Appeal, 179 So. 2d 546 (1965); *e.g.*, the court of appeal indicated this first unit well was drilled in 1956.

tract not included in the original unit, claimed all of the mineral rights as to that area. It contended that the 1959 dry unit well only interrupted prescription running on the 1949 servitude as to the 96 acres within the original unit, urging that inclusion of only a part of the servitude tract within the unit had the effect of "dividing" the servitude.

The trial court sustained the contention of Group Two. The court of appeal reversed. In affirming the court of appeal the Louisiana Supreme Court *held*, if a tract burdened with a mineral servitude is located partially within a drilling unit formed by order of the conservation commissioner, a unit well drilled on any portion of the servitude within the unit interrupts prescription as to the entire tract. *Trunkline Gas Co. v. Steen*, 249 La. 520, 187 So. 2d 720 (1966).

Prior to 1920, there was little authority upon which to base legal rules pertaining to mineral conveyances. However, the landmark decision of *Frost-Johnson Lumber Co. v. Salling's Heirs*[2] left the way open for the courts to look to the Civil Code servitude provisions in determining the legal ramifications of mineral conveyances. In part these principles provide that both personal and predial servitudes must be "used" to prevent their termination by ten-year liberative prescription.[3] However, no definition of "use" is provided by the Code. In the absence of legislation, the Supreme Court sought to fashion a systematic set of use requirements for prescription interruption.

Using article 789 of the Civil Code as a starting point, the court set forth a standard of use which requires, in the case of a mineral servitude, "good faith" drilling on the servitude prem-

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

3. LA. CIVIL CODE art. 646 (1870): "All servitudes which affect lands may be divided into two kinds, personal and real.

"Personal servitudes are those attached to the person for whose benefit they are established, and terminate with his life. This kind of servitude is of three sorts: usufruct, use and habitation.

"Real servitudes, which are also called *predial or landed servitudes*, are those which the owner of an estate enjoys on a neighboring estate for the benefit of his own estate."

Id. art. 618: "The usufruct may be forfeited likewise by the non-usage of this right by the usufructuary or by any person in his name, during ten years, whether the usufruct be constituted on an entire estate, or only on a divided or undivided part of an estate."

Id. art. 628: "The rights of use and habitation are established and extinguished in the same manner as usufruct."

Id. art. 789: "A right to servitude is extinguished by the non-usage of the same during ten years."

ises to a depth at which there is reasonable expectation of production in commercial quantities.[4] While this rule has been rationalized as a use contemplated by the parties, it is fairly clear that in the early days of mineral transactions and development, no such contemplation or intent existed. Thus as a matter of law, the courts have supplied what may be termed an "assumed intent" to the standard described above, and the liberative prescriptive of ten years has also been imposed on these transactions. To what extent parties to these contracts have freedom to alter these requirements is somewhat unclear. While it is possible to make these use requirements more burdensome,[5] it is unknown whether relaxation of the requirements is possible; the prevailing view seems to be that they may not.[6] However, it has been established that a use on any part of a servitude tract interrupts prescription on the entire tract.[7]

Conservation legislation brought widespread unitization of oil and gas properties, raising new problems concerning use of mineral servitudes, including the effect of unit operations on prescription. Some answers were given in *Childs v. Washington*,[8] and *Jumonville Pipe & Machinery Co. v. Federal Land Bank*.[9] There, the Supreme Court held that where there was a partial inclusion of a servitude tract in a drilling unit established by the commissioner of conservation, a producing well drilled within the unit, but not on the servitude tract, interrupted prescription only as to that portion of the servitude within the unit boundaries, the commissioner's orders having "reduced" the servitude to the extent of the unit.[10] What effect these operations would have if conducted on the servitude tract remained

4. McMurrey v. Gray, 216 La. 904, 917, 45 So. 2d 73, 77, 78 (1948); Lynn v. Harrington, 193 La. 877, 192 So. 517 (1939).

5. Leiter Minerals, Inc. v. California Co., 241 La. 915, 940, 132 So. 2d 845, 853, 854 (1961).

6. Leiter Minerals, Inc. v. United States, 381 U.S. 413 (1965); Leiter Minerals, Inc. v. United States, 329 F. 2d 85 (5th Cir. 1964); United States v. Leiter Minerals, Inc., 204 F. Supp. 560 (E.D. La. 1962); Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So. 2d 845 (1961).

7. McMurrey v. Gray, 216 La. 904, 45 So. 2d 73 (1949); Hunter v. Ulrich, 200 La. 536, 8 So. 2d 531 (1942); Lynn v. Harrington, 193 La. 877, 192 So. 517 (1939); Louisiana Petroleum Co. v. Broussard, 172 La. 613, 135 So. 1 (1931); Keebler v. Seubert, 167 La. 901, 120 So. 591 (1929).

8. Childs v. Washington, 229 La. 869, 87 So. 2d 111 (1956).

9. Jumonville Pipe & Machinery Co. v. Federal Land Bank, 230 La. 41, 87 So. 2d 721 (1956).

10. See Childs v. Washington, 229 La. 869, 879, 87 So. 2d 111, 114 (1956); for a more complete discussion of this problem see Hardy, *Ruminations on the Effect of Conservation Laws and Practices on the Louisiana Mineral Servitude and Mineral Royalty*, 25 LA. L. REV. 824, 845 (1965).

undetermined until the instant case. Two choices were available: limiting the use to the unit boundaries in accord with *Childs* and *Jumonville*, or relying on the older rules regarding operations *on* the servitude premises, to extend the use to the entire servitude tract. Part of the difficulty in making the proper choice probably resulted from prior decisions in which there was frequent mention of the idea that the mere issuance of the commissioner's order had some "divisive" effect.[11] Adding further confusion were cases in which it had been held that there could be a division of the "advantages" of a servitude. The leading cases in this area were *Ohio Oil Co. v. Ferguson*[12] and *Spears v. Nesbitt*.[13] However, it should be remembered that they involved contracts entered into by the servitude owners *subsequent* to the original conveyance; thus, some basis for determining whether an intent to divide existed as a matter of contractual interpretation. On the other hand, compulsory unitization cases do not involve interpretation of instruments other than the original conveyance. Thus the rules imposed on the original conveyances in these instances are not based on any contractual interpretation of the "intent of the parties," but rather on legal policy. *Trunkline* follows the older rule and therefore rejects the notion of division or reduction of a servitude upon issuance of the commissioner's order.

As previously stated, the issue presented by the instant case was whether a unit well drilled on a servitude tract partially included within a drilling unit created by the commissioner of conservation interrupted prescription only on that portion of the servitude within the unit or as to the entire servitude tract. In reaching its conclusion, the court noted that by adoption of the conservation act, the legislature was careful to protect the valuable property and contractual rights of mineral owners. It was further recognized that any order of the commissioner which was not necessary for the conservation of natural resources, or one which would unnecessarily deprive an owner of his rights to property would be illegal and unconstitutional. Thus, the well drilled on the servitude premises in 1959 had the effect of interrupting prescription on the entire tract.

11. See Jumonville Pipe & Machinery Co. v. Federal Land Bank, 230 La. 41, 87 So. 2d 721 (1956); Childs v. Washington, 229 La. 869, 87 So. 2d 111 (1956); Frey v. Miller, 165 So. 2d 43 (La. App. 3d Cir. 1964).

12. Ohio Oil Co. v. Ferguson, 213 La. 183, 34 So. 2d 746 (1947).

13. Spears v. Nesbitt, 197 La. 931, 2 So. 2d 650 (1941); see also Elson v. Mathews, 224 La. 417, 69 So. 2d 734 (1954).

Justice Summers dissented on the basis of *Childs* and *Jumonville*. He also pointed out that, under the conservation act, location of wells is determined by available geological and engineering data, and final placement of a well is the optimum position for efficient and economic drainage of the unit. Therefore, he reasoned that location had no relation to the servitude tract, and the division of production in each case was on the basis of the proportion which the acreage of the individual tract bore to the entire unit acreage. Since there was no theoretical drainage outside of the unit boundaries, Justice Summers concluded that it was unconstitutional to give interruptive effect to prescription on premises outside these boundaries because the mineral owner retained the right to conduct operations there.

It is submitted that the result reached in the instant case is sound in that it reflects the traditional rule that use on the servitude premises is a use of the entire tract. This is the standard upon which parties have relied in negotiating mineral contracts in recent years. It has been suggested that when minerals are drained by a unit well from beneath a servitude tract, wholly or partially located within a compulsory unit, there is a use as if the well were located on the tract.[14] This is already the law pertaining to royalty rights under voluntary unitization plans,[15] and is also consistent with the result contemplated by the conservation act.[16] Whether this result will be forthcoming in the near future is doubtful since the *Childs* and *Jumonville* decisions have not been overruled. Where operations are conducted within the unit but not on the servitude tract, it is implied that the "dry hole" use will be given effect as to that portion of the servitude included within the unit.[17] The same reasons for limiting this

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

15. Crown Central Petroleum Corp. v. Barousse, 238 La. 1013, 117 So. 2d 575 (1960); Montie v. Sabine Royalty Co., 161 So. 2d 118 (La. App. 3d Cir. 1964).

16. LA. R.S. 30:10 (1950): "A. When two or more separately owned tracts of land are embraced within a drilling unit which has been established by the commissioner as provided in R.S. 30:9B, the owners may validly agree to pool their interests and to develop their lands as a drilling unit.

"(1). Where the owners have not agreed to pool their interests, the commissioner shall require them to do so and to develop their lands as a drilling unit, if he finds it to be necessary to prevent waste or to avoid drilling unnecessary wells. "(b) The portion of the production allocated to the owner of each tract included in a drilling unit formed by a pooling order shall, *when produced be considered as if it had been provided from his tract by a well drilled thereon.*" (Emphasis added.)

17. See Mire v. Hawkins, 249 La. 278, 186 So. 2d 591 (1966).

effect to the unit boundaries in production cases applies to the dry hole cases.

The critical question, therefore, is not one of "division," but one of "use." Once a determination of what constitutes a use has been made, a further consideration, which is equally important, is the extent this use be given effect. While there are established rules in this area from which to work, they are at present incomplete. Because of the importance these considerations have on the economy of the state, legislation is needed to impose orderly rules which achieve just results. The Louisiana State Law Institute is currently undertaking the difficult task of proposing mineral legislation for the state. During the course of its deliberations the institute will no doubt be confronted with these questions, and the legal profession may be provided with the answers in the not too distant future.

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