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Mineral Rights - Servitudes - Interruption of Prescription

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Notes

MINERAL RIGHTS—SERVITUDES—INTERRUPTION OF PRESCRIPTION

Plaintiffs conveyed land to defendants on March 29, 1937, reserving all mineral rights. They executed a mineral lease on February 26, 1947; the lessee began drilling operations on March 16, under a permit to drill to the Nacatosh strata or zone. Drilling was discontinued on March 26, when the well reached the Nacatosh depth. By March 28, all drilling equipment had been removed from the premises. The lessee obtained a permit to deepen the well, but when he attempted to go back upon the land on April 4, defendants denied admission. Plaintiffs sued to enjoin defendants from interfering with the lessee's attempts to deepen the well. *Held*, drilling to the Nacatosh zone did not constitute a bona fide attempt to obtain production and did not interrupt prescription liberandi causa. However, in view of the lessee's intent to continue deeper drilling, the court stated: "Plaintiffs should be permitted to continue their efforts to interrupt prescription by these drilling operations." *McMurrey v. Gray*, 216 La. 904, 45 So. 2d 73 (1950).

Louisiana jurisprudence has never recognized the existence of a separate "mineral estate." The supreme court has consistently held that any attempt to create such a "mineral estate" will result only in the creation of a servitude,[1] subject to ten-year prescription liberandi causa, just as any other servitude.[2] What constitutes interruption of prescription on a mineral servitude? In *Goldsmith v. McCoy*,[3] the court decided that geophysical exploration of land for minerals does not constitute a user sufficient to interrupt prescription. Successful production of oil or gas is not required, however; the drilling of a non-producing well in good faith is sufficient.[4] A non-productive well must be drilled

1. Frost-Johnson Lumber Company v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922); Wemple v. Nabors Oil Company, 154 La. 483, 97 So. 666 (1923); Lee v. Giauque, 154 La. 491, 97 So. 669 (1923).

2. Art. 789, La. Civil Code of 1870: "A right to servitude is extinguished by the nonusage of the same during ten years." Art. 3546, La. Civil Code of 1870: "The rights of usufruct, use and habitation and servitudes are lost by non-use for ten years." Wemple v. Nabors Oil Co., 154 La. 483, 97 So. 666 (1923); Lee v. Giauque, 154 La. 491, 97 So. 669 (1923).

3. 190 La. 320, 182 So. 519 (1938).

4. Hunter Co. v. Ulrich, 200 La. 536, 8 So. 2d 531 (1942); Lee v. Giauque, 154 La. 491, 97 So. 669 (1923).

to a depth at which there is some reasonable hope of discovering minerals in paying quantities.[5]

There are three possible explanations of the holding in this case. First, the court may have intended to re-define what constitutes a user sufficient to interrupt the ten-year prescription as the *commencement* of drilling operations, with the intent to drill to a depth at which there is a reasonable hope of finding minerals in paying quantities, along with proof of a good faith effort to reach such depth.

Only two cases were found which might support such a view, *Keebler v. Seubert*,[6] a Louisiana Supreme Court case, and *Harrison v. Grandison Company*,[7] a federal district court case. In *Keebler v. Seubert*, the drilling continued for a month after the end of the ten-year period. The court determined that prescription was interrupted, saying, "When these operations *began* the ten-year period had not elapsed. There is nothing justifying the conclusion that the operations were not conducted in good faith." [8] (Italics supplied.) This language implies that the beginning drilling operations is a sufficient user. But plaintiff argued only that the well did not interrupt prescription because it was a dry hole. The supreme court had previously ruled several times that actual production was not required to interrupt the prescription on a mineral servitude.[9] This opinion does not show that plaintiff even questioned defendant's right to continue drilling operations after the expiration of the ten-year period; nor does it show that he raised the issue of the interruption of prescription by the commencement of drilling operations.

In *Harrison v. Grandison Company*,[10] where drilling continued for more than three months after the ten-year period expired, the court simply stated that as long as a good faith use of the servitude is made within ten years, prescription is interrupted.

Any rule that the commencement of drilling operations is a sufficient user would be incompatible with the great bulk of Louisiana jurisprudence. The supreme court has consistently

5. Louisiana Petroleum Co. v. Brousard, 172 La. 613, 135 So. 1 (1931); Lynn v. Harrington, 193 La. 877, 192 So. 517 (1939); Hunter Co. v. Ulrich, 200 La. 536, 8 So. 2d 531 (1942).

6. 167 La. 901, 120 So. 591 (1929).

7. 51 F. Supp. 768 (E.D. La. 1943).

8. 167 La. 901, 906, 120 So. 591, 592 (1929).

9. Lee v. Giauque, 154 La. 491, 97 So. 669 (1923); Wemple v. Nabors Oil Co., 154 La. 483, 97 So. 666 (1923); Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922).

10. Ibid.

ruled that a user of a mineral servitude involves drilling to a depth at which minerals in paying quantities may reasonably be expected.[11] In view of the fact that the court clearly and specifically decided that the well drilled in the *McMurrey* case was not of a sufficient depth to interrupt prescription,[12] it did not intend to sanction the proposition that the interruption of prescription may be accomplished by the commencement of drilling operations.

A second possibility presents itself. Did the court decide that a servitude owner who is conducting drilling operations on the last day of the prescriptive period should be granted a further period of time in which to *attempt to* interrupt prescription if he proves his intention to drill to a reasonable depth? A diligent search has failed to disclose a single case in which the court took that position. Except for the *Keebler* and *Harrison* cases, in all previous situations the wells had been completed comfortably within the ten-year prescriptive period and clearly abandoned as dry holes.

Neither of these two cases could properly support a proposition which would allow an extension of time to the servitude owner, since the litigants never argued the issue. In both cases, the landowner allowed the servitude owner to continue drilling after the ten-year period was up, and then attempted to deprive him of the benefit of the time, money, and effort expended in sinking the well. In other words, the equities of the situation favored the servitude owners who would have lost a considerable sum of money and time had the court decided otherwise. Such is not the situation in the present case, where actual drilling operations had ceased before the last day of the ten-year period and the landowner had steadfastly refused to allow further drilling.

A result which would allow an extension of time to the servitude owner who has not interrupted prescription is undesirable, and difficult to justify under Louisiana jurisprudence. In the first place, the land policy of this state is now and always has been that land should not be tied up for an indefinite length of time under the burden of a mineral servitude.[13] Second, mineral

11. International Paper Co. v. Louisiana Central Lumber Co., 202 La. 621, 12 So. 2d 659 (1943); and cases cited in Notes 4 and 5, supra. See especially, Louisiana Petroleum Co. v. Broussard, 172 La. 613, 135 So. 1 (1931).

12. 216 La. 904, 921, 45 So. 2d 73, 79 (1950).

13. Wemple v. Nabors Oil Co., 154 La. 483, 97 So. 666 (1923); Lee v. Giauque, 154 La. 491, 97 So. 669 (1923); and especially Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922), where the question is considered in detail and rejected.

servitudes are extremely valuable property rights. The protection of such rights demands that the rules governing ownership of them be certain and definite and that ownership be determined without the necessity of frequent lawsuits. Third, it would encourage servitude owners to postpone drilling operations until the end of the prescriptive period. Thereupon the courts would be called upon to decide such complicated questions as, for example, has sufficient action been taken to use the servitude to entitle the servitude owner to continue drilling after the expiration of the prescriptive period? If so, how much more time should be granted? Also, when is the prescription interrupted—as of the date the ten-year period expired, or as of the date of the completion of the well? Only a court of law would be competent to determine these issues and others which the application of such a rule would entail, and, in countless cases, the ownership of mineral rights would be in doubt for a considerable time pending litigation.

The remaining explanation of the case is that the supreme court did not rule on the right of a servitude owner to continue drilling operations after the terminal day of the prescriptive period. The briefs submitted provide clear evidence that the right was not put at issue. Plaintiffs, in their brief, state, "McMurrey could have commenced operations for drilling this well during the last hour of the ten years."[14] Defendants made this statement, "The defendants-appellants likewise do not question the right of . . . [plaintiffs] . . . to wait until the last day to go onto the premises and protect their valuable mineral rights which were about to expire. . . ." [15]

The strategy of counsel for plaintiffs was to urge first, that the drilling to the Nacatosh zone was drilling to a depth at which minerals could be reasonably expected in paying quantities, and, if the Nacatosh well did not interrupt prescription, that the lessee intended to continue drilling if the well was not a producer, and hence the well was never abandoned. Plaintiffs urged that they be allowed further time to complete the well to the depth intended.

Defendants attempted to refute both these arguments, but did *not* argue that, regardless of intent, plaintiffs were not entitled to continue operations after the prescriptive period expired.

14. Plaintiff's brief on the merits, p. 11.
15. Defendant's brief on the merits, p. 8.

The result was that by attempting to prove that McMurrey did not intend to drill to a deeper zone, defendants impliedly conceded that if plaintiffs' facts were found to be correct, that is, if McMurrey did have such intention, then plaintiffs should be entitled to the relief for which they asked—namely, an injunction to prevent interference with them while they completed the well.

Finding in plaintiff's favor on the facts, the court naturally granted the relief asked for, without ruling on plaintiffs' right to continue drilling after the prescriptive period expired.

It seems that the most satisfactory explanation for the case is that the question of continuing operations after the expiration of the ten-year period was not raised and not decided. The issue, therefore, is still open and needs clarification.

When a case is squarely presented, involving the right of the owner of a mineral servitude to continue his drilling operations even though the prescriptive period has expired, the court should properly construe the ten-year prescription non-user strictly. The jurisprudence has revealed that the policy is strong against different individuals controlling the various elements of ownership of the same land by refusing to acknowledge the separate "mineral estate." No preparatory activities, such as exploration, are considered sufficient to interrupt the prescription of a mineral servitude; there must be an actual drilling of a well. It is submitted that, although the servitude owner is allowed to use the servitude at any time within the prescriptive period, a user of a mineral servitude sufficient to interrupt prescription should be the drilling of a well, within the limits of the prescriptive period, to a depth at which there is a reasonable hope of discovering minerals in paying quantities.

A recent act and a recent decision illustrate the trend toward the very narrow construction of prescriptive periods applicable to mineral rights. Act 510 of 1950,[16] providing that in the case of mineral or royalty rights the liberative prescription is not suspended or interrupted by minority or other disability, points out the legislative intent to restrict the prescriptive period to ten years and ten years only. In *Union Sulphur Company v. Andrau*,[17] the terminal day of the prescriptive period on a royalty interest

16. La. R.S. (1950) 9:5805 reads in part, "The accrual of the liberative prescription against the ownership, use, or development of minerals, or mineral or royalty rights shall not be suspended or interrupted because of the minority or other legal disability of any owner."

17. 47 So. 2d 38 (La. 1950).

was December 4. Small traces of gas were discovered on November 23, and again on December 2. On December 5, the well began to flow and by December 7, it had been brought in as a producer. The owner of the royalty interest contended that the traces found before December 5 interrupted prescription, even though they were not in paying quantities[18] until about the 5th. The court held that prescription was not interrupted and that the royalty interest was prescribed. Although a royalty interest is not the same as a mineral servitude, in that actual production is required in the former, it is submitted that the situation is analogous for purposes of analysis of the court's view on the prescription of non-user.

When the question is presented to the court as to whether a mineral servitude owner, who at the termination of the prescriptive period has not yet completed a well to a depth at which minerals could reasonably be expected in paying quantities, should be allowed to continue drilling operations, the court should decide that the servitude owner is to be judged by what he has accomplished during the prescriptive period—namely, whether he has drilled to a depth at which there is reasonable hope of minerals in paying quantities—and not by what he intends to do after the expiration of the prescriptive period.

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OBLIGATIONS—AGREEMENTS IN RESTRAINT OF COMPETITION

The vendor of a business contracted not to engage in or become financially interested in the ready-to-wear business for three years in the city, nor within a three and a half mile radius of the location of the business sold, both parties understanding that the vendor would continue to operate a Five and Ten Cent Novelty store also owned by him. *Held*, the vendee was entitled to an injunction prohibiting the vendor from selling in the Five and Ten Cent Store any ready-to-wear or dry goods other than the kind handled when the sale of the ready-to-wear business was made. *Loftin v. Parker*, 253 Ala. 98, 42 So. 2d 824 (1949).

The decision was based on the lawfulness of the restraint imposed. Recognizing that contracts in total restraint of trade

18. To interrupt prescription on a royalty interest it is required that there be actual production of minerals in paying quantities. See Escoubas v. Louisiana Petroleum & Coal Oil Co., 22 La. Ann. 280 (1870); Green v. Standard Oil Co. of La., 146 La. 935, 84 So. 211 (1920); Daggett, Mineral Rights in Louisiana, § 31 (rev. ed. 1949).