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Mineral Law - Servitudes - Prescription - Reduction of Partially Used Multiple Line Gas Pipeline Servitudes

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make or have made similar exclusive claims to which the United States can no longer object.

It is suggested that the problem of the Russian and Japanese depletion of fish on the ocean floor might have been handled more satisfactorily by agreement than by unilateral action. The United States could have invited Russia, Japan, and Canada to a conference to consider joint measures of investigation and control. Cooperation on conservation measures between these countries is evidenced by the management of the fur seal herds of the North Pacific since 1911.[43] The Russians evidence a readiness for international conservation and are members with the United States in such agreements as the International Whaling Commission, the International Commission for the Northwest Atlantic Fisheries, and the King-Crab Treaty.[44] Russia is not a party to the Convention on Fishing and Conservation of the Living Resources of the High Seas; however, this refusal is not on fishery or conservation grounds, but is based on refusal to accept the convention's compulsory arbitration clauses.[45]

In conclusion, it is submitted that unilateral acts of nations which deal with a policy of exclusion in an area affecting the world community are not recommended where international agreements might accomplish the same result and thus avoid possible international friction or conflict with international law and treaties.[46]

Edward E. Roberts, Jr.

MINERAL LAW — SERVITUDES — PRESCRIPTION — REDUCTION OF PARTIALLY USED MULTIPLE LINE GAS PIPELINE SERVITUDES

In an expropriation proceeding, plaintiff contended that multiple line agreements[1] created a single servitude and gave it the

43. TOMAŠEVIĆ, INTERNATIONAL AGREEMENTS ON CONSERVATION OF MARINE RESOURCES 77-78 (1943).

44. *Hearings Before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Commerce*, 89th Cong., 2d Sess. 83 (1966).

45. *Id.* at 89.

46. See U.S.-U.S.S.R discussions relating to conservation and use of fishing resources off the United States coast, 55 DEP'T STATE BULL. 273 (1966), reprinted in 61 AM. J. INT'L L. 107 (1967).

1. Two "multiple line agreements" were granted when the existing pipeline was constructed in 1953. They provided for a right of way 66 feet wide and contained the following language regarding additional pipelines: "In the event Grantee desires to change or alter the route under, upon, over and through the

right to construct additional gas pipelines upon payment of a stipulated price although more than ten years had elapsed since the laying of the first pipeline for which the agreements were initially executed. *Held,* assuming only one servitude was created, plaintiff's maintenance and operation of one pipeline over the tract had not preserved the right to construct additional pipelines, for under articles 796[2] and 798[3] of the Civil Code, the failure to construct new lines within ten years reduced the servitude to the one right of way actually utilized. *Columbia Gulf Transmission Co. v. Fontenot,* 187 So. 2d 455 (La. App. 3d Cir. 1966), *cert. denied,* 190 So. 2d 234, 235 (La. 1966).

Article 798 of the Code, which has the effect of reducing a partially used servitude to that part which is actually enjoyed during ten years, has seldom been interpreted by the courts. Apparently the only instance of its direct application was the original opinion in *Ohio Oil Co. v. Ferguson,*[4] in which a servitude owner was found to have divided the use requirements of the servitude by selling his entire interest in a forty-acre portion of the tract. The court said:

> "That article, of course, is not to be construed so as to conflict with the rule, which is established by the jurisprudence, that where the owner of a mineral servitude on a single tract of land exercises his right by drilling on any part of the land he suspends prescription of the servitude as to all of the tract. But, when, as in this case, the owner of such a servitude disavows his intention or abandons his right to drill upon a specified part of the tract on which he owns the mineral servitude, article 798 is applicable. In such a case, the article is in harmony with the second paragraph of article 803 of the Civil Code."[5]

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property above described, from that shown on the annexed plat, or desire to construct any additional line or lines, even on the right of way conveyed herein, *which right is specifically granted herein,* then the Grantee will pay therefor to Grantor the sum of One and no/100 ($1.00) Dollars per lineal rod, together with any and all damages resulting to Grantor's property as a result of said change, alteration or additional construction." (Emphasis added.) 187 So. 2d 455, 459-60.

2. LA. CIVIL CODE art. 796 (1870): "The mode of servitude is subject to prescription as well as the servitude itself, and in the same manner.

"By mode of servitude, in this case, is understood the manner of using the servitude as is prescribed in the title."

3. *Id.* art. 798: "If, on the contrary, the owner has enjoyed a right less extensive than is given him by his title, the servitude, whatever be its nature, is reduced to that which is preserved by possession during the time necessary to establish prescription."

4. 213 La. 183, 34 So. 2d 746 (1947).

5. *Id.* at 208, 34 So. 2d at 754.

On rehearing the court avoided any mention of the article in reaching its decision.

With no jurisprudence to guide it, the court in the instant case turned to Planiol's interpretation of article 708 of the Code Napoleon, source of Civil Code article 796:

> "According to Art. 708: 'the mode of the servitude may become prescribed as well as the servitude itself and in the same manner.' This means that partial non-use has the same extinctive effect as total non-use and that it diminishes the servitude to the extent that no use has been made of it. The servitude that has been but partially used, becomes reduced after thirty years. It cannot thenceforth be made use of to its full extent."[6]

But where the court stopped, Planiol continues:

> "The Code makes no distinction. But the Court of Cassation made one. It holds that the servitude is maintained in its entirety, when the use of it was voluntarily reduced by the owner of the dominant estate who used it as needs dictated. The servitude is diminished only in so far as the restriction in its mode of use is due to a physical obstacle."[7]

Referring to the decisions of the Court of Cassation, Planiol goes on to say:

> "This jurisprudence is a reaction against a regrettable decision given by the Code. It had appeared to be logical to Domat that prescription, which has the effect of causing the entire loss of servitudes, could also entail their reduction (*Lois civiles*, Bk. I, Tit. XII, Sec. VI, no. 5). This is the new idea which the compilers of the Code adopted. But practice showed that this time tradition was more sane than logic. Art. 708 led, as regards discontinuous servitudes, to solutions that were impossible (Dupret, *Revue de droit francais et etranger*, 1846, Vol. III, page 821 *et seq.*). And this is why the Court of Cassation took advantage of the opportunity offered it to limit the application of Art. 708 to an exceptional case, so that under normal conditions this article is without effect as far as the partial extinctive prescription of *discontinuous* servitudes is concerned."[8] (Emphasis added.)

6. 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2979 (1959).
7. *Ibid.*
8. *Id.* n. 1.

Article 798 first appeared in the Civil Code of 1825 and is without counterpart in the Code Napoleon, though, as Planiol points out, its effect was found for a time in article 708. In the projet of the 1825 Code, the redactors indicated their source for the article was the works of Toullier[9] and Domat,[10] and in Toullier is found the wording of article 798, with only Toullier's style of writing in the first person changed. Toullier gives as his source the same section of Domat which the previously quoted writings of Planiol state was the basis of the French attempt to employ the rule of Louisiana's present article 798. Domat's reference[11] to the *Digest of Justinian* as authority for his belief does not seem substantiated by an examination of the *Digest*, and rules expressing the contrary view are found.[12] Louisiana is therefore left with an article which seems to have been ill-conceived and which has been found unworkable in France as regards discontinuous servitudes.

What then is the nature of the servitude in the instant case? Is a gas pipeline a continuous servitude defined by the Code as "those whose use is or may be continual without the act of man," as "are aqueducts, drain, view and the like"?[13] It seems that it is instead a discontinuous servitude "such as need[s] the act of man to be exercised," as "the rights of passage, of drawing water, pasture and the like."[14] The gas pipeline is unlike the aqueduct in that water is carried through an aqueduct by the natural force of gravity, while the pipeline requires the act of man and machine to maintain pressure sufficient to force gas through it. Planiol, after concluding that the drain of rain water is a continuous servitude, states:

> "On the other hand, the flow of water from a quarry or a mine, whose discharge pipe works day and night, and all the year without interruption is a discontinuous servitude. It is so classed because its exercise requires man's intervention.

9. 2 TOULLIER, LE DROIT CIVIL FRANÇAIS no 700 (1833). The drafters actually referred to "Thoulier, vol. 3, No. 700, p. 619," reference to previous editions of the work.

10. 1 DOMAT, OEUVRES tit. XII, § VI, no 5 (1828): "Servitudes are lost by prescription, or they are reduced to that which is preserved by possession during the time sufficing to prescribe."

11. *Id.* n. 1. The reference in the note by Domat is to DIGEST 8.6.10.1, 8.1.13.

12. See DIGEST 8.6.8.1., 8.6.9.

13. LA. CIVIL CODE art. 727 (1870).

14. *Ibid.*

> If the engineer in charge did not operate his machine, the water would cease flowing."[15]

The only difference between the quarry water servitude and that of a gas pipeline is that the latter requires that works remain in place across the servient estate while the former may not. But the fact that the pipeline itself remains does not affect the nature of the servitude. This has been firmly established in the analogous situations of railroad tracks,[16] roads,[17] or tramways,[18] all of which have been considered discontinuous servitudes of passage. It is the act of man in forcing gas through the line that constitutes use of a gas pipeline servitude, and it is the use that defines the nature of a servitude, not the works which make this use possible. Thus, it is submitted that the servitude in the present case is discontinuous. Such a belief is strengthened by the well-reasoned and documented opinion of the Third Circuit in *Acadia-Vermilion Rice Irrigating Co. v. Broussard.*[19] There the court found that an irrigation system requiring an initial act of man in opening gates to allow water to flow into the canals was a continuous servitude. The exercise of the servitude survived the act of man since the irrigation system continued to operate after the gates had been closed. In reaching its decision, the court placed primary emphasis upon a passage from Baudry-Lacantinerie and Chauveau which reads:

> "Discontinuous servitudes are those which need the act of man to be exercised. What characterizes them is that the exercise does not survive the act of man; it ceases the moment this act ceases. Such is the servitude of way; it is exercised each time the owner of the dominant estate passes over the servient estate, and only during the time occupied in his passing. The law cites as additional examples servitudes of drawing water, of pasturing cattle."[20]

15. 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2896 (1959).

16. See, *e.g.*, Ogborn v. Lower Terrebonne Refining & Mfg. Co., 129 La. 379, 56 So. 323 (1911) and authorities cited therein.

17. Bomar v. City of Baton Rouge, 4 La. App. 232 (1st Cir. 1926).

18. See Kelly v. Pippitone, 12 La. App. 635, 126 So. 79 (Orl. Cir. 1930).

19. 175 So. 2d 856, 863 (La. App. 3d Cir. 1965). The case is noted in 40 TUL. L. REV. 397 (1966), in which the author suggests that the court may have moved toward a test for discontinuous servitudes which would require the act of man to be exercised on the servient estate, *i.e.*, the servitude would not operate on the servient estate when the servitude owner is absent. But there, as recognized both in the casenote and by the court, the force which actually carried the water over the servient estate was gravity, while in the present case no such natural impetus was present.

20. 5 BAUDRY-LACANTINERIE & CHAUVEAU, TRAITÉ THEORIQUE DE DROIT CIVIL

Clearly, in the present case the use of the servitude in forcing the gas through the pipeline cannot survive the act of man which provides the pressure and impetus for passage.

If the agreements executed by the landowner had the effect of creating two separate servitudes, then the decision of the court would be justified under article 789[21] since no use had been made of the right to lay additional pipelines within ten years. Or if the agreements were construed to be the creation of one servitude and an attempted option to create others for a stipulated price, the decision would be correct since the option was not for a fixed or definite term.[22] One might also raise the interesting questions of whether the acquisition of this real right by private agreement, executed in accordance with law and in the shadow of formal expropriation proceedings, is not an "expropriation" to the extent that it would be subject to the code and constitutional requirements in this area even though it is unattended by court order; and if so, whether it is legal. The theory is not without support,[23] and if accepted raises serious question as to the validity of any agreement which does not specify the land to be taken and which might result in the denial of just compensation[24] to the landowner. Thus there are three alternatives to a decision based upon the apparently unsound application of article 798 which would allow the same result as that reached in the instant case: deciding that more than one servitude was created, interpreting the agreements as the grant of a single servitude with an option to acquire others, or regarding that

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no 1083 (2d ed. 1899), translated by the court in 175 So. 2d at 863. As observed in Note, 40 TUL. L. REV. 397, 402 n.17 (1966), the quotation was inadvertently attributed to Aubry & Rau following a similar mistake in Ogborn v. Lower Terrebonne Refining & Mfg. Co., 129 La. 379, 56 So. 323 (1911).

21. LA. CIVIL CODE art. 789 (1870): "A right to servitude is extinguished by the non-usage of the same during ten years." Justices Hawthorne and McCaleb concurred in denying writs on the ground that more than one servitude was created. Justice Summers agreed the result reached by the court of appeal was correct, on the ground the right to lay additional lines was a separate servitude. 190 So. 2d 234 (La. 1966).

22. Bristo v. Christine Oil & Gas Co., 139 La. 312, 71 So. 521 (1916).

23. See 2 NICHOLS, EMINENT DOMAIN § 6.1[1] (3d ed. 1963). In this context, it is interesting to note that LA. CIVIL CODE art. 2626 (1870) gives the right to expropriate property when necessary for the general use, while the following article gives the power to enforce this expropriation in court when the owner of the property refuses to yield it or demands an unfair price. A plausible implication from this structure is that the power exercised is nonetheless expropriation when legal action is unnecessary.

24. Can it be said that a price set for land is the "fair market value" required under the expropriation articles, LA. CIVIL CODE arts. 2626-2641 (1870), when the land is taken thirteen years after the agreement was formed?

part of the agreement concerning additional pipelines as a possibly illegal "expropriation."

But assuming, as did the court, that one servitude was created and that it was discontinuous, which the court did not consider, the decision could be extended to the absurd, as the French courts realized as early as 1860.[25] If a man has a right of passage at any point on an adjoining tract, is he to lose that right of passage except for the one path he travels for ten years? Or is the mineral servitude owner to lose his right to produce gas when he has only produced oil for ten years?[26] Public policy and equity seem to demand negative answers to these questions, but the theory of the instant decision could be extended to this length if discontinuous servitudes continue to be subject to article 798.

Unexpressed equities in the case may make the result satisfactory. The multiple line agreements[27] purport to give the gas company the right to construct *any number* of additional pipelines, apparently at *any place* chosen, at *any future time* deemed desirable by the gas company, upon payment of one dollar per lineal rod plus surface damages. The blatant indefiniteness of the agreement, the lack of even a minimum restriction such as "reasonableness" on the gas company's ability to act under it, and the lack of consideration of such factors as increment in land value when establishing the price to be paid for the new areas taken, leaves the inherent fairness of such an agreement questionable at best. Were such equities to be served, the court might have placed its decision on firmer ground if it had elected to base its disposition on one of the alternatives previously discussed. But the court avoided the apparently pivotal question of the nature of the agreement, and did not consider the classification of the servitude. By basing its decision on article 798,

25. See Cass. req., June 5, 1860, D.61.1.252, in which the French court states that passing only on foot will preserve a servitude to pass over the land of another with horses and carriages, pointing out that it is in vain for one to pretend that the mode of exercising the servitude with horses and carriages has prescribed because another mode has been used. See 1 PLANIOL, A CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2979, n. 1 (1959).

26. The mineral servitude has been recognized by the courts as being either continuous nonapparent or discontinuous. Savage v. Packard, 218 La. 637, 50 So. 2d 298 (1950). Several leading authorities support the view that the mineral servitude must be classified as discontinuous. See DAGGETT, MINERAL RIGHTS IN LOUISIANA 27, 41, 43 (rev. ed. 1949); Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute*, 25 TUL. L. REV. 155, 157 (1951). No expression of support for the contrary view (continuous nonapparent) has been discovered.

27. For the exact wording of the agreements see note 1 *supra*.

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.

Charles S. Weems, Jr.

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.