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# Sequels To Vincent v. Bullock\*

Harriet S. Daggett†

Many years have passed since a decision from the Supreme Court of Louisiana has been so eagerly awaited as was that of *Humble Oil and Refining Company v. Arcede Guillory*<sup>1</sup> and its companion *St. Martin Land Company v. Stephen L. Pinckney*.<sup>2</sup> The issue was of interest not only to the legal profession, but to all persons engaged in the oil and gas business and indeed to the people of the state as a whole since Louisiana's important resource, minerals, was involved.

As in the case of *Vincent v. Bullock*,<sup>3</sup> the court exerted extreme care, patience, and skill in rendering these decisions, which surely must meet with the approval of all informed, disinterested parties. *Vincent v. Bullock* was reappraised in general principle and extended to cover its converse issue, as the two decisions under discussion deal with a sale instead of a reservation of royalty with no right to search the land. Minority was found to suspend the right to products of a search. Students have hoped for this outcome, if and when the issue was presented, since the holding in 1939 in regard to the reservation of royalty.<sup>4</sup>

The *St. Martin Land Company* case appears to have been decided first, as it is referred to in *Humble Oil Company v. Guillory* rendered on the same day; it will be outlined first. Without mention of various transactions, succession proceedings, et cetera, which were decided in line with fairly well settled law, the simple facts pertinent to the royalty right were that the land company had sold a certain royalty interest more than ten years before this suit and was attempting by action in jactitation to find out the status of the right. Obviously, the plaintiff's plea was that the right had prescribed. One heir of the buyer was a minor. Justice Ponder, who wrote the leading opinion, adhered closely to the decision in *Vincent v. Bullock*, which had announced the royalty interest not to be a servitude but "a con-

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\*192 La. 1, 187 So. 35 (1939).

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1. La. Sup. Ct. Docket No. 37, 862 (Nov., 1947), rehearing refused (reported in *The State Times* Dec. 16, 1947).

2. La. Sup. Ct. Docket No. 38,163 (Nov., 1947).

3. 192 La. 1, 187 So. 35 (1939).

4. Daggett, *Mineral Rights in Louisiana* (1939) 188.

ditional obligation, depending on an uncertain event, that prescribed in ten years if the event did not happen prior thereto." Justice Ponder pointed out the difficulties which the court had experienced in exploring the uncharted course of mineral law. He spoke of the ten year prescription applied in *Vincent v. Bullock* as having been in reality but a reasonable rule. Since that period had been settled in regard to mineral servitudes, the court felt that a fortiori it should apply to a lesser right, royalty, bare of the power to search which accompanies a servitude. Since minority suspends prescription unless specific law to the contrary exists,<sup>5</sup> suspension for the minor heir was the only logical answer as to that part. Under the specific language of Act 232 of 1944 suspension for the minor did not benefit his coproprietors. But for the timely passage of that act an interesting question in regard to the co-owners would have arisen, and they might have been saved under an indivisible theory since the event, production, would seem to fall into such a category.

In his concurring opinion in *Humble Oil Company v. Guillory*, Justice Ponder naturally followed statements in the *St. Martin Land Company* case together with a very fair explanation of his position on the first hearing of the *Guillory* case wherein he felt that he had been in error due to a misconception of the meaning of the contract as differentiated from the content of the instrument interpreted in *Vincent v. Bullock*.

Justice Hamiter, concurring in the decision in *St. Martin Land Company v. Pinckney*, wrote a most interesting opinion. After stating his view that a royalty interest of this nature is not a servitude, since it is bare of the right to search with incidents attendant upon that right, but is a real right running with the land, he then set forth his differences of opinion so far as the reasoning of the *Vincent v. Bullock* case was concerned. He found the suspensive condition pattern unsatisfactory, as logical application would continue the right without a starting date for prescription until the uncertain future event had occurred. Certainly this point is well taken and even more convincing in connection with a sale of royalty than with a reservation thereof,<sup>6</sup> so far as strict adherence to the articles of the Code are concerned. The justice then stated that his concept of this type of royalty was that of the sale of a hope under Article 2451, a thought shared by other students particularly before the matter was crystallized by the court in *Vincent v. Bullock*. A further development of

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5. Art. 8554, La. Civil Code of 1870.

6. (1939) 1 LOUISIANA LAW REVIEW 416.

theory by Justice Hamiter is noted in his position that while the "royalty interest is a real right, a real obligation," a suit to establish the right or have it recognized would not be an action for immovable property within the intendment of Article 3548, placing the prescriptive period at thirty years. The justice then applied the ten year prescription for personal actions laid down by Article 3544.

In writing the leading opinion in *Humble Oil and Refining Company v. Guillory*, Justice Hamiter did not refer to his thesis on the sale of a hope. After finding that the interest involved was "basically and fundamentally identical with that of the *Vincent v. Bullock* case," the justice gave his attention to the plea of potestativity in the condition, grounding his rejection of that defect mainly on Article 2035 and the thought that the vendor landowner would suffer detriment if he exercised his will in the direction of failing to instigate a search wherefrom the royalty owner might benefit.

#### *Public Policy*

In reviewing these decisions as a whole, it appears to the writer that the court's attitude on public policy was indeed praiseworthy. The right of free contract was upheld, as was observance of the seemingly settled property rule.

Large sums of money have been spent in dealing with the well known mineral interest, royalty, and so common is the conveyance that royalty deed forms, devised for use in selling this valuable property right, are even available in quantity from commercial printing houses. To render nugatory or uncertain useful contracts covering lawful subject matter and made in good faith for valuable consideration is a matter of serious concern to the welfare of the state. In recognizing this right of free contract in regard to all matters not prohibited and particularly as pertaining to dealing in royalty, the Supreme Court of Louisiana in 1939 said:

"In reaching this conclusion we think the trial judge failed to give consideration to the fundamental principle that legal agreements have the effect of law upon those who form them and that 'none but the parties can abrogate or modify them' (Article 1945, Revised Civil Code), as well as the corollary rules for the interpretation and construction of contracts as laid down in Section 5 of Chapter 3 of Title 4, Article 1945 et seq., of the Revised Civil Code, under the heading 'Of The Interpretation Of Agreements,' and the provisions of Article 1764 of the Revised Civil Code under the title dealing with the general pro-

visions of conventional obligations, which provide that 'All things that are not forbidden by law, may legally become the subject of, or the motive for contracts . . . .'<sup>7</sup>

It would be passing strange if this important interest, an integral part of Louisiana's greatest resource, could not be safely dealt with under the clear intent of contracting parties. Future interests of like nature are constantly changing hands in all states fortunate enough to possess such resources. The following headnote from *Beam v. Dugan*<sup>8</sup> is illustrative:

"Under conveyance transferring part of 'landowner's royalty,' consisting of rentals in 'any and all oil produced or saved from any wells to be drilled upon' land, grantees acquired perpetual interest in royalties out of any oil produced, irrespective of under what lease such oil was produced."

If evil results from a decision, then, under any system of law, that decision should be overruled by court or legislature. Judges under the civil law, never having been bound by the doctrine of stare decisis, have ever been free and ready to modify the law to promote justice better under changed social or economic conditions. However, when no evil is present and citizens on the faith of a settled rule of property have trustfully contracted, the Louisiana courts together with all others have been loath to break this faith. The Chief Justice of Louisiana in 1931 said:

"The decision of the highest court of a state, on the subject of oil and gas leases, or mineral rights, establishes rules of property; and they should not be reversed, even though a contrary rule might be deemed more logical, unless it be by an act of the Legislature."<sup>9</sup>

### *The Contracts*

In finding the contracts substantially and in principle identical with that of the *Vincent-Bullock* case, the court was again on very

7. *Vincent v. Bullock*, 192 La. 1, 12, 187 So. 35, 39 (1939).

8. 23 P. (2d) 58 (Cal. App. 1933). See also 3 *Summers, Oil and Gas* (1938) 498, § 605; 2 *Thornton, Oil and Gas* (1932) 644, § 363; *Thuss, Texas Oil and Gas* (2 ed. 1935) 164; *Summers, Transfer of Oil and Gas Rents and Royalties* (1931) 16 *Texas L. Rev.* 1.

9. *Roberson v. Pioneer Gas Co.*, 173 La. 313, 323, 137 So. 46, 49 (1931), citing *Farmer's Heirs v. Fletcher*, 11 La. Ann. 142 (1856); *Cunningham v. Steidman*, 133 La. 44, 62 So. 316 (1913); *Minn. Mining Co. v. Nat. Mining Co.*, 70 U. S. 332, 18 L. Ed. 42 (1866); *Truskett v. Closser*, 236 U. S. 223, 35 S. Ct. 385, 59 L. Ed. 549 (1915); *Guffey v. Smith*, 237 U. S. 101, 35 S. Ct. 526, 59 L. Ed. 856 (1915).

solid ground. A comparison of the more troublesome *Humble Oil and Refining Company v. Guillory* with *Vincent v. Bullock* follows.

The contract in *Vincent v. Bullock*:

"It is however, understood and agreed that the vendors (of land) herein reserve unto themselves and their heirs and assigns, in perpetuity, a one-sixteenth (1/16th) royalty of all the oil, gas and other minerals produced and saved from said premises; and royalty to be delivered to the vendors or assigns, free of cost of production and a royalty of twenty-five cents per ton for all salt and sulphur mined and marketed off said premises. This royalty reservation forms part of the purchase price."<sup>10</sup>

The contract in *Humble Oil and Refining Company v. Guillory*:

Sold to Augustus Hill Garland in 52 acres of land "the undivided one-fourth interest in and to all royalties stipulated for or hereafter to be stipulated for, in any oil, gas or mineral lease that may be or has been executed in favor of third persons and more particularly in that certain lease executed in favor of the Louisiana Oil and Refining Corporation or its assignors and granted by vendor on a certain tract of land . . . It being well understood and agreed that the interest herein conveyed is and will remain an interest in all contracts by the vendor with third persons for the exploration and development of the said lands for oil gas or other minerals, the purchaser not to participate with the vendor in any of the proceeds of the rental of the said land for said purposes, but only to share in the royalties in the proportions above set forth. This grant to be continuous and to run with the land into whomsoever's hands it may fall: by assignment, bequest, devise or otherwise."

There are two differences in the wording of these contracts which it is submitted, are entirely immaterial to the essence of the contract and are but "accidental stipulations."

"Accidental stipulations, which belong neither to the essence nor the nature of the contract, but depend solely on the will of the parties. The term given for the payment of a loan, the place at which it is to be paid, and the nature of the rent payable on a lease, are examples of accidental stipulations."<sup>11</sup>

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10. 192 La. 1, 7, 187 So. 35, 37 (1939).

11. Art. 1764, ¶ 3, La. Civil Code of 1870.

First, while the reservation-sale of royalty in both contracts purports to be in perpetuity, there is no specific mention of a lease in the *Vincent-Bullock* contract while there is in the *Guillory* contract though *all other mineral contracts* to be made by the vendor are also mentioned. It is common knowledge that the landowner rarely conducts the search for minerals himself and that the search is ordinarily committed to a lessee. In *neither* contract was the right to search retained by the royalty owner, the subject matter in both cases being a percentage of production and the conduct of the search was obviously not the concern of the owner of the royalty interest. Since the subject matter of the *Guillory* contract was a percentage of production under an existing lease and under all future mineral contracts *to be* made by the vendor, whether lease contracts or otherwise, necessarily the method of search was clearly the choice of the vendor who retained the right to make it.

The second difference between the wording of the contracts is that in the *Vincent v. Bullock* situation, a *promise to deliver* the royalty (production) is found. Obviously this clause added nothing as the seller is bound to deliver in any case.<sup>12</sup> The application of this well known principle by our courts is so frequent as to make citation tedious.

Article 2037 of the Revised Civil Code states that: "Every condition must be performed in the manner that it is probably that the parties wished and intended that it should be."

Certainly there can be no doubt that responsible persons dealing in royalty intended that a search for oil should be made by the party retaining this right and duty. The court has recognized and applied this principle through the years in many and varied situations.<sup>13</sup>

In *Vincent v. Bullock*, the court quoted the following: "If a landowner sells royalty he is selling the proceeds that may issue from his right to explore for minerals on his own land, which is an

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12. Arts. 2475-2479, La. Civil Code of 1870.

13. *Otis v. Pittsburgh-Westmoreland Coal Co.*, 199 Fed. 86 (C.C.A., 3rd, 1912); *Walls v. Smith*, 3 La. 498 (1832); *Durrive v. Frere*, 11 La. 374 (1837); *Lanfear v. Blossman*, 1 La. 148 (1846); *Duclaud v. Rousseau*, 2 La. Ann. 168 (1847) (donation); *Bowman v. McElroy & Bradford*, 15 La. Ann. 646 (1860); *Atkins v. Shreveport & R. V. Ry. Co.*, 106 La. 568, 31 So. 166 (1901); *Girault v. Feucht*, 117 La. 276, 41 So. 572 (1906); *Adeline Sugar Factory Co. v. Evangeline Oil Co.*, 121 La. 961, 46 So. 935 (1908); *Andrews Coal Co. v. Board of Directors of Public Schools*, 151 La. 695, 92 So. 303 (1922); *Blaushild v. Rockhold*, 7 La. App. 709 (1927); *Oliver v. Home Service Ice Co.*, 161 So. 766 (La. App. 1935); *Leinhard v. Meyer*, 11 La. App. 328, 123 So. 130 (1929) noted in (1943) 18 *Tulane L. Rev.* 160.

inherent part of his ownership of the land."<sup>14</sup> In neither case was the contract predicated upon a lease but upon the uncertain future event, production, which in *Vincent v. Bullock* the court said must happen within ten years, the term set by the law. This landmark decision was handed down after most careful consideration by the court preceded by exhaustive research and receipt of expression from all informed sources available. In the opinion, a full paragraph is given to recital of these facts.<sup>15</sup> This decision has been constantly honored by the court since it was handed down. Conveyors and their attorneys relied upon it. The court made clear the distinction between royalty under an existing lease, likened unto rent because consideration for the lease, and royalty sold independently without the right to search and as a possible issue from the land. Laymen are clear on the distinction and many landowners are willing to sell royalty when they are not willing to part with control of their right to search.

It seems proper that this concept of royalty as a mineral right having been carefully and deliberately evolved by the court to validate and protect those who constantly deal should not at this date and in absence of any apparent injustice have been discarded. *Vincent v. Bullock* should not have been overruled sub silentio or otherwise. Even if the contract should be said to have been predicated upon a future lease, the court has said flatly that lease-servitude and thus the *term* might again be said to be set by *law*.

#### *The Potestative Condition*

The potestative condition which might upon first impression be seen in a sale of royalty was most carefully analyzed by Justice Hamiter in his opinion in the *Guillory* case. After consideration of the articles of the Civil Code and pertinent comments and hypotheses of French writers, he arrived at the eminently correct conclusion that the condition was not potestative. The apparent basis of the cure was that the obligor would suffer actual loss if he failed to exercise his power to search. This element has certainly been the criteria in many Louisiana decisions and properly so. It was doubtless a realistic factor under the facts of the case under discussion. However, there might easily be situations where it would be to the advantage of the obligor *not* to search. Suppose he had sold all of his royalty at a good figure. Delay rentals, together with a possible bonus, might be unattractive in comparison with keeping

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14. 192 La. 1, 15, 187 So. 35, 40 (1939).

15. 192 La. 1, 11, 187 So. 35, 38 (1939).

the entire landowner's share after waiting even a full ten years, not to speak of a short period if active leasing developed late in the term. Take Pothier's hypothesis, cited in Justice Hamiter's thesis, wherein the promisor was to give in case he went to Parish so that in order to escape payment, he must refrain from going to Parish. The assumption was that he would suffer a penalty by not making the trip. But assume that he did not want to go, had no real intention of going, would lose money in some other way by going, then the economic detriment basis for validity of the condition is lost. Of course the hypothesis would still stand under the theory of legal restraint, a factor which is not present in the royalty situation, where, if no affirmative duty lies and no economic loss postulated, restraint of any kind seems to be absent.

Under the writer's analysis, the vendor, landowner, in the instrument of sale, by *Guillory*, was not liable to suffer detriment within the meaning of Article 2035 by his failure to lease, but it would appear that he was also legally bound by Article 2037 to make a sincere effort to see that a search was made and again by Article 2040 was bound *not* to hinder the happening of the condition. The condition was not potestative for the landowner could not will oil to be or not to be under the land. The search, while it might depend on the obligor's will, was an obligation which he was bound to perform under Articles 2037 and 2040 and hence was squarely within the permissive terms of Article 2035. The court in numerous cases dealing with contracts allegedly null because of the potestative condition has read the law of Article 2037 into the contract and found the simple condition of Article 2035 approved in the clear term of the article.

For example, when a promise to buy was conditioned upon approval of a loan by a homestead association, the court said, "Plaintiffs inescapable duty was to apply to the . . . association for a loan in order to obtain the money required for the purchase of the property."<sup>16</sup> Again, when a sale of land was conditioned upon title examination by the buyer, the court found no potestative condition as the buyer was bound to examine the title or cause it to be examined and not to reject it, if it was found to be good.<sup>17</sup>

In the *Guillory* contract, the vendor, who retained the right to search was bound to exercise it himself or through his lessee and, if

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16. *Morrison v. Mioton*, 163 La. 1065, 1071, 118 So. 456, 459 (1927).

17. *Girault v. Feucht*, 117 La. 276, 41 So. 572 (1906).

oil was found, to deliver the amount of the contract to his vendee. Obviously, finding of oil cannot depend upon the obligor's will. Searching does depend upon his will but since he is obliged by law to search, there is no reprobation to this condition.<sup>18</sup>

Again, the vendor under Article 2040 is bound not to prevent the happening of the condition. Certainly the finding cannot ensue without search, hence the vendor must instigate a search or prevent the happening of the condition. Conditions suspensive in the civil law are the same as conditions precedent in the common law. Mr. Justice Fuller of the Supreme Court of the United States declared in the case of *City of New Orleans v. Texas and Pacific Company*<sup>19</sup> that, "The suspensive condition under the Louisiana Code is the equivalent of the condition precedent at common law."<sup>20</sup> For that matter, in Article 2013 are found these very words, "These conditions are either conditions precedent, which suspend the operation of the contract until they are performed . . . ."<sup>21</sup>

The concept of conditional obligations comes from the Roman law. Gaius said, "A condition is said to be suspensive, when the commencement of a legal transaction is made dependent upon it . . . ."<sup>22</sup>

Basic Louisiana Code articles were taken, of course, from the French Code. From all sources comes the principle that in an obligation conditionally suspensive or precedent the obligor may do nothing to prevent or hinder the happening of the uncertain event. After all, that is but simple common sense and justice, and even without specific authority might well be drawn from the four corners of any system of law. Common law sources state the principle this way:

"Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event,

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18. *Blaushild v. Rockhold*, 7 La. App. 709 (1927); *Ewell v. Giamanco*, 19 La. App. 672 (1932); *Oliver v. Home Service Ice Co.*, 161 So. 766 (La. App. 1935); (1931) 5 Tulane L. Rev. 396; (1932) 6 Tulane L. Rev. 23; (1939) 13 Tulane L. Rev. 442; (1943) 13 Tulane L. Rev. 160.

19. 171 U. S. 312, 18 S. Ct. 875, 43 L. Ed. 178 (1897). This material was first discussed by the author in *Royalty in Louisiana*, (1941) 13 Miss. L. J. 332.

20. 171 U. S. 312, 334, 18 S. Ct. 875, 883, 43 L. Ed. 178, 186.

21. Art. 2018, La. Civil Code of 1870.

22. Tomkins and Lemon, translators, *The Commentaries of Gaius on the Roman Law* (1869) 184.

particularly where it is dependent in whole or in part on his own act . . . ."<sup>23</sup>

Article 2040 of the Louisiana Civil Code of 1870 appears in these words:

"The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it."

A supreme court justice in the 1832 decision of *Walls v. Smith*,<sup>24</sup> dealing with a bond, rejected this recitation as a mistranslation which he thought might lead to "absurd consequences" and declared that the "obvious sense of the French text is, that the condition is considered as accomplished, when the debtor, whose obligation depends on this condition, prevents the accomplishment of it . . . ."<sup>25</sup> Chief Justice O'Niell speaks of the Louisiana Code's translation from the French text as "incomplete and inaccurate" and states that the "French text of the article (2035) of the Code of 1825 . . . [Article 1178 of the French Code] means that the condition is considered fulfilled, when it is the debtor, bound under the condition, who prevents the fulfillment."<sup>26</sup> He says further that, "The error in the translation was observed long ago, and the French text has always prevailed in the decisions of the court."<sup>27</sup> This salutary principle has been frequently resorted to by Louisiana courts. The case of *Rightor v. Aleman*<sup>28</sup> is an early illustration of the application of Article 2040 of the Louisiana Civil Code of 1870. The plaintiff was a surveyor who performed a professional service for the defendant for which the latter gave his promissory note for \$1,000. The plaintiff signed a receipt, which appears in the following language:

"Received of Mr. F. Aleman his note for one thousand dollars, it being the price agreed upon for the surveying of the land sold by the heirs of P. Aleman to La Ferrière. Now it is agreed that should the survey of mine not be sustained by the courts, then I am to deliver up said note to F. Aleman; but

23. 13 C. J. 648, § 722. See also *Mock v. Trustees of First Baptist Church of Newport*, 252 Ky. 243, 67 S. W. (2d) 9 (1934); Anson, *Principles of the Law of Contract* (Corbin's 5 Am. ed., 1930) 438; Corbin, *Supervening Impossibility of Performing Conditions Precedent* (1922) 22 Col. L. Rev. 421.

24. 3 La. 498 (1832).

25. *Id.* at 501.

26. See *Southport Mill v. Friedrichs*, 171 La. 786, 793, 132 So. 346, 348 (1931).

27. *Walls v. Smith*, 3 La. 498 (1832); *Rightor v. Aleman*, 4 Rob. 45 (La. 1843); *Morrison v. Mioton*, 163 La. 1065, 1072, 113 So. 456, 459 (1927); *Kock v. Emmerling*, 63 U. S. 70, 74, 16 L. Ed. 292, 293 (1860). See *Southport Mill v. Friedrichs*, 171 La. 786, 793, 132 So. 346, 348 (1931).

28. 4 Rob. 45 (La. 1843).

should it be sustained, then it is to be paid in full.' A. F. Rightor."<sup>29</sup>

The defendant and his coheirs effected a compromise, without awaiting a trial of the case alluded to in the receipt. They thus "rendered impossible the fulfilment of the conditions contained in the receipt delivered by the plaintiff; the defendant's obligation to pay, thereby became perfect, and he cannot be permitted to say that the consideration had failed. Civil Code, Art. 2035."<sup>30</sup> The Supreme Court of the United States in 1860 applied the principle in *Kock v. Emmerling*,<sup>31</sup> a suit to recover a broker's commission from a client who simply refused to complete a sale after all arrangements had been made by the dealer. The court said, "It would be a novel principle if the vendor might capriciously defeat his own contract with his agent by refusing to pay him when he had done all that he was bound to do."<sup>32</sup> The case of *Lloyd v. Dickson*<sup>33</sup> presented a contract for joining efforts to control an insurance company of which the plaintiff was to be manager. Defendants subsequently entered into a contract with a third party, competitor of plaintiff, to negotiate and benefit from the same scheme. Plaintiff sued for damages. Defendants offered in support of a plea of exception of no cause of action that the obligation was suspensively conditioned upon the control of the company being secured, and that it was not alleged that control was secured. The court, in overruling the exception and remanding the case for trial, said that "the obligation of defendant was not to control the company, or to secure the position for plaintiff; but only to endeavor to do both."<sup>34</sup> They then applied Article 2040 and said, "If instead of standing loyally by their contract with plaintiff the defendants enter into a contract destructive of it, the condition, as a matter of course, can never be fulfilled. . . ."<sup>35</sup> This case seems partially to fit the new situation. There was no absolute promise to control the company, but to endeavor to do so, and, while it is not clear what would have been judicially considered a reasonable effort to do so, certainly some affirmative duty was laid upon the obligor in addition to the negative one not to put it beyond his power to meet his obligation by actually starting negotiations detrimental and contrary to it. The most frequent application of the principle seems to be (as in the previously cited United States

29. *Ibid.*

30. *Id.* at 46.

31. 63 U. S. 70, 16 L. Ed. 292 (1860).

32. 63 U. S. 70, 74, 16 L. Ed. 292, 294.

33. 116 La. 90, 40 So. 542 (1906).

34. 116 La. 90, 92, 40 So. 542.

Supreme Court case of *Kock v. Emmerling*),<sup>36</sup> in regard to the prevention of a broker's realization of his promised commission by a refusal of the landowner to sell when a prospect has been found or by selling on his own hook to a third person without the broker's knowledge or consent.<sup>37</sup> These cases are thoroughly familiar to the profession and it would be tedious to recite them.

The case of *New Iberia Sugar Company v. Lararde*<sup>38</sup> presents an interesting analogy for the oil problem under discussion. In this case the plaintiff sued to recover damages in the sum of \$26,000 for alleged breach of contract. The contract in question was to the effect that plaintiff, a sugar refining company, bound itself to buy cane from the defendant, a cane grower, for a five year period at so much per ton. The defendant sold his plantation with no mention of or arrangement for the carrying out of the contract, thus committing an active breach and making it impossible for him to perform. The court awarded damages based on the refining company's losses in not being able to get cane to grind, et cetera. The court stated that by this contract the cane grower "obligated himself to grow and deliver the cane on his plantation for a fixed period of time, in his name as owner, and deliver it to plaintiff as stipulated," and that his failure to do so "was a breach for which he (was) liable in damages."<sup>39</sup> The court said further that, "The contract entered into between the parties had all the elements to make it legal. There was a definite price. The parties to it had agreed upon all its terms and conditions. There was a defined thing to be delivered by one and paid by the other."<sup>40</sup> In the royalty sale or reservation the landowner certainly could not be said to have obligated himself to produce oil, but there is an implied obligation to make a reasonable effort to secure production by leasing or attempting to lease to a reliable company.

In the case of *Owens v. Muslow*<sup>41</sup> plaintiff and defendant entered into an option agreement whereby plaintiff paid \$50,000 cash for the option and promised \$100,000 for a later date, and defendant bound himself to deliver to plaintiff a deed to certain oil properties for the agreed price of \$1,300,000 less the \$150,000 paid, "provided

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35. *Ibid.*

36. 63 U. S. 70, 16 L. Ed. 292 (1860) cited supra note 24.

37. See *Southport Mill v. Friedrichs*, 171 La. 786, 132 So. 346 (1931); *Lockett Land and Emigration Co. v. Brown*, 118 La. 943, 43 So. 628 (1907).

38. 130 La. 387, 58 So. 16 (1912).

39. 130 La. 387, 397, 58 So. 16, 19.

40. 130 La. 387, 398, 58 So. 16, 19.

41. 166 La. 423, 117 So. 449 (1928).

that plaintiff should furnish defendant, on or before January 15, 1920, a security or guaranty satisfactory to defendant for the payment to defendant of \$1,150,000 on January 15, 1922, with interest at 5 per cent per annum, payable annually."<sup>42</sup>

The plaintiff declined to avail himself of the option and abandoned it three days before its expiration; five years later he brought suit for the return of the option money, alleging among other things that the defendant was not bound to deed the property to plaintiff unless satisfied with the security which plaintiff might tender him. The court disposed of plaintiff's contention by pointing out that he, and not the defendant made the performance of the condition impossible by abandoning the option and failing to submit any security at all to defendant with which he could be satisfied or dissatisfied. The court said further:

"Now the contract before us may have been a harsh one for plaintiff, but it was not a mere nudum pactum. For it did put certain obligations on defendant.

"First of all it imposed on defendant at least a natural obligation, 'binding in conscience and according to natural justice,'<sup>43</sup> to consider honestly the security which plaintiff might offer him and to accept that security if unquestionably sufficient to secure his debt, under pain of forfeiture of his good name, which every man pledges for the performance of those obligations which bind him in conscience. And we think further that defendant, having received a valuable consideration for the option, would have been legally bound to accept any security with which a reasonable man ought to have been satisfied. . . ."<sup>44</sup>

The last passage seems peculiarly fitting in a consideration of the problem under discussion because the primitive owner of the land in any case, having this real burden running with it, must be, in the language of Justice St. Paul, under an obligation "binding in conscience"<sup>45</sup> at least to accept a lease. If it could be proved that a landowner refused to subscribe to a reasonably advantageous lease contract, might it not be said by a royalty owner that he prevented the happening of the condition?

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42. 166 La. 423, 424, 117 So. 449.

43. Art. 1757, La. Civil Code of 1870.

44. 166 La. 423, 427, 117 So. 449, 450 (1928).

45. Art. 1757, La. Civil Code of 1870.

An affirmative duty has been implied in lease contract. One author has said:

“Quite generally, when oil is discovered, the lessee is under an implied duty reasonably to develop the rest of the land leased. Under a lease for no specific term of years, the so-called ‘no term’ lease, such a duty attaches within a reasonable time after execution of the instrument. Under any kind of lease, where the leased land is in danger of being drained by operations upon adjacent lands, the courts have commonly implied a duty in the lessee to drill offset wells. A failure to fulfill the implied obligation under any of the above situations suffices to establish a forfeiture and to permit the lessor to maintain an action of ejectment.”<sup>46</sup>

The second edition of Professor Merrill’s work on “Covenants Implied in Oil and Gas Leases” contains a chapter on “Implied Covenants between Others than Lessors and Lessees.”<sup>47</sup> The cases imposing upon the grantee the duty of diligent exploration are numerous in situations analogous to, though of course not identical with, the one under discussion. The case of the sublessor’s reserving overriding royalty<sup>48</sup> presents an interesting parallel, as his sole interest is in production, as is that of the owner of Louisiana royalty per se, since he has no other interest in the land, nor has he the right to search or control.

Obviously, these problems of affirmative duty and hindering the happening of the condition were not at issue. In the writer’s judgment, developing such extensions for comment but further strengthens the court’s firm stand on the potestative condition, in connection with what was actually before them.

#### *New Developments*

From the standpoint of future development and creative jurisprudence Justice Hamiter’s concurring opinion in the *St. Martin Land Company v. Pinckney* case<sup>49</sup> is the most interesting phase of the coupled decisions and is most challenging to the student. His valiant effort to cut the coat to better fit the figure of the Civil Code is most heartening.

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46. Note (1938) 24 Wash. U. L. Q. 91, 101.

47. Merrill, *The Law Relating To Covenants Implied in Oil and Gas Leases* (2 ed. 1940) 184, c. IX.

48. *Johnson v. Moody*, 168 La. 799, 123 So. 330 (1929).

49. La. Sup. Ct. Docket No. 38,163 (November, 1947).

In *St. Martin Land Company v. Pinckney* he departs from the future condition idea of the *Vincent v. Bullock*<sup>50</sup> decision and develops the concept of a sale of a hope. Here again, however, no affirmative duty is placed upon the vendor in the analysis. In fact, he is especially relieved from it and takes a double chance first on whether there is oil and second whether his vendor will try to find it.

The Roman differentiation between things having a potential existence and those having none is set forth. However, as to the latter situation the Romans frankly took the view that a chance<sup>51</sup> and not a thing was being purchased and under their system as well as all others while there was no guaranty that fish would be caught, the net had to be cast. If an illustration of an illegal nature may be pardoned, no one would realistically expect that the dice would not be thrown or the poker hand not be played after the bets were down. It would appear that a reasonable attempt to search, to cast the net, personally or through a lessee, should be expected of the one holding the searching rights or even under the gambling contract of the Roman law. After a reasonable attempt to search, certainly there is no warranty to find and the sale of the hope may be a satisfactory answer. Without a reasonable attempt surely the vendee should at least get his money back without having to pursue the vendor by action in fraud with proof of intent and all other attendant difficulties. In the analysis of the sale of the hope as in the discussion on the potestative condition, a lack of duty on the part of the vendor seems to weaken the basic strength of the argument, unless detriment, a pure assumption, is postulated.

Prescription is said by Justice Hamiter, further discussing the sale of a hope, to begin to run when the completed sale, which, incidentally the Romans did not have, was executed. The justice very properly pointed out the fact that under the future condition idea of the *Vincent-Bullock* case, prescription could not properly be said to start until the happening of the condition. It would seem that prescription in the sale of a hope analysis should start at the time of the "casting of the net," the date when the action for delivery under Roman law would lie, if fish were caught.

After giving the starting date of prescription under application of Article 2451, Justice Hamiter after a process of elimination applied Article 3544, the general ten year term for personal actions not other-

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50. 192 La. 1, 187 So. 35 (1939).

51. See Rodin, Roman Law, 220.

wise specially provided for. He held this article to be fitting under the theory that while "a royalty interest is a real right, a real obligation, a suit to establish the right or have it recognized would not be an action for an immovable within the intendment of" Article 3548, the thirty year prescription for an action for an immovable. "It is not a *jus in re*; it is merely a *jus ad rem*."<sup>52</sup> The suit is a personal action, although the interest on which the litigation is predicated is a real right or obligation (since it was stipulated to run with the law). It is not and cannot be considered as a real action in the sense of being a suit to recover an immovable.

Obviously, the justice had to steer away from a thirty year prescription, a difficult maneuver particularly with such an unwieldy craft. It is hard to conceive of a right running with the land, a real right, an incorporeal immovable being at one and the same time a personal right prescribed for protection in ten years. If the original vendor-landowner should sell all of his royalty, sell the land to another and go bankrupt or depart from the country, certainly the royalty owner would have relief against the new landowner and his lessee to have his percentage of production allocated before it emerged from the ground for that matter, else the right does not run with the land. Act 205 of 1938, perhaps the one slight manifestation of legislative displeasure with the magnificent structure created by the court, indicates the over-all desire to have mineral contracts share the protective actions available for immovables. To apply the prescriptive bar for personal actions has the same result as a denial of a right of action. The idea of the split action advanced by Justice Hamiter presents an avenue of escape, but since there is but one procedure, it leaves nothing, rather than a portion. The metaphysics of the split action always seem confounding in any case for in some situations where the theory would appear to be easily applicable as for example in partition,<sup>53</sup> the lesser action is carried along by the weight of the greater, as an incident. However that may be, the fat was successfully retrieved from the fire and certainly at this stage the method or theory is relatively unimportant, when the faith has been kept. The court must decide and is denied pursuit of the delightful byways so dear to the heart of the commentator.

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52. Black's Law Dictionary, *Jus ad rem*, "A term of civil Law, meaning 'a right to a thing;' that is, a right exercisable by one person over a particular article of property in virtue of a contract or obligation incurred by another person in respect to it, and which is enforceable only against or through such other person. It is thus distinguished from *jus in re*, which is a complete and absolute dominion over a thing available against all persons."

53. *Miller v. Thurphy*, 187 La. 230, 174 So. 272 (1937).