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means of deciding whether a card count or an election will be used to reveal the employees' choice. This would also bring into clearer focus the meaning of the refusal to bargain charge itself in this area as the employer, after commencing collective bargaining, has literally refused to continue. This policy would protect the union's desire for stability when it is most essential—during the actual bargaining process—and give greater weight to the desirability of an accurate determination of employee choice before this time. The union still has the right to file for an NLRB election to counteract any delay in bargaining by the employer.[75] Under present procedure a union is able to secure a certification election within ten to seventy days after filing a petition,[76] causing a minimum of delay. The proposed policy looks to determining employee choice in the most effective manner, placing priority on section 9(c) elections with section 8(a)(5) bargaining orders operative in the exceptional cases where the employer has destroyed the possibility of a fair election or has accepted the union and begun to bargain before asserting a doubt of its majority.

L. Edwin Greer

THE AFTER-ACQUIRED TITLE DOCTRINE IN LOUISIANA MINERAL LAW

If *A* acquires ownership of property he previously sold while not the owner to *B*, his after-acquired title inures to *B*. This Comment explores the operation of this after-acquired title doctrine generally and in Louisiana mineral rights.

PART I. FOUNDATION AND GENERAL APPLICATION

A. Foundation

Without express code authority, Louisiana courts have repeatedly asserted that the after-acquired title doctrine is a means

75. The union could file at the time of card presentation. Then if the employer commits unfair labor practices, destroying a free election, refusal to bargain chargés could be filed. Under Bernel Foam, 146 N.L.R.B. 1277 (1964), the union could utilize both methods.

76. Local Regional Directors are now permitted to decide representation questions and to direct elections, thus allowing speedy determination of questions which formerly had to be channeled to Washington. Shuman, *Requiring a Union To Demonstrate its Majority Status by Means of an Election Becomes Riskier*, 16 LAB. L.J. 426, 428 (1965).

of enforcing the vendor's obligation of warranty.[1] Civil Code article 2501[2] provides that even when no stipulations have been made respecting warranty, the vendor must warrant the buyer against eviction. Actual physical eviction not being necessary, the mere threat of such eviction resulting from claims of third persons or title outstanding in a third person is sufficient basis for a call in warranty by the vendee.[3] The warranty applies only if the right of the person evicting existed before the sale.[4] The jurisprudence has ruled that this warranty is, in effect, a warranty of title.[5] From these principles results the rule that if a person sells property which he does not own and subsequently acquires the ownership, his obligation of warranty causes the property to inure to the vendee.

However, it is submitted that the doctrine also has a more fundamental foundation. Planiol, asserting that it is based on something deeper than mere warranty, mentions that a vendor agreeing to procure the enjoyment of property for his vendee

1. Louisiana Canal Co. v. Leger, 237 La. 936, 112 So. 2d 667 (1959); Lun Chow v. Board of Comm'rs, 203 La. 268, 13 So. 2d 857 (1943); Griffith's Estate v. Glaze's Heirs, 199 La. 800, 7 So. 2d 62 (1942); Standard Oil Co. of Louisiana v. Allison, 196 La. 838, 200 So. 273 (1941); Jackson v. United States Gas Pub. Serv. Co., 196 La. 1, 198 So. 633 (1940); Cherami v. Cantrelle, 174 La. 995, 142 So. 150 (1932); Bickham v. Kelley, 162 La. 421, 110 So. 637 (1926); Guice v. Mason, 156 La. 201, 100 So. 397 (1924); Brewer v. New Orleans Land Co., 154 La. 446, 97 So. 605 (1923); Wolf v. Carter, 131 La. 667, 60 So. 52 (1912); Wells v. Blackman, 121 La. 394, 46 So. 437 (1908); Hayward v. Campbell, 119 La. 56, 43 So. 910 (1907); Barkley v. Succession of Steers, 47 La. Ann. 951, 17 So. 438 (1895); Succession of Dupuy, 33 La. Ann. 277 (1881); Rapp v. Lowry, 30 La. Ann. 1272 (1878); Crocker v. Hoag, 25 La. Ann. 159 (1873); Hale v. City of New Orleans, 18 La. Ann. 321 (1866); Lee v. Ferguson, 5 La. Ann. 532 (1850); Noulen v. Perkins, 3 Rob. 233 (La. 1842); Stokes v. Shackleford, 12 La. 170 (1838); Fenn v. Rils, 9 La. 95 (1836); Woods v. Kimbal, 5 Mart. (N.S.) 246 (La. 1826); McGuire v. Amelung, 12 Mart. (O.S.) 649 (La. 1823); Bonin v. Eyssaline, 12 Mart. (O.S.) 185 (La. 1822).

2. LA. CIVIL CODE art. 2475 (1870): "The seller is bound to two principal obligations, that of delivering and that of warranting the thing which he sells."

Id. art. 2476: "The warranty respecting the seller has two objects; the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the thing sold or its redhibitory vices."

Id. art. 2501: "Although at the time of the sale no stipulations have been made respecting the warranty, the seller is obliged, of course, to warrant the buyer against the eviction suffered by him from the totality or part of the thing sold, and against the charges claimed on such thing, which were not declared at the time of the sale."

Id. art. 2500: "Eviction is the loss suffered by the buyer of the totality of the thing sold, or of a part thereof, occasioned by the right or claims of a third person."

3. Hausler v. Nuccio, 214 La. 1069, 39 So. 2d 734 (1949); Greer v. Sumney, 41 So. 2d 526 (La. App. 1st Cir. 1949).

4. LA. CIVIL CODE art. 2502 (1870): "That the warranty should have existence, it is necessary that the right of the person evicting shall have existed before the sale. If, therefore, this right before the sale was only imperfect, and is afterwards perfected by the negligence of the buyer, he has no claim for warranty."

5. O'Reilly v. Poché, 162 So. 2d 787 (La. App. 4th Cir. 1964).

cannot contravene this obligation either by disturbing his possession or by trying to take the property away.[6] Perhaps this is what the Louisiana court in *Rapp v. Lowry*[7] had in mind when it applied the doctrine to a sale *without warranty*:

> "It is shocking to morals, and to common honesty and decency, it can not be tolerated in law, that a vendor, *even without warranty*, should subsequently acquire a title superior to that which he conveyed to his vendee, and attempt to oust his vendee under that title." (Emphasis added.)[8]

At common law, even though there is no implied warranty as in Louisiana, the after-acquired title doctrine is used.[9] There, it is based upon "estoppel by deed,"[10] which seems to imply the same moral imperative as *Rapp v. Lowry*. Thus, the doctrine is not only based on enforcing the warranty against eviction but also upon the principle that, assuming necessary formalities, a person should keep his promises. Whenever a person purports to convey property, the after-acquired title doctrine should apply. Only when the vendor is simply releasing or "quit-claiming" his present interest in property should it not apply."[11]

B. General Application

Although the subsequent acquisition by a vendor of property sold before he was the owner inures to his vendee, the latter has no greater rights in the property than had his vendor upon the subsequent acquisition. In *Barkley v. Succession of Steers*[12] the after-acquiring vendee's rights were subordinated to a special mortgage with which the property passed encumbered into the ownership of his vendor. For the after-acquired title doctrine to operate the vendor must subsequently acquire the property in the same capacity in which he acted to sell it to the vendee. For example, the court in *Lauve v. Wilson*[13] refused to apply the doctrine when it found that the State of Louisiana had sold property in the capacity of trustee for the schools and subsequently acquired the same property as trustee for the public:

6. 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1471 (1959).
7. 30 La. Ann. 1272 (1878).
8. *Id.* at 1275, 1276.
9. 31 C.J.S. *Estoppel* § 21.
10. *Ibid.*
11. See text accompanying notes 21 through 24 *infra*.
12. 47 La. Ann. 951, 17 So. 438 (1895).
13. 114 La. 699, 38 So. 522 (1905).

"The title conveyed to plaintiff's author was a title held in trust for *A*, and the title subsequently acquired and conveyed to defendant's author was acquired in trust for *B*. The doctrine invoked cannot, therefore be applied."[14]

If the doctrine applies, no further action is required by either of the parties. The subsequently-acquired title inures to the vendee *by the operation of law*.[15] The vendee need not call the vendor in warranty and the vendor need not actually deliver a new title document to the vendee. The vendee need not even be aware of the defect in his title nor of the subsequent acquisition by his vendor. The seller's new title vests *immediately* in the buyer.

Since the vendor's after-acquired title vests immediately in the vendee by operation of law, whether the vendee must accept this new title depends upon when and how the vendee manifests his intention not to accept the new title. Clearly, if the vendee sues for rescission of the sale after the vendor has acquired the new title, his suit is to no avail because the vendor's new title vested in him immediately upon acquisition.[16] However, if the vendee actually commences a suit for rescission before the vendor acquires the new title, his suit cannot be defeated by the subsequent acquisition, and he is no longer required to take title.[17] As the court pointed out in *Hale v. City of New Orleans*,[18] the contract of sale is bilateral, requiring the consent of both parties. The consent of the vendee is presumed if he remains in possession of the property "without complaining" until the vendor acquires title to it. "But it is impossible to presume such a consent in the face of the action of nullity instituted by him against the [vendor]. It was out of the power of the [vendor] . . . to make a contract for the plaintiff against his will. . . ."[19] *Bonin v. Eyssaline*[20] held that the vendee must actually sue for rescission of the sale to show that he no longer consents to the contract; public notice of intention to procure a rescission was

14. *Id.* at 703, 38 So. at 523.

15. Wells v. Blackman, 121 La. 394, 46 So. 437 (1908); Benton v. Sentell, 50 La. Ann. 869, 24 So. 297 (1898); Barkley v. Succession of Steers, 47 La. Ann. 951, 17 So. 438 (1895); Crocker v. Hoag, 25 La. Ann. 159 (1873); Hale v. City of New Orleans, 18 La. Ann. 321 (1866).

16. Brady v. Falgout, 42 F. Supp. 532 (E.D. La. 1941); Bonin v. Eyssaline, 12 Mart. (O.S.) 185 (La. 1822).

17. Brewer v. New Orleans Land Co., 154 La. 446, 97 So. 605 (1923); Hale v. City of New Orleans, 18 La. Ann. 321 (1866).

18. 18 La. Ann. 321 (1866).

19. *Id.* at 326.

20. 12 Mart. (O.S.) 185 (La. 1822).

ineffective. Bringing of suit should not be required, however. Following *Hale*, consent to the contract could not be presumed in the face of the vendee's public notice of his intention to have the sale rescinded.

The so-called quitclaim deeds, although not provided for in the Code, have been fully recognized by the jurisprudence.[21] They seem to be permitted as a matter of freedom of contract. The quitclaim differs from a sale without warranty in that it does not purport to convey the property. A quitclaim simply conveys or relinquishes in favor of another the present interest of the grantor. If the grantor actually owns the land, the grantee acquires it; but if he had no present interest in the land, the grantee acquires nothing. Although the question had been previously answered,[22] the court in *Waterman v. Tidewater Associated Oil Co.*[23] fully discussed the problem of whether the doctrine of after-acquired title applies to such deeds. There, the deed stated that the vendor had "remised, released, sold, conveyed, and quitclaimed . . . all the right, title, interest, claim and demand in the following described piece of land."

The court held:

> "[I]t is quite manifest that the doctrine of after-acquired title should not be expanded to include a quitclaim deed, primarily for the reason that a conveyance of that character transfers only the present interest of the vendor in the land and does not convey the property."[24]

This decision is correct, for the vendor, by simply *releasing* any interest he may have in the property at the time, does not necessarily claim to have a present interest. The vendee knows what he is purchasing and should not be able to claim more if the vendor subsequently acquires an interest in the property.

Since the doctrine does not apply to a quitclaim deed, it is important to determine whether the deed is actually a quitclaim. Although the document in *Rycade Oil Corp. v. Board of Commissioners*[25] claimed to be a "quitclaim deed without recourse" and

21. Brazemore v. Whittington, 245 F.2d 943 (5th Cir. 1957); Waterman v. Tidewater Associated Oil Co., 213 La. 588, 35 So.2d 255 (1947); Benton v. Sentell, 50 La. Ann. 869, 24 So. 297 (1898); Rycade Oil Corp. v. Board of Comm'rs, 129 So.2d 302 (La. App. 3d Cir. 1961).

22. Benton v. Sentell, 50 La. Ann. 869, 24 So. 297 (1898).

23. 213 La. 588, 35 So.2d 255 (1947).

24. *Id.* at 611, 35 So.2d 233.

25. 129 So.2d 302 (La. App. 3d Cir. 1961).

"without warranty," the doctrine of after-acquired title still applied. The court looked beyond the label of the deed and saw that the vendor actually contracted to transfer the *land* and not merely the vendor's *present interest*. The court stated:

> "[I]n view of these obligations we do not find the technical labeling of these transactions as quitclaim or non-warranty deeds to be a valid basis for not applying the [after-acquired title] doctrine to the present facts."[26]

If either the vendor or vendee dies, the courts have consistently held that the heirs of the vendee may claim the benefit of the vendor's warranty and thus receive the after-acquired title,[27] and that an heir who unconditionally accepts the succession of a vendor is likewise bound to fulfill the obligation of warranty.[28] For example, the doctrine would apply in the following situation: A widow sells property of her husband's succession when in fact part of the title to the property belongs to her children. She dies and the children unconditionally accept her succession. The children would be bound by their "after-acquired obligation" and their title would vest in the mother's vendee.

PART II. MINERAL RIGHTS

A. *Servitude Application*

Due to the prohibition against establishing mineral estates apart from the land[29] and the courts' careful protection of "public policy,"[30] application of the after-acquired title doctrine to Louisiana mineral law must be approached with caution. A landowner attempting to sell mineral rights which he does not own creates problems requiring careful distinction between situations calling for application of the after-acquired title doctrine[31] and those involving the prohibited sale of reversionary rights.[32] Al-

26. *Id.* at 305.
27. Guice v. Mason, 156 La. 201, 100 So. 397 (1924); Wells v. Blackman, 121 La. 394, 46 So. 437 (1908).
28. Louisiana Canal Co. v. Leger, 237 La. 936, 112 So. 2d 667 (1959); Cherami v. Cantrelle, 174 La. 995, 142 So. 150 (1932); Stokes v. Shackleford. 12 La. 170 (1838); Guselich v. Hingle, 1 Plt. 208 (La. App. Orl. Cir. 1918).
29. Frost-Johnson Lumber Co. v. Salling's Heirs. 150 La. 756, 91 So. 207 (1922).
30. See Hardy, *Public Policy and Terminability of Mineral Rights in Louisiana*, 26 LA. L. REV. 731 (1966).
31. White v. Hodges, 201 La. 1, 9 So. 2d 433 (1942).
32. Hicks v. Clark, 225 La. 133, 72 So. 2d 322 (1954).

though non-landowners dealing with mineral interests can create situations involving the after-acquired title doctrine, this discussion is limited to transactions involving landowners. The basic problem faced by the jurisprudence in this area is whether the doctrine in particular applications transgresses the prohibitions against dealing in reversionary interest.

However, the after-acquired title doctrine is consistent with other mineral rights policies. It is consistent with retention of control of interest in land in the hands of the surface owner[33] because the doctrine will not apply unless the vendor owns the land subject to the mineral sale at the time of reversion. Likewise, the doctrine is not inconsistent with the policy of simplicity[34] of titles since it does not bind future owners of the land.

White v. Hodges,[35] the first mineral rights case of particular interest dealing with the after-acquired title doctrine, involved an unintentional oversale of minerals to an innocent purchaser. When the outstanding servitude terminated, the minerals returned to the land and the after-acquired title doctrine applied, establishing the vendee's servitude. The court in emphasizing the innocent nature of the transaction stated:

> "It also appears that the defendant did not purchase with knowledge of the obstacle nor consent to it. There is nothing in the record which would suggest in the slightest that . . . the vendor and . . . the vendee were attempting — by a subterfuge contrary to public policy — in entering into this sale of mineral rights, to create a servitude in order to avoid the ten year prescriptive period for non-use, and to give the servitude legal existence beyond that period of time."[36]

The question of when prescription began to run against the oversold portion was answered by the obstacle theory of article 792.[37] The court reasoned that the outstanding servitude was an obstacle to the exercise of the servitude on the oversold portion; thus, prescription did not begin to run until the obstacle had

33. See Hardy, *Public Policy and Terminability of Mineral Rights in Louisiana*, 26 LA. L. REV. 731, 739 (1966).
34. *Id.* at 743.
35. 201 La. 1, 9 So. 2d 433 (1942).
36. *Id.* at 32, 9 So. 2d at 443.
37. LA. CIVIL CODE art. 792 (1870): "If the owner of the estate to whom the servitude is due, is prevented from using it by any obstacle which he can neither prevent nor remove, the prescription of non-usage does not run against him as long as this obstacle remains."

been removed by termination of the outstanding servitude. The same result could have been reached by a pure application of the after-acquired title doctrine, without the use of the obstacle theory. Since the vendor did not own the minerals at the time of sale, the vendee acquired none, and the vendee's servitude did not come into existence until the vendor subsequently acquired the minerals by termination of the outstanding servitude. Certainly, prescription could not begin to run against the servitude until it came into existence.

The next case to deal with the problem, *McDonald v. Richard*,[38] differs from *White v. Hodges* in two significant respects: (1) the purchaser had knowledge of the previous sale,[39] and (2) the vendor no longer owned the land at the termination of the outstanding servitude. The question facing the court was whether the minerals inured to the owner of the land at the termination of the outstanding servitude or to the vendee of a previous owner of the land who did not own the minerals at the time of the sale. The court answered the question by applying the after-acquired title doctrine. Dr. Richard did not own the mineral interests he sold Laux and Schuh. It was a sale of property belonging to another, and, thus, null.[40] The only way for Laux and Schuh to acquire the mineral rights through Dr. Richard was for him subsequently to acquire them — which he never did because he sold the land prior to the termination of the outstanding servitude. The court stated:

> "If, in this instance, Dr. Richard had not disposed of the land, after he sold the mineral rights to Laux and Schuh, but had remained the owner of the land until the time when the mineral rights which had been retained by the Morley Cypress Company lapsed by effect of the liberative prescription of 10 years, Laux and Schuh and their transferees would have acquired thereby the mineral rights which the Morley Cypress Company lost by prescription. But there is no theory on which Laux and Schuh or their transferees . . . can claim successfully that they acquired from Dr. Richard mineral rights which he never owned — either at the time when or

38. 203 La. 155, 13 So. 2d 712 (1943).

39. *Id.* at 165, 13 So. 2d at 715.

40. La. Civil Code art. 2452 (1870): "The sale of a thing belonging to another person is null; it may give rise to damages, when the buyer knew not that the thing belonged to another person."

after he made what purported to be sales of mineral rights to Laux and Schuh."[41]

In explaining why the obstacle theory of *White v. Hodges* should not be applied to the case, the court said that the theory only applied to obstacles to which the owner of the servitude has not consented.[42] The court concluded that the theory did not permit a landowner to suspend or extend the period of prescription of ten years by which servitudes are extinguished for nonuser, by selling his so-called "reversionary interest" in a mineral servitude:

> "Even though a sale by a landowner of his so-called reversionary interest in mineral rights which he previously has sold to someone else cannot have effect until and unless the mineral rights previously sold become extinguished by the prescription of 10 years for nonuser, *nevertheless the sale of the so-called reversionary interest itself is subject to the liberative prescription of 10 years from the moment of the sale of the so-called reversionary interest.*" (Emphasis added.)[43]

Again the same result could have been reached by a pure application of the after-acquired title doctrine without resort to the obstacle theory. Under the doctrine there is no question of when prescription began to run against the oversold mineral servitude for it never became effective. Dr. Richard did not own the minerals; he could not sell what he did not own; he never acquired them; thus, his vendee never acquired a servitude on the land because the after-acquired title doctrine did not operate. Since they never had a servitude, there is no question of when it began to prescribe.

The final case of the series, *Bates v. Monzingo*,[44] adds little to the area, for it merely cites both *White v. Hodges* and *McDonald v. Richard* as authority and gives no theoretical reason for its decision. The crucial fact of the case is that the vendor of the oversold minerals still owned the land at the termination of the outstanding servitude, making application of the after-acquired title doctrine possible. Here, the court did not consider the intention of the parties, nor did it look to see if the pur-

41. McDonald v. Richard, 203 La. 155, 162-63, 13 So. 2d 712, 715 (1943).
42. *Id.* at 165, 13 So. 2d at 715.
43. *Id.* at 165, 13 So. 2d at 715-16.
44. 221 La. 479, 59 So. 2d 693 (1952).

chaser of the oversold minerals had knowledge of the previous sale as was done in both *White v. Hodges* and *McDonald v. Richard.*

To be considered with these cases involving application of the after-acquired title doctrine is *Hicks v. Clark,*[45] in which a landowner, after selling the minerals to one person, sold the land to another and reserved the reversionary right in the the minerals to himself. Thus, he was attempting to reserve the reversionary right and have the minerals revert to him individually at the termination of the outstanding servitude instead of reverting to the land. Because such a transaction, if given effect, would burden the *land* without user for more than ten years, the court considered "the reservation of the reversionary interest . . . as an effort to circumvent the public policy of this state."[46]

From the above, the present state of the law seems to be as follows: *White v. Hodges* may still be valid if limited to its facts, *i.e.*, an innocent oversale of minerals with the vendor remaining in possession of the land at the termination of the outstanding servitude. Under *McDonald v. Richard* it is not possible for an intentional over-purchaser to acquire the minerals upon termination of the outstanding servitude. It may also be that *McDonald v. Richard* has imposed further limitation on *White v. Hodges* by requiring prescription to begin to run on the innocent transaction from the purported sale. However, this result is questionable. The intentional dealing with the reversionary rights as such is clearly prohibited if *Hicks v. Clark* is considered as limiting *McDonald v. Richard.* Thus, the question of *McDonald v. Richard* is whether one may disguise intentional dealing with reversionary rights by expressing the transaction in the form of a present sale and applying the after-acquired title doctrine. The policy base of *Hicks* suggests that this may not be possible. Certainly, if such a transaction is possible, prescription would begin to run from the purported sale.[47] In all circumstances, whether the purchaser has knowledge of the oversale or not, the vendor must remain owner of the land until termination of the outstanding servitude in order for the after-acquired title doctrine to apply.

45. 225 La. 133, 72 So. 2d 322 (1954).
46. *Id.* at 141, 72 So. 2d at 325.
47. McDonald v. Richard, 203 La. 155, 13 So. 2d 712 (1943).

The problem in this area of law is apparently caused by a judicial feeling that there is a conflict between two basic public policies. The courts want to enforce the moral imperative[48] underlying the after-acquired title doctrine and require a vendor to deliver the property he purported to sell. On the other hand, there is a decided public policy against dealing in the reversionary rights to mineral interests.[49] Under the circumstances discussed above, the courts appear to feel that the two policy elements are in conflict, that one cannot be applied to its fullest extent without impinging on the other. It seems that the jurisprudence reflects a conviction that permitting unrestricted application of the after-acquired title doctrine would permit parties to enter into transactions which can not be executed directly, *i.e.*, deal with reversionary interests.

The following alternatives are open to the court: (1) refuse to apply the after-acquired title doctrine entirely; (2) apply the doctrine fully regardless of the knowledge or intention of the parties with the result that prescription would run from the after-acquired title date; (3) apply the doctrine only in the case of innocent oversales; (4) apply the doctrine in both situations, but have prescription run from the purported sale in the intentional situation and from the reversion in the innocent situation; and (5) apply the doctrine in both situations but have prescription begin to run from the purported sale.

The policy questions behind the first alternative of refusing to apply the after-acquired title doctrine entirely would rule against the idea. As previously shown there are moral bases behind the doctrine which force a vendor to fulfill his promises. Refusing to apply the doctrine not only aids the bad faith vendors, but injures the innocent good-faith purchaser who otherwise would acquire the minerals when the outstanding servitude terminated.

There is a great deal to be said in favor of applying the doctrine regardless of the knowledge or intention of the parties.[50] Administratively, the rule would be easy to apply. However, it would sharply conflict with both *McDonald v. Richard*[51]

48. See text accompanying note 7 *supra*.
49. Hicks v. Clark, 225 La. 133, 72 So. 2d 322 (1954).
50. See text at notes 54 and 55 *infra*.
51. 203 La. 155, 13 So. 2d 712 (1943).

and *Hicks v. Clark.*[52] Thus, this alternative would be so disruptive of the current law that its application is inadvisable.

The third and fourth alternatives are likewise inadvisable, but for administrative reasons. Distinguishing between innocent and intentional oversales requires judicial determination of the purchaser's subjective intention or knowledge of previous oversales. The burden of proof problem alone makes such a determination impractical.

Applying the doctrine in both situations but having prescription beginning to run from the purported sale — the fifth alternative — may be the best and is the current law.[53] There would be no problem of dealing with the subjective; the innocent purchaser would be moderately protected; and intentional oversales would be made less attractive. However, it should be noted that permitting prescription to run from the purported sale is not consistent with the after-acquired title doctrine. Under that doctrine, prescription could not begin to run until the oversold servitude became vested by the termination of the outstanding servitude. As previously stated, the obstacle theory is based on creation of a present interest by the sale. It is submitted that this theory is inconsistent with the after-acquired title doctrine, which does not create a present interest, and should be rejected in favor of a strict policy determination.

However, the second alternative of permitting prescription to run from the vesting of the servitude on the oversold minerals by operation of the after-acquired title doctrine is not contrary to established public policy. The public policy is against *burdening the land*[54] with a mineral servitude for a longer period then ten years without user. Where the after-acquired title doctrine applies, the land is not burdened at all. That doctrine is based on the *personal obligation* of warranty imposed on the vendor.[55] If he does not own the land when the outstanding servitude terminates, the servitude on the oversold minerals never becomes effective. Thus, there is no burden on the land, and it should not be against public policy.

Long-Bell Lumber Co. v. Granger[56] is the only other mineral servitude case dealing with the after-acquired title doctrine

52. 225 La. 133, 72 So. 2d 322 (1954).
53. McDonald v. Richard, 203 La. 155, 13 So. 2d 712 (1943).
54. Hicks v. Clark, 225 La. 133, 72 So. 2d 322 (1954).
55. See text accompanying note 1 *supra*.
56. 222 La. 670, 63 So. 2d 420 (1952).

worthy of discussion. In that case Long-Bell Petroleum Company, although already owning the minerals in a tract of land, re-acquired the same interest through another transaction with the same vendor. It argued that the transaction constituted an "oversale of the minerals" which resulted, under the after-acquired title doctrine, in establishing a new servitude when the old one terminated. The court, following article 2443,[57] decided that since Long-Bell Petroleum Company already owned the minerals it was impossible for it to purchase them again. Therefore, the after-acquired title doctrine was not applied. The court in distinguishing *White v. Hodges, McDonald v. Richard,* and *Bates v. Monzingo* stated:

> "In none did the same party, as here, purchase identical minerals; in each the purchase was by a third party."[58]

Thus, *Long-Bell Lumber Co. v. Granger* stands for the proposition that a landowner can not create a succession of servitudes in the same party. This certainly means that deliberate oversales would have little market value as a general proposition. Therefore, as the after-acquired title doctrine involves the personal obligation of the vendor who must remain in possession of the land at the reversion, there seems to be little danger of damaging the public policy if the after-acquired title doctrine were applied to its fullest extent.

B. Lease Application

Whether the warranty of a mineral lessor is the same as that of an ordinary vendor is not completely clear. Substantial jurisprudence[59] prior to *Gulf Refining Co. v. Glassell*[60] held that the mineral lessor is in the same position as a vendor under article 2501.[61] However, the *Glassell* decision's holding that a mineral

57. LA. CIVIL CODE art. 2443 (1870): "He who is already the owner of a thing, can not validly purchase it. If he buys it through error, thinking it the property of another, the act is null, and the price must be restored to him."

58. Long-Bell Lumber Co. v. Granger, 222 La. 670, 677, 63 So.2d 420, 422 (1952).

59. Lockwood Oil Co. v. Atkins, 158 La. 610, 104 So. 386 (1925); Cooke v. Gulf Refining Co., 135 La. 609, 65 So. 758 (1914); Rives v. Gulf Refining Co., 133 La. 178, 62 So. 623 (1913).

60. 186 La. 190, 171 So. 846 (1936).

61. LA. CIVIL CODE art. 2501 (1870): "Although at the time of the sale no stipulations have been made respecting the warranty, the seller is obliged, of course, to warrant the buyer against the eviction suffered by him from the totality or part of the thing sold, and against the charges claimed on such things, which were not declared at the time of the sale."

lessee was no more than an ordinary predial lessee and was not the owner of a real right entitled to assert the real actions together with the subsequent statutory enactments[62] and judicial decisions[63] detailing the running battle over the nature of the mineral lease at least raise some question as to the standing of the mineral lessee insofar as the matter of warranty is concerned. If the mineral lessee is in no better position than ordinary predial lessee, the fundamental obligation of the lessor is to assure the lessee of peaceable possession, though the lessor may be liable in damages if there is an actual eviction. However, the predial lessee may not attack his lessor's title and may not take a lease from another party claiming the same property. If, on the other hand, the mineral lessor is in the same position as a vendor of land or real rights therein, the obligation in warranty is considerably greater, as outlined in the prior discussion.[64] One Supreme Court decision[65] since *Glassell* has held that the *assignor* of a working interest is in the same position as an ordinary vendor. A subsequent court of appeal decision[66] has applied that decision to a mineral lessor. Thus, the question cannot be said to be free of confusion. Certainly, viewing the fact that the mineral lease functions as a real right and that in reality the lessee acquires a right of exploration and an interest in production basically similar to the owner of a mineral servitude, distinguishable principally by the mutual expectation of development and the intricate set of contractual relationships concerning development, it seems that the better view would be that the lessor is bound in warranty in the same manner as an ordinary vendor. As a practical matter, however, the confusion of the jurisprudence is avoided in the standard lease by express warranty clauses.[67]

62. See note 63 *infra*.

63. For a discussion of this battle see the following cases: Reagan v. Murphy, 235 La. 529, 105 So. 2d 210 (1958); Amerada Petroleum Corp. v. Reese, 195 La. 359, 196 So. 558 (1940); Allison v. Maroun, 193 La. 286, 190 So. 408 (1939); Payne v. Walmsley, 185 So. 88 (La. App. 2d Cir. 1938).

64. See text accompanying notes 1 through 5 *supra*.

65. Tomlinson v. Thurmon, 189 La. 959, 181 So. 458 (1938).

66. Carter Oil Co. v. King, 134 So. 2d 89 (La. App. 2d Cir. 1961). It should be noted that this court relied on Tomlinson v. Thurmon, 189 La. 959, 181 So. 458 (1938).

67. For example, Bath's Form Louisiana Spec. 14BRI-2A contains the following warranty: "Lessor hereby warrants and agrees to defend the title to said land and agrees that lessee at its option may discharge any tax, mortgage or other lien upon said land and in event lessee does so, it shall be subrogated to such lien with the right to enforce same and apply rentals and royalties accruing hereunder toward satisfying same. Without impairment of lessee's rights under the warranty in event of failure of title, it is agreed that if lessor owns an interest in said land

A series of three cases, *Whittington v. Bazemore*,[68] *Bazemore v. Whittington*,[69] and *Butler v. Bazemore*,[70] has done much to develop the after-acquired title doctrine in the mineral lease area. The facts for all three cases are as follows: Keatchie Investment Corporation (Keatchie) sold land to G.I. Bazemore on October 27, 1941, reserving for itself half of the minerals, which were leased to T. E. Robertson on March 11, 1947. Subsequently, on May 1, 1947, Bazemore leased *all* the minerals to Robertson Stores Incorporation notwithstanding he only owned half at the time. This Bazemore-Robertson lease was eventually assigned to Edman, Whittington, and Reed (Edman). Bazemore still owned the land when Keatchie's servitude terminated.

Judge Dawkins of the United States District Court[71] simply applied the after-acquired title doctrine and ruled that when Keatchie's interest terminated, the minerals returned to the landowner-lessor, Bazemore, but inured to the benefit of his lessee's assignee, Edman:

> "Having previously granted an unrestricted lease, covering *all* of the minerals, upon reversion of Keatchie's interest his warranty immediately ripened the lease into one covering *all* of the minerals."[72]

The Fifth Circuit Court of Appeals,[73] misunderstanding the nature of the assignment to Edman of the Bazemore-Robertson lease, overruled Judge Dawkins. The court, by improperly interpreting *Waterman v. Tidewater Associated Oil Co.*,[74] thought that the "assignment, without express warranties, in terms of 'all of its right, title, and interest' " was a quitclaim, and, thus, there was no basis for applying the after-acquired title doctrine.

Judge Brown's interesting view of the case[75] is that T. E. Robertson and Robertson Stores Incorporated were the same; thus, as in *Long-Bell Lumber Co. v. Granger*,[76] it would be impossible for Robertson Stores Incorporated to acquire a lease which it already owned by the after-acquired title doctrine.

less than the entire fee simple estate, then the royalties and rentals to be paid lessor shall be reduced proportionately."

68. 133 F. Supp. 163 (W.D. La. 1955).
69. 245 F.2d 943 (5th Cir. 1957).
70. 303 F.2d 188 (5th Cir. 1962).
71. Whittington v. Bazemore, 133 F. Supp. 163 (W.D. La. 1955).
72. *Id.* at 168.
73. Bazemore v. Whittington, 245 F.2d 943 (5th Cir. 1957).
74. 213 La. 588, 35 So. 2d 225 (1947).
75. Bazemore v. Whittington, 245 F.2d 943 (5th Cir. 1957).
76. 222 La. 670, 63 So. 2d 420 (1952).

Butler v. Bazemore[77] "is the inevitable result" of *Bazemore v. Whittington*. In *Butler* the Fifth Circuit Court of Appeals recognized it had misunderstood implied warranty under Louisiana law in *Bazemore*, and, thus, overruled the decision.

A final problem is caused by express after-acquired title clauses appearing in mineral leases. A typical clause reads as follows:

> "Lessor agrees that any additional or greater mineral interest in the leased premises that may be acquired by him by purchase or otherwise, is also included and leased herein."[78]

These clauses are, of course, not founded upon any warranty on the part of the lessor; they are bargained for as any other advantage. The lessee, under such a clause, is simply entitled to any and all minerals on the property acquired by the lessor whether there was an oversale or not. The question is whether a purchaser of land subject to a mineral lease containing an after-acquired title clause is bound by that clause. The jurisprudence has consistently held that an after-acquired title clause is a personal obligation of the original lessor and not binding upon a purchaser of the property.[79] In *Calhoun v. Gulf Refining Co.* the court stated:

> "The clause in the Thompson lease dealing with the outstanding minerals merely evidenced a personal agreement between the original parties to the lease, was dependent on the happening of an uncertain event, and was limited to whatever additional ownership in the mineral rights Thompson might acquire while the lease was in full force and effect; the situation did not materialize; consequently, the clause fell when Thompson failed to acquire outstanding mineral interests, and those became vested in Mrs. Calhoun, the owner of the land, at the time the servitude was extinguished because of its non-use for a period of more than ten years."[80]

Thus, it is apparent that as long as the after-acquired title clause of a lease is the personal obligation of the original landowner and not binding on future purchasers it is valid. It is

77. 303 F.2d 188 (5th Cir. 1962).
78. Calhoun v. Gulf Ref. Co., 235 La. 494, 499, 104 So. 2d 547, 548 (1958).
79. Calhoun v. Gulf Ref. Co., 235 La. 494, 104 So. 2d 547 (1958); Williams v. Arkansas Louisiana Gas Co., 193 So. 2d 78 (La. App. 2d Cir. 1966).
80. 235 La. 494, 508, 104 So. 2d 547, 552 (1958).

submitted that these decisions support the idea that applying the after-acquired title doctrine to its fullest extent is not contrary to public policy because it too is a mere personal obligation of the vendor.

CONCLUSION

The basic problem in applying the after-acquired title doctrine to the mineral transactions in Louisiana lies in the apparent conflict between a desire to enforce the moral imperative behind the doctrine and the prohibition against intentional dealing with the reversionary interests in mineral rights. Although applying the after-acquired title doctrine in its entirety to all situations where the vendor remains owner of the land at the termination of the outstanding servitude is not inconsistent with established public policy against burdening the land for a period of time greater than ten years without user; if, for policy reasons, the doctrine must be limited, this limitation should be recognized as arbitrary, because the obstacle theory is theoretically inconsistent with the after-acquired title doctrine.

A. J. Gray, III

REPRESENTATION OF INDIGENTS IN CRIMINAL CASES: GUIDELINES FOR LOUISIANA

Never have the rights of those accused of crime been more zealously protected than in contemporary America; the right to legal representation has been the object of particularly close judicial scrutiny. *Gideon v. Wainwright*[1] held that the sixth amendment entitles an indigent accused of a felony to appointed counsel at trial, whether in state or federal court. *Escobedo v. Illinois*[2] established that once police investigation focuses on the accused, denial of his request to speak with a retained attorney violates his right to counsel; all statements elicited during subsequent detention are inadmissible at trial. The judicial movement toward full implementation of the constitutional protection perhaps reached culmination in *Miranda v. Arizona*,[3] which assured the indigent's right to appointed counsel during custodial

1. 372 U.S. 335 (1963).
2. 378 U.S. 478 (1964).
3. 384 U.S. 436 (1966).