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Obligations - Joint Adventures - Admissibility of Parol Evidence To Show Interest in Profits From Sale of Immovables

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NOTE

OBLIGATIONS — JOINT ADVENTURES — ADMISSIBILITY OF PAROL EVIDENCE TO SHOW INTEREST IN PROFITS FROM SALE OF IMMOVABLES

Plaintiffs and defendant entered into an oral joint adventure under which each party was to advance an equal sum for speculation in mineral interests, using geophysical information furnished by one plaintiff. Defendant, allegedly relying on such information and unknown to plaintiffs, bought a mineral lease with his own funds, naming himself lessee. Defendant later sold the lease at a considerable profit and refused to tender the plaintiffs' respective shares as co-adventurers.[1] Plaintiffs instituted suit for an accounting, contending defendant had breached the contract of joint adventure. Defendant entered an exception of no right or no cause of action, urging that parol evidence could not be used to prove an oral agreement of joint adventure, the object of which was to share in the profits realized from the acquisition and sale of immovable property.[2] The trial court sustained the exception and dismissed the suit. On appeal, the Third Circuit Court of Appeal reversed.[3] The Louisiana Supreme Court, on rehearing, reinstated the judgment of the trial court. *Held,* parol evidence is not admissible to prove a joint adventure to share in profits realized from the sale of a mineral lease. *Hayes v. Muller,* 245 La. 356, 158 So. 2d 191 (1963).

Statutory provisions requiring certain contracts be evidenced in writing have continually provoked many problems for the legal profession — not the least of which concern oral joint ad-

1. The parties originally put up $20,000 each for a total investment of $60,000. Of this sum, over $46,000 had been used to acquire certain other mineral royalties. The exact amount expended by defendant on his lease purchase is not given, but the court said it "was obtained at a cost substantially less than the amount thereto expended for the royalty purchases." Hayes v. Muller, 245 La. 356, 362, 158 So. 2d 191, 193 (1963). The lease purchase was made on October 16, 1953, and sold by defendant on December 10, 1959, for $900,000.

2. Under LA. R.S. 9:1105 (1950) (as amended, La. Acts 1950, No. 6) mineral interests are classified as incorporeal immovables. See note 34 *infra.*

3. Hayes v. Muller, 146 So. 2d 176 (La. App. 3d Cir. 1962). The court of appeal reversed the judgment of the trial court but on rehearing certain questions were certified to the Supreme Court. The Supreme Court treated the case as if it had been appealed directly to it since the record accompanied the certification. See LA. CONST. art. VII, § 25; Grand v. American Gen. Ins. Co., 241 La. 733, 131 So. 2d 46 (1961); *Rules of the Supreme Court of Louisiana,* 8 WEST'S LA. STAT. ANN. rule 12, § 4 (Supp. 1963).

venture. Under French law the value of the contract is the controlling criterion for determining the admissibility of parol, and the general rule is that only written evidence is admissible[4] to prove a contract if the value of its object exceeds a minimum sum.[5] A similar rule applies to partnership contracts.[6] These prohibitions on parol are premised on the theory that a writing is a more reliable form of proof than oral testimony[7] which is fraught with dangers of careless observation, faulty memory, and dishonesty.[8] Oral evidence, however, is admissible to prove contracts exceeding this minimum sum whenever there is a commencement of proof by a writing emanating from the person against whom the claim is made[9] or whenever it was not feasible for the creditor to secure the written proof.[10] There are no special rules barring admission of parol evidence merely because an immovable is involved. These French Code provisions were not adopted in Louisiana. Conversely, the articles in the Louisiana Civil Code precluding proof of sales or transfers of immovables by parol evidence were not contained in the Code Napoleon but were devised by the redactors of the Louisiana Codes of 1808 and 1825.[11] Since the French approach to the requirement

4. FRENCH CIVIL CODE art. 1341, at 246, n. *d* (Wright's transl. 1908).

5. FRENCH CIVIL CODE art. 1341, as amended by Law of Feb. 21, 1948. The current sum is 50 new francs. See *id.* art. 1341, at 535, n.1 (Dalloz ed. 1961).

6. FRENCH CIVIL CODE art. 1834, as amended by Law of Feb. 21, 1948. Under the Code Napoleon the minimum sum was 150 francs. The present article sets the minimum sum at 50 new francs. Under modern French law there is a crucial distinction between joint adventures or partnerships with a "civil purpose" and those with a "commercial purpose" which affects the admission of evidence of proof of the contract to form such a venture. A joint adventure or partnership with a "civil purpose" is subject to the Civil Code (*id.* arts. 1325, 1341, 1834, 1838) in that if it involves a sum of more than 50 new francs, it must be constituted by a written agreement and parol evidence is inadmissible to prove the agreement's existence or contents. *Id.* art. 1341. If the joint adventure or partnership is of a commercial nature, it is subject to the Commercial Code (FRENCH COMMERCIAL CODE arts. 50, 90) and requires no more than an oral agreement. CHURCH, BUSINESS ASSOCIATIONS UNDER FRENCH LAW § 134 (1960). A discussion of the elements of this distinction is beyond the scope of this Note.

7. See 12 AUBRY ET RAU, DROIT CIVIL FRANÇAIS n° 762 (5th ed. 1922); 13 BAUDRY-LACANTINERIE ET BARDE, TRAITÉ DES OBLIGATIONS n° 2564 (1905). See generally Comment, 3 LA. L. REV. 427 (1941).

8. See 12 AUBRY ET RAU, DROIT CIVIL FRANÇAIS n° 761 (5th ed. 1922); 14 BAUDRY-LACANTINERIE ET BARDE, TRAITÉ DES OBLIGATIONS n° 2517 (1905). See generally Comment, 3 LA. L. REV. 427 (1941).

9. FRENCH CIVIL CODE art. 1347. See also 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1117 (1959). See generally Comment, 3 LA. L. REV. 427 (1941).

10. FRENCH CIVIL CODE art. 1348. See also 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1117 (1959). Examples wherein securing of written evidence is not feasible are said to be the necessary deposit, obligations contracted in case of unforeseen accident, deposit of baggage in a hotel by a traveler, and hiring of domestics. *Id.* no. 1119. See generally Comment, 3 LA. L. REV. 427 (1941).

11. See notes 20 and 23 *infra*.

of proof by writing was not adopted by Louisiana, the French law will be of little help to the Louisiana courts in this area. The common law rules, however, appear to provide a more fruitful analogy.

Under the historic statute of frauds of common law jurisdictions certain contracts are enforceable only if evidenced in writing and signed by the party against whom the action is brought.[12] The purpose of this requirement apparently is to prevent the enforcement of unfounded or fraudulent claims through perjured testimony.[13] One contract to which the statute of frauds is applicable is that for the sale of an interest in land.[14] It has long been recognized, however, that oral agreements of partnership or joint adventure are valid although the parties intend to own or deal in real estate.[15] Courts have explained this view in two ways: some have relied on the finding of an implied fiduciary duty, the breach of which gives rise to a con-

12. The original Statute of Frauds is the English statute, An Act for the Prevention of Frauds and Perjuries, 1676, 29 CAR. 2, ch. 3. However, the term "statute of frauds" is descriptive of all statutes which require certain classes of contracts to be in writing, such statutes being largely modelled after the original English statute. 2 CORBIN, CONTRACTS § 278 (1950); 49 AM. JUR. *Statute of Frauds* §§ 1, 2 (1943); 37 C.J.S. *Statute of Frauds* §§ 1, 2 (1943).

Under common law there is a distinction between the statute of frauds and the "parol evidence rule." The statute of frauds makes certain oral contracts unenforceable if not reduced to a signed memorandum; the "parol evidence rule" protects a completely integrated writing from being varied and contradicted by parol testimony. 3 CORBIN, CONTRACTS § 575 (1951).

It appears that the Louisiana Civil Code follows this same basic distinction but confusion is created by the courts' indiscriminate use of the term "parol evidence rule" to encompass both the requirement of writing for certain contracts and the prohibition against varying the terms of a written contract. *Compare* LA. CIVIL CODE arts. 2275, 2440 (1870) *with* LA. CIVIL CODE art. 2276 (1870). For a comprehensive discussion of the latter rule, see Comment, 3 LA. L. REV. 427 (1941).

13. 2 CORBIN, CONTRACTS § 275 (1950); 3 WILLISTON, CONTRACTS § 448 (3d ed. 1957); 49 AM. JUR. *Statute of Frauds* § 1 (1943); 37 C.J.S. *Statute of Frauds* § 1 (1943).

14. 3 WILLISTON, CONTRACTS § 450 (3d ed. 1957). The RESTATEMENT, CONTRACTS § 178(1) (1932) provides: "The following classes of informal contracts are by statute unenforceable unless there is a written memorandum thereof signed by the party against whom enforcement of the contract is sought, or by some person thereunto authorized by him: . . . Class IV. Contracts for the sale of an interest in land."

15. This general position was set forth in the frequently cited English case of Dale v. Hamilton, 5 Hare 369, 67 Eng. Rep. 955 (1846) and has been generally recognized in the United States as the majority view. See cases collected in 2 CORBIN, CONTRACTS § 411, n.41 (1950); 3 WILLISTON, CONTRACTS § 489, n.15 (3d ed. 1957); Annots., 18 A.L.R. 484 (1922), 95 A.L.R. 1242 (1935). RESTATEMENT, CONTRACTS § 193, illus. 6, provides: "A orally promises B to share with him whatever proceeds A obtains from the sale of Blackacre. A's promise is not within Class IV" (of § 178, note 14 *supra*, requiring writing to be enforceable).

For the minority view, see Annots., 18 A.L.R. 484, 497 (1922), 95 A.L.R. 1242, 1246 (1935).

structive trust for the benefit of co-adventurers;[16] others have followed the view that because of the confidential relationship existing between co-adventurers, proceeds from the sale of the real estate are considered personal property and the action to collect a share of the proceeds thus falls outside any prohibition of the statute of frauds.[17] That the agreement involved a mineral interest has likewise generally proved no bar to a co-adventurer's recovery.[18]

Adopting an approach somewhat similar to the common law and apparently following the policy of protecting title to immovables from fraud,[19] Louisiana Civil Code articles 2440 and 2275 require sales and other transfers of immovables to be in writing;[20] and it is well settled in the jurisprudence that title

16. BOGERT, TRUSTS AND TRUSTEES § 488 (2d ed. 1960); 2 WILLIAMS & MEYERS, OIL AND GAS LAW § 437.1 (1959). See also 4 SCOTT, TRUSTS § 499 (2d ed. 1956) where it is pointed out that courts holding to the contrary fail to recognize that a fiduciary relation can arise without a contract, and that a constructive trust may be imposed where a fiduciary, in violation of his duty, acquires and seeks to retain the property to which the fiduciary duty relates.

It has been pointed out that from a theoretical viewpoint there can be no constructive trusts in a civil law system (Patton, *Future of Trust Legislation in Latin America*, 20 TUL. L. REV. 542, 548 (1946)), and that even after the passage of the Louisiana Trust Estates Act, there can be no constructive trusts in Louisiana (Wisdom, *A Trust Code in the Civil Law Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act*, 13 TUL. L. REV. 70, 83 (1938)). *But cf.* Gaines v. Chew, 43 U.S. (2 How.) 619, 650 (1844) (constructive or implied trusts are not prohibited by Louisiana law) and cases which indicate that constructive or implied trusts are a part of Louisiana law, *e.g.*, Succession of Onorato, 219 La. 1, 51 So. 2d 804 (1951); Sentell v. Richardson, 211 La. 288, 29 So. 2d 852 (1947); Haynesville Oil Co. v. Beach, 159 La. 615, 105 So. 790 (1925); Jansen v. Bellamore, 147 La. 900, 86 So. 324 (1920); McClendon v. Bradford, 42 La. Ann. 160, 7 So. 78 (1890); Exchange & Banking Co. v. Yorke, 4 La. Ann. 138 (1849); Gervais v. Gervais, 9 Orl. App. 69 (La. App. Orl. Cir. 1911). In the official comment to LA. R.S. 9:1722 (1950), as amended by La. Acts 1964, No. 338, it is pointed out that the 1964 Trust Code "does not treat constructive trusts and does not affect the Louisiana jurisprudence on constructive trusts. See Pascal, *Some ABC's About Trusts and Us*, 13 LA. L. REV. 555, 558 (1953)."

17. Dayvault v. Baruch Oil Corp., 211 F.2d 335 (10th Cir. 1954); Stewart v. Young, 247 Mich. 451, 226 N.W. 222 (1929); Annot., 18 A.L.S. 484, 490 (1922).

18. Dayvault v. Baruch Oil Corp., 211 F.2d 335 (10th Cir. 1954); Kasishke v. Keppler, 158 F.2d 809 (10th Cir. 1947); 2 WILLIAMS & MEYERS, OIL AND GAS LAW § 437.1 (1959); Annots., 18 A.L.R. 484, 492 (1922), 95 A.L.R. 1242, 1244 (1935).

19. See Hackenburg v. Gartskamp, 30 La. Ann. 898 (1878); Jackson v. Harris, 136 So. 166 (La. App. 2d Cir. 1931).

20. LA. CIVIL CODE art. 2440 (1870): "All sales of immovable property shall be by authentic act or act under private signature.

"Except as provided in article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and testimonial proof of it shall not be admitted."

Id. art. 2275: "Every transfer of immovable property must be in writing; but if a verbal sale, or other disposition of such property, be made, it shall be good against the vendor, as well as against the vendee, who confesses it when

to immovables cannot be established by parol evidence.[21] Likewise it has been held consistently that a principal cannot prove an oral mandate for the purpose of establishing an interest in immovable property purchased by his alleged agent.[22] Where a partnership's assets consist of immovable property, article 2836 requires the partnership agreement to be in writing.[23] Joint adventures, which differ from partnerships by reason of their informal nature, have been defined as a special combination of two or more persons who jointly seek a profit through a specific adventure.[24] While joint adventures are subject to the general rules of partnership by analogy only,[25] there is no clear authority as to whether article 2836 applies to joint adventures.[26]

interrogated on oath, provided actual delivery has been made of the immovable property thus sold."

There are no corresponding articles in the Code Napoleon insofar as immovables are concerned. The Louisiana articles were incorporated into the Code of 1808 with no comment by the redactors. See 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITIONS OF THE CIVIL CODES OF LOUISIANA arts. 2440, 2275 (1942).

The jurisprudence has made the rules relative to sales and transfers likewise applicable to contracts to sell or to transfer. Patterson v. Bloss, 4 La. 374 (1832).

21. Kennedy v. Perry Timber Co., 219 La. 264, 52 So. 2d 847 (1951); Carter v. Loeber, 177 La. 444, 148 So. 673 (1933); Dance v. Craighead, 134 La. 6, 63 So. 604 (1913); Tabernacle Baptist Church v. Green, 124 La. 171, 50 So. 1 (1909); Halsey v. Sandidge & Payne, 27 La. Ann. 198 (1875). Generally the rule is relaxed only in cases of manifest fraud or error. LeBleu v. Savoie, 109 La. 680, 33 So. 729 (1903); *cf.* Hodge v. Hodge, 151 La. 134, 92 So. 612 (1922); Maskey v. Johnson, 122 La. 791, 48 So. 266 (1909). But, even where fraud or error is alleged, title may not be shown in one who never had title. Scurto v. LeBlanc, 191 La. 136, 184 So. 567 (1938).

22. Stierle v. Kaiser, 45 La. Ann. 580, 12 So. 839 (1893); Perrault v. Perrault, 32 La. Ann. 635 (1880); Hackenburg v. Gartskamp, 30 La. Ann. 898 (1878). See also Scurto v. LeBlanc, 191 La. 136, 184 So. 567 (1938); Hanby v. Texas Co., 140 La. 189, 72 So. 933 (1916). *But see* Cuggy v. Zeller, 132 La. 222, 61 So. 209 (1913).

23. LA. CIVIL CODE art. 2836 (1870): "If any part of the stock of this partnership consist of real estate, it must be in writing, and made according to the rules prescribed for conveyance of real estate. . . ."

There was no corresponding article in the Code Napoleon. Article 2836 was incorporated into the Code of 1825 with no comment by the redactors. See 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITIONS OF THE CIVIL CODES OF LOUISIANA art. 2836 (1942).

There would appear to be no ambiguity in the article insofar as to what the word "it" in the article refers. The original French version of the Code of 1825 clearly shows that "it" refers to the papers drawing up the partnership. "*Si quelquè partie du fonds social consiste en immeubles, la société doit être rédigée par écrit et suivant les règles prescrites pour l'aliénation des immeubles, et elle doit être enregistrée, comme il est dit ci-après relativement aux sociétés en commandite.*" *Ibid.*

24. McCann v. Todd, 203 La. 631, 14 So. 2d 469 (1943); Emerson v. Shirley, 188 La. 196, 175 So. 909 (1937); Daily States Pub. Co. v. Uhalt, 169 La. 893, 126 So. 228 (1930); Young v. Reed, 192 So. 780 (La. App. 2d Cir. 1939). See generally Comment, 25 TUL. L. REV. 382 (1951).

25. See Comment, 25 TUL. L. REV. 382 (1951); *cf.* Ludeau v. Avoyelles Cotton Co., 164 La. 275, 113 So. 846 (1927).

26. It has been suggested that in Louisiana the partnership is considered to

While parol is not admissible to establish title to an immovable, nevertheless Louisiana courts have recognized that where title to an immovable is only collaterally involved admission of parol is proper.[27] Thus, even though a principal may not assert an interest by parol in an immovable purchased by his alleged agent, parol is admissible to show that the agent received funds from the principal for which he must account.[28] Difficulty is

be a legal entity whereas a joint adventure is merely an aggregate of individual members. Comment, 25 TUL. L. REV. 382, 393 (1951). In the instant case it would appear that the theory underlying article 2836 would thus not be applicable since ownership of the mineral leases would not vest in an artificial legal entity, the existence of which would have to be in writing to support ownership of an immovable. Since the instant case on rehearing did not base its holding on article 2836, the question evidently remains unanswered.

27. Wampler v. Wampler, 239 La. 315, 118 So. 2d 423 (1960) (to show when assignment and sale consummated); Kennedy v. Perry Timber Co., 219 La. 264, 52 So. 2d 847 (1951) (to show joint adventure and not sale of timber intended); Warnock v. Roy, 217 La. 224, 46 So. 2d 251 (1950) (to show joint adventure to share in profits from drilling oil well); Dejean v. Whisenhunt, 191 La. 608, 186 So. 43 (1938) (to show joint adventure to speculate in a mineral lease); Emerson v. Shirley, 188 La. 196, 175 So. 909 (1937) (to show joint adventure to speculate in mineral leases); Whatley v. McMillan, 152 La. 978, 94 So. 905 (1922) (to recover broker's commission on real estate sale); Levy v. Ward, 33 La. Ann. 1033 (1881) (to correct an error in description of land); Grevenberg v. Borel, 25 La. Ann. 530 (1873) (to prove when timber cut); Barataria & Lafourche Canal Co. v. Field, 17 La. 421 (1841) (to show possession); McGuire v. Amelung, 12 Mart.(O.S.) 649 (La. 1823) (to show possession); Boudreau v. Boudreau, 12 Mart.(O.S.) 667 (La. 1823) (to show possession); Molero v. The California Co., 145 So. 2d 602 (La. App. 4th Cir. 1962) (to prove offer in contract); Jones v. Jones, 126 So. 2d 437 (La. App. 2d Cir. 1960) (to determine improper commission); Byrd v. J. F. Meeks Lumber Co., 158 So. 701 (La. App. 1st Cir. 1935) (to show trust relationship); Landry v. Blache, 17 La. App. 670, 137 So. 208 (Orl. Cir. 1931) (to recover broker's commission). *But see* Stack v. DeSoto Properties, 221 La. 384, 59 So. 2d 428 (1952); Succession of Prescott, 170 La. 233, 127 So. 611 (1930); Paterson v. Bloss, 4 La. 374 (1832).

There has been no clear enunciation of what constitutes a "collateral effect" on title to immovables in the cases that have followed this doctrine. In Amerada Petroleum Corp. v. State Mineral Board, 203 La. 473, 14 So. 2d 61 (1943) a concursus proceeding was brought to determine ownership of a fund representing royalties under certain oil leases. The court was faced with the problem whether the location of the source of funds was the proper place to bring suit. The court found that the location of the oil well was proper since adjudication of title to the property was necessary to determine ownership of the profits: "The oil is located in the parish of St. Martin, and in order to determine the ownership of the funds derived from the oil produced therefrom, it is necessary to determine the ownership of the property on which the well is located." *Id.* at 487, 14 So. 2d at 66. It is submitted that this test should be limited to its facts since the oil is produced from the immovable itself, but such an interest in the immovable is not necessary to be shown to obtain an accounting for profits derived pursuant to a fiduciary agreement. The dissent in the instant case on rehearing said: "[T]he basis of the joint adventure contract was profits to be derived from the pooling of knowledge, know-how, and capital in oil and gas royalty and leasing transactions. The acquisition of title in . . . any . . . person's name was only incidental, collateral to and a means of accomplishing the main object of the joint adventure agreement which was the dividing of profits derived ultimately as a result of the pooling of their knowledge, know-how, and capital." 245 La. at 385, 158 So. 2d at 201 (1963).

28. Little v. Haik, 246 La. 121, 163 So. 2d 558 (1964); Scurto v. LeBlanc,

encountered, however, when the principal seeks to require the agent to account for the profits made from the investment of such funds in immovable property.[29] In *Succession of Prescott*[30] the plaintiffs attempted to show by parol that one of the defendants (a brother) had acquired certain immovable property in his own name, but that in so doing he was acting as the agent of the mother and used money which had been entrusted to him to invest for her. Prior to his mother's death the defendant had sold the property and retained all the funds derived from the sale. By their action, plaintiffs (as heirs of their mother) sought to obtain an accounting for the revenues derived from the property while it was still in his name and to receive their share of the proceeds which had been realized from the sale. The court held that since plaintiffs were prohibited from using parol evidence to show title in their mother they could not be heard to demand an accounting of either the revenues from the property or any part of the proceeds derived from the sale thereof.[31]

In the area of joint adventure, analogous to that of the principal-agent,[32] the only cases found dealing with the admissibility of parol to prove the adventure wherein mineral leases or royalties were involved[33] were decided under the law as it stood prior to the 1938 statute classifying mineral interests as incorporeal immovables (now R.S. 9:1105),[34] but the opinions, never-

191 La. 136, 184 So. 567 (1938).

29. *Compare* Cuggy v. Zeller, 132 La. 222, 61 So. 209 (1913) *with* Succession of Prescott, 170 La. 233, 127 So. 611 (1930). See also Scurto v. LeBlanc, 191 La. 136, 184 So. 567 (1938).

30. 170 La. 233, 127 So. 611 (1930).

31. The court in *Prescott* cited no authority for this proposition. It is submitted that a distinction should have been drawn between the situations where the purported principal seeks to obtain an interest in the immovable itself (which was *not* the case in *Prescott*), and the situation where the purported principal seeks only a share of the profits made pursuant to the agreement (which *was* the case in *Prescott*). In the former situation parol should not be admissible since title to the immovable is sought to be established; in the latter situation there should be no objection to parol evidence since title to the immovable is not in any way involved. See text accompanying notes 50-52 *infra*.

32. The court in the instant case assumed that the principal-agent cases were controlling in refusing to allow parol on rehearing. Further, there is clearly a similar fiduciary relationship in both areas. See text accompanying notes 51-52 *infra*.

33. Dejean v. Wisenhunt, 191 La. 608, 186 So. 43 (1938); Emerson v. Shirley, 188 La. 196, 175 So. 909 (1937).

34. La. Acts 1938, No. 205, now LA. R.S. 9:1105 (1950), as amended, La. Acts 1950, No. 6: "Oil, gas, and other mineral leases, and contracts applying to and affecting these leases or the right to reduce oil, gas, or other minerals to possession, together with the rights, privileges, and obligations resulting therefrom are classified as real rights and incorporeal immovable property. They may be asserted, protected, and defended in the same manner as may be the ownership

theless, contain significant reasoning. In *Emerson v. Shirley*[35] the plaintiff, alleging fraud by a co-adventurer, sued to annul a sale of a royalty interest to the latter. The trial court dismissed the suit on the ground that parol could not be used to prove an oral joint adventure since the object of the adventure was the ownership of immovables and under article 2836 such an agreement must be in writing.[36] The Supreme Court reversed, holding that parol was admissible on the ground that the oral testimony would merely establish the confidential relationship of the parties and not the joint ownership of the property.[37] The rationale was that the effect of the parol on the title to the property would be collateral only, and this would not prevent the admission of evidence relevant for some other purpose — to show a breach of the fiduciary duty owed by a co-

or possession of other immovable property by the holder of these rights, without the concurrence, joinder, or consent of the landowner, and without impairment of rights of warranty, in any action or by any procedure available to the owner of immovable property or land. This Section shall be considered as substantive as well as procedural so that the owners of oil, gas, and other mineral leases and contracts within the purpose of this section shall have the benefit of all laws relating to the owners of real rights in immovable property or real estate."

Prior to the adoption of this statute, oil, gas, and mineral leases were held to confer only personal rights (Gulf Refining Co. v. Glassell, 186 La. 190, 171 So. 846 (1936)), but since this afforded a mineral lessee little protection, the statute was enacted giving a mineral lessee a real right on his lease. Although subsequent cases interpreting the statute produced much confusion, it is generally accepted now that such mineral contracts confer real rights that are both substantive and procedural, thus affording the holders of such contracts the same remedies that belong to owners of corporeal immovables. Comment, 35 TUL. L. REV. 218 (1960). *But see* the recent cases of Harwood Oil & Refining Co. v. Black, 240 La. 641, 124 So. 2d 764 (1960); Tinsley v. Seismic Explorations, Inc., 239 La. 23, 117 So. 2d 897 (1960); Reagan v. Murphy, 235 La. 529, 105 So. 2d 210 (1958). It is generally held now, however, that *ownership* of a mineral interest may not be *created* by parol. Acadian Prod. Corp. v. Tennant, 222 La. 653, 63 So. 2d 343 (1953); Davidson v. Midstates Oil Corp., 211 La. 882, 31 So. 2d 7 (1947); Arkansas Louisiana Gas Co. v. R. O. Roy & Co., 196 La. 121, 198 So. 768 (1940); *cf.* Ingolia v. Lobrano, 244 La. 241, 152 So. 2d 7 (1963).

35. 188 La. 196, 175 So. 909 (1937).

36. It is significant that, notwithstanding the fact that the case arose and was decided under the law as it stood prior to the 1938 statute classifying mineral contracts as immovables, the court in *Emerson* treated the royalty interest as an immovable and went to great lengths to show why title to the royalty would not be involved by the introduction of parol to prove the oral joint adventure. In reversing, the Supreme Court did not specifically state why article 2836 was inapplicable.

37. Plaintiff had owned a record title to the royalty interest. He sued to annul the sale of the royalty interest to defendant co-adventurer urging that the defendant had interposed a third party to purchase the interest while withholding information as to the value of the royalty, and, further, that the sale had occurred while plaintiff was intoxicated to such an extent as to be suffering from a derangement of the intellect. The trial court dismissed the suit on an exception of no cause of action. In reversing the trial court and holding that parol was admissible to prove the original joint adventure, the Supreme Court said that "the plaintiff has alleged such a confidential relationship . . . that he

adventurer.[38] *Emerson* was later cited with approval in a case[39] which held parol evidence admissible to show a joint adventurer's claim for a portion of the profits resulting from an assignment of a mineral lease "since it was not the title to the real estate that was involved but merely a lease on real estate."[40]

On first hearing of the instant case the Supreme Court, using *Emerson* as a guide, held parol evidence admissible to prove the joint adventure, reasoning that the object of the suit was neither assertion of an interest in an oil and gas lease nor an attack upon the title to such a lease, but, rather, the suit was solely for "an accounting for the profits resulting from the joint adventure which is a personal contract."[41] The court emphasized the fact that the joint adventure was not related to the ownership of property but only to a share of the profits, and that, not only was title to the property not affected because of the nature of the plaintiff's demand (an accounting), but title *could not* be affected by proof of the joint adventure since the agreement provided only for a share of the profits and not for joint ownership of the property itself. Thus, success in the suit was dependent only upon whether the plaintiffs could prove there was a joint adventure within the terms of which profits were derived; therefore, code prohibitions on the admissibility of parol were inapplicable.[42]

On rehearing the court reversed its original decision, con-

should be allowed to prove it by parol evidence . . . [and] . . . if parol evidence is offered to prove the confidential relationship alleged in this case it will not be to establish the original joint ownership." 188 La. at 204-05, 175 So. at 911-12.

38. "The rule which forbids the proving of title to real estate by parol evidence is not applicable to evidence which is offered for some other purpose, for which it is relevant and competent, and which relates only collaterally and unavoidably to, and without establishing or affecting the ownership of real estate." *Id.* at 205, 175 So. at 912.

39. Dejean v. Wisenhunt, 191 La. 608, 186 So. 43 (1938).

40. *Id.* at 610, 186 So. at 44. The court in *Dejean* indicated that *Emerson* was followed because the case was governed by the law in effect prior to the 1938 mineral statute (LA. R.S. 9:1105 (1950), quoted note 34 *supra*). However, the opinion of the court of appeal in the instant case said the court in *Dejean* could not have intended the implication that had the 1938 statute been applicable the parol evidence would not have been admissible because *Dejean* "specifically applied the principle of the *Emerson v. Shirley* case, and under that principle parol evidence would have been admissible to prove the verbal contract of joint adventure, regardless of whether that contract was entered before or after the enactment of the 1938 statute." Hayes v. Muller, 146 So. 2d 176, 184 (La. App. 3d Cir. 1962). The Supreme Court in the instant case did not mention *Dejean*.

41. 245 La. at 368, 158 So. 2d at 195 (1963).

42. The court on original hearing said the defendant's contention that articles 2275 and 2836 precluded parol evidence is "inapplicable because title to the 'Sweeney Lease' is not involved." *Id.* at 370, 158 So. 2d at 196.

cluding that parol evidence could not be introduced to prove an oral joint adventure providing for sharing of profits derived from the sale of immovable property. The court reasoned that the prohibition on the use of parol was as applicable to attempts to establish an interest in the proceeds from the sale of an immovable as it was to attempts to prove title to the same.[43] In support of this position the court relied in part on cases denying recovery to a principal who sought to prove by parol evidence an interest in an immovable purchased by his agent.[44] The court considered *Succession of Prescott* as controlling, reasoning that the situation in the instant case was almost precisely the same.[45] *Emerson* was distinguished on its facts[46] and the court said that in *Emerson* "the sole purpose of the introduction of the parol evidence was to show . . . [a] fiduciary relationship . . . and not that of enforcing an agreement so as to give any benefits flowing therefrom."[47] As an alternative reason the court concluded that, even if their factual distinction was erroneous, *Emerson* "was decided in 1937 — or long prior to the legisla-

43. On rehearing the court re-evaluated the meaning of LA. R.S. 9:1105 (1950) and said that the prohibition against using parol evidence "applies to transactions involving mineral leases, just as it does to those affecting real estate." 245 La. at 376, 158 So. 2d at 198 (1963). *But see* discussion of the soundness of this conclusion at notes 48-49 *infra*.

44. Scurto v. LeBlanc, 191 La. 136, 184 So. 567 (1938); Carter v. Loeber, 177 La. 444, 148 So. 673 (1933); Succession of Prescott, 170 La. 233, 127 So. 611 (1930); Hanby v. Texas Co., 140 La. 189, 72 So. 933 (1916); Perrault v. Perrault, 32 La. Ann. 635 (1880); Hackenburg v. Gartskamp, 30 La. Ann. 898 (1878). With the exception of *Succession of Prescott, supra*, the cases cited by the court in the instant case stand only for the proposition that *title to or an interest in the title to an immovable* may not be established by parol and *not* for the proposition that parol may not be used to show an obligation to account to a principal or a co-adventurer for proceeds derived pursuant to an agreement. While it is true that the *Prescott* case apparently denied to a person who advanced funds to another, used subsequently by the other to invest in immovables, the right to use parol evidence for the purpose of showing the basic agreement and what was done pursuant to it, the court in *Prescott* cited no authority for this stated proposition. It is submitted that this holding was contrary to the later holding in *Emerson*, which clearly recognized that parol evidence offered for a similar purpose related only *collaterally* to the ownership of an immovable without affecting that ownership.

45. 245 La. at 378, 158 So. 2d at 199 (1963).

46. On original hearing the court cited *Emerson* as the guiding authority for admitting the disputed parol evidence of the joint adventure. On rehearing the court pointed out that *Emerson* involved an action to annul a sale between co-adventurers on the ground of fraud and intoxication of the vendee and that the plaintiff had been a record owner of the disputed royalty. It is significant, however, to note the emphasis the court in *Emerson* placed on the fiduciary relationship existing between co-adventurers. Neither the *Emerson* case nor the instant case on original hearing discussed the *Prescott* case.

47. 245 La. at 385, 158 So. 2d at 201 (1963). Query: Was this not a fiduciary relationship in the instant case? See 4 SCOTT, TRUSTS § 499 (2d ed. 1956), discussed in note 16 *supra*.

tive enactment placing mineral leases on the same basis of realty insofar . . . as parol evidence rules are concerned."[48]

Assuming the soundness of the court's interpretation and application of R.S. 9:1105 insofar as proof of title by parol was involved,[49] it is questionable whether the admission of parol in the instant case would do any violence to the rule prohibiting proof of title to an immovable by parol since it appears that title to the immovable was not involved. Consistent with the prohibition against use of parol to establish title to an immovable, a contract to buy or sell an immovable must also be in writing[50] and it follows that neither a duty to buy nor a duty to sell an immovable may be established by parol in a suit to recover damages for failure to fulfill such an agreement.[51] However, an action for damages for breach of an oral contract to buy or to sell immovables should be distinguished from an oral agreement seeking to bind an agent, who receives money from his principal for investment pursuant to mandate, to account to his principal for proceeds derived from performance of the agreement. In the former, the promise sued on is to transfer an immovable; in the latter, the promise sued on is to account for the profits made pursuant to the agreement. If, to establish his case, the plaintiff must prove the purchase and subsequent sale of an immovable by the agent, written proof of the purchase and sale must be offered. However, the introduction of parol by the principal to establish a promise to account for proceeds derived from these transactions would not in any way af-

48. 245 La. at 385, 158 So. 2d at 201 (1963). Query: Was this the real intention of the 1938 statute? *Cf.* Arnold v. Sun Oil Co., 218 La. 50, 48 So. 2d 369 (1950); Amerada Petroleum Corp. v. Reese, 195 La. 359, 196 So. 558 (1940), note 49 *infra*. It is significant that notwithstanding the fact that *Emerson* was decided under the law as it stood prior to the 1938 statute (now LA. R.S. 9:1105 (1950)), the court in *Emerson* treated the disputed royalty interest as an immovable. See discussion note 36 *supra*.

49. LA. R.S. 9:1105 (1950), quoted note 34 *supra*, provides that *holders* and *owners* of mineral interests are afforded all substantive and procedural remedies as are available to owners of real rights in immovables. In the instant case the defendant was not a holder and it is questionable whether the statute is applicable. *Cf.* Amerada Petroleum Corp. v. Reese, 195 La. 359, 196 So. 558 (1940) (R.S. 9:1105 did not intend to grant to mineral lessee the same right of ownership as that of the lessor). See, to the same effect, Arnold v. Sun Oil Co., 218 La. 50, 48 So. 2d 369 (1950). Query: If a mineral lessee's rights are subordinate to those of a mineral lessor, can such a mineral lessee be said to be accorded all real rights? In the instant case defendant was a *former* lessee.

50. Patterson v. Bloss, 4 La. 374 (1832).

51. *Ibid.* It should be noted that *Patterson*, cited as one authority for the holding of the instant case, stands only for the proposition that a contract to sell an immovable may not be established by parol evidence, and that parol is likewise inadmissible to show breach of such a contract to recover damages.

fect the title of the named vendee, but would only show the agent's indebtedness to the principal. The same distinction would be applicable to oral joint adventures to require an accounting from a co-adventurer since similar fiduciary duties are involved.[52]

If the ruling of the instant case was based on a desire to prevent fraud,[53] the result appears ironic since the court, in its eagerness to protect title to immovables from fraud, has opened the door to the equally invidious practice of one co-adventurer breaching his fiduciary duty to the other. Furthermore, the holding leads to the possibility that where the assets of an oral joint adventure are movable and immovable property, one party, by mere denial of the agreement by his co-adventurer, may be effectively barred from establishing the joint adventure for the purpose of a partition of the movable assets or the proceeds realized from their sale. A similar problem arises if *A* and *B* orally enter into a joint adventure pursuant to which *B* acquires and disposes of an immovable and invests the proceeds in movable property. Under the holding of the instant case, if *B* could trace the source of the funds to the immovable, *B* could prevent *A* from claiming any part of the assets even after several transactions in movable property. Such inequities are brought into sharper focus if the immovable is bought in direct violation of the express terms of the agreement.

In reaching a solution in the instant case, the court, by choosing the approach of *Prescott*, evidently limited the more equitable approach of *Emerson* to the facts there presented. Had the court in *Hayes* adhered to its original hearing, the problems that may now arise could have been avoided. As the law presently stands under *Hayes*, it is difficult to see a solution to these possible inequities without a corresponding contraction of the rule as set forth. While the instant decision may constitute a genuine attempt to protect the stability of title to mineral interests and thus render oil and gas transactions more certain, it is submitted that the court actually achieved but a Pyrrhic victory. Further, it is difficult to see how protection of title can be said to have been gained by a holding applicable to situations

52. *Cf.* Emerson v. Shirley, 188 La. 196, 175 So. 909 (1937); Cuggy v. Zeller, 132 La. 222, 61 So. 909 (1913).

53. See the dissenting opinion of Judge Frugé in the opinion of the court of appeal in Hayes v. Muller, 146 So. 2d 176, 186 (La. App. 3d Cir. 1962). See also Jackson v. Harris, 136 So. 166, 167 (La. App. 2d Cir. 1931).

wherein title is not involved, as in the instant case. It appears obvious, however, that henceforth fiduciary duties in oral joint adventures, common transactions in the mineral industry,[54] will be largely unenforceable.[55]

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54. In the instant case the court did not question the propriety of using an oral joint adventure to deal in mineral interests since this was alleged to be the custom of the industry. 245 La. at 363, 158 So. 2d at 193 (1963).

55. It appears the instant case has committed Louisiana to the minority view of common law jurisdictions. See note 15 *supra*. In at least two other recent decisions, parties who entered into a verbal joint adventure to deal in oil, gas, and mineral interests were denied recovery on the basis of the instant case. Little v. Haik, 246 La. 121, 163 So. 2d 558 (1964); Pique v. Ingolia, 162 So. 2d 146 (La. App. 4th Cir. 1964). In *Little*, however, the court allowed recovery for funds advanced and the value of services rendered on a *quantum meruit* basis.