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erative prescription is that time runs against a person only when he has a right of action and does not exercise it, and in the case of a wrongful seizure the rights of the parties are not finally determined until the rendition of judgment on this point. Secondly, the claim for damages includes the illegal detention (as well as the seizure) and the amount of damages cannot be fixed until the period of wrongful detention is ascertained.

MINERAL RIGHTS*

*Harriet S. Daggett***

The companion cases of *Reagan v. Murphy*[1] and *Jones v. Sun Oil Company*[2] presented for determination the question whether or not the liberative prescription of ten years could be properly applied to a mineral lease. This question was answered in the negative in the *Reagan* case, and that decision governed the *Jones* case. In the *Reagan* case, the plaintiff's vendor, in 1941, granted a mineral lease covering some 19,000 acres on several non-contiguous tracts for a primary term of ten years. In 1942, vendor sold to plaintiff a 40 acre tract, subject to the lease, and reserved the mineral rights. There was production on some of the tracts within the primary term and therefore the lease was in full effect beyond its primary term, at least as to those producing tracts. However, there had been no drilling operations on plaintiff's 40 acre tract, which was non-contiguous to the producing property, and the mineral servitude thereon prescribed. In 1954 plaintiff sued for cancellation of the lease insofar as it affected his tract on grounds of prescription. In reversing the lower court's decision that the mineral lease was prescribed as to the plaintiff's tract by ten years non-usage, the Supreme Court held that ten-year liberative prescription of mineral servitudes or real rights does not apply to a mineral lease. The court said a mineral lease creates only personal rights, and R.S. 9:1105,[3] even in its amended form, did not have the effect of changing these rights from personal to real rights. Since *Arent*

*Grateful acknowledgment is hereby registered to my student and friend Robert F. LeBlanc for his work in the preparation of these materials.
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1. 235 La. 529, 105 So.2d 210 (1958).
2. 235 La. 554, 105 So.2d 219 (1953).
3. LA. R.S. 9:1105 (1950): "Oil, gas, and other mineral leases, and contracts applying to and affecting these leases or the right to reduce oil, gas, or other

v. Hunter[4] and the passage of the above-mentioned statute this is the first case to consider whether ten-year liberative prescription applies to mineral leases. It was thought, after the 1950 amendment to the statute, that there could be no doubt that the purpose of the amendment was to classify a mineral lease as a real right or immovable *for all purposes.*[5] The court reasoned that since the statute only *classified* and *considered* mineral leases as real rights or immovable property, the legislature could not have intended that a mineral lease created real rights. In the Civil Code, however, these same terms are used. Article 471 provides that a servitude is *considered* as immovable from the object to which it applies.[6] Article 470 provides that incorporeal things, consisting only in a right, are placed in *classes* of movables or immovables according to the object to which they apply.[7] Article 2015 states that not only servitudes, but *leases* and all other rights which the owner imposes on his land before alienating the soil, form *real obligations.*[8] In view of the above and the history of the statute, it is difficult to find more appropriate language to brand a mineral lease as a real right, if indeed such had been the intent of the legislature. Aside from its rationale, the practical effect of the decision is that it possibly reveals a method of circumventing the public policy of the

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 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."

4. 171 La. 1059, 133 So. 157 (1931).

5. INSTITUTE ON MINERAL LAW 37, 62 (Louisiana State University 1953).

6. LA. CIVIL CODE art. 471 (1870): "The following are considered as immovable from the object to which they apply:

"The usufruct and use of immovable things.

"A servitude established on an immovable estate.

"An action for the recovery of an immovable estate or an entire succession."

7. *Id.* art. 470: "Incorporeal things, consisting only in a right, are not of themselves strictly susceptible of the quality of movables or immovables; nevertheless they are placed in one or the other of these classes, according to the object to which they apply and the rules hereinafter established."

8. *Id.* art. 2015: "Not only servitudes, but leases and all other rights, which the owner had imposed on his land before the alienation of the soil, form real obligations which accompany it in the hands of the persons who acquires it, although he have made no stipulation on the subject, or they be not mentioned in the act of transfer. The purchaser may, if the circumstances permit it, have relief against the seller for concealment of such charges; but the law establishes the rule that no one can transfer a greater right than he himself has, except where the neglect of some formality required by law has subjected the owner of the real incumbrance to a loss of his right, in favor of a creditor or bona fide purchaser."

state, which policy is that control of mineral rights should not be separated from ownership of the soil for more than ten years without proper use or development. It now appears possible to acquire a mineral lease for a period in excess of ten years and hold that property out of commerce by paying delay rentals for the term of the lease.

In *Johnson v. Smallenberger*,[9] the plaintiff-lessor had granted an "unless" type lease to the defendant-lessee. On the rental paying date the lessee, through an oversight, neglected to pay the rental, for which amount he had previously made out the necessary check and was holding it. Plaintiff demanded cancellation for non-payment of rentals and defendant immediately forwarded the check which plaintiff refused to accept. Suit followed for cancellation. The defendant argued first that the lease remained in force by offer of payment of rentals just as soon as the "mistake" was discovered because equity requires that the lessor should promptly inform the lessee of the mistake and give the latter an opportunity to correct it before forfeiture can be demanded. Secondly, defendant argued that plaintiff knew that a well was being drilled in a drilling unit and had waited to see if the well was successful before demanding cancellation, and therefore plaintiff was estopped. The court distinguished the *Jones v. Southern Natural Gas Co.*[10] and the *Risinger v. Arkansas-Louisiana Gas Company*[11] cases. The court said that the instant case involved an "unless" type lease and that under that type lease "the lessee is under no duty either to drill or to pay delay rentals; if he either drills or pays, the lease remains in effect, but if he does neither, it ipso facto terminates at the time of default." As to the estoppel argument, the court said that to give rise to estoppel by silence or inaction, there must not only be an opportunity to speak but also an obligation or duty to do so. Here, the lessor was neither under a duty to notify defendant of defendant's failure to pay the delay rental, nor to give him an opportunity to repair the lapse. The court affirmed cancellation of the lease and allowed increase in attorney fees for the plaintiff.

In *Middleton v. California Company*,[12] the partial cancellation of a 4600 contiguous acre lease was sought. Plaintiff's claim

9. 237 La. 11, 110 So.2d 119 (1959).
10. 213 La. 1051, 36 So.2d 34 (1948).
11. 198 La. 101, 3 So.2d 289 (1941).
12. 237 La. 1039, 112 So.2d 704 (1959).

for partial cancellation, as the court found, stemmed primarily from the circumstance that the production had been obtained from a small area, approximately 400 acres, when compared with the entire acreage under lease. The court stated that the law of the case was well settled and the issue to be resolved was purely one of fact, that is, whether the lessee had complied with its obligation of full development of the lease with reasonable diligence, it being established that development of every part of the leased property was an implied condition, and in this case, an express condition. In holding for the defendant-lessee, the court took into consideration the following: 17,000,000 barrels of oil had been produced from the leased premises since 1939 from thirty producing wells; the lessee had expended over seven million dollars in obtaining this production; that although no new wells had been drilled on the lease within the last three years, the lessee had conducted seismograph surveys, and had contributed dry-hole money to adjacent wells. The court found that the lessee had continuously developed the property. In fine, the court found that the lessee's cautionary measures of exploration appeared to be reasonably justified under the facts presented. Justice Hamiter dissented on the ground that the lessee had not satisfied the requisite of developing with reasonable diligence every part of the 4600 acre leased premises. This case is in line with prior cases as to its statement of the law, but is another illustration of the difficulty of proving lack of reasonable development as grounds for partial cancellation.

The case of *Sohio Petroleum Company v. Miller*[13] presented another demand for cancellation of a lease for lack of development, brought by way of reconventional demand by lessor after institution of suit by lessee under the Declaratory Judgments Act, seeking a determination of its rights under the lease. The lease, granted in 1945 and having a primary term of six years, covered three non-contiguous tracts of land.[14] In 1950, after completion of a gas well on one of the tracts, and completion of another well on a third party's land but in the vicinity of that tract, the major portion of that tract was included in commission units and had produced commercially since that time. In

13. 237 La. 1013, 112 So.2d 695 (1959).

14. Actually there were 7 separate tracts, but these were so situated that tracts 2 and 4 were contiguous, 3 and 5 were contiguous, and 6 and 7 were contiguous, thereby making 3 pairs of non-contiguous tracts. Tract 1 was not contiguous to any other tract, and was subsequently released by lessee. Therefore it is of no importance to the case, as the court found.

1951 and numerous times thereafter, lessor made demands on lessee for further development or releases of the portions of the lease not included within units. In November of 1953, lessee made a formal demand on lessor to either resume development within sixty days (as provided for in the lease) or be considered in default. The lessee instituted this suit, seeking a determination of its rights under the lease; and the lessor by way of reconventional demand asked for cancellation of the lease as to the non-producing property, and for $15,000 attorney's fees. The lower court declared the lease valid as to the one producing tract, and decreed that within ninety days from final judgment, lessee shall commence drilling on both of the other non-contiguous tracts, and in default of those operations, the lease as to those tracts shall be forfeited. The Supreme Court reversed in part the lower court decision and held that the lease as it affected the other two non-producing tracts be cancelled. The court stated that it was well settled that the main consideration of a mineral lease is the development with reasonable diligence of the leased premises for minerals, and the development of every part of the lease is an implied condition. The court quoted from an Oklahoma case[15] which said: "Therefore, whether the undeveloped portion be a single tract remote from the rest, or be a considerable portion of a very large tract, . . . or the east one-hundred acres of a tract of 160, it is an implied condition that the lessee will test every part. . . ." The court and the lessee dismissed the fact that the lessee had drilled a dry hole on one of the other two tracts, and both concluded this was not sufficient development under the facts, to satisfy lessee's obligation. Lessee did contend, however, that a contract which they had entered into with another oil company (during the above mentioned sixty-day period) constituted compliance with lessor's demand for development. The court found that this contract merely granted an option to that oil company to drill on the lands under consideration, and evidenced no binding obligation to drill. The court, in addition to ordering cancellation of the lease as to the two non-producing tracts, dismissed lessor's demand for attorney's fees because of lack of proof establishing that the amount demanded was the reasonable value of the legal services rendered.

15. Fox Petroleum Co. v. Booker, 123 Okla. 276, 253 Pac. 33 (1927), which statement was affirmed in Eota Realty Co. v. Carter Oil Co., 225 La. 790, 74 So.2d 30 (1954) and Wier v. Grubb, 228 La. 254, 82 So.2d 1 (1955).

The *Union Oil & Gas Corp. of Louisiana v. Broussard*[16] case is probably the most well-known case of this court term. The case was before the Supreme Court for three different hearings, and a different result was reached on each occasion. The case was presented as a concursus proceeding with the court having to pass on the conflicting claims as to the ownership of a 1/24th royalty interest.

In 1943 Niblett Farms, Inc., the then owner of the land and minerals, conveyed a 1/24th royalty interest to third parties. In 1948 Niblett Farms, Inc., sold the land to Mr. Broussard, but reserved one-half of the minerals plus a 3/32nds royalty interest. The sale provided that the 3/32nds royalty interest included as a part thereof the outstanding 1/24th royalty interest, and when that interest should terminate, the reversion thereof should be for the benefit of Niblett Farms, Inc. The sale also provided that of the reserved 3/32nds royalty interest, 2/32nds were to be chargeable to and payable out of the one-half minerals reserved by Niblett Farms, Inc., and the other 1/32nd was to be chargeable to and payable out of the one-half minerals conveyed to Mr. Broussard. It was the interpretation of the provisions[17]

16. 237 La. 660, 112 So.2d 96 (1958); noted in 20 LOUISIANA LAW REVIEW 169 (1959).

17. "(a) There is excepted from this conveyance oil, gas and other mineral royalties and royalty rights heretofore reserved and sold to others and hereby especially reserved to the vendor in the total of 3/32nds of all of the oil, gas and other minerals produced or to be produced and saved from the land; provided, however, that the foregoing 3/32nds royalty interest includes as a part thereof a royalty interest of 1/24th of the oil and gas on and under said land and to be produced therefrom, being the same 1/24th interest heretofore sold to Mrs. Sarah L. Martin, David C. Ritchie, Mrs. Gladys C. Burchenal, Charles A. McCoy and Mrs. Gertie Halloway, by deed dated January 19, 1943, and recorded * * the rights of Grantor under this additional reservation being subject to the prior sale so made, but including all reversionary rights of Grantor as the present owner of said land, it being the intention that if and when the 1/24th royalty rights so sold should terminate, the reversion thereof shall be for the benefit of Grantor herein whose rights to such additional amount of royalties shall immediately become effective.

"(b) Vendor herein reserves for itself and its successors and assigns a mineral right interest in the said land, together with all necessary rights of ingress and egress thereon, equal to one-half (1/2) of the oil, gas and other minerals therein and thereunder, but subject to the limitations and conditions hereinafter stipulated.

"(c) Two-thirds (2/3) of the amount of outstanding royalties hereinabove excepted from this conveyance, or a total of 2/32nds of all of the oil, gas and other minerals produced from said land shall be chargeable against and payable out of the mineral right interest herein reserved to any by vendor; the remaining 1/32nd royalty interest being chargeable to and deducted from the rights of the vendee in the land herein described.

"(d) No lease shall be granted unless 1 such lease provides for sufficient royalties payable out of the oil, gas and other minerals produced from the land to pay all royalties outstanding on the date of this deed and which are to be charged against the respective rights of the parties as set forth in paragraph (c) hereof, and so as to pay vendee herein, or his successors and assigns, a minimum royalty of 1/32nd of all the oil, gas and other minerals produced and saved from of this contract of sale which caused the Supreme Court to hear the case three times.

The Hawthorne Group, as the court called them, became successor to Niblett Farms, Inc., and there was a dispute between this group and Mr. Broussard, the landowner, as to the ownership of the 1/24th royalty interest which had prescribed in 1953. The Hawthorne Group contended that when the royalty interest prescribed it inured to their benefit by the terms of the contract of sale. Their contention was that since the 1/24th royalty interest was a charge on their one-half mineral servitude, it inured to their benefit upon its prescription. Mr. Broussard claimed the royalty interest as owner of the land. The district court held that the royalty interest prescribed, and since it was apportioned as having been taken one-third from Mr. Broussard's one-half minerals, and two-thirds from the Hawthorne Group's one-half minerals, it inured to their benefit in those proportions. On appeal, the Supreme Court on original hearing reversed, holding that Mr. Broussard, as owner of the land was entitled to the full 1/24th interest. On first rehearing, the court reversed, deciding that upon prescription of the 1/24th royalty interest, the Hawthorne Group was entitled to the full 1/24th royalty interest, since their 3/32nds royalty interest was no longer burdened therewith. On second rehearing, the court again reversed, holding that since the 1/24th royalty interest had been a charge on the entire mineral interest, it should be divided in proportion to the mineral ownership of the parties, and therefore one-half went to each party.

In its decision the court stated, and rightly so, that a landowner should not benefit by the prescription of a royalty interest merely because he is the landowner. It was stated that a royalty interest is but an appendage to a mineral right, and upon prescription of the royalty interest, it ceases to exist and the mineral right is relieved of its charge. Therefore, it inures to the benefit of the owner of the minerals and not the landowner, unless he is also a mineral owner. It may well be that from this decision, a general rule will result whereby upon prescription of a royalty interest, that interest will inure to the benefit of the owner of the portion of the minerals from which the interest originated.

Adhering to its settled policy against reversionary interests, the court refused to give any force and effect to that provision of the instrument stipulating that when the 1/24th royalty should terminate, its reversion was for the benefit of the grantor.[18] On the basis of *Hicks v. Clark*,[19] it was held that if the reservation of a reversionary interest in the superior right, the mineral right, was contrary to public policy, it followed that such a reservation of the inferior right, the royalty interest, was likewise contrary to public policy. However, the court, after so holding, said that if there *had* been production during the life of the 1/24th royalty interest, that interest would have been taken from the Hawthorne Group's 3/32nds royalty interest. This implies that although the Hawthorne Group could have been held to pay the 1/24th interest had it become due, they could not benefit by its prescription. Apparently the court allowed the clause in the contract of sale to stand as far as the vendor's assumption of liability for payment of the debt, but not as to its beneficial provision of reaping gain on the prescription of that debt. Being a charge on *all* of the minerals, as the court stated, it seems strange that the 1/24th royalty interest could have been charged against the owner of one-half of the minerals had it not prescribed, and yet that mineral owner could benefit by only one-half of the 1/24th royalty interest when that interest did prescribe.

Another issue presented for decision, not given in the brief facts above, was the effect of an instrument executed by one of the Hawthornes just prior to the prescription of the 1/24th royalty interest. In that instrument one of the Hawthornes, who owned 9/32nds of the minerals, declared that he "reactivated" a certain fraction of the 1/24th interest. The court, unfortunately in the writer's opinion, gave effect to this instrument as an acknowledgment with intent to interrupt as to that certain fraction. However, if "reactivation" meant a new contract or a renegotiation, the decision is in line with cases on servitudes.

The following cases were also decided during the year but contained little germane to the prime subject of this resume of cases: *Daigle v. Pan American Production Co.*[20] and *Blasingame v. Anderson.*[21]

the property. Should any lease to be negotiated in the future provide for total royalties in excess of the usual 1/8th, then the amount of royalties in excess thereof shall then be divided between and belong to vendor and vendee, or their respective successors or assigns, in equal proportions." *Id.* at 664, 112 So.2d at 97.

18. See paragraph (a) in note 17 *supra*.
19. 225 La. 133, 72 So.2d 322 (1954).
20. 236 La. 578, 108 So.2d 516 (1958).
21. 236 La. 505, 108 So.2d 105 (1959).