

Louisiana Law Review

Volume 24 | Number 2

The Work of the Louisiana Appellate Courts for the

1962-1963 Term: A Symposium

February 1964

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Repository Citation

Karl W. Cavanaugh, *Mineral Rights - Alienation of State-Owned Mineral Rights*, 24 La. L. Rev. (1964)

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MINERAL RIGHTS — ALIENATION OF STATE-OWNED MINERAL RIGHTS

Plaintiff instituted a jactitory action against defendant Levee Board which defendant converted into a petitory action. In 1911, pursuant to the present La. R.S. 38:700, the land was conveyed to the defendant Levee Board which never entered into corporeal possession of it. Plaintiff claims title from a 1912 sheriff's sale and has been in continuous corporeal possession of the property. Plaintiff's pleas of ten and thirty years prescription were sustained below and affirmed on appeal. *Held*, by acquisitive prescription plaintiff had acquired full ownership of both surface and mineral rights to the property. *King v. Board of Commissioners for the Atchafalaya Basin Levee District*, 148 So. 2d 138 (La. App. 3d Cir. 1962) *cert. den.*

The Louisiana Constitution provides that "prescription shall not run against the State in any civil matter,"¹ and since 1921 it has prohibited alienation of mineral rights by the state.² Judicial interpretation has narrowed the scope of these prohibitions. The prohibition against alienation of mineral rights first came before the Supreme Court in *State ex rel. Board of Commissioners of Tensas Basin Levee District v. Grace*,³ in which the state was held not obliged to reserve the mineral rights in lands transferred to a levee district pursuant to statutes enacted prior to 1921.⁴ The decision contains additional language plainly indicating that a levee district could not sell the land so granted without reserving the minerals.⁵ Dicta in *Board of Commissioners*

1. LA. CONST. art. XIX, § 16 (1921); La. Const. art. 193 (1913); La. Const. art. 193 (1898): "Prescription shall not run against the State in any civil matter, unless otherwise provided in this Constitution or expressly by law."

2. LA. CONST. art. IV, § 2: "In all cases the mineral rights on any and all property sold by the State shall be reserved, except where the owner or other person having the right to redeem may buy or redeem property sold or adjudicated to the State for taxes."

3. 161 La. 1039, 109 So. 830 (1926).

4. *Ibid.*

5. *Id.* at 1044, 109 So. at 832: "The state, should it transfer the land to the district, including the mineral rights, in accordance with the grant made by it, would not be parting with the property within the meaning of the constitutional section cited, but would only be placing it under the control of one of its agencies for the purpose of constructing and maintaining levees. The land would, to all practical intents and purposes, still be the property of the state. The district could not sell it without reserving to itself the mineral rights, for the reason that its creator, for whom it holds, could not do so." The majority in the instant case termed this language "obiter dictum." 148 So.2d at 142. See also *Richardson & Bass v. Board of Levee Commissioners of the Orleans Levee District*, 231 La. 299, 91 So. 2d 353 (1956).

of *Caddo Levee District v. Pure Oil Co.*⁶ indicated that a levee district could not lose mineral rights in such lands by prescription.⁷ This indication was not based on a theory that prescription could not run against the levee district — indeed the case held that prescription does run against a state agency even though it cannot run against the state — but on the theory that the levee district could not lose by prescription that which it could not alienate.⁸

The 1921 prohibition against state alienation of mineral rights is not retroactive;⁹ thus it has been held that land and mineral rights may be acquired from a state agency by prescription which accrued prior to 1921.¹⁰ Some cases further held that acquisition of a particular tract prior to 1921 included mineral rights, even though additional steps after 1921 were necessary to perfect title.¹¹ The most convincing decisions apply the doctrine of after-acquired title.¹² No previous case was found in which mineral rights were held to be acquired by prescription

6. 167 La. 801, 120 So. 373 (1929).

7. *Id.* at 810, 120 So. at 376: "If the question presented involved the loss by prescription of the mineral rights themselves, on land conveyed or certified to a levee district, under the Constitution of 1921, we should most likely hold, in view of the conclusion reached in *State ex rel. Board of Commissioners of Tensas Levee District v. Grace* . . . that, as the levee district must retain such mineral rights, it could not lose by prescription that which it must retain, and cannot alienate."

8. *Ibid.*

9. See *Haas v. Board of Commissioners of Red River, Atchafalaya and Bayou Boeuf Levee District*, 206 La. 378, 19 So.2d 173 (1944); *Board of Commissioners of Tensas Levee District v. Earle*, 169 La. 565, 125 So. 619 (1929).

10. *Ibid.* The rationale of decisions allowing prescription to run against a state agency is considered in text accompanying note 23 *infra*.

11. See *Lum Chow v. Board of Commissioners for Lafourche Basin Levee District*, 203 La. 268, 13 So.2d 857 (1943); *Schwing Lumber & Shingle Co. v. Board of Commissioners of Atchafalaya Levee District*, 200 La. 1049, 9 So.2d 409 (1942); *State ex rel. Hyam's Heirs v. Grace*, 197 La. 428, 1 So.2d 683 (1941); *Standard Oil Co. of La. v. Allison*, 196 La. 838, 200 So. 273 (1941); *Barnett v. State Mineral Board*, 193 La. 1055, 192 So. 701 (1939); *Rycade Oil Corp. v. Board of Commissioners for the Atchafalaya Basin Levee District*, 129 So.2d 302 (La. App. 3d Cir. 1961), *cert. denied*. The constitutional prohibition contains one exception: if land is adjudicated to the state for nonpayment of taxes and the tax debtor, his administrator, executor, assign or successor obtains the property through a sheriff's sale per LA. R.S. 47:2189 (1950), the tax debtor acquires mineral rights. See *Sims v. State Mineral Board*, 219 La. 342, 53 So.2d 124 (1951). But if land adjudicated to the state for nonpayment of taxes is subsequently sold, the state reserving the mineral rights, the tax debtor has no right to redeem the mineral rights. See *Lyons v. State Mineral Board*, 22 So.2d 774 (La. App. 1st Cir. 1945). The decision invites discussion, but it is beyond the scope of this Note.

12. See *Lum Chow v. Board of Commissioners for Lafourche Basin Levee District*, 203 La. 268, 13 So.2d 857 (1943); *Rycade Oil Corp. v. Board of Commissioners for the Atchafalaya Basin Levee District*, 129 So.2d 302 (La. App. 3d Cir. 1961), *cert. denied*.

commenced prior to 1921 but completed thereafter.¹³ In 1959 *Stokes v. Harrison*¹⁴ decided that a parish school board was not "the state" and therefore could alienate mineral rights.¹⁵ *Stokes* was the first case which allowed a state agency to alienate mineral rights after 1921. It reached this result by employing a technique of interpretation well illustrated in cases holding that prescription runs against state agencies as distinguished from "the state."¹⁶ This technique had not been previously employed in cases of alienation of state mineral rights.¹⁷ The decision

13. The instant case may so hold. See text accompanying note 31 *infra*.

14. 238 La. 343, 115 So.2d 373 (1959).

15. *Ibid.* The court announced that the language of the *Grace* case, quoted in note 5 *supra* and the dicta in the *Pure Oil* case, quoted in note 7 *supra* were "not necessary for the decision." *Id.* at 361, 115 So.2d at 380.

16. That prescription does not run against the state is an adaptation of the common law maxim that time never runs against the King. In two early cases, Louisiana courts held that under LA. CIVIL CODE art. 3521 (1870) prescription ran against the state, no exception being made in its favor. *Graham v. Tignor*, 23 La. Ann. 570 (1871); *State v. White's Heirs*, 23 La. Ann. 733 (1871). The court soon retreated from this position, particularly in cases of delinquent taxpayers attempting to assert liberative prescription. See *Reed v. His Creditors*, 39 La. Ann. 115, 1 So. 784 (1887); *Succession of Zacharie*, 30 La. Ann. 1260 (1878); *Lesassier & Binder v. Board of Liquidation*, 30 La. Ann. 611 (1878). Since 1898 the Louisiana Constitution has provided that prescription does not run against the state in any civil matter. LA. CONST. art. XIX, § 16 (1921); LA. CONST. art. 193 (1913); LA. CONST. art. 193 (1898). The courts have applied the provision in a variety of cases. See *Scorsone v. State of Louisiana* through the Department of Highways, 230 La. 254, 88 So.2d 211 (1956); *Quaker Realty Co. v. Maier-Watt Realty Co.*, 134 La. 1030, 64 So. 897 (1914); *State v. F. B. Williams Cypress Co.*, 131 La. 62, 58 So. 1033 (1912); *State v. New Orleans Debenture Redemption Co.*, 112 La. 1, 36 So. 205 (1904); *State v. Spence & Goldstein*, 6 So. 2d 102 (La. App. 2d Cir. 1942); *Lindner v. Roth*, 11 Orl. App. 301 (La. App. Orl. Cir. 1914); *In re Zahn*, 8 Orl. App. 69 (La. App. Orl. Cir. 1910). But on several occasions prescription has been allowed to run against a state agency. See *Haas v. Board of Commissioners of Red River, Atchafalaya and Bayou Boeuf Levee District*, 206 La. 378, 19 So.2d 173 (1944); *Board of Commissioners of Tensas Levee District v. Earle*, 169 La. 565, 125 So. 619 (1929); *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (1929); *Board of Commissioners of Port of New Orleans v. Toyo Kisen Kaisha*, 163 La. 865, 113 So. 127 (1927). The following language was used in the foundation case: "And in view of R.C.C. art. 3521, which declares that prescription runs against all persons unless they are included in some exception established by law, we are not prepared to hold that the exception thus established in favor of *the state* applies to any or all other public corporations or agencies; for this constitutional provision is only the reduction to statutory form of a principle of public law already long established by universal jurisprudence, which principle has very generally been confined to actions brought by and in the name of the state itself." *Board of Commissioners of Port of New Orleans v. Toyo Kisen Kaisha*, 163 La. 865, 866, 113 So. 127, 128 (1927). It appears that the metaphysical distinction between "the state" and a state agency as a "separate and distinct entity" is the basis for allowing prescription to run against a state agency: "Plaintiff has, and always has had, the right to sue and be sued in its corporate name. It is a separate entity from the state, created by the state, it is true, to accomplish certain public purposes, but is nevertheless distinct from it." *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 167 La. 801, 812, 120 So. 373, 377 (1929). In essence *Stokes v. Harrison* adopts the same metaphysics and applies it to the prohibition of state alienation of mineral rights.

17. *Stokes* does not rely on the cases on prescription against the state. In-

left unclear to whom the constitutional prohibition applied.¹⁸

The court in the *King* case gave two reasons for sustaining the pleas of prescription: first, relying on *Stokes*, that the Constitution does not prohibit a *state agency* from alienating mineral rights; second, that prescription commenced prior to 1921 was unaffected by the constitutional prohibition adopted that year.¹⁹ In holding the constitutional prohibition inapplicable to a state agency, the majority follows *Stokes* in employing a metaphysical distinction between "the state" and a state agency,²⁰ a distinction which as a matter of logic is at least debatable.²¹ More than logic is involved, however; policy considerations may make the distinction between "the state" and a state agency desirable in some cases but not in others.²² It is

stead, it examines cases inquiring into the nature, character, and powers of a school board. *Ellis v. Acadia Parish School Board*, 211 La. 29, 29 So.2d 461 (1946), whether school board has power to lease sixteenth section lands; *State v. Coulon*, 197 La. 1058, 3 So.2d 241 (1941), whether holding offices of school board member and of clerk of court violates statute making dual office holding a criminal offense (no); *State ex rel. Wimberly v. Barham*, 173 La. 488, 137 So. 862 (1931), whether school board member is an officer of the state within the meaning of LA. CONST. art. XIX, § 4, prohibiting dual office holding (yes); *Henderson v. City of Shreveport*, 160 La. 360, 107 So. 139 (1926), whether school board has authority to sell lands not needed for school sites but acquired for that purpose; *Chase v. Pointe Coupee Parish School Board*, 89 So.2d 466 (La. App. 1st Cir. 1956), whether school board is a public board within the meaning of the Workmen's Compensation Statute (yes); *State ex rel. Debellevue v. Ledoux*, 3 So.2d 188 (La. App. 1st Cir. 1941), whether school board member is a state officer within the meaning of LA. CONST. art. IV, § 7, providing for appeal to the Supreme Court in case of removal of state officer from office (no); *Andrews v. Claiborne Parish School Board*, 189 So. 355 (La. App. 2d Cir. 1939), *cert. denied*, whether school board has power to discharge a teacher. The court observes that nowhere has a school board been called "the state" and proceeds to consider the characteristics of "the state." Essentially the same judicial method has been employed in cases of prescription running against the state.

18. The court quotes three different definitions of "state" and without choosing between them apparently concludes that the constitutional prohibition applies only to the "sovereign." See *Stokes v. Harrison*, 238 La. 343, 115 So.2d 373 (1959). See also Note, 21 LA. L. REV. 271 (1960).

19. *King v. Board of Commissioners for the Atchafalaya Basin Levee District*, 148 So.2d 138 (La. App. 3d Cir. 1962), *cert. denied*. Judge Tate concurred on the second ground only. *Id.* at 145.

20. Both *Stokes* and *King* find that the lawmaker intended to make the distinction.

21. The primary signification of "state agency" is "a body acting for the state." No single state agency possesses all the powers of the state; nor does the legislature or any other governmental body. Who or what, then, is "the state"? Three different definitions of "the state" are quoted in *Stokes v. Harrison*, 238 La. 343, 115 So.2d 373 (1959). The court did not attempt to choose between the diverse definitions.

22. Reasons of policy, different in each case, may make the following all excellent decisions in spite of seemingly contrary holdings as to the qualities of a school board member: *State ex rel. Wimberly v. Barham*, 173 La. 488, 137 So. 862 (1931) that a school board member is a state officer within the meaning of LA. CONST. art. XIX, § 4, which prohibits dual office holding; *State v. Coulon*,

suggested that considerations supporting the use of the distinction in reference to prescription running against the state differ from those applicable to state alienation of mineral rights.

State immunity from prescription is a vestige of royal prerogative which is being pared down in what appears to be a nationwide trend to limit the immunity, especially if it is urged by a state agency, to cases in which a governmental, not a proprietary, right is being asserted.²³ Apparently the impetus behind this movement is a belief that a state or its agency acting as a proprietor should be subject to the same law as other proprietors. Louisiana courts have not been able to use the distinction between governmental and proprietary rights because of the constitutional provision that prescription shall not run against the state,²⁴ but they have achieved essentially the same result by distinguishing between "the state" and a state agency. On the other hand, the prohibition of alienation of mineral rights by the state seems based on very different considerations: first, without the prohibition there is danger that "valuable State assets would be plundered for the benefit of a privileged few with inside knowledge or connections, rather than used for the benefit of all the people";²⁵ second, the prohibition prevents immediate divestiture of title, thereby preserving benefits of these valuable assets for future generations.²⁶ From the different policy considerations applicable to each of these issues, it seems that the immunity from prescription is

197 La. 1058, 3 So. 2d 241 (1941) that a school board member does not violate a criminal statute prohibiting dual office holding when he becomes clerk of court; and *State ex rel. Debellevue v. Ledoux*, 3 So. 2d 188 (La. App. 1st Cir. 1941), that a school board member is not a state officer within the meaning of LA. CONST. art. IV, § 7, providing for appeal to the Supreme Court if a state officer is removed from office.

23. See 34 AM. JUR. *Limitation of Actions* § 395 (1941); 53 C.J.S. *Limitation of Actions* § 15 (1948). Illustrative cases are *Hammon v. Dixon*, 232 Ark. 537, 338 S.W.2d 941 (1960); *People v. Chambers*, 37 Cal.2d 552, 233 P.2d 557 (1951); *Winaker v. Annunzio*, 409 Ill. 236, 99 N.E.2d 191 (1951); *State Insurance Fund v. Taron*, 333 P.2d 508 (Okla. 1958); *Richmond Redevelopment Corp. & Housing Authority v. Laburnum Construction Corp.*, 195 Va. 827, 80 S.E.2d 574 (1954).

24. LA. CONST. art. XIX, § 16. The distinction was employed in cases on the cognate sovereign immunity from suit until it was abandoned, three Justices dissenting, in *Cobb v. Louisiana Board of Institutions*, 229 La. 1, 85 So. 2d 10 (1955). See *Texas Co. v. State Mineral Board*, 216 La. 742, 44 So. 2d 841 (1949); *Begnaud v. Grubb & Hawkins*, 209 La. 826, 25 So. 2d 606 (1946); *State ex rel. Shell Oil Co. v. Register of State Land Office*, 193 La. 883, 192 So. 519 (1939).

25. Concurring opinion of Judge Tate in *King v. Board of Commissioners for the Atchafalaya Basin Levee District*, 148 So. 2d 138, 145 (La. App. 3d Cir. 1962), *cert. denied*.

26. See Note, 21 LA. L. REV. 271 (1960).

a privilege which should be strictly construed, while the prohibition against state alienation of mineral rights seems to merit more liberal construction. As "the state" must act through agents, it seems that since "the state" is forbidden to alienate minerals, so its agencies must also be forbidden to do so.

Since *Stokes* differs from the *King* case factually, it may be more congruent with the policy reflected by the prohibition against state alienation of mineral rights than the instant case. In *Stokes* the mineral rights conveyed had been acquired by the school board from a private person,²⁷ while in the instant case the mineral rights had been granted to the levee district by the state.²⁸ To hold that mineral rights acquired in the ordinary stream of commerce by a parish school board, police jury, or other local agency, *from private persons* do not thereby become inalienable may be justified as a means of keeping property in commerce, although the holding is still somewhat in derogation of the constitutional prohibition. But to hold, as *King* appears to do, that mineral rights inalienable in the hands of the state²⁹ become alienable upon transfer to a state agency appears to open the door to the very evils which the constitutional prohibition sought to prevent.³⁰ It is difficult to believe

27. See *Stokes v. Harrison*, 238 La. 343, 115 So.2d 373 (1959).

28. *King v. Board of Commissioners for the Atchafalaya Basin Levee District*, 148 So.2d 138 (La. App. 3d Cir. 1962), *cert. denied*.

29. Since the state acquired the property in question by a tax adjudication, it held only a defeasible title which could have been defeated by the tax debtor's exercise of his right of redemption. LA. CONST. art. X, § 11; LA. R.S. 47:2221 (1950). This right could have been exercised "as long as the title thereto is in the state or in any of its political subdivisions." LA. R.S. 47:2222 (1950). Apparently, however, the right of redemption was defeated upon transfer of the land to the levee district. See *State ex rel. Hodge v. Grace*, 191 La. 15, 184 So. 527 (1938); *Emery v. Orleans Levee Board*, 15 So.2d 783 (La. App. Or. Cir. 1943). See generally *Smith, Tax Titles*, THIRD ANNUAL INSTITUTE ON MINERAL LAW 85 (1955). Nevertheless the mineral rights may fairly be considered inalienable when the state acquires land by tax adjudication. The constitutional prohibition makes a specific exception in favor of the tax debtor. But if prior to the exercise of the right of redemption, the state conveys the land to another, mineral rights must be reserved pursuant to the constitutional prohibition. In this situation it has been held that the tax debtor cannot redeem the mineral rights from the state. See *Lyons v. State Mineral Board*, 22 So.2d 774 (La. App. 1st Cir. 1945).

30. If the state grants land to a state agency, may the agency *sell* the land without reserving the mineral rights although the state is forbidden to do so? The question has not been decided by the court, but *King* strongly suggests that the agency may do so. If so, Judge Tate's remark that "supposedly inalienable State minerals would then be available for distribution or sale to insiders, cronies, or other private persons" seems ominously accurate. *King v. Board of Commissioners for the Atchafalaya Basin Levee District*, 148 So.2d 138, 145 (La. App. 3d Cir. 1962), *cert. denied*. Or is the *Grace* decision to be overruled entirely, thus requiring the state to reserve mineral rights if it transfers land to a state agency? If so, what effect would that have on the thousands of acres of land

that the draftsmen of the Constitution contemplated such a facile circumvention of the prohibition.

The second reason advanced by the court in *King* to sustain the pleas of prescription is that prescription which had begun to run prior to 1921 was not stopped by the adoption of the new Constitution.³¹ This reasoning considers *King* as fitting the general pattern of cases which recognized the acquisition of land with mineral rights from the state by a transaction prior to 1921 which required further steps after 1921 to perfect the claimant's title.³² However, all the prior cases in this group involved *contractual* dealings between the state and the claimant prior to 1921 which created vested rights in the claimant,³³ and it is these vested rights which the 1921 Constitution has been held not to destroy. In *King* there were no contractual dealings creating vested rights; prescription had begun to run, but no vested rights as to title are created until prescription accrues.³⁴ This distinguishing factor renders the result in *King* questionable.

In conclusion, perhaps the *King* decision can be supported on the ground that prescription had begun to run prior to 1921 and was not stopped by the adoption of the 1921 Constitution, although the case is distinguishable from prior cases in this area. *King* does not answer the ultimate question raised by *Stokes*: to whom does the constitutional prohibition against alienation of state mineral rights apply? But by suggesting that the prohibition does not apply to a state agency whose mineral rights were transferred to it by the state, *King* takes a step on a path fraught with danger for the people of Louisiana. The logical termination of this path is found in the conclusion that the prohibition applies only to mineral rights the title to which is in the State of Louisiana and that the prohibition may be avoided by the transfer of such mineral rights to a state agency—a transfer previously held not to be within the ambit of the

already transferred to state agencies without a specific reservation of mineral rights by the state?

31. *King v. Board of Commissioners for the Atchafalaya Basin Levee District*, 148 So. 2d 138 (La. App. 3d Cir. 1962), *cert. denied*. Judge Tate concurred on this ground only.

32. *Lum Chow v. Board of Commissioners for Lafourche Basin Levee Dist.*, 203 La. 268, 13 So. 2d 857 (1943).

33. See cases cited in note 11 *supra*. The recent decision of *Lewis v. State*, 156 So. 2d 431 (La. 1963) illustrates nicely the point that it is only vested rights created prior to 1921 which the Constitution of that year did not destroy.

34. See *Calvit v. Mulhollan*, 12 Rob. 258, 270 (La. 1845); *Roussel v. Railways Realty Co.*, 9 Orl. App. 288 (La. App. Orl. Cir. 1912).

constitutional prohibition.⁸⁵ Therefore, it is respectfully suggested that either the Supreme Court should reconsider the problem presented in the *King* case at the first opportunity or that the Louisiana Constitution should be amended to close the door to the possible plundering of state mineral rights for the benefit of a privileged few which may have been opened inadvertently by the *King* decision.

Karl W. Cavanaugh

TORTS — LIABILITY OF CHARITABLE BLOOD BANK FURNISHING WRONG BLOOD TYPE

Plaintiffs sued defendant blood bank, a charitable corporation independent of a hospital, for wrongful death resulting from furnishing the wrong blood type to a hospital patient in response to a request from her personal physician.¹ The bank's customary practice was to charge for blood unless replaced by donee. Plaintiffs sought recovery on both tort and sales warranty theories. The Texas Court of Civil Appeals affirmed the district court's instructed verdict for defendant. *Held*, charitable corporations are immune from tort liability when the fees charged are devoted to charitable purposes; and since the supplying of blood is the rendition of a service rather than a sale, plaintiffs cannot recover for breach of warranty. *Goelz v. J. K. & Susie L. Wadley Research Institute & Blood Bank*, 350 S.W.2d 573 (Tex. Civ. App. 1961; error ref'd n.r.e.).

Litigation in the field of blood transfusions is a fairly recent visitor to our courts. In the landmark decision of *Perlmutter v. Beth David Hospital*² which involved a hospital's non-negligent supplying of impure blood³ to its patient, the door was found closed to recovery under implied warranty. Stressing that the supplying of blood was entirely subordinate to the over-all function of the hospital to furnish trained personnel and specialized

35. State *ex rel.* Board of Commissioners of Tensas Basin Levee District v. Grace, 161 La. 1039, 109 So. 830 (1926).

1. An employee of the blood bank whose duty it was to type and cross-match the patient's blood failed to use the correct sample of blood when he ran tests and recorded the results on the patient's card.

2. 308 N.Y. 100, 123 N.E.2d 792 (1954) (a 4/3 decision), *rehearing denied*, 308 N.Y. 812, 125 N.E.2d 869 (1954); noted 40 CORN. L.Q. 803 (1955), 69 HARV. L. REV. 391 (1955), 31 IND. L.J. 367 (1956), 103 U. PA. L. REV. 833 (1955).

3. The impure blood involved was homologous serum hepatitis.