OPINION
51-42

May 18, 1951 (OPINION)

COUNTIES

RE: Right to Delay Rentals After Supreme Court Decision Held Countie

Could Not Retain an Interest

In your letter of May 4, 1951, you state that your first problem is this:

Section 38-0910, N.D.R.C., 1943, provides for rents and royalties after termination of the county's interest in land. You state that your county has held considerable land in the past which has been sold and consequently it has obtained a considerable amount of mineral interest, all of which was held void under the Supreme Court decision in the case of Northwestern Improvement Co. v. Morton County.

You ask how much of the delay rental on oil and gas leases, which have been paid to the county, should be turned over to the purchaser. You also ask whether or not the county is entitled to any portion of the delay rental for the year in which the county owned said land and has leased its interest, and lost it, under the Supreme Court decision.

The counties, by operation of law, reserved unto themselves fifty percent of the minerals underlying the surface of the land held as a result of tax proceedings.

The Supreme Court held that the counties could not legally retain such interest. Prior to the Supreme Court decision, certain counties had entered into lease contracts and had received rents as a result of those contracts.

> It is a universally recognized rule that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal, or that there was no liability to pay in the first instance, though the payer makes the payment expressly reserving his right to litigate his claim, or under the impression that the demand was legal. So it has been held that where one pays a part of a claim and in a suit to recovered the balance it is decided that there was not liability he cannot recover the part originally paid. The rule applies not only as between individuals but also to cases in which one of the parties is the government. * * *"
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> 21 R.C.L. 141, section 165.
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> See 26 R.C.L. 455, section 411, for taxes erroneously paid; and see also 14 A.L.R. 2d., 383.

> North Dakota authorities: Wessel v. Johnston Land and Mortgage Co. 3 N.D. 160, and Re: Peschel, 72 N.D. 14, 22.
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> Except where otherwise provided by statute it is a well-settled general rule that a person cannot, either by way of set-off or counterclaim, or by direct action, recover back money which he has voluntarily paid with a full knowledge of all the facts, and without any fraud, duress, or extortion, although no obligation to make such payment existed. In accordance with the general rule, if a person voluntarily pays what the law will not compel him to pay, but which in equity and good conscience he ought to pay, he cannot recover it back, although the parties differ as to its application; and on the other hand it has been held that action to recover money paid voluntarily will lie only where equity and good conscience require the return of the money."
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> 48 C.J. 734, section 280. (Rising V. Tollerud 34 N.D. page 88)
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> See also 58 C.J.S. ss. 910 and 911; 58 C.J. 1187; 33 Am. Jur. 396.

In Summers, on oil and gas, section 600, at page 483, it is stated that:

> The covenants of an oil and gas lessee to pay rent, royalty and delay rental are generally held to be covenants running with the land, the burden of the covenants running with the assignment of the lease, and the benefit thereof with the assignment of the reversion in the land." (See U.S. Empire Gas and Fuel Co. v. Higgins Oil and Fuel Co., 279 F. 977.)
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> The text goes on to state that:
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> * * * if there has been no previous conveyance of all or a portion of the rents and royalties by the lessor, and the reversionary interest in land is transferred by operation of law, devise, or deed, without some express reservation of rents and royalties, the transferee or assignee of the reversion is entitled to receive all such unaccrued rents and royalties. * * *"

It, therefore, necessarily follows that although rents and royalties have been paid at the date of the transfer that they belong to the transferor or assignor of the reversion.

The question then presents itself whether or not an oil and gas lease is an executory contract or an interest in real estate.

In Laugharn v. Bank of America National Trust and Savings Association, 88 Fed. 2d., 551, the court held that: that which is yet to be executed or performed; that which remains to be carried into operation or effect, incomplete, depending upon a future performance or event, is an executory contract.

Under California law, assignments executed by lessees under oil and gas leases as security for loans, transferring all of the assignor's

right, title, and interest in and to crude oil, gas, and other hydrocarbon substance produced from certain oil wells, are a conveyance of interest in real estate and were held not to be executory contracts.

In Texas Co., v. Daugherty, 176 S.W., 717, the court held that oil and gas within the ground are minerals and their conveyance while in place if the instrument be given any effect is consequently the conveyance of an interest in realty. See Callahan v. Martin 43 P.2d., 788; Standard Oil of California v. John P. Mills, 43 P.2d., 797.

In Pennsylvania the courts have held that a granting clause permitting a lessor to go upon property and explore for oil and gas creates a mining lease which type of granting clause will not support an action of ejectment in the lessee. An oil and gas lease then in that state is a nonpossessory interest.

The Michigan courts have held that an oil and gas lease executed for the purpose of exploring for oil and gas is but an option to drill.

In the states where mining leases are in general use the courts have held that mining lease is analogous with the term "license." The term "license" in its purely nonlegal sense means permission and refers to a physical act by giving consent by the licensor. This operative act of giving permission or lease creates in the licensee a legal privilege.

33 Am. Jur., 396, par. 88.

See also Snyder v. East Bay Lumber Co. 97 N.W. 49; 17 R.C.L. 564; Rodefer v. Pittsburgh, O.V. and C. Ry. 74 N.E. 183; 70 L.R.A. 884.

For cases supporting the view that ejectment is not the proper remedy under a clause giving the exclusive right and privilege to bore for oil and gas coupled with development, see Rynd v. Rynd Farm Oil Co., 63 Pa. 397.

The courts apparently are universally of the opinion that an oil and gas lease permitting the lessee to enter upon the freehold and exploring for oil, and to develop a well, is a contract which by its very nature grants a license and creates an interest in land subservient to the dominant estate. The aggregate of relations given really create either an easement or profit a pendre.

It then necessarily follows that up to and including the time that an oil well is actually brought in and is producing oil and gas, an interest in land, in the sense of a corporal hereditament, is not created. However, the fugitive nature of oil and gas having been identified and produced from the soil the oil and gas are personal property. Prior to the time that the oil and gas are reduced to personal property the minerals unquestionably are part of the real estate and the interest held is such an interest. They are such by the very fact that the oil field has been located and identified.

Here, then, the counties by operation of law held reversionary interest in the minerals of the lands which they came into possession

of. That interest did not terminate prior to the decision of our court. Up to and including the date of that decision the counties exercised complete control over and generally protected their reversionary interest. Having exercised all the rights and privileges of an owner it would then seem that all of those rents and benefits that have accrued up to and including the date of the decision would belong to the transferor or assignor or, as in this case, the county.

It is, therefore, our opinion that under section 38-0910, N.D.R.C., 1943, it is the duty of the county to give notice to the lessee to the effect that the county's interest in those lands terminates as of the date herein mentioned, and that thereafter the present owner of the land takes the interest formerly held by the county. Such notice to be given according to said section.

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