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Adverse Possession of Severable Minerals

WILLIAM B. STOEBUCK

The subject of adverse possession is attended by such mystery that one might think it traceable to the druidic rather than late medieval period of English history.¹ Existence of this mystery, needless as it may be, makes it worthwhile for any article on adverse possession to commence by establishing some basic concepts. Foremost among these is that, as understood today, adverse possession of another’s land for the period of the statute limiting his right to recover it not only bars his remedy but creates in the disseisor an original title in fee simple. Thus, adverse possession gives the wrongful possessor both a defense and a cause of action.

Implicit in what has been said is another concept. The doctrine of adverse possession breaks down into two elements: a statutory limitation on actions to recover land and the principle, usually supplied by judicial decision, that the statutes are run only by possession that is “adverse” to the true owner.² Most questions are concerned with whether certain acts on or with respect to another’s land are “adverse.” These questions are tested by reference to the defining formula for “adverse,” which usually runs “actual, open, notorious, exclusive, continuous, and hostile.” The incantation varies from state to state and from case to case within a given state, apparently with equal magical power. Some opinions add the element “claim of right” or “claim of title.” Occasionally, after they have said everything else, courts have added “adverse”; it hardly can be denied that this closes whatever gaps an already redundant definition may have left.

Considering now some characteristics of minerals, no attempt will be made to list all the methods by which ownership of minerals

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² The origins of modern adverse possession are to be found in the limitations on possessory actions for land. Before 1237 the plaintiff under a writ of right had to show he was seised no earlier than the day in 1135 when Henry I died. Later the time was set as Henry II’s coronation day in 1154, then Richard I’s coronation day in 1189. During this period limitations would bar the remedy but were not thought of as creating a right in the disseisor. 2 POLLOCK & MATTLAND, HISTORY OF ENGLISH LAW 81 (1895).
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may be severed from ownership of the surface nor to explore the legal problems attendant upon severance except as they may directly relate to adverse possession. Suffice it to say, the title to minerals may be severed, certainly by grant or exception in a deed, and also by a contract of sale or, at least in states where is it regarded as a corporeal estate, by a mineral lease. Once there has been a severance, surface and minerals become separate estates, as distinct as different parcels of land, as some cases put it. The term "minerals" includes not only solid substances like coal, stone, clay and ores, but also oil and gas.

Whether minerals are severed or not, the general principles of the law of adverse possession are applied, just as if minerals were not involved. In this article these general principles are not the focus of attention but will be stated and used as needed, though secondary authorities will be cited for them. The problems of primary interest here arise, not from the existence or quality of the principles, but from their application in light of the peculiar nature of minerals and mineral interests. In analyzing these problems, the principal distinction which must be made is whether minerals are severed or unsevered; this dichotomy is the framework for what follows.

BEGIN BEFORE SEVERANCE

No severance at any time. If no severance of minerals is involved, that is, if there is no sufficient proof minerals and surface

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4 E.g., Brooke v. Dellinger, 193 Ga. 66, 17 S.E.2d 178 (1941); Jilek v. Chicago, Wilmington & Franklin Coal Co., 382 Ill. 241, 47 N.E.2d 96 (1943); Lyles v. Dodge, 228 S.W. 316 (Tex. Civ. App. 1921); Ventro v. Clinchfield Coal Corp., 199 Va. 943, 103 S.E.2d 254 (1958); Ohio Oil Co. v. Wyoming Agency, 63 Wyo. 187, 179 P.2d 773 (1947). The foregoing cases specifically discuss the severance principle. It is recognized by implied holding or dictum in most of the cases cited in this article.

5 Arnett v. Sinclair Prairie Oil Co., 88 F. Supp. 343 (W.D. Ky. 1948); Murray v. Allard, 100 Tenn. 100, 43 S.W. 355 (1897).

6 E.g., McBeth v. Wetnight, 57 Ind. App. 47, 106 N.E. 407 (1914); Vorhes v. Dennison, 300 Ky. 427, 189 S.W.2d 269 (1945); Gordon v. Park, 219 Mo. 600, 117 S.W. 1163 (1909); Vance v. Guy, 223 N.C. 409, 27 S.E.2d 117 (1943); Yoss v. Markley, 34 Ohio Ops. 4, 68 N.E.2d 399 (1946); Hassell v. Texaco, Inc., 372 P.2d 233 (Okl. 1962); Smith v. Pittston Co., 203 Va. 408, 124 S.E.2d 1 (1962); McCoy v. Lowrie, 42 Wash. 2d 24, 253 P.2d 415 (1953); Thomas v. Young, 93 W. Va. 555, 117 S.E. 909 (1923). No case has been found that raises the slightest doubt that the general law of adverse possession applies.
have been severed, acts of adverse possession on the surface constitute adverse possession of all minerals.\(^7\) This is the ordinary case of adverse possession against an owner whose ownership is *a coelo usque ad centrum*. Within this context, two problems have arisen that, while worth mentioning, do not limit what has been said.

A pair of Pennsylvania cases\(^8\) involved tracts of land which had not been severed by any instrument. Adverse possessors occupied the surface for the required periods, but at the same time the record owners were mining minerals. In holding there was no adverse possession of minerals, the court's theory seems to be that the owners' mining operations worked a kind of severance, to the end that possession of the surface was not possession of the "severed" minerals. If there was a severance, certainly possession of only the surface is not possession of the minerals, in accordance with the rule to be discussed later. However, one might question that an owner's mining of his minerals severs the legal interest in them. The result could better have been reached on the ground that the alleged adverse possession was not such because not exclusive.

The second problem has to do with use of the surface of unsevered land for a limited purpose. In one case\(^9\) a railroad had maintained its tracks over the land, and in another\(^10\) a school district had occupied the surface for school purposes, in each case for the statutory period. Both courts held that, because of the limited kinds of uses, there was no adverse possession of minerals. Clearly, as to the railroad, it did not acquire even title to the sur-

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\(^8\) Brennan v. Pine Hill Collieries Co., 312 Pa. 52, 167 Atl. 776 (1933); Delaware & H. Canal Co. v. Hughes, 183 Pa. 66, 38 Atl. 598 (1897). See also 20 Va. L. Rev. 120 (1933), which is a note on the *Brennan* case.


face but only an easement of passage through prescriptive use.\textsuperscript{11} The school district case may be exceptionable for having over-ex- tended the doctrine of prescriptive easements, but, having done so, it does not contravene the rule that possession of the surface is possession of unsevered minerals. It seems sound enough to say that acts on the surface which do not give title to the surface do not give title to minerals.

\textit{Severance by owner during running of statute of limitations.} It occasionally happens that adverse possession of the surface commences before there has been a severance. Then, while the statute of limitations is running, the disseised owner severs the minerals. In this situation the courts generally hold that the continuing adverse possession of the surface operates against the now severed minerals.\textsuperscript{12} However, there is some authority from West Virginia to the contrary. \textit{Perkins v. Southern Coal Co.},\textsuperscript{13} a federal district court case, relying upon the West Virginia case of \textit{Central Trust Co. v. Harless},\textsuperscript{14} held that severance by the owner stopped adverse possession as to the minerals. This was the result on the facts in the \textit{Harless} case, though the court there did not discuss the question, nor has any later West Virginia case cited \textit{Harless} for this point.

In support of the majority position, it can be said that it is analogously consistent with a rule of general adverse possession law. If a future interest is created after adverse possession commences, the possession continues to be adverse to the holder of the future interest.\textsuperscript{15} This is an exception to the normal rule that, where the future interest was in existence when adverse possession started, there can be no adversity to the holder of this interest because he has no present right of possession and the statute limiting possessory actions could not run against him.\textsuperscript{16} One reason for

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\item \textsuperscript{11} See Restatement, Property § 477 (1940).
\item \textsuperscript{12} Hunsley v. Valter, 12 Ill.2d 608, 147 N.E.2d 356 (1958); Finnegan v. Stineman, 5 Pa. Super. 124 (1897); Broughton v. Humble Oil & Ref. Co., 105 S.W.2d 480 (Tex. Civ. App. 1937); McElroy, supra note 3, at 256 (citing Texas cases).
\item \textsuperscript{13} 96 F. Supp. 8 (S.D. W. Va. 1951), 54 W. Va. L. Rev. 76.
\item \textsuperscript{14} 108 W. Va. 618, 152 S.E. 209 (1930).
\item \textsuperscript{15} Restatement, Property § 228 (1940); 3 American Law of Property 903-04 (1952); 5 Thompson, Real Property 589 n.43 (1957 Repl. Vol.); 4 Tiffany, Real Property 453 (3d ed. 1939).
\item \textsuperscript{16} 3 American Law of Property 761-63 (1952); 5 Thompson, Real Property 589 (1957 Repl. Vol.); 4 Tiffany, Real Property 452-53 (3d ed. 1939).
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the exception has been said to be that the future interest holder, having acquired his interest from a dispossessed owner, takes it subject to whatever defects existed—in this case the running of the statute. The exception also has been stated to exist because it is "essentially fair." Although the grantee of the future interest could have discovered the adverse possession by inspecting the land, he likely would still argue it was not "essentially fair" for the statute to run against him when he could not stop it by bringing a possessory action.

An argument can be made for the Perkins and Harless cases. Bearing in mind the two elements of adverse possession—a statute of limitations plus "adverse" possession—it seems logical that the statute should not run against one who has no cause of action for possession. In point of fact, however, there are several instances in which adverse possession may go on without the owner's having a possessory cause of action, and vice versa. Whether this is good theory, i.e., whether "cause of action" and "adverse possession" should be equivalents, is a hotly debated and very basic question.

"Severance" by adverse possessor during running of statute of limitations. Several cases involve the situation in which the adverse possessor of the surface, having entered before a severance, executes a mineral severance instrument in favor of a grantee who does not exploit the minerals. The instrument is given before the grantor has perfected his adverse possession title, and the issue is whether his continuing adverse possession of the surface inures to the benefit of the mineral grantee. With the exception of Tennessee, which has decided to the contrary, those states that have considered the question have held it does inure to the benefit of the grantee. Thus, the mineral grantee's title is perfected when the surface possessor's title is. The cases have not supplied

18 Restatement, Property § 228 (1940).
19 Some of these are referred to in Restatement, Property, Scope Note to Ch. 15 (1940).
20 A glimpse of this debate can be had by comparing Restatement, Property § 222 and Scope Note to Ch. 15 (1940), with 3 American Law of Property 761-63, 765 (1952).
21 Northcut v. Church, 135 Tenn. 541, 188 S.W. 220 (1916), overruling McBurney v. Glenmary Coal & Coke Co., 121 Tenn. 275, 118 S.W. 694 (1909), which had held the surface adverse possession inured to the benefit of the disseisor's mineral grantee.
22 Pierson v. Case, 272 Ala. 527, 133 So. 2d 239 (1961); American Petrófina, Inc. v. Warren, 247 Miss. 592, 156 So. 2d 729 (1963) (alternate hold-
a satisfactory rationale for the majority position, but there is one. The attempted severance by the adverse possessor is really no severance, because he then owns no interest which can be severed. As there is no severance, his continuing adverse possession of the surface ripens into title in him as to both surface and minerals. When he thus acquires title, according to a doctrine recognized in the general law of adverse possession, the title relates back to the time of his entry. Because the original entry occurred before the execution of the severance instrument, the acquisition of title validates it, according to the relation-back doctrine. The after-acquired-title doctrine does not apply, because the adverse possessor's title is "prior-acquired."

There is a situation explainable by the theory of after-acquired title. In Tennessee Coal, Iron & Ry. Co. v. Brewer, a Fifth Circuit case involving Alabama law, the adverse possessor of the surface had given a mineral deed before he entered. The court held his subsequent adverse possession of the surface inured to the benefit of his grantee, so as to give the latter title to the minerals. The doctrine of relation back does not support this result, because it places title in the grantor at a time after the mineral deed was given; this of course is the fact pattern invoking the doctrine of after-acquired title.

BEGUN AFTER SEVERANCE

Basic principles. To begin with, it is established beyond cavil that, when commenced after the minerals have been severed, no possession of the surface alone can amount to adverse possession of the minerals. All the cases just cited are ones in which the

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possessor of the surface was the record owner of it, though the courts state broadly that “adverse” possession of the surface is not adverse possession of the severed minerals. On the facts, this is a play on words, because the surface owner, having a legal right to possess the surface, cannot be said to possess it “adversely” or “hostilely” to anyone. There simply is for him no adverse possession of any interest, surface or mineral. It is remarkable that the courts almost always talk about adverse possession. In Kentucky, due to the language of a statute, after severance the surface owner and possessor is said to be a “trustee” of the minerals for the mineral owner. The Kentucky court regards the “trust” theory as a restate-ment of the normal rule, and it does not seem to have produced unusual results, though it may evoke unusual language in some contexts.

Kan. 357, 116 Pac. 499 (1911); Ward v. Woods, 310 S.W.2d 63 (Ky. 1958); Arnold v. Stevens, 24 Pick. (Mass.) 106, 35 Am. Dec. 305 (1839); Logsdon v. Brailer Mining Co., 143 Ind. 463, 128 Atl. 113 (1923) (apparently dictum); Cook v. Farley, 195 Miss. 669, 15 So. 2d 352 (1943); Gordon v. Park, 219 Mo. 600, 117 S.W. 1163 (1909) (dictum); Johnson v. Unknown Heirs, 140 Mont. 128, 366 P.2d 577 (1965); Marvin v. Brewster Iron Mining Co., 55 N.Y. 538 (1874); Vance v. Pritchard, 213 N.C. 552, 197 S.E. 182 (1938) (dictum); Wisness v. Paniman, 120 N.W.2d 594 (N.D. 1963); Yoss v. Markley, 34 Ohio Ops. 4, 68 N.E.2d 399 (1946); Viersen v. Boettcher, 387 P.2d 133 (Okla. 1963); Murray v. Allard, 100 Tenn. 100, 43 S.W. 355 (1897); Smoot v. Woods, 363 S.W.2d 798 (Tex. Civ. App. 1962); Pagel v. Pumphrey, 204 S.W.2d 58 (Tex. Civ. App. 1947); Mountain Mission School, Inc. v. White, 204 Va. 256, 130 S.E.2d 452 (1963); Smith v. Pittston Co., 203 Va. 408, 124 S.E.2d 1 (1962); McCoy v. Lowrie, 42 Wash. 2d 24, 253 P.2d 415 (1953); Bennett v. Neff, 130 W. Va. 121, 42 S.E.2d 793 (1947); Wallace v. Elm Grove Coal Co., 55 W. Va. 449, 52 S.E. 485 (1905); Milliron Oil Co. v. Connaghan, 76 Wyo. 330, 302 P.2d 256 (1956). Dictum to the contrary is contained in Alabama Fuel & Iron Co. v. Broadhead, 210 Ala. 545, 88 So. 789 (1924), but the language was disapproved in Buckelew v. Yawkey, 247 Ala. 304, 24 So. 2d 133 (1945), and recent Alabama cases follow the normal rule. Baker v. Clark, 128 Ga. 181, 60 Pac. 677 (1900), may hold that certain acts on the surface constituted adverse possession of severed minerals, but there had been some mining; it is not clear what acts the court relied upon.

Arnold v. Stevens, 24 Pick. (Mass.) 106, 35 Am. Dec. 305 (1839), contains the clearest reasoning on this point of any of the cases cited. This may demonstrate that old cases are the best.

KY. REV. STAT. § 381.430 (1960), which provides that when a “claimant in possession of the surface” has severed minerals, possession of the surface by him or by those claiming through or under him is “for the benefit” of the owner of the minerals.

Ward v. Woods, 310 S.W.2d 63 (Ky. 1958); Diederich v. Ware, 288 S.W.2d 643 (Ky. 1956); Piney Oil & Gas Co. v. Scott, 258 Ky. 51, 79 S.W.2d 394 (1934); McPherson v. Thompson, 203 Ky. 35, 261 S.W. 853 (1924); J. B. Gathright Land Co. v. Begley, 200 Ky. 808, 255 S.W. 837 (1923) (dictum); Farnsworth v. Barret, 146 Ky. 556, 142 S.W. 1049 (1912). See also Yoss v. Markley, 34 Ohio Ops. 4, 68 N.E.2d 399 (1946), which asserts the “trust” theory.

E.g., Diederich v. Ware, supra note 28, where a surface owner who had adversely helped himself to oil was spoken of as having “repudiated” his “trusteeship.”
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It frequently happens that the surface owner, in possession of the surface, will hold instruments giving him colorable title to minerals as well as surface. The argument may then be made that, even if possession of the surface is normally not possession of severed minerals, it becomes such when accompanied by color of title to them. Apparently the genesis of this argument is in the doctrine of "constructive possession," a part of the general law of adverse possession. Under this doctrine, one who does acts of adverse possession on part of an unsevered tract of land, holding colorable title to the whole tract, has adverse possession of the whole.30 This theory cannot avail the possessor of the surface because, recalling that severance creates what are in legal contemplation separate parcels, he has not possession of any part of the mineral estate. At any rate, the courts uniformly reject the argument.31

It is possible, of course, to have adverse possession of the surface after severance by one not entitled to its possession. Here, too, the adverse possession does not constitute adverse possession of the minerals, though the case authority is sparse.32 Clearly this is correct, because the surface and mineral estates are legally separate parcels, and possession of the surface is not, without more, possession of the severed mineral estate.

It follows as a corollary of these rules that to commence adverse possession of minerals after they have been legally severed, the disseisor's acts must touch and concern the minerals themselves. If acts confined to the surface will not suffice for this purpose, neither will nonuser by the owner of the severed mineral estate.\textsuperscript{33} Whatever the nature of the severed minerals, be they solid or fugacious, the disseisor's acts with respect to them must meet the ordinary test for adverse possession—must be actual, open, notorious, exclusive, continuous and hostile. The elements of claim of right, color of title or payment of taxes also may be involved. As previously mentioned, the serious question is not if these aspects of adverse possession apply, but how they apply, having in mind the peculiar nature of minerals.

\textit{Actual possession.} Adverse possession requires some physical use of the land; in most cases there is permanent occupation, though in some circumstances this is not necessary. It is sometimes said the adverse possessor must use the land in the manner an owner would use similar land under the circumstances. The underlying purpose of this requirement is that the owner shall have notice of the adverse claim, which of course ties into the element of notoriousness.\textsuperscript{34} The courts have been reasonably consistent in applying the principle of "actual possession" to severed minerals.

In the first place, there is no possession of minerals by acts done in relation to them which do not physically touch them underground. Certainly the mere execution of mineral leases is not such a touching.\textsuperscript{35} Neither reputation of ownership\textsuperscript{36} nor payment of either general land\textsuperscript{37} or segregated mineral taxes\textsuperscript{38} will suffice.

\begin{thebibliography}{9}
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\item \textsuperscript{33} Brooke v. Dellinger, 193 Ga. 66, 17 S.E.2d 178 (1941); Arnold v. Stevens, 2d Pick. (Mass.) 106, 35 Am. Dec. 305 (1839); Marvin v. Brewster Iron Mining Co., 55 N.Y. 538 (1874); McKelvy v. Wilkinsburg Domestic Coal Co., 283 Pa. 227, 128 Atl. 830 (1925). The nonuser argument was mentioned and rejected in a number of the cases cited in note 25, supra. But in Louisiana, under the statutory doctrine of liberandi causa, it seems a severed mineral interest may be lost by nonuser. Palmer Corp. v. Moore, 171 La. 774, 132 So. 229 (1930) (dictum). See also McCaw v. Nelson, 168 Ga. 202, 147 S.E. 364 (1929), which holds that a license to mine is lost if not exercised within a reasonable time.
\item \textsuperscript{34} 3 AMERICAN LAW OF PROPERTY 765 (1952); 5 THOMPSON, REAL PROPERTY 516-22 (1957 Repl. Vol.); 4 TIFFANY, REAL PROPERTY 412-19 (3d ed. 1939).
\item \textsuperscript{35} Hale v. Horn, 265 Ky. 560, 97 S.W.2d 402 (1936); Smith v. Graf, 259 Ky. 456, 82 S.W.2d 461 (1935); Vierson v. Bettcher, 387 P.2d 133 (Okla. 1963); Lyles v. Dodge, 228 S.W. 318 (Tex. Civ. App. 1921).
\item \textsuperscript{36} McBeth v. Wetnight, 57 Ind. App. 47, 109 N.E. 407 (1914).
\item \textsuperscript{37} Buckner v. Wright, 218 Ark. 446, 236 S.W.2d 720 (1951); Foss v. Central Pac. Ry., 9 Cal. App. 2d 117, 49 P.2d 292 (1935).
\item \textsuperscript{38} Barr v. Wall, 265 S.W.2d 208 (Tex. Civ. App. 1953).
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The acts of "refining some asphalt" on the premises,\textsuperscript{39} filling in an old mineral cut,\textsuperscript{40} or using for domestic purposes natural gas escaping from an abandoned well\textsuperscript{41} have been held not to be possession. Beyond this, it is not every disturbance of the minerals that will satisfy the requirement. So, the noncommercial taking of small quantities of coal near the surface for domestic use on the land or even for use by neighbors in not "substantial" enough for the purpose.\textsuperscript{42} Not even prospecting for ores\textsuperscript{43} nor exploratory drilling for oil\textsuperscript{44} crosses the threshold of "actual" possession.

The threshold appears to be crossed when mining or drilling operations take on a commercial nature. Commercial quarries and gravel pits were held in one case to be possession of stone and gravel.\textsuperscript{45} Carrying on commercial mining operations, sometimes apparently not very large, has constituted sufficient use in several cases.\textsuperscript{46} Similarly, the drilling and operation of commercially productive oil wells is possessory of the oil.\textsuperscript{47}

\textsuperscript{39} Gilbert v. Lobley, 231 S.W.2d 969 (Tex. Civ. App. 1950).
\textsuperscript{40} Marvin v. Brewster Iron Mining Co., 55 N.Y. 538 (1874).
\textsuperscript{41} Hassell v. Texaco, Inc., 372 P.2d 233 (Okla. 1962).
\textsuperscript{42} Vance v. Clark, 252 Fed. 495 (4th Cir. 1918) (hand-digging coal for domestic use for self and neighbors); Vorhes v. Dennison, 300 Ky. 427, 189 S.W.2d 269 (1945); Prewitt v. Bull, 234 Ky. 18, 27 S.W.2d 399 (1930), 19 Ky. L.J. 74 (1930); Huss v. Jacobs, 210 Pa. 145, 59 Atl. 991 (1904) (neighbors hauling away surface coal for domestic use).
\textsuperscript{43} Davis v. Federal Land Bank, 219 N.C. 248, 13 S.E.2d 417 (1941) (five prospecting shafts twenty-five to 135 feet deep and fourteen smaller openings).
\textsuperscript{44} Harkins v. Keith, 287 Ky. 553, 102 S.W.2d 5 (1936); Lyles v. Dodge, 228 S.W. 315 (Tex. Civ. App. 1921).
\textsuperscript{45} Kinder v. La Salle County Carbon Coal Co., 310 Ill. 126, 141 N.E. 537 (1923) (alternate holding).
\textsuperscript{46} Pollard v. Simpson, 240 Ala. 401, 199 So. 560 (1940) (unspecified mining); Lundy v. Lakin, 96 Cal. App. 2d 221, 215 P.2d 61 (1950) (unspecified mining); House v. Palmer, 9 Ga. 497 (1851) (working a mine); Vance v. Guy, 223 N.C. 409, 27 S.E.2d 117 (1943) (three or four small mines); Hoilman v. Johnson, 164 N.C. 288, 80 S.E. 249 (1913) (mining mica at thirty-six openings); Medusa Portland Cement Co. v. Lamantina, 353 Pa. 53, 44 A.2d 244 (1945) ("substantial" drilling, testing and mining); Thomas v. Young, 93 W. Va. 555, 117 S.E. 909 (1923) (small commercial "country wagon mine"); C.F., Stephenson v. Wilson, 50 Wis. 95, 6 N.W. 240 (1880) (unspecified "mining operations" adverse possession of unsevered land). Compare Mitchell v. Mitchell, 303 P.2d 313 (5th Cir. 1952) ("working and developing" mining property was possession).
A wonderfully wild subject is the extent to which one who has performed possessory acts has "actual" possession of minerals. His position will be greatly enhanced if he has colorable title to the tract on which they are located; this aspect will be considered subsequently. Consider now the situation in which the disseisor has no color of title. He is met by the rule of general adverse possession law that there is adverse possession only of the area covered by his acts of actual possession, though a surface possessor will often be aided by some marked-off boundary, such as a fence or hedge, particularly if he has maintained it. How can a miner have possession of anything beyond the minerals he already has taken? The New York case of *White v. Miller* confronts this problem and answers that he cannot possess anything beyond the exposed face. In plain language, this means no adverse possession is possible, since the mineral when removed is no longer real property; thus, the act of removing it, the very act of dominion which constitutes actual possession, at the same time makes adverse possession impossible. The result in *White* is consistent with this analysis because the court allowed the owner damages for all minerals removed in the previous six years, apparently on the theory of trespass. The few other cases that have had the temerity to face this paradox seem to have reached the same conclusion.

There is some tentative authority for saying a miner might gain actual possession of a block of solid mineral by surrounding it with tunnels. Theoretical support for this authority may be found by drawing an analogy to a surface adverse possessor who has possession up to an enclosure fence. *Kinder v. La Salle County Carbon Coal Co.*, an Illinois case, suggests an extension of this principle in holding that a claimant who had quarried stone and gravel at numerous locations had adversely possessed these minerals over

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50 Claybrooke v. Barnes, 180 Ark. 678, 22 S.W.2d 390 (1929) (dictum that there must be possession of "definite area"); Piney Oil & Gas Co. v. Scott, 258 Ky. 51, 79 S.W.2d 394 (1934) (alternate ground); French v. Lansing, 73 Misc. 80, 132 N.Y. Supp. 523 (1911); Blacksburg Mining & Mfg. Co. v. Bell, 125 Va. 555, 100 S.E. 806 (1919) (alternate ground). Cf., Davis v. Federal Land Bank, 219 N.C. 248, 13 S.E.2d 417 (1941) (dictum that mining at various locations on tract is not claim to mineral under entire tract).

51 Piney Oil & Gas Co. v. Scott, 258 Ky. 51, 79 S.W.2d 394 (1934) (dictum); White v. Miller, 78 Misc. 428, 139 N.Y. Supp. 660 (1912) (dictum).

52 310 Ill. 126, 141 N.E. 537 (1923). But see Davis v. Federal Land Bank, supra note 50.
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the entire tract. The celebrated case of Diederich v. Ware\(^{53}\) contains language from which it can be argued that the claimant of oil and gas would be in a better position than the claimant of solid minerals. Though the possessor had colorable title to all the oil, the court leaves the impression that even without it his two wells might have given a sort of constructive possession under the entire tract of fifty-six acres because they drained a pool underlying the whole area. At least with fugacious minerals, it can be maintained at the theoretical level that a dominion of sorts is exercised over the pool which is drained, giving "possession" to the boundaries of the tract if the pool extends that far. Even with solid minerals the argument might be made that a miner has dominion over a quantity of minerals sufficient reasonably to support his current operations, but this leads to a serious question of how far this would go. In the present state of authorities, it is, for practical purposes, nigh impossible to have any adverse possession of severed minerals without color of title; perhaps some imaginative thinking needs to be done here.

The adverse possessor's hand is greatly strengthened when he has color of title to the minerals under the entire tract. In the general law of adverse possession colorable title, by the doctrine of "constructive possession," extends physical possession of part of a tract to the boundaries described in the colorable instrument.\(^{54}\) This same doctrine is applied to the adverse possession of severed minerals, both solid and fugacious. Therefore, if the claimant has conducted on some part of the tract acts of "actual" possession, as previously described, and if he has color of title to the entire tract, both surface and minerals or minerals alone, his adverse possession is of all minerals described in the colorable instrument to the boundaries it sets out.\(^{55}\) In practice, nearly all the cases in which the adverse mineral possessor has prevailed have been ones in which he has color of title.


Open and notorious. Another requirement for adverse possession is that it be “open” or “visible” and “notorious.” The purpose here is quite plainly that the disseisor shall leave a visible “trail” on the land, by means of which the owner could, by reasonable diligence, take notice of the disseisin. In seeking to apply these principles to severed minerals, it is obvious that the mineral owner, not being a mole, can have knowledge of exploitation of his minerals only by surface features which bespeak underground use. Few cases specifically discuss notoriousness, but it must require such objects as mine entries, oil derricks or pumps, pits or structures associated with removal of minerals.

Occasionally the question has arisen whether the mineral owner has notice of the adverse use when mining tunnels under his land are entered from adjoining land or when his oil pool is drained by an adjoining well. There should be no notice in these situations unless the mineral owner has actual knowledge of the possessor acts against his minerals. He should not be chargeable with taking notice of acts on any but the land under which his minerals lie.

Suppose there are acts sufficient to constitute adverse possession of one mineral, say, coal. Will this be notice of a claim to other minerals? One case holds yes, another, no. A realistic solution that has been suggested is that it should be notice to the person


Kinder v. La Salle County Carbon Coal Co., 310 Ill. 126, 141 N.E. 537 (1923). See also Costello v. Muheim, 9 Ariz. 422, 84 Pac. 906 (1906) (extending small mine shaft from six to ten feet in depth not “visible”). The cases cited in notes 46 and 47, supra, by implication hold that mine entries and oil derricks or pumps are features giving notice.

Brizzolara v. Powell, 214 Ark. 870, 218 S.W.2d 728 (1949) (oil well on adjoining land not notice); Stark v. Pennsylvania Coal Co., 241 Pa. 597, 88 Atl. 770 (1913) (driving mine tunnel from shaft and entry on adjoining land not notorious); Thomas v. Young, 93 W. Va. 555, 117 S.E. 909 (1923) (mine shafts running from entry on adjoining land held to give notice; dubious unless owner had actual notice).


Kentucky Block Cannel Coal Co. v. Sewell, 249 Fed. 840 (6th Cir. 1918).

owning the one mineral actually exploited, so as to give adverse possession of all minerals he owns. If, by virtue of multiple severances, part of the minerals were owned by other persons, there would be no adverse possession of them.

Exclusive. Unless the adverse claimant has exclusive possession of the land, there is no adverse possession. He cannot share possession with either the owner or with others, for the reason that legal possession is by definition exclusive. According to one case, Woodside v. Ciceroni, the same element of exclusiveness applies to adverse possession of minerals, so that during the period of limitations the adverse claimant must have solitary use of the minerals upon the tract in question. It could hardly be otherwise.

Continuous. Acts, otherwise sufficient to constitute adverse possession, must be carried on "continuously" for the period of limitations. In some contexts, as where land is devoted to crops, this may not mean fresh acts on the land every day, but it must mean at least that the owner has a possessory cause of action at all times. The issue is essentially one of fact. Because the mining of solid minerals is apt to be seasonal by nature, especially with small-scale operations, the requirement of continuousness raises close questions.

Mining operations must be spread over the entire period of limitations but do not necessarily have to be carried on every day or perhaps even every month. About the best that can be said is that mining meets the minimum requirements if carried on, "continuously at such seasons as the nature of the business and the customs of the country permit or require." Operations having less continuity are labeled "occasional" or "from time to time" and

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63 93 Fed. 1 (9th Cir. 1899) (adverse claimant's mineral prospecting not exclusive when owner and others also prospected).
65 Pollard v. Simpson, 240 Ala. 401, 199 So. 560, 562 (1940). Accord, Gordon v. Park, 219 Mo. 600, 117 S.W. 1163 (1909) (dictum similar to language quoted in text); Hoolman v. Johnson, 164 N.C. 268, 80 S.E. 249 (1913) (farmer who owned surface mined as he had time in customary fall and winter season); Medusa Portland Cement Co. v. Lamantina, 353 Pa. 53, 44 A.2d 244 (1945) (need not be "every day"); Thomas v. Young, 93 W. Va. 555, 117 S.E. 909 (1923) (mining twenty days per month for eight months per year).
do not suffice. Some acts held not to have been "continuous" are mining small quantities of coal during winter months, removing forty to forty-five carloads of loose stone over a ten to twelve-year period, and "some" surface mining for short periods every three or four months. The opinions evince a certain amount of yawing about in this area, and one suspects that acts to which a given court attaches the epithet "occasional," another court might regard as being continuous during customary mining seasons.

**Hostile.** "Hostility" of adverse possession means that the possessor must not be in by permission of the owner nor in recognition of his right. It is generally found from the character of possession, bolstered perhaps by the possessor's declarations. The application of this concept to severed minerals seems much the same as to unsevered estates. No hostility exists if the possessor is a lessee or licensee of the mineral owner. There may even be a presumption that certain minor interferences with minerals, such as digging small amounts of surface coal for domestic use, are permissive, particularly if persons customarily so conduct themselves. This of course rapidly shades into the rule that temporary trespasses are not dispossession of the owner.

Most of the "hostility" cases involve alleged adverse possession between parties who are co-tenants in the minerals. Since co-tenants each have the right to use and enjoy all parts of the land, there is nothing in the exclusive possession of one that implies ad-

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66 Uphoff v. Trustees of Tuft College, 351 Ill. 148, 184 N.E. 213 (1932); Ward v. Woods, 310 S.W.2d 63 (Ky. 1958) ("time to time"); Piney Oil & Gas Co. v. Scott, 258 Ky. 51, 79 S.W.2d 394 (1934); Vorhes v. Dennison, 300 Ky. 427, 189 S.W.2d 269 (1945); Davis v. Federal Land Bank, 219 N.C. 248, 13 S.E.2d 417 (1941); Central Trust Co. v. Harless, 108 W. Va. 618, 152 S.E. 209 (1930) ("time to time").


69 Claybrooke v. Barnes, 180 Ark. 678, 22 S.W.2d 390 (1929).


72 Desloge v. Pearce, 38 Mo. 588 (1866).

73 Piney Oil & Gas Co. v. Scott, 258 Ky. 51, 79 S.W.2d 394 (1934) (hand-digging coal from exposed veins for use of surface owner and neighbors); Vento v. Clinchfield Coal Corp., 199 Va. 943, 103 S.E.2d 254 (1958) (hand-mining coal for use of surface owner and neighbors).
versity or hostility to the others without something more being shown. The "something more," called an "ouster," must be something calculated to give the others notice that their fellow now claims the whole estate for himself. Obviously, his writing them a letter denying their interest would be such notice. More frequently an ouster occurs when one co-tenant purports to convey all the minerals to one who goes into possession under the conveyance. On the other side, one co-tenant's payment of the full real estate taxes on the minerals is not an ouster. Neither is one tenant's using and allowing others to take coal, nor is possession of the surface alone by one who owns the surface and who also is a co-tenant of severed minerals.

Color of title and claim of right. Colorable title is the status that appears to flow from a document that seems to give title but does not, owing to some defect. Normally the defect is extrinsic to the document, as the inability of a grantor to convey title. The instrument must describe the land correctly and generally must be fair on its face, though some courts have allowed defects on the face if they would not be apparent to a legally untrained person. With minerals the usual document is a deed purportedly granting or excepting severed minerals or seeming to convey the

75 Couch v. Armory Comm'n, 91 Misc. 445, 154 N.Y. Supp. 845 (1915); Medusa Portland Cement Co. v. Lamantina, 353 Pa. 53, 4 A.2d 244 (1945) (alternate ground); Smith v. Kingsley, 331 Pa. 10, 200 Atl. 11 (1938) (one hundred year lease; court says short-term lease probably not ouster). But cf. Powell v. Johnson, 170 S.W.2d 273 (Tex. Civ. App. 1943), which holds that attempted conveyance of a fractional share larger than the co-tenant owned was not an ouster, though the court said a purported conveyance of all minerals would be.
76 Hoagland v. Fish, 238 S.W.2d 133 (Ky. 1951).
77 Clark v. Beard, 69 W. Va. 313, 71 S.E. 188 (1911).

80 E.g., Sanford v. Alabama Power Co., 256 Ala. 280, 54 So. 2d 562 (1951) (though stating there was colorable title, court held there was no adverse possession).
parcels as unsevered land. A void land patent or void tax deed are other examples. The consequences that come from having colorable title to minerals have been discussed previously.

Adverse possession cases sometimes assert that the disseisor’s possession must be under a “claim of right” or “claim of title.” This generally is understood as a restatement of the element of “hostility”; i.e., that he possesses in his own right and not by the owner’s permission. However, occasional cases carry the notion further, leading to intricate questions of the effect of the possessor’s subjective intent to, or not to, possess against the owner. Whether subjective intent should be a factor is one of the persistent, basic, sophisticated running arguments in the study of adverse possession. Some of the mineral cases mention “claim of right,” but in no case cited in this article has anything seemed to turn on it.

Payment of taxes. Some adverse possession statutes, usually with relatively short limitations periods, require, among other elements, the payment of taxes on the land claimed. In applying such statutes to adverse claims to mineral interests, a group of cases has held the mineral claimant does not put himself within the statute by paying taxes segregated to the surface nor even by paying general taxes that, through the assessor’s oversight, have not been segregated. The reasoning seems to be that, after a mineral...

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83 Hellier Coal & Coke Co. v. Bowling, 272 S.W.2d 651 (Ky. 1954).
84 Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 N.E. 214 (1899).
85 See notes 30 and 31, supra, and their textual referents for discussion of the rule that, when actual possession is of the surface only, color of title to minerals is not possession of them. For a discussion of the doctrine of constructive possession, see notes 54 and 55, supra, and the accompanying text.
86 For a general discussion of “claim of right” and an indoctrination in the running argument, see 3 AMERICAN LAW OF PROPERTY 773-85 (1952) (“claim of right” should mean nothing more than “hostile”); 5 THOMPSON, REAL PROPERTY 548-51 (1957 Repl. Vol.) (“better rule” is that subjective intent is required); 4 TIFFANY, REAL PROPERTY 441-46 (3d ed. 1939) (fairly neutral but may lean toward view it means only “hostile”).
88 Utah Copper Co. v. Eckman, 47 Utah 165, 152 Pac. 178 (1915).
89 Jones v. Brown, 211 Ark. 164, 199 S.W.2d 973 (1947); Uphoff v. Trustees of Tufts College, 351 Ill. 146, 184 N.E. 213 (1932) (alternate ground); Yoss v. Markley, 34 Ohio Ops. 4, 65 N.E.2d 399 (1946) (alternate ground); McCoy v. Lowrie, 42 Wash. 2d 24, 253 P.2d 415 (1953) (alternate ground).
severance, unsegregated taxes are regarded as being assessed against the surface.

A few states have statutes giving title to vacant land to one who, having colorable title, has paid taxes for a specified number of years. No possession, adverse or otherwise, is required. Arkansas, whose statute pertains to "wild and uninclosed land," has determined that the statute has no application to severed mineral interests, which are not within the meaning of its language. This seems sensible because such statutes were devised to provide a means of acquiring title to areas, such as inaccessible mountain lands, which are not capable of being adversely possessed.

A Parting Thought

Adverse possessors seldom set out purposefully to gain title to another's land. Sometimes they are mistaken, as when a boundary has become lost. But in adverse possession of minerals the mistake is typically that of a surface owner who genuinely believes, on the basis of colorable title, that he has title to the minerals. For him, assertion of an adverse possession theory is simply an expedient for preserving that to which he supposed he had title and for which he gave something of value. Had he and the record owner of the minerals known of each other's interest from the beginning, no problem would have arisen.

So it is that in most cases the adverse possession problem has its inception in someone's losing track of the severed mineral interests. If conveyancers can prevent this happening, most of the adverse possession litigation can be averted. What, practically, can be done?

Suppose the mineral severance occurs by exception, or as it is popularly called, "reservation." The original owner of unsevered land conveys it and in the deed excepts the minerals. It should be clear to the grantee that he does not own the minerals, but what about the grantor or those who administer his estate? It would be clearer to them if the grantor had a mineral deed running back to him. To accomplish this, he might convey the unsevered land to

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90 Brizzolara v. Powell, 214 Ark. 870, 218 S.W.2d 728 (1949). Compare McCoy v. Lowrie, supra note 89, which assumed arguendo such a statute did apply to minerals, and then held on other grounds there was no adverse possession.
the grantee and, as part of the same transaction, take back a deed to the minerals. Perhaps better yet, he might give a deed excepting the minerals and take back a mineral quit claim deed. The deed back would pass nothing, of course—that was not the reason for it—but it would give the grantor an instrument to record and to place among his valuable papers, calling attention to the fact he owned severed minerals.

Consider now the situation in which the mineral severance is by a deed conveying only the minerals. Here, too, it would be wise for the grantor to take back a quit claim deed—this time for the surface alone. It probably should contain a recital that he has conveyed the minerals. This will give him an original, incoming instrument, reminding those who find it among his papers of the nature of his interest. Like the deeds recommended in the preceding paragraph, it should be recorded.

A number of adverse possession suits may be traced to the practice of using a “blanket” quit claim deed to convey a previously severed surface or mineral interest. That is to say, the owner of one of the interests gives a quit claim deed, not limited to his severed interest, but describing the property as though it were unsevered. No competent draftsman should ever do this. True, it conveys no more than the grantor has, but it commences a delusive and colorable chain of title to the other interest.

No amount of careful drafting will prevent all adverse possession problems. If the advice is trite, it is valuable enough to bear repeating that there is no substitute for title searches and at least periodic physical inspection of the land.