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N. E. R.

West Virginia University College of Law

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CASE COMMENTS

ADVERSE POSSESSION—ACQUISITION OF TITLE TO MINERALS SUBSEQUENT TO SEVERANCE.—*D*'s predecessors in title, claimants under a senior patent, conveyed the disputed property excepting and reserving the minerals. *P*'s predecessors in title entered into possession of the surface as claimants under a junior patent. *P* seeks a declaratory judgment to cancel the severance deed, contending that by adverse possession of the surface for the statutory period under a color of title in fee he acquired title to both the surface and the minerals. *Held*, that the severance deed was duly accepted and recorded, but that an adverse possessor of the surface under color of title in fee and without actual or constructive notice of the severance acquires title to both the surface and the minerals. Decree of cancellation granted. *Dyer v. United Fuel Gas Co.*, 90 F. Supp. 859 (S.D. W. Va. 1950).

The prevailing rule is that if the ownership of the minerals becomes separated from that of the surface, the subsequent possession of the surface is not regarded as extending to the minerals so as to affect title under the Statute of Limitations. *Kentucky Block*

Cannell Co. v. Sewell, 249 Fed. 840, 1 A.L.R. 556 (1918); *Wallace v. Elm Grove Coal Co.*, 55 W. Va. 449, 52 S.E. 485, 6 Ann. Cas. 140 (1905); 4 TIFFANY, REAL PROPERTY 467-471 (3d ed., Jones, 1939); 1 SUMMERS, OIL & GAS 357 (1938).

Since the principal case is an apparent deviation from the prevailing rule, it seems pertinent to examine its supporting authority in order to ascertain the appropriateness of its conclusion.

The court begins by propounding the rule that since *D*'s severance deed was not within the chain of title under which the adverse possessor claimed, the latter was not chargeable with notice of its provisions. This conclusion was reached by analogy to a prior decision in the same circuit. There, the owner had executed a quitclaim deed excepting the minerals, but his prospective grantee refused to accept it. The court found that since the evidence conclusively rebutted any presumption of an acceptance, there was no effective severance of the minerals, adding, however, that even if there had been an acceptance the deed was neither recorded nor in the adverse possessor's chain of title and by W. VA. CODE c. 40, art. 1, §15 (Michie, 1949) "... a purchaser shall not ... be affected by the record of a deed or contract made by a person under whom his title is not derived." *Gill v. Colton*, 12 F.2d 531 (4th Cir. 1926).

Having adopted the dictum requiring constructive notice, the court said that no case could be found "... in which it has been held that a severance deed of which the adverse holder has no notice or knowledge is effective to prevent the adverse holder's possession of the surface from extending to the minerals also. It makes no difference that the severance deed may have been made before possession began. It may be a perfectly valid deed between the grantor and the grantee and those claiming under them but as against one holding adversely under color of a hostile title if the severance deed is to prevent his actual possession of the surface from extending to the minerals, notice thereof must in some way be brought home to him." At 866. To sustain this position the court cites only *Clements v. Texas Co.*, 273 S.W. 993 (Tex. Civ. App. 1921). In that case, one in adverse possession conveyed the mineral rights before the statutory period had fully run, and the owner contended that since the statute would not run after severance of the minerals, the adversary's possession did not mature. The Texas court, in finding that such a severance did not toll the statute as against the owner, commented extensively on severability. The court recognized the rule extant in many jurisdictions that

there can be no adverse possession of minerals after severance by mere possession of the surface but interpreted the rule as applicable only between the severor and his privies and the severee and his privies.

The court in the principal case concluded by asserting that even in those cases where a severance deed was within the adverse possessor's chain of title notice was essential, citing *Miller v. Estabrook*, 273 Fed. 143 (4th Cir. 1920); *Huntington Development & Gas Co. v. Stewart*, 44 F.2d 119 (4th Cir. 1930); *Stowers v. Huntington Development & Gas Co.*, 72 F.2d 969 (4th Cir. 1934). However, a perusal of these cases shows that in each instance there had been a severance of minerals and a subsequent transfer of the surface; and, although the courts assert the need for actual or constructive notice to the adverse possessor by way of dicta, they found by vigorous search a recorded or quasi-recorded severance. See SUMMERS, *supra* at 357 n. 71.

From this resume of the court's opinion and authority there emerge two salient facts: (1) in each instance the authority cited has been mere dicta; (2) from an assertion that all cases known to the court to have deprived the adverse possessor of title to the severed minerals show actual or constructive notice to that possessor, the court concluded that notice was essential to such deprivation.

A notable feature of the principal case is the degree to which the court and its cited authority are engrossed in the protection of a purchaser without notice, affording to him in every instance the statutory protection against all deeds not in his chain of title. The court looks at W. VA. CODE c. 40, art. 1, §15 (Michie, 1949) and offers an avowed adverse possessor its full protection. It is submitted that such protection is not a proper application of the statute since the preceding section defines purchasers ". . . to extend to and embrace all . . . purchasers who but for the deed . . . would have had title to the property conveyed." W. VA. CODE c. 40, art 1, § 14 (Michie, 1949). It is submitted that but for the severance deed this purchaser still would not have gained title to the minerals by virtue of his junior patent but only by complying with the requisites for acquiring title by adverse possession. That is to say, the claimant stands not as a purchaser but as a possessor. And seeking the protection of W. VA. CODE c. 55, art. 2, §1 (Michie, 1949), he must meet its requirements.

The elements of adverse possession have often been defined by our court. In *Core v. Faupel*, 24 W. Va. 238 (1884), the court required a possession: (1) hostile or adverse, (2) actual, (3) visible, notorious and exclusive, (4) continuous, and (5) under a color or claim of title. All these must concur for the full statutory period. Their essence is notice to the owner by affirmative acts of the adverse claimant. Nothing is required of the owner. Indeed, it is the failure of the owner to act which permits the adverse holder to acquire title. The requisite possession “. . . depends on the acts of the junior claimant and not on things left undone by the senior claimant.” *Wilson v. Braden*, 56 W. Va. 372, 381, 49 S.E. 409, 413 (1904). When the federal district court attempts to bring a purchaser, with or without notice, within the statute it must overcome the fundamental principle that an owner must have a right of action against the intruder at all times during the statutory period. *Sperry v. Swiger*, 54 W. Va. 284, 46 S.E. 125 (1903); *Core v. Faupel*, *Wilson v. Braden*, both *supra*. *Quaere*, what act of a surface owner (other than the actual removal of the minerals) is inconsistent with that of the owner of minerals in place?

It is surprising that the court in the principal case did not give weight to the extensive commentaries in West Virginia cases to the effect that the adverse possessor cannot acquire title to minerals previously severed without physically appropriating them. *Wallace v. Elm Grove Coal Co.*, *supra*; *Plant v. Humphries*, 66 W. Va. 88, 66 S.E. 94, 26 L.R.A. (N.S.) 558 (1909); *Thomas v. Young*, 93 W. Va. 555, 117 S.E. 909 (1923); *Vance v. Clark*, 252 Fed. 495 (S.D. W. Va. 1918) (even limited mining did not suffice).

In the *Wallace* case, *supra* at 453, 52 S.E. at 486, the court said that by the great weight of authority the adverse possessor could acquire no title to underlying coal previously served by his actual and exclusive possession of the surface, citing 1 Cyc. 994, “. . . when by conveyance or reservation separation takes place of ownership of surface from minerals, the mineral owner must be disseized to lose his right and no disseisin by an act which does not actually take the minerals out of his possession will suffice.” And when *P* sought to secure the minerals by contending that after severance they were forfeited to the state, the court held that the forfeiture was immaterial since the claimant had no possession of the coal, the only thing thereafter that could ripen a mere color of title into a good legal title. *Cf. Kiser v. McLean*, 67 W. Va. 294, 298, 67 S.E. 725, 726 (1910).

The need of physical appropriation is even more forcefully illustrated by the *Plant* case, *supra*. There a guardian severed the infant's coal. Subsequent to his majority the former infant sought to cancel the deed for fraud. When challenged for laches, the infant sought to defend on the ground that he had at all times been in possession of the surface. The court held, however, that after severance, the possession of the surface was not possession of the underlying coal, and the surface owner must show that he had had actual physical possession of the coal apart from the surface.

It is submitted that these cases emphasize the attitude of the state court in requiring actual possession of the severed mineral interest as a requisite for the acquisition of a possessory statutory title, and that the introduction of actual or constructive notice to the adverse claimant is primarily a result of misapplication of the statutes as to bona fide purchasers and antithetical to the theory of adverse possession. It is interesting to note that the decision in the principal case is not in accord with the principle recently incorporated into our statutes that ". . . ownership or possession of the surface after severance shall not be adverse to the interests of the owner or owners of such minerals and appurtenant rights." W. VA. CODE c. 55, art. 2, § la (Michie, 1949).

N. E. R.

CHARITIES—CHARITABLE CORPORATIONS—LIABILITY FOR TORTS.—*A*, while attending *B* university, was injured when a trapeze supplied by her instructor collapsed. *A* brought action against *B* university for injuries sustained. The university averred that it was a charitable corporation and therefore not liable for torts of its agents and contended that this defense, where interposed, was absolute. *A* contended that there were non-trust funds from which to collect a judgment. The issue was whether a judgment in an action in tort could be obtained against a charitable corporation for the negligence of its servants where that corporation was protected by liability insurance. The trial court dismissed the action and this was affirmed by the appellate court. Judgment reversed on appeal. *Held*, that the question of protecting the trust funds did not affect the liability of the institution, but only the manner of collecting any judgment that might be obtained. *Moore v. Moyle*, 92 N.E.2d 81 (Ill. 1950) (5-2 decision).