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Mines and Minerals--Adverse Possession

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MINES AND MINERALS—ADVERSE POSSESSION.—In an action of ejectment the plaintiff had paper title to the coal and iron underlying the defendant's land. The defendant opened mines and operated them for the statutory period. The court found defendant had color of title to the coal. *Held*, the defendant's possession for the statutory period under color of title had ripened into absolute title. *Thomas v. Young*, 117 S. E. 909, (W. Va. 1923).

When the surface of the land is separated from the underlying minerals by deed or exception, two separate corporeal hereditaments are created. *Preston v. White*, 57 W. Va. 278, 50 S. E. 236; *Peterson v. Hall*, 57 W. Va. 535, 50 S. E. 603; *Caldwell v. Fulton*, 7 Casey (Pa.) 475; *Barnes v. Manson*, 1 Maule & Selwyn 77. Clearly, occupation of the surface estate has no effect upon the rights of the owner of the mineral estate. *Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94; *Wallace v. Elm Grove Coal Co.*, 58 W. Va. 499, 52 S. E. 377; *Yellow Poplar Lumber Co. v. Thompson's Heirs*, 108 Va. 612, 62 S. E. 358; *Morrison v. American Ass'n*. 110 Va. 91, 65 S. E. 469; *Gill v. Fletcher*, 74 Ohio St. 295, 78 N. E. 433. The owner of the surface can acquire title to the minerals only by acts which would give title to a stranger. *Armstrong v. Caldwell*, 53 Pa. St. 284. Possession without color of title is adverse only to the extent of the actual occupancy. *Golson v. Hook*, 4 Strobbart (S. C.) 23; *Farley v. Smith*, 39 Ala. 38. Possession must be by acts suitable to the character of the land, but it matters not what its purpose is—whether for residence, cultivation, or digging for ores. *Lyons v. Fairmont Real Estate Co.*, 71 W. Va. 770, 77 S. E. 525; *Wade v. McDougal*, 59 W. Va. 113, 52 S. E. 1026; *Bell v. Denson*, 56 Ala. 444. There must be a disseisure of the minerals which actually takes them out of the owner's possession. *Plant v. Humphries, supra*; *Wallace v. Elm Grove Coal Co., supra*; *Yellow Poplar Lumber Co. v. Thompson's Heirs, supra*. If there is color of title to the coal under a tract, operation of a single mine for the requisite time will give title to the whole tract. *White Flame Coal Co. v. Burgess*, 86 W. Va. 16, 102 S. E. 690; *Lyons v. Fairmont Real Estate Co., supra*. The purpose of the doctrine of color of title in this connection is to define the limits of the claim under it. *State v. King*, 77 W. Va. 37, 87 S. E. 170. In a Georgia case the defendant went into possession under color of title and worked a mine publicly, notoriously and uninterruptedly for the statutory period, claiming it as his own against all others. The court held that the defendant acquired an inde-

feasible title. *House v. Palmer*, 9 Ga. 497. The mining must be continuous for the statutory period. *Armstrong v. Caldwell*, *supra*. But working a mine during successive seasons with interrupting seasons during which the mine is left idle, according to the custom of the country, is as complete an adverse possession as could be gained by agricultural operations or other acts of possession. MORRISON, MINING RIGHTS, 15th ed., p. 479, citing with approval *Wilson v. Henry*, 35 Wis. 241; *Stephenson v. Wilson*, 37 Wis. 482; *Wilson v. Henry*, 40 Wis. 594; *Stephenson v. Wilson*, 50 Wis. 95, 6 N. W. 240. But claimant's possession to be continuous must be such as will permit the owner to sue him as a trespasser at any time during the period. *Gutherie v. Benry*, 82 W. Va. 443, 96 S. E. 514; *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409; *Core v. Faupel*, 24 W. Va. 246. The extreme case seems to be that of *Hailman v. Johnson*, 164 N. C. 268, 80 S. E. 249, where the facts were similar to *Thomas v. Young*, *supra*, except that plaintiff held title to the mineral interests. The court held that the defendant acquired title to all the minerals under the surface on the theory that mining for one mineral was notice of a claim to all the minerals. A more logical view was taken in *Kentucky Block Cannel Coal Co. v. Sewell*, 249 Fed. 840. Here the Circuit Court of Appeals held that the mining of coal by a grantee of the surface, although for such time as to give him title to the coal in place by adverse possession, did not give him title to oil and gas deposits, as against a prior grantee of the mineral rights in the land. The result of the cases appears to be that when the title of the surface and to the minerals are held separately, the surface owner or a stranger can obtain title to the mineral estate by adverse possession under color of title for the statutory period, getting title only to the mineral or minerals which he occupies and claims.

—A. M. C.