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Working Part of a Mineral Estate as Adverse Possession of the Whole

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THIS ARTICLE is concerned with the acquisition of title by adverse possession to a mineral underlying land where the adverse working of the mineral is begun after legal severance of the rights to the mineral from the surface rights in the land.[1] Our particular concern will be with the question of whether an adverse possessor on the separate mineral estate may, by continuous extraction of a mineral for the limitation period,[2] acquire title to a greater portion of a mineral than he has actually worked.

It is axiomatic that title to minerals, coal, oil, gas, etc., lying beneath the surface of land is capable of being severed from the title to the surface of the land itself.[3] Prior to such severance, minerals in place are deemed to be a part of the land, but after severance, the surface and the minerals are separate and distinct estates. Each may be conveyed by deed or pass by inheritance and each has all the other attributes and incidents peculiar to the ownership of land.[4]

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[1] Where title to all the minerals or more than one mineral has been severed, the adverse working of a particular mineral will ripen title to that mineral only, and not to the minerals in general. Kentucky Block Channel Coal Co. v. Sewell, 249 Fed. 840 (6th Cir. 1927). Cf. Hoilman v. Johnson, 164 N.C. 268, 80 S.E. 249 (1913); Rio Bravo Oil Co. v. Staley Oil Co., 138 Tex. 198, 158 S.W. 2d 293 (1942).

[2] The statutes of limitation applicable in actions for recovery of real property apply also to actions for the recovery of an interest in minerals. Pond Creek Coal Co. v. Hatfield, 239 Fed. 626 (6th Cir. 1917).

[3] 1 Am. Jur. 156 (1936).

[4] Ibid.

In the absence of a severance of the surface rights from the mineral rights in the land, title to the minerals may be acquired merely by adverse possession of the surface.[5]

After severance, however, title to a mineral cannot be acquired by adverse possession of the surface alone.[6] Title to a legally severed mineral can be acquired only by a penetration of the mineral estate and an adverse working of the mineral itself.[7]

Of course, the adverse working of a mineral may continue for the limitation period, at which time the major portion of the mineral may remain to be extracted. In such event, may the ripened title of the intruder extend beyond his operations, or has he acquired title merely to the mineral actually removed?

It has been suggested in a number of decisions that an intruder on a mineral estate cannot gain title to any portion of a mineral not extracted,[8] even though he has worked a well-defined mineral estate under color of title.[9] *Diederich* v. *Ware*,[10] a recent Kentucky case holding otherwise, may be of potentially great importance in the development of mineral law.

In the *Diederich* case,[11] Gray and Mellon had obtained a fee in the oil beneath an 800-acre area by a deed executed and recorded in 1859, and had subsequently conveyed the oil rights to the Gray-Mellon Oil Company, which eventually became defunct. Plaintiff, who had purchased the rights of an heir of Gray, claimed an undivided interest in fee in the oil. He sought a declaration of his rights to royalties from two producing wells on defendant's 56-acre tract, which was situated within the 800 acres. Perhaps due to a gap in title between one of the grantors of the oil rights and subsequent owners of his portion of the 800 acres, the deed of the defendant, and likewise those of his predecessors, contained no exception of the oil. In 1923 a predecessor

[5] J. B. Gathright Land Co. v. Begley, 200 Ky. 808, 255 S.W. 837 (1923). See also 35 A.L.R. 2d 127, 129 (1954).

[6] Porter v. Justice, 242 S.W. 2d 863 (Ky. 1951). See also 35 A.L.R. 2d 127, 154 (1954).

[7] Vorhes v. Dennison, 300 Ky. 427, 189 S.W. 2d 269 (1945). See also 35 A.L.R. 2d 127, 173 (1954).

[8] Sanford v. Alabama Power Co., 256 Ala. 280, 54 So. 2d 562 (1951); Piney Oil & Gas Co. v. Scott, 258 Ky. 51, 79 S.W. 2d 394 (1934); White v. Miller, 78 Misc. 428, 139 N.Y.S. 660 (1912); French v. Lansing, 73 Misc. 80, 132 N.Y.S. 523 (1911).

[9] Ibid.

[10] 288 S.W. 2d 643 (Ky. 1956).

[11] Ibid.

in interest of the defendant leased exploratory drilling rights to an oil company, which in 1924 sunk two wells on the tract subsequently acquired by the defendant. At the time of trial, these wells had been operated openly and continuously for 32 years, the royalties having been paid to defendant's predecessors in title and to defendant. It was held that the defendant had color of title to the oil beneath his tract, and that the operation of the two wells for longer than the required statutory period had perfected his title, by adverse possession, to the oil beneath the entire 56 acres.

The case lends support to the proposition that an intruder on a mineral estate may acquire title by adverse possession to unextracted portions of a mineral, at least a fugacious mineral.

I. *Are the Rules for Determining Extent of Adverse Possession of Surface Estates Applicable to Mineral Estates?*

Courts which have said that an adverse possessor on a mineral estate cannot gain title to a greater portion of a mineral than he has actually removed have generally reasoned that the rules of constructive possession are inapplicable for determining the extent of adverse possession of a mineral estate.[12] Succinctly stated, these rules, as applied to surface estates are as follows.

When a person having color of title to a particular tract of land enters into and adversely holds part of such tract under the authority ostensibly given by an instrument of title, his ensuing possession and eventually consummated right are not limited to the portion of the tract as to which there has been an entry or actual possession, but are commensurate with the limits of the tract to which the instrument purports to give him title.

In cases where the element of color of title is absent, the limits of adverse possession are fixed by the possessor's conduct in erecting fences and cultivating the surface.[13]

Two reasons have been stated in the opinions for rejecting the applicability of the rules in determining the extent of adverse possession of a mineral. It is said that below the surface there are no boundaries for defining the limits of the claim to the

[12] See the cases of Sanford v. Alabama Power Co., Piney Oil & Gas Co. v. Scott, and French v. Lansing, supra note 8.

[13] 2 C.J.S. 769 (1936).

minerals.[14] It is also said that an intruder on a mineral estate can have no immediately potential use and occupation of the whole of the mineral over which the law can by construction extend his actual possession.[15] These reasons were weighed by Kentucky's high court in the *Diederich* case.[16]

To attribute validity to the first reason, the court said, would ignore the fact that mineral estates are generally described by metes and bounds marked off on the surface.[17] As to the second reason, the court said:

> This 'immediacy of use' concept, applicable though it may be to solid minerals, is not particularly persuasive where a fugacious mineral is involved. Two geologists testified in the case at bar that the operation of two oil wells on this 56 acres since 1924 altered the entire subterranean structure underlying not only this particular tract but the entire 800 acres described in the old mineral deed as well, and caused movement of gases and other natural forces which ordinarily move oil to the mouth of a well. Thus, in a sense, the operators of the two oil wells exercised dominion over all of the oil under their tract when they withdrew it by means of their two wells. In the case of a solid mineral such as coal this is not necessarily true, for title to coal can be defeated only by acts which actually take the mineral. Piney Oil & Gas Co. v. Scott, above.[18]

A possible inference from this language is that the court was casting doubt on the necessity of satisfying this concept in general, rather than finding it was satisfied due to the nature of the mineral involved.

The court went on to say that it was consistent with good reason to apply the rules of constructive possession in determining the extent of adverse possession of mineral estates, especially in view of the tendency to treat mineral estates and surface estates alike for most other purposes.[19] Whether the court would have sustained the applicability of these rules had it been dealing with a solid mineral is a matter of conjecture, since it impliedly

[14] Supra note 12.
[15] Piney Oil & Gas Co. v. Scott, supra note 8.
[16] 288 S.W. 2d 643 (Ky. 1956).
[17] Id., at 646.
[18] Id. at 646, 647.
[19] Id. at 647.

approved its earlier opinion in *Piney Oil & Gas Company* v. *Scott.*[20]

In the *Piney Oil* case,[21] by a deed recorded December 24, 1859, the fee simple owner of an 800-acre tract conveyed the minerals under the entire tract to another party. The grantor continued to reside on the tract until his death in 1881, and his widow resided there until her death in 1900. On February 26, 1901, three descendants of the grantor executed partition deeds among themselves, all of which deeds contained clauses of general warranty with no exception of the minerals. This was true of all the divers deeds subsequently executed by them and their vendees. On August 31, 1931, Piney Oil & Gas Company, having purchased the mineral interests of the original grantee, filed a petition in equity against 52 vendees holding general warranty deeds to portions of the original 800-acre tract. Each of the defendants claimed adverse possession of the minerals under his particular segment of the original tract. Many of these defendants had not mined or disturbed the minerals under their properties. Their claim of adverse possession was held to be untenable. Some of the other defendants had engaged in desultory coal mining operations on their land, but the court concluded the mining was permissive and not adverse and that there was no showing of continuous and unbroken working of the coal.

In discussing the limits of possible adverse possession of the coal, the court, in our opinion, was certainly correct in pointing out that those defendants on whose segments there had been no mining could in no way benefit from the mining operations conducted on other segments.

But in relation to the tracts on which there had been mining, the court considered inapplicable to an estate in minerals the rule that actual possession of part of an estate in surface with claim of title to the whole is sufficient to constitute adverse possession of the whole. This is evidenced by the following language from the opinion:

> A disseisor upon the surface may actually build upon, occupy, and use but a portion of the territory embraced within his marked line or color, but he has an im-

[20] 258 Ky. 51, 79 S.W. 2d 394 (1934).
[21] Ibid.

> mediately potential use and occupancy of the remainder of his claim, and the law by construction extends his actual occupation over it, but when he gets below the surface and attempts to take possession of the minerals, he can have no immediately potential use and occupation of the whole of the minerals over which the law can by construction extend his actual possession; therefore, he can have no possession of the unmined portion. Their [those defendants who had mined their tracts] possession was never in advance of their operations, unless they surrounded a block; then they had possession of that block, but no more. They got no more than they loosened or around which they had established a confine. By their operations they may have pushed the mineral owner back, but they never pushed him off. To disseise the title holder, they must push him off and keep him off. See Flinn v. Blakeman, 254 Ky. 416, 71 S.W. 2d 961. They could have no actual possession until they had potential possession of the coal that had not been disturbed.[22] (Brackets ours).

Of course, this language is dictum. The court concluded there had been no showing of continuous working of the coal underlying any segment sufficient to ripen title by adverse possession. Thus the question of whether during their invasion of the mineral estate any of the intruders had an "immediately potential use and occupancy" of coal situated beyond their mining operations was not properly before the court.

Does not "potential immediacy of use", if it is a requisite to the application of constructive possession to adverse possession of minerals, also exist during intrusion on a solid mineral? A new shaft may be sunk rather quickly, or the alternative methods of open pit or strip mining may be practical.

II. *Surface Owner as Trustee of the Legally Severed Minerals Underlying His Land.*

Upon severance of the mineral rights from the surface rights in land subsequent surface holders are by statutory decree[23] in Kentucky trustees of the underlying minerals for the use and benefit of the mineral owner. Unlike non-surface owners intrud-

[22] Id. at 65, 79 S.W. 2d at 400.

[23] Ky. Rev. Stat. sec. 381.430. Curtis-Jordan Oil & Gas Co. v. Mullins, 269 Ky. 514, 106 S.W. 2d 979 (1936). See also 35 A.L.R. 2d 127, 165 (1954).

ing on minerals, the surface owner must repudiate this trust in order to become an adverse possessor, otherwise his working of the minerals will be deemed permissive.[24] In both the *Diederich*[25] and *Piney Oil*[26] cases a question considered was whether there had been sufficient repudiation of this trust by the surface holder to start the statute of limitation running.

The court in the *Piney Oil*[27] case said that in order for the intruding surface holders to have established adverse possession they would have had to openly disavow and repudiate the trust and give notice thereof to the mineral owner. It found no evidence that the surface holders had clearly and unmistakably brought home to the mineral owner by "formal" notice the knowledge that they were claiming the minerals adversely, and therefore found their mining to be permissive.

In the *Diederich*[28] case it appeared that the Gray-Mellon Oil Company, while the oil rights in question were vested in it, had been a party to a suit in which the Kentucky Court of Appeals held, that by virtue of the 1859 oil deed the company had acquired a fee in the oil. Testimony in the record of that case, decided in 1925, indicated that oil was then being taken from the 56-acre tract subsequently acquired by the defendant surface holder. The court considered this testimony actual formal notice to the mineral owners that there was an adverse working of the oil. It held that this notice, together with the open and notorious operation of the two wells since that time, was sufficient repudiation of the trust to cause limitation to run against the mineral owners.

One Kentucky case[29] contains language to the effect that a surface holder may start limitation running either by working the minerals under a claim of right *or* by openly repudiating the trust and giving the mineral owner notice thereof. It would seem, however, that mere repudiation of the trust without any working of the minerals should not be enough to initiate limitation. That a surface holder may establish adverse possession of a mineral

[24] Piney Oil & Gas Co. v. Scott, supra note 8.
[25] Diederich v. Ware, supra note 10.
[26] Piney Oil & Gas Co. v. Scott, supra note 8.
[27] Ibid.
[28] Diederich v. Ware, supra note 10.
[29] Crabtree v. Petroleum Exploration, Inc., et al., 282 Ky. 32, 137 S.W. 2d 713 (1940).

held in trust merely by openly working it for the requisite period, without formal notification to the mineral owner that the trust is repudiated, seems doubtful. The statutory trust undoubtedly is decreed because of the greater likelihood of intrusion by the surface holder than by a non-surface holder. To hold that a surface owner, like a non-surface owner, may start the statute of limitations running merely by openly working a mineral would probably defeat the purpose of the trust statute.

III. *May a Surface Owner Have Color of Title to Previously Severed Minerals Underlying his Land?*

The usual case of intrusion on a mineral estate involves a taking of a mineral by the surface owner or his lessee.[30] Not infrequently the surface owner may have worked the mineral under a claim of right, relying on his deed which does not except mineral rights, although such rights have been previously conveyed to another party.

A question which naturally arises in such circumstances is whether the surface owner may be deemed to have color of title to the mineral he has worked. This is apparently a difficult question of law to be decided on the facts of each case.[31]

The court considered this question in both the *Diederich*[32] and *Piney Oil*[33] cases. It will be recalled that in each case, although the deed severing the mineral rights had been properly recorded, the deeds of the surface owners contained no exception of minerals. In the *Diederich*[34] case the court concluded that the surface owner had color of title to the oil beneath his tract. It reached this conclusion because of the vagueness of description employed in the old deed severing the oil rights, the fact that there was a gap in title between the grantor of the oil rights and subsequent surface owners, and the many conveyances over the span of years which had ignored the mineral deed.[35] Only the

[30] Practically every case cited in conjunction with this article is this type of case.

[31] Black v. Tennessee Coal, Iron & R. Co., 93 Ala. 109, 9 So. 537, 538 (1891) Diederich v. Ware, supra note 10.

[32] Diederich v. Ware, supra note 10.

[33] Piney Oil & Gas Co. v. Scott, supra note 8.

[34] Diederich v. Ware, supra note 10.

[35] Id. at 647.

latter factor was present in the *Piney Oil*[36] case, wherein the court used language indicating it felt the surface owners did not have color of title to the coal beneath their land, or at least had no more than "bare" color of title. The court said:

> A would-be disseisor who enters under a bare color of title is no better off than one who enters without color and marks off a distinct line around what he intends to occupy. Each, if he acquires any rights, must do so because of his occupation, claim, and use of the premises for the statutory period.[37]

This language indicates a conclusion that the defendant surface owners did not have color of title. Upon such a conclusion, the court seemingly was correct in saying that if the defendants could establish adverse possession, their possession would not extend beyond the face of their mine works. Such a holding would be consistent with the rule governing intrusion without color of title on a surface estate where the extent of possession is determined by fences erected or use of the premises. However, perhaps due to its uncertainty as to whether or not the surface owners had color of title, the court reasoned that the rules determining adverse possession of surface estates were completely inapplicable to adverse possession of mineral estates. Probably this reasoning was unnecessary in view of the apparent holding that the defendants did not have color of title.

IV. *Origin of the Law that the Rules Determining the Bounds of Adverse Possession of Surface Estates are Inapplicable to Adverse Possession of Mineral Estates.*

The dictum rule in the *Piney Oil* case,[38] to the effect that working part of a mineral estate is not sufficient to give title by adverse possession to the mineral underlying the whole, was apparently adopted from *Linley on Mines*.[39] Linley supports his text to this effect by citing the case of *French* v. *Lansing*.[40]

In that case there was a severance between the ownership of

[36] Piney Oil & Gas Co. v. Scott, *supra* note 8.
[37] Id. at 65, 79 S.W. 2d at 400.
[38] Piney Oil & Gas Co. v. Scott, supra note 8.
[39] Linley on Mines, sec. 812 (3rd ed. 1914).
[40] French v. Lansing, supra note 8.

the soil and of the minerals. The owner of the surface removed gypsum from time to time from quarries on his 25 acres and from other portions of the original 200-acre tract to which the mineral rights had been reserved. It was held that the mere opening and working of a quarry by the surface owner did not *constitute adverse possession, as against the mineral owners, of the gypsum situated beyond the face of the quarry.* The surface owner's deed purported to give him the right to dig and carry away gypsum. But the court pointed out that this right was dependent upon ownership of the gypsum. Since the title to the gypsum was in another, the surface owner's grantor could not grant him the right to dig for it. The court did not discuss whether or not the surface owner had color of title to the gypsum.

After enumerating what it termed the New York rules of constructive possession applicable to surface estates, the court stated as follows:

> These rules apply to adverse possession of the surface, and form no guide, even by analogy, to such a case as the present. They all contemplate some sort of notice to the true owner and possession and dominion of one kind or another over the whole premises claimed adversely. Where there is such known farm or lot with defined boundaries, the partial improvement may fairly be said to give warning of a claim to the whole, and to constitute possession of the whole.
>
> The same thing cannot be said to result from the opening of a quarry for gypsum or limestone or the driving of a gallery into a vein of coal. In either case, what claim is made or what possession is there of the minerals beyond the face of the quarry or the end of the vein? If a mine, is there possession and claim of the entire vein no matter how far the same may extend? In the case at bar, if there is adverse possession, it covers at least the 200 acres deeded to Otis; for it is to be observed that the act of Otis (surface owner) and his grantees in subsequently dividing the surface is not notice of any kind to Wickham (mineral owner) and his heirs. . . .[41]

The court could have reached the same result in this case by determining the surface owner did not have color of title to the minerals under his tract and then by applying the ordinary rules

[41] 132 N.Y.S. at 526.

of constructive possession it had enumerated. If it had determined the surface owner did have color of title to the minerals, his adverse possession could not have by construction been extended beyond the boundaries of his 25-acre surface, since under his deed he could not possibly have had color of title to the minerals beyond his deeded boundaries. The court's fear that under the ordinary rules of constructive possession, the possession in this instance might be deemed to extend over the entire mineral deposit, or in case of a mine, to the end of the vein, was surely unfounded.

In *White* v. *Miller*,[42] a later New York case concerning a 12-acre parcel of the same 200 acres involved in *French* v. *Lansing*,[43] fuller evidence was given by the surface owner of adverse user of the gypsum. The surface of the 12 acres, due to quarrying, was said to be entirely useless for agricultural purposes. But the court followed the law of the earlier case and held the defendant had not acquired title to the gypsum he had not removed. The defendant was further ordered to pay damages to the mineral owner for the gypsum quarried in the six years prior to the commencement of the action.

There are several English cases which may support in some measure the view taken in *White* v. *Miller*[44] and *French* v. *Lansing*,[45] and our own *Piney Oil* case[46] as to the nonapplicability of the rules of constructive possession to mineral estates. These cases were relied upon as authority for the view taken in those cases.

The English Cases

In *M'Donnell* v. *M'Kinty*,[47] there was a severance of mines, minerals, and quarries from the surface of land and a lime quarry was worked by the surface owner who sold some of the lime. It was held that the user and possession of a part of the quarries by the surface owner would not justify a legal presumption of the possession of the whole so as to constitute adverse possession of the whole. *But there the court held the surface owner's deed*

[42] White v. Miller, supra note 8.
[43] French v. Lansing, supra note 8.
[44] White v. Miller, supra note 8.
[45] French v. Lansing, supra note 8.
[46] Piney Oil & Gas Co. v. Scott, supra note 8.
[47] 10 Ir. L. 514 (1847).

specifically excepted the quarries. Thus the surface owner did not have color of title so the court was probably correct in limiting his possession.[48]

In *Glyn* v. *Howell,*[49] there had been a severance of the minerals from the surface. It appeared that the plaintiff was entitled to an undivided one-sixth part of the mines under a mountain of 92 acres, and that more than twelve years before the commencement of the action, the defendant, who was the owner of another undivided one-sixth, extracted all the coal from certain seams lying under the mountain in a 2-acre patch, having previously obtained licenses for that purpose from the owner of the remaining four-sixths, but having obtained no license from the plaintiff in regard to his one-sixth. It was held that the defendant acquired title by adverse possession only to the plaintiff's sixth in the coal extracted from the 2-acre tract, and he acquired no constructive possession of the plaintiff's sixth in the remainder of the mineral under the mountain, the court stating that where title is founded on an adverse possession, the title will be limited to the area of which actual possession has been enjoyed, *and that as a general rule constructive possession of a wider area will only be inferred from actual possession of the limited area if the inference of such wider possession is necessary in order to give effect to contractural obligations, or to preserve the good faith and honesty of a bargain.* The court said such an inference should not be applied to the defendant's possession in this case because he was a mere stranger in possession as to the one-sixth part he did not own.

Thus the court in effect held him to be without color of title to the one-sixth part he did not own and classified him as a mere wrongdoer. In this leading English case the court seemed to be applying the ordinary rules of constructive possession applicable to surface estates.

[48] M'Donnell v. M'Kinty, supra note 47, is very similar to the American case of Kinder v. LaSalle County Carbon Coal Co., 310 Ill. 126, 141 N.E. 537 (1923), wherein a different result was reached. This difference in result may be justified on the theory that in the Irish case the surface owner's deed specifically excepted the quarries, while in the Illinois case the deed severing the minerals had been interpreted by the parties to convey only those minerals which could be mined, and not to include limestone which outcropped on the surface. Thus in the Illinois case the surface owner could be considered as having color of title to the limestone, although the case did not emphasize this point.

[49] I Ch. 666, 3 B.R.C. 405 (Eng. 1909).

One English case, *Low Moor Co.* v. *Stanley Coal*,[50] probably falls under the rule mentioned in *Glyn* v. *Howell*[51] to the effect that title based on adverse possession may not be limited to the area of actual possession where the inference of possession of a wider area is necessary to give effect to contractural obligations, or to preserve the good faith and honesty of a bargain. In that case it was held that one who enters into actual possession of a part of a mine, and commences working it under an instrument by which the owner intended to make him the absolute owner of the whole mine, but which created in him only a tenancy at will, has constructive possession of the whole, which, if continued for the requisite limitation period, will give him an absolute title to the whole mine, under the statute of limitations.

The English cases of *Ashton* v. *Stock*[52] and *Thompson* v. *Hickman*[53] are sometimes cited in our American cases as authority for the view that one taking possession of part of a mineral estate cannot be deemed to be in constructive possession of the entire estate so as to allow him to acquire title adversely to the whole estate. But these cases are not good authority for that view. In each case an adjoining proprietor, while engaged in working his coal, had gone on working into the vein and getting out a certain quantity of his neighbor's coal. It was held in both cases that this would not in any way give the wrongdoer title to his neighbor's coal.

It is believed that *Earl of Dartmouth* v. *Spittle*[54] is this type of case also. There it was held that the mere working of a portion of one strata of a mine did not amount to such taking of possession of the whole mine as to bar the owner's right of entry or action after the expiration period. But the court also said:

> It might be otherwise if the defendant had openly claimed possession supposing the mine to be his; but here he may have known he was stealing the coal. I hold that he acquired no right to the coal fields; his acquisition must be limited to the coal he took. The case of underground strata is different from that of surface lands where there are metes and bounds.[55]

[50] 34 L.T.N.S. 186 (Eng. 1875), affirming 33 L.T.N.S. 436 (Eng. 1875).
[51] Glyn v. Howell, supra note 49.
[52] 6 Ch. D. 719 (Eng. 1877).
[53] 1 Ch. 550 (Eng. 1907).
[55] Id., 24 L.T.N.S. at 68.
[54] 24 L.T.N.S. 67, 19 Week Rep. 444 (Eng. 1871).

Although it has been interpreted otherwise,[56] the last sentence of the above quotation probably means that encroachment across boundary lines is visible on the surface, whereas it may not be under the ground.[57]

These English cases do not categorically support the view that one working part of a mineral estate cannot be deemed to be in constructive possession of the whole, well-defined mineral tract, or that the rules of constructive possession are inapplicable to mineral estates, except in instances where the mineral is being taken surreptitiously through an opening located off the estate. But they have been interpreted as authority for that view by the American cases relying upon them.[58]

The American Cases

There are two American cases, in addition to our *Piney Oil* case[59] and the New York cases of *French* v. *Lansing*[60] and *White* v. *Miller*,[61] all previously discussed, which have relied on the English cases as authority for the point that working part of a mineral estate is not sufficient to give title by adverse possession to the mineral underlying the whole estate.

In *Davis* v. *Federal Land Bank of Columbia*,[62] where the mineral rights in land had been severed from the surface, and a claim was made to the title to coal by adverse possession *but not by color of title*, the court said the law did not extend the force and effect of the claimant's possession to the outer boundaries of the claim. It said title founded upon adverse possession of a mine is limited to that area of which actual possession had been enjoyed. *Glyn* v. *Howell*[63] was cited as authority. The dictum conclusion in this case as to the limits of the adverse possession, if any, would have been the same even if the ordinary rules of constructive possession applicable to surface estates had been

[56] Piney Oil & Gas Co. v. Scott, supra note 8.
[57] Ky. Rev. Stat., secs. 352.490 and 352.500 are intended to prevent the surreptitious mining of a neighbor's coal.
[58] Piney Oil & Gas Co. v. Scott, White v. Miller and French v. Lansing, supra note 8; Davis v. Federal Land Bank of Columbia, 219 N.C. 248, 13 S.E. 2d 417 (1941).
[59] Piney Oil & Gas Co. v. Scott, supra note 8.
[60] French v. Lansing, supra note 8.
[61] White v. Miller, supra note 8.
[62] 219 N.C. 248, 13 S.E. 2d 417 (1941).
[63] Glyn v. Howell, supra note 49.

applied since there was no evidence of record title or color of title in plaintiff who was claiming title by adverse possession. There was really no question of limiting the extent of adverse possession in that case, however, since the court concluded there had been merely prospecting for coal so that in actuality title to no part of that mineral had been acquired adversely.

In *Sanford* v. *Alabama Power Co.*,[64] there was a severance of the minerals from the surface of the land and the respondent surface owner had conducted coal mining operations on the land, but only for two years prior to the commencement of the action. The respondent's deeds purported to convey him the minerals under his land, despite the prior severance of the minerals. The court said that, "Irrespective of the fact that the grantors in such deeds had no title to the minerals, *the deeds would give color of title.*"[65] (Italic ours.) The respondent invoked "the principle often declared in the cases where surface rights are involved, to the effect that actual possession of part of a tract of land, with a claim of title to the whole, under a written instrument, is sufficient to constitute possession of the whole tract defined in the conveyance to the extent that the same is not in possession of another."[66] The court held this principle inapplicable to mining operations, quoting *French* v. *Lansing*[67] and our *Piney Oil* case.[68]

The court admitted it was indulging in dictum on the question of the respondent surface owner's adverse possession of any mineral under his land. Respondent had conducted his mining operations for only two years, a period less than that required by the statute to ripen title by adverse possession.[69]

The court felt, however, that the extent of respondent's constructive possession of the minerals during the period of his mining operations was a problem that had to be resolved before it could determine whether or not the claimant was entitled to file his bill to quiet title. The court apparently was harrassed by the thought that if it held respondent's possession of the coal to be by construction coextensive with his surface ownership, the claimant would be out of court, since under Alabama law in order

[64] Sanford v. Alabama Power Co., supra note 8.
[65] Id., 54 So. 2d at 570. [66] Ibid.
[67] French v. Lansing, supra note 8.
[68] Piney Oil & Gas Co. v. Scott, supra note 8.
[69] Code of Alabama (1940), Title 7, sec. 828.

to file a bill in equity to quiet title, the claimant must have the quiet and peaceable possession, actual or constructive, of the mineral or land to which a quieted title is sought.[70] The claimant was relying upon the constructive possession which the law attaches to legal title in the absence of actual possession by anyone else. The respondent was relying on his constructive possession of the coal under his tract by reason of his having taken actual possession of part of the coal under color of title. The court held the respondent was not in constructive possession of all of that mineral under his land since the laws of constructive possession did not apply to mineral estates and that therefore the claimant could maintain the suit to quiet title. The question before the Alabama court was somewhat peculiar to that jurisdiction since ordinarily in order to maintain an action to quiet title the claimant must have legal title to the property in question and be in possession thereof at the time of institution of the action.[71] The reason for such requirement as to possession is that the legal remedy of ejectment is ordinarily available to one out of possession.[72]

V. *Several U. S. Cases are Authority for the View that the Rules of Constructive Possession are Applicable to Mineral Estates.*

In a few cases in the United States, courts have apparently taken the view that the rules of constructive possession applicable to surface estates apply also to mineral estates or have concluded that working a mineral on part of the property may be sufficient to give title by adverse possession to all of the mineral underlying or outcropping on the whole property.

In *Kinder* v. *LaSalle County Carbon Coal Co.*,[73] it appeared that the owners of the surface had taken sand, gravel, and limestone from parts of the land suiting their convenience. Title to the minerals had been severed but the court held the severance did not include the limestone because a fair interpretation of the mineral deed indicated that only those minerals which could be mined were to be conveyed and the only mineral being mined on

[70] Id., Title 7, sec. 1109.
[71] 44 Am. Jur. (1942); Ky. Rev. Stat., sec. 411.120; Leach v. Taylor, 206 Ky. 28, 266 S.W. 894 (1924).
[72] 44 Am. Jur. (1942).
[73] 310 Ill. 126, 141 N.E. 537 (1923).

the land at the time was coal. The court felt the limestone was not included because it outcropped on the surface at various places and could not be removed without destroying the surface. However, to get at the question of adverse possession of the limestone by the surface owners, the court assumed for purposes of argument that title to the limestone had also been severed. The surface owners had over a period of twenty years removed large quantities of sand, gravel and limestone and even sold some of it to the mineral owners to use in their coal mining operations. The court, in holding that the owners of the surface had acquired title to the limestone by adverse possession, said:

> These acts were open, notorious, and hostile to appellants and their predecessors. It was impossible for appellees to literally take possession and quarry the limestone on the entire 185 acres at one time. They did take actual possession of it at different places on the land, quarried, hauled it off and sold it, and continued to do so for a period of 20 years, of which appellants had actual notice. By their acts appellees evidenced their claim of right to the limestone at any and every place found in the entire tract. They were such acts of dominion over the limestone as were notice to persons in the neighborhood that they claimed exclusive use and control of the limestone and were sufficient to constitute adverse possession of it.[74]

The court reached this result even though it assumed the surface owners "had no record title or color of title to the limestone." However, it appears that the surface owners may have had color of title to the limestone since there was some question as to whether title to it had been severed.[75]

Where mineral rights in 375 acres of land had been reserved and separated from the surface by the plaintiff's predecessor in title, but a deed conveyed the land to the plaintiff by definite boundaries, in fee simple, without reservation, and the plaintiff claimed title to the coal under 307 acres of land by adverse possession *under color of title,* it was held in *Vance* v. *Guy,*[76] that evidence tending to show continuous operation by the plaintiff of three or four mines or openings of comparatively small area on

[74] 141 N.E. at 542.
[75] 141 N.E. at 541. See supra note 48.
[76] 223 N.C. 409, 27 S.E. 2d 117 (1943).

the entire tract was sufficient to take the case to the jury, *the court stating that where one enters into possession of land under a colorable title which describes the land by definite lines and boundaries, and occupies and holds adversely a portion of the land within the bounds of his deed, by construction of law his possession is extended to the outer bounds of his deed, and possession so held adversely for seven years ripens his title to all the land embraced in his deed which is not actually occupied by another.* The court further held that the trial court erred in instructing the jury that the application of the rules of constructive possession to the mining of a portion of the land would depend upon the size of the operation even though it were just in one part. In a later appeal[77] the court stated that it was generally held that where one enters upon real estate under adverse deed or title, possession so taken will be construed to extend to the boundaries of the deed or title, and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseised to the extent of the boundaries of such deed or title, unless at the same time the true owner is in possession of a part of the estate, claiming title to the whole, in which event his seisin will extend by operation of law to all not in the actual close or occupancy of the party entering and claiming under a defective deed or title.

There are two late cases which, without even discussing the point, have held that working part of a mineral is sufficient to give title by adverse possession to the mineral underlying the whole property.

In *Pollard* v. *Simpson et al.*,[78] where there had been a severance of the mineral from the surface estate and the surface owners had mined coal adversely for the limitation period, it was held that they acquired title by adverse possession to the coal underlying their whole property. It is believed that about 80 acres of property was involved in that case. This 1941 Alabama case is contra to *Sanford* v. *Alabama Power Co.*, discussed above,[79] wherein that court stated that its research disclosed no case where it had been called upon to pass on the question as

[77] 224 N.C. 607, 31 S.E. 2d 766 (1944).
[78] 240 Ala. 401, 199 So. 560 (1941).
[79] Sanford v. Alabama Power Co., supra note 64.

to whether the principle that actual possession of part of a tract of land, with claim of title to the whole, under a written instrument, is sufficient to constitute possession of the whole tract defined in the conveyance, has application to mining operations. To be sure the court did not discuss this principle in the *Simpson* case,[80] but the application of this principle to a mineral estate was implicit in the court's holding. The surface owners held under deeds which purported to convey the minerals.

In *Medusa Portland Cement Co.* v. *Lamantina*,[81] a corporation which had purchased coal lands from its predecessor corporation refused to pay the balance due on the purchase price, claiming there were defects in title to the coal underlying part of the tract. The court held that even though there were defects in title to part of the underlying coal when the predecessor corporation purchased the tract, these defects had been cured by the adverse working of the coal for the limitation period so that the predecessor corporation had acquired title to the coal by adverse possession and could now pass good title.

VI. *Stratification of Minerals and Adverse Possession.*

The English cases of *Ashton* v. *Stock*[82] and *Earl of Dartmouth* v. *Spittle*[83] contain language suggesting that the adverse working of one strata or vein of a mineral would not constitute adverse possession of another strata of the mineral situated at a different level beneath the surface. The American cases which have awarded an intruder the rights to a mineral by virtue of adverse possession have not considered the question of stratification of the mineral in their holdings.[84] Stratification of a mineral probably has no bearing on the acquisition of title to the mineral by adverse possession.

Summary and Conclusions

The reasons assigned by the courts for holding the rules of constructive possession inapplicable in determining the extent

[80] Pollard v. Simpson, supra note 78.
[81] 353 Pa. 53, 44 A. 2d 244 (1945).
[82] Ashton v. Stock, supra note 52.
[83] Earl of Dartmouth v. Spittle, supra note 54.
[84] Pollard v. Simpson, supra note 78; Diederich v. Ware, supra note 10; Medusa Portland Cement Co. v. Lamantina, supra note 81.

of adverse possession are not entirely convincing.[85] Only three American cases have actually so held.[86] Other cases contain dicta to this effect.[87] The English cases cited as authority in the American cases do not entirely support the premise of nonapplicability.[88]

There are a number of decisions by high courts of the several states which support the view that the rule of possession extending by construction of law to a claimed boundary is applicable in determining the extent of adverse possession of minerals.[89] It is submitted that these cases are better reasoned. It is inconsistent to say that there can be an adverse possession of minerals and at the same time reject one of the traditional tenets of the doctrine.[90]

In each instance of intrusion on a mineral estate where the requisites for adverse possession have been satisfied, the court should decide as a matter of law whether or not the intruder has color of title, and then fix the bounds of his possession by that determination, applying the rules for determining extent of adverse possession of surface estates.

If the intruder is the surface owner, the fact that he is considered a trustee of the separate mineral estate beneath his land,[91] and probably must give *actual* notice of his adverse claim in order to repudiate the trust and start the statute of limitation running,[92] affords a great deal of protection to the mineral owner.

The taking of a mineral from one level is probably sufficient manifestation of an adverse claim to that mineral at all levels.

[85] Diederich v. Ware, supra note 10.
[86] Sanford v. Alabama Power Co., White v. Miller and French v. Lansing, supra note 8.
[87] Piney Oil & Gas Co. v. Scott, supra note 8; Davis v. Federal Land Bank of Columbia, supra note 62.
[88] Glyn v. Howell, supra note 49; Thompson v. Hickman, supra note 53; Ashton v. Stock, supra note 52; Earl of Dartmouth v. Spittle, supra note 54.
[89] Pollard v. Simpson, supra note 78; Kinder v. LaSalle County Carbon Coal Co., supra note 73; Vance v. Guy, supra notes 76 and 77; Medusa Portland Cement Co. v. Lamantina, supra note 81; Diederich v. Ware, supra note 10.
[90] 32 New York University Law Review, 621, 629 (1957).
[91] Supra note 23.
[92] Diederich v. Ware, supra note 28; Piney Oil & Gas Co. v. Scott, supra note 27.