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Willard S. Snyder

TAXATION AND SEVERED MINERAL ESTATES

WILLARD S. SNYDER
of the Denver Bar *

It is well settled that the terms "mineral" or "mineral rights" include oil and gas.[1] It is in that sense that the word "mineral" is used herein. Solid minerals such as coal and iron are beyond the scope of this article.

Inasmuch as the production of oil and gas is becoming more and more prominent in the economy of the Rocky Mountain area, it is important for the attorney to become acquainted with the legal problems involved. This article is concerned with the following problem: When the mineral estate is owned separately from the surface estate, and the land is sold for delinquent taxes, does a tax deed [2] carry the mineral estate?

First of all, there are some fundamentals that we should have firmly in mind. It is well settled that separate estates may be created in respect to minerals, including oil and gas. Such separate estates may be created by a deed of the land excepting and reserving all or part of the minerals. Or the separate estates may be created by a deed of all or a part of the minerals only.[3] The process by which the separate estates are created is called a "severance."

If there has been no severance of the mineral estate from the surface estate, the minerals in and under the land are a part thereof and are taxable against the owner of the land.[4] It would follow, of course, that the recipient of a valid tax deed to such land would become vested with both the surface and mineral estates in and to such land.

Turning directly to the situation where there has been a prior severance of the mineral estate, we find that our problem may be divided into two major parts. These are: (1) where the tax deed is invalid and (2) where the tax deed is valid.

PROBLEM WHERE TAX DEED IS INVALID

There are many more or less technical reasons why a tax deed may be invalid. For example, it may be void for uncertainty of description or it may be void because of recitals therein that show a noncompliance with or violation of the statutes concerning tax deeds and the antecedent procedure upon which said deeds are based.[5] Assuming that the tax deed is invalid, for some such reason, it is unnecessary to distinguish between a tax deed based upon a sale of the mineral rights, and a tax deed based upon a sale of the

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* Written while Mr. Snyder was a graduate student at the University of Denver College of Law.

[1] Crain v. Pure Oil Co., 25 F. 2d 824 (10 Cir. 1927).

[2] The term ordinarily used in Colorado is "treasurer's deed." The term "tax deed" is used herein for the sake of uniformity when referring to various jurisdictions.

[3] Summers, THE LAW OF OIL AND GAS (2d ed.) § 784.

[4] *Id.*, § 787.

[5] Calvat v. Juhan, 119 Colo. 561, 206 P. 2d 600 (1949).

land by its government description without, in terms, including or excluding the mineral rights. In either case, the tax deed will not in and of itself pass good and sufficient title to the severed mineral estate, said estate being the one in which we are here interested.

Closely connected with the problem where the tax deed is invalid is the question of adverse possession. The holder of the tax deed may admit its invalidity, but nevertheless argue that it constituted color of title and seek to establish adverse possession to the mineral estate. However, one of the most firmly established and universally accepted rules of law in the field of oil and gas is that after severance of the mineral rights, adverse possession of the surface is not adverse possession of the oil and gas underneath.[6] In a case involving a tax sale of mineral rights, the Supreme Court of Colorado held that after a severance of the mineral rights, possession of the surface does not constitute possession of the mineral estate, and the owner of the minerals does not lose his rights by any length of nonuser.[7] Thus, it may be seen that adverse possession of the severed mineral estate cannot be perfected except by drilling a well and taking actual physical possession of the minerals and holding such possession for the statutory period.

PROBLEM WHERE TAX DEED IS VALID

An example may help to clarify the discussion. A is the fee owner of Blackacre. A conveys Blackacre to B reserving and excepting the minerals in and under the land. Later B fails to pay his taxes. Blackacre is sold for taxes, the land being described by its government description without expressly including or excluding the minerals. Ultimately a tax deed is issued to Y. The tax deed and the procedure upon which it is based are valid. The only question is: Does the tax deed carry the mineral estate? In other words, does A or Y now own the mineral estate?

There has been no express ruling on this question by the Supreme Court of Colorado. Consequently, it is necessary to look to decisions from other jurisdictions in order that we may have some basis for an opinion upon the point involved. Of course, Colorado statutes and judicial precedents are controlling as far as they are applicable. But there are questions of policy and emphasis involved which have permitted the highest tribunals of the various states to reach opposite results, and an effort will be made to tie in these questions of policy and emphasis with the statutes and judicial precedents of Colorado.

A mechanical aproach to the problem disclosed that in Arkansas,[8] Minnesota,[9] Missouri,[10] New Mexico,[11] and Wyoming,[12] it has

[6] 13 A. L. R. 375.
[7] Note 5, *supra.*
[8] Huffman v. Henderson Co., 184 Ark. 278, 42 S.W. 2d 221 (1931).
[9] Washburn v. Gregory Co., 125 Minn. 491, 147 N. W. 706 (1914).
[10] Kernkamp v. Wellsville Fire Brick Co., 237 Mo. App. 457, 170 S. W. 2d 692 (1943).
[11] Sims v. Vosburg, 43 N. M. 255, 91 P. 2d 434 (1939).
[12] Ohio Oil Co. v. Wyoming Agency, ... Wyo. ...., 179 P. 2d 773 (1947).

been held that a tax deed in which the land is described by its government description does not pass title to a prior severed mineral estate. In California,[13] Mississippi,[14] and West Virginia,[15] it has been held that a tax deed in which the land is described by its government description does pass title to a prior severed mineral estate. Thus, we have the familiar situation of a conflict of authority, although at least it can be said that the weight of authority is to the effect that the tax deed does not pass title to the prior severed mineral estate.

Of more importance than a mere weight of authority is the reasoning upon which these various decisions are based. Some of the above cited cases are not too helpful one way or the other. For example, the supreme court of Wyoming in *Ohio Oil Co. v. Wyoming Agency,* [16] without advancing much in the way of reasons, merely states the rule than when the mineral estate is owned separately from the surface estate, and the land is assessed in the name of the owner of the surface, a valid tax sale would not seem to carry the mineral estate. Then there are those states which advance reasons for their holdings, but the logic involved would not be of weight in Colorado, because of judicial precedents in Colorado. Unfortunately such holdings appear on both sides of the fence.

The Same Yardstick With Different Results

The California case of *McCracken v. Hummel* [17] holds that the owner of the tax title acquired the oil and gas rights in the property even though there had been a prior severance of the mineral estate. The court reasons that since there were no separate assessments of the severed oil rights, and since the same assessment was placed upon the land as upon adjoining land where there was no severed mineral estate, the assessment upon the land in question included the severed oil rights; therefore, the holder of the tax deed acquired title to both the surface estate and the mineral estate.

The New Mexico case of *Sims v. Vosburg* [18] holds that the holder of the tax title did not acquire the mineral rights in the property when there had been a prior severance of the mineral estate. The prior severance was in favor of private parties. The court reasons that since the land in question was assessed at the same value as adjacent and similar land from which the minerals had been severed by the United States Government instead of private parties (and could, therefore, not be taxed), the severed mineral interests in question were neither assessed nor sold for taxes and that the holder of the tax title obtained no title to the mineral interests by virtue of his tax deed.

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[13] McCracken v. Hummel, 43 Cal. App. 2d 302, 110 P. 2d 700 (1941).
[14] Stern v. Parker, 200 Miss. 27, 25 So. 2d 787 (1946).
[15] Peterson v. Hall, 57 W. Va. 535, 50 S. E. 603 (1905).
[16] Note 12, *supra.*
[17] Note 13, *supra.*
[18] Note 11, *supra.*

It will be seen immediately that the courts of California and New Mexico have used the same reasoning. The yardstick used is a comparison between the assessment of the land from which the mineral estate has been severed and the assessment of adjoining and similar land from which the mineral estate has either not been severed, or, if it has been severed, the severance was in favor of the government, in which event taxation of the mineral estate was impossible.

Such reasoning is not necessarily valid. In the Colorado case of *Union Pacific R.R. Co. v. Hanna,*[19] which involved a different question, such reasoning was rejected. In that case, the railroad was the owner of severed mineral estates in and under every odd-numbered section of land in Weld County within 20 miles of the railroad right of way. The proceeding before the court was an action to reduce the assessed valuation of these reserved mineral rights. The assessor had assessed the surface estates in the odd-numbered sections from which the mineral estates had been severed at the same value that he had assessed the land in the even-numbered sections from which the mineral estates had not been severed. In addition to the assessment of the surface estate in the odd-numbered sections, the assessor had assessed the reserved mineral estates to their owner, the Union Pacific Co. The railroad argued that this was discriminatory. The court rejected this argument, saying that if the surface estate in the odd-numbered sections subject to mineral reservations is assessed too high, in comparison with the assessment of the land in the even-numbered sections without reservation, this works no hardship on the Union Pacific Co., owner of the reserved mineral estates. Thus, the test used in California and New Mexico of comparing the assessment of the surface estate from which the minerals have been severed with the assessment on adjoining land without reservations probably could not be used in Colorado. For in Colorado, even though the surface of the land subject to mineral reservations is assessed at the same value as adjoining land without reservations, the highest tribunal in the state has taken the position that the surface estate subject to the reservation may have been assessed too high, or the land without reservations may have been assessed too low. Therefore, even though the assessments on adjoining tracts of land (one being subject to a mineral reservation, and the other not) are the same, it would not follow that the assessment of the land subject to a mineral reservation was an assessment which included the minerals. When there has been a prior severance of the mineral estate with no separate assessment of that estate, and when the land is assessed in the name of the owner of the surface, it would seem that a tax sale in Colorado would not carry the severed mineral estate, for there would be no practical way of showing that the severed min-

[19] 73 Colo. 162, 214 P. 550 (1923).

eral estate had even been assessed, let alone sold at the tax sale. However, it should be emphasized that the problem and facts under consideration in the *Union Pacific* case were entirely different from the subject under discussion here, and the language used by the court in that case would not necessarily be controlling if the court were called upon to decide the question here involved.

SEPARATE ASSESSMENT STATUTES NOT TOO HELPFUL

Other courts have taken a different approach to the problem from that taken in California and New Mexico. Some states have what are termed "separate assessment statutes." That is, it is provided by statute that when the surface estate and mineral estate are separately owned, they may, or must, be separately assessed. Colorado has no such statute. Even so, it was expressly held by the Colorado Supreme Court in *Union Pacific RR. Co. v. Hanna,*[20] that a severed mineral estate was separately assessable to the owner thereof. A person would expect that in a state having a separate assessment statute a tax sale would not carry the severed mineral estate. The Supreme Court of Arkansas in *Huffman v. Henderson Co.,*[21] so held on the basis of Arkansas's separate assessment statute. But the Supreme Court of Mississippi, in the case of *Stern v. Parker,*[22] held that the tax sale carried the severed mineral estate. This conclusion was reached notwithstanding the fact that Mississippi has a separate assessment statute [23] which, in referring to a severed mineral estate, provides: "all of such interest shall be assessed, and taxed separately from such surface rights." It appears that the separate assessment statute is not as important a factor in determining whether a tax sale will carry the severed minerals as initial appearances might indicate. Mississippi takes the position that it was the duty of the owner of the severed mineral estate to see that it was separately assessed and that such owner had failed in his duty by not paying taxes on his mineral estate. As a matter of policy, it was thought that the payment of taxes should be encouraged, that attempts to evade just taxes should be discouraged, and that the owner of the severed mineral estate was in no position to complain. As to the question of whether the severed mineral estate had ever been assessed, the Supreme Court of Mississippi took what might be called a practical approach. The court states that when the land was assessed by its government description, the land was assessed in its entirety, and this means all of its assessable estate.

The Minnesota case of *Washburn v. Gregory Co.*[24] is a leading case often cited by those courts which hold that a tax sale in which the land was described by its government desctription without including or excluding the minerals held by a person other than the

[20] Note 19, *supra.*
[21] Note 8, *supra.*
[22] Note 14, *supra.*
[23] Miss Code, § 9970 (1942).
[24] Note 9, *supra.*

owner of the surface does not carry such severed mineral estate. The Minnesota court takes a duty approach to the problem by holding that it is the duty of the taxing officers to assess and tax separately the interests of the owner of the minerals and the owner of the surface. The court states that when the land sold for taxes is described by its government description, it will not be presumed that the separate property of another (the owner of the minerals) is included in the general description used in the tax proceedings.

The Mississippi Supreme Court puts the emphasis on the duty of the owner of the minerals to see that his property is separately assessed and that he pays taxes thereon. The Minnesota Supreme Court emphasizes the duty of the taxing officers to separately assess the separate estate, and thereby these two courts reach opposite results. Yet it is believed that it is generally the duty of the taxing officers to assess all taxable property, and it is the duty of the owner of the taxable property to return it for taxation. Such is the law in Colorado.[25] Although there are persuasive arguments to support the Mississippi court in its holding that a tax sale passes title to the prior severed mineral estate, it still is not felt that Colorado could accept the Mississippi court's holding that when there is a prior severance of the mineral estate, the assessment of the land by its government description includes the land in its entirety, i.e. all of its assessable estates. Before Colorado could accept this proposition, it would be necessary for our Supreme Court to reject the same kind of reasoning that it advanced in support of its decision in *Union Pacific R.R. Co. v. Hanna*.[26]

A PRACTICAL SUGGESTION

It is of course apparent that in a question such as we are concerned with here, it is impossible to predict absolutely what the law in Colorado may be determined to be at some future day. The best that can be hoped for is what might be called an educated guess. Preventive jurisprudence has been called the most useful branch of the law. If a person is the owner of a severed mineral estate in Colorado, and if he wants to protect his said estate fully, it is suggested that he write to the assessor requesting a separate assessment of his mineral estate. If minerals are not being produced thereon, it will be assessed for a nominal amount, and by paying the tax assessed, he will be fully protected. Possible litigation will be avoided, and the owner of the severed mineral estate will have the satisfaction of knowing that his title is perfectly safe.

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[25] The People v. Pitcher, 61 Colo. 149, 170, 156 P. 812 (1916); COLO. STAT. ANN., c. 142, §§ 2, 20, 48, and 50 (1935).

[26] *See* note 19, *supra*.