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ADVERSE POSSESSION — SEVERANCE OF MINERALS AND SURFACE — ADVERSE POSSESSION AS AFFECTING TITLE TO THE MINERALS — The land

in question was set aside by the state for school purposes. For some time prior to 1881 one Bailey had been in possession. At that time he and his children, to whom he had deeded parts of the land, conveyed the mineral interests to a grantee from whom plaintiff claims. At the time of the conveyance the evidence was insufficient to show title by adverse possession in Bailey. Bailey and his grantees, from whom defendant claims, remained in possession until this action was brought. The limitation ceased running against the state by an act of the legislature at which time, the evidence shows, the grantees of Bailey had acquired title by adverse possession of the surface. In 1925 the owners of the surface received a patent from the state.[1] Plaintiff had never worked the minerals and there had never been any actual intrusion on the minerals until defendant commenced to mine shortly before the present action was brought. *Held*, that when there is a conveyance of the minerals, with no physical severance of the minerals by anyone, the grantor and his privies will presumptively continue to hold possession of the minerals for the grantee and his privies so that possession of the surface and minerals for the requisite number of years will ripen title in each as against third parties. *Tennessee Coal I. & R. R. v. Brewer*, (C. C. A. 5th, 1937) 92 F. (2d) 804.

The general rule is that possession of the surface of land extends indefinitely into the substrata when there has been no severance.[2] However, when the owner conveys the subsoil or minerals, the surface and the minerals are severed as completely as two plots of surface soil may be severed by a conveyance of one.[3] In such a case possession of the surface is not deemed to extend to the constructive possession of the severed minerals.[4] Therefore, the rule generally adopted by the courts is that, after a severance, adverse possession of the surface, even under color of title to the whole, will not give title to the minerals.[5]

[1] The court decided that the patent from the government was only to convey what title the government had. Since title had been taken out of the state by 1908, the patents issued in 1908 conveyed nothing.

[2] Armstrong v. Caldwell, 53 Pa. St. 284 (1866); Davis v. Shepard, 31 Colo. 141, 72 P. 57 (1903); Baker v. Clark, 128 Cal. 181, 60 P. 677 (1900).

[3] Bodcaw Lumber Co. v. Goode, 160 Ark. 48, 254 S. W. 345, 29 A. L. R. 578 at 586 (1923); Renfro v. Hanon, 297 Ill. 353, 130 N. E. 740 (1921); Marvin v. Brewster Iron Mining Co., 55 N. Y. 538 (1874); Gill v. Fletcher, 74 Ohio St. 295, 78 N. E. 433, 113 Am. St. Rep. 962 at 967 (1906).

[4] Armstrong v. Caldwell, 53 Pa. St. 284 (1866); Birmingham Fuel Co. v. Boshell, 190 Ala. 597, 67 So. 403 (1914); Kingsley v. Hillside Coal & Iron Co., 144 Pa. St. 613, 23 A. 250 (1891); Moreland v. Frick Coke Co., 170 Pa. St. 33, 32 A. 634 (1895).

[5] Louisville & Nashville R. R. v. Massey, 136 Ala. 156, 33 So. 896, 96 Am. St. Rep. 17 at 19 (1902); Crowe Coal & Mining Co. v. Atkinson, 85 Kan. 357, 116 P. 499 (1911); Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216 at 223 (1899); Morison v. Am. Assn. Inc., 110 Va. 91, 65 S. E. 469 (1909); Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485 (1905); Stowers v. Huntington Development & Gas Co., (C. C. A. 4th 1934) 72 F. (2d) 969.

But it is necessary that the title be severed before the adverse possessor enters on the land or he will acquire title to the minerals as well as the surface. See Finnegan v. Stineman, 5 Pa. Super. 124 (1897).

The theory underlying these cases is apparently the lack of notoriety [6] and hostility [7] in the adverse possessor's claim to the minerals by mere possession of the surface. Once the minerals and surface are severed, continuous actual possession of the minerals is essential to acquire title by adverse possession.[8] Such *actual* possession of the minerals is generally said to require working the minerals in a manner that is as open [9] or notorious and "continuous" [10] as the nature of the mining will permit. However, when the grantor of the minerals is merely an adverse possessor of the land, a somewhat different result is usually reached. In this type of case the courts have generally held that possession of the surface extends to possession of the minerals.[11] Therefore, it would seem that, if the wrongful possessor of the surface is ousted before the requisite number of years had passed, the grantee of the minerals from such wrongful possessor could not acquire title to the minerals.[12] If, however, the wrongful possessor or his privies, having granted the minerals, remains in possession for the requisite number of years, they are said to hold possession of the minerals for the benefit of the grantee of the minerals and title will ripen in the latter. As regards the true owner, the extent of the wrongful possession should not be affected by a

[6] Delaware & Hudson Canal Co. v. Hughes, 183 Pa. St. 66, 38 A. 568, 63 Am. St. Rep. 743 at 749 (1897); Murray v. Allred, 100 Tenn. 100, 43 S. W. 355, 66 Am. St. Rep. 740 at 752 (1897). The court in Crowe Mining Co. v. Atkinson, 85 Kan. 357 at 361, 116 P. 499 (1911), says in reference to the contention that a deed as color of title to the whole should give corresponding title, "But the authorities are practically uniform in holding to the contrary. Any use to which the surface of the ground may be put differs so widely in character from the extraction of the minerals thereunder—the operations are so disconnected and unrelated—that a possession exercised for agricultural purposes only, although taken and held under an ordinary deed purporting to transfer complete ownership, ought not to be deemed to be adverse as to mining rights previously severed by a reservation in a conveyance in the same chain of title." See also French v. Lansing, 73 Misc. 80, 132 N. Y. S. 523 (1911).

[7] This would seem to be especially true when the owner and his privies remain in possession of the surface. See Kingsley v. Hillside Coal & Iron Co., 144 Pa. St. 613, 23 A. 250 (1891); Harkins v. Keith, 267 Ky. 353, 102 S. W. (2d) 5 (1936).

[8] Catlin Coal Co. v. Lloyd, 176 Ill. 275, 52 N. E. 144 (1898); Armstrong v. Caldwell, 53 Pa. St. 284 (1866); Birmingham Fuel Co. v. Boshell, 190 Ala. 597, 67 So. 403 (1914); Delaware & Hudson Canal Co. v. Hughes, 183 Pa. St. 66, 38 A. 568 (1897), discussed in 20 VA. L. REV. 120 (1933).

[9] Supra, note 6. See also: Pierce v. Barney, 209 Pa. St. 132, 58 A. 152 (1904); Uphoff v. Trustees of Tufts College, 351 Ill. 146, 184 N. E. 213 (1932).

[10] Hooper v. Bankhead, 171 Ala. 626, 54 So. 549 (1911); Thomas v. Young, 93 W. Va. 555, 117 S. E. 909 (1923); Uphoff v. Trustees of Tufts College, 351 Ill. 146, 184 N. E. 213 (1932). In Gordon v. Park, 219 Mo. 600 at 610, 117 S. W. 1163, 119 Am. St. Rep. 802 at 809 (1908), it is said, "It is not required that an act of ownership should be done every day or month or at any definite intervals, but they should be of such frequency and character as would at all times apprise the owner 'that his seizin was interrupted and that his title may be endangered.'"

[11] Moore v. Empire Land Co., 181 Ala. 344, 61 So. 940 (1913), noted 27 HARV. L. REV. 173 (1913).

[12] There is a suggestion to that effect in Virginia Coal & Iron Co. v. Hylton, 115 Va. 418, 79 S. E. 337 (1913).

conveyance of the minerals by the wrongful possessor.[13] Certainly, as between the parties to the conveyance and their privies, the grantor of the minerals should not be heard to complain.[14] The result has been that such wrongful possessor-grantor has apparently been treated by the courts as a sort of quasi-bailee of the minerals in order that the grantee may acquire title to them by adverse possession.[15] In view of these decisions, the result in the principal case would seem to be correct. It is to be noted, however, that the court in the principal case might have reached a contrary result. The adverse possessor has a certain interest in the land which can be passed by deed and it is possible to say that constructive possession of the minerals passes with the deed of them from the wrongful possessor of the surface. On that theory, the grantee of the minerals could acquire title to the minerals only by the usual method of actually working the minerals.[16]

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[13] Black Warrior Coal Co. v. West, 170 Ala. 346, 54 So. 200 (1910), noted 24 HARV. L. REV. 582 (1911); McBurney v. Glenmary Coal & Coke Co., 121 Tenn. 275, 118 S. W. 694 (1908); Laird v. Gulf Production Co., (Tex. Civ. App. 1933) 64 S. W. (2d) 1080.

[14] In Black Warrior Coal Co. v. West, 170 Ala. 346 at 353-354, 54 So. 200 (1910), it is said, "We repeat that the mere execution and delivery of a deed to lands of which the grantor is in the actual possession cannot operate, of itself, as an abandonment of possession. If he continues the actual possession, as to his grantee, by a fiction of law, he is held to be holding for the benefit of his grantee, or his assigns, as his tenant at sufferance . . . . there was no severance of estates at all, until the adverse possession of Garner ripened into a legal title, and that became true, in fact, which, as to Dimick [his grantee], Garner was estopped from denying, but which in fact was not true, viz., and actual severance of the estate in the surface, or agricultural right, from the estate in the mineral right."

[15] Albama Fuel & Iron Co. v. Broadhead, 210 Ala. 545, 98 So. 789 (1924).

[16] In Northcut v. Church, 135 Tenn. 541, 188 S. W. 220 (1915), the court proceeded on the theory that, when the wrongful possessor conveyed the minerals, possession of them passed out of the grantor and the grantee did not get title to the minerals by adverse possession because he had never been in actual possession. This overruled the reasoning by the same court in McBurney v. Glenmary Coal & Coke Co., 121 Tenn. 275, 118 S. W. 694 (1908).