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The Arkansas Supreme Court v. Landmen Title Examiners: Recent Oil & Gas Decisions

J. H. Evans, Attorney at Law
P. O. Box 1872
Fort Smith, Arkansas 72902
I. INTRODUCTION:

A. The increased drilling activity of the past ten or fifteen years has resulted in increased litigation over mineral ownership.

B. Rules which establish mineral ownership with reasonable certainty a desirable goal.

C. A look at some Arkansas Supreme Court decisions concerning mineral ownership. ("Minerals" as used in this discussion includes oil and gas).

1. A brief look at the Strockhacker cases creating uncertainty as to whether the word "mineral" includes oil and gas.

2. A discussion of more recent decisions, some of which create uncertainties of mineral ownership for landmen and title attorneys.

3. All oil and gas title attorneys I know are extremely unhappy with some of these recent decisions, and believe the Arkansas Supreme Court has made some bad precedents.

D. Most mineral ownership title problems arise from severed mineral interests.

1. Adverse possession of the surface constitutes adverse possession of the unsevered minerals, but not as to severed mineral interests.
2. Title to severed minerals can only be acquired by adverse possession through continuous production and removal of the minerals for the statutory period of seven years.

II. A LOOK AT THE STROHACKER CASES:

A. Missouri Pacific Railroad Company v. Strohacker, 202 Ark. 645, 152 S.W.2d 557 (1941). In 1892 and 1893 the Railroad, being the fee simple owner of certain land in Miller County, Arkansas, executed and delivered deeds thereto reserving "all coal and mineral deposits". Strohacker owned these lands except for whatever interest had been reserved by the Railroad. Strohacker filed suit in the Miller County Chancery Court against the Railroad to quiet title in him to the oil and gas. His claim was that the parties to the deeds did not intend to include oil and gas by reserving "all coal and mineral deposits". The Trial Court held for Strohacker and the Railroad appealed.

The Arkansas Supreme Court affirmed the lower court decision, stating that the question to be answered was what the Railroad meant when it reserved "all coal and mineral deposits". The Court went on to say, in essence, that in 1892 and 1893 in Miller County oil and gas were not commonly recognized as minerals, and therefore the Railroad could not have intended to reserve same.

B. Stegall v. Bugh, 228 Ark. 632, 310 S.W.2d 251 (1958). On November 6, 1900, B. H. Stegall, the then owner of the fee simple title to 120 acres in Union County, Arkansas, executed a warranty deed to this land to M. F. Goodwin which stated "except the mineral interest in said lands". The appellant, J. H. Stegall was the owner of all rights reserved by B. H. Stegall, and the appellee, Mrs. E. E. Bugh, was the owner of all interest not owned by J. H. Stegall. The trial judge held that the words "mineral interest" did not include oil and gas and entered an order quieting title to the oil and gas in Mrs. E. E. Bugh. Stegall appealed.

The Arkansas Supreme Court stated that although there was testimony that B. H. Stegall intended to reserve the oil and gas, and he thought the words "mineral interest" included oil and gas, that his intention was not the controlling factor. In this connection the Court stated:
"We think that the meaning which this court has heretofore and should hereafter give to the word 'mineral' in connection with its use in situations similar to those of this case, is governed not by what the grantor meant or might have meant, but by the general legal or commercial usage of the word at the time and place of its usage. The testimony in the case under consideration justified the trial court, we think, in finding that the word 'mineral', in its accepted legal and commercial usage, did not include oil and gas in Union County in 1900. This testimony was to the effect that there was no oil production in Union County until about 20 years after the deed in question was executed and that the word 'minerals', as commonly used in South Arkansas and Union County in 1900 would not have included oil and gas."

Based on the foregoing the Arkansas Supreme Court affirmed the trial court's decision.

C. Ahne v. Reinhart & Donovan Company, 240 Ark. 691, 401 S.W.2d 565 (1966). On July 26, 1905, George Heim, being the owner of the fee simple title, executed and delivered a deed to Arkansas Anthracite Coal Company conveying "all of the coal, oil and mineral" to certain land in Logan County, Arkansas. Ahne was the successor to the fee title of George Heim subject to the rights conveyed by the mineral deed to Arkansas Anthracite Coal Company, and the Reinhart & Donovan Company was the successor in title to the rights conveyed by the Heim deed.

The trial court held that the facts showed that gas was a commonly recognized mineral in Logan County in 1905, and that Reinhart and Donovan Company was therefore the owner of all gas under the land involved. Ahne appealed. In its opinion the Arkansas Supreme Court reviewed some of the pertinent facts from the evidence introduced during the trial, which are summarized as follows:

1. A gas field called the Mansfield Field was discovered in Scott and Sebastian Counties in 1902.

2. Most professional landmen in the Arkansas Valley of Northern Arkansas agreed that the word "mineral" included gas after 1900.
3. In Logan County in 1901 Choctaw Oil Company obtained oil and gas leases on a sizable block of acreage and drilled wells pursuant to these leases.

4. 1900 was the earliest year in which there was evidence of the growing realization of petroleum as an economic mineral along the Arkansas River.

5. As early as 1901 oil and gas were commonly recognized minerals in Logan County.

Based upon the foregoing the Supreme Court affirmed the trial court's decision.

D. Uncertainty created by these decisions.

1. They were based upon factual issues on a county by county basis. For example, how early were oil and gas commonly recognized as minerals in other counties, such as Franklin, Johnson and Pope?

2. Justice McFaddin dissented from the majority opinions in the Ahne v. Reinhart & Donovan Company case. He agreed that oil and gas were generally recognized as minerals in 1905 and concurred with the majority in affirming the trial court's decision. His dissent was based upon the reasoning of the other Justices because they were proceeding on a county by county basis. He advocated making the decision uniform for the entire State so that all uncertainty would be erased, and stated he was convinced that oil and gas were commonly recognized as minerals in the entire State as early as January 1, 1900. He went on to say that "I wish this Court would so state
and put an end to this 'drifting like a ship without a rudder' course that we are pursuing on this question which is vital to property".

3. In recent years the Trial judges in counties along the Arkansas River Valley, upon sufficient proof being made, seem to have more or less adopted Justice McFaddin's view, and have held oil and gas were minerals as early as 1903.

III. THE DUHIG RULE:

A. Its name is derived from the Texas Supreme Court case of Duhig v. Peavy-Moore Lumber Company, 135 Tex. 503, 144 S.W.2d 878 (1940). Duhig owned the surface and one-half of the minerals and executed a warranty deed to the predecessor in interest of Peavy-Moore. The deed warranted title to the described land but stated "it is expressly agreed and stipulated that the grantor herein retains an undivided one-half interest in and to all mineral rights or minerals of whatever description in the land." Duhig and Peavy-Moore each claimed ownership of the one-half mineral interest.

The majority opinion of the Texas Supreme Court held that the 1/2 interest was owned by Peavy-Moore. Their reasoning was based on a two step approach. First the granting clause operates and Peavy-Moore receives the surface and one-half of the minerals. Next, the reservation operates to return the one-half interest to Duhig, leaving Peavy-Moore with the surface only. At this point both the grant and the reservation have been given effect, but this leaves Duhig in breach of his warranty of conveying a 1/2 mineral interest. To cure the breach of warranty the 1/2 mineral interest is transferred from Duhig to Peavy-Moore.

B. The Duhig rule was not applied in Opaline King Hill v. Gilliam, 284 Ark. 383, 682 S.W.2d 737 (1985). In 1947 S. E. Gilliam owned the surface and 1/2 interest in the minerals to certain land, and he executed a quitclaim deed to same to Jefferson Phillips, but Gilliam reserved a 1/2 interest in the oil, gas and minerals. The heirs of Gilliam and the heirs of Phillips each claimed this 1/2 mineral interest. The trial court held the 1/2 interest was reserved by Gilliam in the quitclaim deed and was owned by the Gilliam heirs.
Upon appeal the Phillips heirs argued that applying the rule in the Duhig case should result in the interest being awarded to them. However, the Arkansas Supreme Court rejected this argument and affirmed the trial court's decision. The Court stated that Gilliam warranted nothing by his quitclaim deed and that the Duhig case did not apply. Thus, the reservation was effective to reserve the 1/2 mineral interest owned by Gilliam.

C. A few months after the Hill v. Gilliam decision the Arkansas Supreme Court decided the case of Peterson v. Simpson, 286 Ark. 177, 690 S.W.2d 720 (1985). In 1948 Pope owned the surface and 1/2 minerals to certain land and conveyed by warranty deed to Andrews, but Pope reserved 1/2 of the minerals. Andrews conveyed all his interest to Price, who conveyed to Brown, who conveyed to Neal, who conveyed to Pearson, who conveyed to the Simpsons. The Petersons are the successors in interest to Pope and claimed this 1/2 mineral interest, and they brought suit against the Simpsons to quiet title to this 1/2 mineral interest. The trial court held this 1/2 mineral interest was owned by the Simpsons and the Petersons appealed. The Arkansas Supreme Court affirmed.

The Supreme Court discussed the Duhig case at some length and stated that it is to be applied to cases which do not involve the original grantor and his immediate grantee. In this connection the Court stated:

"As set forth previously in describing the chain of title, the plaintiffs' predecessor in interest, Pope, did not convey directly to the defendants. In fact, there were four intervening conveyances between the Pope deed and the Simpson deed. To decide the issue now on the basis of what Pope subjectively thought, or intended, when he conveyed to Andrews in 1948, when neither the grantees, nor their title examiners, were privy to that thought, would be greatly unfair. Therefore, the proper procedure to follow in cases which do not involve the original grantor and his immediate grantee, as here, is to arrive at the meaning of the deed according to rules of objective construction, which we now hold to include application of the Duhig rule. Subjective considerations are not appropriate in such cases. Accordingly, with respect to such reservations contained in warranty deeds, a subsequent grantee is to receive that percentage of mineral interest in the land not reserved to the grantor, since the deed purports to deal with 100% of the minerals."
If both the grant and the reservation cannot thereby be given effect, the reservation must fail and the risk of title loss is on the grantor."

"Subsequent purchasers, or grantees, must be able to rely upon this interpretation or else, under these type of circumstances, every title would require a lawsuit in order to be alienable. Rejection of the Duhig rule would mean sacrificing the degree of certainty and guidance that it can provide concerning marketability of mineral interests, and replacing it with an outbreak of lawsuits. This we are not willing to do."

"Our decision in this case does not change the general rule that subjective considerations may be taken into account in reformation cases involving the original grantor and his immediate grantee."

D. Three Justices dissented in the Peterson v. Simpson case. They stated the reservation should be given effect since subsequent grantees had constructive notice that the grantor only owned a 1/2 mineral interest.

IV. EFFECT OF UNRECORDED MINERAL DEED ON TITLE OF SUBSEQUENT OWNERS:

A. Bona fide purchaser for value without notice.

B. Title acquired by adverse possession and the subsequent grantees in the chain of title.

1. Taylor v. Scott, 285 Ark. 102, 685 S.W.2d 160 (1985) held that a deed effectively severed 1/2 of the minerals when executed even though not recorded for 18 years, during which time an adverse possessor and his subsequent grantees in the chain of title were in possession under a claim of ownership.
2. The author of this opinion refuted the argument that the decision would create uncertainty in the oil and gas industry by stating:

"When a lawyer examines an abstract of title and finds that the apparent owner's title rests only on adverse possession, a rare situation [emphasis supplied], he is at once on notice that there may be flaws in the title, such as the interest of a minor or insane heir of a deceased holder of the record title."

3. As a matter of fact the rare situation is when there is a perfect record title. Thus, contrary to the author's statement, adverse possession is relied upon for title almost 100% of the time.

4. This decision makes it impossible to cure this defect with any certainty.

5. In Phelps v. Justiss Oil Company, 291 Ark. 538, 726 S.W.2d 662 (1987), the Court held that one who purchases from a grantor who does not have apparently a perfect record title is not a bona fide purchaser for value without notice, and cited the Taylor v. Scott case in support thereof.

V. SHOULD THE LACHES OR ESTOPPEL DOCTRINES BE APPLIED TO PERSONS WHO FAIL TO RECORD MINERAL DEEDS FOR PROLONGED PERIODS OF TIME?

A. In some cases the Arkansas Supreme Court has adopted the position that because of the fluctuating and uncertain values of oil and gas lands, parties asserting title thereto must act more promptly than in

B. Should persons be required to record mineral deeds within a reasonable period of time in order to promote certainty of title?

VI. OTHER RECENT CASES OF INTEREST:

A. Wallace v. Missouri Improvement Company, 294 Ark. 99, 740 S.W.2d 920 (1987). The tract of land involved was condemned by the United States in 1942 for use as a military base known as Fort Chaffee. Under the Declaration of Taking the United States condemned the fee simple title and deposited the estimated just compensation. At the time the minerals were owned by Missouri Pacific Railroad Company, the predecessor in title to Missouri Improvement Company. The Railroad was never made a party defendant nor notified of the condemnation proceedings. In 1948 the United States quitclaimed its interest in the tract to Wallace's predecessor in title. Wallace claimed ownership of the minerals because the United States had acquired the full fee simple title in the condemnation action. The trial court held the minerals were owned by Missouri Improvement Company, and upon appeal this decision was affirmed.

The Arkansas Supreme Court held that the basic constitutional requirements of notice and a reasonable opportunity to be heard were not met, and therefore the United States did not acquire the minerals owned by the Railroad. The Court relied on the fact that at the time of the condemnation the minerals were assessed in the same tax book (not sub-joined), and that a reasonable search would have revealed the mineral ownership of the Railroad.

This decision is directly contrary to the decision in the case of United States of America v. Herring, 750 F.2d 669 (1984).

B. Haynes v. Metcalf, 297 Ark. 40, 759 S.W.2d 542 (1988). The fee title to the tract of land involved was vested in V. F. Metcalf alone and in 1969 him and his wife, Oma Metcalf, the appellee, executed a deed to Verna Haynes, the appellant, which contained a reservation by the grantors of the royalties and mineral rights so long as either of the grantors lived. V. F. Metcalf
died in 1984 and this litigation involved who should receive the royalties from producing wells.

The Arkansas Supreme Court acknowledged the general rule that an exception or reservation in favor of a stranger to a deed is void except to confirm a right which the stranger already had. Cases from other jurisdictions were cited which held that there is an exception to this rule when there is a reservation of a life estate in favor of the spouse of the grantor. However, the Court stated it was not necessary to decide whether Arkansas would follow this exception. Instead, the Court held that Haynes was in possession of the deed from 1969 until 1986, when this lawsuit was commenced, and made no objection to the reservation, and she was therefore estopped from changing the terms thereof.

VII. RECENT DECISIONS CONSTRUING WHETHER DEEDS TO RAILROADS CONVEYED THE FEE TITLE OR ONLY A RIGHT OF WAY:

A. Coleman v. Missouri Pacific Railroad Company, 294 Ark. 633, 745 S.W.2d 622 (1988). Three deeds were involved. One conveyed "a strip of land one hundred feet wide." Another conveyed "a strip of land 100 feet wide for right of way also an additional strip of land 250 feet wide extending lying on the south side of said right of way and adjacent thereto . . . ." The third deed conveyed "a strip of land 100 feet wide for right of way . . . also extra for depot grounds a strip of land 250 feet wide lying south of and adjoining said right of way."

The trial court held these deeds conveyed the fee simple title, and the Arkansas Supreme Court affirmed.

B. Wylie v. Tull, 298 Ark. 511, 769 S.W.2d 409 (1989). Approximately 50 deeds were involved. A few were headed "Warranty Deed" but conveyed either a strip 100 feet wide or a strip 200 feet wide "for right of way." The rest were titled "Right of Way Deed" and conveyed a strip 100 feet wide with the right of borrow earth of said "right of way." Dower was relinquished in most.

The trial court held these deeds conveyed only rights of way, and the Arkansas Supreme Court affirmed.

C. Brewer & Taylor Company v. Wall, 299 Ark. 18, 769 S.W.2d 753 (1989). Seven deeds were involved. All were headed "Right of Way and Release of Damages" and stated "hereby grant, bargain, sell and convey unto the Choctaw & Memphis Railroad Company, and unto its successors and assigns forever, a strip of land one
hundred feet in width for a right of way." Dower was relinquished in all but one of the deeds.

The trial court held these deeds conveyed only rights of way, and the Arkansas Supreme Court affirmed.

D. These cases follow the general rule that when construing deeds the primary concern is to ascertain the intention of the parties, and that the deeds will be examined from their four corners for the purpose of ascertaining that intent from the language employed.

In this connection the Brewer & Taylor Company v. Wall case stated that the following factors are indications of the intent to convey an easement or right of way:

1. The deed specifies that the land conveyed is for a right of way.
2. Only nominal consideration is stated.
3. The shape of the tract makes other uses unlikely.
4. The railroad is given the specific right to take stone, gravel, timber and earth from the strip itself.

The Brewer & Taylor Company v. Wall case stated that the following factors are indications of the intent to convey a fee simple interest:

1. The right of increasing the width of the strip of land for necessary slopes, embankments, turnouts and with the right of changing water courses, and of taking a supply of water and of borrowing or wasting earth, stone or gravel outside the strip.
2. The conveyance of additional land besides the strip.
3. The relinquishment of dower rights.

VIII. CONCLUSION:

A. The Supreme Court, although giving lip service to the desirability of certainty in titles, has failed to apply same in some of its decisions.

B. It seems the Court decides some cases based upon its view of equity in the particular situation without
regard to the precedent, or lack of precedent, being set.

C. The name of the game seems to be hooray for the person who does not record his mineral deed for many, many years, and to hell with persons who have in good faith relied upon no such deed being of record during those many years.

D. It is difficult to predict with any degree of accuracy what the courts are liable to do in situations where the facts vary at all from those of previous decisions. Therefore, the only logical solution is to take protective leases.