Adverse Possession of the Severed Mineral Estate in Arkansas

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by

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"There is something about property law that makes it go crazy when it gets underground."
CHARLES C. CALLAHAN, ADVERSE POSSESSION 63 (1961).

I. Adverse Possession of Mineral Interests by Surface Occupancy

A. Adverse possession by surface occupancy acquires title to subsurface minerals if
the minerals have not been severed from the fee prior to the claimant’s surface
entry. Stewart v. Pelt, 131 S.W.2d 644 (Ark. 1939).

1. The rationale for the result.

"Cujus et solu, ergo est usque ad coelum et ad infernos," is the venerable
Latin phrase that has historically been used to refer to the common law’s
Ad coelum theory of land ownership. The doctrine holds that the owner of
the fee owns the subsurface of the land. The phrase is roughly translated as
“To whom ever owns the soil, he owns also to the sky and to the depths.”
See, e. g., Del Monte Mining & Milling Co. v. Last Chance Mining &

2. The Texas statement of the rule.

“The general rule is that if there is no severance of mineral rights from the
surface, an adverse entry upon the surface extends downward and draws to
it a title to the underlying minerals.” Broughton v. Humble Oil and Ref.

B. Adverse possession by surface occupancy does not obtain title to previously

1. The rationale for the result.

“ The statute of limitations does not run against these rights (severed
mineral interests) unless there is an actual adverse holding which
constitutes an invasion of these rights.” *Id.* at 348.

2. Understanding the severed versus non-severed mineral distinction.

When only a fractional share of the mineral ownership has been severed from the original fee title, the non-severed minerals are acquired by adverse possession of the surface estate. *See, e.g.*, [Wright v. Buckner, 236 S.W.2d 720 (Ark. 1951)].

*See also* [Fadem v. Kimball, 612 P.2d 287, 292 (Okla. Ct. App. 1979)], wherein the Court states: “We think it is clear that a conveyance or reservation of a fractional interest in the minerals by the owner of a fee simple estate will only effect a severance of the fractional interest so conveyed or reserved.”

C. The severance of the mineral estate from the fee.

1. Mineral deeds, reservations in deeds, or devises in wills.

Minerals are severed by an operative conveyance, testamentary disposition, or judicial decree that separates the ownership of the surface and the minerals. 1 Eugene Kuntz, *Oil and Gas* § 10.4. (W.H. Anderson Co. 1962).

2. The participation in an off-tract unit well.

Participation in a unit well that was located off-tract, not situated on the tract in issue, did not cause a severance of the mineral estate from the fee. *Krosmino v. Pettit, 968 P.2d 345 (Okla. 1998).*

3. The execution of an oil and gas lease.

a. The Texas cases.

i. Courts in Texas hold that the execution of an oil and gas lease severs the oil and gas from the fee. *Weems v. Hawkins, 278 S.W.2d 438 (Tex. Civ. App. 1954).*

ii. What is the effect of adverse possession of the surface after the execution of an oil and gas lease in Texas? “Logically, adverse possession should run as to rights retained by the lessor, both under the existing lease, as to royalties for example, and as to the reversionary interest which would
b. The Oklahoma cases.

Courts in Oklahoma hold that the execution of an oil and gas lease does not sever the oil and gas from the fee. Krosmico v. Pettit, 968 P.2d 345 (Okla. 1998).

c. Distinguishing the Texas and Oklahoma cases.

Texas, following the “ownership in place” theory, holds that the landowner’s interest in subsurface oil and gas is a corporeal interest. Eliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948). Oklahoma, following the “exclusive right to take theory,” known as the “nonownership” theory, holds that the landowner’s interest in subsurface oil and gas is an incorporeal interest. Rich v. Doneghy, 177 P. 86 (Okla. 1918). Is this an illusory distinction? Arkansas is typically cited as following the corporeal interest theory as to the landowner’s interest in oil and gas. See, e.g., Bodcaw Lumber Co. v. Goode, 254 S.W. 345 (Ark. 1923). However, Arkansas follows the incorporeal interest theory, the exclusive right to take theory, as to the lessee’s interest in the oil and gas lease. Mansfield Gas Co. v. Alexander, 133 S.W. 839 (Ark. 1911).

4. The doctrine of merger.

a. The definition of merger.

“The term merger means that, where a lesser and a greater estate in the same land come together and vest, without any intermediate estate, in the same person and in the same right, the lesser is immediately annihilated by operation of law. It is said to be “merged, i.e., sunk or drowned, in the greater estate”. G.C. Cheshire, The Modern Law of Real Property 831 (Butterworths 10th ed. 1967).

See also Bingham v. Rhea, 143 S.W.2d 1087, 1088 (1940).

b. The merger issue arises when the ownership of the severed mineral estate and the surface estate are subsequently reunited. If the merger doctrine is applied, the severed mineral estate is merged
with the fee and, thereafter, for adverse possession purposes, is treated as a non-severed mineral interest.

I find no case in point from any jurisdiction but two cases are worthy of note.

i. Merger is a matter of intent.

The merger of a previously severed mineral interest with a subsequently acquired surface estate is a matter of intent. Ferguson v. Hilborn, 402 P.2d 914 (Okla. 1965).

ii. Merger occurs as a matter of law.

Jones v. McFaddin, 382 S.W. 2d 277 (Tex. Civ. App. 1964) held that the sovereign’s title to mines and minerals, derived from the Civil Law of Spain that prevailed in Texas prior to 1835, was merged into the private landowner’s fee title by the Constitutional Release of 1866 in which the State of Texas, by a constitutional provision, relinquished its mineral title to landowners. The argument that fee simple absolute estates, being estates of equal dignity, were not merged at the common law was rejected in the case. McFaddin dealt with a surface owner’s acquisition of the severed mineral interest by virtue of a State Constitutional provision and offers little support to the applicability of the merger doctrine to private conveyancing.

D. The horrors of the unrecorded mineral severance.

1. The adverse possessor and the unrecorded mineral reservation.

An unrecorded mineral deed is valid against a subsequent bona fide purchaser who acquires title by adverse possession that is based on surface occupancy that began after the execution of the unrecorded mineral deed. Taylor v. Scott, 685 S.W.2d 160 (Ark. 1985).

Taylor v. Scott establishes that the severance of the mineral estate for purposes of determining the interests acquired by the adverse possessor occurs when the mineral deed is executed, not recorded. As a consequence, any break in the record chain-of-title raises the possibility that an unrecorded deed containing a mineral reservation may exist which pre-dates the adverse possession, and will result in mineral ownership
contrary to that reflected by the record title.

2. Proving the contents of a “lost deed.”


II. Severance of Title to the Minerals after the Surface Entry by the Adverse Possessor

A. Severance of the mineral title by the fee owner.


1. The rationale for the result.

“It is a general rule that once adverse possession has begun, that it may only be interrupted by an ouster, actual or constructive. An actual ouster would consist of physical remover of the AP from the premises, and a constructive ouster by the successful prosecution of an action in ejectment to judgment. A conveyance or reservation of the minerals, or the execution of an oil and gas lease, does not constitute an ouster and, hence, will not interrupt possession.” *Ates v. Yellow Pine Land Co.*, 310 So.2d 772, 775 (Fla. Dist. Ct. App. 1975).

2. The Arkansas authority, however slight, to the contrary.


B. Severance by adverse possessor.

1. Before the limitation period has run, the adverse possessor *conveys all minerals* to a third party grantee. Adverse possessor remains in possession of the surface. After the limitation period has run, the adverse possessor owns the surface and the third-party grantee owns the minerals. *Clements*

"But a severance by one in possession, who has not yet matured a title, does not abandon, limit, or qualify his possession for the purpose of ripening a title against the true owner out of possession; and that, as against such disseized owner, the continued possession of a trespasser after severance, as before, is adverse, and that such possession continued by either the trespasser or the third person to whom he severs will mature a limitation to the entire tract as against such disseized owner." *Id.* at 1004-1005.

2. Before the limitation period has run, the adverse possessor conveys the land to a third party grantee and reserves all minerals. The third party grantee goes into surface possession and the periods of occupation of the two aggregate the limitation period. The third-party grantee owns the surface and the original adverse possessor owns the minerals. *Houston Oil Co. v. Moss*, 284 S.W.2d 131, 137.

"As against a third party, possession by either the grantor or grantee where severance is attempted by a trespasser should be regarded as possession of the entire premises for the benefit of both, since collectively they are asserting a common title against the third party of which he has adequate notice by the possession of either. The result in this case is also desirable for policy reasons in that it will protect property owners, since in most cases it is the rightful owner who must rely upon the statute of limitations to protect his title against the assertion of old claims." *Id.* at 137.


3. Before the limitation period has run, the adverse possessor conveys one-half ($\frac{1}{2}$) of the minerals to a third party grantee. Adverse possessor remains in possession of the surface. After the limitation period has run, the adverse possessor owns the surface and one-half ($\frac{1}{2}$) of the minerals and the third-party grantee owns the other one-half ($\frac{1}{2}$) of the minerals. *Smith v. Nyreen*, 81 N.W.2d 769 (N.D. 1957).

Accord: *Burbridge v. Rosen*, 402 S.W.2d 502 (Ark. 1966) held that a claimant who paid taxes for 7 years to wild and unenclosed lands pursuant to Ark. Code Ann. § 18-11-102 not only acquires title to the surface and non-severed mineral interests but also validates mineral reservations and conveyances that appear in his chain-of-title and occurred during the limitation period.
The Court in *Burbridge* cited *Clements v. Texas Co.*, *supra* and stated: “It is well settled that when a trespasser in actual adverse possession of property either conveys the land with a reservation of a mineral interest or conveys a mineral interest itself, the continued possession by the surface claimant inures to the benefit of the mineral interest as well.” *Id.* at 504.

III. Adverse Possession of Severed Mineral Interests by Working the Minerals.

A. “When a mineral ownership has been severed by deed from the surface ownership, as here, one cannot acquire title to the minerals by adverse possession unless he actually invades the minerals by opening mines or drilling wells and continues that action for the necessary statutory period.” *Peterson v. Simpson*, 690 S.W.2d 720 (Ark. 1985).

B. The requisite production.

1. Fitful and desultory mining operations.

Casual mining every 3 or 4 months from surface outcrops during the limitation period amounted to only “fitful and desultory” occupancy for mining purposes, insufficient to adversely possess the severed mineral estate. No mines were opened or mining machinery installed on the land. There was not continuous mining occupancy of any of the land for the limitation period. *Claybrooke v. Barnes*, 22 S.W.2d 390 (Ark. 1929). *Compare Thweatt v. Halmes*, 580 S.W.2d 685 (Ark. 1979), wherein a severed coal interest was held to have been adversely possessed when mining occurred throughout the limitation period “when there was a market for the coal,” and, also, 15 shafts were sunk and coal for sale was advertised on the land and in a newspaper. But see the dissent by Justice Hickman.

2. Mineral extraction must infringe upon the severed mineral owner’s rights (or commercial production is required).

Taking gas from an off-tract abandoned well for use in connection with a chicken house and a domestic dwelling for the limitation period does not establish adverse possession of a severed mineral interest. The gas was not sold and such use was not inconsistent with the severed mineral owner’s exploration and development right. *Hassell v. Texaco, Inc.*, 372 P.2d 233 (Okla. 1962).
C. Effect of production from an off-tract unit well.

1. Production from an off-tract well does not mature limitation title to a mineral interest in a tract that has been committed by the adverse possession claimant to a voluntarily pooled unit. *Brizzolara v. Powell*, 218 S.W.2d 728 (Ark. 1949). An off-tract well is not notice of production to the mineral owners of other tracts located within the unit.

2. Production from an off-tract unit well on a drilling unit created by the Arkansas Oil and Gas Commission, pursuant to the agency’s determination that the unit well would drain the unit lands, may mature limitation title to a mineral interest to a tract in a unit that the adverse possession claimant commits to the drilling of the unit well. See, *Brizzolara v. Powell*, 218 S.W.2d at 728. *Contra Atlantic Richfield Co. v. Tomlinson*, 859 P.2d 1088 (Ok. 1993); *Hunt Oil Co. v. Moore*, 656 S.W.2d 634 (Tex Ct. App. 1983); *Dye v. Miller & Viele*, 587 P.2d 139 (Utah 1978).

D. The extent of the geographic area or the substance acquired.

1. Adverse possession of oil or gas is limited to the oil or gas that is or will be produced by the then existing wells.

   a. The limits to actual possession: the legacy of the hard mineral cases.

   The adverse possessor only acquires rights to the coal loosened or actually mined.

   "The owner of the mine does not lose his rights as against the owner of the surface by mere nonuser. His title can only be defeated by acts which actually take the mineral out of his possession. In a very late case it is said that it is possible that adverse possession might be shown if a certain mine or quarry were surrounded on all sides with galleries and a defined area was so opened out. But, under ordinary circumstances, it is difficult to see how there can be adverse possession of so much of the mines or minerals as lie untouched in their bed." *Pinev Oil & Gas Co. v. Scott*, 79 S.W.2d 394, 400 (Ky. 1935). See also, *Sanford v. Alabama Power Co.*, 54 So.2d 562 (Ala. 1951); *French v. Lansing*, 132 N.Y.S. 523 (N.Y. 1911).

For a criticism of this narrow view, see 1 Eugene Kuntz *supra* at § 10.5.
b. The geographic extent of the adverse possessor's claim is not determined by the doctrine of constructive possession based on his color of title.

i. Some courts hold that the adverse possessor does not acquire title to the produced mineral coextensive with the legal description contained in his color of title instrument. See Pine Oil & Gas Co. v. Scott, 79 S.W.2d 394, 400 (Ky. 1935), wherein the Court observed: "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 immediately 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 minerals, he can have no immediately potential use or 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." Id. at 400.

ii. The better view.

Production for the limitations period from two wells in the corner of a 56 acre tract, under color of title, matured title to the oil interests, at least as to that production horizon, in the entire tract. Diederich v. Ware, 286 S.W.2d 643 (Ky. App. 1956). The Court noted that the "subterranean structure" underlying the tract was changed as the fugacious minerals were produced by the wells. Thus, the adverse possession claimants exercised dominion over all of the oil in the producing formation underlying the tract. Accord Kinder v. La Salle County Carbon Coal Co., 141 N.E. 537 (Ill. 1923).

iii. The Arkansas case.

Production of oil from one tract within a lease does not constitute "constructive production" of all of the oil throughout the entire leasehold. Laney v. Monsanto Chemical Co., 348 S.W.2d 826 (Ark. 1961). Diederich is expressly disavowed. Id. at 827.
Laney holds that a claimant paying taxes for 7 years under color of title pursuant to Ark. Code Ann. § 18-11-102, acquires title to a non-severed mineral interest even though the tract was subject to an oil and gas lease held by production from an off-tract lease well. Laney is premised on the rationale that the claimant, pursuant to the statute, has constructive possession of the tract even though the non-severed mineral interest is subject to a producing oil and gas lease.

2. Adverse possession by production of one substance does not mature limitation title to other substances claimed under color of title.

a. The Arkansas case.

Production of gas for the limitation period under color of title, a void mineral tax deed, did not acquire title by adverse possession to the coal. *Hurst v. Rice*, 643 S.W.2d 563 (Ark. 1982).

b. The better view.

Adverse possession by actually working one of the minerals matures limitation title to other mineral substances coextensive with the scope of the claim of the color of title. 1 Eugene Kuntz *supra* at § 10.5.

E. Other significant adverse possession cases involving actual mining of severed mineral interests.

1. Production for the limitations period may allow acquisition by adverse possession of the title to an oil and gas leasehold estate when the oil and gas lease has subsequently terminated. *St. Louis Royalty Co. v. Continental Oil Co.*, 193 F.2d 778 (5th Cir. 1952).

2. A claimant to a working interest in the leasehold estate can acquire title by adverse possession, as against other claimants as to the working interest, through receipt for the limitation period of revenues attributable to the working interest and payment of operating costs. *Sun Operating Limited Partnership v. Oatman*, 911 S.W.2d 749 (Tex. Civ. App. 1995).