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A PROBLEM IN MINERAL CONVEYANCES

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In 1892 and 1893, St. Louis, Iron Mountain and Southern Railway Company, a predecessor of Missouri Pacific Railroad Company, conveyed certain lands in Miller County, Arkansas, by deed containing the following reservation:

"Reserving all coal and mineral deposits in and upon said lands with the right to said grantor, its successors and assigns at any and all times to enter upon said lands and to mine and remove any and all coal and mineral deposits found thereon without any claim for damages on behalf of said grantee, his heirs or assigns."

In 1941, Strohacker, a remote grantee of the railroad, brought an action in the Chancery Court of Miller County to cancel the reservation and to quiet title to the oil and gas. The lower court granted the relief sought, as to the oil and gas, and this was affirmed on appeal. Missouri Pacific Railroad v. Strohacker, 202 Ark. 645, 152 SW 2d 587. The opinion of our Supreme Court in that case and the subsequent treatment of the opinion form the basis for this discussion.

My impulse is to say that the Court in that opinion stated eight reasons for the result reached. In deference to the later opinions of the court, however, I think I should say that the Court mentioned eight factors and then reached its conclusion.

These factors may be summarized as:

(1) The railroad did not, as a matter of fact, own the minerals at the time of execution of the deed and could not reserve what they did not own.

(2) The railroad, at the time of execution of the deeds did not intend to reserve the minerals but inserted the words of reservation as a safeguard against future claims of breach of warranty.

(3) Oil and gas were not recognized as minerals in Miller County, Arkansas, at the time of execution of the deed, and the railroad could not have intended to reserve that of which it had no knowledge.
Oil and gas were not recognized as minerals at any place where the railroad had operations, the railroad could not have known about oil and gas and could not have possessed an intention to reserve oil and gas.

"Legal and Commercial usage" did not recognize that the word "minerals" included oil and gas, at the time and place of the conveyance, and the word "minerals" should be given the meaning accorded it by such "legal and commercial usage".

As a matter of law, petroleum was not included within a reservation of "minerals" made in 1887.

The phrase "coal and mineral deposits" had a legal meaning of "coal and deposits of substances commonly recognized as minerals" and oil and gas were not commonly recognized as minerals.

The grantee did not understand that the word "mineral" embraced oil and gas and the construction to be placed upon the word should be that "understood by the parties".

After discussing each of the factors above set forth and citing authorities relevant to each, the court concluded:

"Our task is to decide what Iron Mountain meant when it reserved 'all coal and mineral deposits' ."

The intention of the grantor, said the court, was to reserve only coal and minerals commonly recognized as such, hence the reservation was not sufficient to affect oil and gas.

Five years later, upon a fact situation identical to that in Strohacker, the court refused an express request to overrule its prior decision. Missouri Pacific Railroad Company v. Furqueron, 210 Ark. 460, 196 SW 2d 588 (1946). The latter decision was rested squarely upon Strohacker but, explaining Strohacker, the decision in the prior case was stated to be bottomed upon evidence that the railroad company, and its grantees, intended the reservation to apply only to substances commonly recognized as minerals and oil and gas were not included within such language.

In 1948, the identical reservation was again the subject of an opinion by the Supreme Court Carson v. Missouri Pacific Railroad Company, Thompson Trustee, 212 Ark. 963, 209 SW 2d 297. In the Carson case, the substances which formed the subject matter of the
litigation was bauxite located in Saline County and the reservation was contained in a deed executed August 21, 1892. The Court reiterated its reliance upon Strohacker and Furqueron, but added additional factors which appear to be more persuasive than the precedents:

(1) Bauxite, said the court, is really not a mineral at all, but is a clay formation which contains alumina in very small particles.

(2) Bauxite is mined by the open pit method. To give the reservation its literal interpretation, the grantor, in order to recover the bauxite, could completely destroy, without liability, the estate conveyed to the grantee. In this situation, the reservation would be as broad as the grant and under the ordinary rules a reservation as broad as the grant is void.

The following year the identical reservation was again before the court but under a somewhat different fact situation. Brizzolara v. Powell, 214 Ark 870, 218 SW 2d 728 (1949). In the Brizzolara case the reservation was contained in a deed executed in 1897 on lands located in Johnson County, Arkansas. The mineral rights were separately assessed for taxes commencing with the year 1907 and were forfeited for nonpayment of taxes for the year 1911. Brizzolara purchased the mineral tax title in 1921. In 1948 Powell brought an action to quiet title to the oil and gas on the theory that under the Strohacker rule title to the oil and gas was not included in the mineral assessment. The relief applied for was granted by the lower court, but the decree was reversed and the case remanded on appeal for the reason that, said the court, the Strohacker decision and those following it dealt with questions of fact and not of law and both of the parties had erroneously construed the Strohacker, Furqueron and Carson cases as establishing precedents as to the construction of the language used in the reservation. The question, said the court, involves the intent with which the words were used. Intent is always a question of fact and the case was remanded in order that evidence might be presented to determine the intent with which the words were used.

In 1958, the court was presented with a deed executed in 1900, involving lands in Union County, Arkansas, which deed contained the following phase: "except the mineral interest in said lands". Stegall v. Buck, 228 Ark 632, 310 SW 2d 251. There was testimony in the record to support the contention that the grantor understood oil and gas to be minerals and meant to reserve all rights to the oil and gas when he executed the deed in question. The lower court construed the phrase to exclude oil and gas. The finding was affirmed on
appeal. After discussing the prior decisions in *Strohacker*, *Furqueron*, *Carson* and *Brizzolara*, 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 in 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 of 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."

Thus, it can be seen that in the short space of five decisions, upon the identical point, the court, while reaching the same result in each case, has ruled, in *Strohacker*, that the interpretation of the reservation must be controlled by the intention of the grantor; in *Furqueron*, that the interpretation of the reservation must be controlled by the intention of both grantor and grantee; and, in *Stegall* that the intention of the parties is of no effect but that the effect of a reservation of the minerals is governed by "legal and commercial usage".

Much of the confusion in the opinions in these cases may be attributed to the court's apparent willingness to express a wordy and lengthy opinion when fewer words would have more appropriately served the same purpose. For example, in *Strohacker*, the court discussed eight separate and distinct grounds for decision. *Devlin on Deeds* was cited for the proposition that as a matter of law, petroleum was not known or recognized as a mineral in 1887. But, as pointed out in *Brizzolara*, the question presented is one of fact and not of law. Further, the evidence was abundantly clear in *Strohacker* that the grantor, at the time of execution of the conveyance, had no intention of reserving any minerals to itself but intended only to protect itself against claims under the warranty clause. Why it should have been necessary to reach any other ground for discussion cannot be gleaned from the report.

*Carson* forms another interesting case in point. In that case, great reliance was placed upon *Strohacker* and *Furqueron*. But after so doing, the court seems to have decided that Bauxite was not a mineral at all. If this be so, why was it even necessary to discuss *Strohacker* and *Furqueron* which deal only with minerals? Further, in *Carson*, the court subtly injects the proposition that all Missouri-
Pacific reservations couched in the language found in that case may be void for a new and different reason, namely that the reservation appears to be as broad as the grant and hence void. If this be so, the court should have squarely so held for such decision would have put to rest any further litigation and would have provided sound guide lines for examining attorneys and inquiring landmen of the future.

The decision in Stegall is perhaps the most astounding of the entire line. Here for the first time the court adopted a form of "Rule in Shelley's Case" approach to the construction of mineral reservations; rejected the contention that intention played any part in the construction of the reservation; and, determined that henceforth the meaning of the word "minerals" in a reservation should be governed by its "legal and commercial" usage at the time and place where used.

Nothing in the prior decided cases serves as a sound basis for the rule in Stegall, and indeed Stegall appears contra to the preceding cases. It is true that in Strohacker, the court mentioned that if exploration and development operations had been general and legal or commercial usage had recognized oil and gas as minerals, the reservation would undoubtedly be good. But this part of the Strohacker rule appears to be one of law, and not of fact. The court has yet to favor us with the meaning of "legal and commercial usage" and research has failed to develop the construction which other jurisdictions may have placed upon the term.

Additional difficulty is encountered in an endeavor to ascertain "the time and place" where the words were used. Time, of course, is established by the date shown on the deed. But what of the place? Thousands of acres of Arkansas lands were once owned by railroad companies and northern and eastern coal mining interest. Suppose the deed of such corporate owner was executed in St. Louis and delivered in Arkansas. Is the place where the word "mineral" was used at the place where the deed was executed or is the place where the deed was delivered? Nothing in the reported cases indicates the answer to this problem. Suppose further that the corporate deed be executed in Pennsylvania. Pennsylvania to this day continues to hold that oil and gas are not minerals. Is the reservation in a deed executed in Pennsylvania, covering Arkansas lands, to be construed according to the Pennsylvania meaning of the term "minerals"?

A more troublesome question involves the practical problem of endeavoring to determine, without an examination of intent, the time when a reservation of minerals included oil and gas. Most
examining attorneys have been exposed to a chain of title containing
a reservation of one kind or another where grantors making conveyance
subsequent to the original reservation simply incorporated the iden-
tical reservation in their deeds. If intention really does not matter,
which of the remote grantors, copying the reservation from his deed,
shall now be held to own the oil and gas?

Laying aside criticisms, certain fundamental rules may be
considered established concerning reservations containing the word
"minerals" or "coal and minerals". Stated briefly, these are:

1. The use of the word mineral in a reservation made prior
to 1940 creates an ambiguity in the instrument which ambiguity
may be resolved by evidence outside the instrument itself.

2. The construction to be given the word "mineral" is that con-
struction which "legal and commercial usage" accorded the
word at the time and the place where used.

3. Legal and Commercial Usage is a question of fact to be
established by evidence and not a question of law.

4. The intention of the grantor in using the word "mineral" in a
reservation must yield to the legal and commercial meaning
of the word.

Assuming the correctness of these rules, how is the question
concerning such reservations raised? In each of the cited cases,
the remote grantee brought an action to quiet title to the oil and
gas. This proceeding was, of course, instituted and tried in the
Chancery court and was subject to appeal de novo to the Supreme
Court. This procedure undoubtedly is appropriate in most cases.
Since the court has subtly shifted position a number of times on
this question, however, it may be that a desirable procedure to
follow in cases of this type would be the commencement of an
action for slander of title in the Circuit court, try the case to a
jury, and leave to the Supreme Court only questions of law.

Under either approach, the type and quantity of evidence to
be presented is significant. Arkansas has long adhered to the rule
that a grantor claiming against the provisions of his grant has the
burden of proof. For this reason, the remote grantee probably has
the burden only of introducing his deed and chain of title and this
alone should create a prima facie case in his behalf.

On the other hand, those claiming minerals to include oil and
gas should be prepared to prove the place where the deed was
executed, the place where the deed was delivered, the fact that exploration or development of oil and gas lands was in fact underway at either place or that exploration and development were at least commonly known in either place.

As time progresses the matter of accumulating proof on these points becomes more and more difficult. Most of those who practiced law before and around the turn of the century are now deceased. Likewise most bankers and merchants in business at that time are retired or deceased. So how do you obtain the necessary evidence? I had the good fortune to be associated with Tom Harper of Fort Smith and Bill Wynne of El Dorado in the preparation and presentation in the U. S. District Court for Western District of Arkansas, of a case of this type involving lands in Johnson County and involving a deed executed in 1897.

In that case, we presented recorded copies of oil and gas leases recorded about the time of the reservation. Such leases, we submit, show both legal and commercial usage, for only an attorney could have prepared them, and the recital of consideration for the execution of the lease assuredly is evidence of commercial traffic in such leases. We further offered articles of incorporation of various companies formed to speculate in oil and gas; copies of ancient newspapers with news items relating to the drilling and exploration for oil and gas; and, through some rather fortunate cross-examination, showed by oral testimony that the lawyers and bankers of that day knew about oil and gas and understood its significance. Based on such testimony, Judge Miller ruled as a matter of fact that oil and gas were known to be minerals in Johnson County in 1897. The style of the case is Mothner v. Ozark Real Estate Company, et al., and Judge Miller's decision was affirmed by the Eighth Circuit Court of Appeals early this year.

Yet another form of proof might be in the nature of proof as to the legal meaning of minerals. It seems fair to observe that the court's attitude on this problem appears to be influenced by the relative lack of value attributable to the minerals at the time of the conveyance. This attitude, which I characterize as a willingness to hold that the grantor intended to part with everything not known to be of special value, is in marked contrast to many holdings of our courts when dealing with the doctrine of laches. Touching the laches question, the courts have recognized that mineral values of little or no significance today may in a short time become worth millions. Why this recognition is made in one line of cases and disregarded in another defies logical explanation.

Mineral has been often defined as anything which can be sev-
ered from beneath the surface and sold for a profit. None of the reported cases here discussed have defined minerals except in terms of the word sought to be defined.

It is submitted that the parties, grantor and grantee, intended by use of the reservations here discussed to leave intact in the grantor all minerals, whether valuable or worthless and whether known or unknown.

The results reached by the Arkansas Supreme Court have brought about a situation where the grantor loses that which he did not sell, for which he has not been paid, and with which he did not intend to part while the grantee obtains that for which he did not pay and which he did not except to receive.

Perhaps to the credit of the court, it has exhibited a willingness to shift position on this question as additional litigation is presented. If this is correct, it seems appropriate to seek a complete review of the law on this subject with, I profoundly hope, a clarification which deals more equitably with all parties.