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Mineral Severance in Wyoming

James R. Learned

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NOTES

MINERAL SEVERANCE IN WYOMING

The Wyoming Supreme Court treated the problem of severance of the mineral estate or fee from the surface estate, in some of its aspects, in the case of *Ohio Oil Co. v. Wyoming Agency.*[1] The courts of the older, more populous, and consequently more extensively exploited mineral regions have developed the concept of severance to its present ramified nature.

Historically, the mining law of the United States is a product of the unique problems and necessities of the nation, arising out of the vast areas of new and uncharted lands acquired from England, France, Spain, and Mexico during the period of territorial expansion.[2] The law of the grantors could not be adopted because their law had been developed under different conditions to meet different problems. The principle of severance did exist in their law, but the mode of application varied with the grantor nation. The English common law recognized private rights in the soil underlying surface estates and granted the proprietor full ownership in the mines and minerals under his land, unless the minerals were gold or silver. Those were reserved for the discretion of the Sovereign.[3] The original land grants under royal charters in the present New England and central Atlantic coast areas reserved a fifth of any value extracted from or produced on the land as rental.[4] In Spain,[5] France,[6] and Mexico,[7] mines and minerals were

1. 179 P. (2d) (Wyo. 1947).
2. Davis, Fifty Years of Mining Law, 50 Harv. L. Rev. 897 (1937).
3. Regina v. Earl of Northumberland (Case of Mines), 1 Plowd. 310, 75 Eng. Rep. 472 (1568).
4. Ibid.
5. Shaw v. Kellog, 170 U. S. 312, 18 Sup. Ct. 632 (1897).
6. 1 Lindley, Mines, p. 22.
7. Castillero v. United States, 2 Black 17, 67 U. S. 360, 17 L. Ed. 360 (1862).

state domain. The property owner had title to the surface estate only. The United States Supreme Court reversed all of that foreign law and established the doctrine that mines and minerals in privately owned land are the property of the landowner.[8]

The terminology used in discussing severance has been standardized through frequent application. The mineral estate is frequently described as the "mineral fee".[9] The fee simple title before severance is called the "general title".[10] Where the severance is effected by lease, the term is logically "lease severance".[11] If it is necessary or desirable to distinguish between a conveyance of the entire mineral estate and a conveyance of only a part of it, the terms "total severance" and "partial severance" are utilized.

Once the ownership of the mineral rights became established, the nature of the ownership came into question. The property owner could sever his surface estate by conveyance of a part. His property boundaries extended vertically downward as well as horizontally outward.[12] There was no reason for placing greater restriction on severance in one direction than in another. The farmer in Pennsylvania discovered that he could reap a double harvest from his land by selling the underlying coal and yet retaining the surface farmland. The courts recognized this right, holding that a separate conveyance of the minerals in place was a valid, enforceable transaction.[13] The surface right remained in the grantor and the mineral right was transferred to the grantee.[14] Both were landowners with individual, corporeal interests in their respective properties.[15] They were not joint tenants or tenants in common.[16] Each owned in severalty that to which he had title. The owner of the mineral fee subsequent to the conveyance severing the titles could re-convey without the consent of the owner of the surface estate, unless the initial contract provided otherwise.[17]

Once severed and treated as a separate estate, the mineral fee became subject to the general rules of real property in most respects.[18] The resident minerals, including not only the various metalliferous deposits, but also coal, clay, marble, slate, sand, and assorted building stones, were more readily subjected to the definition of real property than were the fugacious minerals—oil, gas, and water. The evanescent nature of these latter elements was the source of troublesome problems for the courts. The owner of the mineral fee could lose his minerals by seepage into adjacent strata. The owner of the adjacent general estate or mineral fee could penetrate vertically into the oil bearing strata and yet extract oil, gas, or water from the adjacent mineral fee through the natural lateral flow resulting from subsurface pressures or osmotic action. In the case of coal, the

8. Shaw v. Kellog, 170 U. S. 312, 18 Sup. Ct. 632 (1897).
9. Ibid.
10. Hartwell v. Cammon, 10 N. J. Eq. 128 (1854).
11. Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290 (1923).
12. Callahan v. Martin, 3 Cal. (2d) 110, 43 P. (2d) 788 (1935).
13. Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760 (1858).
14. Kentucky Block Cannel Coal Co. v. Sewell, 249 Fed. 840, 1 A. L. R. 556 (C. C. A. 6th 1918).
15. Castillero v. United States, 2 Black 17, 67 U. S. 360, 17 L. Ed. 360 (1862).
16. Virginia Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. 1020 (1896).
17. Ibid.
18. Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760 (1858).

fee to the space occupied by the mineral had been held to terminate when the mine was exhausted.[19] A similar holding in a case involving the conveyance of oil or gas rights would encounter difficulty not only because of their fugacious nature, but also in the tendency of either of these minerals to occur in more than one producing horizon. As a result of these and other considerations, the courts were not even in full agreement as to whether oil and gas should be judicially considered as minerals. That point has been decided affirmatively.[20] A minority of the state courts have not recognized the concept of title severance as being applicable to conveyances of oil and gas rights, regarding the grantee not as the owner in fee simple of a corporal hereditament, but as the possessor of the legal right to conduct exploration and production operations.[21]

Severance may be accomplished by various means. The lease temporarily conveys the mineral fee to the lessee, not merely for his use and occupation but for the actual extraction of the minerals in place.[22] A quasi-severance may be effected by license. The licensee has no estate in the mineral in place, but may own the mineral as personal property once it has been extracted from the soil.[23] A total or partial severance may be effected by conveyance of the general title with an exception or reservation of the mineral fee, in whole or in part.[24] Partial severance may be accomplished by a conveyance of a single mineral only, where there are other minerals under or over the one conveyed.[25] Separate conveyances may be made of separate minerals, creating individual property rights in the individual minerals conveyed.[26]

Once the mineral fee has been severed from the surface estate and separate titles have been created, the rights, responsibilities, and privileges of the individual owners with respect to each other and to the state become possible issues. Each owner receives with his title an implied grant of such rights as are essential to the enjoyment of his property.[27] Thus the mineral owner has the right to make a reasonable use of the surface in the processes of exploration and removal of the minerals. However, he has the responsibility of conducting these operations in the customary manner, without acts of negligence toward the owner of the surface

19. Moore v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N. E. 6 (1907).
20. Barker v. Campbell-Ratcliff Land Co., 64 Okl. 249, 167 Pac. 468, L. R. A. 1918A 487 (1918).
21. Wyoming Law Journal 92, 95 (1947).
22. Walker, Property Interests Created by Lease, 7 Tex. L. Rev. 539 (1928).
23. United States v. Noble, 237 U. S. 74, 35 Sup. Ct. 532, 59 L. Ed. 844 (1915).
24. Shell Oil Co. v. Manley Oil Corp., 124 F. (2d) 714 (C. C. A. 7th 1941), Cert. denied, 316 U. S. 690, 62 Sup. Ct. 1278, 86 L. Ed. 1761 (1942).
25. Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 25 Atl. 597 (1893); Marquette Cement Mining Co. v. Oglesby Coal Co., 253 Fed. 107 (N. D. Ill. 1918).

An interesting possibility arises from the holdings to the effect that the owner of the general title may convey single minerals rather than the entire mineral estate if he prefers doing so. Thus there could be as many titles as there were separate minerals underlying the surface estate. In the case of oil and gas, in the states recognizing the existence of a fee simple in those minerals, there could be as many titles as there were producing horizons, if the grantor expressly so conveyed. The fantastic ramifications of this possibility are more readily apparents when it is observed that there are more than 150 minerals occurring in Wyoming alone.

26. Beulah Coal Mining Co. v. Heihn, 46 N. D. 646, 180 N. W. 787 (1920).
27. Shell Oil Co. v. Manley Oil Corp., 124 F. (2d) 714 (C. C. A. 7th 1941).
28. Treadway v. Wilson, 301 Ky. 702, 192 S. W. (2d) 949 (1946); English v. Harris Clay Co., 225 N. C. 467, 35 S. E. (2d) 329 (1945).

estate.[28] A standing judicial exception to this general rule is the right of the surface owner to subjacent support. The mining operations must be conducted in such a manner that no subsidence is caused; and, the owner of the mineral fee becomes liable in damages with or without negligence if there is subsidence.[29] This rule has been extended to protect one mineral owner from the operations of the owner of a deeper mineral estate.[30] As to the state, the severance of the mineral fee from the surface estate creates separately taxable properties, each capable of sale or incumbrance.[31] Any interest in the mineral estate is taxable as land.[32] A tax lien on one does not attach to the other.[33] If the owner of the surface takes out the minerals, the owner of the minerals may maintain trespass.[34] Each estate is subject to a judgment lien but a lien on one does not affect the other where the estates are separately owned.[35] The mineral fee, once severed, becomes a freehold estate of inheritance, subject to the laws of descent, devise, and conveyance.[36] It follows from the recognition of the separate and distinct nature of the estates created by severance that mere adverse possession of the one does not necessarily constitute possession of the other.[37]

In *Ohio Oil Co. v. Wyoming Agency,* the Wyoming Supreme Court considered the effects of severance on tax liens, judgment liens, and adverse possession.[38] It was held that property must be assessed for taxation in the name of the true owner, if known;[39] and that a valid tax sale of the surface estate based on assessment in the name of the surface owner, where severance had placed the mineral title in another, does not carry the mineral fee.[40] The court held further that a judgment lien against the surface estate based on irrigation assessments did not attach to the minerals, where severance had occurred before the assessments were made. It was indicated that a different result would have been reached if the assessments had preceded the severance. The court rejected a contention that title to the mineral fee was acquired by adverse possession of the surface estate, holding that there could be no adverse possession of minerals that had never been worked or even discovered, where there had been prior severance of the mineral fee and the surface estate. The owner of the mineral fee was allowed to maintain an action to quiet title despite the fact that he was not in possession of the minerals. The statutory requirement of possession[41] was waived by the court on the theory that the remedy existed independent of the statute[42] or be-

29. Cole v. Signal Knob Coal Co., 95 W. Va. 702, 122 S. E. 268 (1924).
30. Marquette Cement Mining Co. v. Oglesby Coal Co., 253 Fed. 107 (N. D. Ill. 1918).
31. Hosack v. Crill, 204 Pa. 97, 53 Atl. 640 (1902).
32. Barwise v. Sheppard, 299 U. S. 33, 57 Sup. Ct. 70, 81 L. Ed. 23 (1936).
33. Stuart v. Commonwealth, 94 Ky. 595, 23 S. W. 367 (1893).
34. Ashman v. Wigton, 12 Atl. 74 (1887).
35. Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1 (1901).
36. Beulah Coal Mining Co. v. Heihn, 46 N. D. 646, 180 N. W. 787 (1920).
37. Vorhes v. Dennison, 300 Ky. 427, 189 S. W. (2d) 269 (1945).
38. 179 P. (2d) 778 (Wyo. 1947).
39. McCarthy v. Union Pacific Ry. Co., 58 Wyo. 308, 131 P. (2d) 326 (1942).
40. Sims v. Vosborg, 43 N. M. 255, 91 P. (2d) 434 (1939).
41. Wyo. Comp. Stat. 1945 sec. 3-7001. "An action may be brought by a person in possession, by himself or tenant, of real property, against any person who claims an estate, or interest therein, adverse to him, for the purpose of determining such adverse estate or interest."
42. Grove v. Jennings, 46 Kan. 366, 26 Pac. 738 (1891).

cause the legal title gave him constructive possession.[43] An influencing consideration in the waiver was the inability of the plaintiff to maintain an action of ejectment because of the non-fulfillment of the statutory requirement that such action be brought against one who "unlawfully keeps him out of possession".[44]

The Wyoming law on severance as established in this case follows the general pattern set by the mineral producing states, with the exception of the holding that an action to quiet title may be maintained by one not in possession of the real property in controversy. The majority rule is that a statory requirement of possession in a quiet title action may be satisfied only by actual possession or possession in fact as distinguished from constructive possession simply by virtue of legal title and that one having the legal title and in constructive possession only cannot maintain the action.[45] However, the holding of the court seems much better adapted to the requirements of the mineral industry of Wyoming than the majority rule would have been. The standard procedure adopted by oil and gas producers in the state for the procurement, exploration, and development of new production areas does not always entail an immediate possession in fact of the mineral fee. Frequently the early exploration is of a geophysical nature; and, whether the torsion balance or the seismic method is employed, no actual possession is taken of the potential producing strata. If test wells are drilled to obtain paleontologic information, possession in fact may have been taken of the mineral fee underlying the particular surface estate selected for the location; but, there has been no taking of possession of other non-contiguous mineral estates included within the boundaries of the deformational or stratigraphic trap. In view of these practices, an application of the strict majority rule, requiring the owner have actual possession of the mineral fee before an action to quiet title can be maintained, acts to deprive the holder of a valid title of a remedy against an interloper who seeks to cast a cloud upon the validity of the title by adverse possession of the surface estate.

JAMES R. LEARNED.

UNFAIR COMPETITION FROM NON-COMPETING GOODS

"Unfair competition" has been treated by the courts for the last two centuries.[1] The original concept was that it consisted of the substitution of goods or wares of one person for those of another, thus inducing the purchase under the false impression as to their origin. To obtain relief two factors were necessary, a "palming off", and actual competition between the two parties.[2] The deception

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43. Mitchell v. Titus, 33 Colo. 385, 80 Pac. 1042 (1905).
44. Wyo. Comp. Stat. 1945 sec. 3-7003.
45. See 51 C. J. 188.

1. Handler, Unfair Competition, 21 Iowa L. Rev. 175, 179 (1936).
2. Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581 (1872); Goodyear's Rubber Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 537 (1888); Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247 (1891).