Land & Water Law Review

Volume 3 | Issue 1 Article 6

1968

Mineral Conveyances - Determination of the Estate the Grantor Purports to Convey - Sheltering the Royalty Interest under the Umbrella of the Warranty - The Non-Applicability of the Doctrine of Record Notice - Selman v. Bristow

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CASE NOTE

MINERAL CONVEYANCES—Determination of the Estate the Grantor Purports to Convey—Sheltering the Royalty Interest Under the Umbrella of the Warranty—The Non-Applicability of the Doctrine of Record Notice. Selman v. Bristow, 402 S.W.2d 520 (Tex. Civ. App. 1966).

This decision determines who as between the grantor and grantee must bear the burden of an outstanding one-eighth "of the royalty"[1] interest which was undisclosed by the warranty deed between the parties. This outstanding interest was created by a reservation in the deed from Mrs. Weeden to Bristow and Austin, the grantors in the principal case.[2] Bristow and Austin then conveyed to Selman. In this conveyance, the grantors reserved an undivided one-fourth interest to themselves and purported to grant an undivided three-fourths interest to Selman.[3] Selman chose not to make any title search and the deed failed to mention the royalty commitment[4] held by the defendants' grantor, although, there was reference to the Weeden deed as the source of title.[5] The grantors initiated this action to determine their share of the burden imposed by the Weeden reservation. The trial court ruled in favor of the grantors and applied the formula which they advanced; namely, that the outstanding interest be apportioned between the holders of the mineral interests according to the portion of the mineral interest held—this would mean that the grantors would bear one-fourth of the burden and the grantee would bear three-fourths. On review, the Court of Civil Appeals reversed the trial court on the basis of their construction of the effect of the warranty deed, their construction of the intent of the parties from the face of the instrument,[6] and an application of the *Duhig* rule.[7] A

1. Selman v. Bristow, 402 S.W.2d 520, 521 (Tex. Civ. App. 1966), *writ of error denied*, 406 S.W.2d 896 (Tex. 1966).
2. *Id.* at 521.
3. *Id.* at 523.
4. 1 WILLIAMS & MEYERS, OIL & GAS LAW § 303.1, at 448 (1964) (hereinafter cited as WILLIAMS & MEYERS).
5. Selman v. Bristow, *supra* note 1, at 523.
6. *Id.* at 523.
7. Peavy-Moore Lumber Co. v. Duhig, 135 Tex. 503, 144 S.W.2d 878 (1940). In a dispute where the grantor—by warranty deed—purported to convey a one-half mineral interest and reserve a one-half mineral interest when, in fact, the grantor received only one-half of the mineral estate in his grant, the court held that the grantor was estopped from asserting his reservation against the grant by virtue of the warranty. Thus, the rule is that where there has been a conveyance by warranty deed of more than the grantor actually holds at the time of the conveyance, the grantor will bear the burden of the loss because of his warranty to the grantee.

request for a writ of error was denied by the Supreme Court of Texas.[8]

Since this case involves the operation of certain definitions, it is necessary to give cursory attention to the definition of certain terms. A *warranty deed* is a contract between the paries which has the same effect as a similar contract between the parties to a sale of goods. It is a pledge by the seller (grantor) that the quality and quantity of the goods (property) which are the subject of the sales contract (deed of conveyance) are the same as described by that sales contract.[9] A *mineral interest* is a present realty interest which carries certain appurtenances; among these is the right to the development of the minerals in place[10] and a right to share in the use of the fruits of the production of these minerals (the royalty).[11] A *royalty interest* is a present realty interest[12] which, in the absence of any additions by specific terms of the conveyance, is the right to have the use of a share of the production.[13] It is to be observed that these standard definitions make a royalty interest a part (an appurtenance) of the mineral interest, conveyed as part of that interest unless it has been specifically "carved out" from the mineral interest.

In theory, this would mean that a warranty deed which passed a mineral interest would, absent any language indicating some other state of title, also be a warrant that the particular appurtenances to that mineral interest were included and that no part of the inherent rights to the use of a share of the production have been severed.

However, the finding by the trial court that the burden of the outstanding royalty should be apportioned between the mineral interests is a finding that the definitions outlined above do not apply to the facts of the principal case. This

8. Bristow v. Selman, 406 S.W.2d 896 (Tex. 1966).
9. 77 C.J.S. *Sales* §§ 301, 302(d) (1952).
10. Stephans County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566 (1923). This case held that the question of an interest in the minerals in place as a realty interest was a closed question in Texas; the question having been answered in the affirmative. *Id.* at 292.
11. WILLIAMS & MEYERS § 202.2, at 24 and § 301, especially the summary at 442 and 443.
12. Sheffield v. Hogg, 124 Tex. 290, 77 S.W.2d 1021 (1934). This case held that a royalty interest is a realty interest and, hence, is subject to certain types of taxation which affect realty interests and do not affect personalty interests.
13. WILLIAMS & MEYERS § 301, at 436.

follows, in that, if the warranty is not to be extended to the royalty interest—if the royalty interest is considered to be a separate estate from the mineral interest—the grantee must look beyond the warranty from his grantor to ascertain the quantum of the estate which he takes.[14] If the grantee must look beyond his grantor's warranty, then he must depend upon the record and the doctrine of record notice applies by virtue of the reference to the Weeden deed.[15] This record appraises the grantee of the fact that there is an outstanding interest in the royalty and he takes his grant subject to the burden of this interest.[16] This analysis would lead to the result handed down by the trial court.

The Court of Civil Appeals begins its analysis by stating that: "Both the interest in the minerals in place and the interest in the royalty based on production of these minerals are separate and distinct estates in land."[17] This statement is not accurate in that, strictly speaking, there can be at most only two estates in any given land—the surface estate and the mineral estate.[18] Each of these estates may be divided into various interests which are less than the full estate and, it would seem, this is what the court is trying to suggest. However, the use of the term estate appears to cause the court to attempt to conduct its analysis of the principal case in terms of *three* distinct and separate estates, none of which are appurtenances of the others, each of which may be separately conveyed. This treatment would further mean that a warranty with respect to any one of these estates alone would not be a warranty with respect to the others. The effect of this thinking is reflected in the opinion of the court when it seeks to describe the interest held by the grantors at the time of their conveyance to Selman; the court states: "Prior to their conveyance to Selman, Bristow and Austin owned

14. W. T. Carter & Bros. v. Davis, 88 S.W.2d 596 (Tex. Civ. App. 1935). This case held that in cases involving mineral conveyances by a quitclaim deed, the record will determine what the parties took at the time(s) of their conveyance(s). The inference here is that in the absence of any expression of intention as between the grantor and the grantee as to what is to be passed by the conveyance, the record will rule. The opposing proposition would be that where the intent as between the parties is clear without any reference—warranted—the quantum passed will be determined by the face of the instrument between the parties.
15. *Id. See also* Loomis v. Cobb, 159 S.W. 305 (Tex. Civ. App. 1913).
16. *Id.*
17. Selman v. Bristow, *supra* note 1, at 524.
18. WILLIAMS & MEYERS § 301, at 431 n.1.

100% of the minerals in place.'"[19] If this is an accurate description of the quantum held by the grantors, then it seems clear that their warranty is sound because they *did* hold all that they purported to dispose of in their conveyance. Further, it would mean that the mineral estate *did not* include any severed royalty interest as an appurtenance. Therefore, the grantee should be held to the duty to look beyond the warranty of his grantor to the record to determine the existence of any severed royalty interests and the result in the trial court would appear to be the result which should rule at the appellate level.

The court qualifies—actually contradicts—the statement noted above in the immediately succeeding sentence in which it states: "They (the grantors) could not, however, because of the outstanding royalty interest, convey to Selman the full fee simple title to three-fourths of the minerals and yet at the same time reserve one-fourth of the minerals for themselves."[20] This is recognition of the generally accepted nature of the royalty interest as a necessary appurtenance of the full mineral interest. The effect of this recognition is the inducement of a situation which is subject to the provisions of the *Duhig* rule and which will charge the full burden of the outstanding interest to the grantor on his liability under the warranty. The general rule to be derived from the decision, then, is that the warranty umbrella extends to the royalty interest and will operate to shelter the grantee against an assertion of the grantors' reservation against his grant.

In reaching the holding discussed above, the court also decides that the doctrine of record notice does not apply in cases of this type when the grantee fails to make a title search. This in effect means that the reference to the prior deed can not operate to limit the granting clause. This is because the warranty states what is to be granted and guaran-

19. Selman v. Bristow, *supra* note 1, at 524. Note also the statement which says that: "[I]n effect, such a reservation [reference to the royalty reservation] would be equivalent to a reservation . . . of the mineral estate . . . ." If this statement is limited only to the interest in the use of the production, it is correct, but if equivalent is given its usual meaning, it is not correct. The royalty interest doesn't carry any of the appurtenances of the mineral interest and the use of the word equivalent seems to be further evidence of confusion resulting from the definition of these interests as "separate and distinct estates in land."

20. *Id.*

tees the quantum of that grant,[21] while the record notice doctrine operates to answer the question of what is conveyed in cases where there has been no express statement of what is to be conveyed.[22] This is in line with the law of the jurisdiction and with the general law as respects the operation of record notice with respect to a warranty deed in the area of mineral conveyances.[23] It raises the question of whether such holdings are compatible with an established public policy which gives great weight to the record of title in conveyancing.[24] The implication with respect to the record notice doctrine arising from this case is that the grantee may ignore the record and choose to rely solely on the warranty of his grantor, and the grantor bears the entire risk of his failure to fully define the nature of the interest which is to be conveyed.

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21. *Supra* note 9.
22. W. T. Carter & Bros. v. Davis, *supra* note 14.
23. Peavy-Moore Lumber Co. v. Duhig, *supra* note 7, at 879. *See also*, Body v. McDonald, 334 P.2d 513 (Wyo. 1959) which held that actual notice is not sufficient to allow a limitation to be placed on the grant where there has been a conveyance by a warranty deed. If the court in the principal case had found that the grantee did know of the reservation in the chain of title, it is doubtful that the result would have been different.
24. Loomis v. Cobb, *supra* note 15. *See also* the discussion of public policy behind the doctrine of record notice in Sheffield v. Hogg, *supra* note 12.