Wyoming Law Journal

Volume 3 | Number 2 Article 4

December 2019

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her the statutory share.[21] Unless there is a contrary preference given in the will, the courts will generally cause the estate to be taken in the following order: residuary intestate property, residuary legacies, general legacies, and specific legacies.[22] All legacies abate before devises of realty.[23] To the extent that it is necessary, the members of each class must contribute pro-rata to make up the deficiency.[24] In New York, however, the above system of abatement is not followed, instead all other beneficiaries, regardless of class, contribute in proportion to the property received by them.[25] Apparently the New York courts take the view that such an adjustment will upset the testator's scheme of disposition the least.[26]

At common law the devise or bequest which is relinquished by the spouse upon election became intestate property and went to the heirs. Today, however, the courts of equity will sequester the repudiated devise or bequest and distribute it to the disappointed devisees and legatees.[27] Thus where a residuary legatee has been deprived of his legacy by the election, the benefit intended for the spouse will be sequestered to compensate him.[28]

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OWNERSHIP OF WYOMING MINERALS UNDER FAULTY FEDERAL PATENTS USED IN RAILWAY LAND GRANTS

Landowners in Wyoming holding deeds to lands patented prior to December 10, 1903 under federal land grants may be the nescient recipients of a mineral windfall. This may be the present effect of a decision of the United States Supreme Court delivered June 22, 1914 in the case of *Burke v. Southern Pacific Railroad Company.*[1]

This possibility arises by virtue of the court's determination that a patent clause reserving mineral lands was void. The clause was contained as standard nomenclature in patents issued by the Land Department under the provisions of the railway land grant acts, and was included from 1866 until omitted by order

21. Dunlap v. McCloud, 84 Ohio St. 272, 95 N. E. 774 (1911).
22. 3 Woerner, op. cit. supra note 16, sec. 452; 4 Page, op. cit. supra note 19, secs. 1497, 1498, 1500; Baker v. Baker, 319 Ill. 320, 150 N. E. 284, 42 A. L. R. 1514 (1925); Ballinger's Devisees v. Ballinger's Adm'r., 251 Ky. 405, 65 S. W. (2d) 49 (1933); Rexford v. Bacon, 195 Ill. 70, 62 N. E. 936 (1902); Lonergan's Estate, 303 Pa. 142, 154 Atl. 387 (1931).
23. 4 Page, op. cit. supra note 19, sec. 1508. Page also states in the same section that by statute in some states the devises abate pro rata with the legacies of the same class.
24. 4 Page, op. cit. supra note 19, sec. 1496; with the exception that a legacy for value has priority over other legacies, 4 Page, op. cit. supra note 19, sec. 1501.
25. In re Byrnes Estate, supra note 8.
26. 47 Harv. L. Rev. 889.
27. 2 Pomeroy's Equity Jurisprudence, sec. 519 (5th ed. 1941); See also Merchants Nat. Bank v. Hubbard, 222 Ala. 556, 133 So. 723, 74 A. L. R. 657 (1931); 1 Woerner, op. cit. supra note 16, sec. 119 at p. 406.
28. Trustees of Kenyon College v. Cleveland Trust Company, 130 Ohio St. 107, 196 N. E. 784, 99 A. L. R. 224 (1935).
1. 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527 (1914).

of the Secretary of the Interior after December 10, 1903.[2] The clause read: "Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands."[3] The terminology of the clause indicates a continuing effect applying to the lands even after issue of the patent and excepting from its operation lands ultimately ascertained to contain minerals. The Supreme Court held that the insertion of such a provision was beyond the power of the Land Department, that body having authority to reserve only mineral lands known to exist as such prior to the issuance of the patent but releasing all authority to effect the land upon issue. The effect of the holding was to vest a general title[4] in the patentee to all lands described in the patent, in the absence of a showing of fraud in the procuring of the patent which would create a right of action in the government to maintain suit to annul the transfer. By the terms of an 1896 statute, suits brought by the United States to vacate or annul any patent to lands theretofore erroneously issued under a railroad or wagon road grant could only be brought within five years from the passage of the act, and suits brought to annul patents issued after the passage of the act could be brought within six years.[5]

By this holding, the patentees acquired a general title which could be severed into mineral and surface estates at the discretion of the title holder.[6] If such a severance was made by the railroad, the general rules of real property control the subsequent devolution of the estates.[7] However, much of the land acquired by the railroads under the faulty patents was conveyed prior to the *Burke* decision. Since the patentee regarded itself as the holder of only the surface estate and coal and iron, it made no attempt to reserve or except the remaining minerals from the operation of the conveyances, and the deed conveyed the patentee's entire interest in the land to the grantee.[8] The grantee accordingly acquired the general title of his grantor.[9] At this point the patentee railroads could possibly have maintained an action to rescind the transaction on the ground of mutual mistake of fact. The prospects of a favorable judgment in such an action are dubious at best, since many courts have held that the fact that the subject matter of a contract possessed qualities which the parties did not believe it to possess is ordinarily immaterial and insufficient to warrant rescission.[10] The patentee would have more readily obtained relief in equity. The requirements for equitable relief are generally held to be that there exist a mutual and material mistake of fact, not induced by the negligence of either party, with each party having equal opportunity to acquire information regarding the subject matter.[11] The party seeking to avoid a contract or secure equitable relief must act within a reasonable time after

2. Ibid.
3. Id. at 909.
4. Hartwell v. Camman, 10 N. J. Eq. 128 (1854).
5. 29 Stat. 42 (1896), 43 U. S. C. A. 900 (1928).
6. Caldwell v. Fulton, 31 Pa. St. 475, 72 Am. Dec. 760 (1858).
7. Id. at 761.
8. Kimbley v. Luckey, 72 Okla. 217, 179 Pac. 928 (1919).
9. Shaw v. Kellogg, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1050 (1898).
10. Wood v. Boynton, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610 (1885).
11. Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798 (1876).

knowledge of the mistake is obtained.[12] If the patentee failed to attempt any such recovery procedure or attempted unsuccessfully, the grantee retained the general title which he acquired originally. Accordingly, he could sever the estate at his descretion.[13]

If the patentee's grantee conveyed the land without severance, and many did so prior to the Burke decision, the general estate passed by the deed just as in the case of the conveyance executed by the railroad. Again the possibilities of legal or equitable litigation would arise. This relief would be available only where there had been no intervening conveyance of legal title to a purchaser for value without notice, since a transfer to a bona fide purchaser cuts off any equitable right arising as a result of the mistake.[14] Thus the patentee could no longer seek a remedy under the contract conveying the land to its grantee once that grantee had deeded the land to a bona fide purchaser.

A problem arises where there is an ambiguity in the conveyance of the land by the patentee or by an intermediate grantor possessing the general title, as in deeds containing the clause: "Subject to reservations and restrictions in deeds to said lands made in U. S. Patent .....", and referring back to the original patent issued to the railroad. If the ambiguous clause is interpreted to reserve the minerals in the grantor, a severance is effected and the grantee acquires only a surface estate. If the clause does not have the effect of reserving or excepting the minerals, there is no severance and the grantee holds a general estate, subject, however, to the earlier described possibility of litigation for rescission or reformation.

The determination of the effect of the "subject to" clause in the deed must be by application of the general rules of contract construction and interpretation.[15] Emphasis is directed primarily to the intention of the parties, particularly to the intent of the grantor in including the ambiguous clause.[16] It may be argued that the grantor was not cognizant of the invalidity of the attempted reservation in the patent and intended the clause to support the warranty of title extended with the conveyance of the land only as a protective measure to avoid litigation with his grantee as to the extent of the estate conveyed. It is apparent that this is the probable explanation where the deed was executed before the patent reservation was declared void. If the clause is so interpreted, to be merely protective, no severance is effected and the grantee acquires a general estate. However, the grantor may contend that the "subject to" clause was an ambiguous clause for language intended to retain any mineral rights arising out of the patent. This argument could be more logically made if the deed were executed after the Burke decision than before. As an alternative argument, the grantor may contend that the "subject to" clause was not intended to reserve any mineral rights to him but was inserted to limit the estate conveyed to the grantee to that estate which the grantor thought he owned at the time the property was transferred. There-

12. Ibid.
13. Caldwell v. Fulton, supra note 6.
14. Goode v. Riley, 153 Mass. 585, 28 N. E. 228 (1891).
15. Hicks v. Sprankle, 149 Tenn. 310, 257 S. W. 1044 (1924).
16. Barker v. Campbell-Ratcliff Land Co., 64 Okla. 249, 167 Pac. 468, L. R. A. 1918A 487 (1917).

fore, even though it did not reserve or except the minerals for the grantor's express benefit, it did restrict the estate passed to the grantee to that intended by the grantor, a surface estate only. This argument has been raised under similar circumstances and dismissed as erroneous with the opinion that a warranty deed reciting that all minerals were sold out of the described tract before acquisition by the grantor and that all minerals were therefore excluded from the conveyance operated to convey all the grantor's rights and title to the tract in the absence of express reservation to the grantor; and, the mineral estate held by the grantor without his knowledge at the time he conveyed passed to the grantee despite the recitation.*17* This logic stresses the grantor's intent to pass not just the estate which he thought he could pass but as great an estate as he actually could. Since the deed was intended to pass the grantor's entire interest, and that interest was a general estate, the grantee acquired a general estate.

In ascertaining the effect of an ambiguous deed, the construction placed upon it in practical conduct by the parties is an indication of their intention.*18* Acts and declarations of the parties prior and subsequent to the transfer may be resorted to as indicia of the construction intended.*19* If the grantor allowed a considerable period of time to pass without asserting or attempting to assert any dominion over the minerals, that fact may be weighed as evidencing an absence of any intent on his part to retain an interest in the minerals by virtue of the ambiguous clause. It is a general rule of deed construction that the interpretation of an ambiguous conveyance which cannot be clarified by application of other rules of analysis may be resolved by the adoption of that method of construction which favors the grantee as against the grantor on the theory that the latter selected the terminology used in the instrument and is therefore chargeable with responsibility for its deficiencies.*20* As is indicated however, this rule is adopted only as a last resort, and it may not be relied upon as the exclusive determining factor in litigation which may arise in this situation.*21* If the facts of the individual case are such that the ambiguous deed is construed as the grantor contends, to retain the mineral estate, then a severance is effected and the grantee acquires only the surface estate.

Landowners in Wyoming who are ultimate grantees of lands included in the federal patents to the railroads issued prior to December 10, 1903 have these problems and possibilities to be resolved before the exact status of their ownership may be finally determined. The ambiguity does not include coal and iron lands since the original void "excluding and excepting" clause expressly renounced any application to these lands, and subsequent grantees were not misled as to their ownership of them. The present landowner may draw these conclusions upon examination of his abstract. First, if there is a recorded express severance of the mineral estate to the benefit of the severing grantor, the ultimate grantee acquired only the surface estate and any unsevered minerals if the severance was partial

17. Commercial National Bank in Shreveport v. Herrick, 3 So. (2d) 449 (La. App. 1941); Criticized, 16 Tul. L. R. 151 (1941).
18. Mansfield v. Place, 93 Mich. 450, 53 N. W. 617, 18 L. R. A. 39 (1892).
19. Livingston v. Ten Broeck, 16 Johns. 14, 8 Am. Dec. 287 (N. Y. 1819).
20. Douglass v. Lewis, 131 U. S. 75, 9 Sup. Ct. 634, 33 L. Ed. 53 (1889).
21. Smith v. Furbish, 68 N. H. 123, 44 Atl. 398, 47 L. R. A. 226 (1894).

rather than total.[22] Second, if there is a deed in the chain of title which is ambiguous in terminology or effect, the grantor of the deed may seek to establish a severance by judicial resolution of the ambiguity. Third, if there are no reservations, exclusions, or ambiguities, or if any ambiguity has been or may be resolved to effect no severance, the ultimate grantee acquired a general estate but his immediate grantor has a possible equitable action to rescind or reform the deed on the ground of mutual mistake.

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PRE-TRIAL PROCEDURE AS AFFECTING SUBSEQUENT COURSE OF ACTION

With the adoption of the new Federal Rules of Civil Procedure,[1] the use of a pre-trial practice has gained in popularity in both State and Federal courts. Rule 16 of the Federal Rules sets out the operation of the pre-trial procedure in the Federal Courts.[2] Practically all states which have adopted a pre-trial system since the Federal Rules have regulations similar to or copied from Rule 16. In the interpretation of the effect of the pre-trial procedure, the weight of judicial authority comes from Massachusetts and Michigan, where such a proceeding has been in effect with great success since the middle thirties in Suffolk and Wayne counties respectively. The purposes of the pre-trial procedure have been held to be a simplication of the issues and a cutting away, by agreement and admission of the parties, all encumbrances to a speedy trial.[3]

Rule 16 leaves the techniques of pre-trial formulation of issues up to the discretion of the individual judge. The usual procedure, however, is briefly dis-

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22. 2 Wyo. L. J. 63 (1948).
1. 28 U. S. C. A. foll. sec. 723c.
2. "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
   (1) The siplification of the issues;
   (2) The necessity or desirability of amendments to the pleadings;
   (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
   (4) The limitation of the the number of expert witnesses;
   (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
   (6) Such other matters as may aid in the disposition of the action.
   The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."
3. Geopulos v. Mandes, 35 F. Supp. 276 (Dist. Col. 1941); Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co., 3 F. R. D. 440 (S. D. N. Y. 1944); Kearney v. Glenn, 1 F. R. D. 203 (W. D. Ky. 1940); Glaspell v. Davis et al, 2 F. R. D. 301 (D. Ore. 1942); Eisman et al v. Samuel Goldwyn, Inc. et al, 30 F. Supp. 436 (S. D. N. Y. 1939).