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Adverse Possession - Oil and Gas - Adverse Possession of Oil and Gas Royalties in North Dakota

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theory that such notice can be implied from unequivocal acts of ownership.[7] On the other hand, the courts following the subjective theory hold that there must be some real and tangible assertion of ownership,[8] rather than a mere quiet acquiescence, the apparent theory being one can gain no title which he has not asserted.

The basic concept of adverse possession involves acquisition of title by running of the Statute of Limitations as opposed to the true owners action of ejectment. North Dakota however, appears to follow the majority view and apply the objective theory that possession is presumed adverse and claim of title is to be inferred from the fact of possession.[9] The alleged requirements of claim of title and hostility of possession mean only that the possessor, or those holding under him, must use and enjoy the property continuously for the required period as the average owner would use it without the true owner's consent.[10] Possession meeting these requirements is in actual hostility to the true owner's rights irrespective of the possessors actual state of mind or intent.[11] The objective theory is the most practical. The conduct of the adverse party should govern and not the thoughts or reasons buried within his mind. The true owner, by a very limited vigilance, may protect his interest, and has an action in ejectment for a certain statutory period.

RONALD YOUNG

ADVERSE POSSESSION — OIL AND GAS — ADVERSE POSSESSION OF OIL AND GAS ROYALTIES IN NORTH DAKOTA. One Skarda owned land in North Dakota. In 1934 he mortgaged the property to the land Bank Commissioner, who later assigned the mortgage to the Federal Farm Mortgage Corpora-

7. Butler v. Hines, 101 Ark 409, 142 S.W. 509 (1912); Bird v. Stark, 66 Mich. 654, 33 N.W. 754 (1887); Krumm v. Pillard, 104 Neb. 335, 177 N.W. 171 (1920).

8. Evert v. Turner, 784 Iowa 1253, 169 N.W. 625 (1918); Hess v. Riedler, 117 Ala. 525, 23 So. 136 (1898); Foltz v. Brokhage, 151 Neb. 216, 36 N.W. 2d 768 (1949).

9. See N.D. Cent. Code § 28-01-04 (1961). "No action for the recovery of real property or for the possession thereof shall be maintained, unless the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within twenty years before the commencement of such action." N.D. Cent. Code § 28-01-11 (1961).

10. See Haney v. Breeden, 100 Va. 781, 42 S.E. 916 (1902), "while the intension to claim title must be manifested, it need not be expressed."

11. Carpenter v. Coles, 75 Minn. 9, 77 N.W. 424 (1898) "This adverse intent to oust the owner and possess for himself may be generally evidenced by the character of the possession and the acts of ownership of the occupant."

tion. In 1936-1937 Skarda conveyed royalty interests amounting to 9½% oil and gas underlying the property to various grantees. In 1939 the mortgage was foreclosed by an action in which the holders of royalty interests were not joined as defendants. As a result of the foreclosure action the Federal Farm Mortgage Corporation received two Sheriff's Deeds covering the property. In 1942 plaintiff contracted to purchase the property from the Federal Farm Mortgage Corporation and entered into possession. In 1943 the Federal Farm Mortgage Corporation conveyed the property to plaintiff by a deed of limited warrant which excepted and reserved to the grantor 50 percent of all oil, gas, and other minerals underlying the land. Plaintiff cultivated the land and paid all taxes thereon from 1942 to 1956. In 1949 plaintiff leased the land for oil and gas purposes. Production of oil and gas commenced in 1953. In 1955 plaintiff sued to quiet title, contending that defendant's 9 percent royalty interest had been lost to plaintiff by adverse possession. The Supreme Court of North Dakota *held* that plaintiff's possession of the property was not inconsistent with or adverse to the existence of defendant's royalty interest. Hence defendant has not lost title to the royalty interest by adverse possession. *Yttredahl v. Federal Farm Mortgage Corporation*, 104 N.W.2d 705 (N.D. 1960).

Assuming that usual requirements have been complied with, it is generally held that title to subsurface minerals will attach to subsurface minerals through adverse possession of the surface before any serverance of the mineral estate.[1] A perpetual non-participating oil and gas royalty is an interest in real property,[2] and severance of a mineral interest from the surface estate creates two estates which are as distinct as if they constituted two different parcels of land.[3] It has been held or recognized in a large number of cases that after title to the surface estate of land has been severed from the underlying mineral estate, title to the minerals cannot be acquired

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1. Bremhoust v. Phillips Coal Co., 202 Ia. 1251, 211 N.W. 898 (1927); Jones v. New Orleans & NER Co., 214 Miss. 804, 59 So. 2d 541 (1952); Rio Bravo Oil Co. v. Staley Oil Co., 138 Tex. 198, 158 S.W.2nd 293 (1942).
2. Dallapi v. Campbell, 45 Cal. App. 2d 541, 114 P.2d 646 (1947), Ulrich v. Amerada Petroleum Corp., 66 N.W.2d 397 (N.D. 1954); Gulf Oil Corp v. Marathon Oil Co., 137 Tex. 59, 152 S.W.2d 711 (1941).
3. Jensen v. Sheker, 231 Ia. 240, 1 N.W.2d 262 (1941); Northwestern Imp. Co. v. Morton County, 78 N.D. 29, 47 N.W.2d 543 (1951); Ohio Oil Co. v. Wyoming Agency, 63 Wyo. 187, 179 P.2d 773 (1947).

by adverse possession through possession of the surface estate alone.[4]

In order to make a holding adverse there must be some denial of the mineral owner's right or some assertion of a claim inconsistent with his right.[5] If the surface owner exercises control over the mineral rights, by actual operations[6] or actual possession,[7] he may acquire title by adverse possession. Using the land for more agricultural purposes[8] or the payment of taxes on the surface estate[9] will not entitle the surface owner to claim title by adverse possession.

In the instant case the court in holding that adverse possession to the severed royalty interests is not possible by mere occupation of the severed surface estate, also stressed the fact that the foreclosure action was defective due to the failure to notify the respective royalty interest holders.[10] The same court held in *Payne v. A. M. Fruh Company*[11] that severed mineral interests may be acquired by mere possession of the surface estate although the title to the surface estate was acquired through an invalid tax deed.

It is submitted that with our court adhering to the theory that severed mineral rights are to be considered as a separate and distinct estate,[12] an enigmatic situation has resulted by distinguishing between title acquired by an invalid tax deed and that which is obtained through an invalid foreclosure action.

Perhaps a reconciliation could be derived from the procedure and effect of title acquired through a tax deed,[13] and that

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4. Foss v. Central Pacific R. Co., 9 Cal. App. 2d 117, 49 P.2d 292 (1935); Peterson v. Holland, 189 S.W.2d 94 (Tex. Civ. App. 1945); Ohio Oil Co. v. Wyoming Agency, 63 Wyo. 187, 179 P.2d 773 (1947).
5. Barker v. Campbell-Ratcliff Land Co., 64 Okl. 249, 167 Pac. 468 (1917).
6. Cook v. Farley, 195 Miss. 638, 15 So. 2d 352 (1943); Deruy v. Noah, 199 Okl. 230, 185 P.2d 189 (1947).
7. Sanford v. Alabama Power Co., 256 Ala. 280, 54 So. 2d 562 (1951); Claybrooke v. Barnes, 180 Ark. 678, 22 S.W.2d 390 (1929).
8. Barker v. Campbell-Ratcliff Land Co., 64 Okl. 249, 167 Pac. 468 (1917).
9. Buckner v. Wright, 218 Ark. 448, 236 S.W.2d 720 (1951); Saunders v. Hornsby, 173 S.W.2d 795 (Tex. Civ. App. 1943); McCoy v. Lowrie, 42 Wash. 2d 24, 253 P.2d 415 (1953).
10. Yttredahl v. Federal Farm Mortgage Corporation, 104 N.W.2d 705 (N.D. 1960).
11. 98 N.W.2d 27 (N.D. 1959).
12. Northwestern Imp. Co. v. Morton County, 78 N.D. 29, 47 N.W.2d 543 (1951).
13. Nelson v. Kloster, 68 N.D. 108, 277 N.W. 390 (1938), ". . . An independent grant from a sovereign authority which gives a new complete and paramont title . . .;" Baird v. Stubbins, 58 N.D. 351, 226 N.W. 529 (1929). ". . . A tax deed has priority over a sheriff's deed even though the tax deed was not recorded and the sheriff's deed was . . .;" See also Nystul v. Waller, 84 N.W.2d 584 (N.D. 1957); Bilby v. Wire, 77 N.W.2d 882 (N.D. 1956).

resulting from a Sheriff's Deed[14] in an foreclosure action.[15] However, this does not result in a harmonizing reasoning, inasmuch as the severance of the title of the mineral estate from the surface estate creates two distinct and separate parcels of land, and it therefore naturally follows that title to one cannot be adverse to the other regardless of the method by which possession was authorized to the surface estate.

F. C. ROHRICH

CIVIL RIGHTS — ACTION FOR DAMAGES — PERSONAL LIABILITY OF POLICE OFFICERS FOR VIOLATION OF CIVIL RIGHTS UNDER COLOR OF STATE LAW. Defendants, thirteen Chicago police officers, broke into plaintiff's home in the early morning forcing plaintiff and his family to stand naked in the living room while conducting an extensive search of the premises. Plaintiff was then taken to the police station, as a suspect, and held for ten hours of interrogation, was not allowed to call an attorney or be taken before a magistrate, and was subsequently released without criminal charges being preferred against him. Alleging that the defendants, though lacking a search warrant or warrant of arrest, acted "under color of the statutes, ordinances, regulations, customs and usages" of Illinois and the City of Chicago, plaintiff sued defendants for violation of his civil rights.[1] On writ of certiorari the Su-

14. North Dakota Horse & Cattle Co. v. Serumgard, 17 N.D. 466, 117 N.W. 453 (1908); See N.D. Cent. Code § 32-10-09 (1961).

15. Knowlton v. Coye, 76 N.D. 478, 37 NW.2d 343 (1949), ". . . Conveys to the grantee the same title which the mortgagor possessed at time of execution of the mortgage . . .," Stewart v. Berg, 65 N.W.2d 621 (N.D. 1954), ". . . Does not invalidate the proceedings against unknown defendants . . .;" See N.D. Cent. Code § 32-17-06 (1961).

1. The action was based on 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1952), which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In determining the civil liability of the defendants the Court was not primarily concerned with whether they had acted in accordance with their authority or had misused it, see Home Telephone and Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913), but was concerned with the narrower issue of whether "Congress, in enacting (17 Stat. 13 (1871), 42 U.S.C. § 1983 (1952)), meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." (81 Sup. Ct. 473, 476 (1961)). Previous cases relative to this question have been brought on the basis of 62 Stat. 683 (1948), 18 U.S.C. § 242 (1948), which is the criminal counterpart of 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1952), and in supporting jurisdiction of the federal courts under 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1952) in the immediate case, the Court relied entirely on cases dealing with interpretation of the "under color of" clause