2001

Kanawha Hocking Coal Company v. Carbon County and Centennial Development Company : Brief of Appellant

Utah Supreme Court

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Wallace D Hurd; Attorney for Plaintiff-Appellant .

Plaintiff-Appellant,

vs.

CARBON COUNTY, a municipal corporation, and CENTENNIAL DEVELOPMENT COMPANY, a corporation,

Defendants-Respondents.

Case No. 13853

BRIEF OF APPELLANT

Appeal from a Judgment of the Seventh District Court
In and for Carbon County, Utah
The Honorable Edward Sheya, Judge

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TABLE OF CONTENTS

STATUTES CITED

CASES CITED

TABLE OF CONTENTS

AUTHORITIES CITED

IN THE SUPREME COURT
OF THE STATE OF UTAH

KANAWHA AND HOCKING COAL AND COKE COMPANY,
Plaintiff-Appellant,

vs.

CARBON COUNTY, a municipal corporation, and CENTENNIAL DEVELOPMENT COMPANY, a corporation,
Defendants-Respondents.

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BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action to quiet title to real property.

DISPOSITION IN LOWER COURT

The court granted a Motion for Summary Judgment finding plaintiff to be the owner of the surface rights, defendant Carbon County to be the owner of coal rights, and dismissing plaintiff's complaint with prejudice. From such judgment plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the judgment and a judgment in plaintiff's favor as a matter of law, or, in the alternative, a mandate that the case should be tried.

STATEMENT OF FACTS

The action in the lower court was originally filed by North American Coal Corporation, a corporation, to

quiet title to a tract of ground in Carbon County described as:

> Township 13 South, Range 10 East, Salt Lake Meridian, in Section 8: Lot 2 (NW¼NE¼); Lot 3 (NE¼NW¼); SW¼ of NE¼; NW¼ of SE¼; SE¼ of NW¼; NE¼ of SW¼.

While the suit was pending, North American Coal Corporation sold and conveyed the premises in question to Kanawha & Hocking Coal and Coke Company (R.21) and pursuant to stipulation of the parties and order of the lower court, Kanawha & Hocking Coal & Coke Company was substituted as plaintiff (R.24).

By their answers, both defendants admit that the plaintiff is the owner of the surface of the land described in plaintiff's complaint. Both defendants deny that plaintiff owns the coal underlying said premises and Carbon County alleges that it is the owner of said coal rights pursuant to two tax sales. The first of these sales was for unpaid taxes for the year 1932 and the sale was followed by the final May sale and an auditor's deed recorded May 26, 1937 in Book D of Auditor's Deeds at Page 185. This sale covers a portion of the premises described as:

> Lots 2 and 3 and the Southwest quarter of the Northeast quarter and the Southeast quarter of the Northwest quarter, Section 8, Township 13 South, Range 10 East, SLM.

The second preliminary tax sale was for the 1944 taxes and was followed by final May sale and an auditor's

endorsement, recorded June 13, 1949 as Entry No. 55783. The second sale covers the following portion of the premises:

> The NW¼SW¼; NE¼SW¼, Section 8, Township 13 South, Range 10 East, SLM.

See (R.7) and exhibits 1 and 2.

By amendment to answer Defendant Carbon County alleged that plaintiff's complaint is barred by the limitations set forth in Sections 78-12-5.1 and 78-12-5.2, Utah Code Annotated 1953, as amended.

The plaintiff's predecessor in title was the Utah Fuel Company which owned all of the acreage in question. On December 23, 1932, Utah Fuel deeded the surface of the property together with other lands to the Utah Grazing Lands Company by deed recorded in Book 5-N of Deeds at Page 411. Under date of August 31, 1950, Utah Grazing Lands Company reconveyed the surface of the premises to Utah Fuel Company by deed recorded in Book 5-Y of Deeds, Page 573, in the office of the County Recorder of Carbon County, Utah.

Pursuant to Requests for Admissions and Interrogatories, the plaintiff set forth its claims as to the invalidity of the tax sales in question (R. 28-29) and also set forth in detail the facts which constituted actual possession of the surface of the premises (R.29). Plaintiff also admitted that from 1951 to the time of filing the Answers, plaintiff had not conducted any drilling operation, nor had the plaintiff or its predecessors entered

into the coal seam underlying the premises. The answers to the Interrogatories further reveal that during this period of time, no taxes were assessed on the coal rights and plaintiff paid no taxes.

The plaintiff submitted Interrogatories to the defendant Centennial Development Company (R.11-12). Objections were filed to these Interrogatories (R.13). After hearing, the objections were sustained (R.18-19) and none of the Interrogatories were answered.

The defendants filed a Motion for Summary Judgment in reliance on the answers to the interrogatories and admissions. For the purpose of this motion the invalidity of the tax sales was admitted.

Following argument on the defendants' motion, the court entered a Summary Judgment finding that the plaintiff is the owner of the surface of the premises in question; that the defendant Carbon County is the owner of the coal rights underlying the property and dismissing the plaintiff's complaint with prejudice (R.55-56).

ARGUMENT

POINT I

PLAINTIFF'S ACTION IS NOT BARRED BY LIMITATION STATUTES AS THERE HAS BEEN NO SEVERANCE OF TITLE.

Appellant has searched in vain for Utah cases specifically dealing with the situation presented here. The Utah cases on the subject deal with surface rights where

taxes were assessed and paid and either the legal title holder or the tax title claimant asserted actual physical possession of the premises.

The only defense relied upon by both defendants is that the plaintiff's action is barred by the provisions of Section 78-12-5.1 and 78-12-5.2 Utah Code Annotated, 1953 as amended. These sections provide as follows:

> "78-12-5.1. *Seizure or possession within seven years — Provisio — Tax title.* No action for the recovery of real property or for the possession thereof shall be maintained, unless the plaintiff or his predecessor was seized or possessed of such property within seven years from the commencement of such action; provided, however, that with respect to actions or defenses brought or interposed for the recovery or possession of or to quiet title or determine the ownership of real property against the holder of a tax title to such property, no such action or defense shall be commenced or interposed more than four years after the date of the tax deed, conveyance, or transfer creating such tax title unless the person commencing or interposing such action or defense or his predecessor has actually occupied or been in possession of such property within four years prior to the commencement or interposition of such action or defense or within one year from the effective date of this amendment.
>
> "78-12-5.2. *Holder of tax title — Limitations of action or defense—Proviso.* No action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four

> years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other purchaser thereof at any public or private tax sale and after the expiration of one year from the date of this act. Provided, however, that this section shall not bar any action or defense by the owner of the legal title to such property where he or his predecessor has actually occupied or been in actual possession of such property within four years from the commencement or interposition of such action or defense. And provided further, that this section shall not bar any defense by a city or town, to an action by the holder of a tax title to the effect that such city or town holds a lien against such property which is equal or superior to the claim of the holder of such tax title."

The plaintiff has alleged and the defendants admit that the plaintiff is now and at all times has been the fee owner of the surface of the lands in question. This was expressly found by the trial court in its Summary Judgment. In their memorandum supporting the Motion for Summary Judgment, the defendants recognize the general rule as set forth in an annotation 35 ALR2d 129:

> "Where there is no severance of the title to the surface estate from title to the underlying mineral estate, adverse possession of the surface for the statutory period gives title to the minerals by adverse possession."

Following this statement of the rule are numerous citations from various states.

It is the plaintiff's position that this rule is applicable, and therefore, the plaintiff's admitted continuous possession of the surface constitutes possession of the subsurface minerals. The limitations statutes, thus by their own terms, do not apply to bar the action since plaintiff was in possession as required under the statute.

The defendants have shown no severance of title to the surface estate from title to the underlying minerals.

For a severance to be effected, there must be a valid deed or conveyance.

In *Gill vs. Colton* (4th Circuit, 1926) 12 Fed. 2d 531, the Court held that there was no severance of the mineral and surface estate because a deed purporting to sever the premises was not accepted by the grantee; a third party had already contracted to purchase the property and he had no notice of the unrecorded deed. Going on, the court states the general rule:

> "Unless there has been a severance, it is a general presumption that one who has possession of the surface, has possession of the sub-soil also."

In *Morse vs. Shackelford* (6th Circuit, 1926) 9 Fed. 2d 907, the court held that an attempted severance of a mineral and surface title was ineffective where the grantor had already conveyed without reservation. It is further stated that:

> "The first grantee, by possession of the surface also had possession of the minerals."

In *Rio Bravo Oil Company vs. Staley Oil Company,* 138 Tex. 198, 158 SW2d 293, the court held that when adverse possession sets limitation statutes in motion to mature title to the surface estate in a claimant, execution and delivery of a mineral lease by another, even during the period that the limitations are so running, will not operate as a severance so as to defeat the claimant's title to the mineral estate, as well as the surface estate. The court stated: "Only an *effective* deed will operate to sever the two estates." (Emphasis added) See also to the same effect on the matter of severance *Redmond vs. Cass* (1907) 226 Ill. 120, 80 NE 708.

In *Pierson vs. Case* (1961), 272 Ala. 527, 133 Southern 2d 239, a purchaser under an invalid tax deed sued to quiet title showing exclusive possession of the surface. The court held that such adverse possession of surface under color of title inured to the benefit of mineral claimants — the grantees of the surface claimant. The basis of the holding was that there could only be a severance by the legal owner.

Hunsley vs. Valter, 12 Ill. 2d 608, 147 NE2d 356 holds that adverse possession of the surface will inure to the benefit of mineral interests which were separated subsequent to the commencement of adverse possession. The court states that this is not in conflict with holdings that where severance occurs prior to adverse possession commencing the possession of the surface does not itself result in prescriptive rights to the minerals.

POINT II

PLAINTIFF'S ACTION IS NOT BARRED BY LIMITATION STATUTES SINCE PLAINTIFF HAS NOT BEEN DISPOSSESSED.

As stated in Volume 1, *Thompson on Real Property,* page 131:

> "It is the right of the owner of the freehold estate to the possession and enjoyment thereof and possession is presumed unless the contrary is shown." (Citing *Ownbey vs. Parkway Properties,* 222 NC 54, 21 SE2d 900)
>
> "Actual possession of a portion of a tract of land by the rightful and legal owner of the entire tract, constitutes constructive possession of the whole, but such possession continues unimpaired so long as there is not, in fact, an actual possession and occupancy by one claiming title by adverse possession." (Citing *Acosta vs. Nunez* (La. App.), 5 Southern 2d 574)

Seisin once established is presumed to continue until contrary is proved. (*Tesar vs. Bartels,* 148 Neb. 889, 32 NW2d 911, 2 ALR2d 1037)

Speaking of what is necessary to show possession of subsurface minerals, it is said in *Thompson on Real Property,* Vol. 1A, page 77, that it:

> " . . . must be actual, notorious, exhaustive, continuous and hostile for the statutory period in the same manner as a stranger. Actual possession is shown by opening and operating the mine and the possession is continuous if the operation is carried on at such seasons as the nature of the work permits or the custom of the neighborhood re-

> quires. It is not required that the act of ownership should be done every day or month or at any definite intervals, but they should be of such frequency and character that they would at all times apprise the owner that his seisin is being interrupted and his title endangered." (Citing *Calvat vs. Juhan,* 119 Col. 561, 206 P2d 600; *Vorhes vs. Dennison,* 300 Ken. 427, 189 SW2d 269; *Rose vs. Martin,* 310 Ken. 193, 220 SW2d 385; *Gordon vs. Park,* 219 Mo. 600, 117 SW 1163)

In *Moore vs. Empire Land Company* (1913), 181 Ala. 344, 61 Southern 940, a fee owner of land conveyed the surface separate and apart from the minerals and the grantee and his successors were in actual possession of the surface with no one in the actual possession of the minerals. The court held that adverse possession of the surface gave title by adverse possession to the minerals pointing out that the conveyance of the surface separate and apart from the minerals was a legal fiction and in the absence of physical possession of the mineral interest distinct from possession of the surface, did not operate to sever the possession of the mineral rights and the rights being held by the possessor of the surface. Consequently, in absence of a physical severance, the possession of the minerals went with and followed the possession of the surface.

Where a person in possession of mineral land continues his possession for the full length of the limitation period, a deed executed by him during his possession which severs the mineral rights from the surface does not stop the running of the statute of limitations in

favor of the mineral rights. *Kilpatrick vs. Gulf Production Company* (1940 Tex.), 139 SW2d 653. To the same effect see *Crawford vs. Humble Oil and Refining Company* (1941 Tex.), 150 SW2d 849.

In 35 ALR2d at page 149 the general rule is stated that where a person is in adverse possession of unsevered mineral land and the owner of land or the one in actual adverse possession conveys or leases the mineral estate, the adverse possession will continue in the same manner as if there had been no conveyance or release. Cited in support of this general rule are cases from Alabama, Kentucky, Mississippi, Pennsylvania, Texas and Virginia.

As stated in Vol. 1A, *Thompson on Real Property,* Mines and Minerals, Section 165 at page 76:

> "Where the adverse possession of the surface commences before the mineral severance by the title holder, the adverse possession continues to own against the mineral severance." *Huddleston vs. Peel,* 238 Miss. 798, 119 Southern 2d 921, 120 Southern 2d 776; *Birdwell vs. American Bonding Company* (Tex. Civil App.), 337 SW2d 120.

In *Payne vs. Fruh Company* (North Dakota, 1959) 98 NW2d 27, is there held that where one person owned the surface and subsurface until after the accrual of taxes and issuance of a deed to the county, the tax title constituted a title to the entire land, including the minerals. Possession of the surface under the tax title constituted possession of the minerals even though there was a mineral conveyance after the date of the tax deed. This

case is the reverse of the present situation, where the minerals were sold for taxes although the title holder owned both the surface and subsurface.

In *Huntington City, a municipal corporation vs. C. W. Peterson,* 30 Ut2d 408, 518 P2d 1246, this court decided:

> "Until levy and assessment are made, there is no tax lien on realty; but when made, the tax relates back to the owner as of January 1st of the taxable year."

On January 1, 1932 title to all of the premises described in the complaint, both surface and subsurface, was vested in Utah Fuel Company. Not until December of 1932 was the surface title conveyed by Utah Fuel Company to Utah Grazing Lands Company. The rule laid down in *Payne vs. Fruh Company* Supra is therefore applicable.

CONCLUSION

The judgment of the District Court should be revised since the plaintiff's cause of action is not barred by the statutes of limitation. Plaintiff and its predecessors have admittedly always owned and been in possession of the surface of the property in question. The defendants have shown no severance of title, which can only occur by a valid conveyance or reservation. The tax sales are admittedly invalid and therefore cannot constitute a severance of the subsurface and surface estates. Even if this were the case, as to the 1932 tax sale, the authorities are clear that where the fee owner

is in possession of the surface prior to a mineral severance, such possession continues against the mineral severance. Furthermore, there has been no dispossession of the record owner nor taking possession by the tax title claimant and under the authorities, possession in the owner of the fee title is presumed to continue under such circumstances.

It is respectfully submitted that the Summary Judgment should be reversed and the case remanded with directions to enter judgment in favor of the plaintiff and against the defendants to quiet plaintiff's title to the mineral rights. In the alternative, the mandate should be that the case be fully tried.

Respectfully submitted,

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