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Kanawha and Hocking Coal and Coke Company v. Carbon County, and Centennial Development Company : Petition for Rehearing

Utah Supreme Court

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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.	CASE NO. 13853

PETITION OF PLAINTIFF-APPELLANT FOR REHEARING

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TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE STATE OF UTAH:

The plaintiff-appellant, Kanawha and Hocking Coal and Coke Company respectfully petitions the Court for a rehearing on its opinion filed May 6, 1975 in the above-entitled action. The petition is based on the following ground.

The Court's opinion does not mention or pass upon one of the legal defenses raised by the appellant on its appeal from the summary judgment.

RESPECTFULLY SUBMITTED,

Wallace D. Hurd
Attorney for Plaintiff-
Appellant

ARGUMENT

Analysis of the Court's opinion filed May 6, 1975 shows that neither the majority opinion nor the dissenting opinion makes mention of or distinguishes the two different factual situations presented by the two tax sales.

The plaintiff's predecessor, the Utah Fuel Company owned all of the acreage in fee simple. The majority opinion states that the tax sale of the mineral rights and the auditor's deed effectively severed the surface estate from that of the underlying minerals. The opinion then adopts the rule that continued pos-

session of the surface after such severance does not constitute possession of the minerals when unaccompanied by any acts of dominion over the minerals.

The opinion, however, does not differentiate between the factual situation presented by the 1932 tax sale and that involved in the 1944 tax sale. On December 23, 1932, Utah Fuel Company deeded the surface of all of the ground to Utah Grazing Lands Company. That company held title to the surface until 1950 when a reconveyance was executed to Utah Fuel Company. Thus, it appears that at the time of the 1932 tax levy, there had been no severance of the mineral and surface estates, while in the 1944 tax sale, these estates had been severed for approximately twelve years.

As appears from the authorities cited hereafter, what appear to be the better reasoned decisions, make a definite distinction between the two factual situations.

MEMORANDUM OF LAW

This court has decided in Huntington City, a municipal corporation v. C. W. Peterson, 30 U2d 408, 518 P2d 1246, that a lien for general property taxes

attaches as of January 1 of the taxable year. As appears from the factual statement, at the time the 1932 tax lien attached, Utah Fuel Company owned the property in fee simple absolute and there had been no severance of the mineral and surface estates.

It is stated in Thompson on Real Property, Vol. 1A, 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 v. Peel, 238 Miss. 798, 119 Southern 2d 921, 120 Southern 2d 776; Birdwell v. American Bonding Company (Tex. Civil App.), 337 SW2d 120.

Such factual situation is illustrated in Payne v. Fruh Company, (N.D., 1959) 98 NW2d 27, where the ownership of surface and subsurface was in a single individual until after accrual of taxes. It is there held that the tax title constituted title to the entire land, and that possession of the surface under the tax title was possession of the minerals, even though there was a mineral conveyance after the date of the tax deed.

In 35 A.L.R. 2d, at Page 149, it is expressed as a general rule that:

> "Where a person is in adverse possession of unsevered mineral land, and the owner of the land, or the one in 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 lease."

Following this statement are citations of cases from Alabama, Kentucky, Mississippi, Pennsylvania, Texas and Virginia.

Of particular interest is Wallace v. Neal, 227 Kentucky 30, 11 SW2d 1002, (1928), which states that even if an oil and gas lease was sufficient to severe mineral and surface estates, the severance could not effect the defendant's possession, and title when continued to maturity, and could not suspend or toll the statute of limitations in his favor after it had begun to run. To the same effect is Rio Bravo Oil Company v. Staley Oil Company (1942) 138 Tex. 198, 158 SW2d 293.

In Hunsley v. Valter, 12 I11.2d 608, 147 NE2d 356, the opinion did distinguish between possession of the surface which enured to the benefit

of the mineral interest where severance occurred after commencement of the adverse possession, and the general rule that if mineral and surface estates are severed, possession of the surface does not include possession of the minerals.

CONCLUSION

The court's opinion leaves unanswered the legal question as to whether possession once begun of surface and minerals which are unsevered will be interrupted by a subsequent severance of these estates.

It is respectfully urged that this legal matter should have been passed upon and decided by the court and it is respectfully urged that a rehearing be granted for this purpose.

RESPECTFULLY SUBMITTED,

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