CLAYBROOKE *v.* BARNES.

Opinion delivered December 23, 1929.

1. MINES AND MINERALS—ADVERSE POSSESSION BY PAYMENT OF TAXES.—Evidence *held* not to establish that defendant has acquired title to the severed mineral estate in wild and unimproved land, the surface of which was owned by her, by payment of the taxes for seven successive years, as provided by Crawford & Moses' Dig., § 6943.
2. ABANDONMENT—FAILURE TO PAY TAXES ON MINERAL RIGHTS.—Mineral rights underlying a tract of land are not lost on a failure to pay taxes thereon, unless there has been a separate assessment of taxes against them.
3. MINES AND MINERALS—ADVERSE POSSESSION.—Where there has been a severance of legal interests in minerals from the ownership of the land, adverse possession of the land is not adverse possession of the mineral estate, and does not defeat the separate interest in the mineral estate.
4. MINES AND MINERALS—ADVERSE POSSESSION.—Where the mineral estate has been severed from the surface estate, the only way the statute of limitations can be asserted against the owner of the mineral estate, so as to acquire title by adverse possession, is for the owner of the surface estate or some other person to take actual possession of the minerals by opening mines and operating them for the statutory period.
5. MINES AND MINERALS—ADVERSE POSSESSION.—In a suit by the owner of a mineral estate to enjoin the owner of a surface estate from removing minerals from 160 acres of land, evidence that the owner of the surface estate had worked surface mines on a part of the land at various intervals during 15 years held insufficient to show title by adverse possession.
6. MINES AND MINERALS—ADVERSE POSSESSION—BURDEN OF PROOF.—In a suit by the owner of a severed mineral estate to enjoin the owner of the surface estate from removing minerals therefrom, the burden of proof was on the owner of the surface estate to show that the title to the mineral estate had been acquired by adverse possession.

Appeal from Independence Chancery Court; *A. S. Irby,* Chancellor; reversed.

STATEMENT BY THE COURT.

On April 20, 1926, appellants brought suit in equity against appellees to enjoin them from mining or removing any minerals from the 160 acres of land described in

the complaint, and to cancel as clouds upon their title certain leases from Laura Barnes to the other appellees. Laura Barnes filed a separate answer, in which she claimed title to the mineral rights by adverse possession, and by payment of taxes on the lands for the statutory period as wild and unimproved lands. None of the other appellees claimed any right or title to the minerals.

The record shows that on the 17th day of November, 1911, appellants executed a warranty deed to the 160 acres of land in controversy to Charles F. Cole for the consideration of $750. All the mineral rights in and under said lands were excepted from the grant. On the 28th day of November, 1911, Charles F. Cole executed a quitclaim deed to said 160 acres of land to T. B. Tate, and the consideration recited in the deed was $750. The deed contained no exception of the mineral interest in the land. On the 8th day of August, 1918, T. B. Tate executed a quitclaim deed to said land to Laura Barnes, and the consideration recited in the deed was $650. No exception of mineral interests in the land was contained in this deed. On September 14, 1916, W. E. Barnes and Laura Barnes, his wife, executed a mineral lease for ten years to the 160 acres of land. On the 5th day of August, 1918, Laura Barnes executed a mineral lease to 80 acres of said land.

T. B. Tate was a witness for appellants. According to his testimony, when he received the quitclaim deed to said lands from Charles F. Cole, on November 28, 1911, he understood that he was not buying the mineral rights in the land, although the deed did not make any exceptions of the mineral interest. He did not intend to convey any mineral interest in the land when he executed the quitclaim deed to it to Laura Barnes on August 8, 1918. Witness bought the land from Cole for W. E. Barnes. The contract was that he was to pay for the land and take a deed for it, and, when Barnes had paid him the money, with ten per cent. interest, he was to convey the land by deed to W. E. Barnes. He paid Mr. Cole $750 as

the purchase price of the land. He was asked if he gave a bond for title to W. E. Barnes, and stated that he could not find any. He admitted that Barnes ought to have had a bond for title, because he had bought the land for Barnes. He testified that it was Barnes' duty to pay the taxes on the land.

The record shows that the taxes on the land were paid by W. E. Barnes from the year 1911 to the year 1917, inclusive, and by the W. E. Barnes estate for the year 1918. After that the taxes on the land were paid by Mrs. W. E. Barnes until the year 1927 inclusive. No mineral rights were assessed on the land until 1923; and for that year and afterwards appellants paid the taxes on the mineral rights or claims in the land.

Mrs. W. E. Barnes (Laura Barnes) was a witness for herself. According to her testimony, she never paid any attention to the land until her husband died in 1918. After he died, she took possession of the land, and T. B. Tate executed and delivered to her a quitclaim deed to the land. Neither she nor her husband ever moved on the land. She testified that T. B. Tate bought the land for her husband. She also testified that she had paid the taxes on the land from 1911 up to the present time. She also testified that her husband had a title bond from Tate to the land.

Other testimony relating to the amount of mining done on the land and tending to establish the adverse possession of appellee, Laura Barnes, in the mineral right to said lands, will be stated or referred to in the opinion.

The chancellor found the issues in favor of appellee, and the complaint was dismissed for want of equity. The case is here on appeal.

Ernest Neill, for appellants.

Coleman & Reeder, for appellees.

HART, J., (after stating the facts). It is first sought to uphold the decree on the ground that appellee, Laura Barnes, paid taxes on the land for seven years under color of title, and acquired title by such payment of taxes

under § 6943 of Crawford & Moses' Digest, as construed by the repeated decisions of this court. The record shows that the lands were wild and unimproved, but we do not think that the facts in the record sustain the contention of Mrs. Laura Barnes. It is true that in one place she testified that she had paid the taxes from the year 1911 up to the time she was testifying, in February, 1927. But her claim in this respect is not borne out by the record of tax payments nor in part by her own testimony. She admitted in her testimony that her husband had received a bond for title for the land from T. B. Tate, and that she did not take possession of it until after his death in 1918. T. B. Tate, who had the legal title to the land, and who testified that he purchased it for W. E. Barnes, testified that it was Barnes' duty to pay the taxes on the land. The tax records show that he did pay the taxes on the land until his death in 1918. The mineral interests in the land were separately assessed in 1923, and from that time on appellants paid the taxes on the mineral interest in the land. The payment of taxes by W. E. Barnes from 1911 to 1917 and 1918 inclusive will be deemed to have been made under his duty to pay them, as testified to by Tate, as being required under his bond for title. So it will be seen that Mrs. Laura Barnes did not pay the taxes for seven years in succession before 1923, when the mineral estate was separately assessed, and did not acquire title by the payment of taxes as provided under § 6493 of Crawford & Moses' Digest.

Besides, this court has held that the minerals underlying a tract of land are not lost by failure to pay taxes thereon unless there is a separate assessment of taxes against them. *Bodcaw Lumber Co.* v. *Goode,* 160 Ark. 48, 254 S. W. 345, 29 A. L. R. 578.

The record in this case shows that the deed from appellants to Cole contained an exception of the mineral rights from the ground, within the principles of law de-

cided in *Grayson-McLeod Lbr. Co.* v. *Duke,* 160 Ark. 76, 254 S. W. 350.

Where there has been a severance of the legal interest in the minerals from the ownership of the land, it has been held as to solid minerals, and the same rule has been applied to oil and gas, that adverse possession of the land is not adverse possession of the mineral estate, and does not defeat the separate interest in it. Summers on Oil and Gas, pp. 139 and 140; and Mills and Willingham on the Law of Oil and Gas, § 18. In *Scott* v. *Laws,* 185 Ky. 440, 215 S. W. 81, 13 A. L. R. 369, the court said that, since there was a severance of the mineral estate from the surface estate, the owner of the minerals did not lose his right or his possession by any length of nonuser, nor did the owner of the surface acquire title by the statute of limitations to the minerals by his exclusive and continued occupancy and enjoyment of the surface merely.

The rule was approved by this court in *Bodcaw Lumber Co.* v. *Goode, supra,* and the court said: "The rule of those authorities is that the title to minerals beneath the surface is not lost by nonuse nor by adverse occupancy of the owner of the surface under the same claim of title, and that the statute can only be set in motion by an adverse use of the mineral rights, persisted in and continued for the statutory period."

So it may be taken as settled that the two estates, when once separated, remain independent, and title to the mineral rights can never be acquired by merely holding and claiming the land, even though title be asserted in the minerals all the time. The only way the statute of limitation can be asserted against the owner of the mineral rights or estate is for the owner of the surface estate or some other person to take actual possession of the minerals by opening mines and operating the same. It is only when such possession has continued for the statutory period that title to the mineral estate by adverse possession is acquired. *Hoskins* v. *Northern Lee*

Oil & Gas Co., 194 Ky. 628, 240 S. W. 377; and *Maney* v. *Dennison*, 110 Ark. 571, 163 S. W. 783.

Tested by this rule, we do not think that appellee, Laura Barnes, has acquired title by actual adverse possession of the mineral estate in said land. Under the authorities above cited, the burden of proof to show such adverse possession rested on her. As said in the last case cited, the burden rested on the one asserting title to show adverse occupancy for a definite area sufficiently described to found a verdict upon. Evidence for appellee tended to show that some mining had been done on the land for each year since 1911, but nearly all of the mining had been done on a single 40-acre tract of land. All of the mining was surface mining, and no mines were opened up and mining machinery installed on the land. There was no occupancy of any of the land continuously for a period of seven years. The most that was shown was that, every three or four months, some of the appellees would work surface mines on the land. They all did so under leases from W. E. Barnes in his lifetime and from Mrs. Laura Barnes after his death. It is not possible, however, to take out any definite part of the land which was so mined, and the evidence does not show any continuous operation of mines for the period of seven years. At best it was only a fitful and desultory occupancy for mining purposes, and was not continued for the necessary length of time to give title by adverse possession for the statutory period of seven years.

It follows that the chancellor erred in finding in favor of appellees, and in dismissing the complaint of appellants for want of equity. The decree therefore must be reversed; and, inasmuch as the case seems to have been fully developed, the cause will be remanded with directions to the chancery court to enter a decree in accordance with the prayer of the complaint.