SMU | Dedman School of Law

SMU Law Review

Volume 3
Issue 3 *Survey of Texas Law for the Year 1948*

Article 3

January 1949

Real Property

Gilbert L. Jackson

supported by a $42,600 down payment at the execution of the lease.

Nonetheless since adoption of the position that a voluntary lease is enforceable,[68] the Texas courts have not been required to pass on the validity of a surrender clause in a lease of that nature[69] and they may yet find consideration unnecessary. However the mere fact that a voluntary lease is effective as a conveyance of land does not, *ipso facto* make the surrender clause effective also. For example, a covenant in such a lease is unenforceable, because a covenant must have consideration. But a surrender clause can hardly be construed as a covenant.[70] The possibility suggests itself that the clause creates in the lessee a power to terminate an interest in land together with its attendant obligations, and since a power coupled with an interest is irrevocable,[71] the grant of the power should be binding on the lessor, consideration or no consideration.

Sydney Farr.

REAL PROPERTY

Method of Accounting to Non-Operating Co-Tenant

IN the case of *White v. Smyth*[1] defendant, White, owned an undivided one-ninth mineral interest in 30,000 acres of land. He leased the remainder of the mineral interest from his cotenants for the purpose of mining asphalt. After terminating the lease, he continued to mine the asphalt rock and stated that while he had his equipment on the property he would take his one-

[68] Jones v. Bevier, 59 S. W. (2d) 945 (Tex. Civ. App. 1933) *writ of error refused.*

[69] *Ibid.* The court upheld a voluntary lease containing a surrender clause without passing on the enforceability of the latter.

[70] Taylor v. Witherspoon, 23 Tex. 643 (1859); 12 Tex. Jur. 8 (1931).

[71] Threadgill v. Butler, 60 Tex. 599 (1884); Gillaspie v. Murray, 27 Civ. App. 580, 66 S. W. 252 (Tex. Civ. App. 1902); 49 C. J. 1255 (1930).

[1] ..... Tex. ....., 214 S. W. (2d) 967 (1948).

ninth interest. Action was brought to enjoin the further taking of the asphalt rock, for partition, and for accounting. The jury found: (1) The minerals were not capable of partition. (2) 397,338.11 tons of rock were mined after the termination of the lease. (3) The value of the rock in the ground was 25c per ton or a total value of $99,334.53. (4) The net profit from the mining operation was $250,180.56. (5) Defendant did not mine more than his one-ninth share of the asphalt rock. The court found for the plaintiffs and directed sale of the entire mineral estate and reimbursement to the non-operating co-tenants in the amount of 8/9 of the net profit from the operations or $222,382.72. The court of civil appeals affirmed the decision of the trial court.[2]

In the majority opinion, written by Justice Smedley, the court points out that there had been some exploration for asphalt rock but not sufficient exploration to determine the mineral value of each tract of land. The limited exploration and the outcropping of the rock shows that the thickness of the rock and the quality varies on different portions of the land. Thus *Henderson v. Chesley*,[3] wherein partition in kind was allowed when there was no evidence of any mineral value, is not applicable. Since the cost of ascertaining the mineral content of the land was prohibitive, the decree of sale was affirmed. The holding in the principal case, that the land was not capable of partition finds support in the fact that in a prior partition suit of the surface the record shows that the mineral content of the land was not capable of partition and was held in undivided interests.

The next question presented was whether or not the defendant should be required to account for the rock taken, since the jury found that he took less than one-ninth of the mineral content of the entire tract. For this point the defendant relies on *Kirby Lumber Co. v. Temple Lumber Co.*,[4] wherein a co-tenant cut timber and the court required him to reimburse his co-tenant only

[2] White v. Smyth, 214 S. W. (2d) 953 (Tex. Civ. App. 1947).

[3] 273 S. W. 299. (Tex. Civ. App. 1925) *writ of error ref'd.*

[4] 125 Tex. 284, 83 S. W. (2d) 638 (1935).

to the extent of the lumber cut beyond his one-half interest. The court distinguishes this case on the ground that the timber land in the *Kirby* case was capable of partition because all parts of the tract of land were of equal value. Thus there seems to be no question but that the rock removed was the common property of the co-tenants.

The controversial issue is the method of accounting to the non-operating co-tenants. There seems to be no case in Texas where this problem has been before the courts with respect to solid minerals. In the field of oil and gas the rule is stated in *Burnham v. Hardy Oil Co.*[5] "One who takes oil without the consent of his co-tenants must account to them for their share of the proceeds of the oil less the necessary and reasonable cost of producing and marketing it."[6] With respect to solid minerals, the court quotes from *American Jurisprudence:*

> "When it is claimed that a co-tenant in possession of a mine or a mineral property has become liable to his co-tenants for profits accruing from his productive operations, the usual mode of settling the account is to charge him with all his receipts and credit him with all his expenses, thereby ascertaining the net profits available for distribution. In other words, the usual basis of an accounting by a co-tenant who works the common mine or develops the common oil or gas property is the value of the product, less the necessary expenses of the production."[7]

The principal cases cited by the majority are *Silver King Coalition Mines Co. of Nevada v. Silver King Consol. Mining Co. of Utah*[8] and *Cosgriff v. Dewey.*[9] In the *Silver King* case ore was mined, processed and sold by one co-tenant without the knowledge of the other co-tenant. The court held that the fact that the operation was secret and with intent to deprive co-tenant did not prohibit his claim for expenses of operation and cites *Appeal of*

[5] 147 S. W. 330, *affirmed* 108 Tex. 555, 195 S. W. 1139 (1917).

[6] *Id.* at 334.

[7] 14 Am. Jur. 106 (1938).

[8] 204 Fed. 166 (C. C. A. 8th, 1913).

[9] 21 App. Div. 129, 47 N. Y. S. 255 (N. Y. Sup. Ct. 1897) *affirmed* 164 New York 1, 58 N. E. 1 (1900).

Fulmer[10] with approval stating: "The general and just rule is that a co-tenant, in exclusive possession of mining property, who extracts and sells ore, may charge against its proceeds the reasonable and necessary expense of its extraction and marketing."[11] In the principal case the dissenting opinion, written by Justice Simpson, relies on *Appeal of Fulmer* and the majority opinion states that this case does not represent the majority view. The *Cosgriff* case, *supra*, where rock was extracted, crushed and sold by one co-tenant, holds that the co-tenant must account for the sale price less the cost of removal. In affirming the decision, the New York Court of Appeals in an opinion written by Justice O'Brien stated:[12] "The trial court held that the plaintiffs were entitled to maintain the action, and a reference was ordered for the purpose of ascertaining the value of the property taken by the defendant from the land, and stating the account between the parties." Later in the opinion the extraction of the rock is considered as waste and the court states: "... he must account (to his co-tenant) for its value." Then again, "... he must account to his co-tenant for their proportionate value."[13] It is submitted that both of the above cases use the selling price less the cost of extracting as a means of determining the value of the mineral in place rather than a measure of damages to the injured co-tenant.

In the *Fulmer* case, *supra*, on which the dissenting opinion relies, slate was mined and sold and that court assessed damages as the value of the mineral in place. As before stated, the *Silver King* case cites this case with approval, but the majority holds this not to be the weight of authority.

The dissent complains of allowing the non-operating co-tenants to profit by the investment and skill of the operating co-tenant and, in view of the fact that materials of greater value than the rock itself were combined with the rock in a manufacturing proc-

[10] 128 Pa. 24, 18 Atl. 493 (1893).
[11] 204 Fed. 166, 180 (C. C. A. 8th, 1913).
[12] 164 N. Y. 1, 58 N. E. I. (1900).
[13] *Ibid.*

ess, compares the holding to a case where a co-tenant in an oil lease is allowed to recover the selling price of gasoline less the cost to produce and manufacture.

Notwithstanding the dissent, the law in Texas would now seem to be that an operating co-tenant is accountable to his non-operating co-tenants for the amount received from the first sale of the product less the cost of preparing that product for sale no matter what or how complex that preparing process may be.

ADVERSE POSSESSION

The Supreme Court of Texas helped clarify the law of adverse possession during 1948 by their decision in *Ricks v. Grubbs.*[14] The record owner of a tract of land brought action in trespass to try title and the defendant claimed title under the 10 year statute of limitations.[15] The trial court found that the defendant had entered into possession in 1931 and had fenced the lot in question in 1932. From that time until 1943 defendant used the land continually for gardening and grazing. During this time the record owner made the following four assertions of ownership without objection by the defendant: (1) Grant of pipeline right and permission to inspect pipeline daily; (2) sale of strip of land for highway and permission to move fence; (3) grant of right to erect sign on property; and (4) permission for army to maneuver on lot.

The trial court directed a verdict for the plaintiff, record owner, and the court of civil appeals reversed and remanded.[16] The court of civil appeals relied on *Cobb v. Robertson,*[17] wherein the making of a survey by the record owner was held not to constitute a re-

---

[14] ..... Tex. ....., 214 S. W. (2d) 925 (1948).

[15] TEX. REV. CIV. STAT. (Vernon 1925) Art. 5510, Ten Years' Possession—"Any person who has the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward . . ."

[16] 212 S. W. (2d) 489 (Tex. Civ. App. 1948).

[17] 99 Tex. 138, 86 S. W. 746 (1905).

entry, and stated that there was no reentry by the record owner within the meaning of Article 5514,[18] and that the evidence raised an issue of fact to be decided by the jury.

The Supreme Court reversed the court of civil appeals and rendered judgment for plaintiff. Their opinion is based on Article 5515[19] as defined by the opinion in *Satterwhite v. Rosser*[20] which requires adverse possession to be "actual, notorious, distinct and hostile, and of such character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant."[21] Article 5510 requires "peaceable and adverse possession." These terms are defined in Articles 5514 and 5515. Article 5514 states: "Peaceable possession within the meaning of this chapter, is such as is continuous and not interrupted by adverse suit to recover the estate." Article 5515 states: "Adverse possession is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." In *Heard v. State*[22] the court said: ". . . The possession must be continuously and consistently adverse to the true owner." In *Southwest Lumber Co. v. Allison*[23] it was determined: ". . . Possession in order to be adverse must be exclusive."

In refusing to apply the rule of *Cobb v. Robertson* to the fact situation in the principal case, the Supreme Court is giving effect to the statute which requires that there be both peaceable *and* adverse possession. The rule now seems to be that any visible manifestation of ownership by the record owner at any time during the period of limitation will defeat adverse possession if the adverse possessor does not resist such acts of ownership.

Gilbert L. Jackson.

---

[18]TEX. REV. CIV. STAT. (Vernon 1925). art. 5514.

[19]TEX. REV. CIV. STAT. (Vernon 1925) art. 5515.

[20]61 Tex. 166 (1884).

[21]*Id* at 171.

[22]146 Tex. 139, 204 S. W. (2d) 344 (1947), comment, 2 SOUTHWESTERN L. J. 267 (1948).

[23]276 S. W. 418, 419, (Tex. Com. App., 1925).