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Adverse Possession of Minerals

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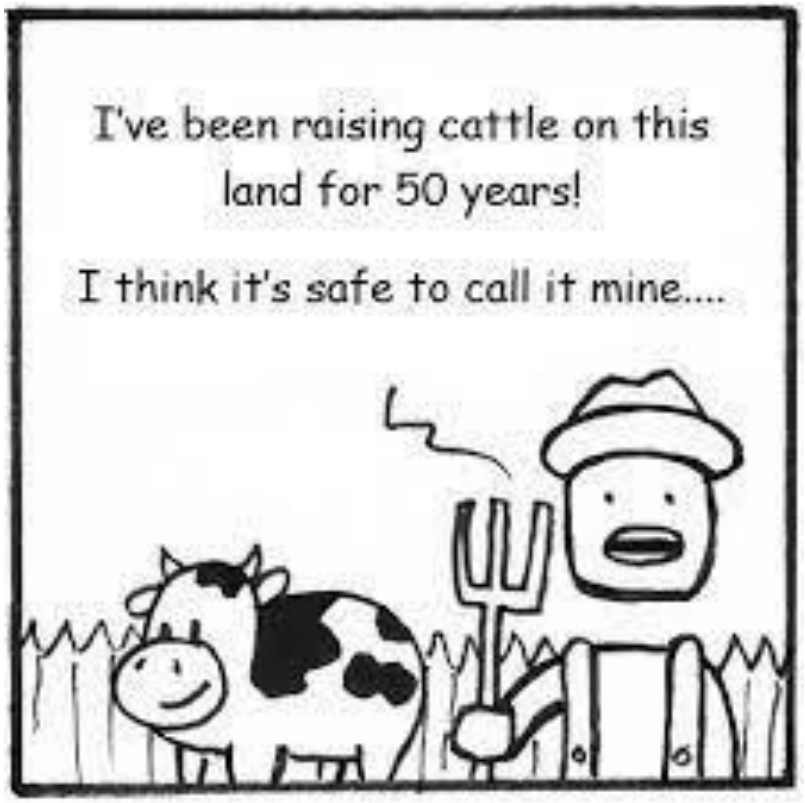
Adverse Possession



Tomechko v. Garrett...A Little Background

- Complaint filed on June 30, 2016
- *Corban v. Chesapeake Exploration, L.L.C.,* 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089, decided on September 15, 2016
- Amended Complaint filed on December 6, 2016

What is Adverse Possession?

- *Grace v. Koch*, 81 Ohio St.3d 577, 692 N.E.2d 1009 (1998):
  - "to acquire title by adverse possession, a party must prove, by clear and convincing evidence, exclusive possession and open, notorious, continuous, and adverse use for a period of twenty-one years."
  - What if the mineral estate has been severed (by conveyance/exception and reservation) from the surface?

Adverse “Use” of Minerals

- Actual development or production of the minerals.

Adverse Possession of Oil and Gas

- *Gill v. Fletcher*, 74 Ohio St. 295, 78 N.E. 433 (1906):
- It is not disputed that title to a mine which has been severed from the title to the surface may be acquired by adverse possession;
  - This can take place only when the possession is actual, continuous, open, notorious and hostile.
  - It cannot be accomplished by secret trespass upon the owner's rights.
  - Neither the owner of the surface nor the owner of the mine can claim the other estate merely by force of the possession of his own estate.
  - Nor does the mine owner lose his rights by mere nonuser.
    - His title can be defeated only by acts which actually take the mineral out of his possession.

Open and Notorious Possession

- Acts as notice to the record owner that claimant has asserted a claim to the land.
  - To be open, the use must be without attempted concealment.
  - To by notorious, the use must be known to some who might reasonably be expected to communicate their knowledge to the owner if he maintained a reasonable degree of supervision over his property.
  - The activity on the land must be “sufficient to raise the duty of inquiry,” meaning they must be the type of activity that would cause the landowner to ask, “What are you doing on my property?”

Hostile Possession

- The use of the property is inconsistent with the rights of the title owner.
- Does not require “adversarial controversy” between owner and adverse claimant.
- In fact, even if you believe you are occupying your own property, and don’t intend to take someone else’s property, the use can constitute “hostile” possession.
  - Title may be acquired “irrespective of any question of motive or of mistake.”

Exclusive Possession

- Exclusive Possession:
  - claimant actively possesses the property to the exclusion of the record owner
    - exclusive of third persons entering the land under their own claim of title, and
    - exclusive of third parties claiming to have permission to be on the premises from the true title holder

Continuous Possession for Over 21-Years

- Continuous possession for at least twenty-one years.
- A party may add their own term of adverse possession to any period of adverse use by prior owners “in privity” with them
  - Privity is established when one owner receives his possession from the other by some act or operation of law.
    - Landowner A adversely possesses a driveway for 10 years, then sells the property to Landowner B.
    - Landowner B continues to adversely possess the driveway for another 12 years.
    - Landowner B can add Landowner A’s 10 years of adverse use to his 12 years.

Adverse Possession is Disfavored

- Adverse possession is generally disfavored because a successful adverse possession action results in a legal titleholder forfeiting ownership without compensation.

- Prove by clear and convincing evidence

Tomechko v. Garrett

- *Tomechko v. Garrett*, 7th Dist. Noble No. 20 NO 0473, 2021-Ohio-1377.
  - Herbert Garrett (father) and John Garrett (son) co-owned property in Noble County, Ohio.
  - Herbert died and his Will devised his property to his wife (Mary) for life/while a widow, and at her death to his children.
    - The Will also empowered Mary to sell the property.

Tomechko v. Garrett

- Mary sold Herbert's ½ of the property to Coralee Garrett (Johns' wife):
  - "RESERVING from the above-described one-half interest all the mineral rights in and under" the property and other lands.
- Surface and ½ mineral rights in the property are conveyed to John & Margaret Anderson.
- The Andersons lease the oil and gas to TransAtlantic Energy Corp. on March 8, 1989.
- On the same day, the Andersons and John & Coralee Garrett ratify the Lease and instruct payments are to be split equally between the Andersons and Garretts.

Tomechko v. Garrett

- Relevant Conveyances of the Property:
  - In 1998, the Andersons conveyed their interest in the property to their Trust.
  - In 2004, Coralee Garrett conveyed her interest in the oil and gas to the Anderson Trust.
  - In 2010, the Anderson Trust conveyed the property to the Tomechkos.

Tomechko v. Garrett

- Two oil and gas wells are drilled in 1991 and start producing.
  - They continue to produce to this day.

- The Andersons and the Garretts, and then the Tomechkos received 100% of the royalties from production from the wells from 1991 until August of 2013 (over 21 years).

- Starting in late 2013, the Garrett Heirs entered into oil and gas leases with Gulfport Energy Corp.

Tomechko v. Garrett

- The Tomechkos file a Motion for Summary Judgment on their adverse possession claim.
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  - The trial court found they acquired title to the ½ oil and gas interest in the shallow formations actually produced by the wells.
  - The trial court denied their claims to have adversely possessed the ½ oil and gas in the deep formations.
- The Tomechkos appealed.

Tomechko v. Garrett

- John and Coralee Garrett, then the Andersons, and then Tomechkos, took actions from 1991 to August of 2013:
  - Leasing the oil and gas estate to Trans Atlantic
  - Authorizing Trans Atlantic to drill and produce oil and gas.
  - Leasing is not enough, one must actually produce minerals.

Tomechko v. Garrett

- Starting in 1991, oil and gas were actually produced from two wells on the property by Trans Atlantic under the Anderson Lease
- The Tomechkos and their predecessors were paid 100% of the royalties from that production.
  - "This actual development of the oil and gas rights took the minerals out of Garrett Heirs' possession."

Tomechko v. Garrett

- Elements:
  - Actual production
  - Open and notorious
  - Hostile
  - Exclusive
  - Continuous for at least 21 years

Tomechko v. Garrett

- Co-Tenancy:
  - A co-tenant cannot assert title by adverse possession against his co-tenant unless he shows a definite and continuous assertion of adverse right by overt acts of unequivocal character clearly indicating an assertion of ownership of the premises to the exclusion of the right of the co-tenant.
    - It must be an actual interference with the seisin of [the co-tenant] with denial of their title."

Tomechko v. Garrett

- The Tomechkos (and their predecessors) and the Garrett Heirs were co-tenants of the oil and gas rights.
  - The Tomechkos must have taken an overt act of unequivocal character that clearly showed an assertion of ownership to the exclusion of Garrett Heirs.
    - Mere possession is insufficient, but
    - Actual notice of ouster is not required.

Tomechko v. Garrett

- The 7th District found the following facts established that the Tomechkos and their predecessors took "overt acts" showing an assertion of ownership and an exclusion of the Garrett Heirs:
  - They entered into a lease with Trans Atlantic,
  - Through that lease began drilling on the property, and oil and gas were produced, and
  - They drilled and produced oil and gas for over 21 years from 1991 to August of 2013.
- Had the Garrett Heirs checked on the property they would have noticed the two wells on the surface the lease encumbrance in the recorder's office.
- These facts sufficiently establish overt acts of unequivocal character asserting ownership by the Tomechkos to the Garrett Heirs' exclusion.

Tomechko v. Garrett

- Question: Does the actual production of the shallow formations extend to the deep formations?
  - No case law directly on point.
  - But, there is the concept of "color of title."
    - A person claims under "color of title" if they enter into possession under an instrument that describes the entire property. *Humphries v. Huffman*, 33 Ohio St. 395, 403 (1878).
    - "Color of title need only be a 'semblance of title. It is the appearance of the title only.'" *Hall v. Cignoni*, 4th Dist. Lawrence No. 92CA19, 1993 WL 220591 (June 18, 1983).

Tomechko v. Garrett

- Argument: if a person claiming title to property by adverse possession claims under color of title, the adverse claimant's use of a portion of the property will extend to the entire property, even if the adverse claimant only occupied part of the property during the 21-year period of adverse possession.
- The Tomechkos argued that because the TransAtlantic Lease described the entire property (i.e., there was no depth limitation) they had color of title to the entire subsurface and their adverse possession of the shallow formations extended to the deep formations.

Tomechko v. Garrett

- The Seventh District looked to the Kentucky case, *Diederich v. Ware*, 288 S.W.2d 643 (Ky. 1956)
  - Surface owner became the adverse possessor of the minerals based on his operation of two oil wells for the requisite statutory period of limitations.
  - The court found that the operation of the two wells modified the subterranean structure under the large tract of land and this constituted constructive possession of all of the minerals underlying the entire 56-acre estate.

Tomechko v. Garrett

- The Seventh District looked to the Kentucky case, *Diederich v. Ware*, 288 S.W.2d 643 (Ky. 1956)
  - The court discussed the fugacious nature of oil and gas and how it alters property and the strata upon withdrawal of oil and gas by drilling.
  - The court held that the adverse possessors exercised constructive possession over all of the minerals in the entire tract of land due to this alteration and permeation of oil and gas.

Tomechko v. Garrett

- The Seventh District agreed with the court in *Diederich.*
  - Adverse possession of the deep rights should follow the shallow rights due to the alteration of the surface and subsurface from drilling and removing the oil and gas.
  - Merely because drilling had not yet affected the deep rights should not yield a finding that there is no adverse possession of the deep rights.
- The Court found that the Tomechkos possesses the deep rights based upon the adverse possession of the shallow rights, the permeating nature of the drilling and production of oil and gas, and the lease with Trans Atlantic which provided for drilling to all strata.

Questions?