Ejectment -- Common Source Rule -- Surface and Mineral Rights

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within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced." Other federal court decisions\(^6\) have upheld this charge. But the person against whom the bill is brought may not be compelled to appear and give testimony against himself,\(^6\) this protection being reserved to him by the Fifth Amendment.

It is apparent from the preceding discussion that the grand jury system, as adopted in the various states of this country, has, in many instances, undergone changes which have lessened in some respects and enlarged in others the powers vested in the grand jury under the common law. In some jurisdictions its full powers have been clearly set out by statutes. In other jurisdictions judicial decisions have provided fairly clear definitions of this body's authority. There are but few North Carolina authorities which may be relied upon to inform the courts or the grand jurors themselves of the grand jury's power to proceed on its own initiative. The existence of situations in which there are variances of opinion, as to the grand jury's authority to make, of its own motion, investigations and reports on matters coming to its attention, is thus easily understood. In order that it successfully fulfill its obligation to protect and uphold the morals and welfare of society, the grand jury must be clearly and accurately informed of its powers to perform these duties. We need clear and definitive legislative enactments to supplement the now scant and obscure authorities on this point.

FRA\(K\) THOMAS MILLER, JR.

Ejectment—Common Source Rule—
Surface and Mineral Rights.

An action was brought to establish \(P\)'s mineral rights in a tract of land, the surface rights of which were admittedly in \(D\). \(D\) denied \(P\)'s title and alleged title in himself by virtue of twenty years adverse possession of the mineral rights or seven years adverse possession under color of title. \(P\) offered evidence that in 1912 the land was claimed in fee by the Toe River Land and Mining Co. \(P\) then showed that in that year the land had been conveyed with reservation and exception of the mineral rights, and that through mesne conveyances from the Toe River Land and Mining Co. he had derived such title as that company had reserved to these mineral rights. The surface rights had been conveyed several times, each time with reservation and exception of the mineral right, until in 1918 \(D\)'s immediate grantor had conveyed the tract to


\(^6\) Housel & Walser, op. cit. supra note 9, §230.
D in fee simple, with neither reservation nor exception. D offered some evidence of adverse possession. The trial judge charged the jury that P had offered sufficient evidence of title to be declared the owner of the mineral interest unless D had acquired title by adverse possession, and that the burden of proving adverse possession was upon D. There was a verdict and judgment for P, and D appealed. Held, the trial court erred in charging the jury that P's evidence was sufficient to establish good paper title. Although it was not pointed out by the court, there is no doubt that P would have won if he had traced his title back to the state, or proved title in himself or in his original grantor by some other method than by reliance on the common source rule—assuming that D had not in fact been in adverse possession as he alleged.

In this note the term "ejectment" will be used to refer to the common law action of ejectment or its modern substitute, the action to establish one's title in land and to obtain possession. In North Carolina ejectment may be maintained only by one having title. Prior peaceable possession is not sufficient. In order to establish title in himself, the plaintiff may use any one of several methods listed and sanctioned by the North Carolina court in case after case. One of these methods is embodied in the "common source" rule. The plaintiff traces the defendant's title back to a common source with his own and then shows that his claim from that source is better than that of the defendant. According to the rule, when the plaintiff and the defendant claim title to the same tract of land and each traces his claim back to a common grantor, each is precluded from denying the title of that common grantor. If, however, it is shown that the two parties claim different

1 Vance v. Pritchard, 213 N. C. 552, 197 S. E. 182 (1938).
2 Once a plaintiff has shown paper title in himself it will be presumed that the defendant holds in subordination to him, and the burden of proving title by adverse possession will be cast upon the defendant. N. C. CODE ANN. (Michie, 1935) §425; Johnson v. Pate, 83 N. C. 110 (1880); Blue Ridge Land Co. v. Floyd, 171 N. C. 543, 88 S. E. 862 (1916); Virginia-Carolina Power Co. v. Taylor, 194 N. C. 231, 139 S. E. 381 (1927).
3 N. C. CODE ANN. (Michie, 1935) §399; McIntosh, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §§87, 97(8). As there is considerable conflict among the different jurisdictions as to the elements of ownership necessary to maintain an action of ejectment, this note is confined largely to the rule prevailing in North Carolina.
4 Cowles v. Ferguson, 90 N. C. 308 (1884); Mobley v. Griffin, 104 N. C. 112, 10 S. E. 142 (1889); Sinclair v. Huntley, 131 N. C. 243, 42 S. E. 605 (1902); Bryan v. Hodges, 151 N. C. 413, 66 S. E. 345 (1909); Moore v. Miller, 179 N. C. 396, 102 S. E. 627 (1920); McIntosh, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §382; notes (1938) 16 N. C. L. REV. 305, (1928) 16 KY. L. J. 353.
6 Mobley v. Griffin, 104 N. C. 112, 10 S. E. 142 (1889); Moore v. Miller, 179 N. C. 396, 102 S. E. 627 (1920); Howell v. Shaw, 183 N. C. 460, 112 S. E. 38 (1922); McIntosh, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §157.
7 Newlin v. Osborne, 47 N. C. 164 (1855); Prevatt v. Hartelson, 132 N. C. 250, 43 S. E. 800 (1903); Howell v. Shaw, 183 N. C. 460, 112 S. E. 38 (1922); Biggs
estates from the same grantor, the rule cannot be invoked. Actually the common source doctrine is not a means of establishing title, but is in the nature of an exception to the general rule that in ejectment the plaintiff cannot win on the weakness of the defendant's title. The purpose is to relieve the plaintiff in ejectment of the necessity of proving title good as against all the world, which might involve the expense and labor of tracing title back to the state, when the defendant's only claim to the property is from the same source as the plaintiff's.

As ejectment is the proper remedy to establish title and get possession of land, so it is also the proper method by which to establish mineral rights by one out of possession. It is very generally held that surface and mineral rights may be severed, and once this is done they become separate and distinct freehold estates. Either may be conveyed separately, leased separately, or taxed separately without in anyway affecting title to the other. Nor will adverse possession of one affect the title to the other.

With these principles in mind, we now turn to a consideration of the principal case in order to determine whether the common source rule is applicable to the facts thereof. In an earlier North Carolina case, v. Oxendine, 207 N. C. 601, 178 S. E. 216 (1935); Newell, Ejectment (1892) 579.

If the plaintiff brings an action of ejectment and the defendant makes no claim of title but enters a general denial, the plaintiff may then show that the defendant is holding under a deed which may be traced to a common grantor and, thereby, invoke the common source rule. McIntosh, North Carolina Practice and Procedure (1929) §§382(1), 461(7). He may do this, even though the defendant, in his answer, does not claim title from any particular source, because a person in possession of property and having a deed to the same is presumed to claim under the deed. See Bailey v. Carleton, 12 N. H. 9, 15 (1841); Ryan v. Martin, 91 N. C. 464, 469 (1884).


See Frey v. Ramsour, 66 N. C. 466, 472 (1872); Christenbury v. King, 85 N. C. 230, 234 (1881); Ryan v. Martin, 91 N. C. 464, 469 (1884); note (1920) 7 A. L. R. 860, 866.

See Mentone Hotel & Realty Co. v. Taylor, 161 Ga. 237, 241, 130 S. E. 527, 529 (1925); Newell, Ejectment (1892) 36, 37; Sedgwick and Wait, Trial of Title to Land (2d ed. 1886) §§108, 116.

Hartwell v. Camman, 10 N. J. Eq. 128 (Ch. 1854); Outlaw v. Gray, 163 N. C. 325, 79 S. E. 676 (1913); Gill v. Fletcher, 74 Ohio St. 295, 78 N. E. 433 (1906); Morrison v. American Ass'n, Inc., 110 Va. 91, 65 S. E. 469 (1909); Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485 (1905); 1 Tiffany, Real Property (2d ed. 1920) 897.

Outlaw v. Gray, 163 N. C. 325, 79 S. E. 676 (1913); 1 Tiffany, Real Property (2d ed. 1920) 867.

1 Tiffany, Real Property (2d ed. 1920) 868.


Fisher v. Cid Copper Mining Co., the plaintiff, as heir at law of X, sought to recover possession as owner of the mineral rights beneath the surface of a tract of land. The surface rights had been conveyed by X in his lifetime and were held by the defendant through mesne conveyances at the time the action was brought. The plaintiff contended that X was the common source of title of both the defendant and himself, and, hence, the defendant was estopped to deny the title of the common grantor in the reserved as well as in the conveyed estates. The court rejected this view, saying: “The conveyed and reserved parts are not one and the same thing. The grantor may have had, himself, only an estate in the land to transfer, while the reserved minerals may have belonged to another. Precisely such were the relations of the succeeding owners, each being capable of passing an estate in the land and not in the mineral deposits below the surface. The estoppel is necessarily confined to the subject matter of the conveyance to which conflicting claims are asserted.”

The only distinction between this decision and the principal case is that in the latter the defendant claimed the mineral rights under color of title. If P had sued D’s immediate grantor in ejectment, the case would have been on “all fours” with the Fisher case, and a similar decision would naturally have been expected. If this be true, what effect does the fact that D, who claims under the immediate grantor, “can only show color of title to the mineral interests by attaching such claim to the chain which shows the title to the surface” have upon the situation? This, it seems, is the most important question in the case. The exact point does not appear to have been decided either in North Carolina or elsewhere. The argument might be advanced that D derived all the title that he claimed from his immediate grantor, who, in turn, derived all the title he had to convey from the original and alleged common source, and hence D’s claim to the minerals is so closely connected with his claim to the surface that it should preclude him from denying the original grantor’s title. D, claiming the entire fee under a deed from his immediate grantor, would be estopped to deny the title of that grantor. Would this estoppel apply as to all grantors in the chain as far back as the original severor, and thus deprive D of a defense which would have been available to his immediate grantor? The dissenting opinion takes the view that it would. But such an argument is not sound when examined carefully. It was seen in the Fisher case that a person who takes a deed which conveys surface rights only, does not admit the grantor’s title to mineral rights, and is not precluded from denying such title. No more should a person who takes a deed to the whole fee without reservation,
where his immediate grantor held a deed conveying only the surface rights, be precluded from denying the title of the remote grantor of the surface rights, to the mineral rights. It is not impossible that the immediate grantor had title to both surface and mineral rights, acquiring title to each from a different source.

The North Carolina court has indicated that the common source rule is not strictly based upon an estoppel in this state, as it is said to be in other jurisdictions. In *Ryan v. Martin*, Merrimon, J., speaking for the court, said: "The conclusion thus established between the parties is not strictly and technically an estoppel, but it is in the nature of and has the practical effect of an estoppel. This rule of law is founded in justice and convenience. . . ." The dissenting opinion makes much of this supposed distinction. It is submitted that if under a given set of facts the courts of other states apply what they term an estoppel and reach a certain result, and the North Carolina court with the same set of facts goes through the identical process to reach the same result but calls its rule one of justice and convenience, there is no real distinction, certainly no distinction such as would call for a different result in the principal case.

The court's decision seems correct, being merely an application of the age-old North Carolina rule that in an action of ejectment, the plaintiff must win on the strength of his own title, and not on the defendant's weakness. The apparent hardship of the present decision may yet be remedied provided that on the new trial which the court granted, P changes his line of attack and establishes his title in another way. D should not be allowed to plead *res adjudicata* because the supreme court did not finally pass upon the issue involved, but merely granted a new trial because of an error of substantive law in the trial judge's charge to the jury.

LAFAYETTE WILLIAMS.

**Mortgages—Conditional Sales—Recordation—Conflict of Laws.**

Intervener's assignor sold an automobile in South Carolina under a duly recorded conditional sale contract. The purchaser, having collided with plaintiff in Virginia while en route to Baltimore, had judgment rendered against him by a Virginia court, and the sale of the automobile was ordered in satisfaction thereof. Intervener then inter-

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21 91 N. C. 464, 469 (1884).