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CASE COMMENTS

CRIMINAL LAW—WHAT IS THE NECESSITY FOR PROOF OF CRIMINAL INTENT UNDER A FEDERAL CRIMINAL STATUTE WHICH MAKES NO REFERENCE TO INTENT? *Morissette v. United States,* 72 S. Ct. 240 (1952.) Joseph Edward Morissette was convicted of knowingly converting to his own use property of the United States, i. e., some apparently abandoned practice bomb cases which were rusting into the ground on a government reserve. Morissette discovered these bomb cases while hunting for deer. To his trained junkman's eye they had possibilities for profits, and, thinking to realize some benefit out of an otherwise fruitless hunting trip, he hauled the bomb cases away in his truck during broad daylight. He later realized $84.00 from the sale of the metal in these cases.

After investigation by a curious patrolman, Morissette was arrested and convicted in the U. S. District Court for the Eastern District of Michigan under Title 18, U. S. C. A,. Sec. 641 (1948), which provides:

> Whoever embezzles, steals, purloins or knowingly converts to his own use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money or thing of value of the United States . . . if the value of the property does not exceed the sum of $100, shall be fined not more than $1000 or imprisoned not more than one year, or both.

Notably, the above section was a consolidation of Sections 82, 87, 100 and 101 (G) of Title 18, U. S. C. A. (1940), which had been so worded that the element of intent was clearly necessary before the crimes therein set out could be found.

The trial court refused to admit evidence of Morissette's belief that the property had been abandoned, and it instructed the jury that the element of intent, not being specifically set out in the statute, was not a necessary element of the crime.

The U. S. Court of Appeals for the 6th Circuit affirmed Morissette's conviction on appeal,[1] and the Supreme Court granted certiorari. Mr. Justice Jackson, delivering the opinion of the Court, said: "This case would have remained profoundly insignificant, but it raises questions which are both fundamental and far reaching . . ."

How far can the doctrine of "Public Welfare" [2] offenses be extended by the omission of the element of intent in statutory definitions of common law crimes? The distinction between crimes

[1] Morissette v. United States, 187 F. 2d 427 (1951).
[2] Sayre, *Public Welfare Offenses,* 33 Col. L. Rev. 55 (1933).

mala in se and crimes *mala prohibita* has been the subject of some controversy. The Court said concerning crimes *mala prohibita*: [3]

> While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted in this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity . . . The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect . . . Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

The situation is otherwise as to crimes *mala in se*: [4]

> Stealing, larcency, and its variants . . . were among the earliest offenses known to the law . . . they are invasions of right of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony . . .. State courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses . . . Congress, therefore, omitted any express prescription of criminal intent from the enactment . . . in the light of an unbroken course of judicial decision in all . . . states . . . holding intent inherent in this class of offense, even when not expressed in a statute.

The court held that the term "knowingly converts" was used by Congress to plug the many loopholes that occur when a criminal statute too specifically sets out offenses that existed as common law crimes. "It is not difficult to think of intentional and knowing abuses . . . of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining."

Nevertheless, the defendant must have knowledge of the facts, though not necessarily the law, that make the taking a conversion, says the Court. Mere taking of possession is not enough.

> It is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property.[5]

The Court said that presumptive intent had no place in this case. Clearly that high tribunal is being very chary of inter-

[3] Morissette v. United States, ... U. S. ....., 72 S. C. 240, 246 (1952).
[4] *Id.* at 248.
[5] *Id.* at 254.

preting criminal statutes as being directed against persons innocent of scienter. Historically the Court is on sound ground. The idea of intent was manifested at an early date in the Pentateuchal legislation, Nos. XV: 27, 28. It grew through the Roman codifications of the law, reaching its culmination in the English law. Finally transferred to and dignified in the law of our own courts, *mens rea* has become firmly fixed as a necessary element of crime.[6]

In the belief of this commentor, presumptive intent has no place in any crime which existed at common law.

KENNETH SELBY

OIL AND GAS—TREASURER'S DEED WILL NOT PASS TITLE TO A PREVIOUSLY SEVERED MINERAL ESTATE WHICH WAS NOT SEPARATELY ASSESSED FOR TAXES—*Mitchell v. Espinosa* (.... Colo. ...., 1951-52 C. B. A. Adv. Sh. No. 18, p. 242). Lawyers concerned with oil and gas and other mineral interests in Colorado were greatly interested in the Colorado Supreme Court's recent decision in the case of *Mitchell v. Espinosa, supra.* In this case the court held that a tax deed to land by description will not pass title to a previously severed mineral estate, where such an estate was not separately assessed. This holding raises some very real problems in real estate law and may seriously affect some existing oil and gas interests.

The United States issued a patent to the real estate in question to Mitchell in 1912. In 1926 Mitchell conveyed the land to Hamer by warranty deed, reserving (in the habendum clause) "one half of oil right." A tax deed was issued to Jacobson in 1933. The interest reserved in Mitchell had not been separately assessed. In order to avoid the necessity of a quiet title suit, Jacobson took quit claim deeds from both Mitchell and Hamer. The deed from Mitchell referred to and excepted the one-half interest reserved to him in the original warranty deed. In the present case plaintiffs instituted a quiet title suit to establish their interests in the minerals involved, claiming under Jacobson, the grantee in the tax deed.

One or two preliminary questions settled by the court in this case may be of interest. The court noted that the tax deed in question was not issued until fifteen days after the day fixed for such issuance in the notice thereof to the owner. In holding that this discrepancy in dates did not void the tax deed, the court said:

> If the deed does not actually issue until a date subsequent to that fixed by the notice as being the day when it will issue, no substantial right of the person entitled to redeem has been lost or impaired; on the contrary, the right to redeem continues, in this case for fifteen days, beyond the time fixed by the notice.

[6] Social Science Encyclopedia, p. 126.

In so holding the court expressly overruled the recent case of *Tewell v. Galbraith.*[1]

Further, the court held that it will construe an instrument so as to give effect to every part thereof if possible; consequently, the reservation of the oil rights in Mitchell by his deed to Hamer was held good although it appeared in the habendum clause rather than in the granting clause.

The principal question in the case, however, was whether or not the tax deed to the surface of the land in question passed title to the mineral right reserved by Mitchell. This question has been the subject of apparent conflict in other states. In view of this conflict and the absence of any decision on the point in Colorado, careful attorneys in this state have long advised their clients to request separate assessments of mineral estates held by them. This was the advice given by Mr. Willard S. Snyder in an article published in *Dicta.* Speaking of the question involved here, Mr. Snyder said:[2]

> The best that can be hoped for is what might be called an educated guess. . . . If a person is the owner of a severed mineral estate . . . it is suggested that he write to the assessor requesting a separate assessment. . . . If minerals are not being produced thereon it will be assesed for a nominal amount . . ."

The above note of caution was entirely justified at the time, but it now appears that the ax falls not upon the one who failed to assure a separate assessment of his mineral estate, but upon the one who took his ever-worrisome tax deed for granted.

The court built its argument that Mitchell's mineral interest had not been lost in carefully logical steps. Quoting from the opinion:

> In the instant case, from and after the date of severance of the oil rights, there were two separate and distinct freehold estates in the property which theretofore had been assessed as a unit. . . . It is clear that before a valid tax deed can be issued . . . there must have been a valid assessment of the property . . . Under section 81, chapter 142, '35 C. S. A., a sufficient description "for the assessment of such lands" is mandatory . . . Where a separate estate consisting of . . . minerals . . . is created by reservation thereof, a sufficient description of this property for assessment purposes requires specific reference to the severed estate. . . . If the separate estate of the owner of the oil interest is held to be included in a description by section number, without more to identify the severed interest, the result would be that the estate in oil is taxed without notice to the

[1] 119 Colo. 412, 205 P. 2d 229 (1949).

[2] *Taxation and Mineral Interests,* 27 DICTA 225 (1950). Be it justly said to Mr. Snyder's credit that his "guessing" was never far from wrong.

> owner, "under the guise of taxing the property of another. The courts do not favor such a result." *Washburn v. Gregory Company,* 125 Minn. 491. 147 N. W. 706 . . .

Certainly it is true that a severed mineral interest is a separate freehold estate, that a valid tax deed must be based on a valid assessment, that a valid assessment must include a valid description, and that a valid description must describe the separate interests of separate owners. The question that courts of various states have struggled with is whether the duty to assure the proper description, and thus a valid assessment, falls upon the owner or upon the assessor. This case places that duty squarely upon the assessor, so far as tax deeds are concerned, by saying:

> We are satisfied that where oil or mineral rights have been severed from real estate and are owned by persons other than those who hold the surface rights, a failure on the part of the owners to report the mineral rights to the assessor will not supply the essential requirement of an assessment of those severed rights as a condition precedent to a valid tax deed covering said severed interest in land . . . Identification of the person who was at fault for the lack of a valid assessments is of no importance.

In so holding the court follows the leading Minnesota case of *Washburn v. Gregory Co.,* quoted above. The court distinguishes the case of *Richards v. Kerr,*[3] which seems to use contrary language, on the ground that there the only interest involved was freehold estate. After conveyance of same, the assessor had continued to assess it in the name of the first owner. It was held that the true owner could not invalidate a treasurer's deed because the land had been assessed in the name of his predecessor in interest. It has been said that the Colorado case of *Kansas City Life Ins. Co. v. Prowers County Oil and Gas Co.*[4] is contrary to the *Mitchell* case, but an examination of that case shows it to be clearly distinguishable on the facts.

In accepting the *Washburn* case as authority, the Colorado court has joined other states in this area, namely Kansas, New Mexico, Wyoming and Arkansas, all of which follow the Minnesota decision with little deviation.

Other states, such as Iowa and West Virginia, and notably Mississippi, have held that the burden of proper assessment is upon the owner—primarily because of state statutes controlling the question. There is no statute upon the point in Colorado. The California Supreme Court held in *McCracken v. Hummel*[5] that since there was in that case no evidence that the tax assessor had breached his duty, it was required to follow the well-estab-

[3] 53 Colo. 376, 127 P. 232 (1912).
[4] 81 Colo. 177, 254 P. 438 (1927).
[5] 43 Calif. 2d 302, 110 P. 2d 700 (1941).

lished presumption that he had performed his duty correctly; therefore, the oil interests passed in the tax deed with the surface estate.

Thus it appears that the Colorado court has followed the majority rule in a question that involves less conflict in other jurisdictions than appears at first blush. The rule of the *Mitchell* case seems a healthy one, and makes it easier for attorneys to determine approximately how the court will go with other questions of a similar nature.

The implications of the *Mitchell* case for the practice of real estate law in Colorado are, however, very great.

It has been a practice in Colorado for the title examiner to go back to the first prior tax deed in the chain of title, and, if that tax deed was valid on its face or was issued more than nine years before, to pass title as to mineral rights. This is in accordance with Real Estate Standard No. 47 (Steps are now being taken to revise this standard to conform to the *Mitchell* case.) Clearly, where that practice has been followed the title to mineral rights so approved may or may not be good, depending on whether there was a prior severance of a mineral estate, or depending perhaps on whether there was a quit claim deed from the owner of such an estate, not reserving the same. The curative statute [6] will not be of any help because there is now no reason to suppose that a tax deed of the surface of a parcel of land constitutes color of title to a prior severed mineral estate. Note that the tax deed in the *Mitchell* case was issued in 1933.

Nor is there any question of adverse possession, in most instances. It is a very well settled rule of oil and gas law that, where the mineral estate has previously been severed from the surface estate, adverse possession of minerals does not start until there has been actual exporation and discovery.[7]

It, therefore, becomes clear that in order to fully serve his client's interests the title examiner must go all the way back to the patent to assure that the title does not depend upon a tax deed which was assumed to convey a prior severed mineral estate. This perhaps does not place any very great burden upon an abstract examiner, but the implications for title search in the record room are far from encouraging. There is no way around it—the examiner must go all the way back.

A prominent attorney for a local oil and gas company reports that the above situation presents no new problems for title examiners for such companies. Their practice has been to go all the way back to the patent anyway. Mineral reservations may occur in the patents themselves. Further, where the situation of the *Mitchell* case has appeared, oil and gas companies have customarily paid double rentals.

[6] COLO. STAT. ANN., c. 40 §§ 146, 147 (1935).
[7] Calvat v. Juhan, 119 Colo. 561, 206 P. 2d 600 (1949).

The *Mitchell* case was decided on good authority and with only one dissent—and that dissent referred only to the overruling of *Tewell v. Galbraith, supra.* It is certainly a landmark in Colorado law. It would seem that this decision will remain one of the most significant in recent years.

We cannot leave this case comment, however, without discussing this one point: It seems that the subject in controversy in the *Mitchell* case was largely one of gas rather than oil. The original reservation in the deed from Mitchell to Hamer was of "one half of oil right." Under the cases such a reservation excepts only oil rights, and all other minerals pass by the grant. To that extent, could this have been useless litigation?

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ANNUAL CONFERENCE OF THE TENTH JUDICIAL CIRCUIT

All members of the Bar are cordially invited and urged to attend the sessions of the Annual Conference of the Tenth Judicial District which will be held in the United States District Court Room in the Post Office Building in Denver on July 17, 18, and 19, 1952.

The first session begins at 10:00 A. M. on Thursday, July 17th, with an address of welcome by Hatfield Chilson, President of the Colorado Bar Association. Each morning session thereafter begins at 10:00 A. M. and each afternoon session at 2:00 P. M. until the end of the conference at noon on Saturday, July 19th. An unusually outstanding array of judges and legal personalities will feature this year's program of addresses and panel discussions.

The entertainment arranged includes dinner at the Teller House in Central City on Thursday evening, July 17th, to be followed by a performance of the opera "La Boheme". On Friday at 6:15 P. M. cocktails will be served at the University Club in Denver prior to the annual banquet which this year features an address by Justice Harold H. Burton of the United States Supreme Court.

Copies of the program for the Conference and tickets for the banquet may be obtained from Robert B. Cartwright, Clerk, United States Court of Appeals in Denver.