

RENDERED: JANUARY 10, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002478-MR

AUSTRALIA CALDWELL, Individually and
as Administratrix of the
Estate of Carl Caldwell

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE, CHARLES E. LOWE, JR., JUDGE
CIVIL ACTION NO. 85-CI-00552

ERNEST HALL, FANNIE
NICHOLS, DELLA FAGALS,
GLADYS MCKINNEY, IVAN KIMERY,
KENNIS HALL, ORVILLE HALL,
GARY HALL, BUTLER HALL, JR.,
BILLY HALL, WAYNE HALL, LIDIA
HALL, CANDY NICHOLS, DANNY NICHOLS,
RALPH FAGALS, IRENE KINNEY, NORMA
G. HALL, ROSE HALL, VIVIAN ALLEN,
LOIS HALL, JEANIE HALL, ANN
RUTH PERRY, ELMON TAYLOR, JR.,
LORETTA TAYLOR, EULA MAE ROSE,
DONALD EDWARD TAYLOR, TIVIS
EUGENE HALL, GOLDIE PARSONS,
BILL HALL, JR., O.C. HALL, BERT HALL,
JUNIOR HALL, GLENDA RUTH WHEELER,
DEANNIE HALL, MARIE CLARK and
JERRY F. HOWELL, JR.

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** * * * *

BEFORE: GUIDUGLI, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: At issue in this case is the ownership of the mineral rights in a tract of land lying on the Left Fork of Toler Creek in Floyd County. The property was originally owned by Tipton and Polly Hall, and had been the subject of the case of Tackett v. Bush.¹ The present case involves a dispute among the heirs of Tipton and Polly Hall over the appropriation of royalties paid for coal mined from the property, referred to throughout the litigation as the AJoe Hall tract.@ In its amended findings of fact, the circuit court outlined the relevant facts as follows:

[T]he Defendant, Jerry F. Howell, Jr., claims title in the minerals under the tracts set forth in Deed Book 106, Page 191 known as the Clell Haynes and Grant Harkins tracts. The Defendant, Jerry F. Howell, Jr., further claims an undivided three quarters (3/4) interest in that property originally set forth in Deed Book 101, page 73. However, the Court specifically finds that these deeds do not cover or include all of the mineral that Tipton Hall and Polly Jane Hall owned at the time of their deaths.

The Deed made by Tipton Hall and Polly Jane

¹ 298 Ky. 536, 183 S.W.2d 538 (1944).

Hall to Joe Hall, specifically refers to a tract they received from Rebecca Sturgell, by Deed bearing date February 7, 1906[,] and recorded in Deed Book 24, Page 569.

[T]he deed from Tipton Hall and Polly Jane Hall to William Hall dated July 18, 1924, specifically refers to a conveyance from Lewis Sturgell to Tipton Hall on the 26th day of November, 1904, with said Deed recorded in Deed Book 13, Page 264.

[T]he Court finds that neither of these two (2) title references, from Rebecca Sturgell and Lewis Sturgell, are within the boundaries of the conveyances received by Defendant, Jerry F. Howell, Jr., as previously found by [the circuit court].

[I]t is apparent that Tipton Hall and Polly Jane Hall[] died the owners of the mineral under the Sturgell tracts and possibly some other tracts or part of tracts that they had previously purchased during their lives.

[S]ince they died the owners of certain tracts of minerals, and without valid [w]ills, the property descended by intestate succession to their heirs and/or their heirs [sic] assigns as reflected by the record in this case.

The primary dispute in this case is whether Australia and Carl Caldwell, who purchased property from Joe Hall, owned an

interest in the minerals under that property. Joe Hall had received the surface estate from Tipton and Polly Jane Hall by deed, but the grantors reserved the mineral estate in that property. The circuit court's finding on the issue was as follows:

[W]hen Tipton Hall's son, Joe Hall, deeded his property to Australia Caldwell and Carl Caldwell, he was not the owner of the minerals as the minerals had been previously excepted out by his parents, Tipton Hall and Polly Jane Hall and had descended by descent and distribution to all of Tipton Hall's heirs and/or their assigns.

The circuit court's language is unclear: whether it means that Joe Hall was not the owner in fee of all the mineral, implying that he had a limited ownership interest, or whether it means that Joe Hall owned no interest in the minerals. All the parties except Jerry F. Howell, Jr., agree that Joe Hall was an heir of Tipton and Polly Hall, who died in 1932 and 1933, respectively. Therefore, prior to the time of his conveyance to the Caldwells, Joe Hall received an interest in the minerals excepted by his parents through intestate succession. The parties agree that Joe Hall was one of nine heirs of Tipton and Polly Hall.

Jerry F. Howell, Jr., argues that the Caldwells are not entitled to any ownership in the subject mineral, claiming that his chain of title precludes their ownership. However, because he has failed to cross-appeal from the circuit court's finding that neither of the relevant title references are within his chain of title, he may not now advance that argument before this Court.

Accordingly, we reverse the circuit court's conclusion, to the extent that it holds that Joe Hall did not have any ownership interest in the subject mineral estate. The judgment should be amended to reflect that Joe Hall owned an undivided one-ninth interest in the subject mineral estate, which he deeded to the Caldwells.

Throughout its judgment, the circuit court refers to ~~A~~the heirs or assigns of Tipton Hall and Polly Jane Hall,~~@~~and instructs that the royalty monies shall be paid ~~A~~according to their proportional interest as is reflected in the record.~~@~~ On remand, the circuit court shall find specifically the identities of parties to be paid, as well as their exact interests.

Finally, the Caldwells argue that the action brought against them seeking reimbursement was barred by the applicable statute of limitation. They claim that their raising of limitations in their 1987 answer² adequately preserved the issue for appeal. However, limitations was never raised in a motion to dismiss or a motion for summary judgment, nor was any evidence taken to establish when the mining activities ceased and thereby started the running of the limitations period. Where an issue has been pled but then abandoned by the parties, it is waived for appellate purposes.³

² It is unclear from the record why the answer was filed some two years after the complaint, or for that matter, why this case languished in the circuit court for sixteen years.

³ See, e. g., City of Louisville v. River Excursion Co., 253 Ky. 95, 68 S.W.2d 792 (1934).

Accordingly, the judgment is reversed as stated and affirmed in all other respects, and this case remanded to Floyd Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

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