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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2016-2017

1150475

Simmons Group, LTD

v.

Caine O'Rear, Jr. Family Trust et al.

Appeal from Walker Circuit Court
(CV-11-900396)

BRYAN, Justice.

This case began as an interpleader action filed by El Paso E&P Production, L.P. ("El Paso"), to determine who owns the mineral interest in a piece of property located in Walker County, Alabama ("the Landon parcel"), on which El Paso

operates a methane well.[1] The competing claimants for the mineral interest are Simmons Group, LTD ("Simmons Group"), on the one hand, and the Caine O'Rear, Jr. Family Trust, Mary Lou Foy, Susan Foy Spratling, Paula Robertson Rose, Stacy Baker Carson, and Warren Dane Baker (hereafter referred to collectively as "O'Rear"), on the other hand. Simmons Group claims ownership by an unbroken chain of conveyances starting with an 1883 quitclaim deed from one Elizer Taylor to Musgrove Bros. purporting to convey the mineral interest ("the 1883 deed"). O'Rear claims ownership by a separate chain of conveyances originating in the adverse possession of the Landon parcel by one J.K.P. Chilton and allegedly ripening into ownership sometime before 1921. O'Rear does not argue that Chilton adversely possessed the mineral interest separate from the surface estate.[2] Rather, O'Rear argues that the 1883

[1]The original owner of the disputed interest was John W. Landon, who acquired the property by patent from the United States government in 1858.

[2]When the mineral interest in a property is severed from the surface estate, adverse possession of the surface does not constitute adverse possession of the mineral interest. Sanford v. Alabama Power Co., 256 Ala. 280, 288, 54 So. 2d 562, 569 (1951) ("To acquire by adverse possession the title to the mineral interests so severed, there must be an actual taking or use under claim of right of the minerals from the land for the period necessary to affect the bar.").

deed did not validly convey the mineral interest and that the mineral interest was not severed from the surface estate until after Chilton adversely possessed the Landon parcel.[3] O'Rear does not dispute Simmons Group's chain of title subsequent to the 1883 deed. Thus, it is undisputed that, if the 1883 deed validly conveyed the mineral interest to Musgrove Bros., Simmons Group is the rightful owner. Ownership of the mineral interest is the dispositive issue in this case.

The case was tried before the circuit court upon stipulations, admissions of fact, and briefs. The court did not hear oral testimony. The circuit court determined that Chilton had adversely possessed the Landon parcel with the mineral interest still attached and that O'Rear therefore owns the mineral interest.

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[3]When the mineral interest has not been severed from the surface estate, adverse possession of the surface is sufficient for adverse possession of the mineral interest. Black Warrior Coal Co. v. West, 170 Ala. 346, 351, 54 So. 200, 201 (1910) ("Had [the adverse possessor not attempted to sever] the coal and mineral interest in said lands ... there could be no question but that his adverse possession would have ripened into a perfect title to the entire interest in the land several years before his death." (emphasis added)).

Standard of Review

Because the circuit court did not hear oral testimony, our standard of review is de novo. § 12-2-7, Ala. Code 1975 ("[I]n deciding appeals, no weight shall be given the decision of the trial judge upon the facts where the evidence is not taken orally before the judge, but in such cases the Supreme Court shall weigh the evidence and give judgment as it deems just."). See also Eubanks v. Hale, 752 So. 2d 1113, 1122 (Ala. 1999) (stating that "where no testimony is presented ore tenus, a reviewing court will not apply the presumption of correctness to a trial court's findings of fact and ... the reviewing court will review the evidence de novo").

Discussion

Neither Simmons Group nor O'Rear can trace its chain of title to Landon, the original owner. Indeed, there is a break in the chain of title to the Landon parcel because in 1877 a fire destroyed the Walker County courthouse along with the Walker County land records. Consequently, Simmons Group argues that its chain of title, which begins with the 1883 deed, is superior to O'Rear's under Whitehead v. Hester, 512 So. 2d 1297 (Ala. 1987). In Whitehead, this Court held that

when all land records have been destroyed, the first conveyance recorded thereafter becomes the new beginning point of the chain of title. In this case, the first recorded conveyance subsequent to the total destruction of the land records in Walker County is the 1883 deed.

O'Rear argues that Whitehead is distinguishable from the present case for two reasons. First, O'Rear argues that Simmons Group failed to establish that all land records in Walker County were destroyed in the 1877 fire and that, therefore, Whitehead does not apply. Second, O'Rear argues that the evidence shows that Elizer Taylor did not own the mineral interest when she executed the 1883 deed and that the deed was therefore ineffective to sever the mineral interest from the surface estate.

I. Destruction of the Walker County Land Records

This Court based its decision in Whitehead on the fact that "neither side in th[at] case [could] trace its title back to the sovereign or to a common grantor because of the total destruction of all the land records by the 1890 fire that also destroyed the Franklin County Courthouse." Whitehead, 512 So. 2d at 1301. O'Rear argues that Simmons Group failed to

establish that all the land records were destroyed in the 1877 fire and that, therefore, Whitehead is inapplicable. We disagree. It is undisputed that the Walker County courthouse burned to the ground in 1877. Furthermore, the record on appeal contains no evidence of any land records having survived that fire. The total destruction of the building housing the county records, along with the absence in the record of any surviving records, is substantial evidence that the Walker County land records were totally destroyed in the 1877 fire. O'Rear has offered no evidence to suggest that any records survived. Accordingly, the rule from Whitehead applies to reestablish the beginning point of the chain of title to the disputed mineral interest.

II. Evidence That Elizer Taylor Did Not Own the Mineral Interest in 1883

Under Whitehead, this Court presumes that the first recorded conveyance after the total destruction of land records to a property is the beginning point of a disputed chain of title. The Court looks to instruments that actually purport to convey an interest, rather than instruments merely

concerning ownership of the land.[4] This is because the purpose of the Whitehead rule is to bring clarity to title disputes where the best evidence of ownership -- i.e., the intact chain of title -- is lost.[5] Only instruments that actually purport to convey an interest can serve the purpose of Whitehead; instruments that, by their terms, cannot convey an interest also cannot form part of the chain of title. Furthermore, by pinning the new beginning point of the chain of title to the first conveyance recorded after the destruction of the land records, the Whitehead rule protects parties from undertaking the onerous task of showing who owned certain property more than a century after the best evidence of ownership has been lost. As the Court stated in Whitehead:

> "To require [the parties] to somehow locate the originals of the instruments that were destroyed in the fire and, thus, establish their chain of title from the present date completely back to a government patent or to a common grantor, would

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[4]We say "purports to convey" because in lost-chain-of-title cases it is not possible to unequivocally determine the true owner of the disputed property at the time of the first-recorded conveyance. Indeed, this is the problem the Whitehead rule is intended to remedy.

[5]"While the legal title to real property can be shown by a valid deed, the record title is the highest evidence of ownership of real property and is not easily defeated." 63C Am. Jur. 2d Property § 39 (2009) (emphasis added).

> place an unreasonable burden on them, or on others similarly situated."

512 So. 2d at 1302.

Of course, the Whitehead rule does nothing to disturb the basic property rule that a grantor cannot convey more than the grantor actually owns. See, e.g., Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 297 (Ala. Civ. App. 2010)(stating that "[a] landowner cannot convey a greater interest in property than he possesses"). Thus, proof that the grantor of the first-recorded deed did not actually own the property at the time of the purported conveyance will defeat the presumption underpinning the Whitehead rule. O'Rear, however, presents no such proof.

In this case, the only post-fire evidence concerning ownership of the mineral interest before the 1883 deed is an 1871 agreement, recorded in 1879, between one Nancy Landon and one Luiza Taylor ("the 1871 agreement"), and three 1920 affidavits sworn to by G.W. Kilgore, E.S. Hutto, and W.R. Brown ("the 1920 affidavits"). The 1871 agreement states, in pertinent part:

> "Contract made and executed the 28th day of November one thousand eight hundred and seventy one by and between Nancy Landon of the first part and Luiza

> Taylor of the second part both of the County of Walker and the State of Alabama[.] [T]he said Nancy Landon agrees to give to her daughter Luiza Taylor her property to take care of her her life time and the said Luiza Taylor agrees to take care of her mother Nancy Landon her life time for the property of her mother all the following described Land ... [describing the Landon parcel] ... and if either of the above named parties fails to comply with the above named duty this obligation is void and set aside."

O'Rear argues that this agreement shows that the mineral interest had not been severed from the surface estate of the Landon parcel and that, therefore, Elizer Taylor did not own the mineral interest when she purported to convey it to Musgrove Bros. in 1883. This argument is unpersuasive. At most, the 1871 agreement is evidence that someone besides Elizer Taylor owned the mineral interest in 1871. Evidence that Elizer Taylor did not own the mineral interest in 1871 is not inconsistent with her ownership of the interest 12 years later in 1883. Thus, the 1871 agreement cannot defeat the presumption that the 1883 deed is the beginning point of the chain of title.[6]

[6]Furthermore, the 1871 agreement cannot itself serve as the presumed beginning point of the chain of title under Whitehead. The agreement is executory in nature and does not purport to convey an interest in the Landon parcel.

The 1920 affidavits, which are each identical in substance, allege that, when the 1883 deed was executed, Elizer Taylor had been in adverse possession of both the mineral interest and surface of the Landon parcel for "more than one year." O'Rear argues that, because those affidavits establish that Taylor had been in adverse possession of the as-yet-unsevered mineral interest for less than the prescriptive period when she executed the 1883 deed, that deed could not convey title. This argument is also unpersuasive. The assertion in the 1920 affidavits that Taylor was in adverse possession of the mineral interest is a legal conclusion, not a factual allegation.[7] Furthermore, the nonspecific assertion that Taylor had been in adverse possession for longer than a year does not support O'Rear's argument that Taylor had been in adverse possession for less than the prescriptive period. That assertion is, in fact, fully consistent with Taylor's possession for the prescriptive period. The 1920 affidavits contain no factual allegations

[7]Section 35-4-70, Ala. Code 1975, governs the admissibility of affidavits as evidence in litigation over title to land and states that affidavits "shall be admissible as evidence of the facts therein recited and shall be sufficient to prima facie establish such facts." (Emphasis added.)

inconsistent with Taylor's actual ownership of the mineral interest and therefore cannot defeat the presumption that the 1883 deed is the beginning point of the chain of title to the mineral interest.

Conclusion

In this case, the first conveyance of the mineral interest recorded after the total destruction of the Walker County land records is the 1883 deed. As such, the 1883 deed is the presumed beginning point of the chain of title under the Whitehead rule. O'Rear has offered no evidence sufficient to rebut this presumption. Therefore, we hold that title to the mineral interest in the Landon parcel vests in Simmons Group. Accordingly, we reverse the circuit court's judgment and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Bolin, Main, Wise, and Bryan, JJ., concur.

Shaw, J., concurs specially.

Murdock, J., concurs in the result.

Stuart and Parker, JJ., concur in the result in part and dissent in part.

SHAW, Justice (concurring specially).

I concur. I write specially to note the following, which I discuss not as an independent theory on which to decide this case, but simply as a broader discussion of the facts presented here.

There are two chains of title to two different estates. One chain shows a transfer of a mineral estate only. This is the chain claimed by the appellant, Simmons Group, LTD ("Simmons"). The other, with some aberrations, shows a transfer of a surface estate. This is the chain claimed by the appellees. The evidence before us tends to explain how these two chains came into being.

We have evidence indicating that John Landon received the property from the United States. We have an agreement dated 1871 indicating that a later Landon, Nancy, agreed to transfer the property to her daughter, Luiza Taylor. In 1883, another Taylor, Elizer, transferred the mineral estate to Simmons's predecessor in title. Then, there is the 1887 deed by R.A. Baker and J.A. Baker conveying the property to A.H. Johnston; the nature of the interest they owned is not clear. However, in 1898, Johnston conveyed the surface rights of the property

to William M. Wallace. Thus, we see Taylors receiving the property from Landons, and then Taylors selling the mineral estate. Subsequent history shows that the mineral estate and the surface estate were being separately transferred.

All of this appears to help explain what happened: The Landons transferred the property to the Taylors, and the surface estate and mineral estates where subsequently transferred separately by the Taylors. We have some evidence confirming or tending to confirm those transfers, but records showing other transfers were lost in the 1877 fire that destroyed the Walker County courthouse. Nevertheless, we do have some explanation as to how the two chains of title exist, and it tends to confirm the holding that results in this case by the application of the rule in Whitehead v. Hester, 512 So. 2d 1297 (Ala. 1987).

PARKER, Justice (concurring in the result in part and dissenting in part).

I concur in the result insofar as the majority reverses the circuit court's judgment in favor of the O'Rear defendants.

I dissent in part because I believe that the main opinion unnecessarily limits a trial court's discretion in considering relevant evidence in a property dispute when it is presented with the situation, as in this case, where competing chains of title cannot be traced to a common grantor or to a patent deed from the United States as a result of the destruction of the relevant land records. I agree that the rule from Whitehead v. Hester, 512 So. 2d 1297 (Ala. 1987), applies in this case; I disagree, however, with the majority's interpretation and application of this rule.

Initially, I note that the Whitehead rule was created by this Court in 1987 to resolve a very specific factual situation before it and that it has not been applied since.[8]

[8]Not surprisingly, given that the Whitehead rule has been applied only once, Jesse Evans's Alabama Property Rights and Remedies, the preeminent property treatise in the state, does not cite Whitehead or provide any discussion of the Whitehead rule. I have researched cases from other jurisdictions and have not discovered any uniform rule concerning disposition of

The Whitehead Court made very clear that its decision announcing this novel, judicially created rule was to be limited to the facts before it. See Whitehead, 512 So. 2d at 1301-02 (using language like "under the facts of this case" and "[i]n such circumstances"). The Whitehead Court did not have before it any evidence of recorded instruments other than deeds. The question now before this Court was not decided by the Whitehead Court. I do not think it would be wise to try to make the rule created by the Whitehead Court -- intended to resolve a specific factual situation before it -- into a "one-size-fits-all" rule with rigid application. With this in mind, I turn to a discussion of Whitehead.

In Whitehead, the parties disputed the ownership of a mineral interest. This Court stated that "[t]he parties derive their respective claims of title to the minerals under two separate chains of title which do not emanate from a common grantor and which are not traced back to a patent from the United States." 512 So. 2d at 1298. This Court noted that the parties were unable to trace their claims of title

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property given the situation raised in this case. Rather, in such a situation the various states have appeared to develop differing rules based on the specific facts before the respective courts.

back to the patent title from the United States "because in 1890, a fire destroyed the courthouse in which land records were maintained." Id. Accordingly, there was a "break in each party's chain of title." Id.

The appellees in Whitehead claimed ownership of the mineral interest "by virtue of a direct and unbroken chain of conveyances commencing in 1892." 512 So. 2d at 1298. The original conveyance in the appellees' chain of title was a quitclaim deed dated October 7, 1892. It was undisputed that the October 7, 1892, deed was "the first documentary evidence," 512 So. 2d at 1298-99, concerning the ownership of the at-issue mineral interest following the 1890 fire that had destroyed the relevant land records. The appellants in Whitehead "trace[d] their surface ownership through a chain of conveyances commencing with a warranty deed ... dated October 27, 1906, which was 14 years after the initial quitclaim deed conveying the mineral interest to [the appellees'] predecessor." 512 So. 2d at 1299.

The trial court in Whitehead had held that the quitclaim deed dated October 7, 1892, severed the mineral interest from the surface estate of the at-issue property. The appellants

argued that the October 7, 1892, deed was "ineffective to transfer title, because there [was] no evidence which trace[d] title back to the United States or to a common grantor." 512 So. 2d at 1301. This Court noted that, "[o]f course, neither side in this case can trace its title back to the sovereign or to a common grantor because of the total destruction of all the land records by the 1890 fire." Id. This Court then stated:

> "We cannot accept the assertion that [the grantor of the October 7, 1892, deed] was not the holder of legal title to the land and was not legally empowered to sever the mineral interest, under the facts of this case. The first conveyance covering the disputed mineral interest which was filed for record after the destruction of county records by fire was the conveyance in 1892 from [the grantor of the October 7, 1892, deed] to [the grantee]. This conveyance was competent and relevant evidence of a separate mineral estate, in which [the grantor of the October 7, 1892, deed] claimed an interest. Since the conveyance from [the grantor of the October 7, 1892, deed] to [the grantee] in 1892, the mineral interest has passed through a clear and unbroken chain of title directly to [the appellees]. If the argument of the [appellants] were sustained, then one who acquired a mineral interest created in Franklin County prior to 1890 might have difficulty in establishing the validity of his title. To require [the appellees] to somehow locate the originals of the instruments that were destroyed in the fire and, thus, establish their chain of title from the present date completely back to a government patent or to a common grantor, would

> place an unreasonable burden on them, or on others similarly situated.
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> "The initial conveyance in the [appellants'] chain of title was from W.H. Tipton to J.A. Thorn in 1906. Again, because of the destruction of the courthouse records by fire, there is nothing in the records to indicate that W.H. Tipton had any title whatsoever to convey in 1906. After the patent in 1844, the next conveyance concerning the subject property filed for record -- so far as the present records indicate -- was the 1892 quitclaim deed from [the grantor of the October 7, 1892, deed] to [the grantee]. Some 14 years later, the [appellants'] chain of title begins with a deed from one W.H. Tipton to J.A. Thorn. In such circumstances, when dealing with two separate and distinct titles to the same property, as here, the Court should acknowledge the superiority of the title of those obtaining interests by the earliest recorded instruments. Pollard v. Simpson, 240 Ala. 401, 199 So. 560 (1941)."

512 So. 2d at 1301-02. Thus, this Court concluded that the appellees had established "paramount legal title" to the mineral interest. 512 So. 2d at 1304.

In summary, this Court determined in Whitehead that, in that it was impossible for the claimants of the property to trace their chains of title to the original grantor because the land records needed to do so had been destroyed by fire, the Court presumed that the grantor of the earliest recorded instrument subsequent to the destruction of the land records owned a fee-simple interest in the land the grantor was

conveying. Accordingly, this Court determined that the party able to trace his chain of title to the earliest recorded instrument indicating ownership of the land had paramount legal title.

The Whitehead rule is one of practicality; it operates to establish a new starting point when there is a break in the chain of ownership concerning a disputed property as the result of the destruction of the relevant land records. The purpose of the Whitehead rule is to establish this new starting point as close in time as possible to the destruction of the relevant land records. Unlike the majority, I believe that the trial court should be permitted to consider any admissible evidence in applying the Whitehead rule in order to be as certain as possible that the new starting point begins with the actual owner of the property.

The majority decision, however, interprets Whitehead to hold that the earliest recorded instrument purporting to convey title is the only evidence that can establish a new starting point under the Whitehead rule. I disagree with this interpretation of the Whitehead rule because it deprives the trial court of the discretion to consider admissible evidence,

other than a recorded deed, for purposes of establishing a new starting point.[9] Whitehead did not establish such a rigid precedent, and I see no reason to make the judicially created, fact-specific Whitehead rule rigid at this time.

In Whitehead, this Court noted that the first recorded documentary evidence concerning ownership of the at-issue property following the destruction of the land records was the October 7, 1892, deed. However, nothing in Whitehead indicates that the first documentary evidence must be a deed. It just so happened that in Whitehead a recorded deed was the first documentary evidence; deeds were the only evidence

[9]I note that the majority decision includes the following statement:

> "Of course, the Whitehead rule does nothing to disturb the basic property rule that a grantor cannot convey more than the grantor actually owns. See, e.g., Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 297 (Ala. Civ. App. 2010)(stating that '[a] landowner cannot convey a greater interest in property than he possesses'). Thus, proof that the grantor of the first-recorded deed did not actually own the property at the time of the purported conveyance will defeat the presumption underpinning the Whitehead rule. O'Rear, however, presents no such proof."

___ So. 3d at ___. However, based on its interpretation of the Whitehead rule, the only evidence contemplated by the majority that may be considered by the trial court concerning ownership of the property is a recorded deed.

presented concerning ownership of the property in Whitehead. It is within this context that the Whitehead Court stated: "In such circumstances, when dealing with two separate and distinct titles to the same property, as here, the Court should acknowledge the superiority of the title of those obtaining interests by the earliest recorded instruments." 512 So. 2d at 1302 (emphasis added). Black's Law Dictionary defines "instrument" as "[a] written document; a formal or legal document in writing, such as a contract, deed, will, bond, or lease." Black's Law Dictionary 719 (5th ed. 1979).

In the present case, the earliest recorded instrument concerning ownership of the property following the alleged destruction of all the land records is the November 28, 1871, agreement between Nancy Landon and Luiza Taylor, a legal instrument recorded in the Walker County Probate Court on March 21, 1879. The agreement does not convey an interest in the property; however, I do not find this fact to be dispositive. The agreement is reliable evidence. It even has all the formalities of a deed: It is signed by both parties, witnessed by two parties, contains a metes-and-bounds description of the property, and is recorded in the deed book

of the probate court. Why is this agreement, which clearly identifies the owner of the property as Nancy Landon, any less reliable than a quitclaim deed in determining the actual owner of the property after the destruction of all the relevant land records?[10]

I also present the following hypothetical to demonstrate the danger of adopting the majority's position of divesting the trial court of discretion to consider admissible evidence for the purpose of establishing a new starting point under the Whitehead rule in cases such as the present one. Suppose in

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[10]The earliest recorded instrument in Whitehead was a quitclaim deed, which does not always convey an interest in property. Of course, "if a grantor in a quitclaim deed has a good legal title, the quitclaim is as effectual to pass the title as a warranty deed." Jesse P. Evans III, Alabama Property Rights and Remedies § 4.5 (5th ed. 2012). However, "[a] quitclaim conveys nothing more than the interest owned by the grantor at the time of this execution and no more." Id. Further,

> "[a] quitclaim deed purports to convey only the grantor's present interest in the land, if any, rather than the land itself. Since such a deed purports to convey whatever interest the grantor has at the time, its use excludes any implication that he has good title, or any title at all. Such a deed in no way obligates the grantor. If he has no interest, none will be conveyed."

Robert Kratovil and Raymond J. Werner, Real Estate Law 60 (8th ed. 1983) (final emphasis added).

the present case that, instead of the recorded agreement, Nancy Landon had recorded an affidavit concerning the ownership of the property. Assume that Nancy Landon had, at some time before the courthouse was destroyed and with it all of the land records, obtained an easement over her neighbor's property. Also assume that Nancy Landon recorded the instrument conveying to her the easement before the land records were destroyed. The land records are then destroyed by fire. Suppose that Nancy Landon and the subservient property owner did not have a copy of the instrument conveying to Nancy Landon the easement to re-record. However, after the land records were destroyed, wanting to protect their respective interests, assume that Nancy Landon and the subservient property owner recorded a joint affidavit in the probate court stating that Nancy Landon owned her property and had obtained an easement over the property of the subservient property owner sometime prior to the destruction of the courthouse and the land records.

Adopting the majority's strict application of the Whitehead rule, the trial court would not be allowed to consider this admissible evidence concerning the actual

ownership of the property for purposes of establishing a new starting point. I do not see the wisdom in adopting such a strict application of the Whitehead rule. I suggest that allowing courts to consider evidence beyond recorded deeds in order to determine the owner of the property following the destruction of all records is consistent with the spirit of the Whitehead rule.

Under the actual facts of the present case, the November 28, 1871, agreement precedes the May 14, 1883, deed, which was not recorded until March 8, 1884; it is the first documentary evidence concerning the ownership of the property following the alleged destruction of all the records concerning the conveyances of property in Walker County.[11] Accordingly, as

[11]Nancy Landon's agreement with Luiza Taylor was recorded on March 21, 1879, more than four years before Elizer Taylor executed the May 14, 1883, deed in favor of Musgrove Bros. This Court has stated that "[t]he purpose of recording is to affect purchasers subsequent to the recording ... with notice." Williams v. White, 165 Ala. 336, 337, 51 So. 559, 559 (1910); see also Jesse P. Evans III, Alabama Property Rights and Remedies § 5.3[a] (5th ed. 2012) ("[T]he recording of an instrument under the recording statutes is conclusive notice to any third person of everything that appears on the face of an instrument so recorded."(footnote omitted)). As the earliest recorded instrument, the agreement put Elizer Taylor, Musgrove Bros., and all other third parties on notice of the fact that Nancy Landon claimed fee-simple ownership of the property.

did the circuit court, I would apply the Whitehead rule in the present case to presume that Nancy Landon, not Elizer Taylor, owned a fee-simple interest in the property.

The practical result of my approach would be that Elizer Taylor's deed to Musgrove Bros. did not severe the mineral interest from the property because, at that time, Elizer Taylor had no interest in the property to convey. Therefore, I would affirm the circuit court's judgment against Simmons Group. However, I do not agree with the circuit court's judgment in favor of the O'Rear defendants because I believe that Simmons Group has demonstrated that the trial court erred in determining that "Chilton was the owner of the property in fee by adverse possession as of 1921." The evidence in the record does not support the trial court's conclusion. Therefore, having concluded that the mineral interest had never been severed from the property, I would send the matter back to the circuit court and allow it to conduct further fact-finding in light of this holding. The property remaining one entire "bundle of sticks," either party could then establish ownership of the property through the principle of adverse possession of the surface.

Stuart, J., concurs.