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The Oil and Gas Profit A Prendre: What Effect on California Land

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THE OIL AND GAS PROFIT À PRENDRE: WHAT EFFECT ON CALIFORNIA LAND?

Land has two basic values—that resulting from its use and that resulting from the resources which can be taken from it. In many areas of the world one of these two values are clearly dominant. For example, land in Saudi Arabia is valuable for what is in it and land on Manhattan Island for what can be built on it. California presents a perplexing problem since in some areas of the state the different values of the land are nearly equal. Where these competing interests coexist, unnecessary and economically senseless results may occur.

A fee simple ownership of land includes the ownership of the minerals. The owner may produce the minerals, use the surface, or do both if appropriate. A discussion of the rights of the parties involved when the mineral interest is severed from the surface interest will illustrate some problems faced and some possible solutions. Judicial and legislative answers will be discussed and the best solution for California will be suggested.

I. The Problem

In a state with a major interest in both the development of hydrocarbons[1] and the proper use of the land's surface, it is undesirable for the two interests to conflict unnecessarily, yet often they do.[2] An owner of land has the power to sever the mineral rights. They may be sold or leased, or they may be reserved or excepted by him in a sale of the land.[3] In any case, the mineral owner or lessee has obtained an interest in real property called a profit *à prendre*, the right to take something, such as oil and gas, from the land itself.[4] The profit *à prendre* has been considered by a recent California case[5] to be analogous to an easement, but it has generally been considered something more.[6] In most cases the profit *à prendre* includes an

[1] "California ranks third in national crude production . . . ." Note, *Private Limitations of Petroleum Production—California's Approach to Conservation*, 17 STAN. L. REV. 942 (1965). ". . . California is also unique in that the Far West forms a geographically isolated market. Oil produced here remains here." *Id.* at 943.

[2] It should be kept in mind that although this comment is primarily oriented to the defined problems in an oil and gas context, California has important non-hydrocarbon mineral resources as well. The problems attendant to their extraction will not be discussed here.

[3] Callahan v. Martin, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871 (1935); Little v. Mountain View Dairies, Inc., 35 Cal. 2d 232, 217 P.2d 416 (1950); Montana-Fresno Oil Co. v. Powell, 219 Cal. App. 2d 653, 33 Cal. Rptr. 401 (1963).

[4] Sehle v. Producing Properties, Inc., 230 Cal. App. 2d 430, 41 Cal. Rptr. 136 (1964).

[5] Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

[6] Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal. App. 431, 297 P. 73 (1931).

implied easement to use the land for the development of the minerals.

Whatever the nuances controlling its definition, the ownership of a profit *à prendre* usually brings with it a general, exclusive, and potentially all-pervasive right of surface entry. In the absence of contrary language in the instrument conveying the interest, a mineral owner or lessee can make any *reasonable* use of the surface of the land to develop the minerals, even to the complete *exclusion* of the surface owner.[7] Naturally this right of surface entry and use is subject to some qualifications.[8]

As a general proposition the modern-day landowner is more sophisticated about his land's potential than was the owner in the late nineteenth and early twentieth century. Unfortunately this sophistication has not had much impact on oil and gas conveyancing. Although modern drilling technology has in many cases obviated the need for a general right of surface entry, landowners still convey the minerals or execute oil and gas leases thereby subjecting the surface to such a right. This lack of concern for or knowledge of the potential involvement of the surface was understandable when there were no known minerals beneath the property and before the potential value of the surface was fully appreciated. Today, however, as land becomes increasingly more valuable and oil and gas is being discovered throughout the state, the wise landowner must protect his surface interests.

As a result of past ignorance or apathy, many surface owners are severely limited in the use of their property. For example, the surface owner may not make any use of his property which will unreasonably interfere with the rights of the mineral owner or lessee, and a surface owner who wishes to construct improvements on his land will do so at his own risk. He must consider the possibility that the entry of the mineral owner has great potential to diminish or virtually destroy his surface investment. Also, a surface owner will likely find it impossible to get institutional financing to develop his land, absent some waiver of, or restriction on, the right of surface entry[9] of the mineral owner or lessee.

Another problem frequently facing a surface owner of California land is the existence on his land of a marginally producing well pumping from a nearly depleted oil field. If the mineral owner or lessee has extensive rights of surface entry, the surface owner may be faced for many years with

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A profit *à prendre* is considered an interest in the land itself, and this is the principal feature which distinguished it from a pure easement, which is a right or interest without profit.

[7] Callahan v. Martin, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871 (1935); Wall v. Shell Oil Co., 209 Cal. App. 2d 504, 25 Cal. Rptr. 908 (1962).

[8] *See* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 218.6 (1964) for a discussion of these qualifications [hereinafter cited as WILLIAMS & MEYERS].

[9] A brief telephone survey of four Los Angeles institutional lenders found them totally unwilling to issue mortgages or other extensions of credit for land developments on parcels subject to a general right of surface entry.

a situation not only inconsistent with his plans for the land but also contrary to its most productive use.

A typical factual situation will bring the problems into focus. Suppose that at the time an oil and gas lease is signed the area in question contains only spotty surface development and there are no known oil reserves. During the primary term[10] of the lease, oil is discovered in relatively small quantities. The lessee has a continuing right to remain on the land until production in paying quantities has ceased. Over the next twenty years the future megalopolis of Los Angeles-San Francisco forms toward the area in question, and the surface owner wishes to develop his property into a subdivision. The oil lessee, however, continues to hold his surface rights with wells evenly spaced over the entire surface of the property. Though it can be shown that the field can be drained as economically from a few drill-sites, the surface rights of the lessee prevent the surface owner from obtaining either financing for his subdivision or a buyer for the land.

As a corollary to the above example, imagine a fee owner who wishes to sell his land while reserving the rights to all of the minerals. As consideration for this reservation he is "willing" to reduce the original $100,000 price by $10,000. The purchaser who agrees without further specification of the extent of the mineral owner's rights to the use of the surface may find that he has purchased very little for his $90,000. The seller will continue to have a broad right of surface entry to develop the minerals.

On a municipal level some of these problems have been solved by zoning ordinances,[11] compulsory unitization,[12] and drilling site restrictions.[13] It is well established that a municipality can enact ordinances to regulate local oil and gas production.[14] The municipality's right is based on the police power to legislate for the health, safety, and general welfare of the community.[15] Drilling operations are sometimes unsightly, malodorous, potentially dangerous, and generally incompatible with residential or

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[10] To aid the reader, several terms should be defined:

a. *primary term:* the period during which the lessee may keep the lease alive by conducting drilling operations on the property or by paying specified rentals. The lease will terminate at the end of the primary term unless the lessee is then producing oil or gas in paying quantities.

b. *compulsory pooling or unitization:* the statutory requirement that contiguous lands be combined for the development of the mineral reserves.

c. *obtaining production:* the development of sufficient oil and gas to give a return in excess of the operating costs of the well.

d. *ownership in place:* the theory that a landowner has the *possessory* interest in the oil and gas beneath his parcel.

e. *bottomed:* referring or pertaining to the bottom of the well.

[11] *See, e.g.,* LOS ANGELES, CAL., MUN. CODE § 13.01 (1955).

[12] *Id.*

[13] *Id.*

[14] Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir. 1931), *cert. denied,* 284 U.S. 634; Beverly Oil Co. v. City of Los Angeles, 40 Cal. 2d 552, 254 P.2d 865, 2 O. & G.R. 477 (1953).

[15] Del Fanta v. Sherman, 107 Cal. App. 746, 290 P. 1087 (1930).

community activities. Attempting to balance the economic desirability of oil and gas production with comfortable municipal development, municipal ordinances often require that lands be pooled for development from a central site, that the drilling sites be made aesthetically compatible with the neighborhood, and that existing nonconforming production sites be made compatible within a specified number of years.[16] The ordinances have been so successful in many areas of Los Angeles that passers-by are often unaware that extensive amounts of hydrocarbons are being produced in the area.

These municipal regulations solve part of the surface owner's problem since they obviate his fear of surface entry by the mineral owner or lessee. Under such regulations, however, the surface owner lacks flexibility, for he may not drill on his own if his land is in an area which has been pooled for mineral development.

II. Preventive Law: The Best Solution

Since oil and gas law is a very specialized field, serious mistakes can be made in conveyances involving mineral interests. Some of the common protections available to a party who wishes to sever the interests in his land are worthy of at least cursory discussion.

A. Subsurface Leases and Sales

It is well established that land can be severed horizontally as well as vertically.[17] If a landowner desires to fully utilize the surface of his land, he can convey or lease his land below a certain depth, commonly 500 feet. He should unequivocally exclude any right of surface entry. In certain situations this type of subsurface lease is entirely satisfactory to the lessee. This is especially true in areas of known reserves which are under development by one major concern, often in a pooling arrangement.

In areas of doubtful or highly speculative hydrocarbon deposits, a very important factor to the lessee will be the right to use the land for testing and exploration. Since the developer-lessee requires the right of surface entry, a subsurface lease excluding such right would frustrate mineral development. A possible solution to this problem would be a clause limiting the right of surface entry to a given length of time, based on the lessee's needs to explore and the lessor's anticipated surface use. Such a clause would give the lessee the right to seismologic and geologic exploration and under certain circumstances would be a satisfactory solution for each party. It would not solve all of the lessee's problems, since one common method of exploration is drilling. If the lessee drills and strikes oil, he will be most un-

[16] *See, e.g.*, Los Angeles, Cal., Mun. Code § 13.01 (1955).

[17] *In re* Barlow v. Security Trust & Savings Bank, 197 Cal. 263, 240 P. 219 (1925).

willing to abandon his well at the termination of his right to be on the surface of the land.

Another possible solution would be a clause giving the lessee a general right of surface entry for exploratory purposes under a provision for an ascertained yearly decline in the percentage of the land available to the lessee. In theory such a clause would balance the important needs of both parties. The lessee would have full use of the land for initial exploration and development, and the lessor would be assured that only small portions of the surface would be involved if oil and gas were discovered.

If the subsurface mineral interests are granted rather than leased, the correlative rights of the parties remain essentially the same as in the lease situation. The mineral owner still has an implied right of surface entry to develop the profit *à prendre*, though he does not "own" the oil and gas in place.[18] The right of surface entry would still have to be specifically and clearly excluded or modified to offer any protection to the surface owner.

B. The Effect of Express Easements

In an attempt to limit and define the implied rights inuring to the holder of a profit *à prendre*, parties to mineral conveyances often enter into agreements providing for express surface easements.[19] Generally such express easements obviate any implied easements.[20] The types of restrictions which are attempted are widely varied. Some examples of possible restrictions are: (1) reservations of certain surface uses by the lessor, (2) restrictions as to well locations, (3) restrictions as to the size of the surface subject to surface entry, and (4) restrictions as to the number of wells that may be placed on the parcel, although this is often regulated by state or local governmental agencies.[21]

A weakness of these attempts to restrict the easements and the rights of the parties is their inflexibility. By limiting the area of surface entry or by expressly giving the lessor the right to use the surface for agriculture, for example, the parties are placed not only in a state of relative certainty, but also in a potential state of restriction. If the context of an agreement remains static, few problems arise. This is seldom the case. Most of the problems that arise in this area are the result of changed circumstances. For example, the lessor now wants to subdivide, but cannot, or the lessee now wants to broaden his drilling operations, but is limited to only a fixed percentage of the acreage.

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[18] Callahan v. Martin, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871 (1935).
[19] *See* 1 WILLIAMS & MEYERS § 218.
[20] *Id.* § 218.1.
[21] *See* 4 H. WILLIAMS, OIL AND GAS LAW § 673.1-.3 (1964).

C. *Arbitration*

Arbitration clauses are seldom found in oil and gas leases. In given areas the arbitration process might well serve the interests of both parties to oil and gas leases, although the arbitration process is no panacea for all that is wrong with oil and gas leasing. It would be easy to say that leases should contain clauses providing that any problems of surface usage should be arbitrated. However, this offers no real solution. What is suggested is that in selected ways arbitration might offer a more functional solution to specific situations.[22]

To offer meaningful aid to oil and gas leasing problems, arbitration must serve some function which is handled inefficiently by present methods. Arbitration is flexible. The parties are not bound by overly formalized procedures. Through arbitration a given question will be resolved expeditiously, for the arbitration process is not burdened with the case loads facing the courts. The arbitration proceeding does not have the stigma that sometimes results from the adversary system. Indeed, one reason cited for the use of arbitration agreements is the maintenance of good relations.[23] In addition,

> [d]isputes should be arbitrated when both parties desire an expert who is familiar with the technical background of the dispute, when some relationship between the parties makes litigation imprudent, or where there is a mutual desire for privacy, or a mutual need for a prompt and final determination.[24]

The realities of the oil and gas industry must be faced. The oil companies write most of the leases and in many instances carry the greater bargaining power, since the prospect of oil and gas revenues may be far more important to the landowner than any of his doubts about restricted surface usage. To successfully provide for arbitration in an oil and gas lease, a potential lessor must have an overwhelming bargaining power, or as a practical matter be satisfied with a modest but meaningful utilization of arbitration.

One area which might be considered arbitrable is the future placement of wells. Imagine an area where the existence of mineral reserves is doubtful yet worthy of exploration. Presently the landowner has no known need for the surface usage, yet he realizes that ten years hence he might. In this situation the landowner might reasonably ask that if oil or gas is discovered on the land, the number and location of the wells reasonably needed to develop the reserves be made the subject of arbitration, absent the ability of the parties to agree. Ideally, of course, an oil company would hope to have a general right of surface entry in this case. As previously

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[22] For discussions of the general advantages of arbitration see Coulson, *The Business Lawyer Discovers Arbitration*, 50 A.B.A.J. 459 (1964); Coulson, *Tailoring Arbitration to Business Needs*, 19 Bus. Lawyer 1037 (1964).

[23] Coulson, *Tailoring Arbitration to Business Needs*, 19 Bus. Lawyer 1037 (1964).

[24] *Id.* at 1050.

suggested, the general right of entry for exploratory purposes might be limited to a fixed number of years, with the final decision about well location left to arbitration. The lessor would not necessarily know ten years in advance what parts of the surface he will want to develop, so express easements and drillsites would be unduly burdensome. The landowner should allow himself a means for protecting his surface investment, while recognizing the developer's need for a broad right of surface entry.

The essence of the suggestion of arbitration in an oil and gas setting is that in an area of changing land and mineral values and in a time of improving technology, the rights of parties to an oil and gas lease should be sensitive to significant changes. In given situations and in combination with appropriate leasing techniques, the arbitration clause deserves consideration and discussion. It appears to have received neither.

III. LEGISLATIVE SOLUTIONS: PRESCRIPTION STATUTES AND ASSEMBLY BILL 2311

For diverse reasons several states have passed legislation[25] that solves at least one aspect of the problem between surface and mineral owners—that of the long-standing mineral interest which ties up the use of the land without development of the mineral resources. These statutes vary greatly, but all are significant to the problems under discussion.

A. Prescription Statutes

Several states have statutes which generally provide that after the passage of a given number of years, mineral interests will vest in the surface owner unless there has been an attempted or actual development of the minerals. While they are referred to as prescription statutes, they should not be confused with the common law extinguishment of easements by prescription. The result is similar, but the mechanics are quite different. The extinguishment of easements by prescription typically requires some use of the land by the servient owner which is hostile to the interest of the easement owner for the common law or statutory period.[26] With this distinction in mind, various state statutes will be examined.

1. *Louisiana.*[27] Since this is a unique state in that it is tied to the civil law, some of its property concepts are different in name or character from those in California. There is a close parallel, however, between what are called "servitudes" in Louisiana and profits *à prendre* elsewhere. Severed mineral interests, whether reserved or granted, and royalty interests

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[25] LA. CIV. CODE arts. 789, 3546 (1952, 1953); MICH. STATS. 26.1163(1)-(4) (Supp. 1968); TENN. CODE 64-704 (Cum. Supp. 1968); VA. CODE 55-154 (Cum. Supp. 1968); VA. CODE 55-155 (1959).

[26] Glatts v. Henson, 31 Cal. 2d 368, 188 P.2d 745 (1948).

[27] LA. CIV. CODE arts. 789, 3546 (1952, 1953).

are subject to prescription *liberandi causa* upon non-use for ten years.[28] On termination of a mineral interest for nonproduction during the ten year period, the interest reverts to the surface owner. Good faith drilling is sufficient to keep the prescriptive period from running against a mineral owner. The lessee must obtain production.[29] The disadvantage of the statutory scheme of Louisiana, one which is generally true of all of the prescription statutes, is that a marginal effort on the part of the mineral owner or mineral lessee will serve to keep his interest alive and his correlative right of surface user operative. For example, a lessee who had obtained production, albeit in small quantities, would retain his full rights by nominal production from but a single well.

2. *Michigan.*[30] This state's statutory scheme uses a presumption of abandonment to terminate dormant mineral interests. If there has been either (1) no recordation of sale, lease, or certificate of interest asserting an intention not to abandon or (2) no issuance of a drilling permit or (3) no actual production of oil or gas for a period of twenty years, then the interest will be deemed to have been abandoned, and title to the mineral interest will vest in the owner of the surface estate. The interest may be extended indefinitely by the periodic recordation of a notice of intent to preserve the interest, each recordation extending the interest for twenty years.[31] The value of this scheme is doubtful, since the major holders of mineral interests will be unlikely to let their interests lapse by failure to record. However, the statute tends to keep the record mineral ownership current.

3. *Tennessee.*[32] This state's statute is quite similar to Louisiana's, but is more stringent. Any interest in oil and gas expires at the end of ten years from the date of its execution unless at the end of that period oil or gas is being produced from the land for commercial purposes. If after the ten years commercial production ceases for six months, the interest reverts to the estate out of which it was carved.[33] This statute has the advantage of treating a mineral leasehold and a mineral ownership on the same basis, a distinction which is not provided for by the Louisiana statute.

4. *Virginia.*[34] The Virginia statute is based upon a statutory prima facie presumption that no oil, gas, or other minerals exist in the land in question if there has been a thirty-five year period during which the right of entry was not exercised. The payment of taxes by the holder of the mineral interest will toll the period.[35] The presumption also applies if the miner-

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28 1 WILLIAMS & MEYERS § 216.

29 *See* 1 WILLIAMS & MEYERS §§ 216, 303.8.

30 MICH. STATS. 26.1163(1)-(4) (Supp. 1968).

31 *Id.*

32 TENN. CODE 64-704 (Cum. Supp. 1968).

33 *Id.*

34 VA. CODE 55-154 (Cum. Supp. 1968); VA. CODE 55-155 (1959).

35 *Id.*

als have been exhausted and the right of mining or drilling has been abandoned for thirty-five years.[36] The owners of land subject to a mineral claim may bring a suit in equity for the extinguishment of such claim, but the defendant is then allowed six months to drill or explore for minerals.[37] If they are found, he will be charged with taxes thereon. Otherwise the claim will be extinguished.[38] The obvious purpose of this scheme is to encourage the development of mineral resources, for it offers little solace to a surface owner to wait thirty-five years only to have his hopes quashed by the mineral owner's or lessee's discovery of mineral deposits.

These various statutes illustrate attempts to limit the length of time that a mineral holder can "sit on" the interest. It is obviously not in the interests of a state to have potentially productive resources privately stockpiled for future development at the whim of the holder. These statutes have the incidental effect of vesting the mineral interests in the surface owner, and in this sense they offer needed relief to surface owners. The purpose of the statutes, however, is not to prefer the surface owner over the mineral owner but apparently to encourage and to enforce the development of mineral resources. Although certainly an important consideration in California, this would solve but part of the problem. California's problem is twofold, as previously discussed, since a major consideration is sensible surface use as well as mineral production.

Assuming the minimal effect of clearing or stabilizing titles, these statutes would be of some value in California. There are, however, more complete solutions.

B. Assembly Bill 2311[39]

Assembly Bill 2311, which was not adopted, sought to resolve some of the problems which arise between mineral and surface owners. The bill received a favorable discussion by Williams and Myers, the leading oil and gas commentators,[40] but the State Legislature did not consider it beyond the committee level. The failure of the bill to pass should not detract from its well considered plan and its potential benefit to the state.

The authors of the bill thought that modern drilling techniques, such as slant drilling, obviate the need for broad rights of surface entry since they make it possible to develop large areas of land from relatively small drillsites. This is quite true, as illustrated by the oil industry's response to very stringent pooling and zoning ordinances in the City of Los Angeles.[41] Large fields of oil reserves are being tapped from small, almost inconspicuous sites.

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36 *Id.*
37 *Id.*
38 *Id.*
39 Cal. A.B. 2311, Reg. Sess. (1968) (Shoemaker) [hereinafter cited as A.B. 2311].
40 1 WILLIAMS & MEYERS § 218.14 (Cum. Supp. 1968).
41 LOS ANGELES, CAL., MUN. CODE § 13.01 (1955).

The bill proposed an addition to the Public Resources Code[42] giving to the Oil and Gas Supervisor the administrative authority to limit drilling to specified sites on property which is subject to a prior general right of surface user. The surface owner, by application to the Supervisor, was to demonstrate to the satisfaction of the Supervisor that (1) the land's surface was of potential commercial or residential value and that this value was being inhibited by the mineral owner's right of surface entry, (2) the hydrocarbons were neither being produced nor capable of being produced in commercial amounts, and (3) the restricted drilling sites were an adequate means of protection and substitution for the mineral owner's right of surface entry.[43]

The bill would have affected only severed mineral estates and was not applicable to oil and gas leases. Naturally the burden was put on the surface owner to satisfy the Supervisor's need for relevant information. Other limitations contained in the bill included its non-applicability to lands on which hydrocarbons were being commercially produced or were capable of being produced and to tidal or submerged lands.

A.B. 2311 would have been a genuine solution to one aspect of the problem. The utilization of the Oil and Gas Supervisor as the administrative focal point was an excellent idea, since it gave to the problem an agency already sensitive to the requirements of oil and gas production. The constitutionality of the bill appeared to present no problem since the bill adopted the standards of the leading California cases on the question of the legality of statutory deprivation of the right to drill.[44]

The bill's obvious weakness was its limited scope. Ideally, and perhaps this ignores legislative reality, if the problem facing the state in this area does indeed exist, a solution is best directed to all of the aspects of the problem, not to just part of it. For example, merely because a piece of real property is now producing hydrocarbons does not mean that on balance society does not have a far greater need for the surface development of that property. Municipalities have been able to provide for the adjustment or improvement of nonconforming land uses as long as some reasonable purpose is shown and adequate time is provided.[45] If the Supervisor should find that the production of the minerals is marginal, especially with reference to the potential surface use, he should be able to give the mineral

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[42] *See* CAL. PUB. RES. CODE §§ 3000-3608.1 (West 1956), *as amended,* (West Supp. 1968-69).

[43] 1 WILLIAMS & MEYERS § 218.14 (Cum. Supp. 1968).

[44] A discussion of the constitutionality of A.B. 2311 is beyond the scope of this paper. The reader is referred to Bernstein v. Bush, 29 Cal. 2d 773, 177 P.2d 913 (1947), and Hunter v. Justice's Court, 36 Cal. 2d 315, 223 P.2d 465 (1950), as two cases cited by the authors of A.B. 2311 in support of its constitutionality. It is arguable that A.B. 2311 would not have given the mineral owner the protections demanded by the cases cited.

[45] Beverly Oil Co. v. City of Los Angeles, 40 Cal. 2d 552, 254 P.2d 865, 2 O. & G.R. 477 (1953).

owner a certain number of years within which to limit his surface use. He could require withdrawal of the surface use to specified areas or perhaps require modification of the pumping equipment to conform to coexistent surface usage.

Another weakness of the bill was its exclusion of leases. In legal effect there is little, if any, distinction between a lease with a marginally producing well and a mineral ownership which has not been developed. Both enjoy the same rights of surface entry and both inhibit surface utilization. Any suggested reformation of the status of oil and gas surface interests should necessarily take cognizance of this similarity and provide some method by which adequate adjustment can be made. The problem that would arise if oil and gas leases were to be covered by similar legislation is that many of these leases already contain express limitations and conditions of surface use. Allowing a statutory modification of these leases would essentially upset a status for which the parties are presumed to have bargained. The situation is different where the lease is silent on the question of surface use, for then the surface rights are implied by the profit *à prendre.*

A.B. 2311 would have given the Supervisor power to divide the surface easements equitably. This is similar to a partition, which is nothing more than an equitable division of jointly held property. Under California law the holder of the servient surface estate and the holder of the dominant mineral interest are not tenants in common[46] of the type that can bring statutory partition actions.[47] The mineral owner does not have a right to *possession,* only to use. But note that the analogy between the two is close, for if the mineral owner's use can be exclusive and total, even to the exclusion of the surface owner, this is in effect a right to possession. Perhaps it would not be unwise to treat the relationship between the mineral owner and the surface owner in the same manner as a cotenancy. If both have interests in the surface and the interests are in conflict and irreconcilable, let the surface use be divided equitably between the parties in conflict. Essentially this is what A.B. 2311 would have given the Oil and Gas Supervisor the power to do. The idea had merit.

Perhaps a solution to some of the problems under discussion would be to modify appropriate portions of the California statutes to allow partition actions by mineral and surface owners. A concept which would have to be accepted as a premise to such a modification would be that in the broad sense of the word the mineral owner is a cotenant with the surface owner. In practical effect the surface use is tied to the desires of the mineral owner, and rarely will the surface owner be able to do as he wishes with his land absent a waiver by the mineral owner of his general right of sur-

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46 Smith v. Cooley, 65 Cal. 46, 2 P. 880 (1884); Porto v. Vosti, 136 Cal. App. 2d 395, 288 P.2d 618 (1955).

47 CAL. CODE CIV. PROC. § 752 (West 1955).

face entry. If this concept is accepted, one must ask whether a partition of the surface would not be equitable and reasonable. By an addition to the California Code of Civil Procedure,[48] the legislature could give to surface owners the option of filing an action in partition to divide the surface of the land. Conceptually, the most efficient method would be to convert the mineral owner's general right of surface entry into a fee interest in a specified area with rights of subterranean entry beneath the remainder of the original parcel. The mineral owner would be able to develop all of the oil and gas resources, and the surface owner would be freed of the burden of the dominant right of surface entry. It is important to note that under Code of Civil Procedure section 764, the referee handling the partition may make appropriate allowances for roads, which would adequately protect the mineral owner's rights of ingress and egress. The same section also requires the referee to consider, as far as is practicable, the improvements made by each party. Therefore an oil and gas owner's fee interest subsequent to partition would probably include any wells previously drilled by him, thereby further protecting his interests.

IV. JUDICIAL EROSIONS OF THE PROFIT *À Prendre*

A discussion of two important California cases is appropriate. The first, *Wall v. Shell Oil Co.*,[49] is important in an illustrative sense, for it defines much of the current status of oil and gas rights in surface use. The second, *Gerhard v. Stephens*,[50] is a recent case which is subject to some question on close analysis, not so much in that its *result* is wrong but in that it failed to achieve its avowed purpose.

A. Wall v. Shell Oil Co.

In 1864, Briggs conveyed to one Haskell all of the mineral rights to the "Rancho Santa Paula y Saticoy" together with all such rights and privileges necessary to give Haskell the full benefit of the conveyance, including the exclusive right to drill and erect houses for workmen. By mesne conveyances the defendants became owners of the severed mineral estate. By mesne conveyances the plaintiffs became surface owners of Parcel A, entirely within the original Rancho. It was undisputed that the surface owners took with notice of the prior severed mineral estate. Defendants had seventeen wells on the original Rancho land, four of which were on the surface of Parcel A, but bottomed outside the parcel. Also on Parcel A were roads, pipelines, and other equipment which served wells on the entire Rancho. Plaintiffs contended that the use of the surface of Parcel A to serve other areas of the Rancho constituted a trespass.

48 The addition to the Code of Civil Procedure would be made in the area of Chapter 4, "Actions for the Partition of Real Property."

49 209 Cal. App. 2d 504, 25 Cal. Rptr. 908 (1962).

50 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

The district court of appeal, recognizing the general concept of a profit *à prendre,* phrased the issue: "[W]hether the subdivision of the surface ownership that followed . . . initial conveyance in any way diminished . . . [the] rights of the grantee."[51] Part of the court's answer is worth quoting, not for its surprise, but for the breadth of its language. After recognizing that the surface may be subjected only to such burdens as are reasonably necessary to the full enjoyment of the mineral estate in the specific parcels, the court went on to say:

> [T]he owner of the surface area in the parcel following such sales or transfers may not by any subsequent subdivision of the surface area deprive the owner of the oil and mineral estate of his rights in the entire parcel.
>
> Further, each subsequent purchaser of a subdivision thereof, taking with notice of the prior sale and reservation of rights, takes knowing that his surface ownership may be burdened in part, *and, in very rare cases perhaps, in its totality,* by the *reasonable* exercise of the rights of the owner of the oil and mineral estate; and this without regard to whether or not the oil or mineral underlies the particular subdivision, or whether the facilities located thereon serve facilities located without the subdivision, so long as they do not lie beyond the original tract.[52] (emphasis added).

The result in the case is that a conveyance of the mineral rights to ranchlands in the 1860's continues to be a burden in the 1960's on the surface use of the land. Surely when the lands were granted there was no contemplation of greatly changed surface conditions. In the 1860's in the Saticoy-Santa Paula area there was little value to the land other than for ranching. Today residences are increasingly prevalent.

The court's terminology in several key areas leads one to the conclusion that it will not in all cases recognize the blanket right of surface user that it seems to have implied. It must be kept in mind that the surface use is limited to what is *reasonable, necessary,* and *convenient* to the enjoyment of the profit *à prendre.* Without defining these terms, the court concedes that "as conditions change, the 'reasonableness' of any particular exercise of a right may also change. An act which would be reasonable in the wilderness might be totally unreasonable in an urban area."[53] What is the court saying? Possibly that a balance of some sort must in fact be drawn between the owners of the surface and the owners of minerals and that this balance will shift as technology improves and as land values change. "The owner of oil rights has a right to develop them, and the owner of the surface area has a right to develop that. Society has an interest in both such developments."[54]

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[51] Wall v. Shell Oil Co., 209 Cal. App. 2d 504, 511, 25 Cal. Rptr. 908, 911 (1962).

[52] *Id.* at 513, 25 Cal. Rptr. at 913.

[53] *Id.* at 516, 25 Cal. Rptr. at 915.

[54] *Id.*

B. *Gerhard v. Stephens*

The *Wall* case gave definition to the mineral owners' right to use the surface. Some language in the case indicated an unwillingness to close the book on surface owners. The *Gerhard* case illustrates a step in favor of surface owners but not one based on what is or is not "reasonable."

The issue of immediate importance was whether or not a profit *à prendre* is subject to abandonment. *Gerhard* answered this affirmatively. Although a complete analysis of this case is far beyond the scope of this comment,[55] a discussion of it is important in order to put its implications into perspective. In 1905 land was conveyed to Adams and Brandt, who had organized two corporations. Adams and Brandt conveyed mineral estates in portions of the land to the corporations, which subsequently forfeited their charters for the nonpayment of taxes. The corporate assets, including the mineral estates, went to the stockholders of the two corporations. When oil was discovered on the land, Gerhard, a complete stranger to the interests in the land, made a title search and found that the mineral ownership might be subject to some question. He contacted various successors to the shareholders of the corporations and obtained assignments of their interests. He then brought an action to quiet title. The principal defendants to the action were the grantees of the surface estate who had executed several oil and gas leases of the property to parties who obtained production in 1956. Another group of plaintiffs were the "Weber plaintiffs," the successors of the children of Charles Weber, one of the major shareholders of the corporations. When Mr. Weber died, his estate's assets contained his proportionate interest in the mineral estates coming from the dissolved corporations. His children, upon finding that the interest was of no value, refused the distribution. The supreme court found this to be a "positive indication of an an intent to renounce their rights."[56]

The nexus of the controversy in this case was whether the mineral interests could be abandoned. The plaintiffs claimed that a severed mineral estate gives a fee simple interest in the minerals and as such is never subject to abandonment. The defendants, on the other hand, claimed that a profit *à prendre* is in the nature of an incorporeal hereditament and is subject to abandonment. The court took the middle road and arrived at the conclusion that a profit *à prendre* can be abandoned if two elements coexist, non-user and a demonstrated intent to abandon.[57]

The benefit of the decision is, in the court's analysis, that titles to land are cleared of long-standing mineral interests which serve to impede exploration or development of the premises.[58] It is interesting to note just

[55] See 2 Loy. U. L. Rev. 152 (1969).

[56] Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

[57] *Id.* at 890, 442 P.2d at 713, 69 Cal. Rptr. at 631.

[58] *Id.* at 887, 442 P.2d at 711, 69 Cal. Rptr. at 631, *citing* 1 Williams & Meyers § 210.1.

how much this effect is like the prescription statutes previously discussed in section III. In fact, the court makes reference to these statutes in a footnote.[59]

For several reasons the result in this case is unsatisfactory. The basis of the court's holding is that since oil and gas interests are nonpossessory, *i.e.*, they cannot be "owned" in place, the right to take the oil and gas, in the nature of an incorporeal hereditament, is abandonable. Standing alone this result might be relatively innocuous. However, the case ignored one of the realities of mineral estates. In contrast to an oil and gas *lease,* a mineral *conveyance* carries with it *actual ownership in place* of nonfugacious minerals.[60] Extending the logic of this case, a situation could arise whereby a party could lose by abandonment his profit *à prendre* related to the oil and gas, yet keep his possessory fee title to the solid minerals.[61] Presumably the owner of the solid minerals would nevertheless have a general right of surface entry to develop them, so the use of the surface would not be freed nor would the title be cleared.[62]

This case has caused an additional uncertainty in titles to California land. Prior to this case, severed mineral estates were not subject to abandonment as a matter of law. Now each case requires the answer to a question of fact: Was there non-user and a correlative *intention* to abandon? No mineral interest is now safe from the type of attack shown in this case, and record title may not afford sufficient protection. The court's initial decision had encouraged people like Gerhard to traffic in questionable titles. On rehearing, the case was affirmed as to all parties except Gerhard. Perhaps this can be taken as an indication of the court's reluctance to encourage parties unrelated to an action from officiously involving themselves in it. There was no explanation of the basis for the decision on rehearing. At best this case presented an unfortunate factual situation upon which to reach a decision.

This case may give some relief to surface owners, but the potential confusion and harassment attending it make one feel that there must be a better way. This case should be a mandate to the California Legislature to solve the problem since the courts are not the proper forum to hear such questions piecemeal.

V. CONCLUSION

Legislative intervention into the continuing conflict between mineral and

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59 *Id.* at 888 n.21, 442 P.2d at 711 n.21, 69 Cal. Rptr. at 631 n.21.

60 *In re* Barlow v. Security Trust & Savings Bank, 197 Cal. 263, 240 P. 19 (1925); Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 99 P. 483 (1909).

61 Hunter v. Schultz, 240 Cal. App. 2d 24, 49 Cal. Rptr. 315 (1966); Carden v. Carden, 167 Cal. App. 2d 202, 334 P.2d 87 (1959).

62 On this point see brief for Southern Pacific as Amicus Curiae on Petition for Rehearing at 12-15, Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

surface interests is needed. As mentioned at the outset, the mineral interests which have been created in recent years are likely to be more protective of the future rights of the parties. Although the protective devices commonly utilized cause some concern, the parties adopt these with open eyes and full rights to bargain otherwise. This is not to say that future developments will not bring entirely new problems, for assuredly they will.

The mineral interests which seem to be most nocuous both to society as an interested party and to surface owners as servient owners are the old leases and mineral estates—those created with little thought or awareness of future problems. To maximize the use of land and the development of mineral resources, private interests may sometimes have to be compromised. In a statutory development, several points seem worthy of consideration. They reflect an eclectic gathering from the solutions which have been discussed.

The general scheme and concept of A.B. 2311 are workable, rational means for solving most of the problems besetting surface owners, who basically want to realize full surface value. By the same token, oil and gas interests are well protected by the general scheme, since the Oil and Gas Supervisor must be satisfied that adequate protection is available to the mineral interests before a change in the surface easements can be made. One problem that must be recognized here is that any final determination of the rights today must take at least cursory cognizance of tomorrow's changes. For example, an area which is of only marginal commercial value today might be a bonanza when deeper drilling techniques are developed. Asking the oil and gas industry to give up this kind of speculative potential is asking a great deal, and adequate protections must be given.

As previously mentioned, one of the serious deficiencies in A.B. 2311 was its exclusion of leases. The distinction between the rights of mineral owners and of owners of producing leaseholds is too narrow to afford the luxury of solving the problems resulting from one and ignoring the other.

A.B. 2311 had as its obvious target the immediate problems that arise between individuals, any benefit inuring to society only incidentally. The interest society has in encouraging the development of its mineral resources is what the prescription statutes seem to protect, and the idea is sound. One defect in these statutes is that, standing alone, they do little to solve the problems posed herein. However, as an adjunct to a scheme such as A.B. 2311, they would have real merit. Most preferable is the restrictive Tennessee statute, both in the time period involved, ten years, and the consistency of treatment between a mineral leasehold and a mineral ownership.

The suggested modification of the California Code of Civil Procedure to allow an action in partition between a surface owner and a mineral owner should be further explored. At least it would offer an alternative to a surface owner who is willing to throw himself on the mercy of the equity court

Kent Graham