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Severed Mineral Interests, a Problem without a Solution

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SEVERED MINERAL INTERESTS, A PROBLEM WITHOUT A SOLUTION?

THE NATURE OF SEVERED MINERAL INTERESTS

The fee ownership of land generally includes the soil and minerals thereunder.[1] However, interests in land may be held in only a stratum of the entire fee. There are then surface interests and subsurface interests. This is the case in a severed mineral situation.[2] This separation of interests can occur in several different ways. One can reserve the mineral interests in a fee in himself when conveying the fee to another and thereby create a profit in himself.[3] An easement can also be created by reservation of an interest in a deed which conveys a fee.[4] The most common result when mineral rights are excepted in a transfer of real property, however, is the creation of a fee simple in the grantee as to the surface and a fee simple in the grantor in the mineral interests.[5] The end result of such exceptions may be either a cloud on the title of the surface owner or an entire separate fee in a given parcel of land. Prolonged experience with such excepted interests has shown that " 'mineral' and 'royalty' rights cannot only become a cloud on title, but one that cannot, under present law be removed by a trespass to try title, or any other presently available legal procedure. . . ."[6] When one considers that the holder of this subsurface estate may be someone who came by title through inheritance, and resides thousands of miles away from the subsurface estate, this problem becomes more apparent. In many instances the owner does not even know of the existence of the estate to which he has succeeded.[7]

The North Dakota case of Wisness *v.* Paniman[8] illustrates

1. *See* BLACK'S LAW DICTIONARY, 742 (rev. 4th ed. 1968). *See also* H. TIFFANY, REAL PROPERTY § 585-89 (3rd ed. 1939).
2. H. TIFFANY, REAL PROPERTY, § 585 (3rd ed. 1939).
3. Rich v. Donaghey, 71 Okl. 204, 177 P. 86, 89 (1918).
4. W. BURBY, REAL PROPERTY, *Profits and Easements*, § 27 p. 71 n 66 (3d ed. 1965).
5. *See* 36 AM. JUR. *Mines and Minerals* § 36 (1941).
6. Dupuy, *Clouds on Title*, 18 TEX. B.J. 275 (1955).
7. This is a very possible situation since the estate is a real property interest. A son might be devised all real property owned by his father, and never know the location or extent of his property unless he searches diligently the extent of his father's holdings and their whereabouts.
8. Wisness v. Paniman, 120 N.W.2d 594 (N.D. 1963).

one type of problem which a severed mineral interest creates. The respondents (Paniman) were owners of non-participating oil and gas leases in the property involved, and the plaintiff (Wisness) acquired the land involved by way of tax deed. Wisness farmed the land and paid taxes on it for a period of fifteen years. Oil and gas production began on the land in 1959. In 1959 Wisness brought action for quiet title through a claim of adverse possession, to the oil and gas interests. The lower court dismissed the complaint and quieted the title of the defendants to the royalty interests. The Supreme Court of North Dakota affirmed, even though the plaintiff had been upon the land for longer than the statutory period required for an adverse possession title, and even though the owners had not tried to assert their rights until the action for quiet title had been commenced by the plaintiffs.[9] The result of the *Wisness* case appears to be the thwarting of the adverse possession statute.[10]

THE GOAL OF MARKETABILITY

The goal of the attempted remedies discussed herein was to eliminate the problems of title discussed above and establish a manner of providing a marketable title to the land involved, i. e. reunite the surface and subsurface into one fee simple. The Supreme Court of North Dakota has described a marketable title as

> A title in fee simple, free from litigation, palpable defects, and grave doubts; that is, a title which will enable the purchaser not only to hold the land in peace, but will enable him, whenever he may desire to do so, to sell or mortgage the land to a person of reasonable prudence and caution.[11]

In examining what method may be used to attempt to attain a marketable title, this paper will address itself only to the problems involved when a fee in the subsurface minerals is created by exception in a deed conveying the surface estate. Profits or easements created by exception or reservation will not be discussed, nor will measures available for their elimination. Generally speaking, the attempts at perfecting title to a parcel of land where a subsurface fee also exists have been unsuccessful in North Dakota.

ADVERSE POSSESSION

The North Dakota Century Code provides:

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9. *Id.* at 595.

10. N.D. CENT. CODE § 47-06-03 (1960) states in part, "A title to real property vested in any person who has been or hereafter shall be either alone or including those under whom he claims, in the actual open adverse and undisputed possession of the land under such title for a period of ten years and who . . . shall have paid all taxes and assessments legally levied thereon shall be valid in law."

11. Kennedy v. Dennstadt, 31 N.D. 422, 434, 154 N.W. 271, 274 (1915) *citing* Reynolds v. Boul, 86 Cal. 538, 25 P. 67, 69 (1890).

> A title to real property, vested in any person who has been or hereafter shall be, either alone or including those under whom he claims, in the actual open adverse and undisputed possession of the land under such title for a period of ten years and who, either alone or including those under whom he claims, shall have paid all taxes and assessments legally levied thereon, shall be valid in law.[12]

As to what constitutes possession, the Code states:

> For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or upon a judgment or decree, land shall be deemed to have been so possessed and occupied in each of the following cases:
>
> 1. When it has been usually cultivated or improved;
> 2. When it has been protected by a substantial enclosure;
> 3. When, although not enclosed, it has been used for the supply of fuel or of fencing timber for the purposes of husbandry, or the ordinary use of the occupant; . . .[13]

and,

> When there has been an actual continued occupation of premises under a claim of title exclusive of any other right, but not founded upon written instrument or upon a judgment or decree, the premises actually occupied and no other shall be deemed to have been held adversely.[14]

In view of these statues it would appear that the plaintiffs in the *Wisness* case had title. They seemed to be in actual possession, the possession seemed to be adverse and undisputed and for the required period. They cultivated the land as required by the statute and did not claim the oil and gas rights under a written instrument. However, in North Dakota it has been held that, where the title to the mineral right has been severed from the title to the surface, possession of the surface by its owner is not adverse to the owner of the minerals below it. The owner does not lose his possession by any length of nonuse, and the surface owner cannot acquire title to the minerals by adverse occupancy of the surface alone.[15] Thus, possession of the surface is never possession of the subsurface for purposes of adverse possession. In addition, "The fact that the sur-

12. N.D. CENT. CODE § 47-06-03 (1960).
13. N.D. CENT. CODE § 28-01-09 (1960).
14. N.D. CENT. CODE § 28-01-10 (1960).
15. Bilby v. Wire, 77 N.W.2d 882, 889 (N.D. 1956). *See generally* 1 AM. JUR. *Adverse Possession* § 119 p. 858 n 15.

face owner has no knowledge of the severance, or believes that he owns the minerals, makes no difference."[16]

It is arguable that the surface owner could utilize the statute by actually possessing the minerals. He might mine coal for his own use, for example, or take gravel from the subsurface. It is doubtful that the mere sinking of a well would suffice because of the lack of actual possession of the subsurface in that situation. An additional problem might be the fact that the statutes cited deal only with real property. In order for the surface owner to show actual possession, it might be necessary for him to actually mine the minerals and they might then become personal rather than real property, and therefore not subject to the statute. Also, a surface owner who knew that he didn't own the minerals and sought to mine them for the purpose of satisfying the adverse possession statute might run the risk of prosecution if the owner were to appear and assert a claim prior to the running of the statutory period of time. There is no case law indicating a successful adverse possession of the subsurface in North Dakota.

NORTH DAKOTA MARKETABLE TITLE ACT

A second possible solution to the problem posed by a severed mineral estate is the North Dakota Marketable Record Title Act.[17] Section one of the act provides:

> Any person having the legal capacity to own real estate in this state, who has an unbroken chai nof title to any interest in real estate . . . under a deed of conveyance which has been recorded for a period of twenty years or longer, and is in possession of such real estate, shall be deemed to have a marketable record title . . . .[18]

There are provisions made in the chapter for the recording of a claim of interest to prevent the statute's taking effect,[19] thereby destroying an ancient interest, and a section excepting certain types of rights.[20] Attempted claims of title made by those claiming title to subsurface estates by virtue of their occupancy of surface estates have met with no success in the area of severed mineral interests, however.

16. L. SIMES & C. TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 245 (1960). *See also* American Law of Property § 10.7 (1952).
17. N.D. CENT. CODE ch. 47-19A (1960).
18. N.D. CENT. CODE § 47-19A-01 (1960).
19. N.D. CENT. CODE §§ 47-19A-03, -07 (1960).
20. N.D. CENT. CODE § 47-19A-11 (1960). The statute does not affect traditional property interests such as reversion, remainder or a possibility of reverter or right of reentry for breach of condition. Also exempt are the contractual interests of mortgage, trust deed and contract for sale (when not barred by the statute of limitations). The statute does not apply to a title held by the state or federal government, nor to one held by a railroad.

While a claim under an adverse possession statute fails because possession of the surface is not *adverse* possession of the subsurface,[21] under the Marketable Record Title Act, possession of the surface is not possession of the subsurface at all, adverse or otherwise. In *Northern Pacific Railway Co. v. Advance Realty Co.*,[22] the Supreme Court of North Dakota stated:

> In order to come under the protection of this act, one who claims an interest in real estate must have two qualifications. He must have an unbroken chain of title of record and he must be in possession of the interest which he claims. . . . By severance, separate estates are created and each is incapable of possession by the mere occupancy of the other. All that these defendants obtained was title to the surface, which did not in any way give them possession of the minerals. . . . It is not shown that any of such defendants exercised any dominion over or possession of the minerals separate and apart from the surface estate. Thus, we reach the conclusion that such defendants are not now in possession of any interest in the minerals in the lands involved. Therefore, the Marketable Record Title Act is not applicable to and has no effect upon the title to the minerals in question.[23]

It was also held in *Wichelman v. Messner*[24] that, "As owner of a separate fee in a separate 'piece' of real property, the record owner of the mineral rights does not have to file a statutory notice."[25] Simes and Taylor have, in their recent book, suggested a Model Marketable Title Act, to deal with problems of clouds and conveyancing complications, but concerning severed mineral interests, they state:

> In mineral areas, it may be desirable to make the Model Marketable Title Act even more explicit in its application to mineral interests. Again, it may be desirable to consider legislation in addition to that act.[26]

TAXATION OF SEVERED MINERAL INTERESTS

North Dakota has attempted to deal with the problem of severed mineral interests by taxation also. The theory seemed to be that if such interests could be taxed, the interests could eventually become

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21. Bilby v. Wire, 77 N.W.2d 882, 889 (N.D. 1956).
22. Northern Pac. Ry. Co. v. Advance Realty Co., 78 N.W.2d 705 (N.D. 1956).
23. *Id.* at 719
24. Wichelman v. Messner, 83 N.W.2d 800 (N.D. 1957).
25. *Id.* at 814. The filing of a notice of claim is provided for in N.D. CENT. CODE § 47-19A-03 (1960).
26. L. SIMES & C. TAYLOR, THE IMPROVEMENT OF CONVEYANCING THROUGH LEGISLATION 246-47 (1960). *See also* Davis, *Some Practical Aspects of Oil and Gas Title Examinations in Nebraska*, 34 NEB. L. REV. 1 (1954); Rummele, *The North Dakota Marketable Record Title Act*, 41 N.D. L. REV. 475, 480-81 (1965).

property of the county where they were located, as provided for by North Dakota Century Code section 57-28-08.[27] The first attempted tax came in 1923. The act provided for "[A]n annual state tax of three cents on each acre . . . upon all deposits of lignite coal and minerals and all titles to coal and minerals underyling any and all lands, the ownership of which coal and minerals has been severed from the ownership of the overlying strata and the surface of the land. . . ."[28] The act also provided for compilation and publication to the owners[29] of a list showing what taxes were owed by whom.[30]

Section five of the act then provided, in part, "If any such tax shall remain unpaid for the period of three years after the same becomes delinquent, the state auditor shall notify all persons . . . that unless paid within thirty days from the date of such notice, proceedings will be taken to declare the title to said mineral reserve forfeited to the state."[31] Section six of the act then made the state, upon non-payment, the absolute fee owner of the property.[32]

In *Northwestern Improvement Co. v. State*[33] this tax was attacked in part, upon the grounds that it violated section 176 of the North Dakota Constitution in that the tax was not uniform because it taxed all mineral reserves alike, regardless of the value of the reserves.[34]

In upholding these contentions, the North Dakota Supreme Court said:

> It is . . . unreasonable and arbitrary to provide a classification based upon the severance of ownership of minerals from that of the surface. It is true that all owners of minerals severed from the surface are in the same class, but that is not a classification of property but of persons. The tax is not upon the person but on the property, and it is

27. The section provides:
The failure of the owner or any mortgagee, or other lien holder, to redeem such lands before the period of redemption expires, shall operate:
1. To pass all of the right, title, and interest of the owner, mortgagee, or lien holder in and to said premises, to the county by operation of law . . .
28. COMP. LAWS OF N.D. § 2255a1 (1913-1925 Supp.).
29. COMP. LAWS OF N.D. § 2255a2 (1913-1925 Supp.).
30. COMP. LAWS OF N.D. §§ 2255a3 and 2255a4 (1913-1925 Supp.).
31 COMP. LAWS OF N.D. § 2255a5 (1913-1925 Supp.).
32. COMP. LAWS OF N.D. § 2255a6 (1913-1925 Supp.).
33. Northwestern Improvement Co. v. State, 57 N.D. 1, 220 N.W. 436 (1928).
34. *Id.* at 437. Section 176 of the Constitution of North Dakota reads:
Taxes shall be uniform upon the same class of property including franchises within the territorial limits of the authority levying the tax. The legislature may by law exempt any or all classes of personal property from taxation and within the meaning of this section, fixtures, buildings and improvements of every character, whatsoever, upon land shall be deemed personal property. The property of the United States and of the state, county, and municipal corporations and property used exclusively for schools, religious, cemetery, charitable or other public purposes shall be exempt from taxation. Except as restricted by this Article, the legislature may provide for raising revenue and fixing the situs of all property for the purpose of taxation. Provided that all taxes and exemptions in force when this amendment is adopted shall remain in force until otherwise provided by statute.

> the property that must be placed in reasonable classes for the purposes of taxation. To be uniform property taxes must be laid with regard to the value, or some other characteristic of the property which justifies classification. The tax in question is not uniform upon the same class of property in the taxing territory as required by section 176 of the Constitution and is therefore void.[35]

The Court felt that the tax violated section 176 because the classification made for the purpose of the tax by the statute was a classification of persons, not of property. It was the owners who had severed or nonsevered interests, not the property, yet it was property which was being taxed. The result was tax upon property which had not been uniformly classified as required by the North Dakota Constitution.

The second attempt at taxation of severed mineral interests in North Dakota came in 1947. In that statue,[36] in order to avoid the problems encountered in the 1923 tax, the legislature called the tax a tax on the privilege of holding mineral rights rather than a property tax.[37] It also changed the basis of assessment and only taxed undeveloped mineral reserves.[38]

In *Northwestern Improvement Co. v. Morton County*[39] this tax was successfully attacked as being unconstitutional. The North Dakota Supreme Court largely disregarded the distinction whether the tax was an excise tax or a property tax. It held that section 176 of the North Dakota Constitution and the Fourteenth Amendment to the Federal Constitution require that the tax be assessed in a manner which is not a purely arbitrary classification which denies equal protection of the laws.[40] In striking down the tax the Court focused upon the exemption of certain holders of mineral interests from paying any taxes.

> Since it is clear that the tax statutes before us apply a flat rate of three cents per acre *solely* to the mineral rights undeveloped by mining operations and severed from the overlying strata or surface rights *by an express reservation of such mineral right in the deed conveying the surface rights,* the said tax statutes are discriminatory, unreasonable and arbitrary and in violation of the rights granted all persons by the Fourteenth Amendment to the Federal Constitution and are void.[41]

35. Northwestern Improvement Co. v. State, 57 N.D. 1, 220 N.W. 436, 439 (1928).
36. N.D. REV. CODE of 1943 §§ 57-4901, -4903 (1949 Supp.).
37. N.D. REV. CODE of 1943 § 57-4901 (1949 Supp.).
38. *Id.*
39. Northwestern Improvement Co. v. Morton County, 78 N.D. 29, 47 N.W.2d 543 (1951).
40. *Id.* at 548.
41. *Id.* at 550, 551.

The Court here felt that to tax only the undeveloped mineral rights when the ownership of them was in a person other than the surface owner, and not tax the developed mineral rights was discriminatory. The two *Northwestern* cases, when read together, indicate the difficulty of taxing severed mineral estates in North Dakota. According to the North Dakota Supreme Court, the classification must be made upon the property, not upon the nature of ownership. The second decision says that a classification of property into developed mineral interests and undeveloped mineral interests, owned by someone other than the surface owner, is discriminatory. Apparently developed mineral estates and undeveloped mineral estates must be taxed alike. This is impossible because the value of a mineral estate is difficult, if not imposssible, to calculate before development.

PROPOSED LEGISLATION

During the 1968 session of the North Dakota Legislative Assembly a bill was introduced, portions of which dealt with disposal of severed mineral interests in this state. The bill passed the Senate, but was defeated in the House.[42]

The bill provided for an assumption that severed mineral interests are abandoned unless (1) the mineral interest has been separately assessed for real property taxation and the taxes are not delinquent (2) the interest has been mortgaged, leased, conveyed, or devised (and such transaction has been recorded) in the last thirty years (3) minerals, in paying quantities have been produced from the interest in the last thirty years, or (4) the owner has, by affidavit, indicated a desire to preserve his interest.[43]

Under the terms of the bill, any person could request to have any severed mineral interest declared abandoned; and, if found abandoned, the state would take custody of the interest. An annual report is provided which lists all mineral production in the state, including premises producing minerals in paying quantities where the mineral ownership has been severed.[44] Once the property is declared abandoned, the register of deeds of the county wherein the mineral interests are located would issue a deed of trust to the administrator of the trust set up for the property taken into custody.[45]

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42. Sen. Res. 38 passed the Senate on Tuesday, February 6, 1969. *See* N.D.S. JOUR. 339 (1969), and was defeated in the House on Saturday, March 15, 1969. *See* N.D.H.R. JOUR. 1344 (1969).
43. Sen. Res. 38 § 10.
44. *Id.* § 15.
45. *Id.* § 19. The section provides, in part, "[T]he register of deeds shall issue a deed of trust to the administrator, placing it of record, which shall convey such mineral interests free of all incumbrances whatsoever to the state as trustee to hold for the benfit of the owner."

This would take place only after publication of a notice in the county wherein the last known owner resided. The notice would contain a statement that if not claimed within 90 days, the property would be placed in the custody of the administrator not later than 120 days after the publication.[46] The deed received by the state as provided for in section 19 grants the power to the state to "receive the rents, and profits of such mineral interests presumed abandoned, and to lease such mineral interests and take custody of the proceeds. . . ."[47] The state holds as trustee for the benefit of the former owner; however, once custody has been taken by the administrator, the owner of the interest is not entitled to the profits earned by the property.[48]

The state may not sell these abandoned mineral interests,[49] but if a claimant to the interest files a claim as provided for in the act,[50] the administrator must convey the interest to the claimant in satisfaction of his claim.[51]

A number of criticisms may be made of Senate Bill Number Thirty-eight. First, by returning the interest to a claimant who proves a valid claim, the custodial period would do nothing to enhance the marketability of the surface estate, or erase the severed mineral estate. If the purpose was to provide a holder of record title so that potential developers of mineral reserves found in North Dakota would have someone from whom to lease the mineral rights, the purpose is again defeated by section 24 of the act because a developer of mineral reserves would certainly be reluctant to enter into an agreement with an owner who is legally bound to convey the property to another party upon proof of a claim of ownership. Since the lease is not only a concept of property law, but of contract law also, problems of privity might arise once the property has been reconveyed to its owner. What if the claimant has leased the mineral rights to another party? What if the reinstated owner refuses to continue the lease between himself and the state's lessee after expiration of the lease? Under section 19, the state would hold as trustee for the benefit of the owner and take custody of the mineral proceeds, but section 20 of the act provides that the owner is not entitled to receive income or other increments ac-

46. *Id.* § 16.
47. *Id.* § 19.
48. *Id.* § 20. The section provides, "When custody of severed mineral interests is taken or personal property is paid or delivered to the administrator under this Act, the owner is not entitled to receive income or other increments accruing thereafter."
49. *Id.* § 21 (1). The section provides, "All abandoned property *other than money delivered to the administrator, and severed mineral interests* taken into custody may be sold . . . ." (emphasis added).
50. *Id.* § 23. A claim can be filed under the act by, "Any person claiming at any time an interest in any property delivered to the state under this Act . . . ."
51. *Id.* § 24(2). The section provides, in part, "If the claim allowed is for severed mineral interests which have been taken into custody by the state, such interest shall be conveyed to the claimant in satisfaction of the claim."

cruing when custody of mineral interests is taken by the state.[52] Since the apparent reason for proposing a custodial statute was to avoid a taking, this purpose also is defeated because the retention of the profits of property to which one is entitled is probably no less a taking than is retention of the property itself. Finally, the very premise that the statute is built upon, i. e. a presumption of abandonment is faulty. It is essential to the concept of abandonment that there be relinquishment coupled with an intent to permanantly quit the property.[53] Thus, abandonment is an affirmative act. The purpose of the proposed legislation is to deal with the owner who does not know of the interest he possesses. It is questionable whether one can abandon property of which he has no knowledge.

CONCLUSIONS AND SUGGESTIONS

For the reasons stated, it is probably best that the proposed legislation was not passed. There are other possible solutions, however, which merit consideration. Section 38-13-01 of the North Dakota Century Code states:

> Where any undivided mineral, leasehold or royalty interest in land is claimed or owned by a person whose place of residence and whereabouts is unknown, and cannot reasonably be ascertained, the district court of the county in which the said land or a portion thereof is situated shall have the power to declare a trust in the interest of such owner or claimant and appoint a trustee therefor. Upon satisfactory proof made by the petitioner that a diligent but unsuccessful effort to locate such owner or claimant has been made and that it will be in the best interest of all owners of interests in said lands, the court shall authorize such trustee to execute and deliver an oil, gas or other mineral lease, an assignment of leasehold interest, a ratification, division orders or other related documents or instruments, on such terms and conditions as the court may approve.[54]

Although the statute makes no distinction between severed and nonsevered mineral interests, there seems to be no bar to its application to severed mineral interests. The section contemplates the situation where more than one party owns the property, and the whereabouts of one or more owners is unkown. Anyone who owns an interest in the land involved can institute proceedings to have such a trust declared.[55] Finally, there is no question of a taking

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55. N.D. CENT. CODE § 38-13-02 (1969).

52. *Id.* § 20. "When custody of severed mineral interests is taken or personal property is paid or delivered to the administrator under this Act, the owner is not entitled to receive income or other increments accruing thereafter."

53. State v. Murry, 195 Wis. 657, 219 N.W. 271, 272 (1928).

54. N.D. CENT. CODE § 38-13-01 (1969).

involved in this statute because the income is held in trust to be paid to the owner of the interest once he is located.[56]

These provisions would be available in situations where the ownership of a severed mineral estate has been divided; such a result is not unlikely because the interest will probably have passed by intestacy to heirs of the former owner. This is especially true if the owner had no knowledge of the interest when he died. If one of the heirs becomes aware of the interest, there seems to be no bar to his invoking the statute.

Another possible, though somewhat awkward remedy has been suggested in connection with a marketable title act.[57] If O, the owner of Blackacre, executes to A a mineral deed conveying one-fourth of all minerals in Blackacre and later executes to X a deed purporting to convey all mineral interests in Blackacre to X, after the statutory period had run, X could claim a perfected title under the deed conveyed to him by O.[58]

If this example is an accurate description of the operation of the act, then the owner of the original fee in all the land could be located, or his successor in interest, and he could convey to the person seeking to utilize the minerals a deed conveying all ownership in them to that person. There is, after all, no limitation of the operation of a marketable title act to a bona fide purchaser.

There are obvious limitations upon this suggestion, however. First, it will not work in the case of a grantor who excepted all of the mineral interests in the original grant because then there is no conflict of ownership or defect of title. (Complete exception of the mineral interests is the usual situation in North Dakota.) Also, if a case did arise where the example would apply, the person seeking to obtain a perfected title to the minerals would have to wait the statutory period before he had such a title.[59]

Probably the best solution to the problem would be to devise a constitutional tax, which would be effective to cause the interest to be forfeited for nonpayment of the tax. In declaring the 1923 tax invalid, the Supreme Court of North Dakota did not hold that *any* tax on severed mineral interests was invalid. It merely said that it must be uniform.

> To be uniform property taxes must be laid with regard to the value, or some other characteristic of the property. . . .[60]

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56. N.D. CENT. CODE § 38-13-03 (1969).
57. Barnett, *Marketable Title Act—Panacea or Pandemonium?*, 54 CORNELL L. REV. 45 (1967).
58. In North Dakota one has a marketable title if his claim of title is unbroken for 20 years so long as the deed is recorded, and he is in possession. N.D. CENT. CODE 47-19A-01, 02 (1960).
59. In North Dakota that period is twenty years. N.D. CENT. CODE § 47-19A-01 (1960).
60. Northwestern Improvement Co. v. State, 57 N.D. 1, 220 N.W. 436, 439-40 (1928).

In addition, the decision in *Northwestern Improvement Co. v. Morton County*,[61] which struck down the 1947 tax held, citing *State v. Wetz*,[62] that it is no longer the rule of section 176 of the North Dakota Constitution that all property taxed be taxed uniformly, according to its true value. The only limitation upon the classification of property for taxes is the Fourteenth Amendment to the Federal Constitution which forbids the classification to be arbitrary.[63] With the requirement of uniformity of evaluation relaxed, it would perhaps be easier to devise a carefully drafted statute taxing severed mineral interests in such a manner as to meet the requirements of the Due Process Clause. A statute drafted in such a manner that severed and non-severed ownership of minerals was treated alike would overcome the problem of being discriminatory. In order to devise such a tax, the levy would have to fall upon the ownership rather than upon the development of the interest. Probably the best statute would be one charging a uniform rate for the privilege of owning a mineral interest. This would prevent any claim of discrimination, and, if the question arose, prevent a claim of lack of uniformity.

The next obstacle would be to show that the tax was levied with regard to the value or some other characteristic of the property, as required by the Court in *Northwestern Improvement Co. v. State*, above. In that regard, the characteristic of the property upon which the tax was laid could arguably be that the property had mining reserves beneath its surface. There was no statement by the Court requiring that the characteristic had to be related to the value of the property. Thus, the tax would be upon the privilege of owning mineral interests and the characteristic of the property upon which the tax was laid would be the presence, actual or potential, of mineral reserves.

Another possible solution might be a revision of the North Dakota Marketable Record Title Act discussed above. As indicated by the Supreme Court of North Dakota in *Northern Pacific Railway Co. v. Advance Realty Co.*, a claimant under the North Dakota Act must be in possession of the estate he claims.[64] However, if the Act were amended so that the only requirement was that a claimant had a root of title, clear of any defect, for the statutory period, a claimant with a record title not showing that the mineral interests were severed from the surface estate would have a clear title to the entire parcel of land. Possession would be of no consequence, so long as the claimant's recorded title was clear of a reference to the

61. Northwestern Improvement Co. v. Morton County, 78 N.D. 29, 47 N.W.2d 543 (1951).
62. State v. Wetz, 40 N.D. 299, 168 N.W. 835 (1918).
63. Northwestern Improvement Co. v. Morton County, 78 N.D. 29, 47 N.W.2d 543 (1951).
64. Northern Pac. Ry. Co. v. Advance Realty Co., 78 N.W.2d 705, 719 (N.D. 1956).

severed mineral interests, and was of record for twenty years or more so that it would serve as a root of title.[65]

It is not the belief of this writer that the possible solutions suggested herein are the only solutions. It is, however, believed that they are the only large scale solutions. Quit claim deeds, curative acts, or title insurance might prevent disputes or law suits between prospective grantors and grantees, but they can do little to eliminate the separate estate. The existence of that estate is the focal point of this paper.

With the coming of the mining industry to North Dakota, these obscure clauses in conveyances have proved to be extremely troublesome. A developer is justifiably reluctant to purchase mineral rights from a surface owner with such a clause in his chain of title, and unless the Legislature is able to find some effective and Constitutional manner of providing for their removal, these severed mineral interests may cause a slowing or ceasation of the mining industry in this state.

DWIGHT F. KALASH

65. The Model Act set forth in L. SIMES & C. TAYLOR, THE IMPROVING OF CONVEYANCING BY LEGISLATURE (1960), is an example of a Marketable Title Act with no requirement of possession.