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Oil and Gas Leases: The Nature and Duration of the Interest

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Here there was an interference with the plaintiff's business. The interference was not justified by contract,[15] and should be subject to the same tests as all other union action: lawfulness of object. The same considerations which lead to the conclusion that the contract was illegal, compel the conclusion that the object was unlawful.

Query: Could the union withhold its shop card from a prospective barber-employer who intends to enter business on the same conditions it sought to withdraw it here?

Dan E. Cooper.

OIL AND GAS LEASES: THE NATURE AND DURATION OF THE INTEREST.—A recent California case, *Kirker* v. *Shell Oil Co.*,[1] gives rise to some interesting inquiry into the nature and duration of the interest of a lessee under a community oil lease for a period of 20 years "and for so long thereafter as Lessee shall conduct drilling . . . or producing operations on the leased land, or be excused therefrom, as hereinafter provided; . . ." The lease provided that the lessee was to commence drilling operations within three years, but could surrender all or any part of the leased land at any time, and thereby be released from all obligations in respect to the land, excepting accrued pecuniary obligations. The case actually decides that drilling within three years was not such a limitation as to create a determinable estate for years. However, the court didn't believe that the provision was breached, whether or not it was treated as a conditional limitation, condition subsequent, or a covenant. While this was sufficient for disposing of the case, the court went on to state "that the granting and habendum clauses of the lease grant the premises for a term of 20 years with a proviso for an extension of the term, if a particular stated event should ensue. Such a grant created a determinable fee." It is submitted that this is the type of dictum that is incomplete and must be closely guarded against, though it may be true as far as it goes.

Some of the questions that suggest themselves are: Why is it a determinable fee? What is the nature of the interest as distinguished from duration? When does it vest in ownership? Is there any interest other than a determinable fee? If not, what is the effect of the original 20-year term?

The first factor to determine is the nature of the interest acquirable in oil in place. There appear to be two major theories as to the nature of the interest created by an oil and gas lease: (1) Ownership of oil in place; (2) A right to acquire the oil in place, or a *profit a prendre.*

The oil in place doctrine is based on the assumption that the land is divisible laterally as well as horizontally.[2] The oil in place is treated in much the same way as other more solid minerals, with the exception that the interest in the oil is subject to defeasance by its escaping to adjoining lands.[3] The underlying premise is that

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[15]Either because the contract was illegal or by construction of it.

[1]104 A. C. A. 609, 231 P. 2d 905 (1951).

[2]Texas Co. v. Daughtery, 107 Tex. 234, 176 S. W. 717 (1915).

[3]Texas Co. v. Daughtery, 107 Tex. 234, 176 S. W. 717 (1915); South Penn. Oil Co. v. Snodgrass, 71 W. Va. 438, 76 S. E. 961, 43 L. R. A. (N. S.) 848 (1913); State v. South Penn. Oil Co., 42 W. Va. 80, 24 S. E. 688 (1896). ". . . the question, it seems to us, reduces itself to this: If the oil and gas, the subject of the conveyance, are in fact not beneath or within the land, and are therefore not capable of being reduced to possession, the conveyance is of no effect. But if they have not departed and are beneath it, they are there as a part of the realty; . . ." 18 Mich. L. Rev. 445, 459 (1920).

"the grant of a thing can be no more than the grant of the full and unlimited use of it. So, too, the general power of disposal without liability to account is equivalent to ownership itself."[4] California, if not actually committed, at least had leanings toward this view at one time.[5] Even at their time the dicta in those earlier California cases seem questionable, for as far back as 1884 a mining right was treated as a "servitude in gross."[6] Since there is actual ownership of the mineral substance under the oil in place doctrine it is of course a corporeal interest.[7]

The second view is that the interest created is a *profit a prendre.* As said in *Richfield Oil Co.* v. *Hercules Gasoline Co.*,[8] it "is a right to take something out of the soil of another, as a right of common, and also some minor rights as a right to fish, hunt and hawk, or to mine metals, dig for oil; take oil from the land." The same court further said it was "in the nature of a covenant running with the land."[9] Here the court is clearly referring to the similarity between land burdened by a covenant and land subject to a profit.[10] In the leading California case of *Callahan* v. *Martin*[11] the court rejected the oil in place doctrine and stated that the "owner of land does not have an *absolute* title to oil and gas in place as corporeal real property, but rather, the exclusive right on his premises to drill for oil and gas, and to retain as his property all substances brought to the surface on his land."[12] The court thus rejected the statements of the earlier California cases.[13] It has been pointed out that the *Callahan* case merely states that the owner of land, or grantee of oil in place doesn't have "absolute title," thus leading to the suggestion that the court meant to imply that there was *some interest* in the oil in place.[14] This suggestion was in turn based on a view expressed in the California Law Review[15] that California has rejected the "full ownership" of oil in place, and the "non-ownership" of oil in place, and has accepted a "qualified ownership." The above quoted language and statements that an oil and gas lease is "in the nature of a *profit a prendre*"[16] furnish a possible basis for this view. However, it is of questionable validity since a *profit a prendre* is merely a right to obtain minerals, as distinguished from ownership of minerals.[17] That is, a *profit a prendre* is the right to enter, separate and carry away the subject matter and is not a present ownership of the subject matter. The number of cases relying on the right

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[4]Caldwell v. Fulton, 31 Pa. 475, 484, 72 Am. Dec. 760 (1858).

[5]"Such an absolute estate in an underlying stratum may be created and the estate of the owner of the overlying land and of the owner of the subterranean stratum will be as distinct and separate as is the ownership of two respective owners of two adjoining tracts of land." Dictum, Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 144, 99 Pac. 483 (1909). Dictum, Chandler v. Hart, 161 Cal. 405, 414, 119 P. 516 (1911). See, also, Black v. Solano, 114 Cal. App. 170, 174, 299 P. 843 (1931).

[6]Smith v. Cooley, 65 Cal. 46, 2 P. 880 (1884).

[7]Stevens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566 (1923); 25 Cal. L. Rev. 230 (1937).

[8]112 Cal. App. 431, 434, 297 P. 73 (1931). See, also, 3 Tiffany, "Real Property," 427 (3d ed., 1939).

[9]Richfield Oil Co. v. Hercules Gasoline Co., *supra,* note 8.

[10]Smith v. Cooley, 65 Cal. 46, 2 P. 880 (1884).

[11]3 Cal. 2d 110, 43 P. 2d 788, 101 A. L. R. 871 (1935).

[12]*Id.*, at 117.

[13]See note 5, *supra.*

[14]Payne v. Callahan, 37 Cal. App. 2d 503, 510, 99 P. 2d 1050 (1940); Western Oil & Refining Co. v. Venago Oil Corp., 218 Cal. 733, 741, 24 P. 2d 971, 88 A. L. R. 1271 (1933).

[15]27 Cal. L. Rev. 192, 193 (1939).

[16]Callahan v. Martin, *supra,* at 118. See, also, note 14, *supra,* where the courts use such language as "no absolute title."

[17]See note 11, *supra.*

to oil in place as being a *profit a prendre* (through a failure to follow literally the language of the *Callahan* case or otherwise) would seem to substantiate this view.[18] Thus, it is submitted that there is merely a *profit a prendre*, which is an incorporeal interest.[19]

These interests are in gross[20] and assignable.[21] Also, the grantee of the profit has a right to such possession of the surface as is necessary to the exercise of his profit.[22] It is to be remembered that while the grantee has a mere expectancy in the oil itself[23] he has a present vested right to reduce that oil to possession.[24]

This brings up the problem of the duration of the *profit a prendre* in the typical oil lease.[25] "A *profit a prendre*, like an easement, may be created to endure in perpetuity, that is for the duration of an estate in fee simple, or for a less period such as a term for years."[26] Thus it would appear that any term may be limited in a *profit a prendre* that may be limited on any of the possessory estates.[27] For our present purposes we need only consider the language of the granting clause: "20 years and for so long thereafter as Lessee shall conduct drilling . . . or producing operation on the leased land, . . ." Initially it will be observed that the grantee had a vested *profit a prendre* for years.[28] It may be that the California definition of "hiring" will apply to the original term for years, if not to the indefinite period for production. (Discussed below.) "Hiring is a contract by which one gives to another the temporary possession and use of property, . . ."[29] If the lease will fit into this definition the lessee is liable for damages resulting from use other than that provided in the hiring.[30]

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[18]Dabney v. Edwards, 5 Cal. 2d 1, 11, 53 P. 2d 962 (1935); Dabney-Johnston Oil Corp. v. Walden, 4 Cal. 2d 637, 52 P. 2d 237 (1935); La Laguna Ranch Co. v. Corp. Commr., 18 Cal. 2d 132, 114 P. 2d 351, 135 A. L. R. 546 (1941); Gavina v. Smith, 25 Cal. 2d 501, 154 P. 2d 681 (1944); Austin v. Hallmark Oil Co., 21 Cal. 2d 718, 134 P. 2d 777 (1943); Tanner v. Title Ins. & Trust Co., 20 Cal. 2d 814, 129 P. 2d 383 (1942).

[19]25 Cal. L. Rev. 230 (1937).

[20]Cal. Civ. Code, sec. 802; Smith v. Cooley, 65 Cal. 46, 2 P. 880 (1884).

[21]Cal. Civ. Code, sec. 1044; Painter v. Pasadena Light & Water Co., 91 Cal. 74, 84, 27 P. 539 (1891).

[22]Dabney-Johnston Oil Corp. v. Walden, 4 Cal. 2d 637, 52 P. 2d 237 (1935).

[23]Cal. Civ. Code, sec. 1725.

[24]". . . only the right to reduce it to possession." Western Oil & Refining Co. v. Venago Oil Corp., *supra*, note 14, noted in 7 So. Cal. L. Rev. 119 (1933); People v. Associated Oil Co., 211 Cal. 93, 294 P. 717 (1930).

[25]While the language varies; viz.: "continue producing in paying quantities," "continue to drill," "continue to produce," the problem remains substantially the same.

[26]4 Tiffany, "Real Property," 428 (3d ed., 1939); Restatement, Property, sec. 450, comment *f*; Restatement, Property, sec. 468, comment *b*.

[27]Dabney v. Edwards, *supra*, note 18, at 11; 13 So. Cal. L. Rev. 304 (1940); see, also, Cal. Civ. Code, sec. 806.

[28]Gavina v. Smith, 25 Cal. 2d 501, 154 P. 2d 681 (1944); Taylor v. Hamilton, 194 Cal. 768, 774, 230 P. 656 (1924), overruling without citing, a statement in Brookshire Oil Co. v. Casmalia Co., 156 Cal. 211, 103 P. 927 (1909), to the effect that prior to discovery of oil or gas the lessee's right is inchoate and no estate vests in him. Jameson v. Chanslor-Canfield Oil Co., 176 Cal. 1, 167 P. 369 (1917); Chandler v. Hart, 161 Cal. 405, 413, 119 P. 516 (1911); 13 So. Cal. L. Rev. 304, 309. See, also, Cal. Civ. Code, sec. 708. *Cf.* Utt v. Frey, 106 Cal. 392, 39 P. 807 (1895). It is clear that these cases could not be concerned about forfeiture, etc., unless there was a vested interest. But see Moon v. Marker, 26 Cal. App. 2d 33, 78 P. 2d 460 (1938).

[29]Cal. Civ. Code, sec. 1925.

[30]Cal. Civ. Code, sec. 1930: "When a thing is let for a particular purpose the hirer must not use it for any other purpose; and if he does, he is liable to the letter for all damages resulting from such use, or the letter may treat the contract as thereby rescinded."

Or upon a use other than that, provided the lessor may treat the contract as rescinded.[31] Thus, aside from any other limitation imposed in the lease, the interest of the lessee may be subject to termination by the lessor on a failure to produce or drill.[32]

Although Thornton in his work on Oil and Gas suggests that drilling should be considered a condition precedent,[33] California has not followed this theory.[34] While not so under the facts of the Kirker case, this *profit a prendre* for years may be subject to a special limitation.[35]

The problem remaining is to determine the effect of the "thereafter" clause. It has been held in a few states that "and so long as oil or gas may be found in paying quantities" gives the grantee merely a tenancy at will or from year to year.[36] This has been expressly repudiated in California,[37] and wisely so. In *Dabney* v. *Edwards*[38] the court indicates that not only is the drilling a condition subsequent to the vesting in ownership of the term for years, but also a condition subsequent to the vesting in ownership of the "indefinite period for production." Thus apparently both interests vest at the execution of the original lease, with the term for years acting as some form of suspension of the condition subsequent. As to the problem of merger, it is said that "equity will prevent or permit a merger, as will best subserve the purposes of justice, and the actual intent of the parties."[39]

On another look at the language used it would seem that "and so long thereafter" would prevent a vesting of the greater estate at least until the end of the 20-year period. "Thereafter" clearly refers to either the 20-year period, or the commencement of drilling, either of which would prevent an immediate vesting. This thought is fortified by "so long thereafter as lessee *shall conduct drilling*." "Conduct drilling" assumes that it has commenced, which in turn would make the commencement of drilling a condition precedent to the vesting in ownership of the indefinite term.[40] While this view may eliminate a problem of merger, problems of suspension of alienation might arise out of older leases.[41]

Having considered *when* the "thereafter" clause gives an interest, the remaining problem is *what* it gives. In view of the decided cases in California it would seem that there is a determinable fee,[42] or at least an interest in the *nature of* a determinable fee.[43] By definition of a determinable fee this view is premised on the assumption

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[31]*Ibid.*

[32]Cal. Civ. Code, sec. 1931. *Cf.* Carstensen v. Gottesburen, 215 Cal. 258, 260, 9 P. 2d 831 (1932).

[33]1 Thornton, "Oil & Gas," 148 (5th ed., 1932), thus on failure to drill there is a noncompliance, rather than an abandonment.

[34]See note 28, *supra,* and especially Jameson v. Chanslor-Canfield Oil Co.

[35]Caswell v. Garden, 12 Cal. App. 2d 597, 600, 55 P. 2d 1222 (1936). (Called a conditional limitation.)

[36]State v. South Penn. Oil Co., 42 W. Va. 80, 24 S. E. 688 (1896). See, also, Harvey C. & C. Co. v. Dillion, 59 W. Va. 605, 53 S. E. 928 (1906). It is submitted that this view is unfounded in law—in that, by its nature, a determinable fee may be terminated by a failure to continue a certain operation. Also if "so long as" is held to create a tenancy at will, it is difficult to see how a determinable fee may be created.

[37]Dabney v. Edwards, *supra,* note 18, at 14.

[38]Note 18, *supra.*

[39]Ito v. Schiller, 213 Cal. 632, 635, 3 P. 2d 1 (1931). See, also, Buell v. Simon Newman Co., 61 F. Supp. 157, affirmed 154 F. 2d 35 (1945).

[40]Moon v. Marker, 26 Cal. App. 2d 33, 37, 78 P. 2d 460 (1938). 1 Thornton, "Oil & Gas," 153 (5th ed., 1932).

[41]Cal. Civ. Code, sec. 715, repealed 1951.

[42]Dabney v. Edwards, *supra,* note 18; 13 So. Cal. L. Rev. 304, 393 (1940).

[43]Callahan v. Martin, *supra;* Gavina v. Smith, 25 Cal. 2d 501, 154 P. 2d 681 (1944); Austin v. Hallmark Oil Co., 21 Cal. 2d 718, 134 P. 2d 777 (1943).