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# Abandonment of the Granted Right to Drill for Oil and Gas: Gerhard v. Stephens

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# ABANDONMENT OF THE GRANTED RIGHT TO DRILL FOR OIL AND GAS: *GERHARD v. STEPHENS*[1]

One of the most difficult problems in the development of oil and gas law has been the determination of the exact nature of the property rights governing the ownership and extraction of petroleum minerals. Various theories of ownership were developed in the United States in the nineteenth and twentieth centuries: (1) absolute ownership of all oil and gas in place,[2] (2) a qualified theory of ownership with certain rights shared in common with other owners above the pool, and (3) a theory of non-ownership, or the exclusive right to drill for oil.[3]

The majority of the major oil producing states had already considered the question of ownership before petroleum production in California began to be important in the early twentieth century. The earliest California case to consider the ownership theories was *Acme Oil and Mining Co. v. Williams*[4] in 1903. The court decided that before most property rights to the oil could attach, the owner would have to reduce the fugacious substance to possession. In *Graciosa Oil Co. v. County of Santa Barbara*[5] the California Supreme Court, operating from the theory of absolute ownership of oil and gas in place, held that a lease to drill for the oil and gas was a servitude on the land. The court ruled that for purposes of taxation such a servitude was a chattel real.

Until the development of the Santa Fe Springs oil field in 1928, the theory of ownership of oil and gas *in situ* was accepted as the rule by California courts. Because of the tremendous waste in the operation of that field, the legislature began passing laws aimed at controlling oil and gas production. To further the purposes of these laws, the courts began to modify the doctrine of absolute ownership in place.[6]

In 1935 the Supreme Court of California decided two landmark oil

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[1] 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612.

[2] This theory is derived from the old common law maxim: *cujus est solum, ejus est usque ad coelum et ad inferos* (to whomsoever the soil belongs, he owns also to the sky and to the depths). BLACK'S LAW DICTIONARY 453 (4th ed. 1951).

[3] Colby, *The Law of Oil and Gas*, 31 CALIF. L. REV. 357 (1943); Hightower, *The Oil and Gas Lease in California*, 3 U.C.L.A. L. REV. 424 (1956). For a survey of the present diversity in ownership theories in the United States, see 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 203 (1964).

[4] 140 Cal. 681, 74 P. 296 (1903).

[5] 155 Cal. 140, 99 P. 483 (1909).

[6] Colby, *supra* note 3, at 386-93.

and gas cases which are the foundation of the present theory of ownership in California. In *Callahan v. Martin*[7] the Supreme Court reviewed in great detail all of the theories of ownership. The case concerned a lease granted for a term of years with the provision that if oil were found, the lease would continue so long as oil should be produced. The court decided that such a lease created for the lessee an interest or estate in real property. The interest thus created was a profit *à prendre*, which is an incorporeal hereditament, *i.e.*, a directly inheritable right arising from and connected with real property.[8]

*Dabney-Johnston Oil Corp. v. Walden*[9] more clearly defined the doctrine of non-ownership of fugacious minerals until reduced to possession. The court found that the owner had the exclusive right to drill for oil on his land. The owner could grant the valuable right to another. Such a granted right to remove a part of the substance of the land was an interest in real property, a profit *à prendre*, an incorporeal hereditament. Such a grant created an estate in real property which would be a chattel real if for a term of years or a freehold interest, an estate in fee if unlimited in duration.[10]

Thus in 1935 the two major decisions characterized the ownership of oil and gas rights both as an incorporeal hereditament and as a fee simple interest in real property. In dealing with many problems of oil and gas property rights, the courts followed both aspects of this characterization prior to 1968. When the issue of abandonment arose concerning the rights, the dual characterization posed a real legal problem. Were the oil and gas rights incorporeal hereditaments that could be abandoned? Or were the rights granted fee simple interests in real property that could not be abandoned? With *Gerhard v. Stephens*[11] the conflict seemingly inherent in such a dual characterization of the property rights was resolved.

In *Gerhard v. Stephens* there were multiple parties, many issues, and an extremely complex factual situation. Only the facts directly pertinent to the major issues, the nature of the oil and gas interests and the abandonment thereof, are included here.[12]

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7 3 Cal. 2d 110, 43 P.2d 788 (1935).

8 *Id.* at 118, 43 P.2d at 792.

9 4 Cal. 2d 637, 52 P.2d 237 (1935).

10 *Id.* at 649, 52 P.2d at 243.

11 68 Cal. 2d —, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

12 There were many issues litigated in the case including the nature of the oil and gas interest, the abandonment of such interests, the adverse possession of mineral interests, adverse possession by a cotenant, the effect of prior quiet title actions, the conclusiveness of judgments, the occurrence of laches, the right to examine adverse witnesses, the nature of a class action, the effect of a foreclosure judgment, the alleged unlawful practice of law by plaintiff Gerhard, and the assertion of invalid acquisition of claims by Gerhard.

The property in dispute in the *Gerhard* case was the petroleum underlying section 31, which was part of the Syncline Ranch. Abrams and Brandt acquired the disputed property in fee simple in 1905. They formed a partnership and with Weber organized two corporations, Ashurst Oil, Land and Development Company (Ashurst) and California Oil Products Company (COP). The partnership conveyed to the corporations the petroleum and asphalt rights underlying section 31 together with the right to enter and extract those minerals forever. Neither corporation found oil. Both forfeited their corporate charters, Ashurst in 1912, and COP in 1915. The partners then owned the surface estate of section 31, the partnership holdings of corporate stock, and their individual corporate stock holdings. In an action in 1917 the court quieted title to the surface estate in Abrams and Brandt and decreed that all 148 stockholders in the two corporations were co-owners of the petroleum mineral estate in proportion to their stock holdings. Following a partnership accounting in 1919, Brandt acquired the partnership interests in both the surface estate and the mineral estate. The Frusetta-Cornwell defendants acquired by deed from Brandt the surface estate and the partnership mineral interests. By acquiring the undivided fractional mineral interests of the partnership, they became tenants in common with the other mineral owners under the 1917 quiet title decree. All plaintiffs were successors in interest to the latter mineral owners.

The Frusetta-Cornwell defendants retained and used the property to the present time. On two occasions they brought quiet title actions to clear the outstanding interests in the land. In neither action were plaintiffs or their predecessors named or served with notice, although their existence and rights were on record and should have been known by the defendants from their deed and from an earlier decree quieting title in the corporate stockholders. The defendants twice issued and recorded mineral leases on the property without any notice to the plaintiffs other than the constructive notice afforded by recording.

In 1956 Shell Oil Company discovered oil on the property under a lease made by the defendants. Plaintiff Gerhard learned of the strike and investigated the history of the property. He approached the successors of certain stockholders and obtained some claims. He then commenced an action to quiet title against the Shell Oil Company and the Frusetta-Cornwell interests. The plaintiffs in the other quiet title actions were the heirs and successors in interest to the individual holdings of Abrams, Brandt, Weber, and the former stockholders of the defunct corporations. There was no dispute about the right of the defendants to make any mineral lease because all plaintiffs conceded that the defendants had an undivided, fractional mineral interest. At issue were the mineral property rights which the plaintiffs maintained were still theirs despite their long nonuser.

The trial court held *inter alia* that by forty-seven years of nonuser, the plaintiffs abandoned their interests in the petroleum. In so holding, the

trial court followed *Callahan* and characterized those interests as incorporeal hereditaments, which could be abandoned. The court of appeal reversed the challenged ruling and held that the right to drill for oil granted in perpetuity was a fee interest in real property and, as such, could not be divested by abandonment. In reversing the trial court, it rested its decision on the *Dabney-Johnston* opinion that the exclusive right to drill, unlimited in duration, created a fee simple title. The court of appeal held that the two Frusetta-Cornwell quiet title actions did not bar the plaintiffs' claims because neither action specifically covered the severed fee interest. All actions against the Shell Oil Company were decided in its favor. Only the Frusetta-Cornwell defendants remained when appeal was taken to the California Supreme Court.

The most significant issue of the case, and the one on which most of the major determinations of the courts depended, was the nature of the interest in oil and gas. Was the interest a fee simple interest in real property which could not be lost by abandonment, or was it an incorporeal hereditament which could be so lost? The California Supreme Court held that the severed petroleum interest was a profit *à prendre*, an incorporeal hereditament, and could be abandoned. The court stated that there was substantial evidence to sustain the trial court's finding that certain plaintiffs had abandoned their interests, but there was no such evidence against the remaining plaintiffs. The court ruled that the Frusetta-Cornwell quiet title decrees did not bar the plaintiffs' claims.

In so holding, the Supreme Court decided which of its 1935 decisions would govern: the characterization of the right as a profit *à prendre*, an incorporeal hereditament, or as an estate in real property, a fee. The court accomplished this by defining the term "fee" as two separate concepts. In one sense "fee" may be used to describe all of the *possessory* and *corporeal* rights of ownership in real property.[13] In the other sense the word "fee" is the interest of an estate of inheritance, a description of the duration of the interest.[14] The court decided that the second meaning was the one intended by the earlier cases. Both cases had used the term "fee" to indicate that the rights involved were of unlimited duration rather than for a term of years. *Callahan* had equated severance from the realty with the possessory ownership of oil, not with the duration of the right to drill.[15]

The court ruled that both the nature of the interests and their duration determined the rights involved. In *Gerhard*, although the duration of the interest made it a fee, an inheritable property right, its nature made it a profit *à prendre*, an incorporeal hereditament. Such profits are like easements, and the courts have described and treated both identically.[16] Prior

[13] 68 Cal. 2d 864, 884, 442 P.2d 692, 709, 69 Cal. Rptr. 612, 629 (1968).
[14] *Id.* at 885, 442 P.2d at 709, 69 Cal. Rptr. at 629.
[15] *Id.* at 885, 442 P.2d at 709-10, 69 Cal. Rptr. at 629-30.
[16] Costa v. Fawcett, 202 Cal. App. 2d 695, 21 Cal. Rptr. 143 (1962).

to the *Gerhard* decision, no California court had ruled that a perpetual profit could be abandoned. The court in *Gerhard* decided that the rule that applied to granted perpetual easements should by analogy apply to granted perpetual profits. Such easements and profits can be abandoned. Abandonment extinguishes the right, and the dominant estate then ceases to exist and is merged with the servient one.[17]

To find that there has been an abandonment of a granted perpetual profit or easement, there must be a showing that the owner had the intent to abandon coupled with a long nonuser of the profit.[18] Certain plaintiffs in the case manifested their intent to abandon their property rights in 1914 at the closing of the estate containing the corporate stock by refusing to accept the stock in order to escape the risk of liability for corporate debts. None of the other plaintiffs ever manifested any intent not to keep their property rights. They merely did nothing for forty-seven years. The court provided the following guideline for future cases considering possible abandonment:

> In order to protect the owner of an unlimited profit *a prendre* or other incorporeal hereditament against "involuntary" abandonment under circumstances in which conflicting inferences may be drawn from his nonuser we hold that the trial court must find either that the owner's future use of the right could result only from a palpably unsound business judgment [footnote omitted] or that the owner has given a further indication of his intent to abandon.[19]

*Gerhard v. Stephens* has now defined the nature of the property interest in oil and gas by resolving the apparent conflict generated by the dual characterizations in the *Callahan* and *Dabney-Johnston* cases. One of the most important effects of the decision is that it opens the possibility of clearing long-dormant mineral interests and of freeing the surface estate from the servitude. Certainly the court based its decision in part on the policy considerations of clearing titles and making property more readily alienable.[20] It might also have been attempting to bring California more closely into line with those states having special statutes terminating dormant oil and gas interests.[21]

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17 68 Cal. 2d 864, 887, 442 P.2d 692, 711, 69 Cal. Rptr. 612, 631 (1968). The cases holding that easements granted perpetually can be abandoned are People v. Southern Pacific Co., 172 Cal. 692, 158 P. 177 (1916); Smith v. Worn, 93 Cal. 206, 28 P. 94 (1892); Buechner v. Jonas, 228 Cal. App. 2d 127, 39 Ca.l Rptr. 298 (1964); Lake Merced Golf & Country Club v. Ocean Shore R.R., 206 Cal. App. 2d 421, 23 Cal. Rptr. 881 (1962); Ocean Shore R.R. v. Doelger, 179 Cal. App. 2d 222, 3 Cal. Rptr. 706 (1960).

18 68 Cal. 2d 864, 890, 442 P.2d 692, 712-15, 69 Cal. Rptr. 612, 632-35 (1968).

19 *Id.* at 895, 442 P.2d at 716, 69 Cal. Rptr. at 636.

20 WILLIAMS & MEYERS, *supra* note 3, § 210.1 (1964); Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests,* 43 TEX. L. REV. 129 (1964).

21 Gerhard v. Stephens, 68 Cal. 2d 864, 888 n.21, 442 P.2d 692, 711 n.21, 69 Cal. Rptr. 612, 631 n.21 (1968). The court takes note of LA. STAT. ANN. CIV. CODE arts. 789, 3546 (1952, 1953) (10 yrs.); MICH. STAT. ANN. § 26.1163(1) (Supp. 1968)

The case has applicability to general property law. Although dealing with a special form of property, fugacious minerals, the court's rulings were made in broad terms not limited to oil and gas. All profits *à prendre* are subject to abandonment. In order to find abandonment of a granted profit and, by analogy, of an easement, the trial court must find nonuser plus the intent to abandon, and both must be clearly shown.

Two aspects of the problem presented by the case were not fully explored by the court. The original grants to the corporations included the fugacious minerals and two minerals which must be mined, asphalt and coal. By normal property definitions an interest in asphalt and coal would be a fee interest in real property in both the possessory and corporeal senses and hence not abandonable. In this case the court decided that the intent of the original grantors had been to sever the profit in oil and gas. The asphalt and coal had merely been included incidentally, so there was no intent to establish a possessory estate in the corporeal sense. The court decided that the grantors could not have intended to create two kinds of estates, a possessory fee in asphalt and coal and a profit *à prendre* in petroleum. It concluded that only one type of estate, the profit *à prendre*, was conveyed for both the fugacious and non-fugacious minerals. There was very little analysis of this point. The decision seems to have been made primarily because the original conveyances were made during an oil boom to two corporations with full corporate names indicating an interest in oil. There is nothing in such a situation that makes it inherently impossible for a grantor to have intended to vest full fee rights in the solid minerals as well as a profit in oil. Such a precedent makes uncertain the area of grants conveying more than one mineral right.

The second problem the court left for future resolution was the effect of conveyance not of the oil and gas profit, but of a horizontal strata containing oil and gas minerals. Will such a severed strata be considered a possessory fee or a profit?

The future application of *Gerhard* to property law and to oil and gas law should result in an answer to the unresolved questions of the case. It should also lead to an expansion of the doctrine of abandonment. The court said that when conflicting inferences from nonuser are present, abandonment should not be found. Thus it may be possible to attack a long-dormant interest and find abandonment from nonuser alone where there are no seriously conflicting inferences. Another mode of attack might well derive from the nonuser in those circumstances where a renewal of use could result only from very unsound business judgment. Although oil and gas drilling rights are by nature speculative and therefore likely to have long periods of nonuser, there should be available to the owner of the

(20 yrs.); TENN. CODE ANN. § 64-704 (Supp. 1968) (10 yrs.); VA. CODE ANN. §§ 55-154 (Cum. Supp. 1968) §§ 55-155 (1959) (35 yrs.).

servient estate some means to clear the title to his property after a long period of nonuser by the dominant owner. *Gerhard v. Stephens* may open such a way.

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