

CHAPTER XXV

PROFIT á PRENDRE



STANDARD 25.1

DEFINITION OF PROFIT Á PRENDRE

STANDARD: A PROFIT á PRENDRE IS A RIGHT TO ACQUIRE, BY SEVERANCE OR REMOVAL FROM LAND OWNED BY ANOTHER, SOME THING OR THINGS CONSTITUTING A PART OF THE LAND SUCH AS SAND, GRAVEL, MINERALS, TIMBER OR GAME. A PROFIT á PRENDRE IS A FLOATING, INDEFINITE, INCORPOREAL HEREDITAMENT WHICH INCLUDES THE RIGHT TO ENTER UPON THE LAND FOR PURPOSES INCIDENTAL TO THE PROFIT á PRENDRE.

Problem: Simon Grant owned Blackacre. Grant contracted with ABC Corporation to sell “all sand, stone and gravel located in and on Blackacre.” The contract term was for three years commencing April 1, 2006. The contract was recorded. On August 1, 2006, Grant deeded Blackacre to John Doe. Is Doe’s title to Blackacre subject to the right of ABC Corporation to remove sand, stone and gravel from Blackacre through March 31, 2009?

Answer: Yes.

Authorities: *St. Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926); *Evans v Holloway Sand & Gravel, Inc.*, 106 Mich App 70, 308 NW2d 440 (1981); *Van Alstine v Swanson*, 164 Mich App 396, 417 NW2d 516 (1987), app den 430 Mich 885 (1988); *Hubscher & Son, Inc. v Storey*, 228 Mich App 478, 578 NW2d 701 (1998).

Comment: The principal difference between a profit á prendre and an easement (whether in gross or appurtenant) is that a profit á prendre allows the grantee to take a profit (e.g., gravel, minerals or game) from the land,

whereas the grant of an easement permits the grantee to “use” the land for the purpose specified in the grant. In other words, an easement is a privilege without a profit which the owner of a parcel of land may grant to another. *Evans v Holloway Sand & Gravel, Inc., supra.*

STANDARD 25.2

CREATION OF PROFIT á PRENDRE

STANDARD: A PROFIT á PRENDRE MAY BE CREATED BY GRANT, RESERVATION OR CONTRACT.

Problem A: ABC Corporation, the owner of Blackacre, granted the exclusive right to hunt game and fowl on Blackacre to Simon Doe. Did Doe acquire a profit á prendre to hunt game and fowl on Blackacre to the exclusion of all other persons, including ABC Corporation?

Answer: Yes.

Problem B: In 2007, ABC Corporation deeded Blackacre to George Davis, reserving to itself the exclusive right to explore for and produce oil and gas for 15 years and so long thereafter as operations to explore for and produce oil and gas were being conducted. In 2020, does Davis have the right to explore for and produce oil and gas from Blackacre?

Answer: No.

Problem C: Same facts as in Problem B. In 2010, Davis sold logging rights on Blackacre by contract to Richard Roe. Did Roe acquire a profit á prendre to remove timber from Blackacre ?

Answer: Yes.

Authorities: Problem A: *St. Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926).

Problem B: *Evans v Holloway Sand & Gravel, Inc.*, 106 Mich App 70, 308 NW2d 440 (1981); *Van Alstine v Swanson*, 164 Mich App 396, 417 NW2d 516 (1987), *lv den*, 430 Mich 885 (1988); *Stevens Mineral Co. v State of Michigan*, 164 Mich App 692, 418 NW2d 130 (1987), *lv den*, 430 Mich 895 (1988).

Problem C: *St. Helen Shooting Club v Mogle, supra*; *Stevens Mineral Co. v State of Michigan, supra*; *Hubscher & Son, Inc. v Storey*, 228 Mich App 478, 578 NW2d 701 (1998).

Comment: A profit á prendre includes two distinct rights: (1) the right to acquire, by severance or removal from another's land, some thing or things constituting a part of the land; and (2) the right to gain access to the land for purposes incidental to the permitted activity. (See, e.g., *Hubscher & Son, Inc. v Storey, supra*; *Van Alstine v Swanson, supra*; *Evans v Holloway Sand & Gravel, Inc., supra*.)

Ownership of a profit á prendre is not the equivalent of ownership of the materials to be removed. Rather, until the rights are actually exercised and the materials reduced to possession, a profit á prendre is a floating, indefinite, incorporeal right. *Harlow v Lake Superior Iron Co.*, 36 Mich 104 (1877); *Stevens Mineral Co. v State of Michigan, supra*; *Van Alstine v Swanson, supra*.

A profit á prendre vests at the time of its creation, even if the right of entry is not yet exercised. Accordingly, the rule against perpetuities does not apply. *Hubscher & Son, Inc. v Storey, supra*. Because a profit á prendre is an interest in real property, it is subject to the statute of frauds and requires a writing for its creation. *St. Helen Shooting Club v Mogle, supra*.

STANDARD 25.3

EXCLUSIVE OR NON-EXCLUSIVE PROFIT á PRENDRE

STANDARD: A PROFIT á PRENDRE MAY BE EXCLUSIVE OR NON-EXCLUSIVE.

Problem: Joan Doe owned Whiteacre. Doe granted to John Jones and his assigns the exclusive right to hunt on Whiteacre, forever. Doe then deeded part of Whiteacre to Sam Smith subject to the exclusive hunting right of Jones. Does Smith have the right to hunt on the part of Whiteacre conveyed to him?

Answer: No.

Authority: *St. Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926).

STANDARD 25.4

PROFIT á PRENDRE IN GROSS OR APPURTENANT

STANDARD: A PROFIT á PRENDRE MAY BE CREATED IN GROSS OR APPURTENANT TO AN ESTATE.

Problem A: John Jones owned Blackacre. Jones granted to Simon Grant a non-exclusive right to hunt on Blackacre. Grant did not own land adjacent to Blackacre. Did Grant acquire a profit á prendre in gross?

Answer: Yes.

Problem B: Max Miner owned Blackacre. Irving Investor owned Whiteacre, a parcel of land adjacent to Blackacre. Investor granted to Miner the right to remove iron ore from Whiteacre for processing in a furnace on Blackacre. Did Miner acquire a profit á prendre appurtenant?

Answer: Yes.

Authorities: Problem A: *St. Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926).

Problem B: *Negaunee Iron Co. v Iron Cliffs Co.*, 134 Mich 264, 96 NW 468 (1903), *error dis*, 197 US 463, 25 S Ct 474, 49 L Ed 836 (1905).

Comment: The right to hunt game and the right to remove timber, sand, gravel and minerals are profits which are often held in gross, though they may also be held appurtenant to an estate.

STANDARD 25.5

TRANSFERABILITY AND INHERITABILITY OF PROFIT á PRENDRE

STANDARD: A PROFIT á PRENDRE, WHETHER APPURTENANT OR IN GROSS, IS TRANSFERABLE AND INHERITABLE.

Problem A: John Jones owned Blackacre. Jones granted to Simon Grant the right to mine sand and gravel from Blackacre for 25 years. After 10 years Grant assigned the right to Sam Smith. Did Smith acquire the right to mine sand and gravel from Blackacre for the remaining 15 years?

Answer: Yes.

Problem B: John Jones owned Blackacre. Jones granted to Simon Grant the right to mine sand and gravel from Blackacre. Grant died, leaving Junior Grant as his heir. Did Junior Grant inherit the right to mine Blackacre?

Answer: Yes.

Authority: *St. Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926).

STANDARD 25.6

DURATION OF PROFIT á PRENDRE

STANDARD: THE DURATION OF A PROFIT á PRENDRE IS ESTABLISHED BY THE INSTRUMENT CREATING IT AND MAY BE PERPETUAL OR LIMITED.

Problem A: Susan Grant owned Blackacre. On November 20, 1994, Grant deeded Blackacre to John Jones reserving to herself, her successors and assigns the right to produce oil, gas and other minerals for a term of 10 years and so long thereafter as oil, gas and other minerals were produced in paying commercial quantities. After January 1, 2006, oil, gas and other minerals were no longer being produced in paying commercial quantities. Did the reservation terminate?

Answer: Yes.

Problem B: John Jones, the owner of Blackacre, entered into an agreement dated January 1, 2001 with Sandstone Sand & Gravel permitting Sandstone to mine sand, stone and gravel from Blackacre for a term of three years, with a right to extend the agreement for an additional two years. Sandstone exercised its right to extend the agreement. Does Sandstone have the right to mine sand, stone and gravel from Blackacre until December 31, 2005?

Answer: Yes.

Problem C: John Jones owned Blackacre. Jones granted to the St. Clair Hunting Club and its assigns, forever, the right to hunt game and fowl on Blackacre. Did the Hunting Club acquire a perpetual right to hunt game and fowl on Blackacre?

Answer: Yes.

Authorities: Problem A: *Van Alstine v Swanson*, 164 Mich App 396, 417 NW2d 516 (1987), *lv den*, 430 Mich 885 (1988); *Stevens Mineral Co v State of Michigan*, 164 Mich App 692, 418 NW2d 130 (1987), *lv den*, 430 Mich 896 (1988); *Hubscher & Son, Inc. v Storey*, 228 Mich App 478, 578 NW2d 701 (1998).

Problem B: *Evans v Holloway Sand & Gravel, Inc.*, 106 Mich App 70, 308 NW2d 440 (1981); *Van Alstine v Swanson, supra*; *Hubscher & Son, Inc. v Storey, supra*.

Problem C: *St. Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926).

STANDARD 25.7

TERMINATION OF PROFIT á PRENDRE

STANDARD: A PROFIT á PRENDRE MAY BE TERMINATED BY EXPIRATION OF ITS TERM, BY ABANDONMENT OF THE PROFIT, OR BY OPERATION OF LAW.

Problem A: John Jones owned Blackacre. Jones granted to Able Timber Company the right to cut and remove standing timber on Blackacre for a term of three years expiring July 1, 2006. May Able Timber Company continue to cut and remove timber on Blackacre after July 1, 2006?

Answer: No.

Problem B: Lois Lane owned Blackacre. Lane granted to First Rate Mining Co. the right to mine and remove iron ore from Blackacre for the sole purpose of converting the ore to merchantable iron in First Rate's own furnaces. For a period of 10 years, First Rate did not mine or remove iron ore from Blackacre. After 10 years, First Rate dismantled its furnaces. Did First Rate abandon its right to mine and remove iron ore from Blackacre?

Answer: Yes. First Rate's failure to undertake any mining activities on Blackacre coupled with its dismantling of the furnaces evidenced its abandonment of the profit á prendre.

Authorities: Problem A: *Evans v Holloway Sand & Gravel, Inc.*, 106 Mich App 70, 308 NW2d 440 (1981); *Van Alstine v Swanson*, 164 Mich App 396, 417 NW2d 516 (1987), app den 430 Mich 885 (1988); *Hubscher & Son, Inc. v Storey*, 228 Mich App 478, 578 NW2d 701 (1998).

Problem B: *Negaunee Iron Co. v Iron Cliffs Co.*, 134 Mich 264, 96 NW 468 (1903), *error dis* 197 US 463, 25 S Ct 474, 49 L Ed 836 (1905).

Comment A: An oil and gas profit á prendre may be terminated by operation of the Dormant Minerals Act, MCL 554.291, *et seq.* See, Standard 15.4.

Comment B: A profit á prendre in minerals other than oil, gas, sand, gravel, limestone, clay and marl may be terminated by operation of the Marketable Record Title Act if the last recording of the interest precedes at least a 20-year unbroken chain of record title that includes no reference to the interest and if other requirements are satisfied. A profit á prendre in sand, gravel, limestone, clay and marl, or any of them, may be terminated by operation of the Marketable Record Title Act if the last recording of the interest precedes at least a 40-year unbroken chain of record title that includes no reference to the interest and if other requirements are satisfied, MCL 565.101 *et seq.* See, Standard 1.6.

Comment C: The bases for termination of a profit á prendre set forth in this Standard are not exclusive. For example, a profit á prendre may also be terminated by release or by merger of the profit with the servient estate. See generally, 8 Thompson, *The Law of Real Property* (1994), § 65.01 *et seq.* and Bruce and Ely, *The Law of Easements and Licenses in Land* (1995), § 1.04[6].