which the spirit of the Wagner Act demands.[18] Either abrogation or substitution is preferable to the strict enforcement of contracts where there has been a change of affiliation.

Oil and Gas—Applicability of Rule against Perpetuities to Grant of Oil and Gas—[Federal].—In 1905 the defendants' predecessor in title conveyed and warranted to the plaintiffs' predecessor in interest "all the coal, oil, and gas in and under" certain premises, together with the right to "take and use so much of the surface of said lands as the grantee" might deem necessary or convenient for the production of the coal, oil, and gas, provided, however, that "all the land the surface of which is so taken shall be paid for when so taken at the rate of $50 per acre." After the co-defendant lessees discovered oil and gas on the premises in 1941, the plaintiffs claimed ownership of these minerals and sought to enjoin the defendants from interfering with their possession and development. The defendants insisted that the provision in the deed respecting the acquisition of surface area violated the rule against perpetuities, and by counter-claim sought to quiet their alleged title to the oil and gas. *Held*, that the provision for payment did not violate the rule against perpetuities. *Chicago, Wilmington & Franklin Coal Co. v. Herr.*[1]

The defendants argued that the deed gave the plaintiffs only an option to acquire the use[2] of surface areas to be designated at an indefinite time in the future and contended that this option was void since an option in gross of unlimited duration violates the rule against perpetuities.[3] However, the court felt itself bound by the case of *Threlkeld v. Inglett.*[4] In that case the Supreme Court of Illinois held that all the means necessary to produce oil and gas pass with a grant of these minerals even without any express provisions in the deed to that effect;[5] one of these means was the right to use

[18] Restriction of the life of a contract to a one-year term has been suggested as the most workable mean between undesirable "freezing" and desirable "reasonable stability" of representation. The establishment of a continuous administrative process would permit the adjustment of contract rights according to the requirements of each case. Legislative promulgation of standard agreements would remove the whole problem from control by union contract. Change of Bargaining Representative during the Life of an Agreement under the Wagner Act, 51 Yale L.J. 465, 481 (1942). If the contracts were to be limited to one year, with a new election to be held after that period, there would no doubt have to be legislation governing the behavior of any growing minority group during that time so that its opportunity for growth might be impeded no more than is required by the legitimate interests of the union holding the present contract. Judicial attacks on this problem have not, as yet, been too felicitous. See Cohen, The Minority Union's Right to Strike, 16 Ind. L.J. 377 (1941).

[1] 40 F. Supp. 311 (Ill. 1941).

[2] That the deed is to be interpreted as providing for the use rather than the fee in such areas is indicated by the phraseology of the clause in question, viz., "the right to take and use so much of the surface. . . ."

[3] London & Southwestern R. Co. v. Gomm, 20 Ch. Div. 562 (C. A. 1882); Lewis Oyster Co. v. West, 93 Conn. 518, 107 Atl. 138 (1918); Barton v. Thaw, 41 Pa. Co. Ct. 396 (1913); Starcher v. Duty, 61 W.Va. 373, 56 S.E. 524 (1907); Winsor v. Mills, 157 Mass. 362, 32 N.E. 352 (1892); cf. Keogh v. Peck, 316 Ill. 318, 147 N.E. 266 (1925).

[4] 289 Ill. 90, 97, 124 N.E. 368, 371 (1919).

[5] See Glassmire, Oil and Gas Leases and Royalties 135 n. 129 (2d ed. 1938).

the surface to any degree necessary for production; this right was already vested[6] regardless of any provision for payment; hence, there could be no violation of the rule against perpetuities.

Even admitting the correctness of the court's position that payment was not a condition precedent, the question still remains as to whether these implied "rights" are really vested as the courts in the *Threlkeld* case and the instant case apparently assumed. Although the court failed to consider the exact nature of the surface rights it was dealing with, the grantee would ultimately secure what may be described as a series of easements[7] in various parts of the surface. Since easements are subject to the rule against perpetuities,[8] the question arises whether these easements will vest within the period of the rule. In considering this question it should be noted that there are two uncertainties aside from payment to which the acquisition of the easements is subject. The first is as to when productive needs will require a particular easement; the second is as to where productive needs will require a particular easement.

Although no decision has been found in which a court knowingly sustained an interest in property where neither the subject matter nor the time of vesting could be ascertained with certainty within the period of the rule against perpetuities, there exists one theory upon which the decision in the instant case might be sustained. It might be argued that the grantee secured an easement in the whole surface of the tract, an ascertained subject matter, and that the sections which are later actually to be used will be subdivisions of the original easement.[9] This approach is subject to the fatal objection, however, that the clear intent of the parties was that not the whole surface, but those portions of the surface only which were needed for production,

[6] "Vested" is used here in the sense of not being subject to any condition precedent. Cf. Leach, Cases and Materials on Future Interests 259–60 (1935). By implication the court seems to hold that payment is a condition subsequent. Indeed, the courts in Illinois have gone far in holding conditions to be subsequent or else charges upon the land. Cronin v. Cronin 314 Ill. 345, 145 N.E. 619 (1924); Spangler v. Newman, 239 Ill. 616, 88 N.E. 202 (1909); Kratz v. Kratz, 189 Ill. 276, 59 N.E. 519 (1901); Parsons v. Millar, 189 Ill. 107, 59 N.E. 606 (1901).

[7] The interest of the grantee under an oil and gas deed might be characterized as a "license coupled with an interest." 3 Tiffany, Real Property § 835 (3d ed. 1939). Licenses have never been subject to the rule against perpetuities. But by the decisions of the Illinois court a grant of oil and gas "passes nothing." Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53 (1908); Triger v. Carter Oil Co., 372 Ill. 182, 23 N.E. (2d) 55 (1939). Therefore there is no interest to which the "license" could be "coupled" unless it be the "power" to reduce the oil and gas to possession. See Hohfeld, Faulty Analysis in Easement and License Cases, 27 Yale L. J. 66 (1917). The distinction between easements and licenses is often vague. Ibid. The Oklahoma court has characterized the interest in question as an easement. Newbern v. Gould, 162 Okla. 82, 19 P. (2d) 157 (1933); Morgan v. McGee, 117 Okla. 212, 245 Pac. 888 (1926); see Glassmire, Oil and Gas Leases and Royalties § 39 (2d ed. 1938).

[8] Gray, Rule against Perpetuities §§ 314–16 (3d ed. 1915); 2 Simes, Law of Future Interests § 509 (1936).

[9] The analogy of a profit à prendre immediately suggests itself here. However, the parties did not express themselves in "profit" language. Nor has the Illinois court, although it has had many opportunities to do so, declared the interest created under an oil and gas instrument to be a profit. Cf. 3 Tiffany, Real Property 431 n. 25 (3d ed. 1939).

should become subject to an easement, and that the remainder should continue in its former use.

Although, because of the peculiar character of the interests granted in the instant case, it is difficult to categorize them in any precise way, there seem to be at least two other constructions, more consistent with the intent of the parties, which could be made as to their nature. First, the provisions, express or implied, regarding the acquisition of surface area might be likened to a conditional limitation that the grantee "shall have the use of those parts of my land upon which he discovers oil." There is little doubt but that this limitation is too remote. Second, the deed might be construed upon closer analysis as giving the grantee a power[10] to create easements in the surface for his own benefit at any time in the future when production requires.[11] Since the power may be exercised at a remote time in the future, it violates the rule against perpetuities.[12]

Assuming that the provision in the instant case does violate the rule against perpetuities, the question remains whether the burden placed upon the premises is onerous enough to warrant the application of the rule as a matter of policy. Certainly, if the grantee may create easements in the surface at any time in the future, and fill these areas with derricks, pipelines, and storage tanks, the owner of the surface may well be hesitant about making substantial improvements upon the premises. Furthermore, the grantee's outstanding interest will tend to prevent the premises from ever being used for residential, industrial, or commercial purposes, with a consequent reduction in value and alienability. Therefore, it would seem that the burden upon the premises is substantial.

It may be argued, nevertheless, that provisions permitting the acquisition of needed surface area by the grantee of oil and gas should be excepted from the operation of the rule against perpetuities. In the first place a grant of oil and gas is valuable only so long as the surface area may be used; thus the surface provisions enhance rather than depreciate the value of the grant. Similar considerations in the case of covenants for the perpetual renewal of leases and options to purchase appendant to long term leases have influenced the courts to declare these instruments exceptions to the rule against

[10] While what the grantee has is not a power in the usual sense of a power of appointment, or a power of sale, yet he does have a power in the broader sense that he is able to change legal relations in a piece of land. See Continental Clay Co. v. Illinois Kaolin Co., 232 Ill. App. 596, 607 (1920). For a similar power in respect to profits à prendre, see Hohfeld, Faulty Analysis in Easement and License Cases, 27 Yale L. J. 66, 70 n. 9, 97 et seq. (1917); Clark, Real Covenants 26 (1929). In general, see Corbin, Legal Analysis and Terminology, 29 Yale L.J. 163, 168 (1919); 2 Simes, Law of Future Interests §§ 534 et seq. (1936); Gray, Rule against Perpetuities §§ 473 et seq. (3d ed. 1915); Sugden, Powers 107 (3d Am. ed. 1856). It would seem that the "power" analysis is more accurate than the "conditional limitation" analysis since the grantee has a certain amount of discretion as to time and place in the creation of the easement, dependent of course on the concurrence of the conditions of productive necessity.

[11] The easements in the instant case are to be distinguished from a way of necessity. In the latter, the grantor of the isolated property may himself designate the way of necessity in the event that the grantee does not do so. 3 Tiffany, Real Property § 804 (3d ed. 1939), and cases there cited.

[12] Gray, Rule against Perpetuities § 473 (3d ed. 1915).

perpetuities.[13] Even though these covenants and options may operate beyond the period of the rule, they enhance the value of the leasehold estate and render it profitable for the lessee to make improvements.

A second reason for excepting the provision for use of surface areas in grants of oil and gas from operation of the rule grows out of the business background of these transactions. They are entirely unrelated to family settlements, to which the rule against perpetuities is ordinarily applied.

Third, in the ordinary case where production has begun, the burden imposed upon the premises will not in fact extend beyond the period of the rule, since the average oil field is exhausted within twenty years.[14] Hence, as long as exploration and development are begun promptly, there is little likelihood of easements being created beyond the period allowed by the rule. The possibility that the grantee may delay production after discovery of the oil and gas is negligible, since he must either produce at the same rate as his neighbors or lose the larger part of the oil beneath the premises through drainage by wells on adjoining property.

If the grantee does not begin operations within a reasonable time, however, or if a second oil horizon is discovered beneath the same premises long after the original horizon has been exhausted, it would seem that a remedy more appropriate in this commercial situation than the application of the rule against perpetuities would be to infer an intent to abandon the entire grant from failure to develop within a reasonable time.[15] But however desirable this solution may seem from a practical standpoint, it will encounter the difficulty that incorporeal rights like those involved in the instant case[16] can not ordinarily be lost by non-user alone,[17] since non-user is held to be insufficient evidence of an intent to abandon. In an attempt to prove there was no intention to abandon, it might be argued that failure to develop is no more than non-user. In the case of oil and gas leases, however, non-user, or failure to enter and develop, is almost everywhere held to constitute abandonment.[18] These holdings are based mainly

[13] 2 Simes, Law of Future Interests §§ 511–12 (1936), and cases there cited; Carey and Schuyler, Illinois Law of Future Interests § 492 (1941); cf. Keogh v. Peck, 316 Ill. 318, 147 N.E. 266 (1925).

[14] The average period of economic production of an oil well or oil field would seem to range from ten to twenty years. Cutler, Estimation of Underground Oil Reserves by Oil Well Production Curves (U.S. Bureau of Mines, Bull. 228, 1924); Beal, The Decline and Ultimate Production of Oil Wells (U.S. Bureau of Mines, Bull. 177, 1919).

[15] See 9 Univ. Chi. L. Rev. 345 (1942), noting Chicago, Wilmington & Franklin Coal Co. v. Minier, 40 F. Supp. 316 (Ill. 1941).

[16] Note 15 supra.

[17] 3 Tiffany, Real Property § 825 (3d ed. 1939), and cases there cited. But non-user for the prescriptive period has occasionally been regarded as creating a rebuttable presumption of an intent to abandon. Hunter v. West, 172 N.C. 160, 90 S.E. 130 (1916); Pratt v. Sweetser, 68 Me. 344 (1878); Dyer v. Depui, 5 Whart. (Pa.) 584 (1840).

[18] In Boatman v. Andre, 44 Wyo. 352, 12 P. (2d) 370 (1932), the court, in declaring a lease abandoned where the lessee had never entered the premises, said ". . . . abandonment will be more readily found in cases of oil and gas leases than in most other instances." In Clark v. Wright, 311 Pa. 69, 166 Atl. 775 (1933), the court said that unexplained failure to develop "gives rise to a fair presumption of abandonment . . . . and, standing alone and admitted, would justify the court in declaring an abandonment . . . . as a matter of law." In Martin

on the theory that the lessor's royalty interest must be protected, with a corollary to the effect that it was not the expectation of the parties that the lessee would permit the land to lie dormant with the lease as a perpetual cloud on the title.[19] Although there is no private royalty interest at stake under the grant in the instant case, it would seem that there remains a public interest which corresponds to the royalty owner's interest, in that it is to the public's advantage to have petroleum resources proved up and developed. This interest should be no more subject to the grantee's inertia that the royalty owner's interest should be subject to the lessee's inertia. Furthermore, in the case of grants of standing timber, where the grantor has no royalty interest, courts uniformly hold that unless the timber be removed in a reasonable time, the grantee's rights in the timber are extinguished.[20] This same rule should be applied to grants of oil and gas.

Patents—Extent of Use of Patent—Use of Tying Agreement Bars Patentee in Infringement Suit—[Federal].—The plaintiff company leased its patented salt-depositing machines to commercial canners on the condition that they use with these machines only salt tablets, which were unpatented, made by the plaintiff's subsidiary. The defendant company, which also manufactured unpatented salt tablets, made unpatented depositing machines and leased them to canners. The plaintiff alleged that the defendant's machine infringed its patent, and brought suit for an injunction and

v. Consolidated Coal & Oil Corp., 101 W.Va. 721, 133 S.E. 626 (1926), the court quoted Archer, Law and Practice in Oil and Gas Cases § 28 (1910): "Where a lessee under an oil and gas lease has not within a reasonable time entered upon the demised premises for the purpose of exploring for oil and gas, the law presumes an abandonment." Hift v. Henderson, 112 Okla. 194, 240 Pac. 745 (1925); New State Oil & Gas. Co. v. Dunn, 75 Okla. 141, 182 Pac. 514 (1919); Cole v. Butler, 103 Kan. 419, 173 Pac. 978 (1918); Mills v. Hartz, 77 Kan. 218, 94 Pac. 142 (1908); Mansfield Gas Co. v. Parkhill, 114 Ark. 419, 169 S.W. 957 (1914); Mansfield Gas Co. v. Alexander, 97 Ark. 167, 133 S.W. 837 (1911); Barnhart v. Lockwood, 152 Pa. 82, 25 Atl. 237 (1892); Kentucky Rock Asphalt Co. v. Milliner, 234 Ky. 217, 27 S.W. (2d) 937 (1930). In Louisiana, a grant or reservation of oil and gas if not exercised for ten years is lost. See Louisiana Civil Code (Dart, 1942) art. 123.118; Achee v. Caillouett, 197 La. 313, 1 S. (2d) 530 (1941); Palmer Corp. v. Moore, 171 La. 774, 132 So. 229 (1930). In Texas, even corporeal estates in oil and gas are terminable by abandonment. Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290 (1923); Texas Co. v. Davis, 113 Tex. 321, 255 S.W. 601 (1923); see 3 Summers, Oil and Gas § 459, at 78–80 (perm. ed. 1938). Illinois courts recognize the principle of abandonment, although no case has been found in which a lease was actually declared abandoned. See Ohio Oil Co. v. Reichert, 343 Ill. 560, 566, 175 N.E. 790, 793 (1931); Gillespie v. Ohio Oil Co., 260 Ill. 169, 102 N.E. 1043 (1913).

[19] 3 Summers, Oil and Gas §§ 453, 459 (perm. ed. 1938).

[20] Couch v. Kahler Co., 199 Ark. 45, 132 S.W. (2d) 648 (1939); Moxley v. Adams, 190 Ga. 164, 8 S.E. (2d) 525 (1940); Wilson Cypress Co. v. Stevens, 106 Fla. 717, 143 So. 661 (1932); Parsons v. Boggie, 139 Ore. 469, 11 P. (2d) 280 (1932); Nelson v. McKinney, 163 Wash. 529, 1 P. (2d) 876 (1931); Altizer v. Jewell Ridge Coal Corp., 157 Va. 1, 160 S.E. 47 (1931); Joyce v. Gibson, 106 W.Va. 221, 145 S.E. 279 (1928); Rathborne, Hair & Ridgway Co. v. Coffron, 173 Minn. 452, 217 N.W. 501 (1928); Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co., 148 Ky. 82, 146 S.W. 438 (1912); Carson v. Lumber Co., 108 Tenn. 681, 69 S.W. 320 (1902); cf. Gay Mfg. Co. v. Hobbs, 128 N.C. (46), 38 S.E. 26 (1901).