Oil and Gas—Interest Created by Grant of Oil and Gas When Right to Use Surface Has Expired—[Federal].—In 1914 the defendant farmers conveyed to the plaintiff coal company all "coal, oil and gas" underlying certain described premises. The deed granted the right to "mine and remove" the named minerals and the right to use as much of the surface as was necessary for purposes of exploration and production. It further provided that if the grantees did not select and pay for this surface area within two years, the right to acquire it would be "at an end." Although the plaintiffs had never designated any operating area, they contended, twenty-six years after the deed, that they still had the right to drill for oil and gas and sought an injunction to restrain the defendants from interfering with their drilling. *Held*, that although the plaintiffs had no right to use the surface of the land, they retained the exclusive right to remove the oil and gas. *Chicago, Wilmington & Franklin Coal Co. v. Minier.*[1]

Because of the "vagrant and fugacious" character of oil and gas, courts trying to apply the traditional property notion that the owner of the surface owns all minerals beneath have encountered many perplexing problems. Some courts, impressed by the similarity of fluid to solid minerals, have held that oil and gas can be owned in place,[2] although they have been forced to admit that the surface owner's property in the oil and gas terminates when they are drained from beneath his land by a neighbor.[3] Other courts have held that there can be no ownership of oil and gas in place, and that property in them vests only when they have been brought to the surface and "reduced to possession."[4]

The underlying confusion as to the physical properties of oil and gas which has led to these seemingly inconsistent theories is evident in the opinions of the Supreme Court of Illinois. Some pattern of development may, however, be discerned. In the earliest case, *Bruner v. Hicks*,[5] the court determined that an oil and gas lease[6] granting the right to use the surface as long as oil and gas were produced created a freehold interest. Subsequently the description of this interest was qualified by the statement that it would not support an "action of ejectment or other real action,"[7] thus indicating that the

[1] 40 F. Supp. 316 (Ill. 1941).

[2] Texas Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717 (1915); Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290 (1923); Gas Products Co. v. Rankin, 63 Mont. 372, 207 Pac. 993 (1922); Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714 (1893); see Westmoreland and Cambria Natural Gas Co. v. DeWitt, 130 Pa. 235, 18 Atl. 724 (1889).

[3] Prairie Oil & Gas Co. v. State, 231 S.W. 1088 (Tex. Com'n App. 1921); Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 Atl. 801 (1907); Jones v. Forest Oil Co., 194 Pa. 379, 44 Atl. 1074 (1900); Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714 (1893); 1 Summers, Oil and Gas 117 et seq. (perm. ed. 1938).

[4] Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900); Callahan v. Martin, 3 Cal. (2d) 110, 43 P. (2d) 788 (1935); Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922); Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86 (1918); Heller v. Dailey, 28 Ind. App. 555, 63 N.E. 490 (1902).

[5] 230 Ill. 536, 82 N.E. 888 (1907).

[6] No distinction has been made in Illinois between the interest created under an oil lease and that created by a grant of oil since both are of indefinite duration, lasting as long as oil and gas are produced. Triger v. Carter Oil Co., 372 Ill. 182, 23 N.E. (2d) 55 (1939); Transcontinental Oil Co. v. Emmerson, 298 Ill. 394, 131 N.E. 645 (1921); Watford Oil and Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53 (1908).

[7] Watford Oil and Gas Co. v. Shipman, 233 Ill. 9, 12, 84 N.E. 53, 54 (1908).

court considers the interest non-possessory, i.e., "incorporeal."[8] In addition, the court has repeatedly held that no interest in the oil and gas in place can be conveyed by lease or grant.[9] In recent decisions construing oil and gas leases and grants the Illinois court seems to describe the interest created as twofold, consisting of 1) the right, either implied or expressly granted, to use the surface for exploring and producing operations, and 2) the right to reduce the petroleum, when found, to possession.[10] Although the Illinois court has never done so, one may describe the first of these rights as an easement; the second, as a profit.[11]

Since these two rights would seem to be "incorporeal,"[12] the court might have found that the interests of the plaintiff in the instant case had been lost by abandonment.[13]

[8] Bigelow and Madden, Introduction to the Law of Real Property 38 (2d ed. 1934); Digby, History of the Law of Real Property 305 et seq. (5th ed. 1897).

[9] The court has said that a grant of oil was not a grant "of the oil that is in the ground, but to such part thereof as the grantee may find." Watford Oil and Gas Co. v. Shipman, 233 Ill. 9, 12–13, 84 N.E. 53–54 (1908). This was the first case to make this clear, since the court had said, ". . . . title to the oil and gas *in said lands* did not vest . . . . until the oil and gas were *discovered and appropriated*. . . . ." Bruner v. Hicks, 230 Ill. 536, 542, 82 N.E. 888, 891 (1907) (italics added). Such language might be construed to mean that upon initial discovery and appropriation title to the oil and gas *in situ* vested in the grantee. In the Watford case the court further stated that oil and gas were not susceptible of ownership distinct from the soil. This statement is the key to the next step taken by the court in Poe v. Ulrey, 233 Ill. 56, 62, 84 N.E. 46, 48 (1908), where the court said that oil and gas "belong to the owner of the land under which they are located so long as they remain there, but when they escape and go under other land the title of the former owner is lost." On the whole, what the Illinois court appears to say is that the landowner can own the oil and gas beneath his land because this ownership is coupled with ownership of the soil, but that such ownership may not be effectively transferred to a grantee or a lessee apart from ownership of the soil. The court has not, however, maintained this position consistently. In Conover v. Parker, 305 Ill. 292, 137 N.E. 204 (1922), where the court had before it a devise of the oil and gas, and in Triger v. Carter Oil Co., 372 Ill. 182, 23 N.E. (2d) 55 (1939), where the court had a mineral deed under consideration, it apparently held that these instruments did convey the grantor's interest in the form of ownership of the oil and gas. The court did hold in these cases, however, that the leases to which these instruments were subject did not convey ownership in place, but only the rights to go upon the land and to take oil and gas. Thus, an internal inconsistency appears within these cases. Note 6 supra. They are also inconsistent with the repeated assertion of the Illinois court, beginning with the Watford case, that there can be no ownership of oil and gas distinct from the soil.

[10] See Triger v. Carter Oil Co., 372 Ill. 182, 23 N.E. (2d) 55 (1939); Transcontinental Oil Co. v. Emmerson, 298 Ill. 394, 131 N.E. 645 (1921); Watford Oil and Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53 (1908).

[11] On the other hand, courts which describe the interest created by an oil and gas lease as a profit imply that the lessee has a right to go on the land from his right to take the oil and gas. La Laguna Ranch Co. v. Dodge, 114 P. (2d) 351 (Cal. 1941); Hardcastle v. McCluskey, 139 Kan. 757, 33 P. (2d) 127 (1934); Boatman v. Andre, 44 Wyo. 352, 12 P. (2d) 370 (1932); Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86 (1918).

[12] 3 Tiffany, Real Property 429 (3d ed. 1939); Bigelow and Madden, Introduction to the Law of Real Property 48 (2d ed. 1934).

[13] Boatman v. Andre, 44 Wyo. 352, 12 P. (2d) 370 (1932) (profit); Tietjen v. Meldrim, 169 Ga. 678, 151 S.E. 349 (1930) (easement); see Dikes v. Miller, 24 Tex. 417, 424 (1859); 3 Washburn, Real Property 60 et seq. (3d ed. 1868).

The plaintiffs had evidenced their intent to abandon by failure to designate any surface upon which operations might be conducted and by non-user for twenty-six years. The failure to discuss this possibility may have been due to the fact that in *Transcontinental Oil Co. v. Emmerson*[14] the Illinois Supreme Court had said that an oil and gas lease created a "corporeal interest,"[15] a type of interest which cannot ordinarily be lost by abandonment.[16] But in that case the question was whether oil and gas leases were tangible property within the terms of a statute fixing the amount of taxation upon foreign corporations licensed to do business in Illinois. Since the statute defined tangible property as "corporeal property,"[17] it may be argued that the court's decision characterized the interest as "corporeal" only within the restricted meaning of the statute.[18] The *Transcontinental* case is consequently not controlling in the instant case.

The practical inability of the plaintiffs to extract oil and gas might be used as an alternative ground for holding that they retained no interest under the grant. This possibility was suggested by the court: "If it were certain that without the right to use the surface, the coal company could have no enjoyment of the oil and gas, it might well be that the grant would fail. . . ."[19] Such a result the court avoids by suggesting that the underlying oil and gas might be exploited by means of oblique wells drilled from adjoining premises. It is questionable, however, whether this expedient constitutes effective "enjoyment" of the oil and gas from the standpoint of either the grantees or the public. In the first place, if the tract involved is large, a very considerable part of the oil and gas may be irretrievably lost to the grantees and to the community for the reason that the effective producing radius of a well is only three to four hundred feet from the bottom of the hole.[20] Second, since the pumping of oblique wells is much

[14] 298 Ill. 394, 131 N.E. 645 (1921).

[15] The use of the term "corporeal" to describe the interest created by an oil and gas lease seems inconsistent with the statement of the Illinois court in Watford Oil and Gas. Co. v. Shipman, 233 Ill. 9, 84 N.E. 53 (1908), that such an interest would not sustain an action of ejectment. Note 8 supra. The interest created by an oil and gas grant or lease, as described by the Illinois court in previous cases, is elsewhere considered an incorporeal interest. Dark v. Johnston, 55 Pa. 164 (1867); Kelly v. Keys, 213 Pa. 295, 62 Atl. 911 (1906); Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. 173 (1872); Schiffman v. Richfield Oil Co., 8 Cal. (2d) 211, 64 P. (2d) 1081 (1937); Callahan v. Martin, 3 Cal. (2d) 110, 43 P. (2d) 788 (1935); Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86 (1918); Kolachny v. Galbreath, 26 Okla. 772, 110 Pac. 902 (1910); Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922); Frost-Johnson Lumber Co. v. Nabors Oil & Gas Co., 149 La. 100, 88 So. 723 (1921); Boatman v. Andre, 44 Wyo. 352, 12 P. (2d) 370 (1932); Burden v. Gypsy Oil Co., 141 Kan. 147, 40 P. (2d) 463 (1935); Ford v. Ball, 76 W. Va. 663, 86 S.E. 562 (1915); Walla Walla Oil, Gas & Pipe Line Co. v. Vallentine, 103 Wash. 359, 174 Pac. 980 (1918); Wagner v. Mallory, 169 N.Y. 501, 62 N.E. 584 (1902); Shepherd v. McCalmont Oil Co., 38 Hun (N.Y.) 37 (1885); Heller v. Dailey, 28 Ind. App. 555, 63 N.E. 490 (1902).

[16] Tietjen v. Meldrim, 169 Ga. 678, 151 S.E. 349 (1930); Cameron v. Bustard, 119 Wash. 266, 269, 205 Pac. 385, 386 (1922); see United Mining Co. v. Morton, 174 Ky. 366, 377, 192 S.W. 79, 83 (1917); 3 Washburn, Real Property 60 et seq. (3d ed. 1868).

[17] Ill. L. (1919) 312, at § 137.

[18] In the following year in Conover v. Parker, 305 Ill. 292, 137 N.E. 204 (1922), the same court said that an oil and gas lease conveyed no interest in the land.

[19] Chicago, Wilmington & Franklin Coal Co. v. Minier, 40 F. Supp. 316, 320 (Ill. 1941).

[20] See Glassmire, Oil and Gas Leases and Royalties 20–21 (2d ed. 1938).

less efficient than the pumping of normal vertically-drilled wells, operations will become unprofitable more quickly than they otherwise might, resulting in a loss of an additional portion of the oil and gas. Third, the grantee may find it difficult or impossible to secure drilling rights from a neighbor who can himself drain the oil and gas from beneath the tract without incurring liability to either the owner of the surface or the owner of the right to take the oil.

Further difficulties will result. Any rule which would separate the right to use the surface from the right to take oil and gas would lessen the alienability of both the surface and sub-surface rights to the tract. The separation might preclude the effective operation and administration of proration or unitization plans for petroleum conservation,[21] since the mechanics of these plans are based upon surface area. It would thus seem preferable to hold that both the right, express or implied, to use the surface and the right to take the oil and gas must be present in order to sustain a lease or grant of these minerals.[22]

Suretyship—Protection of Co-makers under Soldiers' and Sailors' Civil Relief Act of 1940—[New York].—The plaintiff, co-maker of a note made by a person later inducted into military service, sought a stay of enforcement of his liability on the note under Section 103 of the Soldiers' and Sailors' Civil Relief Act of 1940.[1] *Held*, that Section 103 authorizes stays only in favor of sureties, guarantors, and endorsers and hence is inapplicable to co-makers. *In re Itzkowitz.*[2]

The Soldiers' and Sailors' Civil Relief Act of 1940[3] is virtually a reenactment of the 1918 act[4] of the same title. To protect the man in service from undue hardship the act

[21] These plans are designed to prevent physical and economic waste of oil and gas through cooperative development by all the owners of land overlying a common source of supply. N.M. Stat. Ann. (Courtwright, Supp. 1938) c. 97, § 812; Kan. Gen. Stat. Ann. (Corrick, Supp. 1939) §§ 55-603, 55-604; Okla. Stat. (Harlow, Supp. 1940) § 11574; La. Gen. Stat. Ann. (Dart, Supp. 1939) § 9482; Ark. Acts (1939) 219.

[22] Courts discussing the problem indicate that the right to take oil cannot exist without the right to use the surface. Morgan v. McGee, 117 Okla. 212, 245 Pac. 888 (1926); see Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal. App. 431, 434, 297 Pac. 73, 75 (1931); In re Lathrap, 61 F. (2d) 37, 41 (C.C.A. 9th 1932). In the instant case the court mentions the unreported Illinois circuit court opinion, Roth v. Texas Oil Co., which held that where the deed expressly provided that the right to mine should not include the right to break the surface, the grant of minerals did not convey the right to drill for oil. The court distinguishes the Roth case as dealing with the original grant and not with the effect of a condition subsequent as in the instant case. However, since the basic question in either case is whether the right to the surface may be effectively separated from the right to take the oil and gas, there seems to be no distinction between such separation in an original grant and separation as the result of operation of a condition subsequent.

[1] 54 Stat. 1178, at § 103 (1940), 50 U.S.C.A. App. § 513 (Supp. 1941). This section is identical with § 103 of the 1918 act. 40 Stat. 440 (1918), 50 U.S.C.A. App. § 104 (Supp. 1941).

[2] 177 Misc. 269, 30 N.Y.S. (2d) 336 (S. Ct. 1941).

[3] 54 Stat. 1178, at § 100 et seq. (1940), 50 U.S.C.A. App. § 510 et seq. (Supp. 1941).

[4] 40 Stat. 440, at § 100 et seq. (1918), 50 U.S.C.A. App. § 101 et seq. (Supp. 1941). The few changes in phraseology were made because the United States was not at war in 1940.