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.

provides for the exercise of discretionary moratory power by the courts.[5] In the performance of this function the courts are primarily influenced by two considerations: first, whether the man in service is able to appear and defend, and second, whether a default on an obligation by reason of the change in his income will lead to an unjust forfeiture.[6] Section 103 of both the 1918 and 1940 acts is entitled "Protection of persons secondarily liable" and reads:

(1) Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted *to sureties, guarantors, endorsers, and others subject to the obligation or liability*, the performance or enforcement of which is stayed, postponed, or suspended.

(2) When a judgment or decree is vacated or set aside in whole or in part, as provided in this Act, the same may, in the discretion of the court, likewise be set aside and vacated as *to any surety, guarantor, endorser, or other person liable upon the contract or liability* for the enforcement of which the judgment or decree was entered.[7]

The question whether accommodation makers or co-makers,[8] who are not specifically mentioned, are protected has arisen in four cases,[9] and only the instant case holds that they are not. Congressional reports fail to disclose the policy behind the inclusion of Section 103 in the statute. It may be suggested, however, that were service in the armed forces made a purely personal defense, available only to the principal debtor,[10]

[5] 54 Stat. 1178, at §§ 103, 201, 203, 204, 300 (1940), 50 U.S.C.A. App. §§ 513, 521, 523, 524, 530 (Supp. 1941).

[6] Cortland Savings Bank v. Ivory, 27 N.Y.S. (2d) 313 (S. Ct. 1941) (court prevented mortgage foreclosure by allowing defendant in service to make small payments); Griswold v. Cady, 27 N.Y.S. (2d) 302 (S. Ct. 1941) (in personal injury suit stay granted to wife of man in service); Jamaica Savings Bank v. Bryan, 175 Misc. 978, 25 N.Y.S. (2d) 17 (S. Ct. 1941), motion to strike granted 176 Misc. 215, 25 N.Y.S. (2d) 641 (S. Ct. 1941) (stay not granted to one who has only nominal interest in mortgaged premises); Fennell v. Frisch's Adm'r, 192 Ky. 535, 234 S.W. 198 (1921) (stay not granted to a defendant who was able to appear); Ilderton v. Charleston Consolidated R. Co., 113 S.C. 91, 101 S.E. 282 (1919) (defendant employer granted stay where employee was in service and could not appear to testify); Dietz v. Treupel, 184 App. Div. 448, 170 N.Y. Supp. 108 (1918) (stay not granted to soldier whose complaint was inability to advertise property to be sold at judicial sale).

[7] Italics added.

[8] N.Y. Negotiable Instruments Law (McKinney, 1917) § 55 defines an accommodation party as ". . . . one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

[9] In re Itzkowitz, 177 Misc. 269, 30 N.Y.S. (2d) 336 (S. Ct. 1941); Akron Auto Finance Co. v. Stonebraker, 66 Ohio App. 507, 35 N.E. (2d) 585 (1941); Morris Plan Bank v. Waldman, C.C.H. War Law Serv. ¶ 19,511 (Munic. Ct. D.C. 1941); Modern Industrial Bank v. Zaentz, 177 Misc. 132, 29 N.Y.S. (2d) 969 (Munic. Ct. 1941). Only the last case considers the question whether a stay must be granted to the man in service before the court may protect other defendants under § 103. There is no record of cases involving co-makers under § 103 of the 1918 act.

[10] The Availability of a Principal's Defenses to His Uncompensated Surety, 46 Yale L. J. 833, 834, 835 (1937).

security parties would ultimately be called upon to bear a burden which, before the passage of the Selective Service Act, was not within their expectations.[11] And if security parties were permitted to seek reimbursement from the principal debtors, the entire purpose of the relief act would be nullified.[12] Mere non-mention of sureties who sign as co-makers is hardly sufficient to bar them from protection under Section 103, in view of the statutory language extending protection to "sureties, guarantors, endorsers, *and others subject to the obligation.*"[13] Indeed the principle of ejusdem generis[14] suggests that co-makers are included, since it is well-settled that security parties who sign as co-makers are sureties.[15]

It may be argued that the title of Section 103, "Protection of persons secondarily liable," impliedly excludes accommodation makers,[16] who are primarily liable.[17] This argument proves too much, however, since sureties, who are specifically mentioned, are also primarily liable.[18] Thus, the inclusion of sureties strongly supports the conclusion

[11] For example, the principal debtor's service in the armed forces may be distinguished from bankruptcy which is one of the risks against which the surety secured the creditor. The Availability of a Principal's Defenses to His Uncompensated Surety, 46 Yale L.J. 833, 835 n. 22 (1937).

[12] 54 Stat. 1178, at § 100 (1940), 50 U.S.C.A. App. § 510 (Supp. 1941).

[13] Italics added.

[14] 2 Sutherland, Statutory Construction § 422 (Lewis' ed. 1904).

[15] Read v. Cutts, 7 Greenl. (Me.) 186 (1831); Hederman v. Cox, 188 Miss. 21, 193 So. 19 (1940); Bellows v. Blake, 106 Vt. 204, 170 Atl. 906 (1934); Sturges, Suretyship and Guaranty, 14 Encyc. Soc. Sci. 482, 485 (1934); 1 Brandt, Law of Suretyship and Guaranty § 1 n. 1 (3d ed. 1905); Rowlatt, Law of Principal and Surety 5 (1899). The New York cases on this point, however, are in confusion. Cases squarely holding that a co-maker is a surety are: Goldberg v. Albert, 161 Misc. 281, 291 N.Y. Supp. 855 (Munic. Ct. 1936); Salzberg v. Deutsch, 150 Misc. 870, 270 N.Y. Supp. 595 (Munic. Ct. 1934); Horton v. Dow, 10 N.Y. St. Rep. 139 (S. Ct. 1887); cf. Modern Industrial Bank v. Zaentz, 177 Misc. 132, 134, 29 N.Y.S. (2d) 969, 972 (Munic. Ct. 1941) (questioning New York authority that co-makers are not sureties). Contra: Adamson v. Adamson, 251 App. Div. 187, 295 N.Y. Supp. 506 (1937); Nat'l Citizens' Bank v. Toplitz, 81 App. Div. 593, 81 N.Y. Supp. 422 (1903), aff'd on other grounds 178 N.Y. 464, 71 N.E. 1 (1904); In the Matter of the Estate of Craven, 171 Misc. 825, 13 N.Y.S. (2d) 987 (Surr. Ct. 1939); Stricks v. Siegel, 135 Misc. 608, 238 N.Y. Supp. 154 (Munic. Ct. 1929), modified 138 Misc. 266, 245 N.Y. Supp. 372 (S. Ct. 1930).

[16] N.Y. Negotiable Instruments Law (McKinney, 1917) § 3 defines primary liability and secondary liability as follows: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable." The Negotiable Instruments Law has no definition of the nature of the liability of a surety. See Goldberg v. Albert, 161 Misc. 281, 283, 291 N.Y. Supp. 855, 857 (Munic. Ct. 1936).

[17] Modern Industrial Bank v. Zaentz, 177 Misc. 132, 29 N.Y.S. (2d) 969 (Munic. Ct. 1941); Adamson v. Adamson, 251 App. Div. 187, 295 N.Y. Supp. 506 (1937); Davenport & Harris Undertaking Co. v. Roberson, 219 Ala. 203, 121 So. 733 (1929); Nat'l Citizens' Bank v. Toplitz, 81 App. Div. 593, 81 N.Y. Supp. 422 (1903), aff'd on other grounds 178 N.Y. 464, 71 N.E. 1 (1904).

[18] Newark Finance Corp. v. Acocella, 115 N.J.L. 388, 180 Atl. 862 (1935); Howell v. Com'r, 69 F. (2d) 447 (C.C.A. 8th 1934); Peterson v. Miller Rubber Co., 24 F. (2d) 59 (C.C.A. 8th 1928); 4 Williston, Contracts § 1211 (rev. ed. 1936); Sturges, Suretyship and Guaranty, 14 Encyc. Soc. Sci. 482, 484 (1934). Arant, Law of Suretyship and Guaranty § 16, at 24

that the term "secondarily liable" was not used in its technical sense but was merely intended to indicate those persons whose liability on an obligation is other than that of principal debtor.

There appear to be no reasons of policy for excluding co-makers from Section 103. Contract clauses spelling out the liability of the principal debtor indicate that it makes little real difference to loan companies whether the obligation is secured by a co-maker or by another type of surety.[19] In view of the many variations on the suretyship relation, however, loan companies ordinarily designate *uncompensated* security parties as co-makers since this type of surety is specifically and narrowly defined by statute,[20] and confusion and uncertainty is thus avoided. But this mere convenience in terminology should not lead to a substantial difference in result and should not bar accommodation makers from the group protected by Section 103. Furthermore, when it is considered that a compensated surety may be protected by Section 103, it becomes even more difficult to support a result whereby an accommodation maker, who by definition derives no benefit from the obligation incurred, is not protected. And finally, the practice of interpreting the act liberally[21] justifies the inclusion in Section 103 of all persons who, though not named, are situated similarly to those specifically covered.

Taxation—Immunity from Sales Tax of Contractors under Construction Contracts with United States—[United States].—On the order of "cost-plus-a-fixed-fee" contractors the plaintiff, an Alabama lumber dealer, sold building materials to be used in the construction of an army camp in the same state. Pursuant to a state statute[1] imposing a tax on the gross retail sales price of tangible personal property, the plaintiff was assessed on the basis of these sales. The assessment was protested, the United States intervened on behalf of the plaintiff, and an appeal was taken to the state courts. On certiorari from the United States Supreme Court to the Supreme Court of Alabama, *held*, that the immunity of the Government implied from the Constitution did not extend to the cost-plus-a-fixed-fee contractors,[2] since they and not the United States Government had purchased the materials; and that the plaintiff could have exacted the tax from the contractors and is therefore subject to the assessment, despite the fact that under the construction contract the Government had agreed to pay all costs

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(1931), states that, "The contracts of the surety, guarantor and indorser are all accessory, but the former is primarily liable while the two latter are only secondarily liable."

[19] Thus, for example, the instrument involved in Modern Industrial Bank v. Zaentz, 177 Misc. 132, 135, 29 N.Y.S. (2d) 969, 973 (Munic. Ct. 1941), provides that ". . . . the undersigned shall . . . . provide such additional co-makers, guarantors or sureties as shall be satisfactory to the holder . . . . that the holder thereof may accept other co-makers, guarantors, sureties. . . . ."

[20] Note 8 supra.

[21] Dietz v. Treupel, 184 App. Div. 448, 170 N.Y. Supp. 108 (1918); Griswold v. Cady, 27 N.Y.S. (2d) 302 (S. Ct. 1941), noted in 55 Harv. L. Rev. 304 (1941) (§ 103 extended to protect a wife who was jointly liable with her husband, a soldier, in a negligence action).

[1] Ala. Code Ann. (Michie, 1941) tit. 51, §§ 752–86.

[2] This conclusion is inferred from the Court's opinion. See discussion accompanying notes 21 and 22 infra.