

ville School of Law. He is teaching courses in Conflicts, Federal Procedure, Criminal Law, and Insurance.

The enrollment of the Law School for the Academic year 1938-1939 totals 168 students, which is the largest since 1926 and an increase of eight percent over the preceding year. The first year class of seventy-four students, also the largest since 1926, is fifty percent larger than the entering class of two years ago. Two-thirds of the student body have had three years or more of college work before entering law school, and forty students hold Bachelor's degrees.

The Law Quarterly Staff will be represented at a conference of representatives of midwestern law reviews, sponsored by the Board of Editors of the Iowa Law Review on December 3, 1938, at Iowa City.

NOTES

NATURE OF INTERESTS CREATED BY OIL LEASES IN ILLINOIS

I

The collision of the old rule, *cujus est solum ejus est usque ad coelum et ad inferos*, with the strong social and economic pressure for production of oil, and the impossibility of such production by any landowner without the possibility of draining the oil of his neighbor has resulted in a conflicting array of compromises between legal theory and economic necessity. As a result of the varying degrees to which state courts are willing to effect this compromise, there exists a corresponding variance in the fundamental concept of the interest held by a landowner in the underlying oil and gas and in the interests created by him in others by contracts in respect thereto.

Concerning the extent and nature of the estate which an owner of the surface holds in the underlying oil and gas, the conflict is clear and definite. The states are divided into what are known as the "ownership" and the "non-ownership" groups. The majority of the important oil producing states¹ adopt the doctrine,

1. Including Pennsylvania, Texas, Arkansas, West Virginia, Montana, and Tennessee. See *Osborn v. Arkansas Territorial Oil & Gas Co.* (1912) 103 Ark. 175, 146 S. W. 122; *Gas Products Co. v. Rankin* (1922) 63 Mont. 372, 207 Pac. 993, 24 A. L. R. 294; *Nonamaker v. Amos* (1905) 73 Ohio St. 163, 76 N. E. 949; *Hyde v. Rainey* (1912) 233 Pa. 540, 82 Atl. 781, Ann. Cas. 1913B 726; *Murray v. Allred* (1897) 100 Tenn. 100, 43 S. W. 355; *Taylor v. Country School Trustees of Eastland Cty.* (Tex. Civ. App. 1921) 229 S. W. 670; *Haskell v. Sutton* (1903) 53 W. Va. 206, 44 S. E. 533.

on analogy to that applied to solid minerals, that the owner of the fee, or of oil and gas by a separate estate, holds absolute title to the minerals in place.² A universally recognized qualification of this rule is that the estate is subject to being divested by drainage resulting from wells drilled upon adjacent property.³ The "non-ownership" group,⁴ in view of the fugacious character of oil and gas, deny that there can be such a thing as ownership in these minerals in place and limit the interest of the landowner therein to a bare privilege to take. This second theory was, in certain early cases, derived by analogy from the rule applied to animals *ferae naturae*; but the weakness of this analogy was exposed by the United State Supreme Court in *Ohio Oil Co. v. Indiana*,⁵ which, although adopting the non-ownership theory because of the fugacious nature of the subject matter, pointed out that unlike the privilege of taking wild animals which vests in all as a part of the public domain, the right to take oil and gas from the earth is vested exclusively in the owner of the surface, so long as it shall remain within his soil.

While the lease and not the outright purchase and grant has developed as the more practical device for oil and gas production, the distinction remains important since in the "ownership" states the insertion of the words "grant" and "convey" has been construed as effecting an outright grant of a separate mineral estate,⁶ while in the "non-ownership" states the same rule is applied to these operative words as to leases expressly creating a mere privilege to enter and prospect.^{6a}

Neither the absolute ownership theory nor the non-ownership-privilege theory is strictly accurate, it has been contended, since both the physical attributes and the economic policies peculiar to oil and gas make any analogy to solid minerals of questionable legal and economic validity; while to characterize the interest as a bare privilege is to understate, for the landowner's rights and privileges, if less than ownership, constitute substan-

2. See Veasey, *The Law of Oil and Gas* (1920) 18 Mich. L. Rev. 445, 462.

3. *Barnard v. Monongahela Natural Gas Co.* (1907) 216 Pa. 362, 65 Atl. 801; *Jones v. Forest Oil Co.* (1900) 194 Pa. 379, 44 Atl. 1074, 48 L. R. A. 748; Summers, *Oil & Gas* (1st ed. 1926) 73, sec. 2.

4. Including Illinois, Indiana, Oklahoma, and Louisiana. See *Transcontinental Oil Co. v. Emmerson* (1921) 298 Ill. 394, 131 N. E. 645, 16 A. L. R. 507; *Tyner v. People's Gas Co.* (1891) 131 Ind. 408, 31 N. E. 61; *Lieber v. Ouachita-Natural Gas & Oil Co.* (1922) 153 La. 160, 95 So. 538; *Kolachny v. Galbreath* (1910) 26 Okla. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451.

5. (1899) 177 U. S. 190, 209.

6. In *re Prager's Estate* (1920) 74 Pa. Super. Ct. 592.

6a. *Watford Oil Co. v. Shipman* (1908) 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144.

tial property rights.⁷ However desirable a more accurate analysis and classification of property rights or the creation of some new estate to fit this space between ownership and non-ownership might be, the states where the importance of the industry has resulted in anything like exhaustive definition are so far committed to one or the other of the doctrines that that chosen will presumably continue to be followed.

In Illinois, though the matter has not been extensively litigated, the decisions adhere to the non-ownership view consistently enough to render a change in the future improbable, especially since the Texas rule, despite its claimed greater clarity, does not appear in practice more satisfactory than the non-ownership theory as applied in Oklahoma. In the first Illinois case on the subject, *Bruner v. Hicks*,⁸ the court stated:

It may be conceded that title to the oil and gas in said lands did not vest until the oil and gas were discovered and appropriated.⁹

The principle was restated in *Watford Oil and Gas Co. v. Shipman*¹⁰ where the court, relying upon the fugitive nature of oil and gas and following *Dark v. Johnson*¹¹ and *Sheppard v. McCalmont Oil Company*,¹² said:

A lease of land to enter and prospect for oil and gas is a grant of a privilege to enter and prospect, but does not give title to the oil and gas until such products are found. * * * Oil and gas while in the earth, unlike solid minerals, cannot be the subject of ownership distinct from the soil. A grant of oil and gas passes nothing which can be the subject of an ejectment or other real action. It is a grant, not of the oil in the ground, but to such part thereof as the grantee may find.¹³

In *Poe v. Ulrey*,¹⁴ however, the court, exhibiting the confusion prevalent in the field, said that oil and gas, while not subject to absolute ownership, "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,"¹⁵ a statement approximating the Texas view.¹⁶ The opin-

7. Summers, *Oil & Gas* (1st ed. 1926) 66, 144.

8. (1908) 230 Ill. 536, 82 N. E. 888, 120 Am. St. Rep. 332.

9. 82 N. E. at 891.

10. (1908) 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144.

11. (1871) 55 Pa. 164.

12. (1885) 38 Hun (N. Y.) 37.

13. 84 N. E. at 54.

14. (1908) 233 Ill. 56, 84 N. E. 46.

15. 84 N. E. at 48. (Italics supplied.)

16. *Supra*, notes 2 and 3.

ion added that the grantee of such owner is not vested with any estate in the oil and gas until it is actually found. This statement would seem to nullify its previous assertion that the landowner holds a title subject to defeasance, because presumably any estate held by him could, by proper grant, be created in his grantee. The further implication from this last statement, that a lessee though having no estate in the underlying oil prior to discovery attains a vested estate in such oil when found, is inconsistent with the entire non-ownership theory, based as it is upon the fugacious character of the mineral, which is not altered by the drilling of a producing well. Probably, however, this statement contemplated no change from the existing rule that there could be no separate estate in oil and gas, but used the word, "found," to signify production or appropriation, in which event the estate referred to as vesting is more properly an interest in personalty than an estate in realty.¹⁷ This view would seem to be confirmed by the reiteration of the non-ownership theory in *Transcontinental Oil Co. v. Emmerson*¹⁸ and, to a certain extent, by *Conover v. Parker*.¹⁹ This last decision, while denying that a lease to the oil company vested any estate in the oil, supported a devise by the lessor as conveying an interest therein—a seeming contradiction explainable only upon the theory that the court construed the devise as a grant, not of realty, but of the testator's interest, which was an interest in the oil when produced and reduced to possession in the form of personalty.

Although the Illinois courts have more or less consistently adhered to the view that a lessee has no separate estate in the oil, they have not denied that an oil and gas lease may create some interest in land. In the first case²⁰ it was stated that an

17. *Sheppard v. McCalmont Oil Company* (1885) 38 Hun (N. Y.) 37.

18. (1921) 298 Ill. 394, 131 N. E. 645, 16 A. L. R. 507.

19. (1923) 305 Ill. 292, 137 N. E. 204. The fee owner here leased all his lands for oil, reserving a one-eighth royalty and thereafter devised his land to each of his six children together with one-seventh of all oil under the real estate of which he died seized, without regard to the amount of the surface estate devised to each such devisee. After the death of one of the children her husband sued to recover her interest in the oil being produced, which he claimed to be a one-seventh of the one-eighth reserved by the testator or a one fifty-sixth of all oil being then produced from the lease. It was objected that the testator by his lease had conveyed title to all the oil to the lessee and retained only a chose in action to recover the value of one-eighth, and that the devise to the deceased child carried no estate or interest in the oil which could pass to the husband. The court answered that the lease passed no estate in the oil but only a privilege to come on the land and drill. The court then affirmed the finding of the lower court decreeing the husband to be vested of a one fifty-sixth interest in the oil.

20. (1908) 230 Ill. 536, 82 N. E. 888, 120 Am. St. Rep. 332.

oil and gas lease which gave a right to occupy the premises and which might last indefinitely created in the surface, and apart from the oil, a freehold interest in land, and necessitated a release of the homestead rights. In the *Watford* case,²¹ the court re-stated its position in *Bruner v. Hicks*²² but announced that the interest of the lessee would not permit him to maintain partition, ejectment, or other actions to recover realty.

Three views have been advanced upon the right to possessory actions. In the "ownership" states it is held that a lessee has a corporeal interest in the land and can maintain possessory actions.²³ Among "non-ownership" states, most courts, relying upon the fugitive nature of the subject, deny that it can be the subject of a corporeal interest and classify it instead as an incorporeal hereditament.²⁴ In Pennsylvania²⁵ and California²⁶ the corporeal or incorporeal nature of the interest created has been made to turn upon the wording of the granting clause. In *Barnsdall v. Bradford Gas Co.*,²⁷ the Pennsylvania court characterized a lease for mineral purposes as creating a corporeal interest in land, as distinguished from a grant of authority to enter and operate for minerals, classified as simply a license and so an incorporeal hereditament.

In *Transcontinental Oil Co. v. Emmerson*²⁸ the nature of the interest created by a lease was before the Illinois court. The state sought to tax an oil company upon its oil leases as "tangible" property under section 106 of the General Corporation Act,²⁹ "tangible" being defined in section 137 as "corporeal" property. The leases were in the form of grants of land for drilling purposes, and the court, relying upon *Barnsdall v. Bradford Gas Co.*,³⁰ held the interest so created to be corporeal property, not merely an incorporeal hereditament; but it did so without any reference to the distinction in that case concerning the nature of

21. (1908) 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144.

22. (1908) 230 Ill. 536, 82 N. E. 888, 120 Am. St. Rep. 332.

23. *Texas v. Daugherty* (1915) 107 Tex. 226, 176 S. W. 717; *Texas v. Davis* (1923) 113 Tex. 212, 254 S. W. 311.

24. *Federal Oil Co. v. Western Oil Co.* (C. C. D. Ind. 1902) 112 Fed. 373; *Wagner v. Mallory* (1902) 169 N. Y. 501, 62 N. E. 584; *Heller v. Dailey* (1901) 28 Ind. App. 555, 63 N. E. 490; *Kolachny v. Galbreath* (1910) 26 Okla. 772, 110 Pac. 902. The only Missouri case construing such an instrument treats it as an option and not as a lease. *Morton v. Drosten* (Mo. App. 1916) 185 S. W. 733.

25. *Karns v. Tanner* (1871) 66 Pa. 297.

26. *Chandler v. Hart* (1911) 161 Cal. 405, 119 Pac. 516.

27. (1893) 152 Pa. 82, 25 Atl. 237.

28. (1921) 298 Ill. 394, 131 N. E. 645, 16 A. L. R. 507.

29. Ill. Smith-Hurd's Ann. Stats. (1935) c. 32, sec. 157.132.

30. (1893) 152 Pa. 82, 25 Atl. 237.

the granting clause. If the case is to be construed as adopting the distinction laid down in the *Barnsdall* case, it in effect overrules the *Watford* case³¹ where the lessee's right to possessory actions was denied, because in both the *Watford* and the *Transcontinental Oil* cases the lease by its terms was of the whole premises for mining purposes, not a grant of a mere exclusive privilege to drill. However, it would seem probable that Illinois will continue to deny the right to possessory actions, as was done in the *Watford* case and as is done in the great majority of the other states in the "non-ownership" group, regardless of the nature of the granting clause.³² The *Emmerson* case may be confined to its own special facts, as a classification for the purpose of a particular taxing statute. Adherence to the original rule was indicated in *Conover v. Parker*,³³ a later case, where the court, citing the *Watford* case, said by way of *dictum* that the lease conveyed no interest in land; a grant of all the oil instead of a lease of the land was involved, but the court made no effort to ground its decision upon the distinction in the *Barnsdall* case.³⁴

A lessee does have an interest which will support an injunction against drilling by a subsequent lessee.³⁵ Such interest is within the statute of frauds.³⁶ While some jurisdictions regard this interest as inchoate and unvested until oil is discovered,³⁷ it was stated in *Bruner v. Hicks*³⁸ that the lease created "a present vested right in the premises." The statement in *Poe v. Ulrey*³⁹ that the lease vested no estate until oil and gas were actually found must have had reference to the interest in the oil and not to any interest in the premises, as the case further stated that a lease, to be valid, might require a release of the homestead rights.⁴⁰

II

Generally a remainderman cannot execute a valid lease because he has no right to possession.⁴¹ The power of a life tenant

31. (1908) 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144.

32. See Summers, *Oil & Gas* (1st ed. 1926) 174, sec. 53.

33. (1923) 305 Ill. 292, 137 N. E. 204.

34. (1893) 152 Pa. 82, 25 Atl. 237.

35. *Gillespie v. Fulton Oil Co.* (1909) 236 Ill. 188, 86 N. E. 219.

36. *Prout v. Hoy* (1914) 263 Ill. 54, 105 N. E. 26.

37. *Venture Oil Co. v. Fretts* (1893) 152 Pa. 451, 25 Atl. 732; *Crawford v. Ritchey* (1896) 43 W. Va. 252, 27 S. E. 220.

38. (1908) 230 Ill. 536, 82 N. E. 838, 120 Am. St. Rep. 332.

39. (1908) 233 Ill. 56, 84 N. E. 46.

40. See also *Prout v. Hoy* (1914) 263 Ill. 54, 105 N. E. 26, and *Watford v. Shipman* (1908) 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144.

41. *Deffenbaugh v. Hess* (1909) 225 Pa. 638, 74 Atl. 608; Summers, *Oil & Gas* (1st ed. 1926) 226, sec. 66.

to operate, or make a lease, for oil and gas will depend upon whether such act constitutes waste. The common law limitation that only life estates created by law and not to conventional life estates were so impeachable⁴² does not appear to have been much observed in the modern law of oil and gas.⁴³ In some states the common law distinction has been abolished by statute.⁴⁴ In *Ohio Oil Co. v. Daughtee*⁴⁵ where a trustee for both life tenant and remainderman leased for the benefit of the life tenant alone, the court in affirming an injunction against the lessee requested by the remainderman stated:

A life tenant has no right to operate for oil. Neither could the trustee operate for his benefit. The taking out of the oil would be waste.⁴⁶

The rule was followed in the only other Illinois cases dealing with the subject, *Sewell v. Sewell*⁴⁷ and *Prout v. Hoy*.⁴⁸ The distinction between conventional life estates and those created by law is of no significance as the Illinois statute on waste applies to both.^{48a}

While neither life tenant nor remainderman may singly execute a lease, they may do so jointly.⁴⁹ Leases given by either alone have been said to be void,⁵⁰ but the statement appears not to be strictly accurate. Thus where a lessee secured leases independently from the life tenant and from the remainderman,⁵¹ where separate leases were executed by each to different lessees but eventually both were assigned to the same person,⁵² or where a lease executed by a life tenant was ratified by a separate document executed by the remainderman,⁵³ the separately ineffective acts have been given effect as a result of the merger of rights.

Whether a lease executed by a remainderman alone is vali-

42. Walker, Fee Simple Ownership in Oil and Gas (1928) 6 Tex. L. Rev. 125, 142.

43. *Williams v. Jones* (1896) 43 W. Va. 562, 27 S. E. 411; *Marshall v. Mellon* (1897) 179 Pa. 425, 34 Atl. 564; *Meredith v. Meredith* (1921) 193 Ky. 192, 235 S. W. 757; *Deffenbaugh v. Hess* (1909) 225 Pa. 638, 74 Atl. 608. See also Note (1912) 36 L. R. A. (N. S.) 1099.

44. Walker, *supra*, note 42, at 142.

45. (1909) 240 Ill. 361, 88 N. E. 818.

46. 88 N. E. at 820.

47. (1936) 363 Ill. 166, 1 N. E. (2d) 492.

48. (1914) 263 Ill. 54, 105 N. E. 26.

48a. Ill. Smith-Hurd's Rev. Stats. (1937) c. 41, sec. 45.

49. Summers, *Oil & Gas* (1st ed. 1926) 226, sec. 67.

50. See *Gerkino v. Kentucky Salt Co.* (1897) 100 Ky. 734, 39 S. W. 444, 66 Am. St. Rep. 370.

51. (1914) 263 Ill. 54, 105 N. E. 26.

52. *Orndoff v. Consumer's Fuel Co.* (1932) 308 Pa. 165, 162 Atl. 431.

53. *Burden v. Gypsy Oil Co.* (1935) 141 Kan. 147, 40 P. (2d) 463.

dated by the death of the life tenant seems never to have been decided in Illinois. A lease containing warranties would appear to be amenable to the doctrine of estoppel by deed as applied in Illinois;⁵⁴ but even in the absence of warranties, the court might uphold the lease under the principle of *Ziegler v. Brenneman*,⁵⁵ where a lease executed by a tenant in common without his cotenant's consent was held binding upon the lessor although void as to the cotenant.

A contingent remainderman has the same right to enjoin future waste by the life tenant or his lessee as one holding a vested remainder though he has no claim for past waste because he has no certain estate in the land.⁵⁶

The life tenant's refusal to join in a lease may result in the draining off of the oil and damage to the inheritance of the remainderman thereby. It has been urged, upon analogy to cases where the English courts have permitted the remainderman to cut timber to prevent damage to the inheritance by decay,⁵⁷ that equity should grant relief in such a situation at least to the extent of permitting offset wells to be drilled.⁵⁸

III

A life tenant and a remainderman who join in executing a lease may agree upon a division of the royalties, but if they do not, the court will order them impounded for the duration of the life estate, the interest to be paid to the life tenant and the principal to the remainderman upon termination of the life estate.⁵⁹ However, the life tenant's right to the income being dependent upon the consent of the remainderman, where he alone executes

54. *Hitchcock v. Fortier* (1875) 65 Ill. 239, 26 A. L. R. 176; *Elder v. Derby* (1875) 66 Ill. 519, 63 A. L. R. 101.

55. (1908) 237 Ill. 15, 86 N. E. 597. Suit to cancel lease as a cloud on title was brought by co-tenants where lease was executed by one co-tenant alone. " * * * one tenant in common may not prejudice the rights of his co-tenants by a conveyance * * * of any interest in any specific part of the common property, but such conveyance is valid as against the grantor, at least by way of estoppel. It is only where, and as far as, it comes in conflict with the interests of the co-tenants that it is void." 86 N. E. at 600.

56. *Ohio Oil Co. v. Daughtee* (1909) 240 Ill. 361, 88 N. E. 818.

57. *Seagram v. Knight* (1867) L. R. 2 Ch. App. 628; *Tooker v. Annsley* (Ch. 1832) 5 Sim. 235, 58 Eng. Rep. 325; *Hussey v. Hussey* (Ch. 1820) 5 Madd. 44, 56 Eng. Rep. 811.

58. *Simonton, Right of a Remainderman to Compel a Life Tenant to Permit Development for Oil and Gas* (1919) 26 W. Va. L. Q. 213.

59. *Mills and Willingham, Law of Oil and Gas* (1926) sec. 173; *Summers, Oil & Gas* (1st ed. 1926) sec. 196; *Meredith v. Meredith* (1921) 193 Ky. 192, 235 S. W. 757; *Burden v. Gypsy Oil Co.* (1935) 141 Kan. 147, 40 P. (2d) 463; *Eakin v. Hawkins* (1903) 52 W. Va. 124, 43 S. E. 211; *Blakeley v. Marshall* (1896) 174 Pa. 425, 34 Atl. 564.

a lease without joinder or ratification, he is liable to the remainderman for all royalties received.⁶⁰

As to wells opened prior to the commencement of the estate, the life tenant is entitled to the whole royalty, not merely to the interest thereon.⁶¹ This is a direct application of the law of mines and minerals and an exception to the ordinary rule of trusts which requires that any increase in the value of real estate be reserved as corpus for the benefit of the remainderman and the only income of the real estate be paid to the life tenant.⁶² While oil extracted from land, like other minerals, is in fact a part of the estate which once removed can never inure to the benefit of the remainderman, the rule in the general law of mines and mining is established beyond question,⁶³ and there is nothing in the nature of oil and gas to prevent its application.

The rule has been extended to the more doubtful case where a lease has been executed by the testator or grantor, though no wells have been drilled prior to the commencement of the estate. The royalties being even more clearly not part of the existing rents and profits of the land, the courts have been forced to found their position upon the testator's intent.⁶⁴ In *Chaytor v. Trotter*⁶⁵ Williams, L. J., said:

* * * whether a mine is an "opened" mine or not an "opened" mine when one is dealing with the question of the rights of any person who has a life estate in the land, is a question which really depends upon the intention of the settlor or testator as the case may be.^{65a}

As a rule of construction rather than of property is involved, its application would appear to be limited by other statements of the grantor or testator as well as by the circumstances and surrounding facts of the particular case.

60. *Bond v. Godsey* (1901) 99 W. Va. 564, 130 S. E. 142; *Williams v. Jones* (1897) 43 W. Va. 562, 27 S. E. 411; *Westmoreland Coal Company's Appeal* (1877) 85 Pa. 344.

61. *Summers*, supra note 59, at sec. 196; *Mills and Willingham*, supra note 59 at 257, sec. 170; *Koen v. Bartlett* (1896) 41 W. Va. 559, 23 S. E. 664; *Sayers v. Hoskinson* (1888) 110 Pa. 473, 1 Atl. 308; *Sewell v. Sewell* (1936) 363 Ill. 166, 1 N. E. (2d) 492; *Lenfers v. Henke* (1874) 73 Ill. 405, 16 L. R. A. 247; *Restatement, Property* (1936) secs. 119 (b) (c), 144.

62. 4 *Bogert, Trusts* (1935) 2393, sec. 823.

63. *Bainbridge, Mines and Minerals* (1871) 54; *Priddy v. Griffith* (1894) 150 Ill. 560, 37 N. E. 999; *Hendrix v. McBeth* (1883) 61 Ind. 473; *Alderson v. Alderson* (1900) 46 W. Va. 242, 33 S. E. 228, 5 Mor. Min. Rep. 74.

64. *Priddy v. Griffith* (1894) 150 Ill. 560, 37 N. E. 999; *Higgins v. Snow* (1902) 113 Fed. 433; *Koen v. Bartlett* (1896) 41 W. Va. 559, 23 S. E. 664; *Hendrix v. McBeth* (1883) 61 Ind. 473.

65. (1902) 87 L. T. R. (N. S.) 33.

65a. 87 L. T. R. (N. S.) at 37.

Whether a life tenant may take oil not only from the first sand but also from underlying sands does not appear to have been decided; but it would seem to depend upon whether a lease had been executed prior to the life estate, or whether wells had been actually opened prior thereto. The first case, being governed by intention, would appear *per se* to present no sound reason for imputing an intention to grant the privilege only as to the first stratum of oil; but the latter case is controlled by the law of mining, and while it is there conceded that the life tenant may continue to work existing mines⁶⁶ and even to open new pits or shafts to reach the same stratum at another point, still he may not penetrate to another stratum or vein.⁶⁷

A lease jointly executed by life tenant and remainderman is in no way invalidated by a later mortgage of the land, the mortgage being subject to it.⁶⁸ Under the title theory of mortgages, the mortgage acts as an assignment of the reversionary interest entitling the mortgagee, after notice to the lessee, to the royalties as rents issuing out of the land.⁶⁹ Under the lien theory, the mortgagee is not entitled to the royalties unless he has entered into possession⁷⁰ or unless his security is so imperiled that equity will appoint a receiver.⁷¹ In Illinois, where the lien theory appears to be applied until default, whereupon the mortgagee becomes vested with title,⁷² the mortgagee's right to royalties would ordinarily accrue upon default if he gave notice to the lessee.⁷³ A mortgagor remaining in possession may make a valid lease enforceable against the lessee, but the lease will not bind the mortgagee, prejudice his title, or interfere with his right to recover possession or re-enter upon breach of condition.⁷⁴ Mere breach of condition, however, does not entitle the mortgagee to the royalties, there being no privity of estate between him and the lessee which will entitle him to sue for breach of covenants

66. *Lenfers v. Henke* (1874) 73 Ill. 405, 16 L. R. A. 247; *Westmoreland Coal Co.'s Appeal* (1877) 85 Pa. 344; *Chaytor v. Trotter* (1902) 87 L. T. R. (N. S.) 33; *Bond v. Godsey* (1901) 99 W. Va. 564, 130 S. E. 142; *Clavering v. Clavering* (1879) L. R. 4 App. Cas. 454.

67. *Bainbridge, Mines and Minerals* (1871) 42, 44.

68. 2 Jones, *Mortgages* (8th ed. 1928) 361, sec. 978.

69. *Coffey v. Hunt* (1885) 75 Ala. 236.

70. *Mass. Hospital Life Ins. Co. v. Wilson* (1847) 51 Mass. 126.

71. *Home Life Ins. Co. v. O'Sullivan* (1912) 151 App. Div. 535, 136 N. E. 105.

72. *Rohrer v. Deatherage* (1929) 336 Ill. 450, 168 N. E. 266.

73. *Scheidt v. Belz* (1879) 4 Ill. App. 431, Ann. Cas. 1916D 196; *Bradley v. Peabody Coal Co.* (1902) 99 Ill. App. 427, 14 A. L. R. 640.

74. *Gartside v. Outley* (1871) 58 Ill. 210, 11 Am. Rep. 59; *Taylor v. Adams* (1886) 115 Ill. 570, 4 N. E. 837; *Greenbaum Sons v. Kingsbury* (1927) 248 Ill. App. 321; 2 Jones, *Mortgages* (1928) sec. 981.

in the lease unless created by attornment.⁷⁵ But since the mortgagee after condition broken has the right to treat the lessee as a trespasser,⁷⁶ he will ordinarily have little difficulty in coercing such attornment. In Illinois, attornment does not create a new tenancy for the balance of the lease but only from year to year.⁷⁷

Whether the doctrine of marshalling in inverse order is to be applied on foreclosure for the benefit of the lessee of an oil and gas lease does not appear to have been decided in "non-ownership" states.⁷⁸ In Texas, an "ownership" state, the land is not to be sold as a whole but the mineral estate is subject to pay a pre-existing mortgage only where the surface estate is insufficient.⁷⁹ In Illinois, while the lessee does not have a separate mineral estate, he does have an interest in the land separate and distinct from that of his lessor. This interest, though more than an incorporeal hereditament, is yet scarcely more than a *profit a prendre* to which are annexed sufficient rights of entrance, egress, right of ways, *et cetera*, to lead the court to call it a freehold interest in land. There would seem to be no good reason why the usual rule of marshalling in inverse order which the Illinois courts apply where the mortgagor subsequently conveys a part of his fee,⁸⁰ should not be invoked for the protection of this interest. In *Hyde Park Light Co. v. Brown*⁸¹ the rule was invoked to protect one holding an easement to maintain telegraph poles, whose interest would appear to be rather slighter than that arising under an oil and gas lease.

V

Quite generally, when oil is discovered, the lessee is under an implied duty reasonably to develop the rest of the land leased.⁸² Under a lease for no specific term of years, the so-called "no

75. Jones, loc. cit. supra, note 74.

76. *Gartside v. Outley* (1871) 58 Ill. 210, 11 Am. Rep. 59; *Rohrer v. Deatherage* (1929) 336 Ill. 450 168 N. E. 266.

77. *Taylor v. Adams* (1886) 115 Ill. 570, 4 N. E. 837; *Gartside v. Outley* (1871) 58 Ill. 210, 11 Am. Rep. 59.

78. Walker, loc. cit. supra, note 42.

79. *Continental Oil Co. v. Graham* (Tex. Civ. App. 1928) 8 S. W. (2d) 719.

80. *Iglehart v. Crane & Wesson* (1866) 42 Ill. 261; *Lock v. Fulford* (1869) 52 Ill. 166; *Moore v. Chandler* (1871) 59 Ill. 466; *Metzger v. Emmel* (1919) 289 Ill. 52, 124 N. E. 360.

81. (1898) 172 Ill. 329, 50 N. E. 127.

82. *Daughtee v. Ohio Oil Co.* (1909) 151 Ill. App. 102, 93 A. L. R. 469; *Gillespie v. Ohio Oil Co.* (1931) 260 Ill. 169, 102 N. E. 381; *Poe v. Ulrey* (1908) 233 Ill. 56, 84 N. E. 46; *Indiana Oil and Gas Co. v. McCrory* (1914) 42 Okla. 136, 140 Pac. 610; *Bradford Oil Co. v. Blair* (1886) 113 Pa. 142, 4 Atl. 218; Summers, *Oil & Gas* (1st ed. 1926) sec. 126.

term" lease, such a duty attaches within a reasonable time after execution of the instrument.⁸³ Under any kind of lease, where the leased land is in danger of being drained by operations upon adjacent lands, the courts have commonly implied a duty in the lessee to drill offset wells.⁸⁴ A failure to fulfill the implied obligation under any of the above situations suffices to establish a forfeiture and to permit the lessor to maintain an action of ejectment.⁸⁵

The right of the lessor to avoid the lease, to enjoin operations, or to defeat an action of specific performance at the instance of the lessee, because of a failure of consideration is less clear. In *Watford Oil and Gas Co. v. Shipman*⁸⁶ the lease recited a consideration of one dollar, provided for a one-eighth royalty, and contained a clause permitting the lessee to surrender the lease at any time upon a payment of one dollar. The lessee brought a bill to enjoin a junior lessee from drilling, which the court viewed as an attempt to obtain specific performance by indirect means and denied, upon the ground that the lessee by virtue of the surrender clause might nullify the decree by refusing to proceed further, and "A court of equity will not do a vain and useless thing by rendering a decree settling the rights of parties which one may set aside at his will."⁸⁷ No specific reference was made to the doctrine of lack of mutuality, but the equitable rule applied was clearly based upon a want of mutuality of remedies. At the same term of court, in a suit by the lessor to cancel an identical lease as a cloud on title,⁸⁸ based upon a lack of mutuality and non-payment of the recited consideration, the court denied relief on the ground that, while the courts would inquire into the consideration for the purpose of determining the right to specific performance, it would not permit parol evidence for the purpose of invalidating the instrument. The court said further, in respect to the claim of lack of mutuality, that, in the absence of fraud, where the parties were competent to contract, such surrender clauses did not make the contracts invalid. The case, while apparently distinguishing between the application of the equitable doctrine in suits for specific performance and for

83. *Powers v. Bridgeport Oil Co.* (1909) 238 Ill. 397, 87 N. E. 381; *Brown v. Vandergrift* (1875) 80 Pa. 142; *Harris v. Ohio Oil Co.* (1897) 52 Ohio St. 118, 48 N. E. 502.

84. *Summers, Oil & Gas.* (1st ed. 1926) sec. 122.

85. *Ibid.*

86. *Watford Oil Co. v. Shipman* (1908) 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144.

87. 84 N. E. at 54.

88. *Poe v. Ulrey* (1908) 233 Ill. 56, 84 N. E. 46.

cancellation, in fact by its language places in doubt the application of the doctrine to any of these leases. A few months later the court in *Cortelyou v. Barnsdall*⁸⁹ affirmed a cancellation of a lease for want of mutuality, but the case is plainly distinguishable in that no consideration was even recited. However, the court in its opinion relied most strongly upon the lessee's power of withdrawal as depriving the contract of the necessary element of mutuality. The resulting uncertainty is important in view of the fact that most courts deny that there is any fatal want of mutuality.⁹⁰ The theory underlying the judicial invalidation of oil and gas leases containing optional drilling clauses has been criticized as resting on two false hypotheses: first, that an oil lease is an executory contract under which no interest vests prior to discovery; and, second, that prospective royalties are the sole consideration for the lease.⁹¹ That an oil lease is not executory in Illinois but creates a present vested interest in land from the date of its execution has been consistently held since the very first case upon the subject.⁹² In a great majority of the states the courts hold, in accordance with the general contracts rule, that one dollar is sufficient consideration; consequently whether a present vested interest in land is created is immaterial since the independent consideration supports the whole contract.⁹³ Aside from the right to cancellation of the lease, it should be noted that the United States Supreme Court held in *Smith v. Guffey*,⁹⁴ under facts similar to those in the *Watford* case,⁹⁵ that suits of this nature are not for specific performance of executory contracts but to protect a present vested estate from waste. The objection of lack of mutuality is therefore not pertinent. This case, having gone up from Illinois, might be expected to exert considerable persuasive effect. Against this, however, must be reckoned the fact that the other states applying the doctrine of want of mutuality are Oklahoma⁹⁶ and Indiana,⁹⁷

89. (1908) 236 Ill. 138, 86 N. E. 200.

90. See Summers, *Validity of Oil and Gas Leases* (1925) 34 Yale L. J. 383, 392.

91. Summers, *Oil & Gas* (1st ed. 1926) 251, sec. 72.

92. *Bruner v. Hicks* (1908) 230 Ill. 536, 82 N. E. 888, 120 Am. St. Rep. 332.

93. Summers, *loc. cit. supra*, note 91.

94. (1914) 237 U. S. 101. *

95. *Watford Oil Co. v. Shipman* (1908) 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144.

96. *Superior Oil & Gas Co. v. Mehlin* (1910) 25 Okla. 809, 108 Pac. 545; *Kalachny v. Galbreath* (1910) 26 Okla. 772, 110 Pac. 902; *Hill Oil Co. v. White* (1916) 67 Okla. 247, 170 Pac. 691.

97. *Advance Oil Co. v. Hunt* (1917) 66 Ind. App. 228, 116 N. E. 340.

the views of which states have greatly influenced the development of the Illinois law. Should the court continue to follow the Oklahoma and Indiana rule, the lessee will have no remedy to enforce the terms of his lease against the lessor or his assigns unless he has himself performed or has placed himself in a position where he is bound to perform.

The surrender clause is commonly found in modern leases. Other types are what are known as "fixed term," "unless," and "drill or pay" leases.⁹⁸ The first provides for the drilling of a well within the term which is for a definite period of years. The second provides that the lease is to last for a certain term and then terminate "unless" delay rentals are paid or drilling begun. The third type provides that lessee shall drill within a specified time or pay delay rentals. The objection raised to leases containing a surrender clause would apply equally to fixed term and "unless" leases. In either case the lessee is under no obligation either to drill or pay rentals, and the question of consideration stands upon the same basis as if a surrender clause were included. However, the courts have construed the "drill or pay" type as effecting a forfeiture for failure to drill only where the lessor elects to consider it so and leaving him free to waive the forfeiture and insist upon the delay rentals for the remainder of the term.⁹⁹ Since the lessee under such construction is absolutely bound to either drill or pay delay rentals, the courts might be more hesitant to find a lack of mutuality of remedies.

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98. Following are examples of leases construed by the courts: "To have and hold—for and during the term of 25 years * * * and so long thereafter as oil and gas shall continue to be found." *Nesbit v. Godfrey* (1893) 155 Pa. 251, 25 Atl. 621. "This lease shall be null and void unless the lessee shall pay \$10 for each month completion is delayed beyond the time above mentioned." *Glasgow v. Chartiers Oil Co.* (1892) 152 Pa. 48, 25 Atl. 232. "In case of a failure to complete one well within such time, the said parties * * * agree to pay * * * \$1000 per annum—as consideration for such yearly delay." *Galey v. Kellerman* (1888) 123 Pa. 491, 16 Atl. 474.

99. *Galey v. Kellerman* (1888) 123 Pa. 491, 16 Atl. 474; *Jones v. Western Pa. Natural Gas Co.* (1892) 146 Pa. 204, 23 Atl. 386; *Johnstown v. Franklin R. R. Co. v. Egbert* (1892) 152 Pa. 53, 25 Atl. 151. See also *Summers, Oil & Gas* (1st ed. 1926) sec. 105.

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