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THE NATURE OF THE INTEREST OF THE GRANTEE
UNDER AN OIL AND GAS LEASE

By JAMES W. SIMONTON*

The discovery and development of vast deposits of natural gas and petroleum of almost fabulous value, has given rise to legal problems which differ in some respects from any that have heretofore come before the courts for solution. In dealing with cases involving these unfamiliar minerals, the courts naturally resorted to those analogous situations found in the law which seemed to them most nearly applicable. The application of several different analogies to the same problems arising in oil and gas cases by the courts of different states has led to a considerable amount of confusion. One of the first questions which presented difficulties was as to the nature of a landowner's property in oil and gas in place beneath his land. This question is now fairly well settled, though the courts of all the states are not in accord.¹ A second and equally difficult question is as to the nature of the interest in land which passes to a grantee or lessee under an oil and gas lease. As to this question the authorities are in a state of great confusion and uncertainty. In the present paper this latter question will be discussed and the nature of the interest which passes to the lessee will be considered. The instruments which are almost universally known as oil and gas leases will be so termed in this paper, though it is unfortunate that they are not known by some more fitting name since they are not in fact leases, though they are sufficiently analogous to lead some courts to assume them to be true leases.

Oil and gas are found beneath the surface of the earth in pools or reservoirs, irregular in size and shape, and located in strata of porous rock or sand. The depth of these oil and gas bearing strata may be from a few hundred to many thousand feet. At some places there are several of such strata at various depths and having no apparent connection with one another. It is by no means impossible that pools of oil or gas may some day be found at

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¹For a good discussion of this question see an article by Mr. John Stokes Adams entitled, "The Right of a Landowner to Oil and Gas in His Land," 63 PA. LAW REV. 471.

depths to which the genius of man has, as yet, been unable to penetrate, and that landowners in fields that are now supposed to be exhausted, may some day find themselves possessed of new fortunes flowing from what are at present inaccessible depths.

As a foundation for any intelligent discussion of the problems under consideration, it is necessary to state briefly the law as to the nature of the landowner's interest in the oil and gas while in place beneath the surface of the land. One of the minerals being gaseous and the other liquid, naturally an attempt was made to apply the settled principles of law applicable to percolating waters, since such waters, like oil and gas, are in strata beneath the surface and capable of flowing from place to place. These principles, however, proved to be inapplicable in some respects to petroleum and natural gas. For example, even under the more progressive decisions in this country as to percolating waters, a landowner has no right to collect subterranean waters for the purpose of merchandise, if by so doing, he seriously damages his neighbors' use of such waters,² while the whole purpose of oil and gas production is to secure the minerals for the purpose of selling them. It is apparent that the existing law as to solid stratified minerals, such as coal, could not logically be applied to petroleum and natural gas, for like percolating waters, these new minerals are fugitive in nature and capable of passing from place to place, so that a single well near a boundary line might drain oil and gas from a large area of land much of which belongs to strangers. It was also suggested that these minerals were like animals *ferae naturae* in that they were fugitive and capable of escaping from the land at one locality and passing to other land. The principles finally applied by the majority of the courts are in a measure a combination of principles of law taken from these various analogies.

The Supreme Court of Pennsylvania in *Westmoreland Natural Gas Company v. DeWitt*,³ a very influential case on this point, after comparing oil and gas in place in the land to percolating waters and more particularly to animals *ferae naturae*, expressed its opinion in the following language:

“They [oil and gas] belong to the owner of the land so long as they are in it or on it, and are subject to his control; but when they escape, and go into other land, or come under an-

²See FARNHAM, *WATERS AND WATER RIGHTS*, §938; 53 L. R. A. (N. S.) 369 note.
³130 Pa. St. 235, 18 Atl. 724 (1889).

other's control, the title of the former owner is gone. If an adjoining or even a distant owner, drills on his own land, and takes your gas so that it comes into his well and under his control, it is no longer yours but his. And equally so as between lessor and lessee in the present case, the one who controls the gas, has it in his grasp so to speak, is the one who has possession in the legal as well as in the ordinary sense of the word.

“Tested by these principles, there is not the slightest doubt that the possession of the gas, as well as the right to it under this lease, was in the complainants when the bill was filed. They had put down a well, which had tapped the gas bearing strata, and it was the only one on the land. They had it in their control, for they had only to turn a valve to have it flow into their pipe, ready for use.”

While the meaning of the above language is not clear, it would seem that the idea of the court was that the owner of land, after drilling a well and tapping a gas bearing stratum, has title to all the gas in such stratum which happens to be underneath his land at the time. Likewise, if he taps oil bearing rock or sand, he thereby acquires title to all the oil therein. Such title, if it exists, must necessarily be a qualified title since it may be lost by the escape of the oil or gas into other land. The court said the oil and gas belong to the owner of the land, “so long as they are in it or on it, and subject to his control.” What is meant by the clause “and subject to his control”? It might be admitted that if an oil or gas bearing stratum be tapped by a well on a particular tract of land, the owner of that land does have a measure of control over some of the gas under the surface, but such control is very slight, except as to the oil or gas either very near the well or actually in it. If an adjoining owner has a well near the boundary line he will have a greater degree of control over a part of the minerals than has the owner of the land. Of course, under the language of the above case, the owner would have no title to oil or gas in deeper strata not yet tapped by any well. The idea of a qualified ownership of the oil and gas in place as suggested in the above case is not only illogical but is inconsistent with the principles of the law of real property. It leads to the absurdity of holding that a man has title to valuable property which the courts will not protect. As was said by Mr. Justice White in *Ohio Oil Company v. Indiana*:⁴

⁴177 U. S. 190 (1899).

“But it cannot be that property to a specified thing vests in one who has no right to prevent any other person from taking or destroying the object which is asserted to be the subject of the right of property.”

The doctrine of a qualified ownership in oil and gas in place after discovery, as expressed in *Westmoreland Natural Gas Company v. DeWitt*, it seems, has not been followed by subsequent Pennsylvania cases,⁵ but the language used in that decision has often been quoted or its substance stated by other courts.⁶ Some of these courts have mis-stated the language so as to convey the idea that after discovery the owner has title to *all* the oil and gas under his land though in a stratum not yet tapped by any well.⁷ Apparently some of the courts which quote the above language of the Pennsylvania court have not given the matter careful consideration and in a case where the point were important probably would not give effect to the language used. Nevertheless, there is a certain amount of confusion which has grown out of the idea of a qualified title in oil and gas in place as expressed in the above case.

A more logical conclusion as to the nature of a landowner's property right in the oil and gas in place, and one more consistent with established principles of the law of property, is that expressed by the Supreme Court of the United States in *Ohio Oil Company v. Indiana*.⁸ In this case the court called attention to the fact that the analogy drawn as to animals *ferae naturae* failed in an important particular, namely, that title to wild animals is in the public and the public may prohibit an individual from taking them even on his own land, while oil and gas are confined in local reservoirs and the public has no property in them. The court concluded that the landowner has no property interest in the oil and gas which may be beneath the surface of his land, and can acquire no

⁵*Kelly v. Keys*, 213 Pa. St. 295, 62 Atl. 911 (1905); *Duffield v. Hue*, 129 Pa. St. 94, 18 Atl. 566 (1889) and 136 Pa. St. 602, 20 Atl. 526 (1890). But see *Barnsdall v. Bradford Gas Co.*, 225 Pa. St. 338, 74 Atl. 207 (1909) where the court apparently holds that the landowner owns all the oil and gas under his land even though no wells have been drilled.

⁶*Brown v. Spillman*, 155 U. S. 665 (1895); *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 809 (1905); *Osborn v. Arkansas Territorial Oil & Gas Co.*, 103 Ark. 175, 146 S. W. 122 (1912); *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46 (1908); *Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 490 (1902); *Howerton v. Kansas Natural Gas Co.*, 81 Kan. 553, 106 Pac. 47 (1910); *Rives v. Gulf Refining Co.*, 133 La. 478, 62 So. 623 (1913); *Northwest Ohio Natural Gas Co. v. Ullery*, 68 O. St. 259, 67 N. E. 494 (1903).

⁷*Brown v. Spillman*, 155 U. S. 665 (1895).

⁸177 U. S. 190 (1899).

title to them until he reduces them to possession. He has the exclusive right within the boundaries of his own land to sink wells in search of these minerals, and if he finds them, to take all he is able to secure, even though adjoining lands are completely drained. There is no limit on the extent to which he may exercise this right to take oil and gas, except perhaps, that he can be restrained from unreasonable waste of the minerals. Under this doctrine the owner of the land on which there are producing wells, would have no greater property right in oil and gas which has not yet come into his wells, than he had before such wells were drilled. It is submitted that this is the only reasonable theory as to the owner's property right to petroleum and natural gas in place. Any other view seems impossible to reconcile with established principles of the law and particularly with very many existing decisions in connection with the production of oil and gas under oil and gas leases. The doctrine of *Ohio Oil Company v. Indiana* is now the law in most of the oil and gas producing states,⁹ though there is still some uncertainty due to the doctrine of qualified ownership after discovery, expressed in *Westmoreland Natural Gas Company v. DeWitt*.

In West Virginia the courts have come to an entirely different conclusion as to the nature of the owner's property right in oil and gas in place. They hold that since oil and gas are minerals found in strata beneath the surface, they should be treated like solid stratified minerals, such as coal, in so far as property rights in them are concerned. Therefore an owner has title to the oil and gas in place under his land, and the ownership of such minerals may be severed from that of the rest of the land, just as the ownership of a vein of coal may be severed by conveyance from that of the soil.¹⁰ This doctrine is open to all the objections that would apply to a qualified ownership in oil and gas in place such as suggested in *Westmoreland Natural Gas Company v. DeWitt*.

⁹*Osborn v. Arkansas Territorial Oil & Gas Co.*, 103 Ark. 175, 146 S. W. 122 (1912); *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53 (1908); *New American Oil & Mining Co. v. Troyer*, 166 Ind. 402, 77 N. E. 739 (1906); *Manufacturers Oil and Gas Co. v. Indiana Oil and Gas Co.*, 155 Ind. 461, 57 N. E. 912 (1900); *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71, 77 S. W. 368 (1903); *Wagner v. Mallory*, 169 N. Y. 505, 62 N. E. 584 (1902); *Shepard v. McCalmont Oil Co.*, 38 Hun (N. Y.) 37 (1885); *Kolachny v. Galbreath*, 26 Okla. 772, 110 Pac. 902 (1910).

¹⁰*Coffindaffer v. Hope Natural Gas Co.*, 74 W. Va. 107, 81 S. E. 966 (1914); *South Penn Oil Co. v. Haught*, 71 W. Va. 720, 78 S. E. 759 (1913); *Kiser v. McLean*, 67 W. Va. 294, 67 S. E. 725 (1910); *Preston v. White*, 57 W. Va. 278, 50 S. E. 236 (1905); *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781 (1897).

In fact there can be no more than a qualified title to oil and gas in place in West Virginia, for the West Virginia court recognizes the fugitive character of these minerals and admits that title may be lost to a landowner by their escape to other land.¹¹ The West Virginia court has rendered decisions inconsistent with this doctrine, and has gone even so far as to disregard it entirely in a case where it seemed particularly troublesome,¹² but nevertheless it must be regarded as the settled law of the state. The courts of Kansas have followed those of West Virginia, so that in these two states the matter is settled *contra* to the law most of the other states which have passed on the question.¹³

Most of the petroleum and natural gas produced in this country is produced under instruments called oil and gas leases. An instrument of this character usually gives to the grantee or lessee the right to search for oil and gas on certain described premises for a definite term of years and so long thereafter as oil or gas is found in paying quantities. The owner is usually given a share of the oil produced as royalty and, if gas is found, a certain annual sum is paid to him for each producing well. As these instruments are construed by the courts, it is inaccurate to term them leases,¹⁴ but since they are universally called oil and gas leases they will be so designated in this discussion. Before proceeding with the discussion as to the nature of the interest which passes to the lessee under an oil and gas lease, it may be well to give a brief preliminary statement as to the construction which the courts put upon the ordinary form of oil and gas lease.¹⁵

¹¹See cases cited in preceding note.

¹²Hall v. Vernon, 47 W. Va. 295, 34 S. E. 764 (1899). See also Campbell v. Lynch, 94 S. E. 739 (W. Va. 1918).

¹³Mound City Brick & Gas Co. v. Goodspeed Oil & Gas Co., 83 Kan. 136, 109 Pac. 1002 (1910); Moore v. Griffin, 72 Kan. 164, 83 Pac. 395 (1905). By way of *dictum* a similar opinion is expressed by the Supreme Court of Texas in Texas Co. v. Daugherty, 176 S. W. 717 (1915). See also Barnsdall v. Bradford Gas Co., 225 Pa. St. 338, 74 Atl. 207 (1909).

¹⁴See note in 31 HARV. L. REV. 882. See also Brewster v. Lanyon Zinc Co., 140 Fed. 801 (1905); New American Oil & Mining Co. v. Troyer, 166 Ind. 402, 77 N. E. 739 (1906); Stahl v. Illinois Oil Co., 45 Ind. App. 211, 90 N. E. 632 (1910); Dickey v. Coffeyville Vitrified Brick Co., 69 Kan. 106, 76 Pac. 398 (1904); Cooke v. Gulf Refining Co., 135 La. 609, 65 So. 758 (1914); Eaton v. Alleghany Gas Co., 122 N. Y. 419, 25 N. E. 981 (1890); Smith v. Root, 66 W. Va. 633, 66 S. E. 1005 (1910); Lawson v. Kirchner, 50 W. Va. 344, 40 S. E. 344 (1901); Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923 (1899).

¹⁵While oil and gas leases vary greatly in language, as to the granting portion they all are made for the purpose of permitting the development of the land for oil and gas by the lessee, and, taken as a whole, grant to the lessee the right to enter and drill for oil and gas and to take them if found. Hence in so far as the

By its language such an instrument purports to lease the right to explore for and produce oil and gas for a period of years, and as long thereafter as oil or gas can be produced in paying quantities. This grant of the right to search for oil and gas and to produce them if found is in all oil and gas leases. It would seem to be a grant to the grantee or lessee of the owner's right to the oil and gas, whatever its nature, for a period of years. Therefore, it ought to pass to the grantee some sort of a legal interest in the land. This interest must necessarily be only an incorporeal interest in states where the landowner does not own the oil and gas in place,¹⁶ for the lessee does not get possession of the surface of the land, except in so far as is necessary to carry out the purpose of the lease, namely, to explore for and produce oil and gas, the right to possession being merely an easement. In West Virginia and Kansas where the landowner is held to have title to the oil and gas beneath the surface it is nevertheless established law that a lessee under an oil and gas lease gets only an incorporeal interest in the land, though the courts of these states might plausibly have held the contrary.¹⁷

It has been held that the grantee or lessee under an oil and gas lease gets no vested estate in the land until he enters on the land and actually discovers oil or gas. Upon such discovery an estate in the land vests in him for the first time.¹⁸ On principle it seems erroneous to say such grantee or lessee has no vested interest of any sort in the land prior to discovery, for, if so, then the grantor could refuse to permit him to enter, without other penalty than a liability at law for damages for breach of contract. The nature of the interest which passes to the lessee under the lease as construed by the courts will be discussed in detail in a later part of the paper. At present it will suffice to point out that, according to the

problem here under discussion is concerned the difference in language usually affects the quantity but not the general nature of the lessee's interest in the land.

¹⁶See cases cited in note 9, *supra*.

¹⁷*Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S. E. 12 (1916); *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 76 S. E. 961 (1912); *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836 (1909); *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915 (1907); *Beardsley v. Kansas Natural Gas Co.*, 78 Kan. 571, 96 Pac. 859 (1908); *Kansas Natural Gas Co. v. Board of Commissioners*, 75 Kan. 335, 89 Pac. 750 (1907). See also *Pierce-Fordyce Oil Co. v. Woodrum*, 188 S. W. 245 (Tex. Civ. App. 1916).

¹⁸Apparently the first case in which an oil and gas lease was so construed was *Venture Oil Co. v. Fretts*, 152 Pa. St. 451, 25 Atl. 732 (1893). The doctrine has spread rapidly and today nearly all oil and gas leases are so construed. The question as to whether such construction of these instruments can be justified will be discussed at a subsequent place in this article.

great weight of authority, the grantee or lessee under such a lease gets either no interest or a very limited interest in the land before the discovery of oil or gas, and that upon discovery, some kind of a new estate in the land vests in him.¹⁹

It is said that the law will not permit the creation of new forms of estates in real property.²⁰ Therefore any estate which may pass to a grantee or lessee under an oil and gas lease must necessarily be some kind of an estate in land already known to the law. Courts have not attempted the invention of any new kind of estate but have too frequently misnamed the estate which passed under an oil and gas lease. What interests in land might possibly be created by an instrument which purports to grant for a limited term the right to explore for oil and gas and to produce them if found? The possibilities appear to be no more than three in number—a license, a profit and a leasehold. There is much doubt as to whether or not a licensee has any interest in land. Without discussing this mooted question, we will assume that a licensee may have some sort of an interest in land.

We will now proceed to discuss in order the possibilities of the forms of oil and gas leases, as construed by the courts, passing to the grantees or lessees (1) licenses, (2) profits and (3) leaseholds.

I. LICENSES

The word license is often loosely and inaccurately used by the courts. As Professor Hohfeld says in a recent article:²¹ "Like the term 'res gesta' and 'estoppel,' 'license' may be said to be a word of convenient and seductive obscurity." The truth of this statement is nowhere more apparent than in the cases dealing with the various kinds of mining interests. So general has been the misuse of this term that in some states the common-law meaning of the word seems to have been lost.²² If it seems desirable to hold

¹⁹This has been repeatedly stated by the courts of nearly all the oil and gas producing states. See the cases cited in notes 12 and 13, *supra*.

²⁰*Johnson v. Whiton*, 159 Mass. 424, 34 N. E. 542 (1893); *Doebler's Appeal*, 64 Pa. St. 9 (1869). See WASHBURN, *THE AMERICAN LAW OF REAL PROPERTY*, 6 ed., §143.

²¹See 27 *YALE LAW JOURNAL* 66, 92.

²²*Silsby v. Trotter*, 29 N. J. Eq. 228 (1873); *East Jersey Co. v. Wright*, 32 N. J. Eq. 248 (1880); *Thompson's Appeal*, 101 Pa. St. 225 (1882); *Dark v. Johnson*, 55 Pa. St. 164 (1867); *Rynd v. Rynd Farm Oil Co.*, 63 Pa. St. 397 (1869).

In *TIFFANY, REAL PROPERTY*, 746, it is said: "Frequently the term 'license' is applied to all rights to take minerals, although created by instruments sufficient for the conveyance of an incorporeal interest in land, and intended to have such effect, the term being in fact used merely to distinguish such grant of a right to mine from a grant of the mineral in place." This is probably true in some cases but certainly not in all of them. For example see *Dark v. Johnson*, *supra*.

an incorporeal mining right to be irrevocable, the words "coupled with an interest" seem to flow from the judicial pen almost unconsciously. Even an easement has been held to be a license coupled with an interest.²³ The Supreme Court of Pennsylvania in one case used the term license and *profit a prendre* as interchangeable terms, holding that the license or *profit a prendre* in that case was an incorporeal freehold interest in land.²⁴ But in many of the oil and gas cases in which the interest of the lessee is called a license, the language of the opinion seems to indicate considerable doubt in the judicial mind as to the correctness of the term used. There is some hope that courts at some time in the future will confine the meaning of this term within proper limits. It would seem that an incorporeal mining right might properly be termed a profit²⁵ but our courts appear to be unfamiliar with the nature of this interest in land and consequently are reluctant to apply the term to a mining right. Because of the inaccuracy in the use of the term license, it will be necessary to state the common-law significance of the word and throughout the paper to confine its meaning to its common-law limits. It may make little difference to the litigants whether a right is called a license or a profit, but misuse of such terms means an undesirable lack of clearness of judicial expression.

At common law a license is a mere permission to go upon land—a justification for trespass—revocable at any time by the licensor. In Bouvier's Law Dictionary it is defined as:

"A mere permission to do some act or series of acts on the land of the licensor, without having any permanent interest in it; it is founded on personal confidence, and not assignable. It may be given in writing or by parol; it may be with or without consideration, but in either case it is usually subject to revocation, though constituting a protection to the party acting under it until the revocation takes place."

In *Wood v. Leadbitter*,²⁶ which is recognized as a leading case on the subject by the courts in this country, the court says:

"A mere license is revocable; but that which is called a license is often something more than a license; it often com-

²³*Penman v. Jones*, 256 Pa. St. 416, 100 Atl. 1043 (1917).

²⁴*Funk v. Haldeman*, 53 Pa. St. 229 (1866).

²⁵Whether it is a profit is discussed in a subsequent part of this paper.

²⁶13 M. & W. 838 (1845).

prises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant to which it was incident.

“It may further be observed, that a license under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, coupled with a grant, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not incident to a valid grant, and is therefore revocable.”

From the above language it appears that a mere license to go on land is revocable, whether given by parol or by an instrument under seal; that if a valid parol grant be made of anything on the land, then there is a license, implied if not express, to go on the land to enjoy the grant, and such licenses are irrevocable, because the grantor will not be permitted thus to defeat his grant; if there be an attempted parol grant of an interest which can only be granted by deed then such invalid grant amounts to a license—a permission to go on the land. Practically all interests in land, with the exception of some short term leases, must now be granted either by deed or by an instrument in writing. Hence a parol grant of any interest in land, except a short term lease, is usually invalid. But a parol grant of title to chattels on land is valid, so that most of the cases involving a license coupled with an interest are cases where the interest granted is an interest in a chattel on the land. This is the only proper kind of license coupled with an interest.²⁷ As will appear below, a right to enter on land which is coupled with a grant of an interest in land is not a license.

Suppose there is a valid grant of a right to mine coal or to cut timber on land, the coal severed or the logs cut to be the property of the grantee—a grant of an estate in the land. If the grantee severs coal or timber from the land, title to the coal or logs severed passes to him and he then has a right to remove such chattels from the land. This right seems to be similar to a license coupled with a right in a chattel on the land, which chattel the licensee has a right to remove. In the case supposed, the grantee has a right to

²⁷It seems that at common law the expression “license coupled with an interest” is limited to the right which the owner of an interest in a chattel on land has to enter on the land and remove such chattel. See TIFFANY, REAL PROPERTY, 682-684; WASHBURN, REAL PROPERTY, 6 ed., § 847.

mine coal and to carry it away or to cut timber and to remove the logs, and it is necessary for him to go upon the land to accomplish such acts. These rights to go on the land and do the acts necessary to enjoyment of the grant are necessarily incident to the grant, but are they licenses which are irrevocable because coupled with the grant of an interest in the land, or, are they easements? It is submitted that such rights cannot be licenses, because they are interests in the land which arise as incident to the grant of the profit in the land and will continue as long as the profit continues. This cannot be said of a license coupled with an interest in a chattel on the land, for it will continue only for a reasonable time.²⁸ The right suggested above is an easement appurtenant to the profit in the land. True, it is appurtenant to an incorporeal estate in land, and it has been said that an incorporeal estate cannot be appurtenant to an incorporeal estate. This, however, it is submitted, cannot be true on principle and is unsupported by direct decision.²⁹ In the case of a grant of coal in place the grantee has a right to go on the land and open mines and do whatever else is reasonably necessary to secure the coal.³⁰ Where a mere right to mine coal is granted, instead of title to the coal in place, the grantee would also have a right to go on the land and do those things reasonably neces-

²⁸WASHBURN, *THE AMERICAN LAW OF REAL PROPERTY*, 6 ed., § 847.

²⁹In *COKE ON LITTLETON*, 121 b, it is stated concerning things appendant and appurtenant: "First, that prescription (which regularly is the mother thereof) doth not make anything appendant or appurtenant, unless the thing appendant or appurtenant agree in quality or nature to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot be properly appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal." The latter portion of the language quoted has apparently been accepted at its face value by Mr. Jones in his book on Easements and by several courts in this country. See *JONES, THE LAW OF EASEMENTS*, §§18, 19; *Harris v. Elliott*, 10 Pet. 53; *Leonard v. White*, 7 Mass. 8; *Donnell v. Humphreys*, 1 Mont. 509. In Hargrave and Butler's notes to *COKE'S INSTITUTES* in speaking of the above quoted language it is said: "This is not universally true. It sometimes falls as to things appurtenant. Return of writs or a leet may be appurtenant to an hundred; so may waif and stray to a leet; and yet in these instances both subjects are incorporeal The true test seems to be, the propriety of relation between the principal and the adjunct; which may be found out by considering whether they so agree in nature and quality, as to be capable of union without any incongruity." III *COKE ON LITTLETON*, Hargrave and Butler's Ed., Note 175. The decisions in the first two cases above are to the effect that land cannot be appurtenant to land. The Montana case holds that a right to a ditch cannot pass as appurtenant to a conveyance of a right to another ditch. These cases would then fall within the test laid down in the last quotation above, as being estates incapable of union without incongruity. On the other hand, a profit and an easement are just as clearly capable of such union or connection as is a corporeal estate in land and an easement.

³⁰*Williams v. Gibson*, 84 Ala. 228, 4 So. 350 (1888); *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 535 (1874); *Wardell v. Watson*, 93 Mo. 107, 5 S. W. 605 (1887); *Northrup v. Church*, 135 Tenn. 541, 188 S. W. 220 (1916).

sary to enable him to secure the coal.³¹ There is no possible distinction between these cases as to the nature of the grantee's right to possession and use of the surface except that the principal estate to which such right is incident in one case is corporeal and in the other incorporeal. Hence it would seem that there can be no license coupled with a grant of a profit in land, but that the rights of user connected with a profit are easements.³²

Suppose there is an attempt to grant a right by parol to mine coal and carry it away, or to cut timber and remove the logs, such attempted grant will fail as a grant because not by deed, but will amount to a license to go on the land and mine coal or cut trees.³³ This right being a mere license is revocable. If before revocation, the licensee mines coal which is still on the land, or cuts trees and the logs have not been removed, then there will be the so-called license coupled with a grant of chattels on the land and this will be irrevocable but must be exercised within a reasonable time. It would be better if this implied right were not termed a license at all and the meaning of the term license, were confined to a mere revocable permission to go on the land.³⁴ But though this implied right is somewhat illogically called a license coupled with an interest, it cannot with precision be said that a right to use land which passes as incident to a grant of a valid incorporeal estate therein is a license coupled with an interest. Such right to use land has every element of an easement and should be so designated.³⁵ From the above it appears there can be no case involving a true

³¹*Ingle v. Bottoms*, 160 Ind. 73, 66 N. E. 160 (1903); *Ewing v. Sandoval Coal and Mining Co.*, 110 Ill. 290 (1884); see also numerous cases collected in the note in 48 L. R. A. (N. S.) 883.

³²See *Westmoreland Natural Gas Company v. DeWitt*, 130 Pa. St. 235, 18 Atl. 724 (1889); *Union Petroleum Co. v. Bliven*, 72 Pa. St. 173 (1872); *Coffindaffer v. Hope Natural Gas Co.*, 74 W. Va. 107, 81 S. E. 966 (1914). By weight of authority any person, otherwise legally qualified, can create an easement within the bounds of his own estate even though such estate be merely an estate for years. *Gayford v. Moffatt*, L. R. 4 Ch. App. 133 (1868) (*dictum*); *Wallace v. Fletcher*, 30 N. H. 434 (1855) (*dictum*); *Newhoff v. Mayo*, 48 N. J. Eq. 619, 23 Atl. 265 (1891); *Reimer v. Stuber*, 20 Pa. St. 458 (1853) (*dictum*); *Huff v. McCauley*, 53 Pa. St. 206 (1866).

³³By weight of authority an oral contract for the sale of standing timber is void because within the Statute of Frauds. However, the purchaser under such oral contract has a license to enter and cut timber and title to the timber cut before revocation of the license passes to him. See cases collected in 19 L. R. A. 721 and 47 L. R. A. (N. S.) 877.

³⁴It is unfortunate that this right was ever termed a license coupled with an interest. It seems inconsistent with the idea that a license is a mere permission to go upon land, sufficient to excuse trespass while in force, but revocable at the will of the licensor.

³⁵See note 32, *supra*.

license to produce oil and gas unless there was at the beginning a mere revocable permission to search for and produce the minerals.

If a landowner should give to A oral permission to come on the land and explore for oil and gas and to take them as his own if found, this would give A a mere license to do the acts specified. Such license could be revoked at any time. Suppose A should enter on the land and drill a well and should discover oil in paying quantities. The license would still be revocable, and if then revoked, A would no longer have any right to produce oil from the well, but would have the right to go on the land for the purpose of removing any oil already produced, which might still be on the land. As to such oil he would have a license coupled with an interest in a chattel on the land. In those states where *Rerick v. Kern*³⁶ is law, it is probable the courts would hold that since A had expended a large sum of money in drilling the well, the landowner could not revoke the license, thus giving to A a profit in the land.³⁷

Suppose the landowner orally agrees that A, for a period of years, may have permission to go on the land and search for and produce oil and gas, and A in return promises to give to the landowner a share of any oil or gas that may be produced. There would now be an oral contract between the parties, which is unenforceable because within the Statute of Frauds, since it is the apparent intent of the parties to create a profit. A has at least a license to enter and drill for oil. If he should drill a well under such an oral contract then he could probably specifically enforce the contract in equity, because it would be so far performed that a court of equity would grant specific performance under the doctrine of part performance.³⁸ By enforcing such contract A would acquire a profit in the land. If the contract above mentioned were in writing instead of oral, it would be specifically enforceable in equity, and A would have an equitable estate in the land. He would have the right to a conveyance of a profit in the land. If such conveyance were made, as incident to this profit, he would have the right to

³⁶14 S. & R. (Pa.) 267 (1826).

³⁷See *Dark v. Johnson*, 55 Pa. St. 164 (1867) where the doctrine of *Rerick v. Kern* was applied to what the court termed a license though the interest involved was plainly more than a license.

³⁸A parol contract for the sale of land will be specifically enforced where there has been a certain degree of performance. Likewise there is considerable authority to the effect that equity will specifically enforce an oral contract to grant an easement where there has been part performance of the contract. See cases collected in 36 Cyc. 685. There is no reason why the same principle should not apply to an oral contract to grant a profit in land if there has been a sufficient degree of part performance. See *Hosford v. Metcalf*, 113 Iowa 240, 84 N. W. 1054 (1901).

enter on the land and drill wells in search for oil and gas and could occupy so much of the surface as would be reasonably necessary to enable him to make effective search for oil and gas. If he should find oil or gas, then he would have a right to occupy so much of the land as should be reasonably necessary to produce it and to transport the severed product.³⁹ These incidental rights to use the land would be easements appurtenant to the profit.

It is possible, but not probable, that a case may arise where there has been actual production of oil or gas under a mere permission without consideration. Such cases have arisen in connection with the mining of solid minerals⁴⁰ but apparently there have been none involving oil and gas production. If there is a contract which satisfies the Statute of Frauds it will ordinarily be specifically enforceable and therefore will create an estate in land amounting to more than a license. Is there then any way in which cases involving a mere license to search for and produce oil and gas have actually arisen? It seems that the only cases where the right involved at all resembles a license are those where the contract is in writing and under seal but for some reason not specifically enforceable in equity. A case of this sort is *Eclipse Oil Company v. South Penn Oil Co.*⁴¹ In this case the instrument, which the parties termed a lease, purported to grant to the lessee the exclusive right of searching for and producing oil and gas on a certain tract of land, for a term of three years and as long thereafter as oil or gas could be produced in paying quantities. The grantor was to have one-eighth of the petroleum produced and saved by the grantee, and two hundred dollars per annum for each gas well during the time gas therefrom should be utilized off of the premises. Among the further provisions were the following:

“The parties of the second part agree to drill one test well on the above described premises within six months from the execution of this lease, or, in lieu thereof, thereafter pay to the said party of the first part one dollar per acre per annum until such well is completed; and if said test well is not completed within six months from the above date, or rentals paid thereon,

³⁹See *Dietz v. Mission Transfer Co.*, 95 Cal. 92, 30 Pac. 380 (1892); *Chartiers Oil Co. v. Curtiss*, 38 O. Cir. Ct. 106 (1913) aff'd in 88 O. St. 594, 106 N. E. 1053 (1915).

⁴⁰*Williams v. Morrison*, 32 Fed. 177 (1887); *Wheeler v. West*, 71 Cal. 126, 11 Pac. 871 (1886); *Barksdale v. Hairston*, 81 Va. 764 (1886). See BARRINGER AND ADAMS, THE LAW OF MINES AND MINING, 67-74.

⁴¹47 W. Va. 84, 34 S. E. 923 (1899).

this lease is null and void, and not further binding on either party. And it is further agreed that the second parties, their heirs and assigns, shall have the right at any time to surrender up this lease, and be released from all moneys due and conditions unfulfilled; then and from that time this lease and agreement shall be null and void, and no longer binding on either party, and payments which have been made held by the first party as the full stipulated damages for the nonfulfillment of the foregoing contract.''

There was no consideration mentioned other than the covenants and agreements in the instrument. After a year had elapsed, during which time the grantee had not entered under the lease, or paid anything to the grantor, the latter made a second lease to another party and the first grantee brought a suit in equity to enforce his rights under his lease. The court held the lease was terminable at any time by either party because the grantee had the right to surrender at any time and be released from *all moneys due and from all obligations to come due*, and therefore the lease created only a tenancy at will, for, since it was at the will of one party it was at the will of both. In this the court erred because a lease for a term of three years with an option in the lessee to terminate at any time does not create a tenancy at will.⁴² If we assume it was a tenancy at will then such tenancy had been terminated by the assignment made by the original lessees, H. J. and J. C. Stolze, to the complainant, the South Penn Oil Company, a point which the court failed to note.⁴³ But if, as is frequently stated by the West Virginia Court, an oil and gas lessee gets no vested interest in the land until he actually discovers oil or gas,⁴⁴ then the lessee in the above case was a party to an alleged contract under which

⁴²The court relied on the principle that a lease at the will of the lessee is also at the will of the lessor. This erroneous principle has since been repudiated in subsequent cases. *Wilson v. Reserve Gas Co.*, 78 W. Va. 329, 88 S. E. 1075 (1916); *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 76 S. E. 961 (1913); *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101 (1903). See TIFFANY, LANDLORD AND TENANT, 101-104. The court distinguished these latter cases from *Eclipse Oil Co. v. South Penn Oil Co.*, *supra*, on the ground that a consideration was paid by the lessee while there was none in *Eclipse Oil Co. v. South Penn Oil Co.* How can a lessee under a void lease who has not entered on the land be a tenant at will? How can one have a tenancy at will where the lease passes only an incorporeal right, even if the lessee enters? The fact is an oil and gas lease does not create the relation of landlord and tenant such as exists under an ordinary lease, hence the difficulty of applying the principles of the law of landlord and tenant.

⁴³A tenant at will has no assignable interest. TIFFANY, REAL PROPERTY, 141.

⁴⁴*State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 88 (1896); *Kilcoyne v. Southern Oil Co.*, 61 W. Va. 538, 56 S. E. 888 (1907); *Steelsmith v. Gartlin*, 45 W. Va. 27, 29 S. E. 978 (1898); *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836 (1909).

he had done nothing and had not bound himself to do anything. In such case the alleged contract would not be binding on the other party, and, the result would be, the lessee would have a mere license to enter on the land and search for and produce oil and gas, good until revoked by the lessor. Hence if we take as settled law the oft expressed view that the lessee gets no vested interest in the land prior to discovery of oil or gas,⁴⁵ then in cases like this there would be only a license in the lessee. If we assume, as the West Virginia court did, that this was an attempt to make a lease, and further assume that the authorities are correct which say that a consideration is necessary to a valid lease,⁴⁶ then this attempted lease having no valid consideration would be void and the grantee would have a mere license to enter and drill for oil and gas. But is a consideration essential to a lease? Respectable authority says that it is not and that a lease is primarily a grant of an interest in land, though it usually contains various covenants, and that a valid contract, in the sense in which we use the word, is not essential to the passing of the estate under the conveyance.⁴⁷ This seems to be the better view and if correct, then the court erred in treating this instrument as a bare contract. It might be suggested that it was not an attempt to create a lease but an attempt to create a profit. If this was the case then it would certainly seem there is no excuse for holding a consideration is necessary to the creation of a profit in land, and the court would be the more clearly wrong in treating this instrument as if a valid contractual consideration were necessary. It follows that the grantee gets more than a mere license under such an instrument unless one either adopt the doctrine that an oil and gas lessee gets no vested estate in land until discovery of oil or gas (which is unsound) or say a consideration is necessary to the creation of a valid lease, if it is an attempt to create a lease, or of a valid profit, if it is an attempt to create a profit. There are a few cases involving similar leases.⁴⁸ In *Cortelyou v. Barnsdall* and *Mitchell v. Probst*⁴⁹ the so-called

⁴⁵For other cases to this effect see 25 W. VA. L. Q. 33.

⁴⁶See UNDERHILL, LANDLORD AND TENANT, 240; 24 CYC. 377.

⁴⁷See TIFFANY, LANDLORD AND TENANT, 159-165 where the question as to whether a consideration is essential to the creation of a tenancy is discussed at length. See also TAYLOR, LANDLORD AND TENANT, 12.

⁴⁸*Davis v. Riddle*, 25 Colo. App. 162, 136 Pac. 551 (1913); *Mitchell v. Probst* 152 Pac. 597 (1915); *Cortelyou v. Barnsdall*, 236 Ill. 138, 86 N. E. 200 (1908); *Allegheny Oil Co. v. Bradford Oil Co.*, 21 Hun (N. Y.) 26 (1880). See *Stahl v. Van Vleck*, 53 O. St. 136, 41 N. E. 35 (1895).

⁴⁹See note 48.

lease was treated as a mere option which would become binding on the lessee's drilling a well or paying delay rental. This is as unsound as the view taken by the West Virginia court. An option contract is valid and enforceable; but if there is no consideration there is no option contract, hence there could be no more than an offer to make a lease. Needless to say an offer is not an option contract. If there is a mere unilateral offer to make a lease which can be accepted by drilling a well or paying delay rental, then clearly the lessee would have a mere license to enter; but in the last mentioned cases such was not the intent of the parties as shown by the language of the instrument.

It appears, therefore, that nearly all the oil and gas cases wherein it is said the lessee has a mere license are cases wherein such lessee has a vested right to enter on the land to search for oil and gas and a right to take them if found. Whatever the nature of this right to search for oil and gas, it is certainly not a license. Probably there are no oil and gas cases which involve true licenses. Certainly cases like *Eclipse Oil Co. v. South Penn Oil Co.* do not, unless one of the questionable doctrines mentioned above be adopted.

2. PROFITS

As was previously stated, nearly all the oil and gas leases which have come before the courts have been construed to pass to the grantee an incorporeal right in the land. In a jurisdiction where the landowner does not own the oil and gas in place, but has only a right to reduce them to possession, he has merely an incorporeal right in the oil and gas in place and consequently could convey to the grantee only an incorporeal right. In West Virginia and Kansas, where the grantor is able to grant a corporeal interest in the oil and gas beneath the surface of his land, it is nevertheless held that the grantee under an oil and gas lease gets only an incorporeal interest in the land.⁵⁰ The relatively few cases in which a grantee has been held to have acquired a corporeal interest in the land will be discussed in a subsequent portion of this paper.

Since the grantee under an oil and gas lease gets an incorporeal interest in the land, is this a leasehold estate or is it an estate of another kind? In proceeding to answer this question it will be well to set out a common form of oil and gas lease and note the nature of the interest that should pass to a grantee under it.

⁵⁰See note 17, *supra*.

Agreement made the first day of June, A. D., 1912, by and between John Doe, etc., party of the first part, and Richard Roe, party of the second part.

WITNESSETH, that the said party of the first part, for and in consideration of the sum of One Dollar to him in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the said party of the second part, to be paid, kept, and performed, has granted, demised, leased and let, and by these presents does grant, demise, lease and let unto the said party of the second part, his heirs and assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon to take care of the said products, ALL that land situated in (here follows the description of the land). Containing eighty acres, more or less, reserving, however, therefrom three hundred feet around the buildings now on the premises on which no well shall be drilled by either party except by mutual consent.

It is agreed that this lease shall remain in force for the term of ten years and as long thereafter as oil or gas, or either of them, is produced in paying quantities from the said land by the said party of the second part, his heirs and assigns.

In consideration of the premises the said party of the second part covenants and agrees: 1st, to deliver to the credit of the first party, his heirs and assigns, free of cost in the pipe line to which the party of the second part may connect his wells, the equal one-eighth part of all the oil produced and saved from the leased premises; and 2nd, to pay Fifty Dollars (\$50) each three months for the gas from each and every gas well drilled on said premises, the product from which is marketed and used off the premises; said payment to be made on each and every well within sixty days after commencing to use the gas therefrom, as aforesaid, and to be paid each three months thereafter while the gas from said well is so marketed and used.

* * * * *

Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm. And further, to complete a well on the said premises within one year from the date hereof, or to pay at the rate of Twenty Dollars (\$20) quarterly in advance, for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease.

* * * * *

It is agreed that the second party shall have the privilege of

using sufficient water and gas from the said premises to run all machinery necessary for drilling and operating thereon, and at any time to remove all machinery and fixtures placed on said premises; and further, upon the payment of Five Dollars (\$5) at any time, by the party of the second part, his heirs and assigns, to the party of the first part, his heirs and assigns, said party of the second part, his successors and assigns shall have the right to surrender this lease for cancellation, after which all payments and liabilities there-after to accrue under and by virtue of its terms shall cease and determine, and this lease shall become absolutely null and void.

In WITNESS WHEREOF the parties to this agreement have hereunto set their hands and seals the day and year first above written.

Two or three clauses not material to this discussion are omitted from the above form of lease. This lease purports to grant to the grantee the land described therein, "for the sole and only purpose of mining and operating for oil and gas," for a term of ten years and as long thereafter as oil or gas is produced in paying quantities by the grantee. As usually construed by the courts, this language gives the grantee no greater rights than if the instrument had purported to grant to him merely the *right* to mine and operate for oil and gas.⁵¹ It is held that since it appears that the sole and only purpose of the lease is to secure the development of the land for oil and gas, the grantee in either case gets merely a right to search for oil and gas and to produce such minerals if he finds them.

On principle what is the nature of the rights acquired by a grantee under such an oil and gas lease? For the present we will leave out of consideration the effect of the various covenants in the lease which follow the *habendum*. It will appear later that such covenants do not affect the general nature of the estate granted. On execution of the lease there would pass at once to the grantee the right to enter on the land and explore for oil and gas and this right may last for ten years. If the exploration is successful, the grantee has a right to produce oil and gas during the unexpired portion of the ten year period, if any, whether such production is in paying quantities or not, for the term is ten years and the lease would not terminate merely because the grantee chose to produce oil or gas at a loss. The completion of a dry well, or of a well which produced oil or gas in quantities insufficient to pay the cost

⁵¹Mills v. Hartz, 77 Kan. 218, 94 Pac. 143 (1908); Beardsley v. Kansas Natural Gas Co., 78 Kan. 571, 96 Pac. 859 (1908); Wagner v. Mallory, 169 N. Y. 501, 62 N. E. 584 (1902); Toothman v. Courtney, 62 W. Va. 167, 58 S. E. 915 (1907).

of production, would end the obligation of the grantee to pay delay rental under the above lease, but the lease would continue in force during the remainder of the term, particularly if the grantee continued his efforts to produce oil and gas in paying quantities. In order to continue the lease beyond the term fixed it is necessary that the grantee be producing oil or gas in paying quantities at the time of the termination of the ten-year period. The lease will then continue so long as he is able to continue such production. The continuance of the term beyond the ten-year period is therefore subject to a condition precedent, namely, the discovery of oil or gas in paying quantities within the ten-year period and the ability of the grantee to continue the production of oil or gas in paying quantities after the end of such period. The extension of the lease beyond the fixed term will not take place merely because oil or gas is produced in paying quantities at some time during the ten-year term. A grantee might produce oil in paying quantities during the first five years of the term and the flow of oil might cease before the term expired. The production in paying quantities must continue beyond the termination of the fixed period. It appears, therefore, that, as soon as the lease is executed the grantee secures an immediate right to enter on the land and search for oil and gas, and that this right may last for a term of ten years. He also appears to have a right during this ten-year period to produce any oil and gas he may be able to secure from the land even though not produced in paying quantities. If he succeeds in producing oil or gas in paying quantities, he has a right to continue such production during the rest of the ten-year term. After the end of the ten-year term he has a right to continue the production of oil and gas so long as he is able to produce either of them in paying quantities. This right is contingent on the discovery of oil or gas in paying quantities and the production of one or both of the minerals in paying quantities at the time of the termination of the fixed term.

Some leases provide that the term shall continue for a fixed period and so long thereafter as oil or gas may be produced by the grantee, there being no provision that production must be in paying quantities. Under such a clause the only change in the two estates of the grantee above mentioned is that the right to continue the lease after the expiration of the fixed term is dependent only on the mere production of oil or gas even though in quantities insufficient to pay the cost of production. In some leases there is

no fixed term. In these no-term leases, there is still a period of time within which the grantee has an exclusive right to search for oil and gas and, if he finds either of them within that period, he has a right to produce it under the terms of the lease. Hence the same two estates in land are present in the grantee under a no-term lease. In such a lease, if the right of search can be extended for more than twenty-one years by the grantee without the consent of the grantor, the contingent estate may vest too remotely and the lease would therefore violate the rule against perpetuities. It may therefore be said that, on principle, as soon as a valid oil and gas lease is executed, there passes to the grantee a vested right to search for oil and gas and a contingent right to produce either or both if discovered.

Let us now note briefly whether the courts in the decided cases have recognized the interests mentioned above. In dealing with oil and gas leases it seems that there is a decided tendency on the part of the courts to pay little attention to the question, what right the grantor is able to grant. Such an instrument often seems to be construed somewhat in the light of what the judges think the parties ought to have provided, rather than in the light of what they actually did provide. As a result, there is a great deal of confusion in judicial reasoning in such decisions, a confusion which at the present time seems to be increasing. So frequently are inconsistent statements made by the judges that it is necessary to draw conclusions as to the nature of the interest of the oil and gas grantee from a large number of cases.

Perhaps the first case in which the two rights of the grantee above suggested were pointed out was *Venture Oil Co. v. Fretts*.⁵² The question involved in this case was whether a grantee, who had made no effort to develop the land for oil and gas for about six years, had lost his rights under the lease by abandonment. The court said:

“A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil and gas lease stands on quite different ground. The title is inchoate and for purposes of exploration only, until oil is found. If it is not found no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found then the right to produce it be-

⁵²152 Pa. St. 451, 25 Atl. 732 (1893).

comes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract.'''

The language above given has, since its publication, become the favorite quotation of courts when deciding cases involving the nature of the lessee's interest under an oil and gas lease. Unfortunately, in 1893, when this case was decided, the doctrine that there is an implied condition in such a lease that the lessee explore for oil and gas with reasonable diligence, for breach of which the lease may be forfeited, had not yet been developed,⁵³ and the reasoning of the court in respect to the lack of a vested estate prior to discovery of oil or gas seems to have been in order to justify a decision that the lessee had abandoned the lease. Other courts have applied the same reasoning under similar conditions.⁵⁴ The same result could now be reached on the ground of forfeiture for breach of the implied condition to develop the premises with reasonable diligence.⁵⁵ If there is a mere contract right prior to discovery of oil or gas, then it is difficult to see why a substantial breach of that contract would not justify the lessor in refusing further performance without basing the decision on abandonment.⁵⁶ Certainly failure to develop for over six years would be a substantial breach of contract if it were a mere contract. The fact that the court deemed it necessary to base the decision on abandonment seems to indicate a recognition of more than a mere contract right.

It will be noted that in the above quotation there is a distinct suggestion of two rights in the grantee, namely, a right to explore

⁵³See *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801 (1905); *Gadbury v. Ohio & Indiana Consolidated Natural Illuminating Gas Co.*, 162 Ind. 9, 67 N. E. 259 (1903); *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220 (1897).

⁵⁴*Foster v. Elk Fork Oil & Gas Co.*, 90 Fed. 178 (1898); *Brookshire Oil Co. v. Casmalia Ranch Oil & Development Co.*, 156 Cal. 211, 103 Pac. 927 (1909); *Beardsley v. Kansas Natural Gas Co.*, 78 Kan. 571, 96 Pac. 859 (1908); *Aye v. Philadelphia Co.*, 193 Pa. St. 451, 44 Atl. 555 (1899); *Smith v. Root*, 66 W. Va. 633, 66 S. E. 1005 (1910); *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 42 S. E. 655 (1902); *Steelsmith v. Gartlin*, 45 W. Va. 27, 29 S. E. 978 (1898).

⁵⁵In addition to the cases in note 53 see *Peoples Gas Co. v. Dean*, 193 Fed. 938 (1911); *Shannon v. Long*, 180 Ala. 128, 60 So. 273 (1912); *Mansfield Gas Co. v. Alexander*, 97 Ark. 167, 133 S. W. 837 (1911); *Acme Oil & Mining Co. v. Williams*, 140 Cal. 681, 74 Pac. 296 (1903); *Day v. Kansas City Pipe Line Co.*, 87 Kan. 529, 125 Pac. 43 (1912); *Collins v. Mt. Pleasant Oil & Gas Co.*, 85 Kan. 483, 118 Pac. 54 (1911); *Howerton v. Kansas Natural Gas Co.*, 81 Kan. 553, 106 Pac. 47 (1909); *Bay State Petroleum Co. v. Penn Lubricating Co.*, 121 Ky. 37, 87 S. W. 1102 (1905); *Conkling v. Krandusky*, 112 N. Y. S. 13 (1908); *Eaton v. Allegany Gas Co.*, 122 N. Y. 416, 25 N. E. 981 (1890); *Parish Fork Oil & Gas Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 42 S. E. 655 (1902). |

⁵⁶See *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762 (1909).

for oil and gas and a right to produce them if found. These two distinct rights of the oil and gas lessee have subsequently been recognized by various courts,⁵⁷ though some of these courts apparently have not considered the first right, the right of exploration, as a vested interest in the land. This erroneous idea was certainly derived from the opinion of the court in *Venture Oil Co. v. Fretts*. In speaking of these rights the court in the well reasoned opinion in *Lindlay v. Raydure*,⁵⁸ said:

“It is equally certain that an estate of some character does vest in him [the lessee] in the surface; *i. e.*, the rest of the land. The owner thereof by virtue of his proprietorship, as so stated, has the exclusive right thereon to seek to acquire such substances [oil and gas]. This right may be resolved into two successive rights; *i. e.*, to explore therefor by drilling wells, and then, if discovered, to produce them. It is on this production that they become his. Having such right he can transfer it, and immediately upon the execution of the transfer an estate in the land vests in the person to whom it is made, at least so far as the right to explore is concerned. Such a transfer is effected by such an instrument as I am dealing with . . . ‘ . . .

“That an estate in the surface of the land of some character vests in the lessee immediately upon the execution of the instrument I do not understand to be questioned anywhere. Possibly there is some question as to the exact nature of the estate which vests; but otherwise there is none. . . . It is sufficient for the purpose thereof [of the case under consideration] that an estate in possession to explore for oil and gas does vest immediately upon the execution of the instrument, and that an estate in the future to produce oil and gas will vest on its discovery, whatever limitations or qualifications either may be subject to.”

The court after quoting the language above quoted from the opinion in *Venture Oil Co. v. Fretts* continued:

⁵⁷*Shaffer v. Marks*, 241 Fed. 139 (1917); *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46 (1908); *Bruner v. Hicks*, 230 Ill. 456, 82 N. E. 888 (1907); *Heal v. Niagra Oil Co.*, 150 Ind. 483, 59 N. E. 482 (1898); *Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 490 (1902); *Dickey v. Coffeyville Vitrified Brick & Tile Co.*, 69 Kan. 106, 76 Pac. 398 (1904); *Rives v. Gulf Refining Co.*, 133 La. 178, 62 So. 623 (1913); *Kolachny v. Galbreath*, 26 Okla. 772, 110 Pac. 902 (1910); *Glasgow v. Chartlers Oil Co.*, 152 Pa. St. 48, 25 Atl. 232 (1892); *Hefner v. Light, Fuel and Power Co.*, 77 W. Va. 217, 87 S. E. 206 (1915); *South Penn Oil Co. v. Haught*, 71 W. Va. 720, 78 S. E. 759 (1913); *Smith v. Root*, 66 W. Va. 633, 66 S. E. 1005 (1910); *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762 (1909); *Kilcoyne v. Southern Oil Co.*, 61 W. Va. 538, 56 S. E. 888 (1907).

⁵⁸239 Fed. 928, 933-935 (1917).

“Substantially similar statements will be found in other cases involving oil and gas leases. It may create the impression that there is nothing vested until oil or gas is found. Such, however, is not the case and no such thought was intended to be conveyed. What is inchoate until oil or gas is found is the right to produce oil and gas and the right to the oil and gas itself, which remains inchoate until produced. The right to explore, therefore, is at no time inchoate. It is vested, and will be protected from the time of the execution of the instrument.”

Probably it is going too far to say that the courts which follow *Venture Oil Co. v. Fretts* do not intend what the language seems to say, namely, that no estate whatever vests in the grantee prior to discovery of oil or gas. However, a careful reading of the numerous cases cited in the preceding notes will lead to the conviction that the courts now do recognize the fact that the grantee under an oil and gas lease has a vested interest in the land from the moment the lease is executed, though inconsistent language is frequently found. Courts of equity specifically enforce oil and gas leases before discovery of oil or gas, both on the ground that the grantee has no adequate remedy at law⁵⁹ and on the ground that equity has jurisdiction to restrain waste.⁶⁰ These cases necessarily recognize that the grantee has a vested estate in the land as soon as the lease is executed.

Do the express covenants and conditions so frequently found in oil and gas leases prevent the passing of these two estates to the grantee? While the covenants and conditions of oil and gas leases have at times been given impossible constructions plainly contrary to the intention of the parties as expressed in the language of the instrument, there has been no case found where, if the lease is valid at all, the lessee did not secure the exclusive right to search

⁵⁹In many cases courts have proceeded to give relief to the lessee under an oil and gas lease by injunction or specific performance without any question as to the jurisdiction of the court of equity being raised. In the following cases it was held that a court of equity will specifically enforce the covenants of an oil and gas lease: *Shaffer v. Marks*, 241 Fed. 139 (1917); *Gillespie v. Fulton Oil and Gas Co.*, 236 Ill. 188, 86 N. E. 219 (1908); *Indianapolis Natural Gas Co., v. Kibby*, 135 Ind. 357, 35 N. E. 392 (1893); *American Steel & Wire Co. v. Tate*, 33 Ind. App. 504, 71 N. E. 189 (1904); *Smith v. Root*, 66 W. Va. 633, 66 S. E. 1005 (1910); *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 839 (1909).

⁶⁰The following cases hold that equity will interfere to restrain waste at the suit of a grantee under an oil and gas lease who has not entered to begin the development of the property: *Guffey v. Smith*, 237 U. S. 101 (1915); *Lindlay v. Raydure*, *supra*; *Logan Gas & Fuel Co. v. Great Southern Gas & Oil Co.*, 126 Fed. 623 (1903); *Allegheny Oil Co. v. Snyder*, 106 Fed. 764 (1900); *Smith v. Root*, 66 W. Va. 633, 66 S. E. 1005 (1910).

for oil and gas for some fixed period and where, if he should discover oil or gas within such period, the right to produce would not have vested. The courts in some cases have gone far in implying covenants and conditions which clog and restrain the right of the grantee apparently given him by the lease,⁶¹ but have seldom questioned the validity of the lease itself or denied the right to search for oil and gas. Their effort has been to compel the grantee to proceed to explore for oil and gas as soon as possible—to shorten the time within which the exploration must be made. It therefore appears, both on principle and by weight of authority, that on the execution of a valid oil and gas lease two estates in the land pass to the lessee, one of which is a vested right to explore for oil and gas and the other a right to produce them contingent on discovery of either of them.

Some of the courts seem to have doubt as to whether an exclusive right to search for oil and gas during a fixed period is an estate in the land. The right is usually termed "license," "irrevocable license," "right" or "incorporeal right."⁶² It is seldom called an estate in the land, though that is plainly what it is.⁶³ Blackstone stated that,⁶⁴ "An estate in lands, tenements and heri-

⁶¹In some cases oil and gas leases have been given extreme and rather unreasonable constructions which disregard the express language of the parties. See *Brown v. Wilson*, 160 Pac. 94 (Okla. 1916); *Frank Oil Co. v. Belleview Oil & Gas Co.*, 29 Okla. 719, 119 Pac. 260 (1911); *Witherspoon v. Staley*, 156 S. W. 557 (Tex. Civ. App. 1913). But even in these cases the grantee was held to have a right to explore for oil and gas for a limited term though not for the term indicated by the language of the lease.

In a few cases oil and gas leases have been termed unilateral contracts. The judges who decided these cases apparently had no conception as to the meaning of the term used but were aware that if the instrument under consideration were a unilateral contract then it would not be binding on the grantor—the result desired.

⁶²See *Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 490 (1902); *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146, 70 N. E. 149 (1904); *Dickey v. Coffeyville Vitriified Brick & Tile Co.*, 69 Kan. 106, 76 Pac. 398 (1904); *Eastern Oil Co. v. McAvoy*, 75 Kan. 515, 89 Pac. 1048 (1907); *Mitchell v. Probst*, 152 Pac. 597 (Okla. 1915); *Shepard v. McCalmont Oil Co.*, 38 Hun 37 (N. Y. 1885); *Funk v. Haldeman*, 53 Pa. St. 229 (1866); *Rynd v. Rynd Farm Oil Co.*, 63 Pa. St. 297 (1869); *Dark v. Johnson*, 55 Pa. St. 164 (1867); *Thompson's Appeal*, 101 Pa. St. 225 (1882); *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 839 (1909).

⁶³Courts frequently deny that an oil and gas grantee acquires any estate in land prior to discovery.

"This court has held in several cases that such a lease creates no estate in the land, or in the oil or gas which it may contain. It merely creates a license to enter and explore for oil and gas, and to sever them if found." Per Graves J., in *Beardsley v. Kansas Natural Gas Co.*, 78 Kan. 571, 89 Pac. 859 (1908).

"In this State and in Pennsylvania, such leases are generally treated as mere licenses vesting no estate, the title thereto, both as to the period of years and the term thereafter remaining inchoate and contingent on the finding of oil and gas." *Eastern Oil Co. v. Coulehan*, *supra*.

⁶⁴II Blackstone, 103.

ditaments signifies such an interest as the tenant hath therein." In Bouvier's Law Dictionary an estate in land is defined as "the degree, quantity, nature and extent of interest which a person has in real property." Other definitions are equally comprehensive, so that there can be no doubt that a right to enter on land to search for oil and gas for a fixed period is an estate therein.

Having determined the nature of the interest of the oil and gas lessee in the land, the next question is as to what this interest should be termed. It is held that no new kind of estate in real property can be created and it follows that the interest of the lessee, as heretofore stated, must be a license, a profit or a leasehold. It has already been shown that the estate is not a license though it is often erroneously so termed. A leasehold at common law contemplates a corporeal interest in the land of which the lessee has the use and occupation and for which he pays a compensation called rent.⁶⁵ The lessee has no right to destroy the substance of the soil unless such right be expressly conferred, but has only the right to use the premises leased. If he takes part of the soil itself he is guilty of waste. It seems clear, therefore, that the estate in land which the grantee acquires under an oil and gas lease is not a leasehold estate and that the relation of landlord and tenant does not arise between the parties.⁶⁶ The sole object of the oil and gas lease is to search for and produce oil and gas, a thing which no tenant would have a right to do without special permission granted in his lease. The grantee under an oil and gas lease has no rights in the surface of the land except those necessary to enable him to carry out advantageously the one object of the grant. These rights in the surface are easements incidental to the grant of the estate in the land. He does not pay rent for the use and occupation of land but may pay a periodic sum, usually called delay rental, for the privilege of delaying the exploration for oil and gas from period to period. If he discovers oil and produces it he gives to the grantor a share of the oil itself. If he produces gas

⁶⁵The question as to whether any of the oil and gas leases are true leases is discussed in a subsequent part of this paper.

⁶⁶For expression of opinions that oil and gas leases are not leases see *Smith v. Root*, 66 W. Va. 633, 66 S. E. 1005 (1910); *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923 (1899); *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 344 (1901).

In *Lawson v. Kirchner*, *supra*, it was said: "The so-called rental in this case is not reserved for his enjoyment of the estate as in an ordinary lease of realty. But it is compensation or commutation money for his right to enjoy it, and at the same time preventing the plaintiff from conveying the right to the enjoyment thereof to someone else for the stipulated period of two years."

he usually pays a certain sum each year for each gas well. That this is not rent is shown by the cases which have arisen between life tenant and remainderman. The life tenant has a right to lease the property during his life and to collect and enjoy the rents and profits therefrom, but he has no right to make an oil and gas lease nor has he a right to produce oil or gas where no wells existed at the time his estate vested in possession.⁶⁷ Perhaps the same could be said as to the cases involving guardian and ward.⁶⁸ In these cases the oil and gas lease is correctly treated as giving the grantee a right to take something out of the land and not a mere right to use the land. The royalty paid under an oil and gas lease is not rent but a compensation for taking something from the soil.⁶⁹

Since an instrument like that quoted above is popularly termed a lease, courts have often assumed that a tenancy was created and have tried to treat the parties as if they were landlord and tenant, frequently with unsatisfactory results. For example, when the leased premises are severed and the portions pass to different men an attempt has been made to apportion the royalty as rent is apportioned when the reversion is severed.⁷⁰ If the lease is void for some reason, it has been held the grantee becomes a tenant at will, though he has never entered.⁷¹ The statutes in some states to the effect that a lease for an indefinite term shall be considered a lease from year to year have been applied to oil and gas leases, though plainly inapplicable.⁷²

⁶⁷*Shultis v. MacDougal*, 162 Fed. 331 (1907); *Rupel v. Ohio Oil Co.*, 176 Ind. 4, 95 N. E. 225 (1911); *Richmond Natural Gas Co. v. Davenport*, 37 Ind. App. 25, 76 N. E. 25 (1905); *Gerkins v. Kentucky Oil Co.*, 100 Ky. 734, 39 S. W. 444 (1897); *Marshall v. Mellon*, 179 Pa. St. 371, 36 Atl. 201 (1897); *Keen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664 (1895); *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411 (1897); *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 731 (1897).

⁶⁸Though a guardian may have power to lease his ward's lands without an order of court he cannot make a valid oil and gas lease. *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490 (1901); *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533 (1903).

⁶⁹While it is true the lessee for agricultural purposes by farming the land does destroy the substance of the soil in some measure, historically this has been regarded as a use of the land. Furthermore, it is possible by the use of good husbandry to keep up perpetually the fertility of the soil.

⁷⁰See *Wetengel v. Gormley*, 160 Pa. St. 559, 28 Atl. 934 (1894); *Campbell v. Lynch*, 94 S. E. 739 (W. Va. 1918).

⁷¹*Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923 (1899); *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120 (1887).

⁷²*Diamond Plate Glass Co. v. Curless*, 22 Ind. App. 346, 52 N. E. 782 (1899); *Diamond Plate Glass Co. v. Eshelberger*, 24 Ind. App. 124, 55 N. E. 233 (1899). These cases were subsequently overruled by *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146, 70 N. E. 149 (1904). In this case the court said:

"We are unable to see how the principles pertaining to the relation of landlord and tenant are applicable to such a contract as the one before us, either where possession has or has not been taken under the contract."

It is apparent that the oil and gas lease creates a *profit a prendre* and not a leasehold estate. In speaking of *profits a prendre* Blackstone says:⁷³

“A common of turbary is a liberty of digging turf upon another’s ground. There is also a common of digging for coals, minerals, stones and the like. All these bear a resemblance to common of pasture in many respects; though in one point they go much further: common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and the rest, are a right of carrying away the very soil itself.”

Even in Blackstone’s day the character of a profit was well recognized though this class of estates in land was probably neither common nor important prior to the time of the modern mineral leases. Since the interest of the grantee under very many of these mining leases is a *profit a prendre* the estate has now become of much importance. Perhaps the fact that *profits a prendre* were neither common nor of great value, for such a long period is one explanation as to why courts today seem so reluctant frankly to term an estate a profit. It may be suggested that at common law *profits a prendre* were fee simple estates, but both upon principle and authority a profit may be for life or for years,⁷⁴ as well as in fee simple. Consequently, the fact that an oil and gas lease may be for a term of years does not mean that the grantee’s interest is not a profit.

The ultimate object of the oil and gas lease is to develop the land in order to secure these minerals. Title to the minerals passes to the grantee only when he reduces them to possession,⁷⁵ another characteristic of a profit. The grantee has a right to take something of value from the soil, that is, oil or gas or both. Under the law of West Virginia and Kansas he takes a part of the soil itself just as truly as in the case of a profit in solid minerals. As we have seen in most jurisdictions the law is that the owner of the land does not own the oil and gas underneath such land. Does this prevent the estate of the grantee from being a profit? It is submitted that it does not, for the grantee nevertheless has a right to take something of value from the soil not in the nature of crops.

⁷³II Blackstone, 34.

⁷⁴Wood v. Leadbitter, 13 M. & W. 838 (1845); Huff v. McCauley, 53 Pa. St. 206, 210 (1866).

⁷⁵See cases cited in note 9.

Such a right in some degree resembles the right to take percolating waters from the soil, a right which the early courts held to be an easement and which is still so considered. Such a right to take water is really a profit and probably no court which did not consider itself bound by authority would now hold it an easement.⁷⁶

The term of the oil and gas lease set out above is for ten years and as long thereafter as oil or gas is produced by the lessee in paying quantities. Does this create in the grantee an incorporeal estate for years or does it create an incorporeal hereditament? There are some decisions where it is asserted, without giving any very convincing reasons, that the estate of the grantee is not a freehold estate.⁷⁷ On the other hand, some decisions hold that the estate is a freehold estate—an incorporeal hereditament—this being the established law in Illinois.⁷⁸ The courts of that state hold that since the interest of the grantee may last for an indefinite time, it is a freehold estate. It must be admitted that there is much to be said for this view. It is certainly very difficult to argue that an estate which will continue as long as oil or gas can be produced in paying quantities is an estate for years. In most of the cases it has not been necessary to adjudicate this question.

That the ordinary oil and gas lease does create a *profit a prendre* has been recognized by at least one standard text book on real property.⁷⁹ Some cases correctly term the estate a *profit a prendre*.⁸⁰ Many cases state that such a lease creates an incorporeal right in the land.⁸¹ This term is not incorrect but it is not so desirable as the former term because its meaning is too broad. Recognition of the estate as a *profit a prendre* would be of great assistance in getting away from the idea that there is a real tenancy created

⁷⁶While the right to take water from the land of another is held to be an easement a right to take ice seems to be regarded as a profit. *Mitchell v. D'Olier*, 68 N. J. L. 375, 53 Atl. 467 (1902); *Huntington v. Asher*, 96 N. Y. 604 (1884).

⁷⁷*Brown v. Wilson*, 160 Pac. 94 (Okla. 1916); *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688 (1896).

⁷⁸*Eastern Oil Co. v. McAvoy*, 75 Kan. 515, 89 Pac. 1048 (1907); *Martin v. Springfield Crude Oil Co.*, 77 Kan. 851, 92 Pac. 1119 (1907); *Bruner v. Hicks*, 230 Ill. 456, 82 N. E. 888 (1907); *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53 (1908); *Funk v. Haldeman*, 52 Pa. St. 229 (1866); *Thompson's Appeal*, 101 Pa. St. 225 (1882); *Southern Oil Co. v. Colquitt*, 28 Tex. Civ. App. 292, 69 S. W. 169 (1902).

⁷⁹See TIFFANY, REAL PROPERTY, 745. See also 31 HARV. L. REV. 882; 58 U. PA. L. REV. 16.

⁸⁰*Campbell v. Smith*, 180 Ind. 159, 101 N. E. 89 (1913); *Martin v. Springfield Crude Oil Co.*, 77 Kan. 851, 92 Pac. 1119 (1907); *Funk v. Haldeman*, 53 Pa. St. 229 (1866).

⁸¹See cases cited in notes 54 and 57, most of which support this statement.

by an oil and gas lease and the consequent attempts to apply principles of the law of landlord and tenant not properly applicable. Any attempt to apply the rules of law which have grown up in connection with the relation of landlord and tenant, where the estate is corporeal, to an incorporeal estate such as a profit, can only result in confusion and uncertainty in a large number of cases. It is desirable to apply some of the principles of the law of landlord and tenant to cases arising out of oil and gas leases and leases for the mining of solid minerals. It is not desirable to apply all of the principles of the law of landlord and tenant to mineral leases, because many of such principles are inapplicable to a *profit a prendre*. So long as our courts continue to call these instruments leases there will be attempts to apply these inapplicable principles to oil and gas leases, because some courts, without due consideration, will assume that they are leases and that settled principles applicable to leases must therefore be applied to them.

If the fact that an oil and gas lease creates a *profit a prendre* were universally established, how could the application of the desirable rules of landlord and tenant to these interests be justified? Though the *profit a prendre* is an estate which has been known to the law for centuries there has been so little litigation concerning it that the questions which constantly arise in the mining law cases as to the effect of covenants and conditions and the like attached to such estates are entirely unsettled except in so far as settled in mining cases where the estate involved has not been recognized as a profit. Hence the courts are left free to choose those rules of law which seem properly applicable to profits and to disregard those which cannot logically apply to an incorporeal interest such as a profit. For example, there seems to be no good reason why the analogy to landlord and tenant is not sufficiently close to justify the application of the law as to assignment of leases or of the law as to covenants running with leasehold estates to *profits a prendre*, and in fact it is settled that such principles of law should be applied though in cases where it was assumed the relation of landlord and tenant existed.⁸² On the other hand, the

⁸²See *Hefner v. Light, Fuel & Power Co.*, 77 W. Va. 217, 87 S. E. 206 (1915); *Castle Brook Carbon Black Co. v. Ferrell*, 76 W. Va. 300, 85 S. E. 544 (1915); *Montgomery v. Hickok*, 188 Ill. App. 348 (1914); *Ardizzone v. Archer*, 160 Pac. 446 (Okla. 1916); *Indiana Gas & Oil Co. v. Hinton*, 159 Ind. 398, 46 N. E. 224 (1902); *Aikin v. Marshall Oil Co.*, 188 Pa. St. 602, 41 Atl. 748 (1898); *Chandler v. Hart*, 161 Cal. 405, 119 Pac. 516 (1911); *McGoodwin v. Lusterine Mining and Polishing Co.*, 110 S. W. 409 (Ky. 1908).

right of a landlord to distrain for rent in arrears cannot be applied to ordinary mineral leases. It is desirable that the court in each case involving an oil and gas lease should feel free to consider whether or not a particular principle is properly applicable to such a *profit a prendre* without danger of erroneously considering itself bound by authority to apply some particular principle of the law of landlord and tenant. Without definitely recognizing oil and gas leases as profits, courts have already gone far in selecting the rules of law as to landlord and tenant which ought to apply to the situation arising under oil and gas leases but there would be far less confusion and inconsistency had they been treated as profits from the beginning.

3. LEASES

By the law of most jurisdictions the landowner has no interest in the oil and gas in place beneath his land which can be the subject of a lease giving the lessee a corporeal interest in the oil and gas. Hence it would seem that a true lease for the purpose of mining for oil and gas would be impossible. But in two or three jurisdictions oil and gas leases have in some cases been held to give the lessee a corporeal estate in the land.⁸³ It is submitted that these cases are unsound. In West Virginia and Kansas, where the owner of land has title to oil and gas in place, the courts have held that under the usual lease forms the grantee gets no corporeal right in the land, a conclusion which appears to be sound.⁸⁴

In the case of *Brown v. Fowler*⁸⁵ the lease purported to demise all the oil and gas in and under the land "and also the said tract of land for the purpose and with the exclusive right of operating thereon for said oil and gas." The court said this created a corporeal interest in the land. The idea apparently is that the corporeal interest consists of a right to the possession of the land so far as is necessary to mine for oil and gas. It will be noted that

⁸³*Kline v. Guaranty Oil Co.*, 167 Cal. 476, 140 Pac. 1 (1914); *Shenk v. Stahl*, 35 Ind. App. 493, 74 N. E. 538 (1905); *Columbia Gas & Fuel Co. v. Knox County Oil & Gas Co.*, 91 O. St. 369, 109 N. E. 529 (1914); *Brown v. Fowler*, 65 O. St. 507, 63 N. E. 76 (1902); *Harris v. Ohio Oil Co.*, 57 O. St. 118, 48 N. E. 502 (1897); *Woodland Oil Co. v. Crawford*, 55 O. St. 161, 44 N. E. 1093 (1896); *Stahl v. Van Vleck*, 53 O. St. 136, 41 N. E. 35 (1895); *McKean Natural Gas Co. v. Wolcott*, 254 Pa. St. 323, 98 Atl. 955 (1916); *Barnsdall v. Bradford Gas Co.*, 225 Pa. St. 338, 74 Atl. 207 (1909).

⁸⁴*Dickey v. Coffeyville Vitrified Brick & Tile Co.*, 69 Kan. 106, 76 Pac. 398 (1904); *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688 (1896); *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915 (1907).

⁸⁵65 O. St. 507, 63 N. E. 76 (1902).

this is what the grantee would have by implication if such right were not expressly granted. Nothing is paid for the surface of the land and the use is incidental to the grant of the right to search for and produce oil and gas. It would seem that the instrument created only a profit.

In Pennsylvania the courts have attempted to formulate a distinction between those oil and gas leases which pass corporeal interests and those which pass mere incorporeal rights in the land. It has been said that if the instrument purports to grant the land, together with the right to mine for oil and gas thereon, as distinguished from a grant of the mere *right* to go on the land and mine for oil and gas, then a corporeal estate passes to the grantee.⁸⁶ Some of the difficulties in applying such a doctrine are illustrated in *Barnsdall v. Bradford Gas Co.*,⁸⁷ where the court, in holding that the lessee could maintain ejectment though he had never entered to explore for oil or gas, said:

“The language of the agreement in the case at bar shows it to be a lease, conveying an interest in land, a corporeal and not an incorporeal hereditament. The lessor does, in the language of the lease, ‘grant, demise, lease and let unto the said party of the second part all that certain tract of land containing one hundred acres for the sole and only purpose of mining and operating for oil, gas and other minerals and of laying pipe lines and of building tanks, stations and structures thereon to take care of the said products.’ It will be seen, by this transposition of the language of the lease, that the land itself is granted and demised, and not simply the right to enter upon and prospect and operate for oil or gas. It is not simply a privilege given to the lessee to use the premises for mining purposes but the land itself is demised with the right to obtain the minerals thereon. By the agreement the exclusive right to take and appropriate all the minerals is conveyed and during the term of the lease the lessor has no right to enter and operate for oil or gas. The title to the oil except the one-eighth thereof is vested in the lessee, as is also the title to the gas and other minerals in the land. Under the rule of construction established, not only in other jurisdictions, but by our own cases, therefore, the agreement creates a corporeal interest in the lessee in the demised premises, and is not merely a license to enter and operate for oil and gas.”

In order to sustain the finding that a corporeal interest passed

⁸⁶Kelly v. Keys, 213 Pa. St. 295, 62 Atl. 911 (1906).

⁸⁷225 Pa. St. 338, 74 Atl. 207 (1909).

to the lessee the court in the above case overruled such cases as *Westmoreland Natural Gas Co. v. DeWitt*⁸⁸ and *Kelly v. Keys*⁸⁹ and apparently established the doctrine that the landowner has title to the oil and gas in place beneath his land and can convey such title to others. It is difficult to see why any court should make any effort to establish a corporeal estate in the grantee. The remedy in equity is certainly sufficient to enable him to protect his rights effectively and no right to maintain ejectment is necessary. Certainly the rights of an oil and gas grantee can be adequately protected only in a court of equity. It is submitted there should be no distinction drawn in this respect between a lease like that in *Kelly v. Keys* and the one in *Barnsdall v. Bradford Gas Co.* and that the decision in the latter case is not sound.

In Indiana there are a number of decisions involving oil and gas leases, which, judging from the language used, appear more like true leases than the ones involved in the above cases. The leases involved in these Indiana cases expressly demise a certain area of land around each well site and yet the courts of that state have held that the lessee gets no corporeal right in the land.⁹⁰

If an instrument actually does give to the lessee the right to the possession and use of the land with the added right of mining for oil and gas thereon, then no doubt there would be a true lease with a profit attached. But it is doubtful if it was the intent of the parties to any of the instruments involved in the cases cited above to give to the grantee any more than an exclusive privilege of mining for oil and gas. No right to farm the land or to use it for any other purpose than that of the production of oil and gas appears to be granted nor does any case appear where the grantee has claimed greater rights. It is submitted that any oil and gas lease in which the intent is to confer only the right to explore for and produce oil and gas should not be construed to pass a corporeal interest in the land and cannot be a true lease.

CONCLUSION

The primary object of an oil and gas lease is to secure the exploration and development of the leased premises for oil and gas and therefore the grantee is given the right to enter on the land to ex-

⁸⁸See note 3.

⁸⁹See note 82.

⁹⁰See *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146, 70 N. E. 149 (1904); *Diamond Plate Glass Co. v. Knote*, 38 Ind. App. 20, 77 N. E. 954 (1906).

plore for oil and gas and the right to produce them if found by him. As soon as the instrument is executed the right to explore for oil and gas on the premises passes to and vests in the grantee while the right to produce oil and gas is contingent on the discovery of oil or gas by the grantee. These two rights are necessarily incorporeal estates in the land. The grantee under an oil and gas lease has a right to enter on the premises subject to the lease, and to occupy so much of the surface thereof as is necessary to enable him effectively to prosecute a search for oil and gas and to produce them if he is successful in finding them. These rights to use the surface of the premises are rights which, in the absence of express language, pass to the grantee by implication as incidental to the grant of the right to search and the right to produce. They are therefore easements appurtenant to the right to search and the right to produce. If these rights in the surface of the land are expressly granted in the lease they are still easements appurtenant and will continue only until the object of the lease is accomplished. If it be true that the grantee under an oil and gas lease gets no more than the incorporeal right to explore for oil and gas and the incorporeal right to produce them if found, then it follows that an oil and gas lease is not a true lease but is a grant of a profit in the land and ought to be so designated. The use of the term "lease" by the courts is unfortunate because it leads to many unsatisfactory decisions growing out of attempts by courts to treat oil and gas leases as true leases and to apply to them the settled principles of landlord and tenant. If these instruments were recognized as grants of profits the courts would feel free to select and apply to them such of the principles of the law of landlord and tenant as seem desirable and to reject those which are not properly applicable. The result would be a more logical and satisfactory body of law relating to this important field. Perhaps the most important function of decisions of courts of last resort is to furnish rules for guidance of the people in future transactions. Judging from the opinions rendered in the country during the past two or three years involving oil and gas leases, the most learned lawyers cannot advise a course of conduct as to rights arising under an oil and gas lease with any reasonable confidence as to the value of such advice. It is submitted that much of the undesirable confusion in the law as to oil and gas leases has resulted from the unwarranted assumption that these instruments are true leases.