

Opinion No. 44-4517

May 17, 1944

BY: EDWARD P. CHASE, Attorney General

TO: Mr. R. F. Apodaca, Superintendent of Insurance, State Corporation Commission, Santa Fe, New Mexico

We are in receipt of your letter of May 1, 1944, in which you make the following statement:

"An insurance company has inquired as to whether or not, under Section 60-307 New Mexico Statutes 1941 Annotated, they can make a loan on State oil and gas lease which has no improvements on the premises other than the drilling equipment and camp houses, but within producing oil property."

You ask our opinion whether or not a loan of this type is permissible.

The only possible portion of Section 60-307 of the 1941 Compilation which would authorize such an investment is paragraph (e) which provides as follows:

"In the first mortgage or first lien loans on improved real estate, the market value of which is appraised at not less than twice the value of the loan, and the improvements of which are continuously insured for not less than seventy-five (75) per cent of the value of the improvements."

The primary question then is as to what is "improved real estate" within the meaning of this statute. If the words "improved real estate" were considered alone, it could be argued with considerable vigor that an oil and gas lease such as mentioned comes within their meaning. This would be so since many cases hold that land is improved if anything is placed upon it, whether this be a building, a windmill or a fence. See Words and Phrases "improved real estate". Further our Supreme Court in the cases, Terry vs. Humphreys, 27 N.M. 564 and Staplin vs. Veseley, 41 N.M. 543 hold that an oil and gas lease with the usual clause extending it for so long as oil and gas are produced is within the meaning "real estate" as used in Section 56-403 of the 1941 Compilation providing that the husband and wife must join in conveyances of real estate of the community.

Such a construction would however defeat the plain legislative intent as expressed by Section 60-307, since it is seen upon an examination of this statute that its whole purpose is to require insurance companies to invest only in safe, sound investments, while a loan secured by a nonproductive oil and gas lease would in most if not all cases be speculative in nature. In this case it is noted that the only reason the legislature should require the real estate to be improved is that the legislature intended to permit loans only on real estate enhanced in value by improvements or made income producing thereby.

A review of the cases above referred to disclose that in none of them did the courts have before them the question of investments or securities so that the decisions in those cases are not necessarily controlling. The only cases to the knowledge of the writer where this question was raised was *Feist vs. Fifth Avenue Bank*, 280 New York, 189, 20 N. E. (2) 388 wherein the court said:

"We think the phrase "improved real estate" must here be taken in the sense in which the words are usually employed in respect of similar investment situations, i. e., land which at the given time is substantially enhanced in value by some probably durable structural improvement. In this aspect of the matter the foregoing recital of agreed facts is uncertain and incomplete. Market values of the land -- with the buildings and without them -- are not stated. To say of buildings that they were in relatively fair-to-good shape -- or that they were not adequate improvements -- is not to state any ultimate conception. The facts as stated are merely evidentiary and lead to no clear, undeniable deduction respecting the status of -the mortgaged premises as improved real estate. This issue, therefore, should not have been determined in the present controversy. Cf. *Marx v. Brogan*, 188 N. Y. 431, 81 N. E. 231, 11 Ann. Cas. 145."

The same is true with the cases holding that an oil and gas lease is real estate, since in all of these cases statutes of an entirely different nature were involved.

Your attention is called to Section 8-1103 of the 1941 Compilation, which is the statutory form of oil and gas leases to be used by the State. It is noted that the lessee is given:

"The right of removing either during or after the term hereof all or any improvements placed or erected on the premises by the lessee."

In discussing this provision the court in *Jones-Noland Drilling Co. v. Bixby*, 34 N.M. 413, said at page 416:

"In determining whether personal property loses or retains its identity as a chattel by being placed on land, it is generally said that the intention of the parties is a controlling factor. 26 C. J. Fixtures, Sec. 5. An agreement by the owner of the land in favor of the owner of the article at the time of annexation to the effect that the article may be removed as personalty operates to preserve the personal character of the article annexed. 26 C. J. Fixtures, Sec. 39. Fixtures which are removable by the tenant under a lease have been decided to be subject to levy and sale as chattels on execution against the tenant. 26 C. J. Fixtures, Sec. 123; 17 R. C. L. p. 119; note, L.R.A. 1915E, 829, 830.

Furthermore, while the court found that the property in question was situated on and attached to the real estate described in the lease and used for the purpose of pumping oil from the well and taking same to the pipe line, we agree with the trial court that it was not annexed to the interest in the real estate embraced in the leasehold. While an oil and gas lease, with the right of ingress and egress to explore for, discover, develop, and remove oil and gas, conveys an interest in real estate, it does not convey a greater interest in the soil, except the oil and gas, than to enable the owner of the lease to use

the soil in carrying out and availing the leases of the above-named rights. The fee in the soil, except the oil and gas, remains in the lessor unincumbered with those rights of the lessee. The lessee is not the owner of the solids of the earth which the pumping and other equipment is annexed. He, at most, is the owner of the oil and gas, in place, and merely has the right to use the solid portion so far as necessary to bore for, discover, and bring to the surface the oil and gas. If the equipment were a part of the realty, it would not belong to the lessee, but to the lessor, with the same right in the lessee to use it as he has to use the other portions of the solid realty only. Moore v. Carey Bros. Oil Co. (Tex. Com. App.) 269 S. W. 75, 39 A.L.R. 1247.

See also the case of Koenig v. Mueller, 39 Mo. 165 wherein the court held that the term improvements within a statute providing for mechanical liens does not include such additions -as a lessee will be permitted to remove at the end of his term.

In view of the foregoing it is my opinion that an unproductive state oil and gas lease is not "improved real estate" within the meaning of Section 60-307 (e).

By ROBERT W. WARD,

Asst. Atty. General