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by

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Surface Rights. Like *Getty Oil Co. v. Jones*,[1] *Robinson v. Robbins Petroleum Corp.*[2] appears to limit the dominance of the mineral estate. Robinson owned the surface of an eighty-acre tract which was subject to a 221-acre oil, gas, and mineral lease (Wagoner lease) in force at the time of Robinson's acquisition. The Wagoner lease was a part of each of three waterflood units operated by Robbins Petroleum Corporation. Robbins was using a former oil well on the Robinson eighty acres to produce salt water to be injected into the oil-bearing formation to repressure the field. Robinson claimed damages from the operator and owners of the units for wrongful taking of salt water to assist in the production and recovery of oil from lands not covered or authorized to be pooled by the Wagoner lease. The Tyler court of civil appeals ruled for the oil company, reasoning that since injection of salt water would benefit all of the owners of each unit and because the mineral estate is dominant, the operator had the right to produce salt water from Robinson's surface estate and inject it into any tract in the units.[3] Such a use of the salt water was found to be a reasonable and necessary use of the premises to produce oil and to carry out lessee's operations. In so holding the Tyler court expressly approved the Oklahoma rule, expressed in *Holt v. Southwest Antioch Sand Unit*,[4] that salt water may be used in an amount as is reasonably necessary for waterflood operations to produce oil from lands other than where the salt water well is located, provided all lands are in a unit.

The Texas Supreme Court reversed the court of civil appeals, disagreeing with the Oklahoma rule on the grounds that *Holt* failed to give due regard to the rights of the surface estate owner.[5] The first issue decided by the court was that salt water is not a mineral and, therefore, does not belong to the mineral estate. The test of whether a mineral in solution is a mineral according to the ordinary and normal use of words conveying or reserving minerals was said to be whether the mineral in solution or suspension is "of such value or character as to justify production of the water for the extraction and use of the mineral content."[6]

The second major issue raised concerned the extent of the implied easement of the mineral owners over the salt water. In the previous year, in

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1. 470 S.W.2d 618 (Tex. 1971), *reviewed in* McCoy, *Oil and Gas, Annual Survey of Texas Law*, 26 Sw. L.J. 59 (1972).
2. 501 S.W.2d 865 (Tex. 1973).
3. 487 S.W.2d 794 (Tex. Civ. App.—Tyler 1972).
4. 292 P.2d 998 (Okla. 1955).
5. 501 S.W.2d at 867.
6. *Id.*

Sun Oil Co. v. Whitaker,[7] the Texas Supreme Court had held that the mineral lessee had the right to the use of water to carry out secondary recovery operations. However, the court distinguished *Whitaker* because there the water was being used exclusively for the production of minerals under the premises of the lease to which the surface owner was subject. Concluding that the present case was beyond the *Whitaker* situation, the court stated:

> Even if the waterflood operation is reasonably necessary to produce oil from premises of the Wagoner lease, it does not follow that the operator is entitled to the use of Robinson's surface for the secondary recovery unit that includes acreage outside the Wagoner lease . . . . Robinson took his surface title subject to the Wagoner lease and the implied right of the mineral owner to make reasonable use of the surface to produce certain minerals from the land covered by the Wagoner lease. Nothing in the Wagoner lease or the reservation contained in Robinson's deed authorized the mineral owner to increase the burden on the surface estate for the benefit of additional lands.[8]

Robinson was, therefore, entitled to recover the value of that portion of the salt water which was consumed for the production of oil for owners of lands outside the Wagoner lease.

Construction of Instruments. Alamo National Bank v. Hurd[9] involved the construction of a will. The testator left to Jennie Stassinos "all producing and nonproducing oil, gas and mineral royalties, mineral interests, both participating and nonparticipating, perpetual and term owned by me at the time of my death as distinguished from oil, gas and mineral leases and interests in such oil, gas and mineral leases . . . ."[10] The residue of his estate was left to a bank in trust. The question presented was whether overriding royalties and production payments owned by the testator at the time of his death constituted a part of the oil, gas, and mineral interests specifically devised or were intended to pass as part of the residue of the estate.

The San Antonio court had no problem in construing the overriding royalty to be a true royalty and, thus, included in the specific devise. The court reasoned that the only difference from an ordinary royalty was that the override was "something in addition thereto," and that, although the override comes from the working interest, both the overriding and ordinary royalty owners stand in the same relation to the operator with regard to their right to receive some expense-free fractional part of the oil and gas produced.

The production payments, however, presented a more difficult problem. *State National Bank v. Morgan*[11] has long been authority for classifying a production payment reserved in a lease as bonus and not as royalty. But

7. 483 S.W.2d 808 (Tex. 1972), *reviewed in* Young, *Oil and Gas, Annual Survey of Texas Law*, 27 Sw. L.J. 56 (1973).
8. 501 S.W.2d at 867-68.
9. 485 S.W.2d 335 (Tex. Civ. App.—San Antonio 1972), *error ref. n.r.e.*
10. *Id.* at 337.
11. 135 Tex. 509, 143 S.W.2d 757 (1940).

the court found the intention of the testator was not to distinguish between royalties, overriding royalties, and production payments, but to distinguish between expense-bearing operating mineral interests and expense-free non-operating interests such as royalties. Since production payments fall in the latter category they were held to pass under the specific devise.

In *Preston v. Lambert*[12] Preston held a five-year oil, gas, and mineral lease dated July 13, 1948, covering Lambert's land. The lease provided that in the event of cessation of production lessee had the right within ninety days to resume drilling operations without the consequence of termination of the lease. The lease required lessor to give notice to lessee of any breaches of lessee's obligations thereunder, and further provided that lessee would have sixty days after notice to cure the breach. Records of the Railroad Commission reflected an absence of production from June 1970 through July 1971 and the defendant, Preston, acknowledged that he had not commenced any drilling operations on the premises. Preston defended the claim by Lambert for termination of the lease by arguing that his determinable fee created by the lease agreement was extended to sixty days following notice from the plaintiff-lessor and, since it was undisputed that no notice was given, his interest had not yet expired. The Eastland court of civil appeals rejected the defendant's argument, holding the sixty-day notice clause inapplicable. That clause, the court explained, applied only to breaches of contractual obligations and had no effect on the duration of the lessee's property interest. The leasehold was limited to a term of "five years . . . , and so long thereafter as oil and gas, or either of them is produced from said land by the lessee."[13] This limitation imposed no obligation on the lessee to perform any duty, and, therefore, the clause providing for notice in case of breach had no application.

Sivert v. Continental Oil Co.[14] dealt with waterflooding, the injection of water into a formation through an input well in order to force oil into producing wells. Involved was a unitization agreement which provided, in part, that the agreement should remain in force as long as unitized substances were produced and as long as waterflood and secondary recovery operations were conducted without cessation of more than ninety days. The unit operator allowed more than ninety days to elapse between injections although oil production never ceased. Appellants, plaintiffs below, contended that the agreement terminated upon the ninety-day lapse, because for waterflooding to be continuous there must be injections of water without cessation. Appellees took the position that injections need not be continuous and that injection of too much water tended to overpressurize the field. According to the court, the three expert witnesses agreed that waterflooding could be conducted without injections for a period of time; they differed only as to the length of the period, with testimony both favorable and unfavorable to

12. 489 S.W.2d 955 (Tex. Civ. App.—Eastland 1973), *error ref. n.r.e.*
13. *Id.* at 956.
14. 497 S.W.2d 482 (Tex. Civ. App.—San Antonio 1973).

appellants' position. Thus, relying on the trial court's determination as to the credibility of the witnesses, the court of civil appeals did not disturb the finding that waterflooding was continuous in this case.

Gas. In *West v. Humble Oil & Refining Co.*[15] West, plaintiff-lessor, owned royalty interests in gas produced by Humble as lessee. The Railroad Commission permitted Humble to inject foreign gas into gas producing horizons for storage purposes. Humble proposed to pay West on the basis of West's royalty interest in the volume of native gas remaining in the reservoir as determined by Humble. Although Humble paid royalty on *all* gas produced, including the stored gas, it proposed to pay plaintiffs this royalty only until they had received a sum of money calculated by Humble to be equivalent to what plaintiffs would have received had their property interests not been violated. West claimed that Humble had no right to discharge its obligation on that basis, pointing to Humble's contractual obligation to pay royalty on all gas produced, and asked for a permanent injunction prohibiting Humble from using the field as a storage reservoir until all native gas had been exhausted.

The Waco court of civil appeals determined that by ceasing normal and regular production from the field and injecting foreign gas for storage purposes, Humble had breached its contract with West. Thus, the Waco court reversed and, finding damages to be incapable of accurate determination, remanded with instructions for a permanent injunction restraining Humble from further injecting the field and using it for storage until all the native gas had been produced.

Pooling. Westbrook v. Atlantic Richfield Co.[16] involved a ten-year lease from Murphey dated April 22, 1954, covering a 66.5-acre tract. The pooling provision of the lease provided that units pooled for oil should not exceed forty acres or such larger units as might be prescribed by governmental authority. No well was drilled on the 66.5-acre tract but a producing oil well was drilled on a 160-acre unit which included the 66.5-acre tract. Rentals had been paid to keep the lease in force to April 22, 1962. The civil appeals court[17] upheld the contention of the lessors' assignees that the lease terminated under the holding of *Jones v. Killingsworth*[18] because the lease allowed units for oil of more than forty acres only if *prescribed* by the Railroad Commission and that 160-acre units were only *permitted* by the Commission and not prescribed. Since the 160-acre unit was not prescribed it was not authorized under the lease, and, therefore, production from lands within the unit but not from Murphey's tract could not hold the lease in effect without payment of delay rentals. However, the court then held that the lessors, by ratifying the field-wide unit agreement and unit operating agreement in November 1964, reinstated the lease.

15. 496 S.W.2d 212 (Tex. Civ. App.—Waco 1973), *error granted.*
16. 502 S.W.2d 551 (Tex. 1973).
17. 491 S.W.2d 207 (Tex. Civ. App.—Tyler 1972).
18. 403 S.W.2d 325 (Tex. 1965).

The Texas Supreme Court reversed the judgment of the court of civil appeals as to their finding of ratification, holding that there was not sufficient reference to the Murphey lease to revive it. *Leoffler v. King*,[19] relied on by the appeals court, involving the ratification of a lease by mineral deed, was distinguished on the basis that the deed language was sufficient to indicate an intent to refer to a particular lease. But in the present case the supreme court found no inference of validity of the Murphey lease or even of its existence.

Legislation. Several pieces of legislation passed by the 63d Legislature are worthy of brief mention. Article 2320b[20] sets out a method of obtaining leases and assignments of mineral interests which include interests of owners who cannot be located. It provides for suit in the district court seeking appointment of a receiver to execute the appropriate instrument. However, before the article was amended there was no direction as to who should be appointed receiver and there was no provision providing for unitization. House Bill No. 1159[21] amended section 1 of the article to provide for appointment as receiver of either the county judge, the county clerk, or any resident of the county in which the land lies. Section 3 was amended to authorize the receiver under orders of the court "to enter into any unitization agreement which has been duly authorized by the Railroad Commission of Texas."[22] The meaning of the quoted words is unclear. The question arises as to whether the legislature intended to restrict the receiver's rights to execute unitization agreements to those contemplated by article 6008b[23] relating to secondary recovery operations approved by the Railroad Commission. More specifically, it is questionable whether the receiver can enter into pooling agreements creating units allocated to a single well for proration purposes since such agreements are not ordinarily passed upon by the Commission.

Article 2212[24] deals with the rights of certain defendants in tort actions. Under this article, if a judgment is rendered against several defendants and if one pays the judgment, he has a right of action against each co-defendant and may recover from each a proportionate part of the money paid. House Bill No. 596[25] adds as article 2212b an amendment to remove an inequity said to be fostered on drilling contractors by the indemnity provisions contained in drilling contracts. The purpose of the act is to declare against public policy provisions for indemnity in agreements where there is negligence attributable to the indemnitee. The bill provides that an indemnity

19. 149 Tex. 626, 236 S.W.2d 772 (1951).
20. TEX. REV. CIV. STAT. ANN. art. 2320b (1971).
21. Ch. 603, §§ 1, 3, [1973] Tex. Laws 1670-71. Section 3 provides for payment of consideration before execution of the instrument by the county judge but no mention is made of payment by the county clerk or a resident.
22. *Id.* § 3. Receivership appears to be unnecessary to bind the interest of the unknown or unlocated owner under the Mineral Interest Pooling Act. TEX. REV. CIV. STAT. ANN. art. 6008c (Supp. 1973).
23. TEX. REV. CIV. STAT. ANN. art. 6008b (1971).
24. *Id.* art. 2212.
25. Ch. 646, §§ 1, 2, 3, 4, [1973] Tex. Laws 1767-68.

agreement in a drilling contract is void if it purports to indemnify the indemnitee against loss or liability for damages for death, bodily injury, or injury to property resulting from the sole or concurrent negligence of the indemnitee. The bill excludes from coverage loss or liability for damages arising from death or bodily injury to property resulting from radioactivity, injury to property resulting from pollution, and reservoir and underground damage. The provisions do not effect the validity of any insurance contract or benefit conferred by the workmen's compensation laws and do not deprive a surface owner of the right to obtain an indemnity from any lessee, operator, or contractor for conducting exploration or production operations.