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OIL AND GAS

by

William J. Flittie*

*Royalty Interest.*¹ As of this writing the crucial *Vela*² litigation, remarked in last year's *Survey*³ as primarily concerned with the meaning of "market value" in a typical gas royalty lease clause, remains undecided by the Texas Supreme Court. Cited in last year's discussion of the case were two then very recent federal cases suggesting the problem might be one for Natural Gas Act jurisdiction in the case of gas sold interstate, rather than state law. That primary jurisdiction reference, it is reported, has resulted in proceedings before the Federal Power Commission in which there is yet no decision. These two federal cases, properly in this year's selection of cases, now deserve some additional comment. They are the only federal cases meriting special Texas attention in the current reporting period.

If there is no Federal Power Commission jurisdiction, the Fifth Circuit in *Huber Corp. v. Denman*⁴ and *Weymouth v. Colorado Interstate Gas Co.*⁵ agrees with the civil appeals court in *Vela* that "market value" means current, contemporary and shifting values unrelated to gas sales contract values. In arriving at these values probative evidence is evaluated much as in *Vela* except there is even more freedom given in establishing the foundation for expert testimony, and it is said the impact of Federal Power Commission ratemakings upon gas prices in general must be duly considered as a modification of the traditional willing seller-willing buyer means of establishing market value. Additionally, the latter case demonstrates the helplessness of a gas lessee, controlling twenty per cent of a gas field, to increase his takes from the field by unilaterally increasing the producer nominations he makes to the Railroad Commission. The issue here was the

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¹ Cases where textual comment is deemed unwarranted are collected by footnotes under category headings, some of which only approximate the category subject matter.

Clyde v. Hamilton, 414 S.W.2d 434 (Tex. 1967) involves a contest between a life tenant (actually the administrator of his estate) and remaindermen as to entitlement to lease bonuses and royalties. The usual rule giving bonuses and royalties to remaindermen after being invested for the benefit of the life tenant during his lifetime, was followed. Also followed was the exception where, if a lease was "opened" before creation of the life estate, bonus and royalties go entirely to the life tenant. This exception is known as the "open mine" doctrine. Whether it applies if the property was merely leased but without actual production until after the life estate commenced was not in issue. However, *Youngman v. Shular*, 155 Tex. 437, 288 S.W.2d 495 (1956) holds mere leasing is enough.

Read v. Britain, 414 S.W.2d 483 (Tex. Civ. App. 1967) *error granted*, is concerned with interpretation of some special language and hence not of general interest. It quite properly holds that where a lessee is afforded in his lease alternative methods of accounting for royalty on casing-head gas he may select one to the exclusion of the other. By no means so certain, however, is the conclusion that, under the method selected, there was no obligation to pay for gas remaining after separator processing and payment of royalty on the liquids obtained because such gas was not sufficiently stripped to meet the definition of residue gas. The civil appeals court held the residue gas royalty provision pertained only to the gas processing alternative not selected.

² *Texas Oil & Gas Corp. v. Vela*, 405 S.W.2d 68 (Tex. Civ. App. 1966) *error granted*.

³ Flittie, *Oil and Gas, Annual Survey of Texas Law*, 21 Sw. L.J. 29 (1967).

⁴ 367 F.2d 104 (5th Cir. 1966).

⁵ 367 F.2d 84 (5th Cir. 1966).

obligation owed royalty owners to produce and market increased quantities of gas. In terms of the facts of *Weymouth*, it is quite clear there is no duty to increase nominations beyond quantities which genuinely will be produced and sold despite remand to give the royalty owners an opportunity to make a case for increased nominations if they can.

In *Andretta v. West*⁶ the holder of a leasing power leased lands in which existed a severed undivided one-quarter royalty interest. After the leasing transaction, and unknown to the royalty owner, this lessor amended the lease with an arrangement which could extend the lease beyond the primary term by paying what was denominated "lieu royalty" and measured by a fraction of the production of a designated well on other property. Reversing the civil appeals court, which had analyzed the payment to be rental, the supreme court held it to be royalty and the owner of the one-quarter royalty thus entitled to his share. The opinion is based on several factors: the payment is a money substitute for actual production, is based on other actual production in a manner characteristic of lieu royalty, continues beyond the primary term, and uses the words of legal art "lieu royalty." In short, the attributes pointing to royalty were catalogued to reach the result. The case also determined that the lessor holder of the executive power had an obligation to pay over his share to the royalty owner, upon which obligation limitations did not commence to run until the royalty owner actually learned the payments were being received and claimed contrary to his interest, or had information which would have led an ordinarily prudent person to discover the situation.

*Surface vs. Mineral Estate.*⁷ Probably the most significant case pending before the supreme court as of this writing is *Sun Oil Co. v. Whitaker*.⁸ The case involves a contest between the lessee of the mineral owner and the surface owner in an important irrigation area concerning the right of the lessee to produce fresh water from the lessee's own wells for use in water-flooding operations. Instead of being a straight-on collision between mineral and surface ownerships, however, the litigation centers on interpretation of the free use clause of a typical lease, which includes "water from said land except water from Lessor's wells for all operations hereunder."

⁶ 415 S.W.2d 638 (Tex. 1967).

⁷ Phillips Pipe Line Co. v. Razo, 409 S.W.2d 565 (Tex. Civ. App. 1966) deals with the duty of the owner of a gas pipeline easement to mark pipeline crossings of known private roads and to bury the line to a safe depth. In this case a large recovery was obtained by the employee of a sub-contractor who had an easement right to use such a private road from its owner. Injury resulted from an explosion when a bulldozer became stuck in the road over the pipeline and defendant's pipeline was ripped in the effort to extricate it. For further discussion, see Keeton, *Torts*, this *Survey*, at footnote 25.

Rendon v. Gulf Oil Corp., 414 S.W.2d 510 (Tex. Civ. App. 1967) *error ref. n.r.e.* involves the grant of a temporary injunction to prevent the landowner-lessor's interference with building a service road and preparation of a drill site. Probable right and degree of injury, not certainty that the lessee would prevail on the merits, constitute the basis for temporary injunctions in these cases.

Coastal States Crude Gathering Co. v. Cummings, 415 S.W.2d 240 (Tex. Civ. App. 1967) *error ref. n.r.e.* involves the problem of construction of a pipeline easement to ascertain whether it permitted the laying of additional lines within the easement. The use of the phrase "pipeline or pipelines" in conjunction with added payments for additional lines made it easy to construe as a multiple line grant.

⁸ 412 S.W.2d 680 (Tex. Civ. App. 1967) *error granted*.

Treating the phrase "all operations hereunder" as latently ambiguous, the civil appeals court held the use of fresh water in such substantial quantities as to impair the value of the surface estate (to which estate fresh water pertains) as not within the intent of the parties to the lease. One wonders what evidence, considering the small relative volumes of oil and gas bearing formations in relation to the immense size of the Ogallala reservoir from which the water would be drawn, justified the conclusion that the surface estate would be substantially impaired. If this is not really so, the fact that waterflooding was not practiced in the area at the time that the lease was granted in 1946 should be no basis for denying it now.⁹ In any event, the case may not finally resolve the ultimate conflict between mineral and surface ownerships, though its outcome on appeal should show the trend.

In *Chevron Oil Co. v. Howell*¹⁰ the United States had condemned, and owned the surface estate, which it had leased to an agricultural tenant. The mineral estate was in other ownership. The owner of an adjacent leasehold in Lake Texoma, desiring a surface location for directional drilling to a bottom hole location beneath the lake, obtained consent for a surface location from the United States which was given in the terms of "[W]e have no objection to the location specified." Both the agricultural lessee and the mineral owner's oil and gas lessee sought an injunction against drilling at the location, which was granted. The decision did not state in whose right the injunction was obtained. Because there is precedent in Texas for the right of a surface owner to grant such a location over the objection of the mineral owner,¹¹ the case would best be viewed as an injunction granted in the right of the prior agricultural lessee.

One civil appeals decision would be a curiosity except that it should make people consider the content of lease forms currently used in order to avoid problems in special issues submitted to the jury. The lease in issue read only "necessary" rather than "reasonably necessary" in assessing the use of the surface by a mineral lessee. An issue phrased "Do you find [the lessee] made an unnecessary use of the surface . . ." was upheld against a contention that the lessee had the right to use so much of the surface as was reasonably necessary, and to have the issue phrased in that manner.¹²

Holding that it is the burden of the surface owner affirmatively to prove that the development purposes of the lessee could have been accomplished while using less land, the supreme court reversed a civil appeals decision that the building of a blacktop road and destruction of several hundred trees and rutting of the surface by heavy trucks at a turnaround point, without more, constituted evidence from which a finding of excessive use could be made.¹³ This case may turn out to represent a significant added burden of proof for surface owners in these situations.

⁹ Cf. *Yates v. Gulf Oil Corp.*, 182 F.2d 286 (5th Cir. 1950).

¹⁰ 407 S.W.2d 525 (Tex. Civ. App. 1966) *error ref. n.r.e.*

¹¹ *Humble Oil & Ref. Co. v. L. & G. Oil Co.*, 259 S.W.2d 933 (Tex. Civ. App. 1953) *error ref. n.r.e.*

¹² *Texaco, Inc. v. Faris*, 413 S.W.2d 147 (Tex. Civ. App. 1967) *error ref. n.r.e.*

¹³ *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967).

*Termination of the Lease.*¹⁴ The most intricate case decided by the Texas Supreme Court in the period under survey is *Sunac Petroleum Corp. v. Parkes*.¹⁵ The remote assignor of a lease had retained a 1/16 of a 7/8 overriding royalty. It was stated that the assignee and his assigns had no obligation to retain or develop the lease, but that the overriding interest attached to all extensions or renewals of the lease. The lease contained a typical thirty-day continuous drilling clause and a typical sixty-day additional drilling clause. It also contained a gas-only pooling clause. Pursuant to this clause there was drilled an off-lease pooled unit well which produced oil instead of gas. Thirteen days after its completion and well beyond the end of the set primary term another well was commenced on the lease lands which resulted in oil production independent of the unit. About a year after completion of this second oil well the defendant leaseholder, doubting the efficacy of his lease, took a new lease, paying a consideration of \$27,000. Defendant paid overriding royalty on the production from the second well for about five months after its completion, but thereafter refused to pay, contending the lands were held under the new lease and not the first lease upon which the overriding royalty depended for existence. The Texas Supreme Court concluded that the thirty-day clause was not implemented because it was limited to drilling and reworking operations on the pooled unit well drilled through the end of the primary term. Nor was the sixty-day additional drilling clause implemented because the first well could not affect the lease habendum clause since it was an oil well and hence could not be connected with the lease by the gas-only pooling clause. Additionally, the well did not result in a dry hole. Hence, when the second well was drilled on-lease to production the lease had already terminated. The next point was whether the extension or renewal rights of the overriding royalty owner attached the overriding royalty to the second lease as a matter of legal construction. The court held that it did not, pointing to the substantially different terms of the new lease and, more pertinently, to the fact that the second lease was not taken until more than a year after expiration by operation of law of the first lease. Thus, it was concluded, the new lease could not be defined as an extension or renewal lease. The court also considered whether there was nevertheless a violation of trust and confidence sufficient to cause recognition in equity of the overriding royalty through the device of a constructive trust despite its demise in law. The court held that where the duty to perpetuate the lease was expressly negated and, more pertinently, because there was no fiduciary or confidential relationship between the overriding royalty owner and lease owner to be found in these facts, resort to the constructive trust remedy could not be had. Finally, since there was no prejudice or change of

¹⁴ *Eubank v. Twin Mountain Oil Corp.*, 406 S.W.2d 789 (Tex. Civ. App. 1966) *error ref. n.r.e.* enunciates two well-established points: A lessee whose lease has expired is not entitled to recover the cost of wells drilled, nor may he remove casing if there is a reasonable possibility the wells drilled may be made productive. Instead he must accept the reasonable value of the casing. The case does not express it, but presumably this means the net value of casing after deducting salvage costs. Another case to the same effect is *Patton v. Rogers*, 417 S.W.2d 470 (Tex. Civ. App. 1967).

¹⁵ 416 S.W.2d 798 (Tex. 1967).

position, the court held the payment of the overriding royalty for several months did not work an estoppel. There was a vigorous dissent by three justices.

One case important for its implications is *Sunray DX Oil Co. v. Texaco, Inc.*¹⁶ The case involved a lease which was to continue so long as production in paying quantities continued, with a clause permitting continuation beyond this point if the lessee commenced additional drilling or reworking operations within thirty days. The lessee ceased production on December 12, 1962. Production was resumed thirteen months later after a secondary recovery waterflood unit was formed. The court refused to view the cessation, which resulted from normal decline, as temporary, which seems correct. But it also refused to apply the unique Texas rule permitting holding beyond the cessation of paying production if a reasonable operator, for the purpose of making a profit, would continue so to hold.¹⁷ This reasoning, first found in a 1966 civil appeals opinion criticized in last year's *Survey*,¹⁸ seems to be that the thirty-day clause ousts any possibility of a longer holding than permitted by that clause. It is submitted that this clause, now standard in most leases, should not be read as exclusive, but only as one permissive means of continuing the lease. If this interpretation prevails when squarely tested in the supreme court, it will greatly increase the problem of holding leases valuable for potential second recovery through a period of bona fide negotiations to accomplish the unitizations needed before the secondary recovery projects can be undertaken.¹⁹

In another case a gas well was completed in a lease but shut in for lack of a market. The lease contained a shut-in royalty clause which, however, permitted holding pursuant to it for only two years beyond the end of the primary term of the lease. Two years beyond the end of the primary term there was yet no regular sale, but the lessee had run a half-inch line from the gas well to an oil well in another lease where the working interest ownership was virtually identical. There some gas was used as fuel for treating the oil, for which there was an agreement to pay a minimum of \$100 a month for the gas used. This agreement was examined and found not to constitute a legitimate market. Since it is a peculiarity of gas production that it must be currently marketed to be produced in paying quantities (unlike oil, except in the most unusual circumstances gas cannot be produced and stored), the lease was held to have terminated.²⁰

¹⁶ 417 S.W.2d 424 (Tex. Civ. App. 1967) *error ref. n.r.e.*

¹⁷ *Clifton v. Koontz*, 160 Tex. 82, 325 S.W.2d 684 (1959). See also *Skelly Oil Co. v. Archer*, 163 Tex. 336, 356 S.W.2d 774 (1961).

¹⁸ *Hall v. McWilliams*, 404 S.W.2d 606 (Tex. Civ. App. 1966) *error ref. n.r.e., noted in Flittie, Oil & Gas, Annual Survey of Texas Law*, 21 Sw. L.J. 29, 35 (1967).

¹⁹ The civil appeals decisions now exhibit considerable conflict. See *Fick v. Wilson*, 349 S.W.2d 622 (Tex. Civ. App. 1961) *error ref. n.r.e.* It has been suggested that the rule of *Clifton v. Koontz*, 160 Tex. 82, 325 S.W.2d 684 (1959) requires actual continuing physical operations even if not in paying quantity. That is not the reasoning of any of the civil appeals cases. It does not seem justifiable to modify habendum clause effects in so whimsical a manner; either lessee's attitude should hold the lease, or it should not. Certainly production below the level of paying quantities is in law no less antagonistic to the habendum clause than no current production whatever.

²⁰ *Patton v. Rogers*, 417 S.W.2d 470 (Tex. Civ. App. 1967).

*Conveyancing.*²¹ In a novel application of the *Dubig* rule a civil appeals court held that a grantor, in breach of his mineral warranty in the east half of a tract of land, could be forced to cover the breach with minerals otherwise validly reserved in the west half of the tract.²² The east and west halves both had been conveyed in the same warranty deed, and it so happened there were exactly enough west half minerals to cover the east half deficiency. It also was stipulated that the minerals throughout the east and west halves had the same value. These coincidences tend somewhat to obscure and make plausible what, on closer analysis, seems a very erroneous holding. Warranty of title is essentially a contractual undertaking. It is not easy to justify the *Dubig* rule as it presently exists. To permit its extension to operate upon lands other than those in which the deficiency exists—even a west half tract contiguous to the deficient east half tract—will not bear analysis.

*Executive Powers. Montgomery v. Rittersbacher*²³ involves these facts: After severance into plaintiff's separate ownership of a 1/16 royalty interest from tract one, defendant, the mineral owner in tracts one and two, leased both in the same lease. Plaintiff had no interest in tract two. The lease contained an entirety clause. Tract two was placed in a unit which became productive from a well in other unit lands. The court disposed of any right arising from the pooling by pointing to the established Texas rule that the holder of the executive power cannot pool severed royalty and mineral interests, though he can lease them. By no means so secure, however, is the conclusion that there cannot be participation based on the entirety clause. The "cannot pool" rule rests on the technical property effects inherent in the Texas cross-conveyance theory of pooling,²⁴ whereas an entirety clause is contractual, having no effect on the vested property ownerships but merely sharing produced proceeds. Of course, it could be determined that inclusion of an entirety clause is also beyond the power of the executive holder, but this would seem to require a different analysis from that given.

Another case involved a leasing by the holder of the executive power in the same general circumstances as those described in the previous case.²⁵ When production was obtained from the tract in which the royalty owner had no interest, the contention was made that since there could be no pooling, the effect was to sever the two tracts in the lease into two separate leaseholds, with separate obligations to obtain paying production in each tract before the end of the primary term. This was rejected. Though at

²¹ *Tenneco Oil Co. v. Alvord*, 416 S.W.2d 385 (Tex. 1967) is a holding construing particular language in an assignment of leases in which were reserved 16 wells "until [the assignor] elects to abandon the same." "All right, title and interest" was said to be transferred. A contention that the effect was to reserve minerals down to the depth of the wells reserved was rejected. The court held that there being no ambiguity, no parol evidence to vary the plain language construction could be considered.

²² *Hanson v. Pelham*, 413 S.W.2d 394 (Tex. Civ. App. 1967) error granted.

²³ 410 S.W.2d 925 (Tex. Civ. App. 1966) error granted.

²⁴ See the leading case of *Brown v. Smith*, 141 Tex. 425, 174 S.W.2d 43 (1943).

²⁵ *Mathews v. Sun Oil Co.*, 411 S.W.2d 561 (Tex. Civ. App. 1967) error granted.

first blush it seems a hard rule that a lease is perpetuated by production in which an interest owner cannot share because of the effects of the non-apportionment rule in circumstances such as these, that rule is well established law. Considering the problems which would be created in assembling acreage into leaseable blocks should it be overturned, it is advisable that the present rule be continued.

*Delay Rentals.*²⁶ *Skelly Oil Co. v. Kidd*²⁷ is a mispayment of delay rentals case. The mispayment came about because the lessor requested, the lessee drafted, and the lessor signed and delivered a change of depository form incorrectly reading "The First State Bank, Eustage, Texas" instead of "Eustace, Texas." A payment mailed to the incorrect address was delivered to the First State Bank, Carthage, Texas. Time in which to make a correct payment then ran out without the lessee being aware of the error. The payment was held to be sufficient, apparently on the grounds that forfeitures are abhorred. This is not sound analysis. Failure correctly to pay delay rentals is no forfeiture situation; it is automatic termination of the leasehold estate granted. Lessor's involvement in the error, however, seems enough to charge him with it, since the lessee complied as directed and delivered the payment to the mails, an independent agency.

Pooling Agreements. Two cases make it clear that lease pooling clauses can be implemented to avoid the drilling of wells in the acreage affected despite a right under the regulatory scheme to a well at the location. In one case the pooling of a small tract to a tract already containing an existing well was upheld despite the fact that the small tract otherwise was entitled to its own well.²⁸ The second case involved a piercement salt dome field where there is no restriction on well density. Pooling to avoid drilling the particular lands subject to the lease was a valid implementation of the pooling clause in these circumstances.²⁹

Common Purchasers Act. The perennial question of whether a lawsuit can be brought involving a regulatory area independently of a determination by the Railroad Commission that a violation exists is presented by a case where the civil appeals court held there could be no suit for discrimination damages under the Common Purchaser Act unless there was outstanding a Commission order determining that discrimination exists.³⁰ On the par-

²⁶ *Ploeger v. Humble Oil & Ref. Co.*, 416 S.W.2d 553 (Tex. Civ. App. 1967) *error ref. n.r.e.* decided that delay rental payments made to the trustees rather than beneficiaries of a trust pursuant to an ambiguous judgment were sufficient to keep a lease in force. Chief reliance was on the rule that a lessee cannot have thrust upon him the burden of construing at his peril an ambiguous instrument.

Meier v. Suintex Oil & Gas Co., 413 S.W.2d 944 (Tex. Civ. App. 1967) enunciated the well-established rule that the assignee of property subject to a lease has no claim on delay rentals or royalties until he supplies the lessee with evidences of his ownership as required by the lease. The non-apportionment consequences of a partial assignment by vertical segregation out of a larger property subject to lease also were noted.

²⁷ 417 S.W.2d 186 (Tex. Civ. App. 1967) *error ref. n.r.e.*

²⁸ *Expando Prod. Co. v. Marshall*, 407 S.W.2d 254 (Tex. Civ. App. 1966) *error ref. n.r.e.*

²⁹ *Banks v. Mecom*, 410 S.W.2d 300 (Tex. Civ. App. 1966) *error ref. n.r.e.*

³⁰ *Foree v. Crown Central Petroleum Corp.*, 417 S.W.2d 499 (Tex. Civ. App. 1967) *error granted.*

ticular facts the Commission had ordered extension of a gathering line for the benefit of a producer, then withdrew its order when another pipeline indicated it would make the extension. It seems more reasonable that the cause of action for discrimination damages specifically granted by section 11c of the Act³¹ is intended to be and can be implemented independently of any Commission action.

*Subsurface Trespass.*³² In *Nortex Oil & Gas Corp. v. Schlumberger Well Surveying Corp.*³³ the purchaser of properties, dependent for their production on illegal slanted wells, claimed against the well surveying company that had surveyed for the previous owners. There was alleged a conspiracy between this company and the prior owners to conceal the facts of deviation, with the result that the purchaser was damaged. Pointing to evidence showing what the defendant must have known as a result of its surveying activities, and denying the claim that sale of the properties was not a foreseeable damage consequence at the time the surveys were performed, the civil appeals court held the case should not have been withdrawn from the jury because there existed a fact issue "as to whether defendant, a member of a conspiracy, is liable to plaintiff."

*State Lands.*³⁴ An important decision concerned the leasing power of the owner of the surface estate under the Relinquishment Act of 1919.³⁵ These owners are authorized to give oil and gas leases in ordinary commercial form for bonus, rental, and royalty of not less than 1/8, half of which they may keep as statutory leasing agents for the State. In this case such an owner included in the lease an additional clause entitling him, in his discretion, to acquire a 1/16 working interest out of the 7/8 working interest. The lease was held invalid on the public policy ground that this term was

³¹ TEX. REV. CIV. STAT. ANN. art. 6049a, § 11c (1962).

³² *Garvin v. Goldsmith*, 406 S.W.2d 545 (Tex. Civ. App. 1966) *error ref. n.r.e.* is a case concerned with damages for the sale of properties dependent for their production upon illegal slanted wells. The realty measure of damages in terms of the difference between the property as represented and its actual value was held proper, and a special issue inquiring of value "if the wells on the lease had been legally producing oil at the rate at which they were producing oil" was upheld as sufficient to establish what had been represented.

State v. Harrington, 407 S.W.2d 467 (Tex. 1966) involves what constitutes a civil penalty day for operating an illegal slanted well. The court held that any day a well is maintained in an operable, unplugged condition, whether or not actually produced, is a penalty day; also that this is true whether or not there is actual scienter concerning the illegal bottom hole location. The elements making a mining partnership, the jurisdiction of district courts in civil penalties cases pursuant to TEX. REV. CIV. STAT. ANN. art. 6036 (1962) and a conclusion that well location rules pertain to bottom hold locations also are considered in reaching the main holding.

³³ 417 S.W.2d 603 (Tex. Civ. App. 1967).

³⁴ *Noel v. Atlantic Ref. Co.*, 414 S.W.2d 718 (Tex. Civ. App. 1967) was a contest between the lessee from the state of lands asserted to constitute a vacancy and a mineral claimant relying on the patent issued. The problem was whether the original survey, which gave rise to no vacancy, would rule the patent or, instead, a regular subsequent resurvey filed with the state prior to patent which did give rise to the vacancy. Following well-established rules the subsequent resurvey was held to measure the extent of the patent grant, and the vacancy in fact existed.

Duval Corp. v. Sadler, 407 S.W.2d 493 (Tex. 1966) deals with the leasing by the state for sulphur of public free school lands which have been sold with a reservation of minerals in the state. There is extended discussion of the Texas mineral leasing acts and the differing procedures under which oil and gas are leased.

³⁵ *State v. Standard*, 414 S.W.2d 148 (Tex. 1967).

beyond the surface owner's authority. However, since this owner had acted in good faith it was held that he had power to execute a subsequent valid lease.

Drainage. The supreme court opinion, *Shell Oil Co. v. Stansbury*,³⁶ is a very brief per curiam opinion according no reversible error to the prior civil appeals opinion.³⁷ However, it may be of much greater portent than its brevity and the writ treatment suggests. The supreme court suggests that a lessee who is also the draining operator on adjacent lands cannot modify his duty reasonably to protect against drainage with an express covenant clause in the lease of a nature more favorable to the lessee. The lease contained a provision imposing a duty to drill an offset well in the event a draining well was located within a specified distance. The lessee maintained that the draining well was outside this specified distance and that, since the lessee also drilled the draining well, the reasonable operator duty was not applicable. The court rejected this contention. It was the view of the lower court (which was not reversed) that such modifying effect must be unmistakably clear, but that court did not say the reasonable operator duty standard could not be diminished. It is unfortunate to have an area of law potentially productive of so much conflict as this thrown into unstable flux by so cursory a treatment.

An unleased tenant in common of productive property, owning an undivided 1/12 mineral interest, sued the operating lessee of the other 11/12 interest, alleging failure of the operator to protect against drainage. The precise complaint was that an alternate method followed in testing wells for allowable purposes produced lower allowables than did the method followed by others in adjacent competitive properties. Both methods were permitted by the Railroad Commission. Relief was denied, chiefly on the ground that the operator owed no duty to a mere tenant in common. Added was the consideration that the method followed was legal until and unless changed by the Railroad Commission, and not to be collaterally attacked in court proceedings.³⁸

³⁶ 410 S.W.2d 187 (Tex. 1966).

³⁷ *Shell Oil Co. v. Stansbury*, 401 S.W.2d 623 (Tex. Civ. App. 1966) *error ref. n.r.e.*

³⁸ *Zimmerman v. Texaco, Inc.*, 409 S.W.2d 607 (Tex. Civ. App. 1966), *error ref. n.r.e.*, 413 S.W.2d 387 (1967). In the short per curiam opinion of the supreme court, the view of the civil appeals court that such a suit could not be brought in the county where the property was located was rejected, thereby removing this alternate basis for denial of the claim from the civil appeals opinion.