I. SURFACE RIGHTS

The most significant decisions during the period of this Survey established stringent parameters on the surface rights of the oil and gas operator. Limitations were judicially imposed on the operator's rights to the use of the vertical area of the surface and water underlying the surface, and to minerals deposited on or near the surface. In making these decisions—ones surely to be regarded as victories for the environmentalists—the supreme court reaffirmed, rhetorically at best, the doctrine of the dominance of the mineral estate over the surface estate. There will no doubt be those who will claim that this doctrine of dominance has now been emasculated to such a degree that it can no longer be said to exist as a viable legal maxim. This view, however, ignores the fact that the doctrine is a judicially created fiction and mistakenly assumes that "dominance" is tantamount to absolute sovereignty when, in fact, the right has always been encumbered by a test of "reasonableness." Increasingly there will be newer and greater demands for both the surface and the minerals, thereby augmenting the number and degree of these conflicts. Fortunately, our courts have created a rule exemplified in the following decisions that will enable a flexible resolution of these opposing rights.

Getty Oil Co. v. Jones considered the rights of a mineral lessee to the use of the vertical space above the surface when that use interfered with the irrigation system of the surface owner. Getty held under an oil and gas lease dated in 1948 that granted it the right to use the land "for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building roads, tanks . . . ." Jones acquired his surface interest in 1955, purchasing at that time a tract containing 635 acres encumbered with Getty's lease to the extent of 120 acres and with other leases owned by Amerada Petroleum and Adobe Oil Company covering the balance of the 635-acre tract. Jones commenced the installation of the irrigation project in 1955. The system, an automatic one known as the "Valley System," consisted of 1300 feet of pipe supported at a height of seven feet above the ground by a series of towers that rotated in a clockwise direction around six pivot points with the capability of negotiating most obstacles less than seven feet in height.

At the time Jones began the installation of this system, Getty had one producing oil well in the northwest corner of the tract. This well had a beam-type pumping unit considerably over seven feet in height, but located outside the circumference of the sprinkler system. In December 1967 Getty drilled two
additional wells and installed two beam-type pumping units, one of which was seventeen feet high at the top of its upstroke, and the other thirty-four feet high. Because of the height of the pumping units the two wells drilled by Getty in 1967 precluded the use of four pivot points of Jones' irrigation system.

Jones filed suit seeking damages and an injunction to stop Getty from using the vertical space for pumping units that prevented the use of his automatic sprinkler system. The jury found that it was not reasonably necessary for Getty to install pumps that prevented the operation of the irrigation system, and that by so doing Getty decreased the market value of the land by $117,475. However, the trial court entered judgment for Getty, notwithstanding the jury verdict, because it found no evidence that Getty used more lateral surface than necessary. The court of civil appeals reversed the judgment of the trial court, holding that vertical as well as lateral space was amenable to the test of reasonable use, but remanded the case because of improper instructions to the jury.

Getty contended before the supreme court that it had a "right to exclusive use of the superadjacent air space above the limited surface area occupied by the pumps, and that only the lateral surface of the land should be subject to the established rule of reasonably necessary surface usage." The supreme court disagreed. The opinion goes on to declare that the oil and gas estate is the dominant estate, but that these dominant rights must be exercised with due regard for the rights of the surface estate. Presumably, the court must have felt that the language of the lease was superfluous in analyzing these conflicting rights, since the opinion does not elaborate on the lease. The court, in reviewing the record, found ample evidence to support the jury's findings. On the one hand, there was evidence that the irrigation system used by Jones was "the most advantageous, and perhaps the only reasonable means of developing the surface for agricultural purposes;" while, on the other hand, there was evidence that Getty could use other methods for its activities. Specifically, at an additional cost of some $12,000 Getty could place its pumping units in concrete cellars below the surface. In determining that Getty had alternatives available, the court was obviously influenced by the fact that other lessees in the area had placed their pumping units in cellars. Accordingly, the court found Getty's use of the vertical area of the surface to be unreasonable. However, the court further held that a special issue submitted by the trial court was an erroneous comment on the weight of the evidence and remanded the case to the trial court.

On motion for rehearing the court explained its holding as follows:

We do not hold that a mineral lessee's surface use may be found unreasonable without regard to the surface uses otherwise available to the surface owner. The reasonableness of a surface use by the lessee is to be determined by a consideration of the circumstances of both and, as stated, the surface owner is under the burden of establishing the unreasonableness of the lessee's surface use in this light. The reasonableness of the method and manner of using the dominant mineral estate may be measured by what are usual, customary and reasonable practices in the industry under like circumstances of time, place and servient estate uses. What might be a reasonable use of the surface by the mineral lessee

*Id. at 621.
†Id.
‡Id. at 622.
on a bald prairie used only for grazing by the servient surface owner could be unreasonable within an existing residential area of the City of Houston, or on the campus of the University of Texas, or in the middle of an irrigated farm. What we have said is that in determining the issue of whether a particular manner of use of the dominant mineral estate is reasonable or unreasonable, we cannot ignore the condition of the surface itself and the uses then being made by the servient surface owner.  

In *Sun Oil Co. v. Whitaker* Sun acquired from Gann an oil, gas, and mineral lease in 1946 covering 267.7 acres in Hockley County, Texas. In 1948 Gann conveyed the surface to Whitaker by a deed expressly subject to the terms of Sun's lease. At the time of this litigation Sun had completed and was producing eight oil wells from the San Andres Formation. When production from these wells declined because of pressure attrition in the San Andres Formation, Sun instituted a waterflood program for the secondary recovery of the oil by which, pursuant to permission granted by the Railroad Commission, it was taking fresh water from the Ogallala Formation and injecting that water into the San Andres Formation. Whitaker was using water from the Ogallala Formation for cultivating the surface as an irrigated farm. Following an earlier appeal from a judgment entered in a proceeding for a temporary injunction, the parties proceeded to try the case to a jury on the merits. Sun sought a permanent injunction enjoining Whitaker from interfering with its production of not more than 100,000 gallons of fresh water per day from the Ogallala Formation underlying Whitaker's tract. By cross-action Whitaker sought to enjoin Sun from producing and using the fresh water to produce the oil, and, in addition, sought to recover actual and exemplary damages for the water theretofore used. Judgment was rendered on the verdict that Sun take nothing by its suit, that Whitaker recover the sum of $12,598.03 for actual and exemplary damages, and that Sun be permanently enjoined from producing and using the fresh water for its waterflood operations. The court of civil appeals affirmed.  

The oil and gas lease conveyed to Sun the "oil, gas and all other minerals" and also provided: "Lessee shall have free use of oil, gas, coal, wood and water from said land except water from lessor's wells for all operations hereunder . . . ." The court of civil appeals based its holding on the free-use-of-water clause contained in the lease, finding that it was ambiguous and that evidence introduced at the trial supported jury findings that the parties to the lease did not contemplate or intend that such large quantities of water would be used for waterflood purposes. 

The supreme court chose to base its holding on the implied rights of a mineral lessee to the use of the surface, including therein subsurface waters, to the extent necessary to effectuate the purposes of the lease, indicating that its interpretation of the free-water clause of the lease would not create or presumably diminish any right not furnished by the implied grant. Although the opinion states that its holding is therefore on a much more narrow ground,
actually the opinion will most likely have a much broader effect, since it will govern the rights of the lessee without regard to the many varied oil and gas lease forms now in use.

Neither the opinion of the court of civil appeals nor the supreme court's opinion discusses in detail the obvious threshold question, namely: Is water included within the grant of "other minerals" as used in the language of the oil and gas lease? This issue is not mentioned by the court of civil appeals and is summarily disposed of by the supreme court with the statement: "Water, unsevered expressly by conveyance or reservation, is a part of the surface estate." Presumably, therefore, this case does clarify once and for all that water is not a mineral within the usual grant of "other minerals." Moreover, it can certainly be inferred from the disposition thus made of this issue by both courts that the test promulgated in Acker v. Quinn for interpreting the typical "other minerals" grant will not be applied to water, and if water is to be conveyed or reserved, then it can only be accomplished by using the express word "water."

Reiterating and referring to its holding in Getty, the court stated: "We not only reemphasize the limitations on the rights of the owner of the mineral estate to uses which are reasonably necessary and which are made with due regard for the rights of the surface estate owner, we also held that the selection of a use which unduly interferes with the existing uses by the surface estate owner, if there are reasonable alternatives available to the mineral estate owner, will be held unreasonable and, consequently, not reasonably necessary to effectuate the purposes of the lease." The court reasoned that the issue is to be resolved by answering two questions: "(1) Does Sun's use of Ogallala water underlying Whitaker's tract unduly interfere with Whitaker's surface use? (2) Does Sun have a reasonable alternative?" The opinion noted that in response to special issues the jury found: (1) Sun's use of fresh water would materially affect the surface owner's water supply; (2) it was "not reasonably necessary" for Sun to use water from the Ogallala Formation; and (3) the proposed use of the Ogallala water will "substantially devalue" Whitaker's surface interest.

The record revealed that the Ogallala Formation is a closed and isolated underground reservoir in which the water is not replenished except as surface water may percolate down into the reservoir. It was the only source of water available to Whitaker for domestic and irrigation purposes, and the water was being so used by him before Sun entered upon its waterflood project. Sun's proposed use would consume some 4,200,000 barrels of the water and would substantially shorten the life of Whitaker's water supply. Moreover, Sun could purchase the water from an adjoining tract for $42,000 and would receive from the sale of oil from the waterflood project some $3,200,000.

The supreme court held that the evidence supported the jury findings that the waterflood project would materially affect the supply of water available for

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14 Id. at 62.
the uses for which Whitaker was using the tract and that it was not reasonably necessary for Sun to use that water. The court indicated that there may be certain cases in which, as a matter of law, the use of the surface or the subsurface water by the lessee would be reasonably necessary, but that this was not one of those cases and the jury findings must be allowed to stand. Therefore, the court approved the judgment of the trial court awarding Whitaker damages for $9,667.03, the reasonable cash market value of the water produced and used by Sun to the date of trial. However, the court stated that inasmuch as this was a case of first impression in Texas, the evidence would not support an award of exemplary damages.

In Whitaker, as well as in Getty, the court was obviously balancing the agricultural interests with the interests of the oil industry, and in both cases placed great emphasis on the fact that by the expenditure of substantial sums the oil and gas lessee could obviate the conflicting uses by adopting alternative methods. Sun could obtain the water elsewhere for $42,000, and Getty, by spending $12,000, could locate its pumps below the height of the surface owner's irrigation system. Of course, not all cases will be as easy as these. Circumstances can be envisaged in which water from other sources might cost $500,000 with the potential income of the property not more than $600,000, or in which the expense in placing pumps in cellars might convert a marginal operation into a losing one. What happens then? Until such time as the decisions of our courts have amplified the objective criteria for adjusting these conflicts, each case will necessarily be considered on an ad hoc basis, with the operator extremely vulnerable to adverse jury findings on these and comparable issues. The panacea, of course, for the astute operator is to obtain in advance from the landowner express written authorization covering the entire spectrum of potential use. The well-drafted secondary recovery unit agreement already grants the operator the right to use the subsurface water, and it seems quite probable that the standard oil and gas lease will now be modified to negate these supreme court decisions.

Although the third in this series of cases is not concerned with the surface rights of the oil and gas operator, it seems appropriate to consider it at this point because the result reached by the supreme court was predicated on the nature of the surface estate. In a unanimous opinion the court held that a grant of "oil, gas and other minerals" did not include iron ore, even though it is a mineral with commercial value. The deed under consideration covered land located in Cherokee County, Texas, where iron ore is found extensively. These deposits conform generally to the contour of the earth's surface and are located at the surface and to depths of fifty feet below the surface. The ore is mined by the "open pit" or "strip mining" methods, by which the soil and other material overlying the ore is removed with bulldozers, and the ore is then removed with power equipment. The supreme court reasoned that the parties to a mineral deed "usually think of the mineral estate as including valuable substances that are removed from the ground by means of wells or mine shafts." Continuing, the court said:

19 Id. at 352.
It is not ordinarily contemplated ... that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired. Unless the contrary intention is affirmatively and fairly expressed, therefore, a grant or reservation of 'minerals' or 'mineral rights' should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate.  

Therefore, because of its proximity to the surface, the methods by which it is removed, and the deleterious effects of its production on the utility of the surface, iron ore is not a mineral within the purview of a grant of a mineral estate.

The court expressly left unanswered the question of how it might interpret a deed conveying or reserving minerals that are mined by the sinking of shafts or tunnels. Moreover, and quite importantly, the court reaffirmed that the doctrine of ejusdem generis was not to be used as a rule to aid in construing mineral grants or reservations. Therefore, one who holds under a grant containing the language "other minerals" preceded by the specifics "oil or gas," can take comfort in this opinion only to the extent that the "other" mineral which he claims is not mined by the open pit or strip mining methods.

II. OPEN MINE

Generally, absent express language to the contrary, or other special circumstances, a life tenant in mineral land is not entitled to receive royalties from the sales of oil and gas, but is limited to the interest or income derived from their investment. This is because the royalties are treated as corpus to be preserved for the benefit of the remainderman. The open mine doctrine, a legal fiction, is an exception to this general rule that permits the life tenant to receive all of the royalties from mines that were open at the inception of the life tenancy. Under Texas law the open mine doctrine applies not only to wells drilled prior to the inception of the life tenancy, but also to wells drilled after the commencement of the life estate under the authorization of an oil and gas lease executed by the former owner prior to the commencement of the life estate.

There has been considerable speculation and disagreement on whether the open mine doctrine would be applicable to production obtained under an oil and gas lease executed after the inception of the life estate under circumstances in which an oil and gas lease in effect at the inception of the life estate had previously expired. In Moore v. Vines the court of civil appeals held that the open mine doctrine was applicable under these circumstances, but the supreme court held otherwise.

In Moore husband and wife executed a joint will in 1959. The wife died two months later, and the husband inherited a life estate in the wife's separate property. At the time of the wife's death an oil and gas lease that had been executed in 1951 was still in effect although no production had been obtained.

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10 Id.
12 Youngman v. Shular, 155 Tex. 437, 288 S.W.2d 495 (1956).
from it. This lease expired in March 1961, and on June 1, 1961, the husband, joined by the remaindermen, executed an oil and gas lease to a lessee who obtained production from the property. In a contest between the husband and the remaindermen over the ownership of the royalties the court of civil appeals held the open mine doctrine to be applicable so that the husband was entitled to all the royalties from the property during his life tenancy. The court was of the conviction that the execution of the 1951 oil and gas lease made the property an open mine; and since this lease was in effect at the time of the inception of the life estate, the property was subject to the open mine doctrine. More crucially, however, the court refused to regard the expiration of the original lease as an abandonment or closing of the mine.

The supreme court, however, was not of the opinion that the character of the property must be immutably fixed at the inception of the life estate: "The better view, in our opinion, is that the open mine doctrine is not applicable beyond the lease in existence at the time of the vesting of the life estate . . . ." The court noted that resolution of this legal issue depends on whether paramount emphasis is to be given to the fact that wells are drilled under authority of an existing lease, or whether the criterion is the intention of the grantor. While it is not at all clear, it seems that the supreme court's opinion prefers not to adopt either of these approaches to the exclusion of the other. At one point the opinion highlights intention as the key factor, saying that under the circumstances the court was unable to "attribute an intent to Ruby Vines that the land should continue to be leased for mineral development," while at the same time adopting an inflexible rule that presumably may not be vitiates by a contrary intention. It is regrettable that the court did not fully articulate its reasoning. The court also mentioned that the will neither authorized the life tenant to lease the land for mineral development nor gave him enjoyment of the proceeds from any such lease. It, therefore, seems reasonable to speculate that the presence of one or both of these rights might cause the supreme court to reach a contrary conclusion.

III. THE RELINQUISHMENT ACT

The owners of land patented by the state of Texas with a mineral classification do not own the oil, gas, or other minerals. However, as a result of the Texas Relinquishment Act the owner of the soil is made the agent of the state for the purpose of leasing the land for oil and gas development, and is entitled to share equally with the state in the bonus, royalty, rental, or other consideration paid by the lessee. The case of Glass v. Skelly Oil Co. dealt with the meaning of the term "owner of the soil," as used in the Act. In Glass the former owner of the surface died in 1950. His will created several life estates in specified undivided fractional interests with the respective remainders going to specified classes that were subject to open or close and, therefore, not ascertain-
able until the termination of the life estates. The will also authorized the life tenants to execute oil, gas, and mineral leases. In 1967 for a bonus of $192,000, with a like amount being paid to the state, the life tenants executed an oil and gas lease to Skelly Oil Company. Certain of the known remaindermen brought suit seeking to have the lease set aside, contending that it had not been properly executed because the phrase "owner of the soil" as used in the Relinquishment Act must be construed to mean both the life tenant and the remainderman. Under the facts the court of civil appeals held that the life tenants possessed full authority to act as representatives for the state, and declared the lease valid. The result was predicated on the fact that the will clothed the life tenants with the power to execute leases, and the further fact that since the ultimate remaindermen could not be determined until the deaths of all the life tenants, the objectives of the Relinquishment Act should not be frustrated by the absence or uncertainty of an "owner" to act for the state.

IV. POOLING AND UNITIZATION

The Mineral Interest Pooling Act, adopted by the Texas Legislature in 1965, vested the Railroad Commission with limited power to compel unitization or pooling in order to protect correlative rights, to avoid the drilling of unnecessary wells, or to prevent waste. This marginal power could only be invoked by an "owner" of a mineral interest in the proposed unit. As reported in last year's Annual Survey, the supreme court in Coleman v. Railroad Commission held that a royalty owner is not one of the "owners" entitled to invoke the jurisdiction of the Railroad Commission to effect compulsory pooling. That holding has been amplified by the decision in Northwest Oil Co. v. Railroad Commission. In Northwest the oil and gas operator drilled and completed a producing gas well. The Stephensons owned a tract in fee of some six acres included within the perimeter of the 320-acre proration unit created by the operator. Although the operator "made overtures" to the Stephensons to include their acreage in the unit, no agreement was ever concluded. The Stephensons then filed an application with the Railroad Commission for an order permitting their six-acre tract to be pooled as part of the 320-acre unit, which was granted by the Commission. In an action brought by the operator to declare the order of the Commission invalid the trial court sustained the action of the Commission. While the case was on appeal, the Coleman decision was announced by the supreme court. The court of civil appeals, relying exclusively on Coleman, said that it interpreted that decision to mean that an "owner" entitled to make the necessary application for forced pooling under the Act was an owner who not only had the right to drill a well, but one who had in fact proposed the drilling of a well. The opinion, in examining the record made before the Commission and the trial court, concluded that there was no substantial evidence to support the Commission's order because there was no evi-

33 460 S.W.2d 404 (Tex. 1970).
34 462 S.W.2d 371 (Tex. Civ. App.—Beaumont 1971), error ref. n.r.e.
35 Id. at 373.
idence that the Stephensons had ever proposed that a well be drilled on their tract. Accordingly, it was held that the order of the Railroad Commission was void.

The holdings in both Coleman and Northwest have been repudiated by the Texas Legislature as a result of subsequent amendments to article 6008c. That statute, as amended, provides that "where at least one of the owners of the right to drill has drilled or has proposed to drill a well" the application for compulsory pooling may be made by "the owner of any interest in oil and gas in an existing proration unit or, with respect to a proposed unit, the owner of any working interest or any owner of an unleased tract other than a royalty owner." If a party comes within any one of these classes of ownership, he presumably may request the creation of a unit merely by showing that he previously has made a "fair and reasonable offer to voluntarily pool." This means that the owner of a small fractional royalty interest can, with the threat of this statute, intimidate his lessee, as well as adjoining owners, into voluntarily forming units which they might not otherwise be disposed to create.

The plaintiffs in Smith v. Killough sought to have a unit that had been unilaterally formed by their lessee pursuant to a lease pooling clause declared to be null and void. The basis of this claim was that the lessee was a fiduciary or trustee for the "mutual benefit of all concerned" who had acted arbitrarily and outside the scope of the powers granted in the oil and gas lease to effectuate pooling. The plaintiffs asserted that this breach was evidenced by the fact that the lessee pooled the plaintiffs' land with an adjoining lease at a time when there was a producing oil well on the plaintiffs' land, while just previous to that a dry hole had been drilled on the adjoining acreage included within the unit. The plaintiffs, quite understandably, felt that their productive land should not be pooled with land that had been condemned as nonproductive. The court of civil appeals impliedly approved the general rule urged by the plaintiffs, but denied them relief because of an express jury finding that the lessee had acted in good faith, and because of additional special issues which established that the plaintiffs had expressly agreed with the royalty owners under the adjoining tract that the unit should in fact be formed.

Jones v. Hunt Oil Co. is a sequel to the litigation that culminated in the 1966 decision by the Texas Supreme Court in Jones v. Killingsworth. In the earlier litigation the plaintiffs successfully contended and the court held that the lessee had exceeded the authority granted it under the terms of the oil and gas lease, that a unit formed pursuant thereto was void, and that because there was no production on the plaintiff's land at the time the unit was declared void, the underlying oil and gas lease, which was beyond its primary term, had terminated. In this later proceeding the plaintiffs sued their former lessee and unit operator, Hunt Oil Company, the other unit working interest owners, and the purchaser of crude oil from the unit, claiming damages resulting from an alleg-

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37 Id.
36 Id.
35 461 S.W.2d 510 (Tex. Civ. App.—Eastland 1970), error ref. n.r.e.
40 456 S.W.2d 506 (Tex. Civ. App.—Dallas 1970), error ref. n.r.e.
41 403 S.W.2d 325 (Tex. 1965).
ed civil conspiracy. Among the acts of the defendants allegedly constituting the conspiracy were: (1) entering into the unit operating agreement; (2) making application to the Railroad Commission for a drilling permit; (3) laying pipelines; (4) operating the unit; and (5) advising the plaintiffs that they would not allow the plaintiffs to obtain a permit for the plaintiffs to drill on their land. The court, after reviewing the test for civil conspiracy articulated in Schlumberger Well Survey Corp. v. Nortex Oil & Gas Corp.,[4] found that as a matter of law the evidence failed to show that there was a question of fact on the issue of conspiracy. Moreover, the court held that the plaintiffs were precluded from any recovery because of their "stipulations, ratifications and specific grants," among which were the facts that the plaintiffs failed to assert any claim for damages in the previous litigation and stipulated in open court in that earlier litigation that they would ratify the unit if they were successful in that litigation.

V. INTERPRETATION

In Texas Gas Utilities Co. v. Barrett[5] Associated Oil & Gas Company, as seller, entered into a contract for natural gas service with Barrett and others, as purchasers, for the purpose of supplying natural gas for use by the purchasers in fueling irrigation water well pumps on farm properties that the purchasers held under a five-year agricultural lease dated January 17, 1964. In March 1964 and at an expense in excess of $100,000 Associated constructed a five-mile pipeline to the purchasers' property. Deliveries of natural gas were commenced on April 6, 1964. Subsequently, the contract was assigned by Associated to Texas Gas Utilities Company. Thereafter, the purchasers were evicted from the leased properties by their lessors and thereby prevented from taking gas under the contract.

The contract required the seller to deliver the natural gas for the full period of the contract in return for the promise of the purchasers to "take or pay" for the gas at a rate of fifty-five cents per MCF and "an annual minimum . . ., whether used or not, of $7.50 per horsepower for each engine installed . . . ."[6] The contract provided that Associated "will make reasonable provision to insure a continuous supply of natural gas but does not guarantee a continuous supply of natural gas, and shall not be liable for damages occasioned by interruptions to service or failure to commence delivery, caused by conditions beyond its reasonable control . . ." or caused by other acts of force majeure.[7] Moreover, the contract contained the following exculpatory provision:

It is further and distinctly understood and agreed that the company assumes no obligation whatever regarding the quantity or quality of gas delivered hereunder, or the continuity of service, and shall not be liable therefor, but the company will endeavor to supply the requirements of customer for the above class of service to the extent of the amount of gas available for such service . . . .[8]

[6] Id. at 411 n.1.
[7] Id. at 411.
[8] Id.
The selling gas company sought to recover from the purchasers the minimum payments due under the take-or-pay provisions of the contract, which aggregated $34,737.36. A take-nothing judgment rendered against the gas company by the trial court was affirmed by the court of civil appeals, which viewed the contract as unenforceable because it was devoid of mutuality of obligation.\(^{47}\)

The supreme court, however, seemed to regard these distinctions of the lower courts as a bit too invidious, and in a well-reasoned opinion declared that the agreement was "a binding and enforceable contract."\(^{48}\) The gas company was legally bound to deliver the gas and to perform other services in order to implement that obligation, and the purchasers in turn were bound to pay the charges agreed upon. The court concluded that the exculpatory clauses were included to insulate the seller from liability for failure to deliver gas under specifically defined and limited contingencies, but that their presence did not mean that the seller could arbitrarily and with impunity refuse to honor its obligation. Therefore, the court, while retaining the anachronistic doctrine of mutuality, found the contract before it not to be lacking in this respect.

In another case,\(^{49}\) the court of civil appeals was forced to construe a mineral deed that had been grotesquely prepared on a stationery store form in order to determine whether the interest conveyed was for a limited term or was perpetual. The deed in question purported to convey an undivided one-half interest in and to the oil, gas, and other minerals in land located in Marion County, Texas. However, the printed portion of the deed defining the interests transferred in prospective rentals, bonuses, and royalties accruing or to be paid with respect to leases which might be subsequently executed provided that the grantee would receive none of those benefits. However, the following language was typed into the form deed:

\begin{quote}
It is agreed and understood by and between the parties hereto that this deed is intended to convey only one-half of the mineral under said land but the Grantee is not to receive any part of the Bonus Money in case the present lease should lapse or become forfeited, and it will not be necessary for said Grantee to join in the lease and is to receive no part of the rental money paid to extend the term of said lease.\(^{50}\)
\end{quote}

The court of civil appeals, while pointing out that there were inconsistencies in the language of the instrument, placed its primary emphasis on the first portion of the typed clause, referred to by the court as the "mutual intent provision," and held that the grantee acquired a perpetual nonparticipating royalty interest in the property.

In Whitaker v. Formby\(^{51}\) the mineral owners executed an oil and gas lease on February 18, 1961, to Yarbrough, as lessee, covering 113.12 acres and containing a continuous drilling obligation. This lease provided that upon

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\(^{48}\) 460 S.W.2d at 412.

\(^{49}\) Hasty v. McKnight, 460 S.W.2d 949 (Tex. Civ. App.—Texarkana 1970), error ref. n.r.e.

\(^{50}\) Id. at 950.

\(^{51}\) 469 S.W.2d 241 (Tex. Civ. App.—Texarkana 1971).
the failure of the lessee to drill a second well, the lease would terminate as
to all of the acreage covered by the lease except for eighty acres around the
first well, as designated by the lessee. The lessee completed a producing well
in 1961, but drilled no other wells on the property. For reasons not mentioned
in the opinion, the lessee did not designate the eighty acres earned by the
first well. Thereafter, in 1966 the mineral owners executed a lease to Whitaker
covering the 113-acre tract, but it was expressly made subject to the 1961
lease. Whitaker never requested the lessee under the earlier lease to desig-
nate the eighty acres which he was entitled to select around the producing
oil well; but, to the contrary, claimed that he owned an undivided interest in
the 113-acre tract and the production from the first well. The court of civil
appeals held against a claim made by Whitaker for damages that were alleged
to have resulted from the failure of the lessee under the first lease to select
the required acreage, because Whitaker had never legally requested the other
parties to select or designate the eighty-acre tract surrounding the producing
well, and, in effect, denied them that right by claiming an undivided interest
in the whole lease.

The case of Trad v. General Crude Oil Co, involved the question of the
propriety of the payment of delay rentals under an oil and gas lease. The
lease in question was executed by George K. Trad, individually and as attor-
ney in fact for numerous parties. It was also signed individually by Charles
Trad. Although the lessee made timely payment of the delay rentals to the
depository bank specified in the lease, it gave instructions to the bank that
the total rental was to be credited to George K. Trad, individually and as
attorney in fact for various other parties and also for Charles Trad. The
opinion of the court of civil appeals indicates that there was never a showing
that George K. Trad was the attorney in fact for Charles Trad. However, the
court refused to hold that the payments were improperly made, stating that
"the bank was made the agent of lessors under the terms of the lease. No
instructions were given lessee as to how the payment was to be divided or
credited to the various lessors. The timely payment of the rentals to the de-
pository bank were substantial and sufficient compliance with the terms of
the lease." Justice Cardena dissented, stating that the lease required rental
payments to the depository bank to be made "to the credit of lessor," which
the lessee did not do; rather, the lessee directed the credit to a person other
than the lessor. He summarized his position thusly: "I know of no case hold-
ing that payment to the credit of X as agent of A has been held to be pay-
ment to the credit of A where X is not A's agent."

In Candela v. Steidle, the plaintiff and defendant, who each owned a frac-
tion of the working interest in certain properties, entered into an agreement
which provided that efforts would be made to sell their combined interests,
but that if this could not be accomplished by a specified date, the plaintiff
would convey all of his interests to the defendant in return, in part, for the
defendant's assumption of specified indebtedness against the lease. Since the

53/d. at 615.
54 Id. at 616.
55 457 S.W.2d 461 (Tex. Civ. App.—Corpus Christi 1970), error ref. n.r.e.
property had not been sold in accordance with the agreement, the plaintiff
assigned his undivided working interest to the defendant who, six months
later, sold the entire working interest to another party for a profit. The plain-
tiff in Candela contended that he was entitled to a portion of the profit realized
from the sale. The court of civil appeals carefully reviewed each provision of
the admittedly unambiguous agreement and held that the plaintiff had re-
linquished all his rights in the leases and was not entitled to recover any of
the claimed profits.

VI. PROCEDURAL PROBLEMS

Perhaps the most untenable holding of any case rendered during this survey
period was that of Pan American Petroleum Corp. v. Vines. The plaintiff,
a royalty owner in a 700-acre gas unit, filed suit against Pan American, the
unit operator and purchaser of the gas, seeking a declaratory judgment con-
struing the term "wellhead market value" in a division order executed by the
plaintiff. On appeal following an adverse judgment, the defendant argued that
the trial court erred in overruling its plea in abatement based on the absence
of indispensable parties. The defendant asserted that all the royalty owners
in the unit who had signed identical gas division orders were indispensable
parties, and that since they were not joined, the plea should have been sus-
tained. The court of civil appeals sustained the defendant's contention and
reversed and remanded the case to the trial court. The court concluded that
even though all the royalty owners had not signed the same division order,
because they each had signed separate division orders with identical language,
all the separate division orders were treated as a single contract; and, inasmuch
as the suit was brought to interpret this "contract," all of the parties thereto
were indispensable.

The holding of the court of civil appeals appears questionable, not because
of the rule it purports to follow, but because the application of that rule is
based on a non sequitur. The court reasoned that the mere execution of identi-
cal documents by multiple parties is tantamount to the execution of a single
contract or the execution of multiple counterparts of a single contract. Since
the opinion does not quote or describe the provisions of these division orders,
it must be assumed that they did not contain counterpart language or similar
expressions manifesting an intent that they were to be regarded as a single con-
tact. In addition, although the opinion does not so indicate, division orders
normally are revocable by either the purchaser or the seller, and in many in-
stances not all the royalty owners sign identical division orders. Accordingly, it
seems quite probable that the industry does not regard the usual division order
executed by multiple parties, whether identical or not, as constituting a single,
indivisible contract. However, as a result of the instant case, cogent arguments
can now be made that a single royalty owner is precluded from exercising a
right of revocation or amending the division order with the consent of the
purchaser.

In a suit brought by the holder of a top lease to declare a prior oil and gas

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459 S.W.2d 911 (Tex. Civ. App.—Tyler 1970), error ref. n.r.e.
lease terminated for failure to produce in paying quantities, it was held that a national bank could not claim the benefits of federal laws which permit a national banking association to be sued in its domicile because the proceeding was regarded as one peculiarly local rather than transitory; thus thereby distinguishing it, in this court's view, from *Langdeau v. Mercantile National Bank*.

*Bonita Oil Co. v. Wrather* dealt with the statute of limitations. Under a written contract dated in 1949 the plaintiff agreed to drill and operate oil and gas leases in return for the defendant's promise to pay a portion of the plaintiff's expenses and to convey an interest in the wells if they produced. The plaintiff completed the wells and incurred all expenses in connection with the contract on or before 1956. In 1965 plaintiff made demand on defendant for money alleged to be due under the 1949 contract. More than four years after the demand letter the plaintiff filed suit. The court of civil appeals was palpably correct in holding that the four-year statute of limitation barred the plaintiff's cause of action, pointing out that at the very latest the cause of action accrued and the statute commenced running when the plaintiff demanded payment in 1965.

**VII. OPERATIONAL DECISIONS**

In *Sohio Petroleum Co. v. Schumacher* Schumacher was granted a permit by the Railroad Commission to drill a well on a 2.668-acre tract out of a reconstructed 17.8-acre tract as an exception to rule 37. The 17.8-acre tract had previously been used as a highway by Jones County, and after it had been abandoned, the county conveyed portions of the fee of the abandoned road to abutting and adjoining landowners. Schumacher's application was for a first well on the reconstructed 17.8-acre tract under the rule established in the *Century* case. In *Schumacher v. Sohio*, an adjoining owner of producing oil and gas wells, filed suit to set aside the order of the Railroad Commission granting the permit, contending that modifications to the *Century* rule dictated that a rule 37 exception could not be granted to the owner of the drill site in this case. This contention was rejected by the court of civil appeals, which held that the county originally possessed the absolute right to a well on the 17.8-acre tract, and this right, which was quitclaimed to the abutting owners, was the right legally pursued by Schumacher.

In a per curiam opinion the supreme court refused to issue a writ of mandamus against the Commissioner of the General Land Office or the School Land Board of the State of Texas to require them to accept a rejected bid filed by the petitioner for an oil and gas lease on property situated in the Gulf of

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59 461 S.W.2d 451 (Tex. Civ. App.—Waco 1970), error ref. n.r.e.
61 Rule 37, Railroad Commission.
62 Railroad Comm'n v. Magnolia Petroleum Co., 130 Tex. 484, 109 S.W.2d 967 (1937).
Mexico. The court held that article 1735 precluded this action against state boards and commissions.

In Humble Oil & Refining Co. v. Calvert Humble sued to recover severance taxes that it had paid under protest to the state of Texas on its production of oil and gas from a lease covering the Corpus Christi Naval Air Station. Inasmuch as Humble's oil and gas lease was executed by the United States, as lessor, Humble claimed that the production under it was from an area of exclusive federal jurisdiction and, therefore, immune from the Texas tax. The court of civil appeals upheld Humble's claim and required a refund of the taxes. The court reasoned that when the United States acquired the land in question for construction and operation of a naval air station, the state ceded exclusive jurisdiction to the United States, which was not altered as a result of the oil and gas lease, and as a federal enclave any oil and gas production therefrom was immune from taxation by the state. The supreme court has granted writ of error.

In Harding Bros. Oil & Gas Co. v. Jim Ned Independent School District the owners and operators of various oil properties sought to enjoin the collection of ad valorem taxes, claiming that the underlying assessments made by the board of equalization of the school district were void because: (1) the school district surrendered its tax valuation powers to a nonresident private firm of tax consultants; (2) the tax consultants used arbitrary and erroneous systems for determining values of oil and gas properties; and (3) the tax consultants were paid fees based upon a percentage of the total valuations, so that increased valuations meant a commensurate increase in the fee. However, although the taxpayers had rendered the properties, they did not tender the payment of any tax to the school district. Because this was suit for injunctive relief, and, therefore, one in equity, the court held that the failure of the taxpayers to tender the amount of taxes owed under the taxpayers' theory of valuation precluded the granting of the equitable relief sought. It is regrettable that this very technical holding prevented a decision on the merits, since the taxpayers raised issues that are increasingly troublesome and are in need of solution.

Last year's Annual Survey commented on the decision in Tenneco Oil Co. v. Padre Drilling Co. In that case Padre was denied the right to recover attorney's fees in a suit against Tenneco for payment for the drilling of an oil and gas well because article 2226 was construed not to authorize the recovery of attorney's fees by a corporation for "personal services rendered" or for "labor done." This holding may have been abrogated by an amendment to article 2226 which provides that "any person, corporation, partnership, or other legal entity having a valid claim against a person or corporation for services rendered, labor done, material furnished," may, if entitled to judgment and

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68 McCoy, Oil and Gas, Annual Survey of Texas Law, 25 Sw. L.J. 63, 73 (1971).
69 453 S.W.2d 814 (Tex. 1970).
providing that appropriate demands have been made, recover its reasonable attorney's fees.\(^1\)

City of Abilene v. Burk Royalty Co.\(^2\) involved serious interferences by the city in the operations of Burk Royalty Company. The company operated a waterflood containing ten producing wells and three injection wells that adjoined the airport of the city of Abilene. The city commenced the expansion of the airport, and during the course of that construction it became necessary to relocate the tank battery and the transmission lines that furnished electrical power to these wells. To accomplish this the lines were disconnected to all the wells in the airport portion of the waterflood unit on August 7, 1968, and thereafter electrical service was restored to all the wells with the exception of two. Other disruptions to Burk's operations involved the temporary removal of pipe by city employees and the breaking of two oil flow lines resulting in a loss of oil. Difficulties were also experienced by Burk's employees, whose access to some of the wells was impeded. Burk sued the city for damages, claiming that the conduct of the city constituted an inverse condemnation. The jury awarded Burk damages of $88,000, the difference in the value of Burk's interest in the waterflood unit immediately before and immediately after August 7, 1968, the date two of the wells were shut down as a result of the city's construction activities. The court of civil appeals affirmed, stating that the actual physical invasion of Burk's property coupled with an intention to permanently encroach thereon constituted a permanent taking of Burk's property.\(^3\) The supreme court, however, reversed and remanded, stating that the construction activities of the city "did not constitute a constitutional taking or damaging and, in fact, were no more than tortious acts which were sporadic and transient in nature."\(^4\) This holding may very well mean that Burk's injuries will not be assuaged, unless, of course, it had previously followed the requisites necessary to enforce tort liability against a municipality.

In Willey v. Vincik an amendment to an oil and gas lease contained a surface damage clause that required the lessee to "pay damages on each drilling site of not less than $500 per acre for each acre of land actually damaged . . . .\(^5\)" Thereafter the lease was assigned, and the assignee drilled six wells on the plaintiff's land during the period of May 1967 to March 1968. The surface owners filed suit against the lessee and his assignee seeking damages pursuant to the provisions of the surface damage clause. The trial court awarded damages in the amount of $7,815.00, representing damages of $500 per acre times 15.63, the total acres found by the jury to have been damaged. The court of civil appeals, after reviewing evidence that the surface of the land was adversely affected for farming purposes, found that there was evidence to support the finding of the jury that a total of 15.63 acres had in fact been damaged and affirmed the judgment of the trial court.

In Jackson v. Marathon Oil Co.\(^6\) the plaintiff sued Marathon for damages

\(^{12}\) 470 S.W.2d 643 (Tex. 1971).
\(^{13}\) 450 S.W.2d 220 (Tex. Civ. App.—Eastland 1970).
\(^{14}\) 470 S.W.2d at 646.
\(^{16}\) 441 F.2d 511 (5th Cir. 1971).
allegedly resulting from Marathon’s negligence in allowing crude oil to leak from its oil flow lines. Earlier and in return for approximately $4,000 the plaintiff had executed and delivered to Marathon various documents that released Marathon “from all claims and causes of action of every kind and character, if any, which I am or may hereafter become, entitled to assert by reason of, or arising out of or in any way incident or appertaining to the drilling, completion, operating and producing (including all future producing operations) . . . .” Answering the contention made by the plaintiff that this language referred only to operating and producing the wells and not to damages arising out of a leak in the flow lines, the Fifth Circuit stated: “To construe the releases as giving immunity for damages caused at the well sites but not that caused along the flow lines would arbitrarily narrow the broad terms of the releases.”

\[17 Id. at 512.\]
\[18 Id.\]