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THE DOMINANT OIL AND GAS ESTATE—MASTER OR SERVANT OF THE SERVIENT ESTATE

William B. Browder*

The grant of an oil and gas lease carries with it the right to use so much of the leased premises in a manner reasonably necessary to comply with the terms of the lease and effectuate its purposes. The lessee is the owner of the dominant estate, the lessor the owner of the servient estate. As owner of the dominant estate the lessee has the legal right to use land reasonably necessary in his operations to the exclusion of the owner of the servient surface estate. He has the right and privilege to go on the land and do all things necessary and incidental to the drilling of the wells and to the production of the oil and gas. The surface owner is entitled to recover damages from the lessee only for wanton or negligent damage or destruction or for the use of more land than is reasonably necessary.

These rules governing the relationship between the lessor and the lessee are simple to state. The scope and limitations as fixed by the courts of the various states are often more difficult to determine. In most of the opinions it is broadly declared that a lessee has the right to go on the land and do all things “necessary or incidental” to his operations “to the exclusion of the lessor.” However, an explanation usually follows that, even so, the operator must exercise his rights “with due regard to the rights of the owners of the surface.” The problems confronting the attorney who must be prepared to reconcile these issues in his presentation to a trial court are illustrated in the language of several recent decisions of the Texas Supreme Court. For example, in Warren Petroleum Corp. v. Martin1 the court said:

The petitioner [lessee] was lawfully in possession of the premises and being the owner of the dominant estate had the legal right to use so much of the leased premises as were reasonably necessary in its operation to the exclusion of respondent [lessor], the owner of the servient estate.

There is no evidence that petitioner intentionally permitted the oil to escape from the pump. The only duty owed the respondent was not to intentionally, wilfully or wantonly injure his [lessor’s] cattle. The jury has found that petitioner did not intentionally injure the cattle.

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1 153 Tex. 465, 469, 271 S.W.2d 410, 412-13 (1954).
It was necessary for respondent to plead and prove that petitioner used more land than was necessary.

Compared to this is the more recent statement of the court in *Brown v. Lundell*:\(^3\)

The right of the lessee in exploring for and producing oil and gas embraces only the doing of those things expressly granted or necessarily implied in the lease as necessarily incidental thereto. All property rights not granted are reserved in the lessor. The rights of the lessor and lessee are reciprocal and distinct. If either party exceeds those rights he becomes a trespasser. . . . Thus, if the lessee negligently and unnecessarily damages the lessor's land, either surface or subsurface, his liability to the lessor is no different from what it would be under the same circumstances to an adjoining landowner. . . . The use of the lessor's land is limited. In other words the lessor has granted and leased to the lessee only so much of his land as will be reasonably necessary to effectuate the purpose of the lease, and to be used in a non-negligent manner.

In his dissenting opinion in *Brown v. Lundell*, Justice Smith pointed out to the majority:

Under the authorities, as I interpret them, the oil and gas lessee has the right to take without paying damages a part of the surface of the land for drilling operations, and the lessee is not liable to the lessor or his tenant for a negligent use of that land so long as he takes no more than is reasonably necessary. The lessee's only liability, admitting that the part of the premises taken is reasonably necessary, is for wilful, intentional or wanton destruction of the lessor's property. . . .

. . . .

The cases recognize the right of the lessee to exclusive possession of so much of the land as is reasonably necessary for his operations. . . . Since there is no evidence showing the boundaries of the area, either on, above, or below the surface which the lessee is entitled to use to the exclusion of the lessor, how can it be said with any degree of certainty that the salt water has escaped beyond the area which the lessee had the right to use? The rules of common law negligence cannot be applied until this controlling issue has been determined. . . .

. . . .

This court refers to the case of Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362, 65 A.L.R.2d 1352 (1957). . . . The court here admits that this case correctly states the law, yet the majority here is willing to assess damages against petitioner without requiring a finding that more land was used than was reasonably necessary. The court has by implication held that the jury findings of negligence are the equivalent of findings that the petitioners used more land than was reasonably necessary. . . .

\(^3\)162 Tex. 85, 87, 344 S.W.2d 863, 866 (1961).

\(^4\)Id. at 97-99, 344 S.W.2d at 872-73.
As an example of the problem to be solved by an attorney seeking to advise an oil company client concerning proposed recovery operations, consider the holding of the United States Court of Appeals for the Fifth Circuit in Armstrong v. Skelly Oil Co. In that case the court held that the lessee could use all of the gas produced in order to stimulate production of oil, if reasonably necessary, and said:

Based on the clauses above quoted, we think it is a fair and reasonable construction of the lease that the lessee had the right to use all of the gas produced, whether from oil wells or gas wells only, to stimulate the production of oil, if in the exercise of good judgment it was reasonably necessary . . . .

There is no doubt that appellees had the right to use all the gas produced on the land without cost, as it was reasonably necessary to properly work the property and to recover the oil produced in the most economical manner. . . . (Emphasis added.)

In contrast, there is the opinion of the same court in Dunn v. Republic Natural Gas Co., in which the court denied the lessee the right to use gas free of cost for jetting and repressing, and said:

We agree with appellants and not with the District Judge though, that they [the lessors] are entitled to a recovery for all of the gas used for "jetting", as well as that used on their leases as that used on the leases of others. (Emphasis added.)

How can such language and holdings be reconciled? How can a practicing lawyer give advice to his clients on the probable legal effects of their activities? An analytical approach to problems such as these—and there are many more than the two just posed—requires an examination of the lessor-lessee relationship as it has evolved through the courts over the years.

I. USE OF THE SURFACE

A. General Principles

It is fundamental, of course, that certain surface uses by the lessee are consistently recognized within clearly defined limits. The typical oil and gas lease contains express provisions for the use of the surface. Most of the modern lease forms provide that the lessor "has granted, demised, leased and let and by these presents does grant, demise, lease and let unto said lessee, with the exclusive right to prospect, explore, by use of core drills or otherwise. . . ." Other

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4 55 F.2d 1066 (5th Cir. 1932).
5 Id. at 1068.
6 124 F.2d 128 (5th Cir.), cert. denied, 315 U.S. 821 (1942).
7 Id. at 130.
forms state that the lessor "grants, leases and lets to the lessee the following described property for the purposes of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals. . . ." Some provide only that the property is leased "for the sole and only purpose of mining and operating for oil, gas, potash, or any other minerals, and of laying of pipelines and of building of tanks, power stations and structures thereon, to produce, save and take care of said products."

The courts and the text and article writers have consistently recognized that, whether expressed or not, the lease carries with it a right to possession and use of the surface. The basis for this view is the fundamental and often stated precept that the "rule is based upon the principle that, when a thing is granted, all the means to obtain it and all the fruits and effects of it are also granted."

The Texas courts have explained that the grant or reservation of minerals carries with it, as a necessary appurtenance, the right to use so much of the surface as may be necessary to enforce and enjoy the mineral estate conveyed or reserved. They have said that the lessee owns the dominant estate in the land for the purposes of drilling for, producing, storing, and marketing oil. In *Guffey v. Stroud*, the commission of appeals made the grant plain, declaring that the grant of the oil also carried with it a grant of the right-of-way, surface, soil, water, gas, and the like essential to enjoyment of the actual grant of the oil. The Texas courts have gone even further by stating that the mineral lessee possesses the "exclusive right" to

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8 Squires v. Lafferty, 91 W. Va. 307, 309, 121 S.E. 90, 91 (1924); see 4 Summers, Oil and Gas § 652, at 4 (1962).


use so much of the leased premises as is reasonably necessary in the operations in drilling for and in producing oil and gas.\textsuperscript{18}

The courts of California and other states have, on the other hand, generally stated that the lessee merely takes the right to such part of the surface as is reasonably necessary to secure, develop, and care for the oil and gas produced. This is so even where the lease is silent as to the uses of the surface conveyed.\textsuperscript{19} An Arkansas court, however, has apparently announced the same rule as the Texas courts, that is, that the lessee's rights are exclusive for the term of the lease.\textsuperscript{14}

The Illinois courts have held that the law implies a grant of the right to use all of the premises which is essential to the enjoyment of the property granted.\textsuperscript{15} An illustration of this doctrine is Phoenix v. Graham,\textsuperscript{16} where an Illinois court stated with respect to the disposal of salt water:

The proprietor of oil land free from salt water has a natural advantage, and owns a better property than one whose land is subject to the evil. The latter has a burden attached to his ownership, and no logical reason can be given for the law to remove that burden, and give him a better property than he owns, by casting the entire burden on the operator to dispose of the salt at his peril. The burden on the operator is sufficient if he is required to use the reasonable care of the ordinary prudent operator.

Oklahoma courts have expressed the thought that the holder of a valid oil and gas lease has the right and privilege to go on the land and do all those things necessary and incidental to the drilling of wells, including the right to use the surface; the only basis for recovery of damages by the surface owner is by proof of wanton or negligent destruction, or of damage to a portion of the land not


\textsuperscript{14} Henry v. Gulf Ref. Co., 176 Ark. 133, 2 S.W.2d 687 (1927).

\textsuperscript{15} Jilek v. Chicago, Wilmington & Franklin Coal Co., 382 Ill. 241, 47 N.E.2d 96 (1943); Thralkeld v. Inglett, 239 Ill. 90, 124 N.E. 368 (1919).

\textsuperscript{16} 349 Ill. App. 326, 110 N.E.2d 669, 672 (1953).
reasonably necessary for the oil and gas development." This is in line with the decisions of the Texas courts.18

It is difficult to draw conclusions from these varied holdings. However, certain accepted principles have been espoused:

In the first place, a certain amount of use of and damage to the leased premises is regarded as being authorized under the express or implied terms of the lease contract. . . .

If it develops that damage was sustained by or upon the leased premises, the principle employed by the courts as a starting point for discussion of the problem is that the mineral lease creates and vests in the lessee the dominant estate in the surface of the land for the purposes of the lease. As the holder of the dominant estate, the mineral lessee is permitted to occupy such space and do such damage as is reasonably necessary to conduct the operations permitted by the lease. This simply means that the lessor has, through the mineral lease, authorized by implication such conduct of the lessee, and of course there can be no recovery by him for damage resulting from authorized conduct on his property.19

Although the reason is not always clear, the courts20 usually add, as did the Texas court in Warren Petroleum Corp. v. Martin,21 "Of course, each must exercise their respective rights with due regard for the rights of the other." Alternatively, courts quote from the often cited opinion in Gulf Prod. Co. v. Continental Oil Co.: "Of course, in a lease of this character the surface estate is servient to the mineral estate for the purposes of the mineral grant, but even this right is to be reasonably exercised with due regard to the rights of the owner of the surface."22

B. As To Cotenants

With respect to cotenants, the generally prevailing rule is that a lessee of any one tenant in common has the right to go upon and

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19 See Keeton & Jones, Tort Liability and the Oil and Gas Industry, 35 Texas L. Rev. 1 (1956).
21 153 Tex. 465, 469, 271 S.W.2d 410, 413 (1954).
22 132 S.W.2d 553, 562 (Tex. 1939), opinion withdrawn, 139 Tex. 183, 164 S.W.2d 488 (1942).
develop the land and operate it for oil and gas. For that purpose he may drill wells, construct necessary pits, roads, and the like. Thus, a tenant in common may himself or by lease to another utilize or sell the oil or gas discovered on the common land. However, he is subject to a duty to account to his cotenant for a fractional interest in the royalty or for the latter's proportionate share of the value of the oil produced less a proportionate share of the expenses of production and development.\footnote{23}

C. Rights Of The Lessee

In some cases the question of whether the use being made of the surface is reasonable is one of fact for the jury. This is true only if there could be a reasonable difference of opinion about the particular operation in question. As a result, the courts have quite properly held certain uses reasonable and necessary as a matter of law.\footnote{24}

As examples in this area, it has been held that the lessee has the right of entry upon and over the land.\footnote{25} No buildings may be placed on the land which will interfere with this right of ingress and egress.\footnote{26} The lessee can locate and build the roads where he and his experts decide proper.\footnote{27} He can then oil the roads to make them suitable for transportation of the heavy machinery and equipment needed for drilling the wells.\footnote{26} In a case involving these problems, \textit{Gulf Oil Corp. v. Walton, 317 S.W.2d 260 (Tex. Civ. App. 1958); Cozart v. Crenshaw, supra note 26.\footnote{28}
Oil Corp. v. Walton, a Texas court recognized and gave preference to the testimony of an oil company’s experts over that of the land owner’s rancher witnesses, declaring:

Taking the testimony of appellees’ [lessor’s] witnesses at its most optimistic interpretation and highest value, we find only that there were some so-called existing roads, or old roads. The witnesses testifying were ranchers, and admittedly did not know if the roads were usable for any heavy machinery or the demands that appellant might make upon them. . . . In the first place, most of the roads have already been built; and in the second place, admittedly there are no roads to some of the proposed drill sites; and thirdly, there is no evidence that the roads once used are feasible and economical under this water flood spotting plan or development. . . .

. . .

Therefore, we believe and hold that appellant’s [lessee’s] second point is well taken, in that appellees failed to prove that the road program of appellant contemplated an unreasonable use of the surface. . . .

The lessee may dig slush pits and drainage ditches for the drilling of wells and the production of oil or gas. He can construct any and all earthen tanks necessary and incidental to his operations. He can cut and remove trees for drill sites, roads, and tank batteries. He can pipe salt water across the land. He can dig for, take, and use the caliche for roads and drill sites.

In Joyner v. R. H. Dearing & Sons, the lessee claimed the right to erect a house and outbuildings. It asserted that they were necessary in order to keep an employee upon the land for the purposes of properly taking care of its machinery and equipment and protecting such property from damage by fire and theft. The court held that the erection of such buildings was reasonably necessary and said, “If the oil is to be produced and sold profitably, the instruments and instrumentalities of production, storage, and transportation must be safeguarded against loss by theft and fire and other causes.”

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30 Id. at 263-64.
23 Id. at 1112.
It has been decided that the operator can select the time of drilling even though such time would involve an unusual expense to the lessor. In Robinson Drilling Co. v. Moses,8 a Texas court permitted the operator to go upon the land and drill just before a cotton crop matured.

Further, and even more important, if the number of cases involving the question is any criterion, unless restricted by the lease, the operator has the right to select the place for drilling. He cannot be questioned by the lessor in the exercise of his choice nor will his judgment be reviewed by the courts. In Grimes v. Goodman Drilling Co.,9 the lease covered town lots. It provided that the drilling of one well on any one of the lots would hold the lease upon all. The plaintiff bought a house and lot subject to the lease, his grantor retaining all of the royalty. The defendant lessees erected a derrick on the front part of the lot, placed a slush pit along the side of the house, and located the engine and boiler so close to the house that it was impossible for the plaintiff to live in the house while drilling was being conducted. The plaintiff sought an injunction, claiming that the noise and grease were annoying, that the derrick was dangerous in that it might be blown upon the house, that there was a great danger of fire and explosion, that it was necessary to close all the doors and windows on one side of the house in order to keep out the oil which splashed out of the slush pit, and that the house could be entered only through the rear door because of the derrick and pits. The court refused the injunction.

It has been said that this ruling of the Texas court "seems particularly harsh and demonstrates the complete indifference some courts displayed towards surface rights."40 However, this argument overlooks the fact that the lessees had the right and the desire to drill the well; they had given consideration and acquired the lease for the purpose of drilling and producing the oil; the location chosen was proper for the production of oil, as determined by the lessees' experts; and there was no evidence that the slush pit or derrick could have been placed elsewhere on the lot and still fulfill the purposes for which they were designed. As the court stated:

The plaintiff in this case had no interest in the development of the block for oil, but his grantor, who still owns his pro rata part of the royalty, did have such interest, and the other lessors and lessees and their assignees have an interest in the development of said territory to

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40 Comment, supra note 24, at 893.
the fullest extent for oil and gas. In purchasing the lot, as we think, plaintiff must be presumed to have known that the lessees had the right to sink a well on his lot, and that thereby he and his family, if occupying the premises, would be subject to more or less inconvenience and perhaps some danger while said drilling was going on. But he bought the premises so burdened, and has no just ground for complaint by reason of the entry upon his premises and the drilling of the well.41

The same complaint was made as to the location of wells in *Gulf Oil Corp. v. Walton*,42 except that the lease there covered large, sandy, and comparatively barren ranch lands. The lease operator had proposed a program of secondary recovery operations by water flooding of the oil sands. The rancher wanted to choose the drill sites and insisted that the operator use existing roads. The appellate court in dissolving an injunction granted by the trial court stated:

A water flooding plan calls for a geometric spotting of wells for the intake of water, in order to recover a better percentage of oil from the wells as producers. Upon its lease, the appellant had the right to water flood this property, and that right carried with it the further right to do it in the manner, and on the locations, thought most feasible by its experts. . . .

With regard to appellees' [lessors'] claim that appellant [lessee] should use drill sites that had been used for other wells, now abandoned, we do not find merit in this position, as we believe the holder of the mineral estate has the right to put his wells where he wants to, and that does not mean that he shall be forced to use or try to utilize abandoned wells, or that he must drill so close to such abandoned wells that he can utilize all or part of the former drill site. We believe it would be an unwarranted restriction on the rights and privileges held by the holder of the mineral estate, as he is presumed to know from exploration in this section and expert testimony, the best place, or the place in his best judgment where he wants to drill his well.43

To the same effect are decisions of the federal,44 California,45 and Mississippi courts.46 A North Carolina court has gone so far as to hold that an operator can have the house and other buildings of the surface owner moved for the location and drilling of the well.47

There are, however, some decisions which seem to question the lessee's right to locate his wells and roads where he thinks best. In *Mary Oil & Gas Co v. Raines*,48 an Oklahoma court appears to have

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43 Id. at 263-64.
44 Lynn v. Maag, 220 F.2d 703 (5th Cir. 1955); MacDonnell v. Capital Co., 130 F.2d 311 (9th Cir.); cert. denied, 317 U.S. 692 (1942).
48 108 Okla. 222, 231 Pac. 1085 (1925).
announced a rule much the same as that followed by the courts of Texas, California, and the other states. However, in *Gulf Pipe Line Co. v. Pawnee-Tulsa Petroleum Co.* the Oklahoma Supreme Court held that a lessee could not arbitrarily locate the well in a place where it would endanger the property and life of those on the surface when another location was shown to be equally advantageous.

In *Denver Prod. & Ref. Co. v. Meeker,* the plaintiff's petition alleged an unreasonable use of the surface by the lessee's building of unnecessary roads and its driving of heavily loaded vehicles across the land. Plaintiff, a dairyman, testified that some of the roads were unnecessary. Plaintiff also produced other laymen who testified that they were familiar with oil field practices and that the roads were not needed. The testimony of the oil company and its "expert" witnesses was to the contrary, yet the Oklahoma court upheld a jury verdict for the plaintiff. This handling of the question appears to be against the weight of authority.

One of the Texas courts has held that the oil and gas lessee may not, without notice, move piles of commercial sand mined by a subsequent sand and gravel lessee in order to locate a well where the sand and gravel had been stored. This is not contrary to the other Texas decisions, because the court recognized that the lessee had the right "in the exercise of due care . . . to drill oil wells 'wherever it might choose in the development of the premises.'" It declared that the lessee had the right to use such part of the surface as might be necessary to drill the wells and in the exercise of that right could drill a well at the very point where the sand pile was located. But the court said that the lessee could take possession of the sand only by lawful means, and that, by seizing and moving the sand without notice to its owner and without demand that such owner move the same, the lessee had committed a "trespass."

II. THE RIGHT TO USE WATER AND GAS

In addition to those land uses most frequently litigated in the past, a different sphere of activities by oil and gas lessees is becoming the subject of judicial attention, because of the development of newer recovery methods. The right to produce and use water and gas for drilling, production, and secondary recovery operations has been before the courts now on several occasions.

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49 34 Okla. 775, 127 Pac. 252 (1912).
50 199 Okla. 588, 188 P.2d 858 (1948).
52 Id. at 473.
The courts of Kansas, Oklahoma, South Carolina, and Texas have held that a lessee can use such water as is reasonably necessary in his operations. In *Holt v. Southwest Antioch Sand Unit, Fifth Enlarged*, an Oklahoma court held that a lessee had the right, as against the surface owner, to use so much of the salt water produced from the premises as was reasonably necessary for production of the minerals, including the use of such salt water for secondary recovery of oil produced off the premises or within the unit which included the premises. The court said:

Here plaintiff alleged that defendant was using the water "to increase the amount and life of production of oil and gas" and that "the manner of the use of the same is and was to force the salt water into and against the producing oil pool and to force the oil to the bottom of the well and thus force the same to the surface." It would be difficult to conceive of a use of the water more essentially a part of the operation of mining and removing the petroleum minerals from under said lands.

In *Stradley v. Magnolia Petroleum Co.* the mineral and surface estates had been severed. It was held in an action by the surface owner that the lessee of the mineral owner had the right to use as much of the surface, including the water, as was necessary for drilling and producing oil. The Texas court declared:

The testimony shows that the Magnolia went upon the land and drilled a water well for the purpose of securing water to drill an oil well, prospect for and develop its mineral rights. They obtained the water from this well which they used in drilling and operating for oil on the lease. . . .

It is unnecessary for us to determine whether water is a mineral since we believe that the reservation in the deeds by implication retained to the Southwest [owner of the mineral estate] the right to use the amount of water from the land reasonably necessary to enable it to develop the mineral rights; this it sold and transferred to the Magnolia.

The Court of Appeals for the Ninth Circuit followed this case, stating that there is "abundant authority for the proposition that the owner of mineral rights is entitled to take from the land and
use that amount of water which is reasonably necessary for the exploitation of the mineral rights.\textsuperscript{61}

In this connection, a Kentucky court distinguished water used off the premises from that used for lease operations. It held that a lessee could use water for water flooding but had to pay damages for water taken and used off the leased premises.\textsuperscript{62} An Oklahoma court, on the other hand, has held that a lessee could not, for either purpose, use water impounded by the lessor in an artificial pond for agricultural use.\textsuperscript{63}

It has also been held that a lessee can use gas found on the premises for operations on those premises. In \textit{Guffey v. Stroud}\textsuperscript{64} a Texas court said the right to take oil carried with it the right to tap gas pockets, even though the gas was owned by a different lessee, and to bring to the surface so much gas as was necessary to drill for oil.

In \textit{Armstrong v. Skelly Oil Co.}\textsuperscript{65} the plaintiffs sued for an accounting of royalties on gas. Nine wells produced oil and gas. One well produced only gas. All of the gas was used to increase the flow of oil from the nine oil wells by injecting it into the casing. As a result only wet or casinghead gas was produced with the oil. The Fifth Circuit held, “There is no doubt that appellees [lessees] had the right to use all the gas produced on the land without cost, as it was reasonably necessary to properly work the property and to recover the oil produced in the most economical manner.”\textsuperscript{66} Ten years later, in \textit{Dunn v. Republic Natural Gas Co.}\textsuperscript{67} the plaintiffs sued for an accounting for gas taken and produced with the oil, which gas had been used for “jetting” as a part of repressuring operations conducted by the operator. A master, who had been appointed to take and report the evidence, found that the use of the gas for jetting was necessary and proper in order to obtain maximum production of oil. However, the court said that these were not ordinary oil producing operations. The rights of the lessor would not be determined by the use to which the gas was put, that is, whether held for sale or for reworking the wells. The court then held that since there was a “showing that the use of the gas for ‘jetting’ was reasonable and for benefit of both plaintiffs and defendants, plaintiffs [could not]...
complain of the use by defendants but only of its failure to pay the
plaintiffs for its part of the gas so used, the reasonable value thereof.

It would appear that in the Dunn case the court refused to recog-
nize that it was "reasonably necessary" to repressurize the oil wells
and that for such necessary operations the lessee was freely entitled
to take and use the gas. The more realistic view is that expressed by
the Tenth Circuit in Utilities Prod. Corp. v. Carter Oil Co., where
the court said:

When an oil well plays out, it is not because all the oil has been
recovered, but because the gas or water pressure has been exhausted.
When the strata overlying an oil sand is penetrated by the drill, the
gas within the formation, being under pressure, seeks the outlet, carry-
ing with it the oil. When that pressure is gone, there is nothing left to
bring the oil within reach of the pump, except gravity, the operation
of which is limited to upper strata of the sand, and there counter-
acted by properties of viscosity, capillarity and adhesion of oil to its
mother sand. Oil is produced by the lateral thrust of the gas pressure
to the hole, and, after it quits flowing, the vertical lift of the oil to
the top by a pump. Many years ago it was conceived that played-out
wells could be given a new lease on life by injecting gases or liquids
under pressure into the oil sands, thus starting the cycle anew. This is
accomplished by forcing gases or liquids into one of the exhausted wells
on a lease, or into a master-hole drilled for the purpose. The gas, seek-
ing an avenue of escape, percolates through the sands to the outlets—
the other wells on the lease—carrying oil with it. . . .
The operation or development of an oil lease requires that the oil in
the sands be brought to the top of the ground. Moving the oil laterally
is as an important part of the work as moving it vertically. It is
conceded that residue gas may be used to lift it from the bottom of
the hole; no reason is suggested why moving it to the bottom of the
hole is not likewise a part of the operation or development of a lease.

Thus, the better rule seems to be that a lessee should have the right
to use the gas in the jetting operation without having to account
to the lessor for the value of the gas used.

It also should be mentioned that water can be used as well as gas
by means of a process known as water flooding. Writers have defined
the water flooding process and described its legal aspects as follows:

Water flooding is the deliberate, controlled injection of water into
an oil-producing stratum for the purpose of increasing the percentage
and rate of recovery of oil from the stratum. It is thus to be distin-
guished from those operations which have for their purpose only the
disposal of salt water obtained in producing oil. Its function is to re-

66 Ibid.
67 72 F.2d 655 (10th Cir. 1934).
68 Id. at 659.
cover oil which would not be otherwise recoverable by primary production methods. It is what is known as a secondary recovery method, and by this is meant a method which obtains recovery through increase in reservoir energy by the injection of liquids or gases into the reservoir after the original reservoir energy has been dissipated, and usually, but not always, after the primary recovery period has been terminated.

Where there is no pooling of production by lessees cooperating in a water flooding project, it would probably be unnecessary to secure a lessor's consent to such a project, on the grounds that flooding is a legitimate production method which a lessee, in his reasonable discretion, may adopt. The right to use water for lease operations, even water produced on leased premises, is a right which is usually granted expressly in the ordinary oil and gas lease, and implied where not granted in a conveyance or reservation, but there might be a question whether such a use of water was in contemplation of the parties to such an instrument. Nevertheless, since a lessee is required to use due diligence in operating the leased premises, there would seemingly be not only the right, but the obligation as well, on the part of the lessee to adopt any reasonable method of increasing production.

III. The Right To Conduct Geophysical Exploration

The science of locating subsurface structures or formations favorable to the accumulation of oil or gas by geophysical exploration has progressed to such a stage that the right to explore by such methods is now quite valuable. It is a right vested in the owner of the mineral estate, although he may confer it upon another. It was held in a Texas case that a landowner who had executed an oil and gas lease retained no right to resell the geophysical privilege and that the lessee had the exclusive right to prospect or contract for the prospecting of the premises. There would seem to be no doubt about the exclusiveness of this right if the lease expressly grants "the exclusive right to prospect." However, where the right is not expressly granted, the question as to whether the lessee has the sole right to explore is still not settled in all jurisdictions. One commentator has presented arguments both for and against placing the sole right of prospecting in the lessee but concludes that the lessee should probably not have that right. If the criterion of determin-

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1 See text accompanying notes 42, 59 supra.
3 See Gulf Oil Corp. v. Whitaker, 257 F.2d 157 (5th Cir. 1958); Phillips Petroleum Co. v. Cowden, 241 F.2d 186 (5th Cir. 1957); Yates v. Gulf Oil Corp., 182 F.2d 286 (5th Cir. 1950); Ohio Oil Co. v. Sharp, 131 F.2d 303 (10th Cir. 1943); Shell Petroleum Corp. v. Scully, 71 F.2d 772 (5th Cir. 1934); Shell Petroleum Corp. v. Moore, 46 F.2d 919 (5th Cir. 1931); Wilson v. Texas Co., 237 S.W.2d 649 (Tex. Civ. App. 1951); Stonelind Oil & Gas Co. v. Wimberly, 181 S.W.2d 942 (Tex. Civ. App. 1944).
5 Hull, Oil and Gas Lessee v. Seismograph Licensee, 21 Okla. B.A.J. 1503 (1950); see also Comment, supra note 24, at 902.
nation is the good of the industry, then just as the right to drill and produce has been held to belong exclusively to the lessee, it is believed that the courts should and probably will hold that the right to prospect by geophysical explorations is exclusively that of the lessee.

IV. THE RIGHT TO SUBJACENT SUPPORT BY THE LESSOR

Some brief mention should be made of the rights of a lessor as to subjacent support. The question for consideration is whether a lessor has the right to demand compensation for subsidence after executing a lease. One early Texas lawyer and writer was of the opinion that "the surface owner [was] entitled as a matter of absolute right to subjacent support, and the mineral owner [was] responsible in damages for subsidence caused by his operations whether negligent or not." However, this is not now the rule in Texas. Recently the Texas Supreme Court adopted, in effect, the opinion of a court of civil appeals in *Kenny v. Texas Gulf Sulphur Co.*, in which the plaintiff, the owner of the surface estate, sued the defendant, the owner of the oil, gas, and mineral lease, for damages for subsidence. The court declared:

There is no contention or question of negligence in the instant case, and we think that since the defendant had the right to produce the sulphur under its lease, and since it is stipulated that subsidence was a natural, normal, inevitable result of getting the sulphur by the only commercially known process, that defendant's conduct and acts in producing the sulphur are authorized by its lease, and that the plaintiff's right to have her land free of subsidence, was one of the rights disposed of by her predecessor in title, when the lease was made.

This rule applied by the Texas court is contrary to the usual doctrine of subjacent support found in the coal mining cases.

V. THE LESSEE'S DUTY TO THE LESSOR

Up to this point, this Article has dealt with the rights of surface use which an oil and gas lessee will, or may, have protected by the courts. These are the affirmative rights of surface use, that is, what
the lessee can lawfully do. However, there is an equally important area of consideration, that is, what the lessee can refrain from doing because of the lack of any duty on his part. Before reaching any question of possible lessee negligence, there is always the necessity of first determining whether there was any legal duty owed by the lessee to the lessor.

A lessee is under no duty to fence slush pits, pumps, or ditches; this is apparently the universally applied rule. Therefore, as long as the surface used for such purposes is reasonable in area, a lessee should have no liability for damages to the surface or to cattle coming within that area unless he commits an intentional or wilful injury. In Pitzer & West v. Williamson a lessee had left open an unguarded slush pit containing oil and waste material. The surface tenant sued for damages to his sheep resulting from their drinking the material in the pit. A judgment for the plaintiff was reversed on the ground that there was no duty on the part of the lessee to fence the pit. In Carter v. Simmons the plaintiff sued for damages for death of his cattle from drinking oil permitted to escape by the lessee. It was claimed that the lessee had negligently permitted the oil storage tanks to overflow. There was also evidence that the lessee had maintained unfenced slush pits. There was no proof showing whether the cattle had died as the result of drinking the oil in the slush pits or that which had escaped from the tank. The court held that since the lessee was under no duty to fence the slush pits, the judgment of the trial court for the plaintiff landowner would be reversed. In Sinclair Prairie Oil v. Perry, suit was brought by the surface tenant for the value of two mares which had died as a result of drinking a poisonous chemical found in the slush pit. A judgment for the plaintiff was reversed, again with the holding that the lessee was under no duty to fence the slush pit. Trinity Prod. Co. v. Bennett

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81 Note 80 supra.

84 278 S.W.2d 160 (Tex. Civ. App. 1953).
was a suit for damages for the death of a cow which had been caught in a moving oil well pump. A judgment for the plaintiff was reversed, because the lessee was held to be under no duty to fence or put any guards around the pumping equipment.

These decisions denied recovery against an operator either on the ground that he was under no duty to fence the wells, pits, and machinery or on the ground that the livestock were trespassers and, therefore, the operator's only duty was not to injure them wilfully or wantonly. The cases appear to sustain the interpretation given them by Justice Smith in his dissenting opinion in Brown v. Lundell,83 where he said:

Under the authorities, as I interpret them, the oil and gas lessee has the right to take without paying damages a part of the surface of the land for drilling operations, and the lessee is not liable to the lessor or his tenant for a negligent use of that land so long as he takes no more than is reasonably necessary. The lessee's only liability, admitting that the part of the premises taken is reasonably necessary, is for wilful, intentional or wanton destruction of the lessor's property. . . .

The opinion of the Texas Court of Civil Appeals in Weaver v. Reed88 appears to be in direct conflict with the foregoing decisions. Reed owned and operated a cattle ranch. He claimed that five of his cattle had consumed a pipe lubricant from an open bucket left near the well and from pipes stacked at the well and that as a result they had died. The jury found that the lessee's employee had left open a bucket containing pipe lubricant, that it contained elements injurious to cattle, that the cattle had eaten the lubricant, and that leaving the bucket open was negligence and a proximate cause of the death of the cattle. The court said that if lubricating the pipe at the well was a necessary incident to the operation of the well, the lessee was not liable for damages caused thereby, but in remanding the case for a new trial stated: "In this case Weaver [the lessee] had no duty to fence the area reasonably necessary for the oil operations provided for in his lease. But, it does not follow that he was not required to exercise ordinary care in producing oil and maintaining that area."89

It is now rather generally recognized that the lessee has no duty to clean up and restore the surface after a reasonable use, unless the lease expressly imposes such an obligation.88 The Texas Supreme

83 162 Tex. 85, 97, 344 S.W.2d 863, 872 (1961).
87 Id. at 810.
Court made this holding in the Monzingo case. In discussing the Louisiana case of Smith v. Schuster, which has often been argued as holding to the contrary, the Texas court said:

In Smith v. Schuster, 66 So.2d 430, 431, Louisiana Court of Appeal, so far as the plaintiff's cause of action was concerned, the Court says that the only question presented for consideration is whether the plaintiff presented sufficient evidence of damages. The Court goes on to say, however, that "He (the mineral lessee) should maintain and restore the premises in the condition he found them subject to his rightful use. . . ." We do not think this statement of law supports respondent's contention of implied duty to repair the damage done to the land caused by rightful and necessary use.

It has been argued that the courts could hold a lessee to an implied duty to restore the surface and that they have exhibited a "disregard for the lessor's rights in an unwarranted fashion" by holding that the lessor impliedly grants away the right to have the expensive restoration operations performed by the lessee. However, it would seem that this argument is answered by a Kansas court in Duvanel v. Sinclair Ref. Co. That court stated:

Since by the terms of the lease the lessee had the right to construct the improvements that it did and to remove them at its option, with no right on the part of lessor to require removal, lessor cannot be heard to complain because of only partial removal, in the absence of negligence in accomplishing such partial removal, and there is no implied covenant on the part of lessee to restore the premises in question to their original condition.

Finally, it should be mentioned that a lessee is under no duty to give notice to the landowner or his tenant of his going upon the premises to explore, drill, or develop it.

VI. Prohibitions on the Lessor's Use of the Surface

In addition to certain affirmative rights of surface use for his own purposes, and in addition to certain negative rights of non-action in

(1951); Fox v. Cities Serv. Oil Co., 201 Okla. 17, 200 P.2d 398 (1948); Black Gold Petroleum Corp. v. Hill, 188 Okla. 329, 108 P.2d 784 (1940); Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362 (1957); Comment, Duty of an Oil and Gas Lessee To Restore the Surface, 1 Kan. L. Rev. 185 (1952).
89 Warren Petroleum Corp. v. Monzingo, supra note 88.
90 66 So. 2d 430 (La. App. 1953).
92 See Comment, Land Uses Permitted an Oil and Gas Lessee, 37 Texas L. Rev. 889, 898 (1959).
94 Gulf Oil Corp. v. Whitaker, 237 F.2d 117 (5th Cir. 1956); Parker v. Texas Co., 326 S.W.2d 579 (Tex. Civ. App. 1959) error ref. n.r.e.
connection with his own activities, an oil and gas lessee also has a protectible legal interest in the lessor's surface use insofar as that use affects the mineral estate. Thus, a lessee can prevent the landowner from using the property for a cemetery. A lessee can prevent the construction of a refinery on the premises if he shows that it will probably interfere with his operations. He can also prevent the damming and inundating of the property if it will interfere with his operations. On the other hand, until notified that the lessee intends to drill or otherwise use the land, a lessor may put it to any proper use and such use may not be prevented by the lessee.

Humble Oil & Ref. Co. v. Wood is an unusual case in that Humble was in the position of a surface owner and was joined with other surface owners as a defendant in the suit. After the lease was taken by the plaintiff Wood, the defendant surface owners erected a dam and flooded the premises with water. Wood claimed that the flooding of the property with water made it practically impossible for him to operate and explore the lease. He alleged that the use being made of the property destroyed its commercial value. In denying the plaintiff any relief the court held that Wood had not been damaged by the construction of the dam and the placing of the water upon the land at the time such condition was created. However, the court simultaneously said that the lessee Wood had the right to explore the land for oil at any time he saw fit, and when called upon to do so, the surface owners were under a duty to permit the lessee to exercise his rights without hindrance or inconvenience.

In the Atlantic Ref. Co. v. Bright & Schiff case, Atlantic sought to enjoin the use of the surface by one of its competitors, Bright & Schiff, which sought to come on the land with consent of the surface owner to locate its equipment, pumps, tanks, and pit incident to the drilling of a well to be bottomed under the adjacent lot. In denying the injunction, the court said:

It becomes apparent, therefore, that a lessee who would enjoin surface uses by a lessor, or another under his lessor, must prove that the use

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95 Eternal Cemetery Corp. v. Tammen, 324 S.W.2d 562 (Tex. Civ. App. 1959) error ref. n.r.e.
100 321 S.W.2d 167 (Tex. Civ. App. 1959) error ref. n.r.e.
interferes with the reasonable exercise of his own rights under his own lease. To do this he must prove that he needs the surface at the time and place then being used by the other user.  

There has been considerable argument concerning the rights of a lessee with respect to the surface where there are prior surface leases outstanding. Writers of law review articles have generally taken the position that if an agricultural lease becomes effective before the oil and gas lease, the oil and gas lessee cannot interfere in any way with the possession and use of the surface by the agricultural lessee until the expiration of the term of that lease. An Oklahoma court has so held in Republic Natural Gas Co. v. Melson. A Texas court has now held, however, in Phillips Petroleum Co. v. Cargill, that whether or not the agricultural lease was prior in time to the mineral lease, the owner of the fee, having retained the mineral estate following the surface lease, also retained the right to use the surface. Accordingly, when the mineral estate was leased and conveyed, the easements and the right to use the surface for the mineral development were conveyed as well. One commentator felt that the court had applied the correct principle.

Another important attribute of the rights owned by a lessee is that the lessor cannot subdivide or otherwise sell part of the leased premises so as to restrict the lessee in his operations; a lessee can ignore any such subdivision. In Stephenson v. Glass a court said that the owner of the surface could subdivide the leased premises but that he had no power to restrict "the right of the lessee to operate at will upon the premises without reference to such subdivision." The court said that the purchaser of any part of the subdivision took the same estate that his vendor had, "no more, no less." The court added that such purchaser "could not require the lessee to drill any more or other wells, or upon other locations or particular locations, not required of the lessee while the whole acreage embraced in the

101 Id. at 169.
102 See Keeton & Jones, Tort Liability and the Oil and Gas Industry, 35 Texas L. Rev. 1, 5 (1956); McMahon, Rights and Liabilities With Respect to Surface Usage by Mineral Leases, Sw. Leg. Found. 6th Inst. on Oil & Gas L. & Tax. 231 (1955); Comment, supra note 92; 7 Baylor L. Rev. 188 (1955).
103 274 P.2d 543 (Okla. 1954).
105 See 13 Oil & Gas Rep. 1049 (1960); see also Sellers, How Dominant is the Dominant Estate? Or, Surface Damages Revisited, Sw. Leg. Found. 13th Inst. on Oil & Gas L. & Tax. 377 (1962).
107 Note 106 supra.
108 Id. at 1113.
lease was intact. In Conway v. Skelly Oil Co., a promoter had contracted with the lessor to plot and subdivide the premises. Sales were booming until the oil lessee posted large signs on the premises listing its express and implied lease rights and stating that it would enforce these rights by litigation. The sales stopped and the promoter brought suit against the lessee for unjustifiable interference with his business. The court held that the permanent improvements would interfere with the lessee's right to occupy the premises. It said that the terms of the lease implied that the lessor would do nothing in improving the land that would destroy or seriously interfere with the oil lessee's right to enter and exploit the minerals. Moreover, the court said that the lessee's bizarre tactics were justified in protection of its legal rights.

Notwithstanding the rights of user recognized in a lessee, it must be remembered that a lessee does not have the right to use the surface of the premises in aid of drilling operations on other lands. In Russell v. Texas Co., a federal court said, "It is a well established principle of property law that the right to use the surface of land as an incident to the ownership of mineral rights in the land, does not carry with it the right to use the surface in aid of mining or drilling operations on other lands..."

VII. THE RIGHTS OF A LESSOR

At this point it may begin to sound as though there is no question about the mineral estate being the dominant estate—master of the servient surface estate. The oil and gas lessee has certain rights to use the surface. The lessee is legally exempt from doing certain things and the lessee can control, to some extent, the use of the surface by the lessor. However, notice must be taken of the protection which the courts have extended to the lessor, protection which at this time is so extensive as to raise the question of which estate is dominant in actual practice.

The general language of nearly every decided case makes it clear,

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100 Ibid.
110 14 F.2d 11 (10th Cir. 1931).
111 See Ross Coal Co. v. Cole, 249 F.2d 600 (4th Cir. 1957); Russell v. Texas Co., 238 F.2d 636 (9th Cir. 1956), cert. denied, 354 U.S. 938 (1957); Franz Corp. v. Fifer, 295 Fed. 106 (9th Cir. 1924); Bourdeau v. Seaboard Oil Co., 38 Cal. App. 2d 41, 100 P.2d 528 (Dist. Ct. App. 1940); 48 Cal. App. 2d 429, 119 P.2d 973 (Dist. Ct. App. 1941); 63 Cal. App. 2d 201, 146 P.2d 256 (Dist. Ct. App. 1944); Schmidt v. Schmidt, 248 Ill. App. 623, 119 P.2d 973 (Dist. Ct. App. 1941); 1 N.E.2d 419 (1936); Wiser Oil Co. v. Conley; 346 S.W.2d 718 (Ky. 1960); Rose v. Martin, 310 Ky. 193, 220 S.W.2d 385 (1949); Moore v. Lackey Mining Co., 215 Ky. 71, 284 S.W. 415 (1926); Groves v. Terrace Mining Co., 340 S.W.2d 708 (Mo. 1960).
112 238 F.2d 636 (9th Cir. 1956), cert. denied, 354 U.S. 938 (1957).
first, that a lessee can use no more of the surface than is reasonably necessary to effectuate the purposes of the lease. This is a basic protection of the surface estate, implied by the courts from the lease contract. Second, a lessee will be held liable for negligent damage done to the surface owner’s property, depending in most cases upon whether there has been a use of more of the premises than is reasonably necessary. Third, and now to be considered, some jurisdictions impose absolute liability on the lessee for certain types of damage.

These three areas of protection, singly or in combination, afford a formidable defense to any unwarranted invasion of the surface estate by the oil and gas lessee. The real question today is not whether adequate protection exists but rather, whether there is too much protection given the supposedly servient surface estate.

Illustrating this problem is the significant case of Brown v. Lundell. Time after time it has been said that an operator is not liable to his lessor for damages done to the surface by the salt water that is produced with the oil unless the damages proximately result from negligence in the operation. It has even been said that the pits used to store the salt water and other waste may properly cover the whole surface. However, in recent years pollution of fresh water and the fresh water stratum has become an increasing source of friction and litigation between the surface owners and the mineral lessees.

It has been often repeated that it is clearly the Texas view that an operator is not liable for damage caused by the escape of the deleterious substance without proof of negligence. This is where the opinion of the Texas Supreme Court in Brown v. Lundell becomes important. In addition to the securing of the oil and gas lease, the lessee in that case had paid the plaintiff landowners a separate consideration for the right to construct and maintain a surface salt water and refuse pit. The salt water produced with the oil was deposited in this pit. The jury found that the lessee had negligently permitted salt water to escape from this pit and had negligently failed to protect the fresh water stratum. A court of civil appeals said that the only duty owed to the plaintiffs by the lessee was to refrain

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114 162 Tex. 85, 344 S.W.2d 863 (1961).
117 162 Tex. 85, 344 S.W.2d 863 (1961).
from intentionally, willfully, or wantonly injuring the property, but the court then held that the evidence and the jury findings of negligence justified a finding and declaring of wanton conduct on the part of the lessee. The supreme court affirmed the lower decisions but held that in spite of the language of the court of civil appeals, the case was one of negligence and had been tried on that basis. The court distinguished its prior opinion in *Warren Petroleum Corp. v. Martin*\(^{118}\) on the basis that in the *Martin* case there was no proof of negligence and there existed no duty to exclude the cattle from the area of operations. The dissent in *Brown v. Lundell* was founded principally on the reasoning that it had not been demonstrated that the defendant had used more land than reasonably necessary, and consequently, he could be liable only for wilful, intentional, or wanton conduct.\(^{119}\) The dissent also stated that the majority in actuality was holding the defendant "absolutely liable," overruling the long recognized Texas rule of *Turner v. Big Lake Oil Co.*\(^{120}\) without saying so. Further, the dissent pointed out that under the prior decision of the court in *Taylor v. White,*\(^{121}\) proof that the pit had been maintained in accordance with the universal custom in the area should have shifted the burden to the plaintiffs to demonstrate that the custom was in itself negligent.

*General Crude Oil Co. v. Aiken,*\(^{122}\) decided by the court the same day as *Brown v. Lundell*, involved pollution of the fresh water stratum by salt water from pits on the premises, but three specific acts of negligence were proved and found by the jury. These were that the defendant had negligently (1) used too small a pit for disposal of the salt water, (2) located the pit uphill from the plaintiff's fresh water spring, and (3) failed to seal the pit so as to prevent leakage. In particular, the fact that the lessee used too small a pit would seem to provide a more satisfactory basis for liability than the *Brown v. Lundell* findings. There might well not be a duty to seal a pit to prevent leakage of salt water, but the lessee might properly be charged with the duty of constructing a sufficiently large pit to hold the water and other refuse. Criticism of the majority opinion in *Brown v. Lundell* is levied by Justice Smith in his dissent in that case:

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\(^{118}\) 153 Tex. 465, 271 S.W.2d 410 (1954).

\(^{119}\) 162 Tex. 85, 87-99, 344 S.W.2d 863, 872-73 (1961); for a quotation of the relevant portions of the dissent, see note 3 supra and accompanying text.

\(^{120}\) 128 Tex. 155, 96 S.W.2d 221 (1936).


\(^{122}\) 162 Tex. 104, 344 S.W.2d 668 (1961).
The court here admits that this case [Warren Petroleum Corp. v. Monzingo] correctly states the law, yet the majority here is willing to assess damages against petitioners without requiring a finding that more land was used than was reasonably necessary. The court has by implication held that the jury findings of negligence are the equivalent of findings that the petitioners used more land than was reasonably necessary.

In some states there is absolute liability for harm resulting from pollution. Oklahoma is a prime example; there, in addition to common law liability, a statute provides that waste oil and other deleterious substances shall not be permitted to flow over the land. Thus, where salt water or other such deleterious substances are permitted to escape from pits or ditches and flow over onto the land, there is absolute liability. Under a similar statute the Kansas courts also enforce strict liability for all such damage done by salt water or like substances.

It is, of course, recognized that by special contract the parties may limit or extend the rights of use of a lessor or a lessee. The parties may and often do provide that although the lessee has the right to use the surface of the land, he shall pay for it or shall be responsible for any damage done to the land or growing things. It would seem that this proposition is elemental and need not be repeated here, but the issue has arisen often between a lessor and his lessee, and the courts have been constantly called upon to remind the litigants first to search their leases for the express covenants.

VIII. "REASONABLY NECESSARY," NEGLIGENCE, AND BURDEN OF PROOF

In those cases where the surface owner has produced competent evidence to establish that there can be a reasonable difference of opinion, the question of whether a particular use of the premises is

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123 117 Tex. 479, 304 S.W. 2d 362 (1957).
124 162 Tex. 99, 344 S.W. 2d 873.
reasonable is for the jury." In those decisions so holding, most of the courts use the term "reasonably necessary." The West Virginia courts term it "fairly necessary." However, it is understood that the terms mean the same thing.

Where the issue is submitted to the jury, it would appear necessary or, in any event, proper to charge or instruct the jury on the meaning of "reasonably necessary." In the first place, some of the courts themselves have equivocated in applying the standard to the particular operation in question. In the second place, without such an instruction or definition, the jury would be left to guess, surmise, and argue among themselves as to the meaning to be given the term. Without some assistance from the court, it is probable that a jury would end up by applying their own standards as farmers, ranchers, storekeepers, school teachers, and barbers as to what is necessary, in disregard of the expert testimony of the witnesses for the lease operator and of the rights conferred upon him by the lease contract.

This important and so often controlling standard or term "reasonably necessary" has been defined so that it "may mean, on the one hand, less than imperative need, and, on the other, more than mere suitable convenience." It has been explained that "reasonably necessary" means that which is practical or reasonably convenient and is to be distinguished from the more exacting degrees of "absolute" or "strict" necessity. An Indiana court has said that "the word 'necessary' cannot reasonably be held to be limited to absolute physical necessity." A Texas court treated the term as encompassing "operations in the usual and customary way, consistent with the purposes for which the land was leased. . . ."

When speaking of negligence, the United States Supreme Court in Washington & Georgetown R.R. v. McDade approved of the established rule that the standard of ordinary and reasonable care is that degree of care (1) which ordinarily prudent persons (2) engaged in the same kind of business (3) usually exercise under similar

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130 Williams v. Gibson, 84 Ala. 228, 4 So. 310, 354 (1888).


132 135 U.S. 554 (1890).
The Texas Supreme Court in *Brown v. Lundell* declared that in connection with the definitions of "negligence" and "ordinary care," compliance with a custom or conformity with usual and ordinary practices is not an absolute test of freedom from negligence but that the jury may nevertheless properly consider the usual and customary practices of other operators engaged in the same or similar business. Thus, one of the standards used to test the question of "negligence" is the common experience of men engaged in the particular business; that is, there is no negligence where the evidence shows conduct consistent with that of prudent and careful men in the business. However, it is not "negligence" with which the court is concerned when determining, or, in the proper case, when inquiring of the jury whether the operator has used that which is "reasonably necessary." It would, therefore, seem advisable and proper (a) to limit the standard used to test "negligence" to its application to the negligence issues, and (b) to apply to the question of the use of the premises for operations, the definition of "reasonably necessary" as that which is practical or reasonably convenient in the common experience of prudent men engaged in the business of exploring, drilling for, and producing oil and gas.

In applying these rules and standards, the courts have placed the burden of proof upon the complaining surface owner to establish either (1) the use of more land than was reasonably necessary or (2) negligence or wanton conduct. As a court stated in *Arnold H. Bruner & Co. v. McCauley*:

Appellee [lessee] in the trial of the case recognized the well settled rule of law that the lessee in an oil and gas lease has the right to use as much of the surface as is reasonably necessary to carry out the purpose of its lease... The appellee [lessee] had the burden of proving not only that appellant [lessee] used more land than was reasonably necessary in its drilling

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136 162 Tex. 85, 344 S.W.2d 863 (1961).
139 Note 138 supra.
operations, but also the burden of proving his damages with sufficient certainty to enable a jury to compute them.\(^{140}\)

Similarly, it was held by the Texas Supreme Court in *Warren Petroleum Corp. v. Martin*,\(^{141}\) "It was necessary for respondent [lessor] to plead and prove that petitioner [lessee] used more land than was necessary."

**IX. Conclusion**

In conclusion, most of the decisions appear to establish the legal right of the mineral owner to use so much of the surface estate for that period of time during which he is producing the oil or gas at a profit to himself. Yet we find these statements:

May an operator continue to use as much space as he wants so long as he can produce oil in paying quantities from a well that is producing an exorbitant amount of salt water? Certainly, the lessor should not be regarded as authorizing by his lease the use of methods that the *ordinary prudent operator* would not use. Moreover, it is suggested that the lessor should not be regarded as authorizing the doing of more damage than is reasonable in the light of the value of the oil being produced. Thus, it may be necessary to do more damage than is reasonable even though the defendant is operating in the best known manner, since the surface soil is a valuable natural resource as well as the oil. The point is that the operator should be required to discontinue operations if salt water is being produced in such large quantities that, by reason of the damage necessarily resulting, it becomes no longer socially desirable to capture the oil. Finally, even though the oil extracted may be more valuable than the property being damaged, it is suggested that the lessor should not be regarded as authorizing production that is causing or is likely to cause more damage to him than the royalties he is to receive.\(^{142}\)

By written contract and grant a lessee acquires the right to go upon the land to discover and take minerals. He pays what the parties then agree to be a valuable consideration. The lessor accepts that consideration when he needs and wants it. Some wells produce more salt water than the surface owner or even "the public" would consider "socially desirable." Some wells occupy more of the land than the lessor or his vendee or surface tenant ever contemplated. Some operations occupy the entire premises to the exclusion of the lessor. Some surface property becomes much more valuable than the production by reason of its proximity to or inclusion within one

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\(^{140}\) *Id.* at 764.

\(^{141}\) 153 Tex. 465, 469, 271 S.W.2d 410, 413 (1954).

\(^{142}\) *Keeton & Jones*, *supra* note 102, at 13.
of the progressive and ever-growing cities. In many cases, insofar as a surface owner and all those in sympathy with him are concerned, it becomes "no longer socially desirable to capture the oil." In such cases it is probable that the surface owner, buttressed by the energetic subdivider, could establish to the satisfaction of a jury not interested in the oil business that it was no longer socially desirable to capture the oil and sell it on the open market. However, the parties made their contract voluntarily, in good faith, with the mutual expectation of its enforcement according to its terms.

It has been wisely said, "As men bound themselves so shall they be bound." The citizen has the liberty of contract as a natural right which is beyond the power of the government to take from him." "Courts are not authorized to make contracts for the parties, but must construe them as written, and where plain, common words are used in their ordinary meaning, they must be accepted in that sense." Finally, as the Texas Supreme Court solemnly stated in Wood Motor Co. v. Nebel:

Long ago Sir George Jessel wrote: "... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." Printing and Numerical Registering Co. v. Sampson, 19 L.R., Equity, 462, 465.

This argument appears to have been expressed recently by a California court in Sicinon v. Russell, where the plaintiffs purchased property located within the city of Los Angeles and wanted to subdivide it into thirty residential lots. By reason of the development of the area, the land had become much more valuable for residential uses and would have produced a greatly enhanced return to the owners if the operator could have been required to discontinue operations. The court undoubtedly considered the lease contract, the position of the parties, and that which was "socially desirable," and it is believed that it properly held:

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143 Union Oil Co. v. Ogden, 278 S.W.2d 246, 249 (Tex. Civ. App. 1955) error ref. n.r.e.
144 St. Louis, S.W. Ry. v. Griffin, 106 Tex. 477, 483, 171 S.W. 703, 704 (1914).
145 Shell Oil Co. v. Manley Oil Corp., 124 F.2d 714 (7th Cir. 1941), cert. denied, 316 U.S. 690 (1942).
146 150 Tex. 86, 238 S.W.2d 181 (1951).
147 Id. at 93, 238 S.W.2d at 184.
It is argued... that there is a factual question relating to "frustration of purpose due to failure of consideration." The lease expressly provides that the lessee is "to have and to hold the same for a term of twenty (20) years from and after the date hereof and so long thereafter as oil or gas... is produced therefrom." It is not contended that oil or gas is no longer being produced, and obviously the twenty-year period has not expired. Its terms do not set forth a minimum production which, if not met, will terminate the lease. The situation is merely one in which plaintiffs' predecessors surrendered their rights to use the surface for a consideration with which plaintiffs are not satisfied. In order to regain the rights, plaintiffs must negotiate with the person to whom they were surrendered on terms agreeable to both.149

149 Id. at 220-21.