CHAPTER 1
INTRODUCTION: SOME BASIC LEGAL CONCEPTS

A. OWNERSHIP OF MINERALS

DEL MONTE MINING & MILLING CO.
v.
LAST CHANCE MINING & MILLING CO.
171 U.S. 55
(1898)

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

* * * *

MR. JUSTICE BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The questions thus presented are not only important, but difficult, involving as they do the construction of the statutes of the United States in respect to mining claims. As leading up to a clearer understanding of those statutes, it may be well to notice the law in existence prior thereto. The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the states and territories of the United States, and, in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be, who owns the surface? Unquestionably, at common law the owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface, but the possible fact of a separation between the ownership of the surface and the ownership of mines beneath that surface, growing out of contract, in no manner abridged the general proposition that the owner of the surface owned all beneath. * * *

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It will therefore be certified to the court of appeals that the first question is answered in the affirmative, the third in the negative, the fourth in the affirmative. The second and fifth are not answered.

This migratory character of oil and gas has given rise to the so-called rule or law of capture. That rule simply is that the owner of a tract of land acquires title to the oil or gas which he produces from wells on his land, though part of the oil or gas may have migrated from adjoining lands. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands, and without incurring liability to him for drainage. The non-liability is based upon the theory that after the drainage the title or property interest of the former owner is gone.

Elliff v. Texon Drilling Co., 146 Tex. 575, 581, 210 S.W.2d 558, 561-62 (1948)

B. RULE OF CAPTURE

HAMMONDS
v.
CENTRAL KENTUCKY NATURAL GAS CO.

75 S.W.2d 204
(Ky. 1934)

STANLEY, COMMISSIONER.

The case seems to be one of first impression. About 1919 the appellee exhausted the gas from a field of about 15,000 acres in Menifee and adjoining counties, most of which it had under lease. Thereafter it brought in vast quantities of gas from distant fields and put it by force through its previously drilled wells into the vacated underground reservoir, withdrawing it as desired. In recent rate litigation the company valued these holdings at $2,000,000. (citation omitted) The appellant owns 54 acres within this boundary which was never leased to the company. It is not disputed that this geological dome or basin underlies her land. She brought this suit to recover a large sum for use and occupation under the idea of trespass, it being charged that the gas was placed in or under her property without her knowledge or consent. Judgment went for the defendant. The decision must rest upon the character and nature of property in natural gas.

The migratory trait of oil and gas when released from imprisonment in their natural geological reservoirs by decrease of the pressure which confines them when the strata is penetrated, naturally or mechanically-perhaps at a point far removed and where no connection could be suspected-was early judicially recognized. This power, as it were, of self-transmission, or this fleeting nature of oil and gas, soon gave rise to the distinctive rules of law which differentiate these substances from the solid minerals.

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* * * In *Westmoreland & Cambria Natural Gas Company v. De Witt*, 130 Pa. 235, 18 A. 724, 725, 5 L. R. A. 73, that court said:

> Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals ferae naturae. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract was uncertain.' * * * They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas.

But, as is pointed out in MILLS & WILLINGHAM ON THE LAW OF OIL AND GAS, § 13, the doctrine of ferae naturae was not carried to its logical conclusion in that state (as it was in Indiana), for Pennsylvania, as in a majority of the oil producing states, has adopted the rule that the owner of land under which oil and gas lie is the absolute owner of them in place in the same manner and to the same extent as is an owner of solid minerals, and that he may create by grant or reservation a separate corporeal estate in oil and gas identical in nature with the estate of the surface, subject, of course, to loss through escape. We so regard it in Kentucky. * * *

The conception of absolute ownership can go no further, for beyond that point the wild and migratory nature of oil and gas destroys the theory. They may be here to-day and gone to-

morrow. They belong to the owner of the land as a part of it so long as they are on it or in it or subject to his control; when they are gone, his title is gone. (citation omitted) If they escape into the land of another, they become his property in like degree or manner. So it is declared that oil and gas are not the property of any one until reduced to actual possession by extraction, although by virtue of his proprietorship the owner of the surface, or his grantee of the severed mineral estate, has the exclusive right of seeking to acquire and of appropriating the oil and gas directly beneath. This theory of ownership or, perhaps more accurately speaking, lack of ownership is practically universally recognized. (citations omitted)

When gas is thus severed and brought under dominion and into actual possession at the surface, it, of course, becomes the personal property of the one who has extracted it under a right so to do. (citation omitted) The appellee acquired such title to the gas here involved. The question is whether that gas, having once been reduced to possession and absolute ownership having vested, was restored to its original wild and natural status by being replaced in a similar reservoir of nature, taking the place of other gas which once occupied that same subterranean chamber.

* * * *

In seeking for an analogous condition in the law, the courts, since the early Pennsylvania case, have compared natural gas and oil to that of animals ferae naturae. The analogy, as we have seen, formed the basis of the all but universal doctrine of property in these wandering minerals. So we may look to that analogous law. From the beginning, wild animals have been regarded as quasi property of the entire human race. It is the recognition of land titles rather than of any individual property in the game that prevents its pursuit, and, barring all questions of trespass, exclusive property in birds and wild animals becomes vested in the person capturing or reducing them to possession. But unless killed, this is a qualified property, for when restored to their natural wild and free state, the dominion and individual proprietorship of any person over them is at an end and they resume their status as common property. 3 C.J. 18, 19. So, too, are fish collective property so long as they remain unconfined in their natural element in a public stream, and not even the owner of the soil over which the stream flows owns the fish therein, although he may have the exclusive right of fishing in the stream where it runs over his land. And, as in the case of wild game, a qualified property in an individual may be acquired by catching and confining fish within a private pond so they cannot escape. If, however, the fish escape and are found at large in their proper element, they again become public property and are subject to appropriation by the first person who takes them. 26 C.J. 597.

If one capture a fox in a forest and turn it loose in another, or if he catch a fish and put it back in the stream at another point, has he not done with that migratory, common property just what the appellee has done with the gas in this case? Did the company not lose its exclusive property in the gas when it restored the substance to its natural habitat?

Another analogue to the moving deposits of oil and gas is subterranean and percolating water which also have a similarity of relation though not of identity, the substantial difference being only that oil and gas are vanishing products while water may be perpetually supplied by nature. One may draw water and it becomes his when placed in his own receptacle. He may appropriate water from a running stream to turn his mill or to irrigate his land and the property therein may be said to exist in him so long as it remains under his control. But once the water is restored to the earth or to the running stream that exclusive, individual title is lost. (citations omitted)

In his revision of THORNTON'S WORK ON OIL AND GAS, Judge Willis probably had this identical situation in mind when writing section 1264 concerning the taxation of oil and gas. It is there said:

> "When oil and gas are restored to the land they become a part of the real estate and taxable as such. One company owns an entire gas field in central Kentucky. It has for years stored natural gas therein and the question is suggested as to the character of the gas in such circumstances. It differs from ordinary storage in artificial containers. The gas is put back under pressure into the natural reservoirs and assumes again its original character as part of the realty. It plainly should be taxed with and as a part of the land. It is analogous to the law concerning timber. Standing in the woods, timber is a part of the land. When severed it becomes personal property. If made into lumber and used to construct a building it becomes again a part of the land to which it is attached. When gas is stored in the natural reservoir it is subject to all the properties that inhered in it originally. A neighbor could take it with impunity through adjacent wells, if he owned land within the radius of the reservoir. Hence, it should be taxed only as part of the land in which it is placed, and in such circumstances could not be treated as personal property."

We are of opinion, therefore, that if in fact the gas turned loose in the earth wandered into the plaintiff's land, the defendant is not liable to her for the value of the use of her property, for the company ceased to be the exclusive owner of the whole of the gas—it again became mineral ferae naturae.

Accordingly, the judgment is affirmed.

LONE STAR GAS CO.
v.
MURCHISON

353 S.W.2d 870
(Tex. Civ. App.—Dallas, 1962, writ ref'd n.r.e.)

WILLIAMS, JUSTICE.

This appeal presents a question of first impression in Texas. The primary question presented is whether title to natural gas, once having been reduced to possession, is lost by the injection of such gas into a natural underground reservoir for storage purposes.

* * * *

TRIAL COURT'S JUDGMENT.

The trial court, in the material portion of his order said:

> The Court is of the opinion that Plaintiff as a matter of law lost title to the gas injected for storage by Plaintiff in the Bacon Lime Storage Reservoir when it migrated under the Jackson tract and was produced by Defendants from their well on the Jackson tract. (citation omitted) The rule of capture as stated in *Brown v. Humble Oil & Refining Company*, 126 Tex. 296, 83 S.W.2d 935, applies to the gas injected by Plaintiff for storage. Therefore, the Court finds that Plaintiff's petition fails to state a cause of action, and the Defendants' exceptions to Plaintiff's petition must be sustained.

OPINION

It is of utmost importance to understand that we are not here dealing with natural gas as it exists in its natural state. We are concerned here with what is known as 'extraneous gas' which means gas which has been produced elsewhere, acquired and owned by Lone Star and then, for purposes of storage, injected into the Bacon storage reservoir underlying about 4,000 acres in Henderson County, pursuant to authority of the Railroad Commission of Texas. A distinction which must be applied between the status of natural gas, as such, and 'extraneous gas', as defined, is a controlling feature of this appeal. The law of Texas relating to the original capture of natural gas from underlying structures is well settled by the Supreme Court in (citation omitted). On the other hand the direct question of ownership and status of extraneous gas has never been presented to Texas Courts. It is of paramount importance, in approaching this question, to bear in mind the nature of the suit by Lone Star. The action is simply one seeking damages and redress from the conversion of gas which appellant contends is its personal property. Nothing more is here presented. Appellees expend a great deal of space in their brief to the argument that appellant has trespassed upon their property. The status of this record is such, however, that we must, as Ulysses 'lash ourselves to the mast and resist Siren't songs' of trespass, or similar contention. This, for the simple reason that no action seeking redress or claimed trespass is here presented. The simple question upon determination is one of title and ownership, i. e., did the title and ownership of the extraneous gas herein involved, which appellant acquired and stored in the underground reservoir for use, pass from appellant to appellees?

The case relied upon by the trial court, and the one which appellees ask us to embrace as the law of Texas, is *Hammonds v. Central Kentucky Natural Gas Company*, 255 Ky. 685, 75 S.W.2d 204, decided in 1934 by the Court of Appeals of Kentucky. * * *

* * * *

Hammonds, in its application of ferae naturae doctrine, has been the subject of violent adverse criticism by many authors and law review writers.

SUMMERS, 'OIL AND GAS', permanent Ed. Vol. 1, p. 173, states:

> All of these analogies of oil and gas to solid minerals, in subterranean waters, and to animals ferae naturae are false, for the reason that the physical and economical facts of oil and gas from which the legal relations of the landowner respecting them are actually determined, are different from the physical and economic facts of the substances with which they are compared.

* * * *

One of the most distinguished and outstanding authorities on oil and gas law in Texas, A.W. Walker, Jr., in 16 TEX. L. REV. 370 said:

> It is unfortunate that our law as to oil and gas developed before scientific information was available as to the exact nature of oil and gas reservoirs. Throughout all of the earlier decisions are to be found statements indicating the prevailing erroneous opinion that oil and gas in their natural state possessed the quality of free migration. Even as late as 1921, one of the Texas courts indulged in the fanciful statement that oil and gas 'are supposed to percolate restlessly about under the surface of the earth, even as the birds fly from field to field and the beasts roam from forest to forest'.
>
> In the absence of common-law precedent, and without the benefit of scientific information, it is not surprising that the courts sought by analogy to compare oil and gas to other types of property such as wild animals, subterranean waters, and solid minerals, with

> reference to which there was ample common-law precedent upon which to determine property rights. These ugly analogies in the light of modern scientific information have been disproven, and the courts have come to recognize that oil and gas, as commonly found in underground reservoirs are really sui generis, and we are rapidly developing a special jurisprudence adapted to the peculiarities of these particular minerals.
>
> * * * *

It was not until 1960, 26 years following *Hammonds*, but we find an adjudicated case which repudiates the holding of the Kentucky Court. * * * The court refused to follow the Kentucky authority on Hammonds, saying:

> The pivotal issue in this case is whether title to natural gas, once having been reduced to possession, is lost by the injection of such gas into a natural underground reservoir for storage purposes.
>
> * * * application of the ferae naturae analogy apparently has been limited to the original 'capture' of native gas and oil. Insofar as title to gas and oil in place is concerned, the Supreme Court has long considered as firmly established the rule that '. . . oil and gas are minerals, though not commonly spoken of as such, and while in place are part of the land' (Kier v. Peterson, 41 Pa. 357, 362 * * *); . . . .
>
> Once severed from the realty, however, gas and oil, like other minerals, become personal property.
>
> * * * title to natural gas once having been reduced to possession is not lost by the injection of such gas into a natural underground reservoir for storage purpose.' (Emphasis ours.)
>
> * * * *

Several states have enacted legislation which provides explicity that the injector of natural gas retains title thereto. Colo. Rev. Statutes Ann., Chp. 100, § 100-9-7; Mo. Ann. Statutes Title 25, § 393.500; Okla. Statutes Ann. Title 52, § 36.6 (1960).

* * * *

There can be no doubt that gas which has been produced is personal property. Thus, in 31-A TEX. JUR. 27, it is said: 'When oil or gas is removed from the soil it becomes personalty.' (citations omitted)

Assuming the existence of title to the gas as personal property while held above the ground by the owner the question remains does such ownership cease by the act of the owner in storing it in a well-defined storage reservoir. The owner of personal property does not lose his title thereto by not having the property on his person or on his land unless there is abandonment, and abandonment requires an intent to abandon, which is not present in this case. In 1 TEX. JUR. 10, it is said: 'The doctrine of abandonment rests primarily on intention. Indeed, it is common in cases dealing with this subject to find it said that abandonment is a question of intention. Accordingly there must have existed an intention to abandon before property or a right therein can be lost.' Contrary to the theory of abandonment we find in this record a positive statement of intention on the part of appellant to reclaim its gas as it is needed to satisfy the demand of consumers during times of high fuel consumption.

From the available authorities on this subject and based upon what we consider to be sound and logical reason, especially in the light of advanced knowledge and scientific achievement in the oil and gas industry, we are of the opinion that the rule of the *Hammonds* case should not be embraced as the law in Texas. An exegesis of the *Hammonds* opinion, when considered in the

light of present day development of the gas industry, is unimpressive. The analogy of wild animals upon which *Hammonds* is founded fails to undergird the ultimate decision of that case. Gas has no similarity to wild animals. Gas is an inanimate, diminishing non-reproductive substance lacking any will of its own, and instead of running wild and roaming at large as animals do, is subject to be moved solely by pressure or mechanical means. It cannot be logically regarded as personal property of the human race as are wild animals, instead stead of being turned loose in the woods as the fanciful fox or placed in the streams as the fictitious fish, gas, a privately owned commodity, has been stored for use as required by the consuming public being, as alleged by appellant, subject to its control and withdrawal at any time. Logic and reason dictates the application of the *White* decision rather than *Hammonds*, to the end, that in Texas, the owner of gas does not lose title thereof by storing the same in a well-defined underground reservoir. It follows, therefore, that the trial court was in error in applying the *Hammonds* doctrine and thereby holding that Lone Star had lost title to its gas by storing it.

* * * *

From what we have said it seems obvious to us that the trial court committed error in holding that Lone Star had failed to state a cause of action, and sustaining the special exceptions to the pleadings and in dismissing plaintiff's lawsuit. Appellant's first through eight points are sustained.

* * * *

The judgment of the trial court is reversed and remanded for trial on the merits.

YOUNG, J., not sitting.

HUMBLE OIL & REFINING CO.
v.
WEST
508 S.W.2d 812
(Tex. 1974)

STEAKLEY, JUSTICE.

This is a suit by West, et al., Respondents, who are royalty owners, for injunction and, in the alternative, for declaratory judgment. The action is brought against Humble Oil and Refining Company, Petitioner, the fee owner of the gas field and mineral rights, subject to the royalty interests. The problem arises from Humble's action of injecting extraneous gas into the underground reservoir, for purposes of storage, prior to production of all the recoverable native gas. The history of the matter will be recited in some detail.

The Wests, by fee simple conveyance dated December 28, 1938, deeded all lands owned by them in the West Clear Lake (Frio) gas field in Harris County, Texas, to Humble. Each conveyance recited that the Wests "except from this conveyance and retain unto themselves, their heirs, successors and assigns, those certain royalties on oil, gas and other minerals which may be produced and saved from the lands hereby conveyed." Insofar as gas is concerned, the retained royalty was described as 'a royalty equal to the market value at the well of one-sixth (1/6) of the

dry gas so sold or used; provided that on such dry gas sold at the wells the royalties shall be one-sixth (1/6) of the amount realized from such sale.'

The West Clear Lake Field, a water drive field, has been producing gas since 1938. In 1969, Humble concluded that the reservoir was approaching depletion and that the injection of extraneous gas was necessary to preserve the reservoir from destruction by water encroachment. In response to Humble's application, and after a hearing on September 23, 1969, at which the Wests appeared in opposition, the Railroad Commission of Texas, under date of January 20, 1970, authorized use of the reservoir for the storage of gas. There was no appeal from this order.

On March 26, 1970, the Wests instituted this suit against Humble for permanent injunction, i.e., 'that upon final trial hereof defendant be enjoined from using the Clear Lake, W. (Frio) Field, Harris County, Texas, as a gas storage reservoir until all the native gas therein has been produced. "In the alternative, the Wests sought a 'declaratory judgment decreeing that if defendant uses said reservoir as a gas storage reservoir, defendant must account to plaintiffs for their royalty interests in all gas produced from said reservoir irrespective of whether said produced gas be native gas or stored gas."

Humble commenced the injection of extraneous gas on September 1, 1970. In response to the Wests' suit, Humble's first amended answer, filed June 2, 1972, alleged that before commencement of the gas storage project, it had produced 89% of the recoverable gas reserves in the reservoir and that production of the remaining recoverable gas would have resulted in destruction of the reservoir's gas storage capability. Further, in answer, Humble committed itself to continue to pay royalties on production from the reservoir "until, but only until, the total volume of all gas so produced from the particular tract is equal to the volume of gas in place in the reservoir in such tract above the gas-water contact as of January 1, 1969, terminating all royalty payments as to such tract in such reservoir when such production has occurred."

Under date of September 18, 1972, and after a trial before the Court, judgment was entered denying the prayer of the Wests for permanent injunction but decreeing (t)hat defendant must account to plaintiffs for their royalty interests in all gas produced from the tracts in which they own royalty interests in the Clear Lake W. (Frio) Field, Harris County, Texas, irrespective of whether said produced gas be native gas or stored gas.'

Upon appeal by all parties, the Court of Civil Appeals reversed the judgment of the trial court and remanded the cause, with instructions "to enter a permanent injunction restraining defendant from further injecting the field and using same as a gas storage reservoir until all native gas has been produced therefrom." (citation omitted) Writ of error was granted at the instance of Humble. We reverse and remand.

The initial and underlying problem to be solved is whether, under the contract between the parties and the existing circumstances, the Wests are entitled to enjoin Humble from injecting gas in the reservoir until all recoverable native gas has been produced. If not, we must then determine the rights of the parties under the Wests' alternative prayer that Humble account to them in royalty payments on all gas produced from the reservoir, whether native or stored.

As to the first issue, the Wests argue that prior writings of this Court establish principles which entitle them to injunctive relief. They cite *Sheffield v. Hogg*, 124 Tex. 290, 77 S.W.2d 1021 (1934), where this Court determined that in the context of property taxation, a royalty interest, whether payable in money or in kind, should be denominated an interest in land. (citations omitted) They emphasize that one in the position of Humble is required not only to produce and market gas from the tract found in paying quantities, (citations omitted), but also to accurately measure such production and sales in order to accurately account to the royalty owner.

(citations omitted) Thus, the Wests contend that the proprietary and contractual rights arising from their royalty interest translate into certain absolute rights in the native gas now in the reservoir, under which they are entitled to total production of all native gas prior to utilization of the reservoir for storage of extraneous gas. Otherwise stated, it is their position that the nature of their royalty interest, coupled with their right to royalties on all native gas produced at market demand and sold at prevailing market prices, precludes any right in Humble to commingle gas in the reservoir, and that Humble's actions so impaired the rights of the Wests as to entitle them to enjoin further commingling. Additionally, they argue by analogy the applicability of the principle of awarding injunctive relief when one intentionally appropriates another's property interest by encroachment, *Bickler v. Bickler*, 403 S.W.2d 354 (Tex. 1966), or when one is acting in violation of building restrictions. (citation omitted)

The nature of the respective property interests of the parties should first be noted. As stated, the Wests conveyed fee title to the lands but reserved "royalties on oil, gas and other minerals which may be produced and saved from the lands hereby conveyed," payable in money. Humble, on the other hand, owns the lands in fee simple, and this includes not only the surface and mineral estates, but also the matrix of the underlying earth, i.e., the reservoir storage space, subject only to the reserved right of the Wests to the payment of royalties on minerals that are produced and saved. * * * Indeed, the Wests do not challenge Humble's ownership of the reservoir and its right to utilize it for storage; instead, they direct their argument to the time at which, they say, the storage right accrues. They argue, in essence, that the exercise of such right by Humble is postponed by the royalty reservation until total depletion of all recoverable native gas from the reservoir.

It is manifest that the interests of the parties have come into conflict and are not fully compatible. Thus, we have again the recurring problem of adjusting correlative rights. The factual context is unique and there is no directly controlling precedent; however, this Court has led the way in conciliating conflicts between owners of the surface and of the mineral rights, and in requiring reasonable accommodations between them. (citations omitted) These writings and the principles which they establish are instructive here.

* * * *

A further example of the balancing of competing interests in the oil and gas context is found in *Railroad Commission v. Manziel*, *supra*. Here, this Court was faced with a question of whether an enjoinable 'trespass' occurred when an adjoining mineral estate was invaded by salt water injected pursuant to secondary recovery projects authorized by the Railroad Commission. While the issue arose in the context of the validity of the Railroad Commission order, we emphasized that application of orthodox rules and principles may not be appropriate under such circumstances; we spoke of balancing the interests of society and the interests of the oil and gas industry as a whole against the interest of the individual operator.

* * * *

In the case at hand, the interests of the parties are evident; the Wests possess a royalty interest in native gas produced from the West Clear Lake Field, while Humble owns fee title to the lands, including the subsurface reservoir. In conciliating the interests asserted by each party, we must necessarily consider the unusual nature of the subsurface reservoir and the West Clear Lake gas fields. The unique geologic and geographic characteristics of the reservoir are shown by the record; further, the evidence establishes that since this reservoir lies in a water drive field, salt water encroachment reduces the storage capability as native gas is produced. Absent injection of extraneous gas, production of native gas to depletion will result in a 'watering out' or total

destruction of the storage capability of the reservoir. As a consequence, injunction against the injection of extraneous gas would render illusory Humble's ownership of the storage rights in the reservoir.

Moreover, our ruling will determine the continued existence of an important natural resource. The record reveals two significant features of the reservoir which vitally affect the public interest. First, the is well-suited as a "peaking" facility which can handle the seasonal fluctuations and rapidly increasing energy demands for the greater Houston area; secondly, it is a strategically located "emergency" facility, capable of providing a readily deliverable supply of gas at times when accidents, natural disasters or mechanical failures make continued delivery through normal channels impossible.

Under these circumstances, the accepted principles of accommodation that have ruled the resolution of like conflicts are determinative, and we hold that the Court of Civil Appeals erred in ordering the injunctive relief sought by the Wests.

The denial of injunctive relief requires a determination of whether the contractual obligation of Humble is to account in royalties on the production of all gas from the reservoir, "irrespective of whether said produced gas be native or stored gas," as decreed by the trial court.

The Wests argue that this "pay forever" judgment is compelled by the language of the original conveyance. The conveyance stated that the Wests "except from this conveyance and retain unto themselves, their heirs, successors and assigns, those certain royalties on oil, gas and other minerals which may be produced and saved from the lands hereby conveyed." Thus, the Wests claim that while Humble may be permitted to inject extraneous gas for storage purposes, All gas produced and saved from the lands is subject to the Wests' royalty interest. The original conveyance made no distinction between native gas and extraneous or stored gas, and the Wests contend that to hold that Humble is not under obligation to pay royalties on the stored gas "produced and saved" would require a rewriting of the existing instruments of conveyance.

To date, the only Texas case dealing with the issue of ownership of gas stored in a natural reservoir is *Lone Star Gas Co. v. Murchison*, 353 S.W.2d 870 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.). Lone Star Gas, by various conveyances, acquired wells and leases in the Bacon Lime Field; Lone Star Gas also executed a unit operating agreement by which it acquired the right to inject and store extraneous gas in the Bacon storage reservoir. The Murchison group possessed rights as oil and gas lessees on the Jackson tract, and the southwestern part of the Bacon storage reservoir extended under the Jackson tract. The Murchisons drilled a well into the Bacon storage reservoir and took large quantities of gas therefrom. The question was whether the title and ownership of extraneous gas which Lone Star injected into the reservoir for storage was lost upon production of the commingled gas. The Murchisons urged the court to adopt the reasoning of *Hammonds v. Central Kentucky Natural Gas Company*, 255 Ky. 685, 75 S.W.2d 204 (1934); when faced with a similar fact situation, the Kentucky court determined that the doctrine of animals ferae naturae was applicable. Thus, once extraneous gas which was 'turned loose' in the earth wandered to another's land, the party injecting the stored gas ceased to be the exclusive owner of gas; the gas became a mineral ferae naturae.

The Court of Civil Appeals in *Murchison* rejected the doctrine established in Hammonds and embraced the language of *White v. New York State Natural Gas Corp. et al*, 190 F.Supp. 342 (W.D.Pa. 1960), where it was stated that "once severed from the realty, gas and oil, like other minerals, become personal property . . . title to natural gas once having been reduced to possession is not lost by the injection of such gas into a natural reservoir for storage purposes."

Therefore, under *Murchison*, the extraneous gas injected for storage by Humble having assumed the character of personal property, remained its property. (citations omitted)

The Wests assert, however, that since they possess a perpetual royalty on the gas produced from the field, their royalty interest "expires with the end of time." Thus, they argue that the contractual relationship of the parties, i.e., the obligation to pay royalty on all gas produced and saved, becomes the controlling distinction between the instant case and *Murchison*. In our view, this is not a tenable distinction but one which if adopted would implicitly recognize the doctrine of minerals ferae naturae which was rejected in *Murchison*. In accord with *Murchison*, Humble's ownership of the gas as personal property is not altered either upon injection of the gas into the reservoir or upon later production of the gas. The language of the conveyance does no more than reserve the royalty interest in the native gas in the reservoir, and Humble's ownership of the extraneous gas is unaffected thereby.

An alternative basis to be considered is whether the trial court judgment may be sustained on a confusion of goods theory. Under *Murchison*, as noted, the extraneous gas is the personal property of Humble. However, by injecting this extraneous gas into the reservoir prior to production of all native gas, Humble has commingled extraneous gas, in which Humble has an exclusive property interest, and native gas, in which the Wests have a royalty interest. The question thus becomes one of determining whether Humble's intentional "confusion" of the two bodies of gas should result in the forfeiture of its exclusive rights to the extraneous gas. If such a forfeiture is proper, the Wests would be entitled to a royalty on all gas produced, consistent with the trial court judgment.

As a general rule, the confusion of goods theory attaches only when the commingled goods of different parties are so confused that the property of each cannot be distinguished. Where the mixture is homogeneous, the goods being similar in nature and value, and if the portion of each may be properly shown, each party may claim his aliquot share of the mass. (citations omitted) Additionally, the burden is on the one commingling the goods to properly identify the aliquot share of each owner; thus, if goods are so confused as to render the mixture incapable of proper division according to the pre-existing rights of the parties, the loss must fall on the one who occasioned the mixture. (citations omitted) Stated differently, since Humble is responsible for, and is possessed with peculiar knowledge of the gas injection, it is under the burden of establishing the aliquot shares with reasonable certainty. (citations omitted)

Humble sought to discharge this burden by offering expert opinion evidence in estimation of the volume of native gas as of January 1, 1969; its commitment in the trial court was to continue the payment of royalties to the Wests on the basis of this proof until production of the commingled gas equaled the volume of gas in place at such time. As to this, the Wests contend that the obligation of Humble to account for their royalty interests may not rest upon expert opinion evidence and that, at the least, upon its election to utilize the reservoir for storage and hence to commingle native and extraneous gas, Humble came under the obligation of paying royalties on all gas thereafter produced from the reservoir.

The counter position of Humble is that the opinion testimony of the geology and engineering witnesses is reasonably certain; that their testimony was based upon more than acceptable well control for mapping the reservoir, and that there existed sufficient data upon which to compute reservoir pressure, reservoir temperature, gas formation volume factor, reservoir porosity and permeability and connate water saturation. Thus, Humble asserts that the Wests' aliquot share of the gas in the reservoir prior to injection of the extraneous gas is subject to a reasonable estimate and that the expert testimony sufficiently established the volume of the reserves.

In the context of their asserted right to equitable relief, the Wests emphasize, on the other hand, that Warnack, Humble's geologist witness, admitted that a certain "judgment or opinion decision" had to be made in calculating the reservoir size. They stress that the witness acknowledged that wide discrepancies may exist in determining the size of a reservoir and insist that his calculations were based upon limited and unacceptable information. Also, they note that Whitson, he petroleum engineer called to testify by Humble, made critical calculations of porosity and permeability by means of mathematical averages; further, that experts agree that the limits of a reservoir are difficult of exact determination.

As we have indicated, it is our view that the act of commingling native and extraneous gas did not impose upon Humble the obligation of paying royalties on all gas thereafter produced from the reservoir, if the evidence establishes with reasonable certainty the volume of gas reserves upon which the Wests would have been entitled to royalties, absent injection of extraneous gas. The burden of this showing devolves upon Humble after proof by the Wests of their royalty interests, together with proof of Humble's commingling of extraneous and native gas. The threshold question for determination is whether the requisite computation of reserves is capable of establishment with reasonable certainty; and, if so, the further question to be resolved is whether the burden defined above is discharged by Humble under the evidence. We have concluded that the cause should be generally remanded to the trial court for determination of these issues at the trial level, as well as for consideration of any other issues the parties may raise in the light of our rulings.

The judgment of the Court of Civil Appeals is reversed and the cause remanded to the trial court for further proceedings in accordance with this opinion.

PEOPLE'S GAS CO.
v.
TYNER

31 N.E. 59
(Ind. 1892)

COFFEY, JUSTICE.

This was an action by the appellee against the appellants in the Hancock circuit court for the purpose of obtaining an injunction. The complaint alleges, substantially, that the appellee and his wife are the owners by entireties of the real estate therein described, which consists of four city lots in the city of Greenfield; that the lots are inclosed together by a fence, and that his dwelling house and residence, in which he and his family reside, is situated on the lots; that the lots are near the center of the city, and, with his residence thereon, are of the value of $4,000; that with full knowledge of all the facts the appellants, regardless of the rights of the appellee and of the safety, peace, comfort, and lives of himself and family, have, without his consent and over his objections, within the last 40 days, dug and constructed a natural gas well to the depth of about 1,000 feet, and about 200 feet distant from the appellee's residence, with only a street 40 feet in width between the appellee's lots and the lot on which the well is sunk; that the appellants are about to "shoot" said well, and will do so unless restrained; that for the purpose of "shooting" the well the appellants, about midnight of the _____ day of August, 1889, unlawfully procured to be brought

and unlawfully permitted a large quantity of nitroglycerin or other nitro explosive compound to be and remain upon Sycamore street, a public street in the city, and within less than 200 feet of appellee's residence, for about 3 hours, in the midst of and surrounded by a large number of people; that appellants, by their employees, threatened and attempted to "shoot" said gas well, and that they still threaten so to do, with their said nitroglycerin or other nitro explosive compound, and will do so unless restrained; that nitroglycerin is highly explosive, and very dangerous to property and life, and is liable to explode under any and all circumstances, and at any time or place, and that an explosion of 60 or 100 quarts of said explosive at any given place on the surface of the earth could and probably would destroy life and property for a distance of 500 yards in all directions from such explosion; that the handling or storing thereof in or about appellant's gas well will endanger the lives of his family, as well as the safety of his property, and that the shooting of said well with nitroglycerin will greatly injure and damage the appellee's said property, both above and under the surface of the earth, and endanger his life and the lives of his family. This complaint was verified, and upon it and the affidavits filed in support of its allegations the court granted a temporary injunction, from which this appeal is prosecuted. The affidavits filed by the appellee tended to prove that the appellants' gas well is within the corporate limits of the city of Greenfield; that a short time prior to the filing of the complaint in this cause the appellants deposited in or near the derrick at the well described in the complaint about 117 quarts of nitroglycerin, weighing about 340 pounds, with the intention of exploding the same in the well. The affidavits further tend to show that nitroglycerin is very explosive, and that it is liable to explode at any time; that the explosion of that quantity of nitroglycerin upon the surface of the earth would be likely to destroy life or property at any point within 500 yards of such explosion.

It is contended by the appellants-*First*, that they had the right to use their own property as to them seemed best, and for that reason they could not be enjoined from exploding nitroglycerin in their well for the purpose of increasing the flow of natural gas, though such explosion might have the effect to draw the gas from the land of the appellee; *second*, that, as bringing nitroglycerin into the corporate limit of a town or city in a greater quantity than 100 pounds is made a crime by statute, it cannot be enjoined. On the other hand, it is contended by the appellee-*First*, that natural gas is property, and that the appellants have no legal right to do anything upon their own land which will draw such gas from his land, and appropriate it to their own use; *second*, that as he is liable to suffer an injury peculiar to himself, to which the public in general is not subject, by the unlawful act of the appellants in bringing nitroglycerin within the corporate limits of Greenfield, he is entitled for that reason to an injunction.

It has been settled in this state that natural gas, when brought to the surface of the earth and placed in pipes for transportation, is property, and may be the subject of interstate commerce. * * * Water, petroleum, oil, and gas are generally classed by themselves as minerals possessing in some degree a kindred nature. As to whether the owner of the soil may dig down and divert a well-defined subterraneous stream of water, there is much diversity of opinion and conflict in the adjudicated cases; but the authorities agree that the owner of a particular tract of land may sink a well, and appropriate to his own use all the percolating water found therein, though it may entirely destroy the well on his neighbor's land. * * * It is a familiar maxim that in contemplation of law, land always extends downward as well as upwards, so that whatever is in a direct line between the surface of any land and the center of the earth belongs to the owner of the surface. Mr. Angell says that it would seem to follow from this maxim that whether what is subterranean be solid rock, mines, or porous soil, or salt springs, or part land and part water, the person who owns the surface may dig therein, and apply all that is there found to his own

purposes *ad libitum*. Section 109, Ang. Water-Courses. Upon this principle, it was held by this court in the case of *Railroad Co. v. Peterson*, *supra*, that if an adjoining land owner, in lawfully digging upon his own land, draws the water from the land of another, to his injury, such injury falls within the description of *damnum absque injuria*, which cannot become the ground of an action. In the case of *Haldeman v. Bruckhart*, 45 Pa. St. 514, it was said: "The purchaser of land in which there are unknown subsurface currents must buy in ignorance of any obstacle to the full enjoyment of his purchase indefinitely downwards, and the purchaser of land in which a spring arises, ignorant whence and how the water comes, cannot bargain for any right to a secret flow of water in another's land." Mr. Gould, in his work on WATERS, (2d Ed. § 291,) says: "Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word 'land,' and is a part of the soil in which it is found. Like water, it is not the subject of property, except while in actual occupancy, and a grant of either water or oil is not a grant of the soil, or of anything for which ejectment will lie." In recognition of the principles here announced in the case of *Brown v. Vandergrift*, 80 Pa. St. 142, it was said by the court that "the discovery of petroleum led to new forms of leasing lands. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment. * * * It is not denied by the appellee in this case that the appellants have the perfect legal right to sink a well into their own land, and draw therefrom all the gas that may naturally flow to it, but he contends that they have no right to explode nitroglycerin in the well to increase the natural flow. When it is once conceded that the owner of the surface has the right to sink a well and draw gas from the lands of an adjoining owner, no valid reason can be given why he may not enlarge his well by the explosion of nitroglycerin therein for the purpose of increasing the flow. The question is not as to the quantity of gas he may take, but it is a question of his right to take the gas at all. So far as this suit seeks to enjoin the appellants from exploding nitroglycerin in their gas well, upon the ground that it will increase the flow of the gas to the injury of the appellee, it cannot, in our opinion, be sustained. The rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others. It is settled that the owner of a lot may not erect and maintain a nuisance thereon, whereby his neighbors are injured. If he does so, and the injury sustained by such neighbor cannot be adequately compensated in damages, he may be enjoined. * * *

If the appellants in this case have been guilty of the folly of sinking a gas well in the center of a thickly-populated city, where they cannot collect the necessary quantity of nitroglycerin to shoot it without endangering the property and lives of those who have no connection with their operations, they should be content with such flow of gas as can be obtained without such shooting. It certainly cannot be maintained that the destruction of human life is an injury which can be compensated in damages. No authority has been cited, and we know of none, supporting the position of the appellants that the appellee is not entitled to an injunction because the accumulation of nitroglycerin within the corporate limits of a town or city is a crime. It has long been settled that a private citizen may maintain an action for a public wrong if he suffers an injury peculiar to himself, and not sustained by the public in general. * * *

The sufficiency of the complaint, as it would be when tested by demurrer, is not involved here. It is a mere temporary injunction. To authorize the court to grant such relief, it was not necessary that a case should be made that would entitle the appellee to relief, at all events at the hearing. In such cases, it is sufficient if the court finds upon the pleadings and evidence a case which makes the transaction a proper subject for investigation in a court of equity. * * * In our opinion the court did not err in granting the temporary injunction in this case. Judgment affirmed.

ELLIFF
v.
TEXON DRILLING CO.
210 S.W.2d 558
(Tex. 1948)

FOLLEY, JUSTICE.

This is a suit by the petitioners, Mrs. Mabel Elliff, Frank Elliff, and Charles C. Elliff, against the respondents, Texon Drilling Company, a Texas corporation, Texon Royalty Company, a Texas corporation, Texon Royalty Company, a Delaware corporation, and John L. Sullivan, for damages resulting from a 'blowout' gas well drilled by respondents in the Agua Dulce Field in Nueces County.

The petitioners owned the surface and certain royalty interests in 3054.9 acres of land in Nueces County, upon which there was a producing well known as Elliff No. 1. They owned all the mineral estate underlying the west 1500 acres of the tract, and an undivided one-half interest in the mineral estate underlying the east 1554.9 acres. Both tracts were subject to oil and gas leases, and therefore their royalty interest in the west 1500 acres was one- eighth of the oil or gas, and in the east 1554.9 acres was one-sixteenth of the oil and gas.

It was alleged that these lands overlaid approximately fifty per cent of a huge reservoir of gas and distillate and that the remainder of the reservoir was under the lands owned by Mrs. Clara Driscoll, adjoining the lands of petitioners on the east. Prior to November 1936, respondents were engaged in the drilling of Driscoll-Sevier No. 2 as an offset well at a location 466 feet east of petitioners' east line. On the date stated, when respondents had reached a depth of approximately 6838 feet, the well blew out, caught fire and cratered. Attempts to control it were unsuccessful, and huge quantities of gas, distillate and some oil were blown into the air, dissipating large quantities from the reservoir into which the offset well was drilled. When the Driscoll-Sevier No. 2 well blew out, the fissure or opening in the ground around the well gradually increased until it enveloped and destroyed Elliff No. 1. The latter well also blew out, cratered, caught fire and burned for several years. Two water wells on petitioners' land became involved in the cratering and each of them blew out. Certain damages also resulted to the surface of petitioners' lands and to their cattle thereon. The cratering process and the eruption continued until large quantities of gas and distillate were drained from under petitioners' land and escaped into the air, all of which was alleged to be the direct and proximate result of the negligence of respondents in permitting their well to blow out. The extent of the emissions from the Driscoll-Sevier No. 2 and Elliff No. 1, and the two water wells on petitioners' lands, was shown at various times during the several years between the blowout in November 1936, and the time of the trial in June 1946. There was also expert testimony from petroleum engineers showing the extent of the losses from the underground reservoir, which computations extended from the date of the blowout only up to June 1938. It was indicated that it was not feasible to calculate the losses subsequent thereto, although lesser emissions of gas continued even up to the time of the trial. All the evidence with reference to the damages included all losses from the reservoir beneath petitioners' land without regard to whether they were wasted and dissipated from above the Driscoll land or from petitioners' land.

The jury found that respondents were negligent in failing to use drilling mud of sufficient weight in drilling their well, and that such negligence was the proximate cause of the well blowing out. It also found that petitioners had suffered $4620 damage to sixty acres of the

surface, and $1350 for the loss of 27 head of cattle. The damages for the gas and distillate wasted 'from and under' the lands of petitioners, due to respondents' negligence, was fixed by the jury at $78,580.46 for the gas, and $69,967.73 for the distillate. These figures were based upon the respective fractional royalty interests of petitioners in the whole amount wasted under their two tracts of land, and at a value, fixed by the court without objection by the parties, of two cents per 1000 cubic feet for the gas and $1.25 per barrel for the distillate.

The findings as to the amount of drainage of gas and distillate from beneath petitioners' lands were based primarily upon the testimony of petitioners' expert witness, C. J. Jennings, a petroleum engineer. * * * He estimated that 13,096,717,000 cubic feet of gas had been drained from the west 1500 acres of the Elliff land, and that 57,625,728,000 cubic feet had been drained from the east 1554.9 acres as a result of the blowout. The distillate loss was calculated by taking the gas and distillate ratio from the records of the Railroad Commission. Jennings estimated that 195,713 barrels had been drained from the west 1500 acres and 802,690 barrels from the east 1554.9 acres, as a result of the blowout.

On the findings of the jury the trial court rendered judgment for petitioners for $154,518.19, which included $148,548.19 for the gas and distillate, and $5970 for damages to the land and cattle. The Court of Civil Appeals reversed the judgment and remanded the cause. * * *

The reversal by the Court of Civil Appeals rests upon two grounds. The first was that since substantially all of the gas and distillate which was drained from under petitioners' lands was lost through respondents' blowout well, petitioners could not recover because under the law of capture they had lost all property rights in the gas or distillate which had migrated from their lands. The second theory was that the recovery cannot stand because the trial court had submitted the wrong measure of damages in that petitioners' claim "is for trespass in and to a freehold estate in land and the proper measure of damage is the reasonable cash market value before and after the occurrence complained of."

* * * *

Consequently, our attention will be confined to the sole question as to whether the law of capture absolves respondents of any liability for the negligent waste or destruction of petitioners' gas and distillate, though substantially all of such waste or destruction occurred after the minerals had been drained from beneath petitioners' lands.

* * * *

In Texas, and in other jurisdictions, a different rules exists as to ownership. In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. * * * The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. * * * The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value. * * *

* * * This migratory character of oil and gas has given rise to the so-called rule or law of capture. That rule simply is that the owner of a tract of land acquires title to the oil or gas which he produces from wells on his land, though part of the oil or gas may have migrated from adjoining lands. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands, and without incurring liability to him for drainage. The non-liability is based upon the theory that after the drainage the title or property interest of the former owner is gone. This rule, at first blush, would seem to conflict with the view of absolute ownership of the minerals in place, but it was otherwise decided in the early case

of *Stephens County v. Mid-Kansas Oil & Gas Co.*, 1923, 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566. Mr. Justice Greenwood there stated, 113 Tex. 167, 254 S.W. 292, 29 A.L.R. 566:

> The objection lacks substantial foundation that gas or oil in a certain tract of land cannot be owned in place, because subject to appropriation, without the consent of the owner of the tract, through drainage from wells on adjacent lands. If the owners of adjacent lands have the right to appropriate, without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative right to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own.

Thus it is seen that, notwithstanding the fact that oil and gas beneath the surface are subject both to capture and administrative regulation, the fundamental rule of absolute ownership of the minerals in place is not affected in our state. In recognition of such ownership, our courts, in decisions involving well-spacing regulations of our Railroad Commission, have frequently announced the sound view that each landowner should be afforded the opportunity to produce his fair share of the recoverable oil and gas beneath his land, which is but another way of recognizing the existence of correlative rights between the various landowners over a common reservoir of oil or gas.

It must be conceded that under the law of capture there is no liability for reasonable and legitimate drainage from the common pool. The landowner is privileged to sink as many wells as he desires upon his tract of land and extract therefrom and appropriate all the oil and gas that he may produce, so long as he operates within the spirit and purpose of conservation statutes and orders of the Railroad Commission. These laws and regulations are designed to afford each owner a reasonable opportunity to produce his proportionate part of the oil and gas from the entire pool and to prevent operating practices injurious to the common reservoir. In this manner, if all operators exercise the same degree of skill and diligence, each owner will recover in most instances his fair share of the oil and gas. This reasonable opportunity to produce his fair share of the oil and gas is the landowner's common law right under our theory of absolute ownership of the minerals in place. But from the very nature of this theory the right of each land holder is qualified, and is limited to legitimate operations. Each owner whose land overlies the basin has a like interest, and each must of necessity exercise his right with some regard to the rights of others. No owner should be permitted to carry on his operations in reckless or lawless irresponsibility, but must submit to such limitations as are necessary to enable each to get his own. * * * 22 L.R.A. 141, 37 Am.St.Rep. 736.

While we are cognizant of the fact that there is a certain amount of reasonable and necessary waste incident to the production of oil and gas to which the non-liability rule must also apply, we do not think this immunity should be extended so as to include the negligent waste or destruction of the oil and gas.

In 1 SUMMERS, OIL AND GAS, Perm. Ed., § 63 correlative rights of owners of land in a common source of supply of oil and gas are discussed and described in the following language:

> These existing property relations, called the correlative rights of the owners of land in the common source of supply, were not created by the statute, but held to exist because of the peculiar physical facts of oil and gas. The term 'correlative rights' is merely a convenient method of indicating that each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil or gas therefrom by lawful operations conducted on his own land; that each such owner has duties to the other owners not to exercise his privileges of taking so as to injure the common source of

> supply; and that each such owner has rights that other owners not exercise their privileges of taking so as to injure the common source of supply.
>
> In 85 A.L.R. 1156, in discussing the case of *Hague v. Wheeler*, *supra*, the annotator states:
>
> * * * The fact that the owner of the land has a right to take and to use gas and oil, even to the diminution or exhaustion of the supply under his neighbor's land, does not give him the right to waste the gas. His property in the gas underlying his land consists of the right to appropriate the same, and permitting the gas to escape into the air is not an appropriation thereof in the proper sense of the term.

In like manner, the negligent waste and destruction of petitioners' gas and distillate was neither a legitimate drainage of the minerals from beneath their lands nor a lawful or reasonable appropriation of them. Consequently, the petitioners did not lose their right, title and interest in them under the law of capture. At the time of their removal they belonged to petitioners, and their wrongful dissipation deprived these owners of the right and opportunity to produce them. That right is forever lost, the same cannot be restored, and petitioners are without an adequate legal remedy unless we allow a recovery under the same common law which governs other actions for damages and under which the property rights in oil and gas are vested. This remedy should not be denied.

In common with others who are familiar with the nature of oil and gas and the risks involved in their production, the respondents had knowledge that a failure to use due care in drilling their well might result in a blowout with the consequent waste and dissipation of the oil, gas and distillate from the common reservoir. In the conduct of one's business or in the use and exploitation of one's property, the law imposes upon all persons the duty to exercise ordinary care to avoid injury or damage to the property of others. Thus under the common law, and independent of the conservation statutes, the respondents were legally bound to use due care to avoid the negligent waste or destruction of the minerals imbedded in petitioners' oil and gas-bearing strata. This common-law duty the respondents failed to discharge. For that omission they should be required to respond in such damages as will reasonably compensate the injured parties for the loss sustained as the proximate result of the negligent conduct. The fact that the major portion of the gas and distillate escaped from the well on respondents' premises is immaterial. Irrespective of the opening from which the minerals escaped, they belonged to the petitioners and the loss was the same. They would not have been dissipated at any opening except for the wrongful conduct of the respondents. Being responsible for the loss they are in no position to deny liability because the gas and distillate did not escape through the surface of petitioners' lands.

We are therefore of the opinion the Court of Civil Appeals erred in holding that under the law of caputre the petitioners cannot recover for the damages resulting from the wrongful drainage of the gas and distillate from beneath their lands. However, we cannot affirm the judgment of the trial court because there is an assignment of error in the Court of Civil Appeals challenging the sufficiency of the evidence to support the findings of the jury on the amount of the damages, and another charging that the verdict was excessive. We have no jurisdiction of those assignments, and, since they have not been passed upon, the judgment of the Court of civil Appeals is reversed and the cause remanded to that court for consideration of all assignments except those herein decided. *McKenzie Construction Co. v. City of San Antonio*, 131 Tex. 474, 115 S.W.2d 617; *Ritchie v. American Surety Co. of New York*, 145 Tex. 422, 198 S.W.2d 85, and authorities cited.

COASTAL OIL & GAS CORP.
v.
GARZA ENERGY TRUST
268 S.W.3d 1
(Tex. 2008)

JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE BRISTER, JUSTICE GREEN, JUDGE CHRISTOPHER, and JUSTICE PEMBERTON joined, and in all but Part II-B of which JUSTICE JEFFERSON, JUSTICE MEDINA, JUSTICE JOHNSON, and JUSTICE WILLETT joined.

The primary issue in this appeal is whether subsurface hydraulic fracturing of a natural gas well that extends into another's property is a trespass for which the value of gas drained as a result may be recovered as damages. We hold that the rule of capture bars recovery of such damages. * * *

* * * *

We reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

I

* * * *

The Vicksburg T is a "tight" sandstone formation, relatively imporous and impermeable, from which natural gas cannot be commercially produced without hydraulic fracturing stimulation, or "fracing", as the process is known in the industry. This is done by pumping fluid down a well at high pressure so that it is forced out into the formation. The pressure creates cracks in the rock that propagate along the azimuth of natural fault lines in an elongated elliptical pattern in opposite directions from the well. Behind the fluid comes a slurry containing small granules called proppants-sand, ceramic beads, or bauxite are used-that lodge themselves in the cracks, propping them open against the enormous subsurface pressure that would force them shut as soon as the fluid was gone. The fluid is then drained, leaving the cracks open for gas or oil to flow to the wellbore. Fracing in effect increases the well's exposure to the formation, allowing greater production. First used commercially in 1949, fracing is now essential to economic production of oil and gas and commonly used throughout Texas, the United States, and the world.

Engineers design a fracing operation for a particular well, selecting the injection pressure, volumes of material injected, and type of proppant to achieve a desired result based on data regarding the porosity, permeability, and modulus (elasticity) of the rock, and the pressure and other aspects of the reservoir. The design projects the length of the fractures from the well measured three ways: the hydraulic length, which is the distance the fracing fluid will travel, sometimes as far as 3,000 feet from the well; the propped length, which is the slightly shorter distance the proppant will reach; and the effective length, the still shorter distance within which the fracing operation will actually improve production. Estimates of these distances are dependent on available data and are at best imprecise. Clues about the direction in which fractures are likely to run horizontally from the well may be derived from seismic and other data, but virtually nothing can be done to control that direction; the fractures will follow Mother Nature's fault lines in the formation. The vertical dimension of the fracing pattern is confined by barriers-in this case, shale-or other lithological changes above and below the reservoir.

For the Coastal Fee No. 1, the fracing hydraulic length was designed to reach over 1,000 feet from the well. Salinas's expert, Dr. Michael J. Economides, testified he would have designed the operation to extend at least 1,100 to 1,500 feet from the well. The farthest distance from the well to the Share 13 lease line was 660 feet. The parties agree that the hydraulic and propped lengths exceeded this distance, but they disagree whether the effective length did. The lengths cannot be measured directly, and each side bases its assertion on the opinions of an eminent engineer long experienced in hydraulic fracturing: Economides for Salinas, and Dr. Stephen Allen Holditch for Coastal. Holditch believed that a shorter effective length was supported by post-fracing production data.

All the wells on Share 12 and Share 13 were fraced. As measured by the amount of proppant injected into the well, the fracing of the Coastal Fee No. 1 and No. 2 wells was, as Economides testified, "massive", much larger than any fracing operation on a well on Share 13. Several months after filing suit, Salinas amended his pleadings to assert a claim for trespass, alleging that Coastal's fracing of the Coastal Fee No. 1 well invaded the reservoir beneath Share 12, causing substantial drainage of gas.

* * * *

The jury found:

* * * *

- Coastal's fracing of the Coastal Fee No. 1 well trespassed on Share 13, causing substantial drainage, which a reasonably prudent operator would have prevented, and $1 million damages in lost royalties;

* * * *

The trial court reduced the damages for . . . drainage from $1 million to $543,776, in each instance the maximum amount supported by Salinas's evidence, and otherwise rendered judgment on the verdict.

The court of appeals reversed the attorney fee award because it included fees for Salinas's prosecution of a claim of breach of the implied covenant to market, on which the jury found no damages, and remanded the case for attorney fees to be redetermined. In all other respects, the court of appeals affirmed.

II

We begin with Salinas's contention that the incursion of hydraulic fracturing fluid and proppants into another's land two miles below the surface constitutes a trespass for which the minerals owner can recover damages equal to the value of the royalty on the gas thereby drained from the land. Coastal argues that Salinas has no standing to assert an action for trespass, and even if he did, hydraulic fracturing is not an actionable trespass. Because standing may be jurisdictional, we address it first.

A

As a mineral lessor, Salinas has only "a royalty interest and the possibility of reverter" should the leases terminate, but "no right to possess, explore for, or produce the minerals." Texas courts have occasionally stated that "[t]he gist of an action of trespass to realty is the injury to the right of possession." Since Salinas has no possessory right to the minerals in Share 13, Coastal argues he has no standing to sue for trespass.

But courts have stated the rule too broadly. At common law, trespass included several actions directed to different kinds of wrongs. Trespass *quare clausum fregit* was limited to physical

invasions of plaintiff's possessory interest in land; trespass on the case was not and provided an action for injury to a non-possessory interest, such as reversion. Professors Prosser and Keeton explain:

> Thus a landlord cannot sue for a mere trespass to land in the occupation of his tenant. He is not without legal remedy, in the form of an action on the case for the injury to the reversion; but in order to maintain it, he must show more than the trespass-namely, actual permanent harm to the property of such sort as to affect the value of his interest.

Salinas's reversion interest in the minerals leased to Coastal is similar to a landlord's reversion interest in the surface estate. By his claim of trespass, Salinas seeks redress for a permanent injury to that interest-a loss of value because of wrongful drainage. His claim is not speculative; he has alleged actual, concrete harm whether his leases continue or not, either in reduced royalty revenues or in loss of value to the reversion. This gives him standing to sue for a form of trespass, and under our liberal pleading rules, unlike the common law, he was not required to specify which form. At common law, choosing the wrong form of action was fatal to the case, but modern civil procedure has abandoned such rigid distinctions.] It is important to note, however, that Salinas's claim of trespass does not entitle him to nominal damages (which he has not sought). He must prove actual injury.

B

Had Coastal caused something like proppants to be deposited on the surface of Share 13, it would be liable for trespass, and from the ancient common law maxim that land ownership extends to the sky above and the earth's center below, one might extrapolate that the same rule should apply two miles below the surface. But that maxim—*cujus est solum ejus est usque ad coelum et ad inferos*—"has no place in the modern world." Wheeling an airplane across the surface of one's property without permission is a trespass; flying the plane through the airspace two miles above the property is not. Lord Coke, who pronounced the maxim, did not consider the possibility of airplanes. But neither did he imagine oil wells. The law of trespass need no more be the same two miles below the surface than two miles above.

We have not previously decided whether subsurface fracing can give rise to an action for trespass. * * *

We need not decide the broader issue here. In this case, actionable trespass requires injury, and Salinas's only claim of injury-that Coastal's fracing operation made it possible for gas to flow from beneath Share 13 to the Share 12 wells-is precluded by the rule of capture. That rule gives a mineral rights owner title to the oil and gas produced from a lawful well bottomed on the property, even if the oil and gas flowed to the well from beneath another owner's tract. The rule of capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation. Salinas does not claim that the Coastal Fee No. 1 violates any statute or regulation. Thus, the gas he claims to have lost simply does not belong to him. He does not claim that the hydraulic fracturing operation damaged his wells or the Vicksburg T formation beneath his property. In sum, Salinas does not claim damages that are recoverable.

Salinas argues that the rule of capture does not apply because hydraulic fracturing is unnatural. The point of this argument is not clear. If by "unnatural" Salinas means due to human intervention, the simple answer is that such activity is the very basis for the rule, not a reason to suspend its application. Nothing is more unnatural in that sense than the drilling of wells, without which there would be no need for the rule at all. If by "unnatural" Salinas means unusual, the facts are that hydraulic fracturing has long been commonplace throughout the industry and is

necessary for commercial production in the Vicksburg T and many other formations. And if by "unnatural" Salinas means unfair, the law affords him ample relief. He may use hydraulic fracturing to stimulate production from his own wells and drain the gas to his own property-which his operator, Coastal, has successfully done already-and he may sue Coastal for not doing so sooner-which he has also done, in this case, though unsuccessfully, as it now turns out.

Salinas argues that stimulating production through hydraulic fracturing that extends beyond one's property is no different from drilling a deviated or slant well—a well that departs from the vertical significantly—bottomed on another's property, which is unlawful. Both produce oil and gas situated beneath another's property. But the rule of capture determines title to gas that drains from property owned by one person onto property owned by another. It says nothing about the ownership of gas that has remained in place. The gas produced through a deviated well does not migrate to the wellbore from another's property; it is already on another's property. The rule of capture is justified because a landowner can protect himself from drainage by drilling his own well, thereby avoiding the uncertainties of determining how gas is migrating through a reservoir. It is a rule of expedience. One cannot protect against drainage from a deviated well by drilling his own well; the deviated well will continue to produce his gas. Nor is there any uncertainty that a deviated well is producing another owner's gas. The justifications for the rule of capture do not support applying the rule to a deviated well.

We are not persuaded by Salinas's arguments. Rather, we find four reasons not to change the rule of capture to allow one property owner to sue another for oil and gas drained by hydraulic fracturing that extends beyond lease lines.

First, the law already affords the owner who claims drainage full recourse. This is the justification for the rule of capture, and it applies regardless of whether the drainage is due to fracing. If the drained owner has no well, he can drill one to offset drainage from his property. If the minerals are leased and the lessee has not drilled a well, the owner can sue the lessee for violation of the implied covenant in the lease to protect against drainage. If an offset well will not adequately protect against drainage, the owner (or his operator) may offer to pool, and if the offer is rejected, he may apply to the Railroad Commission for forced pooling. The Commission may also regulate production to prevent drainage. No one suggests that these various remedies provide inadequate protection against drainage.

Second, allowing recovery for the value of gas drained by hydraulic fracturing usurps to courts and juries the lawful and preferable authority of the Railroad Commission to regulate oil and gas production. Such recovery assumes that the gas belongs to the owner of the minerals in the drained property, contrary to the rule of capture. While a mineral rights owner has a real interest in oil and gas in place, "this right does not extend to *specific* oil and gas beneath the property"; ownership must be "considered in connection with the law of capture, which is recognized as a property right" as well. The minerals owner is entitled, not to the molecules actually residing below the surface, but to "a fair chance to recover the oil and gas in or under his land, *or* their equivalents in kind." The rule of capture makes it possible for the Commission, through rules governing the spacing, density, and allowables of wells, to protect correlative rights of owners with interests in the same mineral deposits while securing "the state's goals of preventing waste and conserving natural resources". But such rules do not allow confiscation; on the contrary, they operate to prevent confiscation. Without the rule of capture, drainage would amount to a taking of a mineral owner's property—*the* oil and gas below the surface of the property—thereby limiting the Commission's power to regulate production to assure a fair recovery by each owner. The Commission has never found it necessary to regulate hydraulic fracturing, a point to which we will return below, but should it ever choose to do so, permitting

fracturing that extended beyond property lines, however reasonable in terms of industry operation, would be met with the objection that the Commission had allowed the minerals in the drained property to be confiscated. While " 'all property is held subject to the valid exercise of the police power' and thus not every regulation is a compensable taking, . . . some are." "Physical possession is categorically, a taking for which compensation is constitutionally mandated". We need not hold here that without the rule of capture, all regulation of drainage would be confiscatory and thus beyond the Commission's power. We observe only that the rule of capture leaves the Commission's historical role unimpeded. "It is now well settled that the Railroad Commission is vested with the power and charged with the duty of regulating the production of oil and gas for the prevention of waste as well as for the protection of correlative rights." The Commission's role should not be supplanted by the law of trespass.

Third, determining the value of oil and gas drained by hydraulic fracturing is the kind of issue the litigation process is least equipped to handle. One difficulty is that the material facts are hidden below miles of rock, making it difficult to ascertain what might have happened. Such difficulty in proof is one of the justifications for the rule of capture. But there is an even greater difficulty with litigating recovery for drainage resulting from fracing, and it is that trial judges and juries cannot take into account social policies, industry operations, and the greater good which are all tremendously important in deciding whether fracing should or should not be against the law. While this Court may consider such matters in fashioning the common law, we should not alter the rule of capture on which an industry and its regulation have relied for decades to create new and uncertain possibilities for liability with no more evidence of necessity and appropriateness than this case presents. Indeed, the evidence in this case counsels strongly against such a course. The experts in this case agree on two important things. One is that hydraulic fracturing is not optional; it is essential to the recovery of oil and gas in many areas, including the Vicksburg T formation in this case. (This fact has recently been brought to the public's attention because of development in the Barnett Shale in north Texas, which is entirely dependent on hydraulic fracturing.) The other is that hydraulic fracturing cannot be performed both to maximize reasonable commercial effectiveness and to avoid all drainage. Some drainage is virtually unavoidable. In this context, common law liability for a long-used practice essential to an industry is ill-advised and should not be extended absent a compelling need that the Legislature and Commission have ignored. No such need exists.

Fourth, the law of capture should not be changed to apply differently to hydraulic fracturing because no one in the industry appears to want or need the change. The Court has received amicus curiae briefs in this case from the Railroad Commission, the General Land Office, the American Royalty Council, the Texas Oil & Gas Association, the Texas Independent Producers & Royalty Owners Association, the Texas Alliance of Energy Producers, Harding Co., BJ Services Co., Halliburton Energy Services, Inc., Schlumberger Technology Corp., Chesapeake Energy Corp., Devon Energy Corp., Dominion Exploration & Production, Inc., EOG Resources, Inc., Oxy Usa Inc., Questar Exploration and Production Co., XTO Energy, Inc., and Chief Oil & Gas LLC. These briefs from every corner of the industry—regulators, landowners, royalty owners, operators, and hydraulic fracturing service providers—all oppose liability for hydraulic fracturing, almost always warning of adverse consequences in the direst language. Though hydraulic fracturing has been commonplace in the oil and gas industry for over sixty years, neither the Legislature nor the Commission has ever seen fit to regulate it, though every other aspect of production has been thoroughly regulated. Into so settled a regime the common law need not thrust itself.

Accordingly, we hold that damages for drainage by hydraulic fracturing are precluded by the rule of capture. It should go without saying that the rule of capture cannot be used to shield misconduct that is illegal, malicious, reckless, or intended to harm another without commercial justification, should such a case ever arise. But that certainly did not occur in this case, and no instance of it has been cited to us.

* * * *

We reverse the court of appeals' judgment, render judgment that Salinas take nothing on his claims for trespass and breach of the implied covenant to protect against drainage, and remand the remainder of the case for a new trial.

JUSTICE WILLETT, concurring.

* * * *

B. Fracing Is Not Merely Non-Actionable Trespass, But No Trespass at All

I agree with the Court as far as it goes. If the choice is (1) extend trespass liability to thwart a proven and widespread recovery technique or (2) extend the rule of capture-perhaps "the most important single doctrine of oil and gas law"—I favor the latter. To recognize a rule of capture yet at the same time prohibit fracing would create an asymmetry in Texas oil and gas law that leaves the rule of capture frozen in time (at the worst possible time), unable to adapt to essential new technologies.

My departure from the Court's reasoning is a narrow one. The Court says "no liability" because, while it presumes a trespass occurred, the rule of capture precludes injury: no injury, no lawsuit. I would instead tackle a more threshold issue, one we addressed in *Manziel* almost a half-century ago: whether formalistic trespass principles apply with equal force to the recovery of ever-dwindling supplies of natural resources miles below the surface.

To many people, a subsurface intrusion of fissures, fluid, and proppant invites a simple application of rudimentary trespass principles. Why not call a tort a tort? Well, *we* affix that common-law label, and not every technical intrusion, no matter how small, warrants damages, no matter how large. Trespass is a court-defined doctrine, and it falls squarely on this Court's shoulders to decide what is actionable. In doing so, we made clear in *Manziel* the common law must permit common-sense accommodations for technological breakthroughs that benefit society.

In *Manziel*, our watershed waterflood case, we flatly rejected an absolutist trespass standard, stressing that the definition of trespass must make room for industry innovations. We unanimously rejected a theory of trespass based on an earlier-developed secondary recovery practice (waterflooding) that was used to develop the giant East Texas field. In a waterflood, usually conducted after primary production methods have ceased, water is injected under pressure into a reservoir to push residual oil toward certain output wells. The plaintiffs in *Manziel* complained the waterflood amounted to "trespass by injected water" that would drain oil from beneath their lease by pushing it to other properties and "result in the premature destruction of their producing . . . well." We held that injected water that crosses lease lines did not constitute trespass: "The orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropriately applied to subsurface invasions as arise out of the secondary recovery of natural resources." Basically, we held the law of trespass must not be applied in an unduly dogmatic manner to the oil and gas industry, a statement I believe counsels against the *existence* of liability, not merely the *extent* of liability.

Notably, we did not concede in *Manziel* that waterflood amounted to trespass but opt against liability because the good outweighed the bad. Indeed, if encroachment from waterflooding were deemed trespassory, then public policy considerations could not even be factored in. Nor did we say the rule of capture precluded the plaintiffs whose oil was swept away from claiming a compensable injury. Rather, this Court, employing a balancing-of-interests analysis more common to nuisance cases, unanimously declared that injecting water beneath your neighbor's land was simply not a trespass because it was not wrongful:

> Certainly, it is relevant to consider and weigh the interests of society and the oil and gas industry as a whole against the interests of the individual operator who is damaged; and if the authorized activities in an adjoining secondary recovery unit are found to be based on some substantial, justifying occasion, then this court should sustain their validity.

No intervening event, legal or technological, in the forty-six years since *Manziel* urges a different result today than in that case, which incidentally involved a far greater physical invasion (waterflood) that, according to some, inflicts far greater (and irreversible) damage than fractures extending from a wellbore. Plus, with waterflooding, migration across lease lines is guaranteed; with fracing, it's not, since fracture length and direction cannot be precisely controlled. Fracing (like waterflooding) involves the injection of fluids across lease lines, but fracing (like waterflooding) is not a trespass because fracing (like waterflooding) is not wrongful because fracing (like waterflooding) generates societal and economic benefits that outweigh any harm to individual operators. Allowing wide-open trespass damages would unleash a judicial waterflood, as it were, driving out a large amount of oil and gas production, and driving up the cost of any frac-based production that remained.

* * * *

II. A Comment on the Dissent

A. Fracing Is Not Slant-Hole Drilling by Another Name

The dissent likens fracing to slant-hole drilling, intentionally bottoming a drill bit beneath the vertical boundaries of another's land. I see multiple and meaningful distinctions between fraced wells and deviated wells, as does the Railroad Commission.

First, a slant-hole driller exerts absolute control, knowing and directing with GPS-like precision *exactly* where the drillbit is and where it's going. Fracing, as plaintiffs' expert conceded, is highly unpredictable; under present-day petroleum engineering technology, a fracture's direction cannot be determined or controlled, except by Mother Nature, and a fracture's length cannot be precisely measured. Second, a slant-hole well, encased in connecting pipe, remains open at its bottom-hole location, while only a portion of the initial fracture actually contributes to capturing minerals. Third, nobody contends that bottoming a wellbore beneath your neighbor's property is indispensable to Texas oil and gas production; everybody-including plaintiffs' own expert-agrees that fracing is absolutely critical in low-permeability areas like South Texas. Fourth, the Railroad Commission has never treated slant-hole drilling and frac drilling the same. In exercising its expertise, the Commission sees sharp distinctions between slant-hole wells and fraced wells, regulating the former heavily and the latter hardly at all: "the Commission has never categorized wells that have been fracture stimulated as 'deviated' wells by requiring a permit for the fracture job or attempting to determine the location of the fractures to assess compliance with spacing rules of other Commission rules." The Commission has always focused on the location of the wellbore itself, not any fractures or other subsurface features that might impact drainage.

* * * *

D. Allowing Tres-Frac Damages Would Portend Many Inconvenient Truths

* * * *

Sixteen years ago in *Geo Viking, Inc. v. Tex-Lee Operating Co.*, we opened the door to trespass-by-fracture claims: "Fracing under the surface of another's land constitutes a subsurface trespass." This attention-grabbing pronouncement had a short shelf life. We withdrew the opinion six months later, noting *Geo Viking* had been improvidently granted and expressly disavowing that anything we said should be "understood as approving or disapproving the opinions of the court of appeals analyzing the rule of capture or trespass as they apply to hydraulic fracturing." Fortunately, we avoid a similar mistake today.

* * * * * *

Given Texas' unrivaled leadership in shaping the nation's dynamic energy sector, "[o]ther states frequently look to Texas decisions when confronted with a new or unsettled issue of oil and gas law." While I would tackle the trespass issue slightly differently, the reasoning underlying the Court's no-liability outcome provides a valuable legal roadmap. I agree that Texas law should not equate hydraulic fracturing across a lease boundary with actionable subsurface trespass. I also agree with the Court on all the various nontrespass issues.

CHAPTER 2
THE OIL & GAS LEASE AS A CONVEYANCE

A. NATURE OF THE OIL & GAS LEASE

CHEROKEE WATER CO.
v.
FORDERHAUSE
641 S.W.2d 522
(Tex. 1982)

GREENHILL, CHIEF JUSTICE.

This case involves the construction of a deed. The deed conveyed the surface of the subject property, but the grantors reserved the mineral estate. The deed gave the grantee, Cherokee, a preferential right to acquire the minerals if the grantor decided to sell the minerals. The grantor executed an oil and gas lease to a third party. The main question is whether the oil and gas lease constituted a sale so as to give Cherokee a preferential right to acquire the minerals.

* * * *

The trial court granted Cherokee's motion for summary judgment. It severed the mineral owners' claim for reformation of the deed. The trial court found that Cherokee was the holder of a preferential right to purchase under the deed, that an oil and gas lease executed by the mineral owners constituted an attempted sale of the oil, gas and other minerals under the terms of the preferential right to purchase, and ordered specific performance.

The Court of Appeals reversed. * * *

The Court of Appeals also held that the trial court committed error in severing the mineral owners' plea for reformation from the declaratory judgment action. The majority considered the claim for reformation to be a compulsory counterclaim that must be tried with the rest of the cause under Rule 97(a) of the Texas Rules of Civil Procedure.

* * * *

We disagree with the holding of the Court of Appeals. The language in the deed is not ambiguous, and an oil and gas lease is within the scope of the transactions contemplated by the preferential right to purchase. In addition, the trial court did not abuse its discretion by severing the counterclaim for reformation from the declaratory judgment action. The Court of Appeals is therefore reversed, and the judgment of the trial court is affirmed.

Cherokee purchased the surface of a 59.71 acre tract of land in Rusk County, Texas, from the fee owners of the tract, our Respondents, in 1947. Cherokee intended to construct a lake which would cover the surface of the property. The grantors reserved all the oil, gas and other minerals under the surface, but gave Cherokee and its assigns a preferential right to purchase the mineral estate should the mineral owners ever desire and agree to sell it. The preferential right to purchase provided:

> In reference to the reservation of oil, gas and other minerals, it is expressly understood and agreed that the above land is purchased by Grantee for the purpose of forming a Lake and that all or a part of said land will be covered with water that will vary from a few to many feet in depth. This right of Grantee to cover said land with water is superior to the rights of Grantor to use said land to remove said minerals as above set out and the *mineral owners* shall not, in any manner, subject the Grantee to damages, liabilities or obligations of any kind or character by reason of the construction of said dam and covering said land with water. The rights of Grantor to said minerals shall be the same as if such minerals were conveyed to Grantor after said Lake is created and established. If a well or wells are drilled to remove said minerals, such well or wells shall be so operated and maintained as to not to in any manner pollute the Lake water with salt water, hydrocarbons or other foreign matter. If a dike or road is built from the shoreline to such well or wells, the same shall be so located as not to interfere with the use of said Lake by Grantee, his successors or assigns, and such dike or road shall not be constructed across said Lake so as to obstruct free and continuous passage of boats going to and from one part of the Lake to another part of such Lake. No act shall be performed by the *mineral owner* or his successors and assigns that is not necessary in order to remove said minerals.
>
> Grantee is hereby given the first option *to purchase the oil, gas and other minerals* herein reserved, at the same price and on the same terms *as Grantor has agreed to sell* to a third party; such option to be accepted or rejected within five (5) days after Grantee has been furnished with the bona fide offer made by such third party. *Failure to exercise such option on one sale, shall not be a waiver to purchasing* at *any subsequent sale or sales* by Grantor. [Emphasis added.]

As explained more fully in the Court of Appeals opinion, the mineral owners executed a number of oil and gas leases in the thirty years following the Cherokee conveyance, and eventually production was obtained. Cherokee did not attempt to exercise the preferential right to purchase until February 24, 1978. At that time the property was subject to an oil and gas lease executed by the mineral owners in 1976 with a Messrs. Boase and Wood as lessees, a lease Cherokee knew nothing about. When Cherokee discovered the existence of the Boase and Woods lease, Cherokee's attorney tried to contact the mineral owners, Boase, Woods and others to discover the terms and conditions of the lease. This effort proved unsuccessful, and it became necessary for Cherokee to bring the declaratory judgment action. There is no indication that the lessees, Boase and Woods, have expended money on the "lease." As noted above, the deed in question states that failure of Cherokee to exercise their right, assuming that they knew of the other lease, would not constitute a waiver.

The task before us is to determine whether the preferential right to purchase as set out in the deed includes an oil and gas *lease* as a "sale" of the mineral estate. In construing this contractual provision in the deed, we are seeking to ascertain the intent of the parties to the instrument. (citation omitted) In the absence of fraud or mistake, writing alone will be deemed to express the intention of the parties, and courts will enforce an unambiguous instrument as written. … . The court is not looking for the subjective intent of the parties, which, as here, is conflicting and in fact creates an ambiguity in the language of the instrument; instead, it is the objective intent, the intent expressed or apparent in the writing which is sought. (citations omitted)

Absent reformation or other matters not relevant here, there is no need to go beyond the language of the contractual provision in the deed to determine the intention of the parties. The term "sale," when used in a property context, is commonly understood to mean any conveyance of an estate for money or money's worth. Used alone, "sale" does not qualify the duration or

quantity of the property interest conveyed, and a purchase of a fee simple, determinable fee, fee subject to a condition subsequent, or life estate would each be considered a "sale" of those interests.

The term "lease," when used in an oil and gas context, is a misnomer. The estate created by the oil and gas lease is not the same as those interests created under a "lease" governed by the law of landlord and tenant.[1]

The common oil and gas lease creates a determinable fee. It vests the lessee with title to oil and gas in place. *W.T. Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 19 S.W.2d 27 (1929) and authorities cited therein. It logically follows, and has long been held by this court, that an oil and gas lease is a sale of an interest in land. (citations omitted)

The language of the Cherokee deed provides not only that Cherokee may exercise its right to purchase in any sale of the mineral estate, but on any *sale or sales* of that estate. Multiple sales of the mineral estate by the original grantor, either as a portion of the whole mineral estate (i.e., partial undivided interests or segregated acreage parcels) or repeated sales of the entire mineral estate are covered by use of the terms "sale or sales." The determinable fee created by an oil and gas lease will revert to the grantor upon the failure of the lessee to obtain production during the primary term, or failure to timely pay delay rentals. "Leases" generally provide that they will remain in force after the primary term as long as oil or gas is produced in paying quantities. If the mineral estate reverts to the grantor, it will be subject to the multiple sales provision of the preferential right to purchase.

The Court of Appeals noted in its opinion that several leases were executed on the tract during the thirty years subsequent to the 1947 deed, that gas was actually produced sometime during this period, that Cherokee and the mineral owners shared the royalties from this production, and that neither party ever indicated that the preferential right to purchase was triggered by any of the subsequent leases. Consideration by the Court of Appeals of the extrinsic evidence of this subsequent conduct was improper, as the terms sought to be explained are unambiguous. (citation omitted) This evidence does not so much explain the terms of the deed as it does create an ambiguity; as such, consideration by the court was improper. In addition, Cherokee's activities (or non-activity) are covered expressly by language in the deed that the failure of Cherokee to exercise its right of first refusal was not a waiver of subsequent exercises of that right.

* * * *

The mineral owners contend that the preferential right to purchase contained in the deed violates the rule against perpetuities. The point is overruled. We agree with the reasoning of the Court of Appeals on this issue.

The judgment of the Court of Appeals is therefore reversed, and the judgment of the trial court is affirmed. It may proceed with the severed matter, the action for reformation.

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[1] But see *Bean v. Bean*, 79 S.W.2d 652 (Tex. Civ. App.—Texarkana 1935, writ ref. n.r.e.) where the court held that a power of attorney authorizing the holder to execute deeds did not include the right to execute oil and gas leases.

CONCORD OIL CO.
v.
PENNZOIL EXPLORATION AND PRODUCTION CO.
966 S.W.2d 451
(Tex. 1998)

OWEN, JUSTICE.

* * * *

Concord and some commentators suggest that conflicting fractions appear in so many deeds because of a common misconception of what an owner of a mineral interest retains after the execution of a lease. *See*, *e.g.*, 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL & GAS LAW § 327.2, at 94.1 (1980); Frank W. Elliott, Jr., *The Fractional Mineral Deed "Subject To" a Lease*, 36 TEX. L. REV. 620, 622 (1958). Commentators have also observed that most grantors do not intend to convey interests of different magnitudes. *See*, *e.g.*, 2 WILLIAMS & MEYERS, *supra*, § 340.2 (1995); Ernest E. Smith, *The "Subject To" Clause*, 30 ROCKY MTN. MIN. L. INST. § 15.02[1] (1985). Under a typical lease providing for a 1/8 royalty, the lessor may think that the interest retained is 1/8 of the minerals including 1/8 of the royalties. This misconception is evidenced in a few decisions. *See*, *e.g.*, *Tipps*, 101 S.W.2d at 1078 (lessor of mineral interest "retained one-eighth of all the minerals in place, subject to the lease"); *Jupiter Oil*, 819 S.W.2d at 468-69 (citing and following *Tipps* on this point). In actuality, a lease conveys a fee simple determinable with the possibility of reverter. When the lessor owns all the mineral estate (8/8) and executes an oil and gas lease, the lessor has conveyed all the mineral estate (8/8) but has retained a possibility of reverter in the entire mineral estate (8/8). *See generally Luckel*, 819 S.W.2d at 464. The lessor also receives, of course, all rights that are bargained for in connection with the lease, which usually include the payment of royalties, delay rentals, and bonuses.

The decision in *Tipps*, which helped to foster this so-called "estate misconception," went so far as to say that the use of differing fractions was the proper method of conveyance when a mineral lease was outstanding at the time of the grant. 101 S.W.2d at 1079. In referring to the conflicting fractions, the court said, "No language has been suggested, and we know of none, that would more clearly and accurately express the intention of the parties or that would have the legal effect intended by them than that used." *Id.* The *Tipps* court thus blessed the use of "1/16" in the granting clause and "1/2" in subsequent clauses when the grantor owned the possibility of reverter in the entire mineral estate and wished to convey 1/2 of that interest at a time when the property was subject to a mineral lease providing for a 1/8 royalty. *Tipps* was decided in 1936, and the Concord deed was executed in 1937. Under the rationale of *Tipps*, it would have been appropriate for Crosby to have inserted "1/96" in the granting clause and "1/12" in other provisions of the Concord deed if he intended to convey a 1/12 interest in the minerals.

* * * *

B. USE OF SURFACE

GETTY OIL CO.
v.
JONES

470 S.W.2d 618
(Tex. 1971)

STEAKLEY, JUSTICE.

John H. Jones, respondent, the surface owner of a tract of land in Gaines County, Texas, sued for an injunction to restrain Getty Oil Company, petitioner, an oil and gas lessee, from using vertical space for pumping units that prevent the use by him of an automatic irrigation sprinkler system, and for damages. Upon trial, 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 doing so Getty decreased the market value of the land $117,475, and decreased the value of the use of the land from the time of erection of the pumps until the trial by $19,000. The trial court granted Getty's Motion for Judgment Non Obstante Veredicto on the ground there was no evidence that Getty used more lateral surface than reasonably necessary. Upon appeal, the court of civil appeals reversed the judgment of the trial court, holding that vertical as well as lateral space was restricted to that which is reasonably necessary. The court remanded the case, however, on the further holding that the trial court had erroneously instructed the jury. One Justice dissented. … Both parties have filed applications for writ of error. We affirm the judgment of the court of civil appeals.

In 1955 Jones purchased the 635 acre tract of land in question, which was subject to prior mineral leases in which he acquired no interest. Getty holds an oil, gas and mineral lease covering 120 acres in the west half of the tract; Amerada Petroleum Corporation holds a similar lease covering the remainder of the western half of the tract. The lease for the eastern half of the tract is held by Adobe Oil Company.

Jones has drilled seven irrigation wells since 1955, five of which are used to irrigate this tract of land. Prior to 1963, he used hand-moved, and later power roll, irrigation equipment to irrigate the tract. In 1963 he installed a self-propelled sprinkler irrigation system known as the 'Valley System.' This system consists of 1,300 feet of pipe supported at a height of seven feet above the ground by a series of steel towers which rotate in a clockwise direction around a pivot point. The system can negotiate most obstacles which are less than seven feet in height. The pivot points are connected by underground pipes to the irrigation wells. Labor is required only to move the system from one pivot point to another. There are six pivot points which provide for irrigation of the entire tract except for a few corner areas. At the time Jones installed the 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; however, the unit was outside the circumference of the closest pivot point and did not interfere with operation of the sprinkler system.

In December of 1967 Getty drilled two additional wells on its 120 acres which produced but would not flow. Getty installed two beam-type pumping units, one of which is seventeen feet high at the top of its upstroke, and the other thirty-four feet high. Because of this height, the pumps preclude the use of four pivot points of Jones' irrigation system with a consequent depreciation in the value of the land because of the reduction in its production potential. Getty

also has battery tanks placed on the land that are outside the circumference of the irrigation system and do not interfere with it.

Prior to the time Getty developed its two new wells, Adobe had drilled four wells on the eastern half of the Jones tract and had installed beam-type pumping units on each of the wells. Two of these wells were outside the circumference of the closest pivot points of the sprinkler system; the others would have interfered with the system and were placed in concrete cellars to provide clearance. In addition, the cellars were placed so that the support towers of the sprinkler system would pass around them. In its portion to the tract Amerada also has two wells within the circumference of the irrigation system but both utilize hydraulic pumping units which are less than seven feet in height at the well head and hence do not interfere with the irrigation system. The power unit for these hydraulic pumps is also located so as not to interfere with the system.

The oil and gas lease grants Getty 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, power stations, telephone lines, houses for its employees, and other structures thereon to produce, save, take care of, treat, transport, and own said products." The lease obligates the lessee to bury all pipe lines below ordinary plow depth when required by the lessor. The lease contains no specific provision concerning the vertical usage of the land.

Jones does not charge Getty with negligence nor deny Getty's right to determine the location of its wells and to install some type of pumping equipment when necessary for production. His position is that under the facts and circumstances it was not reasonably necessary for Getty to install pumping units in the manner which denies him the use of his irrigation equipment.

Getty's principal contention is that it has a right to exclusive use of the superadjacent airspace 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. We disagree. It has long been recognized that ownership of real property includes not only the surface but also that which lies beneath and above the surface. The use of land extends to the use of the adjacent air. (citations omitted) Although the earlier cases were generally limited to a consideration of the lateral surface, we held in *Brown v. Lundell*, 162 Tex. 84, 344 S.W.2d 863 (1961), that the rule of liability of the mineral lessee for negligently and unnecessarily damaging the surface estate includes the subsurface. This decision implicitly recognized that there are vertical as well as lateral boundaries to the use of the surface estate by the oil and gas lessee. We now hold explicitly that the reasonably necessary limitation extends to the superadjacent airspace as well as to the lateral surface and subsurface of the land.

Getty further says that if it has acted in a reasonable manner in accomplishing the purposes of the oil and gas lease, its right to so use the surface and the air above is absolute, and that the consequences to the owner of the surface estate are of no legal effect. The expert witnesses agreed that the beam-type pumping units used by Getty were more economical than the hydraulic pumping units; and there was no evidence of any intrinsic value to Getty from the extra expense of constructing below-surface cellars to house the beam-type units. So, Getty argues that their placement of the beam-type pumping units on the surface was authorized by the lease as a matter of law. The question to be resolved, then, is whether evidence may be entertained to show the effect of Getty's manner of surface use upon the use of the surface by Jones, together with the nature of alternatives available to Getty, in resolving the issue of reasonable necessity.

It is well settled that the oil and gas estate is the dominant estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease; but that the rights implied in favor of the mineral estate are to

be exercised with due regard for the rights of the owner of the servient estate. * * * But under the circumstances indicated here; i.e., where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.

The only evidence regarding reasonable means of irrigating this land is found in the testimony of witnesses presented by Jones. It was their testimony that a critical shortage of labor available to farms in the area necessitates the use of automatic sprinkling equipment in irrigating the land. Indeed, Jones testified that the decreasing availability of labor was the controlling factor in his installation of the self-propelled sprinkler system in 1963. Getty sought by cross examination of the witnesses to establish that manual irrigation would suffice, or that a reversible automatic sprinkler would be an adequate alternative for Jones; all, however, rejected manual irrigation as a realistic alternative because of the labor shortage. Neither did the witnesses consider the reversible system a suitable substitute since it would require supervision night and day to avoid collision with the pumps; and that, even if supervisory labor is available, loss of a day's watering would result from moving the system to its proper position by the reversal procedures.

Although disputed by Getty, there was evidence to show that it had reasonable alternatives for obtaining its oil. A petroleum engineer presented by Jones testified that the construction of cellars adequate for the two pumping units required by Getty would have cost less than $12,000 when the pumps were initially installed, and that natural air circulation would alleviate the danger of hydrogen sulfide gas collecting in the cellars. He further testified that installation of large hydraulic pumps would have initially cost less than $5,000 more than the present pumps and would have annual operations costing from $350 to $1,000 more per year. Another witness for Jones was a contract pumper for Adobe who was currently operating two beam-type pumps in cellars, together with twenty-five beam-type pumps on the surface. He testified that less maintenance was necessary on the units in the cellars than on the ones on the surface and that there was less leakage of hydrogen sulfide gas; he also testified that the prevailing winds ventilated the cellars.

The record thus indicates that the irrigation system currently in use affords Jones the most advantageous, and perhaps the only reasonable means of developing the surface for agricultural purposes. It is also indicated that there is available to Getty the two types of pumping installations-the beam-type pumps in cellars or the hydraulic pumps on the surface-which are reasonable alternatives to its present use of the surface; and that Getty's use of an alternative method of producing its wells would serve the public policy of developing our mineral resources while, at the same time, permitting the utilization of the surface for productive agricultural uses. Under such circumstances the right of the surface owner to an accommodation between the two estates may be shown, dependent, of course, upon the state of the evidence and the findings of the trier of the facts. Here, the trial court submitted the following special issue and accompanying instruction:

> Do you find from a preponderance of the evidence that Getty Oil Company's erection of the pumping units in question at its Numbers One and Two Wells at such excess in height so that Plaintiff's sprinkler system will not pass over the same constituted a use of the surface of the land in question in a manner which is not reasonably necessary?
>
> In answering the foregoing Special Issue, you are instructed that a determination of whether the erection of such pumping units by Getty Oil Company constitutes a use of the surface of the land in question in a manner which is not reasonably necessary involves

weighing the degree of harm or inconvenience, if any, such pumping units cause to John H. Jones against the utility, if any, of such pumping units to Getty Oil Company and the suitability of other measures, if any, which would substantially serve the purpose of such pumping units to Getty Oil Company at less or no inconvenience or harm, if any, to John H. Jones.

We agree with the court of civil appeals that inclusion of the phrase 'at such excess in height' in the issue was erroneous as a comment upon the weight of the evidence. Additionally, and as also recognized by the court of civil appeals, the accompanying instruction erroneously calls for a weighing of harm or inconvenience to Jones against the considerations pertaining to Getty. This is not the proper test, particularly in the suggestion that inconvenience to Jones may be a controlling element. There must be a determination that under all the circumstances the use of the surface by Getty in the manner under attack is not reasonably necessary. The burden of this proof is upon Jones, the surface owner. (citation omitted) Jones sought to discharge this burden by showing that the use which Getty is making of the surface is not reasonably necessary because of non-interfering and reasonable ways and means of producing the minerals that are available to Getty, the use of which will obviate the abandonment by Jones of his existing use of the surface, and that the alternatives available to Jones would be impractical and unreasonable under all the conditions. These are the elements to be considered by the trier of facts and the jury should be so instructed in resolving the issue of the reasonable necessity of the surface use by Getty, the mineral lessee.

We further hold, as urged by Getty, that in event it is ruled that Getty is making an unreasonable surface use, Getty will have the right to install non-interfering pumping units; and in such event Getty will not be liable in damages beyond the decrease in the value of the use of the land from the time the interfering pumps were installed to the time of their removal.

The judgment of the court of civil appeals is affirmed.

Editors' Note

A. The general rule: The mineral estate has the right to use so much of the surface estate as is reasonably necessary to effectuate the mineral grant.

B. So, on the Lease Premises, the oil and gas lessee as the holder of the mineral estate has the right to go upon the surface and to use so much of the surface as is reasonably necessary to carry out the purposes of the oil and gas lease.

1. Use of the surface for a drill site pad. *Warren Petroleum Corp. v. Martin*, 271 S.W.2d 410 (Tex. 1954).

2. Construction of roads. *Davis v. Devon Energy Production Co., L.P.,*136 S.W.3d 419 (Tex. App.—Amarillo, 2004).

3. Use of sand, gravel and caliche, crushed limestone for drill site or roads.

4. Construction of tank batteries, compressor sites, meter runs, separation facilities. *Ottis v. Haas*, 569 S.W.2d 509 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

5. Selection of the location of drill sites. *Parker v. Texas Co.*, 326 S.W.2d 569 (Tex. Civ. App.—El Paso 1959 reh. denied); *Gulf Oil Corporation v. Marathon Oil Co.*, 137 Tex. 59, 152 S.W.2d 711, 724 (1941).

6. Timing of drilling operations. *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650 (Tex. Civ. App.—Eastland 1953, no writ). But also note that §91.751-755, TEX. NAT. RES. CODE, written notice of operations to surface owner.

7. Use of fresh water. *Sun Oil v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *but see*, §27.0511, (TEX. WAT. CODE) limiting authority of RRC to approve waterflood using fresh water.

8. Use of salt water. *Robinson v. Robbins Petroleum Corp*., 501 S.W.2d 865 (Tex. 1973).

9. Disposal of salt water. *TDC Engineering, Inc. v. Dunlap*, 686 S.W.2d 346 (Tex. Civ. App.—Eastland 1985, writ ref'd n.r.e.).

10. Use of surface for Seismic Surveys. *Wilson v. Texas Company*, 237 S.W.2d 649 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.); *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir.1957).

11. Damage to growing crops. *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650 (Tex. Civ. App.—Eastland 1953, no writ).

12. Damage to standing timber. *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133 (Tex.1967).

13. Damage to improvements. *Grimes v. Goodman Drilling Co.*, 216 S.W. 202 (Tex. Civ. App.—Fort Worth 1919, writ dism'd); *Ottis v. Haas*, 569 S.W.2d 509 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) .

14. Damage to moveable personal property. *Shell Petroleum Corp. v. Liberty Sand and Gravel Co.*, 128 S.W.2d 471 (Tex. Civ. App.—Beaumont 1939, no writ).

15. No duty to restore premises unless expressly obligated. *Warren Petroleum v. Monzingo,* 157 Tex. 479, 304 S.W.2d 362 (Tex. 1957); *Exxon Corp. v. Pluff*, 94 S.W.3d 22 (Tex. App.—Tyler 2002, pet. denied).

16. Right to draw casing and remove equipment is not an obligation. *Exxon Corp. v. Pluff*, 94 S.W.3d 22 (Tex. App.—Tyler 2002 pet. denied).

17. Right to lay pipelines, power lines, telephone lines.

SUN OIL CO.
v.
WHITAKER
483 S.W.2d 808
(Tex. 1972)

MCGEE, JUSTICE.

Our judgment of October 27, 1971 is set aside and our prior opinion is withdrawn and the following is substituted therefor.

* * *

Earnest Whitaker is the owner of the surface estate and Sun Oil Company is the owner of a mineral leasehold estate in a 267-acre tract of land in Hockley County. . . .

Sun's lease has been kept alive beyond the primary term of five years by production from eight oil wells which are producing from the San Andres formation. When production from its oil wells decreased because of diminishing pressure in the San Andres formation, Sun obtained permission from the Railroad Commission to inject fresh water into the San Andres in furtherance of a pressure maintenance program. Whitaker and his son-in-law, Doyle Henderson, are using water from the Ogallala formation for cultivating the land as an irrigated farm.

Following our decision in the appeal from the temporary injunction judgment, the parties proceeded to trial of the case on its merits. Sun sought a permanent injunction enjoining the defendants from interfering with its production of not more than 100,000 gallons of fresh water per day, through an existing supply well, from the Ogallala formation underlying Whitaker's tract of land for use in producing the oil. By cross-action Whitaker sought to enjoin Sun from producing and using the fresh water to produce the oil. Whitaker also sought to recover actual damages for the water theretofore used and for crops destroyed, and, as well, exemplary damages. The case was tried to a jury and based upon the jury's verdict, judgment was rendered 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 program. The court of civil appeals affirmed. (citation omitted) Judgments of the courts below are reversed and judgment is rendered that the permanent injunction prayed for by Sun is granted, and all relief sought by Whitaker is denied except Whitaker is to recover the sum of $431 which has been tendered into court by Sun.

Sun's lease grants and leases the 267-acre tract to Sun "for the purposes of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals. . . ." The lease also provides: "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 evidence shows that the water produced from Sun's well is being produced from the only available source of water on the land and that such water in being used exclusively for the benefit of the leased premises, the so-called Gann-Whitaker tract. Efforts to use available salt water, other than that produced with the oil, have failed. The waterflood operation will result in the production of additional oil, valued at $3,200,000. The evidence further shows that the Sun water supply well is equipped so that it cannot produce in excess of 100,000 gallons of water per day. Sun's water supply well is located 3,138 feet from Whitaker's water supply well on this lease.

The defendants stipulated at this trial that (1) "the waterflood process is a reasonable and proper operation for the production of oil from the San Andres Reservoir under the L. D. Gann tract"; (2) the use of "Ogallala water as the extraneous or make-up water for injection into the San Andres Reservoir under the L. D. Gann tract in conducting secondary recovery of oil by a waterflood process" is a reasonable and proper operation; and (3) "the location of the injection wells and the rates of water injection" as conducted by Sun "constitute reasonable and proper operations for the production of oil." There is, therefore, no fact issue in the case concerning the stipulated matters.

Sun relies on two legal theories upon which it bases its claim to use the Ogallala water, from its own water wells, under the Gann lease to waterflood wells on this lease. (1) As owner of the dominant estate by virtue of its oil and gas lease it has the implied right as a mineral lessee to use such part of the surface and so much thereof as may be necessary to effectuate the purposes of the lease, and (2) it possesses an expressed contractual right to "free use of . . . water from said land except water from Lessor's wells for all operations hereunder. . . ."

In affirming the trial court's judgment, the Court of Civil Appeals dealt with the case as though it involved only the second of Sun's theories; the Court held that the meaning of the quoted language authorizing free use of water from the Whitaker land was doubtful and ambiguous when applied to the subject matter of the contract, and that evidence introduced on the trial supported jury findings that the parties to the lease did not contemplate or intend that large quantities of water would be used for waterflood purposes. We need not decide whether the opinion of the Court of Civil Appeals is sound inasmuch as we are satisfied that Sun has the implied right to free use of so much of the water in question as may be reasonably necessary to produce the oil from its oil wells.

The oil and gas lessee's estate is the dominant estate and the lessee has an implied grant, absent an express provision for payment, of free use of such part and so much of the premises as is reasonably necessary to effectuate the purposes of the lease, having due regard for the rights of the owner of the surface estate. (citations omitted) The rights implied from the grant are implied by law in all conveyances of the mineral estate and, absent an express limitation thereon, are not to be altered by evidence that the parties to a particular instrument of conveyance did not intend the legal consequences of the grant.

The implied grant of reasonable use extends to and includes the right to use water from the leased premises in such amount as may be reasonably necessary to carry out the lessee's operations under the lease.

> The grant of the oil carried with it a grant of the way, surface, soil, water, gas and the like essential to the enjoyment of the actual grant of the oil. (citation omitted)
>
> . . . we believe that the reservation in the deeds by implication retained to the Southwest 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 Magnolia. . . . Magnolia had the right to use the amount of water reasonably necessary for the development and enjoyment of the oil discovered on its lease. (citation omitted)

In *Brown v. Lundell*, *supra*, this Court, though holding the lessee liable for negligence reaffirmed the above quoted rule from *Guffey v. Stroud*.

Water, unsevered expressly by conveyance or reservation, has been held to be a part of the surface estate. (citation omitted) However, that decision expressly recognized the right of the oil and gas lessee to drill water wells on said land and to use water from such wells to the extent

reasonably necessary for the development and production of such minerals. The added language in the instant case that Sun was to have "free use of . . . water from said land except water from Lessor's wells for all operations" under the lease added no limitation on the implied grant except that such water should not be taken from lessor's wells.

Courts have held waterflood projects to be reasonably necessary operations under oil and gas leases. (citations omitted) As stated in *Holt v. Southwest Antioch Sand Unit*, 292 P.2d 998 (Okl.1956) at page 1000:

> 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 land.

. . . Sun has an implied right to waterflood because the waterflood operation is reasonably necessary to carry out the purposes of the lease. The reasonableness of Sun's waterflood operation stands uncontradicted in this record. Its use of Ogallala water for injection was approved by the Railroad Commission. The stipulations are conclusive under this record that the use of Ogallala water was reasonably necessary to effectuate the purposes of the lease.

* * *

Our holding in *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971), is not applicable under the facts of this case. It is limited to situations in which there are reasonable alternative methods that may be employed by the lessee on the leased premises to accomplish the purposes of this lease.

* * *

[But see Editors' Note Number 7 supra.]

MERRIMAN
v.
XTO
407 S.W.3d 244
(Tex. 2013)

JUSTICE JOHNSON delivered the opinion of the Court.

This case involves the question of whether a mineral lessee failed to accommodate an existing use of the surface when the lessee drilled a gas well. Claiming that the lessee did not accommodate his existing cattle operation, the surface owner sought an injunction requiring the well to be moved. The trial court granted summary judgment for the mineral lessee and the court of appeals affirmed. We affirm the judgment of the court of appeals.

I. Background

Homer Merriman, a pharmacist by occupation, owns the surface estate of an approximately 40-acre tract (the tract) in Limestone County. His home and a barn are on the tract, and he has installed permanent fencing and corrals which he uses in a cattle operation. Merriman leases several other tracts of land that he also uses in his cattle operation. Once a year he brings his cattle to the 40-acre tract in a "roundup" to sort and work them. The sorting and working activities involve using temporary corrals and catch-pens in conjunction with the permanent fencing and structures.

XTO Energy, Inc., the lessee of the tract's severed mineral estate, contacted Merriman in September 2007 about locating a gas well on the tract. Merriman claimed that the proposed location would interfere with his cattle operation, so he opposed it. Despite Merriman's opposition, XTO proceeded to construct a well site and drill the well. When XTO began construction of the well site Merriman filed suit seeking temporary and permanent injunctions enjoining it from drilling the well. After the well was drilled he amended his pleadings and sought a permanent injunction requiring XTO to remove it. Merriman's claim for injunctive relief was based on his assertion that XTO failed to accommodate his existing use of the surface for the annual sorting and working part of his cattle operation so XTO's acts exceeded its rights in the mineral estate and constituted a trespass.

* * *

The trial court granted summary judgment for XTO without stating its reasons. The court of appeals affirmed. In concluding there was no evidence that XTO failed to accommodate Merriman's existing use, the appeals court focused on whether Merriman produced evidence that he did not have any reasonable alternative agricultural uses for the 40-acre tract, and also whether he produced evidence that relocating his sorting and working operations to the leased land was not a reasonable alternative. 407 S.W.3d 244, 250.

In arguing that the court of appeals erred, Merriman asserts that he is not required to show he cannot make any alternative agricultural uses whatsoever for the tract as required by the court of appeals. Rather, he argues, he is required to show only that he does not have reasonable alternatives for conducting his cattle operations. He maintains that he did so with competent, non-conclusory evidence. He further argues that the court of appeals erred by considering the availability of additional land he leased in determining whether he has reasonable alternatives for continuing his existing use of the single tract that he owns.

* * *

B. The Accommodation Doctrine

A party possessing the dominant mineral estate has the right to go onto the surface of the land to extract the minerals, as well as those incidental rights reasonably necessary for the extraction. *Tarrant Cnty. Water Control & Improvement Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971). The incidental rights include the right to use as much of the surface as is reasonably necessary to extract and produce the minerals. If the mineral owner or lessee has only one method for developing and producing the minerals, that method may be used regardless of whether it precludes or substantially impairs an existing use of the servient surface estate. *Haupt*, 854 S.W.2d at 911; *Getty Oil*, 470 S.W.2d at 622. On the other hand,

> [i]f the mineral owner has reasonable alternative uses of the surface, one of which permits the surface owner to continue to use the surface in the manner intended . . . and one of which would preclude that use by the surface owner, the mineral owner must use the alternative that allows continued use of the surface by the surface owner.

Haupt, 854 S.W.2d at 911-12.

To obtain relief on a claim that the mineral lessee has failed to accommodate an existing use of the surface, the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. *See Getty Oil*, 470 S.W.2d at 628 (op. on reh-g); *see also Humble Oil & Refining Co. v. Williams*, 420 S.W.2d

133, 135 (Tex. 1967); *Davis v. Devon Energy Prod. Co., L.P.*, 136 S.W.3d 419, 424 (Tex. App.—Amarillo 2004, no pet.). If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use. *Haupt*, 854 S.W.2d at 911-12.

In this case the court of appeals' decision turned on its conclusion that Merriman failed to produce competent evidence that he had no reasonable alternative method by which to continue his cattle operation. As to that element of the accommodation doctrine, a surface owner's burden to prove that his existing use cannot be maintained by some reasonable alternative method is not met by evidence that the alternative method is merely more inconvenient or less economically beneficial than the existing method. *See Getty Oil*, 470 S.W.2d at 628 (op. on reh'g) ("We have not held, as some have stated, that the issue is a question of inconvenience to the surface owner."); *Williams*, 420 S.W.2d at 135 ("[The surface owner's] testimony that the road [the mineral lessee built] interfered with his grazing operations and was a nuisance to him is not evidence that the road was not reasonably necessary."). Rather, the surface owner has the burden to prove that the inconvenience or financial burden of continuing the existing use by the alternative method is so great as to make the alternative method unreasonable. *Getty Oil*, 470 S.W.2d at 628 (op. on reh'g).

III. Discussion

In determining whether the trial court properly granted summary judgment, the court of appeals primarily focused on two considerations. One was whether Merriman could make any alternative use of the surface for general agricultural purposes that was not impracticable or unreasonable. 407 S.W.3d at 250. Specifically, the court of appeals said that under the accommodation doctrine "[t]he surface owner must show that any alternative uses of the surface, other than the existing use, are impractical and unreasonable under all of the circumstances." *Id.* at 249. The court held that "[t]here was no violation of the accommodation doctrine because Merriman had reasonable means of developing his land for agricultural purposes." *Id.* at 249. The other was the availability to Merriman of several tracts of land he leased when determining whether he presented evidence that he did not have reasonable, alternative methods of conducting his cattle operation. *Id.* We agree with the court of appeals' conclusion that XTO was entitled to summary judgment, although as we explain, we do not completely agree with its analysis.

We first address whether part of Merriman's burden was to present evidence that he could not alternatively conduct his cattle operation on tracts that he held by short term leases. We conclude that it was not.

The accommodation doctrine focuses on balancing the respective rights of the parties. *Haupt*, 854 S. W.2d at 911. Requiring a surface owner to show that it could not alternatively conduct its existing use on land held by short term leases would too greatly alter the balance between those who possess and have established a use of the surface estate and those who possess the mineral estate. Such a requirement would reduce the mineral owner's obligation to accommodate existing uses of the surface because of the fortuity that the surface owner had separate holdings, even though the holdings might soon be lost by the leases lapsing or being terminated. Under those circumstances the mineral owner could obtain long-term benefit from use of the surface while forcing the surface owner to relocate an existing use to a place where the use might be conducted for only a short term. Accordingly, the court of appeals improperly considered the land leased by Merriman in determining whether he produced evidence that he had no reasonable alternatives to continue his cattle operation.

We next consider whether Merriman was required to produce evidence that he had no reasonable alternatives for any type of agricultural use on the tract he owned, or whether he was required to produce only evidence that he had no such alternatives for his cattle operation. In doing so, it is clear that no bright lines can be drawn by which to categorize "existing uses" of surface estates. The issue is one of fairness to both parties in light of the particular existing use by the surface owner and the principle underlying the accommodation doctrine: balancing the rights of surface and mineral owners to use their respective estates while recognizing and respecting the dominant nature of the mineral estate. *See Haupt*, 854 S.W.2d at 911 ("The accommodation doctrine, also known as the 'alternative means' doctrine, was first articulated in *Getty* as a means to balance the rights of the surface owner and the mineral owner in the use of the surface."); *Getty Oil*, 470 S.W.2d at 627-28 (op. on reh'g) ("[I]n 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."). Here, Merriman's use can, with fairness to both parties, be classified more narrowly than the broad "agricultural" category applied by the court of appeals. His use of the land was for a cattle operation and its essential parts. That use is what must be considered in balancing his rights with those of XTO. *See Getty Oil*, 470 S.W.2d at 627-28 (op. on reh'g). Therefore, we consider only whether Merriman produced legally sufficient evidence that he did not have any reasonable alternatives for conducting his cattle operations on the tract, not whether he produced evidence that he had no reasonable alternatives for general agricultural uses.

* * *

Merriman's affidavit and deposition testimony, even assuming they were not entirely conclusory, are evidence only that XTO's well precludes or substantially impairs the use of his existing corrals and pens, creates an inconvenience to him, and will result in some amount of additional expense and reduced profitability because to continue his cattle operation he will have to build new corrals or conduct his operations in more phases. Evidence that the mineral lessee's operations result in inconvenience and some unquantified amount of additional expense to the surface owner does not rise to the level of evidence that the surface owner has no reasonable alternative method to maintain the existing use. *See Getty Oil*, 470 S.W.2d at 623; *Williams*, 420 S.W.2d at 135. Thus, Merriman did not produce evidence sufficient to raise a material fact issue as to part of the initial element on which he had the burden of proof: that he had no reasonable alternative means of maintaining his cattle operations on the 40-acre tract. *See Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837, 839-40 (Tex. 2010); *King Ranch*, 118 S.W.3d at 755.

IV. Conclusion

Merriman relied on his claim that XTO failed to accommodate his existing use to establish that XTO was committing a continuing wrongful act entitling him to permanent injunctive relief. Even assuming that the failure of XTO's operations to accommodate Merriman's existing use would have been sufficient to support injunctive relief, a contention XTO disputes and one we do not address, Merriman failed to raise a material fact issue as to whether XTO failed to accommodate his use. Accordingly, the court of appeals did not err by affirming the trial court's summary judgment and we affirm the judgment of the court of appeals.

KEY OPERATING & EQUIPMENT, INC.
v.
HEGAR

435 S.W.3d 794
(Tex. 2014)

JUSTICE JOHNSON delivered the opinion of the Court.

At issue in this case is whether, when parts of two mineral leases have been pooled but production is from only one lease, the mineral lessee has the right to use a road across the surface of the lease without production in order to access the producing lease. The trial court determined that the lessee does not and granted declaratory and injunctive relief. The court of appeals affirmed. Concluding that the lessee has such a right, we reverse and render.

I. Background

Key Operating and Equipment, Inc., (Key) has operated the Richardson No. 1 well on the sixty-acre Richardson tract since 1987. In 1994 Key acquired oil and gas leases on a 191-acre contiguous tract—the Curbo/Rosenbaum Tract—and reworked the Rosenbaum No. 2, an existing well on that property. That same year Key built a road on the Curbo/Rosenbaum tract to access both the Richardson No. 1 and the Rosenbaum No. 2. The Rosenbaum No. 2 stopped producing in 2000, and Key's lease on the Curbo/Rosenbaum tract expired. But also in 2000, Key's owners purchased an undivided twelve-and-a-half percent interest in the mineral estate of the Curbo/Rosenbaum Tract, which they promptly leased to Key. The lease gave Key the right to pool the minerals with other property in the immediate vicinity. Key then pooled its leased minerals under ten acres from the Curbo/Rosenbaum tract with its leased minerals under thirty acres from the adjoining Richardson Tract.

In 2002, Will and Loree Hegar bought eighty-five acres of the Curbo/Rosenbaum Tract (the Hegar Tract). Their acreage included the road Key used to access the Richardson No. 1, and they were aware when they bought the tract that Key used the road in its mineral operations.

In 2003 or 2004, the Hegars built a house on their acreage, used the road to access it, and for several years took no action to restrict Key's use of the road. That forbearance stopped when Key drilled the Richardson No. 4 well on the Richardson tract. Following that drilling, traffic on the road increased, prompting the Hegars to file suit claiming that by using the road, Key was trespassing. They sought a declaratory judgment that Key had no legal right to "access or use the surface of the Hegar Tract in order to produce minerals from the Richardson Tract." At trial, the Hegars called a petroleum engineer who testified that the Richardson No. 4 was the only well on the pooled acreage with significant current production; the size of the reservoir from which it produced was three-and-a-half surface acres; the well's drainage area did not reach the Hegars' property; and the well was not draining oil from the Hegars' property.

The trial court enjoined Key from using the part of the road that was on the Hegars' property for any purpose related to producing minerals from the adjoining Richardson Tract. The court entered findings of fact and conclusions of law in support of its order, including findings and conclusions that (1) Key's use of the surface of the Hegar Tract to access the Richardson Tract constituted a trespass, (2) the use of the surface of the Hegar tract was not reasonably necessary to extract minerals from beneath the Hegar Tract, and (3) no minerals were being extracted from beneath the Hegar tract by wells located on the Richardson Tract.

Key appealed. The court of appeals initially reversed, but granted the Hegars' motion for rehearing, withdrew its opinion, and affirmed. The court held that Key had the right to use the Hegars' surface to produce oil only from beneath the Hegar tract, determined that evidence supported the trial court's finding that Key was only producing oil from the adjacent Richardson Tract, and affirmed the trial court's conclusion that Key had no right to use the Hegars' surface to produce minerals exclusively from the Richardson Tract. The court also held that Key's lease and pooling agreements, which were not part of the Hegars' chain of title, could not contractually expand Key's right to use the Hegars' surface.

Key petitioned this Court for review, arguing that it has the right to use the Hegars' surface estate in producing minerals from any part of the pooled unit. It asserts that the court of appeals erred by relying on the accommodation doctrine and in its application of *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865 (Tex. 1973). . . .

B. Key's Use of the Surface

The owner of the dominant mineral estate in a tract has the right to go upon the surface of that land to produce and remove the minerals, and also the incidental rights necessary for that production and removal. *Merriman v. XTO Energy, Inc*., 407 S.W.3d 244, 248-49 (Tex. 2013). The mineral lessee's incidental rights include the right to use as much of the surface as is reasonably necessary to produce the minerals . . . Key argues that because its production from a tract pooled with others is legally treated as production from each tract within the unit, it has the right to use the surface of any of the units' pooled tracts in its production activities. We agree . . . . Both the Curbo/Rosenbaum and Richardson leases permit pooling. The Curbo/Rosenbaum lease provides that Key has "the right and power to pool or combine the acreage covered by this lease . . . with any other land, lease, or leases in the immediate vicinity thereof." The primary legal consequence of pooling is that "production and operations anywhere on the pooled unit are treated as if they have taken place on each tract within the unit."). . . .

2. Title Documents

The court of appeals first considered whether Key had the contractual right to use the road across the Hegars' property by virtue of its lease and pooling agreement. . . . The court concluded that the Hegars were not bound by the lease or the pooling agreement because those documents were not executed at the time the mineral and surface estates were first severed and, therefore, they were not within the Hegars' chain of title. . . . However, we need not decide whether the lease was required to be in the Hegars' chain of title in order to bind them. As we explain below, Key's owners, as the mineral owners, and Key, as the mineral lessee, have implied property rights to use the Hegars' surface.

3. Implied Surface Rights

Applying the "primary legal consequence" of pooling to this case—that production anywhere on a pooled unit is treated as production on every tract in the unit—we conclude that once pooling occurred, the pooled parts of the Richardson and Hegar Tracts no longer maintained separate identities insofar as where production from the pooled interests was located. So the legal consequence of production from the pooled part of the Richardson Tract is that it is also production from the pooled part of the Hegar Tract, and the Hegars do not contend that Key did not have the right to use the road to produce minerals from their acreage. Because production from the pooled part of the Richardson Tract was legally also production from the pooled part of the Hegar tract, Key had the right to use the road to access the pooled part of the Richardson tract . . . . The court of appeals concluded that Key's surface easement was only implicated when Key used the road to produce oil from beneath the Hegar Tract. This conclusion conflicts with the

legal consequence of pooling that production anywhere on the pooled unit and operations incidental to that production are regarded as taking place on each pooled tract.

The Hegars argue that their position is supported by *Robinson v. Robbins Petroleum Corp.*, in which this Court held that a surface tract may not be used for production on adjacent tracts without the surface owner's consent . . . In *Robinson*, R.O. Robinson owned an eighty-acre surface estate subject to the Wagoner mineral lease. The Wagoner lease included adjacent tracts that had been leased to Robbins Petroleum when the tracts were all owned by the same owners. Sometime after Robinson purchased his surface estate, three waterflood units that did not include the Wagoner Lease were formed. The well operator began using a former oil well on the Robinson Tract to produce salt water that it then used in the three waterflood units that were not part of the Wagoner Lease. This Court held that "Robinson, as owner of the surface, is entitled to protection from uses thereof, without his consent, for the benefit of owners outside of and beyond premises and terms of the Wagoner lease." . . . But Robinson is distinguishable from the situation here. The minerals under Robinson's surface had not been, and could not be, pooled with tracts where the water was being used . . . .

V. Conclusion

Key has the right to use the road across the pooled Hegar Tract for production of minerals from all the acreage with which it is pooled. We reverse the court of appeals' judgment and render judgment for Key accordingly.

Editors' Note

In the early years of the oil industry, controversies between mineral owners and surface were not very common. This was no doubt (i) because most oil fields were in places where the surface estate was not very valuable compared to the mineral estate, and (ii) because until fairly recently the owner of the surface estate usually also owned a significant share of the mineral estate and was often more interested in receiving royalty than he was in preserving the surface estate. Both of these conditions are ceasing to be as widespread as formerly; for example, (i) part of the Barnett Shale trend underlies part of western Fort Worth and (ii) many surface owners now own none of the minerals or royalty appurtenant to their land and regard drilling as a nuisance from which they receive no benefit.

In some states, the surface owners have succeeded in obtaining legislation regulating their rights as against mineral owners. Texas's only statute in this regard is Chapter 92, Texas Natural Resources Code, which, under certain circumstance in populated areas, authorizes the Texas Railroad Commission to designate two acres (or more) as drill sites for each 80 acres in a "qualified subdivision" of not more than 640 acres.

Alternatively, if the land in question is within the city limits of a municipality, the surface owners may persuade the city council to adopt a no-drilling ordinance. This alternative route may in turn trigger inverse condemnation suits against the city. *See Trail Enterprises v. City of Houston*, 255 S.W.3d 105 (Tex. App.—Waco 2008, writ pending).

C. CLAUSES AFFECTING DURATION OF LEASE

Editors' Note

Under Texas law, an oil, gas and mineral lease is a grant to the lessee of a fee simple determinable interest in the mineral estate with a possibility of reverter in the lessor. *Natural Gas Pipeline Co. of America v. Pool*, 124 S.W.3d 188, 192 (Tex. 2003). The lessee's interest is "determinable" because it may terminate and revert entirely to the lessor upon the occurrence of a condition or conditions that the lease specifies will cause termination of the estate. *Id*. As to the differences between covenants and conditions in oil and gas leases, *see Texas Oil & Gas Corp. v. Vela,* 429 S.W.2d 866 (Tex. 1968); *Blackmon v. XTO,* 276 S.W.3d 600, Tex. App (Waco 2008); *Stephens v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290, 295 (1923). Typically, at the end of the primary term, a non-producing lease terminates unless it is perpetuated by a savings clause. *Watson v. Rochmill*, 155 S.W.2d 783, 784 (Tex. 1941). Lease termination cases generally questions of whether the lease continued past the primary term, and if so, whether it was maintained by production or operations.

A failure to timely commence operations before or after the expiration of the "primary term," or continue such operations with reasonable diligence after expiration of the primary term will result in lease termination. *See Guleke v. Humble Oil & Refining Co*., 126 S.W.2d 38, 41-42 (Tex. App.—Amarillo, 1939 no writ). Absent more specific language in the lease, what actions might constitute such "operations" are discussed generally in ERNEST E. SMITH & JACQUILINE L. WEAVER, TEXAS LAW OF OIL AND GAS § 4.5 (Mathew Bender 2ed. 1988 & 2008 Update) [hereinafter Smith & Weaver] and should be used in the instruction for such a question (see 4.e.3; *see also Veritas Energy, L.L.C v. Brayton Operating Corp.*, 2008 WL 384169 (Corpus Christi 2008, Feb. 14, 2008, pet. denied) (mem. op.).

Unless the lease defines "production" otherwise, the term "production" in the habendum clause means "production in paying quantities". *Garcia v. King*, 164 S.W.2d 509 (Tex. 1942). The requirement that the lease produce minerals in paying quantities exists to fulfill the purpose of the lease, which is profit for both the lessor and the lessee. The lessee is not permitted to hold an unprofitable lease for purposes of speculation. *See Clifton v. Koontz*, 325 S.W.2d 684 (Tex. 1959). The questions of whether the lease has terminated because of a total cessation of production and whether it has terminated because of a failure to produce in paying quantities are different, although both issues are sometimes presented in the same case.

Many leases contain savings clauses such as provisions for payment of shut-in royalty, or operations clauses to maintain the lease even in the absence of production. Typically, an operations clause provides that if, during the primary term, production has been obtained but ceases for any reason and the lease is not otherwise held, then the lease can be maintained if lessee timely resumes the payment of delay rentals or operations. If the cessation occurs after the primary term, and the lease is not otherwise maintained, then the lessee generally has a stated period of time in which to commence operations or the lease will terminate. *See Samano v. Sun Oil Co.*, 621 S.W.2d 580, 584 (Tex. 1981); *Sun Operating Ltd Partnership v. Holt*, 984 S.W.2d 277,282 (Tex. App.—Amarillo 1999, writ denied). The operations required to hold a lease are often defined in the lease.

If the lease does not contain an express cessation of operations clause, the lessee may be able to rely upon the temporary cessation of production doctrine to hold the lease. *Watson v. Rochmill*,

155 S.W.2d 783, 784 (Tex. 1941). This doctrine was established in pragmatic recognition of the fact that wells simply do not literally produce "continuously" and will occasionally cease producing. *Ridge Oil Co. v. Guinn*, 148 S.W.3d 143, 151 (Tex. 2004); *Id.*; *see generally* Smith & Weaver, § 4.4(B)). The courts presume that because temporary cessations are unavoidable, the parties did not intend that the lease would terminate. The lessee has the burden of pleading and proving that the cessation of production was temporary. *Bradley v. Avery*, 746 S.W.2d 341 (Tex. App.—Austin 1988, no pet.).

The temporary cessation of production doctrine "applies in a wide variety of circumstances." *Guinn*, 148 S.W.3d at 151 (Tex. 2004). Earlier cases suggested that the temporary cessation of production doctrine was limited to situations in which the cessation was the result of mechanical breakdown, sudden stoppage, or the like, and was unforeseen and unavoidable. *See, e.g., Amoco Prod. Co v. Braslau*, 561 S.W.2d 805 (Tex. 1978); *Midwest Oil Corp. v. Winsauer*, 323 S.W.2d 944 (Tex. 1959); *Scarborough v. New Domain Oil & Gas Co.*, 276 S.W. 331 (Tex. Civ. App.—El Paso 1925, writ dism'd). However, the Texas Supreme Court's opinion in *Ridge Oil Co. v. Guinn* makes it clear that the doctrine is not so limited.

Additionally, while lease termination may hinge on an allegation of temporary cessation or failure to produce in paying quantities, these claims should not be confused with the situation where there is an allegation of complete cessation of production, which also terminates the lease. *See Ridenour v. Herrington*, 47 S.W.3d 117 (Tex. App.—Waco 2001); *Cannon v. Sun-Key Oil Co., Inc.*, 117 S. W.3d 416 (Tex. App.—Eastland 2003); *see also Brown v. Reeter*, 170 S.W.3d 151 (Tex. App.—Eastland 2005).

Finally, Texas courts have distinguished the term "production" from the terms "capable of production," or "capable of producing in paying quantities". Typically, the term "capable" means a well that can immediately produce without further equipment or repairs when "turned on." *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 558 (Tex. 2002); *Hydrocarbon Management, Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427, 433-434 (Tex. App.—Amarillo 1993, no writ).

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1. *Habendum*

CHEYENNE RESOURCES, INC.
v.
CRISWELL
714 S.W.2d 103
(Tex. App.—Eastland 1986, no writ)

RALEIGH BROWN, JUSTICE.

Darrell Criswell, Freda Criswell, and Elsie Criswell sued Cheyenne Resources, Inc. seeking a declaration that an oil and gas lease had expired due to the failure of Cheyenne to commence drilling operations prior to the expiration of its primary term. Based on answers to special issues, judgment was entered declaring that the lease had expired, that the Criswells take nothing against Cheyenne, and that Cheyenne take nothing against the Criswells. Cheyenne appeals. We reverse and render.

Cheyenne urges a single point of error basically contending that:

> The trial court erred in refusing to grant Appellant's Motion to Disregard Finding on Special Issue and for Judgment and in granting judgment for Appellees declaring that the oil and gas lease in favor of Appellant had expired, for the reason that the uncontroverted evidence establishes as a matter of law that the actions of Appellees constituted "repudiation" of Appellant's title to its oil and gas lease. . . .

The lease at issue had a primary term of one year which expired on February 7, 1984. The jury determined that Cheyenne did commence a well on the property on or before February 7, 1984, and was engaged in drilling operations on February 7, 1984. It also found that drilling operations ceased on March 17, 1984. The jury determined that title to the lease held by Cheyenne was not repudiated and that the Criswells were not entitled to damages.

The uncontroverted testimony established that on March 14 or 15, 1984, Darrell Criswell posted a sign on the gate to the leased premises notifying Cheyenne Resources or its assignees that its oil and gas lease had expired with instructions to contact the Sheriff of Eastland County. Darrell Criswell testified concerning the sign as follows:

> Q. Now, in regard to the testimony of Mr. Medford that you put up your sign on the 15th-All right, let's see, the 14th. Would that have been the first sign or the second sign?
>
> A. That was the first sign.
>
> Q. Okay, but you had signs up continuously after that?
>
> A. Yes.
>
> Q. Okay, and the signs said the same thing?
>
> A. Yes.
>
> Q. Was it your intention by putting that sign up and by the language written on the sign to convey to Cheyenne Resources uncategorically that they had no more rights in your lease?
>
> A. No, what I wanted, what I meant for it to say was that the lease had just expired.
>
> Q. All right, what do you mean by expired as opposed to no further rights?
>
> A. Do what, now?
>
> Q. Well, when something expires it is no longer there. It is gone, so it is safe to say that by saying that lease expired, that you considered that Cheyenne had no more rights to come on your place and they had no more rights under the lease?
>
> A. Yes, yes.
>
> Q. And, you intended to convey that thought to them, did you not?
>
> A. Yes.
>
> Q. Now, you have testified earlier, too, that after the date that you put the signs up on the 15th, or pardon me the 14th of March, and after that point in time, that you were-You received a letter from Cheyenne on the 21st of March, 1984; is that a true statement?
>
> A. Yes.
>
> Q. What was the substance of that letter?
>
> A. Oh, I can't remember exactly, something to do with, I believe I have it there with me.

> Q. Well, I don't need the letter itself. I just wanted to know. Did, by the letter that you received, did that indicate to you that your-That you had conveyed or that Cheyenne had received your intention that they understand that their lease had expired?
>
> A. Yes, because the best I understood, the letter was that they was wanting us to sign and mail it back to them to give them the right to come back in.
>
> Q. Okay, so there is no doubt in your mind that the thoughts that you were intending to convey were in fact conveyed?
>
> A. Well, yeah, I guess they were.

The Criswells do not challenge the jury's findings that Cheyenne was engaged in drilling operations on February 7, 1984, and ceased on March 17, 1984. Cheyenne argues that since it was engaged in drilling operations on the last day of the primary term and had so continued until notification of the expiration of the lease by the Criswells, it was excused in suspending its operations until such time as the title issue was settled. Cheyenne contends that the action of Darrell Criswell in posting the sign containing specific language addressed to it at the entrance to the lease at a time when their oil and gas lease was valid and subsisting conclusively establishes "repudiation" of the oil and gas lease by the Criswells.

The *Court in Triton Oil and Gas Corporation v. Marine Contractors and Supply, Inc.*, 644 S.W.2d 443 (Tex.1982), said:

> An issue is conclusively established when the evidence is such that there is no room for ordinary minds to differ as to the conclusion to be drawn from it. (citation omitted); 3 R. MCDONALD, TEXAS CIVIL PRACTICE § 12.08, at 294 (Rev. ed. 1970).

It is well settled that repudiation of a lease by a lessor relieves the lessee from any obligation to conduct any operation on the land in order to maintain the lease in force pending a judicial resolution of the controversy between the lessee and lessor over the validity of the lease. (citations omitted)

The doctrine of repudiation is a variation of the doctrine of estoppel. (citations omitted) For the doctrine to apply, the court in *Adams v. Cannan*, 253 S.W.2d 948 (Tex. Civ. App.—San Antonio 1952, writ ref'd), stated that:

> [I]t is necessary that the lease be subsisting and that the notice of claim asserted against it be a clear, unequivocal challenge to the lessee's title in and to his interest created by the lease. The doctrine applies when the lessor takes the position and makes the same known to the lessee (or his assignees), that he, the lessor, is the owner of the property to the exclusion of all rights formerly held or claimed by the lessee.

In the instant case, the jury concluded that the lease was subsisting at the time that Criswell posted the notice to Cheyenne that the lease had expired. Through such notice, Criswell made known to Cheyenne, by a clear unequivocal challenge, that he claimed ownership of the leasehold rights to the exclusion of all leasehold rights claimed by Cheyenne. We hold that the evidence conclusively established that Criswell repudiated the oil and gas lease in favor of Cheyenne. The point of error is sustained.

The judgment is reversed, and judgment is rendered that the oil and gas lease dated February 7, 1983, in favor of Cheyenne Resources, Inc., the subject of this suit, is valid and subsisting and is in full force and effect for a 60-day period after all litigation herein becomes final to enable Cheyenne to perform operations necessary to extend the lease beyond the primary term.

Editors' Note

The repudiation doctrine applied in the previous case was approved by the Supreme Court of Texas in *Coastal v. Garza*, 268 S.W.3d 1 (Tex. 2008) at page 19.

Repudiation can occur in the context of the oil and gas lease. It is a defense to a lease termination claim. The law is well-settled in Texas that "[l]essors who . . . wrongfully repudiate the lessees' title by unqualified notice that the leases are forfeited or have terminated cannot complain if the latter suspend operations under the contract pending a determination of the controversy and will not be allowed to profit by their own wrong." A lessor's repudiation of a lease relieves the lessee "from any obligation to conduct any operations, drilling, re-working, or otherwise, on said land in order to maintain the lease in force pending the judicial determination of the controversy . . . over the validity of the lease." *Coastal Oil & Gas Corp. v. Garza Energy Trust* 268 S.W.3d 1, 20 (Tex.2008); *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 157 (Tex. 2004); *Kothmann v. Boley* 158 Tex. 56, 60-61, 308 S.W.2d 1, 4 (Tex. 1958). The lessee must act on the repudiation to the lessee's prejudice. *Coastal* at 20; *Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929, 932 (6, 7) (1952). If the lessor does not prevail, the lessee will be allowed a reasonable time after termination of the litigation in which to perform conditions required to extend the lease. *NRG Exploration, Inc. v. Rauch* 671 S.W.2d 649, 652 -653 (Tex. App.—Austin 1984 writ ref. n.r.e.).

The doctrine of repudiation is a variation of the doctrine of estoppel. 'In order for an estoppel to exist, it devolves upon the party seeking the advantage thereof to establish that he has been misled to his injury.' *Atlantic Richfield Company v. Hilton*, 437 S.W.2d 347 (Tex. Civ. App.—Tyler, writ ref'd n.r.e.), cert. denied, 396 U.S. 905, 90 S.Ct. 221, 24 L.Ed.2d 182 (1969). 'The burden of proving an estoppel, and the essential elements thereof, is on the party asserting it.' The opponent of the party relying on an estoppel is not required to show the absence of any of its component elements. An essential element of estoppel is that the party relying on an estoppel must have acted on it to his prejudice. *Concord Oil Co. v. Alco Oil & Gas Corp.* 387 S.W.2d 635, 639 (Tex. 1965). A suit brought by a lessor to have the lease terminated, filing an affidavit of termination in the real estate records, and other communications alleging termination in writing to the lessee can constitute a repudiation.

GARCIA
v.
KING
164 S.W.2d 509
(Tex. 1942)

Rehearing Denied Oct. 7, 1942.

ALEXANDER, CHIEF JUSTICE.

This suit involves the construction of an oil and gas mining lease. The lease was to run for a period of ten years "and so long thereafter as oil, gas, or other minerals is produced from said land." The material question to be determined is whether sufficient oil was produced from the land after the expiration of the primary period to keep the lease in force.

The lease in question covered 7,500 acres of land. From 1925 to 1929 the land was under a lease that required the payment of an annual rental of $13,284, regardless of the amount of oil produced. Lessees were unable to pay this annual rental. Litigation ensued and a settlement was reached, by the terms of which lessees paid lessors $3,500 in cash and agreed to pay them $2,500 out of 1/8 of production, and the 10-year paid-up lease with a 1/8 royalty now in question was executed. It provided in part as follows:

> Subject to the other provisions herein contained, this lease shall be for a term of 10 years from this day (called primary term) and as long thereafter as oil, gas, and other minerals is produced from said land hereunder.

At the time the lease was executed there were 112 producing wells on the land. The wells yielded large quantities of oil, from which the lessors were paid royalties running into thousands of dollars annually. All production was from a shallow reservoir, less than 200 feet deep. In the spring of 1936 forty-seven wells were still producing. At that time production ceased temporarily because a gas well that was furnishing fuel for pumping played out. Thereupon the lessees abandoned the shallow wells and decided to explore for oil in deeper sands. The money for this exploration was raised by sale of the casings and other equipment in the shallow wells. The deep tests were unsuccessful, and the lessees began drilling shallow wells again. At the expiration of the primary term on February 6, 1939, six shallow wells were being operated. Before that time, on November 15, 1938, the lessees had entered into a contract with one Juarez whereby Juarez was to operate the lease and receive as his compensation the entire seven eighths working interest belonging to the lessees. This contract continued until July 15, 1939. During this period a total of 195 barrels of oil was produced, averaging about 24 barrels per month. After deducting the lessors' royalty of $19.11, a total of $135.70 was received by Juarez for his seven-eighths of the oil, or $16.96 per month, which was barely adequate to pay for his labor in operating the wells. .out of this compensation, Juarez had to pay about a dollar each month for fuel. During this period of eight months the lessees received nothing at all from the lease, and yet they were paying the annual taxes thereon. In addition they had to make numerous trips at their own expense to the leased premises. The lessors received only about eight cents per day as royalty from the lease. From these undisputed facts it is clear that production was not in paying quantities when the primary term expired. However, there is evidence tending to show that production was increased after the termination of the Juarez contract, and that before the time of the trial production was obtained in paying quantities.

The lessors filed this suit against the lessees to cancel the lease and remove it as a cloud from their title to the land. Trial was to a jury, but upon the jury's failure to agree upon several of the special issues, the trial judge discharged the jury and rendered judgment for plaintiffs on the ground that their motion for peremptory instruction should have been granted. The court found that the undisputed evidence showed that the lease expired by its own terms at the end of the primary term because neither oil nor gas was then being 'produced,' within the meaning of the lease. Upon appeal the Court of Civil Appeals reversed the judgment of the trial court and rendered judgment for the defendants, holding that the term "produced" did not mean "produced in paying quantities." * * *

It will be noted that the lease provides in effect, that it shall run for a period of ten years, and as long thereafter as oil is 'produced' from the land. It does not provide, as is ordinarily the case, that the production must be "in paying quantities" in order to continue the lease in force after the expiration of the primary term. At the end of the primary period the lease was producing only about 24 barrels of oil per month. This quantity was susceptible of division, but was insufficient to yield a profit over and above operating and marketing expenses. It becomes necessary for us to

determine what is meant by the term "produced," as used in the lease. It is the plaintiffs' contention that the term "produced' means the same thing as "produced in paying quantities," while the defendants contend that the terms of the contract are met if enough oil is produced to be susceptible of division. So far as we have been able to determine, the question has not heretofore been passed on in this State.

The question was before the Supreme Court of Illinois in the case of *Gillespie v. Ohio Oil Co.*, 260 Ill. 169, 102 N.E. 1043, 1044. In that case less than a hundred barrels of oil had been recovered over an eighteen-months period. The Supreme Court of Illinois said:

> The lease was for a five-year term, and so long thereafter as oil or gas was produced. Oil was produced continuously after the drilling of the well. It is true that the quantity produced was so small as to make the venture unprofitable, but the strict letter of the lease was complied with and it had not expired by its own terms.

No authorities were cited in support of this ruling. It will be noted that the above case was decided in 1913, before the oil industry had been fully developed.

In the case of *Enfield v. Woods*, 198 Ky. 328, 248 S.W. 842,843, the Supreme Court of Kentucky used language which on its face appears to be decisive of the question. It was there said:

> It will be observed that the lessee is not required to produce oil in paying quantities, but he is required to produce oil or gas, one or the other, from the premises. This, of course, means a production of oil or gas in such quantities as to be susceptible of division, so as to pay the landowner a royalty, even though small. A mere showing of oil manifestly is not sufficient, even though produced. The production must be tangible and substantial, but it need not be great.

An examination of the case, however, discloses that the well there under consideration produced only a mere scum of oil, and the court held that this was insufficient to keep the contract in force. In view of the facts there involved the statement concerning production in paying quantities was not necessary to the decision of the case.

The above authorities are the only ones that we have found in which the question has been decided favorably to the defendants. After careful consideration we are of the opinion that the weight of authority supports plaintiffs' contentions.

In *Gypsy Oil Co. v. Marsh*, 121 Okl. 135, 248 P. 329, 333, 48 A.L.R. 876, the Supreme Court of Oklahoma passed directly on the question now before us. In that case the lessee had discovered oil in a shallow sand, but not in paying quantities, and was attempting to hold the lease beyond the primary term by producing from that sand in order to drill to a deeper sand at a later date. In discussing the question the court said:

> Some authority may be found holding that, if a lease is to continue so long as oil or gas is produced, it is immaterial whether the lease is a paying one or not, for so long as the well drilled produces either oil or gas the lease continues. THORNTON'S LAW OF OIL & GAS, § 150, citing *Gillespie v. Ohio Oil Co.*, 260 Ill. 169, 102 N.E. 1043. The construction there given the term 'produce' does not appeal to us, because the very purpose of the landowner in executing the lease is to have the oil and gas on the leased premises produced and marketed so that he may receive his royalty therefrom, and the purpose of the lessee is to discover and produce oil and gas in such quantities as will yield him a profit. These are material elements to be considered in the interpretation of the contract, and, if consideration is given these elements, it must be held that the word 'produce,'

> when used in this connection, means something more than mere discovery of a trace of oil or gas, or the discovery thereof in quantities so small as to render operation of the well unprofitable. Such a well would be of no benefit to either party.
>
> In *Parks v. Sinai Oil (& Gas) Co.*, 83 Okl. 295, 201 P. 517, this court had occasion to consider a lease containing, in effect, the same provision as is contained in the lease here under consideration, and it was there held that, when the lease provided that it should remain in force for a term of one year from date, and so long thereafter as oil or gas is produced, it was a condition precedent to the extension of the lessee's right to continue operations beyond the one year that oil or gas should be found in paying quantities within one year from the date of the lease. Thus it will be seen that this court is committed to the doctrine that, when used in this connection, the terms "produced" and "produced in paying quantities" mean substantially the same thing. We have no desire to depart from the holding in that case, but believe that the construction there placed upon the contract is in harmony with the plain intent of the parties, and to hold otherwise would give to the term "produced" a meaning not within the contemplation of either party.
>
> In defining the term "paying quantities" the court said:
>
> It has been generally held that "paying quantities," when used in this connection, means paying quantities to the lessee. If a well pays a profit, even small, over operating expenses, it produces in paying quantities, though it may never repay its costs, and the enterprise as a whole may prove unprofitable. Ordinarily, the phrase is to be construed with reference to the operator, and by his judgment when exercised in good faith.

The court concluded that the lessee's claim that oil was produced in paying quantities was not made in good faith, and affirmed the judgment of the trial court cancelling the lease. This decision was followed by the Oklahoma court in *Woodruff v. Brady*, 181 Okl. 105, 72 P.2d 709, 113 A. L.R. 391.

* * * *

It should be noted that we are here dealing with a situation in which under normal conditions, all of the producing wells on the lease in question at the time of the termination of the primary period were not producing enough oil or gas to pay a profit over and above the cost of operating the wells. In order to understand and properly interpret the language used by the parties we must consider the objects and purposes intended to be accomplished by them in entering into the contract. The object of the contract was to secure development of the property for the mutual benefit of the parties. It was contemplated that this would be done during the primary period of the contract. So far as the lessees were concerned, the object in providing for a continuation of the lease for an indefinite time after the expiration of the primary period was to allow the lessees to reap the full fruits of the investments made by them in developing the property. Obviously, if the lease could no longer be operated at a profit, there were no fruits for them to reap. The lessors should not be required to suffer a continuation of the lease after the expiration of the primary period merely for speculation purposes on the part of the lessees. Since the lease was no longer yielding a profit to the lessees at the termination of the primary period, the object sought to be accomplished by the continuation thereof had ceased, and the lease had terminated.

The judgment of the Court of Civil Appeals is reversed, and the judgment of the trial court is affirmed.

CLIFTON
v.
KOONTZ

325 S.W.2d 684
(Tex. 1959)

SMITH, JUSTICE.

This suit brought by petitioners, Lillie M. Clifton, individually and as executrix of the estate of her husband, J. H. Clifton, deceased, et al., seeks the cancellation of an oil, gas, and mineral lease on the theory that after the expiration of its ten-year primary term, the lease terminated due to cessation of production.

* * * *

We have concluded that the judgment of the Court of Civil Appeals must be sustained. We first consider the primary question, which is: Was there any evidence to sustain the finding of the trial court that production in paying quantities had not ceased?

One of the rules in determining this question is the well-settled rule that if there is any evidence reasonably tending to prove, either directly or by permissive inference, the essential facts, the judgment rendered thereon must be sustained. (citations omitted)

We have examined the entire record and in doing so have viewed the evidence in the light most favorable to the respondents; discarding all adverse evidence, and giving credit to all evidence favorable to the findings and judgment of the court, the trier of the facts, and have reached the conclusion that there is evidence of probative force supporting the judgment of the trial court that the gas well had continuously produced in paying quantities.

* * * *

* * * The petitioners cite the case of *Stanolind Oil & Gas Company v. Newman Brothers Drilling Company*, Tex., 305 S.W.2d 169, 172, as supporting their position. That case has no application to this question since it was concerned primarily with whether the 60-day clause and the 30-day clause contained in an oil, gas, or mineral lease are cumulative in application or separate and distinct provisions. No attempt was made in that case to settle the question of over what period of time paying quantities should be determined. However, the opinion does state that 'the sixty-day provision would be brought into play by a cessation of such production.'

The lease instrument involved in this suit provides by its terms that it shall continue in effect after commencement of production, 'as long thereafter as oil, gas, or other mineral is produced from said land.' While the lease does not expressly use the term 'paying quantities', it is well settled that the terms 'produced' and 'produced in paying quantities' mean substantially the same thing. (citation omitted)

The generally accepted definition of 'production in paying quantities' is stated in the *Garcia* case, *supra*, to be as follows:

> If a well pays a profit, even small, over operating expenses, it produces in paying quantities, though it may never repay its costs, and the enterprise as a whole may prove unprofitable.

In the case of a marginal well, such as we have here, the standard by which paying quantities is determined is whether or not under all the relevant circumstances a reasonably prudent operator

would, for the purpose of making a profit and not merely for speculation, continue to operate a well in the manner in which the well in question was operated.

In determining paying quantities, in accordance with the above standard, the trial court necessarily must take into consideration all matters which would influence a reasonable and prudent operator. Some of the factors are: The depletion of the reservoir and the price for which the lessee is able to sell his produce, the relative profitableness of other wells in the area, the operating and marketing costs of the lease, his net profit, the lease provisions, a reasonable period of time under the circumstances, and whether or not the lessee is holding the lease merely for speculative purposes.

The term "paying quantities" involves not only the amount of production, but also the ability to market the product (gas) at a profit. (citations omitted) Whether there is a reasonable basis for the expectation of profitable returns from the well is the test. If the quantity be sufficient to warrant the use of the gas in the market, and the income therefrom is in excess of the actual marketing cost, and operating costs, the production satisfies the term "in paying quantities". * * *

In the present case we have a finding of the trial court that there was production in paying quantities, and that the lease had not terminated. The evidence supports the finding. Evidence of marketing facilities and that the gas was sold at a profit is present in the instant case, whereas the *Hanks* case, *supra*, was wholly devoid of such evidence.

Proration rules adopted by the Texas Railroad Commission are a factor in determining the productive capacity of a particular lease. The Railroad Commission may by its order, for example, permit the taking of a greater percentage of the daily volume from nonassociated gas wells to the end that adequate quantities of gas may be delivered during the winter months when the demand therefor is the greatest, and by its order reduce the percentage to be taken during the summer months when a much less quantity of gas is needed. Relative to individual lease or gas units, the Commission has taken the position that it may by its order allow an overproduction for a period of time to meet the market demand for that period, and, in order to balance such overproduction, it takes the position that it may order that the well be cut down to a minimum volume of production.

Petitioners contend that the trial court's finding that production in paying quantities had not ceased is erroneous because the profit and loss figures heretofore considered do not include charges for depreciation as an operating expense. We are of the opinion that the trial court correctly excluded depreciation as an operating expense in determining whether and when production in paying quantities ceases. The petitioners contend that depreciation of the original investment cost should be taken into consideration as a part of the expense in operating the well. With this contention we do not agree. We do not have before us the question of whether or not depreciation on producing equipment should be charged as an operating expense, and, therefore, do not decide the question.

As the *Garcia* case, *supra*, indicates, the term "paying quantities", when used in the extension clause of an oil lease habendum clause, means production in quantities sufficient to yield a return in excess of operating costs, and marketing cost, even though drilling and equipment costs may never be repaid and the undertaking considered as a whole may ultimately result in a loss. The underlying reason for this definition appears to be that when a lessee is making a profit over the actual cash he must expend to produce the lease, he is entitled to continue operating in order to recover the expense of drilling and equipping, although he may never make a profit on the over-all operation. Depreciation is nothing more than an accounting charge of money spent in

purchasing tangible property, and if the investment itself is not to be considered, as is held by this Court, then neither is depreciation.

* * * *

Petitioners contend that the 8 per cent overriding royalties outstanding, as shown by the record, should be excluded from the total income attributable to the working interest in determining whether or not production is being obtained in paying quantities. We do not agree. The entire income attributable to the contractual working interest created by the original lease is to be considered. Petitioners cite no Texas case, and we have found none, which supports their argument. While apparently there is no Texas decision in point on the particular question, we believe the case of *Transport Oil Co. v. Exeter Oil Co. Ltd.*, *supra*, is authority supporting our view. In that case the basic oil and gas lease on a tract of land executed in 1921 required certain drilling operations and the payment of 16 2/3 per cent royalty to the lessor based upon the gross income. After several assignments of the lease in which overriding royalties had been reserved, the plaintiff in the action became the owner of the lease subject to the overriding royalty. Thereafter, the plaintiff, Transport Oil Company, assigned this lease to the defendant, Exeter Oil Company, in which assignment the defendant obligated itself to pay out of the gross income from the lease, the basic landowner's royalty, the overriding royalty reserved in previous assignments, and the override to the plaintiff totaling almost 50 per cent of the income per well. In 1942 the defendant plugged the well and abandoned the property, due to declining production. The abandonment terminated the plaintiff's interest as an overriding royalty owner, and it brought suit to recover damages. The court held that overriding royalty could not be excluded from the total income in determining whether there was production in paying quantities. *See also*, *Vance v. Hurley*, 1949, 215 La. 805, 41 So.2d 724.

* * * *

The judgment of the Court of Civil Appeals is affirmed.

HAMILTON, J., not sitting.

PSHIGODA
v.
TEXACO, INC.

703 S.W.2d 416
(Tex. App.—Amarillo 1986, writ refused, n.r.e.)

COUNTISS, JUSTICE.

This is a suit to cancel an oil and gas lease. The mineral owners and appellants, the Pshigoda family, sued the leaseholder and appellee, Texaco, Inc., contending Texaco was holding the lease by two oil wells that were not producing in paying quantities. Appealing from a take-nothing judgment rendered after the jury failed to find facts essential to their recovery, the Pshigodas advance four points of error that present two determinative issues: (1) did the trial court err by telling the jury to exclude reworking costs when determining operating and marketing costs, and (2) did the trial court err by submitting two time periods for jury consideration, one before and one after suit was filed, instead of one time period? We affirm.

In 1946, the Pshigodas' predecessor in title leased a section of minerals to Texaco's predecessor in title, for ten years "and as long thereafter as oil, gas or other mineral is produced" from the land. Texaco has held the lease under the production clause since the expiration of the primary term, and presently has two oil wells on the leasehold, Pshigoda Number One completed in 1958 and Pshigoda Number Two completed in 1974. The wells are not major producers, but have had periods of profitability.

In 1981, Number One developed a casing leak that caused it to produce substantially more saltwater than oil. Texaco eventually repaired the leak by "squeeze cementing" the well, at a cost of approximately $89,000.00.

On December 13, 1982, while Texaco was contemplating the drilling of another well on the leasehold, the Pshigodas filed this suit. They alleged, and at the trial presented evidence, that the two wells were not producing enough oil and casinghead gas to be profitable after deduction of operating and marketing expenses and that a reasonably prudent operator would not continue to operate the lease. Texaco presented controverting evidence and the jury agreed with Texaco (or, at least, did not agree with the Pshigodas by a preponderance of the evidence).

One key item of evidence, and the heart of the first controversy here, is the treatment of the $89,000.00 expenditure to plug the leak in Number One's casing. If it is treated as an operating and marketing expense, the leasehold had a net loss in excess of $69,000.00 from January 1, 1981 through February 1984. (Trial was in May 1984.) If the expenditure is excluded from consideration as an operating and marketing expense, the leasehold had a net profit in excess of $20,000.00 for the same time period.

Witnesses who discussed the expenditure agreed that it was a capital expenditure. The Pshigodas' expert witness called it a "sunk cost" and a "capital investment for the repair of that well." Texaco witnesses characterized the expense as a "workover to repair a capital item" and "an extraordinary item which is not a normal operating expense." One witness also said the expense was "absolutely not" an operating cost or a cost directly attributable to the operation of a lease.

The trial court gave the jury the following instruction on reworking expenses:

> In this connection, you are instructed that the words "at a profit" mean that the income to Texaco, Inc. must be sufficient to pay Texaco a profit, though small, over operating and marketing expenses.
>
> In determining "operating and marketing expenses" as that term is used in this charge, if any there be, you may consider such expenses as taxes, overhead charges, labor, repairs, depreciation on salvable equipment, if any, and other such items of expense, if any. In this connection, *you are instructed not to consider any costs or expenses in connection with* the original drilling and equipping of the well or *a reworking of the well.* (Emphasis added.)

We will first resolve point one, by which the Pshigodas question the propriety of the foregoing instruction and point three, by which they contend the instruction was a comment on the weight of the evidence. They argue that the instruction was fatal to their case because it permitted the jury to exclude the $89,000.00 casing repair item when determining whether the leasehold was profitable. Thus, the basic inquiry is whether it was error to tell the jury it must exclude reworking expenses in deciding whether the wells operated at a profit, *i.e.*, whether as a matter of law reworking expenses are excluded in deciding whether a well is profitable.

Although no Texas case is precisely in point, the controversy can be resolved within the framework of three cases: *Garcia v. King*, 139 Tex. 578, 164 S.W.2d 509 (1942); *Clifton v. Koontz,* 160 Tex. 82, 325 S.W.2d 684 (1959); and *Skelly Oil Company v. Archer*, 163 Tex. 336, 356 S.W.2d 774 (1961). *Garcia* rejected the notion that production will keep a lease in force indefinitely under the habendum clause regardless of the profitability of the production. Instead, said the Court, production means production in paying quantities. *Garcia* was followed by *Clifton v. Koontz, supra,* which refined the profitability test of *Garcia* and enunciated what is now considered a two-step test for determining a well's profitability: (1) does the production yield a profit after deducting operating and marketing costs, 325 S.W.2d at 692 and (2) would a prudent operator continue, for profit and not for speculation, to operate the well as it has been operated. 325 S.W.2d at 691. Central to the *Koontz* decision is the philosophy that fixed or periodic cash expenditures incurred in the daily operation of a well (sometimes called out-of-pocket lifting expenses) are to be classified as operating expenses, while one time investment expenses, such as drilling and equipping costs are to be treated as capital expenditures.

After *Koontz,* the Supreme Court decided *Skelly Oil Company v. Archer, supra.* In *Skelly,* the trial court defined paying quantities by telling the jury "that the gas discovered must be sufficient to pay the lessee a profit, though small, over operating and marketing expenses, although it may never repay the cost of drilling the well." (citation omitted) The Court then illustrated by example the meaning of operating and marketing expenses by telling the jury that it could "consider such expenses as taxes, overhead charges, labor, repairs, depreciation on salvable equipment, if any, and other such items of expense, if any. In this connection, you are instructed not to consider any costs or expenses in connection with the original drilling of the well." (citation omitted)

The Supreme Court approved the instructions, rejecting Skelly's argument that depreciation on salvable equipment, taxes, labor, and repairs should not be treated as operating expenses. It is again apparent, as in *Koontz,* that the Supreme Court considered operating costs to be the ordinary periodic expenses of production. However, none of the cases specifically considered the status of reworking costs.

The Court of Appeals decision in *Morgan v. Fox*, 536 S.W.2d 644, 650 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) is helpful, because the court specifically listed reworking expenses with drilling expenses in stating the items to be excluded when calculating whether a well is profitable. The status of reworking expenses was not directly in issue, however, so the statement must be treated as dictum. (citation omitted)

When this case is analyzed within the framework of the foregoing principles, we are satisfied the trial court correctly instructed the jury. A reworking expenditure is analogous, and closely related, to the initial drilling expenses. It is usually a one time, single expense item, that by the Pshigodas' own witness, is treated as a capital investment. Because it is not an ongoing expense, the operator may eventually recover it if the well continues to show a profit above normal operating expenses, just as the operator may eventually recover the initial drilling and equipment costs. Thus, it is logical and consistent with *Koontz* and *Skelly,* to permit the jury to exclude reworking expenses, as the trial court did. The instruction being proper, it follows that it was not an impermissible comment on the weight of the evidence. TEX. R. CIV. PRO. 277. Points of error one and three are overruled.

The second controversy in this Court revolves around the time frame by which the jury was allowed to measure profitability. The Pshigodas wanted to submit a single inquiry, covering the period from January 1, 1981 to March 1, 1984. However, the trial court asked the jury to make

findings on two periods of time. It first asked the jury to find whether the leasehold was profitable from January 1, 1981 to December 12, 1982, the day before suit was filed, (the jury found that it was) and, if not, whether a reasonable operator would have continued to hold the leasehold for the purpose of making a profit and not merely for speculation. The court then submitted the same inquiries for the period from December 12, 1982 until March 1, 1984, shortly before the case was tried. (The jury failed to find that it was, but found that a reasonable operator would have continued to operate the lease for profit.) Based on the jury's answers, the court rendered a judgment favorable to Texaco in all respects.

By their fourth point of error, the Pshigodas attack the failure of the trial court to submit their requested special issue number one and accompanying instruction. The only viable argument under this point, after our rejection of their argument on reworking expenses, is the contention, that the court should have submitted the single accounting period for determining profitability-January 1, 1981 to March 1, 1984-rather than two time periods, one encompassing 23 1/2 months before suit was filed and the other encompassing 17 months between filing and trial.

The *Koontz* case, discussed in resolving points one and three, also provides the guidelines for resolving this point. *Koontz* states that the court is to determine profitability over "a reasonable period of time under the circumstances." (citations omitted)

We are satisfied the time frames adopted by the trial court are reasonable. The first time period, encompassing the two years immediately preceding the filing of the suit is sufficient to give a picture of profitability over a reasonable length of time uninfluenced by the litigation. The second time period, slightly over a year and encompassing the period when litigation was pending, is also long enough to accurately reflect a profitability period and, additionally provide a contrast with pre-suit performance. Accordingly, point of error four is overruled.

By their fifth point, the Pshigodas say there is no evidence to support the jury's finding that the well operated at a profit during the first time frame. The argument is dependent, however, on treatment of the reworking expenses as operating expenses. Our rejection of that argument is necessarily fatal to the point. Accordingly, point of error five is overruled.

The judgment is affirmed.

STANOLIND OIL & GAS CO.
v.
BARNHILL

107 S.W.2d 746
(Tex. Civ. App.—Amarillo 1937, writ ref'd)

STOKES, JUSTICE.

* * * *

The lease was executed by appellees, J. R. Barnhill and wife and O. B. Carver, to J. A. Batson, and the interest claimed by Stanolind Oil & Gas Company duly assigned to it by the latter. It was dated February 4, 1930, and, by its terms, was to continue for a term of five years and as much longer as oil or gas or either of them should be produced from the land by the lessee. The sum of $10,000 was paid as cash consideration for the lease, and it contained further provisions for the payment of rentals in the sum of $1 per acre if no well were commenced on the land before February 4, 1931, and like payments annually in the absence of drilling operations.

Appellants commenced the drilling of a well on the land December 23, 1930, discovered gas and completed the drilling March 31, 1931, at a depth of 3,370 feet after plugging back from the total depth drilled of 3,498 feet. Tests showed a potential production of more than 7,000,000 feet of sour gas per day, and a pressure of 410 pounds. The well was gauged at intervals of about a month continuously from the date it was completed up to December 5, 1935, when the last test was made and the supply and pressure continued equally as good or better, with a slight increase toward the last portion of the period. No delay rentals were paid, and on May 11, 1932, appellees executed and filed in the office of the county clerk of Hutchinson county an affidavit setting forth this fact, and on May 26, 1932, appellants caused to be filed in the same office an affidavit in substance that the lease was in good standing. Appellants expended about $25,000 in drilling the well, in addition to the $10,000 paid to appellees for the lease.

There was no demand for sour gas, and no market for it, especially from small, isolated wells, such as the one involved here, until late in the year 1935, when House Bill No. 266, enacted by the Forty-Fourth Legislature, became effective, prohibiting the use of sweet dry gas in the manufacture of carbon black, and, though appellants made every reasonable effort to market the product of the well, they were unable to do so until about October, 1935. On the 9th of that month, appellant Stanolind Oil & Gas Company made a contract with Phillips Petroleum Company to begin the delivery of gas from the well on December 31, 1935, but, before the latter date, appellees notified the Phillips Petroleum Company and appellants that the lease had terminated and the Phillips Petroleum Company then declined to take the product of the well until the status of the lease was definitely determined. It was to determine that issue that this suit was filed.

The case was tried by the court, without a jury, and the trial judge filed findings of fact substantially in accordance with the foregoing statement. His conclusion of law was, in substance, that, regardless of what may have been the rights of appellees prior to February 4, 1935, as to forfeiture, there being no production of either oil or gas in paying quantities, as provided by the lease, it expired on that date, which was five years after its date, and judgment was entered denying appellants any relief, canceling the oil and gas lease and removing the cloud cast upon appellees' title to the land and vesting the title in them.

Appellants present the case in this court upon four propositions, the pertinent questions raised in all of which we think may be reduced to the contention that, under the oil and gas lease, appellants hold a determinable fee in the oil and gas conveyed by the same, which is not terminated by failure to sell the product on account of a non existing market, there being no abandonment of the lease and, if the lessors have a remedy, it is one for damages and not for a cancellation of the lease.

It is not an open question in Texas as to the nature of the title or interest of the lessee in an oil and gas lease, such as the one involved here. It invests the lessee and his assigns with the title to oil and gas in place, which is a determinable fee and which is lost on cessation of the use of the land for the purposes of exploration, development, and production of the oil and gas that may be in the land. Where such a lease provides for royalties and fails to define the lessee's duty in respect to development after oil or gas in paying quantities has been discovered, the law implies the obligation of the lessee to continue the development and production of the product with reasonable diligence, and a breach of his duties in that respect will not authorize the forfeiture of the lease as would be the result of a breach of a condition subsequent, such obligation being a covenant. * * * Such is the law in cases wherein there is no question as to the actual production of the product in paying quantities. When a well has been drilled upon the property and oil or gas in paying quantities once produced therefrom, the failure of the lessee further to develop the

property is, under the holdings of the courts, a breach of an implied covenant, the usual remedy for which is an action for damages. It is only in extraordinary circumstances, where there can be no other adequate relief, that a court of equity will entertain an action to cancel the lease on such ground.

As we view the case, it is not so much a question of whether or not the appellants continued to develop the land after they discovered the gas in the first well, and by such continued development complied with the implied covenant so to do, as it is a question of whether or not they have produced oil or gas in paying quantities as contemplated in the lease within the time provided by the lease itself. As has been stated, the estate held under the lease by appellants is what the law denominates a "determinable fee." It is a fee-simple title because it may continue, forever, and it is determinable because it may come to an end upon contingencies. The lease provides that it shall remain in force for a term of five years from its date, which was February 4, 1930, and as long thereafter as oil or gas, or either of them, is produced in paying quantities from the land by the lessee. If, within five years from the 4th of February, 1930, appellants have developed and produced oil or gas from said land in paying quantities, their interest in the estate continues. On the other hand, according to the terms of the lease, if oil or gas is not produced from the land within the period of five years, the lease comes to an end. It terminates, and no act on the part of the lessor is necessary in order to accomplish that result. The lease expires, and, after February 4, 1935, if no oil or gas was being produced, the lessee had no lease upon the land nor any interest whatever therein. The trial court seems to have taken this view of the controversy, and we think it is the proper one. It then becomes a question of whether or not the production of sour gas from the well in the quantity and under the conditions under which it was produced complied, within the five-year term, with the provision of the lease to the effect that the lessee would, within that term, produce such commodity in paying quantities. If it were so produced, the lease continued in full force and effect; if it were not so produced, the lease came to an end.

The facts are that gas was discovered and more than 7,000,000 feet per day could have been extracted from the well. It is not disputed that it would produce that amount of sour gas, and, if there had been an available market, the gas could have been disposed of. There was, however, no market for sour gas in the territory. Carbon black was being manufactured from sweet gas, which abounded in almost inexhaustible quantities in the same general territory, and sweet gas was more desirable for the manufacture of carbon black, as well as other commodities, than was sour gas. It was shown that, if as much as seventy five or a hundred million feet of sour gas per day could be produced within the vicinity, it probably would have attracted the construction of carbon black and natural gasoline plants and it could have been disposed of or a market created for it; but there was no market for small quantities of sour gas such as was produced from this well. It was further shown that appellants knew this at the time the lease was executed and at the time they began and completed the drilling of the well. They also knew the locality was generally considered sour gas territory. At the rate of production and the price that could have been obtained for sour gas, we think the conclusion is warranted that to drill enough wells to produce sufficient gas to attract the construction of carbon black or natural gasoline plants in the vicinity so as to create a market for sour gas would have been out of the question. Appellants went to the expense of $25,000 in drilling the well which was drilled. It was shown that the value of its production, even after a market was available, did not exceed $8.97 per day, thus showing that the expense of drilling other wells would not only have been impracticable, but a wild and foolish venture.

In discussing the question of the production of oil in paying quantities under the provision of a lease similar to the one involved here, the Commission of Appeals, in *Hanks v. Magnolia*

Petroleum Co., 24 S.W.(2d) 5, 6, quoted and approved a definition given in *Barbour, Stedman & Co. v. Tompkins*, 81 W.Va. 116, 93 S.E. 1038, L. R.A.1918B, 365, as follows:

> The question is not how much may be derived from the sale of the gas, but rather whether it may be sold in the market for consumption as fuel with reasonable expectation of profitable returns in excess of costs and expenses. Whether there is a reasonable basis for the expectation of profitable returns from the well is the test. If the quantity be sufficient to warrant the use of the gas in the market, and the income therefrom is in excess of the actual marketing cost, the production satisfies the term 'in paying quantities.'

Similar definitions are given in cases cited from other states, and we think it is a correct one. (citations omitted)

The lease under which appellant holds provides that it shall remain in force for a term of five years from its date, and so long thereafter as oil or gas, or either of them, is produced in paying quantities. Under the above definition of the term employed by the parties in the contract, appellants, although they discovered gas to an extent and in quantity that would have complied with their obligation in the lease if a market had been available for the kind of gas discovered, did not, under the circumstances of this case, discover nor produce gas in such quantities as, under the law, would be "paying quantities," within the five years provided by the lease. Their estate, consisting of a determinable fee, determinable upon their failure to produce oil or gas in paying quantities within such term, came to an end on February 4, 1935, as found by the trial court, after which they did not possess any interest whatever in the land. The lease did not exist. The term had closed, and the interest they procured by the lease was gone. It is not a question of forfeiture for failure to continue to develop the land, nor does it rest upon any other contingency. Appellants did not contract for a term which would depend upon the possibility of procuring a market for the product at some date subsequent to its express date of expiration. The lease did not provide that it should remain in force and effect for five years, and as long thereafter as there may be prospects of a market for the product, and it is not the duty of the courts to make contracts for parties but only to construe such contracts as they make for themselves.

We have carefully considered all of the propositions and assignments of error made by appellants, and, finding no error committed in the trial of the case, the judgment is affirmed.

ANADARKO PETROLEUM CORP.
v.
THOMPSON

94 S.W.3d 550
(Tex. 2002)

BAKER, JUSTICE.

In this case, we decide whether a gas mining lease terminated when actual production ceased longer than sixty days. The lease expressly states that it lasts for one year and "as long thereafter as gas is or can be produced." The lease also provides that, if production ceases for any reason, the lease "shall not terminate provided lessee resumes operations for drilling a well within sixty (60) days from such cessation." The lessees began producing gas in 1936. However, in 1981 and again in 1985, actual production ceased longer than sixty days. The court of appeals held that

these cessations terminated the lease. (citation omitted) We disagree. We conclude that a well that is capable of production sustains this particular lease even if actual production ceases longer than sixty days. Accordingly, we reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion.

* * * *

III. ANALYSIS

A. LEASE CONSTRUCTION

Here, we decide whether the lease terminated when actual production ceased longer than sixty days. Both parties' arguments about what triggers the lease's termination rely upon the lease's habendum and cessation-of-production clauses.

Anadarko contends that the habendum clause's plain language allows production *or the capability of production* to sustain the lease. Thus, Anadarko argues, the court of appeals incorrectly concluded that the habendum clause requires actual production. Anadarko urges us to give the clause's "can be produced" language its full effect. (citation omitted) According to Anadarko, the cessation-of-production clause does not contradict the habendum clause's plain meaning, because the cessation-of-production clause is a savings provision that only applies if the habendum clause's special limitation occurs and threatens to terminate the lease. In other words, the cessation-of-production clause only applies if the well holding the lease becomes incapable of production. Because the well holding the lease has always been capable of production, Anadarko asks us to reverse the partial summary judgment that the lease terminated due to one or more cessations of production.

In response, Thompson asserts that both the lease's terms and existing Texas law support the court of appeals' conclusion that actual production is required to sustain the lease after the primary term. (citation omitted) According to Thompson, the cessation-of-production clause applies whenever actual production ceases rather than when actual production *and* capability of production cease. Moreover, Thompson argues, allowing the capability of production to sustain the lease indefinitely would render the cessation-of-production clause meaningless.

Here, the habendum clause expressly states that the lease lasts as long as gas "is or can be produced." For several reasons, the court of appeals rejected Anadarko's argument that capability of production sustained the lease and, instead, concluded that the habendum clause requires actual production. (citation omitted) First, citing *Garcia v. King*, the court of appeals reasoned that the habendum clause must require actual production to further the lease's objective-to reap economic gain. (citation omitted) Second, the court of appeals construed the habendum clause in light of the lease's continuous operations clause, which sustains the lease so long as drilling operations continue "and if production results therefrom, then as long as production continues." (citation omitted) The court of appeals determined that the continuous operations clause shows that the parties intended that "the continuation of actual production was and is necessary to prolong the life of the lessee's interest." (citation omitted) And third, the court of appeals relied on decisions from other jurisdictions that have interpreted similar habendum clauses. (citations omitted)

We disagree with the court of appeals' lease construction. Here, neither party contends that the lease is ambiguous. Consequently, in construing the lease, we first consider the parties' intentions as expressed in the lease's four corners. (citations omitted) The habendum clause's plain language shows that the parties intended that a well actually produce gas, *or be capable of producing gas,* to sustain the lease. (citation omitted) This construction does not conflict with our rule that Texas leases generally require actual production. (citations omitted) That is because

the cases in which we recognized the general rule involved leases with typical habendum clauses that sustained the lease as long as oil or gas "is produced." (citations omitted) Thus, these cases do not control how to construe a habendum clause that lasts as long as gas "is *or can be* produced."

Additionally, the court of appeals reasoned that allowing the ability to produce gas to prolong the lease would "effectively erase" the cessation-of-production clause from the lease. (citation omitted) But the court of appeals' analysis incorrectly assumes that the cessation-of-production clause is triggered any time actual production stops. Read as a whole, the cessation-of-production clause combines a sixty-day time limit with a resumption of operations provision. Thus, the clause indicates the parties' intent that the cessation-of-production clause apply only when the circumstances require the lessee "to resume operations for drilling a well." In other words, the cessation-of-production clause only applies if a well holding the lease ceases to be *capable of producing gas.* Indeed, in analyzing a similar cessation-of-production clause, one commentator has observed:

> The fact that the event which is designed to prevent termination is the commencement of drilling or reworking operations gives some indication of the purpose of the clause and the intention of the parties. It indicates that the parties are concerned with a situation where cessation of production is of the type that is remedied by drilling or reworking operations. Thus, the parties must have intended that the clause would become operative if a dry well is drilled or if a producing well ceases to be capable of producing in paying quantities. A literal application of the clause to every temporary cessation of production could lead to absurd and unintended results.

(citation omitted)

Construing the cessation-of-production clause to apply when a well holding the lease ceases to be capable of production—and not simply when actual production ceases—accords with the cessation-of-production clause's plain language. Moreover, this construction avoids imposing an unnecessary limitation on the grant. (citation omitted) The court of appeals' construction of the cessation-of-production clause would require Anadarko to resume drilling operations within sixty days of any cessation in actual production even if the existing well remained capable of production. Such a construction disregards the habendum clause's "can be produced" language, whereas our construction gives every clause some effect. (citation omitted) Accordingly, the court of appeals incorrectly relied upon the cessation-of-production clause to hold that the habendum clause requires actual production to sustain the lease.

* * * *

Finally, we reject Thompson's contention that allowing the capability of production to sustain the lease would allow the lessees to sustain the lease indefinitely-without actual production. Rather, the implied duty to manage and administer the lease as a reasonably prudent operator, which encompasses the implied duty to market the gas reasonably, would limit the lessees' ability to sustain the lease based on a well's capability of production. (citation omitted)

For these reasons, we hold that a well actually producing or capable of producing gas sustains this particular lease under the habendum clause. We also hold that the cessation-of-production clause only applies if the lease would otherwise terminate under the habendum clause. Consequently, the court of appeals erred in holding that, under this lease, "can be produced" means "actual production."

B. CAPABILITY OF PRODUCTION

Because we conclude that actual production was not necessary to sustain the lease, we next consider whether the 1981 and 1985 cessations terminated the lease. This depends upon whether the well holding the leased premises was capable of production during the two periods when actual production ceased longer than sixty days. According to Anadarko's brief, "[t]he evidence is undisputed here that the well was capable of production during the two periods when no production was shown," because the evidence shows that the well was shut-in for pipeline repairs. In response, Thompson contends that the well was not capable of production, because the well would not have produced if it had been "turned on." (citation omitted)

We have determined that "the completion of a gas well capable of producing in paying quantities but shut-in due to lack of pipe line facilities or for other reasons is not considered production" and therefore does not sustain a mineral interest that lasts as long as oil or gas "is produced." (citation omitted) (noting the "marked difference between the capacity to produce in paying quantities and actual production in paying quantities"). However, we have not defined what "capable of production" means.

One court of appeals considered this issue in deciding whether a lessee's paying shut-in royalties maintained a lease even though actual production had ceased. (citation omitted) In this context, the *Hydrocarbon*, (citation omitted) court stated:

> We believe that the phrase "capable of production in paying quantities" means a well that will produce in paying quantities if the well is turned "on," and it begins flowing, without additional equipment or repair. Conversely, a well would not be capable of producing in paying quantities if the well switch were turned "on," and the well did not flow, because of mechanical problems or because the well needs rods, tubing, or pumping equipment.

(citation omitted)

We approve the *Hydrocarbon* definition, because it is consistent with existing cases that discuss the difference between actual production and capability of production. *See Peveto*, 645 S.W.2d at 771 (a well is capable of production if it is shut-in because there is no available pipeline); *Stanolind Oil & Gas Co. v. Barnhill*, 107 S.W.2d 746, 749 (Tex. Civ. App.—Amarillo 1937, writ ref'd) (a well is capable of production if it is shut-in because there is no available market); *see also Davis*, 254 S.W. at 309 (a well is incapable of production if the lessee removes the equipment and abandons all efforts to produce); *Pack*, 869 P.2d at 327 (a well is incapable of production if the underlying mineral reserves are depleted). Accordingly, we hold that a well is capable of production if it is capable of producing in paying quantities without additional equipment or repairs.

IV. CONCLUSION

Here, the lease's habendum clause expressly states that the lease lasts as long as gas "is or can be produced." Based on the habendum clause's plain meaning, we hold that a well actually producing gas *or capable of producing gas* sustains this particular lease. To be "capable of producing gas," we conclude that a well must be capable of producing gas in paying quantities without additional equipment or repairs. Accordingly, we reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 60.2(d). Because we resolve this case based on the lease-construction issue, we do not reach Anadarko's affirmative defenses.

JUSTICE O'NEILL did not participate in this opinion.

ON MOTION FOR REHEARING

PER CURIAM.

We deny the motion for rehearing but write to clarify our decision.

In defining "capable of production" in our original opinion, we approved this definition from *Hydrocarbon Management, Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427, 433-34 (Tex. App.—Amarillo 1993, no pet.):

> We believe that the phrase "capable of production in paying quantities" means a well that will produce in paying quantities if the well is turned "on," and it begins flowing, without additional equipment or repair. Conversely, a well would not be capable of producing in paying quantities if the well switch were turned "on," and the well did not flow, because of mechanical problems or because the well needs rods, tubing, or pumping equipment.

94 S.W.3d 550, 557. In so doing, we did not overrule or otherwise call into question our prior decisions regarding the proper interpretation of "production in paying quantities." Specifically, we did not overrule or modify the longstanding requirement that for a well to produce in paying quantities, or to be capable of producing in paying quantities, there must be facilities located near enough to the well that it would be economically feasible to establish a connection so that production could be marketed at a profit. As we explained in *Clifton v. Koontz*, 160 Tex. 82, 325 S.W.2d 684, 691 (Tex. 1959), all the relevant circumstances must be considered in determining whether there are "paying quantities":

> In the case of a marginal well, such as we have here, the standard by which paying quantities is determined is whether or not under all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation, continue to operate a well in the manner in which the well in question was operated.

. . . .

* * * *

We meant in our original decision that, as a practical matter, a lessee will not sustain a lease based on a well's capability of production without actual production of the well because the payment of damages for the failure to reasonably market the gas would be a strong incentive to connect the well to facilities that would permit actual production. And, in an extraordinary case, when damages would not furnish an adequate remedy, a court could conditionally order termination if a connection and actual production were not commenced within a reasonable time. (citation omitted)

Finally, the motion for rehearing contends that several decisions of this Court and other courts compel a different result in this case. We disagree. The cases on which Thompson and the other Respondents rely are distinguishable because they involved different lease provisions, different facts, or both. The leases at issue in many of the cases said that the lease would remain in effect as long as oil or gas "is produced." (citations omitted) But in this case, the lease said "is or can be produced." As we explained in our original opinion, "can be produced" does not mean actual production.

* * * *

Accordingly, we deny the motion for rehearing.

JUSTICE O'NEILL, JUSTICE SMITH and JUSTICE WAINWRIGHT did not participate in the decision on rehearing.

RIDGE OIL CO., INC.
v.
GUINN INVESTMENTS, INC.

148 S.W.3d 143
(Tex. 2004)

OWEN, JUSTICE.

In this oil and gas case, two lessees obtained working interests under a single lease through assignments. Guinn Investments, Inc. is the lessee as to the Guinn tract, and Ridge Oil Company, Inc. is the lessee as to the adjoining Ridge tract. Ridge shut in the only two producing wells, both located on the Ridge tract, for approximately ninety days and subsequently executed new leases with the owners of the possibility of reverter of the mineral interest in the Ridge tract. Among the numerous issues presented, we hold 1) the temporary cessation of production doctrine applies when there is more than one lessee under a single lease, 2) production permanently ceased from the Ridge tract when the new leases between Ridge and the owners of the Ridge tract became effective, 3) Guinn was not conducting operations on the lease sufficient to sustain the lease at the time production permanently ceased or thereafter, and 4) Guinn is not entitled to prevail on its claims for tortious interference, fraud, or the imposition of a constructive trust.

Because the trial court did not err in granting summary judgment for Ridge, we reverse the court of appeals' judgment and render judgment for Ridge.

I

Guinn sued Ridge and Ridge's vice president, Bryan Woodward, who was also one of its two shareholders. Guinn's pleadings sought to remove a cloud upon and quiet title to the interest it held under an oil and gas lease and sought a declaration that the lease was valid. In the alternative, Guinn sought damages and a constructive trust.

Guinn and Ridge were both lessees under a 1937 oil and gas lease. The lease covered two adjoining 160-acre tracts, which we will call the Guinn tract and the Ridge tract for ease of reference. Through various assignments, Guinn became a partial assignee under the lease, obtaining the lessee's rights and obligations with respect to the 160-acre Guinn tract. Through other assignments, Ridge also became a partial assignee, obtaining the lessee's rights and obligations with respect to the 160-acre Ridge tract. Although the record is not entirely clear, the parties agree that the possibility of reverter of the mineral interest in each tract has become separate as well. The successors to the lessor's interest in the Guinn tract have no interest in the Ridge tract, and the successors to the lessor's interest in the Ridge tract have no interest in the Guinn tract. Ridge's brief asserts that both the working interests and the mineral estates with regard to the two tracts have been "partitioned," and Guinn does not dispute that. As the court of appeals noted, "It is undisputed that Ridge Oil's lessors were not the lessors of the Guinn tract." None of the lessors are parties to this suit, with the exception of Ridge, who obtained a percentage of the possibility of reverter of the mineral estate on the Ridge tract.

At one time, there was a producing well on the Guinn tract, but it was plugged and abandoned in 1950. There has been production on the Ridge tract since 1937, and there were two producing wells on that tract at all times material to this dispute. The parties agree that until at least December 1, 1997, those wells sustained the 1937 lease as to both the Ridge and Guinn tracts. The habendum clause of the 1937 lease says:

> It is agreed that this lease shall remain in force for a term of five (5) years from this date, and as long thereafter as oil or gas, or either of them is produced from said land by the lessee, or as long as operations are being carried on.

Guinn acquired its interest under the 1937 lease in the summer of 1997. Shortly thereafter, Ridge offered to purchase Guinn's interest, but Guinn declined the offer. Ridge then decided that it would attempt to terminate the lease. Ridge told its pumper to cut off the electricity to the two producing wells on the Ridge tract and to perform no other activities on the premises until further notice. The electricity to the wells was cut off on December 1, 1997, and the wells ceased to produce on that date. About six weeks later, in January 1998, Ridge wrote a letter to each of the mineral interest owners of the Ridge tract. Ridge explained that production on the Ridge tract held the 1937 lease as to that tract as well as the Guinn tract and asserted that it would be very difficult to obtain an assignment of the part of the lease covering the Guinn tract because the heirs of the original lessors were "scattered across the nation." For purposes of summary judgment, Ridge did not dispute that this last statement, characterizing the owners of the leasehold interest in the Guinn tract as "scattered across the nation," was false. The letters then set forth Ridge's plan to terminate the lease and obtain new leases on both the Guinn and Ridge tracts:

> However, after consulting with my attorney regarding this matter, he has advised me of another avenue that we can take to accomplish the same desired result. He advised me to take new oil and gas leases covering only [the Ridge tract] and to simply shut the two [Ridge tract] wells in for a period of 90 days which would terminate the 1937 oil and gas lease. We could then take new oil and gas leases from the mineral owners under the [Guinn tract].

In these same letters, Ridge sent a new lease to each mineral estate owner of the Ridge tract and offered to pay a $500 bonus to each upon execution of a new lease. The letters also said that Ridge would pay $50 per month to each owner for the loss of royalty proceeds while the wells were shut in, which was the average monthly royalty paid for the last six months of production. Each of the mineral interest owners of the Ridge tract accepted this offer and executed new leases effective as of March 3, 1998. On that same date, Ridge instructed its pumper to reconnect the electricity to the wells, which he did, and the wells resumed production on that date.

On February 17, 1998, Ridge approached the owner of the largest percentage of the mineral estate on the Guinn tract, Burlington Resources, who owned a 5/6 interest in the mineral estate. Ridge offered to lease Burlington's interest, but Burlington declined.

On February 27, 1998, seventy-nine days after Ridge shut its wells in, Guinn obtained a drilling permit from the Texas Railroad Commission to drill a well on the Guinn tract. The only other evidence of activity was that Guinn attempted to pay surface damages to gain entry to drill and drove a wooden stake into the ground marking the proposed well site.

Guinn filed this suit against Ridge and Woodward on March 8, 1998, five days after the effective date of the new leases on the Ridge tract. Within a month after suit was filed, Ridge proceeded to obtain leases from some of the mineral interest owners of the Guinn tract, although Burlington Resources was not among these lessors. One lease was signed by a Guinn tract

mineral interest owner on March 25, 1998, and three other Guinn tract mineral interest owners signed leases on April 1, 1998.

In Guinn's suit against Ridge and Woodward, Guinn contended that the 1937 lease had not terminated as to its tract, either because the cessation of production of the wells on the Ridge tract was temporary or because Guinn had begun operations on the Guinn tract before the lease expired and was prevented from continuing those operations by Ridge's conduct. Guinn alleged alternatively that, if the 1937 lease had terminated, Ridge had tortiously interfered with Guinn's contract rights and had committed fraud, and a constructive trust should therefore be imposed on all new leases on the Guinn tract.

Ridge and Woodward filed a motion for partial summary judgment seeking judgment in their favor on all of Guinn's claims. Guinn filed a competing motion for summary judgment. The trial court indicated that it would grant Ridge and Woodward's motion and deny Guinn's. The trial court then conducted a jury trial only on attorney's fees. Upon conclusion of that trial, the court rendered judgment that Guinn take nothing, that the 1937 lease is terminated and is no longer in force and effect, and that Ridge recover attorney's fees, although in an amount less than that found by the jury. The final judgment also awarded attorney's fees in specified amounts to Guinn in the event the judgment is reversed and it is determined that Guinn should prevail on its claims.

Guinn appealed the take-nothing judgment against it, and Ridge and Woodward appealed the amount of attorney's fees awarded by the trial court. Initially, a panel of the court of appeals affirmed the trial court. However, on rehearing en banc, the court of appeals reversed the trial court's judgment and rendered judgment for Guinn, holding that the lease had not terminated. The court of appeals concluded that the temporary cessation of production doctrine applied, the cessation of production was temporary, and Ridge's surrender of its lease and the taking of new leases from the mineral interest owners on the Ridge tract did not terminate the 1937 lease as to Guinn.

Ridge petitioned this Court for review, which we granted.

II

First, we should make clear what is not at issue in this case. None of the mineral interest owners in either tract are parties to this suit, other than Ridge, who owns a portion of the mineral interest in the Ridge tract. Our determinations do not purport to adjudicate the rights of the absent mineral interest owners. The only issue among those who are parties to this suit (Guinn, Ridge, and Woodward) is whether the 1937 lease remains in effect as to the Guinn tract.

This Court has consistently recognized that when a lease covers more than one tract and provides, as the 1937 lease in this case provides, that it shall remain in force for a stated term and "as long thereafter as oil or gas, or either of them is produced from said land," production on any part of "said land" continues the lease in effect as to all land covered by the lease. This is true even when the lessee assigns interests in parts of the leased premises to different operators and there is production by only one assignee. Neither Guinn nor Ridge takes issue with these principles of law.

Ridge, however, contended in its motion for summary judgment that, when production on the Ridge tract ceased on December 1, 1997, the cessation of production immediately terminated the 1937 lease in its entirety. Ridge contended alternatively that the 1937 lease terminated when it executed new leases with the owners of the possibility of reverter of the mineral interest on the Ridge tract. Guinn countered that the cessation of production was only temporary, and therefore, under the temporary cessation of production doctrine, the 1937 lease did not terminate.

This Court has held that temporary cessation of production in paying quantities does not terminate a lease that provides it will remain in force and effect as long as oil or gas is produced. In *Midwest Oil Corp. v. Winsauer*, we concluded that this doctrine likewise applies to royalty deeds, and we thus said that "a temporary cessation of production in paying or commercial quantities will not cause the royalty deed to terminate" when the term of that grant was as long as oil, gas, or other minerals were produced. We reached the same conclusion in *Stuart v. Pundt*, a decision from a court of appeals in which this Court refused the application for writ of error. We reiterated in *Amoco Production Co. v. Braslau* that only permanent cessation of production may cause the estate to terminate. More recently, we said in *Anadarko Petroleum Corp. v. Thompson* that "a typical Texas lease that lasts 'as long as oil or gas is produced' automatically terminates if actual production permanently ceases during the secondary term," citing our decision in *Amoco v. Braslau.*

We agree with the court of appeals in the case before us today that, absent any language in a lease to the contrary, the temporary cessation of production doctrine applies when a lease covering more than one tract or interest is held by production from a well operated by a partial assignee of the lessee's rights. As noted above, the temporary cessation of production doctrine applies to leases between original lessors and lessees and to owners of nonparticipating royalty interests. It logically should apply to partial assignees of a lessee's interest as well. The central question before us today is whether there was a temporary cessation of production under the facts of this case.

III

This and other courts have held that the temporary cessation of production doctrine applies in a wide variety of circumstances. In *Winsauer*, we held that cessation of production in paying quantities for 174 days was temporary because it was caused by two successive lawsuits and subsequently an obstruction in a gas line that required the laying of a new line. In another temporary cessation of production doctrine case, *Stuart v. Pundt*, the only producing well "began to make sand, water and bottom sediment to the point where the connection was cut off and gas could not be produced." Efforts to restore the well were undertaken until it was determined that the casing in the well had collapsed. The lessee plugged and abandoned that well and drilled a new one. The cessation of production was held to be temporary, and the new well sustained the lease. In *Cobb v. Natural Gas Pipeline Company of America*, Natural was the lessee and also owned and operated the pipeline system into which a well maintaining the lease fed. There were three periods of non-production at issue, nine months in 1946 to 1947, three months in 1962, and another nine months in 1974 to 1975. The well did not produce during these periods because Natural's pipeline pressure was greater than the wells' pressure. After Natural added compression on the line, the well began to produce at rates higher than any in its history. The United States Court of Appeals for the Fifth Circuit held that the three extended cessations of production were temporary and that the lease had not terminated. In *Casey v. Western Oil & Gas, Inc.*, a well was not produced for two months after the lessee's contract with its pipeline purchaser expired and negotiations for a new contract were underway. The court of appeals held that this evidence supported the trial court's finding that cessation of production was temporary and, therefore, that the lease did not terminate. Accordingly, although decisions at times have said that the temporary cessation of production doctrine applies when there is "sudden stoppage of the well or some mechanical breakdown of the equipment used in connection therewith, or the like," or that the doctrine applies when the cause of a cessation of production is "necessarily unforeseen and unavoidable," the circumstances in which this and other courts have applied the doctrine have not

been so limited. The court of appeals in the present case correctly concluded that "foreseeability and avoidability are not essential elements of the [temporary cessation of production] doctrine."

Ridge contends that, when it ceased production on December 1, 1997, the 1937 lease terminated as to the Ridge tract on that date. We do not reach that contention because Ridge's alternative position in its motion for summary judgment is dispositive. Ridge asserted that at least as of March 3, 1998, the date on which new leases became effective for the Ridge tract, cessation of production from the wells on the Ridge tract was permanent with respect to the 1937 lease. We agree.

This Court acknowledged more than a half a century ago in *Superior Oil Co. v. Dabney* that parties to an oil and gas lease may validly include a provision allowing the lessee to surrender all or part of the lease. We said, "Options to surrender in contracts of lease are now regarded as valid by a practical unanimity of decision." Even if an oil and gas lease does not contain a surrender clause, the parties may mutually agree to a release, or they can effectively terminate their lease by signing a new one. When the owners of the possibility of reverter of the mineral interest in the Ridge tract executed new leases with Ridge, they effectively terminated the 1937 lease as to that tract. Production by Ridge from the Ridge tract was thereafter performed under the new, March 3, 1998 leases, not the 1937 lease. The cessation of production from the Ridge tract under the 1937 lease thereby became permanent. Guinn had no right to enter the Ridge tract to restore or obtain production, even under the 1937 lease. Ridge and its lessors, however, could not affect Guinn and its lessors' interests under the 1937 lease, and termination of the lease as to the Ridge tract could not, in and of itself, terminate the 1937 lease as to the Guinn tract. The Guinn tract, by its terms, remained in effect "as long ... as oil or gas, or either of them is produced from said land by the lessee, or as long as operations are being carried on." The question then becomes, was there any production "by the lessee" on March 3, 1998 when the 1937 lease terminated as to the Ridge tract. The answer to that question is no. Ridge was no longer a lessee under the 1937 lease, and production by Ridge was not production "by the lessee" under the 1937 lease. Nor was there any production on the Guinn tract by the only remaining lessee, Guinn.

Guinn contends that Ridge could not "washout" its interest under the 1937 lease in this manner. We turn to that contention.

IV

There are several decisions addressing an alleged "washout" that are instructive. In *Sasser v. Dantex Oil & Gas, Inc.*, Sasser had an overriding royalty interest under a 1974 lease in which Dantex acquired a working interest. That lease had a clause permitting the lessee to unilaterally release the lease as to all or any part of the premises it covered at any time. In 1990 Dantex and the owner of the reverter in the mineral interest entered into a new lease. Sasser contended that there was production in paying quantities under the 1974 lease when Dantex executed the new lease, and therefore, that the 1974 lease and consequently his overriding royalty interest were not extinguished. The court of appeals disagreed, holding that "the 1974 Lease terminated when Dantex [and the owner of the possibility of reverter] signed the 1990 Lease with the intent and understanding that, by doing so, they would effect a release of the 1974 Lease." It was "not material," the court reasoned, that there was production in paying quantities. "Dantex and [the owner] effected a release of the 1974 Lease by signing the 1990 Lease--regardless of whether there was production in paying quantities." Sasser contended that Dantex could not "washout" his overriding royalty interest this way, arguing that " 'evolving principles of Texas law' mandate the conclusion that an oil and gas lessee owes an overriding royalty interest owner a duty of good faith not to engage in intentional acts designed to eliminate or 'washout' the overriding royalty

interest owner." Sasser contended that Dantex's termination of the 1974 lease was in bad faith. The court of appeals rejected these contentions, reasoning that Dantex's actions would have been in bad faith only if its contractual right to surrender the 1974 Lease were subject to a duty to act in good faith, and that it was immaterial how the lease was terminated, so long as the termination of the lease was contractually permitted.

In another overriding royalty interest case, *Keese v. Continental Pipe Line Co.,* the United States Court of Appeals for the Fifth Circuit held the lessees, as "remote assignees in the leasehold chain of title, were under no obligation to plaintiffs [the overriding royalty interest holders] to drill or to continue to hold on to the lease, and the facts set out in plaintiffs' affidavit, that they knew or might have known that a good well could be brought in on the property, could not have prevented them from surrendering the lease to the landowners for any reason or for no reason at all." The lessees "had a clear and absolute right to release the Mills 1939 lease."

Other decisions recognize, in the overriding royalty context, that a lessee may terminate a lease and extinguish the overriding royalty interest, at least when the lease has an express surrender clause. In *In re GHR Energy Corp.*, the overriding royalty agreement provided that the royalty would "extend to and include each and every renewal or extension of an oil and gas lease covered by this Assignment." The agreement also provided that "operations, if any, . . . and the extent and duration thereof, as well as the preservation of such lease by rental payments or otherwise, shall be solely at the will [of the lessee]." The lessee terminated the lease at issue, even though production was prolific and ongoing, under a clause in the lease that permitted it to surrender the lease at any time. The lessee then entered into new leases, thereby cutting off the overriding royalty owner's interest. The United States Court of Appeals for the Fifth Circuit held that the lessee "was free to terminate the leasehold estate, where the lease language expressly authorized the surrender, and to cut off [the] overriding royalties, despite the fact that gas production never ceased on the leasehold." On rehearing, the court noted, "We might well reach a different result if the facts here had suggested that [the lessee] surrendered its interest in the lease to destroy the rights of the overriding royalty interest owner."

Guinn contends that we should hold that a lessee cannot surrender or terminate a lease to destroy the rights of another partial assignee of the lessee's interest. We decline to adopt such a blanket rule of law. Even if such a rule of law might be appropriate in the context of overriding royalty interests when the underlying lease does not contain an express release provision, a question we do not address, there is a material distinction between an overriding royalty interest and that of a lessee. An overriding royalty interest is a non-participating interest. A royalty owner has no right and thus no ability to go onto the underlying property and drill or otherwise take action to perpetuate a lease. An overriding royalty interest owner is wholly dependent on the lessee to keep a lease alive. That is not true of a lessee. A lessee in Guinn's position could continue a lease in effect by drilling a well and obtaining production, or continuing operations until production is obtained, under lease provisions like those in the 1937 lease.

In the case before us today, Ridge was a partial assignee and had no rights or obligations with regard to any tract other than the Ridge tract. Ridge owed no duty to the owners of the possibility of reverter of the mineral interest in the Guinn tract to continue the 1937 lease in effect. Nor did Ridge owe any duty to Guinn, the assignee of the working interest in the Guinn tract, to continue the 1937 lease in effect. The owners of the Ridge tract and the working interest owner of the Ridge tract were free to mutually agree to terminate the 1937 lease as to their respective interests. It is immaterial that a collateral effect of that agreement was that the only producing wells permanently ceased to be produced "by a lessee" under the 1937 lease, and because there was no other production on the lands described in the 1937 lease, that lease terminated by its own terms.

* * * *

The 1937 lease provides that it remains in force and effect so long as oil or gas is produced "by the lessee." When Ridge and the owners of the possibility of reverter of the mineral interest in the Ridge tract executed new leases, Ridge ceased to be a lessee under the 1937 lease. Production by Ridge thereafter was referable to the new leases, not the 1937 lease. Guinn continued as the sole lessee under the 1937 lease, but there was no production by Guinn.

Guinn contends that the 1937 lease nevertheless was maintained by operations. We turn to that argument.

* * * *

VI

Finally, we address Guinn's contention that a constructive trust should be imposed on all new leases covering the Guinn tract, as well as Guinn's fraud and tortious interference claims. In *Sunac Petroleum Corp. v. Parkes*, this Court held that when a lease terminated by its own terms, and thus extinguished an overriding royalty interest, the overriding royalty owner was not entitled to a constructive trust. The overriding royalty agreement applied to the original lease in which the royalty was reserved and "any extension or renewal thereof." This Court concluded that there was no confidential relationship between the lessee and the owner of the overriding royalty that would justify a constructive trust on a new lease. We similarly conclude that there is no confidential relationship between partial assignees of leasehold interests under a base lease.

The decision in *Thomas v. Warner-Quinlan Co. of Texas*, in which this Court refused the writ of error, is instructive. The assignor assigned a lease to the assignee. We held that once the lease vested in the assignee after meeting the assignment's requirement that the assignee drill three wells, the assignee had no duty to drill or to reassign the lease before it expired due to lack of production. When the lease did expire, we held that the assignee had "no duty to procure any renewal or extension of the first lease, although, according to the contract, had it done so, [a renewal or extension of the first lease] would have enured to the benefit" of the assignor. Similarly, Ridge owed no duty to Guinn to perpetuate the 1937 lease or to procure its renewal or extension for Guinn. There is no basis for a constructive trust.

Likewise, there is no basis for a tortious interference claim. Ridge and the lessors of the Ridge tract had the right to terminate the 1937 lease as to their interests. Nor has Guinn set forth any facts to support a fraud claim. Ridge moved for summary judgment on the basis that no representations were made to Guinn. The admittedly false representation made by Ridge was to Ridge's lessors, not to Guinn.

* * * *

The trial court did not err in granting summary judgment for Ridge. The court of appeals' judgment is reversed and judgment is rendered for Ridge.

JUSTICE SCHNEIDER did not participate in the decision.

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2. *Delay Rental Clause*

HUMBLE OIL & REFINING CO.
v.
HARRISON

205 S.W.2d 355
(Tex. 1947)

HART, JUSTICE.

* * * *

The questions presented by this appeal are (1) whether the delay rentals tendered by Humble to Harrison were sufficient in amount and, if not, (2) whether under the facts of this case Harrison is estopped to assert that the leases have been terminated.

* * * *

On February 8, 1944, the Ottos executed to Harrison a mineral deed conveying an undivided interest in the minerals in the entire 1074.4-acre tract. This deed contained the following provisions:

* * * *

> It is understood and agreed that one-half (1/2) of the money rentals, which may be paid, on the above described land, to extend the term within which a well may be begun under the terms of said leases is to be paid to the said Grantee; and, in event that the above described leases for any reason become canceled or forfeited, then and in that event, Grantee shall own one-half (1/2) of all oil, gas and other minerals in and under said lands, together with a like one-half (1/2) interest in all bonuses paid, and all royalties and rentals provided for in future oil, gas and mineral leases covering the above described land.

On the same date that the mineral deed was executed Harrison mailed to Humble a photostatic copy of the mineral deed, together with a letter, which read in part as follows:

> It is our understanding that you are the owners of oil and gas leases from Mrs. Lottie Otto and husband covering portions of 1074.4 acre tract in the Shipman & Charles League in Brazoria County, Texas. We hand you herewith photostatic copy of mineral deed from Mr. and Mrs. Otto conveying to D. J. Harrison 1/2 of the minerals, rentals and royalties, and we ask you to change your records accordingly.

On February 15, 1944, Harrison mailed to Humble a certified copy of the mineral deed from the Ottos. On February 18, 1944, Humble's agent in charge of its records mailed to Harrison a letter in which receipt was acknowledged of the certified copy of the mineral deed and it was stated that "our records have been amended in accordance with this instrument."

The supervisor of the land rental division of Humble's oil department, who is a licensed attorney at law, testified that he had charge of setting up the rental to be paid to Harrison under the mineral deed from the Ottos, and that he construed the deed to mean that thereafter Humble should pay to Harrison one-half of the rentals which had theretofore been payable to the Ottos. Humble's rental records, which were introduced in evidence, show that they were changed in accordance with this construction.

The next rental payment which fell due after the execution and delivery of the mineral deed to Harrison was the annual payment due on March 1, 1944, on the 200-acre tract. Under the lease executed by the Ottos, a total payment of $750 was payable to the Ottos, and following its construction of the mineral deed Humble, on February 23, 1944, deposited in the bank at Needville, which had been designated in the lease as the depository, the total sum of $750, with instructions to credit $375 to the Ottos and $375.00 to Harrison. On the next day the bank mailed a deposit slip to Harrison showing the amount of the deposit, which, it was stipulated, was received by Harrison 'in due course of mail.' It was also stipulated that Harrison's address was in Houston and that Needville is 45 miles from Houston, and it is evident that the deposit slip was received by Harrison before March 1, 1944. However, Harrison at that time made no objection to the amount of the deposit to his credit in the bank and made no request for any additional payment.

The next rental payment which fell due was the semiannual payment due on May 8, 1944, on the 874.4-acre tract. Under the lease executed by the Ottos on this tract, a payment of $1639.50 was due to them, and following its construction of the mineral deed from the Ottos to Harrison, Humble, on April 28, 1944, deposited in the Needville bank the total sum of $1639.50, with instructions to distribute to Harrison the sum of $819.75 and the same amount to the Ottos. The bank, on April 29, 1944, sent a deposit slip to Harrison, which was received by Harrison, according to the stipulation of the parties, "in due course of mail" at Houston. It is evident that this deposit slip, like the one for the rental on the 200-acre tract, was received by Harrison before the due date for the payment of the delay rental, but no objection was made at that time by Harrison to the amount of the payment and no demand was made for an additional payment.

On June 10, 1944, Harrison for the first time made known to Humble that he contended that the delay rentals placed in the bank to his credit by Humble were insufficient. On that date he wrote a letter to the Needville bank, sending a copy to Humble, in which he acknowledged receipt of the deposit slips dated February 23, 1944, and April 28, 1944, and concluded as follows:

> These rentals have not been paid in accordance with the terms of the respective leases, and for that reason these leases have lapsed and are null and void as to my interest. This letter will serve to notify you that I refuse to accept the rentals referred to.

The next rental-paying date for the 874.4-acre tract was November 8, 1944, and prior to that date Humble deposited with the Needville bank to Harrison's credit the sum of $1093. On November 7, 1944, Humble wrote to Harrison, stating that it had made the deposit to Harrison's credit, with the explanation that it was willing to make what it contended was an overpayment in order to satisfy Harrison's contention and to keep the lease in effect. Harrison promptly replied on November 8, 1944, by a letter in which he referred to his letter of June 10, 1944, and made the demand that Humble execute releases to him, "since these leases are null and void as to my interest."

On February 28, 1945, Humble made a similar tender to Harrison of what is considered an overpayment of the rental on the 200-acre tract, by depositing $500 in the Needville bank to Harrison's credit, and notified Harrison of this deposit. Harrison replied on March 8, 1945, stating that "these leases are null and void as to my interest," and demanding that Humble forward to him executed releases covering his mineral interest. Humble, on each rental-paying date thereafter, has tendered, and Harrison has refused to accept, payments of $1093 on the 874.4-acre tract and $500 on the 200-acre tract. Humble has also paid the Ottos and the Paddocks respectively, all rentals due and payable to them.

(1) Construing the mineral deed as a whole, we conclude that the proper construction to be placed on the deed is that Harrison is granted an undivided one-half interest in all of the minerals and an undivided one-half interest in all royalties, bonuses and rentals. We do not think that the interest in the minerals or the interest in the royalties, bonuses and rentals, was intended to be limited to one-half of Mrs. Otto's interest. As the parties expressly state in the mineral deed, it is recognized that Mrs. Otto owns an undivided three-fourths interest in the minerals, and in order that the meaning of 'one-half' as used in the deed may be defined, it is stated that it shall mean two-thirds of Mrs. Otto's three-fourths interest, or one-half of the whole.

* * * *

(2) The question remains whether Humble's lease is terminated as to Harrison's interest because Humble mistakenly advised the depository bank to credit Harrison's account with a less amount than he was entitled to receive and to credit to the Ottos' account a greater amount than they were entitled to receive, at the time of each payment. It is undisputed that Humble deposited in each instance a total amount which paid the delay rentals in full; their only mistake was in misconstruing the mineral deed and erroneously dividing the delay rentals between the Ottos and Harrison. There is no evidence that Humble did not act in good faith, nor does the evidence show that Humble acted negligently. The evidence shows affirmatively that Humble has been willing to make overpayments in order to keep the lease alive. While we have concluded that the construction of the mineral deed adopted by Humble's agent, a licensed attorney, was erroneous, there were provisions in the deed which make its meaning ambiguous and the construction adopted by Humble's agent was not without reasonable foundation. The letter sent by Harrison to Humble with the copy of the deed was not, when considered with the deed, unambiguous, because it likewise was subject to the interpretation that one-half of the royalties payable to the Ottos had been assigned to Harrison. Although Harrison was notified, by receiving the deposit slips, that Humble construed the mineral deed to entitle him to receive only one-half of the Ottos' share of the rentals, he made no protest and no demand for an additional payment, but remained silent until after the rental-paying dates had passed.

It is well settled in this state that the lessee under "unless" leases, such as those involved in this case, has a determinable fee, and that if he fails to drill or to pay delay rentals his lease is terminated. *W. T. Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 19 S.W.2d 27; 2 SUMMERS, LAW OF OIL AND GAS, § 337. In applying this rule, some cases have required a strict compliance by the lessee with the terms of the lease relating to the payment of delay rentals, holding that a small deficiency in the amount of the payment or a failure to make the payment until a short time after its due date terminates the lease. * * * The application of the rule has been relaxed in some cases, however. In *Perkins v. Magnolia Petroleum Co.*, Tex. Civ. App., 148 S.W.2d 266, writ dismissed, judgment correct, it was held that a lessee sufficiently complied with the requirement of the payment of delay rentals by making a joint deposit in the depository bank of the total amount due under separate leases to different lessors, where the lessors were disputing as to the extent of their respective interests. In *Miller v. Hodges*, Tex. Com. App., 260 S.W. 168, it was held that the lease continued in effect and that the leassee was excused from making payments of delay rentals after the lessor brought suit to cancel the lease, during the pendency of the suit. In *Mitchell v. Simms*, Tex. Com. App., 63 S.W.2d 371, it was held that where the lessors received a payment of the delay rental after its due date, the lessors became estopped to assert that the lease had terminated because of delay in the payment.

In the present case, Humble's failure to pay to Harrison his full share of the rentals originally payable to the Ottos is due primarily to a misconstruction of an ambiguous mineral deed to which Humble was not a party, and, secondarily, to a failure on the part of Harrison, after he knew that

Humble had misconstrued the deed, to notify Humble of the proper construction. Each of the leases executed by the Ottos contained the provision that "no change in the ownership of the land or part thereof, the minerals or interests therein, shall impose any additional burden on Grantee." It would be an imposition of an additional burden on the lessee to require that the lessee determine at its peril the proper construction of an ambiguous instrument thereafter executed by the lessors, conveying a part of their interest in the minerals and the royalties, bonuses and delay rentals. Where, as in this case, the lessee has in good faith made a mistaken construction of the lessors' partial conveyance of their interests and lessee has made a payment in accordance with such construction, of which the assignee has notice, the duty rests on the assignee to notify the lessee of its mistake so that the lessee will have an opportunity to make a proper payment of the delay rentals. Where the assignee, instead of giving the lessee such notice, remains silent, we hold that the assignee is estopped to assert that the lease has terminated as to his interest on the ground that the lessee has failed to pay to him a sufficiently large share of the delay rentals.

While we do not know of any case presenting the exact situation involved here, we think the general principles of equitable estoppel are applicable. In *Burnett v. Atteberry*, 105 Tex. 119, 145 S.W. 582, 587, this Court said:

> An estoppel may arise as effectually from silence, where it is a duty to speak, as from words spoken. One may be induced to act to his injury on account of the silence of one interested in a transaction, and when such course of action is permitted with the knowledge of the interested party or induced by silence or tacit acquiescence, the doctrine of estoppel may be invoked.

See also Johnson v. Sovereign Camp, W. O. W., 125 Tex. 329, 83 S.W.2d 605.

We hold that Harrison is estopped to assert that Humble's lease has been terminated because of its failure to make sufficient payments of delay rentals to him. Accordingly, the judgments of the district court and the Court of Civil Appeals are reversed and judgment is rendered in favor of petitioners.

SMEDLEY, JUSTICE (concurring).

I concur in the opinion of the majority, except in its holding that respondent Harrison, by the mineral deed from the Ottos, acquired the right to a rental payment of $500 instead of $375 to prevent the termination of the lease of the 200-acre tract. That mineral deed, in my opinion, is correctly construed as clearly evidencing the intention of the grantors to assign to respondent one-half of the money rentals provided to be paid by the terms of the lease of that tract that had been executed by the Ottos and was then in effect. The lease of the 200 acres to which the mineral deed referred was the lease executed by the Ottos on February 20, 1939. By its terms the annual rental was $750. One-half of that amount, $375, was assigned to respondent Harrison and was duly paid to him.