The Changing Courts

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The oil and gas estate is the dominant estate, and the oil and gas lessee has the right to use so much of the leased premises and in such manner as reasonably necessary to comply with the terms of the lease and to produce the oil and gas. A landowner who seeks to recover money damages from the lease operator for damages to the surface or injury to animals has the burden of proving either specific acts of negligence or that more of the land was used than was reasonably necessary. It is not ordinarily contemplated, however, that the utility of the surface for agricultural purposes will be destroyed or substantially impaired. Further, there will be an accommodation of the conflicting interests of the surface owner and the mineral owner in deciding what limitations will be imposed upon the use of the surface by the operator.

These conflicting statements of the law determining the rights of user of the surface have been recently made by the Supreme Court of Texas in the appeal of one case. They are well calculated to confound and confuse the lease operators and their supervisory landmen, production foremen, geologists and engineers. They illustrate the changes lately being made in this field of oil and gas law so important to the economy and well-being of the oil and gas industry.

In 1929 the Texas court declared:

> "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." **Guffey v. *Stroud***. 16 S.W.2d 527 (Comm. of App.)

As late as 1954 in a case involving Warren Petroleum Corporation the Supreme Court declared that the owner of the minerals had the legal right to use so much of the leased premises as reasonably necessary to the exclusion of the surface owner. The court said that the only duty owed the surface owner was not to intentionally, willfully or wantonly injure his property or cattle. The court denied the landowner damages for cattle which had died after drinking oil thrown out upon the land by defective pumping equipment. Two years later in another Warren Petroleum Corporation case the court announced the same rule and held that the lessee was under no duty to restore the surface of the land to the condition it was in prior to the building of the roads, the drilling of the wells and the production of the oil.

It was generally reasoned that the reasonable use of the leased premises with the resultant damage to the surface was to be expected and was authorized under the terms of the lease contract. It was held that certain operations were privileged as a matter of law. For example, it was held that the operator had the absolute right to select the place for drilling and the time for drilling. The operator had the recognized right to use the timber, water, caliche or any other part of the property as reasonably necessary for the production of the oil and gas.

It was held that the operator could dig and maintain slush pits and drainage ditches on and across the property. He could construct earthen tanks whenever he decided necessary. He could cut and remove trees for drill sites, roads and tank batteries. He could pipe salt water across the land to neighboring in-put wells. He could erect houses and outbuildings on the leased premises for use of his employees engaged in producing the oil.

The courts consistently held that the lessee was under no duty to fence drilling rigs, pumps, slush pits or ditches. The lessee was freed from liability for damages to cattle coming within the area of his operations unless he committed an intentional or willful injury. In one case the surface tenant sued for damages to sheep resulting from their drinking oil in the burn pit. The verdict of the jury for the plaintiff tenant was reversed on the ground that there was no duty on the part of the lessee to fence the pit. In another case the plaintiff sued for damages for death of his cattle from drinking oil which had escaped from the oil storage tanks. The appellate court held that since the lessee was under no duty to

fence the tanks, the trial court judgment and verdict of the jury for the plaintiff landowner should be reversed. In another case suit was brought by the surface tenant for the value of two mares which the proof showed had died as a result of drinking poisonous chemical on the ground around the well. The verdict of the jury and the judgment of the trial court was again reversed, with the repeated holding that the lessee was under no duty to fence off its operations.

It was unequivocally held by one of the courts that the owner of the surface could not subdivide the leased property to restrict the right of the lessee to operate at will upon the premises without reference to such subdivision. The court said that the purchaser of any lot in the subdivision would take such property subject to the oil and gas lease, and such purchaser "could not require the lessee to drill any more or other wells, or upon other locations or particular locations, not required of lessee while the whole acreage embraced in the lease was intact". In another case, a real estate promoter had contracted with the lessor to subdivide the premises. Sales were booming until the oil lessee posted large signs on the premises advertising its oil and gas leases and stating that it would enforce its rights by litigation. The court held that the lessee's tactics in discouraging sales of the lots and protecting its lease rights were justified.

Statements were made in some of these earlier cases that the owner of each estate must exercise its respective rights "with due regard for the rights of the other". Little heed was given such addenda because the courts generally recognized the necessities of the production operations and denied the landowner recovery of damages. Then came the opinion of the Supreme Court in the Lubbock County (Texas) case of ***Brown v. Lundell***. The operator Brown had disposed of salt water produced with the oil into an open, earthen pit, and such water escaped into the underground fresh water. There was no claim made that the operator had used more land than was reasonably necessary or that it had been guilty of any intentional, willful or wanton act. It was proved that the disposal of the salt water in the earthen pit was in accordance with the uniform custom in the area. However, the case was submitted to the jury and the jury found that the operator was negligent in permitting the salt water to escape from the pit into the fresh water strata. The court repeated the rule that the lessee had the right to use so much of the premises as reasonably necessary, but added that such right must be reasonably exercised with due regard to the rights of the owner of the surface. The court said that the operator could not use the surface or subsurface in a negligent manner, and having been found negligent by the jury, would be held liable for damages.

The decision in ***Brown v. Lundell*** was soon cited and followed in various cases imposing liability for damages resulting from negligence alone, as found by the juries.

In 1968 a rancher in Scurry County (Texas) sued Texaco, claiming that Texaco had occupied his ranch under an oil and gas lease, and negligently maintained a cattle guard in which his horse "Lekko" had a leg caught and thereby broken, so that it became necessary to destroy the horse. It was shown that Lekko was a fine registered quarter horse stud of considerable value. The jury found that Texaco was negligent in failing to keep the cattle guard clean, and that such negligence was a proximate cause of the injury and damage, and verdict was for the rancher for $5000.00. The court quoted the rule that the lessee has the right to use so much of the land as reasonably necessary, but then declared:

> "It is an equally well established rule, which is here controlling, that the owner of the surface is entitled to recover damages when the oil and gas lessee has been negligent in the use of the surface owner's land. Although the surface estate is servient to the mineral estate under an oil and gas lease for the purpose of the mineral grant, still the right of the oil and gas lessee must be exercised with due regard to the rights of the owner and he owes the duty to the surface owner not to negligently injure the surface owner in the operation of his estate. Contrary to appellant's contention, the owner of an oil and gas lease is liable for injury to livestock belonging to the owner of the surface estate caused by the lessee's negligence in the operation of the mineral lease."

Argument was made in the Texaco case that the plaintiff rancher was contributorily negligent in permitting his horse to go upon the pasture on which the cattle guard was located because the plaintiff knew of the defective con-

dition of the cattle guard. The court agreed that, as a general rule, a plaintiff who knowingly exposes his animals to danger is guilty of contributory negligence. In denying such defense of contributory negligence, however, the court said:

"The controlling consideration here, however, is that appellee, as owner of the surface estate, had the right to keep his livestock, including Lekko, in the pasture. Because of appellant's negligence it became impossible for appellee to keep his livestock in his pasture without exposing it to the danger presented by the defectively constructed and maintained cattle guard."

In 1958 one of the federal courts in Texas, following Texas law, had held that the lessee entering upon the leased premises to make seismograph tests, without first notifying the rancher, was not liable for damages, even though the cattle and sheep left the premises and were lost. The court there held that the lessee had the legal right to enter upon the ranch and had no duty to warn the rancher that some of the fences would be let down or some of the gates left open. However, in 1968 a quite similar suit was filed against Texas-New Mexico Pipline Company with opposite result. The Pipeline company operated a crude oil pipeline across the plaintiff's ranch. The company's employees learned of a leak in the line, from which a quantity of oil had spread out and formed pools on the ground. Some of the cattle drank the oil, became ill, and died. The jury found that the company had failed to notify the rancher of the leak and the oil pools, and that such failure to notify the rancher was negligence and a proximate cause of the injuries to the cattle. The appellate court sustained the verdict of the jury for plaintiff for $4600.00.

The salt water pollution cases present a special problem. More and more of them are being filed and tried. The courts give lip service to the rule that the lease operator is not liable for damages unless the damages proximately result from negligence. The courts consistently refer to the 1936 decision of the Supreme Court in ***Turner v. Big Lake Oil Company***. However, the courts go ahead and hold that the pollution of the fresh water supply gives rise to the cause of action for damages, by reason of Rule 20 (now Rule 8 (a)) of the Railroad Commission, or the findings of the jury of negligence. Regardless of the theory of law upon which the liability has been based, in most of the cases the lease operator using earthen pits for the disposal of salt water has been held liable for the resultant damage.

It was the ***Alexander v. Gulf Oil Corporation*** case, tried in Levelland, Texas, which gave rise to these suits for damages for pollution of the underground fresh water. Alexander owned a 372-acre farm adjoining the lease operated by Gulf. Although the evidence showed that Gulf's method of disposing of the salt water was the universal method of disposal in the oil fields in that territory, the court found some evidence of negligence and affirmed the verdict of the jury. The court went further and held that, although the two-year statute of limitation, Article 5526, is applicable to such cause of action, the statute does not begin to run until the pollution is discovered or should have been discovered by the landowner. The two-year statute of limitation was effectively disregarded.

It would seem that in the salt water pollution cases the claimant landowners should be restricted to the damages to that part of the property under which the fresh water strata has become contaminated. The claims have not been so restricted. The claimants have hired hydrologists, who testify that the salt water goes down and into the fresh water strata and moves generally across the farm, and real estate experts, who testify that by reason of the discovery of the pollution of the water under part of the farm the cash market value of the entire property has been seriously damaged. The juries find considerable damage to the farm, and judgment is rendered against the defendant operator for the entire amount. Further in this connection, and of equal importance, joint and several liability is imposed upon the lease operators contributing to any extent to the pollution of the underground water. The claimant can sue either one or all of such operators and proceed to judgment against any one of them separately or against all of them jointly. In other words, the operator who has one well and one pit is held liable jointly and equally with the operator who has 100 wells and 20 pits, where both have contributed to some extent to the underground pollution.

Location of the well sites, roads and similar "improvements" has become more hazardous. In 1967 in a suit in Ector County (Texas), the court refused the lessee the right to drill its well at the location selected by its geolo-

gists and engineers. Texaco held the oil and gas lease covering a tract of land in Odessa, Texas, which included the lot owned by the plaintiff, and on which Texaco wanted to drill its well. In the lease Texaco was granted the express right to use the surface "as was necessary". The jury found that Texaco's use of plaintiff's lot was unnecessary. The court gave recognition to the rule that the lessee has the right to use so much of the surface as reasonably necessary. The court said that the evidence that the use of plaintiff's lot was unnecessary was "weak". Nevertheless, the court held the evidence sufficient to raise a fact issue for the jury, and upheld the jury's verdict. The court failed to discuss Texaco's predicament, as and when each of the owners of the other lots in the subdivision objected to the location of the well on his particular lot.

Following the same trend are the decisions in 1967 and 1968 holding that the owner of the ranch or farm can erect and maintain gates across the operator's roads on the leased premises. In each of these cases the question was submitted to the jury and the jury found that the gates did not constitute an unreasonable interference with the operator's use of its roads. The appellate courts again repeated the general rule that the mineral lessee possesses the dominant estate and the surface owner has the servient estate, but then upheld the jury verdicts for the landowners.

And then we come to the decision in ***Getty Oil Company v. Jones*** in 1971 ... the so-called pump-jack case. We see a more substantial, burdensome change. We find the Supreme Court for the first time announcing a theory of "accommodation of conflicting interests". Jones, the surface owner of a tract of land in Gaines County (Texas), sued for an injunction to restrain Getty, the oil and gas lessee, from using beam-type pumping units above the ground which prevented the use by him of an automatic irrigation sprinkler system, and for damages. In 1955 Jones had purchased the tract, subject to prior mineral leases. Getty held the lease covering a part of the land. In December 1967, Getty drilled wells which produced but would not flow, and Getty then installed the pumping units, one of which was 17 feet high at the top of its upstroke, and the other 34 feet high. Because of this height, the pumps precluded the use of Jones' previously installed irrigation system. Jones did not charge Getty with negligence. Jones did not attempt to prove that Getty used more land than reasonably necessary. Jones' position was that under the facts and circumstances it was not reasonably necessary for Getty to install pumping units without burying them.

In deciding the case the court repeated the rule of ***Brown v. Lundell*** that the oil and gas lessee may use as much of the premises as is reasonably necessary to produce and remove the minerals, but that the rights of the lessee are to be exercised with due regard for the rights of the owner of the servient surface estate. The court quoted from its opinion in ***Acker v. Guinn,*** another recent case, to the effect that "it is not ordinarily contemplated, however, that the utility of the surface for agricultural purposes will be destroyed or substantially impaired". The court then said:

> "The due regard concept defines more fully what is to be considered in the determination of whether a surface use by the lessee is reasonably necessary and these established rules carry the idea of an accommodation of conflicting interests under appropriate circumstances. Their application will vary, however, under different circumstances. For example, there may be only one manner of use of the surface whereby the minerals can be produced. The lessee has the right to pursue this use, regardless of surface damage.... 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 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."
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> "When conflicting surface uses occur, the right to an accommodation in favor of the surface estate is founded upon a determination that under all the circumstances the use of the surface by the mineral lessee in the manner under attack is not reasonably necessary."

Strong criticism of the opinion of the court (the opinion adopted by the majority of the justices) is given in the dissenting opinion of two of the justices. It is there argued:

> "The majority is, in the face of express language, reading into the lease an implied covenant requiring Getty to alter its operations at its expense to accommodate Jones

in order that the latter may operate his farm more efficiently whenever the uses of the surace might change."

"The oil and gas lease becomes a mere letter in the sand, to be washed away by the tidal wave which will be caused by the majority holding."

"It should also be noted that the Court's opinion allows Jones to have his cake and eat it too. He purchased the land in question from the original lessor subject to an oil and gas lease, and no doubt paid less for the land than if he had bought the full fee title. Now the majority allows him to recover damages because the lessee is using the land in such a way as to interfere with his farming operations. Further, the majority allows him to require the lessee to bury his equipment, thereby giving him a more valuable estate than the one he originally contracted to buy. The majority opinion, in effect, makes the dominant estate the servient estate and the servient estate the dominant estate."

The opinion of the court in the ***Getty*** case may not be so harsh as labeled in the dissenting opinion. In any case, the holding was tempered to some extent by the court's opinion in reply to Getty's motion for rehearing. There the court said: first, the reasonableness of the use of the surface by the lessee may be measured by what are the usual, customary and reasonable practices in the industry under like circumstances of time and place; second, if the manner of use selected by the lessee is the only reasonable, usual and customary method that is available for producing the minerals on this particular land, then the owner of the surface must yield; third, the burden of establishing the unreasonableness of the lessee's surface use is on the complaining surface owner. Further, the court suggested issues (questions) to be submitted to and decided by the jury: first, a proper initial inquiry would be whether the surface owner had reasonable means of developing his land for agricultural purposes other than by use of the sprinkler system in question; second, whether the oil company's manner and method of pumping operations is unreasonable because there are alternative methods used in the industry on this type of property which are available and which can be used without interfering with the existing use of the surface by the farmer.

The very serious trouble and tribulation caused the oil industry by this ***Getty*** decision is the holding that the questions posed by the court are to be resolved by the jury. There was no evidence that the use of the beam-type unit was not reasonably necessary to produce the company's wells. No one complained about the height of the units from the base to the top. There was no plea of negligence. The only complaint was that unless the units were buried below the surface they would interfere with Jones' agricultural operations. The idea of an accommodation of the conflicting interests between the oil company and the farmer was left to the determination of the Gaines County (Texas) jury, made up of local townspeople, farmers and, possibly one or two oil company employees.

To the same effect is the 1971 opinion of the Supreme Court in ***Sun Oil Company v. Earnest Whitaker***. Sun acquired an oil and gas lease on 267 acres in Hockley County (Texas) from L. D. Gann and wife. The Ganns later conveyed the land to Whitaker, reserving the minerals. Sun drilled eight oil wells on the lease which produced from the San Andres formation. With the permission of the Railroad Commission, Sun attempted to use fresh water from the Ogallala formation underlying the lease for injection into the oil formation in furtherance of a pressure maintenance program. Whitaker attempted to stop the drilling of the water well and the installation of the pressure maintenance equipment. Sun sued to enjoin Whitaker from interfering with such production operations. By cross-action in the suit Whitaker sued to enjoin Sun from producing and using the fresh water to produce the oil, and Whitaker also sought actual and exemplary damages. The parties stipulated at the trial that (1) the waterflood process was a reasonable and proper operation, (2) the use of the Ogallala water as the makeup water for injection into the oil reservoir was reasonable and proper, and (3) the location of the injection wells and the rates of water injection constituted reasonable and proper operations. It was proved that Sun proposed to produce and use some 4,200,000 barrels of the water, which would shorten the life of Whitaker's water supply for irrigation from 44 to 36 years, which the jury found would cause "a substantial decrease in the value of the land". It was also shown that Sun could purchase similar water from an adjoining tract owner for $42,000.00. The trial judge submitted the case to the jury and the jury found that it was not reasonably necessary for Sun to use the water underlying Whit-

aker's tract.

In this ***Whitaker*** case the court said that there are uses of the surface by the mineral owner which as a matter of law are reasonable and with due regard to the rights of the surface owner; that there are, also, uses which would be held as a matter of law to be unreasonable and without due regard for the rights of the surface owner; and that there will be certain uses which will not be categorized as a matter of law (that is, determined by the court and not the jury), and then, in such instances, whether the use is or is not reasonably necessary and with due regard to the rights of the surface owner, will be a fact question for the jury.

What is meant by the term "due regard" as used in the statement of the court that the rights of the mineral owners are to be exercised with due regard for the rights of the surface owner? What kinds of "alternatives available to the lessee" are to be considered to deny the lessee's otherwise reasonable use of the premises? What does it take to "substantially devalue" a farm? To what extent must this devaluation exist before it becomes a controlling factor in denying the lessee the use of water, as well as air space, which are admittedly integral parts of the leased premises? What is meant by "an accommodation of conflicting interests"?

This is the present state of the law confronting the mineral owners, the oil and gas lessees, who are ready and willing to drill their wells and produce the oil and gas for the financial gain of the lessors as well as the lessees. This is the law which must be considered in deciding where to locate the wells, roads and tanks. This is the law to ponder when setting the date for the drilling of the wells, when deciding what kind of production equipment to purchase and install, and when attempting to find out the amount of the landowner's demands for surface damages and whether to pay such demands or go to court. This is the law which may control the decision whether it is economically feasible to continue waterflooding operations or whether the wells are to be plugged and abandoned.