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by

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ALTHOUGH Texas cases during this survey period dealt with a wide variety of oil and gas problems, three areas received special attention: conflicts between holders of different types of interests in mineral land, constructional problems in leases and deeds, and state regulation of the natural gas supply and gas pipelines.

I. CONFLICTS BETWEEN HOLDERS OF DIFFERENT TYPES OF INTERESTS IN MINERAL LAND: THE ACCOMMODATION DOCTRINE[1]

The only case within the last year which dealt extensively with the legal theory to be employed in resolving conflicts between holders of differing interests in land was *Humble Oil & Refining Co. v. West.*[2] Thirty years prior to the litigation, West had conveyed both the surface and mineral estates in the land in question to Humble in fee simple, retaining a one-sixth royalty in the dry gas. Natural gas from a water drive reservoir had been produced from the land since the date of the conveyance, but the reservoir was approaching depletion. Humble believed that further extraction of natural gas would cause the destruction of the reservoir by water flooding and decided to convert it into a gas storage facility for extraneous natural gas. After obtaining authorization from the Railroad Commission to make this use of the reservoir, Humble commenced injecting gas into the reservoir. By Humble's calculation eleven percent of the recoverable gas reserves remained in the reservoir, and it committed itself to pay royalties to West until the total volume of gas subsequently taken from the reservoir equalled the estimated recoverable reserves. West instituted suit to enjoin Humble from using the land as a gas storage facility until all the native gas had been produced. In the alternative, West sought a declaratory judgment that if the reservoir were used for storing extraneous natural gas, Humble would have to pay royalty on all the stored gas subsequently extracted.

The trial court, which denied the injunction but granted the alternative declaratory judgment, was reversed by the Waco court of civil appeals, which stated that the injunction was the proper remedy.[3] The Texas Supreme Court reversed and remanded. In denying the injunction the court recognized that there were no precedents directly in point and looked to the more common types of controversies between owners of different estates. In this

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1. Part of this portion of the Article is based on a speech delivered to the Texas Association of Defense Counsel on Oct. 5, 1974.

2. 508 S.W.2d 812 (Tex. 1974).

3. West v. Humble Oil & Ref. Co., 496 S.W.2d 212 (Tex. Civ. App.—Waco 1973).

regard the court relied upon its decision in *Getty Oil v. Jones*[4] which required an accommodation between the rights of the dominant and servient estates. According to the *West* court, the competing interests in *Jones* were not just two private owners' interests, but included the public interest as well. In *Jones* there was a public interest in promoting productive agricultural use; in *West* there was a significant public interest in a reservoir which was well adapted both to handle seasonable fluctuations in energy demands for the greater Houston area and to serve as a facility for providing immediately deliverable natural gas in an emergency. The court concluded that this public interest, as well as Humble's fee simple ownership rights in the reservoir, would be injured if the company were required to produce the remaining recoverable natural gas, for its extraction would result in the destruction by water encroachment of the storage capability of the reservoir.

The court remanded the case for a determination of whether Humble could establish with reasonable certainty the volume of recoverable native gas upon which it owed royalties to West, suggesting that under the common law doctrine of confusion of goods the declaratory relief would be proper only if Humble could not satisfy this burden of proof.

The express reaffirmation of the accommodation doctrine in *West*, coupled with its extension to a type of controversy substantially different from the traditional surface owner-mineral owner dispute, should dispel any doubts concerning the continued viability of the doctrine.[5] Unfortunately, except for the express inclusion of the public interest as a factor to be considered in the accommodation process,[6] the decision does little to clarify the limits of the doctrine. One of the most troublesome questions raised by the doctrine is whether, in the more typical dispute, the "accommodation" between the surface owner and mineral owner relates only to existing uses of the surface by the surface owner or whether it may also relate to potential uses. If, for example, an oil company has a lease on land which is presently agricultural but which is located near an expanding area that is obviously ripe for development as a residential subdivision, is the oil company now under an obligation to place its drilling sites in such locations as will "accommodate" the potential subdivider?[7]

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4. 470 S.W.2d 618 (Tex. 1971). In this case the surface owner complained that the drilling equipment used by Getty Oil obstructed the irrigation equipment necessary for productive farming. The court held that, although the severed mineral interest was the dominant estate, the easement rights of the mineral estate were limited to reasonably necessary uses made with due regard for the rights of the surface owner.

5. Some doubts had been raised by Sun Oil Co. v. Whittaker, 483 S.W.2d 808 (Tex. 1971). In this case the court held that the owner of the mineral interest had an implied right to use fresh water from the leased premises in amounts reasonably necessary to carry out operations without becoming liable to the surface owner, who alleged that such use would destroy his irrigation system.

6. *Cf.* Railroad Comm'n v. Manziel, 561 S.W.2d 560, 570 (Tex. 1962).

7. The Supreme Court of Arkansas has suggested in a recent case that the rationale may extend this far. *See* Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (Ark. 1974). In this case the plaintiffs had purchased some land with the intent of building a home there at some future time. The oil company, aware of the plaintiffs' plans, drilled a well and constructed various sheds and tanks on the land in a manner which precluded building the house. In upholding an award of $4,000 actual damages, the Arkansas Supreme Court stated that the oil company's use of the surface was unrea-

To the limited extent that the Texas courts have dealt with the issue, they have not yet imposed any obligation to foresee, or adjust to, a future use. The language of the Texas Supreme Court, on motion for rehearing in *Jones*, could hardly have been clearer: "What we have said is that in determining the issue of whether a particular manner of use of the dominant mineral estate is reasonable or unreasonable, we can not ignore the condition of the surface itself or the uses *then* being made by the servient surface owner."[8] In emphasizing that the reasonableness of the manner and method of using the dominant estate depends upon the circumstances, the Texas Supreme Court contrasted development by the mineral lessee on a bald prairie used only for grazing with development by the mineral lessee "within an existing residential area of the City of Houston."[9]

In *Macha v. Crouch*,[10] decided by the Corpus Christi court of civil appeals last year, the plaintiffs, who had bought the surface of an eighty-acre tract which had already undergone substantial mineral development, sued for damages on the basis of unreasonable and excessive use by the mineral owner. After their purchase, the plaintiffs had placed a large portion of the tract in improved grasses and planned to use it for intensive grazing purposes. At trial plaintiff alleged that the combination of an extensive network of roads, an unburied pipeline, and salt water and slush pits, all present at the time plaintiffs purchased, constituted an unreasonable use of the land by the mineral owner in view of the plaintiffs' ranching operations. While apparently recognizing the interference with the plaintiffs' surface use resulting from the mineral owner's operations, the court pointed out that the defendant's rights were prior in time to those of the plaintiff and that the plaintiff purchased with knowledge of the pre-existing use. Although the case falls short of holding that the mineral owner need not anticipate a probable future use, it does clearly indicate that there is no obligation to modify an existing operation because of a changed or more intensive use by the surface owner.

A second, and analytically more difficult, problem with the accommodation doctrine is to distinguish it from a balancing test which weighs the harm or inconvenience to the owner of one type of interest against the benefit to the other. According to the majority decision in *Getty Oil v. Jones*,[11] such a balancing test is improper. The test for accommodation instead seems to be the availability of alternative non-conflicting uses to the two types of owners. In *Jones*, where the mineral owner was using pumping equipment which interfered with the surface owner's irrigation system, the test easily applied. Only one type of irrigation system could feasibly be used by the surface owner, whereas different types of pumps and different locations for pumps were available to the mineral owner. The accommodation test gives a fairly obvious result in such an all-or-nothing situation. A similarly obvious result

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sonable and that it had a duty to exercise its right of ingress and egress in a manner least injurious to the surface owner.

8. 470 S.W.2d at 627-28 (emphasis added).
9. *Id.* at 627.
10. 500 S.W.2d 902 (Tex. Civ. App.—Corpus Christi 1973, no writ).
11. 470 S.W.2d 618, 623 (Tex. 1971).

obtains in a case where, in order to avoid a conflict with a pre-existing surface use, the mineral owner must turn to an alternative use which is not the usual or customary practice in the industry. In that situation the logic of the dominant-servient estate classification and the logic of the accommodation test should compel the surface owner, rather than the mineral owner, to give way. Indeed, in *Jones* the court specifically related its decision to the circumstances of that particular dispute and pointed out that one of the circumstances was the availability to the mineral lessee of alternatives which were "established practices in the industry."[12]

Variations of this problem with respect to leased premises have appeared in recent years. For example, in 1971 the Texas Supreme Court limited the accommodation doctrine to alternatives available on the leased premises themselves.[13] However, this position raised a problem for the Texas Supreme Court during this survey period: If the mineral lessee, in accommodating the surface owner's pre-existing use, need only consider alternatives available on the leased premises, is he also limited to the leased premises in his own rights of user? That is the holding of the court in *Robinson v. Robbins Petroleum Corp.*[14] In this case the surface owner was held to have a cause of action for the value of salt water removed from the premises to carry on water flooding operations outside the premises. Even though the premises were part of a unitized operation, the court held that the operator was not authorized to use the salt water, which belonged to the owner of the surface estate, to benefit any part of the secondary recovery unit that included acreage outside the premises. The court pointed out that there was no proof that water flooding was reasonably necessary in order to obtain production from the premises in question, and went on to say that proof of such necessity would still not insulate the operator from liability for use of the salt water for production outside the leased premises.

Without more information about the lease and the unit operation than the *Robinson* opinion contains, it is difficult to assess the court's holding. If, as the opinion in the lower court indicates,[15] the operator was using the salt water to conduct water flooding operations under land not covered by the lease or authorized to be pooled with the land covered by the lease, the result seems correct. Unless the court had held, as it refused to do in the case, that salt water belongs to the owner of the mineral estate rather than the owner of the surface, it would be difficult to find an acceptable rationale for imposing an easement upon the surface for the benefit of land neither

12. *Id.* at 622. It should be noted that this was one of the grounds under which the four dissenting judges in Sun Oil Co. v. Whittaker, 483 S.W.2d 808, 821 (Tex. 1971), thought the case should have been decided. Rather than allow the mineral lessee to use limited subsurface water supplies which were essential to the surface owner's irrigation system, the dissenters would have forced Sun Oil to purchase water off the premises since that was a customary industry practice in the area. The surface owner would have been forced to abandon his irrigation system only if there was no usual industry practice of going off the leased premises to obtain water.

13. Sun Oil Co. v. Whittaker, 483 S.W.2d 808 (Tex. 1971).

14. 501 S.W.2d 865 (Tex. 1973).

15. Robinson v. Robbins Petroleum Corp., 487 S.W.2d 794 (Tex. Civ. App.—Tyler 1972).

covered by the lease nor pooled with land covered by the lease.[16] If the implied right of surface and subsurface user is not limited to the mineral estate underlying the surface and to lands authorized to be pooled with the mineral estate at the time of severance, the mineral holder could unilaterally expand the scope of his easement merely by acquiring adjacent property. Such a power in the holder of an easement runs counter to the traditional theory of easements[17] and to the probable intent of the parties.[18]

The facts in *Robinson*, however, are susceptible to the interpretation that the leased premises had been properly included in the secondary recovery unit. In a typical unitized operation production from any part of the unitized premises is allocable to all other parts of the unitized land. If the plaintiff purchased the surface of the land subject to a lease authorizing the unitization, injection into other unitized land of salt water obtained from the plaintiff's land would seem permissible, because the resulting production, regardless of its location within the unit, is allocated in part to the premises furnishing salt water. However, it would seem incumbent upon the operator to prove that the lease under which it was operating actually authorized such a plan of untization, for, without such a provision in the lease, proof of the use of salt water off the leased premises would establish a prima facie case of conversion of the surface owner's property. In view of the court's statement in *Robinson* that the record did not disclose any details of the unit operation, the result is justifiable on the ground that the operator failed to meet its burden of proof, regardless of the provisions actually in the lease.

In *Speedman Oil Co. v. Duval County Ranch Co.*[19] the principal issue between different interest owners was the availability of injunctive relief as a remedy against a mineral owner who was guilty of conduct resulting in unnecessary damage to the surface. The surface owner sought actual and exemplary damages and cancellation of the lease because of the operator's allegedly negligent conduct. The plaintiff had also filed separately an application for a temporary injunction restraining the defendant from pumping, flowing, or producing any oil or gas from its leases. In rejecting the defendant's attempt to have the injunction dissolved, the court held that the plaintiff could seek the injunction since it was alleging permanent injury to the freehold, even though he had leased the surface of its land to a third person. Moreover, the plaintiff's failure to join royalty owners and lienholders who had interests in the mineral estate was not fatal to its suit for the injunction. Although such persons might be indispensable parties to the suit for cancella-

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16. The Oklahoma Supreme Court, however, did reach such a result in a case involving facts substantially similar to those in *Robinson*. *See* Holt v. Southwest Antioch Sand Unit, Fifth Enlarged, 292 P.2d 998 (Okla. 1955). In *Holt* the court suggested that the implied right of the mineral owner to use the surface estate in any way reasonably necessary for the development of the mineral estate included the right to use salt water for water flooding off the leased premises. It is difficult to see how an easement theory would justify this conclusion.

17. *See, e.g.*, Wall v. Rudolph, 198 Cal. App. 2d 684, 18 Cal. Rptr. 123 (1961).

18. *See, e.g.*, Socony Mobil Oil Co. v. Cottle, 336 Mass. 192, 143 N.E.2d 265 (1957).

19. 504 S.W.2d 923 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

tion of the lease, they were not indispensable parties in the action to enjoin the type of wrongful conduct which was solely responsible for the injuries. Finally, in view of the evidence that the defendant's "poor boy" operation, which utilized substandard and deteriorating equipment, was inflicting substantial damage to the surface as a result of a long history of oil leaks and spillage, the court stated that the plaintiff did not have an adequate remedy at law by way of damages and hence was entitled to injunctive relief.

II. PROBLEMS OF INTERPRETATION

Not suprisingly, a fair amount of oil and gas litigation which reached the appellate level resulted from claimed ambiguities in mineral deeds and oil and gas leases. The two Texas cases which have involved the construction of a granting clause in a deed have resolved the controversy in accordance with Texas precedent.

In *Barker v. Levy*[20] the owner of an undivided 3/10ths interest in the land in question conveyed to her attorney "a One one hundred and sixtieth (1/160th) part of all oil, gas, petroleum, sulphur and all other minerals that may be produced and saved" from the land described in the deed. At least part of the land described in the deed was subject to a producing oil and gas lease as of the date of the deed, and the grantee began receiving payments of a 1/160th royalty. Forty years later, the grantor's successors in interest brought suit contending that the language conveyed an undivided 1/160th of the minerals in place in fee simple rather than a 1/160th royalty and seeking a recovery of the amount of excess royalty paid to the grantee and his successors in interest. If, as the plaintiffs contended, the grantee received an expense-bearing interest in the minerals in place, he had the right to receive only 1/160th of the one-eighth royalty, or 1/1280th of the oil produced. The Houston (Fourteenth District) court of civil appeals in affirming the trial court, held that the deed unambiguously conveyed a 1/160th royalty to the grantee.

In view of the Texas precedent, the decision is hardly surprising. In both *Miller v. Speed*[21] and *Pinchback v. Gulf Oil Corp.*[22] the courts construed language almost identical to that in controversy in *Barker* as referring to royalty rather than a fee simple interest in minerals. All the factors stressed in *Miller* were present in the deed in *Barker*. The words "in and under," which normally connote an interest in oil and gas in place,[23] were missing; rather, the grant was of a fraction of "all" the minerals that may be "produced and saved." If the intention of the party is to be determined by the language of the deed alone, then the Houston court seems clearly to have reached the correct decision. Had the plaintiff's arguments been accepted, the grantee would unquestionably have been receiving a great deal less than 1/160th of all the oil produced. In distinguishing decisions from other states, most

20. 507 S.W.2d 613 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).
21. 248 S.W.2d 250 (Tex. Civ. App.—Eastland 1952, no writ).
22. 242 S.W.2d 242 (Tex. Civ. App.—Beaumont 1951, writ ref'd n.r.e.).
23. R. HEMMINGWAY, THE LAW OF OIL AND GAS § 2.7 (1971).

notably *Simson v. Langholf*[24] and *Mounger v. Pittman*,[25] both of which construed language similar to that in *Barker* as creating a mineral interest, the court pointed out that the land involved in the out-of-state cases was not under lease at the time the deeds were executed; whereas at least some of the land in the *Barker* case was leased at that time. To the extent that the court is suggesting that a different result might have followed if the land had been unleased, the opinion is open to question. If the land is leased, there is at least some rationale for attempting to create an expense-bearing interest by using language similar to that in the *Barker* deed. A grantor in a state which views an oil and gas lease as transferring a fee simple determinable in the minerals might assume that he could not convey a present corporeal interest in the minerals in place; hence, he might hesitate to use "in and under" language. If the land is unleased, it is difficult to find any justification in an ownership-in-place jurisdiction for the position that the grant of a fraction of all the oil produced and saved entitles the grantee to receive only the specified fraction from whatever royalty is reserved in the lease.[26] There is clearly no language indicating an intent that the fraction of the oil specified was intended to be expense-bearing, nor is there any support in Texas for the proposition that a royalty can be created only in land already under lease.

In *Middleton v. Broussard*,[27] the second case involving deed construction, the court followed the rule of *Hooks v. Neill*[28] that when the language of a deed refers to a fractional mineral interest in the land *described* in the deed, the fractional interest is calculated on the basis of the entire mineral interest rather than as a fraction of whatever fraction of the minerals is conveyed by the grantor.[29] The deed in *Middleton* conveyed both an undivided fractional interest in the tracts of land described in the deed and a 1/64th royalty interest in the minerals produced from the described land. In rejecting the argument by the grantor's successors in interest that the deed transferred only a 1/64th royalty in the fraction of the minerals *conveyed* to the grantee, the Texas Supreme Court pointed out that the deed did not refer to a 1/64th royalty in the land *described and conveyed*; but only to the land *described.* Hence the grantee received a 1/64th interest in one hundred percent of the land described in the deed.

As the lower court's opinion suggests,[30] the distinction between a fractional mineral interest in the land *described* in the deed and the fractional mineral interest in the land *described and conveyed* in the deed is not self-evident. The word "described" can reasonably be construed as including the undivided interest which is included in the description of the land involved. Although

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24. 133 Colo. 208, 293 P.2d 302 (1956).
25. 235 Miss. 85, 108 So. 2d 565 (1959).
26. *See* Little v. Mountain View Dairies, 35 Cal. 2d 232, 217 P.2d 416 (1950), for the position taken in non-ownership jurisdictions.
27. 504 S.W.2d 839 (Tex. 1974).
28. 21 S.W.2d 532 (Tex. Civ. App.—Galveston 1929, writ ref'd). In fact, the court is applying the exception or modification of the *Hooks* doctrine enunciated in King v. First Nat'l Bank, 144 Tex. 583, 192 S.W.2d 260 (1946).
29. R. HEMMINGWAY, *supra* note 23, § 3.2.
30. Broussard v. Middleton, 496 S.W.2d 766 (Tex. Civ. App.—Beaumont 1973, writ granted).

the *Hooks* rule may be open to criticism,[31] it now seems unquestionably a part of Texas law, and it is not unrealistic to assume that some attorneys rely on the rule in drafting and construing instruments or that a deviation from it would unsettle some mineral titles.

The issue involved in *Waggoner & Zeller Oil Co. v. Deike*[32] was also one which had previously been ruled on earlier by courts of civil appeals. The plaintiffs had conveyed an oil and gas lease for a term of three years and as long thereafter as oil or gas was produced. In addition to a clause allowing the lessee sixty days in which to commence drilling or reworking operations in the event that production ceased, the lease contained a provision stipulating that the lessee's breach of any obligation arising under the lease would not result in termination of the lease and that the lessor, in the event of a breach, must give written notice to the lessee, who would then have sixty days in which to remedy default. In March of 1971, after expiration of the primary term, production terminated. On July 8 of that year the plaintiffs notified the defendant oil company in writing that the lease had terminated and at about the same time warned the defendant's employees not "to set foot" on the property. The plaintiffs subsequently brought an action to have a termination declared because production had ceased and no drilling or reworking operations had been commenced within sixty days from such cessation of production.

The Austin court of civil appeals, relying heavily upon *Lynch v. Southern Coast Drilling Co.*[33] and *Preston v. Lambert*,[34] held that the lease had terminated. The lessee had contended that the lessor was required to give written notice of the cessation of production and that the lessee had sixty days from such notice to begin production, reworking, or drilling operations. In rejecting that contention the court pointed out that the clause requiring written notice applied only in the situation where the lessee had breached some duty under the lease. Since the provision for termination of the lease upon cessation of production imposed no duty upon the lessee, no notice was necessary.

III. STATE REGULATION OF GAS PIPELINES

The principal case involving state regulation within the last year was *Railroad Commission v. City of Austin.*[35] Austin, San Antonio, and the lower Colorado River Authority applied to the Railroad Commission to apportion the gas supplies of LoVaca Gathering Company among the plaintiffs. They alleged that LoVaca was diverting substantial portions of its gas reserves, which otherwise would go to the plaintiffs, by entering into contracts with specific customers at a period when LoVaca was unable to fulfill its delivery obligations to the plaintiffs. The Railroad Commission concluded that it had

31. Masterson, *Double Fraction Problems in Instruments Involving Mineral Interests*, 11 Sw. L.J. 281 (1957).
32. 508 S.W.2d 163 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.).
33. 442 S.W.2d 804 (Tex. Civ. App.—San Antonio 1969, no writ).
34. 489 S.W.2d 955 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.).
35. 512 S.W.2d 345 (Tex. Civ. App.—Austin 1974, writ granted).

no authority to apportion the gas and dismissed the application for lack of jurisdiction.

The Austin court of civil appeals upheld the lower court's reversal of the Railroad Commission's dismissal and concluded that the Cox Act[36] clearly supported the plaintiff's contention. According to the court, no statement could be clearer than the provision in article 6053 directing the Railroad Commission to "regulate and apportion the supply of gas between towns, cities and corporations, and when the supply of gas controlled by any gas pipeline shall be inadequate, the Commission shall prescribe fair and reasonable rules and regulations requiring such gas pipelines to augment their supply of gas."

The principal defense raised by LoVaca was the fact that it had already entered into contracts for the sale of gas and the title to gas reserves had thus already passed to purchasers. Since the Railroad Commission had no power to adjudicate either title or contractual rights,[37] LoVaca argued that it had no jurisdiction to divest title or void pre-existing contracts. In rejecting this contention, the Austin court held that the contractual segregation of specific gas reserves for the benefit of specific customers could not place the gas reserves beyond the jurisdiction of the Railroad Commission because such contracts are made in contemplation of the continued regulatory power of the Commission.[38]

Support for the court's conclusion can be derived from an earlier case dealing with Railroad Commission jurisdiction over a gas pipeline, *High Plains Natural Gas Co. v. Railroad Commission*.[39] There a pipeline company sought to invoke Railroad Commission jurisdiction to fix a city gate rate for the sale of natural gas to a municipality. The pipeline company had by contract established a selling price which it contended was unreasonably low. Although the court held against the pipeline, it agreed that the existence of a contract did not oust the Railroad Commission's jurisdiction; rather its effect was to place the burden upon the pipeline to show that a continuation of the contract would be adverse to public interest. One method of proving such an adverse effect would, according to the earlier case, have been a showing that the contract would "cast upon other consumers an excessive burden." Presumably, what the plaintiffs in *City of Austin* were attempting to show was the adverse effect of the new contracts with specific customers entered into by LoVaca.

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36. TEX. REV. CIV. STAT. ANN. arts. 6050-66 (1962 & Supp. 1975).
37. *See, e.g.*, Nale v. Carroll, 155 Tex. 555, 289 S.W.2d 743 (1956). *See generally* Smith, *The Texas Compulsory Pooling Act* (pt. II), 44 TEXAS L. REV. 387, 413-16 (1966).
38. Haby v. Stanolind Oil & Gas Co., 228 F.2d 298 (5th Cir. 1955).
39. 467 S.W.2d 532 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.).