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Frank W. Elliott Jr

Texas A&M University School of Law, [felliott@law.tamu.edu](mailto:felliott@law.tamu.edu)

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# The Fractional Mineral Deed “Subject To” a Lease

FRANK W. ELLIOTT, JR.\*

The recent case of *Garrett v. Dils Co.*<sup>1</sup> points out again the difficulty in construing mineral deeds made subject to an existing lease. The elements of the deed essential to this discussion were as follows:

“[Grantor does] . . . grant, sell, convey, assign, and deliver unto . . . Grantee an undivided one sixty-fourth interest in and to all of the oil, gas and other minerals in and under, and that may be produced from the following described land: . . .

“Said land being now under an oil and gas lease . . ., it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes one-eighth of all of the oil royalty, and gas rental or royalty due and to be paid under the terms of said lease.

“It is understood and agreed that one-eighth of the money rentals . . . is to be paid to . . . Grantee and in event that the above described lease for any reason becomes cancelled or forfeited, then and in that event an undivided one-eighth of the lease interest and all future rentals on said land for oil, gas and other mineral privileges shall be owned by said Grantee, he owning one-eighth of one-eighth of all oil, gas and other minerals in and under said lands, together with one-eighth interest in all future rents.”

The lease mentioned in the deed expired and a second lease was made, both leases reserving a 1/8th royalty. The heirs of the grantor of the deed sued the successor of the grantee in trespass to try title to ascertain the proportion of royalty that should be paid to each under the second lease. The deed was conceded by all parties to be unambiguous and its construction was the sole problem in the case. The majority of the court, in an opinion by Chief Justice Hickman, approached the solution by first deciding the royalty to which the grantee would have been entitled under the original lease, and then determining from the deed whether the royalty should be the same under subsequent leases. The court reasoned that had only the granting clause appeared, clearly a 1/64th interest in the minerals in place would be conveyed. However, the royalty transfer clause covered 1/8th of the royalty under the lease, so the court decided that the parties intended to convey a royalty of 1/64th of production, or 1/8th of the 1/8th royalty retained in the lease. Then turning to the

\* Member of the Austin Bar.

<sup>1</sup> 299 S.W.2d 904 (Tex. Sup. Ct. 1957).

lease termination clause, the court could discover no intent to grant a lesser interest under a subsequent lease. Stating that the parties construed the grant of 1/64th of the minerals as a grant of 1/8th of the royalty,<sup>2</sup> it was held that under the subsequent lease the grantee had a right to 1/8th of the royalty, 1/8th of the delay rentals, and 1/8th of the bonus. Since this was so, the grantee had all the rights incident to ownership of 1/8th of the minerals and the conclusion followed that the deed conveyed an undivided 1/8th of the mineral fee.

Four justices dissented, stating that by the terms of the deed a 1/64th mineral interest was conveyed, together with 1/8th of the royalty and rents under the existing lease, and 1/8th of the bonus and rents, but only 1/64th of the royalty under subsequent leases.

## I. THE TYPICAL MINERAL DEED AND ROYALTY TRANSFER

In a typical deed conveying a mineral interest subject to an existing lease there are three general sections, containing four blanks for the insertion of the fraction to be conveyed. The first section, or granting clause, is designed as a conveyance of all or part of the minerals. The second, or royalty transfer clause, is designed to set out the present estates or property interests arising out of the lease which are intended to be conveyed. The third, or lease termination clause, states the interests owned by the grantee, if for some reason the existing lease terminates. The blanks mentioned are for the mineral interest, the royalty under the lease, the rent under the lease and the grantee's interest on expiration of the lease.

The second section is actually unnecessary in most cases, since the royalty and rents under the lease would be transferred in the same proportion by the granting clause.<sup>3</sup> If a different interest is intended to be conveyed, it of course would be needed.

The third section is also unnecessary, but may be useful in resolving any doubts about the meaning of the other clauses.<sup>4</sup>

## II. SOURCES OF CONFUSION

A good deal of confusion can result if different fractions are placed in the various blanks. Moreover, the addition of further clauses, mistakes about the size of the tract of land involved, and poor wording of the clauses add to the chaos.

<sup>2</sup> *Id.* at 906.

<sup>3</sup> *Richardson v. Hart*, 143 Tex. 392, 185 S.W.2d 563 (1945), 25 TEXAS L. REV. 1, 26 (1946); *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302 (1943), 25 TEXAS L. REV. 1, 24 (1946).

<sup>4</sup> See, e.g., *Schubert v. Miller*, 119 S.W.2d 139 (Tex. Civ. App. 1938), 17 TEXAS L. REV. 346, 350 (1939).

### A. *Misunderstanding of the Nature of the Property Interest of a Landowner after the Execution of a Lease*

The greatest source of confusion is the failure to understand the exact nature of the property interest of a landowner after the execution of an oil and gas lease. The lessor often thinks of his ownership as a 1/8th royalty interest rather than a possibility of reverter in all the minerals. This failure of understanding is illustrated by *Colonial Royalties Co. v. Keener*.<sup>5</sup> In that case the deed provided that all the minerals were conveyed subject to a lease, but that all the royalty under the lease was included. Furthermore, if the lease expired, the minerals were to be jointly owned: a 7/8th working interest by the grantor, and a 1/8th royalty interest by the grantee. The court held, by construing the whole deed, that a 1/8th non-participating royalty had been conveyed. The court said that in the "popular sense"<sup>6</sup> 1/8th royalty was often thought of as all the landowner has in such a situation.<sup>7</sup>

#### 1. CONFLICTING FRACTIONS IN GRANTING AND ROYALTY TRANSFER CLAUSES.

If different fractions appear in the granting and royalty transfer clauses and no lease termination clause is used in the deed, the courts have construed the deeds in several ways. In *Paxton v. Benedum-Trees Oil Co.*<sup>8</sup> the deed conveyed 1/16th of the oil and 1/2 of the gas, including 1/2 of all the royalties, incomes and rentals that might arise by virtue of any lease. The court held that this was a grant of 1/2 of the mineral fee, applying the rule that an ambiguous grant should be construed most strongly against the grantor.<sup>9</sup>

The majority of courts have given effect to both clauses. The deed involved in *Hinkle v. Gauntt*<sup>10</sup> reserved 1/16th of the minerals and a 1/2 interest in bonuses or rent from the lease presently on the land. It was held that the deed would be construed literally and the fact that the reservation of rentals was 1/2 does not mean that the same interest in the mineral fee was reserved.

In *Gillespie v. Blanton*<sup>11</sup> the grant was of 1/8th of the minerals subject to a lease, including the whole royalty under the lease. The effect of this deed was to give the grantee a 1/8th mineral fee plus the whole

<sup>5</sup> 266 P.2d 467 (Okla. 1953).

<sup>6</sup> *Colonial Royalties Co. v. Keener* at 472.

<sup>7</sup> See also *Swearingen v. Oldham*, 195 Okla. 532, 159 P.2d 247 (1945); *Manley v. Boling*, 186 Okla. 59, 96 P.2d 30 (1939); *Berk v. Beckett*, 200 Ark. 1189, 137 S.W.2d 898 (1940); *Craft v. Hahn*, 246 S.W.2d 897 (Tex. Civ. App. 1952, error ref'd n.r.e.).

<sup>8</sup> 80 W. Va. 187, 94 S.E. 472 (1917), 10 TEXAS L. REV. 1, 11 (1931).

<sup>9</sup> See also *Barnard v. Jamison*, 78 Cal. App. 2d 736, 177 P.2d 341 (1947).

<sup>10</sup> 201 Okla. 432, 206 P.2d 1001 (1949).

<sup>11</sup> 214 Ky. 49, 232 S.W. 1061 (1926).

royalty while the original lease was in effect. However, under any subsequent lease he would only receive 1/8th of the royalty provided.<sup>12</sup>

An odd result of giving effect to both clauses is found in *Paddock v. Vasquez*,<sup>13</sup> where 3 per cent of 100 per cent of the minerals were granted, subject to a lease, including in the grant, but not limited to, 6/25ths of the bonus, rent and royalty under the present or any other lease. Expressly stating that the deed was unambiguous, the court held that the grantee owned only a 3 per cent mineral fee but was entitled to 6/25ths of all bonuses, rents, and royalties. In effect, although owning only 3 per cent of the minerals, the grantee had all of the benefits of 24 per cent.

If the deed contains a lease termination clause, the courts have usually construed it as controlling any contradiction between the granting and royalty transfer clauses. In *Krutzfeld v. Stevenson*<sup>14</sup> a grant of 5% of the minerals was made, subject to a lease, and included 2/5ths of the royalty under the lease. Upon termination the grantor was to own 3/5ths and the grantee 2/5ths of the minerals. The court reasoned that since the land was under an existing lease, the parties believed that the grantor could not presently convey a fraction of the whole mineral interest. He had, therefore, attempted to accomplish his purpose by conveying 2/5ths of 12½ per cent, which was the royalty under the lease. Effect was given to this intention, although the court stated that a grant of 2/5ths of the minerals was the proper terminology for such a conveyance.<sup>15</sup>

Two different results have been reached when, although the fractions in the granting and the lease termination clause agreed, they were in conflict with the royalty transfer clause. In *Schubert v. Miller*<sup>16</sup> the deed granted 1/32nd of the minerals subject to a lease, including 1/4th of the royalty under the lease, and a 1/32nd mineral interest to the grantee upon expiration of the lease. The court held that from the face of the instrument the grantee owned a 1/32nd mineral fee and was entitled to receive 1/4th of the royalties under the original lease, but if it expired, he would receive only 1/32nd of the royalty under any subsequent lease.

However, in *Tipps v. Bodine*<sup>17</sup> somewhat tortuous reasoning led to a different conclusion. The grant was of 1/16th of the minerals, subject to a lease, including 1/2 of the rents and royalties under the lease. On termination, 1/2 of the lease interest and rents was to be owned by the grantee. The original lease expired and a new one was made. The trial

<sup>12</sup> See also *Rowland v. Griffin*, 179 Ark. 421, 16 S.W.2d 457 (1929).

<sup>13</sup> 122 Cal. App. 2d 396, 265 P.2d 121 (1953), 32 TEXAS L. REV. 766 (1954).

<sup>14</sup> 86 Mont. 463, 284 Pac. 553 (1930), 10 TEXAS L. REV. 1, 14 (1931).

<sup>15</sup> See also *Broderick v. Stevenson Consol. Oil Co.*, 88 Mont. 34, 290 Pac. 244 (1930), 10 TEXAS L. REV. 1, 14 (1931); *Loeffler v. King*, 228 S.W.2d 201 (Tex. Civ. App. 1950), *reversed on other grounds*, 149 Tex. 626, 236 S.W.2d 772 (1951).

<sup>16</sup> 119 S.W.2d 139 (Tex. Civ. App. 1938), 17 TEXAS L. REV. 346, 350 (1939).

<sup>17</sup> 101 S.W.2d 1076 (Tex. Civ. App. 1936, error ref'd).

court reformed the deed, placing  $1/2$  wherever  $1/16$ th appeared. On appeal the court did not allow reformation but reached the same result, reasoning that the grantor had conveyed  $1/2$  of the minerals then owned by him (*i.e.*,  $1/2$  of  $1/8$ th) or  $1/16$ th, and  $1/2$  of his possibility of reverter. Since the original lease had expired, the grantee owned a full  $1/2$ . It appears that reformation was the proper approach under the facts of the case, and such a devious method was unnecessary to reach the desired result. As can be seen, the facts of this case are similar to those of *Garrett v. Dils Co.*, in which the Texas Supreme Court used still another approach.

## 2. SAME FRACTIONS IN GRANTING AND ROYALTY TRANSFER CLAUSES

When the fractions are the same in both the granting and royalty transfer clauses, and no lease termination clause is present, the courts have given effect to the terms of the deed as written. In *Humphrey v. Stidham*,<sup>18</sup> a suit for reformation, the deed granted  $1/128$ th of the minerals, subject to a lease, including  $1/128$ th of the royalty. The claim was made that the intention of the parties was to grant  $1/16$ th of the minerals and that by mistake  $1/16$ th of  $1/8$ th or  $1/128$ th was inserted in the deed. The court denied reformation, stating that the grant was obviously of a  $1/128$ th mineral fee.<sup>19</sup>

*Shinn v. Buxton*<sup>20</sup> involved a grant of  $1/128$ th of the minerals, subject to a lease, including  $1/16$ th of the full  $1/8$ th of all the royalty. It was held to be a conveyance of  $1/128$ th of the minerals and  $1/128$ th of the royalty, or a royalty of  $1/1024$ th. Much weight was placed on the word "of" following the fraction  $1/8$ th, the court stating that the deed was clear and unambiguous.

When a lease termination clause is included which conflicts with the fractions stated in the granting and royalty transfer clauses, the lease termination clause is generally held to control. *Citizens Inv. Co. v. Armer*<sup>21</sup> involved a grant of  $1/16$ th of the minerals, subject to a lease, including  $1/16$ th of all the rent and royalty under the lease. On termination the grantee was to own  $1/2$  of the minerals. Construing the instrument as a whole, the court held that the grantee owned a full  $1/2$  mineral fee.<sup>22</sup>

If the lease termination clause does not conflict, the job of the courts is simplified. In *Richardson v. Hart*<sup>23</sup> the deed conveyed  $1/16$ th of  $1/8$ th of

<sup>18</sup> 124 S.W.2d 921 (Tex. Civ. App. 1939).

<sup>19</sup> See also *McNeill v. Shaw*, 295 P.2d 276 (Okla. 1956).

<sup>20</sup> 154 F.2d 629 (10th Cir. 1946).

<sup>21</sup> 179 Ark. 376, 16 S.W.2d 15 (1929), 10 TEXAS L. REV. 1, 28 (1931).

<sup>22</sup> See also *Smith v. Grubb*, 402 Ill. 451, 84 N.E.2d 421 (1949); *Stanley v. Slone*, 216 Ky. 114, 287 S.W. 360 (1926), 10 TEXAS L. REV. 1, 27 (1931).

<sup>23</sup> 143 Tex. 392, 185 S.W.2d 563 (1945), 25 TEXAS L. REV. 1, 26 (1946).

the minerals, subject to a lease, including 1/16th of 1/8th of the royalty. No rentals were included, and on termination, none of the lease interest or future rentals were to be owned by the grantee, he owning 1/16th of 1/8th of the minerals, with no interest in future rents. The court held that the deed was free from ambiguity and conveyed two separate estates in the land. The first was a permanent interest in the minerals in place (1/16th of 1/8th or 1/128th) and the second was an interest in the royalty payable under the lease (1/16th of 1/8th of the 1/8th royalty or 1/1064th of production). The fact that the grantee was to have no interest in present or future rents or in future "lease interest" made no apparent difference, since the grantee was to own a continuing 1/128th interest in the minerals in place. It is likely that had the lease expired and a new one been executed, the grantee would have received 1/128th of the royalty reserved in the new lease.<sup>24</sup>

It will be observed that the same form of deed was used in the *Richardson* case as was used in *Garrett v. Dils Co.* It could be argued that the reasoning in the former case should have been applied to the latter, rendering the deed a conveyance of 1/64th of the minerals, 1/8th of the royalty and rents under the existing lease, 1/8th of the bonus and rents under any subsequent lease, and 1/64th of the royalty under future leases. The fact that in *Richardson* the grantee did not own any right to future "lease interest" or future rents did not deprive him of the 1/128th mineral interest. Likewise, perhaps the fact that the grantee in *Garrett* had a right to 1/8th of future "lease interest" and rentals should not act to give him a larger interest in the mineral fee than the 1/64th granted. It has been shown<sup>25</sup> that many times the courts have given effect to different fractional interests in the mineral fee and royalty, and the fact that the last clause quoted in *Garrett* states that the grantee owns 1/8th of 1/8th (1/64th) of the minerals seems to make the case even stronger for such an interpretation.<sup>26</sup>

This approach would tend to give a uniformity and predictability of

<sup>24</sup> See also *Jones v. Bedford*, 56 S.W.2d 305 (Tex. Civ. App. 1932, error ref'd). *Shepard v. Hagan*, 291 Mich. 436, 289 N.W. 205 (1939) is an interesting case in which the fraction 1/16th appeared in the granting clause, royalty transfer clause and lease termination clause. The trial court granted reformation, substituting 1/2 for 1/16th. The appellate court held that the deed was ambiguous, reinforcing its logic with the language in a subsequent lease which stated that the grantor had conveyed 1/16th of the minerals. The court's reasoning is lost on this writer.

<sup>25</sup> *Rowland v. Griffin*, 179 Ark. 421, 16 S.W.2d 457 (1929); *Paddock v. Vasquez*, 122 Cal. App. 2d 396, 265 P.2d 121 (1953), 32 TEXAS L. REV. 766 (1954); *Gillispie v. Blanton*, 214 Ky. 49, 282 S.W. 1061 (1926); *Hinkle v. Gauntt*, 201 Okla. 432, 206 P.2d 1001 (1949); *Woods v. Sims*, 154 Tex. 59, 273 S.W.2d 617 (1954); *Hoffman v. Maguolia Petroleum Co.*, 273 S.W. 828 (Tex. Comm'n App. 1925), 4 TEXAS L. REV. 334 (1925); *Schubert v. Miller*, 119 S.W.2d 139 (Tex. Civ. App. 1938).

<sup>26</sup> See dissenting opinion in *Garrett v. Dils Co.*, 299 S.W.2d 904, 907 (Tex. Sup. Ct. 1957).

construction lacking in other approaches. However, as fine an end as this may be for the enlightenment of future scrivener, it remains that such an approach may vary the intent of the parties in older instruments. The deed construed in *Richardson* contained no discrepancy in the fractional amounts stated, while such a discrepancy did appear in *Garrett*. The many fractions, including the weak buttress of  $1/8$  of  $1/8$  for  $1/64$ , lead one to the conclusion that the actual intent was effectuated in the *Garrett* case. However, it seems that the theory behind this effectuation could better have been a decision that ambiguity existed, and a reflection of the actual intent by a resolving of the ambiguity.

### B. Mistake Concerning Amount of Land Involved

A second cause of confusion is the later discovery that the amount of land described in the deed is not the actual amount on the ground. In *Olvey v. Jones*<sup>27</sup> the deed conveyed  $1/2$  of the minerals, subject to a lease, including  $1/2$  of the royalty under the lease. If the lease terminated, each party would own  $1/2$  of the minerals. The deed stated that fifty-five acres were being conveyed, but actually described 83.23 acres. The plaintiff grantor claimed that only 55 acres were intended to be conveyed. The purchase price had been \$2750, or \$100 per acre for 27.5 acres, being the half of 55. The deed was held unambiguous, conveying a full  $1/2$  interest in the entire 83.23 acres, not just 27.5/83.23.<sup>28</sup>

In *Woods v. Sims*<sup>29</sup> the grant was of 25/200ths of the minerals on a supposed 200 acre tract, with a clause stating that the intention was to convey a 25 acre mineral interest, subject to a lease, including 25/200ths of the royalty, and on termination the grantee would own 25/200ths of the minerals. It developed that actually 226.88 acres were in the tract. The court of civil appeals held that 25/226.88ths of the mineral fee was conveyed, and all parties acquiesced in this decision. However, the supreme court held that 25/200ths of the royalty under the existing lease was transferred. The court reasoned that the intent clause applied only to the conveyance of a permanent interest in the minerals, containing no reference to the royalty, and therefore two different fractional interests were granted. Since there were two conveyances, the royalty interest could be larger or smaller than the permanent mineral interest, and

<sup>27</sup> 95 S.W.2d 980 (Tex. Civ. App. 1936, error dism'd).

<sup>28</sup> In the first trial of the case, reformation was asked for only the granting clause. The court held that even were the granting clause reformed, the principle of *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828 (Tex. Comm'n App. 1925), discussed *infra*, would apply and the royalty would still be one-half of the whole. In a later trial and appeal of the same case, 137 Tex. 639, 156 S.W.2d 977 (1941), reformation of both the granting clause and the royalty transfer clause was sought and granted.

<sup>29</sup> 154 Tex. 59, 273 S.W.2d 617 (1954).



whether such is the intent of the parties must be determined from the language of the deed.

### C. Poor Wording of the Various Clauses

A further source of confusion is lack of care in the use of language in the royalty transfer clause. At times this might result from a failure to adapt a form to a situation it was not designed to cover. For example, in *Hoffman v. Magnolia Petroleum Co.*<sup>30</sup> the grant was of 1/2 the minerals on 90 acres out of a 320 acre tract, subject to a lease on the entire 320 acres, including 1/2 of the royalty under the lease. Upon termination of the lease each of the parties to the deed would own 1/2 of the minerals. Construing the deed as granting two separate interests, the court held that the royalty granted was from the entire 320 acres, and that even though it was possible that a mistake had been made in the deed, the wording was clear and could not be changed in the present litigation.<sup>31</sup> The difficulty in the *Hoffman* case was likely due to the fact that the form used was appropriate for a conveyance of an interest in the entire leased premises, but needed some modification to adapt it to a conveyance of only a specific part.

Failure to adapt a form primarily designed for conveyances by someone owning a full fee to one covering a conveyance by a grantor owning only a fractional interest may also raise problems. In *Waters v. Edwards*<sup>32</sup> the grantor owned 1/4th of the minerals and conveyed that 1/4th of the minerals, subject to a lease, including "such undivided 1/4th part of royalty due me under the lease." The contention was that only 1/4th of the 1/4th of the royalty was conveyed. The court held that the entire 1/4th of the minerals and 1/4th of the royalty was conveyed, stating that the deed was clear, but could possibly have been better expressed as "such 1/4th part of the royalty, same being the part due me."<sup>33</sup>

## III. CONCLUSION

The decisions discussed above lead to the conclusion that when a fractional undivided interest in the minerals of a tract is to be conveyed, the same fraction should normally be inserted in each of the blanks provided for such fraction.<sup>34</sup> Frequently a form is used for a mineral deed and

<sup>30</sup> 273 S.W. 828 (Tex. Comm'n App. 1925).

<sup>31</sup> See the thorough discussions of the *Hoffman* case in Williams, *Hoffman v. Magnolia Petroleum Co.: The "Subject-To" Clause in Mineral and Royalty Deeds*, 30 TEXAS L. REV. 395 (1952); Stayton, *An Easement to Decision: A Servitude upon Judicial Legislation*, 35 TEXAS L. REV. 20, 42-46, 50 (1956); Meyers & Williams, *Hoffman v. Magnolia Petroleum Co.: A Further Comment*, 35 TEXAS L. REV. 362 (1957).

<sup>32</sup> 196 Ark. 1088, 121 S.W.2d 79 (1938).

<sup>33</sup> See also *Wilson v. Stearn*, 202 Ark. 1197, 149 S.W.2d 571 (1941).

<sup>34</sup> See, e.g., *Smiley v. Thomas*, 220 Ark. 116, 246 S.W.2d 419 (1952); *Segars v.*

royalty transfer in which only one blank is provided for a fraction, in the granting clause. It is then provided in the succeeding clauses that the same undivided interest in the rents and royalties under the lease is also conveyed.<sup>35</sup> Of course, if it is desired to convey a different interest in the royalties under the existing lease than the permanent mineral interest, the latter type of form can not be used, and the fractions must be inserted so as to accomplish the desired result. And, as mentioned earlier, forms must also be adapted to any special purposes of the intended grant.

When further cases reach the courts, a uniform procedure should be followed. The deeds should be construed to effectuate the intent of the parties, but if unambiguous, that intent should be found from the words of the instrument itself. When different fractions appear, but the granting clause is clear and buttressed by the lease termination clause, effect should be given to the two different grants, and the deed construed as written.<sup>36</sup> If the actual intent of the parties be different, a suit for reformation will often be available. Even if such a suit is not available, because of limitations, laches, or some other reason, the court should still not attempt to construe the deed as the *court* would have intended, but rather as the *parties* apparently intended by the written words of the deed.

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Goodwin, 196 Ark. 221, 117 S.W.2d 43 (1938); Richards v. Shearer, 145 Kan. 88, 64 P.2d 56 (1937); Koenig v. Calcote, 199 Miss. 435, 25 So.2d 763 (1946); Patek v. Duncan, 178 S.W.2d 577 (Tex. Civ. App. 1944, error ref'd); Clemmens v. Kennedy, 68 S.W.2d 321 (Tex. Civ. App. 1934, error ref'd).

<sup>35</sup> See, e.g., Ford v. Jones, 85 So.2d 215 (Miss. 1956); Gulf Refining Co. v. Harrison, 201 Miss. 294, 30 So.2d 44 (1947).

<sup>36</sup> See dissenting opinion in Garrett v. Dils Co., 299 S.W.2d 904, 907 (Tex. Sup. Ct. 1957). But see text discussion at close of Section IIA2., *supra*.