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OIL AND GAS–FORCED POOLING–PRODUCTION FROM POOLING UNIT AS EXTENDING LEASEHOLD ON UNPOOLED LAND UNDER "THEREAFTER" CLAUSE

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The plaintiffs gave an oil and gas lease to the defendant's predecessor in interest, for a primary term of ten years "and as long thereafter as oil or gas is produced from said land." The lease covered several parcels of land, one of which was noncontiguous to the others. There was no pooling or unitization clause. During the last year of the primary term, the defendant commenced drilling two wells in the area, one of which was on plaintiff's land. Subsequently, still within the primary term, the defendant obtained two orders from the Colorado Oil and Gas Conservation Commission pooling various parts of plaintiff's land. Some was placed in a unit with the well not on plaintiff's land, some in the unit which contained the well on plaintiff's land. The greater part of the leased land, including the noncontiguous tract, was not in any pooling unit. After the expiration of the primary term, plaintiff sought a declaratory judgment that the lease had expired as to the lands not included in the units. Judgment was for the defendant in the trial court. On writ of error, *held,* affirmed. Drilling a productive well within a pooled unit upon part of the lessor's lands prevents termination of the lease as to leased lands outside the unit; further, drilling a productive well within a pooled unit containing a portion of lessor's lands, but not on lessor's land, prevents termination of the lease as to leased lands outside the unit. *Clovis v. Pacific N. W. Pipeline Corp.,* 345 *P. 2d* 729 *(Colo. 1959).*

It may seem from the statement of the case above that the court has purportedly decided two questions. This would seem to be due to the form in which the case came up from the trial court: the case was submitted to the trial court, as to this court, on an agreed statement of the facts and issues. However, it is clear that deciding either question in the affirmative would dispose of the case.

It might be asked whether there should be a difference in the answers to the two questions posed to the court. The difference, it would seem, lies in the fact that when the well has been drilled on the plaintiff's land, the lessee has complied strictly with the terms of his lease—oil or gas is being produced from "said land." To hold that he has complied when the well is not on lessor's land, it must be held in some way that the well is vicariously on the lessor's tract.

Nevertheless, the basic problem is that pooling either divides the lease or leaves it entire. Where the intention of the parties is

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not ascertainable, and especially where the pooling is compulsory, the decision would seem to be one primarily of policy.

It is my intention in this paper to first explore some factors in a lease which might make the lease divisible even apart from the pooling problem, then to look at the factors which appear to have been determinative of lease validation in pooling cases, next to take up the question of policy, and finally, to return to the *Clovis* case and examine it in light of the discussion presented.

FACTORS WHICH MIGHT MAKE A LEASE DIVISIBLE (BUT WHICH SEEM NOT TO HAVE BEEN DETERMINATIVE)

A. *Noncontiguity of Tracts*

As was mentioned in the opening paragraph, the lease in the *Clovis* case contained a noncontiguous tract, and yet the lease was found entire. When the pooling problem is not present, and where the lease does not evince an intention that the tracts be separately developed, it has uniformly been held that the lease is entire.[1]

McCammon v. Texas Co.[2] presents a particularly strong holding in favor of indivisibility, in a pooling problem setting. Here two noncontiguous tracts were leased, and a unitization agreement was executed by lessor and lessee some years later as to tract *A*. The agreement "specifically provided that any part of a lease not covered by the agreement was to be considered a separate lease for all purposes . . . ."[3]

Sometime thereafter, but within the primary term, the lease on tract *B* was assigned to the defendants. A producing well was brought in on tract *A*. Two months after the end of the primary term, the lessor sent defendants a notice of forfeiture, which was disregarded. Defendants unitized tract *B* and developed a producing well on the unit, thereupon the lessor brought a quiet title action.

In giving judgment for the defendants, the trial court held that the well on tract *A* validated the lease as to tract *B*. Since defendants were not parties to the unitization agreement affecting tract *A*, they were not bound thereby, and the terms of the original lease were controlling. "(A)ll the terms of the lease . . . clearly indicate that the intention of the parties was that, though covering more than one tract of land, the lease was to be developed as a unit."[4]

Hillegeist v. Amerada Petroleum Corp.,[5] although involving a term mineral interest, is to like effect. Plaintiff owned two noncontiguous tracts of land on which he had given separate leases to different parties. He thereafter sold a term mineral fee in one deed covering both tracts, for twenty years and so long thereafter. At the date of expiration of the primary term, production was being had on tract *A*, but not on tract *B*. Plaintiff, in an action in trespass to try title, argued that the deed had expired as to tract *B* because it was given "subject to" the separate leases, which in legal effect

1 2 Summers, Oil & Gas § 295, at 210-11 (perm. ed. 1959); Annot., 11 A.L.R. 138 (1921), and cases cited therein; Discussion Notes, 5 Oil & Gas Reporter 261 (1955).
2 137 F. Supp. 256 (D. Kan. 1955).
3 *Id.* at 257.
4 *Id.* at 259.
5 282 S.W.2d 892 (Tex. Civ. App. 1955).

operated to sever the two tracts, so that production would be required on each tract to validate the "thereafter" provision.

The court, in giving judgment for the defendant, rejected the plaintiff's contention on the ground that the deed was entire and given for an entire and indivisible consideration. The parties, by the terms of the deed, had seemed to *intend* an entire transaction, so that production from any part saved the whole. The court had this to say:

> [N]or do we perceive that when the deeds under consideration are treated as if dealing with two segregated mineral estates the situation presented is materially different in the respects under discussion from that which exists when a mineral lease that is to remain in effect during its primary term and so long thereafter as oil or gas is produced from "said land" or from "the above-described premises" is given on two or more noncontiguous tracts of land; and the law appears settled that in the instance of a lease of the type mentioned production from any one of the tracts of land described in it serves to perpetuate the lease as to all.[6]

Mention should be made here also of *Texas Gulf Producing Co. v. Griffith*,[7] in which it was held that production in a unit containing plaintiff's leased lands did not validate the lease as to his lands outside the unit. Although the decision is based on the constitutional question of deprivation of property without due process of law, at least two authorities in oil and gas feel that the contiguity factor may have importance, and cannot be ruled out altogether.[8]

B. *Partial Assignment Clause*

Although there was a partial assignment clause in the lease in the *Clovis* case,[9] the court does not even mention it. In none of the decisions cited in this paper has a partial assignment clause been held to make the lease divisible. Summers,[10] however, points out that "In the situation where the lessor leases a single tract of land, the lease upon a part of which is later conveyed by the lessee, the

6 *Id.* at 896.
7 218 Miss. 109, 65 So.2d 447 (1953).
8 Williams & Meyers, *The Effect of Pooling and Unitization Upon Oil and Gas Leases*, 45 Calif. L. Rev. 411, 420 (1957).
9 Record, f. 39.
10 3 Summers, Oil & Gas § 515 (2d perm. ed. 1958).

Louisiana Court has held that a provision which permits partial assignments and allows the partial assignee to extend the lease as to his portion by paying a proportionate part of the delay rentals makes the covenants divisible upon assignment." He comments that this Louisiana view is "questionable."[11]

The case of *Kugel v. Young*[12] also deserves comment in this connection. A lease containing a partial assignment clause was there involved. One Young acquired the leasehold interest in a part of the leased lands by two separate assignments, dated the same day, relating to land in two different counties. Young tendered delay rentals on the due date, in an amount insufficient to cover all the land in which he then held the leasehold interest. The plaintiffs accepted payment, but after discovering the error, brought suit to quiet title. In writ of error they alleged, *inter alia,* that where one person is the assignee of separate tracts (separate portions of one lease) his responsibiliy for rental payments is not separate with respect to each tract. The defendant, of course, contended that the lease became divisible since the lands were separately assigned. Said the court, "This is only incidental, but . . . (the defendant is) in error. While as between the different assignees the lease may seem to be divisible, as to the lessors it is indivisible, and they are not obliged to keep track of who acquires interests therein by assignment from parties other than themselves."[13]

Incidentally, it might be mentioned that the lease in *Clovis* contained a non-forfeiture clause,[14] which would seem to be often concomitant to the partial assignment clause,[15] and in fact in some jurisdictions is implied if not expressly set out with the partial assignment clause.[16]

C. *Partial Surrender Clause*

The final type of clause I would explore under this heading is the partial surrender clause. Although the lease in *Clovis* contained such a clause,[17] the question was not raised on appeal, and probably could not have been; for reasons developed below it would appear that drilling on the leased lands would avoid any such attack on the lease.

Summers[18] has traced the types of arguments advanced against leases containing surrender clauses supported by nominal or no consideration. His position is that the arguments are unsound,[19] but in light of some of the pronouncements of our Supreme Court, the argument that a lease is an executory optional contract should be examined.

It was stated above that the lease in *Clovis* contained a partial surrender clause. It should be pointed out that the "partial" clause is no less subject to attack than the "total," because it is obvious that unless there is some restriction as to how much acreage may be

11 *Id.* at 440.
12 132 Colo. 529, 291 P.2d 695 (1955).
13 *Id.* at 539, 291 P.2d at 701.
14 Record, f. 39.
15 2 Summers, Oil & Gas § 347, at 445-46 (perm. ed. 1959).
16 *Id.* at 445.
17 Record, f. 34.
18 2 Summers, Oil & Gas §§ 235-36, 242 (perm. ed. 1959).
19 See *id.* § 242, at 159-61. *But cf.* Williams & Meyers, *supra* note 8, at 444, where it is suggested that a duty of fair dealing may arise from the inclusion of a surrender clause in the lease.

surrendered (which there was not in *Clovis*), the whole of it may be.

The ground on which a lease is attacked as being an executory optional contract, and so void for lack of consideration, has its basis in two theories; first, that the interest created by a lease is executory until production is actually obtained; and second, that prospective royalties are the only real consideration given by the lessee for the privilege of exploration.[20]

In *Florence Oil & Refining Co. v. Orman*[21] the first theory set out above is demonstrated. The state granted a lease to the oil company's assignor in 1894, for a twenty-year term, the lessee covenanting to drill two wells within the first eighteen months, and if those two were dry, to pay delay rental until he again started drilling. Three wells were in fact drilled in the first eighteen months, a fourth in 1896. All were dry holes. The delay rentals are not mentioned in the opinion of the court, so that it is not known whether they were paid; the opinion leaves the impression that they were.

At any rate, in July of 1900, the board of land commissioners, without notice, cancelled the lease. In the company's suit to have the lease reinstated, it was held that the "lease" was a mere license to explore. Since no oil or gas had been found, no rights had vested and the lease could be cancelled.

The second theory, that prospective royalties are the real consideration, is demonstrated by the case of *Lanham v. Jones*,[22] where the following language occurs:

> (A) contract such as this, . . . which was in fact merely a naked option, with no definite time of performance, was terminable by either party in the absence of any intervening equities . . . . (I)nstruments of this character are construed most favorably to development, . . . time is of the essence of the contract, and the real motive for the giving of such instruments is the development of the leased property. Therefore, such a lease or option is properly construed strongly against the lessee so as to secure such speedy development. In the instruments before us the supposed lessees were not obliged either to drill or to pay rental; but they might, by payment of rental, defer development for all time, and thus deprive the owner of the land of the principal consideration of the alleged lease.[23]

Nor would this language seem to be completely a relic of bygone days. In a 1942 case[24] and again in 1949[25] our court has used language very similar in tenor.

It was stated at the beginning of this section that a partial surrender clause probably could not be attacked after drilling has been commenced on the land. The reason is probably now obvious: the arguments above are all based on lack of consideration; when the lessee begins drilling he is supplying the consideration which was presumably lacking.

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20 *Id.* § 236, at 145.
21 19 Colo. App. 79, 73 Pac. 628 (1903).
22 84 Colo. 129, 268 Pac. 521 (1928); see Spaulding v. Porter, 94 Colo. 496, 31 P.2d 711 (1934); cf. Davis v. Riddle, 25 Colo. App. 162, 136 Pac. 551 (1913).
23 84 Colo. at 133, 268 Pac. at 522.
24 Mountain States Oil Corp. v. Sandoval, 109 Colo. 401, 125 P.2d 964 (1942).
25 Hill v. Stanolind Oil & Gas Co., 119 Colo. 477, 205 P.2d 643 (1949).

FACTORS WHICH APPEAR TO HAVE BEEN DETERMINATIVE

A. *Interpretation of the Document Authorizing Pooling*

This factor would seem to be easily the most important in arriving at the decision whether a producing well in a unit will validate leased lands outside the unit.

1. Voluntary Pooling Cases

Two cases dealing with wells on the lessor's land in the unit were discussed above.[26] Both hold that the intention of the parties, as found in the lease or the pooling instrument, will be controlling.

Similar holdings are found in cases involving producing wells not on the lessor's land, but in a unit with it. *Buchanan v. Sinclair Oil & Gas Co.*[27] involved a lease allowing the lessee to pool "when in lessee's judgment it is necessary or advisable to do so. . . . If production is found on the pooled acreage, it shall be treated as if production is had from this lease, whether the well or wells be located on the premises covered by this lease or not. . . ."[28] The court construed the language as requiring validation of the lease as to all of lessor's leased lands, based on their holding in *Scott v. Pure Oil Co.*[29]

An Arkansas case[30] involved interpretation of a unitization agreement, which rather clearly provided that a well anywhere within the unit would validate leased lands both within and without the unit. There was an additional factor in this case which might be mentioned: the lease was executed after a spacing order had been entered, and the court comments on this fact. "The original lease was executed with knowledge that rules of the Oil and Gas Commission did not allow drilling on the grant. . . ."[31]

Trawick v. Castleberry[32] also involved interpretation of a lease provision, and also held that lands lying outside the unit were extended beyond the primary term by the language of the lease. An interesting side-light is that the lessee had paid delay rentals during the primary term, thereby avoiding litigation during that time.

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26 McCammon v. Texas Co., 137 F. Supp. 256 (D. Kan. 1955), discussed in text at notes 2-4 *supra*; Hillegeist v. Amerada Petroleum Corp., 282 S.W.2d 892 (Tex. Civ. App. 1955), discussed in text at notes 5-6 *supra*.
27 218 F.2d 436 (5th Cir. 1955).
28 *Id.* at 439 n. 3.
29 194 F.2d 393 (5th Cir. 1952), 31 Texas L. Rev. 75.
30 Gray v. Cameron, 218 Ark. 142, 234 S.W.2d 769 (1951).
31 234 S.W.2d at 770.
32 275 P.2d 292 (Okla. 1953).

However, the lessor had asked cancellation on the ground that the lease had expired at the end of the term.[33]

Humble Oil & Refining Co. v. Hutchins[34] presents the other side of the coin—a case where the lessor and lessee had provided in a pooling agreement that production on land within the unit, even if on lessor's land, would not validate the lease as to lands outside the unit. The court gave effect to the clause.

However, at least one case has refused to give effect to the intention of the parties as expressed in their lease. In *Smith v. Carter Oil Co.*[35] the parties agreed that the lessee should have the right to pool any of the leased land if it were necessary to form a drilling unit, or to conform to spacing orders; however, the lease was to be validated thereby only as to the lands included in the unit. A part of the leased lands was included in a unit formed by order of the Conservation Department. After expiration of the primary term, lessor brought suit to cancel the lease as to lands not included in the unit. It was held that since the lands were force-pooled, and not pooled under the lease, the clause had no effect; the lease was validated as to all lands.

2. Forced Pooling Cases

It would seem that the question of validation of the lease should be decided by construing the terms of the applicable statute or order in a compulsory pooling situation, and yet it would seem that more often the courts make the decision on policy grounds. These cases therefore will be discussed below, under that heading.

B. *Good Faith*

An excellent discussion of this factor will be found in a law review article, under the heading, "Duty of Fair Dealing."[36] It is the authors' thesis that there is slowly developing a duty of fair dealing between lessor and lessee:

> It is not certain whether the so-called "duty of fair dealing" is merely an application of the equitable doctrines of unjust enrichment or is more extensive in scope. It is too early to define the nature of the restrictions on the lessee's authority in such terms as "good faith," "fiduciary duty," "standard of a reasonably prudent operator having in mind the interest of both lessor and lessee," or the rules governing "waste" by a concurrent owner. In any event, it is certain that the authority given a lessee by a pooling clause is somewhat circumscribed despite the broad, unequivocal language of the clause.[37]

A reference to some recent cases will illustrate the point.

In *Gregg v. Harper-Turner Oil Co.*[38] the lessor had leased 160 acres to the defendant lessee. A producer was brought in on this land in 1943. In 1947, after repeated demands by the lessor, another well was completed, but abandoned as non-commercial. In 1948 the

33 Cf. Hill v. Stanolind Oil & Gas Co., 119 Colo. 477, 205 P.2d 643 (1949), noted in text at note 54 *infra*.
34 217 Miss. 636, 64 So. 2d 733 (1953).
35 104 F. Supp. 463 (W.D. La. 1952).
36 Williams & Meyers, *supra* note 8, at 439.
37 *Id.* at 444. (Footnotes omitted.) See also Meyers, *The Implied Covenant of Further Exploration*, 34 Texas L. Rev. 553 (1956).
38 199 F.2d 1 (10th Cir. 1952), 32 Texas L. Rev. 133 (1953).

state Corporation Commission, at the request of the lessee, unitized forty acres of the 160, which forty contained the producing well. The other 120 were not pooled. The rest of the land in the unit thus formed was owned by defendant lessee. At the expiration of the primary term in 1949, the plaintiff asked cancellation of the lease on the 120 acres not unitized, on the ground of failure to develop.

The court decreed a conditional forfeiture, dependent on lessee's commencing drilling within ninety days. In the course of the opinion, the court pointed out that it was in defendant's interest not to develop because its wells were probably draining plaintiff's lands, that defendant testified through its officers that it intended to do nothing about development until offset wells were required by someone else drilling, that the position of other producing wells indicated that there was probably oil on the land, and that plaintiff's royalties were substantially reduced by unitization, which was instigated by the defendant.

Wilcox v. Shell Oil Co.[39] illustrates how strictly a lease may be construed by a court in order to promote what the court feels would be fair dealing. Drilling units for certain sands had been established by commission order in this case, one unit of which included land of the plaintiff. The oil company brought in a producing well in a different sand in the unit, not on plaintiff's land, one month before the annual delay rental was due. Rather than start a new well on plaintiff's land or pay the $2,750 delay rental, the company exercised an option in the lease to pool plaintiff's land with the producing land. The court held that since the production was had from sands other than those covered by the commission order, so far as that order was concerned this was a dry hole. The lease clause provided that production from a well "completed to production on the unit" would validate the lease. The court said that this well was not "completed to production" on the pooling unit, because it was already producing when the unit was formed. Therefore, there were neither operations nor production on the lease on the delay rental date, and since the rental was not paid, the lease terminated.

The line may sometimes be difficult to draw, however, between good business and conservation practice, and unfair dealing. In *Boone v. Kerr-McGee Oil Industries*[40] the lessee exercised a power in the lease to pool the land with other acreage, just a few months before the expiration of the primary term. The land was pooled with other land already producing, so as to save the lease. The court held in this case that it was done in good faith, not only to save the lease but to effect proper development and conservation of the whole pool. In the course of the opinion, the court said:

> Had this pooling arrangement been effected when two or three years of the primary term of appellant's leases remained, there could be no question with respect to the correctness of the decision of Kerr-McGee to produce the entire acreage from this one well and to pay to each royalty holder his proportionate share of the production. The mere fact that only a few months of the primary term remained does not change the basic problem with which Kerr-McGee

39 226 La. 417, 76 So. 2d 416 (1954).
40 217 F.2d 63 (10th Cir. 1954).

was faced and does not make arbitrary a decision which based upon a consideration of relevant factors, was proper.[41]

It is interesting to note here that the action was brought on the ground of lack of good faith. Although it denies the relief sought, the court says, "Where discretion is lodged in one of two parties to a contract or a transaction, such discretion must, of course, be exercised in good faith. . . . All the authorities are to this effect."[42]

POLICY CONSIDERATIONS

Two lines of decisions have developed in the forced-pooling cases, seemingly without regard to the terms of the statutes under which the lands are pooled. The first line is typified by *Hunter Co. v. Shell Oil Co.*[43] and *Le Blanc v. Danciger Oil & Refining Co.*[44] In the *Hunter Co.* case, the plaintiff lessor sued to cancel an oil and gas lease as to lands not included in a forced unit, after the expiration of the primary term. A producing well had been brought in on the unit, but not on plaintiff's land, within the primary term. It was held that production anywhere within the unit would validate the lease as to all lands in the lease. The ground of the decision is that the lease is not divisible, and that the plaintiff has an adequate remedy at law if the lessee fails to adequately develop the lands outside the unit.

The *Le Blanc* case was a similar fact situation, with the plaintiff raising constitutional questions as to validating the lease on lands outside the unit. The court reaffirms its stand in *Hunter Co.* that the lease is indivisible, and holds that the pooling order is not intended to affect lands outside the unit—but that all contracts of lease affecting minerals are subject to the police power anyway—in reply to the constitutional objections.

The second line of decision is illustrated by *Texas Gulf Producing Co. v. Griffith.*[45] In this case it was held that a producing well on a unit, not the lessor's land, would not extend the lease under the "thereafter" clause as to lands outside the unit. The reason for the holding is that otherwise the lessor would be deprived of property without due process of law. The court also says that this case was not contemplated in the statute, and that the legislature cer-

41 *Id.* at 65.
42 *Ibid.*
43 211 La. 893, 31 So. 2d 10 (1947).
44 218 La. 463, 49 So. 2d 855 (1950).
45 218 Miss. 109, 65 So. 2d 447 (1953).

tainly would not intend to extend the lease to lands outside the unit.

Assuming, then, that the language in a statute does not force a conclusion either way, what should be the proper decision? Two authorities in the oil and gas field have taken the position that the *Griffith* case is the proper approach.[46] And it is recognized that validating the lease as to all lands may in some cases be used to work inequities. Especially is this true in a jurisdiction which would follow *Smith v. Carter Oil Co.*[47] and refuse to recognize lease provisions specifically relating to pooling.

On the other hand, the lessee would probably have a large investment already made in the pooling unit before this question would arise; it would seem inequitable to force him to drill on lands outside the unit solely to keep his lease, particularly if he has been developing the entire pool. It should be recognized that developing an entire reservoir may be advantageous to lessors as well as to the lessee from a business viewpoint. For example, it is not inconceivable that a single lessee having control of the entire reservoir may be able to command a better price for the product of the wells, with consequent benefit to both lessors and lessee. Further, the question of good conservation practices would come into the picture here; it may be absolutely wasteful of natural resources to force development in such a manner,[48] especially in view of the fact that a single lessee in control of an entire reservoir can, and probably would want to, apply the most effective conservation measures. He "probably would want to," simply because it is to his economic advantage to obtain maximum long-term production; he is not faced with the necessity in this situation of "getting his while the gettin's good." In addition, as the courts have pointed out, the lessor has the protection of the implied covenants if the lessee attempts to use this approach to his advantage—although we must recognize that the time and expense involved in bringing suit to enforce these covenants may be an effective deterrent.

In summary, then, it would seem proper to me to first construe the statute; if legislative intent is discovered, apply it. If the lease contains an applicable provision, this should control. If this is unfruitful, the *Hunter Co.* approach would seem the better reasoned. Tempering that rule by liberally applying the corrective factors of enforced fair dealing and cancellation for breach of the implied covenants, in order to discourage lessees from taking advantage of the *Hunter Co.* rule, would give lessors adequate protection.[49]

It was stated above that it is my belief that statutory language should control in forced pooling cases, just as language used in leases and unitization agreements controls in voluntary pooling cases. This statement should be qualified in one respect: legislatures would seldom, if ever, anticipate a problem such as the one under discussion; therefore, the problem of construing the statute may be hopeless. This may be the factor which has encouraged courts to

46 Williams & Meyers, *supra* note 8, at 447-49; see Comment, 17 La. L. Rev. 433, 441-45 for a criticism of the *Hunter Co.* and *Le Blanc* cases.

47 104 F. Supp. 463 (W.D. La. 1952), discussed in text at note 35 *supra*.

48 3 Summers, Oil & Gas § 516, at 444-46 presents a good argument for the conservation approach, in a discussion of implied covenants.

49 In addition, a new lessor-protective device may be developed, in the form of an implied covenant of further explorations. See Meyers, *supra* note 37.

make decisions based on what are seemingly policy grounds rather than construction-of-statute grounds.

Incidentally, forced pooling statutes have been found constitutional in all jurisdictions in which the question has been raised.[50] The attacks have been from various angles, including deprivation of property without due process of law, taking of private property without compensation, and abrogation of contract rights. The statutes are generally upheld under the police powers, as conservation measures or as adjustments of correlative rights.[51]

THE CLOVIS DECISION

As was stated at the beginning of this comment, it would seem that the court need not have decided the second question presented to them. It is thus possible that the holding could be classed as dictum, and the court could decline to follow the ruling in a future case where the issue may be clearly presented.

In the light of the discussion heretofore presented, it is clear that in my opinion the court arrived at the correct result. However, this they did without consideration, so far as the opinion of the court shows, of the statute involved,[52] or of the problems of construction thereby raised.

The statute under which a forced pooling order would be obtained in Colorado reads as follows:

> When two or more separately owned tracts are embraced within a drilling unit, or when there are separately owned interests in all or a part of the drilling unit, then persons owning such interests may pool their interests for the development and operation of the drilling unit. In the absence of voluntary pooling, the commission, upon the application of any interested person, may enter an order pooling all interests in the drilling unit for the development and operation thereof. . . . (Notice and hearing are provided for.) Operations incident to the drilling of a well upon any portion of a unit covered by a pooling order shall be deemed for all purposes to be the conduct of such operations upon each separately owned tract in the unit by the several owners thereof. That portion of the production allocated or applicable to each tract included in a unit covered by a pooling order shall, when produced, be deemed for all purposes to have been produced from such tract by a well drilled thereon.[53]

The problem of construction here presented would involve the words, "for all purposes," "each . . . tract in the unit" and "each tract included in a unit." It would seem clear that the statute does not *force* a conclusion to the problem presented.

On the one hand, it could be argued that the words "each . . . tract in the unit," or "each tract included in a unit" apply only to those lands included within the confines of the unit—that a pooling

50 Annot., 37 A.L.R.2d 434 (1954); 1959 U. Ill. L.F. 543, 546. For an excellent discussion of the history and present status of the law in various jurisdictions, see 1A Summers, Oil & Gas § 106 (2d perm. ed. 1954). *But cf.* Texas Gulf Producing Co. v. Griffith, 218 Miss. 109, 65 So. 2d 447 (1953).

51 1A Summers, Oil & Gas § 106 (2d perm. ed. 1954).

52 Colo. Rev. Stat. § 100-6-4(6) (Supp. 1957).

53 *Ibid.*

order creates tracts "included in a unit." This interpretation would result in validating leases as to all land inside the unit, but as to none outside (assuming no provision in the lease itself). It would, in effect, say that a pooling order divides the lease.

On the other hand, it is pertinent to ask what the words, "for all purposes" mean, if they do not mean "to validate the lease as to all lands included in the lease." "For all purposes" is strong language, and would seem to lead to the conclusion that the legislature intended thereby to have operations or production save the entire lease. Further, it could be contended that the word "tract" in context is ambiguous, and that if the legislature intended to divide a lease by a pooling order, they could have used words which would make their purpose clear—"each portion of a leasehold estate," or some such wording.

Assuming, then, that the wording of the statute does not force one conclusion, then the decision would properly be made on policy grounds. This, it would seem, is what the court has done in *Clovis*. From the discussion of policy above, it is apparent that my decision on policy grounds would be to validate the entire lease; this decision is reinforced by a consideration of the purpose of the entire statute—conservation is the objective, and conservation would seem to be better served by keeping as much land as possible under lease.

As incidental to this comment, a word of warning might be added for the benefit of lessees confronted with a situation involving forced pooling. In several of the cases noted herein, the lessee had paid delay rentals to the lessor on lands outside the unit during the primary term, while drilling operations or production was being had somewhere within the unit. By so doing, they put off the day of reckoning, but eventually the problem had to be faced—whether the lease had terminated or been validated. The following words of the Supreme Court of Colorado might be heeded:

> Voluntary payment of rental is convincing evidence that rental was believed to be due. . . . "Nothing to the contrary appearing, it may be presumed that men of ordinary . . . business capacity pay their obligations when due, and, assuming that the business of appellant was being conducted upon business principles and according to the usual and ordinary business methods, we may assume that the payments thus made were on account of some liability then due growing out of the transaction covered by the lease." . . .[54]

54 Hill v. Stanolind Oil & Gas Co., 119 Colo. 477, 493, 205 P.2d 643, 651 (1949).