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The Reasonable Necessity Limitation Extends to the Superadjacent Air Space and the Reasonableness of a Surface Use by the Lessee Is to Be Determined by a Consideration of the Circumstances of Both the Mineral Lessee and the Owner of the Surface Estate, But the Issue Is Not a Question of Inconvenience to the Surface Owner.

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OIL AND GAS—THE REASONABLE NECESSITY LIMITATION EXTENDS TO THE SUPERADJACENT AIR SPACE AND THE REASONABLENESS OF A SURFACE USE BY THE LESSEE IS TO BE DETERMINED BY A CONSIDERATION OF THE CIRCUMSTANCES OF BOTH THE MINERAL LESSEE AND THE OWNER OF THE SURFACE ESTATE, BUT THE ISSUE IS NOT A QUESTION OF INCONVENIENCE TO THE SURFACE OWNER. *Getty Oil Company v. Jones*, 14 Tex. Sup. Ct. J. 372 (May 26, 1971), *opinion on motion for rehearing*, 14 Tex. Sup. Ct. J. 484 (July 28, 1971).

Plaintiff, surface owner of a tract of land, installed an automatic irrigation system which consisted of pipe supported at a height of seven feet above the ground by a series of steel towers which rotated around a pivot point. Defendant oil and gas lessee had previously installed several wells and all contained some type of pumping unit. Defendant installed pumping units in two additional wells located upon this land. Each pumping unit exceeded seven feet in height at the top of its upstroke thereby interfering with plaintiff's irrigation system.[1] Plaintiff contended that the use of the vertical air space was unreasonable under the circumstances. Plaintiff alleged that there were reasonable alternatives available to the defendant as to the type of pumping units to be used and that this fact could properly be considered in determining whether defendant's use of the surface was reasonably necessary. Defendant argued that it had a right to exclusive use of the superadjacent air space above the limited surface area occupied by the pumps and that only the lateral surface of the land should be subject to the established rule of reasonable necessity. Defendant further contended that its action was reasonable in accomplishing the purposes of the oil and gas lease, thereby giving it an absolute right to use the surface and the air above. The issue presented to the supreme court was whether evidence may be entertained to show the effect of the defendant's manner of surface use upon the use of the surface by plaintiff, together with the nature of alternatives available to defendant Getty in resolving the issue of what was reasonably necessary. The trial court granted defendant Getty's motion of judgment non obstante veredicto on the ground there was no evidence that Getty used more lateral surface than reasonably necessary. The San Antonio Court of Civil Appeals[2] held that vertical as well as lateral space was restricted

1 Getty Oil Company v. Jones, 14 Tex. Sup. Ct. J. 372, 373 (May 26, 1971). Plaintiff's irrigation system could negotiate most obstacles less than seven feet in height. There were six of these pivot points located throughout plaintiff's tract. If the wells had been located outside the circumference of the closest pivot point, no interference would have occurred. Getty's wells were located within the circumference of the pivot points, however; thus, the circular movement of the irrigation system was prevented from operating when Getty's pumping units were made to exceed seven feet in height.

2 Jones v. Getty Oil Company, 458 S.W.2d 93 (Tex. Civ. App.—San Antonio 1970), *aff'd* 14 Tex. Sup. Ct. J. 372 (May 26, 1971).

to that which is reasonably necessary. The court remanded the case, however, holding that the trial court had erroneously instructed the jury. Held—*Affirmed.* The "reasonable necessity" limitation extends to the superadjacent air space and the reasonableness of a surface use by the lessee is to be determined by a consideration of the circumstances of both the mineral lessee and the owner of the surface estate, but the issue is not a question of inconvenience to the surface owner.

Tort liability results from the breach of a duty and the relationship of the parties must be examined in order to define the nature of the duty to be observed.[3] When damage occurs upon or to the premises leased for oil and gas purposes, a general principle employed by the courts as a starting point to determine liability is that the mineral lease creates and vests in the lessee the dominant estate in the surface of the land for the purposes of the lease.[4]

Courts look to the law of implied easements to determine the oil and gas lessee's rights when there occurs a conflict between him and the surface owner as to a surface use.[5] The owner of the mineral estate acquires a mineral easement, or the right, which is necessary for his enjoyment of the mineral estate, to use the surface of the land.[6] The reason for the existence of the rule granting an implied easement to the oil and gas lessee is that if it were not for the implied easement the lessee's right to produce oil and gas would, in actuality, be no right at all and would be worth little.[7]

The extent of the easement in the surface estate which the mineral lessee acquires depends upon the purpose of the mineral grant.[8] The intention of the parties is the deciding factor in determining the scope of the easement. In determining the intention of the parties, the purpose or purposes of the grant and its language must be considered along with the condition and situation of the parties and the

3 Keeton and Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEXAS L. REV. 1 (1956); 43 TEX. JUR. 2d *Oil and Gas* § 561 (1963).

4 Warren Petroleum Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410 (1954). *See also* Keeton and Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEXAS L. REV. 1, 2 (1956). The principal case uses this as its starting point, also. Getty Oil Company v. Jones, 14 Tex. Sup. Ct. J. 372 (May 26, 1971). Sometimes the rule is stated conversely, i.e., "the surface estate is servient to the mineral estate for the purposes of the mineral grant." Currey v. Ingram, 397 S.W.2d 484, 486 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.).

5 Comment, *Land Uses Permitted an Oil and Gas Leasee*, 37 TEXAS L. REV. 889 (1959).

6 Empire Gas & Fuel Co. v. State, 121 Tex. 138, 47 S.W.2d 265 (1932). *See also* Browder, *The Dominant Oil and Gas Estate—Master or Servant of the Servient Estate*, 17 SW. L.J. 25 (1963).

7 Harris v. Currie, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943).

8 Placid Oil Co. v. Lee, 243 S.W.2d 860 (Tex. Civ. App.—Eastland 1951, no writ). *See also* Simmons, *Recent Interpretations of Oil and Gas Lease Provisions*, 6 BAYLOR L. REV. 291 (1954). An example of the lessee's right which is implied so far as necessary to a full enjoyment of the grant made is the right of ingress and egress and the erection of structures on the land for purposes of drilling and other operations. *See* Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S.W. 290 (1923); Texas Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717 (1915).

nature of the subject matter. The above particulars can be summarized by the broad statement that the surface easement whether it be express or implied[9] extends to whatever may be reasonably necessary to the proper enjoyment of the mineral estate.[10] The mineral lessee has no right to use the surface where such use is unnecessary or done in a negligent manner.[11] But the lessee is permitted to occupy as much space and do such damage as is reasonably necessary to conduct the operations permitted by the lease.[12] No duty to restore the surface is implied after a reasonable use.[13] Thus, in the absence of lease provisions to the contrary, damage done by the mineral lessee to the surface estate are *damnum absque injuria* if they are reasonable, not negligent and incidental to his development of the leased premises.[14]

There is no precise rule which determines the extent of the surface which may be used by the mineral lessee. The determination of whether a particular use is reasonable or not is a question of fact for the jury once the trial court determines that reasonable minds might differ about the particular conduct in issue.[15]

Although it is generally recognized that a mineral lessee has an implied easement to use as much of the surface estate as is reasonably necessary, this implication may be negatived by the lease itself and the lease governs in each case.[16] Most leases include in the granting clause some general statement of the mineral lessee's rights which may be exercised in developing the leased premises and the problem then be-

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9 Humble Oil & Refining Company v. Williams, 420 S.W.2d 133 (Tex. Sup. 1967); Warren Petroleum Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410, 412 (1954); Finder v. Stanford, 351 S.W.2d 289, 292 (Tex. Civ. App.—Houston 1961, no writ).

10 Carroll v. Roger Lacy, Inc., 402 S.W.2d 307, 316 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.); Johnson v. Back, 378 S.W.2d 723, 726 (Tex. Civ. App.—Amarillo 1964, no writ).

11 Brown v. Lundell, 162 Tex. 84, 86, 344 S.W.2d 863, 865 (1961); Texaco Inc. v. Joffrion, 363 S.W.2d 827, 831 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.).

12 Keeton and Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEXAS L. REV. 1 (1956). Generally, it is immaterial whether the damage was accidentally or intentionally caused. *See generally* Mid-Texas Petroleum Co. v. Colcord, 235 S.W. 710 (Tex. Civ. App.—Fort Worth 1921, writ ref'd n.r.e.). Examples of the lessee's rights in the surface include the right to drill where he pleases, governed by reasonableness, Gulf Oil Corporation v. Walton, 317 S.W.2d 260, 262 (Tex. Civ. App.—El Paso 1958, no writ), and build any structures necessary to his operations. Joyner v. Dearing & Sons, 112 S.W.2d 1109, 1111 (Tex. Civ. App.—El Paso 1937, no writ).

13 Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362 (1957).

14 *See* Lambert, *Surface Rights of the Oil and Gas Lessee*, 11 OKLA. L. REV. 373, 381 (1958).

15 Moore v. Decker, 220 S.W. 773 (Tex. Comm'n App. 1920, opinion adopted); Joyner v. Dearing & Sons, 112 S.W.2d 1109 (Tex. Civ. App.—El Paso 1937, no writ).

16 Freeport Sulphur Co. v. American Sulphur Royalty Co. of Texas, 117 Tex. 439, 6 S.W.2d 1039 (1928); Texaco, Inc. v. Faris, 413 S.W.2d 147 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.); Atlantic Refining Co. v. Bright & Schiff, 321 S.W.2d 167 (Tex. Civ. App. —San Antonio 1959, writ ref'd n.r.e.); 43 TEX. JUR. 2d *Oil and Gas* § 562 (1963); Browder, *The Dominant Oil and Gas Estate—Master or Servant of the Servient Estate*, 17 SW. L.J. 25 (1963); Keeton and Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEXAS L. REV. 1 (1956); Comment, *Land Uses Permitted an Oil and Gas Lessee*, 37 TEXAS L. REV. 889 (1959).

comes one of determining whether the use attempted is specifically allowed by the lease or is reasonably necessary to effectuate the purposes thereof.[17] Express lease provisions can broaden or limit the implied rights of the lessee.[18] The effect of the lease upon the respective rights of the parties is to determine the extent of the mineral lessee's implied easement. Consideration should be given to the terms contained in the lease,[19] the purpose or purposes of the grant,[20] and the relative condition of the parties when an action is sought to be enjoined.[21] The most important element in the case is to determine whether the lease itself provides for the particular act or use in question.[22]

The "due regard" concept is also involved with the dominant-servient relationship and the rule of reasonable necessity. Although it is said that the lessee's estate is the dominant estate, most courts add that the rights of the mineral lessee in the use of the surface must be exercised with due regard for the rights of the owner of the surface estate.[23] The "due regard" concept is frequently mentioned by the courts, but it is infrequently observed.[24]

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17 *See* 4 SUMMERS, OIL AND GAS § 652 (1962); Lambert, *Surface Rights of the Oil and Gas Lessee*, 11 OKLA. L. REV. 373 (1958).

18 Express lease provisions usually enlarge upon the otherwise implied rights of the oil and gas lessee. Keeton and Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEXAS L. REV. 1 (1956).

19 Texaco, Inc. v. Faris, 413 S.W.2d 147, 149 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.).

20 Brown v. Lundell, 162 Tex. 84, 86, 344 S.W.2d 863, 866 (1961); Warren Petroleum Corporation v. Monzingo, 157 Tex. 479, 481, 304 S.W.2d 362, 363 (1957).

21 *Cf.* Robinson Drilling Co. v. Moses, 256 S.W.2d 650 (Tex. Civ. App.—Eastland 1953, no writ); Joyner v. Dearing & Sons, 112 S.W.2d 1109 (Tex. Civ. App.—El Paso 1937, no writ).

22 The importance of determining whether the use is granted by the lease or not is pointed out by the following quotation: "The question of reasonableness of the use by the lessor is not involved where the lease contract grants that same use to the lessee. A lessor cannot grant the right to use the premises for a specific purpose, and then ask the courts to authorize him to reasonably use the premises for the same purpose." United North & South Oil Co. v. Mercer, 286 S.W. 652, 656 (Tex. Civ. App.—Austin 1926, no writ). In Justice McGee's own words: "This case is simple. Getty claims the right to place pumping units on the top of its well sites to a height necessary to effectuate the purposes of its lease . . . . By the terms of the lease, Getty has the right to utilize the air space to a height above its well sites as is reasonably necessary to effectuate the purposes of the oil and gas lease." Getty Oil Company v. Jones, 14 Tex. Sup. Ct. J. 372, 377 (May 26, 1971). The point the dissent makes is that the court is rewriting the oil and gas lease which was of record when Jones purchased the property, thereby deciding contrary to the intention of the original parties. *Id.* at 378.

The majority states: "The oil and gas lease grants Getty the land 'for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipelines, building roads, tanks, power stations, telephone lines, houses for its employees, and other structures thereon to produce, save, take care of, treat, transport, and own said products.' The lease obligates the lesee [sic] to bury all pipe lines below ordinary plow depth when required by the lessor. The lease contains no specific provision concerning the vertical usage of the land." *Id.* at 373.

The dissent attacks this by pointing out that the lease here involved grants to the lessee ". . . any and all lands or rights and interests in land owned or claimed by lessor adjacent or contiguous to the land above described." Thus, the lease deals expressly with the question of the location of Getty's pumping units. *Id.* at 376.

23 Warren Petroleum Corporation v. Martin, 153 Tex. 465, 469, 271 S.W.2d 410, 413

The supreme court in the instant case rejected the mineral lessee's principal contention that it had a right to exclusive use of the superadjacent air space above the limited surface area occupied by the pumps and that only the lateral surface of the land should be subject to the established rule of reasonably necessary surface usage.[25] Following their reasoning in *Brown v. Lundell*,[26] the majority stated: "We now hold explicitly that the reasonably necessary limitation extends to the superadjacent air space as well as to the lateral surface and subsurface of the land."[27] In *Brown*, the court held the mineral lessee's liability for negligently and unnecessarily damaging the surface estate was extended to include the subsurface. This decision, it is reasoned, "implicitly recognized" that there are vertical as well as lateral boundaries to the use of the surface estate by the oil and gas lessee.[28] The implication stems from the long-recognized rule that ownership of real property includes not only the surface, but also that which lies beneath and above the surface.[29]

The court in *Getty* sets out the proper test to be applied in determining whether the owner of the surface estate should have the right to an accommodation in his favor when conflicting surface uses occur. The test is whether, under all of the circumstances, the use of the surface by the mineral lessee is reasonably necessary.[30] This statement was in response to an instruction by the trial court which erroneously

(1954); Currey v. Ingram, 397 S.W.2d 484, 486 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.); Humble Oil & Refining Co. v. L. & G. Oil Co., 259 S.W.2d 933, 938 (Tex. Civ. App. —Austin 1953, writ ref'd n.r.e.); Gulf Oil Corp. v. Walton, 317 S.W.2d 260, 262 (Tex. Civ. App.—El Paso 1958, no writ); Miller v. Crown Central Petroleum Corporation, 309 S.W.2d 876, 877 (Tex. Civ. App.—Eastland 1958, no writ).

24 In connection with the due regard concept and the principal case, there is authority that the lessee should avoid using the premises in such a way as to injure things on the surface such as crops. *Cf.* Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S.W. 290 (1923); Currey v. Ingram, 397 S.W.2d 484 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.). The due regard concept raises the question of where lies the burden of proof. The position of the RESTATEMENT OF TORTS is that one who asserts that he is not liable because of the consent of the owner has the burden of proving this consent to the conduct committed. Therefore there is some logic in placing the burden of proof upon the lessee to prove a reasonable necessity and the Oklahoma Supreme Court has so held in, at least, one case. This is the minority position, however. *See generally* Keeton and Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEXAS L. REV. 1 (1956). *Contra*, Humble Oil & Refining Company v. Williams, 420 S.W.2d 123, 134 (Tex. Sup. 1967); Robinson Drilling Co. v. Moses, 256 S.W.2d 650, 651 (Tex. Civ. App.—Eastland 1953, no writ); Keeton and Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEXAS L. REV. 1 (1956); *cf.* Warren Petroleum Corporation v. Martin, 153 Tex. 465, 271 S.W.2d 410 (1954). Thus, Texas along with the majority has applied the general rule that, in order to recover from the mineral lessee for damage done to the surface estate, the surface owner has the burden of pleading and proving either specific acts of negligence or that more land was used than was reasonably necessary.

25 Getty Oil Company v. Jones, 14 Tex. Sup. Ct. J. 372, 374 (May 26, 1971).

26 162 Tex. 84, 344 S.W.2d 863 (1961).

27 Getty Oil Company v. Jones, 14 Tex. Sup. Ct. J. 372, 374 (May 26, 1971).

28 *Id.*

29 United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946); Getty Oil Company v. Jones, 14 Tex. Sup. Ct. J. 372, 374 (May 26, 1971) (cases cited therein).

30 Getty Oil Company v. Jones, 14 Tex. Sup. Ct. J. 372, 375 (May 26, 1971).

called for a weighing of harm or inconvenience to Jones, the surface owner, against the considerations pertaining to Getty, the mineral lessee.[31] The court applied the test to the facts in the principal case by allowing Jones to show that Getty's use of the surface was unreasonable in that reasonable alternatives were available to him. Similarly, it was shown that alternatives were not available to Jones which were reasonable under all the circumstances. Therefore, the court held that Getty should be enjoined from his present use in favor of one of the reasonable alternatives available to him which would not interfere and preclude Jones' surface use.

The "due regard" concept was considered in *Getty* as a principle which establishes the idea of an accommodation of conflicting interests under appropriate circumstances. The concept was applied as follows: ". . . 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 rule of reasonable usage of the surface may require the adoption of an alternative by the lessee."[32] It may be argued logically that the reasonable necessity rule as applied to the *lessee*, and the due regard concept which involves a consideration of the *surface owner's* position are diametrically opposed. The lessee's liability is based upon an unreasonable usage or a negligent one. The "due regard" concept may mean nothing more than a restatement of this well-established rule. If this reasoning is followed, a consideration of the *surface owner's* position or usage is not involved. But, it may also mean that the accommodation element between the parties is the decisive factor and not the rule of negligence or unreasonableness as applied only to the *mineral lessee*. The dissenting opinion seems to recognize this contradiction when it points out that Jones does not charge Getty with negligence nor does Jones contend that Getty is using more surface than necessary. Thus, the "due regard" aspect of *Getty* might be most important when applied in the future because of a heretofore unrecognized consideration of the surface owner's position or usage.

The opinion on motion for rehearing[33] makes clear the court's position that the reasonableness of a surface use by the lessee is to be determined by a consideration of the circumstances of both the mineral lessee and the surface owner. This is a recognition and approval of the "due regard" concept in a manner that far exceeds the mere lip service paid to the concept in the past. It is also pointed out that "the issue is (not) a question of inconvenience to the surface owner."[34]

31 *Id.* at 375.
32 *Id.* at 374.
33 Getty Oil Company v. Jones, 14 Tex. Sup. Ct. J. 484 (July 28, 1971).
34 *Id.* at 484.