Oil and Gas Protection Leases

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ing standpoints: (1) it follows the comparatively clearly defined rules as to what evidence is admissible on a “not guilty” trial, (2) it offers an incentive to the defendant to plead guilty where there is little or no question of his guilt, thus avoiding the necessity of a trial to prove his guilt and the always present possibility of a “miscarriage of justice.” On the other hand, the Dalhover rule is likely to result in a plea of not guilty in every instance in which the defendant has a criminal record.\textsuperscript{14}

In the ordinary criminal case, after a “guilty” verdict has been found by a jury or after a “guilty” plea by defendant, the trial judge has almost unlimited discretion in obtaining “outside” evidence and information for the purpose of determining the sentence to be imposed.\textsuperscript{15} The role of the jury in setting the punishment for first degree murder, following a conviction or a plea of guilty, is analogous. On the basis of this analogy the Dalhover rule should be followed. Putting it another way, our Legislature has simply chosen to confer upon a jury, in case of a guilty plea to a first degree murder charge, the same discretion (within limits) ordinarily possessed by a trial judge in passing sentence.

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OIL AND GAS PROTECTION LEASES

The modern practice within oil companies is to examine with great care the title to lands upon which they hold leases. The reason for such concern is the improbable but possible chance that the mineral reserves under the lands will prove to be of unusually high economic value. Because great care is exercised in examining mineral titles, many defects of a technical nature are uncovered, which defects must of course be corrected or assumed as a business risk. In the past the usual method followed to cure title defects has been to require a quitclaim of the questionable interest in favor of the lessor. However, this approach is no longer realistic since the public has over the years become wary of quitclaim deeds. The average individual does not wish to alienate unknown but possible interests which he might hold. As an alternative, the protection lease has been developed.

A protection lease is simply a “quitclaim lease.” In general it provides that the owner of a questionable interest leases whatever interest he has, if any, to the lessee, but the lessee is not obligated to recognize any interest

\textsuperscript{14} The Dalhover case cited People v. Popescue, 345 Ill. 142, 177 N.E. 739, 77 A.L.R. 1199 (1931) to support admitting testimony of other crimes. The defense attempted to distinguish this case on the ground that it was heard by a judge, and not a jury. This distinction was refused on the ground that even if the jury weren’t capable of discriminating and applying evidence as a judge, which this court refused to concede, the court stood by to cure any defects, by granting a rehearing, if it thought there had been a lack of discrimination or misapplication of the evidence.

\textsuperscript{15} Note, Judicial Discretion in Imposing Sentence, 4 Wyo. L. J. 209 (1950).
in such lessor until the interest is proved before a court to the satisfaction of the lessee. The form of a protection lease is in the main that of an ordinary oil and gas lease. But there is included a clause similar to the following, which combines a judicial determination provision with a lesser interest provision:

Lessor agrees that no royalties, or rentals to defer commencement of drilling operations, shall be paid or delivered hereunder until lessor's interest in the land above described has been finally determined by a court of competent jurisdiction. In the event that it is determined that lessor owns a lesser interest in the above described land than the entire and undivided fee simple estate therein, or no interest therein, then the royalties and delay rentals herein provided for shall be paid to lessor only in the proportion which his interest, if any, bears to the whole and undivided fee.

"Leasing" instead of "buying" a questionable interest may appear to be a convenient method of curing title defects. However, the procedure appears more doubtful upon application of the age-old landlord-tenant doctrine which provides that a tenant in undisturbed possession of the demised premises is estopped to deny his landlord's title. This doctrine is recognized in Wyoming. As a consequence, it has been suggested that an oil and gas lessee, who does take a second lease from an adverse claimant, automatically surrenders all of his rights under the original lease. Accordingly, the prudent attorney will need to concern himself with the possibility that this doctrine is applicable to oil and gas protection leases.

The leading cases dealing with this problem are *Nabors Oil and Gas Co. v. Louisiana Oil Refining Co.* decided by the Louisiana Supreme Court in 1922, and *Shell Oil Co. v. Howth* decided by the Texas Supreme Court in 1942. In the *Nabors* case the lessee secured a second lease from an adverse claimant to its lessor because lessee regarded its lessor's title as seriously, if not completely, defective. Thereupon the lessor brought an action to annul the lease and put the lessee out of possession. The Louisiana Court first held in favor of the lessor on the grounds that the lessee had denied the title of its lessor. However, on re-hearing, the Court reversed itself and rendered the following holding, which has found acceptance in several subsequent cases:

3. Warfield Natural Gas Co. v. Ward, 286 Ky. 73, 149 S.W.2d 705 (1940). The Court said in a dictum that the acceptance of a second lease from an adverse claimant constituted an abandonment of all rights under the first lease. However, the cases cited as authority for the dictum involved second leases taken from the same lessor. Therefore, it may be possible to distinguish the authority for this dictum from the problem presented by a protection lease.
4. The doctrine that a lessee may not dispute his landlord's title has no application to situations in which quitclaim deeds are secured to remedy defects in mineral titles. The reason is that such quitclaims run in favor of the lessor, and thus the lessee does not dispute his landlord's title, but rather he strengthens such title.
5. 151 La. 361, 91 So. 765 (1922).
6. 138 Tex. 357, 159 S.W.2d 483 (1942).
"... the doctrine that an ordinary lessee, as of a house or farm, cannot dispute the title of his lessor during the term of the lease, has no application to a contract by which a person acquires mineral rights, in the form or name of a contract of lease. Such a contract, in that respect, is more like a sale than an ordinary lease. Surely a purchaser of mineral rights, on discovering that the seller had no title, is at liberty to buy the mineral rights from the one who has the title."

In the Howth case the lessee sought out and secured a second lease from persons whom it felt had some questionable interests adverse to its lessor. The lessor thereupon brought this action to cancel the lease on the grounds that a lessee may not dispute the title of his lessor. The intermediate appellate court held that the lease was canceled. This decision was criticized in a 1940 case comment. Subsequently the Texas Supreme Court reversed the intermediate appellate court and held that a lessee under the provisions of the lesser interest clause may take a second lease from an adverse claimant in order to protect its own title or interest.

The leading case which may be asserted as holding that a second lease from an adverse claimant does violate the duty of a tenant not to dispute his landlord's title is Sabine Lumber Co. v. Broderick. The action was by the lessee against the lessor to recover damages for breach of warranty. The lessee proved that the purchaser of the oil had refused to pay because of the title was defective. The Federal Circuit Court of Appeals held that the lessee could not maintain the action because of the rule that a lessee may not dispute his lessor's title. However, it is possible that this case, together with the line of cases that support it, may be distinguished from the problem created by a protection lease. The distinction is that in the Sabine case, the lessee affirmatively disputed the title of his lessor in that he instituted an action against him. But, in a protection lease case in which a second lease is taken from one whose interest may ripen into a valid claim, the lessee is

7. 91 So. 765, 778 (1922).
8. Shell Petroleum Corp. v. Howth, 133 S.W.2d 253 (1939).
9. 18 Tex. L. Rev. 522 (1940).
10. Shell Oil Co. v. Howth, 138 Tex. 357, 159 S.W.2d 483 (1942); accord, Parker v. Standard Oil Co., 250 S.W.2d 671 (Tex. 1952); Reeves v. Republic Production Co., 177 S.W.2d 1011 (Galveston Civ. App. 1944); Crabtree v. Petroleum Exploration, Inc. 282 Ky. 32, 137 S.W.2d 713 (1940); Hancock Oil Co. v. Independent Distributing Co., 24 Cal.2d 497, 150 P.2d 463 (1944).
11. 88 F.2d 586 (5th Cir. 1937), cert. denied, 302 U.S. 711 (1937). The Court considered the Nabor decisions, note 5 supra, but it then showed that conflict existed in Louisiana as regards the right of an oil and gas lessee to deny the title of his lessor by citing Gulf Refining Co. v. Hayne, 138 La. 555, 70 So. 509 (1915). The Federal Court followed the Hayne rule that an oil and gas lessee may not dispute the title of its lessor because the Louisiana Supreme Court followed this rule the year before in the case of Gulf Refining Co. v. Glassell, 180 La. 190, 171 So. 846 (1936). However, in the Glassell case three out of the seven justices dissented from the decision of the Court not to grant a re-hearing on the question of the right of an oil and gas lessee to dispute the title of his landlord.
merely recognizing the possibility of an interest in someone other than the
lessor, and is not affirmatively disputing the title of his lessor.

It is of significance that both the Louisiana Court and the Texas Court
in deciding the two principal cases\textsuperscript{13} indicated that their findings were
based on the reasoning that an oil and gas lease is more like a sale of realty
than it is like an ordinary lease. Should the Wyoming Supreme Court be
confronted with the problem of a protection lease, it is reasonable to
suppose that they would consider the granting of an oil and gas lease,
which the Court has held constitutes the transfer of a profit,\textsuperscript{14} to be in
the nature of a sale and not in the nature of an ordinary lease. By so
holding, the Court could easily reach a decision in accord with the Nabors
and Howth holdings.

Although the arguments made to date against protection leases have
been principally based on the doctrine that a lessee may not dispute the
title of his landlord, a lessor might also contend that the lessee slanders
his title in taking a protection lease. The typical interest which is secured
by a protection lease is one which has been discovered by an industrious
title examiner. Generally the owner of the questionable interest is not
aware that he may be in a position to assert an adverse claim. Of course,
when the lessee requests a protection lease, the owner of the questionable
defect becomes aware of his position. As a consequence, the lessee has at a
minimum aroused the idea of an adverse interest in the mind of a third
party, but still worse, he may have given birth to a law suit which his
lessor will be compelled to defend.

Notwithstanding the above argument, in the Howth case\textsuperscript{15} the lessor’s
petition, insofar as it sought recovery for slander of title, was held bad on
general demurrer. One of the reasons assigned for this holding was that
the lessee had acted in good faith and had not maliciously asserted any
adverse claim against its lessor. The Wyoming Supreme Court\textsuperscript{16} and
most other courts\textsuperscript{17} have recognized the rule that malice is an essential
element in an action for slander of title. A lessee taking a protection lease
usually has no malicious intent, but is actuated only by the desire to make
secure his leasehold title. Therefore, the essential element in a slander
of title action is missing in the ordinary case involving a protection lease.

Elsewhere the slander of title argument has fared no better. In
Oklahoma the Supreme Court held that an oil and gas lease creates an
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\textsuperscript{13} Nabors Oil and Gas Co. v. Louisiana Oil Refining Co., 151 La. 361, 91 So. 765
(1922); Shell Oil Co. v. Howth, 138 Tex. 357, 159 S.W.2d 483 (1942).
\textsuperscript{14} Boatman v. Andre, 44 Wyo. 352, 12 P.2d 370, 373 (1932); Denver Joint Stock Land
\textsuperscript{15} Shell Oil Co. v. Howth, 138 Tex. 357, 159 S.W.2d 483 (1942).
\textsuperscript{16} Barquin v. Hall Oil Co., 28 Wyo. 164, 182, 202 Pac. 352 (1921), re-hearing denied,
202 Pac. 1107 (1922).
\textsuperscript{17} Continental Supply Co. v. Price, 251 P.2d 553 (Mont. 1952) which held, “Malice is
a necessary ingredient in order to entitle plaintiff to recover for slander of title.
Indeed it has been said that malice is the gist of the action.” Accord, Jarret v. Ross,
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interest in real estate, which interest is sufficient to entitle the lessee to maintain an action to quiet the title to the interests created.\textsuperscript{18} If an oil and gas lessee may maintain a quiet title action, certainly the lessee should be permitted to secure his interest by the less adversary method of purchasing a protection lease. In both Texas\textsuperscript{19} and Louisiana\textsuperscript{20} lessees have been held not liable for slander of title in cases in which they created a question as to their lessor's title while perfecting their leasehold titles prior to the commencement of drilling operations. In view of the holdings in the above cases and of the malice requirement, the ordinary protection lease should present no slander of title problem.

Although the tendency on the part of courts today is to permit protection leases, the following clause is probably desirable in the modern lease as additional assurance that the lessee will be able to take a protection lease should the need arise:

Lessee hereby is given the right to acquire for its own benefit deeds, leases, or assignments covering any interest or claim in the leased premises which lessee or any other party contends is outstanding and is not covered hereby and even though such outstanding interest or claim be invalid or adverse to lessor.

The writer has been unable to find any cases which involve a discussion of a lease provision similar to the one set forth immediately above. However, the combination of such a clause with the fact that only a few modern courts have lent any support to the doctrine that an oil and gas lessee may not dispute the title of his lessor, and the fact that no court has upheld the slander of title attack, should reasonably assure a lessee that he may take a protection lease without impairing his rights under any prior lease or subjecting himself to an action for damages.

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\textsuperscript{18} Franklin v. Margay Oil Corp., 194 Okla. 519, 153 P.2d 486 (1944). The lessee acquired an original lease from the trustees of the estate which owned the leased land, and then lessee acquired a second lease from some of the beneficiaries. The court held that the lessee did not slander the lessor's title by instituting an action to establish and quiet its title to the leasehold interest in the land.

\textsuperscript{19} Craddock v. Humble Oil and Refining Co., 234 S.W.2d 137 (Fort Worth Civ. App. 1950). Lessee surveyed its lease and then submitted the new description to the Railroad Commission as a part of its application for drilling permits. The Court held that such conduct did not constitute slander of the lessor's title.

\textsuperscript{20} Wilson v. California Co., 75 So.2d 224 (La. 1954). Lessee filed instruments necessary for unitization in the county records. The instruments showed certain leased lands to be "Highway" lands. It was held that lessee did not slander the lessor's title by such conduct.