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THE RIGHT OF THE LESSEE TO POOL THE MINERAL INTEREST OF THE LESSOR BEFORE AND AFTER THE EXPIRATION OF THE PRIMARY TERM

In the past generation the development of oil and gas reservoirs has changed from that of uncoordinated individual effort restricted by horizontal property lines to a coordinated system of development which is based upon the particular characteristics of the subterranean structure under development. This coordinated development of an oil or gas reservoir is called a unit operation. The basic reason for this type of development is that it tends to allow the maximum amount of recovery for the minimum expense.

For the most effective unit operation, the developer needs to have complete freedom of movement in order to drill into the most select parts of an underground reservoir .Unfortunately, vertical ownership lines do not usually conform with the irregular shape of an underground oil or gas reservoir. Therefore, the developer must secure permission to conduct a unit operation from all the landowners who own a part of the reservoir. This is often difficult to do because a basic rule of oil and gas law is that the landowner receives a full royalty in the minerals obtained from a hole bottomed on his land. This means that if the landowner consents to having his land included in a unit, he will not derive the full benefit from a well drilled upon his own property, but must share some of the royalty with other landowners in the unit. For this reason, a new body of law has grown up which deals with the rights of parties to conduct and participate in unit operations.

The problem to be dealt with by this article is the question of when the interests of landowners of oil or gas producing lands can be included in a unit operation with the lands of neighboring owners. The interest in question is usually a royalty interest, although a mineral interest could be in issue.[1] Often the landowner's interest is spoken of as being "pooled". This is a term descriptive of the legal consequence which results from a unitization of the properties. For example, when it is said that the interests of landowners included in a unit are "pooled" we mean that each land-

[1] Southland Royalty Co. v. Humble Oil & Refining Co., 151 Tex. 324, 249 S.W.2d 914 (1952).

owner in the unit has a right to share in production from any well in the unit, regardless of the ownership of the tract on which it is actually bottomed. This pooling of interests can take place either by operation of law,[2] or by agreement of the parties, i.e. contract,[3] which takes form as the unitization provision in an oil and gas lease.

Under present consideration is the problem of when, in point of time and condition of development, a developer, hereafter referred to as a lessee, can pool the interests of the mineral owners or lessors. The problem includes the question of formation of production units both during and after the expiration of the primary term as stated in the oil and gas lease. It also includes the question of unitizing both before and after production has been obtained on the established or proposed unit.[4]

The question divides itself into three parts: unitization during the primary term stated in the lease and before production has been obtained upon the lease; during the term but after production has been obtained; and, finally, after the stated primary term has expired, but while the lease is still in effect due to drilling or production on the lease itself or upon a tract of land which is part of a unit in which all or a part of the lease in question is included.

The solution to the problem will be governed by the terms of the contract as evidence of the intent of the parties, lessor and lessee, at the time of the agreement. Therefore, the answer to our problem lies in contract interpretation. However, the plain language of the contract will necessarily be interpreted in accordance with the well established principles of oil and gas law. The basic issue upon which most oil and gas law is based is the question of who is to share in the production from a particular well, and to what extent will they be allowed to share.[5] Before the

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[2] Parker v. Parker, 144 S.W.2d 303 (Tex. Civ. App. 1940) *writ refused;* French v. George, 159 S.W. 2d 566 (Tex. Civ. App. 1942) *writ refused.*

[3] This contract usually takes the form of a so called unitization clause in the oil and gas lease. However, it can take the form of a subsequent agreement, Grimes v. LaGloria Corp., 251 S.W.2d 755 (Tex. Civ. App. 1952).

[4] The problem will be approached from the standpoint of voluntary unitization as distinguished from compulsory unitization. Also, the emphasis will be placed largely upon Texas decisions.

[5] SHANK, PRESENT STATUS OF THE LAW OF CAPTURE, THE SIXTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 258 (Southwestern Legal Foundation 1953).

lessee's right to effect a pooling of interests under a unitization clause of an oil and gas lease can be scrutinized, it will first be necessary to acquaint ourselves with the principles of pooling by operation of law, as well as a few basic principles of oil and gas law.

POOLING OF INTERESTS BY OPERATION OF LAW OR BY AN IMPLIED PROVISION IN THE OIL AND GAS LEASE

Under consideration now is an oil and gas lease which does not contain a unitization provision.[6] In interpreting this contract, the law of capture,[7] the doctrine of non-apportionment,[8] and the incidents of a joint or community lease,[9] must constantly be kept in mind. The courts frequently start an opinion by stating that it is their purpose to construe the contract as written so that it will most nearly reflect the intention of the parties at the time it was executed by them. However, they will proceed to impress upon the words of the parties a heavy gloss of court made law of which it is highly doubtful that many lessors have the slightest knowledge. A large amount of this court-made law will be referred to as "rules of property" and "not to be departed from".[10]

Before further progress can be made it will be necessary to make a short survey of a few of these judicial doctrines.[11]

(a) The Law of Capture[12]

Reduced to its purest form, the law of capture states simply that any person who has the right to drill a well has a right to produce from it as much oil and gas as he can. The rule was announced in such early cases as *Westmoreland & Cambria Natural Gas Company v. DeWitt*[13] and *Barnard v. Monogahela Gas Company*[14] and has been under attack since that time.[15] At the

[6] There is no such thing as a "standard" oil and gas lease, but the lease under consideration will be assumed to have an "unless" clause, and a five-year primary term.

[7] Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 Atl. 801 (Sup. Penn. 1907).

[8] Japhet v. McRae, 276 S.W. 669 (Tex. Comm. App. 1925) *adopted.*

[9] Southland Royalty Co. v. Humble Oil & Refining Co., 151 Tex. 324, 249 S.W.2d 914 (1952).

[10] *In re* Southland, *supra* note 12.

[11] The following analysis is by no means intended to be exhaustive, and the reader is referred to more extensive works upon the subjects in the footnotes.

[12] Shank, *op. cit. supra* note 5, 257.

[13] 130 Pa. 235, 18 Atl. 724 (1889).

[14] 216 Pa. 362, 65 Atl. 801 (1907).

time the rule was announced it was a rule of necessity, the reason behind it being the complete lack of knowledge of the subterranean structures and the true nature of oil and gas. Since the time of its entrance into oil and gas law the reason for the rule has, in fact, largely disappeared, but the rule remains, which is the important point here. The courts have sought to control the harshness of the rule through the doctrine of correlative rights adjustment[17] and the legislatures have done likewise under their inherent police powers for purpose of conservation and adjustment of correlative rights.[18]

Another basic rule that should be kept in mind is the doctrine of ownership in place.[19] That is that the owner of the mineral interest is deemed to own the minerals in place or in the ground until he is divested of such ownership by the law of capture.

(b) The Doctrine of Non-Apportionment[20]

This rule was first announced in the Texas Courts in the case of *Japhet v. McRae*.[21] *A* had given an oil and gas lease on tracts No. 1 and No. 2. Subsequently, while the lease was still in force, *A* sold tract No. 1 to *B*. A producing well was then brought in on tract No. 2. *B* sued for a portion of the royalty. The court held that the entire royalty went to *A*, the man upon whose land the well was located. This case is said to stand for the proposition that royalties will not be apportioned in Texas where an "entirety clause" [22] is not in a common lease. That is, once it is established

[15] However, it is still very much alive, as is evidenced by the latest Supreme Court of Texas decision in Ryan Consolidated Petroleum Corp. v. Pickens, ...S.W.2d........ (Tex. Sup. Ct. on rehearing, 1955).

[16] *In re* Ryan Consolidated, *supra* note 15.

[17] Elif v. Texan Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948); Phillips Petroleum Co. v. Millette, ...Miss.........., 72 So.2d 176 (1954).

[18] The first case establishing the right of a state to do so was Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900).

[19] Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S.W. 290 (1923).

[20] Walker, *Developments in the Law of Oil and Gas in Texas During the War Years — A Resume*, 25 TEX. L. REV. 1, 16 (1946).

[21] Japhet v. McRae, 276 S.W. 669 (Tex. Comm. App. 1925) *adopted.*

[22] "A typical entirety clause reads as follows: 'If the leased premises shall hereafter be owned severally or in separate tracts, the premises nevertheless shall be developed and operated as one lease and all royalties accruing hereunder shall be treated as an entirety and shall be divided among and paid to such separate owners in the proportion that the acreage owned by each such separate owner bears to the entire leased acreage.'" Hardwicke, *Apportionment of Royalty to Separate Tracts: The Entirety Clause and the Community Lease*, 32 TEXAS L. REV. 660 (1954). For a full discussion, Hardwicke, op. *cit. supra.*

that a person has the right to drill, he has the right to all minerals produced, absent an express provision to the contrary. However, it should be kept in mind that in the *Japhet* case the actual situation was not that of a lease signed by both landowners describing their combined tracts. Rather, the situation was one in which a deed conveying part of a leased tract was executed in favor of a grantee who was not a party to the lease contract, and such deed did not make mention of any right to share in mineral production on lands not conveyed in it. Nevertheless, a great number of opinions have cited the *Japhet* case in controversies involving joint and community leases and in controversies over the right to share in production when it is impossible for a landowner to drill himself due to conservation statutes. At the very minimum, we must keep in mind that the doctrine must be eliminated by contract in order that there may be a pooling of interests.

(c) Incidents of a Joint or Community Lease[23]

A joint or community lease is defined as one instrument describing the lands of a number of lessors, which is signed by each of the lessors,[24] or a number of identical leases describing the lands of a number of lessors with each lessor signing only one of the instruments.[25] One would apprehend that if the court reasoned in the *Japhet* case that there must be an express provision before any pooling of lessors' interests could take place, this rule would control as to other similar situations. However, in *Parker v. Parker*[26] it was held that if the landowners sign the same lease, and such lease described their contiguous acreage, the landowners would share prorata[27] in a well located upon the land described in the lease, regardless of whose land it is actually located upon. The court stated, "[t]he lease here in question, by its terms, is a unitized lease as a matter of law."[28]

In *French v. George*,[29] the question was as to who was to share

[23] HOFFMAN, VOLUNTARY POOLING AND UNITIZATION (1954).
[24] Parker v. Parker, 144 S.W.2d 303 (Tex. Civ. App. 1940) *writ refused.*
[25] Thomas v. Ley, 177 Okla. 150, 57 P.2d 1186 (1936).
[26] See note 24 *supra.*
[27] That is, the landowner shares in the royalty in proportion to the number of acres that his land bears to the entire acreage of the community lease.
[28] 144 S.W.2d at 305.
[29] 159 S.W.2d 566 (Tex. Civ. App. 1942) *writ refused.*

in the production from a well when the parties had signed a joint lease. The court held that all the lessors who were a party to a joint lease were to share in the production, regardless of where the well was located on the leased premises. The court further stated that in the absence of an express provision to the contrary, such result must have been intended by the parties. The *Japhet* case was cited to the court, but the court distinguished it upon the basis that, "[i]t is not a question here of the legal rights of the parties in the absence of a contract. It is a question of what they intended by the provision which they inserted in the lease." [30] The court reasons that in *Japhet* there was no contractual relationship between the parties, while here there is a written contract signed by all of the parties to the controversy.

These decisions stand today, and are frequently cited for the proposition that lessors who sign the same instrument, and such instrument describes their combined acreage, will have their royalty interests pooled by operation of law. This means that a lessor, who signs a lease, may in law intend more than is actually spelled out in the contract because a pooling provision will be implied in the lease. The cases indicate to the writer that there exists a certain flexibility in lease interpretation which is in favor of unitization of oil and gas lands.

A recent Texas Supreme Court decision, *Southland Royalty Co. v. Humble Oil & Refining Co.*,[31] sets out by way of dictum a few of the incidents of a joint lease, although it does not purport to be exhaustive:

> It must therefore be held that when the parties executed the lease in 1932 they intended to create a unitized lease with all of the usual incidents and legal consequences thereof.
>
> Some of the legal consequences of a unitized lease as between lessors on the one hand and lessees on the other, in the absence of express agreement to the contrary, are as follows:
>
> (1) the life of the lease is extended as to all included tracts beyond the primary term and for as long as oil, gas or other minerals are produced from any one of the tracts included in the lease;
>
> (2) the commencement of a well on any one of the tracts operates to

[30] *Supra* note 29 at 569.
[31] 151 Tex. 324, 249 S.W.2d 914 (1952).

excuse the payment of delay rentals on all included tracts for the period stated in the lease;

(3) production from a well on any one of the tracts relieves the obligation to pay delay rentals, during production, on all included tracts;

(4) the lessee is relieved of the usual obligation of an implied covenant for reasonable development of each tract separately;

(5) wells may be located without reference to property lines;

(6) the lessee is relieved of the obligation to drill off-set wells on other included tracts to prevent drainage by a well on one or more of such tracts.[32]

With the above doctrines of the law of capture, rule of non-apportionment, and the incidents of a joint lease in mind, we can now proceed to analyze the possible rule as to when a lessee can conduct unit operations upon lands which are held under leases that do not contain unitization provisions.

In accordance with the law of capture, without anything more, the entire royalty interest would go to the owner of the land on which the well is located. The doctrine of non-apportionment tells us that no one, at any time, may be allowed to share in this production without an express provision on the part of the owner. However, if the lessor in question has originally signed a joint lease, by operation of law, his interest will be pooled with those of his co-lessors. Therefore, the life of the lease begins as a unit. The unit was created in its entirety by all the parties before there was any development on any of the lands, and the unit will continue as long as there is drilling or production upon any part of the lease in accordance with the lease.[33]

As to the question of whether or not lands not originally included in the joint lease can be later unitized with all or a part of the lands originally in the joint lease, and thereby increase the size of the unit, the answer would seem to be that they could not be so included without express consent of all the original lessors. This conclusion seems only reasonable because the unit is treated as a single entity for development and production pur-

[32] Southland Royalty Co. v. Humble Oil & Refining Co., *supra* note 31, 249 S.W.2d at 916.

[33] Payment of delay rentals on the entire joint lease will keep the lease in effect during the five-year primary term.

poses and the same situation would exist if there were only one lease and one lessor involved, in which case the lessor's royalty interest could not be pooled without his express consent. The validity of the unitizing effect of a joint lease is not completely above serious challenge,[34] so it would follow that the courts will not extend the effect of a joint lease to include a right on the part of the lessee to further dilute the interest of the lessor without the permission of all the lessors. There is one line of cases that would seem to indicate this result,[35] although they are not directly upon the point.

Pooling of Interests by Express Provision in the Contract

When, in point of time and development, can the lessee pool the royalty interest of the lessor, when the lessee is given the right to do so by an express provision in the contract? The clause which we will assume has been added to the "standard" oil and gas lease is called a "unitization provision". Of course, there is no such thing as a standard "unitization provision," because such a clause in the contract will necessarily be modified to conform with the peculiar size and structure of the land in question and the varying bargaining positions of the parties. For the purpose of this article it will be assumed that the provision allows the lessee to unitize *all or any portion* of the lease with contiguous neighboring tracts in order to form oil or gas producing units of a definitely determined acreage.[36] Further, the provision is assumed to provide that production or drilling on *any part* of the unit so formed shall be considered production or drilling upon all lands included in such unit, and it shall be so considered *for all purposes.* In addition, the lease states that the lessee has the right to form such a unit or units, *at any time.* The royalty from

[34] *In re* Southland Royalty, *supra* note 31, 249 S.W.2d at 916 the court said, "It may be noted here that respondents suggest a re-examination of the Parker and George cases on the theory that the courts should not attribute to lessors jointly executing a general form lease, without more, an intent to pool or unitize their properties; that the language of the general form lease was never intended to effect or to operate as a pooling agreement. This argument is not entirely unappealing. The Texas rule in this respect is not of universal application. . . . On the other hand, the law of the Parker and George cases has now become a rule of property in this state..."

[35] Barnsdall Oil Co. v. Miller, 224 La. 216, 69 So.2d 21 (1953).

[36] Assume 640 acres for a gas producing unit, and 40 acres for an oil producing unit.

the producing wells is shared by the members of the unit in proportion to the number of acres they contribute to the entire unit.

(1) The Power to Pool Before Production

This phase of the question has, in contemplation, the ability of the lessee to form production or drilling units before production has been obtained upon the lease in question.

Naturally, since this is exactly what the lease provides for, it is obvious that such can be done. In addition, since a great number of unitization clauses provide that the lease may be included in one or more units, it is conceivable that portions of the lease could be included in a number of separate production units. Question would seem to arise only when the lessee fails to fulfill the express and implied conditions which are impressed upon him under the lease. For example, the lessee might be sued for damages, on some theory of fraud, where an unusually small amount of his acreage is included in a very large unit. The effect of this would be to give the small contributor to the unit a very small portion of the royalty while at the same time excusing the lessee from paying delay rentals and adequately developing the lessor's remaining land. There are no cases precisely on point, but it is believed that the acts of the lessee would have to be quite shocking since he is doing precisely what the lease states that he has a right to do. (After the stated primary term has expired other factors, to be discussed later, might give rise to an action for cancellation of the unpooled portion.) Also, the lessor might complain that he has been pooled with a worthless tract, but here again, he will find it difficult to tell the court wherein he has been harmed during the stated primary term. An Oklahoma case, *Thomas v. Ley*,[37] says that the pooling must be done within a "reasonable time." A recent Louisiana case, although not completely upon the point, would seem to indicate that the courts of that state will not look with favor upon an "eleventh hour" pooling.[38]

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[37] 177 Okla. 150, 57 P.2d 1186 (1936).
[38] Wilcox v. Shell Oil Company, 226 La. 417, 76 So.2d 416 (1954).

(2) *The Power to Pool After Production but Before the End of the Primary Term*

This issue contemplates two situations. One situation exists where there is a producing well on the lease in question, and the lessee attempts to unitize all or the producing part of the lease with other lands. The next situation arises where an operating unit, including more than one lessor's land, is sought to be changed or redesignated by the lessee so as to include the same number of acres, but different lands than those in the original operating unit.

The Oklahoma court considered the first situation, under modified circumstances,[39] in the case of *Gilham v. Jenkins*.[40] Production had been obtained during the primary term upon the lessors' land in the form of a gas well. World War II was in progress at the time and federal government regulations permitted gas production from units of 160 acres or larger. The lessor's land consisted of only around 80 acres. The lease gave to the lessee the right to form units with the land, and stated that the lease was subject to any state or federal regulations. Under the authority of the right given by the lease, the lessee proceeded to pool the producing property with a neighboring 80-acre tract in order that the gas might be marketed. The lessor brought suit, claiming that the lessee had no right to pool his royalty interest after production had been obtained. The lessor relied heavily upon an earlier decision, *Imes v. Globe Oil & Refining Co.*[41] In its holding the court cited and distinguished the *Imes* case and *Thomas v. Ley*.[42] It went on to say, "a real necessity and purpose existed at the time of the pooling, which was done in good faith to obtain the marketing of the gas from the well on the plaintiff's land and, where the unitization was had, under compulsion, if the gas was to be marketed and benefit obtained by either party." The court further said that from the circumstances of the times, and with an eye to the intent of the parties at the time of execution of the lease, the lessee had a *duty* to act as he did. Possibly, the peculiar circumstances surrounding this litigation should encourage us not

[39] Strict Federal regulations were in effect at that time, due to World War II.
[40] 206 Okla. 440, 244 P.2d 291 (1952).
[41] 184 Okla. 79, 84 P.2d 1106 (1938).
[42] *In re* Imes, *supra* note 41; 177 Okla. 150, 57 P.2d 1186 (1936).

to take all the language in this case too seriously, but when it is compared with decisions in closely related situations, it is clear that the lessee is safe in unitizing the land on which there is already production, provided that he is not attempting to perpetrate a fraud or violate any of his contractual duties to the lessor.

The *Imes* case[43] furnishes an excellent example of a situation where the lessee attempted to go too far in joining additional acreage with a producing unit. In that case, there had been a unit designated, and production had been obtained upon that unit. There was a provision in the lease that allowed the lessee to join other lands in order to form production units, and to do so *at any time*, and *without the consent of the lessors*. The lessee attempted to do so (and before the stated primary term had elapsed). The court said that it would be unfair to allow those who had taken no risk [44] to participate in the benefits of a proven venture. The court further went on to hold that the lessee was acting in bad faith toward the original lessors because the land sought to be joined was of proven worthlessness. A good many of these opinions purport to base their holding upon the good or bad faith of the lessee in doing the acts complained of when the true issue is a question of contract rights. Therefore, in the *Imes* case the actual holding is probably that the lessee does not have a contract right to deliberately diminish the royalty interest of the lessors when there is no benefit to any party to the contract but rather to a group of outsiders who assumed none of the risk of the venture. In a recent federal case, *Boone v. Kerr-McGee Oil Industries*,[45] the court held that the lessee was within his contract right to pool after production had been obtained, and a few months prior to the expiration of the primary term.[46]

Trawick v. Castleberry [47] considers the question of whether a producing portion of a lease which is already entirely included in a unit can be carved out of that unit and placed in a second producing unit. The entire lease upon which a gas producer was located had been unitized. Later, the well became an oil producer,

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[43] *In re* Imes, *supra* note 41.
[44] The court was referring here to the proposed lessors.
[45] 217 F.2d 63 (10th Cir. 1954).
[46] The court stated that the lessee was in "good faith."
[47] ....Okla.........., 275 P.2d 292 (1953).

and the lessee created a new unit which included only a seven acre tract from the 80 acre lease and the producing well was located upon this tract. The lessor filed suit alleging that the lease had expired due to the lessee's failure to diligently develop, and that in any event the lease should be cancelled as to the non-unitized 73 acres due to the fact that the lessee was allowing it to be drained. The court held for the lessee, saying that due to the express provision of the lease, the primary term was extended to the non-unitized as well as to the unitized portion of the lease.[48] The court pointed out, by way of dicta, that the redesignation of the unit is of no consequence in so far as it was done within the primary term.[49]

A Texas case connected with the subject is *Grimes v. LaGloria.*[50] The lessee attempted to create a second unit, excluding a portion of the lessor's land that had been included in the first unit. The court held that the lessee could not vary the lessor's royalty rights as established by the first unit. However, in the unitization agreement signed by the lessor, there was a provision that stated that a certain producing tract, which did not belong to the plaintiff, was to be included in any unit of which the plaintiff's land was made a part. Since this is such an unusual clause, and since the lessee violated it in forming the second unit, the case probably is restricted to its own facts. At any rate, the court purported to hold that the number of acres included in a unit could not be diminished, but the number could be increased by the inclusion of neighboring lands up to the maximum number of acres specified in the lease for the particular producing unit in question.[51]

It is difficult to generalize upon the above cases without a prohibitive amount of qualification. With strict reference to that period stated in the lease to be the primary term, we can conclude that the lessee has the right to form production units, using part or all of the lease in question. The lessee can do this both before and after production has been obtained, provided that he does so within a reasonable time, and that he does not do so in fraud of

[48] The court here had reference to the provision in the lease which stated that production on any part of a unit would be considered production on the lease.

[49] The significance of this statement will be considered later in the comment when the problem of pooling after the expiration of the stated primary term is considered.

[50] 251 S.W.2d 755 (Tex. Civ. App. 1952).

[51] *In re* Grimes, *supra* note 50, at 760.

any rights of the lessor. Likewise, it would seem that he would modify an established unit as to size and shape. In all events, the particular lease in question is the controlling instrument and the lessee's acts cannot be in violation of its express or implied conditions or covenants.

(3) The Power to Pool After the Primary Term

Finally, can the lessee unitize part or all of the lease in question after the primary term?

Before going further, the nature of the unitization provision should be briefly inquired into. There is some controversy as to whether the formation of a unit by the lessee is a conveyance of land, or simply the execution of a contract right which gives to the lessor the right to share in the production of a well located on the unit of which his land is a part. Under Texas law, the pooling clause is considered a cross-conveyance of realty.[52] Possibly it is more logical to reason that a mere contract right to share in the production is all that is actually in issue.[53] Even in jurisdictions where the clause is considered a conveyance, the rule against perpetuities has not as yet been held to have a fatal effect upon such conveyance.[54] A Kansas case affords an excellent example of this.[55] The facts of the case were that the plaintiff owned two tracts of land. The tracts were leased to the defendant, and the instrument contained a unitization agreement of a common form. The defendant-lessee formed one unit, in which was included one of plaintiff-lessor's tracts. Lessee then formed a second unit which included the remaining tract, A producer was brought in on the plaintiff's tract which was included in the second unit, and the plaintiff refused to accept his acreage proportionate share to which he was entitled under the terms of the second unit. Instead, the plaintiff-lessor brought suit for the full royalty. The plaintiff con-

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[52] Miles v. Amerada Petroleum Corp., 241 S.W.2d 822 (Tex. Civ. App. 1950) *error refused n.r.e.*

[53] Phillips Petroleum Company v. Peterson, 218 F.2d 926 (10th Cir. 1954).

[54] For a full discussion of the rule against perpetuities with respect to oil and gas leases, Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests,* 32 TEXAS L. REV. 369 (1954).

See also, Sohio Petroleum Co. v. Jurek, 248 S.W.2d 294 (Tex. Civ. App. 1952); Knight v. Chicago Corporation, 144 Tex. 98, 188 S.W.2d 564 (1945); Leach v. Brown, 251 S.W.2d 553 (Tex. Civ. App. 1952) *writ refused; Boggess v. Milam,* 127 W. Va. 654, 34 S.E.2d 267 (1945).

[55] Kenoyer v. Magnolia Petroleum Co., 173 Kan. 183, 245 P.2d 176 (1952).

tended that the rule against perpetuities was violated by the unitization clause in the lease, and that, therefore, the clause was wholly invalid. The court said:

> The lease does not create any future estates. The rights of the parties thereunder are definitely fixed, and all estates and rights created by it vested immediately upon its execution and delivery. It granted to lessee the right to operate the lands covered by it separately or as a part of a consolidated unit. The royalty provisions fit either operation and provide a formula by which the amount of royalties payable to the lessor is capable of accurate and definite ascertainment. These rights were vested.[56]

Another difficult problem which arises when the unitization provision is considered to be a conveyance of land is that of parties to any litigation.[57] No attempt will be made to go into this any further than to observe the possible difficulty which will result when a title suit is brought that concerns land included in a unit in which there are a large number of royalty and mineral owners.[58]

The *Kenoyer* case [59] raised another question of importance here. The plaintiff contended that due to the indivisible character of an oil and gas lease, the lessee could not place portions of his land in two different units.[60] However, the court held that the placing of the lease into two different production units did not divide the lease. This, of course, is true, because the lease will stand or fall in its entirety regardless of how many units it is included in for production purposes. A late case pointing this out is *Buchanan v. Sinclair Oil & Gas Co.*[61] The issue in that case was whether production on a unit, which included a small portion of the plaintiff's lease, would keep in effect the lease on the non-unitized portion. The court held that under the facts and circumstances of that particular case, such production did perpetuate the entire lease. However, the court limited their holding by the following remarks:

[56] *In re* Kenoyer, *supra* note 55, 245 P.2d at 179. As authority for its holding, the court quoted from 41 AM. JUR., *Perpetuities and Restraints on Alienation*, Sec. 22, 23.

[57] Dedman, *Indispensable Parties in Pooling Cases*, 9 Sw. L. J. 27.

[58] Leach v. Brown, 251 S.W.2d 553 (Tex. Civ. App. 1952) *writ refused.*

[59] Kenoyer v. Magnolia Petroleum Co., 173 Kan. 183, 245 P.2d 176 (1952).

[60] That a lease is indivisible is also the law in Texas, Grimes v. LaGloria, 251 S.W.2d 755 (Tex. Civ. App. 1952).

[61] 218 F.2d 436 (5th Cir. 1955).

> What and all that the district judge determined, and adjudged, all that we hold and adjudge in affirming his judgment, is that, under the undisputed facts, drilling on, and production from, the unit well has kept, and is keeping, the lease in force against the claim that because there is no production from the lands described in lease No. 377, the lease has by its own terms expired or terminated. Nothing in the district judge's holding or judgment, nothing in our affirmance of it, justifies, authorizes, or will permit appellee to hold the unitized portion of the lease against well-founded legal claims, of abandonment or for damages for breach of the implied covenants, or, where there is no other adequate relief, against well-founded claims, for relief in equity.

Thus, the court indicates by way of dicta that in a proper case it might declare a portion of a lease to have been abandoned. However, it should be noted that this has not been done.[62]

By way of summary, we can say that the unitization provision does not violate the rule against perpetuities, whether it be a conveyance or not. Also, the exercising of the unitization provision by including the lessor's land in two or more units does not effect an unlawful division of an oil and gas lease. The *Buchanan* case[63] holds that under the circumstances the lease is kept in effect, at least during the primary term, by the production on a unit which includes part of the lease. The *Trawick* case[64] seems to say that there is a right on the part of the lessee to reform his units, at least during the primary term, regardless of whether production has been obtained on the lease in question. Therefore, if authority can be found for the proposition that the primary term is extended by production *for all purposes,* it would be logical to assume that the lessee in a proper case can unitize beyond the primary term.

[62] That is, there are no cases which have allowed a partial cancellation of a lease. However, in the Buchanan case, 218 F.2d at 441, the court states, "This is not to say, as seems to have been thought in Texas Gulf Producing Co. v. Griffith,... to be the case, that this court and the Supreme Court of Texas, in so holding, have in effect held that 'the production from such unit well' (would) 'keep the lease in force indefinitely as to the leased land without the unit' (and) 'the lessor would be deprived of the right to drill on the leased land without the unit and deprived of any royalties, rentals, or benefits therefrom.' The exact contrary of this has been held in Texas Company v. Davis, 113 Tex. 321, 331, 254 S.W. 304, 255 S.W. 601, . . . and the host of cases following . . . where it has been pointed out (1) estate acquired by . . . lessee . . . is a determinable fee... lost on cessation of use...; (2) . . . estate will not survive abandonment; (3) the lessee . . . remained, subject to . . . development . . . with reasonable diligence; and (4) and (5) breach of implied covenant will not authorize forfeiture . . . a court will, under extraordinary circumstances, entertain an action to cancel the lease in whole or in part."

[63] *Supra* note 61.

[64] Trawick v. Castleberry, ...Okla........, 275 P.2d 292 (1953).

The case of *Scott v. Pure*[65] appears to be very material on this point. A large portion of a lease was unitized during the primary term, and production was obtained upon this unit, although not on the specific tract of land in question. After the stated primary term had expired,[66] the remaining portion of the lease was included in another unit. Scott contended that the lease terminated as to the portion pooled after the primary term due to the fact that there was no production upon that particular tract itself, and that it was not pooled with a producing unit before the expiration of the primary term. (Note that Scott is urging that his lease is divisible.) The court in its holding stated:

> ... where a portion of the whole leased acreage is rightfully unitized production in paying quantities during the primary term of a gas and oil lease, although not from a well on such leased property, maintains the lease in effect as to that part of the leased land which is not included in the unit.[67]

Thus, the court allows the lessee to pool a portion of the land *after* the expiration of the primary term. This was not the sole point of the case, but it appears to be a necessary incident to the holding. The court stated, with regard to the point we are considering:

> The "land covered" by the lease was the entire 317.93 acre tract, "any portion" of which it was agreed might be unitized. . . . To construe this language to mean that only that portion of the acreage actually pooled or unitized would be affected by the production of gas from the unit would be to disregard the phrase "for all purposes" which is contained in the provision, and would effect a reformation of the contract to include an exception which was not placed in the agreement by the parties, and which is not implied by the language used, and moreover, one which is repugnant to the existing contract.[68]

In *Southland Royalty Co. v. Humble Oil & Refining Co.*,[69] after the Texas Supreme Court had enumerated some of the incidences of a joint lease[70] they went on to say:

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[65] 194 F.2d 393 (5th Cir. 1952).
[66] 10-year primary term.
[67] *Supra* note 65 at 395.
[68] See note 65 *supra*.
[69] 151 Tex. 324, 249 S.W.2d 914 (1952).
[70] *Supra* note 69 at 916.

> There is no sound reason to hold that the agreement had the operative effect solely for the purposes heretofore noted; in the absence of express agreement it had that effect *for all purposes.*[71]

It is submitted that the above cases support the conclusion that the lessee has the contract right to further unitize a lease when the primary term of that lease has been extended by production upon the lease itself or production upon a unit which includes a part of the lease in question. When a lessee sets out to determine whether he has this right, he should consider whether or not he is acting within a *reasonable time,* remembering the limitation placed upon the "at any time" phrase used in the *Imes*[72] contract. He must further consider the *venture rule* stated in that case. Also, he should consider the possibility that his lessor's rights have become static under the terms of the particular agreement.[73] He must always consider the possibility that some appellate court might come to the conclusion that the unitization clause is a violation of the rule against perpetuities,[74] due to the fact that a conveyance of reality is the result of the provision. Above all, the lessee should anticipate all of these possible pitfalls in his original lease.

Louis P. Bickel.

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[71] See note 70 *supra.*

[72] Imes v. Globe Oil & Refining Co., 184 Okla. 79, 84 P.2d 1106 (1938).

[73] Such as in Grimes v. LaGloria, *supra* note 50.

[74] Today, many lessees expressly state in the lease that the unitization agreement will have no operative effect in violation of the rule against perpetuities.