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COMMENTS

SYMPOSIUM ON OIL AND GAS UNITIZATION

THE NATURE OF UNITIZED TITLE

As cooperative development becomes increasingly widespread the problems relating to unitized titles grow in importance. The term "unitized title" is used as descriptive of the situation where parties other than the original wellsite owner share in production from the wellsite under an arrangement for reciprocal sharing, either actual or potential, from the production on their wellsites. The term is intended to encompass the situation where such a reciprocal sharing is compelled by an order of a state conservation body. A unitized title may be established over a large area including perhaps an entire field, or it may cover only a small area as the grouping together of a large area is referred to as unitization while the smaller project is termed pooling.¹

A unitized title may be brought about by one of several means. The state may have the power to compel the creation of a unitized title. Voluntary methods include the community lease, the lease pooling clause, and the separate unit agreement. The community lease method is the execution of a single lease by all parties to the unitized area, describing different tracts owned in severalty by them.² The lease pooling clause gives the lessee the power to commit the leased tract, or a part or parts thereof, to a unitized area. The separate unit agreement is entered into by the parties apart from the various leases on the tracts unitized. Certain problems are peculiar to the means of unitizing adopted. For instance, in the case of the community lease, the intent to unitize is presumed as a matter of law in Texas,³ while in Louisiana whether or not the tracts are unitized is determined by ascertaining the

¹ These definitions of "pooling" and "unitization" follow those of Mr. Hardwicke in Unitization Statutes: Voluntary Action or Compulsion, 24 Rocky Mt. L. Rev. 29, 30 (1951).
² For the distinction between a community lease and a joint lease see Hardwicke and Hardwicke, Apportionment of Royalty to Separate Tracts: The Entirety Clause and the Community Lease, 32 Tex. L. Rev. 660, 676 n. 39 (1954).
³ Parker v. Parker, 144 S.W. 2d 303. (Tex. Civ. App. 1940) error ref.
actual intent of the parties.\textsuperscript{4} But for the purposes of this subject it is thought that the means of unitizing selected should not cause divergent results. As will appear hereafter in the discussion of problems raised by unitizing, the courts have failed to make any distinction on the basis of the method of unitizing that was used.

**Effect of Unitizing on Titles**

Two views have been taken as to the effect of unitizing upon the titles of the parties. The view hereinafter referred to as the cross conveyance doctrine is that, by the act of unitizing, each party to the unitized area conveys a real interest in his tract to each other party in return for which there is a similar conveyance of interests in their tracts to him.

The other view will be referred to as the contract theory. The position taken by the advocates of this view is that the act of unitizing has no effect on the titles of the parties to the unitized area, and that there is no conveyance of a real interest. The right of the various parties to share in the production from the tracts of the other parties is simply a contract right, derived from the agreement of the parties.

There is case authority supporting both views, with perhaps the greater weight of authority supporting the doctrine of cross conveyancing. It is thought to be preferable to present the authorities in the context of the particular problem under consideration by the court.

**Problems Created by Unitizing Title**

*Parties*

Since the landmark case in the field of unitized titles arose out of a controversy over the question of who were necessary parties in a suit for title to land within a unitized area, that problem will be first discussed. The Texas case of *Veal v. Thomason*\textsuperscript{5} first laid down the doctrine of cross conveyancing. The actual holding of the case was to the effect that all of the parties to a community lease were necessary parties and had to be joined in the suit before an action could be maintained for title and to free

\textsuperscript{4} Louisiana Canal Co. v. Heyd, 189 La. 903, 181 So. 439 (1938).

\textsuperscript{5} 138 Tex. 341, 159 S.W. 2d 472 (1942).
the tract from the community lease. The rationale of the case was
that upon the execution of the community lease there resulted a
cross conveyance of a royalty interest on the part of each party
within the unitized area to each other party in the area. The court
stated that the result of the execution of the community lease was
"to vest all the lessors of land in this unitized block with joint
ownership of the royalty earned from all the land in such block."6

The party problems raised by this decision have been exten-
sively considered elsewhere.7 A strict application of the rule of
this decision would result in closing the courts to litigants contest-
ing title and to free the tract from the unitizing agreement when
the number of parties to the unitized area is great, as is commonly
the case. If however the question of necessary parties be consid-
ered as a policy question only, as has been suggested,8 then the
solution of this difficulty seems possible even though the rationale
of the Veal case be accepted. The recent case of Douglas v.
Butcher9 indicates the trend of liberality in deciding party ques-
tions. The case seems indistinguishable from the Veal case except
on policy considerations. Suit had been dismissed in a partition
action in the trial court for failure to join 2300 parties. The
judgment of dismissal was reversed on appeal. In any case the
question of parties drops from consideration when the validity
of the unit is not contested.10

In the context of the party question Mr. Dedman in his article
quoted with approval the following statement from an article11
by Hammonds and Ray:

It is submitted, however, that in the great majority of pooling and
unitization agreements the parties thereto do not intend to effect cross
assignments of the historical titles to their mineral interests; and where
there are no words of grant in the agreement the courts should not
hold that they have.12

6 Id. at 476.
7 Dedman, Indispensable Parties in Pooling Cases, 9 Sw. L.J. 27 (1955); Mast-
erson, Indispensable Parties in Oil and Gas Litigation, SIXTH ANN. INST. ON OIL AND GAS
LAW AND TAXATION 139 (1955).
8 Masterson, supra note 7, at 149.
9 272 S.W. 2d 553 (Tex. Civ. App. 1954) error ref., n.r.e.
10 Hudson v. Newell, 172 F. 2d 848 (5th Cir. 1949); Fussell v. Rinque, 269 S.W.
11 Unitization of Oil and Gas Properties, 31 Tax Mag. 199, 200, 1 (1953).
12 Dedman, supra note 7, at 86.
The above statement is an example of the contract theory. It is believed that the adoption of such a theory is not necessary to the solution of the party question and that, as pointed out later, the adoption of such a solution may possibly create problems of a more serious nature.

The Rule Against Perpetuities

If the exercise of the power to unitize constitutes the conveyance of a real interest and such conveyance may take place beyond the period of the Rule then this power violates the Rule. The objection that this power, which might be provided for in either a lease, pooling clause or in a separate unit agreement, constitutes a violation of the Rule has been raised to date in two leading cases. The first was the Kansas case of Kenoyer v. Magnolia Petroleum Co. The Kansas court decided that the Rule "simply has no application" to the lease pooling clause. The principal policy behind the Rule appears to be to prevent restrictions on the alienability of land. There can be little doubt but that unitizing, particularly in an area where the limits of the field are not yet defined, adds to the value of the tracts unitized and thus promotes alienability. It is not thought that the power of the lessee to unitize at some date in the future in any way restricts the free alienability of land. The courts have been quick to prevent any inequitable exercise of the power to unitize. The policy of the state to prevent the waste of natural resources and to promote greater ultimate recovery would seem to be a policy equally strong as that of the Rule. Certainly the right to unitize in the future is a valuable one and does promote the more efficient use of mineral resources.

The second case is Phillips Petroleum Company v. Peterson, perhaps the leading case supporting the contract theory. The court considers the cross conveyance doctrine and expressly rejects it. This rejection of the doctrine is relegated to the status of dicta, however, by the later language of the court. It was said:

14 The policy behind the Rule is extensively discussed in Meyers, The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests, 32 Tex. L. Rev. 369, 415-425 (1954).
16 218 F. 2d 926 (10th Cir. 1954).
Finally, there being no time fixed within which unitization was to be effected, it must be implied that the parties intended it to take place within a reasonable time, and a reasonable time, under the facts and circumstances, would be well within the limitation of the rule against perpetuities. Hence, had there been cross-assignments, the rule against perpetuities would not have been violated.\(^{17}\)

Did the court intend to limit this reasoning to the "facts and circumstances" presented in the *Phillips* case? It should be noted that the court gave some weight to expressions of intent that there be no cross conveyance. It might be, therefore, that the decision in the *Phillips* case will be limited to the situation where there is an expressed intent that no cross conveyance take place. The court had previously used strong language, saying:

Section 12 [the unitization clause of the lease] does not violate the rule against perpetuities, unless the unitization or pooling agreement accomplishes transfers of interests in real property, or, otherwise stated, effects cross-transfers of property interests among the parties to the agreement. (Emphasis added.)

Aside from the question of the Rule Against Perpetuities, the validity of the lease pooling clause seems well established.\(^{18}\)

It is thought to be highly questionable, however, that parties to a unitized area might by expression of their intent not to cross convey, prevent the application of the doctrine in a jurisdiction which otherwise accepts the doctrine. The contrary view is taken by Mr. Hoffman in his leading work wherein he states that "[t]here can hardly be any objection in the law to such an express agreement that the pooling or unitization shall not constitute an exchange or transfer of property interests."\(^{19}\) The grounds of disagreement with Mr. Hoffman's view are set out in the next subdivision. Even if the parties are not able to escape the application of the doctrine of cross conveyancing by contract it seems certain that the application of the rule to invalidate the lease pooling clause may be prevented by express stipulation in the clause that the power to pool shall not be exercised beyond the period

\(^{17}\) *Id.* at 931.

\(^{18}\) Cases recognizing either expressly or impliedly the validity of the clause have been collected in *Hoffman, Voluntary Pooling and Unitization* 98 n. 82 (1954) (hereinafter referred to as Hoffman).

\(^{19}\) Hoffman 168.
of the rule. Such a form has been suggested. This form eliminates the question of whether or not the rule of the Phillips case, that pooling must occur within a reasonable time not beyond the period of the rule, applies only when there is an expression of intent by the parties that there be no cross conveyance.

The contract theory has been proposed as a way to avoid the perpetuities problem presented by the cross conveyancing doctrine. Mr. Hoffman suggests that "...the lease pooling clause can best be dealt with, both by lessors and lessees and by the courts, as an ordinary contract provision which provides for a changed manner of operation under the circumstances prescribed in the clause and a changed manner of calculating the royalties under the new operation." (Emphasis added.) But this particular solution is not thought to be necessary. Indeed if the contract right be in the nature of a real covenant to share proportionately in the production then it might not be efficacious, since the Rule could apply equally to this sort of covenant. Even if there is no express provision in the pooling clause limiting the exercise of the power to a period within the rule, the validity of the clause might still be upheld on the reasoning that the power must be exercised within a reasonable time not beyond the period of the Rule. This is of course the holding in the Phillips case without any modification to conform to the facts and circumstances of that case. The Kenoyer case has been cited as rejecting the cross conveyance doctrine. But the solution of that case, that the Rule does not have application to this situation, would seem sound and applicable even though the doctrine be accepted.

The Statute of Frauds

It is believed that the greatest difficulty presented by the contract theory is that it would present the danger of making an interest in land personalty if the contract right is not considered to be in the nature of a real covenant. Thus unitized interests would be taken outside the protection of the various formalities required

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20 Walker, Recent developments in Pooling and Unitization, Sixth Ann. Inst. on Oil and Gas Law and Taxation 47, 52 (1955).
21 Hoffman 99.
22 Meyers, supra note 14, at 410 n. 127.
23 Hoffman 164; Phillips Petroleum Co. v. Peterson, 218 F. 2d 926, 931 n. 7 (10th Cir. 1954).
for a conveyance of an interest in land and notice thereof. Perhaps from the practical viewpoint the danger is more imagined than real since to date only one case has been found dealing with parol unitizing. On the other hand if there are no particular advantages to be gained from the adoption of the contract theory then little reason appears to convert, or attempt to convert, what has to date been considered a real interest into personality.

The theory of the Veal case was that the act of unitizing constituted a cross conveyance of royalty interests among the parties to the unitized area. Royalty may be defined as the right to share in production without the right to lease, develop, or receive delay rentals and bonuses. The rights of the parties after unitizing seem clearly to be the equivalent of royalty. In only a very few jurisdictions is there any question but that royalty is an interest in land. Whether the interest be realty or personalty the question of parties may remain in any case, the question there being whether or not the interests of the other parties to the unitized area will be irreparably harmed by a judgment in a suit to which they were not parties.

An Oklahoma case has allowed parol pooling although a royalty interest is considered a real interest in that jurisdiction. This case is however probably best explained by an apparent failure to raise the point of violation of the Statute of Frauds. If the rights of the parties to the unitized area in the tracts committed to the area are considered as contractual only then there is a danger that the rights of the parties will be treated as personalty, since contract rights are not usually real rights. A covenant running with the land is in the form of a contract, and yet it must be created by writing. However, it is thought that the better view is that a running covenant is an interest in land. This subject is discussed hereafter. But if a running covenant is considered an

27 See note 68 infra.
28 See text infra beginning at note 65.
interest in land then there is seemingly no purpose at all in making a distinction between a cross conveyance and the acquisition of a contractual right. This is because the party acquiring the benefit of the covenant to share production on the agreed basis would acquire an interest in land. To say, then, that there has not been a cross conveyance of an interest in land is merely to seek a new title for the process that has heretofore been called "conveying". Each party to the unit area will have an interest in land that he did not possess before. It is believed therefore that if the contract theory has any rational basis it is that the interest acquired by the parties to the unitized area is personalty only and thus outside the protection of the traditional safeguards placed around the creation and transfer of real rights. The statement of the Texas court in *Sheffield v. Hogg*,\(^2\) in considering the nature of a royalty interest, is apposite to this question. The court there said:

The oil industry in Texas is largely dependent for development, growth, or prosperity, on the doctrine that the interests we are considering—such as the lessee's and the lessor's estates under contracts which are in customary use in Texas—are interests in land; and hence not subject to parol sale.\(^3\)

These interests are commonly very valuable and should not be subject to the controversy that would undoubtedly follow their creation by parol.

The cases that have apparently adopted the contract theory do not seem to have considered this ramification. In Louisiana the point was raised recently\(^4\) under the following circumstances. The cross conveyance doctrine was proposed as the basis for computing royalty to a lessor in a unit established by the Commissioner of Conservation on the basis of the average price obtained by all the lessees on production from the unit. The court held that the unit was established as a conservation measure only and that the Commissioner had no power to interfere with the contractual rights of the parties with respect to the royalty due and the proper method of computing and paying it. The decision seems

\(^2\) 124 Tex. 290, 77 S.W. 2d 1021 (1934).

\(^3\) Id. at 1024.

\(^4\) *Arkansas Louisiana Gas Co. v. Southwest Natural Production Co.*, 221 La. 608, 60 So. 2d 9 (1952).
correct on the basis of either theory, but has been cited as sustaining the contract theory. Assuming that the lessor obtained an interest in the holdings of each other party to the unit yet the right of the lessor to compensation for the production should be subject to the contractual relation with the lessee as regards payment for that share. The West Virginia court indicated acceptance of the contract theory in the case of \textit{Boggess v. Milam}, the court stating that:

In our opinion, the so-called unitization agreement does not effect a merger of title. . . . It consolidates only the \textit{contractual} interests under the leases to the United Fuel Gas Company. (Emphasis added.)

This view is in accord with the earlier West Virginia case of \textit{Lynch v. Davis}. Assuming that the ordinary effect of unitizing is to effect a cross conveyance of real interests the question arises of whether or not the parties may by express stipulation in the unitizing agreement prevent such a result. The court in the \textit{Phillips} case gave some weight to such a stipulation by the parties. It seems very questionable that the parties may validly so stipulate. A closely analogous question would be whether by stipulation a royalty other than a pooled interest may be made personalty. There is some authority to the effect that it may.

In \textit{Dashko v. Friedman} suit was brought for an overriding royalty as compensation for securing a lease. The court stated that " . . . if terms of the contract so dealt with the minerals only, after they were produced, then the contract would not be prohibited by the statute of frauds." There is a later case where a royalty on sand and gravel was orally agreed upon as consideration for the services of an agent in giving information concerning tracts which contained commercial deposits of sand and gravel. Recovery was allowed on the basis of the \textit{Dashko} case. The mere fact that there is an agency situation is not distinguishing since "[a]n agreement of agency to sell land is within the

\textsuperscript{32} \textit{Phillips Petroleum Co. v. Peterson}, 218 F. 2d 926, 931 (1954); Hoffman 160.
\textsuperscript{33} 127 W. Va. 654, 34 S.E. 2d 267 (1945).
\textsuperscript{34} \textit{Id.} at 270.
\textsuperscript{35} 79 W. Va. 437, 92 S.E. 427 (1917).
\textsuperscript{36} 59 S.W. 2d 203 (Tex. Civ. App. 1933).
\textsuperscript{37} \textit{Waco-Tex Materials Co. v. Lee}, 210 S.W. 2d 886 (Tex. Civ. App. 1948) \textit{error ref.}, n.r.e.
It is certain at least that if it is possible to write around the doctrine of cross conveyancing by providing that the sharing in production from the various unitized tracts should be only in severed minerals then the language used must clearly express this intent. That this is so is illustrated by the case of Tennant v. Dunn.\(^3\) The contention was made there that recordation of a conveyance of an oil payment in the nature of an overriding royalty did not give constructive notice. It was held that there was a conveyance of an interest in land. But the court expressly noted that it did not decide what the nature of the interest would have been “had the assignment provided for payment to her out of the proceeds of the oil, or a part of the value of the oil, rather than for delivery of the oil.” Reference is made back to the statement of the Texas court in Sheffield v. Hogg as a strong expression of what is believed to be much the more desirable view, that these interests should be considered as interests in land, and this should be so regardless of stipulations by the parties.

Thus far attention has been paid the nature of the interest of the lessors within the unitized area. There is no logical reason why the doctrine of cross conveyancing should not apply also to the interest of the lessee. However on this point the Texas case of Knight v. Chicago Corporation\(^4\) should be considered. It might be taken as holding that there is no cross conveyance of the interest of the lessee. Probably however the decision should be limited to the particular facts of that case. In the later case of Leach v. Brown\(^4\) the Texas court apparently considers “lease owners” to be within the rule of the Veal case so that the doctrine would also apply to the lessee. Concerning this question Mr. Hoffman states that “[i]f the doctrine [of cross conveyancing] is well founded in its application, in so far as royalty is concerned, there can be no logical basis for distinguishing working interests.”\(^4\) Apparently however the former method used by the

\(^{38}\) 151 A.L.R. 648, 661 (1944).
\(^{39}\) 130 Tex. 285, 110 S.W. 2d 53 (1937). This case is discussed in Walker, Oil Payments, 20 Tex. L. Rev. 841, 844-47 (1942).
\(^{40}\) 144 Tex. 98, 188 S.W. 2d 564 (1945).
\(^{41}\) 251 S.W. 2d 553 (Tex. Civ. App. 1952) error ref.
\(^{42}\) Hoffman 156.
lessees in committing their interests to the unitized area, the exchange assignments of interests, has fallen into disuse. The unitization agreement in the Phillips case expressly provided that there be no transfer of title.

The Pennsylvania case of Coolbaugh v. Lehigh & Wilkes-Barre Coal Co. adopts the view that even without an express stipulation, the pooling is of the minerals (in that case coal) after severance. The court stated that:

Dana never had any title whatsoever to lot 29, or the coal under it. What he had was an interest in the royalties in 28 and 29 after they had become due by the mining of the coal.

Texas and California seem committed to the view that unitizing results in a cross conveyance of a real interest on the part of each party to the unitized area. Since the holdings of the Texas courts have not been notably consistent in the application of the doctrine when various ramifications have been presented, e.g. Knight v. Chicago Corporation and Sohio v. Jurek, it is of interest to note the recent affirmation of the doctrine by the Supreme Court of Texas in the recent case of Renwar Oil Corporation v. Lancaster where the court held that "... these [unitization] agreements are essentially a conveyance in realty...", citing the Veal case. A compendium of cases applying the doctrine of cross conveyancing has been collected elsewhere. To that collection it is thought that the Mississippi case of Merrill Engineering Co. v. Capital National Bank should be added as having adopted the doctrine because of the view hereinafter taken of the nature of a running covenant in this situation, that being the

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43 "The practice of executing cross assignments is not now general. Most, if not all, of the agreements that I have seen during the last three or four years declare that there is no intention to convey title, but only to provide for development and for allocations of production and the costs of operation." Hardwické, supra note 1, at 30. The two methods of committing the interests of the lessees, by cross assignment or contractual stipulation, are discussed in Voorhees, Techniques of Field-wide Unitization, 24 Rocky Mt. L. Rev. 14, 22 (1951).
44 218 F. 2d 926, 930 n. 5 (10th Cir. 1954).
45 218 Pa. 320, 67 A. 615 (1907).
47 144 Tex. 98, 188 S.W. 2d 564 (1945).
49 --- Tex. ---, 276 S.W. 2d 774 (1955).
50 Hoffman 144-61.
51 192 Miss. 378, 5 So. 2d 666 (1942).
apparent basis of decision in that case. Some confusion might arise in regard to the doctrine of cross conveyancing from the fact that all of the parties to the unitized area do not receive delay rentals and bonuses from all of the leases after the unitizing has occurred. Since the interest acquired by the parties to the unitized area are royalty interests only they acquire no right to delay rentals or bonuses, which are incidents of a mineral interest. The fact that these incidents are not received does not therefore indicate that the cross conveyance of interests occurs later than the execution of the unitizing agreement. In the case of a lease pooling clause or similar provision in a unit or community agreement the cross conveyance obviously cannot occur until the unitizing is accomplished. When unitizing is accomplished by means of a lease pooling clause it may be that the relation between the lessor and the lessee is one of principal and agent. The question then occurs whether such power, since it amounts to a conveyance at the time of unitizing, may be validly exercised after the death of the principal. To meet this objection it has been proposed, and judicially accepted in the Phillips case, that the power be regarded as one coupled with an interest so that the power to unitize is not extinguished upon the death of the principal, the lessor.

**Acquisition of Unitized Interests**

The conclusion simply that unitizing results in the conveyance of an interest in land does not solve the problems which arise in the acquisition of unitized interests. The nature of the right acquired must be more fully investigated.

If the holding of the Veal case be accepted, that there is a cross conveyance of a royalty interest in each tract, then except for the few jurisdictions where a royalty interest is still considered personalty there is a conveyance of a real interest effected at the time of unitizing. The exact nature of that real interest is of

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54 218 F. 2d 926, 933 (10th Cir. 1954).

55 See note 25 *supra*.
some importance. But beyond conceding that royalty is an interest in land there has been little judicial discussion concerning its precise nature. Indeed there has not often been occasion for detailed analysis. Perhaps the most generally accepted view is that royalty is, or is at least closely analogous to, the common law interest of rent.\textsuperscript{56} There has been able argument that royalty is the precise common law interest of rent.\textsuperscript{67}

The question of the exact nature of the interest becomes important when a unitized interest is acquired, whether by voluntary or involuntary conveyance. Under the cross conveyance doctrine each lessor keeps a proportionate interest in his tract and conveys all the rest, receiving a conveyance of interests in the other tracts in return. Assume that after unitizing the lessee will pay a royalty of $\frac{1}{8}$ to the lessors of two tracts which are to share equally in production from either tract. Thus each lessor will be entitled to $\frac{1}{16}$ royalty. The state of the title after unitizing is that each lessor owns a $\frac{1}{32}$ royalty in his own tract and a $\frac{1}{32}$ royalty in the tract of the other lessor. The point is whether a purchaser of either of these tracts acquires only the lessor’s $\frac{1}{32}$ interest in the tract purchased or whether he acquires the entire interest of the lessor in the unitized area, in this case a $\frac{1}{16}$. The question may be framed as whether the entire interest of the lessor in the unitized area is appurtenant to the tract contributed by him, so as to pass unmentioned with the tract, or whether it is held in gross so that it must be expressly mentioned to pass. The question may of course be eliminated by express language in the instrument of conveyance clearly showing the intent of the parties.

The California courts hold that the cross conveyed interests of the lessor in the tracts other than his own must be specifically conveyed or levied upon. In \textit{Tanner v. Title Insurance and Trust Co.}\textsuperscript{58} the court stated that:

The royalty interest thus transferred by each landowner to his colessors is an incorporeal hereditament \textit{in gross} ... and the grantee's interest in the oil produced upon the property of one of the colessors

\textsuperscript{56} Walker, \textit{The Nature of the Property Interests Created by an Oil and Gas Lease in Texas}, 7 Tex. L. Rev. 1, 40-46 (1928); Blake, \textit{Oil Royalties: A Suggested Criterion}, 13 Miss. L. J. 307 (1940).

\textsuperscript{57} Blake, \textit{supra} note 56.

\textsuperscript{58} 20 Cal. 2d 814, 129 P. 2d 383 (1942).
is entirely separate and distinct from the royalty interest retained by him in oil which might be produced from his own premises.\(^5\) (Emphasis added.)

The Mississippi court in *Merrill Engineering Co. v. Capital National Bank*\(^6^0\) reached a contrary result. The court proceeded to its conclusion apparently on the theory that there was a running covenant to share royalty payments on the agreed basis burdening each tract. The benefit of these covenants was held appurtenant to each tract so that it passed with a conveyance of the tract though unmentioned. There is no discussion in the case of the elements of a valid running covenant,\(^6^1\) but this analysis seems clearly supported by the language of the opinion.

Mr. Hoffman takes the view that the agreement by all of the parties to a unitized area to share royalties from production on their respective tracts should be considered a running covenant. However it is his view that such an interpretation precludes the cross conveyance doctrine for he states that:

> It is well to note that had the Texas court chosen to regard the effect of pooling as a sharing of production and operations, without a cross-conveyance of property interests, problems relating to the matter of parties to suits involving unit tracts might also be avoided. Under the suggested analysis the lessor in each tract would retain all of the legal royalty interest in the tract but his agreement in the pooling arrangement to share with others the production from that tract as well as the production from the other tracts comprising the unit would be regarded as a covenant appurtenant to his royalty interest and running with the land.\(^6^2\)

It is not believed that such an analysis necessarily precludes the cross conveyance doctrine.

The analysis of the unitizing agreement as a running covenant to share production on the agreed basis is useful in resolving the problems presented by the acquisition of a unitized interest. Support for such an analysis is readily found in the view that has

\(^5\) Id. at 386.

\(^6^0\) 192 Miss. 378, 5 So. 2d 666 (1942).

\(^6^1\) The essentials of a real covenant are technical and there is considerable disagreement among the scholars in the field. The requisites of a valid running covenant are set out in Chapter IV of *Clark, Real Covenants and Other Interests Which "Run With the Land."* (2d ed. 1947). Judge Clark in the appendices to his book expresses sharp disagreement with some of the views embodied in the Restatement.

\(^6^2\) Hoffman 161.
been taken as to the nature of an entirety provision. When royalty interests under a lease are owned in severalty and production is obtained, those royalty owners not owning an interest in the tract from which production was obtained do not share. This is the doctrine of non-apportionment as laid down by the leading case of *Japhet v. McRae*, The entirety clause was drawn to meet this situation. It provides that all royalty owners are to share in production wherever obtained on the leased premises in the proportion that the acreage owned by each separate royalty owner bears to the entire lease acreage. There is a close analogy between the operation of the entirety provision on the interests of royalty owners holding in severalty under a single lease and the operation of a unitizing agreement between owners of separate tracts. The doctrine of non-apportionment prevents sharing by the royalty owners though oil is being drained out from under the tract wherein they own an interest just as the law of capture operates on production from separate tracts. An entirety clause has been specifically held to be a covenant running with the land. Considering the unitizing agreement, whatever form it may take, as a running covenant eliminates the objection to the sufficiency of the agreement as a conveyance due to the absence of words of grant. And yet it is believed that the situation is the same as if a cross conveyance had occurred. It has been stated that "... a covenant running with the land is treated as a contract and not a property interest in a court of law..." But the distinctions between the various incorporeal interests in land, as easements, servitudes and running covenants, are largely historical and the same interest in substance may be considered as any one of these interests, depending upon the particular manner of its creation. Thus a right essentially amounting to an easement, traditionally considered an interest in land, may be created as a running cove-

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64 "... What he did, in fact, was in the nature of a covenant which burden[ed] his remainder to the extent that one purchasing subsequent to said lease contract and subject to it acquired an interest in the royalty on the whole acreage prorated as the fraction thereof purchased bore to the entire tract..." (Emphasis added). Gypsy Oil Co. v. Schonwald, 107 Okla. 253, 231 P. 864,868 (1924). Messrs. Hardwicke reach a similar conclusion in their article, supra note 2, at 672-73.
66 Clark, op. cit supra note 61, at 5. It is there said, after giving an example, that "[i]t is clear, therefore, that the various interests overlap each other, and that the distinctions between them often break down."
nant. It seems clear therefore that running covenants may amount to an interest in land. Since those parties entitled to the benefit of the covenant to share production on the agreed basis hold a right in the nature of a royalty interest it would seem clear that the right founded on this particular covenant is an interest in land. As has been noted a royalty interest is almost universally considered as a real interest.\(^6\) It should be noted, however, that even if the parties entitled to the benefit of the covenant are not considered to hold interests in the land of the covenantor, yet the covenant must be in writing.\(^8\) The view of the Restatement regarding the creation of an interest in land by a running covenant is that:

A promise that certain land will be used in a specific way is one which either creates, or may easily be thought to create, an interest in land.\(^9\)

A running covenant is frequently referred to as a “right in the land of another.”\(^7\) Thus though the unitizing agreement be considered a running covenant, the situation after the making of the agreement is that each party to the unitized area has acquired an interest in the lands of the other parties. As aforesaid, to deny that this real interest was acquired by a cross conveyance is simply to use another term for the process that has heretofore been called a “conveyance”. It is believed therefore that the analysis of the unitizing agreement as a running covenant is completely consistent with the doctrine of cross conveyancing.

The analysis in terms of a running covenant may be brought to bear on the problem of just what passes unmentioned with a conveyance of a tract within a unitized area. The question, it will be recalled, is whether only the interest of the lessor which he retains in his particular tract passes or whether his entire interest in the unitized area passes.

The sole reason for the necessity of entering into a plan of cooperative development is the law of capture, the rule that the party first reducing the minerals to possession has title even though part of the minerals recovered may have been drained

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\(^6\) See note 25 supra.

\(^8\) 2 A.M. LAW OF PROP. 364 (1952); 5 RESTATEMENT, PROPERTY § 522 (1944).

\(^9\) 5 RESTATEMENT, PROPERTY, INTRODUCTORY NOTE §§ 522-523.

\(^7\) Clark, op. cit. supra note 61, at 2n. 5.
from the land of another. The result of the application of the law of capture was the drilling of many more wells than was necessary to efficiently recover the mineral reserves, entailing considerable waste of capital and mineral resources. It should be clear therefore that the plan is entered into to benefit the mineral estates of the parties. In covenant terminology the respective rights and obligations under a unitization plan "touch and concern" the mineral estate. When the common law principles of appurtenancy are thus injected it appears that the only reasonable conclusion is to hold that the entire interest in the unit is appurtenant to the tract contributed. And when the benefit of sharing is no longer possible in regard to a particular tract because of a surrender of a tract or because of failure of title of one of the parties to the suit, it would seem that the burden to share should no longer be enforced against the tracts remaining within the unitized area in the absence of express provision.

However the California court in Clark v. Elsinore Oil Co. allowed the owners of the surrendered tracts to continue to share though there was no express provision to this effect in the community lease there involved. In the subsequent case of Tanner v. Olds it was further held that the owner of the surrendered tract might continue to share even though he drained the unitized area by wells on his surrendered tract. When there was a title failure, however, the California court in Gillis v. Royalty Service Corporation refused to allow either the former owner or the purchaser at the foreclosure sale to share because of failure of consideration and failure to defend title as required by the lease.

But aside from the covenant analysis and considering the unitized interest acquired as strictly a royalty interest it would seem that the correct view is that the interest of the conveying lessor throughout the entire unitized area should pass with a conveyance of his tract. As indicated earlier the generally accepted view is that royalty is closely analogous to the common law interest of rent. Rent passes with the reversion unless there is an express stipulation to the contrary.

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72 29 Cal. 2d 110, 173 P. 2d 6 (1946).
74 This is the analysis made by Walker in Developments in the Law of Oil and Gas in Texas During the War Years, 25 Tex. L. Rev. 1, 14 (1946).
It is submitted that if the analogy of the unitized interest to either a running covenant or rent is pressed too far then undesirable results follow. For example, to the extent that royalty is considered analogous to rent service, free assignability is retained. But only the lessor's royalty is analogous to rent service, there being a reversion necessary to this interest. Royalty granted by the lessor, overriding royalty reserved by the lessee upon assignment of the lease and overriding royalty granted by the lessee would be analogous to rent charge, distinguished from rent service by the lack of a reversion. Rent charge is freely assignable but "[i]t has been held . . . not subject to division, and that an attempt to subdivide it results in its extinguishment." Clearly this result would not be desirable.

On the other hand the technical requirements of privity essential to a real covenant and the restrictions upon the assignability of a covenant held in gross, would not seem a welcome addition to the present situation.

The courts however have wisely recognized the inapplicability of the common law interests to the comparatively recently developed mineral interests. An example of this judicial attitude is to be found in Callahan v. Martin where the California court said that "... our classification of property as realty or personalty is based on common law definitions which crystallized in a time when oil interests were not the subject of judicial cognizance." A similar attitude was evinced by the Texas court in Sheffield v. Hogg where after an extended discussion the court failed to fit a royalty interest into any common law niche but concluded simply that "[c]lassify them as you may, they are at least rights or privileges appertaining to real property . . ."

To the extent however that either analogy contributes to just and desirable results it is believed that utilization of the analogy is desirable and not inconsonant with present rationalizations about the nature of unitized title.

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76 Blake, The Oil and Gas Lease, 13 So. Cal. L. Rev. 393, 415-22 (1940).
76 Clark, op. cit. supra note 61, at 192.
77 See note 61 supra.
78 3 Cal. 2d 110, 43 P. 2d 788, 791 (1935).
79 124 Tex. 290, 77 S.W. 2d 1021, 1030 (1934).
Conclusion

The purpose of this article has been to present the various problems which arise in connection with unitized titles. More specifically it has been intended to demonstrate that the solution to these problems is not reached simply by rejecting the doctrine of cross conveyancing. It is hoped that a successful attempt has been made to present solutions within the framework of the doctrine. In any case the adoption of a theory that only contract rights are acquired by the parties to the unitized area does not seem necessary or desirable, assuming that the courts presently following the cross conveyance doctrine could be induced to change. The problem of necessary parties would still remain, the question being whether the interests of a party would be irreparably harmed by a judgment in a suit to which he was not a party. If the contractual right is considered a real right in the nature of a running covenant then the Rule Against Perpetuities might still be applicable. The Rule might apply even if the contractual right were personalty only since the Rule applies to personal property as well as to real property. It is thought that considering the unitized right as personalty would violate well considered and long established policies of the courts that rights of this nature should be subject to the formalities incident to dealings in realty. If the right be considered as a running covenant then there is a whole body of technical principles that enter the picture to plague the modern lawyer. But even if these technicalities were to be ignored by the courts, as well they might, then it would seem that a running covenant of this nature should be an interest in land. If it is an interest in land then the cross conveyance doctrine is upheld since after unitizing each party to the unitized area has received a real interest in the tracts of the other parties. However, even if it should be held that this running covenant is not a real interest then it would still be necessary to create it by writing. In any case analogy to the principles of real covenants is useful in resolving problems arising upon the acquisition of unitized interests.

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