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THE IMPACT OF POOLING AND UNITIZATION ON TERM INTERESTS IN OIL AND GAS

by
Howard R. Williams* and Charles J. Meyers**

WHEN all or part of a given tract is included in a unit by the terms of a pooling or unitization agreement, the relationships of persons having interests in the tract may be affected in important respects. In another paper we have considered the impact of such an agreement upon the relationship of lessee and lessor, that is, the effect of pooling and unitization upon the express and implied terms of oil and gas leases.1 Herein we consider the impact of such an agreement upon (I) term mineral and royalty interests (and the hybrid non-executive mineral interest), and (II) Louisiana mineral interests subject to liberative prescription upon ten years non-user.

Our analysis will be made by reference to four generic types of fact situations which may be summarized as follows:

1. Case I: All of the tract in question (Blackacre) is included in a unit and production is obtained from a well drilled on Blackacre or drilling operations are prosecuted on Blackacre;
2. Case II: All of Blackacre is included in a unit and production is obtained from a well drilled on the unit or drilling operations are prosecuted on the unit, but the producing well is not drilled or the drilling operations are not prosecuted on Blackacre itself but on some other tract included within the unit;
3. Case III: A part only of Blackacre is included in a unit and production is obtained from or the drilling operations are prosecuted on the portion of Blackacre included in the unit;
4. Case IV: A part only of Blackacre is included in a unit and production is obtained from or the drilling operations are prosecuted

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on a portion of the unitized or pooled area other than the portion of Blackacre which is included therein.

I. TERM MINERAL, ROYALTY, AND NON-EXECUTIVE INTERESTS

Recent years have witnessed the increasing prominence of three interests in oil and gas production: term mineral interests, term royalty interests, and a hybrid interest having characteristics of both mineral and royalty interests, non-executive mineral interests.²

Term mineral interests are created by grant or reservation for a term of years (e.g., twenty years) "and so long thereafter" as oil or gas is produced. The term interest may cover the entire mineral estate in described premises but usually will cover only an undivided interest in the minerals, e.g., one-half. The owner of a term mineral interest possesses executive power: he may conduct drilling operations on or lease the premises. If his interest covers only a fraction of the minerals it may be necessary as a practical matter to secure the joinder of his concurrent owner³ in a lease before he can secure development since a lessee may be unwilling to assume the risks of exploratory operations without a lease covering all or substantially all of the mineral estate. If the unexpired portion of the primary term of the interest is less than the primary term customary in oil and gas leases in the community, it may be difficult to lease the premises on favorable terms unless the owner of the reversionary interest is also willing to bind that interest by becoming a party to the lease. Refusal of a concurrent owner or reversioner to participate in the lease may frustrate the leasing transaction and cause the term interest to expire at the end of the primary term without production. This is a risk incident to the nature of a term mineral interest and its owner is without power to compel joinder even though refusal to join is motivated by a desire to freeze out the term interest.⁴

² See Cantwell, Term Royalty, SOUTHWESTERN LEGAL FOUNDATION, SEVENTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 339 (1916).
³ The concurrent owner is typically the owner of the reversionary interest (usually classified as a possibility of reverter) after the term interest.
⁴ The case of Shell Oil Co. v. Seeligson, 231 F.2d 14, 5 OIL AND GAS REP. 1307 (10th Cir. 1955), illustrates this difficulty. B, the owner of 3/4ths of the minerals in fee and the reversion in 3/4ths of the minerals, refused to join in a lease with A, the owners of a term interest in 3/4ths of the minerals, except on terms deemed unduly onerous. The trial court [Seeligson v. Eilers, 131 F. Supp. 639, 4 OIL AND GAS REP. 1737 (D. Kan. 1955)] concluded that B was attempting to "freeze out" the term mineral interests by refusing to lease. In lieu of partition the court entered a decree granting first the defendant (B) and then the plaintiffs (A) the right to explore under a standard lease from the other party. Although the decree was reversed by the Court of Appeals, that court did not question the trial court's finding that none of the original parties to the action, acting as a reasonable and prudent operator, would or could be expected to drill a test
The owners of severed royalty interests, on the other hand, whether in fee or for a lesser duration, lack the executive power which belongs to the land or mineral owner. Apart from cloudy legal remedies, the royalty owner must depend upon the self-interest of the executive to secure exploration and development of the premises. Typically a severed royalty interest is smaller than the royalty payable under an ordinary lease and the executive, who usually is entitled to the difference, has an economic incentive to lease the premises. Under these circumstances, the self-interest of the royalty owner and of the executive will generally coincide, and this coincidence of self-interest will normally assure protection of the royalty interest by expeditious leasing of the premises. When, however, the royalty interest is a term interest, the self-interest of the executive (who normally is also the reversioner after the term interest) and of the owner of the term interest often do not coincide. However royalty production may be split between the term royalty owner and reversioner, the closer the term interest to expiration, the lesser the incentive of the executive-reversioner to lease the premises. If it also happens that the term owner has the greater percentage of royalty production, the incentive for the executive to lease is further reduced. To give an extreme example: A owns one-half of the royalty in a tract for a term due to expire in six months absent production. B owns all the remaining mineral interest. B might be inclined to refuse a lease offer for the land in the hopes that the offer will be renewed in six months when A's interest has been eliminated. Perhaps in this instance the duty of fair dealing will protect A, but this is far from clear. On the other hand, if A's interest is only 1/32 of royalty, or if it is 1/2 of royalty but having ten years to run, B's self-interest in prompt leasing will normally be adequate protection for A.

A hybrid type of interest, which we call a non-executive mineral interest, resembles a royalty interest in that its owner is not a necessary party to a lease and resembles a mineral interest in that its owner is usually entitled to a stated share of all lease proceeds, in-
cluding royalty, rental, bonus and production payment, instead of merely a stated share of production; the owner of a 1/16th royalty interest, on the other hand, is entitled to one barrel out of each sixteen produced but to nothing more, whatever the terms of the lease entered into by the executive. The standard non-executive mineral interest, then, has all of the characteristics of a mineral interest except for the executive power. Variations are numerous, however; other incidents of a mineral interest may be severed, e.g., the right to share in bonus. As these additional incidents of a mineral interest are shorn away the interest more and more resembles a royalty interest.

Just as it is with a royalty interest, a non-executive interest is usually assured of adequate protection by the coincidence of the self-interest of the executive and of the non-executive. And again, as we noted in the case of royalty interests, if the non-executive interest is limited for a term rather than in fee, the self-interest of the executive and non-executive tend to diverge rather than coincide, and the executive may be tempted to postpone leasing until the primary term of the non-executive interest has expired.

In our analysis of the impact of pooling and unitization upon these three interests in oil and gas production we shall describe the tract in which the interest has been created as Blackacre. The relationship to be considered is that between the owner of a term mineral interest, a royalty interest, or a non-executive mineral interest—who will be designated as A—and the owner of the reversion after the term interest and the executive, who will be designated as B.

Discussion will be under four headings:

1. Pooling or unitization is imposed by compulsory process;
2. Pooling or unitization is voluntary and has been assented to by both A and B;
3. Pooling or unitization is voluntary, and A has consented but B has failed or refused to join; and
4. Pooling or unitization is voluntary, and B has consented but A has failed or refused to join.

1. Pooling or unitization imposed by compulsory process

In this instance the first inquiry necessarily concerns the provisions of the state compulsory pooling or unitization statute. The Oklahoma statute authorizing compulsory unitization, for example, provides that

Property rights, leases, contracts, and all other rights and obligations shall be regarded as amended and modified to the extent necessary to
conform to the provisions and requirements of this Act and to any valid and applicable plan of unitization or order of the Commission made and adopted pursuant thereto, but otherwise to remain in full force and effect. . . . The amount of the unit production allocated to each separately-owned tract within the unit, and only that amount, regardless of the well or wells in the unit area from which it may be produced, and regardless of whether it be more or less than the amount of the production from the well or wells, if any, on any such separately-owned tract, shall for all intents, uses and purposes be regarded and considered as production from such separately-owned tract, and, except as may be otherwise authorized in this Act, or in the plan of unitization approved by the Commission, shall be distributed among or the proceeds thereof paid to the several persons entitled to share in the production from such separately-owned tract in the same manner, in the same proportions, and upon the same conditions that they would have participated and shared in the production or proceeds thereof from such separately-owned tract had not said unit been organized, and with the same legal force and effect.

When Blackacre has been included in a unit under a statute containing such language as the above, clearly A will share in production from the unit in all cases, I through IV. In Cases I and II production of the unit will suffice to extend the life of a term interest beyond its primary term. In Cases III and IV the term will be extended as to the acreage included within the unit. As to excluded acreage in Cases III and IV a construction problem arises, viz., does the statute have the effect of making the term interest divisible between the included and excluded acreage?

The constitutional question of the power of the legislature to modify the relationship of the owner of a term interest and the owner of a reversionary interest is substantially the same as the question of the power of the legislature to modify the relationship of lessor and lessee by a compulsory pooling or unitization statute. The question under the federal Constitution in the latter context has been settled uniformly in favor of the existence of the power; the same holding is clearly indicated in the context presently under consideration.

9 See Annot., 37 A.L.R.2d 434 (1944), and cases cited therein. See also the cases cited in note 65, infra, sustaining the power of the legislature by a compulsory pooling or unitization statute to affect the relations of landowner and servitude owner in Louisiana, a relationship closely akin to the relationship of B and A, respectively, in the context under consideration.
2. Voluntary pooling or unitization assented to by both A and B

When the unit has been authorized by all parties in interest, both A and B will share in production in accordance with the terms of the unit agreement; typically their respective shares will be proportionate to their present interests in the portion of Blackacre included within the unit. The effect of unit production upon a term interest turns upon the intent of the parties. If intent is clearly expressed the court will give effect thereto. Difficulty is presented by a failure to reach agreement (or clearly to express agreement) on the effect of unit production upon the extension of the life of a term interest beyond its primary term.

Obviously no difficulty is presented by Case I. The production from Blackacre will suffice to extend the life of the interest beyond its primary term. In Cases II, III and IV the matter is more difficult of solution. Absent a clear expression of the parties' intention, what is a court to conclude concerning intent? This problem has been dealt with in two Texas cases, both of which fall in the Case II classification.

The first of these, Southland Royalty Co. v. Humble Oil & Refining Co.,16 dealt with the effect of production under a community lease executed by all persons having mineral interests in a contiguous 250-acre leasehold which included Blackacre and Whiteacre. Thus joining in the lease were the owners of both the term mineral interest and the possibility of reverter in Blackacre. Before the expiration of the primary term of the mineral interest, the lessee began production from wells drilled on Whiteacre. Controversy then arose over the effect of such production upon the term mineral interest in Blackacre.

Reasoning from its conclusions as to the effect of a unitization agreement between lessor and lessee, the court concluded that in Case II, the term of the mineral interest was extended by production from the unit but off Blackacre. The unitization here being voluntary in nature (arising from the execution of a community lease by all parties in interest), the court based its decision on the implied intent of the parties to modify the provisions of the term mineral deed. By express language in the instrument which created the term interest it was to be extended into the secondary term only by production from the land in which the interest existed and there was no such production from the land. But nothing prevented the parties from modifying this agreement so that the "thereafter" clause of

16 Southland Royalty Co. v. Humble Oil & Refining Co., 111 Tex. 324, 249 S.W.2d 914, 1 OIL AND GAS REP. 1431 (1952).
the deed could be fulfilled by production from wells located on other lands. Relying on the Parker\(^\text{11}\) and French\(^\text{12}\) cases, the court concluded that the execution of a community lease evidenced an intention to create a unitized lease with all of the usual incidents and legal consequences thereof. By joining in the lease, the parties necessarily agreed to the legal consequences that production from any of the tracts would be regarded as production from all other included tracts; the provision upon which the term of the grant in the mineral deed was to extend beyond twenty years was modified by agreement of the parties, to the extent that it could be fulfilled by production from wells located anywhere on the unit.

The unitization in the principal case being voluntary in nature, the court based its decision on the judicially ascertained intent of the parties. Obviously in a voluntary agreement, the parties may clearly express their intent in this regard. The important thing is, however, that in Texas, when the instrument is otherwise silent, the court will find the judicially ascertained intent of the parties on the matter in accordance with the holding of this case. Parties who do not wish this result must provide otherwise by express agreement.

The second Texas decision dealing with Case II is Spradley v. Finley.\(^\text{13}\) This case differed from Southland in that separate leases, rather than a community lease, were executed by A and B. To summarize the facts in a somewhat simplified form, A, the owner of a 29.43 mineral acre interest in Blackacre (comprising some 117.7 acres) which had been granted for a term of fifteen years "and so long thereafter . . .",\(^\text{14}\) leased his interest to lessee-1 in 1945. In the same year, B, who owned the balance of the minerals in Blackacre and the reversion after A's interest, executed a lease to lessee-2 covering both Blackacre and Whiteacre (two additional tracts comprising some 129 acres). After describing the premises, the latter lease recited as follows: "LESS 14.43 acres sold out of the above tract to . . . and less 15 acres sold out of said tract to . . ., leaving herein a total of 216.7 acres of land conveyed in this lease." This

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\(^{11}\) Parker v. Parker, 144 S.W.2d 303 (Tex. Civ. App. 1940) error ref.


\(^{13}\) Spradley v. Finley, - Tex. - , 302 S.W.2d 409, 7 OIL AND GAS REP. 610 (1957).

\(^{14}\) The instrument here construed granted the undivided mineral interests in Blackacre and then went on as follows: " . . . if oil, gas or other minerals is not being produced from said lands . . . at the expiration of 15 years from date hereof, this instrument to be null and void and all titles conveyed hereby shall revert to the grantor, their heirs or assigns." The language of the instrument is found in the opinion of the Court of Civil Appeals, 294 S.W.2d 730, 6 OIL AND GAS REP. 1050 (Tex. Civ. App. 1956). The writers believe that the interest created by this language of grant is the same interest that would have been created by a grant of the minerals "for fifteen years and so long thereafter as oil, gas or other minerals is produced."
language was followed by a typical "Mother Hubbard" clause. Each of the above mentioned leases contained a pooling clause authorizing the lessee, at his option, to pool the premises and further providing that "If production is found on the pooled acreage it shall be treated as if production is had from this lease, whether the well or wells be located on the premises covered by this lease or not."

Lessee-1 and lessee-2 thereafter assigned the leases to Skelly Oil Co. and the latter then executed a unitization agreement covering some 699.79 acres which included all of Blackacre and Whiteacre. A producing well was drilled on Whiteacre before the expiration of the primary term of A's mineral interest. Thereafter controversy arose over the effect of production from Whiteacre on the extension of the term interest in Blackacre.

The Supreme Court of Texas (2 justices dissenting) affirmed the judgment rendered by the Court of Civil Appeals that production on Whiteacre served to extend the life of the mineral interest into the secondary term. It declared that:

The case falls within the rule announced by the Southland Royalty case. By the execution of the leases the Spradleys [B] and the owners of the interests conveyed by the deeds [A] agreed that production of minerals from a tract included in a pool unit would be regarded during the life of the lease as production from all of the other tracts included in such unit. The condition upon which the grant in the mineral deed was to extend beyond the 15-year term was thus modified by agreement of the parties, and was fulfilled by production of minerals from the land with which the 20.4 and 97.3 acre tracts [Blackacre] were unitized.15

As was also true in Southland,16 this opinion turns upon the court's finding of the intent of the parties. It may be argued that the court was in error in its determination of intent; certainly the coincidence of the judicially ascertained intent and probable subjective intent of the parties is less readily apparent in Spradley than in Southland. As noted by the dissenting opinion in Spradley, the lease executed by B specifically excluded the 29.43 acre interest previously conveyed to A and hence it may be argued that B intended that his reversionary interest therein was to be unaffected by production from any unit but off Blackacre. The majority opinion declares that "... a landowner joining in a unitized lease may stipulate that production from one tract included therein, shall not be treated as production from any other tract for the purpose of determining rights under

15 302 S.W.2d at 412, 7 OIL AND GAS REP. at 653.
16 Southland Royalty Co. v. Humble Oil & Refining Co., 111 Tex. 324, 249 S.W.2d 914, 1 OIL AND GAS REP. 1431 (1952).
another instrument affecting the title to the latter tract or any part thereof or interest therein;¹⁷ in the light of the holding, however, this intent must be made quite explicit if the consequences of Southland and of Spradley are to be avoided. These two cases indicate that on the basis of rather meager evidence the courts will find an intent that the life of a term mineral interest shall be extended into the secondary term in Case II.

No case authority on Cases III and IV has been discovered by the writers. These cases may be distinguished from Cases I and II and from each other, just as they may be distinguished when the question in issue is whether the life of a lease is extended into the secondary term as to acreage excluded from a unit. Regarding leases we have urged elsewhere that the courts treat Cases III and IV alike and that the lease be considered as divisible in both instances, unless there is a contrary manifested intent of the parties.¹⁸ In the case of term interests, the arguments favoring divisibility are not nearly so compelling. Such interests are not such a common article of commerce as oil and gas leases and typically are dealt in, we believe, by persons reasonably familiar with the oil and gas industry. Moreover, non-divisibility of term interests will not have the same impact upon exploration for or development of minerals as does non-divisibility of a lease.

We are led to the conclusion that if the parties have not adequately dealt with the matter in the instrument creating the term interest nor in the lease, pooling or unitization agreement, the term interest should not be treated as divisible. Hence, as to the excluded acreage in Cases III and IV, the result should be the same as for the included acreage. In other words, Case III should be treated like Case I (and production will keep the entire interest alive) and Case IV should be treated like Case II (the effect of production turning on the intent of the parties). By appropriate language in the instrument which authorizes pooling or unitization, the intent of the parties should be made clear.¹⁹

¹⁷ 302 S.W.2d at 411, 7 OIL AND GAS REP. at 613.
¹⁸ Williams and Meyers, supra note 1.
¹⁹ Cook, Rights and Remedies of the Lessor and Royalty Owner Under a Unit Operation, SOUTHWESTERN LEGAL FOUNDATION, THIRD ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 101, 117 (1952), suggests the advisability of providing in the unit agreement “that any party thereto who is the owner of any reversionary interest in any tract pursuant to any royalty or mineral deed which will endure for a limited time in the absence of production from such tract, by execution of the unit agreement agrees with the owner of such term royalty or mineral right that so long as the unit agreement is in effect as to such tract any condition requiring production from the lands in which such rights exist for continuance of such rights shall be deemed fulfilled.” Owners of reversionary interests may decline to accept a clause so broadly phrased.
3. Voluntary pooling or unitization assented to and binding upon A when B has failed or refused to join in the agreement

When the owner of a reversionary interest fails to join (or ratify) an agreement which binds a term mineral interest, it appears that the rights of the owner of the reversionary interest will be unaffected by production on the unit but off Blackacre. In other words, in Cases II and IV, upon the expiration of the primary term, the term interest will expire, but in Cases I and III the life of the term interest will be extended beyond the primary term by production from the unit well located on Blackacre. Refusal of the owner of the reversionary interest to join in an agreement may, of course, frustrate the attempt to pool or unitize inasmuch as other persons having interests in the proposed unit may refuse to join unless the present and future mineral interests in Blackacre are effectively bound by the agreement; this would appear to be the risk assumed by a person who purchases (or reserves) a term mineral interest in oil and gas. It is improbable that the owner of a mineral interest may compel the reversioner to join in a lease or in a pooling or unitization agreement even though the consequence of such refusal is the expiration of the term interest without production.  

On the other hand, there may be a duty owed by the executive to the owner of a royalty interest or a non-executive mineral interest to join in a fair pooling or unitization agreement if fair dealing requires such action. The character of the duty of fair dealing owed by the executive, if any, and the remedy for breach remain uncertain. It is conceivable that if the executive refuses to join in a fair agreement, and the consequence is that there is no production from Blackacre during the primary term of the royalty interest, equity may decree an extension of the term; possibly the executive will be answerable in damages to the owner of the royalty or non-executive mineral interest for failure to join in the agreement. Case authority on the matter is lacking.

4. Voluntary pooling or unitization assented to by and binding upon B when A has failed or refused to join in the agreement.

As indicated earlier, B will usually have an undivided beneficial present interest in Blackacre in addition to the reversionary interest

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For excellent analyses of the problem, see Jones, Problems Presented by the Separation of the Exclusive Leasing Power from the Ownership of Land, Minerals, or Royalty, SOUTHWESTERN LEGAL FOUNDATION, SECOND ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 271 (1951); Jones, Non-Participating Royalty, 26 TEXAS L. REV. 169 (1948).
after A's interest. In the case of royalty and non-executive mineral interests, B will also have the executive right over A's interest. For example, when B, the owner of Blackacre, grants A a one-half mineral interest for a term of years, in addition to his reversionary interest in the one-half of the minerals granted he has retained a beneficial present interest in the other one-half of the minerals. In this situation B may bind his own interest by a lease just as may A, the owner of the term mineral interest. B is without power to bind A's mineral interest by such a lease, but when royalty or non-executive mineral interests in Blackacre are outstanding, B, the executive, may bind such interests by a lease of Blackacre.

Our concern here is not with a lease of Blackacre itself but with an agreement pooling or unitizing Blackacre with other premises. B may, of course, bind his own beneficial present interest by such an agreement. But what is the extent of his power to bind A's interest by such an agreement? And what is the effect upon A's interest when B has purported to bind it by such agreement?

B is without power to bind an outstanding term mineral interest by pooling or unitization agreement, just as he is without power to bind such an interest by a lease. If, nevertheless, B enters into a pooling or unitization agreement, there are three possible consequences:

1. If B has purported to bind the entire mineral interest in Blackacre, A may elect to ratify the agreement; the result will be the same as previously discussed in this paper in the situation where the pooling is voluntary and has been assented to by both A and B.
2. If B has purported to bind only his own beneficial interest in Blackacre, A will not be able to claim the benefits of ratification. As cotenant, however, during the life of his interest, he will be able to claim an apportioned share of the production from Blackacre (Cases I and III). He will not be entitled to any share or production from the unit but off Blackacre (Cases II and IV). Production on the unit in Cases II and IV will not extend the life of A's mineral interest into the secondary term; it is not certain whether its life will be extended in Cases I and III.22

22 Cf. Earp v. Mid-Continent Petroleum Corp., 167 Okla. 86, 27 P.2d 855 (1933), dealing with the analogous problem of the effect of production by a concurrent owner or his lessee upon the extended life of a lease executed by another concurrent owner. The matter is discussed in Williams, *The Effect of Concurrent Interests on Oil and Gas Transactions*, 34 TEXAS L. REV. 591, 521-23 (1956). Presumably the result will turn upon a close construction of the language of the instrument creating the term interest, viz., is production from Blackacre or production by the term owner from Blackacre required to keep the interest alive in the secondary term? Public interest in conservation and in the avoidance of unnecessary wells would appear to justify a preference for the former construction.
3. A may, of course, elect to explore and develop or to lease Blackacre himself.

On the basis of his self-interest, A could be expected to ratify, if possible, in Cases II and IV so as to claim a share of production from the unit but off Blackacre and to get the benefit of such production for the purpose of extending the life of his interest. In Cases I and III, A will probably prefer not to ratify but instead will claim an apportioned share of production as a cotenant unless ratification or production by A from Blackacre will be required to extend the life of his interest into the secondary term.

On the question of the power of the executive to bind a royalty interest or a non-executive mineral interest by pooling or unitization agreement, the authority is divided. In Texas it appears that the executive does not have this power. In Louisiana, on the other hand, a royalty interest may effectively be bound by a pooling or unitization agreement to which the royalty owner has not assented; presumably the executive may similarly bind a non-executive mineral interest. In most of the producing states the authority of the executive to bind a royalty interest or a non-executive mineral interest remains uncertain.

We are confronted with two questions: (1) What are the consequences of the differing rules as to the power of the executive to bind these interests by pooling or unitization? (2) Which rule is preferable, that the executive may (or may not) effectively bind royalty and non-executive mineral interests by a pooling or unitization agreement?

Adoption of the Louisiana position on the power of the executive to bind a royalty interest or non-executive mineral interest by pooling or unitization means, we believe, that Cases II, III and IV should be treated like Case I, both as to the included and excluded acreage. In other words, if the executive enters into a pooling or unitization agreement, production or other appropriate activities on the unit, whether on or off Blackacre, should suffice to extend the life of a term interest into the secondary term both as to the included and excluded acreage and the owner of the non-executive interest should receive an apportioned share of the unit production.

In a jurisdiction adopting the Texas view of Brown v. Smith the executive is without power to bind a royalty or non-executive min-

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eral interest by a pooling or unitization agreement. If the executive is particularly desirous of securing the execution of such an agreement effective to bind the latter interest, he must secure joinder of the owner of the latter interest. The problem is one of bargaining over the terms of the agreement. When a term interest is concerned, obviously the longer the unexpired term of the interest, the stronger the bargaining position of its owner. On the other hand, the percentage or fraction of production represented by the interest affects the bargain; the greater it is the less the incentive of the executive in pooling or unitizing the premises when the effect may be to extend the term of the interest. As a condition of his consent to the agreement, the owner of the royalty or non-executive interest may be able to demand agreement by the executive that in each of the four cases, I through IV, he will share in unit production whether on or off Blackacre, and that production on the unit will suffice to keep the term interest alive both as to included and excluded acreage. On the other hand, when the bargaining position of the owner of the royalty or non-executive interest is less substantial (as when it is a term interest of short duration) he may be compelled to stipulate that production on the unit will be effective to extend the life of the term interest only if production is from a well located on Blackacre.

In a state adhering to the principle of Brown v. Smith, what are the consequences if an executive executes a pooling or unitization agreement purporting to bind Blackacre despite his lack of power to bind a royalty or non-executive mineral interest?

The following may be suggested as tentative conclusions as concerns these interests:

1. The owner of the interest may ratify the agreement, claim a share of production from the unit whether the well is on or off Blackacre, and gain the benefits of production off Blackacre to keep a term interest alive after the expiration of the primary term under the rulings of Southland and Spradley.

2. If a producing unit well is drilled on Blackacre (Cases I and III), the owner of the interest may refuse to ratify the agreement but instead elect to claim his full interest in production therefrom rather than an interest in the apportioned share of production allocated to Blackacre under the terms of the agreement to which he was not a party; such production will, of course, extend the life of

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26 Ibid.
28 Spradley v. Finley, —Tex.—, 302 S.W.2d 409, 7 OIL AND GAS REP. 650 (1957).
a term royalty or non-executive mineral interest into the secondary term.

3. It is conceivable (but improbable) that if the well is off Black-acre, the owner of the interest will allege a breach of duty in the execution of the agreement and seek relief based on this alleged breach. The duty as well as the remedy for such breach are so speculative in character that it is doubtful that this election will be made.

As to which rule is preferable, we are led to the conclusion that the executive should have authority to bind the royalty or non-executive mineral interest (as in Louisiana).

In the usual instrument creating one of these types of interests, nothing is said concerning the power of the executive to bind the royalty or non-executive interest by pooling or unitization agreement. Such agreements are becoming more common with the recognition that both public and private interests are best protected by pooled and unitized operations. Frequently, if not usually, pooling or unitization is "prudent" development of the premises. We conclude that, in the absence of specific prohibitory language in the instrument creating the interest, the court should find that such conduct by the executive is authorized. Obviously there is always the possibility of damage to the royalty or non-executive interest as a result of wrongful conduct on the part of the executive; we believe that a duty of fair dealing is owed the owner of such an interest by the executive. The hypothetical risk of damage to the owner of the royalty or non-executive interest cannot justify denial to the executive of the power to pool or unitize the royalty or non-executive interest.

II. Prescription liberandi causa

1. Introduction

In Louisiana, all severed mineral and royalty interests are subject to the operation of the civil law concept of prescription on ten years non-user, except for mineral servitudes reserved in transfers of

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29 See Jones, supra note 21.
30 La. Civ. Code Ann. arts. 789, 3546 (West 1952); see Frost Lumber Industries, Inc. v. Republic Production Co., 112 F.2d 462 (5th Cir. 1940), cert. denied, 311 U.S. 676 (1940), 15 Tul. L. Rev. 317 (1941). For a detailed discussion, see Nabors, The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute, 25 Tul. L. Rev. 30, 155, 303, 485 (1950-51), and 26 Tul. L. Rev. 23, 172, 303 (1951-52). Varied attempts to avoid loss of servitudes upon ten years non-user have been nullified by the courts. See, e.g., Ober v. McGinty, 66 So. 2d 385, 2 Oil and Gas Rep. 1215 (La. App. 1953) (deed conveying tract reserved ½ of minerals for ten years and provided that at the expiration of such period the grantor might extend his right and ownership of ½ of minerals for an additional 10 year period upon the payment of a stipulated sum; held, this was an invalid attempt to reserve minerals for a longer period than 10 years).
It is immaterial to the application of this doctrine of prescription liberandi causa whether the interest was created by grant or by exception or reservation, or whether the owner of the interest has a right to enter and drill. The grant of an interest for a term in excess of ten years does not prevent the termination of the interest upon the expiration of the ten year period of non-user. The right of reversion which the landowner has after creating a servitude may not be separated from the land by grant or reservation.

Until recent years, the running of the prescriptive period might be suspended in some cases by the minority of the owner or a co-owner of the interest. However, when an undivided interest was conveyed to a minor with the intent to suspend the running of the prescriptive period, the court might find that the transaction was an ineffective attempt to circumvent the law. By an act of 1944, it was provided that the minority of a co-owner should not interrupt the running of liberative prescription against other co-owners. An amendment in 1950 provided that minority or other legal disability should not suspend or interrupt the accrual of liberative prescription against the ownership, use or development of minerals, or mineral or royalty rights.

The running of the prescriptive period as to mineral servitudes may be interrupted by the commencement of drilling operations in

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81 LA. REV. STAT. ANN. § 9:5806 (1952), enacted in 1940, makes servitudes imprescriptible if reserved upon conveyance of land to the United States or one of its subdivisions. Retroactive application of the statute was sustained in United States v. Nebo Oil Co., 190 F.2d 1003 (5th Cir. 1951). This rule does not apply to land acquired by the State of Louisiana which has the benefit of the prescription doctrine, except in two situations. See La. Act 8, Extra Sess. 1942, and La. Act 169 of 1950.

See Nabors, supra note 30, 26 Tul. L. Rev. at 191-93 (1952); Comment, Imprescriptible Mineral Reservations in Sales of Land to the State and Federal Governments, 22 Tul. L. Rev. 496 (1948).


84 Hicks v. Clark, 225 La. 133, 72 So. 2d 322, 3 OIL AND GAS REP. 1019 (1954). See note 61 infra.


The application of minority suspension to royalty interests was recognized in St. Martin Land Co. v. Pinckney, 212 La. 605, 33 So. 2d 169 (1947); Union Sulphur Co. v. Lognon, 212 La. 612, 33 So. 2d 178 (1947); Humble Oil & Refining Co. v. Guillory, 212 La. 646, 33 So. 2d 182 (1947). These cases are discussed in Daggett, Sequels to Vincent v. Bullock, 8 LA. L. REV. 173 (1948), and Daggett, op. cit. supra note 33, § 64.

86 Superior Oil Co. v. Case, 221 La. 126, 58 So. 2d 733, 1 OIL AND GAS REP. 712 (1952); Roy O. Martin Lumber Co. v. Hodge-Hunt Lumber Co., 190 La. 84, 181 So. 861 (1938); Patton's Heirs v. Moseley, 186 La. 1088, 173 So. 772 (1937).

good faith, whether or not successful, or by an acknowledgement of the servitude which is made for the purpose of interrupting the running of the prescriptive period. In the case of royalty interests, however, actual production, as opposed to drilling operations, is necessary to interrupt or suspend the prescriptive period. When servitudes are created on separate, non-contiguous tracts by a single instrument, or when servitudes are created by separate instruments on contiguous parts of a single tract, the servitudes are separate for each tract (or parts of the tract covered by the individual instruments), and drilling operations interrupt prescription only as to

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28 See the cases and other materials cited in note 33, supra, and Daggett, op. cit. supra note 33, § 21. Geophysical exploration is not sufficient, however, to interrupt the running of prescription. Goldsmith v. McCoy, 190 La. 120, 182 So. 519 (1938). As to the good faith requirement, see Louisiana Petroleum Co. v. Broussard, 172 La. 613, 134 So. 1 (1931); McMurrey v. Gray, 216 La. 904, 45 So. 2d 73 (1949).

29 So long as there is production, whether or not in paying quantities, the running of prescription against a mineral servitude is interrupted. Mays v. Hansbro, 222 La. 557, 64 So. 2d 232, 2 OIL AND GAS REP. 322 (1953).


31 Dispute frequently arises as to whether joinder in a lease or in a pooling or similar agreement is sufficient to interrupt prescription. See infra at note calls 60 and 80; Daggett, op. cit. supra note 33, § 17.

The period of renewal of a servitude by virtue of an acknowledgment may expressly be for less than ten years. Crawford v. Texas Co. 114 F. Supp. 218, 2 OIL AND GAS REP. 1383 (W.D. La. 1953), aff’d, 212 F.2d 722, 3 OIL AND GAS REP. 797 (5th Cir. 1954) (period of five years).

The necessity of careful drafting of an instrument intended to interrupt prescription is indicated by Bourg v. Hebert, 224 La. 533, 70 So. 2d 116, 3 OIL AND GAS REP. 634 (1953) (acknowledgment of 20 separate contiguous servitudes did not convert the 20 servitudes into one servitude; hence the servitudes on which there were no operations in the ten year period after acknowledgment were prescribed.)

32 Union Sulphur Co. v. Andrus, 217 La. 662, 47 So. 2d 38 (1950). A royalty interest arising under a lease (an overriding royalty) is not prescribable apart from the lease, however. Aecher v. Mid-States Oil Corp., 222 La. 812, 64 So. 2d 182, 2 OIL AND GAS REP. 679 (1953). It will be extinguished by the termination of the lease. Arkansas Fuel Oil Co. v. Gary, 70 So. 2d 144, 3 OIL AND GAS REP. 601 (La. App. 1954), rev’d, 227 La. 24, 79 So. 2d 869, 4 OIL AND GAS REP. 1494 (1951) (on the ground that the lease remained valid and binding and hence the royalty, the life of which depended on the continued validity of the lease, was unaffected.)

The differing rules on prescriptibility of mineral and royalty interests give rise to controversy over classification of a particular interest. Cormier v. Ferguson, 92 So. 2d 107, 7 OIL AND GAS REP. 11 (La. App. 1957); Smith v. Anisman, 85 So. 2d 351, 5 OIL AND GAS REP. 1001 (La. App. 1956). See also Horn v. Skelly Oil Co., 224 La. 709, 70 So. 2d 617, 3 OIL AND GAS REP. 781 (1954) (construction of prior grant as creating a mineral or royalty interest was a necessary preliminary to the construction of a later grant which referred to the earlier instrument). See Nabors, supra note 30, 25 Tul. L. Rev. at 45 (1951).

In Union Oil Co. v. Touchet, 229 La. 116, 325, 86 So. 2d 10, 51, 1 OIL AND GAS REP. 1177, 1180 (1956), the court declared that the completion of a well capable of producing in paying quantities within ten years after the date of the creation of a royalty interest is sufficient to save the interest even though the well was shut in for want of a market and no products were marketed from it until after the expiration of ten years from the date of the royalty sale. The interest was held to have been prescribed, however, for other
the specific tract or tracts upon which such operations are pursued. Once prescription liberandi causa has been interrupted, the ten year period starts anew.

2. Oil and Gas Leases and Prescription

As yet it remains uncertain whether an oil and gas lease is subject to liberative prescription. Few occasions arise for testing the question. Such production or drilling operations on the land as will suffice to extend the life of the lease into the secondary term will surely interrupt prescription, if applicable to leases. The standard use of relatively short primary terms in oil and gas leases (ten years or less) results in termination of the lease by its express provisions if there is no production from nor drilling operations upon the land at the expiration of the primary term, so the prescription question is rarely reached.

When the leasehold includes non-contiguous tracts, however, the prescription question may more readily arise. In Arent v. Hunter a mineral lease was classified as a servitude and it was held that liberative prescription terminated the lease insofar as it applied to non-contiguous tracts on which there was neither drilling nor production for more than ten years. With regard to prescription liberandi causa, this case treated a lease of non-contiguous tracts as creating, in effect,

reasons. See infra at note call 91. See also LeBlanc v. Haynesville Mercantile Co., Trustee, 230 La. 299, 88 So. 2d 377, 6 Oil and Gas Rep. 443 (1956) (payment of shut-in royalty interrupts or suspends the running of prescription against a royalty interest).

41 See Frost Lumber Industries, Inc. v. Republic Production Co., 112 F.2d 462 (5th Cir. 1940), cert. denied, 311 U. S. 676 (1940); Dobbins v. Hodges, 208 La. 143, 21 So. 2d 26 (1945). When a servitude includes contiguous tracts, however, production on one tract prevents prescription of the servitude on the other tract. Connell v. Muslow Oil Co., 186 La. 491, 172 So. 763 (1937). As to the effect of division of the advantages of a servitude by the mineral owner or subdivision by the landowner, see note 63, infra.


A single lease or deed from a single landowner creates a single servitude in a contiguous tract, whatever its size. Baker v. Texas Co., 88 So. 2d 263, 6 Oil and Gas Rep. 431 (La. App. 1956); Lenard v. Shell Oil Co., 211 La. 265, 29 So. 2d 844 (1947) (80,000 acres). If separate leases or deeds are executed by the landowner for contiguous tracts, separate servitudes are created by each lease or deed. Co-owners in indivision of a tract may create a single servitude by lease or deed. See Nabors, supra note 30, 25 Tul. L. Rev. at 174 (1951).

a separate servitude on each tract." Apart from prescription, however, production from one tract will satisfy the lease terms and will keep the lease alive during the secondary term as to other non-contiguous tracts on which there has been neither production nor drilling operations.48

Later decisions cast some doubt on the holding of the Arent case49 on the prescription question.50 The secondary authorities are divided on the subject.51

Assuming that a lease is subject to prescription, what is the effect of pooling or unitization upon the application of prescription doctrines? The following conclusions are suggested:

1. If the lessee pools or unitizes the premises without the authority of the lessor or of a compulsory order, operations on the unit but off the leased premises (Cases II and IV) should not suffice to keep the lease alive during the secondary term nor to interrupt prescription.52

In Cases I and III, however, appropriate operations on the unit and on the leased premises should suffice to extend the term of the lease and interrupt or suspend prescription.53

2. If the lessee has authority for pooling or unitization either under the terms of the lease, a separate agreement signed by the lessor, or a compulsory statute, production from or appropriate operations on the unit would appear to have the following consequences:

(a) In Cases I and II, the lease will be kept alive during the sec-

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47 See also Lee v. Giaugue, 154 La. 491, 97 So. 669 (1923) and the cases cited supra note 41. See Daggett, supra note 33, § 21.
48 A. Veed'er Co. v. Pan-American Production Co., 205 La. 599, 17 So. 2d 891 (1944); Veed'er v. Pan-American Production Co., 205 La. 841, 18 So. 2d 314 (1944).
51 Daggett, supra note 33, § 3, takes the position that prescription applies to leases but she observes that the question is not free from doubt and respected students take the contrary view. See also Risinger, Does 10-year Liberative Prescription Apply to Oil and Gas Leases?, 1 La. Bar. J. 39 (1914). Cf. Hunt Trust v. Crowell Land & Mineral Corp., 210 La. 945, 28 So. 2d 669 (1946) (production did not occur until the twenty-fourth year of the primary term of a lease; the court assumed the validity of the lease, possibly upon the theory set forth by Mrs. Daggett, supra note 33, at pp. 17, 157, that the acceptance of delay rentals voluntarily renewed the contract or gave rise to an estoppel to deny the validity of the lease.)
52 Cf. Union Oil Co. v. Touchet, 229 La. 316, 86 So. 2d 50, 5 Oil. and Gas Rep. 1177 (1956), infra note 91. This case concerned prescription of a royalty interest but the reasoning of the opinion seems equally applicable to a lease. The lessor had authority to enter into a unitization agreement, but the inclusion of one tract within the unit had not been authorized. The court concluded that the lessee's authority was limited to entry into a "valid" unit, and hence the entry into the particular unit operation was unauthorized. Operations on the unit but off the tract in which the interest existed were held not to interrupt prescription of the royalty interest.
53 No case dealing with this exact point has been discovered.
ondary term and prescription, if applicable, should be interrupted.\(^{84}\) 

(b) In Cases III and IV, the express provisions of the lease will be satisfied and it will be extended into the secondary term as to the entire tract, both the portions included within and excluded from the unit.\(^{85}\) If applicable, prescription will be interrupted as to the portion of Blackacre included within the unit; it is less certain in Case III\(^{87}\) or Case IV\(^{88}\) that prescription will be interrupted as to the portion of Blackacre excluded from the unit, especially if the included and excluded portions are non-contiguous.\(^{89}\)

### 3. Mineral servitudes

When Blackacre is subject to a mineral servitude or royalty interest in addition to a lease, complex questions arise, many of which cannot now be answered with assurance.

Certainly the owner of a mineral servitude may lease the minerals, and production from or drilling operations prosecuted in good faith on the land will interrupt or suspend prescription of the mineral interest whether or not the landowner has joined in the lease.\(^ {90}\) It is elementary, however, that a lessee’s interest is not greater than the interest of his lessor. Hence, if a lease is executed by the owner of a mineral servitude without the joinder of the landowner, and the mineral servitude is prescribed, the interest of the lessee falls with that of his lessor even though the primary term of his lease has not expired.

To prevent such premature termination of their interests, lessees frequently seek to obtain the joinder of the landowner in the lease (or a counterpart of the lease) executed by the mineral owner on the supposition that if the mineral servitude should be prescribed during the primary term of the lease the lessee’s interest will be pro-

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\(^{84}\) See, e.g., Crichton v. Lee, 209 La. 561, 21 So. 2d 229 (1946) (compulsory unitization; Case II; lease continued in effect during secondary term).


\(^{86}\) LeBlanc v. Danciger Oil & Refining Co., 218 La. 463, 49 So. 2d 855 (1950) (Case IV); Hunter Oil Co. v. Shell Oil Co., 211 La. 893, 31 So. 2d 10 (1947) (Case IV); Crichton v. Lee, 209 La. 561, 21 So. 2d 229 (1946) (Case II).

\(^{87}\) See the discussion of Elson v. Mathewes, 224 La. 417, 69 So. 2d 734, 3 OIL AND GAS REP. 384 (1953), infra at note call 111.


\(^{89}\) Cf. Arent v. Hunter, 171 La. 1019, 133 So. 137 (1931); Lee v. Giaugue, 154 La. 491, 97 So. 669 (1921), and cases cited supra note 41. See DAGETT, supra note 33, § 21.

\(^{90}\) Jantz v. Long Bell Petroleum Co., Inc., 229 La. 821, 86 So. 2d 918, 6 OIL AND GAS REP. 52 (1956) (minerals in large tract severed; subsequently the tract was subdivided by the landowner into smaller tracts; held, operations on tract by lessee of mineral owner interrupted prescription as to entire tract.)
ected by virtue of the lease from the landowner under the doctrine of after acquired title. The authority on the matter is far from clear, but it appears that the landowner will be bound by estoppel by deed on the prescription of the previously granted servitude so that as between him and his lessee, the lease will be valid. If the landowner should convey the land prior to prescription of the servitude, it is less certain whether the lease will continue valid after the running of the prescriptive period.  

The prescription of a mineral or royalty interest may be interrupted by an acknowledgment made with intent to interrupt prescription. The question sometimes arises whether the joinder of the landowner in a lease (or a counterpart of a lease) has this effect. It is clear that such joinder does not necessarily have this effect; this is a question of intent.  

61 Cf. Whittington, Reed and Edman v. Bazemore, 133 F. Supp. 163, 4 OIL AND GAS REP. 1522 (W.D. La. 1955), 138 F. Supp. 324, 5 OIL AND GAS REP. 523 (W.D. La. 1956). This case was reversed in Bazemore v. Whittington, 241 F.2d 943, 7 OIL AND GAS REP. 789 (5th Cir. 1957), on the ground that a quitclaim will not support application of the doctrine of estoppel by deed. The opinions in this case collect and discuss the case and secondary authority on application of estoppel by deed in Louisiana. But cf. Hicks v. Clark, 221 La. 133, 72 So. 2d 322, 3 OIL AND GAS REP. 1529 (W.D. La. 1954), which held that the owner of land subject to an outstanding 1/4 mineral servitude might not reserve the right of reversion to such 1/4 mineral interest in a subsequent conveyance of the land. It may be argued that (1) if a landowner who has previously conveyed minerals executes a lease, he will be bound by estoppel by deed on the prescription of the previously granted servitude and as between him and his lessee, the lease will be valid, but (2) if he reconveys the land prior to the prescription of the servitude, on the prescription of the servitude it will revert to the then landowner free and clear of the lease on the theory that the prior landowner's lease was an invalid attempt to convey the reversion or an interest therein.  

As to the former point it has been uniformly assumed that a lease executed by a landowner at a time when mineral rights are subject to an outstanding servitude is valid upon prescription of the servitude. See, e.g., Gayosa Co. v. Arkansas Natural Gas Co., 176 La. 333, 145 So. 677 (1933). See Sachse, The Validity of Clause Purporting to Bind After Acquisitions of Lessor, L. S. U., SECOND ANNUAL INSTITUTE ON MINERAL LAW 118, 125 (1954).  

Clear authority on the latter point is lacking in decisions of Louisiana courts. A federal district court in Dees v. Hunt Oil Co., 123 F. Supp. 18, 1 OIL AND GAS REP. 1860 (W.D. La. 1914), has dealt with this matter. The owner of a 450-acre tract leased the premises at a time when he owned only a 187.50-acre undivided interest in the mineral rights. The lease purported to cover not only the interests then owned by lessor but also such additional interests as he might acquire in the future. Plaintiff, as heir, succeeded to the lessee's interest in his death and thereafter the outstanding servitude in the land (a 262.50-acre undivided interest in the minerals) was prescribed. Plaintiff asserted, inter alia, that a mineral lease cannot validly be made affecting a future reversionary interest, relying on Hicks v. Clark, supra. The court rejected this contention. As observed in Discussion Notes, 3 OIL AND GAS REP. 1865, 1866 (1914), "[T]he Louisiana Supreme Court's reaction to the decision will be of great interest."  

62 Barnsdale Oil Co. v. Succession of Miller, 224 La. 216, 69 So. 2d 21, 3 OIL AND GAS REP. 147 (1941). See also Spears v. Nesbit, 197 La. 931, 2 So. 2d 650 (1941).  

The execution of a joint lease has been said to extend the term of servitude during the term of the lease but without interruption. See Achee v. Caillouet, 197 La. 865, 197 So. 581, 191 (1940). See Daggett, supra note 33, § 87; Nabors, supra note 30, 25 TULANE L. REV. at 314-8 (1911).  

Lease and pooling forms in contemporary use frequently provide specifically that drilling
Another question which may arise from the joinder of the mineral owner and a landowner in a lease relates to the question of divisibility of a servitude. The parties to a servitude may divide it into two or more parts by an appropriate indication of intent. Thus if a single servitude includes both Blackacre and Whiteacre, the landowner and the mineral owner may agree that the servitudes on Blackacre and Whiteacre shall be separate and distinct; if this be done, production on one parcel will not interrupt prescription of the servitude on the other parcel. It is doubtful that the mere joinder of the landowner and the mineral owner in a lease as to a portion only of the tract subject to the servitude will be taken as evidencing an intent to divide the servitude into two parts, one covering the leased acreage and the other covering the unleased acreage.

A related question arises from the inclusion of a portion only of a tract subject to a servitude in a pooling or unitization agreement: is the servitude divided into two portions, one on the parcel within the unit and the other on the parcel excluded from the unit? In examining this question we consider separately the effect of compulsory and voluntary pooling or unitization.

a. Compulsory pooling or unitization

Clearly production from a compulsory unit in Cases I and II interrupts prescription of a mineral servitude in Blackacre. In Case I, drilling operations alone, without production, suffice to interrupt prescription, but in Case II, drilling operations alone, without production, do not interrupt prescription but the conservation order

operations or production will interrupt prescription liberandi causa. See Placid Oil Co. v. George, 221 La. 200, 59 So. 2d 120 (1952); Daggett, supra note 33, § 17.


A minerlal owner may divide the advantages of a servitude by assigning to a third person all of his interest in a designated portion of the land affected by the servitude and create a situation whereby user of a portion would not prevent prescription of the remainder. Ohio Oil Co. v. Ferguson, 213 La. 183, 34 So. 2d 746 (1947); Byrd v. Forgetson, 213 La. 276, 34 So. 2d 777 (1947). But a landowner cannot alone divide the advantages of a servitude by conveyances of his land in separate parcels. Connell v. Muslow Oil Co., Inc., 186 La. 491, 172 So. 763 (1937); Patton v. Frost Lumber Co., 176 La. 916, 147 So. 33 (1933).


White v. Frank B. Tread & Son, Inc., 230 La. 1017, 89 So. 2d 883, 6 Oil and Gas Rep. 640 (1956) (Case II); Smith v. Holt, 223 La. 821, 67 So. 2d 93, 2 Oil and Gas Rep. 1395 (1953) (Case II); Ohio Oil Co. v. Kennedy, 28 So. 2d 304 (La. App. 1946) (Case II). A fortiori, prescription is interrupted in Case I.

Inclusion of a tract in a compulsory unit does not, however, interrupt prescription acquirendi causa. Adger v. Oliver, 66 So. 2d 625, 2 Oil and Gas Rep. 1376 (La. App. 1953).
will suspend the running of prescription by an obstacle to the user of the servitude. This distinction was drawn in the recent case of Boddie v. Drewett. A 12-acre tract subject to a mineral servitude was included within a compulsory 640-acre drilling unit. Prior to the expiration of the 10-year period from the date of the creation of the servitude, a well was commenced on the unit (but off the 12-acre tract) and completed as a dry hole. Subsequent to the expiration of the 10-year period, another well was commenced on the unit (but off the 12-acre tract) and completed as a producer. The question in issue was whether the mineral servitude had been prescribed before production was obtained from the second well. The court concluded that the dry hole was not such a user of the servitude as to interrupt the running of prescription in the case of the 12-acre tract, declaring that "To use a servitude so as to effect an interruption of prescription is to exercise the right in the manner contemplated by the grant or reservation . . . With respect to a mineral servitude, it is essential that there be exploitation of the land, either by good faith drilling operations thereon, albeit unsuccessful, or by the extraction of the minerals lying under the land by draining or otherwise removing them through operations conducted from outside the land." In other words, the court suggests that in a Case I situation, drilling operations alone will interrupt prescription, but in a Case II situation, production is requisite to interrupt prescription.

In the instant case, however, the court found that the running of prescription had been suspended (as distinguished from interrupted) by an obstacle to the user of the servitude. The obstacle was the order of the Commissioner of Conservation creating the 640-acre and requiring that the well drilled on the unit be drilled at a specified location (other than on the 12-acre parcel). The court assumed that the running of prescription resumed within a reasonable time after the abandonment of the first well as a dry hole since such abandonment opened the door to the initiation of proceedings for the allowance of drilling in areas theretofore prohibited by the order. However, excluding this period of suspension from the period of time between the date of the creation of the mineral servitude and the date production was obtained on the unit which included the 12-acre parcel (Case II), less than ten years had elapsed and hence the servitude had not been prescribed.

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67 Boddie v. Drewett, supra note 66, 229 La. at 1020, 87 So. 2d at 517, 6 OIL AND GAS REP. at 39.
In Case IV, the servitude is, in effect, divided by the operation of the pooling or unitization order into a servitude covering that portion of Blackacre included within the unit and a servitude covering that portion of Blackacre excluded from the unit. As to the portion excluded from the unit, production from or operations on the unit have no effect on prescription of the servitude. As to the portion included within the unit, the effect of drilling operations or production is the same as just indicated for Cases I and II; that is, prescription is interrupted (or suspended).

Authority on Case III is far from clear. It may be argued that prescription is interrupted by production from or operations on Blackacre, as to both included and excluded acreage. This is to say, arguably the servitude on Blackacre is indivisible in Case III. Supporting indivisibility are the decisions on Case IV holding that a lease remains in force on excluded acreage despite nonpayment of delay rentals and expiration of the primary term. But dissatisfaction with the indivisibility concept and the injustices it produces has been growing. Ever since his strong and persuasive dissent in the Hunter case, Justice Hamiter has inveighed against the application of indivisibility to pooling and unitization cases. His opinion in Elson v. Mathewes laid the cornerstone for the Childs and Jumonville Pipe & Machinery Co. v. Federal Land Bank cases. In both of these cases a compulsory unit was formed which included only a part of Blackacre and production was obtained on the unit before the expiration of the ten year prescriptive period. It was held that the servitude was kept alive and extended by production as to the portion of Blackacre included within the unit, but the servitude in the portion of Blackacre excluded from the unit was prescribed by ten years non-user. The result of these cases, it will be seen, is to distinguish the effect on leases and mineral servitudes of production from the unit in a Case IV situation; such production suffices to keep the lease alive in its entirety but suffices to keep a mineral servitude alive only as to the portion of Blackacre included within the unit. See Comment, Mineral Rights and Forced Pooling, 17 La. L. Rev. 433 (1957).

If Blackacre consists of non-contiguous parcels, one of which is excluded from the unit, prescription is not interrupted as to the excluded tract.

Hunter Oil Co. v. Shell Oil Co., 211 La. 893, 31 So. 2d 10 (1947) (Case IV; compulsory pooling order issued three days prior to expiration of primary term; lease extended into secondary term as to acreage included and excluded from the unit); Smith v. Carter Oil Co., 104 F. Supp. 465, 1 Oil and Gas Rep. 698 (W.D. La. 1952) (Case IV; compulsory pooling; delay rentals not paid on excluded acreage on due date; held, lease not subject to cancellation as to the excluded acreage.)

Hunter Oil Co. v. Shell Oil Co., 211 La. 893, 31 So. 2d 10 (1947). (This case held a lease servitude indivisible and that production in Case IV sufficed to keep the lease of Blackacre in effect in its entirety during the secondary term.)

Elson v. Mathewes, 224 La. 417, 69 So. 2d 734, 3 Oil and Gas Rep. 384 (1953) (in this case the court declared that a servitude was divisible by the joint action of the landowner and mineral owner.)

ville decisions, which held mineral servitudes divisible in the Case IV situation. No basis for distinguishing Cases III and IV appears to us. We would urge, therefore, that the Childs and Jumonville cases be extended to Case III, so that drilling or production on Blackacre does not interrupt prescription on a portion thereof excluded from the unit."

b. Voluntary pooling or unitization without joinder of landowner

Production under a voluntary unitization agreement will not cause the interruption of prescription without the assent of the landowner, unless the production is from Blackacre itself. Thus, if after the creation of a mineral servitude in Blackacre, the owner of the servitude (without joinder of the landowner) pools Blackacre with Whiteacre, drilling operations on or production from Whiteacre (Cases II and IV) will not interrupt liberative prescription of the servitude on Blackacre.77 Prescription will be interrupted as to include acreage in Cases I and III. The situation of excluded acreage in Case III is less clear. An analysis founded on the Childs76 and Jumonville79 cases leads to the conclusion that prescription is not interrupted. However, in this instance there has been no compulsory division of the premises by a state order. The operations on Blackacre are such as would have interrupted prescription as to all of Blackacre had there been no pooling or unitization agreement. Since the landowner has not assented to pooling or unitization, his interests may be said to be unaffected thereby and the agreement does not cause

77 Discussion Notes, 2 OIL AND GAS REP. 1399, 1401 (1953) discuss the question of whether the rationale of Smith v. Holt, 223 La. 821, 67 So. 2d 93, 2 OIL AND GAS REP. 1395 (1953) (Case II, prescription did not run against the servitude included in the unit even though no drilling operations were pursued on that parcel) is applicable to contiguous land excluded from the producing unit (Cases III and IV), as follows:

"If the rationale of the decision is that the reserved mineral rights were continued in effect . . . because of the 'obstacle' theory, i.e., the conservation order prohibiting the drilling of more than one well . . . which prevented exercise of the servitude, then the corollary is that the reserved mineral rights would not be continued in effect as to [the excluded acreage] because there was no obstacle, no conservation order prohibiting the drilling of a well on the [excluded acreage]. On the other hand, if the drilling of the unit well was such an exercise of the servitude as to have the effect of interrupting the prescription, then in the hypothetical case above stated it could be logically argued that the servitude was preserved as to both the [included and the excluded land] under the rule that exercise of a servitude upon a tract of land interrupts the prescription as to all contiguous lands covered by the same servitude."

79 Note 74 supra.
80 Note 75 supra.
him to gain (by prescription of excluded acreage in Case III) or to lose (by interruption of prescription in Cases II and IV).

c. Voluntary pooling or unitization with joinder of landowner

If the landowner joins the owner of the mineral servitude in authorizing pooling or unitization of Blackacre by a lessee, this agreement may be treated as an acknowledgement made with intent to interrupt prescription, which will then start to run anew.\(^80\) Whether or not the agreement is sufficient as an acknowledgment to interrupt prescription, production or drilling operations by the lessee will interrupt prescription of the servitude in Cases I and II.\(^81\)

Cases III and IV are more difficult.

The lease executed by the landowner and the mineral owner may authorize the lessee to pool or unitize all or part of Blackacre. Particularly when the landowner retains an undivided interest in the minerals and there also exists a servitude of an undivided mineral interest, such joinder in a lease may be expected. If the lessee elects to pool or unitize a portion only of Blackacre, what is the effect of production or drilling operations on the unit with respect to prescription of the servitude in the portion of Blackacre excluded from the unit? We believe that this should be answered on the basis of the intent of the parties. If intent is not expressed, the court must find what is called the "judicially ascertained intent" of the parties — that is, what the parties would probably have intended if they had thought about the matter. We know of no authority on the question, but

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\(^{80}\) See Elson v. Mathewes, 224 La. 417, 69 So. 2d 734, 3 OIL AND GAS REP. 384 (1953). But cf. Arkansas-Louisiana Gas Co. v. Thompson, 222 La. 868, 64 So. 2d 202, 2 OIL AND GAS REP. 662 (1953) (prescription not interrupted since at the time of the execution of the lease the landowner believed that the servitude had already been prescribed and did not know that the servitude owner executed a counterpart of the lease; the court held the requisite intent to interrupt prescription was lacking); Placid Oil Co. v. George, 221 La. 200, 39 So. 2d 120 (1952) (lease provided for interruption of prescription but the landowner struck this clause from the counterpart he executed); Union Oil Co. v. Toucher, 229 La. 316, 86 So. 2d 50, 7 OIL AND GAS REP. 1177 (1956) (requisite intent on part of landowner to interrupt ten year prescription found not to have been proven); Brown v. Mayfield, 92 So. 2d 762, 7 OIL AND GAS REP. 420 (La. App. 1957) (leases signed by landowner and by mineral owners found not to be counterparts). See Discussion Notes, 3 OIL AND GAS REP. 676 (1953), for a discussion of the problem of acknowledgment by the execution of a pooling agreement; Daggett, supra note 33, § 17; and Nabors, supra note 30, 25 Tul. L. Rev. at 331 (1951).

\(^{81}\) Dobbins v. Hodges, 208 La. 143, 23 So. 2d 26 (1945) (landowner and mineral owner joined in a community lease; Case II; prescription held to have been interrupted. A fortiori, the same result would be reached in Case I.) Cf. Arkansas-Louisiana Gas Co. v. Thompson, 222 La. 868, 64 So. 2d 202, 2 OIL AND GAS REP. 662 (1953) (Case II; but it was held on rehearing that the servitude had prescribed prior to the commencement of drilling operations). See also Robinson v. Horton, 197 La. 919, 2 So. 2d 647 (1941); Spears v. Nesbitt, 197 La. 911, 2 So. 2d 670 (1941).
are led to the conclusion that in this instance the question should be
resolved in the same manner as it is resolved in the case of compulsory
pooling or unitization. It will be recalled that the servitude on the
included and excluded acreage in the case of compulsory pooling or
unitization is divisible in Case IV, and we have argued that it should
be treated as divisible in Case III also. We believe that identical hold-
ings should be made in this instance when the parties to the lease
have not expressly manifested their intent.

The situation just discussed involved a lease covering all of Black-
acre, executed by the landowner and the mineral owner; the lessee
elected to exclude part of Blackacre from the unit as he was author-
ized to do so by the terms of the lease. A slightly different question
is posed by a variant of this situation: the landowner and the mineral
owner enter into an agreement pooling or unitizing a portion only of
Blackacre. Did their joinder in the agreement evidence an intent to
divide the servitude in Blackacre into two parts, one covering the
portion of Blackacre included within the unit and the other covering
the portion of Blackacre excluded from the unit?

Frequently contemporary pooling and unitization agreements con-
tain broadly phrased language apparently designed to protect servi-
tudes from prescription in Cases III and IV, both as to the included
and excluded acreage. It would appear that such a clause indicates

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88 See, e.g., the clause in the lease which was the subject matter of the litigation in
Elson v. Mathewes, 224 La. 417, 421, 69 So. 2d 734, 735, 3 OIL AND GAS REP. 384, 386
(1953): "... [T]his agreement is executed with the specific purpose and intent on
the part of each of the parties hereto to acknowledge the ownership of each and all
of the parties hereto of their respective interest in and to the oil, gas, distillate, condensate
and other minerals and mineral rights in the lands pooled herein, so as to interrupt the
running of liberative prescription of nonuse, applicable under the laws of Louisiana to
mineral servitudes ...."

The unit agreement construed in Placid Oil Co. v. George, 221 La. 200, 59 So. 2d
120, 122 (1952), provided that "drilling for gas on, or the production of gas from,
any part of the pooled premises shall be considered and accepted by each of the parties
constituting Second Party as such drilling and production under the terms of each of
the Oil and gas leases ... and on and from each and every tract covered thereby; and
so long as there may be drilling or production on any portion of the premises pooled
herein, such drilling or production shall produce the same effect respecting the continu-
ance of all leases in force and effect as to the property described therein which is included
within the premises pooled herein as if drilling had been done on or production secured
from each and all of the tracts. ..."

"It is further agreed that any drilling or production on any part of the pooled
premises shall constitute an interruption of prescription liberandi causa then running
against the oil, gas and other mineral rights or royalty interest owned by any of the
parties constituting Second Party in and to all of the lands covered by this pooling agree-
ment and as to any and all other lands covered by any and all of said leases and so long
as there may be production of gas from any portion of the premises pooled herein ... the
same shall constitute an interruption of the running of prescription liberandi causa app-
licable under the law of the State of Louisiana to mineral servitudes. ..."

In neither of these cases, however, was prescription interrupted. In the Placid Oil case
prescription was not interrupted because the landowner struck the quoted clause from the
an intent that the servitude shall not be divisible and that production on the unit will interrupt prescription as to included and excluded acreage in both Cases III and IV. Whether, in Case IV, such a provision may be considered an invalid attempt to waive liberative prescription in advance of its accrual remains uncertain. The effect of drilling operations alone under the language of such clauses is also problematic, particularly in Case IV. 82

In the absence of such a clause in the agreement affecting only a portion of Blackacre, does the agreement have the effect of dividing the servitude? It has been held in situations of this kind that the servitude was divided and hence, at least in Case IV, prescription was interrupted as to included but not to excluded acreage. 84 Whether the same result would be reached in Case III is uncertain. 85

d. Royalty interests

As previously noted, a royalty interest in Louisiana is prescribable in ten years if there is no production. 86 We turn to the questions of (1) the power of the landowner to unitize Blackacre (the tract subject to the royalty interest) without joinder of the royalty owner, and (2) the effect of production on the unit in which Blackacre is included.

counterpart of the lease which he executed. In the Elson case, the clause related only to the acreage included within the unit and the court held that this had the effect of dividing the servitude.

See also the unitization provision discussed in Brown v. Mayfield, 92 So. 2d 762, 7 OIL AND GAS REP. 420 (La. App. 1957).

82 See the discussion of Boddie v. Drewett, 229 La. 1017, 87 So. 2d 316, 6 OIL AND GAS REP. 38 (1956), supra at note call 66.

83 Elson v. Mathewes, 224 La. 417, 69 So. 2d 714, 3 OIL AND GAS REP. 184 (1953) (servitude in 91 acres; 40 acres included within a unit by agreement executed by landowner and servitude owner; Case IV); Spears v. Nesbitt, 197 La. 931, 2 So. 2d 650 (1941) (Blackacre was subject to a mineral servitude; the mineral owner and the landowner joined in the execution of two separate leases, one covering the east half and the other covering the west half of Blackacre; production was obtained on a unit including the west half of Blackacre; held, the execution of the lease had the effect of dividing the servitude into two parts, and interruption of prescription of the servitude as to the west half by operations on the unit of which it was a part did not have the effect of interrupting prescription of the servitude on the east half of Blackacre); Brown v. Mayfield, 92 So. 2d 762, 7 OIL AND GAS REP. 420 (La. App. 1957) (mineral owner and landowner executed unit agreement affecting 22 acres of Blackacre; held that prescription was interrupted by unit production in Case IV as to such 22 acres but not as to the remaining 98 acres.) See Daggett, Brief Comment and Speculation re Elson v. Mathewes, 14 LA. L. REV. 547 (1954).

84 Professor Daggett speculates that if the well had been drilled on the 40-acres included within the unit in Elson v. Mathewes (Case III) during the life of the original servitude, "the original servitude might have been preserved; but under the broad rule announced, certainly a contract might be drawn to prevent such a contingency." Daggett, Brief Comment and Speculation re Elson v. Mathewes, 14 LA. L. REV. 547, 552 (1954).

85 See cases cited note 40 supra.
The former question has been answered in the LeBlanc case, the court declaring specifically that the royalty interest may be pooled or unitized without the consent of the royalty owner:

It is also well settled that the right to search and explore, which belongs to the owner of the servitude, is not given to the royalty owner; that the latter must await such time as the land has been developed, and his right is restricted to a sharing in production if and when it is obtained by the landowner or a lessee. . . . It follows that the defendant [royalty owner] was not a necessary party to the lease . . ., the landowners having full power to enter into any lease contract they saw fit affecting the property—and that would include the power to grant a lessee the authority to pool and combine the leased acreage or any portion thereof with any lands or leases and mineral interests in the immediate vicinity—subject only to the right of the royalty owner to receive its 1/64th of the oil, gas or other minerals allocated to the acreage included in the unit. 87

As to the second question, it has been held that production on the unit in which Blackacre is included will interrupt or suspend prescription of the royalty interest.88 Such authority as has been discovered is limited to Case II.89 The authors believe that in Cases III and IV prescription of the royalty interest should be interrupted or suspended both as to the included and the excluded acreage. Since the royalty owner is not a necessary party to the lease or to the pooling or unitization agreement, it appears essential that his interest be given this much protection.

For production on the unit to have the effect of interrupting or suspending prescription, it would appear reasonable to require that the inclusion of Blackacre and of the producing tract within the unit be valid. The Louisiana Supreme Court in the Touchet and Viator cases went a step further and declared it essential that the

88 Id. at 308, 88 So. 2d at 380, 6 OIL AND GAS REP. at 447.
89 See Union Oil Co. v. Touchet, 229 La. 316, 86 So. 2d 50, 5 OIL AND GAS REP. 1177 (1956). See also LeBlanc v. Haynesville Mercantile Co., supra note 87, which deals with the effect of payment of shut-in royalty.
90 The facts of LeBlanc v. Haynesville Mercantile Co., 230 La. 299, 88 So. 2d 377, 6 OIL AND GAS REP. 443 (1956), supra note 87 were those of Case IV; as a consequence of the pleadings the court treated the case as if it were Case II rather than Case IV and held that prescription had been interrupted. It is possible that the Louisiana court may later reach a different result in a Case IV situation as to excluded acreage.
91 Union Oil Co. v. Touchet, 229 La. 316, 86 So. 2d 50, 5 OIL AND GAS REP. 1177 (1956).
92 Viator v. Haynesville Mercantile Co., 230 La. 132, 88 So. 2d 1, 6 OIL AND GAS REP. 67 (1956), follows Touchet and perhaps indicates that it has a broad significance. Blackacre was subject to a royalty interest created in 1940. The landowner leased Blackacre
inclusion of each parcel in the unit be valid if the prescription of the royalty interest on Blackacre was to be interrupted or suspended. In these cases, before prescription of the royalty interest in Blackacre, the lessee purported to unitize Blackacre, Whiteacre (upon which a well capable of production in paying quantities had been completed) and Greenacre. In the cases of Blackacre and Whiteacre, the landowners had consented in advance to pooling by the lessee. In the case of Greenacre, the lessee did not have the consent of the landowners to pooling, and such consent was not obtained until after the expiration of ten years from the date of the royalty conveyance in Blackacre. The court held that the royalty was prescribed by ten years non-user.

The decision in Touchet\(^9\) might be said to be based on a narrow construction of the particular pooling clause in question and hence to have limited long range significance beyond encouraging redrafting of pooling clauses to prevent a repetition of the result of the case. The decision in Viator,\(^5\) however, makes the problem appear more significant, for there the royalty owner did not join in the pooling agreement. The Court assumed his joinder was not required (in LeBlanc it is made explicit that he is not a necessary party). The case makes it very clear that in Louisiana, then, the owner of a mere royalty interest has little if any protection against lack of fair dealing by the landowner.

For purposes of interrupting or suspending prescription of a royalty interest, payment of a shut-in royalty when authorized by the terms of governing instruments is treated as the equivalent of production.\(^5\) and authorized the lessee "to pool or combine the acreage, royalty or mineral interest covered by this lease, or any portion thereof, with any other land, lease or leases, royalty and mineral interests in the immediate vicinity. . . ." Within ten years of the sale of the royalty interest in dispute, the lessee formed a unit including Blackacre, Whiteacre (on which a well capable of producing in paying quantities had been drilled) and Greenacre. Thereafter shut-in royalties were paid to the owner of Blackacre. However the lease of Greenacre did not authorize pooling and it was not until after the expiration of the ten year period from the creation of the royalty interest in Blackacre that the lessee secured from the owner of Greenacre an amendment to the lease authorizing pooling. The court held that the royalty interest on Blackacre had been prescribed; the purported creation of the unit by the lessee prior to the expiration of the ten year prescriptive period for the royalty, having included Greenacre without the authority or consent of its owner, was invalid and "could not therefore serve as a basis for the interruption of prescription."

\(^9\)Union Oil Co. v. Touchet, 229 La. 316, 86 So. 2d, 5 Oil and Gas Rep. 1177 (1956).
\(^9\)Ibid.
e. Some observations on the possible influence of prescription cases by way of analogy in other contexts

The law of prescription is, of course, of great importance in Louisiana, but lawyers in other jurisdictions tend to ignore these cases as irrelevant to the jurisprudence of their states. But many prescription cases are significant outside Louisiana for they reflect policy considerations applicable in all states. We propose to point out here four developments in Louisiana prescription law with respect to pooling and unitization that we think merit attention elsewhere.

First. Louisiana was the first state to conclude that a lease was generally indivisible in Cases I through IV, a holding which has since been followed elsewhere. Production or operations anywhere on a unit were sufficient to keep the lease on Blackacre alive, whatever portion of Blackacre might be included within the unit. This rule produced dissatisfaction with the state conservation program. "That an unused servitude covering a large tract might be maintained indefinitely by virtue of a part of the land in a unit, appeared inequitable and impracticable under the purposes of the Conservation Act." In more recent Louisiana cases, we see its court backing away from the indivisibility doctrine and holding a servitude divisible so that, at least in Case IV, prescription is not interrupted as to acreage excluded from a compulsory unit. Stare decisis will doubtless hold Louisiana to the view that operations or production on the unit satisfies the express terms of the Blackacre lease, as to all acreage. But where change was possible, namely with respect to liberative prescription, the Louisiana court is moving towards divisibility. Since prescription will terminate a servitude and a lease depending on the

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97 Hunter Oil Co. v. Shell Oil Co., 211 La. 893, 31 So. 2d 10 (1947) (Case IV; compulsory pooling; lease extended into secondary term in its entirety). This view of the indivisibility of a lease has been rigorously adhered to in Louisiana. See Delatte v. Woods, ---La.---, 94 So. 2d 281, 7 OIL AND GAS REP. 813 (1957) (Case IV; held that the unit well satisfied the requirements of the delay rental clause of the lease, both as concerns the included and excluded acreage).

98 Scott v. Pure Oil Co., 194 F.2d 393, 1 OIL AND GAS REP. 546 (5th Cir. 1952) (Case IV arising in Texas; court cites and follows Hunter case); Kunc v. Harper-Turner Oil Co., ---Okla.---, 297 P.2d 371, 5 OIL AND GAS REP. 1028 (1956) (Case III; court cites and follows Hunter case). The same result has been reached in Arkansas but without citation of Louisiana authority. Gray v. Cameron, 218 Ark. 142, 234 S.W.2d 769 (1950) (Case IV). See also Buchanan v. Sinclair Oil & Gas Co., 218 F.2d 436, 4 OIL AND GAS REP. 400 (5th Cir. 1955); Southland Royalty Co. v. Humble Oil & Refining Co., 171 Tex. 324, 249 S.W.2d 914, 1 OIL AND GAS REP. 1431 (1952).

In Mississippi a contrary result has been reached. Texas Gulf Production Co. v. Griffith, 218 Miss. 109, 65 So. 2d 447, 2 OIL AND GAS REP. 1103 (1953) (Case IV; held that upon the expiration of the primary term of the lease, it terminated as to the portion of the leased premises excluded from the unit).

99 Discussion Notes, 6 OIL AND GAS REP. 49 (1956).
Impact of Pooling and Unitization

Servitude, the practical effect of the Childs100 and Jumonville,101 cases is to change the Louisiana law from indivisibility to divisibility where the former rule causes injustice in pooling and unitization cases, as in Case IV. This change of position could (and in our opinion should) influence uncommitted jurisdictions to choose the rule of Texas Gulf Production Co. v. Griffith102 in preference to the rule of Hunter Oil Co. v. Shell Oil Co.,103 and thereby free from the lease land excluded from a unit.

Second. Louisiana holds that a landowner may pool or unitize the land without the consent or joinder of royalty owners.104 In Texas, the contrary appears to be true; the mineral owner with the executive right may not effectively pool or unitize the land without the joinder of royalty owners.105 We believe the Louisiana rule is preferable to the Texas rule, providing the royalty owner is adequately protected, as he was in the LeBlanc106 case, by a holding that production on (or in that case, payment of shut-in royalty from) the unit in which Blackacre is included serves to interrupt or suspend prescription. The problem is of critical importance in other states with regard to term royalty interests. LeBlanc is persuasive that if all or part of Blackacre, in which a term royalty interest exists, is included by the executive in a unit, production on the unit whether on or off Blackacre suffices to extend the life of the royalty interest into the secondary term both as to the portions of Blackacre included and excluded from the unit. Absent this protection of the royalty holder, much is to be said for the position taken by Texas in Brown v. Smith107 that the royalty holder is a necessary party to the unitization agreement. The requirement of his joinder will, in some instances at least, insure adequate protection of his interest since the executive will be debarred from enjoying the benefits of unitization unless he obtains consent of the royalty owner to a fair agreement.

Third. The reasoning of the Touchet108 and Viator109 cases may also

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100 Childs v. Washington, 229 La. 869, 87 So. 2d 111, 6 OIL AND GAS REP. 44 (1956).
102 Texas Gulf Production Co. v. Griffith, 218 Miss. 109, 65 So. 2d 447, 2 OIL AND GAS REP. 1103 (1953), supra note 98.
103 Hunter Oil Co. v. Shell Oil Co., 211 La. 893, 31 So. 2d 10 (1947), supra note 97.
108 Union Oil Co. v. Touchet, 229 La. 316, 86 So. 2d 50, 5 OIL AND GAS REP. 1177 (1956).
have some impact on the developing law in other states, but in this instance such influence would clearly appear to be unfortunate. The court there held that prescription of a royalty interest in Blackacre was not interrupted by production from Whiteacre, even though Blackacre and Whiteacre were in a unit together, if such unit ineffectively attempted to include Greenacre. By analogous reasoning, it might be said that production from Whiteacre under such circumstances did not excuse the payment of delay rentals on Blackacre or extend the life of a lease on Blackacre beyond the expiration of the primary term even in Case II. Whatever the justification for the holding of these cases re prescription, such an extension by way of analogy of the holding would be grossly inequitable and extremely unfortunate. It is one thing to say that if Blackacre or Whiteacre (under this hypothetical) has not been validly included in the unit, then production or drilling operations on Whiteacre shall have no effect on the lease of Blackacre; such a result is entirely reasonable. But to say that the invalidity of the inclusion in the unit of Greenacre, which is not the portion of the unit upon which the drilling operations have been pursued or production obtained, has the same effect would be to jeopardize unduly every voluntary unit which encompasses more than two separate leases.

Fourth. In one other respect Louisiana prescription cases may have persuasive value in other jurisdictions, namely, on the problem of construction of instruments. There is some evidence that in Louisiana the tool of construction has been utilized to mitigate some of the unfortunate consequences of the early holding in the Hunter case. As has been noted, in Elson v. Mathewes, the court found a servitude had been made divisible by the joint action of the landowner and mineral owner, a result not required by the language used by the parties but one reached by the avenue of construction.

This case concerned a mineral servitude of an undivided ½ interest in a 91-acre tract (Blackacre), created in 1937. In 1943, the owner of the land and of ½ of the minerals (defendant) executed a lease covering the 91 acres, and in the following year plaintiff (the owner of the servitude) executed a lease to the same lessee covering 40 of the 91 acres. The lessee formed a unit which included the 40

110 Hunter Oil Co. v. Shell Oil Co., 211 La. 893, 31 So. 2d 10 (1947), supra note 97. Nunley v. Shell Oil Co., 76 So. 2d 11, 4 OIL AND GAS REP. 236 (La. App. 1954), in which an absolute decree of cancellation issued as to excluded acreage in a Case IV situation on the ground of failure of further exploration, also has a mitigating effect. See Williams and Meyers, The Effect of Pooling and Unitization upon Oil and Gas Leases, — CALIF. L. REV. — (1957); on these consequences.

111 Elson v. Mathewes, 224 La. 417, 69 So. 2d 734, 3 OIL AND GAS REP. 384 (1953).
acres but not the remaining 51 acres of this tract, and both plaintiff and defendant executed counterparts of the pooling and unitization agreement. Production was obtained from a well on the unit but off Blackacre. Thereafter the question arose as to whether the servitude in the 51-acre portion of Blackacre excluded from the unit had been prescribed by ten years non-user even though the servitude as to the 40-acre portion of Blackacre included within the unit remained valid.

The court resolved this problem by the technique of construction, declaring:

A grant by a landowner of a mineral interest, under the established jurisprudence of this court, does create a servitude which is indivisible in the sense that a grantor thereafter cannot contract independently with a third person to effect a division of that servitude to the disadvantage of the mineral owner. But there is no law prohibiting the landowner and the mineral owner from entering into a contract with each other, as was done by and between these litigants, whereby a division or a reduction of the servitude results.

Here, plaintiffs and the defendant, in the unitization and pooling contract, agreed to an interruption of prescription as to the 40-acre tract within the Dowling unit, thereby extending the servitude as to it. However, the agreement made no mention of, and did not relate to, the remaining 51 acres (involved in this suit); and this omission, along with the failure to drill on or otherwise use the 91 acres during the prescriptive period, resulted in 1947 in an extinguishment of the servitude to such extent.\(^{12}\)

The reasoning in the opinion was this:
1. Servitudes are normally indivisible;
2. But the landowner and the servitude owner may by contract divide or reduce a servitude;
3. The unitization agreement in this case will be construed as a contract to divide the servitude.

The third step in this reasoning process was not compelled by any language of the instrument construed, for it was silent on the matter. The conclusion which may reasonably be derived from the case is that (at least in Case IV) the Louisiana courts will be ready to construe relevant instruments which are silent on the matter to find an intent to make servitudes divisible.

It should be noted that the language from the opinion quoted above suggests that in Case III, prescription of the servitude on the excluded portion of Blackacre might have been interrupted. If the court is attempting to make a distinction between Cases III and IV

\(^{12}\) Elson v. Mathewes, supra note 111, 224 La. at 422, 69 So. 2d at 735, 3 Oil and Gas Rep. at 386-87 (1953).
as a matter of the "intent" of the parties to an instrument which was completely silent on the matter, one must conclude either that the reasoning process of the court is extremely subtle or that the court is ready to use main strength in the "construction" of instruments to mitigate certain of the more unfortunate consequences of the doctrine of indivisibility announced in the Hunter case.\(^3\) The latter explanation appears more probable and hence such a case as Elson may be persuasive in other jurisdictions that as a matter of construction policy the courts should be ready to find an intent to make leases or other instruments divisible, at least in a Case IV situation.

\(^3\) Hunter Oil Co. v. Shell Oil Co., 211 La. 893, 31 So. 2d 10 (1947).