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COMMENT

The Legal Effect of Voluntary Pooling and Unitization: Theories and Party Practice

JOSEPH J. FRENCH, JR.* AND FRANK W. ELLIOTT, JR.

The pooling or combining of smaller tracts is a recognized and expanding practice in the oil and gas industry. Consequently, it is important to understand the precise legal effect of pooling and unitization. In a typical situation, if *A* owns tract 1 and *B* owns tract 2, and *A* and *B* lease their tracts to *X* and *Y* respectively, it is clear that *B* would not share in the production from a well located on *A*'s tract. However, if tract 2 is pooled or unitized with tract 1, *B* would be permitted to share in the royalties from a well located on *A*'s tract.

In *Parker v. Parker*¹ the owners of contiguous tracts leased them as though they were a single tract owned by the lessors in common. In response to special issues the jury found that the parties had orally agreed that the lease should be considered a unitized one. The court of civil appeals disregarded the jury's finding and held that, as a matter of law, the lessors had pooled their interests "so that they will share pro rata in the royalty no matter from which land oil is produced."²

There are many other forms of pooling,³ as, for example, the true community lease, which generally describes the area that may be pooled and gives the other owners of a mineral interest in the described area an option to join as lessors. When the names of the other owners are subsequently inserted in the agreement and the lease has been executed by them, it has the same effect as a lease executed by one and all at the same time.⁴ The entire acreage of the joining lessors is developed and operated

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¹ 144 S.W.2d 303 (Tex. Civ. App. 1940, error ref'd).

² *Ibid.* See also *French v. George*, 159 S.W.2d 566, 569 (Tex. Civ. App. 1942, error ref'd).

³ Various forms of pooling and types of pooling are discussed in Shank, *Some Legal Problems Presented by the Pooling Provisions of the Modern Oil and Gas Leases*, 23 TEXAS L. REV. 150 (1944).

⁴ See *Imes v. Globe Oil & Refining Co.*, 184 Okla. 79, 84 P.2d 1106 (1938); *Thomas v. Ley*, 177 Okla. 150, 57 P.2d 1186 (1936). The lease in the former case provided: "[A]ny lot, lots or parcels of land embraced within the outer boundary lines of the above described block or blocks and addition to Oklahoma City may at any time be included within the terms hereof and become a part of the leased premises covered

as one lease, and all royalties and rentals are treated as an entirety to be divided among the separate owners in the proportion that the acreage in each tract bears to the entire acreage.⁵

A third form of pooling is created by lessors who, subsequent to the leasing of their respective tracts, enter into a separate pooling agreement among themselves and their lessee(s). In *Duff v. Du Bose*,⁶ the pooling agreement signed by the various lessors provided that all of the leases were "combined, merged, pooled, and shall hereafter be considered one lease for the purpose and operation of the Texas Company." The courts have upheld this type of pooling as a valid and binding contract.⁷

The most common means of pooling in recent years is that which results from the lessee's exercise of authority to pool conferred by a pooling clause in the lease, or from an amendment that inserts a pooling clause in the lease.⁸ Typically, these clauses are drafted in broad, all-inclusive fashion and the lessee is granted the right to pool the lease, or any portion thereof, with any other land, lease, or mineral estate, to create a unit of specified size for the purpose of oil and gas development and production.⁹ The lease pooling clause has also been upheld by the courts.¹⁰

I. THEORIES OF POOLING AND UNITIZATION

Regardless of the method by which the pooling is achieved, it is believed that the legal consequences of the pooling should, as far as possible, be consistent.¹¹ The owners of the working interests could cooperatively

hereby. . . . It is further agreed that copies of this lease may be executed at any time by the owners of any lot or lots . . . [within the described area] and such executed copies shall have the same force and effect as though such parties and all parties thereto had executed the same copy of this lease and all such copies shall be deemed to be originals and to constitute but one lease and that all parties executing such copies as lessors shall have the same rights and relations as if all had executed the same copy at the same time." See also Shank, *supra* note 3, at 153.

⁵ Thomas v. Ley, 177 Okla. 150, 57 P.2d 1186 (1936).

⁶ 14 S.W.2d 911, 913 (Tex. Civ. App. 1929), *aff'd*, 27 S.W.2d 122 (Tex. Comm'n App. 1930).

⁷ Dobbins v. Hodges, 208 La. 143, 23 So. 2d 26 (1945); *Duff v. Du Bose*, 27 S.W.2d 122 (Tex. Comm'n App. 1930).

⁸ HOFFMAN, VOLUNTARY POOLING AND UNITIZATION 87 (1954).

⁹ For illustrative lease pooling clauses see *Grimes v. La Gloria Corp.*, 251 S.W.2d 755, 756-57 (Tex. Civ. App. 1952); *Miles v. Amerada Petroleum Corp.*, 241 S.W.2d 822, 823-24 (Tex. Civ. App. 1950, error ref'd n.r.e.); *Leopard v. Stanolind Oil & Gas Co.*, 220 S.W.2d 259 (Tex. Civ. App. 1949, error ref'd n.r.e.).

¹⁰ *Phillips Petroleum Co. v. Peterson*, 218 F.2d 926 (10th Cir. 1954). Cases involving lease pooling clauses are collected in HOFFMAN, *op. cit. supra* note 8, at 98 n.82.

¹¹ Aside from the rule-against-perpetuities problem, there is no sound reason for attaching one set of legal consequences to one form of pooling and another set of consequences to a different form of pooling, although one case has made such a distinction. The substantive effect in each type of pooling is that the lessee-operator drills and operates the several tracts as a single lease.

develop an oil and gas field, but an agreement of this nature will not permit development without reference to property lines.¹² In order to ensure complete freedom in the selection of well-sites and to eliminate the necessity of drilling off-set wells, the royalty owners of the various tracts must also agree to the cooperative endeavor.¹³ Therefore, it would seem that each of the above methods of pooling is directed toward securing this consent of the royalty owners,¹⁴ which, when received, permits the lessee-operator to drill and operate the several tracts as a single lease.

The legal effect of a community lease was stated by the Texas supreme court in *Veal v. Thomason*,¹⁵ which is considered to be the origin of the cross-conveyancing theory:

"The . . . [community lease] can have no other effect than to constitute all of the lessors of land in the unitized block joint owners or joint tenants, of all royalties reserved in each of the several leases in such block, the ownership being in the proportion which the acreage in each lease contract bears to the total acreage in the unitized block."

In other words, a lessor is permitted to share in the production from a well on a tract other than his own because the act of pooling constitutes a cross-conveyance of royalty interests among all the lessors in the unitized block.¹⁶ Each lessor conveys a portion of his royalty interest to every other lessor and simultaneously acquires a royalty interest in every other tract in the unitized block.¹⁷

¹² 2 WALKER, OIL AND GAS 895 (1949).

¹³ See *Brown v. Smith*, 141 Tex. 425, 431, 174 S.W.2d 43, 46-47 (1943).

¹⁴ See *Martel v. A. Veeder Co.*, 199 La. 423, 433, 6 So. 2d 335, 338 (1942); *Brown v. Smith*, *supra* note 13.

¹⁵ 138 Tex. 341, 349, 159 S.W.2d 472, 476 (1942).

¹⁶ See *Tanner v. Title Ins. & Trust Co.*, 20 Cal. 2d 814, 820, 129 P.2d 383, 386-87 (1942); *Veal v. Thomason*, 138 Tex. 341, 349, 159 S.W.2d 472, 476 (1942).

¹⁷ *Brown v. Smith*, 141 Tex. 425, 430-31, 174 S.W.2d 43, 46 (1943) (dictum). The courts have not decided whether the lessor retains an interest in his own property equal to his percentage interest in the unit and exchanges the remainder of his interest for an equal share in every other tract taken singularly, or exchanges all of his royalty interest for an undivided interest in all of the tracts considered as a unit. The definition of "property" after unitization or pooling could make a difference on such matters as venue, property subject to depletion for federal income tax purposes (see BREEDING AND BURTON, TAXATION OF OIL AND GAS INCOME 237 (1954)), and ad valorem taxes. See Texas Attorney General's Opinion No. V-935, October 13, 1949; Hill, *State Taxation of Oil and Gas—Current Developments and Problems*, 33 TEXAS L. REV. 855, 856-63 (1955).

A. W. Walker, Jr., states that "a community lease has the effect of creating common ownership in the royalties payable under the community lease so that each royalty owner becomes the owner of a royalty interest in each separate tract of land conveyed by the community agreement. . . ." Walker, *Developments in the Law of Oil and Gas in Texas During the War Years—A Résumé*, 25 TEXAS L. REV. 1, 12 (1946). *But see Tanner v. Title Ins. and Trust Co.*, 20 Cal. 2d 814, 820, 129 P.2d 383, 386-87 (1942). However, an exchange of the lessor's entire royalty interest in his own tract for an undivided interest in the unitized block would seem to be more in accord with the economic realities of the situation. BREEDING AND BURTON, *op. cit. supra*. Once the

The cross-conveyancing theory has thus far been more vociferously announced in cases involving community leases, although there is no intimation of limiting it solely to the community-lease situation.¹⁸ It may well be that the act of pooling has the effect of creating common ownership in all the minerals under a unitized block so that each owner of a royalty or working interest becomes the owner of a respective royalty or working interest in each separate tract of land within the unitized block. This would mean that each owner of a working interest, like the owner of a royalty interest, conveys a portion of his interest for an interest in every other tract in the unitized block equal to the interest retained in his own tract. The cross-vested interests so created are apparently a form of determinable interest, the limitation upon their duration being the life of the agreement which created them.¹⁹

The contrary theory, which will be referred to in the rest of this comment as the "allocation theory," has never been completely explained in any case. The recent decisions have espoused its cause chiefly in opposition to the cross-conveyancing theory, rather than as a legal device for explaining the holding in the case. The opinions simply say that the act of pooling does not effect a cross-transfer of mineral interests;²⁰ the pooling agreement merely grants to the lessee the right to drill and operate his lessor's tract in conjunction with every other tract in the unitized block.²¹

The allocation theory is nevertheless commendable for its simplicity. The basic concept is that the pooling furnishes a different way for each landowner to realize his fair share of the oil and gas in the common reservoir. Oil and gas are fugacious substances and, because of pressure differentials, the oil and gas trapped in a reservoir will migrate to the point where a well is drilled. The allocation theory recognizes this geological fact and, consequently, production secured on one or more tracts is deemed production from every tract in the unitized block.²² Each lessor

several tracts are pooled, both lessors and lessees tend to think in terms of the unit and unit operation rather than in terms of development of the minerals under separate tracts of land.

¹⁸ See *Whalen v. Placid Oil Co.*, 198 F.2d 39 (5th Cir. 1952); *Merrill Engineering Co. v. Capital Nat'l Bank*, 192 Miss. 378, 5 So. 2d 666 (1942); *Miles v. Amerada Petroleum Corp.*, 241 S.W.2d 822, 825 (Tex. Civ. App. 1950, error ref'd n.r.e.); *Rogers Nat'l Bank v. Pewitt*, 231 S.W.2d 487 (Tex. Civ. App. 1950, error ref'd).

¹⁹ *Hoffman*, *op. cit. supra* note 8, at 146; *cf. Brown v. Smith*, 141 Tex. 425, 430-31, 174 S.W.2d 43, 46 (1943).

²⁰ *Phillips Petroleum Co. v. Peterson*, 218 F.2d 926, 931 (10th Cir. 1954); *Lynch v. Davis*, 79 W. Va. 437, 443-44, 92 S.E. 427, 430 (1917); see *Shell Petroleum Corp. v. Calcasieu Real Estate & Oil Co.*, 185 La. 751, 771, 170 So. 785, 791 (1936); *Bogges v. Milam*, 127 W. Va. 654, 661, 34 S.E.2d 267, 270 (1945).

²¹ *Lynch v. Davis*, *supra* note 20. See *Shell Petroleum Corp. v. Calcasieu Real Estate & Oil Co.*, *supra* note 20; *Bogges v. Milam*, *supra* note 20.

²² *Lynch v. Davis*, *supra* note 20; see *Merrill Engineering Co. v. Capital Nat'l Bank*, 192 Miss. 378, 398, 5 So. 2d 666, 670 (1942). *But see Shell Petroleum Corp. v. Calcasieu Real Estate & Oil Co.*, *supra* note 20.

and lessee receives his share of production by an allocation formula based generally on the relation of the number of acres in each tract to the total acreage in the unitized block.²³ Once the production is so allocated, it is then considered and treated as if it had actually been produced from wells located on each individual tract.²⁴

II. SOME SPECIFIC PROBLEM AREAS

A. Pooling as a Conveyance of an Interest in Land

In *Brown v. Smith*,²⁵ involving a suit for specific performance of a contract to purchase a community oil and gas lease, the vendee asserted that the abstracts did not show good title as required by the contract. The ownership of one of the two tracts was subject to an undivided 1/32 royalty interest in a Mrs. Lee who had not joined as lessor in the execution of the community lease. The opinion of the Texas supreme court reasoned that the language reserving the royalty interest in the deed from Mrs. Lee negated an intention to confer upon her grantee the power or authority to convey or in any way dispose of her royalty interest; that an oil and gas lease jointly executed by Mrs. Lee's grantee and the owners of the other tract, if effective as to Mrs. Lee's interest, would convey to each of the other lessors an undivided interest in her royalties. Thus, Mrs. Lee's grantee, though having full power to lease the land, did not have the right or authority to pool her royalties with the royalties from other land.

The court obviously utilized the cross-conveyancing theory to reach what may prove to be an unsatisfactory result; but the same holding, if it is a desirable one, could result from the allocation theory. *Schlittler v. Smith*²⁶ held that if a grantor does not expressly reserve the right to lease his retained undivided royalty interest, his grantee has full power to lease the land. The question in the *Brown* case was whether the doctrine of the *Schlittler* case should be expanded to give the grantee authority to pool his grantor's royalty interest. The scope of the grantee's power and authority was the real question decided by the *Brown* case,²⁷ and it should have been decided without reference to whether the pooling does or does not effect a conveyance of an interest in the land.²⁸

²³ Phillips Petroleum Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954).

²⁴ Lynch v. Davis, 79 W. Va. 437, 443, 92 S.E. 427, 430 (1917); see Phillips Petroleum Co. v. Peterson, *supra* note 23. *But cf.* Shell Petroleum Corp. v. Calcasieu Real Estate & Oil Co., 185 La. 751, 770, 170 So. 785, 791 (1936).

²⁵ 141 Tex. 425, 174 S.W.2d 43 (1943).

²⁶ 128 Tex. 628, 101 S.W.2d 543 (1937).

²⁷ See *Brown v. Smith*, 141 Tex. 425, 430, 174 S.W.2d 43, 46 (1943).

²⁸ See *Gulf Oil Corp. v. Marathon Oil Co.*, 137 Tex. 59, 82, 152 S.W.2d 711, 724, (1941), cited in *Brown v. Smith* and decided before *Veal v. Thomason*.

Although the Texas supreme court found the cross-conveyancing theory useful in reaching its conclusion in the *Brown* case, the Texas commission of appeals experienced considerable difficulty with it in *Knight v. Chicago Corp.*²⁹ The plaintiff was the lessor of 320 acres of land. Paragraph eight of the lease provided:

"In the event lessee, its successors or assigns, should attempt to assign any undivided interests, overriding royalty or oil payments without the written consent of the lessors . . . or should attempt to assign any tract or tracts of less than 80 acres, this lease shall ipso facto terminate as to the interest . . . owned by the person or corporation making such assignment."

After four producing wells were drilled on the leased premises, the lessee pooled his working interest with the working interest owned by the Chicago Corporation for the purpose of developing the natural gas resources and installing a gas recycling program. The plaintiff refused to join in the pooling agreement and brought suit in trespass to try title for a decree that the lease had terminated by reason of a breach of paragraph eight, *i.e.*, an attempt to assign an undivided interest.

The court pointed out that the restrictions on assigning undivided interests, overriding royalties, and oil payments were against doing those things which are commonly understood to dilute the working interest and make it less likely for the lessee to continue to operate the lease. The failure to name pooling agreements in the lease, while specifically naming assignments that might impair development and production, signified that the parties did not intend to forbid this type of "assignment." By this interpretation, the court avoided the necessity of declaring a termination of the lease under the theory that the act of pooling cross-conveys the mineral interests.³⁰

It is doubtful that the problem in the *Knight* case would have arisen under the allocation theory. The restrictions in paragraph eight of the lease were directed against an assignment of a real property interest. Under the allocation theory, the act of pooling does not convey an interest in realty.

The act of pooling is not normally considered by the parties as transferring title to any land. Thus, in *Griswold v. Public Service Co.*,³¹ the Oklahoma supreme court held that an oral pooling agreement was a valid and binding contract; but the appellants made no challenge on the ground of the statute of frauds. The decision is surprising because an earlier case

²⁹ 144 Tex. 98, 188 S.W.2d 564 (1945).

³⁰ "The Knight decision represents an excellent illustration of the complications unnecessarily introduced into the pooling agreement by the cross-conveyance theory. It may be predicted that others will plague the courts in the future." HOFFMAN, *op. cit. supra* note 8, at 164.

³¹ 205 Okla. 412, 238 P.2d 322 (1951).

indicated that Oklahoma would follow the cross-conveyancing theory,³² and the oral pooling agreement under that theory should be unenforceable by reason of the statute of frauds.³³ This conclusion is supported by the opinions in *Kuklies v. Reinert*,³⁴ in which all of the justices assumed that the rules of conveyancing applied to pooling agreements.³⁵

An oral pooling agreement might be valid under the allocation theory since that theory implies no transfer of title to any land or to any lease or royalty minerals. Its enforceability would depend upon whether or not a pooling agreement is an agreement that is not to be performed within the space of one year.³⁶ But if the oral pooling agreement is valid under any theory, its use is impractical because of the recordation statutes in the various jurisdictions. For example, pooling agreements are recorded in Louisiana, which does not recognize the cross-conveyancing theory,³⁷ under the civil code provision³⁸ that "all sales, contracts, and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except as between the parties thereto."³⁹ Accordingly, a third party who purchases a portion of the unitized block is not bound by an unrecorded pooling agreement.⁴⁰

In another situation, where the cross-conveyancing theory could have

³² *Lusk v. Green*, 114 Okla. 113, 245 Pac. 636 (1926).

³³ The Texas statute of frauds is typical of the statute of frauds in most jurisdictions. TEX. CIV. STAT. art. 3995 (Vernon 1948) provides: "No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized: . . . 4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year; or 5. Upon any agreement which is not to be performed within the space of one year from the making thereof."

³⁴ 256 S.W.2d 435 (Tex. Civ. App. 1953, error ref'd n.r.e.).

³⁵ The Texas statute of conveyances, TEX. CIV. STAT. art. 1288 (Vernon 1948) provides: "No estate of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereto authorized by writing."

³⁶ See notes 33 and 35 *supra*. Under this theory, the pooling or unitization agreement might create a sharing covenant which runs with the land and other, similar interests in real property. See *Merrill Engineering Co. v. Capital Nat'l Bank*, 192 Miss. 378, 5 So. 2d 666 (1942); HOFFMAN, VOLUNTARY POOLING AND UNITIZATION 182 (1954). As to whether a covenant running with the land is within the statute of frauds, the cases are in conflict. Compare *Sprague v. Kimball*, 213 Mass. 380, 100 N.E. 622 (1913), with *Johnson v. Mount Barker Park Presbyterian Church*, 113 Wash. 458, 194 Pac. 536 (1920).

³⁷ *Shell Petroleum Corp. v. Calcasieu Real Estate & Oil Co.*, 185 La. 751, 770-71, 170 So. 785, 791 (1936); see *Arkansas Louisiana Gas Co. v. Southwest Natural Gas Production Co.*, 221 La. 608, 611-13, 60 So. 2d 9, 10 (1952). But see *Coyle v. North American Oil Consol.*, 201 La. 99, 111-15, 9 So. 2d 473, 477-79 (1942).

³⁸ LA. CIV. CODE ANN. art. 2266 (Dart 1945).

³⁹ *United States v. Nebo Oil Co.*, 190 F.2d 1003 (5th Cir. 1951).

⁴⁰ *Ibid.*

been beneficially applied, it was not. In *Sohio Petroleum Co. v. Jurek*,⁴¹ a widow purchased land in her own name with the proceeds from the sale of personal property belonging to her deceased husband. Under the applicable law, each of the two children and the widow inherited a one-third interest in the personalty of the intestate. The widow subsequently leased the land and it was combined with other tracts as a consolidated unit, apparently under a lease pooling clause. In a suit brought by the two children in trespass to try title to an undivided two-thirds interest in the land so purchased, the other royalty owners contended that since the tract had been pooled with other tracts, each royalty owner was vested with a proportionate interest in every other tract, and that therefore, as to the two children, they should be considered innocent purchasers.

The court of civil appeals affirmed the judgment of the trial court in favor of the two children, apparently rendering their interest free from the unit. The opinion avoided the innocent-purchasers argument by holding that the other royalty owners did not acquire an interest in the minerals by the act of pooling, distinguishing *Veal v. Thomason* and similar cases on the ground that joint ownership is created only by a community lease.⁴² It is doubtful, however, whether this distinction on the basis of the form through which the pooling is achieved is a valid one,⁴³ and hence, *Sohio Petroleum Co. v. Jurek* should not be taken as conclusive of the bona-fide-purchaser-for-value question. If the policy considerations behind the bona-fide-purchaser-for-value doctrine are sound, there is no reason why, in those states that follow the cross-conveyancing theory, the owners of other tracts in the unitized block should not have the benefit of this doctrine.

Assuming *Sohio Petroleum Co. v. Jurek* is correct in holding that the other royalty owners cannot be protected as innocent purchasers for value, can they be protected under any other theory, as for example an estoppel theory? In *Kuklies v. Reinert*,⁴⁴ the lessee brought a bill of interpleader against his lessors for the purpose of determining the ownership of the royalties accruing from a well drilled on the farm belonging to Otto Reinert. In a cross-action by Otto Reinert against the other lessors in the unitized area, the trial court adjudged that Otto Reinert was entitled to all of the royalties in and under his tract, and that the alleged unitization agreement was void for insufficient description of the tract owned by another defendant. Reversing and rendering, the Texas court of civil appeals

⁴¹ 248 S.W.2d 294 (Tex. Civ. App. 1952).

⁴² *Id.* at 298.

⁴³ See *Whelan v. Placid Oil Co.*, 198 F.2d 39 (5th Cir. 1952); *Merrill Engineering Co. v. Capital Nat'l Bank*, 192 Miss. 378, 5 So. 2d 666 (1942); *Miles v. Amerada Petroleum Corp.*, 241 S.W.2d 822, 825 (Tex. Civ. App. 1950, error ref'd n.r.e.); *Rogers Nat'l Bank v. Pewitt*, 231 S.W.2d 487 (Tex. Civ. App. 1950, error ref'd).

⁴⁴ 256 S.W.2d 435 (Tex. Civ. App. 1953, error ref'd n.r.e.).

decided that the description was sufficient, and, alternatively, that Otto Reinert and his wife were estopped to deny the validity of the pooling agreement. The majority view was that since Otto Reinert and his wife after leasing their tract had executed the pooling agreement and had proceeded to cooperate with all of the other parties thereto until the time came to divide the money accumulating from production, their conduct had estopped them from denying every fact recited in the pooling agreement. Apparently, the court was willing to employ estoppel *inter sese* on very slight evidence of affirmative acts in reliance by the other lessors in the unitized block.

In the *Kuklies* case, the party estopped was a party to the pooling agreement, but if the person sought to be estopped is not a party to it and is claiming a unitized tract, it is somewhat more difficult to apply an estoppel theory for the benefit of neighboring landowners, particularly if the pooling is effected by an exercise of the lessee's authority under a lease pooling clause. The doctrine of estoppel *in pais* requires both a misrepresentation and action or inaction in reliance upon the misrepresentation to the detriment of the party relying.⁴⁵ It is certainly arguable that the record title constitutes a representation and that the other owners of a mineral interest, acting in reliance thereon, by pooling have conveyed a portion of their mineral interest to the apparent owner of the tract in question, and, therefore, in cross-conveyancing jurisdictions they should be protected. But whether this argument will prevail in the courts remains to be determined.

B. The Lease Pooling Clause and the Rule Against Perpetuities

A distinction based on the method by which the pooling is achieved may be useful in connection with the rule against perpetuities, which is concerned only with the vesting of remote future estates.⁴⁶ It is not violated where all estates and rights created by the pooling vest immediately upon execution of the pooling agreement.

In *Kenoyer v. Magnolia Petroleum Co.*,⁴⁷ the court sustained a lease pooling clause against an attack that it violated the rule against perpetuities. The same question was involved in *Phillips Petroleum Co. v. Peterson*,⁴⁸ which also held that the lease pooling clause did not violate the rule, but in the latter case the lease spelled out the intended effect of the pooling along the lines of the allocation theory. If pooling pursuant to a lease pooling clause is not considered to transfer title to any land or

⁴⁵ 19 AM. JUR., *Estoppel* § 34 (1939).

⁴⁶ 41 AM. JUR., *Perpetuities and Restraints on Alienation* § 22 (1942).

⁴⁷ 173 Kan. 183, 245 P.2d 176 (1952).

⁴⁸ 218 F.2d 926 (10th Cir. 1954).

other real property interest, as under the allocation theory, the rule presents no difficulty.⁴⁹ However, in those jurisdictions recognizing the cross-conveyancing theory the plaintiff's argument in the *Kenoyer* case, that the pooling clause creates a "power" in the lessee to convey a portion of his lessor's mineral estate and that the time within which this "power" can be exercised is unlimited and indefinite, is not easily answered.

The *Phillips* case suggests that this "power" of creating remote future estates is limited to a "reasonable time," and that a "reasonable time" is well within the limitation of the rule against perpetuities.⁵⁰ In view of the beneficial purpose and the economic necessity of the lease pooling clause, this contention has a great deal of merit, but it is contrary to the approach taken by the courts in the usual perpetuities situation.⁵¹ Perhaps a better argument for the validity of the lease pooling clause is that it does not offend the policy of the rule against perpetuities.⁵² The rule was designed to strike down restrictions that would take land out of trade and commerce for a period longer than a life in being plus twenty-one years.⁵³ Excessive family settlements were the threat that produced the rule, and the period of perpetuities was tailored to fit the needs of family gift transactions.⁵⁴ The real reason for retaining the rule today is that land is a basic natural resource, and therefore social policy dictates its full utilization. If land is to be fully utilized, the present owner must be encouraged to improve the land, and the land must be capable of coming into the possession of the one who sees its more productive use.⁵⁵ This is best achieved by a lease pooling clause.

⁴⁹ See *ibid.*; *Kenoyer v. Magnolia Petroleum Co.*, *supra* note 47.

⁵⁰ 218 F.2d at 931. See also *Imes v. Globe Oil & Refining Co.*, 184 Okla. 79, 84 P.2d 1106 (1938); *Thomas v. Ley*, 177 Okla. 150, 152, 57 P.2d 1186, 1188 (1936).

⁵¹ A court will usually examine the language creating the alleged future interest and determine whether, under a reasonable construction of the language, the interest *must* absolutely vest within a life in being plus twenty-one years. See *Henderson v. Moore*, 144 Tex. 398, 190 S.W.2d 800 (1945); *Brooker v. Brooker*, 130 Tex. 27, 106 S.W.2d 247 (1937); *Neely v. Brogden*, 239 S.W. 192 (Tex. Comm'n App. 1922); *Coffield v. Sorrell*, 183 S.W.2d 223 (Tex. Civ. App. 1944), *aff'd*, 144 Tex. 31, 187 S.W.2d 980 (1945). If it *may* vest at a later date, it is held to violate the rule against perpetuities even though it would in all probability vest before that time. *Brooker v. Brooker*, *supra*; *Neeley v. Brogden*, *supra*.

⁵² An excellent discussion of the policy of the rule against perpetuities appears in Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests*, 32 TEXAS L. REV. 369, 415-25 (1954).

⁵³ *Brooker v. Brooker*, 130 Tex. 27, 39, 106 S.W.2d 247, 254 (1937); *Neely v. Brogden*, 239 S.W. 192, 193 (Tex. Comm'n App. 1922); 32 TEX. JUR., *Perpetuities and Restraints on Alienation* § 3 (1934).

⁵⁴ Leach, *Perpetuities in Perspective; Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 737 (1952).

⁵⁵ Meyers, *supra* note 52, at 419.

C. Pooling and the "Thereafter" Clause

As applied to the lease habendum clause—"so long thereafter as oil and gas is produced"—some of the legal consequences of pooling are significant. When the owners have agreed to pool their interests, the commencement of or production from a well on any one of the unitized tracts eliminates the necessity of paying delay rentals⁵⁶ and continues each lease within the unitized block beyond its primary term.⁵⁷ In *Scott v. Pure Oil Co.*,⁵⁸ the lessor contended that since only a portion of the leased tract had been included within a producing unit, the lease had expired as to the balance of the leased premises. The court held that the lease was still in effect on all the acreage since "production in paying quantities from the well or wells on the area unitized may be imputed as the required production from each of such component tracts so as to continue such individual leases in force as to the entire acreage." To the same effect are decisions by the supreme courts of Arkansas,⁵⁹ Louisiana,⁶⁰ and Oklahoma.⁶¹

On first impression the result seems harsh; conceivably, a one-acre tract out of a 1,000-acre lease could be included within a unit and the production on the unit would perpetuate the entire 1,000-acre lease. This result would appear to be impelled by application of the allocation theory, which seemingly would offer no defense to the sweeping language of the amendment to the lease in the *Scott* case,⁶² or to the broad language in which most pooling clauses are drafted. Nonetheless, application of the allocation theory would not preclude the court from finding a breach of the implied covenant of further exploration, which would furnish a ground for cancellation of the lease as to the unexplored portion.⁶³

⁵⁶ *Southland Royalty Co. v. Humble Oil and Refining Co.*, 151 Tex. 324, 249 S.W.2d 914 (1952).

⁵⁷ *McClain v. Harper*, 206 Okla. 437, 244 P.2d 301 (1952); *Southland Royalty Co. v. Humble Oil & Refining Co.*, *supra* note 56.

⁵⁸ 194 F.2d 393 (5th Cir. 1952), 31 TEXAS L. REV. 75 (1952).

⁵⁹ *Gray v. Cameron*, 218 Ark. 142, 234 S.W.2d 769 (1950).

⁶⁰ *Jackson v. Hunt Oil Co.*, 208 La. 156, 23 So. 2d 31 (1945). Decisions involving compulsory pooling reach the same result. *Le Blanc v. Danciger Oil & Refining Co.*, 218 La. 463, 49 So. 2d 855 (1950); *Hunter v. Shell Oil Co.*, 211 La. 893, 31 So. 2d 10 (1947). *But cf.* *Texas Gulf Producing Co. v. Griffith*, 218 Miss. 109, 65 So. 2d 447, *on suggestion of error*, 218 Miss. 141, 65 So. 2d 834 (1953).

⁶¹ *Godfrey v. McArthur*, 186 Okla. 144, 96 P.2d 322 (1939); *Trawick v. Castleberry*, 275 P.2d 292 (Okla. 1953).

⁶² The amendment authorized the lessee to pool or combine the tract, or any portion thereof, for purposes of production of gas, and provided that production from the pooled unit so formed "shall be considered for all purposes (except for the payment of royalties) as if . . . such production were from land covered by this lease, whether or not the wells be located on the premises covered by the lease." 194 F.2d 393, 394 (5th Cir. 1952).

⁶³ A discussion of this matter appears in Meyers, *The Implied Covenant of Further Exploration*, 34 TEXAS L. REV. 533, 565-67 (1956).

Although the courts have not considered theories of pooling and unitization in this area of the law, it can be argued that a strict adherence to the cross-conveyancing theory offers a reason for overthrow of the rule in the *Scott* case.⁶⁴ The argument would be that the same exchange which in theory permits the lessor of an included tract to share in the production from other tracts is responsible for continuing each lease in force in spite of the nonpayment of delay rentals and the expiration of the primary term. Therefore, since the other lessors have no interest in that portion of a tract not brought within a pooled area and since a lessor is not entitled to royalties for the unpooled portion of his tract, the lessee is expected to continue to pay delay rentals on the unpooled portion of the tract, and at the minimum, the lease will expire at the end of the primary term as to that portion of the tract not included within a productive unitized area.

This argument, however, in our opinion is unsound. It would be an automatic provision that would usurp the place of, and tend to accomplish the same purpose as, the implied covenant of further exploration. Matters of this nature are better left to the discretion of the courts and made to depend upon the facts and circumstances in each case. Moreover, the argument seems to assume that the desires of the lessor and lessee for production on the non-unitized tract are necessarily at odds with each other, which in most instances is not the situation at all.

D. The Lessor's Participation in the Royalties After Surrender of His Tract

Suppose *A* and *B*, who own two adjoining tracts of equal size, execute a single lease covering both tracts. The lease permits the lessee to surrender it at any time in whole or in part; however, no provision defines the rights of the respective lessors upon partial surrender. A producing well is drilled on *A*'s tract. If the lessee in conformance with the lease provision surrenders the lease as to *B*'s tract, is *B* still entitled to share in the royalties from production on *A*'s tract? If *B*, after surrender of his tract, is entitled to share in the production from *A*'s tract, is *A* entitled to participate in the royalties from production later secured on *B*'s tract by virtue of development under another lease or by *B* himself? These and many other perplexing problems arise out of this simple fact situation.

*Clark v. Elsinore Oil Co.*⁶⁵ considered the first of these questions. The California court, without discussing theories as to the legal effect of pooling and unitization, decreed that the owner of the surrendered tract continue to participate on an equal basis in the royalties from production on the unsurrendered tract, basing the result solely on the presumed intent of the parties. One writer suggests, however, that the court might

⁶⁴ 31 TEXAS L. REV. 77 (1952).

⁶⁵ 138 Cal. App. 6, 31 P.2d 476 (1934).

just as logically have reached the opposite conclusion, that the lessors did not intend that the owner of the surrendered tract continue to participate in the royalties.⁶⁶

If *B*, after surrender of his tract, is entitled to share in the royalties from production on *A*'s property, it would seem that if *B* should again lease his tract and a producing well be drilled thereon, *A* should participate in the production on *B*'s tract. However, the decision in *Tanner v. Title Ins. and Trust Co.*⁶⁷ indicates otherwise. As a consequence, under these two cases, the lessor of the land retained must share the royalties from production on his tract, but he is denied the corresponding right to share in the royalties from later production on the surrendered tract.

If the allocation theory is applied to the above situation, the lessor of the surrendered tract should not participate in the production on the remaining unitized block, nor should the lessor of the retained tract share in later production on the surrendered tract. The lessor of property participates in the royalties from production on the unitized block because the unit production is regarded as production of oil, gas or other minerals from his particular tract. Upon surrender of a lessor's tract, or a portion thereof, the lessee is no longer privileged to produce from the surrendered property, and it would be an anomaly to consider unit production as production from the surrendered tract. The surrendered tract and all rights to production should be expunged from the unit as of the date of surrender and a new formula for the computation of royalties applied.

The problem becomes more complex under the cross-conveyancing theory. If the purpose of the surrender provision is to limit participation to only the owners of the productive land, the parties must have intended that the surrender of a tract or tracts eliminates participation in the royalties by the owners of the surrendered premises, and if possible, this intention certainly ought to be given effect. But how is this intention to operate? As was stated earlier, the cross-vested interests created by the cross-conveyancing theory are apparently a form of determinable interest. Is the surrender of a tract, or a portion thereof, by the lessee the happening of the condition that "determines" the property interests conveyed by the act of pooling? If so, doesn't this create a "power" in the lessee to alter his lessor's mineral estate, which is unlimited in time and duration and which, therefore, runs afoul of the rule against perpetuities?

The premise of the California courts is that the surrender provision is inserted solely for the benefit of the lessee and for the express purpose of relieving him from all further obligations with respect to the land sur-

⁶⁶ HOFFMAN, *op. cit. supra* note 36, at 67.

⁶⁷ 20 Cal. 2d 814, 129 P.2d 383 (1942). See also *Tanner v. Olds*, 29 Cal. 2d 110, 173 P.2d 6 (1946).

rendered.⁶⁸ They contend that the parties execute a community lease because of their hope and expectation that oil will be found under some of the land,⁶⁹ and because the benefits accruing from the joint adventure outweigh the benefits that otherwise could be obtained.⁷⁰ Moreover, this position is supported by the facts that most of the communitized tracts are small ones, and that the surrender clauses generally provide for apportionment of the royalties notwithstanding the lessee's surrender of any part of the leased premises.⁷¹

If this premise of the California courts is correct, the instrument of surrender should be construed as an assignment of the working interest by the lessee back to the lessor of the surrendered premises. Although this construction seems highly artificial in view of the fact that the parties provided for a "surrender" of all or a part of the leased premises, it finds some support in that the surrender clause sometimes permits the lessee to reserve easements for pipelines, roads, tanks, etc., in favor of the retained tracts.⁷² Accordingly, the "surrender" of a tract by the lessee is not the happening of the condition that "determines" the property interests conveyed by the act of pooling, and *A* and *B* would still be tenants in common in the royalties on both the retained and surrendered tracts, with *B*, the lessor of the surrendered tract, in addition owning the working interest in the surrendered premises. Being tenants in common in the royalties, *A* and *B* should be entitled to participate in production from both the retained and surrendered tracts.

E. Sale by Deed Describing Only the Vendor's Tract

A related problem is the nature and extent of the royalty interest acquired by a vendee when the deed describes only the vendor's tract and makes no reference to the pooling agreement. To illustrate, suppose *A* and *B*, who own two adjoining tracts of equal size, execute a single lease covering both tracts. *B* subsequently sells his tract to *C* by a deed that describes only his tract and makes no reference to the pooling agreement. What interest, if any, will *C* have in future production from a well on *A*'s tract? Can *B* convey his royalty interest without adequate legal description, by reference or otherwise, of all the land comprising the unitized block?

A federal district court in Oklahoma considered the effect of the con-

⁶⁸ *Clark v. Elsinore Oil Co.*, 138 Cal. App. 6, 31 P.2d 476, 481 (1934).

⁶⁹ *Tanner v. Title Ins. and Trust Co.*, 20 Cal. 2d 814, 824, 129 P.2d 383, 389 (1942).

⁷⁰ *First Nat'l Bank v. Standard Oil Co.*, 91 Cal. App. 705, 267 Pac. 548, 549 (1928).

⁷¹ See *Tanner v. Olds*, 29 Cal. 2d 110, 112, 173 P.2d 6, 7 (1946); *Tanner v. Title Ins. and Trust Co.*, 20 Cal. 2d 814, 818, 129 P.2d 383, 385 (1942); *Andrews v. W. K. Co.*, 35 Cal. App. 2d 41, 94 P.2d 605, 607 (1939); *First Nat'l Bank v. Standard Oil Co.*, 91 Cal. App. 705, 267 Pac. 548, 549 (1928).

⁷² See *Clark v. Elsinore Oil Co.*, 138 Cal. App. 6, 31 P.2d 476, 477 (1934).

veyance of a pooled tract in *Boren v. Burgess*.⁷³ The grantor owned an undivided mineral interest in two tracts of land, both covered by a single lease. After production was secured on one of the tracts, the grantor purported to convey to the plaintiff all of his interest in the other tract. The plaintiff sued for a share of the royalties in the producing tract. The court stated, after pointing out a conflict of authorities on the question, that "the majority and Oklahoma rule is to the effect that all the production belongs solely to the owners of the well and the land on which the well is located." The authorities cited by the court, however, only support the *Japhet v. McRae*⁷⁴ principle that when land covered by an ordinary lease is later subdivided in ownership, there is no apportionment of the royalties; *i.e.*, the owner of each subdivision receives the entire royalty from production on his subdivision.⁷⁵

A decision deriving a contrary rule is *Merrill Engineering Co. v. Capital Nat'l Bank*,⁷⁶ in which the conveyance of a tract comprising part of a unit, even though it failed to mention the unit, passed the grantor's interest in all royalties in the unitized block. The opinion noted the rule of non-apportionment of royalties, applied when the owner of a tract of land leases it as a whole and thereafter subdivides it into several tracts by conveyances that do not reserve the royalty; but, in contrast to the *Boren* case, the Mississippi court decided the rule had application "where the respective landowners supplant the effect of the original lease by entering into a pooling or community agreement with the consent of the lessee, whereby all of the several tracts may be developed as a unit with the right of the several owners to share in the royalties derived from any well or wells drilled anywhere on the pooled area." The court indicated that the grantor's share in the royalties passed with the conveyance of title as a covenant running with the land.

The allocation theory appears to sustain the conclusion of this latter case. The landowner is entitled to participate in the royalties because the oil and gas produced on the unit is deemed production on his particular tract. Since the pooling does not effect a cross-conveyance of the mineral interests, a conveyance by the owner of property without reservation of a royalty or mineral interest should convey all of the grantor's rights and interests in the described property. The grantee should succeed to the same royalties to which the grantor was previously entitled.

Application of the cross-conveyancing theory might not give the same result. The previously mentioned case of *Tanner v. Title Ins. and Trust Co.*⁷⁷ states that "the royalty interest thus transferred by each landowner

⁷³ 97 F. Supp. 1019 (E.D. Okla. 1951).

⁷⁴ 276 S.W. 669 (Tex. Comm'n App. 1925).

⁷⁵ HOFFMAN, VOLUNTARY POOLING AND UNITIZATION 176 (1954).

⁷⁶ 192 Miss. 378, 5 So. 2d 666 (1942).

⁷⁷ 20 Cal. 2d 814, 820, 129 P.2d 383, 386-87 (1942).

to his colessors is an incorporeal hereditament in gross . . . and the grantee's interest in the oil produced upon the property of one of the colessors is entirely separate and distinct from the royalty interest retained by him in oil which might be produced from his own premises . . . [T]he incorporeal hereditament owned by the grantor in the oil produced from land of his colessors, existing in gross, obviously does not follow the conveyance of the lessor's land, but can only be conveyed by a specific transfer of that interest." Several more recent California cases have confirmed and applied this language of the *Tanner* case.⁷⁸ However, there is no special reason, except in California, to consider the interest of a lessor in the land of his colessors as a right or interest in gross, and one writer suggests that such an interest in the land of the colessors is better treated as a right or interest appurtenant rather than in gross.⁷⁹

III. NECESSARY PARTIES TO A SUIT IN TEXAS INVOLVING POOLED OR UNITIZED LAND

No discussion of theories as to the legal effect of pooling or unitization would be complete without mention of the question of necessary parties to a suit involving a pooled or unitized tract. Rule 39 of the Texas Rules of Civil Procedure⁸⁰ sets forth the basic principles pertaining to necessary

⁷⁸ *Howard v. General Petroleum Corp.*, 108 Cal. App. 2d 25, 238 P.2d 145, 148 (1951), *on second appeal*, 114 Cal. App. 2d 91, 249 P.2d 585 (1952); *Brown v. Copp*, 105 Cal. App. 2d 1, 232 P.2d 868, 871 (1951); *Friedrich v. Boland*, 95 Cal. App. 2d 543, 213 P.2d 423, 427 (1950); *Gillis v. Royalty Serv. Corp.*, 91 Cal. App. 2d 365, 204 P.2d 968 (1949).

⁷⁹ HOFFMAN, *op. cit. supra* note 75, at 184.

⁸⁰ TEX. R. CIV. P. 39. "Necessary Joinder of Parties.

"(a) Necessary joinder. Except as otherwise provided in these rules, persons having a joint interest shall be made parties and joined as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant, or, in proper cases, an involuntary plaintiff.

"(b) Effect of failure to join. When persons who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court, the court shall order them made parties. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them can be acquired only by their consent or voluntary appearance; but the judgment rendered therein shall not affect the rights or liabilities of persons who are not parties.

"(c) Names of omitted persons and reasons for non-joinder to be pleaded. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties, if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."

Several theories have been advanced on the proper interpretation of this rule. Perhaps the best of these is that set out in Stayton, *Important Developments Since 1940 in the Texas Law Relating to Parties and Actions*, in LECTURES OF REFRESHER COURSE IN LAW 2 (University of Texas School of Law ed. 1946). Judge Stayton says that rule 39 embraces two kinds of necessary parties. The first is composed of parties having a "joint interest" so strong that a valid judgment cannot be rendered without them. They are necessary in the sense that they *must* be joined—indispensable in the strictest

parties. And no matter which theory as to the legal effect of pooling or unitization is selected, the fundamental application of these principles remains the same. However, since the Texas cases on the problem have adopted, almost to the exclusion of all others, the cross-conveyance theory, attention will be directed to it. Because this theory results in a cotenancy of the various lessors in each unitized tract, a look at non-pooling cotenancy cases involving the party question is in order.

A. Parties in Cotenancy Cases

Before the adoption of the Texas Rules of Civil Procedure in 1941, in a dispute between tenants in common and a stranger to their title, one cotenant could recover possession of the entire tract, and title to the portion owned by him, in trespass to try title without the joinder of his cotenants.⁸¹ If damages to the land were sought, the absent cotenants had to be made parties,⁸² but only if the defendant insisted upon it.⁸³ If the defendant did not so insist, the trial could be had, damages being apportioned to the named plaintiffs.⁸⁴ If the plaintiffs and defendants were all tenants in common, the actual plaintiffs could not recover the possession of the entire tract but could recover their aliquot share of the title if joinder was not demanded.⁸⁵

After the adoption of the rules, two cases have discussed the application of rule 39 to trespass-to-try-title suits. In *Hicks v. Southwestern Settlement and Development Corp.*⁸⁶ several of the tenants in common sued strangers to their title for title and possession, joining a claim for damages, and the defendants entered a plea in abatement for non-joinder. The court decided that the plaintiffs could recover possession and their portion of the title without joinder of the absent cotenants because the defendants were strangers to their title,⁸⁷ but that all of the cotenants must be joined in order to recover damages. This decision followed strictly the pre-rule cases. However, there were so many tenants in common (over 600) and it was so inconvenient to join them that an exception was read into the

sense. The second class is made up of those having a "joint interest" who are necessary if complete relief is to be accorded to the other parties to the suit. They are parties who should be joined, and, if another party insists upon it, must be joined unless they are outside the jurisdiction of the court. Even though these parties are omitted recovery is allowed if their presence is not insisted upon. Judge Stayton calls these "insistible parties."

⁸¹ Padgett v. Guilmartin, 106 Tex. 551, 172 S.W. 1101 (1915); Bounds v. Little, 75 Tex. 316, 12 S.W. 1109 (1889); Cook v. Spivey, 174 S.W.2d 634 (Tex. Civ. App. 1943).

⁸² May v. Slade, 24 Tex. 205 (1859); Arrington v. Southern Pine Lumber Co., 16 S.W.2d 166 (Tex. Civ. App. 1929).

⁸³ Gulf, C. & S.F. Ry. v. Cusenberry, 86 Tex. 525, 26 S.W. 43 (1894).

⁸⁴ May v. Slade, 24 Tex. 205 (1859).

⁸⁵ Boon v. Knox, 80 Tex. 642, 16 S.W. 448 (1891).

⁸⁶ 188 S.W.2d 915 (Tex. Civ. App. 1945, error ref'd want of merit).

⁸⁷ The absent cotenants would not be bound by the decision.

rule, and joinder was not required. *Brown v. Meyers*⁸⁸ used different reasoning to reach a partially conflicting result. The court held that joinder of all tenants in common was needed both to recover the land and to recover the damages. The decision was based on the wording of the rule, not on prior case law. The absent parties were deemed not indispensable, and if their presence were not demanded, the present plaintiffs could wage the fight. In both cases error was refused for want of merit, the supreme court thus approving only the judgments and not the reasoning, and consequently the law is still in a confusing state.

Before 1941, if the omitted parties were tenants in common with the defendants, the suit could be tried without joinder, whether there was a plea in abatement or not, the result binding only those named.⁸⁹ Since the adoption of the rules, such parties would have to be joined if demanded, but would not be absolutely indispensable.

B. Title Suits in Which One Party's Interest is Unitized

Suits involving the party problem in pooling situations can be analogized to those cotenancy suits between cotenants and a stranger to their title. The landmark pooling case is *Veal v. Thomason*.⁹⁰ The plaintiff in that case sued to set aside a trustee's sale of certain land to the defendant and free the land from a community oil and gas lease including other lands totaling about 6,000 acres. The named defendants, who were the purchasers at the trustee's sale and the lessee under the community lease, claimed that all of the royalty owners in the unitized block were necessary parties since they were cotenants of the royalty interest in the subject land. The supreme court accepted the court of civil appeal's definition of necessary parties, saying, "it has many times been held by the courts of this state that those who are necessary parties to a suit are such persons as have or claim a direct interest in the object and subject matter of the suit and whose interests will necessarily be affected by any judgment that may be rendered therein. Such persons are not only proper parties but are necessary and indispensable parties, plaintiff or defendant."⁹¹ This led to the result that all royalty owners in the block were necessary parties; otherwise they "will have had . . . [their] royalty interest in this land, for all practical purposes, cut off and destroyed without having had their day in court."⁹²

Although Thomason's petition contained a trespass-to-try-title count, the nature of the proceeding was primarily an equitable one, seeking to have the trustee's sale and lease set aside. Doubt arose as to whether the

⁸⁸ 163 S.W.2d 886 (Tex. Civ. App. 1942, error ref'd want of merit).

⁸⁹ *Heirs of Tevis v. Armstrong*, 71 Tex. 59, 9 S.W. 134 (1888).

⁹⁰ 138 Tex. 341, 159 S.W.2d 472 (1942).

⁹¹ *Id.* at 351, 159 S.W.2d at 477.

⁹² *Ibid.*

rules set out in the case were also applicable to a trespass-to-try-title action involving no equitable principles such as those that pertain to cancellation of an instrument. Shortly thereafter, in *Belt v. Texas Co.*,⁹³ a trespass-to-try-title action to recover six tracts in the same block as that in *Veal v. Thomason*, the plaintiff made this very contention. The district court held that the royalty owners were necessary parties and the court of civil appeals affirmed its judgment, expressly extending the doctrine of the *Veal* case.⁹⁴

In *Whelan v. Placid Oil Co.*⁹⁵ the plaintiff was the lessee of the land in question and a short time before the expiration of the primary term of the lease joined with the owner of half the minerals in a unitization agreement. The owner of the other half of the minerals did not concur in the agreement. The plaintiff completed a well on the unit, though not on the land in question, during the primary term of the lease. After the expiration of the primary term, the owners of both halves of the minerals joined in the execution of a lease to the defendants. The controversy concerned the lease of the owner of the half interest that had been included in the unit. The court held that the plaintiff could claim a leasehold in this half only by virtue of the unitization agreement. This being the case, *Veal v. Thomason* required that all other mineral owners in the unit join in the action. The holding of the *Veal* case was stretched a little by being made the primary authority for this decision, because that case and the *Belt* case involved parties *defendant* whereas *Whelan* concerned parties *plaintiff*. However, the decision could be based on the principles set out in the cotenancy cases discussed above. Since damages were sought in *Whelan*, it seems that the decision to require joinder was correct.

C. Partition Suits

When partition is sought, the rule of *Veal v. Thomason* does not apply. In *Douglas v. Butcher*,⁹⁶ the plaintiffs, owners of an undivided half of the minerals in a tract, sued the owners of the other half for partition. The defendants' interest was included in a pool, while the plaintiffs' was not. The trial court dismissed the suit for the plaintiffs' refusal to join the some 2,300 royalty owners of the pool. The San Antonio court of civil appeals reversed the judgment and allowed the suit to proceed without joinder, stating that in a partition suit royalty owners are not necessary

⁹³ 175 S.W.2d 622 (Tex. Civ. App. 1943, error ref'd). See also *Leach v. Brown*, 251 S.W.2d 553 (Tex. Civ. App. 1952, error ref'd).

⁹⁴ It is interesting to note that rule 39 is not mentioned in either the *Veal* or the *Belt* case. Under our discussion in note 80 *supra*, the absent parties in both cases would be classified as insistent, since a valid judgment could have been rendered without them. Since joinder was requested, they would be treated as if they were indispensable, and the differentiation would be academic.

⁹⁵ 198 F.2d 39 (5th Cir. 1952).

⁹⁶ 272 S.W.2d 553 (Tex. Civ. App. 1954, error ref'd n.r.e.).

parties. Each royalty owner received royalty in proportion to acreage, and the undivided one-half belonging to the plaintiffs never constituted any part of the ratio. The interest of the non-joined royalty owners would be neither increased nor diminished by a partition, and hence they were not necessary parties under the doctrine of the *Veal* case. The court actually based its decision on the rule of property that the owner of a non-possessory interest can neither compel nor defeat a partition, and since royalty interests are non-possessory, the owners of such interests are not necessary parties, whether their interests are affected or not. The question remains concerning the effect of such a partition on the royalty interests. If the non-joined owners are permitted to retain their interests in an undivided half, they would be unaffected; but the partition itself would be at least a partial failure. If their interests are partitioned, they *would* be affected—losing an undivided half of the whole and gaining a complete interest in a divided half. A case cited by the court in support of its decision points to the latter result,⁹⁷ saying, after allowing the partition because of the rule of property discussed above, that “it . . . would not be consistent to hold that . . . partition could not reach and bind any royalty interest incident to the lease.”⁹⁸ However, this quotation is dictum, since the royalty owner was a party to the suit. No other cases have been found to support this result.

D. Suits in Which the Pool or Unit Is Not Sought to Be Affected

A non-pooling case suggests that when the question involved is the validity of mineral leases on a unitized tract and neither lessee is trying to cancel the unit agreement, the lessees may litigate the contested leasehold without having to join their lessor or other royalty owners in the unit.⁹⁹

⁹⁷ *Chaffin v. Hall*, 210 S.W.2d 191 (Tex. Civ. App. 1948, error ref'd n.r.e.).

⁹⁸ *Id.* at 193.

⁹⁹ *Petroleum Producers Co. v. Reed*, 135 Tex. 386, 144 S.W.2d 540 (1940). This case was a trespass-to-try-title suit to recover an oil and gas leasehold estate. The defendants claimed that the State of Texas should be a party, since the property in dispute was vacant school land belonging to the state and they held an oil and gas lease executed by the Commissioner of the General Land Office. The court decided that the title to the leasehold could be litigated without the state as a party, since its interest was not directly involved (its ownership of the land was not in issue). This case was distinguished in *Belt v. Texas Co.*, the court saying that the controversy involved the mineral estate and not the entire estate in the land.

It was suggested in *Dedman, Indispensable Parties in Pooling Cases*, 9 Sw. L.J. 27 (1955), that *Whelan v. Placid Oil Co.* (see text at note call 95) is in conflict with the *Reed* case, *supra*. Mr. Dedman argues that no matter what result on the merits the *Whelan* case might have reached, the absent parties would still be claiming their unitization agreement, and no attempt was being made to cancel or set aside this agreement. However, in *Masterson, Indispensable Parties in Oil and Gas Litigation*, in *SIXTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION* 139, 158 (Southwest-

In addition, the Fifth Circuit, in deciding a Mississippi case,¹⁰⁰ re-affirmed the principle of *Veal*, but allowed suit for title to land in a unit without joinder of the unit's royalty owners because the plaintiffs adopted and ratified the unitization agreement and sought only to substitute themselves for their adversaries in the unit without affecting in any manner the rights of the other parties thereto. This ruling was later adopted in Texas.¹⁰¹ The issues were reduced to a determination of which of the two parties had the proper claim to the interest in question. Correspondingly, the royalty owners in the unit were not necessary parties to the proceedings. The only weakness of this procedure is that the successful plaintiff must ratify the unit to be able to sue without joinder.

E. Possibilities of Suit By or Against a Pool or Unit Without Joinder of Royalty Owners

The distinction must be made at this time between suits involving members of a pool or unit and a stranger and those involving strictly members of the pool or unit itself. The joinder requirements of the former are not so great, and the suggestions offered below would be applicable to them. The latter category would cover the cases of a single instrument, signed by all the parties (community lease) or their agent (lease with authority to pool). Here the joinder requirements will be strict, since in a suit to cancel written instruments all persons whose rights, interests, or relations with or through the subject matter of the suit will be affected by the cancellation are indispensable parties.¹⁰² Not all of the following suggestions will apply to this category. Those that do will be noted.

When there are so many tenants in common that it is impractical to join them the "equitable exception" offered by the *Hicks* case¹⁰³ may be applied. However, the inherent danger in relying on this departure from the joinder rules is the risk that the trial judge's application of the exception will not be affirmed on appeal. The question might have to be carried all the way to the supreme court at great delay and expense before the plaintiff would know whether or not he had complied with all the requirements necessary for a proper trial of his substantive rights. On the other hand, if the trial court refuses to apply the exception, the appellate procedure would have to be resorted to in order to get the substantive claims

ern Legal Foundation ed. 1955), it was stated that while the court in the *Whelan* case would have been justified in following the *Reed* case, there was no conflict. The author explains his position by stating, "this is because the matter of bringing in absent persons is a matter of policy and has nothing to do with jurisdiction to act upon parties before the court insofar as their rights are involved."

¹⁰⁰ *Hudson v. Newell*, 174 F.2d 546 (5th Cir. 1949).

¹⁰¹ *Fussell v. Rinqe*, 269 S.W.2d 442 (Tex. Civ. App. 1954, error ref'd n.r.e.); *Hutchins v. Birdsong*, 258 S.W.2d 218 (Tex. Civ. App. 1953, error ref'd).

¹⁰² *Sharpe v. Landowners Oil Ass'n*, 127 Tex. 147, 92 S.W.2d 435, 436 (1936).

¹⁰³ See note 86 *supra*.

before a court at all. In addition, the rules allowing service by publication on non-resident defendants,¹⁰⁴ unknown heirs,¹⁰⁵ and unknown owners or claimants of an interest in land¹⁰⁶ would remove these categories of persons from the total number to be considered in deciding upon the equity of the situation. Since jurisdiction of them can be obtained without personal service, they should not be counted among those causing the difficulty.

Two suggestions have been made for the unit itself to follow. The first is that the unit could voluntarily be made into a corporation.¹⁰⁷ However, the double-taxation aspect would probably reduce this to a mere theoretical possibility. The second is that the members of the unit could designate in the unit agreement an agent to receive service of process or to sue in behalf of the unit.¹⁰⁸ Both of these suggestions are based on the assumption that the members of the unit want to facilitate suits against themselves. This very idealistic view likely will not stand up in practice.

One writer recommends that an act of the legislature constituting the Secretary of State or other state official the agent for service of all whose addresses are known be passed as a solution.¹⁰⁹ The lessees would furnish such addresses, the time for answering would be extended, and proper funds and facilities would be provided for carrying out the operations involved.

The three preceding solutions would apply to the intra-unit situation. Another suggestion is an amendment of subdivision (a) of rule 39 to add: "or, unless the court rules otherwise, need not be made a party to the suit."¹¹⁰ However, this amendment would apply also to suits in which truly indispensable parties are involved, and the trial judge should not have discretion to avoid the joinder of these parties. In addition, it would not cover the possibility of multiple defendants. Perhaps this difficulty could be eliminated by placing the following (italicized) amendment in subdivision (b) of the rule, causing it to read:

"(b) EFFECT OF FAILURE TO JOIN. When persons who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court, the court shall order them made parties, *unless such possible parties plaintiff or defendant are too numerous for practical inclusion as named parties.* The court in its discretion may proceed in the action without making such

¹⁰⁴ TEX. R. CIV. P. 108, 109.

¹⁰⁵ TEX. R. CIV. P. 111.

¹⁰⁶ TEX. R. CIV. P. 112, 113.

¹⁰⁷ Dedman, *supra* note 99.

¹⁰⁸ Dedman, *supra* note 99; Cook, *Rights and Remedies of the Lessor and Royalty Owner Under a Unit Operation*, in INSTITUTE ON OIL AND GAS LAW AND TAXATION 101 (Southwestern Legal Foundation ed. 1952).

¹⁰⁹ Cook, *supra* note 108.

¹¹⁰ Masterson, *supra* note 99.

persons parties . . . ^[111] but the judgment rendered therein shall not affect the rights or liabilities of persons who are not parties.”

The judgment in a suit following this procedure would not bind the absent parties, but the suit could at least be prosecuted. Substantial effectiveness would be achieved if the operator and the larger royalty owners were joined, since the greater part of the land could be recovered.

A final recommendation is a statute or rule that permits constructive service on every party to the unit agreement by actually serving the operator of the unit together with the individual owners of the particular tract of land involved.¹¹² These persons are chosen as the agents to receive service because they are the ones who would have the greatest interest in the suit and would ensure that the unit is adequately represented. The operator should have the addresses of all parties in the unit and could notify them of the suit without too much trouble, at least much less than would be required if personal service were made on each party. This suggestion could be varied by a practice derived from the Texas Trust Act.¹¹³ Service on the operator and notice by registered mail to the royalty owners would suffice under the practice there suggested. A list of the owners would be furnished by the operator on demand.

F. Class Action

The most logical and equitable solution to the problem is found in the class action. Rule 42¹¹⁴ provides the procedure necessary for this type of suit. An action involving a pooling or unitization agreement should fall within the provisions of subdivision (a) (2) of that rule. The rights are

¹¹¹ Omitted portion: “if its jurisdiction over them can be acquired only by their consent or voluntary appearance.”

¹¹² Dedman, *supra* note 99.

¹¹³ TEX. CIV. STAT. art. 7425b-21 C (Vernon 1948).

¹¹⁴ TEX. R. CIV. P. 42. “Class Actions.

“(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

“(1) joint, or common or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

“(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

“(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

“(b) Dismissal or compromise. A class action shall not be dismissed nor compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.”

several, and the object of the action is the adjudication of claims which may affect the specific property involved.¹¹⁵

In *Hicks v. Southwestern Settlement and Development Corp.* the court overruled the plaintiffs' contention that rule 42 authorized them to maintain the suit without joinder of other parties. There was an extensive discussion of the class-action problem, but since this type of relief was requested for the first time on appeal, the terms of the rule itself demonstrated that the contention was untenable. The plaintiffs did not plead that they were suing as representatives of a class nor did they prove that they adequately represented the class. The United States District Court for the Eastern District of Texas twice had the question before it.¹¹⁶ In an action to recover title and possession of certain land and for damages of \$500,000,000, the plaintiffs made class allegations under rule 23 of the Federal Rules of Civil Procedure,¹¹⁷ seeking to represent a large number of their cotenants. The court held that the substantive law of Texas required joinder and that rule 23 had no effect on that law.¹¹⁸ In the second hearing the court stated that when several tenants in common sue other tenants in common in trespass to try title, those named as plaintiffs may recover only their aliquot part of the title, and may not recover for the non-joined cotenants.¹¹⁹ The opinion went on to say that the rights of the various plaintiffs were several, not joint, and therefore a class action was not appropriate in Texas.¹²⁰ Much reliance was placed on the dicta in *Hicks* in reaching this decision.

*Matthews v. Landowners Oil Ass'n*¹²¹ takes a step in the opposite direction. Thirteen named plaintiffs sought to represent all landowners similarly situated in a suit to cancel certain mineral conveyances and leases of lands that were included in a pooling agreement. There were twenty-four named defendants, alleged to be fairly representative of all the defendants. The named defendants maintained that necessary parties had been omitted, and their contention was sustained. The Amarillo court of civil appeals affirmed, but recognized the right to a class action under

¹¹⁵ A recent case, *Davis v. Congregation Shearith Israel*, 283 S.W.2d 810 (Tex. Civ. App. 1955, error ref'd n.r.e.), involved a class action to adjudicate rights in a tract of land. The plaintiffs sued class representatives for a declaratory judgment declaring that their tract of land was not burdened with certain deed restrictions. The class action was allowed.

¹¹⁶ *Glover v. McFaddin*, 81 F. Supp. 426 (E.D. Tex. 1948); *Glover v. McFaddin*, 99 F. Supp. 385 (E.D. Tex. 1951), *aff'd*, 205 F.2d 1 (5th Cir. 1953), *cert. denied*, 346 U.S. 900 (1953).

¹¹⁷ Rule 42 of the Texas rules is taken verbatim from rule 23(a) and (c) of the federal rules.

¹¹⁸ *Glover v. McFaddin*, 81 F. Supp. 426 (E.D. Tex. 1948).

¹¹⁹ *Glover v. McFaddin*, 99 F. Supp. 385 (E.D. Tex. 1951), *aff'd*, 205 F.2d 1 (5th Cir. 1953), *cert. denied*, 346 U.S. 900 (1953).

¹²⁰ *But see* TEX. R. CIV. P. 42(a)(3), *supra* note 114.

¹²¹ 204 S.W.2d 647 (Tex. Civ. App. 1947, error ref'd n.r.e.).

proper circumstances. The court cited and discussed the *Veal* and *Belt* cases, and stated that the rules therein would apply unless the requisites for a class action were strictly complied with. The court added “. . . and this fact must appear from the plaintiffs’ allegations . . . [and] proof.”¹²² The class action was denied only because the plaintiffs failed to establish their qualifications as representatives (there was a conflict of interests within the class), and failed to show the practical need for representation.

In a pooling case recently decided by the San Antonio court of civil appeals¹²³ an attempt has been made to plead a class action properly. The pleadings state that the plaintiff does not know the exact number of defendants but that there are more than 300; they identify the class specifically and negate the possibility of conflicting interests; they state that the members of the class are so numerous and scattered that it would be impracticable and prohibitively expensive to locate and serve them all; that even if that were done, there would be numerous interruptions of the proceedings by reason of death and other changes in status; that the named defendants are members of the class; and that they have a sufficiently substantial interest in the matters in controversy to ensure adequate representation. This pleading seems to comply with the requirements of rule 42, and though disallowed by the trial court, it was approved by the court of civil appeals, the opinion of which stated that this was the type of situation for which the class action was designed. The appellate decision should be affirmed by the supreme court if a class action is at all possible in Texas.

Each of the three cases just discussed, in which a class action was attempted, involved a dispute between tenants in common as both plaintiffs and defendants. Even though in such a situation the parties may be considered indispensable, the class action should be allowed. If the representation requirements are met—a necessity for the application of the rule—all of the parties’ substantive rights will be protected and justice should be done.

IV. CONCLUSION

Theories as to the legal effect of pooling and unitization have not become so entrenched in our oil and gas law that the decisions expounding these theories cannot be explained on other grounds. The Texas courts¹²⁴

¹²² *Id.* at 651.

¹²³ *Leach v. Brown*, 251 S.W.2d 553 (Tex. Civ. App. 1952, error ref’d), on second appeal, 287 S.W.2d 304 (Tex. Civ. App. 1956), *rev’d*, 292 S.W.2d 329 (Tex. Sup. Ct. 1956), now pending again in the supreme court on application for writ of error, after the third opinion by the court of civil appeals, 298 S.W.2d 185 (Tex. Civ. App. 1956).

¹²⁴ *Brown v. Smith*, 141 Tex. 425, 430, 174 S.W.2d 43, 46 (1943); *Veal v. Thomason*, 138 Tex. 341, 349, 159 S.W.2d 472, 476 (1942); *Leach v. Brown*, 251 S.W.2d 553, 554 (Tex. Civ. App. 1952, error ref’d); *Miles v. Amerada Petroleum Corp.*, 241 S.W.2d 822, 825 (Tex. Civ. App. 1950, error ref’d n.r.e.); *Matthews v. Landowners Oil Ass’n*, 204

and the California courts¹²⁵ have paid considerable homage to the cross-conveyancing theory. The Oklahoma supreme court in dictum has also recognized it.¹²⁶ But opposed to that theory are the courts of Kansas,¹²⁷ Louisiana,¹²⁸ Mississippi,¹²⁹ and Pennsylvania,¹³⁰ which do not appear to be committed to any particular theory. On the other hand, decisions in West Virginia,¹³¹ and the Tenth Circuit¹³² have explicitly recognized the allocation theory.

No decision has recognized either the cross-conveyancing theory or the allocation theory as an absolute rule of property.¹³³ Parties who have clearly expressed an intention that one theory or the other should control can reasonably expect that their intent will be given effect.¹³⁴ Only if they have not clearly expressed themselves will each jurisdiction apply its own particular theory. We find it difficult to conceive why, absent special circumstances, any owner of a mineral interest would deliberately desire the problems and consequences of the cross-conveyancing theory.

S.W.2d 647, 650 (Tex. Civ. App. 1947, error ref'd n.r.e.); *Belt v. Texas Co.*, 175 S.W.2d 622, 624 (Tex. Civ. App. 1943, error ref'd).

¹²⁵ *Tanner v. Olds*, 29 Cal. 2d 110, 115, 173 P.2d 6, 9 (1946); *Tanner v. Title Ins. & Trust Co.*, 20 Cal. 2d 814, 129 P.2d 383, 386 (1942).

¹²⁶ See *Lusk v. Green*, 114 Okla. 113, 114, 245 Pac. 636, 637 (1926). *But cf.* *Griswold v. Public Serv. Co.*, 205 Okla. 412, 238 P.2d 322 (1951) (oral pooling agreement binding on the lessor).

¹²⁷ See *Kenoyer v. Magnolia Petroleum Co.*, 173 Kan. 183, 186-87, 245 P.2d 176, 179 (1952).

¹²⁸ *Shell Petroleum Corp. v. Calcasieu Real Estate & Oil Co.*, 185 La. 751, 770-71, 170 So. 785, 791 (1936); see *Arkansas Louisiana Gas Co. v. Southwest Natural Gas Production Co.*, 221 La. 608, 611-13, 60 So. 2d 9, 10 (1952). *But see* *Coyle v. North American Oil Consol.*, 201 La. 99, 111-15, 9 So. 2d 473, 477-79 (1942).

¹²⁹ See *Merrill Engineering Co. v. Capital Nat'l Bank*, 192 Miss. 378, 398, 400, 5 So. 2d 666, 672 (1942); *HOFFMAN, op. cit. supra* note 75, at 180. In the *Merrill* case no argument was made that pooling effects a conveyance of an interest in land, but the language of the decision, particularly with reference to drainage, would seem in accord with the allocation theory.

¹³⁰ *Coolbaugh v. Lehigh & Wilkes-Barre Coal Co.*, 218 Pa. 320, 67 Atl. 615 (1907) (joint coal lease).

¹³¹ *Lynch v. Davis*, 79 W. Va. 437, 92 S.E. 427 (1917); see *Bogges v. Milam*, 127 W. Va. 654, 661, 34 S.E.2d 267, 270 (1945). *But see* *Pittsburg & W. Va. Gas Co. v. Ankrom*, 83 W. Va. 81, 88, 97 S.E. 593, 596 (1918), decided by the same court the following year and citing *Lynch v. Davis* for the proposition that lessors who had pooled their tracts in a community lease had thereby made themselves "tenants in common" in the minerals.

¹³² *Phillips Petroleum Co. v. Peterson*, 218 F.2d 926 (10th Cir. 1954).

¹³³ *But see* *Parker v. Parker*, 144 S.W.2d 303 (Tex. Civ. App. 1940, error ref'd). *Cf.* *French v. George*, 159 S.W.2d 566, 569 (Tex. Civ. App. 1942, error ref'd).

¹³⁴ See *Phillips Petroleum Co. v. Peterson*, 218 F.2d 926 (10th Cir. 1954); *French v. George*, 159 S.W.2d 566, 569 (Tex. Civ. App. 1942, error ref'd).