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# BASTARD IN THE GAS FIELD: ACCOUNTING TO THE UNRECOGNIZED OWNER

SI M. BONDURANT\*

*King John: My mother's son did get your father's heir; your father's heir must have your father's land.*

*Robert: Shall then my father's will be of no force to dispossess that child which is not his?*

*Bastard: Of no more force to dispossess me, sir, than was his will to get me, as I think.\*\**

## I. Introduction

One of the most fertile frontiers of oil and gas jurisprudence is the emerging field of reconciliation of rights among the owners of common accumulations of natural gas. This area is generally lumped under the rubric of "gas balancing" disputes. While there is a dearth of reported gas balancing cases,<sup>1</sup> a growing body of literature is developing to assist the practitioner in coping with the problems that are finding their way to the courthouse steps.<sup>2</sup> This article will address one small corner of this frontier

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\*\* W. SHAKESPEARE, *THE LIFE AND DEATH OF KING JOHN*, act 1, scene 1, ll. 128-33.

1. One of the problems faced in researching this area of law is the paucity of reported cases. The only readily accessible significant decisions are: *Pelto Oil Co. v. CSX Oil & Gas Corp.*, 804 S.W.2d 583 (Tex. Civ. App. 1991); *Pogo Producing Co. v. Shell Offshore, Inc.*, 898 F.2d 1064 (5th Cir. 1990); *Kaiser-Frances v. Producer's Gas Co.*, 870 F.2d 563 (10th Cir. 1989); *Chevron U.S.A., Inc. v. Belco Petroleum Corp.*, 755 F.2d 1151 (5th Cir.), *cert. denied*, 474 U.S. 847 (1985); *Killgore v. Texaco, Inc.*, No. 83-4826 (E.D. La. Feb. 2, 1987) (1987 WESTLAW 6203); *Amoco Prod. Co. v. Thompson*, 516 So. 2d 376 (La. Ct. App. 1987), *cert. denied*, 520 So. 2d 118 (La. 1988), *on appeal after remand*, 566 So. 2d 138 (La. Ct. App. 1990); *HBOP, Ltd. v. Delhi Gas Pipeline Corp.*, 645 P.2d 1042 (Okla. Ct. App. 1982); *United Petroleum Exploration Co., Inc. v. Premiere Resources, Ltd.*, 511 F. Supp. 127 (W.D. Okla. 1980); *Beren v. Harper Oil Co.*, 546 P.2d 1356 (Okla. Ct. App. 1975).

2. Martin, *The Gas Balancing Agreement: What, When, Why and How*, 36 ROCKY MTN. MIN. L. INST. 13-1 (1990); Kuntz, *Gas Balancing Rights and Remedies in the Absence of a Balancing Agreement*, 35 ROCKY MTN. MIN. L. INST. 13-1 (1989); Borrego, *Gas Balancing Agreements, Selected Problems and Issues*, 40 INST. ON OIL & GAS L. & TAX'N 4-1 (1989); Hoefling, *Gas Balancing Problems in a Deregulated Market: Changes and Possible Solutions Under Oklahoma Law*, 25 TULSA L.J. 63 (1989); Lansdown, *The Use of Gas Balancing Agreements in Texas*, CORP. COUNS. REV., Nov. 1988, at 1; Penn, *Cotenancy Problems: Is the Gas Balancing Agreement the Answer?*, 33 ROCKY MTN. MIN. L. INST. 18-1 (1988); Note, *Oil & Gas: Gas Balancing or Juggling? A Comprehensive Look At the Current State of Judicial and Contractual Resolutions to Gas Balancing Problems*, 41 OKLA. L. REV. 352 (1988); Smith, *Gas Marketing by Co-Owners: Disproportionate Sales, Gas Imbalances and Lessors' Claims to Royalty*, 39 BAYLOR

— the duty of the sellers of oil and gas production to account to the co-owner whose ownership interest has been previously unrecognized. Before discussing this particular problem, it is helpful to examine the problems of gas balancing in general and the manner in which the courts have addressed these problems.<sup>3</sup>

## II. Gas Balancing — An Overview of the Problem

Gas balancing is necessitated when less than all of the owners of the right to produce gas are marketing their gas. When such a situation occurs, the parties who are marketing more than their pro rata share of the gas being produced incur an obligation to account to the non-marketing owners. "Gas balancing" is the term that has become identified as the method of accounting among these owners. Depending upon the circumstances, the accounting may be either in kind or by cash. In-kind balancing allows an underproduced party to take a certain percentage of the overproduced party's gas until the imbalance has been made up. Cash balancing requires the overproduced party to pay cash to the underproduced party as compensation for the gas sold over and above the overproduced party's share in order to bring the gas accounts in balance. The reasons for a gas imbalance can be myriad. The problem was always apparent in split-stream sales, and the earliest decisions involved owners contracting to sell their production to different purchasers.<sup>4</sup> One purchaser would begin purchasing gas prior to the other, and the sellers would consequently be out of balance. These early problems occurred at a time when there existed a sufficient market for all gas with little price discrepancy and thus primarily involved volumetric balancing problems. Today, the problems of a gas imbalance frequently result from discriminatory purchasing practices of pipelines.<sup>5</sup> Whatever the

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L. REV. 365 (1987); Watters, *Gas Balancing*, LANDMAN, Aug. 1986, at 45; Fell, *Marketing of Production from Properties Subject to Operating Agreements*, 33 INST. ON OIL & GAS L. & TAX'N 115 (1982); Upchurch, *Split Stream Gas Sales and the Gas Storage and Balancing Agreement*, 24 ROCKY Mtn. MIN. L. INST. 665 (1978); Note, *Oil and Gas: Production Imbalance in Split Stream Gas Wells — Getting Your Fair Share*, 30 OKLA. L. REV. 955 (1977); Ellis, *The Production of Gas from Joint Interest Properties*, 21 INST. ON OIL & GAS L. & TAX'N 47 (1970); Hillyer, *Problems in Producing and Selling by Split or Single Stream, Gas Allocable to Diverse Working Interest Ownerships*, 16 INST. ON OIL & GAS L. & TAX'N 243 (1965).

3. Dean Kuntz points out that a comprehensive body of law has yet to develop on the subject of gas balancing and that the courts have not always clearly articulated the theoretical underpinnings of their decisions. Kuntz, *supra* note 2, at 13-4.

4. *Bergen v. Harper Oil Co.*, 546 P.2d 1356 (Okla. Ct. App. 1975); *United Petroleum Exploration Co. v. Premiere Resources, Ltd.*, 511 F. Supp. 127 (W.D. Okla. 1980). See generally Hillyer, *supra* note 2.

5. See, e.g., *Kaiser-Francis v. Producer's Gas Co.*, 870 F.2d 563 (10th Cir. 1989); *Seal v. Corp. Comm'n*, 725 P.2d 278, 285 (Okla. 1986), *cert. denied*, *Amerada Hess Corp. v. Corp. Comm'n*, 479 U.S. 1073 (1987). Many current problems result from the purchaser being unwilling to purchase gas at prices previously contracted for, which it considers to be no longer market clearing, i.e., it can no longer resell the gas at or above the contracted price. Frequently, the purchaser will offer to purchase gas only at a reduced price. Some producers will choose to sell

cause, many older fields and some more recent fields discovered in the wake of the partial deregulation of the gas market by the Natural Gas Policy Act<sup>6</sup> are beginning to deplete, and a flood of gas balancing litigation will soon be washing up on the judicial beachheads.<sup>7</sup>

In most typical drilling ventures, more than one party will own the working interest rights, *i.e.*, the right to drill for and hopefully produce oil and gas in a proposed drilling unit. One of these owners will be selected as the operator, who, in effect, becomes the managing partner of the drilling venture,<sup>8</sup> though the parties are loath to denominate themselves as partners.<sup>9</sup> Those owners consenting to the drilling operations will generally execute a joint operating agreement (JOA), which is the basic contractual agreement that will control the rights of the participating parties.<sup>10</sup> When the owners of all the rights of production have consented to the drilling of the well and entered into a JOA or some other type of agreement for sharing the

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at a reduced price while others will not. For a revealing example of typical pipeline practices, see *Transcontinental Gas Pipe Line Corp. v. American Nat'l Petroleum Co.*, 763 S.W.2d 809, 813-14 (Tex. Ct. App. 1988), wherein Transco admitted to implementing a policy of taking only 3% of the gas capacity of each producer who refused to sign Transco's "omnibus settlement agreement" regardless of take-or-pay, minimum take or ratable take requirements in an effort to pressure producers to waive liability claims against Transco and agree to a price considerably less than their contract price. The Texas Supreme Court recently reinstated the trial court's jury award of \$16 million in exemplary damages against Transco for their conduct reversing the Court of Appeal's decision that had reversed the judgment of exemplary damage. *American Nat'l Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*, 798 S.W.2d 274, 275 (Tex. 1990).

6. 15 U.S.C. §§ 3301-3432 (1982).

7. Dean Kuntz notes that gas balancing problems are not likely to correct themselves in an amicable manner. Kuntz, *supra* note 2, at 13-3. Seminars on gas balancing litigation are becoming a frequent occurrence.

8. See *Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc.*, 282 Ark. 268, 668 S.W.2d 16 (1984); *Amoco Prod. Co. v. Thompson*, 516 So. 2d 376, 392 (La. Ct. App. 1987) (in a compulsory unit the "unit operator has become the managing partner for the purposes of exploration and production"). See generally Boigon, *The Joint Operating Agreement in A Hostile Environment*, 38 INST. ON OIL & GAS L. & TAX'N § 5.02 (1987).

9. The standard form joint operating agreement will deny any attempt to form a partnership. This provision is included primarily to attempt to avoid possible joint liability for debts unrelated to the joint operations and other problems that would exist in a general partnership or mining partnership. Penn, *supra* note 2, at 18-8. This denial has not precluded some courts from holding the operator to fiduciary or trustee obligations that would exist in a normal partnership. See, *e.g.*, *Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc.*, 282 Ark. 268, 668 S.W.2d 16 (1984); *Reserve Oil, Inc. v. Dixon*, 711 F.2d 951 (10th Cir. 1983); Boigon, *supra* note 8, at 5-5 nn.4-7. But see *Wilson v. TXO Production Corp.*, 69 Bankr. 960, 964-65 (N.D. Tex. 1987) (Texas courts hold that an operating agreement does not create a partnership between the operator and the non-operators). One writer has opined that the relationship of the parties in a joint drilling venture is that of partners, but to the extent a joint operating agreement has been executed the partners have limited the partnership duties imposed among themselves. Note, *The Oil and Gas Unit Operator's Duty to Nonoperating Working Interest Owners*, 1987 B.Y.U. L. REV. 1293, 1309-10.

10. *Tenneco Oil Co. v. Bogert*, 630 F. Supp. 961, 967 (W.D. Okla. 1986); *Crosby-Mississippi Resources v. Saga Petroleum U.S., Inc.*, 767 F.2d 143, 147 (5th Cir. 1985); Penn, *supra* note 2, at 18-7; Note, *supra* note 9, at 1302.

production, the court will generally look to the terms of the agreement to ascertain the rights of the parties in the event of a gas imbalance.<sup>11</sup> In an effort to cope with the problems of gas imbalances, an instrument known as a gas balancing agreement was developed to attempt to adjust and reconcile the rights of the joint interest owners. Although most JOAs entered into prior to the mid-to-late 1970s did not contain gas balancing agreements, such an agreement is a standard attachment to most JOAs entered into recently. However, there is certainly no standard form agreement in the industry as yet.<sup>12</sup> Courts have so far applied the terms of the gas balancing agreement,<sup>13</sup> or in the absence of any specific agreement applied "equitable balancing" remedies which may result in either cash balancing<sup>14</sup> or balancing in kind.<sup>15</sup> In a case in which the primary parties had never entered into either a JOA or gas balancing agreement, a Louisiana court held that under its force-pooling laws, the commissioner of conservation had the power to order a partition of the unit production and require an accounting in kind or in cash or could appoint a managing co-owner for the purpose of "marketing all, or part, of the gas produced from a compulsory unit."<sup>16</sup>

### III. *The Legal Status of the Unrecognized Owner*

None of the recent gas balancing decisions have involved a situation in which the title of one party has not been recognized. Though some of the

11. *Andrau v. Michigan Wisconsin Pipe Line Co.*, 712 P.2d 372 (Wyo. 1986); *Kuntz*, *supra* note 2, at 13-6; *Martin*, *supra* note 2, at 13-28.

12. Most gas balancing agreements currently in use were designed to address imbalances arising from split stream sales and do not adequately cover many of the current problems of gas imbalances. *See Penn*, *supra* note 2, at 18-43.

13. *See Chevron U.S.A., Inc. v. Belco Petroleum Corp.*, 755 F.2d 1151 (5th Cir. 1985) (the first reported decision construing the terms of a gas balancing agreement); *Killgore v. Texaco, Inc.*, No. 83-4826 (E.D. La. Feb. 2, 1987) (1987 WESTLAW 6203) (an unreported Louisiana federal district court case). In the first case, Belco sold all of the production from the well without accounting to Chevron, who had elected to take its production in kind. The gas balancing agreement did not specifically provide for cash balancing and the field depleted before Chevron could balance in kind. The parties had considered a cash balancing provision but chose not to include one in the agreement in order not to complicate the negotiations. Chevron sued for the value of the gas production owed by Belco. The Fifth Circuit held for Belco, stating, "We read the gas balancing agreement to unambiguously provide the exclusive means for Chevron and Belco to bring their gas account into balance." *Chevron U.S.A.*, 755 F.2d at 1154. This case has been justly criticized as an extreme application of the terms of the gas balancing agreement. *Lansdown*, *supra* note 2, at n.5. However, Louisiana courts apparently will strictly enforce the terms of gas balancing agreements. *See also Borrego*, *supra* note 2, at 4-26 to -28. *But see Pelto Oil Co. v. CSX Oil & Gas Corp.*, 804 S.W.2d 583 (Tex. Civ. App. 1991) (gas balancing agreement did not provide remedy when producer had in fact taken and marketed its share of production, but unit operator had erroneously allocated production to another producer.

14. *See, e.g., Beren v. Harper Oil Co.*, 546 P.2d 1356 (Okla. Ct. App. 1975).

15. *Pogo Producing Co. v. Shell Offshore, Inc.*, 898 F.2d 1064 (5th Cir. 1990).

16. *Amoco Prod. Co. v. Thompson*, 516 So. 2d 376, 393 (La. App. 1987). For a discussion of the facts leading up to the court's decision in this very complex case, see *Edwards, Current Trends in Gas Marketing and Regulatory Responses Thereto*, 32 INST. ON MIN. L. 19, 26-29 (1985). The court of appeals recently affirmed the commissioner's supplemental order on remand which required a cash accounting for the period of time that the commissioner found the non-taking parties lacked a viable market for their gas. *Amoco Prod. Co. v. Thompson*, 566 So. 2d 138 (La. Ct. App. 1990).

cases have dealt with situations where no gas balancing agreement existed among the parties,<sup>17</sup> the interest of the nonproducing party has always been recognized.

The unrecognized owner stands in a different position than the recognized owner who, for whatever reason, is not currently marketing production. If someone's ownership is recognized, the operator, who controls the well's gas flow and its allocation,<sup>18</sup> must select from among the available options the manner in which the owner's interest is to be treated. Basically, the operator may choose to purchase the nonmarketing party's gas under the operating agreement and then resell it; he may sell the gas under the operating agreement as agent for the party who lacks a gas contract; or he may bank that party's gas pursuant to the terms of any applicable gas balancing agreement.<sup>19</sup> However, when the owner's interest has never been recognized, the operator<sup>20</sup> must of necessity be in the position of a cotenant in possession who is excluding his cotenant.<sup>21</sup> Distinguished commentators and existing case law support just this treatment — the law of cotenancy applies.<sup>22</sup> While few "gas balancing" decisions exist, cases are plentiful that apply the hoary laws of cotenancy to oil and gas disputes.<sup>23</sup>

17. *Beren v. Harper Oil Co.*, 546 P.2d 1356 (Okla. Ct. App. 1975); *Amoco Prod. Co. v. Thompson*, 516 So. 2d 376 (La. Ct. App. 1987).

18. While the operator might not control a pipeline's allocation among its various sellers, it does control the well production and have the ultimate authority to allocate among the various purchasers willing to accept gas. *See Smith, supra* note 2, at 390; *Hoefling, supra* note 2, at 94. The operator is also under a duty to police the production of the well. *Teel v. Public Serv. Co.*, 767 P.2d 391, 397 (Okla. 1985); *Borrego, supra* note 2, at 4-12.

19. *See Smith, supra* note 2, at 369-71. The precise options available to the operator will depend upon the terms of the JOA or an applicable statute. There are three versions of the A.A.P.L. Form 610 Model Form Operating Agreement currently in use: the 1956, 1977, and 1982 forms. A 1989 form has been published but is not yet in wide use. *See* section VI of this article for a discussion of some recent gas marketing legislation.

20. Wherever the term "operator" is used herein, it refers to an operator who owns a working interest in the gas unit, which is normally the case. Occasionally, the well will be operated by a contract operator who owns no interest in the well. The contract operator, in such a case, would be the agent for the producing cotenants who are parties to the JOA. *Neeley v. Intercity Management Corp.*, 732 S.W.2d 644 (Tex. Ct. App. 1987).

21. The producing cotenant might argue that he has not excluded the cotenant from drilling his own well assuming the property in which the parties are cotenants was large enough to include more than one unit. However, the parties are cotenants in the production from the well and the unrecognized cotenant has by definition been excluded from the well production. A cotenant's right of possession extends to the whole property and no cotenant has the right to exclusive possession of any part of the whole. 4 THOMPSON ON REAL PROPERTY, § 1793, at 139 (1979) [hereinafter THOMPSON]; *Knight, Cotenancy — A Sometimes Unholy Alliance*, 33 INST. ON OIL & GAS L. & TAX'N 225, 227 (1982). Thus, to the extent an owner's interest has not been recognized by the operator, he has been excluded from possessing his share of the well's production.

22. *See, e.g., Wilson v. TXO Production Corp.*, 69 Bankr. 960, 966 (N.D. Tex. 1987); *Byrom v. Pendley*, 717 S.W.2d 602 (Tex. 1986); *MCZ, Inc. v. Smith*, 707 S.W.2d 672 (Tex. Ct. App. 1986); *Dilworth v. Fortier*, 405 P.2d 38 (Okla. 1964); *Kuntz, supra* note 2, at 13-5; *Penn, supra* note 2, at 18-4; *J. LOWE, OIL AND GAS LAW IN A NUTSHELL* 394 (1988).

23. *See* cases cited in *E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS* § 5.2-4 (1978); *Annotation, Rights of Cotenants' Inter se as to Oil and Gas*, 40 A.L.R. 1400 (1926), *supplemented*

If the operator has refused or neglected to recognize a cotenant's interest, the cotenant must be considered to have been excluded from participating in the joint operation or the production from the well by the operator, since the operator has the exclusive right to determine how the well should be produced and who shall participate in its production.<sup>24</sup> There are many reasons why someone's ownership might not be recognized.

The operator may have construed the interest to be a nonparticipating royalty interest rather than a mineral interest.<sup>25</sup> Leases may have been taken from a life tenant, but from less than all the remaindermen.<sup>26</sup> A cotenancy may have resulted from an inheritance in which heirship disputes exist and less than all of the cotenant heirs may have leased.<sup>27</sup> The operator may have thought that a lease on one's interest was defective or expired when, in fact, it was still valid.<sup>28</sup> Some of the leases held by an operator may have expired prior to the well being drilled.<sup>29</sup> An overproduced party might file for bankruptcy and reject the gas balancing agreement.<sup>30</sup> Alternately, the mineral interest might be split into numerous small interests, and an operator will feel that it is not economic to attempt to locate and lease all of the small interests and will simply ignore the interest. Whatever the reason, it is not infrequent that someone who owns a mineral or leasehold working interest will not have that interest recognized until sometime after the well has produced. Consequently, the right of these unrecognized owners to the production from the well, both past and future, must be dealt with.

#### IV. *The Development of the Law of Cotenancy*

Cotenancy in property arises when two or more persons become owners of property in such a manner that they have an undivided right of possession. The only element essential to a cotenancy is the right of simultaneous possession.<sup>31</sup>

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by 91 A.L.R. 205 (1934); Annotation, *Basis of Computation of Cotenants' Accountability for Minerals and Timber Removed from the Property*, 5 A.L.R. 2d 1368 (1949).

24. See Smith, *supra* note 2, at 390.

25. Thornhill v. Systems Fuel, Inc., 523 So. 2d 983 (Miss. 1988).

26. Martin v. Humble Oil & Ref. Co., 199 F. Supp. 648 (S.D. Miss. 1960), *aff'd*, 298 F.2d 163 (5th Cir. 1961); MCZ, Inc. v. Smith, 707 S.W.2d 672 (Tex. Ct. App. 1986).

27. Johnson v. Kansas Natural Gas Co., 90 Kan. 565, 135 P. 589 (1913).

28. Byrom v. Pendley, 717 S.W.2d 602 (Tex. 1986).

29. Wickham v. Skelly Oil Co., 106 F. Supp. 61 (E.D. Okla. 1952).

30. See generally Penn, *supra* note 2, at 18-25 to -27. Homer Penn concludes that after rejection of the gas balancing agreement, the underproduced parties are left with a monetary claim against the bankrupt to be paid or discharged in the bankruptcy, and that any entity purchasing the assets of the bankrupt will be treated as a cotenant. *Id.* Frequently, after bankruptcy the operator will refuse to allocate any gas to the account of the "overproduced" bankrupt party, effectively refusing to recognize his interest.

31. THOMPSON, *supra* note 21. "Tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession." 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 194 (1979). There are six common types of co-ownership: tenancy in common, joint tenancy, tenancy by the entirety, coparcenary, community property, and partnership property.

In feudal England, land was frequently held in tenure for life or for a period of years. There had long existed in Medieval England a common law action for waste against a life tenant or a tenant for years.<sup>32</sup> This concept of waste is easily understood. Someone who has been granted possession of property for a limited period of time is expected to return the property at the end of his ownership in as good a condition as it was when it was received except for normal wear and tear. If the permanent value of the property is diminished during the life tenant or tenant for years' tenure, the tenant has committed waste against the reversionary estate for which the law will hold the tenant liable.

The concept of waste by a cotenant in the fee is not as easily understood as waste by a cotenant whose tenure is of limited duration. Prior to the enactment of the Statute of Westminster II in 1285, nothing prohibited a cotenant in the fee from extracting valuable substances from the land held in cotenancy, without any accounting to his cotenants.<sup>33</sup> This statute provided for a writ of waste in favor of one cotenant against another.<sup>34</sup> The offending cotenant was given the option of accepting partition in kind and being allocated the depleted portion of the land, or refraining from any further depletion of the land, except to the extent the other cotenants did so.<sup>35</sup> Some four centuries later, in 1705, the Statute of Anne was enacted which allowed an action for an accounting by one cotenant against another for receiving more than the cotenant's just share or proportion of substances from the land.<sup>36</sup> Thus, the Statute of Westminster established that no cotenant of the fee could engage in waste against the commonly owned property (without defining waste), and the Statute of Anne established accounting as a remedy when a cotenant consumed more than the cotenant's share. It is from these early English statutes that the common law of cotenancy has evolved in American jurisdictions.

#### V. *The Modern Application of Cotenancy Laws to Oil and Gas Disputes*

##### A. *The Early Decisions — Majority and Minority Rule*

The earliest questions that arose in applying the laws of cotenancy to oil and gas matters dealt with the threshold issues of who were cotenants and whether cotenants or their lessees could produce oil or gas without the

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E. KUNTZ, *supra* note 23, § 5.1. For purposes of this article, the incidents of distinction of these various types of ownership are not important.

32. See Kimbrough, *Law of Waste in Mississippi Territory and State*, 7 Miss. L.J. 234, 258-59 (1935). This common law action was restated and additional remedies added by the Statutes of Marlbridge (1257) and Gloucester (1268). *Id.*

33. See E. KUNTZ, *supra* note 23, § 5.2; W. BLACKSTONE, *supra* note 31. See generally AMERICAN LAW OF PROPERTY § 6.15 (1952).

34. E. KUNTZ, *supra* note 23, § 5.

35. *Id.*

36. *Id.*



consent of all the other cotenants. Early on the courts established, with unanimity, that owners of undivided mineral interests are tenants in common<sup>37</sup> and that a lessee of a cotenant stands in the shoes of the lessor, becoming a cotenant with the lessor's cotenants.<sup>38</sup> However, a split of authority developed as to precisely what rights a cotenant has to drill for, produce and market oil and gas from the common property. A majority of the states that confronted this issue established that because of the very nature of minerals, a cotenant has the right to drill for and produce oil and gas without the consent of the cotenants, subject to the duty to account for the value of the production sold, less expenses.<sup>39</sup> The majority rule and the policy behind its adoption is aptly stated by the Texas Supreme Court:

It has long been the rule in Texas that a cotenant has the right to extract minerals from common property without first obtaining the consent of his cotenants; however, he must account to them on the basis of the value of any minerals taken, less the necessary and reasonable costs of production and marketing. The rule announced in *Burnham* and reaffirmed in *Cox* is founded on the distinctive legal relationship existing between cotenants; that is, each cotenant has a right to enter upon the common estate and a corollary right to possession. In establishing this rule, the *Burnham* court was guided by strong policy considerations:

[T]he peculiar circumstances of a cotenancy in land upon which oil is discovered warrant one cotenant to proceed and utilize the oil, without the necessity of the other cotenants concurring. Oil is a fugitive substance and may be drained from the land by well on adjoining property. It must be promptly taken from the land for it to be secured to the owners.<sup>40</sup>

The majority rule has been adopted in Alabama,<sup>41</sup> California,<sup>42</sup> Florida,<sup>43</sup> Georgia,<sup>44</sup> Kansas,<sup>45</sup> Kentucky,<sup>46</sup> Mississippi,<sup>47</sup>

37. See THOMPSON, *supra* note 21, § 1793, at 137; E. KUNTZ, *supra* note 23, § 5.1, at 137.

38. *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566, 572 (8th Cir. 1924) (a cotenant's "lessee upon entry will become for the time being a tenant in common with the other owners and entitled to the same rights in relation to the other cotenants that his lessor had.")

39. See E. KUNTZ, *supra* note 23, § 5.

40. *Byrom v. Pendley*, 717 S.W.2d 602, 605 (Tex. 1986) (citations omitted).

41. *Sun Oil Co. v. Oswell*, 62 So. 2d 783 (Ala. 1953). *But see Clark v. Whitfield*, 119 So. 631 (Ala. 1928).

42. *Dabney-Johnston Oil Corp. v. Walden*, 4 Cal. 2d 637, 52 P.2d 237 (1935).

43. *P & N Investment Corp. v. Florida Ranchettes, Inc.*, 220 So. 2d 451 (Fla. Dist. Ct. App. 1969).

44. *Slade v. Rudman Resources, Inc.*, 237 Ga. 848, 230 S.E.2d 284 (1976).

45. *Prewett v. Van Pelt*, 118 Kan. 571, 235 P. 1059 (Kan. 1925); *Krug v. Krug*, 5 Kan. App. 2d 426, 618 P.2d 323 (1980).

46. *Stephens v. Click*, 287 S.W.2d 630 (Ky. 1955).

47. *Mills v. Damson Oil Corp.*, 931 F.2d 346 (5th Cir. 1991); *Martin v. Humble Oil Ref. Co.*, 199 F. Supp. 648 (S.D. Miss. 1960), *aff'd*, 298 F.2d 163 (5th Cir. 1961). *Martin* involved

Missouri,<sup>48</sup> Montana,<sup>49</sup> North Dakota,<sup>50</sup> Oklahoma,<sup>51</sup> Pennsylvania,<sup>52</sup> Texas,<sup>53</sup> and Wyoming.<sup>54</sup>

A minority of the states, however, conclude that a cotenant does not have the right to produce oil and gas without the consent of the cotenants in the absence of exigent circumstances such as drainage.<sup>55</sup> This position has been adopted by Illinois,<sup>56</sup> Louisiana,<sup>57</sup> Michigan,<sup>58</sup> and West Virginia.<sup>59</sup> The West Virginia court articulated this position in *Law v. Heck*:<sup>60</sup>

To permit the defendant company to proceed with its proposed development of the oil and gas underlying the land in question without the plaintiff's consent, even though the company should faithfully turn over to the plaintiff his full proportionate share of such minerals, or account to him therefor, without cost of production, would be a compelling of the plaintiff to exchange his real estate for personal property. This the law will not require on a showing such as is here presented.<sup>61</sup>

Some writers have opined that this different treatment by the states is a result of different views of waste.<sup>62</sup> Thus, the minority rule views any

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a life estate and remainder interest and not cotenants in the fee. However, Mississippi probably falls in the majority rule jurisdictions. See *Damson Oil Corp. v. Southeastern Oil Co.*, 370 So. 2d 225, 227 (Miss. 1979); cf. *Miles v. Fink*, 119 Miss. 147, 80 So. 532 (1919).

48. *Davis v. Byrd*, 238 Mo. App. 581, 185 S.W.2d 866 (1945).

49. *Marias River Syndicate v. Big West Oil Co.*, 599 Mont. 254, 38 P.2d 599 (1934).

50. *Schank v. North Am. Royalties, Inc.*, 201 N.W.2d 419 (N.D. 1972).

51. *Earp v. Mid-Continent Petroleum Corp.*, 167 Okla. 86, 27 P.2d 855 (1933).

52. *Lichtenfels v. Bridgeview Coal Co.*, 344 Pa. Super. 257, 496 A.2d 782 (1985), *on appeal*, 366 Pa. Super. 304, 531 A.2d 22 (1987), *alloc. denied*, 539 A.2d 812 (1988); *McIntosh v. Ropp*, 233 Pa. 497, 82 A. 949 (1912).

53. *Byrom v. Pendley*, 717 S.W.2d 602 (Tex. 1986); *Cox v. Davison*, 397 S.W.2d 200 (Tex. 1965); *Burnham v. Hardy Oil Co.*, 147 S.W. 330 (Tex. Civ. App. 1912), *aff'd*, 195 S.W. 1139 (Tex. 1917).

54. *Torgeson v. Connelly*, 348 P.2d 63, 70 (Wyo. 1959).

55. See E. KUNTZ, *supra* note 23, § 5.

56. *Zeigler v. Brenneman*, 237 Ill. 15, 86 N.E. 597, 601 (1908); *Murray v. Haverty*, 70 Ill. 318 (1873); *Fyffe v. Fyffe*, 11 N.E.2d 857, 862 (Ill. Ct. App. 1937). By statutory enactments, Illinois has considerably lessened its application of the minority rule. See E. KUNTZ, *supra* note 23, § 5.4, at 142; Smith, *Evolution of Oil and Gas Rights in the Eastern United States*, 10 E. MINN. L. INST. 16-1, 16-40 (1989).

57. *Gulf Ref. Co. v. Carroll*, 145 La. 299, 82 So. 277 (1919). An exception to the rule requiring consent of all cotenants for drilling is now provided by statute when the drilling is done to prevent waste or the extinguishment of a servitude, LA. REV. STAT. ANN. § 31:176 (West 1989), or an undivided 80% interest consents, *id.* § 31:175.

58. See *Hennes v. Charles Hebard & Sons*, 135 N.W. 1073 (Mich. 1912). Like Illinois, Michigan has ameliorated the effect of this position by authorizing development of the land by less than all the cotenants pursuant to statute. See MICH. COMP. LAWS ANN. §§ 319.101-.110 (West 1984).

59. *E.g.*, *United Fuel Gas Co. v. Koontz*, 113 W. Va. 611, 169 S.E. 328 (W. Va. 1933).

60. 106 W. Va. 296, 145 S.E. 601 (1928).

61. *Id.*, 145 S.E. at 602.

62. See *Hurt & Jordan, Co-Ownership: The Problems It Creates for the Oil & Gas Producers*,

exploitation of the mineral interest as waste that may be enjoyed by a cotenant unless drainage is established, while the majority rule views production of oil and gas to be a customary and natural use of mineral property. Undoubtedly, the courts' views on what constitutes waste by a cotenant of the fee impacted these early decisions. The court's decision in the landmark case of *Prairie Oil & Gas Co. v. Allen*<sup>63</sup> clearly articulates the majority view of waste:

Tenants in common are the owners of the substance of the estate. They may make such reasonable use of the common property as is necessary to enjoy the benefit and value of such ownership. Since an estate of a cotenant in a mine or oil well can only be enjoyed by removing the products thereof, the taking of mineral from a mine and the extraction of oil from an oil well are the use and not the destruction of the estate. This being true, a tenant in common, without the consent of his cotenant, has the right to develop and operate the common property for oil and gas and for that purpose may drill wells and erect necessary plants. He must not, however, exclude his cotenant from exercising the same rights and privileges.<sup>64</sup>

However, it appears that the divergence in opinions is as much a question of policy as it is a difference in viewing the law of waste.<sup>65</sup> The court in *Prairie* also noted that allowing a single cotenant to deprive the other co-owners of their opportunity to promptly secure a fugacious substance such as oil could arbitrarily destroy that which constituted the primary value of the land.<sup>66</sup> The majority rule encourages development of the mineral interest, somewhat at the expense of the individual rights of the cotenant.<sup>67</sup> The minority rule jealously protects the right of the individual cotenant at the expense of the rights of the other cotenants and undoubtedly discourages development.<sup>68</sup>

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6 E. MIN. L. INST. 16-1, 16-4 (1985); Shepherd, *Problems Incident to Joint Ownership of the Oil and Gas Leasehold Estate*, 5 INST. ON OIL & GAS L. & TAX'N 215-33 (1954); E. KUNTZ, *supra* note 23, § 5.2, at 139. Dean Kuntz points out that the majority rule amounts to a "recognition that the concept of waste applicable to tenants for life or for years is not applicable to cotenants in the fee." *Id.* § 5.3, at 141. □

63. 2 F.2d 566 (8th Cir. 1926).

64. *Id.* at 571.

65. Some of the early decisions viewed the depletion of mineral resources as waste, but refused to hold a cotenant liable for conversion (trover), rather finding that such action gave rise to an action at law for waste or in equity for an accounting for waste. *See, e.g., Clark v. Whitefield*, 218 Ala. 593, 119 So. 631, 633 (1928).

66. *Prairie Oil & Gas*, 2 F.2d at 571.

67. Professor Lowe is somewhat skeptical that the majority rule encourages development feeling that it is not often relied upon unless the nonconsenting interest is small. J. LOWE, *supra* note 22, at 92-93.

68. The enactment of statutes diminishing the impact of the court position in all of the

The majority rule recognized the realities of the rule of capture and the burden that this rule of property placed on land owned in cotenancy, establishing as a policy that cotenants could proceed to develop the commonly-owned land so long as they were willing to do so at their own risk.<sup>69</sup> These jurisdictional differences are less important now due to the enactment of conservation laws that basically control who is entitled to drill for oil and gas and the spacing patterns of wells in the producing states.

## B. *The Duty to Account*

### 1. *General Statement of Duty*

All of the states that have considered the issue have concluded that a producing cotenant is obligated to account to the nonproducing cotenant for his share of the market value of the oil and gas produced, less the necessary expense of developing, producing and marketing the product.<sup>70</sup> Even in those jurisdictions in which a cotenant is not authorized to produce oil and gas from commonly owned lands without the consent of all cotenants, the nonconsenting cotenants may waive the tort and sue for an accounting.<sup>71</sup> Though there exists a plethora of cases that reiterate this universal rule of accounting, few expound on the nature of this duty to account. Several early cases indicated that a producing cotenant must account to the nonproducing cotenant either for the market value of the material sold less expenses or "the universal and customary royalty paid for the right of mining" the particular product.<sup>72</sup> This rule has basically been developed by the courts to allow the nonconsenting cotenant to ratify the consenting cotenant's lease and accept royalty thereunder or reject the lease and receive a share of the oil and gas produced, less part of the cost of discovery and production.<sup>73</sup> Though the cases are not numerous, there

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minority rule states save West Virginia attests to the fact that legislators felt a need to alter the rule to encourage development.

69. It should be kept in mind that the early oil and gas court decisions were made at a time when the laws of nature that govern how oil and gas actually exist underground were not properly comprehended. This led the courts to analogize to what they did comprehend — "wild animals" and "underground streams," the laws of *ferae naturae*. Thus, the rule of capture was devised as a rule of property as to the ownership of oil and gas providing that so long as a well was located on one's property, title was acquired to all of the oil and gas the well "captured," i.e., produced. This led to a race to drill wells as quickly as possible in order to produce and thus, acquire title to as much oil and gas as possible. The negative effects of the rule of capture, and the reckless development to which it led, gave rise to modern conservation laws. See generally Shepherd, *supra* note 62; Pierce, *Reconciling State Oil and Gas Conservation Regulation with the Natural Gas Act: New Statutory Revelation*, 1989 B.Y.U. L. Rev. 9; Smith, *supra* note 56.

70. See E. KUNTZ, *supra* note 23, § 5.6.

71. See, e.g., *Dangerfield v. Caldwell*, 151 F. 554 (4th Cir. 1907) (a West Virginia case).

72. See, e.g., *New Domain Oil & Gas Co. v. McKinney*, 188 Ky. 183, 221 S.W. 245, 250 (1920).

73. See, e.g., *Davis v. Atlantic Oil Producing Co.*, 87 F.2d 75, 77 (5th Cir. 1936).

are some decisions that address various issues that must be faced in accounting to the unrecognized owner.

## 2. *Who Must Account?*

The numerous cases reiterating the rule of accounting to nonconsenting cotenants generally recite that the “producing”<sup>74</sup> or “developing”<sup>75</sup> cotenant has a duty to account. Does this mean only the well operator or all owners who own a working interest in the producing well? A distinction should be made here between a suit to establish the title of the unrecognized cotenant and a suit for an accounting or damages. Clearly, all parties whose title would be adversely affected should be joined in a suit where the title of the excluded cotenant is contested. But after one’s title has been established and is no longer contested, who has the duty to account? Although very little authority exists on this subject, at least one Texas court has faced this precise issue and has held that the well operator is the only necessary party.

In *MCZ, Inc. v. Smith*,<sup>76</sup> MCZ acquired by assignment a lease from the owner of an undivided one-half interest in the property and a life estate in the remaining one-half interest. The owner of one-half of the one-half remainder interest was listed as a lessor in the lease, though the capacity in which he signed was disputed. However, it was undisputed that the owners of the other one-half of the remainder interest never leased to MCZ or its assignors. The original lessees assigned the lease to MCZ, reserving an overriding royalty interest. MCZ then assigned 90% of the lease in question to eight other parties.

A producing well was drilled on the lease, and the owners of the unleased remainder interest then leased to one Arthur Smith. Smith and his lessors then sued only MCZ, seeking royalties, an accounting, and damages for waste, interest, and costs. MCZ argued that all of the other owners of the lease, both overriding royalty interest and working interest, should have been joined as parties to the suit. However, the trial court rejected this argument, and the appellate court affirmed, stating:

MCZ’s relationship with and liability to Armstrong and Bailey [the remainder interest not leased to MCZ] arises from the law of cotenancy, not from a contractual relationship. A cotenant, such as MCZ, who produces oil and gas from commonly owned property without first having secured the consent of its cotenants, is liable to the non-producing cotenants for minerals produced, less reasonable costs of production and marketing. *As the operator of the Philipello well, MCZ became the producing cotenant to the Armstrong-Beasley remainder interest, and MCZ’s production triggered its duty under Texas law to account to remain-*

74. *E.g.*, *MCZ, Inc. v. Smith*, 707 S.W.2d 672, 678 (Tex. Ct. App. 1986); *Schank v. North Am. Royalties, Inc.*, 201 N.W.2d 419, 429 (N.D. 1972).

75. *Martin v. Humble Oil & Ref. Co.*, 199 F. Supp. 648 (S.D. Miss. 1960).

76. 707 S.W.2d 672 (Tex. Ct. App. 1986).

der interests for minerals produced, less proportionate reasonable costs. *As operator, MCZ alone was responsible under the law of cotenancy to account to its cotenant remaindermen, just as it was responsible under the lease to account to its assignors and assignees.*<sup>77</sup>

MCZ further argued on appeal that the trial court had improperly found that it “held” the lease in question (since it had assigned 90% of the lease to others) and had been the collecting agent for all proceeds from the sale of oil and gas.<sup>78</sup> The court of appeals brushed aside this argument, declaring:

MCZ’s sole responsibility to account occurs because it is the appellees’ producing cotenant who has severed and extracted minerals from the co-owned tract, collected monies, and refused to pay over to co-owner appellees . . . . MCZ’s liability has nothing to do with the percentage of the lease it “holds,” but results from MCZ’s having acquired money due appellees from operating the well.<sup>79</sup>

Thus, the operator is certainly a producing cotenant and may be the only party who is required to account to the nonconsenting cotenants. In most cases, this is not unreasonable. The operator is the one who has chosen to exclude the cotenant,<sup>80</sup> and the fact that it may have paid production proceeds attributable to the interest of the excluded cotenant to the wrong parties should not require the excluded cotenant to seek redress from those parties. The operator is the one who will have any rights of indemnity or other recourse against those parties it has chosen to pay.

As a practical matter, it may be exceedingly difficult for the excluded cotenant to know where the ultimate liability may rest. Who may be responsible to the operator usually will be the result of the contractual arrangements between the operator and the nonoperating working interest owners whom the operator has recognized. The standard joint operating agreement provides two basic methods of dealing with loss of title by parties to the agreement, joint loss or individual loss.<sup>81</sup> In addition, the status of the gas balancing account among the recognized owners might impact on who among them is liable ultimately for the wrongful appropriation of the excluded cotenant’s gas. Frequently, the arrangements are further compli-

77. *Id.* at 676 (emphasis added) (citation omitted).

78. *Id.* at 678. The only evidence that the court’s opinion cites to support the finding that MCZ had control of funds for disbursement and was the collecting agent for proceeds of oil and gas sales, was testimony that it had suspended funds attributable to appellees’ interest and that it had accrued royalties for lessors that it had not paid out.

79. *Id.*

80. The court in *MCZ, Inc.* noted that title opinions secured by MCZ as operator of the well had pointed out that a portion of the remainder interest was not under lease to MCZ, Inc. *Id.* at 676. The operator is in charge of the well’s production and must determine what interest it will recognize as valid.

81. Conine, *Property Provision of the Operating Agreement-Interpretation, Validity and Enforceability*, 19 TEX. TECH L. REV. 1263, 1351 (1988).

cated by fieldwide gas exchanges that allocate and balance gas accounts among the recognized parties in the field, which might result in a working interest owner who has no record interest whatsoever in the particular well being allocated all of the gas produced by that well. The operator is often the only party knowing who has and who has not sold gas.

The operator is the logical and proper person to be held liable to the excluded cotenant to account for the proceeds attributable to the cotenant's interest. The operator is charged with the duty to defend claims against the joint account and police the production from the well.<sup>82</sup> The operator can seek contribution from all parties it believes are liable. Often one of the working interest owners who has been paid is in bankruptcy at the time of the accounting to the excluded cotenant. The operator quite naturally wants to shift that loss to the excluded cotenant. Normally, the operator should not be allowed to.<sup>83</sup>

When the excluded cotenant has made known a claim, there is a compelling reason for holding the operator responsible. A prudent operator should either suspend proceeds when an adverse claim has been made or require appropriate indemnity from the parties whose interest are affected by any adverse claim. Thus, certainly after the excluded cotenant's claim of title is made known, the operator has every opportunity to protect itself and the recognized working interest owners. If it fails to do so, it should expect to suffer any adverse consequences. A prudent operator should likewise not distribute proceeds until it has obtained title opinions from reputable counsel certifying the title of the various owners. In cases in which the title attorney has miscertified the status of the title, the attorney will be liable to the party to whom the title opinion was rendered.<sup>84</sup>

It would seem that all of the recognized working interest owners in a well who have sold production would be considered producing cotenants and, thus, liable to account.<sup>85</sup> When it can be shown that the operator served as the collecting agent for the well's production, the operator alone can be held responsible to account.<sup>86</sup> When split stream connections exist,

82. *Teel v. Public Serv. Co.*, 767 P.2d 391, 397 (Okla. 1985); Ellis, *supra* note 2, at 80.

83. Equitable defenses such as laches would be available to the operator should the facts of the particular case warrant them.

84. *Lear, First Purchaser Suspense Accounts*, 33 ROCKY MTN. MIN. L. INST. 17-1, 17-2 (1988); *see, e.g., Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690, 693 (Tex. 1986) (court noted that a third-party cross-action had been filed by the operator against the title attorney who miscertified the title in the title opinion which the operator relied on to prepare its division order).

85. The liability of cotenants qua cotenants is several, not joint. A nonproducing cotenant may choose to sue less than all of the producing cotenants and the action will be entertained so long as the relief sought will not adversely affect the rights of those cotenants not joined. *Cowling v. Deep Vein Coal Co.*, 183 F.2d 652, 656 (7th Cir. 1950); *Guth v. Texas Co.*, 155 F.2d 563 (7th Cir. 1946); *Martin v. Humble Oil Ref. Co.*, 199 F. Supp. 648 (S.D. Miss. 1960), *aff'd*, 298 F.2d 163 (5th Cir. 1961); *Hendricks v. Hendricks*, 215 Ala. 646, 112 So. 219 (1927); *Armstrong v. Armstrong*, 185 N.Y.S. 853 (N.Y. 1920).

86. *MCZ, Inc. v. Smith*, 707 S.W.2d 672 (Tex. Ct. App. 1986).

and the operator can prove that other working interest owners took their production in kind, it might be necessary to join all such parties in any suit for an accounting. This would certainly be the safest course.

### 3. Accounting in Kind — Your Gas Is Still in the Ground

When demand is made on the producing cotenant to account to the previously unrecognized cotenant for proceeds of past production, the response in a falling market will almost always be, "I have only sold *my* gas, *your* gas is still in the ground."<sup>87</sup> How valid is this response? It is neither valid nor new. The courts considering cases involving hard minerals have rejected this argument and have held as a matter of law that the producing cotenants have produced the well or mine on behalf of all cotenants.<sup>88</sup> These cases dealing with hard minerals properly apply the law of cotenancy. There should be no reason to apply a different rule to gas than to hard minerals.<sup>89</sup>

An interesting Texas case, *White v. Smyth*,<sup>90</sup> considered this question of "involuntary gas banking," albeit in the context of a suit for partition by sale of the rock asphalt estate in a large tract of land, coupled with an accounting for the asphalt removed from the common property. In *White*, the defendant owned a one-ninth interest in 30,000 acres of land and had for some time mined the rock asphalt on some 200 acres thereof, failing to account to the cotenants. The court in *White* noted that it was faced with a case of first impression in Texas as to the duty of a co-owner who takes solid minerals to account to cotenants, but analogized to the well-recognized Texas rule regarding oil and gas that requires the producing cotenant to account to the nonproducing cotenant for the proceeds of the oil and gas sold, less expenses.<sup>91</sup> The defendant contended that the general rule requiring an accounting did not apply "because he ha[d] mined no more than his fair share of the rock asphalt in place and ha[d] not excluded them [the cotenants] from the premises."<sup>92</sup> The court rejected this argument, citing with approval, *inter alia*, a Connecticut decision<sup>93</sup> for the proposition:

87. In a situation of rising gas prices, the response will be different. If the producer can currently sell gas at a higher price than that previously received, he will gladly account to the previously unrecognized cotenant at the lower price rather than forego current production at a higher price.

88. *White v. Smyth*, 214 S.W.2d 967 (Tex. 1948); *Campbell v. Homer Ore Co.*, 309 Mich. 693, 16 N.W.2d 125, 127 (1944); *Memphis Stone & Gravel Co. v. Archer*, 137 Miss. 558, 102 So. 390, 391 (1925); *Cosgriff v. Dewey*, 47 N.Y.S. 255 (App. Div. 1897), *aff'd*, 58 N.E. 1 (N.Y. 1900); *Barnum v. Landon*, 25 Conn. 137, 150 (1856).

89. Kuntz, *supra* note 2, at 13-9. The article states, in pertinent part:

The principles applicable to a gas imbalance between cotenants should be the same as the principles applicable to an imbalance created by the taking of other minerals or timber, although an application of those principles to gas should take into account the peculiar physical characteristics of gas and any peculiarities in the practices of marketing gas.

*Id.*

90. 214 S.W.2d 967 (Tex. 1948).

91. *Id.* at 975.

92. *Id.*

93. *Barnum v. Landon*, 25 Conn. 137 (1856).



The error of the defendants lies in this: They contend they own absolutely whatever they get out of the ore pit if it is not too much, whereas they own only one/twenty-fourth part of what they get out, and must account at reasonable times, for the other twenty-three parts, to the plaintiffs.<sup>94</sup>

The Court further declared:

The ownership of all of the cotenants extends to all of the rock asphalt, and White was not authorized to make partition of it. We approve the conclusion on this point thus well expressed by Associate Justice Norvell, writing the opinion of the Court of Civil Appeals in this case:

“On the other hand, if the mineral estate be not partitionable in kind, it follows that although a cotenant may be entitled to partition, he is not entitled to a partition in kind, consequently, his taking of minerals prior to partition can not be regarded as vesting absolute title of the several minerals in the taker. On the contrary, the title to the several minerals remains in all the cotenants in their proportionate interests. The minerals not being partitionable in kind, the substantive right of cotenants desiring division or partition is the right to have the estate or minerals sold and the proceeds thereof divided. It follows, therefore, that the title of the non-operating cotenant in and to the extracted minerals does not terminate until said minerals are disposed of by sale, or until they are brought to a place or point where there exists an established market value for such minerals. His rights thereupon attach to the proceeds.”

The facts of this case attest the obvious soundness of the rule that a cotenant cannot select and take for himself part of the property jointly owned and thus make partition.<sup>95</sup>

The same argument, that the producing cotenant had not taken more than his pro rata share of the minerals and thus had no duty to account, was rejected by the Mississippi Supreme Court in *Memphis Stone & Gravel Co. v. Archer*,<sup>96</sup> as follows:

It is further contended by the appellants that since they own an undivided two-thirds interest in this property and that they have not taken their share of the gravel from the land, they should not be held liable to their cotenant. They have been in the exclusive possession of the entire property and are accountable to their cotenant for her share of the gravel removed.<sup>97</sup>

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93. *Barnum v. Landon*, 25 Conn. 137 (1856).

94. *White*, 214 S.W.2d at 977.

95. *Id.* at 976 (quoting *White v. Smyth*, 214 S.W.2d 953, 961 (Tex. Civ. App. 1947)).

96. 137 Miss. 558, 102 So. 390 (1925).

97. *Id.*, 102 So. at 391.

Thus, these early cases dealing with hard minerals conclude that cotenants own every particle of the common property, and no cotenant may unilaterally partition the property by claiming some particular portion of it as his own. They also appear to this writer to say that the ownership extends to the extracted minerals, though in a qualified sense.<sup>98</sup> Any cotenant has the right to sell the extracted mineral, but the cotenant's ownership interest will then attach to the proceeds of the sale by virtue of the cotenant's entitlement to an accounting.<sup>99</sup> It is not unlike partnership property, which is a species of co-ownership. Any partner in a general partnership may be authorized to sell the partnership property and deliver good title to the purchaser.<sup>100</sup> However, if the proceeds of the sale are converted to the private use of the selling partner, the seller is liable to the partners for conversion. Likewise, if a cotenant sells commonly owned gas and then refuses to account to the cotenants, the cotenant is liable to them for their share of the property sold.<sup>101</sup>

Court decisions dealing with oil and gas cotenancies repeatedly recite that a cotenant may not exclude concurrent owners from exercising their right to produce minerals from the common property.<sup>102</sup> Thus, it would naturally follow that insofar as a cotenant's interest has not been previously recognized, the cotenant has been excluded from the common property, and the producing cotenant must account for the other's share of the commonly owned oil and gas that has been sold. The producing cotenant cannot simply say that the previously excluded cotenant is now free to go and market the

98. Dean Kuntz, in his analysis of *White*, found nothing to suggest that the cotenants owned an undivided interest in the severed minerals. Kuntz, *supra* note 2, at 13-10. He opines that the common law rights of a cotenant do not include the acquisition of title in minerals extracted by another cotenant, though the right to an accounting for profits make the economic consequences similar. *Id.* at 13-13, -14. In this writer's opinion, some of the cases, including *White*, do hold that the cotenants own an undivided interest in extracted minerals, but that ownership is not unqualified. The extracted minerals are a part of the substance of the fee and as such, each molecule is owned by the tenants in common. If they are extracted and stored, they would still be owned by all of the cotenants; but once sold, the nonconsenting cotenant must look to his selling cotenant for an accounting. This does not detract from what appears to be the thrust of Dean Kuntz's argument — that *the sale* by a cotenant of 100% of the oil and gas produced by a well does not give rise to a claim for conversion, a position that it appears the Oklahoma Supreme Court has now come around to. Compare *Anderson v. Dyco Petroleum Corp.*, 782 P.2d 1367 (Okla. 1989) with *Teel v. Public Serv. Co.*, 767 P.2d 391 (Okla. 1985). However, a refusal of the cotenant to account for the proceeds of such a sale should be grounds for a claim of conversion. Cf. *Van Zandt v. Van Zandt*, 227 Miss. 528, 86 So. 2d 466 (1956).

99. *White v. Smyth*, 214 S.W.2d 967 (Tex. 1948); *Dangerfield v. Caldwell*, 151 F. 554, 559 (4th Cir. 1907).

100. THOMPSON, *supra* note 21, § 1832, at 345.

101. Cf. *Van Zandt v. Van Zandt*, 227 Miss. 528, 86 So. 2d 466 (1956) (cotenant holding power of attorney from other cotenants who sold timber from cotenancy land without disclosing sale or money received to other cotenants, deposited proceeds to own bank account and refused to account is guilty of concealed fraud and must pay the other cotenants their share of sale proceeds plus interest).

102. See, e.g., *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566, 571 (8th Cir. 1924); *Davis v. Byrd*, 185 S.W.2d 866 (Mo. Ct. App. 1945); *Earp v. Mid-Continent Petroleum Corp.*, 167 Okla. 86, 27 P.2d 855 (1933).

cotenant's share of the commonly owned remaining gas. Under the established laws of cotenancy, a cotenant must offer to account to other cotenants for the value of the oil and gas previously sold.<sup>103</sup>

#### 4. *Accounting in Value — The Measure of the Accounting*

##### a) *Market Value or Proceeds*

When the product that has been produced is oil, there is little argument over the price at which the producing cotenant must account. There usually exists a posted price in the field for oil sold, and it can be readily ascertained. Gas is a different matter. Identical molecules of gas flowing out of the same well bore may have been sold for prices varying by 1,000%. Finding out the precise price paid for gas can often be an arduous undertaking. Must the producing cotenant account for the gas sold at the fair market value of the gas at the time it was sold, the actual proceeds received from the sale, or some other price?

The early cases dealing with cotenancy accounting generally discuss this issue only superficially. The standard rule recited is that the producing cotenant must account for the market value of the gas at the time it was sold.<sup>104</sup> But what is market value? There has been a great deal of litigation involving the construction of royalty clauses requiring the payment for gas based on market value. The courts in these cases have split regarding the question of whether the lessee's contract price establishes the market value or whether the market value should be independently established at the time of production.<sup>105</sup> The Texas courts in the market value royalty cases, while generally requiring market value to be established at the time of production, have stated that this market value should be determined by "sales of gas comparable in time, quality and availability to marketing outlets."<sup>106</sup> After fifteen years of litigation and establishing that they were entitled to be paid royalties based on the market value of gas at the time it was produced, some Mississippi royalty owners were instructed by the trial court that the "market value" of their gas was the long-term contract price at which the lessee sold.<sup>107</sup>

These market value royalty cases may not be truly analogous to a cotenancy accounting situation. Most of these cases involve consideration of

103. *Jones v. Strauss*, 745 S.W.2d 898 (Tex. 1988); see *Moody v. Wagner*, 167 Okla. 99, 23 P.2d 633 (1933) (producing cotenant cannot evade his liability to account by making a physical division of the product at the mouth of the well and offering to release to the nonproducing cotenant his proportionate share).

104. See, e.g., *Johnson v. Kansas Natural Gas Co.*, 90 Kan. 565, 135 P. 589 (1913).

105. See Bondurant, *Royalty Owner Rights Under Division Orders*, 25 TULSA L.J. 571, 587 (1990). Compare *Texas Oil & Gas Corp. v. Vela*, 429 S.W.2d 866 (Tex. 1968) with *Tara Petroleum Corp. v. Hughey*, 630 P.2d 1269 (Okla. 1981). See generally Maxwell, *Oil and Gas Royalties — A Percentage of What?*, 34 ROCKY Mtn. MIN. L. INST. 15-1 (1988).

106. See *Sowell v. Natural Gas Pipeline Co. of America*, 604 F. Supp. 371, 375 (N.D. Tex. 1985), *aff'd*, 789 F.2d 1151 (5th Cir. 1986).

107. *Piney Woods Country Life School v. Shell Oil Co.*, No. J74-0307(W) (S.D. Miss. Apr. 24, 1989), *affirmed in part and reversed in part*, 905 F.2d 840 (5th Cir. 1990) (appellate court affirmed trial court for all sales made during 1972-78, but remanded for reconsideration of evidence as to deregulated gas sold post 1978).

implied duties of lessees to lessors and an attempt by the court to divine the intention of the parties to a voluntary lease contract.<sup>108</sup> The obligation of a cotenant to account arises as a matter of law, not because of some voluntary agreement. It would seem logical that an accounting among cotenants should be on the basis of a fair market value at the time of production. However, many of the cases that require an accounting based on such market value imply that the actual sale proceeds of the oil and gas establish that market value.<sup>109</sup> One authoritative commentator apparently believes that the actual proceeds received constitute the basis upon which a cotenant must account.<sup>110</sup>

*b) Establishing Market Value*

Market value is generally understood to be the price at which a willing seller will agree to sell to a receptive buyer when neither party is under any compulsion to make the transaction and the parties are unrelated.<sup>111</sup> Thus, the price at which parties contract with one another at arm's length to buy and sell gas is an indicator of market value.<sup>112</sup> Also, the prices at which the producing cotenants were able to actually sell the gas that was sold would certainly be an element of the market value,<sup>113</sup> though not necessarily determinative.<sup>114</sup>

Pursuant to the partial deregulation of the gas market, many publications are now reporting "spot market" prices of various gas purchasers at various locations, which is beginning to establish an objective market value for non-contract gas. Thus, the market value of gas is becoming more readily ascertainable than in times past.

In some jurisdictions, the price at which the producing cotenants were able to sell their gas would in all probability establish the market value of that gas.<sup>115</sup> There is a certain element of fairness in utilizing the actual

108. See, e.g., *Hillard v. Stephens*, 276 Ark. 545, 637 S.W.2d 581, 585 (1982).

109. See, e.g., *Johnson v. Kansas Natural Gas Co.*, 90 Kan. 565, 135 P. 589 (1913); *Miller v. Wenexco, Inc.*, 743 P.2d 152, 156 (Okla. Ct. App. 1987); *Martin*, *supra* note 2, at 13-11 ("This [duty to account] has generally been for the market value of the production, which has also generally been the price received by the producing party.").

110. *Kuntz*, *supra* note 2, at 13-14.

111. See BLACK'S LAW DICTIONARY 716 (4th ed. 1968) (definition of "fair market value").

112. *Memphis Stone & Gravel Co. v. Archer*, 102 So. 390, 390 (Miss. 1925) ("The usual ordinary way to ascertain the market value is to show what articles were bought and sold for in the market in accordance with contract.").

113. See *Borrego*, *supra* note 2, at 4-18 n.21.

114. Judge Wisdom notes that what constitutes "market value" is a question of fact to be determined by the fact finder, be it judge or jury. See *Piney Woods Country Life School v. Shell Oil Co.*, 726 F.2d 225, 238 (5th Cir. 1984), *cert. denied*, 471 U.S. 1005 (1985). This point was emphatically affirmed by the Fifth Circuit's most recent pronouncement in the long running *Piney Woods* case wherein the Court of Appeals refused to overturn the trial judge's determination that the long-term contract price was the best indicator of current market value for royalty payments. See *supra* note 107.

115. See, e.g., *Tara Petroleum v. Hughey*, 630 P.2d 1269, 1273 (Okla. 1981); *Hillard v. Stephens*, 276 Ark. 545, 637 S.W.2d 581, 585 (1982). The Oklahoma and Arkansas courts found that a requirement that the producer pay royalty on a price higher than the price received by the producer would be unfair. The long-term gas contract price is deemed to establish the market

proceeds received by the producing cotenants, assuming an arm's length transaction. Forcing an accounting at a price greater than the producing cotenant receives would appear to involve a punitive measure to some extent. This might be warranted if the producing cotenant's refusal to recognize the interest of his cotenant was done in bad faith.<sup>116</sup> In addition, even if there were no question of bad faith, if the operator as producing cotenant was selling gas at a below market price, the nonproducing cotenant whose interest was not recognized would have a strong argument that any accounting should be on the higher prevailing market value, since the operator had precluded him from marketing his share of the well's production at this price.<sup>117</sup>

Many of the cotenancy cases speak of the duty to account for "net profits."<sup>118</sup> This measure of accounting, if the language is construed literally, can only be established by utilizing the actual proceeds received from the sale of the product.<sup>119</sup> Those producers who were fortunate enough to have high priced long-term contracts have resisted any accounting based on actual proceeds received since they do not want to "share their market." They prefer an accounting based on a lower market value price, or the price they contend the non-producing party would have received had they sold their gas.

It does not appear that there is any case which analyzes the precise question of whether a cotenancy accounting should be based on actual proceeds or a hypothetical fair market value where the interest of the nonproducing cotenant was not previously recognized. Both measures can be supported. The question may very well be answered on a case-by-case basis depending on the equities of each situation.<sup>120</sup>

##### 5. *Liability for Interest and Attorneys' Fees*

In addition to the value of the gas sold, courts have held the producing cotenant liable for other items of damage in accountings. Courts in Okla-

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value of the gas sold in these market value royalty cases. *But see* State *ex rel.* Superior Oil Co. v. Texas Gas Transmission Corp., 242 La. 315, 136 So. 2d 55 (1961).

116. Kuntz makes a distinction between (1) liability for damages which flow from a cotenant's wrongful conduct such as excluding a cotenant, and (2) liability of a cotenant to account for substances extracted by lawful operations. E. KUNTZ, *supra* note 23, § 5.6. Some courts have held that where the exclusion of the cotenant is done in bad faith, the producing cotenant is not entitled to recover his costs. *Id.*

117. *See* Memphis Stone & Gravel Co. v. Archer, 137 Miss. 558, 102 So. 390, 391 (1925).

118. *E.g.*, Prairie Oil & Gas Co. v. Allen, 2 F.2d 566 (8th Cir. 1924); Miller v. Wenexco, Inc., 743 P.2d 152 (Okla. 1987).

119. *See* Kuntz, *supra* note 2, at 13-14. *But see* Memphis Stone, 102 So. at 391 (defendants alleged no duty to account since mining had not been profitable; court found excluded cotenant was not confined to share of alleged profits as damages, but was entitled to market value of mined product less charge for use of defendants' mining equipment).

120. The gas balancing cases that have required a balancing in money have done so as a discretionary equitable remedy in an attempt to satisfy the court's perception of fairness. Kuntz, *supra* note 2, at 13-24, -25.

homa and Texas have held that the producing cotenant must account to the nonproducing cotenant for interest at the legal rate on the net proceeds from production, from the date the proceeds should have been paid after recoupment of its costs.<sup>121</sup> There is an impressive line of authority that interest should be allowed on equitable principles to compensate one for another's use and possession of his funds.<sup>122</sup> These cases rightfully recognize the time value of money, which should be an element of any accounting among cotenants. Attorneys' fees are generally not recoverable in accountings, unless specifically authorized by statute or unless proof of bad faith on the part of the producing cotenant in failing to account can be shown.<sup>123</sup> However, there is limited authority in the field of insurance law that courts can award attorneys' fees and litigation expenses even in the absence of bad faith where there exist substantially unequal positions between the parties to the litigation and a failure to award attorneys' fees would result in injustice.<sup>124</sup> The denial of a cotenant's claim and a refusal to account can be analogous to the denial of a claim under an insurance contract. However, this author has found no case in which attorneys' fees were awarded in a cotenancy accounting in the absence of proof of bad faith or statutory authorization.

#### 6. *Costs Allowed to Producing Cotenant*

Like the other elements of an accounting between cotenants, the costs that the producing cotenant is allowed credit for in his accounting have not been extensively discussed. The cases generally pronounce that the producing cotenant may recover his costs of drilling, developing and producing the oil and gas before accounting to the nonproducing cotenant and leave it at that. However, there have been some cases that discuss the recoupment of specific items of costs incurred by a producing cotenant.

At least one case has held that "overhead" expenses, such as salaries of employees not directly employed on the property, are deductible.<sup>125</sup> Income

121. *Dilworth v. Fortier*, 405 P.2d 38, 50 (Okla. 1965); *MCZ, Inc. v. Smith*, 707 S.W.2d 672, 677 (Tex. Ct. App. 1986). *Accord* *Campbell v. Homer Ore Co.*, 309 Mich. 693, 16 N.W.2d 125 (1944); *Van Zandt v. Van Zandt*, 227 Miss. 528, 86 So. 2d 466 (1956); *McGowan v. Bailey*, 179 Pa. 470, 481, 36 A. 325, 327 (1897).

122. See *Bondurant*, *supra* note 105, at 595-96 nn.116-18; C. McCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* §§ 54-55 (1935).

123. See, e.g., *Grisham v. Hinton*, 490 So. 2d 1201, 1205-08 (Miss. 1986) (discussion of cases in which award of attorneys' fees is proper). See generally Comment, *The Award of Attorney's Fees to Prevailing Defendants Under the Washington Long Arm Statute*, 63 WASH. L. REV. 125, 127 (1988). Texas appears to have a statute broad enough to authorize attorneys' fees in an oil and gas accounting. See TEX. NAT. RES. CODE ANN. § 91.401-06 (Vernon Supp. 1990). Suits for accounting are frequently joined with partition suits for which many states authorize an award of attorneys' fees.

124. See *Grisham*, 490 So. 2d at 1209 (Robertson, J., concurring); *Blue Cross & Blue Shield v. Maas*, 516 So. 2d 495, 498 (Miss. 1988) (dicta) (Robertson, J., concurring) (bad faith insurance case). See also *Herring*, *The Availability of Extracontractual Damages for Emotional Distress and Attorneys' Fee in Bad Faith Breach of Insurance Contract Cases*, 59 MISS. L.J. 537, 545-49 (1989) (discussion of the Mississippi Supreme Court's apparently evolving position on awarding attorneys' fees as articulated primarily through the opinions of Justice James Robertson).

125. *New Domain Oil & Gas Co. v. McKinney*, 188 Ky. 183, 221 S.W. 245, 250 (1920).

taxes are generally not allowed as a cost of production, though production taxes would be deductible.<sup>126</sup> The Texas Supreme Court has determined that interest on the money expended by the producing cotenant is not an item of cost for which the producing cotenant is entitled to take credit.<sup>127</sup>

Oklahoma has held that the cost of drilling an unprofitable well in an effort to develop the commonly owned property may be considered as a cost of developing the property and charged against subsequent wells that are productive.<sup>128</sup> However, whether the costs that may be deducted are limited to the actual costs incurred in connection with the drilling and producing of the successful well, or whether all previous costs of developing the property may also be included, is still an open question and one over which there exists considerable debate.<sup>129</sup>

Following the general acceptance of the Model Form Joint Operating Agreements with accounting procedures attached, there has been little recent litigation over the costs for which the producing cotenant may take credit. The charges authorized by the joint operating agreement, which the non-producing producing cotenants have paid without protest, would probably be considered the reasonable and necessary expenses of drilling and producing for which the producing cotenant is entitled credit in any accounting.

#### 7. *Timing — When Does the Duty Arise?*

Like the other components of cotenancy accounting, the time that the accounting is due is rarely discussed in the case law. Many different time periods could be utilized. One distinguished commentator has suggested that any accounting by cotenants is probably due on a monthly basis.<sup>130</sup> Others have indicated less specific time periods, such as currently<sup>131</sup> or in reasonable periods.<sup>132</sup> Gas Balancing Agreements frequently postpone any cash accounting until reservoir depletion. There is probably little law on this issue since the producing cotenant frequently refuses to account until ordered to do so by the court.

Since the operator generally accounts to the producing cotenants on a monthly basis, there is no real reason to require a different period for accounting to the non-producing cotenant. The courts would probably find it reasonable for the operator or other producing cotenant to account to the non-producing cotenant at the same time it accounts to itself or the other producing cotenants.

126. See *Swiss Oil Corp. v. Hupp*, 253 Ky. 552, 69 S.W.2d 1037, 1045 (1934).

127. *Cox v. Davison*, 397 S.W.2d 200 (Tex. 1965); accord *Eagle Gas Co. v. Doran & Associates, Inc.*, 387 S.E.2d 99 (W. Va. 1989); cf. *Pursue Energy Corp. v. State Oil & Gas Bd. of Miss.*, 524 So. 2d 569 (Miss. 1988).

128. *Moody v. Wagner*, 167 Okla. 99, 23 P.2d 633 (1933). But see *Neeley v. Intercity Management Corp.*, 732 S.W.2d 644 (Tex. Ct. App. 1987) (producing cotenants not entitled to recover for speculative efforts that proved unsuccessful).

129. See *Hurt & Jordan*, *supra* note 62, at 16-10.

130. *Smith*, *supra* note 2, at 383.

131. *Penn*, *supra* note 2, at 18-14 (cash balancing on a "current" basis is required by the rules of cotenancy).

132. *Barnum v. Landon*, 25 Conn. 137 (1856).

### 8. *Summary of the Duty to Account*

Though it is in no one place clearly articulated, it appears that the producing cotenant should account to the nonproducing cotenant for the fair market value of the gas sold at the time it was produced, along with interest on these sums from and after recoupment of the producing cotenant's reasonable and necessary costs. Also, the prices that the producing cotenant receives should be considered in establishing this market value. This accounting is due at the same time that the producing cotenant accounts to itself or other producing cotenants.

### C. *Effect of Unit Operations*

What is the effect on this duty to account when commonly owned property is pooled, either voluntarily or by force of law, with separately owned tracts to establish a producing oil or gas unit? If the well is located on the commonly owned property, clearly the laws of cotenancy apply, and the producing cotenant must account.<sup>133</sup> But what if the well is located on other separately owned property in the unit? Is there still a duty to account?

#### 1. *Voluntary Pooling*

There is no case on point involving the interest of a previously unrecognized owner in a voluntarily pooled unit. However, courts have considered the issue of whether a nonconsenting cotenant is entitled to participate in unit production from a well in a voluntarily pooled unit located on land in which the nonconsenting cotenant owns no interest. This issue was first addressed in *Bogges v. Milam*,<sup>134</sup> in which the West Virginia Supreme Court concluded that a cotenant in one tract who had been offered an opportunity to join in a unitization agreement and declined was not entitled to share in unit production from an adjacent tract that had been combined with his land.<sup>135</sup> Since the cotenant had not contractually agreed to share in production from the combined tract, he was precluded by the rule of capture from participating in the production flowing from the off-lease well. Other courts have followed the *Bogges* holding in similar factual situations.<sup>136</sup> However, in all of these cases, the courts were faced with situations in which the cotenant had been presented the opportunity to join in the pooling or unitization agreement and had refused to do so. The *Bogges* court emphasized the importance of this point, stating:

All we mean to hold is that a tenant in common, particularly one holding a minor interest in the oil and gas, is not to be allowed, by withholding his consent to the development of the

133. See B. KRAMER & P. MARTIN, *THE LAW OF POOLING AND UNITIZATION* 19-95 to -97 (1989) [hereinafter *KRAMER & MARTIN*].

134. 127 W. Va. 654, 34 S.E.2d 267 (1945).

135. *Id.*, 34 S.E.2d at 270-71.

136. *E.g.*, *Superior Oil Co. v. Roberts*, 398 S.W.2d 276 (Tex. 1966); *Hunt Oil Co. v. Moore*, 656 S.W.2d 634 (Tex. Ct. App. 1983); *California Co. v. Britt*, 154 So. 2d 144 (Miss. 1963); *Scott v. Hunt Oil Co.*, 152 So. 2d 599 (La. Ct. App. 1962).



boundary in which his interest lies, to prevent the development of an adjoining tract under a unitization agreement to which he has been given an equal opportunity to become a party and in which his cotenants have all joined.<sup>137</sup>

When the cotenant's interest has not been previously recognized, the cotenant could not have been given the opportunity to join in the voluntary pooling of the cotenant's interest, and *Bogges* and its progeny are therefore, distinguishable. Thus, once a tenant's interest is recognized, the tenant should be given the opportunity to ratify the pooling agreement and be entitled to a share of the pooled production at least from the date of ratification.<sup>138</sup>

## 2. *Compulsory Pooling and Unitization*

The effect of compulsory pooling and other conservation laws such as well spacing and prorationing will, in a large part, depend on the language of the statutes and the statutory scheme of the state's conservation laws. While courts have held that a cotenancy per se is not created by the formation of drilling units under state conservation laws,<sup>139</sup> other courts have held that all rights of mineral and royalty owners are pooled by the formation of the spacing unit.<sup>140</sup> The various theories of the legal effect of both compulsory and voluntary pooling on property rights, such as "cross-conveyancing" or contractual arrangements, are beyond the scope of this article. Suffice it to say, there appears to be a consensus that units that are formed under the authority of state conservation laws create a cotenancy in the production from the unit.<sup>141</sup> State conservation laws modify the rule of capture,<sup>142</sup> and thus all of the true owners of the minerals in the unit are entitled to participate in unit production, not just the party that actually produces the minerals.

137. *Bogges*, 34 S.E.2d at 270-71. It should also be kept in mind that West Virginia follows the minority rule that says that a cotenant cannot produce oil and gas from the common property without the consent of all cotenants. Thus, *Bogges* can be viewed as not extending the harsh minority rule any further than necessary.

138. *KRAMER & MARTIN*, *supra* note 133, at 19-94 n.228.

139. *See, e.g.*, *Tenneco Oil Co. v. District Court*, 465 P.2d 468 (Okla. 1970).

140. *Superior Oil Co. v. Beery*, 216 Miss. 664, 63 So. 2d 115, 129-30 (1953).

141. *Mills v. Damson Oil Corp.*, 931 F.2d 346, 349 (5th Cir. 1991); *Amoco Prod. Co. v. Thompson*, 516 So. 2d 376, 387 (La. Ct. App. 1987); *Anderson v. Dyco Petroleum Corp.*, 782 P.2d 1367 (Okla. 1989); *Beery*, 63 So. 2d at 129-30; *Ragsdale v. Superior Oil Co.*, 40 Ill. 2d 68, 237 N.E.2d 492, 494 (1968); *Penn*, *supra* note 2, at 18-6; *Kuntz*, *supra* note 2, at 13-11, -12. *But see Taylor*, *The Excess Gas Market—Recent Legal Problems Precipitated by Excess Gas Deliverability and Applicable Regulatory Provisions*, 35 INST. ON OIL & GAS L. & TAX'N 87, 116 (1984).

142. *See, e.g.*, *Amoco Prod. Co.*, 516 So. 2d at 385; *Hassie Hunt Trust v. Proctor*, 215 Miss. 84, 60 So. 2d 551, 556 (1952); *Pierce*, *Reconciling State Oil and Gas Conservation Regulation with the Natural Gas Act: New Statutory Revelations*, 1989 B.Y.U. L. REV. 9, 50 ("State Conservation Laws are an attempt to define property in oil and gas and protect such rights from the Rule of Capture piracy regime.").

Most compulsory pooling laws, in effect, codify the common law of cotenancy, establishing that all owners in the unit are entitled to possession of the oil and gas produced and that the producing cotenants are entitled to recoup their costs from unit production before a nonconsenting cotenant is entitled to receive its share of production. Louisiana has one of the more developed bodies of law with regard to ownership of production from units formed by compulsion of state law. One of the earlier Louisiana decisions, *State ex rel. Superior Oil Co. v. Texas Gas Transmission Corp.*,<sup>143</sup> established that Superior, whose leases had been force pooled into the unit after the well had been drilled and the operator had begun selling production under its contract, was “entitled to be reimbursed for the value of its share of gas” sold, though not at the selling party’s contract price.<sup>144</sup> Thus, the duty to account for unit production was recognized, though the measure of the accounting was not specified. The more recent case of *Amoco Production Co. v. Thompson*<sup>145</sup> held that gas produced from a compulsory unit in Louisiana is initially owned in “indivision,” thus adopting the “molecular theory” of ownership espoused by former State Conservation Commissioner Pat Martin. Professor Martin announced his molecular theory of ownership while serving as Louisiana’s Commissioner of Conservation in an order involving the application of Park Lane Enterprises, Inc. in Irene Field. Commissioner Martin declared:

It follows ineluctably from the working of the order [a typical pooling order] and the statute [La. R.S. 30:10 A(1)(b)] that when gas is produced, it is owned by each of the owners in the unit in the proportion provided for by the order. To put it another way, each molecule of gas that is produced is owned by each owner in the unit in a species of co-ownership. Neither the operator nor any other owner of production may unilaterally alter this effect of a unit order by deciding to sell “his” gas while leaving another’s gas in the ground. It is not enough to say that a market was available to another owner or that the gas would be made available to another owner if he could find a market for “his” gas. The sole means of avoiding this effect is through the order creating the unit or supplement thereto.<sup>146</sup>

Though Louisiana’s concept of commission formed units is somewhat unique, the Louisiana force pooling law which declares that production from any part of the unit is deemed to be from each tract within the unit is similar to many other states.<sup>147</sup> This type of force pooling statute creates by oper-

143. 242 La. 315, 136 So. 2d 55 (1961).

144. *Id.*, 136 So. 2d at 57.

145. 516 So. 2d 376 (La. Ct. App. 1987), *cert. denied*, 520 So. 2d 118 (La. 1988), *on appeal after remand*, 566 So. 2d 138 (La. Ct. App. 1990).

146. KRAMER & MARTIN, *supra* note 133, at 19-128.

147. Compare, e.g., MISS. CODE ANN. § 53-3-7 (1972 & Supp. 1990) with Fla. Stat. § 377.28(7) (1988) and TEX. NAT. RES. CODE ANN. § 102.051 (Vernon 1989).

ation of law a cotenancy in unit production. Thus, it would appear that oil and gas production from compulsory units, regardless of where the well is located, is generally treated as production from commonly owned property, and the normal laws of cotenancy govern, though the rights of partition may be affected depending upon the particular statute.<sup>148</sup>

### VI. Recent Legislation

The plight of the small working interest owner who is unable to market gas in the recent declining gas market leads many small producers to seek legislative relief. The first state to attempt a legislative remedy to the woes of the small producer was Oklahoma. A 1983 Oklahoma statute<sup>149</sup> commonly known as the "Sweetheart Gas Act" provides that all owners share ratably from production of a gas well regardless of who is producing the gas, declaring:

Whenever a well producing natural gas or casinghead gas is placed into production, all owners within such well, including but not limited to, all working interests, any interested parties having a right to produce, overriding royalty, royalty and mineral interest owners in the unit area under the well, shall be entitled to share ratably in the revenues from the sale of production from the well as set forth in the provisions of this act.<sup>150</sup>

The bill further provides that the gas produced, irrespective of the owner producing it, belongs to all of the owners of the well in proportion to their well ownership.<sup>151</sup> The statute has withstood a constitutional challenge,<sup>152</sup> but it is not clear how widely it is being recognized in actual practice.<sup>153</sup>

Louisiana next dealt with this problem insofar as it involved unleased owners by enacting legislation in 1984 that requires the unit operator to account to an unleased mineral owner for the proceeds from the sale of unit production. The statute mandates that the unit operator who proceeds with the sale of unit production when an unleased owner has no arrangement to market production must pay to such party the pro rata share of the sale proceeds within 180 days.<sup>154</sup>

148. Pat Martin concludes that force pooling generally creates a kind of co-ownership or cotenancy in the unit well's production that is analogous to cotenancy in land but not identical. Martin, *supra* note 2, at 13-14.

149. 52 OKLA. STAT. §§ 541-547 (Supp. 1988).

150. *Id.* § 542(A).

151. *Id.* § 544.

152. Seal v. Corporation Comm'n, 725 P.2d 278 (Okla. 1986), *appeal dismissed sub nom.* Amerada Hess Corp. v. Corporation Comm'n, 479 U.S. 1073 (1987).

153. In a recent seminar on gas balancing sponsored by the Tulsa Law School and attended by the author, the lecturer, Lewis Mosburg, asked for a show of hands from the audience which consisted mainly of gas contract personnel of producers as to who was complying with the mandate of the Oklahoma Sweetheart Gas Act. No hands were raised.

154. LA. REV. STAT. ANN. § 10A (West 1989) (act 345 of 1984).

An act was recently enacted in Mississippi to require unit operators to market gas on behalf of all owners in the unit except those who elect not to so participate.<sup>155</sup> The law requires a unit operator to offer to market the non-operator's gas and provides that the operator is entitled to charge and recover expenses and costs associated with marketing such gas.

Many independents and owners of small working interests support gas marketing legislation. The reason most frequently given is that the existing remedy, i.e., the common law of cotenancy, is not specific or certain enough to allow someone to plan and anticipate how one's interest will be treated in the absence of a current gas contract. Thus, these legislative efforts seem to be an attempt to give more certainty to the common law duty of cotenants to account.

### *VII. Conclusion*

A cotenant whose interest has previously been unrecognized by the producing cotenant has been excluded from participating in what is rightfully the unrecognized cotenant's. The producing cotenant is under a duty to account to the previously unrecognized cotenant for the market value of the gas at the time it is produced and sold, along with interest on these amounts, after deducting the reasonable and necessary costs incurred in producing the gas.

*Your father's heirs must have your father's land.*

Cotenants, just like heirs, are established by controlling law, and once this relationship is established, the rights and duties of the cotenants automatically flow to one another. The fact that a rightful owner's interest has been previously unrecognized does not permit the dispossession of vested rights. However, the parameters of these rights and duties are not as yet clearly demarked. Through both legislation and judicial decisions, the boundaries are beginning to be set.

155. Act of Mar. 30, 1991, ch. 490, 1991 Miss. Laws 546.

