MIDSTREAM OIL AND GAS PROCEDURE

WHAT IS A DEDICATION?

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1. What is a Dedication?

The Issue:

This work will explain what a "dedication" is. We will define the term 'dedication" under both Texas, and Oklahoma jurisdictions.

Under the Oklahoma jurisdiction, midstream companies often request that energy producers "dedicate" their interest in production from specific wells, leases or land within a geographic area, often for the life of the lease or during the entire term of production.[2]

The General Rule is:

The general rule is that, midstream companies may request that energy producers dedicate their interest in production from specified wells, leases, or land, within an area, during the lease period.

In Oklahoma, a dedication is common in gas purchase, gas gathering and processing agreements. It is observed that, dedications often serve a dual purpose. For the producer, dedications ensure a level of service for gas production during a defined period of time.[3]For the midstream company, it is said that, dedications ensure that a producer will deliver all of its production, thereby earning fees during the life of the dedication. It is stated that, in order to preserve the long-term economic value of a project—whether from the perspective of a producer that expects long-term service or from a midstream company that expects a long-term stream of revenue from production—the parties typically provide that, the agreement binds successors and assigns. Under some circumstances, the producer will argue that a dedication is either undesirable or unnecessary. The producer may indeed be correct, it is said. It is stated that, for example, if the producer provides a volumetric or cash flow guarantee, it may argue that the dedication serves no useful purpose and, in fact, interferes with the producer's potential disposition or its properties.[4]

Under Texas Law, the law recognizes the doctrine of "accretion,"[5] which provides that the owner of a riparian land gains little to any land that accretes to the property. This is because under Texas law, mineral

[2] Judy H. Moss and M. Scott Regan, "Marketing and Distribution of Production in Times of Financial Distress," 1 RMMLF-INST Paper No. 6 (2010), see 2. The Dedication; "The Nature of the Dedication."
[3] Marketing and Distribution of Production in Times of Financial Distress; Dealing With Financial Distress in the Oil & Gas Industry, No. 1 RMMLF-INST PAPER N. 6 (2010), see: "2. The Dedication."
[4] Id., see footnote FN216.
[5] Dedication, see: 2 Texas Forms Legal & Bus. Section 2C:44 (2015); Also see: Section 2C:44. Dedication—Reservation—Mineral rights, (2015).

rights are a property interest, these rights as well are subject to the doctrine of Accretion. Thus, it has been held that a constructively severed mineral estate is subject to the doctrine of accretion.[6]

It is also further observed that, under the Texas jurisdiction, provided, however, by [the] dedication, all the "oil and gas" and other minerals under the streets, alleys, and avenues designated on the plat, and under the part of the plat designated as [Plots of land "the Design"], are reserved, and the royalty from such reserved interest is also reserved, to [a named "the dedicator"]; and provided further, that nothing in this dedication will in any way interfere with or work a restriction on any oil and gas lease now on the premises, or on the holder of such lease, or on any operations under and by virtue of such leave.[7](This is the main point of this observation on Dedication).

Where Tax Notes are the issue, a dedication of real property for public use may give rise to a federal income tax deduction as a charitable contribution if the intent of the dedicator can be demonstrated to be a donative one. It is further observed that, charitable contributions to, or for the use of, a state, a political subdivision of the state, or the United States are deductible if made exclusively for public purposes.[8]

An explanation of what amounts to a dedication, is not complete without defining the scope of the dedication.

The scope of the dedication

What should the scope of a dedication be? It is stated that, parties to midstream agreements should carefully delineate the geographic scope, if applicable, of the dedication, or specifically list the wells or lease subject to the dedication. Next, it is stated that, the parties should specify whether the dedication (and the corresponding service commitments) contemplated gas other than that attributable to the producer. To illustrate, many midstream agreements allow the producer to dedicate and deliver gas "owned or controlled" by the producer, such as gas marketed by a producer under a Joint Operation Agreement, (JOA). In instances where the dedication contemplates that the producer will deliver gas marketed on behalf of others under the JOA, both the producer and the midstream company should account for the possibility that a non-operator will almost always have the right to take in kind.[9]

The scope of a dedication would lead this discussion to when the acquired property may lead to the problem of a dual dedication to arise, as we shall see here bellow.

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[6] Ely v. Briley, 959 S.W. 2d 723 (Tex. App. Austin 1998); Also see: 3 Tex. Prac., Land Title And Title Examination Section 6.5 (3d ed): States that, Accretion is defined as the act of growing to a thing. The term accretion is usually applied to the gradual and imperceptible accumulation of land by natural causes, as out of the sea or a river.
[7] This is the position of the law in Texas (Id).
[8] See, 26 U.S.C.A. section 170(a), and 26 U.S.C.A. section 170(c)(1). 2000 IRS NSAR 0304, 2000 WL 33953731 which examines the dedication of a right-of-way as charitable deduction under 26 U.S.C.A. section 170 in depth.
[9] Judy Hamilton Moss & M. Scott Regan (et al), "Marketing and Distribution of Production in Times of Financial Distress," No.1 RMMLF-INST PAPER NO. 6 (2010), see: "C. The Scope of the Dedication," footnote FN219.

The After-Acquired Property Clause and the Problem of Dual Dedication

When does a dual dedication arise? How do we resolve the problem of a dual dedication? Many dedications provide that the dedication applies to property that the producer later acquires. It is stated that, when negotiating a provision of this nature, the parties should exclude from the dedication acquired land that remain subject to the dedication of a third party midstream company.[10] It is further stated that, without this "prior dedication clause," a producer faces the possibility of contractually committing production from its lands or leases to two separate midstream companies—a "dual dedication." A dual dedication invariably upsets the economic expectations of the parties: the producer faces the possibility of disposing of its production from certain lands under terms that it did not negotiate—terms that the producer may deem inferior to those in which it negotiated with another midstream company, it is stated. Similarly, the midstream company faces the possibility of losing production from lands from which it anticipated long-term production. It is observed that, in both cases, the dual dedication, although sometimes unavoidable, alters the terms of its original agreement relating to the particular land dedicated under the agreement. It is further stated that, no perfect solution may exist with which to resolve a dual dedication. It is suggested that, one possible solution is to apply the principle of *"first in time, first in right,"* where the first dedication in the chain of title has priority over the subsequent dedication; an argument to adopt this solution may be particularly persuasive if the parties to the original dedication recorded a memorandum of agreement in the applicable county, where successors and assigns had notice of particular dedication.[11] Many commentators would agree with the above suggestion to cure the problem. Whether this would happen in real practice, yet remains to be seen.

It is also suggested that, another possible solution to resolve a dual dedication involves the parties' honoring a prior dedication only to the extent of the lands held by a company at the time of an acquisition or merger. The following hypothetical illustrates this solution:

"Producer A" enters into an agreement whereby it has dedicated for processing services to "Midstream Company 1" all of its natural gas produced in Blaine and Hill Counties, Montana. At the time they enter into the agreement, Producer A only holds leases in Blaine County. The agreement between Producer A and Midstream Company 1 provides that the dedication binds successors and assigns and that the agreement shall be construed in accordance with Wyoming law. This agreement also contains an after-acquired property clause, which states that land acquired by Producer A in these counties will be subject to the dedication. Producer B has entered into an agreement with very similar dedication terms involving these counties with "Midstream Company 2."[12]

[10] Judy Hamilton Moss & M. Scott Regan (et al) (2010), Id., see: "d. The After-Acquired Property Clause and the Problem of Dual Dedications," See footnote FN220.
[11] Judy Hamilton Moss & M. Scott Regan (et al) (2010), Id.
[12] Id.

"Producer B" then acquires Producer A's leases. In this hypothetical, Producer B arguably holds two conflicting agreements binding production from these two counties for processing services to separate midstream companies. How can this conflict be resolved?[13]

From the above scenario, although Producer B and the two midstream companies could potentially resolve the problem in a number of different ways, they could agree that, with respect to Blaine County, Producer B will deliver gas to Midstream Company 1, and with respect to Hill County, gas will be delivered to Midstream Company 2. This particular resolution is noted to accomplish the following:[14]

i. Represents a compromise between all parties because it requires the parties to relinquish some of their expected benefits under each of the agreements;
ii. Formalizes the probable expectation by Producer B that it would be bound by Producer A's agreement because the dedication commitment would have appeared to "run with the land" under the language of the agreement between Producer A and Midstream Company 1 binding successors and assigns; and,
iii. Avoids the problems enforceability of covenants "running with the land" under certain jurisdiction, whereby the parties may have asserted that the dedication did not bind producer B.[15]

How do we then secure a release from a dedication? The observations that follows here bellow attempts to offer the explanation on how release can be secured from a dedication.

Securing a release from a Dedication

How can a release from a dedication be achieved? It is stated that, an oil and gas producer seeks to ensure the continued delivery of gas and is justifiably concerned about the ability of the midstream company to provide the expected level of service during the life of the contract. It is said that, for this reason, as a means of reducing risk and ensuring the continued delivery of gas, many producers request short term releases from the dedication that allow the producer to deliver gas to another midstream company during times of *force majeure*, maintenance or other disruptions of service. In some cases the parties negotiate long term releases in the event that service is disrupted for an extended period of time. It is stated that, when negotiating short and long term releases, the parties should consider and specifically address the duration of any release and the legal effect of any release, it is said.[16]

What if in the process of securing a release from the dedication, the midstream company breaches the agreement leading to legal claims for agreed upon services?

[13] Id.
[14] Id.
[15] Id.
[16] Id. See footnote FN217: For example, the parties may provide that the producer shall be entitle to release gas subject to a dedication only for so long as the midstream company is unable to receive and provide services with respect to the producer's gas.

If the parties agree on a provision to release gas from the dedication, the question arises whether in a release situation the midstream company breaches the agreement, thereby entitling the producer to assert a claim for monetary damages, or whether the release represents the producer's sole remedy for the failure to perform the agreed-upon services. Since the midstream company has breached the agreement and the remedy available to the producer constitutes a release from the dedication (probably temporary release), the producer should still expect the benefits of its bargain—and it is entirely possible that the costs associated with the temporary release exceed the costs of delivering gas to the midstream company under its original contract, assuming infrastructure exists on which to release gas from a dedication.[17] For this reason, it is said that, the producer should retain the right to receive the benefit of its bargain with the mainstream company and, if possible, should resist argument from the midstream company that, the release constitutes the producer's sole remedy for non-performance.

It is added that, in order to maintain the benefit of its bargain, the midstream company should be entitled to redress its non-performance as soon as it is able in order to re-instate the dedication and delivery under the agreement. Similarly, in order to preserve the economic value of the dedication, the midstream company should be careful not to allow a permanent release of gas, unless necessary under the circumstances, it is stated.[18]

The position under the Texas Jurisdiction:

The above has been the legal position in Oklahoma. We now turn to the position in Texas. What is a Mineral dedication in Texas?

Dedication is defined as *the appropriation of land, or an easement therein*, by the owner, for the use of the public, and accepted for such use by or on behalf of the public.[19] Thus, the key is public use, and a fee simple estate, or a lesser estate such as an easement, can be conveyed.

Under the Texas jurisdiction, in *Sourcegas Distribution LLC., v. Noble Energy,*[20] the *"Expert Report of Richard J. Black,"* it is explained that, gas purchase and sales contracts both from the producer perspective as well as the midstream perspective, is a typical acreage dedicated gas purchase contract covering gas produced from the lands described in the accompanying leasehold exhibits with restrictions regarding seller's interests. The dedication is [can be] for the life of the field. The expert report continues that, while long-term or life of lease gas dedications are not as popular today as was the trend in the 1970's, a dedication of gas to a long-term gas sales contract is mutually beneficial to both the producer and the

[17] Id. See footnote FN218: in many cases, the physical infrastructure—whether a gathering system or processing, compression or treating facilities, for example—may not exist, thereby leaving the producer without any way to deliver gas and maintain production in the event of a disruption in service.
[18] Judy Morse and Scott Butcher (et al), Marketing and Distribution of production in times of Financial Distress, No.1 RMMLF-INST PAPER No. 6 (2010), see. "Release From the Dedication"
[19] Black's Law Dictionary 412 (6th Ed. 1990); also see quoted in *Russell v. City of Bryan*, 919 S.W. 2d 698 (1996) see at 702
[20] Expert Report of Richard J. Black, in *Sourcegas Energy v. Noble Energy*, 2011 WL 9132785

purchaser because the producer can commit resources and capital to develop the field if it believes it has locked in a long-term market for the gas, and a purchaser is assured that it has a long term supply of gas that it will be able to market.[21] These functions are defined for operational purposes independent for the definition of dedicated gas under a contract. It is said that these operational parameters allow the parties to design equipment, plan expansion, understand measurement responsibilities and similar operational matters, although this type of provision does not and would not normally modify the amount of characteristic of dedicated gas, it is said.

The *Richard Black expert Report* disagrees that, the life of a lease dedication and the purchase and sale obligations end when the gas can no longer produce into a [50 psig] certain specified gathering system.[22]

The word "dedication" or "dedicated" in this respect, may also have differing effects on the related property or the agreement itself. This is seen here in the arguments that follows here bellow.

What does the effect of the word "dedication" have or convey?

It is observed that, the word "dedication" may in fact have differing effect on property as a word of conveyance. In Texas, in *Russell v. City of Bryan,*[23] it was further observed that, words of dedication can convey different interests. According to the General Land Office, for purposes of administering the state's beaches, a dedication includes, but is not limited to, a restrictive covenant, permanent easement, and fee simple donation.[24] In the *Russell v. City of Bryan* case above, it is stated that, as aptly stated by the city's counsel at oral argument that, the use of the term "dedication" indicates "why" the property is conveyed, not "what" is conveyed.[25]

However the term dedication can also be used in connection to a relation to an easement. In *Humble Oil & Refining Co. v. Blankenburg,*[26] a dedication of the plazas, parks, streets, and an alley shown on the plat of the town for the use and benefit of the public did not convey title but only created an easement. Thus here the *Humble Oil* case concerns a dedication made on a plat, rather than by deed as is the case in the *Russell* case. The existence of a public dedication is a question of fact. The court recognizes the use of the term "dedicate" to indicate the grantor's intent to make a public dedication. The conveying documents also would indicate that the grantor is aware of the difference between an easement and a dedication. Courts expressly recognize that "dedication" is not synonymous with "easement."

In Texas there are cases where a dedication conveyed fee simple. The Texas Supreme Court considered a dedication of land for use as a public park in *Zachary v. San Antonio,*[27] There the city owned the land in

[21] Sourcegas Energy v. Noble Energy, Id, See "Gas To Be Purchased and Sold,"
[22] Sourcegas Energy v. Noble Energy, Id, see "Review of Mr. Kenneth O'Connell's Export Report."
[23] *Russell v. City of Bryan*, 919 S.W. 2d 698 (1996), see at 702
[24] 31 TEX.Admin.Code Section 15.2 (1995).
[25] *Russell v. City of Bryan*, Id, see at 702.
[26] *Humble Oil & Refining v. Blankenburg*, 149 Tex. 498, 235 SW 2d 891, 893 (1951).
[27] *Zachary v. San Antonio*, 157 Tex. 551, 305 SW 2d 558 (1957).

fee simple, yet it was prohibited from using the park land for an underground parking garage, a purpose inconsistent with the public use for which it was dedicated.[28]

A dedication by deed of land for park purposes conveyed a fee simple estate with a condition subsequent rather than a conditional limitation. The Texas Supreme court acknowledges the concept of a "fee simple" dedication. The Russell case acknowledges that, a dedication could carry with it the fee simply title, or it might provide for a reversionary clause in the event the property was ever used for any other purpose.[29] The extent of the estate conveyed in a dedication by deed is determined by the grantor's intent.[30]

The language of the deed of dedication can be ambiguous. Where the deed is ambiguous, examination may be made of the circumstances surrounding the execution of the deed, as well as other actions from which the grantor's intents may be implied. If the instrument has been unambiguous, its interpretation would be a question of law for the court. The burden is on the landowner or his descendants to prove that a dedication conveyed nothing more than an easement to the city for park purposes only.[31]

The Instrument [may] also contain a reversionary clause in the event the park [dedicated property] is not maintained, stating "the aforesaid described tract of land shall revert," rather than merely terminate an easement or stating that the "use" of the land shall cease.[32]

A dedication must list purposes [i.e. a public park] and conditions for which the land should be used. The intended purpose of the conveyance, like whether it was intended to convey only the right to use the land, must also be stated in the conveyance.[33]

2. What is A Covenant Running with the Land?

The Issue:

The issue here is to explain what it means for a covenant to be said to "run with the land."

What is a Covenant running with the land?

Covenant running with the land under the Texas jurisdiction

Covenant running with the land under the Texas Jurisdiction is explained by Howard Williams as follows: Williams writes that, In the Texas Jurisdiction, a covenant which runs with the land, is a promise by the grantor of land to be active or passive in the use of the related land for the benefit of the granted land, or a promise by the grantee of the land to be active or passive in its use for the benefit of related land or the

[28] Id., 305 S.W. 2d at 559—61.
[29] *Russell V. City of Bryan*, Id, see at 703.
[30] *Russell*, Id., 797 S.W. 2d at 115.
[31] Russell, Id., see at 705.
[32] Russell, Id., see at 705.
[33] Russell, Id. See at 706.

grantor . . . and of which promise the effect is to bind the promisor and his lawful successors . . . to the benefitted land, and to give each the power to enforce his rights in his own name, Williams wrote.[34]

It is further stated that, a covenant may run only with certain interests in the land. Covenants deemed to run with the land have included covenants—[35]

--to furnish gas.[36]

--creating easements and servitudes generally.[37]

--by a grantee to pay a proportionate part of the costs of general improvements, such as streets, walks, and sewers, in the tract containing the premises conveyed.[38]

--by a grantor to furnish power, from a source of adjoining property, to the property conveyed.[39]

--by a tenant not to hold any public event in a stadium during hours when the landlord conducted horse racing on another part of the land.[40]

Williams added further that, on the elementary matter of the definition of covenants running with the land,[41] there is no substantial agreement. It is observed that, the phrase "Promises Respecting the Use of Land," comprehends not only real covenants but also certain promises which are not technically covenants. The Term "Real Covenants," is simply defined as[42] "a covenant so connected with realty that either the right to enforce or the duty to perform passes to assigns of the land."

Yet another commentator, Edwin Abbot[43] suggests of the covenant that runs with the land, the definition that, it is a covenant which is so attached to the land, that the right to enforce it, or the obligation to perform it, passes with the estate conveyed, as an incident of ownership, Abbot wrote. Abbot added further that, there is a special necessity for permitting the creation [of a covenant that runs with the land] of such covenants in leases. Many of the incidents of a leasehold estate and reversion are executory covenants. Abbot found that, at common law one who is not a party to a covenant can neither sue nor be

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[34] Howard R. Williams, "*Restrictions on The Use of Land: Covenants Running with the Land at Law*," 27 Tex. L. Rev. 419 (1949), See at 419, footnote 2.

[35] Forms:
Am. Jur. Legal Forms 2d Section 77:32 (Covenant against erection of particular buildings) Model Codes and Restatements.
Restatements Third, Property: Servitudes Sec 1.1

[36] Slife v. Kundz Properties, Inc., 40 Ohio App. 2d 179, 69 Ohio Op. 2d 178, 318 N.E. 2d 557 (8th Dist. Cuyahoga County 1974).

[37] Am. Jur. 2d, Easements and Licenses in Real Property, section 16.

[38] Mendrop v. Harrell, 233 Miss. 679, 103 So. 2d 418, 68 A.L.R. 2d 1013 (1958).

[39] Nordin V. May, 188 F.2d 411 (8th Cir. 1951).

[40] Lipton Professional Soccer, Inc. v. Bay State Harness Horse Racing and Breeding Assn, Inc., 8 Mass. App. Ct. 458, 395 N.E. 2d 470 (1979).

[41] Frequently termed "real covenants."

[42] Clerk, Real Covenants and other Interests that Run With the Land, 93 (2d ed. 1947).

[43] Edwin H. Abbot, Covenants in a lease which Runs with the Land, 31 Yale L. J. 127, 128 (1921).

sued directly upon it. And that, the parties to the covenants in a lease are the original lessor and the original lessee.[44] This is persuasive in Texas too.

In *Fallis v. River Mountain Ranch Property Owners Association, Inc*.,[45] Under the Texas Jurisdiction, the courts made a distinction between "real covenants" and "personal covenants." It is observed that, "Real Covenants" run with the land, binding the heirs and assigns of the covenanting parties, and personal covenants do not. In Texas, in order to run with the land, a covenant must be made by parties in privity of estate at the time the conveyance is made. Personal covenants bind only the actual parties to the covenant and those who purchase the land with the notice of the restrictive covenant, if the restrictions concern land or its use.

Williams continues that, the use of covenants is one of the most common devices to impose restraints on the use of land, either affirmative (e.g., covenant requiring the covenantor to do something on or in connection with the land)[46] or negative in character (e.g., Covenant that premises shall not be used for certain purposes)[47] Williams narrates that, the restraints which may be imposed by covenants on the use of land are almost limitless in character.

Covenant running with the land under the Oklahoma jurisdiction

In Oklahoma, the question considering a "covenant running with the land" was considered in *Baker v. Conoco Pipeline Company*[48] where it was observed that, Oklahoma courts generally require three conditions for a real covenant to run with the land. These are:

1. Privity of estate between the party claiming the benefit and the party upon whom the benefit rests;
2. The burden or benefit must "touch and concern" the land; and
3. The original covenanting parties must have intended for the benefit or burden to pass to successors.[49]

In the Baker case the court explained that, the analysis of the application of the property law concept of "covenants running with the land," an easement is "a non-possessory right to the use of land in the possession of another for a definite and limited purpose."

In applying the requirements for a covenant to run with the land to the easement, the covenant must satisfy each of the requisite elements listed above, in order to run with the land.

[44] Edwin H. Abbot, 1921, Id. See at 128.
[45] 2009 WL 3025079 (Tex. App.-San Antonio) (Appellate Brief) / No. 4-09-00256-CV (2009).
[46] *Gulf, Colorado & Santa Fe Ry. V. Smith,* 72 Tex. 122, 9 S.W. 865 (1888) (Covenant to "construct and maintain a lawful fence . . . sufficient to keep off sheep and goats.").
[47] Anderson v. Rowland, 44 S.W. 911 (Tex. Civ. App. 1898) (Covenant not to run Saloon on premises.).
[48] *Baker v. Conoco Pipeline Company*, 280 F. Supp.2d 1285 (2003).
[49] Id., 1285 (2003), see "2. Property Law Analysis: Covenant Running with the Land," at 1297.

In Oklahoma, two types of privity of estates are recognized at common law, "horizontal and vertical." "Horizontal privity" relates to the relationship between the original covenantor and covenantee. The covenant is created in connection to with a conveyance of an estate from one to the other, i.e., an easement to lay pipelines on the Subject Property.[50]

"Vertical privity" on the other hand, refers to the relationship between a present owner or occupier of land and one of the original covenanting parties. "It exists when the person presently claiming the benefit, or being subjected to the burden, is a successor to the estate of the original person so benefited or burdened."[51]

The explanation of the requirement that, for a successor to the covenantee's estate to compel the performance of the covenant is that the covenant's benefit must "touch and concern the land," is easily dispensed with in this case because the arbitration provision in the easement granting a right-of-way to lay pipelines provided the exclusive procedure for resolving disputes over damage to crops, fences, and timber, which clearly "touch and concern" the real property.[52]

In Oklahoma, in determining whether a covenant runs with the land, whether the original covenanting parties intended for the original covenant to run. "Their intention is to be determined from their entire agreement construed as a whole and not from any single clause or provision." For example, in the setting forth the procedure for resolving disputes [in the arbitration provision] over damage to crops, fences, and timber, the arbitration provision employed the language "undersigned . . . . heirs or assigns" and "[g]rantee, its successors or assigns" in discussing the selection of three disinterested arbitrators.[53] Additionally, the arbitration provision is contained in the easement, which is a recorded instrument in the chain of title on the Subject Property giving all future owners *record* and constructive *notice* of the provision and the parties' intent that the covenant run with the land.[54]

In the *Baker v. Conoco Pipeline Co*[55] case the court determined that, not only is the arbitration agreement enforceable against Plaintiffs under general contract law and the presumption of assignability of contracts not involving personal services or qualities, but is also enforceable against Plaintiffs under the property law concept of real covenants running with the land, which pass by operation of law without express assignment or delegation,[56] the Oklahoma court observed.

However there are requirement that must be met in order to create a covenant that runs with the land. What then is required for a covenant that runs with the land to result? That explanation follows here bellow.

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[50] Id., 1297.
[51] Id. 1297.
[52] Id. 1297-98; Also see: *Richardson v. Mustang Fuel Corp*., 772 P.2d 1324, 1327-28 (Okla. 1989).
[53] [Doc. No. 21, Ex. A, easement].
[54] *Baker v. Conoco Pipeline Co*, Id., see at 1298.
[55] Id.
[56] *Baker v. Conoco Pipeline Co*, Id., see at 1298.

3. What is required to create a Covenant Running with the Land?

The Issue:

The issue for discussion here is, what are the requirements to create a Covenant that runs with the land?

Under the Texas jurisdiction:

In *Fallis v. River Mountain Ranch Property Owners Association, Inc*[57]., it was observed that to create a covenant running with the land at law, it requires that:

(1) Privity of estate exists between the covenanting parties;
(2) The covenant must relate to something in esse, or the assigns must be named if they are to be found in the covenant;
(3) The covenant must touch or concern the land; and
(4) It must be the intention of the original covenanting parties that the restrictive covenant run with the land;[58] unless all such requirements are present, the covenant cannot run with the land and cannot bind subsequent vendees.[59]

The above *Fallis*[60] opinion further confirms that, in Texas, a restrictive covenant runs with the land when

(1) It touches and concerns the land;
(2) It relates to the thing in existence or specifically binds the parties and theirs assigns;
(3) It is intended by the original parties to run with the land; and
(4) When the successor to the burden has notice.

The question then becomes, if a restrictive covenant does not fulfill the requirements for running with the land, would they still bind upon the future successors to the land?

The response to the above question is, in a way, yes. However, the *Fallis* opinion further adds that, even if a restrictive covenant does not fulfill the technical requirements for running with the land, they can still bind successors to the burdened land as an equitable servitude, if the successor to the burdened land took its interest with notice to the restrictions, the covenant limits the use of the burdened land, and the covenant benefits the land of the party seeking to enforce it.

In *Billington v. Riffe*[61], it is confirmed that, to constitute a covenant running with the land, there must be either an express statement that restrictive covenant will bind the heirs and/or assigns, or language in deed to reflect that that was the intent of the parties.

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[57] Fallis v. River Mountain Ranch Property Owners, 2010 WL 2679997 (2010).
[58] *Billington v. Riffe*, 492 S.W. 2d 343 (1973).
[59] Id. See West Headnotes 1.
[60] *Fallis v. River Mountain Ranch Property Owner Association, Inc*., (Supra) at 42-43.
[61] *Billington v. Riffe*, 492 S.W. 2d 343 (1973)., see West Headnotes 3.

Howard R. William[62] in his article concerning restrictions imposed by covenants running with the land at law. Williams went ahead and explained the requirements as follows:

The "In Esse" (in actual existence / in being) Requirement:

Williams explains that, requiring that the covenant relate to something "in esse," or in the alternative, that assigns be specifically mentioned in the instrument containing the covenant, in order that, in order that it runs with the land, have become of less importance in a number of jurisdictions.[63] In some it continues to be an effective requirement. Other courts have for practical purposes merged the term "in esse" requirement with the requirement that, the parties must intend that the covenant run with land, and the status of the covenant as relating to something "in esse" or the presence or absence of the language "assigns" in the instrument is treated merely as evidentiary of the intention of the parties. Williams' opinion is that, the Restatement of Property has adopted this latter position, abandoning the in esse requirement Coke's first resolution in Spencer's case[64]

George Blum and, Russell J. Davis,[65] echoes the above requirements for a covenant to be found to run with the land. They go on to explain that, if a promisor's legal relations in respect to the land in question are lessened by a covenant, i.e., if his or her legal interest as owner is rendered less valuable by the promise, the burden of the covenant touches or concerns that land, [66]Blum and Davis wrote.

In addition, the parties must be in privity of estate at the time the covenant is made.

Blum and Davis, further observed that, while use of the terminology "Successors and Assigns" is helpful in determining the parties' intent for a covenant to run with the land, the use of such terminology is not dispositive of the issue, and an obligation intended to run with the land can be created without such language. It has been further explained that, in Texas for a covenant to run with the land, there is no requirement that the covenant must confer a benefit on the grantor,[67] it was suggested.

Blum and Davis,[68] went on to give an illustrating example that, a deed restriction as to fueling rights on a tract of land adjacent to a private airport met the requirement for a covenant running with the land and would be enforced where the restriction touched and concerned land by limiting the use to which the land could be put by the parties and their assigns, the purchaser had actual and constructive notice of deed restrictions before purchasing the tract, and there was privity of estate when the covenant was

[62] Howard R. Williams, "Restriction on the Use of Land: Covenants Running With the Land at Law," 27 Tex. L. Rev. 419 (1949).
[63] Statutes in some jurisdictions have abolished the necessity for inclusion of the word "assigns." See, e.g. The English Law of Property Act of 1925 (15 Geo. V, c. 20, Sections 78-80), Discussed in Bordwell, English Property Reform and its American Aspects, 37 Yale L. J. 1, 18-27 (1927).
[64] Williams (1949) 419, see at 423-424; Also see: 5 Restatement, Property Section 531 (1944).
[65] George Blum and Russell J. Davis, "12. When Does Covenant Run With Land," 16 Tex. Jur. (2016).
[66] Lyle v. Jane Guinn Revocable Trust, 365 S.W. 3d 341 (Tex. App. Houston 1st Dist. 2010), reh'g overruled, (June 14, 2010) and review denied, (Aug. 19, 2011).
[67] Montfort v. Trek Resources, Inc., 198 S.W. 3d 344 (2006).
[68] Bloom and Davis (2016), see "Illustration," and footnote 6.

established,[69] it is said. Also, the finding that developers of a subdivision intended a covenant to maintain private roadways, lake, and recreational property to run with their land was supported by a statement in the original plats that the county would never assume maintenance of the roadways, as well as by indemnity agreements which recognized that a person with title to property could be held liable for maintenance obligations[70].

Blum and Davis confirm that, such a covenant must be contained in the grant of the land, or in the grant of some property interest in it, and be so related to the land as to enhance its value and confer a benefit to it,[71] they confirmed.

Williams observed that, the leading Texas case on the "in esse" doctrine is *Gulf, Colorado & Santa Fe Ry. V. Smith*,[72] in which a right of way was granted to a railroad by an instrument which contained a covenant by the grantee to the effect that whenever the tract of land across which the right of way extended should be enclosed and utilized as a pasture by the grantor, the grantee would construct and maintain a fence along the granted right of way. Assigns of the grantor were not mentioned in the instrument. Subsequently, the grantor conveyed his remaining property to the plaintiff who notified the railroad of his intention to use the land as pasture, requesting that the right of way be fenced in compliance with the covenant. The railroad failed to comply with this request, and the plaintiff sued for damages to his stock as a result of such failure to fence. The court held for the defendant on two grounds:

1. Applying the in esse doctrine, this covenant did not run with the land so the plaintiff was not entitled to the benefits of defendant's covenant to fence the right of way, "If the covenant be to erect or set up a new house and the like, it will not bind the assignees unless they be named in the covenant."[73]
2. The covenant was not intended to confer a benefit on the grantor affecting the land itself but was intended for the protection from injury of the stock that was to be pastured on the land. The covenant was, therefore, contingent and necessarily temporary in its application.[74]

Williams confirms that, as a practical matter, since it is customary matter to use the technical word "assigns" in instruments containing covenants, problems as to the application of this in esse doctrine are not frequent [in modern days].

Requirement that Covenant Touch or Concern the Land:

A covenant or agreement in a gas lease that lessor shall have part of gas free is a covenant running with the land, and it runs with surface of land rather than with oil, gas and mineral rights. A free gas covenant,

[69] Rolling Lands Investments v. Northwest Airport Management, 111 S.W. 3d 187 (2003).
[70] Musgrave v. Brookhaven Lake Property Owners Ass'n, 990 S.W. 2d 386 (1999).
[71] Homsey v. University Gardens Racquet Club, 730 S.W. 2d 763 (1987)
[72] 72 Tex. 122, 9 S.W. 865 (1888).
[73] Id at 124, 9 S.W. at 866.
[74] Williams (1949) 419, see "The In Esse Requirement," at 424.

in an Oil and Gas Lease, was a covenant running with the surface of the land, and hence owner of the surface of the land was entitled to benefits of the covenant and not owner of oil, gas, and mineral rights, which have become separated from the surface of the land.[75] But the covenant must touch or concern the land as explained bellow.

Williams explain that, the second resolution is the established requirement for the running of a covenant that it "touch or concern" the land, a doctrine applicable both to covenants with leases and covenants with grants of fees.[76] Williams went on to state that, it has been found impossible to state any absolute tests to determine what covenants touch and concern the land and what do not. It is confirmed that, the question is one for the court to determine in the exercise of its best judgement upon the facts of each case. Williams went on to express approval of the test formulated by Professor Bigelow[77]which involves the ascertainment of the exact effect of the covenant upon the legal relations of the parties, summarized as follows:

In effect it is a measuring of the legal relations of the parties with and without the covenant. If the promisor's legal relations in respect to the land in question are lessened—his legal interest as owner rendered less valuable by the promise—the burden of the covenant touches or concerns that land; if the promisee's legal relations in respect to that land are increased—his legal interest as owner rendered more valuable by the promise—the benefit of the covenant touched or concerns the land. It is necessary that this effect should be had upon the legal relations of the parties as owners of the land in question, and not merely as members of the community in general, such as taxpayers, or owners of other land, in order that the covenant may run.

Williams adds that, the problem raised by the requirement that the covenant touch or concern the land is of particular importance relative to the question of whether benefit and burden may run separately. Other writers have argued that either benefit or burden of a, covenant may run separately. It is argued that either benefit or burden of a, covenant may run separately (the other requirements being met) so long as either the benefits of the burden, the running of being urged in any particular case, touches or concerns the land, irrespective of whether the other, either burden or benefit, the running of which is not in issue in the case, also touches or concerns the land.

In light of the Texas jurisdiction, William writes that it is important to explain the differences of what is meant by the "running of benefit", and the "running of burden."

In order that the burden of a covenant be enforceable in equity against an assignee of a covenant, it is necessary to show that such assignee took the land with notice of the covenant or servitude. Arguably the same doctrine should be held applicable to a covenant running with the land at law, and some Texas cases

[75] United Fuel Gas Co. v. McCoy, 307 S.W. 2d 176 (1957).
[76] Williams (1949) 419, see "Requirement that Covenant Touch or Concern the Land," at 429.
[77] Bigelow, The Content of Covenants in Leases, 12 Mich. L. Rev. 639 (1914).

indicate an acceptance of this requirement of the necessity or notice in order that the burden run with the land.[78]

Williams concluded this part that, the Texas Courts have also been willing to enforce the running of benefit or burden of an affirmative covenant of reasonable diligence in the development of oil and gas leases (whether express or implied) in an action for damages by injunctive process or, in appropriate cases, by forfeiture of interest of the covenantor or his assigns, said Williams.[79]

Privity of Estate:[80]

The problem posed by this requirement has been expressed as follows, states Williams:

There are, in general, five views as to the type of relationship between the parties to a covenant demanded by the privity requirement. These are:

1. Tenure relationship between the covenantee. This is the most narrowly accepted view of the privity requirement and such a relationship is required in some jurisdictions for the running of the burden of a covenant although typically a broader concept of privity satisfies the requirement as far as the running of the benefit of the covenant is concerned.
2. The privity rule in some other jurisdictions is said to require that the parties to the covenant have simultaneous mutual interests in the same tract of land, which mutually of interest may have been created prior to the covenant or may be created by the instrument containing the covenant. This concept of privity is broader in nature than the tenure concept since simultaneous mutual interests exist when there is a tenure relationship between the covenanting parties and also when one party owns an interest such as an easement or profit in the land of the other. This privity rule is frequently referred to as the "Massachusetts rule." Williams continues that, the concept of privity even under this rule is somewhat restricted in nature and as a consequence a greater liberality in finding the existence of an easement is to be noted in the jurisdictions following it—

[78] See Ball v. Rio Grande Canal Co., 256 S.W. 678 (1923); Also see, Whittenburg v. J.C. Penney Co., 139 Tex. 15, 161 S.W. 2d 447 (1942).

[79] Williams (1949) 419, see at 439-440; Also see W.T. Waggoner Estate v. Sigler Oil Co., 118 Tex 509, 19 S.W. 2d 27 (1929). On the running of covenants on mineral leases, see Walker, The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, 7 Texas Law Review 539, 560-2 (1929).

[80] http://legal-dictionary.thefreedictionary.com/Privity+of+estate

Privity of Eastate: is the relation which subsists between a landlord and his tenant. It is a general rule that a termor cannot transfer the tenancy or privity of estate between himself and his landlord, without the latter's consent: an assignee, who comes in only in privity of estate, is liable only while he continues to be legal assignee; that is, while in possession under the assignment.

The doctrinal reason is that privity of estate exists between the landlord and whoever occupies the status of tenant. To impose real covenant liability on a title owner, a plaintiff must establish privity of estate connecting its claim with the defendant's obligation.

the so-called "spurious easement," requiring active conduct on the part of possessor of land subject thereto.[81]

3. A third view of the meaning of privity, which is accepted by perhaps the greater number of jurisdictions in this country, writes Williams, is that it means a succession of interests in land between the covenantor and the covenantee, e.g., a deed in fee simple from one party to the other,[82] which succession in interest must be at the time the covenant is made,[83] Williams wrote.
4. The Restatement of Property has accepted a compromise, hybrid position requiring a privity of either succession of or simultaneous interest between covenantor and covenantee and further requiring some compensation benefits to other land justifying the running of the burden. Williams further observed that, for the running of benefit of the covenant of the covenant, however, the Restatement suggests that the only privity required is the mere promise or covenant itself.[84]
5. The most liberal concept of privity is that it does not refer to any relationship between the covenantor and covenantee but merely requires a succession of interest on the part or assignees by or against whom the covenant is sought to be enforced.

In many jurisdictions, observed Williams that, there are different meanings of privity adopted for the running of benefit and for the running of burden of a covenant. Williams found that, mathematically, there are twenty-five permutations of these five basic meanings of privity as applied to the running of benefit and burden, and save for the fact that no jurisdiction has a more stringent requirement for the running of burden, virtually every other possible permutation is adopted by some jurisdiction.

Williams opines that, the meaning of "Privity" under the Texas decisions is not entirely clear. In the *Wiggins*[85] case suggests that for a covenant to run with the land there must be privity of estate by way of mutual or successive interests in the same property between the covenantor and the covenantee, and indicates that privity of contract between them is not sufficient. It is true that the language of this case on privity is purely dictum and that the court refers to no other Texas cases for authority, which certainly limits its authority. On the other hand, observed Williams, in *McCormick v. Stoneheart*[86] which held the burden of a covenant to reimburse for the expense of building a party wall when use thereof was made to run with the land, the court critically discussed the confusion in the privity rule in the various jurisdiction, and, after quoting from a case which set forth the so-called "Massachusetts Rule of privity" (simultaneous interests of covenantor and covenantee in the same land), declared that the great weight of the authorities had adopted this view of the law.[87]

[81] Howard R. Williams, Restrictions on the use of Land: Covenants Running with the Land at Law, 27 Tex. L. Rev. 419 (1949), see "Privity of Estate," 440-441.
[82] Lingle Water Users' Assn. v. Occidental Bldg. & Loan Assn., 43 Wyo. 41, 297 Pac. 385 (1931).
[83] A.W. Walker, The Nature of the Property Interests Created By Oil and Gas Lease in Texas, 10 Tex. L. Rev. 291 (1932), see at 315, "concludes that succession of interests satisfies the privity requirement in Texas."
[84] Williams (1949) 419, see at 442, Para 4.
[85] Wiggins, 161 S.W. 2d 501, 505 (1942).
[86] McCormick v. Stoneheart, 195 S.W. 833 (1917).
[87] Stoneheart (supra) 833 at 855:

Williams suggests that in a number of Texas cases, agreements imposing an affirmative duty of action on the part of the owner of the servient premise have been treated as easements rather than as covenants. Williams writes that, this type of easement is known as a "spurious easement" and is fairly common in jurisdictions which adopt the restricted Massachusetts view of the privity of estates necessary for the running of covenants with the land. Williams opines that, in the great majority of jurisdictions, such so-called easements are treated as covenants.

In *Edinburg Irr. Co. v. Bruner*,[88] in which water rights for irrigation purposes acquired by grant were held not to be barred; by receivership sale of the property of the irrigation company, free of liens, the Court of Civil Appeals declared:

The rights secured by appellee to water is in the nature of real estate; it was a covenant that ran with the land . . . . Their property right was not involved in this [recievership] suit . . . . Water rights originally granted to appellees are easements curved out of the fee simple of said irrigation system attached to the respective tracts of appellee's lands, and appurtenants thereto, and a part thereof from the date of the execution and delivery of the deeds conveying said water rights, and are as covenants running with the land . . . . Therefore, appellants' purchase of said property, through the said receivership proceedings, could acquire no higher title than the receiver acquired, and purchased under such proceedings were charged with all its obligations and covenants to furnish water.[89]

In summary, Williams suggests that, the Texas cases indicate an acceptance of the view that privity is a requirement for the running of covenants, and that this requirement is satisfied by the existence either of simultaneous of successive interest in the same land. Williams thinks that, the Texas cases do not indicate that there is any difference in the nature, of the privity required for the running of the burden of a covenant than is required for the running of the benefit thereof, Williams wrote.[90]

Satisfaction of the statute of frauds:

The fourth requirement for the running of a covenant, that the covenant be created by an instrument satisfying the statute of frauds,[91] is clearly applicable under the Texas decisions.

The court also suggested that benefits of this covenant runs with the land. The court did not rest its decision exclusively on the theory of running covenants, however, but also set forth two alternative bases for the result; (1) ownership of entire wall by builder, (2) quasi-contract.

[88] 165 S.W. 2d 480 (1942).

[89] Id. at 332-3; Also see quoted by Williams (1949) 419, at 445-46.

[90] Williams (1949) 419, at 446.

[91] 5 Restatement, Property (1944) takes the same position (see Sections 522, 523) except in the cases of promises enforceable by estoppel (Section 524) or which are rendered enforceable by the rules of part performance (Section 525). The Restatement declares that the acceptance of a deed poll is sufficient to bind a grantee to a covenant (Section 522 (2)). Accord, Greene v. White, 137 Tex. 361, 375; 153 S.W. 2d 575, 585 (1941).

Williams observed that, in *Miller v. Babb,*[92] action was brought to enforce a parol covenant restricting the use of premises to the erection of a house according to certain standards. The Commission of Appeals affirmed the District Court's denial of an injuction, declaring:

"A 'building restriction' is an easement . . . . An easement is an incorporeal hereditament imposed upon corporeal property . . . . The creation of an easement must be by grant. It cannot be created by parol agreement . . . . The grantor was charged with knowledge that under the law no such easement in favor of his land could be created by an oral agreement or promise, even if made as part of the consideration of sale. A contract prohibited by law cannot be enforced on the ground that it is supported by a consideration. Nor can an estoppel to deny a contract be claimed by one who admits that no such contract was ever made. Article 3965, Revised statutes, having provided that a contract for the sale of real estate cannot be enforced unless it is in writing, such contract resting in parole only is non-enforceable either in law or in equity. If article 3973a affords Babb any relief whatever by reason of a fraudulent promise to do a thing in the future, it is not the relief here sought, but only the right in equity to rescind the contract of sale by reason of such fraud, or a suit at law for damages by reason thereof."[93]

Williams confirms that, it is true that in this case the court discussed the problem in terms of easements rather than in terms of covenants, but it is believed that this does not affect the applicability of the doctrine announced to covenants. As has been noted, says Williams, a number of Texas opinions adopt easement terminology for interests which more appropriately are denominated covenants, Williams wrote.

Similarly, the Supreme Court in *Whittenburg v. J.C. Penney Co*.,[94] denied recovery of an oral agreement to reimburse for a portion of the cost of a party wall when use thereof was made. The defendant, an assignment of one of the original contracting parties, had no notice of the agreement when he acquired his interest in the property.

In response Williams wrote that, the mere fact that an adjoining owner makes use of a wall standing partly on his land, when he was not a party to the oral agreement under which it was erected, and there is nothing of record that would put him upon notice that he was expected to pay for the use of such wall, would not render him liable for any part of the cost of such wall.[95]

The original covenanting parties must have intended the running of the covenant to result on the property, as we shall see here bellow.

The Intent Requirement:

[92] Miller v. Babb, 263 S.W. 253 (Tex.Comm.App. 1924).
[93] Williams (1949) 419, at 447; also see Miller v. Babb, 263 S.W. at 254.
[94] 39 Tex. 15, 161 S.W. 2d 447 (1942).
[95] Id. at 20, 161 S.W. 2d at 449.

Williams expresses that, the requirement that the original covenanting parties must have intended the running of the covenant in order that this result ensue, has been discussed in passing by Courts. As has been noted, writes Williams that, to some extent it has been merged with the *"in esse"* requirement. Williams finds that, in a number of cases the Texas Courts have inferentially if not directly indicated an acceptance on this requirement.[96] Williams went on to observe that, the generally accepted view seems to be in accordance with the results of the Texas cases on the subject admitting that a covenant will not run with the land even though the parties clearly intended it do so, if one or more of the other requirements for the running covenants has not been satisfied, that is not to say that the intention of the parties is unimportant, for the cases are generally in agreement in requiring intention as a necessary element for the running of the covenant.[97]

In the normal covenant situation, such intent may be implied from the fact that the benefit of the covenant was intended to be of more than a transitory nature. In the *Smith* case, wherein such intent that the covenant run might easily have been inferred, the court found to the contrary that the covenant to build a fence was intended for the protection of the stock that was pastured on the land, and hence was contingent and necessarily temporary in its application.

On the other hand, observed Williams that, in *Missouri, K. & T. Ry. v. State*,[98] the court found that the intention of the parties that the covenant should run from "The nature of the things to be done, the period of their continuation, the manner and standard by which their maintenance and operation were to be measured and the relation of the things to be done to the properties and franchises affected thereby. . . "[99]

How then do we enforce or terminate covenants running with the land?

Enforcement and Termination:

The normal methods of enforcement of covenants running with the land have been mentioned in cases. The typical remedy is an action at law for damages for breach of the covenant. The theory courts have applied are that, the covenant has the effect of creating a lien on the burdened land and the remedy for breach of the covenant is an action to foreclose the lien.[100] In the Case of a covenant imposing negative restriction on the use of land, equitable process of injunction have been readily available; as has been indicated, when the covenant imposes an affirmative duty on the owner of the servient premises there has been a notable reluctance on the part of equity to intervene with equitable process.[101] In a limited

[96] *Beckham v. Ward County Irrigation District No. 1*, 278 S.W. 316 (1925).
[97] Williams (1949) 419, see "The Intent Requirement," at 449-50.
[98] Missouri, K & T. Ry v. State, 275 S.W. 673, 679 (1925).
[99] Missouri (Supra); Also see Williams (1949) 419, at 450.
[100] Arlington Heights Realty Co. v. Citizens Ry & Light Co., 160 S.W. 1109 (1913).
[101] American Refilling Co. v. Tidal Western Oil Corp., 264 S.W. 335, 341 (1924).suggesting that equity will prohibit violation of contract by injunction in proper cases, even where the covenant does not run with the land, and in all cases where the covenant is real and runs with the land; Also see quoted by Williams (1949) 419, at 451, footnote 109.

category or cases, Williams suggests that, the remedy of forfeiture of the estate of the cavenantor may be an available remedy.

The Restatement of Property suggests that the covenant may expire in accordance with the initial intention of the covenanting parties,[102] or may be discharged by merger,[103] release,[104] recision,[105] abandonment,[106] or estoppel[107], Williams wrote.

Williams found further that, in the case of the running of the burden of the covenant of a covenant in equity, certain additional defenses are also available: breach of a corresponding promise on the part of the person seeking enforcement of the covenant on the theory that the covenants are dependent, not independent, acquiescence in breaches by another, laches, relative hardship, and change of conditions. Action by public authority, such as condemnation,[108] may also extinguish the covenant. Williams further explains that, inasmuch as the covenant runs with an estate in land, the termination of such estate by disseisin will operate to extinguish the covenant. When the benefit of the covenant is appurtenant, division of the dominant estate may under some circumstances terminate the covenant. Division of the burdened estate should normally result in an apportionment of the burden. Likewise, says Williams that, material breach of the contract may terminate its running with the land and convert it into a cause of action. Williams explains further that, by virtue of the policy of recorded acts, the assignee of the covenantor may be freed of liability on a covenant which would otherwise run with the land if the covenant is unrecorded.[109] It is also true, of course, that a covenant may be unenforceable because too indefinite because too indefinite and uncertain,[110] Williams wrote.

Creating of covenant "Running with the Land" in Oklahoma:

In Oklahoma, the creation of a covenant running with the land, can be observed through the language in the conveyance. Thus Oklahoma places more emphasis on the language in the conveyance. In *Re Wallace's Fourth Southmoor Addition of City of Enid,*[111] the court observed that, if the language in restrictive covenant is ambiguous, then the intention of the parties will control its construction; however, if the language [in the conveyance] is not ambiguous, then the plain language of the covenant must be given effect.

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[102] 5 Restatement, Property Section 554 (1944).
[103] Id. Section 555.
[104] Id. Section556. Rector v. Anderson, 1 S.W. 2d 699 (1927)
[105] Id. Section 557.
[106] Id. Section 558.
[107] Id. Section 558.
[108] Id. Section 565. Also see, City of Houston v. Wynne, 279 S.W. 916 (1925), noted in 4 Texas Law Review 531 (1928); Ball y. Rio Grande Canal Co.., 256 S.W. 678 (1923) giving effect to statute prohibiting running of burden and benefits of contracts between landowners and private canal company or corporation to an irrigation district created under statutory authority to succeed the private company or corporation. (See quoted by Williams (1949) 419, at 452, Footnote 123).
[109] 5 Restatement, Property Section 533 (1944).
[110] McQuitty v. Harton, 149 S.W. 777 (1912).
[111] 1994 OK CIV APP 73, 874 P.2d 818 (1994).

The creating of covenants running with the land is incomplete without mentioning whether there is a test for covenants, which the law permits in satisfying whether the particular covenant fulfills the requirements of running with the land. The explanation of the test follows here below.

The Test for covenants which the law permits to Run[112] [with the land]

Is there a test that must be applied to determine whether the scenario passes the standard of "a covenant that runs with the land?"

Edwin Abbot explains that, almost any covenant can be inserted in a lease, he says. Abbot adds that, if performance of a covenant does not "touch or concern the thing demised in any sort" privity of estate in the thing demised furnishes no reason for imposing a mutuality of obligation and of remedy where none previously existed. The assign of the covenantee may also be left to such remedy as he may be able to enforce against the covenantor in the name of the covenantee, upon the theory of an actual assignment of the covenant.[113] As a matter of law a covenant in a lease could not run *if the thing to be done be merely collateral to the land and does not touch or concern the thing demised in any sort*. If the thing to be done does "touch or concerns the thing demised" the covenant is one which the law permits to run and to bind assigns.[114]

Abbot states further that, if once it be determined that, performance of the covenant does *"not touch or concern the thing demised in any sort,"* it is plain that neither success nor failure in enforcing it affects the mutual relation of the assigns to the thing demised.[115]

The question then becomes, *what is meant by the requirement that, "the thing to be done" must "touch or concern the thing demised."*[?]

This is [must be] a covenant in which the assignee is specifically named; yet being specifically named, it would bind him if it affected the nature, quality or value of the thing demised, *independently of collateral circumstances; or if it affected the mode of enjoying it*.[116]

In explaining the test for the covenant which the law permits to run, Abbot further states that, "it is a covenant beneficial to the owner of the estate, and to no one but the owner of the estate; and therefore, may be said to be *beneficial* to the estate, and so directly within the principle on which covenants are made to run with the land."[117]

[112] Edwin H. Abbot, "Covenants in a Lease which Run with the Land," 31 Yale L. J. 127 (1921), see: "The test for Covenants which the Law Permits to Run," at 132.
[113] Id.
[114] Id.
[115] Edwin H. Abbot, (1921) 127, see at 133.
[116] Id; Also see: Hunt v. Danforth (1856, C. C. D. R. I.) 2 Curt. 592.
[117] Id.

To illustrate the test further, he [Abbot] put the case of a covenant to renew a lease, which is universally held to run,[118] and said:

The general principle is that, if the performance of the covenant be beneficial to the reversioner, in respect of the lessors' demand, and to no other person, his assignee may sue upon it; but if it be beneficial to the lessor, without regard to his continuing owner of the estate, it is a merely collateral covenant, upon which the assignee cannot sue,[119] confirmed Abbot. What affects performance of the covenant must have upon the property demised.

It is observed that, usually performance of a covenant will not directly affect the nature, quality or value of the thing demised, or the mode of occupying it, or enjoying it *without also affecting the owner*, as owner, that is, affecting him through or by reason of his ownership of the property. Abbot explains further that, similarly if performance of the covenant *affects the owner through or by reason of his ownership*, such performance will usually affect the property itself. If a covenant successfully passes both tests, it seems reasonably safe to assume that it does *"touch or concern the thing demised,"* wrote Abbot.[120]

Can a covenant set conditions on land upon which they run? What effect would this condition have on the owner of the land on which it runs?

In response, it might be thought, added Abbot that, a covenant which prescribed what persons could be employed upon the demised land, affects the mode of occupying or enjoying it. Yet such a covenant is in no sense beneficial to the lessor as owner. It might, indeed, be beneficial to the parish, as a parish, to require that only those who dwelt in the parish could be employed upon the land demised. But such a benefit was a benefit to the parish only in its capacity as a *municipal corporation*, and was of no value to it and its capacity as *landlord*.

Literally applied, the language of the test would seem to make the running of the covenant depend on whether performance of the covenant was beneficial to the lessor *as owner of the reversion*. A covenant may run, if performance of it be beneficial to the lessee as owner of the leasehold, even though it be burdensome to the lessor as owner of the reversion. For example, an option to the lessee to renew the lease or to purchase the reversion may run, Abbot opined.[121]

It is further stated that, a covenant by the lessor to purchase at the expiration of the term such improvements as the lessee may have annexed to the soil may run, although such a covenant is clearly burdensome to the owner of the reversion, in that it compels him to purchase what would otherwise have come to him without cost.[122] But Abbot argues further that, the test itself should be more broadly phrased

[118] Edwin H. Abbot, (1921) 127, see at 134; Also see Abbot, Leases and the Rule against Perpetuities (1918) 27 Yale Law Journal, 878, 883-884, notes 17 to 21; *Leominster Gas Light Co. v. Hillery* (1908) 197 Mass, 268, 83 N. E. 870.
[119] Edwin Abbot (1921) 127, see at 134-135, see footnote 35; This test was also quoted or approved in *Allen v. Culver* (1846, N. Y.) 3 Denio, 284.
[120] Edwin Abbot (1921) 127, see at 135.
[121] Id., see at 136.
[122] Edwin Abbot (1921) 127, see at 136-137.

so as to include a covenant which is beneficial to the lessee as owner of the leasehold, even though that covenant be burdensome to the lessor as owner of the reversion, Abbot wrote.[123]

It must be noted, however, says Abbot that, the running of covenants, like the creation of covenants, will not be permitted to infringe upon positive rules of law or considerations of public policy. Thus, even though the covenant touches and concerns the land, it will not run if enforcement would violate the rule against perpetuities. An example Abbot gives, is that, an option to purchase the demised land manifestly touches and concerns the land itself, and so falls within the strictest limits of the tests which ordinarily governs the running of covenants. There is conflict as to whether such an option, if exercisable during the term, will run when inserted in a lease for over twenty-one years, Abbot wondered. Abbot opines that, it is clearly settled law that if such an option, exercisable at a period too remote, be inserted in a deed, it will not run, he thought.

But Abbot confirms with certainty that:

> *"in determining what covenants the law will permit to run we must consider not only what covenants touch and concern the land, but also whether the running of the covenant, if permitted, will conflict with positive rules of law or considerations of public policy."*
>
> Edwin H. Abbott (1921) 127, see at 137-138.[124]

We now revert to the discussion of, whether rights granted under an oil and gas lease can be sufficient to allow a producer to create a covenant running with the land in favor of a midstream company.

This question is discussed in the chapter that follows.

4. Are the Rights Granted Under an Oil and Gas Lease Sufficient to Allow a Producer to Create a Covenant Running with the Land in Favor of a Midstream Company?

The Issue:

The issue here is whether rights granted under Oil and Gas Lease is sufficient to allow a producer to create a covenant running with the land, in favor of a Midstream Company? We will consider the above question in stages here bellow.

The Position under Texas Law:

The pertinent question is: Does an oil or gas lease create an estate or interest in the land within this rule? The response is that, it clearly does in many jurisdictions, but that, in others, the view is taken that an oil

[123] Id.

[124] Edwin H Abbot, "Covenants in a Lease Which Runs with the Land," 31 Yale L. J. 127 (1921), see: "The test for covenants Which the Law Permits to Run," at 137-138.

and gas lease, prior to successful development of the land thereunder, is but little, if anything, more than a mere license to enter upon the land and drill for oil or gas.[125]

The general rule is that the question whether a covenant runs with the land is one of intent, it has been held that, this is not a strictly accurate statement of the rule, for the reason that that which is essentially a personal covenant cannot be made into a covenant a covenant running with the land by a stipulation between the parties to the contract that it shall be such a covenant.

In Texas, in order that there be a covenant running with the land, there must first be an interest or estate therein granted to which the covenant must relate, and the act to be done must concern the interest created or the title conveyed.

Under Texas Law, the general rule in Oil and Gas Law, is that the controversies regarding assignors and assignees are governed by the construction and interpretation of the provisions of the assignment itself and the collateral contracts of the parties.[126] If a contract is unambiguous, a court must enforce the contract as written.

The first question to be considered here is whether, a covenant in oil and gas lease can be structured as running with the land. This question was considered by the American Law Reports in "*Covenants in oil and gas lease as running with the land*.[127]"

Whether a covenant in an oil and gas lease runs with the land, is of interest to note that, only real covenants run with the land. All covenants that are not prospective and do not pass with the land are personal. Real covenants are those so closely connected with the realty that their benefits passes with it to subsequent purchasers.

The question that follows then, is: *Can a producer then create a covenant running with the land in favor of a midstream company, under Texas Law?*

The answer here is yes. The producer here can play the part of a lessor. The midstream company can then become the lessee, or the beneficiary or the recipient of the contract running with the land. There is nothing preventing a producer from creating a contract running with the land in favor of a midstream company, provided the procedure used was not against public policy.

The Legal Position in Oklahoma:

In *Richardson v. Mustang Fuel Corp,*[128] during 1959—1962, Mustang purchased rights of way from numerous individual landowners, through which transactions Mustang obtained easements to lay a natural gas pipeline. The right of way contracts consisted of preprinted forms which Mustang supplied.

[125] *"Covenants in Oil and Gas Lease as Running with the Land" 79 ALR 496 (1932), see, "1. In general."*
[126] EOG Res., Inc. v. Hanson Prod. Co., 94 S.W. 3d 697 (2002), see at 702.
[127] "*Covenants in Oil and Gas Lease as Running with the Land*" 79 A.L.R. 496 (1932)
[128] *Richardson v. Mustang Fuel Corp*, 772 P.2d 1324 (1989).

Most landowners executed the contracts as presented in its original form. Nine landowners however, declined to sign until language was added to the form reserving their right to connect to Mustang's pipe and purchase gas. The right of way grants presently at issue contained the specific language reserving to the landowners the right to purchase gas at a price comparable to that charged in the nearest city or town. In addition to granting the easement, these land owners did the following:

(1) Paid Mustang non-refundable deposits,
(2) Paid Mustang to set meters,
(3) Installed pipe connection with gas meters to their homes, and
(4) Agreed to assume responsibility for upkeep on the connecting lines.[129]

Thereafter, Mustang entered into separate gas purchase contracts with the various landowners, which contract covered the price of gas, liability of the parties, and provided for renegotiation of the price of gas. These contracts also provided for cancellation clause upon thirty days written notice by Mustang to the customer.

Until 1985, Mustang continued to supply gas to all right of way grantors who requested it, such being originally required by statute.[130]

All affected landowners were thus entitled to request gas until the statute was declared unconstitutional in *Transok Pipeline Company v. Richardson*.[131] After the *Transok* decision Mustang, no longer statutorily obligated to connect landowners to its pipeline, gave most of its customers written thirty day termination notice pursuant to the gas purchase contracts.

Numerous plaintiffs brought their action seeking to enjoin Mustang from cutting off the supply of natural gas.

The trial court correctly recognized that the plaintiffs fell into the following two groups:

a. One group who had not expressly reserved the right to purchase gas in the original right of way contract, and
b. The other group who expressly made such reservation as part of the original bargain.

At trial, the court ruled that, the subsequent gas purchase contracts controlled with respect to those landowners who had not reserved the right to purchase gas in the right of way agreement, and accordingly denied injunctive relief to this group.

[129] *Richardson v. Mustang Fuel Corp*, Id. see at 1325-26.
[130] 52 O.S. 1971 section 10: "*Whenever any gas pipeline crosses the land or premises of anyone outside of a municipality, said corporation shall, by request of the owner of said premises, connect said premises with a pipeline and furnish gas to said consumer at the same rate as charged in the nearest city or town.*"
[131] The statute was declared unconstitutional in *Transok Pipeline Company v. Richardson*, 593 P.2d 1079 (Okla. 1978)

On the other hand, plaintiffs who had the specific reservation included in their right of way agreements were awarded permanent injunctive relief.

The Court of Appeals affirmed the trial court's order denying injunctive relief to those plaintiffs who did not originally reserve the right to purchase gas, even in subsequent cases that followed.[132]

In reaching its decision, the court observed that, because it found that the covenant to supply gas constituted a term by which Mustang holds the right of way, its promise to supply gas operated as a covenant running with the land. Thus, the covenant to supply gas runs with the land that applies to the landowners, their successors and assigns until such times as Mustang abandons its right of way.

Only in instances in which an easement or right of way is granted in conjunction with and in exchange for an express personal covenant which relates to the land itself will the personal covenant run with the land as does an easement or right of way. Both the benefit and the obligation must pass with ownership. Likewise, a right of way which limits the owner's use of a portion of realty touches and concerns the land. Similarly, the opportunity for a rural land owner to have a readily available supply of natural gas enhances the value and utility of the realty itself.

The court held that, the express covenants granting right of way to Mustang and granting to the appellees the right to purchase gas constituted covenants running with the land because each touched and concerned the land itself, and the covenant to supply gas is a covenant by which Mustang held its right of way, the court said.[133]

Can a Producer therefore, create a covenant running with the land in favor of a Midstream Company in Oklahoma?

When a producer creates a covenant running with the land, in essence it becomes a dedication. But also, midstream companies can request that energy producers dedicate their interest in production from specific wells, leases or lands within a geographic area, for the life of the lease or during the entire term of the production.

In Oklahoma too, producers may create a covenant running with the land in favor of a midstream company. When this happens, in effect, the producer become the lessor, and the midstream company becomes the lessee. The lease relationship and structure must remain to be in accordance with public policy.

5. Can a Dedication be structured as a Covenant Running with The Land?, If so how?

[132] *Stangl v. Mustang Fuel Corp*., 772 P.2d 1331 (Okl. App. 1987)
[133] *Mustang Fuel Corp*., 772 P.2d 1324, see at 1328-29.

The Issue:

Whether a dedication can be structured as a covenant running with the land, and if so, how it can be achieved.

Can a Dedication be structured as a covenant running with the land?

The position in the Texas jurisdiction is that, the general rule is that the question whether a covenant runs with the land is one of intent. It has been held that, this is not a strictly accurate statement of the rule, for the reason that, that which is essentially a personal covenant cannot be made into a covenant a covenant running with the land by a stipulation between the parties to the contract that it shall be such a covenant.

In *Brown v. Bijan Youssefzadeh, Mussa, Inc,*[134] The facts were that, Defendants owned and operated a liquor store on the southland addition to the city of Fort Worth, Texas. The property was purchased by Defendant *Bijan Youssefzadeh* in 1999, sold to Defendant *Mussa* in 2001, and presently leased by Defendants *Nary Son Liew* and *Thong Bun Liew*. Defendant *Nary Son Liew* is recently deceased and therefore, his estate should be substituted as Defendants in place.

The subject lot was rezoned by the City of Fort Worth in 1999 and the operation of a liquor stories a conforming use for zoning purposes at the time.

When the Southland addition was dedicated in 1954, the lot was reserved for commercial purposes. *The dedication included covenants running with the land*, and provided for this amendments. The Dedication and covenants were filed of record[135] of Tarrant County, Texas. All exhibits offered as judgement evidence.

Thereafter, lots were sold to various residential and commercial buyers, between 1954 and 1961, with true and exact copies of the deeds reflecting the sales presented in court.[136]

In 1961, Ryan and Wean Properties, Inc., the then owners of Southland Terrace, filed an instrument entitled "Amendment to Dedication" ("The Amended Dedication").[137] The amended dedication was duly recorded in the records of Tarrant County, Texas.[138] A copy of the Amended Dedication was attached to the motion.

The original dedication, setting aside[139]the lot for commercial development provided that, no amendment to the dedicated land or covenant can be made for thirty (30) years and only by a majority vote of the

[134] *Brown v. Bijan Youssefzadeh, Mussa, Inc*, 2002 WL 32865962.
[135] The Dedication and Covenants were filed of records—in Volume 388-X, page 21, Plat records of Tarrant County, Texas.
[136] The lots were sold between 1954 and 1961, true and exact copies of the deeds reflecting these reflecting sales were attached as exhibit B.
[137] "Amended to Dedication of Block 24, Southland Terrace, Fifth Filing, and addition to the City of Fort Worth, Tarrant County, Texas" ("The Amended Dedication").
[138] Was duly recorded in Volume 3559, Page 10 of the Real Property Records of Tarrant County, Texas.
[139] Setting aside Lot 24 for commercial development.

then owners of the property. The amended dedication,[140] was filed in 1961, seven (7) years after the original dedication and with no reference to a vote of a majority of the lot owners in the subdivision. The original dedication did not reserve the right to the dedicators to amend the restrictions.

The "Amendment to Dedication of Block 24" purports on its face to be an amendment to the restrictive covenants of applicable to the addition as a whole, although the specific amendments were confined to Block 24, only. Any lawful amendment to the restrictive covenant to the addition, at the time of the amendment. The amendment filed in 1961 did not show the approval of a majority of the then lot owners, only the owners of Block 24.

The basis for summary judgement, according to the Tarrant County, District Court of Texas, the defendant contended that the amended dedication, which is the sole basis of Plaintiffs claim that a commercial use may not be operated on the east of Block 24 (Subject Property) is unenforceable not authorized by the amendment procedure set forth in the original dedication, and contrary to the express provisions of the original dedication.[141]

The *Brown's* motion for summary Judgement observed that, as a matter of law, the 1961 amendment to the original dedication and covenants, pertaining to the Southland Terrace,[142] an addition to the City of Fort Worth are unenforceable as unauthorized by the terms of the dedication.

The motion for summary judgement defendants prayed for was granted.[143]

How then do we structure as a covenant running with the land? In answering this question, the debate follows in response here bellow.

Structuring Dedication as Covenant Running with the Land:

The position in Texas

How do we set a dedication as a covenant, so that it runs with the land? In Texas, *Brown's* motion for Summary Judgement, lays down that, the Fort Worth Court of Appeals set forth the three conditions to lawfully amend restrictive covenants:

"It is well settled that authority to amend requires three conditions to be met. First, the instrument creating the original restrictions must establish both the right to amend and the method of amendment." This was observed in *Scoville v. SpringPark Homeowner's Ass'n, Inc*.,[144] and *Hanchett v. East Sunnyside Civic League.*[145]

[140] Exhibit C
[141] *Brown v. Bijan Youssefzadeh, Mussa, Inc*, 2002 WL 32865962 (2002), see "Basis for Summary Judgement."
[142] Southland Terrace, Fifth Filling, an addition to the City of Fort Worth.
[143] *Brown v. Bijan Youssefzadeh, Mussa, Inc*, (supra), see "Conclusion."
[144] *Scoville v. SpringPark Homeowner's Ass'n, Inc*., 784 S.W. 2d 498, see at 504.
[145] *Hanchett v. East Sunnyside Civic League*, 696 S.W. 2d 613 (1985), see at 615.

Second, the right to amend implies only those changes contemplating a correction, improvement, or reformation of the agreement rather than a complete destruction of it.[146]

Third, the amendment must not be illegal or against public policy.[147]

It is further added that, the amendment requires a concurrence (presently existing owners) of lot owners, and could not be unilaterally amended after lots were sold.[148]

The *Norwood v. Davis* case confirms that, amendments cannot be made except as authorized and in the manner provided by the dedication.[149]

Thus in Texas, Covenants running with the land may be amended by the dedicator, prior to lots being sold, and in accordance with the rights reserved to the dedicator and as provided in any procedure for amendment.[150] After lots are sold, the restrictions may still be amended, as reserved to the developer, but any amendment must be in the manner prescribed by the dedication.[151]

The Position in the Oklahoma jurisdiction:

On the other hand, the position in Oklahoma as compared to Texas, in *Southwest Petroleum Co. v. Logan*,[152] it was observed that, "the recording of restrictions with dedication plat is sufficient notice to subsequent purchasers, and the restrictions need not be included in the subsequent deeds or be such as would technically run with the land."[153]

The Court added that, a valid restriction that, "All lots in this plat are restricted to residences only" prevents the use of such property for the drilling of oil and gas wells.[154]

In the opinion of *Bayless, V.C.J.,* in determining whether a court of equity should refuse to enforce valid restrictions on the use of real property because of change of conditions of the surrounding property, the test is whether the original purpose and intention of the parties creating the restrictions has been so destroyed by the changed conditions, without fault on the part of those who seek to be relieved, that the restrictions are no longer of substantial benefit to the residents, and the original purpose cannot be reasonably affected by granting equitable relief. *Bayless, V.C.J.,* suggests and confirms that, each case must be decided on the equities as they are presented.[155]

In the Logan case, the facts as set forth by Hurst, J., in actions seeking permanent injunctions to prevent the drilling of oil and gas wells in Lincoln Terrace addition in Oklahoma City, the action was commenced

[146] *Hanchette*, 696 S.W. 2d at 615.
[147] *Id*.
[148] *Smith v. Williams*, 422 S.W. 2d 168 (1967) see at 172.
[149] *Norwood v. Davis*, 245 S.W. 2d (1961), see at 948-949.
[150] *Parker v. Delcoure*, 455 S.W. 2d 399 (1970), see at 343.
[151] *Norwood v. Davis*, Id.
[152] *Southwest Petroleum Co. v. Logan*, 180 Okla. 477 (1937); 71 P.2d 759, (1937), see at 759.
[153] Id, see at 759.
[154] Id, see at 759.
[155] Id, per Bayless, V.C.J., (1937) see #4, at 759-760.

by the petition of Margaret Logan,[156] for herself and all other similarly situated and who desired to join therein.[157] Nichols and his wife intervened as plaintiffs at the trial. The *Swindall* case was commenced by the petition of *Charles Swindall* and his wife,[158] to prevent drilling operations on lots 12 and 22 of block 6 in the addition. The *Southwest Petroleum Company* was a defendant in both cases along with numerous lot owners in the addition who had executed oil and gas leases to that company, and at the trial many other lot owners joined as defendants.

Lincoln Terrace addition covering about 97 ½ acres and was laid out by the filing of three separate plats by Culbertson and his wife, who were at the time the owners of the whole tract. The first plat, covering the major part of the addition, was filed on June 28, 1926. With it filed an "Owners' Certificate & Dedication," executed by Culbertson and his wife, which included the following clause:

> *"5. All lots in this plat are restricted to residences only, except lots 10 to 17 inclusive Block 17, on which apartments may be erected, and all blocks, and all of Block 20, on which retail business buildings or apartments houses may be erected."*[159]

On November 10, 1926, the plat of blocks 4, 5, and 6 was filed and with it was also filed an "Owners Certificate & Dedication," which provided: *"4. All lots in this plat are restricted to residences only."*

The plat for the remaining part of the addition, blocks 1, 2, and 3, was filed on February 26, 1927, together with another similar "Owners' Certificate & Dedication" which contained the clause: *"4 All lots in this plat are restricted to dwellings only."*

The owners then begun to sell the platted lots in the addition, and the organization of Mr. Nichols conducted an advertising campaign by a series of newspaper advertisements. These adverts called attention to the restrictions stating that they were protective and insured the purchasers that all houses would be equally of good quality, and contained other advertising matter to the effect that the district would be the city's finest residential district, with lots in the price ranging to be from $850 to $7, 500 per lot.

Except subject to the following restrictions, in addition to those recited in the dedication. The subsequent deeds contained no reference to the restrictions. Within four or five years after the dedication, practically all of the lots in the addition were thus sold and valuable residences built thereon.[160] The total value of the improvements in the addition was estimated at $3, 650, 000.

Thereafter, the Southwest Petroleum Company, having acquired leases from various lot owners in the addition, applied to the building superintendent of Oklahoma City for permits to drill in block 15 and block 6, and these actions were commenced.

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[156] Owner of lot 20 in block 7 of the addition
[157] And by intervening petition A.D. Sills and his wife, owners of lot 16 and 17 in block 6, to prevent drilling operations on lots 12 and 22 of block 6 in the addition.
[158] Owners of lots 16 and 17 in block 6
[159] *Logan, 71 P.2d 759 (1937), see at 760.*
[160] *Logan, Id. (1937), see at 761.*

The several petitions and replies filed by plaintiffs and the intervening plaintiffs presented four theories to the trial court in support of their prayers for permanent injunctions. They were in substance,

1. That the addition is restricted to residences only by the "Owners Certificate & Dedication" filed with the plats;
2. That the leases executed by the other lot owners in the restricted area in the restricted area to the Southwest Petroleum Company are void;
3. That the drilling for oil and gas in the addition would create a nuisance; and
4. That a zoning ordinance which attempts to permit drilling operations in this restricted area is unconstitutional.

The defendants raised the general issue as to the equitable relief sought and pleaded defensive matter presenting six grounds for the denial of the injunctions. They are in substance,

1. That there are no specific restrictions against drilling of oil and gas;
2. That the addition is in the drilling zone created by the city ordinance;
3. That there is an oil field surrounding the addition which is draining a common pool under the addition;
4. That the homeowners in the addition have no remedy to recover for their drainage except the drilling of wells in the addition themselves;
5. That drilling is only a temporary use and will not prevent the addition from continuing to be used for residential purposes, and that the benefits resulting from drilling will exceed the damage thereby occasioned; and
6. That, because of the drilling operations conducted in the immediate vicinity, the conditions have changed so that it would be inequitable to enforce the restrictions.[161]

At the trial numerous property owners in the addition testified that they had purchased with the reliance on the restrictions and had built and maintained residences of considerable value. Also, that their residences were livable and suitable for residence purposes, but that the intrusion of drilling operations into the addition would make hem unlivable and unsuitable. Defendants produced evidence that the depreciation due to the surrounding oil field was from 33 ½ to 50 per cent.

The trial court made an oral argument which was incorporated in the records as finding of fact and conclusion of law, and rendered judgement granting prayed for by plaintiff, that the restrictions are binding.[162]

The defendant contended that the trial court should have refused to grant the injunction for lack of sufficient evidence to show that the lot owners in Lincoln Terrace addition had entered into or assumed the burden of any covenant, restricting the use of the land for oil and gas purposes. It is argued that no such restrictions were created by plat and dedication for the reason that at the time of such dedication the whole addition was owned by the Culbertson, and that the restrictions filed with the plat did not

[161] *Logan, 71 P.2d 759 (1937), see at 761.*
[162] *Logan, Id, see at 762.*

create easements on any part in favor of other parts which would prevent the original owners from conveying other lots without the restrictions.

The court lay down the following position or the law:

So long as a tract remains in one ownership, there can be no dominant and servient tenements as between different portions, and the owner may rearrange the quality of any possible servitude. This is based on the theory that easements are created by grant, and that there can be no effective grant binding the other lot owners until a severance of title has occurred.[163]

The above argument finds support in action by the grantee against the original grantor on the principle that, while the grantor is still the owner of the land, the filing of the plat with restrictions does not entitle the purchaser to assume that the whole tract is governed by a general building scheme and that each lot will therefore be sold by the planters in accordance with the plan.[164] The *Logan* case further points out that, an agreement restricting the use of land in a certain tract, imposed thereon by a common grantor under a general improvement plan, intended for the mutual benefit of all grantees therein, may be enforced in equity by any subsequent grantee in such tract, who purchased with reliance on the general plan, against any other subsequent grantee taking with notice of the restrictions.

One who takes land with notice of a restrictive agreement affecting it cannot equitably refuse to perform it, though the agreement may not be a covenant which runs with the land, or creates a technical qualification of the estate conveyed.[165]

The restrictions need not rise to the dignity of a grant or reservation, but create an equitable right in the nature of an easement, enforceable in equity against all persons taking with notice of it.

The Courts in Oklahoma recognize the creation of restrictions by recorded plat alone. In *Commercial Realty Co. v. Pope* the Court upheld the restrictive provisions of a dedicatory plat.[166]

Therefore, the law is well settled that, where there is a general plan or scheme for the improvement or development of any particular tract of land, which scheme or plan is designed to make it more attractive for residential purposes by placing certain restrictions upon the individual units of the property, *either in the dedication of the plat covering same* or in the deeds by which title is conveyed, the owner or one lot may enforce such restrictions against the owner or occupant of another lot.[167]

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[163] *Logan, Id, see at 762.*

[164] Logan (1937), 759, see at 672; Also see: 4 Thompson on Real Property, Sections 3375, 3376; Also see: *Gardner v. Maffitt* (1934) 335 Mo. 959, 74 S.W. (2d) 604, 606, 95 A.L.R. 452.

[165] 4 Thompson on Real Property, Sections 3407, 3408.

[166] *Commercial Realty Co. v. Pope* (1935) 171 Okl. 331, 43 P. (2d) 62, 63.

[167] Logan (1937), 759, see at 763.

Thus in an action by the grantor to enforce the restrictions against subsequent grantees the question is solely one of notice. The evidence must support both a general improvement plan and notice of the restrictions.[168]

It does not matter that the parties did not anticipate the oil development in this area and contemplate the necessity of excluding the drilling of oil wells in the addition when it is clear that they intended to exclude every use not pertaining to residence purposes. Here the restrictions clearly applied to the use of the land.

The Court found that the Ordinance extending the oil and gas drilling zone to include Lincoln Terrace addition, superseding the restrictions created by the Owners' Certificate & Dedication, and, relieves the addition from those restrictions created by private contracts.

The court further confirmed that, an "Injuction is the proper remedy to enforce against the purchaser of land with notice, a valid restriction on the use of that land."[169]

The Opinion of Bayless, V.C.J., and Riley, J., Dissenting, was that, on the critical question whether plat restrictions in Lincoln Terrace addition to Oklahoma City prevent drilling for oil and gas within the addition. The trial court answered the question affirmatively, and affirmed the judgement rendered.

Now, would the literature on "dedication as covenants that run with the land," in other jurisdictions be persuasive to us here in Oklahoma or Texas? This question is considered in comparison here bellow, with the state of Wyoming as an example.

Dedication as Covenant that "runs with the land" in other Jurisdictions

Although the Texas and Oklahoma positions on dedication and covenants that run with the land is the topic of discussion here, we can still find inputs in other jurisdictions persuasive in this discussion as well.

The decision in *Mountain West Mines v Cleveland-Cliff Iron*[170] illustrates the risk faced by midstream companies, in jurisdictions that strictly apply the traditional common law elements required in order for a covenant to "run with the land." In the above case of *Mountain West,* the parties entered an agreement whereby Cleveland-Cliffs ("Cliffs") would have the option to acquire four uranium properties owned by Mountain West in exchange for royalty payments from uranium production.[171] Cliffs later exercised this option with respect to these four properties. Under the option agreement, Cliffs also agreed to an "area of mutual Interest covenant" ("AMI covenant") to pay royalty to Mountain West on any lands Cliffs later

[168] 4 Thompson on Real Property, Sections 3399, 3401, 3406; Also see: Commercial Realty Co. v. Pope, supra.
[169] Berry, Restrictions on Use of Real Property, Section 267; Also see, Logan (1937), 759, see at 766.
[170] *Mountain West Mines v. Cleveland-Cliffs Iron*, 470 F.3d 947 (10th Cir. 2006), see quoted by Judy Hamilton Moss & M. Scott Regan (et al), "Marketing and Distribution of Production in Times of Financial Distress," 2010 No. 1 RMMLF-INST Paper N. 6 (2010), see: "e. The Dedication as a Covenant that Runs With the Land."
[171] *Mountain West Mines*, Id. at 949.

("new uranium properties") acquired in the Powder River Basin of Wyoming.[172] When Cliffs conveyed property to parties that subsequently acquired interests in new uranium properties, Mountain West claimed that it was entitled to royalty from these properties, even though neither Cliffs nor Mountain West held any interest in these new uranium properties at any time.[173]Cliffs and his successors disagreed, however, and asserted that the AMI covenant did not run with the land.

Under Wyoming law, a covenant runs with the land if:

1. It is enforceable,
2. The parties intend with the covenant to run,
3. The covenant "touches and concerns" the land, and
4. Privity of estate exists between the parties.[174]

Of the above requirement, the Wyoming Court observed that, these are the traditional common law elements. Wyoming also agrees with the finding that, common law has historically distinguished between "horizontal" and "vertical" privity.

Conclusion:

The Texas presidents are in such a state of confusion at the present time that the courts may, with adequate authority from the past decision, effectively eliminate the "in esse" doctrine completely by merging it with the requirement of intention of the parties, and may permit burden of a covenant to run with the land so long as burden touches or concerns the land irrespective of whether benefit touches or concerns the land, suggested Williams. It is said that, the privity doctrine in Texas may clearly permit the running of covenants in cases where there is either successive or simultaneous interests in the same land by covenantor and covenantee, and by liberal use of the concept of easement, simultaneous interests in the same land may readily be found. It would seem that, says Williams, that society would be better served by a more liberal interpretation of the requirements for the running of covenants with the land at law coupled with new safeguards to terminate the running of such covenants when they no longer serve valid social or economic ends, Williams opines.

Williams saw that, a strong argument may clearly be made that requirements laid down in cases, as subsequently developed by courts in England and here in the United States, no longer serve the ends of best land use by society. Williams suggests that, this is particularly true of the "in esse" requirement and the requirement that both benefit and burden must touch or concern the land in order that either run with the land. The enforcement of these restrictions on the running of covenants result in a purely fortuitous selection of those covenants which may run and those which may not run with the land at law. This is not to assert that all covenants are desirable encumbrances on land; certainly, Williams thinks that, some are undesirable in their effect and operation. Williams suggests that, societal policy should

[172] *Mountain West*, Id.
[173] *Mountain West*, Id. at 950.
[174] *Jackson Hole Racquet Club Resort v. Teton Pines Ltd*, 839 P.2d 951, 956 (Wyo. 1992).

determine whether a covenant may run not on the basis of purely fortuitous circumstances, but on the basis of more relevant factors of whether the covenant contributes to or hinders the best Use of land in the light of current economic, political and social factors,[175] concluded Williams.

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