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Oil and Gas—Enforcement of Free Gas Clause in Equity

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courts restraining persons within their jurisdiction from proceeding in distant federal courts, have been found. In this latter category, an Ohio federal court refused to enjoin an Ohio citizen from prosecuting his suit in Indiana.¹¹ Contrary in view, *habeas corpus* was refused by a federal court after petitioner, an Indiana citizen, had been imprisoned for contempt of an Indiana state court injunction forbidding him from suing in Missouri on a Tennessee cause of action.¹² Similarly, after a Virginia state court had enjoined one of her citizens from suing on a Virginia cause of action in a New York federal court, the latter court refused to prevent the defendant railroad from enforcing the injunction.¹³

From the standpoint of fairness the result reached in the instant case seems eminently desirable. Aside from the equitable considerations arising between the parties, another element must be taken into account in some of the cases where suits brought under the act in distant courts have been enjoined, *i.e.*, the participation of certain lawyers who are engaged with their non-lawyer agents in a systematic business of interstate "ambulance chasing".¹⁴ Injunction would seem to place an effective curb on this pernicious practice.

W. E. N.

OIL AND GAS — ENFORCEMENT OF FREE GAS CLAUSE IN EQUITY.

— *P* owned land which he leased for oil and gas purposes to *D*. The lease was for a fixed term and "as long thereafter as oil and gas, or either of them, is produced from" the leased premises. The lease also provided that *D* pay a fixed royalty for gas from each well drilled on the premises, "the product of which is marketed and sold off of the premises," payments to continue so long as gas was marketed and used, or the "well shut in as a gas well." There was a further provision in the lease that *P* could take free gas for use in the two dwelling houses on the premises. One well was

197 Iowa 737, 198 N. W. 62 (1924); *Chicago, M. & St. P. Ry. v. McGinley*; *Missouri-Kansas-Texas R. R. v. Ball*, both *supra* n. 7.

¹¹ *Chesapeake & O. Ry. v. Vigor*, 17 F. Supp. 602 (S. D. Ohio, 1936), *aff'd* 90 F. (2d) 7 (C. C. A. 6th, 1937).

¹² *Ex parte Crandall*, 52 F. (2d) 650 (S. D. Ind. 1931), *aff'd* 53 F. (2d) 969 (C. C. A. 7th, 1931); *cert. denied* 285 U. S. 540, 52 S. Ct. 312, 76 L. Ed. 933 (1932).

¹³ *Bryant v. Atlantic C. L. Ry.*, 92 F. (2d) 569 (C. C. A. 2d, 1937).

¹⁴ Expressly recognized as an element in the *ratio decidendi* where the client has cooperated with the attorney: *Reed's Adm'x v. Illinois Central Ry.*, 182 Ky. 455, 206 S. W. 794 (1918); *Chicago, M. & St. P. Ry. v. McGinley*, 175 Wis. 565, 185 N. W. 218 (1922); *quaere*, to what extent does the obvious presence of "ambulance chasing" form the "inarticulate major premise" where injunction is sought to restrain suit in distant court?

drilled and *P* was allowed to take gas from it. Later while drilling the well deeper *P* was allowed to take gas from *D*'s nearby pipe line. *D* closed in the well, as a gas well, and paid the royalty but refused to allow *P* to take any more gas from the pipe line. *P* sued in equity for an injunction inhibiting *D* from cutting off the flow of gas to *P*'s dwelling houses. *Held*, that *D* must either provide gas from the closed in well or from the pipe line as long as the lease is in effect. *Ketchum v. Chartiers Oil Co.*¹

As a part of the consideration for the grant of the privilege of exploration and development of land for oil and gas purposes, a lessee often agrees to furnish free gas to the lessor for domestic purposes. Such a provision is commonly known as the "free gas clause,"² and is found in most forms of oil and gas leases.³ These "free gas clauses," since they are given in addition to royalty payments for wells drilled, may be considered as part payment in kind for the lessee's use of a profit.⁴

One of the most important considerations, when there is a "free gas clause" in an oil and gas lease, is how much gas may be used by the lessor. In nearly all jurisdictions which have to deal with the problem the amount of free gas that may be used has been regulated by the courts.⁵ In this regard the West Virginia court has laid down the general rule as follows: "give the lessor such a quantity of gas produced from the premises as is reasonably necessary for his domestic use as natural gas is ordinarily used."⁶

Although the courts have often held that the interest created by an oil and gas lease is not in the true sense a leasehold estate,

¹ 5 S. E. (2d) 414 (W. Va. 1939).

² 3 SUMMERS, OIL & GAS (Perm. ed. 1938) § 587.

³ *Hall v. Philadelphia Co.*, 72 W. Va. 573, 78 S. E. 755 (1913).

⁴ "This free gas may be regarded as a part of the royalty, as in fact it is."

⁵ 2 THORNTON, OIL & GAS (Willis ed. 1938) § 368.

⁶ *Graves v. Key City Gas Co.*, 93 Iowa 470, 61 N. W. 937 (1895); *Graves v. Key City Gas Co.*, 83 Iowa 714, 50 N. W. 283 (1891) (lessor used 300,000 cubic feet of gas per year when the average person used only 64,000 cubic feet per year and the court limited the lessor to 150,000 cubic feet per year); *Hall v. Philadelphia Co.*, 72 W. Va. 533, 78 S. E. 755 (1913) ("free gas clause" for use of a dwelling house on the premises, under usage and custom, allowed the lessor to have a light in the curtilage, but the court held that this light could not be a flambeau light but must be an economic gas burner, since the policy of this state is to save all possible gas); *Pittsburgh & W. Va. Gas Co. v. Richardson*, 84 W. Va. 413, 100 S. E. 220, 9 A. L. R. 86, 89 n. (1919) (lessee might install a meter in lessor's line in order to determine the amount of free gas used, in order to see that none was wasted).

⁷ *Pittsburgh & W. Va. Gas Co. v. Richardson*, 84 W. Va. 413, 100 S. E. 220 (1919).

yet all the covenants of such a lease, either expressed or implied,⁷ including the free gas covenant have been held to run with the land so that the lessor's grantee is entitled to free gas and the lessee's assignee is under a duty to furnish it.⁸ Where a suit for damages occasioned by a continuing breach of a covenant in an oil and gas lease, will not give adequate relief, a suit for specific performance may be maintained by the injured party — as, for instance, by the lessor.⁹ In West Virginia, as in no other state, it has been held that a covenant of the lessee to furnish free gas will be specifically performed.¹⁰

In the principal case the court says definitely for the first time that a "free gas clause" exists as long as the lease is in effect. Here the lessee was trying to retain the lease without furnishing free gas, and if free gas is considered as part of the royalty, then the lessee was trying to retain the lease without paying the full royalty, and the court was right in its decision.

J. L. G., Jr.

SALES — IMPLIED WARRANTY OF FOOD SOLD IN BULK BY RETAIL DEALER — LIABILITY TO THE PURCHASER. — *P* purchased meat to be used as food from *D*, a retail dealer. Part of the meat was already sliced and the rest was sliced from a loaf lying on the counter. Soon after eating the meat *P* became very ill. *P* claims that the food was unfit for human consumption and that *D* is liable on the basis either of negligence or implied warranty. The case was tried on the theory of an implied warranty, and *P* appeals from a directed verdict for *D*. *Held*, that where food is purchased in bulk

⁷ *Curry v. Texas Co.*, 8 S. W. (2d) 206 (Tex. Civ. App. 1928) (duty to pay oil and gas royalties, gas well rentals and additional royalties passes to the assignee of the lease); *Steel v. American Oil Development Co.*, 80 W. Va. 206, 92 S. E. 410, L. R. A. 1917E 975 (1917) (covenants to drill, reasonably develop the premises, and to protect land from drainage run with the land); *Standard Oil Co. v. Slye*, 164 Cal. 435, 129 Pac. 589 (1913) (right to renew lease runs with the land); *Henry v. Gulf Ref'g Co.*, 176 Ark. 133, 2 S. W. (2d) 687 (1927) (covenant of lessor giving lessee right to possession runs with the land).

⁸ 3 SUMMERS, OIL & GAS (Perm. ed. 1938) § 553, p. 302; *Indiana Natural Gas & Oil Co. v. Hinton*, 159 Ind. 398, 64 N. E. 224 (1902); *Indiana Natural Gas & Oil Co. v. Harper*, 50 Ind. App. 555, 98 N. E. 743 (1912); *Harbert v. Hope Natural Gas Co.*, 76 W. Va. 207, 84 S. E. 770, L. R. A. 1915E 570 (1915) (stands for the proposition that not only does the covenant for free gas run with the land but where the parties so construe the covenant the gas may be used off of the leased premises if no extra burden is put on the lessee).

⁹ *Lockwood v. Carter Oil Co.*, 75 W. Va. 175, 80 S. E. 814 (1914).

¹⁰ *Bassell v. W. Va. Central Gas Co.*, 86 W. Va. 198, 103 S. E. 116, 12 A. L. R. 1398 (1920); *Harbert v. Hope Natural Gas Co.*, 76 W. Va. 207, 84 S. E. 770 (1915); *Hall v. Philadelphia Co.*, 72 W. Va. 573, 78 S. E. 755 (1913).