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STUDENT NOTES

RECENT PHASES OF FRAUDULENT DRAINAGE

Fraudulent drainage is a concept used to describe a particularly heinous kind of removal of oil or gas by a lessee from beneath the lessor's land. In and of itself there is no fraud in the drainage.¹ One property owner, in fact, may drill as close to his neighbor's line as he pleases, take oil or gas from his neighbor's land and incur no liability whatsoever for the taking either on the basis of fraud or wrongful taking.²

Fraudulent drainage occurs, however, where the lessee of a tract knowingly drains off the oil or gas through a well operated by the same lessee on an adjoining tract. The fraud of the lessee consists of exercising control of the mineral rights in such a manner as to deprive the lessor of royalties or rents to which the lessor would be entitled if the oil and gas were taken out by a well on his land.³ Proof of drainage under such circumstances will be considered as fraudulent drainage irrespective of any dishonest intent on the part of the lessee.⁴

Once fraudulent drainage is established, certain remedies at law and in equity are available to the lessor in West Virginia. He may sue at law for damages for breach of the implied covenant,⁵ bring action in equity for cancellation of the lease either partially or totally on the theory of implied condition,⁶ or seek specific performance of the implied covenant to protect from drainage by drilling offset wells.⁷ It has been held that acceptance of delay rentals for a period barred any action during the period by the lessor for

¹ See Simonton, *Has a Landowner Any Property in Oil and Gas in Place?* (1921) 27 W. VA. L. Q. 281.

² THORNTON, OIL & GAS (1932) § 518; *Barnard v. Monongahela Gas Co.*, 216 Pa. 362, 65 Atl. 801 (1906).

³ *Lamp v. Locke*, 89 W. Va. 138, 108 S. E. 889 (1921); *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124 (1912).

⁴ *Brewster v. Lanyon Zinc Co.*, 72 C. C. A. 213, 140 Fed. 801 (C. C. A. 8th, 1905); *Dillard v. United Fuel Gas Co.*, 114 W. Va. 684, 173 S. E. 573 (1934).

⁵ *Steele v. American Oil Dev. Co.*, 80 W. Va. 206, 92 S. E. 410, L. R. A. 1917E 975 (1917); *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662 (1901); *Core v. New York Petroleum Co.*, 52 W. Va. 276, 43 S. E. 123 (1902).

⁶ *Adkins v. Huntington Dev. & Gas Co.*, 113 W. Va. 490, 168 S. E. 366 (1932).

⁷ *Lamp v. Locke*, 89 W. Va. 138, 108 S. E. 889 (1921). Note: This case is the only instance in West Virginia where the remedy of specific performance without option of cancellation has been applied.

ordinary drainage.⁸ Subsequent decisions, however, have indicated that the delay rental is compensation for delay and not for destruction: hence, in the event of fraudulent drainage, acceptance of the rentals does not bar or waive the lessor's right of action.⁹

The Necessity of Substantial Drainage.—It is thus definitely settled in West Virginia that the lessor may have redress for fraudulent drainage,¹⁰ but the question of just how serious the drainage must be, before relief will be granted, has not until recently been clearly marked out. The first requisite is, of course, proving that the drainage actually is occurring.¹¹ Certainly if the amount is of a serious or great extent no question could be raised to the right of the lessor to relief in some form or other. On the other hand, it might be manifestly unfair to allow a drastic remedy such as specific enforcement of an implied covenant when the drainage is slight or barely appreciable.¹² It then becomes necessary to find a line of demarcation which will serve as a basis for the rights of both parties.

The problem presented is squarely met by the comparatively recent case of *Trimble v. Hope Gas Company*.¹³ In that litigation the lessor sought to force the lessee to drill additional offset wells to protect the lessor's land from alleged fraudulent drainage and also to have the lessee shoot and "pocket-drill" the offset well which had already been drilled. It was conceded by the operator that there might be a slight amount of drainage from under the lessor's land through wells operated by lessee on adjoining land; but it was pointed out in briefs of counsel for the operator that the loss to the lessor from drainage was slight compared to the extreme cost to lessee of drilling additional wells to prevent such drainage.¹⁴ In reversing the decision of the trial chancellor ordering the operator to drill additional wells, the court held that the implied covenant against drainage was confined to *substantial* drainage and did not apply to relatively slight drainage. The opinion further held that

⁸ *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S. E. 12, L. R. A. 1917E 975 (1916). Although no mention is made of fraudulent drainage in the opinion, See Note (1934) 40 W. VA. L. Q. 72-73, as to the fraudulent drainage involved in the case.

⁹ *Trimble v. Hope Natural Gas Co.*, 113 W. Va. 839, 169 S. E. 529 (1933).

¹⁰ See SUMMERS, OIL & GAS (1938) § 455, and cases cited. Note (1937) 43 W. VA. L. Q. 147, 149.

¹¹ The burden of proving substantial drainage is on the lessor. See *Goodwin v. Standard Oil Co.*, 290 Fed. 92 (C. C. A. 8th, 1923).

¹² *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124 (1912).

¹³ 117 W. Va. 650, 187 S. E. 331 (1936).

¹⁴ Reply Brief for Appellant, p. 4, *ibid.*

matters pertaining to the drilling of oil and gas wells and to the producing of oil and gas are primarily within the sound discretion of the operator.¹⁵ It is possible that the decision could have reached the opposite result without involving any strained conclusion by the court. On the same reasoning that even slight eviction of a tenant by the landlord will result in relieving the tenant from any burdens under the lease,¹⁶ so it might have been held that slight fraudulent drainage would work at least a forfeiture of the lease.¹⁷ In a technical sense, even slight drainage by the operator could be considered such a breach of the lessee's obligation of loyalty as to justify relief for the landowner.

It is submitted that the decision in the *Trimble* case is a sound solution of the problems of fraudulent drainage for several reasons. First and foremost should be the consideration of the cost of drilling. It would seem to be a harsh result if an operator could be forced to expend some thousands of dollars drilling a well which would never justify its cost merely to prevent a slight drainage from the lessor's land and the resultant loss of an inconsequential sum of money in royalties or rents.¹⁸ Another consideration which justifies the rule of the case is the danger that requiring offset drilling to prevent bare appreciable drainage might result in overproduction and add to the problems of waste and depreciation of natural resources.¹⁹ It is also clear that substantial drainage may be proved more on a factual basis than slight drainage, proof of which tends more toward a conjectural proof which is difficult for the courts.²⁰ The test of any legal rule is its workability and the requirement of substantial drainage makes the relief sought more readily applicable by the courts. Another good feature of the result in the *Trimble* case is that the rule laid down for relief in

¹⁵ See on this point Notes (1922) 19 A. L. R. 437, (1929) 60 A. L. R. 950, and cases cited.

¹⁶ *Miller v. Southern Ry. Co.*, 131 Va. 239, 108 S. E. 838 (1921).

¹⁷ *Dillard v. United Fuel Gas Co.*, 114 W. Va. 684, 688, 173 S. E. 573 (1934). The court in this case quotes with approval from the case of *Lamp v. Locke*, 89 W. Va. 138, 108 S. E. 889 (1921), the following: "A lessee in the operation of his lease must act in good faith. Where he owns adjoining land he has no right, under the guise of ownership to drain the land leased by putting down wells on the adjoining property, without sinking offset wells on the lease sufficient to protect it from such draining, when the lessor is entitled to royalties in the oil, or gas taken from the leased premises."

¹⁸ *Austin v. Ohio Fuel Oil Co.*, 218 Ky. 310, 291 S. W. 386 (1927).

¹⁹ *Preston, Regulation of the Natural Gas Industry* (1939) 45 W. VA. L. Q. 250, 257.

²⁰ *Trimble v. Hope Natural Gas Co.*, 117 W. Va. 650, 658, 187 S. E. 331 (1936).

fraudulent drainage is brought into line with the law on drainage generally, which is that there must be substantial drainage proved before the operator's implied covenant to protect the landowner may be invoked.²¹ Thus, there is one test and only one test for drainage whether it be fraudulent or not, namely, the existence of substantial drainage.

The Operator's Control as to Drilling Methods.—Presuming that an offset well is drilled either by the operator of his own volition or by court order, the question of whether or not it is being done in the proper manner may become important. Needless to say, if the well is of an offset nature, it must protect the land from the drainage.²² Beyond this requirement, the details of location and drilling should be largely left up to the operator as these are primarily questions of operation and not of right.²³

There is obviously the danger that an operator forced to drill an offset well may not put forth his best efforts in the development. Unless there were some check or supervision on the manner of doing the work the operator could conceivably be unskilled, careless and by inefficient operation ruin the producing sands. On the other hand, as has been pointed out in the preceding paragraph,²⁴ the tremendous investment which the operator has in the drilling and operation of a well, will, to a large extent, act as an insurance to the lessor that the development will be properly carried out. Much modern production is to the deeper sands, involving expenditures of sums like thirty thousand dollars per well; and it can hardly be argued that in drilling such a well the lessee would not take adequate precautions to protect himself and incidentally the lessor. The work of drilling for oil and gas is a highly technical and specialized operation. It would be absurd to permit the lessor to instruct the drilling crew as to how the work should be done.

When determining whether or not an oil and gas operation is being properly conducted, the courts have held the lessee to a standard of reasonable diligence under the circumstances.²⁵ In setting up this standard the courts have adopted two tests. Under

²¹ Hart v. Standard Oil Co., 146 La. 885, 84 So. 169 (1920); Hall v. South Penn Oil Co., 71 W. Va. 82, 76 S. E. 124 (1910); Eastern Oil Co. v. Beatty, 71 Okla. 275, 177 Pac. 104 (1915); Stanley v. United Fuel Gas Co., 78 W. Va. 796, 90 S. E. 344 (1916).

²² Colgan v. Forest Oil Co., 194 Pa. 234, 45 Atl. 119 (1889).

²³ Allen v. Colonial Oil Co., 92 W. Va. 689, 115 S. E. 842 (1923).

²⁴ Reply Brief for Appellant, p. 4, Trimble v. Hope Natural Gas Co., 117 W. Va. 650, 187 S. E. 331 (1936).

²⁵ Hall v. South Penn Oil Co., 71 W. Va. 82, 76 S. E. 124 (1910).

one test the judgment of the lessee is considered as final in the absence of an affirmative showing of fraud or bad faith.²⁶ The care which would be exercised by a reasonably prudent man under the circumstances is the test followed in several jurisdictions.²⁷ While at one time, the West Virginia court apparently adopted the latter test,²⁸ the general policy of the court has been to use the former and in the last *Trimble* case the court clearly adopted that test when it said:

“Matters pertaining to the drilling of oil and gas wells, and to the producing of oil and gas are primarily within the sound discretion of the operator. It is he who carries the hazard, and the burden of the cost. As long as his procedure is in accord with standard methods he will not be interfered with by the courts.”²⁹

The net result of the holding in the *Trimble* case is that in the drilling and operation, the operator may proceed as he thinks best; the only check will be an affirmative showing that his actions are fraudulent and in bad faith. This result is fundamentally sound, although there should possibly be a limitation on the rule.³⁰ It is conceivable that considerations of market for the production, desire to make advantageous purchases in the neighborhood and other matters might influence the operation so that the lessor might not receive justice. However, the seven-eighths interest the operator has in the well will assure that application of the rule laid down will not result in injustice to the lessor.³¹

The new doctrines in fraudulent drainage as laid down in the *Trimble* case are frankly intended to protect the operator. Emphasis is properly placed on the risks taken by the operator. Because of the hazards and uncertainties of the oil and gas business, West Virginia courts have adopted the attitude of refusing to aid the lessor unless there is a clear showing of serious loss. Such a

²⁶ *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004 (1900); *Core v. New York Petroleum Co.*, 52 W. Va. 276, 43 S. E. 128 (1903); *Union Gas & Oil Co. v. Diles*, 200 Ky. 188, 254 S. W. 205 (1923).

²⁷ *Texas Pacific Coal & Oil Co. v. Barker*, 117 Tex. 418, 6 S. W. (2d) 1031, 60 A. L. R. 936 (1928); *Hart v. Standard Oil Co.*, 140 La. 885, 84 So. 169 (1920).

²⁸ *Jennings v. Southern Carbon Co.*, 73 W. Va. 215, 80 S. E. 368 (1913); see *SUMMERS, OIL & GAS* § 416, n. 59.

²⁹ *Trimble v. Hope Natural Gas Co.*, 117 W. Va. 650, 664, 187 S. E. 331 (1936).

³⁰ On this point see Note (1929) 7 TEX. L. REV. 438.

³¹ *Texas Pacific Coal & Oil Co. v. Stuard*, 269 S. W. 482 (Tex. Civ. App. 1925).

policy could at least be in harmony with the judicial tendency favoring the coal industry. Viewing the problem from the angle of the interest of the state as a whole, these rules are eminently proper: they will accomplish the purpose intended, namely, further development of the oil and gas industry to the deeper producing sands.

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THE SCOPE OF WEST VIRGINIA LEGITIMATIZING STATUTES*

At common law only those children born or conceived in lawful wedlock are legitimate¹ and under early common law the illegitimate child had no right of support, of inheritance or even of a name.² Legislators have done much to alleviate the condition of illegitimate offspring, by enacting statutes declaring the child to be legitimate and statutes conferring rights of inheritance upon him. These statutes based on natural justice and on the natural affections of the human heart have radically altered the position of these unfortunates and brought American law into substantial conformity with the Civil and Canon Law.³

Virginia was among the first states to enact legislation designed to mitigate the harsh rules of the common law. In 1776 the General Assembly appointed a Committee of Revisors⁴ to prepare changes in the existing legal system and to Thomas Jefferson⁵ fell the task of drafting the Law of Descents. The Revisors' Report was sub-

*Including W. VA. REV. CODE (Michie, 1937) c. 42, art. 1, § 5, which does not legitimate but gives rights of inheritance through the mother.

¹ VERNIER, AMERICAN FAMILY LAWS (1936) 148; MADDEN, PERSONS & DOMESTIC RELATIONS (1931) 348; Robbins and Deak, *Familial Property Rights of Illegitimate Children: A Comparative Study* (1930) 30 COL. L. REV. 348.

² See MADDEN, *op. cit. supra* n. 1, at 348; Robbins and Deak, *supra* note 1, at 310; Note (1932) 45 HARV. L. REV. 778.

³ 1 BL. COMM. *454; Note (1916) 18 COL. L. REV. 698; Note (1932) 45 HARV. L. REV. 778. See Davis v. Rowe, 6 Rand. 355, 367 (Va. 1828); Garland v. Harrison, 8 Leigh 368, 371 (Va. 1837).

⁴ 9 HEN. STAT. (1821) 175 (Thomas Jefferson, Edmund Pendleton, George Wythe, George Mason, and Thomas Ludwell Lee were appointed on this committee but only the first three named participated in the actual work). See 1 WRITINGS OF THOMAS JEFFERSON (Mem. ed. 1903) 62-67.

⁵ 2 WRITINGS OF THOMAS JEFFERSON (Ford's ed. 1893) 195; 1 WRITINGS OF THOMAS JEFFERSON (Mem. ed. 1903) 461; Davis v. Rowe, 6 Rand. 355, 373 (Va. 1828).