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Mines and Minerals--Fraudulent Drainage by Oil and Gas Lessee-- Estimate of Damages

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Above all it seems preposterous to have two rules of decisions on real property law, and, hence, on mineral law, within a single jurisdiction.⁶²

—STANLEY E. DADISMAN.

MINES AND MINERALS — FRAUDULENT DRAINAGE BY OIL AND GAS LESSEE — ESTIMATE OF DAMAGES. — The complainant sought, *inter alia*, damages for fraudulent drainage in an oil and gas lease of West Virginia land. The lower federal court denied recovery. Complainant sought review by the circuit court of appeals. *Held*: Complainant's evidence, due to its meagreness and insufficiency failed to sustain any cause of action. Affirmed. *Updegraff v. United Fuel Gas Company*.¹

⁶² See annotation as to federal courts following state court decisions as to rules of property, 40 L. R. A. (N.S.) 380, 391 (1912). For a West Virginia case see *Liberty Central Trust Co. v. Greenbrier College for Women*, 50 F. (2d) 424 (S. D. W. Va., 1931), affirmed in a memorandum decision in 283 U. S. 800, 51 S. Ct. 493 (1931). It seems fair to cite Schofield, *Uniformity of Judge-Made Law in State and Federal Courts* (1910) 4 ILL. L. REV. 533, where the writer defends the decision of Mr. Justice Story in *Swift v. Tyson* as "solid, unshaken, and untouched."

A lengthy justification of the rule of *Swift v. Tyson* has been attempted by Parker, Circ. J., in *Hewlett v. Schadel*, 68 F. (2d) 502, 504 (C. C. A. 4th, 1934), of which the following is representative:

"And the occasional conflict which occurs between the decisions of the state and federal courts is by no means the serious matter that some persons imagine. If the federal court follows the rule of the common law, as it must, its decision is in accord with the system which, as has been said, is the common heritage of the people in all of the states and with which they are presumably familiar. Men are presumed to know the law; and they actually do know pretty well those rules of the common law which affect their lives and business. They are not presumed to know what judges have said about the law; and decisions departing from the common-law rules are known to but few persons outside the class of professional lawyers. Adherence to the rules of the common law is not only essential, therefore, to the doing of justice where citizens of different state are involved, but it also results in decisions more nearly in accord with the ideas and conditions of life of the people whose local courts may have departed temporarily from common-law principles."

Judge Parker's view is that the federal rule "will preserve a uniform body of law upon which those who do business in other states can depend, and which will inevitably have a unifying influence on the decisions of the state courts themselves." Such a view assumes the desirability of uniformity throughout the United States, irrespective of divergent local conditions. Even in the classical period of Roman law, its principles varied from province to province. Similarly, where existent in the present-day British Commonwealth of Nations, the common law adapts itself to its habitation and environment. Cf. *Trainor Co. v. Aetna Casualty & Surety Co.*, — U. S. —, 54 S. Ct. 1 (1933), and *Burne Mtg. Co., Inc. v. Fried*, 67 F. (2d) 352 (1933).

¹ 67 F. (2d) 431 (C. C. A. 6th, 1933).

It is well-settled law that, if unlawful drainage² is established, the plaintiff may recover damages.³ At law, the plaintiff should recover damages, on principle at least, in detinue or replevin and in trover. In equity, the remedial constructive trust should be imposed if the complainant can follow the *res*. Proof of the fact of drainage is not limited to expert opinion.⁴ If there are wells on the contiguous tracts, flow indicators can be used to show drainage.⁵ Where there is a well only on the draining tract, the fact of probable drainage can be made through tests on the adjoining land as to (a) rock pressure, (b) porosity of the strata, (c) thickness of "pay".⁶

Assuming that the fact of drainage is established, the difficulty of assessing damages for the injury, which is the proximate result of the defendant's breach⁷ of an expressed contract or a condition implied by operation of law,⁸ will not defeat a recovery.⁹

² "Unlawful drainage" is more accurate than the term "fraudulent drainage."

³ *Steele v. American Oil Dev. Co.*, 80 W. Va. 206, 92 S. E. 410 (1917); *Grass v. Big Creek Dev. Co.*, 75 W. Va. 719, 84 S. E. 750 (1915); *Daughetee v. Ohio Oil Co.*, 263 Ill. 518, 105 N. E. 308 (1914); *Colgan v. Forest Oil Co.*, 194 Pa. St. 234, 45 Atl. 119 (1899); *Kleppner v. Lemon*, 176 Pa. St. 502, 35 Atl. 105 (1896); *McKnight v. Manufacturers' Natural Gas Co.*, 146 Pa. St. 185, 23 Atl. 164 (1892).

⁴ *Grass v. Big Creek Dev. Co.*, *supra* n. 3, at 727 (only such proof as the case will reasonably admit is required). *Junction Oil & Gas Co. v. Pratt*, 99 Okla. 14, 225 Pac. 717 (1924); *Daughetee v. Ohio Oil Co.*, *supra* n. 3.

⁵ U. S. GEOLOGICAL SURVEY BULLETIN, SERIES O, No. 58, UNDERGROUND-WATER PAPERS (1906) 74. For example, in tracing the flow of water, a large number of substances have been used, — many of these being available for detecting drainage from oil wells. Among these substances so used are: (1) Materials dissolved in the water and recognized by chemical or physical tests. (2) Materials dissolved in the water and recognized by their color. (3) Materials suspended in the water and recognized by microscopic examinations. (4) Cultures of bacteria suspended in the water and recognized in samples taken by their cultural characteristics.

⁶ *Veasey, The Law of Oil and Gas* (1920) 18 MICH. L. REV. 445, 652, 736, and (1920) 19 MICH. L. REV. 161. The mere fact of wells on contiguous tracts should not raise a *prima facie* case for the plaintiff.

⁷ *Daughetee v. Ohio Oil Co.*, *supra* n. 3; *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213 (1905).

⁸ *Carper v. United Fuel Gas Co.*, 73 W. Va. 433, 439, 89 S. E. 12 (1916). See, also, for other methods of dealing with the problem (1) *Stanley v. United Fuel Gas Co.*, 78 W. Va. 793, 90 S. E. 344 (1916) (no implied duty to drill offset wells where delay rentals are paid and accepted); (2) *J. B. Gathright Land Co. v. Kentucky-West Virginia Gas Co.*, 65 F. (2d) 907 (C. C. A. 6th, 1933); (3) *Brewster v. Lanyon Zinc Co.*, *supra* n. 7 (adjoining owners take lawfully and cannot enjoin their producing while trying to determine the rights of plaintiff and the defendant); (4) *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, 145 La. 233, 82 So. 206 (1919).

⁹ No precise measure of damages exists in breach of promise suit, beyond the general rule that the jury must not be swayed by passion or prejudice. See, also, *Armory v. Delamirie*, 1 Strange 505, 93 Eng. Rep. 664 (1722); *cf.* mental distress cases, where no contact and the act was unintentional.

There have been numerous rules laid down by the cases to prove and measure damages.¹⁰ In some cases, the plaintiff is aided by *presumptions* and *inferences* based on expert testimony.¹¹ Some courts try to ascertain the exact amount of drainage by expert testimony;¹² others use a purely arbitrary test.¹³ A middle ground which allows the plaintiff "reasonable inferences" drawn from expert testimony seems the most workable.¹⁴ Once the plaintiff has proved his case, the measure should be arbitrarily set at the greatest value,¹⁵ *i. e.*, the percentage of the *profit à prendre*, which the lessor has retained by his lease, should be applied to the whole amount produced by the well which is being used unlawfully to drain the land of the lessor.¹⁶ When an outrageous case presents itself, then the personal property rule of wrongful confusion might be applied.¹⁷

¹⁰ SUMMERS, OIL & GAS (1927) §§ 138, 139.

¹¹ Kleppner v. Lemon, *supra* n. 3, at 511. The court does not find that the wells do reach plaintiff's land, so as to draw from it. "It is the fact that they may do so, that gives plaintiff his claim to present consideration."

Moore v. Ohio Valley Gas Co., 63 W. Va. 455, 60 S. E. 401 (1908). Presumption that gas pressure continued the same until overcome by evidence produced by defendant. See also, Kleppner v. Lemon, *supra* n. 3; Steele v. American Oil Dev. Co. *supra* n. 3; Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 Atl. 801 (1907), — these three cases assuming that the well drains uniformly from a circle, the well being the center and radius being established by expert testimony. But see Note (1934) 40 W. VA. L. Q. 177.

¹² Ammons v. South Penn Oil Co., 47 W. Va. 610, 35 S. E. 1004 (1900); Daughette v. Ohio Oil Co., *supra* n. 3.

But see Russell v. Producers' Oil Co., 146 La. 481, 83 So. 773 (1920) where the approximate output was known and a "margin of safety" was added.

¹³ Curry v. Texas Co., 18 S. W. (2d) 256 (Tex. Cir. App. 1929). Here the cost of drilling the wells was allowed as damages where there was a contract to drill and pay royalties.

¹⁴ Kleppner v. Lemon, *supra* n. 3, and 197 Pa. 430, 47 Atl. 353 (1900); Barnard v. Monongahela Natural Gas Co., *supra* n. 11. But see Lamp v. Locke, 89 W. Va. 138, 108 S. E. 889 (1921). Here plaintiff did not seek damages but an injunction to compel drilling of an offset well to protect his limited right to royalties. Note (1929) 7 TEX. L. REV. 438.

¹⁵ Armory v. Delamirie, *supra* n. 9. Damages were awarded equal to value of a stone of the known size of the finest water, unless defendant should produce the jewel and show that it was not of the finest quality.

¹⁶ Kleppner v. Lemon, *supra* n. 14.

¹⁷ Stone v. Marshall Oil Co., 208 Pa. 96, 57 Atl. 183 (1904). The plaintiff was entitled to one-fourth of gas from his land. Defendant was actually fraudulent, and since confusion existed, plaintiff got one-fourth of the profits of all gas.

Duffield v. Rosenzweig, 144 Pa. St. 520, 23 Atl. 4 (1891). The court measures the damages by the difference in the value of plaintiff's leasehold, before and after the injury was committed. But see Kleppner v. Lemon, *supra* n. 3, holding that it is too harsh to apply the rule of wrongful confusion; plaintiff should have as damages the ratio that the area of his land bears to the circle drained. Great Southern Gas & Oil Co. v. Logan Natural Gas & Fuel Co., 155 Fed. 114, 83 C. C. A. 547 (1907). The plaintiff had a well better than the average in the field of sixty wells; yet the court only allowed him one-sixtieth of the gross receipts from the sale of all the gas.

The present-day tendency to curtail the number of wells tends inversely to increase the number of claims by lessors. Crooked drilling offers a vista of increased litigation in the future.¹⁸ The burden of exploring this borderland of the law rests upon the courts. In any event, the result in the present case is correct, since no satisfactory proof of any sort was adduced by the complainant.¹⁹

—RICHARD F. CURRENCE.

TENANTS IN COMMON — ACCOUNTING FOR DELAY RENTALS — RATIFICATION AFTER SURRENDER OF LEASE. — *W* and *I* were tenants in parcenary of a tract of land inherited from their father. *I* was in exclusive possession of the land. In 1924, *I*, the defendant, executed an oil and gas lease to a third party who held the rights so conveyed until the surrender in 1928. Since the lessee did not attempt drilling for oil or gas during the tenure under the lease, the defendant received the delay rentals. After a continued unexplained absence of more than seven years, presuming *W* dead, an administrator, the plaintiff, was appointed in 1930. The plaintiff instituted this suit against the defendant for the proportionate share of the delay rentals. *Held*: No share of delay rentals received by a cotenant in possession of land under an oil and gas lease can be recovered by the other cotenant, without actual conduct of operations under the lease, and without ratification by the plaintiff cotenant prior to surrender of the lease by the oil and gas lessee. *Lewis v. Milam*.¹

The common law did not afford one cotenant an action against the other who exclusively occupied the premises, receiving the rents and profits therefrom, without an ouster or an agreement between the parties.² The Statute of Anne³ and the code provisions of the various States modify the common law, by providing

¹⁸ Lahee, *Problems of Crooked Holes*, AMERICAN ASS'N OF PETROLEUM GEOL. BULL., Vol. 13 (1929) 1095-1161.

¹⁹ On the general topic of recovery of damages for failure to develop, see the recent case of *Stanolind Oil & Gas Co. v. Kimmel*, 68 F. (2d) 250 (C. C. A. 10th, 1934).

¹ 169 S. E. 70 (W. Va. 1933). Note (1933) 40 W. VA. L. Q. 85.

² *Pico v. Columbet*, 12 Cal. 414 (1859); *Anonymous*, Cary 21, 21 Eng. Rep. 12 (1602); *Wheeler v. Horne, Willes* 208, 125 Eng. Repr. 1135 (1740); 1 Co. LITT. 200a.

³ ST. 4 and 5 ANNE, c. 16 is not a common law statute.