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Tenants in Common--Accounting for Delay Rentals--Ratification after Surrender of Lease

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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]

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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 Anne[3] 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.

one tenant in common shall be liable to account to his cotenant in respect of rents received from third persons.[4] Courts have thus given a liberal interpretation to this statutory rule where one cotenant, without the consent of his co-owner, has made a lease to a stranger.[5]

A lease of oil and gas rights in property held in common is not valid as to the cotenant who did not execute, nor authorize the other to execute, the lease.[6] Under the West Virginia doctrine requiring ratification of the lease as prerequisite to recovery,[7] courts have in fact distinguished the cotenant's suit for an accounting of delay rentals arising out of an oil and gas lease, from the more common actions for rents, issues, and profits out of

[4] ARK. DIG. STAT. (1919) § 1087, "When one or more joint tenants, tenants in common, or coparceners in any real estate, or any interest therein, shall take, use or have the profits and benefits thereof in greater proportion than his interest therein, such person, or his executor or administrator, shall account therefor to his or their cotenant jointly or severally"; OHIO GEN. CODE (Page, 1926) § 12046, "One tenant in common, or coparcener, may recover from another his share of rents and profits received by such tenant in common or coparcener from the estate, according to the justice and equity of the case. One parcener may maintain an action of waste against another. But no parcener shall have any privileges over another, in any election, division, partition, or matter to be made or done, concerning lands which have descended"; PA. STAT. ANN. (Pepper and Lewis's, 1910) Tenants in Common, par. 1; W. VA. REV. CODE (1931) c. 55, art. 8, § 13, "An action of account may be maintained against the personal representative of any guardian or receiver; and also by one joint tenant, tenant in common, or coparcener, or his personal representative against the other, or against the personal representative of the other, for receiving more than his just share or proportion."

[5] Brady v. Brady, 82 Conn. 424, 74 Atl. 684 (1909); Thompson v. Sanders, 113 Ga. 1024, 39 S. E. 419 (1901); Geisendorff v. Cobbs, 47 Ind. App. 573, 94 N. E. 236 (1911); Stevens v. Pels, 191 Iowa 176, 175 N. W. 303 (1919); Monroe v. Luke, 1 Metc. 459 (Mass. 1840); Walter v. Greenwood, 29 Minn. 87, 12 N. W. 145 (1882); Ayotte v. Nadeau, 32 Mont. 498, 81 Pac. 145 (1905); Izard v. Bodine, 11 N. J. Eq. 403 (1857); Johnson v. Johnson, 38 N. D. 138, 164 N. W. 327 (1917); Airington v. Airington, 79 Okla. 243, 192 Pac. 689 (1920); Lancaster v. Flowers, 208 Pa. 199, 57 Atl. 526 (1904); Ward v. Ward's Heirs, 40 W. Va. 611, 21 S. E. 746 (1895). And *cf.* Early v. Friend, 16 Gratt. 21 (Va. 1860), holding that one cotenant may not only recover rents and profits from leases to third parties, but may also recover from the other cotenant for use and occupation, even without an ouster or an agreement.

[6] Zeigler v. Brenneman, 237 Ill. 15, 86 N. E. 597 (1908); New Domain Oil and Gas Co. v. McKinney, 188 Ky. 183, 221 S. W. 245 (1920); Walley v. Jones, 275 Pa. 250, 119 Atl. 75 (1922); McNeely v. South Penn Oil Co., 58 W. Va. 438, 52 S. E. 480 (1905); Sommers v. Bennett, 68 W. Va. 157, 69 S. E. 690 (1910); SUMMERS, OIL AND GAS (1927) p. 221, ". . . . it is well established by the authorities that a tenant in common does not have the power to make a valid lease of the common land for oil and gas purposes . . . ."

[7] McNeely v. South Penn Oil Co., *supra* n. 6. The syllabus of the court: "In such a case, rentals received by a cotenant in possession for delay in drilling, constitutes no part of the damages and should not be included in

ordinary leases: in these latter cases, ratification is seldom stressed. A bill simply for an accounting of the proportionate share of the delay rentals, without in any way questioning their source, is a valid ratification of the lease.[8] An application of these principles to the instant case would impose liability upon the lessor cotenant for the payment of that part of the delay rentals which was over and above his just share or proportion. However, the stumbling block in the way of recovery of any fraction of the delay rentals is another rule peculiar to West Virginia, to the effect that the necessary ratification must occur prior to surrender of the lease by the oil and gas lessee: otherwise, the accounting suit will be futile and nugatory.[9] This doctrine would seem to destroy the fundamental basis for recovery, in the light of the declared policy both of legislature and courts that tenants in common share equally in the land and the profits gained therefrom. Moreover, assuming the lease were unratified by the cotenant, and thus in part at least not binding,[10] the lessee should not be liable for the entire sum of delay rentals accruing under the lease; or, if the lease had been properly ratified, the plaintiff cotenant would be entitled to his proportionate share of the delay rentals. In either event, the cotenant lessor should have only his fair proportion, having regard to the binding force of the lease.

The present case presented an excellent opportunity for the court to retreat from its indefensible position of restricting the all-important ratification to the duration of the oil and gas lease. It is to be regretted that the single earlier precedent was not squarely overruled. Under the doctrine now followed, the cotenant lessor may take more than his share, in defiance of the plain and unambiguous language of the statute.

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the decree, nor are they to be accounted for as rents and profits, unless the lease is ratified or acquiesced in by the other cotenant. A mere demand for discovery as to, and accounting for, such rentals in a bill expressly denying the title of the lessor and validity of the lease, does not amount to the ratification of or adoption of the lease."

[8] Sommers v. Bennett, *supra* n. 6, at 175-176. The fourth paragraph of the syllabus in McNeely v. South Penn Oil Co., *supra* n. 6, holds such a rule is not applicable where the plaintiff cotenant attacks the validity of the lease.

[9] Patterson v. Clem, 79 W. Va. 666, 91 S. E. 664 (1917).

[10] The lease is binding on the interest of the cotenant lessor. Freeman v. Egnor, 72 W. Va. 830, 79 S. E. 824 (1913).