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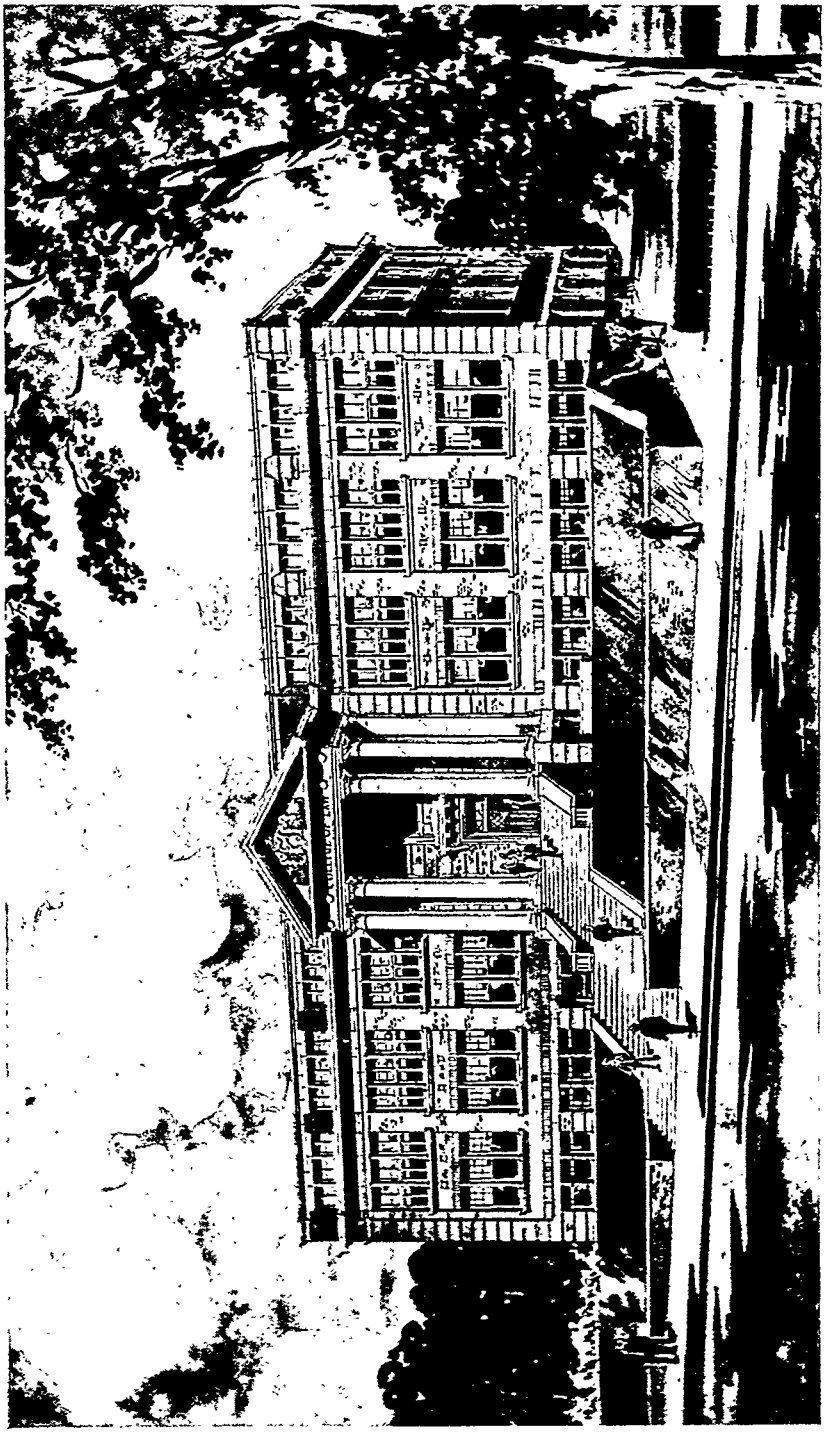

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RIGHT OF REMAINDERMAN TO COMPEL LIFE TENANT TO PERMIT DEVELOPMENT OF OIL AND GAS

BY JAMES W. SIMONTON*

IN the states where oil and gas are found it is probably quite generally understood that where land, which has not been developed for oil or gas and is not subject to a valid oil and gas lease, is in the possession of a life tenant, the person who is next entitled to an estate therein not impeachable for waste has no means of compelling the life tenant in possession to permit wells to be drilled on the premises in order to prevent the loss of oil and gas beneath the land by means of drainage through the adjoining lands. Perhaps a majority of lawyers would concede that in such a case if drainage is occurring or is seriously threatened a remedy ought to be allowed for the benefit of the person who has the next estate not impeachable for waste. For convenience and brevity the latter person will hereinafter be termed the remainderman. In this paper an attempt will be made to show, not only that courts of equity ought to take jurisdiction of such cases and give relief to the remainderman, but also that there is authority to sustain such equitable jurisdiction. So far as the writer is aware no remainderman has attempted to secure such a remedy but it is believed that if some remainderman should make the attempt he would not find a court of equity unfavorably inclined toward his

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suit if his bill were properly drawn and his case properly presented to the court.

The general principles of law which govern the relative rights of a life tenant and the remainderman in respect to mining rights and minerals are fairly well settled. A tenant for life has the right to use and enjoy the premises in the condition in which he receives such premises and to take therefrom the profits whether continuous or periodical, but, as a rule, he is not permitted to do acts upon the lands which involve a diminution in their value to the injury of the remainderman. Such acts constitute waste, the question of what constitutes waste being determined largely by consideration as to whether the acts in question result in substantial damages to the inheritance[1]. A tenant for life can not open mines or remove any part of the soil for this would be removing an integral part of the land itself and would consequently be a damage to the inheritance. However, if there are mines already opened on the premises the life tenant may work such mines to exhaustion, it being considered that the profits of such mines form a part of the profits of the estate given to the life tenant, or, in other words, that the creator of the life estate intended the life tenant to enjoy all the profits of such estate as it was when given to the life tenant, and if there were open mines on the estate the profits which might be derived from working such mines would be a part of the profits the life tenant was intended to have.[2] For the same reason the life tenant is entitled to the royalties on valid mining leases to which the land was subject at the time the life estate began even though no mines had yet been opened for the opening of such mines had been authorized by the creator of the estate.[3]

While a life tenant has no right to open mines or quarries he does have the exclusive right to the possession of the premises, in the absence of specific provisions to the contrary, and therefore may prevent any one from entering on the land.[4] Thus he can prevent the remainderman from entering in order

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[1]TIFFANY, REAL PROPERTY, 559-60.

[2]TIFFANY, REAL PROPERTY, 561-63.

[3]Priddy *v.* Griffith, 150 Ill. 560, 37 N. E. 999 (1892); Andrews *v.* Andrews, 31 Ind. App. 189, 67 N. E. 461, (1903); Richmond Natural Gas Co. *v.* Davenport, 37 Ind. App. 25, 76 N. E. 525 (1905); Woodburn's Estate, 138 Pa. St. 606, 21 Atl. 16 (1891); Keon *v.* Bartlett, 41 W. Va. 559, 23 S. E. 664 (1895); Alderson *v.* Alderson, 46 W. Va. 242, 33 S. E. 228 (1899); Minner *v.* Minner, 100 S. E. 509 (W. Va. 1919). See also note in 36 L. R. A. (N. S.) 1105.

[4]REEVES, REAL PROPERTY, 761-4; TIFFANY, REAL PROPERTY, 559.

to develop the premises for minerals during the continuance of the life estate.[5] Not only do the courts consider that the creator of the life estate intended the life tenant to have the use and enjoyment of the premises as they were when given to him, but they consider that at his death the premises were intended to pass substantially unchanged to the person next entitled, except in so far as changes were necessarily due to the taking of the rents and profits by the life tenant. Therefore, if there are no open mines on the land and it is not subject to mineral leases, the life tenant must leave the coal and all other solid minerals just as he finds them and at his death they pass in place in the land to the remainderman and, on the other hand, the remainderman is not entitled to open mines and derive profits therefrom prior to the termination of the life estate.[6] The rights of the life tenant as to oil and gas where no wells have been drilled and where there are no valid leases are substantially the same as his rights to solid minerals, and, likewise, the rights of the remainderman are the same unless, as hereinafter contended, he has a right to compel the life tenant to consent to development of oil and gas in certain cases.[7]

Oil and gas, as is well known, are found at great depths in the earth and are contained in strata of porous rock or sand and are usually confined under great pressure. Though one is liquid and the other gaseous, they both probably remain in place beneath the land with little or no shifting about so long as no development takes place in the near vicinity. In the absence of development near by, they undoubtedly would remain in place in the land throughout the continuance of the life estate and would then pass to the person next entitled, just as do solid minerals. If a stratum containing oil or gas is tapped by a well and the pressure relieved by production of the mineral therein, such mineral must certainly flow towards the point where the stratum has been tapped. It follows that the oil and gas which is in place beneath one tract of land may be partially or wholly drained by wells outside the boundaries of said land, and the minerals thus lost to the owner of the land within which they originally were contained. That such drainage occurs is cer-

[5]Deffenbaugh *v.* Hess, 225 Pa. St. 638, 74 Atl. 608 (1909).
[6]See the authorities cited in note in 36 L. R. A. (N. S.) 1099.
[7]See the collection of authorities in 36 L. R. A. (N. S.) 1108.

tain though the extent to which it occurs may be impossible to determine with even approximate accuracy, though the quantities of oil and gas there drained must often be very large.[8] If such tract of land were in the possession of a life tenant impeachable for waste, the life tenant could effectually prevent the remainderman from developing the premises for oil and gas and these minerals would be partially or wholly lost to the inheritance.

If the life tenant and the remainderman join in a lease of the premises for oil and gas without making any express provision for the division of the royalties which may result, what share of such royalties will the law give to each if the land proves productive? It is settled that a life tenant is entitled to the profits of the land, that is, the income of the land, and, since here is part (the proceeds or price) of the land itself now capable of producing income, he is entitled to this income (the interest) on the proceeds of the leasehold during his life and at his death the principal (which stands in place of part of the soil) goes to the remainderman.[9] This interest which the life tenant may thus secure by consenting to the development of the land for oil and gas, while substantial, is nevertheless small compared with that of the remainderman. Consequently the life tenant occupies an advantageous position, for he can refuse to join in a lease unless the remainderman gives him a much greater share of the proceeds than the law would allow him. When there is no danger of drainage it is not unfair to give the life tenant the privilege of making a good bargain with the remainderman, for if there is no development the oil and gas will remain in place till the life estate terminates and will all pass eventually to the remainderman. But if the land near the premises subject to the life estate is developed for oil and gas, the oil and gas will not all remain in place, but much of it will be drained out through

[8]Courts have always recognized that drainage occurs but there is great difficulty in proving the extent of such drainage with any degree of certainty. See Jennings *v.* Southern Carbon Co., 73 W. Va. 215, 80 S. E. 368 (1913); Louisville Gas Co. *v.* Kentucky Heating Co., 117 Ky. 175, 77 S. W. 368 (1903); Ohio Oil Co. *v.* Indiana, 177 U. S. 190 (1900).

[9]"An oil lease, investing the lessee with the right to remove all the oil in place, in the premises, in consideration of his giving the lessors a certain per centum thereof is in legal effect a sale of a portion of the land and the proceeds represents the respective interests of the lessors in the premises. If there be life tenants and remainder-men, the former are entitled to the enjoyment of the fund (*i. e.* interest thereon) during life, and at the death of the survivor the corpus of the fund should go to the remainder-men." Blakley *v.* Marshall, 174 Pa. St. 425, 429, 34 Atl. 564 (1896). See also Warnes *v.* Keys, 36 Okla. 6, 127 Pac. 261 (1912); Eakin *v.* Hawkins, 52 W .Va. 124, 43 S. E. 211 (1902); Wilson *v.* Youst, 43 W. Va. 826, 28 S. E. 781 (1897).

neighboring land, and, in such case, the remainderman will lose a part of the inheritance unless a bargain is made with the life tenant, or unless a court of equity will give the remainderman a remedy. If a remedy were given to the remainderman, the life tenant would be entitled to the income on the proceeds of any oil or gas which might be produced and perhaps to damages because of the necessary occupation of part of the surface of the premises for the purpose of drilling and operating oil or gas wells.[10] He would be entitled to nothing more under the present state of the law.[11]

Should a court of equity on petition of the remainderman compel the life tenant to permit the drilling of offset wells to protect the premises where it appears that drainage of oil or gas is occurring or is seriously threatened? Justice would seem to require that the remainderman be given a remedy in order to preserve the inheritance from serious loss which cannot otherwise be prevented, but perhaps a court of equity would be reluctant to grant such relief unless some authority could be produced which would justify the court in taking jurisdiction of such a case and in granting relief.

Is there any authority for granting such relief on petition by the remainderman? It is submitted there is an almost perfect analogy in English equity procedure. In England, a life tenant impeachable for waste had no right to cut timber on the premises except for certain limited purposes, such as for fire wood and repairs and the like, but he had exclusive possession of the premises and could exclude the remainderman. However, where it could be shown that there was mature timber on the premises which was decaying or threatened with decay, and thus depreciating or about to depreciate in value, a court of equity on petition of the remainderman would decree that such timber be cut and the proceeds thereof held in trust, the income being paid to the life tenant during continuance of the life estate and the principal to the remainderman after the termination of the life

[10]See note 9, *supra.*

[11]The author of the note in 36 L. R. A. (N. S.) 1094 at 1100 criticizes the common-law rule as to the rights of life tenants impeachable for waste, stating that such rules commend themselves more by their comparative simplicity and ease of application than by the justice of their results in practical cases. The injustice of these rules has apparently been recognized in England for in the Settled Lands Acts it is provided that the life tenant may lease lands for mining purposes unless a contrary intent is expressed in the settlement. If impeachable for waste three-fourths of the rent is set aside as capital and the residue is given to the life tenant. See Settled Lands Act, 1882, §§ 10-12.

estate.[12] "With regard to timber plainly decaying, it is for the benefit of the persons entitled to the inheritance, that it should be cut down, otherwise it would become of no value."[13] The extent to which courts of equity usually exercised this power was stated in *Hussey* v. *Hussey,*[14] where an infant remainderman in fee tail filed a bill in which the court was petitioned to authorize the cutting of all the mature timber on certain lands, as to a part of which he was tenant in possession, and as to part of which he was remainderman in fee tail following a life tenant. The court said:

> "As to the estate of which the plaintiff is tenant in tail in possession the Court will authorize the cutting of all timber which is fit and proper to be felled in due course of management; but as to the devised estate the Court can only authorize the cutting of such timber as is decaying, or which it is beneficial to cut by reason that it injures the growth of other trees. By making the mother's life interest impeachable of waste the devisor has declared that no timber shall be cut during the continuance of that estate; or in other words that the timber shall be preserved for the benefit of the succession. And the Court, therefore, can only authorize the cutting of timber where the interest of the succession requires it."

The basis on which the court proceeded was that this property which was about to be lost, ought to be preserved for the benefit of the inheritance. The analogy to the situation of the life tenant and remainderman in the case of oil and gas in place in the land, where drainage is occurring or is threatened, is most marked. The oil and gas, a very valuable part of the inheritance will be at least partially lost unless equity intervenes and one may say "it is for the benefit of the person entitled to the inheritance" that wells be drilled and this oil and gas saved. Measured by the extent of the loss to the inheritance the need for a remedy here is much greater than in the case of decaying timber, because of the great value of oil and gas. Of course in the case of oil and gas there is probably no loss to the public as in the

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[12]Hartley *v.* Pendarves, (1901) 2 Ch. 498; Seagram *v.* Knight, 2 Ch. App. 627 (1867); Tooker *v.* Annesley, 5 Sim. 235, 58 Eng. Rep. R. 325 (1832); Hussey *v.* Hussey, 5 Madd. 44, 56 Eng. Rep. R. 811 (1820); Wickham *v.* Wickham, 19 Ves. 419, 34 Eng. Rep. R. 573 (1815); Delapole *v.* Delapole, 17 Ves. 150, 34 Eng. Rep. R. 38 (1810); Burges *v.* Lamb, 16 Ves. 174, 33 Eng. Rep. R. 950 (1809); Mildmay *v.* Mildmay, 4 Pro. C. C. 76, 29 Eng. Rep. R. 786 (1792); Bewick *v.* Whitfield, 3 P. Wms. 267, 24 Eng. Rep. R. 1058 (1734).

[13]Bewick *v.* Whitfield, *supra.*

[14]5 Madd. 44, 56 Eng. Rep. R. 811 (1820).

case of decaying timber, since the fortunate adjoining owners get the benefit of what they can drain from the land but the basis of the English equitable jurisdiction was not the loss to the public but the loss to the inheritance. Though this matter is now controlled by statute in England,[15] the jurisdiction of equity to order mature timber threatened with decay to be cut for the benefit of the parties entitled to the inheritance seems to have been well established.[16]

This equitable doctrine has never prevailed in this country for the reason that the courts in this country very early held that the English law which forbade a life tenant to cut timber was not suited to a new country where such timber frequently had to be cleared away before the land could be used for other purposes; hence similar situations did not arise in this country.[17] But the principle at the root of the doctrine plainly applies to life tenant and remainderman where drainage of oil or gas is threatened or is occurring.[18] It is not just and equitable that a life tenant be permitted to prevent offset wells from being drilled at all or that he be permitted to demand more than his just share of the royalties as a price of his consent to the development of the land for oil and gas. It is submitted that courts of equity ought to give relief to the remainderman in such cases and that the authorities given above fully justify a court of equity in assuming jurisdiction and in granting the proper relief. If the English equity rule were strictly applied it would limit the relief to compelling the life tenant to allow wells to be drilled to offset those through which drainage might be occurring or threatened. Whether the relief ought to be extended by allowing complete development of the land for oil and gas is an arguable question. The only practicable way to prevent drainage is to drill offset wells and take whatever oil and gas can be secured from such wells. Frequently the land could be developed to greater advantage if the whole were developed than if a few wells were drilled along the boundaries, so there is something to be said in

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[15]See Settled Lands Act, 1882, § 35.

[16]See cases cited in note 12, *supra*. See also STORY, EQUITY JURISPRUDENCE, 13 ed., § 919.

[17]For a brief statement of the law as to the right of a life tenant to cut timber in this country see TIFFANY, REAL PROPERTY, 564-66. The law varies considerably in different states but in most states the life tenant is permitted to cut timber under some circumstances. See exhaustive note in 37 L. R. A. (N. S.) 763.

[18]See Tooker *v.* Annesley, *supra*.

favor of authorizing complete development of the land for oil and gas.

As stated above, the writer is aware of no case where an attempt has been made by a remainderman to compel a life tenant to allow wells to be drilled to prevent drainage or threatened drainage of oil and gas from beneath the premises. In one case at least, the Pennsylvania court used language from which one might infer it believed there could be no such remedy in the present state of the law, although some sort of a remedy would be desirable.[19] The Court said:

> "It seems to us, however, in view of the peculiar character of oil and gas as being fugacious in their nature, and liable to be diverted by operations upon other adjoining or nearby lands, in order to preserve the interests of both life tenants and remaindermen, it would be well for the legislature to make such enactments as would enable the owners of this class of lands to secure to themselves the benefits of such minerals as these. As it is now, the law is not efficacious to that end."

The suggestion as to action by the legislature is doubtless a good one but legislatures frequently do not choose to act and, therefore, courts must do the best they can without legislative aid. Under the doctrine above suggested the courts without awaiting legislative aid could give an effective remedy in probably the only class of cases where a remedy is badly needed.

In one case at least, the Supreme Court of Appeals of West Virginia apparently recognized the possibility of a court of equity giving relief on petition of a remainderman where drainage of oil and gas from the premises was threatened or was occurring.[20] In this case the Court, in discussing the rights to the oil and gas of one who was a life tenant and also a tenant in common in the remainder following the life estate, said, after stating the law as to the right of a tenant in common to oil or gas:

> "It may be said that these doctrines would leave the part owner powerless to get any benefit from the oil. If so, it must be as a quality of his estate. But it is not so; for, if he wished a partition, he was entitled to it, and thus could bore on his separate share, and take the oil on it, and per-

[19]Marshall *v.* Mellon, 179 Pa. St. 371, 376, 36 Atl. 201 (1897).
[20]Williamson *v.* Jones, 43 W. Va. 562, 570, 27 S. E. 411 (1897).

haps drain all from the other, and hold it acquit of account for it; and, if he did not wish partition, oil being capable of loss from wells on lands near by, perhaps he could ask a court of equity to allow him to bore, and take his share of the oil, and pay the balance to the remainderman, like that jurisdiction exercised by equity to direct timber in a state of decay to be cut down for the benefit of those entitled to the inheritance, if it would do no damage to the life tenant, compensating him for the use of the land."

It is not clear whether the court meant that a remainderman might file a bill against the life tenant or that the one tenant in common might file such a bill against the other, but apparently it meant to say that both might be possible. However, the Court clearly did recognize the possible application of the old equitable doctrine to the case in question.

It might be suggested that the jurisdiction of equity ought not to be limited to cases where the remainderman chooses to petition for relief, but that the life tenant ought to be permitted to ask relief also in case drainage of oil and gas is occurring or threatened and the remainderman will not consent to development, because if no development takes place the life tenant will lose the income on the proceeds of the oil and gas.[21] It is true that the life tenant would lose the interest on the proceeds in such case if the remainderman refused to join in a lease for the development of the property for oil and gas, but if one considers the basis upon which the life tenant is given such income on the proceeds of development, one would seem to come to the conclusion that the life tenant could have no such right to insist that the remainderman be compelled to consent to development of the premises for these minerals. The life tenant has a right to the rents and profits of the estate, but this does not include the interest on possible royalties on oil and gas or on any other minerals which may be produced. He is given the income from the proceeds of such production because such proceeds represent a part of the estate, that is, stand in the place of a part of the soil itself. Since this money represents the price of part of the inheritance and since the remainderman is not entitled to any income till

[21]In a few cases in England bills by the life tenant in possession to have timber cut for benefit of the inheritance were sustained. See Tooker *v.* Annesley, *supra*, and Mildmay *v.* Mildmay, *supra*. In Dashwood *v.* Magnias, (1891) 2 Ch. 371 doubt was expressed as to the soundness of these decisions.

termination of the life estate, the income is given to the life tenant. But the life tenant apparently has no inherent right to have any development made for minerals of any kind or to any income from any such development and if all or a part of the minerals are lost the loss suffered would not be the loss of the life tenant but the loss of the remainderman.

It might also be suggested that a remedy ought to be given to a tenant in common in case land is owned by tenants in common and one of them will not consent to development of the premises for oil and gas, although drainage is occurring or is threatened. Here if producing wells were near the land in question the oil and gas would be lost unless offset wells were drilled. One tenant in common probably could by injunction prevent any development for oil and gas by the others or by any lessees of the others.[22] If oil and gas were produced by one tenant in common without the consent of his co-tenant, logically the co-tenant ought to be able to recover his full share of the oil or gas produced without any deduction for cost of production, since such oil and gas would be produced by one who acted wilfully with due notice of the rights of his co-tenant.[23]

That there might be a remedy in equity given to a tenant in common seems to be suggested in the last quotation given above, but certainly the right does not seem so clear as in the case of life tenant and remainderman. A tenant in common usually has an absolute right of partition and usually lands can be partitioned in kind and then each party can lease the part given to him. When this is possible there certainly can be no great need of any equitable remedy such as is suggested above. There might be a difficulty, however, where it has been pretty clearly demonstrated that there is oil or gas under the land owned by tenants in common which can be produced in paying quanaities for it is doubtful if such land can be partitioned except by a sale at public auction and a division of the proceeds.[24] Such land cannot be fairly partitioned in kind for it is impossible to partition the oil and gas in place with even approximate fairness because a part set off to one tenant in common might not contain any oil and gas whatever

[22]See Pyle *v.* Henderson, 65 W. Va. 39, 63 S. E. 762 (1909).

[23]Wolfe *v.* Childs, 42 Col. 121, 94 Pac. 292 (1908); Zeigler *v.* Brenneman, 237 Ill. 15, 86 N. E. 597 (1908); Pittsburgh & W. Va. Gas Co. *v.* Prentiss Gas Co., 100 S. E. 296 (W. Va. 1919); McNeely *v.* South Penn Oil Co., 58 W. Va. 438, 52 S. E. 480 (1905); Cecil *v.* Clark, 47 W. Va. 402, 35 S. E. 11 (1900).

[24]See Gulf Refining Co. *v.* Hayne, 138 La. 555, 70 So. 509 (1915); Hall *v.* Vernon, 47 W. Va. 295, 34 S. E. 764 (1899). See also authorities collected in L. R. A. 1916D, 1157.

and another parcel may contain oil and gas in large quantities. Partition by sale would be possible but very unsatisfactory because, on account of the uncertainty as to the quantity of oil or gas which may be secured from the land, a sale probably could not be made at an advantageous figure, even where there was a very strong probability that the land would produce oil or gas in paying quantities. Of course in a case of partition by sale the tenant in common would get some benefit because of the added value due to the probable presence of the oil and gas in the land, so he is not in so bad a situation as a remainderman who might lose all the oil and gas by drainage. Therefore, in a case where land is owned by two tenants in common and one refuses to allow development for oil and gas, it would seem on principle that a court of equity ought to give relief on petition of the other tenant in common if drainage is taking place or threatened since the latter cannot have an adequate remedy by partition and has no other way of securing his share of the oil and gas.

In conclusion, it is submitted that where land is in possession of a life tenant, a court of equity on analogy to the old English equity procedure, ought to give a remedy on petition of the remainderman where it can be shown that oil or gas or both are being drained from beneath the premises or where it can be shown that such drainage is seriously threatened. The court in such a case ought to enter a decree authorizing offset wells to be drilled to prevent such drainage and perhaps the court ought to go further and compel the life tenant to permit the land to be fully developed for oil and gas. The life tenant in such case should be entitled, during the rest of his life, to the interest on the proceeds of the development, and at his death the principal should be truned over to the remainderman. A life tenant, however, is not entitled to any remedy against the remainderman in case drainage is occurring and the latter refuses to permit development of the land for oil and gas. Probably the doctrine suggested above might well be extended so far as to allow relief to a tenant in common where oil and gas are being drained or drainage is threatened and the tenant in common is unable to secure partition of the premises except by sale of the land by judicial decree and division of the proceeds, because the full value probably can not be realized from such sale.