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Apportionment of Royalties on Subdivision of Premises Subject to an Oil and Gas Lease Under Which There is Subsequent Development

J. W. S.
West Virginia University College of Law

band, on the ground of fraud in effecting a separation for the purpose of making the conveyance, is expressly referred to as an open question. However, in an earlier case,[11] it has been held that a conveyance made by a husband and wife in order to prevent an existing judgment from attaching in the future as a lien on the husband's curtesy interest could not be attacked as fraudulent after the death of the wife. This decision is based on the ground that the husband had no interest to which the lien attached at the time of the conveyance, that the conveyance defeated the contingency upon which the curtesy interest otherwise would have vested, and hence that the intent with which the conveyance was made was immaterial. In other words, there could be no fraud in defeating a contingent attachment of the lien, a bare possibility, although evidently the very act by which the contingency was defeated was permeated with an intent which would have been fraudulent if the husband had had a vested interest. If the husband and wife can not be guilty of fraud with reference to third parties in the matter of defeating the possibility of curtesy, on the ground that the husband has no interest which may be the subject of fraud with reference to the husband's creditors, it may very plausibly be argued that, for the same reason, the wife can not be guilty of fraud with reference to the husband. If the wife and husband together can legitimately destroy the contingency upon which the lien would attach, why can not the wife alone, as far as fraud is concerned, destroy the contingency upon which the curtesy would vest? Logically, it would seem that a husband could make no more substantial objection, on the sole ground of fraud, to a conveyance of his wife depriving him of his possibility of curtesy than could a prospective heir make a conveyance executed for the purpose of defeating his inheritance.

—L. C.

APPORTIONMENT OF ROYALTIES ON SUBDIVISION OF PREMISES SUBJECT TO AN OIL AND GAS LEASE UNDER WHICH THERE IS SUBSEQUENT DEVELOPMENT.—In the recent case of *Pittsburgh & West Virginia Gas Co.* v. *Ankrom et al.*,[1] the Supreme Court of Appeals of West Virginia held that where a tract of land, subject to an

[11]Guernsey *v.* Lazear, note 4, *supra.*

[1]97 S. E. 593 (1918). Judges Poffenbarger and Williams dissented. All the prior cases on this point are cited in the opinions in this case and in the opinion in the Oklahoma case discussed hereafter.

oil and gas lease under which there had been no development, is subdivided as to ownership without mention of the royalties, the owner of each part takes it subject to the oil and gas lease, and if oil or gas is later discovered and produced under the lease, such owner will be entitled to all the royalties from oil or gas produced from wells on his portion. This decision is in accord with the weight of authority and apparently overrules the case of *Campbell* v. *Lynch*[2] in which it was held that where the ownership of land subject to an oil and gas lease was divided among tenants in common by partition before development for oil and gas, the royalties on oil and gas subsequently produced under the lease should be divided among the owners of all the parts in proportion to the areas of such parts, regardless of the location of the producing wells. The Supreme Court of Oklahoma has also recently adopted the majority view on this point.[3] It is of interest to note the reasons upon which these courts base their decisions.

Two of the reasons given by the Oklahoma court do not seem to have been suggested in prior cases. The first is that since the particular oil and gas lease involved in the suit contained provisions to the effect that the conditions and agreements contained therein should extend to the heirs, executors, administrators, successors and assigns of both parties, a right to subdivide the land may fairly be implied. It is probable that no authority can be found for such an implication and as the parties certainly had a clear purpose in using this language such an implication is not reasonable. As a second reason the court states that it has been the general, if not the universal, custom in the state since the discovery of oil and gas, to pay the royalties to the owner of the land on which the wells were located and from which the production was had. If the court means that this has been the custom where ownership of land subject to an oil and gas lease has been divided prior to development, then there is doubtless considerable foundation for the statement, but it may be doubted whether there is such a custom so general as to justify the court in taking judicial notice of it.[4]

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[2]81 W. Va. 379, 94 S. E. 739 (1918). For brief discussions of this decision, see 25 W. VA. L. Q. 231, 337.

[3]Kimbley *v.* Luckey, 179 Pac. 928 (Okla. 1919). This decision was followed about two months later in Pierce Oil Corporation *v.* Schlacht, 181 Pac. 731 (Okla. 1919).

[4]The writer has been informed by practicing attorneys in this state that prior to Campbell *v.* Lynch it was generally understood that each man was entitled

The chief ground on which both the Oklahoma and the West Virginia cases seem to be based is that the vendee of the lessor of the oil and gas got all the interest which the lessor had in that portion of the land conveyed to such vendee, and this included the right to all the oil and gas which might be extracted from such land, subject only to the right of the oil and gas lessee to explore for and produce oil and gas. As to this existing lease the vendee would get, not a right to a proportionate share of all the oil and gas which might be produced on all land covered by the lease, but to all royalties from oil and gas produced by the lessee from wells on the vendee's land. The West Virginia court said: ". . . . when these defendants purchased their respective parcels of land from the trustee in bankruptcy they bought all of the estate therein, subject only to the right of the plaintiff to explore for and produce oil and gas. This right which is conferred upon the lessee is exactly the same that would have existed in these purchasers had there been no lease, from which it necessarily follows that the owner of each subdivision is entitled to the royalties on all of the oil produced from the wells drilled on his subdivision." This certainly seems to be in accord with legal principles.[5] It is certainly difficult to justify on legal principle a holding that because B acquired one-fourth of a tract of land subject to an oil and gas lease (which it seems was not considered of sufficient importance to cause the parties to insert in the conveyance a provision as to royalties) he thereby secured a right to one-fourth of all the royalties the whole tract might thereafter produce. As was said by the West Virginia court in the case above mentioned: "It would no doubt result in some of the defendants receiving part of the royalties for oil which was extracted from lands at a distance of more than a mile from lands owned by them, and which could by no stretch of the imagination be taken to have been produced from their lands." It is apparent that the only justification for the rule stated in *Campbell* v. *Lynch* is, that under

to the royalties from all oil and gas produced from his land and that royalties had frequently been so divided in similar cases without any question being raised.

[5]In West Virginia where the landowner owns the oil and gas in place the rule laid down in Campbell *v.* Lynch is illogical because the oil extracted from the land belongs to the owner of that land before it is brought to the surface, yet a share of it is given to owners of other lands who have no interest in the land producing the mineral. In Oklahoma, the landowner does not actually own the oil and gas in place but as owner of that particular area he does have the exclusive right to take oil and gas from that area and this right is attached to every part of the land. Consequently the minority rule is also illogical here.

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the lease the lessee happened to have the right to develop the land as one leasehold and solely because of this fact it is assumed that the parties intended (by reason of silence on the point) to share the royalties produced from the leased premises in proportion to the area of the subdivisions and regardless of whether oil and gas could be produced from any considerable portion of the leasehold.[6] The inference as to their intent is based not on the language of the instrument they execute, but on an instrument (oil and gas lease) executed by other parties at a prior time, the existence of which was probably forgotten. The rule would apparently apply to a case where the vendee did not know there was an existing oil and gas lease.

It is submitted that the rule laid down by the cases under consideration is not only sound but is also for the best interests of the business concerned. It is improbable that any great hardship can result from the fact that the parties neglect specially to mention these royalties unless the subdivisions are very small. It is only fair to give the owner of a subdivision the right to bring suit in case the lessee fails to develop diligently the premises as a whole. He should also be permitted to seek the aid of the courts to prevent drainage of his lands from lands not included in the lease. There seems to be no good reason why such rights should not be given to him and if he has such rights there can be a substantial hardship only in case part of his land is drained by the lessee in properly developing the leased premises for oil and gas, and even here the lessee ought to be compelled to act in good faith though he could probably not be compelled to develop all the subdivisions as if they were separate and distinct leases.

Has the lessee a right to object to being compelled to pay royalties to the owners of subdivisions under the majority rule? In none of the cases which have arisen so far has any objection been

[6] The argument that the majority rule is unjust seems chiefly based on cases which it is feared may arise, rather than on any actual case which has arisen where the application of the rule would work any great injustice. It is submitted that there can be no great injustice except where the oil and gas is drained from one subdivision by wells located on another. To what extent equity can prevent such drainage is for the court to determine if such a case ever arises. Certainly the fact that such a case may arise sometime is not sufficient cause for overthrowing what has been long understood to be the law and substituting for it the rule laid down in Campbell *v.* Lynch, which apparently requires the decision of a court of equity *in every case* to determine how the royalties should be apportioned. See W. Va. L. Q. 232. One great merit in the majority rule is that the parties themselves can determine who is entitled to the royalties in nearly every case without resort to litigation. Under the minority rule this can be finally determined only by the highest court of the jurisdiction.

made by the lessee, and so it is probable that this rule imposes no great hardship on him.

—J. W. S.

WAIVER BY A STATE OF THE RIGHT TO REGULATE RATES.—As the regulation of rates charged by public utilities is admittedly a governmental function—a function generally regarded as an exercise of the police power of the state[1]—there is obviously a grave, if not vital, objection to holding that a state by its legislature may ever waive the right to exercise this fundamental, governmental power. Thus, it is well-settled law that neither the state, nor a municipal corporation to which the state has delegated its powers, can by contract waive the right to exercise those police powers which protect the health, safety, or morals of the public.[2] May a state, then, waive its right to exercise the allied power to regulate rates?

Upon this point the Supreme Court of Appeals of West Virginia has held that this power—a police power—is so fundamentally governmental and that the right to exercise it at all times is so vital to the essential interests of the public and so dependent upon changing conditions that any attempt by the state legislature to relinquish the right is ineffectual.[3] Hence, according to this view, any alleged contract, purporting to be authorized by the state directly through its legislature or indirectly through a municipality to the effect that rates thus fixed by the state or municipality are not to be changed for a stipulated time, is not a valid contract, and, therefore, any subsequent regulation of the rate by the state is not an impairment of the obligation of a contract in contravention of the federal Constitution.[4] Upon principle it is submitted that the above-mentioned view of the West Virginia court is sound; but unfortunately the United States Supreme Court seems to

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[1]Munn *v.* Illinois, 94 U. S. 113 (1876); Union Dry Goods Co. *v.* Georgia Public Service Corporation, 248 U. S. 372 (1919); City of Benwood *et al.* *v.* Public Service Commission, 75 W. Va. 127, 83 S. E. 295 (1914). But see William Draper Lewis, "Constitutional Questions Involved in the Commodity Clause of the Hepburn Act, 21 HARV. L. REV. 595, 609.

[2]Beer Co. *v.* Massachusetts, 97 U. S. 25 (1877); Stone *v.* Mississippi, 101 U. S. 814 (1879); City of Petersburg *v.* Petersburg Aqueduct Co., 102 Va. 654, 47 S. E. 848 (1904); see FREUND, POLICE POWER, §§ 24, 362.

[3]Laurel Fork & Sand Hill R. R. Co. *v.* West Virginia Transportation Co., 25 W. Va. 324 (1884).

[4]Article I, § 10.