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Rights of Tenant in Common Where Oil Is Extracted Under Unauthorized Lease From Co-Tenant

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sense treatment of the original wound. In relation to the act of the defendant, it is an independent intervening act—as much so as if the deceased had been maliciously wounded by another person than the accused—and is only casually consequent upon either the original wound or the incision. Hence, as the court instructed the jury, if the removal of the appendix was the sole cause of death, the defendant is not guilty. However, where the independent act of another party intervenes, it shifts liability from the original assailant only where it is the sole cause of death. Although removal of the appendix may have been a contributing cause of death, still, if the wound inflicted by the defendant contributed to the death, he is guilty. And it necessarily follows from what has been said that, if either the original wound, or the incision and its proximate consequences (provided the incision was proper treatment of the wound), contributed with the removal of the appendix to produce death, the defendant is guilty of homicide. In other words, the original wound may be a contributing cause, either directly or through its proximate consequences as manifested in the intervening act. Hence, the Court properly refused the defendant's instructions.

—L. C.

RIGHTS OF TENANT IN COMMON WHERE OIL IS EXTRACTED UNDER UNAUTHORIZED LEASE FROM CO-TENANT.—In *Paxton v. Benedum-Trees Oil Co.*,¹ it is apparently held, where one tenant in common of the oil and gas in place under certain land makes an oil and gas lease without the consent of his co-tenant, and the lessee enters and produces oil under the lease, that, on an accounting against the lessor and lessee the co-tenant can recover as damages only one-eighth of his share of the oil taken from the land. In this case the wronged co-tenant, Kemper by name, apparently was not a party to the suit though the decision purports to adjudicate his rights. It would seem that since the lessee and lessor are liable for waste under the statute, if there was not a wilful violation of Kemper's rights, then he ought to have the right to elect to take either the value of the oil at the surface of the ground less the reasonable cost of production² or his proportionate share of the

¹94 S. E. 472 (W. Va. 1917).

²*Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411 (1897); *McNeely v. South Penn Oil Co.*, 58 W. Va. 438, 52 S. E. 480 (1905).

royalty provided by the lease.³ If the lessee's acts were in wilful disregard of Kemper's interest it would seem the latter might be allowed his share of the oil free from the cost of production.⁴ The suit was brought by the lessor against the lessee on the ground the lessor was entitled to one-eighth of fifteen sixteenths of the oil as royalty, while the lessee apparently contended that Kemper was entitled to one-sixteenth of the oil, and as the lessor was guilty of a breach of the implied covenant of quiet enjoyment, he would be entitled to one-sixteenth of the oil as royalty or one-half the royalty provided by the lease. Both parties apparently considered Kemper the owner of only one-sixteenth of the oil in place.

The statement in the opinion that the lessor was guilty of a breach of the implied covenant of quiet enjoyment seems to be erroneous, for it does not appear that the lessee's enjoyment had been disturbed. However, since there was a breach of the implied covenant of title and this covenant was broken as soon as the lease was executed, the resulting damages would be the same as if the covenant of quiet enjoyment had been broken. The decree in the lower court gave the plaintiff one-sixteenth of the oil as his share of the royalty, but the grounds of the decision do not appear. This decree was affirmed by the Supreme Court of Appeals on the ground that Kemper owned *one half* of the oil in place and on accounting would be entitled to the usual royalty of *one eighth* and therefore would be entitled to one sixteenth of the oil produced or one eighth of one half. The court may have intended to base this decision on the ground that Kemper had by acts and conduct ratified the lease, and if so, the decision is certainly correct as to this point, but while it is suggested that a wronged co-tenant might ratify the lease in such a case the language used seems to indicate that the court intended to lay down the above rule as the correct rule of damages to be applied where the rights of a tenant in common of oil and gas in place have been thus invaded. The case of *Kilcoyne*

³See *McNeely v. South Penn Oil Co.*, *supra*. This seems in fact the holding of the court in *South Penn Oil Co. v. Haught*, 71 W. Va. 720, 78 S. E. 759 (1913).

⁴See cases cited in note 2. It would seem the measure of damages for the wrongful taking of oil in the principal case ought to be the same as where oil is wrongfully taken by one who is not a tenant in common. In such case it seems the measure of damages in case of a wilful taking is the value of the oil taken without deduction for the cost of production. *Gladys City Oil, Gas & Manufacturing Co. v. Right of Way Oil Co.*, 137 S. W. 171 (Tex. 1911). Where the taking is under an honest mistake the measure of damages is the value of the oil less the cost of production. *Campbell v. Smith*, 180 Ind. 159, 101 N. E. 89 (1913). As to the measure of damages for the wrongful working of mines see notes in 26 Ann. Cas. 562 and 8 Ann. Cas. 43.

v. *Southern Oil Co.*⁵ is disapproved and it is a decision which would have no application had the court intended to base its decision on the ratification of the lease by Kemper. If the court did intend to hold that a wronged tenant in common whose oil has been taken by a lessee under a lease by his co-tenant can recover as damages only the usual royalty provided in oil and gas leases, it is submitted that the decision is unsound.⁶ If the tenant in common owns an undivided half the oil in the ground it is hard to see why he should lose seven eighths of his property because a lessee of his co-tenant wrongfully extracts his oil and why the parties guilty of the tort should in such case be permitted to profit from their own wrong. Why may not the wronged party base his action on the tort instead of being compelled to ratify the contract? The above remarks are made with some diffidence because the writer is not sure that it was not the intention of the court to hold Kemper had ratified the lease.

—J. W. S.

CAN A LESSEE BE COMPELLED TO APPORTION OIL ROYALTIES AMONG OWNERS OF PORTIONS OF THE LEASED PREMISES.—Since the publication of the note on the apportionment of oil and gas royalties in the WEST VIRGINIA LAW QUARTERLY,¹ a criticism of the principles contended for in the note has been made by the counsel for a large oil and gas company which operates in a sister state. He contends that the cases of *Wetengel v. Gormley*² and *Campbell v. Lynch*³ are correctly decided because these cases in-

⁵61 W. Va. 538, 56 S. E. 888 (1907). The rule as stated by the court in the principal case also seems inconsistent with *Williamson v. Jones*, *supra* and *McNeely v. South Penn Oil Co.*, *supra*.

⁶The cases apparently relied on as authorities are *South Penn Oil Co. v. Haight*, 71 W. Va. 720, 78 S. E. 759 (1913) and *Cecil v. Clark*, 49 W. Va. 459, 39 S. E. 202 (1901). In the former case the court allowed recovery of the usual royalty where it appeared the cost of production largely exceeded the value of the oil produced. In the latter the plaintiffs sued to recover a share of the royalties which had been paid to the defendant by the lessee, hence the lease had been ratified by the plaintiffs. It is submitted these two cases tend to support the statement heretofore made that the injured party should have the right to elect whether to proceed on the theory of tort or on the contract.

¹25 W. VA L. Q. 231.

²160 Pa. St. 559, 28 Atl. 934 (1894), and 184 Pa. St. 354, 34 Atl. 57 (1898).

³94 S. E. 739 (W. Va. 1918). A note on this case appeared in a recent number of the HARVARD LAW REVIEW. See 31 HARV. L. REV. 882. In this note it is stated the result reached is sound because the right to the royalties at the time of the partition was contingent on the discovery of oil and therefore there was nothing to partition but the land, and when the right to the royalties did vest it vested in all the heirs in common. But it was stated that had the right to the royalties been