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Can a Lessee Be Compelled to Apportion Oil Royalties Among Owners of Portions of the Leased Premises

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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. Haught*, 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

volve oil royalties while all the cases *contra* involve mere royalties on gas wells; that where the royalty provided is a share of the production, as in the case of oil, the cost to the lessee of the operation of the premises would be greatly increased if he were compelled to keep track of the production of each of the portions into which the premises might be divided, and to pay each part-owner the royalty on the production of his portion. The following excerpt from the letter of the eminent counsel will suffice to make clear the nature of the contention:

"We contend that the lease, as executed in the first instance, is an *entirety* and that the lessor cannot divide up the leased premises, or apportion the same out to many different grantees, or assignees, and thereby increase the burden ten fold that the lessee accepted in the first instance as the measure of his duty and the limitation of the investment necessary to gather all the *oil*.

"As a practical question, how is the grantee of a portion to get his oil from the particular part assigned to him if the lessee does not build separate tankage and separate steaming plants. In one practical, concrete case involving a fine property, we have figured that the transfers already made would cost us one hundred thousand dollars additional in two years, if we recognized the same to the extent that the assignees could get the royalties due from separate tracts. If for one moment it could be urged that we might be compelled to do this extra work from time to time, I would like to inquire into how many portions, and to what extent a one hundred and sixty acre tract could be so divided?

"There is the other question, also, of compelling the lessee to recognize the new boundary lines thus created through his lease by such transfers. If he was compelled to do this, they could simply put him out of business and destroy the full benefits of the contract that he had entered into with the original lessors. On the other hand, if the lessee is not bound to recognize these new lines drawn through the leased premises by such sales of a portion thereof, then an assignee of a portion might suffer if any other rule was adopted than that laid down in Pennsylvania and west Virginia. A transferee of a portion of the leased premises could not bring an action to set aside the lease."⁴

vested at the time of the partition then the division among the heirs would have been *res adjudicata*. The point suggested though arguable seems by no means free from doubt.

⁴Citing *Cochran v. Gulf Refining Co.*, 139 La. 1010, 72 So. 718, (1916); *Jameson v. Chanslor-Canfield Midway Oil Co.*, 167 Pac. 369 (Cal. 1917); *Nabors v. Producers Oil Co.*, 140 La. 985, 74 So. 527 (1917).

The question as to whether the lessee can be compelled to make such apportionment is an interesting one. But it seems clear that the question was not involved in *Wetengel v. Gormley*, while in *Campbell v. Lynch* the lessee was a party defendant and opposed the view taken by the court, apparently untroubled by the considerations suggested above. It is submitted there is nothing in either case to indicate the court was in any way influenced by possible detriment to the lessee. The lessee in neither case raised any such objection and if the court considered it, then the court must have taken judicial notice of the manner in which oil is usually produced by a lessee and from this concluded there would be increased burdens imposed on the lessee. Is this a thing of which a court should take judicial notice? It would seem not, particularly in view of the fact that in the only two cases that have arisen the lessee involved did not even raise the question. Furthermore, neither case decides that the premises cannot be divided so as to give the owner of each part the right to the royalty produced from his portion but on the contrary, the opinion in the case of *Campbell v. Lynch* clearly intimates that such division might be made by agreement of the lessor and his assignees. It is therefore submitted that there is no case which in any degree denies the right of the lessor to divide the premises and assign to the owner of each portion the royalty on the oil produced from such portion. Whether the lessee can be compelled to make such apportionment is an open question.

But suppose a case should arise in which the lessee appears and contends the apportionment of royalties on the basis of the production of each portion cannot be imposed on the lessee because it would substantially increase his burdens. It is submitted that if it were proved that the burdens of the lessee would not be substantially increased then the grantee of a portion of the leased premises, in the absence of express agreement, should be entitled to the royalties on the oil actually produced from his land. On the other hand, if it were proved that the burdens of the lessee would be substantially increased by so apportioning the royalties, then such lessee cannot be compelled to so apportion them. An oil and gas lease in so far as it creates a profit in the land is a conveyance, but it is a contract in so far as the provisions for the payment of royalties are concerned. A party to a contract is often compelled to do things he has not strictly agreed to do if not burdensome.

For example, he may have to pay the half of a sum of money to each of two men when he agreed to pay over the entire sum to one man. It has long been settled law that if the reversion is severed the tenant must pay the rent to the owners of the parts in proportion to the rental value of such parts.⁵

In the early cases on the apportionment of the rent on severance of the reversion we find the argument made by the lessee that such apportionment would compel him to do something he had not contracted to do, that is, pay the rent in parts to two or more when he had contracted to pay it all to one party and that this would be more burdensome to him. This argument did not prevail and the rent was apportioned though this was in fact permitting the assignment of a contract⁶ and contracts were not assignable at that time. If a case had ever arisen where the lessee could have proved that if he were compelled to make such apportionment of the rent he would have to do something really burdensome that he had not contracted to do, it is quite probable the apportionment would not have been allowed. Likewise the rule should not be applied by analogy to oil and gas leases if it would substantially increase the burdens of the lessee. The writer confesses a lack of knowledge of the practical side of oil production and the statements of the eminent counsel as to the immensely increased cost of apportioning the royalties came as a surprise. The writer was under the impression that oil operators always kept careful record of the production of each well. If so, under the ordinary lease where the lessee may deliver the royalty oil in the pipe line to the credit of the lessor or his assignees, the apportionment of oil to a partial assignee of the premises on the basis of the production of his portion would certainly be little more burdensome than paying a part of the rent due on a lease to a partial assignee of the reversion. It would be easy to determine the production of each tract and to credit each owner with his share of the royalties. But the argument of eminent counsel would certainly apply if the lessee by the terms of the lease were compelled to furnish tanks and would have to deliver the royalty oil to the assignees of the lessor in separate tanks. But it is hard to see why, if the production of each well were known, the royalty oil should not be delivered in one tank, the assignees being tenants in common of the contents. In any case where it is found that a substantial detriment would be

⁵See cases cited in 25 W. VA. L. Q. 233, note 17.

⁶See *Ards v. Watkins*, Cro. Eliz. 637, 651 (1598, 1599).

suffered by the lessee if apportionment were required on the basis of the production of each parcel of the premises no such apportionment should be allowed without the consent of the lessee, for the simple reason he should not be compelled to perform substantially more than he has contracted to perform.

As to the matter of development it is clear the lessee can be compelled to develop the premises leased with reasonable diligence and his duty in this respect cannot be changed without his consent. It was suggested in the previous note that in *Campbell v. Lynch* the plaintiff's tract of land was so large that he possibly would not be without remedy against the lessee if there was failure to develop his portion. The lessee was bound to develop the whole tract reasonably and if he developed five tracts and did not drill any wells on the sixth tract (which contained over eighty acres) certainly the owner of such tract should have relief in equity because this would be a breach of the implied covenant to develop the entire tract diligently. Courts which have established an exception to the settled rule of law that a court of equity will not enter a decree in aid of a forfeiture would not be likely to deny relief in such a case at suit of the assignee of a portion of the leased premises because of an old and technical rule of law as to the enforcement of rights of entry for condition broken.

—J. W. S.

SPONTANEOUS EXCLAMATIONS *v.* RES GESTAE.—Perhaps no phrase in the whole field of evidence is the subject of so much misuse as the mystic shibboleth "*res gestae.*" For many years the phrase has been quite generally used as a convenient "catch-all" to cover, for purposes of admissibility, many hearsay statements which the courts, by a sort of judicial intuition, have felt should be admitted, but, at the same time, have failed to assign as a reason for their admission any more satisfactory explanation than the time-worn, empty assertion that they are "a part of the *res gestae.*"¹ The phrase seems to be a relic of the days (not long since) when there was a general belief in so-called solving words and juristic conceptions—a belief, which, as a matter of legal history, generally obtains in the early periods of legal growth. In the development of the law, however, changes in conditions require changes in legal rules and conceptions, and, hence the modern tendency to break

¹See James Bradley Thayer, 15 AM. L. REV. 1, 5 *et seq.*