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APPORTIONMENT OF ROYALTIES ON PARTITION OF PREMISES SUBJECT TO AN OIL AND GAS LEASE.—In the recent case of *Campbell* v. *Lynch*,[1] it appeared that certain land, on which there was an oil and gas lease under which there had been no development, descended to the widow and six children of the deceased owner. By judicial proceedings the land was partitioned among the widow and children, the tracts being of unequal size. The partition decree did not mention the oil and gas lease. Later the lessee drilled wells on all of the tracts into which the leasehold had been partitioned except one, and produced oil in paying quantities. The complainants as owners of the undeveloped tract filed a bill in equity claiming a share of the royalties. The lower court dismissed the bill but on appeal the Supreme Court of Appeals reversed the decree, holding the royalties were not included in the partition and should be apportioned among the parties regardless as to where the oil was produced. A dissenting opinion was filed by Ritz, J., in which Miller, J., concurred.

[1] 94 S. E. 739 (W. Va. 1918).

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The decision of the majority of the court is based on the theory that the right to oil royalties is a distinct entity, "not legally inherent in or annexed to the title to the land, but capable of being held and enjoyed by the owner of the title"; that the right to such royalties is rent like the rent reserved in an ordinary lease of land; therefore such right was not included in the partition. The court states that if the owner of land subject to an oil and gas lease conveys a part of the land to another there is no more than a presumption that a right to any of the royalties will pass to the grantee and that this presumption rests merely on "equity and justice" and may be overcome by showing it is inequitable to make such presumption. It is respectfully submitted that both the reasoning and the conclusion of the majority opinion are unsound and that it does not lay down a definite rule of law upon which the public can rely but necessitates the application of the yard-stick of "equity and justice" by the court to each individual case as it arises. A definite rule of law as suggested in the dissenting opinion is preferable.

Admitting for the sake of argument that a right to an oil royalty is to be regarded as rent such as accrues under a lease for use and occupation of land (though this appears to be unsound[2]) the conclusions of the majority opinion seem contrary to principles of the law of landlord and tenant which have been unquestioned for centuries. If the right to the oil royalty is rent, it must be rent service, and therefore by settled law[3] incident to the reversion.[4] True, it may be conveyed separately from the rest of the reversion but so may a cubic yard of rock or soil. Hence the idea that a right to rent is an entity, a thing distinct and separate from the reversion, is unquestionably erroneous. This idea was apparently taken from the Pennsylvania case of *Wetengel* v. *Gormley*.[5] The error in the reasoning by which the Pennsylvania court in *Wetengel* v. *Gormley* reached its remarkable conclusion will be pointed out below. Since rent service is incident to the reversion, it passes with the conveyance of the reversion unless expressly excepted.[6] If the reversion is severed with out mention of the rent then the rent

[2]See note 10.

[3]TIFFANY, LANDLORD AND TENANT, 1011; UNDERHILL, LANDLORD AND TENANT, 506.

[4]UNDERHILL, LANDLORD AND TENANT, 491-496; TIFFANY, LANDLORD AND TENANT, 1100-1103; TAYLOR, LANDLORD AND TENANT, 8 ed., § 154.

[5]160 Pa. St. 559, 28 Atl. 934 (1894).

[6]See collection of cases in 24 CYC. 1172; see also the text citations in note 3, *supra*. In West Virginia the point is covered by statute and can hardly be said to be a presumption. See W. VA. CODE, c. 93, § 8.

is apportioned according to the rental value of the parts into which the reversion is divided.[7] As has been pointed out in a previous issue of the LAW QUARTERLY,[8] this rule as to apportionment of rent on severance of the reversion is inapplicable to oil and gas royalties. It is manifestly impossible to determine the rental value of an undeveloped tract of land for the purpose of oil and gas production. The difficulty lies in the fact that oil and gas royalties are not paid for the use and occupation of the land as rent is under an ordinary lease. Instead they are the price paid for the severing and carrying away of a part of the substance of the land—for the doing of a thing which would be waste if done by a tenant who has the use and occupation of the land. It is difficult to see how there can be any distinction between an oil and gas royalty and the royalty paid under the ordinary coal lease, particularly in West Virginia, where it is settled law that the owner of the land owns the oil and gas in place under the land just as he owns the coal under the land.[9] Both oil and gas leases and coal leases are not properly leases but are profits in the land. They do not have the fundamental characteristics of leases and do have the fundamental characteristics of profits.[10]

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[7]Roberts *v.* Snell, 1 Man. & G. 577 (1840); Hodkins *v.* Robson, 1 Ventris, 277 (1875) *(dictum);* Babcock *v.* Scoville, 56 Ill. 461 (1870) *(dictum);* Leiter *v.* Pike, 127 Ill. 287, 20 N. E. 23 (1889); Daniels *v.* Richardson, 22 Pick. 565 (1839); Biddle *v.* Hussman, 23 Mo. 597 (1856); Gribbie *v.* Toms, 70 N. J. L. 522, 57 Atl. 144 (1904), aff'd 71 N. J. L. 338, 59 Atl. 1117 (1905); Van Rensselaer *v.* Jones, 2 Barb. (N. Y.) 643 (1848); Van Rensselaer *v.* Gallup, 5 Denio (N. Y.) 454 (1848) *(dictum);* Reed *v.* Ward, 22 Pa. St. 144 (1853); Pingrey *v.* Watkins, 15 Vt. 478 (1843). See also TIFFANY, LANDLORD AND TENANT, 1064; TAYLOR, LANDLORD AND TENANT, § 385. In these text citations the statement is made that if the value of the parts is not shown the apportionment will be according to area. Of the two cases cited Linton *v.* Hart, 25 Pa. St. 193 (1855) does not suggest the point and the other, Van Rensselaer *v.* Jones, *supra,* says that if the question of value is not raised by the parties then it will be presumed the value per acre of the parcels is the same. Hence if the parties do not see fit to raise the question of value it is waived.

[8]See 25 W. VA. L. QUART. 79.

[9]Williamson *v.* Jones, 39 W. Va. 231, 19 S. E. 436 (1894); Wilson *v.* Youst, 43 W. Va. 826, 28 S. E. 781 (1897); Preston *v.* White, 57 W. Va. 278, 50 S. E. 236 (1905); Coffindaffer *v.* Hope Natural Gas Co., 74 W. Va. 107, 81 S. E. 966 (1914); South Penn Oil Co. *v.* Haught, 71 W. Va. 720, 78 S. E. 759 (1913).

[10]That oil and gas royalties are not rent but are payment for a part of the substance of the land seems almost axiomatic. The cases of actions for waste by remaindermen against lift tenants are in point. There is no question that the life tenant has a right to lease the land and collect the rent but he cannot make an oil and gas lease. Keon *v.* Bartlett, 41 W. Va. 599, 23 S. E. 664 (1895); Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411 (1897); Wilson *v.* Youst, 43 W. Va. 826, 28 S. E. 78 (1897). Likewise a guardian has no power to lease the ward's land for oil and gas production but he may sell under order of the court. Ammons *v.* Ammons, 50 W. Va. 390, 40 S. E. 490 (1901). It is submitted the decision of the majority of

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The weight of authority is *contra* to the majority opinion.[11] *Wetengel* v. *Gormley* which was followed and approved by the court seems to be the only case which supports the decision. As to *Wetengel* v. *Gormley* the court says:

> "No court has been able to lay its finger on any flaw in the reasoning of the opinion in *Wetengel* v. *Gormley,* 160 Pa. St. 559, nor to demonstrate inapplicability of the legal principles under which that court disposed of it."

Let us see whether there are any flaws in the reasoning. The case was before the Supreme Court of Pennsylvania twice.[12] The same justices decided both cases and the same justice wrote both opinions, so that we are justified in resorting to the second opinion for an explanation of the somewhat vague language of the first opinion. The facts were that a father who owned about six hundred acres of land on which there was an oil and gas lease for a term of fifteen years, died leaving the land by devise in nearly equal parts to his three sons. The will was silent as to the oil and gas lease. Producing wells were then drilled on one of the three tracts and the owners of the other two parcels brought suit claiming a share of the royalties. In the first opinion it was held that this oil and gas lease was in the nature of a lease for general tillage and not like a coal lease. The court after using some vague expressions indicating an opinion that rent under a lease for general tillage is an entirety, purported to decide the case *on principle* and concluded the complainants had a right to a proportionate share of the royalties. The second opinion explains clearly the basis of the decision. In it the court holds that the *right to royalties is personal property and therefore did not pass under the devise of the land but passed as intestate property.* The court then held the royalties must be apportioned without explaining why the right to these royalties was not administered as intestate property and distributed to the next of kin. The reasoning of the Pennsylvania

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the court that oil royalties are rent is inconsistent with these cases. Many more situations might be suggested tending to show that such royalties are not rent.

[11]Osborn *v.* Arkansas Territorial Oil & Gas Co. 103 Ark. 175, 146 S. W. 122 (1912); Fairbanks *v.* Warrum, 56 Ind. App. 337, 104 N. E. 983 (1914); Northwestern Ohio Natural Gas Co. *v.* Ullery, 68 O. St. 259, 67 N. E. 494 (1903). Lynch *v.* Davis, 79 W. Va. 437, 92 S. E. 427 (1917) is distinguishable though it contains *dicta* in accord with the principal case. Higgins *v.* California Petroleum Co. 109 Cal. 304, 41 Pac. 1087 (1895), is also clearly distinguishable. See 25 W. VA. L. QUART. 79.

[12]160 Pa. St. 559, 28 Atl. 934 (1894) and 184 Pa. St. 354, 39 Atl. 57 (1898).

court is clearly unsound. The opinion states that as the lease was for fifteen years it was personal property as to the lessee, and that the lessor's right to royalties was a mere chose in action and therefore personal property such as under the Pennsylvania statute[13] would pass to the deceased's personal representatives. This seems a rather remarkable conclusion. No authority was cited in either opinion. It is not strange that the Supreme Court of Ohio should have said:[14]

> "We have several times had occasion to carefully examine and consider that case [*Wetengel* v. *Gormley,* 160 Pa. St. 599] and it has always failed to receive the approval of our judgment, and upon reconsideration here it again fails to convince us of its soundness. And the reconsideration of the same principles in the same case in *Wetengel* v. *Gormley,* 184 Pa. St. 354, 39 Atl. 57, fails to strengthen the original case."

Probably everyone will admit that in partitioning land subject to an oil and gas lease the royalties ought to be reserved from partition or otherwise expressly provided for. The same is true in a case where there is a conveyance or devise of land which is subject to an oil and gas lease. But sometimes the severance is made without making any provisions as to the lease. In the principal case it probably was as much due to the neglect of the complainant as of the defendants. Because the parties have placed themselves into such a situation, should a court overturn long-settled rules of law in order to relieve them? The complainants were probably not without remedy. They had such a large tract of land (82 acres) that they should have been able by suit to compel the lessee to develop this portion or partially forfeit the lease. Hence the equity and justice in this particular case is not so clearly with the complainants. It is true that if the tract were small a hard case might arise as to one or more of the owners of the reversion, but hard cases will occasionally arise under any general rule of law. One can easily imagine many situations where the apparent equity would be on the other side and in such case presumably the court would say the "presumption" above mentioned that the royalty

[13]The writer has not examined the statutes of Pennsylvania which were in force in 1894 and the years preceding. A careful search of the statutes now in force in that state has failed to reveal any justification for such a statement in the statutes now in force. It is doubtful whether the court had any particular statute in mind on which its decision was based.

[14]Northwestern Ohio Natural Gas Co. *v.* Ullery, *supra.*

passed on severance of the reversion would not be overthrown. This rule as to a "presumption" that the royalty passes subject to be overcome by the "equity and justice" gives no definite rule of law by which lawyers and the public generally may be guided. Apparently no one could be reasonably sure of his rights in a particular case until suit was brought and the case was decided by the court. The merit of the rule suggested by the dissenting opinion is that it is a definite rule of law which will do substantial justice in a great majority of the cases and upon which lawyers and the public generally can rely. It is submitted that the doctrine of the dissenting opinion is in accord with legal principles, is in accord with the weight of authority and is preferable from the standpoint of general justice and welfare.

—J. W. S.

NO-TERM OIL AND GAS LEASES AND THE RULE AGAINST PERPETUITIES.—In the recent case of *Johnson* v. *Armstrong*[1] the Supreme Court of Appeals has again decided that a no-term oil and gas lease does not violate the rule against perpetuities. The only cases cited by the court in support of its decision on this point in which any question as to the rule against perpetuities was raised are *Thaw* v. *Gaffney*,[2] and *Wilson* v. *Reserve Gas Co.*[3] In *Thaw* v. *Gaffney* it was held that an option in a lessee to renew the lease perpetually is not void as being within the rule against perpetuities. This is in accord with the great weight of authority and has been termed an exception to the rule against perpetuities.[4] A no-term oil and gas lease such as involved in *Wilson* v. *Reserve Gas Co.* and *Johnson* v. *Armstrong* gives to the lessee what is in effect an option to renew perpetually, if we disregard for the present the question, discussed hereafter, as to whether there is an implied condition that the lessee explore for oil and gas. In so far as this right to renew the lease perpetually is concerned the above cases are correct. However, as was pointed out in a recent article in this periodical,[5] a no-term oil and gas lease violates the rule against perpetuities for another reason which it seems has never been

[1] 94 S. E. 753 (W. Va. 1918).
[2] 75 W. Va. 229, 83 S. E. 983 (1914).
[3] 78 W. Va. 329, 88 S. E. 1075 (1916).
[4] See GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§230, 230a, 230aa. See also cases collected in 25 W. VA. L. QUART. 36, note 24.
[5] "Oil and Gas Leases and the Rule Against Perpetuities," 25 W. VA. L. QUART. 36, 37.