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Kent S. Whitford

MINERAL LEASES BY TENANTS IN COMMON

*By Kent S. Whitford of the Denver Bar**

THIS paper deals with certain phases of the above subject as related principally to the law of oil and gas, although some cases are presented relating to coal and the metalliferous minerals.

Ownership of land by tenancy in common has in legal history been the source of much litigation between co-tenants who, being human, could not agree among themselves or with others as to the method of managing their estates or as to their relative rights, duties and liabilities as such co-tenants, and while the general principles of co-tenancy have by this time been well settled, their application is still, of course, the source of litigation. When the co-tenant found himself the co-owner of valuable mineral or oil land, and saw the golden apples of wealth dangle tantalizingly from the tree, and others having colorable adverse claims, or contractual relations, also viewed the fruit with appraising eye, litigation was inevitable; and since in this country our oil and mineral law is mainly the growth of half a century, under stress of large fortunes at stake, and with new applications to be made of legal principles, or new principles to be established, it is not surprising that we find Court decisions not in harmony, and text book statements lacking in dependability.

As a starting point and principal subject of this discussion we state interrogatively one of the perplexing questions arising in oil and gas law, viz.: what are the rights of an oil and gas lessee who leases from a number of tenants in common of oil and gas lands where there are other tenants in common who have not joined in the lease or in any way ratified it? What are the rights of the lessee in respect of drilling and developing the property and what are the rights of the non-consenting tenants in common?

As a practical proposition, this question arises principally in two situations; first where the owners of the land are heirs at law or devisees of a decedent; and second, where a person has leased his land for oil and gas development and, desiring

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to realize some cash on the venture, has proceeded to sell off some of his reserved royalty under the lease. This is usually done by means of what is called a mineral deed, which commonly is the absolute conveyance by fee simple title, of an undivided interest in the mineral estate, subject to an existing lease, including an undivided interest in the lessor's rights under the lease, whereby the grantee obtains not only a royalty right under the lease but an undivided interest in the reversion in fee, or for a term of years. The lease becomes forfeited, expires or is surrendered, and a second lessee desires to lease the lands. The second lessee is therefore confronted with the necessity of obtaining a lease from the original land owner and all the holders of the mineral deeds. The average lawyer may occasionally run into a situation of this kind either on behalf of a client who happens to be engaged in oil and gas or other mineral development, or a land owner owning lands having prospective value for mineral, or one who speculates in oil and gas royalties or buys and sells oil and gas leases for profit.

The fundamental doctrine of the common law is that where persons own lands as tenants in common, each tenant has the right to the use of the land without interference by his cotenants so long as he does not interfere with their like use and enjoyment of the land. This would seem to be a very simple statement of a very simple proposition of law, and seems to have worked out more or less clearly and satisfactorily so far as agricultural lands are concerned, but when we come to consider the rights of tenants in common in mineral lands we are confronted with some practical difficulties. This peculiarly applies to oil and gas lands. It would seem that an extension of this doctrine as stated would produce as a corollary the principle that each tenant in common could go on the land, drill as many wells for oil and gas as he saw fit, and appropriate all the product which he therein found, so long as he did not interfere with the right of his cotenant likewise to go on the land and drill for oil and gas. This obviously would make it necessary for a tenant in common to drill wells if he would protect his interests against that of his cotenant. It would result in the wasteful expenditure of money in drilling duplicate wells, and the practical result would be that the tenant in common who had the largest bank account and the best

facilities, equipment and organization for drilling, would get the lion's share of the estate. *Allies Oil Co. v. Ayers,* 92 Sou. (La.) 720.

The statement in some decisions seems to be that at common law, one cotenant can not take more than his share, and the statute of 4 and 5 Anne, Chapter 16, Sec. 27, seems to give the right to a cotenant to bring an action for account against a cotenant receiving more than his share, particularly as applied to rents and profits. It seems that by the statute of Westminister, 13 Edward the First, cotenants are made liable to their cotenants for account, although Mr. Lindley in his excellent work on Mines, definitely holds that at common law, tenants in common of the freehold are not liable for account. *Faris v. Montgomery,* 10 Sou. (Ala.) 607, 33 Am. Rep. 146.

We are then brought to the proposition, what happens in case one or more of the cotenants instead of themselves making the development, lease to another the land for development purposes? The cradle of the law of oil and gas is in the state of Pennsylvania, as being the state wherein oil and gas wells were first discovered. There we would naturally expect to find those well reasoned decisions which are the leading cases that are followed everywhere. On account, however, of the early lack of scientific understanding of the people and oil operators as to the exact nature and occurrence and characteristics of oil and gas, this lack of understanding has found its way to the courts and the confusion of fact quite naturally has produced a confusion of law on many of the most important and fundamental questions surrounding the subject of oil and gas, which midnight of confusion has finally melted into a condition of comparative clarity by the more recent decisions.

Oil and gas has always been recognized as a mineral and it is elementary that mineral in the ground is a part and parcel of the soil. Since the development for oil and gas or coal and other mineral involved the capturing of that substance, severing it from the soil and carrying it away, it was held by the early decisions to be a destruction of the estate, in other words an unlawful waste, and hence where one cotenant or his lessee did this, it was held to be an invasion of the rights of the non-consenting cotenants. *Murray v. Haverty,* 70 Ill. 318; *Dangerfield v. Caldwell,* 151 Fed. 554; *Stewart v. Tennant,* 44

S.E. (W. Va.) 223; *Abbey v. Wheeler,* 62 N. E. (N.Y.) 1074.

A lease for oil and gas by one or more cotenants was held to be valid as to his interest, but void as to the interests of the non-consenting cotenants, and a trespass as to their rights. It was held that he who was merely a cotenant could not himself exhaust or destroy the estate to the prejudice of his cotenants, and hence he could not convey that right to another. A number of cases have held that the non-consenting cotenants could enjoin the lessee from proceeding with such operations, *Williamson v. Jones,* 9 S. E. 436, 25 L.R.A. 222, and where he had proceeded with the operations could enjoin future operations. *South Penn. v. Haught,* 78 S.E. (W. Va.) 259. By way of alternative remedy, it has been held that the lessee can be held for damages as an absolute trespasser, and that the measure of damages is the full proportionate share in the mineral extracted equal to the fractional estate of the non-consenting cotenants. *Siegler v. Brenneman,* 86 N.E. (Ill.) 597; *South Penn. v. Haught,* 78 S.E. (W. Va.) 259. In other words the lessee would have to pay the non-consenting cotenants in effect 100% royalty on their interest.

In some of the later decisions in certain jurisdictions, it was recognized that the rule of damages for trespass as above set forth worked a hardship on the lessee in certain instances and was inequitable and unfair, and so the rule of damages was adopted in accordance with the present practice in Colorado in the case of trespass by carrying away ore from mining claims, namely that where the trespasser proceeded innocently and in good faith without knowing that there were outstanding interests of cotenants, the measure of damages is the value of the objecting cotenant's share of mineral in place in the ground. Whereas if the trespass is wilful or wanton, the measure of damages is the value of the objecting cotenant's share after it has been extracted. *Liberty Bell Gold Mining Co. v. Moorhead Mining Co.,* 145 Pac. 686; *L. B. G. M. Co. v. S. U. M. Co.,* 203 Fed. 795; *Bender v. Brooks,* 127 S.W. (Tex.) 171; *Hady City Oil Co. v. Right of Way Oil Co.,* 137 S.W. (Tex.) 171. In other words, in the case of innocent trespass the trespasser may deduct from the value of the mineral mined or the proceeds obtained by the sale of the same, the reasonable cost of the mining, extraction and marketing of the same. Where-

as in the case of a willful trespasser, the cotenant takes his share of the mineral in gross, and the trespasser must pay for all the cost of extraction out of his own pocket. Such is the rule announced by some text books, but we are still confronted with the question, what state of facts marks the dividing line between the innocent and wilful trespasser, and the question remains unanswered, as in one case failure to examine the title was held culpable, *Liberty Bell Gold Mining Co. v. Moorland Mining Co.,* 145 Pac. (Colo.) 686, and in another case it was held not so to be. *Findley v. Warren,* 94 Atl. (Pa.)

Within the last fifteen or twenty years there has been quite a change in the attitude of the courts toward this situation. It has been apparently discovered that the conceptions of common law relative to the rights of cotenants have been somewhat unconsciously polluted by the principles of the Roman civil law on this situation. It is there held that no cotenant can go on any particular spot on the land and drill a well or produce oil, as the interest in the land is an undivided interest and that particular spot belongs just as much to all the cotenants as to the cotenant who wishes to drill. Hence a lease by one cotenant is void as to all the others and confers no right to drill on the land whatever. In other words, the right of one cotenant who wishes not to drill and develop the land is expressly held to be superior to the rights of all the other cotenants who desire to drill the land. *Gulf Refining Co. v. Carroll,* 82 Sou. (La.) 277; *Allies Oil Co. v. Ayers,* 92 Sou. (La.) 720.

The modern decisions seem to evince a tendency to go back and re-examine the common law doctrine of cotenants in all its pristine purity, and they have evolved a new conception of the rights and obligations of cotenants. It is pointed out that the only way in which a mineral estate can be enjoyed is by the extraction of the mineral, and hence cotenants have a right to use and enjoy mineral lands in the way in which they were intended to be used and enjoyed, namely by the extraction of the minerals. Therefore when one tenant goes on and opens a coal mine or drills a well for oil and gas or discloses the apex of a vein of precious metal or a placer bed where mineral may be found, he is not a trespasser as against his cotenants, and the extraction of the mineral is not waste in the sense of an unlawful actionable act. Hence if one cotenant

has the right to develop the mineral content of the land without the consent of his cotenant, he has the right to convey or assign or lease that right of exploration and development to third parties. Such a lease, theoretically at least, is not binding on his other cotenants, but is binding on his own interest and confers upon his lessee the right of development. The mere fact that the lessee goes on the land and apparently takes exclusive possession of it, is not a trespass against the non-consenting cotenants even though the lessee knew that there were other cotenants who had not joined in the lease. *Job v. Potton,* L. R. 20 Eq. 84, 14 Mon. Min. Rep. 329; *Compton v. Peoples Gas Co.,* 89 Pac. (Kan.) 1039, 10 L.R.A.N.S. 787; *New Domain v. McKinney,* 221 S.W. (Ky.) 245; *York v. Warren Oil,* 229 S.W. (Ky.) 114; *Burnham v. Hardy Oil Co.,* 147 S.W. (Tex.) 330; *Prairie Oil & Gas v. Allen,* 2 Fed. 2d (Okla.) 566; *McIntosh v. Ropp,* 82 Atl. (Pa.) 949; *Findlay v. Warren,* 94 Atl. (Pa.) 69. This is true so long as the lessee takes possession, claiming the right of possession only to the extent of the undivided interest which he holds and so long as he openly recognizes the fact that there are outstanding interests which he has not leased. Apparently if the lessee of one or more cotenants has the right of possession, and can operate, the non-consenting cotenants can not enjoin him from operating. There have been decisions where an injunction has been denied. *Lindley on Mines,* 3d Ed. Sec. 790; *Compton v. People Gas Co.,* 89 Pac. (Kan.) 1039, 10 L.R.A.N.S. 787; *Prairie Oil & Gas v. Allen,* 2 Fed. 2d (Okla.) 566.

The courts in commenting on the right of a non-consenting cotenant to object, point out that very frequently the drilling of the land is necessary to prevent the supposed gas and oil deposits from being drained away through the porous subsurface strata by wells on adjoining lands whereby the mineral value of the land may become entirely lost without any redress, and therefore it would be wrong to permit a cotenant who perhaps might own but a small fractional interest, from preventing the necessary and beneficial development of the land by the lessee of the other cotenants. Mr. Lindley points out however that the size of the cotenant's fractional holding is no bar to development by his lessee. *Lindley on Mines,* 3d Ed. Sec. 790. Furthermore it is manifest if there be any right of

injunction at all in the non-consenting cotenant, it must be exercised promptly when the lessee proposes to commence drilling operations, for otherwise the right will be lost by laches. *Williamson v. Jones,* 11 S.E. (W.Va.) 436. It is to be noticed that the rule of laches in mining claims is unusually strict, owing to quick changes in values. As a practical matter injunctions are seldom asked for except possibly in terorem because a party seeing his land about to be developed is usually willing to have it developed, and when the development proves successful the cotenant landowner is anxious indeed to obtain a share of the production, the more lion-like the better. As a matter of fact it must be noticed that the actions for damages, accounting etc. by a non-consenting cotenant, amount in a way to the ratification of the possession of the premises by the lessee of the other cotenants.

The lessee however, by operating without the consent of all the cotenants in common, incurs liability for an action for accounting by the non-consenting cotenants, to the extent of their interest. And by the most modern decisions it seems to be the law, that whether the lessee knew or not that there were outstanding interests, the measure of damages is the value of the non-consenting cotenants' share of the production in place in the ground. The rule for the measurement of this value has resolved itself into two separate conflicting rules. There is one line of cases that holds that the value of the non-consenting cotenant's interest is the proportionate part of the consideration paid by the lessee for the lease, namely, the royalty. *Gerkins v. Ky. Salt Co.,* 39 S. W. (Ky.) 444; *Miller v. Powers,* 184 S. W. (Ky.) 417; *McIntosh v. Ropp,* 82 Atl. (Pa.) 949; *Findlay v. Warren,* 94 Atl. (Pa.) 69; *So. Penn. vs. Haught,* 78 S. E. (W. Va.) 759; (as to past production), *New Domain v. McKinney,* 221 S. W. (Ky.) 245; *York v. Warren Oil,* 229 S. W. (Ky.) 114. Therefore if A and B own Black Acre together and B executes a lease covering said land in consideration of the sum of one dollar and one-eighth royalty on all of the minerals produced, A upon an accounting is entitled to his half of the one-eighth royalty. This doctrine obtains with this proviso, that the royalty paid be a fair royalty for the lease, the non-consenting cotenant being not bound to accept his share of an insufficient consideration. *Mercur v. State Line,*

32 Atl. (Pa.) 1126. However the courts have sometimes recognized that one-eighth royalty is the usual established and prevailing royalty for that character of operations, and have awarded non-consenting cotenants their interest on that basis. On principle this doctrine is open to the objection that the non-consenting cotenant is placed in exactly the same position which he would have occupied had he signed the lease, and no better. In other words the doctrine virtually permits one tenant in common to lease the land and thus in effect force all the other tenants in common into the same lease, whether they will or no.

The other rule seems to be that one already alluded to, namely that the lessee is compelled to pay the non-consenting co-owners their proportionate share of the net profits after deducting the operating expenses. In other words the non-consenting cotenants have the right to their share of the value of the product in the ground. *New Domain v. McKinney,* 221 S.W. (Ky.) 245; *York v. Warren Oil,* 229 S.W. (Ky.) 114; *Burnham v. Hardy,* 147 S.W. (Tex.) 330; *Prairie Oil & Gas v. Allen,* 2 Fed. 2d (Okl.) 566; *Crawford v. Forest Oil,* 57 Atl. (Pa.) 46; *Allies Oil Co. v. Ayers,* 92 Sou. (La.) 720; *Martel v. Jennings,* 38 Sou. (La.) 253; *Johnson v. Kansas Natural Gas Co.,* 135 Pac. (Kan.) 589, Ann. Cas. 1915 B, 549; *Job v. Potton,* L.R. 20 Eq. 84, 14 Mon. Min. Rep. 329; (see reasoning in) *So. Penn. v. Haught,* 78 S.E. (W. Va.) 759. The operator can not charge the non-consenting cotenants for the cost of dry holes or drilling or development which results in a failure, *Burnham v. Hardy Oil Co.,* 147 S.W. (Tex.) 330, but he is permitted to recover the proportionate share of the cost of drilling successful wells and the cost of producing oil therefrom, together with the administrative, bookkeeping and other incidental and overhead expenses connected therewith. *New Domain v. McKinney,* 221 S. W. (Ky.) 245.

There are no Colorado cases on this phase of the doctrine as applied to oil and gas. But respecting solid minerals, decisions are in harmony with the views last expressed. The occupation of the premises by one cotenant is held to be an occupation of the premises by all. *Murley v. Ennis,* 2 Colo. 306; *Laesch v. Morton,* 87 Pac. 1081. Cotenants must not take advantage of each other and are liable to each other for the ex-

clusive use of the property. *Canfield v. Jeannotte,* 72 Pac. 1062; *Morton v. Laesch,* 125 Pac. 498. A lease of the premises by one cotenant extends only to the interest of that cotenant, and a cotenant can not bind the interest of his cotenants by contract without their consent. *Rico v. Musgrove,* 23 Pac. 458; *Charles v. Eshleman,* 5 Colo. 107; *Omaha v. Tabor,* 21 Pac. 925; *Stickley v. Mulrooney,* 87 Pac. 547. A cotenant or his lessee can not charge to or recover from the other cotenants the cost of improvements placed on mining property unless they be necessary for the preservation of the property under the peculiar circumstances of the case, and also unless they tend to increase the value of the property. *Rico v. Musgrave,* 23 Pac. 458; *Wahl v. Larsen,* 201 Pac. 48. However if a non-consenting cotenant desires to participate in the profits of the mining operations, the operator can charge his account with the reasonable development costs and recover the same out of production. *Stickley v. Mulrooney,* 87 Pac. 547; *Wolfe v. Childs* (somewhat contra) 94 Pac. 292. A cotenant is permitted to sell his interest, and his vendee becomes a cotenant with the other cotenants. *Wanamaker v. Reno,* 244 Pac. 602.

The principles above announced seem to be well settled as applied to the metalliferous minerals. It has been held that any tenant in common can work a mine to exhaustion and that the same does not constitute waste; *McCord v. Oakland,* 27 Pac. (Cal.) 863, 49 Ann. Rep. 686; *Lindley on Mines,* 3d Ed. 789. That a cotenant or his lessee has a right to possess and enjoy the property subject to the equal right of all other cotenants; *Lindley on Mines,* 3d Ed. 789A. That a non-consenting cotenant is not entitled to an accounting, unless this be recognized by statute or by the adoption of the statute 4 and 5 Anne into the common law of any state. *Faris v. Montgomery,* 10 Sou. (Ala.) 607, 33 Am. Rep. 146.

It seems to be the law that where cotenants lease to separate lessees these lessees become tenants in common as to each other in the absence of any agreement between them. *New Domain v. McKinney,* 221 S.W. (Ky.) 245. Either has the right to go on the property and drill, mine or develop the same subject to the liability to account to his cotenant for his operations on the basis of net profits as above indicated.

From the above it would seem that cotenants could act

independently of each other in handling the property, but the above seems to be about the only exception to the rule that all must join in whatever is done.

When all of the cotenants have joined in executing a lease on mineral lands, the owner of a 2/3 interest or any other interest is powerless to release the lessee from the performance of any of the obligations of the lease or to waive, vary or modify the terms thereof, without the consent of all of the cotenants. *Wally v. Jones,* 119 Atl. 75; *McGary v. Campbell,* 245 S. W. (Tex.) 106. Likewise where the lease is held by tenancy in common between two or more lessees, neither lessee can surrender the same to the lessor without the consent of the other. *Thornton, Oil & Gas,* 4th Ed. p. 794.

We now come to the question as to whether or not it is necessary for all cotenants to join in an action to effect a forfeiture of a lease. As applied to the law of cotenancy, the general rule seems to be as announced in a Kentucky case:

> "The general rule with regard to forfeiture of leases, where the lessors are tenants in common, is that all the tenants in common must concur and unite in an action to enforce the forfeiture on account of the breach of entire and indivisible covenants. Such is the implied covenant in oil leases like the one before us to develop the lease on notice."
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> *Union Oil & Gas Co. v. Gillem,* 279 S. W. (Ky.) 626.
> *Jameson v. Chanslor,* 167 Pac. (Cal.) 369.
> *Cochran v. Gulf Refining Co.,* 72 Sou. (La.) 718.

This would certainly seem to be the law with regard to forfeiture or action for cancellation for the breach of either an implied or an express covenant to mine or drill wells or develop the property as a whole. It would at least be true where all of the tenants in common joined as lessors in one lease. Whether tenants in common who have leased their interest in the land by separate instruments could, in proper case, forfeit his instrument for a breach of the terms thereof, is open to question. There are several interesting exceptions to the general rule. One seems to be that where the lease itself provides expressly that a breach of any certain obligation of the lease shall operate as a forfeiture, it has been held that this amounts to a covenant between the tenants in common who subscribed the lease, that the lease may be forfeited for a breach of the covenant and therefore that less than all of the tenants in common may enforce that right so far as it concerns their

undivided interest. *Green v. Standard Oil Co.,* 84 Sou. (La.) 211. In this particular case, 14 of 15 lessors sought to forfeit the lease and the other lessor defended and resisted the forfeiture. This was a Louisiana case arising under the civil law, and it seems there is a Louisiana statute providing for the several enforcement of joint obligations. But even in this jurisdiction it has been held that cotenants suing to cancel a lease must make the non-joining cotenants parties defendant. *North Central v. Gulf Ref. Co.,* 105 Sou. (La.) 411. Such would seem in line with the general principles of equity. It also seems that covenants in a lease to pay rentals and royalties are not entire covenants, but are severable covenants which can be enforced by appropriate action by any of the cotenants entitled to recover a portion thereof. Thus a cotenant may either in a proper case sue to recover his proportion of a rental or royalty, or may cancel the lease as to his undivided interest for failure to pay the same. It also seems that where a lease by its terms provides that the lessee may by his own act or default automatically terminate the lease, that the lessee having defaulted, one or more of the cotenant lessors may institute an action to cancel the terminated lease of record. This is not considered a forfeiture in the strict sense of the word, as the lease is held automatically terminated. *Empire Gas v. Saunders,* 22 Fed. 2d (Tex.) 733. Apparently this would also be so after the lease had expired.

The greatest danger that confronts a lessee who undertakes to lease mineral lands from less than all of the cotenants, is the danger that the lands may be partitioned. Manifestly mineral lands are rarely susceptible of equitable division in parcels. Therefore in most cases the court would order the land sold and it is manifest that a sale of the property would serve to extinguish a lease made by only a portion of the cotenants. In making such a partition it is probable that the court would appraise the value of the oil lease and pay this to the lessee out of the value of his lessor's share. From a practical standpoint this probably would be poor remuneration. In one case a lessee protected himself by himself buying in the land at the appraised value, on consent of Court. *Barnes v. Keyes,* 127 Pac. (Okla.) 261, 45 L.R.A.N.S. 178, 35 Ann. Cas. 1915 A, 515.