Volume 46 | Issue 1 Article 6

December 1939

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West Virginia Law Quarterly
and The Bar

Published by the Faculty of the College of Law of West Virginia University, and issued in December, February, April and June of each academic year. Official publication of The West Virginia Bar Association.

Subscription price to individuals, not members of The West Virginia Bar Association, $2.00 per year. To those who are members of the Association the price is $1.00 per year and is included in their annual dues. Single copies, 50 cents.

EQUITABLE APPORTIONMENT OF OIL AND GAS ROYALTIES

"It is generally more important that the rule of law should be settled than that it should be theoretically correct."[1] As legal theory gradually crystallizes, reason comes to play less significant a part in the judicial process than strict adherence to established precedents.[2] The supreme court of appeals has had ample opportunity recently to demonstrate the essential truth of these observations, even when aware of weighty arguments favoring an opposite result.[3] Disposing finally of a vexing issue that yielded sharp con-

[1] *Per* Lord Cottenham, L. C., in Lozon v. Pryse, 4 Myl. & C. 600, 617, 41 Eng. Rep. R. 231 (1840). *Cf.* Bailhache, J., in Belfast Ropewalk Co. v. Bushell, [1918] 1 K. B. 210, 213: "Unfortunately or fortunately, I am not sure which, our law is not a science."

[2] See Note (1908) 24 L. Q. REV. 116, 117: "But we in England have long ago committed ourselves to the principle that, within limits to be settled by the House of Lords and the Court of Appeal, uncertainty in the law is a worse evil than unreasonableness, and judges of first instance must continue 'falsely true' to the errors — if they are such — of their predecessors."

[3] Walker v. W. Va. Gas Corp., 3 S. E. (2d) 55 (W. Va. 1939).

flict in the past,[4] the president of the court set forth its policy in clear language:[5]

> "We are not persuaded that the controversy is one that should be reopened and thus bring about a feeling of uncertainty on this very important feature of the law relating to oil and gas. The question involved is one that many years ago engaged the talents of able lawyers and judges . . . .; their views were widely divergent, as ours might be did we feel at liberty to reopen the question."

The *ratio decidendi* of the West Virginia court simply reflects another aspect of the same fundamental policy, — judicial preference for settled doctrine during the period of "the maturity of law."[6] The prior cases, so it is said, had created "a rule of property, with reference to which contracts had been made, and rights had accrued and become vested."[7] Bearing in mind hardship involved through "the retrospective effect of judge-made law",[8] the court wisely refused to jeopardize legal incidents annexed to countless oil and gas leases now in effect.[9] In other words, once a phase of mineral ownership has become firmly entrenched in general commercial practice,[10] the elaborate framework of legal theory will not

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[4] Within a period of four years, there were four three-to-two decisions, the last three of which were contradictory in principle to the first and yet failed to overrule it. Lengthy dissents occurred in three of the four cases. Discussion appeared in Notes (1918) 25 W. VA. L. Q. 79; *id.* at 231; *id.* at 337; (1919) 26 *id.* at 63.

[5] Walker v. W. Va. Gas Corp., 3 S. E. (2d) 55, 57 (W. Va. 1939). *Cf.* Rock Spring Distilling Co. v. Gaines & Co., 246 U. S. 312, 320, 38 S. Ct. 327, 62 L. Ed. 738 (1918), where McKenna, J., quotes the dictum of Circuit Judge Sanborn, in Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 35, 39 (C. C. A. 8th, 1910): "Uniformity and certainty in rules of property are often more important and desirable than technical correctness."

[6] See POUND, OUTLINES OF LECTURES ON JURISPRUDENCE (4th ed. 1928) 24.

[7] Walker v. W. Va. Gas Corp., 3 S. E. (2d) 55, 57 (W. Va. 1939). So, too, Wisconsin Power & Light Co. v. Beloit, 215 Wis. 439, 444-445, 254 N. W. 119 (1934), *per* Fowler, J.: "The decision of the case lays down a rule of property that has stood as the law of this state for over twenty years. In reliance upon the law as there declared, vast investments have doubtless been made throughout the state in street-lighting equipment. Under the principle of *stare decisis*, a rule of law in the nature of a rule of property once established and acquiesced in without change by the legislature should be adhered to."

[8] CARDOZO, NATURE OF THE JUDICIAL PROCESS (1922) 146.

[9] *Cf.* the language of Hatcher, J., in Simmers v. Star Coal & Coke Co., 113 W. Va. 309, 313, 167 S. E. 737 (1933): "Therefore, we must follow the *Griffin* decision not only because it is logical, but also because it has become a rule of property in this state. . . . The fact that there was a dissent does not affect it as such a rule."

[10] *Per* Lord Westbury, L. C., in Ralston v. Hamilton, 4 Macq. 397, 405 (1862): "It must be remembered that the rules which govern the transmission of property are the creatures of positive law, and that when once established and recognized, their justice or injustice in the abstract is of less importance to

be disturbed by later common law decision.[11] Thus, equitable apportionment of oil and gas royalties, where leased land is afterwards subdivided and then developed, has been banished *explicitly* from West Virginia jurisprudence.[12]

In order to appreciate fully the importance of the present holding, it would be well to explain not only the narrow problem before the court but, indeed, the whole issue of equitable apportionment. The ordinary case grows out of the execution of an oil and gas lease, in the usual form, by the owner of a fairly extensive tract. For some time, delay rentals are regularly paid by the operator and development postponed, awaiting favorable conditions. Meantime, through death or sale, the lessor's property passes to others and is subdivided, subject of course to the outstanding lease. Each new subdivision owner then receives his proportionate share of the accruing delay rentals, since the lease binds every part of the original tract. Eventually, a successful well is drilled and production begun; since the development is usually located wholly within one of the subdivisions, its owner naturally claims the entire amount of the oil or gas royalties, or gas well rentals. On the other hand, the remaining subdivision owners assert there should be fair division of these revenues, by reason of the fact that the producer will probably drain all the land leased. Moreover, these latter are precluded from prospecting on their own initiative, for the lease constitutes a burden upon the whole acreage. The difficulty is that the conveyance by which the lessor's tract was divided has omitted any reference to the minerals. With such a seeming deadlock between the respective contentions of the parties, solution of the legal puzzle has to be based perforce on considerations of policy that outweigh arguments of logic.

That is not to say that occasionally the equities will not clearly favor one position or the other. For example, in an Oklahoma

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the community than that the rules themselves shall be constant and invariable.''

[11] ''Such interpretation, even though originally erroneous, should not be disturbed for the very cogent reason that in such situations the social interest in the security of transactions outweighs the conflicting individual and social interest in the just decision of particular cases.'' Hardman, *A Problem in Interpretation* (1936) 42 W. VA. L. Q. 110, 129-130. Dean Hardman's observation was prompted by the quotation from Judge Hatcher's opinion, cited *supra* n. 9.

[12] Until now, Campbell v. Lynch, 81 W. Va. 374, 94 S. E. 739 (1917), — favoring equitable apportionment, — had never been definitely rejected in specific language. There was always a chance, albeit a slim one, that Campbell v. Lynch might someday be followed, at least on its precise facts.

case,[13] the lessee apparently decided to avert controversy as regards two later subdivision owners. Accordingly, this operator undertook to drill a well exactly on the line separating the two lots, so that equitable apportionment would necessarily be inevitable; owing to a survey error, the producing well proved to be located four feet over on the north side of the true boundary. Granted the lessee was under no duty to drill an offset well, it is obvious that the mistake in following the survey created no liability: the well can be located wherever development policy determines its desirability. Without apportionment, the owner of the south lot would be remediless, despite almost certain drainage of his land. The other side of the picture was described in a Texas dictum:[14]

> "It was stated that the . . . . Company has one lease covering 1,000,000 acres of land from the same owner. . . . Suppose the owner should sell 75 acres in one corner to a party . . . . who counts confidently on the one-eighth royalty attaching to that 75-acre tract. He induces the lessee to develop his land, and a gusher is forthcoming. Under the rule [of equitable apportionment], the man . . . . would be entitled to only seventy-five one millionths of the one-eighth royalty. . . . A party owning another 75 acres 75 miles distant would get as much from the oil. . . . And yet this man without the gusher might not have a single drop of oil under his land, which is 75 miles distant from the gusher."[15]

Any hard and fast rule, granting absolutely or withholding completely equitable apportionment in each and every instance, will no doubt prove to be abounding in incongruities of the types illustrated.

Before attempting an analysis of the sharp divergence in the authorities, it is necessary to exclude extraneous matters that might serve here to confuse or becloud the issue. Certainly, partnership or joint ventures in oil and gas leasing,[16] where several owners

[13] Galt v. Metscher, 103 Okla. 271, 229 Pac. 522 (1924).

[14] Japhet v. McRae, 276 S. W. 669, 671 (Tex. Com. App. 1925).

[15] *Cf.* Ritz, J., in Pittsburgh & W. Va. Gas Co. v. Ankrom, 83 W. Va. 81, 85, 97 S. E. 593 (1918): "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 the lands owned by them, and which could by no stretch of the imagination be taken to have been produced from their lands."

[16] As in Lynch v. Davis, 79 W. Va. 437, 92 S. E. 427 (1917). *Cf.* Rymer v. South Penn Oil Co., 54 W. Va. 530, 46 S. E. 559 (1904). Among the outside authorities are Higgins v. California Petroleum & Asphalt Co., 109 Cal. 304, 41 Pac. 1087 (1895); Shell Petroleum Corp. v. Calcasieu Real Est. & Oil Co., 185 La. 751, 170 So. 785 (1936); and Lusk v. Green, 114 Okla. 113, 245 Pac. 636 (1926).

voluntarily unite in one lease, — the implication being that profits are to be fairly divided, — can scarcely assist in the solution: their sharing has to do with the law of contracts, and only secondarily with oil and gas leases.[17] Similarly, no analogy can be drawn from equitable apportionment of delay rentals, — in point of fact, no other result is possible prior to actual development. By and large, the precise nature of the oil and gas lease[18] taken by the operator should make not the slightest difference, assuming it is understood the lessee really receives some sort of *profit a prendre*.[19] A more involved consideration is the character of oil and gas title sanctioned in the particular jurisdiction, (be it absolute ownership,[20] qualified ownership[21] or the no-ownership theory[22]). One needs merely to keep in mind the factual possibility of drainage from additional subdivision lots, along with the legal doctrine that the lease binds not only the producing lot but every other subdivision of the original tract. There is no essential injustice in omitting all such prolonged discussion as to whether fugacious minerals are even susceptible of ownership.

One might seek in lawyer-like fashion to distinguish the cases on the basis of the conveyancing method utilized in dividing the original tract. Presumably, where the land has been sold, either by voluntary deed or by bankruptcy sale,[23] the *bona fide* purchaser

[17] In the Walker case, 3 S. E. (2d) 55, 57 (W. Va. 1939), the court said: "We think the case of Lynch v. Davis, *supra*, may be distinguished from the other cases cited, because in that case the court considered a lease executed by the litigants, and the question involved grew out of the contract relation created thereby."

[18] Pennsylvania courts invented a differentiation between leases creating corporeal interests and those which convey simply incorporeal rights. *Cf.* Barnsdall v. Bradford Gas Co., 225 Pa. St. 338, 74 Atl. 207 (1909), with the prior decision in Kelly v. Keys, 213 Pa. St. 295, 62 Atl. 911 (1906).

[19] Simonton, *Nature of the Interest of the Grantee Under an Oil and Gas Lease* (1918) 25 W. VA. L. Q. 295.

[20] Williamson v. Jones, 39 W. Va. 231, 10 S. E. 436 (1894); Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781 (1897); and Preston v. Young, 57 W. Va. 278, 50 S. E. 236 (1905). Other absolute ownership decisions include Bodcaw Lumber Co. v. Goode, 160 Ark. 48, 254 S. W. 345 (1923); Moore v. Griffin, 72 Kan. 164, 83 Pac. 395 (1905); Williard v. Federal Surety Co., 91 Mont. 465, 8 P. (2d) 633 (1932); Kelly v. Ohio Oil Co., 57 Ohio St. 317, 49 N. E. 399 (1897); Murray v. Allred, 100 Tenn. 100, 43 S. W. 355 (1897); and Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S. W. 296 (1923).

[21] Westmoreland Gas Co. v. DeWitt, 130 Pa. St. 235, 249, 18 Atl. 724, 725 (1889).

[22] Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729 (1900); Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N. E. 53 (1908); Liles v. Texas Co., 166 La. 293, 117 So. 229 (1928); Rich v. Doneghey, 71 Okla. 204, 117 Pac. 86 (1918).

[23] Just as in Pittsburgh & W. Va. Gas Co. v. Ankrom, 83 W. Va. 81, 97 S. E. 593 (1918).

should be protected. That reasoning obviously fails, if through recordation of the lease the buyer of a lot has in any event constructive notice of the outstanding servitude with all its incidents. At the other extreme, the co-parcener who takes in severalty by partition[24] may insist that his purpart carried with it a share in future royalties. Yet, had the heir so intended, the prudent thing would have been the inclusion in the partition decree, or in the partition deeds, of a definite provision to that effect. Somewhere in between these examples, the testamentary disposition[25] might be cited, together with argument that the intent of the testator should determine the whole controversy. The short answer would be that few wills prove either side of the issue as to equitable apportionment. Infrequently the litigation will involve the original owner's sale of the future royalty under a specified part of his yet-undivided tract, the later well being drilled on another part of the land.[26] Whether the grantee or devisee receives the subdivision lot in fee, the oil under a subdivision or the royalty from a definitely-named subdivision, the question is the same: must there be equitable apportionment in favor of the nonproducing owner of a subdivision interest?

Unquestionably many practical considerations have influenced the courts in formulating the rule for or against apportionment. Quite apart from the alleged unfairness of permitting drainage of subdivision oil without compensation to the respective owner, there are serious obstacles in the way of administering any remedial precept. It is true these may be overcome, as for the most part they have been in Pennsylvania and Kentucky; still the flexible jurisdiction of equity will often hesitate at assuming control when continuous supervision by the courts is necessary for proper working of the new equitable principle. In other words, judges must prefer simple rules easily administered. The most obvious difficulty in apportioning has to do with the royalty division itself. Where the original tract has been laid off into town lots, there might be claimants of infinitesimally small fractions of the revenue; and the division order might need the signature of each.[27] Trouble-

[24] This was the type of situation involved both in Campbell v. Lynch, 81 W. Va. 374, 94 S. E. 739 (1917) and Walker v. W. Va. Gas Corp., 3 S. E. (2d) 55 (W. Va. 1939).

[25] Musgrave v. Musgrave, 86 W. Va. 119, 103 S. E. 302 (1920).

[26] Eason v. Rosamond, 173 Okla. 10, 46 P. (2d) 471 (1935). *Cf.* Hoffman v. Magnolia Petroleum Co., 273 S. W. 828 (Tex. Com. App. 1925).

[27] These and other arguments of a practical nature were advanced in briefs of counsel for operators, during the four years of West Virginia litigation

some questions could then arise as to the assessment for taxation purposes of these minute royalty interests. All this assumes the subdivision boundaries are precisely known, — otherwise, surveys will have to be made to settle proportional allocations. The free gas covenant would require construction and reasonable limitation, if operators' practice had been based on nonapportionment. Furthermore, apportionment assumes an equitable relation between subdivision owners that should continue on indefinitely into the future. Whenever such an owner has received a royalty share, manifestly he must reciprocate as to any development on his own land. The situation frequently occurs where one owner's lot has been exhausted, and the lease later surrendered; some time afterwards, further prospecting is undertaken with new leasing of another's subdivision lot. In the event of production, surely the latter ought now to share with any other owner whose royalty he has divided theretofore; yet authority is exiguous on the point. Sound policy would thus seem to require that such renewal leases be executed by all those owning subdivisions of the former leasehold. Practical phases of the sort are merely an illustrative few of the hurdles the apportionment doctrine has to surmount in order to gain acceptance.

More than a half-century ago, operators in this state commenced the practice of yielding all the royalty or gas well rental to the subdivision owner on whose lot the producing well had been drilled. While it may be suggested that disinterestedness in matters of this sort is rare, there is no reason to doubt the sincere desire of lessees for the easiest solution of the problem, provided only that resulting litigation be kept to the minimum. True, the practice of nonapportionment yielded the by-product of reduction in the number of reversioners with whom the operator had to deal; it was an unmixed blessing in that respect. When a few years later the Pennsylvania doctrine of equitable apportionment[28] was invented, West Virginia oil and gas companies thoughtfully considered its practical advantages and disadvantages, but refrained from changing over from the existing order to the more theoretical or ideal solution. Their reluctance to alter business custom was apparently soon vindicated, when the Ohio court definitely re-

(1917-1921). See, for example, petition for re-hearing and argument in support thereof, filed by counsel for W. J. Collins, an appellee, (Feb. 26, 1917), in the Ankrom case, — and, in particular, pages 54-57, inclusive.

[28] Wettengel v. Gormley, 160 Pa. 559, 28 Atl. 954 (1894); 184 Pa. 354, 39 Atl. 57 (1898).

jected apportionment.[29] Indeed, not until 1904 did the issue reach the supreme court of appeals; lessors, lessees and the legal profession alike appeared to acquiesce in a most satisfactory rule of thumb. In that year *Rymer v. South Penn Oil Co.*[30] was decided; while the litigation involved a joint venture by owners in severalty, the West Virginia court by dictum expressly approved the Ohio case critical of the apportionment theory.

It may fairly be asserted that when the equitable apportionment controversy became acute in 1917, settled practice precluded any over-hasty adoption of new principles. Tens of thousands of leases were outstanding, under which rights and liabilities had been uniformly interpreted for decades. In these circumstances, more than ordinary discussion was prerequisite to the court's disposition of the various cases that suddenly arose. The first of these, *Lynch v. Davis,*[31] involved division of royalties where devisees of a tract had divided it and then executed a joint lease for oil and gas. A unanimous court held there should be apportionment, though the language of the opinion was much broader than its facts required.[32] In the same year, *Campbell v. Lynch*[33] pre-

[29] Northwestern Ohio Nat. Gas Co. v. Ullery, 68 Ohio St. 259, 67 N. E. 494 (1902). The Ohio court observed (at p. 271): "We have several times had occasion to carefully examine and consider that case [*i. e.*, the Pennsylvania decision in Wettengel v. Gormley] and it has always failed to receive the approval of our judgment; and upon a reconsideration here, it again fails to convince us of its soundness."

[30] Rymer v. South Penn Oil Co., 54 W. Va. 530, 46 S. E. 559 (1904), held simply that parole evidence was admissible to establish a no-apportionment royalty agreement by and between the lessors, — in a joint lease situation where several tracts owned by various individuals were united in one oil and gas lease. The court, however, went on unnecessarily to approve the recent Ohio decision, remarking (pp. 543-544) that the Ullery litigation seemed "to be a case quite similar to the one at bar and in harmony with the rulings of this Court, and fully sustains the position hereinbefore taken."

[31] 79 W. Va. 437, 92 S. E. 427 (1917).

[32] In the Ankrom case, 83 W. Va. 81, 87-88, 97 S. E. 593 (1918), the court said: "I am not unmindful of the fact that the above views are inconsistent with some expressions contained in the opinion in the case of *Lynch* v. *Davis*. . . . Upon a consideration of that opinion I find that there are expressions contained in it which were not at all necessary for the decision of that case. . . . Confining the language used in the opinion in that case within these limitations, it is not inconsistent with the opinion we entertain in the present case, and correctly solves the questions there involved. Any expressions of opinion in the case of *Lynch* v. *Davis* in conflict with the views expressed in this opinion are disapproved." Ritz, J., wrote the court opinions in both cases.

[33] 81 W. Va. 374, 94 S. E. 739 (1917). While this was the first cause to come before the appellate tribunal, there had been two earlier lower court decisions holding against apportionment. Haggerty v. Gas Co., begun in December, 1905, involved a division of the leased premises by sale: it was held by the circuit court of Harrison County that the owner of the undeveloped land had no claim to a share in the royalties from developed land. To the

sented squarely the whole problem; after leased land had been partitioned by heirs, a producing well was drilled on one of the lots. The suit being primarily a local family dispute,[34] the Pennsylvania doctrine[35] was adopted by a bare majority of the court,[36] despite the fact that Arkansas[37] and Indiana[38] had meantime joined with Ohio[39] in rejecting this theory. West Virginia thus became, temporarily at least, an equitable apportionment jurisdiction. A few months later, a set of facts involving the bankruptcy sale[40] of leased land came before the court: the subdivision owner claimed the entire lessor's share of the revenue from the producer on his land. With neither fickleness nor inconsistency in the alteration of judgment, the judges on rehearing[41] by a bare majority[42] refused appor-

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same effect was Bailey v. Bailey, a partition setup that was tried by the circuit court of Lewis County, in November, 1906. Judge Lynch sustained a demurrer to the bill of complaint in that case, the supreme court of appeals refusing to grant an appeal from his decree.

[34] After partition proceedings, the lands owned by Edward Lewis were divided into seven lots, so that a subdivision apiece was given to Lewis' widow and to each of his six children. Oil wells were drilled on all the lots save one, yielding an unusually large production. The one subdivision left undeveloped had been assigned to the husband and heirs of Prudentia Lewis Campbell, a deceased daughter of the former owner. As tenant by the curtesy, Dr. Campbell demanded a share of the extremely lucrative royalties from wells draining that subdivision: the contest was thus between the Campbell family and the other Lewis heirs, no direct claim against the operator being asserted before the supreme court. Dean Hogg, as counsel for the Campbells, convinced the court that the "equities" of the case demanded apportionment.

[35] Wettengel v. Gormley, 160 Pa. 559, 28 Atl. 934 (1894); 184 Pa. 354, 39 Atl. 57 (1898), requiring apportionment.

[36] The court divided three to two. Poffenbarger, P., wrote the majority opinion in which Lynch and Williams, JJ., concurred. Ritz, J., filed a dissent, with which Miller, J., agreed. It is interesting to note that the only two judges who had had trial experience in oil and gas law, — Judges Lynch and Miller, — were divided in opinion. As indicated above, the former had ruled otherwise while on the circuit bench.

[37] Osborn v. Arkansas Territorial Oil & Gas Co., 103 Ark. 175, 146 S. W. 122 (1912).

[38] Fairbanks v. Warrum, 56 Ind. App. 337, 104 N. E. 983 (1914).

[39] Northwestern Ohio Nat. Gas Co. v. Ullery, 68 Ohio St. 259, 67 N. E. 494 (1902).

[40] Pittsburgh & W. Va. Gas Co. v. Ankrom, 83 W. Va. 81, 97 S. E. 593 (1918).

[41] The syllabus of the decision originally announced, on January 30, 1917, read as follows:

"1. Purchasers at a bankruptcy sale of parcels of a large tract of land, subdivided to entice bidders, take subject to a prior oil and gas lease on the entire acreage, duly recorded, and are entitled to participate jointly in the rentals and royalties reserved by the lessors or payable by the lessee under the terms of the lease, in the ratio each subdivision bears to the area covered by the lease, notwithstanding the rentals and royalties arise out of productions from one subdivision only.

"2. In such case, the several purchasers jointly succeed to the rights of the lessors in the revenues accruing from the lease, in the absence of an express provision in the deed to the contrary."

tionment, confining their previous decision to its precise facts.[43] In this narrative of events, two circumstances should clearly appear:

1. *Campbell v. Lynch,* sanctioning apportionment in a partition dispute, was not overruled by *Pittsburgh & West Virginia Gas Co. v. Ankrom,* the later decision refusing it where sale had divided up the leased premises.[44]

2. While *Campbell v. Lynch* thus represented the "law in books", the "law in action" was never altered.[45] The operators continued the practice of declining to apportion royalties, apparently ignoring the result in *Campbell v. Lynch.*

Two years later, *Musgrave v. Musgrave*[46] brought up the question of severance of the lessor's title by devise, with the usual development by the operator thereafter. With unfeigned diffidence, the *Ankrom* majority[47] ignored *Campbell v. Lynch* and denied the

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Judge Lynch's opinion thus favoring equitable apportionment, counsel sought a re-hearing of the issue. After further consideration, the court swung squarely over to the opposite result, and refused to follow the precedent of only a few months before.

[42] Ritz, J., and Miller, P., continued to oppose apportionment, and were now joined by Lynch, J. On the other hand, Poffenbarger and Williams, JJ., remained constant to the doctrine of Campbell v. Lynch. Accordingly, the decision in these lawsuits depended wholly on Judge Lynch's vote.

[43] Ritz, J., writing for the new majority, stated (83 W. Va. 81, 88): "We [Miller, P., and Ritz, J.] still adhere to the views expressed in that dissent, and think the case of *Campbell* v. *Lynch* should be overruled, but Judge Lynch, who concurs with us in this opinion, is of the opinion that the facts in that case distinguish it from this case, and does not think that the views here expressed result in overruling that decision."

[44] Factually, of course, the cases are distinguishable. In Campbell v. Lynch, there was little doubt as to the drainage of Dr. Campbell's subdivision by the various producing wells. In contrast, the Ankrom case involved the sale of 2307 acres to seventy purchasers, the shares ranging from a small fractional part of an acre to the good-sized lot of 256 acres. (One must bear in mind that a single gas well was thought to drain but eighty acres.) Clearly, some of these purchasers would have been unjustly enriched, if drainage of their subdivisions were not established.

[45] Pound, *Law in Books and Law in Action* (1910) 44 AM. L. REV. 13. The fact that the operators consistently maintained their custom of declining to apportion is a striking one. It was as if the accident of Campbell v. Lynch had never really happened.

[46] 86 W. Va. 119, 103 S. E. 302 (1920).

[47] Lynch, Miller and Ritz, JJ. The last-named again prepared the opinion of the court, in which the newest member of the majority (Judge Lynch) concurred, without opinion. Judge Miller, on the other hand, took occasion in his concurrence to criticize sharply the minority position. Yet in deference to Judge Lynch's views, Campbell v. Lynch was once more spared direct overruling, — even though the drainage present in the Musgrave litigation made it extremely difficult to distinguish the cases.

devisees equitable apportionment: such cavalier treatment of that decision provoked an elaborate dissent[48] setting forth completely the theoretical legal basis of the more generous doctrine. Shortly thereafter, *Fisher v. Teter*[49] permitted a re-examination of the broad issue in an instance where a subdivision owner claimed there had been an unfair development of other lots.[50] The complainant was denied relief, again by a bare majority, and the West Virginia rule of nonapportionment reaffirmed. The final step has now been taken in the present case of *Walker v. West Virginia Gas Corporation*,[51] involving a partition setup. *Campbell v. Lynch* is considered by the court to have been overruled,[52] and the *Ankrom* and *Musgrave* cases to be law. The four years of uncertainty, two decades ago, has ultimately yielded a settled rule of property.

Such is the state of the authorities in West Virginia. There remains obviously the tabulation of other jurisdictions for and against this equitable principle. Only two courts are sympathetic, — Pennsylvania[53] and Kentucky,[54] — curiously enough, the first and last to consider the issue. The others all stand in opposition. Ohio, Arkansas and Indiana decided against royalty division, — in the early years of the present century, — an antiquarian period which is almost legal history in the law of oil and gas. Then followed the war-time controversy in the West Virginia cases. Okla-

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[48] The dissent of Poffenbarger, J., (in which Williams, P., concurred), extends for some thirty pages in the printed report. It contains the best defense any jurist has written of the equitable apportionment theory. See Note (1926) 4 TEX. L. REV. 339, 346.

[49] 89 W. Va. 693, 109 S. E. 896 (1921), Poffenbarger and Lynch, JJ., dissenting. Ritz, P., with Miller and Lively, JJ., made up the majority.

[50] The brief of counsel for appellant, (pp. 2-4), claimed that appellees, her brothers, had "connived" with the operators to confine the drilling to their parcels, to her prejudice. The operators had drilled five wells on each of the brothers' lots; but had deliberately withheld development, (so it was asserted), as regards the lot that had come to the sister. Counsel for the operators, also appellees, naturally denied any such alleged connivance, as wholly unsupported by the record in the case.

[51] 3 S. E. (2d) 55 (W. Va. 1939).

[52] The court's language is careful yet precise on this point, (3 S. E. (2d) 55, 57): "But it is clear to us that the rulings of this court in the three cases last cited above amount, in effect, to the substitution of a different doctrine from that announced in Campbell v. Lynch, supra."

[53] Wettengel v. Gormley, 160 Pa. 559, 28 Atl. 954 (1894); 184 Pa. 354, 39 Atl. 57 (1898).

[54] McIntire's Adm'r v. Bond, 227 Ky. 607, 13 S. W. (2d) 772 (1929). Dietzman, J., writing the opinion for a unanimous court, adopts and quotes from the reasoning of the Musgrave dissent by Poffenbarger, J. In this Kentucky instance perhaps, the latter was a "prophet not without honor".

homa[55] and Texas[56] soon came around to the nonapportionment stand, making the weight of authority number five jurisdictions. Perhaps this is really an understatement of the actual situation: no doubt operators generally follow the majority rule, even where the problem has not as yet undergone judicial scrutiny.

In this legal background of American case-law, with West Virginia following the weight of authority, one must inevitably speculate as to the correct solution on principle. Oil and gas law is so relatively young that if error exists correction may yet occur; there need be no bigoted attachment to doctrines and practices of past generations. For any such investigation of the majority rule, there should be a ready comprehension of first principles. To begin with, — the oil and gas lease is not a true lease in the strict sense of the term; it is rather in the nature of a *profit a prendre*, whether for years or in fee.[57] Similarly, the royalty or rental payable under the lease is not rent, technically, like the common law incorporeal hereditament of rents, — but a compensation for the use of the *profit* over the entire land.[58] Thus the royalty serves two functions; it pays both for the fugacious minerals actually taken and for the continued existence of the *profit* in the undeveloped subdivisions. Whether these royalties are properly regarded as incorporeal interests in realty is wholly irrelevant. In any event, the royalty is appurtenant to the reversion of the lessor, and may be assigned over along with the reversion or severed from it, in exactly the same fashion as true rents.

The fallacy, if there be one, in the majority rule lies not in the classification of the royalty as something other than rent, — for these courts are correct in regarding it as a wholly anomalous type of compensation.[59] The error occurs rather in overlooking this

[55] Kimbley v. Luckey, 72 Okla. 217, 179 Pac. 928 (1919), which has been followed in four subsequent cases.

[56] Stephenson v. Glass, 115 Tex. 192, 279 S. W. 260 (1926). It should be noted, however, that the Texas decisions are not consistently opposed to apportionment.

[57] Simonton, *supra* n. 19.

[58] Believing that the royalty is not merely a return for the right to take oil from the land whence the oil is taken, Poffenbarger, J., said in his Musgrave dissent (86 W. Va. 119, 124, 131): "Manifestly it is that, but it is just as clearly something more than that. Besides paying for the oil taken out, it holds the lease on all of the land and oil included within its boundaries. It maintains the lessee's right to carry his operations to every part of the tract and precludes operation or mining on any part of it by the owner and everybody else except assignees of the lessee. How then can it be said to be only pay for the oil taken out?"

[59] *Cf.* Judge Miller's concurring opinion in the Musgrave case (86 W. Va. 119, 124, 103 S. E. 302): ". . . rent can only issue out of land, and not out

second function the royalty performs, namely, that of holding the *profit* for the entire leasehold. In other words, the owner of an undeveloped subdivision has no legal claim to an offset well, provided the lessee has already adequately developed the land.[60] So, too, the minority has stressed overmuch the rent analogy, in working out the apportionment result.[61] The just solution must depend not on fancied resemblance to the landlord-tenant relation, but on

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of an incorporeal hereditament as this separate entity characterized as royalty is said to be."

Judge Ritz' argument in the Ankrom case for the nonapportionment rule may be briefly summarized, (83 W. Va. 81, 84, 97 S. E. 593): "Oil and gas are minerals, and so long as they are in place they belong to the owner of the land under which they lie, and the right also belongs to that owner of the land to explore for them and extract them therefrom. If they escape from his premises to the premises of another before he has captured them, they no longer are his property; and vice versa, if by exploration on his premises oil escapes thereto from the premises of an adjoining owner it thereby becomes his property. From this it necessarily follows that 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 herein to explore for and produce the 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 sub-division is entitled to the royalties on all of the oil produced from wells drilled on his sub-division."

Professor Simonton [in Note (1918) 25 W. VA. L. Q. 231, 233] combines these two ideas: "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 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."

[60] On the other hand, if the lessee has not adequately developed the leased tract, further development may not be arbitrarily refused. The device of partial cancellation may become available to the lessor in the event the court holds the implied condition of further development has not been properly met. See Comments (1934) 40 W. VA. L. Q. 175; *id.* at 177, and Note, *id.* at 375.

Meantime, pending such partial cancellation, it is settled law that the drilling of a producing well operates to bind every acre of the leased land. As long as the one well yields paying production, the lease holds the entire tract. That is to say, — the operator has a monopoly as to development of the leasehold. Neither the lessor nor any assignee of his, in whole or in part, may attempt independent drilling, individually or through agents. The producing *profit a prendre* is both exclusive and complete, so that a subdivision grantee becomes absolutely helpless as against the peril of drainage.

[61] Judge Poffenbarger's preference was clearly for the rent analogy, though he recognized royalty was compensation for a *profit*. For example, in his Musgrave dissent, he wrote (86 W. Va. 119, 124, 156, 103 S. E. 302): "The royalty in an oil lease is just as clearly compensation for the use of the land as the rent payable under an industrial, mercantile or agricultural lease, where-

reasonable incidents attaching to the oil and gas lease. First and foremost, the operator must be protected; the financial hazards of that business are too great to justify imposing additional burdens merely because the lessor's reversion has been subdivided. Secondly, the present legal position of the owner of the undeveloped subdivision should take into account more fully the three existing handicaps already named:

1. The oil and gas underlying the undeveloped subdivision may be drained away through a nearby well located on another lot.[62]

2. The owner of the undeveloped lot has no legal power to compel the lessee to drill further, assuming there has been proper development; and obviously there can be no independent drilling, since the subdivision is already under lease.

3. The caprice or prejudice of the operator may determine the location of the development; and the owners of undeveloped lots are powerless to interfere with this choice. Wholly apart from the uncertainty attending their chances of future royalties, the lessee has opportunity to exert equitable duress in making selection of the subdivision to be developed.[63]

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fore it, too, obviously issues out of the land, within the legal meaning of the terms."

In Greer, *The Payment of Royalties to Successors in Interest to Lessors in Oil Leases* (1921) 93 CENT. L. J. 330, it is said: "The same reasoning would lead to a denial of apportionment of rents in the agricultural lease, because the lessor there unquestionably owns the land after he has leased it, and the purchaser of a part of the land is the owner of the reversion as to the part he purchases. . . . It is therefore submitted the outcome is unsound, and it would be much more consonant with legal principles and avoid many complications and unjust results if the courts would hold royalties to be simply rentals, and apply all the law of landlord and tenant to the rights of the parties."

Various cases have been collected by Professor Simonton, *supra* n. 59, tending to show that West Virginia courts have consistently refused to regard royalty payments as rents.

[62] This consideration is the one stressed by the writer of the A. L. R. note on the problem (1929) 64 A. L. R. 634, 637-639,—which is perhaps the ablest discussion in print supporting the apportionment doctrine. So, also, Comment (1919) 4 CORN. L. Q. 71, 73, points out that the coal royalty analogy is not in point, since the coal operator removes only the coal under the lessor's tract. The coal operator does not normally mine minerals under adjoining subdivisions, (*i. e.*, the hazard of "drainage" is never present).

[63] In the Musgrave dissent, Judge Poffenbarger reflected this apprehension, (86 W. Va. 119, 124, 149-151, 103 S. E. 302): "I here state what I have been reluctant to mention, although it has been apparent all the time, namely, that the construction opens wide the door to the rankest kind of imposition. The lessee can drill on any one of the parts he may see fit to select, and he may make his location depend upon what he can get the owner of one of the parts to concede to him, by way of inducement. He can delay and bargain with the different parties until he obtains a bonus or reward in money or a

Many companies in other jurisdictions have realized there may be unfairness in denying apportionment absolutely in every case, and have therefore inserted in their leases a specific provision achieving the equitable result. This usually stipulates a division of the royalties, proportioned to the acreage.[64] It is not only interesting that lessees have themselves worked out such a solution, — perhaps the practical difficulties in the way of apportionment are not after all so insurmountable, — but it is important that at least one nonapportionment jurisdiction has recognized its validity.[65] Nevertheless, both the equitable apportionment rule and the newer lease provision seem unsatisfactory in their present form. Surely the owner of an undeveloped lot should have no share in royalties unless his minerals are being drained away; and that owner ought properly to have the burden of establishing the drainage under his land. If such a limitation were imposed, equitable apportionment would then appear to be the correct solution on principle.

There is finally the query as to whether by lease provision or by legislation[66] a duly limited apportionment doctrine should ever

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share of the royalty for drilling on his part, and, in consideration of his draining the oil from the other parts through the wells on that part."

Compare with the principle that equity will enjoin the unconscionable exercise of a legal right the language of the court in Fisher v. Teter, 89 W. Va. 693, 698, 109 S. E. 896 (1921): "It is not unlawful for one adjoining owner to persuade a lessee to first drill and develop his land subject to such common lease, provided no injury is done to the land of the other; and certainly he could not be compelled to account to the unsuccessful contestant for the right of priority in development for oil or gas produced on his land by such prior development, unless, as said, there resulted unlawful drainage and fraud therein injuriously affecting the land of such adjoining owner." *Cf.* also, Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor* (1904) 18 HARV. L. REV. 411, 414 *ff.*

[64] The provision usually reads as follows: "If the leased premises shall hereafter be owned in severalty or in separate tracts, the premises, nevertheless shall be developed and operated as one lease and all royalties accruing hereunder shall be treated as an entirety and shall be divided among and paid to such separate owners in the proportion that the acreage owned by each such separate owner bears to the entire leased acreage."

[65] Gypsy Oil Co. v. Schonwald, 107 Okla. 253, 231 Pac. 864 (1924). *Cf.* Schrader v. Gypsy Oil Co., 38 N. M. 124, 28 P. (2d) 885 (1933).

[66] Such legislation, if enacted, should be in much the following form: "Where land shall hereafter be leased under an oil and gas lease, and prior to its development the lessor's reversion therein shall be subdivided by devise, partition, sale or otherwise, so that the land subsequently be owned in severalty, or in separate tracts, the leasehold shall nevertheless be developed and operated as one lease, as if there had been no such subdivision. Upon satisfactory proof of drainage in a proper proceeding, all royalties and gas well rentals accruing under such lease shall, in the absence of agreement between the parties otherwise, be ordered divided among and paid to such separate owners as may be affected by the producing well or wells, in the proportion

be introduced into West Virginia. With deep-well drilling[67] constantly in progress, to gas-bearing sands with enormous rock pressure, drainage today has possibly a new significance for property owners. If improved methods permit operators to confine development to fewer and fewer wells,[68] perhaps change ought to be made as to all future leases, in order to protect more adequately the modern subdivision owner.[69] This is a hard question to answer, considering the half-century of contrary practice. In any event, existing nonapportionment doctrine has clearly become too well established to be brushed aside by court action. It is now in fact a "rule of property".

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that the acreage subject to drainage owned by the respective separate owner shall bear to the entire area so drained." This provision, if enacted, might be inserted in W. VA. REV. CODE (1931) at the end of Article 4 of Chapter 37, relating to partition,—or, better still, at the end of Article 9 of Chapter 37, relating to apportionment of rent.

[67] MARTENS, PETROGRAPHY AND CORRELATION OF DEEP-WELL SECTIONS IN WEST VIRGINIA AND ADJACENT STATES (1939) WEST VIRGINIA GEOLOGICAL SURVEY; TUCKER, DEEP-WELL RECORDS (1936) WEST VIRGINIA GEOLOGICAL SURVEY.

[68] The ordinary practice in the past has been to assume a gas well will drain eighty to eighty-five acres, depending upon the configuration of the land. Deep-well drilling has recently yielded wells with productions of twenty million cubic feet from the Oriskany sands. In these circumstances, operators have now tended to space their wells at greater intervals, both by reason of the high cost of deep drilling and because increased drainage is thought to follow from the terrific rock pressure. With such a background, no doubt operators should more and more prefer joint leases, as in the Lynch v. Davis situation: the joint lease of a large tract would enable both economical operation and adequate protection of the leasehold. It is then only a short step from popularizing joint leases over to the statutory provision of the sort set forth in n. 66 *supra*.

[69] The criticism may be advanced that drainage is, after all, merely a question of expert opinion: one cannot absolutely establish it beyond peradventure of a doubt. In many instances, no doubt this is true; yet modern geological investigation tends to minimize difficulties of proof. For example, if there are wells on contiguous tracts, flow indicators may be utilized to show drainage. *Cf.* U. S. Geological Survey Bull., Series O, No. 58, Underground-Water Papers (1906) 74. Many substances used in tracing the flow of water are available for detecting drainage from oil wells. Among such flow indicators are: (1) materials dissolved in solution and recognized by chemical or physical tests; (2) materials dissolved in solution and recognized by their color; (3) materials suspended in the liquid and recognized by microscopic examinations; and (4) cultures of bacteria suspended in the liquid and recognized in samples taken by their cultural characteristics.

If, on the other hand, there are wells only on the draining tract, the fact of probable drainage can be shown through tests on the adjoining land as to rock pressure, porosity of the strata, and thickness of the "pay".

See, further, as to manner of proving drainage Humble Oil & Ref. Co. v. Strauss, 243 S. W. 528 (Tex. Civ. App. 1922); Steel v. American Oil Dev. Co., 80 W. Va. 206, 92 S. E. 410 (1917).