Chapter 16

The Nonconsenting Cotenant in Oil and Gas Development: The Oil Patch Version of the "Little Red Hen"

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§ 16.01. Introduction.

This Chapter discusses the rights of nonconsenting cotenants vis-a-vis the development of oil and gas in selected Eastern states. States falling within the classification of "Eastern" for the purposes of this Chapter include: Alabama, Florida, Illinois, Indiana, Kentucky, Michigan, New York, Ohio, Pennsylvania, Virginia, and West Virginia.

The subject of this Chapter is analogous to the children's story, "The Little Red Hen." Recall that the Little Red Hen went through all the steps needed to bake bread. At each step, she asked her fellow farmyard
animals to help her. They all refused; but when the bread was baked and ready to eat, all the animals expected to share. Instead, the Little Red Hen ate the bread herself. The lesson of this classic children's story is obvious; however, the lesson is not so easily applied to oil and gas development by a cotenant because the applicable law does not conform either to the ending or to the moral of the story.

In the oil patch version, the Little Red Hen would have to share any oil and gas production with her fellow cotenants. In fact, in a few jurisdictions, the Little Red Hen could not even commence development without the permission of her cotenants. If they refused to consent, her only remedy would be partition (and even partition might not be possible). When accounting for each cotenant's share of production, she could deduct a proportionate share of costs, but she could not collect those costs directly from the cotenant. Moreover, in some cases, she could not even deduct costs when accounting for production. And if her drilling activity proved unsuccessful, she would bear the entire loss. Isn't it strange how law can ruin a perfectly good children's story? The oil patch version of the "Little Red Hen" seems more like "Chicken Little" – only in this case the sky really falls!

This oil-patch version of the "Little Red Hen" is the subject of this Chapter. As with all legal fables, we begin with a summary of the common law.

§ 16.02. Concurrent Estates at Common Law.

[1]-In General.

While three types of concurrent estates (tenancy in common, joint tenancy, and tenancy by the entirety) survived the transition from the English Common Law and were incorporated into the common law of the United States, this Chapter will focus only on the rights of tenants in common, as this is the tenancy, with respect to oil and gas rights, most commonly encountered. Also, most disputes among concurrent owners of oil and gas rights occur among tenants in common. Accordingly, throughout this Chapter, the terms "cotenant" and "cotenancy" should be construed respectively as referring to a tenant in common and a tenancy in common.

A tenancy in common is characterized by the requirement that each cotenant has an equal right to the possession and enjoyment of the entire property (unity of possession). Unlike a joint tenancy, a tenant in common generally may alienate or lease the interest in the property without destroying the character of that interest. Also, a cotenant, having no right of survivorship, may transfer the property by devise, and if a tenant in common dies intestate, the undivided interest passes to the cotenant's heirs.

A cotenant had no cause of action for waste until the passage of the Statute of Westminster II in 1285. This statute, which is part of American common law, created a Writ of Waste and provided a cotenant with a cause of action either to partition the property or to restrain another cotenant from further depletion of the property. The remedies granted under the Statute of Westminster II were augmented by the passage of the Statute of Anne in 1705. The Statute of Anne established a cotenant's right to an action for accounting against another cotenant who makes a disproportionate use of, or profit from, the property.

A cotenancy, as well as a joint tenancy, may be terminated through either a voluntary or an involuntary partition. Generally, a court is compelled to grant partition as a matter of right; however, a court may, in the absence of a statutory directive, elect to partition the property in kind or by sale. Courts generally favor partition in kind because each cotenant is allowed to retain a divided portion of the property. Nevertheless, a partition in kind will not be granted if the overall value of the property is diminished or if partition in kind would be unfair or unjust. The probable presence of oil and gas on the property may work such an injustice, requiring partition by sale. Here, the property is publicly sold and the proceeds of sale divided among the
Cotenants in proportion to each cotenant's fractional interest in the property.

Many partition actions require a final accounting and each cotenant will be charged for rents and profits received in excess of that cotenant's pro rata share of the proceeds, for any waste committed on the property, and for fair rental value of the property in the event a cotenant was in sole possession and had ousted (denied access to) other cotenants. A cotenant will receive a pro rata credit for the cost of necessary repairs, for improvements which increase the value of the property, for payment of mortgage principal and interest, for real estate taxes, and for insurance expenses which benefit all cotenants.

[2]--In the Oil Patch.

With respect to the exploitation of oil and gas resources, most states allow one cotenant the right to develop oil and gas without permission of the other cotenants.(9) The developing cotenant, however, must account to all other cotenants, and may not prevent other cotenants from developing the minerals directly or through a lessee.(10) A nonconsenting cotenant may seek partition, an accounting,(11) or both, but may not enjoin development that does not wantonly injure the property.(13)

In general, a cotenant must account to other cotenants for the net proceeds of oil and gas production attributable to the nonconsenting cotenant's interest.(14) A developing cotenant has no cause of action to force a nonconsenting cotenant to contribute to the cost of unsuccessful drilling operations.(15) However, if the drilling operation is successful, the developing cotenant may recover "reasonable and necessary" expenses from the nonconsenting cotenant's share of production.(16) In other words, a developing cotenant who owns an undivided ½ interest in Blackacre drills an oil well without the consent and participation of the other cotenants assumes 100% of the risk that the well may be dry or will never pay out in return for 50% (a ½ interest in) of the net profits, if any.

In a few jurisdictions, the developing cotenant accounts to nonconsenting cotenants by paying a royalty (typically of the nonconsenting cotenant's share of gross production).(17) In this situation, a developing cotenant who owns an undivided ½ interest would account to the nonconsenting cotenants by giving them (or some other fraction) of ½ of the gross production. The developing cotenant would be responsible for all costs of production and would be entitled to retain all net profits, subject to the nonconsenting cotenant's right to a royalty. This form of accounting treats the nonconsenting cotenants as though they had leased their interests to the developing cotenant; however, unlike oil and gas lessors, they retain the right to enter the property and drill their own wells.

In a minority of states, including Illinois, Michigan, Virginia, and West Virginia, a cotenant who exploits oil and gas without the consent of the other cotenants commits enjoinable waste, except when the property is being drained.(18) In any case, nonconsenting cotenants may seek an accounting. The required accounting, depending on the circumstances and the jurisdiction, may be for gross profits, net profits, or royalty.(19)

§ 16.03. Majority View.

[1]--Development by Less Than All Cotenants Permitted.

Of the states surveyed for this Chapter, Alabama, Florida, Indiana, Kentucky, New York, Ohio, and Pennsylvania follow the majority rule which allows cotenants to develop minerals over the objections of nonconsenting cotenants.(20) Although this right of a cotenant, or a cotenant's lessee, to develop minerals without consent of other cotenants is widely accepted, one Pennsylvania case described a developing
cotenant as a wrongdoer and did not allow him to profit by his "wrongdoing." There was a strong dissenting opinion in this case; related case law in Pennsylvania indicates that the majority's analysis in this case is an aberration.

A cotenant may exercise this right of development either by unilaterally leasing the property for mineral development or by developing the property personally. This right to develop the mineral estate, however, may not be exercised to the exclusion of other cotenants. Furthermore, a lease executed by one cotenant is not binding on other cotenants; but other cotenants may ratify the lease as their own and share in its benefits.

[2]--Accounting.

A cotenant who develops the minerals is required to account to the other cotenants for their share of the extracted minerals. Because the developing cotenant is permitted to act without the consent of the other cotenants, the statute of limitations for an accounting probably does not begin to run until an accounting is demanded and refused. As in any accounting among cotenants, setoff of a cotenant's expenses related to the property will be allowed in appropriate circumstances.

In the absence of bad faith (such as an ouster of the nonconsenting cotenant), a cotenant is allowed to set off expenses associated with development or management of the property in excess of that cotenant's proportionate share. These expenses typically include taxes, water rents, insurance, necessary repairs, and the cost of exploiting the minerals. A cotenant is under no duty to repair cotenancy property, but a cotenant in exclusive possession of the property may have to make necessary repairs to preserve its original condition at the time of taking possession.

In Pennsylvania, the manner of accounting for oil and gas development has not been clarified. In McIntosh v. Ropp, a life tenant executed an oil and gas lease for the property. This lease was subsequently ratified by one of two remaindemen. After oil production was obtained, the other remainderman demanded her portion of the profits without any offset for the expense of development. The court stated that "as between tenants in common such compensation may be measured by the fair market value of the mineral in place, which may be figured on the basis of the royalty to be obtained for the privilege of removing such mineral." The court also noted that "[t]he tenant out of possession incurs none of the risk or expense, when the mining operations are conducted exclusively by the tenant who is in possession." The court then held that "[w]here the mineral land has never been developed . . . the fair market value of the mineral in place, which would be the value of the privilege of removing it, in view of its special circumstances, would represent the true measure of compensation to the owner."

Several Pennsylvania cases indicate that an accounting on the basis of royalty is appropriate. However, other cases indicate that the proper basis for accounting is net profits, not royalty. A study of the Pennsylvania cases suggests that a royalty accounting is preferred except where there is no evidence of fair royalty value, in which case a net profits accounting is appropriate. In Coleman's Appeal, after approving a net profits approach, the court stated:

We do not mean to say that it [a net profits accounting] would hold in any other case than the one now before the court – certainly not where the mining is expensive and hazardous. . . . Otherwise, with his own capital and at his own risk, he would separate the ore from its natural position, and place it on the surface enhanced in value, for the benefit of a stranger.
Where, however, a cotenant is deprived of a share of oil production by fraud, the developing cotenant may not deduct development costs when accounting for the production.\(^{(45)}\) In *Foster v. Weaver*,\(^{(46)}\) a cotenant in possession of oil producing property fraudulently induced the non-possessor cotenant to sell him the property without revealing that oil and gas were being produced. The non-possessor cotenant learned about the production, returned the sale proceeds, and sought an accounting for the oil taken from the land. The court analogized the possessory cotenant's actions to that of a trespasser and refused to allow his recovery of the costs associated with production. This gross receipts approach, however, has been rejected as a general method of accounting.\(^{(47)}\)

An Indiana case provides that a cotenant who is unable to determine the profits from mining cotenancy property may only be required to pay a royalty to nonconsenting cotenants.\(^{(48)}\) In Kentucky, a nonconsenting cotenant is entitled only to a royalty on production up to the time notice of the cotenant's interest is provided to the developer. After notice, the nonconsenting cotenant is entitled to a share of net profits after taking into account all drilling, completion, and operating expenses.\(^{(49)}\) Note that a nonconsenting cotenant would prefer to receive a royalty where the well will not payout, but would prefer a net profits share in a highly profitable well.

Alabama requires a net profits accounting for mineral production.\(^{(50)}\) However, in non-mineral cases Alabama does not credit a cotenant for permanent property improvements after receipt of notice from another cotenant, unless the other cotenant has consented to the improvement. The theory for this rule is that the improvement hinders the sale of the property in that fewer prospective purchasers can afford to buy it.\(^{(51)}\) Fortunately this rule has yet to be applied to the drilling and completion of oil and gas wells, even though one could certainly classify an oil or gas well as an "improvement."

A developing cotenant must be careful not to deny other cotenants their lawful development rights. A knowingly wrongful denial may be regarded as an ouster and result in the developing cotenant having to account on the basis of gross, rather than net, profits.\(^{(52)}\) However, if the denial is made on the basis of a good faith belief that the ousted cotenant had no interest in the property, the developing cotenant is still entitled to deduct costs – at least in Kentucky.\(^{(53)}\)

The issue of ouster often arises in conjunction with one cotenant claiming ownership of the whole property through adverse possession.\(^{(54)}\) Ouster is defined variously in these cases, but is well summarized in *Forward v. Deetz*:\(^{(55)}\) "[T]he possession must be adverse, uninterrupted, and notorious, and by clear, positive, and unequivocal acts of open denial of their rights, and by keeping them out of the land."\(^{(56)}\) In *Deetz*, an acknowledgement by other cotenants that the cotenant in possession claiming exclusive ownership was the sole owner was not sufficient to constitute ouster. Other courts have stated, "[t]o constitute an ouster one cotenant must take sole possession and perform acts of exclusive ownership of an unequivocal nature,"\(^{(57)}\) and generally the ousted cotenant must have actual knowledge that the possessing cotenant is making an exclusive claim.\(^{(58)}\)

[3]--Compulsory Pooling of Cotenants.

This section addresses whether cotenancy interests may be force pooled in jurisdictions which follow the majority view. Of course, the fee owner of one small tract may force pool the cotenants of another small tract. Also, a cotenant of one small tract may force pool the fee owner or the cotenants of another small tract. The relevant question here is whether the cotenant of one tract may force pool a fellow cotenant of the same tract. This discussion concerns compulsory pooling. Cotenants are always free to enter into voluntary pooling agreements.
The question of whether cotenants may force pool each other is important for at least two reasons: First, if force pooling of cotenants is authorized, the pooling occurs as a result of an order of an administrative agency. Thus, the jurisdiction to force pool and to settle disputes concerning accounting lies initially with the conservation agency, not the courts. Compulsory pooling acts of the selected states authorize the conservation agency to settle all disputes respecting the cost of drilling, completion, and operation of oil and gas wells.

Second, the manner of accounting between a developing cotenant and the other cotenants may differ substantially from common law by reason of the specific provisions of the compulsory pooling act. Many compulsory pooling acts allow the assessment of risk penalties, and some allow nonconsenting cotenants to elect to surrender their interest in return for an appraised price. In addition, under many acts, a nonconsenting cotenant may receive a royalty, either in lieu of, or in addition to, a net profits accounting.

Alabama\textsuperscript{(59)} and New York\textsuperscript{(60)} have very broad compulsory pooling statutes which permit one cotenant to force pool another cotenant. The Pennsylvania act\textsuperscript{(61)} also allows the force pooling of other cotenants, but applies only to wells drilled below a specified depth.\textsuperscript{(62)} These statutes, using similar language, specifically contemplate the force pooling of concurrent interests: "When two or more separately owned tracts are embraced within a spacing unit, or when there are separately owned interests in all or a part of a spacing unit . . . ."\textsuperscript{(63)}

Kentucky has two compulsory pooling statutes, one for "deep wells,"\textsuperscript{(64)} and one for shallow wells.\textsuperscript{(65)} The deep well statute is similar to the Alabama, New York, and Pennsylvania statutes and allows the force pooling of cotenants. However, the shallow well statute appears to limit force pooling of other cotenants only as a part of the pooling of separate tracts. The shallow well statute authorizes compulsory pooling "[w]henever any separate tract of land is so situated because of size or other condition that it does not contain a location at which a well . . . may be drilled."\textsuperscript{(66)} In that event, however, the conservation agency may pool "all oil and gas interests in the separate tract or in a portion thereof with all like interests in a contiguous tract . . . ."\textsuperscript{(67)} Thus, unlike the deep well statute, cotenancy interests in one tract may not be force pooled, unless small tracts are also being pooled. Note that this language could also be read so as not to authorize force pooling of fellow cotenants.

The Florida compulsory pooling statute applies only to the owners of "two or more separately owned tracts of land . . . embraced within an established drilling unit . . . ."\textsuperscript{(68)} The Indiana statute allows force pooling "[i]f the owners of separate tracts of land do not agree to integrate their interests . . . ."\textsuperscript{(69)} The Ohio statute authorizes compulsory pooling only "[i]f a tract of land is of insufficient size or shape to meet the requirements for drilling a well thereon . . . ."\textsuperscript{(70)} Thus, compulsory pooling of cotenants is not specifically authorized in Florida, Indiana, and Ohio; however, the Ohio statute could be construed as authorizing the compulsory pooling of cotenants in the same manner as contemplated by the Kentucky shallow well statute.

Under compulsory pooling, a nonconsenting cotenant's accounting rights may be significantly different from common law rights. For example, the Alabama compulsory pooling statute gives a nonconsenting cotenant 3/16 of that cotenant's share of production as royalty (or any actual lesser royalty).\textsuperscript{(71)} The remaining 13/16 may be retained until the operator has recouped the nonconsenting cotenant's share of the development costs.\textsuperscript{(72)} In addition, if the operator and any consenting cotenants together own more than \( \frac{1}{2} \) of the undivided property interest, and if the operator has made a good faith effort to negotiate a pooling agreement with the nonconsenting cotenants on reasonable terms, the operator may (subject to additional statutory requirements) retain 13/16 of the nonconsenting cotenant's share of production until 150% of that
Under the Kentucky deep well compulsory pooling statute, the operator is entitled to retain a nonconsenting cotenant's share of production, exclusive of any outstanding royalty attributable to that interest (or exclusive of a royalty on an unleased interest), until 125% of that cotenant's share of costs are recouped. The Kentucky shallow well compulsory pooling statute (applicable only to separate tract owners or interest holders) allows an operator to retain a nonconsenting cotenant's share of production, exclusive of any outstanding royalty attributable to the interest (or exclusive of a royalty on an unleased interest), until the nonconsenting cotenant's share of costs are recouped "plus a reasonable charge for interest." (74)

Under the New York compulsory pooling statute, the operator is entitled to withhold a nonconsenting cotenant's share of production, exclusive of a royalty not to exceed, until 200% of that cotenant's share of development costs are recouped. With respect to risk penalties, Pennsylvania's compulsory pooling statute is similar to New York's. If the Ohio statute were construed similarly to the Kentucky shallow well statute, an operator could recoup up to 200% of the nonconsenting cotenant's share of costs exclusive of any outstanding royalty (or a statutory royalty). (75)

In general, rather than relying on common law accounting methods, a developing cotenant would be better served by force pooling nonconsenting cotenants whenever the nonconsenting cotenants are subject to a risk penalty charge. Although the nonconsenting cotenant is ordinarily entitled to a royalty as a result of force pooling, the royalty is seldom likely to exceed the royalty that would be paid if the interest had been leased. In return, the developing cotenant receives some compensation from production for the risk taken in drilling a well that could have been a dry hole. While the risk penalty assessment may not be comparable to the actual risk of drilling, it is preferable to taking all of the risk in return for a fractional interest in actual net profits.

From the standpoint of the nonconsenting cotenant, if the drilled well is productive, but not profitable, the carried cotenant will commonly receive a statutory royalty under compulsory pooling. Also, the nonconsenting cotenant will be given the option to sell out or participate in development after receiving an estimate of development costs.

§ 16.04. Minority View.

[1]--Development by Less Than All Cotenants Is Waste.

Historically, Illinois, Louisiana, Michigan, and West Virginia have followed the minority view that treats exploitation of oil and gas by one cotenant without permission of all cotenants as actionable waste. Virginia should now be added to this list. The only generally recognized exception to this rule of waste is development to prevent drainage to adjoining properties. Presumably, however, these jurisdictions would recognize that one cotenant could hold executive rights with the power to execute a lease binding other cotenants.

The case which best illustrates the harshness of the minority view is Law v. Heck Oil Co. In this case, the nonconsenting cotenant, owner of a fractional 1/768 undivided interest, was permitted to enjoin development by the lessee of the cotenants who owned the other 767/768 interest. The injunction was issued even though the lessee was willing to pay the nonconsenting cotenant 1/768 of the gross production without deducting any costs (in effect a 100% royalty). Moreover, the nonconsenting cotenant had demanded an
excessive cash payment that was tantamount to extortion in that the requested payment far exceeded the value of the 1/768 interest. Nonetheless, the West Virginia Supreme Court concluded that the nonconsenting cotenant could not be compelled to "exchange real estate for personal property." *(88)* Ironically, however, the court did acknowledge that the nonconsenting cotenant could be compelled to partition, which, if accomplished by sale, would result in an exchange of real for personal property.

This waste rule is not based on the notion that cotenants are in a fiduciary relationship with each other *(89)* but, rather, on the notion that minerals in place are a part of the real estate and that any extraction irrevocably diminishes the value of the land. *(90)* The reasoning of an Illinois case is typical.

No principle is better settled than that one tenant in common can not lawfully commit waste or destroy the common property, or do any act that will work a permanent injury to the inheritance . . . . Mining coal or excavating and removing earth, would tend to injure, destroy and lessen in value the estate. Notwithstanding the fact, in contemplation of law, tenants are seized of each and every part of the estate, still, neither one is permitted with impunity to do acts deemed prejudicial or destructive of the interests of the other co-tenants. *(91)*

A nonconsenting cotenant may enjoin waste by a cotenant, or a cotenant's lessee, and may seek an accounting and partition. *(92)* For those cotenants who wish to develop the property, the only remedy generally available is partition. *(93)*

While cotenants have equal rights to lands held in cotenancy, *(94)* cotenants are not implied agents for each other. *(95)* For example, if one cotenant executes an oil or gas lease which purports either to bind other cotenants, or otherwise to lease the fall interest, the lease is binding only on the executing cotenant's interest and any other cotenants who elect to ratify the lease. *(96)* Ratification can be implied or arise by estoppel. *(97)* Also, a lessee who purchases a lease without notice of outstanding cotenancy interests will be protected against the claims of nonconsenting cotenants. These nonconsenting cotenants may only claim a share of lease benefits. *(98)* While the principles expressed in this paragraph are consistent with the general view, special problems can arise in minority view jurisdictions.

For example, in the Illinois case of Zeigler v. Brenneman, *(99)* one cotenant purported to lease the full interest for oil and gas development. Although the lease was void as to other cotenants, it was binding on the cotenant who executed it. During the term of this lease, all cotenants joined in the issuance of a new oil and gas lease to another lessee. Like the underlying cotenants, neither lessee had the right to develop the property for oil and gas without the consent of the other. *(100)* Moreover, under Illinois law, neither lessee could compel partition. *(101)* The court, however, did note that a lessor could compel partition "and in that way give to his lessee the sole right to operate for oil and gas in the portion of the land which may be set off to such lessor." *(102)*

A Virginia case, Chosar Corp. v. Owens, *(103)* held that cotenants who owned approximately 85% of the coal mining rights on a tract of land could not extract the coal without the consent of the other cotenants. In reaching this decision, the court, relying on an earlier case, Dotson v. Branham *(104)* (which deals with coal and oil and gas rights), affirmed the trial court's decision enjoining the developing cotenants from mining coal without the consent of all cotenants.

We conclude . . . that the trial court correctly ruled that Chosar's mining [without the consent of other cotenants] . . . constituted waste. Because continued mining would cause irreparable harm to [the nonconsenting cotenants], we further conclude that the trial court properly enjoined Chosar from committing
further waste.\textsuperscript{(105)}

This decision creates serious problems in Virginia because the Virginia General Assembly has authorized partition of mineral rights only in designated geographic areas.\textsuperscript{(106)} The coal acreage at issue in \textit{Chosar} was outside of the designated areas. Thus, the developing cotenants were unable to secure partition of the coal rights.\textsuperscript{(107)} Needless to say, there was a vigorous dissent in which Justice Thomas advocated adoption of the majority rule.\textsuperscript{(108)}

As the majority acknowledges, . . . the dispute between the owners cannot be resolved by a partition suit. Thus, the owners are locked in battle with no way out. The result of the majority opinion is that the rights of the 15\% who do not want to mine have been made paramount to the rights of the 85\% who want to mine. Indeed, the principle of the majority opinion is such that if the mineral rights here in dispute were jointly owned by 1,000,000 people and 999,999 of these co-owners wanted to mine, one solitary co-owner could enjoin all mining. The majority's decision is neither required nor justified by existing Virginia law; moreover, it is not sound in principle or logic.\textsuperscript{(109)}

In the earlier \textit{Dotson} case, the owner of an undivided \(\frac{1}{4}\) interest in coal, oil, gas, and minerals purported to convey the full interest to a purchaser who immediately began mining the remaining coal on the property for his exclusive benefit.\textsuperscript{(110)} Nonconsenting cotenants filed suit to enjoin the mining and for an accounting. In affirming the trial court's issuance of an injunction, the court noted that the developing cotenants were claiming the right to mine "to the exclusion of their co-owners. They had, of course, no right to exclude their co-owners from their interest in the property and appropriate all of it to themselves."\textsuperscript{(111)} The court, in an unnecessarily broad conclusion that relied on West Virginia law,\textsuperscript{(112)} noted that "extraction of oil and gas by one joint tenant without the consent of his co-owners constituted waste and was properly enjoined."\textsuperscript{(113)}

As Justice Thomas points out in his dissent in \textit{Chosar}, the facts in \textit{Dotson} and \textit{Chosar} are distinguishable.\textsuperscript{(114)} In \textit{Chosar}, the developing cotenants controlled 85\% of the mineral estate, did not claim exclusive ownership of the interest, attempted to leave 15\% of the tract unmined, and set up a royalty account for the non-participating cotenants.\textsuperscript{(115)} Thus, the court in \textit{Chosar} could have adopted the majority rule without overruling \textit{Dotson}.

By following statutory procedures in Illinois and Michigan, cotenants, either acting by themselves or through their lessees, who own more than one-half of the development rights, may develop oil and gas without the consent of the remaining cotenants.\textsuperscript{(116)} In both states, suit must be filed seeking court permission to develop,\textsuperscript{(117)} and nonconsenting cotenants must be made parties defendant.\textsuperscript{(118)} In addition to granting permission to develop, the court may resolve any title disputes.\textsuperscript{(119)} Any decree granting permission to develop must require the developing cotenants to account to the nonconsenting cotenants for net profits.\textsuperscript{(120)} The Michigan Act allows nonconsenting cotenants to elect to participate in the drilling if they do so within fifteen days of the final decree.\textsuperscript{(121)} The statute is confusing, but apparently, if they elect to participate, they are entitled to a royalty, plus any net profits. Also, if some nonconsenting parties are royalty interest owners, or have leased and reserved a royalty, they are entitled to the royalty whether or not they (or their working interest counterpart) participate in development.\textsuperscript{(122)}

\textbf{[2]--Accounting.}

A cotenant who produces oil or gas without the consent of the other cotenants commits waste and may be required to account for the profits of the well.\textsuperscript{(123)} Either the cotenant or lessee may be ordered to
Because the developing cotenant is regarded as committing waste against nonconsenting cotenants, the statute of limitations for waste and accounting may begin to run when production first occurs. (125)

An accounting could be based on gross profits (without deduction of development costs), (126) net profits (with deduction of development costs), or royalty (and other lease benefits). (127) Absent an ouster, no punitive damages are awarded because one cotenant cannot trespass against another cotenant. (128) Most commonly, a developing cotenant (or lessee) must account for net profits (the value of the oil and gas produced less the cost of drilling, completing, and operating producing wells) even though the development itself is regarded as waste. (129)

In Zeigler v. Brenneman, (130) the Supreme Court of Illinois awarded nonconsenting cotenants the proceeds of production "without any charge for production." (131) Later cases, however, have allowed developing cotenants the right to offset expenses associated with producing oil or gas wells, (132) but not unproductive wells or ineffective secondary recovery techniques, unless the additional expense is "necessary." (133) Accounting is apparently done on a per-well basis, not on a property basis. (134)

While the Illinois statute (135) authorizes deductions of costs when statutory procedures are followed, Illinois law is unclear if the statute is not followed. In Ziegler, the cotenant who leased the property acted under an apparent belief that he owned the premises in fee; yet he was required to account for gross profits without deduction for costs. (136) Nonetheless, Illinois law may not require an outright bar to deductions where a developing cotenant acts in good faith, but not under the statute. At least two later cases have expressed support for a net profits accounting without mention of the statute or Zeigler. (137)

West Virginia has the largest and most confusing body of case law on the manner of accounting of all the states surveyed. In Williamson v. Jones, (138) the West Virginia Supreme Court held that a developing cotenant, who had acted under the good faith belief that he owned the entire fee, (139) was entitled to deduct costs of production, as well as costs of drilling and completing producing wells, but not the cost of drilling dry holes. However, dicta in Williamson suggests that one who acts in bad faith may not be allowed deductions. (140) In a federal case construing West Virginia law, however, the developing cotenant was repaired to account only for royalty where the nonconsenting cotenant had let his claim stand idle for a number of years, had failed to record his interest, and had forgotten about the interest. (141) Yet another West Virginia case suggests that a developing cotenant who has not recouped the cost of drilling may nonetheless have to account for royalty. (142) And where cotenants have each leased to separate lessees, the cotenant lessors are accountable to each other for a proportionate share of any royalty received. (143)

A non-consenting cotenant either may ratify an existing lease and receive the same benefits as the consenting cotenant or may sue for an accounting and an injunction. (144) In an early case, a cotenant was held to have ratified a lease issued by another cotenant as a result of filing suit for an accounting with no request for injunction. (145) When one cotenant has leased the interest and the premises are thereafter developed and unitized with other property, nonconsenting cotenants either may ratify the lease and share in lease benefits subject to the unitization agreement or may receive a net profits interest in any production on the leasehold. However, the nonconsenting cotenant may not elect to ratify the lease without being bound to the unitization agreement. (146)

Williamson v. Jones (147) illustrates the confusing nature of suits for an accounting. Jones believed that he
had purchased fee title to property at a judicial sale, although the record indicated that he had notice that the title was defective. Subsequently, Jones drilled twenty three wells on the property in search of oil. Some of these wells were productive. Jones was then sued by remaindermen who owned an undivided 7/10 interest in the property. In other words, Jones held a full life tenancy and a 3/10 undivided remainder interest in the property. The remaindermen sought to enjoin further production and sought an accounting. The trial court awarded them a royalty and the parties cross-appealed.

The West Virginia Supreme Court concluded that Jones' production could be enjoined as waste and that Jones was required to account to the remaindermen for net profits. The court rejected Jones' argument that he could take his 3/10 of the oil, leave 7/10 in the ground, and not account at all. Instead the court noted that the remaindermen could treat Jones as a converter of their share of production and could treat Jones' claim of fee title as an ouster. Moreover, the court stated that one who improves property with notice of an outstanding claim cannot receive any credit for the improvement in the final accounting. Nor could Jones assert a right of exclusive possession or retain all rents and profits pending reimbursement for improvements. Nonetheless, the court, relying on its equity jurisdiction, required Jones to account for production less the cost of drilling, completing, and operating the producing wells. The court noted that "but for him [Jones] perhaps this oil . . . would have been lost [to drainage] . . .. [E]quity cannot be blind to the argument that Jones' acts have been to the plaintiffs a blessing, not even in disguise, but plain and apparent." The court, however, denied Jones any deduction for the cost of dry holes.

[3]--Compulsory Pooling.

This section addresses whether cotenancy interests may be force pooled in the minority view jurisdictions of Illinois, Michigan, Virginia, and West Virginia. Recall that the fee owner of one small tract may force pool cotenants in another small tract. Also, a cotenant of one small tract can force pool the fee owner or the cotenants of another small tract. The relevant question here is whether a cotenant of one tract can force pool a fellow cotenant of the same tract.

Note also that this discussion concerns compulsory pooling, not a voluntary agreement to pool. To illustrate the difference, assume that Blackacre and Whiteacre consist of one drilling unit, that Able and Baker own Blackacre as cotenants and that Carr owns Whiteacre in fee. Assume that Baker and Carr (but not Able) agree to pool their interests in the drilling unit and that Carr drills a producing well on Whiteacre. On similar facts, the West Virginia Supreme Court, in Boggess v. Milam, held that Able was not entitled to share in the production from Whiteacre. However, under the provisions of the West Virginia compulsory pooling statute, Able could force pool Blackacre and Whiteacre if a deep well were involved.

In minority view jurisdictions, the question of whether cotenants can force pool each other is important for at least three reasons: First and most importantly, if force pooling of cotenants is possible, then the minority view, which bars development without the consent of all cotenants, can be circumvented. Second, if force pooling of cotenants is authorized, the jurisdiction to pool and to settle disputes concerning accounting lies initially with the conservation agency, not the courts. Third, the manner of accounting between a developing cotenant and the other cotenants may differ substantially from common law by reason of the specific provisions of the compulsory pooling act.

The Illinois compulsory pooling statute specifically authorizes the pooling of "separately owned interests in all or a part of" a drilling unit. Where the owners of any interests "have not agreed to integrate their interests," the conservation agency has the duty to force pool. The conservation agency, however, is not authorized to force pool if an action has been commenced pursuant to the statutory provisions which allow
the cotenant owners of more than one-half of the undivided ownership to file suit seeking permission to drill for oil and gas.\textsuperscript{(164)} In a situation where the conservation agency is authorized to force pool cotenants, a nonconsenting cotenant may then elect to sell the cotenancy interest "on some reasonable basis and for a reasonable consideration which, if not agreed upon, is to be determined by" the conservation agency, or elect to be "carried."\textsuperscript{(165)} In the case of a carried party, the operator is entitled to retain the nonconsenting cotenant's share of production, exclusive of royalty (not to exceed), until 100\% of that cotenant's share of the cost of all surface equipment and the cost of operating the well, and 150\% of that cotenant's share of the cost of drilling, testing, and completing the well are recouped.\textsuperscript{(166)} This statute provides a royalty for a carried cotenant, but the royalty, presumably whether already existing or created in the pooling order, may not exceed .\textsuperscript{(167)} Because of the risk penalty provision of the force pooling statute, a developing cotenant would be better served by force pooling nonconsenting cotenants than by implementing Illinois' special statutory procedure.\textsuperscript{(168)} Moreover, unlike the special statutory procedure, the developing cotenant does not have to own a majority of the cotenancy interest to seek force pooling.

Michigan's compulsory pooling statute is awkwardly phrased and does not specifically authorize the pooling of cotenancy interests.\textsuperscript{(169)} The provision begins with the statement that "pooling of properties or parts thereof shall be permitted."\textsuperscript{(170)} While this could be construed as authorizing the pooling of undivided interests, the provision specifically authorizes pooling "when and to the extent that the smallness or shape of a separately owned tract or tracts would . . . otherwise deprive the owner of such tract of the opportunity to recover or receive his just and equitable share . . ."\textsuperscript{(171)} Thus, we conclude that a cotenant may not force pool another fellow cotenant in Michigan. Nonetheless, we have been advised by Michigan oil and gas lawyers that the Michigan Act is used to force pool nonconsenting cotenants even though the language of the Act does not authorize this.\textsuperscript{(172)} Moreover, although the Act is silent with respect to carried parties, we have been further advised that substantial risk penalties are assessed against carried cotenants.

The Virginia compulsory pooling statute specifically authorizes the pooling of "separately owned interests in all or a part of" a drilling unit.\textsuperscript{(173)} The conservation board may force pool "all interests in a drilling unit" where the "well operators have not agreed to pool their interests."\textsuperscript{(174)} A nonconsenting cotenant may elect (1) to sell the interest "on a reasonable basis and for a reasonable consideration which, if not agreed upon," may be determined by the conservation board;\textsuperscript{(175)} or (2) to share "on a carried basis" production accruing to the interest, exclusive of any outstanding royalty, "after the proceeds allocable to his share equal" 300\% of the interest's share of costs if the cotenant is a lessee, or 200\% if an unleased owner.\textsuperscript{(176)} The statute does not provide a minimum royalty in favor of a carried interest; it merely recognizes royalties that have already been carved out of the carried party's interest.

The West Virginia compulsory pooling statute does not apply in the case of "shallow" wells.\textsuperscript{(177)} Accordingly, one cotenant may not force pool another cotenant for the purpose of drilling or producing a shallow well. However, a cotenant may force pool another cotenant in the case of a deep well because the compulsory pooling statute authorizes pooling "when there are separately owned interests in all or a part of a drilling unit."\textsuperscript{(178)}

Specifically, in the case of a deep well, the conservation commissioner may, "[i]n the absence of voluntary pooling" force pool "all tracts or interests in the drilling unit . . ."\textsuperscript{(179)} A cotenant, who is force pooled under the deep well statute and decides not to participate in the cost of exploration and development, may elect to surrender its mineral interest for just compensation or may elect to have that interest "carried" by the operator (participating parties).\textsuperscript{(180)} A cotenant who elects to be carried is entitled to a royalty, or the royalty designated in any outstanding lease or other royalty agreement, for the fractional share of
production. The operator, however, may recover from the balance of the carried cotenant's share of production, 200% of the costs attributable to that share, exclusive of royalty. After the double recovery of these costs, the carried cotenant's interest continues to receive royalty plus the net profits attributable to the balance of the interest. Note that this statute provides a minimum royalty for a carried interest owner of an unleased tract, but, unlike the Illinois provision, any higher preexisting royalty must be recognized.

§ 16.05. Involuntary Partition.

This section briefly discusses the availability of involuntary partition with respect to mineral rights and whether partition may be by sale or in kind. Although a review of the cases suggests that partition is understandably more common in minority view jurisdictions (those that view development by less than all cotenants as waste), the basic law of partition is the same in both majority view and minority view jurisdictions. Statutory differences from state to state do not appear to depend upon whether the state follows the majority or minority view. Accordingly, all of the selected jurisdictions are grouped under a single heading.

In the absence of an enforceable agreement to the contrary, cotenants are entitled to compel partition as a matter of right and regardless of motive. Both tenancy in common and joint tenancy property may be partitioned involuntarily, but not property held in tenancy by the entirety. In general, cotenants are entitled to a division of both the surface and mineral interest in a partition suit. When one cotenant seeks partition, a court will also order an accounting as a matter of course. In Virginia, however, the courts are barred by statute from partitioning mineral rights except within designated geographical areas.

Partition in kind is generally preferred; however, if there is a likelihood of (or existing) oil or gas production, or if a partition in kind is deemed unfair, partition by sale (licitation) is preferred. A party requesting a partition by sale ordinarily has the burden to show that a partition in kind would be unfair. If the existence of minerals in the ground has been established, or is probable, partition by sale is required; however, if the presence of minerals is purely speculative, a partition in kind is acceptable. While cotenant oil and gas lessors can generally seek partition, the rights of an oil and gas lessee of all cotenants are not changed by a partition in kind by the cotenant lessors.

Alabama courts will consider the wishes of a large majority of the cotenants when deciding between partition in kind or by sale. In Michigan, oil and gas properties are subject to partition only by sale, even where one cotenant is financially unable to bid on the property. This view was also held in West Virginia; however, a modern case has stated that minerals may be partitioned in kind in the proper circumstances, but not if oil or gas is likely to be present. In a New York suit for partition of oil and gas rights between an individual and the state, the court found that drawing a diagonal line from one corner of the property to the other was an equitable partition in kind. An Illinois case affirmed a partition in kind, with payment of owelty, that gave the surface rights to one cotenant and the mineral rights to a willing group of other cotenants who elected to continue cotenancy ownership of the minerals.

In Illinois, mineral interests that are severed in fee may be partitioned. However, where one cotenant owns all of the surface and a fraction of the minerals, dictum in one case suggests that partition of the minerals cannot be had without consent of all cotenants, even where the party seeking partition is the owner of the surface. This same case suggests that parties to a partition suit must be true tenants in common
with each other – that is they must have the same estate in the minerals. Dictum in another case concerning adverse possession, however, states that owners of fractional interests in minerals are tenants in common of a severed mineral estate even though one cotenant owns the surface. Thus, this later case suggests that a cotenant mineral interest owner could compel partition even though one of the cotenants was also the owner of the surface.

In Kentucky, a surface owner who also owns a fractional interest in the minerals may compel partition of the minerals by sale. However, the owners of a severed mineral interest may not compel the surface owner to partition unsevered mineral interests.

In *Watford Oil & Gas Co. v. Shipman*, the Illinois Supreme Court held an oil and gas lessee:

had no right to a compulsory partition either of the oil and gas considered separately from the land, or the land itself [because a lease] . . . is not a conveyance of the interest of one cotenant in the common property . . . [but] is a grant of a privilege to enter and prospect, but does not give a title to the oil or gas until such products are found.

By itself, this language reflects the view that an oil and gas lease is in the nature of a profit for which a possessory action, such as partition, cannot be maintained. The court goes on, however, to state:

In the eye of the law oil and natural gas are treated as minerals, but they possess certain peculiar attributes not common to other minerals which have a fixed and permanent situs. Owing to their ability to escape, these minerals are not capable of distinct ownership in place. Oil and gas, while in the earth, unlike solid minerals, cannot be the subject of distinct ownership from the soil. A grant to the oil and gas passes nothing which can be the subject of an ejectment or other real action. It is a grant, not of the oil that is in the ground, but to such part thereof as the grantee may find.

While this language is typical of the "nonownership theory" of oil and gas, the language could form the basis of an argument that severed oil and gas rights (as opposed to coal or general mineral interests), even though held for the duration of a fee, are not subject to partition. If this argument were accepted as law, the remedy of partition would not be available to cotenants who hold any kind of oil and gas rights in Illinois. In Kentucky and Ohio, however, cotenant oil and gas lessees are allowed to partition.

§ 16.06. Conclusion.

The likelihood of oil and gas development by less than all cotenants will depend primarily on the availability of compulsory pooling. With respect to the states that follow the majority view (development by less than all cotenants is not waste), the general availability of compulsory pooling of cotenancy interests with risk penalties in Alabama, New York, and Pennsylvania (deep wells) should serve to encourage oil and gas development by less than all cotenants. In the other majority view states, where compulsory pooling of cotenancy interests is not generally available, a cotenant, acting alone, would not prudently choose to develop unilaterally the oil and gas rights except where the nonconsenting cotenants hold a very small interest.

In minority view jurisdictions (development by less than all cotenants is waste), the general availability of compulsory pooling of cotenancy interests with risk penalties in Illinois, Virginia, West Virginia ("deep wells") and, apparently, Michigan should serve to encourage oil and gas development by less than all cotenants. In Illinois and Michigan, resort to compulsory pooling is clearly preferable to the use of the special statutory procedure allowing cotenants holding a majority interest to petition the court for permission to develop oil and gas. While partition is not a commonly sought remedy for resolving disputes over
As is apparent from the preceding discussion, case law gives only general guidance as to accounting among cotenants. This is generally true of all jurisdictions, not just those surveyed in this Chapter. The cases discussed in this Chapter reveal that the most common method of accounting is net profits. In applying this method, however, questions can arise concerning the proper valuation of production, especially gas, and concerning the deductibility of certain cost items when determining net profits. These cost items include depreciation, overhead, and risk capital. These same questions can arise when determining whether a well is producing in "paying quantities"; in determining "fair market value" or "proceeds" royalties "at the well" by way of a "work-back" approach; in determining whether an offset or development well would be "profitable" in an implied covenant case; and in resolving cost disputes arising under a compulsory pooling order. These questions have not been comprehensively addressed in any one jurisdiction, or for that matter, in all jurisdictions as a whole. In addition, authority in one context (e.g., paying quantities) may not be authority in another context (e.g., cotenancy accounting).

Specifically, with respect to cotenancy accounting, a West Virginia case reveals that the cost of drilling a dry hole may not be recouped from the proceeds of production from a producing well. In Illinois, accounting must generally be on a per-well basis, rather than a property basis. On the other hand, an Illinois case allows deductions for what the court described as a "necessary" but ineffective "fracking" operation even though the operation failed to enhance recovery. A Kentucky case allows a deduction for overhead to take into account the salaries of bookkeepers, stenographers, and other employees "not immediately connected with the mining operation." A Michigan case allows deductions for commissions, administrative expenses, and equipment depreciation associated with mineral extraction. However, if the developing cotenant does not keep accurate records of his expenses, recoupment will be denied.

These issues are likely to be the subject of future litigation. In the oil patch, since the Little Red Hen must share production benefits with others who did not share in the labor and risk of securing production, her accountants are bound to claim every conceivable category of deduction and to deduct the maximum amount possible in each category. On the other hand, the other farmyard animals will want to deny as many deductions as possible and minimize the amount of any deduction that is permitted. Thus, the moral of the oil-patch version of the "Little Red Hen" is aimed, not so much at the other farmyard animals, but at the Little Red Hen. Keep competent accountants and attorneys on retainer, and keep the other farmyard animals away from your "bread" as long as possible!

1. * The firm of Jones, Day, Reavis & Pogue expresses no opinion concerning the subject matter of this article.


3. 1. Florida, Indiana, Kentucky, New York, Pennsylvania, and Virginia are among twenty-two states that continue to recognize the estate in tenancy by the entirety. Logan Moore Lumber Co. v. Legato, 131 So. 381 (Fla. 1930); Mastin v. Mastin's Adm'r, 50 S.W.2d 77 (Ky. 1932); R. Powell, 4A Powell on Real Property 620 (1954); Leis v. Shaughnessy, 209 N.Y.S.2d 648 (N.Y. tr. ct. 1960); Jones v. Conwell, 314 S.E.2d 61 (Va. 1984).
5. Of course, there are many interesting issues concerning joint tenancies and tenancies by the entireties. For example, does a lease by one joint tenant sever the joint tenancy into a tenancy in common? Or is there no severance, or a temporary severance? Can either husband or wife, acting alone, authorize development of property held in tenancy by the entirety?

6. 13 Edw. I, 1 Statutes at Large 196.

7. 4 Anne, C. 16, Sec. 16 VII, 11 Statutes at Large 161.


9. 1 Kuntz § 5.3.

10. Id.

11. Id. at § 6.3.

12. Id. at § 5.6.

13. Id. at § 5.3.


15. Id.

16. Id. What constitutes a "reasonable and necessary" expense of development varies from jurisdiction to jurisdiction.

17. Id. § 504.1 at 583.

18. Id. and § 504.2 at 584.3.

19. Id. § 504.2 at 584.4, 584.5.


22. Id. at 127 ("The conclusion that there was a tortious taking in this case is entirely unwarranted.").


24. 5. Sun Oil Co. v. Oswell, 62 So. 2d 783 (Ala. 1953); York v. Warren Oil & Gas Co., 229 S.W. 114 (Ky. 1921); McIntosh v. Ropp, 82 A. 949 (Pa. 1912).


38. 19. 82 A. 949 (Pa. 1912).

39. 20. Id. at 954, citing several Pennsylvania cases.

40. 21. Id. at 955.

41. 22. Id., quoting Appeal of Fulmer, 18 A. 493 (Pa. 1889). In Appeal of Fulmer, the court noted that a net profits accounting would allow recovery of "a share of the profits of carrying on the business without being subject to the risks or possible losses which might accrue; and this we think would not be just and equitable." 18 A. at 494.

Germer v. Donaldson, 18 F.2d 697, 699 (3d Cir. 1927), a federal case construing West Virginia law, the court cited McIntosh as authority for the following rule:

The fact that a co-owner of oil in place does not know of the operation, or that he knows of it, but refuses to give his consent to the withdrawal of the oil, and notifies the party assuming the risk that he expects his proportional share of the profits, does not change the rule that he is not entitled to profits, but only to the customary royalty.

43. 24. See, e.g., Kelley v. Kelley, 115 A.2d 202, 204 (Pa. 1955) (coal); Bell v. Johnston, 126 A. 187, 188 (Pa. 1924) (oil); McGowan v. Bailey, 36 A. 325, 326 (Pa. 1897) (coal); Coleman's Appeal, 62 Pa. at 279 (Pa. 1869) (ore). In 1897, in McGowan v. Bailey, the court approved of an accounting on the basis of the "value of the ore at the mine's mouth, after deducting the expenses of putting it there. . . ." 36 A. at 326. In 1869, in Coleman's Appeal, the court approved an accounting "by ascertaining the market value of the ore at the pit's mouth, and then deducting the cost of mining." 62 Pa. at 279.

44. 25. 62 Pa. at 279.


46. 27. 12 A. 313 (Pa. 1888).


49. 30. Gillespie v. Blanton, 282 S.W. 1061 (Ky. 1926); New Domain Oil & Gas Co. v. McKinney, 221 S.W. 245 (Ky. 1920). Even if a cotenant intended to extract ore without accounting, the excluded cotenant is entitled only to a net profits share in Kentucky. Taylor v. Bradford, 244 S.W.2d 482 (Ky. 1951). Cf. Foster v. Weaver, 12 A. 313 (Pa. 1888).

50. 31. Sun Oil Co. v. Oswell, 62 So. 2d 783 (Ala. 1953).


52. 33. Foster v. Weaver, 12 A. 313 (Pa. 1888).

53. 34. New Domain Oil & Gas Co. v. McKinney, 221 S.W. 245 (Ky. 1920).

54. 35. See generally Medusa Portland Cement Co. v. Lamantina, 44 A.2d 244 (Pa. 1945); Hover v. Hills, 117 A. 346 (Pa. 1922).

55. 36. 32 Pa. 69 (1858).

56. 37. Id. at 71.

57. 38. Daugherty v. Miller, 549 So. 2d 65 (Ala. 1989); Cook v. Rochford, 60 So. 2d 531 (Fla. 1952); Fyffe v. Fyffe, 183 N.E. 641 (Ill. 1932); Hare v. Chisman, 101 N.E.2d 268 (Ind. 1951); Conneaut Lake Park v. Klingensmith, 66 A.2d 828 (Pa. 1949).


any well drilled and completed at a depth less than four thousand (4000) feet except, in the case of any well drilled and completed east of longitude line 84°30', shallow well means any well drilled and completed at a depth less than four thousand (4000) feet or above the base of the lowest member of the Devonian Brown Shale, whichever is the deeper in depth.


83. 5. A West Virginia case states that oil production, not exploration, is waste. Smith v. United Fuel Gas Co., 166 S.E. 533 (W. Va. 1932).


86. 8. See, e.g., Ilari v. Ewing, 234 S.W.2d 293 (Ky. 1950).

87. 9. 145 S.E. 601 (W. Va. 1928).

88. 10. Id. at 602.

89. 11. Pure Oil Co. v. Byrnes, 57 N.E.2d 356 (Ill. 1944); Williamson v. Jones, 27 S.E. 411 (W. Va. 1897).


91. 13. Murray v. Haverty, 70 Ill. 318, 320 (1873). In Illinois, this view is based, at least in part, on statute:

If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy or tenancy in common, the party aggrieved shall have his civil action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist.


93. 15. See, e.g., McConnell v. Pierce, 71 N.E. 622 (Ill. 1904) (mineral interests are subject to partition). But see Watford Oil & Gas Co. v. Shipman, 84 N.E. 53 (Ill. 1908) (cotenant oil and gas lessee may not seek partition); Chosar Corp. v. Owens, 370 S.E.2d 305, 307 (Va. 1988) (partition of severed mineral rights not authorized outside of specified geographical areas). For further discussion of partition, see text, infra, at § 16.05.


98. 20. See, e.g., Martin v. Ohio Fuel Oil Co., 69 S.W.2d 693 (Ky. 1934).

99. 21. 86 N.E. 597 (Ill. 1908).

100. 22. Id. at 601.

101. 23. Id., citing Watford Oil & Gas Co. v. Shipman, 84 N.E. 53, 54 (Ill. 1908). In Illinois, a cotenant oil and gas lessee is not allowed the remedy of partition because an oil and gas lease "is a grant of a privilege to enter and prospect, but does not give a title to the oil or gas until such products are found. . . . A grant of the oil and gas passes nothing which can be the subject of an ejectment or
other real action." 84 N.E. at 54.

102. 24. Id.
103. 25. 370 S.E.2d 305 (Va. 1988).
105. 27. 370 S.E.2d at 308.
107. 29. 370 S.E.2d at 308.
108. 30. 370 S.E.2d at 310-11, quoting 1 Kuntz § 5.3 (1987).
109. 31. 370 S.E.2d at 308-09.
110. 32. 90 S.E.2d at 786.
111. 33. 90 S.E.2d at 786-87.
112. 34. South Penn Oil Co. v. Haught, 78 S.E. 759 (W. Va. 1913).
113. 35. 90 S.E.2d at 787.
114. 36. 370 S.E.2d at 309-10.
115. 37. Id. at 310 (dissenting opinion).
123. 45. Pure Oil Co. v. Byrnes, 57 N.E.2d 356 (Ill. 1944); Campbell v. Homer Ore Co., 16 N.W.2d 125 (Mich. 1944) (iron ore mining); Chosar Corp. v. Owens, 370 S.E.2d 305 (Va. 1988) (coal); McNeely v. South Penn Oil Co., 52 S.E. 80 (W. Va. 1905) (tenants in common, joint tenants, and coparceners); Stewart v. Tennant, 44 S.E. 223 (W. Va. 1903) (widower's interest).
Cases which require accounting on the basis of gross profits are not common, even in minority view jurisdictions. In an early Pennsylvania case (a majority view state), the court set aside a purchase of another cotenant's interest on grounds of fraud and then required an accounting for oil production on the basis of gross profits. Foster v. Weaver, 12 A. 313 (Pa. 1888).

See generally 2 Williams & Meyers § 504.2 (1989).
148. Id. at 416.
149. Id. at 412.
150. Id.
151. Id. at 418.
152. Id.
153. Id.
154. Id. at 421.
155. Id. at 422.
156. Id. at 422-23.
157. Id. at 423.
158. Id. at 423-24.
159. See text, supra, at § 16.03[3] (force pooling in majority jurisdictions).
160. 34 S.E.2d 267 (W. Va. 1945).
167. In Newkirk v. Bigard, 485 N.E.2d 321 (Ill. 1985), cert. denied, 475 U.S. 1140, 477 U.S. 909 (1986), the Illinois Supreme Court construed a pooling order involving cotenants that failed to include any provisions concerning participation or nonconsent. The suit, inter alia, challenged the validity of a pooling order for failing to comply with the statute. The court threw out the suit on the ground that it constituted an impermissible collateral attack on the order. The decision of the court has been criticized. See Beck, "Natural Resources Law," 11 S. Ill. U.L.J. 885, 887-89 (1987).
168. See text, supra, at § 16.04[1].
(Supervisor may make and enforce rules "to carry out the purposes of this act, whether or not indicated, specified, or enumerated in this or any other section hereof.").


183. 2. Discussion of partition procedures and notice requirements are beyond the scope of this Chapter. Note, however, that these requirements may make partition of mineral rights very difficult. For a more detailed study of the problems encountered in partitioning mineral rights, see Wallace, "Partition of Mineral Interests," 9 Inst. on Oil & Gas L. & Tax’n 211 (1958).


185. 4. See, e.g., Heldt v. Heldt, 193 N.E.2d 7 (Ill. 1963).


189. 8. The accounting will be had in accordance with the rules for accounting discussed, supra, at §§ 16.03[2] and 16.04[2].


192. 11. Jenks v. Jenks, 294 So. 2d 147 (Ala. 1974); Thompson v. Mitchell, 429 So. 2d 388 (Fla. Int. App. Ct. 1983); Burkholder v. Burkholder, 135 N.E.2d 504 (Ill. Int. App. Ct. 1956); McClure v. Raber, 19 N.E.2d 891 (Ind. Int. App. Ct. 1939) (en banc); Tuggle v. Davis, 165 S.W.2d 844 (Ky. 1942); Shoup v. Shoup, 364 A.2d 1319 (Pa. 1976); Morley v. Smith, 118 S.E. 135 (W. Va. 1923). In Smith v. McNaughton, 378 So. 2d 703 (Ala. 1979), the surface was divided in kind based on surface values, but the minerals were kept in cotenancy. Once oil or gas has been brought to the surface, it may be divided by sale or in kind. Collins v. Stalnaker, 48 S.E.2d 430 (W. Va. 1948).

193. 12. Thompson v. Mitchell, 429 So. 2d 388 (Fla. Int. App. Ct. 1983); Tuggle v. Davis, 165 S.W.2d 844 (Ky. 1942); Miller v. Miller, 118 S.E. 135 (W. Va. 1923). In Consolidated Gas Supply Corp. v. Riley, 247 S.E.2d 712 (W. Va. 1978), the court ordered a partition by sale even though one of the cotenants had leased the full interest in the property.

194. 13. Clark v. Whitfield, 105 So. 2d 200 (Ala. 1925); Tuggle v. Davis, 165 S.W.2d 844 (Ky. 1942); Warfield Natural Gas Co. v. Cassady, 98 S.W.2d 495 (Ky. 1936); Union Gas & Oil Co. v. Wiedemann Oil Co., 277 S.W. 323 (Ky. 1924); Morley v. Smith, 118 S.E. 135 (W. Va. 1923).


198. 17. Fortney v. Tope, 247 N.W. 751 (Mich. 1933). See also Warfield Natural Gas Co. v. Cassady, 98 S.W.2d 495 (Ky. 1936).


204. 23. Brand v. Consolidated Coal Co., 76 N.E. 849, 850 (Ill. 1906).

205. 24. Id. at 850.


208. 27. Dawson Daylight Coal Co. v Beshear, 287 S.W.2d 925 (Ky. 1956).

209. 28. 84 N.E. 53, 54 (Ill. 1908). See also Zeigler v. Brenneman, 86 N.E. 597, 601 (Ill. 1908).

210. 29. 84 N.E. at 54.

211. 30. Id.
212. 1. "Warfield Natural Gas Co. v. Cassady, 98 S.W.2d 495 (Ky. 1936); Black v. Sylvania Prod. Co., 137 N.E. 904 (Ohio 1922)."


214. 3. "See, e.g., Clifton v. Koontz, 325 S.W.2d 684 (Tex. 1959) (depreciation and overhead)."


216. 5. "See, e.g., Elliott v. Pure Oil Co., 139 N.E.2d 295 (Ill. 1956) (prevention of drainage)."

217. 6. "See, e.g., Imperial Oil of North Dakota, Inc. v. Industrial Comm'n, 406 N.W.2d 700 (N.D. 1987) (risk capital)."


221. 10. "See, e.g., New Domain Oil & Gas Co. v. McKinney, 221 S.W.2d 245, 251 (Ky. 1920)."

222. 11. "See, e.g., Williamson v. Jones, 98 S.W.2d 495 (Ky. 1936); Black v. Sylvania Prod. Co., 137 N.E. 904 (Ohio 1922)."