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Chapter 8

Accounting for Cotenants, Trustees, Lessees, Trespassers and the Like

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Synopsis

§ 8.01. Introduction.

In a recent West Virginia case an oil and gas producer sold gas for $2.22 per mcf, deducted post production expenses and paid royalty on a net value of $.87. After discussion of the ability to deduct such costs, the court ruled that, if an oil and gas lease "provides that the lessor shall bear some part of the costs incurred between the wellhead and point of sale," then before such costs will be allowed, the lessee "must prove, by evidence of the type normally developed in the legal proceedings requiring an *accounting*, that he, the lessee, actually incurred such costs and that they were reasonable."[1]

No elaboration was offered on the evidence "normally developed in * * * an accounting" or what the court meant by the phrase.

Shortly after this case, the same court considered the liability of a lessee whose lease was held to have terminated, but who had held over and continued to produce gas. The court characterized the continued occupancy and production as an innocent trespass, and followed the near universal rule that an innocent trespasser is liable for the value of the minerals taken less the cost of production. As in the previous case the court held that the calculation of such damages must be based on "evidence of the type normally developed in legal proceedings requiring an *accounting*."[2] Again, no elaboration was offered.

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1 Wellman v. Energy Res., Inc., 557 S.E.2d 254, 265 (W. Va. 2001)(emphasis added).

2 Bryan v. Big Two Mile Gas Co., 577 S.E.2d 258, 269-70 (W. Va. 2001)(emphasis added).

This chapter will attempt to provide that elaboration, and hopefully the larger context of cases where the remedy of a party is an "accounting."

In a variety of contexts ranging from lease relationships to trespass to trusts to cotenancies, parties must "account" to one another, particularly when minerals are produced and money is owed. In a gross context this requirement "to account" seems to embody two primary concepts: first, that one party must provide information to the other which is sufficient to establish and justify the amount of money owed, and second, a requirement to pay.

Inherent in these situations are two phenomena: first, one party is armed with all the facts, and the other generally has none, and second, the parties have established a relationship, either voluntary or involuntary. Thus, a lessee, cotenant, partner, trustee or even trespasser who produces and sells or converts minerals belonging in whole or part to another, will generally possess all pertinent information ranging from the amount taken, the quality, the sale price, all costs and expenses of production, and possibly, hidden damages to the residue of the property. While the relationship of the parties may vary, the general remedies are very much the same.

This chapter will explore the concept of accounting and the use of that term as both a cause of action as well as a remedy. Thus, what is meant when the court says that damages must be ascertained "by evidence of a type normally developed in legal proceedings requiring an accounting," and to what parties and situations will these requirements pertain?

[1] — Account (A'kaunt) Defined.

For starters, it is interesting to look up, as courts often suggest, the ordinary meanings of words. In this case the definitions of "account" can consume pages. For example, *The Compact Oxford English Dictionary*[3] requires five large pages of very small print to define "account" and its derivatives. If one would don a good pair of reading glasses, the definitions include basic concepts of reporting, reckoning, counting and calculating, all of which can be summed for our purposes to mean "a reckoning as to money, a statement

3 *Oxford English Dictionary* 85 (compact ed. 2002).