Chapter 6

Selected Issues in the Law of Co-Tenancy

G. Brian Wells
Wyatt, Tarrant & Combs, LLP
Lexington, Kentucky

Synopsis

§ 6.01. Introduction ................................................................. 156
§ 6.02. Creation of a Co-Tenancy Relationship ......................... 156
§ 6.03. Severed Estates ............................................................. 157
§ 6.04. Consent Required to Develop the Oil and Gas Estate ....... 158

[1] — Surface Owners ......................................................... 158
   [a] — Majority Rule .......................................................... 160
   [i] — Rationales for the Majority Rule ............................. 161
   [b] — Minority Rule ........................................................ 163
   [i] — Rationales for the Minority Rule ............................. 163

§ 6.05. State-by-State Analysis ................................................... 164

[1] — States Following the Majority Rule ............................... 164
   [a] — Kentucky .............................................................. 164
   [b] — Indiana ................................................................. 165
   [c] — Pennsylvania ....................................................... 165
   [d] — Tennessee ............................................................ 166
   [e] — Illinois ................................................................. 166

[2] — States Following the Minority Rule ............................... 168
   [a] — Virginia ............................................................... 168
   [b] — West Virginia ....................................................... 169
   [c] — Possible Remedies in Minority States ..................... 170

§ 6.06. Doctrine of Ratification and Acquiescence ..................... 171
§ 6.07. Co-Tenants’ Lease Not Binding .................................... 172
§ 6.08. The Duty to Account ................................................... 172
§ 6.09. Bases of Accounting ................................................... 173

[1] — Royalties ................................................................. 173
[2] — Value Less Expenses .................................................. 175

§ 6.10. The Doctrine of Waste .................................................. 177

[1] — Definition ............................................................... 177
[2] — Policy to Prevent Waste .............................................. 179
[3] — Traditional Notion of Waste ...................................... 179

§ 6.11. Injunctive Relief for Waste .......................................... 181
§ 6.12. Monetary Damages ..................................................... 182
Despite its obvious conflicts with the laws of physics, the law of co-tenancy presupposes that two people can be at the same place at the same time. This concept is known as an undivided interest in real property and grants each co-owner an absolute right to occupy the “whole” of the jointly owned property.

Perhaps not surprisingly, conflicts often arise among co-tenants as to how the co-owned property should be best utilized. These conflicts become significant in the context of drilling for and extracting oil and gas from the co-owned property due to the substantial effects to the real property which may occur during the course of the development of the oil and gas estate. When a conflict arises, the notion of an undivided interest in the “whole” puts one tenant squarely at odds with his fellow co-tenants. In such a case, the law has struggled to balance the competing interests of the co-owners while usually supporting a general policy to promote the efficient development of natural resources.

There are essentially three forms of ownership by which owners of real property may jointly own real property.

Co-owners may be “tenants in common” if they hold the same land together by separate and distinct titles, but they have a unity of possession. A tenancy in common is a form of ownership whereby each tenant holds an undivided interest in property, and generally it is the default form of ownership of real property. Co-owners will be designated as tenants in common unless they are a married couple or have otherwise designated another ownership type. Also, a tenant in common has the ability to convey

---

1  The author expresses his gratitude to Karen J. Greenwell, Wyatt, Tarrant & Combs, LLP, R. Cordell Pierce, Equitable Production Company, and Justin W. Ross, University of Kentucky College of Law for their assistance in the research and writing of this chapter.
away his or her interest and such interest will pass by will or intestacy on
the owner’s death.

A second form of joint ownership is “joint tenancy.” Joint tenancy is
the ownership of real or personal property by two or more persons in which
each owns an undivided interest in the whole and attached to which is the
right of survivorship.\(^3\) The right of survivorship entitles the last living co-
owner to the ownership of all of the jointly owned property by reason of
having survived the others who had an interest in it.\(^4\)

The last form of ownership, “tenancy by the entirety,” shares many
of the same characteristics as joint tenancy. A tenancy by the entirety,
however, is created solely between a husband and wife, and pursuant to it
they each hold title to the whole with the right of survivorship. Another
unique feature of a tenancy by the entirety is that neither the husband nor
the wife may transfer or encumber their interest in the co-owned property
without the consent of the other, and in the event of a divorce, they become
tenants in common.\(^5\)

The distinctions among these three forms of joint ownership could
impact some aspects of the analysis of the relationships among the co-
owners of property. For purposes of this article, however, the term “co-
tenancy” is used generically to encompass all of the foregoing forms of
joint ownership interests, without regard to any distinctions among the
different types.

§ 6.03. Severed Estates.

In dealing with the co-owners of property, it will often be the case that
the surface estate and the mineral estate are held by different owners. That
is, the surface and mineral estates have been “severed.” Generally, a severed
estate is one in which some or all of the minerals have been conveyed or
reserved separate and apart from the surface estate. A severed estate is the
result of the creation of two entirely distinct and independent estates in

\(^3\) Id. at 1314.
\(^5\) Id. at 1465.
the surface and in the minerals. The issues surrounding co-tenancy are equally applicable to the joint ownership of surface and the joint ownership of the mineral estate.

§ 6.04. Consent Required to Develop the Oil and Gas Estate.

In order to drill and operate oil and gas wells, the oil and gas producer must have consent from owners of the mineral estate. Additionally, depending on the activities the producer is planning to conduct on the real property, it may also need consent from the surface owner of the property if the mineral and surface estates have been severed. In essence, whether the consent of the surface owner is necessary depends on the extent of the operations to be conducted on the property and the overall disturbance to the enjoyment of the surface estate by its owner.


There are two separate and distinct concepts at work in the discussion of whether the owners of the surface estate must consent to use of the surface for the purpose of extracting oil and gas. First, what rights do the owners of the mineral estate have to use the surface to access the oil and gas without the consent of the surface owner; and second, if the consent of the surface owners is required, do all of the surface owners have to consent?

The subject of this article is not the respective rights of surface and mineral owners, and whether the consent of surface owner is required is not a “co-tenancy” question. Nevertheless, the two concepts often become blurred due to the fact that both questions are centered around the necessity of the oil and gas developer to obtain all of the appropriate consents before drilling begins.

The ownership of the mineral estate generally carries with it the right to use the surface estate to access the oil and gas; provided, that the use of the surface is reasonably necessary for the extraction of minerals and such use does not create a substantial burden on the surface owner. The use of at least a portion of the surface is contemplated when minerals are

6 Griffith v. J. C. Miller Oil Co., 349 S.W.2d 833 (Ky. 1961).
severed from the surface estate and it is clear that the minerals cannot be developed absent access to the surface.\textsuperscript{7} Additionally, the courts in some jurisdictions have been willing to liberally construe the rights of an oil and gas lessee, or owner of the minerals, to use and occupy so much of the surface as may be necessary and reasonably convenient in the exercise of its rights to develop the oil and gas, even to the preclusion of any other possession of the surface by the owner of the surface estate, unless such rights are expressly limited by the terms of the lease or conveyance.\textsuperscript{8}

Notwithstanding the rights of the mineral owner to a reasonable use of the surface, often the activities planned to be conducted on the property will be outside the scope of what the courts have been willing to recognize as a necessary or reasonable use. In such a case, if the oil and gas producer concludes that consent from the surface owners is necessary in order to extract oil and gas from the property, the principles of co-tenancy will apply.

The principles which govern the relationship of co-tenants are equally applicable in both the surface and mineral estates. Thus, a state which permits the development of the oil and gas estate with the consent of less than all of the co-owners of the mineral estate will likely apply the same rule to surface owners.

Such is the case in both Kentucky and Pennsylvania.\textsuperscript{9} In \textit{MCI Mining Co. v. Stacy}, a co-tenant conceded that his fellow co-tenant had the right to use the surface estate without his consent.\textsuperscript{10} The court’s affirmation of the co-tenant’s concession is indicative of its view that in Kentucky, a co-tenant may conduct mining operations on the surface estate without the consent of all of his fellow co-tenants. Also, in Pennsylvania, the state supreme court recognized the validity of a surface lease which had been executed by less than all of the surface owners.\textsuperscript{11}

\begin{flushright}
\textsuperscript{8} Lindsey v. Wilson, 332 S.W.2d 641 (Ky. 1960).
\textsuperscript{10} \textit{MCI Mining Co.}, at 491.
\textsuperscript{11} Lichtenfels at 782.
\end{flushright}

In the context of whether the consent of all of the co-owners of the mineral estate is required in order to develop the oil and gas estate, the law of the states in the eastern oil and gas fields has taken two dramatically different paths.

[a] — Majority Rule.

The majority rule allows a single co-tenant to extract the oil or gas without consent of all of the remaining co-tenants. In its effort to determine which rule the Missouri state courts should adopt, the Missouri Court of Appeals, in *Davis v. Byrd*,\(^\text{12}\) summarized the majority rule as follows:

[a] tenant in common commits no wrong in entering upon the common property for the purpose of carrying on mining operations in the usual way and therefore cannot be held to be a trespasser; and that the removal of ore without willful injury to the common property or unnecessary destruction caused by negligence or unskillfulness does not constitute waste.\(^\text{13}\)

While there have been numerous opinions which address the theory of the majority rule, perhaps none are more recognizable than the seminal opinion of *Prairie Oil and Gas Co. v. Allen*.\(^\text{14}\)

In *Prairie*, the United States Circuit Court for the Eighth Circuit observed that, “Tenants in common are the owners of the substance of the estate. They may make such reasonable use of the common property as is necessary to enjoy the benefit and value of such ownership.”\(^\text{15}\) Using that principle as its guidepost, the court held that one co-tenant could not prevent another from enjoying the benefit of owning the oil and gas by prohibiting the other co-owner from extracting it.\(^\text{16}\) In the court’s opinion, extracting the oil was a reasonable use of the estate and not a wasteful depletion.\(^\text{17}\)

\(^{12}\) *Davis v. Byrd*, 185 S.W.2d. 866 (Mo. Ct. App. 1945).

\(^{13}\) *Id*.

\(^{14}\) *Prairie Oil and Gas Co. v. Allen*, 2 F.2d. 566 (8th Cir. 1924).

\(^{15}\) *Prairie* at 571.

\(^{16}\) *Id*.

\(^{17}\) *Id*.
court stated, “[a] tenant in common, without the consent of his co-tenant has the right to develop and operate the common property for oil and gas and for that purpose may drill wells and erect necessary plants.”¹⁸

[i] — Rationales for the Majority Rule.

Although there are many reasons for the adoption of the majority rule, the courts seem to have focused on three prevalent rationales and those three are recurring throughout the common law of the states adhering to the majority rule.

The first rationale is that the oil and gas must be removed in order to be “enjoyed,” and therefore the extraction of the minerals is not waste or misuse, but rather it is the proper use of the co-owned property. This first rationale was observed by the Eighth Circuit in *Prairie*, “Since an estate of a co-tenant in a mine or oil well can only be enjoyed by removing the products thereof, the taking of mineral from a mine and the extraction of oil from an oil well are the use and not the destruction of the estate.”¹⁹

A second rationale for the majority rule is that due to the fugacious nature of oil and gas, which can be drained from adjacent properties, co-tenants must be able to protect their interests by extracting the oil and gas from their property. Essentially, the rationale is that if the co-tenants are not able to extract the oil and gas from the property, the owners of adjacent properties will able to drain the oil and gas from the jointly-owned property, and, consequently, reduce the value of the estate such that none of the co-owners will ever be able to enjoy the benefit of owning the estate.

The Texas Court of Civil Appeals specifically noted the importance of permitting a co-tenant to develop the oil and gas estate, stating:

It seems to us that the peculiar circumstances of a co-tenancy in land upon which oil is discovered warrant one co-tenant to proceed and utilize the oil, without the necessity of the other co-tenants concurring. Oil is a fugitive substance and may be drained from

¹⁸ *Id.*
¹⁹ *Id.*
the land by well [sic] on adjoining property. It must be promptly taken from the land for it to be secured to the owners. If a co-tenant owning a small interest in the land had to give his consent before the others could move towards securing the oil, he could arbitrarily destroy the valuable quality of the land.20

For this reason, courts in states which traditionally did not allow a co-tenant to develop the oil and gas without the consent of her fellow co-tenants have been willing to provide a mechanism to the co-tenants desirous of developing the oil and gas.21

A third rationale for the majority rule prevalent throughout the caselaw is that the requirement of consent from all co-tenants gives the non-consenting fractional interest owner too much control over his co-tenants. In other words, the holder of a tiny fractional interest could prevent drilling for oil or gas even if a vast majority of the remaining co-tenants consented to such operations.

The potential rigidness of such a rule was recognized by Justice Thomas of the Virginia Supreme Court, in his dissent in Chosar Corp. v. Owens,22 where the majority opinion held that one co-tenant could prevent the extraction of the oil and gas. Disapproving of the majority opinion, Justice Thomas wrote:

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.23

21  See, e.g. Pure Oil Co. v. Byrnes, 57 N.E. 2d 356, 362 (Ill. 1944), stating “The stern rule of liability of a co-tenant, who commits waste or damage to the common property, has been relaxed where the profit taken from the land is of a fugacious nature and liable to be exhausted by adjacent operators.
23  Id. at 305.
[b] — Minority Rule.
States following the minority rule adhere to the principle that extraction of oil and natural gas by a co-tenant, or his lessee, without obtaining the consent of all of the remaining co-tenants, is prohibited. Just as it did for the majority rule, the Missouri Court of Appeals also articulately summarized the principles of the minority rule in its opinion in *Davis*:

It is trespass for one co-tenant or his lessee to mine real estate and to sell and dispose of ores mined therefrom without the consent of his co-tenant, and injunction will lie to enjoin and restrain the further mining of the property. His theory is that a tenant in common, regardless of the extent of his interest, may prevent the mining of mineral lands by refusing to join his co-tenant in the enterprise, and that said co-tenant cannot mine the land himself or through lessees, even though in so doing such co-tenant or his lessees do not exclude or attempt to exclude their tenant in common from exercising the same rights and privileges. Such a rule, of necessity, must be based on the theory that one co-tenant entering upon and mining the common property against the will of the other is a trespasser and that the digging into the soil and removing ore therefrom constitutes waste.  


[i] — Rationale for the Minority Rule.
Although there are three principal rationales for the majority opinion, states following the minority rule, generally do so for the same reason. That reason is essentially the converse of the first rationale of the majority rule referenced above. States following the minority rule find that the removal of the oil or gas without the consent of all of the co-tenants is a continuing destruction of the mineral estate rather than a natural and anticipated use of it. With that as a threshold assumption, cases following the minority rule, such as *Chosar*, observe that a co-tenant should not be permitted to change or
alter the estate without the consent of all of the co-tenants as such destruction would constitute waste.\textsuperscript{25}

\section*{§ 6.05. State-by-State Analysis.}
Real property law is often painfully jurisdictionally specific. The approach that states have taken with regard to the number of co-owners necessary in order to extract oil and gas is no exception.

The following section is a general summary of the law in selected eastern oil and gas producing states. Not surprisingly, the law is not equally well developed in each state. Where no authority was found in the context of oil and gas, authorities addressing this issue with regard to the coal estate have been substituted. While it is likely that the principles relating to co-tenancy addressed in the context of the coal estate would also be applied in cases involving the owners of an oil and gas estate, it is possible that the differences in the physical characteristics of the minerals could impact a court’s decision.

[1] — States Following the Majority Rule.
[a] — Kentucky.
In Kentucky, a co-tenant is not deemed to be a trespasser in developing co-owned minerals without consent of his fellow co-tenants.\textsuperscript{26} In \textit{Taylor}, the court remarked that each co-tenant has the “lawful right to use and enjoy the estate.”\textsuperscript{27} Moreover, under Kentucky common law, a co-tenant has the right to drill on commonly-owned property without the consent of his other co-tenants.\textsuperscript{28}

In addition, in \textit{York v. Warren Oil & Gas Co.},\textsuperscript{29} it was observed that a lessee of a co-tenant had the authority to develop the jointly-owned oil and

\begin{itemize}
  \item \textsuperscript{25} \textit{Chosar Corp.} at 305.
  \item \textsuperscript{26} \textit{Taylor v. Bradford}, 244 S.W.2d 482 (Ky. 1951).
  \item \textsuperscript{27} \textit{Taylor} at 484.
  \item \textsuperscript{28} \textit{Petroleum Exploration Corp. v. Hensley}, 284 S.W.2d 828 (Ky. 1955).
  \item \textsuperscript{29} \textit{York v. Warren Oil & Gas Co.}, 229 S.W. 114 (Ky. 1921).
\end{itemize}
gas, subject only to the rights of the other co-tenants to receive an accounting of the royalties or demand a division of the minerals thus mined from the premises.30

[b] — Indiana.

The Indiana courts’ adoption of the majority rule is clear in the holding of Price v. Andrew,31 wherein the Indiana Court of Appeals announced, “The principle seems well established in this state that the possession of one tenant in common is the possession of all, and that the tenant in possession is not required to pay rent unless he excludes his co-tenant, but if he receives rent from a third person, he must account for it.”32

[c] — Pennsylvania.

Pennsylvania, likewise, has adopted the majority rule. In fact, the Pennsylvania Superior Court recently reaffirmed the majority rule in its opinion in Lichtenfels. There, the court noted:

Another special rule relating to the mineral estate is that a tenant cannot restrain a co-tenant with an undivided interest in the land from realizing the value of the estate by producing or consuming the underlying minerals, and that such right is only subject to an accounting to his fellow co-tenants.33

Notably, the Lichtenfels court cited with approval the holding in Prairie.34

While the Lichtenfels opinion is more recent, the court was essentially reaffirming the numerous opinions which have set forth the majority rule throughout the history of Pennsylvania’s jurisprudence. In one such opinion, McIntosh v. Ropp,35 the Pennsylvania Supreme Court stated,

we feel that, on reason, the rule there laid down should be adopted in the present case; for, owing to the fugacious nature of oil and

30 Id.
32 Id. at 437.
33 Lichtenfels at 782.
34 Id. at 782.
35 McIntosh v. Ropp, 82 A. 949 (Pa. 1912).
gas, and their ability to be diverted by operations upon adjoining lands, it is particularly necessary that co-tenants should not be unduly restricted in the enjoyment of such properties.36

Additionally, the court acknowledged that it was impossible for one co-tenant in the oil and gas estate to enjoy the benefit of his ownership without affecting the rights of his fellow co-tenants. Specifically, the court stated that as to a tenant in common, “His ownership is such that he cannot take his own share, without also at the same time and by the same act taking the share of the co-tenant.”37

[d] — Tennessee.

Tennessee law is not well developed in the context of the consent required to operate an oil and gas well. In the Chancery Court of Appeals’ opinion, Harlan v. Central Phosphate Co.,38 however, the court adopted similar language to cases in jurisdictions following the majority rule. Specifically, in determining whether it should adopt the minority or majority position, the court opined, “We think the better opinion is that such a lease is binding upon the tenant in common who makes it, but cannot in any way impair the rights of tenants who did not join or consent thereto.”39 This language is indicative of the view that while a co-tenant may not bind the interest of his fellow co-tenants by lease, the lease is nonetheless valid, which is consistent with the majority view.

[e] — Illinois.

Illinois has taken a slightly different approach, striking a balance among the rights of co-tenants by permitting the holders of the majority interest to determine whether the oil and gas should be extracted from the property. The rule is codified in Illinois statutory law as follows:

36 Id.
37 Id., quoting Appeal of Fulmer, 18 A. 493 (Pa. 1889).
39 Harlan at 622.
§ 1. When the right to drill for and remove oil and gas from any lands in this State is owned by joint tenants, or tenants in common, whether such right or title is derived by purchase, legacy or descent, or whether any or all of the claimants are minors or adults, any one or more of the persons owning a 1/2 interest or more in the right to drill for and remove the oil and gas from such lands may be authorized to drill for and remove oil and gas from such lands in the manner hereinafter provided.40

The Illinois statutes go further to authorize an action on behalf of the co-tenants desirous of drilling for the oil and gas who cannot reach an agreement with their fellow co-tenants.41

Likewise, the Illinois Supreme Court observed that the traditional rules regarding the liability of a co-tenant in connection with extraction of oil and gas have been loosened due the fact that oil and gas are fugacious substances. The court stated:

The stern rule of liability of a co-tenant, who commits waste or damage to the common property, has been relaxed where the profit taken from the land is of a fugacious nature and liable to be exhausted by adjacent operators. In such cases the rule allowing deductions for money spent in protecting, preserving and marketing applies, and where the subject matter is oil, the co-tenant who takes it from the land must account to his co-tenants for their respective proportions of the net value of the oil produced, which is its market value, less the cost of extracting and marketing it.42

It is clear from the above language that the Illinois court was particularly concerned with the second rationale in favor of the majority rule; the fact that the oil and gas may be exhausted by oil and gas wells on adjacent properties.

---

42  Pure Oil Co. v. Byrnes, 57 N.E.2d 356 (Ill. 1944).
  
[a] — Virginia.

In the prominent opinion of Chosar, the Virginia Supreme Court held that the removal of coal from a tract of real property without the consent of all co-tenants was not a proper use of the estate, but rather a destruction of the jointly owned minerals. In particular, the court said that removing the coal was a “material and continuing destruction of the very substance of the mineral estate.”43 In the analysis underlying its opinion, the court appeared to rely heavily upon the definition of waste in Black’s Law Dictionary, which defines waste as “[a] destruction, or material alteration or deterioration of the freehold.44 Throughout the opinion, the court used the “destructive and material alteration” language and ultimately concluded that the removal of coal is a “material destruction” of the estate.45

In Chosar, it was apparently not significant that a great majority of the co-tenants in question were in favor of the proposed mining. Approximately 85 percent of the co-tenants were proponents of the development of the oil and gas estate.46 Nevertheless, the court adopted a rule to protect minority interest holders, opining that the “consenting co-tenants had no right to remove coal from the common property without the consent of Owens” [the non-consenting co-tenant].47

Providing further analysis, the majority opinion observed that, “In the case of tenants in common, no tenant can change or alter the common property to the injury of his co-tenants without their consent.”48 Despite the fact that there are many cases in the states which have adopted the minority rule, the Chosar opinion is one of the few modern cases which contains a comprehensive analysis of the reasons for the adoption of the minority view.

43 Chosar at 305, 307, 308.
44 Id. at 307, quoting Black’s Law Dictionary, 5th Ed. 1425 (1979).
45 Id.
46 Id. at 662.
47 Id. at 308.
48 Id.
It is also noteworthy that the Chosar opinion can create particularly dire consequences for co-tenants desirous of developing the mineral estate of jointly owned real property lying north and west of the Clinch River. The Virginia partition statute negatively implies that such property may not be partitioned by the co-owners, even if they cannot agree as to how the property is best utilized.\textsuperscript{49} Therefore, as the dissent in Chosar properly recognized, if the co-tenants cannot agree as to whether the oil and gas estate should be developed, “[t]he owners are locked in battle with no way out.”\textsuperscript{50}

[b] — West Virginia.

Like Virginia, West Virginia’s courts adhere to the principles of the minority view. An early example of West Virginia’s adoption of the minority rule is the opinion of the Supreme Court of Appeals in South Penn Oil Co. v. Haught.\textsuperscript{51} There, it was held that a co-tenant’s removal of oil and gas without the consent of all of his fellow co-owners constituted waste, making such co-tenant liable for an accounting to the non-consenting co-tenants.

The rigidness of the minority rule can sometimes create seemingly inequitable results. One such example is the case of Law v. Heck Oil Co.\textsuperscript{52} In Heck Oil, the non-consenting co-tenant owned an undivided 1/768 interest in the oil and gas estate. The Heck Oil Company leased the remaining 767/768 from the other interest holders.\textsuperscript{53} Despite being offered an “excessive” bonus, the nominal interest holder refused to execute a lease of his interest. Instead, the non-consenting co-tenant sought to enjoin the company from drilling on the property.\textsuperscript{54}

Notwithstanding the fact that the fractional interest holder had only a nominal interest in the oil and gas, the West Virginia court granted the injunction. The court reasoned that the percentage of the ownership was

\begin{itemize}
\item \textsuperscript{49} Va. Code Ann. § 8.01-81 (1964).
\item \textsuperscript{50} Chosar at 309.
\item \textsuperscript{51} South Penn Oil Co. v. Haught, 78 S.E. 759 (W. Va. 1913).
\item \textsuperscript{52} Law v. Heck Oil Co., 145 S.E. 601 (W. Va. 1928).
\item \textsuperscript{53} Id. at 601.
\item \textsuperscript{54} Id.
\end{itemize}
immaterial, stating that an unqualified owner of real property is entitled to have it remain in such condition as he sees fit.\textsuperscript{55} The court opined that there was not a mechanism in West Virginia law which entitled a co-tenant to coerce his co-owner to convert his real property interest into personalty. The \textit{Heck Oil} court opined:

To permit the defendant company to proceed with its proposed development of the oil and gas underlying the land in question without the plaintiff’s consent, even though the company should faithfully turn over to the plaintiff his full proportionate share of such minerals, or account to him therefore, without cost of production, would be a compelling of the plaintiff to exchange his real estate for personal property.\textsuperscript{56}

It is evident that West Virginia courts are willing to protect even a nominal interest in real property which has the potential to create significant problems for oil and gas producers when property is co-owned by multiple parties.

West Virginia’s courts have provided some relief for a co-tenant seeking to develop the oil and gas estate, but only in limited circumstances. Where the oil and gas estate is in danger of being drained by a well on an adjacent property, some West Virginia courts have implied that a co-tenant may extract the oil and gas without the consent of all of his co-tenants to guard against the complete loss of the estate.\textsuperscript{57}

[c] — Possible Remedies in Minority States.

In states following the minority rule, it may be possible for disputing co-tenants bring an action to partition the jointly owned property. Generally, partition is defined as the division of real property between co-owners, resulting in individual ownership of the interests of each.\textsuperscript{58} Both Virginia

\begin{footnotesize}
\begin{enumerate}
\item[55] \textit{Id.} at 601.
\item[56] \textit{Id.} at 602.
\end{enumerate}
\end{footnotesize}
and West Virginia authorize co-tenants to partition their jointly owned real property.\(^{59}\) Notably, however, Virginia case law has interpreted the Virginia partition statute to prohibit partition of jointly held property lying north and west of the Clinch River.\(^{60}\) Therefore, the co-tenants of real property located north and west of the Clinch River in Virginia would not be entitled to seek relief through an action for partition.

In addition to partition some states have adopted compulsory or “forced” pooling regulatory schemes to provide some relief to co-tenants desirous of developing the oil and gas estate, and who cannot reach a suitable agreement with their fellow co-tenants.\(^{61}\) The states’ forced pooling regulations are not within the scope of this chapter.

§ 6.06. Doctrine of Ratification and Acquiescence.

Non-consenting co-tenants may inadvertently ratify or affirm the lease despite the fact the co-tenants did not join in the lease at the time it was executed through their subsequent actions. This principle, known as the Doctrine of Ratification and Acquiescence, is somewhat of an equitable remedy which prohibits a co-tenant from benefiting from a lease and then arguing against its validity. One of the most common situations where the doctrine is applied occurs when a co-tenant accepts a royalty payment for his or her ownership interest in the property despite not having joined in the lease and later challenges the leasehold interest of the lessee.

The principle was recognized in *Farris v. Laurel Explosives, Inc.*\(^{62}\) In *Farris*, the court noted the appropriate standard for the application of the doctrine:

If the objecting joint tenant consents or in any manner ratifies or acquiesces in the renting made by his co-tenant or co-tenants, the doctrine contended for will not apply, since in that case the renting


\(^{60}\) See, *Chosar Corp.* at 305.


joint tenant becomes the agent of the objecting one either by actual consent or by adoption through acquiescence and ratification.63


Whether a state has adopted the majority or minority rule in connection with the number of co-tenants needed to drill and operate an oil or gas well on the premises, one thing remains constant: non-consenting co-tenants are not bound by their fellow co-tenants’ lease. A prime example of the inability of a co-tenant to bind another without his consent is found in the York opinion.64 There, the court stated that despite the fact that one co-tenant had previously leased property to another, the non-consenting co-tenant could have also leased the same property for the same purpose.65

The facts in York involved a dispute between siblings concerning the development of the oil and gas estate.66 In noting that the co-tenants could have both leased the property to separate lessees for the purpose of developing the oil and gas estates, the court observed, “Had the son, who owned the other one-half undivided interest in the land, leased it to another company, both companies would have enjoyed the privilege of entering upon and using the surface of the lands while drilling for oil and gas to the same extent as their grantors could have done, each respecting the prior location and improvements of the other.”67 It is clear from the language of the opinion that just as co-tenants are permitted to occupy the premises at the same time, so too are their lessees.

§ 6.08. The Duty to Account.

Regardless of the fact that most states do not require consent from all joint tenants, those owners not participating in the lease still have the right

---

63 Id. at 490, (quoting Shelby v. Shelby, 279 S.W. 942, 944 (Ky. 1926).
64 York v. Warren Oil and Gas Co., 229 S.W. 114 (Ky. 1921).
65 Id.
66 Id.
67 York at 116.
to collect any profit that is received from the jointly owned property. This is
accomplished through an accounting of all rents and profits received through
the lease. This concept is commonly known as the “duty to account.” The
duty to account among co-tenants is succinctly stated in the following quote,
“[t]he common law in this jurisdiction is that one is liable to his co-tenants
for any rents and profits he collects from the joint property.”68 Indeed, co-
tenants have an affirmative duty to account to their co-tenants in every state
examined.69

The duty to account is so prevalent that some states have codified the
requirement to account. Pursuant to Indiana Code § 32-30-9-1 (2002), a
co-tenant may maintain an action against his fellow co-tenant for receiving
more than his fair share of the profits received from the jointly owned real
property. Likewise, pursuant to VA. Code Ann. § 55-211 (1950), a co-tenant
must account to his co-tenants for any profit received from the jointly owned
real property in excess of his fair share.


Although every state requires a co-tenant to account to his fellow co-
tenants for rents and royalties attributable to the jointly-owned property,
unfortunately not all of the states agree on the proper way to measure the
amount of value received.


One way states have measured the value received by a co-tenant is by
calculating the royalties usually paid in the community where the land is
located. While this is not the rule in most states, Pennsylvania, Indiana, and,
under most circumstances, Virginia, follow this method.

69 See, e.g. New Domain Oil & Gas Co. v. McKinney, 221 S.W. 245 (Ky. 1920); Price
v. Andrew, 10 N.E.2d 436 (Ind. Ct. App. 1937); South Penn Oil v. Haught, 78 S.E. 759
(W. Va. 1913).
In *McIntosh*, the Supreme Court of Pennsylvania found that “a claim by a co-tenant for her share of the proceeds, which should be measured in this case by the fair market value of the mineral in place, which might be figured on the basis of the royalty to be obtained for the privilege of removing such minerals.”70 When faced with basically the same question as it related to coal mining, Indiana’s Appellate Court ruled that “one co-tenant is liable to another co-tenant for his just proportion of the royalty on coal mined and removed from a coal seam owned by them as co-tenants . . . .”71

Although Virginia requires that all of the co-tenants consent to a lease, in the event that one or more of the co-tenants seeks to develop the mineral estate without the consent of all of his fellow co-tenants and is not enjoined before doing so, such co-tenant may be liable for an accounting to the non-consenting co-tenants. In that case, Virginia also adheres to the royalty method of accounting, but allows for other methods under certain circumstances. In *Newman v. Newman*,72 the Supreme Court of Virginia stated that “where a tenant in common uses the common property to the exclusion of his co-tenants, or occupies and uses more than his just share and proportion, the best measure of his accountability to his co-tenants as their shares of a fair rent . . . .” The court went on to hold that in a case of “peculiar circumstances,” it might be “proper to resort to an account of the issues, profits, [etc.] as a mode of adjustment between the tenants in common.”73

Kentucky also uses the royalty method, albeit on a limited basis. In *New Domain Oil & Gas Co. v. McKinney*,74 the Court of Appeals of Kentucky set out two different bases of accounting, with the decision on which to use being based on the knowledge of the co-tenant. If a co-tenant is ignorant of the ownership interest of another co-tenant and extracts oil or gas from

---

70 *McIntosh* at 949, 954.
73 *Id.* at 714.
74 New Domain Oil & Gas Co. v. McKinney, 221 S.W. 245 (Ky. 1920).
his land, he is held to account only on the basis of a “customary royalty.”  

However, once the co-tenant obtains knowledge of the existence of his co-owner, which can occur with the institution of a lawsuit, Kentucky sets the value for accounting at market value of the oil and gas, less the cost of extraction and marketing, including overhead expenses.  

This measure is also the basis of accounting in West Virginia, Ohio, and Illinois.


The value less expenses method of accounting measures value as the market value of the oil and gas produced from the property minus the reasonable expenses incurred in the drilling and operation of the well. Under the value less expenses method, the non-consenting co-tenant is entitled to receive their pro-rata share of the oil and gas produced minus the proportional share of expenses related to the production of such oil and gas. This method and the royalty method are the most common in the eastern oil and gas producing states examined.

West Virginia recognizes that where a joint tenant extracts minerals in good faith and without knowledge of other ownership interests in the land, while still constituting waste, the act is of a lesser degree of wrongdoing than trespass. Applying this reasoning, the Fourth Circuit Court of Appeals, applying West Virginia law, held that a co-tenant who takes oil from jointly-owned land becomes a trustee for his co-tenants, who are entitled to a fair accounting for what he actually received, less his legitimate expenses.  

The Fourth Circuit’s opinion followed a similar one in the Supreme Court of Appeals of West Virginia in McNeely v. South Penn Oil Co.  

Similarly, in Keys v. Pittsburgh & Wheeling Coal Co., the Supreme Court of Ohio held that the method of accounting in a situation of a joint tenant mining coal on jointly-owned lands should be the market value of the coal in place less the expenses incurred in removing the coal. Although

75 Id. at 250.
76 Id. at 251.
77 Dangerfield v. Caldwell, 151 F. 554 (4th Cir. 1907).
78 McNeely v. South Penn Oil Co., 52 S.E. 480 (W. Va. 1905).
79 Keys v. Pittsburgh & Wheeling Coal Co., 50 N.E. 911 (Ohio 1898).
it is unclear whether Ohio would treat a case involving oil or gas differently from one involving coal, it seems likely that the same reasoning would be applied to each mineral type.

Illinois is much like Kentucky in that it has two different methods of accounting, but Illinois bases its decision on which to use on whether or not the co-tenant acquired consent before extracting minerals. In Zeigler v. Brenneman, the Supreme Court of Illinois found that when a co-tenant is given consent from his fellow owners, he must pay them the value of the mineral less his reasonable expenses, just as in West Virginia and Ohio. But the court went on to say that when a co-tenant extracts oil or gas without the consent of his joint owners, he will owe them the market value of the mineral without a credit for his expenses.

In addition to non-consenting co-tenants requiring an accounting for profits derived from the commonly owned real property, there have also been cases in which a co-tenant causes wells to be drilled upon the jointly-owned property without the consent of his fellow co-tenants and then later sought reimbursement from the co-tenants when the business venture proved unprofitable. Where a co-tenant makes improvements on the jointly-owned property without the consent of his fellow co-tenants, he does so at his own risk. In Knight v. Mitchell, the court recognized that, although the co-tenant would have been permitted to offset any joint profits when properly accounting to his co-tenants, he could not seek a contribution from them for costs of associated with the unauthorized drilling of wells.

If a co-tenant does not initially join in a lease of oil and gas rights, the co-tenant may later affirm the lease and share in the royalties paid to its co-tenant as the lessor. If the non-consenting co-tenants do not affirm the lease, however, it may be possible for such co-tenants to look to the lessee, as a co-tenant, for their share of the oil produced.

---

80 Zeigler v. Brenneman, 86 N.E. 597 (Ill. 1908).
82 Id.
Additionally, the duty to account is applicable to all rents and royalties received by a co-tenant including secret profits. Where each of the co-tenants join in a lease, the Kentucky Court of Appeals ruled that one co-tenant cannot enter into an additional agreement whereby such co-tenant would be entitled to a higher royalty than the others. In such a case, the co-tenant receiving higher royalties had to share the higher royalty rate with his fellow co-tenants in proportion to their ownership interests.84

§ 6.10. The Doctrine of Waste.


In one of the more comprehensive historical analyses of the doctrine of waste, the Court of Appeals of New York, in Rogers v. Atlantic G. & P. Co.,85 acknowledged the following as an appropriate definition of waste: “Spoil or destruction done or permitted to lands, houses, or other corporeal hereditaments, by the tenant thereof, to the prejudice of the heir or of him in reversion or remainder.”86

In addition to generally defining waste, the court also explained that, historically, there were forms of waste: permissive and voluntary.

Permissive waste consists in the mere neglect or omission to do what will prevent injury; as to suffer a house to go to decay for the want of repair. And it may be incurred in respect to the soil, as well as to the buildings, trees, fences, or live stock on the premises. Voluntary waste consists in the commission of some destructive act; as in pulling down a house or ploughing up a flower garden. There are two kinds of waste, viz., voluntary or actual, and negligent or permissive. Voluntary waste may be done by pulling down or prostrating houses, or cutting down timber trees; negligent waste may be suffering houses to be uncovered, whereby the spars or rafters, planches or other timber of the house are rotted. Bacon’s Abridgment, vol. 10, p. 422.87

86 Id.
87 Id. at 661.
The doctrine of waste can be traced back to early American courts. Historically, however, the doctrine was limited to remainder or reversionary interests. In Kentucky, one of the early opinions observed that in general, “a tenant is guilty of waste, when, without license or authority from his landlord he performs any act which does a lasting damage to the freehold.”

In the context of mining or the extraction of oil and gas, the doctrine of waste traditionally served to prevent the tenant in possession from drilling new wells, but generally allowed the tenant to operate any existing wells on the property. This is the so called “open mines doctrine.”

Although at first the doctrine of waste was not applicable to co-tenants, the law of the eastern oil and gas producing states has evolved to incorporate actions between co-tenants. Kentucky, Virginia, and West Virginia have enacted statutes to provide a cause of action between co-tenants.

In addition, through their common law, some of the other eastern oil and gas producing states examined also permit a co-tenant to maintain a cause of action against his fellow co-tenants. In Brotherton v. Christ, the Pennsylvania Court of Common Pleas stated that although the state courts were reluctant to interfere in the relationship among co-tenants, they have awarded damages and enjoined co-tenants for committing waste. Also, many other states have caselaw which suggests that a co-tenant may maintain an action against his fellow co-tenants.

---

88 Loudon v. Warfield, 28 Ky. 196 (Ky. 1830).
89 See, 93 C.J.S. Waste § 21 (2001), stating that, generally, a tenant in possession may not remove oil and gas from the property unless such taking is authorized in an agreement with the holder of a reversionary interest.
90 Kentucky—Ky. Rev. Stat. Ann. § 353.320 (1984), states that a waste proceeding may be brought by any one or more parties who have a present or a contingent interest in the land or estate or interest therein. West Virginia—W. Va. Code § 37-7-2 (1923), if a tenant in common, joint tenant, or parcener commit waste, he shall be liable to his co-tenants, jointly or severally, for damages. Virginia—Va. Code Ann. § 55-212 (2007), If a tenant in common, joint tenant or parcener commit waste, he shall be liable to his co-tenants, jointly or severally, for damages.
92 See, e.g., Barber v. Westmoreland, 601 S.W. 2d 712 (Tenn. Ct. App. 1980); Stout v. Curry 11 N.E. 487 (Ind. 1887), holding that a co-tenant may maintain an action in waste against an insolvent co-tenant.
The lessees of co-tenants are also liable to the co-tenants of their lessors in most jurisdictions. Indeed, as recognized in *York*, the lessee of a co-tenant becomes a co-tenant in the property and therefore obtains the rights and privileges of a co-tenant. Because co-tenants are liable to one another, a lessee of a co-tenant may become liable for an accounting to his other co-tenants. In *York*, the Kentucky Court of Appeals stated “[t]he lessee becomes a co-tenant in the mineral leased with the other joint owner.”

**[2] — Policy to Prevent Waste.**

Several states have adopted public policy favoring the development of minerals without waste. The language of the policies varies in each state, but, in general, the policies are in place to foster conservation of mineral resources, to encourage exploration for such resources, to prohibit waste and unnecessary surface loss and damage, and to encourage the maximum recovery of oil and gas.

**[3] — Traditional Notion of Waste.**

As a preliminary matter, it is important to note that regardless of whether a state follows the majority or minority rule, a co-tenant will be liable to his fellow co-tenants for any waste as the result of an unworkmanlike operation of the oil and gas estate or a wasting of the oil and gas due to the reckless or negligent operations by the co-tenant. This concept is separate and apart from waste that occurs as the result of the not obtaining the consent of all co-tenants in a minority rule jurisdiction. Most states have defined and prohibited traditional waste in conjunction with their public policy to prevent waste.

While all of the states examined have enacted statutes which provide some form of definition of traditional waste, the Virginia statute contains one of the more comprehensive statutory definitions. Specifically, it includes, among other things, the following:

---


94 *See*, *Davis v. Byrd*, 185 S.W.2d 866 (Mo. Ct. App. 1945).
(i) physical waste, as that term is generally understood in the gas and oil industry; (ii) the inefficient, excessive, improper use, or unnecessary dissipation of reservoir energy; (iii) the inefficient storing of gas or oil; (iv) the locating, drilling, equipping, operating, or producing of any gas or oil well in a manner that causes, or tends to cause, a reduction in the quantity of gas or oil ultimately recoverable from a pool under prudent and proper operations, or that causes or tends to cause unnecessary or excessive surface loss or destruction of gas or oil; (v) the production of gas or oil in excess of transportation or marketing facilities.95

Likewise, all of the states examined have enacted statutes which prohibit traditional waste.96


In minority rule states, a co-tenant may commit waste despite extracting the oil and gas in a commercially efficient manner. In this context, the waste results from the failure to obtain the necessary consents from all of the co-tenants rather than from unworkmanlike production of the oil and gas. The effect is that the co-tenant could theoretically operate an oil or gas well as efficiently as is reasonably possible and still be liable for waste to non-consenting co-tenants.

As states adhering to the principles of the minority rule, this type of waste is applicable in both West Virginia and Virginia. The Virginia Supreme Court in Chosar was particularly clear as to this point stating that the mining of the mineral without the consent of all of the co-tenants was a “material and

continuing destruction” of the co-owned estate. Based on that position, the court held that mining without consent from all of the co-tenants constituted waste and should be enjoined. 

Like Virginia, West Virginia has also taken the position that the extraction of minerals without the permission of all of the co-tenants constitutes waste. Specifically, the West Virginia Supreme Court of Appeals stated that although each co-tenant had the right to enter the commonly owned real property to explore for oil and gas, the removal of any such minerals found was inappropriate and may be properly enjoined. The court stated, “Each co-tenant had the right to enter on the land himself or by lessee and explore for gas and market the gas if found. But when that right was exercised and the common property was taken, the other co-tenants or tenants in common are entitled to an accounting as for a waste committed.”

§ 6.11. Injunctive Relief for Waste.

Generally, the courts favor enjoining the act or omission which causes waste rather than to allow the waste to continue and permit a claim for damages. Typically, injunctive relief is available to a co-tenant to prevent the occurrence of waste. Injunctive relief against a co-tenant may be appropriate where the injury caused by one co-tenant to another is material, continuing, and is not adequately remedied by damages.

In many cases, injunctive relief may be the potent remedy of a non-consenting co-tenant holding a fractional interest in real property. For example, in *Heck Oil*, the fractional interest holder had only a nominal interest in the co-owned mineral estate, thus any compensation of monetary damages would likely not create a significant financial detriment to the oil and

98 Id.
100 93 C.J.S. Waste § 23 (2001), stating that “Waste, when possible, should be arrested rather than allowed to run its full course.”
102 Chosar, 370 S.E. 2d at 307, 308.
gas developer. In contrast, injunctive relief could have serious economic consequences to the oil and gas producer, especially if the company has already expended significant resources to develop the mineral estate, and is unable to recoup those expenses through the production of oil or gas.

In spite of the general notion that waste should be enjoined if possible, the Pennsylvania courts have been reluctant to enjoin co-tenants from committing waste. There, the courts have embraced the theory that an injunction among co-tenants is not ordinarily granted to prevent waste, unless such waste is “malicious” or “destructive.”


Monetary damages may also be appropriate in actions for waste. Generally, the measurement of damages for the tort of waste is diminution of value to the estate as a result of the waste, i.e. the value of the mineral in the ground.

In jurisdictions requiring all of the co-tenants to consent before the oil and gas may be extracted, the courts have also measured damages by taking an accounting of the profits and receipts received by one of the co-tenants and then proportionally dividing those receipts among the co-tenants. This measure of damages was recognized the West Virginia Supreme Court of Appeals in Smith v. United Fuel Gas Co. There the court held that co-tenants, who had committed waste by taking gas without the consent of their fellow co-tenants, were required to account for their proportional share in the royalties received.


Monetary damages for waste may also be enhanced under certain circumstances. In particular, when the waste is committed wantonly a

103 Heck Oil Co., 145 S.E. at 601.
107 Id.
co-tenant may be liable for three times the actual damages or “treble” damages.108


Perhaps the largest distinction between the duty to account and the doctrine of waste is that co-tenants are required to account to their co-tenants even if no waste occurs. Even if the oil and gas is extracted without unnecessary damage to the property and the recovery was fully maximized, a co-tenant still has a duty to account to his co-tenants for rents and royalties he receives which are generated from the use of the property.

Also, it is noteworthy that theoretically, a cause of action could lie for both an accounting and waste. For example, if oil and gas were extracted in an negligent manner in a majority rule state, a co-tenant may owe his fellow co-tenants an accounting for rents and royalties received for the oil and gas which was produced and also owe damages for the oil and gas which was wasted by the negligent extraction.

§ 6.15. Conclusion.

Although the law of co-tenancy is not a rapidly evolving area of law in modern jurisprudence, it can often be difficult to navigate the numerous applicable concepts and relevant state common and statutory law. Nevertheless, there are certain issues which commonly arise in the evaluation of co-tenancy questions, and knowledge of those issues makes the difficult task of finding the correct answer more manageable.

One of the biggest challenges facing a practitioner is determining the outcome when two co-tenants disagree as to how the commonly-owned property should be utilized. The answer, of course, very much depends on the law of the jurisdiction where the property is located. After making a determination of whether a co-tenant may proceed without the consent of all of his fellow co-tenants, the next question becomes what are the consequences when the oil and gas is removed without their consent? Ultimately, the answers to these questions will likely impact the decision of whether it will be profitable to develop the mineral estate on jointly-owned real property.
