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Damages for Trespass in Exploring for Oil

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ming.[19] The Court in *Bernardy v. Colonial and United States Mortg. Co.*[20] said that "under such a system, abstracts will reasonably show all the conveyances made of the property", and in the case of *Fullerton Lumber Co. v. Tinker*,[21] the Court said after quoting the statute providing for "numerical indexes" (tract indexes):

> "It will be observed, from the reading of these sections, that a party purchasing real property is not only required to examine the indexes of the grantors and grantees, mortgagors and mortgagees, in his chain of title, but also required to examine the numerical index, to ascertain whether there are other conveyances or incumbrances affecting said property not in the chain of title."

In both cases the South Dakota Supreme Court held recorded conveyances constructive notice although not in the chain of title. So apparently in Wyoming and in South Dakota if the conveyances from X to Y were recorded in point of time prior to the recording of A's interest in example (1); or, prior in time to the recording of C's interest in example (2); or, prior in time to the recording of D's interest in example (3)); such recording should give constructive notice to D's predecessors in title which would defeat D's title and the conveyance from X to Y would be more than a mere cloud on the title. Since this probably is the law in Wyoming, it is necessary first, for our examiner to make certain that X has no claim to title, and second, if X should have claim, to make certain that the conveyance from X to Y is not recorded prior to the conveyance from the common grantor (D and X's) to D's predecessors of title. In view of these facts the unqualified answer of "No" to *Standard No. Four* leaves doubt whether it is correct in all situations.[22] It would be wise if the Standards were changed to eliminate the ambiguity and to add a note to show that it refers only to cases where the "Stranger" lacks claim of title. If such is not done it is apt to discredit the balance of the Standards which reflect a worthy effort and a worthwhile aim.

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DAMAGES FOR TRESPASS IN EXPLORING FOR OIL

The problem of determining the proper measure of damages where there have been exploratory trespass on oil lands usually presents itself in fact situations similar to the following: The trespasser enters on the land without permission of the owner and explores it. He either discovers oil or determines that the land is not oil bearing and then allows the results of his exploration to become known to the general public. The more controversial problem arises where the trespasser fails to discover oil and the land is thereby given the reputation of being non-productive of oil. Former potential buyers or lessees are no

19. S. D. Rev. Pol. Code secs. 868-871.
20. (1904) 17 S. D. 637, 98 N. W. 166.
21. (1908) 22 S. D. 427, 118 N. W. 700, 18 Ann. Cas. 11.
22. Colorado has adopted an identical standard. (1946) 19 Rocky Mountain L. Rev. 66. This standard is probably an accurate guide in Colorado since their statutes do not provide for tract indexes.

longer in the market, and the owner brings action for the damage to his interest in the property. Before the trespass, the owner's interest was of considerable speculative value because of the productive nature of the surrounding land, now his interest has no value for the purpose of oil lease or production. In such a case, what should the owner be allowed to recover? Three possible answers to this question have been set down by decisions of courts.

In *Humble Oil & Refining Co. v. Kishi*,[1] the Texas Court of Civil Appeals allowed the owner of the oil and mineral interest to recover as damages the full value of the leasehold interest as it was prior to the trespass and disclosure of non-productivity. The other extreme was reached in *Martel v. Hall Oil Co.*[2] where the Wyoming Supreme Court allowed the owner of the oil and mineral interest recovery of nominal damages only, holding the value of the leasehold interest prior to the trespass to be too speculative to be allowed as a measure of damage. Punitive damages were allowed the owner of the surface but refused to the owner of the oil and mineral rights. The fact situation of the third case, *Shell Petroleum Corp. v. Scully*,[3] differs from that of the other two in that favorable conditions for the presence of oil were discovered by the trespass. The Circuit Court of Appeals Fifth Circuit in this case allowed the plaintiff to recover the value of the exploratory privilege as his measure of damage. Two decisions of the Louisiana Supreme Court seem to indicate that it will allow either, or a combination of both, of the measures of damages allowed in the *Kishi* and *Scully* cases.[4]

The decision in the *Kishi* case has been severely criticized. It has been said that the interest for which protection has been allowed is merely an opportunity to make a good bargain, a gambler's chance, and not such an interest as to which the law usually affords protection.[5] Dean Leon Green, writing on this case, was unable to find a theory on which this decision could be supported. He compared it with the case of allowing recovery for preventing one from competing for a prize but held it not to be analogous. The prize would have an actual value whereas the property interest in the present case has only a speculative value and all that can be said to be lost is the opportunity to make a good bargain.[6] A few months after the decision in the *Kishi* case the Texas court refused recovery where the plaintiff failed to show that the trespass was the proximate cause of the loss of market value,[7] but in two subsequent cases, decided in 1939 and 1941,[8] it is indicated by dictum, at least, that the rule of the *Kishi* case is still

1. (Tex. Civ. App. 1924) 261 S. W. 228, Reversed. (Tex. Comm. App. 1925) 276 S. W. 190, modified, (Tex. Comm. App. 1927) 291 S. W. 538, (Tex. Civ. App. 1927) 299 S. W. 687.
2. (1927) 36 Wyo. 166, 253 Pac. 862, 52 A. L. R. 91.
3. (C.C.A. 5th, 1934) 71 F. (2d) 772.
4. Angelloz v. Humble Oil & Refining Co., (1940) 196 La. 604, 199 So. 656; Layne Louisiana Co. v. Superior Oil Co., (1946) 209 La. 1014, 26 So. (2d) 20.
5. Damages for Exploratory Trespass in the Oil Fields, (1935) 48 Harv. L. Rev. 485.
6. L. Green, What Protection Has A Landowner Against A Trespass Which Merely Destroys The Speculative Value of His Property?, (1926) 4 Tex. L. Rev. 215.
7. Thomas v. Texas Co., (Tex. Civ. App. 1928) 12 S.W. (2d) 597.
8. McCoy v. Texon Royalty Co., (Tex. Civ. App. 1939) 124 S. W. (2d) 877; Humble Oil & Refining Co. v. Luckel, (Tex. Civ. App. 1941) 154 S.W. (2d) 155.

the law in Texas. An Oklahoma court in 1930[9] followed the *Kishi* case but could be distinguished in that the plaintiff therein proved the loss of a sale of the property at a definite price eliminating some of the speculation in fixing the amount of damage.

By denying recovery for the lost opportunity of selling the speculative oil interests the decision of the *Martel* case is probably representative of a sounder public policy but it has been suggested that the wilful or extremely negligent invasion of oil interests by oil companies would seem to require the imposition of punitive damages.[10] This decision might find support in the fact that oil lands can be explored, to a certain extent, without being trespassed upon. Where the underlying structure of the earth is revealed or indicated on the surface, whether or not the area is capable of producing oil can be determined by observation. Observations from, or photographs taken from, aircraft would not constitute a trespass unless the aircraft was operated at such an altitude as to interfere with the owner's "effective possession" of the air space; or to interfere with the actual use or present enjoyment of the property; or create a nuisance.[11] The entire state of Wyoming has been mapped by aerial photographs, prints of which can be obtained by the public. In view of this, exploration to the extent possible by surface observations could be made by any person without trespassing on the property explored. Information as to the existence of oil on certain lands can be gained by seismographic exploration taking place on adjoining premises and without actual entry on the land. This type of exploration is not conclusive as to the presence of oil as it merely indicates whether the underlying structres are favorable or unfavorable for the presence of oil. It is doubtful if this would be considered a trespass.[12]

The measure of damage applied in the Scully case is based on the theory that the plaintiff should recover the reasonable value of the privilege of exploring, taken wtihout permission by the trespasser. Since, in that case, the exploration resulted in a showing of probable existence of oil, there was no loss of speculative value to be considered and the only possible damage that was suffered by the owner was the right to sell the exploratory privilege. Where, as in this case, the exploratory trespass is by seismographic operations, only conditions either favorable or unfavorable for the presence of oil, can be exposed. By exposing favorable conditions for the presence of oil the trespasser probably has not destroyed the exploratory privilege because a purchaser would not be willing to rely on such indications. On the contrary it seems logical that he would be more willing than ever to pay for the privilege of exploring by drilling to conclusively prove the presence or absence of oil. It has been suggested that the true measure of damage in this case is the value of the benefit derived by the trespasser rather than the loss to the landowner.[13]

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9. American Surety Co. of New York v. Marsh, (1930) 146 Okl. 261, 293 Pac. 1041.
10. Damages For Exploratory Trespasses In the Oil Fields, (1935) 48 Harv. L. Rev. 485.
11. Prosser, Handbook of The Law of Torts (1941) sec. 13, p. 86.
12. See Phillips, Circuit Judge, concurring in Ohio Oil Co. v. Sharp (C.C.A. 10th Cir. 1943) 135 F. (2d) 303, 309.
13. Damages For Exploratory Trespasses In the Oil Fields, (1935) 48 Harv. L. Rev. 485.

The rule of the *Scully* case seems to answer the problem more adequately than either of the other two. It does not allow recovery for the loss of the opportunity to sell a "chance", it imposes a just measure of recovery for the taking of a property interest, and it tends to prevent wilful trespass on oil interests.

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LEGISLATION

The following notes discuss briefly some of the more important statutes passed by the Wyoming Legislature during the war years. Research for these notes was performed by the following members of the class in Legislation, given by Professor Edward P. Morton, at the University of Wyoming College of Law: Joyce Allen, Richard R. Bostwick, Robert N. Chaffiin, Frank C. Conley, Wilbur O. Henderson and James L. Thorpe.

SIMULTANEOUS DEATH—DISPOSITION OF PROPERTY

Chapter 94, S.L. 1941 adopts the Uniform Simultaneous Death Act,[1] the purpose of which is to establish rules for the devolution of property where such devolution has heretofore depended upon the priority of death among persons dying under such circumstances as to make it impossible for a court to determine that one decedent survived another.

At common law there was no presumption as to which of two persons died first in a common disaster where the facts could not be known;[2] but presumptions of survivorship, based upon the supposed probabilities according to the age, strength, and sex of the victims of the disaster were created by the Civil Law system. Statutes embodying these presumptions are in force in a few American states. Coming into Wyoming law evidently as a result of the adoption of certain California statutes, these statutory presumptions of survivorship were adopted by the Wyoming legislature in 1897.[3] In recent years, however, a growing realization that these presumptions are not valid[4] has resulted in the drafting of the Uniform Simultaneous Death Act. The Act does not create new presumptions; it repudiates the idea of presumptions, and substitutes positive rules for the disposition of property belonging to common disaster victims where the fact of priority of death cannot be known.

1. The Act is now Wyo. C.S. 1945, secs. 6-2511—6-2517.
2. See Wigmore on Evidence, 3d Ed., sec. 2532 and cases cited therein.
3. The Act is now Wyo. C.S. 1945, sec. 6-2510. In view of the repealing clause in the Uniform Simultaneous Death Act as adopted in Wyoming in 1941, it is not clear what effect, if any, sec. 6-2510 can now have. The Uniform Act was intended to abolish these presumptions of survivorship. At least as far as the disposition of property is concerned, this section would seem to have been completely superseded by secs. 6-2511—6-2517.
4. These presumptions seem unjustified in the light of what we know about human nature. If, for example, a husband and wife, both between 15 and 60 years of age, perish together in a common disaster, the presumption is that the wife perishes first, whereas experience seems to show that most men will sacrifice their own lives in an effort to save that of their wives. The same criticism can surely be made of the presumption that a child dies before his or her father; it is certainly reasonable to assume that the adult used every effort to prolong the child's life, and that the child in fact outlived the adult. For a strong criticism of the statutory presumptions, see Wigmore on Evidence, 3d. Ed., sec. 2532a.