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amounts of money spent thereon. Thus, the exclusive right to explore is recognized as a valuable right, and one to be bargained for, bought and sold as any tangible.

It would seem harsh to say that in Wyoming only nominal damages can be recovered today for a trespass, as in the *Martel* case, regardless of the proof of damages. It is submitted that it is merely a matter of degree in evidence as to whether damages are too speculative to allow recovery, and that the *Martel* case, in recognizing the invasion of a right, would allow damages upon sufficient proof. Thus, where it can be shown that the mineral owner had a valid offer that was withdrawn because of the trespasser's acts, the damages are not speculative. Present practices should also cause recognition of established market values where leases are being bought and sold in the area, and it appears reasonable that the lease could have been sold for a certain amount, so that value is definite enough to take the damages out of the speculative category. Where the holder of the mineral title cannot show that he had an offer or even that it might reasonably be concluded that he could have leased for a determined amount, his damages are speculative and recovery will be denied.

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VALUATION OF A WIDOW'S LIFE ESTATE FOR ELECTION PURPOSES

It frequently happens that it is necessary to calculate the value of a life estate. It is difficult, if not impossible, to make an exact calculation, thus parties seeking such a determination must be satisfied with a just or equitable result. The problem arises in such situations as the partition of property[1] and the determination of value for inheritance tax purposes.[2] However, the present concern is with the method of determining the value of a widow's life estate, for purposes of determining whether the widow may elect to take her statutory share against the husband's will under Wyoming's forced heir statute.[3]

In past history, various methods for determining the value of life estates have been relied upon. Possibly, the most simple is the agreement of the parties in interest,[4] such as the life tenant and the remainderman. This would be an acceptable solution at the present time, but it is seldom that the parties are so agreeable. In England, a rule was established that the value of a life estate should be a one-third share of the net estate.[5] This was known as the Equitable or the Common-law rule. This rule has

1. South Carolina Savings Bank v. Stansell, 160 S.C. 81, 158 S.E. 131 (1931).
2. In re Leonard's Estate, 199 Misc. 138, 100 N.Y. Supp.2d 105 (1950).
3. Wyo. Comp. Stat. § 6-301 (1945).
4. United States v. 15,883.55 Acres of Land in Spartanburg County, South Carolina, 45 F. Supp. 783 (1942).
5. Keniston v. Gorrell, 74 N.H. 53, 64 Atl. 1101 (1906).

been abolished, as being unreasonable and giving absurd results. It has been pointed out that a person at the age of eighty, with perhaps one year to live, should not have the same interest in a life estate, as a person at the age of twenty.[6]

At the present time, an absolute majority of the courts seek help from mortality tables to determine the present value of a life estate. In the past, various mortality tables have been compiled and for various reasons have proved to be faulty.[7] The two main mortality tables, recognized by the courts today, are the Carlisle tables and the American Experience tables.[8]

The Carlisle tables were compiled by Joshua Milne in about the year 1787, from the facts of life and death, according to the population of the community of Carlisle, England. For the most part, these tables are good, but it has been stated that they are faulty and give anomalous results in the death rate at certain ages. However, they were used as a basis for the compiling of the American Experience tables. The Carlisle tables have been further criticized for the fact that they are concentrated on one community and may give unfavorable results in communities in which the climate and living habits are different than those found in Carlisle, England.[9] As one court pointed out, this table was compiled from conditions different from the living conditions found in this country, especially in our large cities.[10]

The American Experience table was originally compiled by Sheppard Homans, based upon fifteen years of experience of the Mutual Life Insurance Company of New York.[11]

The general rule is that the proper method for calculating the present value of the life estate, is to determine the probable duration of life of the life tenant, based upon the tables of life expectancy and considering the habits, state of health of the life tenant, and other circumstances of the particular case.[12] Today, courts are agreed that mortality tables are admissible in evidence to determine the value of a life estate. However, the mortality tables are not conclusive, and the facts of habits, physical appearance, constitution and state of health of the life tenant must be considered.[13] A jury must be instructed that mortality tables are not an exclusive guide and failure to so instruct is considered reversible error.[14]

Present value of the right of dower has been subject to a large amount of litigation. A dower interest is considered as a life estate of the widow

6. Williams' Case, 3 Bland. 200 (1831); see also, Dowell v. Dowell, 209 Ark. 175, 189 S.W. 797 (1945); White v. White, 4 Ves. 24 (1798).
7. Williams' Case, 3 Bland. 200, 247 (1831).
8. Illinois Central R. Co. v. Houchins, 121 Ky. 526, 89 S.W. 530 (1905).
9. Steinbrunner v. Pittsburg & W.R. Co., 146 Pa. 504, 23 Atl. 239 (1892).
10. McCaffrey v. Schwartz, 285 Pa. 561, 132 Atl. 810 (1926).
11. Williams' Case, 3 Bland. 200 (1831).
12. McCommon v. Johnson, 123 Pa. 581, 187 Atl. 445 (1936).
13. Ibid.
14. Alabama Mineral R. Co. v. Jones, 114 Ala. 519, 62 Am.St.Rep. 121, 87 A.L.R. 929 (1896); see also Steiner v. Berney, 130 Ala. 289, 30 So. 570 (1901).

in one-third of the property of her husband.[15] Thus, the same method can be used in determining the present value of a life estate, left to a surviving spouse, as is used in determining dower consumate. The tables have also been used by a South Carolina court,[16] to determine the value of inchoate dower. The court pointed out that such a determination involved an ascertainment of the present value of an annuity for her life, equal to the one-third interest in the proceeds of the estate, and then deduct therefrom the value of a similar annuity based upon the expectant joint livelihood of the husband and wife. In the same case, as a matter of dictum, the court related that the value of the dower consummated depended upon the value of the property, the age, life expectancy, habits, constitution and health of the widow.

In the case of *In re Ferrara's Estate*,[17] the widower was given a life estate by the will. The estate was determinable by remarriage of the life tenant. The widower elected to take against the will. The court followed a prior decision[18] and held that upon such an election the value of the several gifts must be ascertained. The widower's share must then be calculated on the probable duration of his life, according to mortality tables. The situation was somewhat complicated by the fact that the life estate was to be terminated by his possible remarriage. The court resolved the effect of remarriage by assuming that the unmarried or widower status would continue until the eventuality of his death.

In Wyoming, if a testator bequeathed to his wife a life estate with remainder over, the possibility of election against the will would necessitate a determination of the value of the life estate to ascertain if the widow had been given less than her statutory share.[19] Just what procedure would be followed in Wyoming is somewhat open to conjecture. The matter of the present valuation of a life estate has never, as yet, been decided by the Supreme Court of Wyoming.

We have been given a guide by statute, as to the determination of the value of a life estate for inheritance tax purposes, which directs the use of mortality tables.[20] Thus, a formula for computing the present value of a life estate in Wyoming would be to figure an annunity on the net estate, ascertaining the life expectancy according to a mortality table, possibly the American Experience Table of Mortality, taking into consideration

15. Classen v. Heath, 389 Ill. 183, 58 N.E.2d 889 (1945); see also Strayer v. Long, 86 Va. 557, 10 S.E. 574 (1890); Holt v. Hamlin, 120 Tenn. 496, 111 S.W. 241 (1908).
16. Landshaw v. Drake, 183 S.C. 536, 191 SE713 (1937); see also American Blower Co. v. MacKenzie, 197 N.C. 152, 147 S.E. 829, 64 A.L.R. 1047 (1929); Share v Trickle, 183 Wis. 1, 197 N.W. 329 (1924).
17. In re Ferrara's Estate, 165 Misc. 900, 1 N.Y Supp.2d 900 (1938).
18. In re Curley's Estate, 160 Misc. 844, 290 N.Y. Supp. 822 (1936).
19. Wyo. Comp. Stat. § 6-301 (1945).
20. Wyo. Comp. Stat. § 6-2121 (1945). ". . . The value of every future or contingent or limited estate, income, interest, or annuity dependent upon any life or lives in being shall be determined by the rules and standard tables of mortality, in use by the insurance commissioner of this state, and the rate of interest for computing the present value of all future and contingent interests or estates shall be five (5) per cent per annum."

the habits, living conditions and state of health of the life tenant.

So long as the husband's life expectancy is a factor in computing the value of the life estate, it is extremely difficult, as well as hazardous, to advise a testator regarding provisions for a life estate for his spouse with any certainty as to whether his testamentary plan would be accomplished. Since it would depend upon the age of the surviving spouse at the death of the testator, such prediction is beyond the scope of certainty. The shorter the life expectancy of the widow at the death of the hubsand, the greater the chance of taking against the will when given a life estate.

In contrast to the foreging situation is the detailed legislation of New York State, under which a provision in the will for a trust fund or life estate can only be partially defeated. The statute sets a ceiling amount that can be withdrawn from the life interest, and further provides that the value of the principal is to be used in determining election rights. Thus it is unnecessary to determine the value of a life estate under the New York statute.[21]

Insofar as legislation such as New York's provides a firm value for the widow's life interest, the task of planning distribution is eased.

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SURFACE DAMAGE UNDER A FEDERAL OIL AND GAS LEASE

The western stockraisers are owners of vast acreages of land valuable for oil and gas production, of which they own only the surface estate, with the United States having reserved the rights to the minerals, and oil and gas in the original patent. Where such minerals have been reserved, the mineral estate, including the underlying oil and gas deposits, is the dominant estate, with the surface being the servient estate. In order to fully develop the underlying minerals it is necessary to use part of the servient or surface estate, resulting in a loss of the use of the surface estate including a loss of the grass necessary for raising stock. The extent to which the surface owner may be entitled to compensation for such loss comprises the basis for the ensuing analysis.

Under the Picket Act of 1910[1] the Federal Government authorized the President to withdraw public lands from entry which were potentially valuable for minerals. Within the next decade there followed legislative

21. New York § 18(g) Decedent Estate Law. The provisions of this section with regard to the creation of a trust, with income payable for life to the surviving spouse, shall likewise apply to a legal life estate or an an annuity for life or any other form of income for life created by the will for the benefit of the surviving spouse. In the computation of the value of the provisions under the will the capital value of the fund or other property producing the income shall be taken and not the value of the life estate.

1. 36 Stat. 847 (1910), 43 U.S.C. § 141 (1952 ed.).