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his discretion in light of the deliberate bypass test. Such a process serves to shift stale claims which should have been asserted on appeal while still fresh into federal court.[80] The individual cases will have to stand on their facts; few will be so compelling as these of the instant case, but to the prisoners the result is paramount, and Noia is free.

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What Is the Proper Remedy in the Slant-Hole Suit?

With the recent discovery of deviated drilling in the East Texas oil fields, attention again has been focused on the legal implications of the illegally slanted well. It is the purpose of this note to point out that application in the slant-well situation of either the trespass or the conversion theory of recovery leads to inequities, and that a cause of action applying the realty measure of damages (value before injury minus value after injury)[1] would provide more equitable distribution of damages among the injured parties.

I. The Present Approach

Under past and present practice, two causes of action arise when a well is illegally slanted to bottom under the tract of another owner: (1) trespass—for the physical intrusion of the well bore, and (2) conversion—for the illegal taking of the severed oil as personal property.[2]

A. *Trespass*

The gist of an actionable trespass is the unauthorized entry or intrusion upon the land of another in violation of his right of exclusive possession.[3] The intrusion may be upon, beneath, or above the surface of the land.[4] The owner of the mineral estate has the exclusive

[80] Mr. Justice Harlan suggested executive clemency as the proper remedy, 372 U.S. 391, 448 (dissenting opinion). New York has an executive clemency statute. N.Y. Correc. Law §§ 261-266. This was also the remedy suggested in People v. Rizzo, 246 N.Y. 334, 158 N.E. 888, 890 (1927).

[1] Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948); 17 Tex. Jur. 2d *Damages* § 64 (1960).

[2] Bell Corp. v. Bell View Oil Syndicate, 24 Cal. App. 2d 587, 76 P.2d 167 (Dist. Ct. App. 1938); Gliptis v. Fifteen Oil Co., 204 La. 896, 16 So. 2d 471 (1943); see Comment, 27 Texas L. Rev. 349, 353 (1949).

[3] Ripy v. Less, 55 Tex. Civ. App. 492, 118 S.W. 1084 (1909).

[4] Restatement, Torts § 158, comment f (1934).

right to reduce to possession all the oil and gas, migratory or otherwise, that may be found in the soil beneath his tract.[5] The courts have rejected the contention that an oil reservoir may be the subject of a cotenancy of the individual owners of the tracts overlying it[6] and as a result have required each tract owner to confine his wells within his surface boundaries projected vertically downward.[7]

Because a trespass action rests upon a violation of the right of exclusive possession, the physical intrusion of a well bore into the tract of another constitutes a trespass regardless of whether production is obtained. The *drilling* is the essential element of the cause of action; *drainage* is not necessary.[8] However, the owner is entitled only to nominal damages for mere intrusion without further injury;[9] it is necessary to prove that drainage has occurred in order to obtain compensatory damages.[10] The question of intention in slanting a well is irrelevant in an attempt to establish a trespass action because, regardless of intent, the right to exclusive possession is violated.[11] Intention, however, does play a part in determination of the extent of damages.[12]

Because a trespass action requires a right of possession, the category of parties to whom the cause of action may accrue is limited. Owners of adjoining tracts in the common oil pool have no right to sue in trespass because there has been no physical invasion of their lands.[13] To redress the injury which undoubtedly results to their property from a slant-well, these parties must look to another form of action.

B. *Conversion*

The more widely used cause of action, shaped primarily by Cali-

[5] Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948).

[6] Bell Corp. v. Bell View Oil Syndicate, 24 Cal. App. 2d 587, 76 P.2d 167 (Dist. Ct. App. 1938).

[7] *Ibid.*; see 16 Texas L. Rev. 543 (1938).

[8] Bell Corp. v. Bell View Oil Syndicate, 24 Cal. App. 2d 587, 76 P.2d 167 (Dist. Ct. App. 1938); see 27 Calif. L. Rev. 192, 194 (1939).

[9] McCarthy v. Miller, 57 S.W. 973 (Tex. Civ. App. 1900).

[10] Pan Am. Petroleum Corp. v. Orr, 319 F.2d 612 (5th Cir. 1963); Pacific W. Oil Co. v. Bern Oil Co., 81 P.2d 207 (Cal. Dist. Ct. App. 1938), *aff'd*, 13 Cal. 2d 60, 87 P.2d 1045 (1939); Union Oil Co. v. Mutual Oil Co., 19 Cal. App. 2d 409, 65 P.2d 896 (Dist. Ct. App. 1937).

[11] Union Oil Co. v. Domengeaux, 30 Cal. App. 2d 266, 86 P.2d 127 (Dist. Ct. App. 1939); Union Oil Co. v. Mutual Oil Co., 19 Cal. App. 2d 409, 65 P.2d 896 (Dist. Ct. App. 1937).

[12] Pacific W. Oil Co. v. Bern Oil Co., 13 Cal. 2d 60, 87 P.2d 1045 (1939), *affirming* 81 P.2d 207 (Dist. Ct. App. 1938).

[13] To constitute trespass there must be some physical entry upon the land by some thing. Gregg v. Delhi-Taylor Oil Co., 162 Tex. 26, 344 S.W.2d 411 (1961) (cracks from sand fracturing extended into plaintiff's land).

fornia decisions of the 1930's,[14] is for conversion of the severed oil as personal property.[15] Conversion is the unlawful and wrongful exercise of dominion, ownership, or control by one person over the property of another to the exclusion of the owner.[16] The cause of action is applicable only to personalty; there can be no conversion of realty.[17] For the purposes of conversion and its criminal law counterpart, theft,[18] the common law has maintained a strict cleavage between realty and personalty. Minerals constituting a part of the realty cannot be the subjects of larceny or of conversion until severed from the realty of which they are constructively a part.[19] Once severed, however, a natural product of the soil loses its character as realty and becomes personal property, which may be the subject of larceny and conversion.[20] Texas follows this rule with regard to oil that has been severed from the ground.[21]

In order to sue for conversion the plaintiff must have a right to legal possession of the personal property.[22] In the slant-well situation, therefore, the plaintiff should be required to prove that he had title to, or a right to, legal possession of the oil after it became personalty, *i.e.*, after severance. Such proof is difficult under Texas law because the "rule of capture" acts to vest title upon severance in the severor, regardless of the origin of the oil.[23] Some courts have avoided this problem by holding that (1) the rule of capture operates only upon legal production, and (2) because slant-hole production is illegal, title to the oil upon severance becomes vested in the owner or lessee of the tract under which the well is bottomed.[24] Under this treatment,

[14] Union Oil Co. v. Domengeaux, 30 Cal. App. 2d 266, 86 P.2d 127 (Dist. Ct. App. 1939); Pacific W. Oil Co. v. Bern Oil Co., 81 P.2d 207 (Cal. Dist. Ct. App. 1938), *aff'd*, 13 Cal. 2d 60, 87 P.2d 1045 (1939); Bell Corp. v. Bell View Oil Syndicate, 24 Cal. App. 2d 587, 76 P.2d 167 (Dist. Ct. App. 1938); Union Oil Co. v. Mutual Oil Co., 19 Cal. App. 2d 409, 65 P.2d 896 (Dist. Ct. App. 1937).

[15] Pan Am. Petroleum Co. v. Orr, 319 F.2d 612 (5th Cir. 1963); Union Oil Co. v. Mutual Oil Co., 19 Cal. App. 2d 409, 65 P.2d 896 (Dist. Ct. App. 1937).

[16] General Motors Acceptance Corp. v. Boyd, 120 S.W.2d 484 (Tex. Civ. App. 1938).

[17] Smith v. Jaggers, 16 S.W.2d 969 (Tex. Civ. App. 1929) *error dism.*

[18] "Theft is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking." Tex. Pen. Code Ann. art. 1410 (1953).

[19] Ogden v. Riley, 14 N.J.L. 186, 25 Am. Dec. 513 (Sup. Ct. 1833) involved marle, a mineral in place in the realty, and held: "That which is annexed to and constitutes a part of the freehold is not the subject of larceny." *Id.* at 187, 25 Am. Dec. at 513.

[20] Bender v. Brooks, 103 Tex. 329, 127 S.W. 168 (1910); Livingston Oil Corp. v. Waggoner, 273 S.W. 903 (Tex. Civ. App. 1925) *error ref.*

[21] Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948); see also 14 Tex. Jur. 2d *Conversion* § 9 (1960), and cases there cited.

[22] First Nat'l Bank v. Brown, 85 Tex. 80, 23 S.W. 862 (1892).

[23] Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948); Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290 (1923).

[24] Union Oil Co. v. Mutual Oil Co., 19 Cal. App. 2d 409, 65 P.2d 896 (Dist. Ct. App. 1937).

when the oil becomes personalty upon severance from the ground, the plaintiff has the personal property right of possession necessary to a conversion action.

The measure of damages used is the conversion measure, or full value of the severed oil.[25] Both the cause of action and the entire amount of the recovery belong to the owner or lessee under whose tract the well is bottomed.[26] Owners of adjoining tracts in a common pool apparently cannot institute a suit for conversion because, even though operation of a slant-well may cause serious and permanent injury to their reserves through drainage and reduction of pool pressure, no oil has been severed from their property. Their oil continues to be realty and as such it cannot be the subject of conversion.

Application of the conversion measure of damages in the slant-well suit produces manifestly unjust results. The principal objection is that the recovery bears no relation to the actual injuries sustained. Generally, damages for conversion are equivalent to the market value of the personalty at the time and place it was converted.[27] As the owner of the converted oil, the owner of the tract under which the well is bottomed is awarded the entire amount of the measure of damages,[28] even though the depletion of his reserves will have been offset to a great extent by drainage into his tract from surrounding tracts. The owners of the adjoining tracts, who in reality bear a large part of the injury, are denied participation in the conversion recovery.

II. A Proposal

Determination of the proper cause of action and the damages

[25] Pan Am. Petroleum Co. v. Orr, 319 F.2d 612 (5th Cir. 1963); Pacific W. Oil Co. v. Bern Oil Co., 81 P.2d 207 (Cal. Dist. Ct. App. 1938), *aff'd*, 13 Cal. 2d 60, 87 P.2d 1045 (1939); Bell Corp. v. Bell View Oil Syndicate, 24 Cal. App. 2d 587, 76 P.2d 167 (Dist. Ct. App. 1938); Union Oil Co. v. Mutual Oil Co., 19 Cal. App. 2d 409, 65 P.2d 896 (Dist. Ct. App. 1937).

[26] In Pan Am. Petroleum Co. v. Orr, 319 F.2d 612 (5th Cir. 1963), the court held the two-year statute of limitations applicable, and plaintiff was allowed recovery only for oil produced within the two years next preceding the filing of the complaint. Union Oil Co. v. Mutual Oil Co., 19 Cal. App. 2d 409, 65 P.2d 896 (Dist. Ct. App. 1937).

[27] Town of West Univ. Place v. Anderson, 60 S.W.2d 528 (Tex. Civ. App. 1933).

[28] Bell Corp. v. Bell View Oil Syndicate, 24 Cal. App. 2d 587, 76 P.2d 167 (Dist. Ct. App. 1938), held that all those injured by conversion of hydrocarbons through subsurface trespass had a cause of action for injunction and damages. This does not provide relief for adjoining tract owners in a common pool because they have no interest in the property converted, *i.e.*, the oil severed, turned into personalty, and carried away. The court was referring to the lessors and lessees, royalty owners and owners as lessees of only two tracts —the slant-driller's tract and the tract under which the well was bottomed. Other cases which have awarded the full value of all the oil extracted to the owner of the tract under which the well was bottomed include Pacific W. Oil Co. v. Bern Oil Co., 81 P.2d 207 (Cal. Dist. Ct. App. 1938), *aff'd*, 13 Cal. 2d 60, 87 P.2d 1045 (1939); Union Oil Co. v. Mutual Oil Co., 19 Cal. App. 2d 409, 65 P.2d 896 (Dist. Ct. App. 1937); and Pan Am. Petroleum Co. v. Orr, 319 F.2d 612 (5th Cir. 1963), wherein only the value of the oil proved to have been taken in the two years next preceding the action was allowed.

appropriate thereto in a slant-well suit requires an examination of the engineering realities of the oil reservoir. Oil generally is collected in reservoirs of varying sizes, trapped in structures capped by impervious rock. The oil itself possesses no inherent energy by which it can be produced from the reservoir. Its production occurs by the action of some energy associated with the reservoir oil or by secondarily imposed energy. This associative energy may be derived from: (1) solution gas under pressure, (2) free gas under pressure, (3) water under pressure, (4) compression of the oil itself, or (5) gravity drainage. If oil is to be produced, it is necessary that the energy naturally associated with or artificially imposed upon the reservoir oil be operative, because production depends on a pressure differential between the well bore and the reaches of the reservoir. Withdrawal of fluids from a reservoir usually causes a decrease in pressure because in most reservoirs there is no other displacement agent to counteract the withdrawal. A decrease in pressure, therefore, lowers correspondingly the amount of oil which potentially may be recovered from the reservoir.[29] Although the courts in Texas have rejected the idea of common ownership of the oil in a reservoir, the energy within the reservoir necessary for the production of that oil is undoubtedly a property interest of every tract owner.[30] The reduction of this energy by slant-well production limits the recoverable oil of not only the owner of the tract under which the well is bottomed but that of every tract owner in the reservoir.

There is a line of cases that might be utilized by other owners in the pool to recover in the slant-well situation. Texas cases have established that a cause of action exists for an adjoining owner whose subsurface estate, although not trespassed, is injured by operations on an adjacent tract.[31] In *Eliff v. Texon Drilling Co.*,[32] the court allowed recovery for drainage and injury to the reservoir caused by defendant's negligent drilling operations on his own tract. In *Peterson v. Grayce Oil Co.*,[33] the court recognized a cause of action and granted recovery for drainage and permanent injury to the leasehold resulting from the use of vacuum pumps on defendant's well in violation of Railroad Commission Rule 40. In the great majority of cases in which a cause of action has been recognized for drainage or injury to realty

[29] ABA, Section of Mineral Law, Conservation of Oil & Gas 7-14 (Murphy ed. 1949).

[30] *Ibid.* See also Texon Drilling Co. v. Elliff, 210 S.W.2d 553 (Tex. Civ. App. 1947), *rev'd on other grounds*, 146 Tex. 575, 210 S.W.2d 558 (1948); Magnolia Petroleum Co. v. Zeppa; 70 S.W.2d 777 (Tex. Civ. App. 1934).

[31] Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948); see cases cited in note 34 *infra*.

[32] 146 Tex. 575, 210 S.W.2d 558 (1948).

[33] 37 S.W.2d 147 (Tex. Civ. App. 1931), *aff'd*, 128 Tex. 550, 98 S.W.2d 781 (1936).

arising from operations on an adjoining tract, questions of liability for negligence have been involved;[34] however, the theory of recovery equally would be applicable to an injury inflicted intentionally. Thus, although none of these cases involved slant-well drilling, the cause of action established by them very well could be extended to provide a remedy for adjoining owners.

The injury to an owner of mineral rights in the common pool is no less if caused by negligent or intentional acts in an adjoining tract than if caused by a deviated well bottomed in his property. In both cases the real damage is the reduction of reservoir recovery which the owner of the trespassed tract shares correlatively with other owners in the pool. If, however, the adjoining owners as well as the owner of the trespassed tract were allowed to recover, the defendant slant-well driller could be exposed to a liability greater than one hundred per cent of the injury inflicted by his well. He could be liable in a conversion action to the owner of the trespassed tract for the entire value of the oil extracted and, in addition, liable to adjoining owners in the pool for drainage from their tracts and injury to the reservoir. From an engineering standpoint such a combination of damages would approach 200 per cent of the injury done.

This inequitable distribution of damages would violate the basic tenet of compensatory damages, *i.e.*, that the injured party should receive and the offending party should pay damages commensurate with the loss and no more.[35] The injured parties should be restored, as far as possible, to the status which they enjoyed before the injury. Any method of computation which overcompensates one injured party and saddles the defendant with liability for multiple recovery should not be accepted as a correct measure of recovery. The necessary conclusion is to replace the conversion cause of action together with the measure of damages appropriate for that action by an action based on correlative rights in the damaged reservoir applying

[34] In cases involving:

(A) *Destructive Vibrations,* Universal Atlas Cement Co. v. Oswald, 138 Tex. 159, 157 S.W.2d 636 (1941); Indian Territory Illuminating Oil Co. v. Rainwater, 140 S.W.2d 491 (Tex. Civ. App. 1940) *error dism.*; see Smith, *Rights and Liabilities on Subsurface Operations,* 8th Ann. Inst. on Oil & Gas Law and Taxation 1 (1957).

(B) *Seismic Explorations,* Klostermann v. Houston Geophysical Co., 315 S.W.2d 664 (Tex. Civ. App. 1958) *error ref.*; Dellinger v. Skelly Oil Co., 236 S.W.2d 675 (Tex. Civ. App. 1951) *error ref. n.r.e.*; Stanolind Oil & Gas Co. v. Lambert, 222 S.W.2d 125 (Tex. Civ. App. 1949); Seismic Explorations v. Dobray, 169 S.W.2d 739 (Tex. Civ. App. 1943) *error ref. w.o.m.*

(C) *Blowouts,* Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948); Keeton & Jones, *Tort Liability and the Oil and Gas Industry,* 35 Texas L. Rev. 1 (1956);

(D) *Shooting,* Liner v. United States Torpedo Co., 12 S.W.2d 552, *vacated on rehearing on other grounds,* 16 S.W.2d 519, (Tex. Comm. App. 1929); Comanche Duke Oil Co. v. Texas Pac. Coal & Oil Co., 298 S.W. 554 (Tex. Comm. App. 1927).

[35] See note 1 *supra.*

the realty measure of damages. It follows that the proper measure of damages to be awarded is that amount which will, in conformity with known principles of petroleum engineering, compensate *each* tract owner in the reservoir for the injury borne by his reserves. This result may be obtained *only* by regarding the slant-well as an injury to real property and by applying the reduction-in-value measure of damages. Compensation on this basis is computed by subtracting the property value after injury from the property value before injury.[36] The injury sustained by each tract owner, including the owner of the trespassed tract, would be computed in this manner. Drainage factors should be given particular attention. Application of this measure of damages would result in an equitable distribution of the compensatory award among the several injured parties on the basis of their respective losses. Furthermore, it would limit the defendant's liability to one hundred per cent payment for his wrongful act.

The most difficult problem involved in administering the real property measure of damages is the determination of the extent of the injury suffered by each party. The difficulties in ascertaining the volume, situs, and movement of subsurface oil long have been recognized by the courts.[37] However, scientific progress has made it possible for experts to determine with fair precision the amount of oil and gas recoverable under certain operating conditions by the owner of each tract of land in an oil field which has been fairly tested and developed.[38] Moreover, difficulty in determining the extent of injury should not preclude the use of a proper measure of damages. Although a rule of long standing exists against the recovery of uncertain damages,[39] the rule refers to uncertainty as to the *cause* of the injury rather than to uncertainty of the *extent* of the injury[40] In a slant-hole action, the causal connection between the slant-drilling and the injury to the reservoir is established. Difficulty in ascertaining the extent of the injury to each party should not deprive the injured parties of their rightful recovery or the wrongdoer of limitation to his fair liability.

The present slant-hole litigation provides Texas courts with an

[36] Whitehead v. Zeiller, 265 S.W.2d 689 (Tex. Civ. App. 1954). Compensatory damages to a realty owner for damage to the realty should include all injury, both prospective and present. City of Texarkana v. Rhyne, 126 Tex. 77, 86 S.W.2d 215 (1935).

[37] In Union Oil Co. v. Mutual Oil Co., 19 Cal. App. 2d 409, 65 P.2d 896, 899 (Dist. Ct. App. 1937) the California court recognized the "practical impossibility of proving damages to the leasehold resulting from the removal of oil."

[38] Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935 (1935).

[39] Alamo Mills Co. v. Hercules Iron Works, 1 Tex. Civ. App. 683, 22 S.W. 1097 (1892).

[40] If damage was suffered, but there is uncertainty merely as to amount sustained, the case does not fall within the rule that damages that are uncertain and speculative cannot be recovered. Second Nat'l Bank v. McGehee, 241 S.W. 287 (Tex. Civ. App. 1922) *error ref.*