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Oil and Gas: Burger v. Wood--A Misguided Application of the Doctrine of Obstruction to Third Parties

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Oil and Gas: *Burger v. Wood*—A Misguided Application of the Doctrine of Obstruction to Third Parties

The doctrine of obstruction has generally been used by the courts, either with respect to the habendum clause[1] or the drilling clause[2] of an oil and gas lease to permit the lessee additional time to drill or to pay rentals when acts of the lessor have warranted this extension. Thus, the lessor may not assert that the lease has been terminated under the habendum clause for failure on the part of the lessee to produce oil or gas during the primary term when the lessor was found to have, in some way, obstructed the activities of the lessee, and when this obstruction accounted for the lessee's failure to perform.[3] Similarly, obstruction under the drilling clause arises when the lessor interferes with either the lessee's drilling or his payment of rentals, and such obstruction serves to excuse the lessee for his failure to perform.[4]

Numerous Oklahoma cases help define which acts, if committed by the lessor, will be deemed to be obstruction. For example, physical interference, as when the lessor threatens the lessee and his agents with physical violence, will constitute obstruction.[5] Furthermore, attack on the lessee's title, such as suit by the lessor to cancel the lease[6] or to enjoin the lessee's activities,[7] will serve to excuse the lessee's failure to perform.[8] Oklahoma courts have also held that the lessor's granting of a top lease[9] will sustain a finding of obstruc-

[1] 3 E. KUNTZ, OIL AND GAS 1 (1967). The author defines the habendum clause as follows: "The purpose of the habendum clause is to describe the duration of the interest granted by the lease, subject to other provisions contained in the lease which may provide for an earlier or later termination or forfeiture of the lease. The most common type of habendum clause in modern use provides for a fixed term, called the primary or exploratory term, and provides that the lease shall continue thereafter so long as oil or gas is produced."

[2] *Id.* The author defines the drilling clause as follows: "The drilling clause is primarily designed to describe the rights of the lessor and lessee during the primary or exploratory term with respect to drilling operations or the payment of rentals in lieu of drilling."

[3] 5 E. KUNTZ, OIL AND GAS 36 (1978); 2 E. KUNTZ, OIL AND GAS 324 (1964).

[4] 5 E. KUNTZ, OIL AND GAS 36 (1978); 3 E. KUNTZ, OIL AND GAS 199 (1967).

[5] Durkee v. Hazan, 452 P.2d 803 (Okla. 1968); Murphy v. Garfield Oil Co., 98 Okla. 273, 225 P. 676 (1924).

[6] Elsey v. Wagner, 199 Okla. 449, 183 P.2d 829 (1946); Chapman v. Bowers, 180 Okla. 49, 67 P.2d 788 (1937).

[7] Jones v. Moore, 338 P.2d 872 (Okla. 1959).

[8] Attacks by the lessor upon the lessee's title are generally considered to be obstruction because it would be unreasonable to expect the lessee to make expenditures on the lease when there is a substantial risk of loss without a prospect of gain. Too, if the attack upon his title is successful, the lessee may be liable to the lessor for the loss of the land's speculative value should his efforts result in a dry hole. *See* Simons v. McDaniel, 154 Okla. 168, 7 P.2d 419 (1932). *See also* 2 E. KUNTZ, OIL AND GAS 324 (1964).

[9] Brown, *Effect of Top Leases: Obstruction of Title and Related Considerations*, 30 BAYLOR L. REV. 213 (1978). A top lease is defined as "a subsequent oil and gas lease which covers one or more mineral interests that are subject to a valid, subsisting prior lease." *Id.* This would happen, for example, when the lessor, or successor of the original lessor, executes a second lease in favor of a party who is a stranger to the first lease.

tion,[10] but with the restriction that if the top lease is granted without the knowledge of the lessee and is not recorded until after the first lease has expired, the top lease will not serve as a ground for extending the lease.[11] Finally, adverse communications, as where the lessor asserts his belief that the lease has expired[12] or announces his intention to commence suit,[13] will form the basis for a declaration of obstruction. Obstruction within the category of adverse communications sometimes also will require the filing of a suit within a reasonable time after the hostile notification.[14]

The purpose of this note is to examine the doctrine of obstruction along with its underlying policies in the context of a recent Oklahoma case, *Burger v. Wood*.[15] This case in effect extended the doctrine to cover interference by third parties in general and interference by surface owners in particular. In reviewing the case, the court's rationale will be analyzed to determine whether the doctrine was correctly applied. The application of the doctrine in similar, though slightly differing situations will also be examined to demonstrate that such a study might have been useful had it been utilized by the court. Finally, an alternative solution will be suggested as a better method of disposing of the case.

Burger v. Wood

In 1978 The Oklahoma Court of Appeals decided *Burger v. Wood*,[16] a case both unique and disturbing. Although not binding, but only persuasive authority,[17] the decision applies the doctrine of obstruction to an entirely new class of potential obstructors. Whereas obstruction previously had been limited to the lessor or junior lessee of the lessor,[18] this case establishes that

[10] Simons v. McDaniel, 154 Okla. 168, 7 P.2d 419 (1932).

[11] Rorex v. Karcher, 101 Okla. 195, 224 P. 696 (1923). The logic behind this restriction is that the top lease could not have been the grounds for the lessee's failure to perform if the lessee had no knowledge of its existence until after the first lease expired.

[12] Gibson & Jennings Drilling, Inc. v. Amos Drilling Co., 196 Okla. 143, 162 P.2d 1002 (1945).

[13] Hudspeth v. Schmelzer, 182 Okla. 416, 77 P.2d 1123 (1938).

[14] Gibson & Jennings Drilling, Inc., v. Amos Drilling Co., 196 Okla. 143, 162 P.2d 1002 (1945).

[15] Burger v. Wood, 575 P.2d 977 (Okla. Ct. App. 1978).

[16] *Id.*

[17] 44 OKLA. B.A.J. 3037 (1973). The Supreme Court of Oklahoma has issued the following policy on appellate opinions: "Opinions of the Court of Appeals which resolve novel or unusual issues, when unsuperseded and unmodified by the Supreme Court, may be released for publication in the official (Pacific) reporter concurrently with issuance of mandate upon request made to the clerk of the Supreme Court by the presiding judge of the division that handed down the opinion sought to be published. No opinion so published shall have precedential effect but may be considered persuasive. It shall bear the notation 'Released for publication by order of the Court of Appeals.' An opinion of the Court of Appeals that is specifically authorized by the Supreme Court for publication in the official reporter and bears the notation 'Approved for publication by the Supreme Court' shall be accorded precedential value."

[18] A junior lessee is the lessee who is the recipient of the lessor's top lease. He also is referred to as the top lessee. The lessee who was first in time is referred to as the senior lessee or

surface owners also may interfere with a lessee's performance in such a way that additional time will be allowed for the commencement of operations.[19]

The facts are brief. The lessee, Burger, held a valid oil and gas lease whose primary term would expire on November 20, 1976, unless drilling had been commenced.[20] Two days before the expiration date, Burger attempted to move some equipment onto the land in order to rework a previous drilling site but was prevented from doing so by the landowner, who had no interest in the minerals beneath the surface. The lessee immediately filed suit to enjoin the surface owner's interference with the drilling operations, but further interference by the surface owner necessitated a contempt action following the injunction's award. Meanwhile, the primary term expired.

Burger subsequently filed suit and requested a declaratory judgment that the lease was still in effect.[21] The lessors, however, demurred to the petition, asserting that the lease had expired on its own terms. They based their contention on the fact that the lessee had not begun drilling within the primary term and that the failure was not owing to any adverse activities on the part of the lessors. The trial court sustained the demurrer, resulting in an appeal to the court of appeals. The parties in the appellate action apparently argued only the issue of whether the plaintiff-lessee had sufficiently commenced drilling operations to satisfy the terms of the lease.[22] The court of appeals, however, decided the case on another ground—that the lessee had pleaded facts sufficient to excuse commencement of the drilling.

The court based its opinion on three rather broad propositions of law: (1) an extension of the primary term turned upon the good faith of the lessee in attempting to commence or complete drilling; (2) equity abhors a forfeiture; and (3) an oil and gas lessee has the right of ingress and egress to occupy the surface of the leased land to the extent necessary to drill and develop the property.[23] Each of these decision bases will be examined in detail, along with other factors pertinent in a decision such as this.

Good Faith of Lessee

In its opinion, the court cited numerous obstruction cases decided in Oklahoma, noting that since previous authorities dealt with the misdoings of lessors, none presented a set of facts similar to those presented in the instant case.[24] The court then announced the postulate that these decisions extended the primary term because of the lessor's conduct and that they "turned upon" the good faith of the lessee. By stating this hypothesis as it did, the

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the bottom lessee. *See generally* Brown, *Effect of Top Leases: Obstruction of Title and Related Considerations*, 30 BAYLOR L. REV. 213 (1978).

[19] *See* Kuntz comment, Burger v. Wood, 59 O&GR 503, 507 (1978).

[20] Burger v. Wood, 575 P.2d 977, 978 (Okla. Ct. App. 1978).

[21] *Id.* at 979.

[22] *Id.*

[23] *Id.* at 979, 980.

[24] *Id.*

court purposefully, and necessarily, downplayed one of the crucial criteria for a case of obstruction. Interference on the part of the lessor is a critical element of obstruction that simply cannot be overlooked or ignored.[25]

The general rule with respect to the lessor's behavior is that his demeanor must be sufficiently reprehensible to warrant depriving him of the jurisdiction of the court of equity.[26] Courts, in order to deprive the lessor of his ability to declare a termination of the lease, invoke the doctrine of obstruction through the use of old equitable maxims, such as, "He who invokes the jurisdiction of equity, must come with clean hands," and "He who has done inequity cannot have equity."[27] This common philosophy is augmented further in Oklahoma by *Murphy v. Garfield Oil Co.*,[28] a decision dealing with obstruction of the drilling clause of an oil and gas lease. In *Murphy*, a lessor refused on two occasions to accept rental payments necessary to keep the lease in effect until the lessee was able to drill.[29] He also warned the lessee to stay off the land but later attempted to claim that the lease had been forfeited because of the lessee's failure to pay rentals. The court observed that those acts the lessor claimed had not been performed were the very acts which he purposefully had prevented.[30] After quoting and discussing several of the various equitable adages, the court affirmed a decision for the defendant-lessee, ruling that the lessor was the culpable party and, consequently, not entitled to equity.[31]

Thus, it can be seen that it is not solely the lessee's good faith that supplies the theoretical basis for applying the doctrine of obstruction, but it is primarily the censurable conduct by the lessor that provides the doctrine's foundation. In *Burger* the lessor had done nothing that could be considered blameworthy.[32] Since the lessor was innocent and had committed no transgressions which might rob him of the jurisdiction of a court of equity, no theoretical platform existed upon which a court could stand to deprive the lessor of his right to declare the lease's termination.[33]

Abhorrence of a Forfeiture

The Oklahoma Court of Appeals also argued that the obstruction cases

[25] *See generally* Simons v. McDaniel, 154 Okla. 168, 7 P.2d 419 (1932).

[26] 2 E. KUNTZ, OIL AND GAS 323 (1964); 3 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW 77 (1977).

[27] Fey v. A.A. Oil Corp., 129 Mont. 300, 285 P.2d 578 (1955); Murphy v. Garfield Oil Co., 98 Okla. 273, 225 P. 676 (1924).

[28] 98 Okla. 273, 225 P. 676 (1924).

[29] *Id.* at 677.

[30] *Id.* at 680.

[31] *Id.* The court discussed the activities of the lessor-plaintiff and summed up its arguments with the statement: "If they [the plaintiffs] prevail in an action of this sort, the rules of equity count for nothing. We do not think the plaintiffs have done equity. We do not think they are blameless, but culpable, and we do not think they are entitled to equity." *Id.*

[32] Burger v. Wood, 575 P.2d 977, 979 (Okla. Ct. App. 1978).

[33] Kuntz comment, Burger v. Wood, 59 O&GR 503, 507 (1978). *See also* 5 E. KUNTZ, OIL AND GAS 36 (1978).

clearly point out that equity abhors a forfeiture.[34] It is interesting to note, however, that none of the cited cases mentioned this loathing for forfeiture,[35] except for one relatively recent opinion which discusses this philosophy in relation to a topic other than obstruction.[36] Typically, when the primary term lapses without the procurement of production, courts will proclaim the lease to have terminated automatically.[37] Although judicial distaste for forfeiture may constitute some unspoken underlying consideration in obstruction cases, a more accurate depiction of courts' decision-making processes would reveal that it is upon some other, more solid ground that they ultimately rest their opinions that the doctrine of obstruction should apply. This "other ground" usually is a careful consideration of the acts committed by the lessor and whether these acts were sufficient to excuse the lessee's failure to perform.[38]

Thus, to be consistent with a long line of Oklahoma precedent,[39] the court of appeals should have decided its case in a manner similar to that utilized in prior adjudications, with the emphasis upon the lessor's conduct, not upon a distaste for forfeiture.

Right of Ingress and Egress

The third basis the court specified was that a lessee in Oklahoma has the right of ingress and egress to occupy the surface of the leased premises to the extent necessary to drill and develop the property.[40] While this may be an accurate portrayal of Oklahoma law, a more pressing problem lies in determining who owes this right to the lessee. Under the decisions of the Oklahoma Supreme Court, it must be maintained that it is the lessor who owes this right in order to find him at fault for failing to assure that the

[34] Burger v. Wood, 575 P.2d 977, 980 (Okla. Ct. App. 1978).

[35] *See generally* Jones v. Moore, 338 P.2d 872 (Okla. 1959); Elsey v. Wagner, 199 Okla. 449, 183 P.2d 829 (1947); Gibson & Jennings Drilling, Inc. v. Amos Drilling Co., 196 Okla. 143, 162 P.2d 1002 (1945); Hudspeth v. Schmelzer, 182 Okla. 416, 77 P.2d 1123 (1938); Chapman v. Bowers, 180 Okla. 49, 67 P.2d 788 (1937); Simons v. McDaniel, 154 Okla. 168, 7 P.2d 419 (1932).

[36] Durkee v. Hazan, 452 P.2d 803, 814 (Okla. 1969). Here, the court discussed forfeiture in relation to the lessee's supposed failure to operate and develop the lease. On this topic, the court stated that a forfeiture will be decreed only when necessary to effectuate justice.

[37] *E.g.*, Baldwin v. Blue Stem Oil Co., 106 Kan. 848, 189 P. 920 (1920); Browning v. Cavanaugh, 300 S.W.2d 580 (Ky. 1957); Stanolind Oil & Gas Co. v. Barnhill, 107 S.W.2d 746 (Tex. Civ. App. 1937).

[38] *See generally* Durkee v. Hazan, 452 P.2d 803 (Okla. 1969); Jones v. Moore, 338 P.2d 872 (Okla. 1959); Elsey v. Wagner, 199 Okla. 449, 183 P.2d 829 (1947); Gibson & Jennings Drilling, Inc. v. Amos Drilling Co., 196 Okla. 143, 162 P.2d 1002 (1945); Hudspeth v. Schmelzer, 182 Okla. 416, 77 P.2d 1123 (1938); Chapman v. Bowers, 180 Okla. 49, 67 P.2d 788 (1937); Simons v. McDaniel, 154 Okla. 168, 7 P.2d 419 (1932).

[39] Durkee v. Hazan, 452 P.2d 803 (Okla. 1969); Jones v. Moore, 338 P.2d 872 (Okla. 1959); Elsey v. Wagner, 199 Okla. 449, 183 P.2d 829 (1947); Gibson & Jennings Drilling, Inc. v. Amos Drilling Co., 196 Okla. 143, 162 P.2d 1002 (1945); Hudspeth v. Schmelzer, 182 Okla. 416, 77 P.2d 1123 (1938); Chapman v. Bowers, 180 Okla. 49, 67 P.2d 788 (1937); Simons v. McDaniel, 154 Okla. 168, 7 P.2d 419 (1932).

[40] Burger v. Wood, 575 P.2d 977 (Okla. Ct. App. 1978).

lessee was permitted access to the land.[41] It is only under this construction that grounds would exist for denying the lessor the jurisdiction of a court of equity.

In *Burger*, when the land in question was initially severed from the minerals beneath it,[42] the owner of the mineral estate did not in fact obtain title to the unproduced oil and gas but, instead, secured only the right to capture the subterranean substances.[43] The mineral owner did, however, concurrently procure the incidental rights necessary to the beneficial use of his interest, including the right of ingress and egress and the privilege of using so much of the surface as required in order to extract the minerals.[44] When the owner of the mineral rights executed a lease in favor of the lessee to allow him to develop the oil and gas, he granted the lessee the same right of ingress and egress that previously had been bestowed upon lessor.[45] A synopsis of the situation, then, would show the surface owner to be the owner of the entire surface estate and the lessee to have a *profit a prendre* encumbering that estate.[46] This *profit a prendre* is very similar to an easement and often is treated as being in the same category as easements because the same legal principles apply to both.[47] Hence, the owner of a *profit a prendre* has the right to use so much of the surface as is necessary to develop his interest, and the surface owner has an obligation to refrain from interfering with the reasonable operations of the lessee.[48]

[41] *See* Murphy v. Garfield Oil Co., 98 Okla. 273, 225 P. 676 (1924).

[42] 575 P.2d 977 (Okla. Ct. App. 1978). The landowner in the case owned only the surface and had no interest in the minerals. Therefore, sometime previously the surface and mineral estate must have been legally severed from one another.

[43] *See* Cuff v. Koslosky, 165 Okla. 135, 137, 25 P.2d 290, 291-92 (1933). Here, the court quoted from a previous Oklahoma opinion, saying: "Oil and gas in the earth are, unlike ore and coal, fugacious and incapable of ownership distinct from the land, and a grant of the oil and gas in a tract of land is a grant of that part of the oil and gas therein which the grantee may find and capture, no title vests until the oil or gas is reduced to possession by extracting the same from the earth, and hence the lease is a grant of an incorporeal hereditament." This incorporeal hereditament, the court stated, is "more specifically, as designated in the ancient French, a profit a prendre, analogous to a profit to hunt and fish on the land of another." *Id.*

[44] *See* Melton v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940); Romey v. Stephens, 70 Okla. 87, 173 P. 72 (1918). These cases establish that this right passes to the owner of the mineral rights regardless of whether it is specifically delineated in the deed.

[45] *See* Rich v. Doneghy, 71 Okla. 204, 177 P. 86, 89 (1918).

[46] Cuff v. Koslosky, 165 Okla. 135, 25 P.2d 290 (1933). *See also* 1 E. KUNTZ, OIL AND GAS § 3.2 at 80 (1962).

[47] J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 335 (2d ed. 1975). *See also* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS § 210.2 at 119, § 210.4 at 126 (1970). Here, the authors indicate that the surface rights which accompany the mineral rights, whether considered to be corporeal or incorporeal, are easements.

[48] *See, e.g.*, Cozart v. Crenshaw, 299 S.W. 499 (Tex. Civ. App. 1927); United North & South Oil Co. v. Mercer, 286 S.W. 652 (Tex. Civ. App. 1926); Mid-Texas Pet. Co. v. Colcord, 235 S.W. 710 (Tex. Civ. App. 1921). *See generally* 12 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY 683 (repl. 1980); J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 335 (2d ed. 1975).

Thus, it can be seen that it was the surface owner who owed the lessee the undisturbed right to enter and use the land. The mineral owner-lessor, having bestowed upon the lessee the rights and duties accompanying their contractual arrangement, steps out of the picture and, in the normal situation, is not privy to any land use disputes that may arise between the lessee and the surface owner. Not a party to the controversy, the lessor can hardly be said to be anything other than an innocent third person. Therefore, he would have every right to the remedies available in a court of equity and every right to claim termination of a lease when the other party, for whatever reason, has not complied with its terms.

Third Party Obstruction

A useful tool the court could have employed in reaching its decision in the instant case would have been to study the manner in which courts traditionally have dealt with third party obstruction with respect to the drilling clause in an oil and gas lease.[49] Although *Burger v. Wood*[50] deals with obstruction of the lease's habendum clause, the two forms of obstruction are analogous, and a study of one often will provide insights into the other.[51]

Generally, interference by third persons, either with the operations themselves or by attacks upon the title, does not constitute obstruction.[52] However, if the interference serves to breach the lessor's warranty, or if the lessee has reason to believe the lessor is actively cooperating with the third person, or if the interference is comprised of a judicial action, the lessee's nonperformance will be excused.[53]

In accord with the general rule, the Louisiana Supreme Court declined to find obstruction in a case in which the federal government claimed land leased by the state to the plaintiffs.[54] The lessees sought a suspension of the obligation to pay rentals during the pendency of the suit, but their request was denied. The court noted that the leases were free from ambiguity and that the lessees should have included a provision in the lease had they wanted to suspend payments under such circumstances.[55] Subsequently, a federal

[49] *See, e.g.*, Broussard v. Phillips Pet. Co., 160 F. Supp. 905 (W.D. La. 1958); Texas Co. v. State Mineral Bd., 216 La. 742, 44 So. 2d 841 (1949); Schell v. Black, 321 S.W.2d 373 (Tex. Civ. App. 1959).

[50] 575 P.2d 977 (Okla. Ct. App. 1978). The facts of the case reveal that the primary term completely expired. Since the drilling clause deals with drilling or the payment of rentals in lieu thereof in order to preserve the right to drill during the primary term, the complete expiration of the primary term would involve an obstruction of the habendum clause rather than of the drilling clause. See notes 1 and 2, *supra*.

[51] *See generally* 5 E. KUNTZ, OIL AND GAS §§ 56.1-56.5 (1978). Here, the author combines the two forms of obstruction and discusses them together.

[52] *See* Murphy v. Garfield Oil Co., 98 Okla. 273, 225 P. 676 (1924).

[53] Slack v. Riggs, 177 La. 222, 148 So. 32 (1933); Allen v. Palmer, 201 Okla. 673, 209 P.2d 502 (1948); Munsey v. Mornet Oil & Gas Co., 199 S.W. 686 (Tex. Civ. App. 1917).

[54] Texas Co. v. State Mineral Bd., 216 La. 742, 44 So. 2d 841 (1949).

[55] *Id.*, 44 So. 2d at 845.

court sitting in Louisiana reached a similar conclusion in an analogous case.[56] There, the defendants had failed to pay rentals when they were due but insisted that their failure to drill within the allotted time was due to the State Conservation Department's refusal to issue a permit.[57] The opinion, quite unsympathetically, announced that there was no reason whatsoever that the defendants could not have paid the delay rentals during the pendency of the application before the Commissioner of Conservation.[58] A Texas court, in another case involving third party obstruction of the drilling clause, also proclaimed that in the absence of equitable considerations, the omission of either drilling or paying rentals would result in the lease's termination.[59]

On their faces, these cases may appear to lack the substance necessary to aid one in determining the proper outcome of a case of the same genre as *Burger v. Wood*.[60] It is readily perceivable, for example, that a court may display far less compassion toward a party attempting to escape the seemingly light burden of paying rentals than it would toward a party who apparently did everything within his power to drill within the permissible time but was physically prevented from doing so. The cases, likewise, decline to discuss the fact that the lessor was innocent of any wrongdoing. These decisions, however, do manage to demonstrate decidedly courts' tendencies to deny extension of the lease unless the lessor has shown some fault or impropriety. Such is not the case in *Burger v. Wood*.[61]

The *Burger* court based its decision upon an erroneous interpretation of the doctrine of obstruction. Evidently, the court thought the doctrine could be applied whenever anyone prevented the lessee from obtaining production within the primary term of the lease.[62] However, in order to warrant employment of the doctrine of obstruction, it is the lessor or his junior lessee who must interfere with the operations. Therefore, the doctrine was actually inapplicable in *Burger*.

Other Available Remedies

If the court of appeals had refused to extend the primary term of the lease involved in *Burger v. Wood*,[63] other remedial options would have remained open to the plaintiffs. Although the suit against the lessor provided the only means by which the lessee could ensure that the lease would remain intact, the lessee could just as easily, and a bit more logically, have brought

[56] Broussard v. Phillips Pet. Co., 160 F. Supp. 905 (W.D. La. 1958).

[57] *Id.* at 909.

[58] *Id.*

[59] Schell v. Black, 321 S.W.2d 373 (Tex. Civ. App. 1959).

[60] 575 P.2d 977 (Okla. Ct. App. 1978).

[61] *Id.*

[62] *Id.* at 979. The court questioned only whether the surface owner had acted so as to warrant extension of the primary term. The opinion did not even attempt to justify application of the doctrine to someone other than the lessor, indicating that the judges perhaps were unaware of this restriction upon the doctrine.

[63] 575 P.2d 977 (Okla. Ct. App. 1978).

suit against the landowner to recover money damages for his injury. For instance, a surface owner's unauthorized interference with a *profit a prendre*, because it so closely resembles an easement, would apparently give rise to a cause of action for a wrongful invasion of this right and could be maintained by the owner of the easement against the surface owner.[64] Courts also have held that the relief awarded for such an interference need not automatically be injunctive but may consist of money damages.[65] Thus, depending upon the circumstances, the monetary compensation can serve to recompense the plaintiff for any consequential damages he suffered because of the defendant's interference,[66] or it can serve to reimburse him for the permanent deprivation of his right because of the impracticability or impossibility of restoring it to him.[67]

Another theory of recovery that could be asserted in an action against the landowner is that of interference with contractual relations.[68] Here, damages would be assessed in accordance with those injuries that naturally flowed from the interference, including such loss of profits as the plaintiffs could show to have proximately resulted from the wrongful acts.[69] Although wholly speculative damages will not be awarded,[70] the tortious rather than

[64] *See generally* Durkee v. Hazan, 452 P.2d 803 (Okla. 1969); Jones v. Moore, 338 P.2d 872 (Okla. 1959); Elsey v. Wagner, 199 Okla. 449, 183 P.2d 829 (1947); Gibson & Jennings Drilling, Inc. v. Amos Drilling Co., 196 Okla. 143, 162 P.2d 1002 (1945); Hudspeth v. Schmelzer, 182 Okla. 416, 77 P.2d 1123 (1938); Chapman v. Bowers, 180 Okla. 49, 67 P.2d 788 (1937); Simons v. McDaniel, 154 Okla. 168, 7 P.2d 419 (1932).

[65] Chapin v. Popilowski, 139 Conn. 84, 90 A.2d 167 (1952); Sargent v. Brunner Housing Corp., 31 A.D.2d 823, 297 N.Y.S.2d 879 (1969); Yager Pontiac, Inc. v. Fred A. Danker & Sons, Inc., 69 Misc. 2d 546, 330 N.Y.S.2d 409 (Sup. Ct. 1972) (holds that an award of damages can be made, but only when warranted by special circumstances and only in lieu of a permanent injunction); Moundsville Water Co. v. Moundsville Sand Co., 124 W. Va. 118, 19 S.E.2d 217 (1942).

[66] Chapin v. Popilowski, 139 Conn. 84, 90 A.2d 167 (1952); Moundsville Water Co. v. Moundsville Sand Co., 124 W. Va. 118, 19 S.E.2d 217 (1942).

[67] Sargent v. Brunner Housing Corp., 31 A.D.2d 823, 297 N.Y.S.2d 879 (1969); Yager Pontiac, Inc. v. Fred A. Danker & Sons, Inc., 69 Misc. 2d 546, 330 N.Y.S.2d 409 (Sup. Ct. 1972).

[68] *See generally* W. PROSSER, TORTS 934-49 (4th ed. 1971); 1 F. HARPER & F. JAMES, JR., TORTS 497-510 (1956). A problem exists with this theory of recovery since the landowner probably did not act with the specific intent of causing the plaintiff to breach his contract but only to prevent the plaintiff from coming onto his land, knowing that this would probably make the plaintiff incapable of meeting his contractual obligations. The courts are split on how to deal with this dilemma. The authors cited above suggest that the question be resolved on the issue of privilege, that is, whether the defendant's conduct could be excused in some way under the concept that it was privileged. This would require that the interest the defendant was attempting to protect be "superior," or of a greater social importance, than the plaintiff's interests. The *Burger* decision fails to specify why the surface owner behaved as he did, but the court issuing the injunction against the landowner apparently felt that his interests were of a lesser social importance than those of the lessee. Thus, interference with contractual relations would probably be a sound theory to pursue.

[69] Salomon v. Crown Life Ins. Co., 399 F. Supp. 93, 101 (E.D. Mo. 1975); Allison v. American Airlines, 112 F. Supp. 37, 39 (N.D. Okla. 1953).

[70] Mid-Continental Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176, 1200 (N.D. Miss. 1970); Mays v. Stratton, 183 So. 2d 43, 46 (Fla. Dist. Ct. App. 1966).

the contractual nature of the action decrees that the determination of the damages not be subject to a precise mathematical computation.[71] In addition, Oklahoma, along with other jurisdictions, permits the recovery of punitive damages in suitable cases.[72]

The principal problem in a case such as this lies in the determination of damages. The real injury incurred by the plaintiff is the loss of the lease and, consequently, the potential profits that could have been secured through the development of the oil and gas interests. Thus, a calculation of the plaintiff's lost profits would necessarily entail an estimation of the quantities of oil and/or gas which a well, if drilled, would have produced throughout its lifetime. This could be a formidable task. At first glance, such a damages evaluation might appear to be completely speculative, yet a series of cases dealing with damages awardable for a breach of an express drilling covenant shows that this kind of measuring device is not unreasonable.[73] These opinions stress that simply because the damages are difficult to determine or are impossible to ascertain with mathematical certainty, the courts should not be dissuaded from applying this yardstick.[74] This is not to say, however, that a court always should permit this kind of estimate to be made because there are situations, such as when the well to be drilled was exploratory and had no nearby comparable production, where the evidence will be insufficient to lay a nonconjectural basis for a finding of damages.[75] It also has been held that evidence of potential oil production from secondary recovery operations of the undrilled well, as opposed to proof of primary production, is too speculative to take into consideration.[76] Overall, however, these authorities demonstrate that the damages incurred by a failure or an inability to drill a well may be assessed by a method that embodies an analysis of that undrilled

[71] Salomon v. Crown Life Ins. Co., 399 F. Supp. 93, 101 (E.D. Mo. 1975).

[72] Allison v. American Airlines, 112 F. Supp. 37, 39 (N.D. Okla. 1953).

[73] Julian Pet. Corp. v. Courtney Pet. Co., 22 F.2d 360 (9th Cir. 1927); Higgins v. Grant, 111 Cal. App. 351, 295 P. 532 (Dist. Ct. App. 1931); Fallis v. Julian Pet. Corp., 108 Cal. App. 559, 292 P. 168 (Dist. Ct. App. 1930); Midland Gas Corp. v. Reffitt, 286 Ky. 11, 149 S.W.2d 537 (1941); Fain-McGaha Oil Corp. v. Owens, 132 Tex. 109, 121 S.W.2d 982 (1938); Hardwick v. Jackson, 315 S.W.2d 440 (Tex. Civ. App. 1958); Westgate-Greenland Oil Co. v. Mack, 164 S.W.2d 31 (Tex. Civ. App. 1942); Guardian Trust Co. v. Brothers, 59 S.W.2d 343, 346 (Tex. Civ. App. 1933).

[74] Waldrip v. Hamon, 136 F. Supp. 412 (E.D. Okla. 1955); Midland Gas Corp. v. Reffitt, 286 Ky. 11, 149 S.W.2d 537, 540 (1941); Fain-McGaha Oil Corp. v. Owens, 132 Tex. 109, 121 S.W.2d 982 (1938); Guardian Trust Co. v. Brothers, 59 S.W.2d 343, 346 (Tex. Civ. App. 1933).

[75] Waldrip v. Hamon, 136 F. Supp. 412, 413 (E.D. Okla. 1955); Denman v. Aspen Drilling Co., 214 Kan. 402, 520 P.2d 1303, 1307 (1974).

[76] Waldrip v. Hamon, 136 F. Supp. 412, 413 (E.D. Okla. 1955). Primary production is considered to be that oil or gas that the well, either with or without the aid of a pumping unit, is able to produce strictly because of the enormous underground reservoir pressures. Secondary recovery refers to a more artificial means of producing the oil, usually consisting of a waterflood operation where water is forced down some of the wells and into the reservoir in order to push the oil up the remaining wells. For a general discussion on the history and technical aspects of waterflooding, *see* Mallory v. McDermott, 274 A.D. 254, 80 N.Y.S.2d 486 (App. Div. 1948).