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Damages--Measure of Damage for Wrongful Removal of Coal

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DAMAGES—MEASURE OF DAMAGES FOR WRONGFUL REMOVAL OF COAL.—The defendant company, in reliance *bona fide* on an agreement between plaintiff company's superintendent and defendant company's general manager, mined a section of plaintiff's coal. The superintendent had no authority to make such an agreement, and the plaintiff was not estopped to deny its validity. In an action at law the plaintiff recovered (1) the value of coal wilfully mined; (2) damages for injury to unmined coal. The Supreme Court of Appeals reversed the judgment, and *held*, that defendant's trespasses, though intentional, were committed in good faith, and were not wilful; and, therefore, it was error to refuse defendant's first instruction, stating the measure of damages for the coal mined, as its value at the pit-mouth, less the cost of getting it there; and it was error, also, to allow, as damages for the coal unmined but rendered unminable, the value at the tippie, rather than its value *in situ*. *Pan Coal Co. v. Garland Pocahontas Coal Co., et al.*, 125 S. E. 226 (W. Va. 1924).

This case presents two interesting points for consideration: First, is one, who trespasses intentionally but *bona fide*, under a mistake as to his legal rights, to be treated as a wilful trespasser? Second, if such trespass is not wilful, what should be the measure of damages? These questions have been answered variously in the several jurisdictions. *Trustees of Dartmouth College v. International Paper Co.*, 132 Fed. 92; 28 W. Va. L. Quar. 133; 33 W. Va. L. Quar. 201. Sometimes the same court has applied rules inconsistent in principle. Apparently, this case is one of the first in which these questions have been directly adjudicated in an action at law in West Virginia. 28 W. Va. L. Quar. 133, at 135. However, in the recent case of the *Pittsburgh & West Virginia Gas Co. v. Pentress Gas Co.*, 84 W. Va. 449, 100 S. E. 296, which was a suit in equity for an accounting, the defendant had claimed under a junior oil lease, and drilled on certain land, after plaintiff, claiming the oil rights in the same land under a senior lease, had been enjoined from interference, by the Circuit Court, but pending an appeal to the Supreme Court of Appeals, where the injunction was dissolved; the Court held that the defendant, having had full knowledge of the facts, though acting under an honest mistake as to its legal rights, was a wilful trespasser, and was not entitled to deduct labor and other reasonable expenses; but that where the trespass results from a "mistake of fact, the measure of plaintiff's damages is the value of the article after its severance, less the proper expense of such severance." [Italics are ours.] With regard to a

trespasser in good faith under a mistake of law, probably no court has laid down a harsher rule than the one adopted by the West Virginia Court, except the United States Supreme Court in one decision. *Guffey v. Smith*, 237 U. S. 101. In the principal case it was admitted, at 382, that the statement in the Pentress Case was "probably too broad", though the facts in that case justified the decision,—the defendant had drilled for the oil while its rights were still in litigation; therefore, "they [the defendant] could not assert they were acting in good faith under a bona fide claim of right so as to excuse themselves from the charge of being wilful trespassers." The Court modified its earlier position, by holding the law in this State to be that the good faith of a trespasser is a question for the jury, and that if a trespass is committed "under an honest belief that the trespasser was acting within his legal rights, it is an innocent trespass." It is submitted that such a rule secures the maximum of justice, and that there is no controlling reason for inflicting a more severe measure of damages when the trespass arises in good faith out of a mistake of law than when it results from an innocent mistake of fact. In neither situation does the tort-feasor consciously take that which belongs to another and in both instances the damages should be compensatory, and not punitive. 4 SUTHERLAND, DAMAGES, § 1020. But the rules for determining the amount of such compensation have been numerous, and have varied, from that of the value of the property in place before being disturbed, to that of the value at the time of action brought, less reasonable expense of improvement; the latter rule, with the qualification that the "reasonable expense" must be that existing under normal conditions, was adopted in *Spruce River Coal Co. v. Valco Coal Co.*, 95 W. Va. 69, 120 S. E. 302. The divers and irreconcilable rules were collected and discussed in *Trustees of Dartmouth College v. International Paper Co.*, 132 Fed. 92. In that case, which was an action of trover for conversion of timber by an innocent trespass, Lowell, J., held that "the stumpage value better accords with the principles upon which the allowance for improvements is made" than the value "immediately after separation from the freehold." The writer submits that such a rule, though not absolutely perfect, is the most satisfactory yet devised. The plaintiff is fully compensated for his actual injury, and the defendant is permitted to retain the enhanced value, produced by his labor expended in good faith. The principal case, in point 8, syllabus, recognizes that, where the trespass is innocent, the measure of damages for "coal mined and carried away is the value of

the coal in place, usually to be ascertained by finding its value at the pit-mouth or loading tipple, and deducting therefrom the expense of mining and carrying it to the pit-mouth or tipple." The decision follows the Spruce River Case, and is in accord with a leading Missouri case. *Austin v. Huntsville Coal & Mining Co.*, 72 Mo. 535. But it should be noted that the value at the pit-mouth, less the cost of getting it there, does not necessarily represent the value of the coal in place, but usually is greater; and that to give the plaintiff the pit-mouth price in damages is to compensate him for more than he has been injured, and to deprive the innocent trespasser of the profits of his labor expended in good faith.

—G. D. H.

EQUITY—JURISDICTION—ATTACHMENT IN ACTIONS EX DELICTO.
—A entered into a contract with B whereby A was to obtain coal lands and B was to sell them, the profits to be divided between them. B sold the lands, but failed to account for the profits. B prepared to remove from the state all the profits derived from the sales and A brought a bill in equity praying that B be required to make a full discovery of said sales and that an accounting be had, and pursuant to section 1 of chapter 106 of the Code a process of garnishment was issued against the persons with whom the said funds had been deposited by B. The court *held*, by way of dictum, that under this section courts of equity have no jurisdiction as to causes of action *ex delicto*. *Snyder v. Breitinger et al.*, 130 S. E. 96, (W. Va. 1925).

The construction of this section as expressed in the above dictum seems now to be the well settled rule in this state. *Swarthmore Lumber Co. v. Parks*, 72 W. Va. 625, 79 S. E. 723; *Mabie v. Moore*, 75 W. Va. 761, 84 S. E. 788. But it will be noted that an earlier case did not so construe this section. In the case of *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55, it was contended that as the cause of action alleged in the bill was for unliquidated damages for a personal injury, a court of equity had no jurisdiction. The court said: "It is unquestionably true that this statute (referring to the above section) must be construed strictly, but its language is so direct and positive that it does not admit of construction. It authorizes a suit by attachment in equity to recover damages for any wrong." Judge Poffenbarger in *Swarthmore Lumber Com-*