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## Damages--Measure of Damages for Wrongful Removal of Coal

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## STUDENT NOTES AND RECENT CASES

**DAMAGES — MEASURE OF DAMAGES FOR WRONGFUL REMOVAL OF COAL.**— The defendant while operating its coal mine inadvertently removed coal belonging to the plaintiff. Due to the existence of a strike at the time of removal the expenses of mining were exceedingly large. In an action for damages brought by the plaintiff, the defendant claimed allowance for the actual cost of mining the coal. *Held*, the defendant is entitled only to reasonable mining expenses during normal times.<sup>1</sup>

The question of the measure of damages for removal of minerals or timber from lands of another by an innocent trespass has been variously determined.<sup>2</sup> One line of English cases allowed the owner the value of the coal at the pit's mouth less expenses for "hewing and raising."<sup>3</sup> Other cases take the view, however, that the owner is entitled only to the value of the coal to him as it existed as part of the realty before or at the time of the removal.<sup>4</sup> Some American courts have allowed the value of the coal when it first existed as a chattel.<sup>5</sup> The weight of authority in America, however, is in accord with the latter English case.<sup>6</sup> In a well considered Michigan case the court carefully reviewed the authorities bearing upon this question, and came to the conclusion that, where timber was removed from the land of another by an innocent trespasser, the owner may recover the value of the timber at the market less the expense of getting it there. If, however, this amount is less than the value of the trees when standing the latter value is the basis of recovery.<sup>7</sup> In *Trustees of Dartmouth College*

<sup>1</sup> *Spruce River Coal Co. v. Valco Coal Co.*, 120 S. E. 302 (W. Va. 1923).

<sup>2</sup> No attempt is made in this note to treat the question of wilful trespass. For a note bearing on this subject see J. W. Madden, "Interference With Oil and Gas Rights—Measure of Damages," 28 W. VA. L. QUAR. 133.

<sup>3</sup> *Brown v. Dibbs*, 25 Week Rep. 776 (Eng. 1877); *In re United Merthyr Collieries Co.*, L. R. 15 Eq. 46 (1872); *Jegon v. Vivian*, L. R. 6 Ch. 742 (1871).

<sup>4</sup> *Livingstone v. Rawyards Coal Co.*, L. R. 5 App. Cases 25 (1880); *Hilton v. Woods*, L. R. 4 Eq. 432 (1867); *Wood v. Morewood*, 3 Q. B. 440 (1841).

<sup>5</sup> *Perrine v. Chicago etc. Coal Co.*, 173 Ill. App. 287 (1912); *Ivy Coal & Coke Co. v. Ala. Coal & Coke Co.*, 135 Ala. 579, 33 So. 547 (1902); *Omaha etc. Smelting Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925 (1889); *Atlantic etc. Coal Co. v. Maryland Coal Co.*, 62 Md. 135 (1884).

<sup>6</sup> *Matthews v. Rush*, 262 Pa. 524, 105 Atl. 817 (1919); *Bennett Jellico Coal Co. v. East Jellico Coal Co.*, 152 Ky. 838, 154 S. W. 922 (1913); *Stewart v. Colfax Consolidated Coal Co.*, 147 Iowa 548, 126 N. W. 449 (1910); *Coal Creek Mining & Mfg. Co. v. Moses*, 83 Tenn. (15 Lea) 300 (1885); *Wooden-Ware Co. v. United States*, 106 U. S. 432 (1882); *Austin v. Huntsville Coal & Mining Co.*, 72 Mo. 535 (1880); See 3 SEDGWICK ON DAMAGES, 9th ed., §935.

<sup>7</sup> *Winchester v. Craig*, 33 Mich. 205 (1876).

v. *International Paper Co.*,<sup>8</sup> Lowell, District Judge, in a very learned opinion collected the various authorities on this subject, and enumerated the several methods of determining damages, together with the theories underlying each. The action was for wrongful removal of timber. The court, after reviewing the authorities, concluded that the proper measure of damages where the trespass was in good faith, was the stumpage value. In Missouri where the prevailing rule obtains the question arose, how to determine the amount of recovery when the plaintiff is also a coal operator. The court was of the opinion that the plaintiff should have the advantage of the profits incident to the mining of the coal and allowed him the value of the coal at the pit's mouth, less the cost of getting it there.<sup>9</sup> Where the plaintiff is not a coal operator the Missouri court measures the damages by the value of the coal *in situ*, which is usually the royalties paid in the neighborhood where the coal land is situated.<sup>10</sup> If no neighboring coal lands are being developed on a royalty basis, it seems the value at the pit's mouth, or market, less the cost of getting it there is the best evidence by which the value *in situ* may be determined.<sup>11</sup> It is submitted that the rule of the Missouri court obtains the result desired. The principal case does not point out the distinction made by the Missouri court between plaintiffs who are coal operators and those who are not, but since the plaintiff in that case is a coal company the case is in accord with the view taken in the Missouri cases. The West Virginia court followed *Pittsburgh & W. Va. Gas Co. v. Pentress Gas Co.*<sup>12</sup> Since the court, in this case, went on the theory that the trespass was wilful, the case is only dictum for the principal case. The court was right, however, in not allowing the defendant extraordinary expenses for mining since the value of the coal to the plaintiff before the removal was equivalent to the value when mined, less only a reasonable expense for mining during normal times because the plaintiff would probably have mined the coal during normal times had the defendant not wrongfully removed it. A somewhat analogous situation was presented in *McNeely v. South Penn Oil Co.*,<sup>13</sup> where the court held that the basis of accounting by an innocent co-tenant, who wrongfully removed oil from the joint estate, was the value of the oil produced from the land, less the whole cost of its production including the cost of producing wells.

<sup>8</sup> 132 Fed. 92 (1904).

<sup>9</sup> *Austin v. Huntsville Coal & Mining Co.*, 72 Mo. 535 (1880).

<sup>10</sup> *Lyons v. Central Coal & Coke Co.*, 339 Mo. 626, 144 S. W. 503.

<sup>11</sup> *Kingston v. Lehigh Coal Co.*, 241 Pa. St. 469, 88 Atl. 763 (1913).

<sup>12</sup> 84 W. Va. 455, 100 S. E. 296 (1919). See also J. W. Madden, "Interference With Oil and Gas Rights—Measure of Damages," 28 W. VA. L. QUAR. 133.

<sup>13</sup> 58 W. Va. 438, 52 S. E. 480 (1905).

The purpose of a damage suit, where circumstances similar to those in the principal case are relied upon, is purely compensatory.<sup>14</sup> Therefore, a rule which compensates the plaintiff, as nearly as possible, for the damage which he has actually suffered is desired. To obtain this result the Missouri rule, upon sound reason, commends itself.

—E. L. D.

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CRIMINAL LAW—EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE.—Defendant was indicted and convicted of unlawfully storing ardent spirits for sale. At the trial whiskey and other articles obtained from the defendant's premises by a search under a warrant, void under the Virginia search and seizure statute, were admitted in evidence. *Held*, the admissibility of such evidence is not affected by the illegality of the means by which it has been obtained. *Hall v. Commonwealth*, 121 S. E. 154 (Va. 1924).

The Virginia court follows the one-time firmly established rule in the United States as first announced in *Commonwealth v. Dana*, 2 Metc. 329. The first departure from that rule came in the United States Supreme Court in 1885 where it was held that admitting such evidence was a violation of both the Fourth and Fifth Amendments of the Federal Constitution. *Boyd v. U. S.*, 116 U. S. 616. This new doctrine, though qualified by a later case, to the extent that a motion must be made for the return of the evidence before offered had little following in the state courts before the adoption of the Eighteenth Amendment. *Weeks v. U. S.*, 232 U. S. 383; 4 WIGMORE ON EVIDENCE, 2nd Ed., § 2183, and cases cited. From that time the cases involving the question have been numerous and many courts have followed the doctrine of the Federal Court. *Tucker v. State*, 128 Miss. 211, 90 So. 845; *State v. Gibbons*, 118 Wash. 171, 203 Pac. 390; *Youman v. Com.*, 189 Ky. 152, 224 S. W. 860; *People v. Marchausen*, 204 Mich. 559, 171 N. W. 557. The arguments in support of this new doctrine are that the officer making such search is an agent of the state and to permit the use of evidence taken by him without authority is to validate an unreasonable search and seizure; and that such use is compelling the accused to testify against himself. *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385; *State v. Wills*, 91 W. Va. 659, 114 S. E. 621. On the other hand it is said that to look behind the evidence raises the trial of outside issues, that the Fourth and Fifth Amend-

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<sup>14</sup> See Hugh Evander Willis, "Measure of Damages When Property is Wrongfully Taken by a Private Individual," 22HARV. L. REV. 419.