

Interference With Oil and Gas Rights

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INTERFERENCE WITH OIL AND GAS RIGHTS — MEASURE OF DAMAGES.—The problem of determining the proper measure of the plaintiff's recovery in an action for the wrongful taking of property, in the cases where the wrongdoer has expended money or labor which has rendered the property more valuable, has always perplexed the courts, and has been solved in various ways. The desire of the courts, on the one hand to preserve the sanctity of property rights, and, on the other hand, not to mulct the wrongdoer in an amount which would shock the conscience has led to conclusions which cannot be reconciled on principle. In jurisdictions where a recovery of chattels in specie is still permitted by a procedure analogous to replevin or detinue, and in all jurisdictions, by a peaceable recaption,¹ the owner may usually recover his property, even though it has been improved by the defendant.² But if the wrongdoer was acting under an honest mistake,³ or even negligently,⁴

¹ *Isle Royale Mining Co. v. Hertin*, 37 Mich. 332, 26 Am. Rep. 520 (1877).

² *Eaton v. Langley*, 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474 (1898).

³ *Wetherbee v. Green*, 22 Mich. 319, 7 Am. Rep. 653 (1871); *Lewis v. Courtwright*, 77 Iowa 190, 41 N. W. 615 (1889); *Baker v. Melsch*, 29 Neb. 227, 45 N. W. 685 (1890); *Werner Stave Co. v. Pickering*, 55 Tex. Civ. App. 632, 119 S. W. 333 (1909).

⁴ *Trustees of Dartmouth College v. International Paper Co.*, 132 Fed. 92 (1904), *semble*, and cases cited therein.

and the increase in the value was such that the original value of the property taken was insignificant in comparison with the value of the property in its improved condition, many courts have held that the title has passed, and the former owner is relegated to an action for damages for the wrongful taking. If, however, the wrongful taking was conscious and wilful, no such doctrine has been usually applied, even though the value has been greatly increased,⁵ or the property has undergone a change in specie.⁶

If no recovery in specie can be had, as in those jurisdictions where the defendant in replevin is permitted to permanently retain the property upon giving bond, or in case the property or its product is no longer available, or the former owner seeks no specific recovery, but sues in trespass or trover, the difficult question of properly measuring the plaintiff's damages is presented. Where the taking was innocent, in the sense that it was not consciously and wilfully wrongful, the courts have laid down a variety of rules, running from the value of the property in place, before it was disturbed by the wrongful taking⁷ to the value at the time of action brought, less the expense of improvement,⁸ and including almost every conceivable rule between those extremes.⁹ Where, however, the taking was conscious and wilful, the courts have, in nearly all the cases permitted a recovery which goes beyond the rule of the value at the time of taking, and have required the wrongdoer to pay the former owner not only the original value of the property taken, but the added value created by the defendant.¹⁰ This view seems entirely illogical, since it both gives the former owner more than he has lost, and takes from the wrongdoer more than he has gained. It is, in effect, a punishment inflicted upon the wrongdoer, and some courts have frankly so recognized it,¹¹ but other courts have attempted to reconcile

⁵ *Baker v. Wheeler*, 8 Wend. 505, 24 Am. Dec. 66 (N. Y. 1832); *Powers v. Tilley*, 37 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304 (1894); *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238 (1898).

⁶ *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307 (1850); *Curtis v. Groat*, 6 John. 169, 5 Am. Dec. 204 (N. Y. 1810); 2 KENT, COMMENTARIES, *363, but cf. 364.

⁷ *Martin v. Porter*, 5 M. & W. 351 (1839); *Morgan v. Powell*, 3 Q. B. 278 (1842); *Wood v. Morewood*, 3 Q. B. 440 (1841); *Hilton v. Woods*, L. R. 4 Eq. 432 (1867); *Livingstone v. Rawyards Coal Co.*, L. R. 5 App. Cas. 25 (1880); *United States v. Homestake Co.*, 117 Fed. 481, 54 C. C. A. 303 (1903); *King v. Merriman*, 38 Minn. 47, 35 N. W. 570 (1887).

⁸ *Jegon v. Vivian*, L. R. 6 Ch. 742 (1871); *Powers v. United States*, 119 Fed. 562, 56 C. C. A. 128 (1903).

⁹ See *Trustees of Dartmouth College v. International Paper Co.*, *supra*, note 4, where the various rules are collected.

¹⁰ *Ellis v. Wire*, 33 Ind. 127, 5 Am. Rep. 189 (1870), and cases therein cited; *Barton Coal Co. v. Cox*, 39 Md. 1, 17 Am. Rep. 525 (1873); *Cheaney v. Nebraska etc. Stone Co.*, 41 Fed. 740 (1890).

¹¹ *Railway Co. v. Hutchins*, 32 Ohio St. 571, 30 Am. Rep. 629 (1877); *State v. Shevlin Co.*, 66 Minn. 217, 68 N. W. 973 (1895); *Beede v. Lamprey*, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426 (1888).

this measure of recovery with the general doctrine of compensatory damages.¹² A minority of courts have, however, refused to apply a different rule to the wilful trespasser and have limited the former owner to the value of his property at the time and place of the original taking.¹³

In the state of West Virginia there is, it is believed, no reported direct adjudication in an action at law upon the questions discussed above, in spite of the fact that the production of coal, oil, gas and timber would be expected to give rise to litigation involving these questions. There have been, however, cases involving an accounting in equity for the wrongful taking of such property, in which the courts have applied analogous principles. Of these, the recent case of *Pittsburgh & West Virginia Gas Co. v. Pentress Gas Co.*,¹⁴ is of importance as indicating the attitude which the courts of West Virginia will probably take toward the questions discussed above, when they are squarely presented. In the case under consideration¹⁵ the facts were that A, the owner of land, executed a "no-term" oil and gas "lease" to B upon said land. Subsequently A, believing that the "lease" to B had become void, executed a similar lease to C. Both B and C attempted to drill upon the land, when A and C secured a perpetual injunction in the circuit court, against B's drilling upon the land. While this injunction was in force C drilled a well upon the land, at a cost of five thousand dollars, and produced oil from the well, expending fifteen hundred dollars in caring for, storing and transporting the oil, which oil was sold by C for slightly less than fifteen hundred dollars. B prosecuted an appeal from the injunction suit, and in the Supreme Court of Appeals the judgment of the circuit court was reversed and C's bill dismissed. Thereupon B brought suit against C for an injunction against further operations upon the land in question, and to have an accounting and recovery of the money received by C for the oil taken from the premises. The trial court declined to allow C the cost of drilling the well, but did allow the cost of caring for, transporting and storing the oil, which was sufficient to offset the amount received for the oil. Upon appeal to the Supreme Court of Appeals it was held that C was not entitled to any deduction whatever on account of the expense of producing and marketing the oil, but was liable to B

¹² *Trustees of Dartmouth College v. International Paper Co.*, *supra*, note 4.

¹³ *Single v. Schneider*, 30 Wis. 570 (1872); *Weymouth v. Railroad*, 17 Wis. 550, 84 Am. Dec. 763; *Hungerford v. Redford*, 29 Wis. 345 (1872).

¹⁴ 84 W. Va. 449, 100 S. E. 296 (1919).

¹⁵ *Pittsburgh & West Virginia Gas Co. v. Pentress Gas Co.*, *supra*, note 14.

for the total amount of the money received from the sale of the oil.

The court, in the course of the opinion adopted the rule "that where the trespass is willful, the measure of damages is the value of the property at the time and place of demand, without deduction for labor and expense, but where such trespass is not willful, but is the result of 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." It is apparent from the discussion above that the rule adopted is the harshest of all the rules applied by the courts of other jurisdictions, as to both wilful and innocent wrongdoers and that the insertion of the words "of fact" in the rule make it harsher and more rigorous than any rule applied by any court heretofore, except a single decision by the Supreme Court of the United States.¹⁶ All the decisions except these have applied the rigorous rule of recovery only to a defendant who acted consciously and wilfully and with knowledge that he was taking the property of another.¹⁷ It is not apparent why this test of "innocence" is not as fully met by one who acted upon a mistake of law, as upon a mistake of fact. Since the harsh rule of damages is applied as a punishment to the wrongdoer giving the former owner more than he has lost and taking from the wrongdoer more than he has gained, it should be applied only against one who deserves to be punished, because he has consciously taken what belongs to another. So are the authorities.¹⁸ If a *negligent* mistake of fact does not lay one open to the punishment, an honest and non-negligent mistake as to one's legal rights, which mistake in the case under discussion¹⁹ was joined in by the circuit court after a full hearing on the facts and the law,²⁰ should not do so. One who makes such a mistake is no dangerous character, wantonly appropriating the property of his neighbors, and needing the lesson of a punitive judgment.

If we should eliminate the words "of fact" from the rule laid down by the court in the Pentress Case, then there would, as appears from the above discussion, be abundant precedent for the rule laid down, even though the logic of the first branch of the rule is not altogether convincing. But, assuming the correctness

¹⁶ *Guffey v. Smith*, 237 U. S .101 (1915).

¹⁷ All the language of the courts cannot be reconciled, but, upon the whole, it seems that the defendant is bound only to negative wilful injury to the known property of another, and wilful disregard of another's rights. Lowell, J., in *Trustees of Dartmouth College v. International Paper Co.*, *supra*, note 4.

¹⁸ 4 SUTHERLAND ON DAMAGES, § 1020, p. 3739, and notes 73, 74, collecting the cases.

¹⁹ *Pittsburgh & West Virginia Gas Co. v. Pentress Gas Co.* *supra*, note 14.

²⁰ See the statement of facts *supra*.

of the rule, it is with deference submitted that its application in the Pentress Case was erroneous for the following reasons:

(1) There was no trespass, nor taking of the property of another.

(2) The suit was for an accounting in equity, and not for the recovery of specific property nor for damages.

(1) There was no trespass nor taking of the property of another,²¹ since B was not the owner of the oil taken by C. The courts of West Virginia have always held that the so-called oil "lease" is not a conveyance of the oil, but only of "an exclusive right to drill the land for the purpose of producing these minerals, and to produce the same after they are discovered." The language quoted is from the Pentress Case.²² The court further said: "Admittedly plaintiffs (B) had the exclusive right to drill this land for oil and gas, and the defendant (C) wrongfully took this right from them. Plaintiffs likewise had the right, upon discovery of the oil and gas, to produce and sell the same, and of this right they were deprived by the defendants . . ." The court thus recognizing that B's *right* had been taken, fixed his damages as if his *oil* had been taken. If B is deprived of the "right to produce and sell" oil, as the court said, the problem clearly is to determine the value of that *right*. In the Pentress Case the right was worth nothing, since it reasonably cost five thousand dollars to test the land, and fifteen hundred dollars to care for and transport the fifteen hundred dollars worth of oil which was produced and sold. B gained instead of losing, by C's wrongful act, since C, at his own expense, tested the *right* and proved it worthless. The court speaks of *trespass*, but there was, it is submitted, no trespass. B had only a *right*, a species of property which may be of great value, but which is not the subject of a trespass. If B had owned the oil, trespass would have lain for the violation of his possession, or trover for the wrongful conversion of it. But B did not own it. Trespass on the case is the only action at law which would have lain for C's violation of B's incorporeal right.²³ The measure of damages in such an action is, of course, the amount of the injury

²¹ See the statement of facts *supra*.

²² See also *Lowther Oil Co. v. Miller Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433 (1903); *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 344 (1901); *Steel Smith v. Gartlan*, 45 W. Va. 27, 29 S. E. 973 (1898); *Crawford v. Richey*, 43 W. Va. 252, 27 S. E. 220 (1897); *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 638 (1896); *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S. E. 12 (1916); *Musgrave v. Musgrave*, 86 W. Va. 119, at 135, 103 S. E. 302 (1920).

²³ *Fleming v. Railroad*, 51 W. Va. 54, 41 S. E. 168 (1902); *Union Petroleum Co. v. Petroleum Co.*, 72 Pa. 173 (1872); *Duffield v. Rosenzweig*, 144 Pa. 520, at 537 ff., 23 Atl. 4 (1891). MARTIN, CIVIL PROCEDURE, § 94; 1 CHITTY, PLEADING, 139.

resulting to the plaintiff from the defendant's wrongful act, or, if no injury results, then nominal damages may be awarded.²⁴ In the case under discussion there was no injury, hence, it is submitted, there should have been no recovery of substantial damages.

(2) The action being one in equity for an accounting, even though the oil taken by C had belonged to B the harsh measure of recovery permitted in the case under discussion does not accord with the rules usually applied by a court of equity. The court had not, in previous cases of the same nature in which the wrongdoer was at least as culpable as in this case, measured his wrong with any such rule.²⁵ In each of those cases a joint tenant had produced and sold mineral from the premises in question and, in a suit for an accounting in equity, was given credit for the amount expended by him in such production. Those cases are distinguished by the court upon the ground that the relation of joint tenants creates a relation "similar to that existing between a principal and an agent who exceeds his authority," and that the claim made by the wronged joint tenant amounted to a ratification of the enterprise, subjecting him to the burdens of it, as well as the benefits. The suggestion carries a peril, since if a loss were sustained, the joint tenant who had been wronged might find himself indebted to the wrongdoer. But the court in the important case of *Williamson v. Jones*,²⁶ definitely disclaimed any such position by saying "It is therefore immaterial to define his exact case. Whether we regard him as a tenant in common or a stranger, it is the same." That case was expressly put upon the ground that he who seeks equity must do equity, and that it is not equity to seek to have the benefits of the enterprise of another while disclaiming the burdens. An accounting in equity is for the purpose of requiring the defendant to disgorge his unlawful gains, or to compensate the plaintiff for his actual losses. In the case under discussion there were neither gains to the defendant, nor losses to the plaintiff. To require the defendant to pay more than he has gained, and more than the plaintiff has lost, is the imposition of a penalty or forfeiture, which equity abhors. If a plaintiff seeks such an award, he should not seek it at the hands of a court of conscience, but as a strict legal right. In this connection it should be noted

²⁴ *Duffield v. Rosenzweig*, *Fleming v. Railroad*, *supra*, note 23, and cases cited therein.

²⁵ *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411 (1897); *McNeely v. South Penn Oil Co.*, 58 W. Va. 438, 52 S. E. 480 (1905); *South Penn Oil Co. v. Haight*, 71 W. Va. 720, 78 S. E. 759 (1913); *Cecil v. Clark*, 49 W. Va. 459, 39 S. E. 202 (1901); *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223 (1903).

²⁶ *Supra*, note 24, at page 568.

that even though the plaintiff should proceed at law, nevertheless if he desires to waive the tort and sue in *assumpsit* as for money had and received, the court of law will not permit him to recover more than the amount of the defendant's enrichment.²⁷ The *Pentress Case* therefore presents the anomalous situation of a court of equity, under whose influence the courts of common law have moulded the quasi-contractual remedies to prevent unjust enrichment but not to penalize, adopting the harshest rule known to the law courts, the admitted purpose of which is to inflict a penalty.

—J. W. M.

RECOUPMENT—SET-OFF—AND COUNTERCLAIM.—At common law there was no right of set-off, but at an early date recoupment was invented and allowed to avoid circuity of action.¹ It was allowed in the assize of novel disseisin for rent which accrued during the disseisin and in a few other instances when the reduction claimed sprang immediately from the claim relied upon by the plaintiff,² but was very limited.³ In modern law the term has a broader signification. It is said to be "that right of the defendant in the same action to claim damages from the plaintiff either because he has not complied with some cross obligation of the contract upon which he sues, or because he has violated some duty which the law imposes upon him in the making or performance of that contract."⁴ "A defense by way of recoupment denies the validity of the plaintiff's cause of action. It is not an independent cross claim like a separate and distinct debt or item of account due from the plaintiff, but is confined to matters arising out of or connected with the contract or transaction which forms the basis of the plaintiff's action. It goes only in abatement or reduction of the plaintiff's claim and can be used as a substitute for a cross-action only to the extent of the plaintiff's demand."⁵ It is the right to set up and prove damages as a defense because of failure on part of plaintiff to perform his contract.⁶ In West Virginia the essentials of

²⁷ See Arthur L. Corbin, "Waiver of Tort and Suit in *Assumpsit*," 19 *YALE L. J.* 221, 239.

¹ *Baltimore & Ohio R. R. Co. v. Jameson*, 13 W. Va. 833 (1878); 4 *MINOR'S INST.*, 2 ed., 706.

² *Coulter's Case*, 5 Co. Rep. 30a (1598); *Baltimore & Ohio R. R. Co. v. Jameson*, *supra*.

³ *Baltimore & Ohio R. R. Co. v. Jameson*, *supra*.

⁴ *Dillon Beebe's Son v. Eakle*, 43 W. Va. 502, 27 S. E. 214 (1897).

⁵ *Christiancy, J.*, in *McHardy v. Wadsworth*, 8 Mich. 349 (1860).

⁶ *Parker v. Hart*, 32 N. J. Eq. 225 (1880); *Michigan Yacht Club v. Busch*, 143 Fed. 929, 936 (1906).