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# The Measure of Damages for Mineral Trespass--A Kentucky Perspective

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## INTRODUCTION

Mineral trespass may be defined as the loss resulting from the unauthorized taking of coal, oil, gas or other minerals from the property of another.[1] Although there are several distinct kinds of damage which may accompany a mineral trespass,[2] this

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[1] Stiggar, *The Mineral Trespasser: Willful v. Innocent*, R-1, R-2, 12th Annual Mineral Law Seminar, University of Kentucky Mineral Law Center (Oct. 1987).

An important distinction is drawn between a trespass and a situation involving a cotenant who extracts minerals from the mineral estate he shares. A cotenant cannot be a trespasser as against his cotenants since he has a lawful right to extract minerals from the whole of the mineral estate in which the cotenancy exists. Taylor v. Bradford, 244 S.W.2d 482, 484 (Ky. 1951); *see generally* SHORT & THOMAS, 1 KENTUCKY MINERAL LAW § 13.03 (1986). However, a cotenant who mines without the consent of his cotenants must account proportionally to his cotenants for the profits he has made. 244 S.W.2d at 484, 485.

There are several cases illustrating trespasses not involving the removal of minerals which are still called mineral trespass. For example, if a person dumps sludge and other refuse on the land of another, thereby preventing the owner of the mineral rights from mining the minerals, this might be characterized as a mineral trespass. *See* Hi-Hat Elkhorn Coal Co. v. Inland Steel Co., 370 F. 2d 117 (6th Cir. 1966). Or where someone hauls his coal over land he does not have permission to use, this also may be called a mineral trespass. *See* Kentucky Border Coal Co., Inc. v. Mullins, 504 S.W.2d 696 (Ky. 1973). Also, if a person negligently rolls logs down a mountainside which strike and rupture a gas pipeline, this might also be called a mineral trespass despite the fact that the trespasser did not take the gas. *See* Lindsey v. Wilson, 332 S.W.2d 641 (Ky. 1960). Finally, if one were to store gas in an underground cavern, part of which was under the land of another, such action has been called a mineral trespass in using the latter's land without paying for such use. This kind of trespass action was first attempted in Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. 1934), but the plaintiff lost because the court held that since gas when reinjected reverts to its natural state, not owned by anyone until recapture, there could be no trespass. 75 S.W.2d at 206. But *Hammonds* has been recently overruled by a case holding that reinjected natural gas remains personal property. Texas American Energy Corp. v. Citizens Fidelity Bank and Trust Co., 736 S.W.2d 25 (Ky. 1987). Therefore, it is possible that the cause of action attempted in *Hammonds* may be a viable type of mineral trespass which does not involve converting minerals.

[2] For example, the plaintiff would be entitled to recover for damage to the surface of his land caused by the mining, such as damages caused by blasting. *See generally* 58 C.J.S. MINES AND MINERALS § 137(g) (1948); 54 AM. JUR. 2D MINES AND MINERALS § 220 (1971); Stiggar, *supra* note 1 at R-13, R-14.

Note will specifically address only the loss of the minerals and how that loss should be measured.[3]

The general rule regarding the measure of damages to compensate for minerals taken by mineral trespass may be simply stated—the measure of damages depends on whether the trespass is willful[4] or innocent.[5] If the trespass is willful, the mineral owner will recover the full value of the mineral at the time of its removal from his mineral estate. The trespasser's liability will not be reduced by the costs incurred in removing the minerals.[6] On the other hand, if the trespass is innocent, the mineral owner may recover only the value of the minerals in place (i.e. before they are extracted), which in Kentucky is measured in terms of the royalty the mineral owner would have received had he executed a lease granting a lessee the right to produce the minerals.[7] The Kentucky rule in innocent trespass cases has been modified in both the solid minerals[8] and oil and gas[9] contexts when the mineral owner is in a position personally to mine the minerals.[10] In such cases, the mineral owner will recover the full value of the extracted minerals less the costs incurred by the trespasser in removing the minerals.[11]

This Note will discuss the issues that arise upon application of these general rules regarding damages for mineral trespass. First, the meaning of "willful" and "innocent" will be discerned.[12] Second, the historical background and current reason-

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[3] *See infra* notes 79-158 and accompanying text. It should be noted that a plaintiff could seek recovery for the wrongful taking of minerals by an action other than trespass, such as conversion. DOBBS, REMEDIES § 5.2 (1973). "[T]here is often a choice between a trespass to land theory and a conversion to chattels theory." *Id.* at 332. Conceptually the form of action might affect the measure of damages. *See* Note, *The Remedy by Damages for Conversion Compared with that by Trespass, and by Replevin*, 2 UNIV. L. REV. 67 (1894-95). However, commentators and Kentucky courts agree that the name given the cause of action does not affect the measure of damages. DOBBS, *supra* ("It is now generally agreed that the choice of legal theory ought not to govern damages in these cases. . . ."); Falls Branch Coal Co. v. Proctor Coal Co., 262 S.W. 300, 303 (Ky. 1924).

[4] *See infra* notes 16-56 and accompanying text.

[5] *See infra* notes 16-38, 57-78 and accompanying text.

[6] *See infra* notes 89-93 and accompanying text.

[7] *See infra* notes 108-20 and accompanying text.

[8] *See infra* notes 127-39 and accompanying text.

[9] *See infra* notes 121-26 and accompanying text.

[10] *See infra* notes 123-26, 135-37 and accompanying text.

[11] *See infra* notes 125-26, 135-36 and accompanying text.

[12] *See infra* notes 16-78 and accompanying text.

ing behind the different measures of damages will be explored.[13] In particular, this Note will discuss the continuing validity of the royalty measure of damages in cases of innocent trespass.[14] Finally, the costs for which a trespasser, in at least some cases of innocent trespass, will receive credit will be identified.[15]

## I. THE WILLFUL—INNOCENT DICHOTOMY

Before the damages in a mineral trespass action may be ascertained, the trial court must determine whether the trespass was willful or innocent.[16] Some authorities discuss this distinction in terms of bad faith and good faith.[17] Regardless of which terms are used, the line between the two opposites has not been easy to draw.

The opinion of the Kentucky Court of Appeals in *Swiss Oil v. Hupp*[18] is perhaps "the best single treatment"[19] of the willful-innocent dichotomy. In *Hupp*,[20] the court stated in conclusory terms that a willful trespasser "knows he is wrong"[21] whereas an innocent trespasser "believes he is right."[22] These conclusions, if taken literally, would be misleading; they are oversimplifications of an enormously complex determination.[23]

The *Hupp* court, perhaps realizing the need for specific guidance in determining whether a trespass is willful or innocent, set forth the process for making that determination. The tres-

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[13] *See infra* notes 79-158 and accompanying text.

[14] *See infra* notes 140-58 and accompanying text.

[15] *See infra* notes 159-87 and accompanying text.

[16] Swiss Oil v. Hupp, 69 S.W.2d 1037, 1039 (Ky. 1934). "[C]lassification as willful or as innocent . . . is the hinge upon which [a] case hangs and upon which the decision as to the extent of recovery must turn." *Id.*

[17] 1 KUNTZ, THE LAW OF OIL AND GAS § 11.3 (1987); Sullivan, *Good Faith of Mineral Trespasser*, 19 AM. JUR. PROOF OF FACTS 2D 529 (1979); Comment, *The Measure of Damages for Unauthorized Production of Oil and Gas: The Role of Good and Bad Faith*, 15 TUL. L. REV. 291 (1940-41).

[18] 69 S.W.2d at 1037.

[19] Lebow v. Cameron, 394 S.W.2d 773, 776 (Ky. 1965).

[20] 69 S.W.2d at 1037.

[21] 69 S.W.2d at 1039.

[22] *Id.*

[23] *See* Stiggar, *supra* note 1 at R-3, R-4; *see also infra* notes 24-78 and accompanying text; DOBBS, REMEDIES § 5.2 at 328-30 (1973).

passer is presumed to have willfully trespassed.[24] He has the burden of proof and must rebut the presumption.[25] There are certain factors to consider in deciding whether the trespasser has overcome the presumption: (1) Was there "reasonable doubt of the other party's (the mineral owner's) exclusive or dominant right"[26] to the minerals taken? If so, this will weigh in favor of the trespass being innocent.[27] (2) Did the trespasser rely on "the advice of reputable counsel"?[28] If such is the case, this will indicate an innocent trespass.[29] (3) "[T]he fact that a court of competent jurisdiction has rendered a favorable judgment"[30] awarding title to the trespasser will be conclusive and will result in a finding of innocent trespass.[31] (4) What were the trespasser's "sincerity and his actual intention at the time"[32] of the trespass - did he truly believe he had a legitimate claim to the minerals he took?[33] (5) The court must consider the nature of the mineral taken. If it is oil or gas, the "fugacious nature"[34] of such minerals may justify their being taken, even though doubt exists as to ownership, for fear that "delay would endanger loss and action would seem to be urgent."[35] This list is by no means exhaustive,[36] but it does contain the factors on which most cases turn.[37]

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[24] 69 S.W.2d at 1041; *see also* Kycoga Land Co. v. Ky. River Coal Corp., 110 F. 2d 894, 897 (6th Cir. 1940); Rudy v. Ellis, 236 S.W.2d 466, 468 (Ky. 1951).

[25] 69 S.W.2d at 1041.

[26] *Id.*

[27] *Id.*

[28] *Id.* An example of reasonable reliance would be such as where an attorney, after fully considering the facts, renders an opinion for the trespasser leading him to believe he has rights to the minerals. *Id.* at 1042.

[29] *Id* at 1041, 1042.

[30] *Id.* at 1042.

[31] 69 S.W.2d at 1042.

[32] *Id.*

[33] *Id.* at 1041; *see also* Loeb v. Conley, 169 S.W. 575 (Ky. 1914) (This factor is not determined by the trespasser's own testimony, but instead by his actions at the time of the trespass.).

[34] 69 S.W.2d at 1042.

[35] *Id.*

[36] It is beyond the scope of this Note to identify all the factors which could affect the willful-innocent determination. Perhaps the most complete source of information in this vein is Sullivan, *Good Faith of Mineral Trespasser*, 19 AM. JUR. PROOF OF FACTS 2D 529 (1979).

[37] *See infra* notes 39-78 and accompanying text.

Since findings of willfulness depend on the circumstances of each case and will, therefore, turn on unique combinations of the above discussed factors,[38] it is beyond the scope of this Note to hypothesize each case that would result in a finding of willful or innocent trespass. Yet a working knowledge of this dichotomy is necessary to fully understand the measure of damages for mineral trespass. The discussion that follows will provide that knowledge by briefly describing some of the fact situations in the Kentucky cases leading to findings of willful and innocent trespass.

### *A. Cases of Willful Trespass*

*Jim Thompson Coal Co. v. Dentzell*[39] is one of the earlier cases finding a coal company liable for willful trespass. The court in *Dentzell* identified two factors that indicated the willfulness of the trespass. The first was the defendant coal company's failure to keep track of its mining operation maps. These maps were supposed to be used, at least in part, to insure that the company did not mine too close to neighboring mineral estates.[40] There was a statutorily imposed duty to refrain from mining too close to property lines.[41] The second factor was the defendant coal company's actual notice that they were mining the plaintiff's minerals. The coal company knew their blasting operations below ground were centered above ground on plaintiff's land.[42]

In *Elkhorn-Hazard Coal Co. v. Kentucky River Coal Corp. (Elkhorn-Hazard)*,[43] the defendants argued that they were innocent trespassers because they allegedly had a lease contract to

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[38] *See generally* Swiss Oil v. Hupp, 69 S.W.2d 1037 (Ky. 1934); Loeb v. Conley, 169 S.W. 575 (Ky. 1914).

[39] 287 S.W. 548 (Ky. 1926).

[40] *Id.* at 549.

[41] *Id.* Today, KY. REV. STAT. § 352.490 (Bobbs/Merril 1983) [hereinafter K.R.S.] provides that persons engaged in underground mining may not mine within 25 feet of the line dividing his mineral estate from that of another without first getting the permission of the latter and the Commissioner of Mining. If he fails to do this, he will be liable for any damages caused by the unauthorized mining. K.R.S. § 352.490.

[42] 287 S.W. at 549.

[43] 20 F.2d 67 (6th Cir. 1927).

produce the minerals they had taken.[44] The court held that the defendants were willful trespassers because they failed to meet their burden of proof on the issue of the existence of the contract,[45] and even if they had met that burden, they were in breach of the contract's purported terms.[46]

In *Sandlin v. Webb*,[47] the court ruled that it may be a willful trespass for trespassers to purposefully or recklessly fail to determine the boundaries of their mineral rights.[48] Clearly, in the context of mineral trespass, ignorance is not bliss.[49]

Finally, as *Harlan Gas Coal Co. v. Hensley*[50] and *Elk-Horn Coal Corp. v. Anderson Coal Co.*[51] illustrate, since a trespasser has the burden of proof to overcome a presumption that the trespass is willful,[52] he may be found to be a willful trespasser simply because he fails to meet that burden.[53] In other words, the plaintiff does not have to prove any facts, such as those found persuasive in the cases discussed here, indicating willfulness. It is incumbent upon the defendant to prove he is an innocent trespasser.

From the foregoing, one should realize that the term willful, as used in the context of mineral trespass, is not exactly in line with the meaning that term is generally assigned.[54] The term not only embodies the concept of willful conduct but also includes

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[44] *Id.* at 68.

[45] *Id.*

[46] *Id.*

[47] 240 S.W.2d 69 (Ky. 1951).

[48] *Id.* at 70.

[49] *Id.*; *see also* Griffith v. Clark Mfg. Co. 279 S.W. 971 (Ky. 1926). The court states that "[o]ne is presumed to have intended the reasonable and natural consequences of his acts." 279 S.W. at 972. Where persons fail to make a simple measurement which would have clearly shown they were not on their own land, that failure can evince recklessness or wantonness which can be considered a willful trespass. 270 S.W. at 971, 972.

[50] 28 S.W.2d 6 (Ky. 1930).

[51] 223 F. Supp. 746 (E.D. Ky. 1963).

[52] *See supra* notes 24-25 and accompanying text.

[53] 28 S.W.2d at 6; 233 F. Supp. at 750. Some of the trespasses in *Anderson Coal Co.* were found to be innocent because of a court decision mistakenly affirming the trespasser's rights to the minerals in a certain parcel of land. But the trespassers went past even this disputed land onto another parcel, and it was this trespass that was found to be willful due to lack of evidence to the contrary. 233 F. Supp. at 750.

[54] Willful is defined as "[p]roceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary." BLACK'S LAW DICTIONARY 1434 (5th ed. 1979).

what can fairly be described as reckless conduct[55] and gross negligence.[56]

### *B. Cases of Innocent Trespass*

In cases of innocent trespass the trespasser must reasonably believe he has title to the minerals he is taking.[57] For example, if a court has determined that the trespasser owns the mineral rights in question, and he thereafter mines the minerals only later to have the court decision overturned and the title determined to be in someone else, he will be an innocent trespasser because he reasonably believed at the time of the trespass that he had title to the minerals he took.[58] Another example of this general principal is *Rudy v. Ellis*.[59] In that case, the trespasser was mining under a lease that purportedly entitled him to take the minerals in question but subsequently was declared invalid.[60] In those circumstances, the trespass was found to be innocent.[61] Note that *Rudy* is different from the *Elkhorn-Hazard*[62] case in that in *Rudy* the contract definitely existed; therefore, reliance on it to provide a claim of title was more reasonable.[63]

One might argue that a "reasonable belief" in having title is too indefinite a standard, despite the apparent common sense applications of the standard discussed in the preceding paragraph. The case of *Kycoga Land Co. v. Kentucky River Coal Co.*[64] may serve to validate that argument. In *Kycoga*, the United States Court of Appeals for the Sixth Circuit, applying Kentucky law, held that the defendant trespasser was clearly negligent in failing to discover the proper boundaries of his mineral rights.[65]

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[55] *See supra* notes 47-49 and accompanying text.

[56] *See supra* notes 39-42 and accompanying text.

[57] *See infra* notes 58-63 and accompanying text; *see also* Stiggar, *supra* note 1 at R-4. "Any discussion of an innocent trespass presupposes that the trespasser entered under color of title. . . . There can be no innocent trespass where the trespasser knows that he has no title." Stiggar, *supra* note 1 at R-4.

[58] Hughett v. Caldwell County, 230 S.W.2d 92, 21 A.L.R. 2D 373 (Ky. 1950).

[59] 236 S.W.2d 466 (Ky. 1951).

[60] *Id.* at 467.

[61] *Id.* at 468.

[62] *See supra* notes 43-46 and accompanying text.

[63] 236 S.W.2d at 468.

[64] 110 F.2d 894 (6th Cir. 1940).

[65] *Id.* at 896, 897.

Nevertheless, the court held that the trespass was innocent, stating that "mere negligence" is not inconsistent with an innocent trespass.[66] One must wonder whether a trespasser can have a reasonable belief in his title when he has made little or no attempt to determine whether he had any title to the minerals taken. The *Kycoga* case may fairly be characterized as drawing the outer limits of an innocent trespass; it clearly illustrates that "innocent" is a misnomer.[67] One should note, however, that *Kycoga* involved the application of a now-repealed criminal statute that imposed fines and double damages for a willful trespass.[68] The result might not be the same today since the courts interpret terms used in criminal statutes more narrowly than they might interpret the same terms in the common law civil context.[69]

One reason courts may be inclined to find a trespass to be innocent is the confused state of title in mineral producing areas. It is apparently common to have legal title vested in someone other than the owner of record.[70] This fact justifies finding an innocent trespass in cases where the trespasser has a reasonable claim to title regardless of the state of record title.[71] As one author stated, "[i]t is painfully obvious that the mineral operator is particularly vulnerable to defects in his title and the title of his lessor."[72] The courts are not blind to this problem. In *Kycoga* the court recognized "that in the uncertain condition of land rights in that mountainous section of the state there might be infirmities in the lessor's title."[73] The problem is also reflected by cases like *Lebow v. Cameron*,[74] where the court makes it clear that the constructive notice provided by the actual owner's recorded deed does not affect the willfulness of the trespass. Even with actual notice of the true owner's claim, the trespasser

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[66] *Id.*

[67] Innocent means "[f]ree from guilt; acting in good fatih and without knowledge of incriminatory circumstances, or of defects or objections." BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

[68] 110 F.2d at 896.

[69] *See* Com. v. Colonial Stores, Inc., 350 S.W.2d 465 (Ky. 1961).

[70] *See infra* notes 72-73 and accompanying text.

[71] *See infra* notes 74-75 and accompanying text.

[72] Stiggar, *supra* note 1 at R-2.

[73] 110 F.2d at 897.

[74] 394 S.W.2d 773 (Ky. 1965).

can have a reasonable belief that he has title to the minerals.[75]

Surely the difficulty in determining title to mineral rights should be a factor in deciding whether a trespass is innocent, but it should not be used as an excuse. Justice Montgomery, dissenting in *Lebow v. Cameron*,[76] advised the court that a trespasser should not be allowed to rely on the fallibility of record title. Instead, that fallibility should give rise to a duty on the part of the trespasser to make even further inquiry such as talking to the record title holder in a good faith attempt to ascertain who really owns the mineral rights.[77] Justice Montgomery opined that an innocent trespasser was an inadvertant one, not someone who has carelessly avoided determining the actual state of title.[78]

## II. DAMAGES

### *A. Historical Background*

Early English common law did not distinguish between a willful and an innocent trespasser in measuring damages.[79] In all cases of mineral trespass, the trespasser was liable for the full value of the coal at the "pit's mouth" (i.e. the value of the coal after it had been severed and brought to the surface).[80] The trespasser was not allowed to deduct his costs from his liability to the owner.[81] This so called "penal rule"[82] was followed in the

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[75] *Id.* at 777.

[76] *Id.*

[77] *Id.* at 778, 779.

[78] *Id.*

[79] *See e.g.*, Martin v. Porter, 151 Eng. Rep. 149 (1839) (the court held that the plaintiff is entitled to the same amount of recovery as he would be if a chattel of his had been converted, rejecting the defendant's contention that such an award unjustly enriched the plaintiff).

[80] 151 Eng. Rep. at 149. *See also* Note, *Coal Worked Beyond Boundary Through Common Error*, 69 L.T. 76 (1880); Note, *Trespass to Minerals: Measure of Damages*, 170 L.T. 487 (1930) (discussing *Martin* in the context of the development in English law on the measure of damages).

[81] 151 Eng. Rep. at 149, 150. *But see* Morgan v. Powell, 3 Q.B. 278, 11 L.J.R. 263 (1862) (the only expense allowed was the cost of transporting the coal from where it was wrongfully converted to where it was sold).

[82] Note, *Trespass to Minerals: Measure of Damages*, 170 L.T. 487 (1930).

United States as evidenced by cases like *Blaen Avon Coal Co. v. McCullah*[83] in which the Maryland Court of Appeals held that the proper measure of damages, even for cases of innocent trespass, was the full value of the extracted coal without allowance for production expenses.[84]

Over time, commentators recognized the unfairness of the strict application of such a rule: "Where, as frequently occurs, minerals are severed and brought to the surface by other than the owner in genuine ignorance of the trespass, the penal rule would work injustice."[85] The courts decided that in cases of innocent trespass the focus should be on compensating the plaintiff for the trespass committed against him without the unnecessary element of punishment for the trespasser.[86] The question in such cases should be the value of the mineral "to the person from whose property it is taken."[87] Thus, the innocent - willful distinction became a critical factor in measuring damages.

### *B. Willful Trespass*

In cases of willful trespass, the measure of damages has remained the same as it was under the common law penal rule.[88] The owner is entitled to the full value of the mineral after its extraction without a reduction for the trespasser's production expenses.[89] The jurisdictions that have considered willful trespass cases are "virtually unanimous"[90] in the application of this measure of damages. This rule obviously fully compensates the plaintiff, but at the same time also contains a "punitive"[91] or

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[83] 59 Md. 403 (1883).

[84] *Id.* at 419, 422, 423.

[85] *Note*, *supra* note 82 at 488.

[86] Note, *Measure of Damages - Coal Worked Beyond Boundary Through Common Error*, 69 L.T. 76, 77 (1880).

[87] *Id. See also* Livingston v. Rawyards Coal Co., 5 App. Cas. 25 (1880) (an excellent conceptual discussion of why different measures of damages are called for in cases of innocent trespass).

[88] *Compare supra* notes 80-84 and accompanying text *with infra* notes 89-93.

[89] Annotation, *Right of Trespasser to Credit for Expenditures in Producing, as Against his Liability for Value of, Oil or Minerals*, 21 A.L.R. 2D 380 (1952) (the annotation is based on the Kentucky case of Hughett v. Caldwell Co., 230 S.W.2d 92 (Ky. 1950)).

[90] *Id.* at 391.

[91] Stiggar, *supra* note 1 at R-2.

"exemplary"[92] element which serves as a "deterrent to wrongdoers."[93]

Authority exists for awarding additional punitive damages in willful trespass cases.[94] But at least one jurisdiction has held that because the measure of damages for willful trespass is punitive as it is, there is no need to award additional punitive damages.[95] Kentucky's stance on the issue of additional punitive damages is not entirely clear. From 1928 until 1975, Kentucky was one of several states[96] with statutes providing for multiple damages in cases of willful trespass.[97] The Kentucky statute was a criminal statute under which a willful trespasser would be fined up to $5000 and would "be liable to the owner in damages double the market value of the coal mined and removed."[98] In the statute's forty-seven year existence, only two reported cases found a trespasser liable under the statute.[99] Now that the statute has been repealed, there is no particular authority for a Kentucky court to make an additional award of punitive damages. One might argue that a court may, in its discretion, make an award of additional punitive damages in cases of particularly egregious behavior by the trespasser as is sometimes possible with other tort actions.[100] However, because the measure of damages is

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[92] Athens and Pomeroy Coal and Land Co. v. Tracey, 153 N.E. 240, 244 (Ohio 1925).

[93] *Id.*

[94] *See* Barton Coal Co. v. Cox, 39 Md. 1, 2 (1873). *See generally* 58 C.J.S., MINES AND MINERALS § 137(g)(3)(b) (1948).

[95] Martinez v. De Los Rios, 331 P. 2d 724 (Cal. App. 1958).

[96] *See* MCCORMICK, DAMAGES 499 (1935) (a list of states having mineral trespass statutes is given).

[97] K.R.S. § 433.270 provided:

> Any person who willfully or knowingly mines or removes coal of the value of twenty dollars ($20.00) or more from the property of another, without color of title in himself to the coal so mined and removed, shall be fined not less than one hundred dollars ($100) nor more than five thousand ($5000) and in addition be liable to the owner in damages double the market value of the coal mined and removed.

The law was enacted by 1928 Ky. Acts 165, approved March 21, 1928 and repealed by 1974 Ky. Acts 406, ch. 336, effective January 1, 1975.

[98] *See supra* note 97.

[99] Elk Horn Coal Corp. v. Anderson Coal Co., 233 F.Supp. 746 (E.D. Ky. 1963); Sandlin v. Webb, 240 S.W.2d 69 (Ky. 1951).

[100] *See e.g.*, Hensley v. Paul Miller Ford Inc., 508 S.W.2d 759 (Ky. 1974). The defendant car dealer sold the plaintiff's car and the personalty therein while the plaintiff

already punitive, the success of such an argument is doubtful.[101]

### C. *Innocent Trespass*

In cases of innocent trespass, the value to the particular owner of the mineral taken must be established.[102] The majority of jurisdictions addressing the issue have determined that the proper measure of damages is the value of the mineral after extraction less the costs incurred by the trespasser in producing the mineral.[103] Authorities generally agree that this measure of damages is fair because it compensates the plaintiff[104] without punishing[105] or rewarding the trespasser.[106] The Kentucky courts have not followed this majority view.[107]

*Sandy River Channel Coal Co. v. White House Coal Co.*,[108] which presents a classic case of innocent trespass, was the first Kentucky case to explain how the damages in such cases would be measured. *Sandy River* involved a dispute regarding the dividing line between the properties of two coal companies. White House claimed that Sandy River was mining its mineral estate.[109] Sandy River denied the allegations.[110] White House prevailed in a suit to quiet title.[111] White House then sought damages for the full value of coal taken from its mineral estate by Sandy River without a reduction for the costs Sandy River had incurred in producing the coal.[112] The lower court awarded White House the value of the coal when sold less the production costs incurred

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was test driving one of the defendant's cars. There was evidence that the defendant did so in bad faith and punitive damages were awarded because of the egregiousness of the defendant's actions. *Id.*

[101] *See supra* notes 95-100 and accompanying text.

[102] *See supra* note 87 and accompanying text.

[103] Annotation, *supra* note 89 at 384, 385.

[104] *Id.* at 382.

[105] *See id.* at 385, 386.

[106] *Id.*

[107] *See infra* notes 108-147 and accompanying text.

[108] 101 S.W. 319 (Ky. 1907).

[109] *Id.*

[110] *Id.*

[111] *Id.*; Sandy River Channel Coal Co. v. White House Channel Coal Co., 72 S.W. 298 (Ky. 1903).

[112] 101 S.W. at 320.

by Sandy River.[113] Both parties appealed.[114] The Kentucky Court of Appeals (then Kentucky's highest court) held that "the measure of damages is the value of the coal or ore as it was in the mine before it was disturbed. . . . This valuation may also be expressed as the usual royalty paid for the right of mining" (citations omitted).[115] The court pointed out "that damages in cases of innocent mistake must be confined to compensation for the injury done."[116] Further, "all that the plaintiff can fairly ask is that it be made whole."[117] In this case, the only way to get to the coal converted was through the trespasser's mine opening; therefore, the plaintiff was entitled only to a "reasonable royalty."[118] To hold otherwise, the court felt, would be to unjustly enrich the plaintiff at the expense of the trespasser.[119] Thus began a long line of cases, continuing to the present day, holding that the proper measure of damages is the royalty that the mineral owner might have received.[120]

An exception to the rule was created by two important cases, one in the oil and gas context and one in the solid minerals context. In *Swiss Oil v. Hupp*,[121] the plaintiff, a lessee under a valid oil lease, sought recovery for the trespass of a lessee under an invalid oil lease.[122] The *Hupp* court, after holding that the trespass was innocent,[123] recognized that the plaintiff, a lessee, was in a position to extract the minerals and thereby garner any profit to be made.[124] The court believed that in such circumstances, a recovery of the royalty value of the minerals taken

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[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] 101 S.W. at 320.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *See e.g.*, Kycoga Land Co. v. Kentucky River Coal Corp., 110 F.2d 894 (6th Cir. 1940), *cert. denied*, 312 U.S. 688; Holloway v. Kruger, 682 S.W.2d 787 (Ky. 1984); North East Coal Co. v. Blevins, 277 S.W.2d 45 (Ky. 1955); Roberta Coal Co. v. Rudd, 258 S.W.2d 495 (Ky. 1953); Ashurst v. Cooper's Adm'rs, 291 S.W. 730 (Ky. 1927); Middle Creek Coal Co. v. Harris, 290 S.W. 468 (Ky. 1927); North Jellico Coal Co. v. Helton, 219 S.W. 185 (Ky. 1920); Burke Hollow Coal Co. v. Lawson, 151 S.W. 657 (Ky. 1912).

[121] 69 S.W.2d 1037 (Ky. 1934).

[122] *Id.* at 1033, 1039.

[123] *Id.* at 1042, 1043.

[124] *Id.* at 1044.

did not adequately compensate the lessee for his loss.[125] The court held that the lessee should receive the market value of the minerals taken less the production costs.[126]

In *Hughett v. Caldwell County*,[127] the court clarified the application of the exception to the royalty rule first announced in *Hupp*.[128] In *Hughett*, there had been a long battle between the parties concerning who owned the mineral rights in a strip of land.[129] The trespasser won one round of the litigation over title and proceeded to mine for fluorspar.[130] Later, it was determined that he did not have title,[131] and the true owners, also in the business of mining, sued for trespass.[132] The *Hughett* court's discussion of what constitutes an innocent trespass leads to the conclusion that this trespass was innocent,[133] and the *Hughett* court so held.[134] As to the measure of damages, the court cited *Hupp*[135] and held that in cases where both parties are in a position to mine, royalty is not the proper measure of damages. Rather, the plaintiff should recover the market value of the mineral less the production costs.[136] The court reasoned that if compensation is the goal a recovery should be based on, then mere royalty cannot be adequate in the circumstances of this case:

> In any case of innocence of the trespass, the owner of the minerals, whether in fee simple or under a mining lease, is in effect compelled by operation of law to execute a retroactive lease to the trespasser, though he may be ever so adverse to doing so, to him or to anybody else. Where one is in a position to mine his own mineral, he has lost more than that. He has lost the right to mine it himself. One ought not to be deprived

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[125] *Id.* at 1043, 1044.
[126] *Id.* at 1044.
[127] 230 S.W.2d 92 (Ky. 1950).
[128] *See supra* notes 121-126 and accompanying text.
[129] 230 S.W.2d at 94.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *See supra* note 58 and accompanying text.
[134] 230 S.W.2d at 94.
[135] *Id.* at 94, 95.
[136] *Id.* at 97.

> of the right of developing and getting out his own mineral and of reaping the profit himself, and the trespasser ought not to be allowed unjust enrichment. Royalty is a matter of contract - not of damages for tort.[137]

The *Hughett* court overruled cases contrary to the rule stated above.[138] However, cases like *Sandy River* where the plaintiff was not in a position to mine his own minerals were apparently left standing.[139]

One commentator at the time of the *Hughett*[140] decision expressed his hope that *Hughett* would lead to a total abandonment of the royalty theory:

> Whether a landowner whose minerals have been converted by a trespasser is in a position to mine them himself, or has no present feasible way of mining them should make no difference. In either case he has been damaged to the same extent—he has been deprived of the right to receive the profits from his minerals. In either case the converter is a wrongdoer of the same nature. Why should he be permitted to retain the profits from his own wrongful acts to the detriment of the one wronged simply because the landowner is in no position to remove his own minerals? It is submitted that this violates well established legal principles; that originally the royalty test for ascertaining damages for the innocent conversion of minerals was based on reasons of expediency rather than justice; that justice, not expediency, should be the controlling factor; and that in all cases of conversion of minerals, justice can be done only by giving to the owner the profits from the minerals. It is hoped that when an appropriate case arises the Kentucky Court will go the whole way and apply the test for fixing damages used in [*Hughett*] to all conversions of minerals by innocent trespass, regardless of whether or not the owner is in a position to mine the minerals himself.[141]

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[137] *Id.* at 95, 96.

[138] *Id.* at 97. *See e.g.*, Falls Branch Coal Co. v. Proctor Coal Co., 262 S.W. 300 (Ky. 1924).

[139] 230 S.W.2d at 97; *see supra* note 118 and accompanying text.

[140] 230 S.W.2d at 92 (Ky. 1950).

[141] Comment, *Hughett v. Caldwell County - Measure of Damages for Innocent Conversion of Minerals*, 39 KY. L.J. 236, 238 (1950-51).

This commentator is certainly not alone in his criticism of the royalty measure of damages. Some of the most learned legal theorists have found themselves at a loss to justify the rule.[142] Perhaps the strongest denunciation of the royalty measure was expressed as follows:

> Where recovery is limited to the reasonable royalty value of the property converted, the wrong-doer, though innocent, is actually profiting by his wrong in that he not only deducts the expenses of production but has sufficient allowances remaining to realize a profit therefrom. This is a violation of all established legal principles and the arguments of the courts in sustaining such a legal monstrosity seem founded on reasons of expediency rather than principles of justice.[143]

Despite the criticism, the Kentucky courts have continued to apply the royalty theory as the measure of damages; however, it is a modified version of the royalty theory based on *Hupp* and *Hughett* as evidenced by cases like *Roberta v. Rudd*,[144] *Bowman v. Hubbard*,[145] and *Holloway v. Krugar*.[146] In cases where the mineral owners have been deemed not in a position to mine the minerals themselves, the mineral owners have been relegated to recovery of only the royalty value of the minerals.[147]

The distinction between an owner who is in a position to mine the minerals himself and one who is not is questionable in light of *Commonwealth v. Majestic Collieries*.[148] That case involved liability for severance taxes.[149] A lessee coal company, who had engaged "contract miners" to extract the coal argued that the company was not liable for the tax because it did not sever the coal.[150] The court disagreed, and characterized the coal company as "taxpayers engaged in severing coal" and therefore,

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[142] *See e.g.*, DOBBS, REMEDIES § 5.2. at 322, 323 (1973); Stiggar, *supra* note 1 at R-20.

[143] Note, *Damages for the Conversion of Minerals*, 21 NOTRE DAME L. REV. 201 (1945-46).

[144] 258 S.W.2d 485 (Ky. 1953).

[145] 257 S.W.2d 550 (Ky. 1953).

[146] 682 S.W.2d 787 (Ky. 1984).

[147] *See e.g.*, Northeast Coal Co. v. Blevins, 277 S.W.2d 45 (Ky. 1955).

[148] 594 S.W.2d 877 (Ky. 1979).

[149] *Id.*

[150] *Id.* at 877, 878.

liable for the tax.[151] The implication of this case is that all mineral estate owners are in a position to mine their own minerals since, for tax purposes, they are considered to be mining it themselves even if they hire a mining operation to do the work.

Additional considerations suggest that the royalty measure of recovery is not based on sound legal principles.[152] The alleged justification for the royalty theory is that it compensates the owner without unjustly enriching him at the expense of the trespasser.[153] The theory's first flaw is that it does not compensate the owner. It may be true that the owner of a mineral estate in land can generally only expect to execute a lease for which he receives a mutually agreed upon royalty, but as the *Hughett* case points out, there is no contract in a trespass case.[154] The owner has lost more than what he might have received had he voluntarily executed a lease allowing removal of the minerals. The mineral owner has lost the freedom to contract as he chooses. Is nothing to be said for the owner who wishes to wait until the mineral he has is at a higher price so that he might bargain for a better royalty? This is not to mention the possibility that the owner may eventually be in a position to garner the profit himself. Is there any reason for not protecting this interest of the owner?

Second, although the royalty measure of damages does not unjustly enrich the plaintiff at the expense of the trespasser, as it was feared would be the case with any other measure of damages,[155] it does unjustly enrich the trespasser.[156] Clearly, in most trespass cases, the trespasser makes a profit.[157] If the Kentucky courts were to apply the *Hughett* exception to all cases of

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[151] *Id.* at 878.

[152] *See* text accompanying notes 153-58.

[153] *See supra* notes 116-19 and accompanying text.

[154] *See supra* note 137 and accompanying text.

[155] *See supra* note 119 and accompanying text.

[156] See Stigger, *supra* note 1 at R-20. *See also* Note, *Policy Underlying Liability for Trespass to Land*, 5 R. MT. L. REV. 286 (1923-33) (the note's author asserts liability is based on fault. Where someone is not at fault there is no need to punish him, but at the same time he should not benefit at the expense of the true owner). Note, *supra* at 287.

[157] *See* 230 S.W.2d at 95, 96 (the fact that under the royalty theory the trespasser was receiving the profit instead of the true owner who was also in a position to mine was the reason for modifying the general royalty rule).

innocent trespass, there would still not be unjust enrichment at the expense of the trespasser. The trespasser would retain his costs, including reasonable compensation.[158] Under such a rule, justice would be done. As between the innocent actual owner and the innocent trespasser, who should receive the profits? To ask the question is to answer it. There is no justification for favoring a tortfeasor over the true owner of the minerals.

Perhaps because of the deplorable state of title in mineral producing regions and because the production of minerals is valued so highly, one might argue that the profits should go to the party who actually labored to remove the minerals. The contention that the person extracting the mineral should receive the profit fails to recognize that the true owner has not been fully compensated. If the profits issue is to be decided in terms of the allocation of the risk of bad title, how can one justify penalizing the person who actually had title? In sum, by awarding the market value less the cost of production the innocent trespasser is not harmed and the owner is fully compensated. Any enrichment by way of profits goes to the most innocent party.

### *D. Costs Allowed*

Whether the Kentucky courts eventually abandon the royalty measure of damages or not, it is important to consider what costs are allowed. In such cases, "innocent trespassers are allowed credit for proper expenditures in extracting the minerals . . . ."[159] The problem has been that most courts fail to state precisely what are proper expenditures.[160]

For a period of time the courts in Kentucky adjudicated this issue on a case by case basis. *Rudy v. Ellis*[161] indicates that the oil and gas trespasser is allowed the expenses related to drilling, equipping, and operating the wells.[162] In *Swiss Oil v. Hupp*,[163]

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[158] *See infra* text accompanying note 168; 233 F. at 577.

[159] 394 S.W.2d at 776.

[160] *See* Annotation, *supra* note 89 at 411. One collection of what costs are allowed may be found in AM. LAW OF MINING § 203.01 [2][b] (1986).

[161] 236 S.W.2d 466 (Ky. 1951).

[162] *Id.* at 467.

[163] 69 S.W.2d 1037 (Ky. 1934).

the court held that general overhead expenses could be recovered as long as they could be allocated between the costs related to the trespassing operation and the other expenses of the trespasser not connected to the trespassing operation.[164] However, the *Hupp* court concluded that income taxes paid by the trespasser on the sale of the oil produced could not be allowed as an expense[165] nor could the counsel fees incurred by the trespasser in defense of the trespass action.[166] On remand, the *Hughett* case squarely addressed what costs should be allowed.[167] The court held that the trespasser was entitled to reasonable compensation for the work performed in producing the minerals.[168]

Eventually the Kentucky courts were given some guidance on the question in *Joyce v. Zackary*.[169] *Joyce* established a "test of allowability."[170] The test is "whether the expenses were *reasonably calculated* to be beneficial and productive"[171] in the mining operation. Under that test, the court held that an $8800 expense for waterflooding was allowable,[172] as were an engineer's fee of $182.83 for services "in making an analysis of the oil reserve,"[173] the "ad valorem taxes assessed against the leasehold,"[174] and the "cost of drilling [a] dry hole."[175] The expenses of one of the investors in the trespassing enterprise, who claimed to be entitled to them in return for his "supervisory services," were not allowed.[176] The court felt he was merely an observer watching his investment and that this activity was not "reason-

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[164] *Id.* at 1045.

[165] *Id.*

[166] *Id.*

[167] 248 S.W.2d 338 (Ky. 1951).

[168] *Id.* However, the expense incurred by Hughett in paying a neighbor to dewater the mine was not allowed when in fact the neighbor did not do so. The court explained that it was "without authority to make the plantiffs pay [the trespasser] for money he lost fooling with [the neighbor]." *Id.* at 339.

[169] 434 S.W.2d 659 (Ky. 1968).

[170] *Id.* at 661.

[171] *Id.*

[172] *Id.* at 661, 662.

[173] *Id.* at 662.

[174] *Id.* at 663, 664.

[175] 434 S.W.2d at 664.

[176] *Id.* at 662.

ably calculated to be beneficial or productive in the operation of the lease."[177]

Other jurisdictions that have addressed the subject are generally in agreement with the pronouncements of the Kentucky court. For example, an Oklahoma court[178] allowed the recovery of all amounts "expended in the development, equipment, maintenance and operation of the lease in question . . . [including] all of the equipment, supplies, tools, lumber and other materials" used to operate the lease.[179] In addition, the court allowed recovery for the expense of "all labor, drilling and casing."[180] In *Clark-Montana Realty Company v. Butte and Superior Copper Co.*,[181] the court held that general expenses could not be recovered where the trespasser could not clearly demonstrate that such expenses were increased by his trespassing activities.[182]

However, one case may conflict with the holding in the *Hupp* case regarding which expenses are allowed. In *United States v. Standard Oil*,[183] the court allowed the recovery of income taxes,[184] contrary to *Hupp*.[185] Also, *Standard Oil* allowed the expense of shutting down the operation at the true owner's request pending the outcome of the lawsuit.[186] The holding in *Standard Oil* may be anomalous due to the fact that the federal government was the owner of the mineral rights in question.[187]

## CONCLUSION

The measure of damages in mineral trespass cases depends upon whether the trespass was innocent or willful.[188] The term

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[177] *Id.*

[178] Zelma Oil Co. v. Nemo Oil Co., 203 P. 203 (Ok. 1921).

[179] *Id.* at 206.

[180] *Id.*

[181] 233 F. 547 (D. Mont. 1916), *aff'd*, 248 F. 609 (9th Cir. 1918), *decree aff'd*, 249 U.S. 12 (1919).

[182] *Id.* at 577.

[183] 21 F.Supp. 645 (D. Cal. 1937), *aff'd* 107 F.2d 402 (9th Cir. 1939), *cert. denied*, 309 U.S. 654 (1940), *reh'g denied*, 309 U.S. 697, *cert. denied*, 309 U.S. 673.

[184] 21 F.Supp. at 655.

[185] *See supra* note 165 and accompanying text.

[186] 21 F.Supp. at 656.

[187] *See supra* notes 165-71, 183.

[188] *See supra* note 16 and accompanying text.

"willful" in this context means that the trespasser knew he did not have title to the minerals he extracted or was grossly negligent in not discovering that fact.[189] The term "innocent" in this context always implies that the trespasser was acting under color of title; he thought he owned the minerals he was taking.[190]

When the trespass is willful, the courts have determined that the measure of damages should not only compensate the true owner but also punish the wrongdoer.[191] This is accomplished by awarding the owner the market value of the minerals converted without any reduction for the costs the trespasser incurred in production.[192] Kentucky courts are in agreement with the courts of other states that have addressed the issue as to this being the proper measure of damages.[193] There is a possibility of additional punitive damages, but recovery of such damages is unlikely.

In cases of innocent trespass, the courts' goal is to compensate the true owner without penalizing the trespasser.[194] The majority of jurisdictions accomplish this by awarding the true owner the value of the mineral after it has been removed less the cost incurred by the trespasser in its production.[195] The Kentucky courts only follow this rule in cases where the true owner was himself in a position to presently mine the minerals taken by the trespasser.[196] In all other cases, the true owner is entitled only to the royalty he could have received had he executed a lease permitting removal of the minerals.[197] This royalty measure of recovery has been sharply criticized because it allows a tortfeasor to profit from his wrong.[198] It is suggested that the Kentucky courts give serious consideration to the continuing validity of the royalty measure of damages.[199] Broadening the

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[189] *See supra* notes 16-56 and accompanying text.
[190] *See supra* notes 16-38, 57-78 and accompanying text.
[191] *See supra* notes 89-93 and accompanying text.
[192] *See supra* note 89, text accompanying *supra* note 90.
[193] *See supra* note 89 and accompanying text.
[194] *See supra* notes 85-87, 116-19 and accompanying text.
[195] Annotation, *supra* note 89 at 384, 385.
[196] *See supra* notes 121-39 and accompanying text.
[197] *See supra* notes 115-20, 144-47 and accompanying text.
[198] *See supra* notes 141-43, 156-57 and accompanying text.
[199] *See supra* notes 141-58 and accompanying text.

*Hupp* and *Hughett* exceptions[200] to apply to all cases of innocent trespass would better serve the policy behind the measure of damages in mineral trespass cases.[201]

Where costs are allowed the trespasser,[202] the test for determining allowability is whether the expense incurred was "reasonably calculated" to be beneficial or productive to the mining operation.[203] Costs that are allowed include overhead expenses where they can be clearly allocated between the trespassing activity and the non-trespassing activity of the trespasser,[204] engineering costs,[205] exploration expenses,[206] ad valorem taxes,[207] and reasonable compensation for the trespasser's efforts.[208] Income taxes paid on proceeds from the sale of the minerals are not allowed.[209] Counsel fees incurred for litigating the mineral trespass suit are not allowed[210] and fees paid to persons who do no actual work toward making the mine productive are not allowed.[211]

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[200] *See supra* notes 121-39 and accompanying text.

[201] *See supra* notes 141-43, 153-58 and accompanying text.

[202] *See* Annotation, *supra* note 89 at 384, 385; *supra* notes 121-39 and accompanying text.

[203] *See supra* notes 169-71 and accompanying text.

[204] *See supra* notes 163-64, 181-82 and accompanying text.

[205] *See supra* note 173 and accompanying text.

[206] *See supra* note 175 and accompanying text.

[207] *See supra* note 174 and accompanying text.

[208] *See supra* note 168 and accompanying text.

[209] *See supra* note 165 and accompanying text. *But see supra* note 184 and accompanying text.

[210] *See supra* note 166 and accompanying text.

[211] *See supra* notes 176-77 and accompanying text.