

Case No. 15,707.

{3 McLean, 171.}²

UNITED STATES v. MAGOON.

Circuit Court, D. Illinois.

June Term, 1843.

PUBLIC LANDS—DIGGING ORE—TRESPASS—GIST OF ACTION.

1. In trespass for digging and carrying away lead ore from the lands of the United States, they are not entitled to recover, as damages, the value of the ore after it is dug.

[Cited in brief in *Illinois & St. L. Railroad & Coal Co. v. Ogle*, 92 Ill. 358; *Waters v. Stevenson*, 13 Nev. 157.]

2. The injury done the soil is the gist of the action; and ore extracted must be considered in aggravation of the damages.

[Cited in *Barton Coal Co. v. Cox*, 39 Md. 24; *Foote v. Merrill*, 54 N. H. 493; *Waters v. Stevenson*, 13 Nev. 157.]

3. A trespasser is not to be placed on the same footing with a lessee.

At law.

Mr. Butterfield, U. S. Dist Atty.

Mr. Logan, for defendants.

OPINION OF THE COURT. This is an action of trespass, charging the defendant with digging and carrying away a large amount of lead from the lands of the United States. The defendant suffered a default, and the jury was sworn to assess the damages, &c. It was proved that defendant entered upon the lands of the United States, dug a large quantity of ore, and conveyed it away. The plaintiffs contended that they are entitled to the value of the ore, after It was dug; but the court instructed the jury, that that was not the measure of damages, but the injury done to the soil by the trespass. That the digging and carrying away by the same person, is presumed to be a continuous act and the lead ore removed must be considered in aggravation of the trespass upon the soil. Neither is the rate at which leases are made for these mineral lands, a proper criterion of damages. A trespasser is not to be put upon the footing of a lessee.

The jury assessed the damages at—dollars. Judgment.

² [Reported by Hon. John McLean, Circuit Justice.]