

Damages - Recovery of Double Damages for Conversion of Timber

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RECENT DECISIONS

Damages—Recovery of Double Damages for Conversion of Timber—The defendant, through mistake, converted timber from the land of the plaintiff. *Held*: The plaintiff did not substantiate the allegation of legal bad faith and therefore must be restricted in his recovery to the actual stumpage value¹ at the time of conversion. *Timmons v. Lakeside Lumber Co. et al.*, 68 So. 2d 796 (La. 1953).

The defendant, after repeated attempts to purchase the land from the plaintiff, entered upon the plaintiff's land and cut timber which he converted to his own use. *Held*: Inasmuch as the defendant knew that he had no valid title to the land he must be held to be acting in bad faith. Recovery was allowed for the amount of manufactured value of the timber without allowance or deduction for the cost of manufacture. *Hovard v. Luttrell*, 68 So. 2d 798 (La. 1953).

These two decisions illustrate the usual measure of recovery as codified by statute or as followed by the courts in the absence of statute.² The present Wisconsin statute provides:

“. . . any person unlawfully cutting forest products shall be liable to the owner or to the county holding a tax certificate . . . to the land on which the unlawful cutting was done, in a civil action, for double the amount of damages suffered. This section shall not apply to the cutting of timber for the emergency repair of a highway, fire lane or bridge upon or adjacent to the land.”³

This section does not expressly include bad faith as an element for the recovery of double damages.

A Wisconsin decision⁴ construing a similar provision⁵ involving triple damages as a recovery for conversion of logs floating in the waters of this state, without express provision for another measure of recovery in cases of conversion by mistake, held that bad faith was implied as an element of recovery since the court: “. . . could not think it [the statute] was intended to apply to every conversion.” The often enunciated rule that “Statutes must be construed according to the intention of their makers, if that can be ascertained with reasonable certainty,” was the test followed.

The usual statutes enacted by the states on this subject fall into two general categories: those which allow double or treble damages for any unlawful conversion followed by an exculpatory provision restricting recovery to actual damages in case of a casual or involun-

¹ “Stumpage generally refers to the sum . . . to be paid to an owner for trees standing or lying on the land. . . .” 54 C.J.S. 677.

² McCORMICK, DAMAGES 481 (1935).

³ WIS. STATS. (1953) §26.09.

⁴ Cohn v. Neeves, 40 Wis. 393 (1876).

tary trespass, and those which afford a measure of enhanced damages for wilful conversions.⁶ The courts in those states which have the former type construe both provisions together and hold that wilfulness or bad faith is an element in the recovery of enhanced damages.⁷ The latter type does not present a problem since any unlawful act which does not fall under the statute as wilful is governed by the common law rule of single damages.⁸ Those few states which have statutes similar to our own can merely base their determination of legislative intent on inference from legislative history or correlative provision.⁹

The following is an attempt, through an analysis of the state statutory and case history in Wisconsin, to show the intention of the legislature to afford only one rule of damages for all timber trespass regardless of mistake or bad faith.

Prior to 1872, two Wisconsin cases¹⁰ allowed damages only for the amount of the stumpage value. They held that there should be no difference in the amount of damages whether the act was done intentionally or through mistake since the loss to the plaintiff remained the same in either case unless the intentional act was coupled with malice. If there was malice, then the doctrine of exemplary damages would be applicable. Strongly influenced by the overindulgence of the judiciary to timber trespassers at a time when logging was predominant, the legislature enacted section 331.18¹¹ which provided as follows:

"In all actions to recover the possession or value of logs, timber or lumber wrongfully cut . . . the highest market value of such logs, timber or lumber, in whatsoever place, shape, or condition, manufactured or unmanufactured, the same may be between the time of such cutting and the time of the trial of the action . . . shall be found or awarded to the plaintiff . . . [unless the defendant] serve upon the plaintiff an affidavit that such cutting was done by mistake, and a tender of judgment . . . with interest . . . and ten per cent upon the whole amount as damages . . ."

This provision did not make bad faith an element of recovery of enhanced damages, but rather made good faith an affirmative defense.

⁵ Tays. Stats. (1871) Ch. 42, §5.

⁶ 111 A.L.R. 79.

⁷ *Stewart v. Sefton*, 108 Cal. 197, 41 P. 292 (1895); *Wallace v. Finch*, 24 Mich. 255 (1872); *McHargue v. Calchina*, 78 Ore. 326, 153 P. 99 (1915).

⁸ *Smith v. Lundy*, 175 Miss. 485, 167 So. 631 (1936); *Glenn v. Adams*, 129 Ala. 189, 29 So. 836 (1900).

⁹ *Cook v. Bennet Gravel Co.*, 90 N.J.L. 9, 100 A. 331 (1917) in which the provision was restricted to those acting in bad faith because criminal liability was also imposed.

¹⁰ *Weymouth v. Chicago and Northwestern Railway Co.*, 17 Wis. 550 (1863); *Single v. Schneider*, 24 Wis. 299 (1869); on rehearing, 30 Wis. 570 (1872).

¹¹ WIS. STATS. (1873) §4269, renumbered §331.18, repealed by Ch. 252 of the Wis. Session Laws (1949).

Thus in *Webber v. Quaw*,¹² where the greater damages were recovered from one who converted by mistake, but failed to serve the affidavit of mistake, the Supreme Court stated:

"We hold therefore that the statute, both in terms and intention, comprehends all cases of unlawful and unauthorized cutting of logs and timber on the lands of another, or where such cutting is done without right, and fixes the invariable rule of damages in all such cases at the highest market value of such logs or timber between the time of such cutting and the trial of the action, unless the defendant . . . [file an affidavit of mistake]."

Notwithstanding *Cohn v. Neaves*,¹³ the court declared that the legislative intent was to apply one rule of damages to all conversions, unless there be established the affirmative defense of mistake.

The predecessor of section 26.09 was enacted in 1905, providing for double damages for wilful trespass.¹⁴ This section encompassed unlawful cutting, but the term "wilful trespass" implied the element of bad faith precedent to recovery.¹⁵ The term "wilful" is "used to define an act done consciously, and intentionally or knowingly and purposely, without justifiable excuse."¹⁶ Under Chapter 252 of the Laws of 1949, the subject of this provision not only was changed from "trespass" to "cutting of timber," but also the degree of intent as an element of recovery was changed from "wilful" to "unlawful." Wrongful and unlawful may be used synonymously to include anything done contrary to law.¹⁷ Wrongful cutting as defined by the Wisconsin Supreme Court means, ". . . any unlawful cutting, and precludes that a cutting may be wrongful yet done by mistake."¹⁸ Since the Supreme Court had given an interpretation to these two terms in connection with this subject, it is logical to assume that it was the legislative intent to include all cases of unauthorized cutting.

The present enactment expressly excepts "cutting of timber for the emergency repair of a highway, fire lane or bridge upon or adjacent to the land"¹⁹ from its dominion. The express exclusion from liability for cutting for certain purpose implies blanket inclusion for all other purposes.

Another section of the Wisconsin Statutes²⁰ allows the tender of payment, in cases of involuntary trespass, to go toward mitigation of

¹² 46 Wis. 118, 49 N.W. 830 (1879).

¹³ See *supra*, n. 4.

¹⁴ WIS. STATS. (1905) §1494-60.

¹⁵ *Boneck v. Herman*, 247 Wis. 592, 20 N.W.2d 664 (1945).

¹⁶ 68 C.J. 268.

¹⁷ 66 C.J. 34.

¹⁸ *Webber v. Quaw*, *supra*, n. 9.

¹⁹ See *supra*, n. 8.

²⁰ WIS. STATS. (1953) §331.17.

damages. This was amended in 1949²¹ to expressly exclude the coverage of timber trespass.

Thus the legislature indicated its disfavor toward lenient treatment of timber trespassers by the enactment of section 331.18 in 1873. The awareness on the part of the legislature in 1873 that bad faith is normally considered an element in the recovery of enhanced damages is expressly shown by the provision for an affidavit of mistake. By the abolishment of section 331.18, the amendment to 331.17, and the important change from the term "wilful" to "unlawful" in section 26.09 it can be logically concluded that the legislature intended that the rule of double damage should be applied to all cases of timber trespass, whether done wilfully or by mistake.

GEORGE RADLER

Administrative Law—Jurisdiction of Courts in Railway Wrongful Discharge Cases Under Collective Bargaining Agreements— Plaintiff for many years was employed by the defendant railway company in its Wisconsin Law Department in the City of Milwaukee, Wisconsin, as a stenographer-typist and clerk. In August, 1947, the plaintiff was discharged allegedly in violation of a collective bargaining contract which was in force at that time between the defendant and the Brotherhood of Railway and Steamship, Freight Handlers, Express and Station Employees. An action was commenced in the District Court of the United States for the Eastern District of Wisconsin in which plaintiff, after alleging certain items of damage, demanded judgment for \$6,000.00 and for a decree reinstating her to her former position with her seniority, pension, vacation and pass rights unimpaired. The District Court conducted a hearing on the issues of (1) whether the plaintiff was covered by the contract or was expressly excluded and (2) whether the court has jurisdiction over the matter. The court concluded that the plaintiff's position "was excluded" by the contract and, second, that the matter was "not properly before this court, and should have been brought before the National Railroad Adjustment Board because it involves a grievance and dispute arising under a bargaining agreement." The District Court therefore dismissed the complaint on the merits. Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit and filed a motion that oral argument limited to the question of the jurisdiction of the District Court be held in advance of a hearing on the merits, which motion was granted. Thus, the appeal presented the question of whether or not the District Court had jurisdiction to pass on a question of the interpretation of a collective bargaining agreement

²¹ Ch. 252, Wis. Session Laws (1949).