Washington Law Review

Volume 31
Issue 2 *Washington Case Law - 1955*

6-1-1956

Damages

Gordon L. Walgren

person. Adultery is not a crime which imperils the life of the unoffending spouse or threatens bodily harm to him. Although adultery is a crime against the unoffending spouse, adultery is not a felony committed *upon* the innocent spouse within the meaning of RCW 9.48.170, defining justifiable homicide.

DAMAGES

Punitive Damages—"Wilfulness" of Tort Feasor. In the recent case of *Grays Harbor County v. Bay City Lumber Co.*[1] the Washington Supreme Court construed the element of "wilfulness" in a conversion action very narrowly, and has, by so doing, removed a source of protection for owners of private and public timber lands in this state. The case involved an action by Grays Harbor County against an innocent purchaser of timber cut by a prior converter on county lands.[2] The value of the timber, as found by the trial court sitting without a jury, was $8 per thousand board feet at the time of the first conversion and $35 per thousand at the time of the purchase. The trial court expressly found that the first converter acted "wilfully"[3] and, as a result, assessed damages at the rate of $35 per thousand. In reversing the trial court in a six to three decision, the supreme court determined that since these greater damages would be punitive damages, which are not generally favored in Washington,[4] this result should be avoided. This result was achieved by strictly construing "wilfulness" as had been done in decisions[5] under the Washington treble damage statute.[6] The

[1] 147 Wash. Dec. 792, 289 P.2d 975 (1955).

[2] The facts of the case are as follows: A small group of "gypo" loggers acquired timber rights to a tract of land immediately adjacent to the plaintiff county land. Although the vendor described the timber sold, the loggers realized that a survey was necessary since the tract was unmarked. They were unable to secure the services of a surveyor as soon as they would have liked and so proceeded to survey the area themselves "using a compass and a length of rope" and with occasional reference to Geodetic Survey and Metzker maps. The loggers were unsuccessful in their efforts to determine the true boundaries and in cutting the timber, trespassed onto the county land and cut a substantial amount there. They then hauled the timber to defendant's sawmill and sold it. Plaintiff elected to bring suit against the lumber company. It, in turn, interpleaded the loggers as cross defendants.

[3] The exact words of the trial court were that the taking of the timber by the loggers was "heedless and wanton, not unintentional and inadvertent." 147 Wash. Dec. at 793, 289 P.2d at 977.

[4] Spokane Truck and Dray Co. v. Hoefer, 2 Wash. 45, 25 Pac. 1072 (1891); Anderson v. Dalton, 40 Wn.2d 894, 246 P.2d 853, 35 A.L.R.2d 302 (1952).

[5] Bailey v. Hayden, 65 Wash. 57, 117 Pac. 720 (1911); Hirt v. Entus, 37 Wn.2d 418, 224 P.2d 620 (1950); Martinson v. Gregorsen, 129 Wash. 701, 225 Pac. 243 (1924). "Not even where defendant knows his right is in question, are treble damages allowed." Gibon v. Thisius, 16 Wn.2d 693, 134 P.2d 713 (1943); Chappell v. Puget Sound Reduction Co., 27 Wash. 63, 67 Pac. 391 (1901); Tonsrud v. Puget Sound Traction Light and Power Co., 91 Wash. 660, 158 Pac. 348 (1916); Gardner v. Lovegren, 27 Wash. 356, 67 Pac. 615 (1902). *But see:* Harold v. Toomey, 92 Wash. 297, 158 Pac. 986 (1916).

[6] RCW 64.12.030. It would seem that RCW 79.40.030 would be applicable in cases where county lands are involved, depending upon how the phrase "public lands of the state" is construed. However, no cases seem to have done so.

court stated that wilfulness does not exist unless "it is shown that the defendant either intended to deprive the plaintiff of his property or, having knowledge of facts sufficient to put him on notice of the plaintiff's ownership, acted in reckless disregard of the probable consequences."[7]

Conversion cases involving increased value to felled timber present four[8] basic factual patterns, and different rules for assessing damages are applicable to each.

First: In an action against an innocent first converter of timber who subsequently adds to the value of that timber, the general rule of damages is to allow the defendant a deduction for the increase in value and to award the plaintiff damages measured from the time of the conversion.[9] This jurisdiction has followed the general rule.[10]

Second: In an action against a wilful first converter of timber who has added value to the timber, the general rule of damages is to deny a deduction to that converter and to award damages according to the value of the timber in its enhanced state at the time of the recovery.[11] Washington has also followed this rule.[12]

---

[7] 147 Wash. Dec. 792 at page 798.

[8] Actually, there are various other factual situations that are similar, but the four noted are the most common.

[9] E. E. Bolles Wooden Ware Co. v. United States, 106 U.S. 432 (1882); Meloon v. Read, 73 N.H. 153, 59 Atl. 946 (1905). However, many earlier cases, in accordance with the theory that a trespasser cannot acquire title to timber by cutting it down and carrying it away and that the owner may reclaim it wherever he can find it, permitted a recovery in trover for the value of the severed timber as enhanced by the labor of the trespasser without necessary reference to the elements of bad faith or intentional wrongdoing on the part of the trespasser. Busch v. Fisher, 89 Mich. 192, 50 N.W. 788 (1891); Isle Royale Mining Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520 (1877).

The writer is assuming in all of these factual situations that there has not been such an increase in value so as to change the physical properties of the chattel and therefore divest the original owner of title as has been the result in some cases. Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653 (1871). See also Myers v. Gerhart, 54 Wash. 657, 103 Pac. 1114 (1909).

[10] Chappell v. Puget Sound Reduction Co., 27 Wash. 63, 67 Pac. 391 (1901); Farmers and Merchants Bank v. Small, 131 Wash. 197, 229 Pac. 531 (1924); Baumgardner v. Kerr-Gifford and Co., 144 Wash. 206, 257 Pac. 390 (1927); Watkins v. Siler Logging Co., 9 Wn.2d 703, 116 P.2d 315 (1941). There is authority for the proposition that in an action for conversion there may be a recovery of the highest value the property reaches between the time of the conversion and the time of the action. Generally, however, such a rule has been applied to chattels with a fluctuating market value. Parks v. Yakima Valley Production Credit Association, 194 Wash. 380, 78 P.2d 162 (1938); Lemaire v. Yakima Valley Production Credit Association, 194 Wash. 689, 79 P.2d 693 (1938); Claspe v. Prelusky, 36 Wn.2d 592, 219 P.2d 585 (1950).

[11] E. E. Bolles Wooden Ware Co. v. United States, 106 U.S. 432 (1882); 44 A.L.R. 1321 (1926).

[12] Chappell v. Puget Sound Reduction Co., 27 Wash. 63, 67 Pac. 391 (1901); Watkins v. Siler Logging Co., 9 Wn.2d 703, 116 P.2d 315 (1941); Fischmiller v. Sussman, 167 Wash. 367, 9 P.2d 378 (1932). It is interesting to note that the question as to whether the awarding of the higher damages in this situation is the awarding of punitive damages. This has not been seriously questioned by the court.

If the court elects to follow the decision of the principal case, it will in the above

Third: Where the action is brought against an innocent purchaser from an innocent original converter, the general rule is to allow the purchaser to deduct the value that has been added by the first converter's labors, and to measure damages of the plaintiff as at the time of the original conversion.[13] Washington has followed this rule also. In fact, it is the rule applied by the court in the principal case. The rationale for this position has generally been that since the first converter is himself liable only for the original value of the converted chattel, it would seem unjust to hold the purchaser from him for any greater measure of damages. He should at least be allowed to stand in the shoes of his vendor. However, there are decisions from other jurisdictions holding that the plaintiff should be allowed to recover the value of the chattel as of the time the purchaser took dominion. This is done on the ground that the second sale also is a conversion, and by following the rule pointed out in the first factual situation, damages are to be measured from the time of the conversion—only now, from the time of the second conversion.[14]

Fourth: Where the plaintiff brings an action against an innocent converter who has purchased from a wilful first converter, the great weight of authority is to allow no deduction for the increased value added by the first converter, but to give the plaintiff damages measured from the time of the purchase.[15] Washington also has applied this rule, calling it an exception to this state's general policy against the awarding of punitive damages.[16] Several theories have been advanced as the basis for this rule, the most prevalent one being that the vendee stands in the shoes of the vendor and takes any disabilities in the chattel that

factual situation refuse the plaintiff an award of increased damages unless it can be shown that the defendant "intended to deprive the plaintiff of his property," knowing that it belonged to the plaintiff.

[13] United States v. St. Anthony R. Co., 192 U.S. 524 (1904); Hoyt v. Duluth and I.R.R. Co., 103 Minn. 396, 115 N.W. 263 (1908).

[14] Wing v. Milliken, 91 Me. 387, 40 Atl. 138 (1898); Glaspy v. Cabot, 135 Mass. 435 (1883); Nesbitt v. St. Paul Lumber Co., 21 Minn. 491 (1875); Weymouth v. Chicago & N.W. R. Co., 17 Wis. 550, 84 Am. Dec. 763 (1863); Central Coal and Coke Co. v. John Henry Shoe Co., 69 Ark. 302, 63 S.W. 49 (1901); 2 COOLEY, LAW OF TORTS (4th ed.) 506.

[15] E. E. Bolles Wooden Ware Co. v. United States, 106 U.S. 432 (1882); Hastay v. Bonness, 84 Minn. 120, 86 N.W. 896 (1901); Tuttle v. White, 46 Mich. 485, 9 N.W. 528 (1891); Strubbee v. Cincinnati R. Co., 78 Ky. 481, 39 Am. Rep. 251 (1880); Newton v. Porter, 69 N.Y. 133, 25 Am. Rep. 152 (1877); Silsbury v. McCoon, 3 N.Y. 379, 53 Am. Dec. 307 (1850); Peters Box and Lumber Co. v. Lesh, 119 Ind. 98, 20 N.E. 291 (1889); Hoyt v. Duluth and I.R. R.R. Co., 103 Minn. 396, 115 N.W. 263 (1908); Powers v. Tilley, 87 Me. 34, 32 Atl. 714 (1894); United States v. Perkins, 44 Fed. 670 (1891); Central Coal and Coke Co. v. John Henry Shoe Co., 69 Ark. 302, 63 S.W. 49 (1901).

[16] Chappell v. Puget Sound Reduction Co., 27 Wash. 63, 67 Pac. 391 (1901); Watkins v. Siler Logging Co., 9 Wn.2d 703, 116 P.2d 315 (1941); Bailey v. Hayden, 65 Wash. 57, 117 Pac. 720 (1911). This rule was also recognized in the principal case.

the vendor may have had.[17] Another basis for the rule seems to be the idea that since the purchase is a separate conversion, damages are to be measured from the time of that conversion under the usual rule applied in single conversion cases.[18] Washington has recognized this latter theory.[19] A further reason often suggested is that since the plaintiff could bring an action in the nature of replevin and either recover the chattel itself with no deductions for added value, or, if it could not be returned, the increased value at the time of the demand with no deduction to the defendant for value added,[20] he should not be penalized by being denied the greater damages simply because he elected to bring his action in the nature of trover.[21] The Washington Court seems to have summarily dismissed this theory by way of dicta in the principal case.[22]

Apparently, the court's reasoning in deciding the principal case was that if it should agree with the trial court and call the first conversion wilful, then it would have to allow the award of the greater damages under the court's recognized exception to the non-punitive damage policy.[23] In so doing the court evidently reasoned that if they were to continue to follow their often expressed policy against punitive damages, then they should construe "wilful" very narrowly. However, it should be noted that there are two well recognized exceptions in this jurisdiction to the rule against the awarding of punitive damages. First: Punitive damages are permitted where they are specifically pro-

---

[17] Godwin v. Taenzer, 122 Tenn. 101, 119 S.W. 1133 (1909); E. E. Bolles Wooden Ware Co. v. United States, 106 U.S. 432 (1882); Peters Box and Lumber Co. v. Lesh, 119 Ind. 98, 20 N.E. 291 (1889); Hoyt v. Duluth and I.R. R.R. Co., 103 Minn. 396, 115 N.W. 263 (1908).

[18] 2 COOLEY, LAW OF TORTS (4th ed.) 506. See note 14, *supra.*

[19] The rule is recognized in the principal case at 147 Wash. Dec. 792 at page 796. See also Meyers v. Gerhart, 54 Wash. 657, 103 Pac. 1114 (1909).

[20] This would be possible under the Washington replevin statute, RCW 4.56.080. *See* Hall v. Law Guarantee and Title Society, 22 Wash. 305, 60 Pac. 643 (1900); Hallidie Match Co. v. Whidby Island S. & G. Co., 73 Wash. 403, 131 Pac. 1156 (1913). See also Conway v. Sunset Motor Co., 144 Wash. 373, 285 Pac. 31 (1927); American Packing Co. v. Luketa, 115 Wash. 1, 196 Pac. 1 (1921).

[21] BOWERS, LAW OF CONVERSION § 32 (1917). One court has said "To say that the owner may retake the property in replevin in an improved condition, as all the authorities hold, and yet that he may not, when he sees fit to resort to an action of trover, recover an equivalent in damages, is a subtlety too refined to be adopted in the ordinary affairs of business transactions. It would relieve trespassers from all loss, and would tend to encourage wrongdoing." Wing v. Milliken, 91 Me. 387, 40 Atl. 138 (1898).

[22] 147 Wash. Dec. 792 at page 796. The court points out that the replevin analogy is faulty since it could also be applied where the conversion was innocent but where the authorities hold that the converter is not liable in increased damages. Although this may be true, it is not reasonable to refuse to apply the analogy where the conversion is wilful. The allowance made to the innocent converter could just as easily be called an exception.

[23] See note 16, *supra.*

vided for by statute.[24] Second: Punitive damages are allowed in the case of wilful conversions.[25] The court mentions both of these exceptions in the principal case, but refuses to apply the latter exception to a situation that seems to be an ideal case for such an application. Instead, the court evidently decided that it was necessary to strictly conform to the general policy against punitive damages. To accomplish this result it could overrule the trial court's finding of wilfulness, or overrule its own prior decisions which recognized the second exception. The court chose the former alternative.

As indicated, the court could have agreed with the trial court's finding of fact and allowed the higher measure of damages under their general exception in cases involving wilfulness, or it could have considered the purchase as an independent conversion and measured damages from that time as has been done in former cases.[26]

Under the majority opinion of the principal case it will be unlikely that there will be many cases in this jurisdiction finding a defendant "wilful". The writer believes that the court's prior exception to the punitive damage rule in the case of wilful converters has been considerably narrowed by this decision. A logger need only excercise a very extreme minimum of care in his operations and he will be protected by the decision of this case. As the minority opinion points out, "all that one has to do to force an owner to 'sell' his property is to use a compass and a piece of rope in a casual and amateur manner."[27] The economic and social effects of such a decision as the present one could be disastrous in a heavily timbered state such as Washington. It seems to this writer that since timber is fast becoming more and more valued, both from a commercial and from an aesthetic point of view, it would be wise to reaffirm a strong position against any encroachment which could provide an excellent opportunity for "shady" timber operations. The decision of the principal case has certainly not aided such a policy of protection.

GORDON L. WALGREN

---

[24] As in the Washington treble damage statutes for wrongful cutting of timber, RCW 79.40.030 and RCW 64.12.030.

[25] See note 16, *supra*. One of the primary arguments against allowing punitive damages is that a jury might award such damages far out of proportion to what should be allowed. In the two recognized exceptions by the Washington Supreme Court this possibility is somewhat mollified in that there are set standards by which the measurement of the damages can be established.

[26] See note 19, *supra*.

[27] 147 Wash. Dec. 792 at page 804.