Property - Damages for Timber Trespass

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where the prisoner was serving a valid sentence at the time of
the petition. In an Iowa case, although the trial court erred on
its basis for sustaining the writ, the appellate court noted that the
petitioner had served time equivalent to the only valid sentence
against him and concluded that he was entitled to discharge by
some proceeding to that end, and granted immediate release.

The Federal Rules have been held sufficiently flexible to allow
credit for a prior void sentence.

While these cases are only a sparse minority, it is submitted
that their reasoning has merit in regard to assuring substantial
justice to a prisoner who has served long years of confinement
under an invalid conviction.

This is not to discount the desirability of maintaining a
stable form of procedure in the face of “hard” cases. But it is
the continual function of our system of law to develop the pro-
cedures by which the rights of the individual are kept in balance
with the judicial process. In this respect the Midgett decision
should cause reflection and debate over the proper ends to these
means.

P. T. W.

PROPERTY—DAMAGES FOR TIMBER TRESPASS

A 1957 case decided in the Supreme Court of Appeals of
Virginia evidences that Virginia is in accord with the majority
of states and the Restatement views regarding the assessment of
damages for timber trespass.

The facts of the case show that the defendant, without per-
mission of the plaintiff, and in the face of repeated warnings that
he was trespassing on the plaintiff’s land, cut and removed virgin
timber from the plaintiff’s land, and manufactured it into lumber.
The defendant asserted that the cutting and removal was done
under an oral contract of sale. The contract referred to was

12 Ex Parte Bell, 256 S.W.2d 413, Tex.Cr.App. (1953).
15 See dissent to Lang v State, supra, Note 11.
shown to be for the sale of cut over timber, on nearby land owned by a kinsman of the defendant. As an intelligent and experienced lumber operator, the defendant doubted the identity and location of the land; but his doubt caused him to make only superficial inquiries. Instead of having the title examined, he relied on statements of others including boundary affirmations of an aged, senile and nearly blind kinsman of the defendant who was easily influenced and who originally had been induced into the true contract partly through the influence of alcohol. The appellate court correctly affirmed the trial court's finding of gross negligence on the part of the defendant. Judgment was entered against the defendant for the gross negligence, the damages being measured by the ascertained manufactured value of the timber.

The special damages awarded in such cases of trespass have an interesting and venerable origin reaching at least as far back into antiquity as 533 A.D. The Institutes of Justinian published in that year provide an early example of accession where creation of a valuable painting on someone else's tablet innocently acquired by the painter, would give the painter title to both the painting and the tablet, subject to an action of *utilis actio* by the owner of the tablet for the value thereof. However, if the tablet had been stolen by the painter or anyone else, the owner of the tablet could bring an action of theft. The principle has been applied in England and in this country to determine the amount of damages for coal taken from a mine as the result of an honest mistake as to the true ownership.

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2 The decision is also in keeping with §42 of *Restatement of the Law of Restitution*. It is interesting to note that 34 Am.Jur. §12, p. 498, holds that in contracts for the sale of timber wherein immediate cutting and removal is not specified or contemplated, the timber is considered to be realty. Oral contracts of this nature are unenforceable under the Statute of Frauds. This unenforceability leaves the defendant without an enforceable claim of title and where trespass is also present is further indicia of willful negligence. In the instant case the court did not discuss this aspect, possibly because the timber was removed within a reasonable time. In this connection, Hurley v. Hurley, 110 Va. 31 (1909), holds that oral contracts for the sale of standing timber to be removed immediately, or within a reasonable time, are not within Section Four of the Virginia Statute of Frauds.

3 *The Institutes of Justinian* by T. C. Sandars, M.A. Lib. II, Tit. I, Sec. 34, p. 197.

4 Martin v. Porter, 5 Mee. & W. 351; Morgan v. Powell, 3 Ad. & E.N.S.
The case of Wooden Ware Company v. United States,\textsuperscript{5} which represents the weight of authority in this country and in England, propounded the following principles for the assessment of damages for timber trespass:

1. A furtive, fraudulent, or willful trespasser is liable to the true owner for the full value of the property at the time and place of demand or of suit brought, with no deduction for his labor and expense.

2. A defendant who, without notice of wrong, has purchased from a willful trespasser, stands in the trespasser's shoes and is liable for the value at the time of such purchase. Such defendant is not liable to the original owner for any increase in value which he adds to the property after purchase.

3. An unintentional, mistaken, or inadvertent trespasser is liable for the value of the timber at the time of conversion, but is not liable for any addition to its value by cutting, transportation, or manufacture.\textsuperscript{6}

4. An innocent vendee from an unintentional or mistaken trespasser is liable for the value at the time and place of conversion, but is not liable for any amount which he and his vendor may have added to its value.\textsuperscript{7}

\textsuperscript{5}Ibid.

\textsuperscript{6}Barnes v. Moore, supra, rounds out this principle by holding that where a timber trespass, even though made in error or mistake, is committed in bad faith, or recklessly, or in willful disregard of rights of others, or by failure to do what an ordinary, reasonable, and prudent man would do under the circumstances, the trespasser's conduct constitutes gross negligence and the trespasser is liable for the full value of the timber including any improvements he may have made upon it by manufacturing it into lumber. See also Restatement of the Law of Torts, §927, par. f, p. 651, and Illustration 5, p. 652.

\textsuperscript{7}In such cases the owner of the chattel is not allowed to recover the value added by the labor of the non-willful trespasser or innocent purchaser from a non-willful trespasser, since it is recognized even in courts of law that an equitable and quasi-property right is acquired by one who adds value to property by his labor, although the property upon which it is expended may be that of another, when the labor is bestowed in a bona fide belief of a right to ownership of the property. Indeed, the principles of accession may intercede to give full title to the trespasser.
Barnes v. Moore places Virginia completely in accord with the first principle of the Wooden Ware case and in addition presents the following basic concepts:

1. Every trespass is *prima facie* willful; where the trespass is conceded, the burden of proof is on the defendant to show that the trespass was not willful.\(^8\)

2. Where the defendant-trespasser, though warned that he is cutting timber on plaintiff's land, continues cutting operations in disregard of the warning, he is guilty of gross negligence.\(^9\)

The case presented by Barnes v. Moore is noteworthy from a negative standpoint in that no effort was made to obtain the treble damages provided for under Virginia statutes.\(^10\) The intent of these statutes is open to several interpretations. From a literal reading it would appear that the triple damages provided for by the statute are intended to be in addition to, rather than an alternative to, all other remedies afforded by law. In keeping with this interpretation it has been stated that a statute prescribing damages to be recovered for timber trespass does not prevent the application of another provision providing for recovery of double damages.\(^11\) Where a statute provides for double or treble damages, the excess recovery over the actual damages is considered punitive in character; punitive damages not lying for damages occasioned merely by ordinary negligence. The purpose of this is to subject only the gross wrongdoer to an extraordinary liability by way of punishment. The writer has discovered no case applying the treble damage statutes,\(^12\) although similar West Virginia statutes have been applied in that state.\(^13\)

\(^9\) See also Restatement of the Law of Torts, §929, par. e.
\(^12\) Va. Code §§8-906, 8-910 (1950).
\(^13\) Darnell v. Wiemouth, 69 W.Va. 704, 72 S.E. 1023 (1911).
The State of Washington has allowed treble damages for willful conversion of fruit trees.\textsuperscript{14}

In summary, \textit{Barnes v. Moore} places Virginia in accord with the view of the majority concerning damages for timber trespass as exemplified by the Restatement and the \textit{Wooden Ware} case views. It is submitted that in future cases, whenever a trespass resulting from an intentional or grossly negligent act is involved, consideration be given to the benefits obtainable from the utilization of the Virginia treble damage statutes.

H. D. M.

\section*{TORTS—LIBEL AND SLANDER}

The incredible judicial inertia,\textsuperscript{1} which has existed since the sixteenth century\textsuperscript{2} in regard to the alleged distinction between libel and slander,\textsuperscript{3} has been overcome at long last in the recent New York case of \textit{Shor v. Billingsley}.\textsuperscript{4} An action for defamation was instituted on the basis of certain interpolations, disparaging to the plaintiff, made by the defendant on his television show.

The statements upon which this action was predicated were as follows:

"Mr. Billingsley: Yes, he (Plaintiff) is. Want to know something? I wish I had as much money as he owes."

"Mr. Birsson: Owes you or somebody else?"

"Mr. Billingsley: Everybody—oh, a lot of people."\textsuperscript{5}

Defendant's main contentions were that there was no def-

\textsuperscript{14} Lawson v. Helmich et al., 146 P.2d 537 (1944).
\textsuperscript{1} Prosser on Torts, Ch. 19, 593, pp. 595-596 (2nd Ed.) (1955).
\textsuperscript{2} Holdsworth, \textit{Defamation in the Sixteenth and Seventeenth Centuries}, 41 L.Q.Rev. 13 (1925); Holdsworth, \textit{Defamation in the Sixteenth and Seventeenth Centuries}, 40 L.Q.Rev. 302 (1924).
\textsuperscript{3} "Libel was originally written defamation, while slander was oral; the present tendency is to make the distinction on the basis of permanence of form, or potentiality of harm, similar to writing or printing." Prosser on Torts, Ch. 19, 593, pp. 584-596 (2nd Ed.) (1955).
\textsuperscript{4} 158 N.Y.S.2d 476 (1956) on Reargument, Jan. 8, 1957.
\textsuperscript{5} \textit{Ibid.} at 478.