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LIABILITY FOR REMOVAL OF TIMBER, MINERALS, AND DIRT

Ownership of immovable property vests in the owner the right to dispose of the soil itself and all things that grow upon it. Thus, when an individual goes upon the land of another and removes growing crops, timber, or minerals, the owner has been legally wronged and the courts must determine the intruder's liability under applicable law. Although the substantive statutory law of Louisiana is adequate for a just resolution of the problems that arise in such situations, our courts have unfortunately created rigid jurisprudential rules for measuring the amount of recovery. The purpose of this Comment is to explore and to evaluate the actions available to the true owner to recover the economic benefits the interloper has derived from the land. Attention will be focused primarily on the recovery of those things classified as non-fruits. At the outset, however, it is essential to define certain legal distinctions involved in cases of this nature.

Fruits and Non-Fruits

Traditional civilian analysis of immovable property involves a classification of those things derived from or produced by the immovable estate. In France, these things are categorized as either fruits or products.¹ While Louisiana has never clearly recognized this distinction,² for purposes of this Comment the latter category will be termed non-fruits. Fruits are those things which are born and re-born of the soil and which do not deplete the substance of the land.³ Non-fruits, or products, are those things which deplete the substance of the land when they are severed or removed and which do not replenish themselves or only do so very slowly. Timber and minerals, including revenues therefrom such as royalties, delay rentals and bonuses, are thus non-fruits and are considered component parts of the immovable estate.⁴

1. 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 206 (La. St. L. Inst. transl. 1966); 1 PLANIOL, CIVIL LAW TREATISE no. 2297 (La. St. L. Inst. transl. 1959).

2. 2 A. YIANNPOULOS, CIVIL LAW TREATISE § 20 (1966).

3. LA. CIV. CODE art. 499; 1 PLANIOL, CIVIL LAW TREATISE no. 2296 (La. St. L. Inst. transl. 1959); Harang v. Bowie Lumber Co., 145 La. 96, 81 So. 769 (1919); Elder v. Ellerbe, 135 La. 990, 66 So. 337 (1914).

4. 2 A. YIANNPOULOS, CIVIL LAW TREATISE § 18 (1966).

Possessors and Trespassers

Most modern legal systems recognize that some usurpers of property rights are more culpable than others. Consequently, interlopers have generally been categorized either as trespassers or possessors, a distinction which has been generally recognized in Louisiana.⁵ However, when considering the accountability for profits to the owner, our courts have in some cases ignored the distinction. The possessor category may be further divided into possessors in good or bad faith. A possessor in good faith is one who possesses under title translative of ownership, has just reason to believe himself the master of the thing, and is unaware of any defect in his title.⁶ A possessor in bad faith is "he who possesses as master, but assumes that quality when he well knows that he has no title or that his title is vicious and defective."⁷ Thus, all possessors, whether in good or bad faith, possess as master. This common quality separates the possessor from the mere trespasser who makes no claim to ownership of the immovable property. In contrast with common law states⁸ all possessors in Louisiana whether in good or bad faith are accorded certain privileges not given to the mere trespasser.⁹

5. The court recognized this in *Davis v. Moore*, 156 La. 488, 100 So. 691 (1924). There they concluded that arts. 3451-3453 relative to good faith possessors are only applicable where questions of title to the thing are in dispute. See also *Falgoust v. Inness*, 163 So. 429 (La. App. Orl. Cir. 1935); *Alexius v. Oertling*, 13 Orl. App. 216 (La. App. 1916); Comment, 28 LA. L. REV. 584, 606 (1968).

6. LA. CIV. CODE arts. 503, 3451.

7. *Id.* art. 3452.

8. Adverse possession which culminates in perfecting title by acquisitive prescription is recognized. 3 AMERICAN LAW OF PROPERTY §§ 15.1-15.4 (1954). However, the right of one wrongfully in possession of land to retain the fruits of his labor is not dependent on his status, but on the time when the fruits are gathered. The majority rule in America is that any person wrongfully in possession of land is privileged to retain the crops he produces if harvested prior to his eviction. If he is evicted before the crops are harvested, they belong to the true owner. *Id.* § 19.16.

9. LA. CIV. CODE art. 3453: "The rights, which are peculiar to the possessor in good faith, are:

"1. The right which such a possessor has to gather for his benefit the fruits of the thing, until it is claimed by the owner, without being bound to account for them, except from the time of the claim for restitution.

"2. The right which such a possessor has, in case of eviction from the thing reclaimed, to retain it until he is reimbursed the expenses he may have incurred on it."

Id. art. 3454: "Rights, which are common to all possessors in good or bad faith, are:

"1. That they are considered provisionally as owners of the thing which they possess, so long as it is not reclaimed by the true owner or person entitled to reclaim it, and, even after such reclamation, until the right of the person making it is established.

"2. That every person who has possessed an estate for a year, or

Legislative Provisions

The Louisiana Civil Code provides that fruits produced by a thing belong to its owner, although they may have been produced by a third person, upon the owner's reimbursing such person for his expenses.¹⁰ An exception to this general rule is established in articles 502¹¹ and 3453¹² which provide that the good faith possessor is not obligated to restore the fruits. Therefore, it would appear that the third person who is required to return the fruits is either the bad faith possessor or the trespasser.¹³ It is equally apparent that these articles apply only to fruits.¹⁴ Although article 502 uses the word "products," it seems that as used in this article this word is synonymous with fruits and no distinction was intended.¹⁵

It is only where fruits are involved that the distinction be-

enjoys peaceably and without interruption a real right, and is disturbed in it, has an action against the disturber, either to be maintained in his possession, or to be restored to it, in case of eviction, whether by force or otherwise.

"3. That such a possessor may, by prescription, acquire the property of the thing which he thus possesses, after a certain time, which is established by law according as he has possessed in good or bad faith."

See Note, 8 TUL. L. REV. 596 (1934) for a discussion of the historical development of the concept of a good faith possessor as a civil law creation derived from Roman law.

10. LA. CIV. CODE art. 501.

11. "The products of the thing do not belong to the simple possessor, and must be returned with the thing to the owner who claims the same, unless the possessor held it *bona fide*."

12. See note 9 *supra*.

13. 2 A. YIANNPOULOS, CIVIL LAW TREATISE § 20 (1966); Comment, 15 TUL. L. REV. 291 (1941).

14. 2 A. YIANNPOULOS, CIVIL LAW TREATISE § 20 (1966). In discussing articles 549 and 550 of the French Civil Code, which correspond to articles 502 and 503 of the Louisiana Civil Code, Planiol said, "The following rules deal solely with the acquisition of fruits. As regards products, which are not fruits (cuttings of wood from forest trees not regulated, substances taken out of quarries that are not worked etc.) the possessor never has a right to them. The owner may always insist upon restitution." 1 PLANIOL, CIVIL LAW TREATISE no. 2297, at 355 (La. St. L. Inst. transl. 1959); see 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 206, at 273 (La. St. L. Inst. transl. 1966): "But he [the good faith possessor] does not acquire the title to the yield which does not have the character of profits. Despite his good faith, he must restitute the yield of extraordinary lumber cuts (that means those made beyond the regular forest management); those of mines, surface mining or turfing operations, or quarries, which were not open at the time he entered into possession. . . ."

15. See 2 A. YIANNPOULOS, CIVIL LAW TREATISE § 20 (1966); see also Harang v. Bowie Lumber Co., 145 La. 96, 114, 81 So. 769, 775 (1919), where the court said, "[b]etween the alternatives, therefore, of having to give the word 'fruits' the broad and comprehensive meaning of all kinds of products of land, or give the word 'products' the restricted meaning of fruits, properly so called, we adopt the latter."

tween good or bad faith, or between possessors and trespassers becomes material. An action to recover for non-fruits is governed by the general articles on revendication.¹⁶ Where the recovery sought is not for fruits, no preferred status is accorded the possessor.¹⁷ Therefore, any protection extended to a possessor or trespasser when recovery for non-fruits is sought is a creation of the jurisprudence and not the legislature.

The above rules are matters within the ambit of the law of property. They are concerned with the owner's right to reclaim his property in the hands of another. Where the issue is damage to the property, completely different considerations are involved. In such cases the landowner is not seeking to recover his property but only compensation for the loss in value it has suffered. Thus, the good or bad faith of the other party is immaterial and the real inquiry is whether the damage occurred through the fault of the defendant.¹⁸

Jurisprudence

As mentioned earlier, this Comment is limited primarily to examining the recovery allowed for those things classified as non-fruits. This examination will be made of the jurisprudence in two sections—one concerning timber and the other dealing with minerals and the removal of the soil itself. The landowner's right to recover for fruits will be discussed only briefly in order to establish a frame of reference with which to compare the jurisprudence on non-fruits.

16. LA. CIV. CODE arts. 488-98, 525, 531; LA. CODE CIV. P. arts. 3651, 3655.

17. 1 PLANIOL, CIVIL LAW TREATISE no. 2298 (La. St. L. Inst. transl. 1959). Planiol explains this by pointing out that the landowner is not hurt when the good faith possessor has harvested and consumed those recurring things that have not diminished the substance of the immovable. The landowner neglected to use the immovable and when he recovers it he has been put back in his original condition. To allow him to also claim all fruits would unjustly enrich him at the expense of the good faith possessor. Where products are involved the landowner is not recovering his property in its original condition. The substance has been decreased and he is sustaining a loss unless he can recover the part of the immovable that was severed.

18. LA. CIV. CODE art. 2315. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." See Planiol's discussion of the general theory of fault in the civil law beginning at 2 PLANIOL, CIVIL LAW TREATISE no. 863 (La. St. L. Inst. transl. 1959). In discussing French Civil Code article 1382 (LA. CIV. CODE art. 2315) Planiol states: "The idea of fault includes all, it is the unjustified injury which gives rise to the obligation to indemnify; it matters little in what manner the injury was caused." 2 PLANIOL, CIVIL LAW TREATISE no. 827, at 443 (La. St. L. Inst. transl. 1959).

Recovery for the Production of Fruits

For the most part, Louisiana courts have applied the provisions of the Civil Code when the landowner has sought to recover for those things properly classified as fruits. Thus, the possessor in good faith is required to return the fruits only from the time judicial demand is made by the true owner.¹⁹ Where general rents and revenues are involved, however, the courts have not specified whether the amount recoverable after judicial demand is to be based upon gross or net revenues.²⁰ The bad faith possessor, on the other hand, must account to the landowner for all the fruits but may claim credit for the expenses of production.²¹ The obligation of the possessor in bad faith, then, is generally measured by the amount of profit that he has made from the overall transaction.²² The measure of recovery, however, is not always based upon actual production. Where the possessor neglects to utilize the land efficiently, recovery may be based upon the production he could have made through the exercise of ordinary care²³ or the fair rental value of the land.²⁴

19. *Roussel v. Railways Realty Co.*, 165 La. 536, 115 So. 742 (1928); *Moore v. Pitre*, 149 La. 910, 90 So. 252 (1921); *Delouche v. Rosenthal*, 143 La. 581, 73 So. 970 (1918); *Blair v. Dwyer*, 110 La. 332, 34 So. 464 (1903); *Adkins v. Cason*, 170 So. 366 (La. App. 2d Cir. 1936).

20. In *Roussel v. Railways Realty Co.*, 165 La. 536, 115 So. 742 (1928) the court simply stated that after judicial demand the possessor was responsible for "rents and revenues." In *Adkins v. Cason*, 170 So. 366 (La. App. 2d Cir. 1936) the case was remanded for the sole purpose of ordering the defendant to account to plaintiff for "any and all revenues" received after demand for restitution. It seems logical that this should include only net revenues. According to article 503 of the Civil Code the possessor ceases to be a bona fide possessor from the time a suit is instituted so he should then be treated the same as a bad faith possessor.

21. In *Lawrence v. Young*, 144 La. 1, 80 So. 18 (1918) the court expressly disallowed a claim for expenses made by a bad faith possessor on the ground that the expenses had not been proved. The court then expressly reserved an opinion as to whether she would have been entitled to the expenses if proved. This seems to be the only case where the propriety of the bad faith possessor's recovery of expenses was questioned.

22. *Curran v. Jones*, 163 La. 579, 112 So. 492 (1927); *Rosenthal-Brown Fur Co. v. Jones-Frere Fur Co.*, 162 La. 403, 110 So. 630 (1926).

23. *Winter v. Zacharie*, 6 Rob. 466 (La. 1844).

24. In *Provost v. Romero*, 177 So. 375, 377 (La. App. 1st Cir. 1937) the court stated: "But the possessor of land who holds it in bad faith is required to restore the fruits or pay for the use of the land." (Emphasis added.) In *Brown v. Tausin*, 185 La. 86, 168 So. 502 (1936) the possessor was in bad faith and recovery was computed at the fair rental value of the land that had been under cultivation, with no attempt to show the actual production. See also *Harang v. Gheens Realty Co.*, 155 La. 68, 96, 98 So. 760, 769 (1923). The court held that the owners were entitled to recover from a bad faith possessor the fair rental value, saying: "It is not important in determining the question here presented whether defendant so managed the property as to have derived but little or no revenue from it. The fact remains that during

*Recovery for Production of Non-Fruits**Timber*

According to the Louisiana jurisprudence, the amount recoverable for the wrongful removal of timber depends upon the classification of the person who cuts it.²⁵ He may be in good faith,²⁶ in legal bad faith but moral good faith,²⁷ or in legal and moral bad faith.²⁸ If he is in good faith the landowner can recover only the stumpage value of the timber, that is, its value in place. In other words, he is subject to the same obligation as the possessor in bad faith who gathers fruits.²⁹ If the timber remover is in legal bad faith but moral good faith, the landowner can recover the value of the timber when sold by the wrongdoer less the actual production expenses incurred. If the

that period plaintiffs were illegally deprived of their property, and should not be permitted to suffer because of the manner in which defendants may have managed or used it, but, under the circumstances, are entitled to its fair rental value."

25. *Wooden-Ware Co. v. United States*, 106 U.S. 432 (1882); *Motichek v. Perriloux*, 231 La. 849, 93 So.2d 190 (1957); *Blanchard v. Normand-Breaux Lumber Co.*, 220 La. 633, 57 So.2d 211 (1952); *Quatre Parish Co. v. Beauregard Parish School Bd.*, 220 La. 592, 57 So.2d 197 (1952); *Kennedy v. Perry Timber Co.*, 219 La. 264, 52 So.2d 847 (1951); *Culpepper v. Weaver Bros. Lumber Corp.*, 194 La. 897, 195 So. 349 (1940); *Coignet v. Louisiana Cypress Lumber Co.*, 177 La. 1023, 150 So. 7 (1933); *Ward v. Hayes-Ewell Co.*, 155 La. 15, 98 So. 740 (1923); *Martin v. Louisiana Cent. Lumber Co.*, 150 La. 157, 90 So. 553 (1920); *Interstate Trust & Banking Co. v. Picard & Geismar*, 147 La. 430, 85 So. 65 (1920); *Ducros v. St. Bernard Cypress Co.*, 145 La. 691, 82 So. 841 (1918); *Allen v. Frank Janes Co.*, 142 La. 1056, 78 So. 115 (1918); *Texas Delta Land Co. v. Fleischer*, 132 La. 1021, 62 So. 129 (1912); *State v. F. B. Williams Cypress Co.*, 131 La. 62, 58 So. 1033 (1912); *St. Paul v. Louisiana Cypress Lumber Co.*, 116 La. 585, 40 So. 906 (1906); *Guarantee Trust & Safe Deposit Co. v. E. C. Drew Inv. Co.*, 107 La. 251, 31 So. 736 (1902); *Gillian v. Jones*, 157 So.2d 598 (La. App. 2d Cir. 1963); *Havard v. Luttrell*, 68 So.2d 798 (La. App. 2d Cir. 1953); *Sentell v. Warmesley*, 157 So. 152 (La. App. 2d Cir. 1934); *Ray v. Normand*, 2 La. App. 310 (2d Cir. 1925).

26. This means that he believed the timber or land was his and had just reason for believing so. *Guarantee Trust & Safe Deposit Co. v. E. C. Drew Inv. Co.*, 107 La. 251, 31 So. 736 (1902).

27. This means that he did believe the timber was his but should have known from external evidence available that it was not. *State v. F. B. Williams Cypress Co.*, 131 La. 62, 58 So. 1033 (1912).

28. This means that he knew the timber did not belong to him but cut it anyway or cut it with reckless disregard for whether it belonged to him or not. *Terry v. Butler*, 240 La. 398, 123 So.2d 865 (1960).

29. See 2 A. YIANNPOULOS, *CIVIL LAW TREATISE* 418 n.239 (1966). In actual practice such a concise statement as this seems questionable. Compare, for instance, the court's statement in *Harang v. Gheens Realty* quoted in note 24 *supra* with the statement in *Melton v. Gross & Janes* quoted in note 49 *infra*. The formula for determining liability is the same, but in the case of fruits the landowner's protection is greater because the possessor can be charged with what should have been produced whereas in non-fruits, particularly timber, the possessor or trespasser is only charged for actual production.

timber remover is in legal and moral bad faith, the landowner can recover the value of the timber when sold and the remover may not claim the costs of production.³⁰

The origin of the distinction between legal and moral bad faith is unclear. No basis exists for the distinction in the Louisiana Civil Code³¹ nor does such a distinction exist in French law.³² Although this classification has been viewed as an encroachment of the common law upon Louisiana's civil law³³ and it is even said to have been wholly "drawn from common law sources,"³⁴ this is not the case.³⁵ The distinction originated through a curious merger of the civil law principles applicable to good and bad faith possessors on the one hand and common law principles of damage for trespass on the other.

The early cases dealing with good and bad faith possession for purposes of acquisitive prescription and the right to retain fruits and revenues³⁶ delineated only two classes of possession—good faith and bad faith. In an effort to explain what constituted bad faith, however, the court in several cases held that one who possessed under some legal defect—i.e., some error of law—must be charged with constructive knowledge of the defect. While no moral turpitude was ascribed to the possessor's actions, he was legally considered to be a possessor in bad faith.³⁷

30. There is a concise statement of these rules in *Kennedy v. Perry Timber Co.*, 219 La. 264, 52 So.2d 847 (1951).

31. Note, 5 TUL. L. REV. 117 (1930). Regardless of the elements constituting good or bad faith possession, it is obvious that the idea of good faith being opposed by two classes of bad faith has no sanction in the Civil Code.

32. See 1 PLANIOL, CIVIL LAW TREATISE nos. 2667-2669, 2290-2301, 2725-29 (La. St. L. Inst. transl. 1959); see also 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS §§ 206, 218, sub. ¶¶ 311-12 (La. St. L. Inst. transl. 1966).

33. Note, 5 TUL. L. REV. 117, 118 (1930).

34. *Gray v. State, Department of Highways*, 191 So.2d 802, 811 n.4 (La. App. 3d Cir. 1966).

35. The majority rule in common law seems to be that the trespass is either intentional or innocent with the question of his justifiable belief in a legal right to enter the land determinative of his status. In effect, a third category is created in most jurisdictions by allowing the court wide discretion to assess punitive damages if the trespasser's actions are willful or reckless. The willfulness or recklessness is treated as simply an extreme category of intentional trespass. 4-A AMERICAN LAW OF PROPERTY §§ 28.14-16 (1954); 87 C.J.S. *Trespass* § 121 (1954); 52 AM. JUR.2d *Loss and Timber* §§ 126, 129, 135 (1970).

36. *Vicksburg, S. & P. R.R. v. Elmore*, 46 La. Ann. 1237, 15 So. 701 (1894); *Montgomery v. Whitfield*, 41 La. Ann. 649, 6 So. 224 (1889); *Heirs of Dohan v. Murdock*, 41 La. Ann. 494, 6 So. 131 (1889).

37. An example of one explanation that is typical is found in *McDade v. Bossier Levee Bd.*, 109 La. 627, 636, 33 So. 628, 632 (1902), where the court said: "Coming to the matter of the settlement of accounts between the

These early cases did not establish the triple classification system currently in use; the possessor was considered as being in good or bad faith only.

The development of legal and moral bad faith as separate concepts can be traced directly to the early timber cases. In *Eastman v. Harris*³⁸ the court rendered judgment against the defendant for the value of the goods he had converted, allowing the cost of conversion as a deduction. The court said of the defendant: "Whatever in a mere moral point of view may be defendant's freedom from blame, it is clear that in a legal aspect he was a possessor in bad faith."³⁹

In 1882, the United States Supreme Court decided *Bolles Wooden Ware Co. v. United States*.⁴⁰ This case, unrelated to Louisiana property law, was concerned with the unauthorized removal of timber from public land in Wisconsin. Relying on several English cases involving trespass to mining properties, the court allowed the landowner to recover the value of the timber when sold by the willful trespasser. The rationale of *Bolles Wooden Ware Co.*⁴¹ was incorporated into Louisiana's jurisprudence in *Guaranty Trust & Safe Deposit Co. v. E. C.*

litigants for improvements on the one part, and rents and revenues, on the other, we have to hold that, legally speaking, plaintiff has been a possessor in bad faith; and this we regret, for we are satisfied that morally he was in good faith." Further on in the opinion the court said: "His error was one of law and not of fact. Applying the law to this situation, the possession of plaintiff was in *legal bad faith*." (Emphasis added.) *Id.* The defendant had purchased, in good faith, from the levee board in contravention of a law prohibiting the levee board from selling.

This view was later repudiated by the courts after much discussion about the effects of an error of fact. See *Delouche v. Rosenthal*, 143 La. 581, 585-86, 78 So. 970, 972 (1918) where the court stated: "If the maxim, 'Ignorantia legis non excusat,' applies to a possessor who has bought the property fairly, for an adequate consideration and in ignorance of any fact affecting the validity of his title, we can never say that a defendant in a petitory action was a possessor in good faith if we declare his title invalid. . . . Having just reason to believe does not mean having a reason supported by law."

38. 4 La. Ann. 193 (1849).

39. *Id.* at 195. This characterization of the defendant was not necessary to the decision in this case. The plaintiff's raft of logs had run aground on defendant's land while being floated down the river. Defendant cut them up and sold them for fuel wood. So, actually the court was dealing with movable property that had been appropriated by a non-owner, changed in form and sold. The court correctly applied La. Civ. Code arts. 517-518, 524, 2292, 3384, 3387 (1825), which are presently LA. CIV. CODE arts. 525-526, 532, 2314, 3421, 3424.

40. 106 U.S. 432 (1882).

41. This case was based on the common law actions of trover and conversion; therefore, it was not appropriate authority for either recovery in tort or revendication of property under the Louisiana Civil Code.

*Drew Investment Co.*⁴² In this case defendant Maguire purchased certain timber from the defendant E. C. Drew Investment Co. The location of the timber was revealed to him by an agent of the company based on a map the agent had. Later, it was discovered that the map was in error and Maguire had cut timber belonging to the plaintiff. Maguire and Drew Investment Co., along with all the partners, were joined as defendants and found liable in solido as joint tortfeasors. As Maguire was in good faith, his liability for wrongful removal of the timber was limited to the stumpage value. The members of the Drew Investment Co., however, were found to be in bad faith, and their liability was computed at the price they received for the timber with no deductions allowed for the costs of production. In this case the court was unconcerned with categorizing defendants as good or bad faith possessors of land. The case was simply one of trespass and wrongful damage to land. Had Drew Investment Co. attempted to prove their good faith under standards established by the Civil Code for good faith possession they would have failed because they had no title at all. It is not clear what standard the court used in determining bad faith. But since the only authority cited by the court was *Bolles Wooden Ware Co.*, it would appear that the defendant was viewed as a willful trespasser. Thus Drew's bad faith was assimilated to the obvious moral turpitude involved in the cited case.

In *State v. F. B. Williams Cypress Co.*⁴³ the Supreme Court of Louisiana reviewed the above jurisprudence and determined that it established the following principles: (1) where one has been in bad faith (presumably meaning legal bad faith) the proper measure of recovery for converted property is the value after conversion less expenses of conversion; (2) where "the defendants have been found to have converted the property of others in bad faith, moral as well as legal, they have been condemned for the value of the property, in its changed condition, with no deduction whatever of the cost incurred in making the change."⁴⁴ The court then concluded that in the instant case, "the ends of justice are subserved by holding that the owner is entitled to the profit resulting from the change made in the form or condition of the property by the possessor in legal bad

42. 107 La. 251, 31 So. 736 (1902).

43. 131 La. 62, 58 So. 1033 (1912).

44. *Id.* at 70, 58 So. at 1036.

faith, and that the latter cannot reasonably expect anything more than the re-imbursement of the expenses incurred in making the change."⁴⁵

Since *Williams Cypress Co.* the jurisprudence has remained consistent, and the triple classification seems firmly established in Louisiana whether ownership of the property is at issue or defendant has merely gone upon plaintiff's land and removed timber without claiming ownership.⁴⁶ Consequently, even though the action is brought in tort under Louisiana Civil Code article 2315, the same standard of recovery will apply. The classifications of good faith, legal bad faith, and moral bad faith make the quantum of recovery depend on the degree of culpability of the wrongdoer and not on the amount of harm suffered. Adherence to such a system results in awarding punitive damages to the landowner in some cases, while in others inadequate compensation is received. The latter situation is well illustrated in *Terry v. Butler*⁴⁷ where the defendants cut and sold immature pine trees for pulpwood. The owner attempted to recover the value of the trees in their more valuable mature state.⁴⁸ Although the defendants were in moral and legal bad faith, recovery was limited to the value of the pulpwood. As properly pointed out by dissenting Justice Hawthorne, such an inflexible rule places the landowner at the mercy of the wrongdoer. If that wrongdoer cuts, processes, and sells valuable timber as an inferior product, the landowner is unjustly deprived of the highest economic utilization of his property completely against his will.⁴⁹

45. *Id.* at 70-71, 58 So. at 1036.

46. *Blanchard v. Norman-Breaux Lumber Co.*, 220 La. 633, 57 So.2d 211 (1952); *Quatre Parish Co. v. Beauregard Parish School Bd.*, 220 La. 592, 57 So.2d 197 (1952); *Kennedy v. Perry Timber Co.*, 219 La. 264, 52 So.2d 847 (1951); *Ward v. Hayes-Ewell Lumber Co.*, 155 La. 15, 98 So. 740 (1923); *Melton v. Gross & Janes Co.*, 46 So.2d 918 (La. App. 2d Cir. 1950); *Allen v. Frank Janes Co.*, 142 La. 1056, 78 So. 115 (1918); *Sentell v. Warmesley*, 157 So. 152 (La. App. 2d Cir. 1934).

47. 240 La. 398, 123 So.2d 865 (1960).

48. The owner advanced an alternate claim for the value of the timber as "lap pulp" which was after processing by the paper mill and equivalent to the value of the trees in their mature state. The court said the value to be used was not the ultimate manufactured value but the value at which the trespasser sold it.

49. This was the case in *Melton v. Gross & Janes Co.*, 46 So.2d 918 (La. App. 2d Cir. 1950). The defendant had cut oak trees from plaintiff's land and manufactured them into railroad crossties. The court found that defendant was in legal bad faith and assessed damages at the manufactured price of the finished product less the cost of manufacture. Plaintiff introduced evidence to show that if the trees had been manufactured into oak flooring the manufactured value would have been approximately three times

Although the majority of cases compute damages by either deducting expenses from the value at which the timber was sold or not, according to the degree of bad faith of the remover, some cases indicate that other factors should be considered and other items of damages allowed. Thus, while an award for diminution in the value of the remaining timber has been allowed,⁵⁰ it has been held that no recovery can be had for the humiliation, grief, and worry resulting from the unauthorized removal of timber.⁵¹ Claims for damages resulting from negligence in felling and removing trees,⁵² diminution in value of the property, and loss of aesthetic value⁵³ have been denied because proof of the items was speculative. Moreover, it has not been determined whether they constitute legitimate items of damage. It has been held that the plaintiff's desire that the character of his land not be changed from woodland to open land is not a valid basis for recovery.⁵⁴

Two cases, in particular, indicate dissatisfaction with measuring recovery according to the degree of culpability of the wrongdoer and not on the amount of harm suffered. In *Anders v. Tremont Lumber Co.*⁵⁵ plaintiff recovered for damage suffered by young trees in a fire caused by the defendant's train while hauling out timber that had been wrongfully removed. The result is commendable. The landowner was fully compensated not only for the value of the timber removed but for the additional damage done to his property through the wrongdoer's negligence. In a second, very recent, case the court awarded defendants five hundred dollars as damages for the trespass

their value when manufactured into railroad ties. The court rejected this argument, stating: "The testimony introduced by plaintiff that the manufactured value of flooring that could have been made from the trees wrongfully cut has no force in setting the amount of his claim, inasmuch as plaintiff's right to the value above that of stumpage . . . is under that portion of the Article [article 525] which gives him the right "to claim the thing which was made out of' his materials." *Id.* at 919-20.

50. *Green v. Delafield*, 121 So. 339 (La. App. 2d Cir. 1929).

51. *Anders v. Tremont Lumber Co.*, 171 La. 1, 129 So. 649 (1930); *Foster v. Beard*, 221 So.2d 319 (La. App. 2d Cir. 1969).

52. *Quatre Parish Co. v. Bearegard Parish School Bd.*, 220 La. 592, 57 So.2d 197 (1952).

53. *Foster v. Beard*, 221 So.2d 319 (La. App. 2d Cir. 1969).

54. *Id.* See also *Livaudais v. Williams Lumber Co.*, 34 So.2d 292 (La. App. 1st Cir. 1948), where the plaintiff was allowed damages for a fence the defendants had torn down in addition to recovery of the manufactured price of the timber removed. An award for damages to young trees was not allowed because there was insufficient proof.

55. 171 La. 1, 129 So. 649 (1930).

committed by the defendants."⁵⁶ The award was for "nonpecuniary damage" and was in addition to the manufactured value of the timber even though the timber had not been sold by the defendants but had been allowed to rot.

Minerals and Dirt

As mineral law in Louisiana is not expressly provided for in the Civil Code and has been developed primarily by the courts, it is not surprising that it accords generally with the law prevailing in our sister states. The general common law rule is that the landowner can recover the value of the oil or gas when brought to the surface and placed in the pipeline or storage tank. The unauthorized producer is allowed to deduct for drilling and production expenses if the taking was innocent, that is, in good faith; but there is no deduction if the taking was willful or in bad faith.⁵⁷ Some difficulty has been experienced in defining good and bad faith. Generally, a justifiable belief in one's title is enough to constitute good faith. Having no title or no justifiable reason for believing in the validity of one's title constitutes bad faith.⁵⁸ A minority common law view, however, is illustrated in *Pittsburg & West Virginia Gas Co. v. Pentress Gas Co.*⁵⁹ where the defendant, justifiably believing in his own title, continued to produce gas after plaintiff had informed him of his claim. The Supreme Court of West Virginia held that the knowledge of an opposing title put defendant on notice as to possible defects in his title and placed him in legal bad faith. This holding has been criticized as unsound by the *American Law of Property*.⁶⁰

In Louisiana in suits for recovery for the unauthorized production of oil and gas and for removal of dirt, the courts have relied heavily on the timber cases.⁶¹ It was recognized at an early date that minerals, like timber, could not be properly

56. *Knoll v. Delta Development Co.*, 218 So.2d 109, 112 (La. App. 3d Cir. 1969), *cert. denied*, 253 La. 830, 220 So.2d 460 (1969).

57. See 2 AMERICAN LAW OF PROPERTY § 10.9 (1954) and cases collected at 528 nn.3, 4.

58. 2 AMERICAN LAW OF PROPERTY § 10.9 (1954) and cases collected at 531 n.19 distinguishing between good and bad faith.

59. 84 W. Va. 449, 100 S.E. 296 (1919).

60. 2 AMERICAN LAW OF PROPERTY § 10.9, at 531 (1954).

61. See Comment, 15 TUL. L. REV. 291 (1941) for a discussion of the measure of damages allowed for unauthorized production of oil and gas.

classified as fruits.⁶² There was the additional problem of determining whether a mineral lessee could be given the status of a possessor since he did not claim ownership of the property.⁶³ Despite the apparent inconsistency, the courts considered the mineral lessee a possessor in order to afford him some protection when he was in moral good faith.⁶⁴ As in the timber cases, the mineral lessee who is in legal bad faith but in moral good faith is under the same obligation as the possessor in bad faith who gathers fruits. He must restore the value of the minerals taken but is allowed to deduct the expenses of production.⁶⁵

Louisiana courts have exhibited more flexibility in measuring damages for the removal of dirt than for the removal of timber or minerals. This flexibility can be attributed to the fact that most of these cases have been presented to the court as actions based on tort law and the emphasis has been on compensating the landowner for his loss. The question of the ownership of the land was not usually at issue.⁶⁶ Among the various methods which have been utilized for determining the award for wrongful removal of dirt are the cost necessary to replace the dirt,⁶⁷ the cost of restoring the property to its original con-

62. *Harang v. Bowie Lumber Co.*, 145 La. 96, 81 So. 769 (1919); *Elder v. Ellerbe*, 135 La. 990, 66 So. 337 (1914).

63. In *Vance v. Sentell*, 178 La. 749, 152 So. 513 (1933), it was held that the only bona fide possessor was one who held under a title translatif of ownership.

64. The courts had simply applied the timber cases to the mineral cases by analogy. In *Cooke v. Gulf Refining Co.*, 135 La. 609, 65 So. 758 (1914), the court cited as authority *Wooden-Ware Co. v. United States*, 106 U.S. 432 (1882); *Ball & Bro. Lumber Co. v. Simms Lumber Co.*, 121 La. 627, 46 So. 674 (1908); *Guarantee Trust & Safe Deposit Co. v. E. C. Drew Inv. Co.*, 107 La. 251, 31 So. 736 (1902).

65. *Mason v. United States*, 260 U.S. 545 (1923); *Martel v. Hunt*, 195 La. 701, 197 So. 402 (1940); *Cooke v. Gulf Refining Co.*, 135 La. 609, 65 So. 758 (1914).

66. *Gallo v. Sorci*, 221 So.2d 570 (La. App. 4th Cir. 1969); *Woods v. Slocum*, 179 So.2d 464 (La. App. 3d Cir. 1965); *East v. Pan American Petroleum Corp.*, 168 So.2d 426 (La. App. 3d Cir. 1964); *Joseph v. Netherton Co.*, 136 So.2d 556 (La. App. 3d Cir. 1962). Where the issue of ownership was present the question of good or bad faith appears in the cases. *DeHart v. Continental Land & Fur Co.*, 205 La. 569, 17 So.2d 827 (1944); *Amite Gravel & Sand Co. v. Roseland Gravel Co.*, 148 La. 704, 87 So. 718 (1921). This same principle was followed where removal of salt was involved. *State v. Jefferson Island Salt Mining Co.*, 183 La. 304, 163 So. 145 (1935). But in an early petitory action with a claim for recovery for dirt sold the court very properly awarded the value of the dirt removed without concerning itself with the good or bad faith of the possessor. *Caillier v. Profito*, 171 La. 693, 131 So. 851 (1931).

67. *Woods v. Slocum*, 179 So.2d 464 (La. App. 3d Cir. 1965).

dition,⁶⁸ and the market value of the dirt removed.⁶⁹ These cases emphasize the importance of determining the landowner's loss and compensating him for that loss. For example, in *Woods v. Slocum*⁷⁰ the plaintiff's property could have been made suitable for commercial development by filling the low areas. He had, in fact, a mound of dirt on it for that purpose. When the defendant wrongfully removed the dirt, the court awarded plaintiff the cost of replacing it as damages. In *Gallo v. Sorci*⁷¹ sand had been wrongfully removed from a batture area. The court held that the measure of recovery was the value of the sand in place since there was no indication that the damage to the property had rendered it unfit for the purposes for which the plaintiff intended to use it. In both cases a flexible standard measured recovery. That standard was the use prospects of the land and the intentions of the owner. While such flexible standards have been adopted for the most part, there are a number of cases involving dirt removal where the measure of recovery centered around the good or bad faith of the remover in much the same way as in the timber and oil cases previously cited.⁷²

One recent case needs discussion. In *Gray v. State, Department of Highways*⁷³ the department had removed a large quantity of dirt from plaintiff's land thereby creating borrow pits. The plaintiff claimed the taking was illegal and sought recovery of an amount sufficient to restore the premises to its original condition. After reviewing the cases on dirt removal and the jurisprudential rules developed in the timber cases, Judge Tate (then serving on the Third Circuit Court of Appeal) reached what seems to this writer to be a correct result. The department was held liable for the value of the dirt taken and for the damages caused by the taking. The holding was based in large part on Louisiana Civil Code article 507⁷⁴ because the department

68. *Joseph v. Netherton Co.*, 136 So.2d 556 (La. App. 3d Cir. 1962).

69. *East v. Pan American Petroleum Corp.*, 168 So.2d 426 (La. App. 3d Cir. 1964).

70. 179 So. 2d 464 (La. App. 3d Cir. 1965).

71. 221 So.2d 570 (La. App. 4th Cir. 1969).

72. *DeHart v. Continental Land & Fur Co.*, 205 La. 569, 17 So.2d 827 (1944); *Amite Gravel & Sand Co. v. Roseland Gravel Co.*, 148 La. 704, 87 So. 718 (1921); *Derbofen v. T. L. James & Co.*, 148 So.2d 795 (La. App. 4th Cir. 1962), *rehearing denied*, Feb. 4, 1963.

73. 191 So.2d 802 (La. App. 3d Cir. 1966), *modified*, 250 La. 1045, 202 So.2d 24 (1967).

74. LA. CIV. CODE art. 507 provides: "If the owner of the soil has made constructions, plantations and works thereon, with materials which did not belong to him, he has a right to keep the same, whether he has made

had used the plaintiff's materials for construction on its land. The value of the dirt was determined as of the time it was converted into materials for use in the highway minus the costs of conversion. Although the court concluded that the department was at least in legal bad faith, the concept of legal bad faith was not at all necessary to the decision. The result reached is supported by either article 507 or 531⁷⁵ of the Civil Code, neither of which are concerned with good or bad faith but with the right of an owner to recover his property or its value. On appeal the supreme court did not consider the validity of Judge Tate's analysis but reversed on other grounds.⁷⁶ This liberal approach seems highly desirable in the types of cases under consideration because it affords the court a degree of flexibility which enables it to fully compensate the landowner for his loss.⁷⁷

Conclusion

As noted above the cases dealing with soil removal have exhibited more flexibility than either the mineral or timber cases. The greatest inequities seem to exist in the timber removal cases. These inequities are perpetuated because of two standards used by the courts. These are: (1) basing the recovery on the price actually received for the timber, and (2) basing allowance for expenses on the degree of culpability of the intruder. This makes it possible for two landowners to lose timber in identical amount and quality, yet receive substantially different recoveries. If one intruder on land sold the timber he re-

use of them in good or bad faith, on condition of reimbursing their value to the owner of them and paying damages, if he has thereby caused him any injury or damage."

75. *Id.* art. 531 provides: "In all cases where the proprietor, whose materials have been employed unknown to him in making a thing of another kind, has a right to claim the property of that thing, he is at liberty to demand either that the materials be returned to him in the same species, quantity, weight, measure and quality, or that their value be paid."

76. *Gray v. State, Department of Highways*, 250 La. 1045, 202 So.2d 45 (1967).

77. Article 507 is particularly applicable in the *Gray* case because the department used rather than sold the earth. The article requires both payment for the materials used and compensation for any damage caused. In a case where the materials were sold the court should apply article 531, which provides for payment of value rather than return of the property when demanded by the owner. Since there is no provision in that article for additional payment for damages, recovery could then be had under article 2315 for any additional harm suffered.

moved for its maximum value while the other intruder sold his as a product of lesser value, the second landowner would be deprived of his property without being fully compensated. The same result would obtain if both intruders sold the timber for its maximum value but the second was in good faith while the first was in moral and legal bad faith. The second landowner's recovery would be decreased by the costs of production, thus not affording him complete compensation. It is suggested that a more equitable result would follow in all cases if the courts would first classify the economic benefits as either fruits or non-fruits. Where fruits are involved the courts should follow the statutory authority and jurisprudence outlined earlier. The good faith possessor would retain all fruits produced prior to judicial demand, and the bad faith possessor would be obligated to restore all fruits after deducting his production costs. In addition, the landowner should have a right to recover any other damages he could prove based on the delictual responsibility of the "third party." This aspect of the case would be governed by the usual rules in any tort action. Under this analysis it would be possible to require a good faith possessor, who had no responsibility to restore fruits, to repair any damage caused by his fault.

In cases where the economic benefits derived are properly classified as non-fruits, the code articles dealing with good or bad faith would not be applicable. As non-fruits are a part of the substance of the property, they are not governed by the code articles dealing with the landowner's right to fruits, but by the articles dealing with any owner's right to revendicate his property in the hands of another. If, after exercising his rights under these articles to reclaim his property, the landowner is still left in a damaged financial condition he should be able to obtain relief under Louisiana Civil Code article 2315. In either case the landowner's action against the wrongdoer would encompass two distinct theories of recovery. One would be based on property law—the landowner's right to recover his property or the benefits it produces. The other would be a delictual action—the right of anyone to recover from the one whose fault caused him harm.

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