Louisiana Law Review

Volume 4 | Number 2
January 1942

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LOUISIANA LAW REVIEW

PUBLISHED QUARTERLY, IN NOVEMBER, JANUARY, MARCH AND MAY
LOUISIANA STATE UNIVERSITY LAW SCHOOL
UNIVERSITY STATION, BATON ROUGE, LOUISIANA

Subscription per year $4.00 (Foreign $4.50) Single copy $1.00

VOLUME IV JANUARY, 1942 NUMBER 2

Comments

RUMINATIONS ON A NEW TORT:

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The development of oil production has brought in its wake many novel torts problems. One of the most interesting and difficult of these was presented to the Louisiana Supreme Court in the recent case of *Angelloz v. Humble Oil & Refining Company.*[1] In order to initiate our discussion we need only a spare outline of the events that led up to the controversy; more facts will be added later as the need arises.

The defendant oil company held the mineral rights in all the property above a certain oil dome, with the exception of 950

1. 196 La. 604, 199 So. 656 (1940).

acres of swamp land owned by the plaintiff Angelloz. Drilling operations had been conducted upon the defendant's land with varying success, and the value of the dome property for oil production was a matter of lively speculation. The defendant, for purposes of its own, determined to conduct geophysical tests and sought Angelloz' permission for the use of his property. When this was refused the defendant entered by trespass and established four torsion balance stations upon the land. The resulting test showed that production of oil was impracticable. When this fact became known the value of Angelloz' property for speculation was destroyed. Angelloz sued for the trespass and for the dissemination of injurious information. The lower court awarded him $7,500.00 damages, and this was affirmed by the supreme court.

Two aspects of the *Angelloz* case can be dismissed with only a few remarks. First, the plaintiff was clearly entitled to damages for the invasion of his land, based upon the extent of the injury to his property and the deprivation of his right to be in exclusive uninterrupted possession. The damage of this nature appears to be comparatively trivial. A path diagonnally across the southern portion of the property was cut to a depth of eighteen hundred feet, and the total area of the invaded property amounted to only about fifty-five acres. It is clear that the infringement of the plaintiff's rights in this respect was not the principal cause of his complaint.

Second, by his entry the defendant appropriated the privilege of making a geophysical survey. This privilege has a value which is recognized in the market. Sometimes it is sold at a fixed price for each acre of land involved and is transferred in conjunction with an option to lease part or all of the property explored at a price agreed upon in advance. In such a case the arrangement is termed a "selection lease."[2] The same privilege has also been sold in the market as a "shooting permit," which is paid for at a certain price per "shot point."[3] This latter arrangement is much less profitable for the lessor.

The appropriation of the privilege to explore should be regarded as an independent wrong, separate from the unlawful entry. One who acquires such a privilege is thereby placed in a position to gain information which may be of great value to him.

2. See Shell Petroleum Corp. v. Scully, 71 F. (2d) 772, 773 (C. C. A. 5th, 1934) and Brief for the Appellees in that case, p. 9, citing the record.
3. Ibid.

It is clear that the owner is entitled to payment if the privilege of exploration is taken without his consent. In this respect his action is essentially one for restitution.

The problem of assessing the value of an appropriated privilege of exploration is difficult. For example, suppose that the exploration reveals the presence of oil lying not only under the property wrongfully entered, but also under adjoining property in which the defendant has full mineral rights. In such a case he should be required to make restitution to the extent of the value of the information he has gained. The price usually paid for a shooting permit would not afford a fair measure of compensation. The honest purchaser, who acquires such a permit in order that he may explore, bargains only for a gambling chance that he will secure information of value to him, and the price he pays is severely graded down accordingly. Obviously a wrongdoer who has avoided paying the price of the gamble should not be permitted to enjoy the fruits of the information tortiously acquired by paying on a mere chance basis.

It is doubtful that the price normally paid for a selection lease affords any better basis for adjustment. The same criticism noted in connection with the shooting permit is also applicable here. The defendant should not be allowed to pay on a "chance" basis when he has avoided entering into a chance transaction. There is an additional difficulty involved in the use of the selection lease for this purpose. It has already been noted that under such a lease an option to the defendant to select a part of the property for drilling operations at a price stipulated in advance is an important part of the consideration. Compensation in these terms is obviously impossible where no such advance arrangements were made and the plaintiff is unwilling to permit the defendant either to enter or drill.

In *Shell Petroleum Corporation v. Scully*[4] the amount of recovery in a situation somewhat similar to the type we have considered was determined on the basis of the price paid for a selection lease. The court sought to avoid the difficulties mentioned above by requiring that the attention of the jury be called to the fact that the defendant did not get an important incident of a selection lease, namely, the option to drill the land at a price fixed in advance. It is difficult to imagine what the value of the selection lease would be under these circumstances.

4. Shell Petroleum Corp. v. Scully, 71 F. (2d) 772 (C. C. A. 5th, 1934).

In the *Scully* case, however, it does not appear that the defendant oil company owned any mineral rights in the vicinity. Its only purpose in making an exploration on plaintiff's property was to determine whether or not it should continue bargaining with him. Since the plaintiff refused to negotiate with the defendant, the latter gained nothing except information which it was unable to turn to its own profit. It follows that if Scully is to be compensated at all, his recovery *must* be measured by some approximation of market value. When viewed in this light, the conclusion reached in that case is not open to criticism. The action was one for restitution, but unfortunately the thing taken could not be assessed in terms of its peculiar value to the plaintiff; nor could it be assessed in terms of its peculiar value to the defendant, for the latter was not in a position to turn it to his advantage.[5] This situation differs substantially from the case we have supposed where the defendant is in a position to utilize the unlawfully gained information for the purpose of exploiting his own property.

It strikes the writer that there is only one fair procedure in the case where the defendant has received information which exceeds in value the market price of the permit. He should be forced to disgorge the *value to him* of the thing he has appropriated. Through his misconduct he has gained knowledge of facts from which he stands to secure a substantial profit. The value of this information for his purposes should determine the amount of recovery. The fact that this is difficult to assess should not deter the courts from enforcing restitution on that basis. The market value of the privilege affords some evidence of the extent of the unjust enrichment, but it should not set the outside limit of recovery. The extent of the defendant's holdings, the extensiveness of the profits foreshadowed by the survey, the increase in market value of the defendant's property —all these are factors which should be considered. The problem of assessment here is scarcely any more difficult than the problem of placing a value upon a business idea which has been wrongfully appropriated.[6] Nor should the amount to which the plain-

5. If he had preserved the secrecy of his findings he would have been in a position to make a profitable use thereof in negotiations for the purchase of the surrounding property. According to the facts, however, he made an open disclosure. Such other advantages as the defendant may have gained (in the sense that he got what he wanted) are unsusceptible of evaluation.

6. Compare Liggett and Myers Co. v. Meyers, 101 Ind. App. 240, 194 N. E. 206 (1935) (advertising idea); Healey v. R. H. Macy & Co., 251 App.

tiff is entitled be affected by the fact that the defendant's appropriation has done the plaintiff no "harm" and, in fact, has enhanced the value of his property. In cases of wrongful appriation, the value to the defendant of the thing acquired—not the out-of-pocket loss to the plaintiff—determines the amount of recovery.[7]

The problem becomes even more difficult where, as in the *Angelloz* case, the trespassing defendant discovers that production of oil from the property is not feasible. It is clear that the defendant does not enjoy any increase in his present or potential assets when he acquires information to the effect that his own land cannot produce the profits which he had hoped for. Nevertheless, the facts which he has learned may well save him the expense and trouble of further fruitless drilling. There is no reason why information which enables the defendant to effect a definite saving should not be regarded as an "enrichment" to that extent.[8] As an abstract proposition it appears fair that the plaintiff should be entitled to whatever saving the defendant can make by reason of this tortiously acquired information.

It is difficult, however, to understand how such a theory can be administered. The difficulties in attempting to evaluate the defendant's saving appear to be insurmountable, for there is no way of knowing at what later time the defendant might have received the same information through other sources, nor can we estimate how vigorously he would have prosecuted his drilling enterprise in the meanwhile. It is noteworthy that the plaintiff did not urge this theory upon the court. His action is clearly not one for restitution.

The plaintiff's chief claim of injury was the loss of the speculative value of his land when the defendant let the cat out of the sack. The wrong complained of was the impairment

Div. 440, 297 N. Y. Supp. 165 (1937) (Christmas slogans). The amount of recovery in these cases was $9,000 and $2,500, respectively. Comment (1941) 4 LOUISIANA LAW REVIEW 118.

7. A. L. I., Restatement of Restitution (1937) § 151, comment *b*. In Edwards v. Lee's Adm'r, 265 Ky. 418, 96 S. W. (2d) 1028 (1936), noted in (1937) 37 Col. L. Rev. 503, plaintiff and defendant owned adjoining tracts of land which were over the Great Onyx Cave. The only entrance to the cave was over defendant's property. Defendant opened the entire cave to tourists and received substantial profits from admission charges. Plaintiff sued and was allowed a pro rata share of the net profits despite the fact that he could not have utilized the cave himself and the defendant's trespass in no way injured his land. This case marks an advance over the earlier English case, Phillips v. Homfray, 24 Ch. D. (1883).

8. A. L. I., Restatement of Restitution (1937) § 1, comment *b*.

of a business relationship, namely the plaintiff's access to an advantageous market. He was deprived of what is now seen as a naked speculation which had no foundation in fact. Hence the court must first determine whether this interest is entitled at all to legal protection.

Once it has been determined that the interest is one which under some circumstances may be recognized by the courts, a second inquiry remains: Is the interest protected against the kind of wrongdoing that the defendant engaged in?[9]

The first question can be answered without too much difficulty. Values that depend upon speculation are frequently protected by the courts even though it is known at the time of the trial that the speculation was without warrant. The types of action in which this question arises are varied. A close analogy is afforded by a New York case, *Smith v. Griffith.*[10] The plaintiff in that case sued for the value of certain mulberry trees which had been lost through the defendant's negligence. He was allowed to recover the value of the trees at the time of their destruction, despite the defendant's insistence that the market price had been inflated by a current belief that the trees might be suitable for the cultivation of silkworms—a fact which had been disproved at the time of the trial.

Speculative interests are uniformly protected as a valid ingredient of "market value." The development of our natural resources would not have been possible had it not been for the pioneer who envisioned the wilderness in terms of its future possibilities and was willing to "take a chance." This has been particularly true of the development of oil properties. The capital for the prosecution of oil enterprises has come largely from the investor who has been willing to speculate.

The argument has been advanced, however, that once the court can be certain that the speculation will lead to disaster for some ultimate purchaser, it should adopt a different position. The plaintiff, it is said, has been deprived only of an opportunity to transfer a recognized loss onto the shoulders of someone else who is equally innocent, and this is not a claim the law should

9. A more casual approach to the problem would be to ask whether the plaintiff's claim is protected by law and, if so, was the defendant's trespass the proximate cause of the loss of speculative profits? This, however, tends to obscure rather than to clarify the real issue. Green, Rationale of Proximate Cause (1927) c. 1.

10. 3 Hill 333 (N. Y. 1842). See Note (1926) 11 Corn. L. Q. 416, 418.

recognize.[11] But if the plaintiff's interest is to be judged as of the time of the wrongdoing, this argument fails. Prior to the defendant's misconduct the plaintiff claimed only the privilege of taking a chance. Courts have not hesitated to enforce contracts merely because the speculative element has since turned to the disadvantage of the purchaser. By the same token, there is no reason why a seller's access to a speculative market should be denied protection on the sole ground that any contract which might have resulted therefrom would have brought a similar disadvantage to the other contracting party. If a speculative contract is worthy of legal protection, the access to the speculative market should be correspondingly protected.

Although we conclude that the plaintiff's claim is entitled to legal protection against *some* wrongs, it does not follow that it should be protected against the specific type of misconduct of which the defendant was guilty. This latter is a more difficult question.

What wrongs did the defendant commit? In the first place it is conceded that he trespassed upon the plaintiff's land and that he appropriated a valuable privilege of exploration. As we have seen, damages should be allowed for the trespass; but we add nothing to the argument by concluding that the loss of speculative profits was proximately caused by the wrongful entry and that it is merely a matter in aggravation of the trespass. This entirely begs the issue. It is possible for the court to say that the loss of speculative profits *is* a legally recognized consequence of the trespass; on the other hand, it is equally possible for the court to say that the loss of speculative profits is *not* such a consequence. Generalities of this sort may assist the court in explaining its conclusion in lawyers' language; they do not, however, afford any assurance that the conclusion is a sound one.[12]

Some insight into the problem is gained by recalling that the immediate cause of the injury was the disclosure of damaging information by the defendant. If the latter had preserved the secrecy of his findings, the speculative value of the plaintiff's land would not have disappeared.

Speculative values are not protected against the dissemination of truths which were *honestly* obtained. If, for example,

11. Comments (1927) 36 Yale L. J. 1167, 1180; (1934) 48 Harv. L. Rev. 485, 486.

12. See note 8, supra.

the defendant had discovered through its own lawful oil operations that the plaintiff's land was not productive, it would have been free to broadcast the news. Is this privilege lost by the fact that the information was unlawfully acquired? This appears to be the real problem of the case.[13]

Normally there is an interest in preserving the right to make a free and full disclosure of the truth. For this reason, truth is regarded as an absolute defense to an action for defamation.[14] But this policy is subject to certain limitations. An employee or a competitor, for example, is not privileged to use or disclose information concerning trade secrets which he has gained through a breach of confidence or by other unlawful means.[15] Similarly, the International News Service was denied the right to publish news acquired by reading the bulletin boards of competing newspapers.[16]

These situations can be distinguished from the instant case by the fact that they involve wrongs between competitors,[17] whereas here there was no competition between plaintiff and defendant. What amounts to a tort on the competitive level may not be regarded as wrongful between strangers.[18] Further-

13. In treating the defendant's wrong as a disclosure of damaging information acquired through unlawful conduct, several complications arise. What, for example, should be done where the defendant trespasses, publicly digs a dry well, but says nothing about it? It appears that here the problem is essentially the same. The process of drilling involves assertive conduct and the defendant should not escape liability in an otherwise appropriate case on the ground that he did not make an intentional oral disclosure of the facts. A more difficult problem arises when the defendant trespasses in making a geophysical survey, preserves the secrecy of his findings, but his subsequent cessation of drilling on his own land leads others to believe that the results of his survey were negative.

14. Prosser, The Law of Torts (1941) § 95. Some states have statutory provisions requiring a showing of good motive and justifiable ends. However the motive of the publication in the present case is sufficiently innocent to meet this requirement. Truth is likewise a defense to an action for disparagement of title or quality. For this reason, the trial court's reference to defendant's wrong as a "disparagement of mineral quality" [Angelloz v. Humble Oil & Refining Co., 196 La. 604, 608, 199 So. 656, 660 (1941)] is difficult to support.

15. Notes (1928) 42 Harv. L. Rev. 254, (1919) 19 Col. L. Rev. 233.

16. International News Service v. The Associated Press, 248 U. S. 215, 39 S. Ct. 68, 63 L. Ed. 211 (1918), noted in (1919) 13 Ill. L. Rev. 708 and (1919) 28 Yale L. J. 387. For piracy of news by radio broadcasting station see Associated Press v. KVOS, 80 F. (2d) 575 (C. C. A. 9th, 1935), noted in (1935) 44 Yale L. J. 877, reversed on jurisdictional grounds, 299 U. S. 269, 57 S. Ct. 197, 81 L.Ed. 183 (1936).

17. But see Note (1928) 42 Harv. L. Rev. 254, in which the writer expresses doubt as to whether unfair competition is the basis of the trade secret decisions.

18. Callman, What is Unfair Competition? (1940) 28 Geo. L. J. 585, 592 et seq.

more, the individual who purloins a trade secret, a customer's list, a business method, or a piece of news is generally regarded as an *appropriator.* It may well be argued that there is no appropriation in the instant case other than that discussed earlier in this comment; the plaintiff's loss in the value of his property is not the defendant's gain. Nevertheless, the unfair competition situations constitute a class of cases where the law's interest in preserving ethical standards of conduct has been greater than its interest in encouraging a publication of the truth.

Another class of cases deserves special mention. The imperfectly recognized right of privacy involves a policy of delimiting the privilege of publishing truthful facts.[19] Here again, however, the analogy to the present situation is by no means perfect. Those courts that have recognized an interest in the right of privacy have protected it against the publication of honestly acquired facts, as well as facts which were gained through tortious conduct. Furthermore, the protection afforded under the right of privacy is a protection of the personality—the human claim to be left alone—, whereas in the present case the plaintiff's interest is in the profits to be gained from a commercial venture. The fact remains, however, that in enforcing a right of privacy the courts have again recognized that some social interests are more important in the eyes of the law than the privilege to broadcast the truth.

A broad doctrine denying recovery in cases such as the instant one would be productive of unfortunate results. Oil prospectors would thereby be encouraged to make clandestine entry upon the land of others, being liable only for the reasonable value of any information gained which would produce a profit, and leaving the landowner to suffer the loss if the information is negative in character.

On the other hand, an unlimited policy allowing recovery for speculative profits lost by reason of the dissemination of truthful information acquired through trespass would produce equally unfortunate results. The interest of the law in encouraging the free publication of truthful facts is a strong one, and although it may be subordinated to other claims in appropriate

19. Brandeis and Warren, The Right to Privacy (1890) 4 Harv. L. Rev. 193; Green, The Right of Privacy (1932) 27 Ill. L. Rev. 237. This right has been recognized in Louisiana. Schulman v. Whitaker, 117 La. 704, 42 So. 227 (1906).

cases, it should be limited only to the extent necessary to protect a particular claim of greater importance.

The problem is essentially one of striking a balance between two conflicting ideals. Hence the writer suggests that the court should place no limitation upon this right except such as may be necessary in order to discourage practices which are consciously unethical. For this reason a prospector who enters another's land inadvertently, through mistake, or in bona fide assertion of a privilege should receive different treatment from the deliberate trespasser. Only the latter should be held for the loss of speculative profits.

In this respect the *Angelloz* case presents an interesting problem. The court found that the defendant entered "through lack of proper prudence, diligence and skill on the part of defendant's employees engaged in the geophysical survey."[20] If the solution suggested above is correct, how should the court regard the dissemination of injurious truths which were learned by means of *unintentional* but *unreasonable* conduct?

An analogous problem is found in the law relative to slander of title. If *A* publicly asserts ownership of *B's* land, thereby injuring the market value of the latter's title, he is not liable for the falsity of his statement, provided that his claim is asserted under a genuine belief that the disparaging words are true.[21] This is because the only way in which such a claimant can protect what he believes to be his rights is through publication. Even here, however, some courts (probably a minority) require that there be reasonable grounds for the defendant's erroneous belief—simple honesty is not enough.[22] The same policy that requires reasonable care on the part of the defendant where he is acting solely for his own protection applies with much greater force where, as in the *Angelloz* case, the defendant is acting gratuitously without any legitimate interest to protect.

On the other hand, it can be argued that the courts should limit the publishing of useful and truthful information only to the extent necessary in order to discourage unethical practices and to warn all potential wrongdoers of the consequences with which they may be faced. By holding the merely negligent trespasser the courts would extend liability farther than is neces-

20. Angelloz v. Humble Oil & Refining Co., 196 La. 604, 608, 199 So. 656, 658 (1940).
21. Prosser, op. cit. supra note 12, at § 106.
22. Id. at 1047.

sary to attain this objective. It is doubtful that a warning to the careless would be of much avail. In this respect the soundness of the conclusion in the *Angelloz* case is open to question.

By allowing recovery in the instant case the court has in effect recognized a new tort. The same problem has, to the writer's knowledge, arisen only twice before. The Texas Commission of Appeals allowed recovery under similar circumstances, where the entry was unintentional and was not even regarded as negligent.[23] This decision was severely criticized by Dean Leon Green.[24] The question arose later in Wyoming. The supreme court of that state denied recovery, relying largely upon Dean Green's commentary.[25] The *Angelloz* case has now placed the "weight of authority" in favor of recovery.

How far can the doctrine be extended? Suppose that *A*, *B*, and *C* own adjoining tracts which are all reputed to be over a productive oil dome. *A* trespasses upon *B's* land and makes tests which establish that the production of oil is not feasible. Can *C*, who loses the speculative value of his property by reason of *A's* statement, recover on the ground that the information was obtained by methods which were illegal as against *B*? If the object of recovery is to discourage unethical practices, it can be argued that any person injured should be allowed recovery. On the other hand, the rule that *A* violated was not designed for *C's* protection; the conduct was not wrongful as to him. The writer suggests that this latter is the more tenable view.

It is clear that if the damaging information revealed by the defendant was totally unconnected with the trespass, recovery should be denied. If, in the instant case, the defendant had concluded from lawful operations upon its own land that the production of oil from the plaintiff's property was not feasible, it doubtless would have been free to say so. Is this privilege lost when the defendant seeks to confirm its conclusion by a test, and trespasses in so doing?

Several variations of this problem are likely to arise. Geophysical surveys employing the torsion balance system require a

23. Humble Oil and Refining Co. v. Kishi, 276 S. W. 190 (Tex. Comm. App. 1925), modifying and affirming 261 S. W. 228 (Tex. Civ. App. 1924), noted in (1926) 11 Corn. L. Q. 416. See comment, note 24, infra.

24. Green, What Protection has a Landowner Against a Trespass Which merely Destroys the Speculative Value of his Property? (1925) 4 Tex. L. Rev. 215.

25. Martel v. Hall Oil Co., 36 Wyo. 166, 253 Pac. 862, 52 A. L. R. 91 (1927). The *Martel* case and the *Kishi* case are jointly noted in (1927) 36 Yale L. J. 1167, (1934) 48 Harv. L. Rev. 485.

large number of stations, usually running into the hundreds. The effect of adding stations is merely to increase the dependability of the test. It is fair to assume that the four stations placed upon *Angelloz'* property constituted only a small fractional part of the total number of stations employed.[26] It follows that even if the defendant had not established these four stations, he still probably would have acquired sufficient information from the remaining stations to enable him to conclude that drilling operations were not feasible. Is he to be precluded from publishing this conclusion by reason of the fact that four illegally established stations played some part in confirming the result of the test?

It has frequently been said that a defendant should not be held responsible for a consequence which would have occurred irrespective of his wrongdoing.[27] This position, however, is open to serious dispute in cases where, as here, several active factors combine to produce a single injury.[28] In the present case each station played a part in making the final conclusion possible. It appears that all the stations were equally important, even though any one, or possibly more, of them might have been omitted without substantially affecting the result.

Even though we are prepared to conclude that the use of a single station established by trespass is a cause-in-fact of the plaintiff's loss, we do not thereby solve the problem. Something more than causation is involved. In determining causal relationship it is assumed at the outset that the defendant's conduct is wrongful. This assumption, however, cannot be made in the present case. The statement that injured the plaintiff was a truthful one; hence it was permissible or privileged unless it was so tainted by the defendant's previous wrongdoing that it lost its originally

26. See, for example, Thomas v. Texas Co., 12 S. W. (2d) 597 (Tex. Civ. App. 1928), where there was a trespass in establishing 2 of 153 stations.

27. A. L. I., Restatement of Torts (1934) § 432 (1); Prosser, op. cit. supra note 13, at § 46.

28. It is generally conceded that where two causes concur to produce a single injury and either cause would have been sufficient operating alone to produce the result, each may be regarded as a responsible cause. A. L. I., Restatement of Torts (1934) § 432 (2); Prosser, op. cit. supra note 13, at 323, § 46. In the present case, the four wrongfully established stations could not alone have produced the result. However, if we conclude that this prevents the establishment of the four stations from being regarded as a substantial cause, we would be forced to the absurd conclusion that a defendant could establish four trespassing stations on each of twenty-five tracts of land owned by as many different persons and escape liability entirely, although every station was established wrongfully! A somewhat similar situation is suggested in Prosser, op. cit. supra note 13, at 323, n. 62.

privileged character. The question, then, upon final analysis is as to how far the illegally gained information must enter into the statement in order to make it unsusceptible of publication. This is a matter of social engineering. The court again must weigh the defendant's claim to make a free disclosure of the truth, against the law's interest in preserving ethical conduct. The conflicting interests involved are the same as those already considered. This time, however, they are weighed in the light of the particular facts before the court, and the balance is made upon a keener edge, namely, the edge of quantity.

There obviously can be no pat solution to this last problem suggested. All that legal theory can do is to afford a means of posing the problem and to offer a comfortable medium for expressing whatever conclusion the court may reach in a given controversy. To this end, nothing can be found more adaptable than the "substantial factor" formula: Was the employment of the illegally established stations a substantial factor in enabling the defendant to arrive at the conclusion which he made public? The "substantial factor" test may likely be used twice in the same controversy, for it may be necessary to inquire whether or not the defendant's statement was a substantial factor in producing the decline in market value of which the plaintiff complains. In the latter instance there is a genuine problem of causal sequence.[29]

WEX S. MALONE*

THE RESURRECTION AND CONSTITUTIONALITY OF A LIBERAL CRIMINAL VENUE PROVISION

Under the Louisiana constitution, the trial for a crime must take place in the parish where the offense was committed.[1] This provision presents no difficulty when an offense is completed within a single parish. However, modern crime has little or no respect for parish lines. An offense may be begun in one parish, partly executed in another, and completed in a third. In what *one* parish was the crime committed? In attempting to solve such legal riddles, the courts are often forced to rely on fiction and

29. Recovery was denied on this ground in Thomas v. Texas Co., 12 S. W. (2d) 597 (Tex. Civ. App. 1928).

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1. La. Const. of 1921, Art. I, § 9.