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# Encroaching Walls - Balancing Equities

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It should also be noted that the Negligent Homicide Article[25] in the new Criminal Code is broader than the prior involuntary homicide statute in that it covers *all* negligent killings and thus will include homicides caused by the grossly negligent handling of a firearm or poison. It also follows a sound rule enunciated in the old involuntary homicide statute by expressly providing that "the violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence."[26] The congruence of the present case and the new Louisiana Criminal Code creates a supposition that there will be no further lengthy disputes about the elements of criminal negligence or of negligent homicide in Louisiana. For other jurisdictions, whose courts have been in utter confusion as to the interpretations of the heterogeneous terms and language of their negligent homicide statutes, it is suggested that they follow the clear distinction now set out in the present case and so ably expressed in the Louisiana Criminal Code.

*J. J. C.*

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ENCROACHING WALLS—BALANCING EQUITIES—Plaintiff and defendant acquired adjacent lots from a common vendor. Defendant constructed a brick building on the property purchased by him. Afterwards plaintiff decided to erect a building on his lot. When a survey was made it was ascertained that the entire northern wall of defendant's building, which was sixteen inches in width, was located on plaintiff's land. Plaintiff sued to have the boundary line established in accordance with a description of the property and to have the encroaching wall removed. The court found that the defendant had been fully cognizant, previous to the erection of his building, that such building would encroach on plaintiff's property. *Held,* under the provisions of Article 508 of the Civil Code,[1] plaintiff had a clear and legal right to demand the

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25. Art. 32, La. Crim. Code.

26. La. Act 64 of 1930, § 4 [Dart's Crim. Stats. (1932) § 1050] provides: "In all prosecutions under this Act or under the manslaughter law, as it now exists, whether or not the defendant is guilty of gross negligence or gross recklessness shall be a question of fact for the jury, and shall not depend upon the rate of speed fixed by law for operating such vehicle."

1. Art 508, La. Civil Code of 1870: "When plantations, constructions and works have been made by a third person, and with such person's own materials, the owner of the soil has a right to keep them or to compel this person to take away or demolish the same.

"If the owner requires the demolition of such works, they shall be demolished at the expense of the person who erected them, without any com-

demolition and removal from his premises of the encroaching wall.[2] *Esnard v. Cangelosi,* 8 So. (2d) 673 (La. 1942).

Article 508, La. Civil Code of 1870, clearly contemplates that when improvements are made by a person who is not the owner of the land, such improvements may eventually become subject to the ownership of the land. The article contemplates two different situations. If the trespasser was a possessor in good faith,[3] the owner of the land is compelled to keep the improvements and must either reimburse the constructor for the value of the materials and the price of workmanship, or a sum equal to the enhanced value of the soil.[4] On the other hand, if the person who made the improvements was not a possessor in good faith, "the owner of the soil has a right to keep them or to compel this person to take away or demolish the same."[5] The provisions of this article have been literally applied by the Louisiana courts.[6] It is interesting to notice that these provisions were taken verbatim from the French Civil Code.[7]

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pensation; such person may even be sentenced to pay damages, if the case require it, for the prejudice which the owner of the soil may have sustained.

"If the owner keeps the works, he owes the owner of the materials nothing but the reimbursement of their value and of the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby.

"Nevertheless, if the plantations, edifices or works have been made by a third person evicted, but not sentenced to make restitution of the fruits, because such person possessed bona fide, the owner shall not have a right to demand the demolition of the works, plantations or edifices, but he shall have his choice either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil."

2. The case reaffirms the position taken in Barker v. Houssiere-Latreille Oil Co., 160 La. 52, 106 So. 672 (1925), noted in (1926) 39 Harv. L. Rev. 1098.

3. Art. 503, La. Civil Code of 1870: "He is bona fide possessor who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of. He ceases to be a bona fide possessor from the moment these defects are made known to him, or are declared to him by a suit instituted for the recovery of the thing by the owner."

4. Supra note 1.

5. Ibid.

6. McCastle v. Chaney, 28 La. Ann. 720 (1876); Voiers v. Atkins Bros., 113 La. 303, 36 So. 974 (1903); Page v. Kidd, 121 La. 1, 46 So. 35 (1908); Quaker Realty Co. v. Bradbury, 123 La. 20, 48 So. 570 (1909); Barker v. Houssiere-Latreille Oil Co., 160 La. 52, 106 So. 672 (1925); Carol Lumber Co. v. Davis, 133 La. 416, 63 So. 93 (1913); Larido v. Perkins, 132 La. 660, 61 So. 728 (1913); Ruth v. Buwe, 185 La. 204, 168 So. 776 (1936); Venta v. Ferrara, 195 La. 334, 196 So. 550 (1940), discussed in The Works of the Louisiana Supreme Court for the 1939-1940 Term (1941) 3 LOUISIANA LAW REVIEW 267, 280.

7. In Voiers v. Atkins Bros., 113 La. 303, 339, 36 So. 974, 988 (1903), the court said: "Article 508 is taken verbatim from the Code Napoleon, Art. 555. As originally drafted and reported, this article did not contain the fourth paragraph; so that the possessor in good faith, like him in bad faith, had no other right than that of removing his materials, etc., in case the owner elected not to keep them. In other words, he was not entitled to recover

In the instant case the defendant claimed that the well-recognized theory of "Balancing the Equities in Trespass Cases"[8] should be applied, and that under such doctrine the plaintiff's prayer to have the encroaching wall demolished should be dismissed. The court in emphatic terms refused to recognize such a doctrine.[9] This theory of "Balancing the Equities in Trespass Cases" has been generally accepted in common law states in cases where slight encroachment by buildings has been created by accident or mistake, i.e., when the defendant was in good faith.[10] In such cases, the court will refuse to order the defendant to remove the encroaching part of his building, where it clearly appears that the plaintiff can be adequately compensated in damages, and where the loss which will occur to the defendant if an injunction were granted is greatly disproportionate to the benefits which the plaintiff will receive. The determination of this matter naturally rests in the sound discretion of the court.

The recognition of this doctrine has been objected to on the ground that its application amounts to a sort of private eminent domain, with the plaintiff being compelled to convey the part of the land encroached upon to the defendant at a price which is determined by the court in the amount of damages which it allows. It is argued that in the exercise of his legal freedom the plaintiff should be permitted to demand whatever price he de-

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for the enhanced value of the property. In the course of the discussion before the tribunate, it was amended by the addition of the fourth paragraph. The consideration which led to this amendment was the following:

> 'The law attaches so much favor to the possessor in good faith that it permits him to retain the fruits he has received; it would then be repugnant to principle to treat him with the same severity as the individual whose possession is tainted with bad faith. He ought not to lose his expenses. To that end, the tribunate proposes to compel the proprietor to pay him, either the price of his materials and the wages of the workmen, or the enhanced value of the soil.'

See Discussions, Civil Code, Art. 555. Also Fenet, same article.

"Thus, it is seen, the article of the Code Napoleon was adopted with the distinct understanding that the possessor in bad faith would have no other right than to remove his materials in case the owner elected not to keep them; that he would not be entitled to the enhanced value of the soil. The article will be read in vain to find support for a claim on his part to the enhanced value of the soil."

8. Walsh, A Treatise on Equity (1930) 55, 284.

9. The language used by the court follows: "We find no warrant to introduce into the jurisprudence of this State the doctrine of 'Balancing the Equities in Trespass Cases,' where, as in this case, under the provisions of Article 508 of the Civil Code the plaintiff has a clear and legal right to demand the demolition and removal from his premises of the encroaching wall."

10. Botsford v. Wallace, 72 Conn. 195, 44 Atl. 10 (1899); Hunter v. Carrol, 64 N.H. 572, 15 Atl. 17 (1888); Crocker v. Manhattan Life Ins. Co., 61 App. Div. 226, 70 N. Y. Supp. 492 (1901); Goldbacher v. Eggers, 38 Misc. Rep. 36, 76 N. Y. Supp. 881 (1902).

sires for the strip of land. Such objection lacks merit. The application of this doctrine merely amounts to a refusal to grant an injunction in a case where to allow it would operate as a very severe penalty for an unintentional trespass, and where the purposes of justice and equity can be much better served by allowing the plaintiff a recovery in damages. At the same time, by allowing damages for the full value of the property appropriated, equity avoids a multiplicity of suits for the continuing trespass.

Upon the facts of the instant case, a mandatory injunction requiring removal of the wall would not have been granted in common law jurisdictions, for the courts have never balanced equities in cases in which it was found as a matter of fact that the defendant was in bad faith.[11]

In Louisiana the fate of the bad faith encroacher is even more certain. On the basis of Article 508 of the Civil Code,[12] and the decision in *Barker v. Houssiere-Latreille Oil Company*,[13] it is definitely settled that our courts are not to apply the doctrine of "Balancing the Equities" in cases of encroaching walls when the defendant is in bad faith. In fact, in view of the express language of the above code article, the courts of this state are extremely limited in the use of their discretion in the solution of this problem presented by encroaching walls.

It is interesting, however, to notice that the courts of Louisiana have "balanced the equities" in some other types of cases. In *Adams v. Town of Ruston*,[14] the plaintiff complained that the defendant had made the natural servitude of drainage more burdensome by flowing wash water emptied from the town swimming pool over the plaintiff's land.[15] The court found that in fact the defendant's acts had made the servitude more burdensome on the plaintiff's land, but it refused to grant the injunction prayed for, maintaining that the granting of an injunction was

11. Tucker v. Howard, 128 Mass. 361 (1880); Curtis Mfg. Co. v. Spencer Wire Co., 203 Mass. 448, 89 N. E. 534 (1909); Kershishian v. Johnson, 210 Mass. 135, 96 N.E. 56 (1911); Stowers v. Gilbert, 156 N.Y. 600, 51 N.E. 282 (1898).

12. Supra note 1.

13. Supra note 2.

14. 194 La. 403, 193 So. 688 (1940).

15. Art. 660, La. Civil Code of 1870: "It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude.

"The proprietor below is not at liberty to raise any dam, or to make any other work, to prevent this running of the water.

"The proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burdensome."

discretionary and that before granting it, the court must balance the respective interests involved. This case can be readily distinguished from the encroaching wall cases. While the remedy that the owner of the land has against the possessor in bad faith is fully set out in Article 508 of the Civil Code,[16] Article 660[17] does not provide the remedy that the owner of the estate below has against the proprietor of the estate above who renders the natural servitude more burdensome. Again, in *Young v. International Paper Comapny*[18] the court refused to enjoin the defendant from polluting a certain stream, when the evidence showed that the plaintiff could be properly compensated in damages and that the granting of an injunction would subject the defendant to great expenses, disproportionate to the rather insignificant benefits which the plaintiff would receive. From these cases it may be concluded that the Louisiana courts will be ready to "balance the equities" in cases that demand it and where the rights of the respective parties are not fully covered by express provisions of the Civil Code.

*R.R.A.*

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INDUCING BREACH OF CONTRACT—DAMAGES—Plaintiff, a member of the Hospitality and Service Bureau of New Orleans which brought customers from city newcomers to clients of the organization, filed an action against a third party defendant for inducing her co-partner to breach her contract of partnership with plaintiff. The court held for the defendant saying, "It is now well settled that one who is not a party to a contract is not liable in damages to one of the parties to the contract for inducing the other party to breach the contract."[1] *Cust v. Item Company,* 8 So. (2d) 361 (La. 1942).

At common law, protection is given the interest of an individual in his contractual relations and in the fulfilment thereof,

16. Supra note 1.
17. Supra note 15.
18. 179 La. 803, 155 So. 231 (1934).

1. The only loss alleged to have resulted *directly* from the breach was the loss of six customers whose patronage was said to have been worth $105.00 a month. The court said that all other items of damage (certain traveling expenses in returning to rearrange the business, living expenses while in New Orleans, and also certain medical expenses incurred in treating her illness which she alleges was caused by the breach) would be too remote to justify a recovery by the plaintiff, even if the law of Louisiana permitted a party to the contract to recover damages from a third party for his inducing the other party to breach the contract.