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heightened awareness of the different areas in which variation is possible; the provisions recommended above must be understood in this manner, or they cannot be understood at all.

Joseph E. LeBlanc, Jr.

THE POSSESSOR'S RIGHT TO COMPENSATION*

A possessor of land is almost certain to incur some expense during his possession in an effort to improve and preserve the land. The land may be cleared and prepared for habitation and cultivation; ditches may be dug; repairs and additions may be made; or completely new structures may be erected. The possessor may pay the taxes on the land and obtain insurance to protect his investment. If the possessor is subsequently evicted by one who proves to be the rightful owner, problems arise when the possessor claims compensation for some or all of his improvements and expenses.

At present some uncertainty exists as to exactly what improvements and expenses are subject to compensation and under what circumstances compensation should be allowed. The purpose of this Comment is to examine and determine the rights of the possessor who has been evicted by the rightful owner\(^1\) to claim reimbursement for his improvements and expenses under the provisions of articles 508, 2314, and 3453 of the Louisiana Civil Code. These articles specifically apply to possessors evicted through judgments obtained in possessory\(^2\) and petitory actions\(^3\). The discussion will, however, touch upon other articles which allow possessors evicted through other types of action (such as collation in kind,\(^4\) warranty,\(^5\) and lesion beyond moiety\(^6\)) to recover similar expenses. Although the good or bad faith of the possessor\(^7\) will bear upon his right to recover, no detailed discussion of these elements will be undertaken. Finally, no attempt will be made to examine the possessor's

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1. This discussion is limited to the rights of possessors as distinguishable from other third persons on the land, i.e., trespassers, intermeddlers, etc.
right to recover expenses incurred in the production of fruits and revenues under article 501 of the Civil Code.

Legislative Scheme

The Civil Code clearly distinguishes the rights of possessors in good faith and possessors in bad faith to seek compensation for improvements and reimbursement for expenses. The Code defines a possessor in good faith as one who has just reason to believe himself master of the property which he possesses, although it may in fact belong to another. A possessor in bad faith is defined as one who possesses as master with knowledge that he has no valid title to the property.

The possessor in good faith is entitled to seek compensation for improvements constructed during the period of his possession under the provisions of article 508 of the Code which falls within the general provisions dealing with accession. Accession is a mode of acquiring ownership whereby the owner of the principal thing is deemed to become the owner of whatever is produced by or becomes incorporated with the principal thing. Where immovable property is involved, a general, although rebuttable, presumption is established that all constructions, plantations, and works made on or within the soil have been

8. This topic is to be the subject of a forthcoming Comment in the Louisiana Law Review.
11. La. Civ. Code art. 508:
   "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 compensation; such persons 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 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."
placed there by the real owner at his own expense. Complications, however, arise in two situations provided for by the Code: (1) where the rightful owner of the land builds some improvement with the materials of another, and (2) where one other than the true owner has improved the estate using his own materials and labor. We are concerned with the possessor's right to compensation for improvements in the latter situation. The basis of this right is the equitable principle of unjust enrichment; that is, the landowner should not be able to retain such improvements for his own benefit without compensating the ousted possessor.

The possessor in good faith has the right to compensation under article 508 for those improvements constructed by him prior to judicial demand. At the moment of judicial demand, the character of possession changes to bad faith by operation of law, and the compensation provisions are no longer applicable. The measure of recovery is set at the price of materials and workmanship or the enhanced value of the soil, at the option of the landowner. Recovery is limited to those improvements which are subject to accession, i.e., something new built upon the land.

15. La. Civ. Code art. 507: "If the owner of the soil has made constructions, plantations or works thereon, with materials which do not belong to him, he has a right to keep the same, whether he has made 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." See Comment, 28 La. L. Rev. 584 (1968).
17. Pearce v. Frantum, 16 La. 414, 421 (1840).
18. Possession ceases to be in good faith as of the moment of judicial demand. At such time the possessor no longer has reason to believe himself rightful owner of the land. He begins to posses in bad faith and continues to do so until the time he is evicted from the land. See La. Civ. Code art. 503; see also Comment, 28 La. L. Rev. 584, 592 n. 44 (1968).

As for constructions partially completed as of the time of judicial demand, perhaps the possessor should be considered in good faith for the percentage of the improvement constructed before judicial demand, and in bad faith for that completed afterwards.

19. The price of materials and workmanship should include such incidental costs of construction as architect's fees, interim financing, licenses, and legal fees. The enhanced value of the soil is approximated at the time of judicial demand by comparing the value of the estate with and without the improvements. Cases affirming the good faith possessor's right to choose the measure of compensation have been: Ruth v. Buwe, 185 La. 204, 168 So. 776 (1936); Miller v. Shumaker, 42 La. Ann. 398, 7 So. 456 (1890); Baldwin v. Union Ins. Co., 2 Rob. 133 (La. 1842).

20. Article 508 is derived directly from article 555 of the Code Napoleon which is so limited. See 2 Aubry & Rau, Droit civil français § 204, ¶ 216 (La. St. L. Inst. transl. 1966). See also notes 38-43 infra and accompanying text.
The possessor in good faith is also entitled to reimbursement for expenses incurred in the preservation of the property during his possession under Civil Code article 2314 which falls within the general provisions dealing with quasi-contractual obligations. Recovery here is likewise based upon the equitable principle of unjust enrichment. Since the true owner of the land would have had to make such expenditures himself had he been in possession, recovery is allowed to the full extent of the expenses incurred.

The French version of article 2314 (article 2292 of the Louisiana Civil Code of 1825) granted the evicted possessor the right to reimbursement for both necessary and useful expenses. Necessary expenses are those which are indispensable for the preservation of the property. Useful expenses are those which increase the overall value of the estate, but without which the property may be preserved. Unfortunately, recovery under article 2314 has been limited to necessary expenses as a result of a mistranslation from the French version.

The evicted good faith possessor is allowed to retain the property under article 3453 of the Code until he is fully reimbursed.
reimbursed for the expenses to which he is entitled. This article falls within the provisions setting forth the rights of possessors of land, and specifically enumerates a right peculiar to possessors in good faith. Article 3453 simply implements the rights of recovery granted to the evicted good faith possessor under other articles of the Code, without granting any additional rights of recovery.

The possessor in bad faith is entitled to recover for improvements under article 508 only if the owner of the land elects to keep them for his own use. In such case, the measure of recovery is always the price of materials and workmanship. Should the owner of the land repudiate the improvements, he may compel the bad faith possessor to take away the improvements or demolish them at his own expense. He may even force him to pay damages if the property has been injured. Nevertheless, the possessor in bad faith has the same right to recover necessary expenses under article 2314 as the possessor in good faith.
faith; however, he does not enjoy the same right of retention under article 3453.

This legislative scheme corresponds to provisions of the French Civil Code which were followed closely by the Louisiana redactors. The French, in turn, relied upon principles of ancient Roman law. Article 555 of the Code Napoleon of 1804, from which article 508 of the Louisiana Civil Code was

32. See note 21 supra for the text of article 2314.
33. Article 3453 grants a right of retention only to the possessor in good faith. The possessor in bad faith is not granted a similar right under the Code. However in some cases the evicted possessor in bad faith was allowed to retain the property until reimbursed for all his expenses. See Page v. Kidd, 121 La. 1, 46 So. 35 (1908); Cloud v. Cloud, 145 So.2d 331 (La. App. 3d Cir. 1962); Levy v. Clemons, 3 So.2d 440 (La. App. 2d Cir. 1941); Gregory v. Kedley, 185 So. 105 (La. App. 2d Cir. 1938). Yet, in other cases the possessor in bad faith was expressly denied the right to retain the property from which he had been legally evicted. See Payne v. Anderson, 35 La. Ann. 977 (1883); Baldwin v. Union Ins. Co., 2 Rob. 133 (La. 1842); Ferrier v. Mossler, 2 So.2d 341 (La. App. 1st Cir. 1944). See also Comment, 28 LA. L. REV. 584, 591 n. 36 (1968).
34. The Roman law and French civil law, which preceded the Code Napoleon of 1804, distinguished between the types of expenses which were recoverable by an evicted possessor. These expenses were classified into necessary, useful, and luxurious expenses. Necessary expenses were those necessary for the preservation of the property. Useful expenses were those which, while not indispensable for the preservation of the estate, improved it and enhanced its overall value. Luxurious expenses were those expended for the pure pleasure of the possessor not enhancing the overall value of the estate. 2 AUBRY & RAU, DROIT CIVIL FRANÇAIS § 219, ¶323 (La. St. L. Inst. transl. 1966); 1 PLANIOL, CIVIL LAW TREATISE no. 2457 (La. St. L. Inst. transl. 1959); 1 A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 20, 137 (1966).
The traditional concept of classifying the kinds of expenses recoverable by an evicted possessor was subsequently incorporated into the Code Napoleon, retained in the present French Civil Code, and transferred to the Louisiana Civil Code. See LA. CIV. CODE art. 1259.
35. Article 555 of the Code NAPOLEON (1804):
"Lorsque les plantations, constructions et ouvrages ont été faits par un tiers et avec ses matériaux, le propriétaire du fonds a droit de les retenir, ou d'obliger ce tiers d'enlever.
"Si le propriétaire du fonds demande la suppression des plantations et constructions, elle est aux frais de celui qui les a faites, sans aucune indemnité pour lui; il peut même être condamné à des dommages et intérêts, s'il y a lieu, pour le préjudice que peut avoir éprouvé le propriétaire du fonds.
"Si le propriétaire préfère conserver ces plantations et constructions, il doit le remboursement de la valeur des matériaux et du prix de la main-d'œuvre, sans égard à la plus ou moins grande augmentation de valeur que le fonds a pu recevoir. Néanmoins, si les plantations, constructions et ouvrages ont été faits par un tiers évincé, qui n'aurait pas été condamné à la restitution de fruits, attendu sa bonne foi, le pro-
taken verbatim, granted the evicted possessor the right to seek compensation for those new “plantations, constructions et ouvrages” which enhanced the value of the estate. That article clearly distinguished the rights of possessors in good faith and possessors in bad faith to seek compensation for improvements. The landowner, suing a possessor in good faith in revendication, was compelled to keep the improvements and reimburse either the cost of construction or the enhanced value of the soil. The landowner, suing a possessor in bad faith, was granted the option either to force demolition of the improvements or to keep them and reimburse for the cost of their construction.

Article 555 was one of the provisions of the Code Napoleon dealing with accession. As such, the applicability of that article was limited to improvements subject to accession. The term “constructions et ouvrages” was interpreted to encompass new buildings and additions to new buildings constructed where none had stood before. The costs of maintaining, repairing, renovating, and replacing pre-existing buildings were not subject to recovery under that article. “Plantations” was interpreted to mean the planting of new trees and vegetation where none had stood before and not just the maintenance of existing orchards and forests. Improvements that were neither “constructions” nor “plantations,” but improvements to the land itself, were necessarily excluded from coverage under that article. Such improvements were not subject to accession.

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42. 2 Aubry & Rau, Droit civil français § 204, 213; § 219 (La. St. L. Inst. transl. 1959); 1 Planiol, Civil Law Treatise no. 2733 (La. St. L. Inst. transl. 1959).
Article 1381 of the Code Napoleon of 1804,\(^44\) from which article 2314 of the Louisiana Civil Code was taken verbatim, granted the evicted possessor the right to seek reimbursement for both necessary and useful expenses incurred during possession.\(^45\) Under this article the evicted possessor was allowed compensation for those improvements for which he was unable to recover under article 555 (article 508 of the Louisiana Civil Code). Repair and maintenance costs were considered as expenses necessary for the preservation of the property. Improvements not subject to accession were considered as useful expenses.\(^46\) Necessary expenses were recoverable to the full amount expended, while useful expenses were recoverable to the enhanced value of the soil.\(^47\) There was no differentiation between the rights of possessors in good and bad faith to recover under this article.\(^48\)

The general legislative scheme discussed above is modified by specific provisions of the Louisiana Civil Code which allow similar rights of compensation and reimbursement to possessors evicted through actions other than ordinary possessory or petitory actions. One dispossessed through an action for collation in kind\(^49\) is treated the same as an evicted possessor under the Code. He is entitled to proceed against his evicting coheirs

\(^{44}\) Article 1381 of the Code Napoleon of 1804: "Celui auquel la chose est restituée, doit tenir compte, même au possesseur de mauvaise foi, de toutes les dépenses nécessaires et utiles qui ont été faites pour la conservation de la chose."


\(^{49}\) The evicted possessor was not allowed recovery under the Code Napoleon for those improvements which he constructed for his own pleasure. Although the Code had no specific article setting forth such a rule, recovery was denied under general principles of law. The possessor was, however, allowed to remove his luxurious improvements where feasible without permanent damage to the property. 2 Aubry & Rau, Droit civil français § 219, 323 (La. St. L. Inst. transl. 1966); 2 Planiol, Civil Law Treatise no. 805 (La. St. L. Inst. transl. 1959). This same rule was incorporated into the Louisiana Civil Code and the subsequent jurisprudence. Luxurious expenses are defined under article 1259. Such expenses are ordinarily non-recoverable except under special circumstances. LA. CIV. CODE arts. 2510, 2598. See notes 55-56, 58-59 infra.

\(^{49}\) LA. Civ. Code arts. 1251-88.
to recover compensation for useful improvements. He is similarly entitled to reimbursement for necessary expenses incurred for the preservation of the property. Although the evicted coheir is not entitled to compensation for those improvements which were constructed purely for his own pleasure, he is allowed to remove these luxurious improvements if he can do so without permanently damaging the property.

A bona fide purchaser in possession of land, who discovers that his vendor did not have valid title, may proceed against his evictor for the recovery of compensation for improvements under article 508 and for reimbursement of expenses under article 2314. He may also proceed against his vendor to recover compensation for improvements under article 2509 of the Civil Code. The vendor remains secondarily liable under this latter article for such compensation should the evicting landowner fail to pay it.

50. LA. CIV. CODE art. 1256: “The donee who collates in kind an immovable, which has been given to him, must be reimbursed by his coheirs for the expenses which has improved the estate, in proportion to the increase of value which it has received thereby.”

Recovery for useful expenses (improvements) under this article corresponds to reimbursement for useful improvements under article 508 of the Code, where the possessor has been evicted through a possessory or petitory action. Recovery is similarly based upon the equitable principle of unjust enrichment. Article 1256 is derived directly from article 861 of the Projet of the CODE NAPOLEON of 1804. See 3 PLANIOL, CIVIL LAW TREATISE no. 2282 (LA. ST. L. INST. TRANSL. 1959).

51. LA. CIV. CODE art. 1257: “The coheirs are bound to allow to the donee the necessary expenses which he has incurred for the preservation of the estate, though they may not have augmented its value.” Cases allowing recovery under articles 1256 and 1257 have been: Succession of Czarnowski, 151 LA. 754, 92 So. 325 (1922) and Berthelot v. Fitch, 44 LA. ANN. 503, 10 So. 867 (1892).

The possessor evicted through an action for collation in kind has as his exclusive remedy compensation for improvements and expenses under articles 1256 and 1257. He may not proceed under articles 508 and 2314.

52. LA. CIV. CODE art. 1258: “As to works made on the estate for the mere pleasure of the donee, no reimbursement is due to him; he has, however, the right to take them away, if he can do it without injuring the estate, and leave things in the same situation they were at the time of the donation.”

53. LA. CIV. CODE art. 2509: “The seller is bound to reimburse, or cause to be reimbursed, to the buyer, by the person who evicts him, all the useful improvements made by him on the premises.”

54. See 2 PLANIOL, CIVIL LAW TREATISE no. 1532 (LA. ST. L. INST. TRANSL. 1959) referring to article 1634 of the CODE NAPOLEON (from which article 2509 was derived). Cases allowing recovery for useful improvements against the vendor under article 2509 have been: Juneau v. Laborde, 224 LA. 672, 70 So.2d 451 (1953); Hale v. City of New Orleans, 18 LA. ANN. 321 (1866); Coleman v. Heirs of Ballard, 13 LA. ANN. 512 (1868); Babin v. Winchester, 7 LA. 468 (1834); Willis v. Hamilton, 108 So. 355 (LA. APP. 2d CIR. 1930). See Smith, Recovery of Damages for Non-Delivery and Eviction in Louisiana—A Comparison, 17 LA. L. REV. 253, 259 (1957).
sold the land to the purchaser, then the evicted possessor may also proceed against him under article 2510 to recover all his expenses, including luxurious expenses.65

A possessor who is effectively evicted by his vendor through an action to rescind the contract of sale for lesion beyond moiety66 may proceed against his evicting vendor to recover compensation for improvements under article 508 and reimbursement of expenses under article 2314. He may also seek to recover luxurious expenses under article 2598 of the Civil Code.67 The possessor is granted the additional right under article 259968 to retain possession until fully reimbursed.

Louisiana Jurisprudence

Good Faith Possessors

Louisiana courts have always allowed the evicted possessor in good faith recovery for improvements and necessary and useful expenses. Compensation has been allowed for those improvements, subject to accession, under article 508 of the Civil Code.69 Recovery has been specifically limited to those improvements made completely on the estate.70 The courts have expressly

55. LA. CIV. CODE art. 2510: "If the seller, knowingly and dishonestly, has sold the property of another person, he shall be obliged to reimburse to the buyer all expenses, even of embellishments of luxury, that the buyer has been at improving the premises." See 2 PLANIOL, CIVIL LAW TREATISE nos. 1508(5), 1511 (La. St. L. Inst. transl. 1959) for a discussion of article 1635 of the CODE NAPOLEON from which article 2510 was derived.

56. LA. CIV. CODE art. 1259: "Expenses for mere pleasure are those which are only made of the accommodation or convenience of the owner or possessor of the estate, and which do not increase its value."

57. LA. CIV. CODE arts. 2589-2600.71

58. LA. CIV. CODE art. 2598: "The buyer is entitled to repayment for ameliorations which he has affected, although they be merely for pleasure and convenience."

59. LA. CIV. CODE art. 2599: "He may remain in possession of the thing sold until the seller has restored the price which he paid, together with his expenses."

60. The leading case allowing the possessor in good faith reimbursement for the useful improvements under art. 508 is Pearce v. Frantum, 18 La. 414 (1840). Other cases allowing recovery have been: Mereaux & Nunez v. Houck, 202 La. 820, 13 So.2d 233 (1948); Venta v. Ferrara, 195 La. 334, 196 So. 550 (1940); Lothrop v. Goudeau, 142 La. 342, 76 So. 794 (1917); Foster v. Meyers, 117 La. 216, 41 So. 551 (1906); Gibson v. Hutchins & Vaughn, 12 La. Ann. 545 (1857); Beard v. Morancy, 2 La. Ann. 347 (1847); Gregory v. Kedley, 185 So. 105 (La. App. 2d Cir. 1938); Edmiston v. Tulane Inv. Co., 9 La. App. 112, 119 So. 75 (Orl. Cir. 1928).

61. Recovery has been denied for those improvements totally or partially on the land of another. Such improvements are obviously not subject to accession. Uthoff v. Thompson, 176 La. 589, 146 So. 161 (1933); Gordon v. Pahrenberg & Penn, 26 La. Ann. 366 (1874); Morehead v. Smith, 225 So.2d 729 (La. App. 2d Cir. 1969); Sanders v. Jackson, 192 So.2d 694 (La. App. 3d Cir. 1966).
conditioned the owner's right to set compensation at the enhanced value of the soil upon the presentation of sufficient proof of such value.\textsuperscript{62} Where the owner has shown that the improvements have not enhanced the overall value of the estate, he has been allowed to keep them for his own use without compensation.\textsuperscript{63} Similarly, the owner's right to set compensation at the price of materials and workmanship has been conditioned upon the possessor's supplying proof of such costs from his own records.\textsuperscript{64} When he has failed to provide such information, the courts have set compensation at the present value of the improvements.\textsuperscript{65}

The evicted good faith possessor has generally been allowed

\textsuperscript{62} The Supreme Court of Louisiana set forth this required burden of proof in Foster v. Meyers, 117 La. 216, 41 So. 551 (1906). Other decisions employing this burden of proof have been: Venta v. Ferrara, 195 La. 334, 196 So. 550 (1940); Rousel v. Railways Realty Co., 165 La. 536, 115 So. 742 (1928); Boagni v. Staman, 136 La. 36, 66 So. 389 (1914); Durbridge v. Crowley, 44 La. Ann. 74, 10 So. 402 (1899); Hutchinson v. Jamison, 39 La. Ann. 150 (1886); Heirs of Wood v. Nichols, 33 La. Ann. 744 (1881); Rivas v. Hunstock, 2 Rob. 187 (La. 1842); Sanders v. Jackson, 192 So.2d 654 (La. App. 3d Cir. 1966); Peters v. Crawford, 199 So. 433 (La. App. 2d Cir. 1940). See Comment, 28 LA. L. REV. 584, 592 n. 40 (1968).

It must be noted that this figure is approximated as of the time of judicial demand, not as of the time of construction. Peters v. Crawford, 199 So. 433 (La. App. 2d Cir. 1940); Comment, 28 LA. L. REV. 584, 592 n. 41 (1968). In most instances, the enhanced value of the soil at the time of judicial demand will be the lesser of the amounts of remuneration. However, it must be restated that should the owner of the land wish to reimburse this figure, he must set forth sufficient proof of such a value. If not, he can only reimburse the price of materials and workmanship.

\textsuperscript{63} Some improvements do not enhance the value of the estate at all, e.g., a small fence or a single shade tree. Other improvements may have enhanced the value of the land at the time of construction, but because of depreciation or obsolescence result in no enhancement of the value of the estate at the time of judicial demand. If there has been no enhancement of the value of the estate, there can be no unjust enrichment to the owner of the land when he comes into possession after evicting the possessor in good faith. Hence, there can be no recovery under article 508. In Sanders v. Jackson, 192 So.2d 654 (La. App. 3d Cir. 1966) the court denied reimbursement for ponds and a small dam which did not enhance the value of the soil.

\textsuperscript{64} This burden of proof upon the possessor in good faith is set forth in Foster v. Meyers, 117 La. 216, 219, 41 So. 551, 552 (1906). In most cases, the possessor is able to produce receipts for materials and financial charges, etc. The problem is when the possessor himself supplied the labor involved in constructing the improvements. In such a case, he would have no record of the value of his labor. The evicted possessor must only approximate such a value.

\textsuperscript{65} Comment, 28 LA. L. REV. 584, 592 n. 43 (1968) citing Guinea Realty Co. v. Battle, 1 So.2d 153 (La. App. 2d Cir. 1941). However, this result is open to criticism. The provisions of article 508 are explicit that reimbursement shall be set at the costs of construction. In this case, the court attempted to substitute an estimate of the present value of the improvement. This is seemingly contrary to the intent of the redactors of the Code. It is submitted that the court might simply estimate the costs of constructing such an improvement at the time of actual construction.
recovery of his necessary expenses under the English version of article 2314. Reimbursement for property taxes and assessments, repairs and maintenance costs, and insurance expenses has also been approved. Insurance has been viewed as a necessity, not a luxury, as it has been held that the possessor is obligated to protect his investment. An evicted possessor has also been allowed to recover legal expenses incurred in protecting the land from the adverse claims of strangers.

The jurisprudence has been unable to rely upon the English

66. Such property taxes and assessments are necessary for the preservation of the property. Had they not been paid, the land would have been seized and sold to satisfy their payment. Dunlap v. Whitmer, 137 La. 792, 69 So. 189 (1914); Larido v. Perkins, 132 La. 660, 61 So. 728 (1913); Beaulieu v. Monin, 50 La. Ann. 732, 23 So. 937 (1898); Scott v. Scott, 42 La. Ann. 766, 7 So. 716 (1890); Litton v. Litton, 36 La. Ann. 348 (1884); Chaffe v. Farmer, 94 La. Ann. 1017 (1898); Heirs of Wood v. Nicholls, 33 La. Ann. 744 (1881); Gregory v. Kedley, 185 So. 105 (La. App. 2d Cir. 1938).

67. Jackson v. Ludeling, 98 U.S. 513 (1878); Nabors Oil and Gas Co. v. Louisiana Oil Ref. Co., 151 La. 361, 91 So. 765 (1922); Keller v. Thompson, 121 So.2d 575 (La. App. 1st Cir. 1960). In theory, at least, all expenses incurred through repairs to the property which are indispensable for its preservation should be recoverable under article 2314. The owner of the land would have had to make such repairs himself, had he been in possession. Recovery should be based upon the equitable principle of unjust enrichment. However, the courts have not awarded reimbursement for these necessary repairs in some cases. In Ferrier v. Mossler, 23 So.2d 341 (La. App. 1st Cir. 1945) the court denied recovery for certain repairs made upon the property because they were inseparable in nature. The court cited the Voters and Gibson decisions as authority, confusing article 508 with article 2314. In Brown v. Tauzin, 185 La. 86, 168 So. 502 (1938) the supreme court denied recovery for certain repairs on the theory that such repairs were so minor in nature that the owner of the land had the right to refuse them under article 508. Other cases in which recovery for repairs was denied were: Citizens' Bank of Louisiana v. Miller, 44 La. Ann. 199, 10 So. 779 (1892) and Johnson v. Mattle, 6 Orl. App. 218 (1909).


69. See 3 A. YIANNOPLOULOS, PERSONAL SERVITUDES §§ 44, 62 (1968). However, it is submitted that not all types of insurance premiums should be recoverable under article 2314. The possessor should be able to recover only those insurance premiums which were expended for the protection of the property, not those serving to protect himself or his business—e.g., certain types of fire, theft, flood, and windstorm coverage, life insurance, or business interruption insurance.

70. Under strict theory, legal expenses incurred while protecting the land from the fraudulent claims of strangers should be recoverable under article 2314. Such expenditures are certainly necessary for the preservation of the property. Had the owner been in possession, he would have had to incur these same expenses. These types of legal expenses should be recoverable in spite of the general rule in Louisiana that legal expenses are never recoverable unless under contractual agreement. The supreme court allowed recovery of these kinds of expenditures under article 2314 in the case of Litton v. Litton, 36 La. Ann. 348 (1884). Other types of legal expenses may be directly or indirectly recoverable under other provisions of the Code. Those incurred in connection with gathering fruits, producing products, or doing business upon the land are certainly within the expenses contemplated by article 501. Hence, the possessor in bad faith may offset such expenses against his accounting for fruits and revenues.
version of article 2314 to allow the good faith possessor to recover for useful expenses. As mentioned earlier, the key wording of that article in the French text has unfortunately been omitted in the English version.71 The courts have disregarded the French version of that article (article 2292 of the Louisiana Civil Code of 1825) and relied solely upon the English text.72 The courts, however, have allowed the possessor in good faith to recover useful expenses through an expanded interpretation of article 508. The result was to include within article 508 improvements not subject to accession, such as ditching and land clearing. The source of this expansion may be traced to the landmark case of *Pearce v. Frantum* where the Supreme Court of Louisiana stated in dictum:

"In respect to the right to be reimbursed for useful expenses, by which the property has been made more valuable to the owner, the Code makes little or no distinction between the possessor in good or bad faith. It would seem that the sum to be reimbursed can in no way exceed the increased value of the property."73

The court spoke as if this right existed under what was then article 500 of the Louisiana Civil Code of 1825 (predecessor of article 508); no mention was made of a right to recover useful expenses under article 2292 of the Code of 1825 (the predecessor of article 2314). Subsequent courts have interpreted

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71. The redactors of the Louisiana Civil Code adopted the French text of article 1381 of the *Code Napoleon* verbatim in drafting article 15, page 320 of the 1808 Digest (the predecessor of article 2314). Article 1381 of the *Code Napoleon* of 1804 (French) and La. Digest of 1808, bk. IV, tit. I, art. 15: "Celui auquel la chose est restituée doit tenir compte, même au possesseur de mauvaise foi, de toutes les dépenses nécessaires et utiles qui ont été faites pour la conservation de la chose." The English version of that article in the Digest of 1808 was a true translation of the original French text: "He to whom property is restored must refund to the person who possessed it, even in bad faith, all the necessary and useful expenses that have been incurred for the preservation of the property." (Emphasis added.)

However, when the Louisiana Civil Code was drafted in 1825, the redactors of that Code unintentionally omitted the key language allowing recovery for useful expenses from the English version of then article 2292. The inadvertence of this omission is evidenced by the lack of a notation of any intended change in the wording of article 2292 in the Projet of the Louisiana Civil Code of 1825 and by the unchanged French version of that article. This omission was subsequently passed on into article 2314 when the Louisiana Civil Code was again revised in 1870.

72. See note 24 supra for the text of the French version of article 2292.

Had the courts been aware of this French text, they might have recognized the error of the 1825 Code in omitting the language allowing recovery for useful expenses. Had this error been recognized and corrected, the courts might have avoided trouble in justifying recovery for useful expenses.

73. 16 La. 414, 422 (1840).
this language to mean that all useful improvements (including those not subject to accession and, hence, recoverable as useful expenses under the French version of article 2314) were subject to compensation under article 500 of the Civil Code of 1825. Moreover, some courts reached the same result by reliance upon article 3453. Consequently, as concerns the possessor in good faith, there is no difference between the jurisprudence and the legislative scheme of recovery in actual results. Presumably,

74. See Beard v. Morancy, 2 La. Ann. 347, 348 (1847) in which the Supreme Court of Louisiana stated:

"The court in that case [Pearce v. Frantum, 16 La. 414, 422 (1840)] came to the conclusion that, under the general principles of civil law, and the enactment of the laws of Spain, the party evicted was entitled to be indemnified for the useful improvements by him made on the property during the whole time of his possession. This doctrine appears to have been acquiesced in ever since. Our impression is, that the rule has been laid down too broadly; but there can be no doubt that the party evicted is entitled to be paid for necessary improvements. The improvements in this case were clearings, levees and ditches, without which the land could not have been brought into cultivation, so as to yield the rents and profits which the plaintiff now claims. These were necessary improvements. . . ."

and the enactment of the laws of Spain, the party evicted was entitled to full reimbursement for his improvements and expenses according to rights granted him under other articles in the Code (articles 508, 1256-57, 2314, 2509-10). The courts have exhibited signs of confusion in some cases where they have allowed recovery for improvements and expenses under article 5453 without mentioning articles 508 or 2314—e.g., Beaulieu v. Monin, 50 La. Ann. 732, 23 So. 937 (1898); Litton v. Litton, 36 La. Ann. 348 (1894); Davenport v. Knox, 35 La. Ann. 486 (1893); Laizer v. Generes, 10 Rob. 178 (La. 1845); Bourguignon v. Destrehan, 5 La. 115 (1833); Donaldson v. Winter, 8 Mart. (N.S.) 175 (La. 1829); Orr v. Talley, 84 So. 2d 894 (La. App. 2d Cir. 1956). However, such a theory is completely without a basis. Article 3453(2) simply allows the evicted possessor in good faith to remain upon the land until fully reimbursed for his improvements and expenses according to rights granted him under other articles in the Code (articles 508, 1256-57, 2314, 2509-10). The courts have exhibited signs of confusion in some cases where they have allowed recovery for improvements and expenses under article 5453 without mentioning articles 508 or 2314—e.g., Beaulieu v. Monin, 50 La. Ann. 732, 23 So. 937 (1898) where the court allowed the reimbursement of certain taxes under article 3453 without mentioning article 2314. In Hutchinson v. Jamison, 38 La. Ann. 150 (1886) and Edmiston v. Tulane Inv. Co., 9 La. App. 112, 119 So. 75 (Orl. Cir. 1928) the courts confused recovery of useful improvements under article 508 with recovery under article 3453.

76. There may, however, be some difference in the bases of compensation for such useful expenses under the jurisprudence and under the legislation. The measure of compensation under article 2314 is always the enhanced value of the soil attributable to the improvement. The measure of recovery under the jurisprudential expansion of article 508 is either the enhanced value of the soil or the price of materials and workmanship, at the option of the landowner. In most cases, the landowner will select reimbursement for the enhanced value of the soil; hence, there would be no difference between the measures of recovery under articles 508 and
the same results could be achieved, more naturally, by applying the French text of article 2314.

**Bad Faith Possessors**

Louisiana courts have allowed the possessor in bad faith to recover only for those improvements which the landowner has elected to keep for his own use under article 508, and for necessary expenses under the English version of article 2314. This practice contravenes the intended legislative scheme of recovery in that the evicted bad faith possessor should be allowed reimbursement for both necessary and useful expenses under article 2314. However, since there is no basis for recovery of useful expenses under the existing language in that article, the courts are faced with the perplexing task of discovering a new justification for allowing such recovery.

Although possessors in good faith have recovered useful expenses under an expanded interpretation of article 508, the courts have been unwilling to accord the evicted bad faith possessor similar treatment. *Pearce v. Frantum* did indicate that both good and bad faith possessors should have equal rights to recover useful expenses under article 508. However, the Supreme Court of Louisiana in *Gibson v. Hutchins & Vaughn* distinguished the right of the possessor in bad faith to recover compensation for improvements which were separable from the soil from his right to recover for inseparable improvements. Separable improvements are those which do not become permanently merged with the soil and remain distinguishable as individual works. Inseparable improvements are those which become permanently merged with the soil so as to lose their identity as separate works. In effect, separable improvements are constructions subject to accession, while inseparable im-

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2314. But, if the landowner should elect to set reimbursement at the price of materials and workmanship (which may be lower than the enhanced value of the soil), there may, in fact, be some difference between the measure of compensation under the jurisprudence and under the legislative scheme. In such case, the possessor will recover less under article 508 for his useful improvements than he would have under article 2314.

77. See notes 23, 44-48 supra and accompanying text.

78. See notes 71-75 supra and accompanying text.

79. 16 La. 414, 422 (1840). See note 73 supra and accompanying quote in text.


81. E.g., houses, barns, carports, office buildings, apartment houses, etc.

82. E.g., clearing, draining, filling in, or leveling the land, digging irrigation ditches and wells, building levees, building underground reservoirs, building pipelines, digging lakes, etc.
provements are useful expenditures. The supreme court in Gib-
son expressly overruled Pearce, holding that the possessor in
bad faith had no right to seek compensation for “ameliorations
inseparable from the soil” under article 500. This holding was
apparently motivated by a desire to align the Louisiana juris-
prudence on this subject with that of the common law states.
In Heirs of Wood v. Nicholls the supreme court again held that
the possessor in bad faith had no right to recover for “improve-
ments which by their nature are inseparable from the soil, such
as ditching and wells.”

The ratio decidendi behind the rule of law announced in
Gibson and Nicholls warrants further analysis. The possessor
in bad faith is entitled to claim compensation under article 508
only for those improvements that the owner of the land elects to
keep for his own use. The landowner may repudiate the im-
provements and compel the bad faith possessor to remove or
demolish them. However, if the owner makes no such election,
he is held to have tacitly accepted the improvements, whether
he wants them or not, and is required to pay compensation.
The supreme court apparently reasoned that it would be unjust
to require the owner to make an election where useful expenses,
designated as inseparable improvements, were involved. Hence,

83. Pearce v. Frantum, 16 La. 414, 422 (1840) had been interpreted
by such later cases as Beard v. Morancy, 2 La. Ann. 347, 348 (1847) to imply
that all useful improvements constructed upon the land by the possessor in
good or bad faith should be recoverable under article 500 (article 508). See
notes 73-74 supra and accompanying text.
85. Id. at 548.
87. The landowner has the option to keep the improvements or to force
removal or demolition of it. Cases reconfirming this right have been: South-
west Gas & Electric Co. v. Nowland, 164 La. 1044, 115 So. 140 (1927); Carroll
Lumber Co. v. Davis, 133 La. 416, 63 So. 93 (1913); Succession of Landry,
128 La. 335, 54 So. 870 (1911); Morehead v. Smith, 225 So.2d 729 (La. App.
2d Cir. 1969); Blocker v. Mizell, 202 So.2d 387 (La. App. 1st Cir. 1967); Peters
v. Crawford, 199 So. 433 (La. App. 2d Cir. 1940). Where the owner of the
land repudiates the improvements, the possessor in bad faith may remove
them if feasible without permanent damage to the property. Edwards v.
S. & R. Gas Co., 73 So.2d 590 (La. App. 2d Cir. 1954); Levy v. Clemens, 3
So.2d 440 (La. App. 2d Cir. 1941); Peters v. Crawford, 199 So. 433 (La. App.
2d Cir. 1940).
88. See D’Armand v. Pullin, 16 La. Ann. 243 (1861) holding a landowner
to have tacitly elected to keep the improvements constructed by a bad faith
possessor where he did not expressly repudiate them.
89. Gibson v. Hutchins & Vaughan, 12 La. Ann. 545, 546 (1857); “To
place the real proprietor at the mercy of a possessor in bad faith by re-
quiring him to pay the latter who has, without just authority, changed
the face of the land for selfish purposes of his own, does not accord with
those rules of law which give the dominion of the soil to the proprietor
only. . . .”
the court established a rule which prevents the bad faith possessor from claiming compensation for inseparable improvements. Consequently, the landowner was not required to expressly repudiate these improvements. He could make use of such improvements without being required to pay compensation, but he could not insist that they be removed or demolished. This rule was not completely without benefit to the evicted bad faith possessor. Although he was unable to claim reimbursement for such improvements, he no longer ran the risk of incurring the additional expense required to remove or demolish them.

This rather arbitrary rule was tempered somewhat by subsequent decisions. The Supreme Court of Louisiana, in Wilson v. Benjamin, allowed a bad faith possessor to set off land clearing expenses against a landowner’s claim for damages for unlawful detention of the property.90 Similarly, the bad faith possessor in Green v. Moore was allowed to set off expenses for clearing and fencing the land against the owner’s claim for rents due.91 Finally, the supreme court, in Voiers v. Atkins Bros., held that although the landowner is not obligated to compensate the evicted bad faith possessor for inseparable improvements, he must offset the value of the inseparable improvements against any claim he has against the possessor under article 50292 obligating the possessor in bad faith to restore the profits realized in gathering fruits and revenues during his possession.93 This rule has remained intact to the present time.94

91. 44 La. Ann. 855, 858, 11 So. 223, 224 (1892).
92. 113 La. 303, 342, 36 So. 974, 988 (1903).
93. The possessor's obligation to restore the fruits and revenues gathered during possession is based upon articles 501 and 502 of the Code.

LA. CIV. CODE art. 501: “The fruits produced by the thing belong to its owner, although they may have been produced by the work and labor of a third person, or from seeds sown by him, on the owner's reimbursing such person his expenses.”

LA. CIV. CODE art. 502: “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.”

The possessor in bad faith, who is limited in his right to reimbursement for his inseparable improvements up to that amount which may offset any accounting owed to restore fruits and revenues, may never walk away with money in his pocket. If no accounting is owed to restore fruits and revenues, he is not entitled to any reimbursement for his inseparable improvements, no matter how they have enhanced the overall value of the estate. It should be noted that the possessor in bad faith is obligated under articles 501 and 502 to restore to the rightful owner of the soil only the profits which he has received from gathering the fruits of the thing. He is allowed (under article 501) to offset his expenses incurred in the production of such fruits and revenues against the sum due. In effect, this obligates the possessor to restore only his profits.

94. Cases following the rule of law in Voiers have been: Juneau v.
Thus, the evicted bad faith possessor has a limited right of recovery for his useful expenses.

Conclusion

As to the possessor in good faith, there is no discrepancy between the result reached by the existing jurisprudence and the intended legislative scheme of recovery. However, the same result could be achieved more naturally by limiting recovery for improvements under article 508 to those subject to the principle of accession, and by granting the good faith possessor recovery for necessary and useful expenses under article 2314.

As to the possessor in bad faith, there is some discrepancy between the result achieved by the jurisprudence and that intended by the legislation. Under the jurisprudence his right of recovery for useful expenses is limited to an amount which will offset his liability under article 502 of the Civil Code. Under the intended legislative scheme of recovery (article 2314) he should be entitled to recover all useful expenses up to the enhanced value of the soil. The correct result could be achieved by limiting compensation for improvements under article 508 to those which are subject to accession, and by granting the bad faith possessor the right to reimbursement for his necessary and useful expenses (in full) under article 2314.

In order to accomplish these results, and to correct the error that was made so long ago, it will be necessary to rewrite the English version of article 2314. It is therefore suggested that the text of article 2314 be corrected to read: “He to whom the property is restored must refund to the person who possessed

Laborde, 224 La. 672, 70 So.2d 451 (1953); Hennan v. Hennan, 174 La. 929, 142 So. 129 (1932); Roussel v. Railways Realty Co., 165 La. 536, 115 So. 742 (1928); Southwest Gas & Electric Co. v. Nowland, 164 La. 1044, 115 So. 140 (1927); Nabors Oil & Gas Co. v. Louisiana Oil Ref. Co., 151 La. 361, 91 So. 764 (1922); Boagni v. Stamen, 139 La. 851, 72 So. 417 (1916); Larido v. Perkins, 122 La. 660, 61 So. 728 (1913); Davidson v. McDonald, 121 La. 1047, 60 So. 679 (1913); Quaker Realty Co. v. Bradbury, 123 La. 20, 45 So. 570 (1909); Ferrier v. Mossler, 23 So.2d 341 (La. App. 1st Cir. 1945).

It must also be noted that in a few instances after Voiers the courts have treated certain inseparable improvements as separable improvements and have allowed reimbursement over and above any liability on the part of the possessor in bad faith to restore fruits and revenues. In these cases, the possessor was required by law to make such improvements—e.g., filling in low land to protect the public health. See Comment, 28 La. L. Rev. 584, 592 n.58 (1968) citing Succession of Davis, 6 Orl. App. 69, 71 (1909) and Gele v. Contonio, 3 Orl. App. 165 (1906).
it, even in bad faith, all the necessary and useful expenses that have been incurred for the preservation of the property.\textsuperscript{95}

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\textsuperscript{95} It is worthwhile to speculate whether the courts would have any difficulty in handling the somewhat contradictory wording of this corrected version of article 2314—"... all the necessary and useful expenses that have been incurred for the preservation of the property." Recovery of useful expenses is seemingly limited to those incurred for the preservation of the property, but, by definition, useful expenses are those which, while not indispensable for the preservation of the estate, do improve its overall value. (La. Civ. Code art. 1259.) Clearly it was the intent of the redactors of the Louisiana Civil Code to allow recovery of all useful expenses under article 2314, and not just those which were expended for the preservation of the property. The French, who have the exact wording in their article 1381, have had no trouble allowing recovery for all useful expenses, even those which were not incurred for the preservation of the property. It is evident that some useful expenses will serve to preserve the estate as well as to improve it, \textit{e.g.}, a levee; but not all such expenditures, \textit{e.g.}, a well.