but the defendant, having had notice, and having appeared, is concluded by the judgments therein rendered both as to the eviction and as to the fruits.

As to the rule to be followed in ascertaining the rents and profits, the court, in the order of reference, directed the master to take account, not only of the rents, revenues, and values for use actually received, but also of those which the evidence showed would have been received with ordinary good management. In the Agnelly and Monsseaux causes, in response to a request of the masters for instructions upon this point, the court ruled as follows:

"The defendants therefore must, in accordance with the very textual provisions of the law, restore all products of the property which they have possessed. They are also liable for the products which they ought to have realized with ordinary good management. The possessor in bad faith is not held to the highest possible degree of skill and care, but he must have administered as a prudent master of a family. *Winter* v. *Zacharie*, 6 Robinson, 467. This was a cause in which the defendant had wrongfully possessed a plantation, and he was adjudged not only liable for the fruits which he received, but those which he could have received with ordinary husbandry; and the doctrine is laid down in express terms that the possessor in bad faith must not only restore the fruits received, but also those fruits which, with ordinary good management, he ought to have received. That case was determined in the first instance after a thorough argument, and an elaborate opinion was written. Upon a rehearing the court reiterated their view, and it is the settled law of Louisiana down to the present time.

"This question has been raised in the reports of both masters, whether the principles already enunciated apply to all lands, improved and unimproved. They apply to all lands unimproved as well as improved. The complainant is not entitled to a recovery for the revenues which might, by the remotest possibility, have been received by the possessor; on the other hand, she is entitled to all income, revenues, profits, and value for use or occupation which the evidence establishes she, as owner, would have received or derived whether the possessor has realized them or not, and whether the failure on his part to realize them resulted from his not managing the estate with ordinary prudence, or from the estate remaining unproductive by reason of the title thereto being in dispute on account of a claim of title on the part of the possessor, now adjudged to have been unfounded."

This is the doctrine distinctly laid down by Mr. Justice BRADLEY in *Gaines* v. *Lizardi* and *Gaines* v. *New Orleans*, 1 Woods, 105. This is the settled rule of the civil law—The Partidas, (Moreau & Carlton's Ed.) vol. 2, p. 1109, tit. 14, law 4: "If the possessor held in bad faith and was evicted, he would have been obliged to deliver up the estate, together with all the fruits he had gathered from it, those which he had consumed, and even the rents and fruits which he might have gathered from the estate had he cultivated it, inasmuch as he had no right to possess it and has acted in bad faith."

Precisely this principle was laid down by the circuit court of the United States for the district of Arkansas in *Beebe* v. *Russell*, 19 How. 285, which was an action for fraudulently withholding real estate, and for rents and profits. According to the statement of the supreme court in their opinion, wherein they assign their reasons for

dismissing the appeal as premature, the circuit court ordered "that the master take an account of rents and profits received, or which could and ought to have been received." See this principle expounded in Duranton, vol. 16, p. 307, No. 288; Demolombe, vol. 9, p. 96; and MacEldey's Compendium, No. 154. Says Papinian, lib. 62, §§ 1, 6, ff. de rei vindi: "Generally, when the amount of fruits is being inquired into, we must not consider whether or not the possessor in bad faith has reaped fruits, but whether the complainant (owner) might have reaped fruits if he had been allowed to remain in possession. And this decision is also approved by Julian." (Generaliter autem, quum de fructibus æstimandis quæritur, constat adverti debere, non aumalæ fidei possessor fruitus sit, sed an petitor frui potuerit, si ei possidere licuisset—quan sententian Juliaun quoque probat.) See, also, same author, lib. 64, ff. de rei vind. And Paulus, lib. 33, eodem titulo, says: "Not only the fruits that have been gathered, but also those that might have been gathered, must be accounted for." (Fructus non modo percepti, sed ed qui percepi honeste potuerunt, æstimandi sunt.)

1 Du Caurroy, 285, 289, 298, Instit. de Justinien, (Ed. 1826,) says, at page 298, "that the possessor in bad faith must account for all the fruits received, and even for the fruits which, though not received by him, could have been obtained by the owner." (Papin, fr. 62, § 1, Paul, fr. 33, eod. v. sec. de off. Ind.; 1 Moreau de Montalin, p. 596, (Ed. 1824,) and Analyse des Pandretes de Pothier.)

The common law, as stated in Bracton's Laws and Customs of England, gives the same rule: "The jurors will diligently inquire what profits the disseizor had received in fruits, rents, and other commodities. They were also to estimate the advantages the disseizen might have derived from the estate if he had not been disseized." Stearns, Real Actions, 393.

The amounts already in judgments would establish the limit of recovery if there was nothing but the naked liability flowing from the law of warranty. But there is here another ground of liability on the part of the defendant which is to be considered in connection with, but which exists independent of, the warranty. The warranty gave the defendant her moneyed interest in defeating and delaying the complainant in the enforcement of her rights. But it is the unjust hindrance which was the cause and is the measure of the damage; for it cannot be that a wrong-doer can so frame the execution of his wrong as to limit his liability short of complete indemnity. The evidence shows that for 47 years the city of New Orleans has in bad faith kept the complainant out of the possession of her property; that she has done this by using her vast resources and even her power of annually taxing complainant's property for keeping in prosecution a gigantic system of litigation, having for its object to prevent the complainant from possessing and enjoying property which the defendant

knew, and had been judicially decreed to have known, belonged to complainant.

It is not now as warrantor that we are considering the defendant's conduct, but as a person who, from motives springing from her own advantage, has caused to the complainant pecuniary loss, and that, too, when aware of her own wrong doing. From this fact a liability springs up which is not necessarily satisfied by the redress given indirectly through the machinery of warranty; *i. e.*, the complainant may recover from the defendant all the loss which she suffered for the entire period during which she has been kept out of possession by the defendant.

Of all the writers on the subject of the obligation to redress wrongs and injuries none are more discriminating, or consider the matter in broader relations, than Puffendorf in his Law of Nations. He states (book 3, *c.* 1, § 3) the division of damage by the civilians into *damnum emergens* (loss which one suffers by diminishing his present goods) and *lucrum cessans*, (damage which one receives by loss of gain which he might have made.)

"All hurt, spoil, or diminution of whatever is actually our own, and all interception of what we ought to receive," the same writer says, entitles us to reparation. At section 4 he enumerates those who are responsible for a wrong as comprising those who give any real assistance in the act of damage, or who, by any antecedent motion or default, caused it to be undertaken, or who came in for any part of the advantage; to those, he says, must be added all *who hinder the duty of restitution.* He cites the case of Probus, a prefect, who, under the Emperer Valentinian, did nothing but protect his clients in unlawful action, and he was held to be responsible therefor; "for here," says the author, "protection of a great patron, interposing, hindered them from making good the damage they had been guilty of."

At the common law, at a time when its maxims were but an utterance of the civil law in another tongue, the disseizor was liable for the possession of his grantees and feoffees, and until the statutes of Gloucester and Marlbridge he alone was liable, and after those statutes the tenants were liable to the extent of the insolvency of the disseizor. In construing the statute, it was held that the damages should still be recovered against the disseizor, if he was able to satisfy them. See a summary of the law on this point derived from Bracton, in Prof. Stearns' Treatise on Real Actions, 389, 390.

See Pothier, Contract of Sale, Cushing's translation, No. 127.

Now, in this case, the evidence establishes that the tenants have been kept from making restitution, and the complainant from receiving it, solely by the defendant, and it is a case where every day of hindrance added fresh loss to complainant.

It must be that a defendant, clothed with such semi-sovereign powers alike for repairing or committing injury, must render to this

complainant, who, after 47 years of resistance, calls it into a court of equity, and shows that it is the author of this deliberately unjust and long-continued disposssession, a compensation equal to her established pecuniary loss.

In the light of these twofold liabilities of the defendant, I will consider the master's report as to the revenues which were and could have been derived. His report enables the court to come to a conclusion on the subject from two distinct processes, sustained by two distinct resources of testimony.

As to the improved property, from an examination of 64 different squares and lots, upon the testimony derived largely from the tenants themselves, he shows, after allowing for all expenditures for ameliorations and taxes, and interest upon the same, a net income, averaging 13 per cent. upon 70 per cent. of the price of adjudication at the public auction at which the defendant sold the same in 1837. This, of course, would be a net annual income of over 9 per cent. upon the entire price. As to the unimproved property, he finds as a fact that it was capable of yielding a revenue from that which so many lots upon the same tract did yield, and states it as at least 5 per cent. upon 70 per cent. of the adjudicated price at said public sale. The evidence fully establishes a further fact that the sole reason which prevented the improvement of the unimproved lots was a fear on the part of pretended owners and of the public that the title of the complainant was well founded. Now, if the improved yielded an annual income of upwards of 9 per cent. net, taking the value as the full price of adjudication, and the unimproved would have been improved but for the doubt which the defendant's wrong inspired as to the title, it follows that 5 per cent. net, at the very lowest, would have been realized, not upon 70 per cent., but upon 100 per cent. of the price of public adjudication.

The second source of evidence upon this point is the sale upon ground rents of property within the city limits and its suburbs. In 49 instances of ground rent reserved by the city, and 46 other cases of ground rent reserved by Daniel Clark, in most cases, for the period of 29 years, some of which still continue, the yearly rent was 6 per cent. upon the fixed value. The rate at which these ground rents were contemporaneously established and continued, by which the income was fixed for long periods, furnishes a sound, independent standard, and corroborates the inference drawn from the 64 cases into which inquiry was made by the master, that the fructual value was considerably above 5 per cent. upon the ascertained value of the land. The case shows a great fact, which fortifies the conclusion drawn from these facts found by the master.

What the value of this Blanc tract should be held to be when it is regarded as a capital from which an income is to be held to have been derivable, is additionally and independently established by the

auction sale of 1837. The adjudication and other evidence show that at the public sale at which the defendant sold these lots there were upwards of 60 purchasers who had the money to pay the adjudicated price. The city had laid out the Blanc tract, with adjoining property, into squares and lots, and 60 different persons estimated the value of, and purchased, the same at auction.

The concurrence of so many minds as to the value of these lots, thus expressed and recorded, furnishes a criterion as to its productive value, founded upon so many practical judgments, that a court, after a lapse of 46 years, should not lightly disregard it, certainly not upon the evidence in the record; for the case shows that the complainant commenced her assertion to title to this property by suit against the First Municipality in 1836, and from most of the witnesses, even from those who were defendants themselves, come such statements as to authorize the inference that the value fixed by the public sale of 1837 was prevented from continuing to be the productive value by the doubts which the defendant's unjust pretensions threw upon the title. From this fact alone, then, it might safely be considered as established, and the defendant is estopped from denying, that the use of each lot or parcel of this land was yearly worth 5 per cent. upon this auction price.

The rate of 6 per cent. was virtually allowed for the use of such property by the supreme court of this state in the year 1843. See *Erwin* v. *Greene*, 7 Rob. 175. Vacant lots to the value of several hundred thousand dollars had been sold subject to a mortgage, which the vendor agreed to remove. Notes for the price were given, dated at the time of the sale, which was contemporaneous with the period of the public sale here, in 1837, bearing 6 per cent. interest, which were deposited to be delivered when the mortgage should be canceled. The mortgage was not canceled till 1843. The question was whether the vendor should recover 6 per cent interest for the time previous to cancellation of the mortgage. The court answer "yes," for two reasons; one of which was that the purchaser could have had possession, and that by the Civil Code of Louisiana he must pay interest if the property did, in the eye of the law, yield a revenue. The case showed that it was vacant city lots; from which the court inferred it was susceptible of yielding a revenue, "for," says the court, "they could have been rented."

The court ought not to overlook a principle always recognized by the civil authorities, and which is laid down in *Pontchartrain R. Co.* v. *Carrollton R. R.* 11 La. Ann. 258, 259, that even if the evidence as to the value of the rents had been much less satisfactory than it is, and if an accurate estimate of loss had not been attainable upon such clear and full proofs as are here afforded, the defendant having invaded the rights of complainant, and failing itself to furnish more satisfactory proof, would have had to be content with the conclusions to which the court would have been able to arrive from the evidence

which had been produced. See, also, *McGary* v. *City of Lafayette*, *supra*, where the court, in the assessment of compensation, lay great weight upon *vexatious and incidental wrongs* which have been established.

In short, the burden which bad faith places on the defendant, according to the civil law and the jurisprudence of Louisiana, while it should lead to the assessment of no damages or compensation beyond those actually suffered, requires the court to adopt conclusions fully warranted by evidence, though through the fault of the defendant it must be derived from facts outside of the receipt of actual rents; for, since the law requires the court, in such a case, to go further and decide from evidence extrinsic to actual receipts, it must be admitted that a safe guide may be obtained, and in this case has been furnished, from the rents and profits, for the very period in question, shown to have been actually derived from so many other lots, adjacent, similarly situated, and no better capacitated, from numerous ground rents, and from the opinion of such a multitude of purchasers.

This is a peculiar case. It calls a defendant to a reckoning for 50 years of flagrant and already adjudged wrong. The complainant has already recovered possession. The restitution to which the complainant was and is entitled is founded upon decrees between the parties which establish it conclusively. The hindrance on the part of the defendant and the amount of compensation due are fully proven. The bad faith of the defendant has been previously determined, and is a thing adjudged. The court must not be deterred, by the magnitude of the amount involved, from the application of settled principles of law, and the deduction of conclusions which follow from established facts. The conclusion which must be deduced, after giving all the evidence in this cause its full weight, is that the productive value of the Blanc tract was, in the year 1837, fixed at the public sale, and has not been maintained, but has receded, and has been kept from advancing only by the insecurity as to the title created by the pretensions of the defendant, asserted in bad faith at the outset, and continuously, and persisted in years and years after they had been rejected and even rebuked by the highest tribunal under our government; and that the actual yearly value, which could and would have been derived from the lots constituting the same by the complainant, had she been allowed to occupy them without unjust molestation from the defendant, is established to have been at least 5 per cent. upon the price which they brought when sold by the defendant at public auction in 1837.

The master's account is stated in the precise manner determined to be correct in the case of *Gaines* v. *City of New Orleans*, 15 Wall. 634; *i. e.*, he has stated the account with reference to each lot separately, and has ascertained the rent or income which should have been derived each year, and has computed interest at 5 per cent. upon the same down to January 10, 1881, which point of time he

selected for convenience. The master's account shows that the total amount of judgments rendered against the warranties of the defendant in the Agnelly and Monsseaux suits is 576,707.72. This amount, though less than the evidence shows is requisite to indemnify the complainant, cannot be disturbed. It is, to the extent of the periods covered thereby, binding alike upon the complainant and the defendant. A study of his report, and the records of the causes introduced in evidence, shows that, when the complainant recovered the land, she recovered rents for only a portion of the period of her dispossession, often a small one, as the tenants had been in occupation only varying fractions of time since 1837. The proof shows that the earlier intermediate grantees who occupied it are either insolvent, dead, without representatives, or, after search, cannot be found. The balance of the amount, viz., $1,045,363.78, which is the aggregate of the rents and profits which would, with ordinary good management, have been received from the unimproved lots,—*i. e.*, for those periods not covered by the possessory judgments,—is derived from a detailed statement of the rents from each lot, the yearly rental being 5 per cent. upon 70 per cent. of the price of adjudication in 1837. This rate, according to the conclusion of the court, as stated above, is short of what the evidence shows is the true measure of the rent by 30 per cent.; *i. e.*, that the yearly rent, as established by the evidence, is 5 per cent. upon 100 per cent. of the full price of adjudication and sale. The correction required is made by adding 30 per cent. of this sum, where, as has been said, the computation has been made upon a basis of 70 per cent. The amount to be recovered, therefore, would be as follows:

For improved and unimproved land already in judgments,	$ 576,707 92
For balance of rents, unimproved land,	1,348,959 91
Total,	$1,925,667 83

For which last amount, and the costs which have been taxed in the Agnelly and Monsseaux suits, with interest upon that portion which arises from the yearly sums for rent from January 10, 1881, the complainant must have a decree.

UNITED STATES *v.* BEEBEE and others.[1]

(*Circuit Court, E. D. Arkansas.* June, 1883.)

1. EQUITY—LAPSE OF TIME AS A DEFENSE.
It is a general principle of equity that lapse of time may constitute a sufficient defense, even in the absence of any statute of limitations, and without necessary reference to any question of laches.

[1] From the Colorado Law Reporter.