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## Cover Page Footnote

Thank you to my wife, Tanya, who constantly inspires me; our new dog, Indy who has taken on the task from the sadly deceased and not forgotten Murphy, to constantly entertain me; and our sons, Jonathan and Garrett, who constantly interest me. Thank you also to Kathi Menard, who has taken on the task, from the now retired Marion Wiltier of trying to decipher my dictation and handwriting. In addition, I would like to thank participants at the Pacific Southwest Region Academy of Legal Studies in Business Annual Meetings for their insightful comments and qucstions concerning this and other articles of mine.

# IF GOOD FENCES MAKE GOOD NEIGHBORS, DO BAD NEIGHBORS MAKE GOOD REAL PROPERTY LAW?

*John R. Dorocak, J.D., LL.M. (Tax), C.P.A.*[*]



## ABSTRACT

When a bad neighbor tears down a good neighbor's newly erected fence, the bad neighbor likely has no defense in a criminal or civil case for vandalism and trespass, absent any special circumstances. The statutory "Good Neighbor Fence Law," "Spite Fence Law," and the common law remedy for nuisance, likely provide no defense for the bad neighbor who acts willfully and unlawfully. However, the good neighbor's damages may be limited, although the cost of reinstalling a fence and damage to materials are likely recoverable. Perhaps, proximate damages such as for the good neighbor having to board his dog may be recoverable. Attorney's fees, surveyor's fees, damages for emotional distress, and punitive damages are not likely to be collectible. Possibly, the good neighbor would meet the requirements for a federal casualty loss tax deduction. Thus, all in all, a bad neighbor may not make good real property law.

## I. INTRODUCTION

Imagine the following scenario.[1] A bad neighbor tears down a good neighbor's newly erected fence. California is among the states which have sought to prescribe some statutory rules for a dispute over a fence;[2] however, one of those rules, often known as "The Good Neighbor Fence Law,"[3] is likely limited to border or division fences.[4]

Thus, the bad neighbor in this scenario likely could not take refuge in the Good Neighbor Fence Law. The bad neighbor alleges to the responding police authorities that he tore down the good neighbor's newly erected fence because he thought the fencing material used (for example, chain link) was prohibited by a local city ordinance and/or he thought the newly erected fence was erected on the common border of his own property.

Is the bad neighbor entitled to self-help such as tearing down the good neighbor's new fence? If the bad neighbor has no legal protection for his actions, what legal remedies might the good neighbor seek? These are the questions that are the focus of this article. It may well be that the good neighbor is left with some remedies which are not altogether satisfactory. This article examines California's statutory law and case law. Judging from the number of feuded disputes, it is likely that the issues raised herein are common with other states and their respective statutory and case law.

## II. JUSTIFICATIONS FOR BAD NEIGHBOR'S ACTIONS?

Possibly with the view to limiting neighbor disputes, California statutory law provides guidance with regard to fences in two specific situations: (1) the relatively recently enacted Good Neighbor Fence Law,[5] and (2) the Spite Fence Law.[6] Both of the statutory prescriptions have limited applicability. Thus, neither the good neighbor nor bad neighbor in the posited

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[1] Any similarity between the hypothetical facts and real, historical, or fictional persons (living or dead), places, things, or events is purely coincidental.

[2] *See, e.g.*, Cal. Civ. Code § 841 (West 2017).

[3] *See, e.g.*, *California's New "Good Neighbor" Fence Law*, JASON ELIASER – SAN DIEGO PROPERTY ATT'Y, www.eliaser.com/californias-new-good-neighbor-fence-law/ (last visited Dec. 21, 2018).

[4] Andrew R. Henderson, *Boundary Issues: California Law Provides Some Clear Answers on Such Sources of Conflict Between Neighbors as Encroachments, Lot Lines, Fences and Trees*, L.A. LAWYER, Jan. 2016, at 28, 32 n.49.

[5] CIV. § 841.

[6] *Id.* at § 841.4.

scenario may be able to seek remedy or refuge in these two statutory provisions.

*A. Good Neighbor Fence Law*

The so-called Good Neighbor Fence Law became effective in California on January 1, 2014. It presumes that adjoining land owners benefit equally from a fence dividing properties.[7] When a fence is subject to the provisions of the Good Neighbor Fence Law, specific procedural requirements governing the adjoining neighbor's possible actions apply; however, the key to the law is the wording that the fence is one "dividing their properties." Thus, for the Good Neighbor Fence law to apply, the fence in question must be a border fence, a division wall, or a similarly termed fence.[8] When the fence does not meet such definition, the provisions of California Civil Code § 841 do not apply. As a result, the parties are often left to older statutory and common law.

If the California Good Neighbor Fence Law applies, a landowner intending to incur costs with regard to such a fence is required to give thirty (30) days' written notice to an affected adjoining landowner.[9] The law also imposes a "presumption of equal responsibility for reasonable costs."[10] A landowner may overcome the presumption by proof of a variety of circumstances. For example, a court determination of equal responsibility would be found unjust for reasons such as substantially disproportionate benefit, cost exceeding difference in value before and after installation, undue financial hardship, unreasonableness of construction including unnecessary or excessive expenses, or expenses which are the result of a landowner's personal aesthetic, architectural, or other preferences. The court may also consider, per the statute, any other equitable factors.[11]

In the posited scenario, the bad neighbor might mistakenly believe there is recourse in the California Good Neighbor Law because the fence in question is not a border fence. The fact that the neighbor may be mistaken in his belief about the applicability of the Good Neighbor Fence Law does not appear to provide the bad neighbor with grounds to tear down the good neighbor's newly installed fence.

Established case law in California distinguishes between division fences and fences which were not on the border.[12] The California Supreme Court stated in *Ingwersen v. Barry* that an adjoining landowner did not have the right to prevent a neighbor from building on his own land, provided the

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[7] *Id.* at § 841(b)(1).
[8] *Id.*
[9] *Id.* at § 841(b)(2).
[10] *Id.*
[11] *Id.* at § 841(b)(3).
[12] *See, e.g.*, Ingwersen v. Barry, 118 Cal. 342 (1897). *See also Henderson, supra* note 4, at 32 n.49.

structure was not a nuisance.[13] The structure was not a nuisance merely because it obstructed the passage of light and air.[14] Thus, the Good Neighbor Fence Law, as well as other recent legislation, such as the Solar Shade Control Act, California Public Resources Code §§ 25980, *et seq.*, are exceptions to the basic doctrine enunciated in *Ingwersen*. The Solar Shade Control Act is constitutional and within legislative power because of the public interest in promoting solar energy.[15]

*B. The Spite Fence Law*

Another departure from *Ingwersen* is the statutory Spite Fence Law.[16] It is unlikely in the scenario posited that either the Solar Shade Control Act or the Spite Fence Law provide any defense to the bad neighbor's actions. None of the facts indicate any solar installation.[17] The California Spite Fence statute neither prohibits all fences exceeding 10 feet nor permits all fences less than 10 feet. The statute reads as follows:

> Any fence or other structure in the nature of a fence *unnecessarily* exceeding 10 feet in height maliciously erected or maintained for the *purpose of annoying* the owner or occupant of adjoining property is a private nuisance. Any owner or occupant of adjoining property *injured either in his comfort or the enjoyment* of his estate by such nuisance may enforce the remedies against its continuance.[18]

At common law in California, a fence that obstructed passage of light and air to the adjoining premises was not a nuisance merely because of that fact.[19] It was precisely because of that limitation of the common law that the Spite Fence Law was enacted so that a fence (1) *unnecessarily* exceeding 10 feet, (2) *maliciously* erected or maintained, (3) for the *purpose of annoying* the owner/occupant of the adjoining property was deemed a private nuisance.[20] In addition, the statute also requires that the owner or occupant of the adjoining property "*be injured either in comfort or enjoyment.*"[21] Given the strict requirements of the statute, even a fence above 10 feet could be justified for a purpose other than to annoy the adjoining landowner.[22] In addition, a fence less than 10 feet high could still be a nuisance.[23]

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[13] *See generally* Ingwersen v. Barry, 118 Cal. 342 (1897).
[14] *Id.*
[15] *See, e.g.*, Sher v. Leiderman, 181 Cal. App. 3d 867 (Cal. Ct. App. 1986).
[16] CIV. § 841.
[17] *See generally Leiderman*, 181 Cal. App. 3d 867.
[18] CIV. § 841 (emphasis added).
[19] *See, e.g.*, Ingwersen v. Barry, 118 Cal. 342, 343 (1897); Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111, 113 (1894).
[20] Wilson v. Handley, 97 Cal. App. 4th 1301, 1304 (Cal. Ct. App. 2002).
[21] Vanderpol v. Starr, 194 Cal. App 4th 385 (Cal. Ct. App. 2011).
[22] *Handley*, 97 Cal. App. 4th at 1304.
[23] Griffin v. Northridge, 67 Cal. App. 2d 69, 75 (Cal. Ct. App. 1944).

Given the rather specific situations in which the Good Neighbor Fence Law and the Spite Fence Law apply and the limitations of the common law nuisance, it is likely the bad neighbor in the scenario posited could not avail himself of those statutes.

### *C. Fence as Nuisance at Common Law*

In *Griffin v. Northridge*, there appears to have been abundant evidence that the defendants' actions were taken with malicious intent so as to deprive the plaintiffs of full enjoyment of their home.[24] Among other things, the defendants trespassed upon flower beds, removed a blooming plant from a pot, moved a garbage can next to the plaintiffs' dining area, placed a line with tin can tops along the border to cause noise, cast paint upon the walls and windows of the plaintiffs', verbally berated the plaintiffs and their guests, and interfered with the plaintiffs' sale of the property.[25] Although the fence was less than 10 feet tall, those actions were sufficient to establish a nuisance. Thus, the bad neighbor in the posited scenario did not meet the statutory requirements of the Good Neighbor Fence Law, the Spite Fence Law, nor the common law requirements for nuisance, such as those set forth in *Griffin*.

### *D. Mistaken Belief as Defense to Prosecution for Vandalizing a Fence*

Could the bad neighbor defend his destruction of the good neighbor's newly erected fence with an argument that he was mistaken that one of the two statutes, The Good Neighbor Fence Law or The Spite Fence Law, or both, apply, or that he thought the fence had been erected on his property so that he was entitled to use self-help to destroy the fence? Will the bad neighbor in either a criminal prosecution for vandalism or trespass, or a civil suit by the good neighbor on the same grounds, have a defense for destroying a fence? Apparently, there is California law providing that a reasonable, though mistaken belief, might be a defense even to a criminal prosecution for vandalism.[26] In *Seabridge v. McAdam*, the court held that there was a lack of probable cause for the criminal charge of maliciously tearing down fences.[27] McAdam had instituted a prosecution of criminal charges against Seabridge for Seabridge's tearing the fence down.[28] In the case before the *Seabridge* court, Seabridge had instituted an action against McAdam for malicious prosecution.[29] Seabridge was a subtenant under a lease that allowed for growing crops on the land that McAdam had purchased. Under the lease, Seabridge was to receive reasonable compensation for the crops up to the time of sale of the land, but McAdam asserted that such compensation should come

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[24] *Id.* at 75.
[25] *Id.* at 71–72.
[26] Seabridge v. McAdam, 108 Cal. 345, 349–50 (1895).
[27] *See generally, id.*
[28] *Id.* at 347.
[29] *Id.*

from the administrator of the lease. McAdam then "nailed up the fence where" Seabridge had been accustomed to going to his field.[30] Suffice it to say that in the scenario posited herein, the bad neighbor does not seem to have any facts similar to those in *Seabridge* giving rise to a reasonable belief, as the court stated, that Seabridge might have a right to go through the fence.[31]

Thus far, the suggested scenario has been mainly examined from the bad neighbor's perspective as to whether the bad neighbor had any justification for destroying the good neighbor's newly erected fence. Apparently, given the number of cases, some of which have already been cited, in which such fence disputes arise, the scenario suggested may not be an unusual one. If indeed the good neighbor has acted rightly under the law, what remedies are available to that good neighbor and how sufficient are they?

## III. REMEDIES FOR THE GOOD NEIGHBOR

### *A. Criminal and Civil Vandalism and Trespass for Destruction of Fence*

An intent to act willfully and unlawfully in California is sufficient to support a criminal prosecution for tearing down a fence either as vandalism, trespass, or both.[32] Similarly, the willful, wrongful removal of a fence, which involves a trespass, supports recovery of damages in a civil action.[33] Thus, it appears that once the good neighbor has established that the bad neighbor has trespassed on the good neighbor's property, the destruction of the fence constitutes a criminal vandalism and trespass, as well as imposes potential civil liability. Although it would seem that a successful criminal prosecution would establish *res judicata* for a civil action, the good neighbor may indeed have difficulty in seeking a criminal prosecution by the appropriate authorities. Those authorities might prefer to leave the matter to be settled civilly as a neighborhood dispute.[34]

### *B. Measure of Damages to the Good Neighbor for Bad Neighbor's Destruction of Fence*

Furthermore, the good neighbor may have trouble recovering damages. The California Civil Code provides for damages. Section 3281 states that, "[e]very person who suffers detriment from the unlawful act or omission of another, may recover from that person in fault a compensation

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[30] *Id.* at 345, 348.

[31] *Id.* at 350.

[32] *See, e.g.*, Messick v. Superior Court of Cal., 57 Cal. App. 340 (Cal. Ct. App. 1922).

[33] *See, e.g.*, Morrissey v. Morrissey, 191 Cal. 782 (1923).

[34] Henderson, *supra* note 4, at 33 ("[u]se common sense, seek reasonable accommodation, and try hard to be polite and friendly."). Eliaser, *supra* note 3 ("[b]ecause good fences make good neighbors, but good *communication* make even better neighbors.").

therefore in money, which is called damages."[35] Section 3282 states that, "[d]etriment is a loss or harm suffered in person or property."[36] Certainly the good neighbor would be able to recover from the bad neighbor the cost of reinstalling the fence and any damages to the materials. The question is whether the good neighbor would be able to recover any other costs which might be involved in reinstalling the fence.

1. Proximate Damages for Destruction of Fence

At this point, let us add to the good neighbor/bad neighbor scenario the following facts. Let us say that the good neighbor never intended to replace his old fence, until the bad neighbor indicated he was going to replace that fence. The bad neighbor even went so far as to knock out boards in the old fence, so that the good neighbor's yard was no longer enclosed, and the fence no longer kept the good neighbor's dog within the good neighbor's yard.

It could well be that damages to the good neighbor due to the escape of the dog could be assessed against the bad neighbor because the bad neighbor's holes in the fence were the proximate cause of those damages.[37] Certainly it would seem that the good neighbor's costs to board the dog at a kennel when the bad neighbor had damaged the old fence enclosing the property, are proximate damages.

2. Attorney's Fees and Other Fees as Proximate Damages for Destruction of Fence

Beyond those costs resulting directly from the damage to the fence, it may be more difficult to ascertain whether or not damages were proximately caused by the bad neighbor's injury to the fence. Much of California law indicates that the recovery of attorney's fees is rather limited if the good neighbor incurs attorney's fees from arguing with the bad neighbor about restoring the destroyed fence and new fence installation. Where litigation against a third party is necessitated by a defendant's wrongful act, attorney's fees can be recovered. For example, when the vendor of land is required to institute an action to quiet title against the purchaser and first trust deed holder because of negligence of the escrow holder, the vendor may recover attorney's fees from the escrow holder.[38] However, attorney's fees incurred and sought in the same litigation generally are not included in damages in

[35] CAL. CIV. CODE § 3281 (West 2018).

[36] *Id.* at § 3282.

[37] *See, e.g.*, Brett v. Berger, 4 Cal. App. 12 (Cal. Ct. App. 1906) (finding the tenant could not blame the landlord for destruction of the tenant's crops by the tenant's livestock, when neither the tenant nor the landlord had repaired the fence allowing an escape of such livestock).

[38] *See generally* Prentice v. N. Am. Title Guar. Corp., Alameda Division, 59 Cal. 2d 618 (1963).

California.[39] Given the law regarding attorney's fees, it is unclear whether a party could recover surveyor's fees necessitated by the other party's actions whether or not a lawsuit results. The litigation experts in the area recommend a professional surveyor, although the recommendations may underscore that such expenses are costs akin to attorney's fees.[40]

3. Further Damages Recoverable and Small Claims Court

Many of these likely fence disputes, if similar to the posited scenario, might result in litigation in small claims court, if anywhere at all. The small claims court in California has jurisdiction for actions for recovery of money.[41] The current limit of the small claims jurisdiction in California is $10,000.00.[42] Small claims court cases include cases concerning damages from emotional distress.[43] There are cases in California where damages were recoverable for emotional distress caused by tortious infliction of damages to property, even unaccompanied by personal injuries.[44] The likely problem would be proof of severe emotional distress, which the California Supreme Court has defined as "emotional distress of such substantial quality or enduring quality that no reasonable person in civilized society should be expected to endure it."[45]

Indeed, it appears that the good neighbor could not recover attorney's fees and possibly not even surveyor's fees that might be necessitated by his bad neighbor's actions. Possible additional costs with regard to the good neighbor's dog might be within the proximate cause of the bad neighbor's actions. Certainly, the good neighbor, even if litigation takes places in the small claims court, will have costs in excess of any recovery from the bad neighbor because of an injury to property in tearing down the newly erected fence. Punitive damages might be unlikely under the requirement that there be callous disregard for the California Civil Code on exemplary damages to apply.[46]

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[39] *See, e.g.*, Bean v. Pac. Coast Elevator Corp., 234 Cal. App. 4th 1423, 1430 (Cal. Ct. App. 2015) (finding no authority permits that prejudgment interest be awarded); Simke, Chodos, Silberfeld & Anteau, Inc. v. Athans, 195 Cal. App. 4th 1275 (Cal. Ct. App. 2011) (stating that attorney's fees are not ordinarily recoverable unless asserted in a present malpractice matter).

[40] *Hendersen*, *supra* note 4, at 30 ("[a]ny landowner undertaking an improvement near the edge of a neighboring property, even constructing a modest fence, is advised to hire a professional surveyor[.]").

[41] CAL. CODE CIV. PROC. § 116.220 (West 2017).

[42] CAL. ONLINE: SELF-HELP LAW CENTER, cc-courthelp.org (last visited Dec. 21, 2018).

[43] *Id.*

[44] *See, e.g.*, Crisci v. Sec. Ins. Co. of New Haven Conn., 66 Cal. 2d 425 (1967); Acadia, Cal., Ltd. v. Herbert, 54 Cal. 2d 328 (1960); Stoiber v. Honeychuck, 101 Cal. App. 3d 903 (Cal. Ct. App. 1980).

[45] Hughes v. Pair, 46 Cal. 4th 1035 (2009) (internal citations omitted). *See also* Nebal v. Sulak, 73 Cal. App. 4th 1363 (Cal. Ct. App. 1999); Grant v. Clampitt, 56 Cal. App. 4th 586 (Cal. Ct. App. 1997). The California Civil Harassment Restraining Order provision was apparently enacted to supplement existing torts such as intentional infliction of emotional distress; thus, the statute, requires that the defendant's conduct must be such that a reasonable person would suffer substantial emotional distress and that a particular plaintiff has suffered substantial emotional distress. *See* CIV. PROC. § 527.6(b)(3).

[46] CAL. CIV. CODE § 3294. *See, e.g.*, Farmy v. Coll. Hous., Inc., 48 Cal. App. 3d 166 (Cal. Ct. App. 1975).

## IV. TAX DEDUCTION OF CASUALTY LOSS BY GOOD NEIGHBOR

For tax years 2018 – 2025, the itemized deduction for personal casualty losses is limited to losses attributable to federally declared disasters.[47] A casualty loss which occurred in a year prior to 2018 might still be deductible in 2018 or thereafter, because, for example, an action for damages against a party may postpone the year in which the deduction could be claimed.[48] It would seem a change in the law as to deductibility should not impact a deduction delayed in time because the amount had not been determined as yet because of a reasonable prospect of discovery. Thus, the good neighbor might still be able to recoup some costs in terms of a casualty loss deduction incurred in a year prior to 2018. Still, such personal casualty losses must exceed $100.00 and 10% of adjusted gross income, are measured generally by fair market value before casualty minus fair market value after casualty (or adjusted basis, if less) less any insurance proceeds available, and the taxpayer must be itemizing deductions.[49] Repair costs can sometimes be used as the measure of decline in value.[50] However, attorney's fees and surveyor's fees are not likely part of the casualty loss: "Expenses paid or incurred in . . . improving property, constitute a part of the cost of the property and are not deductible expenses."[51] In addition, the Tax Cuts and Jobs Act of 2017 increased the standard deductions greatly so that a single taxpayer would normally need to exceed the $12,000 standard deduction and a married filing jointly taxpayers exceed the $24,000 standard deduction before any deductions would be itemized.[52]

## V. CONCLUSION

Do bad neighbors then make good real property law? Not if the good neighbor's attempting to recoup costs he might not otherwise have in opposing his bad neighbor. As Judge Learned Hand said, "I must say that, as a litigant, I should dread a lawsuit beyond almost anything short of sickness and death."[53]

One in the position of the good neighbor is left to wonder what other remedies there might be for a bad neighbor.

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[47] 28 U.S.C. § 165(h)(5) (2018).

[48] Treas. Reg. § 1.165-1(d); Von Packard v. Comm'r, No. 9526-80, 1983 Tax Ct. Memo LEXIS 109 (T.C. Nov. 14, 1983); Jackson v. Comm'r, No. 1827-69 SC., 1970 Tax Ct. Memo LEXIS 133 (T.C. Aug. 6, 1970); Partyka v. Comm'r, No. 8563-16S, T.C. Summ. Op. 2017-79 (T.C. Oct. 25, 2017).

[49] 28 U.S.C. § 165(h) and (a); Treas. Reg. § 1.165-7(a)(2).

[50] *Id.*

[51] Treas. Reg. § 1.212-1(k).

[52] *Id.* at § 63.

[53] Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 675 (1956) (quoting Judge Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, THREE LECTURES ON LEGAL TOPICS, 89, 105 (1926)).