

Louisiana Law Review

Volume 20 | Number 2

The Work of the Louisiana Supreme Court for the

1958-1959 Term

February 1960

Strict Liability For Uses of Property Under the Louisiana Civil Code

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Repository Citation

George C. Herget Jr., *Strict Liability For Uses of Property Under the Louisiana Civil Code*, 20 La. L. Rev. (1960)

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ployer is not likely to find lighter work for the employee no longer able to perform regular work if wages paid therefor are considered earned and hence not credited against compensation due the employee. Further, the uncertainty present as to whether wages are actually earned or unearned may have a detrimental effect on an employee's claim. If the employee assumes his wages fall in the unearned classification but in actuality they do not, prescription will bar his claim. However, if the employee chooses to sue to establish his claim and avoid the risk of having it prescribe, he runs the risk of losing his job.

Thus it seems that, from a standpoint of policy, the distinction between earned and unearned wages in the problem areas of the retained employee should be abolished. This would definitely encourage rehabilitation, since the employer could be sure that he would not have to pay both wages and compensation. At the same time the employee could be sure that his claim is not prescribing since all the wages paid would interrupt prescription. As a result he would not be forced into court. It seems that rehabilitation should be a primary consideration of the courts; and since the elimination of the distinction between earned and unearned wages would encourage rehabilitation, there appears to be good reason for such elimination.

Hillary Crain

Strict Liability For Uses of Property Under the Louisiana Civil Code

Under the classic doctrine of *Rylands v. Fletcher*¹ the common law imposes liability on certain activities without a showing

1. *Fletcher v. Rylands*, 3 H. & C. 774, 159 Eng. Rep. 737 (1865), reversed in L.R. 1 Ex. 265 (1866), affirmed in L.R. 3 H.L. 330 (1868). In deciding the case, the court in the Exchequer Chamber said: "We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." *Fletcher v. Rylands*, L.R. 1 Ex. 265, 279-80 (1866). In the House of Lords, it was stated that the principle applied only to a non-natural use of the defendant's land. *Rylands v. Fletcher*, L.R. 3 H.L. 330, 338 (1868). Since the *Rylands* decision, various terms for the rule have evolved, e.g., strict liability for abnormal things and activities (PROSSER, *TORTS* § 59 (2d ed. 1955)), liability for ultrahazardous activities (RESTATEMENT, *TORTS* § 519 (1938)). Dean Prosser states that today a doctrine based on the *Rylands* decision obtains in England and some twenty American jurisdictions. PROSSER, *op. cit. supra*, at 329, 333.

of negligence or intent. The application of the doctrine is dependent upon two factors.² First, the activity must be unduly dangerous, i.e., one that is likely to cause serious harm even with the utmost care. Second, the activity must be one that is abnormal to its surroundings. The fact that there must be a determination of whether the activity meets these elastic requirements³ allows a court to weigh the relative advantages and disadvantages to society of imposing strict liability upon a particular activity. The basis for the imposition of this doctrine of strict liability is the belief that certain activities have developed to the extent that they, as opposed to the innocent victim, should bear the risks involved in their operation.⁴

Several recent cases⁵ have presented to the Louisiana judi-

2. These two factors are stated in a variety of ways. Under the *Rylands* decision there must be (1) a collection in dangerous quantities of substances likely to escape and do mischief, and (2) a non-natural use. Dean Prosser states that the activity must: (1) involve a high degree of risk of harm to others; and (2) be abnormal in the community and inappropriate to its surroundings. PROSSER, TORTS 329 (2d ed. 1955). The Restatement of Torts provides: "An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage." It can be seen that all of these definitions incorporate the two ideas of undue danger and unusualness. RESTATEMENT, TORTS § 520 (1938).

3. 2 HARPER & JAMES, TORTS 794 (1956).

4. *Id.* at 794-95; PROSSER, TORTS 332 (2d ed. 1955). This view appears to have been accepted by the Louisiana Supreme Court in the case of *Fontenot v. Magnolia Petroleum Co.*, 227 La. 866, 877, 80 So.2d 845, 849 (1955), in which the court stated: "There can be no legal justification for relieving it [the business] of liability and thereby deny compensatory damages to one having no relation to the conducting of such business and thus compel him to bear the unwarranted loss."

5. *Gotreaux v. Gary*, 232 La. 373, 94 So.2d 293 (1957), discussed in *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Torts and Workmen's Compensation*, 18 LOUISIANA LAW REVIEW 63, 64 (1957), and noted in 32 TUL. L. REV. 146 (1957) (held strict liability imposed on crop dusting operations); *Modica v. Employers Casualty Co.*, 231 La. 1065, 93 So.2d 659 (1957) (held causal connection not established between damages to residence and operation of machine used to ram pipeline under highway); *Fontenot v. Magnolia Petroleum Co.* 227 La. 866, 80 So.2d 845 (1955), discussed in *The Work of the Louisiana Supreme Court for the 1954-1955 Term—Torts and Workmen's Compensation*, 16 LOUISIANA LAW REVIEW 228, 267 (1956), and noted in 30 TUL. L. REV. 156 (1955) (held company carrying on blasting operations liable for damage to nearby homes without a showing of negligence or fault); *Town of Jackson v. Mounger Motors, Inc.*, 98 So.2d 697 (La. App. 1957) (held use of property as a used car lot not so inherently dangerous as to warrant imposition of strict liability); *Jones v. Morgan*, 96 So.2d 109 (La. App. 1957) (held causal connection established between damages to cotton crop and spraying of rice field with chemicals); *Pate v. Western Geophysical Co.*, 91 So.2d 431 (La. App. 1956) (held causal connection established between damages to property and blasting operations); *Beck v. Boh Brothers Construction Co.*, 72 So.2d 765 (La. App. 1954) (held causal connection not established between damages to residence and operation of concrete mixer); *Bruno v. Employers' Liability Assurance Corp.*, 67 So.2d 920 (La. App. 1953) (held plaintiff could recover for damages to dwelling by pile driving operations conducted in the regular and customary manner); *Hauck v. Brunet*, 50 So.2d 495 (La. App. 1951), noted in 6 LOYOLA L. REV. 77 (1951),

ciary this question of liability for damage caused by conduct which is neither negligent nor intentional. In deciding these cases, the Louisiana courts have rested their decision on Article 667 of the Louisiana Civil Code, which provides:

“Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.”⁶

The purpose of this Comment is to examine the language of the article, the various judicial interpretations of it, and its use as a solution to the problem dealt with at common law under the doctrine of *Rylands v. Fletcher*.

THE SERVITUDE VIEW OF ARTICLE 667

According to the Louisiana Civil Code, perfect ownership gives the right to use, to enjoy, and to dispose of one's property in the most unlimited manner.⁷ Certain attributes of this perfect ownership may be limited by the establishment of servitudes, which are charges laid upon one estate for the use and convenience of another estate.⁸ The establishment of a servitude is dependent upon the existence of separate estates⁹ belonging to different owners.¹⁰ Article 667 of the Civil Code is found in the title “Of Predial Servitudes” in the chapter “Of Servitudes Imposed by Law.” It was included in the Louisiana Civil Code of 1808¹¹ and, although it is found in neither the Code Napoleon nor the present French Civil Code, it appears to have been taken verbatim from the writings of Domat.¹² A literal reading of the article and its location in the Code suggest that it establishes a

26 TUL. L. REV. 524 (1952) (held plaintiff could recover for damage to dwelling caused by pile driving operations even though piles were driven in the usual and customary manner and even though defendant had no reason whatever to anticipate or foresee any possible damage).

6. LA. CIVIL CODE art. 667 (1870).

7. *Id.* art. 491.

8. *Id.* art. 647.

9. *Id.* art. 648.

10. *Id.* art. 640.

11. “*Quoiqu'un propriétaire puisse faire dans son fonds, tout ce que bon lui semble, il ne peut cependant y faire d'ouvrage qui ôte à son voisin, la liberté de jouir du sien, ou qui cause quelque dommage.*” LA. CIVIL CODE 1808, p. 130, Art. 15.

“Although a proprietor may do with his estate whatever he pleases, still he cannot make on it any work which may deprive his neighbor of the liberty of enjoying his own, or which may be to him the cause of any damage.” *Ibid.*

12. 1 DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER 441-42, Nos. 1046, 1047 (Cushing's ed. Strahan's transl. 1853).

servitude imposed by law proscribing any utilization of property which causes a harmful effect to the estate of a neighbor. The effect of the article, however, is somewhat qualified by Article 668, which provides that neighboring landowners may be required to sustain "some inconvenience."¹³ Nevertheless, it would appear that a violation of this servitude occurs whenever the utilization of property by one person causes more than "some inconvenience" to the property of another. Since the basis of recovery would not be one in tort, but one that arises from the violation of a servitude, the question of "negligence" should not be taken into consideration.

If this view of Article 667 as establishing a servitude is accepted, it follows that the article should not serve as a basis of liability in situations where basic servitude principles are inapplicable. Thus, the article should not be used to impose liability on a person, such as an independent contractor operating on the estate, who does not own the estate.¹⁴ Neither should liability be imposed on one, such as a lessee, whose interest in the estate is less than ownership.¹⁵ Further, it would appear that the article should not be used as a basis of recovery for injuries to the person, since the article provides only for damages to an estate.

It can be seen that the type of liability provided for by a literal reading of Article 667 is related to the common law doctrine of strict liability derived from *Rylands v. Fletcher*. This is true at least in the sense that under both views only damage and causation need be shown in order for recovery to be allowed. However, the servitude view differs from the *Rylands* doctrine in that the latter is restricted in its application to ultrahazardous activities. Further, because the *Rylands* doctrine is not exclusively a landowner doctrine, it is applicable to situations which

13. LA. CIVIL CODE art. 668 (1870): "Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

"Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbor's house, because this act occasions only an inconvenience, but not a real damage."

14. LA. CIVIL CODE arts. 648, 649 (1870), requiring that there must be two separate estates belonging to two different persons would seem to preclude this.

15. The word "proprietor" in Article 667 is a translation from the French version of the Civil Code of 1808 of the word "*propriétaire*," denoting a landowner. Throughout the articles on servitudes, the word "*propriétaire*" is rendered as either "owner" (e.g., Articles 647, 659, 670, and 671) or "proprietor" (e.g., Articles 660, 662, 666, 667 and 672). It would thus seem that the article imposes a duty only on the owner of the estate and not on a lessee.

the servitude view of Article 667 would not cover.

The servitude view of Article 667 is based on an examination of the language of the article and its location in the Civil Code. It would seem that this is the view apparently intended by the redactors of the Civil Code of 1808. In examining the jurisprudence it is interesting to compare this view of the article with the manner in which the article has actually been employed.

ARTICLE 667 AND THE JURISPRUDENCE

Prior to 1947 little attention was paid by the Louisiana courts to Article 667 in deciding controversies arising between neighboring landowners over various uses of land.¹⁶ Since 1947, however, it would appear that the appellate courts of Louisiana have utilized Article 667 in order to dispose of any requirement of fault or negligence in certain actions for damage caused by the operation of various activities. Apparently three positions have been set forth: (1) that Article 667 imposes liability on activities classified as *nuisances* even though these activities are conducted with reasonable care; (2) that Article 667 imposes liability on *all activities* which cause *any damage* to neighboring property, even in the absence of negligence; (3) that Article 667 imposes liability without a showing of negligence, on activities which by their nature cause *risk or peril* to others.

That Article 667 could be used to impose liability on properly operated enterprises was first enunciated in the case of *Devoke v. Yazoo & M.V. R.R.*,¹⁷ decided in 1947. In this case the Su-

16. In most of the early cases involving disputes between neighboring landowners over various uses of land, much reliance was placed by the courts on the concept of nuisance. Cases and materials on nuisance from the common law were used a great deal. In a recent court of appeal case, it has been stated: "Cases involving the abatement of nuisances are many and varied. The foundation of the rights of such actions is a matter of codal provision and is set forth in Articles 667, 668, 669 of our Civil Code. These articles have been oft interpreted and applied in a long line of familiar decisions." *Hobson v. Walker*, 41 So.2d 789, 794 (La. App. 1949).

Two cases of interest in which a use of Article 667 to impose strict liability was rejected are *Watkins v. Gulf Refining Co.*, 206 La. 942, 20 So.2d 273 (1944) (in action to recover for damages from "blowing out" of a well on the theory that Article 667 imposes absolute liability, held, recovery could be allowed under the doctrine of *res ipsa loquitur* and that the question of strict liability need not be reached) and *McIlhenny v. Roxana Petroleum Corp.*, 122 So. 165 (La. App. 1929) (in action to recover for damages from explosion of dynamite nine miles from plaintiff's home, held, Article 667 inapplicable).

17. 211 La. 729, 30 So.2d 816 (1947). On the same day, the Supreme Court held that a petition seeking to recover damages for injury to property allegedly occasioned by soot and oily substance dispersed from defendant's carbon black plant and for abatement of alleged nuisance stated a cause of action, although it did not contain any allegation of negligence. *O'Neal v. Southern Carbon Co.*,

preme Court found that the operation of a railroad terminal was a nuisance and held that liability for nuisance did not depend on negligence. This holding was a modification of the jurisprudence; for in prior decisions if the thing complained of was properly installed, properly operated, and of modern vintage,¹⁸ the court would hold that these were unavoidable inconveniences which must be accepted for the sake of the public good.¹⁹ In reaching its decision in the *Devoke* case the court referred to various material from the common law dealing with "nuisance."²⁰ It should be noted that at common law private nuisance is an unreasonable interference with the interest in the use and enjoyment of land. The determination that the interference is unreasonable is essentially a balancing process by which the gravity of the harm to the plaintiff is weighed against the utility of the defendant's conduct.²¹ Thus it would appear that the

211 La. 1075, 31 So.2d 216 (1947) (this case later came up on the merits, 216 La. 96, 43 So.2d 230 (1949); the court refused to allow damages on the ground that casual connection was not established between injuries to residence and operation of the carbon plant). For a court of appeal case applying the *Devoke* rule see *Codding v. Braswell Supply, Inc.*, 54 So.2d 852 (La. App. 1951) (plaintiff could recover for damage to aluminum skins of trailers caused by cement dust emanating from cement loading plant, even though negligence was not alleged or proved).

18. *Irby v. Panama Ice Co.*, 184 La. 1082, 1092, 168 So. 306, 310 (1936) ("living in such a neighborhood, plaintiffs cannot be heard to complain that an industrial plant is operated on adjoining property, if it is operated in a proper manner. Defendant's plant is properly operated and the noise and vibrations it produces are only those which are unavoidable, and such as may be reasonably expected to emanate from a plant of that character"); *DiCarlo v. Laundry & Dry Cleaning Service*, 178 La. 676, 152 So. 327 (1933) (one witness testified that the machines are unbalanced, and defendants' witness testified that good machines do not vibrate); *Germann v. 557 Tire Co.*, 167 La. 578, 120 So. 13 (1929) (evidence showed that this machine was either set up improperly or else improperly operated); *Orton v. Virginia Carolina Chemical Co.*, 142 La. 790, 793, 77 So. 632, 633 (1918) ("a careful reading of the testimony convinces us that the defendant's plant was well constructed, but that it did not use certain appliances that it might have used"); *Hill v. Chicago, St. Louis & New Orleans R.R.*, 38 La. Ann. 599, 606 (1866) ("the best authorities agree that mere consequential injuries, not occasioned by fault or neglect, but incident to the prudent exercise of the right conferred, are not included").

19. *LeBlanc v. Orleans Ice Mfg. Co.*, 121 La. 249, 250-51, 46 So. 226, 227 (1908) ("the owner of such a plant must take all proper precautions to prevent noise, smoke, etc., from becoming a nuisance to the neighbors . . . This being done, unavoidable noise, smoke, etc., must be considered as an inconvenience to which the neighbors must submit for the public good"). *Cf. Germann v. 577 Tire Co.*, 167 La. 578, 120 So. 13 (1929) and *Eagen v. Tri-State Oil Co.*, 183 So. 124 (La. App. 1938), in which it was stated that it is only unavoidable disturbances to which neighbors must submit for the public good and in which plaintiffs were allowed to recover because of finding that damage was not unavoidable.

20. 211 La. 729, 740, 30 So.2d 816, 820 (1947). The court relied strongly on the American Jurisprudence section on nuisance. It also cited WINFIELD, LAW OF TORT (2d ed. 1943); HARPER, TORTS (1933); Ruling Case Law, Words and Phrases (Nuisance); and various cases from common law jurisdictions.

21. PROSSER, TORTS § 72 (2d ed. 1955): "Private Nuisance. The law of private nuisance is very largely a series of adjustments to limit the reciprocal

court in the *Devoke* case did no more than recognize that in some situations the balancing process involved in determining the existence of a nuisance might result in liability being imposed on properly operated businesses. However, in order to incorporate this common law rule into Louisiana law, the court cited Article 667. This article was used as the basis for a statement that the action was clearly not one in tort, but sprang from an obligation imposed upon property owners by the operation of law.²² The use of the article in this manner and the result of the case suggest a possible consistency with the servitude view of the article. The proprietor of one estate was held liable for damage caused to a neighboring estate by the use of his property. Nevertheless, it should be emphasized that the court did not bind itself to a literal interpretation of Article 667. The requirement that the activity must first be classified as a nuisance in order for liability to attach allowed the court to balance the competing interests.

A second interpretation of Article 667 is found in two decisions of the Orleans Court of Appeal.²³ In these cases the court apparently read Article 667 literally, holding that where the property of the plaintiff was injured by pile driving operations on adjoining premises, the plaintiff could recover against the owner of the adjoining premises under Article 667 without a

rights and privileges of both, in every case the court must make a comparative evaluation if the conflicting interests according to objective legal standards, and the gravity of the harm to the plaintiff must be weighed against the utility of the defendant's conduct."

HARPER & JAMES, TORTS 71, § 1.24 (1956): "The element of fault in private nuisance. What constitutes a reasonable user of property on the one hand, or an unreasonable harm to others on the other, must be determined by reference to all the conditions of the parties, the circumstances of the situation, and the balancing of advantages and disadvantages incident to the defendant's conduct for all concerned. The social desirability and utility of the defendant's conduct together with the possibility and practicability of avoiding the damage to the plaintiff are important considerations."

22. 211 La. 729, 743, 30 So.2d 816, 821 (1947). This statement by the court is rather enigmatic in that nuisance is considered a tort at common law and in that the court in this opinion relied on common law "tort" material. It would seem that the court meant that this was not an action in that type of tort suit where negligent conduct or intentional wrongdoing is a requisite.

23. *Bruno v. Employers' Liability Assurance Corp.*, 67 So.2d 920 (La. App. 1953) (plaintiff could recover against owner of adjacent property for damage to dwelling caused by pile driving operations conducted in the regular and customary manner and in no way negligently); *Hauck v. Brunet*, 50 So.2d 495 (La. App. 1951); noted in 6 LOYOLA L. REV. 77 (1951) and 26 TUL. L. REV. 524 (1952) (plaintiff could recover against owner of adjacent property for damage to dwelling caused by pile driving operations without adducing proof that the performance of the work had been done unlawfully, negligently, or intentionally).

showing of negligence.²⁴ This interpretation is similar to the servitude view of the article and, if followed, would lead to an imposition of liability broader than that involved in a nuisance case²⁵ or in a case based on the *Rylands* doctrine.

However, any extension of this literal view devised by the Orleans Court of Appeal would appear to be negated by a third line of cases interpreting Article 667. In these cases the courts have used Article 667 as a basis for a rule of liability resembling that of *Rylands v. Fletcher*. This is first noticeable in the case of *Fontenot v. Magnolia Petroleum Co.*,²⁶ decided in 1955, which involved damages from the operation of geophysical explorations with dynamite. In this case the court allowed recovery without a showing of negligence, although the plaintiffs were suing the engineering company which conducted the tests and not the owner of the neighboring property. The court held that the doctrine of absolute liability is applicable to activities which cause *risk or peril* to others, even though the defendant is without fault and conducts his business according to modern and approved methods and with reasonable care. Although the court stated that the action was not one in tort but one that sprang from an obligation imposed by law on property owners,²⁷ it

24. This line of cases appears to have begun with *Loesch v. R. P. Farnsworth & Co.*, 12 So.2d 222 (La. Or. App. 1943). In that case the plaintiff was suing the contractor and not the owner of the property for damages caused by pile driving. There was no negligence. The court did not reach the question of the type of liability imposed by Article 667; for they held that the article was not applicable to independent contractors operating on the property. In the *Hawck* case (1951), the court was squarely presented with the question, for there the plaintiff sued the owner of the property. In holding the owner liable, the court stated: "It seems paradoxical to say that the exercise of a legal right by one can amount to a legal wrong, but the . . . article emphatically places the onus on a proprietor of making upon his property no work which may be the cause of damage to his neighbor's property." (50 So.2d 495, 497). In the *Bruno* case (1953), applying the rules of the former cases, the court held the owner liable, but absolved the contractor and subcontractor of liability under Article 667.

25. Under the concept of nuisance only those activities which, in the court's opinion, cause "unreasonable interference" are subjected to liability. If Article 667 is read so as to impose liability on activities which cause "any damage" it can be seen that liability would be imposed in more instances than under the nuisance concept. On the other hand, if Article 668, providing that the neighbor may be required to sustain "some inconvenience," is interpreted as including some physical damage, it can be seen that this interpretation would result in a type of liability very similar to that of nuisance.

26. 227 La. 866, 80 So.2d 845 (1955), discussed in *The Work of the Louisiana Supreme Court for the 1954-1955 Term*, 16 LOUISIANA LAW REVIEW 228, 267 (1956), noted in 30 TUL. L. REV. 156 (1955). For a similar court of appeal case see *Pate v. Western Geophysical Co.*, 91 So.2d 431 (La. App. 1956) (held causal connection established between damage to property and blasting operations).

27. The court's use of this statement here is especially puzzling in view of the fact that the defendant in the case had no proprietary interest in the land whatsoever.

should be noted that the holding and the language used are clearly not consistent with a servitude view of Article 667. First, the court's statement that strict liability is applicable to activities which cause "risk or peril" can be interpreted as a qualification by the court of the effect of the article.²⁸ This interpretation would be a departure from the words of the article, which apparently proscribes all works which cause damage or deprivation of enjoyment. Secondly, it is obvious that since a servitude requires the existence of two separately owned estates, there can be no violation of a servitude when, as here, the defendant had no proprietary interest whatsoever. On the contrary, it can be seen that the holding of the court bears a greater resemblance to the *Rylands* doctrine, with its qualification of "ultrahazardous."

In 1957, in the case of *Gotreaux v. Gary*,²⁹ the Louisiana Supreme Court held a crop duster and the owner of the property strictly liable for damage done by the crop dusting to a neighbor's crop. In disposing of this case the court relied on Article 667 and the *Fontenot* case. It is interesting to note that the plaintiffs contended that spraying was a nuisance and that, under the *Devoke* rule, liability for a nuisance did not depend on negligence. The court, however, stated that the legal problem presented was not that of private nuisance, but resolved itself to the determination of whether the doctrine of strict liability was applicable. Thus it would appear that in these two cases the Supreme Court evolved a rule very similar to the *Rylands* doctrine and that it has not recognized any view of Article 667 as establishing a servitude. Further, it would appear that the court has recognized a type of liability distinct from that of the *Devoke* case.³⁰

28. For such an interpretation, see *Town of Jackson v. Mounger Motors*, 98 So.2d 697, 699 (1957).

29. 232 La. 373, 94 So.2d 293 (1957), discussed in *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Torts and Workmen's Compensation*, 18 LOUISIANA LAW REVIEW 63 (1957), noted in 32 TUL. L. REV. 146 (1957). For a similar court of appeal case, see *Jones v. Morgan*, 96 So.2d 109 (La. App. 1957) (causal connection established between damages to cotton crop and spraying of rice field with chemicals).

30. Under the *Rylands* rule, an activity which is classified as "ultrahazardous" is liable for any damage it may occasion without proof of negligence. Liability under the concept of nuisance is different in that any activity which causes "unreasonable interference" with adjoining property is a nuisance and the other party may recover damages. Thus the fact situation in the *Devoke* case, train terminal emitting smoke, is readily classified as an "unreasonable interference," although it would seem difficult to classify it as an ultrahazardous activity" or, in the words of the court in *Fontenot*, as an activity causing risk or peril. The statement in the text that the court in these two cases has apparently recognized

A recent court of appeal case, which carried the *Rylands* theory even further is *Town of Jackson v. Mounger Motors, Inc.*,³¹ in which the town's fire house was damaged when a truck on an adjacent used car lot was backed into it by a driver who took the truck without permission after business hours. The court stated that Article 667, as interpreted in the *Fontenot* case, was the *Rylands* principle and that this doctrine applies only when an activity involves a high degree of risk of harm to others and when it is inappropriate to the place where it is maintained. Applying these rules to the fact situation presented, the court reached the conclusion that the evidence did not reflect such a use of property so inherently dangerous as to justify the application of strict liability.

CONCLUSION

Since 1947 the Louisiana courts have enunciated three interpretations of Article 667. The view developed by the Orleans Court of Appeal that the article imposes a duty on proprietors not to damage their neighbor's property is most consistent with the servitude view. However, this was apparently an independent development by the Orleans Court and would seem to be implicitly overruled by later Supreme Court cases. In the *Devoke* case the Supreme Court used Article 667 as the basis for its holding that liability for nuisance does not depend on negligence. This view still has not been overruled by the Supreme Court, although its effect would seem to be limited by the decision in the *Gotreaux* case.³²

The most important development, however, has been the introduction of a doctrine into Louisiana very similar to the common law doctrine of strict liability for ultrahazardous activities. Although the Louisiana Supreme Court has not yet stated out-

a type of liability distinct from that of *Devoke* is based on two factors. First, the court rejected the contention of the plaintiff in the *Gotreaux* case that the legal problem presented was one of private nuisance. Second, the court in the *Fontenot* case stated that absolute liability is imposed on activities causing "risk or peril," which appears to be more closely connected with the notion of "ultrahazardous" than with "unreasonable interference." However, it should be pointed out that in both the *Fontenot* and *Gotreaux* cases the court referred with approval to the *Devoke* case. In addition, in the *Gotreaux* case the court, citing the *Devoke* case, stated: "Although the use of the spraying operation was lawful, it was carried out in such a manner as to unreasonably inconvenience plaintiff and deprive him of the liberty of enjoying his farm." This language would seem to indicate that the court was still regarding this as a nuisance type interference.

31. 98 So.2d 697 (La. App. 1957).

32. See note 28 *supra*.

right that Article 667 is to be equated with the common law doctrine, the language and results of the opinions suggest that this is the trend.

Since the article apparently establishes a servitude, the court's use of it as the basis for a doctrine of strict liability for ultrahazardous activities raises the question of the merits of the court's view and the servitude view. From a vantage point of the general problems of recovery for non-intentional, non-negligent damage, a comparison of the two views would indicate that the *Rylands* rule handles the problem better than the servitude rule. In the first place, the *Rylands* rule allows the court greater flexibility in determining which activities are to be subjected to liability without a showing of negligence. The requirements of "undue danger" and "abnormal to the surroundings" furnish the court a rule with which a differentiation can be made between activities of little use to society and those of great public benefit. The servitude view, on the other hand, by apparently imposing liability in all cases where the use of one estate causes any damage to another estate, establishes a standard which is very broad and inflexible, affording the court little balancing power. In the second place, the *Rylands* rule enables a court to reach situations which a servitude view would not. As *Rylands* is not exclusively a landowner doctrine nor limited to affording redress for damages to property, it would apply to persons with no proprietary interest in land, and could be used as a basis for allowing recovery for personal injuries. On the other hand, the servitude view, by not imposing liability on a lessee or an independent contractor and by not allowing recovery for personal injuries, would appear to be placing its stress on a relatively narrow aspect of the general problem. At best, the use of a servitude view would require that other theories be used to cover these situations.

Any use of Article 667, however, as a basis for a version of the *Rylands* doctrine is embarrassed by the fact that the article says nothing about peril-making enterprises or ultrahazardous activities. Further, since Article 667 apparently applies only to proprietors, using the article to impose liability on non-proprietors results in an anomalous situation. It is submitted that if the court is desirous of using the *Rylands* doctrine, this could be accomplished through Article 2315 of the Louisiana Civil

Code,³³ providing that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The court could recognize that the word fault need not be limited in its meaning to negligence or wrongful intent, and hold that "fault" is present whenever one exposes another to injury by engaging in an ultrahazardous activity and in so doing causes injury. The acceptance of such a view would have the advantage of incorporating a form of strict liability into our law which would bring about the desired result in a manner not inconsistent with the Code.

If a form of strict liability were read into Article 2315, there would still remain the question of what to do with Article 667. If it is felt that the language of the article is in fact too broad, it is submitted that the application of the article might be limited to the adjudication of disputes between adjoining landowners involving typical "nuisance" situations.³⁴ It should be noted that such an interpretation³⁵ would not result in a literal application of the article, but would have the effect of introducing the concept of "unreasonableness" into the article. This interpretation would give the article meaning and at the same time serve to limit its broad and unqualified language.

George C. Herget, Jr.

Attorney's Fees As An Element of Damages: The General Rule and Its Exceptions

In general the jurisprudence of Louisiana has not favored the allowance of attorney's fees as part of the damages to be

33. LA. CIVIL CODE art. 2315 (1870).

34. It would seem that the concepts of nuisance and of Article 667, as written, are quite similar in that they both purport to be rules for regulating disputes between adjoining proprietors over various uses of land. The chief distinction would appear to be in the nature of the interference. For an activity to be classified as a nuisance, the interference must be "unreasonable." On the other hand, any interference which is more than "some inconvenience" (Article 668) would appear to be a violation of Article 667 as written.

35. This interpretation of the article bears a close resemblance to the decision of the Supreme Court in *Devoke v. Yazoo & M.V.R.R.*, discussed above. See note 17, *supra*. Further, as pointed out above (see note 28 *supra*) the later Supreme Court cases which seem to be moving toward a rule resembling *Rylands*, do contain language suggesting that the type of liability involved is related to that of nuisance.