It is true that the only article in the Code Napoléon that requires a date on a will is article 970, prescribing the formalities for the olographic testament. But in view of the above, the reason is clear: provision for a date had to be made because the olographic will was not governed by the laws of Ventôse referred to above.

It would appear that the failure of the Louisiana Civil Code to make provision for the date in wills other than the olographic will is due to the fact that these articles were taken from the French articles which, as noted, were silent on the subject. But this inadvertence is not grounds for saying that only the olographic will need be dated. As the court points out in the instant case, there are very strong reasons why a date is necessary in all wills.

But all this is extraneous to the question presented for adjudication in the Gordon case, for there is no mistake or ambiguity in requiring a complete date for validity thereof in the legislation pertaining to the statutory will.

TORTS
Wex S. Malone*

NEIGHBORING LANDOWNERS—DANGEROUS ACTIVITIES

The Round Trip Excursion to Article 667 and Return

"Although a proprietor may do with his estate whatever he pleases, still he cannot 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." Louisiana Civil Code article 667.

The basic nature of the obligation imposed by Louisiana's anomalous Civil Code article 667 together with the proper ambit for the operation of that article has been the subject of lively debate among law writers for the past twenty-five years. One

* Boyd Professor of Law, Louisiana State University.

authority has consistently maintained that the article is a rule of property,\(^2\) while others, including the writer, prefer to regard this article as an aspect of delictual liability.\(^8\) The Louisiana courts through their decisions have obligingly provided abundant ammunition for both sides of the dispute.

The noteworthy entry for the journal now is *Reymond v. State, Department of Highways*,\(^4\) a supreme court decision during the recent term, which appears to have achieved a final resolution of the issue—a resolution that leaves each of the scholarly disputants as both victor and vanquished. Here is the story.

The construction of Interstate 10 Highway through Baton Rouge depreciated the value of the residential property of plaintiff, Mrs. Reymond, in several respects. She suffered physical damage to her home resulting from vibrations caused by pile driving activity, the repair cost of which was $2,500. In addition, it was found that the value of her property was depreciated by the impairment of its access to neighboring highways and by the physical isolation of the residence from other parts of the subdivision. This latter loss had been assessed on trial at $6,250. The result was an award of $8,750 to Mrs. Reymond.

The supreme court regarded the contest as one controlled exclusively by principles of expropriation. It affirmed the award for physical damage, although the opinion observed significantly that diminution of market value of the property, rather than cost of cure, was the proper measure of recovery. It concluded that under the particular facts presented the cost of correction would fairly reflect the lessening in market value.

The court declined to award the damages claimed for impairment of access and for isolation because it did not appear that the loss suffered was peculiar to the plaintiff, but, rather,

\(^{2}\) See Dainow, note 1 supra.
\(^{3}\) See Malone, note 1 supra. I gather from Professor Stone's article, supra, that he shares my views. The same, I believe, is true of Mr. Herget's observations in his Comment, 20 La. L. Rev. 378 (1960).
that it was of a kind general to the entire neighborhood. Without denying that there was an impairment of value by reason of the routing of the multilane highway, the court laid emphasis on the fact that public improvements will inevitably cause discomfort, disturbance and inconvenience to property owners in the close vicinity of the newly established highway.5 The opinion wisely refrained from any attempt to draw the precise point where the inconvenience suffered by a complainant so exceeds the suffering to be endured by the entire community that it becomes a damage that can be regarded as special and peculiar, and hence compensable. The majority was content to conclude that no such point had been reached in Mrs. Reymond’s case, and it was here that three Justices disagreed.

The interesting feature of the opinion from the standpoint of Louisiana tort and property theory was the fact that the majority opinion deliberately embarked upon an interesting and elaborate discussion of the applicability of Civil Code article 667 to a controversy of this kind, and concluded that the article was not relevant.

Before attempting any discussion of the substance of the controversy concerning article 667, it seems advisable to make mention of the fact that two members of the court6 expressed the opinion that any discussion of this article in the majority opinion was unnecessary. It is easy for this reviewer to appreciate why the majority felt otherwise and went into the matter as it did.

The precise nature of the claim asserted by a landowner against a public body may be a matter of importance for several purposes: the character of the suit may be determinative of the necessity of showing fault; it may serve to establish those elements of loss that can or cannot be legally recognized; it may fix the measure of the quantum of damage recoverable. Furthermore, at one time the choice of theory could determine whether the defendant public body would enjoy an immunity from liability for conduct that would be actionable if the defendant were a private corporation. If the public corporation were charged with a tort at one time it might have successfully con-

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5. For a general discussion of this problem, see M. Dakin & M. Klein, EMINENT DOMAIN IN LOUISIANA C. III, § 4(D) and (E) (1970).

6. Hamlin and Sanders, JJ.
tended that as a sovereign it could do no wrong; if it were charged with a taking of private property or the infliction of damage in making a public improvement, its exercise of the power of expropriation could carry with it an obligation to make restitution. Similarly, if the landowner were able to assert that he enjoyed a servitude conferring upon him a right of enjoyment free of interference by a “neighbor,” he might insist his claim was not an assertion that a tort had been committed but rather an effort to enforce a servitude. Therefore, the plaintiff might enjoy recovery despite the rubric that the king can do no “wrong.” Although in the instant case the court experienced no difficulty in concluding that under article 3, section 35 of the Louisiana Constitution, the clause to “sue and be sued” of La. R.S. 48:22 effectuates a general waiver of any immunity that might formerly have been enjoyed by the Highway Department, nevertheless this same conclusion—that sovereign immunity against tort was unavailable under the facts presented—could have been reached by avoiding tort and recognizing instead that the claim was one for the enforcement of a servitude. Although this same contention concerning sovereign immunity had been dismissed by a court of appeal in an earlier decision, and a writ of certiorari had been refused by the supreme court, the matter perhaps should not be regarded as conclusively settled adversely to a claimant of a servitude.

Perhaps the most significant reason for a resort to article 667 by plaintiff was the fact that she failed to show that the physical damage suffered was caused by negligence. The shortcoming here could be avoided if she could convince the court that she was entitled to assert a privilege under article 667 and that the privilege was of such a character that its invasion was actionable even if no fault were involved. Although the court did reach a conclusion favorable to the plaintiff and allowed a recovery despite the absence of fault, it deliberately rejected the application of article 667 and affirmed the award of damages for physical injury by resort to public law principles of expropriation. It

does not follow, however, that the court's venture into a dis-
cussion of the reasons why article 667 was not applicable was
an unnecessary meandering of the opinion, as was suggested by
the dissenting judges. A matter of damage measurement was
involved in the choice of theory. The writer of the opinion took
meticulous pains to make clear that the measure of recovery
should be determined by the lessening of the market value of
the land by reason of the conduct complained of. This is the
normal measure of damage where the claim is based upon ex-
propriation. On the other hand it can be surmised that the amount
of damage to be recovered under article 667 would be measured
by the cost of repairing the damage inflicted. Although the dif-
ference in the method of fixing damages was fortuitously of no
significance under the facts presented, in future decisions it
could be a matter of great importance. I suggest that even for
this reason alone the court was entirely justified in launching a
discussion of the reasons that prompted it to reject the plaintiff's
urging that liability be imposed through resort to the servitude
argument.

The court's undertaking to explain limitations on the opera-
tive ambit of Civil Code article 667 is entirely justifiable, as this
writer sees it, for a further reason: an ultimate question to be
answered was, what elements of loss are to be regarded in
assessing damages against those who undertake a public im-
provement that has lessened the value of neighboring private
property? Under principles relative to public appropriation and
under such tort principles as may be applicable, the answer is
fairly well settled: neither an impairment of the view or outlook
of the property affected nor a lessening of the owner's conveni-
ence of access to public roads are recognized elements of loss
except under sharply limited circumstances (circumstances over
which the court can exercise an effective control). If, however,
the victim could avoid these traditional approaches and could
invoke some independent competing principle of liability—if he
could maintain that the situation was neither merely another
incident of inverse expropriation nor the mere creation of a
public nuisance, but rather, the judicial recognition of an en-
forceable servitude on the part of the plaintiff, then a new ave-
nue of liability would be open for exploration, inviting a not
implausible contention that the servitude with which the de-

11. Klein v. Louisiana Dep't of Highways, 175 So.2d 454 (La. App. 4th
Cir. 1965).
fendant interfered embraces the values of a pleasant view and of neighborhood convenience. In short, a new theory might arguably bring a new and broader concept of the range of losses to be recognized, unembarrassed by the established limitations on liability under tort or public law principles.

In view of the fact that both courts below had granted recovery under article 667 expressly and that the damages that had been awarded under this approach were held improper by the supreme court with respect both to the types of losses properly compensable and with respect to the technique of measuring the amount to be recovered, it seems the supreme court's announcement of its reasons for rejecting the application of article 667 should be regarded as considerably more than a mere venture into the world of dictum.

The Decision

The court's announced version of the nature of the obligation imposed under Civil Code article 667 and the more closely circumscribed area imposed by the court for its operation can be stated in a few words: the article expresses a rule of property, not of tort. Hence, for situations falling within the proper operative ambit of article 667 the incidents of property law must attach. Presumably, this means that the prescriptive period of one year for tort controversies does not apply,¹² and that whatever shreds may remain of governmental immunity from tort in this state have no application in claims appropriate to this article.

Once it is recognized that the rule of the article is one of property, whereby a servitude is imposed, it follows that the article's application must be confined to those entities that can be regarded as subservient to a servitude. Thus, the court observed the article must be restricted in application to other estates. The importance of this limitation lies in the fact that it excludes from article 667 coverage all harmful activities of men, except as such activities may bring about a physical alteration of the subservient estate. The opinion clearly shows that the court was entirely cognizant of the importance of this exclusion of harmful activity or enterprise. The court freely confessed that several earlier decisions had subjected to the servitude of article

¹² The contrary conclusion had been reached by the Fourth Circuit Court of Appeal in Gulf Ins. Co. v. Employer's Liab. Assur. Corp., 170 So.2d 125 (La. App. 4th Cir. 1965).
667 a fairly wide range of human activities, including pile driving, emission of nauseous smoke and fumes, and release into the air of poisons injurious to neighboring crops.

The court further supported the newly imposed limitation by observing that the language of the article in question prohibits only the making of any work upon the land which may deprive one's neighbor of the liberty of enjoying his own. A work, the court stated, denotes some structure upon the subservient premises which injures the neighbor. Presumably, any alteration of the condition of the offending property so that its physical state is changed to the injury of the neighbor would fall within the article's coverage. The opinion proceeds by pointing to the fact that article 667 has no counterpart in the French Civil Code and that it was probably a verbatim translation of a paragraph in the writings of Domat. It is then pointed out that the rule or principle as announced by Domat is clarified by several illustrations furnished by that author in his text. Each of these, the opinion emphasizes, refers to a harm-inflicting structure of some kind, such as a roof that discharges water on the neighbor or a bakehouse near the boundary that proves to be a fire hazard because of its proximity. No bare activities, however dangerous they might be, are mentioned anywhere by the early writer.

With reference to the Domat passage, the dissenting opinion of Justice Sanders urges that the classic author's illustrations must be understood in the light of the limited variety of harmful activities that could have been anticipated at the time he wrote. Crop dusting, the use of dynamite, the emission of smoke and fumes by industrial plants, and similar annoyances which are all too characteristic of our modern society were obviously unknown in the eighteenth century, and hence no reference to such hazards should be expected. But, conceding that this is true, as the dissent indicates, nevertheless a distinction between harmful activities, on the one hand, and dangerous structures, on the other, is one that would have as readily occurred to a writer then as it would today. For instance, the most obvious hazard that would be expected to emanate on one tract of land and spread its destructive force to neighboring property would seem to be fire. Yet it is significant that no mention is made of a default in the building or maintenance of a destructive fire that

13. The article is quoted in full at p. 231 supra.
escapes and does damage to surrounding property. Instead, the author appears constrained to refer specifically to the placing of physical objects such as stoves and fireplaces against a common wall.

This writer suggests that no effort to concentrate upon the chrysalis of history or tradition from which article 667 arguably emerged can afford a very meaningful approach to an appraisal of the soundness of the *Reymond* decision. Attention to the underlying considerations of public policy affords a more productive attack. Here, available arguments against the more restricted scope of article 667 announced by the decision deserve serious attention. As society becomes more complex and dangerous, the entire juridical world (not merely the common law or the civil law) is moving apace toward an imposition of liability for the hurts inflicted by the many hazardous activities around us without reference to the presence or absence of blameworthiness on the part of those who conduct them. The capacity of enterprise to bear the costs of the losses it inflicts upon mankind is fast becoming a consideration that attracts as much sympathy in fixing liability as the familiar impulse to avoid penalizing the innocent. The evidence of this shift in the spectrum faces us at every hand. In France, for example, the operator of a motor vehicle is subject to unqualified liability for all the injury he inflicts. This liability is achieved through a manipulation of traditional articles of the French Civil Code.\(^\text{15}\) We are on the verge of achieving the same result in the United States through statutes that would cast the loss incurred by reason of the operation of motor vehicles upon the institution of automobile insurance, which would be made mandatory.\(^\text{16}\) Strict liability is now imposed nearly everywhere upon manufacturers for all injuries inflicted by any product released by them that could be characterized as "defective."\(^\text{17}\) Again, the public is insisting that society be protected against the pollution of air and water and


\(^{16}\) Massachusetts has become the first state to adopt a no-fault plan for automobile liability. Mass. Senate Bill 1580 of 1970. The measure becomes effective Jan. 1, 1971. Even more significant is the portended incursion of the federal government into the field of no-fault automobile liability under the interstate commerce clause. S. 4339, 91st Cong., 2d Sess. (1970), introduced by Senator Hart (Mich.) in September, 1970, has been referred to the Senate Commerce Committee.

other harms affecting our natural environment by modern industrial operations. This, too, is exerting pressure upon the courts to extend liability increasingly without regard to who may or may not have been “to blame.”

The need and direction is becoming increasingly obvious, and few judges, lawyers, or writers would disagree in their estimate that this is the ultimate objective toward which the legal order is now moving at a dizzy pace. For this reason one might be tempted to regard with indiscriminate favor all rules that would result in unqualified liability. By the same token one may be tempted to look with a cynical eye upon a decision that would inhibit the operation of any no-fault principle or which would tend to restrict the area in which such principle could be made effective. Any decision that would have this effect is in danger of being regarded as a reactionary movement against the tide of the times.

Is any such observation appropriate to the Reymond decision? Although article 667 has served as a resort in support of unqualified liability for harmful activities in past decisions, I cannot feel that the opinion in Reymond, which sharply limits the article's area of operation, should be regarded as anything other than a commendable and important step in the right direction toward an intelligent and discriminate handling of enterprise liability for hazardous undertakings. I hope to explain in the following paragraphs why I feel this is so.

First, it is particularly noteworthy that the court in Reymond made clear the fact that it intended no retreat from the proposition that there should be recovery “for damages resulting from the use of dangerous instrumentalities or materials or man's engagement in inherently dangerous activities.” “We simply find article 667 inapplicable in such situations.” Thus there is no reason to regard the decision in any way as marking a retreat from the objective of unqualified enterprise liability in appropriate instances. In other words, the destination, in terms of policy, has not changed. The only change is the abandonment of the old vehicle that formerly had served as one means of transportation toward unqualified liability in Louisiana. The question, therefore, is whether article 667 should be regarded as a good device that is fairly adaptable to the purpose to which

it must be put. If so, it should not be cast aside. If, on the other hand, the court is conscious of its need for better and more flexible machinery to assist it in handling the problem of liability for hazardous enterprises, there is neither compulsion of history nor any demand of overriding tradition that should compel it to retain the older approach. We are justified, then, in making inquiry as to whether the language of article 667 affords a useful and discriminating tool for the job it must perform in modern society. Or is the article too awkward and too blunt for the task to which it must be put? This writer feels that it definitely is.

In undertaking to make an appraisal of the demands of policy we must bear in mind that we are in a transitional state between fault liability, on the one hand, and a liability predicated solely upon the creation of risk and a recognized capacity to pay, on the other. We are not yet prepared to surrender completely the notion that in most instances individuals should not be obliged to pay merely because the activity in which they were engaged happened fortuitously to go wrong. Perhaps we shall never desert the fault principle entirely. There is enough of the nineteenth century left in us to prompt us to afford some place of shelter for the prudent individual who inflicts harm through sheer inadvertence. This impulse finds an expression in the "fault" language of article 2315. On the other hand, a host of modern enterprises bring substantial wealth to those who conduct them, while imposing extravagant and irreducible risks of harm upon others—risks so severe that they cannot be wholly avoided even by the exercise of all feasible precautions. Thus the notion of unqualified enterprise liability arises. But it is important to bear in mind that all human activity does not fit the picture here, and courts, in the adjudication of controversies as they arise, cannot escape the responsibility of sorting out the types of enterprise conduct that should be subjected to absolute liability and separating these from those activities that should be held liable only when they are improperly conducted. At this point the hallmark of good legal doctrine lies in its elasticity and in its capacity to afford as much assistance as possible to the courts as they attempt to separate the sheep from the goats in the pastures of enterprise.

Furthermore, although living in a complex and congested world obliges us all to accept certain harms and annoyances
without recourse, it does not oblige us to submit to all inconveniences indiscriminately. For this reason another process of selection is unavoidable. The harms that can be recognized as compensable, as well as the enterprises that can be made to suffer without qualification, must be sorted out by the courts as intelligently and in as meaningful a way as is possible. Here again, doctrine must be of as much assistance as doctrine can ever be, and at least it should not get in the way of the decisional process.

It strikes this writer that article 667 does not lend itself well to the purpose of adjusting conflicts of the types suggested in the preceding paragraph. If, as would seem proper, the inescapable accident cost of a given hazardous activity ought to be so allocated by law that this cost can ultimately be passed on in dilution as a charge upon the numerous consumers or users of the goods or services produced by the activity, then it would seem that the enterprise—the individual or corporation that conducts the activity—is the appropriate unit that should initially shoulder the cost burden; for the enterpriser is in the best position to convert the anticipated accident charge into an item of capital cost, to insure against it, and to transfer the resulting premium cost into the price structure of the goods or services the activity produces. Furthermore, it is only the enterpriser who is in a position to adopt or to devise those precautionary measures that may serve in the future to minimize the chance of a recurrence of the tragedy. If this is true, the deficiencies of article 667 are immediately apparent. The language of that article makes no reference to enterprise liability as such. Instead, the finger of responsibility is pointed exclusively toward a "proprietor." This term indicates at least a holder of a property interest of some kind in land, even though this interest may be less than full ownership. Of course, the owner of the estate upon which a hazardous enterprise is being conducted may, by chance, serve also in the role of enterpriser, as where an industrial plant owned and operated by defendant contaminates the air and water of the neighborhood. But, on the other hand, he may not be engaged in any enterprise whatsoever, or the enterprise that he does conduct may be of a basically non-hazardous character. Nevertheless, liability against him may be strenuously urged under the language of article 667. *Town of Jackson v. Mounger Motors*\(^\text{19}^\) affords an excellent illustration of the reaction of a

\(^{19}\) 98 So.2d 697 (La. App. 1st Cir. 1957).
Louisiana court when faced with this dilemma. A truck was parked on Mounger Motors Used Car Lot. After business hours, one Bolden, while attempting to take the truck without permission, backed it into the adjacent town fire hall and caused the damages sued for. The town, being unable to establish negligence, based its reliance upon article 667. The contention was that the defendant’s property had been so used as to injure the neighboring town hall, and defendant, the owner, should automatically be subjected to liability therefor. The argument failed. In denying recovery, the court of appeal, speaking through Tate, J., observed that “the doctrine [of article 667] importing liability to the non-negligent owner of property for damage caused by his legal use of his own property applies only when such use ‘involves a high degree of risk of harm to others and is abnormal in the community’ [citing Prosser, Torts (Second Edition 1955) 329], or is ‘unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings.’”

This observation is highly significant. The author of the opinion was obliged to make an entire reconstruction of the language of article 667 so as to restrict “proprietor” to “proprietor engaged in extrahazardous enterprise.”

In other instances the “proprietor” or owner may be merely the customer receiving the benefit of services of an ultrahazardous character which are performed under contract. Here again the primary risk bearer should be the enterpriser because he alone is so strategically situated that he can insure against the prospect of loss that is inherent in the operation of his business, and he alone can pass along the premiums indiscriminately to all the customers (“proprietors”) he serves as an increase in the contract price. In most cases it will be found that the enterpriser has done this, and each proprietor has supported the cost of the accident risk in advance. Nevertheless, the language of the article in question does not contemplate that anyone except a proprietor is subject to unqualified liability. Here again, however, the courts have managed to hold the enterpriser to a strict responsibility even though he is in no sense an owner. In such case the language restricting liability to the “proprietor” is simply ignored. Thus, in Gotreaux v. Gary the supreme court imposed absolute liability upon an enterpriser engaged in the obviously hazardous business of cropdusting by airplane.

20. Id. at 699.
21. 232 La. 373, 94 So.2d 293 (1957).
duster, together with the owner of the land who had contracted for the work, was obliged to pay for the defoliation of a neighbor's property even though no negligence was established. Similarly, a petroleum producer and its contractor, an engineering concern, were subjected to no-fault liability under the article for vibration and concussion damage sustained by plaintiff on his residence, although both defendants were bare enterprisers, rather than proprietors of adjacent estates. It is noteworthy that in each of these instances the courts were able to achieve results consonant with a sound administration of enterprise liability for ultrahazardous activities; and they did so by invoking the provisions of article 667. But to this writer, at least, the important observation is that in each instance the author of the opinion was obliged to work against the article upon which the court was relying, either by wholly ignoring its strictures, or by radically reformulating the tenets of the codal provision relied upon.

Again, it should be noted that many costly activities of an ultrahazardous character are frequently conducted on public highways, on public bodies of water, or in the public airlanes. Here, any notion of a “proprietor” making a “work” upon his “estate” is entirely lacking. Can the inflexible language of article 667 again be transmuted through some magic of interpretation into a pronouncement of unqualified liability to be imposed on all dangerous activities quite without reference to where they are conducted? Or, should we conclude, obedient to what the article clearly says, that liability for the conduct of activities on one's own private premises is to be determined by a set of no-fault principles, while an engagement in dangerous operations in public places is to be judged solely by reference to the presence or absence of negligence, as dictated by article 2315?

Finally, the only object afforded protection under the express language of article 667 is the “neighbor.” Although one early opinion suggested that this term must be restricted to the man next door, Civil Code article 651 states that “it suffices that they [the lands] be sufficiently near, for one to derive benefit from the servitude on the other.” But even under this broader

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conception of neighbor, a physical proximity of some kind existing between two estates is clearly contemplated. This would suggest that the only damage recognizable under the article is an injury to a property interest (damage to the estate that enjoys the benefit of the servitude). Perhaps an accompanying injury to the owner or his family might be recognized as parasitic damage entitled to coverage. But what is to be done if the victim of the miscarried enterprise happens to be a pedestrian on the public way or even a casual visitor on neighboring premises? Of course, the phrases of the article might again be maneuvered by an ingenious and creative judge so as to support coverage for an indeterminate wide group of persons and interests. Indeed, a court may be induced to observe in a pious moment that enterprise should be its neighbor's keeper. But here again this kind of effort to achieve justice through a frantic manipulation of language marks an unhappy approach to the solution of human problems, provided that some more straightforward theoretical approach can be made available. Although a highly skilled golfer might manage to shoot par golf with a putter, he can do a much better job with a full set of suitable clubs.

After rejecting article 667 for enterprise harms, the court took care in the Reymond opinion to do no more than suggest in the broadest terms possible the type of reagent by which enterprise liability should be tested. It observed that unqualified liability could be imposed upon harms inflicted by "inherently hazardous activities." Beyond this, the opinion is deliberately cautious: "We need not and do not state the basis, authority, or source for recovery in cases of this nature."24 The decision thus clears the path for resort to a newly formulated body of doctrine leading to enterprise liability.

The idea of absolute liability for inherently hazardous activities is one which, as we have already observed, is emerging both in America and abroad. In France, the development of the theory of le risque crèé and the recent and dramatic expansion of liability for the acts of "things" based upon article 1384 of the French Civil Code are indicative of the flexibility of the civil law in affording recognition of absolute liability in appropriate instances.25 Article 2315 of the Louisiana Civil Code (cor-

25. See the discussion in F. Lawson, NEGLIGENCE IN THE CIVIL LAW § 19 (1950). The expansion of article 1384 of the Code Napoléon so as to impose
responding substantially to article 1382 of the French Civil Code) which imposes liability in terms of "fault" need not be restricted arbitrarily to negligent or intentional misconduct. The term, fault, can be regarded as sufficiently expansive to meet the needs of our complex and dangerous society. The term is properly applicable to the enterpriser who undertakes an activity which he knows in advance involves a high degree of risk to society even after all reasonable precautions have been taken. This risk is inherent in the enterprise undertaking itself, and for creating it the enterpriser can appropriately be made to answer. This is his compact with society. It is the price he pays for the privilege of undertaking the enterprise. The act of launching a dangerous business or operation in the face of a certain although unavoidable chance of injury to the public can appropriately be characterized as "fault," even though society tolerates and even encourages the activity as so conducted.

The designation of certain activities as inherently dangerous or as ultrahazardous and the consequent imposition of absolute liability upon those who conduct them has become current practice in most American jurisdictions and has found its expression in the Restatement of Torts. This recognition of liability beyond negligence can only be regarded as an indigenous American development. It is not to be attributed to English common law, even though one of its germinal sources was probably the doctrine of Rylands v. Fletcher, the famous English decision of the mid-nineteenth century. The Rylands v. Fletcher rule, however, related only to substances or things that escaped from land and which in escaping injured neighboring property. There is a noticeable similarity between these restrictions and the unqualified liability for the acts of "things" under the care ("garde") of defendant is discussed in Malone, Damage Suits and the Contagious Principle of Workmen's Compensation, 12 La. L. Rev. 231, 238 and following (1952).


27. An interesting parallel is found in the discussion of A. EHRENZWEB, NEGLIGENCE WITHOUT FAULT (1961).


30. Among the many excellent treatments of the Rylands v. Fletcher development are: J. CHARLESWORTH, LIABILITY FOR DANGEROUS THINGS (1922); F. BOHLEN, STUDIES IN THE LAW OF TORTS 344 (1925); Bohlen, The Rule in Rylands v. Fletcher, 59 U. PA. L. Rev. 423 (1911); WIGMORE, RESPONSIBILITY FOR TORTIOUS ACTS: ITS HISTORY, 7 HARV. L. Rev. 441 (1894). One of the most recent and comprehensive is W. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 135 (1953).
tions that seem to inhere in the language of article 667. Any expectation that the English doctrine of *Rylands v. Fletcher* would eventually be enlarged in that country so as to embrace highly dangerous activities wherever they may be conducted or to afford protection against harms beyond those suffered by neighboring landowners was sharply nipped in the bud by the House of Lords in 1946. In England, *Rylands v. Fletcher* remains strictly a landowner's doctrine of limited utility.

Although the American courts were hostile at first toward even this modest step in the direction of absolute liability, as American industry put aside its swaddling clothes at the turn of the century and emerged in full stature as a source of peril to the public (but a source endowed with an economic capacity to support the costs of the damages of its creation), our American judges were impelled to reconsider the prospect of imposing absolute liability, and they succeeded in transforming the rule of *Rylands v. Fletcher* into a principle appropriate to our own national needs. As a result, the term, ultrahazardous activity, which appears nowhere in the *Rylands v. Fletcher* doctrine, became the touchstone to liability on the American scene. The person or organization conducting such an activity was subjected to liability irrespective of where his operation was being conducted or who his victim might be. Once the term "ultrahazardous activity" was evoked, the courts proceeded to determine the appropriate boundaries for the phrase. The interpretative process moved in two directions; first, there was an effort to determine in each instance whether there was a substantial likelihood of serious danger in the operation in question that could not be eliminated by the exercise of the utmost care; second, there followed an inquiry by the court as to whether the activity or the operation was one that had become a matter of common usage at the place where it was conducted. Upon these two inquiries rested the decisional process. A new approach has thus been molded through the creativity of American judges and unless there is a sudden change in the judicial climate

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32. See note 30 supra.
33. These requirements appear as *Restatement of Torts* § 520 (1938). They are discussed in some detail in W. Prosser, *The Law of Torts* § 77 at 523 (3d ed. 1964).
of Louisiana, there is reason to believe that the Reymond decision has opened the gate for a course of meaningful development along these lines in this state.

TORTS

William E. Crawford*

SELECTED TOPICS

Traffic Cases

In Cartwright v. Firemen's Insurance Co. the Supreme Court of Louisiana held emphatically that under Louisiana law an automobile owner may not be held liable under the theory of strict liability for damages resulting from a latent defect in the brakes of his vehicle. The court pointed out that strict liability, or liability without fault, may not be invoked as a theory of recovery unless provided for by the legislation of the state. The court further specifically stated that the policy considerations inherent in the problem were properly for the legislature rather than for the court.

In Fairbanks v. Travelers Insurance Co., involving operation of vehicles on the highways, the Second Circuit Court of Appeal applied and interpreted the so-called "slow speed statute" to find for the plaintiffs. It is the first appellate case reported under this statute. The crucial language of the statute forbids the operation of a motor vehicle upon the highways "at such a slow speed as to impede the normal and reasonable movement of traffic." The court found that it was for the trier of fact to determine whether the speed in a given case was slow enough to constitute a violation of the statute. As the court pointed out, excessive speed under certain conditions has long been found to be negligence. It is hardly debatable that an excessively slow speed on modern highways can be dangerous and therefore should be classifiable as negligence.

A statement by that court in dictum may give rise to trouble in future cases of this nature. The court said:

"Thus, the slightest degree of inattentiveness by the driver

*Associate Professor of Law, Louisiana State University.

4. Id.