Opening the Can of Worms and Putting Them Back in: An Analysis of New Louisiana Civil Code Article 2695

Brad R. Resweber
INTRODUCTION

The lessee-lesser relationship is one of the most common juridical relationships known to the law. As such, one would expect the law to clearly define the parameters of this relationship and to detail the rights and obligations of the parties thereto. Unfortunately, Louisiana’s law of property and lease does virtually nothing to address one of the most fundamental concerns of these contracting parties—constructions or improvements the lessee makes on land during the lease term.

Suppose, for example, a lessee builds a house and swimming pool on land belonging to the lessor. Suppose further that the lessee decides that he does not want an above-ground pool, but also does not want to pay the cost of installing a concrete pool. So, the lessee decides to dig a hole himself, buy an above-ground pool, and put it in the hole. What happens at the end of the lease? Under Louisiana’s law of lease prior to 2005, there was no clear answer to questions such as who owns the pool, whether the landowner must pay the lessee for the pool, or whether the landowner could demand that the lessee remove the pool.

What happens to the house constructed by a lessee on leased premises? Must it be torn down, and if so, at whose expense? May it remain? If so, must the landowner pay the lessee for the increased value of the land due to the construction of the house? Under Louisiana’s law of lease prior to 2005, the lessee owns the house and has the right to remove it. If the lessee does not remove it, the landowner may either become the owner of the

Copyright 2007, by LOUISIANA LAW REVIEW.


house or let it stay on his land without becoming the owner. Is this not an unfair result for unsightly and unwanted constructions? Should the landowner be forced to keep such items on his land?

These issues were exceptionally problematic when the landowner did not consent to the lessee’s construction of the house. According to Louisiana’s law of lease prior to 2005, the unconsenting landowner owns the house and owes nothing to the lessee. Is it not unfair to the lessee to provide no measure of reimbursement for his legitimate expenses in constructing this improvement, which may be quite substantial? Is forcing a landowner to own a construction he does not desire a sufficient remedy to the problem?

Louisiana’s law of lease prior to 2005 created these and other troubling issues with respect to the resolution of landlord-tenant construction disputes. However, after a ten-year revision process, the Louisiana Law Institute recently completed a comprehensive revision of the Civil Code’s law of lease. The lease revision was adopted during the 2004 legislative session and became effective January 1, 2005. This comment focuses on one particular change made by the new Louisiana Civil Code articles on lease. In particular, it will analyze new article 2695 addressing attachments, additions, or other improvements to leased things.

Prior to the 2005 revision, improvements to leased things were regulated solely by cross-reference to the general accession code articles in the Property section of the Louisiana Civil Code. This cross-reference created a number of gaps in the Code and

3. Id.
4. Id.
6. LA. CIV. CODE ANN. art. 2695 (2006). Pre-revision article 2695 (1870), which dealt with the lessor’s liability for damages from vices and defects, is now covered under article 2696. See LA. CIV. CODE ANN. art. 2696 (2006).
7. LA. CIV. CODE ANN. art. 2726 (1980). The cross-reference has existed since 1980. Prior to 1980, article 2726 provided: The lessee has a right to remove the improvements and additions which he has made to the thing let, provided he leaves it in the state in which he received it. But if these additions be made with lime and cement, the lessor may retain them, on paying a fair price. See LA. CIV. CODE ANN. art. 2726 (1870), amended and reenacted sub nom article LA. CIV. CODE ANN. art. 2695 by 2004 La. Acts No. 821, § 1.
incorporated "numerous deficiencies and inequities" of the law of accession into the law of lease.\(^8\) Those demonstrated in the opening hypothetical give just a small glimpse of the problem.

This comment compares pre-revision Louisiana Civil Code article 2726, dealing with improvements made to leased property by cross-reference to the law of accession, with its replacement, article 2695. Part I explores the gaps and inequities of the pre-revision cross-reference to the law of accession. Part II considers whether the 2005 lease revision and creation of new article 2695 solves those problems, and notes some new, and likely unforeseen, problems created by the new article.

I. THE PRE-REVISION LAW OF LEASE: CHAOS CREATED BY CROSS-REFERENCE TO THE LAW OF ACCESSION

To appreciate the extent to which the revised law of lease solves the problems of constructions made to leased property, it is necessary to examine the rules from which the Lease Committee expressly chose to depart. Again, prior to 2005, cross-reference made general law of accession the Louisiana law of lease regarding improvements made to leased property as well.\(^9\)

A. Accession in General

The Louisiana Civil Code's lynchpin article on accession provides that "[t]he ownership of a thing includes by accession the ownership of everything that it produces or is united with it, either naturally or artificially."\(^10\) Consider, for example, the situation where a lessee constructs a building on the land of the lessor. The law of accession provides the rules for what happens now that the building and land are united. The laws on accession control both ownership (who owns the building) and remedies (what rights the landowner has to remove the building from his land, as well as

---

8. LA. CIV. CODE ANN. art. 2695 cmt. (c) (2006).
what rights the builder has to either remove it or be compensated for his expenses). The following sections explore the ownership and remedial rules of accession, with particular emphasis on the flaws of the articles as applied in the lease context.

B. The Accession Articles' Rules of Ownership

Who owns an improvement will depend on two fundamental questions. First, is it even possible for an improvement to be owned separately from the underlying immovable? Second, if it is possible, which types of improvements are capable of being owned separately?

1. Is Separate Ownership Possible?

Historically, if a person constructed a building or planted crops on another's land, there was no question that the new thing belonged to the owner of the ground. In Roman law and in the Louisiana Civil Code of 1870, component parts of a tract of land could not be owned by someone other than the owner of the ground.

Gradually, however, jurisprudence and legislation changed. Courts began by recognizing that standing crops and timber could be owned by someone other than the owner of the ground. Now, the Louisiana Civil Code recognizes that "buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops or ungathered fruits of trees" may belong to a person other than the owner of the ground. Not all "constructions" may be separately owned, though. Some constructions, such as things "incorporated into a tract of land, a building, or other construction, so as to become an integral part of

---

14. Id.
15. Id.
are still subject to the old Roman rule and may not be owned separately from the ground.18

2. Distinguishing Between Things That Can Be Owned Separately and Things That Cannot

Obviously, determining whether an improvement falls within the category of things that can be owned separately from the ground, or within the category that cannot, is a prerequisite to determining ownership of the improvement. However, in the case of constructions attached to the ground, this is an especially challenging task because the categories overlap.

Ownership of an improvement is governed by either Louisiana Civil Code article 493 or 493.1, depending on what type of thing is united with the underlying immovable. Article 493 covers the things that are capable of being owned separately from the ground.19 Within this category, ownership depends on the consent of the landowner.20 If these constructions are made without the landowner's consent, they belong to the landowner.21 If, however, they are made with the landowner's consent, they belong to the maker.22

Article 493.1, on the other hand, covers things that are not capable of being owned separately from the ground.23 These

17. LA. CIV. CODE ANN. art. 465 (2006). Building materials are one such example. Id.
19. The things susceptible of separate ownership include: buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops or ungathered fruits of trees. See LA. CIV. CODE ANN. art. 491 (2006).
21. Id.
22. Id.; S. Casing of La., Inc. v. Houma Avionics, Inc., 809 So. 2d 1040, 1052 (La. App. 1st Cir. 2001) (evidence as to whether the landowner consented to an airplane hangar being built on his land was required to determine ownership of the hangar).
23. These include things incorporated into a tract of land, a building, or other construction so as to become an integral part of it, or things permanently attached to a building or other construction. LA. CIV. CODE ANN. art. 493.1 (2006) (cross-referencing articles 465 and 466).
things are owned by the landowner regardless of his consent because they are incapable of separate ownership.

Recall, for example, the opening hypothetical. Should the underground swimming pool be treated under article 493 or 493.1? Is it an “other construction permanently attached to the ground” or a thing so incorporated into a tract of land as to become an “integral part” of it? If it is the former, the lessee owns the pool because the landowner consented to its addition to the land. If it is the latter, the landowner owns the pool. Under the current legislation, there is no way to determine whether the pool is “permanently attached” to or an “integral part” of the ground, and thus no way to know who owns it.

This overlap has been noted by a number of legal scholars, and Louisiana courts have provided little help in defining the parameters of the two articles. Often courts simply assume the thing falls into one category or the other and move on with little or no analysis. For instance, wood pilings, oil well casings, underground pipelines, permanent billboards, and underground drainage systems have all been assumed to be other constructions permanently attached to the ground, which are capable of separate ownership. On the other hand, fill dirt, septic systems, and

31. Id.
driveways\(^{32}\) have been classified as integral parts of the ground, which cannot be separately owned.

These classifications are specious at best. A septic system and an underground drainage system bear striking physical similarities, yet one is classified as "permanently attached" to the ground and the other as an "integral part" of the ground. Both systems seem to have the same "connectedness" to the ground, so what is the logical basis for the distinction?

Common constructions such as koi ponds or underground wells further demonstrate the problem with the overlap between articles 493 and 493.1. There is no basis for determining whether these things are "permanently attached" to or "integral parts" of the ground. These endless problems of classification cause serious concerns in practice. Lawyers are generally rendered unable to advise clients with any certainty on such fundamental questions as who will own things united with a lessor's immovable by a lessee.

C. The Remedies Provided by the Accession Articles

The remedial rules of the accession articles determine the maker and landowner's rights with respect to the construction.\(^{33}\) Specifically, these rules determine whether the landowner has to pay the lessee for the construction, whether the landowner can force the lessee to remove his construction, and whether the lessee has a right to remove the construction or to be compensated for it.

1. An Overlap Revisited

Much like the rules of ownership, the accession articles in the Property section of the Code hinge remedies upon the landowner's consent and the type of improvement.\(^{34}\) If the landowner consented to the improvement, the maker may have some remedies, depending on the type of improvement.\(^{35}\) If the

\(^{32}\) Id.
\(^{34}\) LA. CIV. CODE ANN. arts. 493, 495 (2006).
landowner did not consent to the improvement, the maker may have no remedy at all.\textsuperscript{36}

Again, if we consider a swimming pool made by the lessee with the landowner’s consent, the problem is well-illustrated. Because we are not sure whether the pool is “permanently attached” to or an “integral part” of the ground, we are unsure who owns the pool. This same problem exists in the remedial articles because the remedial articles have the same overlapping categories.\textsuperscript{37} The group of things that are capable of separate ownership, including, \textit{inter alia}, buildings and other constructions permanently attached to the ground, have one set of remedies,\textsuperscript{38} while the group of things that are not capable of separate ownership, including, \textit{inter alia}, integral parts of the ground, have another set of remedies.\textsuperscript{39}

Under either group, the maker has the right to remove the improvement subject to the obligation of restoring the property to its former condition.\textsuperscript{40} So, regardless of which category the lessee’s pool falls under, if the landowner consented to its construction, the lessee has the right to remove it at the end of the lease.

The big difference between the two groups is the result when the maker does not remove his improvement. If the pool is considered an “other construction permanently attached to the ground,” and thus in the group of things that may be owned separately from the ground, the landowner may not remove the pool at the lessee’s expense.\textsuperscript{41} The landowner’s only remedy is to keep the pool and, if he chooses, become owner of it.\textsuperscript{42} On the other hand, if the pool is considered an “integral part” of the ground, and thus in the category of things that cannot be owned

\textsuperscript{36} See discussion \textit{infra} Part I.C.2.
\textsuperscript{40} \textsc{La. C iv. Code Ann.} arts. 493, 495 (2006); Walters v. Greer, 726 So. 2d 1094, 1101 (La. App. 2d Cir. 1999).
\textsuperscript{42} \textit{Id.}
separately from the ground, the landowner can remove the pool at
the lessee’s expense.\textsuperscript{43}

This result seems counterintuitive. If the pool is classified as
such a distinct thing that it can be owned separately, it should be
susceptible of removal. On the other hand, if it is classified as
such an integral part of the ground that it cannot be owned
separately, it should not be subject to removal.

This important problem was ignored by the Louisiana Supreme
Court in the highly criticized and eventually legislatively overruled
case, \textit{Guzzetta v. Texas Pipe Line Co.}\textsuperscript{44} Guzzetta owned a large
tract of swampland. His ancestors-in-title had granted Texas Pipe
Line a servitude for a price of $250, which allowed Texas Pipe
Line the right to construct, operate, and remove a pipeline on the
land.\textsuperscript{45} Texas Pipe Line ran the pipeline three feet below the
ground across Guzzetta’s entire tract of land. Upon expiration of
the servitude, Guzzetta no longer wanted his land to be burdened
with an abandoned pipeline, so he requested that Texas Pipe Line
remove it. The cost of removing the pipeline was estimated at
$12,000. Guzzetta argued that the pipeline was an “integral part”
of the ground and he could, therefore, demand that Texas Pipe
Line remove it, or remove it himself at their expense according to
Louisiana Civil Code article 495.

With no discussion of the criteria for its distinction, the court
rejected Guzzetta’s argument, finding that the pipeline was instead
an “other construction permanently attached to the ground” under
Louisiana Civil Code article 493.\textsuperscript{46} Because the court pinned
Guzzetta into article 493, he could not force Texas Pipe Line to
remove the pipeline or remove it himself at their expense.\textsuperscript{47}
Rather, he was forced to keep it.

\section*{2. A Gap for Improvements for Which Consent Was Not Given}

Deciding which category of remedies an improvement for
which the landowner gave consent falls under is not the only

\textsuperscript{43} \textit{L.A. CIV. CODE ANN.} art. 495 (2006).
\textsuperscript{44} 485 So. 2d 508 (La. 1986).
\textsuperscript{45} \textit{id}.
\textsuperscript{46} \textit{id}.
\textsuperscript{47} \textit{L.A. CIV. CODE ANN.} art. 493 (2006).
problem with the remedial rules. For some improvements for which the landowner did not give consent, there are no applicable Civil Code articles and possibly no remedies. The previously discussed remedial rules, Louisiana Civil Code articles 493 and 495, apply only if the improvement was made with the landowner's consent.48 Another set of articles, Louisiana Civil Code articles 496 and 497, provide some rules regardless of the landowner's consent, but only when the maker is a possessor.49 These two sets of articles create a huge gap in the Civil Code for improvements that are made without the landowner's consent by a lessee, who, by definition, is not a possessor.50

The Code's deficiencies in this area are evident in the recent decision of Southern Casing of Louisiana, Inc. v. Houma Avionics.51 Houma gave Southern Casing permission to build a hangar on land that Houma leased from the Airport Commission. Ultimately, Houma and Southern Casing had a dispute over ownership of the hangar. The trial court analogized the situation to that of an owner, Houma, and good faith possessor, Southern Casing, and applied Louisiana Civil Code article 496.52 The result of the application of this article was that Houma was required to keep and pay for the hangar.53

The court of appeal rejected the trial court's faulty application of article 496 but replaced it with its own faulty analysis. The court of appeal correctly determined that the issue of ownership

50. In order to be a possessor, one must take corporeal possession of the immovable with the intent to possess as owner. LA. CIV. CODE ANN. art. 3424 (2006). This excludes all precarious possessors, such as lessees, that acquire the property on behalf of someone else, because they lack the requisite intent to possess as owner. Wilson v. Capitano, 656 So. 2d 696, 698–99 (La. App. 5th Cir. 1995); V & S Planting Co. v. Red River Waterway Comm'n, 472 So. 2d 331, 336 (La. App. 3d Cir.), writ denied, 475 So. 2d 1106 (La. 1985) (predial lessee does not qualify as a possessor because the lessee does not possess as owner according to article 3424; lessee is also not a possessor in "good faith" under article 487 because he does not possess the land by virtue of an act translative of ownership); Symeonides, 1983–1984, supra note 24, at 549.
51. 809 So. 2d 1040 (La. App. 1st Cir. 2001).
52. Id. at 1047.
53. Id.
could not be solved without evidence as to the consent of the landowner, the Airport Commission.\textsuperscript{54} Because the Airport Commission was not made party to the suit and there was no evidence in the record as to the Airport Commission's consent, the court of appeal could not resolve the issues of ownership or remedies. The court of appeal also correctly determined that Southern Casing was not a possessor in good faith because it did not possess the leased property by an act translatable of ownership, believing itself to be owner of the leased property.\textsuperscript{55} Thus, article 496—covering only "good faith possessors"—could not apply.

However, in dicta, the court of appeal completely misinterpreted the law of accession. The court stated that if the Airport Commission were found to be owner of the hangar because it did not consent to the hangar's construction, the Airport Commission could demand the demolition and removal of the hangar based on article 497, addressing constructions made by a bad faith possessor.\textsuperscript{56} The court of appeal went on to say that if the Airport Commission was found to be the owner and chose to keep the hangar, it would be bound to reimburse Southern Casing under article 497.\textsuperscript{57}

This analysis is completely incorrect. Articles 496 and 497 do not apply at all in lease situations because the lessee does not possess as owner.\textsuperscript{58} It is article 493 that should apply instead. If the Airport Commission did not consent to the hangar's construction on its land, under article 493 it is the owner of the hangar and owes nothing to Southern Casing.\textsuperscript{59} This absurd result—that a lessee who made an unconsented to improvement had no remedy at law to either remove the improvement or be

\textsuperscript{54} Id. at 1052 (based on Louisiana Civil Code article 493, the airplane hangar belongs to the Airport Commission, as owner of the ground, unless it was built with the Airport Commission's consent).

\textsuperscript{55} Id. at 1053.

\textsuperscript{56} Id. at 1052.

\textsuperscript{57} Id.


\textsuperscript{59} LA. CIV. CODE ANN. art. 493 (2006).
reimbursed for it—is one of the inequities in the accession articles that the new law of lease sought to rectify.60

**D. Interplay Between Ownership and Remedies: The Evolution of Article 493**

"Article 493 of the Louisiana Civil Code has been largely misinterpreted by courts and commentators."61 Because of this misinterpretation, the article seems to be in a perpetual state of change. Since its enactment in 1980 it has been amended twice,62 likely in a legislative attempt to clarify its meaning. Even today, it is not without fault. The next few sections explore the evolution of the law of lease through the amendments to article 493.

1. **The Original Article 493**63

The 1979 revision of the law governing immovables allowed buildings, other constructions permanently attached to the ground, timber, and unharvested crops in Louisiana to be owned separately from the ground.64 Article 493 was needed to determine who was the owner of these improvements.65 As enacted in 1979, it stated, in relevant part:

Buildings, other constructions permanently attached to the ground, and plantings made on the land of another with his

60. Melerine v. State, 773 So. 2d 831, 839 (La. App. 4th Cir. 2000), writ denied, 789 So. 2d 595 (La. 2001) (person making the building has no rights whatsoever when he permanently attaches a building to the land of another without the landowner’s permission). Some courts resolve the issue under alternative equitable theories, such as unjust enrichment, quantum meruit, and equitable estoppel, but there is a lack of consistency. See, e.g., Carriere v. Bank of La., 702 So. 2d 648 (La. 1996); Haring v. Stinson, 756 So. 2d 1201 (La. App. 2d Cir. 2000); Gray v. McCormick, 663 So. 2d 480 (La. App. 3d Cir. 1995); Kibbe v. Lege, 604 So. 2d 1366 (La. App. 3d Cir.), writ denied, 606 So. 2d 540 (La. 1992).


63. This article had no prior counterpart in the Code of 1870. Dep’t of Wildlife & Fisheries v. Anchor Gasoline Corp., 669 So. 2d 470, 475 (La. App. 1st Cir. 1996).

64. Yiannopoulos, supra note 12, at § 116.5, at 272.

65. Id.
consent belong to him who made them. They belong to the owner of the ground when they are made without his consent.\textsuperscript{66}

This first paragraph remained unchanged through the two subsequent revisions and is still effective today verbatim.\textsuperscript{67} This original version had a significant and obvious flaw: it was silent with respect to the rights and obligations of the maker and landowner after termination of their legal relationship.\textsuperscript{68} To appreciate the significance of this silence, recall, for example, the problem of a house built by a lessee with the lessor’s consent. Under the original version of article 493, this house would be a building made on the land of another and would, therefore, belong to the person that made it, the lessee.\textsuperscript{69} But, what happens when the lease terminates and the lessor no longer wants the lessee on his land? There is now a building that belongs to one person on land that belongs to another and no legal relationship between the two. The 1980 version of article 493 provided no guidance on this issue. The significant gap led to a prompt legislative revision.

2. The 1984 Amendment\textsuperscript{70}

Louisiana Civil Code article 493 was amended in 1984 with the addition of a second paragraph, which stated, in relevant part:

When the owner of buildings, other constructions permanently attached to the ground, or plantings no longer has the right to keep them on the land of another, he may remove them subject to his obligation to restore the property to its former condition. If he does not remove them within 90 days after written demand, the owner of the

\textsuperscript{66} LA. CIV. CODE ANN. art. 493 (1980) (amended 1984). The 1979 enactment had two additional paragraphs which were later redesignated as articles 493.1 and 493.2, with no change in the law, by 1984 La. Acts No. 933, § 1. Similarly, lease article 2726 originally only cross-referenced article 493, but was then amended to add articles 493.1, 493.2, and 495 in the same act. See 1984 La. Acts No. 933, § 1.
\textsuperscript{67} LA. CIV. CODE ANN. art. 493 (2006).
\textsuperscript{68} Yiannopoulos, supra note 12, at § 116.5, at 272–73.
\textsuperscript{69} LA. CIV. CODE ANN. art. 493 (1980).
\textsuperscript{70} 1984 La. Acts No. 933, § 1.
land acquires ownership of the improvements and owes nothing to their former owner.\textsuperscript{71}

This additional paragraph filled the gap left in the 1980 version of the article by providing a remedy when the parties’ legal relationship ends. Under the 1984 amendment, the lessee can remove the house he constructed with the landowner’s consent and restore the lessor’s land to its former condition. However, if the lessee does not remove the house within ninety days of the lessor’s demand, ownership of the house transfers from lessee to lessor with the lessor owing nothing to the lessee.\textsuperscript{72}

The 1984 amendment was an adequate remedy if the landowner wanted the improvement, but created a new problem for unwanted improvements. Judicial interpretations of this second paragraph saddled landowners with unwanted improvements and provided them no remedy for removal.\textsuperscript{73}

For instance, suppose that instead of a nice house, the lessee built a dilapidated shack that was an eyesore. Assume further that at the end of the lease, the lessee moved out with no intention of removing the shack from the lessor’s land. Under the 1984 amendment, ninety days after demand for removal, ownership of the shack automatically transferred to the lessor. This is precisely the result that was obtained with the unwanted pipeline in the Louisiana Supreme Court \textit{Guzzetta} opinion, previously addressed above.\textsuperscript{74}

Civilian scholars decried the \textit{Guzzetta} interpretation as inconsistent with the civil law notions that ownership is presumed to be free of all burdens, legal or physical, and that a landowner has the right to demand the removal of any structure that encroaches upon his property.\textsuperscript{75} One of these scholars, Symeon Symeonides, explained the problematic relationship between the rules on ownership and remedies in accession law as follows:

\begin{itemize}
\item \textsuperscript{72} Id.
\item \textsuperscript{74} 485 So. 2d 508; see discussion \textit{supra} Part I.C.1.
\item \textsuperscript{75} Yiannopoulos, \textit{supra} note 12, at § 116.10, at 20 (Supp. 2005).
\end{itemize}
If a thing is incorporated into your land in such a way as to become an integral part of it, we call that thing a component part of your land. This means that the thing is yours, whether or not you consented to its incorporation. If, however, you consented to such incorporation, you may force the person who made it to remove the thing at his expense, although the thing belongs to you and no longer to him.

On the other hand, if the thing is not so incorporated into your land, but is merely attached to it permanently with your consent, then we do not call that thing a component part of your land. Obviously, this means that the thing is not yours. Although it is not yours and you may not want to have it, it may somehow become yours, if the person who put it there does not want to remove it.\footnote{Symeonides, supra note 1, at 450–51 (citing LA. CIV. CODE ANN. art. 493, as interpreted in\textit{ Guzzetta} (citations omitted)).}

This explanation articulates the illogical scheme of the law of accession in 1984. However, the problems did not end with a mere absence of logic. The court’s analysis in\textit{ Guzzetta} caused even more trouble for landowner liability. In\textit{ Melerine v. State}, for instance, ownership of an abandoned oil well casing reverted to the State of Louisiana when the maker did not remove it within ninety days.\footnote{773 So. 2d 831 (La. App. 4th Cir. 2000).} Therefore, the state was liable for tort damages when a fisherman’s boat struck the oil well casing.\footnote{Id. at 842.} Similarly, in\textit{ Anderson v. Tenneco Oil Co.}, ownership of an unmarked piling reverted to the State of Louisiana when the maker failed to remove it.\footnote{826 So. 2d 1143 (La. App. 4th Cir. 2002).} Therefore, the state was liable for tort damages when a shrimper’s boat struck the piling.\footnote{Id.} This undesirable result of landowner liability for wholly unwanted improvements led to yet another revision of article 493.

\begin{itemize}
\item \footnote{Symeonides, supra note 1, at 450–51 (citing LA. CIV. CODE ANN. art. 493, as interpreted in\textit{ Guzzetta} (citations omitted)).}
\item \footnote{773 So. 2d 831 (La. App. 4th Cir. 2000).}
\item \footnote{Id. at 842.}
\item \footnote{826 So. 2d 1143 (La. App. 4th Cir. 2002).}
\item \footnote{Id.}
\end{itemize}
3. Current Article 493

In the most recent revision of Louisiana Civil Code article 493, in 2003, the first paragraph was again left unchanged. However, the text of the second paragraph was changed as follows:

When the owner of buildings, other constructions permanently attached to the ground, or plantings no longer has the right to keep them on the land of another, he may remove them subject to his obligation to restore the property to its former condition. If he does not remove them within 90 ninety days after written demand, the owner of the land may, after the ninetieth day from the date of mailing the written demand, appropriate ownership of the improvements by providing additional written notice by certified mail, and upon receipt of the certified mail by the owner of the improvements, the owner of the land obtains ownership of the improvements and owes nothing to the owner of the improvements. Until such time as the owner of the land appropriates the improvements, the improvements shall remain the property of he who made them and he shall be solely responsible for any harm caused by the improvements. . . .

The historical progression of article 493 leaves little doubt as to the legislature's intention in this revision. Still, House Concurrent Resolution No. 306 of 2004 makes it clear that:

[It]s intent in the enactment of Act No. 715 of the 2003 Regular Session was to legislatively overrule the decisions in Guzzetta, Melerine and Anderson to the extent those cases held that the provisions of Civil Code article 493 bestowed ownership of improvements, as a matter of law, on the owner of land on which the improvements had been made by another merely with his consent without specific claim to ownership of the improvements by the landowner, to this extent, Act No. 715 of the 2003 Regular Session is

81. 2003 La. Acts No. 715, § 1 (strike through indicates text that was deleted and underline indicates text that was added).
procedural and interpretative and is to be applied retroactively.\textsuperscript{82}

It is yet to be determined how courts will interpret this amendment and what new problems may lie ahead. One, as yet jurisprudentially unrecognized problem with article 493, is an equitable issue that has remained unchanged through the two revisions. This problem concerns the first paragraph of article 493. If the legislature finds it unfair to bestow ownership on a landowner who originally consented to an improvement, but now no longer wants it, it seems even more inequitable to bestow ownership on a landowner that never consented to the improvement in the first place.\textsuperscript{83}

For example, assume that, without the landowner’s consent, a lessee constructs a dilapidated shack on his leased property. Even after the 2003 revision, the first paragraph of article 493 bestows ownership on the landowner for the unconsented to and unwanted improvement.\textsuperscript{84} The second paragraph of article 493 does not apply to such an improvement because it is not one for which consent was given.\textsuperscript{85} As a result, the problems of Guzzetta, Melerine, and Anderson continue to apply to improvements made without the landowner’s consent.

In the style of Professor Symeonides, an explanation of the persisting problem would be as follows: If the thing is not so incorporated into your land as to become an integral part of it, but is merely attached to it permanently with your consent, then we do


\textsuperscript{83} Melerine \textit{v.} State, 773 So. 2d 831, 837 (La. App. 4th Cir. 2000), \textit{writ denied}, 789 So. 2d 595 (La. 2001) (second sentence of Louisiana Civil Code article 493 automatically vests ownership in the landowner of buildings permanently attached to land by someone other than the landowner, without the landowner’s permission—a rule that apparently applies whether or not the landowner wants the building).


\textsuperscript{85} The second paragraph of article 493 only applies when the maker no longer has the right to keep his improvement on the land. Without the landowner’s consent, the maker never had the right to have his improvement on the land. Thus, the second paragraph does not apply. \textit{See La. Civ. Code Ann.} art. 493 (2006).
not call that thing a component part of your land. However, if you did not consent to the thing being incorporated into your land, then we do call that thing a component part of your land. This means that the thing is yours. Even though you may not want to have the thing, it is yours and you cannot demand that the person who put it on your land without your consent remove it.

In the case of an unwanted improvement, this result is absurd. Even after two revisions, Louisiana Civil Code article 493 retains the problem of burdening landowners with these unwanted items.

4. Abandonment as a Way Out of the Accession Articles?

Given the plethora of problems with the law of accession, it is no wonder that Louisiana courts have tried to avoid opening the “cans of worms.” The Louisiana Supreme Court in *Smith v. State Department of Transportation* recently used abandonment instead of accession to resolve the issue of improvements made to leased property.

Smith leased a commercial building from its owner, Unkel, and used the building to run his business, B&K Music. During the lease term, Smith made various improvements to the interior of the building, such as installing signs and air conditioners, mostly with the consent and knowledge of the lessor. After eighteen years, the parties agreed to terminate the lease due to the imminent threat of expropriation by the State of Louisiana; the building was to be torn down so that the state could expand a highway. Smith was

---

89. *Id.*
91. 899 So. 2d 516 (La. 2005). *Smith* is actually a combination of two separate suits that Smith filed against Unkel and the State Department of Transportation and Development (“DOTD”). *Id.* at 519. The court of appeal found the DOTD not liable for the improvements, and Smith did not appeal, thus making the judgment final. *Id.* at 534.
92. *Id.* at 520.
93. *Id.*
94. *Id.* at 521.
given ample opportunity\textsuperscript{95} to remove all items he wished to remove from the building and, upon returning his key to Unkel, Smith indicated that all items he desired to keep had been removed.\textsuperscript{96} Unkel then sold the building to the state in lieu of expropriation.\textsuperscript{97} A month after the sale was complete; Smith’s attorney sent a letter to Unkel demanding payment for the improvements under article 495.\textsuperscript{98}

The district court determined that after termination of the lease, the lessor elected to keep the improvements and was, therefore, entitled to compensation under article 495.\textsuperscript{99} Noting that Unkel was well aware that Smith wanted compensation for the improvements and that at no time did Smith abandon his request for that compensation, the district court determined that Unkel elected to keep the improvements because he: (1) sold the property with the improvements attached; and (2) went back after the sale and removed one of the improvements, an air conditioner, to keep for himself.\textsuperscript{100} Therefore, Unkel was ordered to pay Smith $500 for the improvements Smith made to the leased property, particularly his B&K Music Sign.\textsuperscript{101}

In an unpublished opinion, the court of appeal found no error in the trial court’s award of damages to the lessee under article 495.\textsuperscript{102} However, the Louisiana Supreme Court reversed. It disagreed with the trial court’s factual determination that Unkel elected to keep the improvements. The Louisiana Supreme Court instead concluded that Smith was not entitled to the value of his improvements because he abandoned them and made no attempt to remove them or request their removal. Thus, article 495 did not apply.\textsuperscript{103} The Louisiana

\textsuperscript{95} Unkel allowed Smith to extend the lease by a month and a day in order to accommodate the move. \textit{Id.}
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Id.} at 531 (had the land actually been expropriated, Smith would have been limited to recovery only against the expropriator and not the lessor under pre-revision article 2697).
\textsuperscript{98} \textit{Id.} at 521.
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{Id.} at 523–24.
\textsuperscript{101} \textit{Id.} at 522.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.} at 519–20.
Supreme Court's only basis for its reversal was its factual finding that Unkel did not elect to keep the improvements.

New Louisiana Civil Code article 2695 was not applicable here because the facts occurred before its passage.104 But the Louisiana Supreme Court's avoidance of the accession question raises the issue of what precedent Smith leaves after the 2005 revision, and whether abandonment may still provide an escape from the accession rules under the newly-revised law of lease.105

II. CLARITY THROUGH A NEW AND "SELF-CONTAINED" ACCESION ARTICLE TAILORED TO LEASE

The Louisiana Legislature charged the Louisiana State Law Institute ("Law Institute") with the revision of the lease articles in the Civil Code. As part of this revision, the Law Institute necessarily had to revisit the question of accession in lease situations. Revised Louisiana Civil Code article 2695 was introduced as a solution to the problems created by the previous cross-reference to the general accession articles.106 The next few sections discuss the history of article 2695's enactment, the problems it solves, and the new problems it creates.

A. The History of Article 2695's Enactment

When the Law Institute began to undertake the lease revision, the reporter for the Lease Committee, Symeon Symeonides, explained to the Lease Committee the deficiencies in the pre-revision scheme for additions to leased property created by the cross-reference to the general accession code articles.107 Following that presentation, the Law Institute authorized Symeonides to revise not only the law of leases, but also the general accession articles, the latter in cooperation with the Property Reporter.108 However, to

105. ld.
106. ld.
108. Id.
save time, the Law Institute decided to leave the revision of the general accession articles to the Property Reporter. To this day, the general accession articles have not been revised; therefore, all of the inconsistencies and inequities present in those articles remain.

The Law Institute did go forward with the lease revision and devised a solution to avoid the problems created by the cross-reference to the accession articles. Comment (c) to revised article 2695 makes it clear that the new article is intended to be a "self-contained rule" applicable to leases and is meant to fill the gaps created by the pre-revision cross-reference.

The Law Institute ultimately proposed the following to the Louisiana Legislature:

Article 2695. Attachments, additions, or other improvements to leased thing

In the absence of contrary agreement, upon termination of the lease, the rights and obligations of the parties with regard to attachments, additions, or other improvements made to the leased thing by the lessee are as follows:

(1) The lessee may remove all improvements that he made to the leased thing, provided that he restore the thing to its former condition.

(2) If the lessee does not remove the improvements, the lessor may:

(a) Appropriate ownership of the improvements by reimbursing the lessee for their costs or for the enhanced value of the leased thing whichever is less; or

(b) Demand that the lessee remove the improvements within a reasonable time and restore the leased thing to its former condition. If the lessee fails to do so, the lessor may remove the improvements and restore

109. Id.
110. This was a poor word choice by the drafter of the comment. A civil code is an interdependent document in which each article is read in light of its relation to other articles on the same subject matter. See Alain Levasseur, On the Structure of a Civil Code, 44 TUL. L. REV. 693, 700–03 (1970). A civil code is not simply a list of "self-contained" rules to be read in isolation. Id.
111. LA. CIV. CODE ANN. art. 2695 cmt. (c) (2006).
the leased thing to its former condition at the expense of the lessee or appropriate ownership of the improvements without any obligation of reimbursement to the lessee.\textsuperscript{112}

This draft article was not accepted by the legislature as written. Instead, the Senate Committee amended the article in two ways. First, at the end of the draft article section (2)(b), the legislature added: "A appropriation of the improvement by the lessor may only be accomplished by providing additional notice by certified mail to the lessee after expiration of the time given the lessee to remove the improvements."\textsuperscript{113} Second, the legislature added section (2)(c), which states: "Until such time as the lessor appropriates the improvement, the improvements shall remain the property of the lessee and the lessee shall be solely responsible for any harm caused by the improvements."\textsuperscript{114}

These amendments bear a striking resemblance to the 2003 amendments to article 493.\textsuperscript{115} It appears that the legislature was again trying to avoid the problem created by \textit{Guzzetta},\textsuperscript{116} \textit{Melerine},\textsuperscript{117} and \textit{Anderson}\textsuperscript{118} of forcing ownership of unwanted improvements on landowners. Unfortunately, these added provisions cause problems of their own.

\textbf{B. Overlap Rears Its Ugly Head Yet Again}

\textit{Louisiana Civil Code} article 2695 does not regulate ownership of improvements.\textsuperscript{119} It only addresses remedies available to lessees and lessors upon termination of the lease.\textsuperscript{120} In order to

\begin{itemize}
  \item \textsuperscript{113} Amendments proposed by Senate Committee on Judiciary A to Reengrossed House Bill No. 38 by Representative Ansardi, \textit{available at} http://www.legis.state.la.us/leg_docs/04RS/CVT4/out/0000LR40.pdf.
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} \textit{See} discussion \textit{supra} Part I.D.3.
  \item \textsuperscript{116} 485 So. 2d 508 (La. 1986).
  \item \textsuperscript{117} 773 So. 2d 831 (La. App. 4th Cir. 2000), \textit{writ denied}, 789 So. 2d 595 (La. 2001).
  \item \textsuperscript{118} 826 So. 2d 1143 (La. App. 4th Cir.), \textit{writ denied}, 828 So. 2d 585 (La. 2002).
  \item \textsuperscript{120} \textit{Id.}
\end{itemize}
determine ownership of the improvements, one must look beyond the "self-contained" article to the general law of accession yet again.

Recall the problem of determining whether a swimming pool the lessee constructs on the lessor's property is an article 493 other construction "permanently attached" to or an article 493.1 "integral part" of the ground. If it is the former, the pool is in a category of things that can be owned separately from the ground and ownership will depend on the landowner's consent. In this instance, the remedies available to the respective parties are found in article 493.

If it is the latter, an integral part, the pool belongs to the landowner because it is in a category of things that cannot be owned separately from the ground, and the remedies available are found in article 495. This problem of determining ownership still exists even after the 2005 revision, though the problem of determining remedies is solved.

C. Elimination of a Distinction Based on Improvement Type

Louisiana Civil Code article 2695 solves the problem created by the overlap in categories with regard to remedies by eliminating the distinction based on the type of improvement. Article 2695 applies to "attachments, additions, or other improvements."121 Comment (a) to article 2695 clarifies that attachments and additions are types of improvements and that "other improvements" may include items mentioned in other Code articles.122 Articles 493 and 495 are specifically listed among those other articles to which article 2695 is supposed to apply.123

Thus, under the new article, the lessee and lessor will have the same remedies under revised article 2695, regardless of whether the swimming pool is in the category of things that can be owned separately from the underlying immovable or the category which cannot. Either way, the lessee will first have the option to remove the pool. If he does not, then the landowner can: (1) appropriate

121. Id.
122. LA. CIV. CODE ANN. art. 2695 cmt (a) (2006).
123. Id. (other articles that are within the scope of 2695 are articles 463, 465, 466, 491, 496, and 510).
ownership of the pool by reimbursing the lessee for his costs or the enhanced value of the land; (2) demand that the lessee remove the pool; (3) remove the pool himself at the lessee's expense; or (4) if the lessee does not remove the pool after demand, appropriate ownership of the improvement, owing nothing to the lessee.  

Thus, the overlap is reconciled under the new law of lease. But, applying article 2695(2)(c) to both types of improvements, regardless of consent, creates yet another serious anomaly. How can something that cannot be owned separately from the underlying immovable, such as integral parts of the ground, building materials, or component parts of a building, at the same time belong to the lessee according to article 2695(2)(c)?

For example, assume that the lessee's pool is classified under article 493.1 as an "integral part" of the ground that cannot be owned separately from the owner of the ground. If we apply article 2695, section (2)(c) suggests that after the lease terminates, if the lessee does not remove the pool (which the lessor owns according to article 493.1), and the lessor does not appropriate the improvements (which he already owns), then the improvements remain the property of the lessee and the lessee shall be solely responsible for any harm caused by the improvements. This is true, even though the lessee never owned the improvements and, in the case of article 493.1, the improvements are not capable of being owned by someone other than the owner of the ground. This is a problem that the Senate Committee apparently did not consider when adding section (2)(c) to article 2695. This added provision simply cannot be reconciled with article 493.1 and the theory that some things cannot be owned separately from the owner of the ground.

D. Elimination of a Distinction Based on Consent

Recall that the general accession articles provide remedies for consented to improvements and unconsented to improvements made by possessors, but not for unconsented to improvements

made by precarious possessors, such as lessees. In order to fill this gap, revised article 2695 provides the same remedies for improvements, regardless of landowner consent. This change fills the gap for improvements constructed by lessees without consent and also solves the problem of the faulty application of articles 496 and 497 to non-possessors, as illustrated in Southern Casing of Louisiana v. Houma Avionics.

Although article 2695 solves two problems, it raises a new question of whether the policies it expresses are equitable. Moving from no remedy to providing the same remedy for lessees who obtained owner consent and those who did not is certainly a drastic change. In evaluating the legislature’s policy decision, it is important to realize that article 2695, as well as the general accession articles, are suppletive. Therefore, article 2695 is a default provision and will only apply in the absence of a prior agreement between the lessor and lessee as to the fate of improvements made to the leased property.

Many academics support the notion that default terms should be set at what the parties would have wanted had they negotiated the transaction. Under this theory, the convergence of the remedies for consented to and unconsented to improvements seems logical. If the contracting parties had negotiated, consent would not be an issue, and, therefore, not be a basis for differing remedies. Bargaining lessors and lessees would likely negotiate for similar remedies. Namely, lessees would want the right to remove their improvements or be compensated for them, and lessors would want the option of appropriating ownership of improvements or forcing the lessees to remove them at the lessees’ expense.

However, evaluating article 2695 in terms of whether it comports with what the parties would have wanted had they negotiated ignores the fact that, with regard to improvements for

---

128. See discussion supra Part I.C.2.
129. LA. CIV. CODE ANN. art. 2695 cmt. (b) (2006).
130. Id.
which the lessee did not obtain consent, he intentionally avoided a negotiation with the lessor. It seems inequitable to give a lessee who does not get the lessor’s consent to make an improvement the same rights as a lessee who does. In the case of the unconsented to improvement, the lessee should have limited rights. Such a limitation is necessary to encourage lessees to get permission before making improvements to the leased property. Other civil law jurisdictions treat makers with consent differently from those who proceed without it for this very reason.\(^{132}\) Louisiana’s new lease redactors would have done better to follow their lead.

Symeonides once proposed that a distinction based on consent be incorporated into article 2695, but it never came to fruition.\(^ {133}\) During a drafting meeting, Symeonides himself noted that new article 2695 leaves a “major equity gap: in cases involving valuable improvements that were made with the lessor’s consent but which cannot be removed without substantial damage to themselves or to the thing, the lessee is left without an effective remedy while the lessor may be unjustly enriched.”\(^ {134}\) Symeonides was asked to review the matter and return to the Law Institute with a recommendation to fill the gap.\(^ {135}\) At the next meeting, he suggested remedying the problem by distinguishing rights based on lessor consent. He proposed the creation of two alternatives: (1) if the improvements had been made without the lessor’s consent, then the lessee must compensate the lessor; and (2) if the improvements had been made with the lessor’s consent, then he must pay the lessee some reimbursement.\(^ {136}\) However, at the next meeting of the Lease Committee, no one moved to reconsider article 2695. The gap therefore remains today.\(^ {137}\)

\(^{132}\) \textit{ITALIAN CIV. CODE} art. 1593; \textit{ARGENT. CIV. CODE} art. 1573.

\(^{133}\) Louisiana State Law Institute, Notes Prepared for Meeting of Council (Sept. 14–15, 2001).

\(^{134}\) Louisiana State Law Institute, Minutes (May 18–19, 2001). At the time this gap was noticed, the proposed article was similar to what was eventually enacted, but not exactly the same. \textit{See LA. CIV. CODE ANN.} art. 2695 (2006).

\(^{135}\) Louisiana State Law Institute, Minutes (May 18–19, 2001).

\(^{136}\) Louisiana State Law Institute, Notes Prepared for Meeting of Council (Sept. 14–15, 2001).

\(^{137}\) Louisiana State Law Institute, Minutes (Dec. 21–22, 2001).
E. The Possibility of Abandonment

Recall the Louisiana Supreme Court’s use of abandonment as a method of avoiding the application of the accession articles in *Smith v. State Department of Transportation*. The court circumvented the application of article 495 by finding that the lessee abandoned the improvements. Such an approach may not be possible under new article 2695. The major obstacle is 2695's section (2)(c): “Until such time as the lessor appropriates the improvement, the improvements shall remain the property of the lessee and the lessee shall be solely responsible for any harm caused by the improvements.” Article 495 contains no such provision.

If the facts of *Smith* occurred today, article 2695 section (2)(c) would likely change the analysis. The improvements would have remained the property of Smith until such time as Unkel, the landowner, appropriated ownership of them. How could the court determine that the lessee abandoned his improvements, and at the same time that they remain the lessee’s property? The *Smith* opinion seems irreconcilable with article 2695(2)(c).

III. CONCLUSION

The Law Institute and legislature’s goals in revising the rules regarding constructions on leased property are certainly admirable ones. New article 2695 solves many of the problems of the old law. In the context of the lessee-constructed house and pool referenced in the Introduction, the lessee still owns the house and still has the first right to remove it, and the lessor still has the right to demand that the lessee remove it. Importantly, the gap for unwanted improvements has now been filled. Under new article 2695, if the landowner does not want the house, he has the right to remove it at the lessee’s expense. Before 2005, he had no such right.

The overlap between other constructions “permanently attached” to and “integral parts” of the ground has not been

remedied. Even today, we do not know who owns the swimming pool. However, we do know the remedies available with respect to the lessor and lessee. Remedial rules are clearly detailed in article 2695. Here, the lessor can remove the pool at the lessee’s expense, should the lessor so choose. Before the 2005 revision, it was unclear whether the lessor could remove an improvement at the lessee’s expense. The right to removal depended on whether the pool was covered under overlapping articles 493 or 495.

There also seems to be a disconnect between the new remedial rules in article 2695, in particular section (2)(c), and the ownership rules in articles 493 and 493.1 If the pool is classified as an “integral part” of the ground then article 493.1 says the pool must belong to the landowner—lessor. However, article 2695(2)(c) says that the pool belongs to the lessee until the landowner appropriates ownership. There seems to be no way to reconcile the new remedial rules with the established ownership rules.

Problems of consent have been remedied. If a construction is made without the landowner’s consent, it still belongs to the landowner. However, the Civil Code now provides remedies for unconsented to improvements as well. The lessee and lessor now have the exact same remedies for improvements under article 2695, regardless of owner consent. Whether this is a change for the better is certainly debatable.

Overall, the recent lease revision solves a few of the major inequities with the previous law of lease, carries over some of the past problems, and creates some new anomalies. The Law Institute successfully fit most of the worms back into the can, but several are still wiggling around loose.

Brad R. Resweber*

* The author would like to thank Professor Andrea Beauchamp Carroll for her invaluable assistance throughout the drafting of this comment and Lacie N. Quinn for her patience and support.