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Water Resources - Limitations On Consumption of Subterranean Water

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blood suppliers insurers even where blood impurities were medically undetectable, would discourage or do irreparable harm to a function that is vitally necessary.[14]

Labeling the transaction a "service" or a "sale" is misleading and conceals the real issues in question. Whether a hospital or independent blood bank is involved, the courts, after inquiring into medical facts concerning blood transfusions and the risks involved for both the patient and the supplier, should decide whether the policy behind strict tort or warranty liability is appropriate to suppliers of blood. The extension of legal liability in blood transfusion cases must keep pace with the medical development in this field, and perhaps a degree of non-fault liability would provide impetus toward achieving a completely safe transfusion.

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WATER RESOURCES — LIMITATIONS ON CONSUMPTION OF SUBTERRANEAN WATER

While engaged in secondary recovery operations, defendant oil operator withdrew fresh water from a shallow sand and

14. For a discussion of the medical consideration, see Note, 42 MINN. L. REV. 640 (1948); *Blood Transfusions — Medicolegal Responsibilities*, 163 A.M.A.J. 283 (1957); *Medicolegal Aspects of Blood Transfusion*, 151 A.M.A.J. 1435 (1953); *Prevention of Accidents in Blood Transfusions*, 156 A.M.A.J. 1301 (1954). "From a medical standpoint, the taking and transfusion of blood have evolved from difficult to relatively simple technique, while at the same time the number of accidents has apparently increased appreciably. This is characteristic of medical progress, for as the number of lifesaving procedures increase the number of accidents tend to increase even though the ratio of accidents to treatment may remain constant or even diminish." 163 A.M.A.J. 283, 288. "Many of the accidents that have occurred are directly attributable to untrained interns and physicians who performed these tests at night or on holidays, in the absence of regularly assigned technicians." *Id.* at 283. "Probably the most serious risk relating to blood transfusion and one that defies medical science and preventive measures is the danger of transmitting hepatitis. Careful screening and questioning of donors may to a limited degree lessen this risk." *Id.* at 285. For a discussion of the risks and dangers in blood transfusions and present medical research being done concerning detection of hepatitis, see Life, Feb. 15, 1963, p. 70. See also *Medicolegal Aspects of Blood Transfusions*, 16 *Current Medicine for Attorneys* 35 (1957); *Tortious Aspects of Blood Donations and Blood Transfusions*, 2 CURRENT MEDICINE FOR ATTORNEYS 38 (1953); *Hemolytic Transfusions Reactions — Medicolegal Aspects*, 2 J. OF FORENSIC MEDICINE 78 (1955); 6 LAWYER'S MEDICAL CYCLOPEDIA § 42.33 (1961); *Blood Transfusions — Medicolegal Responsibilities*, (March) MEDICAL TRIAL TECHNIQUE Q. 31 (1958); *Responsibilities in Blood Transfusions*, (June) MEDICOLEGAL DIGEST 1:21-28 (1960).

injected it into oil producing formations. Plaintiffs, nearby property owners who obtained water for their personal uses from the same sand, alleged that defendant's use of the water was critically depleting their only available fresh water supply and had caused them to incur expenses in deepening their own wells. They further asserted that defendant's needs could be served by deeper salt water sands readily available to him. Accordingly, they sued for injunctive relief and damages. The district court sustained defendant's exception of no cause of action and dismissed the suit. The Second Circuit Court of Appeal affirmed. *Held,* ownership of subterranean waters does not inure automatically to the owner of the land; as with oil and gas, it is acquired only upon reduction to possession. Furthermore, Civil Code articles 600 and 661[1] and R.S. 38:218,[2] regarding obstruction, diversion, or retardation of the flow of watercourses, do not apply to subterranean waters. Therefore, plaintiffs have no right to protest the drainage of water from under their land. *Adams v. Grisby,* 152 So. 2d 619 (La. App. 2d Cir. 1963), *writs denied,* 153 So. 2d 880 (La. 1963).

Faced with an issue that was res nova in this state, the court in the instant case swept aside plaintiffs' argument that the statute and code articles[3] relating to passage of water through different estates was applicable to underground waters, finding that they referred only to surface drainage. Furthermore, the court refused to apply these rules by analogy because it felt compelled to find the nature of such waters to be the same as that of oil and gas; the landowner has no right to these "fugitive" minerals until they are captured and reduced to posses-

1. LA. CIVIL CODE art. 660 (1870): "It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude.

"The proprietor below is not at liberty to raise any dam, or to make any other work, to prevent this running of the water.

"The proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burdensome."

Id. art. 661: "He whose estate borders on running water, may use it as it runs, for the purpose of watering his estate, or for other purposes.

"He through whose estate water runs, whether it originates there or passes from lands above, may make use of it, while it runs over his lands; but he can not stop or give it another direction, and is bound to return it to its ordinary channel, where it leaves his estate."

2. LA. R.S. 38:218 (1950) provides in part: "No person diverting or impeding the course of water from a natural drain shall fail to return the water to its natural course before it leaves his estate without any undue retardation of the flow of waters outside of his enclosure thereby injuring an adjacent estate."

3. See notes 1 and 2 *supra.*

sion. On the same ground, it held that Civil Code article 667[4] was inapposite. This article is the Louisiana counterpart to the *sic utere* doctrine of common law — that broad and ambiguous tenet that a landowner may not use his land so as to injure that of his neighbor.[5]

It is suggested that the court was not compelled to find articles 660 and 661 inapplicable to subterranean waters. Since many legal problems occasioned by the complexity of today's society could not have been foreseen when our Civil Code was drafted almost one hundred and sixty years ago, it has been advocated that the judiciary should have authority to apply by analogy general principles underlying code articles to modern conditions.[6] Articles 660 and 661 seem to have reference to the civil law riparian doctrine which prohibits an owner of land abutting running water from appropriating a quantity so large as to injure other riparian owners.[7] If this underlying principle were extended to subterranean waters, plaintiffs clearly would have stated a cause of action. Since article 667 imposes no limitations on the scope of "damage" to a neighbor, it also might be applicable.[8] It is upon this same principle that other American jurisdictions base the rule, contrary to the holding of this case, that landowners' right to underground waters are "correlative" or subject to a "reasonable use."[9] It is submitted, however, that

4. LA. CIVIL CODE art. 667 (1870): "Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

5. See Comment, 20 LA. L. REV. 378 (1960); Note, 6 LOYOLA L. REV. 77 (1951).

6. See GENY, METHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVE POSITIF (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE no. 107 (1963). A similar mode of interpretation was applied in the creation of the concept of the mineral "servitude." See Frost Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922).

7. While there is nothing in the articles explicitly to this effect, they are apparently interpreted as having such a meaning. See 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 2418-19 (1959); Agnor, *Riparian Rights in the Southeastern States*, 5 S.C. L.Q. 143-44 (1952); Comment, 16 LA. L. REV. 501-03 (1956).

8. See note 4 *supra*. Apparently the court's reasoning is that since the neighbor does not own the water beneath his land, he suffers no "damage" when deprived of acquiring its ownership by reducing it to possession. Such a restricted interpretation of the word "damage" in the article does not seem mandatory. The court itself indicated that it might be applicable to pollution of the water supply or to waste without any benefit to the one reducing the water to possession.

9. See Gagnon v. French Lick Spring Hotel Co., 163 Ind. 687, 72 N.E. 849 (1904); Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1936); Annot., 55 A.L.R. 1399-40 (1928); 56 AM. JUR. *Waters* § 93 (1956); 93 C.J.S. *Waters* § 93 (1956). However, a contrary interpretation may be indicated by Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 239, 82 So. 206, 209 (1919),

the course taken by the court has the better practical result. As indicated in the decision, to allow relief in such a case would compel entrance of the judiciary into a long series of complicated and technical regulations — a scheme not best effected by the judicial process. Such regulation, like that of fugacious hydrocarbons, should be left to regulatory agencies.

While both the state constitution and the Conservation Act provide that the Department of Conservation has jurisdiction over the water resources of the state,[10] the commissioner's actual authority to manage and regulate such resources is extremely limited. First, it appears that he has been given no authority to issue orders and regulations dealing with any of the resources under the department's jurisdiction except as might be incident to preventing waste of oil and gas.[11] Consequently, withdrawal of water for uses other than those in the oil and gas industry is apparently free from regulation. Second, even as to the oil and gas industry, the commissioner has no general or express authority to regulate depletion of water supplies.[12] While the commissioner may have limited power to regulate depletion of water resources in situations such as presented by the instant case through the broad grant of authority "to regulate secondary recovery methods,"[13] the subtle nature of this

wherein the court, obiter dictum, quotes an illustration of the *sic utere* principle given by the French commentator Laurent: "An owner constructing works on his land diminishes the volume of a spring the benefit of which his neighbor has been having. He is within his right. If he thereby causes an injury to his neighbor, the latter cannot complain; for he has not the absolute ownership of the waters."

10. LA. CONST. art. VI, § 1(A), (B) provide that the Wildlife and Fisheries Commission and the Forestry Commission are charged with the management of the state's wildlife and the practice of forestry, respectively. Subsection C provides that all other natural resources are placed under the Department of Conservation. LA. R.S. 30:1 (1950) provides in part that "all natural resources of the state not within the jurisdiction of other state departments or agencies are within the jurisdiction of the department."

11. See LA. R.S. 30:2, 4 (1950).

12. See *id.* 30:4.

13. *Id.* 30:4(C) provides: "[The commissioner has authority] to regulate secondary recovery methods, including the introduction of gas, air, water, or other substances into producing formations." The question would be whether this language is broad enough to include regulations for purposes of water conservation as well as that of oil and gas. While it is true that the commissioner's regulatory powers appear confined to the general area of preventing waste of oil and gas (see note 11 *supra* and accompanying text), two closely related powers specifically delegated to him indicate that he may also have a right to regulate for conservation of water in certain instances. *Id.* 30:4(C)(1) provides that the commissioner has authority "to require the drilling, casing, and plugging of wells to be done in such a manner as . . . to prevent the pollution of fresh water supplies by oil, gas, or salt water." *Id.* 30:4(C)(3) provides that he has authority "to prevent wells from being drilled, operated, and produced in a manner to cause injury to neighboring leases or property." (The "wells" referred to here

basis for regulation suggests its inadequacy. Thus, legislative action granting express regulatory powers seems to be the preferable solution to the problem presented here as well as those involved in other water resource disputes.

At least twenty-three states have already recognized the growing importance of their underground fresh water resources and have enacted statutes governing their distribution and protection.[14] While it is true that Louisiana is unusually blessed with bounteous water supplies, it is submitted that cases do arise, and with increasing industrialization will arise more often in the future, when large consumers in one area provoke shortages. The possibility that industrial installations will be pitted against each other, or against farming or the domestic consumer, is not remote.[15] Relief should be available to the land-

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are not water wells but oil and gas wells. It would seem that depletion or pollution of a landowner's water supply could be construed to be an "injury to neighboring leases or property.") Since the commissioner has authority to act for the protection of water resources in these two instances, he may possibly have the same power in regulating a secondary recovery.

As a possible indication that the authority "to regulate secondary recovery methods" may be given a restricted meaning, one court has implied that the power to "regulate" does not include the power to compel participation in a secondary recovery program. Hunter v. Hussey, 90 So. 2d 429, 433 (La. App. 1st Cir. 1956).

LA. R.S. 30:5(C) authorizes the commissioner, under certain conditions, to require the unit operation of any pool or of two pools in the same field in connection with a program of pressure maintenance or secondary recovery upon application of any interested party. Conceivably, the commissioner could refuse to issue such an order if he did not approve of a proposed source of water for a plan of water injection. Any power of regulation derived from this subsection, however, would only be concurrent with the more embracive authority "to regulate secondary methods" found in subsection 4(C)(10).

14. Arizona, ARIZ. REV. STAT. ANN. §§ 45-301 to -324 (1956); Colorado, COLO. REV. STAT. ANN. §§ 147-19-1 to -15 (Supp. 1960); Florida, FLA. STAT. §§ 373.071-.251 (1960); Hawaii, HAWAII REV. LAWS §§ 87B-1 to -36 (Supp. 1961); Idaho, IDAHO CODE ANN. §§ 42-204 to -239 (Supp. 1963); Indiana, IND. ANN. STAT. §§ 27-1301 to -1316 (1960); Iowa, IOWA CODE §§ 455A.1 to .39 (Supp. 1963); Kansas, KAN. GEN. STAT. ANN. §§ 82a-701 to -725 (Supp. 1961); Maryland, MD. ANN. CODE art. 66C, §§ 718-755 (1957); Minnesota, MINN. STAT. §§ 105.37-.79 (Supp. 1961); Montana, MONT. REV. CODES ANN. §§ 89-2911 to -2936 (Supp. 1963); Nevada, NEV. REV. STAT. §§ 534.010-.190 (1961); New Jersey, N.J. STAT. ANN. tit. 58, §§ 4A-1 to -28 (Supp. 1962); New Mexico, N.M. STAT. ANN. §§ 75-11-1 to -36 (Supp. 1963); New York, N.Y. CONSERV. LAW §§ 400-476 (Supp. 1963); North Dakota, N.D. CENT. ANN. CODE §§ 61-02-01 to -74 (1960); Oklahoma, OKLA. STAT. tit. 82, §§ 1071-1079 (Supp. 1962); Oregon, ORE. REV. STAT. tit. 45, ch. 536.010-558.990 (1961); South Dakota, S.D. CODE §§ 61.0401-0430 (Supp. 1960); Utah, UTAH CODE ANN. §§ 73-1-1 to -12-3 (1953); Washington, WASH. REV. CODE ANN. §§ 90.44.010-.250 (1962); Wisconsin, WIS. STAT. ANN. § 144.03(6), (8) (1957); Wyoming, WYO. STAT. ANN. §§ 41-121 to -128 (1957).

15. *E.g.*, the Louisiana Department of Public Works cited these conditions in its 1956 report to the legislature:

"In Baton Rouge water levels in wells 450 to 700 feet deep have declined from a level near the land surface to about 200 feet below the land surface in recent years.

"In the area west of Lake Charles where the principal industries are located,

owner who is deprived of receiving a fair share of the waters beneath his land. To this end it is submitted that some sort of legislative scheme should be enacted which would specifically empower the commissioner of conservation to make the requisite findings, orders, and regulations necessary for equitable solution of water shortage problems whenever they arise and — what is more important — for the administration of these resources in such a manner as to eliminate the possibility of their occurrence.

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WORKMEN'S COMPENSATION — CREDIT AGAINST LIABILITY FOR WAGE PAYMENTS TO RETAINED EMPLOYEES[1]

If following convalescence for an industrial accident an injured employee is rehired by his former employer and thereafter seeks workmen's compensation payments, questions inevitably

water levels in wells 200, 500, and 700 feet deep were a few feet above the land surface in 1905, whereas at present (1955) the levels are as much as 50 feet below the surface in wells screened in the "200-foot" sand, 85 feet below the surface in wells screened in the "500-foot" sand, and as much as 70 feet below the surface in wells screened in the "700-foot" sand. This is the result of an average daily pumpage of about 60 million gallons a day for all purposes for the past decade."

"In southwestern Louisiana, where the average daily pumpage amounts to about 530 million gallons, or about 1,600 acre-feet, there has been an average annual decline of about 1.2 feet per year for the past ten years. Owing to local concentration of pumping and poor well spacing there have been a number of local problems, such as decreasing yield from wells and excessive lowering of water levels. However, there has been no excessive regional lowering, and none is anticipated at the present rate of pumping. It is estimated that an average of only about 10 acre-feet of ground water is being removed daily from storage. This amounts to less than 1 percent of the annual average of 596,000 acre-feet of ground water being pumped for all purposes in southwestern Louisiana. In other words, more than 99 percent of the water pumped is replenished by recharge.

"Owing to increased pumping at Monroe and vicinity, there has been a continuous water-level decline in wells screened in the principal sands, which range in depth from 450 to 950 feet. Since 1946, the average rate of decline has been 4 feet per year. At present (1954) the water level is about 120 feet in wells near the periphery of the area of heavy withdrawal, and about 220 feet in the area of heavy withdrawal." LOUISIANA DEPARTMENT OF PUBLIC WORKS, WATER — A SPECIAL REPORT TO THE LOUISIANA LEGISLATURE 27 (1956). See DEPARTMENT OF CONSERVATION, LOUISIANA GEOLOGICAL SURVEY, and LOUISIANA DEPARTMENT OF PUBLIC WORKS, WATER RESOURCES PAMPHLETS 1-10 (1954-61) and WATER RESOURCES BULLETINS 1-2 (1960-61); LOUISIANA DEPARTMENT OF PUBLIC WORKS, WATER — A SPECIAL REPORT TO THE LOUISIANA LEGISLATURE (1956); LOUISIANA LEGISLATIVE COUNCIL, WATER PROBLEMS IN THE SOUTHEASTERN STATES (1957). See generally COUNCIL OF STATE GOVERNMENTS, STATE ADMINISTRATION OF WATER RESOURCES (1957); Martz, *Water for Mushrooming Populations*, 62 W. VA. L. REV. 1 (1959).

1. The term "retained employee" is used to refer to an employee who has re-