Correlative Rights of Surface and Mineral Owners

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I. *Introduction*

The term "correlative rights" is commonly applied to two related but somewhat different situations that arise from or are incidental to the exploration and production of oil and gas. First, it refers to the rights and obligations of landowners (and those holding from them) to each other arising out of the exploration and production from a common reservoir that underlies their respective tracts and to their other activities related to the use and enjoyment of adjacent tracts of land. Second, it may refer to the rights and obligations with respect to each other of persons holding separate rights to the use and enjoyment of the same tract of land.

II *Rights Arising from Ownership of Adjacent Tracts*

A. The Source Of TheCorrelative Rights And Obligations.

The statutory basis for regulating the matters under consideration is found in both the Mineral and Civil Code provisions relating to the obligations of "neighborhood."

B. The Mineral Code

The juridical basis for the rights and obligations of owners of interests in land directly relating to production and exploration of oil and gas deposits is found in Mineral Code Articles 6, 8, 9, 10 and 14, which establish the so-called "non-ownership" theory and prescribe the "correlative" rights and obligations of persons who own rights to oil and gas found in a common reservoir underlying two or more tracts.

The principles upon which these rights are based can be summarized somewhat as follows:

1. In theory, oil and gas, and other liquid or gaseous minerals and substances occurring naturally in association with them are not "owned" by the owner of the land in which they are found.[1]

2. Instead, each landowner is described as simply having the exclusive right to explore and develop his property for the production of such minerals and reduce them to possession and ownership even if their extraction causes the migration of the minerals from beneath the land of another.[2]

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[1] "Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such mineral. M.C. Art. 6.

[2] The landowner has the exclusive right to explore and develop his property for the

This places Louisiana into the category of "non-ownership" states and establishes the so-called "rule of capture" as an integral part of the ownership of land.[3] It, however, does not mean that a landowner is without property rights of a sort in the oil and gas under his land. M.C. Articles 9 and 10 further articulate the consequences of the principles referred to. Article 9 declares (perhaps somewhat inconsistently with the theory of "non-ownership") that while the substances themselves are not owned, landowners having:

> *rights in a common reservoir or deposit of minerals* have correlative rights and duties with respect to one another in the development and production of the common source of minerals (emphasis supplied)

Article 10 then amplifies this by providing that:

> a person with *rights in a common reservoir or deposit of minerals* may not make works, operate, or otherwise use his rights so as to deprive another intentionally or negligently of the liberty of enjoying his rights, or *that may intentionally or negligently cause damage to him.* [emphasis supplied].

Finally M.C. Article 14 declares that while a landowner has no right against another who causes drainage of the minerals from under his land, by drilling or mining operations on other lands, the principle does not affect his right "to relief for negligent or intentional waste" under Articles 9 and 10, or against another who may be "contractually obligated to protect his property from drainage." The official comments indicate the articles are intended to be a confirmation of existing law, in that the landowner is "protected against both surface and subsurface invasions that result in unauthorized removal of minerals.[4]"

C. Relevancy of Civil Code Art. 667

Taken as a whole the articles present somewhat of a contradiction in the theory that has caused difficulty. The official comments note that Art. 14 is a "particular and limited application of the provisions of C.C. Art. 667" which presently provides (in part) that:

> Although a proprietor may do with his estate whatever he pleases, he still cannot make any work on it which may deprive his neighbor

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production of such minerals and to reduce them to possession and ownership. M.C. Arts. 6 and 8.

[3] Actually, in some respects the classification between so-called "non-ownership" and "ownership" states has little to do with the substances themselves, since the so-called rule of capture prevails in all of them. Rather, it relates to whether the interest in "fugacious minerals" of one holding from the landowner is characterized as an estate or other interest in the land itself or is in the nature of a right "over" the land such as an easement or servitude.

[4] There is of course, no question as to the liability of one who intentionally or even inadvertently causes a well to be completed under the lands of another.

of the liberty of enjoying his own, or which may be the cause of any damage to him.[5]

Article 10, however, by declaring that one does not own the oil or gas under his lands, also notes he may extract all he can from his land with impunity, even though it may cause migration of the substances to his land from that of his neighbors. His neighbors' "remedies" in such a case being to themselves extract all they can before he produces it. However, the article also forbids an owner from exercising his rights in such a manner to deprive his neighbor of the "liberty" of enjoying those rights or so as to "cause damage" to him. The latter provision however, appears to be somewhat contradictory to the theory that the owner does not own the oil and gas under his land, if the activities complained of take place off of the "injured" party's land. Attempting to determine the content and limits of the principle that one can be injured by the loss or damage to something he does not own by activities lawfully conducted upon the lands of another has been the source of considerable litigation and difficulty.

One of the earliest cases presented to the courts is *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*[6] In that case, defendant had drilled a well that was a "dry hole" on a tract adjoining one over which the plaintiff held a lease. It was alleged that the defendant had left the well unplugged and, according to the plaintiff, was creating a "vacuum" under the land, which he had leased that prevented his own wells from producing.[7] In reversing an exception of no cause of action, the court made the following observations relating to the then state of the law, which was, for all practical purposes subsequently codified by the Mineral Code.

> The provision of article 667, that the owner may not make any work on his property "which may be the cause of any damage to" his neighbor is found under the title "Of Servitudes," and hence apparently is one of the exceptions to which article 505 refers, and hence would seem to be a limitation upon article 505.[8]

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[5] As is discussed hereafter, since 1996, the article has limited the liability to damage caused by "works" that the proprietor knew or should have known would result in the damage which he could he could have prevented with reasonable care and he failed to exercise that care.

[6] 82 So. 206 (La. 1919).

[7] The precise allegations were that "through some underground communication it lets air into the radius affected by plaintiff's pump, thereby reducing the suction power of the pump, and as a consequence reducing markedly its production."

[8] "The ownership of the soil carries with it the ownership of all that is directly above and under it. . . . He may construct below the soil all manner of works, digging as deep as he deems convenient, and .draw from them all the benefits which may accrue, under the modifications as may result from the laws and regulations concerning mines and the laws and regulations of the police." C.C. Art 505

Art. 667 is also apparently in direct conflict with the provision of article 491 that "ownership gives the right to enjoy and dispose of one's property in the most unlimited manner." The line of demarcation between what an owner may do with impunity and what he may not do without incurring liability is drawn by article 668 between what is a mere inconvenience and what causes a real damage.[9] But that cannot be the meaning; for very evidently an owner cannot be debarred from the legitimate use of his property simply because it may cause a real damage to his neighbor. It would be contrary to the fundamental legal principle according to which the exercise of a right cannot constitute a fault or wrong, and, besides, every damage is real; and unreal damage cannot be a damage.

We cannot reconcile these contradictions, or gather the true meaning or scope of these articles, from the articles themselves . . .

The court then made an exhaustive analysis of the problem as articulated by the French authorities and concluded that:

the simple fact of neighborhood, then, imposes certain limitations upon the exercise of the faculties inherent in ownership; and this is the reciprocal interest of the owners. This feature of reciprocity shows the correctness of the observations made hereinabove, and proves that the sole purpose is to cause ownership to be restricted, and to regulate the conflict of rights between the neighboring proprietors.

Finally, exhibiting some frustration, the court concludes:

Here is, however, a proposition which appears acceptable: That every owner is limited in the exercise of his right of ownership by the inhibition to injure the equal right of the neighboring owner. This formula implies, in the first place, that simply to deprive the neighbor of some enjoyment, or to cause him a prejudice of whatever kind, would not be sufficient to fetter the exercise of the right of ownership. The question of determining the point where an act begins or ceases to be injurious to the right of the neighbor is, no doubt, a very delicate one; it will be of absolute necessity to have recourse to an analysis, minute in its details, of the faculties, of the attributes, of the advantages which compose the right of ownership,

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[9] "Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

"Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors' [neighbor's] house, because this act occasions only an inconvenience, but not a real damage". C.C. Art. 668.

to know if one of them is infringed upon, and thus to diagnose the injury to the neighbor's right.[10]

It then summarized the crux of its holding by declaring, "from the moment that an act can be characterized as illicit the owner can no longer invoke any right of ownership; now an unlawful act should disappear." At the same time, the court was careful to note that:

> We must guard, however, against a too hasty application of this formula. In one sense, it implies a restriction, and in another sense, it implies a certain extension. It is restrictive in the sense that the injury must be of a certain gravity; in other words, the neighbor cannot complain of those inconveniences which are habitual and inevitable, the trifling annoyances inseparable from neighborhood; the necessities of life in common imposes certain usages susceptible of causing annoyance, but each one must bear these reciprocal inconveniences; so long as they do not transcend the normal and habitual measure of inconveniences resulting from neighborhood, no action in damages will lie. The courts must consider whether the prejudice complained of is excessive, greater than the ordinary inconveniences which the obligations of life create; they may take into consideration in that connection certain circumstances, varying according to locality, and take into account the local habits.

The court then concludes that "the case must turn upon whether plaintiff has the right to operate the pump in question, and whether, if plaintiff has that right, defendant may interfere with it with no benefit to itself, but simply to hinder plaintiff." It then remanded the case for a trial on the merits.

In later cases the court has held that in order to recover damages from a party who willfully or through negligence deprived his neighbor of the correlative right to produce the oil or gas under his land proof of such damages would have to be made and, in effect, the plaintiff would have to show that he would have himself drilled a well and the amount that the well in question would have produced, but for the actions of his neighbor.[11]

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[10] Among the French authorities relied upon was a decision by the court of Lyon in which a landowner was condemned to pay damages because he had installed a pump and apparently appropriated water from a spring, intercepting it before it reached the land of the plaintiff. The French court noted the plaintiff was not using the water, but simply allowing it to flow into a river, his motivation being, the court observed, simply one of "spite" to prevent his neighbor from obtaining any of the water. The Louisiana court also noted that only damages were awarded by the French Court and that it thought "the (French) court was too conservative in doing so."

[11] The jurisprudence in this connection, before adoption of the Mineral Code is well summarized in *Breaux v. Pan American Petroleum Corporation et al.* 163 So.2d 406 (La. App. 3rd 1964) writs ref.

It is obvious Article 10 of the Mineral Code essentially attempts to codify the principles enunciated in *Higgins* by declaring:

> A person with rights in a common reservoir or deposit of minerals may not make works, operate, or otherwise use his rights so as to deprive another intentionally or negligently of the liberty of enjoying his rights, or that may intentionally or negligently cause damage to him. This Article and Article 9 shall not affect the right of a landowner to extract liquid or gaseous minerals in accordance with the principle of Article 8.

Other jurisdictions, wrestling with the fugacious nature of the substances and a lack of real precedent have, to some degree reached the same conclusions as those adopted by the Mineral Code. Professor Kuntz in his article[12] on the subject some 50 years ago analogized the parties owning interests in a particular reservoir as constituting a "special community" and said that their conduct should be regulated in the following manner:

> In determining whether a particular form of conduct is or is not socially acceptable, we may not only look to generally accepted standards, but we must look to the utility of such conduct in the light of the special consequences which may be expected to follow for the other parties in the same special community. The term "correlative rights" is simply a term to describe such reciprocal rights and duties of the owners in a common source of supply.

The writer would postulate, in somewhat the same vein, that the principles in question might also be analogized to the situation prevailing when a non-navigable lake is located partially over the lands of several proprietors. In theory each owns, not only the exclusive right to the part of his land that is covered by the water, but the water itself and can draw from it, in the absence of some legislative regulation, all that he needs or can use, even at the risk of lowering the levels and hence the amount of water over his neighbors' lands. In short, the writer would suggest, that it might be more useful to rationalize the situation under consideration as involving a special form of co-ownership of the oil and gas in which each co-owner may utilize the amount of the production that he can obtain from the reservoir under his lands without accounting to his co-owners, but in doing so, he must restrict his activities to the geographic limits of his ownership and must neither prevent his co-owners from themselves obtaining a share of the product, nor engage in any activity that might result in damage to the reservoir or the substance in such a manner as to preclude the equal enjoyment of it by them.

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[12] Kuntz, *Correlative Rights of Parties Owning Interest in a Common Source of Supply of Oil or Gas*, 17th Inst. on Oil and Gas Law and Taxation, 217, 224-225 (1966).

One of the situations in which the courts have most directly faced the application of the legal principles regulating the obligations of neighborhood and which perhaps most clearly illustrates those principles is found in the cases in which otherwise lawful operations upon the lands of one person have resulted in a "blow out" of a well and the unfettered escape of the production from a common reservoir. It may be recalled that the *Higgins* case involved the failure of a lessee to "plug" or cap a well he had drilled, that was alleged to be doing essentially the same thing.

If an owner can produce as much oil and gas as he desires from his land without regard to the fact that it is coming from his neighbor's lands, the question might be asked as to why he should be penalized for just letting it blow into the air instead of selling or using it? It is true, of course, that allowing oil or perhaps even gas to flow uninhibitedly into the environment may create some damage to the land in or around which it ends up, and that the person who conducts such activities may be liable to those persons. However, why should he also be liable to the owner of the land over part of the reservoir from which it was produced? *Higgins*, it is suggested, reached the conclusion in a balancing of equities, there was no useful or socially beneficial reason for the lessee to leave his well open and that in the normal course of sound operating practices it would have been capped to prevent damage to the neighbors.

In the most recent case to consider the matter,[13] the first Circuit held a lessee whose well was shown to have "blown out" through the negligence of the driller working for the lessee reiterated the continued validity of the *Higgins* and rejected the seeming absolutism of *Butler*. It contains an excellent summary of the history and present state of the matter and summarizes the current state of the jurisprudence as follows:

> This reflects a determination that the public interest in utilization of the resources is such that the ordinary risks of waste occasioned by occurrences that are not the result of intent or negligence should not be shifted from one party engaged in extraction to others engaged in the same utilitarian endeavor. It is in this sense, in view of the general jurisprudence, that Article 10, of the Mineral Code is more limited than Article 667 of the Civil Code. ***Under Article 10, the obligations of those having correlative rights in a common source of minerals result in liability only if damage is intentionally or negligently caused.*** The fact that ordinary risks have not been shifted among those engaged in extraction does not, however, mean that relief cannot be granted if, once an event has taken place, an operator does not take reasonable steps to remedy a situation resulting in

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[13] *Mobil Exploration & Producing U.S. Inc. et al v. Certain Underwriters et al*, 837 So.2d 11 (La. App. 1st, 2002) rehearing den, writ den.

waste. If, for example, a producing formation is menaced by a blowout resulting from an unavoidable accident causing waste of the common resource, the operator suffering the accident cannot fail to take all necessary and reasonable measures to minimize the damage to other interests in the common source of supply. [emphasis the court's].

D. The Louisiana Conservation Act.

The effect of the Civil and Mineral Code articles have also been substantially modified by the Louisiana Conservation Act which is designed to regulate the orderly development of an oil and gas deposits, maximize their production and reduce what is referred to as "economic waste," while at the same time permit the owners of the lands in which it occurs to obtain their "just and equitable share" of the production. It is one of those "laws and regulations concerning mines" referred to in Article 505 of the Civil Code, to which the public is subject.

Section R.S. 30:9 of the Conservation act declares that each owner of a tract of land under which a pool or reservoir is located is entitled to "obtain the tract's just and equitable share" of production from that pool or reservoir and cannot be required to drill or operate any well on his tract "in addition to the well or wells that can, without waste, produce that share." The commissioner is then authorized to establish drilling (and production) units for each pool consisting of such area of the pool as can be "efficiently and economically" drained by one well. He may then, as to each such unit require the owners within it to develop and produce it by a single well.

Without undertaking an exhaustive review of the rights and obligations to each other of persons owning interests in oil and gas deposits under a common pool in light of the Conservation act, which is intended to and largely does regulate the correlative rights of the persons owning those interests, it might suffice to say that, in practical terms, the courts have held that the drilling and production of a well upon a unit formed by the commissioner has, with respect to the owners of the lands lying within the unit, the same effect as if the unit well were drilled upon each of the tracts comprising it and was producing the share of the production allocated to the tract by the commissioner.

While the act preserves the appearance of continuity with the past and the Civil Code, in reality, it recognizes a commonality of ownership of the substances in a reservoir underlying several tracts and delegates to the commissioner the task of regulating the rights and obligations of its owners. Most of the problems arising from the drilling and production of oil and gas and the distribution of that production among the owners will now be determined in light of and regulated by the provisions of that act at least when the reservoir has been unitized, which today will almost invariably be case.

This is not to say that all of the problems arising from the correlative rights of landowners (and their successors) to explore for and produce from a common reservoir are, or can be solved, by the Conservation Act. While is it not the purpose of this presentation to make a comprehensive analysis of the consequences of the act upon the so-called right of capture, there are some problems not directly resolved by the act that should be mentioned.

One such problem arises from the fact that while the act permits the commissioner to require compulsory "pooling" or unitization of an area he cannot to large degree, dictate or order its development. To that extent, the act is not compulsory, in that by establishing units for the production from a common source, it does not, of itself, require anyone to drill or attempt to drill on them. Nor does it directly purport to amend or modify whatever contractual provisions parties owning interests in land may make for its development.

E. Liability for Non-Reservoir Damages to Adjoining Tracts Caused by the Exploration and Production of Oil and Gas.

There are difficult questions arising from the application of Article 667 of the Civil Code to oil and gas operations that are unrelated to waste or damage to the reservoir, that are not directly addressed by the Conservation Act. The extent to which the act may permit a lessee or person appointed as an operator to conduct unit operations upon the land of a person owning lands in the unit, but as to whom he has no other relationship is somewhat uncertain. The Supreme Court in *Nunez v. Wainoco Oil & Gas Co.*[14] rejected the claim of a landowner for trespass by the lessee of an adjoining tract who's well located on the unit, but not on the owners land wandered a few feet into the land of the plaintiff at a considerable distance under the ground although still within the unit. The court found the well was in fact not completed in or producing from the plaintiff's land, it having also wandered back off of the land in question. The court based its holding, however on the grounds that the conservation act superseded the rights of the plaintiff when his lands were unitized his lands. It carefully avoided discussing the question as to the rights, if any of the lessee to operate on the "surface" of the plaintiff's land. However, the Third Circuit, in a later case involving a complaint by the same landowner, that the unit operator had in fact occupied some of the "surface" with his production facilities, held that since, under the terms of the Unit order it was "necessary" for the lessee drilling the well to utilize plaintiff's land,, the commissioner's order permitted him to do so.[15] However

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[14] 488 So2d 955 (La. 1986).

[15] "Therefore, given the size of a drilling rig and the surface drilling location with pits, water wells, and related drilling equipment and facilities, we find that it was necessary for Wainoco to utilize plaintiff's land in order to comply with the order of the Commissioner. Otherwise, Wainoco would not have been able to drill the Stone No. 1 well at

the court also found that although the plaintiff, might be "entitled to damages" for such use, he in fact suffered none because the disturbance of the land was inconsequential and it was proven he had previously leased the land for cattle grazing purposes and had suffered no diminution in the rent as a result of the plaintiff's activities. The extent to which the court will permit intrusion into the lands of a non-consenting, non-participating landowner in order to comply with the commissioner's orders is by no means settled since the matter will undoubtedly involve questions as to the taking of property without "due process" and resolving some difficult constitutional questions, which fortunately, are beyond the scope of this presentation.[16]

F. Recent Developments

The Courts have recently addressed the problems under consideration, with perhaps, no more success in clarifying the matter of the correlative rights of adjoining landowners than they have had in the past. In *Butler v. Baber*,[17] a mineral lessee holding his lease from the state was held liable under Civil Code Art. 667, for the damages to the plaintiff's oyster bed, the rights to which were also held under a lease from the state, covering some of the same lands as the defendant's lease. The damage was caused by sediment resulting from the defendant's construction of a canal across the lands, even though the construction was properly done, without negligence and was within the lawful terms of the defendant's lease.

The court held that liability under Art. 667 is not based upon either negligence or fault and that the term "proprietor" in Article 667 is broad enough to encompass lessees and others with rights to use a tract of land. Furthermore, the term "neighbor" as used in it may include persons other than the owner, holding rights on or in the same or adjacent tracts. The opinion appears to require only that "damage" be caused to the "neighbor" by the actions of the "proprietor" without either intention, or negligence – only violation of Art. 667 *et seq.* which it considers to be "fault." The court also considers "adjacent tracts" to be virtually any tract

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the optimum location for this unit because this type of well requires two acres for the necessary reserve pits, water pit and water well". *Nunez v. Wainoco Oil & Gas Co*,. 606 So.2d 1320 (La App. 3rd 1992) writ den.

16 A 2006 amendment to the Louisiana Constitution now expressly limits the "public purposes" for which property may be taken by the state to a series of quite limited situations all of which appear to require a "public use" and, in with paragraph 3(b) of the amendment expressly prohibits taking into consideration "economic development, enhancement of tax revenue, or any incidental benefit to the public" in determining what a public purpose is. It is difficult to see, where from its terms, a commissioner's order permitting use of tract of land by the owners of adjoining tracts in a unit will falls within the ambit of a "permitted purpose" as defined by the amendment.

17 529 So.2d 374 (La. 1988).

in the vicinity that is affected by the activities of the "proprietor." In reaching its conclusions, the court makes the following analysis:

> Domat used the word *propriétaire,* but Carbonnier said that the relation of neighborhood (*voisinage*) a priori can be conceived between tenants (*locataires*) or between farmers (*fermiers*) just as well as between owners (*propriétaires*). In Louisiana "the obligation of Art. 667 has been enforced against the holder of a mineral lease . . . and against the holder of a long term lease." Stone, 40 Tul.L.Rev. at 704-705, citing *Fontenot v. Magnolia Petroleum Co.,* 227 La. 866, 80 So.2d 845 (1955); *Devoke v. Yazoo & M.V.R. Co.,* 211 La. 729, 30 So.2d 816 (1947); *McGee v. Yazoo & M.V.R. Co.,* 206 La. 121, 19 So.2d 21 (1944).
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> Liability under article 667 has been called strict liability, but strict liability is liability without negligence, not liability without fault. "Fault" in the sense of *Langlois* encompasses more than negligence, and violation of 667 constitutes fault. Fault under 667 is the damage done to neighboring property, and relief under 667 requires, therefore, only that damage and causation be proved.
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> The facts of this case clearly establish that the defendants' dredging operation caused damage to the plaintiffs' oyster beds and the oyster production from those beds. Despite the care and prudence exercised by defendants, plaintiffs are entitled to damages for their oyster leases.

A few years later, the Supreme Court, in *Inabnet v. Exxon Corp.*,[18] limited the absolute application of Article 667 as it was construed in the *Butler* case and attempted to further rationalize the concept of "fault" as used in the article in a quite similar situation.[19] In doing so, the court distinguished the basis for the defendant oil company's liability to the plaintiff arising from its activities on those areas over which defendant held a servitude to construct and maintain a pipeline and a lease to construct and maintain a "tank battery" that antedated the plaintiff's oyster lease, from those areas covered by the plaintiff's lease that were not covered by the defendant's lease or servitude but that were adjacent to them. As to the areas where the parties rights overlapped, it purported to "clarify" the *Butler* case by holding that:

> We therefore clarify the *Butler* decision to hold that, in cases involving damages caused to one holder of a right to immovable property by another holder of a right to the same property, the court in determining "fault" under Article 2315 must consider not only Articles

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[18] 642 So.2d 1243 (La. 1994)

[19] The only difference being that in *Inabnet* the defendant held a servitude for the construction of a pipeline as well as a lease for the construction and operation of a "tank farm."

667-669, but also all other applicable codal and statutory rules and legal principles and other pertinent considerations.

It then noted that the defendant's rights antedated those of the plaintiff and that in the exercise of those rights the defendant had constructed a canal and operated a "tank battery" which it clearly had the right to do under its contracts and that were in fact, the object of those contracts. It then found that the exercise of the plaintiff's lease to grow and harvest oysters were, in light of such use, impossible of performance.[20] It therefore held the defendant was not liable for its actions. In doing so it observed that the rights of the defendant antedated those of the plaintiff by some ten years and, further that the landowner (the state) could not itself have utilized the property for the purpose of growing oysters, without preventing the defendant from exercising the rights had previously granted by the state to the defendant.

Simply stated, at the time the "proprietor" granted the plaintiff the right to use the land for oyster harvesting, it had itself effectively disposed of that right, inferentially at least, since to exercise it would have prevented the defendant from exercising the rights previously given to it. This in substance represents the foundation for the familiar adage of "first in time, first in right" and represents at least the outer limits for resolving controversies as to the use of the same land between a landowner and those holding from him.

However, the court also recognized that the effect of the defendant's activities on lands outside of the limits of its servitude and lease presented a different situation. The servitude of the defendant gave it the right to dredge a canal and to deposit spoil on the banks. The court found the spoil was deposited "outside of the banks" and that even if the servitude impliedly gave it the right to do so, it was shown that there were other methods available that would have avoided or lessened the damage to the plaintiff's oyster bed. It further found that the defendant knew or could have known of the location of the plaintiff's oyster beds. It then concluded that:

> Exxon's use of the property in its servitude area in such a manner as to injure its adjoining neighbor constituted fault under Article 2315 by analogy to Articles 667 - 669, and Exxon's use occasioned more than mere inconvenience to the neighbor. Exxon is therefore liable without negligence for any damages sustained by plaintiff because of the manner of disposition of the dredged materials and the slumping of the spoil from the bank.[21]

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[20] "The nature of Exxon's existing use incidental to its surface lease and right-of-way precluded oyster production on the same property and made these 8.2 acres unavailable for plaintiff's use under his lease." *Id.*

[21] *Id.*

It might also be observed that in spite of its exhaustive analysis of Article 667 and its limitations, the court essentially set forth no objectively dependable criteria by which cases of this type can be evaluated. In making its analysis of Art. 667 it notes that:

> However, judicial decisions have clarified that conduct by a proprietor that violates Articles 667-669 may give rise to delictual liability, without negligence, as a species of fault within the meaning of La.Civ.Code Art. 2315.

And that "fault" under Article 2315 is:

> a term encompassing more than negligence or other blameworthy conduct and including violations of standards of conduct set out in the Civil Code and the statutes to govern the responsibility of persons in certain relationships and arising from certain activities.

The court then says to determine those "standards of conduct" the "courts have referred to Articles 667-669 to determine the conduct which constitutes 'fault' under Article 2315 in the context of neighboring proprietors" referring to a case in which it was held not to have occurred because the conduct complained of was not shown to have caused physical damage or injury to the property and that it was neither "ultra hazardous activity" nor excessive abusive conduct which "exceeded the level of inconvenience which a neighbor must tolerate under Art. 668." [22] In essence it declared that Articles 667 et seq. are based on "fault" as defined by Art. 2315, which in turn is, partially at least, defined by Arts. 667 *et seq.*[23]

After finding the defendant "at fault" in the deposit of the spoil outside of the limits of its servitude the court addressed the matter of damages. It rejected the claim of the plaintiff for the cost of restoring the premises to their former condition on the ground that "any real and actual interest in restoring the property was in the owner and not the lessee who had little or no 'personal' reason for restoring the property to its original condition." Of course, this also presupposes in a sense, that the owner also had a cause of action for the "damage" resulting from the defendant's actions. Accordingly, the case was remanded to determine the diminution in the value of the lease of the plaintiff, which the court held to be the measure of his damages.

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[22] Citing also *State of La., Through Dept. of Transp. and Dev. v. Chambers Inv. Co.*, 595 So.2d 598 (La.1992) that appears to hold that one of the enumerated conditions must have contributed to the damages for liability to attach under under Art. 667.

[23] It should be noted that the court also held that the plaintiff claiming damages under the articles must qualify as having some proprietary interest in the adjacent properties and that the provisions are not statements of general delictual responsibility to the public. *See* also, *Louisiana Crawfish Producers Ass'n – West et al v. Amerada Hess Corp.* et al. 935 So2d. 380 (La App. 3rd 2006).

Most recently, the Louisiana First Circuit considered the problem and expressed its understanding that the liability of one co-owner to another is neither absolute nor based merely upon a showing of damage. In the case in question,[24] the court in considering the liability of a lessee whose well was shown to have "blown out" through the negligence of the driller working it, to the owners of other interests in the reservoir reiterated the continued validity of the *Higgins* and rejected the seeming absolutism of *Butler*, but without directly mentioning either the *Butler* or *Ibanet* decisions. The opinion otherwise contains an excellent summary of the history and present state of the jurisprudence and summarizes the court's understanding of its current state in the following terms:

> This reflects a determination that the public interest in utilization of the resources is such that the ordinary risks of waste occasioned by occurrences that are not the result of intent or negligence should not be shifted from one party engaged in extraction to others engaged in the same utilitarian endeavor. It is in this sense, in view of the general jurisprudence, that Article 10, of the Mineral Code is more limited than Article 667 of the Civil Code. ***Under Article 10, the obligations of those having correlative rights in a common source of minerals result in liability only if damage is intentionally or negligently caused.*** The fact that ordinary risks have not been shifted among those engaged in extraction does not mean, however, that relief cannot be granted if, once an event has taken place, an operator does not take reasonable steps to remedy a situation resulting in waste. If, for example, a producing formation is menaced by a blowout resulting from an unavoidable accident causing waste of the common resource, the operator suffering the accident cannot fail to take all necessary and reasonable measures to minimize the damage to other interests in the common source of supply. [emphasis the court's].

G. The Effect of the 1996 Amendment to Art. 667.

In 1996, Article 667 was amended by adding to it several clauses apparently intended to make the article less restrictive for the "proprietor" of an estate.[25] As amended the article still declares that a proprietor

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[24] *Mobil Exploration & Producing U.S. Inc. et al v. Certain Underwriters et al*, 837 So.2d 11 (La. App. 1st Cir., 2002) rehearing den, writ den.

[25] The article as amended provides:

"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. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the

may "do with his estate what ever he pleases" provided that does not "make any work on it, which will deprive his neighbor of his enjoyment or may cause damage to the neighbor," but it has added to it a proviso that the proprietor is not liable unless it can be shown (1) that he knew or should have known that "his works" would cause such the damage; (2) that the damage could have been prevented by the exercise of reasonable care, and (3) that he failed to exercise that care.

Literally the amendment can be interpreted to permit a "proprietor" to make any "work" upon his land, no matter how obnoxious or inappropriate it may be and how much damage it may cause his neighbors, as long as he knows that what he is doing will cause damage to his neighbor; but he cannot avoid the damage through the exercise of reasonable care, although he in fact exercises such care. In other words, literally applied it would appear to permit an owner to make any works on his land that he knows will cause damage to his neighbor, if it cannot reasonably be avoided. It is rather obvious that is not its intention. The writer would suggest the intention in all probability was to declare that an owner is not liable if he had no reason to believe the damage might occur, or if whatever he does, is done negligently. It is difficult to integrate the idea that he is not responsible if he does not know the damage might reasonably occur and then hold him responsible for not performing the activity in another manner. Obviously, if he is careless or negligent and that leads to damage, it should not matter whether the activity if done properly might or might not have caused the damage.

Although it is too early to see how the courts will finally integrate the addition into the jurisprudence, it will undoubtedly present difficulties. It might be noted that so far in the cases involving M.C. Art. 10 and C.C. Art. 667, the courts do not appear to consider the amendment to have worked substantial change to the limitations upon an owner in using his property to the detriment of his neighbors.[26] The article still maintains the premise that a proprietor "cannot make any work on it which . . . may be the cause of damage" to the neighbor. The amendment appears only to further confuse the basis for limiting the exercise of ones rights in land when it correspondingly will cause undue damage to ones neighbors. Except perhaps to clearly inject the element of foreseeability into the

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court from the application of the doctrine of res ipsa loquitur in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives."

[26] *See Parish of E. Feliciana v. Guidry,* 923 So.2d 45 (La. App 1st Cir., 2005). At the same time that Art. 667 was amended C.C. Art. 2317.1 was added relieving the "owner or custodian" of a thing from liability arising from its ruin, vice or defect, unless he knew, or through the exercise of reasonable care should have known of the condition. The *Mobil* case referred to previously, also ignores its provisions.

equation, it does not seem to make any substantial change to the existing jurisprudence. The writer would also suggest that perhaps rather than defining "damages" for which the owner may be liable, it was intended to provide that in those cases where such damage occurs that the owner may escape liability if he did not know and should not have known it would be caused by his activities or that the damage would have been avoided through the exercise of reasonable care which the defendant did not exercise. Because of the use of the three conjunctive conditions what the amendment says, if they were literally construed, would appear broader than it was intended.

H. The Effect of R.S. 9:2773

The question of the responsibility of a lessee or landowner to the owners of neighboring tracts is further complicated by the 1975 enactment of R.S. 9:2773 which declares that it is the "public policy" of the state that:

> the responsibility which may be imposed on an agent, contractor, or representative by reason of the responsibility of proprietors under Article 667 of the Louisiana Civil Code shall be limited solely to the obligation of such agent, contractor, or representative to act as the surety of such proprietor in the event the proprietor is held to be responsible to his neighbor for damage caused him and resulting from the work of such agent, contractor, or representative.[27]

Paragraphs B and C of the Section declares that it does not relieve a "contractor" from any liability for his own negligence or improper performance of his work, and that it applies "to all construction agreements entered into after the effective date hereof and may be waived by the contractor." No reference is made to "agents" or "representatives" in those paragraphs and there is, perhaps, an implication that the act applies only to "construction contracts." However, Paragraph A unequivocally makes the Section applicable to any "agent, . . or representative" for "work" that he does for a "proprietor."

In the two cases in which the matter has be considered to date, the court has found that each of the contractors engaged construction activities for the owners of tracts of land were liable "as a surety" to the owner of adjacent tracts that suffered "damage" under Article 667 et seq. They imposed the primary liability upon the owner as the "proprietor" and used the articles of the Civil Code regulating suretyship to determine the liability of the contractor.[28]

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[27] The act then clarifies the position of the "agent, contractor or representative" of the "proprietor" as being that of a surety and gives, a "cause of action" to the "surety" against the "proprietor.".

[28] *Burrell v. Schlesinger*, 459 So.2d 1195 (La. App. 4th Cir., 1985) writ ref. *See also Owens v. U.S. Home, Inc.* 552 So.2d 998 (La. App. 1st Cir., 1989). The activities were "pile driving" (which is per se defined as an "ultrahazardous activity") and construction

The act seems at first blush to be limited to affording contractors relief from liability under Art. 667 when the activities they conduct are those authorized by their principal and are properly performed in accordance with the contract. This should clearly permit drilling and other contractors performing work for a lessee to recover any damages caused by their activities under Art. 667 from the "proprietor" who has primary responsibility.

One problem that is yet to be addressed by the courts is who the "proprietor" referred to in Art. 667 as amended is, in the case of drilling and production of oil and gas under the ordinary oil and gas lease, and to the statute refers when it, in substance, imposes only secondary liability upon the "agent, contractor or representative" of the "proprietor."

As has been mentioned previously the definition of "proprietor" has apparently been construed to include anyone who has a right or interest in land, including ownership, servitudes, or leases. The Code does not do a very good job of specifying when the responsibility, if at all, of a "proprietor" ceases. That is, to what extent a lessor is liable for the actions of his lessee, if the lessee is prudently exercising the rights given to him by the lease, but in doing so causes "real damage" to a neighboring tract and liability under Art. 667 because those rights exceeded what the lessor in fact had. The courts, in the cases cited have not questioned that the interest of a lessee is both regulated and protected by the articles in question, but have not directly addressed its limits – for example as to whether the lessor of a lessee is a "proprietor" or the lessee a "representative" who may thus also be liable with or for the actions of the lessee. This may also give rise to difficulties, particularly to the owners of undivided interests in oil and gas lease, sublessee, parties to operating agreements, and others having a share in or enjoying the benefits of a lessee's or contractor's actions.

Also, it would seem reasonable to conclude that in the ordinary "farmout" agreement, when the farmee is not given an interest in the lease until he completes a well, that the "farmor" at least, is still the "proprietor" causing the work to be done and can be held in damages resulting from the actions of the "farmee" or his contractor or representative, under the provisions of the articles in question.[29]

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of a canal.

[29] While he may be the proverbial voice crying in the wilderness, the writer would suggest that, in Louisiana, that a "farmout" cast in terms of a sublease with an express resolutory condition terminating it, if the obligations of the farmout are not complied with, is much preferable from the farmor's view than the ordinary "contract" with an obligation to give an assignment or sublease upon completion of such performance. In addition to the considerations mentioned above, it appears quite clear than in the case of a contract to make an assignment or sublease upon performance of the "farmee's" obligations, the entire lease of the farmor is subject to the privilege given by the Oil Well Lien Act and bears the responsibility of the owner under it. *See* R.S. 9:4861 et seq.

III *Landowner - Mineral Owner – Lessee*

A. General Considerations:

The foundation for the relationship between the landowner and a mineral owner is established by Articles 15, which declares that a landowner may "convey" or "reserve" his right to explore and develop his land for production of minerals and to reduce them to possession. Art. 16 declares that the "basic" mineral rights that may created are the mineral servitude, mineral royalty, and mineral lease.[30] However, it is customary to refer to the mineral servitude as being the "mineral right" and its owner as the "mineral owner" and the other interests, as "mineral royalties" and "mineral leases."

Articles 11 and 22 establishes what may be referred to as the "correlative rights" of the landowner and owners of "mineral rights" as well as the owners of separate "mineral rights" by declaring that each must "exercise their respective rights" with "reasonable regard for the rights of other owners."[31] These relate to all forms of mineral rights. Insofar as mineral servitudes are concerned, the matter is amplified by Art. 22 declaring that a mineral servitude is under no obligation to exercise it. However, if he does so:

1. He is entitled to use only so much of the land as is "reasonably necessary" to conduct his operations, and

2. He is obligated, insofar as practicable, to restore the surface to its original condition at the earliest reasonable time.

B. The Effect of the Amendment to Article 11 by Act 446 of 2006 .

Mention should first be made of the amendment to Art. 11 by Act 446 of 2006 which adds a new Subsection B to the article. It declares that the "reservation" of mineral rights in "an instrument transferring ownership of land *must* include mention of the surface rights in the exercise of the mineral rights reserved *if not otherwise expressly provided by the parties."* [emphasis supplied].

The meaning of the portion of the act emphasized above is somewhat amplified in that it also declares that in the absence of "particular provisions regulating the extent, location and nature of the rights of the mineral owner to conduct operations on the property" a particularly prescribed statement contained in the act shall "satisfy" its requirements.[32]

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[30] The servitude is defined by M.C. Art. 21 as the "right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership".

[31] As used in this article the term "mineral rights" includes both mineral servitudes and mineral leases. Insofar as mineral servitudes are concerned, the matter is amplified by Art. 22 declaring that while the owner of a mineral servitude is under no obligation to exercise it, if he does so:

[32] Art. 11(B)(2) declares that the following is deemed to be satisfactory: "The trans-

The act as amended also declares that it shall apply to all "mineral rights" that are created by "reservation in instruments transferring ownership of land confected on and after" its effective date. Its provisions, pragmatically, seem to be limited to the reservation of "mineral servitudes" since mineral leases are rarely reserved in the sale of the land and royalty interests carry with them no rights to operate.[33] At the same time, it is broad enough to apply to any transaction in which a "mineral right" is technically "created by reservation."

The problems created by the act are several. First, and most importantly, its requirements are expressed in mandatory terms declaring that a transfer of land in which a reservation of "mineral rights" is made "*must include*" the required provisions. However, it contains no further expression as to what happens if the instrument fails to include such provisions. It therefore would appear that if an "instrument" that "transfers ownership" of property also purports to reserve "mineral rights" and fails to contain the stipulated language or other provisions that define with some unexpressed degree of particularity the "extent, location and nature of the rights of the mineral owner to conduct operations on the property" some part, if not all, of the reservation is invalid. The most extreme, although least likely conclusion in such a case is that there is a failure of cause, since the mandatory provision was omitted, and that the entire transaction is null and void. This seems doubtful, but not beyond the realm of possibility.

A less extreme, and somewhat more plausible interpretation, is that the reservation of the "mineral right" is invalid. Finally, it might be asserted that the only penalty should be that the mineral owner cannot physically exercise his rights by conducting of operations on the premises. In other words even though the owner of the reserved right may not possess the right to conduct such operations, he is nonetheless vested with the right to their enjoyment, albeit those rights must be exercised without conducting his operations "on the land." It should be noted that the "satisfactory" provision stipulated by the act declares in part that:

> The transferor . . . shall use only so much of the land, *including the surface,* as is reasonably necessary . . . . The transferee (Buyer) recognizes that the mineral owner shall have the right to use so much

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feror (Seller) shall exercise the mineral rights herein reserved with reasonable regard to the rights of the landowner, and shall use only so much of the land, including the surface, as is reasonably necessary to conduct his operations. Such exercise of mineral rights shall be subject to the provisions of Articles 11 and 22 of the Louisiana Mineral Code. The transferee (Buyer) recognizes that by virtue of the mineral reservation herein made, the mineral owner shall have the right to use so much of the land, including the surface, as is reasonably necessary to explore for, mine, and produce the minerals."

[33] The rest of the discussion will assume the "reserved right" is some form of mineral servitude for the reasons mentioned.

of the land, *including the surface*, as is reasonably necessary. . . [emphasis supplied].

Such an interpretation would leave the mineral owner free to produce by directionally drilled wells (depending upon how one interprets the words "on the land") or perhaps more restrictively, by causing them to be unitized with others by the Commissioner of Conservation. Certainly, if the lands being transferred are already in a unit formed by the commissioner and the unit well is off the premises to hold the reservation totally invalid would seem to be unduly harsh and unnecessary to the rather obvious purposes of the amendment – which it is believed was brought about by what some might consider both intrusive and abusive occupation of the premises by the seller or his lessee in such cases.

It might be observed that the writer is encountering more and more provisions of similar nature in connection with sales reserving minerals and the granting of mineral leases. Their presence is indicative, perhaps, of the cause for the amendment. They appear to be occasioned as a result of the increasing density of the population, a substantial increase in the value of land, and the drilling of deeper wells requiring longer periods to accomplish with larger and more intrusive drilling rigs and their associated facilities. Many mineral reservations and leases now expressly require the minerals to be developed through off-tract activities by directional drilling or contemplate that unitization will satisfy the lack of actual development on or under the property.

It might also be argued, although not without some obvious deficiencies, that the requirement of the act is satisfied, if at the time the land is transferred and the "minerals" reserved, there is an oil and gas lease over the land to which the transfer is made subject, since the nature, extent and rights of the existing lessee would certainly continue and might be deemed to reasonably define the activities contemplated by the purchaser and seller as being acceptable.

At the same time, the amended article is quite vague as to what constitutes an acceptable alternative to the prescribed provision. It only declares that the instrument must describe the "extent, location and nature" of the right to conduct operations on the property. The clause that is prescribed as being "satisfactory" hardly seems to comply with such a requirement itself, since it only declares that the mineral owner shall have the "right to use so much of the land, including the surface, as is reasonably necessary to explore for, mine and produce the minerals." This does not appear to advise the purchaser as to the "extent, location and nature" of the future activities of the mineral owner. From the draftsman's point of view, the writer would suggest that unless and until the exact parameters of the requirement are better defined, the best course of action would seem to be, in all cases, to utilize the prescribed language

and then to modify it by exception or qualification to the extent the parties to the transaction may otherwise agree.

Also, while it would appear the drafter of the legislation had in mind only sales of land with reservation of the minerals, there is nothing limiting the application of Art. 11, as amended, to acts of sale except, perhaps, by a parenthetical reference to "(Buyer)" and "(Seller)" in the provision deemed to be "satisfactory," it would appear to be equally applicable to donations, and exchanges, as well as partitions where the parties reserve the minerals, and in any other of the many ways land can be conventionally transferred and enjoyment of the minerals reserved.

C. Mineral Owners and Landowner – Correlative Rights

Article 11[34] recognizes what may be said to be an extension of the idea of "correlative rights" discussed in Part II above by declaring:

> The owner of land burdened by a mineral right or rights and the owner of a mineral right must exercise their respective rights with reasonable regard for those of the other. Similarly, the owners of separate mineral rights in the same land must exercise their respective rights with reasonable regard for the rights of other owners.

There appears to be no reason why the principles discussed in Part II above, relative to the correlative rights of parties holding interests in a common reservoir, are not equally applicable, in principle at least, to the rights and obligations of persons owning separate interests in a single tract of land. There is, however, one distinct difference in most cases that is exemplified in the *Ibanet* case, previously discussed. In that case, the court distinguished the principles applicable to the situation where parties hold their rights in distinct tracts and are thus derived from differing "proprietors" from those principles applicable when the rights are derived from the same owner. In the latter situation, if there is an irreconcilable conflict between the owners of interests, the court, it will be recalled, held that since an owner could not create rights that were in conflict with or contrary to those of persons who had derived their rights from earlier transfers the later ones must give way to the earlier.

The provisions of M. C. Article 11 can easily be the source of such a conflict in either of the situations mentioned. Mineral rights are most often created by their reservation in the sale of other transfer of land.[35] Applying what may be called the "first in time, first in right" principle in such cases is not necessarily easy. In such a transaction, the seller, while "reserving" the minerals ordinarily also warrants not only title and "peaceful" possession of the land sold, but that it is "fit for its intended

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[34] Which is entitled "Correlative rights of landowner and owner of a mineral right and between owners of mineral rights."

[35] It might be noted that the 2006 amendment to Art. 11 applies only to those mineral rights created "by reservation."

use."[36] The official comments to the Civil Code also note that the term "intended use" is presumed to mean "ordinary use" unless the seller "has reason to know of the particular use the buyer intends for the thing."[37] It quite easy to postulate that an irreconcilable conflict may arise between a purchaser who acquires land by an act of sale with warranty but subject to a reservation of "all of the oil gas, and other minerals" and despite the presence of the required notice under R.S. 9:2773.1, the mineral owner or his lessee proposes to use the land in such a manner as to effectively preclude the purchaser of the land from the "ordinary" enjoyment. Or, perhaps, more relevantly, the buyer has some special or particular purpose for the land, to which the seller not only know he intends to devote it, but on which may have based his price and negotiations asserting that the land was peculiarly suited for such purposes. In such a case, the warranty of the seller could be held to preclude the unfettered exercise of the reservation, even with the addition of the provision required for "reservations." After all, the provision actually declares no more than the law previously implied in its absence.

D. Limitations on Servitude – Effect upon Leasing.

It at least one case, the court held that Mineral Code Article 42 providing that the 'use of a servitude must be" by its owner or "some other person acting on his behalf" included a mineral lessee holding from a servitude owner, and therefore that, by obtaining the benefits of the use the mineral owner was responsible to the landowner for damages resulting from the lessee's actions.[38] Whether that will stand in all cases, such as those where the lessee acts beyond the authority given by the lease may be questioned. However if it is shown that his actions are in conformity with the rights leased, but exceed the rights of the mineral owner – lessor, there would seem to be good reason why the landowner and the lessee may both have recourse against him. The former, for exceeding the limits of his servitude and the latter for breaching his warranty of peaceful possession.

It therefore behooves the mineral owner who proposes leasing his servitude to be conscious of limitations that may not exist in the case of a landowner. For example, most modern leases provide that the lessee may use the leased premises not only for operations conducted on the leased land but that he may use them to locate roads, pipelines and other facilities on the premises for the purpose of conducting operations upon "adjacent" or "adjoining lands."[39] It is at least questionable perhaps even

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36 C. C. Art. 2475.

37 Official Comments, C.C. art. 2475.

38 *See Dupree v. Oil, Gas & Other Minerals*, 731 So.2d 1067 (La. App.2d Cir 1999).

39 One of the Bat n forms formerly in common usage, for example, grants to the lessee the "right to construct, maintain, and use roads, pipelines, and/or canals thereon for operations hereunder or in connection with similar operations on adjoining land." These

probable, in the writer's opinion of the writer, that a servitude owner does not possess such rights and may not lease them, particularly when his rights are created by a "reservation of the "oil, gas and other minerals." If the reservation contains the stipulation required by the recent amendment to Art. 11 discussed above, without modification, the ability to do so seems even less likely.

While the courts have granted to a mineral lessee the right to seek access to the leased premises under the "enclosed estate" provisions these do not appear to apply to the lessee of a mineral owner who, as a matter of convenience, wants to use the premises to conduct activities for the benefit of adjoining premises over which he also holds a lease.[40] In any event, his right to do so will have to be based upon the rights derived from the Civil Code provisions relating to such matters – and the presence of a servitude or lease covering the premises that does not give that right may prove to be a detriment rather than an advantage.

There are, of course a number of other situations in which a lessee may be restricted in his rights by virtue of the fact that he is dealing with a servitude owner, rather than the landowner. For example it is, at least in the writer's opinion, highly doubtful that a servitude owner can grant a lessee the right to conventionally unitize the leased premises with adjoining lands – at least to the extent that operations on adjacent premises could be relied upon to interrupt prescription of the servitude and even if his lease expressly authorizes him to do so. Fortunately, so-called conventional units are becoming increasingly rare, but many lease forms still appear to routinely have such provisions in them.

E. Provisions Favoring Landowners in Leases executed by Servitude Owners.

Mineral leases and servitudes may also contain, expressly or implicitly restrictions or limitations upon the rights of a lessee to conduct operations upon the premises that are obviously of benefit only to the landowner, or purport to extend the rights of the lessor to matters that exceed the rights of the mineral owner. For example, the lease form previously mentioned provides that the lessee will "be responsible for all damage to timber and growing crops *of Lessor* caused by Lessee's operations."

The order in which these rights are created can also materially influence the relative obligations of the parties. If the lease is granted and the land is thereafter sold with a reservation of minerals, but "subject to" the

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clauses have been upheld where expressly stated. *See Caskey v. Kelly Oil Co.,* 737 So. 2d 1257 (La. 1999).

[40] *See Blanchard v. Pan-O.K. Production Co., Inc.*, 755 So.2d 376 (La. App.2d 2002) writ Ref. 568 So.2d 1054 in which the right was sustained under the "enclosed estate" provisions on the grounds that the owner of the adjacent tract was the same as that covered by the lease and that mineral lessees, as the holder of a real right may seek a servitude of passage, citing *Salvex v. Lewis*, 546 So.2d 1309 (La. App.3rd Cir., 1989) writ den.

terms of the lease then, arguably, the provisions referred to above relative to the use of the premises for activities on "adjacent" lands would clearly be binding upon the new landowner and the clause providing for payment for damages to the crops and timber, arguably, should remain binding in his favor constituting a form of "stipulation pour autri." That is, the new landowner by taking the land "subject to" the lease may not be personally bound by its provisions, but may well argue that its existence represents a limitation on the warranties of the seller and to that extent they obligate the existing lessee to restrict his activities or to perform some act beneficial to the land, and should be enforceable by him as an implicit condition of that limitation.

Put more simply, if the land is leased and then sold and the minerals "reserved" to the seller—former landowner—the lease is not a lease of the servitude, but remains a lease of the land with the "mineral owners" rights to its benefits being derived from his servitude. This may also may give him the benefits of lessee's actions in exploiting the minerals, as well as the right to do so himself. However, the reservation does not convert the lease to one directly emanating from him as the owner of a mineral servitude.

The distinction might be illustrated most simply in the case where, for example, the lease covers two non-contiguous tracts and only one of them is sold by an act that reserves the minerals to the seller. It should be clear that production from the tract not covered by the servitude will maintain the entire lease, but will have no effect as a use of the servitude owner's rights. Nor would it be proper to say, in such a case without more, that the lease is divided even if the landowner accepts the royalties due under the producing tract and thus may be deemed to have "ratified" the lease.

The dilemma arises from treating the lease as a "contract" implying personal rights and obligations by the lessor to the lessee and at the same time characterizing it as a "real right" containing, correlatively, "real obligations." Treating the lease as a "contract" implies that its obligations are personal, and continue after the transfer of the land. On the other hand, the owner of a real right is ordinarily bound to recognize, if not to personally perform, the "real obligations" of land when he acquires it, but he is correspondingly relieved of them, for the future at least, when he transfers the thing.

The fact of the matter is that in the situation under consideration, the bar, the courts and the industry have a tendency to assume that the reservation of "minerals" subject to a prior lease is equivalent to converting the lease to a charge on the servitude, if for no other reason than since it antedates the servitude and the owner of the servitude was also the lessor when he owned the land and remains liable in that capacity, even after he has sold the land.

Thus in *Ashby et al. v. IMC Exploration Company*[41] the court held that violation of a provision in a lease restricting the location of wells to within 300 feet of a residence could be enforced by a purchaser of part of the land covered by the lease, in which the minerals had been reserved. The court held that the plaintiffs of course, could assert any rights they possessed "pursuant to their deeds, subject of course, to the previously recorded mineral lease."

The court then characterized the issue as being whether which prohibiting the well from being located within 300 feet of the "main dwelling" was made "solely for the benefit of the lessor" or was "intended for the benefit of "subsequent surface owners." It then, by way of dictum, in a sense, observed that had they intended the latter "*they could have clearly stipulated" that the benefit of the restriction should inure to future "surface owners.*" The court observed that in the case before it "as *mere surface owners*, plaintiffs are not mineral lessors, as they have no ownership interest in the property's minerals." This of course, completely overlooks the fact that the lease, when granted was given to the lessor as the owner of the land. There were then and could not thereafter be any "surface owners" in whose favor the obligations could be stipulated, in the sense used by the court. Justices Dennis and Lemmon dissented, first interpreting the clause in the lease as applying to the plaintiff's residence because it was an obligation that was clearly "intended to run with the land." Had the restriction been in a mineral "reservation" it would clearly have been a limitation on the servitude owners rights and enforceable by the landowner.

From the preceding discussion, it should be obvious that the order in which these rights are created may materially influence the relative obligations of the parties. If the lease is granted and the land is thereafter sold with a reservation of minerals, but "subject to" the terms of the lease then, arguably, the provisions previously referred to would seem to be both binding upon the new landowner and the clause providing for payment for damages to the crops and timber, would arguably, remain binding in his favor since he, like most landowners acquiring land "subject to a lease" is bound by its provisions, but may also take advantage of its benefits unless they are reserved by the seller. The relationship of a "new owner" who acquires land "subject to" a lease and the lease is extensively discussed in the official comments to Civil Code Article 2711, and are essentially rationalized on the premise that the original lessor remains liable to the lessor because, as the Civil Code provides, the lease of a thing belonging to another is binding upon the parties and Civil Code Art. 2674 providing that the lessor remains bound to warrant the lessee's peaceful possession.

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41 506 So.2d 1193 (La. 1987).

At the same time, and although the Civil Code provides that the assumption of an obligation must be in writing,[42] the courts have had no difficulty in the case of predial leases in holding successors of lessors who have purchased the leased premises liable for the obligations of a lease on lands to which they have succeeded, if they "accept the benefits" of the lease, by for example, receiving the rents, that have not been reserved to the seller.

The extent to which modifications or amendments to the lease, in cases such as those described above, made between lessee and the mineral owner and landowner, respectively, are binding upon the other if they do not rise to the level of a "novation" and if so, to what extent the various parties to them may have rights against the others is, at least, complicated and in many respects still unresolved.

F. Mineral Owner and Lessees – Termination of Interests.

Another problem "lurking in the wings" and that has not been definitively resolved, involves the obligations of mineral lessees and servitude owners to the landowner upon the cessation of activities on the land. Article 2 of the Mineral Code declares that the provisions of the Civil Code are applicable in those cases where the Mineral Code is silent.

The Civil Code obligates the lessee only to "return the premises at the end of the lease in a condition that is the same as it was when the thing was delivered to him, except for normal wear and tear or as otherwise provided hereafter."[43] The Louisiana Supreme Court recently held this provision to be applicable to oil and gas leases in *Terrebonne Parish School Board v. Castex Energy, Inc.*[44] It has further held that in the absence of an express provision to the contrary the obligation, such as it is, does not arise until termination of the lease.[45] This is supported by C.C. Art. 2386, which declares that the obligation is to "return the premises at the end of the lease in the condition described."

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[42] C.C. Art. 1821 "An obligor and a third person may agree to an assumption by the latter of an obligation of the former. To be enforceable by the obligee against the third person, the agreement must be made in writing. The obligee's consent to the agreement does not effect a release of the obligor. The unreleased obligor remains solidarily bound with the third person."

[43] The lessee is bound:

(3) To return the thing at the end of the lease in a condition that is the same as it was when the thing was delivered to him, except for normal wear and tear or as otherwise provided hereafter. La. C.C. 2683) [C.C. Art. 2683].

[44] 893 So.2d 789 (La 2005) "Applying the jurisprudence and Civil Code articles discussed above, we hold that, in the absence of an express lease provision, Mineral Code article 122 does not impose an implied duty to restore the surface to its original, pre-lease condition absent proof that the lessee has exercised his rights under the lease unreasonably or excessively".

[45] *See Corbello v. Iowa Production*, 850 So.2d 686, (La. 2003) clarified on rehearing, on remand 851 So.2d 1253, (La.App. 3 Cir. 2003).

On the other hand, M.C. Art. 22 affirmatively obligates the owner of a mineral servitude to "restore the surface to its original condition at the earliest reasonable time." This obviously may put the mineral owner in the untenable position of facing a demand for repair or restoration by the landowner and a lessee who is contending his obligation, under the lease is not yet due, and, relying upon *Castex*, that he has no obligation to restore the surface to its original, pre-lease condition in any event.

Again, the order in which the rights are created may influence the result. If the lease is in existence when the minerals are reserved by the transferor and the transfer is made "subject," not only to the mineral reservation, but the lease, the mineral owner may well argue that by agreeing that the land is subject to the provisions of the lease, and that the reservation of the minerals is also subject to it that the parties have modified the requirements of the landowner and the provisions of the lease supersede those of Article 22, at least insofar as the operations of the existing lessee are concerned. Whether this will succeed is unclear.

IV *Conclusion.*

Many of the problems discussed in this presentation are intimately entwined with the rights and obligations of landowners, mineral owners, and lessees having rights over the same tracts of land. Some of them are, perhaps, technically more properly related to the nature, extent, and limitation off those three rights than of what the Mineral Code refers to as the "correlative rights" of parties having diverse interests in the exploitation and production of oil and gas.

The contracts and the rights in question are simple and perhaps, in more than any other industry, have been uniform in their basic structures and largely unchanged in their provisions since the inception of the industry.

As far as the writer can determine, the first appellate case concerning production of oil and gas, reached the courts in Louisiana in 1904 in *State ex rel. Jennings-Heywood Oil Syndicate,*[46] in which the plaintiff drilled a well in the Jennings field, that the court described as being "an oil gusher." In preparing this paper, it has occurred to the writer that, after at least a hundred and three years of litigation and the drilling of over a quarter of a million wells, all of the problems arising from the nature, extent and relationship of three such essentially simple contracts and property rights should have been interpreted, clarified and settled by the members of the profession—the courts, the legal faculty and the bar—involved with drafting and interpreting them. He will leave to the reader the problem of why they have not been able to accomplish more than they have.

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[46] 37 So. 481 (La. 1904).