

Louisiana Law Review

Volume 27 | Number 4

June 1967

Rights of the Usufructuary: Louisiana and Comparative Law

A. N. Yiannopoulos

Repository Citation

A. N. Yiannopoulos, *Rights of the Usufructuary: Louisiana and Comparative Law*, 27 La. L. Rev. (1967)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol27/iss4/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

RIGHTS OF THE USUFRUCTUARY; LOUISIANA AND COMPARATIVE LAW

A. N. Yiannopoulos*

Articles 544-556 of the Louisiana Civil Code of 1870 deal comprehensively with the rights of the usufructuary, *i.e.*, his enjoyment of the property subject to usufruct and his legal powers vis-a-vis the naked owner and third persons. These articles, deriving from the reservoir of the civilian tradition, have, for the most part, exact equivalents in foreign civil codes. The following discussion is devoted to an analysis of the rights of the usufructuary under the laws of Louisiana, France, Germany, and Greece.

I. THE USUFRUCTUARY'S RIGHT OF ENJOYMENT

1. *Use of the Thing*

The usufructuary's right of enjoyment comprises, in all legal systems under consideration, two elements: the right to use the thing and the right to draw its fruits.¹ The usufructuary's right to use the thing is as extensive as that of an owner. Article 597 of the French Civil Code provides expressly that the usufructuary "enjoys. . . generally all the rights that the owner may enjoy, and he enjoys them as the owner himself."² Article 554 of the Louisiana Civil Code of 1870 corresponds in part to article 597 of the French Civil Code but does not assimilate the usufructuary's enjoyment to that of an owner.³ Nevertheless, it ought to be accepted that, in principle, the usufructuary in Louisiana as well as in other civil law jurisdictions is entitled to use the thing as the owner himself.

The extent of the right of use is determined by the nature of

* Professor of Law, Louisiana State University.

1. See LA. CIVIL CODE arts. 533, 535 (1870); FRENCH CIVIL CODE art. 578; B.G.B. §§ 1030, 1068(2); GREEK CIVIL CODE art. 1142.

2. FRENCH CIVIL CODE art. 579. Accordingly, the usufructuary has fishing and hunting rights on the land subject to usufruct. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 768 (2d ed. Picard 1952).

3. See LA. CIVIL CODE art. 554 (1870): "The usufructuary enjoys the rights of servitudes, ways or others due to the inheritance of which he has the usufruct; and if this inheritance is inclosed within the other lands of him who has established such usufruct, a way must be gratuitously furnished to the usufructuary by the owner of the land or by his heirs." *Cf.* LA. CIVIL CODE art. 547 (1825); La. Civil Code p. 114, art. 20 (1808).

the things subject to usufruct and by prevailing conceptions in society. The usufructuary of non-consumable things does not have the right to abuse these things or to dispose of them; on the contrary he is under obligation to preserve their substance and destination.⁴ But the usufructuary of consumables, having merely an imperfect usufruct, is accorded by the law the power of disposition as owner.⁵

4. See LA. CIVIL CODE arts. 533, 534(1), 535 (1870); FRENCH CIVIL CODE art. 578; B.G.B. § 1037; GREEK CIVIL CODE art. 1142. In Germany, the usufructuary may be given by the grantor the right to dispose of things subject to perfect usufruct. Further, the usufructuary is entitled by law to dispose of things included in a perfect usufruct under the terms of section 1048(1) of the Civil Code. See BAUR, LEHRBUCH DES SACHENRECHTS 261 (2d ed. 1963).

The grantor in Louisiana may expressly accord to the usufructuary of non-consumable things the right to sell, in which case the usufruct may be converted from perfect into imperfect at the option of the usufructuary. In *Heirs of Mitchel v. Knox*, 34 La. Ann. 399, 401-402 (1882), testator left to his wife the usufruct of his immovable property and conferred upon her power to sell the property subject to usufruct. The court interpreted the will correctly, as follows: "Mrs. Mitchel had the option to exercise her right of usufruct on her husband's immovables, directly, or by provoking a sale of the same at public auction, to have her usufruct established on the proceeds of the sale. If she elected to exercise her usufruct on the property itself, she would have been subjected to the rules of perfect usufruct, under which she could not acquire title to the property which she was legally bound to restore to the owners at the termination of the usufruct. If, on the other hand, she chose, as she did, to have the property sold, to enjoy the usufruct of the proceeds of the sale, she was governed by the rules of the imperfect usufruct, under which she became owner, of the fund, subject to the obligation of accounting for the same to the heirs and legatees of the husband, at the expiration of the usufruct." See also *Michel v. Beale*, 10 La. Ann. 352 (1855) (testamentary usufruct with power of disposition; perfect usufruct converted into imperfect). *But cf. Giroir v. Dumesnil*, 184 So. 2d 1 (La. 1966). Testator in this case left the usufruct of his estate to his widow with power to "enjoy and dispose of as she pleases, and as a thing belonging to her." The widow sold the property and her successors in title claimed that she had been bequeathed ownership rather than usufruct; accordingly, she could validly convey ownership. Heirs of the husband, on the other hand, claimed that the widow had been merely given the usufruct of the property and any inconsistent language should be disregarded. The court held, as a matter of will construction, that the widow had merely been given ownership rather than usufruct; accordingly, she could convey valid title. It is submitted that the court should interpret the will as in the *Heirs of Mitchel* case, *supra*. The testator had clearly granted to the usufructuary an option to convert the perfect usufruct into imperfect; accordingly, she had authority to convey title.

5. See LA. CIVIL CODE arts. 534(2), 536, 549 (1870); FRENCH CIVIL CODE art. 587; B.G.B. § 1067; GREEK CIVIL CODE arts. 1174, 1175. In Louisiana, the grantor may relieve the usufructuary of things subject to imperfect usufruct of the obligation to account for their value to the naked owner. In other words, the naked owner may be given a right to whatever is left of a fund at the end of the usufruct. See *In re Courtin*, 144 La. 971, 81 So. 457 (1919). The testator in this case directed that his property be sold and the proceeds be invested in an interest bearing account. His sister was granted a usufruct thereon, with the right to draw, in addition to interests, \$40 per month from the principal for life. Legal heirs attacked the will on the ground that it established a forbidden fideicommissum and a tenure unknown to civil law. The court held correctly that the will was valid. The testator had presently vested in the naked owner the ownership of whatever might remain of the principal at the death of the usufructuary. Indeed, there is no reason why this type of bequest should not be given effect. The usufructuary, by virtue of his imperfect usufruct, becomes owner of the fund and is free to dispose of it as he pleases; the provision allowing him to touch the prin-

The right of the usufructuary extends to all accessories of the thing at the time of the creation of the usufruct.⁶ Further, according to both the Louisiana and the French Civil Codes, the right of the usufructuary extends to "the increase brought by alluvion to the land of which he has the usufruct."⁷ But the usufructuary's right of enjoyment does not extend to islands formed in the middle of the stream,⁸ nor to a tract of land carried away from an adjoining field by a sudden eruption (*avulsion*).⁹

2. Right to Fruits

The right of the usufructuary to draw the fruits of the thing is the principal characteristic of usufruct. This right may be exercised by the usufructuary personally or through other persons, like servants, agents, or lessees.¹⁰

a. Notion and Kinds of Fruits

The provisions of the Louisiana Civil Code of 1870 concerning fruits are almost identical with those of the French Civil Code. Both Codes distinguish fruits into natural fruits, fruits of industry, and civil fruits. Natural fruits are "the spontaneous

cipal has no meaning other than to relieve him of the obligation to account to the naked owner at the end of the usufruct. Seen in another light, the disposition confers on the usufructuary an imperfect usufruct plus true ownership of a portion of the principal.

6. See *Peters v. Fonville*, 70 So. 2d 209 (La. App. 2d Cir. 1954). The proposition in the text may be regarded as founded on an expansive interpretation of articles 553 and 554, and on application by analogy of articles 1636 and 2490, of the Louisiana Civil Code of 1870. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 769 (2d ed. Picard 1952), relying in part on analogous application of articles 1018 and 1615 of the French Civil Code, corresponding to articles 1636 and 2490 of the Louisiana Civil Code of 1870. See also B.G.B. § 1031: "By virtue of the usufruct of a tract of land the usufructuary acquires the usufruct of its accessories under the provisions of Section 926 applicable to the acquisition of ownership"; *Id.* §§ 93-96 (component parts); WOLFF-RAISER, *SACHENRECHT* 466 (10th ed. 1957). For Greek law, see CIVIL CODE arts. 953-966; BALIS, *CIVIL LAW PROPERTY* 342 (3d ed. 1955) (in Greek).

7. LA. CIVIL CODE art. 553(1) (1870); FRENCH CIVIL CODE art. 596.

8. See LA. CIVIL CODE art. 553(1) (1870). Doctrinal writers in France have reached the same conclusion, even in the absence of a corresponding provision in the French Civil Code. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 769 (2d ed. Picard 1952); 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 661 (7th ed. Esmein 1961). *But cf.* 10 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 282 (1875).

9. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 769 (2d ed. Picard 1952); 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 661 (7th ed. Esmein 1961). *But see* 10 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 281 (1875). It may be argued that avulsion is not an accessory of the land subject to usufruct. Further, if the tract of land which has been carried away is susceptible of identification, its owner may reclaim it. See LA. CIVIL CODE art. 511 (1870). When this happens, the usufructuary is clearly without any rights as to this tract of land which belongs to a third person.

10. See LA. CIVIL CODE art. 555 (1870); FRENCH CIVIL CODE art. 595; B.G.B. § 1059; GREEK CIVIL CODE art. 1166.

product of the earth" and "the product and increase of cattle."¹¹ Fruits of industry are those "obtained by cultivation" as a result of "industry bestowed on a piece of ground."¹² Civil fruits are "rents of real property, the interest of money, and annuities" as well as "all other kinds of revenue derived from property by operation of the law or private agreement."¹³

Neither the Louisiana Civil Code of 1870 nor the French Civil Code defines the generic term "fruits." The definition accepted by courts and writers in France is that fruits are things which are produced periodically by a principal thing without diminution of its substance.¹⁴ This definition distinguishes fruits from "products" (*produits*) which are derived from a principal thing whose substance is thereby diminished. Once separated, products are not reproduced. The significance of this distinction in French law is that, in this way, the rights of the usufructuary are confined, in principle, to revenues produced by a thing periodically and without diminution of its substance while the owner is accorded the right to obtain all products.¹⁵ Thus, stones extracted from a quarry not regularly exploited and trees cut down without any plan of exploitation are products rather than fruits. The owner of a thing, however, may by his intention and regular exploitation attribute the quality of fruits to component parts of the ground. Accordingly, the products of a regularly exploited quarry or forest are classified as fruits.¹⁶ It is apparent, therefore, that the classification of certain things as fruits in French law depends either on their intrinsic characteristics or on the will of the owner.¹⁷

In interpreting the corresponding provisions of the Louisiana Civil Code in this area, Louisiana courts have frequently followed French doctrine and jurisprudence. The distinction between "fruits" and "products," however, has not been accepted.

11. LA. CIVIL CODE art. 545(1) (1870); FRENCH CIVIL CODE art. 583(1).

12. LA. CIVIL CODE art. 545(2) (1870); FRENCH CIVIL CODE art. 583(2).

13. LA. CIVIL CODE art. 545(3) and (4) (1870); FRENCH CIVIL CODE art. 584. Cf. LA. CIVIL CODE art. 499 (1870).

14. See 2 CARBONNIER, DROIT CIVIL 63 (1957); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 255 (2d ed. Picard 1952); 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 254 (7th ed. Esmein 1961).

15. The broad language of a number of articles in the French Civil Code conferring upon certain persons the right to obtain "fruits" needed to be limited to revenues produced periodically and without diminution of the substance of the principal thing. See YIANNPOULOS, CIVIL LAW PROPERTY § 20 (1966).

16. See 3 CARBONNIER, DROIT CIVIL 64 (1957); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 256, 770 (2d ed. Picard 1952); 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 255 (7th ed. Esmein 1961); 2 COLIN, CAPITANT ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL 37 (1959).

17. For an excellent analysis, see Labbé, Note, S.1878.1.7.

On the contrary, Louisiana courts have declared that the word "products" in the Civil Code has the same meaning as the word "fruits."¹⁸ As a result, a different conceptual apparatus has had to be employed for the apportionment of economic advantages between the owner of a thing and other persons entitled to "fruits" as usufructuaries, possessors in good or bad faith, or as spouses living under the regime of community property.¹⁹ And, instead of a unitary notion of fruits for all purposes, Louisiana courts have adopted different notions of fruits for different purposes.²⁰ With regard to the rights of the usufructuary, Louisiana courts established the proposition that under article 533 of the Civil Code fruits are only things "born and reborn of the soil."²¹ Accordingly, the usufructuary is not entitled to products resulting from a depletion of the land such as timber and mineral substances, except as provided in articles 551 and 552 of the Civil Code.²²

In the complex scheme of the German Civil Code, "fruits" are treated as a species of the generic concept "profits."²³ Fruits are subdivided into fruits of things and fruits of rights, direct or indirect. Prior to the enactment of the Civil Code, fruits were conceived of in Germany as periodically recurring economic advantages obtained from a thing according to its destination and without diminution of its substance. The German Civil Code, however, enlarged the notion of fruits by abandoning the requirement of preservation of the substance in all cases, and in the case of organic products, the requirement of production according to destination.²⁴ This broad notion of fruits in the German Civil Code made necessary the enactment of specific provisions limiting the right of certain persons to the acquisition of fruits produced according to the destination of the thing and not resulting in diminution of its substance.²⁵

The usufructuary of a corporeal object is entitled to all its profits, *i.e.*, natural and civil fruits as well as all other advan-

18. See *Harang v. Bowie Lumber Co.*, 145 La. 96, 81 So. 769 (1919); *Elder v. Ellerbe*, 135 La. 990, 66 So. 337 (1914).

19. See YIANNPOULOS, CIVIL LAW PROPERTY § 20, text at notes 138-165 (1966).

20. *Id.* § 20, text at notes 148-158 (relations among possessors and revending owners); text at notes 159-162 (community property); text at note 162 (severance tax).

21. *Elder v. Ellerbe*, 135 La. 990, 995, 66 So. 337, 337 (1914).

22. See text at notes 73, 97 *infra*; *King v. Buffington*, 240 La. 955, 126 So. 2d 326 (1961); *Gueno v. Medlenka*, 238 La. 1081, 117 So. 2d 817 (1960); *Elder v. Ellerbe*, 135 La. 990, 66 So. 337 (1914).

23. See YIANNPOULOS, CIVIL LAW PROPERTY § 21, text at notes 170-181 (1966).

24. See B.G.B. § 99.

25. *Id.* §§ 581, 993, 1039, 2133.

tages of use.²⁶ The usufructuary acquires the ownership of all natural fruits upon separation.²⁷ But if these fruits are produced contrary to the rules of orderly management or as a result of the destructive forces of nature, the usufructuary must account for the value of the fruits so produced to the naked owner upon the termination of the usufruct. Further, if the usufructuary is at fault, the naked owner has an action for damages during the existence of the usufruct or an action for accounting upon its termination. In all cases the usufructuary is required to furnish security for the fulfillment of his obligations.²⁸ Further, the usufructuary is entitled to draw the civil fruits of the thing as of the creation of the usufruct. He may lease the thing and collect the rent or if the thing is already leased by the owner he may claim the rent from a lessee who has knowledge of the creation of the usufruct.²⁹ Likewise, the usufructuary of a right is entitled to all profits in accordance with the nature of the right subject to usufruct.³⁰ For example, the usufructuary of an interest-bearing credit is entitled to collect interest as of the day of the creation of the usufruct.³¹

The Greek Civil Code, following the pattern of Roman-Byzantine law, distinguishes fruits into natural and civil.³² In addition, following the German Civil Code, the Greek Civil Code establishes the categories of "fruits of things" and "fruits of rights," and introduces the notion of "profits."³³ According to the Greek Code, fruits of things are organic products, advantages obtained according to the destination of a thing, and any revenues the thing may produce by operation of law or by virtue of a legal relation. According to the prevailing view, organic products are regarded as fruits only if the substance of the principal thing is preserved.³⁴ The destination of a thing as fruit producing is determined by reference to its nature, prevailing conceptions in society, and the intention of the parties

26. *Id.* § 1030; WOLFF-RAISER, SACHENRECHT 465, 466 (10th ed. 1957).

27. See B.G.B. § 954.

28. *Id.* § 1039; *cf.* R.G. Oct. 16, 1912, 80 R.G.Z. 229, 232.

29. See WOLFF-RAISER, SACHENRECHT 465 (10th ed. 1957); 3, 2 STAUDINGER-SPRENG, KOMMENTAR ZUM B.G.B. 1166 (11th ed. 1963); R.G. Nov. 2, 1912, 80 R.G.Z. 311, 316; R.G. May 27, 1929, 124 R.G.Z. 325, 329. See also text at notes 41, 59 *infra*.

30. See B.G.B. § 1068(2); WOLFF-RAISER, SACHENRECHT 483 (10th ed. 1957).

31. See 3, 2 STAUDINGER-SPRENG, KOMMENTAR ZUM B.G.B. 1166 (11th ed. 1963); text at notes 50, 214 *infra*.

32. See GREEK CIVIL CODE art. 961; YIANNOPOULOS, CIVIL LAW PROPERTY § 21, text at notes 182-185 (1966).

33. See GREEK CIVIL CODE art. 962.

34. See BALIS, GENERAL PRINCIPLES OF CIVIL LAW 518 (7th ed. 1955) (in Greek).

to a transaction. Fruits of rights are royalties and interests deriving from rights other than ownership. Under the Greek Civil Code, the usufructuary is entitled to all profits of the thing or right subject to the usufruct. Since, however, the notion of fruits is limited by the requirement of production according to the destination of the principal thing or right,³⁵ the usufructuary does not become owner of emoluments produced contrary to the rules of orderly management or as a result of the destructive forces of nature; these emoluments belong to the owner.³⁶

b. Mode of Acquisition of Fruits

Neither the Louisiana Civil Code of 1870 nor the French Civil Code provides expressly for the mode of acquisition of natural and civil fruits by the usufructuary.

Question thus arises as to whether the usufructuary acquires the ownership of natural fruits produced by the thing subject to usufruct by collection, *i.e.*, acquisition of possession, or merely upon separation from the principal thing. French doctrine and jurisprudence, drawing arguments from articles 520 and 585 of the Code Civil (corresponding to articles 465 and 546 of the Louisiana Civil Code of 1870), decide that the usufructuary acquires the ownership of natural fruits upon their separation.³⁷ It is submitted that the same rule ought to apply in Louisiana. The German and the Greek Civil Codes provide expressly that the usufructuary, as any other person entitled to fruits by virtue of a real right, acquires the ownership of natural fruits upon separation.³⁸

Civil fruits, accruing by virtue of an obligation, involve dis-

35. GREEK CIVIL CODE, art. 961.

36. See GREEK CIVIL CODE art. 1150: "Fruits collected by the usufructuary contrary to rules of orderly management or as a result of extraordinary events belong, as to the excess, to the naked owner." *But cf.* B.G.B. § 1039, text at note 28 *supra*, establishing a different rule.

37. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 255, 655 (7th ed. Esmein 1961); 10 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 230 (1875). *But cf.* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 772 (2d ed. Picard 1952) (collection rather than separation). Article 546 of the Louisiana Civil Code of 1870, discussed text at note 51 *infra*, provides that "natural fruits. . . hanging by branches or roots at the time when the usufruct is open, belong to the usufructuary." This does not mean that the usufructuary becomes owner, upon the creation of the usufruct, of hanging natural fruits. These fruits, until separation, are component parts of the ground and immovables by nature owned by the landowner by right of accession. LA. CIVIL CODE art. 465 (1870). They "belong" to the usufructuary merely in the sense that the usufructuary is entitled to acquire ownership upon separation or collection during the existence of his usufruct. See 2 MARCADÉ, EXPLICATION THÉORIQUE ET PRATIQUE DU CODE NAPOLÉON 456 (1852).

38. See B.G.B. § 954; GREEK CIVIL CODE art. 1065.

tinct considerations. According to traditional civilian ideas, maintained in certain modern civil codes,³⁹ the usufructuary acquires a "claim" to such fruits rather than "ownership" thereof.⁴⁰ Analytically, the creation of the usufruct operates as an assignment of credits: the usufructuary is now entitled to collect from the obligor but the obligor who has no knowledge of the creation of the usufruct may validly be discharged by payment to the naked owner. In this case, as well as in case the naked owner has collected civil fruits in advance for the period of the usufruct, the usufructuary's claim is addressed against the naked owner for accounting. These solutions are sanctioned by the German and Greek Civil Codes. According to the rigorously logical system of these codes, the usufructuary acquires a claim for the collection of exigible civil fruits against the debtor of the obligation as soon as the usufruct is created.⁴¹ But, in the internal relations between usufructuary and naked owner, the civil fruits collected by either of them for the period of the usufruct are subject to apportionment in proportion to the duration of the usufruct.⁴²

In France, commentators relying on article 586 of the Code Civil, corresponding to article 547 of the Louisiana Civil Code of 1870, declare cryptically that civil fruits are "acquired" by the usufructuary day by day.⁴³ No clear distinction is made between the usufructuary's claim for the collection of civil fruits from any obligor and the apportionment of civil fruits as between the usufructuary and the naked owner. One may thus come to the conclusion that the usufructuary is entitled to claim from the debtor of the obligation only the part of the civil fruits to which he is entitled. It is submitted, however, that the provision under consideration may be interpreted as concerning merely the internal relations of usufructuaries and naked owners and the apportionment of fruits as between these persons. And, in the light of the civilian tradition and contemporary analysis,

39. See notes 41, 42 *infra*.

40. See BALIS, CIVIL LAW PROPERTY 351 (3d ed. 1955) (in Greek).

41. See note 29 *supra*; WOLFF-RAISER, SACHENRECHT 465 (10th ed. 1957); 3, 2 STAUDINGER-SPRENG, KOMMENTAR ZUM B.G.B. 1166 (11th ed. 1963); R.G. May 27, 1929, 124 R.G.Z. 325, 329 (1929). If the lessee ignores the creation of the usufruct, he is discharged by payment to the naked owner. See B.G.B. §§ 407, 412. For analysis of Greek law, see BALIS, GENERAL PRINCIPLES OF CIVIL LAW 520, 522 (7th ed. 1955) (in Greek); *id.* CIVIL LAW PROPERTY 351 (3d ed. 1955) (in Greek).

42. See text at notes 59-62 *infra*.

43. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 256, 655 (7th ed. Esmein 1961); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 733 (2d ed. Picard 1952).

it may be argued the usufructuary acquires upon the creation of the usufruct, both in France and in Louisiana, a claim for the collection of all exigible civil fruits against the obligor directly. Naturally, the naked owner may have a claim against the usufructuary for apportionment; and in case the naked owner has collected civil fruits in advance or from an obligor ignoring the creation of the usufruct, the usufructuary may have a claim against the naked owner for accounting or apportionment.⁴⁴

c. Commencement of the Right to Fruits

Article 566 of the Louisiana Civil Code of 1870, and corresponding article 604 of the French Civil Code, create the impression that the usufructuary's right to obtain fruits commences, in all cases, "from the moment that the usufruct has accrued."⁴⁵ In reality, this rule applies merely to legal usufructs and to contractual usufructs in the absence of contrary agreement by the parties.⁴⁶

In cases of testamentary usufructs, the commencement of the usufructuary's right to fruits should be determined in the light of articles 1608 and 1626 of the Louisiana Civil Code of 1870 and corresponding articles 1005 and 1014 of the French Civil Code.⁴⁷ Thus, the usufructuary by universal title has a claim to fruits "from the day of the decease, if the demand for the delivery has been made within a year from that period; if not, enjoyment will only commence from the day of the judicial demand, or from the day on which the delivery has been agreed upon."⁴⁸ The usufructuary by particular title, on the other hand, has a claim to fruits "only from the day the demand of delivery was formed. . . or from the day on which that delivery was voluntarily granted to him."⁴⁹

Under the German and the Greek Civil Codes the usufructuary's right to fruits commences uniformly on the day of creation of the usufruct in the absence of contrary provision by the testator or the parties to an agreement.⁵⁰

44. See text at notes 56-58 *infra*.

45. LA. CIVIL CODE art. 566 (1870); FRENCH CIVIL CODE art. 604.

46. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 772 (2d ed. Picard 1952).

47. *Ibid.* See also 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 654 (7th ed. Esmein 1961).

48. LA. CIVIL CODE art. 1608 (1870).

49. *Id.* art. 1626.

50. See text at notes 38, 41 *supra*; WOLFF-RAISER, *SACHENRECHT* 465 (10th ed. 1957).

d. Apportionment of Fruits

According to article 546 of the Louisiana Civil Code of 1870, and corresponding article 585 of the French Civil Code, natural fruits and fruits of industry "hanging by branches or roots at the time when the usufruct is open, belong to the usufructuary. Fruits in the same state, at the moment when the usufruct is at an end, belong to the owner."⁵¹ Under this provision, the usufructuary is merely entitled to natural fruits and fruits of industry *separated*, even though not collected,⁵² during the existence of the usufruct. Fruits which have not been separated or collected at the end of the usufruct, even due to irresistible force,⁵³ belong to the naked owner. But the usufructuary is entitled to the value of fruits he was unable to collect because of acts of the owner or disputes as to ownership.⁵⁴ The redactors of the two Codes thus rejected the principle of apportionment of natural fruits and fruits of industry in order to simplify accountings and minimize recourse to courts.⁵⁵ They accepted, however, the principle of apportionment with respect to civil fruits.

Article 547 of the Louisiana Civil Code of 1870, and corresponding article 586 of the French Civil Code, provide that "civil fruits are supposed to be obtained day by day, and they belong to the usufructuary, in proportion to the duration of the usufruct, and are due to him, though they may not be collected at the expiration of the usufruct."⁵⁶ The usufructuary has thus a claim to civil fruits accruing during the calendar years of commencement or termination of the usufruct in proportion to the days of his enjoyment. Payment or collection during the existence of the usufruct is not required. For example, if an immovable subject to usufruct is already leased at the time of the creation of the usufruct, the usufructuary has a claim for rents corresponding to the days of his enjoyment whether they are

51. LA. CIVIL CODE art. 546 (1870); FRENCH CIVIL CODE art. 585; *Caire v. Her Creditors*, 45 La. Ann. 461, 12 So. 624 (1893); *In re Davis*, 22 La. Ann. 497 (1870); *Moore v. Moore*, 20 La. Ann. 159 (1868).

52. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 256, 654 (7th ed. Esmein 1961); note 37 *supra*.

53. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 655 (7th ed. Esmein 1961); 10 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 310 (1875); 2 MARCADÉ, EXPLICATION THÉORIQUE ET PRATIQUE DU CODE NAPOLÉON 456 (1852).

54. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 655 (7th ed. Esmein 1961); 10 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 311 (1875).

55. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 773 (2d ed. Picard 1952).

56. LA. CIVIL CODE art. 547 (1870); FRENCH CIVIL CODE art. 586.

paid in advance or after the termination of the usufruct.⁵⁷ The civil fruits produced by a thing subject to usufruct are thus divided into 365 or 366 equal parts: the usufructuary is attributed a number of these parts corresponding to the days of his enjoyment and the rest is given to the naked owner. It is regrettable that this principle of apportionment has not been adopted as to both natural and civil fruits.⁵⁸

Under the German and Greek Civil Codes, the apportionment of fruits between usufructuaries and naked owners concerns exclusively their internal relations rather than the right of the usufructuary to the acquisition of fruits. The two questions are kept distinct: one set of rules determines the mode of acquisition of fruits,⁵⁹ a matter of property law, and another set of rules the question of apportionment, a matter of the law of obligations. With respect to apportionment, the two Codes provide generally that one who has the right to collect the natural fruits of a thing or of a right up to a certain time or from a certain time is entitled, in the absence of other agreement, only to fruits separated from the principal thing during the existence of his right.⁶⁰ As to civil fruits, the German Civil Code establishes a distinction between those which accrue periodically and those which do not. In the absence of other agreement, one entitled to periodically accruing civil fruits may claim a part proportionate to the duration of his right whereas one entitled

57. See Civ., July 20, 1897, S. 1899.1.1878; *Gaspard v. Coco*, 116 L^a. 1096, 41 So. 326 (1906). In this case, the usufruct was created on June 4, 1882, and the usufructuary claimed \$650 which she had collected as rental of lands for the year 1882. The court stated: "Five months of the year have elapsed, the succession was entitled to five-twelfths as that portion of the rent that had accrued although it was not collectible at that date. Her contention is, as before stated, that she was entitled to the whole amount; the rental of the whole year, by reason of the fact that the lease was for one year and the rental was not due and not collectible at the beginning of the usufruct in June; it was due at the end of the year; and the obligation cannot be divided. We cannot agree with that view. The usufructuary was entitled to the rent from the day the usufruct begins. The rent was due day by day." *But cf.* *Stringfellow v. Murphy*, 195 So. 844 (La. App. 2d Cir. 1940) (cash bonus paid for an oil and gas lease for the initial term of one year is neither "rent" nor "civil fruit" accruing from day to day, but is all due at one and the same time; hence, it is not subject to apportionment).

Ordinarily, the claim of the usufructuary arises on the day of the creation of the usufruct. But if the civil fruits commence to accrue *after* the creation of the usufruct, *e.g.*, an immovable is leased three months after the creation of the usufruct, the usufructuary is entitled to a proportionate share of the rents corresponding to his days of enjoyment from the date of the lease rather than from the creation of the usufruct. See 10 DEMOÏOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 318 (1875).

58. For a critique, see 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 773 (2d ed. Picard 1952).

59. See text at notes 38, 39-42 *supra*.

60. See B.G.B. § 101(1); GREEK CIVIL CODE art. 963(1); *cf.* YIANNOPOULOS, CIVIL LAW PROPERTY § 21, note 185 (1966).

to civil fruits which do not recur periodically may claim only those matured during the existence of his right.⁶¹ The Greek Civil Code has not adopted this distinction: all civil fruits are apportioned in the light of the duration of the respective rights of the parties.⁶²

e. Apportionment of Expenses for the Production of Fruits

According to article 546 of the Louisiana Civil Code of 1870, and corresponding article 585 of the French Civil Code, the owner has no claim for reimbursement of expenses incurred for the production of fruits which at the commencement of the usufruct are attributed wholly to the usufructuary.⁶³ Conversely, the usufructuary has no claim for expenses incurred for the production of fruits which at the end of the usufruct belong in their entirety to the naked owner. These provisions have been justified on the ground that they effect a balance among equal chances.⁶⁴ It has been pointed out, however, that just results may be achieved only if the same persons were to repeat the same operations an indefinite number of times. But every usufruct is created and terminates only once; thus, the usufructuary may benefit at the commencement of the usufruct without losing anything at the end; and, conversely, the naked owner may benefit at the end without having incurred any loss at the commencement of the usufruct.⁶⁵

As in France and in Louisiana, usufructuaries and naked owners in Germany and in Greece have, in general, no claim against each other for the production costs of non-separated fruits which at the commencement of the usufruct are attributed to the usufructuary and at the end to the naked owner. But exception is made as to the usufruct of a rural immovable. In this respect, the two Codes provide specifically that the usufructuary is entitled to reimbursement of production costs for fruits which at the end of the usufruct are attributed to the naked owner, provided that the expenses do not exceed the value of the fruits.⁶⁶

61. See B.G.B. § 101(2).

62. See GREEK CIVIL CODE art. 963(2).

63. See LA. CIVIL CODE art. 546 (1870); FRENCH CIVIL CODE art. 585.

64. Cf. 10 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 314 (1875).

65. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT FRANÇAIS 774 (2d ed. Picard 1952).

66. See B.G.B. § 1055(2) making applicable by analogy §§ 591-593; GREEK CIVIL CODE art. 1162; WOLFF-RAISER, SACHENRECHT 472 (10th ed. 1957); BALIS, CIVIL LAW PROPERTY 370 (3d ed. 1955) (in Greek).

3. Trees in usufruct

Trees in Louisiana and in France are considered, in principle, as component parts of the ground⁶⁷ and capital assets rather than fruits. Trees are born and reborn of the soil but, in the light of their slow growth and relative value, French doctrine, jurisprudence, and legislation are in agreement that trees are to be considered as fruits only in exceptional cases and in accordance with the will of the owner.⁶⁸ Thus, in principle, the usufructuary has the right to collect the fruits of trees but may not treat the trees themselves as fruits of the ground. By way of exception to the principle, however, the owner of a forest may by regular exploitation and in accordance with a reforestation plan that guarantees a regular income attribute to trees the status of fruits. And a usufruct established over such a forest confers on the usufructuary in France the right to continue the exploitation of the owner.

The Louisiana Civil Code of 1870 does not deal in detail with the rights of the usufructuary to cut trees. Article 551 merely provides that the usufructuary "may cut trees on land of which he has the usufruct. . . but for his use only, and for the amelioration and cultivation of the land, provided that he act in that respect as a prudent administrator, and without abusing this right."⁶⁹ The Code makes no provision for exploitation of timber and it might be argued that the usufructuary of a

67. See YIANNPOULOS, CIVIL LAW PROPERTY §§ 18, 20, 40 (1966); cf. Harang v. Bowie Lumber Co., 145 La. 96, 81 So. 769 (1919).

68. See text at notes 74, 79, 84 *infra*. In Roman law, the usufructuary did not normally have the right to cut trees because trees were not considered to be fruits of the ground. If, however, timber was a usual product of the estate and a normal source of income for the owner, the trees were considered to be fruits; the usufructuary had the right and duty to continue the operations of the owner but had to conform to the rules of orderly management as a prudent head of family. See BUCKLAND, A TEXT-BOOK OF ROMAN LAW 268 (3d ed. Stein 1963); RADIN, HANDBOOK OF ROMAN LAW 380-83 (1927).

69. LA. CIVIL CODE art. 551 (1870). The 1808 La. Civil Code, p. 114, art. 18 provided that the usufructuary "may cut trees on land of which he has the usufruct, dig stones, sand and other materials both for his use and for sale provided that he act in these respects as a prudent father, and so as that the inheritance [estate] be not thereby rendered entirely barren or useless." This provision was changed in the 1825 revision to read like article 551 of the Louisiana Civil Code of 1870. See La. Civil Code art. 544 (1825). The redactors explained the change as follows: "We have thought that the power given to the usufructuary to sell the wood or earth at his pleasure might be ruinous to the owner, and we have thought proper to limit his rights in this respect to what might be necessary for his own use and for that of the property." 1 LA. LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825 p. 52 (1937). For the purposes of this discussion, timber may be defined as trees which, if cut, would produce lumber for building or manufacturing purposes. This includes any trees which could be cut for economic gain, such as pulp wood, pines, hardwoods or building lumber. This could be considered the definition of merchantable timber as used in Louisiana law.

forest may *never* exploit it, not even if the owner himself had exploited it in the past in accordance with regulated felling. This question has not been presented to Louisiana courts.

It is submitted, however, that, without doing violence to the precepts of the Civil Code, considerations of social and economic utility as well as concern for the interests of both usufructuary and the naked owner lead to the idea that the usufructuary ought to be allowed, in certain cases, to exploit timber lands commercially. In the first place, it ought to be noted that article 551 of the Louisiana Civil Code of 1870 does not establish a rule of public policy. Accordingly, the parties to a conventional usufruct may well stipulate expressly that the usufructuary shall have the right to conduct timber operations according to an approved plan or even as he pleases.⁷⁰ And if this intention is not expressed, it may be derived by the courts in the case of a conventional usufruct established over timberlands regularly exploited by the owner. Any other interpretation of the juridical act creating the usufruct which would exclude the right of the usufructuary to continue the operations of the owner, would do violence to the obvious intention of the parties or of the grantor of the usufruct. Application of article 551 to conventional usufructs should thus be limited to cases where the juridical act creating the usufruct does not confer on the usufructuary the right to cut timber and the usufruct is established over timberlands not regularly exploited by the owner.

In the second place, in the more prevalent case of legal usufruct, application of article 551 should be limited to timberlands not regularly exploited by the owner at the time of the creation of the usufruct. Concededly, article 551 might be taken literally to exclude commercial exploitation of timberlands by the usufructuary in *all* cases of legal usufruct. This literal interpretation would conform with the precept of the Civil Code that, in principle, trees are not fruits of the ground. It is submitted, however, that in the light of the civilian doctrine of *destination*⁷¹ underlying the provisions of the Civil Code, distinction should be made between timberlands regularly exploited by the

70. See LA. CIVIL CODE art. 569(3) (1870): "It is understood that all these restrictions on the rights of the usufructuary, and others mentioned in this title of the Code, only take place, when there is no provision to the contrary in the act establishing the usufruct."

71. See YIANNPOULOS, CIVIL LAW PROPERTY § 20, text at note 132 (1966). The doctrine of destination has been clearly adopted in article 552 of the Louisiana Civil Code of 1870.

owner at the time of the creation of the usufruct and timberlands not so exploited. As to the latter, there is no doubt that article 551 is directly applicable and that the usufructuary is not entitled to commence timber operations. But as to regularly exploited timberlands, the usufructuary ought to have the right to continue the operations of the owner who, by his acts, has attributed to trees the quality of fruits. Further, society has an interest in the continuous productivity of lands, the naked owner has an interest in the maintenance of crafts and skills organized around a going concern, and the usufructuary has an interest in the security of a regular income. It would be of no avail to argue that the continuation of timber operations by the usufructuary will result in depletion of substance. Modern techniques of regulated felling insure continuous reproduction of timber and improvement of its quality. And, in any case, the interests of the naked owner are protected by the prohibition of waste and by the obligations of the usufructuary to act as prudent administrator and to preserve the substance of the thing subject to usufruct.⁷² The suggested solution is bolstered by article 552 of the Louisiana Civil Code of 1870⁷³ which could apply by analogy. It is indeed difficult to explain why the exhaustible products of mines and quarries open at the creation of the usufruct should be assimilated to fruits whereas the renewable products of timberlands should not be so assimilated.

The French Civil Code, in contrast with the Louisiana Civil Code, contains detailed regulation of the rights of the usufructuary to cut trees. In that respect, the Code distinguishes underwood (*bois taillis*), tall timber (*haute futaie*), trees in tree-farms (*arbres de pepinières*), and fruit-bearing trees (*arbres fruitiers*).

Underwood is born and reborn of the soil a number of times during the life of man. Accordingly, it is considered as a fruit of the ground to which the usufructuary is entitled. He has the right to exploit an underwood forest but as to the order and quality of sections he is obliged to observe the prevailing or uniform custom of the owners.⁷⁴ Thus, if the underwood was exploited at the time of the creation of the usufruct, the usufructuary must respect the established method of exploitation. For example, if the owner used to reserve a certain number of

72. See LA. CIVIL CODE arts. 533, 551, 558, 567, 621 (1870).

73. See text at note 107 *infra*.

74. See FRENCH CIVIL CODE art. 590(1)

trees per acre for future growth, the usufructuary must do the same. If the forest was not regularly exploited in the past, the usufructuary is bound, in principle, to follow the habits of the owner. However, if the owner had engaged in haphazard felling, the usufructuary cannot do the same because he is under obligation to act as a prudent administrator.⁷⁵ He must then conform to the use of previous owners, and in the absence of any established pattern, the usufructuary must conform to the best methods followed in the area or to the rules established for the exploitation of state forests.⁷⁶ The right of the usufructuary does not extend to tall timber found in an underwood forest. It extends, however, to dead trees in the forest and to timber improperly cut before the arrival of its term. Doctrinal writers maintain that trees felled or uprooted by accident belong to the usufructuary⁷⁷ but the jurisprudence is to the contrary.⁷⁸

Trees and plants in a tree farm are likewise considered as fruits. The usufructuary of a tree farm may thus remove trees and plants provided that he does not thereby deteriorate the farm. Further, he is under obligation to conform to the usage of the place with respect to the replacement of the trees and plants removed.⁷⁹

In contrast with underwood and trees in a tree farm, tall timber is considered to be a component part of the ground and a reserved capital asset. Thus, in principle, the usufructuary does not have the right to touch tall timber. He does not even have the right to take dead trees or trees felled by accident in a tall timber forest, except to the extent that they may be needed for repairs the usufructuary is bound to make.⁸⁰ But he may take from a forest of tall timber all the annual products that the forest produces, as acorns, beechnuts, birch-wood, or elm-wood, according to the usage of the place or the custom of the owners.⁸¹ Further, he may take poles needed for the vines included in the

75. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 775 (2d ed. Picard 1952).

76. See 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 657 (7th ed. Esmein 1961); 5 BAUDRY-LACANTINERIE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 390 (2d ed. Chauveau 1899).

77. See 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 657 (7th ed. Esmein 1961); 5 BAUDRY-LACANTINERIE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 391 (2d ed. Chauveau 1899).

78. See Req., Aug. 21, 1871, D. 1871.1213; Nancy, Feb. 26, 1870, D. 1870.2.169, Note by Dubois.

79. See FRENCH CIVIL CODE art. 590(2).

80. *Id.* art. 592.

81. *Id.* art. 593; 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 778 (2d ed. Picard 1952).

usufruct⁸² and timber for repairs he is bound to make, provided that in the last case the necessity of so doing is admitted by the owner.⁸³

Exceptionally, tall timber exploited by regulated felling at the time of the creation of the usufruct is considered as fruit of the ground.⁸⁴ The term "regulated felling" cannot be easily defined. In general, periodical felling of trees of a certain age in a designated part of a forest, or of certain quantity of trees in the entire forest, constitutes regulated felling. The courts in France attach much significance to the intention of the owner to derive a periodical revenue. Thus, if the owner cuts every year an undetermined number of trees in order to make repairs, or to use them as firewood, the felling is not regulated.⁸⁵ On the other hand, if the owner cuts in successive years a number of trees especially selected for sale to third persons, the felling is regulated although the number of trees felled each year or the lumber obtained may not be of the same quantity.⁸⁶ Once it is established that a forest at the time of the creation of the usufruct was exploited by regulated felling, the usufructuary is entitled to continue the operations of the owner. But he must follow as to the periods, the order, and the extent of sections the methods established by the owner prior to the creation of his right.⁸⁷ The usufructuary of a regularly exploited forest has the right to take trees felled or uprooted by accident only if the owner used to include such items in his annual production plan.⁸⁸

Fruit-bearing trees, *i.e.*, trees cultivated for the production of edible fruits,⁸⁹ are not themselves fruits of the soil. When they are dead, however, uprooted, or broken by accident, the usufructuary may take them subject to the obligation of replacing them by others.⁹⁰ In this way, the Code simplifies the rendering of accounts between usufructuaries and owners and, at the same

82. See FRENCH CIVIL CODE art. 593.

83. *Id.* art. 592.

84. *Id.* art. 591.

85. See Req., Dec. 16, 1874, D. 1876.1.431, S. 1875.1.265; Req., March 14, 1838, S. 1838.1.741.

86. See Riom, July 19, 1862, D. 1862.2.123, S. 1863.2.29; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 777 (2d ed. Picard 1952).

87. See FRENCH CIVIL CODE art. 591; Req., Jan. 8, 1845, D. 1845.1.113.

88. See Req., Aug. 21, 1871, D. 1871.1.213, S. 1871.1.144; Nancy, Feb. 26, 1870, D. 1870.2.169, Note by Dubois; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 778 (2d ed. Picard 1952).

89. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 779 (2d ed. Picard 1952).

90. See FRENCH CIVIL CODE art. 594.

time, takes into account the interests of owners to have their lands planted with new trees.

Trees are, under the German Civil Code always⁹¹ and under the Greek Civil Code depending on their destination,⁹² fruits of the ground. Accordingly the usufructuary of a forest is entitled to exploit the timber growing therein. The law, however, taking into account the interests of both usufructuary and the naked owner, provides that each of them may demand judicially and at common expense the adoption of an approved plan of exploitation.⁹³ Once the plan of exploitation is established by the court, the usufructuary is bound to follow it; violation of this obligation may give rise to a claim for damages. In the case of material change of circumstances, the plan of exploitation may be altered by the court.⁹⁴

4. Minerals in Usufruct

Under the Louisiana Civil Code of 1870 and the French Civil Code, mineral substances extracted from the ground are component parts and capital assets rather than fruits.⁹⁵ Like timber, however, the products of a regularly exploited mine or quarry may exceptionally be regarded as fruits. Thus, in principle, the usufructuary does not have the right to open mines and quarries in order to extract mineral substances for exploitation.⁹⁶ But if a mine or quarry was open at the time of the creation of the usufruct, the usufructuary is entitled to continue the operations of the owner and to treat the minerals as fruits of the ground.⁹⁷

91. See YIANNPOULOS, CIVIL LAW PROPERTY § 21, text at note 127 (1966). Under the German Civil Code, the usufructuary thus becomes owner of any trees he chooses to cut down. However, being obliged to maintain the economic destination of the land, to observe the rules of orderly management, and to act as a prudent administrator, he must account to the landowner for any trees cut in violation of his duties. See B.G.B. §§ 1037(1); 1039; 1041; R.G. Oct. 16, 1912, 80 R.G.Z. 229, 232.

92. See BALIS, GENERAL PRINCIPLES OF CIVIL LAW 518 (7th ed. 1955) (in Greek).

93. See B.G.B. § 1038(1); GREEK CIVIL CODE art. 1149; BALIS, CIVIL LAW PROPERTY 353 (3d ed. 1955) (in Greek).

94. See B.G.G. § 1038(1). Doctrinal writers in Greece have reached the same conclusion even in the absence of a corresponding provision in the Greek Civil Code. See BALIS, CIVIL LAW PROPERTY 354 (3d ed. 1955) (in Greek).

95. See YIANNPOULOS, CIVIL LAW PROPERTY §§ 18, 42 (1966). Cf. Jackson v. Shaw, 151 La. 793, 92 So. 339 (1922); Elder v. Ellerbe, 135 La. 990, 66 So. 337 (1914); Commissioner of Internal Revenue v. Gray, 159 F. 2d 834 (5th Cir. 1947).

96. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 770, 780 (2d ed. Picard 1952).

97. See LA. CIVIL CODE art. 552 (1870); FRENCH CIVIL CODE art. 598. These articles effect a compromise between two conflicting principles: that the usu-

In France, the regime of mines is regulated by special laws.⁹⁸ According to the basic law of April 21, 1810, the exploitation of mines may be undertaken by the usufructuary, the naked owner, or even by a third person, by virtue of a concession granted by the state. It is generally accepted in France that the special statutes applicable to mines do not affect rights established by the Civil Code. Thus, if the mine were open at the time of the creation of the usufruct the royalties due to the surface (*redevance minière*) belong to the usufructuary; if the mine was opened subsequently, the royalties belong to the naked owner.⁹⁹ Mines, being distinct immovables,¹⁰⁰ may themselves become the object of a usufruct. The creation of this usufruct is governed by the rules applicable to the transfer of a concession.¹⁰¹

In Louisiana, the branch of law governing minerals has been predominantly the result of a creative jurisprudence dealing with oil and gas.¹⁰² The discovery and production of oil and gas in the state compelled Louisiana courts to adapt the precepts of the Civil Code to new developments and to supplement them by the enunciation of rules applicable to the various "mineral rights." The Louisiana legislature failed to adopt an all-inclusive mineral code and limited itself to piecemeal corrective legislation in connection with particular issues.¹⁰³ In principle, minerals extracted from the ground are not natural fruits because they are not "born and reborn of the soil."¹⁰⁴ Nor are the

fructuary should enjoy the thing as owner and that he should preserve the substance of the thing. In Roman law, the usufructuary had the right to work mines which had been opened by the owner prior to the creation of the usufruct. D.7.1.13.5. Further, he had the right to open new mines and quarries, provided that this should not interfere with the cultivation of the land. If the mineral operations would yield more profit than the pursuit of agriculture, interference with the cultivation of the land formed no obstacle to the opening of new mines. *Ibid.* If, however, the operations begun by the usufructuary polluted the air or necessitated a great array of workmen, the usufructuary was considered to be abusing his right. D.7.1.13.6.

98. See Law of April 21, 1810; Law of Sept. 9, 1919.

99. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 781 (2d ed. Picard 1952); Lyon, Jan. 5, 1882, D. JUR. GÉN. USUFRUIT, No. 145, *cf.* Req. Feb. 23, 1881, D.1881. 1.315; Besançon, March 3, 1863, D. 1863.2.49; Lyon, May 24, 1853, D. 1855.2.347.

100. See YIANNPOULOS, *CIVIL LAW PROPERTY* § 69, text at note 353 (1966).

101. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 781 (2d ed. Picard 1952).

102. See DAGGETT, *MINERAL RIGHTS IN LOUISIANA, INTRODUCTION* (2d ed. 1949); *id.*, *Mineral Rights as They Affect the Community Property System*, 1 LA. L. REV. 17, 26-44 (1938).

103. See YIANNPOULOS, *CIVIL LAW PROPERTY* § 62, 99-102 (1966).

104. *Elder v. Ellerbe*, 135 La. 990, 995, 66 So. 337, 338 (1914). See also *Jackson v. Shaw*, 151 La. 795, 92 So. 339 (1922); *Commissioner of Internal Revenue v. Gray*, 159 F.2d 834 (5th Cir. 1947); *Sachse, The Mineral Rights of the Usufructuary*, 1 LA. BAR J. 25 (1954); *Comment, Mineral Leases on Land Subject*

various royalties, bonuses, and delay rentals, civil fruits of the ground.¹⁰⁵ Thus, in principle, the usufructuary does not have the right to exploit minerals found in the land subject to his usufruct. He may merely "take from the earth, stones, sand and other materials but for his use only, and for the amelioration and cultivation of the land, provided he act in that respect as a prudent administrator, and without abusing his right."¹⁰⁶ By way of exception, however, "the usufructuary has a right to the enjoyment and proceeds of mines and quarries in the land subject to the usufruct, if they were actually worked before the commencement of the usufruct; but he has no rights to mines and quarries not opened."¹⁰⁷ In such a case, mineral substances extracted from the ground, and the proceeds therefrom, could be exceptionally regarded as natural and civil fruits respectively.

The Louisiana Supreme Court was first called upon to determine the respective rights of usufructuaries and naked owners to oil and gas under the land subject to usufruct in *Gueno v. Medlenka*.¹⁰⁸ In this case, the naked owners and the usufructuary had separately executed mineral leases covering the land subject to the usufruct and question arose as to who had the right to grant such leases. The naked owners and their lessee sought a declaratory judgment decreeing the usufructuary to be without any right to the minerals under the land. The usufructuary answered and each party then asked that his lease be recognized as valid and the lease of the other party be cancelled. The court

to *Usufruct*, 34 TUL. L. REV. 784 (1960); Comment, *Usufructuary's Right to the Proceeds of Oil and Gas Wells in Louisiana*, 2 LA. L. REV. 169 (1939).

105. See *King v. Buffington*, 240 La. 955, 126 So. 2d 326 (1961); *Gueno v. Medlenka*, 238 La. 1081, 117 So. 2d 817 (1960); *Stringfellow v. Murphy*, 195 So. 844 (La. App. 2d Cir. 1940); *Commissioner of Internal Revenue v. Gray*, 159 F.2d 834 (5th Cir. 1947). *But cf.* *Milling v. Collector of Internal Revenue*, 220 La. 773, 57 So. 2d 679 (1952); *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (1928); *Gulf Refining Co. v. Hayne*, 148 La. 340, 86 So. 891 (1921).

106. LA. CIVIL CODE art. 551(2) (1870). Under the Louisiana Civil Code of 1808, p. 114, art. 18, the usufructuary had the right to "dig stones, sand and other materials both for his use and for sale." This article was modified in the 1825 revision and the right of the usufructuary was limited to minerals needed "for his use only, and for the amelioration and cultivation of the land." See La. Civil Code art. 544 (1825), same as LA. CIVIL CODE art. 551 (1870); note 69 *supra*. At the same time, however, the redactors of the 1825 Code adopted the "open mines" doctrine. See La. Civil Code art. 545 (1825), same as LA. CIVIL CODE art. 552 (1870).

107. LA. CIVIL CODE art. 552 (1870). Article 552 refers in terms to "mines and quarries." Its application to oil and gas operations has been contested, but has consistently been affirmed by the courts. *Gueno v. Medlenka*, 238 La. 1081, 1090, 117 So. 2d. 817, 820 (1960): "... that exploration for oil and gas is mining within the meaning of our law is no longer an open question."

108. 238 La. 1081, 117 So. 2d 817 (1960); Note, 20 LA. L. REV. 773 (1960). See also *Wilson v. King*, 165 So. 2d 70 (La. App. 4th Cir. 1964).

reasoned that minerals are component parts of the ground and that the usufructuary does not have the right to "consume the substance of the land," except under the terms of articles 551 and 552 of the Civil Code. "The products derived from mines and quarries which are not opened before the commencement of the usufruct," the court went on, "as they are expressly excepted by Article 552. . . must be excluded from the fruits and products to which the usufructuary is entitled."¹⁰⁹ Since article 552 thus withholds from the usufructuary any right to mines and quarries not opened, it follows, the court declared, that the naked owner retains, as an incident to his ownership, the right to open a new mine on the land subject to the usufruct and to the products derived from mining operations. The right of the naked owner to explore for minerals and reduce them to possession is unaffected by the usufruct so long as the usufructuary's use of the surface is not unreasonably disturbed. The naked owner may execute a mineral lease without the consent of the usufructuary; and the rights granted under the lease are not subordinate to the rights of the usufructuary.

The court in the *Gueno* case did not rule expressly on the quality of minerals as fruits. The reasoning underlying the decision, however, makes it clear that minerals are to be regarded as fruits only within the terms of articles 551 and 552 of the Civil Code. In the subsequent case of *King v. Buffington*,¹¹⁰ the Louisiana Supreme Court declared that royalties, delay rentals, and bonuses, deriving from a mineral lease granted after the commencement of the usufruct, are neither natural nor civil fruits, and therefore, that these economic advantages belong to the naked owner. In this case the naked owner and the usufructuary were both parties to the lease in question. The defendant, owner of an undivided one-half interest in the land and usufructuary of one-half, had received and retained the bonus and delay rentals payable under the lease. The plaintiff, naked owner of an undivided one-half interest in the land, filed suit for a declaratory judgment decreeing her to be entitled to a proportionate share of the bonus and delay rental payments as well as to all future royalties attributable to her interest. Counsel for the defendant usufructuary urged that the court

109. *Id.* at 1096, 177 So. 2d 822.

110. 240 La. 955, 126 So. 2d 326 (1961). According to the holding of the court, the naked owner retains the right to search for minerals and may validly grant a lease. Mineral operations, however, are not to be exercised in a manner detrimental to the usufructuary.

was bound to apply articles 544, 545, and 547 of the Civil Code, which grant to the usufructuary the right to gather civil fruits produced as a result of the right to lease granted to a usufructuary by article 555. The court rejected this argument and held that, since bonus payments are part of the consideration for granting a mineral lease and since exclusive authority to execute a mineral lease is vested in the naked owner, delay rental payments made in compensation of the right of exploration necessarily inure to the benefit of the naked owner. In the same decision the Supreme Court indicated that a usufructuary should be entitled to the proceeds of mines and quarries "actually worked" before the commencement of the usufruct in accordance with article 552 of the Civil Code.¹¹¹

The rules established by articles 551 and 552 of the Louisiana Civil Code of 1870 may be altered by the instrument creating the usufruct.¹¹² It may be expected that in the case of a conventional usufruct the owner will ordinarily take care to define the rights of the usufructuary with respect to minerals, and, in the absence of specific provision, the matter could be dealt with as a problem of interpretation of the intention of the parties.¹¹³ But in the more frequent case of a legal usufruct, Louisiana courts will have to define the rights of the usufructuary by reference to the open mines doctrine and application of article 552 of the Civil Code. In that respect, the courts will

111. *Id.* at 962, 126 So.2d at 328. In *Gueno v. Medlenka*, 238 La. 1081, 1091, 117 So.2d 817, 820 (1960), the court indicated by way of dicta that in the field of oil and gas operations a mine is actually worked "if the well is already drilled and producing oil at the time when the usufruct was created." The court was quoting from *Gulf Refining Co. v. Garrett*, 209 La. 674, 686, 25 So.2d 329, 332 (1945), a case which, on rehearing, was set aside and remanded. 209 La. 674, 25 So.2d 329 (1946). The *Garrett* case has been revived, however, only "as far as may be pertinent to the case at hand," namely, with regard to the application of article 552 of the Civil Code to mineral operations.

It might be argued, however, that a mine is actually worked when: (1) at the time the usufruct is created a mineral lease has been granted on the property although drilling operations have not begun; (2) a well is being drilled but is not completed at the time the usufruct is created; (3) a well is completed after the creation of the usufruct in a reservoir from which wells completed prior to the creation of the usufruct have heretofore produced; and (4) unitization is achieved after the commencement of the usufruct which results in the inclusion of lands heretofore non-productive in a producing unit. See Comment, *Mineral Leases on Land Subject to Usufruct*, 34 *TUL. L. REV.* 784, 795-97 (1960).

112. See LA. CIVIL CODE art. 560(3) (1870): "It is understood that all these restrictions on the rights of the usufructuary, and others mentioned in this title of the Code, only take place, when there is no provision to the contrary in the act establishing the usufruct."

113. *Cf.* LA. CIVIL CODE arts. 1945-1962 (1870). Article 552 could thus apply to conventional usufructs, as a rule of interpretation, in the absence of contrary manifestation of intention by the parties or by the grantor of the usufruct. It could also apply directly when usufruct is established over mines, oil wells, or mineral rights (leases, servitudes, royalties).

have to determine specifically when a mine or quarry is "actually worked," since valuable mineral rights could be apportioned between the naked owner and the usufructuary only on the basis of this determination.¹¹⁴

Insofar as the rights of the usufructuary are concerned, the nature of minerals and of the proceeds of mineral rights may thus be regarded as settled: minerals are to be regarded as natural fruits and the proceeds of mineral rights as civil fruits only in the exceptional cases of an express stipulation to that effect in the juridical act creating the usufruct or of open mines at the time of the creation of the usufruct. For a number of other purposes, however, minerals and the proceeds of mineral rights have been classified as fruits by Louisiana courts even in the absence of an express stipulation or without regard to the open mines doctrine. For example, in the fields of community property and state income taxation, mineral royalties have been classified as civil fruits.¹¹⁵ These apparently inconsistent judi-

114. See note 111 *supra*. It might be argued that, in cases of legal usufruct, the usufructuary should have the enjoyment of all mineral rights included in the estate subject to usufruct without regard to the provisions of article 552 of the Civil Code. Legal usufructs are by universal title and cover all things, corporeal or incorporeal. Thus, if a mineral lease were granted by the owner on the land subject to usufruct, the usufructuary should be entitled to rentals and bonus payments as fruits of the *lease* rather than as fruits of the *land*.

Application of article 552 to legal usufructs may be detrimental to the interests of naked owners. Indeed, at the end of the usufruct the land may well be depleted of its most valuable assets. Louisiana writers, therefore, have suggested various methods for restrictive interpretation of article 552. According to one view, the usufructuary merely acquires an imperfect usufruct on the proceeds of mineral rights. See DAGGETT, *MINERAL RIGHTS IN LOUISIANA* 325 (2d ed. 1949). A related proposal suggests that the proceeds be invested, that the interest therefrom be paid to the usufructuary, and that the naked owner receive the principal upon termination of the usufruct. Dreyfous, *Symposium on the Proposed Louisiana Mineral Code*, 12 *TUL. L. REV.* 552, 606 (1938). Finally, proposal has been made for a ratable distribution between the usufructuary and the naked owner. See Shotwell, *Symposium on the Proposed Louisiana Mineral Code*, 12 *TUL. L. REV.* 552, 593 (1938).

115. See *Milling v. Collector of Revenue*, 220 La. 773, 780, 57 So. 2d 679, 682 (1952): "Although the products of mines and quarries, once taken would not be reproduced, nevertheless they 'are products of the land, and products may be assimilated to fruits, within the meaning of R.C.C. art. 2671.'" *Cf. King v. Buffington*, 240 La. 955, 963, 126 So. 2d 326, 329 (1961): "The case of *Milling v. Collector of Revenue*, 220 La. 773, 57 So. 2d 679, relied on by the defendant, was concerned with the declarations of Article 2402 of the Louisiana Civil Code concerning property which forms the community; what was said there can have no bearing on the question presented in the instant case."

For purposes of federal income tax, however, federal courts have refused to treat mineral royalties from separate property as fruits falling into the community; consequently, these royalties are taxed as separate property. See *Commissioner of Internal Revenue v. Gray*, 159 F.2d 834 (5th Cir. 1947) (the court conceding the proposition that mineral royalties may be regarded as fruits for other purposes). See also *United States v. Harang*, 165 F.2d 106 (5th Cir. 1947). Similarly, for purposes of state severance tax, mineral royalties are not regarded as civil fruits in Louisiana. See *Wright v. Imperial Oil & Gas Prod. Co.*, 177 La. 482, 148 So. 685 (1933).

cial determinations could, perhaps, be reconciled by a conceptual analysis classifying minerals as civil fruits which belong to the naked owner, except in the case of open mines.¹¹⁶ A more desirable ground of reconciliation would be to distinguish between fruits and products and to classify minerals as products for all purposes.¹¹⁷ Thus, a possessor in good faith should be entitled to keep the fruits but not the products of a thing.¹¹⁸ Similarly, a usufructuary should be entitled to the fruits of a thing and to products only within the limits of articles 551 and 552 of the Civil Code. For purposes of community property and state income taxation, economic advantages other than fruits, *e.g.*, mineral royalties, delay rentals, and bonuses, could form part of the community as "profits" within the literal meaning of article 2402 of the Civil Code¹¹⁹ or within the meaning of the applicable internal revenue legislation.

In Germany and in Greece, the exploitation of minerals is governed by special legislation¹²⁰ and isolated provisions in the Civil Codes. According to mineral codes and special statutes in force in the two countries, a number of important minerals are

116. See Hardy, *The Work of the Louisiana Supreme Court for the 1960-1961 Term, Mineral Rights*, 22 LA. L. REV. 329, 333 (1962).

117. See YIANNOPOULOS, CIVIL LAW PROPERTY § 20, text at note 165 (1966). The proceeds of mineral rights (bonuses, rentals and possibly royalties) should be classified as civil fruits of these rights for *all* purposes. They should belong, however, to the holder of the mineral rights, be the usufructuary, the naked owner, or a third person.

118. This suggestion, if adopted, will not upset the settled jurisprudence interpreting article 502 of the Civil Code. In that article the word "products" has the same meaning as the word "fruits" in the preceding article 501. Clarification may be necessary only in connection with the interpretation of article 2402 of the Civil Code: "profits" in that article may mean both "fruits" and "products."

119. According to Article 2402 of the Louisiana Civil Code of 1870, "the profits of all the effects of which the husband has the administration and enjoyment" fall into the community of acquets and gains. The word "profits" is an incorrect translation from the French text of the corresponding Article 2371 of the 1825 Code and should read "fruits." Louisiana courts, however, have applied Article 2402 literally to include "profits," *i.e.*, both fruits and products. See *Milling v. Collector of Revenue*, 220 La. 773, 57 So.2d 679, 682 (1952), citing *Succession of Goll*, 156 La. 910, 101 So. 263 (1924); *Succession of Ratcliff*, 212 La. 563, 33 So. 2d 114 (1947); *Peters v. Klein*, 161 La. 664, 109 So. 349 (1926).

120. See HEDEMANN, SACHENRECHT DES BÜRGERLICHEN GESETZBUCHES 225-31 (3d ed. 1960); WOLFF-RAISER, SACHENRECHT 384-400 (10th ed. 1957); 5 SOERGEL-BAUR, BÜRGERLICHES GESETZBUCH 1007 (9th ed. 1961). Articles 67 and 68 of the Introductory Law to the German Civil Code have retained in force the mineral legislation of the various German states. Thus, in the absence of comprehensive federal legislation, mineral rights are, for the most part, regulated by state laws. With the exception of Saxony, mining and mineral law are still regulated in the various states on the model of the Prussian Mineral Code of 1865. In Greece, article 56 of the Introductory Law to the Civil Code has retained in force the pre-existing mineral legislation. See BALIS, CIVIL LAW PROPERTY 355 (3d ed. 1955) (in Greek).

either considered to be *res nullius* or are reserved to the state.¹²¹ The rights to search for and reduce to possession these minerals are not exclusive prerogatives of land ownership.¹²² And if a usufruct is created on a tract of land which contains such minerals, the usufructuary has no greater rights than the landowner: he may acquire the right of exploitation as any third person in accordance with the applicable mineral laws.

Minerals which are neither reserved to the state nor declared to be *res nullius* are considered to be component parts of the ground.¹²³ The landowner may search for and reduce these minerals to possession as he pleases; further, he may lease his rights or he may encumber his land by a limited personal servitude for the exploitation of minerals.¹²⁴ If a usufruct is established on a tract of land containing such minerals, the rights of the usufructuary are determined, on principle, in the light of the economic destination of the land as well as in the light of his obligations to preserve its substance, not to alter essentially its economic destination, and to act in accordance with the rules of orderly management.¹²⁵ The usufructuary is entitled to take component parts of the ground which qualify as fruits, *i.e.*, those produced in accordance with the destination of the immovable.¹²³

121. For a list of minerals which are considered to be *res nullius*, see WOLFF-RAISER, *SACHENRECHT* 387 n. 1 (10th ed. 1957).

122. *Cf.* section 905 of the German Civil Code, and corresponding article 1001 of the Greek Civil Code, according to which the landowner may not restrain an interference with his ownership which "takes place at such height or depth that he has no interest in its privation." Any person desiring to win minerals under the land of another which qualify as *res nullius* must first acquire the right to search for them from the owner of the surface. If the landowner refuses to grant this right, the public authorities may intervene and fix the conditions of the search. The most important condition in this respect is the amount of compensation which will be due to the owner for damage to the surface of the land. The finder of minerals, either in his own land or in the land of another by virtue of the right to search, may file a claim with the authorities for a grant of the mineral rights. The claimant must include a plat showing the exact position and dimensions of the proposed mine. The date of filing the claim is conclusive as to the priority of the claimant. The mining authority is bound to make the grant in accordance with the claim, if it does not refer to lands under which mining is forbidden. The grants are subject to outstanding rights of third persons, but these rights are barren unless exercised within a specified time. The grantee obtains a right capable of alienation, encumbrance, and transmission on death, to reduce to possession the mineral specified in the grant. This right is treated, for all purposes, as an immovable real right. Obviously, the usufructuary of a tract of land does not have greater rights than the landowner as to these minerals which are considered to be *res nullius* or are reserved to the state.

123. See B.G.B. § 94(1); GREEK CIVIL CODE art. 954.

124. See WOLFF-RAISER, *SACHENRECHT* 388 (10th ed. 1957).

125. See B.G.B. §§ 99(1), 1036(2), 1037; GREEK CIVIL CODE arts. 961(1), 1142, 1148.

126. See B.G.B. § 99(1); GREEK CIVIL CODE art. 961(1). Destination is determined according to objective standards rather than the intention of the owner. See 3 SOERGEL-MÜHL, *BÜRGERLICHES GESETZBUCH* 399 (9th ed. 1960).

When the usufruct bears on an immovable destined to the exploitation of minerals, *e.g.*, a mine or a quarry, minerals are clearly fruits under both the German and Greek Civil Codes. Almost identical provisions in the two Codes establish the rights of the usufructuary and of the naked owner to have the plan of exploitation determined at common expense by judicial order.¹²⁷ When the usufruct bears on an immovable not destined to the exploitation of minerals, the usufructuary may still have the right to take certain component parts of the ground subject to a number of limitations. The German Civil Code provides specifically that the usufructuary of a tract of land "may erect new structures for the purpose of obtaining stone, gravel, sand, loam, clay, marl, peat, and other component parts of the ground insofar as the economic destination of the land is not essentially altered thereby."¹²⁸ The Greek Civil Code does not contain a corresponding provision but it is clear that the usufructuary may take similar component parts of the ground, provided that he does not thereby alter essentially the economic destination of the land and that he act in accordance with the rules of orderly management.¹²⁹

5. *Treasure Found in Land Subject to Usufruct*

Directly applicable provisions in all Civil Codes under consideration declare that the usufructuary's right of enjoyment does not extend to a treasure found in the land subject to usufruct.¹³⁰ The treasure is neither product nor component part of the land.¹³¹ There is no reason, therefore, to attribute the en-

127. See B.G.B. § 1038(2); GREEK CIVIL CODE art. 1149; note 93 *supra*.

128. B.G.B. § 1037(2). Thus material alterations are forbidden, even if they accord with the economic destination of the land. The usufructuary is entitled to such fruits as are produced in accordance with the destination of the land at the time of the creation of the usufruct and following the rules of orderly management. Fruits produced in violation of these rules are attributed to the usufructuary by the German Civil Code subject to the obligation of restoring their value at the end of the usufruct. See B.G.B. § 1039; 80 R.G.Z. 229; note 91 *supra*.

129. See GREEK CIVIL CODE art. 1148; BALIS, CIVIL LAW PROPERTY 353 (3d ed. 1955) (in Greek). In contrast with the German Civil Code, the Greek Civil Code provides that fruits produced contrary to the destination of the thing or in violation of the rules of orderly management belong to the naked owner. See GREEK CIVIL CODE art. 1149; note 36 *supra*.

130. See LA. CIVIL CODE art. 553(2) (1870); FRENCH CIVIL CODE art. 598(2); B.G.B. § 1040; GREEK CIVIL CODE art. 1151.

131. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 781 (2d ed. Picard 1952); 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 403 (9th ed. 1960); BALIS, CIVIL LAW PROPERTY 350 (3d ed. 1955) (in Greek); *id.*, GENERAL PRINCIPLES OF CIVIL LAW 518 (7th ed. 1955) (in Greek).

joyment of a treasure to the usufructuary. But if the usufructuary discovers the treasure by accident, he is entitled to one-half of the find in accordance with the general rules governing treasure trove.¹³²

6. Herd of Animals in Usufruct

In contrast with the German and Greek Civil Codes, the Louisiana Civil Code of 1870 and the French Code contain provisions regulating specifically the usufruct of a herd of animals. These provisions in the two Codes derive directly from Roman sources.¹³³

According to well-established civilian doctrine, real rights have as their object individually determined things.¹³⁴ However, by way of exception to the rule, the usufruct of a herd of animals in Louisiana and in France bears on the universality¹³⁵ of the herd rather than on individual heads. This exception, in turn, results in modifications of the usufructuary's right of enjoyment.

The usufructuary is entitled to the fruits produced by the herd, *i.e.*, milk, manure, wool, and its natural increase. But, contrary to the rules applicable to the usufruct of individual things, if a number of heads perish without the fault of the usufructuary, he "is bound to make good the number of dead out of new born cattle, as far as they go."¹³⁶ According to French

132 See LA. CIVIL CODE art. 3423 (1870); FRENCH CIVIL CODE art. 716; B.G.B. § 984; GREEK CIVIL CODE art. 1093.

133. See LA. CIVIL CODE art. 593 (1870); La. Civil Code art. 587 (1825); La. Civil Code p. 118, art. 41 (1808); FRENCH CIVIL CODE art. 616; *cf.* BUCKLAND, A TEXT-BOOK OF ROMAN LAW 223 (2d ed. 1932); 10 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 263 (1875).

"Head of cattle" in article 592 of the Louisiana Civil Code of 1870 ought to read "animal." The French text of the corresponding article 586 of the Louisiana Civil Code of 1825 reads: "*Si l'usufruit n'est établi que sur un animal. . .*" Likewise, "herd of cattle" in article 593 of the Louisiana Civil Code of 1870 ought to read "herd of animals." The French text of the corresponding article 587 of the Louisiana Civil Code of 1825 reads: "*Si le troupeau, sur lequel un usufruit a été établi. . .*"

134. See YIANNPOULOS, CIVIL LAW PROPERTY § 18, text at notes 116, 117 (1966). In Germany and in Greece, therefore, the usufruct of a universality of things is analyzed as consisting of as many usufructs as there are individual things comprised in the universality. See 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 398 (9th ed. 1960); BALIS, CIVIL LAW PROPERTY 342 (3d ed. 1955) (in Greek).

135. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 782 (2d ed. Picard 1952); 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 711 (7th ed. Esmein 1961).

136. LA. CIVIL CODE art. 593(1) (1870); La. Civil Code art. 587 (1825); La. Civil Code p. 118, art. 41 (1808); FRENCH CIVIL CODE art. 616. See also Wimbish v. Gray, 10 Rob. 46 (La. 1845).

doctrine and jurisprudence, the usufructuary must apply to that end any increase he might have received since the commencement of the usufruct, or its price.¹³⁷ Further, the usufructuary may dispose of heads which are incapable of reproduction subject to the obligation of replacing them by new born animals.¹³⁸ If the entire herd is destroyed without the fault of the usufructuary, he "is bound only to return to the owner the hides of such cattle, or the value of such hides."¹³⁹

Heads of livestock attached to an immovable subject to usufruct for its service and improvement are considered as a herd. Accordingly, the rights of the usufructuary of the immovable with respect to the livestock are governed by the rules applicable to a herd rather than individual heads.¹⁴⁰

7. Shares of Stock in Usufruct

The Louisiana Civil Code of 1870, following the pattern of the French Civil Code, is mostly occupied with immovable property which, at the time of its promulgation, was clearly the foundation of wealth. Movables are dealt with scantily and new sources of riches have not been regulated at all. Thus, it is not surprising that neither the French nor the Louisiana Civil Code of 1870 contains provisions dealing with shares of stock in usufruct. In the absence of directly applicable legislative texts, courts in France and in Louisiana were compelled to adapt the precepts of the Civil Codes to new situations and develop rules governing the not so infrequent usufruct of shares of stock.

The usufruct of shares of stock gives rise to a number of difficult problems concerning the apportionment of economic advantages of stock ownership between usufructuaries and naked owners. For example, questions arise as to voting rights, subscriptions for new stock, distribution of capital reserves, and rights to cash or stock dividends. In this respect, French doctrine and jurisprudence have developed the general principle that

137. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 782 (2d ed. Picard 1952); 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 711 (7th ed. Esmein 1961). *But see* 5 BAUDRY-LACANTINERIE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 466 (2d ed. Chauveau 1899); 10 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 264 (1875).

138. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 782 (2d ed. Picard 1952); 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 711 (7th ed. Esmein 1961); 10 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 263 (1875).

139. I.A. CIVIL CODE art. 593(2) (1870); FRENCH CIVIL CODE art. 616(1), Law of May 17, 1960 (estimation of value as of the day of restitution).

140. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 783 (2d ed. Picard 1952); Bourges, June 12, 1872, D. 1873.5.479, S. 1873.2.12.

fruits of shares to which the usufructuary is entitled are merely periodical revenues distributed to shareholders, representing distributable profits of the corporation.¹⁴¹ In principle, the management of a corporation may at its discretion, and in accordance with the charter, designate certain profits as distributable surplus and others as capital reserves. The usufructuary's right of enjoyment is limited to cash dividends that the management of the corporation attributes, in effect, the status of fruits.

Stock dividends, whether representing a dilution of the original capital or capitalization of profits, belong to the naked owner subject to the usufructuary's enjoyment.¹⁴² Appreciation of the value of stock by means of capitalization of profits benefits the naked owner; the usufructuary has no claim to the increased value or to the distribution of profits marked as capital reserves.¹⁴³ If capital reserves are later distributed to the shareholders, the cash belongs to the naked owner subject to the usufructuary's enjoyment.¹⁴⁴ But, exceptionally, when capital reserves are regularly distributed to shareholders to provide a minimum of periodical income, the sums distributed acquire the nature of fruits and belong to the usufructuary.¹⁴⁵

Subscription premiums, *i.e.*, sums in excess of the par value of shares paid by new shareholders, represent a capital surplus to which the usufructuary has no claim as long as it remains in the treasury of the corporation.¹⁴⁶ When this surplus is distributed to the original shareholders, the usufructuary is entitled to the enjoyment of the fund, the naked ownership of which belongs to the owner of the shares. The rights to vote and to subscription for new shares belong to the naked owner; these rights are not fruits, nor increase of the stock, but powers in-

141. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 783 (2d ed. Picard 1952); 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 662 (7th ed. Esmein 1961); Leblond, *Droits respectifs du nu-propriétaire et de l'usufruitier dans les bénéfices, les réserves, les remboursements et amortissements de capital, ainsi que dans les augmentations de capital en numéraire ou par incorporation de réserves*, *GAZ. PALAIS* 1956.2.Doctr.1; Lalou, *Droits respectifs du nu-propriétaire et de l'usufruitier d'actions nominatives*, *GAZETTE DALLOZ* 65 (1924); Michel, *Des droits respectifs de l'usufruitier et du nu-propriétaire d'actions*, *REC. JUR. DES SOCIÉTÉS* 135 (1924); Solus, *S.* 1931.2.9.

142. See 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 662 (7th ed. Esmein 1961); 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 785 (2d ed. Picard 1952); *Req.*, March 14, 1877, D.1877.1.353, S.1878.1.5.

143. See *Civ.*, Feb. 5, 1890, S.1893.1.471, D.1890.1.300; Montpellier, Oct. 17, 1926, *Gaz. Pal.* 1927.1.90.

144. See *Req.*, March 14, 1877, D.1877.1.353, S.1878.1.5.

145. See Note, Labbé, S.1878.1.5; 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 785 (2d ed. Picard 1952).

146. *Req.*, Jan. 27, 1920, *J. Soc.* 214 (1920).

herent in the naked ownership of shares. If the naked owner fails to subscribe, the usufructuary may take his place only if the by-laws of the corporation so provide.¹⁴⁷

Doctrinal controversies surround the questions of the rights of the usufructuary to bonuses and cash paid by the corporation for the redemption of stock. According to one view, both belong to the naked owner because they cannot be regarded as fruits.¹⁴⁸ According to a diametrically opposite view, these are fruits which belong to the usufructuary because both bonuses and redemption price are paid out of withheld profits of the corporation.¹⁴⁹ The usufructuary has suffered a privation as a result of the capitalization of profits and he is the one who ought to benefit from the distribution of capital surplus. The Court of Cassation has adopted an intermediate approach: the naked ownership of these disbursements belongs to the owner of the shares and the enjoyment of them to the usufructuary.¹⁵⁰ The principles developed by the courts with respect to the usufruct of shares of stock apply by analogy to partnership shares.

In Louisiana, in the absence of controlling legislative texts, the question of which economic advantages of stock ownership belong to the naked owner and which to the usufructuary must be resolved in the light of doctrinal considerations and guidelines gained from a limited number of judicial decisions. As in France, some benefits of stock ownership may be analogized to fruits and others to capital. The rights to vote and to participate in the administration of the corporation ought to be regarded as incidental to stock ownership; they have nothing in common with fruits and belong to the naked owner. Likewise, bonuses and payments representing distribution of capital assets belong to the naked owner; but, by operation of the prin-

147. See 3 *PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 786 (2d ed. Picard 1952). According to the jurisprudence, the ownership of the new shares for which the usufructuary has subscribed belongs to the naked owner. Upon termination of the usufruct, the naked owner must reimburse the usufructuary for the price he paid. Paris, June 5, 1950, *Gaz. Pal.* 1950.2.96. *But see* 2 *AUBRY ET RAU, DROIT CIVIL FRANÇAIS* 663 n. 51 (7th ed. Esmein 1961) (the usufructuary becomes owner of the new shares but must reimburse the naked owner at the end of the usufruct for the value of the subscription right).

148. See Lyon, May 29, 1884, *D. Jur. Gén., Supp. Usufruit*, No. 112; Chateau-Thierry, Dec. 20, 1882, *S.* 1884.2.103.

149. See 5 *BAUDRY-LACANTINIERE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 382 (2d ed. Chauveau 1899).

150. *Req.*, March 14, 1877, *D.* 1877.1.353, *S.* 1878.1.5, Note by Labbé; Paris, April 13, 1878, *D. Jur. Gén., Contrat de mariage*, No. 201; Lyon, May 29, 1884, *loc. cit.* No. 122. See also 2 *AUBRY ET RAU, DROIT CIVIL FRANÇAIS* 663 (7th ed. Esmein 1961); 3 *PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 787 (2d ed. Picard 1952).

principle of real subrogation, the usufructuary's right of enjoyment attaches to the proceeds.¹⁵¹ On the other hand, cash dividends are clearly fruits which belong to the usufructuary.¹⁵²

No case has been found dealing directly with the rights of the usufructuary to stock splits¹⁵³ and stock dividends.¹⁵⁴ However, guidelines may be derived from cases considering the nature of these operations for purposes of taxation and community property. In these two fields, when stock has been split and a greater number of new shares issued in the place of the old, it has been determined that the new shares are capital rather than income or fruits.¹⁵⁵ Likewise, when the corporation, instead of making a cash distribution from surplus capitalizes profits and issues stock dividends, the Louisiana Supreme Court has held that the new shares are capital assets rather than income.¹⁵⁶ The court reasoned that the interest of the shareholder in the corporation remained the same after the distribution as before: the same assets were represented in the original shares plus their proportionate interest in the surplus account as in the additional number of shares which the shareholder now possessed.¹⁵⁷ For purposes of income taxation, distinctions have been drawn between a stock dividend which works no change in the corporate structure, the same interest in the corporation

151. See *Succession of Stewart*, 100 So. 2d 228 (La. App. 2d Cir. 1958).

152. *Succession of Wengert*, 180 La. 483, 156 So. 473 (1934); *Leury v. Mayer*, 122 La. 486, 47 So. 839 (1908); *Succession of Heckert*, 160 So. 2d 375 (La. App. 4th Cir. 1964); *Succession of Stewart*, 100 So. 2d 228 (La. App. 2d Cir. 1958).

153. "Stock split" is used in the sense of corporate action dividing each share into two or more, without capitalization of earned surplus. See GRAHAM & KATZ, *ACCOUNTING IN LAW PRACTICE* 157 (1938); KATZ, *INTRODUCTION TO ACCOUNTING* 167 (1954); LATTIN, *CORPORATIONS* 466 (1959).

154. In the *Succession of Stewart*, 100 So. 2d 228 (La. App. 2d Cir. 1958), the court, in accordance with the agreement of the parties, attributed stock dividends to the naked owner subject to the enjoyment of the usufructuary. The new stock certificate had been issued to the names of both, one as owner and the other as usufructuary. "Stock dividend" is used in the sense of corporate action distributing surplus in the form of additional shares, in proportion to the ownership of original shares. The result is to move the surplus fund to capital. See GRAHAM & KATZ, *ACCOUNTING IN LAW PRACTICE* 155 (1938); KATZ, *INTRODUCTION TO ACCOUNTING* 167 (1954).

155. See *Succession of Hemenway*, 228 La. 572, 83 So. 2d 377 (1955). The matrimonial community in Louisiana enjoys a right akin to usufruct over the separate property of the spouses. See Comment, *Problems of Classification of Particular Property under Community Property Regimes*, 25 LA. L. REV. 108, 135 (1964).

156. *Daigre v. Daigre*, 228 La. 682, 83 So. 2d 900 (1955). This is in line with most tax cases which have held that a stock dividend is not taxable as income under the federal internal revenue legislation. See *Eisner v. Macomber*, 252 U.S. 189 (1920); cf. *Scotfield v. Weiss*, 131 F.2d 631 (5th Cir. 1942) (gift tax); *Duncan v. United States*, 247 F.2d 845 (5th Cir. 1957) (estate tax).

157. *Daigre v. Daigre*, 228 La. 682, 83 So. 2d 900, 902 (1955); cf. *Succession of Quintero*, 209 La. 279, 24 So. 2d 589 (1946).

being represented after the distribution by more shares of the same character, and a stock dividend which involves changes in the corporate identity or a change in the nature of the shares issued, whereby the interest of the shareholder in the corporation is basically affected.¹⁵⁸ In the last case, stock dividends are treated as income.

It is submitted that, in the determination of the rights of the usufructuary, Louisiana courts should hold dividend shares to be fruits belonging to the usufructuary, at least in circumstances in which federal courts would treat stock dividends as income, as in the cases of shares of a different character in the same corporation¹⁵⁹ or shares of another corporation.¹⁶⁰ Further, distinction could be drawn between stock dividends representing a capitalization of profits and stock dividends which, like stock splits, merely dilute the existing capital. Stock dividends distributed in lieu of cash should benefit the usufructuary.¹⁶¹ From an accounting viewpoint, though the corporate structure is not affected by the normal stock dividend, the net result is the same as if the stockholders had been paid a cash dividend and all recipients had immediately reinvested the cash in additional shares of the same corporation.¹⁶² Had this transaction actually occurred, the new shares would belong to the usufructuary. Totally different consequences following from two different methods destined to accomplish the same result cannot be justified. It might be argued, of course, that if the ownership of the stock dividend were to be attributed to the usufructuary, voting rights as well as other incidental advantages of stock ownership belonging to the naked owner would be affected adversely.¹⁶³ The answer to this objection is that the usufructuary

158. See SCHAPIRO & WIENSHIEK, *LAW AND ACCOUNTING* 173 n.19 (1949). See also *Duncan v. United States*, 247 F.2d 845 (5th Cir. 1957); *Scotfield v. Weiss*, 131 F.2d 631 (5th Cir. 1942); *Eisner v. Macomber*, 252 U.S. 189 (1920).

159. See *Koshland v. Helvering*, 298 U.S. 441 (1936).

160. See *Peabody v. Eisner*, 247 U.S. 347 (1918).

161. Cf. Comment, *Problems in Classification of Particular Property Under Community Property Regimes*, 25 LA. L. REV. 108, 134, 137 (1964).

162. See PATON, *ACCOUNTANT'S HANDBOOK* 1016 (3d ed. 1950).

163. This objection was considered in *Daigre v. Daigre*, 228 La. 682, 691 n.1, 83 So. 2d 900, 903 n.1 (1955): "At this point it might also be well to consider the difference between a stock dividend and a cash dividend which the shareholder uses to buy stock in the same corporation. The difference between these two transactions is easy to grasp. In the stock dividend transaction the shareholder's proportionate interest in the corporation assets remains unchanged. On the other hand, if a shareholder receives a cash dividend with which he buys additional shares of the same type of stock in the same corporation, the shareholder's proportionate interest in the corporation assets is increased." Of course, this assumes that all the shareholders receiving the cash dividend will not act similarly, all reinvesting in the corporation.

could be attributed the cash equivalent of the new shares. A much more serious objection to the suggested solution is that it might give rise to litigations and corporations might be subjected to continuous harassment by judicial investigations tending to ascertain the extent of their capitalized profits.¹⁶⁴

The stock dividend method may effectively postpone the time when the corporation will be able to pay cash dividends through reduction of its surplus account.¹⁶⁵ And if the naked owner owns a controlling interest in a closely held corporation, this effect would allow him freedom to determine the measure of the usufructuary's enjoyment. It ought to be expected, however, that any abusive exercise of the rights of the naked owner will be closely scrutinized by the courts and that in appropriate cases the corporate veil will be pierced.¹⁶⁶

It is well settled in Louisiana that the usufruct of shares of stock is a perfect usufruct¹⁶⁷ and that the usufructuary is under obligation to preserve them. When, without right, the usufructuary disposes of the shares of stock, question arises as to the rights of the naked owner. It may be argued that in such a case the usufruct terminates and that the naked owner is entitled to claim the proceeds in the hands of the usufructuary.¹⁶⁸ When, as it frequently happens, the sale of the shares is discovered by the naked owner at the end of the usufruct, the courts charge the usufructuary with the value of the shares at the time of the sale or of the creation of the usufruct.¹⁶⁹ It is submitted that the naked owner, entitled to restitution of the stock at the end of the usufruct, should be able to claim its value at that time.¹⁷⁰ But if the stock depreciated since the sale, the

164. Cf. LATTIN, CORPORATIONS 459, 461 (1959).

165. Cf. PATON, ESSENTIALS OF ACCOUNTING 726-28 (rev. ed. 1949). It ought to be noted, however, that earnings or profits permitted to accumulate beyond the "reasonably anticipated needs of the business" receive a very heavy accumulated earnings surtax. See LATTIN, CORPORATIONS 461 (1959).

166. Cf. *Wainer v. Wainer*, 210 La. 324, 26 So. 2d 829 (1946).

167. See *Leury v. Mayer*, 122 La. 486, 47 So. 839 (1908); *Succession of Heckert*, 160 So. 2d 375 (La. App. 4th Cir. 1964). *But cf. Kelley v. Kelley*, 185 La. 185, 168 So. 769 (1936).

168. It ought to be clear that if the usufructuary alienates things subject to perfect usufruct he violates his obligation to preserve the substance of the thing. Accordingly, his usufruct may terminate by application of article 621 of the Civil Code. Upon termination, the usufructuary will be "answerable for such losses as proceed from his fraud, default, or neglect" (article 567).

169. See *Succession of Wengert*, 180 La. 483, 156 So. 473 (1934); *Succession of Heckert*, 160 So. 2d 375 (La. App. 4th Cir. 1964).

170. See LA. CIVIL CODE art. 567(2) (1870). Further, it is clear that the usufructuary who without authority alienates shares of stock commits an offense and is liable under article 2315 of the Louisiana Civil Code of 1870.

usufructuary should not be allowed to benefit from his own wrong and the naked owner should be given the value of the stock at the time of sale by application of the principle of unjust enrichment.¹⁷¹ When the shares of stock are converted into money without any act of the usufructuary, as a result of redemption by the corporation or liquidation of its capital, the right of the usufructuary attaches to the proceeds by operation of the principle of real subrogation.¹⁷² In these circumstances, the usufruct becomes imperfect and the usufructuary is entitled to reinvest or use the proceeds as he pleases.¹⁷³

Stock of building and loan associations involves distinct problems as it bears characteristics of both ordinary stock and of an indebtedness.¹⁷⁴ In most American jurisdictions this stock has been consistently treated as indebtedness¹⁷⁵ but Louisiana courts have implicitly treated it as ordinary stock for some purposes and as an indebtedness for other purposes.¹⁷⁶ Depending on the

171. See LA. CIVIL CODE art. 1965 (1870). *Cf.* YIANNPOULOS, CIVIL LAW PROPERTY § 143, text at note 305 (1966).

172. See Succession of Dielman, 119 La. 101, 43 So. 972 (1907). Any capital gain reflected in the liquidation dividends benefits both the naked owner and the usufructuary. The naked owner acquires ownership of the entire dividend, subject to the enjoyment of the usufructuary. Succession of Stewart, 100 So. 2d 228 (La. App. 2d Cir. 1958). The federal capital gains tax on the stocks is to be paid by the naked owner. *Ibid.*

173. See Succession of Dielman, 119 La. 101, 43 So. 972 (1907). Naturally, the parties may by agreement determine the mode of reinvestment. See Succession of Stewart, 100 So. 2d 228 (La. App. 2d Cir. 1958). The Louisiana Supreme Court has declared that when shares of stock are converted into money by the usufructuary rather than by the corporation the usufruct does not become imperfect. See Wainer v. Wainer, 210 La. 324, 26 So. 2d 829 (1946). It is difficult to understand what the court meant by this statement. Perhaps, the court wished to indicate that, in these circumstances, the usufructuary is not free to use the cash as he pleases and that he is bound to account to the naked owners for all profits rather than for the value of the shares at the creation of the usufruct plus legal interest. *Id.* at 344-47, 26 So. 2d at 836-37.

174. First, the owners of building and loan stock control the operation of the association through voting power (LA. R.S. 6:747 (1950)), and second, any return on investment paid to the owner of the stock is in the form of a dividend which can only be paid from the profits of the association (LA. R.S. 6:744 (1960)). These are attributes of ordinary corporate stock. On the other hand, the owner of building and loan stock is entitled to repayment from the association of any amount which he has invested (LA. R.S. 6:791 (1950)). This right of return of investment from the association parallels the debtor-creditor relations arising from a bank deposit. *But cf.* LA. R.S. 6:741(3)(b) (1950), allowing the issue of permanent reserve shares which are non-redeemable until dissolution of the association. These types of shares should be treated as ordinary corporation stock.

175. See cases cited in Note, 18 LA. L. REV. 335, 336 n.14 (1958).

176. See Lilley v. First Federal Sav. & Loan Assn., 194 So. 901 (La. App. 2d Cir. 1940); State *ex rel.* Moulin v. Ideal Sav. & Homestead Assn., 178 So. 521 (La. App. Or. Cir. 1938) (Uniform Stock Transfer Act, *held*, applicable to the transfer of building and loan shares). The Louisiana Uniform Stock Transfer Act (LA. R.S. 12:521(1950)) regulates the transfer of corporate stock whereas the transfer of negotiable instruments which are evidences of debt is regulated by the Negotiable Instruments Law (LA. R.S. 7:1 (1950)). Accordingly, these

one or the other classification, building and loan association stock could be held to be subject to perfect or imperfect usufruct. In the absence of compelling reasons for the classification of this stock as consumable, and taking into account primarily the interests of the naked owner, the usufruct of building and loan association stock ought to be considered as perfect.¹⁷⁷

In Germany and in Greece, the usufruct of shares of stock issued to the bearer and of shares of stock to the order endorsed in blank is governed by the rules of the Civil Codes applicable to the usufruct of negotiable instruments.¹⁷⁸ These rules, however, do not resolve the question of apportionment of economic advantages between naked owners and usufructuaries. Doctrine and jurisprudence in the two countries, groping for solutions, establish a distinction between economic advantages which as fruits belong to the usufructuary and powers incidental to stock ownership which belong to the naked owner. The rights to vote and, in general, to participate in the administration of the corporation belong to the naked owner according to the prevailing view in Germany.¹⁷⁹ The Greek Civil Code, however, provides that in the absence of contrary agreement the usufructuary is entitled to participate in the meetings of the shareholders.¹⁸⁰ Cash dividends belong to the usufructuary but options for the acquisition of new shares to the naked owner.¹⁸¹ The proceeds of the liquidation of stock by the corporation belong to the naked owner subject to the enjoyment of the usufructuary.¹⁸² And,

decisions give rise to the implication that building and loan association stock is to be treated as ordinary corporation stock. *But see* Dimitry v. Shreveport Mut. Bldg. Assn., 167 La. 875, 120 So. 581 (1929); Succession of D'Anna, 6 La. App. 142 (Orl. Cir. 1927) (an association shareholder is a creditor of the association and upon the death of the shareholder the administrator of his estate is entitled to withdraw the value of the shares from the association). These decisions give rise to the implication that, if the shares were burdened with usufruct, the usufruct should be qualified as imperfect.

177. *Cf.* Succession of Wengert, 180 La. 483, 156 So. 473 (1934) (homestead stock dealt with as if it were subject to perfect usufruct). *But see* Note, 18 LA. L. REV. 335, 337 (1958).

178. See B.G.B. §§ 1081-1084; GREEK CIVIL CODE art. 1176; text at notes 797-807 *infra*; and, in general, WEIDER, DER NIESSBRAUCH AN AKTIEN (1925); Siebert, Note, 63 JURISTISCHE WOCHENSCHRIFT 1116 (1934).

179. See 3, 2 STAUDINGER-SPRENG, KOMMENTAR ZUM B.G.B. 1186 (11th ed. 1963); 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 428 (9th ed. 1960); WOLFF-RAISER, SACHENRECHT 483 (10th ed. 1957); and in general, PETERS, AUSÜBUNG DES STIMMRECHTS BEI NUTZNIESSUNGSBELASTETEN AKTIEN (1952).

180. See GREEK CIVIL CODE art. 1177.

181. See 3, 2 STAUDINGER-SPRENG, KOMMENTAR ZUM B.G.B. 1189 (11th ed. 1963); WOLFF-RAISER, SACHENRECHT 483 (10th ed. 1957); Heidecker, *Das Bezugsrecht bei niessbrauchbelasteten Aktien*, 9 NEUE JURISTISCHE WOCHENSCHRIFT 892.

182. See 3, 2 STAUDINGER-SPRENG, KOMMENTAR ZUM B.G.B. 1190 (11th ed. 1963); 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 428 (9th ed. 1961).

with respect to stock dividends, distinction is made between the value of the new shares representing capitalization of profits which belong to the usufructuary and the value of the share representing a fractional interest in the corporation itself which belongs to the naked owner.¹⁸³

8. *Business Enterprise in Usufruct*

Questions arising from the creation of a usufruct over a business enterprise are not specifically dealt with in the Civil Codes under consideration. A business enterprise may be defined as the sum total of rights, interests, corporeal objects, and relations destined for a determined purpose and organized as an economic unit by a person called entrepreneur.¹⁸⁴ An enterprise thus includes corporeal elements, as merchandise, and incorporeal elements, as leases, good will, trademarks, and copyrights, which form a universality or a special patrimonial mass.

According to French doctrine and jurisprudence, the right of the usufructuary bears on the universality rather than on individual objects.¹⁸⁵ The usufruct of an enterprise is, in the absence of contrary agreement, a perfect usufruct; accordingly, the usufructuary does not become owner of the various elements, nor does he have the right to sell the enterprise. And, in case of bankruptcy, the creditors of the usufructuary may merely seize the usufruct; the naked ownership is beyond their reach.¹⁸⁶ The usufructuary has the right and the obligation to continue the business. If he refuses to do so, the naked owner may demand the sale of the enterprise. As any other usufructuary, the usufructuary of an enterprise may lease it or he may assign his rights to a third person.

Continuation of the business presupposes the usufructuary's right to sell merchandise and, in general, individual elements of the enterprise. This right of the usufructuary cannot be easily explained on theoretical grounds. Certain authors suggest that the usufructuary possesses a quasi usufruct which confers upon

183. *Ibid.*; cf. Bayer, Oberstes Landesgericht, Jan. 18, 1918, 36 O.L.G. 282.

184. See YIANNPOULOS, CIVIL LAW PROPERTY § 83 (1966).

185. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 708 (7th ed. Esmein 1961); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 788 (2d ed. Picard 1952); 2 COLIN, CAPITANT, ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL 151 (1959); DELALANDE, L'USUFRUIT D'UN FONDS DE COMMERCE (Thesis, Bordeaux 1922); Civ., Feb. 26, 1894, S. 1895.1.102, Note by Wahl; Aix, March 12, 1878, S. 1878.2.265.

186. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 708 n. 4 (7th ed. Esmein 1961).

him the ownership of the individual elements and enables him, as owner, to sell individual objects. This analysis has been rejected in France because it leads to the conclusion that the usufructuary is bound to restore, upon termination of the usufruct, the estimated value of the merchandise rather than the stock in kind. Yet, restoration of the stock in kind may be indispensable for the preservation of the enterprise; and the obligation of the usufructuary to preserve the thing subject to usufruct implies clearly his duty to replace the merchandise sold. Thus, according to the prevailing view, the usufructuary of an enterprise in France has the power of alienation of individual objects in his capacity as administrator. Sale is the normal exercise of his right of enjoyment and constitutes an act of administration required by the obligation to continue operations.¹⁸⁷

The usufructuary is entitled to the profits of the enterprise which are considered as civil fruits. But he is bound to make allowance for the depreciation of the various elements and he may be required to place certain profits on reserve because, according to article 578 of the French Civil Code, the usufructuary must conform to the methods of enjoyment established by the owner.¹⁸⁸

In Louisiana, the usufruct of a business enterprise has been classified by the courts as an imperfect usufruct.¹⁸⁹ Accordingly, the usufructuary has been held to be entitled to dispose of the stock of merchandise as owner. His obligation is to account to the naked owners upon termination of the usufruct for the estimated value of the merchandise at the commencement of the usufruct.¹⁹⁰ It is submitted that in the absence of legislative texts much benefit could be derived from the consideration of French doctrine and jurisprudence. Louisiana courts could re-

187. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 789 (2d ed. Picard 1952); 5 BAUDRY-LACANTINIERE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 377 (2d ed. Chauveau 1899); 2 COLIN, *CAPITANT, ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL* 151 (1959).

188. See FRENCH CIVIL CODE art. 578; 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 790 (2d ed. Picard 1952).

189. See Succession of Trouilly, 52 La. Ann. 276, 26 So. 851 (1899); Succession of Blanchard, 48 La. Ann. 578, 19 So. 683 (1896). *Cf.* Succession of Journe, 21 La. Ann. 391 (1896) (surviving spouse and usufructuary disposed of rights to a butcher's stall in the market place; the court did not question the authority of the usufructuary to terminate the business).

190. See Succession of Trouilly, 52 La. Ann. 276, 26 So. 81 (1899); Succession of Blanchard, 48 La. Ann. 578, 19 So. 683 (1896). If the usufructuary sells the enterprise, the price representing the good will of the business or other incorporeal assets should belong to the naked owner, subject to the enjoyment of the usufructuary. *Cf.* Succession of Journe, 21 La. Ann. 391 (1896).

consider their solutions in the interest of justice, and, taking into account the interests of both the usufructuary and of the naked owner could conclude that the usufruct of an enterprise is a perfect usufruct which, by its nature, confers on the usufructuary power of administration¹⁹¹ and alienation of the various elements. The usufructuary should be entitled to the profits of the enterprise subject to the obligations of preserving its substance, renewing the stock of merchandise or other equipment, and of making proper allowances for depreciation and capital reserves.¹⁹²

According to the prevailing views in Germany and in Greece, the usufruct of an enterprise bears on the various individual elements rather than on the business as a whole.¹⁹³ Depending on the nature of these elements as corporeal or incorporeal, the usufruct is governed by the rules of the Civil Codes applicable to usufruct of things or usufruct of rights.¹⁹⁴ Since, however, a number of these rules are incompatible with the requirements of orderly management of an enterprise, doctrine and jurisprudence affirm deviations as to certain specifics.

For the determination of the rights of the usufructuary and of the naked owner, distinction is drawn between fixed capital which continues to be owned by the naked owner and circulating capital which is now owned by the usufructuary. The usufruct of an enterprise is thus partly perfect and partly imperfect. Fixed capital, being non-consumable, is subject to perfect usufruct, whereas circulating capital, being consumable, is subject to imperfect usufruct. The usufructuary is under obligation to preserve the fixed capital, which constitutes the essence of the enterprise, and to continue operations. His administration must conform to the rules of orderly management. He cannot

191. See note 187 *supra*; *Folsie v. Maryland Cas. Co.*, 193 So. 385 (La. App. 1st Cir. 1940). See also *Bell v. Saunders*, 139 La. 1037, 72 So. 727, 730 (1916): "The law constitutes him [i.e., the usufructuary], in effect, and with respect to the rights of ownership, the agent or representative of the owner, imposes on him the obligation of an administrator. . ."

192. See note 188 *supra*.

193. See 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 441 (9th ed. 1961); WOLFF-RAISER, SACHENRECHT 490 (10th ed. 1957); BRECHER, DAS UNTERNEHMEN ALS RECHTSGEGENSTAND 130 (1953); GODIN, NUTZUNGSRECHT AN UNTERNEHMEN UND UNTERNEHMENS BETEILIGUNGEN (1949); Gieseke, DER RECHTSBEGRIFF DES UNTERNEHMENS, DEUTSCHE LANDSREFERATE ZUM III. INTERNATIONALEN KONGRESS FÜR RECHTSVERGLEICHUNG IN LONDON 606 (1950). Cf. BALIS, CIVIL LAW PROPERTY 342 (3d ed. 1955) (in Greek).

194. See B.G.B. §§ 1030-1067, 1068-1084, 1085; GREEK CIVIL CODE arts. 1142-1177, 1178-1182.

substantially transform or alter the nature of the enterprise.¹⁹⁵ It is disputed whether the usufructuary is under obligation to pay business debts of the grantor incurred prior to the creation of the usufruct. But if the usufructuary continues operations under the same firm name, he is bound to the payment of debts under Section 25 of the German Commercial Code. The same applies to the naked owner who, after termination of the usufruct, continues the business of the usufructuary under the same firm name. The collection and investment of credits due to the business escapes application of the general rules because the restrictions established therein are incompatible with the demands of orderly business administration.¹⁹⁶

In Germany, the usufructuary of an enterprise is bound to contribute to the payment of private debts and public burdens in accordance with the rules governing usufruct of individual things.¹⁹⁷ The rules of the German Civil Code governing usufruct of patrimonies apply to the usufruct of an enterprise only if the enterprise constitutes the entire patrimony of the grantor.¹⁹⁸ On the contrary, under the Greek Civil Code, the liability of the usufructuary ought to be measured in the light of the rules governing usufruct of an entire patrimony.¹⁹⁹

The usufructuary is entitled to the net profits of the enterprise, which are its civil fruits. He must balance operating losses with gains and he must undertake expenditures for the maintenance or renewal of fixed capital even in excess of his profits.²⁰⁰ The risk of depreciation and the gain of appreciation of the business are attributed to the naked owner.

10. Rights in Usufruct

a. In general

Under the Louisiana Civil Code of 1870 and under the French Civil Code, "things" may be either corporeal or incorporeal. The general provisions on usufruct in the two Codes are thus supposed to apply without discrimination to corporeal objects and

195. See GODIN, NUTZUNGSRECHT AN UNTERNEHMEN UND UNTERNEHMENSBE-
TEILIGUNGEN 21 (1949).

196. See 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 442 (9th ed. 1961).

197. See B.G.B. § 1047.

198. See 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 441 (9th ed. 1960).

199. See GREEK CIVIL CODE art. 1156; *cf. id.* art. 479.

200. See GODIN, NUTZUNGSRECHT AN UNTERNEHMEN UND UNTERNEHMENS-
BETEILIGUNGEN 37 (1949); 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 442
(9th ed. 1960).

rights burdened with a usufruct.²⁰¹ Yet, a great number of these provisions contemplate usufruct of corporeal objects, and, particularly, of immovables.²⁰² Their application to usufruct of incorporeals, as it will be shown, is not always warranted nor entirely adequate to regulate the incidents of these usufructs which involve problems of their own. In the event of a Code revision, therefore, it would be preferable, from the viewpoints of both legislative technique and substantive regulation, to enact in Louisiana special provisions applicable to the usufruct of rights.

Under the German and Greek Civil Codes, "things" are only corporeal objects, and, strictly speaking, real rights of enjoyment may burden only such objects.²⁰³ But, since the usufruct of rights is a useful legal institution which has its place in every civilian system, theory had to be stretched to accommodate the demands of social utility. The redactors of the two Codes thus felt compelled to enact special provisions authorizing expressly, and regulating the effects of, the usufruct of rights.²⁰⁴

Usufruct may be established on both personal and real rights, movable or immovable. Under the Louisiana Civil Code of 1870 and under the French Civil Code, usufruct may thus burden any right, with the possible exception of "strictly personal" rights.²⁰⁵ It may even burden another usufruct.²⁰⁶ In Germany and in Greece, usufruct may be established only on transferable rights.²⁰⁷ Usufruct, being in principle a non-transferable right in these two countries, cannot be established on another usufruct.²⁰⁸

According to section 1069 of the German Civil Code, and corresponding article 1178 of the Greek Civil Code, the crea-

201. See LA. CIVIL CODE art. 541 (1870); FRENCH CIVIL CODE art. 581.

202. See, e.g., LA. CIVIL CODE arts. 546, 548, 551-554, 563, 565, 568-579, 581, 582, 590, 591, 594-598, 601-605, 613-615, 622 (1870); FRENCH CIVIL CODE arts. 585, 590-594, 596, 597, 599, 605-609, 614, 624.

203. See YIANNPOULOS, CIVIL LAW PROPERTY § 13, text at note 75 (1966).

204. See B.G.B. §§ 1068-1084; GREEK CIVIL CODE arts. 1178-1182; cf. DULCKEIT, DIE VERDINGLICHUNG OBLIGATORISCHER RECHTE 54 (1951).

205. For the notion of strictly personal rights, see YIANNPOULOS, CIVIL LAW PROPERTY § 78, text at note 117 (1966). Since strictly personal rights are incapable of assignment or exercise by third persons, they ought to be insusceptible of encumbrance.

206. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 755 (2d ed. Picard 1952).

207. See B.G.B. § 1069(2); GREEK CIVIL CODE art. 1178(3). Further, it is self-evident that only rights capable of enjoyment may be burdened with usufruct. See WESTERMANN, SACHENRECHT 681 (4th ed. 1960); 3, 2 STAUDINGER-SPRENG, KOMMENTAR ZUM B.G.B. 1165 (11th ed. 1963).

208. See B.G.B. §§ 1059, 1059b; GREEK CIVIL CODE art. 1166.

tion of usufruct on rights is subject to the rules governing transfer of rights.²⁰⁹ Thus, depending on the nature of the right intended to be burdened with usufruct, formal and substantive requirements for the creation of usufruct are the same as those applicable to assignment of credits or alienation of real rights. For the rest, the German Civil Code contains detailed provisions which in many instances do not have an equivalent in the Greek Civil Code. The German Civil Code, for example, provides expressly that if the right burdened with usufruct involves a performance, the relations between the usufructuary and the debtor of the obligation are subject to the rules governing the relations between assignee of a credit and debtor.²¹⁰ Further, in case the exercise of the usufruct is transferred to an administrator,²¹¹ the transfer is effective against the debtor as of the time he acquired knowledge or received notice thereof. The same rule applies in case of termination of the administration.²¹² A right subject to usufruct may be terminated by juridical act only with the consent of the usufructuary; the consent must be declared to the person in whose favor it is given and is irrevocable. The same rule applies to transformations of the right which might affect adversely the interests of the usufructuary.²¹³

The content of the usufruct of a right is determined as to specifics in Germany and in Greece in the light of the nature and characteristics of the right burdened. In general, the usufructuary is entitled to receive profits, *i.e.*, advantages of use and fruits. For example, the usufructuary of a predial lease is entitled to the use of, as well as to the fruits produced by, the leased immovable; the usufructuary of an interest producing credit, to the interests; and the usufructuary of an annuity or life rent, to accruing payments.²¹⁴ The usufructuary of the burdened right acquires the ownership of fruits of things, which

209. See B.G.B. § 1069(1); GREEK CIVIL CODE art. 1178. Thus, in Germany, the usufruct of a claim or of a patent may be created merely by agreement between the parties. *Cf.* B.G.B. §§ 398, 413. The usufruct of a mortgage requires, in addition to agreement, entry into the land register and delivery of the mortgage certificate to the usufructuary. *Id.* § 1154. For the creation of usufruct on negotiable instruments, see text at note 241 *infra*.

210. See B.G.B. § 1070(1).

211. According to section 1052 of the German Civil Code, the exercise of usufruct may, on demand of the naked owner, be entrusted to an administrator in case the usufructuary fails to furnish security under the terms of a judicial decision ordering him to do so.

212. *Id.* § 1070(2).

213. *Id.* § 1071.

214. See WOLFF-RAISER, *SACHENRECHT* 483 (10th ed. 1957).

are at the same time fruits of rights,²¹⁵ on separation. If the fruits of the right are merely claims, *e.g.*, interests, the usufructuary is entitled to them as of the creation of the usufruct.²¹⁶ For the rest, the rules governing usufruct of things in the German and Greek Civil Codes apply by analogy to the usufruct of rights unless this is excluded by directly applicable legal provisions or by the nature of the right subject to usufruct.²¹⁷ Thus, in principle, rights and obligations of the usufructuary and of the naked owner, and termination of the usufruct of rights are matters to be determined in the light of the rules governing usufruct of corporeal objects.

The legal nature of the usufruct of rights has given rise to doctrinal controversies in Germany. According to the prevailing view today, the usufruct of a right is of the same nature as the burdened right.²¹⁸ Thus, the usufruct of a dismemberment of ownership is a real right and the usufruct of a personal right is itself an obligation.²¹⁹

b. Usufruct of Credits

According to French doctrine and jurisprudence, non-matured credits are the object of a perfect usufruct.²²⁰ The usufructuary, therefore, does not become owner of the titles of obligations, as promissory notes, certificates of deposit, or negotiable instruments evidencing an indebtedness. But, by virtue of his right of enjoyment, the usufructuary has power of administration and authority to collect the capital assets evidenced by these various titles.²²¹ If the object of delivery is money or other consumables, the usufruct is transformed into an im-

215. See text at note 27 *supra*.

216. See text at note 41 *supra*. Interests are regarded as direct fruits of rights under B.G.B. § 99(2). See 1 SOERGEL-SIEDERT, BÜRGERLICHES GESETZBUCH 353 (9th ed. 1959); Reichel, *Der Begriff der Frucht im römischen Recht und in deutschen B.G.B.*, 42 IHERINGS, JAHRBÜCHER 205, 299 (1901).

217. See B.G.B. § 1068(2), GREEK CIVIL CODE art. 1182, B.G.B. § 1039 is inapplicable to usufruct of rights. Thus, the usufructuary of a right does not acquire ownership of fruits produced contrary to the rules of orderly management. See WOLFF-RAISER, SACHENRECHT 484 (10th ed. 1957).

218. See WOLFF-RAISER, SACHENRECHT 482 (10th ed. 1957).

219. Cf. 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 633 n. 1 (7th ed. Esmein 1961) explaining that "technically" the usufruct of incorporeals is not a real right, in the same way that the ownership of incorporeals is not, strictly speaking, a real right.

220. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 794 (2d ed. Picard 1952).

221. *Ibid.* See also 6 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 521 (1876); Comment, *Usufruct of a Promissory Note—Perfect or Imperfect?*, 4 TUL. L. REV. 104, 108 (1930).

perfect one upon payment; if the object of delivery is a non-consumable thing, the usufruct continues being perfect. Since the creation of usufruct on a credit functions as an assignment,²²² the usufructuary is entitled to receive payment either by amicable demand or following judicial action. He may discharge the debtor without the consent of the naked owner (creditor), who cannot intervene even if the usufructuary is in a state of insolvency.²²³ And the debtor cannot raise the exception that the usufructuary has not furnished security to the naked owner.

The usufructuary is entitled to dispose of money and other consumables he has received in payment as he pleases, subject to his obligation to account to the naked owner upon termination of the usufruct. This prerogative of the usufructuary involves many dangers for the naked owner, and, for this reason, it has been criticized in France.²²⁴ It might have been more reasonable to require the usufructuary to invest the capital assets he has collected in cooperation with the naked owner, but in the absence of a directly applicable legislative text the courts cannot impose such requirements. However, they may order the usufructuary to furnish security that he will restore the capital at the end of the usufruct, even if the juridical act creating the usufruct relieved him of the obligation to furnish security.²²⁵ Indeed, it may be argued that the intention of the grantor of the usufruct was to dispense with security merely as to the perfect usufruct of the non-matured credit; when the usufruct is converted into an imperfect one, the situation is not covered by the juridical act creating the usufruct and the requirement of security is to be determined under the applicable text of the Civil Code.²²⁶

In Louisiana, no distinction is made between matured and non-matured credits. The jurisprudence is settled that the usufruct of credits is an imperfect usufruct and, therefore, the usufructuary of titles evidencing indebtedness becomes owner of

222. See text at notes 40-41 *supra*.

223. See Req., May 21, 1930, S.1930.1.286; Req., Nov. 8, 1881, D.1883.1.174, S.1885.1.11; Civ., March 3, 1868, D.1868.1.160; Req., Jan. 21, 1845, D.1845.1.104, S.1845.1.129.

224. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 795 (2d ed. Picard 1952); and, in general, Chancerele, *De l'usufruit des valeurs mobilières* (Thesis, Paris 1912).

225. See Req., Oct. 28, 1889, S.1890.1.53; Req., March 26, 1889, S.1889.1.206; Aix, June 12, 1879, S.1880.2.77; Aix, Jan. 31, 1879, S.1879.2.332.

226. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 795 (2d ed. Picard 1952).

these titles.²²⁷ As owner, the usufructuary may pledge the title,²²⁸ collect the capital,²²⁹ and reinvest it as he pleases.²³⁰ The decided Louisiana cases deal mostly with promissory notes and bonds, but the rules announced therein are susceptible of generalization and application to all usufructs of credits.

Detailed provisions in the German and Greek Civil Codes regulate the incidents and effects of obligatory claims (credits). The German Civil Code establishes a distinction between claims which produce interests and claims which do not. The usufructuary of a non-interest producing claim is entitled to take delivery of the object of performance, and, if the maturity of the obligation depends on notice by the creditor, to give notice.²³¹ He may not dispose of the claim otherwise; for example, he may not cede or remit it. The creation of the usufruct functions as an assignment of the credit; accordingly, the debtor is discharged by payment to the usufructuary rather than to the naked owner (creditor). But if the debtor ignores the creation of the usufruct, payment to the creditor is valid.²³² The usufructuary is under obligation to act as a prudent administrator for the orderly collection of payment.²³³ Upon payment, if the object of delivery is a consumable thing, the usufructuary becomes owner subject to his obligation to account to the grantor at the end of the usufruct; if the object of delivery is a non-consumable thing, the usufructuary acquires a right of enjoyment thereon and ownership vests in the grantor.²³⁴

If the claim produces interests, the usufructuary is entitled to collect these interests which are fruits of the claim and of his right of enjoyment. The principal, however, is payable jointly to the usufructuary and the naked owner. The debtor who has

227. See *Vivian State Bank v. Thomason-Lewis Lumber Co.*, 162 La. 660, 111 So. 51 (1927); *Miguez v. Delcambre*, 125 La. 176, 51 So. 108 (1910); *Succession of Block*, 137 La. 302, 68 So. 618 (1915); cf. *Taylor v. Taylor*, 189 La. 1084, 181 So. 543 (1938) (negotiable instruments to the bearer; imperfect usufruct); *Johnson v. Bolt*, 146 So. 375 (La. App. 2d Cir. 1933).

228. See *Vivian State Bank v. Thomason-Lewis Lumber Co.*, 162 La. 660, 111 So. 51 (1927); *Miguez v. Delcambre*, 125 La. 176, 51 So. 108 (1910).

229. See *Succession of Block*, 137 La. 302, 68 So. 618 (1915); *Kahn v. Becnel*, 108 La. 296, 32 So. 444 (1902).

230. See *Succession of Block*, 137 La. 302, 68 So. 618 (1915); cf. *Burdin v. Burdin*, 171 La. 7, 129 So. 651 (1930); *Lagle v. Marchand's Estate*, 129 So. 2d 849 (La. App. 1st Cir. 1961); *Gryder v. Gryder*, 37 La. Ann. 638 (1885); *Danna v. Danna*, 161 So. 348 (La. App. 1st Cir. 1935); *Johnson v. Bolt*, 146 So. 375 (La. App. 2d Cir. 1933); Comment, *The Usufructuary's Obligation of Restitution in Imperfect Usufruct*, 6 *TUL. L. REV.* 165 (1931).

231. See B.G.B. § 1074.

232. See WOLFF-RAISER, *SACHENRECHT* 486 (10th ed. 1957); cf. B.G.B. § 1070.

233. See B.G.B. § 1074.

234. *Id.* § 1075.

knowledge of the creation of the usufruct is thus discharged only by payment to both the usufructuary and the naked owner; but if he ignores the usufruct, he is validly discharged by payment to the naked owner alone. Either the usufructuary or the naked owner may demand payment on account of both of them; but if the maturity of the claim depends on prior notice, this notice must be given jointly.²³⁵ If the object of delivery is a consumable thing, the naked owner and the usufructuary acquire co-ownership; if the object is a non-consumable, the naked owner acquires ownership and the usufructuary enjoyment. Usufructuary and naked owner are bound toward each other to cooperate for the orderly collection of payment.²³⁶ They are likewise obligated to cooperate for the safe investment of the collected capital in interest bearing accounts. The mode of investment is determined by the usufructuary. The usufructuary does not have a right of enjoyment on the reinvested capital by operation of law: he merely has a personal right against the naked owner for the creation of a usufruct thereon.²³⁷ These rules apply to all kinds of obligations, even to those secured by a pledge or mortgage: the usufruct on the secured credit extends to the accessory rights of real security.

The Greek Civil Code establishes a distinction between monetary and non-monetary claims. The usufructuary of a non-monetary claim is entitled to collect payment; after collection of the object of delivery his usufruct of a claim is transformed into a usufruct of a thing.²³⁸ If the claim is monetary, the usufructuary is entitled to the collection of any interests due without the participation of the naked owner; but the capital may be collected only by the usufructuary and the naked owner acting in cooperation. In lieu of collection of the capital, or after collection, either the usufructuary or the naked owner may demand the safe investment of the capital in an interest bearing account. The mode of investment is determined by the usufructuary.²³⁹

c. Usufruct of Negotiable Instruments

In France and in Louisiana, the usufruct of negotiable instruments is governed by the general rules on usufruct.²⁴⁰ In Ger-

235. *Id.* § 1077.

236. *Id.* § 1078.

237. *Id.* § 1079; WOLFF-RAISER, *SACHENRECHT* 487 (10th ed. 1957). *But cf.* as to non-interest bearing credits B.G.B. § 1075, text at note 234 *supra*.

238. See GREEK CIVIL CODE art. 1179.

239. *Id.* art. 1180.

240. See text at note 201 *supra*.

many and in Greece, however, the Civil Codes contain a number of special provisions which need to be considered at this point.

Usufruct on all kinds of negotiable instruments may be created in Germany following the formalities and substantive regulations which govern the transfer of the particular right evidenced by, or incorporated into, the title. The creation of usufruct on the right results, at the same time, in creation of usufruct on the title.²⁴¹ Negotiable instruments to the order, as checks, bills of lading, or shares of stock issued to the order, may also be burdened with usufruct by endorsement, delivery of the instrument to the assignee, and agreement as to the creation of usufruct. The endorsement need not state the purpose of the transaction, *i.e.*, the intention of the parties to create a usufruct.²⁴² Further, negotiable instruments to the bearer, or to the order endorsed in blank, may be burdened with usufruct in accordance with the rules governing the creation of usufruct on corporeal movables. This transaction requires only agreement of the parties and delivery of the title to the usufructuary. The delivery need not be actual: recognized substitutes for actual delivery or creation of joint possession suffice.²⁴³

The rights and duties of the usufructuary and of the naked owner of negotiable instruments issued to the order of a named person are governed by the rules of the German Civil Code applicable to the usufruct of credits.²⁴⁴ But with respect to negotiable instruments issued to the bearer, or to the order endorsed in blank, the German Civil Code provides by way of exception that possession of the title and of the renewal coupons belongs jointly to the usufructuary and the naked owner. Possession of interest coupons, annuity coupons, or dividend coupons, on the other hand, belongs to the usufructuary alone.²⁴⁵ Either the usufructuary or the naked owner may demand that the title, together with its renewal coupons, be deposited with a depository institution subject to the condition that it be withdrawn jointly. The usufructuary may designate certain named banks as depositories.²⁴⁶ The matured principal must be collected jointly by the usufructuary and naked owner. Joint action is also required for all requisite measures of orderly management as well as for

241. See WOLFF-RAISER, *SACHENRECHT* 488 (10th ed. 1957); *cf.* B.G.B. § 952.

242. *Ibid.*; *cf.* B.G.B. § 1063(2).

243. See B.G.B. § 1081(2).

244. See WOLFF-RAISER, *SACHENRECHT* 488 (10th ed. 1957).

245. See B.G.B. § 1081.

246. *Id.* § 1082.

the procurement of new coupons, annuity, or dividend coupons. Upon payment of the principal, the parties are under duty to cooperate for its reinvestment in accordance with the rules governing usufruct of claims.²⁴⁷ If the instrument subject to usufruct is itself a consumable thing, the rights and duties of the usufructuary and of the naked owner are determined in the light of the rules governing usufruct of consumables.²⁴⁸

In contrast with the complex system of the German Civil Code, the Greek Civil Code provides simply that the usufruct of negotiable instruments is subject to the rules governing usufruct of (corporeal) things.²⁴⁹ Thus, creation, incidents, and termination of this usufruct are matters determined by analogous application of the rules governing usufruct of things rather than usufruct of rights. In accordance with the general rules, the usufructuary is obligated to furnish security unless the contrary has been stipulated.²⁵⁰ By way of exception, however, the Greek Civil Code provides that the usufructuary is relieved of the obligation to furnish security if the instruments are deposited with a safe bank or other depositary institution subject to the rights of the usufructuary or if the usufructuary is a donor who has reserved usufruct. In all cases, the usufructuary is entitled to the possession of dividend coupons without security.²⁵¹

II. LEGAL POWERS OF THE USUFRUCTUARY

In addition to his right of enjoyment, the usufructuary is accorded by law a certain measure of authority to administer the property subject to usufruct and to bring all actions, personal and real, for the protection of his interests. Accordingly, the usufructuary may have authority to lease the property subject to usufruct, sell standing crops which are expected to mature after the end of the usufruct, collect payment of maturing obligations, and participate in general assemblies of corporations if shares of stock are burdened with usufruct; further, he may enforce his rights against the naked owner or against third persons by recourse to justice in his own name. The following discussion is devoted to an examination of the scope of the usufructuary's power of administration and of the incidents and effects of actions initiated by or against the usufructuary.

247. *Id.* § 1083.

248. *Id.* § 1084.

249. See GREEK CIVIL CODE art. 1176.

250. *Id.* art. 1176(1).

251. *Id.* art. 1176(2).

1. Acts of Administration

According to well-established French civilian doctrine, juridical acts are distinguished, in the light of their nature, into conservatory acts, acts of administration, and acts of disposition.²⁵² Classification of juridical acts within one of the three categories is not always easy. In this respect, the criteria developed by French doctrine and jurisprudence are in the nature of general propositions which, by necessity, lack precision.²⁵³ In general, conservatory acts are those which tend to preserve a thing within a given patrimony, to prevent it from being destroyed, damaged, or lost for the owner. Acts of disposition tend to divest the owner of his interest, to deprive him, in part or in whole, of a real or personal right. Thus, acts translatives of ownership or of other real rights, as sales, exchanges, and donations, the burdening of ownership with a real right, the abandonment of a real right or the renunciation of a personal right, and the compromise of a claim are examples of acts of disposition. Acts of administration are acts of management of a thing or of a patrimony which exceed the limits of mere conservatory

252. See BAUDRY-LACANTINIERE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL*, III Supplement by Bonnecase 630-86 (1926); 1 CARBONNIER, *DROIT CIVIL* 625-28 (1955); 1 MARTY and RAYNAUD, *DROIT CIVIL* 261 (1956); 1 PLANIOL, RIPERT, ET BOULANGER, *TRAITÉ DE DROIT CIVIL* 929 (1956); and, in general, TRASBOT, *L'ACTE D'ADMINISTRATION EN DROIT PRIVÉ FRANÇAIS* (Thesis, Bordeaux 1921); cf. 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 239, 663 (7th ed. Esmein 1961).

The distinction of juridical acts into conservatory acts, acts of administration, and acts of disposition is also known in Germany and in Greece. For example, under Greek law, the tutor or the curator of a person may perform conservatory acts and certain acts of administration without prior authorization by the family council. See BALIS, *FAMILY LAW* 410 (1956) (in Greek). This classification of juridical acts, however, does not determine by itself the authority of a person to act, be he tutor, curator, or owner with limited juridical capacity. Instead, directly applicable provisions in the Civil Codes prescribe specifically the capacity or authority of certain persons to perform juridical acts affecting their own patrimony or the patrimony of another person under their control without reference to the nature of these juridical acts. Thus, a person having the administration of another's patrimony may well be authorized to perform certain acts of disposition. See 1 ENNECERUS-NIPPERDEY, *ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS* 885 (10th ed. 1960). Under German and Greek law, therefore, acts of disposition need not be contrasted to either acts of administration or to conservatory acts. Disposition is dealt with in the framework of the theory of loss of rights and is contrasted to acts involving merely a promise for the disposition of a right. The question of authority to dispose is dealt with as one of the requirements for the validity and effect of dispositive juridical acts. See ENNECERUS-NIPPERDEY 882, 885, 814 *supra*; BALIS, *GENERAL PRINCIPLES OF CIVIL LAW* 97-105, 111, 172-74 (7th ed. 1956) (in Greek).

253. See 1 PLANIOL, RIPERT, ET BOULANGER, *TRAITÉ DE DROIT CIVIL* 929 (1956). The lack of precise criteria has led Aubry and Rau to the conclusion that the distinction between acts of disposition and acts of administration ought to be abandoned. See 1 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 696 n. 1 (5th ed. 1897).

measures.²⁵⁴ Acts of administration thus constitute a residual category, frequently defined by the process of exclusion. In the absence of rigorous criteria, classification in concrete cases may rest on directly applicable legal provisions, or, more elusively, on policy considerations and teleological interpretation of existing texts.

From a functional viewpoint, the distinction is supposed to furnish guidelines for the determination of the authority of certain persons to act with respect to things under their ownership or control.²⁵⁵ But in this regard, classification actually depends on the *purpose* rather than the *nature* of individual acts. Thus, especially in connection with the administration of an entire patrimony, certain acts which are necessary or useful for the orderly management of the property are classified as acts of administration although they may tend to divest the owner of a real or of a personal right.²⁵⁶

Insofar as the usufructuary is concerned, the classification of certain acts within one of the three categories carries significant legal consequences. The usufructuary of non-consumable things is under obligation to perform conservatory acts,²⁵⁷ may have authority to perform acts of administration,²⁵⁸ and lacks authority to make acts of disposition.²⁵⁹ In this context, "authority" means the power of the usufructuary to represent the owner

254. See 1 CARBONNIER, DROIT CIVIL 627 (1955); 1 MARTY ET RAYNAUD, DROIT CIVIL 261 (1956).

255. Thus, for example, a competent major may, in the absence of legal or contractual prohibition, perform as to his property all kinds of juridical acts. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 239 (7th ed. Esmein 1961). Interdicted persons and non-emancipated minors may perform conservatory acts but they may not perform acts of disposition or acts of administration. Emancipated minors, prodigals, and feeble-minded persons under curatorship may perform conservatory acts and acts of administration but not acts of disposition. Further, the authority of tutors or curators to act alone or with the concurrence of the family council or of the court, or their lack of authority to act, may be determined in the light of the classification of the various acts as conservatory, acts of administration, or acts of disposition. See 1 CARBONNIER, DROIT CIVIL 625-28 (1955); 1 PLANIOL, RIPERT ET BOULANGER, TRAITÉ DE DROIT CIVIL 929, 948 (1956).

256. Cf. Trib. Périgueux, April 29, 1947, 2 Gaz. Pal. 53 (1947); 1 PLANIOL, RIPERT ET BOULANGER, TRAITÉ DE DROIT CIVIL 929 (1956). Cf. 7 DEMOLOMBE, TRAITÉ DE LA MINORITÉ 313, 366 (1880).

257. See, e.g., LA. CIVIL CODE arts. 533, 558, 567, 570, 571, 578 (1870); FRENCH CIVIL CODE arts. 578, 595, 601, 605, 614; B.G.B. §§ 1036(2), 1037, 1041, 1042; GREEK CIVIL CODE arts. 1142, 1148, 1152, 1153.

258. See text at notes 856, 864, 867 *infra*.

259. See LA. CIVIL CODE arts. 533, 535, 567, 590, 591 (1870); FRENCH CIVIL CODE art. 578; B.G.B. §§ 1036(2), 1037, 1041, 1055; GREEK CIVIL CODE arts. 1142, 1148, 1161.

and to perform juridical acts with binding effects toward the naked owner and third persons.²⁶⁰

a. *Leases*

According to article 555 of the Louisiana Civil Code of 1870,²⁶¹ and corresponding article 595 of the French Civil Code, the usufructuary is entitled to lease his right to another.²⁶² This is an attribute of the usufructuary's enjoyment, accorded to him in all legal systems under consideration.²⁶³ Questions arise, however, as to the authority of the usufructuary to lease movables or immovables subject to usufruct for a term exceeding the period of his enjoyment by a contract binding the lessee and the naked owner.

Since according to traditional ideas leases give rise to merely personal obligations, they should not be binding on persons other than the contracting parties.²⁶⁴ A lease by the usufructuary should not bind the naked owner and an existing lease at the time of the creation of the usufruct should not bind the usufructuary. Abstract principles, however, had to give way to practical considerations of economic utility. Accordingly, in all systems under consideration, leases of immovable property may, to a variable extent, be binding on persons other than the contracting parties.

Leases of immovables contracted by the owner prior to the creation of the usufruct remain in effect everywhere—subject

260. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 790 (2d ed. Picard 1952); 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 663 (7th ed. Esmein 1961).

261. See LA. CIVIL CODE art. 555 (1870): "The usufructuary may enjoy by himself or lease to another, or even sell or give away his right; but all contracts or agreements which he makes in this respect, whatever duration he may have intended to give them, cease of right at the expiration of the usufruct." The second sentence was added in the 1825 revision. According to the redactors, the source of this provision is Book 7, tit. 1, law 67 of the Digest of Justinian. See 1 LOUISIANA LEGAL ARCHIVES, *PROJET OF THE CIVIL CODE OF 1825* p. 52 (1937). It ought to be noted, however, that the passage in the Digest reads as follows: "Anyone to whom the usufruct has been bequeathed can sell the same to a stranger, even without the consent of the heir."

262. See FRENCH CIVIL CODE art. 595: "The usufructuary may enjoy by himself, or lease to another, or even sell or transfer his right by gratuitous title. If he leases it, he must comply, as to the periods for the renewal of leases and as to their duration, with the rules established for the husband administrator of property of his wife in the title *Of the Contract of Marriage and of the Respective Rights of the Spouses*." It ought to be noted that the second sentence of this article is materially different from the second sentence of article 555 of the Louisiana Civil Code of 1870.

263. See B.G.B. § 1059; GREEK CIVIL CODE art. 1166.

264. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 790 (2d ed. Picard 1952); YIANNPOULOS, *CIVIL LAW PROPERTY* § 95 (1966).

to certain conditions in some instances. Since, in principle, change of ownership does not affect existing leases adversely,²⁶⁵ the creation of usufruct should *a fortiori* be without effect on the validity of existing leases. The usufructuary, however, is entitled to rentals as of the creation of the usufruct.²⁶⁶ In France, a lease contracted by the naked owner prior to the creation of the usufruct is effective against the usufructuary if it acquired certain date before the commencement of the usufruct.²⁶⁷ Further, leases made for a period in excess of twelve years bind the usufructuary only if recorded.²⁶⁸ If the absence of recordation, the duration of the lease is reduced to twelve years.²⁶⁹

In Louisiana, leases granted by the owner prior to the creation of the usufruct are binding on the usufructuary regardless of their duration, even in the absence of certain date. In this respect, article 2733 of the Louisiana Civil Code of 1870²⁷⁰ differs substantially from the corresponding article 1743 of the French Civil Code which requires certain date.²⁷¹ However, predial leases, in order to be effective against third persons, need to be recorded. Article 2266 of the Louisiana Civil Code, which has no equivalent in the French Civil Code, provides that "all sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto."²⁷² Further, the Louisiana legislature enacted in 1950 a statute which provides that "no . . . surface lease or other instrument of [sic] writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where

265. See LA. CIVIL CODE art. 2733 (1870); FRENCH CIVIL CODE art. 1743; B.G.B. §§ 571, 577; GREEK CIVIL CODE arts. 614, 615.

266. See text at notes 56-62 *supra*.

267. Cf. FRENCH CIVIL CODE art. 1743: "If the lessor sells the thing leased, the purchaser cannot turn out the tenant who has a lease by notarial act or of certain date, unless the contrary has been stipulated in the contract." The article speaks of "purchaser" but it ought to apply *a fortiori* to the usufructuary. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 791 (2d ed. Picard 1952).

268. See Decree of Jan. 4, 1955, art. 28(1)b; 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 666 (7th ed. Esmein 1961).

269. See Decree of Jan. 4, 1955, art. 30 (3); cf. 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 791 (2d ed. Picard 1952).

270. See LA. CIVIL CODE art. 2733 (1870); LA. CIVIL CODE art. 2704 (1825); LA. CIVIL CODE p. 380, art. 44 (1808). The version adopted in Louisiana is that of the *Projet du Gouvernement*, Book III, Title XIII, art. 56.

271. See FRENCH CIVIL CODE art. 1743, note 267 *supra*.

272. See LA. CIVIL CODE art. 2266 (1870). This provision derived from La. Acts 1855, No. 274, § 2. According to Louisiana *jurisprudence constante*, predial leases are "contracts . . . affecting immovables" within the meaning of article 2266. Accordingly, in order to be effective against third persons, predial leases

the land or immovable is situated; and neither secret claims or equities nor other matters outside the public records shall be binding on or affect such third parties."²⁷³ Third persons or third parties are defined to be "any third person . . . acquiring a real or personal right therein as purchaser, mortgagee, grantee or vendee of servitude. . . ."²⁷⁴

A literal interpretation of the quoted provisions might lead to the conclusion that leases contracted by the owner prior to the commencement of the usufruct are *never* binding on the usufructuary in the absence of recordation. It is submitted, however, that distinction ought to be made between usufructuaries by universal title and usufructuaries by particular title.²⁷⁵ A usufructuary by particular title is certainly a "third person" and "grantee or vendee of a [personal] servitude," within the scope of the statute. In the absence of recordation, such a usufructuary is not bound by leases contracted by the owner. On the other hand, a usufructuary by universal title, as the surviving spouse in community, is not a third person but a successor who continues the personality of the deceased and assumes his rights and obligations. Such a usufructuary is bound by the leases of the owner, even in the absence of recordation.

In Germany, leases for a period in excess of one year must be made in writing to be valid²⁷⁶ and leases in excess of thirty years may always be cancelled after completion of thirty years in accordance with statutory rules of notice.²⁷⁷ Subject to these limitations, and without any requirement as to certain date or recordation of the lease, the usufructuary is bound to respect leases granted by the owner if the lessee had taken delivery of the leased premises at the time of the creation of the usufruct.²⁷⁸ If the lease were granted prior to the creation of the usufruct but the lessee had not taken delivery at the time of the

must be recorded. See *Flower v. Pearce & Son*, 45 La. Ann. 853 (1893); *Lewis v. Klotz*, 39 La. Ann. 259 (1887); *Anderson v. Comeau*, 33 La. Ann. 1119 (1881); *Tate v. Fakouri*, 118 So. 2d 464 (La. App. 1st Cir. 1960); *State ex rel. Winn v. Sinclair Refining Co.*, 25 So. 2d 543 (La. App. 2d Cir. 1946); *Hamilton Co. v. Hughes*, 141 So. 398 (La. App. 2d Cir. 1932); cf. Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 TUL. L. REV. 491 (1965).

273. La. Acts 1950 (2 E.S.) No. 7, now LA. R.S. 9:2721 (1950). The statute was intended to overrule legislatively the decision of the Louisiana Supreme Court in *Arnold v. Sun Oil Co.*, 218 La. 50, 48 So. 2d 369 (1950).

274. LA. R.S. 9:2722 (1950).

275. See LA. CIVIL CODE art. 3556(28) (1870).

276. See B.G.B. § 566.

277. *Id.* § 567.

278. *Id.* § 577; 2 SOERGEL-ERDSIEK-MÜHL. BÜRGERLICHES GESETZBUCH 326 (9th ed. 1962).

creation of the usufruct, the usufructuary is bound to respect the lease only if he assumed towards the lessor the fulfillment of the obligations arising from the lease.²⁷⁹

In Greece, leases which acquired certain date prior to the creation of usufruct over the leased premises are binding on the usufructuary²⁸⁰ up to a period of nine years without recordation, and for a period in excess of nine years if they are dressed in the form of notarial act and are recorded.²⁸¹ Leases which have not acquired certain date prior to the creation of the usufruct are subject to cancellation by one month's notice if they are made for one year or less, and by two months' notice if they are made for a period in excess of one year.²⁸²

Different solutions have been adopted as to the validity of *leases contracted by the usufructuary*. Article 555 of the Louisiana Civil Code of 1870 establishes the general principle that all contracts or agreements made by the usufructuary "whatever duration he may have intended to give them, cease of right at the expiration of the usufruct."²⁸³ In accordance with this principle, article 2730 of the same Code declares that "a lease made by one having a right of usufruct, ends when the right of usufruct ceases."²⁸⁴ It may be said, therefore, that in Louisiana leases are not acts of administration insofar as the usufructuary is concerned. The usufructuary has no authority to act in a representative capacity by virtue of his real right of enjoyment. His contracts, however, may be binding on the naked owner in accordance with the general rules of express mandate,²⁸⁵ *negotio-*

279. See B.G.B. § 578.

280. See GREEK CIVIL CODE art. 614.

281. *Id.* art. 618; 2 ZEPHOS, LAW OF OBLIGATIONS 247 (2d ed. 1965).

282. See GREEK CIVIL CODE art. 615.

283. See LA. CIVIL CODE art. 555 (1870), note 261 *supra*; *Dickson v. Dickson*, 33 La. Ann. 1370 (1881). The second sentence of article 555 has no equivalent in the Civil Codes of France, Germany, or Greece. This does not mean that the usufructuary may elsewhere burden the property with real rights or affect it with contractual agreements running in excess of the period of usufruct. On the contrary, it follows from general theory that contracts made by the usufructuary and real rights validly granted by him expire with the usufruct. But, by virtue of exceptional provisions in these Civil Codes, leases granted by the usufructuary may, within certain limits, be binding on the naked owner for a period in excess of the usufruct. See text at notes 301-320 *infra*.

284. See LA. CIVIL CODE art. 2730 (1870); La. Civil Code art. 2701 (1825); La. Civil Code p. 380, art. 41 (1808). This article derives from the *Projet du Gouvernement*, Book III, Title XIII, art. 53. There is no equivalent in the Napoleonic Code.

285. See LA. CIVIL CODE arts. 2985-3034 (1870); *cf.* Yiannopoulos, *Brokerage, Mandate, and Agency in Louisiana: Civilian Tradition and Modern Practice*, 19 LA. L. REV. 777, 778 (1959); LA. CIVIL CODE art. 1889 (1870): "No one can, by a contract in his own name, bind any one but himself or his representatives. . . ."

rum gestio,²⁸⁶ *stipulation pour autrui*,²⁸⁷ and ratification by the owner.²⁸⁸

If the usufructuary grants a predial lease merely for the period of the usufruct or makes it clear to the lessee that he acts as usufructuary, the lessee is not entitled to any indemnity upon termination of the lease as a result of the termination of the usufruct.²⁸⁹ But "he who lets out the property of another, warrants the enjoyment of it against the claim of the owner."²⁹⁰ Thus, if the usufructuary misrepresents himself as owner or fails to disclose to the lessor the fact that he is usufructuary rather than owner, the lessee is entitled to an indemnity from the usufructuary or his heirs in case of premature termination of the lease.²⁹¹ The warranty of the lease by the usufructuary need not be express; it arises by operation of law in all cases of misrepresentation or non-disclosure of the identity of the lessor. Naturally, indemnity will be due *a fortiori* in case the usufructuary expressly warrants the lease for a stated period of time. In this case, the obligation is purely contractual and has nothing to do with misrepresentation or non-disclosure of identity.

Misrepresentation or non-disclosure of the lessor's identity, and express warranty, give rise to heritable obligations for the

286. See LA. CIVIL CODE art. 2299 (1870): "Equity obliges the owner, whose business has been well managed, to comply with the engagements contracted by the manager, in his name. . . ."

287. *Id.* art. 1890: "A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked." See also *id.* arts. 1889, 1902.

288. See *id.* art. 1840: "Contracts, however, made in the name of another, under void powers, will be valid, if ratified by the principal before the other contracting party has signified his dissent to the agreement." *Cf. id.* art. 2272; *Aucoin v. Greenwood*, 199 La. 704, 7 So.2d 50 (1942) (usufructuary's lease ratified by the owner). Question arises as to whether the lessee is bound by a lease contracted by the usufructuary for a period in excess of the usufruct. Since the naked owner is not bound, argument could be made that in the absence of mutuality of obligations the lessee should likewise be free of any contractual obligations. *Cf. LA. CIVIL CODE* arts. 1792, 1913 (1870). However, after ratification of the lease by the owner, the lessee is bound to the agreement. *Id.* art. 1840.

289. See *id.* art. 2730(2): "The lessee has no right to an indemnification from the heirs of the lessor, if the lessor has made known to him the title under which he possessed."

290. *Id.* art. 2682.

291. *Id.* art. 2730(2) (*arg. a contrario*); *Sparks v. Dan Cohen Co.*, 187 La. 830, 175 So. 590, 593 (1937): "The second paragraph of article 2730 is intended to protect one who leases property from an usufructuary under the belief on the part of the lessee that the lessor is the owner of the property. The reason for this is given in article 2682 of the Civil Code, thus: 'He who lets out the property of another, warrants the enjoyment of it against the claim of the owner'."

payment of the indemnity.²⁹² Since usufructs are normally for life, indemnity is ordinarily claimed from the heirs of the usufructuary as a result of the termination of the usufruct and of the lease by the death of the usufructuary. The heirs of the usufructuary, if they happen to be naked owners of the leased property, are not under obligation to continue the lease; the lease "ceases of right" upon the death of the usufructuary.²⁹³ But the naked owners may be bound to pay an indemnity in cases of misrepresentation, non-disclosure of identify, or express warranty, as all other heirs of the usufructuary, or, at their choice, to respect the terms of the lease. Where, exceptionally, the usufruct is for a term or terminates during the lifetime of the usufructuary because of the usufructuary's abuse of the property, any indemnity is due by the usufructuary himself.²⁹⁴

Mineral leases in Louisiana involve distinct problems. According to the "open mines" doctrine, the usufructuary has no right to grant mineral leases on lands which, at the time of the creation of the usufruct, were not being exploited by mineral operations.²⁹⁵ This is the prerogative of the naked owner who also enjoys the proceeds of minerals operations deriving from mines, quarries, or oil wells not opened at the time of the crea-

292. Language in *Sparks v. Dan Cohen Co.*, 187 La. 830, 175 So. 590, 592 (1937), creates the impression that "the obligation of a lessor, to warrant and defend the lessee's right of possession of the leased premises, survives as an obligation of the succession of the lessor, in the event of his death before the expiration of the term of the lease, *only* in cases where the lessor claimed ownership of the leased premises. . ." (Emphasis added.) Elsewhere in the opinion, however, the court seemed to indicate that the intended meaning of article 2730(2) is to protect the lessee not only in cases where the lessor claimed ownership of the leased premises but also in case the lessor merely failed to disclose his identify. See note 291 *supra*. It would seem that, according to a proper interpretation of articles 2730(2) and 2682 of the Louisiana Civil Code of 1870 in combination with articles 1999 and 2008 of the same Code, the heirs of the usufructuary incur the obligation to pay an indemnity in *all* cases of misrepresentation, non-disclosure of identity, or express warranty. On heritable obligations, see LA. CIVIL CODE arts. 1997-2009 (1870); Currier, *Heritability of Conventional Obligations*, 31 TUL. L. REV. 324 (1957).

293. *Sparks v. Dan Cohen Co.*, 187 La. 830, 175 So. 590, 593 (1937): "A lease made by the usufructuary, therefore, 'ceases of right at the expiration of the usufruct', whether the lessor informed the lessee, or failed to inform him before or at the time of making the lease, that he, the lessor, was only usufructuary, and not the owner, of the property." It is the right of the lessee to be indemnified by the heirs of the lessor, if the lessor is only the usufructuary and if he dies before the expiration of the term of the lease, that depends upon whether the lessor failed to make known to the lessee that he, the lessor, was not the owner but only the usufructuary of the property. That is the precise language and meaning of Article 2730 of the Civil Code. "An usufructuary cannot, by failing to disclose to a lessee that he, the lessor, is not the owner but only the usufructuary of the property, deprive the owner of the right under the law which says that such a lease 'ceases of right at the expiration of the usufruct'."

294. See *Dickson v. Dickson*, 33 La. Ann. 1370 (1881).

295. See LA. CIVIL CODE art. 552 (1870).

tion of the usufruct.²⁹⁶ If the usufructuary, without right, grants a mineral lease, the naked owner is free to cancel it at will; but the usufructuary or his heirs will incur the obligation to pay an indemnity for breach of the lessor's warranty.²⁹⁷

Conceivably, the usufructuary may grant mineral leases as to mines or oil wells opened and under exploitation by the owner at the time of the creation of the usufruct. This, however, is hardly a practical situation in oil development. Due to the high cost of oil production it is rare that a simple landowner is ever himself the producer. If wells are in operation at the time of the creation of the usufruct, the chances are that the mineral rights are already under lease or under some other form of exploitation.²⁹⁸ Questions, therefore, are more likely to arise in practice as to the disposition of the proceeds of mining operations and as to the rights of the usufructuary to extend or alter the terms of existing leases.²⁹⁹

In France, article 595(2) of the Civil Code, which has no equivalent in the Louisiana Civil Code of 1870, provides that if

296. See *King v. Buffington*, 240 La. 955, 126 So. 2d 236 (1961), text at notes 102-114 *supra*.

297. See LA. CIVIL CODE art. 2682 (1870), text at note 290 *supra*. In this respect, the usufructuary occupies the position of a person who, without right, leases the property of another. In effect, his position is similar to that of a usufructuary who grants a predial lease for a term in excess of the period of the usufruct by misrepresenting himself or failing to disclose his identity. The heirs of the usufructuary, if they accepted the succession unconditionally, incur the obligation to indemnify the lessee for the breach of the warranty.

If the heirs of the usufructuary are also naked owners of the property, they are bound by the warranty of their ancestor as *heirs* rather than as *owners*. Whatever rights the usufructuary grants on the property expire of right with the usufruct insofar as owners of the land are concerned; but heirs who have accepted the succession of the usufructuary unconditionally, assume the heritable obligations of the deceased. In theory, therefore, the obligation of the heirs, even if they are naked owners of the property, should be merely the payment of an indemnity for the breach of the warranty or at their choice, continuation of the lease, as in the case of predial leases. In practice, however, the amount of the indemnity for the breach of a mineral lease may not be easily ascertainable, and, in any case, the cancellation of the lease may involve reimbursement of large sums of money which the heirs may not have at their disposal. Under the pressure of circumstances, the heirs may be forced to respect the lease.

298. See Daggett, *Mineral Rights as They Affect the Community Property System*, 1 LA. L. REV. 17, 34 (1938). It ought to be clear that in the rare case of a mineral lease that the usufructuary is allowed to grant, the term of the lease may not exceed the period of the usufruct. In this respect, the respective positions of the usufructuary, the lessee, and of the naked owners are precisely the same as in the case of predial leases. Specifically, misrepresentation, non-disclosure of identity, and express warranty by the usufructuary ought to have the same effects as in predial leases.

299. In *Cochran v. Gulf Refining Co.*, 139 La. 1010, 72 So. 718 (1916), the surviving widow of the lessor, and usufructuary of land, granted extension of the term of an existing mineral lease. She died before the last extension expired.

the usufructuary grants "leases, he must conform, as to the periods for the renewal of the leases and as to their duration, with the rules established for the husband administrator of the property of his wife in the title *Of the Contract of Marriage and the Respective Rights of the Spouses*."³⁰⁰ Accordingly, whereas the usufructuary is always bound personally toward the lessee for the execution of the lease, the naked owner may be bound to respect the lease for limited periods and under stated terms and conditions applicable to the administration of matrimonial property. The validity of leases executed by the usufructuary is, specifically, determined according to the following rules:

At the end of the usufruct, the lease is *supra* divided into periods of nine years and the lessee is accorded the right to continue the lease until the end of the nine-year-period running at the time of the termination of the usufruct. If the lease has been granted for a longer period of time, it is reduced to fit the rule.³⁰¹ The fact that the naked owner is the heir of the usufructuary is immaterial in this respect: the obligations assumed by the usufructuary as usufructuary terminate with the usufruct and do not pass to his heirs.³⁰² If the usufructuary, however, misrepresented himself as owner or expressly warranted the lease, his heirs inherit obligations arising from the misrepresentation or from the warranty.³⁰³ By way of exception, any lease granted by the usu-

Her heirs and naked owners of the property accepted the succession unconditionally and by their actions showed their assent to the acts of the usufructuary. In an action to set aside the last extension and to cancel the lease, the court held that the heirs assumed the obligation of the deceased "with respect to the land, and were thereby bound to recognize the contract of lease" (139 La. at 1018, 72 So. at 720). Since the case was decided prior to *Gulf Refining Co. v. Glassel*, 186 La. 190, 171 So. 846 (1936), the decision was predicated on the assumption that the oil and gas lease in question involved the *sale of a real right*. See *Sparks v. Dan Cohen Co.*, 187 La. 830, 175 So. 590 (1937). Under the applicable rules of sales, heirs of the seller who accept the succession unconditionally assume the obligation of warranty of title which includes the duty "to cause the buyer to be placed in possession of the thing sold, that is, to deliver it, and to warrant the buyer's peaceable possession." *Smith, Recovery of Damages for Non-Delivery and Eviction in Louisiana—A Comparison*, 17 LA. L. REV. 253 (1957). If the case were decided today, the court would have to apply the rules governing leases rather than sales. Accordingly, the obligation of the heirs would be, on principle, the payment of an indemnity, or, at their choice, the continuation of the lease.

300. FRENCH CIVIL CODE, art. 595 (2), note 262 *supra*.

301. See Toulouse, Nov. 29, 1915, D. 1917.2.87; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 792 (2d ed. Picard 1952). Cf. FRENCH CIVIL CODE art. 1429.

302. See Req., April 18, 1921, D.1922.1.210, S.1922.1.15; Req., April 13, 1897, D.1898.1.76, S.1900.1.173. *But see* 2 COLIN, CAPITANT ET JULLIOT DE LA MORAN-DIÈRE, TRAITÉ DE DROIT CIVIL 161 (1959).

303. See Req., April 18, 1921, D.1922.1.210, S.1922.1.15; Trib. Civ. Fontainebleau, Nov. 25, 1932, Gaz. Trib. March 24, 1933, 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 665 n.58 (7th ed. Esmein 1961).

fructuary in fraud of the rights of the naked owner is subject to annulment regardless of its intended duration.³⁰⁴

The law, in order to prevent vacancies, allows the usufructuary to renew the lease of a building in the last two years of the running nine-year-period and the lease of a rural immovable in the last three years of the running nine-year-period.³⁰⁵ In case the usufructuary exercises this faculty, the lease may bind the owner of a building for eleven years and the owner of a rural immovable for twelve years. Leases executed by the usufructuary prior to the last two or three years of the running nine-year-period are null, unless performance of the contract commenced before the termination of the usufruct.³⁰⁶

Annulment or reduction of the term of a lease may be demanded only by the naked owner. The lessee has not been accorded a corresponding faculty;³⁰⁷ thus, if the naked owner chooses to maintain the lease, the lessee is bound to the terms of the contract. Rentals, even if paid in advance, are apportioned between the naked owner and the usufructuary in proportion to the duration of the usufruct.³⁰⁸ Bonuses received by the usufructuary upon conclusion of the lease are likewise subject to apportionment.³⁰⁹

French writers maintain that article 595 of the French Civil Code refers to immovables exclusively. Accordingly, any lease of movables granted by the usufructuary should, on principle, be effective only as between the parties to the contract. It has been pointed out, however, that this rigorous interpretation may run counter to the intention of the parties and may do violence to the demands of economic utility. By way of exception, therefore, it seems to be generally admitted that the usufructuary has authority to lease movables which by their nature are destined to be leased, as for example, a fleet of automobiles for hire.³¹⁰

304. See Ch. réun. May 21, 1952, D.1952.537; Pau, Feb. 19, 1959, D.1959.409; Req., Oct. 28, 1896, D.1897.1.45; Poitiers, March 22, 1881, D.1881.2.150, S.1882.2.105; Orléans, Dec. 31, 1868, S.1869.2.51; Poitiers, April 29, 1863, S.1863.2.169.

305. See FRENCH CIVIL CODE art. 1430.

306. See Trib. Pithiviers, May 28, 1925, D.H. 1925.511; Trib. Civ. Seine, LE DROIT, Feb. 11, 1892; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 793 (2d ed. Picard 1952).

307. See Req., Jan. 29, 1883, D.1883.1.314, S.1885.1.482; Douai, March 18, 1852, D.1853.2.20, S.1852.2.337; 2 AUBBY ET RAU, DROIT CIVIL FRANÇAIS 665 (7th ed. Esmein 1961).

308. See Civ., July 20, 1897, D.1899.1.17, S.1899.1.78.

309. See 2 AUBBY ET RAU, DROIT CIVIL FRANÇAIS 664 n.56 (7th ed. Esmein 1961).

310. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 794 (2d ed. Picard 1952).

In Germany and in Greece the usufructuary has been accorded by law, in effect, authority to lease immovables for a period exceeding the term of the usufruct.³¹¹ In both countries, upon termination of the usufruct, the naked owner is substituted for the usufructuary as lessor. However, different rules apply in each country with respect to the precise effect of usufructuary's leases vis-a-vis the naked owner. In Germany, the naked owner has been given the right to terminate the lease of the usufructuary before the expiration of the stipulated term by complying with the statutory rules of notice.³¹² In case the usufructuary waives his usufruct or is deprived of his right of enjoyment for any cause, the naked owner may give notice for the termination of the lease only at the time that the usufruct would have expired without the waiver or cancellation.³¹³ Upon termination of the usufruct, the lessee is entitled to summon the owner to make a declaration within a fixed reasonable period whether or not he will exercise his right of giving notice; after the lapse of this period, the owner may terminate the lease for cause only.³¹⁴ Disposition, by the usufructuary, of rentals due to accrue after the termination of the usufruct may be opposed to the naked owner only for the calendar month current at the time of termination of the usufruct.³¹⁵ Juridical acts made between the lessee and the usufructuary for the payment of the rent are effective against the naked owner only for the calendar month in which the lessee acquired knowledge of the termination of the usufruct, and, if he acquired knowledge after the fifteenth day of the month, for the following month. Such juridical acts are entirely ineffective if made after the termination of the usufruct and the lessee had knowledge of the fact.³¹⁶

311. See B.G.B. § 1056; GREEK CIVIL CODE art. 1164. Section 1056 of the German Civil Code makes applicable to leases contracted by the usufructuary, with certain modifications, and article 1164 of the Greek Civil Code without modification, the rules governing transfer of ownership or encumbrance of immovables under lease. Under both Codes, the lessee is protected, subject to certain conditions, against eviction by the new owner or acquirer of a real right on the immovable. See, in general, Ackerman, *Haftung des Niessbrauchers aus von ihm abgeschlossenen Mietsverträgen bei vorzeitiger Kündigung durch den Ersteher oder den Eigentümer*, BLÄTTER FÜR RECHTSPFLEGE IM BEZIRK DES KAMMERGERICHTS 12 (1919); Gschnitzer, *Miete von Nichtberechtigten*, 123 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 43 (1925).

312. See B.G.B. § 1056(2), referring by implication to §§ 565 and 595 of the same Code; 3 STAUDINGER-SPRENG, KOMMENTAR ZUM B.G.B. 1142 (11th ed. 1963).

313. *Ibid.* See also K.G., Oct. 10, 1907, 18 O.L.G. 150 (1909); 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 415 (9th ed. 1960).

314. See B.G.B. § 1056(3).

315. See *id.* § 1056(1), referring to § 573, first sentence, of the same Code.

316. See B.G.B. § 1056(1), referring to § 574 of the same Code.

According to the much simpler regulation of the Greek Civil Code, the validity and effect of leases made by the usufructuary are matters determined, without exception, by analogous application of the provisions governing transfer of leased immovables.³¹⁷ Thus, if the lease is embodied in an instrument which has acquired certain date, the naked owner, upon termination of the usufruct, assumes the obligations and enjoys the rights attributed to any lessor under the Code.³¹⁸ If the lease has not acquired certain date, or if the lease provides that the naked owner will have the right to terminate the lease, the naked owner is free to give notice in accordance with the statutory rules.³¹⁹ Payments of advance rentals to the usufructuary or his assigns may be opposed to the naked owner only for a period of three months from the time the naked owner has notified the lessee of the termination of the usufruct.³²⁰

In both countries, the substitution of the naked owner in the position of the usufructuary as lessor does not relieve the usufructuary of his own civil responsibility toward the lessee for premature termination of the lease. Thus, if upon termination of the usufruct the naked owner has the right, and chooses, to give the statutory notice before the expiration of the term of the lease, the usufructuary or his heirs will suffer the consequences of the violation of the contract.³²¹

b. Collection of Capital

In all legal systems under consideration, the usufructuary has some measure of authority to collect capital payments due to the naked owner. In Germany and in Greece, directly applicable provisions in the Civil Codes³²² confer on the usufructuary of a claim authority to collect payment with or without the concurrence of the naked owner. In the absence of corresponding provisions in the Louisiana and French Civil Codes, doctrine and jurisprudence have reached comparable solutions by reference to the usufructuary's power of administration.³²³

317. See GREEK CIVIL CODE art. 1164.

318. *Ibid.*, referring by clear implication to article 614 of the same Code. Leases made for a period in excess of nine years must be recorded. See text at note 281 *supra*; GREEK CIVIL CODE art. 618.

319. GREEK CIVIL CODE art. 1166, referring by clear implication to article 615 of the same Code.

320. *Ibid.*, referring by clear implication to article 617 of the same Code.

321. See B.G.B. §§ 535, 536, 538, 541; GREEK CIVIL CODE arts. 574, 575, 583, 584.

322. See text at notes 231-251 *supra*.

323. See text at notes 220-230 *supra*.

Further, the usufructuary may have authority to collect payments due for the expropriation, damage, or total destruction of the property subject to usufruct. In this respect, solutions vary with each legal system and detailed discussion of the applicable rules of law is here desirable.

(1) *Expropriation.* In Louisiana, argument could be made that the expropriation of the property subject to usufruct results in termination of the usufructuary's right of enjoyment³²⁴ and that the usufructuary is entitled to demand from the expropriating authorities compensation for the deprivation of *his* interest.³²⁵ However, at least in cases involving the legal usu-

324. See LA. CIVIL CODE art. 613(1) (1870): "The usufruct expires before the death of the usufructuary, by the loss, extinction or destruction of the thing subject to usufruct." Paragraph 3 of the same Article seems to exclude application of the principle of real subrogation, stating expressly that "the usufruct is to be retained to what is specified in the title". See also *id.* art. 615: "The thing subject to the usufruct is considered as lost, when it undergoes from accident, such a change in its form that it can no longer be applied to the use for which it was originally destined."

325. This is the rule of law applicable to the expropriation of property burdened with a predial servitude or with a predial lease. See *Arkansas Louisiana Gas Co. v. Louisiana Department of Highways*, 104 So.2d 204 (La. App. 2d Cir. 1958) (expropriation of property burdened with a pipeline right of way; *held*, a right of way is property and interference with its free use by the owner thereof gives rise to a right for compensation). See also *Department of Highways v. Caldwell Brothers Real Estate, Inc.*, 155 So.2d 231 (La. App. 2d Cir. 1963); *Louisiana Power and Light Co. v. Department of Highways*, 142 So.2d 807 (La. App. 1st Cir. 1962). In case the expropriated property is leased, the lessee, though holder of a personal right, is entitled to recover compensation from the expropriating authorities for the privation of his "lease advantage." See *State Through the Department of Highways v. Levy*, 242 La. 259, 136 So.2d 35 (1961); *State v. Ferris*, 227 La. 13, 78 So.2d 495 (1955); *In re Morgan R. R. & S. S. Co.*, 32 La. Ann. 371 (1880). In *State through Department of Highways v. Cockerham*, 182 So.2d 786, 789 (La. App. 1st Cir. 1966), the court declared: "The purchase or expropriation of the rights of the owner does not therefore necessarily embrace or operate upon the right of the lease. That right in order to be affected must be itself the object of purchase or expropriation. . . . The purchaser gets only the thing encumbered by the lease. That is all he can get, for that is all the owner has." It would seem, therefore, that in case of expropriation of the property subject to usufruct, the usufructuary ought to recover the value of his interest from the expropriating authorities. Decided cases dealing with the rights of the lessee do not only furnish a rule by analogy but also give rise to an argument *a fortiori*.

Further, it would seem that, in an action for expropriation of property subject to usufruct, the usufructuary as well as the naked owner is an indispensable party. See *Tennessee Gas Transmission Co. v. Derouen*, 239 La. 467, 118 So.2d 889, 891 (1960): "It is elementary that every party who may be affected by a decree must be made a party to a suit, because no one should be condemned without a hearing. This principle is sanctioned by numerous decisions of this court." In this case, involving expropriation of a pipeline right of way, action was brought against the owner of an undivided one-half share in the property and usufructuary of the other half; the court held that the naked owners were indispensable parties. Obviously, the same rule ought to apply in the converse situation of an action brought against the naked owner alone.

It ought to be noted, however, that existing legislative texts in Louisiana are susceptible of the interpretation that the expropriating authorities acquire perfect ownership "free and clear of all encumbrances" upon deposit of the indemnity in the registry of the court and that persons claiming interests on the land must look

fruct of the surviving spouse, Louisiana courts seem to be prepared to grant to the usufructuary the right to collect and enjoy the sums due as an indemnity for the taking of the property subject to usufruct. In *State Through the Department of Highways v. Costello*,³²⁶ land burdened with a usufruct in favor of the survivor in community had been expropriated and the indemnity deposited in the registry of the court. The children, issue of the marriage and naked owners of the land, opposed the withdrawal of funds from the registry of the court by the usufructuary, relying on article 613 of the Louisiana Civil Code of 1870.³²⁷ The court, citing a number of cases for the proposition that the survivor's usufruct did not terminate "merely because the property to which the usufruct attached was changed in form,"³²⁸ held that the usufructuary was entitled to withdraw the funds. "The proceeds of the expropriated property," the court declared, "belong to the naked owner, subject however to the rights of the usufructuary."³²⁹ The decision may be explained as involving application of the principle of real subrogation: the indemnity of expropriation that the usufructuary has collected is substituted for the property.³³⁰

It remains to be seen whether Louisiana courts will apply the same principle of real subrogation to conventional usufructs. It ought to be noted that the court in the *Costello* case took care to ground its decision on article 916 of the Louisiana Civil Code of 1870 and pointed out that "the purpose of this article is to preserve the community upon the death of one spouse and to grant to the survivor the means of maintaining himself and

for reimbursement in a concursus proceeding or from "the person who received the price." See LA. R.S. 19:11 (1950); LA. CIVIL CODE art. 2641 (1870); and, in general, Comment, *Expropriation—Compensable Items in Louisiana*, 24 LA. L. REV. 849, 868-76 (1964).

326. 158 So. 2d 850 (La. App. 4th Cir. 1963).

327. See note 324 *supra*.

328. *State Through Department of Highways v. Costello*, 158 So. 2d 850, 852 (La. App. 4th Cir. 1963). Indeed, Louisiana decisions support the proposition that property subject to the usufruct of the surviving spouse is governed by the principle of real subrogation. See *Magee v. Catlin*, 51 So. 2d 154 (La. App. 1st Cir. 1951) (motor vehicles subject to survivor's usufruct sold by the survivor; *held*, usufruct attached to the proceeds of the sale); *Succession of Russel*, 208 La. 213, 23 So. 2d 50 (1945) (sale of assets of the succession for the payment of debts; *held*, usufruct of the survivor attaches to cash residue after payment of debts); *Succession of Dielman*, 119 La. 101, 43 So. 972 (1907) (sale of stock by liquidator of succession; *held*, survivor's usufruct attached to the proceeds of liquidation). See also Note, 39 TUL. L. REV. 160 (1964).

329. *State Through Department of Highways v. Costello*, 158 So. 2d 850, 852 (La. App. 4th Cir. 1963).

330. See YIANNPOULOS, CIVIL LAW PROPERTY § 82 n. 196 (1966).

his family.”³³¹ Obviously, this rationale does not apply to conventional usufructs; and, in the absence of legislative authorization, further extension of the principle of real subrogation is unwarranted. Moreover, courts ought to be aware that real subrogation without some form of security for the naked owner may indeed be detrimental to the interests of the naked owner. Prior to the expropriation, the naked owner is afforded a measure of protection by the rules governing usufruct of corporeal immovables as well as by the form of the property; after expropriation, the usufructuary acquires a quasi-usufruct of money and restitution of the sum at the end of the usufruct is largely dependent on the financial situation and good faith of the usufructuary.³³²

In France, the statute regulating expropriation of property for public utility provides expressly that, in case the property is burdened with usufruct, the administrative authorities owe a single indemnity which is substituted for the property expropriated.³³³ Accordingly the usufructuary is entitled to collect and enjoy for the period of the usufruct the entire indemnity of expropriation. Since, however, expropriation results in conversion of a perfect usufruct into an imperfect one, usufructuaries other than parents having the enjoyment of the property of their minor children are required by the same law to furnish security. This requirement, being a rule of public law, does not establish a civil obligation of the administrative authorities toward the naked owner; if the usufructuary obtains payment without having given security, the administrative authorities are not civilly liable to the naked owner.³³⁴

In Germany, expropriation of the thing subject to usufruct extinguishes the usufructuary's right of enjoyment. However, constitutional guarantees and rules of public law contained in federal and state legislation secure to the usufructuary and to the naked owner an indemnity representing the value of their respective interests.³³⁵

331. *State Through the Department of Highways v. Costello*, 158 So.2d 850, 852 (La. App. 4th Cir. 1963).

332. See Comment, *The Usufruct of the Surviving Spouse*, 25 LA. L. REV. 873, 885 (1965).

333. See Decree of August 8, 1935, art. 35.

334. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 796, 842 (2d ed. Picard 1952).

335. See WOLFF-RAISER, *SACHENRECHT* 224, 479 (10th ed. 1957); 3 STAUDINGER-SPRENG, *KOMMENTAR ZUM B.G.B.* 1111 (11th ed. 1963). Cf. *INTRODUCTORY Law of the Civil Code* art. 109.

In contrast with the casuistic approach followed in Louisiana, France, and Germany, article 1171 of the Greek Code provides generally that the usufruct of a corporeal thing includes claims for any payment, compensation, or indemnity, due by virtue of insurance contracts or as damages for the deterioration, destruction, or expropriation of the thing subject to usufruct.³³⁶ In case the thing subject to usufruct is expropriated, damaged, or destroyed, the usufruct attaches to attendant claims and is governed by the articles of the Civil Code which deal with claims in usufruct.³³⁷ Both the usufructuary and the naked owner have the right to demand that any sum collected be disbursed for the restoration or replacement of the thing, if restoration or replacement is warranted under the rules of orderly management.³³⁸ In case this demand is granted, the usufruct becomes again governed by the rules applicable to corporeals.³³⁹

(2) *Damage to, or total destruction of, the property subject to usufruct.* In case the thing subject to usufruct is damaged or totally destroyed through the wrongful act of a third person, both the usufructuary and the naked owner may suffer pecuniary losses. Questions arise, therefore, as to the rights of the usufructuary to bring action and collect payment for injuries to his interest, the interest of the naked owner, or both.

In Louisiana, the usufructuary is clearly entitled to proceed in his own name and recover damages attributable to the infringement of his right of enjoyment due to the wrongful deterioration or partial destruction of the thing subject to usufruct.³⁴⁰ If, however, the damage is attributable both to the right of enjoyment and the naked ownership, or to the naked ownership exclusively, it would seem that the naked owner must be made a party to the proceeding.³⁴¹ Sums recovered for dam-

336. See GREEK CIVIL CODE art. 1171.

337. See text at notes 238-239 *supra*; See BALIS, CIVIL LAW PROPERTY 382 (3d ed. 1955) (in Greek).

338. See GREEK CIVIL CODE art. 1172.

339. See BALIS, CIVIL LAW PROPERTY 382 (3d ed. 1955) (in Greek).

340. See LA. CIVIL CODE art. 2315 (1870); *Miller v. Colonial Pipeline Co.*, 173 So. 2d 840 (La. App. 3d Cir. 1965); *New Orleans v. Wire*, 20 La. Ann. 500 (1868).

341. In *Miller v. Colonial Pipeline Co.*, 173 So. 2d 840, 842 (La. App. 3d Cir. 1965), the court of appeal apparently adopted the view that in case of "alteration or depletion of the substance of the land, such that the naked owners will be permanently deprived of any part thereof or right thereto," the naked owners must be made a party to the suit. Yet, in another part of the opinion, the court of appeal quoted with approval the following language from the opinion of the lower court: "The Exception of Improper Parties Plaintiff . . . is overruled for the reason that the usufructuary is charged with the responsibility of maintaining the land in its original condition. Should the usufructuary fail to take action

age to the property will have to be disbursed for its restoration, subject to the rules of the Civil Code governing repairs.³⁴²

No Louisiana cases have been found dealing with the total destruction of the property subject to usufruct due to the wrongful act of a third person. In this case, a literal interpretation of article 613 of the Louisiana Civil Code of 1870³⁴³ should lead to the conclusion that the usufruct terminates and that both the usufructuary and the naked owner may sue the wrongdoer for injuries to their respective interests.³⁴⁴ Further, it might be argued that the usufructuary is under duty to notify the naked owner of the destruction of the property³⁴⁵ and to bring suit in his own name, making the naked owner a party to the litigation.³⁴⁶ In cases involving usufruct of the surviving spouse, however, Louisiana courts may be expected to apply the principle of real subrogation, allowing the usufructuary not only to sue in his own name but also to recover and enjoy the payment for the period of the usufruct.³⁴⁷

In France, doctrine and jurisprudence are in agreement that, in case of wrongful damage or destruction of the property subject to usufruct, the usufructuary is entitled to collect by virtue of his power of administration, and enjoy by application of the principle of real subrogation, any indemnity due.³⁴⁸ In this respect, article 617 of the French Civil Code, corresponding to article 613 of the Louisiana Civil Code of 1870, has been interpreted as applicable, exclusively, to accidental destruction of the property.

In Germany, the usufructuary may bring action against any wrongdoer for any damage suffered in the exercise of his right

to recover for and repair the damages, then the naked owners would have a cause of action against the usufructuary for damages (LSA-R.C.C. 570, 573) or could sue for the termination of the usufructuary (sic), LSA-R.C.C. 621." The requirement that the naked owner be made a party to the suit tends to safeguard the interests of the naked owner: the usufructuary will not be allowed to recover, and spend at his pleasure, sums representing damage to the property or to the right of naked ownership. But if, for any reason, the naked owner does not wish to prosecute the claim, the usufructuary ought to be allowed to proceed alone and recover damages representing injuries to his right of enjoyment.

342. See LA. CIVIL CODE arts. 567, 570-577 (1870). Thus, if neither the usufructuary nor the naked owner is under obligation to make repairs, each will be entitled to keep the sums recovered.

343. See note 324 *supra*.

344. See LA. CIVIL CODE art. 2315 (1870).

345. *Id.* art. 591.

346. See text at note 341 *supra*.

347. See text at notes 326-331 *supra*.

348. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 842 (2d ed. Picard 1952).

of enjoyment, and if the property is completely destroyed and his usufruct extinguished, for the full value of the usufruct.³⁴⁹ Naturally, the naked owner may bring an independent action for any injury to his naked ownership. In Greece, as indicated above, the usufructuary's interest attaches to the claims born of the deterioration or destruction of the thing.³⁵⁰

(3) *Insurance payments.* In case the property damaged or totally destroyed is covered by insurance, questions arise as to the rights of the usufructuary and of the naked owner to the proceeds of insurance. If the usufructuary and the naked owner had insured their respective interests separately, *i.e.*, the usufructuary his right of enjoyment and the owner his naked ownership, each should be entitled to recover and keep payments due as compensation for their individual losses.³⁵¹ But if insurance has been taken by the usufructuary or by the naked owner for the value of the entire property, several solutions are possible. For example, the proceeds of insurance may be apportioned between the usufructuary and the naked owner; the naked owner may be granted the entire sum, subject to the enjoyment of the usufructuary; or payment may be made to the named insured up to the amount of his actual loss.

In Louisiana, in the absence of directly applicable legislative texts or judicial decisions on point, solutions may be suggested in the light of general principles, considerations of equity or policy, and analogous application of existing texts.³⁵² These solutions may vary with the person of the insured, the coverage of the insurance, and the type of the loss.

Under Louisiana law, both the naked owner and the usufructuary have insurable interests; therefore, each may insure not only his own right of enjoyment or naked ownership, as the case may be, but also the entire property subject to usufruct.³⁵³

349. See B.G.B. § 1065; 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 422-23 (9th ed. 1960). The usufructuary, however, cannot bring an action in his own name for damages to the naked ownership. See WOLFF-RAISER, SACHENRECHT 479 (10th ed. 1957).

350. See text at notes 336-339 *supra*.

351. See text at notes 355, 365 *infra*. In France, insurance companies request that usufructuary and naked owner be insured separately. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 796 (2d ed. Picard 1952).

352. See LA. CIVIL CODE art. 21 (1870).

353. *Cf.* LA. R.S. 22:614 (1950), as amended and re-enacted by La. Acts 1958, No. 125; *Knigheten v. North British & Mercantile Ins. Co.*, 238 La. 767, 116 So.2d 516 (1960); *Welch v. New York Underwriters Ins. Co.*, 145 So.2d 376 (La. App. 3d Cir. 1962); *Rube v. Pacific Ins. Co.*, 131 So.2d 240 (La. App. 1st Cir. 1961). The statute does not preclude the existence of multiple insurable

Indeed, the usufructuary may be under obligation to insure the property up to its full value;³⁵⁴ and the naked owner, though not under obligation, ought to be granted the same right. If the usufructuary had insured his right of enjoyment only, and the naked owner his naked ownership, each should be entitled to recover an indemnity from his insurer as compensation of his individual loss. It is another question, of course, whether the person recovering the indemnity may or may not be under obligation to expend sums for repairs.³⁵⁵

When the entire property is insured jointly by the usufructuary and by the naked owner, it is clear that the insurance has been taken in their common interest and that each named insured has a claim to the proceeds in proportion to his loss. If insurance is taken on the entire property by the usufructuary or by the naked owner acting alone but expressly in the names or interests of both, it ought to be equally clear that the other party may recover payments from the insurer under the theories of *stipulation pour autrui* or *negotiorum gestio*.³⁵⁶ But if insurance is taken by the usufructuary or by the naked owner on the entire property without any mention of the name or interests of the other party, argument could be made that, under Louisiana insurance law, recovery may be had only by the named insured.³⁵⁷ It is submitted, however, that this solution, conferring on insurance companies an unfair advantage, should not be adopted; instead, it ought to be admitted that in all cases where the entire property is insured by the usufructuary or by

interests. *Milan v. Providence Washington Ins. Co.*, 227 F. Supp. 251 (E. D. La. 1964).

354. According to article 567 of the Louisiana Civil Code of 1870, the usufructuary is under duty to administer the property as a "prudent owner." This provision should be interpreted to include the duty to insure the property. *Cf.* LA. CODE OF CIVIL PROCEDURE art. 4262 (1960), providing that the tutor "shall act at all times as a prudent administrator." Comment (c) under the same article points out that "the duty to insure is covered by the prudent administrator concept." See also Besangon, April 1, 1963, D.1863.2.93 which analogized the usufructuary's situation as prudent administrator to that of a tutor and held him responsible to the naked owner for not having paid premiums where a loss had occurred. *But see* Comment, *The Usufructuary's Obligation to Preserve the Property*, 22 LA. L. REV. 808, 817 (1962), suggesting that the naked owner should bear the cost of premiums for accidental losses which he is responsible to make good, and the usufructuary for losses occasioned by his own fault or neglect which he is under obligation to repair.

355. See LA. CIVIL CODE arts. 570-577 (1870).

356. See notes 286, 287 *supra*; text at note 367 *infra*. Resort to these theories would be unnecessary if the naked owner and the usufructuary were named co-beneficiaries or if the policy taken by one were partly assigned to the other with the consent of the insurer.

357. See LA. R.S. 22:615, as amended and reenacted by La. Acts 1958, No. 125: "When the name of a person intended to be insured is specified in the policy, such insurance can be applied only to his own proper interest."

the naked owner, even if the name or interests of the other party are not mentioned, the person not named in the insurance policy could have a claim to the proceeds, in proportion to his loss, under the theory of a tacit stipulation in his favor or under the rules of *negotiorum gestio*.³⁵⁸

If Louisiana courts were to adopt the view that insurance taken on the entire property by either party benefits, in all cases, both the usufructuary and the naked owner, the following results would be obtained. In case of partial destruction or damage to the property, each should be entitled to recover for his actual loss.³⁵⁹ Thus, the usufructuary should recover for the diminution of his enjoyment, damage to his own property on the premises, and damage to the property subject to usufruct which he is under obligation to repair, *i.e.*, the cost of ordinary repairs as well as the cost of extraordinary repairs occasioned by his own fault or neglect.³⁶⁰ The naked owner should likewise recover for his actual loss, *i.e.*, the cost of extraordinary repairs he is under obligation to make.³⁶¹ In case of total destruction of property, if it were accepted that the usufruct terminates,³⁶² the actual loss of the usufructuary is the value of his enjoyment as well as any damage to his own property. Conversely, the actual loss of the naked owner is the value of his naked ownership or the value of the entire property minus the value of the usufructuary's enjoyment. If the principle of

358. See text at note 368 *infra*.

359. Under Louisiana insurance law, in principle, the insured may recover only for his actual loss. *Lighting Fixture Supply Co. v. Pacific Fire Ins. Co.*, 176 La. 499, 146 So. 35 (1933); *Macarty v. Commercial Ins. Co.*, 17 La. 365, 369 (1841): "If the assured retains but a partial interest in the property, it will only protect such insurable interest as he had at the time of the loss"; *Chambers v. North British & Mercantile Ins. Co.*, 175 So. 95 (La. App. 1st Cir. 1937). However, under valued insurance policies, an insured could recover in the past the face value of the policy even if his insurable interest were less than the face value. See *The Forge, Inc., v. Peerless Co.*, 131 So. 2d 838 (La. App. 2d Cir. 1961); *Share v. Northwestern Underwriters of Citizens Ins. Co.*, 208 F. Supp. 461 (W.D. La. 1962). Today, under LA. R.S. 22:695, as amended by La. Acts 1964, No. 464, "the liability of the insurer, in the event of total or partial loss, shall not exceed the insurable interest of the insured in the property and nothing shall be construed as precluding the insurer from questioning or contesting the insurable interest of the insured."

360. In the first place, the usufructuary is under obligation to repair damage occasioned by his own fraud, fault or neglect. LA. CIVIL CODE art. 567 (1870). Further, the usufructuary is bound to make ordinary repairs (*id.* arts. 570, 571(1), and 577) as well as extraordinary repairs which "have become necessary in consequence of the usufructuary's neglect to make the repairs for keeping the property in good order" (*id.* art. 571(2)).

361. The naked owner is under obligation to make, or at least reimburse the usufructuary for, certain extraordinary repairs. LA. CIVIL CODE arts. 571(2), 576 (1870).

362. See text at notes 327, 343 *supra*.

real subrogation were to be applied, as in cases of legal usufruct,³⁶³ the usufructuary should be attributed the entire proceeds until the end of the usufruct. This is the simplest solution, and, perhaps, it should be adopted in all cases of total destruction of the property, especially if it were accepted that the usufructuary is under obligation to insure the property and pay the premiums.³⁶⁴

If Louisiana courts were to adhere strictly to the rule that insurance payments must be recovered by the named insured only,³⁶⁵ the following results would ensue. In case the entire property is insured by the usufructuary, and the loss is damage to, or partial destruction of, the property, the usufructuary should be entitled to recover his actual loss as itemized above.³⁶⁶ If the insured party is the naked owner, it would seem that his loss should be measured merely by the cost of extraordinary repairs he is bound to make, since any other loss would have to be made good by the usufructuary. Indeed, if the naked owner were to recover for the entire damage to the property, the insurer would have a right to be subrogated in the rights of the naked owner against the usufructuary, which would result in a circuity of actions. In case of total destruction of the property, the recovery of the insured usufructuary should be limited to the value of his enjoyment, plus any damages he may owe to the naked owner. Conversely, the insured naked owner should recover only the value of his naked ownership. Strict adherence to the rule would also limit the operation of the principle of real subrogation in cases of legal usufruct: the legal usufructuary could not properly claim the funds representing the value of the naked ownership. These solutions confer an unfair advantage on insurance companies. The insured party has paid premiums calculated on the value of the entire property but his recovery may be limited to a small fraction of the insured value. For this reason, and in the interest of justice for all concerned, it has been suggested that insurance policies covering the entire property should be so interpreted as to protect both the usufructuary and the naked owner, no matter who is the named insured.

363. See text at notes 330, 347 *supra*; Succession of Glancey, 114 La. 1051, 38 So. 826 (1905) (indemnity of insurance for the destruction of property by fire paid to the usufructuary rather than the naked owners).

364. See text at note 354 *supra*.

365. *Cf.* note 357 *supra*.

366. See text at note 360 *supra*.

In France, insurance taken jointly by the usufructuary and by the naked owner for the entire property benefits the parties up to the amount of their respective interests. If insurance is taken on the entire property by the naked owner or by the usufructuary separately but expressly in the interests of both, the other party may recover payments from the insurer under the theory of *stipulation pour autrui*.³⁶⁷ But if the contract of insurance made by the usufructuary or by the naked owner does not mention the interests of the other party, payments according to the prevailing view may be claimed only by the named insured up to the value of his interest. This solution has been rightly criticized in France on the ground that where insurance is taken by either party on the entire property there is a tacit stipulation in favor of the other party.³⁶⁸

Under the German Civil Code, the usufructuary is bound to insure the property subject to usufruct against fire and casualty, "if orderly management so requires."³⁶⁹ The insurance policy is taken by the usufructuary in his own name but on behalf of the naked owner who is the beneficiary. If the property is already insured, the usufructuary must pay for the period of the usufruct, premiums which he would have been under obligation to pay had the property been uninsured. These provisions do not preclude the usufructuary or the naked owner from insuring their interests separately and to recover under their own separate policies payments for losses sustained.³⁷⁰ If insurance has been taken by the usufructuary or by the naked owner on the entire property, the usufruct extends to all claims against the insurer for damage or destruction of the property.³⁷¹ These payments need be collected jointly by the usufructuary and the naked owner, as is the case with all claims bearing interest.³⁷²

367. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 833 (2d ed. Picard 1952).

368. *Id.* at 834. Under the theory of a tacit *stipulation pour autrui*, in combination with the principle of real subrogation, it is maintained in France that a usufructuary who has insured the entire property is entitled to recover in case of total destruction the full value of the property rather than the value of his enjoyment. At the end of the usufruct, the usufructuary is bound to restore this value to the naked owner; in turn, the naked owner is bound to reimburse the usufructuary for the premiums he has paid. See 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 675 (7th ed. Esmein 1961).

369. See B.G.B. § 1045; J. Gierke, *Der Versicherungsvertrag beim Niessbrauch in B.G.B.*, 40 IHERINGS JAHRBÜCHER 341-450 (1899). See also GREEK CIVIL CODE art. 1154.

370. See 2 STAUDINGER-SPRENG, *KOMMENTAR ZUM B.G.B.* 1125 (11th ed. 1963).

371. *Id.* at 1126; B.G.B. § 1046(1).

372. See B.G.B. § 1046(1); text at notes 235-236 *supra*.

Either of them, however, may demand that payments collected be applied to the restoration or replacement of the property, if the demand accords with orderly management.³⁷³ In case no such demand is made or granted, the usufructuary is entitled to enjoy the indemnity in accordance with the rules governing usufruct of claims. Identical solutions are provided for in the Greek Civil Code on the basis of a much broader regulation.³⁷⁴

c. Sales of Crops, Fruits, and Timber

In France, the usufructuary may, by a contract valid toward the naked owner, sell standing crops, fruits, and timber, even if the usufruct is to terminate before the harvesting of the crops and fruits or the cutting of the timber.³⁷⁵ This solution rests on a broad interpretation of article 595 of the French Civil Code and on considerations of economic utility.³⁷⁶ The sale of hanging crops and fruits, and of standing timber, is thus classified as an act of administration furthering the interests of both the usufructuary and the naked owner. Indeed, a better price may be realized by timely sale and single harvesting. The price of the sale is apportioned according to the rules established in article 585 of the French Civil Code: the usufructuary is entitled to the portion of the price representing the value of crops, fruits, and timber harvested or cut prior to the termination of the usufruct and the naked owner to the portion representing the value of crops, fruits, and timber hanging by branches or roots at the end of the usufruct.³⁷⁷

These solutions, though perhaps desirable, cannot be followed in Louisiana, Germany, or Greece. In these jurisdictions, in the absence of express legislative provisions to the contrary, contractual rights granted by the usufructuary are without effect vis-a-vis the naked owner after the end of the usufruct.³⁷⁸ Sales of crops, fruits, or timber, therefore, which at the end of the usufruct belong to the naked owner,³⁷⁹ will be subject, as to

373. See B.G.B. § 1046(2); 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 406 (9th ed. 1960).

374. See text at notes 336-339 *supra*.

375. See Civ., July 21, 1818, S.1818 Chr.; Req., Aug. 9, 1881, D.1882.1.365, S.1882.1.369, Note by Labbé; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 796 (2d ed. Picard 1952); 5 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL 340 (2d ed. Chauveau 1899).

376. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 797. (2d ed. Picard 1952).

377. See text at note 51 *supra*; Req., Aug. 9, 1881, D.1882.1.365, S.1882.1.369; 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 667 (7th ed. Esmein 1961); 2 COLIN, CAPITANT, ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL 162 (1959).

378. See text at notes 283, 284, 311 *supra*.

379. See LA. CIVIL CODE art. 546(2) (1870); B.G.B. § 954; GREEK CIVIL CODE art. 1065; text at note 59 *supra*.

all their incidents and effects, to the rules governing the sale of a thing belonging to another. Under these rules, the usufructuary will always be personally liable toward the purchaser for any violation of the contract. The naked owner, however, being a third person, will be free of any responsibility toward the purchaser unless, of course, the responsibility of the naked owner could be made to rest, independently of the contract of sale, on ratification, representation, *stipulation pour autrui*, or *negotiorum gestio*.³⁸⁰

d. *Participation in General Assemblies of Corporations; Voting of Shares*

According to well-settled French doctrine and jurisprudence, one who administers the property of another, *e.g.*, as tutor or as husband, is entitled to participate in general assemblies of corporations and vote shares of stock under his control. Exercise of voting rights is thus considered, on principle, as an act of administration. Consistent application of this principle ought to lead to the conclusion that the usufructuary of shares of stock may, by virtue of his power of administration, participate in general assemblies of corporations and vote shares of stock subject to his enjoyment.³⁸¹ Yet, in the absence of judicial decisions on point, there is much disagreement among doctrinal writers in France as to who should be entitled to vote shares of stock burdened with usufruct. Under one view, voting rights belong, in accordance with the principle, to the usufructuary; according to the second view, these rights belong to the naked owner; and according to a third view, voting rights may belong either to the usufructuary or to the naked owner. Adherents of the last view distinguish between ordinary and extraordinary general assemblies and argue that the usufructuary is entitled to vote in ordinary assemblies whereas the naked owner is entitled to vote in extraordinary ones. These doctrinal controversies are, of course, obviated where the shares of stock subject to usufruct are issued to the bearer, or where the right to vote is granted to the usufructuary by the title creating the usufruct or by the by-laws of the corporation.

380. *Cf.* text at notes 285-288 *supra*.

381. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 797 (2d ed. Picard 1952); 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 669 (7th ed. Esmein 1961); and, in general, COCART, *DE L'USUFRUIT DES ACTIONS ET DES OBLIGATIONS* (Thesis, Caen 1938). *Cf.* Algiers, May 13, 1954, *GAZ. PAL.* 1954-2.100.

In Louisiana, the voting of shares of stock may be regarded as a prerogative of ownership, which, however, cannot be exercised abusively.³⁸² In Germany, the question has given rise to doctrinal controversies but the prevailing view today is that shares of stock are to be voted by the naked owner.³⁸³ And, according to the Greek Civil Code, the right to participate in general assemblies of corporations belongs to the usufructuary in the absence of a provision to the contrary.³⁸⁴

e. Change of the Form of Securities

In France, prior to the law of February 27, 1880,³⁸⁵ an administrator of the property of another had authority to convert titles issued to the name of the owner into titles to the bearer. This was considered to be an act of administration. However, article 10 of the law of February 10, 1880, provides that the conversion of titles issued to the name of a minor or interdict into titles to the bearer is an act of alienation. Applying this provision by analogy to the usufructuary, French courts have held, with the approval of doctrinal writers, that the usufructuary lacks authority to convert titles issued to the name of the naked owner into titles to the bearer or into other forms of securities.³⁸⁶

Further, French courts have held that the usufructuary may not split blocks of shares into individual titles, or group individual titles into a single block, because he is under obligation to restore the titles to the owner in their original form.³⁸⁷ And, according to at least one decision that has been rightly criticized, the usufructuary lacks authority to renew expired dividend coupons of titles to the bearer.³⁸⁸ This solution does violence to the right and duty of the usufructuary to manage the property subject to usufruct as a prudent head of family.

Conversion by the usufructuary of titles issued to the name of the naked owner into other forms of securities ought to be regarded as a prohibited act of alienation in Louisiana, Germany, and Greece.³⁸⁹

382. *Cf.* text at notes 151, 166 *supra*.

383. See 3 STAUDINGER-SPRENG, KOMMENTAR ZUM B.G.B. 1174 (11th ed. 1963); 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 428 (9th ed. 1960).

384. See GREEK CIVIL CODE art. 1177; BALIS, CIVIL LAW PROPERTY 387 (3d. 1955) (in Greek).

385. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 799 (3d ed. Picard 1952).

386. See Lyon, Jan. 20, 1882, S. 1884.2.205.

387. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 668 (7th ed. Esmein 1961).

388. See Trib. civ. Saint Omer, April 15, 1892, D. 1893.2.433; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 799 (2d ed. Picard 1952).

389. See LA. CIVIL CODE arts. 535, 567 (1870); B.G.B. § 1037; GREEK CIVIL CODE art. 1148.

2. Alienation and Other Acts of Disposition

In the light of the foregoing, it is clear that the usufructuary does not have power of alienation or disposition of the property subject to perfect usufruct. He may not sell, mortgage, or generally burden the property with a real right;³⁹⁰ nor may he validly renounce a servitude or other real right existing in favor of the property.³⁹¹ And, if the usufructuary loses "by non-usage on his part, a servitude belonging to the property subject to his usufruct,"³⁹² or allows a third person to acquire a servitude by acquisitive prescription,³⁹³ the usufructuary is civilly responsible toward the naked owner. The usufructuary, however, is free to undertake any personal obligation with respect to the property subject to his right of enjoyment; thus, he may undertake the obligation not to exercise a predial servitude in favor of the dominant estate or to suffer the exercise of a right-of-way over the land subject to the usufruct. These obligations, in principle, do not bind the naked owner, except for the period

390. See LA. CIVIL CODE art. 737 (1870): "The usufructuary can not establish on the estate of which he has the usufruct, any charges in the nature of servitudes because they of necessity cease with the usufruct." *A fortiori*, the usufructuary has no authority to alienate the property subject to usufruct. See *Miller v. Blackwell*, 142 La. 571, 77 So. 285 (1918) (usufruct of the surviving spouse).

However, it has been held in Louisiana that the surviving spouse, having an undivided one-half interest in the community as owner and usufruct over the other half, may donate immovables belonging to the former community. In case the donation violates the interests of the naked owners, it may be annulled or reduced at the end of the usufruct. *Gryder v. Gryder*, 37 La. Ann. 638 (1885). This holding has been rightly criticized by Cross, SUCCESSIONS 274 (1891). Further, it has been held that if the surviving spouse in community sells movables subject to his perfect usufruct, he is entitled to keep the proceeds until the end of the usufruct. See *Magee v. Catlin*, 51 So. 2d 154 (La. App. 1st Cir. 1951). It would seem that the sale or donation of things subject to usufruct, even by the surviving spouse, is null and void. See *Miller v. Blackwell*, *supra*. The naked owners ought to have the right, during the existence of the usufruct, to reclaim the things alienated by the usufructuary without authority. See LA. CIVIL CODE art. 2452 (1870); YIANNPOULOS, CIVIL LAW PROPERTY § 145 (1966). And the usufructuary ought to be civilly responsible toward the naked owner for the violation of his duties. Cf. Yiannopoulos, *Usufruct; General Principles in Louisiana and Comparative Law*, 29 LA. L. REV. 369 (1967). Of course, it is a different matter when the usufructuary sells property as administrator of the succession to satisfy debts. In these circumstances, the sale is valid and the usufruct attaches to any cash residue. See *Succession of Russel*, 208 La. 213, 23 So. 2d 50 (1945), note 328 *supra*.

For France, Germany, and Greece, see 3 PLANIOL, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 800 (2d ed. Picard 1952); WOLFF-RAISER, SACHENRECHT 467 (10th ed. 1957); BALIS, CIVIL LAW PROPERTY 351 (3d ed. 1955) (in Greek).

391. See Civ., August 25, 1863, D. 1863.1.361, S. 1963.1.466. See also LA. CIVIL CODE art. 590 (1870), which has no equivalent in the French Civil Code.

392. See LA. CIVIL CODE art. 950 (1870).

393. LA. CIVIL CODE art. 951 (1870); FRENCH CIVIL CODE art. 614. Cf. 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 413 (9th ed. 1960); BALIS, CIVIL LAW PROPERTY 357 (3d ed. 1955) (in Greek).

of the usufruct.³⁹⁴ But if the naked owner is a universal successor of the usufructuary who has accepted the succession unconditionally and without benefit of inventory, heritable obligations of the usufructuary with respect to the property will be assumed by the naked owner.³⁹⁵

Naturally, the usufructuary is entirely free to dispose of anything he owns. Thus, as owner, he may sell separated natural fruits, consumable things subject to imperfect usufruct, or any movables delivered to him following an estimation-sale.

The usufructuary has power of disposition over consumable things, as wines, foodstuffs, money, or a stock of merchandise which is destined to be used or to be alienated, by virtue of directly applicable provisions in the various Civil Codes.³⁹⁶ But with respect to non-consumable things, the usufructuary's power of disposition, if any, will have to rest on the intention of the grantor or of the parties to the title creating the usufruct.³⁹⁷ Further, in Louisiana, France, and Greece the usufructuary may be accorded power of disposition indirectly by the creation of an imperfect usufruct over non-consumable movables.³⁹⁸ This end is accomplished in France by a transaction known as *estimation-sale, i.e.*, a sale of movables with estimation of their value.

394. See LA. CIVIL CODE art. 555 (1870); 3 PLANIOL ET RIPIERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 800 (2d ed. Picard 1952); BALIS, *CIVIL LAW PROPERTY* 351 (2d ed. 1955) (in Greek).

395. See Civ., Aug. 25, 1863, D.1863.1.361, S.1863.1.466. Cf. text at notes 292, 303, 321 *supra*.

396. See LA. CIVIL CODE art. 549 (1870); FRENCH CIVIL CODE art. 589; B.G.B. § 1067; GREEK CIVIL CODE art. 1174. Further, the usufructuary in Germany may have legal power of disposition under the provisions of §§ 1048, 1074, and 1087(2) of the Civil Code.

297. In Louisiana, occasionally, wills confer on a beneficiary the usufruct of the estate of the deceased *with* power of disposition. In these circumstances, question arises as to the nature of the interest bequeathed. Louisiana courts, almost uniformly, proceed on the assumption that the will grants necessarily *either* full ownership *or* merely usufruct. For example, in *Giroir v. Dumesnil*, 184 So.2d 1 (1966), testator left to his widow "the enjoyment and usufruct during her life span of all the property. . . for her to do with, enjoy and dispose of as she pleases, and as a thing belonging to her." The court, on the basis of extrinsic evidence, concluded that the testator bequeathed to his wife the perfect ownership of his property. It is submitted, however, that this type of bequest does not necessarily involve a choice between full ownership and usufruct. The bequest may indeed be a grant of usufruct *with* power of disposition. In accordance with the will, the usufructuary is entitled to dispose of the property; but, at the end of the usufruct, the usufructuary or his heirs will have to restore to the naked owner the price of the sale.

398. In Germany, parties are not free to create an imperfect usufruct over non-consumables. See 3 SOERGEL-MÜHL, *BÜRGERLICHES GESETZBUCH* 395, 424 (9th ed. 1960); STAUDINGER-SPRENG, *KOMMENTAR ZUM B.G.B.* 1164 (11th ed. 1963). However, the grantor of the usufruct may by independent juridical act confer on the usufructuary power of disposition. See WOLFF-RAISER, *SACHENRECHT* 468 (10th ed. 1957).

Estimation is not by itself equivalent to sale. Ordinarily, movables subject to perfect usufruct are delivered to the usufructuary following the making of an inventory and an estimation of their value.³⁹⁹ The purpose of this estimation is to determine in advance the indemnity to which the naked owner will be entitled in case of destruction or undue deterioration of the movables subject to perfect usufruct. Parties, however, may, in the exercise of their contractual freedom declare by unambiguous language that the purpose of the estimation is to effect a sale. In this case the usufructuary becomes owner of the movables, whatever be their nature, and is vested with full powers of disposition; at the same time, he becomes debtor of the price of the sale which he must restore to the naked owner at the end of the usufruct.⁴⁰⁰

a. Transfer, Mortgage, and Seizure of Usufruct

The alienation of the usufruct is clearly an act of disposition of the right of enjoyment rather than of the property subject to usufruct. The usufructuary, being entitled to enjoyment, ought to have, on principle, the right to dispose of it as he pleases.⁴⁰¹ However, disposition of the enjoyment and substitution of another person for the original usufructuary may affect adversely the interests of the naked owner. Thus, in an effort at balancing conflicting interests, provisions in the various Civil Codes under consideration either exclude the transfer of usufruct or attach to the transfer certain guarantees in favor of the naked owner.

Transfer. According to article 555 of the Louisiana Civil Code of 1870, and the corresponding article 595 of the French Civil Code, the usufructuary may "lease to another, or even sell or give away his right."⁴⁰² These provisions establish the principle that the right of usufruct is fully transferable: the usufructuary, in the absence of a prohibition in the title creating the usufruct, may transfer "his right" to another person. The transferee becomes himself usufructuary, *i.e.*, the holder of a real right of enjoyment, vis-a-vis the transferor, the naked owner,

399. Cf. LA. CIVIL CODE art. 557 (1870); FRENCH CIVIL CODE art. 600; B.G.B. § 1035; GREEK CIVIL CODE art. 1146.

400. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 800 (2d ed. Picard 1952); 5 BAUDRY-LACANTINIERE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 410 (2d ed. Chauveau 1899).

401. See, in general, von Blume, *Die Übertragung des Niessbrauchs*, 34 *IHERINGS JAHRBÜCHER* 281-324 (1895); cf. text at notes 395-396 *supra*.

402. LA. CIVIL CODE art. 555 (1870); FRENCH CIVIL CODE art. 595.

and third persons. However, the original usufructuary remains bound toward the naked owner for any violations of duty by the transferee of the usufruct;⁴⁰³ and the usufruct terminates upon the death of the original usufructuary rather than upon the death of the transferee.⁴⁰⁴ Thus, in spite of the formal texts of the Louisiana and French Civil Codes which confer on the usufructuary authority to sell "his right," one may argue that the usufructuary may merely transfer the *exercise* of his right rather than the right of enjoyment itself.⁴⁰⁵

Since, according to formal texts, usufruct is transferable in Louisiana and in France, it follows that the usufructuary may burden his right of enjoyment with another usufruct.⁴⁰⁶ This faculty is rarely exercised in practice. The burdening of usufruct with another usufruct is indeed a rare occurrence brought about by operation of law in situations where a legal usufruct bears on a right of enjoyment. For example, the legal usufruct of a parent over the property of a minor child may bear on a right of enjoyment that the minor has. In these circumstances, the parent is substituted for the minor in the position of the usufructuary. The legal situation of the substitute usufructuary differs from that of the transferee of usufruct in one respect: whereas the transferee's right is transmissible to heirs the right of the substitute usufructuary is non-heritable. The second usufruct may thus be extinguished by the death of either the original or the substitute usufructuary.⁴⁰⁷

In Greece, in the absence of contrary provision, usufruct is a nontransferable right.⁴⁰⁸ In Germany, the usufruct in favor

403. See LA. CIVIL CODE art. 561 (1870). The same solution has been reached in France even in the absence of a corresponding provision in the FRENCH CIVIL CODE. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 802 (2d ed. Picard 1952).

404. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 670 (7th ed. Esmein 1961); 2 COLIN, CAPITANT ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL 162 (1959). The right of the transferee is heritable. See 5 BAUDRY-LACANTINIERE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL 349 (2d ed. Chauveau 1899).

405. See 2 PROUDHON, TRAITÉ DES DROITS D'USUFRUIT, D'USAGE, D'HABITATION ET DE SUPERFICIE No. 894 (2d ed. 1836); 1 DEMANTE, PROGRAMME DE COURS DE DROIT CIVIL FRANÇAIS 291 (1830). Cf. 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 802 (2d ed. Picard 1952).

406. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 638 (7th ed. Esmein 1961).

407. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 802 (2d ed. Picard 1952).

408. See GREEK CIVIL CODE art. 1166.

of a natural person is always non-transferable,⁴⁰⁹ whereas the usufruct in favor of a juridical person may be transferred subject to certain conditions.⁴¹⁰ Thus, if the title creating the usufruct does not expressly exclude transfer, a juridical person may transfer a usufruct in its favor to a natural or juridical person along with all its assets; further, if an enterprise or part of an enterprise is transferred by a juridical person, the transferor may convey to the transferee rights of enjoyment destined to serve the purposes of the enterprise transferred.⁴¹¹ The creation of a usufruct on another usufruct is expressly forbidden in Germany.⁴¹² In Greece, the burdening of a usufruct with another usufruct will presumably be permissible in the rare case of a transferable usufruct.

Although the usufruct may not be itself transferable in Germany and in Greece, the *exercise* of the right, *i.e.*, the actual enjoyment, may be freely transferred by the usufructuary to another person,⁴¹³ and even be burdened with usufruct.⁴¹⁴ Any provision to the contrary in the title creating the usufruct establishes merely a personal obligation of the usufructuary toward the naked owner and is without effect insofar as the transferee of the enjoyment is concerned.⁴¹⁵ According to the prevailing view in Germany and in Greece, the transfer of the enjoyment does not create a real right in favor of the transferee; it merely gives rise to an obligatory relationship between

409. See B.G.B. § 1059. This provision is not susceptible of modification by agreement. See WOLFF-RAISER, *SACHENRECHT* 475 (10th ed. 1957). For critical observations, see WESTERMANN, *SACHENRECHT* 601 (4th ed. 1960); HEDEMANN, *SACHENRECHT DES BÜRGERLICHEN GESETZBUCHES* 253 (3d ed. 1960); 3 SOERGEL-MÜHL, *BÜRGERLICHES GESETZBUCH* 416 (9th ed. 1960); PALANDT-HOCHE, *KOMMENTAR ZUM B.G.B.* 954 (22d ed. 1963).

410. See B.G.B. §§ 1059 a-e, incorporating Law of December 13, 1935 (I. R.G.B1. 1468 (1935)), as amended by Law of June 12, 1936 (I. R.G.B1. 489 (1936)). These sections apply to both private and public corporations, and, according to the prevailing view in Germany, to ordinary commercial partnerships which, strictly speaking, do not possess juridical personality. See HUECK, *DAS RECHT DER OFFENEN HANDELSGESELLSCHAFT* 170 (2d ed. 1951); 3 SOERGEL-MÜHL, *BÜRGERLICHES GESETZBUCH* 418 (9th ed. 1960); 3 STAUDINGER-SPRENG, *KOMMENTAR ZUM B.G.B.* 1151 (11th ed. 1963); Heins, *Betrachtungen zum Recht der oHG*, 1 *NEUE JURISTISCHE WOCHENSCHRIFT* 252, 254 (1948). *But see* WOLFF-RAISER, *SACHENRECHT* 475 (10th ed. 1957).

411. See B.G.B. § 1059a; 3 SOERGEL-MÜHL, *BÜRGERLICHES GESETZBUCH* 418 (9th ed. 1960).

412. See B.G.B. § 1069(2). The usufruct in favor of a juridical person, though transferable in certain circumstances, can neither be encumbered nor seized. B.G.B. § 1059b.

413. See B.G.B. § 1059; GREEK CIVIL CODE art. 1166.

414. See WOLFF-RAISER, *SACHENRECHT* 482 n.3 (10th ed. 1957).

415. *Cf.* B.G.B. § 137; GREEK CIVIL CODE art. 177; BALIS, *GENERAL PRINCIPLES OF THE CIVIL LAW* 178 (7th ed. 1955) (in Greek); 1 SOERGEL-HEFERMEHL, *BÜRGERLICHES GESETZBUCH* 470 (9th ed. 1959).

the usufructuary and the transferee, which is bound to terminate with the usufruct.⁴¹⁶ The usufructuary remains bound toward the naked owner for all violations of duty by the transferee of the enjoyment.⁴¹⁷

Pledge and mortgage. Since usufruct is in principle transferrable under French and Louisiana law, it follows that the usufructuary, in the absence of contrary provision, may pledge his right of enjoyment over movables⁴¹⁸ and mortgage his right of enjoyment over immovables. Article 3289(2) of the Louisiana Civil Code of 1870, and corresponding article 2118(2) of the French Civil Code, specifically authorize mortgages on the usufruct of immovables in commerce.⁴¹⁹ The mortgage granted by the usufructuary is a precarious form of security because it is bound to be extinguished with the usufruct. The mortgage creditors of the usufructuary may merely seize and sell the usufruct; the naked ownership is beyond their reach. Upon termination of the usufruct, the immovable is restored to the owner free of the charge.⁴²⁰ Whether the usufructuary has or has not granted a mortgage on the usufruct, the naked owner is free to grant a mortgage on his naked ownership; upon termination of the usufruct, the owner's mortgage attaches to his full ownership.

In Germany, the right of usufruct itself can neither be pledged nor mortgaged.⁴²¹ But the exercise of the right of enjoyment, to the extent that it is transferable, may be the object of a pledge.⁴²² In Greece, as an exception to the principle of non-

416. See 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 416 (9th ed. 1960); 3 STAUDINGER-SPRENG, KOMMENTAR ZUM B.G.B. 1146 (11th ed. 1963); WESTERMANN, SACHENRECHT 601 (4th ed. 1960); HECK, GRUNDRISS DES SACHENRECHTS 310 (1930); BALIS, CIVIL LAW PROPERTY 376 (3d ed. 1955) (in Greek). But see WOLFF-RAISER, SACHENRECHT 476 (10th ed. 1957). All authors are in agreement that the right of the transferee is heritable.

417. See WOLFF-RAISER, SACHENRECHT 476 (10th ed. 1957); 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 419 (9th ed. 1960); BALIS, CIVIL LAW PROPERTY 378 (3d ed. 1955) (in Greek).

418. Cf. LA. R.S. 9:4321 (1950). It ought to be noted, however, that pledge of the right of enjoyment over movables is a rare occurrence. For example, the usufructuary of shares of stock may pledge his right to dividends. But the usufructuary of movables is not allowed to pledge the movables themselves; this would be a prohibited act of disposition. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 800 (2d ed. Picard 1952); 5 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL 380 (2d ed. Chauveau 1899). Trib. Civ. Saint-Omer, April 15, 1892, D.1893.2.433.

419. See LA. CIVIL CODE art. 3289 (1870); FRENCH CIVIL CODE art. 2118; cf. Bank of Terrebonne v. Engeron, 140 So. 58 (La. App. 1st Cir. 1932).

420. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 801 (2d ed. Picard 1952); 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 670 (7th ed. Esmein 1961).

421. See B.G.B. §§ 1050b; 1274(2).

422. See WOLFF-RAISER, SACHENRECHT 719 n.11 (10th ed. 1957); 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 418 (9th ed. 1960).

transferability of the usufruct, the Civil Code expressly provides the mortgage of the usufruct over immovables.⁴²³

Seizure. In Louisiana and in France, general creditors of the usufructuary may seize his enjoyment for the satisfaction of their claims,⁴²⁴ unless, of course, the usufruct has been declared inalienable or exempt from seizure by the law⁴²⁵ or by the grantor.⁴²⁶ Further, if the usufructuary has validly mortgaged his enjoyment, his mortgage creditors may seize and sell the usufruct.⁴²⁷

In Germany and in Greece, general creditors of the usufructuary may always seize his enjoyment.⁴²⁸ The right of usufruct itself may never be seized in Germany; in Greece, however, mortgage creditors of the usufructuary may seize and sell the usufruct.⁴²⁹

3. Recourse to Justice

According to article 556 of the Louisiana Civil Code of 1870, "the usufructuary can maintain all actions against the owner and third persons, which may be necessary to insure him the

423. See GREEK CIVIL CODE art. 1259; BALIS, CIVIL LAW PROPERTY 376 (3d ed. 1955) (in Greek). The mortgage attaches to the right of usufruct itself and not merely to the exercise of the right.

424. *Marsoulet v. Clancy*, Man. Unrep. Cas. 38 (La. 1880); *Davis v. Carroll*, 11 La. Ann. 705 (1856) (conventional usufruct). Creditors of the usufructuary may not seize the interest of the naked owner and vice versa. *Cf. Wilson v. King*, 165 So. 2d 70 (La. App. 4th Cir. 1964) (mineral royalties derived from wells not opened at the time of the creation of the usufruct).

425. The legal usufruct of parents over the property of their minor children is exempt from seizure by creditors of the usufructuary. See LA. CIVIL CODE art. 1992 (1870); *Marsoulet v. Clancy*, Man. Unrep. Cas. 38 (La. 1880); *Davis v. Carroll*, 11 La. Ann. 705 (1856) (dicta). See also *Johnson v. Bolt*, 146 So. 375 (La. App. 2d Cir. 1933) (necessitous widow's usufruct exempt from seizure). On the other hand, the usufruct of the surviving spouse ought to be subject to seizure for debts of the usufructuary. See CROSS, SUCCESSIONS 226 (1891). *But see dicta* in *Succession of Coyle*, 32 La. Ann. 79 (1880) ("such a right is not liable for the payment of debts. C.C. 1992, 1987").

426. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 802 (2d ed. Picard 1952); Paris, Nov. 5, 1901, D.1902.2.89. In Louisiana, a conventional prohibition against alienation or seizure of the usufruct of immovable property, in order to be effective against third persons, must be recorded. *Cf. text* at notes 272-273 *supra*.

427. See LA. CIVIL CODE art. 617 (1870); 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 670 (7th ed. Esmein 1961).

428. See 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 416-18 (9th ed. 1960); GERMAN CODE OF CIVIL PROCEDURE art. 857(3); BALIS, CIVIL LAW PROPERTY 377 (3d ed. 1955) (in Greek). However, the parental enjoyment in Greece, and the right of parents to spend the revenues of a child's property in Germany, are non-transferable and exempt from seizure. See GREEK CIVIL CODE art. 1517(2); BALIS, FAMILY LAW 317 (1956) (in Greek); B.G.B. 1649; 4 SOERGEL-LANGE, BÜRGERLICHES GESETZBUCH 379 (9th ed. 1963).

429. See Z.P.O. § 851(1); BALIS, CIVIL LAW PROPERTY 376 (3d ed. 1955) (in Greek).

possession, enjoyment and preservation of his right."⁴³⁰ In Germany and in Greece, corresponding provisions in the Civil Codes declare that usufruct is protected in the same manner as full ownership.⁴³¹ And in France, even in the absence of a directly applicable provision in the Civil Code, there is no doubt that the usufructuary may initiate all the appropriate actions for the protection of his interests.⁴³²

a. Real Actions

In the first place, the usufructuary may bring against the naked owner or against third persons any available real action. In Louisiana, the usufruct of immovable property, being an immovable real right, is protected by several innominate real actions as well as by three nominate real actions: the petitory action, the possessory action, and the action of boundary.

The petitory action is "brought by a person who claims the ownership, but who is not in possession, of immovable property or of a real right, against another who is in possession or who claims the ownership thereof adversely, to obtain judgment recognizing the plaintiff's ownership."⁴³³ The usufructuary of immovable property may thus clearly bring the petitory action against a person who possesses the property without right or who claims adversely to the plaintiff a right of usufruct. The possessory action is available to the "possessor of immovable property or of a real right to be maintained in his possession or enjoyment of the right when he has been disturbed, or to be restored to the possession or enjoyment thereof when he has been evicted."⁴³⁴ According to the definition, the possessory action may be brought by a "possessor," *i.e.*, one who "possesses

430. LA. CIVIL CODE art. 556 (1870). This provision, which has no exact equivalent in either the Louisiana Civil Code of 1808 or in the French Civil Code, was added in the 1825 revision of the Louisiana Civil Code. The redactors stated: "The usufructuary has the possessor's action to maintain his possession of the usufruct, and to cause himself to be reinstated, if he is evicted. Domat, part 1, tit. 11, sec. 1, No. 16." LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1870 p. 53 (1937). *Cf.* Kahn v. Becnel, 108 La. 296, 32 So. 444 (1902); Folse v. Maryland Casualty Co., 193 So. 385 (La. App. 1st Cir. 1940).

431. See B.G.B. § 1065; GREEK CIVIL CODE art. 1173.

432. See text at notes 440-446, 453 *infra*.

433. LA. CODE OF CIVIL PROCEDURE art. 3651 (1960). See also Messick v. Mayer, 52 La. Ann. 1161 (1900) (petitory action by usufructuary); YIANNPOULOS, CIVIL LAW PROPERTY § 137 (1966).

434. LA. CODE OF CIVIL PROCEDURE art. 3655 (1960); *Cf.* LA. CIVIL CODE art. 3454(2) (1870); Preston v. Zabrinsky, 2 La. 226 (1831); Bagents v. Crowell Long Leaf Lumber Co., 20 So. 2d 641 (La. App. 1st Cir. 1945).

for himself."⁴³⁵ The usufructuary possesses for himself the right of enjoyment; accordingly, he may be plaintiff in a possessory action.⁴³⁶ The boundary action is available "if two contiguous lands have never been separated, or have never had their boundaries determined, or if the bounds which have been formerly fixed are no longer to be seen, or were wrongly placed."⁴³⁷ This action "may be instituted by the usufructuary, but the determination of the limits will be only provisional, unless the owner has been made a party to the suit; and in this case the owner may require the limits to be fixed anew at the termination of the usufruct."⁴³⁸ The usufructuary of movable property, having a movable real right, is protected in Louisiana by the revendicatory action.⁴³⁹

In France, the dispossessed usufructuary of immovable property may bring against the owner or against a third person who possesses the property without right a petitory action for the recognition of his right of usufruct. Following the civilian tradition, this action is frequently termed "confessory action of the usufruct" (*action confessoire de l'usufruit*).⁴⁴⁰ When the right of usufruct is not itself in dispute but merely the right to the possession of the immovable property in question, the appropriate remedy is one of the possessory actions.⁴⁴¹ Object of the possessory actions is the elimination of disturbances or the recovery of a lost possession. Question has arise in France as

435. LA. CODE OF CIVIL PROCEDURE art. 3656 (1960): "A plaintiff in a possessory action shall be one who possesses for himself. A person entitled to the use or usufruct of immovable property, and one who owns a real right therein, possesses for himself."

436. At the same time, the usufructuary possesses the property, precariously, for the naked owner. See comment (b) under Article 3656 of the Louisiana Code of Civil Procedure (1960): ". . . A person who is entitled to the use or usufruct possesses the property or right both for himself and for the naked owner, and hence either may bring the possessory action." Cf. *Bell v. Saunders*, 139 La. 1037, 72 So. 727 (1916). In case the usufructuary is disturbed in his possession by third persons, he is under duty "to give information of the same to the owner, and if he fails to do it, he shall be answerable for all damages which may result to the owner, as he would be for injuries committed by himself." LA. CIVIL CODE art. 591 (1870).

Since the usufructuary possesses precariously vis-a-vis the naked owner, he cannot claim the property adversely to the owner by virtue of acquisitive prescription. See LA. CIVIL CODE arts. 3441, 3446, 3488-3490, 3510 (1870); *Succession of Heckert*, 160 So. 2d 375 (La. App. 4th Cir. 1964).

437. LA. CODE OF CIVIL PROCEDURE art. 3691 (1960). See also LA. CIVIL CODE art. 823 (1870); *Randazzo v. Lucas*, 106 So. 2d 490 (La. App. Or. Cir. 1958); *Deshotels v. Guillory*, 161 So. 217 (La. App. 1st Cir. 1935), rehearing denied, 162 So. 652 (1935).

438. LA. CIVIL CODE art. 830 (1870).

439. See YIANNPOULOS, CIVIL LAW PROPERTY 432 (1966).

440. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 803 (2d ed. Picard 1952).

441. See, in general, YIANNPOULOS, CIVIL LAW PROPERTY §§ 13-132 (1966).

to the right of the usufructuary to bring a possessory action since under the Code of Civil Procedure possessory protection is not available to precarious possessors and article 2236 of the Civil Code states that usufructuaries are precarious possessors.⁴⁴² A literal interpretation of these provisions might lead to the idea that the usufructuary is not entitled to bring the possessory actions for the protection of his interest. French doctrine and jurisprudence, however, have interpreted these provisions to mean that the usufructuary possesses for himself the right of enjoyment, an independent real right, and for the owner the property subject to usufruct. Thus, the usufructuary is a precarious possessor vis-a-vis the naked owner only insofar as the right of ownership is concerned; insofar as the usufruct is concerned, the usufructuary possesses for himself and is protected by the possessory actions. If the usufructuary is successful in his possessory action against the owner, he will be entitled to a judgment recognizing his right to possession as usufructuary; at the same time, he will be presumed to have confessed the precariousness of his right vis-a-vis the owner and will not be later allowed to claim ownership.⁴⁴³ As in Louisiana, the naked owner possesses through the usufructuary; accordingly, he may always bring the possessory actions against third persons who have disturbed or evicted the usufructuary. This is confirmed by article 614 of the French Civil Code which imposes on the usufructuary the duty to notify the naked owner of any troubles to his possession.⁴⁴⁴ The usufructuary, in addition to the petitory and possessory actions, is entitled to bring the action of boundary, which, as in Louisiana, will not result in a judicial determination binding on the naked owner.⁴⁴⁵ In contrast with the usufructuary of immovable property, the usufructuary of movables in France may bring the revendicatory action for the protection of his interests only in cases not covered by the sweeping declaration of article 2279 of the Civil Code that "with respect to movables, possession is equivalent to title."⁴⁴⁶

442. See FRENCH CODE OF CIVIL PROCEDURE art. 23; FRENCH CIVIL CODE art. 2236, corresponding to LA. CIVIL CODE art. 3510 (1870).

443. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 803 (2d ed. Picard 1952).

444. See FRENCH CIVIL CODE art. 614, corresponding to article 591 of the LOUISIANA CIVIL CODE of 1870.

445. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 671 (7th ed. Esmein 1961); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 803 (2d ed. Picard 1952) (solutions reached in the absence of an article in the French Civil Code corresponding to article 830 of the Louisiana Civil Code of 1870).

446. See YIANNPOULOS, CIVIL LAW PROPERTY § 127 (1966).

In Germany and in Greece, usufruct is protected by the real actions available for the protection of ownership, by analogous application of both substantive and procedural rules.⁴⁴⁷ Thus, in Germany, the usufructuary may protect his enjoyment against any person by petitory actions corresponding to the *rei vindicatio* and *actio negatoria* of the Roman law as well as by various possessory actions.⁴⁴⁸ In Greece, the usufructuary may bring the revendicatory action, the Publican action, the negatory action, and the various possessory actions.⁴⁴⁹ The same actions are available to the naked owner for the protection of his own right of ownership or right to possession.⁴⁵⁰

b. Personal Actions

In addition to the real actions, the usufructuary may bring in all legal systems under consideration all the appropriate personal actions for the protection of his interests.⁴⁵¹ Thus, in case of wrongful interference with his enjoyment, he may sue for damages under the law of delictual obligations with or without the concurrence of the naked owner.⁴⁵²

If the usufruct bears on a credit, on its maturity, the usufructuary is entitled in France and in Louisiana to bring an action for payment.⁴⁵³ In Germany, however, the usufructuary may bring an action for the payment of claims which do not produce interest whereas he must bring an action jointly with the naked owner for the payment of interest producing claims.⁴⁵⁴

447. See *id.* §§ 150, 151, 152; WOLFF-RAISER, *SACHENRECHT* 465, 479 (10th ed. 1957); and, in general, WÜST, *DIE INTERESSENGEMEINSCHAFT-EIN ORDNUNGSPRINZIP DES PRIVATRECHTS* 145-172 (1958).

448. See B.G.B. § 1065, referring to §§ 985-1004 of the same Code. Further, according to Section 1036(1) of the German Civil Code, the usufructuary is entitled to possession.

449. See GREEK CIVIL CODE art. 1173. *Cf. id.* arts, 1094, 1008, 1112.

450. See, in general, YIANNOPOULOS, *CIVIL LAW PROPERTY* §§ 151, 152 (1966).

451. See LA. CIVIL CODE art. 556 (1870); Kahn v. Becnel, 108 La. 296, 32 So. 444 (1902); Folse v. Maryland Casualty Co., 193 So. 385 (La. App. 1st Cir. 1940); Snow v. Copley, 3 La. Ann. 610 (1848); Cleveland v. Sprowl, 12 Rob. 172 (La. 1845). See also 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 804 (2d ed. Picard 1952); WOLFF-RAISER, *SACHENRECHT* 479 (10th ed. 1957); BALIS, *CIVIL LAW PROPERTY* 383, 390-92 (3d ed. 1955) (in Greek).

452. See *New Orleans v. Wire*, 20 La. Ann. 500 (1868) (wrongful removal of trees; usufructuary entitled to damages for "loss of convenience and gratification"); text at note 340 *supra*. For the right of the usufructuary to bring action for damages to the naked ownership, or both to the right of enjoyment and the naked ownership, and for the apportionment of the recovery between the naked owner and the usufructuary, see text at notes 341-350 *supra*.

453. See text at notes 220-230 *supra*. Actually, the usufructuary is under duty to bring an action for the payment of an obligation on its maturity. Indeed, the usufructuary is liable to the naked owner to make good any loss of capital resulting from his negligence to collect, in case of prescription of the claim or subsequent insolvency of the debtor. *Ibid.*

454. See text at notes 234-235 *supra*.

Likewise, in Greece, the usufructuary may bring an action for the payment of other than monetary obligations but must act in concurrence with the naked owner for the payment of monetary claims.⁴⁵⁵

At least under French law, the usufructuary of a credit may bring all the appropriate actions for the enforcement of securities attached to the credit, as suretyships, privileges, and mortgages. Further, he may bring the revocatory action to set aside a disposition made by the debtor in fraud of his creditor; and if his right of enjoyment bears on the price of a sale, the usufructuary may bring an action for the resolution of the sale in case of non-payment of the price. But the usufructuary may not bring an action for the recovery of objects which, at the time of the creation of the usufruct, no longer formed part of the grantor's patrimony. Thus, the usufructuary cannot bring the action of lesion, the action of nullity, or the action of redemption. If the naked owner institutes these actions and is successful, the usufructuary may claim the enjoyment of the things restored to the patrimony of the naked owner on the condition that he reimburses him for the expenses of the litigation or pays the interest thereon.⁴⁵⁶

c. Effect of Judgments Obtained by or Against the Usufructuary

A petitory action brought by the usufructuary against third persons tends to establish the existence or non-existence of his right of usufruct, and a possessory action the existence or non-existence of his right to possession, vis-a-vis his opponents. Therefore, unless the grantor of the usufruct is made a party to the proceedings, judgments obtained by the usufructuary in real actions against third persons or by third persons against the usufructuary do not establish the ownership or right to possession of the grantor or of the third persons with respect to the property subject to usufruct and do not have the force of

455. See text at notes 238-239 *supra*.

456. See 2 AUBRY ET RAU, *DRIT CIVIL FRANÇAIS* 671 (7th ed. Esmein 1961); 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 804 (2d ed. Picard 1952); 5 BAUDRY-LANCANTINERIE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL FRANÇAIS* 358 (2d ed. Chauveau 1899).

res judicata in the relations between the grantor and the third persons.⁴⁵⁷ However, judgments obtained by the usufructuary in such proceedings benefit the grantor of the usufruct in the sense that the usufructuary is now under obligation to preserve the things he has recovered and to restore them to the grantor at the end of the usufruct.

Personal actions brought by the usufructuary of a credit for the collection of payment, however, necessarily involve a determination as to the existence or non-existence of the credit subject to usufruct. Whether the usufructuary acts in an administrative capacity, as in France,⁴⁵⁸ as owner of the credit under Louisiana law,⁴⁵⁹ or as assignee of the credit under German and Greek law,⁴⁶⁰ the decision ought to have the force of res judicata in the relations between the grantor of the usufruct and the persons sued for payment. Indeed, in these circumstances, the usufructuary acts either as representative of the grantor or as his successor by particular title.

The plaintiff usufructuary may join the naked owner;⁴⁶¹ persons sued, be they usufructuaries, naked owners, or third persons, may bring in or implead any person having an interest in the proceedings,⁴⁶² and, conversely, any person having an interest in the proceedings may intervene.⁴⁶³

457. *Louisiana*: see LA. CIVIL CODE art. 2286 (1870); Note, 15 LA. L. REV. 846 (1955); McMahon, *The Work of the Louisiana Supreme Court for the 1957-1958 Term-Res Judicata*, 19 LA. L. REV. 390-93 (1959); *France*: FRENCH CIVIL CODE art. 1351; CUCHE, PRÉCIS DE PROCÉDURE CIVILE 68-71 (13th ed. 1963); *Germany*: CODE OF CIVIL PROCEDURE § 325(1); ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 757-62 (8th ed. 1960); *Greece*: CODE OF CIVIL PROCEDURE art. 563.

458. See text at note 221 *supra*.

459. See text at note 227 *supra*.

460. See text at notes 209, 210 *supra*.

461. *Louisiana*: see LA. CODE OF CIVIL PROCEDURE art. 463 (1960); *France*: see 1 GLASSON AND TISSIER, TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANIZATION JUDICIAIRE, DE COMPÉTENCE, ET DE PROCÉDURE CIVILE 637 (3d ed. 1925); *Germany*: see CODE OF CIVIL PROCEDURE § 76; ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 212 (8th ed. 1960).

462. *Louisiana*: see LA. CODE OF CIVIL PROCEDURE arts. 1111, 4652 (1870); *France*: see CUCHE, PRÉCIS DE PROCÉDURE CIVILE 619 (13th ed. 1963). In Germany, parties to a lawsuit have, subject to certain conditions, the right to serve notice of the proceedings to a third person; the recipient of the notice is thus given the opportunity to intervene. See GERMAN CODE OF CIVIL PROCEDURE §§ 72-77; ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 210-14 (8th ed. 1960).

463. *Louisiana*: see LA. CODE OF CIVIL PROCEDURE art. 1091 (1960); *France*: 1 GLASSON & TISSIER, TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANIZATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE 621 (3d ed. 1925); CUCHE, PRÉCIS DE PROCÉDURE CIVILE 617 (13th ed. 1963); *Germany*: CODE OF CIVIL PROCEDURE §§ 64, 66, 69; ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 199, 209, 476 (9th ed. 1960).

c. *Costs*

In Louisiana, according to article 588(1) of the Civil Code of 1870, the cost of lawsuits between the usufructuary and third persons "concerning the enjoyment of the property" subject to usufruct and "for judgments which may have been given in such suits," are borne by the usufructuary.⁴⁶⁴ These provisions give rise to an argument *a contrario* that costs incurred in lawsuits concerning protection of the interests of the naked owner are to be borne by the naked owner. On the other hand, the costs of litigation in actions by the usufructuary "for the recovery of the thing subject to usufruct against the owner" are divided equally between the usufructuary and the naked owner.⁴⁶⁵ These rules do not apply to parents having the enjoyment of the property of their minor children: "fathers and mothers who enjoy the legal usufruct of the property of their children, are bound to support the expenses of all suits concerning that property, in the same manner as if they were the owners of it."⁴⁶⁶

Article 613 of the French Civil Code, corresponding in part to article 588(1) of the Louisiana Civil Code of 1870, provides that "the usufructuary is bound only for such costs as result from law suits concerning the enjoyment, and for judgments to which such law suits may have given rise."⁴⁶⁷ This provision has been interpreted in France as applicable to gratuitous usufructs exclusively.⁴⁶⁸ Indeed, if the usufruct is established by onerous title, costs incurred by the usufructuary in law suits concerning his enjoyment ought to be covered by the warranty of the vendor in accordance with the general rules of sales. But if the usufruct is established by gratuitous title, article 613 furnishes the rule that the costs of law suits concerning the enjoyment are to be borne by the usufructuary and the costs of law

464. LA. CIVIL CODE art. 588(1) (1810). The present version of this provision was adopted in 1825. In support of proposed changes the redactors cited GOMEZ, *VARIAE RESOLUTIONES*, chap. 15, No. 7. See 1 LA. LEGAL ARCHIVES, *PROJET OF THE CIVIL CODE OF 1870* p. 59 (1937).

465. See LA. CIVIL CODE art. 588(2) (1870); note 464 *supra*.

466. LA. CIVIL CODE art. 589 (1870); *cf.* La. Civil Code art. 583 (1825); La. Civil Code of 1808 (no corresponding article). Application of article 589 is subject to two conditions: the minor must have property subject to the parental enjoyment and the action must be one "concerning that property." Thus, the costs of an action for personal injuries brought by a father on behalf of a minor who has no property, are not to be borne by the father. See *Fontenot v. United States Fid. & Guar. Co.*, 113 So. 2d 33 (La. App. 1st Cir. 1959).

467. See FRENCH CIVIL CODE art. 613.

468. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 829 (2d ed. Picard 1952); 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 682 (7th ed. Esmein 1961).

suits concerning the naked ownership, by the naked owner.⁴⁶⁹ If a law suit concerns both the enjoyment and the naked ownership, distinction is made by French commentators according to whether the law suit is won or lost. If won, expenses which cannot be recovered from the losing party should be borne by the person who incurred them, be he the usufructuary or the naked owner. If the law suit is lost, the usufructuary and the naked owner should share equally the costs of the judgment given to their adversary.⁴⁷⁰

In Germany and in Greece, costs and expense incurred by the usufructuary in actions against the naked owner or third persons will be borne, in accordance with the general rules, by the losing party.⁴⁷¹ Exceptionally, however, certain expenses incurred by the usufructuary in law suits brought for the protection of the interests of the naked owner may be recovered from the naked owner under the rules of negotiorum gestio or unjust enrichment.⁴⁷²

469. *Ibid.* The costs incurred in law suits between the usufructuary and the naked owner will be borne, in accordance with the general rules, by the losing party. See CUCHE, PRÉCIS DE PROCÉDURE CIVILE 639 (13th ed. 1963).

470. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 829 (2d ed. Picard 1952). For solutions proposed by other commentators, see 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 681-82 (7th ed. Esmein 1961); 5 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL 462 (2d ed. Chauveau 1899).

471. See ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 357 (8th ed. 1960). In Greece, the paternal enjoyment over the property of minor children, though termed "usufruct," is subject to special rules. Thus, article 1520 of the Greek Civil Code provides that the father, during the existence of the enjoyment, is bound for the costs of law suits concerning the property subject to his enjoyment if there are sufficient profits to cover the expenses. In Germany, Section 1649 of the Civil Code establishes the proposition that expenses of law suits concerning the property of the child subject to parental administration are to be paid out of the revenues of that property. See 4 SOERGEL-LANGE, BÜRGERLICHES GESETZBUCH 378 (9th ed. 1963).

472. See WOLFF-RAISER, SACHENRECHT 472 (10th ed. 1957); BALIS, CIVIL LAW PROPERTY 364 (3d ed. 1955) (in Greek).