

Louisiana Law Review

Volume 5 | Number 4
May 1944

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Repository Citation

Henry A. Mentz Jr., *Can a Usufruct be Stipulated for a Term?*, 5 La. L. Rev. (1944)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol5/iss4/6>

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First, all essential elements of the lesser offenses must be included in the indictment for the offense charged. Second, the generic offenses must be segregated from the non-generic offenses. To do this, the genus of the crime charged in the indictment is determined, and each of the lesser crimes compared with it. If the lesser crime is of the same generic class, it is responsive; if not, it is not responsive. If the lesser offense meets both of these tests it may be the subject of a valid and "responsive" verdict.

It is submitted that this technique offers a workable solution to the problem of the responsive verdict.

B. NEWTON HARGIS

CAN A USUFRUCT BE STIPULATED FOR A TERM?

A proposition which seems to have been tacitly assumed is that a usufruct may be stipulated by convention to last for a certain term, for example, I give to X the usufruct of Sabine Farm for five years. In a recent Civil Law Seminar some doubt was expressed as to the legal basis on which this proposition had been assumed to rest. A perusal of nearly two hundred cases¹ decided under the Louisiana Civil Code "Usufruct" articles demonstrated that there was no judicial precedent for stipulating a usufruct for a term.² Some twenty-odd law review articles dealing with usufruct gave no hint as to the answer to this problem, nor even contemplated its possibilities. As for actual written law, only two Code articles appeared to be pertinent:³

Art. 542, Louisiana Civil Code of 1870: "Usufruct may be established simply, or to take place at a certain day, or under

1. Citation of cases would be superfluous. Needless to say, they may be found listed by Shepard under the "Usufruct" articles of the Louisiana Civil Codes of 1808, 1825, and 1870.

2. No aid is afforded to the solution of the problem by the fact that a mineral servitude may be stipulated for a term. "A so-called mineral servitude . . . is not a 'personal servitude' within strict legal meaning." *Ford v. Williams*, 189 La. 229, 236, 179 So. 298, 300 (1938). The creation of this hybrid mineral servitude device was forced upon the court by the legislature's inaction.

3. A possible exception is Art. 610, La. Civil Code of 1870: "The usufruct granted until a third person shall arrive at a certain age, lasts until that time, although the third person should die before the age fixed on." This appears to authorize stipulation of a usufruct to last for a term determined by the time necessary for a third person to arrive at a certain age. This would be a usufruct under condition if it were not for the clause, "although the third person should die before the age fixed on." Conceding that this permits such a term usufruct, would not other term usufructs—the *dies ad quem* class—be considered unauthorized under the rule, *expressio unius est exclusio alterius*?

condition; in a word, under all such modifications as the person who gives such a right may be pleased to annex to it."

On its face this article refers to the *establishment* of the usufruct, not to its termination. At this point it should be emphasized that the "usufruct for a term" and the "usufruct under a condition" represent two mutually exclusive categories. The former depends on a future event which will necessarily happen, while the latter depends on a future event which, although anticipated, may never occur.⁴ With this in mind, it will be seen that Article 542 contemplates three situations: (1) where there is a grant of usufruct without conditions and under no term—e.g., I grant to X the usufruct of Sabine Farm; (2) where there is a grant of usufruct to begin at a certain day—after the running of a term—e.g., I grant to X the usufruct of Sabine Farm, to begin January 1, 1943; and (3) where a condition must be fulfilled before the usufruct begins—e. g., I grant to X the usufruct of Sabine Farm if he marries Miss Y. The last clause of Article 542, particularly the phrase "under all such modifications," would again refer to conditions attached to the establishment of the usufruct.

Art. 608, Louisiana Civil Code of 1870: "If the title of the usufruct has limited the right to it to commence or determine at a certain time, or in the event of a certain condition, the right does not commence or determine till the condition happens or the time elapses."

This article would give no comfort to the proposition that a usufruct may be established for a term, were it not for the word "determine." But is it not used naturally as a synonym for commence, in the sense of "fix" or "establish?" The argument might then be advanced that it is incongruous to think of an article dealing with a condition precedent to the usufruct's establishment, in a codal section on "How Usufruct Expires," which evidently refers to the ending of the usufruct.⁵ But we cannot be held for an incongruity ascribable to the redactors. Without the word "determine," the whole article refers to conditions precedent, viz., "If the title of the usufruct has limited the right to it to commence . . . at a certain time, or in the event of a certain condition, the right does not commence . . . till the condi-

4. See diagram of French Usufructs, *infra* p. 613.

5. Art. 608, La. Civil Code of 1870, is listed under Book II, Title III, Chapter I, Section 5—"How Usufruct Expires."

tion happens or the time elapses."⁶ If there is already an incongruity, in that an article on how the usufruct may commence is included in the section on "How the Usufruct Expires," it is a matter of no consequence that we reconcile the article with itself rather than with the terms of the section title.

The case most directly bearing on the principal question is *Marshall v. Pearce*,⁷ but it only serves to give a reason why a usufruct for a term is necessary in France but unnecessary in Louisiana. In French law there is but one type of ownership—perfect. Hence, where a sale or concession of property for life or for a term falls short of being translatif of the property, it may be held to confer a usufruct for life, or for a term. But since our Code distinctly recognizes the right of imperfect ownership,⁸ there is no necessity in this situation for the device of usufruct for a term. The disposition of the property will retrogress into imperfect ownership for a term rather than usufruct for a term.

An observation on the usufruct-trust situation is pertinent. As stated by Dr. Lepaulle:⁹ "The usufruct . . . is remarkably like (the common law trust) if we adopt a functional point of view."¹⁰ The most striking similarities between the two are (1) the split in ownership, (2) the possibility of applying them to all types of assets, (3) the beneficiary's getting all the advantages of the res, but not the substance of it, or the power to endanger it, (4) the beneficial interest may be freely disposed of by the beneficiary, (5) both can be created either mortis causa or inter vivos, (6) the grantor may reserve the beneficial interest for himself, and (7) efficient checks insure that the substance of the res shall not be endangered.¹¹ The differences are characterized as unsubstantial.¹² Could it be that the Constitutional Convention of 1921,

6. Art. 608, La. Civil Code of 1870.

7. 34 La. Ann. 557 (1882).

8. Art. 490, La. Civil Code of 1870: "On the contrary, ownership is imperfect, when it is to terminate at a certain time or on a condition. . . ."

9. Lecturer on Comparative Law at the University of Paris.

10. Lepaulle, *Civil Law Substitutes for Trusts* (1927) 37 Yale L. J. 1126, 1140. See also Wisdom, *The Louisiana Trust Estates Act* (1938) 13 Tulane L. Rev. 70, 77, where it is said that the essence of a trust "has always seemed to be the separation of the legal ownership from the equitable ownership." The essence of the usufruct is the placing of the usufruct of the property in the hands of one party and the naked ownership in the hands of another. Both devices are successfully used to evade the inheritance tax, in that only one inheritance tax is paid during two lifetimes—that of the usufructuary and that of the naked owner.

11. Lepaulle, loc. cit. supra note 10.

12. Lepaulle, supra note 10, at 1141. The principal differences are said to be that (1) the beneficiary of a usufruct has the management of the property, while the *cestui que* trust has not, and (2) the trustee must keep the substance of the res, while the usufructuary must not only do that but must also manage the property as it was managed at the start of the usufruct.

in authorizing trusts only for a term,¹³ understood that usufructs were ordinarily intended to be for life or under a condition, and that when a party wished to employ the "term" device in the disposition of property, he should use the statutory trust?¹⁴

In a situation where our Code provisions and judicial precedents are so devoid of aid in the solution of the problem, recourse to the French authorities is a necessity.

The French Authorities

Mm. Dalloz,¹⁵ Fuzier-Herman,¹⁶ Aubry et Rau,¹⁷ Baudry-Lacantinerie,¹⁸ Beudant et Lerebours-Pigeonnière,¹⁹ Delsol,²⁰ Demante,²¹ Huc,²² Demolombe,²³ Laurent,²⁴ Marcade,²⁵ and Toullier²⁶ are in general agreement as to the manner in which usufructs may be constituted in France. Perhaps the most enlightening classification is that of *Senateur Delsol*, which is as follows, from the French:

"Usufruct may be constituted thusly:

"(I. By operation of law.)

"(II. By convention of the parties.)

13. La. Const. of 1921, Art. IV, § 16: "the Legislature may authorize the creation of trust estates for a period not exceeding ten years after the death of the donor; provided, that where a natural person is the direct beneficiary, said period may be made to extend until ten years after his majority; and provided further, that this prohibition as to trust estates or fidei commissi shall not apply to donations strictly for educational, charitable, or religious purposes."

14. Professor Nabors of Tulane Law School characterizes the usufruct-naked ownership disposition as one of the evasive devices "which are not trusts as defined in the Louisiana Trust Estates Act, but which have many of the effects of trusts, and yet are not subject to the codal prohibitions of trusts." Nabors, *The Shortcomings of the Louisiana Trust Estates Act and Some Problems of Drafting Trust Instruments Thereunder* (1938) 13 *Tulane L. Rev.* 178, 210. The usufruct-naked ownership disposition, however, cannot be used to defeat the forced heir's right to full ownership of his legitime. *Clarkson v. Clarkson*, 13 *La. Ann.* 422 (1858); *Succession of Braswell*, 142 *La. 948*, 77 *So. 886* (1918). See Art. 1710, *La. Civil Code of 1870*, providing that "no charges or conditions can be imposed by the testator on the legitimate portion of forced heirs."

15. 1 *Dalloz, Nouveau Code Civil* (1900) 971, Art. 580, nos 24-35.

16. 1 *Fuzier-Herman, Code Civil Annoté* (1935) 794, Art. 580, no 1.

17. 2 *Aubry et Rau, Cours de Droit Civil Français* (6 ed. 1935) 636, no 228.

18. 1 *Baudry-Lacantinerie, Précis de Droit Civil* (14 ed. 1926) 753, no 1554.

19. 4 *Beudant et Lerebours-Pigeonnière, Cours de Droit Civil Français* (2 ed. 1938) 465, no 424.

20. 1 *Delsol, Explication Élémentaire du Code Civil* (3 ed. 1878) 466, no 808.

21. 2 *Demante, Cours Analytique de Code Civil* (3 ed. 1896) 462, no 418.

22. 4 *Huc, Commentaire Théorique et Pratique du Code Civil* (1893) 218, no 171.

23. *Demolombe, Cours de Code Napoleon* (1875) no 238.

24. 6 *Laurent, Principes de Droit Civil Français* (2 ed. 1876) 453-454, no 359-360.

25. 2 *Marcade, Explication Théorique et Pratique du Code Civil* (8 ed. 1886) 465, no 465.

26. 2 *Toullier, Le Droit Civil Français* (6 ed. 1833) 99, no 394.

"A. Purely and simply: in this case, it comes into existence and may be exercised from the very day of its establishment.

"B. For a term. The term is a future event which will necessarily happen. The parties are able to place it at the beginning or at the end of the usufruct. For example, in the former case the usufruct will commence only at the end of such a term (*dies a quo*), and in the latter case it will last only until the end of the term (*dies ad quem*). The death of the usufructuary is a necessary term which can never be exceeded.

"C. Under a condition. A condition is a future event which will not necessarily happen. In contrast to a term, it suspends not only the exercise of the rights dependent on the event, but also their existence. Two examples will render that difference understandable. Thus, when I sell a usufruct, with a stipulation that the purchaser will only exercise it after a year has passed, his right comes into existence immediately and only the exercise of it is withheld. On the contrary, when I sell a usufruct on the condition that a certain vessel returns from its voyage, the right only comes into existence on the day on which the condition is fulfilled. (The suspensive condition having been discussed, the author treats the resolutive one.) In this case the right exists actually and may actually be exercised. (Example: I give you a usufruct as long as you reside in Nouvelle Orleans.) But if the condition is realized, the usufruct disappears, and is deemed never to have existed."²⁷

A simple diagram may serve to further illustrate the ordinary situations in which usufruct is established in France:

Usufruct is constituted:

- I. By operation of law—this is not included in the scope of this paper.
- II. By convention of the parties.
 - A. Purely and simply—with no terms or conditions—to begin at once and terminate in the manner set forth in the Code.

27. 1 Delsol, *op. cit. supra* note 20.

B. For a term.

1. *Dies a quo*—to begin at the end of a fixed period.
2. *Dies ad quem*—to begin immediately and last until the end of a fixed period.

C. Under condition

1. Under a suspensive condition—the right does not exist till the condition is fulfilled.
2. Under a resolutive condition—the right exists and the usufruct may be exercised until the condition is realized.²⁸

The French Code expressly provides for the ending of the usufruct by the expiration of the time for which it was granted,²⁹ when it has been constituted for a fixed term which ends before the death of the usufructuary.³⁰ The commentators³¹ recognize the existence and use of sale, exchange, testament, donation, and other conventions, whether gratuitous or onerous, to establish usufructs.³² Other not-too-common instances of setting up a usufruct are by disposition of property with a reservation of the usufruct³³ and by acquisitive prescription.³⁴

The French and Louisiana Materials Correlated

From our Louisiana Code articles, it would seem that we have authorization for the "pure and simple" usufruct,³⁵ the "*dies*

28. It is obvious that by the use of more than one of these subdivisions, hybrid devices may be evolved to set up the usufruct.

29. Art. 617, French Civil Code.

30. 1 Colin et Capitant, Cours Elementaire de Droit Civil Français (1934) 849, n° 803(2). Laurent contends that in effect a usufruct may be stipulated for a term of ninety-nine years, the usufruct to be inheritable, etc., by use of the civilian device of emphyteusis. 6 Laurent, op. cit. supra note 24, at 446, n° 353. See diverse opinion in Demolombe, op. cit. supra note 23, at 217, n° 245.

31. 1 Baudry-Lacantinerie, op. cit. supra note 18, at 751, n° 1549; 4 Beudant et Lerebours-Pigeonniere, op. cit. supra note 19, at 465, n° 424; 1 Delsol, op. cit. supra note 20, at 484, n° 843; 1 Fuzier-Herman, op. cit. supra note 16, at 794, Art. 580, n° 1; 3 Planiol et Ripert, Traité Pratique du Droit Civil Français (1926) 270, n° 263.

32. A few Louisiana cases recognize establishment of usufruct by some of these conventions. Davis v. Carroll, Pritchard & Co., 11 La. Ann. 705 (1856) (donation with a reservation of usufruct); Succession of Cardona, 14 La. Ann. 356 (1859) (bequest of usufruct under resolutive condition). In none of these instances was the usufruct for a term in the civilian sense, as distinguished from a condition.

33. 4 Beudant et Lerebours-Pigeonniere, op. cit. supra note 19, at 465, n° 424; 3 Planiol et Ripert, op. cit. supra note 31, at 718, n° 762.

34. 4 Beudant et Lerebours-Pigeonniere, op. cit. supra note 19, at 466, n° 426; 1 Bonnacarrere, Laborde-Lacoste, et Cremieu, Precis Elementaire de Droit Civil (1937) 580, n° 815.

35. Art. 542, La. Civil Code of 1870. See Diagram of French Usufructs, No. 1, at page 613, supra.

a quo" usufruct,³⁶ and the usufruct "under conditions."³⁷ It is obvious that the usufruct "*dies ad quem*"—where the right lasts until the happening of a future necessary event, the end of the term—is missing. Lacking apparent codal sanction and judicial precedent, it may be possible to correlate the French and Louisiana Code articles in order to better interpret the meaning of our articles.

Except for the "under all such modifications" clause, our Article 542 appears to have been directly taken from the French Civil Code, Article 580: "*L'usufruit peut etre etabli, ou purement, ou a certain jour, ou a condition.*" In the Compiled Edition³⁸ this French article is translated: "Usufruct may be established simply, or to take place at a certain day, or under conditions."³⁹ Research indicates that the clause "*a certain jour*," instead of being translated "or to take place on a certain day," should be "or up to a certain date."

Baudry-Lacantinerie states that the phrase "*a certain jour*" contemplates both "*dies a quo*" and "*dies ad quem*" usufruct: "*Il peut etre constitue a certain jour, c'est-a-dire a terme. Cette modalite peut offrir deux variantes (dies a quo and dies ad quem).*"⁴⁰ This construction is borne out by reference to other commentators,⁴¹ and is the same as Mr. Henry Cachard's translation of the French Civil Code article corresponding to our Article 542.⁴² If the court interpreted Article 542 in this manner, there would be express codal sanction for the usufruct for a term. Thus the first part of Article 542 should be read: "Usufruct may be established simply, or up to a certain date, or under condition. . . ."

Article 608⁴³ of the Louisiana Civil Code is not sufficiently similar to the French articles to be useful for the purpose of comparison and correlation. The Compiled Edition, however,

36. "Usufruct may be established . . . to take place at a certain day." Art. 542, La. Civil Code of 1870. There is no reference to Article 542 in the Projet of the Louisiana Civil Code of 1825. See Diagram of French Usufructs, No. II-B-1, at page 614, supra.

37. "Usufruct may be established . . . under condition." Art. 542, La. Civil Code of 1870. See Diagram of French Usufructs, No. II-C, at page 614, supra.

38. Louisiana Legal Archives, Compiled Edition of the Civil Codes of Louisiana (1940) 310.

39. Art. 580, French Civil Code.

40. 1 Baudry-Lacantinerie, op. cit. supra note 18, at 753, n° 1554.

41. Supra notes 15-26.

42. Cachard, The French Civil Code (1930) 184.

43. No reference to this article is made in the Projet of the Louisiana Civil Code of 1825.

lists Article 617, paragraphs 1 and 3, as the possible source.⁴⁴ The most conclusive piece of evidence is the fact that, in the French Edition of both the Civil Codes of 1808 and 1825, the words "*finir*" and "*cessera*" are used as the French for the word "determine" in the English edition. Thus, Article 608 should be read: "If the title of the usufruct has limited the right to it to commence or end at a certain time, . . . the right does not commence or end till . . . the time elapses."⁴⁵

But the question remains, Can a usufruct be stipulated for a term? The problem has been, from the author's point of view, one of negative research. The answer is made difficult by the present terms of the Louisiana Civil Code and the absence of judicial precedents. The court might well decide either way on the basis of the equities and particular facts of the first case presented.⁴⁶ A reply might well be framed in the language of Judge Westerfield in the *Succession of Lynch*, when he says: "The answer may be expressed in the ungrammatical words of a childish rhyme, which comes to the writer at the moment: 'Neither you, nor I, nor nobody knows.'"⁴⁷

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44. "Usufruct becomes extinguished, . . . by the expiration of the time for which it had been given." Art. 617 (1, 3), French Civil Code. See Louisiana Legal Archives, op. cit. supra note 38, at 352.

45. As M. Raymond Poincaré, former President of the French Republic, speaks of the problem of translation: "It is never without great risk that one attempts to transpose from French into English. . . . The style of the two languages is so different that there is always a danger of betraying one or the other. Still more difficult and doubtful is the result, when one is confronted with a language as concise and compact as that of the (French) Civil Code." Preface to Cachard, French Civil Code (1930) v.

46. Suppose a father bought the usufruct of a plantation for a twenty year term, paying \$20,000 for it, and expecting the revenues to support his family. One year later the father dies, leaving his family little except a claim to the usufruct. Would the court say that under the law the purchaser got all that was bargained for, or would they say that the usufruct for a term is not authorized by law and that the parties should be restored to their former position?

47. 145 So. 42 (La. App. 1932).

* Prepared while a student at Louisiana State University Law School. Presently serving in the armed forces.