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# Usufructuary's Right to the Proceeds of Oil and Gas Wells in Louisiana

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year, for the purpose of the law is not to force a contract upon parties unwilling to contract, but merely to establish a rule of evidence, or presumption, as to their intention in the premises."

#### CONCLUSION

Despite the importance of these provisions in the life of the average man, there has been very little appellate litigation on leases and notice to vacate, probably because the amount involved is ordinarily too small to make an appeal worthwhile. Clarification by the higher courts is, therefore, not likely to be forthcoming. The legislature, however, could do much to alleviate the confusion: (1) by conclusively defining the word "limitation" in Act 200 of 1936 as a common law "conditional limitation,"<sup>39</sup> and amending Articles 2734 and 2739 to resolve the resulting conflict between them and the Act; or (2) by deleting the word if it was inadvertently continued after the reason for its inclusion was lost, thus obviating the apparent inconsistency within the Act itself.

As discussed herein, the conditional limitation theory appears to supply the more logical interpretation of the statute as a whole, but deletion of the word "limitation" from the text of the Act would seem the preferable solution when the legislature approaches the problem. In such an event, the reservations by the lessor would still be covered by the specific codal provisions, and all requirements of notice to vacate would be reconciled.

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### USUFRUCTUARY'S RIGHT TO THE PROCEEDS OF OIL AND GAS WELLS IN LOUISIANA

#### LOUISIANA CIVIL CODE OF 1870:

ART. 552. 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 right to mines and quarries not opened.<sup>1</sup>

In the development of the oil and gas law of Louisiana, the courts have been forced to apply, to the situations which arise, articles of the Civil Code which never contemplated the nature

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39. See text, *supra*, pp. 162-163.

1. La. Civil Code of 1870.

of oil and gas in the earth. In so doing, they have recognized that oil and gas have a peculiar nature<sup>2</sup> and that this fact must be kept in mind in applying the articles. In view of those considerations it is pertinent to examine Article 552 in order to consider its relation to the Louisiana law of oil and gas, especially with regard to usufruct.

At first glance there would seem to be an irreconcilable conflict between the above article and Article 533,<sup>3</sup> which provides that "Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profits, utility and advantages which it may produce, provided it be without altering the substance of the thing." In Louisiana the jurisprudence and the statutes indicate that the products of mines and quarries are not fruits, but a part of the realty.<sup>4</sup> If the usufructuary has a right to exploit mines and quarries, how can he do so *without altering the substance of the thing*? If full effect is given to Article 552, how can a violation of the latter part of Article 533 be avoided? This Comment is based on the idea that the two articles cannot be reconciled. However, serious consideration is given to the argument that Article 533 merely lays down a general definition of the civil law concept of usufruct<sup>5</sup> and that this definition is qualified by other codal articles.<sup>6</sup>

Article 552 can best be understood in the light of its history. Originally, in the Roman law, the usufructuary was granted the enjoyment of mines and quarries so long as he did not interfere with the cultivation of the soil.<sup>7</sup> The old French law did not

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2. *Rives v. Gulf Refining Co. of Louisiana*, 133 La. 178, 62 So. 623 (1913); *Frost-Johnson Lumber Co. v. Sallings Heirs*, 150 La. 756, 91 So. 207 (1922).

3. La. Civil Code of 1870.

4. *Elder v. Ellerbe*, 135 La. 990, 66 So. 337 (1914); *Wiley v. Davis*, 164 La. 1090, 115 So. 280 (1928); *Federal Land Bank of New Orleans v. Mulhern*, 180 La. 627, 157 So. 370 (1934). The federal and state income tax provisions allow deductions for depletion in certain cases. Revenue Act of 1938, § 23(m), 52 Stat. 460, 26 U.S.C.A. § 23(m) (1938); La. Act 21 of 1934 as amended by Acts 2 of 1934 (E.S.), 7 of 1934 (2 E.S.), 21 of 1935 (E.S.), 11 of 1935 (3 E.S.), 24 and 143 of 1936, 229 and 231 of 1938. And the very idea and name of the Louisiana severance tax (La. Const. of 1921, Art. X, § 21) implies a loss of natural resources which dismembers the realty.

5. Usufruct is purely a civil law concept; therefore any discussion of it must necessarily be confined to civil law authorities. The counterpart of usufruct in the common law is the life estate although Louisiana courts seem to distinguish between the two. *Marshall v. Pearce*, 34 La. Ann. 557, 560 (1882).

6. Arts. 551, 553, La. Civil Code of 1870; Arts. 582-599, French Civil Code; 6 Laurent, *Principes de Droit Civil Français* (2 ed. 1876) 565, nos 449 et seq.

7. Pandects, Book VII, Title I, De Frag. 13, § 5, as translated in 3 Scott, *The Civil Law* (1932) 233: "Hence the question arose, whether the usufructuary himself can open stone quarries, or chalk, or sand pits? I think that

follow this rule,<sup>8</sup> for in France each province had its own customary law; the rule generally followed was that the usufructuary was not entitled to any of the proceeds of mines and quarries.<sup>9</sup> However, with the adoption of the Code Napoleon, the Roman rule was revived and a modification of it was embodied as Article 598 of that Code.<sup>10</sup>

Since the promulgation of the Code Napoleon, its Article 598

he can do so, if he does not use for that purpose any portion of the land required for something else. Therefore he can look for places for quarries and excavations of this kind, and he can work any mines of gold, silver, sulphur, copper, iron, or other minerals which the original proprietor opened; or he himself can open them, if this does not interfere with the cultivation of the soil. . . ."

8. 6 Laurent, *op. cit. supra* note 6, at 563, n° 448. 4 Beudant, *Cours de Droit Civil Français* (2 ed. 1938) 479, n° 441 states: "*A cet égard, le Code consacre des règles nouvelles, aussi opposées à celles du droit romain (qui accordait toujours à l'usufruitier la jouissance des mines et carrières) qu'à celles de l'ancien droit (qui, au contraire, refusait à l'usufruitier tout droit sur ces richesses). L'article 598 s'attache, pour définir les droits de l'usufruitier, à la destination de la chose, à son aménagement, lors de l'établissement de l'usufruit.*"

Translation: "In this respect, the Code consecrates new rules, just as opposed to those of the Roman law (which always gave the usufructuary the enjoyment of mines and quarries) as to those of the old [French] law (which on the contrary, refused any right over these riches to the usufructuary). Article 598 is applicable, to define the rights of the usufructuary, to the destination, to the disposition, of the thing at the time that the usufruct is established."

9. It is not certain that the rule in each province was the same. The main objection of the Court of Lyons to the first draft of Article 598 of the Code Napoleon was that it was not in line with "existing jurisprudence." Cf. 6 Laurent, *op. cit. supra* note 6, at 563, n° 448.

10. Article 598, French Civil Code: "*Il jouit aussi, de la même manière que le propriétaire, des mines et carrières qui sont en exploitation à l'ouverture de l'usufruit. . . . Il n'a aucun droit aux mines et carrières non encore commencées. . . .*"

Translation: "He has also the enjoyment, in the same way as the owner, of the mines and quarries which are being worked when the usufruct begins. . . . He has no right to the mines and quarries which have not yet been opened. . . ."

Article 460, Quebec Civil Code provides: "Mines and quarries are not comprised in the usufruct of land. The usufructuary may nevertheless take therefrom all the materials necessary for the repair and maintenance of the estate subject to his right. If however, these quarries, before the opening of the usufruct have been worked as a source of revenue by the proprietor, the usufructuary may continue such working in the way in which it has been begun."

The article above quoted includes both the unadopted provisions of the projet of the Code Napoleon that "mines and quarries are not comprised in the usufruct of land" and the substance of the French and Louisiana provisions to the effect that the usufructuary is entitled to the revenues of mines open at the time the usufruct was created. At first blush, there seems to be a conflict between the respective provisions mentioned. But, a more critical examination of Article 460 of the Quebec Code discloses that the first paragraph is merely a general rule, the qualifications and exceptions to which are laid out in the remaining portions of the article. All provisions of the article are thus given effect. This construction is supported by 2 Mignault, *Droit Civil Canadien* (1896) 568.

has provoked a great deal of argument among the French commentators. The great bone of contention has been, and still is, whether this article can be reconciled with the general principles of usufruct. The commentators who approve of Article 598 of the Code Napoleon reconcile it with their general article on usufruct<sup>11</sup> by means of the theory of destination.<sup>12</sup> Their argument is that Article 598 is a compromise between two conflicting ideas—the general principle that the usufructuary, although entitled to the fruits of the thing, both natural and civil,<sup>13</sup> must not impair its *substance*; and the notion that the usufructuary is entitled to the same enjoyment as the original owner of the thing. The compromise which resulted from this conflict was that, if the mines and quarries have been set apart for exploitation prior to the creation of the usufruct, the things extracted therefrom, although falling naturally within the category of *products*, are nevertheless assimilated to fruits and belong to the usufructuary.<sup>14</sup> Thus the character of the usufructuary's right is determined by the *destination* that has been given to the thing by the owner.<sup>15</sup>

11. Art. 578, French Civil Code.

12. The theory seems to be distinctly of French origin. If it is extended to its logical conclusion, it would seem to be applicable to a mineral lease granted by the owner even though the drilling operations had not been begun prior to his death. Thus a well can be "open" and "actually worked" for the purposes of Article 552 although a well is not drilled for nine years after the death of the owner. On similar facts, the same result is reached by the common law authorities cited in note 26, *infra*.

13. Arts. 544, 545, 546, 547, La. Civil Code of 1870.

14. 1 Colin et Capitant, Cours Élémentaire de Droit Civil Français (8 ed. 1934) 823, n° 780: ". . . on appelle produits les objets qui sortent de la chose, mais en en épuisant la substance, parce qu'ils ne se reproduisent pas, ou ne se reproduisent que très lentement. Tels sont les extraits des mines, des carrières, des tourbières. Ces produits qui, en somme, représentent une portion du capital, ne doivent pas appartenir à un usufruitier. Ou ne lui attribuera pas davantage les arbres de haute futaie, parce que les futaies ont été, de tout temps, considérées comme un capital, qu'un bon administrateur doit mettre en réserve. Toutefois, le principe que les produits n'appartiennent pas à l'usufruitier reçoit un tempérament, grâce à l'intervention d'une autre idée, celle de l'aménagement donné à la chose par le propriétaire. Il résulte de cette idée que, si des choses susceptibles de fournir des produits, mine, carrière, haute futaie, ont été affectées par le propriétaire à une exploitation régulière avant l'ouverture de l'usufruit, ces biens qui, naturellement, se rangent dans la catégorie des produits, seront assimilés à des fruits et, dès lors, appartiendront à l'usufruitier. . . ."

15. This idea is very strongly brought out in 1 Colin et Capitant, *op. cit. supra* note 14, at 823, n° 780. See also 6 Baudry-Lacantinerie et Chauveau, *Traité Théorique et Pratique de Droit Civil* (3 ed. 1905) 407, nos 627 et seq.; 4 Huc, *Commentaire Théorique et Pratique du Code Civil* (1893) 249, nos 176 et seq.; 3 Planiol et Ripert, *Traité Pratique du Droit Civil Français* (1926) 739, nos 786 et seq.; 2 Aubry et Rau, *Cour de Droit Civil Français* (5 ed. 1922) § 689.

The destination theory of the French has been accepted in Quebec. 2 Mignault, *op. cit. supra* note 10, at 567 et seq.: "*Un terrain renferme-t-il*

The article which provoked so much discussion in France first appeared in Louisiana as Article 545 of the Civil Code of 1825.<sup>16</sup> During the many years that it has been in our law, it has never been litigated nor has it often been discussed.<sup>17</sup> However, an examination of the Code articles on usufruct and of the jurisprudence dealing with mineral rights will reveal that the problems which have been raised in France might very well be raised here.

Article 544<sup>18</sup> provides that "All kinds of fruits, natural, cultivated, or civil, produced during the existence of the usufruct, by the thing subject to it, belong to the usufructuary." In the case of *Elder v. Ellerbe*<sup>19</sup> it was held that fruits are those "things that are born and reborn of the soil." The French commentators are in accord and state that "fruits" are the things which the object of the usufruct produces periodically and indefinitely.<sup>20</sup> Now, the rights that are given to the usufructuary by Article 544 are explained further by Articles 545, 546, and 547; and the definitions and examples of the different kinds of fruits exclude such things as furniture,<sup>21</sup> trees, earth and stones,<sup>22</sup> alluvion,<sup>23</sup> servitudes,<sup>24</sup> and mines and quarries.<sup>25</sup> The argument can be made, therefore, that Article 544 is not to be taken as exclusive, but that there are things which do not have the quality of indefinite reproduction that are granted to the usufructuary. Thus the latter is, in many

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*une carrière ouverte et en exploitation: sa destination est d'être une carrière: fermer la carrière et faire un vigné du terrain qui la contient, ce serait changer sa destination et par suite sa substance.*

*"Un terrain est-il cultivé comme vigné ou come prairie: sa destination est de produire des raisins ou des fains: y ouvrir une carrière, ce serait dénaturer tout à la fois sa destination et sa substance—De là la distinction suivante:*

*"L'usufruitier a le droit d'exploiter, comme le propriétaire lui-même les carrières qui étaient déjà en exploitation au moment de la constitution d'usufruit. Quant à celles qui n'étaient pas encore en exploitation à cette époque, l'usufruitier n'y a aucun droit. En d'autres termes, l'usufruitier peut bien continuer l'exploitation qui a été commencée par le propriétaire; mais il ne peut en fonder une, la commencer."*

16. No change was made in the revision of 1870. But the number of the article was changed to 552.

17. Article 552 was considered for the first time by Daggett, *Mineral Rights as They Affect the Community Property System* (1938) 1 *LOUISIANA LAW REVIEW* 17.

18. La. Civil Code of 1870.

19. 135 La. 990, 66 So. 337 (1914).

20. 1 Colin et Capitant, op. cit. supra note 14, at 823; 3 Planiol et Ripert, op. cit. supra note 15, at 728, n° 776; 4 Huc, op. cit. supra note 15, at 221, n° 175.

21. Art. 550, La. Civil Code of 1870.

22. Art. 551, La. Civil Code of 1870.

23. Art. 553, La. Civil Code of 1870.

24. Art. 554, La. Civil Code of 1870.

25. Art. 552, La. Civil Code of 1870.

cases, entitled to a portion of the capital over which he has the usufruct. Further, it can be argued that Article 552 is not foreign to the concept of usufruct, but that on the contrary it is part of a comprehensive scheme to give the usufructuary the same enjoyment as previously had by the owner.<sup>26</sup> In short, the destination theory evolved by the French is a potent argument in favor of giving full effect to Article 552.<sup>27</sup>

However, if the approach suggested by the French destination theory is taken, it will result in the incorporation of an undesirable feature into the law of Louisiana.<sup>28</sup> The usufructuary should enjoy like the proprietor, but he should not impair the capital.<sup>29</sup> Can this be done without running counter to the rules laid down in Article 552? Perhaps a more thorough consideration of the history of Article 552, together with an analysis of the article, will suggest an answer.

The history of the principle embodied in Article 598 of the Code Napoleon reveals that even in the Roman law the usufructuary had no right to the products of mines and quarries unless they were in waste places unfit for any other purpose.<sup>30</sup> This concept had its justification in the Roman belief that the products

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26. This idea is not peculiar to the civil law for, as pointed out in note 5, *supra*, although there is no common law equivalent of usufruct, yet the same result is reached that the French reach by means of their theory of destination. In the first common law expression on this subject we find this language: "In the case of trees there is a profit in the shade and pannage, but in the case of a mine, the working it is the only way in which it can be enjoyed." *Stoughton v. Leigh*, 127 Eng. Rep. 889 (1808). Subsequent decisions have followed this doctrine. See cases collected in 3 *Summers, Oil and Gas* (1938) 547, § 613; *Glassmire, Oil and Gas Leases and Royalties* (2 ed. 1938) 159, § 46. The common law goes even further and holds that though there was no drilling, if there was a valid lease granted prior to the death of the owner then the life tenant gets the royalties in full ownership. *Daniels v. Charles*, 172 Ky. 238, 189 S.W. 192 (1916); *Graham v. Smith*, 170 Va. 246, 196 S.E. 600 (1938); *Koen v. Bartlett*, 41 W.Va. 559, 23 S.E. 664, 31 L.R.A. 128 (1895); *Alderson's Adm'r v. Alderson*, 46 W.Va. 242, 33 S.E. 228 (1899).

27. Too much reliance, however, cannot be placed upon the French authorities, because of the fundamental difference between the French conception of property rights, as respects minerals, and that of Louisiana. Under the present French law undiscovered minerals, with the possible exception of coal, are not considered susceptible of private ownership. The right to mine is derived from the state by concession; and this concession may well be given to a third party instead of to the usufructuary or naked owner. The evolution of the French mineral law is concisely set forth in 3 *Planiol et Ripert*, *op. cit. supra* note 15, at 739, n° 786.

28. *Daggett*, *supra* note 17.

29. This statement is made despite decisions such as *Logan v. State Gravel Co.*, 158 La. 105, 103 So. 526 (1925), and *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (1929), in which royalties were held to be like rent. This phase of the subject has been so well covered by Professor *Daggett*, *supra* note 17, that it has been deemed unnecessary to discuss it in this Comment.

30. See note 7, *supra*. Also 6 *Laurent*, *op. cit. supra* note 6, at 564, n° 448.

of a mine were inexhaustible. But no such belief existed in France at the time of the promulgation of the Code Napoleon; it was well known that if that wealth were given to the usufructuary he would actually receive part of the capital.<sup>31</sup> For that reason Article 598 of the Code Napoleon, which is the source of our Article 552, was hard fought even at the time the Code Napoleon was being drafted.<sup>32</sup> In view of the above considerations, it would seem that Louisiana should have no difficulty in repudiating Article 552,<sup>33</sup> especially since there is nothing to show that the principles of destination were considered when Louisiana embodied the rights of the usufructuary in Articles 544-556 of the Civil Code.

Furthermore, an additional argument against the application of Article 552 to oil properties is founded on the proposition that oil is in truth a severance of the realty and should not go to the usufructuary. Usufruct in Louisiana usually comes into existence by the operation of law, and is created most frequently by the accident of death. Therefore if Article 552 is interpreted in the light of the destination theory, the naked owner of the realty would be unprotected; for the death of the prior owner would result in the oil or gas, probably the main value of the inheritance, going to the usufructuary in perpetual ownership. But in harmony with the concept of usufruct in Louisiana, the naked owner should be entitled to the unimpaired substance of the thing upon the death of the usufructuary. If the French theory is not employed, all parties could be adequately protected by defining the usufructuary's right as an imperfect usufruct over the proceeds of the well.<sup>34</sup>

Finally, even if Article 552 is not completely repudiated, oil and gas wells should not be held subject to its provisions. By the strict terms of the article, it applies only to mines and quarries. As late as 1910 the Supreme Court held that drilling operations were not mining in the true sense of the term.<sup>35</sup> Later the court classified drilling operations as mining for the reason that various

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31. 6 Laurent, *op. cit. supra* note 6, at 564, n° 448.

32. The projet prepared by the commissioners of the Government in the year eight of the Republic of France (1800), following the French customary law, contained the following provision: "*Les mines et carrières ne sont pas comprises dans l'usufruit.*" *Projet de la commission du Gouvernement, an VIII (1800)*, Liv. II, tit. III, Art. 23, found in 2 Fenet, *Recueil Complet des Travaux Préparatoires du Code Civil (1836)* 110. This proposed article, however, was rejected after the observation of the Court of Lyons that it was not in line with "existing jurisprudence." See further, 6 Laurent, *op. cit. supra* note 6.

33. La. Civil Code of 1870.

34. Arts. 534, 536, 549, La. Civil Code of 1870.

35. *J. M. Guffey Petroleum Co. v. Murrell*, 127 La. 466, 53 So. 705 (1910).



statutes indicated that it was the intention of the legislature so to classify them.<sup>36</sup> But those decisions should have no bearing here because, if oil and gas wells were not considered to be mines prior to 1910, their subsequent classification by the legislature, in acts that had no relation whatsoever to usufruct, can hardly be used as an argument to impute to the legislature the intention of broadening the scope of Article 552. It is submitted that, as regards Article 552, the court should adhere to the definition of mines laid down in *Guffey Petroleum Co. v. Murrell*<sup>37</sup> until there is a definite pronouncement on the part of the legislature to the effect that the word "mines" in Article 552 includes oil and gas wells.<sup>38</sup>

Summarizing, it is submitted that the usufructuary is not entitled to the proceeds of oil and gas wells. The only support for the application of Article 552 is the French theory that the usufructuary enjoys not only the fruits of the patrimony but also whatever the prior owner would have enjoyed had he retained full proprietorship. On the other hand, to repudiate that argument, it is pertinent to note that the theory was not invented by the French until after the promulgation of the Code Napoleon. Furthermore, it is still uncertain, in view of the Louisiana jurisprudence, whether an oil well could be classified as a mine or quarry under Article 552. In order to protect the naked owner in his right to enjoy *all* of the thing upon the death of the usufructuary, it is submitted that Article 552 should be interpreted to give the naked owner of the land the naked ownership of the proceeds of oil and gas.<sup>39</sup>

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36. *Etchison Drilling Co. v. Flournoy*, 131 La. 442, 59 So. 867 (1912); *Rives v. Gulf Refining Co. of La.*, 133 La. 178, 62 So. 623 (1913). There has been no difficulty in the common law. *Rice Oil Co. v. Toole County*, 86 Mont. 427, 284 Pac. 145 (1930); *Luse v. Boatman*, 217 S.W. 1096 (Tex. Civ. App. 1919).  
37. 127 La. 466, 53 So. 705 (1910).

38. In common law jurisdictions, "mines" have been held to comprehend oil and gas wells. See cases collected in Glassmire, *op. cit. supra* note 26, at 161; 3 Summers, *op. cit. supra* note 26.

39. Article 552 was incorporated as Article 42 in the Revised Draft of the Proposed Mineral Code that was submitted to the Legislature of Louisiana at the 1938 session. Act 320 of 1936 (amendment to Art. III, Const. of 1921) restricted the redactors to the codification of existing laws relating to oil and gas. It is hoped, however, that a way of mitigating the harshness of Article 552 can be found. If it is, then serious consideration should be given to the suggestion by Mr. Alden T. Shotwell in (1938) 12 Tulane L. Rev. 593 to the effect that "consideration be given to an additional paragraph to this article providing that, when the usufruct arises by the operation of law, the mineral rights shall belong to the owner of the usufruct and the naked owner in some ratable or fair proportion, and it is suggested, for consideration, that a division be made on a fifty-fifty basis," is accepted. Or the redactors of the Mineral Code may just give an imperfect usufruct to the usufructuary.