

# Mineral Rights - Rights of the Naked Owner and the Usufructuary

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hardship to the parties, and consequently less bitterness should build up that would possibly impair labor-management relations. The present policy is also in accord with the Board's related policy which requires that parties having binding agreements to arbitrate must arbitrate before seeking Board relief, as to matters submissible to arbitration.<sup>24</sup> A failure to give effect to the subsequent award would nullify this related policy.

It is concluded that the policy of the Board gives full effect to the purposes and policies of the act, while respecting the intentions of the parties as much as the act permits. This enables the parties to rely on the collective bargaining process to reach terms mutually satisfactory, with full knowledge that so long as the three criteria are met, labor disputes may be settled authoritatively by arbitration even though they involve issues of potential interest to the NLRB.

*Merwin M. Brandon, Jr.*

#### MINERAL RIGHTS — RIGHTS OF THE NAKED OWNER AND THE USUFRUCTUARY

The naked owners executed a mineral lease on property which they owned subject to a usufruct, and about a year later the usufructuary executed a mineral lease on the same land. Subsequently, plaintiffs, the naked owners and their lessee, sought a declaratory judgment asking that the usufructuary be declared to be without any right to the minerals under the land and that he therefore had no authority to grant a mineral lease on it. Each party prayed that their lease be recognized as valid and that the lease of the other party be cancelled. The trial judge held for the plaintiffs, but declared that the rights of the lessee were subordinate to the rights of the usufructuary and the lessee could not enter and use the land subject to the usufruct without the consent of the usufructuary.<sup>1</sup> On appeal to the Supreme Court, *held*, affirmed as amended. The rights of the usufructuary to the oil and gas under the land are governed by Article 552 of the Civil Code and he is not entitled to the proceeds of

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Senate Committee on Labor and Public Welfare on the Organization and Procedure of the National Labor Relations Board, S. Doc. No. 81, 86th Cong., 2d Sess., CCH Lab. L. Rep. No. 602, p. 12 (Feb. 11, 1960).

24. See *United Tel. Co. of the West, Inc., & International Brotherhood of Electrical Workers, Local No. 843, AFL*, 112 N.L.R.B. 779 (1955).

1. The lessee of the naked owner was, however, according to the view of the trial court entitled to extract the minerals under the land subject to the usufruct by directional drilling.

the mines and quarries that were not opened before the commencement of the usufruct. The rights of the naked owner to explore for minerals and reduce them to possession are not affected by the usufruct so long as the exercise of these rights does not unreasonably interfere with the usufructuary's use of the land. The naked owner may therefore execute a mineral lease without the consent of the usufructuary and the rights of the lessee under such a lease are not subordinate to the rights of the usufructuary. *Gueno v. Medlenka*, 117 So.2d 817 (La. 1960).

Usufruct is defined in the Civil Code as the right to enjoy property which is owned by another, and to draw from it all the profit, utility, and advantages which it may produce.<sup>2</sup> There are two kinds of usufruct, perfect and imperfect.<sup>3</sup> A perfect usufruct exists when the usufructuary can enjoy the property without changing its substance.<sup>4</sup> In such a case the usufructuary is obliged to act as a prudent administrator and to restore the property to the owner upon the termination of the usufruct.<sup>5</sup> An imperfect usufruct exists when the object of the usufruct can be used only if consumed or expended.<sup>6</sup> The usufructuary becomes the owner of the property in an imperfect usufruct with the right to dispose of it at his pleasure, but he is obliged to return the same quantity and quality or its estimated value upon the termination of the usufruct.<sup>7</sup>

The Civil Code provides that the usufructuary is entitled to both the natural and civil fruits of the property subject to the usufruct.<sup>8</sup> The question of whether the revenues from the production of oil and gas are "fruits" within the meaning of the Code has been troublesome. Natural fruits are defined as things that are "born and reborn" of the soil,<sup>9</sup> or things that are produced and reproduced in successive seasons.<sup>10</sup> Under these defi-

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2. LA. CIVIL CODE art. 533 (1870). Usufructs may be established by contract or donation, but they are usually created by operation of law. *Id.* art. 540. See *id.* arts. 223 (parent's usufruct of minor's property); 916 (usufruct of surviving spouse upon deceased's share of community); 2382 (usufruct of marital portion); 3252 (usufruct of widow's homestead).

3. *Id.* art. 534.

4. *Ibid.*

5. *Id.* art. 535.

6. *Id.* art. 534.

7. *Id.* art. 536.

8. *Id.* art. 544.

9. BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL n° 431 (14th ed. 1926). See *Elder v. Ellerbe*, 135 La. 990, 995, 66 So. 337, 338 (1914).

10. *Elder v. Ellerbe*, 135 La. 990, 995, 66 So. 337, 338 (1914). Oil and gas are in fact a part of the realty and when they are extracted the soil is taken out piece by piece. See *Federal Land Bank of New Orleans v. Mulhern*, 180 La. 627, 157 So. 370 (1934), where it was held that the granting of a mineral lease on

nitions it is apparent that oil and gas are not natural fruits, and thus the problem is determining whether the revenues from the production of oil and gas are civil fruits. The rents of real property are civil fruits,<sup>11</sup> and it has often been stated in the jurisprudence that the payment of royalty under a mineral lease is the payment of rent.<sup>12</sup> In the early cases it was held that the provisions of the Civil Code on lease applied to mineral leases and the fact that the contract provided for the payment of "royalty" rather than the payment of "rent" was inconsequential.<sup>13</sup> The court did not have to determine who was entitled to the royalties under a mineral lease in these cases, but this issue was squarely presented to the court in *Milling v. Collector of Revenue*.<sup>14</sup> In that case it was held that royalties and bonuses from mineral leases on the husband's separate property, paid during the existence of the community, are civil fruits or rents which fall into the community of acquets and gains. It was argued that the usufructuary occupies the same position with reference to the fruits of the property subject to the usufruct as the community occupies with reference to fruits of separate property of one of the spouses, and that the holding of the court would allow the usufructuary to retain all royalties and bonuses paid under a mineral lease during the existence of the usufruct. The court pointed out that the respective interests of the naked owner and usufructuary were not at issue in that case and it refused to express an opinion on what the effect of the decision would be on the rights of the usufructuary. Thus, it was not clear whether the usufructuary would be entitled to retain the royalties and bonuses as civil fruits.<sup>15</sup>

#### Article 552 must also be considered in determining the rights

mortgaged property constituted waste of the property and was grounds for foreclosure of the mortgage.

11. LA. CIVIL CODE art. 545 (1870). The interest of money and annuities are also civil fruits.

12. See *Roberson v. Pioneer Gas Co.*, 173 La. 313, 137 So. 46 (1931); *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (1928); *Logan v. State Gravel Co.*, 158 La. 105, 103 So. 526 (1925).

13. See *Roberson v. Pioneer Gas Co.*, 173 La. 313, 137 So. 46 (1931) (sublease and assignment were distinguished by applying Article 2725); *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (1928) (prescription of three years against a claim for arrearage in the form of additional royalty was applied under Article 3538); *Logan v. State Gravel Co.*, 158 La. 105, 103 So. 526 (1925) (the contract under which the defendant was allowed to remove sand and gravel was a lease contract and the lessor had a lessor's lien. The fact that the word royalty was used rather than the word rent in the contract was inconsequential because royalty was considered as rent in the form of a portion of the produce of the land within the meaning of Article 2671).

14. 220 La. 773, 57 So.2d 679 (1952). *Contra*, *Commissioner of Internal Revenue v. Gray*, 159 F.2d 834 (5th Cir. 1947).

15. See Note, 12 LOUISIANA LAW REVIEW 491 (1952).

of the naked owner and the usufructuary to the proceeds from the production of oil and gas. It provides:

"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.*" (Emphasis added.)<sup>16</sup>

This article is based upon Article 598 of the Code Napoleon<sup>17</sup> and it grants to the usufructuary a right to enjoy products that are not "fruits," properly speaking.<sup>18</sup> The reason that products of mines and quarries are not fruits is that they are not produced periodically, and when they are extracted the substance of the soil is exhausted. When the owner has opened a mine or quarry and it has become a regular source of income to him before the commencement of the usufruct, the usufructuary is allowed to continue the exploitation of the mine or quarry. These products are not fruits, but under these circumstances they are assimilated to fruits to permit the usufructuary to enjoy them.<sup>19</sup>

The instant case is the first case in which the court has had to decide upon the respective rights and interests of the usufructuary and naked owners to oil and gas under the land subject to the usufruct,<sup>20</sup> and it is a landmark decision in the Louisiana law of mineral rights. Two significant points were decided. The first was that the rights of the usufructuary are governed by Article 552 of the Civil Code and he is not entitled to the proceeds of mines and quarries that were not actually worked

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16. LA. CIVIL CODE art. 552 (1870).

17. See DAGGETT, LOUISIANA MINERAL RIGHTS 328 *et seq.* (rev. ed. 1949); Comment, 2 LOUISIANA LAW REVIEW 169 (1939).

18. 1 PLANIOL & RIPERT, CIVIL LAW TREATISE (A TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2790 (1959): "Owners sometimes derive from their property certain products that are not fruits. This may be due to the fact either that the element of periodicity is wanting or that, in collecting them the substance of the thing is exhausted. These products are, on the one hand, trees and on the other, the substances that are extracted from mines, pits, and quarries. It follows from the special nature of these products that, in principle, the usufructuary's right of enjoyment cannot apply to them. His rights apply solely to fruits, properly so called. Nevertheless, as the utilization of these products sometimes becomes a regular source of income for the owner, the strict rules of logic are not enforced. These products are assimilated to fruits in order to permit usufructuaries to enjoy them in certain cases. The inquiry must accordingly be directed to ascertain under what circumstances these exceptional products become fruits and are attributed to usufructuaries."

19. *Ibid.*

20. In the only other case in which these rights were at issue, Gulf Refining Co. v. Garrett, 209 La. 674, 25 So.2d 329 (1946), there was a contract involved, and on rehearing the case was remanded to determine what the intention of the parties in executing the contract was.

before the commencement of the usufruct. It was also decided that the right of the naked owner to explore for minerals and reduce them to possession is unaffected by the usufruct as long as the usufructuary's use of the land is not unreasonably interfered with. The naked owner may therefore execute a mineral lease without the consent of the usufructuary, and the rights granted to the lessee are not subordinate to the usufructuary's rights.

Article 552 applies only to the products of "mines and quarries" and, in deciding that the article governs the rights of the naked owner and the usufructuary, the court had to interpret it as being applicable to the production of oil and gas, even though an oil or gas well is not a mine in the true sense of the word.<sup>21</sup> The court concluded that since the legislature had classified the production of oil and gas as mining for other purposes,<sup>22</sup> and the court had recognized it as such,<sup>23</sup> it was no longer open to question that the production of oil and gas is mining within the meaning of the law. It seems that in light of these legislative enactments and prior decisions it would have been difficult for the court to conclude that the production of oil and gas is not mining within the meaning of Article 552.<sup>24</sup> The court recognized the general rule that the usufructuary is entitled to the natural and civil fruits of the property subject to the usufruct, but it interpreted Article 552 as placing a limitation on this rule. It said that Article 552 expressly *excludes* the products of mines not opened before the commencement of the usufruct from the fruits to which the usufructuary is entitled. It has already been pointed out that Article 552 actually lets the usufructuary enjoy the products of mines and quarries under certain circumstances even though they may not properly be classified as fruits.<sup>25</sup> It seems, however, that if the court had

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21. Webster's New International Dictionary (2d ed. 1944) gives the following definition of the terms here involved: "Mine—A pit or excavation in the earth from which ores, precious stones, coal, or other mineral substances are taken by digging." "Quarry—An open excavation, usually for obtaining building stone, slate or limestone. . . . In its widest sense the term mines includes quarries . . . , but when the distinction is drawn, mine denotes underground workings, and quarry denotes superficial." "Well—A pit or hole sunk into the earth to such depth as to reach a supply of water; . . . a shaft or hole sunk to obtain oil, brine, gas, etc."

22. See La. Acts 1908, No. 144, § 2; La. Acts 1910, No. 254, § 2.

23. See *Etchison Drilling Co. v. Flournoy*, 131 La. 442, 59 So. 867 (1912).

24. If the court had felt that the rule of Article 552 is undesirable, it might have reasoned that none of the legislative enactments relied on had any application whatsoever to usufruct and that they should not be applied to broaden the scope of Article 552 and change the substantive rights of the parties. One writer has suggested that this would be the preferred solution. See Comment, 2 *LOUISIANA LAW REVIEW* 169 (1939).

25. See note 18 *supra*.

not interpreted the articles as it did, the usufructuary would be entitled to retain royalties and bonuses as civil fruits under the *Milling* case. In the instant case there was no mineral lease on the land at the time the usufruct came into existence and no well had been opened before the usufruct began. Under these circumstances the usufructuary was not entitled to any of the proceeds from the mineral lease, but it seems implicit in the decision that, if a well had actually been worked before the commencement of the usufruct, the usufructuary would be entitled to the proceeds from such a well under Article 552.

In deciding that the naked owner has the right to search for minerals and reduce them to possession during the existence of the usufruct, the court relied heavily on the French writer Planiol.<sup>26</sup> The court reasoned that since Article 552 withholds from the usufructuary any right to mines and quarries not opened it necessarily recognizes that the naked owner retains the right to open a new mine on the land subject to the usufruct and to the products therefrom. In reaching this conclusion the court said that this was indicated by Planiol in his discussion of the franchise system that was instituted in France in 1810. Planiol said,

"But the law of April 21, 1810 has entirely changed the system of the exploitation of mines. They can no longer be opened, *even by the owner of the surface*, except in virtue of a governmental permit. (Emphasis added.)<sup>27</sup>

". . . According to the Civil Code the same rule applies to mines. *At the time of its compilation owners themselves had the right to exploit mines contained within the perimeter of their lands.* But Art. 598 is implicitly amended, as regards mines, by the law of April 21, 1810 which created the franchise system. *The owner himself could not work the mine. And the usufructuary, on the other hand may obtain the concession to do so, just as could any other citizen. And if he does, he will exploit the mine as a concessionnaire and not as usufructuary. The mine upon which he has obtained a concession will remain in his hands as an immovable distinct from that upon which he has a usufruct.*" (Emphasis added.)<sup>28</sup>

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26. It should be noted that this is the first Supreme Court decision to rely on the Louisiana Law Institute's translation of PLANIOL & RIPERT, *A TREATISE ON THE CIVIL LAW* (A TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) (1959).

27. 1 *id.* no. 2795.

28. 1 *id.* no. 2819.

From an examination of *Planiol* it seems to the writer that the excerpts relied on do not support the conclusion reached by the court. It seems that when *Planiol* speaks of the "owner of the surface," "owners themselves," and "owner himself" he is talking about a person who had the complete ownership, not just the naked ownership. It also seems that the conclusion of the court is unsupported by the Code. All of the articles in the section entitled "Of the Obligations of the Owner"<sup>29</sup> indicate that the usufructuary is entitled to the use and enjoyment of the estate without being interfered with in any manner by the naked owner. One of the articles relied on by the court as vesting the naked owner with certain rights was Article 602, which provides that he may create a new servitude on the land provided it be of *no* injury to the usufructuary.<sup>30</sup> It is hard to conceive of any development under a mineral servitude or lease that would not interfere with the enjoyment of the usufruct.<sup>31</sup> It seems that the real reason for the decision that the naked owner has the right to search for the minerals and reduce them to possession during the existence of the usufruct without the consent of the usufructuary is the court's feeling that it would be against the public policy to give the usufructuary the power to keep the minerals out of commerce for the existence of the usufruct.<sup>32</sup> The court indicated that if the owner or his lessee interfered with the usufructuary in his rights that they would be bound to compensate him for any losses or damages that he suffered. Perhaps this policy is a sound basis for the decision and it might well be that the usufructuary can be adequately compensated by damages.<sup>33</sup>

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29. LA. CIVIL CODE arts. 599-605 (1870).

30. *Ibid.*

31. It is significant that under both a mineral servitude and a mineral lease the effect on the usufructuary would be the same. The servitude owner or lessee would have the right to search for the minerals and reduce them to possession.

32. This is indicated by the following language of the court. "In their answer to the appeal plaintiffs complain of this ruling and we believe that there is merit in their contention that the subordination of the exercise by the plaintiffs of their rights to the usufructuary's right of possession of the land may well be contrary to our public policy." 117 So. 817, 823 (La. 1960). It also stated: "In this connection, it is to be borne in mind that it is contrary to public policy of this State to hold property out of commerce and this Court has consistently applied the liberative prescription of ten years in dealing with the exercise of mineral rights. Hence, it would not be reasonable to conclude that the usufructuary's consent was required in order for the owner to conduct mineral operations on the lands so long as the operations do not to any substantial extent interfere with the usufructuary's enjoyment of the property — for to so hold would vest in the usufructuary a veto right not accorded by law and permit him to keep the mineral rights out of commerce during the entire life of the usufruct." *Id.* at 824.

33. In evaluating the policy decision it is interesting to inquire into the practice that has been followed for the last fifty years by mineral lessees when there was a usufruct on the land. Apparently the lessees have acquired a joint lease from both the naked owner and the usufructuary, with the rights of the parties

It should be noted that there was no mineral lease in existence at the commencement of the usufruct in the instant case and in this situation the naked owner could execute a lease. It would seem, however, that if there were a mineral lease on the property at the commencement of the usufruct then the naked owner would be bound by it and he could not execute another lease until the original lease had terminated.

The instant case will no doubt be the first in a series dealing with the rights of the naked owner and the usufructuary to oil and gas.<sup>34</sup> It is not decided, for example, what will constitute an "opened well" under Article 552. It may be that a well will be opened when a mineral lease has been granted on the property at the time the usufruct is established, or it may be necessary that there actually be a well already drilled and producing.<sup>35</sup> If a well has been opened at the time of the creation of the usufruct, then the usufructuary apparently will be entitled to all of the proceeds from the production with the naked owner obtaining nothing. By the use of modern drilling methods an oil deposit may be completely depleted in a short while, and it is apparent that the naked owner is in danger of being deprived of all of the mineral value of the property by an application of Article 552. In order to protect the naked owner's interest it would seem desirable to limit the usufructuary's rights as much as possible under Article 552. It is submitted that a well should not be considered as being opened or worked unless it has been drilled and is actually producing at the commencement of the usufruct.

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#### PRACTICE AND PROCEDURE—RIGHT TO APPEAL FROM A JUDGMENT IN A JACTITORY ACTION

Two recent decisions have dealt with defendant's right to appeal devolutively from a judgment in a jactitory suit. In each

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to receive bonuses, rentals, and royalties being determined by the terms of the agreement.

It would seem that if the lessee is going to be bound to compensate the usufructuary for any damages that he might cause in the exercise of his rights that he should still attempt to get the usufructuary's consent before he goes upon the land. By doing this he could avoid the expenses that would be involved if he were sued for damages.

34. There has already been one court of appeal decision in which the right to delay rentals and bonuses on a lease executed after the commencement of the usufruct were at issue. It was held that the naked owner and not the usufructuary is entitled to the bonus and delay rentals, as well as the royalties. *King v. Buffington*, 119 So.2d 519 (La. App. 1960).

35. See DAGGETT, *LOUISIANA MINERAL RIGHTS* 325 *et seq.* (rev. ed. 1949).