Introduction to the Law of Things: Louisiana and Comparative Law

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I. THINGS: TERMINOLOGY AND DEFINITION

Article 448 of the Louisiana Civil Code of 1870 provides: "The word estate is applicable to any thing of which riches or fortune may consist. The word is likewise relative to the word things, which is the second object of jurisprudence, the rules of which are applicable to persons, things and actions."¹ Obviously, the word "estate" is used in a technical sense, different from its accepted meaning in common law.² The word "things" is not defined; there is merely an indication that the word "estate," as defined, "is relative" to "things." Article 448 seems to distinguish between "estates" and "things"; however, a close examination shows that the two words are synonymous. The word "estate" recurs in several other articles in the Code, though, more frequently, reference is made to "things." Where the word "estate" is used no distinct technical meaning may be fairly attributed to it, in contra-distinction with "things." Thus, in Articles 272 and 473, in connection with the distinction of things into movables and immovables, "estate" is used synonymously with "thing." Similar observations apply to other occasions in which the word "estate" is employed, as in Article 541, concerning usufruct, and in Article 872, concerning successions. That "estate" is synonymous with "things" is supported by reference to the French text of the Louisiana Civil Code. "Estate" is a translation of the French "biens," while "thing" is the English equivalent of the word "choses." In the French text the two words are used interchangeably. In the English translation the word "biens" has either been omitted or, quite frequently, translated as "things." Thus, the heading of Book II of the Civil Code "Of Things and of the Different Modifications of Property"

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1. Cf. LA. CIVIL CODE art. 439 (1825); LA. CIVIL CODE p. 94, art. 1 (1808).
2. Cf. RESTATEMENT, PROPERTY § 9 (1936): "The word 'estate', as it is used in this Restatement, means an interest in land which
   
   "(a) is or may become possessory; and
   "(b) is ownership measured in terms of duration."
reads in French “Des Biens et des Differentes Modifications de
la Proprieté.” Title I in the same book bears the heading “Des
Choses ou des Biens” which has been translated into English as
“Of Things” rather than “Of Things or Estates.” Further, Book
II, Title I, Chapter I, bears the heading “De la Distinction des
Choses ou des Biens” which has been translated “Of the Distinc-
tion of Things.” And, in the text of the 1825 Code, the words
“chose ou bien” in Article 452 became “things.” Having thus
concluded that the words “estate” and “things” are synonymous
as used in the Louisiana Civil Code, it follows that Article 448
also defines “things.” Consequently, a “thing” according to the
Code is “anything of which riches or fortune may consist.”This
definition accords with early civilian conceptions but differs
from contemporary continental civilian doctrine and from defi-
nitions employed in certain modern codes. If consistently fol-
lowed, this definition would exclude from the “law of things,”
and, perhaps, from the entire law of property all those physical
objects and intangible rights that may not be regarded as “riches
or fortune.” Thus, physical objects which are not susceptible of
appropriation, or of pecuniary evaluation, such as “common
things” and “public things” would not be “things” at all. In
addition, according to modern civilian conceptions, certain rights
connected with the so-called “right of personality” would not be
regarded as “things.” A living human body and any member or

3. See LA. CIVIL CODE art. 452 (1825) and corresponding Article 461 of the
1870 Code. See also LA. CIVIL CODE p. 96, art. 12 (1808): “The third and last
division of things or estates, is into movable and immovable.”
4. See 2 CARBONNIER, DROIT CIVIL 43 (1957). Cf. SOHM-MITTEIS-WENGER,
INSTITUTIONEN DES RÖMISCHEN RECHTS 250 (1923); LEHMANN, ALLGEMEINER
TEIL DES BÜRGERLICHEN GESETZBUCHES 348 (1957).
5. The “right of personality” has been given various definitions and various
names. See ROQUIN, LA RÈGLE DU DROIT 252 (1889) (“rights to one’s own per-
son”); NERSON, LES DROITS EXTRAPATRIMONIAUX (1939) (“extra patrimonial
rights”); 1 CARBONNIER, DROIT CIVIL 227 (1955) (“primordial rights”). In
France, doctrine and jurisprudence have been moving toward the recognition of
an all-inclusive “right of personality” as distinguished from the several limited
personal rights which have long been recognized. See 1 RIEPE ET BOULANGER,
TRAITÉ DE DROIT CIVIL 348-9 (1956); and in general, DECOQ, ESSAI D’UNE THÉ-
ORIE GÉNÉRALE DES DROITS SUR LA PERSONNE (1960). The French Avant-Projet
for a new “Law of Persons” contains detailed provisions concerning particular
“rights of personality” (Articles 148-165). In addition, Article 165 establishes
an all-inclusive “right of personality.” Article 823(1) of the German Civil Code
establishes the general rule that “He who contrary to law injures the life, body,
health, freedom, property, or any right of another intentionally or negligently, is
obliged to repair the damage thus sustained.” There is disagreement as to whether
this provision establishes an all-inclusive “right of personality” or several limited
“rights” of a personal nature. Article 2 of the Bonn Constitution, however, guar-
antees to all persons the free development of personality, and the consensus seems
to be that a broad “right of personality” is created by virtue of the constitutional
provision. See LEHMANN, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES
part thereof are generally regarded as incidents of that comprehensive “right of personality” and, therefore, are not susceptible of ownership. With regard to dead bodies, civilian sources seem to admit the possibility of private ownership, though such bodies are ordinarily subject to compulsory burial. Finally, this definition could be taken to exclude from the sphere of property law certain legal relations of a predominantly “moral” character, and, perhaps, “relational interests” in general. Indeed, according to modern analysis, “relational interests,” on the one hand, and “interests in personality,” on the other, should be excluded from the sphere of property law.

The terminology of the Louisiana Civil Code, however, is

76 (1957). The “right of personality” has been established in Switzerland by Article 28 of the Civil Code which provides that: “He who suffers an illegal invasion in his personal interests may request the court to enjoin it. An action for damages, or the payment of a sum of money as moral satisfaction, may be brought only in the cases provided for by law.” In accordance with the modern trend, Article 57 of the Greek Civil Code establishes an all inclusive “right of personality”: “He who suffers an illegal invasion in his personality is entitled to request the suppression of the invasion and an injunction for the future. If the offense concerns the personality of a deceased, the right belongs to the spouse, descendants, ascendants, brothers and sisters, and testamentary heirs. An additional claim for damages in accordance with the provisions governing delictual responsibility is not excluded.” The Greek Civil Code has also recognized the right in one’s own name (Article 58) and the right to the products of one’s intellect (Article 60). Cf. Balis, General Principes of Civil Law 78 (1955) (in Greek).

6. Cf. 3 Planiol et Ripert, Traité Pratique de Droit Civil Français 27 (1952); 1 Carbonnier, Droit Civil 227 (1955). In order to indemnify persons injured in their physical integrity, French courts have at times indicated that one’s body is a thing in which he may have an ownership right. Cf. Civ. Ct. Lannion, Dec. 19, 1932 [1933] Gaz. Pal. 1, 339. But cf. Lyon Ct. of App., July 2, 1937, appeal dismissed, Cass. June 22, 1942 [1944] D.C. 16. In France a living human body and members thereof have been traditionally regarded as “out of commerce.” See 2 Demogue, Traité des Obligations en Général 652 (1923-33); Josserand, La personne humaine dans le commerce juridique, [1952] D.H. 1. Contemporary legislation, jurisprudence, and doctrine, however, indicate that transactions concerning parts or members of human bodies (e.g., donation of blood, legacy of eyes) are valid except where in conflict with good mores. See Decocq, Essai d’une théorie générale des droits sur la personne 31, 43, 193 (1960). In Germany, transactions concerning members or parts of living human bodies (e.g., sale of hair) are valid if not in conflict with Article 138 of the German Civil Code which forbids all transactions contrary to good mores. In any case, there can be no action for specific performance or damages. See Lehmann, Allgemeiner Teil des Bürgerlichen Gesetzbuches 345 (1957).

7. See Decocq, Essai d’une théorie générale des droits sur la personne 40, 53, 208, 348 (1960). See also Lehmann, Allgemeiner Teil des Bürgerlichen Gesetzbuches 345 (1957). The author, however, suggests that dead bodies should be regarded as things susceptible of appropriation. The right of the relatives to dispose of the body, based on customary law and limited by provisions of public law concerning burial, should not be regarded as a right of ownership. Transactions of the relatives concerning dead bodies (e.g., sale for anatomical purposes) are invalid as contrary to good mores (Article 138 of the Civil Code). Ownership rights are recognized, however, on mummies, skeletons, and anatomical preparations.

neither accurate nor consistently used. Consistent terminology should distinguish between "estates" and "things." The word "estate" should apply to objects having an economic value including both physical objects and rights, and the word "things" to corporeal objects regardless of their pecuniary value and whether or not susceptible of appropriation. This would result in attributing a technical meaning to the word "estate" while the word "things" would be employed in accordance with non-legal everyday usage. However, for purposes of discussion, and in deference to the terminology of the Code, the word "things" will apply narrowly to physical objects and rights having a pecuniary value, susceptible of appropriation, and broadly to physical objects in space regardless of their pecuniary value and their susceptibility of appropriation.

Accurate definition of the word "things" is not merely a matter of esthetic predilection or a problem of semantics. Such a definition is indispensable in view of the fact that only "things" within the meaning of the Code can be objects of ownership rights. Objects which are not "things" do not enjoy the almost absolute protection given to ownership and other real rights. Further the definition of "things" is important outside the field of property law. For example, certain rules of the law of obligations may be applicable only with regard to "things." Owing to the importance of the concept of "things" in the entire field of civil law, continental textwriters prefer to deal with "things" in the general part of their treatises rather than in the section on property law.

Much of the terminological difficulty in the Louisiana Civil Code has resulted from the use of conflicting source materials.

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9. If "thing" is defined as "anything of which riches or fortune may consist," then objects not susceptible of appropriation should not be classified as "things." This, however, is not the case since several articles in the Civil Code refer to "things" which are not susceptible of appropriation, and therefore, cannot possibly constitute "riches or fortune." See, e.g., Articles 450 (common things) and 482 (things in common). This inconsistency in the terminology of the Code may be traced directly to Roman sources where the word "res" was used in two different meanings. Cf. Buckland, A Manual of Roman Private Law 107 (1939).

10. See e.g., LA. CIVIL CODE arts. 1774, 1887, 1905 et seq., 2150 et seq. (1870).

11. See 1 Enneccerus-Nipperdey, 1 Allgemeiner Teil des bürgerlichen Rechts 494 et seq. (1953); Lehmann, Allgemeiner Teil des bürgerlichen Gesetzbuches 343 et seq. (1957); Ballis, General Principles of Civil Law 473 et seq. (1955) (in Greek). Cf. 2 Aubry et Rau, Cours de droit civil français 1 (1897-1922). Most French writers devote special parts of their treatises to the Law of Things. See 2 Carbonnier, Droit civil 41 (1957); 9 Demolombe, Traité de la distinction des biens (1874-82); 3 Planiol et Rispert, Traité pratique de droit civil français (1962).
Article 448 refers both to advanced French doctrine of the late eighteenth century and to classical Roman notions. The first paragraph of this article can be best understood in the light of the French Civil Code and its commentators. There, the word "estates" (biens) is used interchangeably with the word "things" (chooses) to denote, at times, corporeal and incorporeal objects having a pecuniary value, and, at times, physical objects regardless of their pecuniary value. The second paragraph of the same article can only be understood in the light of the Roman division of civil law into the law of persons, the law of things, and the law of actions. This is the classification made by Gaius in his Institutes, subsequently followed by Justinian, and frequently repeated by medieval scholars.

The word "thing" (res) in Roman law had a double meaning, and this has caused difficulties and misunderstandings among scholars. Res in Roman sources refers both to physical objects in space and to economic interests, i.e., rights having a pecuniary value and protected by law. Originally, the point of contact between the two conceptions was the fact that the law of things concerned rights relating to physical objects. In the classification made by Gaius and Justinian, it is not always easy to determine in which sense the word res is used. At times reference is clearly to physical objects and the rights which exist over them; in other instances the word res is used in a much broader sense to include tangible physical objects and intangible rights. However, not all rights are res. Since res referred solely to rights of a pecuniary value, the word did not apply to rights governed by the law of persons. For example, personal liberty and paternal authority were not res, since they were not susceptible of evaluation in money. It should also be mentioned that the word res was not always confined to rights in rem but was also applied to obligations, i.e., rights in personam.

Following Roman law methodology, French writers of the ancien regime classified civil law into the law of persons, the law of things, and the law of actions. Pothier followed this pattern in his General Introduction. In dealing with the law of things,
Pothier used the word *chooses* much more frequently than the word *biens*, though no distinction is made between the two terms. The term *chooses*, as an object of municipal laws, is defined as anything which forms "the fortune of individuals, *res qui sunt in bonis*."\(^\text{17}\) Domat divided the preliminary title of his dissertation into three parts, dealing respectively with the rules of law in general, persons, and things.\(^\text{18}\) *Chooses* was used interchangeably with *biens*. According to Domat, the word *chooses* comprises everything that God created for men. The French Civil Code, following this tradition, does not distinguish between *chooses* and *biens*. In the title dealing with things and their classification, the Code speaks of *biens* rather than *chooses*. In the following title, dealing with the institution of ownership, the word *chooses* is preferred. Neither word is defined.

For purposes of consistent analysis the French commentators have sought to define and distinguish between *chooses* and *biens*. It has been suggested that the word *chooses* should apply to anything existing in nature, whether or not susceptible of appropriation, while the word *biens* should be reserved to designate objects of "riches or fortune."\(^\text{19}\) Thus, although the Code and certain writers employ the word *chooses* loosely to designate *biens*, were the terms used consistently, it would be obvious that all *biens* are *chooses*, while not all *chooses* are *biens*. The sea, the air, and the sun are *chooses* but not *biens*. Objects susceptible of appropriation are *biens* not only when they belong to someone in particular, but also when they belong to no one (Code Civil Articles 539 and 713). *Biens* may be corporeal or incorporeal and moveables or immovables.\(^\text{20}\)

The German Civil Code distinguishes aptly between "object" ("*Gegenstand*") and "thing" ("*Sache*").\(^\text{21}\) "Object" is a generic

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\(^\text{17}\) See Pothier, *Introduction Générale aux coutumes*, 1 *Oeuvres de Pothier* 12 (1861) (biens used as synonymous to choisir at p. 14).

\(^\text{18}\) See Domat, *Les Loix civiles dans leur ordre naturel* 1, 10, 16 (1777).

\(^\text{19}\) See 3 Planiol et Ripert, *Traité pratique de droit civil français* 58 (1952). See also 2 Carbonnier, *Droit civil* 43 (1957); 9 Demolombe, *Traité de la distinction des biens* 5 (1874-82). In this sense, the word *biens* includes things, property rights, and any other right whether connected with a thing (e.g., usufruct, servitudes) or not (e.g., commercial name, right of personality). See *Encyclopédie Dalloz*, 1 *Droit Civil* 447 (1951).

\(^\text{20}\) See 1 Colin, *Capitant et Julliot de la Morandière, Traité de droit civil* 37, 820 (1953).

concept which includes anything that can be the subject matter of a legal relationship, with the exception of strictly personal relations. Objects can be either corporeal or incorporeal. "Things" are only corporeal objects of the impersonal nature, susceptible of appropriation.  

For the classification of an object as corporeal or incorporeal, prevailing notions in society rather than physics are determinative. If the object can be perceived with any of the senses it is corporeal, whereas at Roman law only tangible objects were considered to be corporeal. Natural forces and energies are incorporeal, and therefore not things within the meaning of the German Code. Thus, heat, light, sound, electricity and radioactivity, though potential objects of pecuniary rights, are not regarded as "things" in Germany. Accordingly, the Reichsgericht has repeatedly held that electricity may not be "stolen" since the Penal Code defines theft as appropriation of things belonging to others. Finally, rights, universalities, and aggregates of things are incorporeal, and therefore not "things." Application of the word "things" to corporeal objects only has been strongly criticized. It has been suggested that possibility of appropriation should be controlling in defining "things" rather than perception with the senses of objects occupying space. If this were the case, there would be no problem with the wrongful appropriation of energies.

Things are only individual objects, having a well-defined existence in space. Air, the sea, and running water are not things. Fruits of trees are not things before separation because they are part of the tree. Gases, whether natural or artificially produced, acquire individuality and become things as soon as they are put in containers. Lands acquire individuality by the human activity of fixing boundaries.

Only objects which can be appropriated are "things." The sun and the stars, which no man can have as his own, are not "things." Living human bodies, and parts thereof, are not

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“things” because these are expressions of man’s moral personality rather than objects of pecuniary rights. Upon death, however, human bodies become “things.” Parts of a human body become “things” upon their separation.26

Following the German Civil Code, the Greek Civil Code of 1940 distinguishes between “objects” and “things.” “Object” has a broad meaning, as it includes anything, whether corporeal or incorporeal, having a pecuniary value (Articles 175, 239, 304). “Things,” according to the Code, are individual, corporeal objects (other than human beings) which are susceptible of appropriation.27

Fluids and gases are corporeal, and as soon as they acquire the mark of individual existence, become “things.” Natural forces and energies, though incorporeal, are regarded as “things” by the Code in accordance with a legal fiction (Article 947(2)). Thus, in contrast to Germany, producers of energies enjoy full proprietary protection in Greece under the Civil Code. As in Germany, however, rights, aggregates of things, and universalities of rights such as “patrimony” and “enterprise” are incorporeal and therefore not “things.” In the main, Greek doctrine follows the German as to what constitutes individuality, what is an object of the impersonal nature, and which objects are susceptible of appropriation.

II. CLASSIFICATION

In civil law systems, “things” are classified into several categories in accordance with a number of criteria. The significance of classification lies in the fact that different rules of law may apply to the different categories of “things.” Book II, Title I, of the Louisiana Civil Code contains such a classification. According to the Code, “things” are “divided” into: (1) common, public, and private; (2) corporeal and incorporeal; and (3) movables and immovables.28

While the classification in the Louisiana Civil Code accords substantially with early civilian sources, it differs from classifi-

28. See LA. CIVIL CODE arts. 449, 460, 461 (1870).
cations developed by modern continental doctrine. In modern literature, "things" are classified as (1) those "in commerce" and those "out of commerce"; (2) corporeals and incorporeals; (3) movables and immovables; (4) consumables and non-consumables; (5) fungibles and non-fungibles; (6) divisibles and indivisibles; (7) single and composite things; (8) principal, component parts, and accessories; and (9) principal, fruits, and products. This classification is conducive to a more systematic analysis and a better understanding of the law of things. Accordingly, in the following commentary on the relevant articles of the Louisiana Civil Code, classification and distinctions will be made following these requirements of systematic analysis rather than the scheme of the Code.

Things "in commerce" and "out of commerce"

The first "division" of things in the Louisiana Civil Code is into common, public, and private. According to Article 449, "Things are either common or public. Things susceptible of ownership belong to corporations, or they are the property of individuals." Elsewhere, it has been demonstrated that this article actually establishes a distinction between things which may be privately owned and things which cannot be so owned. Accordingly, under Article 449 of the Louisiana Civil Code things may fall in one of the two broad categories: they may be susceptible of ownership (private things) or they may not be susceptible of ownership (common and public things).

Apparently, the intention of the redactors of the Civil Code was to distinguish, as did Roman law, between things susceptible of private ownership (res quae in nostro patrimonio sunt) and things which cannot be the object of patrimonial rights (res extra nostrum patrimonium). This distinction, originally made

29. See Ballis, General Principles of Civil Law 489 et seq. (1955) (in Greek); 1 Colin, Capitant et Julliot de la Morandière, Traité de droit civil 819 (1953); 1 Enneccerus-Nipperdey, 1 Allgemeiner Teil des bürgerlichen Rechts 503 (1952); Lehmann, Allgemeiner Teil des bürgerlichen Gesetzbuches 357 (1957); 3 Planiol et Ripert, Traité pratique de droit civil français 59 (1952).


32. Article 449 should, actually, read: "Things [which are not susceptible of ownership] are either common or public. Things susceptible of ownership belong to corporations or they are the property of individuals."
by Gaius, was taken over in the Institutes of Justinian.\textsuperscript{33} Other
Roman jurists, however, seemed to distinguish between things “in commerce” (\textit{res in commercio}) and things “out of commerce” (\textit{res extra commercium}).\textsuperscript{34} This distinction rests on the possibility of alienation of things and their susceptibility of private legal relations rather than susceptibility of private ownership. In any case, the same things which were classified as \textit{extra patrimonium} were also classified as \textit{extra commercium}. Thus, the difference between the two approaches seems to be that things \textit{extra patrimonium} may not be privately owned while things \textit{extra commercium} may be.

Contemporary continental doctrine, and modern codes, generally, have abandoned the distinction of things into those susceptible of private ownership and those which are not, and have adopted the analytically preferable distinction between things “in commerce” and things “out of commerce.”\textsuperscript{35} This is based on the realistic consideration that, while all things are by their nature susceptible of ownership, consideration of public utility and convenience may require certain things to be withdrawn, entirely or in part, from the sphere of free private relations. Thus, ordinarily, things “in commerce” are all things which the law has not placed “out of commerce.” Things out of commerce are, ordinarily, common things, things serving a public purpose, and things dedicated to public use.\textsuperscript{36}

In Articles 449-459 and 481-483 the Civil Code of Louisiana follows the terminology of Gaius and Justinian. Yet, other articles in the Code, subsequent statutory legislation, and jurisprudence seem to indicate that things in Louisiana are classified according to whether or not they may become the object of private relations rather than the object of private ownership. Thus,

\textsuperscript{33} See \textit{Gaius, Institutes II.1; Justinian, Institutes II.1} De R.D.Pr. \textit{Cf. Girard, Manuel élémentaire de droit romain} 251, n. 1 (1924).
\textsuperscript{34} See, \textit{e.g.}, \textit{Digest}, XX.3.1.2. \textit{Cf. Sohm-Mitteis-Wenger, Institutionen des römischen Rechts} 253 (1923); \textit{Weiss, Institutionen des römischen Privatrechts} 129 (1949).
\textsuperscript{35} See 1 \textit{Enneccerus-Nipperdey, 1 Allgemeiner Teil des bürgerlichen Rechts} 544 (1952); \textit{Ballis, General Principles of Civil Law} 525 (1955) (in Greek). \textit{Cf. 2 Aubry et Rau, Cours de droit civil français} 68 (1897); 3 \textit{Planiol et Ripert, Traité pratique de droit civil français} 700 (1952).
\textsuperscript{36} See, \textit{e.g.}, \textit{Greek Civil Code} art. 396: “Things out of commerce are those common to all, those subject to public use and those dedicated to serve public, municipal, communal, or religious purposes.” The German Civil Code and the Swiss Civil Code have not included corresponding provisions. It was thought that things not in commerce should be regulated exclusively by rules of public law which had no place in a civil code. See \textit{Lehmann, Allgemeiner Teil des bürgerlichen Gesetzbuches} 368 (1957).
things subject to public use cannot become objects of private relations which are incompatible with public use, though, contrary to Article 482(2) of the Code, these things may be privately owned.  

Accordingly, it might be more accurate for Louisiana to adopt the distinction between things “in commerce” and things “out of commerce,” and to treat the common, public, and private things within these two categories. An analysis of the Louisiana law concerning things public, common, and private has been made elsewhere. At this point, the discussion will be confined to a brief analysis of foreign law.

In Roman law, things *extra patrimonium* or *extra commercium* were common things (*res omnium communes*), public things (*res publicae*), and things of divine law (*res divini juris*). Common things were regarded as insusceptible of private ownership by their nature; in this category were included air, running water, the sea, and its shore. Public things in early Roman law were things owned by the Roman people. The incidents of this public ownership were regulated by rules of public rather than civil law. In the Justinian legislation, the term “public things” is not well-defined. The term was applied to public property which was insusceptible of private ownership — out of commerce because it was serving a public purpose — and to things which were public only in the sense that they were dedicated to public use (*res publicae publico usu destinatae*). The term also applied to public property belonging to the state or to political subdivisions which were in commerce and susceptible of private ownership like any other property held by private persons (*res fisci, res in patrimonio universitatis*). Of divine law were the sacred, sanctioned, and religious things.

The French Civil Code distinguishes between things suscep-
tible of private ownership and those not so susceptible. Things susceptible of private ownership are the private things. These may belong to private persons or to the state in its capacity as a private person. Things insusceptible of private ownership are the common things and the things of the public domain. With regard to common things, there is only an allusion in the French Civil Code: Article 714 declares that "there are things which belong to nobody in particular and the use of which is common to all. Police regulations govern the mode of their enjoyment." This apparently refers, by implication, to the known category of Roman law. Article 538 of the French Civil Code, however, provides that the public domain includes the seashore and navigable rivers, which, according to Roman conceptions, were regarded as common things. Thus, under the French Civil Code, only air and the open sea are common things.

French writers disagree as to which things are included in the public domain and as to the criteria for this determination. Article 538 of the Civil Code declares that "highways, roads, and streets maintained by the State, navigable and floatable rivers and streams, the seashore, alluvion and derelictions of the sea, ports, harbors, and roadsteads, and generally all parts of French territory which are insusceptible of private ownership, are considered to be part of the public domain." The Code, further, enumerates as being part of the public domain "gates, walls, trenches and bulwarks of fortified cities, and fortresses" (Article 540), "lands, fortifications, and bulwarks of cities which are no longer fortified places" (Article 541), and "all property which is vacant and without owner, and all that of persons who die without heirs, or whose successions are abandoned" (Article 539).

43. See French Civil Code art. 537; 3 Planiol et Ripert, Traité pratique de droit civil français 65, 122 (1952); 2 Aubry et Rau, Cours de droit civil français 65 (1897); 9 Demolombe, Traité de la distinction des biens (1874-82).
44. State-owned private property (property of the private domain) is subject to the rules of the Civil Code and does not differ from property owned by private individuals. To the private domain of the state belong forests, alluvion, and derelictions of the sea, buildings housing public authorities, factories, farms, movable things, and generally, all species of property susceptible of private ownership. Cf. 3 Planiol et Ripert, Traité pratique de droit civil français 145 et seq. (1952).
45. See Justinian, Institutes II.1.1.
46. See 3 Duguit, Traité de droit constitutionnel 347 (1938); DuB, Traité de droit administratif 759 (1952); Proudhon, Traité du domaine public 62-63 (1834); 2 Aubry et Rau, Cours de droit civil français 50 (1897).
French jurisprudence and doctrine have departed from the literal wording of the Code. Some things, which according to the Code are part of the public domain, are treated as part of the private domain; and a number of things not mentioned in the Code have been added to the public domain. Thus, although not mentioned in the Code, artificial navigable waterways, except those subject to a perpetual concession, and salt water lakes directly connected with the sea are regarded as part of the public domain. On the other hand, alluvion and derelictions of the sea, vacant estates, and fortifications no longer needed are classified, contrary to the Code, as part of the private domain.

There is no general agreement in France as to the classification of public buildings and movable things belonging to the state. In the treatise of Planiol, the following buildings are enumerated as part of the public domain: those which may be regarded as accessory to territorial parts of the public domain, such as beacons erected on the seashore, and bridges on highways; those which a statute had declared to be a part of the public domain; cemeteries and buildings dedicated to worship or to the service of the public, such as libraries, schools, and covered market places. Public buildings housing governmental offices are regarded as part of the private domain. The Code seems to imply that movable state property cannot form part of the public domain. The courts, however, have indicated that certain movable things dedicated to the service of the public, such as exhibits in a museum, documents in archives, and manuscripts or books in a library are included in the public domain.

The German Civil Code has not included provisions establishing the categories of things insusceptible of private owner-
ship or out of commerce. It was thought that things of this nature should be regulated exclusively by rules of public law which had no place in a civil code. German writers, however, for systematic purposes, include in their treatises on the Civil Code chapters dealing with things out of commerce. Things out of commerce are defined as those which, "though susceptible of private ownership but on account of their dedication to a public purpose, are withdrawn from the sphere of private law in whole or in part, and, for this reason, either cannot become subject of private relations at all or if so, to only a limited extent." To this category belong the religious things and the public things. The things known as "common" in Roman law are either regarded as public things or as not things at all.

Religious things (res sacrae et religiosae) are things dedicated to worship. They may belong to the Church as a religious association, to public corporations (cemeteries), or to private persons (family plots and private churches). Ownership, however, is limited in that use contrary to the dedication is excluded. Public things (res publicae) are things dedicated to public use. Highways, streets, rivers, and lakes are public things if open to the general traffic. These things may belong to the state, other public corporations, or even to private persons. Regardless of the owner, this type of property is subject to the provisions of the Civil Code governing private property. Designation of a thing as public begins with a public law act of dedication and commencement of the public use.

The scope of ownership is limited as a result of dedication to public use. The owner of the thing dedicated must refrain from incompatible activities and must take all appropriate measures to facilitate public use. The Reichsgericht has indicated that the right of the public is not confined to a mere use but extends to the enjoyment of certain facilities and conveniences. It is debatable, however, whether participation in the public use is an individual right or merely a privilege accorded to everyone. Limitations on ownership continue so long as the thing is subject to public use. Public use terminates by revocation of

51. See 1 Ennecerus-Nipperdey, 1 Allgemeiner Teil des bürgerlichen Rechts 544 (1952); Lehmann, Allgemeiner Teil des bürgerlichen Gesetzbuches 368 (1957); 1 Staudinger, Kommentar zum B.G.B. 405 (1957).
dedication. Revocation is a public law act requiring the consent of supervising governmental authorities. Upon termination of the public use, ownership becomes free of all limitations.

Under the scheme of the German Civil Code, the notion of "public domain" is avoided. Apart from certain things dedicated to public use, state property may consist of things dedicated to public service, such as courthouses, schools, fortifications, prisons, and buildings housing governmental offices. These are the "property of the administration" and belong to the state or other public corporations. So long as public service continues, these things may not be seized by creditors.54 Another species of state property consists of private property in the literal sense (*res fisici*). These things serve public purposes only indirectly and are subject to the rules of the Civil Code like any other property held by private persons. Money and negotiable instruments, state factories, state farms, and autonomous state enterprises which run factories, the railroads, and electricity networks belong to this category.

In the Greek Civil Code, the traditional classification of things "in commerce" and "out of commerce" is retained. Article 966 declares that "things out of commerce are those common to all, those subject to public use and those dedicated to serve public, municipal, communal, or religious purposes." The category of common things has only academic significance; it includes air, and, perhaps, the open sea.55 Things of public use are those which become dedicated either as a result of legislation or by a private act of the owner. Article 967 indicates that "things of public use are, particularly, freely and perpetually running water, roads, public squares, the seashore, harbors and roadsteads, the banks of navigable rivers, large lakes and their shores." The list is merely illustrative. In interpreting this article, it has been suggested that beds of navigable rivers, though not mentioned specifically, are necessarily included by implication.56 The banks of non-navigable rivers belong to the adjacent landowners and are not subject to public use. However, inasmuch as running water is subject to public use, remote landowners are entitled to its use and may have access to it through ditches or pipelines.57 According to well-settled inter-

55. See BALIS, GENERAL PRINCIPLES OF CIVIL LAW 527 (1955) (in Greek).
56. Id. at 532.
57. Cf. GREEK CIVIL CODE arts. 1029, 1031.
pretation, "large" lakes are lakes formed by running water. Artificial lakes and lakes formed other than by perpetually running streams are private property "in commerce." Special legislation governs ownership of mineral waters. Things subject to public use may belong to the state, towns or communities, or even to private persons. In the latter case, enabling legislation is necessary (Article 968). Ownership of things subject to public use is limited. Rights of ownership may be exercised only if compatible with the public use; accordingly, the owner may be entitled to a treasure found on the land and to all valuable minerals.

The last group of things "out of commerce" includes in a broad sense all things dedicated to a public purpose. These differ from things dedicated to public use in that the public purpose served by them is not public use. Like things dedicated to public use, these are susceptible of private ownership but only to the extent compatible with the public purpose. In this category belong state-owned buildings housing governmental offices, and educational and health institutions. Municipal buildings housing municipal offices and institutions belong to the same category. State and municipal enterprises, whether autonomous or not, may serve public purposes. The accepted criterion of distinction is whether the main purpose of the enterprise is the production of revenue or service to the public. The state owned railroad and telecommunications systems and electric utilities are regarded as serving a public purpose, and, therefore, are things out of commerce. Finally, to this category belong religious institutions and cemeteries.

The Greek Civil Code, like the German Civil Code, has avoided the confusing notion of "public domain." State property is, in all cases, private property within the meaning of the Civil Code; in some instances, however, exercise of ownership rights is limited in the interest of public use and public purpose. The power of the state to regulate public use and public purpose is not regarded as an incident of ownership but as authority deriving from the sphere of public law properly belonging to the state.

Things out of commerce may lose this character under certain circumstances. When such is the case, all limitations on ownership are lifted. Change of ownership occurs in only two
instances, where islands are formed in navigable rivers and
where beds of rivers have ceased to be navigable. In these
instances the state is divested of ownership; and, according to
Articles 1071 and 1072 of the Civil Code, title belongs to the
adjacent landowners.

Corporeal and Incorporeal Things

Roman law distinguished between res corporales and res in-
corporales. This was a classification of objects rather than
things. Physical objects which could be felt or touched were
given as illustrations of res corporales. Res incorporales were
abstract conceptions — objects having no physical existence, but
having a pecuniary value. The illustrations given were rights
of various kinds, among them inheritance, obligations, and all
real rights with the exception of ownership. Ownership was
regarded as res corporales as a result of latent confusion between
the right of ownership and its object. The practical significance
of the distinction between res corporales and res incorporales
was that possession, and methods of acquiring ownership based
on possession were applicable only to material things. Later
in the history of Roman law, when the deficiencies of this classi-
fication became apparent the concept of quasi-possession, i.e.,
possession of real rights other than ownership, was developed.
The division of things into corporeal and incorporeal in Roman
law resulted in a sharp distinction between ownership, on the
one hand, and all other rights, on the other. Modern codes de-
veloped conceptual techniques designed to bridge this gap.

According to Article 460 of the Louisiana Civil Code, “things
are divided, in the second place, into corporeal and incorporeal.”
Corporeal things are “such as are made manifest to the senses,
which we may touch or take, which have a body, whether ani-
mate or inanimate.” The Code offers as illustrations “fruits,
corn, gold, silver, clothes, furniture, lands, meadows, woods, and

58. See GAIUS, INSTITUTES II.12-14: “Quaedam praeterea res corporales sunt,
quae tanti possunt, velut fundus, homo, vestit, aurum argentum et denique aliae res innumerabiliae. Incorporales
sunt, quae tanti non possunt, qualia sunt ea, que jure consistunt, sicut hereditas,
usu fructus, obligationes quoque modo contractae.”
59. See BUCKLAND, A TEXT-BOOK OF ROMAN LAW 186 (1950) ; WEISS, INSTITU-
TIONEN DES RÖMISCHEN PRIVATURECHTS 126 (1949).
60. See 1 MONIER, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 342 (1947) ; 1
HUVELIN, COURS ÉLÉMENTAIRE DE DROIT ROMAIN 419 (1927).
61. See LA. CIVIL CODE art. 460(1) (1870). Cf. LA. CIVIL CODE art. 451
(1825) ; LA. CIVIL CODE p. 96, art. 11 (1808).
Incorporeal things, on the other hand, are "such as are not manifest to the senses, and which are conceived only by the understanding; such as the rights of inheritance, servitudes, and obligations."63

Departing from the narrow notions of Roman law where only tangible objects were regarded as corporeal, the Code declares that perceptibility by any of the senses suffices to classify a thing as corporeal. It is questionable, however, whether energies could be regarded as corporeal things under the Code. Perhaps French jurisprudence and doctrine construing corresponding provisions of the French Civil Code to include energies as corporeals64 should be followed in Louisiana. In any case, unlike the situation in Germany and Greece,65 energies in Louisiana are clearly objects "of riches or fortune" and should enjoy full proprietary protection as things.66

The division of things into corporeals and incorporeals in the Louisiana Civil Code did not, as in the Roman law, result in a sharp distinction between the right of ownership and all other rights. Ownership in Louisiana does not seem to be limited to corporeal things67 and acquisition of ownership as between the parties to a contract does not depend on transfer of posses-

62. LA. CIVIL CODE art. 460(2) (1870).
63. Id. art. 460(3). See also Succession of Sinnott, 105 La. 705, 30 So. 233 (1901) (shares of stock); Succession of McGuire, 151 La. 514, 92 So. 40 (1922) (certificate of stock); Vercher v. Roy, 171 La. 524, 131 So. 558 (1930) (certificate of deposit); Messersmith v. Messersmith, 229 La. 495, 86 So.2d 109 (1956) (group annuity policy); Merres v. Compton, 12 Rob. 76 (La. 1845); Miller v. Andrus, 1 La. Ann. 237 (1848) (promissory notes); First Nat'l Bank & Trust Co. v. Drexler, 171 So. 101 (La. App. 2d Cir. 1937) (right of succession); Louisiana Arkansas Co. v. Louisiana Dept. of Highways, 104 So.2d 151 (La. App. 2d Cir. 1937) (right of way). Classification of negotiable instruments, insurance policies, and certificates of deposit as "incorporeal" things is confusing. Accurate terminology should distinguish between the paper (which is corporeal) and the rights it evidences or embodies (which, indeed, are incorporeal). Cf. LA. CIVIL CODE art. 1762 (1870); Succession of Sinnott v. Hibernia National Bank, 105 La. 705, 717, 30 So. 233, 238 (1901) ("rights must not be confounded with writings which evidence them").
64. See 3 PLANIOLE ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 102 (1952); Cass., April 20, 1864, D.1864.1.178.
65. Cf. text at notes 23, 27 supra.
66. Cf. LA. CRIMINAL CODE art. 2(3) (1942): "'Anything of value' must be given the broadest possible construction, including any conceivable thing of the slightest value, movable or immovable, corporeal or incorporeal, public or private. It must be construed in the broad popular sense of the phrase, and not necessarily as synonymous with the traditional legal term 'property.'"
67. See Arkansas Louisiana Gas Co. v. Louisiana Dept. of Highways, 104 So.2d 204 (La. App. 2d Cir. 1958) (right of way is "property"). Cf. LA. CIVIL CODE art. 488 (1870): "Ownership is the right by which a thing belongs to some one in particular, to the exclusion of all other persons." Possession, however, is
sion and delivery. However, there are a number of articles in the Code which apply only to corporeal things. The distinction is also important in connection with the division of things into movables and immovables.

In France, estates (biens) are divided into things (chooses, biens corporels) and rights (droits, biens incorporels). This distinction is not spelled out in the Civil Code, but is implied in several articles. The distinction has been criticized as an "incoherent juxtaposition" of things and rights — objects which have no common characteristics.

Though no longer relevant in connection with modes of acquiring property, the distinction carries consequences in the light of Article 2279 of the French Civil Code; its rule that "possession is equivalent to ownership with regard to movables" applies only to corporeal objects.

In the German and Greek Civil Codes things are corporeal objects only. As a result, ownership and other real rights may limited to corporeal objects. Cf. La. Civil Code art. 3432 (1870): "Possession applies properly only to corporeal things, movable or immovable. The possession of incorporeal rights, such as servitudes and other rights of that nature, is only a quasi possession, and is exercised by the species of possession of which these rights are susceptible."

68. See La. Civil Code art. 2456 (1870).

69. The law of predial servitudes relates exclusively to corporeal immovables. On the other hand, there are also rules in the Code which apply only to incorporeal things. Cf. La. Civil Code art. 2481 (1870). Classification of things as corporeal or incorporeal is particularly important in the determination of validity of an inter vivos donation: corporeal things may become the subject of an inter vivos donation by manual gift (art. 1539), while incorporeal things may be given only by authentic act (art. 1536). In this context, Louisiana courts have classified shares and certificates of stock as "incorporeal." See supra note 63. The Uniform Stock Transfer Act (La. R.S. 12:521-43 (1960)) has superseded Article 1530 of the Civil Code inasmuch as it applies to shares of stock. LeBlanc v. Volker, 198 So. 398 (La. App. Orl. Cir. 1940). Thus, though "incorporeal," shares of stock may validly be the subject of an inter vivos donation by manual gift. Ibid.


71. See 3 Planiol et Ripert, Traité pratique de droit civil français 60 (1952). According to the prevailing doctrine in France, corporeal estates are objects of value which can be perceived through the senses. Incorporeal estates are services and rights in general having a pecuniary value. Cf. 1 Colin, Capitain et Julliot de La Morandière, Traité de droit civil 521 (1953). These authors suggest that estates are rights rather than things. Incorporeal estates are other than ownership rights on corporeal or incorporeal things. Corporeal estates are ownership rights on corporeal objects.

72. See French Civil Code arts. 518-525, 528 (corporeal things); arts. 526, 529 (incorporeal things).

73. See 3 Planiol et Ripert, Traité pratique de droit civil français 60 (1952).

74. See Paris Ct. of App., Nov. 25, 1886, D.1887.2.110; Cass., Nov. 4, 1892, D.1908.1.44; id., Nov. 25, 1929, D.H. 1930.1.3.

75. Cf. text at notes 22, 27 supra.
exist only on corporeal things. Incorporeal objects, namely, rights having a pecuniary value, though a part of a person’s “patrimony,” are not governed by the law of things.

**Things Movable and Immovable**

According to Article 461 of the Louisiana Civil Code, “the third and last division of things is into movables and immovables.” This “division” rests in part on policy considerations; as a result, it does not always correspond with lay notions of physical mobility. The Code defines movables and immovables, furnishes criteria for this classification, and establishes the rule of construction that things not classified as immovables are movables. Immovables are subdivided into immovables by nature, by destination, and by their object. Movables are distinguished into movables by nature and movables by the disposition of the law. The code provisions have been implemented by a number of statutes and by a growing gloss of jurisprudence. Detailed study of the Louisiana and comparative law concerning movables and immovables has been made elsewhere.

**Other Distinctions**

The preceding classification of things in the Louisiana Civil Code is not exhaustive. Indeed, civilian tradition has developed additional distinctions which, though not mentioned by name in the Louisiana Civil Code, may be regarded as adopted by implication. In case of a future revision of our Civil Code, these distinctions should perhaps be considered.

**Things consumable and non-consumable.** Corporeal objects are distinguished by civilian writers into consumable and non-consumable things, depending upon whether or not they are extinguished (or intended to be extinguished) by use. Extinction of consumable things may be the result of physical destruction (e.g., consumption of foods or drinks) or the consequence of a juridical act (e.g., alienation of money). In all cases a disposition takes place which cannot be repeated. Non-consumable things continue to exist in spite of prolonged use (e.g.,

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76. La. Civil Code art. 461 (1870).
77. Id. art. 475.
79. See 3 Planiol et Ripert, Traité pratique de droit civil français 61 (1962).
furniture, houses, utensils). The distinction of things into those consumable and those non-consumable was known in Roman law. The French Civil Code and the Louisiana Civil Code have adopted this distinction by clear implication. The German Civil Code and the Greek Civil Code contain specific provisions and definitions.

The practical significance of this distinction in France and Louisiana lies in the fact that only consumable things may be the object of a loan for consumption and only non-consumable things the object of a loan for use. Further, perfect usufruct is possible only on non-consumable things, while imperfect usufruct is possible only on consumable things. Comparable consequences attach in other civilian systems. In the absence of definition in the Civil Code, characterization of a thing as consumable or non-consumable in France and Louisiana properly belongs to doctrine and jurisprudence. According to prevailing French doctrine, which may be relevant for Louisiana also, this is a factual determination depending on the inherent nature of things. Things which according to their nature cannot become the object of a prolonged right of enjoyment, i.e., things

80. See Justinian Institutes II.d.b. "... quae ipso usu consumuntur quo numero sunt vinum oleum frumentum vestimenta. quibus proxima est pecunia numerata: namque in ipso usu adsidua permutatione quodammodo extinguitur."


82. Louisiana Civil Code art. 2896 (1870): "Everything...which is not consumed by use..." See also id. art. 2678, notes 83-84 infra.


extinguished by the first use. According to Article 92 of the German Civil Code "consumable things, within the meaning of the law, are movables the intended use of which consists in their consumption or alienation. Movable things which belong to a stock of goods or to any other aggregate of things the intended use of which consists in the alienation of the single objects are likewise considered to be consumable." Articles 951 and 952 of the Greek Civil Code contain provisions similar in substance. German and Greek doctrine and jurisprudence interpret these articles to mean that determination of the character of a thing as consumable or non-consumable depends on objective criteria and prevailing notions in trade rather than actual use. Food, drink, and raw materials are destined to be consumed and are clearly consumable per se. Clothes, however, are not consumable because they are not destined to be consumed; their deterioration and ultimate destruction is the result of use rather than their destination. Money and goods destined to be alienated, or the utility of which consists in their alienation, are assimilated to things consumable per se. The distinction has practical consequences as to legal relations concerning the use of things. Depending upon characterization of things as consumable or not consumable, one may be under a duty to return either specific things or things of like quantity and quality.

Things fungible and non-fungible. Another important classification of things is into fungibles and non-fungibles. The criterion for this distinction is the possibility of replacement

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85. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 62, 64 (1952). In Roman law, however, the category of consumable things was broader as it included things subject to deterioration rather than extinction by the first use (e.g., clothes). Cf. supra note 80.


87. According to Article 951 of the Greek Civil Code "Consumable things are those movable things the intended use of which consists in their being consumed." The following Article 952 provides that "Likewise consumable are those movable things the intended use of which consists in alienation. Such are especially coins and bank notes, matured interest and dividend coupons, as well as movable things which without being consumable per se are part of a commercial establishment or of any aggregate of things and are destined to be alienated individually."

88. See BALIS, GENERAL PRINCIPLES OF CIVIL LAW 493 (1955); 1 ENNECERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 505 (1952); LEHMANN, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES 359 (1957); SOKOLOWSKI, DIE PHILOSOPHIE IM PRIVATRECHT 383 (1902); 1 STAUDINGER, KOMMENTAR ZUM B.G.B. 434 (1957).
of one thing by another. Things which according to law or the intention of the parties may be regarded as interchangeable are termed fungible; things which are not interchangeable are non-fungible. Ordinarily, fungible things occur in trade in terms of numbers, weight, or measure. Characterization of things in that regard may involve comparison with other things.\textsuperscript{89}

This distinction has its foundation in Roman law.\textsuperscript{90} The German and Greek Civil Codes clearly distinguish between fungibles and non-fungibles, whereas the French and the Louisiana Civil Codes have adopted this distinction only by implication. The word “fungibles” occurs in the French Civil Code and in the French text of the Louisiana Civil Code in connection with compensation.\textsuperscript{91} In several other articles reference is made to fungibles by description rather than by use of this term.\textsuperscript{92}

In certain instances, however, the redactors of the Louisiana Civil Code seem to have confused fungible things with consumable things and have regarded as fungible those things destined to be consumed by use.\textsuperscript{93} The same error was made by the redactors of the French Civil Code who relied heavily on the texts of Domat and Pothier.\textsuperscript{94} Indeed, quite frequently, things which are fungible are also consumable. But this is not necessarily so, for there are things which are fungible without being consumable (\textit{e.g.}, books of the same edition) and things which are consumable without being fungible (\textit{e.g.}, wine of a particular vintage). In any case, as the two characteristics fre-

\textsuperscript{89} See 3 Planiol et Ripert, Traité pratique de droit civil français 63 (1952); Jaubert, Deux notions du droit des biens: la consomptibilité et la fongibilité, [1945] Rev. Trm. Dr. Civ. 75.

\textsuperscript{90} See Paulus, Digest XII.1.2.2: "Mutui datio consistit in his rebus, quae ponderes numero mensura consistunt."

\textsuperscript{91} See French Civil Code art. 1291; LA. CIVIL CODE art. 2205 (1825): "La compensation n'a lieu qu'entre deux dettes qui ont également pour objet une somme d'argent, ou une certaine quantité de choses fungibles de la même espèce, et qui sont également liquides et exigibles." In the corresponding Article 2209 of the 1870 Code, the word "fungibles" is translated as "consumable."

\textsuperscript{92} See, \textit{e.g.}, LA. CIVIL CODE arts. 2458-2459 (1870) (sale of goods by weight, tale, or measure).

\textsuperscript{93} See, \textit{e.g.}, LA. CIVIL CODE art. 2896, 2010 (1870). \textit{Cf. supra} note 91. Article 2010 of the Louisiana Civil Code should refer to "fungibles" rather than "things which are consumed by the use." \textit{Cf. Greek Civil Code} art. 806: "By the contract of loan one party to the transaction transfers to the other party the ownership of money or of other fungible things, and the borrower is under obligation to return to him other things of the same quantity and quality."

\textsuperscript{94} See, \textit{e.g.}, French Civil Code arts. 1874, 1875, 1892; 9 Demolombe, Traité de la distinction des biens 23 (1874-82). \textit{Cf. Pothier, Traité des obligations, 1 Oeuvres de Pothier 191 (1830); Domat, Les loix civiles dans leur ordre naturel 78 (1777); Dutch Civil Code} art. 561 (1838); \textit{Spanish Civil Code} art. 337 (1889).
quently coincide, this confusion of concepts has not caused sub-
stantial practical difficulties.\textsuperscript{95}

French writers do not agree as to whether the quality of a
thing as fungible or non-fungible depends upon its nature or
upon the intention of the parties. According to Demolombe in-
tention controls.\textsuperscript{96} According to other commentators, while intention
may be relevant, it is indispensable that a thing should, by
its nature, be susceptible of determination by weight, tale, or
measure in order to qualify as fungible; for example, the inten-
tion of the parties may not render a house fungible.\textsuperscript{97} In France
and in Louisiana, the distinction of things as fungible or non-
fungible is significant in the field of obligations. Obligations
having as their object things determined by quantity and
quality\textsuperscript{98} ("genre," "genus") and obligations having as their object a thing determined individually\textsuperscript{99} ("corps certain," "species") concern, respectively, fungible and non-fungible things.\textsuperscript{100}

According to Article 92 of the German Civil Code, "fungible
things in the legal sense are movable things which in trade are
generally determined by number, measure or weight," The Greek
Civil Code contains a similar definition.\textsuperscript{101} According to settled
interpretation in Germany and Greece, the quality of a thing as fungible or non-fungible is determined by reference to objective
criteria and notions prevailing in trade.\textsuperscript{102} As in France and in
Louisiana, the distinction is important in the field of obliga-
tions, particularly in connection with the contracts of loan,
deposit, and annuity. Responsibility for loss or deterioration

\textsuperscript{95} See 3 Planiol et Ripert, Traité pratique de droit civil français 64
(1952).
\textsuperscript{96} See 9 Demolombe, Traité de la distinction des biens 23 (1874-82).
\textsuperscript{97} See 3 Planiol et Ripert, Traité pratique de droit civil français 64
(1952).
\textsuperscript{98} See, e.g., La Civil Code art. 2156 (1870). See also id. arts. 1856, 1915,
\textsuperscript{99} See, e.g., La Civil Code arts. 2150, 2151 2155 (1870). Cf. id. art. 1909.
Cf. Ulpian, Digest XXX 30.6: "Si legetur pecunia quae in arca est, vel vinum, quod in apotheca est, et cet. species legetur. et cet."
\textsuperscript{100} Cf. Comment, Supervening Impossibility as a Discharge of an Obligation,
21 Tul. L. Rev. 603 (1947).
\textsuperscript{101} See Greek Civil Code art. 950: "Fungible things are those movables
which in trade are ordinarily determined by number, measure, or weight."
\textsuperscript{102} See Balis, General Principles of Civil Law 492 (1955) (in Greek); 1
Enneccerus-Nipperney, 1 Allgemeine Teil des bürgerlichen Rechts 504
(1952); See Lehmann, Allgemeine Teil des bürgerlichen Gesetzbuches 368
(1957).
of a fungible thing is discharged by the delivery of another similar thing, while with regard to non-fungibles a money judgment is the only permissible substitute. The distinction of things into fungible and non-fungible corresponds to the distinction of obligations having as their object a genus and those having as their object a species, an individually determined thing. In that regard, however, classification of a thing as fungible or non-fungible depends upon the intention of the parties rather than upon objective criteria.¹⁰³

**Things divisible and indivisible.** The distinction of things into those divisible and those indivisible has been termed "one of the most abstract and most obscure matters of civil law."¹⁰⁴ Indeed, "divisibility" is a juridical abstraction which does not always correspond with lay notions. In Roman law, things were divisible if they could be divided into several parts of the same kind as the whole without thereby suffering diminution in value.¹⁰⁵ Characterization of a thing as divisible or indivisible was important in judicial partition, for depending on the divisibility of things, substantially different methods of procedure were available.

The French and the Louisiana Civil Code refer to divisibility in a number of articles.¹⁰⁶ As in Roman law, the issue of divisibility is important in connection with judicial partition. Divisible things may be partitioned in kind while indivisible things are subject to partition only by licitation. The Louisiana Civil Code declares that a thing is indivisible "when a diminution of its value, or loss or inconvenience of one of the owners, would be the consequence of dividing it."¹⁰⁷ There is no corresponding article in the French Civil Code.
The German and the Greek Civil Codes deal with divisibility in connection with the institution of co-ownership (Gemeinschaft, communio). According to Article 752 of the German Civil Code, partition in kind is available as to things which, without diminution in value, can be divided in equal parts corresponding to the shares of the co-owners. Article 800 of the Greek Civil Code contains a similar provision. According to settled doctrine in both countries, tracts of land are always divisible in kind. Buildings may be susceptible of vertical division in kind, if they have several entrances; horizontal division of buildings is possible under the Greek Civil Code only by amicable partition. As a rule, movables are indivisible; divisible are those whose value consists in their substance rather than form and those consisting of a mass of similar things (e.g., grain).

Single and composite things; aggregates and universalities. Civilian scholars, elaborating on Roman law sources, distinguish things into those single (res singulares, corpus continuum, corpus quod uno spiritu continentur) and those composite (corpus compositum, corpus quod ex contingentibus constat, universitas rerum cohaerentium). Single things are natural objects which not susceptible of horizontal division. Ibid. Whether land can be partitioned in kind depends on its nature, the character of improvements thereon, adaptability of land to farming purposes, accessibility of lots to highways, and a number of other considerations. Pryor v. Desha, 204 La. 575, 15 So.2d 891 (1944). See also Bordelon v. Starker, 237 La. 612, 111 So.2d 791 (1959); Cain v. Boudosque, 227 La. 333, 79 So.2d 328 (1955); Oliver v. Robinson, 221 La. 658, 60 So.2d 76 (1955). A partition in kind is said to result in a diminution of the value of the property when the total value of the lots is less than the value of the tract as a whole. Babineaux v. Babineaux, 237 La. 806, 814, n.4, 112 So.2d 620, 622, n.4 (1959). Whether land should be divided in kind or by licitation is thus reduced to "a question of fact to be decided by the judge before whom the partition proceedings are tried." Green v. Small, 227 La. 401, 79 So. 497 (1955). Mines and known mineral lands are indivisible in kind. Sellwood v. Phillips, 185 La. 1045, 171 So. 440 (1936); Gulf Refining Co. v. Hayne, 138 La. 555, 70 So. 509 (1915); Demegre, Co-ownership of Oil and Gas Interests in Louisiana, 24 Tul. L. Rev. 288, 290 (1950). Cf. Comment, Circumstances under which Partition is Available and Procedure for Securing It as They Developed Historically, 8 Tul. L. Rev. 574 (1934).

108. See GERMAN CIVIL CODE art. 752: "The dissolution of the community is effected by partition in kind, if the object held in common, or in case several objects are held in common, the latter may without diminution in value, be divided in equal parts corresponding to the shares of the co-owners. The division of equal parts among the co-owners takes place by drawing lots."

109. "Partition is made in kind if the objects to be partitioned, one or more, may be divided in similar parts corresponding to the shares of the co-owners, without diminution in value."

110. See GREEK CIVIL CODE arts. 1002. In Germany, Article 93 of the Civil Code blocked recognition of ownership in individual apartments. Special legislation was enacted, however, which permitted contractual and judicial horizontal division of buildings. See Law of March 15, 1951, 1 B.G. bl. 175 (1951).

111. This distinction is merely systematic and has not become the object of
according to physical, though not necessarily scientific, notions appear as one thing (e.g., stones, pieces of metal, wood, organic matter). Objects which have trade value only in certain quantities (e.g., grain) are also single things. Composite things consist of several single things ("component parts") which have lost their individuality and are regarded as one thing while their association lasts (e.g., a piece of furniture, a car, a ship). The distinction of things into single and composite is important in the light of consequences attaching to things characterized as component parts.

The component parts of a composite thing are either "essential" or "non-essential." Essential component parts are those which cannot be separated from each other without destruction of one part or another or without essential change in their substance. In general, factual relations of things and prevailing societal notions determine lines of demarcation. The significance of classifying a thing as an essential component part is that, so long as the association lasts, this thing is not an object of separate real rights and follows the principal thing in all cases of alienation or encumbrance. Non-essential component parts, on the other hand, are objects of separate real rights but they follow the principal thing in the absence of provision to the contrary. The French and the Louisiana Civil Codes refer to this distinction only by implication. The German Civil Code and the Greek Civil Code contain provisions defining the words "essential component parts" and establishing the consequences of characterization.

Composite things are distinguishable from so-called "aggregates of things" (corpus ex distantibus, universitates rerum distinctis in civil codes. See Balis, General Principles of Civil Law 474 (1955) (in Greek); Demolombe, Traité de la distinction des biens 28 (1874-82); Enneccerus-Nipperdey, Allgemeiner Teil des bürgerlichen Rechts 506 (1952); Lehmann, Allgemeiner Teil des bürgerlichen Gesetzbuches 349 (1957); Weiss, Institutionen des römischen Privatrechts 152 (1949).

112. See Yiannopoulos, Movable and Immovable in Louisiana and Comparative Law, 22 Louisiana Law Review 517 (1962). Roman law did not recognize separate real rights on component parts. Buildings and plants were considered component parts of the ground and, therefore, insusceptible of separate ownership. Ownership over things which became component parts of other things became dormant for the period of association but could revive upon separation unless extinguished by acquisitive prescription.

114. German Civil Code arts. 93-96.
115. Greek Civil Code arts. 953-55.
These aggregates are composed of several similar or dissimilar, single or composite things which because of their common destination are regarded in trade as one thing (e.g., a herd, an art collection). In these circumstances, the several individual things do not lose their identity and continue having an independent juridical existence. The aggregate as such is not a thing, nor does it have a juridical existence of its own, but exists only in fact. Consequently, ownership rights operate only on the several individual things and not upon the aggregate. The aggregate may become the object of obligations but never the object of real transactions. Aggregates of things should not be confused with universalities of rights and things (e.g., patrimony). These are juridical entities distinct from the several rights and things of which they are composed. Universalities are not things; however, unlike aggregates, which exist only in fact, universalities exist both in fact and in law. They are particularly important in the field of successions and obligations.

Things principal and accessory. The traditional distinction into things principal and accessory rests on the observation that things which preserve their identity may exist in a relationship of coordination (e.g., spoon and fork) or in a relationship of subordination (e.g., house and key). In the second relationship, the subordinate thing is called an accessory. Accessories are defined by civilian writers and by certain modern codes to be things which, without being component parts of a principal thing, are nevertheless destined to serve its economic purpose.

117. See BALIS, GENERAL PRINCIPLES OF CIVIL LAW 475 (1955) (in Greek); DE LOOMBE, TRAITÉ DE DISTINCTION DES BIENS 29 (1874-82); ENNECERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 501 (1952); SCHMIDT-WAGNER, INSTITUTIONEN DES RÖMISCHEN RECHTS 251 (1923).

Louisiana Civil Code indicate that accessories are things united to a principal thing for its "use, ornament, or completion." Several articles in the French and in the Louisiana Civil Code refer to the consequences of the characterization of a thing as accessory. Ordinarily, party intention, factual relations of things, and prevailing conceptions in society determine which things are principal and which accessories. Characterization of a thing as accessory means that in certain instances the accessory follows the principal thing. But while essential component parts follow the principal thing always, accessories follow the principal thing only in enumerated instances and in the absence of a contrary intention of the parties.

120. Cf. FRENCH CIVIL CODE arts. 624, 696, 1018, 1019, 1015, 1019; LA. CIVIL CODE arts. 613, 771, 1036, 1057, 1615, 1692; LA. CRIML CODE arts. 613, 771, 1636, 1637, 2461, 2490, 2645 (1870). Article 2461 of the Louisiana Civil Code declares that "the sale of a thing includes that of its accessories, and of whatever has been destined for its constant use, unless there be a reservation to the contrary." In interpreting this article, the Louisiana Supreme Court has held that a derrick anchor and certain spare parts of a dredge were "absolutely necessary to the successful operation" of the dredge, and, therefore, its accessories. Louisiana Contracting Co. v. Board of Commissioners of Port of New Orleans, 150 LA. 559, 574, 91 So. 43 (1922). Similarly, a fence has been held to be "an integral and essential part of a going plantation." Bagley v. Rose Hill Sugar Co., 111 LA. 249, 277, 35 So. 539 (1903). Cf. New Orleans S.F. & L.R.R. v. Delamore, 114 U.S. 501 (1885) (right of way and franchise accessories of a business). Louisiana courts have not developed a generally applicable test for the characterization of a thing as principal or accessory. Ordinarily, characterization is made in concrete instances by reference to party intention or on the basis of economic considerations and factual relations of things. For this reason, the scattered decisions bearing on this issue cannot be taken to establish a general rule. Accessories in Louisiana may be corporeal or incorporeal. See, e.g., Partout v. Lewis, 51 LA. ANN. 210, 25 So. 134 (1899) (servitude: includes certain accessory rights); National Collection Service Inc. v. Woodward, 111 LA. 240, 180 (1910) (materialman's lien and privilege are included in the sale of credit); Clark v. Warner, 6 LA. ANN. 496 (1851); Madison v. Zabrinskis, 11 LA. 247 (1837) (actions relating to the enjoyment of a thing sold pass with the sale). The vendee, however, has no right of action against third parties for damages to the thing before his acquisition of title. Matthews v. Alsworth, 45 LA. ANN. 465, 12 So. 518 (1893). Similarly, an insurance policy on a thing sold does not pass with the sale. King v. Preston, 11 LA. ANN. 95 (1856).

121. Buildings and other improvements, whether classified as immovables by nature or immovables by destination, are component parts of the ground. Title to
Principal things and their fruits. French and Louisiana civil law. In the French Civil Code and in the Louisiana Civil Code, fruits are dealt with as particular instances of the right of accession within the institutional framework of ownership. Fruits, however, are things (i.e., corporeal objects and incorporeal economic advantages) derived from, or produced by, things. For systematic reasons, therefore, analysis of the notion of fruits in Louisiana and comparative law is undertaken at this point.

The provisions of the Louisiana Civil Code concerning fruits are almost identical with those of the French Civil Code. Both codes distinguish natural fruits, fruits of industry, and civil fruits. Natural fruits are "the spontaneous product of the earth" and "the product and increase of cattle." Fruits of industry are those "obtained by cultivation" as a result of "industry bestowed on a piece of ground." 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 the operation of the law or private agreement." Neither the French Civil Code nor the Louisiana 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

the land, therefore, carries title to buildings and other improvements. Prevot v. Courtney, 241 La. 313, 129 So.2d 1 (1961); Green v. Small, 227 La. 401, 79 So.2d 497 (1956); Bacque v. Darby, 69 So.2d 145 (La. App. 1954). See also Smith v. Bell, 224 La. 1, 68 So.2d 757 (1954) (immovables by destination pass with the sale of land as accessories under Article 2461 of the Civil Code). Dicta in these cases indicate that title to buildings and improvements may be "reserved" by the conveying landowner, by express contractual provision. Old cases, however, indicate that this is not possible. Boyle v. Swanson, 6 La. Ann. 263 (1851). Cf. Lasyone v. Emerson, 220 La. 951, 57 So.2d 906 (1952). If a landowner may validly reserve title to buildings and improvements while conveying lands, then, contrary to the Lasyone case, horizontal division of immovable property is possible in Louisiana. Cf. Yiannopoulos, Movables and Immovables in Louisiana and Comparative Law, 22 Louisiana Law Review 517 (1962).

122. FRENCH CIVIL CODE arts. 546-50; LA. CIVIL CODE arts. 498-503 (1870).
123. Several continental writers, following the method of the Pandectists and the scheme of the German Civil Code, deal with fruits in the general parts of their treatises. See BALIS, GENERAL PRINCIPLES OF CIVIL LAW 517 (1955) (in Greek); 1 ENNENEBURUS-NIPPERDEY, 1 ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 537 (1952); LEHMANN, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES 364 (1957); 1 SOERGEL-STERNER, BÜRGERLICHES GESETZBUCH 350 (1959). Cf. 2 CARBONNIER, DROIT CIVIL 63 (1957).
124. FRENCH CIVIL CODE art. 583(1); LA. CIVIL CODE art. 545(1) (1870).
125. FRENCH CIVIL CODE art. 583(2); LA. CIVIL CODE art. 545(2) (1870).
126. FRENCH CIVIL CODE art. 584; LA. CIVIL CODE art. 545(3), (4) (1870). Cf. LA. CIVIL CODE art. 499 (1879): "[T]he revenues yielded by property from the operation of the law or by agreement." Natural and industrial fruits derive from the body of the principal thing, the first spontaneously and the second as a result of cultivation. Civil fruits do not derive from the body of the principal thing but result from legal relations having as their object the principal thing.
principal thing without diminution of its substance. This definition distinguishes fruits from "products" (produits). In a technical sense, products are things 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 certain persons entitled to receive "fruits" are confined to revenues produced by a thing periodically and without diminution of its substance. Correspondingly, the owner of a thing is accorded the right to obtain all products. This conceptual technique carries significant practical consequences in connection with the status of timber and mineral substances extracted from the ground. The French regard stones extracted from a quarry not regularly exploited and trees cut down without any plan of exploitation as "products." The products of a regularly exploited quarry or forest, however, are considered to be fruits. The result in the last instance is based on Article 598(1) of the French Civil Code which has been interpreted as extending the notion of fruits to include component parts of the ground obtained in certain circumstances. This much broader conception of fruits is said to correspond with the intention of the owner and the destination of a thing. Obtaining parts of the substance of a thing becomes the subject matter of a particular legal relation.

As is the case with accessories, fruits and products ordinarily follow the juridical situation of the principal thing. The owner of the principal thing acquires, by his own right, the ownership of fruits and products. Revendication of a principal thing by

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127. See 2 Carbonnier, Droit civil 63 (1957); 3 Planiol et Ripert, Traité pratique de droit civil français 255 (1952).
128. Indeed, the broad language of a number of articles in the French Civil Code, conferring upon persons such as a usufructuary and a possessor in good faith the right to derive "fruits," needed to be limited to revenues produced periodically and without diminution of the substance of the principal thing. Cf. text at notes 135, 136 infra.
129. See 2 Carbonnier, Droit civil 64 (1957) (interpretation based on Articles 598(2) and 592 of the French Civil Code). Cf. 3 Planiol et Ripert, Traité pratique de droit civil français 256 (1952).
131. "He [the usufructuary] has also the enjoyment, in the same way as the owner, of mines and quarries which are being worked, when the usufruct begins."
132. See 1 Colin-Capitant et Julliot de la Morandière, Traité de droit civil 967, 969 (1953); 3 Planiol et Ripert, Traité pratique de droit civil français 770 (1952); 2 Aubry et Rau, Cours de droit civil français 689 (1897); Comment, Usufructuary's Right to the Proceeds of Oil and Gas Wells in Louisiana, 2 Louisiana Law Review 169, 172 (1939).
a dispossessed owner includes, ordinarily, fruits and products. In certain circumstances, principal things and fruits are disassociated and their juridical situation is no longer the same. In these circumstances, fruits do not follow the ownership of the principal thing, though products still do. Thus, when a usufruct is established, the fruits belong to the usufructuary though the owner retains the right to the acquisition of products. And, in connection with the administration of the estate of an incompetent, alienation of fruits is regarded as an act of administration, while alienation of the principal or products an act of disposition subject to special formalities.

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 adopted in Louisiana. On the contrary, Louisiana courts have declared that the word “products” has the same meaning as the word “fruits.” As a result, a different conceptual apparatus has had to be employed in apportioning economic advantages between the owner of a thing and other persons entitled to fruits. The courts have been faced with these questions, quite typically, in cases involving rights of a usufructuary, a possessor in good or bad faith, and in cases involving problems of community property and taxation.

With regard to the usufructuary, Louisiana courts established the proposition that under Article 533 of the Civil Code

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498 (1870); Manuel v. Metropolitan Life Ins. Co., 139 So. 548 (La. App. 1st Cir. 1932).


135. See note 134 supra.

136. See FRENCH CIVIL CODE art. 582. Cf. LA. CIVIL CODE art. 533 (1870).

137. See 2 CARBONNIER, DROIT CIVIL 64 (1957). Cf. LA. CIVIL CODE art. 530 (1870), repealed by Acts 1960, No. 30, § 2; replaced by LA. CODE OF CIVIL PROCEDURE arts. 4261, 4262 (1960); Stewart v. Crump, 131 La. 463, 59 So. 503 (1912) (minor’s estate; distinction between capital and revenue).


139. The notion of fruits is important in Louisiana law in connection with a variety of other problems. See, e.g., LA. CIVIL CODE art. 466 (1870) (seizure); Manuel v. Metropolitan Life Ins. Co., 139 So. 548 (La. App. 1st Cir. 1932) (insurance); Derouen v. LeBleu, 18 So.2d 207 (La. App. 1st Cir. 1944); LA. CIVIL CODE art. 2506 (1870) (rights of an evicted possessor); DaPonte v. Ogden,
fruits are only things "born and reborn of the soil." Accordingly, the usufructuary is not entitled to products resulting from a depletion of the land such as timber and mineral substances, except as provided for in Articles 551 and 552 of the Civil Code. In the case of King v. Buffington, the Louisiana Supreme Court declared that royalties, delay rentals, and bonuses, deriving from a mineral lease granted after the commencement of a usufruct, are neither natural nor civil fruits, and therefore, that these economic advantages belong to the naked owner. In the same decision the Supreme Court indicated that a usufructuary should be entitled to the proceeds from mines and quarries only "if they were actually worked before the commencement of the usufruct" in accordance with the provis".

140. See Elder v. Ellerbe, 135 La. 990, 66 So. 337 (1914). See also Gueno v. Medlenka, 238 La. 1081, 1090, 117 So.2d 817, 819, 820 (1960): "The usufructuary of land, having only a perfect usufruct, has only the right to the natural fruits of the land and such civil fruits as are described and treated in Articles 544 through 554 of the Civil Code. The right to consume the substance of the land is not permitted, save in the exceptional instance hereinafter pointed out"; LA. CIVIL CODE art. 533 (1870): "Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantages which it may produce, provided it be without altering the substance of the thing. . . . The obligation of not altering the substance of the thing takes place only in the case of perfect usufruct." 141. See Elder v. Ellerbe, 135 La. 990, 66 So. 337 (1914). 142. See King v. Buffington, 240 La. 955, 126 So.2d 326 (1961); Gueno v. Medlenka, 238 La. 1081, 117 So.2d 817 (1960). But cf. Milling v. Collector of Revenue, 220 La. 773, 57 So.2d 679 (1952) (bonuses and royalties are civil fruits; community property and taxation); Note, Mineral Rights — Oil Royalties as Fruits, 12 LOUISIANA LAW REVIEW 491 (1952). 143. LA. CIVIL CODE art. 551 (1870): "The usufructuary has a right to draw all the profits which are usually produced by the thing subject to the usufruct. Accordingly he may cut trees on land of which he has the usufruct, take from it 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 this right." Id. 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." See Sacks, The Mineral Rights of the Usufructuary, 1 LA. B.J. 25 (1954); Comment, Mineral Lease on Land Subject to Usufruct, 34 TUL. L. REV. 784 (1959); Comment, Usufructuary's Right to the Proceeds of Oil and Gas Wells in Louisiana, 2 LOUISIANA LAW REVIEW 169 (1939). 144. 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. 145. "That exploration for oil and gas is mining within the meaning of our law is no longer an open question." Gueno v. Medlenka, 238 La. 1081, 1090, 117 So.2d 817, 820 (1960).
sion of Article 552 of the Civil Code.\textsuperscript{146} It may be expected that in the case of a conventional or a testamentary usufruct, the owner will ordinarily take care to define the rights of the usufructuary in the instrument creating the usufruct. In the absence of specific provision, the matter could be dealt with a problem of interpretation which could be solved by reference to the intention of the parties.\textsuperscript{147} But in the more frequent case of legal usufruct, Louisiana courts will have to determine 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.

With regard to the rights of a possessor in good faith, Louisiana courts have held that the word “products” in Article 502 of the Civil Code\textsuperscript{148} has the same meaning as fruits. In turn, the word “fruits” has been declared to mean things produced without depletion of the substance of the principal thing.\textsuperscript{149} These things are earned by a possessor in good faith and no

\textsuperscript{146} See King v. Buffington, 240 La. 955, 126 So.2d 326 (1961). See also Gueno v. Medlenka, 238 La. 1081, 1091, 117 So.2d 817, 820 (1960): “[A] usufructuary has a right to the proceeds of an oil well on the land subject to the usufruct, if the well was already drilled and producing oil at the time when the usufruct was created.” Presumably, in such a case, mineral substances extracted from the ground, and the proceeds therefrom, will be regarded as natural and civil fruits respectively. The court was quoting from Gulf Refining Co. v. Garrett, 209 La. 674, 686, 25 So.2d 329, 332 (1945), 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 applicability of Article 552 of the Civil Code to mineral operations. The common law rule is that if a mine is already opened, the life tenant is entitled to the royalty and if not opened all that he is allowed is the interest therefrom. See 18 A.L.R. 2d 106, 115 (1951).

\textsuperscript{147} Perhaps the proper solution should be to restrict application of Article 552 to cases in which the mineral lease itself (or the production of minerals) is the subject matter of the usufruct. Further, the interpretation could be adopted that Article 552 involves an “imperfect” usufruct, in which case the usufructuary would have only the interest on the proceeds subject to reimbursement of the naked owner at the termination of the usufruct.

\textsuperscript{148} See La. CIVIL CODE art. 502 (1870): “The products of the thing do not belong to the simple possessor, and must be returned with the thing to the owner who claims the same, unless the possessor held it bona fide.” Cf. note 138 supra; Harang v. Bowie Lumber Co., 145 La. 96, 114, 81 So. 769, 775 (1919): “Between the alternatives, therefore, of having to give the word ‘fruits’ the broad and comprehensive meaning of all kinds of products of land, or give the work ‘products’ the restricted meaning of fruits, properly so called, we adopt the latter.”

\textsuperscript{149} See Harang v. Bowie Lumber Co., 145 La. 96, 81 So. 769 (1919); Elder v. Ellerbe, 135 La. 990, 995, 996, 66 So. 337, 339 (1914) (“The right of a possessor in good faith to gather for his benefit the fruits of the property of another, cannot be greater than the right of a usufructuary. He has no right to mines and quarries not opened.’ R.C.C. 552”). Trapping royalties are fruits. See Rosenthal-Brown Fur Co. v. Jones-Frere Fur Co., 162 La. 403, 110 So. 630 (1926); Curran v. Jones, 103 La. 579, 112 So. 492 (1927).
accounting is due to the true owner. Timber and minerals (as well as bonuses, delay rentals, and royalties deriving from mineral rights) are not fruits. A possessor in good faith, therefore, must account to the owner for all values received from timber or mineral operations but is entitled to reimbursement of all production costs. According to Article 501 of the Civil Code, a possessor in bad faith must return to the owner all

150. A possessor in good faith is accountable for the fruits of the thing possessed from the time the true owner makes demand for restitution. Woodcock v. Baldwin, 110 La. 270, 34 So. 440 (1902). The possessor is liable for such fruits as he might have obtained with ordinary good management. Actual production may not be the measure of damages in all cases. See Winter v. Zacharie, 6 Rob. 406 (La. 1844). A possessor in good faith is one "who possesses under a title translatable of property and not defective on its face." See Vance v. Sentell, 178 La. 749, 758, 152 So. 513, 516 (1934); New Orleans v. Gaines, 82 U.S. 624 (1872). Cf. Derouen v. LeBlue, 18 So.2d 207 (La. App. 1944). In this case the lower court had ordered defendant, a possessor in good faith, to return to the owner of a cow a calf born during defendant's possession of the cow; the court of appeal questioned the correctness of the lower court's judgment but did not pass on it as defendant failed to appeal that issue.

151. Harang v. Bowie Lumber Co., 145 La. 96, 81 So. 769 (1919) (the court discussed French doctrine extensively and overruled a number of cases holding that a possessor in good faith was under no obligation to account to the owner for the value of the timber cut). See also Logan v. State Gravel Co., 158 La. 105, 103 So. 526 (1925). But cf. Board of Commissioners of Caddo Levee District v. Pure Oil Co., 167 La. 801, 120 So. 373 (1928) (mineral royalties are civil fruits for purposes of prescription); Gulf Refining Co. of Louisiana v. Hayne, 148 La. 340, 86 So. 891 (1921) (profits of mineral operations are civil fruits for purpose of indemnification of mineral lessee by owner producing oil in breach of lease); cases cited note 157 infra.

152. See Elder v. Ellerbe, 135 La. 990, 66 So. 337 (1914), followed in Jackson v. Shaw, 151 La. 795, 799, 92 So. 338 (1922). Cf. cases cited note 142 supra. See also Logan v. State Gravel Co., 158 La. 105, 103 So. 526 (1925). But cf. Board of Commissioners of Caddo Levee District v. Pure Oil Co., 167 La. 801, 120 So. 373 (1928) (mineral royalties are civil fruits for purposes of prescription). Comment, Measure of Damages for Unauthorized Production of Oil and Gas; the Role of Good and Bad Faith, 15 Tul. L. Rev. 291 (1941). Thus, in effect, a possessor in good faith deriving profits from mineral operations is accorded the same protection as a possessor in bad faith deriving "fruits." Cf. infra note 154.


154. "The fruits produced by the thing belong to its owner, although they may have been produced by the work and labor of a third person, or from seeds sown by him, on the owner's reimbursing such person his expenses." See Lawrence v. Young, 144 La. 1, 80 So. 18 (1918); Laride v. Perkins, 10 Orl. App. 19 (La. App. 1912). Although this article speaks of "a third person," courts, ordinarily, restrict its application to the case of a possessor in bad faith. Cf. Moore v. Pitre, 149 La. 910, 921, 90 So. 252, 256 (1921); Harang v. Geeens Realty Co., 155 La. 68, 95, 98 So. 760, 769 (1924). Thus, technically, a lessee in bad faith cannot qualify as a possessor and is not entitled to his production costs. Cf. Hammonds v. Buzbee, 170 La. 573, 128 So. 520 (1930); Elrod v. Hart, 146 So. 797 (La. App. 1933). But apparently a lessee exploiting timber or minerals in good faith qualifies as an ordinary possessor in bad faith and is entitled to compensation for production costs under Article 501. See Cooke v. Gulf Refining Co., 135 La. 609, 613, 65 So. 755, 759 (1914) (minerals); Ball and Bro. Lumber Co. v. Simms Lumber Co., 121 La. 627, 46 So. 674 (1908) (timber). Trapping royalties are (natural or civil) fruits. Thus, a possessor in bad faith is still entitled to com-
“fruits” and in turn, the owner must reimburse him for all his costs. In connection with timber and minerals, the rule is that since these things are not fruits, the possessor in bad faith must return them to the owner without being entitled to deduction of production costs.\textsuperscript{155}

In the field of community property, it is well settled in Louisiana that “the fruits, both civil and natural, of the husband’s separate property fall into the community during its existence.”\textsuperscript{156} In this context and also for state income tax purposes, Louisiana courts have extended the notion of fruits to include economic advantages derived from a thing as a result of depleting its substance. Thus, mineral royalties have been declared to be civil fruits which fall into the community.\textsuperscript{157} Presumably, the same rule would apply to royalties derived from exploitation of timber. 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, compensation for costs. See Rosenthal-Brown Fur Co. v. Jones-Frere Fur Co., 162 La. 403, 110 So. 630 (1926); Curran v. Jones, 163 La. 579, 112 So. 492 (1927). Article 501 of the Civil Code applies also to the administrator of an estate. See Succession of Hawthorne, 158 La. 637, 104 So. 481 (1925) (administrator liable for fruits to be received by exercise of prudent management; he can deduct expenses).

\textsuperscript{155} Like any possessor deriving from a thing economic advantages which cannot classify as “fruits,” a mineral lessee in bad faith is not entitled to compensation for production costs. See Nabors Oil and Gas Co. v. Louisiana Oil Refining Co., 151 La. 361, 91 So. 765 (1922) (reversed on other grounds). Similar results have been reached in timber cases. A possessor (or lessee) in bad faith is liable for the value of timber in manufactured state, without deduction of expenses. State v. Williams Cypress Co., 131 La. 62, 70, 58 So. 1033, 1036 (1912).

\textsuperscript{156} Milling v. Collector of Revenue, 220 La. 773, 781, 57 So.2d 679, 682 (1952) citing Succession of Goll, 156 La. 910, 101 So. 263 (1924); Peters v. Klein, 161 La. 604, 109 So. 349 (1926); Succession of Ratcliff, 212 La. 563, 33 So.2d 114 (1947). Article 2402 of the Louisiana Civil Code provides that “the profits of all the effects of which the husband has the administration and enjoyment” form part of the community property. The word “profits” has been held to be an incorrect translation from the French and should read “fruits.”

\textsuperscript{157} See Milling v. Collector of Revenue, 220 La. 773, 780, 57 So. 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.” See also Daigre v. Daigre, 228 La. 682, 83 So.2d 900 (1955) (retirement pension and stock dividend deriving from the separate property of the husband are not fruits and do not fall in the community); Daggett, \textit{Mineral Rights as They Affect the Community Property System with Particular Reference to their Effect on Usufructuary and Naked Owner}, 1 \textit{Louisiana Law Review} 17 (1938).
these royalties are taxed as separate property. Similarly, for purposes of state severance tax, mineral royalties are not regarded as civil fruits in Louisiana.

Louisiana courts, charged with the duty to interpret and apply the Civil Code to concrete issues, have managed to reach commendable solutions and to do justice on the merits—though not infrequently at the expense of deviation from a consistent conceptual pattern. Indeed, they have apparently adopted different notions of fruits for different purposes. In connection with the rights of a usufructuary and a possessor in good or bad faith, and for state severance tax purposes, Louisiana courts have confined the notion of fruits to economic advantages which are produced periodically without diminution of the substance of the principal thing. As to community property and state income taxation, however, the courts have adopted a much broader notion of fruits which includes economic advantages resulting from a depletion of the principal thing. These apparently inconsistent decisions could be reconciled by a conceptual analysis classifying timber and minerals as civil fruits which belong to the owner in all cases. Thus, neither a possessor in good faith nor a usufructuary would be entitled to these civil fruits. A more desirable ground of reconciliation would be to distinguish between “fruits” and “products.” A possessor in good faith should be entitled to keep the fruits but not the products of a thing. 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, products other than fruits (e.g., mineral royalties, delay rentals, and bonuses) could form part of the

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158. 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) (the court indicating that local law, and classifications based thereon, may not be controlling for income tax purposes).

159. Wright v. Imperial Oil and Gas Products Co., 177 La. 482, 148 So. 685 (1933).

160. Federal courts have reached the same conclusion for purposes of federal income taxation, seemingly on the basis of Louisiana law. See Commissioner of Internal Revenue v. Gray, 159 F.2d 834 (5th Cir. 1947).


162. This suggestion has nothing to do with the interpretation placed by the courts on Article 502 of the Civil Code. Indeed, 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.”
community as “profits” within the literal meaning of Article 2402 of the Civil Code.

Comparative law. In classical Roman law, fruits (fructus) were, generally, the products derived from a thing whether resulting in diminution of its economic value or not. Distinction was made between natural fruits (fructus naturales) which were the product of natural forces or industry and civil fruits (fructus civiles) which were the product of legal transactions. Ordinarily, natural fruits were corporeal objects while civil fruits were values resulting from the ownership of a thing or from the conduct of business. These values could be converted into corporeal objects, particularly money.

Natural fruits were divided into several categories. Hanging fruits acquired individuality and became things upon actual separation from the principal thing. Separated fruits (fructus separati) were fruits detached from the principal things whether as a result of natural forces or of human action. Collected fruits (fructus percepti) were fruits gathered by human action, consisting in acquisition of possession. Finally, fruits which ought to have been collected (fructus percipiendi) were fruits for which a possessor in bad faith should account to the true owner.

Fruits followed the juridical situation of the principal thing in all cases. Since stolen things could not be acquired by acquisitive prescription, the same applied to the fruits of stolen things. The owner of a thing ordinarily acquired its fruits. It was only in exceptional cases that other persons—a lessee, a usufructuary, and a bona fide possessor—acquired them. The owner of the principal thing and a possessor in good faith acquired fruits by separation; a usufructuary and a lessee by collection. The possessor in good faith was entitled to keep the fruits he collected and consumed up to the time of the initiation of an action. He was liable to return all fruits collected during the pendency of the action and to pay damages for the fruits that he should have collected by exercising due care.

In Germany, prior to the enactment of the Civil Code, fruits were conceived of as periodically recurring economic advantages 163. See Weiss, Institutionen des römischen Privatrechts 135 (1949). But cf. Sohm-Mitteis-Wenger, Institutionen des römischen Rechts 262 (1923). The children of a female slave, however, were not fruits. Cf. La. Civil Code arts. 492, 539 (1825).
obtained from a thing according to its destination and without diminution of its substance.\textsuperscript{164} The German Civil Code enlarged the notion of fruits by abandoning the requirement of preservation of substance in all cases and in the case of organic products, the requirement of production according to destination.\textsuperscript{165} 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.\textsuperscript{166}

In the complex scheme of the German Civil Code, fruits are treated as a species of the generic concept “profits.” Profits are defined as “the fruits of a thing or of a right, as well as the advantages which the use of the thing or of the right confers.”\textsuperscript{167} The habitation of a house by the owner, the enjoyment of one’s own automobile, and the trophy which a race horse wins are given as examples of “advantages,” as distinguished from “fruits.” Fruits are subdivided into fruits of things and fruits of rights, direct or indirect. Direct fruits of a thing are its organic products and everything (other than advantages of use) derived from it according to its destination.\textsuperscript{168} Organic products (e.g., the young of animals, crops, and trees) are fruits whether produced according to the destination of the principal thing or not, and whether or not there is a resulting diminution of its value. A fruit-bearing tree is not destined to be cut down and burned as wood, yet it is a fruit of the ground. Similarly, though a piece of land stripped of its timber suffers diminution of value, the timber is regarded as its fruit. However, the right of certain persons to obtain fruits is limited to that portion of the fruits

\textsuperscript{164} See 1 \textsc{Enneccerus-Nipperdey}, \textit{1 allgemeiner teil des bürgerlichen rechts} 537 (1952); \textsc{Lehmann}, \textit{allgemeiner teil des bürgerlichen gesetzbuches} 364 (1957); \textsc{Söergel-Stierk}, \textit{bürgerliches gesetzbuch} 350 (1959); \textsc{Stauchinger}, \textit{kommentar zum b.g.b.} 479 (1957). \textsc{Kruchen}, \textit{frucht und fruchterwerbsrecht}, in 3 \textit{rechtsvergleichendes handwörterbuch} 540 (1931); \textsc{Schoor von Garolfsfeld}, \textit{soziale ausgestaltung des erwerbs von erzeugnissen}, 148 \textit{archiv für die civilistische praxis} 9 (1939); \textsc{Wieacker}, \textit{sachbegriff, sachheit und sachzuordnung}, 148 \textit{archiv für die civilistische praxis} 97, 98 (1943).

\textsuperscript{165} \textit{German civil code} art. 99: “Fruits of a thing are the products of the thing and such other profits as are obtained from the thing according to its destination. Fruits of a right are the revenues which the right yields according to its destination, particularly where one has a right to obtain parts of the ground the parts so obtained. Fruits are also the revenues which a thing or a right yields by reason of a legal relation.”

\textsuperscript{166} \textit{id.} arts. 581, 993, 1039, 2133.

\textsuperscript{167} \textit{id.} art. 100.

\textsuperscript{168} See \textit{id.} art. 99(1).
which may be regarded as a product of the thing according to rules of orderly management. Products resulting from the destruction of a thing (e.g., the meat and bones of an animal) are not fruits. In the last analysis, characterization of products as fruits may depend upon prevailing conceptions in society. Products (other than organic ones) derived from a thing are regarded as its direct fruits only if produced according to the destination of the principal thing. It is not necessary that these products be periodically recurring or that the substance of the thing be preserved. Here belong the products and output of mines and quarries. The component parts of a completely destroyed thing (e.g., the products of the demolition of a house) are not fruits.

Direct fruits of rights are the revenues which rights produce according to their destination. Direct fruits of the right of usufruct are the revenues obtained by the usufructuary; direct fruits of mineral rights are royalties due to one entitled thereto; direct fruit of the right to claim a capital sum is the interest due to the claimant. The notion of "direct fruits of rights" has been criticized as too shallow. In reality, most of these revenues are fruits of things rather than rights obtained by virtue of a right other than ownership. The same revenue can thus be a fruit of a thing (namely, fruit of the right of ownership) and fruit of a right (other than ownership). In any case, as direct fruits of rights are regarded not only revenues obtained but also claims for accrued revenues.

Indirect fruits of things or rights are revenues which a thing or a right produces by operation of law or by virtue of a legal relation directed to the acquisition of these revenues (civil fruits). Such are mostly sums due for permission to use a thing or to exercise a right (e.g., rents, interest on a loan).

In the framework of the German Civil Code, the notion of fruits is important in connection with several legal relations and

169. Cf. id. arts. 581 (lessee); art. 993 (possessor). See also id. art. 1039 (usufructuary under obligation to account to the naked owner for the value of all products obtained in excess of the rules of an orderly management of the thing subject to the usufruct).
171. See German Civil Code art. 99(2).
173. See German Civil Code art. 99(3).
institutions. In the first place, fruits are important with regard to acquisition of rights. One’s right to obtain fruits is determined by rules of property as to natural fruits and by rules of the law of obligations as to civil fruits. Secondly, the notion of fruits is important for the determination of the rights and duties of a usufructuary or a possessor in good faith vis-à-vis the owner of a thing. These persons are entitled to obtain “fruits” as distinguished from detached component parts of a thing. Thirdly, the notion of fruits is important in connection with obligations of certain persons to return, or to account for, fruits obtained. Finally, the notion is important in cases involving partition among successive beneficiaries of fruits obtained within a certain period. The moment of separation is determinative as to natural fruits and the moment of acquisition for civil fruits which do not recur periodically. For periodically recurring civil fruits the duration of one’s right is determinative. Analogous provisions govern the apportionment of expenses and charges.

The Greek Civil Code, following the pattern of Roman-Byzantine law, distinguishes fruits into those natural and civil. 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.” According to the Greek code, fruits of things are organic products, advantages obtained according to the destination of a thing, and any revenue the thing may produce by operation of law or by reason of a legal relation. According to the prevailing view, organic prod-

174. Cf. id. arts. 954 et seq., 1030, 1039, 1080, 1213, 1383.
175. See id. art. 102: “He who is legally bound to return the fruits is entitled to reimbursement of costs incurred for the production of such fruits, in so far as they accord with a prudent management and do not exceed the value of the fruits.”
176. See id. art. 101: “If one is entitled to receive the fruits of a thing, or of a right, up to a certain time or from a certain time, he has the following rights, insofar as is not otherwise provided: (1) he is entitled to the products and parts of the ground designated in Article 99 (1), even when he is to receive them as fruits of a right, insofar as they are separated from the thing during the existence of his rights; (2) he is entitled to other fruits, insofar as they become due during the continuance of his right; if, however, the fruits consist of the compensation for the use or the usufruct, in interest, a share of the profits or other proceeds derived at regularly recurring intervals, the holder of such rights is entitled to a part (of said profits or proceeds) proportionate to the duration of his rights.”
177. See id. art. 102.
178. GREEK CIVIL CODE art. 961: “Fruits of a thing are its products as well as everything which one derives from a thing according to its destination. Fruits of a right are the revenues which the right yields according to its destination. Fruits are likewise the revenues which the thing or the right yields by virtue of some legal relation (civil fruits).”
179. Id. art. 962: “Profits are not only the fruits of a thing or a right, but also every advantage which the use of the thing or of the right confers.”
ucts are regarded as fruits only if the substance of the principal thing is preserved. 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 to a transaction. Fruits of rights are royalties and interests deriving from rights other than ownership. For the rest, the Greek Civil Code and doctrine follow closely the German prototypes.

180. See BALIS, GENERAL PRINCIPLES OF CIVIL LAW 518 (1955) (in Greek).
181. See GREEK CIVIL CODE art. 963: "He who has the right to collect the natural fruits of a thing or 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. With regard to civil fruits, especially rents, interests, dividends or other revenues which are produced regularly, the one entitled thereto receives in the absence of different agreement, a portion proportionate to the duration of his right"; id. art. 964: "He who is obliged by law to return fruits is entitled to compensation for expenses incurred for their production, provided that expenses do not exceed the value of the fruits."