

Louisiana Law Review

Volume 24 | Number 4

June 1964

Civil Law Property - Partition of Land Subject to a Usufruct

Charles A. Snyder

Repository Citation

Charles A. Snyder, *Civil Law Property - Partition of Land Subject to a Usufruct*, 24 La. L. Rev. (1964)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol24/iss4/11>

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

events beyond its control while the shipowner — the only party who has the means to prevent the accident — would go free.⁵³

Wendell G. Lindsay, Jr.

CIVIL LAW PROPERTY — PARTITION OF LAND SUBJECT
TO A USUFRUCT

Plaintiff filed suit for partition by licitation¹ of property owned as follows: an undivided half interest was held in perfect ownership by all eleven living heirs; one co-heir (a defendant) had the usufruct of the other undivided interest while his eleven co-heirs (including plaintiff) held the naked ownership thereof in indivision.² Thus all the parties to the suit owned an undivided interest in imperfect and perfect ownership. Dismissal of plaintiff's suit was affirmed on appeal. *Held*, partition by licitation of all interest cannot be forced by a proprietor who holds shares of undivided perfect and naked ownership, if the property, or an undivided portion thereof, is burdened with a valid usufruct. *Fricke v. Stafford*, 159 So. 2d 52 (La. App. 1st Cir. 1963).

The Civil Code provides that anyone may demand partition of a thing held in common.³ Determination of what constitutes

53. For the proposition that the shipowner has no right to indemnity in such cases, see *Hudson S.S. Co. v. Ayala Colon*, 314 F.2d 44 (1st Cir. 1963) (*per curiam*); *Ray v. Compania Naviera Continental, S.A.*, 203 F. Supp. 206 (D. Md. 1962).

1. All references in this Note to partition mean partition by licitation. The property in this suit, 225 acres of land, is not susceptible to the preferable partition in kind which is governed by different rules. See *Kaffie v. Wilson*, 130 La. 350, 57 So. 1001 (1912).

2. The father, who died first, left a life usufruct to his youngest daughter, subject only to his surviving spouse's legal usufruct, and the naked ownership of his undivided interest in the community to the remaining children. When the mother died, she left her undivided one-half ownership to all the children. The property was held in indivision, though each heir had been sent into possession. The court held that an attack on the usufruct on the grounds that it impinged upon the legitime had prescribed. *Fricke v. Stafford*, 159 So. 2d 52 (La. App. 1st Cir. 1963).

3. LA. CIVIL CODE art. 1289 (1870): "No one can be compelled to hold property with another, unless the contrary has been agreed upon; any one has a right to demand the division of a thing held in common, by the action of partition."

Id. art. 1308: "The action of partition will not only lie between co-heirs and co-legatees, but between all persons who hold property in common, from whatever cause they may hold in common. (As amended by Acts 1871, No. 87.)"

For the nearly identical article which is the basis of French doctrine and cases on the subject, see FRENCH CIVIL CODE art. 815(1).

holding in common is the essential inquiry in ascertaining the right to partition. It clearly means more than owning rights in the same property.⁴ Ownership may be characterized by its elements: the right to use (*usus*), the right to enjoyment (*fructus*), and the right to alienate (*abusus*).⁵ Ownership is also categorized by its forms: perfect ownership, with the elements of *usus*, *fructus*, and *abusus*;⁶ usufruct, with *usus* and *fructus*;⁷ and naked ownership, with *abusus*.⁸ Under the Louisiana Civil Code and jurisprudence, holding in common means at least holding the same form of ownership in the same property. Thus perfect owners may force partition among perfect owners;⁹ usufructuaries, among usufructuaries;¹⁰ and naked owners, among naked owners.¹¹ It seems equally clear that whether holding in common refers to form or elements of ownership, naked owners and usufructuaries cannot force a partition between themselves since the forms are different and there are no common elements. This is well established in Louisiana by the landmark *Smith v. Nelson*¹² case which refused to allow the naked owner of an undivided one-half interest to force a partition against one who held the usufruct over his interest and perfect ownership of the remainder. To enable usufructuaries and naked owners to partition against perfect owners, holding in common must be defined as holding the same elements of ownership in the property. In essence, this would be recognition that perfect ownership (*usus*, *fructus*, and *abusus*) is made up of severable components of usufruct (*usus* and

4. *Amerada Petroleum Corp. v. Reese*, 195 La. 359, 196 So. 558 (1940); *Smith v. Nelson*, 121 La. 170, 46 So. 200 (1908).

5. LA. CIVIL CODE art. 491 (1870): "[O]wnership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner. . . ."

6. *Id.* art. 491: "Perfect ownership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner. . . ."

7. *Id.* art. 533: "Usufruct is the right of enjoying a thing . . . and to draw from the same all the profit, utility and advantages which it may produce. . . ."

8. *Id.* art. 490: "On the contrary, ownership is imperfect, when it is to terminate at a certain time or on a condition, or if the thing, which is the object of it, being an immovable, is charged with any real rights toward a third person; as a usufruct. . . ."

Id. art. 492: "Imperfect ownership only gives the right of enjoying and disposing of property. . . ."

9. This situation would come under the general rule for partitions as set out in *id.* art. 1289.

10. *Id.* art. 1309: "[U]sfructuaries of the same estate can institute among themselves the action of partition."

11. *Smith v. Nelson*, 121 La. 170, 174, 46 So. 200, 201 (1908): "There is no doubt that, as between those in whom the naked ownership alone is vested, a partition may be enforced . . . by licitation."

LA. CIVIL CODE art. 605 (1870): "The owner may mortgage, sell or alienate the thing subject to the usufruct, without the consent of the usufructuary. . . ."

12. 121 La. 170, 46 So. 200 (1908).

fructus) and naked ownership (*abusus*). Although no case squarely holds that partition of common elements cannot be forced between perfect and imperfect owners, there is language in *Smith v. Nelson*¹³ indicating that a naked owner should not be allowed to force a perfect owner to dismember his title and lose the property involved from his estate forever. Both French courts and commentators, however, recognize the right of imperfect and perfect owners to partition the elements of ownership that they hold in common.¹⁴ Thus usufructuaries may force perfect owners to partition the usufruct (*usus* and *fructus*) even though the perfect owners' interest would be converted into naked ownership plus his share of the proceeds. Likewise, the French recognize that naked owners may force partition of naked ownership (*abusus*) against perfect owners; and perfect owners may partition the elements in common against the usufructuaries and naked owners or of the entire property by joining all usufructuaries and naked owners.¹⁵

In the instant case, plaintiff and all except one of the defendants held undivided shares in naked ownership and in perfect ownership while one of the defendants owned shares in perfect ownership and in usufruct. The court, relying on *Smith v. Nelson*,¹⁶ held that there could be no partition. Since the plaintiff did not hold all forms of ownership held by defendants as a group, the instant case is consistent with *Smith v. Nelson* if that case stands for the proposition that to hold in common, co-owners must hold the same form of ownership. *Smith v. Nelson*, however, does not necessarily establish this proposition, since even under the element criterion it would have been decided the same way. The plaintiff (naked owner) in *Smith v. Nelson*, who was seeking partition of the whole property, did not hold all elements in common with the defendant (perfect owner and usufructuary). The plaintiff in the instant case held the same form of ownership in common with others owning interest in perfect and naked ownership; and, therefore, he should at least

13. *Id.* at 174, 46 So. at 201.

14. See 4 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS n° 477 (1928) and 10 AUBRY ET RAU, DROIT CIVIL FRANÇAIS n° 621 *bis* (6th ed. 1954), for both doctrine and cases. See also Buckner-Harmon Wood Contractor v. Norris, 231 La. 37, 91 So.2d 594 (1956) for analogous situation dealing with separate timber estates; noted in 18 LA. L. REV. 31 (1958), with reference to similar problem involved.

15. See note 14 *supra*.

16. Also cited by the court was *Amerada Petroleum Corp. v. Reese*, 195 La. 359, 196 So. 558 (1940), in which the holders of a mineral lease to land attempted to partition with the owners.

be able to force partition of those interests.¹⁷ Had the court recognized that holding in common referred to elements of ownership, the plaintiff would have been able to partition the entire property since his interest in perfect ownership gave him elements in common with all co-owners including the usufructuary.

It is submitted that Louisiana courts should adopt the element approach to holding in common. Partition is the most logical solution to the intolerable management problems which can arise when perfect owners and usufructuaries, each with equal rights to use the property,¹⁸ cannot agree as to the manner in which the property is to be utilized. Under the element criterion either the perfect ownership or usufructuary could force partition of the usufruct. It is true that under the code provision the same right of partition could not be denied the naked owner even though there is no compelling management consideration. In answer to the countervailing consideration that perfect owners should not be forced to dismember their titles, it may be observed that a perfect owner who desired to avoid the dismemberment of his title resulting from partition of the usufruct and naked ownership alone would be afforded ample protection by his right to reconvene against naked owners and usufructuaries for a partition of the entire property. The French adoption of the element interpretation of holding in common clearly indicates that this approach is available under the Louisiana code provision.¹⁹ It is submitted that the necessity for partition to resolve management conflicts makes it clearly desirable that Louisiana adopt the concept that those who possess the same elements of ownership hold in common.

Charles A. Snyder

CIVIL LAW PROPERTY — TACKING WITHOUT JURIDICAL LINK

Plaintiff sought to be declared owner of a 38-acre tract of land by thirty years acquisitive prescription. His father ac-

17. See notes 9 and 11 *supra*.

18. The perfect owners, through LA. CIVIL CODE art. 491 (1870), and the usufructuary, through *id.* art. 533, have the right to enjoy the full use of the property to the extent of their interest.

19. *But cf. id.* art. 1303. An argument is also possible, though not acceptable to the author, that the provision in *id.* art. 1309—"Thus, usufructuaries of the same estate can institute among themselves the action of partition"—is the only manner in which the usufructuary is able to partition, and thus is a specific rejection of the element criterion.