

Louisiana Law Review

Volume 27 | Number 3

*The Work of the Louisiana Appellate Courts for the
1965-1966 Term: A Symposium
April 1967*

Usufruct: General Principles - Louisiana and Comparative Law

A. N. Yiannopoulos

Repository Citation

A. N. Yiannopoulos, *Usufruct: General Principles - Louisiana and Comparative Law*, 27 La. L. Rev. (1967)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol27/iss3/3>

This Article 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.

USUFRUCT: GENERAL PRINCIPLES LOUISIANA AND COMPARATIVE LAW

A. N. Yiannopoulos*

INTRODUCTION: PERSONAL SERVITUDES AS DISMEMBERMENTS OF OWNERSHIP

The right of ownership, which according to traditional civilian analysis includes the elements of *usus*, *fructus*, and *abusus*,¹ may lawfully be dismembered in a variety of ways either by the intention of the owner² or by operation of law.³ Book II, Title III, of the Louisiana Civil Code of 1870 deals specifically with three permissible dismemberments of the right of ownership: usufruct, use, and habitation.⁴ These dismemberments of ownership are *real rights*⁵ of enjoyment which, by their

1. See LA. CIVIL CODE art. 491 (1870): "Perfect ownership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner . . ."; *Queensborough Land Co. v. Cazeaux*, 137 La. 724, 736, 67 So. 641, 645 (1915): "As stated by article 491 of the Code, ownership is composed of the rights to use, to enjoy, and to dispose of. These three constituent elements of the ownership bear in the civil law the designation given to them in the Roman law: The *usus*, the *fructus*, and *abusus*. . ."; *In re Morgan R & S.S. Co.*, 32 La. Ann. 371, 375 (1880), quoted in *Reagan v. Murphy*, 235 La. 529, 105 So. 2d 210 (1958) and *Harwood Oil and Mining Co. v. Black*, 240 La. 641, 124 So. 2d 764 (1960): "The rights of use, enjoyment, and disposal are said to be the three elements of property to things."

2. For the limits of the owner's freedom to create real rights other than those regulated in the Louisiana Civil Code of 1870, see YIANNPOULOS, *CIVIL LAW PROPERTY* § 96 (1966). See also text at notes 213-227 *infra*.

3. See LA. CIVIL CODE arts. 223, 916 (1870); Yiannopoulos, *Legal Usufruct; Louisiana and Comparative Law*, to be published in a forthcoming issue of this *Review*.

4. See LA. CIVIL CODE arts. 533-645 (1870). See also FRENCH CIVIL CODE, bk. II, tit. III, arts. 578-624 (*usufruct*); arts. 625-636 (*use and habitation*); B.G.B., bk. III, ch. 5, §§ 1030-1089 (*usufruct*); §§ 1090-1093 (*limited personal servitudes, including habitation*); GREEK CIVIL CODE, bk. III, ch. 8, arts. 1142-1182 (*usufruct*); arts. 1183-1187 (*habitation*); arts. 1188-1191 (*limited personal servitudes*).

5. See LA. CIVIL CODE art. 490(2) (1870): ". . . any real rights towards a third person; as a usufruct, use or servitude"; LA. CIVIL CODE art. 1904 (1870): "Contracts, as to their effects upon property or real rights, are of two kinds: 1. Such as purport a transfer of that which is the object of the contract. 2. Such as only give a temporary right of enjoyment of it." See also *id.* arts. 487, 2012; *Gibson v. Zylks*, 186 La. 1043, 1054, 173 So. 757, 761 (1936) ("The usufruct of immovable property is a real right, Civ. Code art. 2012, and as such passes with the property to the heirs"); *Perin v. McMicken's Heirs*, 15 La. Ann. 154 (1860) (*usufructuary has a real right*). For the notion of real right, see in general, YIANNPOULOS, *CIVIL LAW PROPERTY* §§ 87, 90 (1966).

In article 2012 of the Louisiana Civil Code of 1870, the rights of usufruct, use, and habitation are declared to be "examples" of "real obligations" created by

nature, confer direct and immediate authority over a thing belonging to another person.⁶ They are distinguished from *personal* (obligatory) rights of enjoyment, such as those arising under leases⁷ or loans for use,⁸ which confer authority merely over the person of a determined debtor who has assumed the obligation to allow the enjoyment of a thing by his creditor.⁹

Usufruct, use, and habitation, though clearly real rights, are termed in the Louisiana Civil Code of 1870 "personal servitudes."¹⁰ This terminology follows the Romanist tradition¹¹ and

"alienating to one person the immovable property, and to another, some real right to be exercised upon it." While the notion and function of real obligations is an involved matter in civilian theory (see YIANNPOULOS, CIVIL LAW PROPERTY § 112 (1966)), the nature of usufruct, use, and habitation as real obligations under the Louisiana Civil Code should not give rise to difficulties. Article 2012 merely means that the acquirer of land subject to a real right of personal or predial servitude incurs duties incidental and correlative to the rights of the holder of the servitude. These duties are "real" in the sense that the landowner is not personally liable with his entire patrimony and that they are transferable to successors by particular title as burdens on the land. See LA. CIVIL CODE arts. 2010, 2015 (1870). By abandoning the land to the obligee, the landowner may relieve himself of all responsibility. Accurate language, therefore, ought to indicate that usufruct, use, and habitation are real rights rather than real obligations; but these real rights involve incidental and correlative duties which may be termed "real obligations." Be it as it may, the notion of real obligations is an awkward analytical tool which can be fully dispensed with. See YIANNPOULOS, *loc. cit. supra*.

6. See YIANNPOULOS, CIVIL LAW PROPERTY § 88, text at note 43 (1966); *cf.* LA. CIVIL CODE art. 556 (1870): "The usufructuary can maintain all actions against the owner and third persons, which may be necessary to insure him the possession, enjoyment and preservation of his right."

7. On the nature of predial leases as personal rights, see YIANNPOULOS, CIVIL LAW PROPERTY § 95 (1966). See also LA. CIVIL CODE art. 2692 (1870): "The lessor is bound from the very nature of the contract, and without any clause to that effect: 1. To deliver the thing leased to the lessee. 2. To maintain the thing in a condition such as to serve for the use for which it is hired. 3. To cause the lessee to be in a peaceable possession of the thing during the continuance of the lease." Thus, in contrast with the usufructuary, the lessee does not enjoy the protection of real actions. See LA. CODE OF CIVIL PROCEDURE art. 3656 (1960).

8. See LA. CIVIL CODE art. 2893 (1870): "The loan for use is an agreement, by which a person delivers a thing to another, to use it according to its natural destination, or according to the agreement, under the obligation on the part of the borrower, to return it after he shall have done using it."

9. On the nature of personal obligations, see YIANNPOULOS, CIVIL LAW PROPERTY §§ 86, 90 (1966).

10. See LA. CIVIL CODE art. 646 (1870): "All servitudes which affect lands may be divided into two kinds, personal and real. Personal servitudes are those attached to the person for whose benefit they are established, and terminate with his life. This kind of servitude is of three sorts: usufruct, use and habitation." Use of the word "personal" to qualify both *rights* and *servitudes* is confusing. Actually, the distinction of servitudes into personal and predial has nothing to do with the distinction of rights into personal and real. Personal rights are termed "personal" because they confer authority over the person of the debtor. Personal servitudes, on the other hand, are termed "personal" because they are in favor of a person.

11. See 10 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 169 (1874-82); JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 282 (2d ed. 1952); SOHM-MITTEIS-WENGER, INSTITUTIONEN 325 (17th ed. 1923). Modern re-

accords with the terminology employed in Germany¹² and Greece.¹³ The redactors of the French Civil Code, however, have avoided the appellation "personal servitudes" in order to prevent confusion with reprobated feudal tenures which were suppressed by the Revolution.¹⁴ French commentators, following the civilian tradition, do not hesitate to refer to usufruct, use, and habitation as personal servitudes.¹⁵

Usufruct, use, and habitation are personal servitudes in the sense that they are "attached to the person for whose benefit they are established, and terminate with his life."¹⁶ They are distinguished from predial servitudes which are charges "laid on an estate for the use and utility of another estate belonging to another owner."¹⁷

Usufruct, use, and habitation are the only personal servitudes regulated in the French and the Louisiana Civil Codes. Question, therefore, has arisen as to the freedom of interested parties to create new kinds of personal servitudes. Articles 646¹⁸ and 709¹⁹

search, however, shows conclusively that usufruct was not a servitude in classical Roman law. See SCHULZ, *CLASSICAL ROMAN LAW* 382 (1951); Buckland, *The Conception of Usufruct in Classical Law*, 43 L. Q. REV. 326-48 (1927). Kagan, *The Nature of Servitudes and the Association of Usufruct with Them*, 22 TUL. L. REV. 94-110 (1947).

12. See WOLFF-RAISER, *SACHENRECHT* 431 (10th ed. 1957). In the text of the B.G.B., usufruct is not expressly designated as a "personal" servitude. Book III, ch. 5, dealing with servitudes (§§ 1018-1093) is subdivided into predial servitudes (§§ 1018-1029), usufruct (§§ 1030-1089), and limited personal servitudes (§§ 1090-1093). German writers today refer to usufruct by its name rather than by the generic "personal servitude." See BAUR, *LEHRBUCH DES SACHENRECHTS* 259 (2d ed. 1963).

13. Book III, ch. 8 of the Greek Civil Code, bears the heading "Personal Servitudes." It deals with usufruct (arts. 1142-1182); habitation (arts. 1883-1187), and limited personal servitudes (arts. 1188-1191).

14. See 2 TOULLIER, *DROIT CIVIL FRANÇAIS* 94 (1833).

15. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 753 (2d ed. Picard 1952). The authors indicate, however, that according to recent practice in France the term "servitude" is reserved for predial servitudes. Usufruct, use, and habitation are referred to by their proper name rather than collectively as personal servitudes.

16. LA. CIVIL CODE art. 646(2) (1870).

17. *Id.* art. 647.

18. See *id.* 646(2): "Personal servitudes are those attached to the person for whose benefit they are established, and terminate with his life. This kind of servitude is of three sorts: usufruct, use and habitation." However, argument may be made that the enumeration is merely indicative. See text at notes 23-28 *infra*.

19. See LA. CIVIL CODE art. 709(1) (1870): "Owners have a right to establish on their estates, or in favor of their estates, such servitudes as they deem proper; provided, nevertheless, that the services be not imposed on the person or in favor of the person, but only on an estate or in favor of an estate; and provided, moreover, that such services imply nothing contrary to public order." However, argument may be made that this article merely prohibits the resurrection of feudal tenures. See note 20 *infra*.

of the Louisiana Civil Code of 1870, and article 686²⁰ of the French Civil Code, seem to exclude this freedom. Nevertheless, French courts and commentators are in accord today that charges may be laid on an estate in favor of a person: these are real rights of limited enjoyment, expiring with the life of the beneficiary in the absence of contrary stipulation.²¹ And, in Louisiana, special legislation and jurisprudence relying on articles 754 to 758 of the Civil Code allow, within certain limits, the creation of personal servitudes other than usufruct, use, or habitation.²²

Articles 754 to 758 of the Louisiana Civil Code of 1870 have no equivalent in the French Civil Code. They were first introduced in the 1825 Louisiana Code on the basis of the text of Toullier.²³ The primary purpose of these articles is to furnish

20. See FRENCH CIVIL CODE art. 686, reading precisely as article 646 of the Louisiana Civil Code, quoted note 19 *supra*. This article has been interpreted in France as prohibiting services imposed on a person in favor of another person, or on an estate in favor of a person and his heirs. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 918, 921 (2d ed. Picard 1952); 2 TOULLIER, *DROIT CIVIL FRANÇAIS* 94, 95 (1833); 3 *id.* at 401, n. 1.

21. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 927 (2d ed. Picard 1952). The authors refer to real rights laid on an estate in favor of a person by the generic "rights of use." In France, limited real rights of enjoyment may indeed be classified as rights of use. Article 628 of the Civil Code, corresponding to article 631(1), first paragraph, of the Louisiana Civil Code of 1870, provides: "The rights to use and habitation are regulated by the title which has established them, and receive accordingly a more or less extensive sense." In Louisiana, however, article 626 of the Civil Code gives a rather narrow definition of use and article 631(1), second paragraph, declares that "these conventions do not exceed the limits of the laws on use and habitation, for if they do, they create other rights." None of these provisions has an equivalent in the French Civil Code. Argument could be made, therefore, that limited real rights of enjoyment in Louisiana are "other rights" rather than "use." For discussion of the more general question of whether owners may create real rights other than those regulated in the French Civil Code, see YIANNPOULOS, *CIVIL LAW PROPERTY* § 87, text at nn. 30-42 (1966).

22. See, in general, LA. R.S. 19:2 (1950) (expropriation of ownership or servitudes by public corporations and public utilities); *id.* 2:82, 389 (expropriation of air rights); *id.* 12:328 (electric cooperatives); *id.* 38:2334 (Sabine River Authority); *id.* 45:64 (irrigation canals); *id.* 48:833 (servitudes for highway purposes). These so-called "servitudes" in favor of public utilities are not predial servitudes under the Civil Code because they are not charges laid on an estate "in favor of an estate." LA. CIVIL CODE art. 648 (1870). Nor are they equivalent to common law "easements." *Arkansas Louisiana Gas Co. v. Cutrer*, 30 So.2d 864 (La. App. 2d Cir. 1947). They should rather be classified as limited personal servitudes, real rights of enjoyment in favor of a person, governed by the rules of the Civil Code pertaining to both predial and personal servitudes, applied by analogy. See note 35 *infra*. *Cf. Rock Island, A. & L. R.R. v. Gournay*, 205 La. 164, 17 So.2d 21 (1944) (railroad right-of-way); *Tate v. Ville Platte*, 44 So.2d 360 (La. App. 1st Cir. 1950) (pipeline servitude in favor of town); *Arkansas Louisiana Gas Co. v. Cutrer*, 30 So.2d 864 (La. App. 2d Cir. 1947) (pipeline servitude); *Tennessee Gas Transmission Co. v. Bayles*, 74 F. Supp. 258 (W.D. La. 1947) (pipeline servitude).

23. See 1 LA. LEGAL ARCHIVES, *PROJET OF THE CIVIL CODE OF 1825* p. 82 (1937). Articles 754, 755, and 756 of the Louisiana Civil Code of 1870 reproduce, almost verbatim, the text of Toullier. See 2 TOULLIER, *DROIT CIVIL FRANÇAIS* 167

rules of interpretation as to the type of rights created by juridical acts in the absence of express designation. At the same time, these articles authorize by clear implication the creation of servitudes in favor of a person in the form of limited rights of enjoyment. Article 757 thus declares that "if the owner of a house near a garden or park, should stipulate for the right of walking and gathering fruits and flowers therein, this right would be considered personal to the individual, and not a servitude of the house or its owner. But the right becomes real and is a predial servitude, if the person stipulating for the servitude, acquires it as owner of the house, and for himself, his heirs and assigns."²⁴

(1833): "*Si la concession énonce qu'il est concédé pour l'utilité d'un autre fonds, il ne peut y avoir de doute, quand même le droit ne serait pas qualifié de servitude. Cette qualification n'est pas nécessaire: tout service imposé sur un fonds en faveur d'un autre fonds, est essentiellement une servitude. La nature d'un droit se détermine par sa qualité plutôt que par la denomination qu'on lui a donnée*" (art. 754); "*Si l'acte n'énonçait pas que ce droit est concédé pour l'utilité de tel héritage, mais en faveur de telle personne qui en est propriétaire, il faudrait considérer si, par sa nature, le droit concédé procure une utilité réelle à l'héritage, ou seulement un agrément personnel à l'individu propriétaire*" (art. 755); "*Dans le premier cas, on doit présumer que le droit concédé est une servitude réelle, quoiqu'on ne lui en ait pas donné ce nom. . . . Il en est de même si, possédant une maison contiguë à des terres riveraines d'une grande route, j'ai stipulé le droit de passer sur ces terres, sans exprimer que le passage est pour le service de ma maison; car il est évident qu'elle retire une utilité réelle de ce passage*" (art. 756). For the text of Toullier corresponding to articles 757 and 758 of the Louisiana Civil Code of 1870, see notes 24 and 26 *infra*.

24. LA. CIVIL CODE art. 757 (1870); cf. 2 TOULLIER, DROIT CIVIL FRANÇAIS 167 (1833): "*Au contraire, si, par sa nature, la concession ne paraît procurer qu'un agrément personnel à l'individu, elle ne peut être considérée que comme stipulée en faveur de la personne, et ne peut être rendue réelle que par une énonciation expresse.*"

"*Par exemple, si le propriétaire d'une maison voisine d'un parc, d'un jardin, stipule le droit d'y passer, de s'y promener, d'y cueillir des fruits, des fleurs, la concession sera considérée comme un droit personnel à l'individu; ce ne sera point une servitude, parce que le Code prescrit formellement les servitudes personnelles. . . . Mais le droit pourrait être rendu réelle, et deviendrait une véritable servitude prédiiale, si j'avais stipulé, comme propriétaire de la maison, pour moi et mes successeurs ou ayants-cause.*"

Toullier states, in the sequence of the passage, that personal servitudes other than usufruct, use, or habitation are forbidden by the Code and that rights of enjoyment which do not qualify as predial servitudes, usufruct, use, or habitation are necessarily obligations. See 2 TOULLIER, DROIT CIVIL FRANÇAIS 167 (1833): "*Ainsi l'acquéreur du parc ne serait point obligé de souffrir l'exercice d'un pareil droit, à moins que son contrat d'acquisition ne l'y obligéât. C'est une obligation personnelle à celui qui l'a contractée, et à laquelle l'acquéreur demeure soumis en vertu de la convention contenue dans son contrat d'acquisition.*" The author, however, revised this view in the third volume of his treatise and concluded that a real right of enjoyment other than usufruct, use, or habitation may validly be stipulated in favor of a person. Thus, a right of passage could be stipulated in favor of a person rather than an estate, and this right would bind all subsequent acquirers of the property. This right would not be a predial servitude because it would terminate with the life of the beneficiary. Nor would this be a personal servitude forbidden by article 686 of the French Civil Code: "This article must apply," Toullier stated, "to services that are due, not to any person whoever, but to the owner of an estate as such. For example, the right to silence the frogs

The expression "personal to the individual" does not necessarily mean that the right created is a personal obligation binding only the parties to the agreement. It obviously means that the right is not a predial servitude in favor "of the [dominant] house or its owner." Thus, it can be a *real* right,²⁵ a veritable personal servitude on the servient estate which expires with the life of the beneficiary in the absence of contrary stipulation. This interpretation finds support in article 758 which declares that "when the right is merely personal to the individual, it expires with him, unless the contrary has been stipulated."²⁶ If the "personal" right were not a personal servitude but a contractual right of enjoyment, there is no reason why it should terminate with the life of the beneficiary. Personal rights (obligations) are, in principle, heritable.²⁷ It is only personal servitudes, *i.e.*, real rights of enjoyment, that terminate with the life of the individual beneficiary.²⁸

The question of the freedom of parties to create personal servitudes other than usufruct, use, or habitation has been raised in a number of Louisiana cases. In *Louisiana & A.R.R. v. Winn Parish Lumber Co.*,²⁹ involving especially the problem of the validity of a servitude imposing affirmative duties on the owner of the servient estate, Justice Provosty rendered a monumental separate opinion in which he discussed at length the nature of

which disturb the sleep of a landowner or of his wife would be a service due to a person; the right to kiss the bride would be of the same nature. This is an observation that has escaped my attention in the treatise on servitudes; because if one were to argue that the Code does not allow a citizen of Rennes to stipulate for a right of passage, during his life, over an estate so as to shorten the distance or to go to places not accessible by highway, one would attribute to the Code an absurd meaning, namely that it prohibits something without reason." 3 TOULLIER, DROIT CIVIL FRANÇAIS 401 (1833).

25. See Mallet v. Thibault, 212 La. 79, 31 So.2d 601 (1947), discussed in note 44 *infra*; Simoneaux v. Lebermuth & Israel Planting Co., 155 La. 689, 99 So. 531 (1924), discussed in note 44 *infra*; Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1920), discussed text at note 38 *infra*; Levet v. Lapeyrolerie, 39 La. Ann. 210, 1 So. 672 (1887), quoted note 36 *infra*. However, the question whether a real right has been created or merely an obligation will be determined in the light of the circumstances and the intention of the parties. See *Martin v. Louisiana Public Utilities Co.*, 13 La. App. 181, 127 So. 470 (1st Cir. 1930) (contract of water company to connect plaintiff's property with its sewer system, *held*, a lease rather than a servitude).

26. LA. CIVIL CODE art. 758 (1870); *cf.* 2 TOULLIER, DROIT CIVIL FRANÇAIS 167 (1833): "Ainsi, le même droit concédé peut n'être qu'une faculté personnelle à l'individu, et qui s'éteint à sa mort. . . ."

27. See LA. CIVIL CODE art. 1999 (1870): "Every obligation shall be deemed heritable as to both parties, unless the contrary be specially expressed, or necessarily implied from the nature of the contract"; Currier, *Heritability of Conventional Obligations*, 31 TUL. L. REV. 324 (1957).

28. See LA. CIVIL CODE arts. 646, 758 (1870).

29. 131 La. 288, 59 So. 403 (1911).

personal servitudes and the extent of the owner's freedom to create new kinds of personal servitudes. The Justice pointed out that while article 646 recognizes personal servitudes "it at the same time declares that they terminate with the life of the beneficiary, and that 'this kind of servitudes is of three sorts — usufruct, use and habitation.' Not of four or more sorts, note. Not whatever unregulated brood of personal servitudes owners of estates may choose to create; but of three sorts — usufruct, use, and habitation."³⁰ One should agree with Justice Provosty that servitudes *in faciendo*, sometimes referred to as "personal servitudes" by French writers of the *ancien régime*, are reprobated feudal tenures which have no place under the Louisiana Civil Code.³¹ But it is a different question whether the owner of an estate may or may not create a limited real right of enjoyment in favor of a person rather than in favor of an estate. This right of the owner has been recognized in France.³² And both the German³³ and the Greek³⁴ Civil Codes have introduced the notion of "limited personal servitudes," i.e., real rights in favor of a person which confer a limited advantage of use or enjoyment of a thing belonging to another person.

Since usufruct, a personal servitude exhausting the utility of a thing, is allowed under the Louisiana Civil Code there is no valid reason why limited personal servitudes, exhausting only partially the utility of a thing, should not be allowed.³⁵ In no case, however, should such limited personal servitudes involve affirmative duties imposed on the owner of the servient estate or tenures not recognized by Louisiana law. Accordingly, the content of any predial servitude³⁶ as well as rights to the collec-

30. 59 So. 403, 419 (La. 1911).

31. Indeed, it is only exceptionally that the Louisiana Civil Code of 1870 imposes affirmative duties on the owner of the servient estate. See arts. 663, 671, 691, 712, 773, 775, 815. Cf. 3 TOULLIER, DROIT CIVIL FRANÇAIS 401 n.1 (1833), quoted note 25 *supra*.

32. See note 21 *supra*.

33. See B.G.B. §§ 1090-1093.

34. See GREEK CIVIL CODE arts. 1188-1191.

35. This suggestion does not open the floodgates for the recognition of an "unregulated brood" of real rights. Limited personal servitudes, as charges on an estate, should be governed by the rules of predial servitudes, applied by analogy. Thus, for example, they ought to confer a determined advantage to the beneficiary without imposing affirmative duties on the owner of the servient estate. See LA. CIVIL CODE arts. 654, 655 (1870). On the other hand, as personal servitudes, they ought to expire with the beneficiary unless the contrary has been stipulated. LA. CIVIL CODE art. 758 (1870).

36. See *Mallet v. Thibault*, 212 La. 79, 31 So.2d 601 (1947) (servitude of passage in favor of a person rather than an estate); *Simoneaux v. Lebermuth & Israel Planting Co.*, 155 La. 689, 99 So. 531 (1924) (right-of-way for construction of railroad could be a servitude in favor of a person); *Levet v. Lapeyrolerie*, 39 La. Ann. 210, 214, 1 So. 672, 674 (1887): "Where a servitude is acquired by

tion of fruits³⁷ could be validly stipulated in the form of a personal servitude burdening an estate in favor of a person rather than in favor of another estate.

In a landmark decision, *Frost-Johnson Co. v. Salling's Heirs*,³⁸ the Louisiana Supreme Court declared that personal servitudes other than usufruct, use, or habitation may be validly created by the intention of the owner. "The right to establish a servitude in favor of a person *and his heirs*," the court reasoned, "seems to be forbidden by C.C. arts. 646, 709. But, on the other hand, it seems to be allowed by C.C. arts. 607, 758, 2013. And with these conflicting provisions before us we cannot say that the law clearly prohibits the creation of a servitude upon lands in favor of a person *and his heirs*. And hence the intention of the parties should govern in such matters."³⁹ It has been pointed out elsewhere, however, that the holding of this case may be justified in the light of pressing social and economic needs⁴⁰ so that the recognition of new kinds of personal servitudes may depend on a showing of similar needs. Indeed, the freedom of contracting parties to create dismemberments of ownership other than those regulated in the Civil Code has been sparingly recognized by Louisiana courts;⁴¹ and, outside the fields of mineral law,⁴² building restrictions,⁴³ and servitudes in favor of public utilities,⁴⁴ the courts have only exceptionally given effect to juridical acts creating limited personal servitudes.⁴⁵

title, the act stipulating it may validly declare whether it is in favor of the estate, or only in favor of the landowner, and such stipulation will receive full effect."

37. See *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1920) (mineral servitude likened to usufruct); *Peyton v. Hammonds*, 125 So. 2d 491 (La. App. 3d Cir. 1960) (legacy of revenues as "kind of usufruct" and a personal servitude).

38. 150 La. 756, 91 So. 207 (1920).

39. *Id.* at 864, 91 So. 245.

40. See YIANNPOULOS, CIVIL LAW PROPERTY §§ 99, 100 (1966).

41. See *id.* § 96.

42. *Id.* §§ 99-102.

43. *Id.* § 104.

44. See note 22 *supra*.

45. See *Mallet v. Thibault*, 212 La. 79, 31 So. 2d 601 (1947). In this case a servitude of passage was held to be a personal servitude. "We are not unmindful," the court declared, "of Article 709 of the Code which seems to forbid conventional establishment of a servitude in favor of a person. However, that article cannot be reconciled with Articles 757 and 758 which are contained in Section 2 of Chapter 4 of Title IV dealing with the establishment of servitudes and which provide directly to the contrary. . . . Thus the creation of a personal servitude by convention will be approved provided, of course, that it does not contravene the public order." (*id.* at 89-90, 31 So. 2d at 604). In *Simoneaux v. Lebermuth & Israel Planting Co.*, 155 La. 689, 694, 99 So. 531, 533 (1924), plaintiff had granted to defendant a right-of-way over her property for the construction of a railway needed for transportation of crops to defendant's refinery. Years later

The following discussion is devoted to the notion, creation, and function of the right of usufruct, the most important of all personal servitudes. Use and habitation, along with limited personal servitudes, will be discussed in another study.

1. NOTION AND KINDS OF USUFRUCT

a. Perfect Usufruct; Definition

Article 533 of the Louisiana Civil Code of 1870 defines usufruct as "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 advantage which it may produce, provided that it be without altering the substance of the thing."⁴⁶ Substantially similar definitions are employed in the French,⁴⁷ German,⁴⁸ and Greek⁴⁹ Civil Codes. These definitions apply merely to usufruct properly so-called (*perfect usufruct*).⁵⁰

defendant sold both the refinery and the right-of-way to a third person. Plaintiff sued to annul the grant on the ground that it was a personal servitude in favor of the defendant which could not be transferred by sale or otherwise. The court declared that "The right granted, whether it be considered a real or a personal servitude, may be sold. . . . If the right granted be considered a personal servitude, we think that its sale is authorized by article 2449 of the Civil Code." "There is nothing in Article 758," the court went on, "cited by plaintiff, that provides to the contrary, directly or indirectly. All that the article provides is that, unless the contrary be expressly stipulated, a servitude personal to the individual expires with him. If the servitude in contest be considered personal, it can be so considered only in the sense that it is not predial, or in favor of an estate. It cannot be considered personal in the sense of being nonheritable or non-transferable. It is only to personal servitudes that are nonheritable or non-transferable that article 758 refers." See also *Levet v. Lapeyrollerie*, 39 La. Ann. 210, 1 So. 672 (1887).

46. LA. CIVIL CODE art. 533 (1870); La. Civil Code art. 525 (1825). In the 1808 Louisiana Civil Code, p. 110, art. 1, the definition included the words "as the owner himself could do." These words were struck out on the recommendation of the redactors of the 1825 Code because "there is a variety of things which the owner of the thing can do, without altering its substance which are prohibited to the usufructuary." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, p. 48 (1937).

47. FRENCH CIVIL CODE art. 578: "Usufruct is the right of enjoying things, the property of which is vested in another, as could the owner himself, but under the obligation of preserving its substance."

48. B.G.B. § 1030: "A thing may be burdened with a real right in such a manner as to confer on the beneficiary of the right the authority to draw all the profits of the thing (usufruct)." This is obviously a deficient definition. According to German doctrinal writers (perfect) usufruct is a real right of enjoyment conferring on the beneficiary the authority to draw all the profits of an object belonging to another under the obligation of not altering its substance.

49. GREEK CIVIL CODE art. 1142: "The personal servitude of usufruct consists in the real right of the beneficiary to make complete use and to enjoy a thing belonging to another while the substance of the thing is fully preserved." Cf. QUEBEC CIVIL CODE art. 443; LAWS OF PUERTO RICO-CIVIL CODE § 1501; SPANISH CIVIL CODE art. 467; SWISS CIVIL CODE art. 745(2).

50. See LA. CIVIL CODE art. 533(2) (1870); "The obligation of not altering the substance of the thing takes place only in the case of perfect usufruct." See also FRENCH CIVIL CODE art. 587; B.G.B. §§ 1037, 1067; GREEK CIVIL CODE

The definition of usufruct in article 533 of the Louisiana Civil Code is deficient as it fails to indicate that usufruct is a real right⁵¹ of limited duration.⁵² Yet, these are important characteristics of the right of usufruct as they distinguish it from other rights of enjoyment. Thus, the limited duration of usufruct distinguishes it from rents of lands⁵³ and from superficiary rights⁵⁴ whereas its nature as a real right distinguishes it from leases⁵⁵ and obligations having as their object the collection of fruits or revenues.⁵⁶ Accordingly, it is submitted that perfect usufruct may be defined as a real right of enjoyment of limited duration which is exercised on a thing belonging to another under the obligation of preserving the substance of the thing.⁵⁷

b. Imperfect Usufruct; Definition

Real rights of enjoyment under the obligation of preserving the substance of the thing may properly be established only on non-consumable things.⁵⁸ When the right of enjoyment bears on consumable things, *i.e.*, things which are extinguished or are intended to be extinguished by the first use, the obligation of preserving their substance would contradict the very possibility of enjoyment: as to such things the *jus utendi* is meaningless without the *jus abutendi*.

art. 1174; text at note 62 *infra*. The definition of perfect usufruct in the various civil codes derives from the text of Paul: "*usufructus est ius alienis rebus utendi fruendi salva rerum substantia*." D. 7.1.1. For early Roman law, see Buckland, *The Conception of Usufruct in Classical Law*, 43 L.Q. REV. 326-48 (1927); Kagan, *The Nature of Servitudes and the Association of Usufruct with Them*, 22 TUL. L. REV. 94-110 (1947); and, in general, PUGLIESE, USUFRUTTO, USO E ABITAZIONE 2-18 (1956).

51. *Cf.* LA. CIVIL CODE art. 490(2) (1870): "... any real right towards a third person; as a usufruct, use or servitude." See also text at note 5 *supra*.

52. See LA. CIVIL CODE arts. 606, 612, 646 (1870).

53. See *id.* art. 2780; YIANNPOULOS, CIVIL LAW PROPERTY § 94 (1966).

54. See YIANNPOULOS, CIVIL LAW PROPERTY § 93 (1966).

55. *Id.* § 95.

56. Obligations, *i.e.*, personal rights, may indeed have as their object the collection of fruits or revenues. See *New Orleans v. Baltimore*, 13 La. Ann. 162 (1858) (legacies of revenues, *held*, personal obligations imposed on the universal legatees rather than a personal servitude burdening the estate). Frequently, the question of whether a usufruct has been established or an obligation having as its object the collection of fruits is a matter of contractual interpretation. See *Peyton v. Hammonds*, 125 So. 2d 491, 492 (La. App. 3d Cir. 1960) (legacy of a "usufruct . . . on [the testator's] estate to the extent [of] One Hundred Fifty Dollars per Month." *Held*, the disposition was a "kind of usufruct," referred to in article 607 of the Civil Code). See also text at notes 199, 200 *infra*.

57. *Cf.* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 745 (2d ed. Picard 1952).

58. For the notion of consumables and non-consumables, see YIANNPOULOS, CIVIL LAW PROPERTY § 15 (1966).

Accordingly, article 534 of the Louisiana Civil Code of 1870⁵⁹ declares that there are two kinds of usufruct: perfect and imperfect (or quasi-usufruct). Perfect usufruct is the usufruct of non-consumable things "which the usufructuary can enjoy without changing their substance, though their substance may be diminished or deteriorated naturally by time or by the use to which they are applied; as a house, a piece of land, furniture and other movable effects."⁶⁰ Imperfect usufruct, on the other

59. See LA. CIVIL CODE art. 534 (1870); La. Civil Code art. 526 (1825). *Cf.* La. Civil Code p. 110, arts. 2-3 (1808). These two articles of the 1808 Code, containing the definitions of perfect and imperfect usufruct and describing the obligations resulting from each kind of usufruct, were revised by the redactors of the 1825 Code. See 1 LA. LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, pp. 48, 49 (1937): "We have formed one article, which contains the definition of perfect and imperfect usufruct, and have inserted in other articles the description of the obligations which result from each kind."

60. LA. CIVIL CODE art. 534(1) (1870). See also *id.* art. 533(2): "The obligation of not altering the substance of the thing takes place only in the case of perfect usufruct." The classification of a thing as consumable or non-consumable controls the classification of usufruct as perfect or imperfect. See *Succession of Franklin*, 13 La. App. 289, 127 So. 767 (1930) (jewelry; perfect usufruct). Shares of stock have been correctly held to be non-consumables, and, therefore, subject to perfect usufruct. *Leury v. Mayer*, 122 La. 486, 47 So. 839 (1908); *Succession of Heckert*, 160 So.2d 375 (La. App. 4th Cir. 1964). However, when a corporation is liquidated without any act of the usufructuary, the usufruct attaches to the proceeds of liquidation and is converted into an imperfect one. *Succession of Dielmann*, 119 La. 101, 43 So. 972 (1907). When, on the other hand, shares of stock are converted into money by the usufructuary, the Louisiana Supreme Court has declared that the usufruct does not become an imperfect one. *Wainer v. Wainer*, 210 La. 324, 26 So.2d 829 (1946). It is difficult to understand what the court meant by this statement. It ought to be clear that if the usufructuary alienates things subject to perfect usufruct he violates his obligation to preserve the substance of the thing. Accordingly, his usufruct may terminate according to article 621 and, upon termination of the usufruct, the usufructuary will be "answerable for such losses as proceed from his fraud, default, or neglect" (art. 567). It is submitted, therefore, that in case the usufructuary sells shares of stock which later appreciate the measure of the naked owner's recovery ought to be the value of the stock at the end of the usufruct. Louisiana courts, however, have allowed recovery of the value of the stock at the time of the creation of the usufruct or of the sale of the stock. See *Succession of Wengert*, 180 La. 483, 156 So. 473 (1934); *Succession of Heckert*, 160 So.2d 375 (La. App. 4th Cir. 1964). This measure of recovery is prejudicial to the interests of naked owners since they may thus be deprived of any appreciation of their stock to which they should be entitled under the law. In *Kelley v. Kelley*, 185 La. 185, 168 So. 769 (1936), the court assumed, without deciding, that stocks and bonds were subject to imperfect usufruct; this assumption ought to be taken with a grain of salt. The court merely held that stocks and bonds burdened with a usufruct could be garnisheed subject to the rights of the usufructuary, for debts of the naked owner. In this respect, the court pointed out, classification of the usufruct as perfect or imperfect would be immaterial insofar as the interests of the usufructuary were concerned.

The classification of things as consumables or non-consumables is also important for the determination of the question whether the parties to an agreement intended to conclude a loan for consumption or a loan for use: consumable things form the object of a loan for consumption and non-consumable things form the object of a loan for use. Thus, the loan of banknotes is a loan for consumption. *Egerton v. Buckner*, 4 Rob. 346 (La. 1843). On the other hand, the loan of an automobile or of a prize ox is a loan for use. *New York Fire Ins. Co. v. Kansas Mill Co.*, 227 La. 976, 81 So.2d 15 (1955); *Reehlman v. Calamari*, 94 So.2d 311 (La. App. Orl. Cir. 1957).

hand, is the usufruct of consumables, "which would be useless to the usufructuary, if he did not consume or expend them, or change the substance of them, as money, grain, liquors."⁶¹ Provisions in the French, German and Greek Civil Codes establish likewise the notion of usufruct of consumables and regulate its incidents.⁶²

Imperfect usufruct differs from perfect usufruct in that it transfers to the usufructuary the ownership of the things subject to the usufruct and renders the naked owner simple creditor of the usufructuary. The usufructuary is accorded the right to "consume, sell or dispose" the things subject to the usufruct "as he thinks proper"⁶³ under the obligation "of returning the same quantity, quality and value to the owner, or their estimated price, at the expiration of the usufruct."⁶⁴ Imperfect usufruct

61. LA. CIVIL CODE art. 534(2) (1870). See also *id.* art. 549: "If the usufruct includes things, which can not be used without being expended or consumed, or without their substance being changed. . . ." Louisiana courts have classified as consumables, and, therefore, as subject to imperfect usufruct *money*: *Mariana v. Eureka Homestead Soc.*, 181 La. 125, 158 So. 642 (1935); *Gryder v. Gryder*, 37 La. Ann. 638 (1885); *Succession of Bickham*, 197 So. 924 (La. App. 1st Cir. 1940); *Danna v. Danna*, 161 So. 348 (La. App. 1st Cir. 1935); *Johnson v. Bolt*, 146 So. 375 (La. App. 2d Cir. 1933); *promissory notes*: *Succession of Block*, 137 La. 302, 68 So. 618 (1915); *Miquez v. Delcambre*, 125 La. 176, 51 So. 108 (1910); *Kahn v. Beemel*, 108 La. 296, 32 So. 444 (1902); *negotiable instruments to the bearer*: *Taylor v. Taylor*, 189 La. 1084, 181 So. 543 (1938); *Johnson v. Bolt*, *supra*; *stock of merchandise*: *Succession of Trouilly*, 52 La. Ann. 276, 26 So. 851 (1899); *Succession of Blanchard*, 48 La. Ann. 578, 19 So. 683 (1896); *bales of cotton*: *Succession of Hays*, 33 La. Ann. 1143 (1881); and *certificates of deposit*: *Vivian State Bank v. Thomason-Lewis Lumber Co.*, 162 La. 660, 111 So. 51 (1926). *Cf.* Comment, *Usufruct of a Promissory Note—Perfect or Imperfect?*, 4 TUL. L. REV. 104 (1930); Note, *Building and Loan Stock: The Subject Matter of a Perfect or an Imperfect Usufruct?*, 18 LA. L. REV. 335 (1958).

When non-consumables are converted into money as a result of expropriation or liquidation, the usufruct attaches to the proceeds and becomes imperfect. See, e.g., *Burdin v. Burdin*, 171 La. 7, 129 So. 651 (1930); *Succession of Dielmann*, 119 La. 101, 43 So. 972 (1907); *State Through Dept. of Highways v. Costello*, 158 So. 2d 850 (La. App. 4th Cir. 1963). In this respect, Louisiana courts have applied the principle of real subrogation. See YIANNOPOULOS, CIVIL LAW PROPERTY § 79 (1966).

62. FRENCH CIVIL CODE art. 589; B.G.B. § 1067; GREEK CIVIL CODE art. 1174. The expressions "imperfect" and "quasi usufruct" have been avoided in the text of the French, German, and Greek Civil Codes. These codes merely regulate the usufruct of consumables by directly applicable provisions.

63. LA. CIVIL CODE art. 536 (1870); LA. CIVIL CODE art. 528 (1825); LA. CIVIL CODE pp. 110, 111, art. 3 (1808). See 1 LA. LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, p. 49 (1937): "This article is taken from the third article of this title, from that part which we there suppressed."

The usufructuary of consumables has power of disposition as a matter of right. The usufructuary of non-consumables may be granted the same power by the title creating the usufruct. In such a case, the usufruct attaches to the proceeds of the sale and is converted from perfect into imperfect. See text at note 221 *infra*.

64. LA. CIVIL CODE art. 549 (1870); LA. CIVIL CODE art. 542 (1825); LA. CIVIL CODE p. 112, art. 15 (1808). The title creating the usufruct may relieve the usufructuary of the obligation to account to the naked owner at the end of the

is rarely established in practice by particular title. More frequently imperfect usufruct is brought about in cases of universal succession where the estate transferred includes both consumable and non-consumable things.

Imperfect usufruct was unknown in early Roman law. Thus, when a usufruct was established by universal title and the estate given in usufruct included consumable things, the usufructuary could take possession of the non-consumables only.⁶⁵ In the early years of the Empire, however, a *Senatus Consultum*, whose exact date remains uncertain, provided that testamentary usufruct could be established on all kinds of things.⁶⁶ It was on the basis of this legislation that Roman jurists and Romanist scholars in the following centuries developed the notion and incidents of imperfect usufruct.

The respective obligations of usufructuaries and naked owners of things subject to imperfect usufruct will be discussed in another study.

c. Things Susceptible of Usufruct

According to article 541 of the Louisiana Civil Code of 1870⁶⁷ and the corresponding article 581 of the French Civil Code,⁶⁸ usufruct may be established "on every description" of things,⁶⁹ movable and immovable, corporeal and incorporeal. The German and the Greek Civil Codes provide generally for the creation of

usufruct. See *In re Courtin*, 144 La. 971, 81 So. 457 (1919), note 221 *infra*. In such a case, the "usufructuary" is in reality *owner*. See also B.G.B. § 1067: "If object of the usufruct are consumable things, the usufructuary becomes owner thereof; upon termination of the usufruct, he shall pay to the grantor their value at the time of the constitution of the usufruct. Both the grantor and the usufructuary may have the value fixed by experts at their expense"; GREEK CIVIL CODE art. 1174: "If object of the usufruct is a consumable thing, the usufructuary, in the absence of contrary provision, becomes owner of the thing, subject to the requirement that he must return upon termination of the usufruct, at the choice of the grantor, either its value at the time of the creation of the usufruct or other things of the same quantity and quality." See also FRENCH CIVIL CODE art. 587 (same as article 549 of the Louisiana Civil Code of 1870). *Cf.* ITALIAN CIVIL CODE art. 995; LAWS OF PUERTO RICO-CIVIL CODE § 1522; SPANISH CIVIL CODE art. 482; QUEBEC CIVIL CODE art. 452; SWISS CIVIL CODE art. 772.

65. See BUCKLAND, *A TEXT-BOOK OF ROMAN LAW* 271 (2d ed. 1932); SOHM-MITTEIS-WENGER, *INSTITUTIONEN* 327 (17th ed. 1923).

66. See KASER, *DAS RÖMISCHE PRIVATRECHT* 380 (1955); SCHULZ, *CLASSICAL ROMAN LAW* 390 (1951).

67. See LA. CIVIL CODE art. 541 (1870); La. Civil Code art. 533 (1825); La. Civil Code p. 110, art. 5 (1808).

68. See FRENCH CIVIL CODE art. 581. See also QUEBEC CIVIL CODE art. 446; SWISS CIVIL CODE art. 745.

69. For the notion of things, see YIANNPOULOS, *CIVIL LAW PROPERTY* § 9 (1966).

usufruct on "things," *i.e.*, corporeal objects susceptible of appropriation.⁷⁰ Special provisions in these two Codes, however, authorize specifically the creation of usufruct on "rights,"⁷¹ *i.e.*, incorporeal objects in commerce which do not qualify as things, and regulate the incidents of such a usufruct.⁷² Usufruct may thus bear in all jurisdictions on copyrights, claims or credits, leases, partnerships, business enterprises, and in France even on another usufruct.⁷³ Generally, any corporeal or incorporeal object which is capable of producing an economic advantage may become the object of usufruct.⁷⁴

The recognition of usufruct on rights has been said to involve a doctrinal anomaly. Indeed, under the schemes of the German and the Greek Civil Codes,⁷⁵ and according to prevailing doctrine in France,⁷⁶ the word ownership in its technical sense applies to corporeal objects exclusively, and only by recent extension, to rights of intellectual property. Now the recognition of usufruct on incorporeals involves implicitly the notion that the "ownership" of an incorporeal may be dismembered whereas, at the same time, it is being asserted that incorporeals cannot

70. See B.G.B. § 1030; GREEK CIVIL CODE art. 1142. For the notion of things under the German and the Greek Civil Codes, see YIANNPOULOS, CIVIL LAW PROPERTY § 10 (1966).

71. See B.G.B. §§ 1068-1084; GREEK CIVIL CODE arts. 1178-1182.

72. The B.G.B. regulates in detail the usufruct of corporeals ("things"), movables and immovables (§§ 1030-1067). The same rules apply by analogy to usufructs of rights (§§ 1068-1084) and usufructs of a person's patrimony (§§ 1085-1089). Similar legislative technique has been followed by the redactors of the Greek Civil Code. Thus, article 1182 of that Code declares that the rules governing usufruct of things apply by analogy, in the absence of contrary indication, to usufructs of rights. Thus, in contrast to predial servitudes and limited personal servitudes which may burden immovable property only, and as to certain aspects of use or enjoyment, usufruct under the two Codes confers the right to exhaust the utility of an *object*, movable, or immovable, corporeal or incorporeal. For the notion of object, see YIANNPOULOS, CIVIL LAW PROPERTY § 10 (1966).

73. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 755 (2d ed. Picard 1952). In Germany, section 1059 of the B.G.B. provides expressly that usufruct cannot be established on another usufruct. In Greece, in the absence of contrary intention, usufruct is non-transferable and, therefore, cannot be burdened by another usufruct. See GREEK CIVIL CODE art. 1166.

74. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 755 (2d ed. Picard 1952). In *Lasyone v. Emerson*, 220 La. 951, 57 So. 2d 906 (1952), the Louisiana Supreme Court seemed prepared to accept that usufruct may burden *a part* of a building belonging in indivision to the naked owner and the usufructuary! It is submitted that this is contrary to fundamental precepts of Louisiana civil law. A co-owner may certainly burden his *undivided* share with usufruct in favor of a *third* person. But no one can have a servitude over a thing one owns. LA. CIVIL CODE art. 619 (1870). Further, co-owners may apportion among themselves the *use* of the thing owned in common; but they cannot establish real rights of enjoyment, even in favor of third persons, over material parts of the thing they own by undivided shares.

75. See B.G.B. § 903; GREEK CIVIL CODE art. 999.

76. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 755 (2d ed. Picard 1952).

be "owned"! Be it as it may, this doctrinal anomaly does not involve practical consequences. While the recognition of ownership over incorporeals might solve a number of problems and might result in more effective protection of these rights, the usufruct on incorporeals may be regarded as a necessary concession of theory to practical necessity.⁷⁷ In Louisiana, one frequently speaks of ownership of rights⁷⁸ and the difficulty is entirely obviated.

d. Usufruct as an Incorporeal Thing

According to article 537 of the Louisiana Civil Code of 1870,⁷⁹ usufruct "is an incorporeal thing because it consists in a right." The same classification obtains in France, even in the absence of a corresponding provision in the Code Civil.⁸⁰ In Germany and Greece usufruct is a right, and, therefore, not a thing.⁸¹

In France and Louisiana usufruct may be either an incorporeal movable or an incorporeal immovable, depending on the nature of the things subject to usufruct.⁸² The classification of rights as movables or immovables has been avoided in both the German and the Greek Civil Codes.⁸³

e. Conventional and Legal Usufruct

Article 540 of the Louisiana Civil Code of 1870⁸⁴ declares that usufruct "may be established by all sorts of titles; by a deed

77. Cf. BALIS, *CIVIL LAW PROPERTY* 387 (3d ed. 1955) (in Greek).

78. See YIANNPOULOS, *CIVIL LAW PROPERTY* § 1 (1966).

79. LA. CIVIL CODE art. 537 (1870); LA. CIVIL CODE art. 529 (1825); LA. CIVIL CODE (1808) (no corresponding article). See 1 LA. LEGAL ARCHIVES, *PROJET OF THE CIVIL CODE OF 1825*, p. 49 (1937), giving as source of this article Digest, bk. 7, tit. 1, law 2.

80. Cf. 3 PLANIOL ET RIPERT, *TRAITÉ DE DROIT CIVIL FRANÇAIS* 754 (2d ed. Picard 1952); 10 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 173 (1874-82).

81. See YIANNPOULOS, *CIVIL LAW PROPERTY* § 10 (1966).

82. See LA. CIVIL CODE art. 471 (1870), and corresponding article 526 of the French Civil Code: "The following are considered as immovable from the object to which they apply: The usufruct and use of immovable things." Thus, the usufruct of an immovable may be the object of a real mortgage. See LA. CIVIL CODE art. 3289(2) (1870); FRENCH CIVIL CODE art. 2118(2); YIANNPOULOS, *CIVIL LAW PROPERTY* § 60 (1966). Cf. *Arcadia Bonded Warehouse v. National Union Fire Ins. Co.*, 206 La. 681, 19 So.2d 514 (1944) (insurance of the right to "use and occupancy" of an immovable was considered insurance of an (incorporeal) immovable right within the meaning of the regulatory statute, La. Acts 1922, No. 136); *Succession of Gamble*, 23 La. Ann. 9 (1871) (right to use pews in a church—an incorporeal immovable).

83. See YIANNPOULOS, *CIVIL LAW PROPERTY* §§ 60, 71 (1966).

84. LA. CIVIL CODE art. 540 (1870); LA. CIVIL CODE art. 532 (1825); LA. CIVIL CODE p. 110, art. 4 (1808).

of sale, by a marriage contract, by donation, compromise, exchange, last will and even by operation of law." Thus usufructs are distinguished into *conventional*, created by mortis causa or inter vivos juridical acts and *legal*, created by operation of law. Civil Codes, doctrine, and jurisprudence in other civil law countries establish the same distinction.⁸⁵ The methods of creation and incidents of each kind of usufruct are discussed *infra*.

f. Universal Usufruct, Usufruct Under Universal Title, and Usufruct Under Particular Title

According to the Louisiana and French Civil Codes, usufruct may be universal, under universal title, or under particular title.⁸⁶ The usufruct of an entire patrimony is universal,⁸⁷ of a fraction thereof or of a patrimonial mass, under *universal title*,⁸⁸ and of individually determined things, under *particular title*.⁸⁹ The distinction among the three kinds of usufructs involves practical consequences in the light of the rules governing the liability of the usufructuary for the payment of debts burdening the property subject to usufruct. Thus, for example, the usufructuary under particular title is not bound to pay debts, not even those "for which the estate is mortgaged."⁹⁰ The universal usufructuary and the usufructuary under universal title, on the other hand, may be bound under certain circumstances to contribute to the payment of debts, whether he has acquired the

85. See Yiannopoulos, *Legal Usufructs; Louisiana and Comparative Law*, to be published in a forthcoming issue of this *Review*.

86. See LA. CIVIL CODE arts. 580-587 (1870); FRENCH CIVIL CODE arts. 610-612.

87. See LA. CIVIL CODE art. 585 (1870): "if the legacy of the usufruct *includes all the property of the testator*, and the universal usufructuary . . ." (emphasis supplied).

88. See *id.* art. 586: "If, on the contrary, the legacy *includes only a certain portion of the property of the testator, or the whole of a certain kind of property*, the usufructuary under an universal title. . ." (emphasis supplied).

89. See *id.* art. 581: "the particular legatee of a usufruct. . ." See also *Cecile v. Lacoste*, 8 La. Ann. 142, 144 (1853) (bequest of usufruct over individually determined things; *held*, "it is the legacy of a distinct object, and is of that class called particular legacies"). However, when the testator bequeaths usufruct over individually determined things but the estate consists exclusively of the property subject to usufruct, the legacy is in reality one by universal title. Accordingly, the usufructuary incurs the obligations of a universal usufructuary under articles 584 and 585 of the Louisiana Civil Code of 1870. See *Succession of Sinnot*, 3 La. Ann. 175 (1848) (decided under the corresponding articles 578 and 579 of the 1825 Civil Code). See also 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 757 (2d ed. Picard 1952). *Cf.* LA. CIVIL CODE art. 3556(28) (1870): ". . . the buyer, donee or legatee of particular things. . ." For the notion of patrimony, see YIANNPOULOS, *CIVIL LAW PROPERTY* § 77 (1966).

90. LA. CIVIL CODE art. 581 (1870); La. Civil Code art. 575 (1825); La. Civil Code p. 118 art. 36 (1808); *Cecile v. Lacoste*, 8 La. Ann. 142 (1853). *Cf.* FRENCH CIVIL CODE art. 611.

usufruct by inter vivos or mortis causa juridical act or by operation of law.⁹¹

Legal usufructs may be either universal or under universal title whereas conventional usufructs may be universal, under universal title, or under particular title. The classification of conventional usufructs in the last analysis depends on the nature of the things subject to usufruct and on the intention of the grantor. Since, however, contractual usufructs are rather rare in practice, courts in Louisiana and in France have dealt almost exclusively with the classification of testamentary usufructs.

The question of whether the usufruct is universal, under universal title, or under particular title should not be confused with the question of whether the usufructuary is universal or particular successor of the grantor of the usufruct. This last distinction is likewise important in the light of the rules governing the responsibility of the acquirer of a right (successor) for the payment of the debts of the transferor. Thus, article 3556(28) of the Louisiana Civil Code of 1870 declares that "successor is, generally speaking, the person who takes the place of another. There are in law two sorts of successors: the successor by universal title, such as the heir, the universal legatee and the legatee by universal title; and the successor by particular title, such as the buyer, donee or legatee of particular things, the transferee. The *universal* successor represents the person of the deceased, and succeeds to all his rights and duties. The particular successor succeeds only to the rights appertaining to the thing which is sold, ceded or bequeathed to him."⁹²

The usufructuary may be either particular or universal successor of the grantor of the usufruct. If the usufruct is established by inter vivos juridical act, the usufructuary is always a particular successor of the grantor, regardless of whether the usufruct itself is under universal or under particular title.⁹³ If, however, the usufruct is established by will, the usufructuary may be either particular or universal successor of the grantor, depending on the nature of the legacy. According to the law of

91. See LA. CIVIL CODE arts. 580, 582, 583 (1870); Succession of Sinnot, 3 La. Ann. 175 (1848). See also note 102 *infra*.

92. See LA. CIVIL CODE art. 3556(28) (1870), and, in general for the liabilities of successors, YIANNPOULOS, CIVIL LAW PROPERTY § 78, text at notes 129-145, §§ 113, 115 (1967).

93. See LA. CIVIL CODE art. 582 (1870). For the proposition that inter vivos transfers of patrimonies are always by particular title, see YIANNPOULOS, CIVIL LAW PROPERTY § 77, text at note 68 (1967).

successions, legacies of an entire estate are universal, of a fraction thereof under universal title, and of individually determined things under particular title.⁹⁴ Universal legatees and legatees under universal title are universal successors; legatees under particular title are particular successors.⁹⁵ These classifications are also reflected in the articles of the Louisiana and French Civil Codes dealing with legacies of usufruct.

Doctrine and jurisprudence in France are substantially in agreement that the legacy of usufruct, even of an entire estate, can never be a universal legacy. According to most commentators of past generations the legacy of usufruct is always under particular title, whether it bears on an entire estate, a fraction thereof, or on individually determined things.⁹⁶ Thus, the legatee of the usufruct is always a particular successor of the grantor. According to French jurisprudence, however, and modern French writers, the legacy of usufruct of an entire estate or of a fraction thereof is a legacy under universal title; it is only the legacy of the usufruct of individually determined things that is a legacy

94. See LA. CIVIL CODE art. 1606 (1870); FRENCH CIVIL CODE art. 1003: "A universal legacy is a testamentary disposition, by which the testator gives to one or several persons the whole of the property which he leaves at his decease"; LA. CIVIL CODE art. 1612 (1870); FRENCH CIVIL CODE art. 1010(1): "The legacy under a universal title is that by which a testator bequeaths a certain portion of the effects of which the law permits him to dispose, as a half, a third, or all his immovables, or all his movables, or a fixed portion of all his immovables or all his movables"; LA. CIVIL CODE art. 1625 (1870); FRENCH CIVIL CODE art. 1010(2): "Every legacy, not included in the definition before given of universal legacies and legacies under a universal title, is a legacy under a particular title."

The distinction between the three kinds of legacies involves practical consequences in the light of the rules governing payment of debts, seizure, profit by the lapse of other legacies, and many other matters. See Comment, *Some Problems in the Classification of Legacies*, 3 LA. L. REV. 212-22 (1940).

95. See LA. CIVIL CODE art. 3556(28) (1870), text at note 92 *supra*. Cf. *id.* arts. 580-587 (1870); FRENCH CIVIL CODE arts. 610-612. See also Comment, *Some Problems in the Classification of Legacies*, 3 LA. L. REV. 212, 213-217 (1940).

96. See 11 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 444 (5th ed. 1913); 21 DEMOLOMBE, TRAITÉ DES DONATIONS 510 (5th ed. 1876); 13 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 574 (2d ed. 1876). According to these authors, article 612 of the French Civil Code (corresponding to articles 582 and 587 of the Louisiana Civil Code of 1870) does not establish the proposition that the legacy of usufruct can be universal or by universal title; when it speaks of a "universal usufructuary" or "usufructuary under a universal title," the article merely refers to the scope of the usufruct. The contribution to the debts of the estate, provided for in this article, is not a personal obligation imposed on the usufructuary as universal legatee or as legatee by universal title but merely a charge on the revenues produced by the things subject to the usufruct. This view is, indeed, supported by article 1010 of the French Civil Code (corresponding to article 1625 of the Louisiana Civil Code of 1870), which, without mentioning usufruct, declares that the enumeration of universal legacies or legacies by universal title is limitative. But it does violence to the language of article 612 and leads to unfair solutions.

under particular title.⁹⁷ Thus, the universal usufructuary and the usufructuary under a universal title are universal successors of the grantor whereas the usufructuary under particular title is a particular successor.

In contrast to the legacies of usufruct, legacies of naked ownership have not given rise to doctrinal disagreements: courts and commentators are in accord that the legacy of the naked ownership of an entire estate is universal, of a fraction thereof, under universal title, and of individually determined things, under particular title.⁹⁸

In Louisiana, the question whether a universal usufructuary or a usufructuary under universal title may qualify as a universal legatee was involved in the *Succession of Dougart*.⁹⁹ The court declared in that case that the legacy of usufruct is always a legacy under particular title. "True, we speak of a universal usufructuary," the court reasoned, "or of one by universal title, so does the Code, Art. 580, but this is only a manner of speaking, and does not constitute the legatee of the usufruct either a universal legatee, or a legatee by universal title. This is more evident by the fact that universal legatees, and those by universal title, are liable for the debts of the succession. C.C. 1611, 1614; whereas the legatee of the usufruct, however general, is never liable therefor."¹⁰⁰ It is submitted that this solution is quite

97. See Req., Dec. 27, 1934, D.H. 1935.100, S. 1935.1.256; Req., June 29, 1910, D.1911.1.49, Note by Capitant, S. 1913.1.33, Note by Hugueney; Civ., June 19, 1895, D. 1895.1.470, S. 1895.1.336; Req., Jan. 31, 1893, D. 1893.1.359, S. 1893.1.438; See 11 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 344 n.7, 348 (7th ed. Esmein 1956); 3 COLIN, CAPITANT, ET JULLIOT DE LA MORANDIÈRE. COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 948 (10th ed. 1950); 3 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 676 (4th ed. 1951); 5 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 776, 777 (2d ed. Trasbot et Loussouarn 1957). These authors point out that, theoretical difficulties notwithstanding, this solution is preferable in the light of considerations of practical utility and fairness to all concerned. According to a third view, the legacy of usufruct can be universal, under universal title, or under particular title, depending on whether it bears on an entire estate, a portion thereof, or on individually determined things. See Labbé, J. Pal. 1863.113.

98. See 11 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 344, 347 (7th ed. Esmein 1956); 11 BAUDRY-LACANTINIERE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL 195 (3d ed. Colin 1905); 21 DEMOLOMBE, TRAITÉ DES DONATIONS 472 (5th ed. 1876); 13 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 573 (2d ed. 1876); 5 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 775 (2d ed. Trasbot et Loussouarn 1957). See also Civ., July 12, 1892, D.1892.1.451, S. 1892.1.573; Req., Dec. 3, 1872, D. 1873.1.233, S. 1873.1.73; Angers, March 25, 1895, S.1895.2.270.

99. 30 La. Ann. 268 (1878); SAUNDERS, LECTURES ON THE CIVIL CODE OF LOUISIANA 329 (1925).

100. Succession of Dougart, 30 La. Ann. 268, 272 (1878). But see Succession of Sinnot, 3 La. Ann. 175 (1848) (legacy of usufruct over testator's entire property is a universal legacy).

unfortunate because it is liable to lead to unfair results.¹⁰¹ The legatee of usufruct by universal title and the universal legatee of the usufruct ought to qualify as universal legatees for purposes other than the payment of the debts of the succession. Insofar as the debts are concerned, directly applicable provisions in the Louisiana Civil Code declare that the legatee of usufruct is not to be treated as a universal successor; his liability is limited to contributions in accordance with the detailed applicable provisions.¹⁰²

In the legal systems of Germany and Greece, distinction is made between usufruct of individual objects¹⁰³ and usufruct of an entire patrimony,¹⁰⁴ of a fraction thereof, or of a patrimonial mass.¹⁰⁵ From the viewpoint of functional considerations, it may be said that the Louisiana and French notions of usufruct by particular title corresponds to the German and Greek notions of usufruct of individual objects; conversely, the notions of usufruct by universal title and universal usufruct correspond to the notions of usufruct of an entire patrimony, a fraction thereof, or of a patrimonial mass. The German Civil Code contains a number of provisions governing the usufruct of patrimonies.¹⁰⁶

101. *Cf.* Succession of Sinnot, 3 La. Ann. 175, 177 (1848) (declaring that the legacy of usufruct over testator's entire property is governed "by the rules in relation to legatees under an universal title" and that "this construction appears to us to be reasonable, and consistent with the remaining dispositions of the Code upon the same subject"; note 97 *supra*).

102. See LA. CIVIL CODE arts. 580-587 (1870); *cf.* Succession of Singer, 208 La. 463, 23 So.2d 184 (1945); *Haight v. Johnson*, 131 La. 781, 60 So. 248 (1912); *Long v. Dickerson*, 127 La. 341, 53 So. 598 (1910); Succession of Moore, 42 La. Ann. 332, 7 So. 561 (1890); Succession of Pratt, 12 La. Ann. 457 (1857); Succession of Bringier, 4 La. Ann. 389 (1849); Succession of Fitzwilliams, 3 La. Ann. 489 (1848); Succession of Sinnot, 3 La. Ann. 175 (1848). See also 3 COLIN, *CAPITANT ET JULLIOT DE LA MORANDIÈRE, COURS ÉLÉMENTAIRE DE DROIT CIVIL* 949 n. 1 (10th ed. 1950).

103. See B.G.B. §§ 1030-1067 (usufruct of things); §§ 1068-1084 (usufruct of rights); GREEK CIVIL CODE arts. 1142-1176 (usufruct of things); arts. 1178-1182 (usufruct of rights). In the absence of contrary provisions, the rules governing usufruct of things apply by analogy to usufruct of rights. B.G.B. § 1068; GREEK CIVIL CODE art. 1182. In both Codes, the usufruct of universalities of things bears on individual things rather than on the whole and is reduced to as many usufructs as there are things in the universality. This is so because real rights can exist only on things; but universalities are *not* things in these systems. See YIANNPOULOS, *CIVIL LAW PROPERTY* § 18 (1966); *cf.* B.G.B. 1035; GREEK CIVIL CODE art. 1146.

104. See B.G.B. §§ 1085-1089; GREEK CIVIL CODE art. 1156.

105. In the German Civil Code the generic "patrimony" ordinarily includes fractions thereof and patrimonial masses. In the Greek Civil Code the term includes patrimonial masses but the redactors of the Code took care in referring to patrimony to add the clause "or a part thereof." See GREEK CIVIL CODE arts. 367, 1156. For the notion of patrimony and patrimonial masses under the German and Greek Civil Codes, see YIANNPOULOS, *CIVIL LAW PROPERTY* §§ 80-83 (1966).

106. See note 104 *supra*. Further, the German Civil Code provides that the provisions governing usufruct of patrimonies apply by analogy to usufruct of a

The Greek Civil Code contains merely Article 1156 which deals specifically with the liability of the usufructuary for the debts of the naked owner.¹⁰⁷ Under both the German and the Greek Civil Code, the usufruct of patrimonies is reduced to as many rights of usufruct as there are individual objects in the patrimony.¹⁰⁸ Since patrimonies are not "things" under these codes, there can be no comprehensive real right of usufruct over the entire mass. Thus, the provisions of the Civil Codes dealing with usufruct of things or rights apply by analogy to each individual object included in the mass, depending on its nature as corporeal or incorporeal.¹⁰⁹

The difference between usufruct of individual objects and usufruct of patrimonies manifests itself in the rules governing the liability of the usufructuary for debts of the grantor. Under both the German and the Greek Civil Code, the usufructuary of individual things is bound to pay, for the duration of the usufruct, the ordinary public charges and interests on real security rights burdening the property at the time of the creation of the usufruct.¹¹⁰ This obligation of the usufructuary is incurred toward the grantor rather than his creditors who have no direct action against the usufructuary.¹¹¹ On the contrary, the liability of the usufructuary of patrimonies is incurred directly toward creditors and is more extensive than that of the usufructuary of individual things. Under the German Civil Code, the usufructuary of patrimonies is bound for the payment of periodically accruing debts as well as for the payment of both capital and interests on debts existing at the time of the creation of the usufruct.¹¹² Under the Greek Civil Code, however, the usufruc-

succession. B.G.B. § 1089. There is no corresponding provision in the Greek Civil Code because the usufruct of a succession may be subject to different rules. See text at notes 118-119 *infra*.

107. Since testamentary usufructs may be subject to different rules, the field of operation of this article is restricted, in most cases, to contractual usufructs. See BALIS, CIVIL LAW PROPERTY 362 (3d ed. 1955) (in Greek); text at notes 118-119 *infra*.

108. See B.G.B. § 1085. The same result follows logically under the Greek Civil Code even in the absence of a corresponding provision. See BALIS, CIVIL LAW PROPERTY 343 (3d ed. 1955) (in Greek).

109. See WOLFF-RAISER, SACHENRECHT 489 (1957).

110. B.G.B. § 1047; GREEK CIVIL CODE art. 1156.

111. *Ibid.* See also 26 O.L.G. 93, 94 (K.G. Feb. 9, 1911).

112. See B.G.B. §§ 1086-1088. The grantor remains the principal debtor; the liability of the usufructuary consists in that he must suffer execution on the property subject to usufruct for the payment of the debts of the grantor. The liability of the usufructuary is thus *limited*; and, in any case, he may free himself of any obligation by abandoning the usufruct. See WOLFF-RAISER, SACHENRECHT 491 (10th ed. 1957).

tuary of patrimonies is liable only for alimentary obligations and interests on debts of the owner existing at the time of the creation of the usufruct.¹¹³

As in Louisiana and in France, the usufructuary in Germany and in Greece may be universal or particular successor of the grantor of the usufruct. According to the system of the German Civil Code, the legacy of usufruct is, ordinarily, a charge on the inheritance of instituted or *ab intestat* heirs who are bound by an obligation to establish the usufruct.¹¹⁴ Thus, the legatee of usufruct is ordinarily a particular successor of the grantor, and, from the viewpoint of functional considerations, it may be said that the legacy of usufruct in Germany ordinarily corresponds to the notion of a particular legacy under the Louisiana and French Civil Codes.¹¹⁵ Exceptionally, the usufructuary of an entire succession in Germany may occupy in all respects the position, rights and duties, of an instituted heir, *i.e.*, he may be a universal successor.¹¹⁶ If the usufructuary is a successor by particular title, as it usually happens, his liabilities for the payment of debts are determined according to whether the usufruct bears on individual objects or on entire patrimony.¹¹⁷

Under the Greek Civil Code, the legacy of usufruct is likewise a charge on the inheritance of *ab intestat* heirs but the legatee's right may vest immediately upon the death of the testator.¹¹⁸ The legatee of the usufruct of an entire estate, of a fraction thereof, or even of individually determined things may qualify according to the intention of the testator as an instituted heir, in which case he is liable along with other heirs for the payment of the debts of the succession.¹¹⁹ But, if the intention of the testator is that the usufructuary be a legatee rather than heir the liabilities of the usufructuary are determined according to whether the usufruct is of individual objects or of a patri-

113. See GREEK CIVIL CODE art. 1156; BALIS, CIVIL LAW PROPERTY 362 (3d ed. 1955) (in Greek).

114. See 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 446 (9th ed. 1960); 5 SOERGEL-EHARD-EDER, BÜRGERLICHES GESETZBUCH 196 (9th ed. 1961); WOLFF-RAISER SACHENRECHT 462, 489 (1957). See also Rheinstein, *Niessbrauch*, in 5 RECHTSVERLEICHENDES HANDWÖRTERBUCH 431, 434 (1936). The notion of instituted heir under the German Civil Code corresponds to the notion of universal legatees or legatee by universal title under the French and Louisiana Civil Codes.

115. See text at note 93 *supra*.

116. See 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 446 (9th ed. 1960) and cases cited.

117. See B.G.B. § 1089.

118. See GREEK CIVIL CODE arts. 1995, 1996.

119. See BALIS, CIVIL LAW PROPERTY 362 (3d ed. 1955) (in Greek).

mony. The usufructuary of an entire succession or of a fraction thereof is clearly bound as a usufructuary of an entire patrimony.

g. Usufruct in Undivided Shares; Partition

According to article 539 of the Louisiana Civil Code of 1870, usufruct may be conferred "on several persons, in divided or undivided portions."¹²⁰ Similar provisions may be found in other civil codes.¹²¹

When usufruct is conferred in undivided portions the right of enjoyment is "but one,"¹²² shared among co-usufructuaries in proportion to their interests. Usufruct, however, is a divisible¹²³ incorporeal¹²⁴ thing and the state of indivision may terminate at any time upon the demand of any of the co-usufructuaries by partition in kind or by licitation.¹²⁵ Article 538 of the Louisiana Civil Code of 1870¹²⁶ seems to indicate that partition in kind is always possible "because the object of this right is the receiving the fruits of the thing, which are corporeal and divisible." But usufruct may well be established on indivisible things or things which do not produce fruits (*e.g.*, usufruct of jewelry); in these cases partition by licitation is the available remedy.¹²⁷

120. See LA. CIVIL CODE art. 539 (1870); La. Civil Code art. 531 (1825); La. Civil Code (1808) (no corresponding article). The redactors of the 1825 Louisiana Civil Code cited as source of this article Digest, bk. 7, tit. 1, law 5. See 1 LA. LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, p. 50 (1937).

When usufruct is conferred jointly on two or more persons, it is a matter of contractual or testamentary interpretation to determine whether a right of survivorship has been granted in favor of the persons named as usufructuaries. Thus, the usufruct may terminate at different periods as to the several usufructuaries and the undivided share in usufruct may be united with the naked ownership upon the death of each usufructuary. See *Samuels v. Brownlee*, 36 La. Ann. 228 (1884). On the other hand, the undivided share of one of the usufructuaries may, upon his death, inure to the benefit of the remaining usufructuaries. See *Arceneaux v. Bernard*, 10 La. 246 (1836).

121. See GREEK CIVIL CODE art. 1144; LAWS OF PUERTO RICO-CIVIL CODE § 1529; *cf.* B.G.B. §§ 1060, 1066. Even in the absence of a corresponding provision in the French Civil Code, no doubt has ever been entertained there that usufruct may be conferred in undivided portions. See 10 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 757 (1874-82); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 757 (2d ed. Picard 1952).

122. LA. CIVIL CODE art. 538 (1870); La. Civil Code art. 530 (1825); La. Civil Code (1808) (no corresponding article). Source of this article is the Digest, bk. 7, tit. 1, law 5. See 1 LA. LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825 p. 50 (1937).

123. See LA. CIVIL CODE art. 538 (1870).

124. *Id.* art. 537; text at note 79 *supra*.

125. See LA. CIVIL CODE art. 1309 (1870); "Usufructuaries of the same estate can institute among themselves the action of partition." *Cf. id.* art. 538; and, in general, Comment, *Licitation*, 8 TUL. L. REV. 574 (1934).

126. See note 122 *supra*.

127. For the notion of indivisible things, see YIANNPOULOS, CIVIL LAW PROPERTY § 17 (1966).

Likewise, when the naked ownership is held by several persons in undivided shares and the usufruct by another person or persons, partition of the naked ownership in kind or by licitation may be demanded by any of the co-owners.¹²⁸ This partition of the naked ownership does not affect adversely the interests of the usufructuaries who continue to enjoy the thing as if no change of ownership took place.¹²⁹

Difficulties arise, especially in cases of usufruct established by universal title, when the same person acquires an undivided interest in usufruct and an undivided interest in naked ownership; when the sole naked owner has also an undivided interest in usufruct; or when the sole usufructuary has also an undivided interest in the naked ownership. Partition merely of the right of enjoyment or of the naked ownership in kind or by licitation has long been recognized in France.¹³⁰ In Louisiana, courts and litigants have failed to distinguish clearly between partition of the elements held in common (right of enjoyment or naked ownership) and partition of the entire property free of the usufruct.¹³¹ Thus, while no case holds squarely that partition

128. See *Smith v. Nelson*, 121 La. 170, 174, 46 So. 200, 201 (1908): "There is no doubt that, as between those to whom the naked ownership alone is vested, a partition may be enforced by . . . licitation"; *Succession of Glancey*, 108 La. 414, 421, 32 So. 356, 359 (1902): "We are not aware that this court had ever held that the fact of the existence of the usufruct, in the surviving partner in community, would cut off an action of partition by the heirs of the other spouse if the result of the partition would not be to extinguish the usufructuary's right." The Civil Code provides that anyone may demand partition of a thing held in common. 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." See also *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."

129. See *Kaffie v. Wilson*, 130 La. 350, 353, 57 So. 1001, 1002 (1911) (partition of the *naked ownership* in kind among co-owners none of whom had a fractional interest in usufruct over the same property). The court stated: "We do not perceive any legal impediment to a partition in kind, of the naked property, subject to the rights of enjoyment of the usufructuary. As the naked property may be mortgaged, sold, or alienated (C.C. art. 605), it may be partitioned in kind, subject to the usufruct. In such a case the usufructuary has no cause of complaint." It is submitted that the same argument applies to partition of the naked ownership *by licitation*, which is a judicial sale authorized by Article 605 of the Civil Code. Of course, it is a different question when partition by licitation of the property *free of the usufruct* is demanded. See text at notes 136-138 *infra*.

130. See 4 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 675 (2d ed. Maury et Vialleton 1956); 10 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 117 (6th ed. Esmein 1954); and, in general, Vialleton, *Le droit au partage des usufruitiers et propriétaires par indivis*, 24 REV. TRIM. DR. CIV. 261 (1925).

131. See, e.g., *Kaffie v. Wilson*, 130 La. 350, 57 So. 1001 (1911), discussed note 129 *supra*. In the course of its opinion, the court distinguished the case of *Succession of Glancey*, 112 La. 430, 36 So. 483 (1904), where partition by licitation was refused. There, the court declared, the usufruct was *legal* whereas in the

of the elements held in common cannot be forced between naked owners or between usufructuaries, it seems to be assumed, on the authority of cases dealing with the distinguishable situation of sale of the entire property free of the usufruct, that such partition is excluded. Actually, this assumption rests on dicta in a leading case which indicate that the naked ownership cannot be partitioned by licitation if one of the naked owners has also an undivided interest in usufruct.¹³² It is submitted, therefore, that partition of the common elements is permissible in Louisiana.

In the absence of elements held in common, partition in kind or by licitation as between naked owners and usufructuaries is excluded.¹³³ These persons do not hold the same type of interest by undivided shares, *i.e.*, they do not possess rights of the same nature over the same object.¹³⁴ Partition upon demand of the

case under consideration the usufruct was *conventional*. It is submitted that this distinction is not well taken. The nature of the usufruct ought to be without consequence in the matter of partition. The difference between the *Kaffie* case and the *Glancey* case actually lies in the fact that in the latter partition free of the usufruct was demanded while in the former the demand was for partition subject of the existing usufruct.

132. *Cf.* *Smith v. Nelson*, 121 La. 170, 46 So. 200 (1908), text at note 139 *infra*. But see *Day v. Collins*, 5 La. Ann. 588 (1850) (community partitioned notwithstanding the existence of survivor's usufruct).

133. Thus, when the same thing is held by several persons as usufructuaries *Smith v. Nelson*, 121 La. 170, 46 So. 200 (1890); 15 DEMOLOMBE, *TRAITÉ DES SUCCESSIONS* 435 (1874-82). In these cases indivision exists only as to co-usufructuaries or co-owners. See 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 639 (7th ed. Esmein 1961). *Cf.* *Succession of Glancey*, 112 La. 430, 36 So. 483 (1904) (partition by licitation of property free of the surviving spouse's usufruct of the whole excluded). The court in reaching this decision relied on the intention of the legislature to protect the survivor.

Determination of what constitutes holding in common is the essential inquiry in ascertaining the right to partition. It clearly means more than holding real rights over the same thing. See *Amerada Petroleum Corp. v. Reese*, 195 La. 359, 196 So. 558 (1940); *Smith v. Nelson*, 121 La. 170, 46 So. 200 (1908). Under the Louisiana Civil Code and Louisiana jurisprudence, holding in common means holding the same type of real right over the same object. Thus, perfect owners may force partition against perfect owners, usufructuaries against usufructuaries, and naked owners against naked owners.

134. *Cf.* *Buckner-Harmon Wood Contractor v. Norris*, 231 La. 437, 91 So. 2d 594 (1956), involving the analogous situation of an action for partition of timberlands brought by holders of a fractional interest in timber and in land; *held*, in the light of *Smith v. Nelson*, 121 La. 170, 46 So. 200 (1908), that partition by licitation is excluded. "Plaintiffs and defendants," the court declared, "are not owners in common of the same estate which is essential under articles 1289 and 1308 of the Civil Code for the action of partition. Although plaintiffs undoubtedly own an undivided estate in timber, separate and apart from the land on which it stands, they cannot demand a partition from the defendants, who hold a single estate under article 465 of the Civil Code consisting of an undivided interest in the land and the growing timber."

Sale of the property free of the usufruct, however, may be accomplished for the satisfaction of debts burdening the estate of the grantor. LA. CIVIL CODE arts. 584, 585 (1870). In such a case, the right of usufruct attaches to the proceeds

usufructuary would constitute, in effect, expropriation of the naked ownership; partition upon demand of the naked owner would result in termination of the usufruct or in its transfer to the proceeds of the sale of the property. But when the same person holds undivided interests in usufruct and in naked ownership, commentators and jurisprudence in France seem to be in agreement that, if the things are susceptible of partition *in kind*, the entire property may be so partitioned.¹³⁵ As a result of such a partition, the person holding undivided interests in both usufruct and naked ownership may acquire perfect ownership over certain individually determined things. The availability of this proceeding, therefore, tends toward re-integration of ownership. On the contrary, partition *by licitation* of the entire property, *i.e.*, sale free of the usufruct, should be excluded according to the prevailing doctrine in France even if there are elements held in common.¹³⁶ A number of judicial decisions, however, stressing the interests of all concerned and particularly the interests of the naked owners, have allowed partition and sale of the property free of the usufruct.¹³⁷ Obviously separate sale of the naked ownership and separate sale of the usufruct would be less advantageous to the parties; the proceeds of the sale of perfect ownership may generally be expected to be higher than the combined proceeds of the separate sales of usufruct and naked ownership.¹³⁸

remaining after the satisfaction of creditors. Succession of Singer, 208 La. 463, 23 So.2d 184 (1945).

135. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 758 (2d ed. Picard 1952).

136. 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 663 n.11 (5th ed. 1897); 15 DEMOLOMBE, *TRAITÉ DES SUCCESSIONS* 435 (1874-82); 6 LAURENT, *PRINCIPES DE DROIT CIVIL FRANÇAIS* 466 (2d ed. 1876); Beudant, Note, D. 1878.1.145. Separate sale of the usufruct or of the naked ownership, however, is always permissible. See text at note 130 *supra*.

137. See, *e.g.*, Req., July 20, 1932, D.P. 1933.1.113, Note by Savatier; Civ., August 25, 1879, S. 1880.1.181; Civ., June 24, 1863, D.63.1.285; Trib. Civ. Muret, Dec. 29, 1894, D. 1898.1.164, under Cass., May 12, 1897; Poitiers, Dec. 28, 1887, D.89.2.113. *Cf.* Req., Jan. 7, 1878, S.80.1.145, Note by Labbé. According to one view, the proceeds of the sale would be partitioned between naked owners and usufructuaries, in proportion to the value of their respective interests. See Aix, Oct. 22, 1929, J.C.P. 1929.2.1389. According to another view, the usufruct should attach to the proceeds of the sale. See 4 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 676 (2d ed. Maury et Vialleton 1956); Savatier, Note, 29 REV. TRIM. DR. CIV. 164 (1930).

138. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 759 (2d ed. Picard 1952); 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 639 (7th ed. Esmein 1961). *Cf.* Succession of Glancey, 112 La. 430, 432, 36 So. 483 (1904): "It is not probable that any one would seek to buy property thus burdened. One of the coheirs, owning a limited fractional portion, as compared to the

In Louisiana, it seems to be assumed that partition by licitation of the entire property (free of the usufruct) is excluded not only in the absence of elements held in common¹³⁹ but also when a person holds an undivided interest in naked ownership and an undivided interest in usufruct over the same property. In the leading case of *Smith v. Nelson*,¹⁴⁰ action was brought by persons holding an undivided one-half interest in naked ownership against the owner of the other half and usufructuary of the whole for partition by licitation. The demand was predicated on the mistaken assumption that the usufruct had terminated and on the assertion that the property was not susceptible of partition in kind. The court first determined that the usufruct continued to burden the property and then dismissed the action on the ground that there was no thing "held in common." The conclusion was bolstered by reference to article 605 of the Civil Code, which prohibits interference with the enjoyment of the usufructuary.

In the light of the facts involved and the nature of the demand, the narrow holding of *Smith v. Nelson* is that when a person holds an undivided interest in naked ownership and the same person is also usufructuary of the whole, partition by sale of the property free of the usufruct is excluded.¹⁴¹ The court, as it should, left open the question whether partition of the entire property in kind could be obtained.¹⁴² Further, the court did

remainder owned by his coheir, should not have the right to insist upon a sale and compel a loss to which in all fairness his coheirs should not be subjected."

139. See text at note 133 *supra*.

140. 121 La. 170, 46 So. 200 (1908). See also Succession of Glancey, 112 La. 430, 36 So. 483 (1904) (partition by licitation of property free of the surviving spouse's usufruct excluded). *Nelson v. Smith* was followed in *Fricke v. Stafford*, 159 So.2d 52 (La. App. 1st Cir. 1963), noted in 24 LA. L. REV. 885 (1964). In that case, an undivided half interest was held in perfect ownership by eleven living heirs; one co-heir, defendant, had the usufruct of the other half undivided interest. All eleven heirs held the naked ownership in indivision. In an action for partition of the property by licitation, free of the usufruct, the court held that partition by licitation of the entire complex of rights cannot be forced by a person who holds shares of undivided perfect and imperfect ownership, if the property, or an undivided portion thereof, is burdened with a valid usufruct.

141. This holding conforms fully with the precepts of the Civil Code. See text at note 133 *supra*. In the case of *Baum v. George*, 154 La. 680, 98 So. 85 (1923), the survivor in community, entitled to one-half of the naked ownership and the usufruct of the remainder, brought action against the remaining naked owners to partition the property. The court distinguished this case on the ground that it was the usufructuary who was asking the court to compel the sale of the entire property to effect a partition. Her demand was made without reservation of her usufruct and without any claim of usufruct in the proceeds. This proceeding, said the court, was in effect a waiver and a renunciation of her usufruct, in order that the usufructuary might obtain a partition of the property and that such a proceeding was permissible and valid.

142. See *Smith v. Nelson*, 121 La. 170, 171, 46 So. 200, 201 (1908): "We

not have the opportunity to determine the question whether partition in kind or by licitation of the element actually held in common, *i.e.*, of the naked ownership, was permissible. Language indicated that a naked owner should not be allowed to force a perfect owner to dismember his title;¹⁴³ but the court took care to indicate that no such demand had been made.¹⁴⁴

While the narrow holding in *Smith v. Nelson* is thus beyond reproach, it is submitted that Louisiana courts should follow it only in similar fact situations and should reconsider the soundness of certain uncalled for judicial declarations of policy made by way of dicta. It ought to be remembered that partition of the elements held in common, *i.e.*, of the usufruct or of the naked ownership, is clearly permissible under the Civil Code. Further, pragmatic considerations and the French experience point to the desirability of partition by licitation of the entire property at the discretion of the court, with the rights of the parties transferred to the proceeds of the sale.¹⁴⁵

The issue of partition between usufructuaries and naked owners is also raised when succession property subject to universal usufruct is sold for the satisfaction of debts burdening the estate of the grantor.¹⁴⁶ If there is some cash residue, argument could be made that it should be partitioned among usufructuaries and naked owners in proportion to the value of their

may remark, in conclusion, that, in having been conceded that the property here in question is not susceptible of division in kind, we have not felt called upon to express an opinion upon the question whether, if it were divisible in kind, a partition of the naked ownership might not be enforced, and we do not wish to be understood as conveying any intimation to the contrary."

143. See *id.* at 174, 46 So. at 201: "If it be said that plaintiffs and defendants are owners in common, of the naked title, and that, the property being indivisible in kind, plaintiffs have a right to compel the sale of such naked title in order to effect a partition, the answer is that a sale of that kind would have the effect, as to the undivided half interest in the property of which defendant has the perfect ownership, of permanently dismembering his title, so that the naked ownership would become vested in the purchaser whilst the usufruct would remain in the defendant." The argument is not well taken because in similar situations the right of ownership is already dismembered; and the person who holds undivided interests in both usufruct and naked ownership does not hold any identifiable portion of the property in perfect ownership.

144. See *id.* at 175, 46 So. at 201: "The fact is plaintiffs have not prayed for a sale of the naked ownership, or for a sale of the property subject to the usufruct. . . ."

145. Cf. note 137 *supra*.

146. When property subject to usufruct is burdened with debts, the usufructuary may retain the property, make advances for payment and be reimbursed without interest upon termination of the usufruct; or he may sell property sufficient to pay the debts, unless the heirs advance money for payment. LA. CIVIL CODE arts. 584, 585 (1870); Succession of Weller, 107 La. 466, 31 So. 883 (1902); Succession of Bringier, 4 La. Ann. 389 (1849).

respective interests.¹⁴⁷ According to Louisiana jurisprudence, however, and the prevailing view in France, the usufruct attaches to the cash residue.¹⁴⁸

According to the systems of the German and Greek Civil Codes, the usufruct in undivided shares establishes a community of interests¹⁴⁹ among co-usufructuaries. The right of enjoyment may thus be apportioned in kind among co-usufructuaries, in the sense of attribution to each holder of the right in common of determined emoluments or advantages of use.¹⁵⁰ But since usufruct is ordinarily a non-transferable right under these codes,¹⁵¹ partition of the right itself in kind or by licitation is excluded.¹⁵² Moreover, there can be no partition in kind or by licitation of the entire property upon demand either of the usufructuary or of the naked owner because there is no community of interests between these persons.¹⁵³

Under the German Civil Code, if property held in common is burdened with a right of usufruct it may be partitioned only with the concurrence of the naked owners and usufructuaries.¹⁵⁴ In such a case, the property is sold free of the usufruct and the usufructuary has an obligatory claim against the naked owner whose share was burdened with the usufruct for the establishment of a new usufruct on his share of the proceeds of the sale.¹⁵⁵ On the contrary, under the Greek Civil Code, co-owners may partition among themselves the property held in common in kind or by licitation but always subject to the rights of the usufruc-

147. See 10 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 174 (1874-82), and cases cited.

148. See Succession of Singer, 208 La. 463, 23 So. 2d 184 (1945); Succession of Gardona, 14 La. Ann. 356 (1859); see also Succession of Russel, 208 La. 213, 23 So. 50 (1945); cf. Savatier, Note, 29 REV. TRIM. DR. CIV. 164-166 (1930).

149. See B.G.B. §§ 741-758; GREEK CIVIL CODE arts. 785-804; 2 SOERGEL-MÜHL, *BÜRGERLICHES GESETZBUCH* 392, 393, 423 (9th ed. 1960); 2 ZEPOS, *LAW OF OBLIGATIONS* 658 (2d ed. 1965) (in Greek).

150. See B.G.B. §§ 743, 745; GREEK CIVIL CODE arts. 786, 787, 790.

151. See B.G.B. § 1059. Exceptionally, and by virtue of a 1953 amendment, usufructs in favor of a juristic person is transferable under certain conditions. B.G.B. § 1059a. See also GREEK CIVIL CODE art. 1166. This article is applicable only "in the absence of other provision." The parties, therefore, are free to establish a transferable usufruct in Greece.

152. Sections 746, 747, and 749-751 of the German Civil Code and articles 791, 793, and 795-801 of the Greek Civil Code, dealing with disposition and partition of interests in the community of ownership are not applicable to usufruct. 3 SOERGEL-MÜHL, *BÜRGERLICHES GESETZBUCH* 423 (9th ed. 1960).

153. Cf. text at notes 133, 149 *supra*.

154. B.G.B. § 1066(2).

155. See B.G.B. § 1066(3); 3 SOERGEL-MÜHL, *BÜRGERLICHES GESETZBUCH* 434 (9th ed. 1960).

tuary.¹⁵⁶ This means, in effect, that when property held in common is burdened with a usufruct it is only the naked ownership that can be partitioned without the consent of the usufructuary.

2. CREATION OF USUFRUCT

Article 540 of the Louisiana Civil Code of 1870,¹⁵⁷ and corresponding provisions in the French¹⁵⁸ and Greek¹⁵⁹ Civil Codes, indicate that usufruct may be created either by inter vivos or mortis causa juridical act (*conventional usufruct*) or by operation of law (*legal usufruct*). Further, the Greek Civil Code provides expressly for the creation of usufruct by acquisitive prescription.¹⁶⁰ According to the system of the German Civil Code, however, usufruct may be created directly either by inter vivos juridical act or by acquisitive prescription.¹⁶¹

Usufructs created by juridical act may be either *contractual* or *testamentary*.¹⁶² Legal usufructs may be of various kinds. In Louisiana, the surviving spouse has a legal usufruct on one-half of the community property inherited by issue of the marriage¹⁶³ and parents have a right of enjoyment over the property of their minor children.¹⁶⁴ In France¹⁶⁵ and Greece,¹⁶⁶ provisions in the Civil Codes or in special legislation establish likewise species of legal usufructs. These usufructs may, in some re-

156. See GREEK CIVIL CODE art. 803; BALIS, CIVIL LAW PROPERTY 275 (3d ed. 1955) (in Greek).

157. See LA. CIVIL CODE art. 540 (1870): "Usufruct may be established by all sorts of titles; by a deed of sale, by a marriage contract, by donation, compromise, exchange, last will and even by operation of law. Thus the usufruct to which a father is entitled on the estate of his children during the marriage, is a legal usufruct." La. Civil Code art. 532 (1825) (same); La. Civil Code p. 110, art. 4 (1808) (same).

158. See FRENCH CIVIL CODE art. 579: "Usufruct is established by law or by the voluntary acts of man." See also QUEBEC CIVIL CODE art. 444 (same).

159. See GREEK CIVIL CODE art. 1143: "Usufruct is established by juridical act or by acquisitive prescription. The provisions governing acquisitive prescription of movables or immovables, and transfer of ownership by agreement, apply by analogy to the creation of usufruct." See also LAWS OF PUERTO RICO-CIVIL CODE § 1520; ITALIAN CIVIL CODE art. 978.

160. See note 159 *supra*.

161. See B.G.B. §§ 873, 1032, 1033; WOLFF-RAISER, SACHENRECHT 464 (10th ed. 1957). Cf. text at notes 268-277 *infra*.

162. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 760 (2d ed. Picard 1952). In the framework of the German Civil Code, "testamentary" usufructs merely involve an obligation of the heirs to create a usufruct on the estate of the testator by their own inter vivos juridical act. See text at note 114 *supra*.

163. See Yiannopoulos, *Legal Usufructs; Louisiana and Comparative Law*, to be published in a forthcoming issue of this *Review*.

164. See *ibid*.

165. See *ibid*.

166. See *ibid*.

spects, be subject to special regulation as is, for example, the right of enjoyment that a husband has over the dotal property of his wife.¹⁶⁷ In Germany, however, rights of enjoyment founded directly on law are distinguished sharply from usufruct and are regarded as substantially different institutions.¹⁶⁸

a. Creation of Usufruct by Juridical Act

i. Contractual Usufruct. Contractual usufruct may be created by means of any contract translatif of ownership, as sale, exchange, or donation.¹⁶⁹ It may also be created by voluntary partition.¹⁷⁰ The owner may reserve the usufruct and transfer the naked ownership to another person, reserve the naked ownership and transfer the usufruct, or he may alienate the thing completely by transferring the usufruct to one person and the naked ownership to another.¹⁷¹ By way of exception, however, article 1533 of the Louisiana Civil Code of 1870 provides that the donor of immovable property cannot reserve the usufruct for himself.¹⁷² This article was given its present formulation in the 1825 revision. The redactors, following the Custom of Orleans, declared that "the reservation of the usufruct in favor of the donee [sic] would produce the disadvantage of concealing from the eyes of the public the change of property which has taken place. He who wishes to enjoy during his life a piece of property which he destines for another, can give it by last will, and is not easy to perceive the use of a donation inter vivos, with reserve of usufruct."¹⁷³ It is submitted that this reasoning

167. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 760 (2d ed. Picard 1952); cf. *Wimbish v. Gray*, 10 Rob. 46 (La. 1845).

168. Apt German terminology thus distinguishes between *Nutzniessung* (legal rights of enjoyment) and *Niessbrauch* (usufruct). See WOLFF-RAISER, *SACHENRECHT* 462 (10th ed. 1957); 2 OTTO GIERKE, *DEUTSCHES PRIVATRECHT* 680 (1905).

169. See LA. CIVIL CODE art. 540 (1870); FRENCH CIVIL CODE art. 579; B.G.B. §§ 873, 1032; GREEK CIVIL CODE art. 1143.

170. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 761 (2d ed. Picard 1952).

171. See LA. CIVIL CODE art. 2012 (1870): "Real obligations may be created in three ways: . . . 2. By alienating to one person the immovable property, and to another, some real right to be exercised upon it. . . . The right of use and habitation and usufruct, are examples. . ."; *Gibson v. Zylks*, 186 La. 1043, 173 So. 757 (1937) (sale with reservation of usufruct).

172. See LA. CIVIL CODE art. 1533 (1870): "The donor is permitted to dispose, for the advantage of any other person, of the enjoyment or usufruct of the immovable property given, but he can not reserve it for himself."; LA. CIVIL CODE art. 1520 (1825); *Creech v. Errington*, 207 La. 615, 21 So. 2d 761 (1945). But see LA. CIVIL CODE p. 220, art. 50 (1808) same as art. 949 of the French Civil Code: "The donor is permitted to reserve for his own advantage, or to dispose of for the advantage of any other person, the enjoyment or usufruct of the immovable property given."

173. See COUTUME D'ORLÉANS, art. 284; 1 LA. LEGAL ARCHIVES, PROJET OF

misses the essential point that wills are freely revocable while inter vivos donations are revocable only for enumerated reasons.¹⁷⁴ Accordingly, the availability of an inter vivos donation of property with reservation of usufruct in other civil law systems favors substantially the position of the beneficiary. Article 1533 of the Louisiana Civil Code of 1870 does not prohibit the reservation of usufruct where movable property is donated and the implication is that this is permitted.¹⁷⁵ However, argument has been made that the contrary implication ought to be drawn in the light of the history and the policy underlying this article.¹⁷⁶

Creation of contractual usufruct by sale, or onerous title in general, is rarely encountered in practice.¹⁷⁷ Price is an essential prerequisite for the validity of a sale; yet, the price of usufruct is not easy to determine since the duration of the right depends on the life of the usufructuary. This difficulty is obviated in gratuitous juridical acts which, for this reason, are more prevalent.

In all legal systems under consideration, the creation of usufruct by contract is subject to the rules governing transfer of ownership as to both requirements of form and substance. Thus,

THE CIVIL CODE OF 1825, p. 209 (1937). It would seem that this reasoning applies with even greater force to the donation of movables with reservation of usufruct. Yet, the proposed article 1520 of the Louisiana Civil Code of 1825 mentions only "immovable property"!

174. See LA. CIVIL CODE arts. 1559, 1690 (1870).

175. Cf. LA. CIVIL CODE art. 560 (1870): "Neither the father nor mother, having the legal usufruct of the estate of their children, nor the seller, *nor the donor, under the reservation of the usufruct*, is required to give security" (emphasis added); *id.* art. 1500: "The value in full ownership of property which has been alienated, either for an annuity for life, or with reservation of a usufruct. . . ." These provisions were applicable, under the regime of the 1808 Code, to donations of both movables and immovables with reservation of usufruct. Today, in the light of prohibition of article 1533 of the 1870 Code, they may apply to donations of movables only.

176. See Comment, *Reservation of Usufruct on Donation of Movables*, 4 TUL. L. REV. 419 (1930). Art. 50, bk. III, of the Louisiana Civil Code of 1808 followed literally the text of article 949 of the French Civil Code, with the omission of the words "or movable." This might be taken as an indication of the intention of the redactors of the Louisiana Civil Code of 1808 to disallow the reservation of usufruct in donations of movables. But this indication is weak and is countered by the provisions of the preceding article 49 of the 1808 Code, repeating the text of article 950 of the French Civil Code, which regulated the obligations of the donor of movables who had reserved the usufruct.

177. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 761 (2d ed. Picard 1952); WOLFF-RAISER, *SACHENRECHT* 461 (10th ed. 1957); BALIS, *CIVIL LAW PROPERTY* 343 (3d ed. 1955) (in Greek). Cf. SAUNDERS, *LECTURES ON THE CIVIL CODE OF LOUISIANA* 169 (1952): "This subject is not of a great deal of practical importance. You might infer this by looking at your Merrick's Code; you will see there very few references to cases on the subject of usufruct. . . ."

inter vivos donations of usufruct must be dressed in the appropriate forms in order to be valid even between the parties to the transaction.¹⁷⁸ Specifically, articles 1536 and 1538 of the Louisiana Civil Code of 1870 require the authentic form for the validity of *inter vivos* donations of both corporeal and incorporeal movables and immovables. The exception as to manual gifts of corporeal movables, established in article 1539 of the same Code, does not apply to donations of usufruct because usufruct is an incorporeal.

Agreements establishing usufruct of immovables by *onerous title* may be made under private signature in Louisiana.¹⁷⁹ Such agreements ought to be valid between the parties even if not reduced to writing; but, in this case, they might only be proved under the terms of article 2275 of the Louisiana Civil Code of 1870 which declares that "if a verbal sale of such [immovable] property, be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, provided that actual delivery has been made of the immovable property thus sold." This article, which has no equivalent in the Civil Codes of France, Germany, or Greece, has been apparently disregarded in a number of Louisiana cases. Instead, Louisiana courts, relying on procedural rules of evidence, have uniformly required written instruments for the proof, even between the parties, of onerous agreements creating usufruct over immovables.¹⁸⁰ In France, instruments under private signature are sufficient for the creation of usufruct by onerous title insofar as the parties to the transaction are concerned.¹⁸¹ In Germany, usufruct by onerous title may be created over immovables

178. See LA. CIVIL CODE arts. 1536, 1538 (1870); FRENCH CIVIL CODE arts. 931, 948; B.G.B. § 518 (promises of donations); GREEK CIVIL CODE art. 498. For Louisiana jurisprudence, see *Bailey v. Ward*, 32 La. Ann. 839 (1880); *Lee v. Cummings*, 27 La. Ann. 529 (1875); *Lynch v. Lynch*, 23 La. Ann. 242 (1871) (parol evidence inadmissible to prove *inter vivos* donations of usufruct over immovables).

179. See LA. CIVIL CODE art. 2240 (1870).

180. See *Guier v. Guier*, 7 La. Ann. 103 (1852); *Newman v. Gumina*, 77 So. 2d 899 (La. App. Or. Cir. 1955) (oral testimony to prove usufruct over immovable property inadmissible); cf. *Louis v. Garrison*, 64 So. 2d 254 (La. App. Or. Cir. 1953) (habitation; requirement of written instrument satisfied). The cases cited are based exclusively on procedural objections relating to the inadmissibility of oral testimony. The substantive question of the validity of a usufruct created by oral agreement was not at issue. Thus, one might speculate as to whether the courts would give substantive effect to admissions by the alleged naked owner tending to show an oral agreement for the creation of usufruct. It would seem that in these circumstances article 2275 should apply.

181. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 633 (2d ed. Picard 1952). As to requisites for the validity and effect of conventional usufructs against third persons, see note 184 *infra*.

by informal agreement but the agreement must be inscribed in the land register.¹⁸² And in Greece, usufructs over immovables require for their creation agreement dressed in the notarial form and inscription in the public records.¹⁸³

In France and in Louisiana, contractual usufructs affecting immovables, whether by gratuitous or by onerous title, need be recorded in order to be effective against third persons.¹⁸⁴ In Germany inscription in the land register, and in Greece inscription in the public records, is an essential prerequisite for the very creation of the real right of enjoyment over immovables. Prior to inscription or recordation there is no usufruct in the two countries but merely a personal obligation of the grantor to create the usufruct.

Inter vivos donations of the usufruct of movables, clothed in the appropriate form, are valid between the parties as well as against third persons in Louisiana and in France without delivery of the movables to the usufructuary.¹⁸⁵ Onerous agreements for the creation of usufruct over movables are likewise valid between the parties as well as against third persons in

182. See B.G.B. § 873; 3 SOERGEL-BAUR, BÜRGERLICHES GESETZBUCH 54-61 (9th ed. 1960).

183. See GREEK CIVIL CODE art. 1143, referring by implication to arts. 1033, 1192, and 1198 of the same Code; BALIS, CIVIL LAW PROPERTY 344 (3d ed. 1955) (in Greek).

184. *France*: see Law of March 23, 1855, art. 1; Decree of Jan. 4, 1955; 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 395, 642 (7th ed. Esmein 1961); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 762 (2d ed. Picard 1952). Further, it ought to be noted that according to article 4 of the Decree of Jan. 4, 1955, all acts subject to recordation need be dressed in the authentic form. Thus, the creation of usufruct over immovables in France, whether by gratuitous or by onerous title, in order to be effective against third persons, must be reduced in the notarial form and inscribed in the public records.

It is equally clear in Louisiana that contractual usufructs affecting immovables, whether by onerous or gratuitous title, in order to be effective against third persons, must be recorded. See LA. CIVIL CODE art. 2266(1) (1870): "All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording"; LA. R.S. 9:2721 (1950): "No sale, contract. . . or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry. . . ." Cf. *Blevins v. Manufacturers Record Publishing Co.*, 235 La. 708, 771, 105 So.2d 392, 414 (1958): "[A] third party purchaser may rely upon the conveyance records and is not bound or barred by unrecorded claims against the property purchased, even though he has actual notice thereof from outside the records"; *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1910) (unrecorded acts affecting immovables cannot be asserted against third persons); *Jackson v. Colson*, 91 So.2d 394 (La. App. 2d Cir. 1956) (third persons dealing with immovables have the right to depend on public records).

185. See FRENCH CIVIL CODE art. 938; LA. CIVIL CODE art. 1550 (1870): "A donation, duly accepted, is perfected by the mere consent of the parties; and

France merely by the effect of the consent and without delivery;¹⁸⁶ in Louisiana, however, such agreements become effective against third persons upon delivery of the movables.¹⁸⁷ In Germany and in Greece, all usufructs of corporeal movables are validly constituted by agreement and delivery of the movables to the usufructuary. Delivery of the corporeal movables, corresponding to the requirements of inscription or recordation for immovables, is essential for the creation of the real right itself.¹⁸⁸

the ownership of the objects given is transferred to the donee, without the necessity of any other delivery." See also 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 629 (2d ed. Picard 1952); 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 620, 642 (7th ed. Esmein 1961).

It ought to be noted that, with respect to inter vivos donations of movables, the donee, by an act clothed in the appropriate form, acquires ownership without delivery in so far as both the donor and third parties are concerned. Article 1550 of the Louisiana Civil Code is not subject to an exception corresponding to that established in article 1922 of the same Code (note 187 *infra*): Article 1922, establishing a general rule for obligations to give, is subject to the exception established for donations. In other words, article 1922 applies to onerous transactions exclusively. Indeed, the requirement of authentic act for the validity of donations of corporeal movables not given manually (text at note 178 *supra*) is an adequate substitute for delivery. Delivery serves notice to the world that the ownership of movables has been transferred and tends to prevent fraudulent claims. Authentic acts, subject to publicity, obviously tend to perform the same functions. Cf. *Harper v. Pierce*, 15 La. Ann. 666 (1860) (donation of a slave valid against third persons without delivery).

186. See FRENCH CIVIL CODE art. 1138; cf. Civ., June 24, 1845, D. 1845.1.309, S. 1846.1.551; 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 630 (2d ed. Picard 1952). However, delivery of possession to the usufructuary may be essential for his protection against claims by third persons since the grantor may, under the terms of articles 1141 and 2279 of the French Civil Code, transfer ownership free of charges to bona fide purchasers.

187. In Louisiana, as in France, obligations to give, arising from acts translatif of title, result in transfer of ownership merely by operation of consent. See LA. CIVIL CODE art. 1909 (1870), corresponding to article 1138 of the French Civil Code. However, article 1922(1) of the Louisiana Civil Code of 1870, which has no equivalent in the French Civil Code, provides that "with respect to movable effects, although, by the rule referred to in the two last preceding articles, the consent to transfer vests the ownership of the property in the obligee, yet this effect is strictly confined to the parties until actual delivery of the object." Accordingly, Louisiana courts have rightly insisted that transfers of movables by onerous title are effective against third persons from the time of delivery. See *Nicolopoulou v. His Creditors*, 37 La. Ann. 472 (Orl. Cir. 1885); *Nanson and Co. v. Matthews*, 24 La. Ann. 90 (Orl. Cir. 1872); Comment, "*Traditio*" in the Civil Law, 22 LA. L. REV. 418, 429 (1962); Note, 30 TUL. L. REV. 153, 155 (1955).

188. See B.G.B. § 1032; GREEK CIVIL CODE art. 1143. Actual delivery of the movables may be substituted by *brevi manu traditio* and other forms of fictitious delivery. See B.G.B. § 1032(2) making applicable by analogy §§ 929(2), 930, and 933-936 of the same Code; GREEK CIVIL CODE arts. 976-978, 1034-1035. Further, usufruct over corporeal movables may be established in Germany and in Greece by the effect of the principle of real subrogation. Thus, when the usufructuary of a claim receives payment of the thing due, his usufruct of a right is converted by operation of law into a usufruct of a thing. See B.G.B. § 1075; GREEK CIVIL CODE art. 1179. It ought to be noted that usufruct over movables may be created in Germany and in Greece by a non-owner. For example, a person taking possession of a thing as usufructuary from a non-owner may acquire usufruct by acquisitive prescription. See WOLFF-RAISER, *SACHENRECHT* 473 (10th ed. 1957).

ii. *Testamentary Usufruct*. In all civil law systems under consideration, testamentary usufruct is the most prevalent form of conventional usufruct. The testator may leave the naked ownership to his heirs and the usufruct to a designated legatee or he may leave the naked ownership to a legatee and the usufruct to his heirs.¹⁸⁹ The bequest of usufruct provides resources for the legatee for life without depriving the heirs definitively of their interest in the succession. Obviously, the same result may be accomplished by the bequest of an annuity for life.¹⁹⁰ Each of the two methods of securing funds for the legatee has its advantages and its disadvantages.

Testamentary usufructs are created directly by the effect of wills in both France and Louisiana.¹⁹¹ However, since the legacy of usufruct may be either by universal title or by particular title,¹⁹² the usufructuary legatee has no seizin and must demand the delivery of the legacy from the heirs, universal legatees, legatees by universal title, or the executors of the will.¹⁹³ In Germany, it is only exceptionally that the legatee of the usufruct of an entire estate may qualify as heir; almost always, therefore, the legacy of usufruct establishes merely the obligation of instituted or *ab intestat* heirs to create the usufruct.¹⁹⁴ But in

189. See LA. CIVIL CODE art. 1522 (1870); text at note 171 *supra*; Succession of Quinlan, 118 La. 602, 43 So. 249 (1907). When the testator leaves his property to a named person as usufructuary without disposing of the naked ownership, the naked ownership vests in the legal heirs of the testator. See Fontenot v. Vidrine, 218 La. 979, 51 So. 2d 597 (1951).

190. See New Orleans v. Baltimore, 13 La. Ann. 162 (1858). Cf. text at notes 199-202 *infra*.

191. See FRENCH CIVIL CODE art. 579; LA. CIVIL CODE art. 540 (1870).

192. See text at notes 96, 99 *supra*.

193. See FRENCH CIVIL CODE art. 1011; LA. CIVIL CODE arts. 1613, 1630 (1870); Succession of Piffet, 39 La. Ann. 466, 1 So. 889 (1887) (particular legacy of usufruct; usufructuary put in possession by the executors of the will). It is only universal legatees who have seizin, in the absence of forced heirs. LA. CIVIL CODE art. 1609 (1870); FRENCH CIVIL CODE art. 1004. Seizin, according to the better view, should not be confused with possession. Thus, the legatees by universal or by particular title continue the possession of the testator but have no seizin. See 4 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 321 (2d ed. Maury et Vialleton 1956).

194. See text at note 114 *supra*, and in general, Erdmann, *Der Niessbrauch in Verfügungen von Todes wegen nach gemeinem Recht und dem Bürgerlichen Gesetzbuch*, 94 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 284-304 (1903). It ought to be noted, however, that testamentary usufructs in favor of the surviving spouse (which, in the past, were prevalent) are uncommon in Germany today. Instead of creating a usufruct in favor of the survivor, the testator may institute the spouse as a fideicommissary heir (*vorerbe*) and his children as substitutes (*Nacherben*). See B.G.B. §§ 2100-2146. The spouse acquires the ownership of the estate with power of disposition, subject only to certain limitations. This is a flexible institution better conforming to the needs of everyday life than usufruct which does not allow disposition of the assets (*dispositionsniessbrauch*). For details, see LANGE, LEHRBUCH DES ERBRECHTS 245-248 (1962). Taxation has exer-

Greece, the legatee of usufruct may quite regularly be an instituted heir, and, in any case, even the particular legatee of usufruct may acquire the right directly, upon the death of the testator.¹⁹⁵

The creation of usufruct by will is, in general, subject to the rules governing mortis causa dispositions as to both form and substance. Further, with the exception of Louisiana, wills creating usufruct on immovable property must be recorded.¹⁹⁶

iii. Contractual and Testamentary Interpretation. Testators and parties to contracts do not always take care to designate by its proper name the type of right they intend to create. Thus, whenever descriptive language is used, questions arise as to whether a usufruct or another right of enjoyment has been intended. Further, in mortis causa dispositions, questions arise as to whether a permissible disposition of usufruct and naked ownership has been intended or a reprobated substitution.

These are matters of testamentary or of contractual interpretation governed by the general rules of construction of juridical acts. In general, "precise, technical terms are not necessary to create a usufruct."¹⁹⁷ The testator or the parties to the contract may even use common law terminology to describe the function of the right of usufruct they intend to create and still validly establish a usufruct under the civil law.¹⁹⁸

cised some influence in that development. See 3, 2 STAUDINGER-SPRENG, KOMMENTAR ZUM B.G.B. 1089 (11th ed. 1963).

195. See text at notes 118-119 *supra*.

196. *France*: Decree-Law of October 30, 1935; Decree-Law of Jan. 4, 1955; 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 643 (7th ed. Esmein 1961); *Germany*: B.G.B. § 873; *Greece*: GREEK CIVIL CODE art. 1193. In Louisiana, it is the judgment of possession rather than the will that must be recorded in order to have effect against third persons. See LA. CODE OF CIVIL PROCEDURE arts. 2951, 3061 (1960); LA. CIVIL CODE art. 2266 (1870).

197. *Haggard v. Rushing*, 76 So.2d 52 (La. App. 2d Cir. 1954) (quitclaim deed authorized defendant "to use, without cost, the surface of the south 840 feet" of plaintiff's property; *held*, the instrument created a usufruct); *Greech v. Errington*, 207 La. 615, 21 So.2d 761 (1945) (provision that donor of property should "have and control said property during his lifetime, collecting and disbursing all income. . . as may seem just and right to him"; *held*, donor reserved usufruct); *King v. King*, 155 La. 19, 98 So. 742 (1924) (provision that named beneficiary should "receive all the rents, benefits, and emoluments" of property; *held*, testator intended to create usufruct). On the other hand, use of the word "usufruct" may not be determinative in the presence of dispositions irreconcilable with the notion of usufruct. See *Succession of Ward*, 110 La. 75, 34 So. 135 (1903). *But cf.* *Giroir v. Dumesnil*, 172 So.2d 89 (La. App. 1st Cir. 1965); note 221 *infra*.

198. In *Gibson v. Zylks*, 186 La. 1043, 1047, 173 So. 757, 758 (1937), a contract styled as "deed" contained the following language: "In making this deed to Sam G. Zylks it is understood and mutually agreed that the said

Legacies of revenues or fruits frequently give rise to the question of whether a usufruct was intended by the testator or merely a personal right of enjoyment. In *Peyton v. Hammonds*,¹⁹⁹ the court held that a legacy of revenues was a "kind of usufruct," namely a real right of enjoyment. The court relied on article 607 of the Louisiana Civil Code of 1870 which provides that "the legacy made to any one of the revenues of a property is a kind of usufruct, which also ceases and becomes extinguished by the death of the legatee, if the contrary has not been expressly stipulated. It is the same with all annual legacies as pensions of alimony and the like."²⁰⁰ It is submitted that article 607 does not intend to make the legacy of revenues or of fruits a real right; it merely states that it is a "kind of usufruct" in the sense that it terminates upon the death of the beneficiary unless the contrary is expressed.²⁰¹ This possibility of extension of

Mrs. M. M. Zylks is to have the revenue from this property for her support as long as she lives and to own it as her home untill [sic] death and then this deed to operate as a complete transfer of said property to the said Sam G. Zylks and it is agreed that if the same Sam G. Zylks should die first then in that event the property shall still be used to support the said Mrs. M. M. Zylks and the family of the said Sam G. Zylks and at the death of said Mrs. M. M. Zylks then to revert [sic] to the heirs of said Sam G. Zylks." When the instrument was attacked by the vendor's children on the grounds that it was an attempt to dispose of a succession not yet devolved, to make a disposition mortis causa by deed, and to establish a fideicommissum, the court held that it merely was a sale with reservation of usufruct for life in favor of the vendor.

199. 125 So.2d 491, 492 (La. App. 3d Cir. 1960) (legacy "of a usufruct. . . on [the testator's] estate to the extent [of] One Hundred Fifty Dollars per Month." *Held*, the disposition was a legacy of revenues, a "kind of usufruct").

200. The interpretation given by the court to article 607 conflicts with article 646 of the Louisiana Civil Code which limits personal servitudes to usufruct, use, and habitation. *Cf.* text at notes 18, 19 *supra*. It has been suggested, of course, that a limited usufruct or a limited personal servitude for the collection of fruits may be considered as authorized by the Louisiana Civil Code. See text at notes 25-28 *supra*. But if a limited real right of enjoyment bearing on fruits or revenues may be established, it must be a direct charge on specified things. Thus, if A bequeaths to B the fruits or revenues of his estate or of a part thereof, this is a usufruct; if he bequeaths certain portions of the fruits or revenues of specified property, this may be regarded as a limited usufruct. But where fruits or revenues are bequeathed to derive out of an unliquidated estate or from unspecified property this is not a real right. It is a debt of the succession to be discharged periodically by the heirs or universal legatees.

A limited usufruct bearing on a portion of fruits of specified things might, perhaps, qualify as a right of *use*. See LA. CIVIL CODE art. 634 (1870). Use differs from usufruct in that it involves only partial enjoyment of a thing. The beneficiary of the right is merely entitled to "exact such portion of the fruit [the thing] produces, as is necessary for his personal wants and those of his family." *Id.* art. 626. It is doubtful, however, whether the right of the beneficiary may so be varied as to entitle him to fruits in excess of those needed for "his personal wants and those of his family." See text at notes 18-24 *supra*. Indeed, it might be argued that this would be a right other than use. See LA. CIVIL CODE art. 631 (1870).

201. This interpretation of article 607 was followed in the early cases of *New Orleans v. Baltimore*, 13 La. Ann. 162, 163 (1858), decided under the corresponding article 602 of the 1825 Louisiana Civil Code. The court declared that "the

the life of the right beyond the life of the beneficiary is mentioned precisely because the right deriving from a legacy of revenues is obligatory in nature.²⁰²

The question whether a will establishes a usufruct rather than a prohibited substitution has been an "ever recurring problem"²⁰³ in Louisiana. The courts have basically ascribed to the theory that the intention of the testator controls in this matter. If by looking to the language of the will, the court arrives at the conclusion that the testator intended to vest title in a first donee for life and on the first donee's death to be transmitted to a second donee, the disposition is a prohibited substitution which must fall.²⁰⁴ If, on the other hand, the court finds that the testator intends to give the usufruct to one person and the naked ownership to another, with both interests vesting on the death of the testator, the disposition is valid.²⁰⁵

The application of these tests has proven difficult in practice and has left almost every testamentary disposition open to litigation

intention [of the legislature] was, not to make such bequests as these 'annuities' usufructs in reality, for there is no transfer of possession to the usufructuary, but that by Article 607 the extreme limit to the bequest before us is thirty years." See also Succession of Ward, 110 La. 75, 34 So. 135 (1903): "A person to whom, out of the revenues of an estate, a certain amount is to be paid monthly, is not a usufructuary" (syllabus by the court).

202. See Note, 35 TUL. L. REV. 845, 848 (1961).

203. Succession of Johnson, 223 La. 1058, 67 So. 2d 591 (1953). See also Comment, *Testamentary Substitutions and Conditions*, 1 LOYOLA L. REV. 207, 211-13 (1941).

204. See Succession of Thilborger, 234 La. 810, 813, 101 So. 2d 678, 679 (1958): "The simplest test of the substitution prohibited by our law is that it vests the property in one person at the death of the donor and at the death of such person vests the same property in another person, who takes the same directly from the testator but by a title which springs into existence only on the death of the first donee." See also Succession of Rougon, 223 La. 103, 65 So. 2d 104 (1953) (prohibited substitution); Succession of Williams, 169 La. 696, 125 So. 858 (1930), note 207 *infra*; Succession of Ward, 110 La. 75, 34 So. 135 (1903); Marshall v. Pearce, 34 La. Ann. 557 (1882).

Occasionally, wills that might be attacked on the ground that the testator intended to create a prohibited substitution are merely submitted to the court for construction and determination of the question whether the legatee is to take the usufruct or the perfect ownership of the property. See Succession of Heft, 163 La. 467, 112 So. 301 (1927) (perfect ownership); Succession of Verneville, 120 La. 605, 45 So. 520 (1908) (usufruct); Succession of Weller, 107 La. 466, 31 So. 883 (1902) (usufruct).

205. See Succession of Thilborger, 234 La. 810, 101 So. 2d 678 (1958); Succession of Johnson, 223 La. 1058, 67 So. 2d 591 (1953); Girven v. Miller, 219 La. 252, 52 So. 2d 843 (1951); Succession of Fertel, 208 La. 614, 23 So. 2d 234 (1945); Succession of Blossom, 194 La. 635, 194 So. 572 (1940); Succession of McDuffie, 139 La. 910, 72 So. 450 (1916), Note, 2 So. L.Q. 72 (1917); Rice v. Kay, 138 La. 483, 70 So. 483 (1916); Succession of Reilly, 136 La. 347, 67 So. 27 (1915); Succession of Good, 45 La. Ann. 1392, 14 So. 252 (1893); Succession of Law, 31 La. Ann. 456 (1879); Cecile v. Lacoste, 8 La. Ann. 142 (1853); Roy v. Latiolas, 5 La. Ann. 552 (1850).

tion. Further, in interpreting specific language in wills, the attitude of the Louisiana Supreme Court has fluctuated from a strict construction of the terms employed to a liberal view giving effect to dispositions (as conferring usufruct and naked ownership) in the presence of an almost clear intention to create a prohibited substitution.²⁰⁶ The problem is still "perplexing, and it is difficult to reconcile or distinguish"²⁰⁷ apparently conflicting judicial determinations. It has been suggested that the intention theory should be abandoned and the general policy of declaring a will valid whenever possible be adopted.²⁰⁸ Courts, however, are not at liberty to disregard terms used in a testament.²⁰⁹ An acceptable solution is to give effect to wills "involving a gift of the property to one for life with a limitation over to another on his death . . . as a gift of usufruct to one and naked ownership to another unless the testator expressly outlines the details of a prohibited substitution by forbidding the second donee from selling his interest before it vests in possession and by stating that the heirs of the second donee shall

206. In *Roy v. Latiolas*, 5 La. Ann. 552 (1850), the court sustained a bequest for life as a donation of the usufruct. But the case was overruled in *Marshall v. Pearce*, 34 La. Ann. 557 (1882). In *Succession of McDuffie*, 139 La. 910, 72 So. 450 (1916), the court reverted to the rule of *Roy v. Latiolas*. But again, in the *Succession of Ledbetter*, 147 La. 771, 85 So. 908 (1920), involving the validity of a conditional gift, the court reinstated by way of dictum the rule of *Marshall v. Pearce*. This dictum resulted, in the *Succession of Williams*, 169 La. 696, 698, 125 So. 858, 859 (1930), to the annulment of a disposition which should be interpreted as establishing a usufruct rather than a prohibited substitution. The will provided that property was given to the testator's wife "for her use and benefit . . . for the period of her natural life and at her death everything shall belong to [the testator's] niece." The court held that the bequest was a prohibited substitution. "It is clear," the court stated, "that the intention of the testator was to convey the title of the property as well as the usufruct, to his wife for the term of her natural life, and that it was only 'at the death' of his wife that the ownership should vest in the legatee." The decision has been criticized. See Nabors, *An Analysis of the Substitution-Usufruct Problem Under Articles 1520 and 1522 of the Louisiana Civil Code*, 4 TUL. L. REV. 603, 605 (1930). Finally, the *Williams* case has been found "difficult to reconcile or distinguish" from the *Succession of Fertel*, 208 La. 614, 23 So.2d 234 (1945). See *Succession of Thilborger*, 234 La. 810, 101 So.2d 678, 680 (1958).

207. *Succession of Johnson*, 223 La. 1058, 1063, 67 So.2d 591, 593 (1953).

208. Cf. LA. CIVIL CODE art. 1712 (1870): "A disposition must be understood in the sense in which it can have effect, rather than that in which it can have none"; *Succession of Thilborger*, 234 La. 810, 101 So.2d 678, 682 (1958), concurring opinion by Justice Fournet.

209. See dissenting opinion of Justice O'Niell in *Succession of McDuffie*, 139 La. 910, 912, 72 So. 450, 452 (1916): "If we were at liberty to disregard the terms used in a testament, to carry out the presumed intention of the testator, every disposition that has been declared null as a prohibited substitution should have been maintained as a donation of the usufruct of the property to one person and the ownership to another. I have not yet observed, and cannot imagine, a case in which a prohibited substitution should be decreed null, if we apply the doctrine 'that a bequest of property for life is a donation of the usufruct.'"

not inherit if the second donee should die before the first donee."²¹⁰

Article 4, section 16, of the Louisiana Constitution of 1921 and article 1520 of the Louisiana Civil Code of 1870 were amended in 1962 to permit substitutions in trust²¹¹ to the extent allowed by legislation.²¹² In the future, therefore, Louisiana courts construing testaments will have to determine whether the testator intended to create a substitution in trust, a forbidden substitution out of trusts, or a usufruct and naked ownership complex.

iv. Freedom of the Will. According to article 542, first clause, of the Louisiana Civil Code of 1870,²¹³ and corresponding provisions, jurisprudence, or doctrine in other civil law jurisdictions,²¹⁴ usufruct may be established simply or under condition or term. But the Louisiana Civil Code declares further that usufruct may be established "under all such modifications as the person who gives such a right may be pleased to annex to it."²¹⁵ This broad freedom of will is not recognized in Germany or Greece;²¹⁶ nor is there a corresponding provision in the French

210. Nabors, *An Analysis of the Substitution-Usufruct Problem Under Articles 1520 and 1522 of the Louisiana Civil Code*, 4 TUL. L. REV. 603, 607 (1930). Cf. 11 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 183 (6th ed. Esmein 1956).

211. See LA. CONST. art. 4 § 16, as amended, La. Acts 1962, No. 521 (adopted Nov. 6, 1962); LA. CIVIL CODE art. 1520 (1870): "Substitutions are and remain prohibited, except as permitted by the laws relating to trusts."

"Every disposition not in trust by which the donee, the heir, or legatee is charged to preserve for and to return a thing to a third person is null, even with regard to the donee, the instituted heir or the legatee" (as amended by La. Acts 1962, No. 45, § 1).

212. See *La. Trust Estates Code*, La. Acts 1964, No. 338, now LA. R.S. 9:1721-2252 (1965).

213. See LA. CIVIL CODE art. 542 (1870); La. Civil Code art. 534 (1825); La. Civil Code p. 112, art. 6 (1808).

214. See FRENCH CIVIL CODE art. 580; QUEBEC CIVIL CODE art. 445; cf. 1, 1 ENNECCERUS-NIPPERDEY, *ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS* 1192 (15th ed. 1960); Gieseke, *Belastung*, in 2 *RECHTSVERGLEICHENDES HANDWÖRTERBUCH* 426 (1929); GREEK CIVIL CODE arts. 206, 239; BALIS, *CIVIL LAW PROPERTY* 7 (3d ed. 1955) (in Greek).

215. See LA. CIVIL CODE art. 542, second clause (1870); *id.* art. 569(3): "It is understood that all these restrictions on the rights of the usufructuary, and others mentioned in this title of the Code, only take place, where there is no provision to the contrary in the act establishing the usufruct;" *id.* art. 2013: "The real obligation, created by condition annexed to the alienation of real property, is susceptible of all modifications that the will of the parties can suggest, except such as are forbidden by law. These conditions are either conditions precedent, which suspend the operation of the contract until they are performed, or subsequent and resolutive, which, unless they are performed, annul the contract. . . ."

216. See WOLFF-RAISER, *SACHENRECHT* 9 (10th ed. 1957); BALIS, *CIVIL LAW PROPERTY* 5 (3d ed. 1955) (in Greek). Under both the German and Greek Civil Codes freedom of will (autonomy) has limited functions in the field of property

Civil Code.²¹⁷ And even in Louisiana, freedom of the will obtains (in spite of the declaration in article 542 of the Civil Code) only as to modifications which do not contravene public policy or mandatory provisions of the Civil Code dealing with real rights in general or usufruct in particular.²¹⁸ Thus, for example, usufruct may not be created for a period exceeding the lifetime of the usufructuary²¹⁹ or for more than thirty years in favor of a juridical person.²²⁰ But it may well be confined to certain designated advantages of use and enjoyment²²¹ and be declared non-transferable²²² or exempt from seizure; and in France, a con-

law. Thus, the person creating a usufruct may not confine the right of enjoyment to enumerated advantages. However, he may exclude certain advantages from the comprehensive right of usufruct. See B.G.B. § 1030(2); O.L.G. Oct. 23, 1902, 6 O.L.G. 121; BALIS, *op. cit. supra* at 339. Further, the grantor may accord to the usufructuary, by independent juridical act, the right to alienate things subject to perfect usufruct. See 3 SOERGEL-MÜHL, BÜRGERLICHES GESETZBUCH 395, 424 (9th ed. 1960). And, in Greece, non-consumables may be the object of an imperfect usufruct in accordance with the intention of the parties. See BALIS, *op. cit. supra* at 385. For similar solutions reached by Louisiana courts, see note 221 *infra*.

217. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 763 (2d ed. Picard 1952). Article 580 of the French Civil Code differs from article 542 of the Louisiana Civil Code by the omission in the former of the clause "in a word, under all such modifications as the person who gives such right may be pleased to annex to it."

218. Cf. YIANNPOULOS, *CIVIL LAW PROPERTY* § 96 (1966); text at notes 18-21 *supra*.

219. See LA. CIVIL CODE art. 606 (1870); FRENCH CIVIL CODE 617; B.G.B. § 1061. *But see* GREEK CIVIL CODE art. 1167, allowing freedom for contrary stipulation.

220. See LA. CIVIL CODE art. 612 (1870); FRENCH CIVIL CODE art. 619; LAWS OF PUERTO RICO-CIVIL CODE § 1573; QUEBEC CIVIL CODE art. 481. It was thought by the redactors of these codes that since the dissolution of a juridical person is a rare occurrence, an arbitrary limit (corresponding roughly to the life expectancy of a natural person at the time the civil codes were enacted) should be set for the dismemberment of ownership into right of enjoyment and naked ownership. In modern codes, however, usufruct in favor of a juridical person may be constituted for an unlimited period of time. See B.G.B. § 1061; GREEK CIVIL CODE art. 1167. Obligatory rights of enjoyment in favor of juridical persons may, of course, exceed the thirty year limit in France and Louisiana. Thus, a legacy in favor of a juridical person for the annual payment of a sum of money may be constituted for a period in excess of thirty years. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 764 (2d ed. Picard 1952). *But see* New Orleans v. Baltimore, 13 La. Ann. 162 (1858), note 201 *supra*.

221. See Gibson v. Zylks, 186 La. 1043, 173 So. 757 (1937). *Cf.* note 216 *supra*. The grantor may validly relieve the usufructuary of the obligation to preserve the substance of a thing subject to perfect usufruct; for example, the grantor may confer on the usufructuary authority to sell the thing. In such a case, the perfect usufruct may be converted at the option of the usufructuary into imperfect, with the usufructuary's right of enjoyment attaching to the proceeds of the sale. See Heirs of Mitchel v. Knox, 34 La. Ann. 399 (1882). The grantor may also relieve the usufructuary of things subject to imperfect usufruct of the obligation to account for their value to the naked owner. See In re Courtin, 144 La. 971, 81 So. 457 (1919). But he cannot deprive the usufructuary of the management of the fund. See Succession of Ward, 110 La. 75, 34 So. 135 (1903).

222. See LA. CIVIL CODE art. 555 (1870); FRENCH CIVIL CODE art. 595; GREEK CIVIL CODE art. 1166. On the contrary, usufruct in favor of individuals is

tractual usufruct may be subject to the administration of a person other than the usufructuary.²²³

Question has been posed as to whether or not usufruct may be stipulated for a term in Louisiana.²²⁴ In France, article 617 of the Civil Code provides for the termination of the usufruct "by the expiration of the time for which it has been granted" and no one has ever doubted the validity of a usufruct granted for a term.²²⁵ Nor is any doubt justified under the regime of the Louisiana Civil Code, even in the absence of an article corresponding exactly to article 617 of the French Civil Code. Indeed, any doubt is dispelled in the light of article 608 of the Louisiana Civil Code of 1870.²²⁶ Moreover, the need for specific statutory authorization of usufruct for a term in Louisiana is obviated by the provision of article 542 of the Civil Code which has no equivalent in the French Code.²²⁷

v. Successive Usufructs. It is generally accepted in France that usufruct may be created in favor of successive beneficiaries.²²⁸ This is not considered as a prohibited substitution be-

non-transferable under the German Civil Code and stipulations to the contrary are ineffective. See B.G.B. § 1059.

223. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 763 (2d ed. Picard 1952). In the past, usufruct without power of administration was forbidden in Louisiana. Cf. Succession of Stephens, 45 La. Ann. 962, 13 So. 197 (1893). Today, such a stipulation might be considered valid only if construed as placing the usufruct in trust in accordance with the applicable legislation.

224. See Comment, *Can a Usufruct Be Stipulated for a Term?*, 5 LA. L. REV. 609-16 (1944).

225. Article 580 of the French Civil Code, authorizing the creation of usufruct "at a certain date" (*à certain jour*) has been interpreted in France to authorize usufruct for a term. Accordingly, these words ought to read in English "up to a certain date." In the French text of the Louisiana Civil Code of 1825, the language of article 534 is identical with that of the French Code. But in the English translation of the 1825 Code, and the corresponding text of article 542 of the 1870 Code, the words "*à certain jour*" have been translated as "at a certain day" rather than "up to a certain date."

226. See LA. CIVIL CODE art. 608 (1870): "If the title of the usufruct has limited the right to it to commence or determine at a certain time, or in the event of a certain condition, the right does not commence or determine till the condition happens or the time elapses." The French text of the Louisiana Civil Code of 1825, article 603, corresponding to article 608 of the 1870 Code, reads: "*Si le titre de l'usufruitier en borne le droit pour commencer et finir à un certain temps, ou à l'événement d'une certaine condition, le droit ne commencera ou ne cessera que lorsque la condition sera arrivée, ou le temps expire.*"

227. See text at note 215 *supra*. The provision of article 617 of the French Civil Code is perhaps a necessary clarification in the absence of a provision corresponding to article 542, second clause, of the Louisiana Civil Code of 1870.

228. See Req., Nov. 13, 1918, D.1921.1.119; Bordeaux, June 16, 1863, D.63.2.109, S.63.2.263; Rennes, May 19, 1863, S.63.2.263; Req., March 23, 1859, D.59.1.508; 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 763 (2d ed. Picard 1952). In Germany, successive usufructs might be considered as prohibited in the light of the principle of non-transferability of usufructs. Cf. B.G.B. § 1059. And in Italy, successive usufructs are expressly forbidden, although substitutions are valid within certain limitations. See ITALIAN CIVIL CODE art. 698.

cause usufruct terminates necessarily upon the death of the first usufructuary. The new beneficiary of the right thus takes directly from the original owner. This analysis of the nature of successive usufructs poses a limitation: in the case of a contractual successive usufruct each beneficiary must exist or at least be conceived at the time of the creation of the usufruct; and in the case of a testamentary successive usufruct each beneficiary must exist or at least be conceived at the time of the testator's death.²²⁹

In Louisiana, it might be argued that successive usufructs fall within the sweeping prohibition against substitutions²³⁰ which, indeed, has no equivalent in the French, German, or Greek Civil Codes.²³¹ But there is sufficient statutory basis to sustain the creation of successive usufructs in Louisiana. The Civil Code affirms expressly the validity of a testamentary usufruct to one legatee and the naked ownership to another.²³² The divisibility of usufruct is recognized,²³³ and successive usufructs are permitted by almost clear implication.²³⁴ As in France, however, a usufruct created in favor of a certain person and his heirs would be null and void.²³⁵

vi. Value of Usufruct; Fiscal Legislation. Computation of the value of usufruct may be an important matter in a variety of contexts. The question, however, arises most frequently in the framework of fiscal legislation as a result of levies on values transferred or acquired by inter vivos or mortis causa juridical acts.

229. LA. CIVIL CODE art. 1482 (1870); FRENCH CIVIL CODE art. 906; 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 641 (7th ed. Esmein 1961).

230. See LA. CIVIL CODE art. 1520 (1870), as amended by La. Acts 1962, No. 45.

231. Article 896 of the French Civil Code, containing a general prohibition against substitutions, is largely modified by Articles 1048-1074 which allow certain substitutions. In most civil codes a limited number of fideicommissary substitutions is permitted. See B.G.B. §§ 2100-2146; GREEK CIVIL CODE arts. 1166, 1923-1941; ITALIAN CIVIL CODE arts. 688-699; SPANISH CIVIL CODE art. 774.

232. See LA. CIVIL CODE art. 1522 (1870):

233. *Id.* art. 538. This article may be construed to mean that the grantor is authorized to create one usufruct and divide it between the donees.

234. See LA. CIVIL CODE art. 609 (1870): "If the usufructuary is charged to restore the usufruct to another person, his right to the usufruct expires whenever the time for making such restitution arrives." A successive usufruct was actually established under the facts of *Fricke v. Stafford*, 159 So.2d 52 (La. App. 1st Cir. 1963). The testator left to his daughter "a life usufruct of all property real, personal and mixed of which I may die possessed, subject only to the usufructuary claim of my wife should she survive me as fixed by law in her favor."

235. See note 219 *supra*.

Fiscal laws vary widely in the legal systems under consideration and it would be outside the scope of the present study to attempt an exhaustive treatment of matters of taxation. In general, two approaches are followed: usufruct and naked ownership are either assessed separately or the property subject to usufruct is assessed for taxes without regard to outstanding rights of enjoyment. In the last case, a question arises as to the apportionment of charges between the naked owner and the usufructuary.

In France, the acquisitions of usufruct and of naked ownership are assessed separately. The value of the naked ownership is that of perfect ownership after deduction of the value of the usufruct. The value of the usufruct is appraised in the light of the age of the usufructuary and the value of perfect ownership. If the usufructuary is less than twenty years old, the usufruct is seven-tenths the value of the property. The value of the usufruct is decreased by one-tenth for every ten years of the age of the usufructuary and at age seventy it becomes only one-tenth of the value of perfect ownership. If the usufruct is created for a term, its value is two-tenths of the perfect ownership for every ten years of duration without regard to the age of the usufructuary.²³⁶ According to the jurisprudence, however, this last rule does not apply where it would result in attributing to a usufruct of fixed duration a value greater than that of usufruct for life.²³⁷

In Louisiana, questions of taxation arise under both federal and state laws.²³⁸ Under federal law, the conveyance of usufruct or of naked ownership of immovable property by inter vivos transactions is subject to tax.²³⁹ Further, transfer of property

236. See Law of Feb. 25, 1901, art. 13; 3 *PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 765 (2d ed. Picard 1952).

237. See *Civ.*, March 20, 1922, D.H. 1924.62, S.1923.1371; *Civ.*, May 21, 1924, D.1926.128.

238. See in general, Greco, *Valuation of Naked Ownerships, Usufructs and Annuities Under Louisiana Inheritance Tax Laws*, 10 *LA. B.J.* 119-44 (1962); Hickey, *The Usufruct and Taxation*, 8 *LA. B.J.* 223-26 (1961); Lapeyre, *Income Tax Problems Caused by the Usufructuary's Handling of Properties*, 10 *TUL. TAX INST.* 399-408 (1961); Wisdom and Pigman, *Testamentary Dispositions in Louisiana Estate Planning*, 26 *TUL. L. REV.* 119, 128-30 (1952); Rubin & Champagne, *Some Community Property Aspects of the 1948 Revenue Act*, 9 *LA. L. REV.* 1-17 (1948); Comment, *The Louisiana Gift Tax*, 25 *TUL. L. REV.* 370 (1951).

239. *INT. REV. CODE* of 1954, § 2501, as amended Sept. 14, 1960 (1965 Supp.): "For the calendar year 1955 and each calendar year thereafter, a tax, computed as provided in section 2502, is hereby imposed on the transfer of property by gift during such calendar year by any individual, resident or non-resident, except transfers of intangible property by a non-resident not a citizen of the United States and who was not engaged in business in the United States during such calendar year"; *id.*, § 4361, as amended June 21, 1965 (1965 Supp.): "There is hereby

upon death is subject to the federal estate tax, to the extent of the interest therein of the decedent at the time of his death.²⁴⁰ The estate tax is to be paid by the executor or administrator out of the entire estate²⁴¹ but the tax collector may proceed directly against any transferee.²⁴² The extent of the deceased's interest in property is a matter determined under state laws.²⁴³ Likewise, the distribution of the residue and the ultimate impact of federal estate taxes on the heirs or legatees are matters governed by state laws.²⁴⁴

In the absence of directly applicable statutory provisions dealing with the apportionment of federal estate taxes, Louisiana courts resorted in the past to "equitable principles under Article 21 of the Civil Code."²⁴⁵ Accordingly, the burden of federal taxes was apportioned among usufructuaries and naked owners as well as other persons "sharing in the estate in accordance with their respective interests."²⁴⁶ Today, under the Louisiana Estate Tax Apportionment Act of 1960,²⁴⁷ the usufructuary is expressly re-

imposed, on each deed, instrument, or writing by which any lands, tenements, or other realty sold shall be granted, assigned, transferred or otherwise conveyed to, or vested in, the purchaser or purchasers or any other person or persons, by his or their direction, when the consideration or value of the interest or property conveyed (exclusive of the value of any lien or encumbrance remaining thereon at the time of sale) exceeds \$100, a tax at the rate of 55 cents for each \$500 or fractional part thereof. The tax imposed by this section shall not apply on or after Jan. 1, 1968." Thus, computation of the value of usufruct will always be an issue in transfers of usufruct or of the naked ownership of immovable property. For computation of the value of usufruct, and the applicable life expectancy tables, see Fed. Treas. Dep't, Regs. 25.2512-5(c) (1965).

240. See *id.* §2031, as amended Oct. 16, 1962 (1965 Supp.). See also *id.* §§ 2033 (transactions in contemplation of death); 2035 (transfers taking effect at death); and 2038 (revocable transfers); *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921).

241. See INT. REV. CODE of 1954, § 2002. See also *Succession of Ratcliff*, 212 La. 563, 571, 33 So.2d 114, 117 (1947): "[T]here is but one estate for federal taxation purposes and the tax is levied on the whole."

242. See *Fetting v. Flanigan*, 185 Md. 499, 45 A.2d 355 (1946).

243. See *Aldrich v. United States*, 346 F.2d 37 (5th Cir. 1965). According to Louisiana jurisprudence, the surviving spouse receiving 1/2 of the community in usufruct is entitled to deduct, for state inheritance tax purposes, the value of the usufruct from the gross estate. See text at note 260 *infra*. Thus, argument might be made that the deceased did not have a property interest under state law to the extent of the value of usufruct. But, be it as it may, the question of what interests are subject to federal tax is a federal question decided according to federal law. And, according to section 2056(b) of the Internal Revenue Code of 1954, the usufruct of the surviving spouse, whether testamentary or legal, is not a deductible item from the adjusted gross estate. *Cf. Rubin & Champagne, Some Community Aspects of the 1948 Revenue Act*, 9 LA. L. REV. 1-17 (1948); *Liebman v. Fontenot*, 275 Fed. 688 (W.D. La. 1921).

244. See *Riggs v. Del Drago*, 317 U.S. 95 (1942); *Succession of Jarreau*, 184 So.2d 762 (La. App. 3d Cir. 1966); *Herson v. Mills*, 221 F. Supp. 714 (D.C.D.C. 1963); *Liebman v. Fontenot*, 275 Fed. 688 (W.D. La. 1921).

245. *Succession of Ratcliff*, 212 La. 563, 33 So.2d 114, 116 n. 2 (1947).

246. *Id.* at 570, 33 So.2d at 117.

247. See La. Acts 1960, No. 362, now LA. R.S. 9:2431-2438 (1965 Supp.).

lieved of the burden of apportionment. The federal estate tax as well as the Louisiana estate transfer tax²⁴⁸ is to be paid out of the entire estate and property subject to usufruct may be sold, in the absence of agreement between interested parties, for the satisfaction of the tax burden. The usufruct thus attaches to the "balance of the property remaining after the sale or the balance of the proceeds of the sale not necessary for the payment of the tax."²⁴⁹

Louisiana has a gift tax applicable to inter vivos donations,²⁵⁰ an inheritance tax²⁵¹ imposed on all inheritances, legacies, and donations made in contemplation of death unless specifically exempted, and an estate transfer tax²⁵² the function of which is to obtain for the state the full benefit of the 80 per cent credit allowed by the United States on the federal estate tax.²⁵³ The burden of the gift tax is placed on both the donor and the donee,²⁵⁴ of the inheritance tax on each individual donee, heir, or legatee for the amount due on his particular inheritance or legacy,²⁵⁵ and of the estate transfer tax on the estate as a whole.²⁵⁶

248. See text at note 251 *infra*. The Estate Tax Apportionment Act regulates apportionment of the federal estate tax and of the Louisiana estate transfer tax exclusively, in the absence of contrary testamentary disposition. See *Succession of Jarreau*, 184 So.2d 762 (La. App. 3d Cir. 1963). The tax liability under the Louisiana inheritance tax is imposed directly on the recipient of values, and problems of apportionment do not arise. See LA. R.S. 9:2431(7) (Supp. 1965). The testator, however, may provide for payment of the inheritance taxes out of the residuary estate. *Succession of Jarreau*, 184 So.2d 762 (La. App. 3d Cir. 1966).

249. LA. R.S. 9:2433 (1965 Supp.).

250. See La. Acts 1940, No. 149, now LA. R.S. 47:1201-1212 (1950); Dakin, *Louisiana Tax Legislation of 1940*, 3 LA. L. REV. 55 (1940). This tax may be applicable only (1) to inter vivos donations of usufruct to one person and naked ownership to another and (2) donations of usufruct with reservation of naked ownership. Inter vivos donations of the naked ownership of immovables, and perhaps of movables, with reservation of usufruct are forbidden by Article 1533 of the Louisiana Civil Code of 1870. See text at note 173 *supra*.

251. See La. Acts 1921, No. 127, now LA. R.S. 47:2401 (1950). Exemptions are listed in *id.* 47:2402. See also Comment, *The Louisiana Inheritance and Estate Taxes*, 22 TUL. L. REV. 635 (1948).

252. See La. Acts 1932, No. 119, now LA. R.S. 47:2431-2435 (1950); Willis v. Flournoy, 231 La. 264, 91 So. 2d 33 (1957).

253. The Louisiana estate transfer tax is operative only when the inheritance tax does not absorb the entire 80 per cent credit allowed by the United States (see LA. R.S. 47:2432 (1950); INT. REV. CODE of 1954, § 2011(d)), and cannot exceed that amount. Since the federal estate tax provides for an exemption of \$60,000, successions of less than \$60,000 are subject only to the Louisiana inheritance tax.

254. See LA. R.S. 47:1209 (1950).

255. See La. Acts 1921, No. 127, now LA. R.S. 47:2401 (1950); *Succession of Cotton*, 172 La. 819, 135 So. 368 (1931); *Succession of Jones*, 172 So.2d 312 (La. App. 4th Cir. 1965).

256. See text at note 248 *supra*; Hickey, *The Usufruct and Taxation*, 8 LA.

Under this fiscal legislation, the acquisition of usufruct or of naked ownership by inter vivos donation is subject to the gift tax and by donation mortis causa subject to the inheritance tax.²⁵⁷ The value of naked ownership is determined by multiplying the actual cash value of the property at the time of death by the value of one dollar discounted at six per cent per annum for a number of years equal to the life expectancy of the usufructuary.²⁵⁸ The value of the usufruct is determined by subtracting from the actual cash value of the property at the time of death the present value of the naked ownership.²⁵⁹

The usufruct of the surviving spouse under article 916 of the Louisiana Civil Code of 1870 escapes the state inheritance tax. According to well-settled Louisiana jurisprudence, this usufruct is created by operation of law as an incident of the marriage contract rather than by "inheritance."²⁶⁰ This is so even if the legal usufruct is "confirmed" by testament.²⁶¹ And according to

B.J. 223, 224 (1961). According to the Louisiana Estate Tax Apportionment Act of 1960, the burden of federal estate taxes and Louisiana estate transfer taxes is chargeable against the naked ownership without apportionment. See note 247 *supra*.

257. See Succession of Baker, 129 La. 74, 55 So. 714 (1911); Succession of Eismann, 170 So. 2d 913 (La. App. 4th Cir. 1965). The usufruct-naked ownership disposition is the only device permitted by the Louisiana Civil Code, which gives the benefit of taxation and succession costs savings of one succession for two deaths. See Nabors, *The Shortcomings of the Louisiana Trust Estates Act and Some Problems of Drafting Trust Instruments Thereunder*, 13 TUL. L. REV. 178, 211 (1939).

258. See LA. R.S. 47:2405 (1950). The figures for the discounted value of one dollar and for the life expectancy of the usufructuary are obtained from the tables annexed to the applicable statutes. See Succession of Lewis, 12 So. 2d 7 (La. App. 1st Cir. 1943); *In re Stelly's Estate*, 185 So. 637 (La. App. 1st Cir. 1939); Greco, *Valuation of Naked Ownerships, Usufructs, and Annuities Under Louisiana Inheritance Tax Laws*, 10 LA. B.J. 119, 120 (1962). Even if the actual life span of the usufructuary is known due to his death before the settlement of the estate, the mortality tables are still to be used. See LA. OPS. ATT'Y GEN. 1689 (1942-44).

259. See Greco, *Valuation of Naked Ownerships, Usufructs and Annuities Under Louisiana Inheritance Tax Laws*, 10 LA. B.J. 119, 122 (1962); McMAHON & RUBIN, PLEADINGS AND JUDICIAL FORMS ANNOTATED, 11 LSA-CCP Form No. 807 (1964). The value of an annuity is determined by ascertaining the present value of the annual receipts for every year of the life expectancy of the beneficiary. The present values are then added together, and the sum total is the present value of the annuity. Succession of Cotton, 172 La. 819, 135 So. 368 (1931).

260. See Succession of Marsal, 118 La. 212, 42 So. 778 (1907); Succession of Teller, 49 La. Ann. 281, 21 So. 265 (1897); Succession of Brown, 94 So. 2d 317 (La. App. Orl. Cir. 1957); Succession of Gremillion v. Downs, 165 So. 481 (La. App. 2d Cir. 1936). *But cf.* Liebman v. Fontenot, 275 Fed. 688 (W.D. La. 1921) (subjecting the usufruct of the surviving spouse to federal estate tax).

The naked ownership of the children of the marriage, however, is subject to the inheritance tax. See *In re Stelly's Estate*, 185 So. 637 (La. App. 1st Cir. 1939).

261. See Succession of Baker, 129 La. 74, 55 So. 714 (1911) (confirmation of legal usufruct by will is not sufficient to change the nature of usufruct into a testamentary one for purposes of taxation). See also Succession of Brown, 94 So. 2d 317 (La. App. Orl. Cir. 1957); Succession of Lynch, 145 So. 42 (La. App.

at least one decision, the surviving spouse is entitled to deduct the value of the usufruct if children issue of the marriage renounce the inheritance and the survivor acquires one-half of the community as heir.²⁶²

According to article 2951 of the Louisiana Code of Civil Procedure of 1960, judgments of possession may not be rendered unless the inheritance taxes have been paid, or satisfactory proof has been given that no taxes are due, or the maximum amount claimed by the tax collector has been deposited in the registry of the court.²⁶³ In addition, the legislature has enacted certain statutes which prohibit banks, homestead associations, corporations, and other depositary institutions from delivering the deceased's property to anyone until satisfactory proof is given that the inheritance tax laws have been complied with.²⁶⁴ The usual proof is a judgment of possession issued by the court having jurisdiction over the succession proceedings. Questions thus

Orl. Cir. 1932) (confirmation merely confers the privilege of remarriage without forfeiture of the usufruct created by law).

262. See *Succession of Norton*, 157 So. 2d 909 (La. App. 1st Cir. 1963). This solution has been criticized as it implies, contrary to the Civil Code and Louisiana jurisprudence, that the usufruct of the surviving spouse pre-exists the inheritance of the one-half of the community by children of the marriage. See Comment, *The Usufruct of the Surviving Spouse*, 25 LA. L. REV. 873, 889 (1965). Cf. *Succession of Eisemann*, 170 So. 2d 913 (La. App. 4th Cir. 1965). Testator left his entire estate, consisting principally of community property, to his wife. On the authority of the *Norton* case, the widow sought to deduct for taxation purposes the value of usufruct over the deceased's share in the community. The court declared that "Succession of Norton must be distinguished from this case. There, the existence of forced heirs created the usufruct of the surviving spouse by operation of law. Here in the absence of forced heirs, no usufruct ever existed. . . . We hold, therefore, that the inheritance tax due on the Succession of Ludwig Eisemann should be computed on the value of the whole property and there can be deduction for a nonexistent usufruct by the surviving spouse."

In *Succession of Baker*, 129 La. 74, 55 So. 714 (1911), note 261 *supra*, deceased husband had bequeathed to his wife the disposable portion of his estate in perfect ownership and the remainder in usufruct. Since the only forced heir was a child of the marriage, the court held that the widow owed taxes on two-thirds of the deceased's separate property and on two-thirds of his share in the community property as owner, as well as on one-third of the deceased's separate property as testamentary usufructuary. No taxes were due on one-third of the deceased's share in the community property which the widow acquired in usufruct under article 916 of the Civil Code. If the *Norton* rule were to be followed, a surviving spouse in similar circumstances today should be entitled to deduct the value of the usufruct over the entire one-half of the community.

263. See LA. CODE OF CIVIL PROCEDURE art. 2951 (1960).

264. See, e.g., LA. R.S. 6:66 (1950) (banks); *id.* 6:789 (homestead associations); *id.* 12:503 (corporations). However, motivated by a desire to afford the surviving spouse some of the means of support in the interim between deceased's death and a judgment of possession, the legislature enacted special statutes allowing the surviving spouse to withdraw some funds from certain depositary institutions. See, e.g., *id.* 9:1513 (Supp. 1964) (banks-\$1,000.00); *id.* 6:751.1 (homestead associations \$1,500.00); *id.* 6:664 (credit unions-any amount in deposit in a joint account).

arise as to the right of the usufructuary to enjoy the property in case the naked owner does not discharge his tax liability. In an early case, the Louisiana Supreme Court declared that the usufructuary cannot be placed in possession of the property subject to usufruct before the full payment of taxes levied on the naked ownership.²⁶⁵ This solution does not result in defeat of the rights of the usufructuary. If the usufructuary is also the succession representative, he can pay the taxes and claim compensation from the heirs when he delivers their virile shares to them. If anyone else is representative, payment of taxes is insured by the rule that his discharge is conditional on payment of all debts.²⁶⁶ And if no representative is appointed and the heirs refuse to pay the tax, the collector is authorized to obtain judgment and sell sufficient property to satisfy the judgment.²⁶⁷

b. Creation of Usufruct by Acquisitive Prescription

Both the German²⁶⁸ and the Greek Civil Codes²⁶⁹ declare that usufruct may be created by acquisitive prescription. This method for the creation of usufruct, however, is not mentioned in the French or in the Louisiana Civil Codes. Accordingly, doubts have been voiced in France as to the availability of this method and argument *a contrario* has been drawn from article 690 of the Code Civil (corresponding to article 765 of the Louisiana Civil Code of 1870), according to which *predial* servitudes may be acquired by acquisitive prescription. This view no longer has followers in France and commentators are in agreement today

265. See *In re Cornell's Estate*, 137 La. 702, 69 So. 145 (1915). In the past, if the surviving spouse exercised actual possession over one-half of the community as usufructuary and the naked owners had avoided the payment of taxes, question arose as to liability for penalties. In *Succession of Bolan*, 158 La. 911, 105 So. 10 (1925), the court held that no penalty was to be paid by the naked owners upon termination of the usufruct. The inheritance consisted wholly of a dismembered title, the court declared, and thus it would be unfair to hold the heirs liable for the tax penalty because they paid the inheritance taxes when they became perfect owners instead of when they had only a fragmentary interest. Today, it is provided in La. R.S. 47:2422 (1950) that inheritance taxes prescribe within three years from December 31 of the year in which they become due.

266. See LA. CODE OF CIVIL PROCEDURE art. 2951 (1960); LA. R.S. 47:2407(c) (1950).

267. See LA. R.S. 47:2408(b) (1950); *id.* 47:2409(c).

268. As to movables, see B.G.B. § 1033, making applicable by analogy §§ 937-945 of the same Code. The acquirer of the movables must possess as usufructuary for ten years. Section 1033 applies even if the movables are lost or stolen, provided, of course, that the usufructuary be in good faith. See 3, 2 STAUDINGER-SPRENG, KOMMENTAR ZUM B.G.B. 1113 (11th ed. 1963). As to the immovables, see B.G.B. § 900(2). The requisite conditions are: possession by the acquirer for thirty years as usufructuary and registration in the land register.

269. See GREEK CIVIL CODE art. 1143. See also ITALIAN CIVIL CODE art. 987; LAWS OF PUERTO RICO-CIVIL CODE § 1502; SPANISH CIVIL CODE art. 648.

that both predial and personal servitudes may be acquired by acquisitive prescription.²⁷⁰ This conclusion is supported by the definition of possession in the Code Civil as "the detention or enjoyment of a thing or of a right."²⁷¹ In the light of today's doctrine, exclusion of acquisitive prescription as a method for the creation of usufruct should rest on express legislative prohibition.

The requisite conditions for the creation of usufruct by acquisitive prescription are identical with those governing acquisition of ownership by prescription. In that respect, the detailed rules governing acquisition of movables or immovables apply by analogy. Accordingly, the usufruct of immovables may be acquired in France by good faith possession of ten or twenty years or by bad faith possession of thirty years.²⁷² With respect to movables, possession is, in general, equivalent to title under article 2279 of the French Civil Code.²⁷³ Thus, in cases to which this article applies, a person who possesses a movable in good faith as usufructuary is deemed to have acquired the usufruct thereof even if he derives his title from a non-owner. In cases to which article 2279 does not apply, the usufruct of movables may be acquired upon the lapse of three or thirty years.²⁷⁴

The Louisiana Civil Code of 1870 does not contain a provision equivalent to article 2279 of the French Civil Code.²⁷⁵ Thus, a person possessing movables as usufructuary will be protected against an action brought by the true owner only upon completion of the three-year prescription, if he is in good faith, or of the ten-year prescription if he is in bad faith.²⁷⁶ With respect to immovables, the applicable prescriptions are those of ten or thirty years.²⁷⁷

270. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 766 (2d ed. Picard 1952); 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 640 (7th ed. Esmein 1961).

271. See FRENCH CIVIL CODE art. 2228; cf. LA. CIVIL CODE art. 3426 (1870).

272. See FRENCH CIVIL CODE arts. 2265, 2266, 2262; LA. CIVIL CODE arts. 3475, 3478, 3499 (1870).

273. See FRENCH CIVIL CODE art. 2279; YIANNPOULOS, *CIVIL LAW PROPERTY* § 127 (1966).

274. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 698, 766 (2d ed. Picard 1952).

275. See Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 604 (1932).

276. See LA. CIVIL CODE arts. 3506, 3509 (1870); YIANNPOULOS, *CIVIL LAW PROPERTY* § 148 (1966). Naturally, acquisitive prescription is excluded where the possessor began his possession precariously toward the naked owner. See LA. CIVIL CODE art. 3510 (1870); Succession of Heckert, 160 So.2d 375 (La. App. 4th Cir. 1964).

277. Cf. LA. CIVIL CODE arts. 3475, 3478, 3499 (1870).

The question of the creation of usufruct by acquisitive prescription has merely theoretical significance insofar as usurpers are concerned. Since the requisite conditions for the acquisition of usufruct by prescription are the same as those for the acquisition of ownership, it is hardly imaginable that a possessor in bad faith in whose favor the prescription has run will claim usufruct rather than perfect ownership. But this question has practical significance in cases where a person has acquired, in good faith, the right of usufruct from a non-owner. This person ought to be protected for the same reasons that he would have been protected if he had acquired perfect ownership.

c. Creation of Usufruct by Operation of Law

Article 916 of the Louisiana Civil Code of 1870²⁷⁸ accords to the surviving spouse a right of usufruct over the half of the community inherited by issues of the marriage. Special legislation in France²⁷⁹ has likewise accorded to the surviving spouse, in certain circumstances, a right of usufruct over the entirety or portions of the estate of the deceased spouse. No such right has been accorded to the survivor in Greece or Germany. In these countries, the surviving spouse is protected in a simple and effective way: in cases of intestate succession, he concurs with close relatives for a portion of the estate or he is called to succeed the deceased as his sole heir;²⁸⁰ and in cases of testamentary succession, the surviving spouse is entitled to a forced share.²⁸¹

278. See LA. CIVIL CODE art. 916 (1870), as amended by La. Acts 1844, No. 152: "In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold a [in] usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage." See also Oppenheim, *The Usufruct of the Surviving Spouse*, 18 TUL. L. REV. 181-217 (1943); Oppenheim, *One Hundred Fifty Years of Succession Law*, 33 TUL. L. REV. 43-58 (1958); Comment, *The Usufruct of the Surviving Spouse*, 25 LA. L. REV. 873-92 (1965).

279. See FRENCH CIVIL CODE art. 767, as amended by laws of March 9, 1891, April 29, 1925, and December 3, 1930.

280. See B.G.B. §§ 1931, 1932; GREEK CIVIL CODE arts. 1820, 1821. Even testamentary usufructs in favor of the surviving spouse are rare in both Germany and Greece. In these countries, the Civil Codes allow the creation of family substitutions and the surviving spouse may well be an instituted heir while children or other persons the substitutes. B.G.B. §§ 2100-2146; GREEK CIVIL CODE arts. 1923-1941.

281. See B.G.B. § 2303; GREEK CIVIL CODE art. 1825.

Further, article 223 of the Louisiana Civil Code of 1870 accords to "fathers and mothers . . . during marriage, the enjoyment of the estate of their minor children until their majority or emancipation."²⁸² Substantially similar rights of enjoyment are accorded to fathers rather than parents by corresponding provisions in the French²⁸³ and Greek²⁸⁴ Civil Codes. The German Civil Code had originally accorded to fathers a right of enjoyment over the patrimony of their minor children;²⁸⁵ however, constitutional and legislative reforms in post-war Germany resulted in profound modifications of the parent-child relations and, strictly speaking, in extinction of the parental enjoyment.²⁸⁶

Finally, a widow in necessitous circumstances may claim under article 3252 of the Louisiana Civil Code of 1870 a privilege up to the amount of one thousand dollars from the succession of her husband;²⁸⁷ and the survivor, widow or widower, may claim under article 2382 of the same Code, under certain circumstances, the so-called marital portion from the deceased's estate.²⁸⁸ If the deceased died without children, the survivor is awarded the amount of the privilege or the marital portion, as the case may be,²⁸⁹ in perfect ownership. But, in the presence of children, the survivor merely receives the sums granted to him

282. See LA. CIVIL CODE art. 223 (1870); LA. CIVIL CODE art. 239 (1825); LA. CIVIL CODE p. 52 art. 42 (1808); Dowling, *Parents' Usufruct of Child's Estate During Marriage*, 20 TUL. L. REV. 163-76 (1945).

283. See FRENCH CIVIL CODE art. 384.

284. See GREEK CIVIL CODE art. 1517.

285. See B.G.B. §§ 1649-1663 (1900).

286. See RONN CONSTITUTION (*Grundgesetz für die Bundesrepublik Deutschland*) art. 3(2) (1949); Law of June 18, 1957 (*Gleichberechtigungsgesetz*), effective since July 1st, 1958: 4 SOERGEL-LANGE, BÜRGERLICHES GESETZBUCH 324-29 (9th ed. 1963); Beitzke, *Betrachtungen zum neuen Kindschaftsrecht*, 5 EHE UND FAMILIE IM PRIVATEN UND ÖFFENTLICHEN RECHT 7 (1958); Donau, *Das neue Kindschaftsrecht*, 11 MONATSSCHRIFT FÜR DEUTSCHES RECHT 709 (1957), continued p. 6 (1958); Schramm, *Die durch das Gleichberechtigungsgesetz im Kindschaftsrecht eingetretenen Änderungen*, MITTEILUNGEN AUS DER PRAXIS, ZEITSCHRIFT FÜR DAS NOTARIAT IM BADEN-WÜRTTEMBERG 97 (1958).

287. See LA. CIVIL CODE art. 3252 (1870).

288. See *id.* art. 2382.

289. The widow "may assert either, but not both, of these rights. . . . She may . . . assert that one of these rights which will be more advantageous to her and afford her more protection." Succession of Tacon, 188 La. 510, 513, 177 So. 590, 591 (1938). The assertion of either right is not, as a matter of law, dependent upon the solvency or the insolvency of the succession. But, as a matter of fact, the widow's privilege is ordinarily claimed from insolvent successions whereas the marital portion, which is not a privileged claim, is obtained from solvent estates. Cf. *Malone v. Cannon*, 215 La. 939, 41 So.2d 837 (1949), Note, 10 LA. L. REV. 257 (1950); Comment, *The Marital Fourth and the Widow's Homestead*, 25 LA. L. REV. 259, 261 (1964).

in usufruct.²⁹⁰ Articles 3252 and 2382 have no exact equivalents in the Civil Codes of France, Germany, or Greece.²⁹¹

The creation, incidents, and function of legal usufructs in Louisiana, France, Germany, and Greece have been discussed in another study.²⁹²

290. See LA. CIVIL CODE arts. 3252, 2382 (1870).

291. Under article 205 of the French Civil Code, as amended by Law of March 9, 1891, however, the necessitous widow is entitled to alimony from the succession. In Germany and in Greece the surviving spouse is amply protected as a forced heir of the deceased. See note 282 *supra*.

292. See Yiannopoulos, *Legal Usufruct: Louisiana and Comparative Law*, to be published in a forthcoming issue of this *Review*.