Mineral Rights As They Affect The Community Property System

Harriet S. Daggett
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The new problems concerning mineral rights specifically affect the rules of community property in Louisiana in two major categories: (1) the conflicting claims of ownership between the community and the separate estates of husband and wife; (2) the conflicting rights of usufructuary and naked owner. When the latter situation arises upon the dissolution of the community by death of one of the spouses, it raises not only the problems of community property settlements but the many mooted questions of the whole law of usufruct and hence must occupy the greater portion of this paper. Before focusing upon the specific problems of the two main divisions, it seems advisable to point out the fundamental issue necessarily underlying the settlement of these particular questions.

Whether or not the disposition of the right to explore for oil and gas should be considered in every case as an alienation of a part of the realty has not been definitely established as yet. The legal nature of the right to capture minerals was the critical ground of legal battle in Louisiana for many years. It may be said definitively that Louisiana has adopted the non-ownership theory of oil and gas which means that only a right to explore may be conferred.¹ This right may arise out of a contract of sale or a contract of lease. It is settled that the former creates but a servitude and it is the opinion of the author that a lease, which likewise gives only the right to explore, can logically confer no greater substantive right when problems affecting the theory of ownership are involved.² Within this limit, however, the problem has been resolved into the two major compartments of servitude and lease, with fairly certain application of the law of those subdivisions.

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2. This problem is fully discussed in the chapter on the Nature of the Right in the monograph, Mineral Rights in Louisiana, referred to above.
The legal nature and ownership of the product derived from the exercise of the rights of servitude and lease is as yet only partly defined and presents as important problems as did the original question of the nature of the ownership, and the present problems of servitude and lease. There seems to be but one answer, in the judgment of the writer. No one would dispute the fact that oil and gas are a part of the realty while in storage within the earth. Their severance should be considered as a disposal of a part of the land regardless of the legal transaction involved. Some of the questions issuing out of this major problem have been settled by the courts and will be referred to first as a basis for the discussion of the topic of this paper.

When a possessor, whether in good or bad faith, restores land to the owner he must also return the oil and gas or its price because oil is not a fruit. The landmark decision of Elder v. Ellerbe laid down the principle in 1914 and relied heavily upon the French authorities to reach this eminently correct conclusion. The court referred in particular to the famous statement from Baudry-Lacantinerie that "fruits must be of things that are born and reborn of the soil" which cannot be simplified nor improved upon to express this concept. Since oil and gas deposits have taken years which geologists can only estimate to form, they represent the very antithesis of the idea of fruits of the land which the possessor in good faith may keep.

The case of Federal Land Bank v. Mulhern expresses the same basic thought though the question was raised in a very different manner. In this case production of oil under a lease granted after the giving of a mortgage was held to be such waste of the land and depreciation of the security as to give the mortgagee the right to foreclose his mortgage immediately.

The court in Wiley v. Davis spoke of the leasing of a minor's land under the special enabling act as an alienation of his realty and insisted upon a court order safeguarding such a disposal. The federal and state income tax provisions logically allow deductions for depletion in certain cases. The whole tenor of the Louisiana

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3. 135 La. 990, 66 So. 337 (1914).
4. The same problem was presented and Elder v. Ellerbe followed in Jackson v. Shaw, 151 La. 796, 92 So. 339 (1922).
5. 180 La. 627, 157 So. 370 (1934).
6. 164 La. 1090, 115 So. 280 (1928); See also Andrus v. Tidewater Oil Co., 189 La. 142, 179 So. 61 (1938).
7. Revenue Act of 1938, § 23(m), 52 Stat. 460, ——, 26 U.S.C.A. § 23(m) (1938); Murphy Oil Co. v. Burnet, 287 U.S. 298, 53 S.Ct. 161, 77 L.Ed. 318 (1932);
severance tax provisions, including their name, carries the thought of a loss of a natural resource which living states will not remain to see replaced. The fact that oil is not a fruit which will come again with normal culture but is a part of the land which is dissipated forever is a self evident truth.

The argument used against this simple notion that oil and gas are parts of the land consists chiefly in the court's use of the analogy of "products," synonymous with "fruits" in the French and Louisiana codes, in reaching the conclusion that royalty is rent in a mineral lease. There are several types of royalty which are not rent. The word is sometimes used loosely to indicate an interest in the mineral right, or as synonymous with servitude. The word has been used to mean the consideration paid for a mineral right or servitude or for a lease. The word is used frequently in a common form, termed a Royalty Deed, wherein it describes a mineral interest over which the owner—sometimes vendor, sometimes vendee—may have no leasing or production privilege. In a case soon to be argued before the Supreme Court, the contention is made that a reservation of "royalty" was understood to be a "rent charge," not a servitude and hence not subject to the prescription of ten years' non user. "Custom" was urged upon the district court to explain this meaning.


10. Glassmire, Oil and Gas Leases and Royalties (1935) 64: "Mineral grants are often erroneously called 'royalty deeds' but that designation is a misnomer; for it confuses the royalty proper with that which produces the royalty, or rather it mistakes the proceeds of the thing for the thing itself. Therefore a grant of minerals does not necessarily presuppose a lease to develop; but as a matter of fact, a lease is necessary in order that the royalty may be obtained. In other words, it is not the practice actually to operate for oil and gas under a general warranty or mineral deed."


12. See Royalty Deed forms; Mount Forest Fur Farms of America v. Cockrell, 179 La. 795, 156 So. 228 (1934); Wall v. United Gas Public Service, 181 So. 502 (La. App. 1938). See also note 10 supra.

ing from the varied connotations of the word has already been a fruitful ground for attempted fraud.¹⁴

The word "royalty" is used most frequently perhaps, and certainly most properly as far as its derivation¹⁵ is concerned, to describe the portion of the working interest which must be paid to the lessor, whether he is owner of the land or of the servitude or is merely a lessee himself, for the privilege of developing the lease. This use of the word was common in Louisiana instruments and cases before it became necessary for the courts to specifically label it rent, in order to apply the appropriate provisions of the civil code in that connection.¹⁶

Necessity for this label arose in connection with a contract to produce a solid, gravel. The grantor of the privilege under a contract which was found to be a lease claimed a lessor's privilege and it was granted. The court stated "that land adapted to mining or quarrying may be leased for a certain portion of the produce of such mine or quarry, and the fact that said portion is called 'royalty,' instead of rent, is not of the least consequence."¹⁷ The use of royalty as a synonym for rent for purposes of convenience in applying the lessor's privilege, the prescriptive period for rent collections,¹⁸ or for any other reason, does not affect the mineral substance in its relation to the land or prevent its being a severance of the realty.

COMMUNITY VERSUS SEPARATE PROPERTY

Conflicting Claims of Ownership

The same fundamental questions of ownership of oil and gas arise in settlements between husband and wife or their heirs upon dissolution of the community and in the determination of creditors' rights during the existence of the community, as are sug-

¹⁴ Chatman v. Giddens, 150 La. 594, 91 So. 56 (1922). See also Fontenot v. Ludeau, Sup. Ct. of La., Docket Nos. 34872-3-4-5-6-7 (Consolidated for Argument). (Appealed from the Thirteenth Judicial District Court in and for the Parish of Evangeline, Louisiana; J. Cleveland Fruge, Judge.)
¹⁵ See Glassmire, op. cit. supra note 10, at 55 et seq.
¹⁶ Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253 (1905); Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate, 115 La. 107, 38 So. 32 (1905); Goodson v. Vivian Oil Co., 129 La. 955, 57 So. 281 (1912); Hudspeth v. Producers' Oil Co., 134 La. 1013, 54 So. 891 (1914); Baird v. Atlas Oil Co., 146 La. 1091, 84 So. 866 (1920); Rowe v. Atlas Oil Co., 147 La. 37, 84 So. 485 (1920); Pipes v. Payne, 156 La. 791, 101 So. 144 (1924).
¹⁸ Board of Commissioners of Caddo Levee District v. Pure Oil Co., 167 La. 801, 120 So. 373 (1928).
gested by the problems of the respective rights of usufructuary and naked owner. The three estates involved in such settlements, namely, the separate property of the husband, the separate property of the wife, and the community property, make the problem even more involved in some of its aspects.

Separate Property of Husband: The separate property of the husband, while not presenting any trouble as far as creditors' rights are concerned because it is available for the satisfaction of the personal debts of the husband and the obligations of the community, raises the question of ownership of oil and gas, of lease rentals, and of bonuses upon settlement at the dissolution of the community. The fruits, both civil and natural, of the husband's separate property fall into the community during its existence. If the test of Elder v. Ellerbe that "oil is not a fruit" is applied, obviously the wife or her heirs have no claims upon the minerals produced. If the test of Logan v. State Gravel Company and Board of Commissioners of Caddo Levee District v. Pure Oil Company that "royalty is rent" is taken to mean rent in the usual predial lease sense of the word, the income falls into the civil fruit class and therefore into the community. If the husband sells his mineral rights for a lump sum or for part cash plus "royalties" in the nature of deferred payments it could scarcely be argued that he had not disposed of an interest in his land, the proceeds of which would, if properly preserved, continue to be his separate property. If he leases, he alienates the same right to explore which affects his estate substantially in the same manner.

Separate Property of the Wife: The fruits of the separate estate of the wife under her own administration remain hers, secure in general from all creditors except her own. If, however, the husband is administering her property or if he and she are administering it "indifferently" the fruits fall into the community and are available for the satisfaction of the husband's creditors and those of the community, and must be considered in the final settlement of the community as well.

Few cases have as yet been decided in this jurisdiction which bear specifically upon these problems. The case of Shell Petro-

20. 135 La. 990, 66 So. 337 (1914).
21. 158 La. 105, 103 So. 526 (1925).
22. 167 La. 801, 120 So. 373 (1928).
23. Daggett, op. cit. supra note 19, chap. VI.
eum Corporation v. Calcasieu Real Estate and Oil Co.\textsuperscript{25} presented a situation wherein a wife suing in her own right and administering her own separate property recovered royalty due her as a joint lessor with her husband who had leased community property. Since the wife was administering her own separate property, the question involving the community did not arise.

Eight states\textsuperscript{26} of the Union have the community property system but Louisiana is the only one of these which adheres to the non-ownership theory\textsuperscript{27} of oil and gas. California is in the "qualified ownership" class.\textsuperscript{28} No great help, therefore, is to be expected from these jurisdictions for the solution of Louisiana's community property problems of oil and gas, though the decisions are valuable for their analogies.

The case of \textit{Lucas v. Baucum}\textsuperscript{29} arose by petition for review of the decision of the United States Board of Tax Appeals for the district of Louisiana. The latter had decided that money received by Mrs. Baucum, as consideration in a sale of certain fractional royalty interests due her under a lease of land belonging to her separate estate but administered by her husband, was community property and hence should be taxed "one-half to her husband and one-half to petitioner."\textsuperscript{30} In reversing this decision, Judge Hutcheson regarded the sale of 3/32 from her original 1/8 royalty interest as a sale of "her mineral rights in the land."\textsuperscript{31} Since there is so little jurisprudence on the questions under discussion, a lengthy quotation should be permitted:

"Respondent, conceding that the courts of Louisiana have not directly determined the matter at issue here, insists that the state of the law in Louisiana upon the character and quality of an oil interest in the light of the jurisprudence of Louisiana upon community and separate property makes it clear that both royalties received from oil wells and the proceeds of their sale are fruits of the land, and fall into the community.

\textsuperscript{25} 185 La. 751, 170 So. 785 (1936).
\textsuperscript{26} Arizona, California, Idaho, New Mexico, Nevada, Texas, Washington, Louisiana.
\textsuperscript{27} Glassmire lists Indiana, New York, Kentucky, Louisiana and Oklahoma as "non-ownership states," op. cit. supra note 10, at 104.
\textsuperscript{28} Id. at 100; Graciosa Oil Co. v. Santa Barbara Co., 155 Cal. 140, 99 Pac. 483 (1909); Western O. & R. Co. v. Venago Oil Corp., 218 Cal. 733, 24 P. (2d) 971 (1933).
\textsuperscript{29} 50 F. (2d) 806 (C.C.A. 5th, 1931).
\textsuperscript{30} Bamma Baucum, Petitioner v. Commissioner of Internal Revenue, Respondent, 17 B.T.A. 1312 (1929).
\textsuperscript{31} Lucas v. Baucum, 50 F. (2d) 806, 808 (C.C.A. 5th, 1931).
"Assuming, but not deciding, that if the question here were as to the status of royalties reserved in oil leases, that is, returns to respondent as rents paid her for the right to take the minerals from her land, or even as to the status of the proceeds from the sale in bulk at an estimated figure of the royalties to be received, that the law in Louisiana might be different from that in Texas. It is perfectly clear, we think, that the facts presented here defeat respondent's claim. Here the respondent owning as her separate property the lands and minerals, first through the medium of a lease conveyed to the extent of \( \frac{7}{8} \) the real incorporeal right to extract the minerals from the land, Logan v. State Gravel Co., 158 La. 105, 103 So. 526, 527; Wilkins v. Nelson, 155 La. 807, 99 So. 607; Bodcaw Lbr. Co. v. Cox, 159 La. 810, 106 So. 313, 314, reserving in herself, in separate and distinct ownership, \( \frac{1}{8} \) of the minerals in and under the land (Bodcaw v. Cox, supra). Thereafter, she parted this time, not by lease, but by sale having however the same effect, (Logan v. State Gravel Co., 158 La. 105, 103 So. 526) with \( \frac{3}{32} \) of her mineral rights, vesting the purchaser with the incorporeal right, the real right or servitude, not as she had theretofore owned it, as a part of and appurtenant to the land, but separate and distinct from the land. Wilkins v. Nelson, 155 La. 807, 99 So. 607. Thus, in effect, by two separate conveyances she sold to various purchasers, not an interest in royalties, but \( \frac{31}{32} \) of her mineral rights in the land. Leydig v. Comm. (C.C.A.) 43 F. (2d) 494; Bellport v. Harrison, 123 Kan. 310, 255 P. 52.

"Certainly it would not be contended by respondent that if she had sold the land without reservation of the minerals she had thereby converted her separate property into community; nor had she sold her land reserving her minerals, or her minerals reserving her land, would it be contended by her that either of these transactions would have converted the proceeds from separate to community. It cannot be any more contended that because the minerals were disposed of by fractional sales such a result would come about.

"Whatever then may be the law, which we do not at all undertake to decide, as to the status, whether separate or community property, of royalties which respondent received from her lease, or as to the status of the proceeds if respondent, instead of selling her mineral interests had merely sold the right to receive the royalties to accrue under the lease, we think it
perfectly plain that upon no reasonable theory can a sale, as here, by the wife of a part of her mineral interests operate to convert separate into community property, and that the ruling of the board has the effect of a spoliation of the wife's property in favor of the community, upon facts which do not at all sustain it."

Undoubtedly, Judge Hutcheson arrived at the correct conclusion. Unfortunately, under the process of reasoning and by deliberate reservation, the question of the nature of the royalty, had the mineral interest remained in Mrs. Baucum's hands, was left open. It is submitted that if that fact were taken as a ground for a mystical conversion of the separate property into community property, that the distinction attempted would be one without a difference. The United States Board of Tax Appeals in 1931, considering the same community property question of separate versus joint income tax return on royalty sales by the husband, followed the decision of Lucas v. Baucum and added nothing to the open question.

The subsequent case of Turbeville v. Commissioner of Internal Revenue (also on review of a decision of the United States Board of Tax Appeals but from the District of Texas) set forth the same question pertinent to income tax returns. The problem was whether or not certain bonuses and royalties received from oil and gas leases negotiated by the husband on the separate property of the wife were community property. The fact was urged that because of an agreement between the husband and wife giving the management and control of her property to the husband, and consideration for his service being one-half of the revenues, that the proceeds became community property for which a joint return might be made. Judge Hutcheson in sustaining the decision of the Board and holding that these revenues were the separate property of the wife and taxable to her, cited Lucas v. Baucum and said:

"... Boiled down, what the parties were trying to do was to change the rule of property in Texas that bonuses and royalties from leases on the wife's separate property are her separate property, by an agreement that because of Turbeville's acting for her in negotiating the leases these receipts when

32. Id. at 807, 808.
34. 84 F. (2d) 307 (C.C.A. 5th, 1936).
obtained should be regarded as community property, one-half attributable to his management, one-half to her ownership. This will not do . . . there is nothing in the point that these receipts were fructus industriales, the result of the husband’s labor on the wife’s property. There was no working of the land, no production from it, by the husband. The only thing he did was to sell the property and receive the proceeds. It would be a straining after an unreality having no counterpart in the facts to hold that anything occurred here but a leasing of petitioner’s property under an agreement between petitioner and her husband that he should have one-half of the proceeds when and as received."

The case under the “absolute ownership” theory of Texas may not be authority for Louisiana but the difference in the theory of ownership certainly does not alter the nature of the substance which under either theory involves an alienation in fact of the most valuable and irreplacable element of the terrain and hence the conclusion should be the same.

Authority to Convey Mineral Rights in Community Property

Community Property in the Name of the Wife: Community property in Louisiana is in general under the complete control of the husband who as “head and master” of the community, “administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.” “But when the title to community property stands in the name of the wife, it cannot be mortgaged or sold by the husband without her written authority or consent.” The latter provision has been given a reciprocal interpretation by the court so that the wife has to have the “written authority or consent” of the husband to mortgage or sell community property even though the title stands in her name.

The limitations expressed are only in regard to sale or mortgage of the property. Would a husband be permitted to sell mineral rights without the wife’s consent? Clearly not, as this would be a sale of an immovable, a servitude. Would he be permitted

35. Id. at 309.
37. Ibid.
to lease? Under the idea of a predial lease, his general administrative powers as head of the community would undoubtedly cover the situation. Under the basic concept of the true meaning of an oil or gas lease which gives the same right as does the sale, and under the realistic situation involved, he would in fact be alienating a part of the land and hence should be prevented from validly doing so by the limitations of the 1912 statute.\textsuperscript{41} Parallel problems arise in connection with the similarly worded statute popularly called the Family Home Act.\textsuperscript{42}

Community Property in the Name of Husband and Wife: When community property stands in the names of husband and wife jointly, the Supreme Court of Louisiana has twice held that it may be sold by the husband without the consent of the wife\textsuperscript{43} "notwithstanding Article 2334 of the Civil Code, as amended by Act 170 of 1912 and by Act 186 of 1920, forbids the husband to sell or mortgage community property standing in the name of his wife without her written authority or consent."\textsuperscript{44} There is little doubt but that under Article 2404 and in their present reactionary mood on that particular subject the court would not hold valid a sale made by a wife of community property owned jointly with her husband.

Community Property in the Name of the Husband: The husband has in general full power to dispose of the community property standing in his name but there are certain limitations upon this power notable among which is the article\textsuperscript{45} forbidding him to make gifts of the "immovables of the community."\textsuperscript{46} Could he give away a mineral lease?

**Usufructuary versus Naked Owner**

While a "usufruct may be established by all sorts of titles"\textsuperscript{47} the most frequent creation is "by operation of law."\textsuperscript{48} The legal

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\textsuperscript{41} La. Act 170 of 1912.
\textsuperscript{42} La. Act 35 of 1921.
\textsuperscript{43} Young v. Arkansas-Louisiana Gas Co., 184 La. 460, 166 So. 139 (1936); Otwell v. Vaughan, 186 La. 911, 173 So. 527 (1937) (strangely enough, both controversies were over oil lands). See also Le Rosen v. North Central Texas Oil Co., 169 La. 973, 128 So. 442 (1930) and Clingman v. Devonian Oil Co., 188 La. 310, 177 So. 59 (1937).
\textsuperscript{44} See dissenting opinion of Chief Justice O'Neill, in Clingman v. Devonian Oil Co., 188 La. 310, 177 So. 59, 60 (1937).
\textsuperscript{45} Art. 2404, La. Civil Code of 1870; See Daggett, op. cit. supra note 19, at 23 et seq.
\textsuperscript{46} See also Family Home Act (La. Act. 35 of 1921); La. Const. of 1921, Art. XI, § 3 ("Homestead" provisions).
\textsuperscript{47} Art. 540, La. Civil Code of 1870.
\textsuperscript{48} Ibid.
usufructs are the usufruct of the parents upon the property of the
minor child, the usufruct of the surviving spouse upon the estate
of the deceased wife or husband under the "marital portion" pro-
vision, the usufruct of the so-called "widow's homestead" and
the usufruct of the surviving spouse upon the "share of the de-
ceeded" in the community property. The last one, falling under
the topic of this paper, is the one most frequently met with and
hence from a practical standpoint the most important, though the
series of articles governing usufruct are applicable regardless of
the manner in which the usufruct has been created, and hence the
discussion of mineral rights as affected by the usufruct of the com-
munity share would be pertinent to all other usufructs as well.

The Rights of Usufructuary and Naked Owner to Sell or Lease
Mineral Rights on Undeveloped Land

Usufructuary: It seems clear to the writer, under the articles
of the Civil Code, that an individual owning only a usufruct on
land could not, alone, create a mineral servitude upon it, or in
other words, he could not sell the mineral rights. The whole tenor
of the group of articles on usufruct is against the burdening or
alienating of any element of the ownership of the land. Article
590 is specific in these words: "He is also responsible to the owner
if he permits a servitude to be acquired on the property by pre-
scription." A deliberate creation by conveyance is obviously a
much stronger case. Again, Article 621 prohibits abuse or waste
on the estate under penalty of forfeiture of the usufruct. Since
the court has very properly declared the leasing for minerals of
land under mortgage to be such a waste as to give the mortgagee
an immediate right of foreclosure, it should follow that the usu-
fructuary could not lease the land under usufruct for mineral ex-
plorations. This view is supported not only by the clear language
of the code articles but by common law decisions dealing with
the rights of life tenants and remaindersmen whose legal position
corresponds perfectly to that of the usufructuary and naked
owner.

53. See also Art. 2386, La. Civil Code of 1870 (relatively unimportant be-
cause the settling of dowry occurs rarely if ever, today).
57. See Rupel v. Ohio Oil Co., 176 Ind. 4, 95 N. E. 225, Ann. Cas. 1913E
While no decision of the problem in Louisiana may be pointed out, certain cases bearing upon this question may be noted. In *Cochran v. Gulf Refining Co.* a widow, usufructuary, granted an extension of a lease given by her deceased husband. In a subsequent suit to cancel, brought after the death of the usufructuary, the court said:

"... Pretermitting the question whether the widow, as owner of one half of the land and usufructuary of the other half, could bind the co-owners by her contract extending the term of the lease, she bound herself by that contract; and, by accepting her succession unconditionally and partitioning the land that was subject to the lease which she was bound to respect, her heirs assumed her obligations with respect to the land, and were thereby bound to recognize the contract of lease."

The case of *Sparks v. Dan Cohen Co.* presented the problem of a lease given by a life usufructuary on a store building. The usufructuary leased the property on February 1, 1934, for five years at $200 per month giving the lessee an option of renewal for an additional five years at $300 per month. This optimistic usufructuary was then ninety-two years of age and died April 23, 1936. After the death of the usufructuary suit was brought to cancel the lease, and the court held the contract terminated under Articles 555, 606, and 2730 of the Civil Code, since parol evidence showed that the lessee knew that the lessor had only a usufruct. The court explained that while a warranty obligation in an act of sale is not extinguished by the death of the warrantor, and survives as an obligation of his succession, "the obligation of a lessor, to warrant and defend the lessee's right of possession of the leased premises, survives as an obligation of the succession of the lessor, in the event of his death before the expiration of the term of the lease."
lease, only in cases where the lessor claimed or pretended to be the owner of the leased premises—not in cases where the lessor claimed to be—and was in fact—only the usufructuary of the leased premises.\textsuperscript{62}

The Cochran case\textsuperscript{68} was distinguished on the ground that the oil lease there involved was treated as a sale, though the court did not make that the basis of the decision. Chief Justice O'Niell pointed out in the Sparks case\textsuperscript{64} that an oil lease is more a sale of a real right than an ordinary lease, a fact that was recognized by the court on many occasions and notably in the cases of Rives v. Gulf Refining Co.\textsuperscript{64} and Nabors Oil and Gas Company\textsuperscript{68} which were the bases for the decision of the Cochran case. The Sparks case, while not dealing with an oil lease, is of particular interest not only because of its discussion of the Cochran case but because it was decided since the Glassell case,\textsuperscript{67} which Chief Justice O'Niell suggested was not in accord with the idea of those cases which were the foundation of the Cochran case (distinguished from the Sparks case as being an oil lease which was more in the nature of a sale than a lease).\textsuperscript{68}

The right to "lease" given to the usufructuary by Article 555\textsuperscript{69} of the Civil Code clearly had no reference at its framing to the unknown contract of searching for oil. But if for sake of argument its applicability is admitted, the term of the lease must cease upon the death or remarriage of the usufructuary under Article 916 which would obviously make the life of the contract entirely too

\textsuperscript{62} Art. 606, La. Civil Code of 1870: "The right of the usufruct expires at the death of the usufructuary."

\textsuperscript{63} Art. 2730, La. Civil Code of 1870: "A lease made by one having a right of usufruct, ends when the right of usufruct ceases. The lessee has no right to an indemnification from the heirs of the lessor, if the lessor has made known to him the title under which he possessed."

\textsuperscript{64} 187 La. 830, 843, 175 So. 590, 594 (1937).

\textsuperscript{65} 151 La. 361, 91 So. 765 (1922).

\textsuperscript{66} 185 La. 365, 169 So. 436 (1936).

\textsuperscript{67} Gulf Refining Co. v. Glassell, 186 La. 1010, 175 So. 718 (1916).

\textsuperscript{68} The case of Stinson v. Marston, 185 La. 365, 169 So. 436 (1936) should also be noted in connection with this resumé of cases for the following statement: "The contention of plaintiffs that the option expired on the death of Mrs. Nina Vance because the lease or the option to lease, ceased of right at the expiration of the usufruct is without merit, in our opinion." This statement is unsupported and it is notable that in the Sparks decision rendered a year later this case was not referred to nor has it been cited elsewhere according to Shepard's Citator.

\textsuperscript{69} See note 61, supra, for provisions of Art. 555, La. Civil Code of 1870.
uncertain for risk of the investment necessary to develop an oil lease.

*Naked Owner*: The naked owner of the land cannot sell the mineral rights, so as to create a servitude, "unless it be done in such a manner as to be of no injury to the usufructuary."\(^7\)\(^7\)\(^0\) Certainly any conceivable development of an oil servitude would interfere with the enjoyment of the ordinary usufruct. The whole section "Of the Obligations of the Owner"\(^7\)\(^7\)\(^1\) would preclude the leasing of the land for development during the usufruct, because the affirmative rights given to the usufructuary would obviously negate a leasing privilege to the naked owner.

*Usufructuary and Naked Owner—Division of Compensation*: There would seem to be no good reason why the usufructuary and naked owner could not join in a sale or lease of the undeveloped mineral rights since between them exists perfect ownership of the land and each is specifically given the right to alienate his holding subject to the other's rights.\(^7\)\(^2\) If they contract\(^7\)\(^8\) for the division of the returns, obviously there is no problem; if legal division is involved, a troublesome question is raised.

Commentators on usufruct, considering this personal servitude of Roman law\(^7\)\(^3\) through its development to the modern concept, have compared the device to the life estate of the common law. The "naked owner" obviously corresponds to the remainderman. Since there are no Louisiana decisions on the question, the common law method of handling problems which involve the rights of life tenant and remainderman may serve as a fair and valuable guide and should be considered. A most interesting case on this subject and one of particular interest to Louisiana lawyers is *Barnes v. Keys*\(^7\)\(^4\) (from the Supreme Court of Oklahoma, a state adhering to the non-ownership theory) which presents the

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73. See Superior Oil Producing Company v. Leckelt, 189 La. 972, 181 So. 462 (1938). It is not stated whether usufruct was involved or not but on the face it appears probable. Note the following excerpt: "This property was acquired during the community of Gotlieb Leckelt and his deceased wife, Matilda Leckelt, who died on March 1, 1924. At the time the lease was executed Gotlieb Leckelt owned a one-half undivided interest in the property and each of the children owned an undivided one-tenth interest in the property." (181 So. 462, 463.)
75. 86 Okl. 6, 127 Pac. 261, 45 L.R.A. (N.S.) 173, Ann. Cas. 1915A, 515 (1912); See in Kulp, op. cit. supra note 57, at 81.
question of how the royalties should be shared where both life tenant and remainderman had joined in the lease. The life tenant had a life expectancy of about thirty-eight years. The taking of the oil was said to be in effect a sale of the land and hence it was held that the remainderman should have the proceeds, and the income therefrom should go to the owner of the life estate, or that the latter should have such a sum as would produce thirty-eight annual payments at six per cent. The following quotation from the opinion gives insight into the sound reasoning of the court and by the introduction of the case of Blakely v. Marshall further develops the analogy to the usufruct, which has been called the “civil law substitute for common law trusts.”

“The question is, all having agreed that the lease should be made, what interest should each have in the income from the lease? It would seem that their interests would be the same as if that much land had been sold. The life tenant would be entitled to the income from the purchase price, that is, to interest during his life. The remaindermen would be entitled to the whole amount upon the death of the life tenant. This rule is supported by the authorities. In Blakely v. Marshall, 174 Pa. 425, 34 A. 564, the court said: ‘Acting for themselves in their own right as tenants for life, and also as trustees for those in remainder, the plaintiffs executed the lease to N. B. Duncan, “for the purpose of operating and drilling for petroleum and gas,” for the term of 15 years from August 10, 1894, “and so long thereafter as oil and gas can be produced in paying quantities.” It was obviously necessary, as well as to the interest of both the tenants for life and the remaindermen, that they should thus unite in the lease, because no practical oil operator would undertake the development of supposed oil territory on the faith of a lease from life tenants only, and for the further and more important reason that, if not promptly developed and worked, the land would soon have been drained of its oil through wells on adjoining lands’.

Article 621 of the Louisiana Civil Code, providing for termination of a usufruct because of abuse or waste, directs that “the judge may, according to the circumstances, decree the absolute

76. 174 Pa. 425, 34 Atl. 564 (1896).
77. See Lepaulle, Civil Law Substitutes for Common Law Trusts (1927) 36 Yale L. J. 1126.
78. 36 Okl. 6, 127 Pac. 261, 262 (1912).
79. See Francez v. Francez, 152 La. 666, 94 So. 203 (1922) for application of this article.
extinction of the usufruct, or order that the owner shall re-enter into the enjoyment of the property subject to the usufruct, on condition that he shall pay annually to the usufructuary, or his representatives, until the usufruct expires, a sum which shall be fixed on by the judge in proportion to the value of the property subject to the usufruct." The second solution is similar to the reckoning device employed in *Barnes v. Keys*. The provisions for imperfect usufruct of things which must be consumed to be enjoyed, such as cotton, groceries, money, furnish the clearest and fairest analogy for oil and gas, certainly consumables.

The case of *Orndorff v. Consumers' Fuel Co.* presented a situation where the remaindermen leased but could not give possession or entry; this would clearly be the case if a "naked owner" in Louisiana saw fit to lease or sell without the consent and assistance of the usufructuary. The life tenant then gave a lease granting possession, which the court found he had a right to do, saying:

"We cannot subscribe to the position of the Consumers' Company that Anderson had no estate in the land nor the right to place an oil and gas lease thereon. He could not grant the oil and gas rights without the joinder of the remaindermen (Marshall v. Mellon, 179 Pa. 371, 36 A. 201, 35 L.R.A. 816, 57 Am. St. Rep. 601), but, in virtue of his life tenancy when they had granted their interest, he could deal on his own account for possession of the property which the lessee could not acquire against him." The owner of the life estate enjoyed his right "as tenant by the curtesy," the common law quasi-equivalent for the usufruct of the surviving spouse upon the deceased spouse's share of the community. He asked, according to his lease, for one-sixth—a child's share—of the one-eighth royalty produced during his life time and was awarded that amount by the court. Apparently, had he asked in time, he could also have had the value of the remainder-

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84. 308 Pa. 165, 162 Atl. 431 (1932); See in Kulp, op. cit. supra note 57, at 85.
85. 308 Pa. 165, 162 Atl. 431, 433 (1932).
man's one-eighth royalty impounded so as to receive the interest on it during his life. These cases and many others furnish fair and practical analogies for the division of consideration and royalty where naked owner and usufructuary join in a sale or lease of the mineral rights. Since the necessity for development is apparent and since oil and gas or their value is a consumable thing, the provisions and decisions for imperfect usufruct in Louisiana fit the new situation perfectly.

**The Rights of Usufructuary and Naked Owner to Sell or Lease Mineral Rights on Developed Land**

The next problem to be considered is that of the rights of the usufructuary and naked owner upon land *under development*. If the land comes to the usufructuary burdened with a mineral servitude, he will be "bound to suffer the servitude which existed on the land of which he has the usufruct at the time his right commenced." If the right to explore for minerals was conferred by a lease contract this grant will be protected under the preceding article if the court takes what would appear to be the only logical view, that substantively the right is the same, whatever the form of the contract granting it. However that may be, under the specific terms of the law of lease, the contract is not affected by the death of the lessor, so in any event the usufructuary is bound as is the naked owner. The interesting problem in this connection is the question of the disposition of the "rent" or "royalty" from the lease.

The usufruct in this situation should be, in the writer's judgment, upon the proceeds of the lease—not upon the land. One article of the Civil Code stands in the way of this conclusion. Article 552 stipulates that: "The usufructuary has a right to the enjoyment and proceeds of mines and quarries in the land subject to the usufruct, if they were actually worked before the commencement of the usufruct; but he has no right to mines and quarries not opened."

It "was not until 1910 that oil and gas were classed with 'other minerals'" and certainly were not in the contemplation of the redactors of that article. An oil well is certainly not a quarry and is not a mine within the understanding of the legisla-

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86. See collection by Kulp, op. cit. supra note 57, at 84.
89. See Guffey Petroleum Co. v. Murrell, Tax Collector, 127 La. 466, 53 So. 705 (1910).
tive composers of that date. In discussing misnomers applied in the oil and gas industry, Mr. Glassmire says:

"... The misleading term 'oil and gas mining lease' reminds one of the school-boy's definition of a crab, as being a 'red fish that crawls backwards.' Such a superficial likeness might appear conclusive were it not for the fact that a crab is not red, does not crawl backwards and is not a fish. At least this much might be well said of our present lease contract: oil and gas are not 'mined,' the contract isn't a 'mining lease or license' proper, and for most intents and purposes it isn't a lease at all. Its distinctive features, however, do not depend on its name, but rather on its legal effect and significance."

Admitting for purposes of argument the applicability of Article 552, its wording, nevertheless, suggests producing mines worked by the usufructuary himself or by his lessees, which is hardly a practical situation in oil development. Due to the cost of oil production it is rare indeed that the simple land owner is himself the producer. If the well is producing under a valid lease, the usufructuary should then be entitled to the usufruct of a certain amount of oil or money, consumable things, which may be disposed of at the pleasure of the usufructuary "but under the obligation of returning the same quantity, quality and value to the owner, or their estimated price, at the expiration of the usufruct." Under the language of Article 552, it is only when the land is "subject to the usufruct" that the usufructuary has a right to the "enjoyment and proceeds of the mines." The land in the hypothesis discussed is not subject to the usufruct but to the lease and it is the lessor's interest in the lease over which the usufruct is enjoyed. Certainly that might be true of an ordinary predial lease. To follow this reasoning further, however, it might well be to argue that the rent coming to the usufructuary would be his as a civil fruit, so again the analysis has to be bottomed finally upon the fact that an oil and gas lease involves a severance of the realty itself and has no likeness in fact to a predial lease.

No support is found in common law jurisdictions for this interpretation of Article 552. In dealing with the rights of the life tenant and remainderman, the same regulation is found as that

90. See also Art. 2738, La. Civil Code of 1870.
91. Glassmire, op. cit. supra note 10, at 68. (Italics supplied.)
92. See also Art. 551, La. Civil Code of 1870.
94. Italics supplied.
95. See Arts. 2730, 2731, La. Civil Code of 1870.
of the Louisiana\textsuperscript{96} and French\textsuperscript{97} codal provisions. According to Thornton, the life tenant coming to his estate where wells are producing is entitled to the royalty.\textsuperscript{98} Similarly, the Oklahoma Supreme Court has said:

"It is settled by a long line of decisions, beginning with Stoughton v. Leigh, 1 Taunt. 402, that a life tenant cannot open new mines, but that, where mines are already opened, the life tenant may work them.\textsuperscript{99} . . . The doctrine or theory of these cases is that the opening of new mines is a permanent injury to the inheritance constituting waste. In other words, it is held that the minerals are part of the land itself, and that the life tenant has no right to take the minerals, any more than he would have the right to sell or dispose of a part of the surface of the land."\textsuperscript{100}

The fallacy of the logic of granting the minerals to a life tenant simply because the mine happened to be open when his right accrued is apparent. Certainly, the minerals are still as much a "part of the land" as they were before. The waste of the title or permanent inheritance is the same in either case.

If usufruct in Louisiana commonly arose by contract, the question might seem unimportant. It usually comes into existence by operation of the law, and is created most frequently by the accident of death. If at the moment of that act of God the property is not under lease, then neither the naked owner nor the usufructuary may alone develop the property and they must share equitably in the enjoyment of this valuable part of the land. Each has protection against the other's failure to abide. "The usufruc-

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\textsuperscript{96} Art. 552, La. Civil Code of 1870.
\textsuperscript{97} Art. 598, French Civil Code (English translation by Cachard, rev. ed. 1930): "He has also the enjoyment, in the same way as the owner, of the mines and quarries which are being worked, when the usufruct begins; but, nevertheless, if such working cannot be carried on without a concession, the usufructuary can only have the enjoyment thereof after he has obtained the permission of the King (President of the Republic).

"He has no right to the mines and quarries which have not yet been opened, nor to the turf pits which have not been worked, nor to the treasure-trove which may be discovered during the continuance of the usufruct."

\textsuperscript{98} See 2 Thornton, The Law of Oil and Gas (1932) ch. 10.
\textsuperscript{99} 98. See 2 Thornton, The Law of Oil and Gas (1932) ch. 10.
\textsuperscript{100} 100. Barnes v. Keys, 36 Okl. 6, 127 Pac. 261, 262. See Kulp, op. cit. supra note 67, at p. 82.
tuary 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.101 The naked owner may cause the termination of the usufruct if the usufructuary gives a mineral lease which has been held as to a mortgagee to be "waste."102 If, however, a lease exists on the land when death occurs, then under what may be the popular interpretation of Article 552 the "proceeds" of the well, doubtless the main value of the inheritance, will go in perpetual ownership to the usufructuary, and the land may be returned to its owners exhausted of its richness and in many cases made valueless even for farming or any other purpose.

The fact that no comfort is found in common law authority for the author's view is not particularly disturbing and is more than counterbalanced by the civil law interpretations of the French commentators.108 These writers were found to be in accord—to an unhoped for extent—with what in the writer's judgment is the only equitable view to be taken of the mine and quarry article. Furthermore, the stupidity and injustice of Article 598104 of the French Code, from which our Article 552 was taken, was hard fought as early as in the conferences held by the framers of the Code Napoleon.

The projet prepared by commissioners of the government in the year eight of the Republic of France (1800) contained the following provision: "Les mines et carrières ne sont pas comprises dans l'usufruit."105 In commenting upon this provision, Laurent says: "The commission charged with the redaction of a projet of the civil code had formulated the true principles in declaring that 'mines and quarries were not comprised within the usufruct.' All that the usufructuary would have been able to claim, was to enjoy the interest of the capital extracted from the earth, as he had the right to enjoy other capitals."106 The projet was presented

103. The writer is indebted to DeVan D. Daggett, II, A.B. (Louisiana State University) LL.B. (Yale) presently graduate student in Louisiana State University Law School, for the research in French sources.
104. For text of Art. 598, French Civil Code, see note 97, supra.
106. "La commission chargée de la rédaction d'un projet de code civil avait formulé les vrais principes en déclarant que 'les mines et carrières n'étaient pas comprises dans l'usufruit.' Tout ce que l'usufruitier aurait pu
to the various courts of France, and Laurent states that the pro-
test of the Court of Lyons, based on the “existing jurisprudence,” was responsible for the rejection of this provision and for the article which was adopted in the Code Napoleon—and hence for the present Louisiana codal provision. The commissioners named by the Court of Appeal of Lyons, made the observation that “... in general, it is only the discovery of quarries and the produce of metal mines which are prohibited to the usufructuary by the present jurisprudence.” However, according to Laurent, the article as finally adopted went much further than the “old law.” His comment follows:

“But the old law did not go as far as the civil code. The Roman law is not authority on this matter; the most eminent jurists believed that the interior products of the soil renewed themselves like fruits, or that at least they were inexhaustible. This is a double error. The richest mines will in the end be exhausted; if men are not frightened by that prospect, however certain it may be, it is because they, feeble creatures, are only preoccupied with their own life-time interests, and hardly worry about what will happen in the centuries to come. Daily experience constantly contradicts the Roman jurists. In the old law, they had restrained the rights of the usufructuary; they only permitted him to continue the exploitation begun by the proprietor in the exceptional case where the mine was so abundant that it appeared in some way inexhaustible. The idea was just, even though it rested upon an incorrect supposition. It was desired that the usufructuary should not consume the substance of the thing, and that at the end of the usufruct he should return an enjoyment nearly equal to that which he had received. But that is impossible; therefore the usufructuary should have only the enjoyment of the products, and account for the capital to the naked owner.”

107. 6 Laurent, Principles de Droit Civil Francais (2 ed. 1876) 564, no 448.
108. “En général, il n'y a que la découverte des carrières et le produit des mines de métaux qui soient prohibés à l'usufruitier par la jurisprudence actuelle.” 4 Fenet, op. cit. supra note 105, at 102.
109. Art. 598, French Civil Code, as set out in note 97, supra.
110. “Ulpian, dans la loi 7, § 1, D., solut. matrim. (XXIV, 3); Ducaurroy, Bonnier et Roustan, t. II, p. 120, no 185.” (note 2, in 6 Laurent 564)
112. “Mais l'ancien droit n'allait pas aussi loin que le code civil. Le droit romain est sans autorité en cette matière; les jurisconsultes les plus éminents
The discussion in the French Conseil d'État at the time of the adoption of the projet as reported was not concerned so much with the provision under discussion in this paper as with the matter of government concessions.118

Laurent114 comments on Gary’s115 exposition in the following manner:

"According to the terms of Article 598, ‘the usufructuary enjoys, in the same manner as the proprietor, the mines and quarries which are in exploitation at the time of the opening of the usufruct; he has no right to mines and quarries not yet open.’ The orator of the Tribune said that this disposition is a consequence of the principle that the usufructuary enjoys like the proprietor, in conserving the substance of the thing. If the mines are open when the usufruct begins, the usufructuary will continue to enjoy them; but he will never be authorized to open any if the proprietor has not done so, because he must enjoy as the proprietor did, without being able to destroy the products of the soil as the fruits are of the plant. Double error. The richest mines will not be exhausted; if the men do not fear the future, whatever it may be, it is because they only think of their interests, and very little of what will happen in a hundred years. Always, experience has refuted the ancient jurists. In ancient times, the rights of the usufructuary were restricted; he was only allowed to continue the mining operations started by the proprietor in cases where the mine was so abundant that it seemed as if it would never be exhausted. The idea was right, although it was based on an inaccurate assumption. One wanted that the usufructuary not consume the substance of the thing, but only enjoy like the proprietor, with the capital. But this is impossible; therefore the usufructuary should only have the enjoyment of the products, and take them into account. This is not very juridical. Yes, the usufructuary enjoys like the proprietor, but from the products, and not of the capital. Or, the products of the mines and carrières are not certain as a fruit; it is part of the fund, that is the substance of the thing that the exploitant expells successively; how can the usufructuary claim the right to exploit the mines and carrières, which should conserve the substance?" 6 Laurent, loc. cit. supra note 106.

113. 11 Fenet, op. cit. supra note 105, at 179 et seq.
114. "Aux termes de l'article 598, l'usufruitier jouit, de la même manière que le propriétaire, des mines et carrières qui sont en exploitation lors de l'ouverture de l'usufruit; il n'a aucun droit aux mines et carrières non encore ouvertes." L'orateur du Tribunat dit que cette disposition est une conséquence du principe que l'usufruitier jouit comme le propriétaire, en conservant la substance de la chose. Si les mines sont ouvertes au moment de l'ouverture de l'usufruit, l'usufruitier continuera d'en jouir; mais il ne sera jamais autorisé à en ouvrir quand le propriétaire ne l'a pas fait, parce qu'il doit jouir comme le propriétaire jouissait et sans pouvoir dénaturer la substance de l'héritage soumis à l'usufruit. Ces motifs ne sont pas très-juridiques. Oui, l'usufruitier jouit comme le propriétaire, mais des fruits, et non du capital. Or, les produits des mines et carrières ne sont certes pas un fruit; c'est une partie du fonds, c'est donc la substance de la chose que l'exploitant expulse successivement; comment l'usufruitier aurait-il le droit d'exploiter les mines et carrières, lui qui doit conserver la substance?" 6 Laurent, op. cit. supra note 106, at 563, no 448.
115. Discours Prononcé par le Tribun Gary devant le Corps Léjislatif. 11 Fenet, op. cit. supra note 105, at 228 et seq.
substance of the property subjected to the usufruct. These reasons are not very juridical. To be sure, the usufructuary enjoys like the proprietor, but he enjoys the fruits, and not the capital. Now, the products of mines and quarries are certainly not a fruit, but a part of the ground. It is therefore the substance of the thing which the exploiter successively depletes; how could the usufructuary have the right to exploit the mines and quarries, when he must conserve the substance?" It is interesting to note the close similarity between the erroneous reasoning on the protection of the substance criticized by Laurent and that of the common law jurists indicated above. Gary's discussion does disclose, however, according to his interpretation, that under the Roman law mining was only allowed to the usufructuary when the deposits were located in areas which had no agricultural value or when the mining would not interfere with cultivation. It will be seen, therefore, that the French Civil Code, while following the Roman provision of permitting the usufructuary to enjoy the mines, departed from the Roman idea and limitation in order to suit the changed conditions of their time. Louisiana might well follow the French example and modulate to suit her time and the new substance involved. Certainly, Louisiana should not feel bound by a theory originating in the Roman law and modified by the French, when even the French modulation was severely criticized in 1800. Conditions in regard to oil and gas are so foreign to both the Roman and the old French concepts that adherence to the old provisions seems marked stupidity. It is interesting to note that the Civil Code of the Province of Quebec includes in the article dealing with mines and quarries both the provision of the unadopted projet of the Code Napoleon that "mines and quarries are not comprised in the usufruct of land" and the substance of the French and Louisiana provisions expressed in these words: "If however these quarries, before the opening of the usufruct, have been worked as a source of revenue by the proprietor, the usufructuary may continue such working in the way in which it has been begun."

116. "Gary, Discours, no 14 (Locr6, t. IV, p. 139)" (note 2, 6 Laurent 563) (also reported in 11 Fenet, op. cit. supra note 105, at 234).
118. Supra note 115, at 234 et seq.
119. See comments by Laurent, supra note 112; and by Gary, supra note 118.
120. Art. 460, Quebec Civil Code (1937).
What is Developed Land? Again, a plague of litigation may arise out of what may be the popular interpretation of Louisiana's article on mines and quarries. What would constitute an "opened" oil well? Would the fact that a lease had once been given, that unsuccessful operations had been begun, that a geophysical survey had been made, that a shallow strata had been worked, constitute an "open mine or quarry"? Some of these questions have been answered in common law jurisdictions, and others have not. The analogies to be found in the decisions on "user" of servitude are far from satisfactory for the solution of a problem which has its roots in rights of such a different nature. Laurent gives serious consideration to these problems presented by the French article. A lengthy extract may be pardoned since material on the topic is so scanty and his remarks are so pertinent. Of course, his reference to that portion of the French article dealing with government concessions does not concern Louisiana but his analysis even in that regard is valuable.

"Of mines of which the exploitation was commenced. The essential condition required by the law in order that the usufructuary may enjoy the mines, is that they be in exploitation at the time of the opening of the usufruct (art. 598). When

121. See Thornton, op. cit. supra note 98.
122. Art. 598, French Civil Code (English translation by Cachard, rev. ed. 1930): ". . . but, nevertheless, if such working cannot be carried on without a concession, the usufructuary can only have the enjoyment thereof after he has obtained the permission of the King (President of the Republic.)."
123. "Des Mines dont l'Exploitation était Commencée. La condition essentielle requise par la loi pour que l'usufruitier jouisse des mines, c'est qu'elles soient en exploitation lors de l'ouverture de l'usufruit (art. 598). Quand peut-on dire que les mines sont en exploitation? C'est une question de fait plutôt que de droit. En effet, sur quoi se base le droit de l'usufruitier? Sur la jouissance du propriétaire, que l'usufruitier continue. Or, la jouissance est un fait, et, dans l'espèce, il faut ajouter qu'il y a une question d'intention. La mine est un capital; le propriétaire a-t-il l'intention d'employer ce capital pour s'en faire un revenu? Dans ce cas, il y a exploitation, et par suite l'usufruitier pourra la continuer."

"Il se peut même que l'usufruitier n'ait aucun droit ni à l'exploitation, ni à la redevance. Nous avons dit plus haut (no 247) que la concession d'une mine a pour effet de démembler la propriété; la mine est séparée de la superficie, et forme une propriété distincte. On peut donc avoir l'usufruit de la superficie sans avoir l'usufruit de la mine, et réciproquement; et l'on peut aussi avoir l'usufruit de l'une et de l'autre. Tout dépend de la volonté des parties intéressées. La question de savoir si l'usufruit porte sur la superficie, sur la mine ou sur l'une et l'autre, sera décidée par l'acte constitutif de l'usufruit.

L'application de ces principes donne lieu à quelques difficultés. On suppose que le propriétaire a fait des travaux de recherche ayant pour objet de découvrir la mine. Est-ce là un commencement d'exploitation? Non évidemment. On ne peut pas dire qu'une mine soit exploitée alors que l'on ne sait pas encore s'il y a une mine. Vainement dirait-on que le propriétaire a
might one say that mines are in exploitation? That is a question of fact more than of law. In effect, upon what is the right of the usufructuary based? Upon the enjoyment of the proprietor, which the usufructuary continues. But, the enjoyment is a fact, and, in that event, it must be added that there is a question of intention. The mine is capital; did the proprietor have the intention of employing that capital to obtain a revenue? In that case, there is exploitation, and consequently the usufructuary will be able to continue it.\(^{124}\)

“It is even possible that the usufructuary has no right, either to the exploitation, or to the revenue. We have said above (no. 247) that the concession of a mine has the effect of dismembering the property; the mine is separated from the superficies, and forms a distinct property. One may thus have the usufruct of the superficies without having the usufruct of the mine, and vice versa; and one may also have the usufruct of the one and the other. Everything depends upon the will of the interested parties. The question of knowing whether the usufruct bears upon the superficies, upon the mine or upon one and the other, will be decided by the act constituting the usufruct.\(^{125}\)

“The application of these principles gives rise to several difficulties. If the proprietor has made some research for the

\(^{124}\) "Aubry et Rau, t. II, p. 485, note 32 et les autorités qui y sont citées.”

\(^{125}\) "Genty, De l’usufruit, p. 111, n° 140.”
discovery of a mine, is that a commencement of exploitation? Obviously not. One cannot say that a mine is being exploited when it is not yet known whether there is a mine. It may be said in vain that the proprietor has manifested the intention of exploiting the mine; one replies, and the reply is peremptory, that the intention is necessary, but that it does not suffice; there is also necessary the fact of the enjoyment. And that is very logical. In making the search to discover a mine, the proprietor certainly manifests the will to exploit it, but upon one condition, that the mine be sufficiently rich to give a profit after the costs of opening and of exploitation will have been paid. It is thus quite possible that the prospecting for the mine may not be followed by exploitation.126

"If the usufruct is constituted after the proprietor has obtained the concession, but the exploitation was not begun until after the opening of the usufruct, will the usufructuary have the right to commence it? It is first necessary to see if the usufructuary has a right to the mine, that is to say if the usufruct does not bear exclusively upon the surface. If it is certain that the usufruct bears on the mine, it is necessary to decide whether the usufructuary may exploit it, not by virtue of article 598, which requires that the exploitation be commenced, but by virtue of the intention of the constituent. Here is a case which was presented before the court of Lyons. A testator wills to his wife the usufruct of all his goods; he wills to his nephew all his immovables and particularly the fifth of the concession of a mine. The court decided that the usufruct included that fifth. Hence the usufructuary had the right to exploit it, since it is the exploitation itself which was willed to him.127 But if the title constituting the usufruct did not decide the question, it would be necessary to apply article 598 . . . ."

The writer has the highest personal and professional regard for the framers of the recent Proposed Mineral Code for Louisiana and for the scholarly work behind that proposed code. It was a

127. "Lyon 1er juillet 1840, Dalloz, au mot Usufruit, no 327." (note 2, in 6 Laurent 566)
128. In the omitted portion, reference is made to the following: Lyon, 24 mai 1853, Dalloz, 1855, 2, 347; Loi du 10 avril 1810, art. 42; Proudhon, t. III, no 1206; Duranton, t. IV, no 569; Demolombe, t. X, no 432 et 436; Dalloz, au mot Mines, no 297 et suiv." (notes in 6 Laurent 567)
keen disappointment, however, to find the article which would perpetuate the old principles of the present law, condemned by famous French jurists even before its official appearance in the Code Napoleon; awkward, inequitable and unsuited to mineral rights in Louisiana. It is the hope of the author, that, if and when the mineral code is again offered to the Legislature for acceptance, a modification of these provisions may be effected, or that in the interim, the courts may see fit to place a different interpretation upon the old article of the Civil Code or decree its entire inapplicability to the modern problem.

So called "bonuses" would ordinarily follow the contract to which they are attached as additional compensation and should present little trouble per se after the major problems of royalty in its various uses are settled. Delay rentals in mineral lease contracts represent an intermediary stage and have left a query in the minds of commentators on life estate versus remaindermen which will certainly arise to perplex commentators on usufructuary versus naked owner and community property problems. As Laurent has said in another connection "One cannot say that a mine has been exploited when he does not yet know if there is a mine." Mr. Glassmire comments as follows:

"The [lease] contract in no sense resembles a house or farm lease, nor has such a lease contract the distinctive characteristics of an ordinary leasehold. The estate is granted for certain considerations, and the incidental 'rentals and royalties' are not rent moneys paid for the use of land and tene-

129. Art. 42, Second Revised Draft of the Mineral Code, prepared for the 1938 session of the Louisiana Legislature: "In the case of property subject to usufruct, except in the case where the property was actually producing minerals at the date of the creation of the usufruct, the consent of the usufructuary is not necessary. The mineral lease may be validly executed by the naked owner, who shall, in the absence of an express agreement, be entitled to receive the down payment, the delay rentals and the royalties, and the lessee shall have the full right of possession for all the purposes of the lease without interference by the usufructuary. However, when the property was actually producing minerals at the date of the creation of the usufruct, the lease may be validly executed by the usufructuary who shall be entitled to all of the avails of the lease, and the consent of the naked owner shall not be necessary. In such case, the naked owner shall take over the property at the termination of the usufruct, subject to any such valid leases executed by the usufructuary. Likewise, in such case, whatever shall have been received by the usufructuary shall be deemed income and therefore not due to be restored to the owner." See also Article 28: "Likewise, the usufruct of the mineral right is considered in law a perfect usufruct, as in the case of other immovables." But see Dreyfous, The Relation of the Proposed Mineral Code to the Civil Law (1938) Tulane L. Rev. 606.

130. See Kulp, op. cit. supra note 57, at 84, n. 10.

131. 6 Laurent, op. cit. supra note 106, at 566, no. 450.
ments. It resembles a lease only in that it contains a definite or indefinite term and provides for surface rights necessary to development, from which incidental attributes it derives its name.\textsuperscript{132}\textsuperscript{132}

The reports are full of similar statements made by the Supreme Court of Louisiana. These rentals arising out of a mineral contract contemplating development, whether or not the latter ever ensues, certainly should not be confused with ordinary land rentals and might best be allotted in the same manner as are the other revenues.

The attempted analysis of the problems presented in this paper is grounded upon the belief that the courts of Louisiana have made it plain that, under the non-ownership theory of oil and gas, a sale or lease can confer only the right to explore, and that consequently when problems of basic fundamental concepts of ownership are involved, solutions must be based upon this one idea. The main arguments against this theory seem to proceed from dicta and inadvertent comments made from time to time in cases whose decisions do not involve the underlying rule. The decision of the case of \textit{Gulf Refining Company v. Glassell}\textsuperscript{133}\textsuperscript{133} and the statements made therein are given entirely too much weight. The case was a procedural settlement and has been strictly confined to that holding in subsequent litigation.\textsuperscript{134}\textsuperscript{134} The decision did not evidence, in the writer's judgment, any intention on the part of the Supreme Court to negate their firm statements and important judgments bearing upon the problems discussed in this paper.

It is a noteworthy juridical achievement that the court has been able, in formulating a new jurisprudence, to waver little and to create a body of principles from statutes old and poorly adapted to the subject matter in hand. The future settlement of the many unanswered questions raised in this discussion, which mean so much to the property owners of this state, may be a hopeful expectation.

\textsuperscript{132} Glassmire, op. cit. supra note 10, at 68. (Italics supplied).
\textsuperscript{133} 180 La. 190, 171 So. 846 (1936); see La. Act 205 of 1938, negating the effect of this decision.
\textsuperscript{134} Smith v. Kennon, 188 La. 101, 175 So. 763 (1937); United Gas Public Service Co. v. Mitchell, 188 La. 651, 177 So. 697 (1937); Tyson v. Spearman, -La.--, 183 So. 201 (1938). The lessee of an oil and gas lease has an action against lessor to have validity of lease judicially determined. \textit{Jefferson v. Childers}, 189 La. 46, 179 So. 30 (1939).