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SECURITY DEVICES

*Michael H. Rubin**

SURETYSHIP

Because suretyship is a contract, there must be both an offer and an acceptance. An offer is irrevocable for a reasonable period of time.[1] Acceptance of an offer may be made through an express written statement[2] or through actions that necessarily imply acceptance when the parties contemplate such actions will suffice.[3]

Travelers Indemnity Company v. Ducote[4] involved a performance bond for a livestock dealer. The bonding company required, prior to the bond's being issued, that the defendants indemnify it from loss through suretyship agreements. The defendant sureties claimed that their contracts never became binding because the bonding company did not notify them it had issued the performance bond. The court found that the contracts executed by the defendants showed that they did not expect and were not to receive any written notice of acceptance; mere issuance of the performance bond was sufficient for acceptance. Therefore, the court found the defendants liable on their indemnity agreement.[5]

In the last five years the Louisiana Supreme Court has rendered three significant decisions that have attempted to harmonize the conflicting requirements of the Louisiana Civil Code articles on suretyship,[6] the Louisiana Civil Code articles on solidary obligations,[7] and contracts by which a surety binds himself *in solido* with the principal obligor.

By definition, a surety's obligation is accessory to that of the

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1. LA. CIV. CODE arts. 1801, 1804, & 1809.
2. LA. CIV. CODE arts. 1811-14.
3. LA. CIV. CODE arts. 1811, 1816, & 1817.
4. 380 So. 2d 10 (La. 1980).
5. Compare this case with *L. D. Brinkman & Co. v. Cash & Carry Building Materials Co., Inc.*, 377 So. 2d 415 (La. App. 2d Cir. 1979), in which it was held that the guarantor for an open account was not liable because he never received any notification of acceptance of his offer to become a guarantor and because, from the terms of this contract, the creditor should have known that an express notice of acceptance was required. The guaranty was by one of two sole shareholders of a corporation; the guarantor ceased to be a shareholder prior to the extension of credit.
6. LA. CIV. CODE arts. 3035-70.
7. LA. CIV. CODE arts. 2091-2110.

principal debtor.[8] A surety has a right of discussion, the ability to require the creditor to proceed against the debtor's other assets;[9] division, the right to require the creditor to proceed against each surety for his virile share;[10] and indemnity, the ability of the surety, regardless of the actions of the creditor, to receive full reimbursement from the principal debtor.[11]

The first of the supreme court's decisions was *Louisiana Bank and Trust Company, Crowley v. Boutte*.[12] Four stockholders signed a single continuing guaranty agreement containing language by which they bound themselves in solido with the debtor corporation. After filing suit, the bank released with the corporation and three of the four shareholders, specifically reserving its right against the fourth shareholder. The court held that the language of the continuing guaranty agreement[13] allowed the creditor to view the debtor and all shareholders as solidary obligors rather than as principal debtor and sureties. Since the creditor had expressly reserved his rights in accordance with Civil Code article 2203, the remaining shareholder was bound even though the corporate borrower was released. The court did not have before it either the issue of the amount of the remaining shareholder's liability or the question of what rights, if any, the shareholder retained to recover monies from the corporation or the other shareholders.[14]

The second case, *Aiavolasiti v. Versailles Gardens Land Development Company*,[15] involved three separate transactions con-

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8. LA. CIV. CODE art. 3035.

9. LA. CIV. CODE arts. 3045-48.

10. LA. CIV. CODE arts. 3049-50.

11. LA. CIV. CODE art. 3057.

12. 309 So.2d 274 (La. 1975). The *Boutte* case was the object of some criticism. *See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Security Devices*, 36 LA. L. REV. 437 (1976); Comment, *The Extinction of the Surety's Obligation*, 23 LOY L. REV. 539 (1977); Note, *Right of the Solidary Surety: Louisiana Bank & Trust Co. v. Boutte*, 36 LA. L. REV. 279 (1975); Note, *Security Rights—Suretyship—Release of Principal Debtor Does Not Discharge Solidary Surety*, 49 TUL. L. REV. 1187 (1975).

13. We do furthermore bind and obligate ourselves, our heirs and assigns in solido with said debtor, for the payment of the said indebtedness precisely as if the same had been contracted and was due or owing by us in person hereby agreeing to and binding ourselves, our heirs and assigns, by all terms and conditions contained in any note or notes signed or to be signed by said debtor, making ourselves party thereto . . . .

309 So. 2d at 276 n.1.

14. The court attempted to indicate, in *obiter dictum*, that the remaining shareholder did have some rights. 309 So. 2d at 278-79. The court's dictum, however, raised more questions than it answered. See note 12, *supra*.

15. 371 So. 2d 755 (La. 1979). The *Aiavolasiti* case also generated much comment and criticism. *See The Work of the Appellate Courts for 1978-1979 Term—Security*

sisting of both promissory notes and continuing guaranty agreements. All the contracts contained language by which sureties or endorsers bound themselves *in solido* with the principal debtor.[16] Reaffirming *Boutte*, the court in *Aiavolasiti* reasoned that when a surety signs a contract binding himself *in solido* with the principal debtor, the creditor may view all of the parties as solidary obligors; as between sureties themselves, however, and as between the sureties and the debtor, the rules of suretyship continue to apply.

The third and most recent case is *First National Bank of Crowley v. Green Garden Processing Company, Inc.*[17] Three shareholders signed separate but identical continuing guaranty agreements binding themselves *in solido* with the corporate borrower.[18] After suit was filed one of the shareholders received a bankruptcy discharge and another was released. It is not clear from the court's opinion whether the release was with or without a reservation of rights. Amazingly, the court did not refer to either *Boutte*, or *Aiavolasiti* or to any other Louisiana Supreme Court case dealing with the rights of sureties who sign a contract imparting solidary liability.[19] The court ruled, solely on the basis of the contractual language, that the remaining shareholder was liable to the bank for 100% of the amount stated in the guaranty agreement.[20]

Devices, 40 LA. L. REV. 572 (1980) [hereinafter cited as *1978-1979 Term*]; Note, *Aiavolasiti: A Conflict Resolved, A Conflict Ignored*, 40 LA. L. REV. 483 (1980); Note, *Louisiana Supreme Court Clarifies the Solidary Surety's Right to Contribution*, 25 LOY L. REV. (1979).

16. The continuing guaranty agreements provided:

> [A]nd I hereby bind and obligate myself, my heirs and assigns, in solido with said debtor, for payment of any such indebtedness or liability precisely as if the same had been contracted and was due or owing by me in person, hereby agreeing to, and binding myself, my heirs and assigns, by all the terms and conditions contained in any note or notes or other obligation or obligations signed or to be signed by said debtor, making myself a party thereto . . . .

371 So. 2d at 757 n.2.

17. 387 So. 2d 1070 (La. 1980). This case will be noted in a later issue of this Review.

18. I do furthermore bind and obligate myself, my heirs and assigns in solido with said debtor, for payment of the said indebtedness precisely as if the same had been contracted and was due and owing by me in person, hereby agreeing to and binding myself, my heirs and assigns, by all terms and conditions contained in any note or notes signed or to be signed by said debtor, making myself a party thereto . . . .

Id. at 1072 n.3.

19. *See, e.g.*, Brock v. First State Bank, 187 La. 766, 175 So. 569 (1937); Leigh v. Wright, 183 La. 765, 164 So. 794 (1935); Hibernia Nat'l Bank & Trust Co. v. Succession of Cancienne, 140 La. 969, 74 So. 267 (1917); Union Nat'l Bank v. Legendre, 35 La. Ann. 787, 792 (1883).

20. Concerning the Bank's right to release sureties, the Continuing Guaranty provides:

> The Bank may . . . release or discharge endorsers, guarantors or other parties . . .

While the court's enforcement of the parties' contract strengthens a creditor's rights and gives full meaning to the usual boilerplate provisions contained in lenders' standard continuing guaranty forms, the result does little to aid the analysis of this developing area of Louisiana law. The language of the contract in *Green Garden* is almost identical to that in *Boutte*.[21] Under the analysis of the court in *Boutte*, release of one of the "solidary sureties" with a reservation of rights would extinguish at least a portion of the remaining "solidary surety's" liability.[22] Perhaps this is the reason that the *Green Garden* court did not refer to *Boutte*. On the other hand, the court may have been attempting to overrule *Boutte sub silentio* by returning to the principles of "simple" suretyship. A "simple" surety (*i.e.*, one whose contract merely binds him to pay if the principal obligor does not) is not relieved of liability regardless of either the number of other sureties or the release of other sureties. The "simple" surety remains liable for the full extent of the obligation stated in his suretyship contract subject only to a dollar-for-dollar credit for payments made by the other sureties or by the debtor.[23]

Perhaps the court was concerned with conflicting public policy considerations. A contract forms the law between the parties;[24]

> without notice to the undersigned, such notice being hereby specifically waived. . . . We consider this provision to give the Bank the right to release sureties as it deems appropriate without affecting its right to full recovery from [the remaining shareholder] of [the corporation's] debt up to the dollar limits set in the contract.

387 So. 2d at 1073.

21. See notes 13 & 18, *supra*.

22. One of the significant problems with the *Boutte* analysis is that it grants to the principal debtor the same reduction of his virile share of liability as that granted to the "solidary surety." Using *Boutte's* analysis, the principal debtor benefits every time a "solidary surety" is released. For example, if there is a principal debtor and three "solidary sureties," *Boutte* would require that the creditor treat them all as solidary obligors and apply those Civil Code articles to determine his rights. If the creditor released one of the "solidary sureties" with a reservation of rights, he would reduce not only his claim against the remaining "solidary sureties," but also his claim against the principal debtor. Indeed, this was precisely the result reached in *Wisconsin Capital Corp. v. Trans World Land Title Corp.*, 378 So. 2d 495 (La. App. 4th Cir. 1979). This strange and perhaps unintended result of *Boutte's* reasoning leaves the two disparate approaches, depending upon one's point of view. The debtor, following *Boutte*, should insist that the creditor take 99 "solidary sureties" and then release all but one of them. This would reduce the debtor's liability to a mere 2/100th of the original obligation. The creditor, on the other hand, never would want to release any surety, thus hindering commerce and impairing the credit standing of those sureties who otherwise would be released.

23. LA. CIV. CODE art. 2206. Of course, in the case of multiple sureties, the surety also has the right of division. LA. CIV. CODE arts. 3049-50.

24. LA. CIV. CODE art. 1901.

therefore, courts strive to enforce it. A contract of suretyship (whether it is denoted "continuing guaranty" or whether it contains language binding the individual solidarily with the principal obligor) is a security device that both requires a creditor to work precisely within defined legal limits and entitles the surety to an interpretation of the agreement most advantageous to him[25] so as to limit his liability.

The court in *Green Garden* has elevated contractual language to immutable law between the parties while ignoring prior jurisprudence. If the court meant to overrule *Boutte* and *Aiavolasiti*, it should have said so. If *Boutte* and *Aiavolasiti* are distinguishable, the court should have explained their distinguishing features. What is not desirable is the court's avoiding reference to any relevant prior jurisprudence.

How far the court will allow contractual language to alter the usual strict construction given to security devices remains to be seen. For example, will the court allow parties to stipulate in an ordinary mortgage that payment will not extinguish the mortgage pro rata?[26] May parties agree to the creation of security devices not authorized by statute?[27]

Since the advent of *Boutte*, Louisiana has needed a comprehensive judicial analysis of the rights of all parties (creditor, debtor, and surety) in situations involving notes or contracts by which sureties bind themselves *in solido* with the principal debtor. *Green Garden* is not a case in which such an analysis can be found.

COLLATERAL MORTGAGES

In the last faculty symposium, the case of *Kaplan v. University*

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25. *See, e.g.*, Texas Co. v. Couvillon, 148 So. 295, 296 (Orl. App. 1933):

> It must be borne in mind, too, that the surety is entitled to a strict construction of his contract. He is protected from any interpretation of his contract not resting on clear expression or plain implication. The Code declares that suretyship is not to be presumed, should be expressed, and is to be restricted within the limits intended. Civ. Code, art. 3039; *New Orleans Canal & Banking Co. v. Hagan*, 1 La. Ann. 62; Freeland v. Briscoe, 3 La. Ann. 257.

26. LA. CIV. CODE art. 3285 provides in part: "In all cases where the principal debt is extinguished, the mortgage disappears with it." *See* Thrift Funds Canal, Inc. v. Foy, 261 La. 573, 260 So. 2d 628 (1972); Mente & Co. v. Levy, 160 La. 496, 107 So. 318 (1926).

27. *See, e.g.*, Wayside Dev. Co. v. Post, 338 So. 2d 1173 (La. App. 2d Cir. 1976) (a creditor unsuccessfully attempted to gain secured status by recording a service contract in the public records). *See also* American Bank & Trust Co. v. Louisiana Savings Ass'n, 386 So.2d 96 (La. App. 3d Cir. 1980) (the court was unsure of the type of security device a contract created but nevertheless allowed enforcement of the contractual right in preference to the claim of other purportedly secured creditors).

Lake Corporation[28] was noted.[29] After the prior article had been printed, a rehearing was granted.

Reaffirming prior jurisprudence, the *Kaplan* court on its original hearing had held that a handnote is imprescriptible when secured by the pledge of a collateral mortgage note, regardless of whether the collateral mortgage note had prescribed. This issue was not examined on the rehearing; the court confined its reexamination of the case to the personal liability of a purchaser of the property who had assumed all "valid" encumbrances,[30] but who had not assumed expressly the obligations contained in the handnote or the collateral mortgage note.

Because the court found that the collateral mortgage note had prescribed prior to the purchaser's act of assumption, the court found that the collateral mortgage was not a valid encumbrance and thus the purchaser had no personal liability.

Traditionally a collateral mortgage note is a demand instrument so that, in case of default in the payment of the principal obligation, the creditor can execute his rights against the property immediately.[31] Since the obligation[32] the collateral mortgage secures matures in less than nine years, the mortgage retains effect on the public records as to third parties for ten years.[33] Several sales with assumptions occurred prior to the ultimate purchaser's acquisition in *Kaplan*. Why each of these assumptions did not operate as an acknowledgment of the mortgage note and as a reinscription of the mortgage itself was not discussed by the court. It would appear, from the facts, that the collateral mortgage note had not prescribed. A sale with assumption of a mortgage creates solidary liability between the purchaser and seller in favor of the creditor.[34] Each act of assumption operates to interrupt prescription on the obligation being secured.[35] Since third parties were not involved, the question of reinscription of the mortgage under Civil Code Article 3369 is not relevant.[36]

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28. 381 So. 2d 385 (La. 1980).

29. *1978-1979 Term, supra* note 15, at 577.

30. 381 So. 2d at 390.

31. LA. CIV. CODE art. 3170.

32. *I.e.*, the demand collateral mortgage note.

33. LA. CIV. CODE art. 3369.

34. Simon v. McMeel, 167 La. 243, 119 So. 35 (1928); Federal Land Bank of New Orleans v. Cook, 179 La. 857, 155 So. 249 (1934); Schlatre v. Greaud, 19 La. Ann. 124 (1867).

35. "Moreover, prescription on this note was interrupted or suspended quoad this defendant when she assumed its payment as part of the purchase price . . . ." Simon v. McMeel, 167 La. 243 at 247, 119 So. 35 at 36.

36. LA. CIV. CODE art. 3344; Schutzman v. Dobrowolski, 191 La. 791, 186 So. 338 (1939).

Kaplan brings certainty to the area of collateral mortgages in holding that the collateral mortgage note is imprescriptible.[37] The cautious counsel for creditors, after *Kaplan*, will want to make certain that the act of mortgage or collateral pledge agreement contains specific language allowing the creditor to declare a default in the obligation if a mortgagor does not sign the necessary documents to acknowledge the collateral mortgage note[38] or to reinscribe the collateral mortgage.

A continuing debate among lawyers is whether a collateral mortgage note creates personal liability for the maker or whether the collateral mortgage package itself is a type of "in rem" mortgage.[39] *Central Bank v. Bishop*[40] gives support to those who contend that the collateral mortgage note is an enforceable personal obligation. The court held that interest should be calculated on a collateral mortgage note from the date it is signed, not from the date it is pledged nor from the date money was advanced on the principal obligation.

THE DEFICIENCY JUDGMENT ACT

The Deficiency Judgment Act[41] prevents a creditor from collecting personally from the debtor more than is brought at a judicial sale unless the requirements of the Act are followed.[42] While the Deficiency Judgment Act refers expressly only to judicial sales by executory process, it has been extended to preclude deficiency judgments after nonjudicial sales.[43]

At least two distinct public policy arguments exist in favor of the Act. The Act obviously is designed to prevent a creditor from

37. This writer still stands by his previous criticism of the original decision in *Kaplan*. *1978-1979 Term*, *supra* note 15, at 577.

38. As long as the debtor or his co-debtors *in solido* make payments on the principal obligation, each payment will operate as an interruption of prescription on the collateral mortgage note. LA. R.S. 9:5807 (Supp. 1970).

39. This writer is of the opinion that a collateral mortgage note does create personal liability for the maker; however, the maker can be liable for no more than the extent of the principal obligation that was secured by the pledge of the collateral mortgage note. *See 1978-1979 Term*, *supra*, note 15, at 582.

40. 375 So. 2d 149 (La. App. 2d Cir.), *cert. denied*, 378 So. 2d 435 (La. 1979).

41. LA. R.S. 13:4106-07 (1950 & Supp. 1952).

42. To obtain a deficiency judgment, the property must be appraised. LA. CODE CIV. P. art. 2332. The property, after appraisal, must be sold at two-thirds of the appraised value. If that price is not obtained, a second sale may be held, at which point the property may be sold "for cash for whatever it will bring, except as provided in Article 2337." LA. CODE CIV. P. art. 2336. In any event, the price must be sufficient to discharge the costs of the sale and any superior mortgages, liens, or encumbrances. LA. CODE CIV. P. art. 2337.

43. Farmerville Bank v. Sheen, 76 So. 2d 581 (La. App. 2d Cir. 1955); Home Fin. Service v. Walmsley, 176 So. 415 (Orl. App. 1937).

collecting more than the amount due.[44] A second rationale, however, also can be discerned in the requirement that the property must be sold for two-thirds of its appraised value at the first judicial sale.[45] If judicial sales were in fact true public auctions, no minimum bid requirement would be needed because the auction would always bring the fair market value of the property. The requirement that the property be sold for two-thirds of its appraised value represents recognition of the fact that, at most judicial sales, there is no adverse bidding and the purchaser is usually the seizing creditor. Over the past five years a number of cases have been decided in which debtors attempted to defend against deficiency judgments after judicial sales, alleging that either appraisal formalities were not properly complied with or that the appraisal itself was somehow invalid because it did not reflect the true fair market value of the property. With one notable exception,[46] these attacks have been rejected.[47]

Two difficult problems arise in conjunction with nonjudicial sales. The first is whether any nonjudicial sale can meet the requirements of procedural due process. In 1969 the United States Supreme Court, in *Sniadach v. Family Finance Corporation*,[48] held that prejudgment seizures of property without judicial intervention or oversight violated the fourteenth amendment's guarantee of procedural due process. *Sniadach's* rationale was expanded, in *Fuentes v. Shevin*,[49] to include any seizures of property that deny the owner the right to be heard before the property is taken. *Sniadach* and *Fuentes* represented the high-water mark of due process protection for debtors. The Court subsequently backed away from these stringent requirements in *Mitchell v. W. T. Grant Company*,[50] a case involving Louisiana's sequestration provisions. Finally, in *Flagg*

44. For example, assume a $100,000 loan is secured by a mortgage on property. Further assume that upon the debtor's default the creditor "purchases" the property for $20,000 and then seeks a $80,000 deficiency judgment against the debtor. If the property, in fact, is worth $100,000, the creditor reaps a windfall at the debtor's expense. The purpose of appraisal is to prevent such an occurrence. If the creditor decides to forego appraisal, the law assumes he is willing to be made whole only by seizure and sale of the security and to release the personal liability of the principal obligor.

45. LA. CODE CIV. P. art. 2336.

46. General Motors Acceptance Corp. v. Boutte, 338 So. 2d 363 (La. App. 3d Cir. 1976).

47. Ardoin v. Fontenot, 374 So. 2d 1273 (La. App. 3d Cir. 1979); Fidelity Nat'l Bank of Baton Rouge v. Pitchford, 374 So. 2d 149 (La. App. 1st Cir. 1979); John Deere Indus. Equip. Co. v. Luther, 352 So. 2d 761 (La. App. 3d Cir. 1977); First Nat'l Bank of Lafayette v. Doni Homes, Inc., 338 So. 2d 1202 (La. App. 3d Cir. 1976).

48. 395 U.S. 337 (1969).

49. 407 U.S. 67 (1972).

50. 416 U.S. 600 (1974).

Brothers, Inc. v. Brooks,[51] the Court sanctioned private, pre-judicial sales when authorized by state law. The Court held that a warehouseman did not violate the provisions of procedural due process when it sold, pursuant to state law, stored goods because of the failure of the debtor to pay storage charges. While the case may be distinguished from prejudgment seizures,[52] the language of the majority opinion is so broad that it now appears that the Court, as it currently is constituted, will reject future constitutional challenges to prejudgment private seizures and sales.[53]

The second problem of nonjudicial sales is how far the public policy provisions of the Deficiency Judgment Act will be stretched. The latest case that has limited the application of the Deficiency Judgment Act is *International City Bank & Trust Co. v. Zander*.[54] In *Zander* the court held that the Deficiency Judgment Act did not apply to the sale of stock listed on a national exchange. The court noted that there is no better arbiter of the price of stock than that price which it brings at any moment on the exchange. Thus the creditor, having disposed of the stock, was not prohibited from collecting a deficiency judgment. Whether the rationale of *Zander* can be expanded remains to be seen. It may be argued that the Deficiency Judgment Act should not apply to sales of stock that are sold "over the counter"[55] or to those items sold on national or regional commodity exchanges.

PLEDGE OF STOCK

A creditor who grants a loan secured by the pledge of stock of a closely held corporation can exercise several precautions to make sure that his security does not dissipate. The principal concern of the creditor is to make sure that the corporation is run in a business-like manner. To this end, the creditor may desire a seat on the board of directors, the power to vote the pledged stock, or both. A problem arises in trying to obtain the right to vote the stock, however, because it has been held that a mere pledgee cannot vote pledged stock unless the shares are transferred on the books of the corporation to the pledgee.[56] Creating the right of the pledgee to

51. 436 U.S. 149 (1978).

52. In *Flagg Brothers* the warehouseman was already in possession of the merchandise, and the goods secured a legal not a consensual lien; furthermore, the warehouseman was not seeking a deficiency judgment.

53. *See* Justice Steven's dissent in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 168 (Stevens, J., dissenting).

54. 378 So. 2d 506 (La. App. 4th Cir. 1979).

55. *I.e.*, stocks listed by the NASDAQ.

56. Emile M. Babst Co. v. Commercial Enterprises, Inc., 274 So. 2d 742 (La. App. 4th Cir.), *cert. denied*, 277 So. 2d 673 (La. 1973).

vote the stock through a voting trust has its own difficulties because a voting trust is allowed only between two or more shareholders, not between a shareholder and a creditor.[57]

Two cases from the fourth circuit have dealt with these issues. *Defelice v. Garon*[58] held that a creditor may acquire, by contract, the right to vote the stock from the pledgee. If such a contract exists, the corporation must transfer the stock to the name of the pledgee. In *First Metropolitan Bank v. Plaia*,[59] the pledge agreement did not expressly authorize the creditor to vote the stock; however, it did authorize him to sell the stock upon default. The court, noting that "the right to sell would have little value if not coupled with the right to have the stock transferred,"[60] held the agreement sufficient both to allow the creditor to vote the stock and to require the corporation to transfer the certificate to the creditor's name.

The cautious practioner, in drafting pledge agreements on closed corporation stock, may want not only to include a provision allowing the creditor to vote the stock and to sell it at a private sale upon default,[61] but also one or more of the following provisions:

(1) Requiring the corporation to pass an amendment to its articles or bylaws prohibiting the corporation from mortgaging or encumbering any of its assets without prior notice to the pledgee;
(2) Prohibiting the corporation from issuing any more stock without the prior notice to and consent of the pledge;
(3) Entering into a written stock restriction, the existence of which is noted on all share certificates, prohibiting the sale of any corporate stock without the consent of the pledgee;
(4) Prohibiting any change of officers, directors, or the corporate structure without the pledgee's affirmative consent.

While these clauses may be of questionable enforceability as to third persons absent a change in the articles or bylaws, they at least should be considered by the creditor before making the loan.

FEDERAL TAX LIENS VERSUS LOUISIANA SECURITY DEVICES

Under the Federal Tax Lien Act of 1966[62] a federal tax lien that

57. LA. R.S. 12:78 (Supp. 1968).
58. 380 So. 2d 676 (La. App. 4th Cir. 1980).
59. 384 So. 2d 560 (La. App. 4th Cir. 1980).
60. *Id.* at 564-65.
61. Civil Code article 3165 expressly allows a private sale of pledged stock. For a review of a potential conflict this creates in conjunction with the Deficiency Judgment Act, *see* Comment, *Deficiency Judgments in Louisiana*, 49 TUL. L. REV. 1094 (1975).
62. 26 U.S.C. § 7401.

is inferior to other encumbrances will survive a judicial proceeding or other sale unless the provisions of the federal act are followed. In *Myers v. United States*,[63] a creditor invoked a sale by executory process. Federal tax liens were recorded properly more than thirty days prior to the sale; however, the federal government was not notified of the sale. The federal act distinguishes between "judicial proceedings" in which the government must be joined as a party and "other sales" in which the government need not be joined as a party but must be given notice prior to the sale.[64] The court noted that while executory process is "'judicial' in that it requires the use of the courts . . . it is clearly not a *plenary* judicial proceeding";[65] therefore, the "other sales" provisions of the act apply, and the government must be given prior notice. Because the government was not given prior notice, the inferior federal lien was not extinguished by the judicial sale.

Federal tax liens affect movable as well as immovable property.[66] In *Abbadie's IGA Supermarket, Inc. v. Barousse*,[67] a chattel mortgage certificate was obtained prior to the sale of a grocery business. The certificate did not show the recorded federal tax lien. The court held that the clerk had no liability for failure to show the tax lien on the chattel mortgage certificate because Louisiana's Federal Tax Lien Registration Act[68] requires clerks to maintain separate federal tax lien indices; the federal tax lien need not be shown under the chattel mortgage index. The cautious practioner, prior to passing an act of sale involving the acquisition of movables, should check not only the chattel mortgage index but also the federal tax lien index.[69]

THE PUBLIC WORKS ACTS

Slagle-Johnson Lumber Company, Inc. v. Landis Construction Company[70] overruled *H.R. Hayes' Lumber Company v. McConnell*[71]

63. 483 F. Supp. 1154 (W.D. La. 1980).
64. *Compare* 26 U.S.C. § 7425(a) *with* § 7425(b).
65. 483 F. Supp. at 1159.
66. 26 U.S.C. § 6321.
67. 378 So. 2d 591 (La. App. 3d Cir. 1979).
68. LA. R.S. 9:5251-66 (1950).
69. 1980 La. Acts, No. 235, added R.S. 9:5367-72, which allows a chattel mortgage on fixtures, furniture, and equipment (but not on inventory) by a simple description in a chattel mortgage or a mortgage on an immovable. Therefore, there will be occasions when an effective chattel mortgage is recorded in the immovable property mortgage records.
70. 379 So. 2d 479 (La. 1980).
71. 176 La. 431, 146 So. 14 (1932).

and held that a supplier of materials is entitled to a lien whenever materials are furnished for the construction of a public work, whether they are incorporated in the edifice or merely consumed during construction. Therefore, the supplier of lumber and nails used to build concrete forms was entitled to assert a lien because the materials, although not physically incorporated in the building, were consumed during construction.

PRIVATE WORKS ACT

Deciphering the convoluted language of the Private Works Act[72] is never easy. If a contract is not recorded, the time for filing the lien is sixty days. When, however, does the sixty-day period begin to run? The statute provides that if no affidavit of completion is recorded, the lien must be filed: "Within sixty days after the date of the last delivery of all material upon the said property or the last furnishing of services or the last performance of labor upon the same, *by the said furnisher of materials or services or the said laborer . . . .*"[73]

George Kellett & Sons, Inc. v. Dobbs[74] held that despite the seemingly literal terms of the statute, "the jurisprudence has interpreted the statute to provide a supplier with a cause of action even though recordation is made beyond sixty days if it occurs within sixty days after the last date on which any material was supplied or work was performed on the job by anyone."[75]

The time for filing a lien in the case of an unrecorded contract was also an issue in *Jonesboro State Bank v. Tucker.*[76] The court held that the sixty-day period commences upon "any unexplained and complete cessation of all work";[77] the owner's subjective intent whether or not to abandon the project is not determinative. Because a lien affidavit had not been filed within sixty days after complete cessation of all work, the privilege was lost.

If a lien is improperly filed, attorney's fees are awardable under R.S. 9:4821. *Welch v. Daigrepont*[78] interpreted the statute as granting attorney's fees only if the lien claimant has been sent a letter requesting cancellation. Since the lien had been cancelled prior to

72. LA. R.S. 9:4801-21 (1950).
73. LA. R.S. 9:4812 (Supp. 1966) (emphasis added).
74. 380 So. 2d 758 (La. App. 4th Cir. 1980).
75. *Id.* at 759.
76. 381 So. 2d 578 (La. App. 2d Cir. 1980).
77. *Id.* at 581.
78. 378 So. 2d 607 (La. App. 3d Cir. 1979).

receipt of the demand letter, the owner was not entitled to attorney's fees.

The Residential Truth and Construction Act[79] provides a cause of action[80] for a private owner against a contractor who fails to give a notice of lien rights. *Landry v. Racca*[81] held that a contractor is liable for damages and attorney's fees when the required notice is not given and liens are later filed.

The Residential Truth and Construction Act has an admirable title; the form of the required notice to be given to owners, however, contains legalistic jargon and extensive statutory citations meaningless to a residential homeowner.[82] A revision of the notice itself would be desirable. It should be written in language readily understandable by laymen. The following is suggested:

NOTICE OF LIEN RIGHTS

If your residential property is under construction or if your residential property is being improved, there is a possibility that a lien may be filed against your property. If a lien is filed, your property is seized and sold by a court of law to satisfy the lien.

Who gets a lien?

Your general contractor gets a lien if you have a written contract with him that is recorded in the public records. Anyone else who works on the property, any laborers, and anyone who supplies materials to the property are also entitled to a lien regardless of whether you have a written contract with your general contractor.

What is a lien?

If the people who are entitled to a lien are not paid, they can file a notice in the public records. This notice acts like a mortgage on your property. They have a right to file this lien if they are not paid by the general contractor even if you have paid the general contractor.

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79. LA. R.S. 9:4851-55 (Supp. 1976).
80. LA. R.S. 9:4855 (Supp. 1976).
81. 386 So. 2d 1013 (La. App. 3d Cir. 1980).
82. *E.g.*, the notice must state the following:

> that said contractor is about to begin improving my residential property according to the terms and conditions of a contract, and that in accordance with the provisions of law in Part I of Chapter 2 of Code Title XXI of Title 9 of the Louisiana Revised Statutes of 1950, R.S. 9:4801, *et seq* . . . .

LA. R.S. 9:4852 (Supp. 1976).

How can I avoid a lien being placed on my property?

You can avoid a lien being placed on your property by entering into a written contract with your general contractor. This contract must be recorded in the mortgage records of the parish where your residential property is located. The contract must be recorded prior to work's beginning on the property. The contractor must furnish a bond that meets the requirements of law.

I have received this notice from my contractor on this _____ day of _____, 19____.

_____

Owner