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defense the insurer filed an exception of no right of action and pleaded in bar the release given to the railroad without a reservation of rights. The exceptions and pleas in bar were overruled on the ground that there had been no showing that the railroad was a joint wrongdoer. The earlier case of *Reid v. Lowden*²¹ was distinguished on the ground it was conceded in that case that the party released was a co-tortfeasor. The court indicated in its opinion a possibility that a showing might still be made that the accident occurred through the joint negligence of the railroad and the operator of the automobile but the method by which this might be done was not indicated. This and other aspects of the case will be covered in a later issue of this review.

SECURITY DEVICES

*Alvin B. Rubin**

Judicial Sureties

Article 3066 of the Civil Code provides that "a judicial surety cannot demand the discussion of the property of the principal debtor.

"But no suit shall be instituted against any surety on appeal bond, nor on the bond of any administrator, tutor, curator, executor, or syndic until the necessary steps have been taken to enforce payment against the principal."¹

The question of what constitute the requisite "necessary steps . . . to enforce payment" was presented to the court in *Posey v. Hamner*.² That case was an action on a tutor's bond, by his children, after the death of the tutor. The defendants, sureties on the tutorship bond, urged successfully an exception of prematurity on the ground that judicial proceedings were necessary against the principal debtor or his representative prior to the institution of suit against his sureties. This even though the tutor may have died without leaving any property whatever, and judicial proceedings against his succession would be "a vain and useless effort."³

It is well established that "the necessary steps" required by Article 3066 do not include the issuance of writs of execution against the estates of deceased principal debtors prior to suit

21. 192 La. 811, 189 So. 286 (1939).

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1. Art. 3066, La. Civil Code of 1870.

2. 27 So.(2d) 158 (La. 1946).

3. 27 So.(2d) 158, 159.

against their sureties.⁴ The court distinguished these cases, however, in *Posey v. Hamner* as involving a proceeding *after* judgment had been secured against the principal debtor. The rationale of the cases so distinguished, however, was not based on that point, but rather on the futility of the execution; in each of them an appeal bond was involved, and, of course, the liability of the surety for a judgment is expressly conditioned upon the rendition of such a judgment.

The provision of Article 3066 denying the exception of discussion to judicial sureties appears to have been adopted to expand the rights of creditors against such sureties, as compared with the rights of creditors against conventional sureties. But the doctrine of *Posey v. Hamner* appears to make the rights of creditors against judicial sureties more onerous than those against conventional sureties. For the conventional surety may be sued before there is judgment against the principal debtor,⁵ and the surety's sole remedy in such cases is the exception of discussion, which requires him to point out property of the principal debtor subject to seizure and pay the costs of such seizure.⁶ At most, the conventional surety can ask a stay of the action against him pending the securing of judgment against the principal debtor and the execution of that judgment.⁷

The court remarks that the doctrine of *Posey v. Hamner* "seems somewhat harsh" under the facts of that case. This is seen to be particularly true when it is considered that the judgment against the principal is at best only *prima facie* evidence against the surety.⁸ As a usual matter, the proceedings to secure judgment against the principal debtor in a situation similar to that presented in *Posey v. Hamner* would be perfunctory, at best, and it would appear that time and expense would be conserved and justice served as well, if not better, by permitting proof of the debt in the proceeding against the surety. Even if

4. *Alley v. Hawthorn*, 1 La. Ann. 122 (1846); *Trimble v. Brichta*, 11 La. Ann. 271 (1856); *Murrison v. Butler*, 20 La. Ann. 512 (1868); *Lepretre v. Barthet*, 25 La. Ann. 124 (1873).

5. *Curtis v. Martin*, 5 Mart. (O.S.) 674 (La. 1818); *Wood v. Fitz*, 10 Mart. (O.S.) 196 (La. 1821); *Boutte v. Martin*, 16 La. 133 (1840); *Griffing v. Caldwell*, 1 Rob. 15 (La. 1841) (unless he properly pleads discussion, the surety's remedy is to pay the debt and exercise his creditor's rights against the creditor through subrogation).

6. Art. 3047, La. Civil Code of 1870.

7. *Bernard v. Curtis*, 4 Mart. (O.S.) 214 (La. 1816). And see *Hill v. Bourcier*, 29 La. Ann. 841 (1877).

8. See *Fusz v. Trager*, 39 La. Ann. 292, 1 So. 535 (1887); *Horsthemke v. National Surety Co.*, 151 La. 55, 91 So. 544 (1922); *Hopkins v. National Surety Co.*, 154 La. 61, 97 So. 297 (1923).

the correctness of requiring a prior judgment against the principal debtor be conceded, it would be less harsh merely to order suspension of the judgment, instead of dismissing the suit. The only right available to creditors proceeding on judicial bonds, under the rule of *Posey v. Hamner*, which would mitigate the effect of requiring the fruitless suit against the estate of the insolvent deceased, is that of joining the surety and the representatives of the principal debtor in a single action.⁹

Building Liens

Although Louisiana Act 298 of 1926,¹⁰ creating liens on immovables in favor of laborers and materialmen, affords the landowner adequate means to safeguard himself by the recordation of his contract together with a bond exacted from the contractor, this protection is frequently overlooked. The possible consequences of such failure, on both the owner at the time the construction contract is made and subsequent purchasers of the immovable, are illustrated in the case of *Glassell, Taylor, & Robinson v. John W. Harris Associates, Incorporated*,¹¹ where exceptions of no cause of action were dismissed, rendering the contracting owner personally and the immovable in the hands of a subsequent purchaser potentially encumbered by a lien to the sum of \$383,317.39.

Louisiana Act 298 of 1926, which replaced earlier legislation on the same subject, creates a comprehensive building liens structure, which was designed to protect all the parties involved in a construction contract from the hazards frequently incident to such contracts. Section 1 of the act creates a "lien and privilege" in favor of laborers, materialmen, and other parties engaged in the work.¹² Section 2 provides for recordation of construction contracts and permits the landowner to protect himself from liens by requiring bond of the contractor, conditioned on the faithful performance of the contract and the payment of all debts under it.¹³ Section 12 provides for the personal liability of the landowner, as well as for the subjection of the immovable to liens, if no contract is recorded, or if the owner fails to take other action prescribed by the statute, but its language is not so

9. Art. 3051, La. Civil Code of 1870. See also *Brock v. First State Bank & Trust Co.*, 187 La. 766, 175 So. 569 (1937).

10. Dart's Stats. (1939) §§ 5106-5122.

11. 209 La. 957, 26 So.(2d) 1 (1946).

12. La. Act 298 of 1926, § 1 [Dart's Stats. (1939) § 5106].

13. *Id.* at § 2 [Dart's Stats. (1939) § 5107].

detailed as that of Section 1 in listing those who are entitled to avail themselves of the benefits of the section.¹⁴

In the *Glassell* case, the landowner entered into a contract with a general contractor for construction of a housing project. The general contractor made sub-contracts with the plaintiff for the construction of a sewerage system, roads, and other work involved in the project. The general contract was not recorded, nor, apparently, was any bond exacted or recorded. Subsequently the landowner conveyed the property to the general contractor who in turn sold to the present owner. While the project was still under construction, a dispute arose between the plaintiff and the general contractor which resulted in the ouster of the plaintiff. The plaintiff thereupon recorded liens for damages alleged due, and brought suit against the original landowner and the subsequent transferees in solido. By means of an exception of no cause of action, the original landowner and the present owners raised the question of the right of the subcontractor to either a lien or a personal cause of action against them.

The reasoning of the defendant's unsuccessful argument was that the general contractor can acquire no lien unless his contract is recorded in accordance with the procedure outlined in Section 2 of the act, that Section 12 of the act providing for liens and for a personal right of action in case no contract is recorded applies only to laborers and materialmen, that subcontractors acquire no rights greater than those of the general contractor, and that therefore the sole right of the subcontractor where no general contract has been recorded is a personal right against the general contractor. This argument convinced the trial judge.

But, reasoned the supreme court, no such hiatus in the act was intended. The subcontractor is entitled, under the intentment of the statute, to the rights granted in Section 12, including a lien on the property and a personal right of action against the owner where the owner fails to record the contract, even though subcontractors, elsewhere expressly mentioned in the act, are not mentioned in Section 12. Indeed, despite the failure of Section 12 specifically to mention subcontractors, they appear to be embraced within its terminology, which applies to "any person furnishing service or material or performing any labor on said building or other work to or for a contractor or subcontractor," as the court pointed out.¹⁵

14. *Id.* at § 12 [Dart's Stats. (1939) § 5117].

15. 209 La. 957, 974, 26 So.(2d) 1, 6 (1946).

Officer v. Combre,¹⁶ in which the Court of Appeal for the First Circuit held that Section 12 gave no right of lien to a general contractor, impressed the trial judge as "decisive"; the supreme court affirmed it only as to result, refusing to adopt its reasoning. That case, although excluding the general contractor from the provisions of Section 12 because he is not expressly mentioned, can be sustained on the theory that it is the contractor's own fault if he is not fully protected by recordation of the contract pursuant to Sections 1 and 2 whereas the subcontractor has no such means of protection and is placed in his precarious position through the combined failures of the owner and the general contractor to record the contract and bond.

In *National Homestead Association v. Graham*,¹⁷ the supreme court had previously held the provisions of Section 12 applicable to one who contracted directly with the landowner, although not as a general contractor. Taken together, the cases therefore can be said to apply the general rule that the provisions of Section 12 can be utilized by any party entitled to the benefits of the act generally, even though not specifically named in Section 12, except general contractors.

The court further held that the owner at the time the contract was made is the "owner" who is subject to personal liability under the provisions of Section 12, and later transferees are "only liable in rem" unless they specifically assumed the liability of their vendor.¹⁸ Although this is contrary to the interpretation of the earlier building liens statute,¹⁹ the ruling appears justified by changes in terminology in the statutes.²⁰

Scale-Down Agreements in Federal Farm Mortgages

*Federal Farm Mortgage Corporation v. Hatten*²¹ involved a suit by the Federal Farm Mortgage Corporation to have a judgment secured on a note taken by a creditor of a farmer in violation of a scale-down agreement. Under authority of the Emergency Farm Mortgage Act of 1933,²² the Federal Farm Mortgage

16. 194 So. 441 (La. App. 1940).

17. 176 La. 1062, 147 So. 348 (1933).

18. Glassell, Taylor & Robinson v. John W. Harris Associates, Inc., 209 La. 957, 974, 26 So.(2d) 1, 6 (1946).

19. See Robinson-Slagle Lumber Co. v. Rudy, 156 La. 174, 100 So. 296 (1924).

20. Compare La. Act 298 of 1926, § 12 [Dart's Stats. (1939) § 5117], with La. Act 229 of 1916, §§ 1, 3. The earlier act made no provision for personal liability on the owner, and contained no clause comparable to Section 12 of the 1926 act.

21. 210 La. 249, 26 So.(2d) 735 (1946).

22. 48 Stat. 48, § 32, 12 U.S.C.A. § 1016 (1933).

Corporation had secured scale-down agreements from the creditors of a farm-owner, and had executed a mortgage on the land of the farm-owner based on these agreements. One of the assenting creditors on the same day secured a note from the debtor, which he later reduced to judgment, then transferred to a third party, who was found not to be a holder in good faith. This judgment was recorded in 1936; in 1944 the Federal Farm Corporation sued the original creditor and his transferee to have the judgment declared void and cancelled from the mortgage records and to enjoin a sale of the debtor's property in execution of the judgment.

The court applied fairly well settled principles to sustain the plaintiff's suit. Any security given a scale-down creditor in addition to the amount received from the federal loan agency was declared void,²³ not only as between the parties but also as against the federal agency.²⁴ The court found that the federal agency possessed the necessary interest to sue in its pecuniary interest in the security given for its mortgage and in the ability of the debtor to pay the federal loan. The questions resolved by application of Louisiana law were primarily procedural, and are discussed elsewhere in this article.

Rank of Mortgages Relative to Tax Liens

In the case of *Oil Well Supply Company v. Red Iron Drilling Company*,²⁵ elsewhere discussed at greater length,²⁶ a recorded mortgage was held to prime judgments later secured for unpaid power, severance, and corporation franchise taxes. Under authority of the Uniform Tax Procedure Act,²⁷ the case justifies reliance upon the public records to afford parties dealing with immovables—and, incidentally, movables²⁸—protection against unrecorded incumbrances in the form of tax liens.

23. *Russell v. Douget*, 171 So. 501 (La. App. 1936). See also the host of cases cited in the opinion, 210 La. 249, 26 So.(2d) 735, 738. The question is also annotated in (1943) 147 A.L.R. 743.

24. *O'Neil v. Johnson*, 29 F. Supp. 307 (N.D. Calif. 1939); *Jones v. McFarland*, 178 Miss. 282, 173 So. 296 (1937); *Federal Land Bank of St. Paul v. Koslofsky*, 67 N.D. 322, 271 N.W. 907 (1937). See also the annotations in (1943) 147 A.L.R. 743.

25. 210 La. 222, 26 So.(2d) 726 (1946).

26. *Supra*, p. 177.

27. La. Act 265 of 1940, § 3, as amended by La. Act 157 of 1942 [Dart's Stats. (Supp. 1946) § 8422.3].

28. The lien procedure of the Uniform Tax Procedure Act applies to both movables and immovables. *Supra*, page 177.

Hypothecary Actions—Third Possessors

*In re Union Central Life Insurance Company*²⁹ involved a number of interesting rulings. In 1929, E. D. Thomas mortgaged a tract of land, which was his separate property,³⁰ to the Union Central Life Insurance Company. Thomas died intestate, and, in 1931, pursuant to court order to sell for cash to pay debts, his administrator sold the tract to Dora Thomas, wife of the deceased. The administrator's deed recited that the consideration had been paid in cash, but the administrator's return on his commission to sell showed that Dora Thomas had retained the consideration for the purpose of discharging the mortgage.

In 1933, Dora Thomas failed to meet the mortgage payments, and the insurance company foreclosed, by hypothecary action against Dora Thomas, as third possessor, and against the administrator of the succession, who had been discharged. The heirs of the succession were not cited. At the sheriff's sale the property was purchased by the insurance company, which later conveyed it to other parties, then subsequently repurchased it and brought this monition proceeding³¹ to be decreed owner.

Under this set of facts the court held:

(1) The sale to Dora Thomas was "absolutely null." The adjudicatee did not pay in cash, which was an essential term of the sale.

(2) Therefore, title remained in the heirs of E. D. Thomas.

(3) The foreclosure by Union Central was of no effect; for the heirs of E. D. Thomas were not cited, and Dora Thomas was not a third possessor, who might be proceeded against by the hypothecary action without citing the legal owners.

(4) Therefore Union Central derived no title from the sale, and it owes the heirs of Thomas damages for cutting timber on the property. Legally it was a possessor in bad faith because it knew all the preceding facts. For the same reason, it could not claim the benefits of good faith prescription under Civil Code Article 3543.

(5) The notes for which the mortgage was given have pre-

29. 208 La. 253, 23 So.(2d) 63 (1945).

30. For this reason, apparently, Code of Practice Article 734, authorizing proceeding against the personal representative of a deceased mortgagor was not relied upon. The article has been interpreted to authorize proceedings against the surviving spouse in community, as to mortgaged community property. See *Slayton v. Swor*, 195 So. 85 (La. App. 1940).

31. See La. Act 74 of 1938 [Dart's Stats. (1939) §§ 9021-9025].

scribed, but the insurance company may credit their sum against what it now owes the heirs of Thomas.

Justice Rogers dissented, without rendering a written opinion, and Chief Justice O'Niell dissented, stating briefly that Dora Thomas was a third possessor within the meaning of Code of Practice Article 68.

The crux of the matter became therefore the question: Who is a third possessor? The majority of the court quoted with approval this definition: "One who buys the mortgaged property without assuming to pay the mortgage."³² To this the court apparently added: One who buys the property *and gets good title*. If this be the ratio decidendi, then certain other interesting problems are raised. What if the purchaser buys the property but has a defective title, one which is voidable at the option of the mortgagor-vendor? Is the plaintiff in the hypothecary action against the third possessor bound to determine the validity of the defendant's title before proceeding against him?

Other questions are raised by the definition of "good faith" in dealing with the five-year prescriptive period against informalities in public sales created by Civil Code Article 3543. The insurance company was in bad faith because, alleging that Dora Thomas did not acquire good title as against the mortgagor, it did not cite the heirs of E. D. Thomas. Apparently, then, the "good faith" required is not merely factual "good faith," or a clear conscience, but observation of legal rules, whether or not they are clear. That the question of whether the hypothecary action against Dora Thomas and the administrator was a proper method of proceeding was at least a debatable one is demonstrated by the fact that the chief justice dissented expressly on this point, while Justice Rogers dissented generally.

Against this technical definition of "good faith" stands the roughly measured "equity" awarded the insurance company in permitting it to off-set its prescribed notes against the damages due the heirs of E. D. Thomas. This was not based on any theories of "compensation,"³³ strictly speaking, as indeed there was at least a question of whether the debts were "equally liquidated and demandable,"³⁴ but on the "moral maxim of the law . . . that no one ought to enrich himself at the expense of another."

If the implications of the case are closely followed in the

32. Quoting from *Thompson v. Levy*, 50 La. Ann. 751, 23 So. 913 (1898).

33. Art. 2207, La. Civil Code of 1870.

34. See Art. 2209, La. Civil Code of 1870.

future, an interesting set of sequels should result. If the rules, on the other hand, are confined to "goose cases," some finely knit logic of distinction will have to be produced.

PROPERTY

*Joseph Dainow**

In the case of *Dickson v. Board of Commissioners of Caddo Levee District*,¹ a riparian proprietor claimed damages sustained by his property through erosion. This erosion was the result of an artificial current which had been created in the river and thrown against his plantation at a right angle when defendants made two straight channels, or cut-offs, across two bends of the river above plaintiff's property. The court's opinion, rendered by Justice Fournet, contains a clear and interesting history of the servitude under Article 665 of the Revised Civil Code² which is imposed on riparian properties for levee purposes. From the construction of the first levees by the French in 1727, through the Spanish regime, and until 1878, the matter of flood control was an obligation on the riparian proprietors. Accordingly, when flood control became a governmental function, it was a considerable relief of responsibility even though the land remained subject to the use without compensation. The beneficent establishment of compensation—in 1898 for Orleans,³ and in 1921 for the whole state⁴—did not alter the nature of the servitude; and the levee districts are invested by statute with complete authority for the determination, construction and maintenance of flood control works. In the present case, the actions of the defendant were properly performed for the preservation of existing levees, and the plaintiff's only recourse would be to claim the compensation allowed under the constitution for lands taken, used or destroyed. Since the plaintiff was not making this kind of claim, and his action did not meet the requirement of such a claim, the defendant's exception of no cause of action was maintained and the suit dismissed.

In the case of *Breaux v. Lefort*⁵ a group of plaintiffs claimed ownership of a tract of land. Their predecessors had instituted

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1. 210 La. 121, 26 So. (2d) 474 (1946).

2. For texts of corresponding articles in prior civil codes, see Compiled Edition of the Civil Codes of Louisiana, p. 383.

3. La. Const. (1898) Art. 312.

4. La. Const. of 1921, Art. XVI, § 6.

5. 209 La. 506, 24 So. (2d) 879 (1946).