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Repository Citation

Joseph Dainow, *Ranking Problems of Chattel Mortgages and Civil Code Privileges in Louisiana Law*, 13 La. L. Rev. (1953)
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Ranking Problems of Chattel Mortgages and Civil Code Privileges in Louisiana Law

*Joseph Dainow**

This article deals with a limited kind of ranking problem among claims which already have preferential status and where the determination of priority requires the affixing of a date of creation which is not supplied by the law establishing the privileges. It is not within the scope of this article to cover all the details concerning the privileges involved, nor is any consideration given to the subject of recordation.

It might also be added that this article does not purport to be exhaustive of the problems or the authorities, but it does attempt to outline the nature of the principal problem and the nature of any solutions.

I. PRIVILEGES UNDER THE LOUISIANA CODE

Theory of Privileges

In the civil law, the transactions which are intended to provide security for the fulfillment of a principal obligation are usually classified as being in the nature of either personal security (suretyship) or real security (pledge, mortgage). A privilege, which is one of the Louisiana security devices, gives a particular creditor precedence before other creditors; however, it does not fit into either of these two categories, although it comes closer to the latter than the former.

Generally speaking, all a person's property assets can be sought out by his creditors for the payment of his debts,¹ and the general rule is that the creditors share ratably if the proceeds are insufficient to pay them all.² The whole subject of privileges in the Civil Code is introduced, as an area of exception to the

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1. Art. 3182, La. Civil Code of 1870.

2. Art. 3183, La. Civil Code of 1870.

general rule of proration, by the concluding phrase of Article 3183, ". . . unless there exist among the creditors some lawful causes of preference."

The effect of this exemption from proration gives the privileged creditor an assurance of payment in full even if the ordinary creditors get nothing. In this respect, the Civil Code privilege constitutes a security device.

The subject matter of privileges is *stricti juris*, and no privilege can be claimed without an express text of law either in the Civil Code or in a statute.³ That is, privileges arise exclusively by the operation of law, and by reason of the nature of a debt.⁴ The determination of which debts shall carry a privilege is purely and simply a matter of legislative policy decision and the purpose is to make this automatic security device accompany the transaction so favored.

Reasons for Privileges

In the case of every single privilege, there is necessarily a policy objective which warrants an exception to the general rule of proration among creditors. The reasons are seldom stated, but it is apparent that in many instances the privilege is created in order to help a prospective debtor get credit which is not otherwise likely to be extended to him.⁵

In some instances, the interest which needs the special automatic protection of the privilege is that of the creditor, such as the servant,⁶ the clerk,⁷ and the artisan.⁸ These persons are presumably dependent upon their personal earnings for their daily living.⁹

A number of the Civil Code privileges must be considered as having been established in the ultimate general interest, despite the fact that a certain creditor gets the immediate advantage. In this category are the funeral charges,¹⁰ the expenses of the

3. Art. 3185, La. Civil Code of 1870.

4. Art. 3186, La. Civil Code of 1870.

5. E.g., Arts. 3191 (5), 3208 (supplies of provisions), Art. 3217 (1) (services and advances for crops), La. Civil Code of 1870. Cf. 2 Planiol, *Traité Élémentaire de Droit Civil* 882, n° 2544, 2570 (11 ed. 1939).

6. Arts. 3191 (4), 3205, La. Civil Code of 1870.

7. Arts. 3191 (6), 3214, La. Civil Code of 1870.

8. Art. 3217 (2), La. Civil Code of 1870.

9. Cf. 2 Colin et Capitant, *Cours de Droit Civil Français* 944, n° 1495 (10 ed. 1948); 2 Planiol, *op. cit. supra* note 5, at 880, 882, n°s 2562, 2570.

10. Arts. 3191 (1), 3192-3194, La. Civil Code of 1870.

last illness,¹¹ and to some extent the law costs for the administration of justice.¹²

The privilege of the lessor¹³ does not have to be considered as established exclusively in favor of the lessor, because this security device may well be the supporting reason for a lease which might not otherwise be granted. Likewise, the privilege of the vendor¹⁴ may give as much help to the purchaser who needs credit as it is an encouragement to business. And so on.

Ranking of Privileges

When there are two or more privileged debts which seek payment at the same time, the determination of their competition and order of priority is referred to as a problem of ranking. The several privileges do not come together into one category for proration among themselves, but there is another order of preference established among them. This order of priority has nothing to do with the time of their creation but is settled exclusively by their nature.¹⁵ It is only privileges in the same rank which are paid in concurrence,¹⁶ and here again there is no significance attached to the time of their coming into existence.

Just as the creation of each privilege involves a decision of policy, so the matter of each ranking between privileges is a policy decision. Despite a seeming complexity of detail, the codifiers had a pretty straight pattern in mind for this part of the law, and they followed it through in a systematic manner. An analysis of the provisions concerning the ranking of privileges under the Civil Code was published in a prior article,¹⁷ wherein it was pointed out that there are rules in the code for the settlement of any ranking problem that might arise among Civil Code privileges.

It was there observed that, unless otherwise provided specifically, special privileges have priority over general privileges bearing upon the same subject matter, and that where a privilege operates on both movable and immovable property it should be exercised first against the movables before proceeding against

11. Arts. 3191 (3), 3199-3204, La. Civil Code of 1870.

12. Arts. 3191 (2), 3195-3198, La. Civil Code of 1870.

13. Arts. 3217 (3), 3218-3219, 2705-2709, La. Civil Code of 1870.

14. Arts. 3217 (7), 3227-3231, 3249 (1), La. Civil Code of 1870.

15. Art. 3187, La. Civil Code of 1870.

16. Art. 3188, La. Civil Code of 1870.

17. Dainow, Article 3267 and the Ranking of Privileges, 9 LOUISIANA LAW REVIEW 370 (1949).

the immovables.¹⁸ It was then shown that the chapter of articles (3254-3270) on ranking was carefully divided by the redactors into two groups: the one dealing with competing privileges on movables (3255-3265), and the other with the ranking of privileges affecting immovable property (3266-3269).¹⁹

Recordation

In order to be effective against third persons, some of the privileges affecting immovable property have to be recorded, but privileges on movables do not require any recordation.²⁰ The problems incident to recordation are not within the scope of the present article.

II. STATUTORY PRIVILEGES

Purposes and Operation

From the point of view of the creditor, a privilege is certainly a good thing; and a good thing is sought after by all who have the means to do so. The excessive multiplication of new statutory privileges inevitably decreases the significance of the original idea of a special area of exception to the general rule of proration among creditors; the exceptions can become top-heavy in relation to what was intended to be the rule.

Since legislation of this sort does not originate by itself, it must be requested by interested parties. The interests with the greater legislative pressures are usually the more successful. In the course of time, a large number of new privileges got into the statute books.²¹

As with the Civil Code privileges, each statutory privilege involves two policy decisions: one, to create the privilege for the debt involved and exempt that creditor from the general rule of proration; another, to fix its ranking in competition with other privileges. In the enactment of each of these statutes, it can hardly be said that the legislators of all the various sessions had in mind any consistent pattern for either the creation or the ranking of these new privileges.

Ranking

Most of the privilege statutes contain a ranking provision whereby the newly-created privilege is subordinated to a very

18. *Id.* at 371.

19. *Id.* at 372-373.

20. La. Const. of 1921, Art. XIX, § 19; Arts. 3271, 3272, 3273, La. Civil Code of 1870. See also Vehicle Certificate of Title Law, La. R.S. 1950, 32:701 et seq.

21. See La. R.S. 1950, 9:4501 et seq.

few of the older code or statutory privileges, but with no attempt to maintain any symmetry or comprehensive consistency among the ever-increasing list of privileges. No attempt has ever been successful in making one ranking list of all the privileges. It is not possible.

With all this, most of the statutory privileges are ranked by their nature and not by the date of their creation. In some statutes, recordation is required,²² but this is for the effective existence of the privilege and not for its ranking.

III. CHATTEL MORTGAGE LAW

Scope and Development

The first chattel mortgage act in 1912²³ permitted chattel mortgage on a small number of enumerated articles: lumber, logs, and livestock. In 1914²⁴ the list was extended to include vehicles, machinery, and certain oil well equipment. In 1916²⁵ more items were added to the enumeration, and since 1918²⁶ the omnibus phrase including "all other movable property" has made the Louisiana chattel mortgage law one of general application and of very extensive use. Subsequent amendments and consolidations seem to have been a frequently recurring legislative process in order to take care of the various problems as they developed. Among the more recent changes, the extension of the chattel mortgage to "assemblages of things"²⁷ and to "stocks of merchandise"²⁸ broadened the scope of this security device beyond any of the earlier contemplations. Perhaps the most surprising amendment was the very latest one, whereby the chattel mortgage follows construction materials into the building itself in certain cases.²⁹

For the present inquiry, these details are not pertinent; however, two facts stand out significantly. Primarily, the use of the chattel mortgage as a security device has pervaded every phase of life and activity in Louisiana. At the same time, there was created a new kind of ranking problem for priority between chattel mortgages and other preferences.

22. E.g., under the Building Contract Law, La. R.S. 1950, 9:4801 et seq.

23. La. Act 65 of 1912.

24. La. Act 155 of 1914.

25. La. Act 151 of 1916.

26. La. Act 198 of 1918.

27. La. Act 172 of 1944.

28. La. Act 474 of 1948.

29. La. Act 50 of 1952, amending La. R.S. 1950, 9:5351.

Ranking Provision

The arrival of the chattel mortgage into the law of Louisiana brought a strong and increasingly frequent competitor in the field of preferences against movable property. The chattel mortgage is effective against third persons from the time of its filing for recordation;³⁰ and in all its versions and revisions, the chattel mortgage law has had essentially the same ranking provision that "every such mortgage shall be . . . superior in rank to any privilege or preference arising subsequently thereto."³¹

As a basis for ranking between competing preferences, this was a departure from the Civil Code principle of ranking privileges by reason of their nature. Instead there was introduced a new principle of chronological priority wherever a chattel mortgage was involved. Since the chattel mortgage laws came into effect as legislation subsequent to the Civil Code, the ranking provision of the chattel mortgage law had to prevail in all situations of competition.

It might be argued that, since the chattel mortgage is assimilated to the Civil Code immovable mortgage for certain creditors' remedies³² and other rules not expressly covered in the chattel mortgage law,³³ the provision of Civil Code Article 3186³⁴ should govern so as to give privileges priority over chattel mortgages. However, the fact remains that this code provision was promulgated in 1870 whereas the chattel mortgage laws are all of much later date. And there is no escape from the basic rule of statutory interpretation that in matters of conflict or inconsistency the later legislation supersedes the earlier.

Under the Civil Code system of privileges and their ranking, the time of creation of each privilege was irrelevant and not even considered. Accordingly, there are no provisions in the code as to this point. When such code privileges (and most of the statutory privileges) are found in competition with a chattel mortgage, it is not only important but indispensable to affix on each a date of creation, in order to get it into the necessary

30. La. R.S. 1950, 9:5354. See also Vehicle Certificate of Title Law, La. R.S. 1950, 32:710.

31. La. R.S. 1950, 9:5354 (italics supplied).

32. La. R.S. 1950, 9:5363.

33. *Durel v. Buchanan*, 147 La. 804, 86 So. 189 (1920); *Charrier v. Greenlaw Truck & Tractor Co., Inc.*, 2 La. App. 622 (1925).

34. Art. 3186, La. Civil Code of 1870—"Privilege is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages."

framework for ranking as against a chattel mortgage on the same property.

In the absence of legislative direction, the courts have been obliged to proceed on their own to meet these situations. In so doing, they in turn have also been motivated by policy objectives in reaching their decisions and in filling this newly-created gap in the law.

IV. THE DATE OF CREATION OF CIVIL CODE PRIVILEGES

The Civil Code privileges are either special or general. The special privileges on particular movables are more frequently encountered and more likely to get into conflict with chattel mortgages; the courts have had to fix a point as their date of creation when litigation made a ranking date necessary. The general privileges on all the movables of a debtor have not been in so much competition with chattel mortgages, and there are fewer judicial expressions as to their date of creation. An examination of the question of the date of creation will now be made concerning the most important of the Civil Code privileges.

Special Privileges

Lessor. The existence of the lessor's privilege is dependent upon two elements: (1) a lease between the parties,³⁵ and (2) the presence of the effects in the premises.³⁶ Accordingly, the earliest point of time when these two elements concur is the date on which the lessor's privilege arises.³⁷ This is not dependent upon any rent being due;³⁸ the privilege is protection for a continuing relationship.

The lessor's privilege is predicated upon a lease; therefore, it must be a particular lease. Consequently, if either by agreement or operation of law there comes into existence a new lease, that also means a new privilege with a new date of creation. Thus, if the lessor and lessee (under a monthly lease for an indefinite term) agree upon a change in the rent, they are deemed to have made a new lease,³⁹ and the privilege deriving from the new lease cannot have a date of creation any earlier than the

35. *Fisk v. Moores*, 11 Rob. 279 (La. 1845).

36. Arts. 2705-2709, 3217 (3), 3218, La. Civil Code of 1870.

37. *Youree v. Limerick*, 157 La. 39, 101 So. 864 (1924).

38. *Ibid.*

39. *McGuffin v. Barkett*, 44 So. 2d 195 (La. App. 1950); *Weeks Supply Co. v. Werdin*, 147 So. 838, and 154 So. 378 (La. App. 1933, 1934), criticized in Note, 9 *Tulane Law Review* 124 (1934).

concurrence of the new lease and the presence of the effects on the premises. This means that a chattel mortgage which came into existence after the first lease but before the new lease thereby moves into first rank ahead of the lessor's privilege.⁴⁰

The most troublesome problem on the question of a new lease has been in the case of "reconduction." Where a lessee stays on after the expiration of an original lease term, without objection of the lessor, there is a lease by reconduction,⁴¹ which the court has held to be a continuation of the original lease and not a new lease.⁴² The significance of retaining the original date of creation for the lessor's privilege is apparent and preserves his ranking over any intervening chattel mortgages.

The articles of the Louisiana Civil Code use language which has been relied upon in support of the continuation theory for the lease by reconduction.⁴³ The French Civil Code uses language directly expressive of the new lease idea.⁴⁴ A strong argument has been made that the new lease theory would have been appropriate in Louisiana because reconduction takes place only where a specified term has expired and by reason of the general principles of lease,⁴⁵ and in fact an earlier Louisiana decision was to that effect.⁴⁶ However, in the settlement of this question—which appears to have stood the test of time—the continuation theory has prevailed together with its obvious results. The decision to preserve the lessor's priority was clearly one of policy.

Since a lessor's privilege gives him a right of pursuit, against the lessee's effects subject to the privilege, for fifteen days "after

40. Cf. *Easterling v. Brooks*, 213 La. 519, 35 So. 2d 132 (1948).

41. Art. 2688, La. Civil Code of 1870. "If, after the lease of a predial estate has expired, the farmer should still continue to possess the same during one month without any step having been taken, either by the lessor or by a new lessee, to cause him to deliver up the possession of the estate, the former lease shall continue subject to the same clauses and conditions which it contained; but it shall continue only for the year next following the expiration of the lease."

Art. 2689, La. Civil Code of 1870. "If the tenant either of a house or of a room should continue in possession for a week after his lease has expired, without any opposition being made thereto by the lessor, the lease shall be presumed to have been continued, and he can not be compelled to deliver up the house or room without having received the legal notice or warning directed by Article 2686."

42. *Comegys v. Shreveport Kandy Kitchen*, 162 La. 103, 110 So. 104 (1926), reversing 3 La. App. 692 (1926); *McKesson Parker Blake Corp. v. Eaves & Redditt, Inc.*, 149 So. 294 (La. App. 1933).

43. See note 39, *supra*.

44. Arts. 1738, 1776, French Civil Code.

45. *Lapeyre, Tacit Reconduction—A New Lease*, 1 LOUISIANA LAW REVIEW 439 (1939).

46. *Remedial Loan Society v. Solis and Trepagnier*, 1 La. App. 164 (1924).

they are taken away,"⁴⁷ it has been held that the lessor's privilege is lost after that time so that if the effects are later brought back to the premises it is a new privilege which attaches as of the return.⁴⁸ There is some logic to this conclusion, but it can be questioned as to policy. If a tenant sends out his furniture, household appliances, or other effects, to be repaired, and more than fifteen days elapse before they are brought back into the premises, the lessor has only a new privilege; for no palpable reason, he has lost his priority over intervening chattel mortgages and is thereby effectively deprived of his security.

On the other hand, if there were as clear a policy to protect the lessor's priority in this situation as there was in the reconduction issue, it might not be difficult or far-fetched to support it. This might be done by taking the phrase "after they have been taken away" or "have been removed" as meaning *permanently* or *without intent to bring them back*, which is in all probability what the original redactors of this rule had in mind.⁴⁹

Vendor. The vendor's privilege arises purely and simply from the sale, as an automatic security device for the unpaid balance of the price. The date of its creation must then be the point of time at which the sale as a contract is complete.⁵⁰ Since delivery to the purchaser is not essential to the perfection of the sale,⁵¹ that element cannot be of any consequence in fixing the time at which the vendor's privilege comes into existence.

A condition for the continued existence of the vendor's privilege is that the object remain in the possession of the purchaser.⁵² There has been, and there may still be, some question as to whether this means the purchaser's physical possession or legal possession,⁵³ although the court has given some indication that

47. Art. 2709, La. Civil Code of 1870. See also Art. 288, La. Code of Practice of 1870.

48. *General Motors Acceptance Corp. v. Hand*, 16 La. App. 488, 133 So. 466 (1931).

49. Cf. Art. 2102 (1), French Civil Code. The French commentators consider this right of pursuit as an exceptional right to protect the lessor's security, and their observations seem to be predicated upon the situation of removal intended to be permanent. Where things were returned to the premises, no question could arise because no significance attached to the date of creation of the privilege. 2 Planiol, *op. cit. supra* note 5, at 854, nos 2478-2480; 2 Colin et Capitant, *op. cit. supra* note 9, at 962-996, nos 1533-1536; 1 Troplong, *Privilèges et Hypothèques* nos 161-164 (3 ed. 1838).

50. Art. 3227, La. Civil Code of 1870. See also the statement to this effect by the Supreme Court in *United Credit Co. v. Crowell Co.*, 219 La. 993, 997, 54 So. 2d 425, 426 (1951).

51. Art. 2456, La. Civil Code of 1870.

52. Art. 3227, La. Civil Code of 1870.

53. Comment, 4 *Tulane Law Review* 239 (1930).

it means the former.⁵⁴ Here, likewise, there is room for a policy decision concerning the extent of protection for the vendor's privilege.

A question might be raised as to whether a vendor has a privilege if the issue is presented while the object is still undelivered. While there is no provision of law to the effect that he cannot have the privilege under these circumstances, it might appear inconsistent with the provision which preserves the privilege only as long as the thing is in the possession of the purchaser. At the same time, it must be kept in mind that if the date of creation of the vendor's privilege were dependent upon the concurring element of delivery, it would be quite simple for the purchaser to defeat the vendor's privilege by having a chattel mortgage recorded while he delayed the delivery. Again, there is a policy decision, on a point that was irrelevant under the Civil Code system of privileges.

Artisans and Mechanics. The artisan's privilege under the Civil Code⁵⁵ is a security device and therefore an accessory. Three points of view can be taken concerning the time at which this privilege comes into existence.

As an accessory, the privilege cannot exist without or prior to the principal debt which it is intended to secure. The debt may be considered as coming into existence when the artisan does the work and supplies the materials as agreed between the parties. A further division here might be between fixing the date of creation of the privilege as of the beginning of the work or as of its completion; and perhaps the stronger argument might be made for the start of the work.

Another point of view would consider the principal obligation as coming into existence at the time of the contract for the work, which would bring into existence with it the automatic legal security of the privilege. The doing of the work is merely the artisan's performance of his obligation under the contract, just as the payment for the work is the owner's obligation under the contract.

A third position might be that, since the artisan can have a privilege only if the thing is "in his possession,"⁵⁶ there can be

54. *Pierson v. Carmouche*, 146 La. 798, 84 So. 59 (1928). Cf. *Milam Realty Co., Inc. v. Jones*, 7 So. 2d 405 (La. App. 1942).

55. Art. 3217 (2), La. Civil Code of 1870.

56. *Ibid.*

no privilege until the thing is delivered to him in accordance with the agreement between the parties. Support for this view might be found in the argument that, if the owner changed his mind, the artisan might have a good action for damages resulting from breach of contract but could not obtain specific performance to get the job itself.

This last view would be consistent with the rule that the lessor's privilege comes into existence when there is concurrence of the lease and the presence of the effects on the lessor's premises. It might appear to vary from the position that the vendor's privilege comes into existence at the time of the sale regardless of delivery; however, the situations can be distinguished on the ground that the vendor's privilege is given essentially to protect the vendor when the thing is not under his control but in the vendee's possession, whereas the lessor's privilege and artisan's privilege are limited to the situations where the lessor and artisan have some control over the thing itself by reason of its location on their premises.

The statutory artisan's privilege which was introduced by Act 341 of 1946⁵⁷ would seem to be subject to similar observations concerning the date of its creation as of the time of delivery into the workmen's possession, but the situation is not exactly the same because this privilege cannot be predicated upon possession since it has a continued effectiveness for ninety days after the performance of the work, and it would more likely be deemed to come into existence at the time the work began. There would be even more difference for the mechanic's privilege which was introduced by Act 209 of 1926⁵⁸ because in addition to making the privilege effective for ninety days after the performance of the work this statute specifically excludes any relationship of the privilege to possession by providing that "it is immaterial where the automobile or other machinery may have been located at the time or by whom the parts may have been attached."

Expenses of Preservation. The Civil Code fortifies the privilege for the expenses of preservation with two species of rights.⁵⁹ The creditor has not only an exemption from the rule of proration

57. La. R.S. 1950, 9:4502. This statute, as well as the one cited in the next note, provides that its privilege shall have "no effect against . . . a chattel mortgage previously recorded." This merely reiterates the basic problem of the present article, because neither statute states expressly the exact time at which its privilege comes into existence.

58. La. R.S. 1950, 9:4501.

59. Arts. 3217 (6), 3224-3226, La. Civil Code of 1870.

and a very high priority among privileges⁶⁰ but also a right of retention which can be exercised against all other creditors.⁶¹ In competition with a chattel mortgage recorded prior to the making of the expenses of preservation, the latter would have to yield in accordance with the ranking provision of the chattel mortgage law. However, this result does not seem to be in keeping with the purpose of the privilege for expenses of preservation, and the third person in possession may well prefer to protect himself by not incurring the expense rather than expending the money to protect the interest of the chattel mortgagee.⁶²

General Privileges

The general privileges on movables are enumerated in Article 3191 of the Civil Code.⁶³ All the statutory privileges appear to be special, that is, against particular movables, so that the list in the Civil Code⁶⁴ may be considered complete.

There is not a great likelihood of frequent competition between a general privilege on movables with a chattel mortgage on particular things, but it is not at all impossible and has in fact occurred. The first decision by the Louisiana Supreme Court on this kind of a question was only recently rendered,⁶⁵ involving the privilege of a secretary.

Clerks and Secretaries. In the recent case of *Union Credit Company v. Crowell Company*,⁶⁶ a secretary was given priority over a chattel mortgage on the basis that the secretary's privilege came into existence at the beginning of the employment relation-

60. Art. 3262, La. Civil Code of 1870.

61. Art. 3225 (2), La. Civil Code of 1870.

62. But see *Federal Mortgage & Finance Co. v. Bohne*, 146 So. 173 (La. App. 1933), where a mechanic tried to prime a prior chattel mortgage by classifying his repairs as expenses of preservation.

63. Art. 3191, La. Civil Code of 1870:

"The debts which are privileged on all the movables in general, are those hereafter enumerated, and are paid in the following order:

"1. Funeral charges.

"2. Law charges.

"3. Charges, of whatever nature, occasioned by the last sickness, concurrently among those to whom they are due.

"4. Wages of servants for the year past, and so much as is due for the current year.

"5. Supplies of provisions made to the debtor or his family, during the last six months, by retail dealers, such as bakers, butchers, grocers; and, during the last year, by keepers of boarding houses and taverns.

"6. The salaries of clerks, secretaries, and other persons of that kind.

"7. Dotal rights due to wives by their husband."

64. Including the widow's homestead (\$1,000) under Article 3252 (last par.), La. Civil Code of 1870. (No consideration is here given to tax liens.)

65. *United Credit Co. v. Crowell Co.*, 219 La. 993, 54 So. 2d 425 (1951).

66. *Ibid.*, reversing 47 So. 2d 443 (La. App. 1950).

ship, even though no salary was in default until after the execution and recordation of the chattel mortgage. This reversed the court of appeal, which had given priority to the chattel mortgage on the theory that the secretary could have no privilege until there was a debt of unpaid salary owing to her. The Supreme Court held that the employment constituted a continuous contract and that the privilege came into existence at the time of the employment relation.

The court found encouragement for its position on this point in the similar rule which recognizes the vendor's privilege and the lessor's privilege as coming into existence at the time of the contract and not having to wait until a payment has been defaulted. The court's realization that a policy decision was really involved found expression and comfort in the belief that this must have been the original legislative intent because otherwise the secretary's privilege would be defeated by a chattel mortgage which had been recorded before any salary was in default.⁶⁷

An incidental issue in this particular case was whether an intervening change in salary constituted a new employment contract, thereby setting a new date for the secretary's privilege. However, this was distinguished from the effect of a change in rent in connection with a lease, and the basic policy of protecting the secretary was effectuated.

Funeral Expenses. Under the ranking provision of the chattel mortgage law, there is not likely to be competition between funeral expenses and a chattel mortgage because the latter must be established during the debtor's lifetime, whereas the funeral expenses necessarily arise subsequently thereto. However, the possibility of conflict is definitely present, especially by reason of the rule that the privilege for funeral expenses covers dependent members of the immediate family.⁶⁸

Among the dates which may be considered as the proper point of reference for the coming into existence of the privilege for funeral expenses would be: (1) the death, (2) the contract between the debtor and the undertaker, (3) the burial, and (4) the rendition of the undertaker's statement of charges.

67. "To hold otherwise would render the privilege valueless and subordinate to mortgages in many instances." 219 La. 998, 998, 54 So. 2d 425, 427.

68. See Art. 3257, La. Civil Code of 1870; *Alter v. O'Brien*, 31 La. Ann. 452 (1879).

The death itself can hardly be the time at which the privilege comes into existence because no choice has yet been made as to undertaker or selection of materials and service desired. These elements become fixed only when an agreement is made with a particular undertaker; and therefore this point can more reasonably be taken for the creation of the privilege. The burial is merely the performance of the service of interment and is not the time at which any original obligations arise. Although the rendition of the statement may be the first knowledge of the exact extent of the debt, it can hardly be considered as the time of its first creation for privilege purposes.

The foregoing analysis is pertinent as long as the conflict between funeral charges and chattel mortgage is governed by the ranking provision of the chattel mortgage law. However, the policy question may well be asked as to whether this conflict of preferences ought not to be governed by the same considerations (decency, sanitation, and so forth) as the conflict between funeral charges and the regular immovable mortgage, in which case both the Civil Code and the jurisprudence have maintained the priority of the funeral charges over the mortgage.⁶⁹

Law Charges. The privilege for law charges presents several complications. The code provisions⁷⁰ contemplate a number of different kinds of items within the category of taxed costs, but in some of the code ranking provisions, there is a specific priority for costs incurred in selling the property,⁷¹ and in some instances for costs of affixing seals and making inventories.⁷² It would thus appear that for ranking purposes the law charges consist of at least three groups, of which the costs indispensable to the liquidation of the assets are given the highest priority. No creditor at all can obtain his preferential payment until the debtor's property is transformed into money, so these costs are necessarily paid first of all, possibly even ahead of funeral expenses.⁷³

The specific ranking provisions of the code expressly place funeral charges ahead of law charges,⁷⁴ but this may have to be

69. Art. 3186, La. Civil Code of 1870; Succession of Hardy, 11 La. App. 239, 122 So. 154 (1929); Home Owners Loan Corp. v. Succession of Brooks, 180 So. 170 (La. App. 1938).

70. Arts. 3195-3198, La. Civil Code of 1870.

71. Arts. 3252 (last par.), 3254 (last par.), 3256, 3262, 3265, 3267, La. Civil Code of 1870.

72. Arts. 3263, 3267, La. Civil Code of 1870.

73. Cf. Arts. 3262, 3263, La. Civil Code of 1870.

74. Arts. 3191, 3254, La. Civil Code of 1870.

taken to mean those law charges which were not incurred in the sale of the property. Otherwise, the officers of the court could refuse to incur the expense if it would be tantamount to their having to pay the funeral charges. On the other hand, the Louisiana codifiers, both in the 1808 and 1825 Civil Codes,⁷⁵ reversed the order of the French Civil Code, which ranks all law charges ahead of funeral charges;⁷⁶ and it may be that they really intended to rank funeral charges ahead of all law charges just as they stated in Articles 3191 and 3254.

The above discussion about law charges may seem irrelevant to the principal issue of this article, namely, the conflict with chattel mortgages. However, there may be something more to the matter of separating costs of sale from other law charges than what appears in the texts. As a practical matter, it is not conceivable that a chattel mortgage would not have to accept subordination to the costs incurred in selling the property involved. Yet these costs of sale are necessarily the most recent in point of time and under the ranking provision of the chattel mortgage law they would be primed because they "arise subsequently."

If the chattel mortgagee is the plaintiff in a foreclosure, he finds as a practical matter that he may not be able to get the wheels of justice into motion until he himself puts up the money for the costs before the property is even seized. If the chattel mortgagee is the intervenor successfully claiming a priority, he will find the law charges—at least the costs of sale—ranked ahead of him in the distribution of the proceeds.⁷⁷ These situations seem to be accepted much more clearly in actual practice than they are spelled out in the texts of law.

Law charges include quite a variety of kinds of items, and it would hardly be satisfactory to reason out, as well as impractical to administer, bases for classification as to the inception of the privilege that attaches in each case (for example, the commencement of a lawsuit for all the costs duly incurred therein, or the opening of a succession for the costs of administration). It might appear simpler to legislate all taxed law costs into one category as the first privilege, ranking ahead of all others, with no excep-

75. La. Civil Code of 1808, Art. 73, p. 428; Art. 3158, La. Civil Code of 1825. See Compiled Edition of the Civil Codes of Louisiana, Art. 3191.

76. Art. 2101, French Civil Code.

77. Cf. *Federal Mortgage & Finance Co. v. Bohne*, 146 So. 173 (La. App. 1933) (re storage charges).

tion; however, neither this nor any other proposal is likely to be satisfactory to everybody.

Expenses of Last Illness. The last illness is still defined in the Civil Code as "that of which the debtor died."⁷⁸ Since there is no certainty of a privilege until the patient dies, it might be argued that the time of death is the earliest inception of the privilege. This would not be in keeping with the code provisions which expressly contemplate an earlier date of creation. Although no privilege exists until the death, the fact of death has a retroactive effect in creating the privilege for the expenses incurred during the preceding period. In the case of a chronic illness, "the privilege shall only commence from the time when the malady became so serious as to prevent the deceased from attending to his business and confined him to his bed or chamber."⁷⁹

Accordingly, it would seem that the date of inception of the privilege for expenses of last illness would be the beginning of the relationship out of which the charges arose. Thus, it would be the date of entering the hospital for the hospital charges, the date of engaging the physician for the medical services, the date of purchase for cost of medicines, and so forth. Such a system might sound reasonable and logical, but it could result in a curious inconsistency. If there were a chattel mortgage subsequent to some of the expenses but prior to others, it would separate the different expenses of last illness for ranking purposes among themselves. This would be contrary to the general principle of Article 3188, which ranks concurrently all privileges of the same kind, and directly opposed to Article 3191(3), which expressly ranks concurrently all charges occasioned by the last sickness.

By providing an automatic legal security device, the policy underlying this Civil Code privilege is to encourage the rendition of necessary services to a sick person who may not have the means or the credit standing to obtain them otherwise. To fit in with the general policies and with the developing pattern of the law, it would seem that the proper point of inception for this

78. Art. 3199, La. Civil Code of 1870; Succession of Whitaker, 7 Rob. 91 (La. 1844). Louisiana borrowed this provision from French law; but France has in the meantime corrected the incongruity by granting the privilege for expenses of last (most recent) illness, whatever its outcome, in a law of 30 November 1892 amending Article 2101 (3) of the French Civil Code; see 2 Planiol, *op. cit.* supra note 5, at 881, n° 2558.

79. Art. 3200, La. Civil Code of 1870.

privilege would be the beginning⁸⁰ of the illness which necessitated all the expenses. However, in any event, this date could not be more than "one year before the decease" because that is the limit of the privilege granted by the code.⁸¹

Wages of Servants. The privilege granted to servants and domestics⁸² is so similar to the privilege of clerks and secretaries that little discussion is needed to give it the same date of creation at the time of the commencement of the employment relation. It must be kept in mind, however, that there is an express limitation on the extent of the privilege of the secretary⁸³ and that the privilege of servants is likewise and expressly limited to the past year and so much as is due for the current year.⁸⁴

Supplies of Provisions. Here also there is a limitation on the extent of the privilege, this time to the supplies furnished during the past six months for retail dealers,⁸⁵ and for the past year and the current year in case of keepers of boarding houses and taverns.⁸⁶ The privilege covers the entire indebtedness as a single unit; it would not be in keeping with the purpose or provisions of the Civil Code to consider each purchase as a separate transaction with a series of separate privileges for each.

Therefore, to effectuate the code policy, this privilege should be considered as coming into existence at the time of the establishment between the parties of the relationship for the furnishing of the supplies, but not to exceed the limits expressly indicated in the code.

Widow's Homestead. The privilege granted to the widow in necessitous circumstances can hardly be considered as coming into existence at any time other than the death of the husband. Both the right and the accessory privilege are dependent upon the circumstances which have to be necessitous at the time of the death. If there were any conflict with a chattel mortgage, the latter would prevail because the widow's claim would always "arise subsequently thereto." In any event, the widow's privilege is expressly subordinated to "conventional mortgages" in the

80. By objective symptoms, medical diagnosis, or first expenditure?

81. Art. 3201, La. Civil Code of 1870. But see dictum in *Succession of Felps*, 191 So. 738 (La. App. 1939).

82. Arts. 3191 (4), 3205-3207, La. Civil Code of 1870.

83. Art. 3214, La. Civil Code of 1870.

84. Art. 3206, La. Civil Code of 1870.

85. Art. 3209, La. Civil Code of 1870.

86. Art. 3213, La. Civil Code of 1870.

text of its creation.⁸⁷ The omission of this subordination in Article 3254, which contains an order of ranking for general privileges on movables, might be argued as a distinction from the ranking provision in Article 3252, which also affects immovables; but this would not change the fact that the chattel mortgage law is still the later legislation and that the widow's homestead privilege would necessarily arise subsequently to the chattel mortgage involved.

V. CONCLUSION

Each rule for the ranking of claims among preferred creditors is a policy decision made, or to be made, by the legislature or by the courts. When promulgated by the legislature, there need not be stated any rhyme or reason for the rule in order to give it effect. When worked out judicially by the court, a rule must be consistent with existing law and be able to fit into its basic pattern. The range of legislative policy decisions is accordingly greater than that of the courts—although it would be expected that the same considerations should apply in very large measure.

Under the Civil Code system, privileges constitute a very limited kind of exception to the general rule of proration among creditors. And as between the two lawful causes of preference among creditors,⁸⁸ privileges were ranked higher than mortgages⁸⁹ without any reference to the date of creation of either.

The statutory privileges have now multiplied the lists of exceptions to such an extent that they have cut down considerably on the original significance of privileges, and the chattel mortgage law has cut across a good deal of the original area of preference. The total result is that there exist gaps and inconsistencies in the law. Quite a number of policy decisions will have to be made and clarified before a comprehensive and a clear system of ranking of preferences can be properly established.

87. Art. 3252 (last par.), La. Civil Code of 1870, as amended by La. Act 242 of 1918.

88. Art. 3184, La. Civil Code of 1870.

89. Art. 3186, La. Civil Code of 1870.