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Louisiana Practice - Executory Process - Use of Injunction to Raise Question of Authenticity

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objective of the statute, as it eliminates any doubt which the *Motor Sales Co.* case may have created concerning the act's application to secondary debtors. The sole remaining doubt is provided by the unfortunate dictum in the *Lofton* case. It is to be hoped that the Louisiana courts will seize upon the first opportunity to repudiate this dictum, and to reaffirm the rationale of the *Walmsley* and *Simmons* cases.

Ronald Lee Davis, Jr.

LOUISIANA PRACTICE—EXECUTORY PROCESS—USE OF INJUNCTION TO RAISE QUESTION OF AUTHENTICITY

Plaintiff invoked the seizure of defendant's automobile under executory process[1] to enforce a chattel mortgage given to secure the unpaid portion of the purchase price. This mortgage was evidenced by an act under private signature duly acknowledged and was identified with a promissory note executed in connection therewith. Defendant sought injunction to oppose plaintiff's use of executory process, upon the ground that the mortgage was not in authentic form. The trial court held that defendant's remedy was by appeal from the order of seizure and sale. *Held*, the issue of lack of authentic evidence may be raised by a defendant in executory proceedings by resort to injunctive process. *General Motors Acceptance Corp. v. Anzelmo*, 222 La. 1019, 64 So. 2d 417 (1953).

Though generally service of citation cannot be waived, nor judgment confessed, Louisiana's Constitution makes a specific exception in the case of executory process.[2] Historically, the procedure recognized by this constitutional provision was developed originally by the medieval Italian jurists out of the

1. For the information of the common law lawyer, it may be pointed out that a proceeding is executory when seizure of the debtor's property is obtained without previous citation, by virtue of an act or title importing confession of judgment. Art. 98, La. Code of Practice of 1870, provides for executory process in other cases also. This idea is foreign to the common law, for a confession of judgment prior to maturity of an obligation is an absolute nullity under that system. See Tidd, Practice 599 et seq. (9 ed. 1840). It may be further pointed out that the common law *cognovit actionem* is roughly analogous to the procedure used in the principal case. In the *cognovit actionem* situation confession of judgment does not take place until after maturity of the obligation; whereas confession of judgment warranting executory process is confected prior to maturity. It is the idea of confession of judgment prior to maturity which the common law rejects.

2. La. Const. of 1921, Art. VII, § 44.

blending of the Lombard notion of the private seizure of a debtor's goods with the Roman maxim *"confessus in jure pro judicato habetur."*[3] The analogy of the confession of judgment originally led to the requirement of the execution of the pledge or mortgage, and of the confession of judgment, before a judge, so that all that remained was to obtain execution if the debt was not paid at maturity. Eventually, execution of the instrument containing the confession of judgment was permitted before the notary, who traditionally possessed quasi judicial powers under the civil law.

Initially, the execution of the mortgage or privilege through seizure and sale of the hypothecated property was ex parte, and the debtor was afforded no opportunity to present a defense. In the development of executory procedure, however, the analogy of the judicial confession of judgment again provided a solution to this problem. Since, under Roman law, the judgment debtor could always enjoin the execution of the alleged confession of judgment on the ground of fraud, payment, prescription, et cetera, eventually the judgment debtor was permitted to raise these defenses to the executory procedure in a separate injunction suit.[4] This injunction suit provided the debtor his day in court, in effect constituted the only answer which he could make, and was the only way in which in executory process our notions of fair play involved in the concept of due process could be effectuated. Louisiana inherited executory process from Spanish law, and in the redaction of the Code of Practice of 1825, Spanish procedural rules formed the basis of the applicable code provisions.[5]

The Code of Practice authorizes the use of executory process in two cases: (1) enforcement of a privilege or mortgage evidenced by an executory title; and (2) enforcement of a judgment of another Louisiana court.[6]

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3. Engelmann-Millar, History of Continental Civil Procedure 9 (1927).

4. Id. at 498-501. Pertinent excerpts of the foregoing are set forth in 2 McMahon, Louisiana Practice 1421 (1939).

5. See 2 Louisiana Legal Archives 115-119 (1937), where the redactors' notes indicate Febrero's adicionado as the source of the basic articles. This reference is to Febrero, Librería de escribanos (ed. 1817).

6. Art. 732, La. Code of Practice of 1870. In this connection see also Arts. 746, 752, La. Code of Practice of 1870.

It would appear that the theory of permitting the use of executory process to enforce judgments of other Louisiana courts is based on the recognition of the dignity to be accorded judgments contradictorily obtained. That a judgment thus acquired is entitled to greater weight than the quasi-judicial authentic act cannot be denied. It is to be noted that the

In Louisiana, originally an act was said to import a confession of judgment in matters of privilege and mortgage when such act was passed before a notary public and two witnesses and wherein the debtor acknowledged the obligation to which the privilege or mortgage relates.[7] This requirement, insofar as movables are concerned, was relaxed in 1952 to permit the enforcement via executiva of a chattel mortgage executed under private signature, if "duly acknowledged."[8]

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use of executory process to enforce judgments of other Louisiana courts is rather limited. The court rendering the judgment can simply issue a writ of fieri facias directed to the sheriff of the parish where the property to be seized is situated. See Arts. 641-642, La. Code of Practice of 1870. See also Lafon v. Smith, 3 La. 473 (1832) for a very early application of Article 642. This point is discussed at length by the opinion in Marine Bank & Trust Co. v. Shaffer, 166 La. 164, 116 So. 838 (1928). Resort to executory process is still necessary in two cases: (1) garnishment under the writ of fieri facias where the garnishee has his domicile in another parish (see Arts. 642[2], 246[3, 4], La. Code of Practice of 1870; Featherston'h v. Compton, 3 La. Ann. 380 [1848]; E. Marqueze & Co. v. LeBlanc, 29 La. Ann. 194 [1877]), and (2) examination of a judgment debtor domiciled in another parish (see La. R.S. 1950, 13:4311, 4312[4]).

Originally executory process was available to enforce judgments rendered by other states and even foreign countries. Apparently its use in this connection proved unsatisfactory, so that prior to 1870 the article was amended.

7. Art. 733, La. Code of Practice of 1870. Art. 2234, La. Civil Code of 1870, reads in part: "The authentic act, as relates to contracts, is that which has been executed before a notary public or other officer authorized to execute such functions, in presence of two witnesses, aged at least fourteen years, or of three witnesses, if a party be blind. If a party does not know how to sign, the notary must cause him to affix his mark to the instrument."

See La. R.S. 1950, 35:7, which provides that acts executed before any commissioned officer of the United States armed forces shall have the same force and effect as if made or executed before a notary in Louisiana. To the same effect as regards ambassadors and consular officials, see La. R.S. 1950, 35:9. The Governor may appoint commissioners for each one of the states and territories of the union, who shall have the powers of a notary public. In this connection see La. R.S. 1950, 35:454-457. Cf. La. R.S. 1950, 35:460.

8. La. R.S. Supp. 1952, 9:5363, provides: "All laws and rules and all remedies and processes now or hereafter made available to creditors for the protection or enforcement of their rights under mortgages affecting immovables shall be available to creditors of obligations secured by mortgages affecting movables. *The right of executory process is hereby specifically granted to all creditors on movable property as hereinabove set forth whether their rights shall arise under the terms of [an] authentic act or acts under private signature duly acknowledged.*" (Italics supplied.)

This amendment legislatively overrules Osborne v. Mossler Acceptance Co., 214 La. 503, 38 So. 2d 151 (1948), and the opinion expressed in Miller, The Louisiana Chattel Mortgage and Small Loans Act, 23 Tulane L. Rev. 61, 70-73 (1948).

The Chattel Mortgage Act, La. R.S. Supp. 1952, 9:5363, simply provides that a mortgage under private act "duly acknowledged" can be enforced by executory process. Acknowledgment in this sense merely means that the person against whom the act under private signature is adduced appears before a notary and affirms that he executed such act as his free act and deed. See Arts. 2242, 2260, and 2261, La. Civil Code of 1870. Cf. La. R.S. 1950, 35:511-513, 35:551-555, and 13:3720.

A proceeding by which a person's property is summarily seized and sold without citation is one of great severity; and it appears axiomatic that "to justify the order of seizure and sale every muniment of title, and every link of evidence must be in authentic form."[9] There appears to be no dissent from the foregoing requirement. The difficulty has arisen as to the remedy a defendant must use to raise the issue of authenticity.

The instant case considers the conflicting cases and in the view of the writer clearly dispels the arguments espoused for the disallowal of injunction to raise the issue of lack of authentic evidence.

Prior to the passage of the present injunction statute,[10] the strongest argument, it would seem, against permitting the use of injunction to raise the question of authenticity in executory proceedings was bottomed on the premise that such remedy, usually an ex parte order, would in effect defeat the whole idea behind proceedings via executiva—that is, a fast and efficient means of enforcing an undisputed mortgage or privilege on property. This reason no longer exists for no writ of injunction may now be issued without notice,[11] except, of course, in those cases where the court, upon a proper showing, may in its discretion issue a temporary restraining order.[12] Further, as the instant opinion indicates, a devolutive appeal would not be an adequate remedy;[13] and, if resort must be had to suspensive appeal, in many cases the defendant would be deprived of his remedy to protect his property from illegal seizure and sale because of the requirement of a bond in the amount of one and one-half times the mortgage indebtedness.[14] It was further pointed out that a defendant desirous of raising the issue of

9. Miller, Lyon & Co. v. Cappel, 36 La. Ann. 264 (1884). Cf. Miller v. Gaskins, 3 Rob. 94 (La. 1842); Lowry v. Erwin, 6 Rob. 192 (La. 1843); Dunlap v. Hundly, 2 La. Ann. 212 (1847); Chambliss v. Atchison, 2 La. Ann. 488 (1847); Fortier v. Burthe, 19 La. Ann. 510 (1867); Bank of Leesville v. Wingate, 123 La. 386, 48 So. 1005 (1909); Hackemuller v. Figueroa, 125 La. 307, 51 So. 207 (1910).

10. La. Act 29 of 1924, now La. R.S. 1950, 13:4062 et seq.

11. La. R.S. 1950, 13:4062.

12. La. R.S. 1950, 13:4064.

13. The reason for the ineffectiveness of a devolutive appeal lies in the fact that pending the appeal the property will be sold, so that the appeal has to be dismissed as presenting only a moot question. Jurisprudential authority for this proposition will be found in Citizens' Bank of Columbia v. Bellamy Lumber Co., 140 La. 497, 73 So. 308 (1916); Ouachita National Bank v. Shell Beach Const. Co., 154 La. 709, 98 So. 160 (1923); T. Hofman-Olsen, Inc. v. Northern Lumber Co., 160 La. 839, 107 So. 593 (1926).

14. See Arts. 145.7, 575, La. Code of Practice of 1870.

authenticity and other questions would be compelled to resort to an appeal for one and to an injunction for the other—resulting in multiplicity, which the law abhors.

Professor McMahon in his work on Louisiana Practice[15] has pointed out the conflict of authority on the instant point. Two of the reasons which he advances for permitting the defendant to raise the question of authenticity by injunction[16] were invoked by the court in the instant case and need not be discussed further. A third reason which he advances, and which was not adverted to in the instant case, appears to the writer to be one of the strongest arguments available to support the court's position here; and that is that a defendant in executory process should not only be permitted, but should be required, to seek the necessary relief from the trial court which committed the error before invoking the aid of the appellate court.[17] Usually a plaintiff proceeding via executiva will present his petition for the order of seizure and sale to the judge along with the supporting authentic act. The court does not have time, nor should it be expected, to read each paper placed before it and hence signs the order, depending on the implied assurance of plaintiff's counsel that everything is in authentic form. If it later develops that there is a lack of authentic evidence to support the order, it would appear that the trial judge would welcome the opportunity to correct his error rather than have his knuckles rapped by an appellate court.

Perhaps even more important than any of the foregoing is the fact that in certain cases a remedy by appeal is totally inadequate.[18]

15. 2 McMahon, Louisiana Practice 1464, n. 17 (1939). The same author further points up wherein Chief Justice O'Niell's opinion in the case of Weber v. Dawson, 172 La. 213, 133 So. 751 (1931), cites the exact authorities upon which the learned jurist relied in his dissenting opinion in the case of Jones v. Bouanchaud, 158 La. 27, 103 So. 393 (1925). Nor did the Chief Justice in the *Dawson* case cite any authority to the contrary of the position taken by the court, though at the time ample contrary authority had been reported in prior opinions. Along this line see the *Bouanchaud* case cited supra.

16. See The Work of the Louisiana Supreme Court for the 1937-1938 Term, 1 LOUISIANA LAW REVIEW 314, 322, n. 14 (1939). See also note 15 supra.

17. Cf. Ascension Red Cypress Co. v. New River Drainage District, 169 La. 606, 125 So. 730 (1930).

18. Suppose that, in the enforcement via executiva of a real mortgage, the mortgagor contended that he had not signed the mortgage and note in the presence of a notary and two witnesses and that hence, despite its appearance, in truth and in fact it is not authentic. Suppose in the case of a chattel mortgage the mortgagor contends that he never "duly acknowledged" his execution of the mortgage and mortgage notes before

Though the early cases[19] are specific in holding that Article 739[20] enumerates the only grounds upon which executory process can be enjoined, the later cases[21] are just as specific in holding that Article 739 merely illustrates the grounds upon which an injunction may be secured without bond and that this article does not exclude the issuance of an injunction with bond on other grounds. The instant case finally settles the point that lack of authentic evidence is one of these "other grounds."

It is heartening to note that though the question of authenticity may have been presented on appeal only obliquely,[22] the court was nevertheless justified in definitively settling this issue.

Inasmuch as the 1952 act permitting a chattel mortgage under private signature duly acknowledged[23] to be enforced by executory process was passed after he had confessed judgment, the defendant urged that to allow plaintiff the use of executory process would be in violation of Article VII, Section 44, of the Louisiana Constitution. The basis for such contention was founded upon the premise that Act 441 of 1952 was substantive or created a new right in plaintiff and hence could not be given retroactive effect. The court sufficiently and correctly dealt with this problem, holding that the act was remedial and

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the notary or anybody else. The remedy by appeal in these cases is valueless, as proof of the mortgagor's contentions do not appear in the record and if the debtor could not raise his contentions through injunction he would have his property seized and sold summarily without any basis therefor in Louisiana law.

19. Exchange & Banking Co. v. Walden, 15 La. 431 (1840); Dupre v. Anderson, 45 La. Ann. 1134, 13 So. 743 (1893).

20. Art. 739, La. Code of Practice of 1870.

21. Sowell v. Cox, 10 Rob. 68 (La. 1845); Hackemuller v. Figueroa, 125 La. 307, 51 So. 207 (1916); Jones v. Bouanchaud, 158 La. 27, 103 So. 393 (1925).

22. The observation here made is based upon the following language from the instant opinion: "The relator (defendant below) makes no contention that the ruling of the trial judge on the latter point [that is, that his remedy to raise the question of authenticity was by appeal from the order of seizure and sale] is not supported by jurisprudence of this Court, but claims that petition for injunctive relief was the only means available to him to attack the constitutionality of Act No. 441 of 1952 in so far as it is deemed to be applicable to his mortgage, confected four months prior to the effective date of the Act." 222 La. 1019, 1021, 64 So. 2d 417, 418 (1953). This observation is further bolstered by the fact that the brief filed in behalf of relator does not disclose that the specific question of authenticity was raised by him though a reading of the original brief filed in behalf of the respondent discloses that counsel for the latter party submitted this question as his main argument. See Brief for Relator, pp. 2-3 and Brief for Respondent, pp. 4-6, General Motors Acceptance Corp. v. Anzelmo, 222 La. 1019, 64 So. 2d 417 (1953).

23. La. R.S. Supp. 1952, 9:5363, as amended by La. Act 441 of 1952.

hence retroactive.[24] The 1952 act merely provides that in the case of movable property executory process may be resorted to in those cases where the confession of judgment and chattel mortgage are by private act duly acknowledged. Prior to the passage of this act executory process could be resorted to only in those cases where the act importing confession of judgment was in authentic form.[25] It is to be noted that the 1952 act did not change the rule as applied to immovable property. The court cogently pointed out that "the fact that the procedural remedy [defendant] contracted for was in a form which at that time would not have authorized executory process does not detract from the *validity of his confession of judgment.*"[26] (Italics supplied.)

Executory process is one of the simplest, most expeditious, and effective remedies available in Louisiana. Under the regime of *Coreil v. Vidrine*,[27] it had one serious defect in not affording the debtor a day in court or an adequate opportunity to assert his defenses. The principal case completely removes these objections and supplies the needed remedy.

John S. Covington

SUCCESSIONS—EXEMPTIONS FROM COLLATION—COLLATION OF MANUAL GIFTS

Three grandchildren of the deceased Mrs. William Gomez, children of a predeceased son, sued the only surviving child, Mrs. Amelie Gomez Salatich, and the testamentary executrix, for the collation of certain sums given the daughter during the lifetime of Mrs. Gomez.[1] The deceased gave her daughter $19,200 in the form of checks[2] in monthly installments between 1930 and

24. See discussion of this point in Shreveport Long Leaf Lumber Co., Inc. v. Wilson, 195 La. 814, 197 So. 566 (1940).

25. Osborne v. Mossler Acceptance Co., 214 La. 503, 38 So. 2d 151 (1948). Cf. La. Act 172 of 1944.

26. General Motors Acceptance Corp. v. Anzelmo, 222 La. 1019, 64 So. 2d 417, 420 (1953).

27. 188 La. 343, 177 So. 233 (1937).

1. This case is one for collation only and not for reduction of an excessive donation, because it is conceded that the total amount received by Mrs. Salatich does not exceed the disposable portion of her mother's estate.

2. The question that a check, if considered an incorporeal thing, could not be the object of a manual gift was not raised in the instant case. See Art. 1539, La. Civil Code of 1870.