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Security Devices - Suretyship - Deficiency Judgment Act

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case the contractual undertaking of the seller was to deliver the specific paint in question. The paint was declared to be mold and mildew resistant. As it was proved not to be mold and mildew resistant, the declaration of quality was false. Since a false declaration of quality gives rise to the redhibitory action, the court's application of the one-year prescription rule seems correct.

Charles M. Lanier

SECURITY DEVICES—SURETYSHIP—DEFICIENCY JUDGMENT ACT

The defendant Scheen purchased an automobile from a corporation whose president and principal stockholder was the defendant Mingledorff. Scheen borrowed the purchase price from the plaintiff bank. As security for this loan Scheen executed a note to the plaintiff. The note was endorsed by Mingledorff and secured by a chattel mortgage on the automobile. When Scheen defaulted, Mingledorff persuaded him to sign an instrument requesting the plaintiff to repossess the automobile and sell it at private sale in order to avoid the cost and expense of a public sale. By the terms of this instrument, prepared by Mingledorff, Scheen as its signer agreed to waive appraisement and pay the plaintiff bank any deficiency after the sale. After the private auction sale, plaintiff sued for a deficiency judgment *in solido* against Scheen, the maker of the note, and Mingledorff, its endorser. The trial court held that Scheen was discharged from liability by the terms of the Deficiency Judgment Act,[1] and that Mingledorff was discharged from liability by the terms of Civil Code article 3061,[2] because, as surety, he was prevented

of Goods, 1 COLUM. L. REV. 71 (1901). Similar English cases are found in BENJAMIN, SALE 616 *et seq.* (8th ed. 1950). See illustrations in 1 WILLISTON, SALES 180 and discussion at § 225 *et seq.* (rev. ed. 1948).

1. LA. R.S. 13:4106 (1950): "In any case where any mortgagee or other creditor takes advantage of the waiver of appraisement of the debtor and provokes a judicial sale, without the benefit of appraisement, of the encumbered property, whether real or personal, or of both characters, and the proceeds of such sale are insufficient to satisfy the debt for which the property is sold, the debt nevertheless shall stand fully satisfied and discharged, . . . and such mortgagee or other creditor shall not thereafter have the right to proceed against the debtor or any other of his property for such deficiency, in any manner whatsoever."

LA. R.S. 13:4107 (1950): "R.S. 13:4106 declares a public policy and the provisions thereof can not, and shall not be waived by a debtor. . . ."

2. The article provides: "The surety is discharged when by the act of the creditor, the subrogation to his rights, mortgages and privileges can no longer be operated in favor of the surety."

by the creditor's act from being subrogated to the creditor's rights against the debtor. On appeal, *held*, affirmed as to Scheen but reversed as to Mingledorff. The Deficiency Judgment Act was enacted for the protection of the mortgage debtor only and not those secondarily liable, such as endorsers. Moreover, because Mingledorff "promoted and negotiated"[3] the private sale, he was precluded by his own actions from availing himself of the provisions of Civil Code article 3061. *The Farmerville Bank v. Scheen*, 76 So.2d 581 (La. App. 1954).

The fundamental characteristic of the surety's contract in civil law jurisdictions is that it is accessory[4] and presupposes the existence of a principal debt.[5] His obligation being accessory, the surety may use against the creditor all the exceptions belonging to the principal debtor which are inherent in the principal debt.[6] This accessory feature distinguishes the suretyship contract from other contracts binding a person for the debt of another, such as an absolute promise to pay the debt of another.[7] When the surety binds himself *in solido* with the debtor, his obligation to the creditor is governed by the section of the Code on solidary obligations.[8] Although the surety bound *in solido* may not avail himself of the pleas of discussion or division,[9] the full effects of suretyship obtain between himself

3. The Farmerville Bank v. Scheen, 76 So.2d 581, 586 (La. App. 1954).

4. Art. 3035, LA. CIVIL CODE of 1870, provides: "*Suretyship* is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not." Gay & Co. v. Blanchard, 32 La. Ann. 497 (1880); Andrus v. Chretien, 3 La. 48 (1831). FRENCH CODE CIVIL art. 2012 provides: "*Le cautionnement ne peut exister que sur une obligation valable . . . .*"

5. See Hubert, *The Nature and Essentials of Conventional Suretyship*, 13 TUL. L. REV. 519, 529 (1939).

6. Art. 3060, LA. CIVIL CODE of 1870, provides: "The surety may oppose to the creditor all the exceptions belonging to the principal debtor, and which are inherent to the debt; but he can not oppose exceptions which are personal to the debtor." Simmons v. Clark, 64 So.2d 520 (La. App. 1953).

7. Watson Bros. v. Jones, 125 La. 249, 51 So. 187 (1910); Williams v. Breazeale-Hyams Motors, Inc., 16 La. App. 291, 134 So. 330 (1931); Lawrason v. Banister, 13 La. App. 610, 128 So. 318 (1930).

8. Art. 3045, LA. CIVIL CODE of 1870, provides: "The obligation of the surety towards the creditor is to pay him in case the debtor should not himself satisfy the debt; and the property of such debtor is to be previously discussed or seized, unless the security should have renounced the plea of discussion, or should be bound *in solido* jointly with the debtor, in which case the effects of his engagements are to be regulated by the same principles which have been established for debtors *in solido*." Smith v. Scott, 3 Rob. 258 (La. 1842); Morgan v. Young, 5 Mart.(o.s.) 364 (1818); Ashton v. Morgan, 2 Mart.(o.s.) 336, 5 Am. Dec. 733 (1812). See Comment, *Solidary Obligations*, 25 TUL. L. REV. 217 (1951).

9. Brock v. First State Bank & Trust Co., 187 La. 766, 175 So. 569 (1937); Edward Bruce Co. v. Lambour, 123 La. 969, 49 So. 659 (1909); Bond v. Bishop, 18 La. Ann. 549 (1866); State v. Winfree's Securities, 12 La. Ann. 643 (1857);

and the debtor.[10] Whether the surety is bound *in solido* or not, he is released if his right of subrogation to the creditor's rights against the debtor is impaired by the act of the creditor.[11] Co-debtors *in solido* may plead all exceptions resulting from the nature of the obligation and those which are common to all the debtors, but may not plead exceptions which are merely personal to another co-debtor.[12] An obligation *in solido* is not presumed but must be expressly created or clearly implied.[13]

The Deficiency Judgment Act provides that a mortgage creditor must forego his claim for any deficiency if he takes advantage of a waiver of appraisement by the debtor and provokes a judicial sale without appraisement.[14] The act declares this provision a matter of public policy which cannot be waived by the debtor.[15] Though specifically applicable only to judicial sales without appraisement, it has been extended by analogy to include private sales without appraisement.[16] The act does not prevent the creditor from taking advantage of the waiver by provoking a sale without appraisement; if he does, the statute destroys his right to recover for any deficiency.[17] The courts have held that it applies with equal force to sales made pursuant to collateral waivers made after the original contract,[18] as well as to waivers in the mortgage instrument itself.[19] *Southland Investment Co. v. Motor Sales Co.*[20] is the only case in

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New Orleans Canal & Banking Co. v. Escoffie, 2 La. Ann. 830 (1847); *cf.* Arts. 2094 (division) and 3045, LA. CIVIL CODE of 1870; Comment, *Solidary Obligations*, 25 TUL. L. REV. 217 (1951).

10. Art. 2106, LA. CIVIL CODE of 1870, provides: "If the affair for which the debt has been contracted *in solido*, concern only one of the coöbligors *in solido*, that one is liable for the whole debt towards the other codebtors, who, with regard to him, are considered only as his securities." Marfese v. Nelson, 10 Orl. App. 288 (La. App. 1913).

11. *Cf.* Arts. 2106, 3061, LA. CIVIL CODE of 1870; Brewer v. Foshee, 189 La. 220, 179 So. 87 (1938).

12. *Cf.* Art. 2098, LA. CIVIL CODE of 1870.

13. Art. 2093, LA. CIVIL CODE of 1870; George Moroy Cigar & Tobacco Co. v. Henriques, 184 So. 403 (La. App. 1938); Industrial Loan Co. v. Noe, 183 So. 175 (La. App. 1938); Dodd v. Lakeview Motors, 149 So. 278 (La. App. 1933).

14. LA. R.S. 13:4106 (1950).

15. LA. R.S. 13:4107 (1950).

16. Farmer v. Smith, 57 So.2d 778 (La. App. 1952); Futch v. Gregory, 40 So.2d 830 (La. App. 1949); Southland Investment Co. v. Lofton, 194 So. 125 (La. App. 1940); Home Finance Service v. Walmsley, 176 So. 415 (La. App. 1937).

17. Simmons v. Clark, 64 So.2d 520 (La. App. 1953), 14 LOUISIANA LAW REVIEW 285 (1953).

18. Southland Investment Co. v. Lofton, 194 So. 125 (La. App. 1940); Home Finance Service v. Walmsley, 176 So. 415 (La. App. 1937).

19. Simmons v. Clark, 64 So.2d 520 (La. App. 1953).

20. 198 La. 1028, 5 So.2d 324 (1941).

which the Supreme Court has had occasion to apply the act. In that case the plaintiff sued the endorser of promissory notes for the deficiency remaining after private sales of certain mortgaged automobiles without appraisement. Although the endorsements were unconditional, it had been agreed that the defendant would become liable as endorser only if the plaintiff repossessed the automobiles and turned them over to the defendant. The plaintiff repossessed a number of automobiles and, "with the consent and acquiescence of the defendants,"[21] sold them at private sale. The defendant contended that by the terms of the Deficiency Judgment Act, the obligation had been satisfied by the sales made without appraisement. The court, observing that the Deficiency Judgment Act was designed to protect the mortgagor only, held the defendant liable. In answer to the defendant's argument that, by the terms of section 120 of the Negotiable Instruments Law, "a person secondarily liable on an instrument is discharged . . . by an act which discharges the instrument,"[22] the court emphasized that the cars had been sold with the defendant's "consent and acquiescence" and found "under these circumstances . . . the defendant is liable." By the terms of the contract involved in the *Motor Sales* case, a condition precedent to the endorser's liability was the turning over of the repossessed cars to him. This condition having been prevented from occurring by the plaintiff's sale of the cars, it seems that the only possible basis for holding the defendant endorser liable would be a finding of an express agreement made subsequent to the original contract. This conclusion seems particularly unavoidable in view of the fact that suretyship contracts are strictly construed and not extended by implication.[23] Unfortunately, the opinion in the *Motor Sales* case is not clear as to whether the court found such a subsequent agreement in the endorser's "consent and acquiescence"[24] to the sale. In *Simmons v. Clark*,[25] decided after the *Motor Sales* case, the defendant sureties were sued for a deficiency remaining after mortgaged property had been judicially sold without appraisement. In sustaining the exceptions of no cause or right of action the court looked to Civil Code articles 3060 providing that the

21. 198 La. 1028, 1034, 5 So.2d 324, 326 (1941).
22. LA. R.S. 7:120 (1950).
23. Art. 3039, LA. CIVIL CODE of 1870, provides: "Suretyship can not be presumed; it ought to be expressed, and is to be restrained within the limits intended by the contract." Wells v. Fidelity & Deposit Co., 146 La. 169, 83 So. 448 (1919); Shreveport Laundries v. Sherman, 7 So.2d 433 (La. App. 1942).
24. 198 La. 1028, 1034, 5 So.2d 324, 326 (1941).
25. 64 So.2d 520 (La. App. 1953).

surety may assert any defense available to the debtor except those which are purely personal, and 3061 providing that the surety is discharged when the creditor's act prevents the surety from being subrogated to the creditor's rights against the debtor. The court held that either article was sufficient ground on which to sustain the exception.

In the instant case the court had no difficulty in finding that Scheen, the maker of the note, was discharged from liability. Any other view, said the court, would be "inimicable to the public policy of the state"[26] declared in the Deficiency Judgment Act. The endorser Mingledorff had convinced the trial court that Civil Code article 3061 and the holding in *Simmons v. Clark* justified releasing him from liability. The court of appeal, although agreeing with the application of article 3061 to the facts of the *Simmons* case, stated that the instant case was readily distinguishable from that case, because the defendant surety, Mingledorff, had actively promoted and negotiated the private sale. After quoting at length from the *Motor Sales* case, the court said that, "as was substantially held"[27] in that case, the defendant "is precluded . . . by his own actions"[28] from availing himself of article 3061.

The Deficiency Judgment Act serves a sound public policy by affording protection to the mortgagor who otherwise could be forced to waive by agreement the benefit of appraisement. Consistent with this policy, the court in the instant case properly held that the mortgagor was discharged from his indebtedness. With regard to the endorser's liability, however, the decision does not appear to be legally sound. Although the endorser, acting in good faith, never agreed to relinquish his rights against the debtor, the latter was absolved of all liability and the endorser held responsible without recourse against him.[29] This absence of an agreement between the endorser and the plaintiff would seem to make this case distinguishable from the *Motor Sales* case because in that case, as previously stated, the endorser

26. Farmerville Bank v. Scheen, 76 So.2d 581, 584 (La. App. 1954).
27. *Id.* at 586.
28. *Ibid.*
29. See LA. R.S. 13:4106 (1950), which provides that where the mortgaged property is sold at unappraised sale, *"the debt shall . . . stand fully satisfied and discharged, . . .* and such mortgagee *or other creditor* shall not thereafter have the right to proceed against the debtor . . . in any manner whatsoever." (Emphasis added.) See also Simmons v. Clark, 64 So.2d 520, 523 (La. App. 1953), where the court stated: "[T]he petitioner [creditor] has no right or mortgage which might be subrogated in favor of defendants [endorsers] should the demand of petitioner be allowed."

could have been liable only by a subsequent agreement, since his liability within the scope of his original suretyship contract never arose. The *Motor Sales* case was also cited as authority for the proposition that the Deficiency Judgment Act is not for the protection of "parties secondarily or otherwise obligated for the indebtedness."[30] Be this as it may the court seems to overlook the fact that the surety in the instant case was being sued as a primary debtor, liable *in solido* with the mortgage debtor. Being directly responsible for the debt, the surety bound *in solido* has the same interest in having the mortgaged property appraised as does the real debtor, and the Deficiency Judgment Act ought to afford him protection. If on the other hand the surety was by contract not bound *in solido*, then it would seem that the very definition of suretyship as an *accessory* obligation would have precluded his liability. It is inconceivable that there can be an accessory obligation to secure the performance of an extinguished principal obligation.

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WORKMEN'S COMPENSATION—PRESCRIPTION—OCCUPATIONAL DISEASES

Plaintiff's employment in defendant's paper mill required him to work "constantly in contact with chemicals and water."[1] He contracted blastomycosis, a form of dermatosis, at some time prior to March 7, 1952, at which time he filed a claim with defendant's health insurer, stating that the cause of his disability was blastomycosis. By April 1, 1952, ulcers and sores had begun to appear on plaintiff's body. When treatment by several doctors failed to alleviate his condition, plaintiff, "due to the inroads of the disease,"[2] was forced to stop working on August 15, 1952. When his bones and lungs became affected, he reported to a veterans hospital where he was hospitalized from January 12, 1953, to April 29, 1953. Plaintiff did not learn of any connection between his disease and his employment, however, until July 13, 1953, when he consulted a doctor who expressed the opinion that such a connection existed. On July 29, 1953, he instituted this suit for workmen's compensation allegedly due by reason of

30. The Farmerville Bank v. Scheen, 76 So.2d 581, 586 (La. App. 1954).
1. 76 So.2d 621, 622 (La. App. 1954).
2. *Ibid.*