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Civil Code and Related Subjects: Security Devices

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SECURITY DEVICES

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Suretyship

When a debtor fails to make the payment due, the guarantor must satisfy the obligation.[1] In such event the guarantor or surety is subrogated by operation of law to all the rights and recourses which the creditor had.[2] In *Keller v. General Motors Acceptance Corporation*[3] the creditor held the debtor's promissory note and the certificate of title of the automobile on which there was a chattel mortgage. When the guarantor paid the defaulted debt he attached a written request that the note and the certificate of title be forwarded to him. By inadvertence the creditor marked the note paid and mailed it along with the certificate of title to the original debtor. The latter sold the car to an innocent purchaser, delivering the cancelled note and the title certificate along with the car. In the present suit by the guarantor, the court granted recovery against the creditor.

The judgment is right, but the rationale gives cause to reflect. The court stated that after the creditor's inadvertent error of delivering the note and certificate to the debtor, "responsibility for taking legal action to prevent injury rested primarily on GMAC, for the difficulty was caused solely by its negligent act."[4] Then the court concluded that "having failed to perform this obligation GMAC must reimburse the plaintiff the amount which he expended."[5] The tenor of these words strikes almost the note of tort language, whereas the underlying legal principle involved is the surety's right of subrogation. When a creditor does anything — negligently or otherwise — to reduce or destroy the surety's rights of subrogation, he is to that extent held responsible to the surety.[6]

Pledge

The utilization of movable things as security for credit has been developed in the civil law in the institution of pledge. Part

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1. LA. CIVIL CODE art. 3035 (1870).
2. *Id.* arts. 2161, 3052, 3053.
3. 96 So.2d 598 (La. 1957).
4. *Id.* at 600.
5. *Ibid.*
6. LA. CIVIL CODE art. 3061 (1870); Provan v. Percy, 11 La. Ann. 179 (1856).

of this development included as an essential requirement that the things pledged must be delivered into the physical possession of the creditor.[7] By way of attenuation of this rule, delivery may be made to a third person agreed upon by the parties.[8] In the Roman law, there were two basic patterns of real security: *pignus* (pledge) in which the debtor was necessarily dispossessed of his property, movable or immovable; and *hypotheca* (mortgage) in which the debtor was not dispossessed of his property, movable or immovable. The former came to be used essentially for movables, the latter for immovables; and that is how they were carried forward into the modern civil codes.

The limitations in the use of pledge, with dispossession of the debtor, brought about in Louisiana the adoption and expansion of the chattel mortgage as an appropriate institution to utilize movables as security without dispossession of the debtor. A more difficult problem confronts other jurisdictions which refuse to accept the chattel mortgage device as such but seek to achieve similar results in other ways.

It is regrettable in Louisiana to find situations in which the requirement of delivery is squeezed dry of any significance in order to make the institution of pledge fit a given fact situation. There have been decisions upholding the validity of a pledge where delivery was made to an employee of the debtor,[9] and there has also been the self-contradictory language asserting that delivery may be made to the debtor himself provided his tenure be precarious and clearly for the account of the creditor.[10] These expressions do not make it right, for their result is to defeat the nature of pledge which is predicated upon the dispossession of the debtor.

Accordingly, the decision in *Scott v. Corkern*[11] is a move in the wrong direction because the court treated as valid the pledge of a life insurance policy in the physical possession of the debtor. Although he did no act inconsistent with the pledge agreement, there was nothing to show that he could not have done so. There was nothing to characterize his tenure as precarious; there was

7. LA. CIVIL CODE arts. 3152, 3162 (1870).
8. *Id.* art. 3162, *in fine.*
9. Jacquet v. His Creditors, 38 La. Ann. 863 (1886), cited in Scott v. Corkern, 231 La. 368, 377, 91 So.2d 569, 572 (1956).
10. See language in Conger v. New Orleans, 32 La. Ann. 1250 (1880), cited in Scott v. Corkern, 231 La. 368, 377, 91 So.2d 569, 572 (1956).
11. 231 La. 368, 91 So.2d 569 (1956).

nothing to show conclusively that it was for the account of the creditor. At the time of the pledge agreement, there had been an actual delivery of the policy to the creditor. Five years after the death of the creditor, the debtor died and the policy was found in his bank box. There was no evidence as to how the policy got back to the debtor. The court indulged in the presumption that this "possession of the pledgor was precarious or as agent pro hac vice"[12] and accordingly found "the pledge to have been presumptively extant between the parties."[13] A footnote by the court that the delivery requirement "is not applicable as between the parties to the pledge"[14] is not supported by any authority. Civil Code Article 3162 does say that "in no case does this privilege subsist on the pledge, except when the thing . . . has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties." However, this is not inconsistent with Civil Code Article 3152, which states that "it is essential to the contract of pledge that the creditor be put in possession of the thing." The inference that delivery is required only for the subsistence of the privilege is unwarranted.[15]

Concededly, the chattel mortgage act has certain limitations. It can be used only for corporeal things and there must be compliance with requirements of form and recordation. Many centuries ago, the Romans had a complete pattern of institutions so that either movables or immovables could be used as security with or without dispossession of the debtor. Certain parts fell into disuse. In very recent times, with changes in the economy and practice, some of the civil code countries are finding a need for the use of movables as a security device without dispossession of the debtor. The problem is one that calls for comprehensive study and perhaps ingenuity. It hardly seems to be the best answer to distort pledge with the fiction of delivery and dispossession where they do not exist.

Privilege for Expenses of Preservation (Storage)

Civil Code Articles 3224-3226 establish a privilege for expenses of preservation whereby the creditor has a right of re-

12. *Id.* at 378, 91 So.2d at 572.
13. *Ibid.*
14. *Ibid.*
15. See 2 COLIN ET CAPITANT, COURS ELÉMENTAIRE DE DROIT CIVIL FRANÇAIS n° 1012 (8th ed. 1935); 2 PLANIOL, TRAITÉ ELÉMENTAIRE DE DROIT CIVIL n° 2404 (11th ed. 1939).

tention against the owner and a right of preference against other creditors. The articles do not limit the creditor to services rendered at the request or with the consent of the owner. Storage charges are generally accepted to be expenses of preservation.

In re *Parking Service, Inc.*[16] looks like a case of hardship against the owner, but it clarifies the principle that the creditor has a claim and privilege for storage charges regardless of a request or consent of the owner for the storage in question. On the day that the Federal Bureau of Investigation arrested a person accused of a crime, they seized his two automobiles, which they placed in storage. Later in the same day, the cars were sold to the present owner, but their release to him was refused because they were being held by the FBI as evidence. About ten months later, the owner secured a release order from the federal court, but he refused to pay the accumulated storage charges.

The court of appeal found that there was no privity of the owner to any contract for storage and therefore there was no liability or lien for the charges.[17] In reversing, the Supreme Court maintained that the FBI had authority "to store the cars taken by them as evidence at the expense of the owner and without his consent thereto."[18] This might seem to make the decisive issue whether the person ordering the storage had authority to do so, and leaves the unasked question why the FBI should not be responsible for the services which it engages. If the Civil Code articles are applicable without the request or consent of the owner, then it should not matter whether the cars were placed in storage by the authority of the FBI or by a thief who had stolen them in the first place.

PRESCRIPTION

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In matters of acquisitive prescription of ten years, a person is presumed to possess the full extent of the property described in his title.[1] In *Agurs v. Holt*[2] the court held that this presumption can be rebutted. In this case, there was undoubted identi-

16. 232 La. 133, 94 So.2d 7 (1957), reversing 88 So.2d 52 (La. App. 1956).
17. 88 So.2d 52 (La. App. 1956).
18. 232 La. 133, 138, 94 So.2d 7, 9 (1957).

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1. LA. CIVIL CODE art. 3498 (1870).