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Executory Process - Annulment of Seizure and Sale for Lack of Authentic Evidence

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or a constitutional requirement.[16] Now that the *Mapp* decision has made clear the constitutional nature of the rule, perhaps the waiver which could result from a failure to file the motion before trial should be re-examined. It is arguable that such a highly regarded right ought not be lost for mere failure to file the pre-trial motion.[17] However, if such a procedure is established by statute clearly setting forth its requisites and providing for entertainment of the motion within the court's discretion at any time, there would appear to be adequate opportunity for a defendant to assert his fourth amendment rights. Without some compulsion to dispose of the issue before trial, it would seem that the result might be undue interruption and prolongation of criminal trials.

James L. Dennis

EXECUTORY PROCESS — ANNULMENT OF SEIZURE AND SALE FOR LACK OF AUTHENTIC EVIDENCE

More than five weeks after the sale of certain property under executory process, the plaintiffs, heirs of the deceased mortgagor, sued to annul the seizure and sale on the ground that it was not supported by sufficient authentic evidence.[1] This alleged insufficiency was caused by the failure of the clerk of court to certify the copy of the mortgage presented to the trial court. The defendant mortgagee had precipitated the sale, had purchased the property himself, and was in possession of it at the time the heirs' action was brought. He contended that plaintiffs were precluded[2] from attacking the sale because they had had notice of the proceeding and had failed to interpose an objection prior to the sale. The district court dismissed. Upon appeal to the Fourth Circuit, *held*, reversed. A mortgagor or his successors are not precluded from attacking a sale made under executory

16. See Wolf v. Colorado, 338 U.S. 25 (1949); McNabb v. United States, 318 U.S. 332 (1943).

17. See United States v. Ascendio, 171 F.2d 122 (3d Cir. 1948); Application of Bogish, 173 A.2d 906 (N.J. App. 1961).

1. There were also allegations of failure of the record to include evidence of notice of appointment of an attorney to represent the succession, and a defect in the advertisements announcing the proposed sale.

2. Actually, the defendant urged that "because of laches, the plaintiff was estopped" to attack the sale. But neither the defendant's brief nor the court's opinion seems to make any distinction between laches and estoppel. Because of the ambiguity of the opinion on this phase of the case, it is assumed for the purposes of this Note that the court meant that the plaintiff was not precluded from recovering, either from inordinate delay or because of conduct inducing detrimental reliance.

process based upon insufficient authentic evidence where the purchaser-mortgagee is still the owner of the property and is charged with, and is responsible for, the lack of authentic evidence. *Doherty v. Randazzo*, 128 So. 2d 669 (La. App. 4th Cir. 1961).

In a proceeding via executiva the mover must produce authentic evidence of his right to enforce his privilege or mortgage.[3] Authentic evidence is deemed necessary because executory process is an expeditious and harsh ex parte remedy. If executory process is unavailable, the only practical injury to the creditor is to force him to resort to an ordinary proceeding.[4]

Lack of sufficient authentic evidence is an affirmative defense which may be urged before the sale by injunction or suspensive appeal.[5] The general rule is that once the property has been sold to one other than the mortgagee the mortgagor may not ground a suit to recover the property upon defects which he might have urged prior to the sale.[6] However, there are excep-

3. LA. CODE OF CIVIL PROCEDURE art. 2635 (1960): "The plaintiff shall submit with his petition the authentic evidence necessary to prove his right to use executory process to enforce the mortgage or privilege. These exhibits shall include authentic evidence of:

"(1) The note, bond, or other instrument evidencing the obligation secured by the mortgage or privilege;

"(2) The authentic act of mortgage or privilege importing a confession of judgment; and

"(3) Any judgment, judicial letters, order of court, or authentic act necessary to complete the proof of plaintiff's right to use executory process.

"This requirement of authentic evidence is relaxed only in those cases, and to the extent, provided by law."

See also Miller, Lyon & Co. v. Cappel, 36 La. Ann. 264 (1884); Ricks v. Bernstein, 19 La. Ann. 141 (1867).

4. LA. CODE OF CIVIL PROCEDURE art. 2644 (1960).

5. Devolutive appeal in executory proceedings has been abolished. *Id.* art. 2642; General Motors Acceptance Corp. v. Kroger, 136 So. 2d 402 (La. App. 1st Cir. 1961).

6. Continental Securities Corp. v. Wetherbee, 187 La. 773, 175 So. 571 (1936); Turner v. French, 171 La. 431, 131 So. 289 (1930); Ouachita National Bank v. Shell Beach Const. Co., 154 La. 709, 98 So. 160 (1923); Franek v. Brewster, 141 La. 1031, 76 So. 187 (1917); King v. Hardwood Mfg. Co., 140 La. 753, 73 So. 853 (1917); Citizens' Bank v. Bellamy Lumber Co., 140 La. 497, 73 So. 308 (1916); Pons v. Yazoo & M.V. R.R., 122 La. 156, 47 So. 449 (1908); Huber v. Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889 (1904); Herber v. Thompson, 46 La. Ann. 186, 14 So. 504 (1894); Burden v. Peoples' Homestead & Savings Ass'n, 167 So. 487 (La. App. 2d Cir. 1936); Miller v. People's Homestead & Savings Ass'n, 161 So. 656 (La. App. 2d Cir. 1935); Madden v. Lowe, 3 La. App. 24 (2d Cir. 1925). Most of the cases espousing this rule have involved devolutive appeals where the property had been sold pending appeal. Before the enactment of the Louisiana Code of Civil Procedure, the cases held that when property was sold through executory process pending devolutive appeal, the appeal would be dismissed because there had been an execution of the order and the question was then moot. *Contra*, Baulieu v. Furst, 8 Rob. 485 (La. 1844). See Comment, 17 TUL. L. REV. 630 (1943); Note, 14 LOUISIANA LAW REVIEW 289 (1953).

If the mortgagor acquiesces in the executory proceedings, or is present in the

tions to this rule.[7] One exception was established by the case of *Viley v. Wall*,[8] where the mortgagee had conspired with the directors of the mortgagor-corporation to defraud its stockholders by mortgaging corporate property, enforcing the mortgage by executory process, and having the property adjudicated to themselves. The Supreme Court allowed the mortgagor-corporation to recover the property from the mortgagee in a derivative action brought by its stockholders. In dictum, the Supreme Court indicated that perhaps fraud is not a necessary ingredient to such an action and that whenever the rights of innocent third parties will not be jeopardized, the mortgagor may rescind the sale if the mortgagee has knowledge of and is responsible for the defects in the executory proceeding.[9]

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parish and allows the sale to go uncontested, he may not thereafter annul the judgment. LA. CODE OF CIVIL PROCEDURE art. 2003 (1960).

7. Stapleton v. Butterfield, 34 La. Ann. 822 (1882) (Plaintiff sued to recover property sold under executory process. The defendant-purchaser was not the mortgagee, yet the plaintiff prevailed. The note and mortgage clearly indicated that they had been executed by a married woman and this was sufficient to put a third party on notice of defects.); Germaine v. Mallerich, 31 La. Ann. 371 (1879) (Plaintiff, wife of deceased mortgagor, sued as tutrix of her daughter to annul a sale of property made under executory process. The defendant-purchaser was not the mortgagee. The plaintiff had signed papers of appraisement without authority after the mortgagor's demise. This fact was patent on the face of the appraisement papers, and the defendant had full knowledge of the facts at the time of the sale. The plaintiff was allowed to recover.). In Farrell v. Klumpp, 13 La. Ann. 311 (1858), the defendant mortgagor was present in the state, but the plaintiff was unable to locate him, and had notice to appoint an appraiser served on an attorney appointed by the court. The court held the sale invalid because of the improper appointment and service of notice. Such an appointment, service, and judicial sale would be valid today. The definition of "absentee" in executory proceedings was later broadened to include a person who might still be in the state, but who could not be found and served after diligent effort. La. Code of Practice art. 277 (1870), as amended, La. Acts 1920, No. 130, § 1. This broadened definition was adopted by the Code of Civil Procedure for all purposes. LA. CODE OF CIVIL PROCEDURE art. 5251(1) (1960).

8. 154 La. 221, 97 So. 409 (1923).

9. *Id.* at 229-30, 97 So. at 411-12: "[D]efendants contend that . . . plaintiff did not know of said proceedings before the sale, and, having failed either to appeal from the order of seizure and sale or to enjoin the same, he is now barred from . . . annulling the mortgage and sale; in other words, that the sole remedy in such proceedings is to appeal or enjoin.

"We have . . . been unable to find any decision sustaining this view; nor have defendants cited any case so holding *where the property had not passed out of the hands of the purchaser at such sale, and who was charged with knowledge of and participation in* the fraud and conspiracy, *or other nullities or illegalities* upon which the same was attacked." (Emphasis added.) In support of this language, the Supreme Court cited the three cases discussed in note 7 *supra*.

There is a possibility that the court in the instant case might have considered the doctrine discussed in Graham v. Egan, 15 La. Ann. 97, 98 (1860). In considering whether to give the mortgagor money damages or restore the property itself, the court said in regard to restitution: "[H]e can restore the property itself, and place the [mortgagor] in the same condition he would have occupied if he had not been harassed with an unfounded demand. This is precisely what is meant by the restitution in integrum. If there be ground for restitution at all, there is the same ground for a complete restitution, a restitution in integrum."

In the instant case the court, relying on the *Viley* dictum, held that the mortgagor could recover, from the mortgagee, property sold through executory process, where there had been insufficient authentic evidence and where the mortgagee still owned the property and was responsible for and had knowledge of the deficiency, although no fraud was found. It is unclear from the opinion whether the mortgagee-adjudicatee must have instigated the sale or have had knowledge of defects in order for the sale to be subject to annulment by the mortgagor. The court did not indicate that prompt action to rescind is necessary. Apparently annulment is available so long as the adjudicatee at the sale convoked by executory process remains the owner of the property.

Under the instant case, a mortgagor is not limited to injunction or suspensive appeal when attacking a sale of his property by executory process. This holding would establish another safeguard against abuse of this expeditious remedy, yet its result would not seem to pose any substantial problem to title examiners involving sales by executory process since recovery is available only where the property has not passed out of the hands of the mortgagee-adjudicatee. This seems justifiable because executory process is a harsh, ex parte remedy and should be restricted to situations where the formal requirements for protecting the rights of mortgagors are clearly satisfied.

Bert K. Robinson

FAMILY LAW — PARENT AND CHILD — EXTENT OF PARENT'S OBLIGATION TO PROVIDE PSYCHIATRIC CARE FOR MAJOR CHILD

Plaintiff sued his father for support in the amount of $1750.00 per month needed to defray the cost of necessary hospitalization and psychiatric care. Expert testimony was to the effect that treatment in a state hospital would be inadequate but that with treatment in a private hospital plaintiff had a "50-50 chance of surviving." Defendant father testified that his income was $1,140.00 per month and that his assets exclusive of his business, his residence, and the cash value of his insurance had a total appraised value of less than $13,000.00. The trial court awarded $450.00 per month, and the plaintiff appealed, seeking to have the award increased to the $1750.00 per month requested. Upon appeal to the Fourth Circuit, *held,* affirmed.