Louisiana Law Review

Volume 23 | Number 2
The Work of the Louisiana Appellate Courts for the 1961-1962 Term: A Symposium
February 1963

Private Law: Security Devices

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mony *pendente lite* would, of course, impose the liability of attorneys' fees on all husbands, whether or not living under the community regime. The rule sanctioned by the amendment to Article 155 is very different.

SECURITY DEVICES

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In large measure, the fertile soil of this area of our substantive law was permitted to lie fallow during the past year. Only three cases of interest, and only one of importance, were decided by the appellate courts in this field during the past term.

State v. Thoman[1] actually hinged on issues of fact; but, nevertheless, the case is of more than passing interest because of the importance of the legal principles called into play. There, by a mandamus proceeding, the plaintiff sought to cancel the inscription of a mortgage on urban property on the ground that the mortgage note had prescribed. The defendant's answer denied the prescription asserted and alleged that it had been interrupted both by partial payments on and acknowledgment of the mortgage indebtedness. Apparently without objection by the plaintiff,[2] the defendant reconvened and sought judgment on the mortgage note and recognition of the mortgage. The factual issues as to whether there had been any partial payments or acknowledgments which interrupted the current of prescription, decided in favor of the plaintiff by the trial court and in favor of the defendant by the appellate court, possess no particular interest to the professional reader. Settled, but nonetheless important, principles of law applied, however, are of interest. The Court of Appeal, First Circuit, reiterated the rule that prescription on a demand note commences to run from the date of execution, and not from any demand for payment. Both the trial and appellate courts applied the rule that the obligee has the burden of proving interruption of prescription on a written obligation which is prescribed on its face. The appellate

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1. 135 So. 2d 791 (La. App. 1st Cir. 1961).

2. Mandamus is a summary proceeding, LA. CODE OF CIVIL PROCEDURE arts. 2592(5), 3781 (1960); while the reconventional demand is available only in ordinary proceedings. *Id.* art. 851. Had the plaintiff excepted timely to the reconventional demand, it could have been dismissed. *Id.* arts. 926(3), 1036.

court's finding of fact necessarily had the effect of holding impliedly that the defendant had successfully carried this onus of proof.

The old saw that it is often impossible to separate substance from procedure is illustrated by *Galloway v. Levitt*,[3] where the sublessor of space in a commercial building sought to enforce her lessor's privilege on the subtenants' movable effects in the subleased premises. Most of these movables were subject to a chattel mortgage, which was then being enforced; and to maintain the *status quo*, the plaintiff had these attached, on the ground of the nonresidence of the defendants. The chattel mortgagee intervened in the proceeding, moved to dissolve the attachment and to recover its alleged damages, on the grounds that: (1) the two defendants were members of an existing partnership who could not be sued except with the partnership;[4] and (2) neither of the defendants was a nonresident.[5] Both the trial and appellate courts held that these two defenses (apparently valid) were personal to the defendants and could not be raised by the intervener.[6] On the merits, both courts found that the lessor's privilege of the plaintiff had attached before the chattel mortgage was executed and that, hence, this privilege primed the lien of the chattel mortgage.

The initial reaction of a cursory reader of the Supreme Court's decision in *Fruge v. Muffoletto*[7] would be a highly critical one. A study of this opinion, however, leaves the conviction that the court had no escape from the result which it reached, and that the public policy effectuated by the pertinent statute is completely sound. The case involved the construction of the Private Building Contract Lien Act.[8] The pertinent facts, as stated succinctly by the Court of Appeal, Third Circuit, in its certificate to the Supreme Court,[9] are as follows:

> "This is a suit by a building contractor seeking recognition of a lien in the amount of $4,160.88 for labor and mate-

3. 135 So.2d 798 (La. App. 2d Cir. 1961).

4. "The partners of an existing partnership may not be sued on a partnership obligation unless the partnership is joined as a defendant." LA. CODE OF CIVIL PROCEDURE art. 737 (1960).

5. *Cf.* LA. CODE OF CIVIL PROCEDURE art. 3541 (4, 5) (1960).

6. "An intervener cannot object to the form of the action, to the venue, or to any defects and informalities personal to the original parties." *Id.* art. 1094.

7. 242 La. 569, 137 So.2d 336 (1962). The Supreme Court's answers to the three questions certified were conformed to in Fruge v. Muffoletto, 140 So.2d 173 (La. App. 3d Cir. 1962).

8. LA. R.S. 9:4801 through 9:4817 (1950).

9. Fruge v. Muffoletto, 137 So. 2d 333, 334 (La. App. 3d Cir. 1961).

rial furnished in the reconstruction and renovation of business premises located on property owned by the defendant. These substantial repairs were made at the order of a tenant to whom the property had been leased.

"The business premises had been leased for the purpose of operating a 'drive-in' restaurant. By agreement both written and oral between the owner-lessor (defendant herein) and this tenant, the latter was authorized to undertake at his own expense the needed reconstruction to make the premises suitable for the purpose for which leased. The owner had personal knowledge that the reconstruction project was being undertaken and was personally present during the course of the reconstruction, and he had accompanied the tenant to the plaintiff contractor's office when the plaintiff furnished the tenant an estimate of the cost of the repairs; but the owner did not enter into any of the negotiations between the tenant and the contractor, nor did he indicate any personal responsibility for the cost of the repairs (nor, in fact, did he even know the estimated cost of the repairs). . . .

"The plaintiff appeals from a trial court judgment dismissing his suit upon an exception of no cause of action."

The three questions certified by the intermediate appellate court presented the single issue of whether, under the two pertinent sections of the statute, plaintiff had a privilege on the defendant's property to secure his unpaid claim for labor and material. While the suit was pending, the tenant was adjudicated a bankrupt. The case was certified to the Supreme Court because of a conflict between the decisions of the intermediate appellate courts.[10]

Two different provisions of the statute competed for accept-

10. The position of the defendant and appellee was supported by Shreveport Armature & Electric Works v. Harwell, 172 So. 463 (La. App. 2d Cir. 1937); and Shreveport Long Leaf Lumber Co. v. Parker, 144 So. 153 (La. App. 2d Cir. 1932). *Cf.* Berg v. Schneider, 12 So. 2d 501 (La. App. 2d Cir. 1943).

Sirone v. Distefano, 67 So. 2d 150 (La. App. 1st Cir. 1953), where the Court of Appeal for the First Circuit apparently overlooked the provisions of LA. R.S. 9:4811 (1950), definitely supported the position of the plaintiff and appellant. Madison Lumber Co. v. Rossi, 18 La. App. 461, 137 So. 221 (Orl. Cir. 1931), also relied on by the plaintiff, appears to be distinguishable. There, the court found that the owners' brother, who had ordered the work done, was the duly authorized agent of the owners.

ance. The initial section provides the privilege for work done "*with the consent* or at the request *of the owner* thereof, or his duly authorized agent or representative."[11] A subsequent provision creates the privilege for work done at the request of a person "who is not the owner of the land"; and limits the operation of the privilege to "whatever right the said person having the work done . . . may have to the use of the land as lessee."[12] Here, the renovations were made at the request of the lessee, who had authority therefor under his lease; and the owner, who knew of the work being done, in one sense *consented* thereto. The Supreme Court, construing the statute as a whole, very properly restricted the language of the initial provision to the case where the owner consents to the work being done *at his own expense.*

Since the renovations and improvements were acquired by the lessor when the lease was terminated through the tenant's failure to pay the rent, it appears at first blush that the decision permitted the unjust enrichment of the owner at the expense of the contractor. Yet, the court had no escape from its decision; and had a contrary one been made, it would have been necessary to overrule it legislatively through an amendment of the statute, in order to provide necessary protection to the owners of property. The majority of commercial leases permit renovations and improvements to be made at the expense of the tenant; and, in this sense, the lessor consents thereto in advance. Even if a lessor theoretically may protect himself by serving notice that he does not consent to such work being done at his expense, it would be virtually impossible for him to notify every laborer who might do any of the work, and every materialman who might furnish some of the materials.

There is, however, a moral to the story of this unhappy litigation — and one which should be preached from the housetops by the Public Relations Committee of the Bar Association. The contractor might have averted his heavy loss readily and economically, by consulting his attorney before entering into the contract.

11. LA. R.S. 9:4801 (1950).
12. *Id.* 9:4811.