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CIVIL PROCEDURE — ANNULMENT OF EXECUTORY
PROCEEDINGS AFTER SALE

Defendant, endorsee of a note and chattel mortgage securing the purchase price of an automobile bought by plaintiff, successfully enforced the mortgage under executory proceedings without authentic evidence of the endorsement. Although plaintiff apparently had proper notice of the proceedings,¹ he made no appearance to appeal from the order of seizure or enjoin the sale, and the automobile was sold to a third party.² Shortly thereafter, defendant procured a deficiency judgment against plaintiff by default. More than three years after the sale, plaintiff, alleging lack of authentic evidence of the endorsement of the note to defendant, sued to annul both the executory proceedings and the deficiency judgment.³ Plaintiff did not seek to recover the automobile but prayed for damages for its wrongful seizure. The trial court held for defendant, but the First Circuit Court of Appeal reversed. *Held*, an executory proceeding which is null because based on insufficient authentic evidence can be attacked after the sale in a suit by the mortgagor against the instigator of the proceedings who knew of the defect and was responsible for it, although the mortgagor failed to enjoin the sale or appeal from the order of seizure.⁴ *Tapp v.*

1. It is not explicitly stated in the opinion that notice was given, but since no complaint of lack of notice was made, it will be assumed that notice was served.

2. The court said "Guaranty Finance obtained an order for executory process, seized and sold the automobile with appraisalment." 158 So.2d at 229. Though there is no specific indication to whom the car was sold, the language quoted indicates it was adjudicated to a third party.

3. The primary aim of plaintiff's suit was to annul the deficiency judgment and to enjoin the garnishment of his wages obtained by defendant in satisfaction thereof. 158 So.2d at 231. However, nullity of the deficiency judgment was predicated on the contention that the executory proceeding, including the appraisalment, was null, and consequently the deficiency judgment was in violation of LA. R.S. 13:4106 (1950). See note 4 *infra* for a more extensive treatment of the court's holding on this point.

4. Plaintiff's claim for damages for wrongful seizure was characterized as a tort action and held barred by prescription of one year. 158 So.2d at 236. Although no plea of prescription was entered against the action to annul the executory proceedings, it is possible such a plea would have been successful under Louisiana Civil Code article 3543 (quoted note 15 *infra*) which provides for a prescription of two years against informalities in or connected with public sales. See note 25 *infra* for further discussion of this point.

The court's subsequent holding that the deficiency judgment was null is beyond the scope of this Note, but a brief explanation and comment are in order. The court held that since the executory proceeding was null *in toto*, the appraisalment of the automobile was invalid, and the sale was one "without the benefit of appraisalment" under LA. R.S. 13:4106 (1950), which prohibits a creditor who has taken advantage of a waiver of appraisalment, and provoked a judicial sale without appraisalment, from later obtaining a deficiency judgment against

Guaranty Finance Co., 158 So. 2d 228 (La. App. 1st Cir. 1963), cert. denied, 160 So. 2d 228 (La. 1964).

Executory process is an ex parte proceeding which may be employed by a creditor to enforce a mortgage or other privilege evidenced by an act importing a confession of judgment.⁵ The creditor must produce authentic evidence of his right to invoke the proceeding, including authentic proof of the underlying obligation, the mortgage or privilege, and any endorsement or transfer thereof.⁶ An order of sale under executory process

the debtor. 158 So. 2d at 234-35. The statute was construed to be a law of public policy absolutely prohibiting "a mortgagee or other creditor from proceeding against the debtor or any other of his property for any deficiency judgment in the absence of a legal appraisalment." 158 So. 2d at 234. It was concluded the deficiency judgment was absolutely null, *id.* at 234-35, and was subject to attack under Louisiana Code of Civil Procedure article 2004, which authorizes annulment of judgments obtained by "ill practice." *Id.* at 233. Conceding article 2004 applies to a judgment rendered in violation of a prohibitory law, see *Ciluffa v. Monreale Realty Co.*, 209 La. 333, 24 So. 2d 606 (1945); *Phillips v. Bryan*, 172 La. 269, 134 So. 88 (1931), the application of R.S. 13:4106 to the situation of the instant case appears questionable. The statute was designed to protect the debtor against the unfair practice of a creditor's procuring a waiver of appraisalment, selling the property at much less than its value and then suing the debtor for the deficiency. See *Soileau v. Pitre*, 79 So. 2d 628 (La. App. 1st Cir. 1955); *Futch v. Gregory*, 40 So. 2d 830 (La. App. 2d Cir. 1949); *Southland Inv. Co. v. Lofton*, 194 So. 125 (La. App. 2d Cir. 1940); *Home Finance Serv. v. Walmsley*, 176 So. 415 (La. App. Orl. Cir. 1937). It would seem then that the statute should only apply either where there was no appraisalment at all or where the appraisalment did not conform to the legal requirements. *But see Mack Trucks, Inc. v. Dixon*, 142 So. 2d 605 (La. App. 4th Cir. 1962) (R.S. 13:4106 applied when court lacked jurisdiction though appraisalment was otherwise valid). In the instant case there was judicial appraisalment, 158 So. 2d at 228, and no irregularity in the appraisalment was alleged. The lack of authentic evidence was an informality essentially unrelated both to the appraisalment and to the policy behind R.S. 13:4106. Furthermore, though the court indicates insufficient authentic evidence rendered the entire executory proceeding, including appraisalment, absolutely null and of no legal effect, 158 So. 2d at 234, 235, there is no authority for this proposition and the jurisprudence indicates such a defect should be treated only as an irregularity giving rise to a relative nullity. See note 25 *infra*. It is arguable, therefore, that for the purposes of R.S. 13:4106 there was a valid appraisalment and that the court's holding as to the deficiency judgment was incorrect.

5. LA. CODE OF CIVIL PROCEDURE art. 2631 (1960). See generally McMahon, *Historical Development of Executory Procedure in Louisiana*, 32 TUL. L. REV. 555 (1958).

6. 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."

The general provision of section 3 would include authentic evidence of a

is not a judgment in a strict legal sense,⁷ and no service of citation on the debtor is required.⁸ However, between the order for issuance of a writ of seizure and sale and the issuance itself, a demand for payment, unless waived, must be served on the debtor with notice that the writ will issue unless payment is made within three days.⁹ After seizure, notice of seizure and sale must be served on the debtor;¹⁰ this requirement is not waivable.¹¹ Defenses to an executory proceeding may be urged before the sale by suspensive appeal or injunction.¹²

Viewing executory process as a harsh and expeditious remedy, the courts have exacted strict compliance with the formal requirements imposed by law.¹³ Lack of authentic evidence is deemed a valid defense which may be urged by appeal or injunction.¹⁴ When the debtor has failed to assert lack of authentic evidence or other such irregularities in this manner, there is confusion in the jurisprudence concerning his right to attack the executory proceeding on such grounds after the property

transfer or endorsement of the mortgage note in accordance with prior jurisprudence. *Id.* comment (d); *Van Raalte v. The Congregation of the Mission*, 39 La. Ann. 617, 2 So. 190 (1887); *Miller, Lyon & Co. v. Cappel*, 36 La. Ann. 264 (1884); *Tufts, Fermor & Co. v. Beard*, 9 La. Ann. 310 (1854); *Brock v. Messina*, 200 So. 511 (La. App. 1st Cir. 1941).

7. *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); *Stapleton v. Butterfield*, 34 La. Ann. 822 (1882); *Harrod v. Voorhies' Adm'x*, 16 La. 254 (1840); *Mack Trucks v. Dixon*, 142 So.2d 605 (La. App. 4th Cir. 1962). In *Harrod* the court described an order of sale under executory process as follows: "It issues without citation to the adverse party; it decides on no issue made up between the parties, nor does it adjudicate, to the party obtaining it, any right in addition to those secured by his notarial contract. . . . Such a decree then can be viewed only as giving the aid of offices of justice, to execute an obligation which, by law, produces the effects of a judgment, in relation to the particular property mortgaged." 16 La. at 256-57.

8. LA. CODE OF CIVIL PROCEDURE arts. 2631, 2640 (1960).

9. *Id.* art. 2639.

10. *Id.* art. 2721.

11. *Id.* comment (b).

12. *Id.* art. 2642. Prior to the enactment of this provision a devolutive appeal from an order of seizure and sale was theoretically possible, but if the property was sold while the appeal was pending, the appeal would be dismissed as presenting a moot question. *E.g.*, *Bank of LaFourche v. Barrios*, 167 La. 215, 118 So. 893 (1928). For this reason devolutive appeal in this situation was eliminated in the new provision and is no longer possible. LA. CODE OF CIVIL PROCEDURE art. 2642, comment (c) (1960); *General Motors Acceptance Corp. v. Kroger*, 136 So.2d 402 (La. App. 1st Cir. 1961).

13. *Myrtle Grove Packing Co. v. Mones*, 226 La. 287, 76 So.2d 305 (1954), and cases cited therein; *Miller, Lyon & Co. v. Cappel*, 36 La. Ann. 264 (1884); *Ricks v. Bernstein*, 19 La. Ann. 141 (1867).

14. *General Motors Acceptance Corp. v. Anzelmo*, 222 La. 1019, 64 So.2d 417 (1953). Prior to this decision there was a conflict in the jurisprudence on whether lack of authentic evidence was properly urged in injunction proceedings. See generally Note, 14 LA. L. REV. 289 (1953). In *Anzelmo* the court resolved the conflict in favor of the view that either injunction or appeal was proper.

has been sold. Doubt in this area has apparently arisen out of the conflicting interests of the complaining debtor and the purchaser at the judicial sale or subsequent purchasers. Although it has occasionally been announced that the remedies of appeal and injunction are exclusive,¹⁵ numerous cases have permitted actions to annul sales under executory process.¹⁶ Annulment has been allowed on various grounds when the property was sold to the mortgagee and was still in his possession.¹⁷ In the majority of these cases, however, there was either fraud on the part of the mortgagee or failure to serve proper notice on the

15. *Franek v. Brewster*, 141 La. 1031, 1043, 76 So. 187, 192 (1917); *Pons v. Yazoo & M.V. R.R.*, 122 La. 156, 171, 47 So. 449, 454 (1908) (dictum); *Miller v. Peoples' Homestead & Sav. Ass'n*, 161 So. 656, 657-58 (La. App. 2d Cir. 1935). That these pronouncements are too broad is implied by article 3543 of the Louisiana Civil Code which clearly contemplates the possibility of annulling a sale under executory process: "All informalities of legal procedure connected with or growing out of any sale at public auction, . . . of real or personal property, . . . shall be prescribed against by those claiming under such sale after the lapse of two years from the time of making said sale. . . ." See note 26 *infra* for further discussion of this provision.

16. *Reid v. Federal Land Bank*, 193 La. 1017, 192 So. 688 (1939); *Continental Sec. Corp. v. Wetherbee*, 187 La. 773, 175 So. 571 (1936); *McDonald v. Shreveport Mut. Bldg. Ass'n*, 178 La. 645, 152 So. 318 (1933); *Ring v. Schilkoffsky*, 158 La. 361, 104 So. 115 (1925); *Viley v. Wall*, 154 La. 221, 97 So. 409 (1923); *Brewer v. Yazoo & M.V. R.R.*, 128 La. 544, 54 So. 987 (1911); *Pons v. Yazoo & M.V. R.R.*, 122 La. 156, 47 So. 449 (1908); *Huber v. Thompson*, 46 La. Ann. 186, 14 So. 504 (1894); *Killelea v. Barrett*, 37 La. Ann. 865 (1885); *Stapleton v. Butterfield*, 34 La. Ann. 822 (1882); *Germaine v. Malerich*, 31 La. Ann. 371 (1879); *Birch v. Bates*, 22 La. Ann. 198 (1870); *Farrell v. Klumpp*, 13 La. Ann. 311 (1858); *Tufts, Fermor & Co. v. Beard*, 9 La. Ann. 310 (1854); *Doherty v. Randazzo*, 128 So.2d 669 (La. App. 4th Cir. 1961).

Because an executory proceeding involves no judgment in the legal sense of the term (see note 7 *supra* and accompanying text), an action to annul such proceedings is not governed by articles 2001-2006 of the Code of Civil Procedure dealing with actions to annul judgments. *Cf.* *Pons v. Yazoo & M.V. R.R.*, 122 La. 156, 47 So. 449 (1908) (wherein it was held an action to annul sale under executory process governed by prescriptive provision of article 3543 of the Civil Code rather than the one-year prescription of article 613 of the Code of Practice of 1870); *Stapleton v. Butterfield*, 34 La. Ann. 822 (1882) (same). There is no legislative provision specifically authorizing such an action, but the courts have recognized it as a direct action to annul a judicial sale and, in case of a sale of an immovable, distinct from a petitory action. *Reid v. Federal Land Bank*, 193 La. 1017, 1024, 192 So. 688, 690 (1939), and cases there cited.

17. *Reid v. Federal Land Bank*, 193 La. 1017, 192 So. 688 (1939) (proceedings brought against mortgagor's succession though she was alive; no notice to mortgagor); *McDonald v. Shreveport Mut. Bldg. Ass'n*, 178 La. 645, 152 So. 318 (1933) (improper advertisement of sale); *Ring v. Schilkoffsky*, 158 La. 361, 104 So. 115 (1925) (notice improperly served on wife instead of husband who was living separately); *Killelea v. Barrett*, 37 La. Ann. 865 (1885) (tutor ad hoc appointed to represent minors did not take oath; absolute nullity); *Stapleton v. Butterfield*, 34 La. Ann. 822 (1882) (mortgage absolutely null; fraud; note enforced by holder with notice of nullity); *Birch v. Bates*, 22 La. Ann. 198 (1870) (no notice to mortgagor who was out of state at time of sale); *Farrell v. Klumpp*, 13 La. Ann. 311 (1858) (no notice to mortgagor); *cf.* *Acadian Prod. Corp. v. Savanna Corp.*, 222 La. 617, 63 So.2d 141 (1953) (sale under writ of fieri facias; no notice to debtor; fraud).

debtor,¹⁸ suggesting that at the time of the sale the debtor had no knowledge of the proceedings or the irregularities complained of and thus could not have been reasonably expected to urge his defense prior to the sale. When the property has been sold to one other than the mortgagee, however, the courts have generally not allowed the mortgagor to annul the sale on grounds he could have urged prior to the sale.¹⁹ An exception to this rule was created in *Viley v. Wall*²⁰ which held that annulment could be obtained for fraud where the property was still in the hands of an adjudicatee who had participated in the fraud. Dictum in *Viley* which indicated that the rule applied to irregularities other than fraud²¹ was seized upon in *Doherty v. Randazzo*,²² a court of appeal decision, to allow

18. See note 17 *supra*.

19. Continental Sec. Corp. v. Wetherbee, 187 La. 773, 175 So. 571 (1936); Culotta v. Grosz, 173 La. 83, 136 So. 95 (1931); Ouachita Nat'l Bank v. Shell Beach Constr. Co., 154 La. 709, 98 So. 160 (1923); Greenwood Planting & Mfg. Co. v. Whitney Cent. Trust & Sav. Bank, 146 La. 567, 83 So. 832 (1920); Franek v. Brewster, 141 La. 1031, 76 So. 187 (1917); 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); Wisdom v. Parker, 31 La. Ann. 52 (1879); Laforest v. Barrow, 12 La. Ann. 148 (1857); LeBlanc v. Rock, 84 So. 2d 629 (La. App. 1st Cir. 1955) (dictum); Burden v. People's Homestead & Sav. Ass'n, 167 So. 487 (La. App. 2d Cir. 1936); Miller v. People's Homestead & Sav. Ass'n, 161 So. 656 (La. App. 2d Cir. 1935).

20. 154 La. 221, 97 So. 409 (1923). The fraud proven in *Viley* was a conspiracy between the mortgagee and the directors of a corporation to mortgage corporate property and foreclose under executory process, the conspirators purchasing the property themselves, thus defrauding the stockholders. The corporation was allowed to annul the sale and recover the property in a derivative stockholder's action.

A similar exception was made in *Germaine v. Mallerich*, 31 La. Ann. 371 (1879), where the widow of the mortgagor sued as tutrix of her daughter to annul a sale under executory process brought against her husband while he was out of the country. The husband died while abroad and the wife signed the appraisal papers without authority. The court found the proceedings null and allowed recovery of the property from a third-party purchaser. The purchaser was found to be in bad faith since he knew of the husband's absence and the wife's signature was patent on the face of the appraisal papers.

21. 154 La. 221, 229-30, 97 So. 409, 411-12: "Defendants contend that . . . plaintiff did know of said proceedings [the executory 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*. . . . [No] provision of law that we know of prevents him from attacking subsequently the sale upon the ground of fraud, where the rights of no third person have intervened." (Emphasis added.)

22. 128 So. 2d 669 (La. App. 4th Cir. 1961), noted in 22 LA. L. REV. 845 (1962), in which views contrary to those herein expressed are advanced. In *Burden v. People's Homestead & Sav. Ass'n*, 167 So. 487 (La. App. 2d Cir.

the only case found where annulment after sale has been allowed solely on grounds of insufficient authentic evidence.²³ Furthermore, since there was no fraud or lack of notice,²⁴ *Doherty* goes beyond the majority of other cases allowing annulment after sale on other grounds.

In the instant case, relying on the *Doherty* decision, the court applied the *Viley* holding and dictum to permit the mortgagor to annul the executory proceeding on grounds of lack of authentic evidence, although he had made no attempt to appeal from the order of seizure or to enjoin the sale.²⁵ As in *Doherty*, there was no fraud alleged, and the debtor had been served with

1936), factually similar to *Doherty*, the court refused to apply the *Viley* dictum to a suit to annul for lack of authentic evidence because no fraud or knowledge of the defect on the part of the purchaser was alleged.

23. *But see* Tufts, Fermor & Co. v. Beard, 9 La. Ann. 310 (1854), where on devolutive appeal the court decreed the order of seizure null because of lack of authentic evidence, though the property had already been adjudicated to a third party. However, recovery of the property was denied because the purchaser was not before the court. The court said: "Any relief to which the appellant may be entitled for alleged irregularities after the judgment, must be sought by a direct action." *Ibid.*

24. Allegations of insufficient notice was made by plaintiff, but the court found it unsupported by evidence. 128 So. 2d 669 (La. App. 4th Cir. 1961).

25. 158 So. 2d at 231-32. The present action was brought more than two years after the date of the sale. See *id.* at 231. While no plea of prescription was entered under article 3543 of the Civil Code (quoted note 15 *supra*), interesting questions would have arisen had such been the case. Under article 3543 irregularities in or connected with public sales are "prescribed *against by those claiming under such sale* after the lapse of two years from the time of making said sale." (Emphasis added.) Defendant in the instant case was the foreclosing creditor, not one claiming the property under the sale. No cases have been found holding whether the article can be invoked by one other than a claimant under the sale. In numerous cases, however, the courts have broadly characterized the prescription under this article as one which "cures" the defects in the proceedings. *E.g.*, Phoenix Bldg. & Homestead Ass'n v. Meraux, 189 La. 819, 180 So. 648 (1938); Buillard v. Davis, 185 La. 225, 169 So. 78 (1936); Rizzotto v. Grima, 164 La. 1, 113 So. 658 (1927); Walling v. Morefield, 33 La. Ann. 1174 (1881). From this it could be argued that any party having an interest in the validity of the proceedings should be able to invoke article 3543. The prescription of two years, however, cures only irregularities constituting relative nullities and not radical defects which render the proceedings absolutely null. *E.g.*, Acadian Production Corp. v. Savanna Corp., 222 La. 617, 63 So. 2d 141 (1953); Gaspard v. Coco, 208 La. 73, 22 So. 2d 829 (1945); Pons v. Yazoo & M.V. R.R., 122 La. 156, 47 So. 449 (1908); Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800 (1904). In the instant case the court indicated that lack of authentic evidence rendered the proceedings absolutely null. 158 So. 2d at 228. No authority for this proposition has been found in the jurisprudence, and in *Skannal v. Hespeth*, 196 La. 87, 198 So. 661 (1940), it was specifically held that failure to attach notes and a copy of the mortgage to a petition for executory proceedings was an informality cured by two years' prescription. Furthermore, in *Thibodeaux v. Thibodeaux*, *supra*, it was held that informalities cured under article 3543 were those "which do not reach matters that are of the essence of those contracts, or prejudicially affect the substantial rights of the parties." 112 La. 906, 913, 36 So. 800, 802 (1904). Mere lack of authentic evidence would seem to meet this test. For a discussion of the jurisprudence under article 3543 see Comment, 13 TUL. L. REV. 615 (1939).

proper notice of the proceedings.²⁶ Although the instant case is distinguishable from *Viley* and *Doherty* in that the property here had evidently been adjudicated to an innocent third party²⁷ annulment for lack of authentic evidence when the property was still in the hands of the mortgagee-adjudicatee. This is not joined as a defendant, and there was no indication of his knowledge of the defect in the proceedings, this distinction seems immaterial since plaintiff did not seek to recover the property, and thus the rights of the third-party purchaser were not determined or immediately endangered. Thus, if the *Viley* dictum and its application in *Doherty* were sound, the instant decision would appear correct also. However, this essential premise appears questionable.

While executory process is in a sense a harsh remedy because it is an *ex parte* proceeding without service of citation on the debtor, this is mitigated by the fact that the debtor, having executed a confession of judgment, has full knowledge that the proceeding may be invoked against him. Furthermore, he is given notice of the proceedings and has ample opportunity to protect his interests by appeal or injunction. While it appears a reasonable safeguard to allow him to invoke insufficiency of authentic evidence as a *defense* to the action, it should be noted that in most cases all the debtor will gain by asserting such a defense is a delay; the creditor may still enforce his claim by ordinary proceedings²⁸ in the absence of some other valid defense such as fraud or invalidity of the underlying obligation. This being the case, it seems to be an unwarranted liberality to an inattentive and negligent party to allow him to annul executory proceedings solely for formal deficiencies, when he has had notice of the proceedings and has neglected to urge these defenses in the manner specifically provided by law, *i.e.*, by appeal or injunction. Aside from the *Viley* dictum and *Doherty*, the jurisprudence does not conflict with this reasoning. As previously pointed out,²⁹ most cases which have permitted annulment after sale have involved either fraud or lack of proper notice to the debtor, which might well excuse his neglect. Furthermore, it is arguable that there is no more reason for mere insufficiency of authentic evidence to be grounds for annulling an executory proceeding than for in-

26. See note 1 *supra*.

27. See note 2 *supra*.

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

29. See notes 17 and 18 *supra* and accompanying text.

sufficiency of evidence to be a basis for annulment of a judgment.³⁰ In both cases the defendant is given an opportunity to contest the evidence brought. The requirement that evidence in executory proceedings be in authentic form is apparently a safeguard to assure the judge that the plaintiff is entitled to bring the action and to protect against enforcement of fabricated claims in defraud of the debtor's rights. Thus where failure to comply strictly with the requirement is not accompanied by fraud on the court or the debtor, there seems little reason to allow a subsequent annulment on such grounds.

If carried to its logical extreme, the trend set by the application of the *Viley* dictum in *Doherty* and *Tapp* may lead to a widespread practice of annulling judicial sales on minor formal irregularities some time after the sale is completed. Such a result would appear to be undesirable in prolonging litigation³¹ and adversely affecting the stability of judicial sales and land titles.³² This danger seems to outweigh whatever public interest there may be in protecting a debtor who has negligently failed to protect himself. It is submitted that in a suit brought by the debtor insufficient authentic evidence and other such minor formal irregularities should be grounds for annulling executory proceedings only when accompanied by fraud or lack of notice to the debtor which excuses his failure to appeal from or enjoin the sale.

George A. Kimball, Jr.

CONSTITUTIONAL LAW — COMMERCE CLAUSE — RESERVATION OF LOCAL MILK MARKETS

Plaintiff, a Florida milk distributor, challenged orders of the Florida Milk Commission which regulated sales between

30. That insufficiency of evidence is not ground for annulling a judgment was held in *Emuy v. Farr*, 125 La. 825, 51 So. 1003 (1910).

31. This was one of the reasons given by Judge LeBlanc for his judgment in the district court for defendant in the instant case. 158 So.2d at 232.

32. Although in the instant case an automobile was involved, in *Doherty* a sale of real estate was annulled. Even in a situation like *Doherty*, where the property at the time of the action in nullity remains in the hands of the mortgagee-adjudicatee who is charged with knowledge of the defect in the executory proceedings, annulment of the sale could do substantial damage to the purchaser if he has put improvements on the property or is using it for business purposes. In absence of fraud on his part it seems an unreasonable penalty to require him to give up the property merely because of a formal irregularity in the executory proceedings.