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SECURITY DEVICES — MORTGAGES ON IMMOVABLES — WHEN
EFFECTIVE AGAINST THIRD PERSONS

Plaintiffs sold mineral leases to defendant and received a note secured by a vendor's lien and special mortgage. Several days later, the leases were transferred to intervenor without reference to the lien and mortgage, and on the same day this and the former conveyance¹ were duly filed with the Clerk of Court and indorsed in the proper chronological order. The conveyance by plaintiffs to defendant, however, was not inscribed in the mortgage book until three days after the transfer to intervenor. Subsequently, plaintiffs sued defendant on the indebtedness and prayed for recognition of the mortgage. Intervenor asserted her ownership free of all encumbrances on the ground that a mortgage is effective against third persons only from the date of its inscription in the mortgage books and not from the date of filing with the Clerk of Court. The trial court held for intervenor. The Second Circuit Court of Appeal reversed; on certiorari the Supreme Court affirmed. *Held*, a mortgage which has been duly and timely inscribed is effective against third persons from the time of its filing. *Kinnebrew v. Tri-Con Prod. Corp.*, 244 La. 879, 154 So. 2d 433 (1963).

The Civil Code of 1825 provided that mortgages on immovables had no effect against third persons until inscribed in the records, but timely inscription made them retroactive to the date of their passage.² The provisions giving mortgages retroactive effect, however, were not included in the Code of 1870.³ In the present Code articles 2254, 2264, and 2266 provide that an *act affecting immovables* is effective against third persons from the time of *depositing* the act in the proper office,⁴ and articles 3342,

1. There were actually three conveyances: one from plaintiffs to defendant on July 30, 1960; one from defendant to its president on August 4, 1960; and one from defendant's president to intervenor on August 5, 1960. The conveyance from defendant to its president, like the one from plaintiffs to defendant, made no reference to the lien and mortgage.

2. La. Civil Code arts. 3314, 3319, 3320 (1825).

3. See LA. CIVIL CODE — *Concordance Table* 716 (Dainow ed. 1961). *Kinnebrew* contains a summary of the history of legislation in this area, 244 La. at 885-89, 154 So. 2d at 435-37.

4. LA. CIVIL CODE art. 2254 (1870): "It shall be the duty of the recorder to indorse on the back of each act deposited with him the time it was received by him, and to record the same without delay in the order in which they were received; and such acts shall have effect against third persons only from the date of their being deposited in the office of the parish recorders."

Id. art. 2264: "No notarial act concerning immovable property shall have any effect against third persons, until the same shall have been deposited in the office

3345, and 3347 provide that a mortgage must be *recorded* to affect third persons.⁵ Early confusion arose from the apparent conflict between these articles, but the courts decided that since mortgages were *stricti juris*, articles 2254, 2264, and 2266, under the general head "Of Registry," could not control the specific provisions dealing with mortgages.⁶ Therefore, it was held that conveyances were effective against third persons from the time of filing, whether subsequently recorded or not,⁷ but mortgages could have no effect against third persons until the time they were actually and properly recorded in the mortgage books.⁸ The Constitution of 1898 provided that mortgages on immovables could not affect third persons *unless recorded or registered* in the manner and within the time prescribed by law.⁹ Against this jurisprudential background, and presumably aware of the constitutional provision, the legislature enacted Act 215 of 1910, the source of R.S. 9:5141.

R.S. 9:5141 provides that mortgages, when filed, shall be immediately indorsed by the recorder with the date, hour, and minute of filing, which indorsement shall be recorded with the

of the parish recorder, or register of conveyances of the parish where such immovable property is situated."

Id. art. 2266: "All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording.

"The recording shall have effect from the time when the act is deposited in the proper office, and indorsed by the proper officer."

5. *Id.* art. 3342: "Conventional mortgage is acquired only by consent of the parties, and judicial and legal mortgages only by the effect of a judgment or by operation of law.

"But these mortgages are only allowed to prejudice third persons when they have been publicly inscribed on records kept for that purpose and in the manner hereafter directed."

Id. art. 3345: "All mortgages, whether conventional, legal or judicial, are required to be recorded in the manner hereafter provided."

Id. art. 3347: "No mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated."

The term "recorded" as used in articles 3345 and 3347 apparently means filing plus inscription since article 3342 specifically requires inscription to give mortgages effect against third persons. See text accompanying note 8 *infra*.

6. See *State ex rel. Slocumb v. Rogillo*, 30 La. Ann. 833 (1878)

7. See *Way v. Levy*, 41 La. Ann. 447, 6 So. 661 (1889); *Lewis v. Klotz*, 39 La. Ann. 259, 1 So. 539 (1887); *Givanovitch v. Hebrew Congregation*, 36 La. Ann. 272 (1884); *Gallaughers Heirs v. Hebrew Congregation*, 35 La. Ann. 829 (1883); *State ex rel. Slocumb v. Rogillo*, 30 La. Ann. 833 (1878); *Payne v. Pavey*, 29 La. Ann. 116 (1877). This jurisprudence apparently survived the public records doctrine inaugurated by *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909). See text accompanying note 24 *infra*.

8. See *Baker v. Lee*, 49 La. Ann. 874 (1897); *State ex rel. Slocumb v. Rogillo*, 30 La. Ann. 833 (1878); *Ford v. Tilden*, 7 La. Ann. 523 (1852); *White v. Union Bank*, 6 La. Ann. 162 (1851); *Ellis v. Simms*, 2 La. Ann. 251 (1847).

9. La. Const. art. 186 (1898).

registry of the instrument, and that all such instruments shall be effective against third persons from the time of filing.¹⁰ The Constitution of 1921¹¹ provides, as did the constitutions of 1898 and 1913,¹² that no mortgage or privilege on immovable property shall affect third persons unless recorded or registered in the parish where the property is situated, in the manner and within the time prescribed by law.

After the passage of Act 215 of 1910, the source of R.S. 9:5141, the courts continued to cite the jurisprudence before the act as authority for the proposition that mortgages were effective against third persons only from the time of inscription.¹³ In one case the court took the position that the act intended to deal only with the problem of ranking.¹⁴ Others, after considering the constitutional provision and the Civil Code articles, were of the opinion that the act contemplated actual and timely inscription after filing.¹⁵ Some courts intimated that if the act were interpreted so as to make mortgages effective from the time of filing, the act would have to be held unconstitutional.¹⁶

10. LA. R.S. 9:5141 (1950): "All acts or instruments of writing which import mortgage or privilege, when filed for record with the recorder of mortgages, shall be immediately indorsed by him with the date, hour, and minute of filing which indorsement shall be recorded with the registry of the instrument.

"All such instruments shall be effective against all persons from the time of their filing."

11. LA. CONST. art. XIX, § 19: "No mortgage or privilege on immovable property, or debt for which preference may be granted by law, shall affect third persons unless recorded or registered in the parish where the property is situated, in the manner and within the time prescribed by law . . ."

12. La. Const. art. 186 (1913).

13. See, *e.g.*, *Washington Bank & Trust Co. v. Cowan-Kerr Lumber Co.*, 155 La. 1076, 99 So. 881 (1924); *LeGoaster v. Lafon Asylum*, 155 La. 158, 99 So. 22 (1924); *Wood Preserving Corp. v. Mitchell Tie & Lumber Co.*, 167 So. 122 (La. App. 1st Cir. 1936); *Opelousas Fin. Co. v. Reddell*, 119 So. 770 (La. App. 1st Cir. 1929); *Whitney-Central Nat'l Bank v. Cuneo Fid. & Deposit Co.*, 7 La. App. 197 (Orl. Cir. 1927); *Charrier v. Greenlaw Truck & Tractor Co.*, 2 La. App. 622 (2d Cir. 1925); *Oakdale Bank & Trust Co. v. Young*, 2 La. App. 586 (1st Cir. 1925); *Lederman v. McCallum*, 1 La. App. 552 (2d Cir. 1925). However, in one case, the Supreme Court indicated in dictum that a mortgage became effective against third persons from the time of filing. See *Godchaux Sugars, Inc. v. Boudreaux*, 153 La. 685, 96 So. 532 (1923).

14. See, *e.g.*, *Lederman v. McCallum*, 1 La. App. 552 (2d Cir. 1925).

15. See, *e.g.*, *Opelousas Fin. Co. v. Reddell*, 119 So. 770 (La. App. 1st Cir. 1929); *Whitney-Central Nat'l Bank v. Cuneo Fid. & Deposit Co.*, 7 La. App. 197 (Orl. Cir. 1927); *Charrier v. Greenlaw Truck & Tractor Co.*, 2 La. App. 622 (2d Cir. 1925).

16. See, *e.g.*, *Whitney-Central Nat'l Bank v. Cuneo Fid. & Deposit Co.*, 7 La. App. 197 (Orl. Cir. 1927); *Charrier v. Greenlaw Truck & Tractor Co.*, 2 La. App. 622 (2d Cir. 1925). In the *Whitney* case, the court said that "if Act 215 of 1910 declares that mortgages shall be effective from the date of filing, irrespective of whether or not they are subsequently recorded, we hold that this act is unconstitutional as being violative of the Constitution of Louisiana." 7 La. App. at 204. However, it is submitted this is purely dictum, since in *Whitney* the holder of

Probably the most authoritative support for the proposition that registry is essential for mortgages is found in *Opelousas Finance Co. v. Reddell*.¹⁷ In dictum, the *Reddell* court said that the indorsement required to be made under the source provisions of R.S. 9:5141 is merely preliminary, not equivalent, to registration, but when registration is promptly and actually made in its proper order, the registry is effective as of the time the act was deposited. However, the court indicated that a mortgage, though properly indorsed, would have no effect against third persons if it were never actually recorded.¹⁸

In the instant case, recognizing the apparent confusion in the jurisprudence, the court concluded that the intent of R.S. 9:5141 was to end the arbitrary distinction between mortgages and conveyances, at least to the extent of making mortgages effective against third parties from the date of deposit with the recorder when the recordation was timely.¹⁹ The court, however, specifically restricted its holding to the facts presented, expressly reserving opinion on the effect of untimely recordation and non-recordation on mortgages.

The holding of the instant case that a duly and timely re-

certain mortgage notes was suing the notary who executed the mortgage and his surety. The court found the notary negligent for not calling to the attention of the recorder the fact that the instrument he wanted filed contained both a chattel mortgage and a mortgage on real estate.

17. 119 So. 770 (La. App. 1st Cir. 1929). The court was faced with ranking a mortgage which was recorded some eighteen months after filing, but the indorsement at the time of filing recited that it was recorded on the same day. The mortgage was in fact recorded on the day of filing, but in the chattel mortgage book rather than the mortgage record for immovables. Later, the clerk attempted to antedate the recordation to the time of filing by means of a certificate. The court held that an intervening mortgage outranked the former mortgage because the indorsement made on it was not sufficient compliance with the source provision of R.S. 9:5141. See note 10 *supra*.

18. *Id.* at 771: "Another question logically suggests itself, and that is, Suppose, although properly indorsed, would an act of mortgage which never was recorded be effective against third persons? Obviously it would not, for registry is sacramental under the provision of the Civil Code to render an act of mortgage effective against third persons." It is interesting to note that the *Reddell* case referred to the Civil Code rather than to the constitutional provision set forth in note 11 *supra*. The court apparently failed to notice the clause in Act 215 of 1910, which repealed all conflicting laws. La. Acts 1910, No. 215, § 3. Presumably the court could have reached the same conclusion by application of the constitutional provision.

19. "After a careful study of the quoted provisions, as well as a consideration of the historical background thereof, we are convinced that the Legislature by such statute (which specifically refers to mortgages and privileges) intended to eliminate the above mentioned confusion in the jurisprudence and to place mortgages and privileges on the same footing as conveyances with reference to their registry—that is, to make them effective against third persons from and after the time of their being deposited with the recorder (at least, if the acts thereafter are duly and timely inscribed.)" 244 La. at 889, 154 So. 2d at 437.

corded mortgage is effective against third persons from the time of filing appears reasonable and logical, for, as the court pointed out, a recorder's office may often become congested with acts to be recorded, and several days might elapse before these acts can be inscribed. During the intervening period, several subsequent mortgages may have been given on the same immovables and recorded. It would be basically unfair to make the subsequent mortgages prevail over the previously filed original merely because the latter remained unrecorded. Further, the court's limitation of the retroactive effect of inscription to mortgages duly and timely inscribed seems in harmony with the constitution, which provides that mortgages are ineffective against third persons unless recorded or registered "in the manner and within the time prescribed by law."²⁰

The court's finding that R.S. 9:5141 was intended to place mortgages and conveyances on the same footing may be somewhat misleading unless considered carefully.²¹ The law is well settled that conveyances of immovables become effective against third persons from the time of their filing, *even if never recorded*.²² If R.S. 9:5141 were intended to place mortgages and conveyances on the same footing, it would apparently require no subsequent recordation of mortgages to make them effective against third persons, so long as they were properly filed. The court, however, carefully qualified its statement by saying that R.S. 9:5141 was intended to place mortgages and conveyances on the same footing, *at least* when mortgages are thereafter duly and timely inscribed. By doing so, the court cautiously avoided a conflict with the Constitution, which, it is submitted, requires actual recordation by providing that mortgages will have no effect unless "*recorded or registered . . . in the manner and within the time prescribed by law.*"²³ (Emphasis added.) Although it

20. See note 11 *supra*. Since there are no statutes prescribing a time limit for recording mortgages after filing, it seems that the Supreme Court could properly say that if a mortgage is duly and timely recorded after filing, it is recorded "in the manner and within the time prescribed by law." This also seems consistent with the views expressed in the *Reddell* case.

21. See note 19 *supra*.

22. See, e.g., *Burgas v. Stoutz*, 174 La. 586, 141 So. 67 (1932); *Schneidau v. New Orleans Land Co.*, 132 La. 264, 61 So. 225 (1913); *Bank of Coushatta v. Williams*, 121 So. 646 (La. App. 2d Cir. 1929). See also cases cited note 7 *supra*.

23. See note 11 *supra*. It has been suggested that this phrase is sufficiently broad to make filing alone, in accordance with R.S. 9:5141, adequate compliance with the constitution. See Note, 1 LA. L. REV. 231 (1938). In consideration of the instant case the court of appeal made a similar suggestion, but the Supreme Court said this holding was unnecessary for the lower court's decision, since recordation was made.

appears that the time of effectiveness of actually recorded mortgages and the manner of making recordation have been left to the discretion of the legislature and the courts, it seems beyond their discretion to say that filing has the legal effect of recordation or registration. Filing is merely preliminary in the process of recordation. Consequently, if the court is presented with the question whether mortgages must be recorded to affect third persons, it should hold that R.S. 9:5141 contemplates subsequent actual recordation or registration in order to avoid a constitutional conflict.

Furthermore, the very language of R.S. 9:5141 suggests that mortgages must be subsequently recorded in order to give them effect from the time of filing. The statute provides that all mortgages, when filed with the recorder, shall be immediately indorsed by him with the date, hour, and minute of filing, "*which indorsement shall be recorded with the registry of the instrument.*" (Emphasis added.) The statute then provides that "all *such instruments* shall be effective against all persons from the time of their filing." (Emphasis added.) It seems logical to argue that "such instruments" refer to those instruments which are indorsed and registered along with the indorsement in compliance with the statute. Under this construction, only mortgages which are properly filed, indorsed, and recorded would be effective against third persons from the time of their filing.

It seems reasonable, however, to conclude that R.S. 9:5141 was intended to place the time of effectiveness of mortgages and conveyances on the same footing, and were it not for the constitutional provision, this would seem to be the most logical construction of the statute. There is no apparent justification for drawing an arbitrary distinction between the time of effect of conveyances and the time of effect of mortgages. The purpose of requiring any act to be recorded is to serve notice of its existence upon the public.²⁴ When an act is filed, but not recorded, one searching the public records may not be given such notice. If a mortgage or a conveyance is filed, but not recorded, the law must choose to protect the first mortgagee or purchaser, or subsequent ones. Regardless of which policy the law chooses, however, it seems sensible to treat mortgages and conveyances alike. There seems to be no reason for giving subsequent mortgagees

24. Cf. *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909).

more protection than subsequent purchasers, as Louisiana apparently does.

With the law in its present state, it seems apparent that recordation is essential to give mortgages effectiveness against third persons. If it is desirable to place mortgages on the same footing as conveyances and give them effect against third persons from the time of filing, whether or not they are ever recorded, it seems that this will have to be accomplished through the appropriate constitutional processes. Until the constitutional barrier is overcome, mortgages should be effective against third persons from the time of filing only if the filing is followed by timely recordation.

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SECURITY DEVICES — RANKING OF COLLATERAL MORTGAGE SECURING REISSUED MORTGAGE NOTE

Defendant was indebted to one Morgan for \$114,000, a sum secured by the pledge of four collateral mortgage notes bearing the face amount of \$220,000. Subsequent to the recordation of the collateral mortgages defendant had granted various other duly recorded mortgages on the same property. Later plaintiff paid defendant's indebtedness to Morgan, and defendant reissued the collateral mortgage notes to plaintiff in pledge to secure its promissory note for \$120,000. Plaintiff instituted proceedings to enforce the collateral mortgage, and holders of the notes secured by the mortgages granted subsequent to recordation of the collateral mortgage but prior to reissuance of the collateral mortgage notes intervened asserting priority over plaintiff. The trial court upheld the interveners' claims, and on appeal the Fourth Circuit Court of Appeal affirmed that portion of the judgment. *Held, inter alia*, a collateral mortgage, in competition with other mortgages, is ranked from the date of issuance or reissuance of the note secured by it and not from the date of recordation of the collateral mortgage. *Odom v. Cherokee Homes, Inc.*, 165 So. 2d 855 (La. App. 1st Cir. 1964), *writs denied*, 246 La. 867, 167 So. 2d 677 ("no error of law").

As the Louisiana conventional mortgage is an accessory security device,¹ it must be founded on a principal debt² which it

1. LA. CIVIL CODE art. 3284 (1870).

2. *Id.* art. 3285.