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Private Law: Security Devices

Joseph Dainow

SECURITY DEVICES

*Joseph Dainow**

SURETYSHIP

Civil Code article 3061 provides for the discharge of the surety when his subrogation rights have been prejudiced "by the act of the creditor." In *Pioneer Bank & Trust Co. v. Foggin*,[1] this article is used in connection with some of the discussion which centers on the loss of subrogation rights due to acts of the *debtor*. However, the question of whether the surety is released in the latter situation did not have to be decided because the court found that the surety had knowledge of the debtor's acts which were carried out with the consent of creditor. Furthermore, the court did not find that there had been any impairment of the security by reason of these acts. Since the surety's principal undertaking is to the creditor, there would be no basis for his release on account of prejudicial acts of the debtor performed *without the knowledge or consent of the creditor*, regardless of whether the surety had any knowledge of the acts involved.

The quotation in the dissenting opinion, "It is a longstanding rule in Louisiana that an action by a principal debtor which releases any security, without the knowledge or consent of an endorser or surety, relieves the latter,"[2] is from a case[3] in which the debtor acted *with the consent of the creditor*, thus bringing the situation within the textual scope of article 3061.[4] This would not be so where the debtor's acts were done *without* the knowledge and consent of the creditor.

REPAIRMAN'S PRIVILEGE

The repairman's privilege is effective against the thing on which he has worked regardless of whether his personal claim for payment is against the owner or some other person.[5] Of course, the repairman can waive the privilege, and if he does

*Professor of Law, Louisiana State University.

1. 177 So. 2d 131 (La. App. 2d Cir. 1965), *writs denied*, 248 La. 423, 179 So. 2d 18 (1965).
2. 177 So. 2d at 136-37.
3. Glass v. McLendon, 66 So. 2d 369, 370 (La. App. 2d Cir. 1953).
4. See also 2 PLANIOL nos. 2382 *et seq.*
5. LA. CIVIL CODE art. 3217(2) (1870); LA. R.S. 9:4501, 4502 (1950).

so expressly there is no problem. The difficulties arise when his actions and behavior are urged as the basis of an implied waiver. In *Babineaux v. Grisaffi*,[6] Duplantis caused the damage to Grisaffi's automobile and had the car taken to his own garage, where he arranged to have the repairs made. It was agreed that he (Duplantis) would make payment by installments. The court concluded that there was an implied waiver of the privilege because the repairman agreed to look to Duplantis alone for payment and that the installment arrangement was "wholly inconsistent with the assertion of any lien on the vehicle within 90 days." In making this decision, the court relied upon the earlier case of *Wardlaw Bros. Garage, Inc. v. Thomas*,[7] where a similar situation was found.

Privileges are created only by legislative authority and the preferential status of such creditors is an exceptional one.[8] To deprive a person of this special right by an implied waiver should require conclusive evidence, and actions which are "wholly inconsistent" with any reliance upon the protection of this privilege might well satisfy this test. However, actions which could still include reliance on the privilege are not "wholly inconsistent." Accepting the credit of the person who was responsible for the damage instead of cash payment or the credit of the car owner is not of itself wholly inconsistent with reliance on the privilege. For the Civil Code privilege, the creditor can preserve the privilege by retaining possession (with no time limit); and for the repairman's statutory privilege under R.S. 9:4501, the privilege is good for 90 days after the job is done (even though delivered to debtor). If the creditor accepts an installment arrangement which extends beyond the 90-day period, his action is "wholly inconsistent" with any reliance on the privilege; but if he extends credit for a period less than 90 days, or if he still retains possession of the object, there is no reason why he cannot still make use of his privilege.

In the principal case, the facts do not disclose for how long a period the repairman agreed to extend credit to Duplantis; and unless this was for a period in excess of 90 days, there should not be an implied waiver of the privilege on the score of looking to Duplantis alone for payment. Furthermore, as a

6. 180 So. 2d 888 (La. App. 3d Cir. 1965).
7. 19 La. App. 241, 140 So. 108 (La. App. 2d Cir. 1932).
8. LA. CIVIL CODE arts. 3182-3185 (1870).

separate basis for the preservation of the privilege, there was also the fact of his retention[9] of the automobile (until bonded by the owner), which is more consistent with an assertion and reliance on the privilege than with a waiver of it.

BUILDING CONTRACT LAW

The building contract law,[10] which creates liens and privileges to secure payment of services and supplies, is in derogation of common rights and must be strictly construed in favor of the property owner whose common rights are affected. This is in accord with the rule of *stricti juris* in Civil Code article 3185. Accordingly, in *Pennington v. Campanella*,[11] the court held that a subcontractor's expense in securing insurance and the amount of his profit which had been separately stipulated (in a cost-plus-profit contract) were not covered by the language of the statute. From the point of view of the statutory security, this decision gives the contractor and subcontractor better protection with a lump sum agreement than with a cost-plus contract.

Similarly, in *Mayeux v. Lamco*,[12] it was held that under the public works contract law[13] the surety bond does not cover the claim of an unpaid lessor of manned equipment which had been rented to the contractor. The lessor of the equipment was not a subcontractor because he did not have the responsibility to perform a specific part of the contract. Neither could a privilege attach for the salaries of the workmen or the supplies utilized because there were not separate items but were comprised within the single claim of rental charges.

MORTGAGES — PUBLIC RECORDS DOCTRINE

In Louisiana, the public records doctrine is often referred to in sacrosanct terms, but it must be remembered that there are some exceptional situations in which the law protects certain interests despite their absence from the public records. One such situation occurred in the case of *Lacour v. Ford Investment*

9. *Id.* art. 3217(2); LA. R.S. 9:4502(A) (1950).
10. LA. R.S. 9:4801 *et seq.* (1950).
11. 180 So. 2d 882 (La. App. 1st Cir. 1965), *writ granted*, 248 La. 783, 181 So. 2d 782 (1966).
12. 180 So. 2d 425 (La. App. 1st Cir. 1965).
13. LA. R.S. 38:2242 (1950).

Corp.,[14] where the court reiterated the well-established rule that a mortgage continues to have its full effectiveness despite a cancellation on the basis of a fraudulent release.[15] Likewise, during the interval allowed for inscription, vendors' liens[16] and building contract privileges[17] are temporarily secret liens not discoverable in the public records. Incidentally noteworthy incidents of the opinion in the principal case are (1) a footnote distinction between the civil law attitude concerning *stare decisis* in the branches of the law which call for greater certainty and those in which the nature of the subject calls for greater adaptability,[18] and (2) the forceful assertion that Civil Code article 21 does not open the door to the admission of equitable principles of the common law.[19]

PRESCRIPTION

*Joseph Dainow**

ACQUISITIVE PRESCRIPTION

Possession as Owner

Normally, one co-owner cannot prescribe against other co-owners because his possession is precarious. Even if he occupies physically the entire property, his status as co-owner incorporates recognition of the rights of the others, and therefore he is not in possession *as owner* of their shares. However, this does not completely exclude the possibility of acquisitive prescription where the physical occupation is under circumstances which are inconsistent with recognition of other rights and hostile to any such possible claims.

This is what occurred in *Continental Oil Co. v. Arceneaux.*[1]

14. 183 So. 2d 463 (La. App. 4th Cir. 1966), *writ granted*, 249 La. 385, 186 So. 2d 630 (1966).
15. Citing Zimmer v. Fryer, 190 La. 814, 183 So. 166 (1938); see also Gallagher v. Conner, 138 La. 633, 70 So. 539 (1915).
16. LA. CIVIL CODE art. 3274 (1870).
17. LA. R.S. 9:4801 *et seq.* (1950).
18. 183 So. 2d at 465, n. 1.
19. *Id.* at 467 — text supported by note 4.

*Professor of Law, Louisiana State University.

1. 183 So. 2d 399 (La. App. 3d Cir. 1966), *writ refused*, 249 La. 66, 184 So. 2d 736 (1966).