Private Law: Security Devices

Joseph Dainow
DUTY TO WARN SOCIAL GUEST

One Christmas night a Mrs. Foggin and her daughter-in-law were carrying Christmas wrappings and boxes from the latter's house to a trash receptacle. The dark backyard through which they walked was enclosed by a fence with a gate that opened outward. The daughter-in-law held the gate open for Mrs. Foggin to precede her through it, at which point Mrs. Foggin tripped over a plank which was painted a dark color and nailed across the bottom of the gateway, extending six or eight inches above the ground. The suit that arose from Mrs. Foggin's injuries due to this fall afforded the Louisiana Supreme Court an opportunity to affirm the rule established by the intermediate courts, unique to Louisiana, that a social guest is considered an "invitee" to whom the landowner owes the duty of exercising reasonable care for his safety. The court defined this duty further as one requiring the occupant to warn the guest of a hidden or concealed peril. The daughter-in-law's tacit invitation for the plaintiff to pass through the gate meant that plaintiff could reasonably assume that she could walk through safely, negating any assumption of risk on her part.

SECURITY DEVICES

Joseph Dainow*

Pledge

The necessity of delivery as an essential requirement for a valid pledge has been the subject of discussion several times in recent years. Generally, the matter is considered as of the time of the making of the purported pledge agreement. There is no reason why the parties could not agree to a later delivery, in which event the pledge is only perfected at the time of such delivery. In *Steadman v. Action Fin. Corp.*, the parties signed

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2. In all other American jurisdictions, the social guest is held to be a mere licensee, to whom a lesser standard of care is owed. See Annot., 25 A.L.R.2d 538 (1962); W. Prosser, *The Law of Torts* § 60, at 388 (3d ed. 1964).
3. Professor of Law, Louisiana State University.
4. LA. CIVIL CODE arts. 3133, 3152 (1870).
5. 18 LA. L. REV. 50 (1957); 33 Tul. L. Rev. 74 (1958); 26 LA. L. Rev. 182 (1965).
7. 197 So. 2d 424 (La. App. 2d Cir. 1967), writ refused, 199 So. 2d 918 (La. 1967).
an agreement which purported to be a present pledge and to be accompanied by immediate delivery. Actually, no delivery was made at that time, but the trial judge held that a subsequent passive surrender of possession constituted delivery and perfected the pledge. In the court of appeal, the same circuit (with the same judge writing the opinion) that clarified the delivery problem in the case of *Powers v. Motors Securities Co.* reversed the trial judge on this point, and held that “since there was no delivery pursuant to the written agreement there was no pledge.” The circumstance that the subsequent passive surrender occurred in the process of repossession after default, for purposes of sale, “convinced us the taking was unlawful.”

**ATTORNEY’S PRIVILEGE ON JUDGMENT**

Louisiana law permits a contingent fee contract between attorney and client and provides for the attorney a special privilege on any judgment obtained. In *Palmer & Palmer v. Stire,* a money judgment was rendered, and it was inscribed as a judicial mortgage against the judgment debtor. Some time later, the judgment creditor and judgment debtor entered into a compromise (which was paid), and the judicial mortgage was erased upon the written authorization of the judgment creditor. The present suit by the attorney for reinstatement of the judicial mortgage, with priority over other intervening recorded mortgages, was dismissed. It is refreshing to read an opinion based entirely on Civil Code articles together with statutory provisions and their legislative history—not a single case is cited.

Three issues merit discussion. The first is Civil Code article 3371, which comes directly from the Code Napoleon and provides that mortgage inscriptions are erased by consent of “the parties interested and having capacity for that purpose.” This is not qualified as “any” party or as “all” parties; neither is there description of the word “interested.” The additional requirement of “having capacity for that purpose” is explained by Planiol as meaning that “every creditor having the capacity to receive pay-

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5. 168 So.2d 922 (La. App. 2d Cir. 1964), noted in 26 La. L. Rev. 182 (1965).
6. 197 So.2d at 427.
7. Id.
9. Id. 9:5001.
10. 195 So.2d 708 (La. App. 1st Cir. 1967), writ refused, 197 So.2d 899 (La. 1967).
11. See LOUISIANA LEGAL ARCHIVES, Compiled Edition of the Civil Codes of Louisiana art. 3371 at 1847 (1942).
The two parts of this phrase are linked by the conjunctive "and" so that the latter part is also a limitation on the first. Accordingly, there is no doubt that the judgment creditor, having capacity to receive payment and discharge the debtor, can validly authorize and instruct the erasure of the accompanying mortgage. Furthermore, after payment and extinction of the principal obligation, the accessory mortgage is automatically of no effect neither as between the parties nor as against third persons.

The question posed by the principal case is whether the attorney qualifies under article 3371 to authorize the erasure of a judicial mortgage inscription based upon the judgment obtained for his client. Since granting a mortgage is tantamount to an alienation and requires that kind of capacity, the giving up of a mortgage should require the same capacity. In the absence of an agreement between client and attorney giving the latter authority to receive payment or to cancel a mortgage, it would not appear that he has this authority. Accordingly, it is hard to agree with the court's statement: "We do not believe that the signature of both the attorney for a judgment creditor and the judgment creditor himself is necessary on an authorization to cancel a judicial mortgage, but believe that this right to obtain cancellation is coextensive in both the judgment creditor and his attorney." (Emphasis added.) The mortgagee has a real right on the property; the attorney's privilege does not give him the same right.

The second issue, in itself, adequately supports the court's decision. The statute which authorizes contingent fee contracts also provides that either party may prevent the other from making any individual settlement or compromise without the other, by filing the contract with the clerk of court and serving a copy on the other party. If the attorney had done this, he could have prevented his client's compromise and mortgage cancellation. This legislation was originally enacted as part of the same statute which created the attorney's privilege on the judgment.

12. 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL no 3063 (11th ed. 1939).
14. Id. art. 3300.
15. 195 So.2d 706, 710-11 (La. App. 1st Cir. 1967).
16. La. Civil Code art. 3282 (1870).
17. See 195 So.2d 706, 711 (La. App. 1st Cir. 1967).
and these provisions are *in pari materia*, so that the filing with the clerk of court was intended as the implementation and protection of the privilege. Since the attorney had not done so, the erasure was good and that was the end of the mortgage.

The third issue stems from an observation quoted from the trial court's reasons for judgment, namely, that "reliance upon the public records and the law of registry would be greatly hobbled"15 if the attorney could get the judicial mortgage reinstated after two other proper mortgages had been duly recorded. If this implies that the intervention of the rights of third parties is material to the decision, it would be misleading because the same result should obtain even if there are no other recorded rights against the property.

**Building Contract Privileges**

With a statute as complex as the Building Contract Law,19 it is not surprising that there appears to be no end to the problems and the litigation. However, it is not often that one finds the architect's privilege involved. In *Capital Bank & Trust Co. v. Broussard Paint & Wallpaper Co.*,20 there was a priority dispute between the mortgagee and certain lienholders including the architect. The statute provides that the architect's privilege against the property is "of equal rank with the contractor."21

The two principal kinds of situations contemplated by the statute are (1) where a contract and appropriate bond have been recorded (R.S. 9:4801-4802) and (2) where there is no written contract or it has not been recorded (R.S. 9:4812). In the first situation, the contractor may have a privilege against the property; but in the latter, the statute does not provide a privilege for the contractor, and it has been held that he has none.22 If the architect's privilege is of equal rank with the contractor's, then in the fact situation which is governed by R.S. 9:4812 the architect is no better off.

In the case at bar, the court gave judgment in favor of the mortgagee on the basis of the statutory provision that the architect's privilege "affects third persons only from the date of recordation."23 This takes for granted that the architect did have

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18. Id. at 709.
20. 198 So.2d 204 (La. App. 1st Cir. 1967).
22. Officer v. Cambre, 194 So. 441 (La. App. 1st Cir. 1940).
a privilege against the property but was outranked by the mortgagor, and does not answer the question whether the architect is really given a privilege (upon proper recordation of claim) where there has been no recordation of the principal contract.

In the examination of this question, it should be noted that R.S. 9:4813 (architect's privilege is of equal rank with the contractor) incorporates the language of Act 208 of 1926, section 13, whereas many of the other sections have gone through several more recent amendments. For the creation and preservation of the architect's privilege, the statute provides that "it may be recorded not later than thirty days after registry . . . of notice of acceptance by the owner of the said work, or notice of default."24 This language corresponds to the language used in R.S. 9:4802 which contemplates the situation where a contract and bond have been recorded in the first place, and it can be concluded that the architect's privilege was, in the original legislative intent, to exist only in this type of situation. Where there is no recorded contract, the original statutory language fixed the delay for recordation of claims from "the last delivery of all material upon the said property or the last performance of all services or labor upon the same."25

Unless architects (and consulting engineers) can make sure to be paid early in the program of construction for which there is no recorded contract and bond, they may find themselves without the security protection of a privilege against the property.

Mortgages

Generally, the problems of the mortgagee are either with the mortgagor or with third persons who claim a competing right or interest in the mortgaged property. A somewhat unusual situation presented itself in the case of Stamper v. Arkansas-Louisiana Gas Co.,26 where the mortgagee's complaint was against a third party who had prejudiced his security by alleged damage to the property in connection with the performance of a contract with the property owner. The suit was instituted as an action in tort, and under the circumstances the court found there was no fault and therefore no liability. The fact situation,

24. Id.
however, evokes the question of how far the mortgagee may go for the protection or making good of his security against the acts of a third person, irrespective of the tort issue.

In the absence of fraud or other rescindable act, the mortgagee cannot undo the acts of the mortgagor which depreciate the value of the property, such as the sale and removal of accessories or equipment. If the owner had a garage demolished with a view to putting in a swimming pool (which was never done), the mortgagee cannot force him to replace the garage. On the other hand, if the house itself is sold and removed, the mortgagor's right of pursuit would be effective because the building has not ceased to be an immovable. Of course, the mortgagee who has advance knowledge of such intentions can enjoin the mortgagor from depreciating the value of the security or committing "waste." However, he cannot hold the owner separately liable after the damage has been caused. There is no purpose in such a liability because the mortgagor is personally liable for the principal indebtedness.

The case being examined holds that a third person is not liable for damage or depreciation of the security by reason of appropriate (non-negligent) acts in the performance of a valid contract with the owner. The negative pregnant in the decision is that, if the damage or depreciation is due to the third person's negligence, he would be liable in tort to the mortgagee. This leaves two questions: (1) the negligent third party's liability to the property owner, and (2) the mortgagee's right to enjoin such acts which he has reason to believe will be prejudicial to his security.

On the first point, there can be no doubt that the negligent third party is liable, either ex contractu or ex delicto or both, to the owner. If he has already paid the owner, can the mortgagee also hold him liable again for the damage done to his security? Such a conclusion is hardly palatable, yet it would seem to follow if the decision in the principal case is taken to mean that the mortgagee has an independent and separate right of action in tort against the negligent third party.

On the second point, it is clearer that the mortgagee has an independent and distinct right to prevent prejudice to his security because this is his own interest which he seeks to protect.

and if he can prove his allegation within the established procedural forms, he should be entitled to an appropriate injunction. This is on the basis of preventing a harm which is not a tort but which would cause damage by the depreciation of the mortgagee’s security through the fact of the third person’s action no matter how free from negligence or fault.

Reverting now to the principal case, it may be questioned whether the tort issue is appropriate under the circumstances.

**Chattel Mortgages**

Since 1948, the law provides that a stock of merchandise can be the subject matter of a chattel mortgage, with the requirement that such a chattel mortgage “shall describe the same as all of a particular class or classes or grade or kind or type or species or dimensions or as a stock of merchandise to be kept at a certain location.” This provision for a simplified form of inventory financing does not seem to have produced the beneficial results contemplated. Apart from the absence of a mortgagee’s traditional right of pursuit, and the displacement of a future vendor whose lien is outranked before it comes into existence (and who, therefore, will not sell on credit to the mortgagor), the Bulk Sales Law has severely cut down the effectiveness of the chattel mortgage on a stock of merchandise.

In *Fidelity Credit Co. v. Winkle*, the chattel mortgage covered “all of mortgagor’s stock of merchandise composed of Liquefied Petroleum gas ranges, refrigerators ... and other equipment, parts and appliances now located at ... complete with all present and future attachments, accessories, replacements and additions.” Since there had been no compliance with the notice requirements of the Bulk Sales Law, the other creditors claimed that the chattel mortgagee was liable as a receiver for the fair value of the goods “transferred.” Another section of the statute defines transfers under this act to include “transfers in payment of debt, in whole or in part, pledges, mortgages, sales, exchanges. ..” (Emphasis added.)

30. Id. 9:5352.
31. Id. 9:2961-2968.
32. 191 So.2d 718 (La. App. 2d Cir. 1966), reversed, 202 So.2d 280 (La. 1967).
34. Id. 9:2965.
The court of appeal sustained the chattel mortgage by interpreting the Bulk Sales Law definition of "transfer" as one in which the transferee has actually received the property (or obtains the proceeds of its sale). The Supreme Court reversed, apparently applying the "plain meaning" rule of statutory interpretation that the statute specifically includes a mortgage within its definition of transfers covered by this legislation, and it is in the very nature of a mortgage as a security device that the property remains in the possession of the mortgagor.

Although the Supreme Court decision was made by a divided court (4 to 3), it would seem that the majority's interpretation of the original legislative intent of the statute is probably correct because the court of appeal's qualification of transfer would read the word "mortgage" out of the definition entirely. On the other hand, neither can it be said that the original legislative intent was to include a chattel mortgage on a stock of merchandise because this was not authorized until 1948. It can hardly be stated with absolute assurance just what the legislature did intend when the word "mortgage" was originally included in the definition of "transfers" under the Bulk Sales Act. Under the circumstances, the plain meaning of the statute is not displaced by any more sophisticated interpretation.

It has already been noted that "Louisiana's position is unique. The Bulk Sales Act found in Article 6 of the Uniform Commercial Code is expressly made inapplicable to security transactions in our sister states." The basic policy issues, as illustrated in the facts of the case being discussed, call for serious and careful legislative reconsideration.

PRESCRIPTION

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Acquisitive

In Zeringue v. Blouin, possession of a part was deemed possession of the whole of contiguous lands described in the deed of a good faith possessor, although no part of the land

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35. Note, 15 LA. BAR J. 232 (1967), referring to UNIFORM COMMERCIAL CODE art. 6, § 103(1), and art. 9, § 111 (see also Comment) (1962).

1. 192 So.2d 888 (La. App. 1st Cir. 1966), writ refused, 250 La. 100, 194 So.2d 98 (1967). The case did not involve any facts to invoke well-settled jurisprudence that the rule is inapplicable to noncontiguous parcels and to any situation where the true owner against whom prescription is claimed is himself in constructive possession by actual possession of a contiguous part of his estate.