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FORUM JURIDICUM

EXECUTORY PROCESS AND COLLATERAL MORTGAGES—AUTHENTIC EVIDENCE OF THE HAND NOTE?

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The common practice of the Bar in filing a petition to enforce a collateral mortgage by executory process is to make no reference to the hand note in the petition. The collateral mortgage note and the mortgage constitute the only evidence of indebtedness described and submitted to prove the creditor's right to executory process. The practice has been approved by the jurisprudence,¹ although the leading case² has been only questionable authority subsequent to the adoption of the Louisiana Code of Civil Procedure in 1960, because the Code of Practice of 1870 did not contain the specific requirements for executory process that are established in the new Code.

To enforce a collateral mortgage by executory process, is it required that the hand note be submitted in authentic form with the petition? Article 2635 of the Louisiana Code of Civil Procedure³ provides that authentic evidence of *the instrument evidencing the obligation secured by the mortgage* must be submitted with the petition for executory process. In the typical collateral mortgage loan package, is it the hand note or the mortgage note which evidences the obligation secured by the mortgage?

It is the intent of the parties that the hand note represent the obligation, because the collateral mortgage package was conceived so that when the indebtedness is paid off, it is the hand note which is paid and extinguished, and not the mortgage note, so that the mortgage note and mortgage might be used

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1. *Slidell Bldg. Supply, Inc. v. I.D.S. Mtg. Corp.*, 273 So.2d 343 (La. App. 1st Cir. 1972); *First Nat'l Bank v. Gaddis*, 250 So.2d 504 (La. App. 3d Cir. 1971); *Allen v. Commercial Nat'l Bank*, 138 So.2d 252 (La. App. 2d Cir. 1962).

2. *Mechanics' & Traders' Ins. Co. v. Lozano*, 39 La. Ann. 321, 1 So. 608 (1887).

3. "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;"

again.⁴ The mortgage note does not represent an obligation because no funds were advanced thereunder.

To reinforce the analysis that there is no obligation in a collateral mortgage package except that contained in the hand note, we might trace the legal path followed to form a collateral mortgage package.

The jurisprudence states that the mortgage and mortgage note have no life until "issued."⁵ *New Orleans Silversmiths, Inc. v. Toups*⁶ states that the "legal efficacy against third persons is contemporaneous with the execution of the hand note for the payment of which it is given in pledge."⁷ The jurisprudence indicates that there is no life in the mortgage as the mortgagor in the privacy of his office signs the collateral mortgage and the collateral mortgage note and returns them to his desk.⁸

To move along the path, as mortgagor sits across from lender and pushes the mortgage across the desk, has an obligation at that moment arisen? Since it is the mortgagor's intention to issue the mortgage contract in return for an advance of funds, is it not clear that there is no mortgage until the funds have been advanced? If the funds are then advanced and the hand note is signed for the amount of the advanced funds, is not the hand note the evidence of the obligation to repay the funds? The collateral mortgage note itself represents no obligation or indebtedness at all.

It is no answer to rely on the authentic recital in the mortgage that consideration was received for the mortgage note described in the mortgage. *Unity Industrial Life Insurance Co. v. Dejoie*⁹ held that an allegation that no money consideration or other valuable consideration was given for the mortgage note amounts to an allegation of fraud which will allow the authentic recitals in the act of mortgage to be contradicted. Thus, the fact that no funds were advanced under the mortgage note would be admissible into evidence under an attack by

4. *Thrift Funds Canal, Inc. v. Foy*, 261 La. 573, 260 So.2d 628 (1972).

5. *Walmsley v. Resweber*, 105 La. 522, 30 So. 5 (1899); *New Orleans Silversmiths, Inc. v. Toups*, 261 So.2d 252 (La. App. 4th Cir. 1972).

6. 261 So.2d 252 (La. App. 4th Cir. 1972).

7. *Id.* at 254.

8. *Walmsley v. Resweber*, 105 La. 522, 30 So. 5 (1899).

9. 202 La. 249, 11 So.2d 546 (1942).

injunction or suspensive appeal against the use of executory process when only the collateral mortgage and collateral mortgage note have been submitted with the petition.

Nor is it an answer to look for a debt or obligation arising from the *pledge* of the collateral mortgage note to secure the hand note. Civil Code article 3133 provides "the *pledge* is a contract by which one debtor gives something to his creditor as a security for his debt." The fact that the collateral mortgage note and mortgage are pledged properly to secure the payment of the hand note is only the execution of a security device for payment of the debt represented by the hand note. The contract of pledge would not seem to supply any obligation to which the collateral mortgage is accessory.¹⁰

Neither is it an answer to seek in the negotiable instruments law a supporting obligation emanating from holder in due course status. If the petition for executory process is accompanied only by the collateral mortgage note, which has been negotiated by the original holder to a third party having holder in due course status, the mortgage itself may nevertheless be attacked for want of consideration even though the defense is precluded as to the mortgage note.¹¹ Evidence that no funds were advanced under the mortgage note may not be received to defeat the mortgage note itself because the holder in due course status cuts off the defense of want of consideration;¹² however, since the mortgage is not itself a negotiable instrument, evidence may be received to show that no consideration was received for the mortgage note (the consideration was received for the hand note) and that accordingly the mortgage note does not represent a debt secured by the mortgage. The Dejoie case permits the authentic recitals in the mortgage to be contradicted as to consideration received. Thus, while the negotiable mortgage note in the hands of a holder in due course might not be defeated as a debt, it is possible to defeat the mortgage itself as an encumbrance on the property affected thereby because the mortgage was not supported by a debt.¹³

10. *New Orleans Silversmiths, Inc. v. Toups*, 261 So.2d 252, at 256-57.

11. *Pertuit v. Damare*, 50 La. Ann. 893, 24 So. 681 (1898); *Jennings v. Vickers*, 31 La. Ann. 679 (1879); *Bouligny v. Fortier*, 17 La. Ann. 121 (1865).

12. La. R.S. 6:57 (1950).

13. Parenthetically, the cases hold that the public records doctrine gives substantial protection to an innocent third party transferee of the collateral

While it is a more difficult area of inquiry than any of the foregoing, the concept of a mortgage for future advances seems to hold no answer to the problem of supplying an obligation when only the collateral mortgage note has been submitted with the petition. Civil Code article 3285 reads as follows:

"Consequently, it is essentially necessary to the existence of a mortgage, that there shall be a principal debt to serve as a foundation for it.

"Hence it happens, that in all cases where the principal debt is extinguished, the mortgage disappears with it.

"Hence also it happens that, when the principal obligation is void, the mortgage is likewise so; this, however, is to be understood with certain restrictions which are established hereafter."

Civil Code article 3292 then provides that a mortgage may be given for an obligation which has not yet risen into existence.¹⁴ Article 3293¹⁵ provides further that the mortgage shall only be realized insofar as the promise is carried into effect by the person making it. *Walmsley v. Resweber*¹⁶ recognized this requirement of fulfillment of a promise as a prerequisite to the viability of the mortgage. It is not a departure from the accessory concept of mortgage¹⁷ to allow an obligation (a promise) to advance funds in the future to be a sufficient obligation to support the mortgage. The accessory quality of the mortgage has not changed, but the nature of the obligation to which it is accessory has changed. Whether the obligation be one to repay funds already advanced or whether it be an obligation by the lender to advance funds in the future, the obligation must be demonstrable and enforceable.¹⁸ In the typical collateral mort-

mortgage and note. *Deering Harvester Co. v. Smith*, 83 So. 580 (1919); *First Nat'l Bank v. Garlick*, 137 La. 282, 68 So. 610 (1914); *Pertuit v. Damare*, 24 So. 681 (1898).

14. "A mortgage may be given for an obligation which has not yet risen into existence; as when a man grants a mortgage by way of security for indorsements, which another promises to make for him."

15. "But the right of mortgage, in this case, shall only be realized in so far as the promise shall be carried into effect by the person making it. The fulfillment of the promise, however, shall impart to the mortgage a retrospective effect to the time of the contract."

16. 105 La. 522, 30 So. 5 (1899).

17. *Id.*

18. *Id.* at 535. 30 So. at 11.

gage, the mortgagor intends to issue the mortgage in exchange for an advance of funds, not in exchange for a *promise* to advance. Even if it were otherwise, if the promise were not fulfilled, but was itself the obligation supporting the mortgage, then authentic evidence of the promise would be required for executory process. Once the promise is fulfilled by advance of funds, the supportive obligation is to repay the funds advanced and that obligation is evidenced by the hand note.

As a digression, according to the Civil Code, a mortgage for a particular debt, a collateral mortgage, and a mortgage for future advances are all "conventional" mortgages, since mortgages are divided only into the categories of conventional, judicial, and legal.¹⁹ The obligation secured in the so-called collateral mortgage may vary as widely as the debt securable by the device of pledge;²⁰ the obligation supporting the so-called mortgages for future advances may vary even to the point of being potestative, providing it ultimately be fulfilled;²¹ and the obligation of the mortgagor to pay back money advanced is that which supports the so-called mortgage for a specific debt. The device of mortgage remains constant, while the character of the obligation supporting the mortgage is variable. The conventional mortgage might well be granted for an obligation outside the categories of specific debt, collateral mortgage, or future advances.

In conclusion, the thrust of this inquiry is that an essential link in the chain of authentic evidence is missing if the hand note in a collateral mortgage package is not submitted in authentic form with the petition for executory process; *i.e.*, the thrust is solely against the creditor's right to executory process. The mortgage should be valid as a security right in that it is accessory to an existing debt represented by the hand note. The only problem is that since the hand note is the evidence of the obligation secured by the mortgage, but is not in authentic form, the express requirements for authentic evidence may not be fulfilled.

To preserve the current commercially useful collateral mort-

19. LA. CIV. CODE art. 3286.

20. *Id.* art. 3133.

21. *Id.* arts. 3292, 3293; *Pickersgill & Co. v. Brown*, 7 La. Ann. 297 (1852).

gage package and to keep as a part of the package the useful expedience of executory process, the solution may be to amend Code of Civil Procedure article 2637 to include hand notes inscribed with a pledge conforming to the provisions of Civil Code article 3158. The form provided in article 2637 is legislatively deemed to be authentic.