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JUDICIAL MORTGAGE RIGHTS: RECORDATION OF NON-EXECUTORY JUDGMENTS

Louisiana jurisprudence has created a dilemma for judgment creditors seeking to determine the appropriate time for inscription of judgments in the mortgage records. Because of the rather confusing decisions and dicta of the Louisiana courts,¹ the judgment creditor may not always be protected fully by recording his judgment immediately after it is rendered and signed by the trial court. Rather, it now appears that an immediate recordation of a judgment is effective only if no suspensive appeal is subsequently taken;² if a suspensive appeal is taken, the recordation may become null, forcing the creditor to rely solely upon the security provided by the suspensive appeal bond.³ The jurisprudence seems to urge the judgment creditor to record his judgment when rendered so that he will be protected in case no suspensive appeal is taken; then, in the event of suspensive appeal, he must again record the judgment after it is affirmed. Establishment of a clear rule has become even more important since the 1974 amendment to article 2123 of the Code of Civil Procedure⁴ extending the suspensive appeal period from fifteen to thirty days and thus lengthening the period of uncertainty for the judgment creditor.

The problem is caused by what may seem to be a conflict between the Civil Code and the Code of Civil Procedure. Article 3322 of the Civil Code provides that a judicial mortgage takes effect when recorded.⁵ Related Civil Code provisions acknowledge a creditor's right to record a judgment, whether "final or provisional"⁶ and state

1. See *Denny v. Jefferson Constr. Co.*, 164 La. 775, 114 So. 650 (1927); *State ex rel. Machea v. Dunn*, 148 La. 460, 87 So. 236 (1921); *Daly v. Brock*, 133 La. 752, 63 So. 318 (1913); *Cluseau v. Wagner*, 126 La. 375, 52 So. 547 (1910); *Dannenmann & Charlton v. Charlton*, 113 La. 276, 36 So. 965 (1903); *Associates Financial Serv. Co. v. Hillebrandt*, 250 So. 2d 75 (La. App. 3d Cir. 1971); *City Elec. & Supply, Inc. v. Taft Park Homes, Inc.*, 225 So. 2d 293 (La. App. 4th Cir. 1969); *Kimber-Murphy Mfg. Co. v. Vestal, Inc.*, 43 So. 2d 508 (La. App. 2d Cir. 1949).

2. *Cluseau v. Wagner*, 126 La. 375, 52 So. 547 (1910); *Associates Financial Serv. Co. v. Hillebrandt*, 250 So. 2d 75 (La. App. 3d Cir. 1971).

3. LA. CODE CIV. P. art. 2124 provides in part: "A suspensive appeal bond shall provide, in substance, that it is furnished as security that the appellant will prosecute his appeal, that any judgment against him will be paid or satisfied from the proceeds of the sale of his property, or that otherwise the surety is liable for the amount of the judgment."

4. La. Acts 1974, No. 129 § 1.

5. LA. CIV. CODE art. 3322: "The Judicial Mortgage takes effect from the day the Judgment is recorded in the manner hereinafter directed."

6. LA. CIV. CODE art. 3321: "The *judicial mortgage* is that resulting from judgment [judgments] (whether these be rendered on contested cases or by default, or whether they be final or provisional), in favor of the person obtaining them."

that if the judgment is confirmed, the judicial mortgage "relates back" to the time of recordation.⁷ Further, if a judgment is reversed in part, the Civil Code declares that the judicial mortgage "still exists" on the remainder.⁸ While the substantive provisions of the Civil Code relating to the effectiveness of judicial mortgages clearly seem to sanction recordation without reference to suspensive appeal delays, they must be construed in light of the subsequently enacted Code of Civil Procedure article 2252 which provides: "A judgment creditor may proceed with the execution of a judgment only after the delay for a suspensive appeal therefrom has elapsed." Thus, the central issue becomes whether recordation by the judgment creditor should be considered an act in execution of the judgment and thus prohibited by article 2252 until after the delay for a suspensive appeal has passed.

In the early case of *Chaffe & Sons v. Walker*,⁹ the Louisiana supreme court held that a judicial mortgage recorded immediately after a judgment was rendered and signed primed later mortgages, even though the judgment was not executory when recorded. To reach its decision, the court construed the provisions of the 1870 Code of Practice governing execution of judgments in light of the substantive provisions of the Civil Code. The Code of Practice article stated that a judgment was to be considered as "having effect" only after a specified period of time.¹⁰ By construing the phrase "having effect" as equivalent to "being executory," the court was able to confine the applicability of the Code of Practice rule as governing only the various aspects of the procedure for executing judgments.¹¹ Because of

7. LA. CIV. CODE art. 3323: "If there be an appeal from the judgment and it is confirmed, the mortgage relates back to the day when the judgment was recorded."

8. LA. CIV. CODE art. 3324: "When on the appeal the judgment has only been reversed in part, the mortgage still exists for that part which has not been altered or reversed." Cf. LA. R.S. 13:4434-36 (1950) (registry of appellate decrees).

9. 39 La. Ann. 35, 1 So. 290 (1887).

10. La. Code of Practice art. 555 (1870): "All judgments rendered, except in the first judicial district, shall be considered as having effect only from the last day of the term, whatever may be the day on which they shall have been signed."

11. In *Chaffe*, two judgments were recorded on different days prior to the last day of the term of court. Relying on article 555 of the Code of Practice, the creditor claiming under the later judgment argued that his judicial mortgage should be of equal rank to that of the creditor whose judgment was recorded earlier. A proviso of article 575 of the Code of Practice stated: "[I]n country parishes no execution shall issue in cases where an appeal lies, until ten days after the adjournment of the court, by which the judgment was rendered, within which delay a party may take a suspensive appeal" By examining this proviso, the court reasoned that "nothing was meant by article 555 other than that the judgment did not become executory, and its payment could not be enforced until the time stated." *Chaffe & Sons v. Walker*, 39 La. Ann.

the difference between recordation and execution of the right, the court found no conflict between the two Codes and outlined the function of each:

[T]he Code of Practice is intended and designed to establish rules of civil procedure. Thus it defines what actions are. . . and how they may be enforced or executed. . . . On the other hand, the Civil Code treats of legal rights that give rise to actions, and the different kinds of contracts and obligations, and the manner in which they are created and preserved. . . .¹²

The court concluded that the creation and recordation of mortgages are governed exclusively by the Civil Code and should be treated separately from execution of judgments regulated under what is now the Code of Civil Procedure.¹³ *Chaffe* thus recognized a clear distinction between the creation of a judicial mortgage and execution of the judgment which it secures.¹⁴

Although the legislature amended Civil Code article 3322 in 1888 to provide that all judicial mortgages rank from the end of court term,¹⁵ *Wolfe v. Joubert*¹⁶ held that the amendment had no effect upon the distinction between recordation and execution recognized by *Chaffe*. In 1900, the legislature repealed the 1888 amendment and re-enacted substantially the original language of article 3322,¹⁷ argua-

35, 38, 1 So. 290, 292 (1887).

12. 39 La. Ann. at 37, 1 So. at 291.

13. *Id.*

14. Insight into the policy reasons underlying the court's decision is provided by the concurring opinion of Justice Fenner, who submitted that "[t]he opposite construction [of article 555] gives advantage to the fraudulent debtor, who, after condemnation by final judgment, would be left a considerable period, during which he might dispose of or establish mortgages on his property, while the hands of his judgment creditor would be tied." 39 La. Ann. at 42, 1 So. at 296.

15. "The judicial mortgage takes effect from the day on which the judgment is recorded in the manner hereinafter directed; *provided, that judgments, the parish of Orleans excepted, rendered at any term of court shall have no effect to create a judicial mortgage as between judgment creditors until from the day of adjournment of the term at which the same was rendered, although recorded prior to the adjournment of said term.*" LA. CIV. CODE art. 3322, as amended by La. Acts 1888, No. 143 (amendment in italics, repealed 1900).

16. 45 La. Ann. 1100, 13 So. 806 (1893). In *Wolfe*, the Louisiana supreme court limited the impact of the amendment to situations involving multiple judgment creditors only. Reaffirming the *Chaffe* decision, the court held that the amendment was not applicable where only one judicial mortgage was involved; rather, the amendment governed the rank of conflicting judicial mortgages. 45 La. Ann. at 1108, 13 So. at 809.

17. The 1888 proviso to LA. CIV. CODE art. 3322 (*see note 15 supra*) was repealed by La. Acts 1900, No. 60. La. Acts 1900, No. 78 amended the article to read as follows: "The Judicial Mortgage takes effect from the day the Judgment is recorded in the

bly evidencing a legislative intent to preserve the Civil Code recordation provisions intact after finding them to be consistent with execution procedure.

Unfortunately, the *Chaffe* holding has not been followed by later courts. Although the decision has not been expressly overruled, it appears to have been completely overlooked by lawyers in formulating arguments before the courts. For example, in *Dannenmann & Charlton v. Charlton*,¹⁸ decided only three years after the reenactment of the original language of article 3322, a judgment creditor had recorded his judgment before disposition of a pending suspensive appeal. The creditor, rather than arguing the applicability of *Chaffe*, apparently objected only to the appellate jurisdiction of the supreme court.¹⁹ Upon finding jurisdiction, the court accepted the debtor's argument that the recordation was without effect, reasoning that the appeal suspended the "effect and execution" of the judgment and that the mere inscription of the encumbrance was an improper attempt to prematurely execute the judgment.²⁰ Furthermore, according to the court, its decision did no harm to the creditor because the suspensive appeal bond provided him with ample security.

Similar conclusions were reached in later decisions involving recordation prior to the debtor's suspensive appeal. For instance, in *Cluseau v. Wagner*,²¹ the court held that the effect to be given the inscription is dependent, not upon the time of recordation, but upon whether a suspensive appeal is actually taken. The court asserted that absent such an appeal, the judgment takes effect when recorded; but if a suspensive appeal is taken after recordation, the inscription may be cancelled.²²

At first glance, these decisions may seem reasonable and fair to the creditor who remains protected by the suspensive appeal bond. However, the Louisiana supreme court has failed to consider that the Civil Code grants the creditor the right to the additional security of a judicial mortgage, in conformity with the presumption of the law that a judgment appealed from is correct although its execution is

manner hereinafter directed."

18. 113 La. 276, 36 So. 965 (1903).

19. *Id.* at 280, 36 So. at 967.

20. The court declared that recordation after appeal "trenches upon the suspensive appeal . . . which requires that everything in the case should remain in abeyance . . ." 113 La. at 284, 36 So. at 968. Although the court cited no statutory authority, it presumably relied on the prohibition against execution pending appeal provided in La. Code of Practice art. 624 (1870), the source of LA. CODE CIV. P. art. 2252.

21. 126 La. 375, 52 So. 547 (1910).

22. *Id.* at 379, 52 So. at 548. The court reasserted the rule of *Cluseau* in *Daly v. Brock*, 133 La. 752, 63 So. 318 (1913).

suspended.²³ Furthermore, the judicial mortgage protects the surety who, if required to pay the creditor, is subrogated to his mortgage rights against the debtor's property.²⁴

In *Denny v. Jefferson Construction Co.*,²⁵ the Louisiana supreme court again failed to apply the *Chaffe* rule.²⁶ The court held that since a suspensive appeal had been taken from the judgment, conventional mortgages and a lien recorded subsequent to the recordation of a judicial mortgage primed the judicial mortgage. The result was justified by reasoning that the inscription was null as an act in execution of the judgment.²⁷ In support of its reasoning, the *Denny* court cited confusing dicta in the case of *State ex rel. Macheca v. Dunn*.²⁸ In *Dunn*, plaintiff sought a writ of mandamus to compel cancellation of the inscription of an out-of-state judgment, claiming that the execution of the foreign judgment had not been ordered by a decree of a Louisiana court as required by Civil Code article 3326.²⁹ The court, although correctly ordering cancellation under article 3326, reached beyond the facts of the case and purported to enunciate a general rule concerning the effect of recordation of a non-executory judgment. The court asserted:

The recording of a judgment on the mortgage record, so as to create a judicial mortgage, is, to that extent, an execution of the judgment. A judgment cannot be effectively executed, even

23. See LA. CIV. CODE art. 2285.

24. LA. CIV. CODE art. 2161.

25. 164 La. 777, 114 So. 650 (1927). In *Denny*, a suspensive appeal was taken from a judgment dissolving an injunction against execution on a prior judgment. The original and dissolving judgments were recorded on the same day. After lapse of the appeal period, three conventional mortgages and a lien were recorded against the property of the debtor. The supreme court stated that the question on appeal was "whether any judicial mortgage results at all to the prejudice of third parties, from a judgment recorded in the mortgage office during the pendency of a suspensive appeal." *Id.* at 778, 114 So. at 651. In dissent, Chief Justice O'Niell claimed that the majority misstated the issue since no appeal had been taken from the original judgment and argued that the proper inquiry should be whether a judicial mortgage recorded during the suspensive appeal period should take effect from the date of recordation, if no appeal is subsequently taken. *Id.* at 782-87, 114 So. at 652-54 (O'Niell, J., dissenting).

26. The court erroneously stated that "[t]he precise question here presented has never been directly passed upon by this court so far as we are advised." 164 La. at 779, 114 So. at 651.

27. *Id.* at 780-81, 114 So. at 652.

28. *Id.* at 780, 114 So. at 651, citing *State ex rel. Macheca v. Dunn*, 148 La. 460, 87 So. 236 (1921).

29. LA. CIV. CODE art. 3326: "Mortgages result from the judgment rendered in other States of the Union or in foreign countries, only in so far as the execution has been ordered by a tribunal of this State, in the manner prescribed by law."

to the extent of recording it on the mortgage record, pending a suspensive appeal, or until the judgment has become final and executory.³⁰

The clear implication of the *Dunn* dicta is that a judicial mortgage is only effective if recorded after the running of the suspensive appeal period or after disposition of the suspensive appeal if one is taken. Such reasoning is clearly contrary to *Chaffe* and would render several specific provisions of the Civil Code meaningless and ineffective.³¹ Although it is doubtful that the broad assertions in *Dunn* represent the dominant jurisprudential rule, unless the dicta in the case is clearly repudiated, it is likely to continue to create confusion.

Perhaps recognizing that *Dunn* would lead to inconsistent results, the Third Circuit Court of Appeal in *Associates Financial Services Co. v. Hillebrandt*,³² refused to apply the *Dunn* dicta to judgments recorded during the delay for suspensive appeal when no appeal was taken. Several judgment creditors had recorded their judgments prior to the running of the suspensive appeal period; others, whose judgments were rendered at the same time, waited until their judgments had become executory before recording them. Although holding that the judgments recorded prior to the running of the suspensive appeal period primed the subsequent judicial mortgages, the court unfortunately did not expressly rely on the *Chaffe* rationale but employed a rather inconsistent analysis.

The court began correctly by pinpointing the basic issue as whether the court should apply the procedural rules relating to execution of judgments and thereby ignore the substantive law relating to judicial mortgages.³³ The court then reviewed the substantive Civil Code provisions and concluded that the judicial mortgage was effective from date of inscription.³⁴ However, rather than expressly disowning the prior conflicting case law, the court proceeded to distinguish the instant case on the basis that no suspensive appeal had been taken. Regrettably, the court chose to rely on *City Electric & Supply, Inc. v. Taft Park Homes, Inc.*³⁵ for the proposition that "pre-

30. 148 La. at 464-65, 87 So. at 238.

31. See text at notes 5-8 *supra*. The court also failed to recognize that the exception provided in Civil Code article 3326 for foreign judgments would be unnecessary if the Civil Code generally required that a judgment be executory before a judicial mortgage could take effect.

32. 250 So. 2d 75 (La. App. 3d Cir. 1971).

33. *Id.* at 77.

34. *Id.* at 77-78.

35. 225 So. 2d 293 (La. App. 4th Cir. 1969).

mature" recordation is "at worst, a relative nullity. . . cured"³⁶ by the defendant's failure to appeal suspensively. The use of *City Electric* as a precedent was particularly surprising since that case was not concerned with recordation of a judgment but rather dealt with the filing of a garnishment petition, clearly a step taken in execution of the judgment.³⁷

Thus, the court in *Hillebrandt* came full circle in its analysis that had begun by treating substantive Civil Code rights differently from Code of Civil Procedure rules involving execution. By distinguishing the previous cases on their facts and by relying upon *City Electric*, the court fell into the trap of looking to the procedural rule for judgment execution, rather than the articles of the Civil Code creating mortgage rights which are the proper tools for the resolution of the issue.

In the important area of property rights, the great need for certainty can best be fulfilled by a return to the *Chaffe* court's interpretation of the legislative intent. The recordation of a judicial mortgage is not an act in execution of the judgment; rather, recordation establishes a substantive right granted by the Civil Code that should remain in effect unless cancellation is warranted by a reversal of the judgment.³⁸ The debtor is amply protected because there can be no seizure and sale of his property until the judgment becomes final and executory. Accordingly, recordation should be considered effective if accomplished at any time following the trial court's rendition of judgment, regardless of whether an appeal is taken.

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ADVISORY OPINIONS AND THE REQUISITES OF JUSTICIABILITY IN LOUISIANA COURTS

The concept of justiciability has traditionally been thought to

36. *Associates Financial Serv. Co. v. Hillebrandt*, 250 So. 2d 75, 79 (La. App. 3d Cir. 1971).

37. *Kimber-Murphy Mfg. Co. v. Vestal, Inc.*, 43 So. 2d 508 (La. App. 2d Cir. 1949) also blurred the distinction between recordation and execution of a judgment in dicta which incorrectly analogized a premature seizure by a judgment creditor, truly an act in execution of the judgment, to recordation of a non-executory judgment. The *Hillebrandt* court disposed of *Kimber-Murphy* as well as *Charlton*, *Cluseau* and *Denny* as involving "execution of judgments, with which we are not concerned herein." 250 So. 2d at 79.

38. LA. CIV. CODE art. 3381 provides for erasure of the inscription of a judgment which is later reversed on appeal.