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Security Devices

Thomas A. Harrell

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*Thomas A. Harrell**

"IN REM" MORTGAGES AND PLEDGES

Louisiana National Bank of Baton Rouge v. O'Brien[1] required the court to characterize the juridical nature of a so-called "in rem" mortgage or pledge. The defendant gave the plaintiff a note that stipulated it was secured by the pledge of a limited partnership interest that was to be "the sole and absolute security" for its payment.[2] The court found that the provision, in light of the circumstances under which it had been negotiated, evidenced an agreement that the maker's obligation was to be "in rem only"—"excluding any personal liability" on his part. The argument was then made that without a personal obligation there could be no pledge since pledge is an accessory contract that may not exist without a principal obligation.

The court noted that the supreme court had recognized the validity of the so called "in rem" mortgages, "even though no personal liability exists as to the mortgagor."[3] It then considered whether there may be "in rem" pledges as well as "in rem" mortgages and concluded that, because of the similarity of pledge and mortgage, there is no reason to differentiate the two in this respect. This conclusion, although accurate, misses the point. All mortgages and pledges are by their nature "in rem," if by that one means that no other responsibility for satisfaction of the principal obligation rests upon the mortgagor or pledgor by virtue of his contract and that each creates a real right over the property to have it sold and the proceeds applied to satisfy the obligation it secures.[4]

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* Professor of Law, Louisiana State University.

1. 439 So. 2d 552 (La. App. 1st Cir.), cert. denied, 443 So. 2d 590 (La. 1983).

2. The court considered two questions concerning the validity of the pledge of the partnership interest. The first was whether notice of the pledge to the "obligor" of the interest (presumably the partnership) was required by Civil Code Article 3158 to effectuate it between the parties. The other question was whether the absence of "personal" liability rendered it invalid for lack of a principal obligation. As to the first question, the court properly held that such notice is only required to affect third persons. The parties apparently did not question, and the court did not consider, whether a "partnership interest" can be pledged by a mere agreement between the parties, without something more to evidence or effect a delivery. It is by no means certain that article 3158 regulates the pledge of such interests. Futhermore, the article requires delivery of "the written obligation" evidencing the pledged obligation as a condition of the pledge under its provisions.

3. Keene v. Williams, 423 So. 2d 1065 (La. 1982); Kavanaugh v. Berkett, 407 So. 2d 645 (La. 1981); Tennant v. Caffery, 163 La. 976, 113 So. 167 (1927); Shexnailder v. Fontenot, 147 La. 467, 85 So. 207 (1920).

4. It is obvious from the opinion as a whole that the court viewed its statement

At the same time, it is axiomatic that such security exists only to guarantee performance of another distinct obligation of the debtor and that the secured party has no right to resort to the security except to satisfy that obligation. In fact, absent a prior confession of judgment on the principal obligation or special agreement of sale in the case of a pledge, the creditor has no avenue by which he can proceed against the security unless he first obtains a judgment against the principal obligor on the principal obligation.

The question raised by the so called "in rem" mortgage (or pledge) does not concern the nature of the obligation created by the security, which is fixed by law. Rather, it requires a determination of the effect of an agreement by a creditor that he will satisfy the debt only out of certain property upon the default of the debtor. A distinct contract of mortgage or pledge of the property is customarily given to assure the creditor that the property out of which the debt is to be satisfied will in fact be available to him. There is no logical reason, however, why such an agreement requires it be secured by an accessory contract of mortgage or pledge.

The court primarily relied upon the authority of decisions of the supreme court recognizing the validity of mortgages given in such cases. It also approved the analysis of Professor Max Nathan in an article on the subject in which he concludes that while such an agreement does not give rise to a personal obligation, neither does it require denial of the accessorial nature of the mortgage (or pledge) securing it for the following reasons:

> If C loans D $25,000 which is repayable only out of specified assets, there is a "duty" to repay the $25,000, even though not all of D's estate is obligated to repay it. Whether the correlative aspect of C's right to be repaid the $25,000 which he has advanced is called a "duty" or an "obligation" or a "debt", it seems perfectly apparent that C is entitled to be repaid. And it appears naive to contend that the correlative aspects of that right are not in the nature of a debt or obligation. In any event, the transaction is patently "some engagement" within the terms of Articles 3290 of the Code even if it does not give rise to a personal obligation or debt. Article 3290 defines mortgage in terms of securing "the execution of some engagement", and it

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that the pledge was intended to be in rem only and without personal liability by the pledgor as meaning that the obligations of the pledgor were restricted to those of the contract of pledge and that the reference to a lack of "personal liability" was viewed as being synonomous with a lack of a "personal obligation" for the debt. The common law has wrestled with the problem of the nature of such arrangements, although from a quite different perspective. See G. Osborne, Handbook on the Law of Mortgages § 156 (2d ed. 1970).

> strains semantics to belabor distinctions between duty, obligation, debt and "some engagement". In other words, unless C intends the $25,000 as a gift to D, there is a duty to repay. That duty to repay should suffice as a principal obligation and ought to be sufficient to support an accessorial obligation. . . . Viewed liberally, from the backdrop of commercial and practical desirability, the in rem mortgage can easily be upheld on the basis that there is a principal indebtedness satisfying the accessory obligation principle . . . In addition the principal obligation, the duty to repay, can be analogized to a natural obligation, so that it is considered binding on the obliger, but not actionable on the part of the obligee.[5]

The court thus concluded, "there is a real 'debt' in both [the in rem mortgage and pledge] sufficient to support an accessory obligation whether or not that 'debt' involves personal liability."[6]

The conclusion is correct. A proper analysis of the arrangement, however, does not require denial of the existence of a "personal" obligation of the debtor in such a case, apart from the mortgage or pledge, nor that it is different in its other aspects from that which would exist in absence of the agreement limiting liability, as is suggested by the court and Professor Nathan.

Contracts limiting a debtor's liability to the existence of specific property or funds are quite common and may essentially take one of two forms that frequently employ similar terminology for their expression but are quite different in theory and effect. In the first type of contract the parties agree the debt will be paid only if certain funds are received by the debtor. For example, a sale of movables may provide the price will be payable "only out of" revenues derived from the rental of the property which the buyer is to effectuate. This gives rise to an obligation subject to a suspensive condition.[7] The debtor has no obligation to pay unless the funds are received. In all other respects, however, the responsibility of the debtor to perform is unlimited. The seller is given no right in the proceeds, but when the buyer receives them his obligation to pay an equivalent amount to the seller becomes fixed. If he fails to do so, the seller has his action for the amount owed. If the parties secure the obligation by a pledge of the revenues to be received it might also superficially appear that the purchaser has no "personal" liability. Such is, in fact, not the case because the principal obligation exists,

5. Nathan, The In Rem Mortgage, 44 Tul. L. Rev. 497, 509, 512-13 (1970).

6. 439 So. 2d at 558.

7. Breaux v. Lauve, 24 La. Ann. 179 (1872); Roehl v. Porteous, 47 La. Ann. 1582, 18 So. 645 (1895); Pertuit v. Weinberg, 134 So. 2d 652 (La. App. 4th Cir. 1961); Dales Jewelers, Inc. v. Rice, 316 So. 2d 416 (La. App. 2d Cir. 1975).

the suspensive condition is fulfilled as the rents are paid, and the debt is extinguished as they are received by the pledgee. If for some reason the pledge is invalid it will not affect the purchaser's obligation to pay what he owes.

The other kind of arrangement is the one under consideration. The debtor agrees to perform an obligation. The creditor agrees he will only "look to" or "satisfy the debt out of" certain property of the debtor or certain security given to him for it. This also implicitly recognizes that there must be a default by the debtor before resort is had to the property and distinguishes this arrangement from the first.

Some modern continental theorists have postulated that an obligation can be separated into two distinct elements: the duty of the obligor to perform and his liability for failing to do so. Professor Litvinoff in his treatise on Obligations observes in this connection:

> Nowadays, the duty to render a certain prestation and the liability—or prejudice imposed on the defaulting debtor such as execution on his property—appear together as forming one single unit; but it has not always been so. These two elements, according to the dualist theory, operated originally in an independent way. In the ancient law of Rome, as in the primitive law of other peoples, an obligation did not automatically entail liability. For this to emerge, the execution of another and different act was necessary. In the case of a contract, for instance another act, or agreement, ought to be added to the original promise, clearly specifying the liability to be incurred in case of nonperformance.[8]

Professor Litvinoff also notes that while this is probably an accurate analysis of some earlier legal systems, the two concepts cannot be as completely differentiated today as they were in ancient law because they have largely become fused in contemporary thought. An "obligation," as that term is now generally understood encompasses both aspects of the obligor's relationship to the obligee. It is difficult to conceive of an obligation totally without sanctions, nor of sanctions in the absence of an obligation. At the same time the two concepts have not become so integrated that the content of one necessarily defines the other. In this connection, Professor Litvinoff observes: "In sum, it can be said that, according to prevailing contemporary doctrine, the separation of duty and liability as two independent elements is a helpful device for the task of clarifying concepts, although its scope of application is somewhat reduced."[9] Then, in discussing situations in which the analytical model still has utility, he notes:

8. 1 S. Litvinoff, Obligations § 51, at 72, in 6 Louisiana Civil Law Treatise (1969).

9. Id. § 55 at 79-80.

> Another instance of the separation of the two elements has been found in situations where the duties entail only a limited liability, that is, where only some and not all of the debtor's property is intended to serve as satisfaction for the right of the creditor. But such a case, says an Italian writer, does not differ from any other where the debtor owes an amount that exceeds the value of his property, and neither of these situations is apt to impair the traditional concept of obligation as in both of them a true and proper legal relation attended by a sanction can be noticed. In other words, any limitation, in fact or in law, of the liability still shows that the two elements can be distinguished, but it does not prove that they can be separated.[10]

One might add to the above comment: neither does a limitation upon the obligor's liability for default require denial of the existence of the obligation or render it intrinsically different in nature. The civil code itself supports the finding that the two elements are not so inextricably entwined as to dictate the conclusion that an "ordinary" personal obligation no longer exists where the parties have contractually agreed the creditor will limit his recourse against the debtor to certain property for its satisfaction.

The newly adopted revision of the Title on Obligations provides in new articles 1756 and 1758:

> Art. 1756. Obligations; definition. An obligation is a legal relationship whereby a person called the obligor is bound to render a performance in favor of another called the obligee. Performance may consist of giving, doing or not doing something.
>
> Art. 1758. General Effects. An obligation *may* give the obligee the right to:
>
> (1) Enforce the performance that the obligor is bound to render;
>
> (2) Enforce performance by causing it to render by another at the obligor's expense
>
> (3) Recover damages for the obligors failure to perform on his defective perfomance. (Emphasis added).

Civil Code article 3182 in the title "Of Privileges" declares:

> Whoever has bound himself personally is obligated to fulfill his engagement out of all of his property, movable and immovable, present and future.

10. Id. at 79.

The location of this article in the code demonstrates it is not intended to define the nature of a "personal" obligation but rather to prescribe one method by which the obligee may ordinarily enforce it. The article is limited by its terms to those who "have bound themselves personally." It does not however declare or imply that personal obligations may not exist without its application, or even that their existence in all cases carries with it those consequences. Nor has it ever been assumed that the existence of a "personal" obligation is dependent upon unlimited recourse to the obligor's patrimony.[11] The law itself recognizes numerous situations in which a debt exists, but the creditors' right of recourse is limited to certain parts of the debtor's property—as where an heir accepts a succession with benefit of inventory; a debtor is granted a discharge in bankruptcy having property over which a creditor has security; a suit is instituted against property of a person outside the jurisdiction of the court; part of the debtor's property is declared exempt from seizure and so forth. The courts have never held that such restrictions upon the creditor's right of recourse changes the intrinsic nature of the debtor's obligation.

Viewed from this perspective agreements of the type under consideration are merely contractual modifications of the provisions of article 3182. The creditor has agreed—to use the terms of the article—that his debtor, who has bound himself personally, is not obligated to fulfill the obligation out of his general patrimony but only fróm designated or specified portions of it.

It only creates obscurity and confusion to postulate that no "personal" obligation exists in such a case or, more importantly, that the "obligation," "debt," or "duty" as it has been variously referred to by the court is of a different nature than it would otherwise be. Surely no one would contend the debtor could recover sums he had paid on the debt because he did not owe it. Is it not an indispensable allegation of the creditor's petition in a case such as that under consideration that a sum is owed for the satisfaction of which the property should be sold? Is the debtor prohibited from pleading in defense of the action an extinction of the obligation by payment, prescription, or some other cause or that it is not binding upon him because of error, fraud, mistake or lack of consideration independently of the validity of a distinct contract of mortgage or pledge given by him to secure it?

The real danger of the court's analysis that the mortgage is in rem and that the obligor is not personally liable to the creditor although some sort of "duty" or "natural" obligation to pay exists that "sup-

11. The obligation of fidelity in a marriage is certainly a personal obligation of the parties who contract it. The breach of the obligation may permit dissolution of the bond, but it is hard to see how it can give rise to recourse to the patrimony of the obligor. Injunctive relief or specific performance is frequently granted in a variety of situations where no pecuniary liability may exist for the obligor's breach.

ports" the mortgage is that it implies that the "duty" or obligation is a unique or distinct one that may be subject to rules or principles different from those that would be applicable if the debtor were "personally" liable. There is no reason to hold that the debtor and creditor have not entered into whatever type contract they have agreed to with the normal consequences attendant to such an obligation, except as it has been conventionally modified, directly or by implication, by limiting the creditor's right to pursue the debtors general patrimony.[12]

RETROACTIVITY OF PLEDGES AND MORTGAGES UNDER CIVIL CODE ARTICLE 3158

One of the well known characteristics of the so-called collateral mortgage is that it is deemed to come into existence only when the note it secures is issued in pledge to the prospective mortgagee. If the pledge is extinguished by surrender to the pledgor of the mortgage note, the mortgage is extinguished but may later be given vitality as a new mortgage if the note is again reissued in pledge by its maker. If the pledge is extinguished the mere fact that the note is left in the hands of the former pledgee does not give continued vitality to the mortgage. A new or additional pledge in such a case is considered technically a new issuance of the note, "revitalizing" the mortgage that becomes effective only at that time. Civil Code article 3158, which regulates the restrospective effect to be given pledges that secure future obligations, has been held to inferentially regulate the effectiveness of the mortgage securing a note intended to be issued in pledge. Civil Code article 2645 provides that the transfer or assignment of a principal obligation implicitly includes an assignment of the security that is accessory to it.

These rules sometimes require a practictioner to take into account rather subtle distinctions if he wishes to maintain the security for an obligation upon its transfer, as is illustrated by two cases decided last year. In the first case, *New Orleans Federal Savings & Loan Association v. Lee*,[13] a bank loaned $100,000 to a customer secured by the pledge

12. If a mortgage is given to secure a note containing such a stipulation and suit is brought 6 years after maturity, a plea of prescription of the debt—the note—should be valid. There would also appear to be no reason why an agreement of the kind under consideration could not be made when the obligation is for something other than the payment of money. A lessee might pledge bonds "as sole security and exclusive recourse for performance of the obligations of the lease." If he failed to make repairs called for by the lease or to restore the leased premises to their former condition at its termination, a question might be raised as to whether the limitation comprehended such breaches. If a court concluded it was so intended, would it then hold no contract of lease existed because the lessee was not "personally bound" upon it? Could the lessee get an injunction to prevent those breaches? Could he dissolve the lease instead of resorting to an action to execute on the pledged property? More importantly, is not the answer to these questions one of interpreting the import of the agreement of the parties under their contract of lease rather than postulating that no such contract exists?

13. 449 So. 2d 1099 (La. App. 5th Cir. 1984).

of his $150,000 collateral mortgage note. A judicial mortgage second in rank to the collateral mortgage was later obtained by the defendant. The plaintiff association, apparently as a part of its overall financing arrangements with the customer, thereafter paid the customers' balance to the bank. The bank marked both the so called "hand" note evidencing the principal obligation and the pledge agreement as "paid" and delivered the collateral mortgage note and the "paid" hand note to the plaintiff. The customer apparently had agreed that the collateral mortgage note would secure the plaintiff's loan to him, the proceeds of which were used to pay the loan of the bank. The plaintiff association argued that the priority of the bank's mortgage was maintained by the physical transfer of the collateral mortgage note and its repledge by the customer to secure repayment of the money the plaintiff had advanced. The court observed that while an assignment of the principal obligation would have carried with it the accessory pledge of the mortgage note, the facts revealed that an extinction of the obligation by payment had taken place. It then properly held that the transaction was equivalent to a surrender and reissuance in pledge of the collateral note by the maker, so that the mortgage, which had been extinguished by payment of his debt and surrender of the mortgage note, was revived upon repledge of the note but became second in rank to the judicial mortgage. The result is obviously correct, and indeed, the case is factually indistinguishable from the earlier case of *Odom vs. Cherokee Homes, Inc.*[14] in 1964. The plaintiff's admission that the note was repledged to it to secure a new loan it had made to the customer was intrinsically fatal to its case.

The language of article 3158 is quite confusing, redundant, and to some degree inconsistent. The relevant part of the article, stripped of some of its excess verbiage and with certain bracketed additions to facilitate its consideration, reads as follows:

> Whenever a pledge of any instrument or item of the kind listed in this article is made [1] to secure a particular loan or debt, or to secure advances to be made up to a certain amount and [2] if so desired or provided to secure any other obligations of the pledgor to the pledgee then existing or thereafter arising, up to . . . the limit of the pledge and [3] the pledged instrument or item remains . . . in the hands of the pledgee, [Then] the item may . . . be repledged to secure at any time any . . . renewals of the original loan . . . or any new . . . loans . . . even though the original loan . . . has been reduced or paid, up to the total limits which it was agreed should be secured . . . and if so desired or provided to secure any other obligations . . . without any added penalty . . . and the pledge shall be valid against third persons . . . to the same extent as if they [the additional obligations] came into existence when the . . . item was originally pledged. . . .

14. 165 So. 2d 855 (La. App. 4th Cir. 1964).

The provisions of the article under consideration were added by Act 290 of 1952. They were obviously designed to extend the rights of a pledgee by giving a pledge retrospective effect in situations where such might not otherwise have been the case. Pledges to secure "future obligations" have been in common usage for many years. The accessorial nature of the pledge however, caused doubts as to whether the privilege of the pledgee in such cases arose at the time of the agreement of pledge and delivery of the property or only when the later debt was incurred. This was particularly true if a period elapsed when nothing was owed to the creditor, as where the debts first incurred were paid and new ones were then negotiated.

It is obvious that the principal thrust of the amendment was to make it clear that a pledge given for future obligations could relate back to an earlier time. The terms of article 3158 appear to require at least three conditions for such retrospectivity as is indicated by the bracketed additions made to the article above. The pledge must be made to secure "a particular loan or debt, or . . . advances to be made;" the item pledged must "remain in the hands of the pledgee" and "it must be desired" or "provided" that other or future obligations will be secured by the pledge.[15] If these conditions are met, the pledge for such other or future debts relates back to the date the property was "originally" pledged.

If this is a proper interpretation of the article then the earliest time to which such a pledge has retrospective effect as to a particular obligation is the time at which there is a concurrence of all of the following conditions:

First: When there was an agreement that the particular obligation would be secured by the pledge. If a pledge is only given to secure an existing obligation, and the pledgor thereafter incurs another obligation to the creditor, no pledge exists for the latter absent an additional agreement to that effect by the pledgor.[16] Neither can it be said that it was "so desired or provided" that the future debt would be secured when the item was first delivered in pledge as the clause numbered [3] appears to require. Similarly, if the first obligation is satisfied before the second is incurred the "pledgee" would simply be holding the pledged item as a custodian during the interim, not as a pledgee. A new and independent agreement of pledge securing the second obligation would be just that, having effect only from the day of the second agreement.

15. At least one of the courts of appeal has expressly recognized that these requirements are a condition of the application of the articles. See New Orleans Silversmiths, Inc. v. Toups, 261 So. 2d 252 (La. App. 4th Cir. 1972).

16. Lepow v. Walker Land Co., 352 So. 2d 314 (La. App. 4th Cir. 1977); People's Bank & Trust Co. v. Campbell, 374 So. 2d 741 (La. App. 3d Cir.), cert. denied, 376 So. 2d 1268 (La. 1979); Romero v. Newman, 50 La. Ann. 80, 23 So. 493 (1898); Herber v. Thompson, 47 La. Ann. 800, 17 So. 318 (1895); Teutonia Nat'l Bank v. Loeb, 27 La. Ann. 110 (1875).

Second: The time the pledged item was last delivered in pledge to the pledgee. It is of the essence of pledge that delivery occur.[17] Pledge is a form of real contract. The agreement of pledge does not create a right of possession in the pledgee or privilege over the property until delivery is effected. The requirement that the item "remain in the hands of the pledgee," as will be more fully discussed later, should not be interpreted to mean that the pledgee must have continuous physical detention of the thing, but rather that the pledge must have been perfected by delivery and not extinguished by the surrender of the pledgee's right of possession to the pledgor.[18]

Third: The time the item was first pledged to secure "a particular loan or debt or . . . advances to be made." This is perhaps the most confusing part of the clause since it apparently requires one to distinguish these kinds of obligations from "other obligations" thereafter incurred that the parties must apparently "provide" or "desire" to be secured. Viewing Act 290 of 1952 in light of its history and obvious purpose, it would appear that the phrase "whenever a pledge . . . is made to secure a particular debt, or to secure advances to be made" was intended to fix the starting point of the pledgee's rights as the time a pledge relationship is first established, and that this is to be determined from existing principles without resort to the restrospective features extended to "future" obligations by the amendment. Otherwise, why would the clause have been required? If this is correct, then the earliest time a pledge securing "future advances" can be retrospectively valid is the time the pledgee can demonstrate he enjoyed a pledge for some other obligation without relying upon the retrospective provisions of the article. This would certainly include a pledge for an obligation in existence at the time the pledge is given. If the pledgee is obligated to permit the incurring of the debt by the pledgor, then a pledge given to secure the future performance by the pledgor under the contract should also be secured by the pledge when the item is delivered. This would explain the imperative terms of the phrase "advances *to be* made."

In summary, if the pledgee need not resort to article 3158's provisions relative to the retrospective effect of future obligations he should be secured, but if he asserts that his pledge should be given retrospective effect because of the article to a time before the obligation in question was incurred he must point to some other obligation that was secured

17. La. Civ. Code arts. 3152, 3162.

18. The property may be returned temporarily to the pledgor without extinction of the pledge. Canal-Commercial Trust & Savings Bank v. New Orleans T & M Ry., 161 La. 1051, 109 So. 834 (1926); Scott v. Corken, 231 La. 368, 91 So. 2d 569 (1956). The property may be "subpledged" by the pledgee and delivered to another without extinction of the pledge. Meyer v. Moss, 110 La. 132, 34 So. 332 (1902). The parties may agree a third person shall hold the property. La. Civ. Code art. 3162; Wells v. Dean, 211 La. 132, 29 So. 2d 590 (1947). See also infra note 26.

by the pledge at the time he claims the pledge was effective. He must also prove that he has held the property in pledge since then and that when the earlier pledge was made it was "provided" or "desired," *i.e.* agreed, that the future obligation would be also secured, should it arise.

Once the pledge is effective, however, the rights of an assignee or transferee of either the debt or pledged property should be determined on the basis of the general principles of pledge. The restrospective provisions of the article apply to the pledge of all movables. They clearly must be interpreted in light of the rest of the law of pledge. Article 3158 does not directly regulate the priority of a collateral mortgage by rules unique to it. The mortgage question arises only because of the holding that its efficacy is derivatively dependent upon the note it secures being issued and continuously held in pledge.[19]

If a principal obligation is sold, assigned, or transferred, the law provides the security given for it is also transferred.[20] This gives rise, however, to additional considerations that are frequently present in cases involving pledges given to secure future obligations that are sometimes overlooked.

When a pledge is given to secure an existing obligation and future ones as well, the extinction of the first obligation does not prevent the pledge from coming into effect as to the later ones. Assuming in such a case that the pledge itself has not been extinguished, but that the debt is merely paid (even by a third person), a subsequent advance by the pledgee would have retroactive effect to the date of the first debt according to the terms of article 3158.

Suppose in such a case, however, the first debt is assigned rather than being paid, and a later advance is made by the original pledgee. Absent an express or implied agreement by the pledgee restricting or limiting the agreement of pledge with the pledgor, the later advance should also be secured by the pledge although the priority of the rights of the original pledgee *vis-a-vis* those of the transferee are not entirely certain.[21] There appears to be no reason, however, why the pledge is not valid as to both debts. Neither should there be any question as to

19. First Guar. Bank v. Alford, 366 So. 2d 1299 (La. 1978); Rex Fin. Co. v. Cary, 244 La. 675, 154 So. 2d 360 (1963); American Bank & Trust Co. v. F & W Constr., Inc., 357 So. 2d 1226 (La. App. 2d Cir.), cert. denied, 359 So. 2d 1306 (La. 1978); Wallace v. Fidelity Nat'l Bank, 219 So. 2d 342 (La. App. 1st Cir.), cert. denied, 253 La. 1083, 221 So. 2d 517 (1969).

20. La. Civil Code art. 2645.

21. The rule in the case of mortgages is that where a mortgage secures several debts, each shares pro rata in the proceeds upon execution. When the original mortgagee assigns one of several secured obligations there is an implied agreement that he will not compete with his assignee. This is viewed as a personal obligation arising out of the assignment and is thus not binding upon subsequent assignees of the other debts. See Leonard v. Brooks, 158 La. 1032, 105 So. 54 (1925). The same rules would appear to be applicable to the assignment of obligations secured by a pledge.

the validity of the pledge as to either, whether or not the pledged property is physically delivered to the assignee. In fact one may question whether or not the pledgee is ever authorized to physically deliver the pledged property to an assignee of the principal obligation.[22]

In summary, the writer would suggest that where a pledgor agrees a pledge will secure several debts, including those to arise in the future, any or all of the existing debts may be paid without affecting the validity of the pledge as to others then existing or thereafter arising; one or all of the debts may be assigned or sold with no effect on the pledge either as to the debt assigned or the others; the pledge itself may be released

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22. If the pledgee assigns the principal obligation and delivers the pledged property to the assignee, it would not appear that the original pledgee would be relieved of his responsibility to the pledgor if the assignee absconds with or fails to preserve the property, unless one concludes that the obligations of the pledgee are truly "real" ones that are extinguished as to the pledgee when the right to the possession is divested by transfer of the principal obligation. There appears to be no Louisiana case directly on the subject. The French law recognizes that the pledgee's obligations are personal, not real. See 3 H. Mazeaud & J. Mazeaud, Lecons de Droit Civil no. 82 (5th ed. 1977), where the contract of pledge is noted as being an "imperfect synallagmatic one" because, although creating a real right in thé pledgeė it also imposes upon him the obligation to preserve and restore the thing. Louisiana Civil Code article 3162 recognizes that the pledged property may be placed in the hands of a third person who is bound to the pledgor and pledgee to hold it under the pledge. The writer suggests that the code thus recognizes that the *detention* of the item, as distinguished from the rights given the pledgee by the contract of pledge, may be separated. Where the pledgee agrees to hold the property of the pledgor, he should, upon assignment of the debt, be likened unto one who is now holding the property for the assignee but who is also the person "chosen by the parties" to do so. His responsiblity to the pledgor for its safe keeping should continue. If this is true, absent some agreement to the contrary he should be entitled to retain the property in his hands, but would at the same time be holding it for the assignee of the principal obligation to whom he has inferentially assigned his rights as pledgee. The principles involved are well summarized by the court in In re Pan Am. Life Ins. Co., 88 So. 2d 410, 416 (La. App. 2d Cir. 1956) as follows:

> In Conger v. City of New Orleans, 1880, 32 La. Ann. 1250, 1252, the supreme court said:
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> "Possession, though essential to the validity of the pledge, need not be always in the creditor. It is sufficient that the thing pledged be in the possession of one occupying ad hoc, the position of a trustee. The debtor himself may, in some cases, be considered as such trustee and be given possession of the thing by him pledged, provided his tenure be precarious and clearly for account of the creditor. The Louisiana doctrine is in perfect accord with both the common, the Roman and French laws" . . . .
>
> It is clear that possession for the pledgee by a third party is equivalent to the possession of the thing by the pledgee. See Wells v. Dean, 1947, 211 La. 132, 29 So. 2d 590. . . . (Citations omitted).

The pledgee who has assigned the principal obligation and thus, with it, his rights to the pledge, certainly has, to use the expression of the court in the *Conger* case, "ad hoc the position of trustee" to his assignee. If he should release the property to the pledgor without the assignee's consent, is he not liable to the latter? If he fails to return it to the pledgor upon satisfaction of the debt, is he not responsible to the pledgor?

or remitted by the surrender of all or part of the property, extinguishing the pledge as to the property released; or any combination of these events may occur, depending upon the agreement of the parties.

This leaves one remaining question. May the pledgee assign not only the principal obligation but his rights under the agreement with the debtor that future advances will be secured by the pledge and thus permit the assignee to make those advances and maintain the secured position the transferor would have had if he had made them?

This question was presented for the first time in *Texas Bank of Beaumont v. Bozorg.*[23] The defendant pledged a collateral mortgage note to the First National Bank of Jefferson Parish. The terms of the pledge do not clearly appear from the opinion. The bank, in reliance upon the pledge, made loans to the defendants taking several notes for them. Later, a second mortgage was executed by the defendant securing a collateral mortgage note that was pledged to Massey Ferguson (the Intervenor) to secure amounts owed to it. The First National Bank then delivered the collateral mortgage notes, the "hand" note and the collateral mortgage to the plaintiff bank. The plaintiff then "refinanced" the "hand" notes it had acquired from the First National Bank and also advanced additional sums to the defendants. The court had little difficulty with the first question presented—whether or not the assignment of the principal obligation and the collateral mortgage note transferred the rights to the collateral mortgage to the plaintiff bank and maintained its security as against the intervenor. The court relied upon *Odom v. Cherokee Homes, Inc.*[24] and later cases by the circuit courts of appeal[25] indicating that an assignment of the principal obligation carries with it the security of the mortgage. It distinguished the case before it from one such as the *Lee* case discussed above, where the principal obligation is paid, and the pledge is also extinguished by the surrender of the property with a new pledge being thereafter effected by the pledgor in favor of another creditor.

A literal interpretation of article 3158 was advanced by the intervenor in support of its contention that the transfer of the collateral mortgage note extinguished the pledge since the pledged property had not "remained in the hands of the pledgee." This argument seemingly overlooked the fact that Civil Code article 3162 has always provided that "in no case does this privilege [of the pledgee] subsist except when the thing pledged . . . has actually . . . remained in possession of the creditor . . . ." As previously mentioned, this article has been construed only to require a continued right of possession in the pledgee or assignee of the principal obligation—not to require corporeal detention of the

23. 444 So. 2d 698 (La. App. 5th Cir.), rev'd in part, 457 So. 2d 667 (La. 1984).
24. 165 So. 2d 855 (La. App. 4th Cir.), cert. denied, 167 So. 2d 677 (La. 1964).
25. Mardis v. Hollanger, 426 So. 2d 392 (La. App. 2d Cir. 1983); Richey v. Venture Oil & Gas Corp., 346 So. 2d 875 (La. App. 4th Cir. 1977).

thing in the hands of the original pledgee.[26] There is no reason to believe the language of article 3158 was intended to establish a different rule. If the thing pledged is unconditionally surrendered to the pledgor, the pledge is extinguished. Its subsequent redelivery in pledge obviously creates a new pledge. The transfer of the principal obligation and the implicit assignment of the security held for it, however, does not mean that the pledged property is not still in the "hands of the creditor" since the assignee is now the creditor and is, moreover, the assignee of the original creditor's rights. The court also held that the "refinancing" of the notes transferred by the first pledgee was not a novation—so that the security held for them was preserved.

The more difficult question alluded to above was also presented—whether the security enjoyed for the new advances made by the assignee was entitled to be given the same retrospective effect it would have had in the hands of the assignor. A majority of the court concluded it did. In doing so, however, they seemed to assume, without expressly addressing the problem, that the mere possession of the collateral note as security for a loan made to the original pledgor of necessity gave its assignee a pledge for other obligations owed to it by the pledgor. The majority thus held that advances made after the transfer by the assignee to the pledgor were also secured retrospectively to the date of the first pledge.

The facts do not clearly reflect the nature of the arrangement between the three parties—the original bank, the borrower and the second bank—nor the precise terms of the pledge to the first bank. The opinion does suggest the borrower was "moving his business" to the second bank that was succeeding to all of the rights and obligations of the first. Thus, an officer of the first bank testified the plaintiff bank was to buy the first bank's "collateral position."

Two judges dissented on the grounds that the refinancing of the existing notes and the later advances were "new obligations" extended by a new creditor and must necessarily rank under article 3158 only from the time such loans were made. The contrary result constituted, in the terms of one of the judges, "an unwarranted extension" of the provisions of article 3158.

It appears neither the majority nor minority of the court recognized the basic question presented. Both appear to have assumed that there is some sort of necessary legal relationship between the possession of a collateral mortgage note and the other obligations of its maker to the possessor that is prescribed by article 3158. Neither the majority or minority considered whether a pledge agreement existed, what its terms were, or whether any attempted assignment of the original pledgee's

26. See cases cited supra note 18.

rights could be (or was in fact) made. Although they arrived at different conclusions, both the majority and the minority discussed the issue as simply being whether possession of the collateral mortgage note invoked the provisions of article 3158. Writs were granted in the case by the supreme court.[27] The case is still pending. It is therefore perhaps premature to comment on the issue further.

PRIVATE WORKS ACT

Con-Plex Division of U.S. Industries, Inc. v. Vicon, Inc.[28] raised the question of the validity of a clause in a surety bond given by a subcontractor of a construction project to the principal contractor to guarantee the former's performance. The clause provided, "Any suit under this bond must be instituted before the expiration of two years from date on which final payment under the subcontract falls due."[29] The argument was made that this was an attempt to modify the statutory term of prescription, contrary to public policy. The court held that the clause was valid, relying upon *Landis & Young v. Gossett & Winn*[30] and *Leiter Minerals, Inc. v. California Co.*[31] which held that while parties cannot waive prescription in advance or agree to a longer period they are free to stipulate a shorter period than that provided by law.

Article 3471 now expressly provides that parties may not agree to specify a longer period of prescription nor make the requirements established for it more onerous. The comments of the Law Institute to that article also state that parties may agree to shorten the period if they so desire and confirm the correctness of the opinion.[32] It should also be noted, perhaps, that the suretyship in question was not one given for a general contractor to an owner that is regulated by the private works act. That act now provides that such a bond "shall be deemed to conform to the requirements of this part notwithstanding any provision of the bond to the contrary . . ."[33] and would render such a clause invalid in the case of such a bond.

OIL, GAS AND WATER WELL LIEN ACT

Louisiana Revised Statutes 9:4861-4867 (commonly called the oil, gas and water well lien act) gives a privilege to certain suppliers of material, labor or services utilized in the drilling of an oil and gas or

27. 444 So. 2d 698 (La. App. 5th Cir.), rev'd in part, 457 So. 2d 667 (La. 1984).
28. 448 So. 2d 191 (La. App. 1st Cir. 1984).
29. 448 So. 2d at 192.
30. 178 So. 760 (La. App. 2d Cir. 1937).
31. 241 La. 915, 132 So. 2d 845 (1961).
32. La. Civ. Code art. 3471, comment (b) (Supp. 1983).
33. La. R.S. 9:4812(D) (1983).

water well over the oil and gas produced from the well; the lease "whereon the well is located" and all "drilling rigs, standard rigs, machinery, appurtances, appliances, equipment, buildings, tanks and other structures thereto attached or located on the lease."[34] Louisiana Revised Statutes 9:4862 provides that the privileges are second in rank to all other privileges except taxes "or a bona fide vendors privilege, or privileges filed or recorded prior to the date on which the first labor, service . . . materials or supplies covered by the privilege is furnished." Louisiana Revised Statutes 9:4864 then provides: "As to movable property the vendor's privileges must exist and be filed for record within seven days after the property subject to the privilege is delivered to the well or wells . . . . The effect of such filing shall prevent the movables from becoming immovables by nature or destination."

The United States Fifth Circuit Court of Appeals was faced, in *In re Martin Exploration Co.*,[35] with the task of construing these provisions to the case of one who had sold pipe to a lessee drilling a well. The pipe was never incorporated into the well—a fact apparently brought about by the bankruptcy of the lessee. The seller did not record the evidence of the sale as required by Louisiana Revised Statutes 9:4864 quoted above. A company having a privilege under the statute claimed that the privilege was superior to the vendor's privilege of the seller of the pipe because of the latter's failure to make the filing required by Louisiana Revised Statutes 9:4864. The court, recognizing that Louisiana law ordinarily does not require (or provide for) recordation of a vendor's privilege on movables and noting an absence of any language in the act generally purporting to extinguish the privilege in the absence of such filing, concluded that Louisiana Revised Statutes 9:4864 was not designed to limit or restrict the rights of the vendor by requiring him to file evidence of his privilege to preserve it, but rather to expand them by permitting him to maintain his privilege in cases where it would otherwise be divested by the incorporation of the movables into an immovable. The court rejected as erroneous *dicta* a statement of the Louisiana First Circuit Court of Appeal to the contrary in an earlier case.[36] Although the matter is by no means clear, and a persuasive argument can be made for the other position, on balance the interpretation of the court in light of the express provisions of the section as to its "effect" appears to be the most reasonable one.

34. La. R.S. 9:4861 (1983).
35. 731 F.2d 1210 (5th Cir. 1984).
36. Pertuit v. Angelloz, 164 So. 2d 125 (La. App. 1st Cir. 1964).