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SURETYSHIP

In *Daigle v. Oakwood Homes, Inc.*[1] the court held that the statutory bond required of mobile home dealers by the Motor Vehicle Act[2] and conditioned upon the dealer complying with any written contracts for the sale or exchange of motor vehicles and complying with the laws relating to the sale of motor vehicles "was only intended to protect the purchaser from the unscrupulous motor vehicle dealer." Accordingly, the court found that the surety bond did not guarantee the purchaser against redhibitory vices in the vehicle since "there were no misrepresentations relating to the identity of the vehicle or any other unscrupulous dealing" on the part of the dealer, the plaintiff's principal complaint being that the mobile home was defective and the sale subject to redhibition.

In *Koeniger v. Lentz*,[3] the court rejected the efforts of a surety who, upon paying a note he had guaranteed, obtained a conventional subrogation to it, and then tried to collect the note entirely from another surety. The court relied upon *Aiavolasiti v. Versailles Gardens Land Dev. Co.*[4] which in effect held that where parties contract as principal obligors toward a creditor, their liability will nonetheless be regulated according to the rules of suretyship if some of them are in fact lending their credit to the others. The precise question at issue in *Aiavolasiti* had also been rejected long ago in the case of *Phillips v. Pedarre*.[5]

In *McKesson Chemical Co. v. Tideland Chemical Co.*,[6] the defendant's president wrote a letter to the plaintiff on company stationary beginning with the words: "This is a personal guarantee . . . for Tideland Chemical Incorporated." It was signed by the president over his typed

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1. 460 So. 2d 51 (La. App. 1st Cir. 1984).

2. La. R.S. 32:701-34 (1963 & Supp. 1985) The bonding provisions are found in La. R.S. 32:718 (D) (Supp. 1984) (repealed in 1984 La. Acts No. 733, § 4).

3. 462 So. 2d 228 (La. App. 4th Cir. 1984).

4. 371 So. 2d 755 (La. 1979).

5. 156 La. 509, 100 So. 699 (1924).

6. 471 So. 2d 812 (La. App. 3d Cir. 1985).

name under which also appeared the word "President". The plaintiff's action against the president as a surety for the company was met with the plea that he had signed only in his representative capacity and that the letter was in any event not sufficiently express to constitute a suretyship. The court responded to the latter argument with the well established principle that a contract of "guarantee" is synonymous with suretyship. It also found no ambiguity in the letter, despite the fact that it identified the defendant as president of the company, noting that the words "personal guarantee" in the body of the letter were not consistent with corporate liability, and more importantly, that to construe the contract as the defendant contended would mean that the corporation was "personally guaranteeing" its own obligations, rendering the agreement of no effect at all, contrary to established canons of construction.

PLEDGE

In *Fontenot v. Hanover Insurance Co.*,[7] the Louisiana Supreme Court held that the pledgee of an incorporeal was not an indispensable party to an action by the pledgor to enforce the pledged credit. The court relied upon two earlier cases, *American Capital Corporation v. Falk*[8] and *Hewitt v. Williams*,[9] which held that the pledgor of an obligation was entitled to enforce it if the pledgee did not do so. *American Capital* relied upon the official comments to Code of Civil Procedure article 696 (that declares the pledgee is the proper person to enforce the pledge), which observe that if the pledgee fails or neglects to do so, the pledgor may bring the action.

The court appears to be in error both in its decision and its reliance upon the authorities mentioned. The cases and comments referred to, as well as other authorities cited by them, recognize that while the pledgee is vested with possession of the thing and is the person entitled to enforce the obligation, it remains the property of the pledgor and he may take steps to enforce or protect it. However, each of the cases cited involved negotiable instruments, and the courts clearly held that for the plaintiff to succeed he would have to procure and present the notes sued upon and establish that he was acting with the permission of the pledgee in attempting to collect the amount. Unless the pledgee is made a party to the action, he is obviously not bound by the judgment. What is to prevent him from enforcing the pledged right again? If the debtor has been notified of the transfer of the right by his creditor, he is prohibited from paying the creditor. To say the pledgor, who is still

7. 465 So. 2d 678 (La. 1985).

8. 181 So. 2d 241 (La. App. 4th Cir. 1965), cert. denied, 248 La. 1032, 183 So. 2d 653 (1966).

9. 47 La. Ann. 742, 17 So. 269 (1894).

the owner of the pledged property, has sufficient interest to bring a suit to protect or enforce the pledged rights does not necessarily mean that he should not be required to make the pledgee a party to the action, or to show that the pledgee has in fact authorized him to bring the action. Such is the actual import or holdings of the cases relied upon by the court.

MORTGAGES

The Louisiana First Circuit Court of Appeal held in *Magee Finance Service of Slidell, Inc. v. White*[10] that a mortgagee who obtained a judgment against his debtor on obligations secured by mortgages waiving the homestead exemption, but who did not have the mortgages recognized in the judgment, lost its mortgages and with them the waiver of the homestead exemption. Since the debtor's homestead exemption primed the judicial mortgage arising from the recordation of the judgment, the debtor's homestead would be exempt to the extent allowed by statute.

The customary practice in Louisiana, in proceeding by ordinary process upon an obligation secured by a mortgage, has long been to allege the existence of the mortgage, ask that it be recognized and declared executory, prove its existence at the time of trial or default, and have the judgment recognize the existence of the mortgage, the property it affects, and its essential terms. The jurisprudence is not entirely consistent as to the effect upon the mortgagee's rights when this is not done. There is authority for the proposition that it is not necessary to explicitly ask that a mortgage or privilege be recognized in a suit upon the principal obligation, and that the validity and rank of the mortgage may be asserted by way of summary process to determine the order of distribution of the proceeds of the sale of the debtor's property under a writ of *fieri facias* issued in execution of the judgment.[11] Other cases indicate that if the plaintiff prays for recognition of a mortgage or privilege and the judgment as rendered fails to mention it, the omission is equivalent to a rejection of the plaintiff's demand and extinguishes the mortgage or privilege.[12] The cases holding it unnecessary to obtain a recognition of the mortgage for the most part involve disputes among mortgagees as to the relative rank of their claims. The courts were undoubtedly impressed by the fact that declaring the mortgage secured the plaintiff's claim would have been of no consequence to the other mortgagees who are not parties to the action.

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10. 471 So. 2d 982 (La. App. 1st Cir. 1985).

11. Perot's Estate v. Perot, 122 La. 640, 643, 148 So. 903, 904 (1933).

12. See, Houma Steel & Supply, Inc. v. Allied Towing Services, Inc., 468 So. 2d 637 (La. App. 4th Cir. 1985).

The decision in the *Magee* case is not illogical. Failure to obtain recognition of the mortgage and waiver of the homestead exemption means the matter would have to be litigated again. On the other hand, until the creditor actually seizes the property, the question of whether it is or is not the homestead of the debtor arguably is not at issue. In addition, the creditor should be able to defeat the claim when it is raised by showing that it has been waived with respect to the particular property as to the particular debt. Whether the decision is correct or not, it illustrates the importance to the creditor of carefully preserving and securing recognition of his rights at all stages of the process of collection. He is certainly not entitled to nor should he expect much sympathy or liberality of construction by the courts in his efforts to execute upon his debtor's property.

THE PRIVATE WORKS ACT

In *Ragusa v. Burns*,[13] the court held that the Private Works Act[14] as it existed before its revision in 1981[15], denied a privilege to a general contractor who did not file his contract before beginning the work.[16] The court also held that a purchaser who bought the property being improved after the work had begun took it subject to the privileges given by the Act, but was not personally liable to the claimants, even in cases where the seller who contracted for the work had failed to comply with the Act and was personally responsible for the claims arising thereunder.[17]

Lake Forest, Inc. v. Cirlot Co.[18] presented a somewhat difficult question as to the proper classification of a contract for purposes of the Act. The defendants were unpaid contractors of the Lionel J. Favret Construction Company. Favret had been excavating sand from the plaintiff's land under a contract with the latter. The defendants filed notices of privilege under the Private Works Act. The plaintiff sought to have the privileges declared invalid or, in the alternative, restricted to the interest of Favret in the property.[19]

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13. 462 So. 2d 658 (La. App. 1st Cir. 1984), cert. denied, 464 So. 2d 1375 (La. 1985).

14. La. R.S. 9:4801-55 (1983 & Supp. 1985).

15. The Act was completely revised and restated by Act 724 of 1981. References to the Act in this work refer to the provisions as revised, unless the contrary is stated.

16. The rule is perpetuated in the revision of 1981, with the qualification that such filing is unnecessary if the amount of the contract is less than $25,000.

17. This also should be the result under the revised act. La. R.S. 9:4806 (B) (Supp. 1986) provides that the claims under the Act are limited to "the owner or owners who have contracted with the contractor . . . ." See infra note 22.

18. 466 So. 2d 61 (La. App. 4th Cir. 1985).

19. Section 4806(B) of the Act limits the privilege given to the interest in the immovable of the person who contracts for the work. Thus, if a lessee contracts with a contractor the privileges are limited to the lease.

Favret's contract, which was unrecorded, gave it the exclusive right to operate a sand pit on the property for twenty months. It also required Favret to conform the pit to certain boundaries with specified slopes and to fill it with water within thirty days after completion of the work. Favret was also to pay the plaintiff a royalty on the sand extracted from the pit.

The plaintiff first asserted that the privileges were invalid because the construction of the pit and extraction of the sand was not an "improvement" to the land and was therefore not subject to the Act. The court rejected this argument, noting that the Act gives a privilege to those who perform a "work" upon an immovable and that a work is defined as "single continuous project for the improvement, construction, erection, reconstruction, modification repair, demolition, or other physical change of an immovable or its component parts."[20]

The policy of the Act is obvious. If the owner undertakes some modification or change to an immovable, it should be of no concern to the persons with whom he deals whether the work "improves" or deteriorates the thing. It is enough that the owner desires the work done and undertakes to do it.

The plaintiff next argued that since the contract called for the extraction of sand from the earth it was governed by the Mineral Code and that the Act did not apply. The court rejected this claim, noting that the Act, in defining a "work," excludes from its provisions only "the drilling of a well . . . or other activities in connection with such a well or wells for which a privilege is granted by R.S. 9:4861." The section cited is the first section of what is commonly referred to as the "oil, gas and water well lien act." That act is limited to activities in connection with oil, gas, and water wells and has no application to sand, gravel, or so-called "hard minerals."

The third contention of the plaintiff gave the court more difficulty. The plaintiff argued that its contract with Favret, calling for the extraction of the sand and payment of a royalty, was a mineral lease and therefore the defendants' privileges were to be limited to Favret's interest in the lease (which presumably at the time of the suit was extinguished because of its breach).

The court rejected the argument, somewhat inconsistently, by first holding that the contract was not a lease but more closely resembled a construction contract, thus making the plaintiff an owner who had contracted with a general contractor, and thereby imposing the privilege upon the immovable itself. The court found that the plaintiff's objective in entering into the Favret contract was to construct a lake on the land as a part of a plan to develop the land for residential purposes and

20. La. R.S. 9:4808 (A) (1983).

that the contract actually required Favret to accomplish that objective. Secondly, the court held that the privilege existed because the "lease" was not recorded, and as a result the defendants had no way of knowing that they were dealing with a lessee. Thirdly, it held that the privilege existed because the work was obviously being done "for the benefit" of the owner.

The court's judgment, based upon its determination of the facts, is undoubtedly correct. However, some of the grounds upon which the decision in *Lake Forest* is based appear to be questionable, if not clearly incorrect. The Private Works Act makes it clear that neither the lessor nor his interest in the land is liable under the Act for work performed on the land by the lessee, absent some contractual assumption by him of the obligations of the lessee.[21] Furthermore, the Act requires anyone claiming a privilege upon property, as a consequence of doing work upon it for someone other than the owner, to prove that the owner was contractually bound for the work, either to the claimant or by way of a contract between the owner and an intermediary.[22] Since the defendants could only prove that they enjoyed a privilege upon the property by relying upon the Favret contract, they could hardly claim its lack of inscription rendered it void as to them, or claim it should be given an effect it actually did not have. In the absence of a contract between Favret and the plaintiff, the defendants would enjoy no privilege at all. How could the defendants point to it as the touchstone of their rights and at the same time deny it as what it is?

The court was, however, intrinsically correct when it realized that not every contract calling for the extraction of a substance from the earth, be it a mineral or not, is a mineral right or lease within the purview of the Mineral Code. A close analysis of the Mineral Code

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21. This is confirmed by Act 903 of 1985, amending La. R.S. 9:4806(B) (1983) of the law to require a written agreement by the lessor to impose liability on the lessor before responsibility would attach. See infra note 22.

22. The claims against an owner . . . are limited to the owner or owners who have contracted with the contractor or to the owner or owners who have agreed in writing to the price and work of the contract of a lessee, wherein such owner or owners have specifically agreed to be liable for any claims. . . .

La. R.S. 9:4806 (B) (Supp. 1986) (as amended by 1985 La. Acts No. 903).

The court's objection that the defendants had no way of knowing the "contractor" was a lessee misses the point. If the contract, or a notice of it is recorded as required by the Act, third persons will, of course, know the status and situation of the contractor. The Act, although protecting persons who perform work upon land at the request of the owner, does not authorize a subcontractor to simply assume that anyone who walks into their door and hires them to do work upon a tract of land has any particular right to do so. Would the subcontractors in this case be entitled to hold the owner for the price of their work and assert their lien if Favret had been a trespasser? Would they not instead be liable to the owner for digging up his land without his consent?

discloses that it regulates only those arrangements entered into for the commercial extraction of minerals or other substances from the earth. It is true that this is not as obvious from its provisions as one might like. In the case at issue for example, if the contract was a mineral lease its term would have expired unless the production from the lease was in paying quantities.[23] The *Lake Forest* court found that the purpose of the contract was to obtain the construction of a lake by the contractor; that as an incident to the work, sand, having value, would be removed; that the contractor would dispose of it, and would receive a part of its value as additional compensation for the work. A contract for the construction of a road or building, requiring the contractor to remove dirt, sand, gravel, or other substances excavated for the foundations of the work, is not converted into a lease because the contractor is given the proceeds from the sale of the earth as additional compensation for his work, or because the proceeds are partly applied as a credit against the contract price. Neither is an ordinary predial lease converted to a mineral lease because it authorizes the lessee to level the soil, build a pond on the land, dig a well, or excavate the earth for the foundations of the work he is authorized to construct.[24] Neither would the fact that the lessee is directed or authorized to dispose of the material excavated at his own expense, risk or profit, rather than to spread it about on the land, convert an ordinary predial lease to a mineral lease.[25]

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23. La. R.S. 31:124 (Supp. 1985) [hereinafter cited as La. Min. Code]. Among other articles of the Mineral Code that implicitly recognize the commercial nature of mineral rights are: Article 29, which provides that the owner of a mineral servitude is not exercising his rights "in good faith" if he attempts to mine or extract minerals when there is no "reasonable expectation" that they can be produced in "paying quantities"; Article 122, which provides that the lessee of a mineral lease is bound "to operate the property as a prudent operator for the mutual benefit of himself and his lessor;" and La. Min. Code art. 15 which, in defining the power of a landowner to create mineral rights, notes that he may "convey, reserve, or lease his right to explore and develop the land for production of minerals. . . . "

24. "A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals. . . ." La. Min. Code art. 114. "A mineral lessor is bound to deliver the premises . . . [and] to refrain from disturbing the lessee's possession . . . ." La. Min. Code art. 119; "A mineral lessor impliedly warrants title to the interest leased. . . ." La. Min. Code art. 120. These and the other provisions of the Mineral Code would hardly seem applicable to the kind of arrangement contemplated by the Favret contract as determined by the court.

25. The proper classification of agreements that contain elements common to several nominative contracts is hardly unique in Louisiana's legal system. It could hardly be contended that a contract for the demolition of a building would have to be in writing, or that if it was recorded it would be enforceble against subsequent owners of the land on the grounds that it was the sale of the building and thus of a distinct immovable. Would the result be different if the contract provided that the contractor agreed to remove the debris from the demolition, but was entitled to any salvage value it might have? Is there any difference between the sale of timber as a distinct immovable and a sale of particular trees to a purchaser, who is required to cut and haul them off?

OIL, GAS AND WATER WELL LIEN ACT

In *C-Craft Marine Services, Inc. v. Log Exploration Company*,[26] the Louisiana Fourth Circuit Court of Appeal held that the failure of a privilege claimant to timely file a notice of his privilege in the mortgage records as provided by section 4862 of the Oil Well Lien Act [27] results in the loss of the privilege. The courts have been divided on the question of whether timely filing of the notice of privilege is required to preserve the privilege, or only its ranking vis-a-vis other such liens. Two federal cases held that the priority alone is affected and that the privilege itself persists after the time for filing expires.[28] A later case by the Louisiana Court of Appeal for the Fourth Circuit indicated that the privilege was lost, although the matter was only inferentially at issue.[29] The problem is caused by the first two sections of the Act in question which, in essence, provide:

> Any person who performs any labor or service . . . in connection with the drilling of any well . . . , has a privilege on . . . the . . . well . . . and for the cost of preparing and recording the privilege. . . .[30]

> If a notice of such . . . privilege . . . is filed for record and inscribed in the mortgage records . . . within one hundred and eighty days after the last day of the performance of the labor or service . . . the privileges are superior to all other privileges or mortgages against the property . . . [except for certain vendors privileges or mortgages] . . . .[31]

Since there is nothing in the first section to limit the existence of the privilege, or require recordation as prerequisite of its effectiveness, and the second section implies only that failure to file the required notice affects the "superiority" of the privilege, the federal courts con-

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26. 470 So. 2d 241 (La. App. 4th Cir.), cert. denied, 412 So. 2d 921 (La. 1985).

27. La. R.S. 9:4861-67 (1983 & Supp. 1985). Although the Act technically creates a privilege in favor of certain persons supplying labor, material, or services in connection with the drilling and operation of wells, it is entitled a "privilege" act, and it is customary to refer to the privilege as a "privilege" and the Act as the Oil Well Lien Act. That practice is followed here.

28. The Louisiana Fifth Circuit Court of Appeal and the United States District Court for the Western District have held the privilege is not rendered invalid, only that the privilege claimant loses his priority. See, Continental Cas. Co. v. Associated Pipe & Supply Co., 447 F.2d 1041 (5th Cir. 1971); Beacon Gasoline Co. v. Sun Oil Co., 455 F. Supp. 506 (W.D. La. 1978).

29. Western Wireline Serv., Inc. v. Pecos Western Corp., 377 So. 2d 892 (La. App. 4th Cir. 1979).

30. La. R.S. 9:4861 (Supp. 1985).

31. La. R.S. 9:4862 (Supp. 1985).

cluded, as did the dissenting judge in *C-Craft Marine* that the privilege continued indefinitely without recordation or filing. The conclusion is plausible, in light of the portions of the Act quoted above. Other portions, however, apparently contemplate that filing is necessary to the continued existence of the privilege itself: "Unless interrupted by suit thereon, the privilege shall prescribe and become ineffective one year form the date of recordation."[32]

> A. If a statement of claim or privilege . . . is filed, any interested party may deposit with the recorder of mortgage . . . a bond of a lawful surety company . . . to guarantee payment of the obligation secured by the privilege . . . .
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> B. If the recorder of mortgages finds . . . the terms and amount of a bond deposited with him to be in conformity with this Section he shall . . . cancel the statement of claim or privilege . . . from his records . . . .[33]

Unless the privilege is recorded, there is no time fixed by the Act for its extinction. Of course it is possible that the Legislature intended such a result (this would make the privilege coterminous with the life of the claim it secures, not an unusual result under Louisiana law). If this were the Legislature's intention, it is difficult to understand why section 4865 specifies a one year prescriptive period for the privilege from the date of its filing, leaving the prescription of the unfiled privilege unprovided for.[34] Section 4867, relative to the bonding out of the privileges, contemplates filing as necessary to the existence of the privilege in that it refers to the "creditor who has secured his claim" by recording the privilege, and furthermore, bonding out the claim would have the anomalous effect of maintaining the privilege without recordation, although it had been canceled by the clerk if the contrary interpretation is taken. The most reasonable construction appears to be that adopted by the court in the case at hand.

CHATTEL MORTGAGES AND THE VENDOR'S PRIVILEGE ON MOVABLES

In *Warren Refrigerator Company v. Fosti Midstream Fueling and Service, Inc.*,[35] the court struck down two chattel mortgages because one failed to set forth the terms of the note it secured and the other

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32. La. R.S. 9:4865 (1983).

33. La. R.S. 9:4835 (A) (Supp. 1985).

34. It also appears reasonably certain that neither section 4865 nor section 4867 is concerned with the effect of the inscription of the privilege as distinguished from its existence.

35. 462 So. 2d 1343 (La. App. 3d Cir. 1985).

failed to set forth the time of its payment.[36] The court recognized that where the mortgages had been given in the sale of the mortgaged property, the seller enjoyed a vendor's privilege upon the thing sold. Civil Code article 3327 provides that the vendor's privilege is divested if the purchaser does not continue in possession of the property. In the case at hand, the purchaser was declared a bankrupt. This transfers title to his property to the trustee. The trustee subsequently abandoned title and it passed back to the bankrupt, presumably because there was no equity in it for the bankrupt's estate. The bankrupt argued that the transfer of title to the trustee was sufficient under article 3227 to extinguish the purchasers privilege and that the subsequent transfer back of the title did not reinstate it. This was rejected by the court, which apparently viewed the so-called passage of title to the trustee as being provisional and in itself insufficient to divest the purchaser of his privilege. This seems reasonable in light of the well known holdings of the United States Fifth Circuit Court of Appeals that the vendor's privilege is enforceable against the trustee under the Bankruptcy Act.[37] It was also argued that the privilege had been lost because the property was physically in the possession of third persons. The court, rejecting these contentions, reasoned that the possession referred to was not the mere physical detention of the thing, but the right to possession, and unless

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36. These conclusions are undoubtedly correct in light of La. R.S. 9:5352 (1983), although one would hope that the legislature in its wisdom will someday eliminate the incredible complexity required to perfect a chattel mortgage. Every other state in the union, including some which probably have as many transactions in a month as are confected in Louisiana in a year, gets along very well under the U.C.C. with a simple signed document creating the equivalent of a chattel mortgage. As Louisiana's law now stands, one can validly mortgage a $100,000,000 shopping center if he can prevail upon the clerk to file a paper in any form signed by the owners of the property that evidences their intention to mortgage it, reasonably identifies the property, and declares the amount of the obligation it secures. However, to obtain a chattel mortgage on a $500 cash register in the same shopping center, it is necessary to have an authentic act of mortgage, or one duly authenticated, with the necessary notary and witnesses, which describes the item with particularity, including all thirteen digits of its serial number, if such be the case, and which describes with particularity the amount, terms of payment, and other details of the note it secures, and then to record it in the chattel mortgage records of as many as two different parishes. The complicated, prolix, and unduly formal requirements of the chattel mortgage act in no way enhances the integrity of the mortgage or protects the innocent. The requirements for the most part have served primarily as a means of increasing the compensation of bankruptcy trustees who have to some extent been dependent for their fees upon avoiding security placed upon the debtor's property prior to his final plunge into insolvency.

37. La. Civ. Code art. 3227 states: "He who has sold to another any movable property has a preference on the price . . . if the property remains in the possession of the purchaser."

some person other than the buyer acquired some right to possess the thing, the mere fact that it was being detained by someone other than the owner did not affect the privilege.[38]

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38. In our view, the vendor's preference established by La. C.C. Art. 3227 is viable so long as the right to possession of the movable property remains in the vendee, although it be shown that others without color of right have taken physical possession of the movable effects.

462 So. 2d at 1348.