Formal Requirements of Pledge Under Louisiana Civil Code Article 3158 and Related Articles

Valerie Seal Meiners
COMMENTS

FORMAL REQUIREMENTS OF PLEDGE UNDER LOUISIANA CIVIL CODE ARTICLE 3158 AND RELATED ARTICLES

According to the scholar Denis, "[t]he pledge springs from natural law and is of the farthest antiquity;" it secured debts "in the primitive relations of men." Although the specific beginnings are unknown, frequent mention of the pledge in ancient texts evidences its early application and points to at least one conclusion: that in its earliest stages of development, formalities of pledge were much simpler, albeit more dramatic, than those of today.

Herodotus, in his Histories, explains that a debtor in ancient Egypt would deliver the mummy of his father to his creditor, who was quite willing to make a loan on this basis. Since the mummy was of great religious value to the debtor, he would certainly pay the debt in order to redeem the pledge.

In ancient Athens and Rome, the mechanics of pledge were similarly simple: the debtor and creditor contracted that, upon default of the loan, the debtor would become the slave of the creditor until the debt was repaid. In Rome, the creditor could have the debtor executed without the burden of any judicial process whatsoever.

Eventually, these methods were replaced, in both Athens and Rome, with the more mundane practice of pledging property. To prevent the creditor from choosing at his pleasure from the debtor's available assets, the debtor designated certain pieces of his property which would become the property of the creditor if the debt was not paid. This practice

Copyright 1987, by LOUISIANA LAW REVIEW.

1. This comment does not extend to certain areas closely related to but not contemplated under article 3158, such as the pledge of immovables, the Assignment of Accounts Receivable Act, and the pledge of certain incorporeal rights created by operation of law, such as trademarks.


4. Squillante, supra note 3, at 618.

5. Id. at 619.

6. The pledge of property is also found in ancient French law, and, in fact, the word "pledge" comes from the old French law term pleige which meant a "surety" or "personal security." The French pledge, however, was "real security," and the French law writers distinguished between the concepts of surety and pledge by remarking that "'Pleige plaide et gage rend.' The surety pleads or resists, but the pledge pays," Denis, supra note 2, at 3.
proved quite workable since it allowed the debtor to control which of his properties would be subject to forfeiture while at the same time providing an inducement for the creditor to make the loan.\footnote{7}

Under Roman law, the agreement took either of two forms: the \textit{fiducia} or the \textit{pignus}. The \textit{fiducia} contract, which developed first, transferred title to the creditor until the debt was paid. Upon payment in full, the creditor was required to re-transfer title to the former debtor. The \textit{pignus} contract, like today's pledge, transferred only \textit{possession} to the creditor as security for the debt. Delivery of the property to the creditor was the essential element of the contract. The debtor, however, retained ownership, and the parties were free to agree that the debtor would remain in possession of the property in some circumstances.

In the more recent history of pledge, personal property of various kinds began to replace real estate as the more common object of pledge. As a result of abuses by both debtors and creditors, relatively simple rules of pledge were replaced, in civil law countries, with strict formalities. Gradually, during the nineteenth century, the rules were relaxed once more in the interest of commerce, making a pledge valid simply by delivery of the pledged property.\footnote{8}

Today, the formal requisites of pledge are not readily apparent. The requirements differ depending upon the type of property being pledged, which, under Louisiana law, may be either movable or immovable.\footnote{9} As to movable property—by far the more common subject of pledge today—the Louisiana Civil Code distinguishes between the formalities necessary for pledging corporeal movables, incorporeal movables evidenced by a written instrument, and incorporeal movables not evidenced by a written instrument. Within these subdivisions, there are further distinctions, and some objects of pledge do not clearly fit anywhere.\footnote{10}

Of great significance, in discerning the formal requisites of pledge, is the Louisiana classification of pledge as a form of "real security."\footnote{11} It functions primarily to give the creditor a right to have his debt satisfied out of the property pledged and ahead of other creditors.\footnote{12}

\begin{footnotes}
\item[7] Squillante, supra note 3, at 619.
\item[8] Denis, supra note 2, at 6-7.
\item[9] "There are two kinds of pledge: The pawn. The antichresis." La. Civ. Code art. 3134. "A thing is said to be pawned when a movable thing is given as security; and the antichresis, when the security given consists in immovables." La. Civ. Code art. 3135.
\item[11] Denis, supra note 2, at 1.
\item[12] "The pawn invests the creditor with the right of causing his debt to be satisfied by privilege and in preference to the other creditors of his debtor, out of the product of the movable, corporeal, or incorporeal, which has been thus burdened." La. Civ. Code art. 3157.
\end{footnotes}
This privilege does not exist unless the pledge itself is valid, and the requirements for such validity differ depending upon whose rights are at stake—the parties to the pledge or third persons asserting claims against the pledged property. It thus becomes necessary to distinguish those formalities necessary for the intrinsic validity of the pledge from those necessary to make the pledge effective as to third persons. Unfortunately, this distinction is not always made clear, either by the code or by the cases.

Because of the accessorial nature of pledge, its validity may also have a significant impact on the primary obligation. Under Louisiana Civil Code article 3464, "[p]rescription is interrupted when one acknowledges the right of the person against whom he had commenced to prescribe." Louisiana courts have frequently asserted that a pledge serves as such a constant acknowledgment and thus interrupts prescription of the primary debt.

A determination that a pledge is invalid can, therefore, result in serious repercussions to the pledgee's position: he is left with no preference over other creditors as to the pledged property, and, perhaps worse, the primary debt itself may have prescribed. Compliance with the proper formalities of pledge therefore becomes crucial to the pledgee, as well as the attorney advising him.

Unfortunately, the authority in this area offers little in the way of clear guidance. Discerning which formalities are indeed necessary for validity, both intrinsic and as to third persons, becomes a difficult, often illusory goal. The purpose of this analysis is to sift through the available authority and offer such guidance as exists on the formal requisites of a pledge of movable property.

I. DELIVERY: THE ESSENTIAL ELEMENT

"The symbol of the pledge, in the Roman law, is the fist of the creditor closed on the pledge, denoting that actual possession which all

13. "The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference." La. Civ. Code art. 3183.
16. See Scott v. Corkern, 231 La. 368, 91 So. 2d 569 (1956), for an extended treatment of this subject and an abundant reference to authority in support thereof. Note, however, that the opinion distinguishes between two views of this issue: (1) that the existence of the pledge itself interrupts prescription, and (2) that it is not the contract of pledge alone that interrupts, but rather the detention of the thing pledged (the view espoused in Scott). In either case, a determination that the pledge was invalidly perfected would seem to do serious harm to the argument of "constant acknowledgment."
recognize as linked to the pledge, and without which none can exist.’’17
In Louisiana as well as in Rome, delivery—the actual dispossession of
the pledgor in favor of the pledgee—is the formality central to the
concept of pledge.18 Civil Code article 3152 states that “[i]t is essential
to the contract of pledge that the creditor be put in possession of the
thing given to him in pledge, and consequently that actual delivery of
it be made to him, unless he has possession of it already by some other
right.”19 Even as to the pledge of incorporeal rights—property not
susceptible to actual delivery—a “fictitious and symbolical” delivery is
required.20 A pledgor accomplishes such symbolical delivery by trans-
ferring to the creditor possession of the instrument evidencing the in-
corporeal.21 Only pledges of incorporeal rights not evidenced by a writing
are released from the requirement of delivery.22
As opposed to other security devices in which the creditor’s rights
spring solely from an agreement with the debtor, a pledge cannot be
validly created by mere agreement. The pledgor must additionally dis-
possess himself of the property he is pledging in favor of the pledgee.
This actual delivery is required for two reasons: (1) to secure the rights
of the pledgee by placing the pledged property under his control, and
(2) to protect against fraud by the pledgor.23 Addressing the concern
over fraud by the pledgor, the scholar Denis explains that,

[i]f the thing given in pledge remained in the hands of the
[pledgor] . . . he could pledge it to several persons at the same
time, deceiving them all.

In the emphatic language of Troplong: “By dispossessing him-
self, the debtor announces to third persons who deal with him
that he is impoverished by that much . . . . Where would business
be if things were pledged without delivery! what frauds! what
deceptions! what losses for third persons!”24

The Louisiana Supreme Court has been equally adamant, maintaining
that “[t]he privilege of pledge is subject to unbending conditions. There

18. Lallande v. Ingram, 19 La. Ann. 364 (1867). It should be remembered, however,
that this discussion concerns only the “formalities” of pledge. Thus, a pledge for which
the proper formalities were present, but as to which there was no meeting of the minds
between the pledgor and pledgee, was not valid. Franklin v. Bridges Loan and Inv. Co.,
371 So. 2d 294, 296-97 (La. App. 2d Cir. 1979).
23. Denis, supra note 2, at 79.
24. Id. at 79-80.
must be an actual delivery, in order that those who transact with the pledgor may know that the property is held in pledge .... The possession of the pledgee should be real and effective at all times. It must be apparent and well known."

It becomes critical, then, to understand what delivery entails—what constitutes a dispossession by the pledgor of his property into the hands of the pledgee such that a valid pledge is created. To begin with, the pledge agreement and the dispossession of the pledgor do not have to take place simultaneously. Although the pledge is not valid until the pledgee has possession,

the law does not fix or specify the time when such possession should begin. The pledgor may have had possession before the contract of pledge was entered into and, in that case, the possession continues; or the pledgee may only receive possession some time after the contract and, in that case, the pledge is vivified from the moment of possession."

In addition, the pledgor must dispossess himself of the property voluntarily. The direction of article 3152, that actual delivery be made to the pledgee, does not lend itself to an interpretation that delivery may be accomplished through the involuntary dispossession of the pledgor.

In Steadman v. Action Finance Corporation, Steadman had signed with a finance company an agreement which evidenced an intent to pledge two vehicles and which, in fact, declared that the vehicles had been delivered to the pledgee on the date of the signing. The vehicles had not been delivered, however, and had remained in Steadman's possession. Upon Steadman's default, the finance company took possession of the automobiles. In court, the company argued that the "subsequent passive surrender" of possession by Steadman constituted delivery and thereby perfected the pledge.

The court, however, focused upon the fact that the written agreement purported to be "a present pledge," since it contained a declaration that the vehicles were delivered at the time the agreement was signed. The court noted that no contention had been made that the agreement was a "contract to pledge," contemplating delivery on a later date. Therefore, according to the court, it was a "present pledge," and "since there was no delivery pursuant to the written agreement there was no pledge."
The court was imprecise; there was no valid delivery at any point because of the involuntary nature of the dispossession. A contention that the agreement contemplated delivery at a later date should make no difference. The court itself noted that the "circumstances surrounding the 'taking of possession' by defendant's agents convinces us the taking was unlawful and tortious."\(^{30}\)

Since article 3152 requires that the pledgee be put in possession of the pledged property, the next step must be to determine what constitutes valid possession by the pledgee. Article 3162 states that, as to movable property, a pledge does not become valid until the pledged property "has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties."\(^{31}\) This provision allowing possession by a third party has not proved to be very troublesome, so long as there is a clear understanding by all the parties that the third party is holding the property for the pledgee and that the pledgor himself has been dispossessed of the property.

In *Succession of Lanaux*,\(^{32}\) the Louisiana Supreme Court found that a third party arrangement lacked such a clear understanding. With the knowledge of his creditors, the pledgor placed packages of promissory notes to various creditors, along with the evidence of pledges securing each, in his own bank box and instructed his clerk to deliver the packages to his creditors. The court held that there was insufficient delivery, asserting that,

\[
\text{[w]hen the pledge is consummated by delivery to a third person to hold for the creditor, it is the natural result that a liability at once arises between the third person thus selected and the creditor. No such liability, in this case existed . . . .}
\]

Placed in the debtor's bank box, deposited and held as his property, the securities remained untouched until his death . . . . There was clearly no delivery of the securities; none to the creditor; none to a third person to hold for [the creditor] . . . . The pledge was inchoate—a delivery proposed, but never accomplished.\(^{33}\)

Since the clerk never had possession of the securities as agent for the pledgee, but instead held them for the pledgor, the pledgor had never dispossessed himself of the property.

*Succession of Bier*\(^{34}\) involved a complicated third party arrangement between a pledgor and three banks. Having already pledged certain

\(^{30}\) Id.


\(^{32}\) 46 La. Ann. 1036, 15 So. 708 (1894).

\(^{33}\) Id. at 1051-52, 15 So. at 712-13 (emphasis added).

\(^{34}\) 145 La. 722, 82 So. 868 (1919).
mortgage notes to one bank, the pledgor pledged the same mortgage notes to a second bank, subject to the rights of the first bank. This second bank transmitted the pledge document to the first bank, who took cognizance of the secondary pledge, retained a copy of the document, and returned the original to the bank. Eventually the mortgage notes were sold to a third bank who took the notes with the secondary pledge attached. At trial, the third bank contended that the secondary pledge was invalid, since the mortgage notes were never actually delivered to the second bank, and that the pledge remained in the hands of the first and, by then, the third bank. Since the pledgor was certainly dispossessed of the mortgage notes, the issue was whether there was a clear understanding by all parties as to the third party arrangement. The court found that there was, noting that “the understanding of all parties evidently was that subsidiarily to its own pledge the Commercial Bank was to hold the note subject to the pledge of the Citizens’ Bank; that when the Calcasieu Bank succeeded to the Commercial Bank as holder of the pledged note, it did so on the same conditions.”

The court explained further that express terms were not necessary, thus, a tacit agreement as to the third party arrangement was sufficient.

In Jacquet v. His Creditors, the third party arrangement was more intriguing. There, the third party, who held a pledged piece of machinery as agent for the pledgee, was an employee of the pledgor. As ticklish as this arrangement might seem, the court apparently had no trouble in finding a valid delivery, emphasizing that the third party exercised control over the property, took care of it, cleaned it, and was paid for these services. The court noted that the fact that the pledgor himself was allowed to use the machinery did not derogate from the validity of the pledge.

Jacquet has been described as a “regrettable . . . situation” in which the requirement of delivery is squeezed dry of any significance in order to make the institution of pledge fit a given fact situation. And, according to Denis, Jacquet represents a clear “departure from the principle so well established, that the possession of the pledgee must not be uncertain or equivocal.” It is certainly conceivable that, since Louisiana had no chattel mortgage at the time of Jacquet, the court felt induced to stretch the doctrine of pledge. However, the principles

35. Id. at 726, 82 So. at 869.
37. Id. at 866. As a basis for this reasoning, the court cited Conger v. City of New Orleans, 32 La. Ann. 1250 (1880), discussed infra in text accompanying notes 45-47.
39. Denis, supra note 2, at 118.
40. Dainow, supra note 38, at 51.
espoused in *Jacquet* are valid. Since the third party was possessing the machinery for the pledgee and not the pledgor, the pledgor had been validly dispossessed of the property. It is the appearance that the pledgor is still in control of the property which evokes criticism.

The fact that the Louisiana Civil Code allows for possession of the pledged property by a third party demonstrates that the possession by the pledgee required under article 3152 is more specifically the "right of possession" rather than the actual physical detention of the pledged property. The courts in *Lanaux*, *Bier*, and *Jacquet* made their determinations as to whether delivery to a third party created a valid pledge by looking to see if the third party was obligated to the pledgee as his agent. If the third party was so obligated, the pledgee thus had the "right of possession" of the property even though he did not himself physically possess it.

This premise, that the "right of possession" is determinative, has led to an extension of the rule requiring actual possession by the pledgee, or a third party obligated to the pledgee, to allow "the pledgor [sic] himself to be, to a certain extent, for a special purpose, the possessor or detainer *ad hoc* of the pledge for account of the pledgee." Thus, while the pledgor must initially dispossess himself of the pledged property in order to create a valid pledge, a subsequent surrender of possession by the pledgee does not necessarily extinguish the pledge. While retaining his "right of possession," the pledgee may surrender physical detention of the property to the pledgor without invalidating the pledge. However, such a surrender may raise a presumption, rebuttable by the pledgee, that he has remitted the pledge.

Article 1889, in the obligations section of the Civil Code, states that "[a]n obligee's voluntary surrender to the obligor of the instrument evidencing the obligation gives rise to a presumption that the obligee intended to remit the debt." Article 1891 provides that "[r]elease of a real security given for performance of the obligation does not give rise to a presumption of remission of debt." Reading these rules together, it may be implied that the return of the pledged property to the pledgor results in a presumption that the pledgee has remitted the pledge, although not the primary obligation thereby secured.

The initial burden of proof is thus borne by the pledgee, who must establish that a valid pledge was created—that a valid agreement was made between the pledgor and pledgee and that the pledge was perfected.

41. Denis, supra note 2, at 114.
42. There is no authority in Louisiana for the proposition that the requirement of an initial dispossession by the pledgor has been dispensed with.
44. La. Civ. Code art. 1891.
by delivery. The burden then shifts to the pledgor to prove the extinction of the pledge. His proof of a voluntary surrender of the thing pledged by the pledgee gives rise to the presumption that the pledgee has remitted the pledge. At that point, the burden of proof shifts back to the pledgee to establish that there was not a remission, because the pledgor was possessing the property as his agent.

Since the pledged stock had been sold and the primary obligation had long since prescribed, the court's dicta in the century-old case of *Conger v. City of New Orleans*, in support of possession by the pledgor, has been uniformly cited by courts presented with similar issues. The oft-quoted passage begins with the general rule that delivery is essential to pledge, but continues with this assertion:

> 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.

In *Citizens' Bank v. Janin*, the alleged pledgor, Janin, was in possession of the pledged property. However, since he had never been out of possession, the question was not so much whether Janin was possessing it for the pledgee (although the parties had in fact agreed to such an agency relationship), but whether there had ever been an actual delivery of the property, and thus a valid pledge. Janin, the owner of the steamboat in Louisiana, had executed a chattel mortgage on the boat in New York, but had remained in possession of the boat as agent for the pledgee under an agreement. Since chattel mortgages were not recognized in Louisiana, the pledgee bank contended that the transaction contained all of the elements of a valid pledge under Louisiana law, specifically arguing that it had the required possession of the boat under the *Conger* theory of ad hoc possession by the pledgor for the pledgee.

The court held, however, that a valid pledge had not been created, since there had not been an unequivocal dispossession by Janin in favor of the bank. The court implied that in some instances the pledgor's

---

45. 32 La. Ann. 1250 (1880).
47. 32 La. Ann. at 1252.
49. Id. at 1004, 15 So. at 473.
use of the pledged property would not disturb the pledgee's possession. Under the facts of *Janin*, however, the court did not have to respond to that issue directly.

More recently, in *Canal-Commercial Trust and Savings Bank v. New Orleans T. and M. Ry. Co.*, the Louisiana Supreme Court determined that a pledge of a bill of lading was not annulled, and that the creditor did not lose his preference over the pledged property, when the pledgee temporarily returned the bill of lading to the pledgor on a trust receipt. Thus, the pledgee did not forfeit the pledge to other creditors; he took only the risk that the pledgor would act in bad faith.  

In *Scott v. Corkern*, the Louisiana Supreme Court again determined that possession by the pledgor did not destroy the pledge; however, the opinion has been much criticized. In that case, a man had pledged a life insurance policy to secure a loan in order to attend medical school. At the time of the trial, both pledgor and pledgee had died; thus the suit was between the relatives of each. The problem addressed by the court was that, although the pledged policy had originally been placed in the hands of a third party, it was found with the pledgor's belongings. The pledgee's relatives claimed that the pledgor had possessed the policy precarious as trustee for the pledgee. The court agreed, explaining that

> it is manifest that the mere circumstance that the pledged insurance policy was found in the possession of the pledgor does not justify the conclusion that the pledge was extinguished and, in the absence of any evidence showing that the parties intended that the pledge be terminated or even that the pledgor considered it terminated, it will be presumed that the possession of the pledgor was precarious or as an agent pro hac vice.

*Scott* has been criticized as an indulgence by the court and a “move in the wrong direction. . . . Although . . . [the pledgor] did no act inconsistent with the pledge agreement, there was nothing to show that he could not have done so. There was nothing to characterize his tenure as precarious; there was nothing to show conclusively that it was for the account of the creditor.” It must also be noted that *Scott* involved no third party creditors. Thus, it is arguable that the court looked more

50. 161 La. 1051, 109 So. 834 (1926).
51. Id. at 1065, 109 So. at 839. Thus, if the pledgor sells the pledged property to a good faith buyer, the pledgee loses the pledged property, but has a cause of action against the pledgor.
52. 231 La. 368, 91 So. 2d 569 (1956).
53. Id. at 378, 91 So. 2d at 572.
54. Dainow, supra note 38, at 50-51.
to the intent of the parties and less to the formalities, so often relied upon to protect innocent third parties.55

In actuality, however, *Scott* does not represent a move in any direction, but rather a honing in on, and a fine tuning of, certain aspects of the general premise under analysis here. Since a presumption arises that the pledge has been abandoned when the pledged property is found in the possession of the pledgor, it becomes very significant in *Scott* that the pledged life insurance policy had, at first, been delivered to a third party agent, and that it was not clear how the policy came back into the pledgor's possession or whether the pledgee had any knowledge of the repossession by the pledgor. Such a scenario necessitates a distinction between a voluntary surrender of the property by the pledgee into the pledgor's possession, which should more persuasively raise the presumption that the pledgee has remitted the pledge, and an involuntary loss of physical custody to the pledgor.56 *Scott* involved what was apparently an involuntary loss of physical custody; thus, the pledgee took no action which evidenced a relinquishment of her claim and the presumption that the pledge is valid should remain intact. This is exactly what the court in *Scott* did in presuming that the possession of the pledgor was as an agent for the pledgee.

Though the court in *Kreppein v. Demarest*57 criticized the *Scott* opinion to some degree, the two cases are quite compatible. In *Kreppein*, the issue was whether a note which had been transferred from the original pledgee to another pledgee had prescribed. The court's determination of the issue depended on whether there was in existence a valid pledge, which would have interrupted prescription on the note. The problem was that there was no evidence that anything had ever been actually delivered to the original pledgee, much less to the current holder of the note. Thus, the pledgee failed to carry his burden of proof. Further, there was no agreement between the parties to the litigation as to what property, in fact, had been pledged.

The court reasserted the view expressed in *Conger v. City of New Orleans*58 and *Scott v. Corkern*,59 that the pledgor may possess precar-

---

55. Most troubling in *Scott* is footnote 2, in which the court asserted that the delivery requirement, set forth in article 3162 as being necessary in order for the pledgee's privilege to exist over other creditors, is not applicable as between the parties to the pledge. The court did not mention article 3152, which states that delivery is "essential to the contract of pledge," and the implication seems to be that delivery is not necessary between the parties. At least two scholars have expressed disdain for this assertion, noting a lack of direct authority for the view expressed in the footnote. Dainow, supra note 35, at 51; Slovenko, Of Pledge, 33 Tulane L. Rev. 59, 74 (1958).
56. La. Civ. Code art. 3173 states: "The debtor who takes away the pledge without the creditor's consent, commits a sort of theft."
57. 120 So. 2d 301 (La. App. Orl. 1960).
59. 231 La. 368, 91 So. 2d 569 (1956).
iously for the pledgee, but did not have to address that issue since there was no initial delivery of pledged property to the pledgee. In finding that there was not a valid pledge, the court expressed skepticism over the fact that the pledgee knew so little about the pledged property, noting that the pledgee

was not able to show exactly what . . . [the pledged property] was nor whether it remained in the possession of the original pledgee. He admitted that the pledged article had never been in his actual possession and he could not show where it was, nor in what capacity it was held, if in fact it continued to exist.60

Thus, in all of these cases the initial and most important question in determining whether a valid pledge has been created is whether the pledgor has actually dispossessed himself of the property. It is only then, when it has been established that there has been an actual dispossessions of the pledged property in favor of the pledgee or third party agent, that the analysis moves to the next issue—whether the pledgee has maintained the possession. On this point, it must be remembered that such possession should be thought of as a right or power to possess, not physical detention.

II. DEVELOPMENT OF LOUISIANA CIVIL CODE ARTICLE 3158

While article 3152 sets out the basic delivery requirement for all pledges, it is article 3158 which has developed into a notorious “junk drawer” for accumulated legislative pronouncements as to the formal requirements for the pledge of movables.61 Since the remainder of this

60. Kreppein, 120 So. 2d at 306.
61. La. Civ. Code art. 3158 reads as follows:

But this privilege shall take place against third persons only in case the pledge is proved by some written instrument, in which shall be stated the amount of the debt intended to be secured thereby, and the species and nature of the thing given in pledge; or the description of the thing pledged may be contained in a list or statement annexed to the instrument of pledge and giving its number, weight or descriptive marks.

When a debtor wishes to pledge promissory notes, bills of exchange, bills of lading, stocks, bonds, policies of life insurance, or written obligations of any kind, he shall deliver to the creditor the notes, bills of exchange, bills of lading, stocks, bonds, policies of life insurance, or other written obligations, so pledged, and such pledge so made, except as hereinafter provided with regard to life insurance policies, shall without further formalities be valid as well against third persons as against the pledger thereof, if made in good faith, provided that where the pledge of instruments not negotiable, the debtor must be notified thereof, it being understood that no notification is required in the case of the pledge of certificates of corporation stock. All pledges may be made by private writing of any kind if only the intention to pledge be shown in writing, but
comment will attempt to untangle the many rules crowded into article 3158, a brief history of its development should provide a useful backdrop for the analysis to follow.

First enacted in 1804 in the Code Napoleon, the provision elaborated on the pledgee's privilege over other creditors, described in the article directly preceding it, and prescribed the formalities necessary for the creation of such a privilege as follows:

This privilege takes place only in case there is a public act or an act under private signature, duly registered, mentioning the amount of the debt, as well as the species and nature of the

all pledges, except of a life insurance policy in favor of the insurer, must be accompanied by actual delivery. The pledge of a life insurance policy must also be evidenced by a written assignment thereof as security to the pledgee and by delivery of the pledge or assignment to the insurer and, unless the beneficiary thereof may be changed upon the sole request of the insured, or unless pledge or assignment without the consent of the beneficiary be specifically provided for in the policy, must be accompanied by the consent of any named beneficiary who is not the insured or his estate; it is further provided that whenever a pledge of any instrument or item of the kind listed in this article is made to secure a particular loan or debt, or to secure advances to be made up to a certain amount, and, if so desired or provided, to secure any other obligations or liabilities of the pledger or the pledgee, then existing or thereafter arising, up to the limit of the pledge, and the pledged instrument or item remains and has remained in the hands of the pledgee, the instrument or item may remain in pledge to the pledgee or, without withdrawal from the hands of the pledgee, the instrument or item may remain in pledge to the pledgee or, without withdrawal from the hands of the pledgee, be repledged to the pledgee to secure at any time any renewal or renewals of the original loan or any part thereof or any new or additional loans, even though the original loan has been reduced or paid, up to the total limit which it was agreed should be secured by the pledge, and, if so desired or provided, to secure any other obligations or liabilities of the pledger to the pledgee, then existing or thereafter arising, up to the limit of the pledge, without any added notification or other formality, and the pledge shall be valid as well against third persons as against the pledger thereof, it made in good faith; and such renewals, additional loans and advances or other obligations or liabilities shall be secured by the collateral to the same extent as if they came into existence when the instrument or item was originally pledged and the pledge was made to secure them; the delivery of property on deposit in a warehouse, cotton press, or on storage with a third person, or represented by a bill of lading, shall pass to the pledgee by the mere delivery of the warehouse receipt, cotton press receipt, bill of lading, or storage receipt, showing the number, quantity or weight of the thing pledged; and such pledge so made, without further formalities, shall be valid as well against third persons as against the pledger thereof, if made in good faith. Such receipts shall be valid and binding in the order of time in which they are issued for the number, quantity, or weight of the things pledged, if there should not be enough to meet all receipts so issued. Nothing herein contained shall be construed to repeal any part of Title 9, Sections 4301 to 4382, both inclusive of the Louisiana Revised Statutes of 1950.
thing given in pledge, or having a statement annexed thereto of its quality, weight and measure.  

Comparing this language to the current article 3158, it is obvious that this early provision is the direct antecedent of what is now paragraph one.

The wording of this original provision remained basically unchanged until 1900, when it was amended to contain its present language. Additional provisions were added in 1952 and subsequently. Instead of the previous requirement of a public act or a private act plus registration, the amended language, now paragraph one of article 3158, requires only "some written instrument." Just as before, this written instrument must include the amount of the debt and a description of the property being pledged.

The remainder of article 3158 originated separately from what is now the first paragraph. In Act No. 25 of 1852, forty-eight years after the antecedent provision to the first paragraph had been enacted, the legislature set out formal requirements for the pledge of various incorporeals—"promissory notes, bills of exchange, stocks, [and] obligations or claims upon other persons"—stating that a pledge of these incorporeals is made valid against the pledgor and against third parties simply by delivery to the pledgee of the "notes, bills of exchange, certificates of stock, or other evidences of the claims or rights." The Act also provides that if the property pledged is non-negotiable, the debtor must be given notice, and that delivery to a pledgee of a warehouse receipt creates a valid pledge "as well against third persons as against the pledgors thereof . . . ." The Act also provides that if the property pledged is non-negotiable, the debtor must be given notice, and that delivery to a pledgee of a warehouse receipt creates a valid pledge "as well against third persons as against the pledgors thereof . . . ."

Two provisions in the Act do not expressly limit their applicability to the pledge of incorporeals. One of these provisions is set out as section 4 of the Act and authorizes the non-judicial sale of the pledged property upon agreement by the parties. This section is the only section of the Act not included as part of article 3158.

The other provision not expressly limited to incorporeals deals with formalities of pledge and is found in section 2 of the Act. It provides that "all pledges of moveable property may be made by private writing, accompanied by actual delivery. . . ." The rest of section 2 deals with the pledge of incorporeals. Because of its position in the Act, in the midst of provisions regarding incorporeals, and because it was placed in paragraph two of article 3158, still in the midst of provisions expressly

62. Code Napoleon 1804, art. 2074, par.1.
64. 1852 La. Acts No. 25.
65. Id.
66. Id.
applicable to incorporeals, there is a sound basis for arguing that this provision was intended to apply solely to the pledge of incorporeals.

Act No. 287 of 1855 enacted virtually identical language to that of the 1852 Act, but added a section which repealed "all laws contrary to the provisions of this Act, and all laws upon the same subject-matter, except what is contained in the Civil Code and Code of Practice". Just what the legislature intended to accomplish with this provision is not readily apparent. In Act No. 138 of 1866, the same provisions were again enacted, but this time with a different repealing section, proclaiming, "[t]hat all laws and parts of laws contrary to or conflicting with the provisions of this Act, be and the same are hereby repealed."

Quite arguably, the provision which developed into what is now the first paragraph of article 3158, was itself in conflict with the provisions of the 1866 Act. In requiring formalities in addition to delivery, in order that the pledgee's privilege over other creditors be valid, it contradicted section 1, which provided that delivery of the instrument evidencing an incorporeal claim is the only formality required, both as to intrinsic validity and validity against third parties.

Legislative enactments and revisions of article 3158 subsequent to the 1866 Act have not contained a similar repealing provision. The failure to include the repealing provision does not, however, negate the provision of 1866 and thereby erase its effect. Any law which was repealed as contradictory in 1866 should therefore remain repealed unless reenacted specifically to undo the work of the repealing provision.

Since 1866, the first paragraph of article 3158 has been reenacted twice, in 1900 and 1952. Neither amendment, however, contained any specific instruction that the article should be applied to the pledge of incorporeals as well as corporeals. Under the argument that it was contradictory to the 1866 Act and thereby repealed, insofar as its applicability to the pledge of incorporeals, the additional formalities required by the first paragraph of article 3158 should not be applicable to the pledge of incorporeals.

Finally, in 1952, Act No. 290 added specific formal requirements regarding the pledge of life insurance policies, corporation stock, and property on deposit in a warehouse, cotton press, or in storage with a third person, plus an additional provision dealing with the repledge of instruments.

From the history of article 3158, it is apparent that the two paragraphs of the current article originated and developed separately, in

67. 1855 La. Acts No. 287 (emphasis added).
68. 1866 La. Acts No. 138 (emphasis added).
70. Id.
spite of the fact that they are situated together in one article. This mutually exclusive development, together with the fact that the 1866 Act repealed conflicting laws, provides persuasive support for arguing that the two paragraphs of article 3158 are in fact two separate sets of rules; paragraph one addresses the pledge of corporeals, and paragraph two concerns solely the pledge of incorporeals.

III. THE FORMAL REQUISITES FOR PLEDGE OF CORPOREAL MOVABLES

The formal requisites necessary for a valid pledge of a corporeal movable are set forth quite clearly in two Civil Code articles. Article 3152 sets forth the requirement of delivery, the minimal requirement, while paragraph 1 of article 3158 provides further that the pledgee's "privilege shall take place against third persons only in case the pledge is proved by some written instrument . . . ." The written instrument must include: (1) the amount of the debt to be secured, and (2) a description of the property being pledged, although it is likewise acceptable for the description to "be contained in a list or statement annexed to the instrument of pledge and giving its number, weight or descriptive marks." Under these two provisions, it seems quite evident that only delivery is required for intrinsic validity; an oral pledge of corporeals is sufficient. For validity against third parties, however, there must be delivery plus a written agreement evidencing the agreement.

A possible source of confusion lies within the second paragraph of article 3158 which instructs that "all pledges may be made by private writing of any kind if only the intention to pledge be shown in writing, but all pledges . . . must be accompanied by actual delivery." In light of this provision, the earlier conclusion that an oral pledge plus delivery is sufficient for intrinsic validity is cast in some doubt. As discussed in the previous section, however, arguably none of the provisions in the second paragraph of article 3158 are intended to apply to the pledge of corporeals. In any event, the instruction is only that pledges may be made by private writing, not that they must be. In fact, the cases on the subject of the pledge of corporeals espouse the earlier conclusion, that delivery alone is sufficient for intrinsic validity, while delivery plus a written agreement is necessary only for validity against third parties.

In *Sambola v. Fandison*, the court reviewed the plight of the peddler, Sambola, who persuaded a New Orleans merchant named Fan-
Sambola argued that there was no valid pledge, since there was (1) no written instrument evidencing the pledge, (2) no definite amount of debt secured by the pledge, and (3) no delivery of the truck to Fandison. The court responded that the requirements of a written instrument and a definite amount of debt secured by the pledge were not applicable in this case, since no third parties were challenging the validity of the pledge. The court explained that the "portion of Civ. Code Art. 3158, in which reference is made to the requirement of proof 'by some written instrument' . . . shows clearly that proof by written instrument is necessary only where it is intended that the pledge 'shall take place against third persons."" Since the requirement that there be a definite amount of debt secured comes from article 3158, the court concluded that the requirement applies only to validity against third parties. The court did agree that delivery of the truck was essential to the validity of the pledge, even between the parties, but found that there had been such a delivery, since Sambola's truck had been left with Sambola's brother-in-law, from whom Fandison was to, and in fact did, obtain it.

Another case, *Madding v. Hoover*, involved the pledge of two diamond earrings as security for a gambling debt. In particular, the court confronted the problem of determining who are "third persons" under the first paragraph of article 3158. An ex-wife of the pledgor, the former owner of the earrings, argued that the pledge was not valid against her, since she was a third party to the pledge transaction and the pledge was not in writing. The court described how the ex-wife had written for her former husband letters which discussed the whole pledge transaction, and how she had participated in events surrounding the pledge. The opinion concluded that her "conduct and actions . . . were such as to identify her as a participant in the transaction and remove her from the category of a 'third person' as contemplated by the above

75. Id. at 278. This position has been reaffirmed in *State v. Ackal*, 290 So. 2d 882 (La. 1974); *Citizens Bank and Trust Co. v. Consolidated Terminal Warehouse, Inc.*, 460 So. 2d 663 (La. App. 1st Cir. 1984); and *Davis v. Davis*, 50 So. 2d 647 (La. App. 2d Cir. 1951).

76. 178 So. at 278-79.

77. 44 So. 2d 184 (La. App. 2d Cir. 1950).
By ratifying the pledge, she became a party to the agreement.\textsuperscript{79}

In dicta, the court also provided some insight into what the requirement of a written instrument entails. Explaining that article 3158 does not require a formal written act of pledge, but merely a written instrument stating the amount of the debt and a description of the property pledged, the court noted that there was in fact a written instrument.\textsuperscript{80} According to the court, the letters written by the ex-wife were sufficient.

\section*{IV. The Formal Requisites for Pledge of Incorporeal Movables}

In stark contrast to the straightforward and uniform requirements for the pledge of corporeal movables, the formal requirements for pledge of incorporeal movables become discernible only after much shifting and sorting of rules, scattered like puzzle pieces in nooks and crannies of the Civil Code and jurisprudence.

A starting point exists, however, in that the Civil Code and its ancillaries approach the requirements for pledge of incorporeal movables by treating separately those incorporeal movables which are evidenced by a written instrument from those which are not.

\subsection*{A. Incorporeal Movables Evidenced by a Written Instrument}

The second paragraph of article 3158 sets forth certain formalities required for the pledges of incorporeal movables evidenced by a written instrument:

\begin{quote}
When a debtor wishes to pledge promissory notes, bills of exchange, bills of lading, stocks, bonds, policies of life insurance, or written obligations of any kind, \textit{he shall deliver} to the creditor the notes, bills of exchange, bills of lading, stocks, bonds, policies of life insurance, or other written obligations, so pledged, and such pledge so made, \ldots \textit{shall without further formalities be valid as well against third persons as against the pledger thereof, if made in good faith, provided that where the pledge of instruments not negotiable, the debtor must be notified thereof} \ldots \textsuperscript{81}
\end{quote}

\textsuperscript{78} Id. at 188.
\textsuperscript{79} "One person may pledge the property of another, provided it be with the express or tacit consent of the owner." La. Civ. Code art. 3145. "But this tacit consent must be inferred from circumstances, so strong as to have [leave] no doubt of the owner's intention; as if he was present at the making of the contract, or if he himself delivered to the creditor the thing pawned." La. Civ. Code art. 3146 (brackets in original).
\textsuperscript{80} 44 So. 2d at 188.
\textsuperscript{81} La. Civ. Code art. 3158 para. 2 (emphasis added).
This passage reflects the differentiation in article 3158, of the requirements for pledge of incorporeals evidenced by a written instrument, into those necessary for pledging a negotiable, as opposed to a non-negotiable, instrument. After establishing this basic division, the article makes some exceptions for the pledge of life insurance policies and corporate stock and offers further elaboration on the pledge of bills of lading and warehouse receipts. A discussion of the requirements for pledging incorporeals evidenced by a written instrument thus necessarily requires a further subdivision of the topic, into the categories of (1) negotiable instruments, (2) non-negotiable instruments, and (3) special situations.

There are, however, three issues concerning the pledge of an incorporeal evidenced by a written instrument which require analysis regardless of which category the pledged instrument falls into, and thus should be addressed at the outset. The first issue is whether the first paragraph of article 3158, which requires a written instrument stating the amount of the debt and a description of the pledged property in order for the pledge to be valid against third parties, is applicable to the pledge of incorporeals evidenced by a written instrument. The second paragraph of the article states that upon delivery of the instrument, the pledge is "valid as well against third persons as against the pledger thereof . . . ."

Additional requirements are prescribed for non-negotiable instruments and life insurance policies, but there is no express incorporation of the requirements set out in the first paragraph. It has been argued, however, that the first paragraph of article 3158 is applicable to pledges of incorporeals evidenced by a writing.

In Wallace v. Fidelity National Bank, the trial court espoused the position that the first paragraph is applicable to such pledges. It determined that the pledge of a promissory note was invalid as to third parties, and thus would not prime other creditors, since the delivery of the note was not accomplished by a written pledge instrument. The first circuit disagreed, asserting that a fair reading of the article leads to the conclusion that the first paragraph establishes the general rule that a contract of pledge of movable property, in order to affect third persons, must be by written act containing certain required information. The second paragraph of the Article makes exceptions to this general rule, . . . whereby only delivery of excepted object is required to perfect a pledge valid against the world.

---

83. 219 So. 2d 342 (La. App. 1st Cir.), writs denied, 253 La. 1083, 221 So. 2d 517 (1969).
84. Id. at 344.
In *Citizens Bank and Trust Co. v. Consolidated Terminal Warehouse, Inc.*, however, the same court took the other position. The issue was the validity of a pledge of invoices, and the parties were in disagreement over how to label such property—as incorporeals evidenced by a written instrument or as incorporeals not evidenced by a written instrument. The court asserted that, regardless of which label was applied, the pledge was invalid as to third parties unless there was written evidence of the pledge, stating the amount of the debt and the nature of the thing pledged, under article 3158. Thus, there is no clear jurisprudential guidance as to whether the requirement of a written instrument in paragraph one is applicable to the types of pledges specifically addressed in paragraph two.

The earlier discussion on the development of article 3158 becomes relevant here as a strong basis for deciding the issue in favor of non-applicability of the first paragraph. Generally overlooked by the courts are two helpful observations derived from a study of the article's history: (1) the two paragraphs were enacted separately and developed separately; and (2) since paragraph one was contradictory to Act No. 138 of 1866, which prescribed rules for pledging incorporeals evidenced by a written instrument, the Act's repealing provision quite arguably had the effect of making paragraph one inapplicable to the pledge of incorporeals evidenced by a written instrument. The result flowing from these observations is that paragraphs one and two of article 3158 have distinct applications—the first deals with corporeals, the second with incorporeals evidenced by a written instrument.

The second issue regards the meaning of the provision in the second paragraph of article 3158 that “[a]ll pledges may be made by private writing of any kind if only the intention of pledge be shown in writing, but all pledges, . . . must be accompanied by actual delivery.” Due to its position in the second paragraph, it seems clear that the provision applies to the pledge of an incorporeal evidenced by a written instrument. What is not so clear is whether this provision implies that a written instrument evidencing the parties' intent to pledge—as distinguished from the written instrument evidencing the pledged incorporeal which is delivered to the pledgee—is mandatory for the intrinsic validity of such pledges, in spite of the use of the word “may” in the provisions.

While the provision is ambiguous, the argument can be made that the provision is completely superfluous unless it implies a requirement of an additional written instrument evidencing the pledge. An implication that a private writing is merely optional only restates, and at the same

85. 460 So. 2d 663 (La. App. 1st Cir. 1984).
86. Id. at 669.
time confuses, the earlier statement in paragraph two that delivery of the instrument evidencing the incorporeal is the sole requirement.

A stronger argument may be made for the position that the provision suggests only an optional formality for the pledge of an incorporeal evidenced by a writing. As was pointed out earlier, paragraph two of article 3158 includes another provision, preceding the one at issue, which states that delivery of the written instrument is the only requirement (plus notice to the debtor in the case of non-negotiable instruments), and that the pledge "shall without further formalities be valid." These two provisions were enacted as sections 1 and 2 in Act No. 25 of 1852. Since a mandatory requirement of a written instrument evidencing the intent to pledge contradicts the preceding statement that delivery is the sole requirement, the reasonable interpretation seems to be that the provision expresses a merely optional formality.

The language and phrasing of the provision itself lends support to this interpretation. The first part of the provision says that there may be a private writing, while the last part says that the pledge must be accompanied by actual delivery. The resulting implication is that actual delivery is the key element; a written instrument may be used to evidence the agreement so long as it shows the parties' intent to pledge, but the writing itself does not create a valid pledge.

The jurisprudence reflects clear support of this latter view, that a written instrument is not mandatory for the intrinsic validity of a pledge of an incorporeal evidenced by a written instrument, although the courts generally only cite article 3158 for this conclusion without offering any further reasoning.

In American Bank and Trust Co. v. Straughan, for example, the court asserted:

It is clear that when a debtor wishes to pledge written obligations of any kind to secure an indebtedness, the debtor perfects the pledge by delivery to the creditor of the obligations pledged to secure the indebtedness, and such pledge so made is valid and binding without further formality, Louisiana Civil Code Article 3158; it is not necessary to the efficacy of a contract of pledge that it be in writing....

---

88. Id.
89. 1852 La. Acts No. 25.
90. 248 So. 2d 73 (La. App. 1st Cir. 1971), writ denied, 259 La. 746, 252 So. 2d 450 (1971).
91. Id. at 77. See also, Citizens Bank and Trust Co. v. Consolidated Terminal Warehouse, 460 So. 2d 663, 669 (La. App. 1st Cir. 1985); Plumbing Supply House, Inc. v. Century Nat'l Bank, 440 So. 2d 173, 176 (La. App. 4th Cir. 1983), writs denied, 444 So. 2d 1226 (La. 1984); Mardis v. Hollander, 426 So. 2d 392, 395 (La. App. 2d Cir.), writs denied, 430 So. 2d 93 (La. 1983); and Acadiana Bank v. Foreman, 343 So. 2d 1138, 1141 (La. App. 3d Cir.), aff'd, 352 So. 2d 674 (La. 1977).
The third issue springs from the language contained in a Civil Code article that is closely related to article 3158. Article 3156 states that "when a debtor wishes to pawn a claim on another person, he must make a transfer of it in the act of pledge, and deliver to the creditor to whom it is transferred the note or instrument which proves its existence." It seems arguable that the emphasized language implies that a written act of pledge is required; the jurisprudence, however, does not indicate that the courts have contemplated such an argument.

The opposing argument would again be that the implication of such a requirement is contradictory to the clear language of article 3158 which states that delivery is the sole requirement for the pledge of negotiable instruments. Also, since article 3156 contained the emphasized language in 1866, when Act No. 138 repealed the articles in conflict with its provisions (which included the provision that delivery is the sole requirement), the contention that a written act of pledge is required under article 3156 is greatly weakened.

These three issues—the applicability of paragraph one of article 3158 to the pledge of an incorporeal evidenced by a written instrument, the interpretation of the provision in the second paragraph of article 3158 regarding a private writing, and the implication from article 3156 that a written act of pledge is necessary when pledging an obligation—lurk as potential "flies in the ointment" when addressing the formal requirements for the pledge of an incorporeal evidenced by a written instrument. With this warning, the analysis may now move to a discussion of the specific requirements prescribed by the second paragraph of article 3158 and related articles for the pledge of negotiable instruments, non-negotiable instruments, and other special cases.

1. Negotiable Instruments

Under article 3158, a pledge of an incorporeal evidenced by a written instrument is validly created by the delivery of the instrument to the pledgee, "and such pledge so made . . . shall without further formalities be valid as well against third persons, as against the pledger thereof . . . provided that where the pledge of instruments not negotiable, the debtor must be notified thereof . . . ." Thus, after subtracting the additional requirement for non-negotiable instruments, it seems apparent from the language of this provision that one may validly pledge negotiable instruments simply by delivering the instruments to the pledgee. Such delivery creates not only the intrinsic validity of the pledge but its validity against third persons as well.

The jurisprudence concerning the pledge of negotiable instruments supports this conclusion. In *Plumbing Supply House, Inc. v. Century National Bank*, only the intrinsic validity of the pledge was at issue, since no third parties were involved. The case involved the alleged pledge of a home by way of a ne varietur collateral mortgage bearer note. The Girards, who owned the home and were the alleged pledgors of it, contended that the pledge was invalid since Mr. Girard had not signed the hand note which explicitly pledged their house as security.

The court concluded that the absence of Mr. Girard's signature was not determinative, asserting that

> [a]s to the collateral pledge agreement we note that while this document may be evidence of an intent to pledge it is not necessary to perfect a pledge of the type involved in this case. The pledge here was of a ne varietur collateral mortgage note in bearer form. To pledge such a negotiable instrument no written agreement or other formality beyond delivery to the pledge is required.

The court noted further that, while an intent to pledge must be shown in order that the pledge be complete, such intent does not have to be evidenced in a writing; it can be inferred from the circumstances.

In *Wallace v. Fidelity National Bank*, the issue was the validity of the pledge as to other creditors. As discussed earlier, the pledge of a promissory note had not been accompanied by a written pledge instrument and the contention addressed by the court was that this lack of a written instrument destroyed the effectiveness of the pledge as to third persons. The court disagreed with this contention, asserting that delivery is the only formality required to perfect a pledge of a negotiable instrument.

Civil Code article 3156, already discussed for its implication that a written act of pledge is required for the pledge of an incorporeal evidenced by a writing, provides further insight into the pledge of negotiable instruments by way of its history. At one time, article 3156 contained additional words at the end: “... and must indorse it if it be negotiable.” These words were excluded, however, when the article was amended in 1981. As a result of this amendment, it now seems quite

---

95. Id. at 176. See also, *Mardis*, 426 So. 2d at 395; *American Bank and Trust Co. v. Straughan*, 248 So. 2d 73, 77 (La. App. 1st Cir. 1971); and *Foreman*, 343 So. 2d at 1141.
96. 219 So. 2d 342 (La. App. 1st Cir.), writs denied, 253 La. 1083, 221 So. 2d 517 (1969).
97. Id. at 344.
apparent that articles 3158 and 3156 require no endorsement, even for "order" paper, to perfect a valid pledge. Delivery is the sole requirement. One writer advises that "as a practical matter, a pledgee should insist upon such an endorsement so that he will have the right to enforce the pledge if it becomes due prior to the underlying obligation or if there is a default in the underlying obligation." 99 In fact, a pledgee has a statutory right to force the pledgor to endorse the pledge under Louisiana Revised Statutes 10:3-201(3)100 This route could necessitate a lawsuit, however, if the pledgor refuses to comply, a step which can be avoided by requiring an endorsement from the outset.

2. Non-Negotiable Instruments

With the pledge of non-negotiable instruments, attention must be directed not only to the requirements necessary for intrinsic validity and validity as to third persons, but also to those requirements necessary for validity as to the obligor on the pledged instrument. To lessen confusion as much as possible, the discussion of the required formalities will address each area separately.

a. Intrinsic Validity

Article 3158, paragraph 2, requires more than just delivery for the pledge of non-negotiable instruments; it adds: "provided that where the pledge of instruments not negotiable, the debtor must be notified thereof . . . ."101 Article 3160 is also relevant: "When the thing given in pledge consists of a credit or instrument not negotiable, the pledge shall be complete as to all the world, as soon as the debtor of such pledged credit or instrument shall have been notified in writing of the giving of such pledge."102 Although both of these articles require notice to the debtor on the pledged instrument, article 3158 seems to imply that such notice is necessary for the intrinsic validity of the pledge, while article 3160 seems to imply that such notice is necessary only for validity against people who are not parties to the pledge. Another difference is that article 3160 requires that a written notification be given to the debtor, whereas article 3158 states only that the debtor must be notified, with no requirement that the notification be in writing. The first step,

100. La. R.S. 10.3-201(3) reads as follows:
    Unless otherwise agreed a transfer for value of an instrument not then payable
to bearer gives the transferee the specifically enforceable right to have the
unqualified endorsement of the transferor. Negotiation takes effect only when
the endorsement is made and until that time there is no presumption that the
transferee is the owner.
therefore, is to determine which, if any, of the requirements in these articles is necessary for the intrinsic validity of the pledge. Unfortunately, the jurisprudence provides scant guidance.

In *Foote v. Sun Life Assurance Co. of Canada*, the court confronted the issue of whether a pledge of a life insurance policy was intrinsically valid, despite the fact that the insurer on the policy had not been notified of the pledge's existence. At the time this case was decided, life insurance policies were not named specifically in article 3158, as they are today; thus, they fell under the general category of non-negotiable written obligations.

The court looked only to article 3160 for guidance and concluded that the notice to the debtor on the instrument, required by that article, is without application to the immediate parties to the agreement and may only be invoked by a third person. The obvious purpose of its enactment was to prevent the debtor of the security pledged from paying his obligation to the pledgor or to anyone else, other than the pledgee, where he has written notice of the pledge. Since the court did not look to article 3158, the holding in *Foote* is severely limited. The court’s reasoning, that the notice requirement in article 3160 is inapplicable to intrinsic validity, could be used just as readily, however, to find the article 3158 notice requirement unnecessary to intrinsic validity.

In fact, in the more recent case of *Louisiana National Bank of Baton Rouge v. O'Brien*, the first circuit asserted that *Foote* implicitly recognized that the article 3158 requirement of notice, like the article 3160 requirement, applied only to third party creditors of the pledgor. The assertion was dicta, however, and the fact remains that *Foote* did not address article 3158; guidance from other courts on these issues has not been forthcoming. The question of whether notice to the debtor is required for the intrinsic validity of the pledge thus remains largely unanswered. The question of whether such notice, if required, must be written has not been addressed in an opinion where intrinsic validity is the issue. The only certain requirement for intrinsic validity is that of delivery.

---

104. Id. at 481.
105. 439 So. 2d 552 (La. App. 1st Cir.), writs denied, 443 So. 2d 590 (La. 1983).
106. Id. at 555, citing Williams v. Succession of Anderson, 133 La. 640, 641, 63 So. 250, 251 (1913).
b. Validity as to Third Persons

Possibly because of the clear language in article 3160 that "the pledge shall be complete as to all the world,"107 as soon as the debtor on the instrument has been notified of the pledge, the law appears well settled that the pledge of a non-negotiable instrument will not be enforceable against third parties unless such notice has been given.

In Commercial Bank of Alexandria v. Shanks,108 a judgment creditor challenged the validity of an alleged pledge of a certificate of indebtedness issued by the City of Alexandria in favor of the judgment debtor. According to Mr. Shanks' testimony, he had assigned the certificate to the bank for collection; the certificate, however, had disappeared from the bank's portfolio. It was found in the possession of the father-in-law, Mr. Crockett, who claimed that the certificate had been pledged to him.

Sorting out the confusion, the Louisiana Supreme Court determined that there had not been a valid pledge of the certificate by Mr. Shanks to the cashier since "[t]he evidence shows no delivery to Mr. Crockett personally, and it is not pretended that any written notice of a pledge of the certificate was given to the City of Alexandria."109 Citing articles 3158 and 3160, the court explained that "[a] pledge of a non-negotiable instrument, not only requires delivery, but written notice thereof to the debtor of the credit."110

In Williams v. Succession of Robertson (In re Maumus),111 the Louisiana Supreme Court continued to espouse its position in Shanks that a pledge of a non-negotiable instrument is not enforceable against third parties unless notice has been given to the debtor on the instrument. In this case there was a pledge of stock certificates, but the debtor on the certificates had not been notified about the pledge.112 Since the person challenging the validity of the pledge was the administrator of the alleged pledgor's succession, the issue was whether the pledge could be enforced against him, as a representative of the creditors of the succession. The court unhesitatingly determined that since no notice had been given to the debtor on the certificates, the pledge was without effect.113

Though the court in Maumus made no mention of whether the notice must be written, it appears clear from Shanks and Maumus that

108. 129 La. 861, 56 So. 1028 (1911).
109. Id. at 864, 56 So. at 1029.
110. Id. (emphasis added).
111. 133 La. 640, 63 So. 250 (1913).
112. When this case was decided in 1913, the special language now present in article 3158, which excepts corporate stock from the notice requirement, was not contained in the article.
113. Maumus, 133 La. at 643, 63 So. at 251.
a pledge of a non-negotiable instrument is not valid against third parties unless the debtor on the instrument has received notice of the pledge, and, under Shanks, that the notice was written. Of course, the instrument also must be delivered to the pledgee.

c. Validity as to the Debtor on the Pledged Instrument

The final question is whether there must be notice to the debtor on the pledged non-negotiable instrument for the pledge to be enforceable against that debtor, and whether the notice must be in writing.

In Louisiana National Bank of Baton Rouge v. O'Brien the first circuit determined that notice to the debtor on the instrument is not necessary for the pledge of a non-negotiable instrument to be valid against that debtor. In that case, a non-negotiable $280,000 note, executed by O'Brien in favor of a partnership and transferred by the partnership to LeBlanc, had been pledged to Louisiana National Bank (LNB) by LeBlanc. When LeBlanc was placed in bankruptcy, LNB served notice on O'Brien to pay the note. This notice came three and one-half years after the note had been pledged to LNB and was the first notice received by O'Brien that the note had been pledged. O'Brien refused to pay it.

In the litigation that followed, the trial court asserted that, since the note was not negotiable, written notice of the pledge had to be given to O'Brien within a reasonable time. Since notice was received after three and one-half years, the trial court concluded that LNB had no right of action against O'Brien.

The first circuit reversed, stating that the debtor on the pledged security is not in the same position as a third party creditor. The court explained that

[t]he debtor on the security pledged certainly stands in place of the pledgor. He has no more rights than the pledgor with reference to the pledge itself. Since La. C.C. Arts. 3158 and 3160 cannot be invoked by the pledgor to invalidate the pledge, they cannot be invoked by the debtor on the security for the same purpose.

A little over a year later, however, the first circuit took a different position. Citizens Bank and Trust Co. v. Consolidated Terminal Warehouse, Inc. involved the pledge of invoices to secure loans made by Citizens Bank to Consolidated. The debtor on the invoices was Scaffolding Rental and Erection Service. When Citizens Bank sued Scaffolding to collect the debts represented by the invoices, Scaffolding contended that the invoices had not been validly pledged since Sca-

115. Id. at 555.
116. 460 So. 2d 663 (La. App. 1st Cir. 1984).
folding, as the debtor on the invoices, had not received written notice of the pledge. The court agreed that the debtor on a pledged non-negotiable instrument must receive written notice of the pledge under articles 3158 and 3160. The court concluded, however, that such notice had been given since copies of the invoices, on which there was printed language stating that they were being pledged, had been mailed to Scaffolding by the pledgor.117

In summarizing the requirements for pledging non-negotiable instruments, it is not clear whether the debtor on the pledged instrument must receive notice in order for the pledge to be valid as to him. The more recent pronouncement on the subject is that such notice is necessary and that the notice must be in writing. As to third parties, however, the law appears to be well settled that the pledge is not valid unless written notice is given to the debtor on the pledged instrument. As to intrinsic validity, the law is also not clear. According to Foote v. Sun Life Assurance Co. of Canada,118 notice of the debtor on the pledged instrument may not be necessary for intrinsic validity. Finally, for intrinsic validity, validity against third persons, and validity against the debtor on the pledged instruments, there must be actual delivery of the non-negotiable instrument.

3. Special Cases

a. Life Insurance Policies

The formal requirements for the pledge of a life insurance policy receive detailed treatment in article 3158, but apparently very little treatment in the jurisprudence.119 Before 1952, article 3158 made no mention of life insurance policies, but language added in 1952120 sets forth specific guidelines for the pledge of such property.

Article 3158, paragraph two, includes life insurance in the listing of incorporeals evidenced by a writing. It states that delivery of the written instrument evidencing the incorporeal is the only formality necessary for a valid pledge, "except as hereinafter provided with regard to life insurance policies."121 The additional guidelines for the pledge of a life insurance policy prescribe that

all pledges, except of a life insurance policy in favor of the insurer, must be accompanied by actual delivery. The pledge of

117. Id. at 669-70.
119. Foote v. Sun Life Assurance Co. of Canada involved the pledge of a life insurance policy but was decided long before article 3158 was amended to add the special provisions concerning such policies. Scott v. Corkern also concerned the pledge of life insurance, but the discussion of formalities was limited to delivery and possession.
120. La. Civ. Code art. 3158 was amended by 1952 Acts No. 290.
a life insurance policy must also be evidenced by a written
assignment thereof as security to the pledgee and by delivery of
the pledge or assignment to the insurer and, unless the beneficiary
thereof may be changed upon the sole request of the insured,
or unless pledge or assignment without the consent of the ben-
eficiary be specifically provided for in the policy, must be ac-
accompanied by the consent of any named beneficiary who is not
the insured or his estate.122

The following requirements may be derived from this passage. First,
the pledgor must deliver the policy to the pledgee, unless the pledgee
is the insurer on the policy. Second, there must be a "written assign-
ment" of the policy to the pledgee, evidencing the pledge. The words
"written assignment" must actually mean a written pledge agreement,
however, since assignment and pledge are two very different concepts.
The use of the word "assignment" in describing a requirement of pledge
is a contradiction of terms. Third, the pledgor must deliver the written
pledge agreement to the insurer. Finally, any beneficiary who is not the
insured or his estate must give his consent, unless under the policy the
beneficiary can be changed upon request by the insured or the policy
provides for pledge without the beneficiary's consent. The article does
not make any distinction as to requirements necessary for intrinsic
validity as opposed to validity against third parties or validity as to the
insurer on the policy. Until there is jurisprudence which interprets these
provisions, the safe approach is to comply with each of the requirements.

b. Corporate Stock

The pledge of a corporation's stock also receives special treatment
in article 3158. Although notice of the debtor is required for the pledge
of non-negotiable instruments, article 3158 states that it is "understood
that no notification is required in the case of the pledge of certificates
of corporation stock."123 It appears that delivery of the stock to the
pledgee is the only formality required for validity between the parties,
as to third persons, and as to the issuer of the stock. Here again the
jurisprudence offers little assistance.

Even such a simple requirement may cause problems. In Lallande
v. Ingram,124 the would-be pledgor attempted to pledge shares of stock.
He had paid for a subscription agreement and had directed the cor-
poration to send the stock certificates to the pledgee. The shares of
stock, however, had not been issued. The court determined that the
pledge was invalid, explaining that "[s]hares in stock cannot be pledged,
unless they be evidenced by certificates, which must be transferred and

123. Id.
delivered to the pledgee.\textsuperscript{125} Since no certificate had been issued, none had been transferred, and there was no pledge.

Though the requirements for the pledge of stock are simple, a creditor who grants a loan secured by the pledge of stock may want to take extra precautions as a practical matter. One writer has suggested that "it is always advisable to have a document setting forth the true intent of the parties so there will be no dispute at a later date as to the type of security device created.\textsuperscript{126} The creditor may also want to include a provision which allows him to vote the stock, in order to protect his interest, or a provision allowing him to sell the stock at a private sale upon default, to avoid first having to obtain a judgment.\textsuperscript{127}

c. Warehouse Receipts, Bills of Lading, etc.

Paragraph two of article 3158 states that

the delivery of property on deposit in a warehouse, cotton press, or on storage with a third person, or represented by a bill of lading, shall pass to the pledgee by the mere delivery of the warehouse receipt, cotton press receipt, bill of lading, or storage receipt, showing the number, quantity or weight of the thing pledged; and such pledge so made, without further formalities, shall be valid as well against third persons as against the pledger thereof, if made in good faith . . . .\textsuperscript{128}

The only formal requirement, at least under Article 3158, for the pledge of warehouse receipts, bills of lading, and similar instruments, is the delivery of the receipt containing a description of items pledged. Such delivery should make the pledge valid both intrinsically and as to third parties.

Here, again, even so simple a requirement can be difficult. In \textit{In re Pine Grove Canning Co.},\textsuperscript{129} the court held the pledge of a warehouse receipt invalid against other creditors because of problems with the management of the warehouse owned by the pledgor. The court acknowledged that under article 3158 delivery of the receipt is sufficient, but asserted that the warehouseman’s lack of control over the warehouse and failure to comply with applicable law caused the receipt itself to be invalid.\textsuperscript{130}

\textsuperscript{125} Id. at 368.


\textsuperscript{128} La. Civ. Code art. 3158 (emphasis added).


\textsuperscript{130} Id. at 877-88.
In *Blanc v. Germania National Bank*, the plaintiff representing the pledgor challenged the validity of a pledge of warehouse receipts by contending that the act of pledge of warehouse receipts did not contain an adequate description. The court responded that under article 3158 mere delivery of the receipts was required; each such receipt should contain an ample description of the property.

In stating the requirements for the pledge of warehouse receipts, bills of lading, and similar instruments, article 3158 does not require endorsement of the instrument. The article also does not distinguish between instruments that are negotiable and those that are not. Under Louisiana Revised Statutes 10:7-504, “[a] transferee of a document, whether negotiable or non-negotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey.” Delivery as required by article 3158 should thus effectively place the pledgee into the pledgor’s shoes without further formality.

Reliance solely on the article 3158 requirement of delivery, however, can place the pledgee in a vulnerable position. If the instrument is not negotiable and no notice has been given to the warehouseman or carrier, the warehouseman or carrier may unwittingly surrender the goods to the pledgor.

Under Louisiana Revised Statutes 10:7-403, the warehouseman or carrier has an obligation to deliver the goods to “a person entitled under the document” unless he can establish a lawful excuse. Section 4 of the statute defines “person entitled under the document” as “the person to whom delivery is to be made by the terms of or pursuant to written instructions under a non-negotiable document.” According to section 7-404 of the statute, if the warehouseman in good faith has received goods and delivered or otherwise disposed of them according to the terms of the document of title, he will not be liable for delivering the goods to a person who had no authority to receive them. While delivery alone thus creates a valid pledge, notification of the warehouseman or carrier of the pledge becomes a practical necessity.

### B. Incorporeal Movables Not Evidenced by a Writing

The formal requisites for pledging incorporeal movables not evidenced by a writing were enacted by Act No. 95 of 1938. Until that
time, such incorporeals were not considered susceptible of pledge because of a very basic problem: there was nothing, not even a document symbolizing the incorporeal, which could be delivered to and be possessed by the pledgee.

The case of *Caffin v. Kirwan*\(^{137}\) illustrates the problem. The would-be pledgor attempted to pledge his rights under a lease on a "bathing establishment." The parties had executed a notarial agreement evidencing the pledge and had recorded it in the conveyance records. The contention was made that this agreement was equivalent to a fictitious or symbolic delivery. The court disagreed with that contention, holding that there was no valid pledge since there had been no delivery, either actual or symbolic. Instead, they viewed the agreement and recording as "amounting to nothing."\(^{138}\)

The court took the same position in *Sevin and Gourdain v. Caillouet*.\(^{139}\) In that case, there was an attempt to pledge a mortgage and vendor's privilege on property. Again, the parties had executed and recorded an agreement evidencing the pledge. Citing *Caffin*, the court concluded that "[t]here was certainly no delivery of possession,"\(^{140}\) and thus there was no valid pledge.

In dicta, the *Caffin* court offered its opinion on how such rights might validly be pledged. It stated that "a legal delivery might have been effected by an instrument in the form of a sale or transfer, of all Kirwan's right to Caffin for the avowed purpose of securing him by way of pledge, accompanied by a notice to Kirwan's lessor. This would have vested the legal title into the pledge."\(^{141}\) According to this suggestion, an additional agreement in the form of a sale or transfer would create a valid pledge "when it appears that the intention of the parties was to secure an existing debt and not the transfer of the property outright."\(^{142}\) While there are apparently no cases in which a valid pledge of an incorporeal, not evidenced by a written instrument, was created by this method, the courts have determined that such an agreement in the form of a sale may effect a valid pledge of immovable property.\(^{143}\)

The scholar Denis points out inherent problems in the use of a sale to effect a pledge of incorporeals not evidenced by a written instrument,

---

137. 7 La. Ann. 221 (1852).
138. Id.
139. 30 La. Ann. 528 (1878).
140. Id. at 532.
141. 7 La. Ann. at 221.
in that third parties are not sufficiently placed on notice. He explains that

[a] sale may be made of credits which have no muniments of title, because the delivery and possession to the purchaser are not an essential element of that contract, as they are of that of [sic] pledge. But, if the pledge in the form of a sale, in order to be valid as to third persons, must fulfill all the requirements of the contract of pledge, it is clear that the ostensible vendee, in reality the disguised pledgee, must be put in possession of the thing pledged under the garb of a sale, and that his possession must be ostensible, notorious and such as to warn third persons. When the thing pledged is a credit without muniment of title, it is evident that the pledge of it in the form of a sale can have no effect as regards third persons.  

This confusion, over whether or not incorporeals not evidenced by a written instrument could be pledged due to the impossibility of delivery, led to the passing of Act No. 95 of 1938. According to two scholars, "[t]he main effect of the 1938 Act . . . [was] to eliminate the requirement of delivery for the pledge of such incorporeal rights as are not evidenced by written instrument or muniment of title." The last two of the three sections of the Act, codified as Louisiana Revised Statutes 9:4321 through 4323, have caused little dispute. Section 4322 states that "[t]he pledge shall be valid as to all persons without delivery of the claim, credit, obligation, or incorporeal right to the pledgee." Section 4323 further provides that, "[t]o bind the obligor to pay the amount due to the pledgee, notice of the pledge shall be given in writing to the obligor or shall be acknowledged in writing by him." These instructions are quite clear: there is no requirement of delivery; to bind the obligor on the pledged incorporeal, he must be given notice or must himself acknowledge the pledge in writing.

It is the first of the three statutes, with its ambiguous language, that has caused confusion in this area. Section 4321 states that "[c]laims, credits, obligations, and incorporeal rights in general not evidenced by written instrument or muniment of title, shall be subject to pledge, and may be pledged in the same manner as other property." Specifically, the last ten words are the cause of the problem.

144. Denis, supra note 2, at 137-38.
146. Hebert and Lazarus, supra note 142, at 109.
It has been argued that the term "other property" should be understood to refer to corporeal movables; incorporeals not evidenced by a writing should be pledged in the same manner as corporeal movables.\textsuperscript{150} The court in \textit{Citizens Bank and Trust Co. v. Consolidated Terminal Warehouse, Inc.}\textsuperscript{151} took this position when confronted with the pledge of invoices which were arguably incorporeal rights not evidenced by a written instrument. The court reasoned that "other property" in section 4321 "must refer to the pledge of corporeal movables because there exists no written instrument susceptible of delivery, as in the pledge of an incorporeal right evidenced by a written instrument."\textsuperscript{152} To be valid between the parties, an oral pledge is thus sufficient; a written pledge is not required. For validity as to third parties, article 3158 requires that there be some written evidence of the pledge, stating the amount of the debt and a description of the thing pledged.\textsuperscript{153}

The court in \textit{Vaughn Flying Service v. Costanza}\textsuperscript{154} took a different approach. There the court had to determine what requirements were necessary to make a pledge of a bank account effective against other creditors. Looking to the history of section 4321, the court concluded that the pledge of the bank account was effective against third parties without a written instrument stating the amount of the debt secured.

The court reasoned that the phrase "may be pledged in the same manner as other property"\textsuperscript{155} in section 4321 was not \ldots{} a directive to incorporate other statutory rules, but merely \ldots{} a declaration that, contrary to the prior jurisprudence, incorporeal rights not evidenced by written title can indeed be pledged and that this can be done 'in the same manner,' i.e. without the necessity of an additional act of transfer, as other property \ldots{}. The sole purpose of the phrase is to accentuate the break from the prior jurisprudential rule that some agreement in addition to the pledge is required.\textsuperscript{156}

The court was apparently referring to the use of a sale to effectuate a pledge, as suggested in \textit{Caffin}. In dicta, the court further explained that the parties could sign a written act of pledge if they wished, but that the pledge would be valid without such an act if the obligor as to the pledged incorporeal had been given written notice or had given a written acknowledgment.\textsuperscript{157}

\begin{thebibliography}{9}
\item[\textsuperscript{150}] Hebert and Lazarus, supra note 142, at 109-10.
\item[\textsuperscript{151}] 460 So. 2d 663 (La. App. 1st Cir. 1984).
\item[\textsuperscript{152}] Id. at 668.
\item[\textsuperscript{153}] Id. at 668-69.
\item[\textsuperscript{154}] 590 F. Supp. 1077 (W.D. La. 1984).
\item[\textsuperscript{155}] La. R.S. 9:4321 (1983).
\item[\textsuperscript{156}] 590 F. Supp. at 1080-81.
\item[\textsuperscript{157}] Id. at 1081.
\end{thebibliography}
The reasoning in *Vaughn Flying Service* is defective, however, in that it overlooks the basic problem in pledging incorporeals which are not evidenced by a written instrument—the fact that there is nothing which can be delivered to the pledgee and thus no ostensible possession by the pledgee to put a third person on notice that the right has been pledged. While the Act of 1938 does remove the delivery requirement for the pledge of these incorporeals, the need to warn third persons remains. For this reason, the better approach seems to be the one taken in *Consolidated Terminal Warehouse*.\(^{158}\) The article 3158 requirement, that of a written instrument evidencing the debt and describing the rights pledged in order for the pledge to be enforceable against third parties, should be applicable to pledges of incorporeals not evidenced by a written instrument.

In fact, despite a holding to the contrary, the federal district court offered similar advice in dicta in its opinion in *Vaughn Flying Service*. The court advised that the signing of a written act “would of course be the wisest procedure to follow until the issue is definitively resolved by the Louisiana Supreme Court or by a clarifying legislative enactment. The opinion of a federal district court acting as a surrogate civilian court gives scant security to a pledgee-creditor seeking to protect his claim against third parties.”\(^{159}\)

The court in *Vaughn* apparently considered notification of the obligor a requirement necessary not only to bind the obligor but also to make the pledge valid against third parties. Compliance with this formality may also be the “safe” approach, since under article 3160 “the pledge shall be complete as to all the world”\(^{160}\) as soon as the debtor has been notified. As to validity between the parties themselves, an oral pledge is sufficient under *Consolidated Terminal Warehouse*. Even for intrinsic validity, however, the “safe” approach may be to have a written instrument evidencing the pledge, since the pledgee otherwise has nothing in his possession by which he can prove the pledge.

C. Incorporeals Which May Be Pledged by More Than One Method

1. Bank Deposits

The formalities required for pledging bank deposits depend upon the nature of the deposit. If it is a bank account, not evidenced by a writing other than periodic statements, the formalities for pledging an

---

158. 460 So. 2d 663 (La. App. 1st Cir. 1984).
incorporeal not evidenced by a written instrument apply. As already discussed, the court in *Vaughn Flying Service*161 concluded that an oral pledge of bank accounts was enforceable against third parties. However, a more defensible approach was taken in *Montaldo Insurance Agency, Inc. v. Culotta*,162 where the court determined that there was sufficient written evidence to constitute a valid pledge, enforceable against third parties. For validity between the parties themselves, an oral pledge is adequate under *Redman Energy, Inc. v. Peoples State Bank.*163

Also significant in *Montaldo* was the court's response to the contention that there was no actual delivery of the bank account to the depository bank. The court responded that since the bank already had possession of the deposits there was no need for an actual delivery. An argument not raised in the case is that, under Louisiana Revised Statutes 9:4322, there is no requirement of delivery in the first place with regard to incorporeals not evidenced by a written instrument. If the bank deposit is evidenced by a certificate of deposit, the provisions in article 3158 and related articles apply for the pledge of an incorporeal evidenced by a written instrument. Thus, if the certificate is negotiable, delivery is required; if it is non-negotiable, both delivery and notice to the depository bank are necessary.

In *Peoples Bank and Trust Co., Natchitoches v. Harper*,164 there was an attempt to pledge to Peoples Bank a non-negotiable certificate of deposit issued by a savings and loan association. A written agreement evidencing the pledge was sent to the savings and loan association, who acknowledged it and recorded the pledge in their records. Subsequently, the would-be pledgor, who had retained the certificate, withdrew most of the funds from the deposit. Upon maturity and default on the loan secured by this pledge, Peoples Bank instituted the lawsuit, claiming that the savings and loan association had violated a valid security interest. The court determined that the pledge was not valid, however, since there had been no delivery of the certificate to the bank.

*First National Bank of Commerce v. Hibernia National Bank in New Orleans*165 also involved the pledge of a non-negotiable certificate of deposit. In that case, Hibernia had issued a certificate of deposit to Mr. and Mrs. Callico and then loaned them money. The Callicos executed a pledge agreement in favor of Hibernia which stated that the loan was secured by every balance in their accounts. Later, the Callicos pledged

---

162. 153 So. 2d 899 (La. App. 4th Cir. 1963).
163. 497 So. 2d 53 (La. App. 3d Cir. 1986).
164. 370 So. 2d 1291 (La. App. 3d Cir. 1979), writ denied, 371 So. 2d 1330 (La. 1979).
165. 427 So. 2d 569 (La. App. 4th Cir. 1983).
the certificate of deposit, issued by Hibernia, to First National Bank. Again there was a written pledge agreement, signed by the Callicos and sent to Hibernia, who signed in acknowledgment. The Callicos delivered the certificate to First National. When the loan they had made to the Callicos matured, First National Bank presented the certificate to Hibernia and requested payment. Hibernia refused, claiming that it was setting off the principal and interest accrued on the certificate in satisfaction of the Callicos' debts to Hibernia.

During litigation, Hibernia contended that its right of pledge covering the certificate was superior to First National's claim. Noting that under Montaldo the pledge of a bank account was held to be valid without delivery since the bank was already in possession of the funds, Hibernia argued that First National's possession of the certificate did not defeat Hibernia's claim. The court disagreed, stating that "[t]his logic should not apply to a situation where a certificate of deposit is involved . . . . For a pledge of funds represented by a certificate of deposit to be valid, possession of the certificate is essential."

An interesting aspect of the pledge of bank deposits is the fact that the pledgor may withdraw funds from the pledged accounts. The court in Montaldo explained that

[t]he fact that . . . the bank permitted withdrawals from defendant's saving and checking accounts, which withdrawals reduced the total amount of the pledged deposits, did not result in a surrender of the pledge or pledges. The creditor is free to reduce the amount of the security if he sees fit and does not thereby invalidate the pledge; there remains a valid pledge of that portion of the security which is retained by the creditor.

Similarly, Louisiana Revised Statutes 6:316, which was added by Act No. 451 of 1986 and which by operation of law sets up the pledge to the depository bank of funds deposited in a bank, also allows withdrawals by the pledgor/depositor. Under that statute, "compensation takes place by operation of law between funds held on deposit with a bank . . . and any loan, extension of credit, or other obligation incurred by the depositor in favor of the bank." By operation of law, the funds on deposit are considered to be pledged by the depositor to the bank, and "[t]he ability of the depositor to withdraw funds from a deposit account at will shall not be deemed to adversely affect the validity of the pledge provided under this Section." The bank must

166. Id. at 572.
167. 153 So. 2d at 901.
notify the depositor in writing within two business days from the time compensation takes place.

Unanswered at this point is the question of whether a pledge of an account with notice to the depository bank is equivalent to a withdrawal by the pledgor. If not, it seems that now, in order to pledge a bank account to a pledgee other than the depository bank, it is necessary to get a release of the pledged account from the depository bank in favor of the pledgee.

2. Rents

There are at least four ways by which rent accruing from the lease of immovable property may be pledged. In the cases of Hamilton Co. v. Hughes171 and Triangle v. AMI, Inc.,172 it was determined that rents from immovables do not fall in the class of immovables, but rather are incorporeal movables.173 One may thus effectively pledge rents by complying with the formalities for pledging incorporeals not evidenced by a written instrument under Louisiana Revised Statutes 9:4321 through 4323. To be valid against third parties and to bind the lessee, a written pledge should be executed and written notice sent to the lessee.

A second method for pledging rents is authorized by Louisiana Revised Statutes 9:4401,174 which requires that a written act of pledge be filed in the conveyance records of the parish where the immovable is situated, in order for the pledge to have effect against third parties. It does not become binding on the lessee until he is given written notice by the pledgee.

Louisiana Revised Statutes 6:830175 authorizes a third method in which rents may be pledged—as a mortgage provision in favor of a savings and loan association. According to the statute, a mortgage securing a loan on immovable property “may provide for an assignment of rents, and if such assignment is made, any such assignment shall become absolute upon the mortgagor’s default, becoming operative upon written demand by the association.”176 The mortgage has priority over all subsequent claims if it is recorded within three working days after its execution.

The second and third methods for pledging rents are illustrated in the cases of Toomer v. Lowenthal177 and Mexic Brothers, Inc. v. 108

171. 141 So. 398 (La. App. 2d Cir. 1932).
172. 280 So. 2d 858 (La. App. 3d Cir.), writ denied, 282 So. 2d 719 (La. 1973).
173. Hamilton, 141 So. at 400; Triangle, 280 So. 2d at 860.
177. 430 So. 2d 353 (La. App. 3d Cir. 1983).
University Place Partnership. In Toomer, the purchasers of certain property were challenging an alleged pledge, by the previous owners to a savings and loan association, of rents accruing from the lease of the property. The pledge was evidenced by a written instrument which had been recorded in the mortgage records of the parish. No written notice of the pledge had been given by the pledgee to the lessees. Looking to Louisiana Revised Statutes 9:4401, the court concluded that the pledge was not enforceable against the purchasers of the property, as third parties, since the instrument had not been recorded in the conveyance records as the statute instructs. Moreover, since no notice was given to the lessees, the court also determined that the pledge was not valid against the purchasers under article 3160.  

The fourth circuit stated that they disagreed with Toomer and declined to follow it in Mexic Brothers. As in Toomer, the issue was whether a pledge of rents to a savings and loan association, as additional security for an indebtedness already secured by a mortgage, was enforceable against third parties when it had been recorded in the mortgage records, rather than the conveyance records. The court concluded that, while Louisiana Revised Statutes 9:4401 requires recordation in the conveyance records, Louisiana Revised Statutes 6:830 provides for recordation in the mortgage records, and thus the pledge was valid. Noting that Louisiana Revised Statutes 9:4401 states that the statute is intended to provide an additional method for pledging rents, the court asserted that if the court in Toomer had been cited to Louisiana Revised Statutes 6:830, "it would have reached the opposite result."  

Finally, the Louisiana Assignment of Accounts Receivable Act, authorizes a fourth way to pledge rents from immovable property. Under the Act, "accounts receivable" or "account" includes "indebtedness owing to the assignor in connection with . . . the leasing of movable or immovable property." A pledge is effected by filing the notice of assignment in the conveyance records of the parish where the immovable property is located. Once the notice is filed, "the assignment shall be valid as to third parties and, as to them, shall constitute a completed assignment, sale, or pledge, or any combination thereof, of the accounts receivable covered, notwithstanding the fact that any debtors of the account are not notified of or do not consent to the assignment."  

178. 488 So. 2d 1193 (La. App. 4th Cir. 1986).  
179. 430 So. 2d at 356-57.  
180. 488 So. 2d at 1195-96.  
CONCLUSION

The law governing the formalities of pledge has evolved into a chaotic hodge-podge of disconnected requirements. A confector of pledges must proceed cautiously and cunningly, at least until the time that the legislature gets around to a spring cleaning of the messy accumulation of rules heaped principally in article 3158.

Valerie Seal Meiners