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Security Devices

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SECURITY DEVICES

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VENDOR'S PRIVILEGE OF SAVINGS ASSOCIATIONS

For many years savings and loan associations have obtained the benefit of a vendor's privilege as security for their loans by having their borrower "sell" his property to the association for cash. The association then immediately reconveys the land to the borrower for a credit price, equal to the cash which the association has just "paid" him. A variation of the procedure occurs when a borrower seeks a loan to purchase land. The association purchases the land itself and immediately sells it to the borrower without warranty for a credit price equal to the amount to be financed.[1] These transactions have long been countenanced by the courts and confirmed by the legislature, despite the rather obvious questions that could be raised about their bona fides.[2] In 1983, apparently in an attempt to simplify the procedure and recognize it for what it is, the legislature amended the provisions regulating mortgages of savings and loan associations to eliminate the necessity for these rather cumbersome procedures by directly providing that a mortgage in favor of an association would have the rank of a vendor's privilege.[3] The present text of these provisions reads in pertinent part as follows:

> (1) All mortgages . . . in favor of associations . . . shall have a rank equal to that of a vendor's privilege upon immovable property and shall have priority over all other liens, privileges, encumbrances, and mortgages upon the property . . . which are recorded or arise in any manner subsequent to the date of recordation of the mortgage . . . including tax privileges of any nature . . . except ad valorem taxes . . . and assessments for paving.

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1. The purchaser, of course, also pays the association, as part of the total price, the difference between the purchase price to the original seller and the amount to be borrowed from the association.

2. For an excellent history of the procedure and its early legislative and jurisprudential development see: A. Plough, Homestead, Building and Loan Associations In Louisiana, 1951 Commentary, 2 Louisiana Statutes Annotated—Revised Statutes 315 (West 1986).

3. That the amendment giving the rank of a vendor's privilege to a mortgage in favor of the association created an alternate procedure, and did not intend to do away with the sale and resale device itself, appears clear, since the statutory foundations for the latter have been continued as subsections D (1) and (2) of La. R.S. 6:830 (1986).

> (2) If any mortgage provided for in this Section is placed on record within three working days of its execution . . . [if] made in the parish where the act was executed, and within five working days . . . in any other parish . . . it shall have and enjoy the same priority in regard to the effective date . . . as is accorded vendor's liens under the provisions of Louisiana Civil Code Article 3274 . . . .[4]

In *Home Savings and Loan Association v. Tri-Parish Ventures, Ltd, No. 1*[5] the plaintiff association took a mortgage on two lots at a time when there was a judicial mortgage recorded against their owner. The mortgagor defaulted. The association executed upon its mortgage and the judicial mortgagee intervened, claiming priority. The association argued that its vendor's privilege was superior in rank to ordinary mortgages, relying upon Louisiana Civil Code article 3186 which declares that privileges rank ahead of mortgages.[6] The court rejected the argument stating: "[t]he Louisiana Civil Code firmly establishes that in order to be effective against third parties, mortgages and privileges must be recorded and that preference in ranking is dependent upon the date of recordation."[7] It then observed that a "limited exception to this rule is found in LSA-C.C. Art. 3274 in which a grace period is given to the privilege holder over *intervening* mortgages only, where the act importing privilege is recorded within a very limited period after the date of execution."[8] The court then construed the provisions quoted above as codifying the rule, concluding: "[t]hus, whether the effective ranking date of the (association's) mortgages and vendor's liens is the recordation date or the date of execution, they remain secondary in rank to intervenor's mortgage which was executed and recorded at least a month earlier."[9]

Although the result reached by the court is correct, its reasons are demonstrably wrong. There has never been any doubt that a vendor's privilege, if timely filed, is superior in rank to previously recorded mortgages emanating from the *purchaser*.[10] Perhaps the best and most

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4. La. R.S. 6:830(H)(1)-(2) (1986 & Supp. 1987).

5. 505 So. 2d 165 (La. App. 4th Cir. 1987).

6. "*Privilege* is a right, which the nature of the debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages." La. Civ. Code art. 3186.

7. 505 So. 2d at 166. The court relied upon a number of Code provisions, notably articles 3347, 3329, 3273, and 3322 declaring that mortgages and privileges take effect against third person only from the date of recordation.

8. 505 So. 2d at 167.

9. Id.

10. Union Homestead Ass'n v. Finck, 180 La. 437, 156 So. 458 (1934); Way v. Levy, 41 La. Ann. 447, 6 So. 661 (1889); Givanovitch v. Hebrew Congregation of Baton Rouge,

complete analysis of why this is so is found in the old case of *DeL'Isle v. Succession of Moss*[11] in which the court noted that:

> It would indeed be unjust to place an unpaid vendor on a footing of equality with the other creditors of the *purchaser*, and permit these to devour his substance; for it is only on condition that the price of the thing sold has been paid, that the purchaser acquires an indefeasible title of ownership to the property, and that his creditors can be paid.
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> It [the privilege] confers rights of a high character, superior to those which flow from a mortgage. It entitles the vendor, at his option, either to specific performance in exacting payment, or to a resolution of the sale and taking back the property, free from all encumbrance by the vendee.
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> It is the price that is protected by the privilege. By the sale the vendor increases the estate of the purchaser. It would be iniquitous to permit the property sold to become the prey of the creditors of the purchaser, without requiring as a condition precedent, the payment of its costs. Laurent 30, p.6 § 2; p. 18 § 16; Troplong, Priv. and Hyp. on Art. 2096, p. 25; on Art. 2103, p. 333.[12]

The purpose of the privilege is to prevent other creditors of the purchaser from appropriating the value of an increase in the assets of the purchaser when the purchase price has not been paid and his patrimony has in fact not increased.[13] The vendor's privilege does not, however, outrank mortgages and privileges existing on the property before the sale securing the debts of the seller or his predecessors.

> [The privilege] springs into existence from the mere fact of a sale on credit and continues in force as long as the price remains due, contingent on proper registry to bind third parties. It

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36 La. Ann. 272 (1884); Succession of Marc, 29 La. Ann 412 (1877); Ex'rs. of Bird v. Lobdell, 28 La. Ann. 305 (1876); DeL'Isle v. Succession of Moss, 34 La. Ann. 164 (1882); Miller-Gol'l Mfg. Co. v. Metropolitan Bldg. Co., 13 Orl. App. 5, (La. App. 1915).

11. 34 La. Ann. 164 (1882).

12. Id. at 166-67 (emphasis added).

13. The court in *DeL'isle* also notes the interrelationship between the right of resolution and the vendor's privilege. Although the two are distinct, generally speaking it would be illogical to permit the creditor to dissolve the sale to the prejudice of prior mortgagees of the purchaser (which may clearly be done) and yet give them priority over the privilege securing the purchase price.

> extends, not only to such portion of the price as may be due to the vendor, but also to all other portions which may be represented by others and which form a consideration for the sale. They are all protected by law, with this distinction, however, that where part of the price is a debt of the vendor, the creditor holding that debt would outrank the vendor; as for instance, where there are successive sales on which the price is due, wholly or in part, the first vendor is preferred to second, the second to the third, and so throughout.[14]

The reason for this is obvious. The vendor should not be permitted to compete with his own creditors, or those who hold claims against his property, by selling that property on credit.

By giving a vendor a privilege superior to others it is also essential that some method of publicity be provided to evidence the fact that the privilege exists. The law thus requires that which evidences its existence, the sale, be filed in the mortgage records. Under the authorities relied upon by the court in the *Home Savings* case, the sale is not effective as to third persons until filed. A purchaser of the property would thus take it free of the claim of the vendor even though the sale, recorded in the conveyance records, indicates that the price, initially at least, was not paid.[15] As to purchasers or others acquiring rights in or to the property, lack of recordation of the privilege thus presents no problem. If the privilege is unrecorded, it is not effective, and its subsequent recordation would no more affect persons acquiring rights in the property than would a subsequently recorded sale or alienation. There is however a distinction, which the court failed to recognize in the *Home Savings* case, between a privilege that is not effective as to third persons until it is recorded and the rank of such a privilege, with respect to other mortgages and privileges, after it is recorded and thereby made effective. The one is concerned with its validity vel non while the other concerns the order in which creditors having claims over the property will be paid. It is deemed desirable that sellers be paid before others having claims against the purchaser share in the proceeds of the

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14. Conte v. Cain, 33 La. Ann. 965, 968 (1881).

15. The right of resolution for non-payment of the price still exists and may be enforced without regard to whether the vendor's privilege has been preserved by filing in the mortgage records. See: Robertson v. Buoni, 504 So. 2d 860 (La. 1987). One might question the usefulness of requiring recordation of the privilege at all under those circumstances; however, it does provide a method of evidencing payment of the price when the recorder erases the privilege from the records. To the writer's knowledge, no case addresses the question of whether a savings association that follows the traditional sale-resale procedure, rather than simply taking a mortgage with the "rank" of a vendor's privilege as provided by La. R.S. 6:730, may sue to rescind the sale for non-payment of the purchase price.

property sold. For that reason the privilege arises with the sale and is superior to other claims that attach to the property at the time of its transfer.[16]

Once a privilege arises, however, there is no reason to permit its holder to indefinitely refrain from recording its evidence. To give a seller priority for his price over existing creditors of the purchaser, even over those who hold mortgages created and recorded before the purchaser acquired the property, does no violence to the public records doctrine.[17] To permit the seller to indefinitely refrain from recording his privilege after title has passed creates the appearance that the land is free of encumbrances; the equities would then favor the subsequent creditors who extend credit in the belief that the debtor's patrimony has in fact been increased by the property. Civil Code article 3274 is designed to prevent this. It originally provided: "[n]o privilege shall have effect against third persons, unless recorded in the manner required by law . . . . It shall confer no preference on the creditor who holds it, over creditors who have acquired a mortgage unless the act . . . is recorded on the day that the contract was entered into."[18]

The difficulty in recording the privilege on the day it was executed caused the legislature to modify the article in 1877 to permit recordation up to seven days after the date of the act evidencing the privilege.[19] The article as amended does not prescribe the effect if any of a privilege recorded after the requisite time period. The corresponding article of

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16. One might argue, technically, that while there may be "prior" creditors of the purchaser, there are no "prior" encumbrances. Any encumbrance emanating from the purchaser, recorded or not, can only affect the land when title vests in the purchaser, by which time the right of resolution and lien have been created. To "split hairs", it is logical to say that the purchaser acquires the land with the vendor's privilege and right of resolution already upon it, because the law reserves them to the seller in the act of sale itself. Therefore the purchaser's mortgages are second in rank, although previously recorded, as they would be if the seller put a mortgage upon the land the instant before he sold it.

17. How could the mortgagee claim he has "relied" on the public records, when they reveal the mortgagor has no interest at all in the property?

18. La. Civ. Code art. 3274 (1870). If the preference referred to in the article only applied to subsequently recorded documents, the second sentence would have been unnecessary. Furthermore, the provision deals with all privileges against immovables, not just that of a vendor.

19. 1877 La. Acts No. 45. If the property is located in another parish the act gave the privilege holder 15 days to record the document. It is significant that the article still distinguishes the time of its effectiveness from the preference it gives. It thus declares:

> No privilege shall have effect against third persons, unless recorded . . . . It shall confer no preference . . . over . . . a mortgage, unless the act or other evidence of the debt is recorded within seven days from that date of the act . . . . It shall, however, have effect against all parties from date of registry.

The preceding article 3273 was also left unchanged and more emphatically declares that "[p]rivileges are valid against third persons, from the date of recording . . . ."

the Code of 1825 stated that the privilege "would still avail as a mortgage, and be good against third persons from the time of its being recorded."[20] The courts essentially continued the same interpretation, indicating that the privilege would have priority only against those mortgages or privileges recorded after recordation of the privilege when the latter was recorded late.[21] That the effect of timely filing gave priority over mortgages filed before the vendor's privilege, or those obtained in the period intervening between the date of the act and its recordation, was confirmed a few years after the amendment of 1877 by the supreme court, in *Givanovitch v. Hebrew Congregation of Baton Rouge*,[22] in which it observed:

> [U]nless the contract from which the vendor's or other privilege is claimed to arise was recorded seasonably . . . general mortgages previously recorded, and even certain liens, will take precedence . . . .
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> The authority invoked of *del'Isle v. Moss*, 35 A. 165, is well entitled to the respect which is claimed for it, but it cannot avail Givanovitch as it recognizes in a vendor the privilege which secures payment of the price, with priority over the purchaser's creditors only where the act mentioning it has been seasonably and properly recorded.[23]

The principles just discussed would have led to the conclusion that, in the ordinary sale and resale procedure utilized by savings and loan associations, mortgages existing against the property when the association "bought" it would outrank the vendor's privilege given for the credit price of the subsequent sale. However, in the case of a sale from a third person to the association, followed by a credit sale by the association to the buyer, the association's privilege would have priority, assuming seasonable recordation, over previously recorded mortgages against the purchaser.

Louisiana Revised Statutes 6:830(H)(1) and (2), previously referred to, essentially provides that mortgages in favor of savings and loan associations have a rank equal to that of a vendor's privilege and also that such mortgages have priority over all other liens, mortgages and privileges which are recorded or arise after the recordation of the as-

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20. La. Civ. Code art. 3241 (1825).

21. See Union Homestead Ass'n v. Finck, 180 La. 437, 156 So. 458 (1934).

22. 36 La. Ann. 272 (1884).

23. Id at 274. As a matter of fact, it is obvious the provision would initially have been unnecessary, had it been meant to apply only to those mortgages recorded after the act of sale was executed and the vendor's privilege given. Recordation had to take place on the same day, and the result would have been no different had it been an ordinary mortgage.

sociation's mortgage. These are not in conflict if one postulates that they were to be a substitute, for the ordinary "sale and resale" to the same person, utilized to create vendor's privileges in favor of associations. The second paragraph does conflict with the first if one assumes a purchase and credit sale by the association. The original enactment of what is now subsection H did not repeal what are now subsections D(1) and (2) of the section. These recognize the "sale and resale" or "purchase and sale" methods of creating a vendors privilege and do not, by their terms at least, limit the priority of the privilege to those mortgages and encumbrances recorded after the date of the sale by the association, as do the provisions of subsection H.[24] Subsection D(2) apparently contemplates the purchase and sale transaction, although both subsections, literally construed, are broad enough to comprehend both kinds of transactions.

Subsection H obviously was to designed to eliminate the necessity of the sale and resale by giving to the association a direct mortgage having the rank of a vendor's privilege. In the case of the common "sale and resale", the provisions of the statute appear to accomplish that result. There may in fact still be advantages to the more cumbersome procedure where the transaction is a purchase and sale to the borrower. Not only should this give a priority over the previously recorded mortgages and privileges of the purchaser, it may provide an opportunity to invoke the right of resolution, should this prove to be advantageous. Thus, subsection H merely gives the rank of a vendor's privilege to a mortgage in favor of an association. Subsection D(2), however, in referring to the transaction by which the association purchases the property and sells it to the borrower, declares that

> [t]his contract shall not be considered or treated as a loan, but as a purchase or acquisition by the association and a sale by the association to the borrower, and the association, to secure payment of the amount due by the borrower, has a privilege of equal rank with a vendor of immovable property and enjoys for the protection of its claim and the enforcement of its loan all the rights, privileges, and securities which are now accorded by law to the vendor of immovable property.[25]

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24. Subsection D(1) reads in pertinent part:
> If an association . . . purchases . . . property from any person and afterwards sells or disposes of the same property to a borrower, the association has a privilege of equal rank as the vendor's privilege upon the property so acquired, sold, and disposed of for the security of the payment of the money due by the borrower.

La. R.S. 6:830 (D)(1) (1986).

25. La. R.S. 6:830(D)(2) (1986).

Although it can be argued that the effect of this clause should be limited to those rights necessary to collect the unpaid portion of the price, it certainly appears to be broad enough to give to the association the right to resolve the sale. This would eliminate all claims not existing against the property at the time the original seller sold the land to the association. The clause also appears to be broad enough to eliminate, in the case of third party acquisitions, the possibility that the court would hold, as it apparently did in the case under consideration, that preexisting mortgages would out rank the vendor's privilege of the association.[26]

OIL, GAS AND WATER WELL LIEN ACT

The Oil, Gas and Water Well Lien Act[27] gives laborers, suppliers of materials, contractors and others who contribute to the drilling of a well a privilege on the lease, the well, its production and "all drilling rigs . . . attached or located on the lease . . . ."[28] This has been construed as giving a claimant a privilege on a drilling rig belonging to a third person while it is on the lease, even though the claimant did not furnish his materials or services to the owner of the rig, and had no contractual relationship with him.[29]

Ogden Oil Co. v. Venture Oil Corp.,[30] carries the interpretation a step further by giving a privilege over the drilling rig of a contractor doing work on a well to secure the unpaid claim of the owner of another rig who had moved his rig off the drill site several weeks earlier. The court rejected the argument that the privilege should only attach to property on the lease at the time the claimant's work was performed. The court recognized that, had the second contractor been unpaid, he too "would [have been] entitled to the protective lien and privilege granted by the statute [and that his right] could have been exercised against any equipment found on the premises, regardless of ownership."[31]

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26. It might be noted, finally, that permitting such rights does nothing that could not be accomplished in another manner by the association. The association could easily require the seller and borrower to enter into a credit sale, evidencing a note for the purchase price which would also be secured by a right of resolution and vendor's privilege. By purchasing the note from the seller, the association would succeed to all of his rights. The same section of the law, in which subsections H and D referred to above are found, expressly provides in subsection G that the notes in such transactions may be made payable directly to the association and authorizes the association to purchase such notes to accomplish its purposes.

27. La. R.S. 9:4861 to 9:4867 (1983).

28. La. R.S. 9:4861 (1983).

29. Sargent v. Freeman, 204 La. 997, 16 So. 2d 737 (1944); Boudreaux v. Moon Oil Co., 158 So. 672 (La. App. 1st Cir. 1935); JHJ Ltd. I v. Chevron U. S. A., Inc., 580 F. Supp. 6 (M.D. La. 1983).

30. 490 So. 2d 725 (La. App. 3d Cir. 1986).

31. Id. at 728.

Although one cannot completely disagree that a literal application of the Act supports the position of the court, the result is, to say the least, anomalous and clearly inequitable. Part of the problem may arise because the Act was written at a time when drilling practices were quite different and drilling rigs, consisting of the familiar wooden or steel derricks and their attached equipment, were more or less permanently erected on the leased premises.[32] The court in the present case found the privilege existed because the rig was "'thereto attached' to . . . the well drill-site for drilling the well" although it undoubtedly was not a structure or component part of the land in any respect.[33] The court also observed that the obvious intent embodied into the act is to protect those who supply services and materials to the drilling of wells, and therefore it should be given a "liberal, non-technical construction."[34] The social utility of requiring a driller employed by the owner to pay the costs of drilling a previous well is difficult to discern.

The act provides that a claimant's privilege may continue without recordation for 180 days after he last supplies materials or services in the same "field" to the same person, even though such service may be rendered on different leases. These could be separated from each other by several miles if one defines the term "field" in its ordinary sense. Given the common occurrence of "fractional" oil and gas interests and that work performed for one co-owner gives a privilege over the entire lease,[35] it would appear that furnishing of labor or materials to the owner of a fractional interest in a lease can indefinitely preserve the privilege for other work on any leases in the field in which any of the co-owners have an interest.[36] It is pragmatically impossible for drilling companies to protect themselves from claims by suppliers, contractors and drillers arising out of activities conducted months before on other portions of the leased premises and far removed from the place where they are operating.

Texas Pipe & Supply Co. v. Coon Ridge Pipeline Co., Inc.,[37] held that the plaintiff, who sold and delivered pipe to a purchaser that in turn sold it to a contractor building a pipeline, was a "furnisher" of

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32. 1934 La. Acts No. 145 is the genesis of the present provisions; it gave a privilege on "drilling rigs, standard rigs . . . equipment, buildings, tanks and all *other structures thereto attached or located on said lease* . . . ." (emphasis added).

33. 490 So. 2d at 730.

34. Id. All privileges, of course, are given to protect some perceived socially desirable interest. None the less, the normal rule is that they are to be strictly construed.

35. 490 So. 2d at 730.

36. The *Texas Pipe & Supply* case, discussed hereinafter, implies that one who "furnishes" material to a well may be furnishing it to all of the lessees, thus diluting the requirement of extending the time for filing only to work performed or supplies furnished to the "same" lessee.

37. 506 So. 2d 1296 (La. App. 2d Cir. 1987).

the pipe and was entitled to the privilege even though the plaintiff's purchaser had been paid by the contractor. The court relied upon a 1951 decision, *Oil Well Supply Co. v. Independent Oil Co.*,[38] which held that one who delivered materials directly to the well site had a privilege. In that case the court found that a direct contractual relationship between the furnisher of the materials and the driller or operator was not necessary for the privilege to attach. The only requirement is that a person "furnish" materials that are incorporated into the well.

On the other hand, *P & A Well Service Co. v. Blackie's Power Services, Inc.*[39] held that one who leases equipment to another, who then utilized it in performing services for a subcontractor of the drilling contractor, was not entitled to a privilege. The court reasoned that "the statute in question requires the equipment supplied be furnished for a drilling of the well . . . . [Defendant] furnished the equipment to Fishing Tool (the company performing the services) as part of a rental agreement and not for use in the drilling of P & A's well."[40] It distinguished both the *Oil Well Supply* and *Ogden Oil* cases, on the grounds that, in those cases the materialman had "furnished" the materials and supplies directly to the oil well contractor.[41]

The first opinion is questionable. If the court's analysis is correct, the privilege depends upon whether the wholesaler delivers materials to the job site. If it is the wholesaler, it logically follows either that there are two successive furnishers of the same material or that the person who actually sells the materials to the owner or contractor is not a "furnisher". The Act, despite its broad and redundant phraseology, apparently does not appear to contemplate that there will be two furnishers of the same material.

In *Texas Pipe & Supply*, the court primarily relied upon the fact that the first seller delivered the pipe to the job site. "Although there was no contract between Texas Pipe and the owner, operator or builder of this pipeline, Texas Pipe delivered the pipe directly to the job site and thereby 'furnished' the identifiable pipe used in the construction of the pipeline."[42] To this extent the opinion is supported by the *Oil Well Supply* case on which it relied. The supreme court in that case also disclaimed any intention to permit the privilege to exist in favor of a "furnisher to a furnisher," declaring:

> We do not think that this result will follow from our affirming the judgment in this case, for the reason that the record does

38. 219 La. 936, 54 So. 2d 330 (1951).
39. 507 So. 2d 280 (La. App. 3d Cir. 1987).
40. 507 So. 2d at 282-83.
41. Id.
42. 506 So. 2d at 1299.

> not show that Oil Well Supply Company was the furnisher of a furnisher; but, as heretofore pointed out, it furnished the materials and supplies by delivering them direct to the leased premises on which the well was drilled, and these materials and supplies were actually used in the drilling of the oil well or in connection therewith.[43]

Presumably, under this analysis, if the purchaser of pipe picks it up at the seller's yard and delivers it to the well, the seller is not the furnisher of the pipe. Although the Act does not expressly require the furnisher to have a contract with either the lessee or the contractor, one may question whether he has furnished the pipe to a well merely because he delivers it to the place his purchaser directs. To "furnish" means to provide or to make available, not merely to deliver. The one who owns the property at the point of delivery and who can remove it or divert it to other purposes would, under normal circumstances, be considered the person who furnishes it. Nor is there any discernible reason why the legislature would have made a supplier's privilege dependent upon whether he sell his property "F.O.B., sellers yard" or delivers it to a place designated by the buyer.

THE PRIVATE WORKS ACT

The Private Works Act requires a general contractor to provide a surety bond guaranteeing payment to those dealing with him and his subcontractors. Two cases again affirmed the well established rule that surety bonds given by subcontractors to contractors are not regulated by the Act but are subject to the ordinary rules of suretyship.[44] In one of them[45] the court also noted that a so-called performance bond, by which the surety guarantees to the owner that the contractor will perform his contract, is different from the payment bond required by the Act, and is not regulated by its provisions.[46] Accordingly, the one year peremptive period provided by the Act for bringing an action against the surety is inapplicable.

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43. 219 La. at 943, 54 So. 2d at 332.

44. Emile M. Babst Co. v. United States Fidelity & Guaranty Co., 497 So. 2d 1358 (La. 1986); Congregation of St. Peter's Roman Catholic Church v. Simon, 497 So. 2d 409 (La. App. 3d Cir. 1986).

45. Congregation of St. Peter's Roman Catholic Church v. Simon, 497 So. 2d 409, 412 (La. App. 3d Cir. 1986).

46. The court said:

> The Act does not purport to regulate performance bonds at all. Its only mention of a performance bond is that provision that the payment bond required of the general contractor shall be deemed to include a performance condition in favor of the owner, unless the bond expressly excludes such a guarantee . . . .

497 So. 2d at 412.

Section 4833 of the Act authorizes a summary procedure to erase from the records notice of privileges that are "improperly filed" or where the claim or privilege is extinguished. In *LaMoyne-Clegg Development Corp. v. Bonfanti-Fackrell*[47] the court affirmed a judgment canceling, as having been improperly filed, a notice of privilege filed by a general contractor, because the notice incorrectly stated the amount of the contract and the defendant had completed the project. The court also held that the notice was improperly filed because the amount claimed by the contractor had not been determined and was not yet due under the terms of the contract. The first two grounds relied on by the court as evidencing an "improperly filed" notice of claim appear wrong, particularly since neither item is required to be included in the notice of claim.[48] The court primarily based its holding on the fact that the amount claimed was unliquidated and was not yet due under the terms of the contract.[49] It is apparently commonly believed that a notice of privilege may not be filed until the amount owed the contractor or claimant is past due, if not in default. The privilege, however, exists for the contractor from the moment he files his contract, and for others from the moment they supply their materials or services.[50] The filing of the notice of claim or privilege does not create the privilege, but only serves to prevent its extinction.[51] The Act does not expressly prohibit filing a notice of a privilege before the debt is due or before a notice of completion is filed.[52] The practice of requiring progress payments and final payment upon completion of the job, and of not filing the notices of privilege until there has been a default in payment, or at least until a notice of termination has been filed fixing the end of the filing period, has probably given rise to the belief that the filing of the notice of the privilege is equivalent to a declaration that the owner or contractor is in default. This in fact is not the case; such filing only evidences an amount owed and a privilege securing it. Absent a con-

47. 509 So. 2d 43 (La. App. 1st Cir. 1987).

48. The Act only requires that the notice "set forth the amount and nature of the obligation giving rise to the claim or privilege and reasonably itemize the elements comprising it . . . ." La. R.S. 9:4822(G)(4) (1983).

49. There was obviously a dispute between the parties as to the amount due. The contract provided for arbitration to resolve disputes concerning the amount. The court seemed to believe filing the notice of privilege was contrary to that clause as well.

50. "The privileges granted by this Part arise . . . when: (1) Notice of the contract is filed . . . ." La. R.S. 9:4820(A)(1) (1983).

51. "A privilege given by R.S. 9:4801 . . . is extinguished if: (1) The claimant or holder of the privilege does not preserve it as required by R.S. 9:4822 . . . ." La. R.S. 9:4823(A)(1) (1983).

52. Subsections A, B, and C of La. R.S. 9:4822, dealing with the time for filing of the notices by the various parties, all are phrased in terms of filing "within" a period after filing of the notice of termination or completion of the work.

tractual provision or understanding to the contrary, there would seem to be no reason why the claimant must wait until the job is finished, or until notice of termination is filed, before he files his statement of claim. The privilege already exists. In light of the strong public policy against secret and unrecorded encumbrances of immovables, it would seem anomalous to declare that a recorded statement that does nothing more than evidence an existing, but unrecorded, privilege is improper. Furthermore, it appears quite clear that the summary procedure for erasure of statements of the privilege was not intended to substitute for a trial on the merits of the claim. Section 4833 of the Act requires a claimant to give a release if a statement of claim "is improperly filed" or if the privilege preserved by the filing "is extinguished." If the claimant refuses to give the release the summary action may be resorted to.[53] The judgment rendered pursuant to the action is tantamount to a declaration that the claimant has no privilege at all.[54] The court's determination that the notice of privilege was "improperly filed" in the instant case appears to be incorrect.

MORTGAGES

Reinscription—Third Persons

In *Exxon Process & Mechanical Federal Credit Union v. Moncrieffe*,[55] the court held a statement in the act of sale, by which the purchasers expressly recognized a mortgage on the land and agreed to take it subject to the same, was equivalent to a reinscription of the mortgage.[56] In doing so, the court relied upon a number of earlier cases to the effect that any act by the mortgagor, identifying the mortgage and setting forth its relevant terms, will substitute for its reinscription by the recorder of mortgages. The case reached the right conclusion, but for the wrong reasons. The opinion does not indicate that the act of sale was recorded in the mortgage records or that the court considered the matter relevant. However, a reinscription in the conveyance records

53. "A person who has properly requested written authorization for cancellation shall have an action . . . to obtain a judgment declaring the . . . privilege extinguished . . . ." La. R.S. 9:4833(C) (1983).

54. "The recorder of mortgages shall cancel a statement of a claim or privilege from his records . . . upon the filing with him . . . of: (2) A . . . judgment declaring the claim or privilege extinguished and directing the cancellation." La. R.S. 4:4833(E)(2) (1983).

55. 498 So. 2d 158 (La. App. 1st Cir. 1986).

56. "Any act inscribed in the recorder's office, which conveys to third persons the knowledge of a mortgage, fulfils the object of the law . . . ." Sauvinet v. Landreaux, 1 La. Ann. 219, 221 (1846). See also, Life Ins. Co. of Va. v. Nolan, 181 La. 357, 159 So. 583 (1935); Lalane v. Payne, 42 La. Ann. 152, 7 So. 481 (1890); and Hart v. Caffery, 39 La. Ann. 894, 2 So. 788 (1887).

obviously should not suffice.[57] At the same time, recordation is irrelevant between the parties. Consequently, the agreement of the purchaser in the act of sale to take the land subject to a mortgage should render the question of recordation irrelevant. The term "third persons" as used in the context of the public records doctrine excludes those persons who are contractually bound to recognize the validity of another persons rights, whether or not he is personally bound to honor those rights.[58]

Suretyship

First Federal Savings Bank v. Dan Quirk Ford Co.[59] involved a rather common "repurchase agreement" between a bank and a car dealer by which the dealer sold the bank chattel mortgage notes representing the unpaid purchase price of vehicles it has sold to its customers. Under the terms of the agreement, the dealer agreed to purchase any vehicle tendered to it by the bank if the borrower failed to pay the first three installments of any of the notes sold to the bank. The bank reacquired (by means not disclosed in the opinion) and tendered to the dealer two vehicles on which the mortgagors had failed to pay their first three installments. The dealer resisted on the grounds that his rights of subrogation as a surety had been impaired. The court quite sensibly noted that the agreement was not one of suretyship, but was simply an innominate principal contract obligating the bank to purchase the vehicles, if the bank reacquired them, and the purchaser had defaulted on his first three installments.[60]

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57. A mortgage recorded in the conveyance records is simply not effectively filed for record.

58. Were this not so, the recordation of the act in question would have created greater rights against the purchaser under the act than existed without its recordation. This is fundamentally inconsistent with the concept of the public records doctrine. Of course, taking a tract "subject to" existing rights should not be deemed to impose on the land greater rights than in fact exist, but it should render the question of recordation irrelevant to their effectiveness against the purchaser.

59. 504 So. 2d 930 (La. App. 1st Cir. 1987).

60. Id. at 933.