Private Law: Security Devices

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that a partner who misappropriates funds of the partnership cannot be prosecuted for the crime of theft. The basis of this decision was that a partner in a commercial partnership could be ultimately liable for all of the debts of the partnership under Civil Code article 2872, and therefore the taking was not of something belonging to another. In State v. Morales, the court specifically overruled State v. Peterson in recognition of the fact that in Louisiana a partnership is a legal entity separate from the partners who form it. Therefore, the taking by a partner of partnership funds is a taking of something “of value which belongs to another.” The Peterson case had been criticized, and it is fortunate that the court in the recent case corrected its earlier erroneous position and clarified the law on this point.

In McCray v. Blackburn, the court held that partners who covenant not to compete upon their withdrawal from the partnership are not subject to the statute limiting the rights of employers to enforce non-competition agreements against their employees. The distinction is entirely proper and the purpose of protecting employees does not make necessary the same protection for partners entering a partnership.

SECURITY DEVICES

Gerald Le Van*

Mortgages to Secure Future Advances

As it presently stands, Thrift Funds Canal, Inc. v. Foy holds that a mortgage granted to secure future advances must say so. The supreme court has granted writs and its decision is expected during the current term. Suffice it to say, however, that Foy has created considerable stir.

In 1963, Foy executed a note in the amount of $10,000 secured by a first mortgage on an unimproved lot in Jefferson Parish. Three years later, in 1966, he executed a note to the same creditor

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1. 242 So.2d 253 (La. App. 4th Cir. 1970), writs granted, 257 La. 980, 244 So.2d 855 (1971).
in the amount of $3,000, the note reciting that it was also secured by the 1963 mortgage. Thereafter, in 1968, Foy executed a third note, this time in favor of the plaintiff, Thrift Funds Canal, Inc., secured by a second mortgage on the same lot. The original mortgage had not been extinguished by payment in full of the $10,000 note at the time the $3,000 note was executed. According to the majority:

"[T]he mortgage is drawn in the standard form (printed) for a conventional mortgage, refers solely to the single $10,000 note which it secures, contains no clause whatsoever reciting that it is made to secure future advances and recites no obligation in favor of future holders . . . ."\(^2\)

Relying upon *Walmsley v. Resweber*\(^3\) and certain statutory provisions,\(^4\) the Fourth Circuit held that, since the act of mortgage did not recite that it was given to secure future advances, the second note (for $3,000), executed in 1966, was not secured by the mortgage.

Judge Regan filed a well-reasoned dissent, relying upon *Hortman-Salmen Co. v. White*,\(^5\) in which the supreme court clearly stated that a mortgage to secure future advances need not say so. However, his dissent notes some of the "serious functional disadvantages" encountered if no reference to future advances is required:

"Recordation of such a mortgage merely discloses the maximum possible encumbrance which the collateral can secure, but it does not indicate whether the mortgage has become effective by issuance to a creditor, or, if issued, the amount actually secured by the mortgage. Since there is no requirement that it appear on the face of the instrument that it is to secure future advances, a third party is placed at a disadvantage in not knowing whether the mort-

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2. *Id.* at 254.  
3. 105 La. 322, 30 So. 5 (1899).  
4. Formerly La. R.S. 6:767 and 6:767.1 (1950), renumbered as La. R.S. 6:827 and 6:829 (Supp. 1970), respectively, per La. Acts 1970, No. 234. These sections provide, essentially, that every savings and loan mortgage may secure such certain future advances as the homestead may make for the payment of taxes, insurance premiums, assessments, repairs, remodeling, and the like. Future advances made for other purposes are likewise secured but are expressly subordinated to certain intervening creditors. Apparently these statutes were cited in support of the theory that special legislation is necessary to permit mortgages to secure future advances unless such mortgages so provide on their face.  
5. 168 La. 1057, 123 So. 711 (1929).
gage is in fact a collateral mortgage [mortgage to secure future advances]. Consequently, notice furnished to third parties by recordation of a collateral mortgage [to secure future advances] is inadequate."

The giving of a mortgage to secure future advances is not peculiar to Louisiana. Such are recognized and used in most, if not all, Anglo-American jurisdictions, particularly in construction financing. The owner of the project arranges a construction loan in advance. He must have the assurance of such financing before he can put the contractor to work. If he can, the owner will want to limit the security for the loan to the project itself. This may be agreeable with the lender if, as construction progresses, the value of his security will likewise increase. In most cases, his security will be a mortgage on the project. The lender wants assurance that his security is a first mortgage which will prime the claims of various other parties which might arise during the course of construction. Knowledgeable lenders are aware that their solid first mortgages may be subordinate to certain high priority liens such as those for taxes and in favor of laborers on the project. However, if the risk of further subordination were present, the loan might not be granted.

If the lender's original mortgage could not secure future advances, it would be necessary to record a new mortgage with each subsequent disbursement of loan proceeds ("draw") and for the lender's attorneys to supplement title examination prior to each such draw. Even such examination could not assure the lender that the project is free of inchoate (and superior) labor and material liens. If it were impossible to secure future advances with a single mortgage, the only alternative to a series of mortgages (one for each draw) would be disbursement of the entire loan in a single draw at the commencement of the project to assure the priority of his mortgage. This would work a hardship both on the lender and the owner. For a time, the entire loan would be secured only by a mortgage on bare land and would remain undersecured until the completion of construction. The owner would have the loan proceeds before he actually needed them, along with the burden of administering the money and, most probably, the obligation to pay interest at a higher rate than any short-term investment of the idle funds would

yield. The owner might also be subject to the temptation to spend the money on other things. This would be completely unacceptable to the lender, who must rely upon the proper expenditure of the loan proceeds to increase the value of his security. In short, without the single mortgage to secure multiple future advances, construction financing as we know it simply would not work, in this or any other jurisdiction.

The customary Louisiana vehicle for securing future advances is that "strange alchemy of pledge and mortgage" commonly known as the "collateral mortgage." The basic documents involved in such a transaction are ordinarily:

1. a promissory note ("collateral mortgage note") in the principal amount of the maximum anticipated loan or line of credit, generally payable to "myself or any future holder" (or simply "any future holder" or perhaps to "bearer"), usually payable on demand or within a very short period after demand;

2. a "collateral mortgage" on the land, buildings, and improvements constituting the project, securing the collateral mortgage note; and

3. a series of promissory notes ("hand notes"), each representing an actual draw or advance.

The collateral mortgage note is pledged to the lender as security for actual advances to be made in the future. Technically, the collateral mortgage does not itself directly secure future advances but rather secures the collateral mortgage note, which is, in turn, pledged to secure the various hand notes which represent the actual loan of funds. So long as the collateral mortgage note is retained by the lender, it may secure and resecure future advances made from time to time by the lender to the pledgor, even though periodically all such loans are repaid in full. As against third persons, the rank of the mortgage is effective as of the time of its recordation or the time the note is pledged, whichever last occurs. Should the pledged note be

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returned to the pledgor, it may be repledged, but the rank of the mortgage as against third persons will be effective only from the time of its repledge.\textsuperscript{11}

In most other American jurisdictions, an intervening creditor of the borrower (such as the holder of a second mortgage on the project or the borrower's judgment creditor who has acquired a judicial mortgage on the property) can compete with the mortgagee as to future advances by giving the mortgagee actual knowledge of his competing claim. Once such knowledge is acquired, those valid claims of the competing creditor set forth in his notice will prime the mortgagee as to any amounts the mortgagee thereafter loans after receiving such notice.\textsuperscript{12}

For example: Borrower has secured a commitment from Bank to loan $100,000 as and when needed for the construction of a service station. Borrower has executed a mortgage in favor of Bank to secure those advances to be made in connection with such loan commitment. In mid-construction, and after Bank has advanced only $50,000, Creditor obtains and properly records a judgment against Borrower for $10,000, creating a judicial mortgage on the construction site. Creditor immediately communicates actual knowledge of his judgment and judicial mortgage to Bank. Thereafter, Bank advances the remaining $50,000 to Borrower, who subsequently takes bankruptcy. Bank forecloses its mortgage, which yields $90,000 upon judicial sale, and Creditor intervenes claiming $10,000 out of the foreclosure proceeds. In most states, other than Louisiana, Creditor's claim would be good. To the extent Bank lent funds after receiving actual notice of Creditor's claim, Bank's construction mortgage would be subordinate to Creditor's judicial mortgage. All of this, of course, assumes that Creditor has been able to identify, locate, and notify the mortgagee. If, as is common in Louisiana, Bank's mortgage had secured a bearer note or a note payable to the order of "Myself or any future holder," Creditor might never know whom to notify. Creditor would be spared the trouble in Louisiana, for giving his notice would not change a thing. So long as Bank retains the collateral mortgage note, its loans to Borrower up to the principal amount of the note are secured by

\textsuperscript{11} Odom v. Cherokee Homes, Inc., 165 So.2d 855 (La. App. 4th Cir. 1964).
the original mortgage notwithstanding blinding publicity of the claims of intervening creditors.

Another of those "serious functional difficulties" noted by Judge Regan involves the amount secured. How does another creditor determine how much indebtedness the collateral mortgage secures? To be safe, he must assume that the maximum amount of the mortgage is outstanding at all times. Suppose in the above example, Bank had lent Borrower only $10,000. Without some sort of inside information, Creditor would never know it. If he asked Borrower, Borrower might send him packing; if he asked Bank, Bank should politely refuse to disclose such confidential information. Assume Creditor knows that the fair market value of the land is $100,000; Creditor must either assume it is fully mortgaged or "smoke out" Bank by an expensive foreclosure proceeding perhaps only to discover that indeed the maximum amount, $100,000, had been loaned and was indeed outstanding.

It is common knowledge that in Louisiana a large number of loans are presently outstanding secured by mortgages given and recorded long before such loans were made, where the mortgage instruments say absolutely nothing about the mortgagor's intent to secure future advances thereby. If the Foy case is affirmed, such presently outstanding loans are unsecured. Though ordinarily reluctant to discuss the merits of a court of appeal decision pending on writs to the supreme court, the importance of this particular matter convinces me that it should be aired here and now.

The majority in Foy relied upon Walmsley v. Resweber. On the surface, Walmsley requires that a mortgage given to secure future advances must say so. However, the unusual facts of Walmsley cast considerable doubt as to whether it stands for so broad a proposition. Apparently, as between Resweber and his intended original mortgagee, there was a verbal agreement that the mortgage would secure future advances. However, the mortgage notes were eventually negotiated to a third party with whom the maker had no such agreement. The following language from Walmsley was quoted by the Fourth Circuit in Foy:

"We must look for the obligations of the mortgage in the act itself. To extend them beyond the plain terms of the
act on evidence such as that here suggested would be to create a mortgage by parol or by implication, in violation of the articles of the Code. . . . True it is that between mortgagor and mortgagee a mortgage may be executed for advances to be made, and it may be that, as between them, although the mortgage does not contain the stipulation that it should regarding future advances, it may yet be construed to embrace them as a consideration; but as between a transferee of a mortgage and a third person, the former cannot establish by parol a consideration not even hinted at in the act of mortgage, or in any writing.”14 (Emphasis added.)

Thus, Walmsley may stand for the limited proposition that the transferee of the mortgage note may not prove an agreement with the mortgagor that the mortgage secures future advances if the act of mortgage does not so state. This is not inconsistent with the latest expression of the supreme court in Hortman-Salmen Co. v. White:

“It is true that the full amount of the loans were not advanced in money to White by plaintiff . . . at the date of recordation of the mortgage, although the recorded acts of mortgage state that such advances had been made in fact.

“This is unimportant, however, . . . as it is well settled that mortgages . . . may be given to secure debts having no legal existence at the date of the mortgage. It is not essential, in such mortgage, even with respect to third persons, that it should express on its face that it was executed to secure future debts. It may be described as security for existing debts, and yet used to protect those which, in contemplation of the parties, were to be created at a future time.”15 (Emphasis added.)

The foregoing language, partially quoted with approval by the court from Pickersgill v. Brown,16 appears to be the last supreme court holding in point. However, recently, in Baton Rouge Wood Prod. v. Ezell,17 the supreme court had an opportunity to re-
affirm the Hortman-Salmen Co. v. White rule but chose not to do so. Perhaps this hints that the supreme court will be ready to review the entire matter when it takes up Foy.

If the Fourth Circuit is ultimately reversed and the supreme court adheres to Hortman-Salmen Co. v. White, we retain the "serious functional disadvantages" outlined above. Whether or not a given mortgage secures future advances will still be a matter of the intent of the original parties and third persons will yet have no clue as to that intention from the public records. Also, the reversal of Foy should provoke an audible sigh of relief on the part of some lenders and their attorneys who have heretofore relied on Hortman-Salmen Co. v. White. On the other hand, if Foy is affirmed and if mortgages given to secure future advances must say so, will any of these "serious functional disadvantages" be alleviated? I think not. It will still be possible to conceal the identity of the mortgagee by utilizing a collateral mortgage note payable to the order of "Myself," "Any Future Holder," or payable to "Bearer." 18 Requiring the mortgage to recite that it secures future advances will not assist third persons in determining the amount of indebtedness secured by the mortgage at any given time. To be safe, it will still be necessary to assume that the maximum indebtedness recited in the mortgage is presently outstanding. Certainly affirmation of the Foy case would have no effect on the most serious of the functional disadvantages, namely, the priority given to the collateral mortgagee over competing creditors as to advances made after actual knowledge of their claims.

Perhaps at the root of the controversy over the mortgage to secure future advances lies its potential use to give the collateral mortgagee an unfair advantage over other creditors or, in some circumstances, as a vehicle for outright fraud upon the mortgagor's creditors. There is no legal reason why the Louisiana collateral mortgage device cannot be used to secure what amounts to a lifelong line of credit with a local bank, to the prejudice of...
most other creditors of the mortgagor. Furthermore, the collateral mortgage device offers a compelling invitation to those who would abuse the law by mortgaging valuable property and placing the mortgage note with a confederate, all with the hope of discouraging creditors from foreclosing. It is extremely doubtful that such frauds would be prevented, discovered, or defeated by requiring such "straw mortgages" to recite that they secure future advances.

In view of the above, I find no compelling reason for the supreme court to change the rule of property so firmly announced in *Hortman-Salmen Co. v. White*. I further suggest that the "serious functional disadvantages" in our present system suggested by Judge Regan will not be alleviated until:

1. the identity of the mortgagee can be determined from the public records;
2. the amount of the indebtedness secured by the mortgage can be ascertained by other creditors of the mortgagor;\(^{19}\)
3. some opportunity is offered competing creditors to prime future advances made after the mortgagee receives actual knowledge of the perfection of the competing creditor's claim.

Obviously, such changes require thoughtful legislation. Regardless of the outcome of *Foy*, I suggest it is time to begin.

*Private Works Act, R.S. 9:4801-4842.*

Lien claims under the Louisiana Private Works Act ("PWA") continued to provoke litigation. The following examples attest to problems generated by the much-patched statute, the ingenuity of attorneys, and the unforeseen factual situations in which the PWA must be applied.

*Architects' Liens*

In *National Bank of Commerce v. Southern Land Title*

\(^{19}\) *See, e.g.,* Uniform Commercial Code § 9-208, which empowers the debtor to require the creditor to disclose the amount secured by an assignment of accounts receivable. An Arizona statute would require the assignee to disclose the same information to any bona fide creditor of the assignor. Ariz. Rev. Stat. Ann. § 4-802 (1956). *See generally,* P. Coogan, W. Hogan & D. Vagts, Secured Transactions under the Uniform Commercial Code, 6.02 (1963).
Corp.20 the project architect intervened in foreclosure proceedings on the construction mortgage, claiming a superior right to the proceeds on the basis of his recorded lien for services rendered. He alleged that his work was done prior to the recording of the building contract and the construction mortgage, although his lien affidavit was filed some two years after their recordation.

The mortgagee relied on section 481321 of the PWA, which would rank the architect’s lien only from its date of recordation; on the other hand, the architect claimed to rank concurrently with laborers and furnishers under the provisions of section 4801 of the PWA and, to the extent of his labor, superior to the mortgagee.

Unlike most of the other PWA sections, which have been repeatedly amended, section 4813 remains unchanged since its original enactment in 1926. Oddly enough, the instant case is among the very few reported decisions attempting to apply its terms. The ranking provisions of section 4813 are none too clear. The architect’s lien “stands of equal rank with the contractor.” Does this mean that the law gives an architect a lien only under the same circumstances in which the general contractor would also have a lien? The general contractor’s claim is secured by a lien only when the building contract is properly recorded, the bond is sufficient, and the surety is solvent. This was the argument made in Capital Bank & Trust Co. v. Broussard,22 where the building contract was unrecorded, the construction mortgage recorded subsequent to the commencement of work, and the architect’s lien affidavit recorded subsequent to the construction mortgage. The court rejected the contention that the architect had no lien because the building contract was unrecorded (thus depriving the general contractor of a lien).

Section 4813 further provides that the architect’s lien “affects third persons only from the date of recordation.” The archi-

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20. 244 So.2d 685 (La. App. 4th Cir. 1971), writs refused, 258 La. 569, 247 So.2d 392 (1971).
21. La. R.S. 9:4813 (1950): “Architects and consulting engineers, employed by the owner . . . have a privilege for the payment of their contract charges on the building or other work, and on the land on which it stands of equal rank with the contractor. Said privilege may be recorded not later than thirty days after registry in the office of the clerk of court or recorder of mortgages of notice of acceptance by the owner of the said work, or notice of default, but affects the third persons only from the date of recordation,” (Emphasis added.)
22. 198 So.2d 204 (La. App. 1st Cir. 1967).
tect in *Broussard* argued that this subordinate ranking provision had been repealed by sections 4801 and 4802 of the PWA, which expressly grant liens to architects in the course of granting similar liens to other laborers and furnishers of materials. The architect in *Broussard* claimed to rank concurrently with these other lien claimants on the theory that sections 4801 and 4802, as amended, were later legislation and had impliedly repealed the ranking provisions of Section 4813. However, the First Circuit in *Broussard* applied section 4813 as written.

In the instant case, the architect claimed to be in a different position from the architect in *Broussard* because the building contract had been properly recorded. He argued that sections 4801 and 4802 must necessarily rank architects on a parity with other laborers and material furnishers because those sections deal exclusively with lien rights in the context of properly recorded building contracts. However, the Fourth Circuit did not buy this distinction, holding, in effect, that section 4813 determines the rank of the architect's lien whether or not the building contract is properly recorded. The court seemed to gain some satisfaction from that part of section 4813 granting the architect only a thirty-day period within which to record and serve his lien affidavit (the same given to laborers and to material furnishers in the event of a properly recorded building contract) rather than the sixty-day filing period where the contract is not properly recorded.²⁸

The persuasive value of this decision is diluted by Judge Stoulig's concurring opinion, where he notes that the building contract was not properly recorded in the instant case and that, to him, the issues are exactly those disposed of in *Broussard*.

Perhaps we were forewarned that architects are creatures set apart (for ranking purposes) in *Construction Engineering Co. of Louisiana v. Village Shopping Center, Inc.*,²⁴ holding that a consulting engineer was not entitled to a PWA lien for preliminary services where the project was never commenced:

"From a reading of the statute, it appears that a privilege exists in favor of an architect or engineer only where buildings or other works are, at least partially, constructed."²⁵

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²⁵. Id. at 830.
As noted by the Second Circuit in Village Shopping Center, architects and engineers are customarily entitled by contract to at least eighty percent of their compensation before actual work begins. Thus, perhaps it is only appropriate their their lien against the project securing the remaining twenty percent be subordinate to the claims of other laborers and material furnishers as well as mortgagees.

**Single Lien Period**

Under the classification of novel circumstances, we have *National Surety Corp. v. Colquitt.* Colquitt, a homebuilder, agreed with Rudolph to construct a residence on a city lot which the builder owned. No building contract or bond was recorded. Rudolph moved into the completed residence in December, 1968. Certain corrective work on the house was done following Rudolph's occupancy, but all work was completed by the end of February 1969. However, it was not until May 1969 that title was conveyed from Colquitt to Rudolph. Rudolph's purchase was financed through a homestead association, which required Colquitt to furnish a lien bond in the sum of $8,000; plaintiff, National Surety Corporation, was the surety. Recorded with the deed and loan documents was an "affidavit of acceptance" executed by Rudolph, the buyer, declaring that the building and improvements were entirely completed on or about the date the deed was passed and that no labor or material had been furnished since the date of acceptance. Most probably, the homestead was seeking to clear second title of any outstanding lien claims. There followed a flurry of lien filings by Colquitt's unpaid subcontractors and material furnishers. None of the liens was filed within sixty days following the last furnishing of labor or materials in connection with the construction of the house, but all were filed within sixty days following recordation of the "affidavit of acceptance." The lien claimants urged that a new lien period had commenced with the recording of the "acceptance" filed by Rudolph.

As the court narrowly construed section 4812 of the PWA, the filing of an affidavit of acceptance, where the building contract is unrecorded, commences a lien period only if the affidavit is executed by the owner who undertakes the work. Since Rudolph undertook no work himself, his affidavit of acceptance

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26. 246 So.2d 890 (La. App. 2d Cir. 1971), writ refused, 249 So.2d 201.
created no lien period. There was no showing that Colquitt undertook the work as Rudolph's agent, their relationship being solely that of vendor and vendee. Since Rudolph purchased on the faith of the public records, which disclosed no liens filed during the sixty-day period following the last furnishing of labor or materials,

"[I]t would appear inconceivable that the Legislature intended that the period for filing liens already expired might be revived to allow another 60-day period within which liens could be filed."28

It seems to me that section 4812 should afford any owner the right to clear record title to his property of inchoate liens by recording the affidavit. The alternative is a recorded judgment holding that more than sixty days have elapsed since the last furnishing of labor or materials. If section 4812 presently limits use of the affidavit to the owner who did authorize the work, thus excluding owners in Rudolph's category, it should be amended to make the remedy available to any owner. By holding that the affidavit was not filed by the proper party, the court did not decide the knotty question of whether the PWA contemplates two possible lien periods, but the above language strongly suggests its view that once sixty days have elapsed since the last furnishing of labor or materials, no new lien period would be created by the affidavit of the owner who did undertake the work. Suppose such affidavit were filed during the sixty days following the last furnishing of labor and materials, would the lien period be extended to sixty days after recordation of the affidavit? Probably not if the reasoning of Colquitt is followed. One's satisfaction with Colquitt may hinge on his objectives. If the affidavit is recorded prior to the last furnishing of labor or materials in order to advance the commencement and

27. Id. at 893. La. R.S. 9:4812 (1950) in pertinent part provides: "When the owner... undertakes the work... for which no contract has been entered into, or when a contract has been entered into but has not been recorded, as and when required, the owner... may file an affidavit that the work has been completed, then any person furnishing... material or performing... labor on the said... work may record... an affidavit of his claim, which recordation, if done within sixty days after the date of the affidavit of completion or if no affidavit of completion is filed within sixty days after the date of the last delivery of all material upon the said property or the last furnishing of services or the last performance of labor upon the same... shall preserve a privilege... in favor of... such person." (Emphasis added.)

28. 246 So.2d 890 (La. App. 2d Cir. 1971), writs refused, 249 So.2d 201.
termination of the lien period, then one has no quarrel with Colquitt. If the affidavit is recorded after the last furnishing of labor and materials for the purpose of clearing record title, Colquitt will not offer much guidance unless the affidavit is recorded on the very day work ceases. It is not unlikely that the PWA may be headed for further surgery.

An interesting side issue involved the taxability of court costs. In compliance with section 4804 of the PWA, the plaintiff surety had instituted a concursus proceeding by paying the amount of the bond into court. Although no liens were sustained, the trial court had directed that the deposit be returned to the plaintiff, less court costs. The Second Circuit reversed on this issue, taxing the costs to the various lien claimants under the authority of article 2164, Code of Civil Procedure.

"Plaintiff, surety on the lien bond, succeeding in its contentions that the purported liens were not timely filed . . . should not be penalized by being required to pay the costs of the lien claimants who were unable to establish the verity and validity of their claims."29

Attorney Fees in Contract Litigation

In Popich v. Fidelity & Deposit Co. of Maryland,30 the primary issue involved the surety's obligation to pay attorney fees incurred by the owner in the course of litigation following the contractor's failure to complete construction. In order to comply with PWA section 4802 and rather than file a separate surety bond, the surety "intervened" in the construction contract, acknowledged its obligations as surety in the customary form, and further agreed to be

"[L]iable for all . . . attorney fees incurred in any . . . legal proceeding made necessary by the failure of the contractor to faithfully comply with the foregoing contract, said attorney fees to be fixed at five per cent of the amount of the foregoing bond." (Emphasis added.)31

Construction had been interrupted by Hurricane Betsy in 1965. The contractor blamed his own failure to complete the work on

29. Id. at 894.
30. 258 La. 163, 245 So.2d 394 (1971).
31. Id. at 166, 245 So.2d at 395.
the scarcity of labor following the hurricane. The owner filed a notice of default and took possession. Litigation was commenced by the contractor’s suit against the owner to recover some $15,000 of the contract price which the owner had withheld. The owner reconvened for damages and filed a separate suit against the surety. The contractor recovered judgment for some $15,000; the owner obtained judgment against the contractor and surety for less than half that amount, which included some $2,183 as attorney fees, being five percent of the original contract price of $43,660. The supreme court held the award of attorney fees to be reasonable under the circumstances.

Justice Barham dissented vigorously, pointing out that the owner had been awarded attorney fees equal to almost half his claim, whereas the contractor had succeeded in recovering more than three times that amount against the owner.

Construction on the Outer Continental Shelf—Application of the Louisiana Private Works Act and Oil Well Act

Although this symposium is ordinarily limited to the work of Louisiana appellate courts, the Fifth Circuit decision in Continental Casualty Co. v. Associate Pipe & Supply Co. should be mentioned.

Offshore Gathering Corporation, as general contractor, undertook to construct Texaco’s “South Pass Gathering System” linking an offshore oil and gas field to an onshore terminal in Plaquemines Parish. The contractor furnished a commercial surety bond, but neither the contract nor bond was recorded anywhere. The work was completed satisfactory to Texaco, but the contractor left miscellaneous unpaid laborers and material furnishers in its wake. Texaco filed an interpleader (concursus) suit for

32. The surety made the interesting, although unsuccessful, argument that it was relieved of liability for attorney fees because of the hurricane, contending that its obligation to pay attorney fees was a “penal obligation” as defined in La. Civ. Code arts. 1934(5) and 2117-2127; that being "penal," it was not enforceable under the particular language of La. Civ. Code art. 2120: “The penalty being stipulated merely to enforce the performance of the principal obligation, it is not incurred, although the principal obligation be not performed, if there be a lawful excuse for its non-performance, such as an inevitable accident, or irresistible force.”

33.—F.2d— (5th Cir. 1971), decided July 29, 1971, but unreported as of this writing. See the decision of the trial court as to liability at 279 F. Supp. 490 (E.D. La. 1967) and as to quantum, 310 F. Supp. 1207 (E.D. La. 1969). As to disputes of this nature arising on the Outer Continental Shelf, federal courts have exclusive jurisdiction. See Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (1970).
the purpose of distributing some $190,000 in contract retainage among the various claimants. The surety also filed an interpleader suit in order to determine claims against its bond.

The project was largely underwater construction in the Gulf of Mexico, partly within the territorial limits of Louisiana, but the greater part lay outside, in or under ocean bottoms designated by Congress as the Outer Continental Shelf. The court held that Louisiana law applied, specifically the PWA and the Oil, Gas and Water Well Act ("OWA"). Application of these statutes to offshore operations (obviously not contemplated by the draftsmen) presented a real challenge. The Fifth Circuit held, inter alia, that the PWA applies to gathering systems even though located, in part, underground. The court further held that, although the performance bond ran nominally in favor of Texaco, it was nevertheless a "statutory bond" conditioned upon the payment of the various categories of lienors which the statute protects. Accordingly, the surety was personally liable to the PWA lien claimants.

Texaco argued that the gathering system was used solely for transportation and thus did not constitute a part of the "operation of the well," and that, accordingly, the OWA was inapplicable since by its terms it was limited only to labor and materials furnished in connection with the "drilling or operation of the well." As the Fifth Circuit construed the OWA, removal of fluids from the well site was clearly contemplated because liens were granted in favor of those providing trucking, towing, or barging. Although "pipelines" are not mentioned in the OWA, the court was satisfied that such were encompassed in:

34. Id. § 1331.
36. In his second opinion, District Judge Fred T. Cassibry observed: "This case is replete with complex state law problems, concerning which Louisiana Courts have had little opportunity to address themselves. If this suit finds its way to the Court of Appeals, I am sure they will become keenly aware of the need for a certification procedure by which the Louisiana Supreme Court could determine these knotty legal issues." 310 F. Supp. 1216, 1217 (1969). The Fifth Circuit indicated its sympathy with this view.
37. Earlier Louisiana decisions raised some question as to whether or not the PWA applied to immovables situated beneath the ground. See H.R. Hayes Lumber Co. v. H. M. Jones Drilling Co., Inc., 177 La. 626, 148 So. 899 (1933); Calatex Oil & Gas Co. v. Smith, 175 La. 673, 144 So. 243 (1932). The Fifth Circuit took a narrow view of Hayes, limiting its holding to the proposition that the PWA does not apply to oil wells. The Fifth Circuit would not accept the interpretation of Hayes advanced by Texaco, that it excluded any underground immovable, including gathering lines, from the ambit of the PWA.
"[D]rilling rigs, standard rigs, machinery, appurtenances, appliances, equipment, buildings, tanks, and other structures thereto attached for drilling, equipment and operation of the well." (Emphasis added.)

Several of the OWA lien claimants had failed to record their claims. The district court had held that recordation was not sacramental to the existence of the lien but rather affected only its rank among lien claimants. The Fifth Circuit affirmed on the tenuous proposition that:

"[T]he rule in Louisiana is that where a statute grants a priority to a lien recorded within a certain time, failure to record within that time forfeits the priority only." (Emphasis added.)

As to the liens of various suppliers, the court found OWA liens to exist in favor of furnishers of crewboat services, food and housekeeping services, and rental equipment even though not manned by the lessor. Finally, the court left undisturbed the district court's solution to the knotty question of what constitutes "delivery to the job site." In essence, the trial court found adequate delivery if the supplies were delivered to the owner's dock where there were, at the time, boats or barges destined for the job site; the types of supplies delivered were necessary to the particular project; and the suppliers' invoices were marked for that particular job.

38. See note 33 supra.

39. This principle is difficult to defend in light of the PWA, where the laborer or furnisher of material loses his lien if he fails to perfect it during the lien period. See La. R.S. 9:4802, 4812 (1950) and La. R.S. 9:4802, as amended, La. Acts 1956, No. 100, § 4 provides, in pertinent part: "If notice of such claim . . . is filed for record . . . within 90 days after the last day of the performance of the labor . . . [or] within 90 days from the last day of the delivery of . . . material to the . . . wells, the privileges are superior to all other privileges or mortgages against the property, except taxes or a bona fide vendor's privilege, or privileges or mortgages filed or recorded prior to the date on which the first labor . . . material or supplies covered by the privilege herein granted is furnished . . . ."

40. Under the PWA, only furnishers of materials which are "incorporated into the work" are entitled to a lien. The jurisprudence has created the presumption that proof of delivery of the materials to the job site is prima facie proof of their incorporation into the work. Bernard Lumber Co. v. Sayre, 230 La. 217, 87 So.2d 713 (1956); Mestayer Lumber Co. v. Tessner, 101 So.2d 238 (La. App. 4th Cir. 1958).
Pledge

An interesting question involving an alleged private sale of pledged stock was raised in D'Amico v. Canizaro. D'Amico had loaned $40,000 to G.B.C. Corporation, secured by the pledge of all of its corporate stock and the personal endorsement of the three corporate officers, including Canizaro. The pledge was evidenced by a stock power endorsed in blank. When the loan became in default, D'Amico had the stock registered in his name. However, before attempting to enforce the pledge, D'Amico entered into a continuing guaranty arrangement with Canizaro, whereby D'Amico agreed not to pursue Canizaro personally until his remedy had been exhausted against the other two endorsers. Both of the other endorsers subsequently filed bankruptcy.

Canizaro argued that D'Amico had effected a private sale of the stock by having it registered in his own name and thus was not entitled to a deficiency judgment. The court found the stock to be worthless, doubted that D'Amico would have taken it in satisfaction of so large an obligation, and held that no private sale had occurred as the result of registration in the pledgee's name. Its view was not altered by the fact that, in another lawsuit involving one of the stockholders, D'Amico had intervened and claimed to be the owner of some of the shares in dispute.

PRESCRIPTION

Joseph Dainow*

ACQUISITIVE PRESCRIPTION

Allen v. Paggi Brothers Oil Co. involves a number of interesting questions resulting from an unusual combination of facts. A piece of community property was sold by a married woman, identified as such in the deed, but without her husband's joinder. Acts of possession by the vendee were commenced only twenty years later. It was during this interval that the husband died. Pretermittting the issues concerning the tax adjudications

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1. 244 So.2d 116 (La. App. 3d Cir. 1971), writs denied, 258 La. 247, 245 So.2d 713. The trial court sustained the defendants' plea of ten-year acquisitive prescription, and this was affirmed by the court of appeal which denied a rehearing. In refusing writs, the supreme court said: "Under the facts found by the Court of Appeal there is no error of law in the judgment."