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THE COLLATERAL MORTGAGE: LOGIC AND EXPERIENCE

Max Nathan, Jr.*

Anthony P. Dunbar**

The life of the law has not been logic: it has been experience.
—Justice Oliver Wendell Holmes, Jr., The Common Law

In the decade and more since the publication of Nathan and Marshall’s article1 and their forum juridicum postscript2 on the collateral mortgage, litigation involving collateral mortgages has burst like a supernova, lighting the jurisprudential sky. On balance, the explosion of reported decisions has illuminated many of the more obscure areas of collateral mortgage law, clarifying and resolving certain problems, and highlighting others that still must be solved. The emerging jurisprudence has reinforced the fundamental analysis contained in those earlier articles, although a significant recent decision portends a major departure from the logic and the pragmatism of the trend. The authors believe that an examination of the trends and the portents is needed and hope that critical commentary and positive suggestions will be helpful to judges and lawyers alike.

To return to basics: the form and mechanics of the collateral mortgage “package” remain intact. The package consists of an act of mortgage, a collateral mortgage note (the “ne varietur” note), and a pledge of the ne varietur note to secure an indebtedness, usually represented by a hand note.3 The package continues to be a hybrid security device, combining

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* Professor of Law, Tulane University Law School; Member, Sessions, Fishman, Rosenson, Boisfontaine, Nathan & Winn; Tulane University Law School (J.D., 1960); Northwestern University (B.A., 1956).

** Associate, Sessions, Fishman, Rosenson, Boisfontaine, Nathan & Winn; Tulane University Law School (J.D., 1985); Brandeis University (B.A., 1972).


the elements of both pledge and mortgage. The essential function and 
operation of the collateral mortgage package have not been impaired, 
and indeed there have been several constructive changes in the law that 
make the device function more smoothly by deflecting technical attacks 
based on minor documentary imperfections.4

On a substantive level, an updated outline comparing the law today 
with that of a decade ago with respect to the fundamental elements of 
the collateral mortgage package looks like this:

1. Act of Mortgage. Basically there has been no change in the 
formal requisites of the act of mortgage itself. All of the material 
in the original articles, therefore, remains applicable.5

2. Ne Varietur Note. New cases have enhanced the importance 
of the ne varietur note as an element of the collateral mortgage 
package and also as a separate legal obligation. As part of the 
package, it may increase the security of the creditor because of 
the interest accruing on the note, which daily increases the amount 
of the collateral for which the creditor is secured. As a separate 
legal obligation, independent of the mortgage, the ne varietur 
note may afford the creditor recourse against the maker per-
sonally, a remedy beyond foreclosing upon the property itself. 
Both of these developments will be explored below.

3. Act of Pledge. The pledge has taken on considerable im-

4. For example, La. R.S. 9:2728 was added by 1987 La. Acts No. 750, to provide, 
among other things, that the misspelling of the mortgagor's name will not cause a mortgage 
to lose its rank. Article 2635 of the Louisiana Code of Civil Procedure was amended in 
1981 and 1982 by La. Acts Nos. 210 and 259, respectively, to remove the risk of losing 
executory process because of a variance between the collateral mortgage itself and the ne 
varietur note regarding the obligation to pay attorney's fees, and to provide that the 
plaintiff may prove his right to use executory process for movable property with authentic 
evidence of an authentic act or a private act duly acknowledged. Article 2636 of the 
Louisiana Code of Civil Procedure was amended by 1982 La. Acts No. 185, § 1, to provide 
that a certified copy of a contract of partnership authorizing the execution of an act of 
mortgage filed for registry with the Secretary of State shall be deemed to be authentic 
1988), enacted by 1982 La. Acts No. 178, provides, among other things, that the holder 
of a promissory note secured by a mortgage need not submit authentic evidence of the 
negotiation of the note in order to proceed 
by executory process. Article 2637 of the 
Louisiana Code of Civil Procedure was amended in 1982 and 1983 by La. Acts Nos. 260 
and 185, respectively, to provide that for executory process, evidence of any agreement to 
extend or modify the obligation to pay or written notification of default or of the breach 
or occurrence of a condition of the act of mortgage need not be by authentic evidence, 
and that if the mortgage sought to be enforced is a collateral mortgage, the existence of 
the actual indebtedness "may" be proved by verified petition with the hand note or other 
evidence.

5. See infra notes 49-57 and accompanying text for a discussion of the effect of 
community property law on the requisites of the mortgage.
importance in the past decade, as dramatically illustrated by two Louisiana Supreme Court decisions. In *First Guaranty Bank v. Alford*, the mortgagor was not liable for subsequent advances because the act of pledge was restricted to a specific debt. In *Texas Bank of Beaumont v. Bozorg*, the court implied that the act of pledge is critical in order to obtain retroactive ranking. We will discuss both of these cases shortly.

4. Retroactive Ranking. The Louisiana Supreme Court filled in one of the areas left undecided by *New Orleans Silversmiths v. Toups* when, in *Acadiana Bank v. Foreman*, it held that even though the principal debt is extinguished (by being paid), the creditor may make subsequent advances without a “reissuance” and will thereby retain the original “issuance” ranking date. Questions and answers regarding retroactive ranking have been raised in other cases, too, and these will be discussed further in the text.

Building upon these basic elements, the courts have dealt in recent years with many of the complexities of the ne varietur note, the act of pledge, and the operation of retroactive ranking. Nevertheless, courts are still on occasion presented with security arrangements so perplexing on their face that even jurists must return to basics and rethink the nature of the collateral mortgage.

**The Ne Varietur Note: Increased Importance**

It is now quite clear that the ne varietur note is not a meaningless piece of paper. The note is indeed an enforceable obligation even though it does not represent the indebtedness of the borrower. No primary obligation is brought into existence by the mere execution of a collateral mortgage and a ne varietur note. The enforceability as well as the ranking

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6. 366 So. 2d 1299 (La. 1978).
8. To make the collateral mortgage work, there must be a pledge, and in search of the pledge courts sometimes take a flexible approach. For example, in *First United Bank v. Tabor*, 499 So. 2d 513 (La. App. 2d Cir. 1986), Tabor executed a $500,000 “Continuing Guarantee” form by which he guaranteed his own debt to the bank up to $500,000 (an arguably meaningless obligation extinguished by confusion). Tabor had previously executed a collateral mortgage and, evidently, a ne varietur note, which he had pledged to secure a hand note. On the back of the form, Tabor listed the “collateral pledged” as the collateral mortgage previously executed and several other collateral mortgages Tabor later executed. The question was whether the ne varietur notes had been pledged to secure the continuing guarantee or whether the language on the back of the guarantee form was a pledge of all the collateral mortgage notes to secure the hand note. The court held that this continuing guarantee itself was a valid act of pledge that had accomplished its purpose.
10. 352 So. 2d 674 (La. 1977).
of the mortgage depends upon "issuance" (the pledge of the ne varietur note). Nonetheless, the ne varietur note is a separate, viable negotiable instrument that may give rise to personal liability on the part of the maker.

Two cases have expressly passed on this point, and the issue is beyond dispute. In Central Bank v. Bishop, the court observed that "[t]he collateral note is a separate negotiable instrument which is enforceable by its own terms." In Central Progressive Bank v. Doerner, the court held that in order to calculate the amount of collateral for security represented by the collateral mortgage, one would calculate the principal and interest due on the ne varietur note.

Indisputably, then, if interest accrues on the ne varietur note over a period of years, the amount of security represented by a collateral mortgage can be greatly enhanced. For example, if a collateral mortgage for $100,000 is granted, and the note provides for interest at the rate of 10% per annum, then five years later the total amount secured by the mortgage is $150,000, and at the end of ten years, the amount of collateral would be $200,000, double the amount of the original collateral mortgage. Since payments of any indebtedness for which the note is pledged are made only on the hand note, there would be no reduction of, and no stopping the accrual of interest on, the ne varietur note during that time.

These holdings have larger implications. Since the ne varietur note is a separate negotiable instrument, it can be sued upon and enforced without foreclosing upon the mortgage itself. Of course, if the maker of the hand note is the same person as the maker of the ne varietur note.

11. 375 So. 2d 149 (La. App. 2d Cir.), writ denied, 378 So. 2d 435 (1979) (payment of interest due on the hand note does nothing to stop the accrual of interest on the ne varietur note, which runs from the date stated on the face of the ne varietur note, and a third party who takes the property subject to the mortgage must tender that full amount, up to the limit of the actual outstanding indebtedness, in order to be entitled to enjoin a seizure under a writ of fieri facias). See infra note 105 and accompanying text.

12. 375 So. 2d at 150.


14. In Doerner, the ne varietur note of $10,500.00, bearing interest at the rate of 10% per annum and fixing attorney fees at the rate of 25%, was pledged as security for a hand note of $17,472.00, bearing interest at the rate of 12% per annum and fixing attorney fees at the rate of 25%. At the time suit was commenced the balance due on the handnote was $16,821.58. The portion of that debt actually secured by the ne varietur note was calculated according to the terms of the pledged note, however, and totalled $13,674.50 (principal of $10,500.00, interest at 10% of $539.60, and fees of $2,634.90). The remainder due on the handnote was unsecured. The court's analysis is consistent with that contained in Nathan & Marshall, Postscript, supra note 2.

15. See Nathan & Marshall, The Collateral Mortgage, supra note 1, at 505.
note, it would make little sense for the pledgee who holds the hand note to sue on the ne varietur note without seeking to enforce the mortgage. There is, after all, only one principal obligation owed to that creditor by the debtor, which is the amount represented by the hand note, and the creditor cannot recover more than the amount of that principal obligation.

But in the context of mortgaging property to secure someone else's debts, the arrangements may be different. If the collateral mortgage were granted by S on Blackacre, and S pledged his collateral mortgage and collateral mortgage note to C to secure D's debt, then C might well have a good reason to sue on the ne varietur note. It is axiomatic that a person may grant a mortgage on his property for the benefit of another.16 Suppose that, in the example given, S granted a $100,000 mortgage on Blackacre and pledged the mortgage note to secure a $75,000 hand note given by D to C. Now further suppose that the value of Blackacre has declined and the property is worth only $50,000, less than the principal debt. C is not limited to enforcement of his personal obligation against D on the hand note, nor is he limited to foreclosure of the mortgage on Blackacre. He has an additional remedy, for he may, if he chooses, sue S on the ne varietur note, which is, as recognized by Bishop and Doerner, a separate negotiable instrument enforceable in accordance with its terms. Thus, in reality what has happened is that S has become a kind of surety for D. He has not merely exposed his immovable property, Blackacre, for D's debt, but he is, in addition, personally liable on the ne varietur note.17

The fact that personal liability may be incurred by S does not mean that such liability will be imposed on S. If S wants to avoid personal liability, he can make the collateral mortgage an in rem mortgage.18 If he so states on the ne varietur note, then, by its very terms, the note would only be enforceable by foreclosure on Blackacre, and the maker of the note, S, would have no personal liability.19 Thus, by stipulation, S can avoid the result of personal liability for the debt of another. In the absence of such a stipulation, S unquestionably has created in per-

19. A good argument can be made that a ne varietur note that bears the words “in rem” on its face would no longer represent an unconditional promise to pay (but rather a promise to pay from a particular source) and would therefore not be a negotiable instrument. La. R.S. 10:3-104 to 3-105 (1983). One result of this unexpected status of the ne varietur note might be that notice to the debtor would be required before the note could be assigned, and subsequent holders would take subject to defenses, thereby reducing the risk of the note “getting loose” in the world. La. Civ. Code art. 2643.
sonam liability in addition to the in rem liability. That a promissory note might carry personal liability should come as no surprise to anyone.

It bears pointing out that Louisiana's law of negotiable instruments governs the validity of both the hand note and the ne varietur note, while the law applicable to pledge and mortgage governs the validity of, or rights to, the security itself. This may sound complicated at first, but it simply means that the holder of either note may have recourse against the maker of that note under the law of negotiable instruments, while his right to the security will be determined by the general laws governing security rights. If the mortgage is defective in form or in the manner of its recordation, a holder in due course of the mortgage note has defective security. But one may take a note without being aware of any defenses to it, and, if the note is secured by immovable property, one is still bound to check the public records to determine the efficacy of the security. If there were private agreements or other "equities" between the original mortgagor and mortgagee that were not in some way manifest in the public records, then the assignee of the hand note or the ne varietur note may have better security than the original holder. An interesting question is whether, if a mortgagor were to pay his indebt-

20. Louisiana's commercial laws may be applied to a collateral mortgage package to the extent that the dispute centers on the validity of, or rights to, the ne varietur note secured by the mortgage. Republic of Texas Savings Ass'n v. First Republic Life Ins. Co., 417 So. 2d 1251 (La. App. 1st Cir. 1982) (note may have been postdated and signed by unauthorized agent); Rein v. Merriell, 150 So. 2d 73 (La. App. 4th Cir. 1963) (note was fraudulently obtained); Eskew v. Walker, 127 So. 2d 210 (La. App. 3d Cir. 1961) (holder obtained note either without consideration or by theft).

But the mortgage does not partake of this same negotiability; it is governed by the law of registry. "Persons receiving negotiable notes secured by mortgage, cannot be benefited by their neglect to examine the acts with which the notes are identified." Schmidt v. Frey, 8 Rob. 435, 441 (La. 1844). See also Leonard v. Brooks, 158 La. 1032, 105 So. 54 (1925).

21. A mere check of the public records, however, may not be dispositive of the issue. For example, the mortgage may be recorded and yet, if the principal debt has prescribed, may have no efficacy. See Nathan & Marshall, The Collateral Mortgage, supra note 1, at 506-07.

22. It is well established that the assignee of a mortgage takes no greater rights in the premises than the assignor had, and that the rules governing negotiable instruments have no bearing. Equitable Sec. Co. v. Talbert, 49 La. Ann. 1393, 1404, 22 So. 762, 767 (1897). But the bona fide holder of a negotiable note secured by a mortgage, duly recorded and bearing nothing on its face to impeach its validity, cannot be defeated in his mortgage rights by secret equities between the original parties if he has no actual notice of them and if no act in the public record would give notice. Bell v. Canal Bank & Trust Co., 193 La. 142, 190 So. 359 (1939); Smith v. Deano, 179 La. 561, 154 So. 452 (1934); Davis v. Welch, 128 La. 785, 55 So. 372 (1911). Under Louisiana's strong public records doctrine, a third party may be entitled to rely on the record even when he is aware of unrecorded equities between the original parties. Bell v. Canal Bank & Trust Co., 193 La. 142, 155, 190 So. 359, 364 (1939) (cited, with apparent approval, in dicta, Arnold v. Sun Oil Co., 218 La. 50, 110, 48 So. 2d 369, 389 (La. 1949).
edness in full yet fail to retrieve the note, mark it paid, and cancel the mortgage, and if that note passed to a holder in due course, the mortgage would remain valid. The mortgage was theoretically extinguished when the debt was paid, yet it remains on the public records. Two basic principles of law are, therefore, in conflict. On the one hand, there is the rule that a transferor of a note cannot transfer greater rights to the security than he has; on the other, there is the rule that the test of security is an examination of the public records. While the issue is not without difficulty, our view is that a mortgage valid on the public records should be enforceable by a holder in due course of the note it secures despite the claims of the original mortgagor that he has paid the debt.

**RULE THAT PLEDGE INTERRUPTS PRESCRIPTION**

It was suggested in *The Collateral Mortgage* that one of the great utilities of the collateral mortgage lies in the application of the rule that the retention of an item in pledge by the pledgee serves as a constant acknowledgement of the debt by the pledgor, with the result that the principal obligation is imprescriptible. Thus the pledge of the *ne varietur* note to secure the hand note results in the hand note's becoming imprescriptible as long as the creditor retains possession of the *ne varietur* note. The article further pointed out the risk that if there were no payments on the hand note that would interrupt prescription on the *ne varietur* note, then in five years the *ne varietur* note would prescribe, and the mortgage would fall. The extremely important rule with reference to a pledge interrupting prescription has been challenged, but upon reevaluation, the Louisiana Supreme Court found the rule to be valuable and reaffirmed it.

In the case of *Kaplan v. University Lake Corp.*, an imaginative creditor created a two-tier pledge. The debtor executed a collateral mortgage on property in the University Lake subdivision in Baton Rouge, and pledged the *ne varietur* note to secure an original hand note, thereby making the hand note imprescriptible. But at the time, 1963, there was no statute in existence that would have operated to have payments on

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23. This conflict apparently remains unresolved, though in *Bell v. Canal Bank*, the court did hold that the innocent transferee of a note secured by a mortgage executed by one who is not the true owner of the property had greater rights to the property than did the true owner.


27. 381 So. 2d 385 (La. 1980).
the hand note interrupt prescription on the ne varietur note.\textsuperscript{28} Instead, at that time, careful lenders required a mortgagor to acknowledge the ne varietur note within every five years and thereby interrupt prescription and start a new five-year period. Apparently in order to avoid that necessity, the creditor had University Lake Corporation pledge eighteen written "contracts to sell" lots in the subdivision to secure the ne varietur note.

The legal result would have been that even if no payments were made by anybody on anything, the pledge of the written "contracts to sell" would continually acknowledge the ne varietur note. The ne varietur note thus remained imprescriptible, and the retention of the ne varietur note by the creditor in turn would continually acknowledge the hand note. The hand note would be imprescriptible, too—an interesting game of leap frog with the rules of prescription. Unfortunately for the creditor, in 1964 the "contracts to sell"—were rescinded by mutual agreement, and these documents thereby became nothing but mere scraps of paper with no legal value.

The Supreme Court of Louisiana, in reappraising the interruption of prescription rule, analyzed earlier jurisprudence in the pledge area, including \textit{Succession of Picard}.\textsuperscript{29} The \textit{Picard} case had applied the rule even to the point of holding that the pledge of a prescribed note and worthless stock served to acknowledge the debt and interrupt prescription.

The court used unfortunate language in \textit{Picard}: "It is not the detention of a thing \textit{of value} by the pledgee which serves as a constant acknowledgment of the debt . . . . Regardless of the value of the thing pledged . . . the detention or possession is the factor which serves as a constant acknowledgment of the debt."\textsuperscript{30} This broad language had led some commentators to speculate whether the use of "a mere peppercorn" could serve constantly to acknowledge a debt and interrupt prescription.\textsuperscript{31}

\textsuperscript{28} The applicable statute today is La. R.S. 9:5807 (1983), which provides that a payment by a debtor of principal or interest on an obligation acknowledges all other obligations, including promissory notes, pledged to secure the obligation. See Nathan & Marshall, \textit{The Collateral Mortgage}, supra note 1, and Nathan & Marshall, \textit{Postscript}, supra note 2.

\textsuperscript{29} 238 La. 455, 115 So. 2d 817 (1959).

\textsuperscript{30} Id. at 462, 115 So. 2d at 819-20.

\textsuperscript{31} Michael Rubin effectively questions "blind adherence" to the rule and urges reexamination of its applicability where "the pledgor [does not] relinquish[] control of something valuable, something he wants returned." Rubin, \textit{The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Security Devices}, 40 La. L. Rev. 572, 577 (1980). In this sense, he is correct: no pledgor \textit{really} cares whether a prescribed note is returned. But there is a distinction, albeit without great difference, between a peppercorn that has no value and a prescribed note that has some value. We submit that the rationale of the basic rule is sound and the rule has great commercial utility. It is the extension to absurdity that is questionable. Most legal theorems involve drawing a line somewhere, and no
The Supreme Court in *Kaplan*, however, emphasized that a prescribed note is not a completely meaningless document. As a prescribed obligation, it is nonetheless a natural obligation. Since natural obligations will serve as good cause for a new contract, the pledge of a prescribed note interrupts prescription on the note that it is pledged to secure. The "contracts to sell," however, had become totally worthless in 1964 and had no value whatsoever after that date. The court rejected a peppercorn theory approach and held that from that point in time nothing existed in pledge to interrupt prescription on the ne varietur note. It therefore held that when the agreements to sell were rescinded, the interruption of prescription ceased, and prescription began to run. Five years from that date the ne varietur note prescribed, and the mortgage, as an accessorial obligation, fell with it. Nonetheless, the prescribed ne varietur note was a natural obligation and as such did serve to interrupt prescription on the hand note. This meant that the creditor had a viable hand note executed by a defunct corporation (and thus as a practical matter uncollectible), a truly Pyrrhic victory.

**THE PLEDGE AGREEMENT: THE MOST VITAL ELEMENT?**

Two major Louisiana Supreme Court decisions have dealt with the requisites and limitations of the pledge agreement that underlies the collateral mortgage package. One opinion has added clarity to the area, and the other has muddied the waters. *First Guaranty Bank v. Alford* clarified the important role that an act of pledge can play in limiting the liability of the pledgor. Dr. Alford borrowed $155,000 from First Guaranty Bank on April 30, 1973. At that time he and his wife executed a collateral mortgage in the amount of $155,000 on her separate property. The mortgage stated on its face, as is customary, that the $155,000 ne varietur note paraphed for identification with it might be placed as security for future obligations. The Alfords also executed a written act of pledge, thereby exceeding the requirements of *Wallace v. Fidelity National Bank*, which had held that under Civil Code article 3158 a jurimetric scale exists so finely calibrated that it can weigh the difference between one peppercorn, two peppercorns, and so on, until so many peppercorns have been pledged that the pledgor does want them returned. Since peppercorns are rarely pledged except in the classroom, we suggest that the distinction made by the Court in *Kaplan* is pragmatic even if not intellectually unassailable, and the rule should be left alone at this point.

32. 381 So. 2d at 388; La. Civ. Code arts. 1760 and 1762 (prior articles 1757 and 1758).
34. In *Kaplan* the creditor knew that the "contracts" had been rescinded. The court did not say how its conclusion might have differed if the pledgee had not known and continued to hold the agreements believing they had value.
35. 366 So. 2d 1299 (La. 1978).
36. 219 So. 2d 342 (La. App. 1st Cir. 1969).
promissory note may be pledged by mere delivery. This act of pledge recited the terms of the $155,000 hand note and then stated that the Alfords "do by these presents pledge [the ne varietur note] as security for said note . . . ."37

Dr. Alford paid the $155,000 hand note, which was marked cancelled, and later borrowed about $300,000 more in separate transactions, each evidenced by a new hand note. At the time of each transaction, Dr. Alford, but not his wife, signed an agreement that pledged the original $155,000 ne varietur note to First Guaranty Bank. For its part, First Guaranty Bank continuously held possession of the original ne varietur note.

Dr. Alford defaulted and First Guaranty Bank sought to foreclose upon Mrs. Alford's separate property, based upon the 1973 collateral mortgage. The bank ran into difficulties, however, because in the 1973 pledge agreement Mrs. Alford had pledged the ne varietur note specifically to secure the original $155,000 hand note, the "said" note referred to in the agreement. The bank pointed out that the 1973 document was part of a collateral mortgage package that contained in the ne varietur note (and in the mortgage) this variation of the standard language:

DUE ON DEMAND. This is a collateral note secured by a collateral mortgage and may be placed as collateral security for any hand note or notes which shall govern the terms, time of payment, interest rate and all other conditions set forth therein. This note may be issued and re-issued without being extinguished by confusion, and its validity will not be affected by the fact that the original indebtedness for which it was issued is paid.38

Unlike a mortgage to secure a specific debt, the very purpose of a collateral mortgage, said the bank, is that the note may be issued and reissued without extinguishing the mortgage. Because that is so, the bank then argued, new advances will be made.

Justice Calogero correctly held that the standard language merely permits, but does not require, the reissuance of the note and the making of future advances, and that, at least between the original parties to the transaction, the specific language of the act of pledge governs.39 Therefore,

37. 366 So. 2d at 1301 (emphasis added).
38. Id.
39. Justice Calogero noted:
   The collateral mortgage note and collateral mortgage admittedly contained the identical provision quoted hereinabove by which Mrs. Alford acknowledged that the note may be placed as collateral security for any hand note or notes and that the note may be issued and reissued without being extinguished (and that its validity will not be affected by the fact that the original indebtedness for which it was issued is paid.)
   That the note may be reissued does not require the conclusion that it was.
   Id. at 1302.
because Mrs. Alford had neither originally pledged the mortgage note to secure future debts nor repledged it to secure the later debts when they were incurred, none of Dr. Alford’s debts after the initial one were secured by the mortgage on Mrs. Alford’s separate property.

This holding places no onerous restrictions on lenders. When a written act of pledge is used, the parties to it are and ought to be bound by its terms. A lender may still secure future advances by a collateral mortgage, and obtain retroactive ranking to an original issuance date. The creditor must simply avoid placing restrictive language in the original act of pledge. The lender must obviously meet the following five requirements expressly spelled out in *New Orleans Silversmiths v. Toups*,40 based upon (and expanding) article 3158 of the Louisiana Civil Code:

1. The initial pledge was properly confected;
2. Each subsequent loan was specifically secured by a pledge of the original collateral mortgage note;
3. The parties mutually agreed at the time of the original pledge that the pledge would also secure obligations thereafter arising;
4. The pledged collateral has continuously remained in the hands of the pledgee; and
5. the parties at all times acted in good faith.41

Since a collateral mortgage may be used to secure a specific debt,42 a debtor who wishes to limit the mortgage to that debt can lawfully do so and the pledge agreement is clearly the proper document in which to manifest such an intent. The risk, of course, is that the ne varietur note, which is negotiable, may fall into the hands of bona fide third parties who are unaware of the pledge agreement and are not bound by it.43 That risk is probably the major drawback to use of the collateral mortgage. The problem is mitigated by the fact that a pledgee, who accepts a fiduciary duty as such, surely would be liable to a borrower injured in such a situation. The risk can be further minimized by use of a third-party custodian to hold the ne varietur note, or by use of a safety deposit box with appropriate restrictions.

We would have thought, at least until *Texas Bank of Beaumont v. Bozorg*,44 that if there were no written act of pledge, it would be presumed that the collateral mortgage was intended to secure future advances. As a corollary, we might also have assumed, prior to the holding in *Bozorg*, that absent a written act of pledge executed contemporaneously with the

40. 261 So. 2d 252 (La. App. 4th Cir. 1972).
41. Id. at 254.
43. See supra note 20 and accompanying text.
44. 457 So. 2d 667 (La. 1984).
creation of the collateral mortgage, subsequent advances would relate back to the original mortgage so long as there was no limiting language to the contrary contained in any subsequent repledges of the ne varietur note, and so long as the new pledges were made by the parties who actually had rights to the pledged note or the mortgaged property (unlike Dr. Alford, who had no rights to either). The doubts now shadowing this area will be discussed shortly.45

One weakness in the Alford holding involves an argument discussed and rejected by the supreme court. Although it is correct that Mrs. Alford pledged the ne varietur note to secure a specific debt, it is also true that when the debt was paid she did not demand that the First Guaranty Bank return the ne varietur note to her. Implicit in the theory that the pledge of the ne varietur note interrupts prescription on the hand note it secures (because the pledge constantly acknowledges that debt) is the notion that once the debt is paid, the debtor will ask for the return of the pledged ne varietur note.46 Perhaps this presupposes greater sophistication than the law should require of a collateral mortgagor, but certainly an argument exists that by allowing the bank to retain the ne varietur note, Mrs. Alford tacitly or implicitly acknowledged that she intended this pledge to be maintained to secure her husband’s debts, that is, to secure more than just the original debt. Indeed, a later court applied such a principle to hold that a pledge by a third person, not the principal debtor, continued to acknowledge the debt of the principal debtor and thereby interrupted prescription.47 The Alford court, however, did not focus on that argument, but disposed of the issue in short order by stating that “[m]ere retention of the thing pledged, i.e. the collateral mortgage note, does not determine the continued existence of the pledge.”48

45. See discussion of Bozorg infra notes 62-77 and accompanying text; see also infra note 86 and accompanying text.

46. Kaplan v. University Lake Corp., 381 So. 2d 385, 387 n.3 (La. 1980) (rationale for the “constant acknowledgment” rule is that the debtor makes an implied acknowledgment of the debt by delivering his property to the creditor in pledge).

47. See Allen v. Huls, 517 So. 2d 188 (La. App. 1st Cir. 1987), writ denied, 518 So. 2d 511 (1988), in which the court cited French authority for the proposition that:

Commentary suggests that the detention of the pledge must interrupt prescription because the creditor assumes that it is the debtor’s acknowledgment of the debt, not an oversight, keeping him from seeking the return of the thing pledged, and, therefore, the creditor does not act further to preserve his right . . . . The focus of the doctrine, thus, is the creditor’s justifiable reliance that he need do nothing further to interrupt prescription but continue to hold the pledge. Id. at 189-90. One may question how far this holding should be extended. For example, if the original debtor D is unaware of the existence of the pledge by S, he might be surprised to find that a note he thought had been extinguished by the passage of time had been rendered imprescriptible.

48. Justice Calogero did remark that “[t]he bank’s retention of the collateral mortgage
The Alford case should also remind all practitioners of the need to stay alert to the consequences of Louisiana's community property law. With the 1978 and 1979 revisions in our community property law,\(^4\) it is now clear that, as to all mortgages, unless a spouse has renounced the right to concur, both husband and wife must execute the act of mortgage itself if it affects a community immovable.\(^5\) As to collateral mortgages, must both husband and wife also sign the act of pledge? In *American Bank v. Red Diamond Supply Co.*,\(^5\) the court held that where a collateral mortgage had been executed and the ne varietur note had already been pledged before the law changed (at a time when the husband was still "head and master" of the community), subsequent advances made in reliance on the effectiveness of the collateral mortgage were secured even without the wife's consent.

Under the new community property laws, it can be argued that because either spouse can alienate or encumber an unregistered community movable without the consent of the other,\(^5\) and because a promissory note is an incorporeal movable,\(^5\) then either spouse can pledge the ne note after extinguishment of the ancillary debt note (or hand note), without either an outset pledge to secure future obligations or a subsequent pledge by the obligor on the collateral note (Ms. Alford, that is) gives the bank no security interest in the collateral mortgage note," and that "[i]n]ere retention of the thing pledged, i.e., the collateral mortgage note, does not determine the continued existence of the pledge." *Alford*, 366 So. 2d at 1302, 1304 n.4 (citing *Durham v. First Guar. Bank*, 331 So. 2d 563 (La. App. 1st Cir. 1976) and *Scott v. Corkern*, 231 La. 368, 91 So. 2d 569 (1956)).

It is instructive to note that the Alford case might have reached a different result if there had been no written act of pledge. Under La. Civ. Code art. 3158, a pledge of a promissory note need not be in writing in order to be effective against third parties. See supra note 3. In such event, the question of whether the parties agreed or contemplated future advances at the outset would have been a question of proof, and the bank would not have been bound by a restrictive pledge. In the absence of a restrictive writing, if the bank could have proven by parole evidence that the parties originally contemplated future advances, then the mortgage might have been held to be effective throughout the series of new loans made by Dr. Alford. The irony, of course, is that the Louisiana Supreme Court in *Bozorg* stressed that one must "look" to the act of pledge to determine whether the parties contemplate future advances. In the absence of a writing to which one could "look," however, the unwritten pledge would have nonetheless been valid under article 3158 and the issue would have turned on oral testimony.

\(^5\) See infra note 59.
\(^5\) La. Civ. Code arts. 2346, 2347. It should be noted that the transfer of a negotiable note and mortgage can be accomplished by mere delivery (bearer paper) or endorsement (order paper) under La. R.S. 10:3-202 (1983). The fact that the note is secured by a mortgage does not alter the efficacy of these provisions. See *Thompson v. Crow*, 3 La. App. 158, 160 (2d Cir. 1925). See also infra notes 55-59 and accompanying text.
\(^5\) La. Civ. Code art. 473; *Mille v. Dupuy*, 21 La. Ann. 53 (1869). True, the Louisiana Supreme Court has in one instance characterized promissory notes as "corporealized in-
varietur note without the other's consent. Under this analysis, both spouses must sign the mortgage (the actual encumbrance of the immovable), but either spouse acting alone can control the issuance of the ne varietur note. This analysis, though certainly supportable, is not necessarily correct. Although Civil Code article 2347 requires both spouses’ signature and concurrence to grant the mortgage (since that is the encumbrance of the immovable), inasmuch as the pledge is of movable property (namely, a bearer note), it is certainly arguable that article 2347 does not apply and that either spouse may act alone under Civil Code article 2346 to pledge the ne varietur note. Countering that argument, however, it might be said that since the negotiable instrument is a collateral mortgage note and is paraphed ne varietur to identify it with the mortgage, it is apparent on the face of the note that it involves "rights and actions that apply to immovable things," and therefore it is an incorporeal immovable under Civil Code article 470. If the ne varietur note is classified as an incorporeal immovable, then the concurrence of both spouses is required to pledge it. The implications of this classification would be far-reaching. For example, the pledge agreement would have to be filed in the public records in order to affect third parties. On the other hand, if the note is classified as an incorporeal movable, then even though the act of pledge is required to bring the collateral mortgage package to fruition, concurrence might be necessary only for the act of mortgage and not for the pledge.

corporeals," but it is well recognized that a promissory note is incorporeal. La. Civ. Code art. 461. See, e.g., McLaughlin v. Knox, 224 So. 2d 491 (La. App. 1st Cir. 1969). Indeed, it was for that reason that the law regarding donations of negotiable instruments was changed to permit donations to be made other than by authentic act. See Succession of Miller, 405 So. 2d 812 (1981); see also id. at 819 (Dixon, C.J., dissenting); 1982 La. Acts No. 452, adding La. R.S. 10:3-201 (1983). For a discussion of the classification of the ne varietur note, see infra notes 57, 59.


55. See Comment, "Selected Problems in Equal Management of Community Property," 60 Tul. L. Rev. 821, 839 (1986), presenting this analysis, which has the virtue of being consistent with pre-1980 marital property law. See infra notes 57, 59.


57. It is indisputable that mortgage is an incorporeal immovable, whereas promissory notes are incorporeal movables. See La. Civ. Code art. 470; Yiannopoulos, Property § 99, at 301, in 2 Louisiana Civil Law Treatise (2d ed. 1980) as to mortgage. See also La. Civ. Code art. 473 and Yiannopoulos, supra, at 300, as to promissory notes. Viewed separately, there is no problem. It is when the two are combined so that the movable note is secured by an immovable mortgage that a problem arises. Does the otherwise movable note become immovable when it is paraphed for identification with the mortgage? No case has expressly considered whether a mortgage note should be characterized as movable or immovable, although McLaughlin v. Knox, 224 So. 2d 491 (La. App. 1st Cir. 1969), which dealt with the necessity of an authentic act for donations of incorporeals, referred to an ordinary
A middle ground that satisfactorily protects the rights of spouses and respects the nature of the collateral mortgage would be to ignore the classification of the ne varietur note as movable or immovable and to proceed on the following line of reasoning. Recognizing the unique nature of the collateral mortgage as a hybrid security device, a package that requires both pledge and mortgage for its efficacy, and further recognizing that the net effect of the perfected package is to encumber an immovable, it would seem reasonable to view the transaction as a whole and require both spouses to sign all of the documents that de facto encumber the community immovable, namely, the act of mortgage and the act of pledge. Both spouses should also be required to sign any subsequent “repledge” of the ne varietur note to secure future advances. A spouse who does not want to expose his or her separate property to liability for the community indebtedness for which the collateral mortgage will be pledged has a safety hatch. He or she should renounce the right to concur in the encumbrance of the community immovable and allow the other spouse to mortgage the immovable and pledge the mortgage note without his or her concurrence. We suggest that if the law in this

It should be noted that La. Civ. Code art. 474 of 1870 classified promissory notes and mortgages as movables by disposition of the law, expressly providing for that result “although these obligations are accompanied with a mortgage.” La. Civ. Code art. 474 (1870), from Compiled Edition of La. Civil Codes (Dainow ed. 1973). The redactors of the new Code article state in comment (a) to article 473, that it does not change the law, but it is obvious that the law has been altered since the words “although these obligations are accompanied with a mortgage. . . .” have been omitted. Whether they are omitted as unnecessary, or for substantive reasons, the redactors now state in comment (c) to article 473: “[r]eal mortgage, the kind of interest the redactors of the Civil Code had in mind, is a real right, which, in light of its object, ought to be classified as an incorporeal immovable . . . but an action on the principal debt . . . to [recover] a sum of money, is a movable. . . .” At best, this observation is ambiguous.

The French recognized the same dichotomy between incorporeal immovables and promissory notes as incorporeal movables. See Aubry and Rau, Droit Civil Francais, § 165, at 36, 38 (La. St. L. Inst. trans. 1966). Planiol observed that a mortgage on an immovable retains its immovable character regardless of the connection and reliance on notes or movable assets. He characterized this reliance as a situation where the mortgage becomes an accessory of the notes and stated: “this [reliance] takes place in mortgage loans. There, the mortgage, a real and immovable right, is attached to a movable right. The mortgage follows the loan everywhere. It does so in the case of legacies, in communities, in partitions. It does not, because of this, lose its own nature, which is immovable.” See Planiol, Traité Élémentaire de Droit Civil, § 2213, at 306 (La. St. L. Inst. trans. 1959).

58. The issue of the effect of a spouse’s failure to join in subsequent “repledges” was raised but not resolved in Citizens Nat’l Bank v. Coates, 509 So. 2d 103 (La. App. 1st Cir. 1987). See infra note 106 and accompanying text.

59. It should be noted that under prior law when the husband was “head and master,” wives were nonetheless required to sign acts of mortgage to waive their homestead exemptions on property. The courts held that by signing the mortgage and mortgage note, the wife
area is to remain consistent with the overall design of our community property law, then it should not be possible to divorce the pledge from the mortgage.

Must there be a written act of pledge to have a valid collateral mortgage? Certainly there need not be. Wallace v. Fidelity National Bank\(^6\) and article 3158 of the Louisiana Civil Code supply the answer to that question.\(^6\) But what is the effect of the failure to have a written pledge agreement? Despite ten years of excellent jurisprudence correctly interpreting the law and spreading sunshine on the use of the collateral mortgage as a security device, the case of Texas Bank of Beaumont v. Bozorg\(^6\) has clouded the area and raised serious doubts concerning the necessity of having a pledge agreement as well as its requisites.\(^6\)

became personally liable on the note and subjected her separate property to liability. When the new matrimonial regime law became effective in 1980, requiring the concurrence of both spouses for the alienation, encumbrance, or lease of community immovables (La. Civ. Code art. 2347), the Council of the Law Institute recognized this danger and designed a way for one spouse to permit community immovables to be mortgaged without having to join in the mortgage and expose his or her separate property to liability for the debt. La. Civ. Code art. 2348 was adopted, authorizing the spouse to "expressly renounce the right to concur in the . . . encumbrance . . . of a community immovable or some or all of the community immovables, or community immovables which may be acquired in the future . . . ." Article 2348 was originally adopted by 1979 La. Acts No. 709 § 1 but was amended in 1981 and twice in 1984 to clarify the parameters of such renunciation. The renunciation may be irrevocable for a stated term not to exceed three years, and if it "was proper in form and effective under the law at the time it was made," it remains effective for three years or until revoked. As a side note, one should observe that while the article refers to "proper in form," no provision sets forth the proper form. Another amendment provided that the spouse may "nonetheless reserve the right to concur in the . . . encumbrance . . . of specifically described community immovable property." See 1979 La. Acts No. 709 § 1; 1981 La. Acts No. 132; 1984 La. Acts No. 554; 1984 La. Acts No. 622. By way of example, if a wife has separate property that she does not want to expose to liability for the indebtedness that the collateral mortgage will be pledged to secure, or the possible future debts, then instead of signing the mortgage and the collateral mortgage note she would use article 2348 and renounce the right to concur in the encumbrance of the community immovable, allowing her husband to mortgage it without her concurrence. This technique is commonly used by lawyers aware of the ramifications, who are seeking to protect spouses with separate property. As the revision comments note, "The renunciation, unlike the granting of a power of attorney or mandate, does not render the renouncing spouse a party to the transaction. Consequently, a resulting obligation may not be satisfied from the separate property of the spouse who renounces the right to concur." See also La. Civ. Code art. 2345.

60. 219 So. 2d 342 (La. App. 1st Cir. 1969).
61. Cf. Pontchartrain State Bank v. Gross, 508 So. 2d 901 (La. App. 5th Cir. 1987) (it is unnecessary to file or attach a collateral pledge agreement to obtain executory process).
63. As counsel for Massey-Ferguson, which won a great part of what it sought in the Bozorg case, we do not wish to appear ungrateful to the Louisiana Supreme Court. Our present argument is simply that victory should have been awarded on a different set of legal principles.
Mr. Bozorg executed a ne varietur note and a collateral mortgage, both in the amount of $200,000, in favor of First Metropolitan Bank of Jefferson Parish (FMB) on August 12, 1975. He pledged the ne varietur note to secure a hand note, which apparently was also in the amount of $200,000. No evidence in the court records described that hand note, although the court of appeal, with mystic intuition, stated that it was a bearer note. It also seems that there was a written act of pledge of the ne varietur note, though what became of that act of pledge is unknown.

Three years later, when the balance on Bozorg's debt to FMB had been reduced to $96,000, Bozorg borrowed $344,406.59 from Massey-Ferguson (MFI). He executed another collateral mortgage and ne varietur note in that amount, which was pledged to MFI to secure a hand note also in that amount, all on September 11, 1978. In the act of mortgage, Bozorg committed himself not to increase his indebtedness secured by the August 12, 1975, collateral mortgage to FMB, and he instructed FMB not to increase the indebtedness beyond the $96,000 then owed.

On January 4, 1980, FMB transferred the ne varietur note dated August 12, 1975, to Texas Bank of Beaumont (TBB) for $88,025.34, which was then apparently the balance outstanding on the original $200,000 loan. The transfer was evidenced by a notarial act of assignment that made no reference to a hand note. Exactly one month later, ignoring his promise not to borrow more funds secured by the 1975 mortgage, Bozorg rolled his $88,000 debt into a new $200,000 loan from TBB. He executed a new hand note in that amount and pledged the 1975 ne varietur note to secure the new hand note. When Bozorg defaulted, TBB foreclosed upon the 1975 collateral mortgage; MFI intervened seeking to have its 1978 mortgage recognized as superior to TBB's mortgage.

Two major legal questions were involved: First, did TBB succeed to FMB's rights in the pledged collateral by virtue of the 1980 transaction? Second, if so, was TBB entitled to retroactive ranking back to August 12, 1975, for the loan TBB made to Bozorg in 1980?

The facts strongly paralleled those of Odom v. Cherokee Homes, Inc., 64 which was cited and followed by the district court. Relying on the Odom analysis, MFI argued, and the district court held, that unless FMB assigned the hand note to TBB, and with it the accessorial obligations represented by the ne varietur note and the 1975 collateral mortgage, then TBB's payment to FMB of the outstanding balance due on the hand note extinguished the note, and any new use of the mortgage would be a reissuance with a new ranking date. As in Odom, the original Bozorg hand note, if it ever existed, had disappeared. TBB could not produce it in court, and FMB did not know whether the note had or

64. 165 So. 2d 855 (La. App. 4th Cir. 1964).
had not been marked "paid" and returned to Bozorg. Indeed, the Supreme Court acknowledged: "There is no evidence that the existing principal obligation evidenced by the hand note was ever assigned to TBB." 

Had the court followed Odom, that finding alone would and should have ended the matter. If the hand note was not assigned to TBB, but rather was paid, then any subsequent advances secured by the ne varietur note and mortgage would be reissues and therefore not entitled to retroactive ranking to the earlier original issuance date. 

Justice Lemmon, however, writing for the majority, found that the transfer to TBB of the ne varietur note, while not an actual assignment, was intended by the parties to subrogate TBB to FMB's rights to the collateral, and qualified as a conventional subrogation pursuant to article 2160(1) of the Louisiana Civil Code. 

By notarial act, FMB had transferred to TBB, "all of its right, title, interest, priority, and privilege" in connection with the 1975 ne varietur note and mortgage. Thus, said the court, when FMB received full payment of the Bozorg indebtedness from TBB, it subrogated TBB to all of FMB's privileges and rights, including the security of FMB's 1975 collateral mortgage, to the extent of the $88,000 which TBB paid. This holding effectively, though sub silentio, overruled Odom, where the identical "intention" was apparent and where virtually identical facts existed, yet an exact opposite result was reached. 

The supreme court, curiously, never referred to Odom at all, despite the fact that the trial court had cited Odom, had found it indistinguishable, and had followed it. Dr. Odom, like TBB, had not received an assignment of the hand note. Dr. Odom wanted to stand in the shoes of Morgan, just as TBB wanted to stand in the shoes of FMB. But Dr. Odom ended up with a reissuance and a new rank, whereas TBB acquired the original issuance and its earlier rank. "Who can explain it? Who can tell you why?" Perhaps, as in Some Enchanted Evening, only fools would give reasons, and wise men wouldn't try. 

It is intellectually unacceptable to leave unexamined the overruling of a major case and its extremely important holding. One cannot dismiss so profound a reversal in legal thought with a wave of the hand. The implications are too important and far-reaching for our commercial law.

65. 457 So. 2d 667, 673 (La. 1984).
66. Odom, 165 So. 2d at 865.
67. Id. The supreme court correctly held that FMB could not sell Bozorg's ne varietur note since it did not own the note but merely held it as pledgee. Bozorg, 457 So. 2d at 674. As the court noted in Odom, "a sale of collateral divorced from the debt it is pledged to secure would amount to a conversion." Odom, 165 So. 2d at 864.
In the authors' opinion, Odom was correctly decided and gave predictability and consistency to the law. Bozorg removes the predictability and substitutes a large measure of uncertainty, which results from the court's search for an equitable result for the litigants immediately before it. What creditor will not maintain that it "intended" to be subrogated to its predecessor, no matter how inartfully it pursues its course? Bozorg gives rise to other, equally troublesome problems because of its pursuit of "equity" for the litigants involved. If the supreme court was correct in finding that FMB had properly subrogated TBB to all of its rights in Bozorg's collateral mortgage package, then predictable consequences should follow. TBB should have been able to make those future advances that were implicit in the standard language contained in the collateral mortgage, and, assuming it otherwise met the five tests enunciated in Silversmiths, TBB should have obtained retroactive ranking as provided in article 3158 of the Civil Code. Logically, that should have been the end of the case for MFI, which then should have gone home a loser. The court, however, elected to follow a different and unanticipated course, one that none of the litigants had advocated.

The supreme court focused on the third of the Silversmiths tests: that the parties mutually agreed at the time of the original pledge that the pledge would also secure obligations arising thereafter. The court held that it did not need to reach the question of whether TBB, as a third party, was entitled to retroactive ranking. The real issue, said the court, was whether FMB itself had ever had such a right, that is, whether in the original August 12, 1975, transaction, Bozorg and FMB had agreed that the $200,000 ne varietur note was being pledged to secure future obligations.

The problem here, however, was that no one could produce the 1975 act of pledge, if indeed one existed. The court held that the standard language contained in the original ne varietur note and mortgage was not sufficient to show that the parties intended that the mortgage would secure future advances entitled to retroactive ranking. Nor was it even presumptive of such intent, a presumption rebuttable perhaps by oral testimony or certainly by a written act of pledge restricting its use, as in Alford. Why? The standard language should have been satisfactory to obtain such a result.

69. 261 So. 2d at 255; see infra note 41 and accompanying text.
70. Bozorg, 457 So. 2d at 674. The court ignored the argument that the "good faith" requirement contained in article 3158 had been violated when Bozorg borrowed money from TBB after declaring in the MFI mortgage that he would not do so. The question of whether a debtor's bad faith can undermine the security of a third-party creditor who makes subsequent advances pursuant to a collateral mortgage remains unresolved.
71. Bozorg, 457 So. 2d at 675.
72. See supra note 44 and accompanying text.
Louisiana law, as noted earlier, does not require a written pledge agreement since the pledge of a promissory note is confected by mere delivery.\textsuperscript{73} But the court in \textit{Bozorg} "emphasized" that the parties' agreement "must be in the contract of pledge and not in the collateral mortgage instrument."\textsuperscript{74} The court held that TBB had the burden of proof to establish the original intent. Since the court could not determine from the record what the original pledge agreement provided, TBB failed to meet its burden. FMB would not have been entitled to retroactive ranking for future advances, and therefore, its subrogee, TBB, was not entitled to retroactive ranking for the advances it made to Bozorg in 1980. The right hand gave, and the left hand took: TBB ranked first to the extent of its $88,000 "subrogation" to rights under the 1975 mortgage, but MFI ranked next to the extent of the $344,406.59 secured by Bozorg's 1978 mortgage, while TBB ranked after MFI to the extent of its 1980 advance secured by the 1975 mortgage.

There is an irreconcilable philosophical conflict in the court's holdings. On the one hand, the court stressed substance over form by ignoring the failure to assign the hand note, which, representing the principal indebtedness, was a critical element and as such is always extraordinarily important in collateral mortgage packages, and by seeking to honor the parties' \textit{intent} that TBB would stand in the shoes of FMB. Shifting gears, the court then exalted form over substance and became exceedingly literal and overly technical in requiring an act of pledge, which is not in itself necessary, that manifests an \textit{intent} to secure future advances, despite the fact that everyone knows that securing future advances is one of the chief functions of the collateral mortgage package.

Problems with the decision in \textit{Bozorg} are many. First, it erased the easily understood principle set forth in \textit{Odom} that the rights created by a collateral mortgage may only be conveyed to a third party by the assignment of the principal debt (represented by the hand note) and not by an assignment of the auxiliary or accessorial obligation pledged to secure it (the ne varietur note and mortgage). Second, it reduced the question of whether a particular collateral mortgage is deemed to secure subsequent advances, ranking retroactively to the original issuance, to a question of proof without a presumption. Under \textit{Bozorg}, a lender cannot rely on the standard "future advances" language in a collateral mortgage to establish the requisite intent. That language authorizes the advances, but it is not sufficient proof of intent in a given case, and it is not even presumptive evidence of such intent. So if there is no written act of pledge, what is required to prove "intent"?

\textsuperscript{73} See La. Civ. Code arts. 3153, 3158 and 3162. Before 1988, if the promissory note was nonnegotiable, the pledge was not perfected as to third parties until notice was given the obligor. La. Civ. Code art. 3160 (repealed by 1988 La. Acts No. 243).
\textsuperscript{74} 457 So. 2d at 675 n.10.
Third, Bozorg did not decide whether the right to retroactive ranking for future advances passes with the package into the hands of third persons. Rather, the court gratuitously elected, within parentheses, to cast doubt upon the issue. "Because there is no proof in this record regarding the initial contract of pledge, we do not reach the question of whether loans made to Bozorg by TBB after January 4, 1980 might have been secured with the August 12, 1975 ranking (or even whether an assignee can ever avail himself under La. C.C. Art. 3158 of retroactive ranking for later loans)." It is already established that the proper assignment of a hand note carries with it all of the collateral securing the note, including the ne varietur note and the collateral mortgage. Why should a bona fide third party assignee not also be subrogated to the original mortgagee’s right to retroactive ranking for future advances as expressed in the original act of pledge or, if there is no written pledge, as implicit in the very nature of a collateral mortgage? There is no reason to cast doubt on such a reasonable and commercially important practice.

From the commercial lender’s point of view, one troubling implication of the Bozorg decision is that a new lender seeking security and retroactive ranking for future advances must prove that the original parties intended at the outset that the mortgage secure future advances. How does the lender go about this? If there is no written act of pledge, can it be done at all? Is it a matter of having witnesses testify to what the parties said when they were in the notary’s office? Why is it not implicit when parties use a collateral mortgage, instead of an ordinary mortgage for a specific debt, that they always intend to make future advances unless, as in Alford, there is an express stipulation to the contrary? If a mortgagor sets the wheels in motion and uses a collateral mortgage but does not intend to secure future advances, should the mortgagor not have the burden to do what Mrs. Alford did, namely, expressly limit his liability by a specific act of pledge?

If a third party is an assignee of the hand note, and is fully subrogated to the assignor’s rights, and the assignor could have made future advances and obtained retroactive ranking, no reason of policy suggests itself why the assignee equally should not be able to make future advances and to have the same retroactive ranking that the assignor would have had. In commercial practice, banks, life insurance companies, and other financial institutions “sell” and assign loans on a regular basis. Surely no public policy is offended when an assignee who touches the bases is ranked the same way his assignor would have been ranked if the assignor had

75. Id. at 674.
76. La. Civ. Code art. 2645. See also Foster & Glassell Corp. v. Rachal, 191 So. 584 (La. App. 2d Cir. 1939).
touched the same bases. We submit that a bona fide assignee should not be denied the opportunity to make future advances with the security of a collateral mortgage. If one accepts the reasoning in the Bozorg decision, the message to assignees is clear: an assignee must not only meet the five requirements of Silversmiths; he must additionally prove that the original parties met them also, and specifically that they agreed that the pledge would secure future advances. The moral of all this is clear: Do not purchase a loan package if you intend to make subsequent advances unless, among other things, there is a written pledge agreement expressly providing for future advances.

We do not wish to overemphasize the importance of Bozorg. The case may represent nothing more than an effort by the judges to reach an equitable result for the litigants standing before the bar, and not an attempt at establishing a rule of law. Bozorg may be another case of hard facts making bad law. A result that may be equitable for immediate litigants may cause more harm than good, however, when lawyers around the state plan commercial transactions and draft documents in reliance on the opinion. We suggest that from a legal and commercial standpoint; the more reasonable rule to follow in future cases should be to recognize a rebuttable presumption that whenever a collateral mortgage is pledged, the parties intend to secure future advances; and, if the mortgagor wants to overcome that presumption, he should so specify in a written act of pledge, as Mrs. Alford did in her case. That rule would make good sense practically and would be consistent with article 3158 of the Civil Code, which is, after all, a pledge article and not a mortgage article. Absent such a stipulation, there is no reason why the language in the act of mortgage should not be used to support the fact that future advances were contemplated when the package was executed. To the contrary, the language clearly implies such use.77

Our state courts were not alone in tampering with the role of the pledge agreement. The federal courts also, in 1987, threw a monkey wrench into the machinery of the act of pledge. In Bank of Benton v. Keith Howard Real Estate,78 the Fifth Circuit Court of Appeals upheld a district court decision that if a pledgee wanted to enjoy the privileges under a collateral mortgage against third persons, the act of pledge must

77. A typical collateral mortgage may state that:

And here the said mortgagor declared that this mortgage is executed and granted for the equal benefit and security of any and all future holders of the hereinabove described note ... the purpose of the present act being to enable said mortgagor to pledge, pawn, hypothecate, and deliver ... the said note as collateral security to secure such loan or loans as said mortgagor may from time to time desire to make.

See also supra note 38 and accompanying text and infra note 86 and accompanying text.

78. 819 F.2d 98 (5th Cir. 1987).
also be recorded in the public records. Additionally, the case strongly suggested that a collateral mortgage would be void if the note it secured were not pledged by a written or recorded act of pledge. The Louisiana Legislature removed that wrench and started the machinery working again by passage of Act 129 of 1987. It hardly seems necessary to comment that the court should have known better; it has never been the practice in Louisiana to record acts of pledge.

While Act 129 of 1987, which added La. R.S. 9:4451, unequivocally overruled *Bank of Benton*, it may also have gone a good bit further than that. Subsection E of the statute provides that if the mortgage has been filed for recordation in the proper mortgage records, then the pledge or collateral assignment of the secured instrument “shall create a security interest in favor of the pledgee or assignee effective against third persons from the date of physical delivery of the secured instrument to the pledgee or assignee or to a third person agreed on by the parties.”

If read literally, this new language may have the unintended effect of altering the established rules of “issuance,” which determine the ranking of a collateral mortgage. Under the generally established rules prior to the enactment of the statute, even if the maker of the hand note physically delivers the ne varietur note to the pledgee, and the mortgage is properly recorded, the mortgagee still does not have rank or effectiveness against third parties unless and until there is “issuance.” The case law has generally determined that “issuance” is either the first bona fide advance made in reliance on the pledge of the mortgage note, or a binding commitment of the mortgagee to lend. Hoping that form would prevail over substance, lawyers, on occasion, did set up collateral mortgage packages requiring a nominal initial advance in an attempt to establish an early issuance date. If such an advance was not truly a part of the real loan package but instead was only made for the technical purpose of obtaining an “issuance” date (much in the manner of the old common law peppercorn theory approach to contracts), the trans-

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81. As the court stated in *Odom*:
    
    The jurisprudence is clear that the lien of a collateral mortgage dates from the date of issuance or reissuance of the note identified with it and not from the date of recordation of the mortgage. The lien is regarded as being suspended insofar as third persons are concerned during any period in which the note remains unissued in the possession of the mortgagor or during any period between the extinguishment of a debt which the note is pledged to secure, and its repledge as security for another debt. The lien of the mortgage revives upon the repledge of the note and dates from that day.
165 So. 2d at 865.
82. Id. and cases cited therein; see also infra notes 83 and 86 and accompanying text.
action ought to be labeled a sham and should not be effective to establish "issuance."

On the other hand, if the pledge of the ne varietur note took place when the lender was obligated to make advances, for example in connection with a building contract as specified stages of construction are completed, then that binding obligation should constitute "issuance" and should protect the lender from the point when the lender is bound to lend. If, however, the lender was not obligated to make advances, but such advances were merely facultative, then the "issuance" date would and should be when the first bona fide advance was made. Louisiana Revised Statutes 9:4451 could alter these rules if the statute is interpreted to mean that a collateral mortgage becomes valid and effective as to third parties literally "from the date of physical delivery," even if that date is prior to "issuance." The mere physical delivery of the ne varietur note to the pledgee may, under the statute, give the mortgage rank even without an actual advance of funds or a binding commitment to make such an advance. The plain language of the statute so provides, but this effect undoubtedly was not contemplated.

Building contract law has figured prominently in several cases to determine ranking based on issuance, where the contest was between a lending institution financing construction with a collateral mortgage as security and a contractor claiming a Private Works Act83 lien. In People's Bank & Trust Co. v. Campbell,84 the court considered whether a collateral mortgage securing a ne varietur note that was delivered to the creditor on March 31, but where the mortgage was not recorded until April 3, primed a contractor who delivered material to the jobsite on April 4, when the bank made its first advance on April 7. There was no written act of pledge. The court held that the collateral mortgage was made effective by "issuance"—the pledge to secure a future obligation—and the subsequent recordation of the mortgage. Since the bank was bound to lend even though the actual advance came later, the mortgage ranked

83. La. R.S. 9:4801-4961 (1983 & Supp. 1988). See also Bank of Jena v. Rowley, 370 So. 2d 146 (La. App. 3d Cir. 1979); American Bank & Trust Co. v. F & W Const., Inc., 357 So. 2d 1226 (La. App. 2d Cir.), writ denied, 359 So. 2d 1306 (1978). The basis for the lien claim in these cases was a provision formerly appearing in La. R.S. 9:4812 (amended in 1981 by La. R.S. 9:4821 (1983)), which provided that a materialman's lien was primed by "a bona fide mortgage." To assure that the Private Works Act was interpreted to mean that liens of furnishers of material primed a collateral mortgage where labor or material was furnished prior to issuance, the statute was amended in 1981 to state that such lien claimants were primed by "[b]ona fide mortgages . . . that are effective as to third persons before the privileges granted by this Part are effective . . . ." La. R.S. 9:4821 (1983) (emphasis added). Clearly, the collateral mortgage becomes "effective as to third persons" upon issuance.

84. 374 So. 2d 741 (La. App. 3d Cir.), writ denied, 376 So. 2d 1268 (1979).
from April 3, and was therefore effective before materials were delivered to the job site.

In *Campbell*, the court made the very important point that mere delivery of the *ne varietur* note to the bank was not sufficient to constitute a contract of pledge. The court stated that there had to be additionally a "meeting of the minds," or, in other words, that the parties must have intended to make a pledge. That seems simple enough. The court found that such a meeting of the minds did occur in *Campbell*, but it appeared to derive this insight from the mere fact that a collateral mortgage was executed and advances were made.

In a footnote, the court noted that the collateral mortgage provided that the *ne varietur* note is intended to secure any indebtedness now existing or that might arise in the future, which, said the court, "tends to show the intent of the parties that the collateral mortgage note be pledged to secure future indebtedness." In our opinion, this is the correct, albeit rebuttable, presumption that should attach whenever a collateral mortgage is executed, but it is precisely this presumption which the Louisiana Supreme Court rejected in the *Bozorg* footnote criticized above. The *Bozorg* court held that the intention to secure future advances must appear in the "contract of pledge and not in the collateral mortgage instrument." 87

**RETROACTIVE RANKING: PLEDGE AND REPLEDGE**

One of the five tests of *New Orleans Silversmiths* that must be met for the lender to obtain retroactive ranking is that the parties mutually agree at the outset that the mortgage will be used for future advances. But another *Silversmiths* test is that each of the succeeding loans be specifically secured by the pledge of the *ne varietur* note. In *Tallulah Production Credit Association v. Turner*, future advances were made in connection with hand notes that bore no reference to an original pledge and collateral mortgage. The issue was whether these notes were secured by the original mortgage and entitled to retroactive ranking. The notes not only contained no reference to the collateral mortgage, but also stated that they were secured by a crop pledge and a chattel mortgage. When the new loans were made, the debtor did not execute any express agreement repledging the *ne varietur* note to secure these new loans. The parties, however, had employed typically broad language in an express

85. Id. at 744.
86. Id. at 744 n.3 (emphasis added).
89. 391 So. 2d 885 (La. App. 2d Cir. 1980), writ denied, 398 So. 2d 900 (1981).
agreement that pledged the collateral mortgage note to “secure the payment of: (1) the particular debt [and] (2) any and all further or other debts . . . of Pledgor to Pledgee, . . . hereafter arising, up to a total of . . . $12,000.00.”

As to the Silversmiths test regarding mutual agreement at the outset, the court held that the original pledge agreement determined whether subsequent or future loans would be secured by the pledge of the note. The parties’ intent was evident at the beginning. The language of the original pledge, said the court, was also sufficient to satisfy the other test, that each succeeding loan be specifically secured by the pledge. A strong dissenting opinion in Tallulah argued that the majority decision both effectively eliminated this second requirement and ignored the provision of article 3158 that for subsequent advances to be entitled to retroactive ranking, the pledged instrument must 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.” Where was the “repledge,” asked the dissenting judge, Fred W. Jones, Jr.?

The dissenter’s point is well taken. While an open ended pledge agreement can be used to support future advances, this potentiality does not necessarily mean that it has been so used, or that the parties necessarily intended that any and all subsequent advances would be secured by the pledge. While no written “repledge” agreement is necessary, some manifestation of a specific intent to secure each subsequent advance by the mortgage is required both by New Orleans Silversmiths and by the plain language of article 3158. What is a sufficient manifestation? A ratification of the original pledge would silence all critics. A reference to the mortgage on a hand note given for the subsequent advance should clearly suffice. The utility of the open ended initial pledge agreement is that it permits future advances to gain retroactive ranking when the ne varietur note is repledged, not that it dispenses with the need to specifically secure those advances with the ne varietur note.

We further suggest that when this kind of broad act of pledge has been executed at the outset, future advances should be able to be secured by the mortgage even if the parties had no present intention at the outset to make specific advances in the future. Suppose that A executes a collateral mortgage and pledges it to B to secure a specific debt, but the parties have no present intention at that time to make or receive any future advances. Six months later, A wants to borrow more money from B.

90. Id. at 889.
91. Id.
92. Id. at 892 (Jones, J., dissenting).
93. For an interesting effort to circumvent this problem, see infra note 108 and accompanying text.
At that time the parties agree that B will extend a line of credit to A and that they will use the collateral mortgage to cover the fluctuating future advances. This is a perfectly valid use of the collateral mortgage, and those new advances ought to be entitled to ranking from the date when the parties reach their new agreement. We do not suggest retroactive ranking under such circumstances, but we do suggest that the original intention is not immutable. The alternative would be to execute an entirely new collateral mortgage, perhaps, and that would be an absurd waste of paper and time. After all, making security devices work for creditors has the beneficial result of making it easier for creditors to lend and debtors to borrow.

This end was served by the holding in Acadiana Bank v. Foreman, which resolved an issue not addressed by New Orleans Silversmiths, Inc. v. Toups. In Silversmiths, at no time was the principal debt ever fully paid, and despite the provisions of article 3158, there had been some concern by lenders that if the principal debt were ever fully paid, the accessorial obligation of the mortgage might automatically fall, and there would be a "reissuance" for ranking purposes if the lender thereafter advanced funds.

In Acadiana Bank v. Foreman, which involved a conflict between a collateral chattel mortgage and a lessor's privilege, at one point in time the payments extinguished the principal debt (the balance reached zero), but later the creditor made additional loans. The court applied and enforced the language of article 3158 and held that so long as the pledge remained intact, and the five tests were met, subsequent advances related back to the original issuance of the collateral chattel mortgage. This question, therefore, has now been laid to rest.

A case that raised the issue of retroactive ranking, but which reached into the shadowy world of homespun security devices in order to determine what is and what is not a collateral mortgage, was Mingledorff

94. 352 So. 2d 674 (La. 1977).
95. 261 So. 2d 252 (La. App. 4th Cir. 1972).
96. The language of La. Civ. Code art. 3158 would require the same result even if the principal debt is extinguished:

[I]t is further provided that whenever a pledge of any instrument ... is made to secure a particular loan or debt, or to serve advances to be made up to a certain amount, and, if so desired or provided, to secure any other obligation or liabilities of the pledger to the pledgee, then existing or thereafter arising, up to the limit of the pledge, and the pledged instrument ... remains and has remained in the hands of the pledgee, the instrument ... may remain in pledge ... 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 ... additional loans, even though the original loan has been reduced or paid. ... 
97. 352 So. 2d 674 (La. 1977).
A lawyer promised to represent Mingledorff for a fee of $25,000. Mingledorff paid $7,600, but by the time of trial he owed the lawyer another $15,000. Mingledorff executed a note in the amount of $25,000 payable to "any future holder," and a mortgage on his property in like amount, which was recorded on January 5, 1979. Because Mingledorff was in California, and the parties feared to send the bearer note through the mail, Mingledorff held the note until mid-January when, at his lawyer's instructions, he entrusted it to a mutual friend who later gave it to the attorney. Between the time that the mortgage was recorded and the time that the bearer note was actually delivered by Mingledorff to the "mutual friend," another creditor obtained and recorded a judgment against Mingledorff, which created a judicial mortgage on the property. One question was what breed of mortgage Mingledorff had given his lawyer; another question was whether the mortgage ranked from the date of recordation of the mortgage or from the time when the note passed from Mingledorff's hands.

The court of appeal, on rehearing, correctly held that a collateral mortgage package must involve a mortgage, a ne varietur note, and a pledge of the ne varietur note. The date from which the mortgage ranks (that is, the date of issuance) is the time when the ne varietur note is pledged to secure an advance, not the time when the mortgage is filed or recorded, unless recordation occurs subsequent to issuance. Despite various indicia that Mingledorff's mortgage was a collateral mortgage, namely, that the note was payable to any future holder and was in a face amount greater than the existing debt, the court found no element of pledge and no suggestion that the note was not intended to represent the actual debt. It was, the court concluded, an ordinary mortgage ranking from the date of recordation and priming the judgment.

A persuasive dissent, again written by Fred W. Jones, Jr., the dissenter in Tallulah, argued that from the testimony of the trial witnesses it could be concluded that the parties did not intend that the $25,000 note be evidence of the actual debt, but that it was intended to secure the then existing specific indebtedness and to secure indefinite future indebtedness. It could, therefore, be characterized as a collateral mortgage, ranking from the date when the note passed out of the hands of the debtor and into the hands of a third person agreed on by the parties. The dissent presented a strong argument because, given certain facts, Mingledorff may have executed a collateral mortgage; but the

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98. 420 So. 2d 463 (La. App. 2d Cir.), writ denied, 423 So. 2d 1161 (1982).
99. Id. at 469.
100. See People's Bank & Trust Co. v. Campbell, 374 So. 2d 741 (La. App. 3d Cir.), writ denied, 376 So. 2d 1268 (1979).
101. 420 So. 2d at 472 (Jones, J., dissenting).
fundamental weakness in the dissenting opinion is that it rests upon the incorrect premise that, since the mortgage at issue could not be classified as a mortgage to secure a specific debt or a mortgage to secure future obligations, it must by process of elimination be a collateral mortgage.

On the facts as reported, the Mingledorff mortgage could have been classified as a mortgage to secure future advances. Under the jurisprudence, if it is "within the contemplation" of the parties when a mortgage is confected that it may be used to secure future advances, then these advances are secured, and obtain retroactive ranking, despite the fact that no language setting out this intention appears in the mortgage. The mortgage need not be given to secure a specific future advance (as the dissent in Mingledorff argues), but may secure indefinite advances so long as the parties contemplate future advances and the lender promises to make them as required. Whether this "promise" need be any more binding than the "good faith" obligation spoken of in Pickersgill v. Brown is an issue to be judicially settled.

In any case, the Mingledorff mortgage could have been classified as a mortgage to secure future advances if the original intention of the parties was that the lawyer had a good faith obligation to provide legal services as required up to the total value of $25,000, and that all sums as they became due would be secured by the mortgage. The Mingledorff mortgage could, therefore, have ranked from the date of recordation and primed the judgment, as the majority found.

**UNRESOLVED PROBLEMS**

A major unresolved area concerns advances made after the mortgagor has disposed of the property, a not uncommon situation. Suppose that A grants a collateral mortgage on Blackacre, pledges the ne varietur note, signs a hand note, and puts a package properly in place. He then sells Blackacre to B, and B assumes the existing mortgage. Now B goes to the bank and wants to borrow additional funds, that is, he wants to obtain future advances on the strength of that mortgage. How can this be accomplished, and what is the effect of doing so?

B is clearly bound by the future advances, because he is the borrower; but what about A? If B ratifies and confirms the original act of pledge, what effect does this have upon A? Recall that A has personal liability on the ne varietur note. Can A continue to have such personal liability

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105. We have discussed that issue above in reviewing the two cases on the ne varietur note; supra notes 11 to 13 and accompanying text.
on all of the future advances to B? The answer may depend on the specific language of the act of pledge. If the pledge agreement refers to future advances to A, or refers to A as "the borrower," for example, then by its own terms it will not apply: the new borrower will not be A, who originally pledged the note to secure his own debts, but rather B. A might even argue that the pledge agreement by its own terms (if it contains standard language) could not be used for the debts of B. On the other hand, it would be difficult for B to argue that the ne varietur note had not been pledged to secure his debts, because he would have ratified and confirmed the original pledge (and perhaps even intervened in the pledge agreement) so that his debts ought to be secured.

No lender wants to litigate a new proposition of law, so the most practical advice to creditors is not to make any future advances based on a collateral mortgage assumed by the new owner of Blackacre. But that approach is an overreaction. After all, in this situation it is the personal liability of A that is troublesome, not the in rem liability of the property. Although the safest procedure is to require a new collateral mortgage, making sure that a whole new collateral mortgage package is in place before any advances are made to the new owner, a creditor defending its security for loans made to Blackacre's new owner can argue with more than color of merit the proposition that, since the mortgage is valid, the creditor is indisputably protected with the in rem security of that mortgage as to both the old debt and the future advances. It is only A's in personam liability that may be in doubt. The lender's argument is consistent with what is intended to be accomplished through the collateral mortgage package, makes good sense commercially, and does not offend any principle of public policy.

A closely related question arose in *Citizens National Bank v. Coates.* Warren Coates and his wife executed a collateral mortgage on their community owned property in 1978. In 1981 the couple separated, and Warren conveyed all of his interest in the property to his wife. So far, so good, but then Warren borrowed additional funds, and the original hand note was rolled over several times. In 1983 the consolidated note was worth nearly $94,000 to the bank. Warren defaulted; the bank then foreclosed upon the original collateral mortgage and won a summary judgment. The Coates' defenses were that (1) Warren lacked authority to use a collateral mortgage note as collateral after he ceased to own the property, (2) the parties did not intend to secure the 1983 note by the collateral mortgage, and (3) the bank, which knew that Warren no longer owned the property after 1981, was in bad faith.

All of these questions are important and remain to be decided. The reported opinion dealt with procedure more than substance, since the

106. 509 So. 2d 103 (La. App. 1st Cir. 1987).
The case was on appeal from the granting of a summary judgment and the court merely found that the defendants had raised genuine issues of material fact sufficient to defeat the motion for summary judgment. For the present it may be noted that, in contrast to *Tallulah*, where the court held that the original intention of the parties to the pledge was paramount, in *Coates* the crux of the issue was the parties’ intention when the ne varietur note was arguably repledged to secure Warren Coates’ note.

The “good faith” requirement in article 3158, commonly referred to as the fifth *Silversmiths* requirement, clearly overrides all four of the preceding technical requirements, and yet the parameters have not been well defined by the jurisprudence. In *Bozorg*, the court declined to clarify those limits. A situation such as that in *Coates* might indeed prompt a court to deny a lender retroactive ranking and the security of a collateral mortgage on the basis of the good faith requirement.

Another interesting aspect of the *Coates* case was that the collateral pledge agreement at issue contained a so-called “gorilla clause,” which ostensibly created a “conclusive presumption” that all future loans and advances made to Coates by the bank would be secured by the collateral mortgage note. “Gorilla,” the adjective and not the noun, is often used today to refer to a provision or term that cannot be argued with, and, if the gorilla clause of the *Coates* mortgage is valid and enforceable, its widespread use would certainly eliminate some problems of proof relating to collateral mortgages. We doubt, however, that a pledge agreement can create such a conclusive presumption. The fact that the court of appeal in *Coates* reversed the summary judgment despite the appearance of this clause in the pledge implies that the gorilla may only be a stuffed animal, and that there cannot be a “conclusive presumption”

107. See supra note 70.
108. The “Gorilla Clause” stated as follows:

The securities described herein [the August 1978 collateral mortgage note] shall be held by the Citizens National Bank in Hammond as general collateral to secure any and all indebtedness due or become due by the undersigned and it shall be conclusively presumed that any and all loans and advances hereafter made to the undersigned by said Bank shall have been made in accordance with and upon the security provided for in this agreement which shall remain in force and effect so long as undersigned is indebted under the Citizens National Bank of Hammond, and it is expressly understood that the possession of the Citizens National Bank of Hammond of any security or property of the undersigned of any character whatever shall conclusively evidence the fact that such security or property has been delivered in accordance with this agreement whether or not the same may be specifically described as contemplated herein.

509 So. 2d at 104 n.2.
as to the parties' intent and future conduct in the language of a collateral mortgage or collateral pledge.\textsuperscript{109}

\textbf{Conclusion}

In retrospect, the collateral mortgage appears to be far more useful to debtors and creditors alike than had been realized fifteen years ago. Many of the refinements that have taken place have clarified certain aspects of the package and have made it easier to employ this Louisiana security device with confidence. But additional refinements, as suggested in this article, are needed if the package is to retain its vitality and fulfill its proper and necessary role in future credit transactions in this state. We hope that this article will foster a better understanding of the package and lead to the needed corrections in the statutes and the jurisprudence.

\textsuperscript{109} While seductive in its simplicity, the "gorilla clause" would, if sanctioned, soon become boiler-plate language in all pledge agreements and thereby in time effectively eliminate the requirements of identification of an advance with the collateral. The authors suggest that the requirement of such identification is valid and proper for many reasons, and not unduly burdensome.