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Security Devices - R.S. 9:4812 - Requirement of Suit Within One Year on Materialman's Lien

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principle emerges from the instant case: if a lease contains a pooling clause permitting declarations of units for conservation purposes, an intent of the parties to freeze their interests will not be presumed or implied, but must be expressed. Thus, the draftsman of the lease must manifest such intent clearly and unambiguously.[44]

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SECURITY DEVICES — R.S. 9:4812 — REQUIREMENT OF SUIT WITHIN ONE YEAR ON MATERIALMAN'S LIEN

Plaintiff materialman furnished certain building materials to contractor who had entered into an unrecorded written agreement with landowner to construct a building. As provided by R.S. 9:4812,[1] plaintiff recorded his claim for the uncollected bal-

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would be evidenced by the one instrument creating the unit. However, a problem may arise when pooling clauses in leases on different tracts consolidated into a declared unit evidence an opposite intention on the question whether a conservation unit would terminate the declared unit. It would appear that the lessor who intended the termination would not be bound by the declared unit after the creation of the conservation unit. If the unit be terminated as to that lessor, it may be terminated as to all lessors within the unit. Viator v. Haynesville Mercantile Co., 230 La. 132, 88 So.2d 1 (1956); Union Oil Co. of California v. Touchet, 229 La. 306, 86 So. 2d 50 (1956) (unit invalid from its inception as to one lessor is invalid from its inception as to all lessors of acreage purported to be included within the unit).

44. See, *e.g.*, the following provision in a standard lease form: "Any unit created by Lessee hereunder shall also be revised so as to conform with an order of a Regulatory Body issued after said unit was originally established; such revision shall be effective as of the effective date of such order without further declaration by lessee." Bath-O-Gram, Form 42 CPM-New South Louisiana Revised Six (6)—Pooling.

1. LA. R.S. 9:4812 (1950): "When the owner, or his authorized agent, undertakes the work of construction, improvement, repair, erection, or reconstruction, for the account of the owner, for which no contract has been entered into, or when a contract has been entered into but has not been recorded, as and when required, then any person furnishing service of material or performing any labor on the said building or other work may record in the office of the clerk of court or recorder of mortgages in the parish in which the said work is being done or has been done, a copy of his estimate or an affidavit of his claim or any other writing evidencing same, which recordation, if done within sixty days after the date of the last delivery of all material upon the said property or the last performance of all services or labor upon the same, by the said furnisher of material or the said laborer, shall create a privilege upon the building or other structure and upon the land upon which it is situated, in favor of any such person who shall have performed service or labor or delivered material in connection with the said work or improvement, as his interest may appear. The said privilege, recorded as aforesaid, shall constitute a privilege against the property for a period of one year from the date of its filing, and may be enforced by a civil action in any court of competent jurisdiction in the parish in which the land is situated and such right of action shall prescribe within one year from the date of the

ance within sixty days from date of last delivery of materials. There was no judicial action the first year following inscription, but in the second year, following a timely reinscription of the claim, suit was brought to enforce the double remedy of R.S. 9:4812 — a privilege against the property and personal action against the landowner. The trial court rendered judgment against the owner in personam and against the property in rem. The Fourth Circuit Court of Appeal, one judge dissenting, amended the judgment to eliminate the personal judgment which had been abandoned on appeal, and affirmed.[2] On certiorari on the in rem action alone, the Louisiana Supreme Court reversed, two Justices dissenting. *Held*, provision for reinscription in materialman's lien statute does not permit the lien to be enforced against the property by civil action filed more than one year after original recordation. *Lumber Prod., Inc. v. Crochet*, 244 La. 1060, 156 So. 2d 438 (1963).

Under R.S. 9:4801-4817, suppliers of materials for construction on immovable property, among others, have been granted certain rights against the improvement and the land upon which it is situated as well as against the owner of the property.[3] The provisions governing the materialman's privilege can be divided initially into two parts: those which refer to written contracts which are recorded (R.S. 9:4801-4802); and those which refer to written contracts not recorded and oral contracts (R.S. 9:4812).[4] Since these sections cover different situations, R.S.

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recordation of the privilege in the office of the recorder of mortgages. The effect of registry ceases, even against the owner of the property or the property itself, if the inscription has not been renewed within one year from the date of the recordation. Any person furnishing service or material or performing any labor on the said building or other work to or for a contractor or sub-contractor, when a contract, oral or written, has been entered into, but no contract has been timely recorded, shall have a personal right of action against the owner for the amount of his claim for a period of one year from the filing of his claim, which right of action shall not prescribe within one year of the date of its recordation, or the reinscription thereof. This shall not interfere with the personal liability of the owner for material sold to or services or labor performed for him or his authorized agent. The said privilege shall be superior to all other claims against the land and improvements except taxes, local assessments for public improvements, a bona fide mortgage, or a bona fide vendor's privilege, whether arising from a sale or arising from a sale and resale to and from a regularly organized homestead or building and loan association, if the vendor's privilege or mortgage exists and has been duly recorded before the work or labor is begun or any material is furnished. The wages of a laborer for work done by him on any building, shall, when properly presented and recorded by him in accordance with the provisions of this Sub-part, create in his favor a privilege on the land and improvements which will prime the right of mortgagees or vendors."

2. Lumber Prod., Inc. v. Crochet, 146 So. 2d 44 (La. App. 4th Cir. 1962).

3. LA. R.S. 9:4801-4817 (1950).

4. See note 1 *supra*.

9:4812 should be construed independently of the other sections.[5] In general, R.S. 9:4812 provides for a privilege on the building and the land and a personal right of action against the owner independent of the privilege.[6] With respect to the privilege and the right to enforce it, the statute originally provided that recordation constituted a privilege against the property "for a period of one year from the date of its filing, unless interrupted by judicial proceeding . . . ."[7] Therefore, it was necessary to institute suit within one year to enforce the privilege, but after suit there was no need to reinscribe the claim.[8] In 1938, the statute was amended[9] to provide, *inter alia*:

> "The said privilege, recorded as aforesaid, shall constitute a privilege against the property for a period of one year from the date of its filing, and may be enforced by a civil action . . . and such right of action shall prescribe within one year from the date of the recordation of the privilege in the office of the recorder of mortgages. The effect of the registry ceases, even against the owner of the property or the property itself, if the inscription has not been renewed within one year from the date of the recordation . . . ."[10]

Since this amendment to the statute, the court has required reinscription of the privilege even though suit has been filed within one year of the original recordation.[11] On the other hand, similar language in R.S. 9:4812 which provides for the personal action against the owner[12] was interpreted not to require reinscription once the action had been filed within the first year.[13]

5. DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGES 298 (1942). See *The Work of the Louisiana Supreme Court for the 1945-1946 Term — Security Devices*, 7 LA. L. REV. 234 (1947).

6. See note 1 *supra*.

7. La. Acts 1926, No. 298, § 12.

8. Lumber Prod., Inc. v. Crochet, 244 La. 1060, 156 So. 2d 438 (1963); National Homestead Ass'n v. Graham, 176 La. 1062, 147 So. 348 (1933); Moseley v. Levy, 18 La. App. 70, 137 So. 559 (2d Cir. 1931).

9. La. Acts 1938, No. 323, § 1.

10. LA. R.S. 9:4812 (1950). See note 1 *supra*.

11. Shreveport Long Leaf Lumber Co. v. Wilson, 195 La. 814, 197 So. 566 (1940).

12. The statute provides: "Any person furnishing service or material . . . shall have a personal right of action against the owner for the amount of his claim for a period of one year from the filing of his claim, which right of action shall not prescribe within one year of the date of its recordation, or the reinscription thereof."

13. Rathborne Lumber & Supply Co. v. Falgout, 222 La. 345, 62 So. 2d 507 (1952). See *The Work of the Louisiana Supreme Court for the 1950-1951 Term — Civil Procedure*, 12 LA. L. REV. 184 (1952); *The Work of the Louisiana Supreme Court for the 1951-1952 Term — Security Devices*, 14 LA. L. REV. 150 (1953); Comment, 12 LA. L. REV. 210, 214 (1952). It should be pointed out

This distinction can be justified from a policy standpoint since the privilege is a right in rem against the property and poses a danger to third persons which should appear on the records, while the personal action poses no special danger to the property. Prior to the instant case, the question whether reinscription extended beyond the first year the time in which suit might be filed to enforce the privilege had not been presented. It had been suggested by one writer that in view of the singular term "reinscription," the privilege at least could not be extended beyond a second year.[14] With respect to the personal action, one court of appeal has held that "reinscription" in the singular in that part of R.S. 9:4812 required the personal action to be brought no later than during the first reinscription.[15]

In the instant case, the Supreme Court was concerned with the question whether the privilege could be enforced more than one year after the original inscription, but within one year of its reinscription.[16] It concluded that reinscription preserved the privilege but not the right to enforce it, and therefore the right to enforce the privilege was lost unless judicially asserted within one year of the original recordation.[17] The court first recognized that the materialman's privilege was in derogation of the common rights of the owner and his ordinary creditors and hence must be strictly construed.[18] It then noted that the language creating the privilege in fact created two rights — the privilege itself and the right to enforce it — and that reinscription preserved only "the effect of registry."[19] The court reasoned that the only effect of registry is to create the privilege, and that the language establishing the prescription on the right to enforce the privilege was independent of the language creating

that the same rationale would not apply to the in rem action since it appears in a different part of the statute, and under the principle of stricti juris, it would not be appropriate to attach a retrospective quality to the provisions concerning the personal right of action.

14. DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGES 322 (1942): "There is some doubt about whether the life of the privilege could be prolonged indefinitely by reinscription at least once each year. Since the statute does not so provide in express words, it would follow, under the strict construction rule, that the life of the privilege could not be continued for a longer period of time than two years." See Thibodaux Boiler Works v. People's Sugar Co., 122 So. 290 (La. App. 1st Cir. 1929).

15. Kaplan v. Pettigrew, 150 So. 2d 600 (La. App. 4th Cir. 1963).

16. Lumber Prod., Inc. v. Crochet, 244 La. 1060, 156 So. 2d 438 (1963). See *The Work of the Louisiana Supreme Court for the 1962-1963 Term — Security Devices*, 24 LA. L. REV. 205, 208 (1964).

17. 244 La. at 1072, 156 So. 2d at 443.

18. *Id.* at 1067, 156 So. 2d at 441.

19. *Id.* at 1069, 156 So. 2d at 441.

the privilege and not an effect of registry.[20] Thus the privilege could be preserved by reinscription, but unless suit had been instituted within one year from original recordation, it "becomes a hollow right for it can no longer be enforced."[21] The court further reasoned that a contrary interpretation would allow the claimant to encumber the property perpetually by annual reinscription without ever seeking to obtain judicial recognition of the privilege.[22] The court determined that such interpretation would not be sound policy and could be avoided by resolving the onerous implications of the statute's ambiguous language against the person in whose favor the privilege was created.[23] With regard to the purpose of the 1938 amendment in permitting reinscription, the court observed that reinscription was now necessary to preserve the privilege even though suit had been filed.

The decision undoubtedly upholds the policy of strictly construing privileges;[24] and in view of the policy considerations emphasized by the court and the somewhat ambiguous language of the statute, the decision cannot be said to be unreasonable. Even within the confines of strict construction, however, it is certainly arguable that registry of the claim creates both the privilege and the right to enforce it — that "the effect of registry" is an inseverable privilege and right of enforcement. The court's narrow construction rejects what at least one writer considered to be the effect of the statute's amendment.[25] The Supreme Court itself has made the statement that "the manifest purpose of the amendment was to substitute a new and different

20. *Id.* at 1070, 156 So. 2d at 442.
21. *Id.* at 1072, 156 So. 2d at 443.
22. *Id.* at 1074, 156 So. 2d at 443.
23. *Ibid.*
24. 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2544 (1959). See, *e.g.*, Glassell, Taylor & Robinson v. John W. Harris Associates, 209 La. 957, 26 So. 2d 1 (1946); Conservative Homestead Ass'n v. Boyle, 172 La. 878, 135 So. 663 (1931); Cole v. Schexnadire, 163 La. 132, 111 So. 651 (1927); Alfred Hiller Co. v. Hotel Grunewald Co., 147 La. 129, 84 So. 520 (1920); Kaplan v. Pettigrew, 150 So. 2d 600 (La. App. 4th Cir. 1963); Clarke v. Shaffett, 37 So. 2d 56 (La. App. 1st Cir. 1948); Griffith v. Williams, 19 So. 2d 277 (La. App. 1st Cir. 1944); Yellow Pine Lumber Co. v. Maniscalco, 9 So. 2d 320 (La. App. 2d Cir. 1942); Callendar v. Marks, 166 So. 891 (La. App. 2d Cir. 1936); Texas Lumber Co. v. E. D. Green Realty Co., 19 La. App. 585, 140 So. 828 (2d Cir. 1932); Southern Gas Line v. Dixie Oil Co., 16 La. App. 26, 133 So. 181 (2d Cir. 1931); Fowler Comm'n Co. v. E. J. Deas & Co., 13 La. App. 141, 127 So. 456 (2d Cir. 1930); Lawrence v. Wright, 11 La. App. 703, 124 So. 697 (Orl. Cir. 1929); Price v. Lee, 11 La. App. 291, 123 So. 458 (2d Cir. 1929); Casey v. Allain, 9 La. App. 725, 120 So. 420 (Orl. Cir. 1929); Routier v. Hughes, 2 McGloin 99 (La. App. 1884).
25. DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGES 322 (1942).

method of procedure for interrupting or suspending the running of prescription against the lien."[26] The court's fear that a contrary interpretation would permit perpetual encumbrance could be avoided by construing the singular term "reinscription" to allow only one reinscription of the privilege.[27] Since judicial proceedings do not preserve the privilege, however, such restricted interpretation could create other serious problems; litigation could easily extend beyond the term of one reinscription.[28] In any event, this decision requires the materialman to file suit on his timely recorded claim within one year of recordation regardless of reinscription.[29]

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TORTS — IMPUTATION OF SON'S CONTRIBUTORY NEGLIGENCE TO MOTHER

Plaintiff, a passenger in an automobile driven by her minor son with his father's permission, was injured when her son negligently attempted a left turn and was struck by defendant who was negligently attempting to pass him. The district court rendered judgment for the plaintiff in her suit for personal injury, but it was reversed in part by the court of appeal. On certiorari, the Louisiana Supreme Court reinstated the district court's judgment. *Held,* in absence of an agency or other legal relationship for which responsibility is imposed on one for the fault of another, contributory negligence cannot be imputed to

26. Shreveport Long Leaf Lumber Co. v. Wilson, 195 La. 814, 825, 197 So. 566, 569 (1940). It should be noted that the use of the terms "interruption" and "suspension" as effects of the reinscription is not entirely correct, but the scope of this Note is not intended to include an analytical criticism of such a use.

27. DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGES 322 (1942).

28. If only one reinscription were allowed and the court interpreted the statute to permit that reinscription to preserve both the right of action and the privilege, when suit was filed after the first but within the second year, the defendant owner could effectively use delays which would cause the judicial proceedings to go beyond the second year — and the plaintiff materialman would lose his privilege. The court effectively avoided this situation by requiring suit to be filed within the first year and impliedly allowing an unlimited number of reinscriptions in the event judicial proceedings extend beyond the next year.

The Supreme Court reaffirmed its decision in the instant case in Arby Brothers, Inc. v. Tillman, 162 So. 2d 346 (La. 1964). Justice Hamiter, who dissented in the *Crochet* case, speaking for the majority, said: "The author of this opinion disagreed with that conclusion [of the *Crochet* case] and still entertains the same view. However, since the result reached in such a case does bear on the merchantability of titles to immovables he now feels compelled to abide by the conclusion until it is changed by legislative action."