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The Problem of a Series of Mortgage Notes

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is admissible to show that an ostensible *dation en paiement* was in reality a donation of all the donor's property in contravention of Article 1497.[93] It is not clear what legal principles are prohibitory within the meaning of this rule. The strength of the policy the courts feel to be embodied in the article or statute under consideration is probably the major factor, with some regard placed on the wording of the legislation.[94]

In conclusion, it may be said that except for occasional aberrations the Louisiana decisions have correctly applied the Code articles, although the *Queensborough* case has never been overruled and the receipt cases remain anomalous. The general rule established by the decisions is that parol evidence is inadmissible to vary in any way the recital in a written contract that a stated sum has been received as consideration. The wisdom of such a rule may be questioned. It may be objected that it should not be possible to evade the legal requirement of consideration by a mere recital, and further that the probative value of a written instrument should not be so great. Notwithstanding the fact that common law jurisdictions in general follow different principles,[95] our Code has adopted the French rule. If a change is to come, it should come only by way of legislative amendment of the Civil Code.

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THE PROBLEM OF A SERIES OF MORTGAGE NOTES

A very usual form of borrowing is the giving of a series of notes secured by a special mortgage. While such a series may often be held in its entirety by a single creditor, yet since the notes are negotiable, transfers may be readily effected by which each note becomes the property of a different owner. It is surprising, then, that the respective rights of each of the holders of such

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Equitable Securities Co. v. Talbert, 49 La. Ann. 1393, 22 So. 762 (1897); Kelley v. Kelley, 131 La. 1024, 60 So. 671 (1913); Becker v. Hampton, 137 La. 323, 68 So. 626 (1915). See Arts. 11, 12, La. Civil Code of 1870. For the French rule in accord, 12 Aubry et Rau, op. cit. supra note 3, at 375-376, § 765; 2 Josserand, op. cit. supra note 27, at 115, nº 216; 6 Planiol et Ripert, op. cit. supra note 8, at 476, nº 348.

93. Kelley v. Kelley, 131 La. 1024, 60 So. 671 (1913).

94. See the French commentators and the Louisiana cases on forced heirship cited supra note 62.

95. Because of the differences in theory and application of the civil and common law rules of parol evidence, and because of lack of space, common law rules on the problem were not discussed.

notes, and the proper procedure for enforcing them, have not been more definitely settled. An example may be given. *A*, the owner of one note of a series secured by a special mortgage, discovers after the maturity of his note that the mortgaged property has been sold under proceedings instituted by the owner of a prior maturing note of the same series. What are his rights? Of course his note may represent the personal obligation of the debtor, but what is the nature of his security?

To answer these questions, the procedure at a sheriff's sale and disposition of funds under the usual special mortgages should be made clear. In the following summary it should be remembered that the results are the same when there are privileges and other liens, and that "mortgage" is used merely because it more directly concerns the problem presented here. The senior mortgagee may require the property to be sold at any price, although it is not sufficient to satisfy his debt or the subsequent mortgages.[1] If there is a surplus, however, it must be retained by the purchaser to apply to the junior mortgages.[2] Since the sheriff is authorized to receive only that amount called for by the writ, payment to him of any more is at the risk of the purchaser, and there is no recourse against the sheriff's sureties.[3] Such a payment constitutes the sheriff the agent of the purchaser, who of course is exonerated if the sheriff does pay the other mortgages correctly.[4] Claims of the junior mortgagees cannot be prejudiced by this payment and they may proceed against the property by the hypothecary action.[5] A safe procedure for the purchaser to follow is to have all the mortgagees called in to settle their claims, and secure thereby a cancellation of the mortgages.

If no surplus exists, the sheriff is authorized to give a release from the mortgages.[6]

Where there are mortgages which are preferred to that of the seizing creditor, there can be no adjudication until the amount bid is sufficient to discharge them.[7] The property is sold subject

1. Art. 685, La. Code of Practice of 1870.
2. Art. 706, La. Code of Practice of 1870. J. Quertier & Co. v. Succession of Hille, 18 La. Ann. 65 (1866); Denegre v. Mushet, 46 La. Ann. 90, 14 So. 348 (1894); Robinson & Co. v. Cosner, 136 La. 595, 67 So. 468 (1915); Forrey v. Strange, 158 La. 941, 105 So. 21 (1925).
3. J. Quertier & Co. v. Succession of Hille, 18 La. Ann. 65 (1866); Robinson & Co. v. Cosner, 136 La. 595, 67 So. 468 (1915); Forrey v. Strange, 158 La. 941, 105 So. 21 (1925).
4. Cummings v. Erwin, 15 La. Ann. 289 (1860).
5. Art. 709, La. Code of Practice of 1870. See supra note 3.
6. Art. 708, La. Code of Practice of 1870.
7. Art. 684, La. Code of Practice of 1870.

to the mortgages, and the purchaser must retain an amount sufficient to satisfy them.[8]

The court has not been so specific with regard to special mortgages securing a debt represented by a series of notes.[9] The mortgage is itself indivisible,[10] and the ordinary procedure for raising it pro tanto as the notes are paid is stated in simple language in the Code.[11] It is an accessory to the credit,[12] and together with its provisions, the mortgage follows the notes as they are transferred. Thus, a pact de non alienando,[13] a waiver of homestead exemption,[14] an acceleration clause,[15] or a provision for attorney's fees,[16] contained in the mortgage is transferred with the notes and inures to the benefit of each holder.

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8. Arts. 679, 683, La. Code of Practice of 1870. The sheriff is not authorized to receive this sum and his sureties cannot be held. Bacas v. Hernandez, 31 La. Ann. 85 (1879). The purchaser does not assume the indebtedness but takes the land with its indebtedness. By paying the prior mortgagee he is subrogated to the latter's rights. Nelson v. Stewart, 173 La. 203, 136 So. 565 (1931).

9. The procedure where there are general mortgages has been conflicting, and while not directly involved in the present problem, should be indicated:

The purchaser cannot retain the balance unless there are special mortgages, or unless he is threatened with eviction by holders of general mortgages. Art. 710, La. Code of Practice of 1870; Tessier v. Bourgeois, 38 La. Ann. 356 (1886); (judicial mortgage) Alford v. Montejo, 28 La. Ann. 593 (1876).

Even though the purchaser has a prior general mortgage, he may not retain the amount of that mortgage, but must pay the price and claim the proceeds from the sheriff. Godchaux v. Succession of Dicharry, 34 La. Ann. 579 (1882); Pasley v. McConnell, 38 La. Ann. 470 (1886).

The purchaser should pay the price to the sheriff. Robinson & Co. v. Cosner, 136 La. 595, 67 So. 468 (1915). But he may deposit it in court and call in the mortgagees to litigate their rights. Fortier v. Slidell, 7 Rob. 398 (La. 1844).

The sheriff should apply the proceeds pro tanto to the general mortgages according to date. La Gourgue v. Summers, 8 Rob. 175 (La. 1844). But the sheriff is liable if, on his own authority, he pays out funds subject to conflicting claims. Citizens' Bank of Louisiana v. Payne & Gilman, 21 La. Ann. 380 (1869).

10. Art. 3282, La. Civil Code of 1870.

11. Arts. 3377, 3378, 3382, 3383, La. Civil Code of 1870.

12. Art. 3284, La. Civil Code of 1870. For a discussion of the action of resolution as an accessory to the credit, see Comment (1939) 1 LOUISIANA LAW REVIEW 800.

13. Smith v. Nettles, 13 La. Ann. 241 (1858).

14. Iberville Bank & Trust Co. v. Dupuy, 139 La. 28, 71 So. 206 (1916).

15. Gaines v. Bonnabel, 168 La. 262, 121 So. 764 (1929).

16. Pugh v. Houseman Roofing Co., 165 La. 795, 116 So. 189 (1928). If the seizing creditor owns all the notes, and the provision is for a percentage of the amount sued for, attorney's fees are collectable on the entire amount. *Pugh v. Houseman Roofing Co.*, supra, and cases cited therein. Cf. City Savings Bank & Trust Co. v. Wilkinson, 165 La. 385, 115 So. 629 (1928). A different rule has been intimated if the notes are held by different persons. Grunewold v. Commercial Soap, Starch & Candle Manufactory, 49 La. Ann. 489, 21 So. 646 (1897). To avoid the difficulties of these cases, a provision for attorney's fees should be drafted carefully in order that an equitable division be effected.

As among themselves the notes are equally secured by the mortgage.[17] No preference results from any difference in the dates of transfer.[18] However, under a well settled rule, an assignor cannot compete with his assignee in the proceeds so as to prevent him from recovering the amount he has paid.[19] The assignor must receive consideration in order to be estopped,[20] since the basis of the rule is that he has already been paid the amount received from the assignee. Of course, the assignor may reserve an equality of rights, so that he will be entitled to share in the proceeds proportionately.[21] Such an act of preference or equality need not be recorded,[22] but it must be specific, and not a mere release from personal liability.[23] The Negotiable Instruments Law is inapplicable to these rights, as it is confined to defenses available to prior parties among themselves.[24]

It is more particularly with the incidents of judicial sale that this comment is concerned. Article 686 is the only provision in the Code of Practice specifically dealing with a sale under a mortgage securing several notes. It provides that a holder of an installment which is due may have the property sold for the entire debt, although the other installments are not yet due, provided the sale is on such terms of credit as are granted by the original contract.[25] The creditor does not have to show that he is the holder of the other notes,[26] or give notice to those holders. If he is the holder of all, and the mortgage contains an acceleration clause, he may waive it and have the property sold under

17. Jacobs v. Calderwood, 4 La. Ann. 509 (1849).

18. Adams v. Lear, 3 La. Ann. 144 (1848); Begnaud v. Roy, 21 La. Ann. 624 (1869).

19. Salzman v. His Creditors, 2 Rob. 241 (La. 1842); Ventress v. His Creditors, 20 La. Ann. 359 (1868); Barkdull v. Herwig & Smith, 30 La. Ann. 618 (1878); Stevenson v. Short, 52 La. Ann. 967, 27 So. 350 (1900); Meriwether v. New Orleans Real Estate Board, 182 La. 649, 162 So. 208 (1935); Cason v. Cecil, 194 La. 41, 193 So. 362 (1940), discussed in The Work of the Louisiana Supreme Court for the 1939-1940 Term (1941) 3 LOUISIANA LAW REVIEW 267, 302, 348.

20. Leonard v. Brooks, 158 La. 1032, 105 So. 54 (1925). Cf. Abney & Co. v. Walmsley, 33 La. Ann. 589 (1881). There the owner gave a note without indorsement to his daughter, who after securing his indorsement sold it, and received the price. He was held estopped to compete.

21. Howard v. Schmidt, 29 La. Ann. 129 (1877).

22. Morris v. Cain, 39 La. Ann. 712, 1 So. 797 (1887). A different rule would obtain had the parties dealt with the property instead of the notes.

23. Abney & Co. v. Walmsley, 33 La. Ann. 589 (1881).

24. Meriwether v. New Orleans Real Estate Board, 182 La. 649, 162 So. 208 (1935).

25. Rice v. Schmidt, 11 La. 70 (1837); Pepper v. Dunlap, 16 La. 163 (1840); McDonough v. Fost, 1 Rob. 295 (La. 1842); Robinson v. Aubert, 6 Rob. 461 (La. 1844); The Union Bank of Louisiana v. Smith, 10 Rob. 49 (La. 1845).

26. Pepper v. Dunlap, 16 La. 163 (1840).

this article.[27] While a sale not made in conformity with these provisions is null,[28] it has been held that the debtor cannot claim as a right that the sale be so made when the proceeding is by *ordinary* process.[29] But the court has stated that the article was enacted in the sole interest of the defendant in *execution*, giving him a purely personal right, and that nonobservance created only a relative nullity.[30] There is no basis for drawing a distinction between a foreclosure via ordinaria and via executiva as the same procedure of sale is followed in either case. It appears that the provisions of this article should afford protection to both the defendant, to secure the best possible price, and to the other creditors, to retain their original contract and security.

When the sale is made under Article 686, the creditors of the unmatured installments are fully protected. The sale is subject to the mortgage,[31] and the amount of the notes is a part of the price which should be retained.[32] The mortgage is not extinguished,[33] and can only be erased with the creditor's consent, or by a contradictory proceeding with the creditor after payment and refusal to cancel.[34] It is when all the notes are due that the court has experienced the most difficulty. Since the mortgage secures all the notes, the owner of any note may enforce it.[35] There is no necessity of proving that any of them have been paid.[36] If the part yet due at the time of suit under Article 686 matures before the case is disposed of, the court may order the sale to be made for cash,[37] even after executory process has been issued.[38] When the sum becoming due during suit is not all the remaining credit, the sheriff may demand a larger proportion in cash.[39]

It is not necessary to make the owners of other notes parties to the suit.[40] In fact, no notice to them is necessary, other than

27. Ives v. Citizens' Bank, 15 La. Ann. 83 (1860).
28. Rice v. Schmidt, 11 La. 70 (1837).
29. Florance v. The Orleans Navigation Co., 1 Rob. 224 (La. 1842).
30. Hughes v. Edson, 129 La. 866, 57 So. 154 (1912).
31. Chaffraix & Agar v. Packard, 26 La. Ann. 172 (1874).
32. Alling v. Beamis, 15 La. 385 (1840).
33. Chaffraix & Agar v. Packard, 26 La. Ann. 172 (1874).
34. Morris v. Cain's Executors, 34 La. Ann. 657 (1882).
35. Utz v. Utz and Peck, 34 La. Ann. 752 (1882).
36. Ledoux v. Jamieson, 18 La. Ann. 130 (1866). Cf. Armour v. Downs, 2 La. Ann. 242 (1847).
37. McCleland v. Bideman, 5 La. Ann. 563 (1850); Penouilh v. Abraham, 44 La. Ann. 188 (1892).
38. McCalop v. Fluker's Heirs, 12 La. Ann. 551 (1857).
39. City Savings Bank & Trust Co. v. Wilkinson, 165 La. 385, 115 So. 629 (1928).
40. Utz v. Utz and Peck, 34 La. Ann. 752 (1882); Smith v. Sanders-Lenahan Lumber Co., 139 La. 898, 72 So. 445 (1916).

that given by the writ[41] or the seizure and advertisement.[42] Notice in most cases would be impracticable, as would joinder, since the notes are negotiable and only the name of the original mortgagee appears on record.

If an owner of a note other than the one being foreclosed upon gains knowledge of the execution, he may proceed by motion as a third opponent;[43] his rights are limited to causing the proceeds to be brought into court for a pro rata distribution.[44] By intervening he treats the sale as valid, and waives any informality or other grounds for annulling.[45] If there are invalidities, the proper remedy is a direct action in the court which rendered the judgment.[46]

While the holder who intervenes is protected as to his pro rata share, what are the rights of those who do not intervene? As in the case of other special mortgages, the purchaser is bound to retain for the benefit of the other note holders the proportion of the price due them.[47] The sheriff has no authority to collect more than the share of the seizing creditor.[48] If the purchaser pays the entire amount of the price to the sheriff, the owners of the other notes are not deprived of their security.[49] The purchaser has no recourse against the sureties of the sheriff, for, by paying the sheriff he makes the latter his agent.[50]

It does not appear that the purchaser has to take notice of any preferences existing among the holders if they are not of record.[51] However, extreme caution should be used in payment, for the writ need not fix the exact balance due.[52] Where the assignor has provoked the sale or has secured his pro rata share,

41. Howard v. Schmidt, 29 La. Ann. 129 (1877).

42. Soniat v. Miles, 32 La. Ann. 164 (1880).

43. Begnaud v. Roy, 21 La. Ann. 624 (1869); Reine v. Jack, 31 La. Ann. 859 (1875); Abney & Co. v. Walmsley, 33 La. Ann. 589 (1881); Gumbel & Co. v. Boyer and Sheriff, 46 La. Ann. 762, 15 So. 84 (1894); Pilsbury v. Babington Bros., 139 La. 727, 72 So. 186 (1916); Smith v. Sanders-Lenahan Lumber Co., 139 La. 898, 72 So. 445 (1916).

44. City Bank of New Orleans v. McIntyre, 8 Rob. 467 (La. 1844).

45. Factors' and Traders' Insurance Co. v. DeBlanc, 31 La. Ann. 100 (1879). Accord: 1 McMahon, Louisiana Practice (1939) 670, n. 61.

46. Ibid.

47. Pepper v. Dunlap, 16 La. 163 (1840); Johnson v. Duncan, 24 La. Ann. 381 (1872); Morris v. Cain's Executors, 34 La. Ann. 657 (1882).

48. Scott v. Featherston, 5 La. Ann. 306 (1850). Cf. Gallier v. Garcia, 2 Rob. 319 (La. 1842). Here, a holder of part of the notes due caused the property to be sold for cash to the amount of all the notes then matured.

49. Morris v. Cain's Executors, 34 La. Ann. 657 (1882); Ash v. Southern Chemical & Fertilizing Co., 107 La. 311, 31 So. 656 (1902).

50. Morris v. Cain's Executors, 34 La. Ann. 657 (1882).

51. Cf. Morris v. Cain, 39 La. Ann. 712, 1 So. 797 (1887); note 22, supra.

52. City of New Orleans v. Pigniolo and Popovich, 29 La. Ann. 835 (1877).

the assignee should be allowed to recover from him the difference between the amount paid the assignor and the pro rata share received on his note on distribution. Such recovery would be limited to the amount received by the assignor from the distribution, for the basis of the action is the theory that an assignor may not compete with his assignee in the proceeds of their common pledge.[53]

On the amount retained the purchaser owes interest from the date of sale and must pay when demanded.[54] It has been intimated, as appears sound, that the purchaser could make a deposit and escape the interest.[55] In addition, if the purchaser desires, he has a right, by a concursus proceeding, to have the claims of the note holders settled by the court[56] and to have his mortgage cancelled.

Does the sale destroy the mortgage? On this point there are two conflicting lines of cases. One holds that the mortgage is entirely destroyed.[57] The better view is that the sale is subject to the mortgage. The portion of the other creditors remaining in the hands of the purchaser is secured by their mortgage,[58] and the hypothecary action will lie.[59] It requires no reinscription, for the purchaser assumes the debt to the extent of the funds retained.[60] This is in accord with the rule that a mortgage can be raised only with the creditor's consent or by a contradictory proceeding with the creditor after payment.[61] A close analogy exists in the articles of the Civil Code providing for payment and raising of the mortgage pro tanto,[62] for this is the effect of enforcing the mortgage as to a portion of the debt.

JOHN M. SHUEY

53. See supra note 19.

54. Yeatman, Woods & Co. v. Erwin, 14 La. Ann. 149 (1859); Johnson v. Duncan, 24 La. Ann. 381 (1872); Morris v. Cain, 39 La. Ann. 712, 1 So. 797 (1887).

55. Morris v. Cain, 39 La. Ann. 712, 1 So. 797 (1887). Cf. La. Act 123 of 1923 [Dart's Stats. (1939) §§ 1556-1563].

56. Morris v. Cain, 35 La. Ann. 759 (1883).

57. Parkins v. Campbell, 5 Mart. (N.S.) 141 (La. 1826); Soniat v. Miles, 32 La. Ann. 164 (1880).

58. Scott v. Featherston, 5 La. Ann. 306 (1850).

59. Art. 709, La. Code of Practice of 1870. Johnson v. Duncan, 24 La. Ann. 381 (1872); Soniat v. Miles, 32 La. Ann. 164 (1880).

60. Johnson v. Duncan, 24 La. Ann. 381 (1872). In Blood v. Vollers, 6 La. Ann. 784, 785 (1851), the court stated that "neither the sheriff nor the court would raise the whole mortgage, and give the purchaser an unencumbered title, without providing for a proportional division."

61. Morris v. Cain's Executors, 34 La. Ann. 657 (1882).

62. Arts. 3377, 3378, 3382, 3383, La. Civil Code of 1870.