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Security Devices - Pledge - Requirement of Dispossession

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cause of this, personal privileges and freedoms are receiving more protection from state abuse than they once did. The minority position, as expressed in separate concurring opinions by Justices Harlan and Stewart, was that the state conviction should be reversed because absence of an opportunity to confront and cross-examine the witness, through counsel, was a denial of due process of law guaranteed by the fourteenth amendment, but that the fourteenth amendment should be controlling independently of the sixth. Justice Harlan argued that the Court had not incorporated the first eight amendments *in toto* was evidence that not all of the provisions of the Bill of Rights are fundamental,[32] yet the Court ignored the possibility that all parts of any one provision may not necessarily be fundamental. The traditional and indispensable diversity of the federal system, subject of course to due process of law, was also alluded to by Justice Harlan as a reason not to bind the states rigidly in the area of criminal law enforcement. The minority view would afford adequate protection for the individual liberties deemed fundamental, and, at the same time, would be more in keeping with the language and apparent intent of the fourteenth amendment. However, the majority holding is definite and explicit and also clarifies the federal rule. It appears that the other states with a Texas-type preliminary hearing, including Louisiana,[33] will be compelled to modify their procedure to bring it in accordance with the instant decision.

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SECURITY DEVICES—PLEDGE—REQUIREMENT OF DISPOSSESSION

Plaintiff financed the purchase of a used automobile through defendant corporation. Delinquent on three installment payments, plaintiff "pledged" the car to defendant in consideration of an extension of thirteen days and agreement by defendant not to bring suit during the extension period. The agreement provided that if the installment notes remained unpaid at the end of the extension period, defendant could sell the car without resort to legal process; the car, however, remained in plaintiff's

32. See notes 10, 11, 12 *supra*.
33. See LA. R.S. 15:153-155 (1950).

possession. Thirty days after execution of the extension agreement defendant seized the car to sell it and satisfy the debt. Plaintiff filed suit, claiming damages for illegal seizure and conversion of property. Defendant contended that under the "pledge" extension agreement it had "legal" possession of the car and was therefore authorized to take physical possession and offer the car for sale without resort to legal process. The district court entered judgment for defendant and plaintiff appealed. *Held,* without physical delivery of the automobile to the creditor there was no pledge, and defendant had no right to take possession without legal process. *Powers v. Motors Securities Co.,* 168 So.2d 922 (La. App. 2d Cir. 1964).

In the Louisiana Civil Code pledge is defined as a contract by which a debtor gives something to his creditor as security for his debt,[1] and two types of pledge are provided for: pawn and antichresis.[2] Pawn is the pledge of a movable, antichresis the pledge of an immovable.[3] Although "pledge" is commonly used interchangeably with "pawn," pawn pertains to movable property, whereas pledge encompasses both pawn and antichresis. Since pledge is a contract by which a debtor gives something to his creditor,[4] it is the creditor's possession which entitles him to a privilege on the thing pledged and which accords him rank among other secured creditors.[5] The creditor is not always required to be personally in possession of the pledged property, for the Code recognizes that actual possession may be in a third person agreed upon by the parties if his control is adverse to the debtor.[6] Further, it has been suggested that the debtor himself may retain possession of the thing where his possession is clearly precarious and for the creditor's account.[7] In *Scott v.*

1. LA. CIVIL CODE art. 3133 (1870).
2. *Id.* art. 3134.
3. *Id.* art. 3135.
4. *Id.* art. 3133; Slovenko, *Of Pledge,* 33 TUL. L. REV. 59, 62 (1958).
5. LA. CIVIL CODE arts. 3157, 3162 (1870). The creditor's privilege is classified as a special privilege and thus primes all general privileges on movables with the possible exception of a privilege for taxes. *Id.* art. 3254. See Slovenko, *Of Pledge,* 33 TUL. L. REV. 59, 103 (1958). While the pledgee's privilege primes a vender's privilege, it does not prime a chattel mortgage recorded prior to the pledge. Pierson v. Carmouche, 146 La. 798, 84 So. 59 (1920); Dainow, *Ranking Problems of Chattel Mortgages and the Civil Code Privileges in Louisiana Law,* 13 LA. L. REV. 537 (1953).
6. LA. CIVIL CODE art. 3162 (1870): "In no case does this privilege subsist on the pledge, except when the thing pledged . . . has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties."
7. Scott v. Corkern, 231 La. 368, 91 So.2d 569 (1956); Conger v. City of New Orleans, 32 La. Ann. 1250, 1253 (1880) (*dictum*). This position also seems

Corkern[8] the debtor effected a change of beneficiary in a life insurance policy, then pledged the policy to the creditor-beneficiary and delivered possession to a bank. The creditor predeceased the debtor, and after the debtor's death the policy was found in the debtor's bank box. Since after obtaining possession of the policy the debtor had taken no action inconsistent with the pledge agreement (for example, effecting a further change of beneficiary) the Supreme Court concluded that the debtor's possession, however it arose, had been precarious and as an agent *pro hac vice* of the creditor.[9] The pledge was held to be valid and the heirs of the creditor were given a preference out of the proceeds of the policy. The court implied in dictum that had the contest been between debtor and creditor, a finding of agency would not have been necessary because, as between the parties, actual delivery is not essential to a valid pledge.[10] Both the holding and dictum in *Scott* do violence to the underlying policy requiring dispossession of the debtor[11] and to the express language of the Civil Code providing that a pledge does not come into existence until the creditor or third party custodian has possession.[12] The policy requiring dispossession of the

to have been derived from a misinterpretation of the holding in the case of Jacquet v. His Creditors, 38 La. Ann. 863 (1886), wherein the control of the property pledged was in a third person, not the debtor. In that case *A* pledged machinery to *B*. The contract of pledge stipulated that the property was to be placed in the hands of *C*, an employee of *A*, who was to act as agent for *B*. *C* was given the key to the warehouse where the machinery was kept and only by permission of *B* and *C* was *A* allowed to use the machinery from time to time in pursuit of his tobacco business. In such a situation, it can hardly be said that the debtor *A* retained possession of the property.

8. 231 La. 368, 91 So.2d 569 (1956).

9. It appears that the *Scott* holding expanded the definition of "possession" to include constructive as well as actual possession.

10. Scott v. Corkern, 231 La. 368, 377, 91 So.2d 569, 572 (1956): "Article 3162 of the Civil Code, requiring actual physical delivery to and possession in the creditor (or a third person) of the pledged movable, credit or other instrument in order for the privilege to subsist, is not applicable as between the parties to the pledge." The court seems to be implying that the delivery requirement is only necessary for the existence of the privilege and thus not necessary for the validity of the contract of pledge. But article 3152 of the Civil Code explicitly requires possession by the creditor for a valid pledge. The court's position has been criticized by authorities in the field of pledge. See Dainow, *Security Devices*, 18 LA. L. REV. 49, 50 (1957); Slovenko, *Of Pledge*, 33 TUL. L. REV. 59, 74 (1958).

11. Casey v. Covaroc, 96 U.S. 467 (1817); Wells v. Dean, 211 La. 132, 29 So.2d 590 (1947); Mechanics Bank v. Van Zant, 144 La. 685, 81 So. 251 (1919); Succession of Gragard v. Metropolitan Bank, 106 La. 298, 30 So. 885 (1901); Succession of Lanaux, 46 La. Ann. 1036, 15 So. 708 (1894); Lee v. Bradlee, 8 Mart. (O.S.) 20 (La. 1820); Kreppein v. Demarest, 120 So.2d 301 (La. App. Orl. Cir. 1960). See Slovenko, *Of Pledge*, 33 TUL. L. REV. 59, 73-75 (1958).

12. LA. CIVIL CODE art. 3152 (1870): "It is *essential* to the *contract* of pledge that the creditor be put in possession of the thing given to him in pledge, and consequently that actual delivery of it be made to him, unless he has possession

debtor exists to prevent secret encumbrances. If the pledgor were allowed to create a pledge and still retain possession, creditors of the pledgor and prospective purchasers might be misled.[16] Manifestly, transfer of possession to a pledgee would give notice of the encumbrance.

In the instant case, the court failed to find precarious possession in the debtor and, what is more significant, it required actual delivery as a prerequisite to the existence the pledge. It thus joined the fourth circuit, which has declined to accept the thesis that a valid pledge between the parties does not require actual possession in the pledgee.[14] Further, the court appeared hesitant to adopt the holding in *Scott* that the debtor himself can serve as the creditor's agent for possessions. Manifestly, the court adheres to the traditional notion that dispossession of the debtor is a prerequisite to existence of a privilege in the creditor and to the contract of pledge.[15]

It is submitted that the holding in the instant case and the trend it reflects are correct and should be followed. Dispossession should be treated as essential to validity of a pledge even between the parties, and the debtor should not be permitted to serve as the creditor's agent. Further, effective security depends upon existence of a right of preference which in turn requires possession in the pledgee or in a third person. Clearly, a contract of pledge without a privilege and right of preference would be useless.[16] Moreover, a thing left in possession of the debtor, in addition to its potential of fraud, is useful as security only if the creditor has a right of pursuit in the property and a

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of it already by some other right." (Emphasis added.) *Id.* art. 3162: "In no case does this privilege subsist on the pledge, except when the thing pledged . . . has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties." *Id.* art. 3133: "The *pledge* is a contract by which one debtor gives something to his creditor as a security for his debt." Although the pledge does not come into existence until the creditor or a third party custodian has possession, there may be a contractual obligation to give pledge. See 2 COLIN ET CAPITANT, PRECIS DE DROIT CIVIL nos 982, 983 (9th ed. 1950); 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2401 (1959).

13. Slovenko, *Of Pledge*, 33 TUL. L. REV. 59, 73-75 (1958). It should be noted that the rule requiring possession by the pledgee prevails in the common law as well as in the civil law. In Casey v. Cavaroc, 96 U.S. 467, 490 (1877) the Court stated: "The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

14. Kreppein v. Demarest, 120 So.2d 301 (La. App. Orl. Cir. 1960).

15. See notes 11, 12 *supra*.

16. Slovenko, *Of Pledge*, 33 TUL. L. REV. 59, 74 (1958).

"pledge" without possession does not confer this right.[17] Creditors like defendant in the instant case should execute and record a chattel mortgage, or take actual possession of the property as a pledge. Either course would amply protect their interests.

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17. *Ibid.*