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Civil Code and Related Subjects: Security Devices

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The existence or absence of this authority depended upon the provisions of a long and detailed agreement. The court found the authority lacking and citing Article 3007 as a basis, said "it is well settled that an agent has no power to substitute another to perform duties of his mandate unless expressly or impliedly authorized to do so by the principal."[2]

SECURITY DEVICES

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SURETYSHIP

"The surety who has paid the debt, has his remedy against the principal debtor . . . ."[1] In connection with his general relationships and responsibilities the surety may also incur other expenses (apart from principal and interest, and formal legal costs), and the extent of permissible recovery is the question which was the issue in *Standard Accident Insurance Co. v. St. Romain.*[2] As a result of complaint about performance of work under a plumbing contract and suit filed against the plumbing contractor and his surety, the latter incurred certain expenses for telephone, telegram, attorney and adjuster, in the amount of $167.03. After due examination of the trouble (seepage within the building), the necessary corrections were made, and the building owner had its suit dismissed as having been filed in error because it agreed that the plumbing contractor's work had been properly performed and that the trouble had been due to other people's mistakes. In the present case the trial court and the court of appeal gave judgment for the surety against the principal, and it is surprising that it was necessary for the Supreme Court to grant certiorari in this case in order to correct an oversight of the lower court.

It goes without saying that, as long as there is nothing contrary to public order or a prohibitory law, the surety and principal can stipulate in their contract what will be the extent of the surety's indemnification against the principal. Sometimes this is for "any and all liability, damages, loss, costs,

2. *Id.* at 554, 70 So.2d at 122.

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1. Art. 3052, LA. CIVIL CODE of 1870.

2. 224 La. 382, 69 So.2d 508 (1953).

charges and expenses of whatsoever kind or nature, *including counsel and attorney's fees. . . .*"[3] In the present case, the Supreme Court found that the lower court "overlooks the provision in the indemnity agreement that the reimbursement by the principal who signed it . . . applies to those losses, costs, expenses, 'resulting from any act, default or neglect of the undersigned'."[4] Since the surety's expenses in this case did not result from any act, default or neglect of the principal, but were incurred as a result of the building owner's mistake in instituting a suit which he later had dismissed by reason of his own error in having filed it, the surety could not recover these expenses from the principal.

In *Ranger Land Co. v. Aetna Casualty & Surety Co.*[5] suit was brought against the surety on the bond of a real estate broker who had made sales of plaintiff's property without reporting or accounting for them. The broker died, leaving an insolvent succession. Among the surety's contentions were the arguments that (1) the broker was not acting as agent for the plaintiff, (2) the surety was not liable in the absence of proof of dishonesty on the part of broker, and (3) the sale of timber is not a sale of real estate within the meaning of the real estate act.[6] In affirming the lower court's decision, the court found that the broker was in fact the plaintiff's agent, asserted that the surety's liability is not limited to proof of the broker's dishonesty, and held that, in the light of Act 188 of 1904[7] and all the jurisprudence, the term "real estate" in the statute included timber.

Building Construction Privileges

In *Laney Co. v. Airline Apartments*[8] the plaintiff sued for recovery of the cost of materials furnished to a subcontractor and for recognition of its privilege. The purchases here involved were not disputed, but the owner and the contractor defendants denied that the materials were used in the project. Since the building contract was not recorded and no bond was given by the principal contractor, the case is governed by R.S. 9:4812, which

3. *Cf.* Conway v. Union Indemnity Co., 185 La. 240, 246, 169 So. 73, 75 (1936).
4. 224 La. 382, 390, 69 So.2d 508, 511 (1953).
5. 224 La. 153, 68 So.2d 907 (1953).
6. La. R.S. 37:1431 *et seq.*, 37:1447 (bond) (1950).
7. La. R.S. 9:1103 (1950).
8. 223 La. 1000, 67 So.2d 570 (1953).

establishes the privilege "in favor of any such person who shall have performed service or labor or *delivered* material. . . ." (Italics supplied.) The court held that it is incumbent on the plaintiff to prove only that the materials were delivered to the premises, placing the burden then on the defendant to show that the materials were not used in that project. In the present case there was evidence of the delivery, and no evidence to the contrary. The lower court's judgment in favor of plaintiff was affirmed.[9]

When the building contract is recorded and a contractor's bond given, the situation is governed by R.S. 9:4801, which establishes a privilege "for the payment in principal and interest of such work or labor performed, or materials, machinery, or fixtures *furnished*. . . ." (Italics supplied.) The difference in the word might not seem sufficient to distinguish the situations, yet it might be argued that the latter term (furnished) would be satisfied by proof of the sale without necessarily proving delivery to the premises, thereby making heavier the burden to disprove the use of the materials in the project.

A somewhat different variation of this problem appeared in the case of *Mayronne Lumber & Supply Co. v. Houston Fire & Casualty Ins. Co.*[10] The building contract and the bond had been duly recorded, so the case came under the first sections of the building contract law; and since the main issue was the liability of the surety on the bond, the specific statutory provision involved is R.S. 9:4803. This section provides that the surety "shall be liable in solido with the contractor for all labor and material *used* in the said work. . . ." (Italics supplied.) It is doubtful whether different meanings were intended in each of these texts, yet it might be wondered whether this richness of language is best utilized within the same statute. In the present case there was no dispute that the plaintiff sold the materials to the contractor and that they were actually used in the project, but the surety tried to disclaim liability for a certain part of the materials which were first sent to a cabinet-making shop, for conversion into door frames and so forth, before delivery to the project site. On the basis of the language in R.S. 9:4803, the lower court's judgment for plaintiff was affirmed. It would

9. The court cited with approval and quoted from the court of appeal decision in Hortman-Salmen Co. v. Raymond, 13 La. App. 490, 127 So. 452 (1930).

10. 74 So.2d 198 (La. 1954).

hardly be expected that there would have been a different decision if the term in this section were "delivered" or "furnished" instead of "used."

PRESCRIPTION

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LIBERATIVE PRESCRIPTION

There are different kinds of rules of law concerning the loss or change of rights by reason of the lapse of time, but the classification and characteristics of each have not been clearly indicated. In the case of liberative prescription, the running of the time is subject to interference through interruption and suspension, and the prescription can be renounced after accrual. However, in some cases, the running of time brooks no interference, and after the lapse of the stated period, the right is completely lost.

In *Cassiere v. Cuban Coffee Mills*[1] this question of classification of the nature of the prescription was directed at Article 3547 of the Civil Code, which provides that, in the absence of appropriate revival proceedings, "all judgments for money. . . shall be prescribed by the lapse of ten years." Petition to revive a judgment was filed twenty years after its rendition and was followed by allegations of interruption and suspension. After tracing the history of the Civil Code article, and the fluctuating jurisprudence, the court held that the only way to prevent accrual of this prescription was by means of an action to revive the judgment, stating, "[We] think it the wiser policy to regard Article 3547 as sui generis and we attach no particular importance to the circumstance that, because it has been placed in that part of the Civil Code which deals with the liberative prescription, the articles pertaining to the interruption of prescription are, or should be, applicable."[2]

It is sometimes a necessary technique to make a present policy decision as to which of two conflicting lines of jurisprudence should be followed. However, if the statement with reference to this article is implied for other Civil Code articles,

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1. 74 So.2d 193 (La. 1954).
2. *Id.* at 197.