Louisiana Law Review

Volume 39 | Number 3
The Work of the Louisiana Appellate Courts for the 1977-1978 Term: A Faculty Symposium
Spring 1979

Private Law: Security Devices

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SECURITY DEVICES

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SURETYSHIP

Bonura v. Christiana Brothers Poultry Co. of Gretna, Inc.[1] gives judicial sanction to a concept practitioners have long held, that a "continuing guarantee" is an enforceable contract of suretyship for an unlimited duration. The *Bonura* court also held that if the term of a suretyship agreement is co-extensive with the term of the principal obligation, the contract of suretyship does not prescribe until the principal obligation prescribes.

Suretyship is an accessory obligation.[2] Because a surety undertakes personal liability, suretyship is not presumed;[3] the contract of suretyship must be in writing.[4] This does not mean, however, that the principal obligation which the suretyship secures must also be written. As long as a principal obligation exists, the written contract of suretyship is valid. Therefore, as was held in *Parish of East Baton Rouge v. Travelers Insurance Co.*[5] and *Quickick, Inc. v. Quickick International,*[6] parol evidence is admissible to prove the principal obligation that the suretyship secures.[7]

Louisiana courts have long distinguished between "gratuitous" and "compensated" sureties. The general rule is that a gratuitous surety is entitled to a much narrower interpretation of the suretyship contract than a compensated

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1. 336 So. 2d 881 (La. App. 4th Cir. 1976).

2. LA. CIV. CODE art. 3035.

3. LA. CIV. CODE art. 3039.

4. Civil Code article 2278 provides: "Parol evidence shall not be received: . . . (3) To prove any promise to pay the debt of a third person."

5. 342 So. 2d 226 (La. App. 1st Cir. 1976), *cert. denied,* 344 So. 2d 5 (La. 1977).

6. 341 So. 2d 1313 (La. App. 1st Cir. 1976), *cert. denied,* 343 So. 2d 1076 (La. 1977).

7. *Cf.* LA. CIV. CODE art. 3038: "A man may be surety without the order or even the knowledge of the person for whom he becomes surety." *See also* Queen's Ins. Co. v. Bloomenstiel, 184 La. 1070, 168 So. 302 (1936).

surety.[8] Bonding companies on jobs falling within the scope of the Public and Private Works Acts[9] and those bonding companies that issue performance bonds cannot rely upon a stricti juris reading of their contracts to protect them in all cases. Nevertheless, the contract of a compensated surety must be enforced if violations of the contract by the creditor operate to the detriment of the surety. In *Airtrol Engineering Co., Inc. v. United States Fidelity & Guaranty Co.*[10] the court held that a premature payment by a contractor to a sub-contractor discharges the sub-contractor's surety; to hold otherwise would be to encourage the disbursement of funds prior to the performance of the work.

PLEDGE

Out of an abundance of caution, and perhaps in reliance on concepts set forth in dicta in early cases but long since outmoded by the passage of legislation,[11] many practitioners routinely draft documents in the form of a "pledge and assignment." *Naquin v. American Bank of Luling*[12] reiterates the rule set down in *Scott v. Corkern;*[13] the concept of pledge is antithetical to that of assignment.[14] As an assignment is a transfer of title, if a debtor truly "assigns" property to his creditor, this

8. *Compare* Texas Co. v. Couvillon, 148 So. 295 (La. App. Orl. Cir. 1933), *with* Bickham v. Womack, 181 La. 837, 160 So. 431 (1935).

9. LA. R.S. 9:4801-55 (Supp. 1976) and LA. R.S. 38:2241-48 (Supp. 1978), respectively.

10. 345 So. 2d 1271 (La. App. 1st Cir. 1977).

11. *Compare* Caffin v. Kirwan, 7 La. Ann. 221 (1852), *with* LA. R.S. 9:4321 (1950).

12. 347 So. 2d 332 (La. App. 4th Cir. 1977).

13. 231 La. 368, 91 So. 2d 569 (1956).

14. The only possible exception to this rule is the Assignment of Accounts Receivable Act, LA. R.S. 9:3101-10 (Supp. 1964). The Act itself defines "assignment" as including "any sale, *pledge,* conveyance or transfer of an account, or of any right, title or interest therein." LA. R.S. 9:3101(3) (Supp. 1964) (emphasis added). The common use of assignment of accounts, however, is to secure obligations; in other words, it is used as a pledge rather than as a true assignment. Any problems that may arise concerning the validity of the "assignment" (pledge) of accounts receivable without actual dispossession of the pledgor in control of the funds (*cf.* Casey v. Cavaroc, 96 U.S. 467 (1877)) have been resolved in favor of the validity of the pledge by the addition of Revised Statutes 9:4324. LA. R.S. 9:4324 (Supp. 1978), *added by* 1978 La. Acts, No. 703, § 1.

may result in the extinction of the debt through a dation en paiement.[15] On the other hand, if the "assignment" is intended only to secure the payment of an obligation, it is a mere security device. In the case of movable property, the security device would be a pledge. The court in *Naquin* put substance over form in holding that a written "assignment" of a bank account as security for a loan constituted a valid pledge rather than a true assignment.[16]

A pledge of negotiable instruments need not be in writing; mere delivery of the instrument pledged completes the pledge both as between the parties and as to third parties.[17] Like suretyship, a pledge is an accessory obligation; the principal obligation which the pledge supports need not be in writing.[18] Therefore, the issue to be determined, both as between the debtor and the creditor and as to third parties, is precisely what obligation is secured by the pledge of a negotiable instrument when there is no contemporaneous written evidence at the time of the pledge. *Lepow v. Walker Land Co., Inc.*[19] and *Durham v. First Guaranty Bank of Hammond*[20] reaffirm the rule that the extent of the principal obligation secured by the pledge is determined by the subjective intent of the parties at the time the pledge was entered into. In *Durham* a note paraphed for identification with an act of collateral mortgage was pledged without a written act of pledge. There was at that time a pre-existing debt to the creditor. Some months after the pledge, a second loan was obtained from the same creditor. The court held that the collateral mortgage package did not secure the debt incurred prior to the pledge because there was no proof that, at the time of the pledge, the parties intended to secure pre-existing obligations.[21] In *Lepow* a written act pledged seventy-nine negotia-

15. LA. CIV. CODE arts. 2655-59. *See* Pomez v. Camors & Co., 36 La. Ann. 464 (1884).

16. Civil Code article 3158 requires that, with certain exceptions, there must be an act of pledge in order to affect third parties.

17. LA. CIV. CODE art. 3158.

18. Sambola v. Fandison, 178 So. 276 (La. App. Orl. Cir. 1938).

19. 352 So. 2d 314 (La. App. 4th Cir. 1977).

20. 331 So. 2d 563 (La. App. 1st Cir.), *cert. denied*, 334 So. 2d 431 (La. 1976).

21. While the result of the *Durham* case is perhaps correct, considering the inability of the lender to produce sufficient proof to show intent at the time of the

ble notes to secure a $296,000 debt. The creditor sought to extend the pledge not only to the $296,000 debt but also to other obligations. The *Lepow* court acknowledged that negotiable instruments could be pledged without a written act but ruled that the creditor had not met its burden of proving that the pledge secured anything other than a specific debt. The results of *Durham* and *Lepow* indicate that, although a pledge of negotiable instruments need not be in writing, it is always advisable to obtain a contemporaneous written act of pledge to prove what debts are to be secured.

Avoyelles Trust & Savings Bank v. Liliedahl[22] held that while corporate stock of a close corporation may be pledged to secure a debt of a shareholder, the creditor may not proceed to a judicial sale of the pledged stock if it bears a restriction requiring that the corporation and other shareholders be given a right of first refusal prior to any sale. Acknowledging that the issue was res nova in Louisiana, the Third Circuit found persuasive the holding of New York and Florida courts that such

pledge, there is unfortunate dictum in the case. The court set forth, as one of its rationales, that the pre-existing debt was not "connected" by any writing to the collateral mortgage package. Insofar as the court was implying that there must be a written connection between a handnote and a collateral mortgage package, the court was incorrect. There is no requirement that there even be a "handnote" in a collateral mortgage situation. There are no statutory or jurisprudential rules mandating the existence of the handnote. A collateral mortgage package is merely the pledge of a negotiable instrument to secure a debt. The principal obligation need not be in writing. The pledged note, the so-called "ne varietur" note, is in turn secured by a mortgage. But the fact that the mortgage secures a "ne varietur" note alters neither the basic structure of the arrangement nor the legal rights of the parties. A collateral mortgage package is first and foremost a pledge of a negotiable instrument, the "ne varietur" note. The principal obligation secured by a pledge need not be in writing. Steeg v. Codifer, 157 La. 298, 102 So. 407 (1924); Sambola v. Fandison, 178 So. 276 (La. App. Orl. Cir. 1938). In fact, there have been several cases that have enforced the validity of a collateral mortgage package even though no handnote existed. *See, e.g.*, New Orleans Silversmiths, Inc. v. Toups, 261 So. 2d 252 (La. App. 4th Cir.), *cert. denied*, 263 So. 2d 47 (La. 1972); Odom v. Cherokee Homes, Inc., 165 So. 2d 855 (La. App. 4th Cir.), *cert. denied*, 246 La. 867, 167 So. 2d 677 (1964). Furthermore, a negotiable instrument may be pledged by mere delivery—no written act is required. LA. CIV. CODE art. 3158. Therefore, it is clear that as no writing is required for either the principal obligation or the pledge, there is no requirement of written "connexity" between the principal obligation and the pledged "ne varietur" note secured by a collateral mortgage. A written pledge agreement merely aids in the proof of both the possibly unwritten principal obligation and the date of the pledge.

22. 348 So. 2d 153 (La. App. 3d Cir.), *cert. denied*, 350 So. 2d 1228 (La. 1977).

a stock restriction bars judicial sales prior to an offer to sell to the corporation. The case was admittedly a close one. "First right of refusal" stock restrictions are authorized by Revised Statutes 12:57(F). The corporation also could have chosen to restrict the ability of shareholders to pledge the stock; however, it chose not to do so. On the other hand, had the stock contained a restriction on pledge, the creditor obviously would not have taken it as security without obtaining a waiver of the restriction from the corporation. Without a restriction on pledge of the stock, neither the owner nor the creditor had to notify the corporation of the act of pledge.[23] If the corporation need not be notified of the pledge, it seems inconsistent to allow the corporation to hinder the enforcement of the pledge by enjoining the judicial sale.

The prohibition of a judicial sale can restrict trade and credit.[24] Considering that the issue was res nova, the court could have taken judicial notice of the fact that, prior to the court's decision, many creditors were of the opinion that a stock restriction on resale applied only to voluntary transfers, an opinion supported by decisions in Iowa, Kentucky, Oklahoma, and Pennsylvania.[25] Judge Watson's dissent appears to be the sounder view. The resale restriction should not apply to non-voluntary transfers such as judicial sales, but even if it

23. *See* LA. CIV. CODE art. 3158, which reads:

> When a debtor wishes to pledge . . . stocks . . . he shall deliver to the creditor the . . . stocks . . . so pledged, and such pledge so made . . . shall without further formalities be valid as well against third persons as against the pledgor thereof, if made in good faith . . . it being understood that no notification is required in the case of the pledge of certificates of corporation stock.

24. The court noted that the corporation was not required to have a pledge restriction on the stock certificate to prevent third parties from purchasing the stock through a judicial sale. The court stated:

> It can be argued that the corporation could have prevented the present situation by forbidding stockholders the right to pledge their shares. However, since restrictions of trade are not favored in law, it would perhaps be wise not to hold the corporation to such a duty.
>
> The bank could also have foreseen such a situation when it accepted the pledge, and it was clearly warned of the prohibition by the warning on the certificates.

348 So. 2d at 156.

25. These decisions were cited by the *Liliedahl* court, but the court declined to follow this line of jurisprudence.

should, the corporation can be protected by requiring that it receive notice of the sale.[26] At the judicial sale the corporation could bid the stock in at the same price as any other buyer.

The holding in *Liliedahl* may lead to further abuses. Upon seizure and sale, could a corporation enforce a restriction that allows it to buy the stock back at book value or at some other price lower than was offered by a bona fide third-party purchaser? As a result of *Liliedahl,* creditors will have to scrutinize closely all stock given as security and obtain a waiver from the corporation of any "first right of refusal" restrictions.

MORTGAGES

Article 3305 of the Civil Code states that conventional mortgages can be contracted by an act under private signature. There is an apparent conflict between articles 3305 and 3348;[27] the latter article seems to require a notarial act or a private act duly acknowledged. Two early cases held that the provisions of article 3348 are directed to the clerk of court and do not refer to the effect on third parties of the recordation of a mortgage.[28] *American Bank & Trust Co. in Monroe v. Carson Homes*[29] follows the rule of these older cases. A timely recorded mortgage under private signature affects third persons; the mortgage need not be in authentic form nor by a private act duly acknowledged.

Bonner v. B-W Utilities, Inc.,[30] a federal district court opinion, is perhaps the most important case during the past year in the area of security devices and civil procedure. *Bonner* held that procedural due process requires the holder of a conventional mortage to give notice of seizure in executory proceedings to a third party possessor. The right to receive notice

26. *See* Bonner v. B-W Utilities, Inc., 452 F. Supp. 1295 (W.D. La. 1978).

27. LA. CIV. CODE art. 3348 reads in part:

> If the instrument on which the mortgage or privilege is based be an authentic act, a copy thereof shall be recorded; if it be an act under private signature, promissory note or other written instrument, it must be proved up and recorded in the manner required for acts under private signature.

28. Allen, West and Bush v. Whetstone, 35 La. Ann. 846 (1883); Stallcup v. Pyron, 33 La. Ann. 1249 (1881).

29. 344 So. 2d 456 (La. App. 2d Cir.), *cert. denied,* 346 So. 2d 221 (La. 1977).

30. 452 F. Supp. 1295 (W.D. La. 1978).

had been accorded previously only to third party possessors of property subject to a judicial or legal mortgage.[31] While the court stopped short of holding that the notice of seizure must be served by the sheriff, the cautious practitioner will now not only run a title check on property prior to foreclosure by executory process, but will also serve a notice of seizure on all those who have purchased the property subject to the mortgage or who have assumed the mortgage. The holding in *Bonner* is relatively narrow, but it implicitly raises the issue of whether notice of seizure must be served upon "simple sureties" or sureties bound "in solido" with the debtor although the sureties do not own an interest in the property being seized. Because the court relied primarily upon the holdings of United States Supreme Court cases that prohibit pre-judgment seizures of property,[32] a strong contention can be made that those without a possessory or ownership interest in the property need not be given notice of executory proceedings.[33]

COLLATERAL MORTGAGES

The ranking of a collateral mortgage depends not only upon the date of its recordation but also upon the date of pledge of the note paraphed "ne varietur" for identification with the act of collateral mortgage.[34] *Richey v. Venture Oil and Gas Corp.*[35] delineates the procedure by which a creditor secured by the pledge of a collateral mortgage package can transfer his rank to others and holds that if a new creditor has the

31. LA. CODE CIV. P. art. 3742.

32. Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

33. *See, e.g.*, Chrysler Credit Corp. v. Breaux, 293 So. 2d 261 (La. App. 1st Cir.), *cert. denied*, 294 So. 2d 548 (La. 1974).

34. New Orleans Silversmiths, Inc. v. Toups, 261 So. 2d 252 (La. App. 4th Cir.), *cert. denied*, 263 So. 2d 47 (La. 1972); Odom v. Cherokee Homes, Inc., 165 So. 2d 855 (La. App. 4th Cir.), *cert. denied*, 167 So. 2d 677 (La. 1964). For detailed expositions concerning collateral mortgages, see Nathan and Marshall, *The Collateral Mortgage*, 33 LA. L. REV. 497 (1973); Nathan and Marshall, *The Collateral Mortgage: A Reassessment and Postscript*, 36 LA. L. REV. 973 (1976); Vetter, *The Validity and Ranking of Future Advance Mortgages in Louisiana*, 21 LOY. L. REV. 141 (1975).

35. 346 So. 2d 875 (La. App. 4th Cir. 1977).

handnotes assigned to him, he will not lose the rank that his transferor had held.[36]

RECORDATION

Just because a security device is not recorded on the face of the public records does not mean that third parties are unaffected.[37] For example, certain privileges arising upon the death of a debtor need not be recorded.[38]

Likewise, a fraudulent cancellation of a mortgage will not deprive a creditor of his ranking as against third parties.[39] On the other hand, recording a document that need not be recorded does not create any additional rights. *Wayside Development Co. v. Post*[40] held that recording a "service contract" in the mortgage records did not give the creditor any secured right to the immovable property. The court repeated the well-known rule that mortgages and privileges are stricti juris; parties cannot create security rights on immovable property apart from those security devices expressly authorized by statute.

JUDICIAL MORTGAGES

Consolidation Loans, Inc. v. Guercio[41] dealt with whether a judgment had prescribed when a suit to revive the judgment

36. The handnotes are the principal obligation secured by the pledge of the "ne varietur" note; the "ne varietur" note, in turn, is secured by the collateral mortgage. A transfer of the handnote transfers the accessory obligation, the "ne varietur" note. LA. CIV. CODE art. 2645. The transfer of the "ne varietur" note, in turn, carries with it the collateral mortgage. An attempted "assignment" of the "ne varietur" note, however, without the assignment of the principal obligation (the handnote), constitutes either a breach of the pledge by the assignor or a "reissuance," giving the transferee a new, lower rank than that held by the assignor. Odom v. Cherokee Homes, Inc., 165 So. 2d 855 (La. App. 4th Cir.), *cert. denied*, 167 So. 2d 677 (La. 1964).

37. *See* Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 TUL. L. REV. 491 (1965).

38. Privileges arising at death, such as for funeral charges (*see* LA. CIV. CODE arts. 3192-94) and for last illness (*see* LA. CIV. CODE arts. 3199-3204), need not be recorded and yet affect the immovable property of the decedent. LA. CONST. of 1921 art. XIX, § 19 was continued in LA. CONST. art. XIV, § 16(A)(15).

39. This rule was reiterated in two cases decided last year. Gulf South Bank and Trust Co. v. Demarest, 354 So. 2d 695 (La. App. 4th Cir. 1978); Bank v. Bishop, 353 So. 2d 1109 (La. App. 2d Cir.), *cert. denied*, 355 So. 2d 549 (La. 1978).

40. 338 So. 2d 1173 (La. App. 2d Cir. 1976).

41. 356 So. 2d 441 (La. App. 1st Cir. 1977).

was brought within ten years after the court of appeal's affirmation of the trial court's judgment, but more than ten years after the trial court's judgment had been signed. The court ruled that the suit to revive the judgment was untimely, holding that a "rendition" of a judgment within the meaning of article 3547 of the Civil Code[42] occurs solely upon the signing of the judgment by the trial court; the "mere" affirmation by an appellate court (as opposed to a decree amending or reversing the trial court) is not the type of "judgment" to which the article refers.

By literally applying earlier jurisprudence and by refusing to recognize the distinction between trial court and appellate court judgments created by the 1960 amendments to article 3547,[43] the court missed an opportunity to clarify a murky area of Louisiana law. While the validity of a judicial mortgage was not directly before the court, perhaps the opinion might have been different if the original appellate court judgment (affirming the trial court) had been recorded.[44] Revised Statutes 13:4434-35 provide that the recordation of an appellate court decree in the mortgage records "shall operate as a judicial mortgage." These statutes, when read in conjunction with article 3547 of the Civil Code, would lead one to believe that an appellate court decree affirming a trial court's ruling is just as much a "rendition" of a "judgment" as a reversal or amendment of the lower court's opinion.[45]

The problem with the result of *Guercio* originates in two

42. LA. CIV. CODE art. 3547, *as amended by* 1960 La. Acts, No. 30, § 1, provides in part: "A money judgment rendered by a court of this state is prescribed by the lapse of ten years from its signing, if rendered by a trial court, or from its rendition if rendered by an appellate court."

43. Prior to 1960 La. Acts, No. 30, § 1, Civil Code article 3547 made no distinction between judgments of trial and appellate courts; it spoke only of "all judgments for money." The 1960 amendments seem to indicate that any appellate court decree for a money judgment starts the running of prescription; no distinction is made between decrees affirming trial court judgments and those amending or reversing the trial court.

44. The instant case did not state whether the earlier appellate opinion, 200 So. 2d 717 (La. App. 1st Cir. 1967), had been recorded.

45. *See also* Mossler Acceptance Corp. v. Naquin, 30 So. 2d 766 (La. App. 1st Cir. 1947).

early cases holding that neither suspensive[46] nor devolutive[47] appeals interrupt prescription of the trial court's "rendition of judgment."[48] As one court has noted, this leads to the possibility of the "anomalous consequence of a judgment becoming extinguished by prescription before a final determination of the rights of the litigating parties has been reached in the appellate court and the whole subject matter vanishing into thin air and leaving not a trace behind."[49] Because a plaintiff is prevented from executing on the judgment of a trial court if a suspensive appeal has been taken,[50] there is also the unsettled question of whether judicial mortgages can be validly recorded before the delays run for the suspensive appeal.[51] If a case is appealed to the United States Supreme Court, a delay of more than ten years from the signing of the judgment by the trial court to a final decision by the nation's highest court would not be inconceivable. As a matter of policy, it would appear more equitable that a successful plaintiff should be permitted to "revive" a judgment up to ten years after the rights of the litigating parties finally have been decided.

CHATTEL MORTGAGES

Two of the numerous problems created by the Chattel Mortgage Statute[52] involve the degree of detail required in the description of the mortgaged property and the place where the chattel mortgage must be recorded. Both issues arose in the case of *Young v. Squeeze Tools, Inc.*[53] The defendant granted

46. Arrowsmith v. Durell, 21 La. Ann. 295 (1869).

47. Walker v. Towne, 23 La. Ann. 176 (1871).

48. These two cases were decided on the basis of a provision originating with 1853 La. Acts, No. 274, which became the basis for article 3547 in the 1870 Civil Code. There had been no corresponding provisions in the 1825 Code or the Digest of 1808; likewise, there was no corresponding article in the Code Napoleon. *Cf.* 1972 COMPLIED EDITION OF THE CIVIL CODE OF LOUISIANA art. 3547 (J. Dainow ed.). Article 3547 was last amended by 1960 La. Acts, No. 39, § 1.

49. Arrowsmith v. Durell, 21 La. Ann. 295-96 (1869).

50. LA. CODE CIV. P. art. 2252.

51. *See* Comment, *Judicial Mortgage Rights: Recordation of Non-Executory Judgments*, 35 LA. L. REV. 892 (1975).

52. LA. R.S. 9:5351-66 (Supp. 1978).

53. 350 So. 2d 967 (La. App. 2d Cir. 1977).

a chattel mortgage on a portable drilling rig, the only one it owned, but did not include the rig's serial number in the act of chattel mortgage. The chattel mortgage indicated that the rig was to be located in Iberia Parish "when not in use." The court found that the description was adequate to affect third parties and that once the chattel mortgage was recorded in Iberia Parish it was effective throughout the state.

This case is one more example of how the Chattel Mortgage Statute, complex and convoluted to begin with, has had another layer of judicial gloss added to its tarnished facade. Revised Statutes 9:5352 states, in connection with the description which must be given in an act of chattel mortgage of a specific item, that "a full description of the property to be mortgaged *shall* be set forth so that it may be identified and its location *shall* be stated."[54] The court ruled that because the chattel mortgage stated that the rig was to be located in Iberia Parish "when not in use," this was a sufficient description of the location. The court also decreed that, because it was the only rig owned by the defendant, a listing of the serial number was not required. The result of *Young* creates further "secret liens" to benefit chattel mortgagees in contravention of the general rule that mortgages and privileges are stricti juris.

The thrust of any inquiry about a mortgage or privilege should begin with the premise set forth in article 3183 of the Civil Code that, unless there exists a "lawful cause" of preference, the creditor is unsecured.[55] A line of decisions under the Chattel Mortgage Statute appears to indicate that if the location of the movable property is stated in the mortgage, then a lesser description of the item is permissible than would be the case had no location been given. These cases also appear to require a more detailed description of items subject to a chattel mortgage for a commercial (as opposed to a consumer) loan.[56]

54. LA. R.S. 9:5352 (Supp. 1975) (emphasis added).

55. Civil Code article 3183 states: "The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference."

56. *Compare* Remington Rand, Inc. v. Profits Island Gravel Co., Inc., 150 So. 76 (La. App. 1st Cir. 1933), *with* All State Credit Plan Houma, Inc. v. Fournier, 175 So. 2d 707 (La. App. 1st Cir. 1965), and *In re* Nero, 501 F.2d 1354 (5th Cir. 1974).

There is nothing in the text of the statute to support the distinction these cases create; the statute mandates that the location "shall be stated."

It was obvious that the parties in *Young* did not intend that the rig remain in Iberia Parish; the chattel mortgage stated that the rig was there only when not in use. The chattel mortgage would be valuable to the mortgagee only if the rig were kept productive and not allowed to deteriorate. Revised Statutes 9:5353 states that the mortgage must be recorded "where the mortgaged property is to be located according to the terms of the mortgage instrument . . . ."[57] It seems unfair to allow the parties to devise a mortgage, give as the location of the property a place where it will not be used, record the mortgage in such a parish, and then obtain an effective state-wide chattel mortgage, the existence of which is not known to other creditors in the parishes where the property is actually to be located when in productive use. The purpose of the state-wide effect of the chattel mortgage should be to protect the mortgagee in case the mortgagor removes the property unexpectedly from the parish.[58] The Chattel Mortgage Statute should not be used as a shield behind which the chattel mortgagee may assert his rights against other creditors in good faith when the chattel mortgagee can easily protect his rights by recording the chattel mortgage in other parishes.

Public policy would appear to require that the serial number of the rig should have been given. Granted, the rig was the only one owned by the defendant; nevertheless, *Young* was unlike those cases in which the mortgaged property was the only item of its kind on the premises of the debtor and was to remain on those premises.[59] In the instant case it was apparent that the rig was to be put to use in various areas of the state. Without a serial number or a more particularized description, there was no way for a third party to know whether a particular portable drilling rig off the defendant's premises was in fact

57. LA. R.S. 9:5353 (Supp. 1978).

58. *See, e.g.*, Mossler Acceptance Corp. v. Naquin, 30 So. 2d 766 (La. App. 1st Cir. 1947).

59. *See, e.g.*, Abbott v. Temple, 73 So. 2d 647 (La. App. 2d Cir. 1954); Remington Rand, Inc. v. Profits Island Gravel Co., Inc., 150 So. 76 (La. App. 1st Cir. 1947).

subject to a chattel mortgage, even if the third party creditor suspected the existence of the chattel mortgage. The description given in *Young* does not appear adequate to put third parties on notice given the fact that the drilling rig was not to remain on the defendant's premises and, in this case, was in fact seized by a third party creditor in a different parish.

A sounder approach would be for a court to ask whether the creditor did all that was reasonably possible to put third parties on notice of the existence of the chattel mortgage on the particular item; if not, third parties should not be affected. Perhaps the crux of the problem is Louisiana's antiquated public records doctrine that treats each parish as a separate entity. With the use of computers, it is feasible to create a central repository for all recordation data, a repository whose records would be available throughout the state by the use of computer terminals located in each parish.

EXEMPTIONS FROM SEIZURE

The Vehicle Certificate of Title Law[60] expressly allows a chattel mortgage to be placed on a mobile home; if the mobile home is later immobilized, the chattel mortgage can be converted to a mortgage on immovable property.[61] *Ellis v. Dillon*[62] held that even if the provisions of the VCTL have not been followed in "immobilizing" a mobile home, whether a mobile home has become an immovable so as to qualify for a homestead exemption involves a factual determination. The court ruled that the owner of the mobile home was entitled to a homestead exemption because, in fact, the mobile home had been transformed into an immovable by nature.[63] In *Ellis* the chattel mortgagee may not have obtained a waiver of the homestead exemption because he may have been under the impression, at the time the chattel mortgage was executed, that the mobile home would not qualify for a homestead exemption.

60. LA. R.S. 3:701-34 (Supp. 1978).

61. LA. R.S. 32:710(N) (Supp. 1978).

62. 345 So. 2d 1241 (La. App. 2nd Cir. 1977).

63. LA. CIV. CODE art. 464. Book two, title I, of the Civil Code, "Of Things," has been amended by 1978 La. Acts, No. 728, § 1.

The Fourth Circuit faced the problem of whether a chattel mortgage implicitly waives any other exemptions from seizure and sale and held, in *Aetna Finance Co. v. Antoine,*[64] that when the debtor executed a chattel mortgage on household furniture, he implicitly waived the exemptions from seizure given in Revised Statutes 13:3881.[65] There is dictum in the case, however, which strongly suggests that the creditor must expressly explain to the debtor that he is waiving exemptions from seizure and sale for the mortgaged items. Judge Lemmon's concurring opinion appears to be a preferable point of view. As Judge Lemmon noted, an affirmative requirement that the creditor explain to the debtor that the mortgage will waive exemptions from seizure and sale "would invite a swearing match over the validity of the waiver whenever statutorily exempt chattels are seized. I would limit such contests to those cases in which there are allegations of fraud, misrepresentation or other vices of consent."[66]

ATTORNEYS' PRIVILEGES

Revised Statutes 9:5001 provides a "special privilege" to attorneys "for the amount of their professional fees on all judgments obtained by them, and on the property recovered thereby, either as plaintiff or defendant, to take rank as a first privilege thereon."[67] *Livaccari v. Demarest*[68] held that the privilege under section 5001 and the privilege for law charges under article 3191 of the Civil Code do not extend to services performed prior to filing suit. Therefore, the clerk of court was ordered to erase a purported "attorneys' privilege" recorded by a lawyer who had performed work on a succession but who apparently had not filed the succession proceedings.

The use of the term "rank" in section 5001 appears to refer to ranking as to third parties; whether there is a privilege as between an attorney and his client on funds held by the attor-

64. 343 So. 2d 1195 (La. App. 4th Cir. 1977).

65. LA. R.S. 13:3881 (Supp. 1978), *as amended by* 1978 La. Acts, No. 563, § 1.

66. 343 So. 2d at 1199 (Lemmon, J., concurring).

67. LA. R.S. 9:5001 (1950).

68. 352 So. 2d 792 (La. App. 4th Cir. 1977), *cert. denied,* 354 So. 2d 211 (La. 1978).

ney is a different matter. The First Circuit[69] found that Louisiana has both a "charging lien" and a "retaining lien"[70] under section 5001 and articles 3022 and 3023 of the Civil Code. The court ruled that the attorney for the losing party in a lawsuit had a right to retain funds given "in trust" by his client as against a garnishment by an unsecured creditor. The case involved only a dispute between an unsecured creditor and the attorney for the losing party; it should not be seen as authority for an attorney to retain property as against a secured third party.[71]

REPAIRMAN'S PRIVILEGE

Revised Statutes 9:4501 grants a repairman of automobiles a privilege that is effective for a period of ninety days from the "last day on which the repairs were made, or parts made or furnished, or the labor performed."[72] In *Van-Trow Olds Cadillac, Inc. v. Kahn*[73] the court held that the privilege is lost if asserted more than ninety days after the labor was performed or parts furnished.[74] The court did not deal with whether the ninety-day period is one of "peremption" or prescription. If peremption, it would not matter whether the automobile was in the hands of the repairman for the ninety-day period or not; the privilege would be lost if not asserted within ninety days. On the other hand, if the period is one of liberative prescription, then arguably possession by the repairman interrupts prescription.

69. Board of Trustees of the East Baton Rouge Mortgage Fin. Auth. v. All Taxpayers, 361 So. 2d 292 (La. App. 1st Cir. 1978).

70. The use of the terms "charging lien" and "retaining lien" derive from common law and have no special meaning in civil law; the use of common law terminology may hinder rather than aid analysis of the exact nature of the Louisiana security device involved.

71. The attorney for the losing party would not have a privilege under LA. R.S. 9:5001 (1950) because no "judgment" would have been obtained in favor of the client. Articles 3022 and 3023 of the Civil Code do not create a privilege for the attorney as to secured third parties.

72. LA. R.S. 9:4501 (Supp. 1977).

73. 345 So. 2d 991 (La. App. 2d Cir. 1977).

74. The court also held that floormats are not "parts" within the meaning of the statute creating the repairman's privilege.

LESSOR'S PRIVILEGE

Acadiana Bank v. Foreman[75] involved a ranking contest between a lessor's privilege and a collateral chattel mortgage. Beginning with the premises that a collateral chattel mortgage ranks from the date of the pledge of the "ne varietur" note and that the earliest time a lessor's privilege can affect movables "is that time when the lease is in effect and the movables are on the premises,"[76] the court held that a collateral chattel mortgage outranks a lessor's privilege when the "ne varietur" note is pledged prior to the time the lease is to take effect even though the lease is recorded before the pledge of the note. The court did not find that the recorded written lease was a reconduction of the previous oral lease between the parties; had it been a reconduction, the lessor would have won.

VENDOR'S PRIVILEGES

In *Guaranty Bank & Trust Co. v. Hoggins*[77] a repairman claimed a vendor's privilege for "component parts" installed in a car. The court held that once parts are installed in an automobile and become an integral part of it; the vendor's privilege of the individual parts is lost and the repairman is relegated to his privilege[78] against the car as a whole. The court also found, under the terms of the statute, that a prior chattel mortgage on the car outranked the repairman's privilege even though the parts were put in after the chattel mortgage was recorded.[79]

City Bank and Trust Co. v. Caneco Construction, Inc.[80] interpreted article 3249(1) of the Civil Code as providing a privilege to vendors of immovable property only if the act of sale is on its face a credit sale.[81]

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75. 352 So. 2d 674 (La. 1977).

76. *Id.* at 678.

77. 347 So. 2d 919 (La. App. 3d Cir. 1977).

78. LA. R.S. 9:4501 (Supp. 1977).

79. Prior to the foreclosure sale by the chattel mortgagee, the repairman could have moved for a separate appraisal under the provisions of article 1092 of the Code of Civil Procedure to protect his rights.

80. 341 So. 2d 1331 (La. App. 3d Cir. 1976), *cert. denied*, 345 So. 2d 52 (La. 1977).

81. *See also* Singer Co./Singer Furniture Co. v. Willis, 435 F. Supp. 1188 (W.D.

PRIVATE WORKS ACT

Louisiana National Bank v. Triple R Contractors, Inc.[82] is the first supreme court case to interpret the adjacent lots privilege under Revised Statutes 9:4816(A). The decision provides guidelines for determining when the privilege attaches to adjacent lots and what factors should be considered in determining if there is a "separate phase of . . . development . . . pursuant to separate and distinct construction contracts."[83]

In *American Bank & Trust v. F & W Construction Co., Inc.*[84] a collateral mortgage was recorded but the "ne varietur" note was not pledged. Work began and materials were furnished; the "ne varietur" note was then pledged to the creditor. The court held that a collateral mortgage cannot affect third parties until both the mortgage is recorded and the "ne varietur" note is pledged; because work began before the "ne varietur" note was pledged, the materialman's lien outranked the collateral mortgage.

Courshon v. TIL[85] apparently involved an ordinary mortgage to secure future advances, not a collateral mortgage. Beginning with the premise that a mortgage to secure future advances ranks from the date of recordation, not from the date funds were actually advanced,[86] the court ruled that if recordation occurred prior to the time work began and materials were furnished, the holder of the future advance mortgage outranked the materialman regardless of the time the funds were actually lent. Unfortunately, the court did not specify whether the mortgage in question was a mortgage to secure future advances or a collateral mortgage. From the facts, it appeared to

La. 1977). A vendor's privilege on movable property applies only to sales completed in Louisiana. If a sale is completed outside of Louisiana and the state in which the sale was completed does not recognize the vendor's privilege, no vendor's privilege will be granted in Louisiana. LA. R.S. 9:5353 has been amended by 1978 La. Acts, No. 572, § 1, to provide a method for perfecting an out-of-state security interest on movables brought into Louisiana.

82. 345 So. 2d 7 (La. 1977).

83. LA. R.S. 9:4816(A) (Supp. 1977).

84. 357 So. 2d 1226 (La. App. 2d Cir.), *cert. denied*, 359 So. 2d 1306 (La. 1978).

85. 344 So. 2d 719 (La. App. 2d Cir.), *cert. denied*, 346 So. 2d 1108 (La. 1977).

86. Thrift Funds Canal Inc. v. Foy, 261 La. 573, 260 So. 2d 628 (1972). *Cf.* Vetter, *supra* note 34.

have been a mortgage to secure future advances; but the court applied Revised Statutes 9:4801(C),[87] which appears to be applicable only to collateral mortgages. The phrase "and the note delivered" in the statute seems to be an explicit reference to a collateral mortgage, for only a collateral mortgage involves delivery (pledge or "issuance") of the note paraphed for identification with the act of mortgage. In a mortgage to secure future advances, there is no need to "deliver" the note because, as it directly represents the debt being secured, it never leaves the creditor's possession.[88]

Furthermore, even as applied to collateral mortgages, section 4801(C) should not be read to give the collateral mortgagee a superior ranking position if (1) the building contract has been recorded,[89] (2) labor has begun, or (3) materials have been furnished prior to both the recordation of the collateral mortgage and the pledge of the "ne varietur" note. Most practitioners make it a policy not to record a mortgage if there is a contract of record, or to require cancellation of the contract prior to

87. When a mortgage note has been executed by the owner of the immovable for the purpose of securing advances to be made either simultaneously therewith or in the future, whether such advances be for the payment of all or part of the purchase price of the property, for commitment fees or any other type of expenses incurred or to be incurred in connection with construction on the property, and the mortgage has been recorded and *the note delivered to* the lender before any work or labor has begun or material has been furnished, or before the recordation of a building contract, the amount of the advances made simultaneously therewith or thereafter shall be deemed secured by the mortgage in precedence to and with priority over any of the claims had under the privileges conferred by Sub-Section (A) of this section, except as stated Sub-Section (D) hereof.

LA. R.S. 9:4801(C) (Supp. 1975) (emphasis added).

88. For sources on the distinction between a mortgage to secure future advances and a collateral mortgage, see note 34, *supra*. Several old cases talk about "delivery" of the note in an ordinary mortgage situation as supporting proof of acceptance of the mortgage by the mortgagee. *See, e.g.*, Citizens' Bank v. Ferry, 32 La. Ann. 310 (1880); Ells v. Sims, 2 La. Ann. 251 (1847). It does not appear likely, however, that this is the type of delivery to which Revised Statutes 9:4801(C) refers.

89. If a building contract is not recorded before the work is to commence, the provisions of Revised Statutes 9:4802 have been violated. This means that not only does the owner become personally liable to claimants under sections 4806 and 4812 of the Act, but claimants can proceed under Revised Statutes 9:4812 because the contract was not recorded "as and when required." Additionally, the general contractor loses his privilege. Gulfco Fin. Co. of Marrero v. Malone, 230 So. 2d 269 (La. App. 4th Cir. 1969), *writ not considered*, 255 La. 341, 230 So. 2d 835 (1970).

recording the mortgage. It is a commonly held belief among practitioners that if either (a) labor has begun or materials have been furnished before the recordation of an ordinary mortgage or (b) the building contract has been recorded before recordation of the ordinary mortgage, then materialmen may outrank the ordinary mortgagee. No policy reason dictates that the rule should differ for either future advance[90] or collateral[91] mortgages; the act needs to be further clarified on this point.

Since its inception,[92] the Private Works Act has suffered from almost yearly amendment by the legislature. These annual changes, in conjunction with rather prolix language, have created both lacunae concerning procedures to be followed and pitfalls for the unwary. For example, meshing the procedural requirements for claiming the lien and the substantive recoveries allowed lien claimants in concursus proceedings invoked under the Act is no simple task. *Federal National Bank & Trust Co. v. Clasim, Inc.*[93] held that when a concursus proceeding had been invoked under section 4804 of the Act, an answer filed in the concursus action negated the requirement[94] that the lien claimant file a separate suit within a year after recording his affidavit to claim the privilege. On the other hand, the court also held that filing an answer in the concursus proceeding did not vitiate the need to record a notice of lis pendens;[95] unless the notice was timely filed, the privilege perempted.

The detail required in the notice of lis pendens was discussed in *Ragsdale v. Hoover;*[96] *Paul E. Riviere, Inc. v. Univer-*

90. In fact, in *Hortman-Salmen Co., Inc. v. White,* 168 La. 1057, 123 So. 711 (1929), the supreme court expressly refused to create a distinction in ranking between an ordinary mortgage and a mortgage to secure future advances under the provisions of the forerunner of Revised Statutes 9:4812. *Cf.* Courshon v. Mauroner-Craddock, Inc., 219 So. 2d 258 (La. App. 1st Cir. 1968), *cert. denied,* 253 La. 760-62, 219 So. 2d 778 (1969).

91. Except, as noted, that in a collateral mortgage, both recordation of the collateral mortgage and pledge of the "ne varietur" note must occur to mark one's rank as to third parties.

92. For the history of previous reincarnations of the Private Works Act, see H. DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE 225-34 (1942).

93. 340 So. 2d 611 (La. App. 4th Cir. 1976), *cert. denied,* 342 So. 2d 1110, 1111 (La. 1977).

94. LA. R.S. 9:4802 (Supp. 1966 & 1977).

95. *Id.*

96. 353 So. 2d 1132 (La. App. 2d Cir.), *cert. denied,* 355 So. 2d 263 (La. 1978).

sal Excavators, Inc.[97] dealt with the requisite details for lien affidavits. Both cases held that minor errors in these documents will not defeat the lien.

There continues to be a split in the jurisprudence on the issue of subrogation under the Private Works Act. Two questions are involved: first, is a contractor or sub-contractor who pays his laborers entitled to claim the laborers' privilege as to the owner and unsecured creditors; second, is he entitled to the rank of the laborers' privilege as to secured creditors.

The answer to the second question appears to be settled; a sub-contractor cannot pay his laborers and be subrogated by operation of law to the laborers' priority[98] over other secured creditors.[99] On the other hand, there is no definitive answer to the first question. The First Circuit appears to have held that a materialman who pays his laborers is not entitled to any privilege on the property for the amounts paid.[100] In contrast, the Second and Third Circuit Courts of Appeal[101] have held that a sub-contractor or labor supplier, while not subrogated to the laborers' superior ranking, is entitled to a privilege on the property over unsecured creditors up to the amount paid to the laborers. The Louisiana State Law Institute currently is working on a restatement of the Private Works Act that, if adopted, should clarify these uncertain areas.

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97. 358 So. 2d 670 (La. App. 1st Cir. 1978).

98. The basis of the laborer's priority is Revised Statutes 9:4801(D).

99. Pringle Associated Mort. Corp. v. Eanes, 208 So. 2d 346 (La. App. 1st Cir. 1968), *aff'd*, 254 La. 705, 226 So. 2d 502 (1969).

100. Hunt v. La Chere Maison, Inc., 316 So. 2d 850 (La. App. 1st Cir. 1975).

101. Ragsdale v. Hoover, 353 So. 2d 1132 (La. App. 2d Cir. 1978), *cert. denied*, 355 So. 2d 263 (La. 1978); City Bank and Trust Co. v. Caneco Constr. Inc., 341 So. 2d 1331 (La. App. 3d Cir. 1976), *cert. denied*, 345 So. 2d 52 (La. 1977). *See also* American Fidelity Fire Ins. Co. v. United States Service Corp., 430 F. Supp. 1053 (E.D. La. 1977).