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Civil Procedure - Deficiency Judgment After Invalid Executory Process

Samuel A. Blaize

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"We favor the abolition of the death penalty. Modern penology with its correctional and rehabilitative skills affords greater protection to society than the death penalty which is inconsistent with its goals. This Nation is too great in its resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime."⁵⁷

However, in default of legislative action in this area, the United States Supreme Court seems to be moving toward such a result. This is evidenced by the attitude taken by the Court in the two cases noted in this series,⁵⁸ and the fact that the Court has granted certiorari in a case which clearly presents the issue.⁵⁹ It is submitted that society's "evolving standard of decency" requires the court to declare capital punishment unconstitutional.

Edward A. Kaplan

CIVIL PROCEDURE—DEFICIENCY JUDGMENT AFTER INVALID EXECUTORY PROCESS

After default in payments plaintiff successfully foreclosed *via executiva* on a chattel mortgage securing the purchase price of defendant's automobile, without authentic evidence of the chattel mortgage. Since defendant, although having notice of the proceedings, did not seek to enjoin or appeal the seizure and sale, the car was sold to a third party.¹ Soon thereafter, plaintiff sought a deficiency judgment for the balance of the debt. Defendant's administratrix argued that the acknowledgment of the chattel mortgage under private signature, by an agent of the mortgagee, was improper; the evidence given in order to use executory process was illegal; and therefore everything done subsequently was null and void.² *Held*, where executory process is invalid because a chattel mortgage under private signature has not been duly acknowledged, a deficiency judgment is not al-

57. Letter of then Deputy Attorney General Ramsey Clark to the Honorable John L. McMillan, Chairman, House Committee on the District of Columbia, July 23, 1965, reported in the N.Y. Times, July 24, 1965, at 1, col. 5.

58. Notes, 29 LA. L. REV. 381 (1969) 29 LA. L. REV. 389 (1969).

59. *Boykin v. Alabama*, 37 U.S.L.W. 3133 (Oct. 15, 1968).

1. Although the facts of the case are unclear, it will be assumed for the purpose of this Note that no appeal or injunction was sought, and that the automobile was sold to a third party purchaser in good faith.

2. Since the agent of the chattel mortgagee was neither the grantor of nor a witness to the act as required by LA. R.S. 13:3720 (1950), the act was not duly acknowledged.

lowed. *League Central Credit Union v. Montgomery*, 251 La. 971, 207 So.2d 762 (1968).

Under the Deficiency Judgment Act, a creditor can recover the balance due on a debt following executory process with appraisal.³ The proceeds of a judicial sale often do not fully extinguish the debtor's obligation to his creditor; thus the creditor is able to invoke the remedy of the deficiency judgment. The defendant must be cited, and is afforded all the delays and formalities of ordinary proceedings.⁴

The creditor is required to comply strictly with the Deficiency Judgment Act as regards appraisal of the property.⁵ The strict compliance requirement is a result of the legislative and judicial policy of protecting the debtor's rights in the expeditious executory proceedings.⁶ If there is no appraisal, the debt is discharged and the creditor may not seek a deficiency judgment.⁷

When the debtor fails to assert his defense of irregularity in the executory process at the time of seizure and sale, there has been confusion as to whether he can assert it in the subsequent suit for a deficiency judgment. The ambiguity seems to arise because of the conflicting policies of protecting the debtor on the one hand and the innocent purchaser at judicial sale on the other.⁸ Those cases allowing the debtor to assert the defense of irregularity in the executory process reason that since it is such a harsh remedy, the debtor will not be estopped from asserting his defense and the deficiency judgment suit will fall.⁹ The opposing line of cases reasons that if the deficiency judgment were upset by this defense, then the judicial sale to an innocent third party could also be upset.¹⁰ The latter view

3. LA. R.S. 13 :4106, 13 :4107 (Supp. 1966) ; LA. CODE CIV. P. arts. 2771, 2772.

4. LA. CODE CIV. P. art. 2771.

5. *Buchanan v. Williams*, 104 F. Supp. 243 (W.D. La. 1952) ; *Carr v. Lattier*, 188 So.2d 645 (La. App. 2d Cir. 1966) ; *Universal C.I.T. Credit Corp. v. Hulett*, 151 So. 705 (La. App. 3d Cir. 1963) ; *Associates Discounts Corp. v. Johnson*, 149 So.2d 14 (La. App. 1st Cir. 1963) ; *Mack Trucks, Inc. v. Dixon*, 142 So.2d 605 (La. App. 4th Cir. 1962) ; *Shreveport Auto Fin. Corp. v. Harrington*, 113 So.2d 476 (La. App. 2d Cir. 1959) ; *David Inv. Co. v. Wright*, 89 So.2d 442 (La. App. 1st Cir. 1956) ; *Southland Inv. Co. v. Lofton*, 194 So. 125 (La. App. 2d Cir. 1940).

6. *Emmco Ins. Co. v. Nola Cabs, Inc.*, 125 So.2d 207 (La. App. 4th Cir. 1960).

7. See note 5 *supra*.

8. *White Motor Co. v. Piggy Bak Cartage Corp.*, 202 So.2d 294, 296 (La. App. 4th Cir. 1967) ; Note, 24 LA. L. REV. 894, 901 (1964).

9. *League Central Credit Union v. Montgomery*, 251 La. 971, 207 So.2d 762 (1968) ; *Tapp v. Guaranty Fin. Co.*, 158 So.2d 228 (La. App. 1st Cir. 1963).

10. *White Motor Co. v. Piggy Bak Cartage Corp.*, 202 So.2d 294 (La. App. 4th Cir. 1967) ; *League Central Credit Union v. Montgomery*, 198 So.2d 914 (La. App. 4th Cir. 1967).

thus disallows the defenses and permits the creditor to recover the balance of the debt. This problem is not present where the purchaser at the judicial sale is the creditor. Since there are no third party rights to protect, the judicial sale can be avoided.¹¹

Protection was afforded the debtor in *Tapp v. Guaranty Fin. Co.*¹² In that case, the First Circuit announced that executory process, which was invalid on its face, could not be the basis for a valid appraisal. Coupling this decision with the requirement that no appraisal means no deficiency judgment, the court concluded that the debtor could successfully defend a deficiency judgment action by showing that there was an irregularity in the executory process. However, this reasoning seems to be more makeweight than the actual basis for the decision. The real basis seems to be that only the executory process was invalid.¹³ However, by this artificial invalidation of the appraisal, the court bolstered its decision because the legislation explicitly provides that a failure to appraise the property precludes recovery of a deficiency judgment. Thus, the court in effect held that all defenses to an invalid executory process are available in a suit for a deficiency judgment.

*White Motor Co. v. Piggy Bak Cartage Corp.*¹⁴ a Fourth Circuit case, decided after *Tapp*, held that the creditor can recover the deficiency judgment despite the irregularity in the executory process, and adopted the reasoning of the jurisprudence applying the bona fide purchaser doctrine.¹⁵ The court stated that if a creditor were refused recovery on the deficiency judgment because of a defect in the executory process, the rights of a third party who had purchased in good faith at the judicial sale would be jeopardized. The court thus held that the debtor must be estopped from asserting his defense of an irregularity in the executory process.

The court in *White*, however, seemed to overlook the fact that only the deficiency judgment was under attack, not the rights of the bona fide purchaser.¹⁶ The mortgagor has the re-

11. *League Central Credit Union v. Montgomery*, 251 La. 971, 207 So.2d 762 (1968).

12. *Tapp v. Guaranty Fin. Co.*, 158 So.2d 228 (La. App. 1st Cir. 1963).

13. Note, 24 LA. L. REV. 894, n.4 (1964).

14. *White Motor Co. v. Piggy Bak Cartage Corp.*, 202 So.2d 294 (La. App. 4th Cir. 1967).

15. *Cullotta v. Grosz*, 173 La. 83, 136 So. 95 (1931); *Huber v. Jennings-Heywood Oil Syndicate*, 111 La. 747, 35 So. 889 (1904); *Miller v. People's Homestead & Savings Ass'n*, 161 So. 656 (La. App. 2d Cir. 1935).

16. *League Central Credit Union v. Montgomery*, 251 La. 971, 987, 207 So.2d 762, 764 (1968).

medies of appeal or injunction whenever property is seized.¹⁷ The jurisprudence indicates that when the debtor does not use these remedies to attack the seizure and sale, he is estopped from complaining of defects in the proceeding thereafter, in the absence of fraud or ill practice. However, these decisions dealt with the rights of the mortgagor as against the rights of a *third party purchaser*, not the mortgagee.¹⁸ When a third party enters the picture, the courts will not prejudice his rights because of neglect on the part of the debtor.

In the instant case, which followed the reasoning of the earlier *Tapp* decision, an officer of the creditor was the witness to the acknowledgment of the chattel mortgage before a notary public.¹⁹ The Supreme Court stated that because the officer was neither the grantor of the mortgage nor a witness to the private signature as required by R.S. 13:3720, there was no authentic evidence to support the executory process. Therefore, since the executory process was invalid, the creditor could not recover the deficiency judgment.

League clearly points out that because the rights of an innocent third party will not be prejudiced after the property has been seized and sold to him, the courts should not be concerned with his rights at all in considering a defense of invalid executory process to a deficiency judgment action.²⁰ This action is simply a contest between the creditor and the debtor. If the executory process is found to be invalid, then it and everything based upon it is null and void; unless the rights of an innocent third party purchaser are infringed.

It is suggested that *League* conforms to the general public policy of protecting the debtor from abuse in the expeditious executory proceedings, where, without prior citation or formal judgment, the creditor may seize and sell the property.²¹ The legislation affords a creditor an easy, quick, and relatively inexpensive method to enforce his rights. In return, he is required to follow the law to the letter.

League may be logically inconsistent in allowing the debtor to attack the validity of the executory process in the suit for the deficiency judgment, while barring him from so doing where the rights of third parties are concerned because he failed to

17. LA. CODE CIV. P. art. 2642.

18. See note 15 *supra*.

19. 251 La. 971, 974, 207 So.2d 762, 763 (1968).

20. *Id.* at 978, 207 So.2d at 765.

21. LA. CODE CIV. P. art. 2631.

use his remedies of appeal or injunction to prevent the unauthorized seizure and sale. However, the creditor's suit for a deficiency judgment does not involve the policy considerations of protecting third persons who purchase at judicial sales. Therefore, since the bona fide purchaser doctrine is not applicable, the court in *League* approves the general principle that a debtor beset by executory proceedings is not required to attack the seizure and sale of the property in order to assert defenses to the deficiency judgment. He may wait to do so until a deficiency judgment is actually sought against him.²²

Samuel A. Blaize

COMMUNITY OF ACQUETS AND GAINS—ANTENUPTIAL
OBLIGATIONS OF THE HUSBAND—ARTICLE 2403

Proceedings were instituted to enforce a judgment rendered against a husband prior to his marriage by garnishment of his wife's salary¹ and community funds in a joint bank account. Judgment debtor and his wife intervened, praying that the garnishment be dissolved and that the judgment creditor be enjoined from obtaining execution against these assets. *Held*, the wife's salary and community funds in a joint bank account are not subject to garnishment to pay an antenuptial obligation of the husband. *United States Fidelity & Guar. Co. v. Green*, 252 La. 227, 210 So.2d 328 (1968).

The Civil Code does not mention the right of creditors of either the husband or wife to have execution against the community assets. This is understandable. As Article 2807² states, "the community of property . . . is the effect of a contract" and contracts create rights only between the contracting parties.³ Furthermore, the articles on the community are found in the title captioned "Of The Marriage Contract, And Of the Respective Rights Of The Parties In Relation To Their Property."⁴

22. *LeBlanc v. Rock*, 84 So.2d 629 (La. App. 1st Cir. 1955).

1. It was assumed without question that the wife's salary was a community asset. The classification of a wife's salary was made uncertain by La. Acts 1912, No. 170. However, *Houghton v. Hall*, 177 La. 237, 148 So. 37 (1933) held that the earnings of the wife living with her husband were not affected by this amendment to LA. CIV. CODE art. 2334.

2. LA. CIV. CODE art. 2807: "The community of property, created by marriage is not a partnership; it is the effect of contract governed by rules prescribed for that purpose in this Code."

3. *Id.* art. 1901: "Agreements legally entered into have the effect of laws on those who have formed them."

4. *Id.* bk. III, tit. VI.