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Care J. Gugliemo

Sidney M. Blitzer Jr.

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## Forum Juridicum

### PLEDGE OR MORTGAGE OF IMMOVABLE PROPERTY AS PROPER SECURITY FOR A SUSPENSIVE APPEAL

*Carey J. Guglielmo and Sidney M. Blitzer, Jr.\**

The Louisiana Code of Civil Procedure fixes the security for a suspensive appeal from a money judgment at an amount that exceeds by one-half the amount of the judgment, including the interest allowed by the judgment to the date the security is furnished, and exclusive of costs.<sup>1</sup> The defendant, particularly when an individual, may have difficulty in supplying such security, especially if the amount of the money judgment is substantial. Even if he is a person of moderate income, compensated sureties are reluctant to write suspensive appeal bonds, and personal sureties may be impossible to obtain. However, if he is a landowner and his immovable property is of sufficient value, he may pledge or mortgage it as his security for the appeal. There are no reported cases approving or disapproving of the pledge or mortgage of immovable property as security for a suspensive appeal. Nevertheless, it is clearly authorized by the Civil Code.<sup>2</sup>

An example of the practicality of this procedure can be

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\*Members, Baton Rouge Bar.

1. LA. CODE CIV. P. art. 2124: "The security to be furnished for a devolutive appeal shall be fixed by the trial court at an amount sufficient to secure the payment of costs.

"The security to be furnished for a suspensive appeal is determined in accordance with the following rules:

"1. When the judgment is for a sum of money, the amount of the security shall exceed by one-half the amount of the judgment, including the interest allowed by the judgment to the date the security is furnished, exclusive of costs;

".....  
"A suspensive appeal bond shall provide, in substance, that it is furnished as security that the appellant will prosecute his appeal, that any judgment against him will be paid or satisfied from the proceeds of the sale of his property, or that otherwise the surety is liable for the amount of the judgment.

"Both devolutive and suspensive appeal bonds shall afford security for the payment of all appellate costs paid by the appellee, and all costs due by the appellant, including those due the clerk of the trial court for the preparation of the record on appeal."

2. LA. CIV. CODE art. 3065: "The person who can not give a surety is admitted to give a pledge or other satisfaction sufficient to secure the debt, provided that the thing given in pledge may be kept without difficulty or risk.

"He may also deposit in the hands of the public officer, whose duty it is to receive the surety, the sum for which he is required to furnish a surety."

found in the unreported district court proceeding of *Burks v. Williams*,<sup>3</sup> in which plaintiff obtained a money judgment against defendant in the amount of \$55,649.93. The only assets owned by the defendant were four contiguous tracts along a highway on which defendant operated a motel and lounge, and she was unable to obtain a surety. If the defendant could not have suspensively appealed this adverse money judgment, the plaintiff would have executed his judgment by having this property seized and sold at sheriff's sale. By furnishing a mortgage and/or a pledge of the property as security for the suspensive appeal, defendant was able to avoid loss of her property before the appeal was heard.

The Code of Civil Procedure does not set forth any requirement for the kind of security permitted for a suspensive appeal. However, article 2124 does state that the suspensive appeal bond will provide that any judgment will be satisfied from the sale of appellant's property or that otherwise the *surety* is liable for the amount of the judgment.<sup>4</sup> This indicates that a surety is contemplated as the usual form of security for the suspensive appeal.<sup>5</sup> The most common forms of security are personal and corporate sureties, whether they be gratuitous or compensated. However, article 3065 of the Louisiana Civil Code provides for the situation in which a person cannot obtain a surety:

"The person who can not give a surety is admitted to give a pledge or other satisfaction sufficient to secure the debt, provided that the thing given in pledge may be kept without difficulty or risk.

"He may also deposit in the hands of the public officer, whose duty it is to receive the surety, the sum for which he is required to furnish a surety."

The reported cases indicate that a variety of different forms of security have been permitted by the courts where a surety was not provided. For example, cash,<sup>6</sup> a personal check of

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3. No. 6900 (18th Judicial District Court, Parish of West Baton Rouge, State of Louisiana 1968-69).

4. LA. CODE CIV. P. art. 2124.

5. *Cf. id.* art. 5121, which indicates that surety bonds are the form of security given in judicial proceedings.

6. *Adams v. Aetna Cas. & Sur. Co.*, 199 So.2d 361 (La. App. 1st Cir. 1967); *Green v. Billa*, 86 So.2d 578 (La. App. Or. Cir. 1956); *Lanata v. Bayhi*, 31 La. Ann. 229 (1879).

appellant's attorney,<sup>7</sup> a bank money order,<sup>8</sup> and municipal bonds<sup>9</sup> have all been accepted in place of a surety, presumably under the "other satisfaction" clause and paragraph 2 of article 3065 of the Civil Code. In *Mitchell v. Murphy*,<sup>10</sup> the appellant tendered a certified check as his bond in an attachment proceeding under the provisions of the former Louisiana Code of Practice. There was nothing in writing identifying the check as a substitute for a surety bond. The court did not accept the check as proper security, but added:

"If plaintiff had been careful to have filed some instrument as a bond with the clerk, stating that he was making a pledge of a \$6,000 check, and that the pledge was made instead of a regular surety on bond in the case where a bond was required, thus stating its nature and object, and he had delivered such instrument to the clerk of the court for filing, and the same had been filed in the cause, he would have conformed to the law."<sup>11</sup>

In *Wilson v. Jarnevic*,<sup>12</sup> cash and, alternatively, a cashier's check were tendered as security for a devolutive appeal. The court restated the rule:

"One required to furnish security must primarily offer either a security company authorized to do business in this State or a person able to contract, who has property subject to seizure in the State of a value of the amount of the obligation, and who is domiciled in the parish where the security is to be given (LSA-C.C. Art. 3042). But, where he cannot give a security, he is permitted to give a pledge or other satisfaction sufficient to secure the obligation, or to deposit the sum for which he is required to furnish security . . . ."<sup>13</sup>

The source of article 3065 of the Louisiana Civil Code is article 2041 of the Code Napoleon.<sup>14</sup> There is a source note no-

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7. *Marie v. Police Jury*, 157 So.2d 919 (La. App. 1st Cir. 1963). The check was cashed and the money was held by the clerk.

8. *Bell v. Taylor*, 203 So.2d 840 (La. App. 2d Cir. 1967).

9. *Sauer v. Union Oil Co.*, 43 La. Ann. 699, 9 So. 566 (1891).

10. 131 La. 1033, 60 So. 674 (1913).

11. *Id.* at 1033, 60 So. at 676.

12. 211 So.2d 717 (La. App. 2d Cir. 1968).

13. *Id.* at 718.

14. Article 2041 of the Code Napoleon (1804) is identical to art. 28 of the Louisiana *Digest* of 1808. 3 LA. LEGAL ARCHIVES pt. II, at 1684. Both read: "The person who can give no security, is admitted to give a pledge or other

tation in the de la Vergne copy of the *Digest* of 1808 which identifies article 3065 with Pothier's commentary on obligations. Pothier states:

"It remains to examine the question, Whether the person who is bound to find a surety can be admitted instead thereof, to give sufficient pledges to answer the debt? For the negative, this maxim of law, *aliud pro alio, invito creditore, solvi non potest*, is adduced, which applies even when the thing offered should be better; whence it seems to follow, that the creditor who is entitled to have a surety is not obliged to receive pledges instead: notwithstanding these reasons, there should be some facility in allowing such pledges to be given, when the debtor cannot procure a surety; for the only interest of the creditor is to have security, and there is more security in a pledge than in a personal engagement; because, as the person to whom the surety is to be given, has no other interest but to have security, *cum plus cautionis sit in re quam in persona; et tutius sit pignoris incumbere quam in personam agere*: it would be mere ill-humour to refuse pledges in lieu of a surety, if the things which are offered are such as he may keep without any trouble or danger."<sup>15</sup>

In addition, Planiol, in commenting on the Code Napoleon provision, interprets the phrase "pledge or other satisfaction" to include mortgages:

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satisfaction sufficient to secure the debt." In the Civil Code of 1825, this article was renumbered article 3034 and revised to read essentially the same as the present article 3065 does today.

15. 1 POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS § 392, at 194-95 (William David Evans transl. 1839); cf. 1 POTHIER, A TREATISE ON OBLIGATIONS, CONSIDERED IN A MORAL AND LEGAL VIEW § 392, at 279 (Martin & Ogden transl. 1802). 2 BUGNET, OEUVRES DE POTHIER 212 at (2d ed. 1861) states: "Il nous reste la question de savoir si celui qui est tenu de donner une caution, peut être admis à donner à la place des gages suffisants pour répondre de la dette?"

"Pour la négative, on allègue cette maxime de droit, *Aliud pro alio invito creditori solvi non potest*; maxime qui a lieu quand même la chose qu'on offrirait serait meilleure: d'où il paraît suivre que la créancier à qui l'on doit une caution, n'est pas obligé de recevoir des gages à la place. Nonobstant ces raisons, on doit être facile à permettre à celui qui doit une caution, de donner des gages à la place, lorsqu'il ne peut donner de caution; parce que celui à qui la caution est due, n'ayant d'autre intérêt que de se procurer une sûreté, et en trouvant dans des gages autant, et même plus (cum plus cautionis sit in re quam in persona, et tutius sit pignori incumbere, quam in personam agere), ce serait de sa part une pure mauvaise humeur de refuser les gages à la place de la caution, si ce qu'on lui offre pour gages peut se garder sans aucun embarras, sans aucun péril."

"Between the contract surety on the one part and the judicial or legal surety on the other, there is a difference: he who is legally or judicially required to furnish a surety can, when he cannot find one who having the desired conditions, free himself by offering another equivalent security (pledge or mortgage)."

[A footnote relating to this statement provides that] "Article 2041 [Code Napoleon] names expressly only the pledge, but it is admitted that a mortgage can replace the surety quite as well as the pledge. (Cass., 7 Aug. 1882, D. 83.1.220, S.82.1.457)."<sup>16</sup>

It is therefore submitted that either a pledge or mortgage of immovable property, in favor of the clerk of the court in which the judgment is rendered,<sup>17</sup> sufficient in value to equal the security obligation, is proper security for a suspensive appeal if a surety cannot be obtained.<sup>18</sup>

If the immovable property is productive of fruits or revenues, the mortgage instead of the pledge is preferable both from the appellant's and clerk of court's viewpoints. The appellant may retain the fruits and revenues during the appeal if he has given a mortgage. If he gives a pledge, then, absent any agreement to the contrary in the act of antichresis, the clerk of court, in whose favor the pledge would be given, has the right to keep the fruits or other revenues of the immovable given in pledge.<sup>19</sup> However, the clerk of court would also be bound to pay the taxes and annual charges of the property and to provide for the useful and necessary repairs of the pledged

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16. 2 *PLANIOL CIVIL LAW TREATISE* no. 2335 (La. St. L. Inst. transl. 1959).

17. LA. CIV. CODE art. 3065; LA. CODE CIV. P. art. 5121; *Mitchell v. Murphy*, 131 La. 1033, 60 So. 674 (1913); *Sauer v. Union Oil Co.*, 43 La. Ann. 699, 9 So. 566 (1891); *Lanata v. Bayhi*, 31 La. Ann. 229 (1879); *Marie v. Police Jury*, 157 So.2d 919 (La. App. 1st Cir. 1963).

18. In fact, LA. CODE CIV. P. art. 4133 provides for a special mortgage on unencumbered immovable property in lieu of a surety bond as security of a tutor; the same applies to curators, *id.* art. 4554; *id.* art. 3157 provides for a special mortgage on unencumbered immovable property as security of an administrator or executor of a succession.

19. LA. CIV. CODE art. 3176: "The antichresis shall be reduced to writing. "The creditor acquires by this contract the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt."

estate.<sup>20</sup> Since article 3065 limits the situations in which "pledge[s] or other satisfaction" may be given to those in which the pledged item may be kept without difficulty or risk, it might prove difficult, depending on the nature of the immovable pledged, for the clerk to collect the fruits and revenues and make the required repairs. The clerk of court could hardly be required to accept these conditions of the pledge, and he may further be unable to agree with the pledgor, without court authority, to relinquish these rights as pledgee. On the other hand, if a pledge is to be given, the judgment creditor whose judgment is being suspensively appealed could argue, with merit, that he is entitled to have the fruits and other revenues added to his protection; yet, if the property itself is of sufficient value to serve as proper security, *i.e.*, one and one-half the amount of the money judgment plus interest, then the judgment creditor would be getting more security than the law requires from his judgment debtor. In view of the complicating factors inherent in offering the pledge of immovables, the more simple solution is a mortgage, equal in amount to the required security,<sup>21</sup> in favor of the clerk of court.

A difficult problem in furnishing a mortgage or pledge of immovable property as security, if such tender is contested, is that of valuing the property. In the case of a suspensive appeal, the trial court determines whether the security is sufficient.<sup>22</sup>

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20. *Id.* art. 3177: "The creditor is bound, unless the contrary be agreed on, to pay the taxes, as well as the annual charges of the property which have been given to him in pledge.

"He is likewise bound, under penalty of damages, to provide for the keeping and useful and necessary repairs of the pledged estate, saving himself the right of levying on their fruits and revenues all the expenses respecting such charges."

21. If there is concern over interpreting "other satisfaction" to include mortgages, compliance with the term "pledge" can be obtained by executing a collateral mortgage in favor of any future holder or holders and pledging the collateral mortgage note, which has been paraphed for identification with the mortgage, to secure the security obligation, in favor of the clerk of court.

22. LA. CODE CIV. P. art. 2088, *as amended*, La. Acts 1968, No. 128, § 1: "The jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the timely filing of the appeal bond, or if no bond is required, on the granting of the order of appeal. Thereafter, the trial court has no jurisdiction over these matters except to:

"(5) Test the solvency of the surety on the appeal bond as of the date of its filing or subsequently, consider objections to the form, substance, and sufficiency of the appeal bond, and permit the curing thereof, as provided in Articles 5123, 5124, and 5126 . . . ."

Expert witnesses familiar with values of immovable property in the locale where the mortgaged or pledged property is situated can testify as to their opinion of the value of the property. A current mortgage certificate and evidence of the balance due on all encumbrances affecting the property should also be obtained and introduced into evidence so that the court can deduct the amount due on any prior mortgages, liens, judgments, or other encumbrances affecting the property from the determined value of the property.<sup>23</sup> The court can then determine from the evi-

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*Id.* art. 5123: "Any person in interest wishing to test the sufficiency, solvency of the surety, or validity of a bond furnished as security in a judicial proceeding shall rule the party furnishing the bond into the trial court in which the proceeding was brought to show cause why the bond should not be decreed insufficient or invalid, and why the order, judgment, writ, mandate, or process conditioned on the furnishing of security should not be set aside or dissolved. If the bond is sought to be held invalid on the ground of the insolvency of a surety other than a surety company licensed to do business in this state, the party furnishing the bond shall prove the solvency of the surety on the trial of the rule."

*Id.* art. 5124: "Within four days, exclusive of legal holidays, of the rendition of judgment holding the original bond insufficient or invalid, or at any time if no rule to test the original bond has been filed, the party furnishing it may correct any defects therein by furnishing a new or supplemental bond, with either the same surety if solvent, or a new or additional surety."

"The new or supplemental bond is retroactive to the date the original bond was furnished, and maintains in effect the order, judgment, writ, mandate, or process conditioned on the furnishing of security."

"The furnishing of a supplemental bond, or the furnishing of a new bond by a different surety, does not discharge or release the surety on the original bond; and the sureties on both are liable in solido to the extent of their respective obligations thereon and may be joined in an action on the bond."

*Id.* art. 5126: "The party furnishing a new or supplemental bond under the provisions of Article 5124 may correct an insufficiency or invalidity therein by furnishing a second new or supplemental bond within four days, exclusive of legal holidays, of rendition of judgment holding the new or supplemental bond insufficient or invalid, or at any time if no rule to test the new or supplemental bond has been filed."

"If the second new or supplemental bond is insufficient or invalid, the party furnishing it may not correct the defects therein by furnishing a further new or supplemental bond."

23. It may be that a court would decide that the property, which is already encumbered, is unacceptable, because the prior mortgagees, lien holders or judgment creditors could execute against the property and have it seized and sold. The price paid at a Sheriff's sale, especially if it is sold at a second offering, may not be equal to the true value of the property. After paying all prior mortgagees, lien holders and judgment creditors, there may not be enough to provide the required security. In that case, the appellee would have to demand more security. LA. CODE CIV. P. arts. 5124, 5125, 5126. Otherwise the appeal should be dismissed, set aside or dissolved. LA. CODE CIV. P. art. 5125. Although the articles regulating tutors', curators' and succession representatives' special mortgages specify mortgages on unencumbered property, there is no such provision applicable to the mortgage for security for a suspensive appeal.



dence adduced whether or not the property is of sufficient value to be used as security for the appeal.

The court must also decide whether there is "difficulty or risk" involved with accepting the pledge or mortgage as security. If there are improvements or crops on the immovable, the appellant may offer to provide various kinds of insurance coverage on the improvements or crops, with the loss payees being the clerk of court and the owner of the immovable as their interests may appear. There seems to be no reason why a court might not even require this insurance of the appellant if it feels that such insurance is needed to avoid any "risk." This is an example of the element of discretion which article 3065 gives the court in reaching a determination of whether any particular pledge or mortgage of an immovable is proper and acceptable security.

Although the pledge or mortgage of immovables as security for an appeal appears to be a little used procedure, it may be helpful to enable one to suspensively appeal an adverse judgment where a surety cannot be obtained. Suspensive appeal bonds are most difficult to obtain, particularly for individuals, and they are very expensive. If the size of the judgment is large, personal sureties will be equally hard to obtain. Unless the credit of the appellant is good enough to enable him to obtain a loan (perhaps in an amount equal to the full value of his property), the pledge or mortgage of his immovable property, as security for the suspensive appeal, might well be his only procedure for having the judgment suspended while the merits of his case are considered by the higher courts.