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November 12, 2014

Representative Charles "Chuck" Kleckley
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804-9062

Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, LA 70804

RE: HCR 15 of 2011

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature in response to 2011 House Concurrent Resolution No. 15, relative to purchase money mortgages.

Sincerely,


William E. Crawford
Director

WEC/puc

Enclosure

cc: Representative Major Thibaut

email cc: David R. Poynter Legislative Research Library
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**LOUISIANA STATE LAW INSTITUTE
SECURITY DEVICES COMMITTEE**

**REPORT TO THE LOUISIANA LEGISLATURE
IN RESPONSE TO HCR NO. 15 OF THE 2011 REGULAR SESSION
RELATIVE TO PURCHASE MONEY MORTGAGES**

November 12, 2014
Baton Rouge, Louisiana

L. David Cromwell, Reporter
Claire Popovich, Staff Attorney

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Regular Session, 2011

HOUSE CONCURRENT RESOLUTION NO. 15

BY REPRESENTATIVE THIBAUT

A CONCURRENT RESOLUTION

To authorize and direct the Louisiana State Law Institute to study all laws relative to conventional, legal, and judicial mortgages and liens in order to create a purchase money special mortgage and to make recommendations on or before January 1, 2013, as to the advisability of revising state laws in order to create a purchase money special mortgage and to resolve any resulting conflicts between the laws relative to conventional, legal, and judicial mortgages and liens.

WHEREAS, Civil Code Articles 3278 through 3313 and various other provisions of law, such as those found in Code Titles XXI and XXII of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950, provide relative to mortgages and liens and to the effect and rank of mortgages and liens; and

WHEREAS, judicial and legal mortgages burden all of the property of an obligor, including property that the obligor owns when the mortgage is created and property that the obligor acquires in the future; and

WHEREAS, judicial and legal mortgages existing at the time an obligor purchases new property take priority over a mortgage created at the time of the purchase of the new property; and

WHEREAS, the priority of existing judicial and legal mortgages over mortgages created with the purchase of new property may prevent the extension of credit for the purchase of the new property; and

WHEREAS, creation of a purchase money special mortgage would enable a borrower to purchase immovable property, allowing the lender to have first priority and giving the judicial or legal mortgage holder a second priority on new property that would not have otherwise been acquired; and

WHEREAS, the creation of a purchase money special mortgage may create conflicts with the existing laws on conventional, legal, and judicial mortgages and liens which may need to be resolved.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby direct the Louisiana State Law Institute to study all laws relative to conventional, legal, and judicial mortgages and liens and make specific recommendations as to the advisability of revising state laws in order to create a purchase money special mortgage.

BE IT FURTHER RESOLVED that a suitable copy of this Resolution be transmitted to the director of the Louisiana State Law Institute and that the Louisiana State Law Institute report its findings and recommendations to the legislature on or before January 1, 2013.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

**REPORT TO THE LOUISIANA LEGISLATURE
ON PURCHASE MONEY MORTGAGES**

HCR NO. 15 OF THE 2011 REGULAR SESSION

HCR No. 15 of 2011 requested the Louisiana State Law Institute to "study all laws relative to conventional, legal, and judicial mortgages and liens and make specific recommendations as to the advisability of revising state laws in order to create a purchase money special mortgage." HCR No. 15 of 2011 was assigned for study to the Security Devices Committee of the Law Institute.

The study resolution observes that "judicial and legal mortgages existing at the time an obligor purchases new property take priority over a mortgage created at the time of the purchase of the new property" and that "the priority of existing judicial and legal mortgages over mortgages created with the purchase of new property may prevent the extension of credit for the purchase of the new property." The study resolution posits that "creation of a purchase money special mortgage would enable a borrower to purchase immovable property, allowing the lender to have first priority and giving the judicial or legal mortgage holder a second priority on new property that would not have otherwise been acquired." Nevertheless, the resolution recognizes that "the creation of a purchase money special mortgage may create conflicts with the existing laws on conventional, legal, and judicial mortgages and liens." Significantly, the resolution does not direct the Law Institute to propose legislation creating the concept of a purchase money mortgage. Instead, the resolution seeks the Law Institute's recommendation on the threshold issue of whether introduction into Louisiana security device law of the concept of a purchase money mortgage is advisable.

HCR No. 15 of 2011 was not adopted in a vacuum. During the same legislative session, a bill was introduced to amend Civil Code Article 3307 to provide that "when the proceeds of a mortgage are used by the mortgagor to purchase immovable property, the mortgagee shall have the same ranking as a vendor in accordance with the rules set forth in Article 3251."¹ Thus, this bill, which was referred to the House Civil Law and Procedure Committee but did not proceed further in the legislative process, would have granted the priority of a vendor's privilege to a mortgage securing the purchase price of an immovable. If a mortgage securing the purchase price of an immovable were to be given special priority, assimilating such a mortgage to a vendor's privilege would seem to be a sensible means of doing so, for it would achieve most of the consequences mentioned in the recitals of HCR No. 15 of 2011 within the framework of the existing law governing vendor's privileges. Accordingly, this report will give special emphasis to the existing rules governing vendor's privileges.

For the reasons expressed below, the Law Institute believes legislation altering the well-established rules of priority of mortgages in order to favor a lender who lends the purchase price of an immovable, whether through the creation of the concept of a purchase money mortgage or

¹ H.B. 266 of 2011.

through the adoption of the rules applicable to vendor's privileges, to be both unwarranted and inadvisable and therefore recommends against such legislation.

I. EXISTING RULES RANKING PRIVILEGES AND MORTGAGES

Louisiana law recognizes two kinds of security encumbering an immovable—mortgage and privilege.²

A. *Mortgages*

The Civil Code characterizes mortgage as an indivisible real right that burdens an immovable and that follows it into whatever hands it may pass.³ The law provides for three kinds of mortgages—conventional, legal and judicial.⁴ A conventional mortgage can be established only by written contract.⁵ A legal mortgage is established by operation of law,⁶ such as the mortgage that arises in favor of a minor upon the recordation of a certificate reciting the total value of the minor's property according to an inventory or detailed descriptive list.⁷ A judicial mortgage, which arises from the recordation in the mortgage records of a money judgment, secures the payment of that judgment.⁸

Legal mortgages and judicial mortgages are both general mortgages; that is, they burden all present and future property of the mortgagor susceptible of encumbrance by mortgage.⁹ They are established over property that the mortgagor owns when the mortgage is created and over future property of the mortgagor when he acquires it.¹⁰ By contrast, conventional mortgages are always special mortgages; that is, they can burden only certain specified property of the mortgagor.¹¹

The existing rule governing the ranking of mortgages is quite simple: a mortgagee is

² See C.C. Art. 3138 (as amended by Acts 2014, No. 281, effective January 1, 2015). As amended in 2014, the Civil Code defines "security" as "an accessory right established by legislation or contract over property, or an obligation undertaken by a person other than the principal obligor, to secure performance of an obligation." C.C. Art. 3136 (2014).

³ C.C. Art. 3280.

⁴ C.C. Art. 3283.

⁵ C.C. Arts. 3284, 3287.

⁶ C.C. Art. 3284.

⁷ C.C.P. Art. 3134. A similar legal mortgage arises in favor of an interdict upon all property of his curator. C.C.P. Art 4563.

⁸ C.C. Arts 3284, 3299, and 3300.

⁹ C.C. Arts. 3285, 3302.

¹⁰ C.C. Art. 3303.

¹¹ C.C. Art. 3285, 3292. Under Roman law, a conventional mortgage could be general and therefore burden all of the property of the debtor. A reform effected during the French Revolution, embodied in what was known as the law of 11 brumaire An VII, made it impossible to create general mortgages by contract on all property of the debtor, nor for indefinite sums. See 2 MARCEL PLANIOL & GEORGES RIPERT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, pt. 2, No. 2680-86 (La. State Law Inst. trans., 1959) (12th ed. 1939). The Code Napoleon did not permit conventional general mortgages, nor has any Civil Code in effect in Louisiana. See, e.g., C.C. Art. 3276 (1825); C.C. Art. 3308 (1870).

preferred not only to the unsecured creditors of the mortgagor but also to other persons, such as other mortgagees, whose rights become effective against third persons after the mortgage becomes effective as to them.¹² Thus, where two competing mortgagees are concerned, it is the mortgage that has first become effective as to third persons that has priority. The means of making a mortgage effective against third persons is by filing the act of mortgage for registry,¹³ specifically, in the mortgage records of the parish in which the mortgaged immovable is located.¹⁴ Thus, the mortgage that is first filed for registry has priority over other mortgages.¹⁵

B. Privileges

The other type of encumbrance that can encumber an immovable as security for an obligation is the privilege. The Civil Code defines a privilege as a right which the nature of a debt gives to the creditor and which entitles the creditor to be preferred before other creditors, even those holding mortgages.¹⁶ A privilege is thus a preference established by legislation and is an exception to the general rule of the Civil Code that the proceeds of the sale of an obligor's property are distributed ratably among them.¹⁷ It is central to the notion of privilege that it cannot be granted contractually; rather, a privilege can arise only by operation of law based upon the nature of the debt.¹⁸

Some privileges are general and operate on all property of the debtor, such as those established by the law securing funeral charges, law charges, and expenses of the last illness.¹⁹ Other privileges are special; that is, they operate only on specific property. One of the most important special privileges is the privilege of the vendor upon an immovable as security for the unpaid purchase price owed to him.²⁰ The law itself grants the unpaid vendor this privilege; it is unnecessary for the vendor to obtain a mortgage, or even to obtain written recognition of the existence of the vendor's privilege, for it to arise.

The ranking rules applicable to privileges are wholly different from those that govern mortgages. In the first place, as a general rule, all privileges, the vendor's privilege included, outrank all mortgages,²¹ provided that the act evidencing the privilege is timely filed for registry.²² If the act evidencing the privilege is not timely filed, the privileged creditor still holds

¹² C.C. Art. 3307.

¹³ C.C. Art. 3338.

¹⁴ C.C. Art. 3346.

¹⁵ Priority can be lost, however, if the inscription of the mortgage is not reinscribed within the time provided by law. C.C. Art. 3357 *et seq.*

¹⁶ C.C. Art. 3186. Though privileges can bear on movables and immovables alike, the discussion of privileges in this report is limited to those bearing upon immovables. Privileges bearing on movables are in many cases governed by other rules that are not relevant to the present discussion.

¹⁷ C.C. Art. 3134 (2014).

¹⁸ C.C. Art. 3185.

¹⁹ C.C. Art. 3191, 3252.

²⁰ C.C. Art. 3249.

²¹ C.C. Art. 3186. There are notable exceptions to this rule provided by legislation. For instance, most privileges arising under the Private Works Act are inferior to mortgages that were effective against third persons before the commencement of the work out of which the Private Works Act privileges arose. See footnote 26 *infra*.

²² C.C. Art. 3274. The period within which registry must occur is seven days from the passage of the act giving rise

a privilege, but that privilege takes its rank against mortgages only from the date that the privilege is filed and loses its priority over previously recorded mortgages.²³

The ranking of one privilege against another is generally *not* governed by the order of recordation at all, but rather by the nature of the competing privileges involved.²⁴ The general rule is that special privileges on immovables, including the vendor's privilege, are granted preference over most general privileges.²⁵ The ranking of a vendor's privilege on an immovable against the other commonly encountered special privileges—those arising under the Private Works Act—is governed by the Private Works Act. Essentially, Private Works Act privileges other than those in favor of laborers are inferior to vendor's privileges that were effective against third persons before the commencement of the work out of which the Private Works Act privileges arose.²⁶ The last potential conflict involving special privileges on immovables arises when there are multiple vendor's privileges upon an immovable arising out of successive sales. In that case, the Civil Code grants priority to these vendor's privileges according to the order of the sales out of which they arose.²⁷

C. Priority of conventional mortgages and privileges against judicial and legal mortgages

As the recitals of HCR No. 15 of 2011 suggest, the real issue to be considered is whether there is a need to amend the law to provide that a mortgage securing the purchase money of an immovable has priority over *previously filed* judicial mortgages, which, because of their general nature, attach to an immovable at the moment it is acquired by the judgment debtor. The same issue arises when the purchaser is the subject of a previously recorded legal mortgage.

From the rules detailed above, it can be readily seen that a previously recorded judicial mortgage will prime a mortgage that the judgment debtor might grant to another creditor at the time he later acquires an immovable, even if that other creditor lends him the money with which to acquire the immovable. The reason that the judicial mortgage has priority is simply that it was recorded first. It is impossible for the judgment debtor to grant, at the time of acquisition of the immovable, a conventional mortgage that will have priority over the previously recorded judicial mortgage. Significantly, however, this does not mean that the holder of the judicial mortgage will necessarily have priority, for his rights are subject to a timely filed *vendor's privilege*, even

to the privilege in cases in which registry is required in the same parish where the act was passed and fifteen days otherwise.

²³ See *Wheelright v. St. Louis, N.O. & O. Canal Transportation Co.*, 17 So. 133 (La. 1895)(holding that tardy inscription of a privilege does not cause it to degenerate into a mere mortgage; rather, its effect as a privilege is lost as to mortgagees only, and it retains its effect as a privilege as to other parties).

²⁴ C.C. Art. 3187. See Vetter and Harrell, *Louisiana Creditor's Security Rights*, Volume II: Mortgages, Chattel Mortgages, Privileges, page 281.

²⁵ C.C. Art. 3267. The reference to "movables" in C.C. Art. 3267 gives the impression that the article is designed to rank the vendor's privilege on *movables* against certain other privileges. However, when the entire article is read, it is readily apparent that the word *movables* at the beginning of the article must mean *immovable*. Professor Dainow wrote an entire article dedicated solely to the proof that the word *movables* in Article 3267 should be *immovables*. See Dainow, *Art. 3267 and the Ranking of Privileges*, 9 La. L. Rev. 370 (1949). Incidentally, this article was not borrowed from the French Civil Code, and for that reason, the error cannot be laid to a fault in translation.

²⁶ R.S. 9:4821. Laborer's privileges have priority even over previously filed vendor's privileges.

²⁷ C.C. Art. 3251.

though the vendor's privilege is not filed until long after the judicial mortgage. This has been borne out by the jurisprudence.²⁸ In considering the issues posed by HCR No. 15 of 2011, it is appropriate to examine the policy reasons why the law affords this priority to the vendor's privilege.

D. Genesis and theory of the vendor's privilege

At Roman law, no privilege existed in favor of the vendor.²⁹ Indeed, no privilege was necessary, for so long as the price was not paid, the vendor remained the owner of the thing sold and could revendicate it. There was an exception to this rule, however, if the vendor agreed to allow the vendee a term for payment of the price. In that case, the vendor was deemed to have trusted in the faith of the buyer and held the status of only an ordinary creditor if the price was not paid when due.³⁰ For centuries, France followed these rules: The vendor under a sale without term could avail himself of the right of revendication if the vendee failed to pay the price. The vendor under a sale on term was relegated to a personal action.³¹

The sixteenth-century text of the *Coutume de Paris* did not provide for a privilege in favor of the vendor of an immovable, and the courts of Paris, in the early seventeenth century, held that the vendor of an immovable on term had no privilege and was protected only if a mortgage was stipulated in the contract of sale. The vendor of an immovable without a term continued to be viewed as owner and protected by the Roman rule of revendication. Thus, it was necessary for his protection that the vendor on term stipulate a special mortgage, and this usage became so general that, in two judgments of the Parlement of Paris in 1628, it was held that, even without a contract of mortgage, the vendor on term enjoyed a special privilege on the immovable securing the payment of the price, even though there was no textual provision to this effect in the *Coutume de Paris*.³²

Article 2301 of the Code Napoleon specifically provided for a privilege for the price in favor of the seller of immovable and movables alike.³³ In Louisiana, the Digest of 1808 was even more explicit,³⁴ providing that the privilege existed whether the estate was sold for ready money or on credit and whether or not a mortgage was expressly stipulated. In the 1825 code, as well as the 1870 code, the latter proviso was dropped.

In *De L'Isle v. Succession of Moss*,³⁵ the Louisiana Supreme Court succinctly stated the

²⁸ *Lawyer's Title Insurance Corporation v. Valteau*, 558 So. 2d 1319 (4th Cir. 1990), writ denied, 563 So. 2d 260 (La. 1990); *Verret v. Rougeau*, 579 So.2d 1239 (La. App. 3d Cir.1991). On the other hand, if the vendor's privilege is not recorded timely, it, like a conventional mortgage, is subject to the previously recorded judicial mortgage. *Ridings v. Johnson*, 9 S. Ct. 1882 (1888); *Givanovitch v. Hebrew Congregation*, 36 La. Ann. 272 (1884).

²⁹ See HARRIET SPILLER DAGGETT, *LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE* § 33, at 90 (1942).

³⁰ See Planiol *supra* note 11 at No. 2604.

³¹ *Id.* at No. 2605.

³² The vendor's privilege on movables arose from wholly different legal origins. See Planiol, *supra* note 11 at No. 2605 *et seq.*

³³ See now Article 2374 of the French Civil Code.

³⁴ La. Digest of 1808 art. 475.

³⁵ 34 La. Ann. 164 (1882).

policy reasons for the vendor's privilege:

The privilege accorded for the payment of the unpaid price of sale, is of great value, resting on considerations of the plaintiff's equity. It would indeed be unjust to place an unpaid vendor on a footing of equality with the other creditors of the purchaser, and permit these to devour his substance; for it is only on the condition that the price of the thing has been paid, that the purchaser acquires an indefeasible title of ownership to the property, and that his creditors can be paid. . . . It would be iniquitous to permit the property sold to become the prey of the creditors of the purchaser, without requiring, as condition precedent, the payment of its costs.³⁶

Planiol gives essentially the same justification, but in language that evokes other concepts of the Civil Code: the justification for the vendor's privilege is that the unpaid vendor has gratuitously augmented the *common pledge* of the creditors,³⁷ who are thus *unjustly enriched* at his expense. Since the sales articles of the French Civil Code—and of course the Louisiana code as well—force the immediate transfer of title to the vendee even though the price has not been not paid, the privilege is necessary to prevent an inequity. Simply put, the vendor is privileged because he has augmented the patrimony of the vendee.³⁸

Undoubtedly, this same argument of augmentation of patrimony could be made in support of giving priority to a purchase money lender over previous existing judgment creditors. But there is another legal justification that underpins the priority of a vendor's privilege and that would not be assertable by the holder of any mortgage, even a purchase money mortgage, granted by the judgment debtor: the rule that no one can grant a greater right than he himself holds. In discussing this point, Planiol cites Pothier:

As Pothier explains, the reason that he who has sold the heritage should be preferred to all the other creditors is that the owner has acquired the heritage only with the charge of the mortgage which his vendor has reserved on it in alienating it. The purchaser cannot mortgage it to his other creditors except subject to the charge of this mortgage, because he cannot transfer to them a greater right than he had on it himself.³⁹

E. The vendor's privilege distinguished from the vendor's right of dissolution

The vendor's privilege is but one arrow in the quiver of the vendor. He also enjoys the

³⁶ *Id.* at 167.

³⁷ See C.C. Art. 3183 (1870), to the effect that the property of a debtor is the “common pledge of his creditors.” That Article was replaced in the 2014 revision of the law of pledge by C.C. Art. 3134 (2014), which deleted the non-technical use of the word “pledge.” Nonetheless, the underlying principle remains intact. See Comment (a) to C.C. Art. 3134 (2014).

³⁸ See Planiol *supra* note 11 at No. 2608-09.

³⁹ See Planiol *supra* note 11 at No. 3140.

right of dissolution of the sale in the event the vendee fails to pay the price.⁴⁰ The exercise of this right is, of course, antithetical to the vendor's privilege. With the exercise of the right of dissolution of the sale, the vendor rescinds the sale and must return whatever portion of the price has been paid.⁴¹ Enforcement of the vendor's privilege, on the other hand, is an affirmation of the sale under which the vendor seeks to enforce the vendee's obligation to pay the price.⁴² The right of a vendor to seek dissolution of a sale upon non-payment of the price is not dependent on the existence of a privilege in his favor; it is a distinct and independent remedy.⁴³ Thus, the Louisiana Supreme Court has held that a provision in an act of sale to the effect that the vendee's obligation to pay the price would be a personal obligation and that no "lien" would exist in favor of the vendor was ineffective to waive the vendor's right of dissolution.⁴⁴ Another difference between the two alternative rights is recordation: where immovables are concerned, the vendor's privilege must be evidenced by a recordation in the mortgage records.⁴⁵ On the other hand, the right of dissolution can be asserted against third persons without the necessity of recordation in the mortgage records, so long as the act conveying the immovable to the vendee does not reflect that the price was paid. As Comment (h) to C.C. art. 2561 recites, the fact that the vendor has failed to preserve his privilege by recordation in the mortgage records is of no moment.⁴⁶

F. Ability of a purchase money lender to acquire a vendor's privilege under existing law

A feature of the vendor's privilege relevant to the present discussion is its transferability. As an accessory of the note or other instrument evidencing the unpaid purchase price, the

⁴⁰ C.C. arts. 2561-2653; 2615. The seller who has not granted a term for payment of the price also has the right to refuse delivery until the price is paid. C.C. art. 2487.

⁴¹ Comment (e) to C.C. art. 2561. *Lee v. Taylor*, 21 La. Ann. 514 (La. 1869); *Louis Werner Saw Mill Co. v. White*, 17 So.2d 264 (La. 1944).

⁴² *Robertson v. Buoni*, 504 So.2d 860 (La.1987).

⁴³ *Johnson v. Bloodworth*, 12 La. Ann. 699 (1857); *Louis Werner Saw Mill Co. v. White*, *supra*.

⁴⁴ *Sliman v. McBee*, 311 So.2d 248 (La. 1975).

⁴⁵ C.C. arts. 3271 and 3274.

⁴⁶ Until the revision of the sales articles of the Civil Code in 1995, there was another interesting distinction between the vendor's privilege and the right of dissolution. Following prior jurisprudence, the court in *Louis Werner Saw Mill Co. v. White*, 17 So. 2d 264 (La. 1944) held that the action to dissolve a sale for the non-payment of the purchase price is a personal action prescribed by ten years under C.C. art. 3499, running from the moment the buyer defaults on the payment of the credit portion of the price. Applying the rules that the right of dissolution is independent of the vendor's privilege and is not dependent on the preservation of the latter, the court followed earlier cases to the effect that the right of dissolution may be exercised even if the notes given to evidence the purchase price have prescribed. See, e.g., *School Directors v. Anderson*, 28 La. Ann. 739 (La. 1876), in which the court had held that "the prescription of the notes given as evidence of the price does not affect [the right of action to dissolve a sale], the right to dissolve not being an accessory to but different from the right to enforce the payment of the price." The Court in *Louis Werner Saw Mill Co.* also held that that this rule was not altered by a 1924 amendment to Civil Code Article 2561 making the right of dissolution an accessory to the credit representing the price. According to the court's opinion: "By amending and reenacting Article 2561 of the Code so as to provide that 'This right of dissolution shall be an accessory of the credit representing the price', the Legislature evidently did not intend to put the 'right to dissolve' on 'all-fours' with the accessory right of mortgage and vendor's privilege 'as regards the term of its existence'. In other words, it did not intend to change the prescriptive period applicable to actions to enforce the resolutive condition." 17 So.2d at 256. The holding of *Louis Werner Saw Mill Co.* was ultimately altered in the 1995 revision of the law of sales: if an instrument is given to evidence the price, the right of dissolution now prescribes at the same time and in the same period as the instrument. C.C. art. 2561. The vendor's privilege, being a mere accessorial obligation, would also prescribe at the same time as the underlying obligation. C.C. art. 3277.

vendor's privilege is transferred along with the transfer of that note or other instrument by operation of law without the need of any conventional subrogation.⁴⁷ Thus, under existing law, it is possible for a purchaser to give his purchase money lender priority over a previously filed judicial mortgage. This can be accomplished through the simple expedient of having the vendor sell the immovable on credit represented by a note, thus giving rise to a vendor's privilege, and then to assign that note to the lender who furnishes the purchase money. Indeed, for many years institutional lenders followed this very practice in Louisiana. The act of sale took the form of a credit sale creating a vendor's privilege as security for a promissory note that was, at least in theory, initially held by the vendor but was immediately endorsed over to the institutional lender. This capability remains as available today as it ever was to any purchase money lender—whether a lending institution or a private lender—who wishes to attain the advantages of a vendor's privilege, including priority over previously filed judicial mortgages. The law has not changed in a manner that caused this approach to be disfavored; rather, institutional lenders, either unaware of the advantages that a vendor's privilege would afford to them or no longer desirous of obtaining these advantages, simply changed their forms in a manner that eliminated their ability to claim the benefits of a vendor's privilege in cases where the purchase money of an immovable was financed.

G. *The vendor's privilege of building and loan associations*

One particular group of residential lenders—building and loan associations—clung tenaciously for many years to the benefits afforded by a vendor's privilege, developing the use of a sale/resale procedure to create a vendor's privilege even in those cases where a sale was not otherwise involved.⁴⁸ This practice was made possible by the enactment of legislation in 1888 providing that "in case any such association shall purchase property from any person and shall afterwards sell the same property to the same person, then such association shall have the vendor's lien and privilege upon the property so sold."⁴⁹ As the Supreme Court later explained, this enactment was necessary in order to overcome prior jurisprudence that a transaction by which a borrower made a cash sale of his property to the lender, which then immediately resold the same property to the borrower on terms of credit, was a mere pignorative contract that did not create a vendor's privilege.⁵⁰ The policy reasons motivating this favored treatment for building and loan associations have been explained in the following terms:

The purpose for which building and loan associations are established is to enable persons of small means and limited incomes to acquire homes and thus become better citizens and more identified with the welfare and growth of the community. Because of the advantageous results attending the operation of such associations and their beneficent [*sic*] purpose, they have been favored and

⁴⁷ Perot v. Levasseur, 21 La. Ann. 529 (1869). See more generally C.C. art. 2645, providing that the assignment of a right includes its accessories such as security rights.

⁴⁸ Under this approach, the borrower, already the owner of the immovable, would sell it to the building and loan association, which then resold the property back to the borrower, reserving both the vendor's privilege provided by law and a conventional mortgage upon the immovable.

⁴⁹ Acts 1888, No. 115, Section 4.

⁵⁰ Capillon v. Chambliss, 211 La. 1, 17; 29 So.2d 171 (1946).

granted special privileges by various state Legislatures. Our own Legislature has deemed it to be in the interest of our people to encourage the formation and operation of building and loan associations, and has enacted special laws giving them certain well-defined powers and privileges to be exercised in the promotion of their objects.⁵¹

This legislation spawned a considerable amount of litigation in which the courts were called upon to determine the extent to which these sale/resale transactions would be treated as true sales.⁵²

In 1902, the Legislature reinforced the 1888 legislation, providing "that *every* loan [made by a building and loan association] on real estate shall be secured by vendor's privilege and first mortgage upon real property."⁵³ This enactment not only made the vendor's privilege mandatory, but it introduced into the law a certain ambiguity, for the act provided that "[s]uch vendor's privilege and mortgage shall have priority over all other liens, charges, privileges, incumbrances and mortgage" . . . which shall be recorded or claimed *subsequent* to the recording of such vendor's privilege and mortgage." (Emphasis added.) The 1902 act then repeated the provisions of the 1888 legislation that allowed associations to enter into sale/resale transactions, stating that in such cases "such association shall have a privilege of equal rank as the vendor's lien and privilege upon the property so acquired." There is obvious tension between these two provisions, for a true vendor's privilege outranks even pre-existing mortgages. This tension exists in the law today. One paragraph of R.S. 6:830 authorizes building and loan associations to enter into sale/resale transactions and provides that such transactions are treated as a purchase and sale vesting in the association a privilege of equal rank with the vendor of immovable property.⁵⁴ A later paragraph in the same statute provides that all mortgages in favor of building and loan associations "shall have a rank equal to that of a vendor's privilege . . . and shall have priority over all other liens, privileges, encumbrances and mortgages . . . which are recorded or arise in any manner subsequent to the date of recordation of the mortgage in favor of the association."⁵⁵

Surprisingly, the courts have addressed the priority of a vendor's privilege held by a building and loan association only rarely. In one early case, the court held that a timely filed vendor's privilege arising in favor of an association from a sale/resale transaction primed a

⁵¹ *Mayre v. Pierson*, 171 La. 1077, 1084; 133 So. 163 (1931).

⁵² *See, e.g.* *American Homestead Company v. Karstendiek*, 11 La. 884, 35 So. 964 (1903)(holding that a sale/resale involving a building and loan association was a valid sale creating a vendor's privilege in favor of the association); *Hutts v. Crowley Building & Loan Association*, 146 La. 85, 83 So. 417 (1919)(sale of community property to an association followed by a re-sale to the husband after the wife's death did not vest any interest in the property in the deceased wife's heirs); *George P. Caire v. Mutual Building & Loan Association*, No. 7315, 1 Pelt. 166 (La. App. Orl. 1918)(hurricane damage occurring while title was vested in the association was borne by the association). *But see* *Mayre v. Pierson*, *supra* note 51 and *Capillon v. Chambliss* *supra* note 50 (holding that sale of wife's separate property to the association followed by resale did not change the character of the property from separate to community).

⁵³ Acts 1902, No. 120.

⁵⁴ R.S. 6:830D(2).

⁵⁵ R.S. 6:830H.

conventional mortgage executed at the same time in favor of another creditor.⁵⁶ The issue of whether a timely recorded vendor's privilege in favor of a building and loan association outranks a pre-existing judicial mortgage against the association's borrower was addressed in *Homes Savings & Loan Association v. Tri-Parish Ventures*.⁵⁷ Significantly, the building and loan association in this case was not a seller under a sale/resale transaction but instead claimed the ranking of a vendor's privilege on the basis of the provision of R.S. 6:830H that all mortgages executed in favor of building and loan associations "shall have a rank equal to that of a vendor's privilege upon immovable property and shall have priority over all other liens, privileges, encumbrances, and mortgages upon the property . . . which are recorded or arise in any manner subsequent to the date of recordation of the mortgage in favor of the association." The association's mortgage was in competition with a judicial mortgage that had been filed against the association's borrower *before* the borrower acquired the property and mortgaged it to the building and loan association. Citing C.C. Art. 3273 to the effect that privileges are effective against third persons from the date of recordation, the court held that C.C. Art. 3274 is simply a limited exception to this rule, "in which a grace period is given to the privilege holder over *intervening* mortgages only, where the act importing privilege is recorded within a very limited period after the date of execution." (Emphasis original.) The court observed that a similar grace period was created for mortgages in favor of building and loan associations pursuant to the savings and loan association law; "however, the special ranking date, as in C.C. Art. 3274, affects intervening mortgages only." Later the court remarked that "[a] vendor's privilege which is preserved and perfected against third parties through recordation primes subsequent mortgages affecting the property." The court thus found that the holder of the previously filed judicial mortgage had priority. What is surprising about the court's reasoning is that it did not seem to be based upon an interpretation of R.S. 6:830 but rather upon an interpretation of those articles of the Civil Code applicable to all vendor's privileges.

This rationale was called into question in *Lawyer's Title Insurance Corporation v. Valteau*,⁵⁸ in which the court was faced with a true credit sale in favor of purchaser against whom a judicial mortgage had been recorded five years earlier. In affirming a finding by the trial court that the vendor's privilege outranked the previously recorded judicial mortgage against the vendee, the Fourth Circuit went to great lengths to explain its prior opinion in the *Home Savings* case, maintaining that the building and loan association in the earlier case was never actually a vendor and that R.S. 6:830H does not actually afford savings and loan associations a vendor's privilege that outranks pre-existing interests. The Fourth Circuit in *Valteau* further explained that its actual holding in *Home Savings* was that mortgages and other encumbrances *emanating from the vendee* are primed by the vendor's privilege even when recorded before a credit sale is consummated. In its opinion denying writs, the Supreme Court limited this holding to a mere statement that a vendor's privilege arising from a sale to a vendee outranks a prior recorded judicial mortgage *against the vendee*. The Supreme Court explained that the decision in *Home Savings* involved a situation in which a judgment debtor already owned the property *before* mortgaging it the building and loan association in a refinancing transaction. For that reason, the prior recorded judicial mortgage against the party who owned the property before

⁵⁶ Union Homestead Ass'n v. Fink, 180 La. 437, 156 So. 458 (1934).

⁵⁷ 505 So. 2d 165 (La. App. 4th Cir. 1987).

⁵⁸ See *supra* note 28.

granting the mortgage outranked any vendor's privilege arising from the mortgage in favor of the building and loan association. Nonetheless, the Supreme Court found that the Fourth Circuit's observations concerning the nature and effect of the vendor's privilege granted to building and loan associations under R.S. 6:830H were "clearly dicta" since there was no building and loan association involved in this case.

The courts have not since been called upon to determine whether, in the absence of a sale/resale transaction, R.S. 6:830 grants a building and loan association mortgage the ranking of a true vendor's privilege (outranking pre-existing mortgages) or whether, as the statute itself provides, this statutory vendor's privilege outranks only later arising encumbrances. One noted commentator offers this attempt at reconciliation of the provisions of R.S. 6:830:

Part of the confusion caused by Home Savings may have resulted from the wording of the statute (La. Rev. Stat. Ann. § 6:830) that purports to give vendor's privilege status to mortgages in favor of savings and loan associations. Under an expansive reading of La. Rev. Stat. Ann. § 6:830(H)(2), any mortgage in favor of a savings loan association has the same rank of priority as a vendor's privilege under Article 3274 (assuming timely recordation). The statute cannot be construed so broadly, however, so as to give the savings and loan a vendor's privilege that outranks prior mortgages when there is no sale and where the owner has simply borrowed funds from the savings and loan to secure his debt. If the statute were given that interpretation, then any time a party borrowed money from a savings and loan, the mortgage in favor of the savings and loan would outrank previous mortgages recorded against the borrower on that property. On the other hand, if there is a true sale in which the savings and loan is financing the acquisition by a purchaser of real estate, then the savings and loan should enjoy priority over prior mortgages recorded against the purchaser (but not mortgages recorded against the seller before the execution of the sale), just as would the vendor who himself financed the sale and, by law, retained a vendor's privilege.⁵⁹

Thus, if a building and loan association enters into a sale/resale transaction, it enjoys a true vendor's privilege that outranks any mortgage bearing against the vendee but does not outrank a mortgage that burdened the property at the time it was conveyed to the association. If, on the other hand, the building and loan association merely obtains a mortgage on the property without actually participating in the transaction as a vendor, its "vendor's privilege" outranks only later arising encumbrances.

II. THE CASE FOR SPECIAL PRIORITY OF PURCHASE MONEY MORTGAGES

It is not surprising that the concept of the purchase money mortgage is unknown to Louisiana law, for it appears to be a creature of the common law. Reputedly, its "venerable roots" can be traced to a case decided in England in 1631⁶⁰ and to Lord Coke's *Commentaries on*

⁵⁹ Peter S. Title, *Louisiana Real Estate Transactions*, 1 La. Prac. Real Est. Section 15:7 (2d Ed.).

⁶⁰ *Nash v. Preston*, 1 Cro. Cas 190, 79 Eng. Rep. 767 (K.B. 1631).

Littleton.⁶¹ The Restatement (Third) of Property - Mortgages provides the following treatment for purchase money mortgages:

(a) A purchase money mortgage is a mortgage given to a vendor of the real estate or to a third-party lender to the extent that the proceeds of the loan are used to:

- (1) acquire title to the real estate; or
- (2) construct improvements on the real estate if the mortgage is given as part of the same transaction in which title is acquired.

(b) A purchase money mortgage, whether or not recorded, has priority over any mortgage, lien or other claim that attaches to the real estate but is created by or arises against the purchaser-mortgagor prior to the purchaser's-mortgagor's acquisition of title to the real estate.

(c) A purchase money mortgage given to a vendor of real estate, in the absence of a contrary intent of the parties to it and subject to the operation of the recording acts, has priority over a purchase money mortgage on the real estate given to a person who is not its vendor.⁶²

A. Conformity to the prevailing rule in the United States

In the course of its study, the Committee surveyed the law of other states to determine whether Louisiana stands alone in according no special priority to purchase money mortgages. Most of the other states grant priority to purchase money mortgages,⁶³ either by specific statute⁶⁴ or by case law.⁶⁵ There are a number of varying legal theories and policy arguments that support this treatment.⁶⁶ In some states, conditions, such as special wording on the mortgage, must be satisfied for the mortgage to have prior over other encumbrances.⁶⁷ Other states apparently

⁶¹ See Grant Gilmore, *The Purchase Money Priority*, 76 Harv. L. Rev 1333, 1340 (1962-63), citing Osborne, *Mortgages* 558 (1951).

⁶² Restatement (Third) of Property - Mortgages, Section 7.2 (1997).

⁶³ See Nelson & Whitman, *Real Estate Finance Law*, Sec. 9.1 (2007).

⁶⁴ See, e.g., Cal.Civ.Code § 2898 (West 2014); Ind. Code § 32-29-1-4 (2014) Md. Code Ann., Real Prop. § 7-104 (West 2014); Mich. Comp. Laws Ann. § 600.2807 (West 2014); Miss. Code Ann. § 89-1-45 (West 2014); N.Y. C.P.L.R. 5203 (McKinney 2010); S.C. Code Ann. § 30-7-10 (1976); S.D. Codified Laws § 44-2-2 (2014) ; Wis. Stat. Ann. § 708.09 (West 2014)..

⁶⁵ See, e.g. *Bunting v. Jones*, 78 N.C. 242 (1878); *Curtis v. Root* 20 Ill. 54 (1858).

⁶⁶ See, e.g., *Rees v. Luddington*, 13 Wis. 276 (1860): "The settled doctrine in such cases is as follows: that when property passes through a man without his having paid for it, and with an understanding that he is at once to secure the payment by a mortgage or lien on the property itself, no right vests in him except that which is subject to such payment; that to the extent of the unpaid price, he is, in contemplation of the law, never the owner until it is paid. The delivery of the deed to the vendee and his execution and delivery of the mortgage or other security for the unpaid purchase-money, are but parts of the same transaction... Their operation is contemporaneous and connected, and affords no opportunity for the liens of judgments or other creditors of the grantee to attach to the legal estate, before that of the grantor for the unpaid price."

⁶⁷ See, e.g. 42 Pa. C.S.A. Section 8141(1).

recognize no special priority at all.⁶⁸

Texas, which does not grant special priority to purchase money mortgages, follows an approach which, though couched in common law terms, is remarkably similar to Louisiana's civil law regime affording the twin remedies of the vendor's privilege and the vendor's right of dissolution:

It has long been established by Texas decisions that where a vendor reserves in his deed an express vendor's lien to secure unpaid purchase money, the contract is executory for some purposes, and superior title remains in the vendor until the purchase money is paid. On the purchaser's default, the vendor has his choice of a variety of remedies. He may sue for his money and to foreclose the lien, or he may rescind the contract and resume possession, or he may recover title and possession in a suit brought for that purpose. [Citations omitted] Where the purchase money is not paid, but no express lien is reserved in the deed, the vendor has an implied equitable lien which may be established and foreclosed in a suit brought for that purpose. [Citations omitted] Such an equitable lien may arise from the purchaser's assumption of the vendor's indebtedness to a third party. [Citations omitted] However, the holder of such an equitable lien has no superior title, and has no right to rescind the sale and recover the land, since the deed passes full title and the transaction can no longer be considered executory.⁶⁹

Thus, a reserved vendor's lien in Texas has been described as "essentially a mortgage coupled with a power of rescission on default."⁷⁰ These rights appear roughly analogous to the vendor's privilege and vendor's right of dissolution available under Louisiana law. Under Texas law, the vendor who has reserved a vendor's privilege retains legal title which is superior as against the vendee and all those in privity with him.⁷¹ Texas law permits the vendor to transfer the notes evidencing the purchase money, but in that event the transferee acquires only the lien that secures the notes, and nothing more.⁷² To this extent, Texas law varies from analogous rules under Louisiana law, which provides that both the right of dissolution and the vendor's privilege follow a transfer of the note evidencing the unpaid purchase price.⁷³

Of course, the law of Texas on this issue, like that of Louisiana, is the minority position, for most states do accord favored treatment to purchase money mortgages. To the extent that uniformity of our law with the majority view is in and of itself a worthwhile objective, there is no doubt that embracing the concept of the purchase money mortgage would further that goal.

⁶⁸ Notable examples include Texas and Massachusetts.

⁶⁹ *Zapata v. Torres*, 464 S.W.2d 926, 928-929 (Tex.Civ.App. 1971).

⁷⁰ Aloysius A. Leopold, *Texas Practice Series*, Vol. 5, *Land Titles and Title Examination*, 3d Ed., Section 30.2 (2014).

⁷¹ *Id.*

⁷² *Russell & Seisfeld v. Kirkbride*, 62 Tex. 455 (1884).

⁷³ C.C. Art. 2561, 2645.

The Committee is aware that favored treatment for the purchase money lender can also be found in some civil law jurisdictions. Since 1971, the French Civil Code has granted to the lender of funds for the acquisition of an immovable a privilege upon the immovable, even in the absence of subrogation from the vendor, but only if it is provided in an authentic act that the funds were borrowed for this purpose and the vendor acknowledges in an authentic act that he has been paid from the borrowed funds.⁷⁴

B. Policy arguments

The policy arguments that the Committee heard from the proponents of special priority for purchase money mortgages revolved around two themes.⁷⁵ First, a purchase money mortgage with priority over pre-existing judicial mortgages would allow judgment debtors to acquire immovable property without having first to satisfy the debts secured by these judicial mortgages. Secondly, with the expansion of the secondary mortgage market that has occurred over the last several decades, building and loan associations, which were historically endowed with a statutorily-granted vendor's privilege, have been displaced by other types of residential lenders, and Louisiana law should keep pace with this change by granting similar protections to these new residential lenders through the creation of a purchase money mortgage with special priority.

It is argued that the national and international lenders who are now financing purchases of residential property in Louisiana dictate the use of standard mortgage forms that must be used in order for mortgages to be purchased on the secondary market. These lenders are no longer using sale/resale instruments, and the argument is that forms that these lenders have now chosen to use should not deprive them of the ranking that lenders enjoyed in previous years when local attorneys could fashion closing documents to give maximum protection to lenders.

A number of rejoinders can be offered in opposition to these arguments. First, setting aside the policy issue of whether a judgment debtor should have the ability to acquire immovables without first satisfying his judgment creditors, the simple answer is that Louisiana law already permits a debtor to do so, through the use of the assignment of the privilege of his vendor to his lender, in the manner discussed above. Of course, the mere fact that the protections of a vendor's privilege are already available to any purchase money lender does not necessarily

⁷⁴ French Civil Code Art. 2374(2). Originally, this privilege in favor of the lender of the purchase money was nothing more than the vendor's privilege transmitted to the lender by subrogation, just as is possible under Louisiana law. The privilege now arises in favor of the lender in its own right, provided that the conditions of Art. 2374(2) are satisfied. The conceptual basis for the privilege remains that of the vendor's privilege. The fact that this privilege exists autonomously and is no longer founded upon subrogation has the effect of extending the privilege to the full extent of the interest charged under the contract of loan, rather than limiting the privilege to the rate of interest agreed to by the vendor, thus eliminating the added cost and complication of forcing the lender to obtain a conventional mortgage in order for all interest to be secured. See Simler et Delebecque, *Droit civil, Les sûretés La publicité foncière*, Section 418 (2004). The reason for the requirement of the authentic declarations concerning the use of the borrowed funds is to prevent a debtor from favoring one creditor to the prejudice of others by a false claim that the loan proceeds were used to acquire the immovable. *Id.* at 419; V. Bergel, *La vente d'immeubles existants*, No. 297 (Litec 1983).

⁷⁵ The Committee wishes to acknowledge and express its gratitude to Stephen G. Sklamba and Brent Laliberte for materials that they submitted on behalf of the Louisiana Land Title Association to assist the Committee in its work.

mean that a purchase money mortgage having the priority of a vendor's privilege is a concept unworthy of adoption in Louisiana.

In response to the argument that the protections analogous to those historically given to building and loan associations should now be granted to the new types of residential lenders, it could be countered that, as discussed above, the case law has not gone so far as to hold that the statutorily-granted vendor's privilege in favor of building and loan associations outranks pre-existing judicial mortgages, and giving that effect now to purchase money mortgages would venture far beyond the protections that building and loan association mortgages historically enjoyed. It could also be observed that the Legislature's motivation in extending special protections to building and loan associations had much to do with the nature of the associations themselves:

The reason for making, by Act 115 of 1888, and its successors, Act 120 of 1902 and Act 280 of 1916, an exception in favor of building and loan associations, or homestead associations, in the matter of securing loans made by them, manifestly, was that they had been declared by Act 151 of 1888 to be corporations of 'Public utility and advantage'.⁷⁶

Of course, whether present-day residential mortgage lenders are sufficiently similar to building and loan associations to enjoy their favored position is of only secondary interest. The real issues are whether the public interest would be promoted by granting purchase money mortgages special priority over other types of mortgages and whether the benefits of doing so would outweigh the disadvantages. Significantly, the Committee did not hear assertions from any lender that residential lending in Louisiana is being impaired to any degree by the absence of special priority for purchase money mortgages, nor that mortgage loans would become increasingly available to borrowers in Louisiana if our law on mortgage priority were changed. This is not surprising in view of the current federal regulatory emphasis on requiring regulated lenders to evaluate a residential borrower's repayment ability before even making a residential loan available⁷⁷ and subjecting a lender to a claim of offset and substantial civil penalties if it fails to do so.⁷⁸ While an outstanding unsatisfied money judgment might not necessarily remove a residential mortgage loan from the realm of possibility, it certainly cannot be said to reflect favorably on a prospective borrower's ability to repay. Throughout the time the Committee has

⁷⁶ Capillon v. Chambliss, *supra* note 50.

⁷⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 129C(a)(1). *See also* 12 CFR 1026.43(c)(1): "A creditor shall not make a loan that is a covered transaction unless the creditor makes a reasonable and good faith determination at or before consummation that the consumer will have a reasonable ability to repay the loan according to its terms." Two factors to be considered in determining a consumer's ability to repay are his current debt obligations and his credit history. Outstanding judgments are not expressly mentioned in the discussion of either factor. *See* 12 CFR Section 1026.43(c)(2)(vi) and (viii). However, the federal Consumer Financial Protection Bureau has published a guide containing a discussion of sources of credit history information and indicating that credit history might include information about judgments, collections, and bankruptcies. Consumer Financial Protection Bureau, *Ability-to-Repay and Qualified Mortgage Rule Small Entity Compliance Guide*, Chapter 3, Section VIII (iii). http://files.consumerfinance.gov/f/201310_cfpb_atr-qm-small-entity_compliance-guide.pdf.

⁷⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1413, 1416.

considered the study resolution, not a single lending institution or association of lenders has urged the Committee to recommend enhanced priority for purchase money mortgages.

If residential lenders are dictating the use of standard mortgage forms that do not provide them the benefits that they could otherwise obtain by fashioning a purchase money transaction to create a vendor's privilege, a fair inference might be that they are choosing to protect themselves through other means, such as by performing an examination of the public records to negate the possibility of pre-existing judicial mortgages that would outrank their mortgages. In almost all cases in which residential mortgages are sold on the secondary mortgage market, the lender obtains a policy of title insurance that insures the validity and priority of the mortgage. Louisiana law provides that such a policy can be issued only if an attorney-at-law licensed to practice in Louisiana has performed a title examination for a statutorily prescribed period.⁷⁹ This examination should, of course, reveal the existence of any pre-existing judgments against the purchaser. Shielding lenders, title insurers, or title attorneys from a loss that results from their failure to search for or discover a pre-existing judicial mortgage would not appear to be a valid justification for changing long-standing Louisiana mortgage ranking rules.

C. Analogy to purchase money security interests under the Uniform Commercial Code

It might be argued that Louisiana's adoption of a modified version of Article 9 of the Uniform Commercial Code effective January 1, 1990,⁸⁰ which embraced the concept of purchase money security interests in movable property,⁸¹ militates in favor of the adoption of what some might view to be the analogous concept of the purchase money mortgage. While there are certain functional similarities between the two concepts, the legal landscape applicable to the encumbrance of immovable property in Louisiana differs radically from the regime of the Uniform Commercial Code applicable to the encumbrance of movable property. The former finds its basis in the civil law; the latter in a uniform act that is based almost wholly on common law concepts. Louisiana adopted the purchase money security interest in movables, along with most of the rest of the uniform act, in order to create uniformity with the security device law of other states concerning movables, which by their very nature can usually move easily from state to state. There is obviously no ability to transport immovable property from one state to another, and for that reason there is no corresponding need for uniformity in the law governing the encumbrance of immovables. Just as its property law is fundamentally different from that in force in the common law states, much of Louisiana's mortgage law varies substantially from that of its sister states, both in its conceptual underpinnings and in more practical ways, such as the legally permissible procedures available for enforcement of mortgages.

Moreover, the governing substantive rules applicable to the two different types of property differ markedly even within Louisiana law. For one thing, judicial mortgages do not attach to movable property, and there is no means by which an ordinary judgment creditor can

⁷⁹ If the insured transaction is a sale, the minimum search period is thirty years, or longer, if necessary, in order to reach an arms-length sale between unrelated third parties. If only a mortgage is being insured, then the search must be for a minimum of ten years or two links in the chain of title, whichever is greater. R.S. 22:512(17)(b)(vi).

⁸⁰ See Acts 1989, No. 135, enacting Chapter 9 of the Louisiana Commercial Laws, R.S. 10:9-101, *et seq.*

⁸¹ See R.S. 10:9-103.

obtain an involuntary general encumbrance on all of his debtor's movable property.⁸² Thus, the Uniform Commercial Code never has to address the ranking of a purchase money security interest against a general judgment lien.⁸³ Secondly, while mortgage law prohibits a debtor from voluntarily granting a general mortgage on all his present and future immovables, the Uniform Commercial Code readily grants a debtor the ability to grant a floating lien on all of his present and future movables,⁸⁴ and it is precisely this type of floating lien that the purchase money security interest was created to outrank.⁸⁵ Mortgage law never has to address this issue, because general mortgages cannot be granted by contract. There are even marked differences in the treatment of vendor's privileges on immovables as compared to those bearing on movables. While vendor's privileges on immovables have, as a general rule, priority over all mortgages, they have precisely the opposite ranking where movable property is concerned, for they rank behind all security interests in movable property.⁸⁶ Purchase money security interests in consumer goods,⁸⁷ as well as vendor's privileges on movables,⁸⁸ are effective against third persons without any public registry at all, whereas vendor's privileges on immovables are subject to the laws of registry and effective only if recorded as required by law. In short, the differences in the substantive rules applicable to the encumbrance of movable property and those applicable to the encumbrance of immovable property, and the varying policy judgments that gave birth to these differing rules, are so stark that any attempt to draw an analogy between a purchase money security interest and a purchase money mortgage would rest on very precarious footing indeed.

III. THE CASE AGAINST SPECIAL PRIORITY OF PURCHASE MONEY MORTGAGES

The Committee has identified a number of disadvantages that could arise from the adoption of a purchase money mortgage concept in Louisiana.

A. *Erosion of the public records doctrine and the possibility of "hidden liens"*

Giving special, and in effect retroactive, priority to a purchase money mortgage would constitute, at least to some degree, an erosion of one of the bedrock principles of Louisiana's public records doctrine—interests in immovable property are "utterly null and void as to third persons unless recorded."⁸⁹ Granting the status of a vendor's privilege to a purchase money mortgage could easily have the unintended effect of exposing innocent third persons who relied on the absence of a filing from the public records to the risk of hidden liens. For example, if a

⁸² Certain privileged creditors are granted general privileges on the movable property of a debtor, but these arise from the nature of the debt owed to the creditor rather than from the recordation of a money judgment. *See generally* C.C. Art. 3191.

⁸³ The Uniform Commercial Code does address the relative rights of a secured party holding a security interest and a judgment creditor who has acquired a privilege on *specific* property by virtue of his seizure of it through judicial process. *See* R.S. 10:9-102(a)(52); 9-317(a)(2).

⁸⁴ Floating liens on certain types of movable property are not permitted. *See* R.S. 10:9-204(b).

⁸⁵ *See generally* Gilmore, *supra* note 61.

⁸⁶ R.S. 9:4770.

⁸⁷ R.S. 10:9-309(1).

⁸⁸ La. Const. 1921 (Ancillaries), Article XIX, Section 19.

⁸⁹ *Phillips v. Parker*, 483 So.2d 972, 975 (La.1986).

purchase money mortgage is executed in Orleans Parish upon property located in Jefferson Parish and if the rules of vendor's privileges apply, then the purchase money lender has a full fifteen days to file his purchase money mortgage in the mortgage records of Jefferson Parish.⁹⁰ If he files timely, then his purchase money mortgage, having the effect of a vendor's privilege, would outrank not just pre-existing judicial mortgages but also any other mortgage that the new owner might grant during that fifteen-day period. This result would obtain even if the other mortgagee conducted an exhaustive search of the public records and found no mortgage of record at the time he recorded his mortgage.

Significantly, the risk of this happening under existing law with a true vendor's privilege is virtually nil, for the very same instrument that evidences the sale itself also evidences the vendor's privilege. In practice, this instrument is recorded in both the conveyance and mortgage records at the same time. Even if the vendor for some reason tarried in seeking recordation of the instrument in the mortgage records, a third person who wanted to obtain a mortgage from the new owner would not be caught by surprise, for he would in any event search the conveyance records to find an act of sale in favor of the new owner, in order to confirm that the new owner had in fact acquired the property. Thus, the third person would at least see that the acquisition was accomplished under a credit sale⁹¹ and would understand the risk that the act of credit sale might be filed shortly in the mortgage records, thereby making the vendor's privilege effective against him.⁹² If, on the other hand, the law is amended to give a purchase money mortgage the ranking of a vendor's privilege as long as it is recorded within seven or fifteen days after the sale, what this same third person would see in the conveyance records would likely be an act of *cash* sale, from which he might conclude, erroneously, that his borrower had acquired unencumbered title. Because of this risk, it might well be envisioned, if the law is changed in this manner, that as a matter of course non-purchase money lenders would require a borrower who had purchased an immovable for cash to wait at least fifteen days after the purchase before they would be willing to lend money to the borrower on the security of the property. This delay would be necessary in order to negate the possibility that a purchase money mortgage might be recorded during that period and thereby attain priority over any mortgage that the non-purchase money lender might record in the interim. The point is that if the priority of a vendor's privilege is given to a purchase money mortgage, that mortgage would outrank not just pre-existing judicial mortgages but also conventional mortgages that might be recorded after the sale but *before* the purchase money mortgage makes its way to the courthouse.⁹³ Even a buyer who had purchased

⁹⁰ C.C. Art. 3274.

⁹¹ If an act of sale indicates that the price was paid, a vendor's privilege is thereby waived, even if the price in fact remains unpaid. *See Pelican Homestead & Savings Association v. Royal Scott Apartments Partnership*, 541 So. 2d 943 (La. App. 5th Cir. 1989), *writ denied*, 543 So. 2d 9 (La. 1989).

⁹² Irrespective of whether the act of credit sale is ever recorded in the mortgage records, the existence of a credit sale would still be cause for concern to the third person, because the vendor's right of dissolution would be effective against the third person without recordation in the mortgage records. *See* C.C. art. 2561, comment (h).

⁹³ Another consequence of giving the status of a vendor's privilege to a purchase money mortgage is that it would outrank the general privileges established by the Civil Code, such as those for funeral charges, law charges and expenses of the last illness. C.C. Art. 3267. This would occur *even if* the purchase money mortgage is not recorded within the period of time provided under C.C. Art. 3274. *See Wheelright v. St. Louis, N.O. & O. Canal Transportation Co.*, *supra* note 23 (holding that, under the Civil Code of 1870, tardy inscription of a privilege does not cause it to degenerate into a mere mortgage; rather, its effect as a privilege is lost as to mortgagees only, and it

wholly for cash would be unable to prove his title to be unencumbered during the first fifteen days after his purchase.

B. *Increased burdens on sheriffs and other participants in mortgage foreclosures*

If one mortgage could prime a previously recorded mortgage because of its purchase money status, ranking mortgages from a simple inspection of a mortgage certificate would no longer be as easy as in the past. It would become necessary to make a determination—based upon facts not necessarily in the public records—whether one of several competing mortgages may have been granted to secure the purchase money. Thus, sheriffs conducting foreclosure sales would be put to the task of inquiring, in almost any instance in which more than one mortgage appears of record, whether any of the competing mortgages might happen to secure the purchase money. Sheriffs have to be certain of mortgage priority not only for purposes of cancelling inferior encumbrances and paying inferior mortgagees after the sale⁹⁴ but also for purposes of determining the minimum bid that will apply at the sale, for the law provides that property must be sold at sheriff's sale for an amount sufficient to discharge any priming encumbrance.⁹⁵ In most instances today, the sheriff is able to determine the priority of mortgages based upon a simple inspection of a mortgage certificate prepared by the clerk of court.⁹⁶

It might be argued that the sheriff could determine whether a mortgage qualifies for purchase money status by an examination of the public records to see whether the mortgage was recorded within a short period after the mortgagor acquired the property, thus suggesting the existence of purchase money status. But this would require that the sheriff examine the *conveyance* records to locate the act of sale by which the mortgagor (and perhaps other owners) acquired the property. Even if the sheriff had the resources at his disposal to conduct a title examination of this nature, he still could not be certain of purchase money status; he would have to seek a determination from the courts.

There is arguably a simple remedy for this problem—the law could require that a purchase money mortgage, if it is to enjoy that status, must contain language conspicuously proclaiming its purchase money status, perhaps in its title or elsewhere on the first page.⁹⁷

retains its effect as a privilege as to other parties). This, incidentally, would lead to yet another vicious circle if the status of a vendor's privilege is given to purchase money mortgages: a previously filed judicial mortgage would outrank an untimely filed purchase money mortgage, which would outrank the general privileges, which in turn would outrank the judicial mortgage.

⁹⁴ C.C.P. Arts. 2376-77.

⁹⁵ C.C.P. Art. 2337.

⁹⁶ Of course, there are instances today in which the priority of encumbrances is not readily apparent or may even require judicial determination. For example, Private Works Act privileges generally rank from the time work began, a fact that is often not of record. However, those instances are relatively rare. In most cases, the ranking of mortgages can be made strictly on the basis of the order of recordation. It is true that a mortgage may have lost its ranking for lack of timely reinscription, but in that case nothing outside the mortgage records need be consulted to make that determination.

⁹⁷ A similar requirement appears in Article 9 of the Model Uniform Commercial Code, which, in giving priority to construction mortgages over security interests in fixtures, includes a provision requiring that a mortgage indicate that it is a construction mortgage in order to enjoy this priority. In its adoption of Chapter 9 of the Louisiana

However, this requirement would run afoul of one of the stated goals of the adoption of a purchase money mortgage—to allow institutional lenders to continue to use their standard mortgage forms without special adaptation. Lenders would have to develop one form for use with purchase money loans and another for refinancings. There might also be the problem of lenders including the prescribed language as a matter of routine in their mortgage forms, even for use with loans that do not finance the purchase money, with the result that the claim of purchase money status would become ubiquitous and therefore largely unreliable.

C. *The risk of creating "vicious circles"*

Another undesirable consequence that might result from a rule permitting a mortgage to rank on a basis other than the date of its filing is the risk of creation of unforeseen vicious circles in the ranking of mortgages and privileges on immovables.⁹⁸ It has been observed that any ranking system that permits creation of a variety of encumbrances that rank according to different criteria implicitly permits the possibility of circular priorities.⁹⁹ Though there are likely several others, one new vicious circle might be easily envisioned if the law is changed to grant a purchase money mortgage the ranking of a vendor's privilege so that it outranks previously filed judicial mortgages. Suppose that the sale transaction, including execution of the purchase money mortgage, occurs on Monday, the new owner begins construction work on his estate on Tuesday, and the purchase money mortgage is not filed for registry until Wednesday. Suppose also that there is a pre-existing judicial mortgage against the new owner. Under these facts, the judicial mortgage would outrank the Private Works Act privilege because the judicial mortgage was already effective against third persons when work began on Tuesday.¹⁰⁰ The Private Works Act privilege, in turn, would outrank the purchase money mortgage because the purchase money mortgage was not effective against third persons at the time work began.¹⁰¹ However, the purchase money mortgage itself would outrank the judicial mortgage because the purchase money mortgage was filed within the seven-day period of time permitted for vendor's privileges to be filed and therefore outranks all mortgages, including those that were filed beforehand.¹⁰² Of course, this particular vicious circle might be eliminated if the law provided that the purchase money mortgage is effective against third persons immediately upon execution without any recordation, provided that it was ultimately recorded within the period provided by C.C. Art. 3274, but such a rule would likely have its own unforeseen, and potentially disastrous, consequences.¹⁰³

Uniform Commercial Code, Louisiana eliminated the requirement for such a declaration. See R.S. 10:9-334(h).

⁹⁸ For an excellent discussion of vicious circles that have resulted from piecemeal legislative alteration of priorities, see Dainow, *Vicious Circles in the Louisiana Law of Privileges*, 25 La. L. Rev. 1(1964).

⁹⁹ See R.S. 9:4821, comment (c).

¹⁰⁰ R.S. 9:4821A(3).

¹⁰¹ R.S. 9:4821A(6).

¹⁰² This result would flow from C.C. arts. 3186 and 3274 if purchase money mortgages are given the rank of a vendor's privilege.

¹⁰³ Another vicious circle that would result from granting purchase money mortgages the status of vendor's privileges is discussed in note 93 *supra*: a previously filed judicial mortgage would outrank an untimely filed purchase money mortgage, which, despite its untimely filing, would outrank the general privileges, which in turn would outrank the judicial mortgage.

D. Problems with ranking multiple lenders claiming purchase money status arising from a single sale

Yet another problem that would arise from granting to purchase money mortgages the priority of a vendor's privilege is that numerous persons could claim vendor's privileges arising out of a single sale.¹⁰⁴ For instance, the actual vendor might not have been paid the full amount of the purchase price and thus might be in competition with the purchase money lender who has lent only a portion of the purchase price. This circumstance would present the question of not only the ranking of the purchase money mortgage against the true vendor's privilege but also the ranking of the purchase money mortgage against the vendor's right of dissolution.¹⁰⁵ It is also possible that all or part of the down payment made to the vendor may have been borrowed from yet another lender, such as a family member. In that instance, that person, too, would seem to qualify for purchase money priority. Thus, from a single sale, multiple vendor's privileges might be claimed. Yet existing law provides no guidance as to how these multiple vendor's privileges might rank. The only article presently found in the Civil Code ranking vendor's privileges contemplates vendor's privileges arising out of *successive* sales and ranks them accordingly.¹⁰⁶ It would not be clear that these multiple vendor's privileges would rank according to order of filing of the instruments evidencing the respective privileges for, as pointed out above, privileges normally rank according to their nature and not according to other factors. Where privileges are of the same nature, they rank concurrently.¹⁰⁷ A sensible solution might be to adopt a rule that multiple purchase money mortgages arising from the same sale rank in order of recordation. However, such a rule would likely be unpalatable to the institutional lender that lent the bulk of the purchase money, for it would almost always place that lender's mortgage behind the true vendor (because the act of sale in favor of a vendee is uniformly recorded before any mortgages granted by the vendee).¹⁰⁸

E. Difficulty in delineating who qualifies for purchase money status

¹⁰⁴ For a detailed discussion of competing purchase money mortgage claims, see Nelson & Whitman, *Real Estate Finance Law*, Sec. 9.1 (2007).

¹⁰⁵ See note 40 *supra*.

¹⁰⁶ C.C. Art. 3251.

¹⁰⁷ C.C. Art. 3188.

¹⁰⁸ Other states have developed differing rules to address the ranking of multiple purchase money mortgages arising from the same transaction. The ranking is sometimes dependent on the order of recordation, sometimes on whether one of the competing claimants is a true vendor, and sometimes on whether one party had actual knowledge of the other party's mortgage. For instance, Minnesota courts treat a true vendor's purchase money mortgage and a third party lender's purchase money mortgage taken as part of the same transaction as arising simultaneously and therefore having "the same equities," ranking them according to order of filing rather than by giving preference to the true vendor. See, e.g., *Slattengren & Sons Properties, LLC v. RTS River Bluff, LLC*, 805 N.W.2d 279 (Minn. App. 2011). In *Estate of Skvorak v. Security Union Title Ins. Co.*, 89 P.3d 856 (Id. 2004), the Idaho Supreme Court ranked a true vendor's purchase money mortgage behind a third party lender's purchase money mortgage where the third party lender filed first and, in addition, the true vendor had actual knowledge of the third party lender's mortgage. Since the third party lender was the initial encumbrancer, its knowledge of the true vendor's mortgage was irrelevant. In reaching this holding, the court refused to follow comment (d) of Restatement (Third) of Property - Mortgages, Section 7.2 (1997) to the effect that "if both lenders have notice of the other's mortgage, the vendor's mortgage will be superior to its third party counterpart."

Finally, another problem that might arise from the adoption of the concept of purchase money mortgage is the difficulty that would be encountered in an attempt to define precisely who would be entitled to the special priority of a purchase money mortgage. Drawing lines risks either arbitrariness or, worse, ambiguity, with the result that courts could be left with the task of drawing lines when the Legislature has not done so clearly.

The policy argument for purchase money mortgages in common law states is that the pre-existing mortgagee receives a windfall because he has not extended credit in reliance upon the specific property that is being acquired with a loan made available by the purchase money lender.¹⁰⁹ By contrast, the civil law, in favoring the vendor with a privilege that ranks above pre-existing mortgages, shifts the perspective to the point of view of the vendor, who, by selling the immovable on credit, has thus augmented the vendee's patrimony.¹¹⁰

It is simple enough for the law to provide privileged status to a true vendor, but determining where to draw the line when other creditors contribute to an augmentation of a debtor's patrimony becomes much more complicated. If a creditor lends money to the owner of an estate in order to finance the owner's construction of improvements upon the estate, can it be said that that creditor has augmented the owner's patrimony to such an extent that that creditor's mortgage should have priority over an existing mortgage that the owner had granted previously to another lender? Would it make a difference if the holder of that existing mortgage had lent the purchase money of the land, and, if so, should the two mortgagees, both of whom contributed to the augmentation of their common debtor's patrimony, rank concurrently? If the owner of a tract of land purchases a manufactured home on credit, immobilizes it in accordance with law¹¹¹ and then grants the seller of the manufactured home a mortgage upon the land and the immobilized manufactured home that is now a component part of the land, has that seller sufficiently augmented the debtor's patrimony such that the seller's mortgage should outrank an existing mortgage previously granted by the owner on the land? If a mortgagee lends funds to finance the purchase of an immovable but, either at the same time or thereafter, lends additional funds that are used for other purposes, to what extent should that mortgagee be able to claim the special priority of a purchase money mortgage? And if that mortgagee is able to claim special priority only to the extent that his loan proceeds paid the purchase money, what is the effect on this special priority when the debtor makes partial payment to the mortgagee on the loan, particularly when a single promissory note represents all of the loan advances? What should be the ranking of a mortgage securing the refinancing of a purchase money debt, and should it make a difference whether the refinancing is made by the original lender or a new lender?¹¹² Even if all these issues are sorted out initially, would other lenders who contribute to an augmentation of a debtor's patrimony, conscious of the special priority now given to purchase money lenders,

¹⁰⁹ See Nelson & Whitman, *Real Estate Finance Law*, Sec. 9.1 (2007). This argument may not be as compelling in Louisiana, for the law provides that all of a debtor's property is ratably available to his creditors and that a debtor is obligated to fulfill his engagements out of all of his property, both present and future. C.C. Arts. 3133-34 (2014).

¹¹⁰ See Planiol *supra* note 11 at No. 2608-09.

¹¹¹ R.S. 9:1149.1, *et seq.*

¹¹² For a discussion of a number of these issues in the context of purchase money security interests in movable property, as well as the historical development of the purchase money concept, see Robert M. Lloyd, *Refinancing Purchase Money Security Interests*, 53 Tenn. L. Rev. (1985).

continually lobby the Legislature for further changes to the rules in order to create their own special preferences, ultimately leading to the same disarray in mortgage ranking that plagues the ranking of privileges on movable property?

These are thorny questions indeed, but certainly they are not insolvable. However, the existence of these questions, and perhaps countless others that might be posed, suggests that the development of the concept of a purchase money mortgage with priority over pre-existing rights would not be nearly so simple as merely legislating that a purchase money lender is entitled to the ranking of a vendor's privilege. Of course, the difficulty of the task should not itself dissuade the Legislature if, indeed, demonstrable benefits would flow from the creation of the concept of a purchase money mortgage. But where those benefits are questionable or marginal, a convincing argument can be made that settled law is best left untouched.

V. CONCLUSION

Louisiana's existing mortgage ranking rules are simple, widely understood, and easily applied. They have remained essentially unchanged throughout Louisiana's history and have resulted in surprisingly sparse mortgage ranking litigation. They comport with two of the central tenets of the state's very strong public records doctrine: unrecorded interests in immovables are generally not effective against third persons, and competing interests in immovable property almost always rank in the order in which they are recorded. Finding no compelling case for the alteration of these time-honored rules, and cognizant of the many unforeseen problems that could result from an attempt at altering them, the Law Institute recommends against changing Louisiana's mortgage ranking rules to grant special priority to purchase money mortgages.