Reduction and cancellation of registrations of hypothec and privilege

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THE Civil Code, after dealing with the manner of registration of Hypothecs and Privileges, passes on to speak of their cancellation and reduction, in sub-title V of Title XXIII, a subject which is of the utmost importance, especially with respect to those intending to exercise the Notarial profession.

The cancellation of a registration (annientamento giuridico d'una inscrizione) may take place either by the consent of the creditor or in execution of a judgment which must have become a "res judicata". A judicial cancellation or reduction takes place, of course, when the creditor is unwilling to give his consent for the cancellation or reduction, in which case, the interested party institutes an action before the Competent Court to obtain his objective. We may also have the case of a judicial reduction of a registration if it is shown that the registration can be restricted as to the property affected thereby, without injuring the interests of the creditor. Similarly, a reduction of the property subject to hypothec may take place in the case of general conventional hypothecs created to secure a right contingenet upon an uncertain event, e.g., debt of warranty of peaceful possession, or debt in security of the execution of contracts for supply and services.

It is to be noted that the law requires a "*public deed*" in order that registrations be reduced or entirely cancelled. The reason is that a cancellation or a reduction of a registration is an alienation of real rights, and the law requires that all transactions affecting immovable property or real rights thereon should be brought to the cognizance of third parties by means of the relative Note to be presented in the Public Registry.

The expression "public deed" as indicated in Section 2165, must be given a strict interpretation. Thus, a document containing the acknowledgement of a total or partial payment of a debt, and which is enrolled (transuntato) in a public deed, would not comply with the law. This principle is based on the teachings of Giorgi who states that "le parti possono depositare pres-

so un Notaro un testamento olografo, o un'atto privato di altra natura, e pubblico sarà senza dubbio l'atto del deposito ricevuto e disteso dal Notaro; ma non per questo diviene pubblica la scheda depositata." A case on this point arose in 1925, when the late Notary Francesco Giorgio Schembri attempted to file in the Public Registry a Note of Reference resulting from a receipt which had been enrolled in his records. The Note was rejected, and the reasons submitted by Notary Doctor Vincent Gatt, then Assistant Director, who based his sound arguments on the theory of Giorgi, were also approved by the Crown Counsel.

We have seen that in case of a sentence of the Competent Court ordering the total or partial extinction of a registered debt, it is necessary that the judgment must have become final and binding (res judicata). Section 271 of the Code of Organization and Civil Procedure states: "A judgment subject to appeal, ordering the cancellation of any hypothecary registration, may not be given effect to by the Director of the Public Registry, without a certificate from the Registrar that no appeal against such judgment has been entered and that the time for entering an appeal has elapsed." This certificate is of the utmost importance, for, if a registered debt is cancelled, it cannot revive that is, if a right has ceased to exist, its effects cannot be restored. The only remedy, if we might call it a remedy, after all, would be to file a new Note, which would not, however, enjoy its former priority, but would only rank as from its new date of registration. An important decision on this point was delivered by His Majesty's Court of Appeal on the 7th June, 1897, in the case "Carmela Grech et vs. Pietro Paolo Mompalao DePiro et." The point at issue was that the plaintiffs tried to revive a note of registration which had previously been cancelled, on the ground that the payment of the credit to which the note referred was not made to the true creditor. The Court of Revision of Notarial Acts upheld plaintiffs' claim, but His Majesty's Court of Appeal revoked this decision "giacchè il ristabilimento della inscrizione non può, secondo le nostre leggi, effettuarsi altrimenti che mediante una nuova inscrizione, non essendo fra noi conosciuto altro mezzo di inscrivere l'ipoteca che quello indicato nelle disposizioni del Codice Civile, le quali disposizioni, in difetto di altre, sono applicabili, senza distin-

zione tanto nel caso in cui si tratti di nuova ipoteca, quanto ove si tratti di fare rivivere un'ipoteca già inscritta, ma che fosse stata, per errore e senza titolo legale, cancellata." This shows how important these Notes of Cancellation are, and why more attention is given to these Notes than to any other Note which is filed in the Public Registry.

According to Section 2164, a registration may be reduced:—

(a) If a part of the debt is extinguished (riduzione),

(b) if the right of the creditor, previously affecting the whole of an immovable, or several immovables, is restricted to a part of such immovable conveniently separable therefrom, or to one or some only of such immovables (restrizione).

In other words we may have a reduction of the amount of the credit as such, or we may have a restriction of the security. With regard to the former case, an easy example would be the consent given by a creditor for the reduction of a registration once that a partial payment of the amount due is paid by the debtor. It is to be noted that the Notary concerned with the deed of payment is not to register in the Public Registry "the direct payment, whether total or partial, by debtor to creditor, but *the consent given by creditor for the cancellation or reduction of the credit*. Direct payments as such, as in the case under review, are not to be annotated in the Public Registry. Of course, we may have a direct payment by one of two co-debtors in solidum to the creditor — in which case such an annotation may take place, in view of the fact that the co-debtor paying will enjoy a subrogation against the other co-debtor.

A restriction of security takes place when, for example, the creditor who has been enjoying a privilege and a hypothec to safeguard his rights, does not think it any longer necessary to continue having all these safeguards, and so he gives his consent for the reduction of the registered Note in the sense that it should remain safeguarded only by the hypothec or by the privilege. We may also have the case of the creditor renouncing to his rights of privilege or of hypothec over a particular immovable, and maintaining all his rights firm and valid over all the remaining property of the debtor.

If the creditor has not the power to alienate, he cannot give his consent for the reduction or the cancellation of the registration, for broadly speaking a reduction or a cancellation

is an alienation of real rights. Of course, he can obtain the necessary authorization from the Court. Thus, for example, a minor who enjoys a general legal hypothec of tutorship can give his consent for the reduction or the cancellation of the relative note of registration, only on the attainment of full age.

We have already seen that registrations may be reduced or entirely cancelled by the consent of the creditor. Though at first sight, it may seem that the consent of the creditor is a "sine qua non" requisite, Section 2166 states: "If the total or partial *extinguishment* of a registered debt results from a judgment which has become "res judicata" or from any other public deed, the cancellation of the registration, or the reduction thereof as to the amount of the debt, may be effected *without the consent of the creditor.*" When examining this section, we come to the conclusion that a Notary may annotate at the Public Registry a cancellation or reduction of a registered debt if from the deed published by him it appears that a credit has been paid entirely or partially, even though there may not be the consent of the creditor for such purpose.

The word "extinguishment" in the above quoted Section 2166, is however of the utmost importance, and it must be given the right legal meaning. It must be given the interpretation of Section 1188 which enumerates the modes of extinction of obligations. Thus, from the note of cancellation or of reduction which is presented for registration, it must clearly appear that the total or partial extinction of the registered debt has taken place in one of the ways specified in Section 1188, e.g. payment, merger.

The Note to be presented to the Director of the Public Registry consists of a true copy of the original registration together with the particulars required to demand the cancellation or the reduction of the credit, which is to be inserted in the fifth column. Before accepting such note for registration it is necessary to ascertain whether there are any eventual previous annotations with regard to the same credit, that is, one is to see whether any notes of reference relating to the note in question had been entered in the Public Registry prior to the date of presentation of the note of reduction or of cancellation. One is to see, for example whether any payments with subrogation had been effected by third parties; whether a total or partial

cession of the credit had taken place, and if in the affirmative, who is the present assignee; whether a previous reduction of the credit was consented to, and so on. These annotations are carefully examined by the Director who is to see whether their contents are compatible with the note of cancellation or of reduction which is presented to him. All this shows that a clear distinction has to be made between the case of a registration of a credit and the case of a cancellation, reduction or modification thereof. In the former instance, the Director is not so strict in the examination of the note of registration, because it is the case of a preservation of rights, and so if the requisites established by law are complied with, he immediately accepts the note for registration, because it is to be borne in mind that the question of priority is of paramount importance in the case of ranking of several hypothecary or privileged creditors; moreover, it is to be noted that an eventual error in the original registration may be remedied by means of a new registration, or in case the debtor considers himself aggrieved by the registration, he may apply to the Court for the cancellation or reduction thereof. But in the case of a reduction or of a cancellation of a registration, the position is fundamentally different, and so the Director is more rigorous in his examination. It is no longer a case of preservation of rights — on the contrary, it is a case of a reduction or of an annihilation of rights, which, if not properly and legally made, might cause irreparable damage.

It is important to note that a registered credit cannot be cancelled, if a previous payment (with subrogation of rights had been made to the creditor by some third party either "de proprio" or by delegation of the debtor, or of one of the co-debtors in solidum. The creditor, in this case can only give his consent for the reduction of the credit, in the sense that it should remain firm and valid for the said subrogation in favour of the person who had effected the payment on account or in full settlement. A decision in this sense was given by a decree of the Court of Revision of Notarial Acts on the 21st April, 1928, following an application of the late Notary Arturo Leone Ganado. The Court was of the opinion that the Director of the Public Registry was correct and in conformity with the law, when he insisted that the note in question should have been worded in such a way that there should have appeared

clearly and without any doubt whatsoever the fact that the registration was to remain firm also for a subrogation which was previously annotated. I need hardly add that if a credit had been previously assigned "in toto", it is only the assignee (cessionario) who is entitled to give his consent for the reduction or cancellation of the said credit, and not the creditor (assignor).

The title of these notes is also worthy of attention. Te law in Section 2170 states that the note must contain an indication as to whether a reduction or the cancellation of the registration is demanded. Due importance must be given to this requisite and unless the demand for the cancellation or for the reduction clearly appears, the note cannot be accepted for registration. Another important requisite in Section 2170 is "an indication of the judgment, or deed, under which the reduction or cancellation is demanded." This shows that in the case of a sentence it is important to specify the Court ordering the cancellation or the reduction of the note, as well as the date of the pronouncement of the judgment. In the case of a public deed, the date of publication and an indication of the Notary who published it, are essential.

A very important Section is Section 2171 which runs as follows: "When the reduction of a registration is demanded, the sum or property in respect of which the registration is to continue to be operative shall be stated in the note." Thus, it is clearly enunciated that it is not enough to state that the credit or the note has been reduced by a certain amount. The law does not state that we should express by what amount or by what property the credit has been reduced or restricted: but it clearly stresses that we should express in the note to what amount or to what property the registration is to continue to hold good. Thus, it is absolutely incorrect to state that the registration is to be maintained for the remaining part of the credit or for the balance. This condition, after all, is only a corollary to Sections 2132 and 2147 which clearly establish the rule that the 'amount' of the credit due must be specified in the note of hypothec. A ruling stressing the principle enunciated in Section 2171 is to be found in a Decree delivered by the Court of Revision of Notarial Acts on the 24th September,

1929, following an application of the late Notary Luigi Gauci Forno.

On the basis of Section 2132 and 2147, and in view of the fact that third parties examining the notes of Reduction should have a clear statement before them as if they were examining a ledger, without having to resort to indirect means which might lead them to mistakes relative to the amount of the credit or to the property in respect of which the registration is to continue to be operative, one would appreciate the sound and practicable wording of Section 2171. It must, however, be stated that it is not always possible to express clearly to what amount the registration is to continue to hold good. The law in fact, exempts certain legal hypothecs from the absolute necessity of establishing an amount in the registration (Sec. 2149). We may have, for instance, a general legal hypothec in favour of minor children against their tutor for the good administration of their property. In these notes, generally, no amount is fixed. When one of the minors becomes of age, he would be capable to give his consent for the reduction of the note, but he would not state to what amount the registration is to continue to hold good: that would be impossible in this case, for no amount had been fixed in the original note of legal hypothec, and so he would only state that the note should remain firm and valid in so far as it regards the interest of the other minor children. Like this we may have other instances, but the rule established in Section 2171 should be interpreted strictly, and it is only in exceptional cases like the one just quoted that we can or rather we have forcibly to depart from the literal wording of the law.

Can a creditor in a registration including several co-debtors "in solidum" release some of them, and leave the remaining debtors burdened with the whole debt? The creditor may do so, but the 'acceptance' is required of the debtor or of the debtors who are to be burdened with the debt, once that some of them are to be released. This acceptance, of course, is only important is so far as it affects the internal relations of the co-debtors, and not vis-a-vis third parties who may claim the whole amount from any one of the co-debtors. What in the case of several debtors who are however not bound jointly and severally between them? The answer is in the negative, and a note

framed in a way as to remain firm and valid only against one of the debtors, would not be accepted for registration by the Director. If that were to be allowed, we would be extending the obligation of one of the co-debtors mentioned in the note, against whom the registration would solely be maintained — which would be contrary to the law. Such an annotation would also have prejudicial effects, for vis-a-vis third parties, each debtor in the original note was only responsible for his quota of the debt, and so how can an annotation be made in the margin burdening one of the debtors with the whole debt. Moreover, if that were to be upheld, we would have a novation, in as much as one debtor would be burdened with the quota of the other co-debtors, and in this sense we would have a new debtor with regard to the hypothec or privilege.

Before concluding this short survey, it may not be amiss to mention one final case in connection with the cancellation or reduction of registrations. This refers to the case of a cancellation or a reduction of a credit which is asked for by a legatee of the deceased creditor. In practice, this is not a very common occurrence; however, the principle to be applied in such a case is not altogether well known. First of all, can a legatee give his consent for the cancellation or reduction of a credit pertaining to the deceased creditor? It seems, "prima facie", that the answer is in the affirmative. However, in such cases we have to see whether the credit in question bears any interest and also, whether the legatee is a legatee of all the credits of the deceased or only of one particular credit. If the credit bears interest and the person demanding the cancellation or reduction is only a legatee of that particular credit, then we have to see whether the interests due up to the time of the demise of the creditor have been paid or not. If they have not been paid then the concurrence of the heirs of the decuius would also be required to give their consent for the cancellation or reduction of the interests which had accrued up to the time of the death of the creditor and which, however, had not been settled, as the interest due up to that time does not pertain to the legatee but to the heirs of the deceased. The concurrence of the heirs would not be required if we have the case of a legatee of all the credits of the deceased creditor, for if one is a *"legatee of all the credits"*, he is necessarily also a legatee of the interests

which had accrued up to the time of the creditor's death.

There is much more to be said on the subject under review, but space does not permit me to continue to deal with it more extensively. I hope that the principles above quoted would be of great interest and of practical value to those who will soon start exercising the profession of a Notary Public.

TO BE A LAWYER.

The luxury of pleasing others, enjoyed alike by actors, singers, and lecturers, is shared by lawyers. They show it in looks, express it in words, and tell it in tones of speech that thrill and captivate hearers and inspire the young with an early desire to be like such leaders. With this longing after greatness few believe in the hindrance to success, and most young men allow a free fancy to picture the future in guilded colouring. As thought crosses leagues and spans oceans in space as soon and as easily as across the street, so the ambition leaps from youth to greatness without the steps that lead upward on the rounds of fame's steep ladder. — Judge J.W. DONOVAN.