Journal of Civil Law Studies

Volume 5
Issue 1 *200 Years of Statehood, 300 Years of Civil Law: New Perspectives on Louisiana's Multilingual Legal Experience*
October 2012

Article 18

10-1-2012

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Repository Citation
Joseph Stanier Manning, *Wede v. Niche Marketing*, 5 J. Civ. L. Stud. (2012)
Available at: http://digitalcommons.law.lsu.edu/jcls/vol5/iss1/18

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LOUISIANA PUBLIC RECORDS DOCTRINE AFTER *WEDE V. NICHE MARKETING*

Joseph Stanier Manning*

Louisiana's approach to public records doctrine is muddy and largely the result of historical accident; the Louisiana State Law Institute and Louisiana legislature have amended the civil code intending to reform this body of law, but the courts have not recognized this reform and interpret the new codal text in ways that yield no new substantive change in the law. Beginning in 1992, the Louisiana legislature revised the Civil Code, which created Titles 22 and 22-A. Some commentators interpreted these revisions as an attempt to change the law of recordation completely. In 2010, the *Wede v. Niche Marketing* case made its way to the Louisiana Supreme Court, and the case was decided in such a way that the apparent changes in the law made by the revisions were given no effect.[1] *Wede* tells us that the law of public records doctrine has not changed since the addition of Titles 22 and 22-A, but the case also illustrates the problems that arise by keeping two separate sets of land records – one for mortgages and one for conveyances. If this arbitrary distinction were removed, it is likely that the *Wede* case would have been decided in a way that would have given effect to the apparent changes in the revisions.

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1. Wede v. Niche Mktg. USA, LLC, No. 51406, 2008 WL 5770634 (La. Dist. Ct. November 25, 2008), *rev'd*, 09-146 (La. App. 5. Cir. 12/29/09); 30 So. 3d 145, *aff'd*, 2010-0243 (La. 11/30/10); 52 So. 3d 60 (2010).

I. BACKGROUND

In *Wede*, a money judgment was filed in the parish records to create a judicial mortgage on all immovables that the defendant-debtor owned in that parish. Because the Clerk of Court's office no longer kept physical records, the judgment was scanned electronically. When the document was scanned, the Deputy Clerk handling the document, instead of electronically marking it "MO" for mortgage documents, electronically marked it "CO" for conveyance documents. Because of this mistake, the judgment would not show up in any mortgage searches made by means of the computer system.

Before the Clerk's Office realized and corrected its mistake, the debtor sold some of his encumbered immovable property. The judgment creditor then moved to seize that property from the third-parties who had bought it, insisting that its judicial mortgage was in evidence in the parish records when the sale took place despite the Deputy Clerk's computer errors.

II. JUDGMENT OF THE COURT

The district court, applying Louisiana Civil Code article 3347 ruled for the judgment creditor.[2] The article states in full:

> The effect of recordation arises when an instrument is filed with the recorder and is unaffected by subsequent errors or omissions of the recorder. An instrument is filed with a recorder when he accepts it for recordation in his office.[3]

The court found the mistake to be one of misindexing on the part of the Clerk's office rather than one of misrecording. Though the court acknowledged that third-parties should be able to rely on the public records, the court also pointed out that the indices are not part of the public records. To the trial court, this meant the

2. *Id*.
3. LA. CIV. CODE ANN. art. 3347 (2012).

recording was valid and that the clerk's mistake did not have any adverse effect on the judicial mortgage.

The Fifth Circuit and the Louisiana Supreme Court both disagreed with the district court that this was an indexing error. The Louisiana Supreme Court echoed the circuit court's reasoning by reading Civil Code article 3347 alongside Civil Code article 3338.[4] The Supreme Court held that, while article 3347 describes "when" a document must be recorded, it is article 3338 that addresses "where" a document must be recorded.[5] The Supreme Court held that because the document was listed as "CO" rather than "MO," it had been filed in the conveyance records rather than the mortgage records. And because it was filed in the wrong set of records, it was not properly recorded and did not affect third-parties.

III. COMMENTARY

Among the jurisdictions within the United States, there is a majority and a minority approach regarding how to deal with public records. "The majority view is that a person who files a document . . . is protected if the instrument is delivered to the proper recording official. . . ."[6] Under this approach the filer is legally protected despite any recording errors later – even if the instrument is never actually recorded at all.[7] On the other hand, the minority jurisdictions hold an instrument must be recorded to be effective.[8] Louisiana has historically fallen within the minority camp, and this case further cements Louisiana's position among those jurisdictions.

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4. LA. CIV. CODE ANN. art. 3338 (2012).
5. Wede, 52 So. 3d 60, n.9 at 65.
6. ALEJANDRO M. GARRO, LOUISIANA PUBLIC RECORDS DOCTRINE AND THE CIVIL LAW TRADITION 218–219 (Paul M. Hebert Law Center Publications Institute, Baton Rouge, 1989).
7. *Id*. at 219.
8. *Id*.

For most of Louisiana legal history, the Louisiana law of recordation has lacked "a unified and coherent legislative framework."[9] Indeed, "the statutory provisions specifying . . . when the act of recordation was deemed to be complete contradicted one another."[10] This unruly approach came about largely through accident.[11] "Louisiana law historically has always distinguished between filing and recordation."[12] It also distinguished and treated separately "the recordation of mortgages and that of conveyances."[13] For example, "[c]onveyances were always deemed effective upon filing, even if not recorded, while mortgages were effective only upon recordation."[14] Also, rather than recording all land documents together like most jurisdictions, Louisiana record offices keep a distinct set of records for conveyances and a distinct set of records for mortgages.[15]

Over the past century the legislature made several attempts to remedy these discrepancies.[16] For example, Act 215 of 1910, codified as Louisiana Revised Statute 9:5141, was passed to make mortgages effective against third-parties at the time of filing.[17] This would have brought the way mortgages were deemed to be effective into line with the way conveyances were treated. Even so, this legislative intent was "not recognized by the jurisprudence."[18]

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9. *Id*. at 246.
10. *Id*. at 247.
11. *Id*.
12. Michael H. Rubin & Stephen P. Strohchein, *Security Devices*, 55 LA. L. REV. 611, 615 (1995).
13. GARRO, *supra* note 6, at 245.
14. Rubin & Strohchein, *supra* note 12, at 615.
15. The *Wede* case is rooted in the fact that these distinct sets of records are kept. Although the judgment-creditor's mortgage did indeed get recorded, the problem was that it was incorrectly recorded in an arbitrarily defined set of land records. If nothing else, this case illustrates the folly of keeping separate records for conveyances and mortgages for no reason other than historical accident.
16. GARRO, *supra* note 6, at 276–282 (discussing a thoroughly researched history of these attempts as well as the various outcomes of each attempt).
17. Michael H. Rubin & R. Marshall Grodner, *Security Devices*, 53 LA. L. REV. 969, 1002 (1993); Rubin & Strohchein, *supra* note 12, at 615; GARRO, *supra* note 6, at 279.
18. *Id.*, Rubin & Grodner at 1002.

Instead of ruling that mortgages become effective immediately upon filing, the courts made mortgage instruments effective retroactive to the time of filing only if they were actually placed in the records within a reasonable time after the filing.[19]

This was the state of the law until 1992 when the Louisiana State Law Institute, recognizing the law's haphazard approach to registry, decided to fully systematize and integrate the public records law. This systemization was put into effect by the Louisiana Legislature through Act 652 of 1991 and Act 169 of 2005, which gave rise to Title 22 and Title 22-A respectively, in Book III of the Civil Code. Notably, one of the amendments to the Civil Code that came about through these revisions was article 3347. A plain reading suggested that in all instances a record would become effective against third parties at the time of filing without regard to later errors.[20] For these reasons, this article at first glance appeared to rewrite the recordation law so that Louisiana would join the majority view described above.

While the earlier rule, as noted above, was that an instrument's effectiveness arose retroactive to filing provided that actual recordation later occurred, this new provision's language seemed to put forward rather plainly that any "effect" that comes from "recordation" arises when an instrument is "filed," without regard to any later errors on the part of the recorder. The new article goes on to specify that an instrument is "filed" when the instrument is accepted by the recorder.

Of the three courts that rendered judgment in the *Wede* case only one – the trial court – adopted this "plain meaning" reading of the article. The Louisiana Supreme Court, by contrast, specifically

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19. *Id*.; GARRO, *supra* note 6, at 280 (explaining the now irrelevant constitutional reasons behind this rule); Rubin & Strohchein, *supra* note 12, at 615 (citing Kennibrew v. Tri-Con Prod. Corp., 154 So. 2d 433 (La. 1963) and Opelousas Fin. Co. v. Reddell, 119 So. 770 (La. App. 1929)).

20. Generally this is the tentative rule that was being taught to students by Louisiana law professors since the legislation was passed and at least up until the *Wede* court delivered this decision.

rejected this reading. According to that court, article 3347, rather than answering the question "what must be done in the way of filing and recordation" in its entirety, answers only the "when" part of the question. Alongside this part of the question, the court reasoned, there is also a "where" part. According to the court, the "where" part of the question is answered in article 3338. So, under article 3347 "recordation" occurs when an instrument is "filed," but according to the Louisiana Supreme Court interpretation of article 3338 any recordation is "without effect . . . unless the instrument is registered by recording it in the appropriate mortgage or conveyance records."

But what effect, if any, did the Supreme Court give to the language of article 3347 stating that a recording's effectiveness is "unaffected by subsequent errors or omissions of the recorder?" In a footnote, the court explained that it was unnecessary to describe "what might be included within the complete spectrum" of that phrase.[21] The court did, however, declare that the error of "placing an instrument outside of the mortgage records and into the conveyance records" could not be the kind of error contemplated, because otherwise the article would conflict with article 3338.[22] Justifying this interpretation, the court referred to its jurisprudential rule not to interpret statutes as in conflict with one another but rather to reconcile perceived inconsistencies.

Since the revisions to the Civil Code adding Titles 22 and 22-A, *Wede* has been the only case decided that tells us whether there was effective legislative reform in this area of law. From *Wede* we learn that the change in the Louisiana public records from the minority view to the majority view that some observers believed had been accomplished by legislative revision was illusory. It remains the case that in Louisiana a mortgage instrument must be actually placed in the correct set of records – the mortgage records – to be considered "recorded." Only then is

21. Wede, 52 So. 3d, n.10 at 65.
22. *Id.*

this recordation effective against third parties (albeit retroactively to the original time of filing). This is the same law as Louisiana had before 1992. In this regard, *Wede* informs us that no change has taken place in this crucial element of the Louisiana public records doctrine. The Louisiana Supreme Court reached its result by focusing intently on "where" land records are filed – with the mortgages or conveyances. Louisiana does not need to maintain two separate sets of records. Removing this arbitrary distinction between mortgage records and conveyance records will go a long way toward improving Louisiana public records doctrine.