Louisiana Law Review

Volume 1 | Number 1
November 1938

Community Property - Rights of Heirs of Each Spouse to Acquisition by Wife in a Purported Purchase of Separate Property

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Notes

COMMUNITY PROPERTY—RIGHTS OF HEIRS OF EACH SPOUSE TO ACQUISITION BY WIFE IN A PURPORTED PURCHASE OF SEPARATE PROPERTY—A wife was designated vendee in a conveyance of real estate from her father, and her husband joined her in a recital in the acceptance affidavit that the purchase was "to be separate and paraphernal property." When she died, leaving neither ascendants nor descendants, her surviving husband was recognized as her sole heir. Upon his death the property descended to the present defendants, who are his children by a prior marriage. The wife's heirs, her brothers, sisters, nephew and nieces, bring this action, alleging that the property was part of her separate estate to which they are entitled. *Held:* (1) that the defendants, being forced heirs of the husband, are not bound by his estoppel, and plaintiffs have not succeeded in rebutting the presumption that the property was part of the community; and (2) that plaintiffs may not adduce parol evidence to show that the purported sale was actually a disguised donation. *Drewett v. Carnahan,* 183 So. 103 (La. App. 1938).[1]

The doctrine of estoppel when the husband has joined his wife in a recital that property bought in her name is to be part of her separate estate has a long history in Louisiana jurisprudence. The husband himself is clearly estopped;[2] similarly the husband's devisees, legatees, and "simple heirs" are debarred, since they stand in his shoes and cannot claim as his that which he declared or admitted was another's.[3] It is equally well settled that creditors of the husband are not estopped.[4] Difficulty arose in determining the rights of forced heirs, and prior to 1876 there were conflicting lines of authority on such rights.[5] In that year *Kerwin v. Hibernia Ins. Co.* made its first appearance before the supreme

1. A number of other problems are presented in this decision, but the present discussion is limited to the points indicated.

2. Maguire v. Maguire, 40 La. Ann. 579, 4 So. 492 (1888); Succession of Bellande, 42 La. Ann. 241, 7 So. 535 (1890).

3. Kerwin v. Hibernia Ins. Co., 35 La. Ann. 33 (1883); Drumm v. Kleinman, 31 La. Ann. 124 (1879); Brown v. Stroud, 34 La. Ann. 374 (1882).

4. Gogreve v. Dehon, 41 La. Ann. 244, 6 So. 31 (1889).

5. On the one hand there is the policy of protecting titles and of preventing attacks by children on the acts of their parents. Boone & Cockerham v. Carroll, 35 La. Ann. 281, 284 (1883). And on the other, the policy of protecting the rights of forced heirs and preventing any change in the rights of succession or in the character of separate and community property. Kerwin v. Hibernia Ins. Co., 28 La. Ann. 312, 315 (1876).

court, which said that "the heirs of the husband are not estopped from questioning it [the transaction] as they might be if the acknowledgment was in favor of any one other than his wife."[6] A different rule was adopted, however, when the *Kerwin* case made its third appearance before the court, in 1883; the rule laid down in the earlier decision was termed "obiter" and specifically repudiated[7], and the right of attack granted to forced heirs was limited to the protection of their légitime. Thus if the heir had already secured his forced portion, he had no action.[8] In the following year the legislature amended Article 2239 of the Civil Code[9], extending to forced heirs all the rights of creditors to attack simulated sales, and specifically adding that the attack by such heirs is not limited to their légitime.[10]

In the instant case, the heirs of the husband are relieved of the burden of proof by the presumption that anything acquired by either spouse during the marriage is community property, despite contrary recital in the acceptance affidavit.[11] The same presumption exists in favor of the husband's creditors in the analogous situation.[12] It is then incumbent upon the party alleging the separate character of the property to establish "(1) The paraphernality of the funds; (2) the administration thereof separately and apart from her husband; and (3) investment by her."[13] The plaintiffs in the instant case failed to carry this burden.

The present court's decision on this point is amply justified by prior cases,[14] but the policy of this jurisprudence is questionable. If the property was actually a donation to the wife from her father, disguised as a sale to prevent its being kept out of commerce during his lifetime,[15] the inequity is obvious: A father

6. Kerwin v. Hibernia Ins. Co., 28 La. Ann. 312, 314-315 (1876).

7. Kerwin v. Hibernia Ins. Co., 35 La. Ann. 33, 36 (1883).

8. Westmore v. Harz, 111 La. 305, 35 So. 578 (1904).

9. La. Act 5 of 1884, amending and re-enacting Art. 2239, La. Civil Code of 1870.

10. Westmore v. Harz, 111 La. 305, 35 So. 578 (1904); Bauman v. Pennywell, 164 La. 888, 114 So. 723 (1927).

11. Arts. 2402, 2405, La. Civil Code of 1870. Houghton v. Hall, 177 La. 237, 148 So. 37 (1933). Daggett, The Community Property System of Louisiana (1931) 84, 138-139 (also found in (1929) 4 Tulane L. Rev. 27, 40).

12. Gogreve v. Dehon, 41 La. Ann. 244, 6 So. 31 (1889).

13. Houghton v. Hall, 177 La. 237, 244, 148 So. 37, 39 (1933).

14. Particularly Westmore v. Harz, 111 La. 305, 35 So. 578 (1904); and Gogreve v. Dehon, 41 La. Ann. 244, 6 So. 31 (1889).

15. The dangers of purchasing donated property during the lifetime of the donor, aptly illustrated in Guidry v. Caire, 181 La. 895, 160 So. 622 (1935), render it extremely difficult to secure a purchaser, or a lender willing to accept such property in mortgage. Cf. Kirby v. Kirby, 176 La. 1037, 147 So. 70 (1933).

makes a disguised, but not fraudulent, inter vivos gift to his married daughter and takes the precaution to have her husband join in the acceptance affidavit and recital that the property is to be a part of the wife's separate estate. The intent of the donor, of the donee, and of the husband is manifest; yet after the death of the principal parties the precautions are ineffective against the husband's forced heirs. Even though the latter are strangers to the successions of donor and donee alike, the property is vested in them by a presumption of law which can be rebutted by the heirs of the donee only through the satisfactory discharge of an almost impossible burden of proof.

The amendment to Article 2239 has been considered largely declaratory of the existing jurisprudence, except that the heirs are no longer confined to their légitime.[16] This extension imposes a severe penalty on any ancestor who may wish to transfer his disposable portion by what is actually a donation inter vivos, concealed as a sale in order that the subject of the donation may not be kept out of commerce during his remaining years.[17] His own forced heirs may always attack a direct simulated sale and return the entire property to the succession.[18] The ancestor thus has no option, but must make his inter vivos disposal in the form of a donation and as a specific extra portion; and consequently the property cannot safely be sold or hypothecated until the donor's death. Under the doctrine propounded in the final decision of the *Kerwin* case[19] the rights of forced heirs to their légitime were adequately protected, yet the ancestor's freedom of disposition beyond that portion was unimpaired. The legislative change therefore seems undesirable.

Article 2239, as amended, seems to contemplate an active *attack* by the heirs who allege the simulation and who therefore have the burden of proving it. It is doubtful whether the legislature considered the undesirable consequences which would result when this right was combined with the general presumption of community property. The power of attack by parol evidence clearly does not extend to situations in which the ancestor bought

16. Eberle v. Eberle, 161 La. 313, 319, 108 So. 549, 551 (1926).

17. See note 15, supra.

18. He can protect title in his donee-heir by buying in the donee's name from a third person, but even then the other forced heirs can require collation of the purchase price under Article 1248; and he cannot protect the property itself from the forced heirs of the donee's husband, if the donee be a married woman.

19. 35 La. Ann. 33 (1883).

property in the name of a third party, because his heir may not by such means show title in him when it does not appear that the property ever "belonged to his ancestor by some title recognized by law."[20] However, because of the presumption that all purchases during the marriage are community property,[21] the heirs of the community do not fall under this ban when they allege that the community was actual vendee of property purchased in the name of the wife.[22] When the ancestor actually supplied the price, there can be no quarrel with the result attained. Indeed, the right of attack might well be extended to include such simulations, whoever the named vendee may be, in order to close an obvious loophole by which creditors and forced heirs may be defrauded of their rights.[23] But relieving the heirs of the burden of proof invokes inequitable results when the wife is actually beneficiary of a disguised donation from anyone other than her husband.

The inequity suggested in the instant case might have been avoided if the plaintiffs had attacked the simulated sale by their father to their sister, to have the transaction set aside and the property revert to their father's estate.[24] Since the vendee in the simulated sale was one of the vendor's children, the situation falls squarely under Article 2444;[25] and actions by forced heirs under this article seem never to have been limited to the légitime.[26] The plaintiffs here, however, sued as legal heirs of their sister, claiming under her, and since they are not her *forced* heirs, they have no right under either Article 2239 or Article 2444. They first attempted to claim the property as their sister's by virtue of a valid sale, and when the presumption of community property combined with the lack of an estoppel against the de-

20. Eberle v. Eberle, 161 La. 313, 108 So. 549 (1926), following Barbin v. Gaspard, 15 La. Ann. 539 (1860).

21. Article 2402, La. Civil Code of 1870.

22. The same applies to creditors of the community. Gogreve v. Dehon, 41 La. Ann. 244, 6 So. 31 (1889).

23. The rights of third parties, who have bought in good faith through reliance on the public records, being protected as in other attacks under Article 2239 (as amended). Cf. Weydert v. Anderson, 157 La. 577, 102 So. 676 (1925).

24. Succession of Bauman, 167 La. 293, 119 So. 54 (1928). Cf. the language of the court in Dupuy v. Dupont, 11 La. Ann. 226, 228 (1856): "The District Judge decreed that the sale should be set aside, and the property declared to belong to the succession of Antoine Dupuy. It would have been more formal to have declared the sale a disguised donation to the daughter, and decreed that she should collate the property in a partition to be made hereafter among the heirs of Dupuy."

25. Article 2444, La. Civil Code of 1870.

26. Dupuy v. Dupont, 11 La. Ann. 226 (1856).

fendants to confound that contention, they attempted to show by parol evidence that the transaction was actually a disguised donation. The refusal of the court of appeal to admit such evidence is justified by the case of *Whittington v. Heirs of Pegues*,[27] in which plaintiffs, holding title by purchase from Mrs. Pegues to property which she had secured from her mother in a purported sale, were denied the right to show by parol evidence, in defense of an attack by the children of the vendor, that the former sale was actually a disguised donation.[28] The *Whittington* case, in turn, is based on *Loranger v. Citizens' National Bank*.[29] The ruling is justified in the *Loranger* case because it was a purported sale from husband to wife, which is prohibited under the laws of Louisiana; but the broad rule against parol evidence therein laid down was carried over to the *Whittington* case, where (as in *Drewett v. Carnahan*) it was used *against* those whom it was intended to protect—the parties who would profit by absolute maintenance of the written contract.

The fact that the plaintiffs in the principal case could have availed themselves of an alternative attack does not mean that all such injustices can be so solved. This solution is obviously possible only when the donee's heirs are also *forced* heirs of the donor. Thus if a wife's uncle makes a disguised donation in her favor, her heirs have no recourse when the property is treated as community property and seized by the forced heirs of her husband—unless they are permitted the right, specifically denied them under *Whittington v. Heirs of Pegues,* to show by parol evidence that the purported sale was actually a donation and thus a part of the wife's separate estate.[30] Therefore, it seems advisable that the donee's heirs should be given that right; that the forced heirs' attack be limited to the légitime, except where the policy of equality among forced heirs is involved;[31] and that this right be

27. 165 La. 151, 115 So. 441 (1928).

28. After the decision was handed down the plaintiffs accepted unconditionally the estate of their mother, warrantor of the title. Therefore the case was remanded on rehearing.

29. 162 La. 1054, 111 So. 418 (1927).

30. Article 2334, La. Civil Code of 1870. Even heirs of the donee who are forced heirs of the donor may suffer under this rule when the donor has purchased from a third person in the name of the donee. Their only recourse is to secure collation of the purchase price, although the property may have enhanced greatly in value, as by discovery of oil. See note 18, supra. In many instances the gift of money cannot be established, though the circumstances of the sale could be, so the heirs cannot force the collation. Cf. Eberle v. Eberle, 161 La. 313, 108 So. 549 (1926).

31. This could be effected by the repeal of La. Act 5 of 1884 and the reestablishment of the jurisprudence of Kerwin v. Hibernia Ins. Co., 35 La.

extended to permit attack on the property itself in those situations wherein the ancestor accomplishes his simulation by buying from a third party in the name of his donee (the rights of subsequent purchasers always being protected). Such sweeping changes could not be accomplished without action of the legislature, but their need is indicated by the possible injustices revealed in *Drewett v. Carnahan.*

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CONSTITUTIONAL LAW—DUE PROCESS—FIXING OF MINIMUM PRICES IN BARBERING BUSINESS—Act 48 of 1936 grants the Board of Barber Examiners[1] the power to fix in each Judicial District the minimum prices which may be charged by the barbers of that district. The official prices are to be ascertained from price agreements submitted to the Board by a group of at least three-fourths of the barbers in each district. The purpose of the act is declared in section 1 to be to "protect the public welfare, public health and public safety." The orders of the Board are given the force and effect of law and their violation is made a criminal offense. The defendant Parker charged less than the minimum price set for his district and his license was suspended for six months by order of the Board. He disregarded this order. Thereupon, suit was instituted to enjoin him from conducting his barbershop.[2] The defendant contended that Act 48 of 1936 violates the due process clauses of both the Federal and the State Constitutions. *Held,* on rehearing, with two justices dissenting, that Act 48 of 1936 is a proper exercise of the police power of the state. *Board of Barber Examiners v. Parker,* 182 So. 485 (La. 1938).

It is a truism of constitutional law that the police power of the state enables it, with certain limitations,[3] to regulate private business in order to protect the public health, safety, morals and general welfare.[4] And it was early held by the United States

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Ann. 33 (1883). The equality among forced heirs is protected by Art. 2444, La. Civil Code of 1870.

1. The Board of Barber Examiners was created by Act 247 of 1928, § 20, as amended by Act 126 of 1932, § 1 [Dart's Stats. (1932) § 9386].

2. A criminal proceeding, State of Louisiana v. Guchereau, 182 So. 515 (La. 1938), having substantially the same facts, was consolidated with this action on the rehearing and the cases were argued together.

3. Voight v. Wright, 141 U.S. 62, 11 S.Ct. 855, 35 L.Ed. 638 (1891); Bailey v. People, 190 Ill. 28, 60 N.E. 98 (1901); People v. Murphy, 195 N.Y. 126, 88 N.E. 17 (1909); State v. Clausen, 65 Wash. 156, 117 Pac. 1101 (1911).

4. Slaughter House Cases, 83 U.S. 36, 21 L.Ed. 394 (1873); Chicago B. & Q.