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instant case is clearly consistent with both French and common law principles and appears to be a commendable addition to the Louisiana jurisprudence.

William Shelby McKenzie

THE PUBLIC RECORDS DOCTRINE, LIS PENDENS, AND CIVIL
CODE ARTICLE 150

Plaintiff filed suit for separation from bed and board against her husband and obtained a preliminary injunction prohibiting him from alienating community property. Neither the suit nor the injunction was recorded in the mortgage or conveyance records of the parish where the community immovables were located. Over a year later, the husband sold a lot belonging to the community to a third person who had no actual knowledge of the pending suit or of the injunction. Plaintiff sued to annul the sale. The trial court dismissed on the ground that the public records doctrine protected the third party purchaser. On appeal to the Fourth Circuit Court of Appeal, *held*, affirmed. A wife cannot annul a sale of community property by the husband to one who purchased in good faith, where notices of a pending action for separation from bed and board and an injunction against alienation of community property were not recorded in the mortgage or conveyance records. *Shapiro v. Bryan*, 132 So.2d 97 (La. App. 4th Cir. 1961).

Article 2266¹ of the Civil Code provides that unrecorded sales, contracts and judgments shall be utterly null and void with respect to third party transferees. The Louisiana Supreme Court in

by the court in the instant case as cases where "the court concluded that there had been no suitable consideration given or obligation incurred by the lessee for the right to 'tie up' the lessor's property for the term of the lease." *Long v. Foster & Associates*, 136 So.2d 48, 54 (La. 1961). When the holding in the instant case is viewed in the light of the mineral lease cases, it appears that the court may require, in enforcing a contract containing a conditional promise, some assurance that a party appreciated the fact that he was binding himself in return for a conditional promise and seriously intended to be so bound. In the instant case the facts afford no basis for believing that there was anything but a serious and true intent on the part of the employer to bind himself as he did. The employer was at least in an equal bargaining position with the employee. If the termination clause were exercised, it also ended the obligations of the employer with respect to the employee. It seems evident that the power of cancellation was simply an inducement for the employee to undertake the employment.

1. LA. CIVIL CODE art. 2266 (1870): "All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording."

McDuffie v. Walker,² in which the public records doctrine is generally said to have originated, interpreted this article literally, adding that an unrecorded sale, contract, or judgment has no effect on the title of a third party transferee in the absence of recordation, even if he has actual knowledge of the unrecorded claim.³ The Revised Statutes⁴ extend the public records doctrine to any "sale, contract, counter letter, lien, mortgage, judgment, surface lease, oil, gas or mineral lease, or other instrument or writing relating to or affecting immovable property." Thus, the public records doctrine, as founded on Article 2266 and elucidated by *McDuffie v. Walker*, requires the recordation of a claim against the immovable in order for it to affect third parties, irrespective of their actual knowledge of the claim.⁵

Article 2453 of the Civil Code provides that the mere filing of a suit affecting title to an immovable charges third persons not parties to the suit with notice of a demand which might affect title to the immovable.⁶ However, Louisiana Act 22 of 1904⁷ requires that a notice of *lis pendens*, i.e., notice of the pend-

2. 125 La. 152, 51 So. 100 (1910). The plaintiff claimed title to property under deed dated and recorded in 1907, acquired by him with knowledge of the prior sale of the property to defendant in 1899, which was not recorded until 1908. The court declared the plaintiff the lawful owner of the parcel holding that unrecorded sales have no effect on third persons.

3. See *Ewald v. Hodges*, 239 La. 883, 120 So.2d 465 (1960); *Gulf Refining Co. v. Bagby*, 200 La. 258, 7 So.2d 903 (1942); *Westwego Canal & Terminal Co. v. Pizanie*, 174 La. 1068, 142 So. 691 (1932); *Louisiana Land & Pecan Co. v. Gulf Lbr. Co.*, 134 La. 787, 64 So. 713 (1914); *Washington v. Filer*, 127 La. 862, 54 So. 128 (1911); *Riggs Cypress Co. v. Albert Hanson Lbr. Co.*, 127 La. 450, 53 So. 700 (1910); *Graham v. Murphy*, 126 La. 210, 52 So. 277 (1910).

4. LA. R.S. 9:2721 (1950): "No sale, contract . . . mortgage, judgment . . . or other instrument relating to or affecting immovable property shall be binding on or affect third parties unless and until filed for registry in the office of the parish recorder of the parish where the immovable is situated. Neither secret claims, nor equities, nor other matters outside the public records shall be binding on or affect such third parties."

5. The purpose of the doctrine is to establish a dependable and functional method by which a prospective purchaser can ascertain the validity of the title to real estate on the strength of the record alone without any time-consuming search for unrecorded rights or hidden equities. See *Blevins v. Manufacturers' Record Publishing Co.*, 235 La. 708, 105 So.2d 392 (1957); *Watson v. Bethany*, 209 La. 989, 26 So.2d 12 (1946); *Schneidau v. New Orleans Land Co.*, 132 La. 264, 61 So. 225 (1913): See Comments, 14 TUL. L. REV. 16 (1940), 12 TUL. L. REV. 308 (1938).

6. LA. CIVIL CODE art. 2453 (1870): "The thing claimed as the property of the claimant can not be alienated pending the action, so as to prejudice his right. If judgment be rendered for him, the sales is considered as a sale of another's property, and does not prevent him from being put in possession by virtue of such judgment." See *Lacassagne v. Shapuis*, 144 U.S. 199 (1892); *Wells v. Blackman*, 117 La. 359, 41 So. 648 (1906).

7. La. Acts 1904, No. 22, incorporated as LA. R.S. 13:3541 (1950) provides: "The pendency of an action in any court, state or federal, in the state affecting the title, or asserting a mortgage or lien upon immovable property, shall not be considered or construed as notice to third persons not parties to such suit, unless a

ing action affecting immovable property, be recorded in the mortgage or conveyance records in order to affect third parties. In *Soniat v. Whitmer*⁸ the court upheld title of a vendee who purchased during the pendency of a suit less where notice of *lis pendens* was not properly recorded, even though the vendee had actual knowledge that the suit was pending.⁹ Though a subsequent decision cast doubt on the latter holding,¹⁰ Article 3751 of the Louisiana Code of Civil Procedure,¹¹ supplanting Act 22 of 1904, adopts the *Soniat* position.¹²

The public records doctrine applies to claims against immovables which arise out of contractual and judicial action. However, it does not apply to rights arising by "operation of law," such as rights of heirship,¹³ rights in community prop-

notice of pendency of such action shall have been made, filed or registered, in compliance with R.S. 13:3541-13:3543 [the articles setting forth the mechanics of recordation]."

8. 141 La. 235, 74 So. 916 (1917). Here, a third party purchaser sued to enjoin defendant from seizing property bought by third party during litigation in which defendant was successful in contest with plaintiffs' vendor over title. In keeping with *McDuffie v. Walker* the court held that even if the third party knew of the litigation, the notice of *lis pendens* must be recorded to affect him legally.

9. Thus, regarding the effect of actual knowledge of the claim on the part of the third person had actual knowledge of the litigation there was no reason to as is found in the area of the public records doctrine.

10. *Richardson Oil Co. v. Herndon*, 157 La. 211, 216, 102 So. 310, 312 (1924). In determining whether an assignee, who, in "consideration" of the assignment, had agreed to obtain the dismissal of a pending suit, had bought at his peril and risk even though no notice of *lis pendens* was filed, the court held that when the third person had actual knowledge of the litigation there was no reason to resort to "constructive knowledge," i.e., notice by recordation under La. Acts 1904, No. 22. It has been suggested that the *lis pendens* statute applies only to cases where constructive notice is necessary, and that Article 2453 is still applicable in cases of actual notice, even against third persons. See Comment, 12 TUL. L. REV. 318 (1938).

The decision in the *Richardson* case may stand for the proposition that the assignee was a party to the litigation, thus making the statute inoperative by its own terms, as the *lis pendens* statute requires recordation only for the pending suit to affect persons not parties to the litigation. Parties to the litigation have actual knowledge and are unaffected by non-recordation. If such an interpretation is valid, this case does not relate to the *McDuffie* rule concerning persons not parties to the transactions, nor to the *Soniat* case concerning persons not parties to the pending suit.

11. LA. CODE OF CIVIL PROCEDURE art. 3751 (1960): "The pendency of an action or proceeding in any court, state or federal, in this state affecting the title to, or asserting a mortgage or privilege on, immovable property does not constitute notice to a third person not a party thereto unless a notice of the pendency of the action or proceeding is made, and filed or recorded, as required by article 3752."

12. *Id.* Comment (b): "This article is declaratory of the rule of *Soniat v. Whitmer* . . . and is intended to overrule legislatively the contrary decision in *Richardson Oil Co. v. Herndon*." However, the statute is similar in language to the *lis pendens* statute which was distinguished by *Richardson*, and it cannot be said definitely that a similar interpretation of the new article is impossible, although the comment makes this unlikely.

13. Legal heirs are vested by operation of law with their proper share of

erty,¹⁴ and certain privileges,¹⁵ all effective against third persons

inheritances. Even though the purchaser relies on a judgment placing the vendor in possession of property belonging to these heirs and not to the seller, he will not be protected, though there is nothing in the record to give notice of the right of the heirs. In *Long v. Chailan*, 187 La. 507, 175 So. 42 (1937), defendant, a purchaser of land seized and sold to settle debts of Mr. Long after the death of Mrs. Long, contended that the rule of *McDuffie v. Walker* protects the purchaser against the unrecorded claims of the heirs of Mrs. Long. The court declared that "article 2266 of the Civil Code, or the doctrine of *McDuffie v. Walker*, is not to be construed so as to defeat the right of heirs who inherit from their mother her half interest in the community property." *Id.* at 522, 175 So. at 48. In *Chachere v. Superior Oil Co.*, 192 La. 193, 187 So. 321 (1939) plaintiff heirs attempted to introduce parol evidence that the sale of property to a co-heir by their father was a simulation, after the vendee heir had sold to a third person who had relied on the records which did not indicate that his vendor was heir of the original vendor. The court held that after the property has passed into the hands of third persons, evidence to vary the public records cannot be introduced. In this fact situation, the rights of the purchaser who relied on the public records were superior to those of the forced heir. In *Thompson v. Thompson*, 211 La. 486, 30 So.2d 321 (1947), where the heirs of deceased father attempted to have a sale by him to a co-heir declared a simulation in defraud of their rights, and the co-heir had granted an option contract to third person to purchase the property, the court protected the rights of the heirs to the property. However, it was noted in the dicta that had the option been acted upon and the sale completed, the heirs would have been estopped from asserting their claim.

14. Upon dissolution of the community by death of one of the spouses, the heirs of the deceased are vested by operation of law with his half of the community, with the surviving spouse retaining authority over her half. In *Succession of James*, 147 La. 944, 86 So. 403 (1920) the public records showed the mortgagee to be a *femme sole*, when in fact she was married and property was community property. The court held that the rights of the husband prevailed and that the mortgagee was not protected by the public record doctrine. In the case of *Humphreys v. Royal*, 215 La. 567, 41 So.2d 220 (1949), the defendant purchased land by act of sale which stipulated vendor was a "single man," though he was married at the time he bought the land, but had been subsequently divorced, having failed to record the divorce judgment. In upholding the defendant's rights against that of a purchaser of the wife's community half, the court declared that the unrecorded divorce judgment is null and void so far as its affecting immovable property purchased by third parties who rely on the public record. The resulting law seems to be that where the vendee is a man he is presumed to be able to transfer title to the property regardless of his marital status, as the man is head and master of the community and may alienate the community property without consent of the wife. However, as the wife has no such authority, it devolves upon the third person to ascertain the true marital status of the female vendor. The public records doctrine will not protect the good faith purchaser from the community property rights of the other spouse when the vendor is female. See *Daggett, Policy Questions on Marital Property Law in Louisiana*, 14 LOUISIANA LAW REVIEW 528 (1953); Comment, 11 TUL. L. REV. 389 (1937).

15. To be effective against third person, liens and privileges generally require recordation according to the form prescribed in LA. CIVIL CODE art. 3274 (1870). However, certain privileges are by law effective without recordation. For example, privileges for expenses of a last illness arising upon the death of the owner and privileges for taxes are valid against third persons without recordation. LA. CONST. art. XIX, § 19. Funeral charges, and law charges for settling succession, and the right of the widow or minor heirs of the deceased to a thousand dollar statutory allowance, need not be recorded to be effective. LA. CIVIL CODE art. 3276 (1870). Material men and laborers have a claim effective for a certain length of time without recordation. LA. R.S. 9:4801 (1950). As a consequence the purchaser of immovables may be required to pay secret liens to acquire title even though the records showed no outstanding equities. *Washington v. Washington*, 116 So.2d 125 (La. App. 1st Cir. 1960).

without recordation as there are no documents necessary to establish the right.¹⁶

Article 150 of the Civil Code¹⁷ provides that the husband may not alienate community immovables after the filing of a suit for separation from bed and board "if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife." Prior to the instant case, Article 150 had not been construed in a judicial decision. However, the French commentators, Aubry and Rau, suggested that a similar French article is applicable only when both the vendee and the vendor conspire to defraud the wife of her community property.¹⁸

16. Those cases where faith in the records alone does not protect the purchaser, relying upon the public records are said to be those where property vests by operation of law. *Bishop v. Copeland*, 222 La. 284, 62 So.2d 486 (1952). Some courts and writers envision the concept underlying public registry requirements as a broad general principle and treat these areas as exceptions to that principle. See *Vell v. Canal Bank & Trust Co.*, 193 La. 142, 190 So. 359 (1939); *Cole v. Richmond*, 156 La. 262, 100 So. 419 (1924); *Hodgeson v. McDaniel*, 233 La. 180, 96 So.2d 481 (1957); *Comments*, 19 LOUISIANA LAW REVIEW 548 (1957), 12 LOUISIANA LAW REVIEW 511 (1952), 24 TUL. L. REV. 375 (1950). However, this view finds no basis in the legislation or the majority of the jurisprudence.

To call these areas "exceptions" to the public records doctrine, the doctrine must be sufficiently extensive to include the areas of forced heirship and community property within the requirement of recordation. Any doctrine which would apparently include those types of rights must be one which holds that *all* outstanding claims must be recorded to be effective against third persons, and the fact that they may be rights created by operation of law is immaterial.

However, the leading cases which purportedly established these "exceptions" give no such broad interpretation to the *McDuffie* doctrine. In *Chachere v. Superior Oil Co.*, 192 La. 193, 187 So. 321 (1939), the court declared: "The doctrine of *McDuffie v. Walker* . . . has no reference to an unrecorded title acquired by inheritance." *Id.* at 199, 187 So. at 322. In *Succession of James*, 147 La. 944, 86 So. 403 (1920), the court held that the community property rights of a spouse are not within the ambit of applicability of the public records doctrine.

The court did not speak of these areas of law as exceptions, but rather areas of law to which the laws of registry are not applicable. It seems the court's continual references to these areas as exceptions is not intended to enlarge the ambit of the public records doctrine beyond that defined in the text, but the use of such terminology is merely a convenient label.

17. LA. CIVIL CODE art. 150 (1870): "From the day on which the action of separation shall be brought, it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time, shall be null, if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife." (Emphasis added.)

18. Article 150 is derived from French Civil Code Article 271: "Any obligation contracted by the husband on account of the community, and any alienation by him of the immovables belonging to it, after the date of the order mentioned in Article 238, shall be declared null, if it is afterwards proved that it was made or contracted in fraud of the rights of the wife." (Trans. Louisiana Legal Archives 1938). 5 AUBRY ET RAU, COURS DE DROIT CIVIL FRANCAISE 204, § 494 (4th ed. 1872) indicates that contracts entered into by the husband after the filing of a suit for separation from bed and board may be annulled under Article 271 only "when they have been contracted or made in fraud of the rights of the

In the instant case, plaintiff wife sought to annul the sale executed during pendency of her suit for separation from bed and board under Article 150 of the Louisiana Civil Code on the ground that the sale was in fraud of her community property rights. The court found that the vendee had no actual knowledge of the suit and was himself innocent of any fraudulent intent. The court pointed out that the public records did not reveal the pending suit, although the wife could easily have protected her interests by recording notice of the pending action. The opinion reveals that the court did not choose to ground its holding exclusively on Article 150, but arrived at its conclusion after a general examination of the public records doctrine in conjunction with Article 150. However, it appears that the decision could have been reached by applying either Article 150 or the public records doctrine alone, or by applying the rules of *lis pendens*.

Under the public records doctrine the injunction must have been recorded to affect third parties. No such recordation was made, so the third party was free to purchase.¹⁹ Similarly, the *lis pendens* statutes require recordation of the pending suit in order for it to convey legal notice to third parties. As there was no recordation of the separation suit, the third party purchaser was unaffected by the outcome of the litigation.

The essential elements of Article 150 are the filing of the suit for separation from bed and board, which gives rise to the right of the wife, and the necessity that the alienation of community property be with the fraudulent view of injuring the rights of the wife in the community. The court approved of the Aubry and Rau position that fraud is present only where there is conspiracy on the part of both the husband and the third party transferee. However, it is arguable that fraud only on the part of the husband should suffice. Certainly the article itself makes no specific mention of the transferee and seemingly the phrase "fraudulent view" refers only to the action of the husband. To

wife, and if the third parties with whom the husband has dealt have been accomplices of the fraud."

19. Disobedience of an injunction subjects the offender to contempt of court charges, and allows for rescission of what was done in violation of the injunction. LA. CODE OF CIVIL PROCEDURE art. 3611 (1960): "Disobedience of or resistance to . . . a preliminary or final injunction is punishable as a contempt of court. The court may cause to be undone or destroyed whatever may be done in violation of an injunction, and the person aggrieved thereby may recover the damages sustained as a result of the violation." The effect of such a provision on the public records doctrine, and its application to Article 150, are beyond the scope of this Note.

this problem is added the question of the effect of the *lis pendens* statute, Act 22 of 1904, on the right arising under Article 150. It may be argued that the act did not affect the right accorded the wife by Article 150, since it is akin to community property rights which arise by operation of law and do not need to be recorded in order to be effective.²⁰ Further, one who fraudulently conspires to deprive another of immovable property may not avail himself of the public records doctrine.²¹ However, it may be asserted that recordation is required. The right arising under Article 150 is dependent upon the filing of the suit. As the filing of the suit is now generally ineffective notice to third persons of the pending action without recordation, one may argue that the *lis pendens* statute modified Article 150 in the same manner as it changed Article 2453. In view of the foregoing, it is submitted that Article 150 may be applicable in one of the four following situations: (1) both the husband and the third person conspire to defraud, and there is no need of recordation for the right to be effective; (2) fraud is required on the part of both parties, but recordation is required in order for the wife to attack the fraud; (3) fraud is required only on the part of the husband, and recordation is required; (4) fraud is required only on the part of the husband, but no recordation is required. In the context of the public records doctrine and the *lis pendens* statute, any one of these four positions could be supported by the language of Article 150. It is suggested that the courts should attempt to select the interpretation of the article which would accord with the most desirable practical result.

The first interpretation gives no meaning to Article 150, as the sale could be rescinded because of the fraud regardless of the application of Article 150. The second seems equally unsatisfactory for the reason that Louisiana jurisprudence does not apply the laws of registry when fraudulent transfers are involved. The third interpretation would again give no effect to the article, for upon recordation of the suit, the *lis pendens* statute would provide protection for the wife even if the husband were not

20. The general rule seems to be expressed in *Bishop v. Copeland*, 222 La. 284, 292, 62 So.2d 486, 488 (1952): "[T]he law of registry . . . is not applicable when . . . a claim affecting the immovable has become vested in claimant by mere operation of law."

21. As held in *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1910), fraud cuts down all things. Where fraud is alleged and proved, failure to record is immaterial to the rescission of the sale, contract, or judgment, or to the recovery of damages.

attempting to defraud her. The fourth interpretation would provide the only solution giving the article vitality, in that it would protect the rights of the wife in the community property, even against innocent third party transferees, if the alienation by the husband were made with the intent to defraud her. This result would obtain neither under the law of registry nor under an action to rescind an agreement on the grounds of fraudulent conspiracy.

Whether such an interpretation is desirable requires a brief examination of the policy considerations involved. Generally, unrecorded rights in the community are protected against alienation, even to innocent third parties, as the importance of maintaining community rights seems to outweigh the importance of protecting the titles of transferees. Such a view would necessarily underlie the fourth interpretation of the article. However, it is nonetheless important that, where possible, innocent vendees should be unaffected by secret equities affecting title to the immovable. In view of the fact that the wife in the instant case could have easily protected herself by merely recording the suit or injunction, and from the fact that the right arising under Article 150 may be distinguished from other community property rights which generally arise without judicial proceedings, in that this right arises only upon filing of the suit, it is submitted that the innocent vendee should have been protected.²² Such a view, of course, would lend no vitality to Article 150, as previously indicated. It is submitted that such a construction is in accord with the general purpose of the *lis pendens* statute, which has been held to have modified Article 2453 to the extent that the filing of suit, generally, is insufficient notice of a claim against immovable property. It would seem that the *lis pendens* statute would afford adequate protection for the wife without further encroaching upon the laws of registry.

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22. This situation may be analogous to that in *Humphreys v. Royal*, 215 La. 567, 41 So.2d 220 (1949), where the court held that the public records protected the innocent third party purchaser against the community property rights of the wife because she could have protected herself by the recordation of an available divorce judgment. It seems that where some documentary evidence is available to establish the right, failure to record such document prevents the rights arising therefrom from being effective against third persons, even though where no such document is available the right may be effective against innocent third persons regardless of the registry laws.