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Adoption - Requirement of Recordation

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were unreasonable, it is difficult to ascertain whether the court gave *great* weight, *some* weight, or *no* weight to the consideration that the orders prevented enforcement of the rate-fixing agreement. Since the court clearly asserted that the Commission was not bound by the agreement before it declared that the contractual obligation had been impaired by the orders, it is suggested that *no* weight was given this consideration.

While the court stated that the instant case was not a true rate case but one dealing with the impairment of the obligation of contract, it is submitted that the case was decided on the misuse of state police power in fixing unreasonable rates. The court evidently concluded that the Commission was acting within its granted powers in ordering modification of rates, but that in this instance the police power was exercised unreasonably because it forced the water company to operate at a loss.[17] The language in the decision pertaining to impairment of the obligation of contract was unnecessary because the court recognized that a contractual obligation is not a restraint on the exercise of state police power. The result could have been obtained by relying solely on rate regulation principles. Further, it is conceivable that the language pertaining to the impairment of the obligation of contract could lead to the erroneous conclusion that municipal agreements on utility rates can restrict the Commission's rate-fixing power. Manifestly, such a conclusion is inconsistent with the well-settled principle that the sole limitation on the Commission's rate-fixing power is that it must be exercised in a just and reasonable manner.

Raleigh Newman

ADOPTION — REQUIREMENT OF RECORDATION

A succession proceeding raised the issue of validity of an adoption of a major by the deceased, where the act of adoption had not been properly recorded prior to the death of the adoptor. The parties had executed a notarial act in compliance with the statutory provisions but failed to record the instrument im-

17. It is suggested that the actual basis for the decision was that the water company needed $28,500.00 additional annual revenue to pay for the added facilities and the Commission's actions caused it to operate at an annual deficit of $13,500.00.

mediately. It was recorded a year later in the parish where the parties were domiciled, but not until two weeks after the adoptor's death was it properly recorded in the parish where it was executed. *Held,* the adoption of a major by a notarial act not recorded as the statute requires, in the parish of execution, before the adoptor's death is invalid. *Succession of D'Asaro,* 167 So.2d. 391 (La. App. 4th Cir. 1964).

The primary consideration in this case is the proper interpretation and application of the statute which provides in part:

> "Any person above the age of twenty years may adopt any person over the age of seventeen years according to the following conditions, limitations and procedure:
>
> "(1) That the adoption shall be *effected* by the execution of a notarial act signed by the adoptive parent or parents and the person to be adopted. . . .
>
> "(2) That the notarial act executed in accordance with paragraph (1) of this Section shall be registered with the clerk of court of the parish in which the act is executed."[1] (Emphasis added.)

It was argued that "effected" as used in the statute recognized that the adoption was legally completed when the notarial act was duly executed and that the last paragraph was a non-essential provision to be performed after the legally effective act of adoption had taken place. The court rejected this contention by stating: "All that is meant in the sense in which 'effected' is used is that the adoption shall be caused by the execution of a notarial act when followed by the requirements of paragraph (2) with reference to registration."[2] The opposing interpretation based upon a literal reading of that section seems persuasive, and the court's reply does not appear to refute it.

The court further held that paragraph (2) was not merely directory and reasoned that "if we were to uphold the purported adoption in the instant case, we would in effect be accomplishing a judicial repeal of that part of the statute requiring registration."[3] This drastic conclusion need not follow. The court could have limited the holding to the facts of this case, i.e., that whenever the act of adoption is in fact recorded, although

1. LA. R.S. 9:461 (Supp. 1963).
2. Succession of D'Asaro, 167 So.2d 391, 397 (La. App. 4th Cir. 1964).
3. *Id.* at 396.

improperly, and there is no suspicion of fraud, then the adoption will be upheld unless third parties are prejudiced by the failure of proper recordation.

The original act providing the present mode of adopting persons over seventeen specified that such adoptions should be invalid "unless all the *essential provisions* of this act have been complied with."[4] (Emphasis added.) In the preparation of the Revised Statutes of 1950 the Reporter deliberately omitted that language, stating as his reason that its inclusion was simply "unnecessary."[5] In the 1952 amendment[6] of that act the legislature did not reinstate the language described as "unnecessary" but made certain other changes in the procedure. It seems reasonable to conclude that the legislature also felt such a provision to be unnecessary, in effect assenting to the Reporter's implication that such provisions are tacitly written into all such legislation. Had its intent been otherwise, the legislature would have provided specifically that all requirements of that statute must be met rather than merely accepting deletion of the language requiring that *essential provisions* be followed. Thus, it could be concluded that the legislature intended that the essential provisions must be followed but that a failure to meet a non-essential provision would not nullify the adoption. The court did not consider this possibility, however.

Recordation is generally considered an incidental act intended only to provide legal notice to third parties. Never before, to the writer's knowledge, has recordation been held to effect substantive rights between the parties to an act of adoption. Yet this was the effect the court gave the registration requirement in the instant case by holding the adoption null, even between the parties, unless the act was recorded properly and in time.

The legislative purpose (which the court did not consider) for requiring the act of adoption to be registered in the parish where it was executed is unclear. In earlier adoption legislation the act of adoption was to be recorded in the parish where the adopting party resided.[7] A later statute changed this and stipulated that the adoption act be filed in the parish where

4. La. Acts 1940, No. 169, § 3.
5. See Reporter's Notes to LA. R.S. 9:461 (1950).
6. See LA. R.S. 9:461 (Supp. 1963), as amended, La. Acts 1952, No. 514.
7. La. Acts 1924, No. 109.

it was executed, "provided that failure to so record any act shall not invalidate the adoption."[8] If the purpose of recordation is to give legal notice to third persons, it would seem that requiring the act to be recorded in the parish where the adoptor is domiciled would serve the function of providing notice better than requiring the act to be recorded in the parish where it was executed.[9] A closer look suggests a query as to what third persons need be given notice. The legal heirs are not regarded as third persons in law.[10] Only if the one adopted were not a major (as he is in this case) would third persons ordinarily have an interest in knowing of the adoption.[11] Such thoughts becloud any certain determination of the legislative purpose. A possible answer to this is that the requirement of recordation is intended to afford the parties to the act a means of preserving that act as proof of the adoption, or to show that the parties were of serious, non-fraudulent intent, rather than to provide third persons with notice. If this be so, satisfaction of the registration requirement certainly was not intended to be essential to the validity of the adoption.

Nevertheless, in the instant case there is even stronger reason for upholding the adoption; for here there was in fact a registra-

8. La. Acts 1928, No. 13, § 2.

9. Third persons might check the records of the domiciliary parish of the adoptor or adoptee, but they would hardly consider examining the records of every parish to discover if there had been an adoption executed in some other parish.

10. See Porterfield v. Parker, 189 La. 720, 180 So. 498 (1938), where the husband sold a community immovable, but the deed was not recorded until after the death of the wife. The court held that the wife's heirs could not recover the realty sold, stating: "Plaintiffs' mother was bound by the deed made by her husband, although unrecorded, up to the moment of her death, and plaintiffs' rights as heirs arose and were fixed at that moment. Plantiffs are not 'third persons,' as that term is used in the Code." *Id.* at 722, 180 So. at 499. See also Saunier v. Saunier, 217 La. 607, 47 So.2d 19 (1950), where the ex-husband successfully defended an action by his former wife for alimony payments past due to her and their children by pleading compensation. The court held that compensation between the ex-husband and ex-wife could be effected in this instance even though such compensation may abridge the rights of the children of the marriage to alimony on the basis that "the two children are not third persons within the meaning and contemplation of the article of the Code [article 2215] relied on." *Id.* at 619, 47 So.2d at 23. *But see* Quinette v. Delhommer, 176 So.2d 399, 406 (La. 1965), where the court recognized an exception to the general rule that heirs are not considered as third parties, stating: "Article 2239, however, has created an exception to the rule for forced heirs attacking the simulated contracts of those from whom they inherit. When prosecuting such an action, forced heirs do not stand in the shoes of their ancestor."

11. Only if the one adopted were a minor could his acts ever bind the adoptor, thereby supplying an instance when some third party might have a definite interest in knowing of the adoption. Otherwise creditors of the adoptor would have no interest in the adoption until the death of the adoptor. At that time it would be incumbent upon the adopted one to prove the adoption, and creditors' rights become subject to such proof. When their interest does accrue, they may actively challenge or defend the adoption.

tion with no suspicion of fraud, albeit in the improper parish, and no one claimed injury from such a defect. Yet the heirs were permitted to reap profit from a technical irregularity and to divest the adopted son of the rights the deceased intended him to have.

The basis of the court's decision was that adoption statutes are to be complied with strictly in every particular before the adoption will be upheld. Several Louisiana cases adhering to the rule of strict construction of adoption legislation were cited by the court in support of its position.[12] Of the cases cited, those which are truly authority for the principle of strict construction deal with the adoption of children and concern themselves with the issue of proper consent of the natural parents.[13] In such instances the courts have always applied the statutory provisions strictly[14] and the rule of strict construction is justifiable. But where the issue presented was other than that of proper consent of the natural parents, the courts have been more liberal.[15] It is submitted that the cases the court cited are not good author-

12. Green v. Paul, 212 La. 337, 31 So.2d 819 (1947); Owles v. Jackson, 199 La. 940, 7 So.2d 192 (1942); Hardy v. Mobley, 183 La. 668, 164 So. 621 (1935); State *ex rel.* Monroe v. Ford, 164 La. 149, 113 So. 798 (1927); Succession of Brand, 162 La. 880, 111 So. 267 (1927); *In re* Brand's Estate, 153 La. 195, 95 So. 603 (1923). Succession of Pizzati, 141 La. 645, 75 So. 498 (1917).

13. Further, although recent decisions have not questioned the strict construction rule, it is submitted that this doctrine had a precarious beginning. Of the cases cited in support of the rule in note 12 *supra*, only *Hardy*, *Owles*, and *Green* actively enunciated the doctrine that adoption statutes, being in derogation of the natural rights of the parties, are to be strictly construed in all instances. Moreover, while *Hardy* paid lip service to the principle, the court nevertheless upheld an adoption on a finding of concurrence of consent of the adopting parents. Thus the rule of strict construction was not truly applied until *Owles*, where the court supported its holding with an array of early cases which can hardly be said to have invoked the doctrine.

14. See, *e.g.*, Madere v. Long, 231 La. 498, 91 So.2d 771 (1956); Green v. Paul, 212 La. 337, 31 So.2d 819 (1947); Owles v. Jackson, 199 La. 940, 7 So.2d 192 (1942). In State *ex rel.* Monroe, 164 La. 149, 113 So. 798 (1927) and *In re* Brand's Estate, 153 La. 195, 95 So. 603 (1923), it was held that the proper consent of both parents was essential to the validity of the adoption because the legislature strictly provided for both parents to give their consent. Nevertheless, these cases did not state that adoption statutes are to be strictly construed in all instances because such statutes are in derogation of the natural rights of the parties.

15. See Hardy v. Mobley, 183 La. 668, 164 So. 621 (1935), where the adoptive parents did not both sign the act of adoption, but later made a formal acknowledgment of the adoption. This was held to be adequate concurrence of consent as required by Civil Code art. 214.

See also Succession of Dyer, 184 La. 251, 166 So. 68 (1936), where the parties had followed the procedure set forth in La. Acts 1932, No. 46, of which a pertinent part was declared unconstitutional. Nevertheless the court upheld the adoption on the grounds that the parties had complied with the procedure provided for in an earlier act which the 1932 statute had superseded. It seems doubtful that any part of the earlier act was still effective after passage of the comprehensive act of 1932, since only one section of that act was held unconstitutional.

ity for the instant case, for there was no need to guard the natural parents' rights and no need for their consent. Only the consent of the two parties to the act of adoption was necessary, and this consent had been given.

Numerous decisions from common law jurisdictions applying the rule of strict construction to adoption statutes were relied upon by the court.[16] All of these, however, are of doubtful persuasive effect in Louisiana for various reasons. First, it may be noted that it is the tradition in common law jurisdictions that a statute changing the substantive common law is to be strictly construed.[17] Such a rule is inapplicable in a civil law jurisdiction having legislation as the foundation of its legal order. Moreover, the court cited early Iowa and Texas cases supporting the view that recordation is essential to the validity of the adoption where the statute so provides;[18] but the wording

16. Abney v. DeLoach, 84 Ala. 393, 4 So. 757 (1887); *In re* Estate of Taggart, 190 Cal. 493, 213 Pac. 504 (1923); Monk v. McDaniel, 120 Ga. 480, 47 S.E. 931 (1904); Kennedy v. Boroh, 226 Ill. 243, 80 N.E. 767 (1907); Morris v. Trotter, 202 Iowa 232, 210 N.W. 131 (1926); Young v. McClannahan, 187 Iowa 1184, 175 N.W. 26 (1919); Webb v. McIntosh, 178 Iowa 156, 159 N.W. 637 (1916); Horner v. Merwell, 171 Iowa 660, 153 N.W. 331 (1915); Riley v. McKinney, 167 Iowa 508, 149 N.W. 603 (1914); Lamb v. Morrow, 140 Iowa 89, 117 N.W. 1118 (1908); Sires v. Melvin, 135 Iowa 460, 113 N.W. 106 (1907); Hopkins v. Antrobus, 120 Iowa 21, 94 N.W. 251 (1903); Bresser v. Saarman, 112 Iowa 720, 84 N.W. 920 (1901); McCollister v. Yard, 90 Iowa 621, 57 N.W. 447 (1894); Burger v. Frakes, 67 Iowa 460, 23 N.W. 746, 25 N.W. 735 (1885); Shearer v. Weaver, 56 Iowa 578, 9 N.W. 907 (1881); Gill v. Sullivan, 55 Iowa 341, 7 N.W. 586 (1880); Tyler v. Reynolds, 53 Iowa 146, 4 N.W. 902 (1880); Long v. Hewitt, 44 Iowa 363 (1876); Fiske v. Lawton, 124 Minn. 85, 144 N.W. 455 (1913); Eckford v. Knox, 67 Tex. 200, 2 S.W. 372 (1886); Sanders v. Lane, 227 S.W. 946 (Tex. Com. App. 1921); Powell v. Ott, 146 S.W. 1019 (Tex. Civ. App. 1912); J. M. Guffey Petroleum Co. v. Hooks, 47 Tex. Civ. App. 560, 106 S.W. 690 (1907); James v. James, 35 Wash. 650, 77 Pac. 1080 (1904).

17. See, *e.g.*, Hughes v. Industrial Comm'n, 69 Ariz. 193, 211 P.2d 463 (1949); *In re* Webb's Adoption, 65 Ariz. 176, 177 P.2d 222 (1947); *In re* Newman, 88 Cal. App. 186, 262 Pac. 1112 (1927); Adoption of Wedl, 56 Abs. 231, 114 N.E.2d 311 (Ohio 1952); Dougherty's Adoption, 358 Pa. 620, 58 A.2d 77 (1948); Petition of Clements, 201 Tenn. 98, 296 S.W.2d 875 (1956); *In re* Smith's Estate, 49 Wash.2d 229, 299 P.2d 550 (1956). See also CRAWFORD, THE CONSTRUCTION OF STATUTES § 248 (1940).

18. Young v. McClannahan, 187 Iowa 1184, 175 N.W. 26 (1919); Webb v. McIntosh, 178 Iowa 156, 159 N.W. 637 (1916); Homer v. Maxwell, 171 Iowa 660, 153 N.W. 331 (1915); Riley v. McKinney, 167 Iowa 508, 149 N.W. 603 (1914); Lamb v. Morrow, 140 Iowa 89, 117 N.W. 1118 (1908); Sires v. Melvin, 135 Iowa 460, 113 N.W. 106 (1907); Shearer v. Weaver, 56 Iowa 579, 9 N.W. 907 (1881); Gill v. Sullivan, 55 Iowa 341, 7 N.W. 586 (1880); Tyler v. Reynolds, 53 Iowa 146, 4 N.W. 902 (1880); Long v. Hewitt, 44 Iowa 363 (1876); Sanders v. Lane, 227 S.W. 946 (Tex. Com. App. 1921); Powell v. Ott, 146 S.W. 1019 (Tex. Civ. App. 1912); James v. James, 35 Wash. 650, 77 Pac. 1080 (1904) (applying Iowa law). Also cited as authority for the same holding were Evans's Estate, 47 Pa. Super. 196 (1911), which depended upon Iowa decisions for its holding, and Monk v. McDaniel, 120 Ga. 480, 47 S.E. 931 (1904), the holding of which has never been cited in any other Georgia case, either approvingly or disapprovingly.

of those statutes clearly compelled the result.[19] Even so, those jurisdictions have avoided possible injustices by applying the doctrine of equitable adoption, *i.e.*, enforcing the null adoption as though it were valid.[20]

Iowa cases were emphasized by the court as applying the rule of strict construction of adoption statutes;[21] but these were all early decisions, and the rule has been expressly rejected by more recent Iowa cases advocating liberal construction.[22] Many of the other cases cited were inapplicable for other reasons.[23]

In spite of their traditional attitude toward legislation, common law jurisdictions have been retreating from their former position concerning the construction of adoption statutes. The

19. The Iowa Civil Code (1873) sets forth in mandatory language the procedure to be followed in order to adopt a child. Section 2308 states in part: "Such instrument in writing shall also be signed by the person adopting, and shall be acknowledged by all the parties thereto; . . . and shall be recorded in the recorder's office." Then section 2309 states: "Upon the execution, acknowledgment and filing for record of such instrument, the rights, duties and relations between the parents and child by adoption shall thereafter . . . be the same that exists by law between parent and child by lawful birth." See Bresser v. Saarman, 112 Iowa 720, 722, 84 N.W. 920 (1901).

TEXAS REV. CIVIL STAT. art. 1 (1911) states: "Any person wishing to adopt another as his legal heir may do so by filing . . . a statement in writing by him signed and authenticated or acknowledged . . . ." See Sanders v. Lane, 227 S.W. 946 (Tex. Com. App. 1921).

There is yet another reason why the requirement of recordation is more essential to the adoption in the above jurisdictions than it should be in Louisiana. In Iowa and Texas, as well as in some other jurisdictions, adoptions could be effected by a private contract, which necessitated there be some reliable source of proof. In Louisiana the requirement of a notarial act ascertains the intent of the parties and makes a public official a witness to the act, thus largely satisfying the necessity for proof.

20. See, *e.g.*, *In re* Painter's Estate, 246 Iowa 622, 67 N.W.2d 617 (1954); Vermillion v. Sikora, 227 Iowa 786, 289 N.W. 27 (1939); Horner v. Maxwell, 171 Iowa 660, 153 N.W. 331 (1915); Cubley v. Barbee, 123 Tex. 411, 73 S.W.2d 72 (1934); Guy v. Jones, 132 S.W.2d 490 (Tex. Civ. App. 1939).

21. See, *e.g.*, Lamb v. Morrow, 140 Iowa 89, 117 N.W. 1118 (1908); Sires v. Melvin, 135 Iowa 460, 113 N.W. 106 (1907); Shearer v. Weaver, 56 Iowa 579, 9 N.W. 907 (1881); Gill v. Sullivan, 55 Iowa 341, 7 N.W. 586 (1880); Tyler v. Reynolds, 53 Iowa 146, 4 N.W. 902 (1880); Long v. Hewitt, 44 Iowa 363 (1876).

22. See Adoption of Alley, 234 Iowa 961, 14 N.W.2d 742 (1944); Shaw v. Scott, 217 Iowa 1259, 252 N.W. 237 (1934); *In re* Estate of Wadst, 209 Iowa 1200, 229 N.W. 835 (1930); *cf.* Seibert v. Seibert, 170 Iowa 561, 153 N.W. 160 (1915); Sires v. Melvin, 135 Iowa 460, 113 N.W. 106 (1907).

23. Abney v. DeLoach, 84 Ala. 393, 4 So. 757 (1887) (advocated substantial compliance with the statute); Kennedy v. Boroh, 226 Ill. 243, 80 N.E. 767 (1907) (required substantial compliance); Morris v. Trotter, 202 Iowa 232, 210 N.W. 131 (1926) (oral contract to adopt held unenforceable); Hopkins v. Antrobus, 120 Iowa 21 (1903) (question of proper consent of natural parents); Burger v. Frakes, 67 Iowa 460, 23 N.W. 746, 25 N.W. 735 (1885) (question of consent); Fiske v. Lawton, 124 Minn. 85, 144 N.W. 455 (1913) (private contract of adoption upheld as a contract); Eckford v. Knox, 67 Tex. 200, 2 S.W. 372 (1886) (no question of the validity of the adoption itself); J. M. Guffey Petroleum Co. v. Hooks, 47 Tex. Civ. App. 560, 106 S.W. 690 (1907) (parole evidence allowed to prove act of adoption where no record thereof was found).

great weight of modern authority appears to favor a more liberal view.[24] Presently, the construction given to adoption statutes in other states can be roughly classified into five categories: (1) liberal construction,[25] (2) substantial compliance with the statute,[26] (3) compliance with the essentials of the statute,[27] (4) a construction to favor the child and carry out the legislative purpose,[28] and (5) strict construction.[29] The rule of strict construction clearly appears to be a minority view in the United States today.[30]

The legislature has provided a means of adopting majors. It should not be the purpose of the court to defeat the legislative purpose, but rather to sustain it. This decision undoubtedly works an injustice upon one who lived for nearly two years with the deceased as her legal son. But more significantly, it extends a poorly founded rule of law[31] well beyond its scope in any prior Louisiana case. It is the opinion of the writer that the rule of strict construction should be narrowly limited in its application rather than extended to catch such irregularities as that of the instant case.

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24. See notes 25, 26, 27, 28 *infra*.

25. See, *e.g.*, *In re* Adoption of Barnett, 54 Cal. 2d 370, 6 Cal. Rptr. 562, 354 P.2d 18 (1960); Herrin v. Graham, 87 Ga. App. 291, 73 S.E. 2d 572 (1952); Adoption of Alley, 234 Iowa 961, 14 N.W.2d 742 (1944); *In re* Goodwin's Estate, 147 Me. 237, 86 A.2d 88 (1952); *In re* Adoption of Moffett, 5 N.J. Super. 82, 68 A.2d 279 (1949); Conville v. Bakke, 400 P.2d 179 (Okla. 1964); Stinson v. Rasco, 316 S.W.2d 900 (Tex. Civ. App. 1958); Taylor v. Waddoups, 121 Utah, 279, 241 P.2d 157 (1952).

26. See, *e.g.*, Petition of Simaner, 16 Ill. App. 2d 48, 147 N.E.2d 419 (1957); Renz v. Drury, 57 Kan. 84, 45 Pac. 71 (1896); Davis v. McCraw, 206 Mass. 294, 92 N.E. 332 (1910); *In re* Jordet's Petition, 248 Minn. 433, 80 N.W.2d 642 (1957); *In re* C., C., & C., 380 S.W.2d 510 (Mo. App. 1964); Lacher v. Venus, 177 Wis. 558, 188 N.W. 613 (1922); Hiatt v. LaFever, 69 Wyo. 373, 242 P.2d 214 (1951); Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23 (1893).

27. See, *e.g.*, *In re* Taggart's Estate, 190 Cal. 493, 213 Pac. 504 (1923); Emmons v. Dinelli, 235 Ind. 249, 125 N.E.2d 446 (1955); Glansman v. Ledbetter, 190 Ind. 505, 130 N.E. 230 (1921); Sklaroff v. Stevens, 76 S.C. 736, 120 A.2d 694 (1956).

28. See, *e.g.*, Adoption of McDonald, 43 Cal.2d 447, 274 P.2d 860 (1954); *In re* McKeag's Estate, 141 Cal. 403, 74 Pac. 1039 (1903); Shepherd v. Murphy, 332 Mo. 1178, 61 S.W.2d 746 (1933); Hahn v. Sorgen, 50 N.M. 83, 171 P.2d 308 (1946); *Ex parte* Wolfenden, 49 Tenn. App. 1, 349 S.W.2d 713 (1959); Woodall v. Schmudlach, 299 S.W.2d 780 (Tex. Civ. App. 1957).

29. See note 17 *supra*.

30. Certainly, where there is no question of proper consent of the natural parents, a substantial majority of jurisdictions would apply a liberal construction to the adoption statutes. See note 13 *supra* and accompanying text.

31. See note 13 *supra*.