Louisiana Law Review

Volume 27 | Number 1
December 1966

Judicial Sales - The Public Records Doctrine's Effect on Radical Nullities

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primarily liable because by the very terms of the unlimited escape clause the policy containing it could not constitute other valid and collectible insurance. Such a holding would have been consistent with the understanding and clear intent of the Louisiana Insurance Rating Commission.

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JUDICIAL SALES — THE PUBLIC RECORDS DOCTRINE'S EFFECT ON RADICAL NULLITIES

Plaintiff, a posthumous child born in 1941, brought a petitory action in 1963 to recover his forced portion of his father's succession. He sought to set aside the 1940 succession sale of the immovable property of the estate, alleging that his co-heirs fraudulently had the property appraised at less than one-half its value and purchased it for less than two-thirds the appraised value. The co-heirs and bona fide third-party purchasers of some of the property were joined as defendants. The trial court sustained defendants' exception of five-year curative prescription applied to judicial sales by Civil Code article 3543.[1] On appeal, *held*, reversed. Since the property was sold not only for less than two-thirds its appraised value, but also for less than its actual value, the succession sale was an absolute nullity. Prescription under article 3543 was not available even to subsequent purchasers for it was apparent in the public records that a just price had not been obtained. *Bordelon v. Bordelon*, 180 So. 2d 855 (La. App. 3d Cir. 1965).

Louisiana has effected a blend of Anglo-American and civil law in dealing with errors in judicial sales. The doctrine of informality, as opposed to radical error, is a common-law concept used to protect the stranger who purchases at a judicial

1. LA. CIVIL CODE art. 3543 (1870), as amended by La. Acts 1932, No. 231; La. Acts 1960, No. 407, § 1. All informalities of legal procedure connected with or growing out of any sale at public auction or at private sale of real or personal property made by any sheriff of the parishes of this state, licensed auctioneer, or other persons authorized by an order of the courts of this state, to sell at public auction or at private sale, shall be prescribed against those claiming under such sale that the lapse of two years from the time of making said sale, except where minors or interdicted persons were owners or part ownership by said minor or interdicted persons, the prescription thereon shall accrue after five years from the date of public adjudication or private sale thereof.

sale.[2] These problems, however, are dealt with by courts of equity,[3] and the decision to vacate or uphold a judicial sale is largely left to judicial discretion. Lapse of time and acquiescence are but two elements considered in this determination.[4] The French are more protective of the original owner's property right. The Code Napoleon has no separate treatment of judicial sales corresponding to the Louisiana Civil Code's Book III, Chapter 10, and deals with judicial sales under general sales provisions. Since the formalities of judicial sales are adjective law, their non-observance requires the adjudicatee to resort to acquisitive prescription to establish clear title. Since the French Code does not contain an article similar to Louisiana Civil Code article 3543, the prescriptions of ten, twenty, and thirty years are applied.[5]

The instant case illustrates the Louisiana approach. If the procedural error is judged harmless, the short prescriptive pe-

2. 50 C.J.S. *Judicial Sales* § 42, at 659-60 (1947): "In general, the reversal or vacation for irregularity or error of a decree for sale, made by a court having jurisdiction over the subject and the parties, does not invalidate the title of a stranger who bought in good faith at a sale while the decree was in force . . . . However, the rule does not operate or apply where the decree for the sale was a nullity; where the record shows that there was a defect of necessary parties in the action in which the sale was ordered; where the purchaser was an attorney engaged in the litigation, or an assignee of the judgment; where the appeal was perfected before the sale was fully completed; or where the property sold is owned by some one other than the defendant on whose account it is sold. Likewise the rule that the title of the purchaser will be protected has been held not to apply where the purchaser was a party to the suit in which the sale was ordered." *Cf.* Note, 22 LA. L. REV. 845 (1962).

3. 50 C.J.S. *Judicial Sales* § 52, at 670 (1947): "Courts of equity have a general supervision over judicial sales made under their decrees and may set aside or vacate sales for cause, whether the property is bid in by the party to the suit or by a stranger, even after confirmation and a conveyance to a bona fide purchaser. . . . Mere lapse of time does not affect the power of the court to set aside or vacate a sale; but the question of the time within which a rescission should be ordered may be considered by the court in the exercise of its discretion."

4. *Id.* § 54, at 673-74: "Since the law aims to uphold judicial sales, it follows that the court, in exercise of its discretion will not as a rule set aside the sale for mere informalities or irregularities, or slight, trivial, and immaterial defects in the proceeding or causes which the parties in interest might with a reasonable degree of diligence have avoided, *especially at the instance of one who acquiesced in the irregularities*. . . . The court, however, may in its discretion, set aside a sale irregularly made and order another sale, where the irregularities are such as to have worked hardship, injustice, or unfairness, or have been coupled with inadequacy of price. . . ." *Contra, Hicks v. Hughes*, 223 La. 290, 304, 65 So. 2d 603, 608 (1953): "[A]ppellants argue that the Hughes heirs, by long silence and acquiescence, are estopped from asserting title. It is well settled in our jurisprudence that mere silence and delay cannot cause a loss of title to property except by the effect of the law of prescription. Consequently there is no merit in this plea."

5. FRENCH CODE OF CIVIL PROCEDURE arts. 907-1002 (1806); 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2662 (1959): "According to art. 2267, 'the title that is null for want of form cannot serve as the basis of a prescription of from ten or

riod of article 3543 is applied.[6] If harm has resulted, or intent to defraud is found, the sale is an absolute nullity and stricter rules of articles 3474, 3499, and 9:5642[7] are invoked, subjecting the adjudicatee to all the suspensions attached thereto.[8]

Arceneaux v. Cormier[9] held that a succession sale for less than two-thirds the appraised value was not necessarily an absolute nullity. Standing alone, this was merely an informality cured by the prescription of article 3543. However, if a substantive right was affected, and a just price was not received, the sale would be void and ownership of the property could be obtained only by acquisitive prescription. *Bordelon* follows this general rule, but it also gives meaning to the concept of "legal bad faith," states that bad faith is not inherited by third-party purchasers, and offers an insight into the questions whether ten- or thirty-year prescription should apply.

The court in *Bordelon* equates legal bad faith with moral bad faith. Thus when the formalities were purposely and knowingly disregarded, the adjudicatee placed himself outside the protection of article 3543.

"The benefit of prescription under LSA-C.C. Art. 3543 is available only to purchasers in good faith. This prescription

twenty years.' This ruling applies solely to solemn acts, such as donations and testaments. They are the only acts that according to our law may be null for want of form. Should the ruling made by art. 2276 be extended to grounds of nullity other than those of defects of form? The question is answered by drawing a distinction. The extension is recognized as regards all cases of absolute nullity. When a title is tainted with '*Substitution*' it cannot be considered to be a just title for purposes of prescription, because '*Substitutions*' are rigorously prohibited by art. 896. The same thing may be said of a sale made by a legally interdicted condemned person or by the straw man of a dissolved congregation. On the contrary, the ruling given in art. 2267 is not extended to grounds of nullity that make the act merely annullable. Thus titles that emanate from an incapable, even if they be annullable upon his petition, nevertheless serve as a just title in favor of the acquirer for the purpose of permitting prescription to run against the true owner."

6. Sun Oil Co. v. Roger, 239 La. 379, 118 So. 2d 446 (1960); Granger v. Hebert, 121 La. 1045, 46 So. 1012 (1908); Caldwell v. Hay, 170 So. 2d 194 (2d Cir. 1964); Comment, 13 TUL. L. REV. 615 (1939).

7. This statute, adopted in 1928, cures all errors in judicial sales. The prescription does not run against minors and interdicts. Also this prescription applies "only where the owner knew that the sheriff was proceeding to sell his property and where the purchaser or those claiming under him went into possession under the deed and remained in actual, open and peaceable possession as owner for five years." LA. R.S. 9:5642 (1950). See Tucker v. New Orleans Laundries, Inc., 145 So. 2d 365 (4th Cir. 1962).

8. See, *e.g.*, Buillar v. Davis, 185 La. 255, 169 So. 78 (1936), in which a dispute was finally settled involving an unprobated will made in 1819. The court had to resort to the Code of 1808 to solve the jurisdictional problem. LaCroix v. Crane, 133 La. 227, 62 So. 657 (1913); Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800 (1904).

9. 175 La. 142, 144 So. 722 (1932).

> curing irregularities in a public sale is not available to a purchaser in legal bad faith; in such latter instance, it is immaterial whether the defects are relative or radical nullities because the bad faith purchaser at the succession sale is in neither case shielded by the article's prescription . . . the three brothers purchased at the sheriff's sale pursuant to a conspiracy to defraud their coheirs and thus were not purchasers in good faith . . . the sale to them of estate lands is subject to being nullified for their fraudulent conduct in connection with the sale."[10]

Considering legal bad faith as actual knowledge, usually coupled with an intent to defraud, seems the only sound approach. Previous cases have used the term with vague connotations of constructive knowledge,[11] but any such construction defeats the purpose of the code provision.[12]

The bad faith of the adjudicatee does not pass to subsequent purchasers. A third-party purchaser cannot be held responsible, since he did not participate in the wrongful act. He thus may invoke the prescription of article 3543.[13] Even a subsequent purchaser with actual knowledge of an informality would probably come within the ambit of article 3543. This follows by analogy to decisions concerning third-party purchasers in cases of lesion beyond moiety,[14] and to judicial interpretation of the public records doctrine.[15] Chief Justice Slidell pointed out in *Snoddy v. Brashear*,[16] the reason for not holding the third-party purchaser responsible for his vendor's fraud is that annulment of

10. Bordelon v. Bordelon, 180 So. 2d 855, 858 (1965).

11. Arcadian Prod. Corp. v. Savanna Corp., 222 La. 617, 63 So. 2d 141 (1953); *In re* Union Central Life Ins. Co., 208 La. 253, 23 So. 2d 63 (1945); Thibodaux v. Barrow, 129 La. 395, 56 So. 339 (1911).

12. This article is a "statute of repose" intended to quiet and give stability to land titles and to create confidence in judicial sales. Dixon v. Federal Land Bank of New Orleans, 196 La. 937, 200 So. 306 (1941); Phoenix Bldg. & Homestead Ass'n v. Meraux, 189 La. 819, 180 So. 648 (1938).

13. Bordelon v. Bordelon, 180 So. 2d 855, 859 (3d Cir. 1965): "A different question is presented as to the subsequent assigns of these three original purchasers. . . . These subsequent assigns or purchasers did not, even under the allegations of the petition, participate in the alleged fraudulent scheme. As to them, as good faith subsequent purchasers, the prescription of LSA-C.C. Art. 3543 may prevent attack upon their title acquired through the court-ordered succession sale."

14. Morgan v. O'Bannon & Julien, 125 La. 367, 51 So. 293 (1910); Beatty v. Vining, 147 So. 2d 37 (2d Cir. 1962).

15. Smith v. Taylor, 226 La. 235, 75 So. 2d 850 (1954); King v. Bickman, 105 So. 2d 301 (1st Cir. 1958).

16. 3 La. Ann. 569 (1848).

a contract because of fraud is a personal action, while a suit for return of immovable property is a real action.[17]

Third-party purchasers can prescribe under article 3543 against all informalities,[18] but not against absolute nullities appearing on the face of the public records. The court states in its conclusion:

> "The exception of prescription under Civil Code Article 3543 is overruled both as to the three brothers who under the allegations were bad faith purchasers at the sale . . . and also as to both them and their subsequent assigns by good-faith purchase, because of the alleged nullity of the succession sale by reason of the inadequate price shown on the face of the record by the sale for less than two-thirds of the inventory value, together with the allegations that by reason of such defect the sale was an absolute nullity because in addition to the defect of a sale at less than the required minimum the sales price was less than the actual value of the property (such as should reasonably have been received at a fairly conducted succession sale at the time)."[19]

The third-party purchaser is thereby protected from hidden equities, and from fraudulent schemes that could not be discovered even by diligent investigation. In such cases he can obtain full ownership of the property through the prescription of article 3543.[20] However, this rule has one defect. The subsequent purchaser has little to guide him in determining whether a sub-

17. *Id.* at 573. The Chief Justice in deciding whether an action to annul on grounds of lesion should extend to third purchasers, takes cognizance of the fact that the majority of civilian writers hold that it should. He decides, however, that it was the legislative intent that the general rule should be changed because the redactors of the Louisiana Civil Code omitted FRENCH CIVIL CODE art. 1681 to confine the action of lesion to the original vendor and vendee. Although the *Snoddy* case was decided after La. Civil Code art. 3543 was enacted, an equally convincing argument can be made that the legislature intended that the action to annul a judicial sale endured only so long as the land remained in the hands of the adjudicatee, since art. 3543 was placed in the section dealing with liberative prescription, bk. III, ch. 3, § 3, pt. 3. The court further stated: "Nobody will contend that the property passing into third parties' hands, bona fide, can be affected by the error or fraud. This, no doubt, is an exception introduced for the security of titles and the peace of society; though the true and real difference is to be found in this, that actions for the annulment of contracts on the grounds of error and fraud are personal actions, while the action of lesion is a real action — *dolus re ipsa.*"

18. It left undecided the question of whether the prescriptive period should begin from the date of the subsequent sale, or be retroactive to the date of adjudication.

19. Bordelon v. Bordelon, 180 So. 2d 855, 860 (3d Cir. 1965).

20. Skannal v. Hespeth, 196 La. 87, 198 So. 661 (1940); Irwin v. Flynn, 110 La. 829, 34 So. 794 (1903).

stantive right has been violated. In the present case the sale of the land for less than two-thirds the appraised price is an informality, unless considering all the circumstances a so-called just price is not obtained. To complicate this matter, the case was remanded to determine if the estate was solvent. If the estate was insolvent, no prejudice occurred to the plaintiff, and the basic element of an absolute nullity disappears. This information could not be gleaned from the public records. Therefore the purchaser of property that shows a defect of title resulting from a judicial sale takes a title which is clouded until a judge decides such questions as just price and prejudice of substantive rights.

The rule does, however, cast some light on the question whether ten- or thirty-year prescription should apply. The cases on this point are inconsistent,[21] but it is a logical corollary to the instant case that when article 3543 is inoperative because of the adjudicatee's bad faith or a radical error or absolute nullity on the face of the records, thirty-year prescription should be the proper rule to apply. In *Bordelon*, since two-thirds the appraised value was not received and the inadequacy of the price was on the face of the records, the plaintiff would not lose his right of action for over fifty-one years.[22] On the other hand, if from an examination of the records there appears only a relative nullity or informality, and it is subsequently discovered that a substantive right had been prejudiced, the purchaser who bought on the faith of the public records has a just title for purposes of ten-year prescription. Such a rule would give some standard to a good-faith third purchaser to estimate his right and to calculate his risks of loss.

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MINERAL RIGHTS — TITLE CONTROVERSIES WITH THE STATE AND ITS AGENCIES — SOVEREIGN IMMUNITY FROM SUIT

The common-law maxim — the King can do no wrong — has been transposed in most states, including Louisiana, into a simi-

21. Pearlstine v. Mattes, 223 La. 1032, 67 So. 2d 582 (1953); Hicks v. Hughes, 223 La. 290, 65 So. 2d 603 (1953). *But cf.* Arceneaux v. Cormier, 175 La. 941, 144 So. 722 (1932).

22. Prescription would have been suspended by the minority of the posthumous child for more than twenty-one years. Only after this could the running of the thirty-year prescription begin to accrue. Tillery v. Fuller, 190 La. 586, 182 So. 683 (1938).