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NOTES

THE RIGHTS OF FORCED HEIRS AND THIRD PARTIES IN SIMULATIONS

A conflict between forced heirs and third parties purchasing on the faith of the public records presents a conflict between two sets of rights, both of which traditionally have been given favored status in Louisiana. The law grants preferential rights to the forced heir in order to protect his legitime,¹ and to the third party relying on the public records to insure stability of title to immovable property.²

A conflict among these parties most frequently arises in cases involving simulated contracts. A simulation exists when the parties have two different intents with respect to a given act: the apparent intent, expressed in a public act; and the actual or private intent, which may either totally destroy or modify the public act.³ There are two kinds of simulations: a "non-transfer"⁴ or "pure" simulation, in which the parties intend that no transfer of ownership take place although their public act professes a sale; and a "disguised transfer"⁵ simulation or "donation in disguise," in which the parties conceal the gratuitous intent to transfer ownership in the onerous form of a sale.

Since two intents exist with respect to a single act, it must be determined which intent shall govern. With respect to the original parties to the act, the law is settled. For example, if in a public act *A* sells a tract of land to *B* without any intent to transfer ownership, *A* may subsequently recover the property from *B* through a counter-letter which reveals the true intent of the parties.⁶ Similarly, the law grants certain remedies to the forced heirs of *A* to recover the property from *B*, these remedies differing according to the kind of simulation involved. In a non-transfer simulation, since the original parties intended no transfer of ownership, the forced heir should be able to recover the property from the supposed transferee once he reveals the simulation. However, in a disguised donation, the actual intent of the

1. LA. CONST. art. IV, § 16 (1921); LA. CIV. CODE arts. 1493-1502, 1508-12, 1516-18, 2239.

2. LA. CIV. CODE arts. 2253, 2262-66; LA. R.S. 9:2721-22 (1950); *Blevins v. Manufacturer's Record Publ. Co.*, 235 La. 708, 105 So. 2d 392 (1957); *Thompson v. Thompson*, 211 La. 468, 30 So. 2d 321 (1947); *Speights v. Nance*, 142 So. 2d 418 (La. App. 2d Cir. 1962); *Shapiro v. Bryan*, 132 So. 2d 97 (La. App. 4th Cir. 1961).

3. For an excellent discussion of the entire area of simulations, see Lemann, *Some Aspects of Simulations in France and Louisiana*, 29 TUL. L. REV. 22 (1954) [hereinafter cited as *Lemann*]. See also 2 PLANIOL, CIVIL LAW TREATISE pt. 1, nos. 1188-1200, at 677-84 (11th ed. La. St. L. Inst. transl. 1959) [hereinafter cited as PLANIOL].

4. *Lemann* 34; see also PLANIOL, No. 1188 at 677.

5. *Id.*

6. LA. CIV. CODE art. 2239.

parties is to effect a donation. Although a valid transfer results, Civil Code article 1502 allows reduction of the donation in excess of the disposable portion by the timely action of the forced heirs as long as the property is held by the donee.⁷

An 1884 amendment of Civil Code article 2239 provides that "forced heirs shall have the same right to annul absolutely and by parol evidence the simulated contracts of those from whom they inherit and shall not be restricted to the legitimate [legitime]." Prior to the passage of this amendment, the forced heirs had been jurisprudentially granted the right to use parol evidence to reveal simulations, but only to the extent that they impinged upon the legitime.⁸ In *Cole v. Cole*,⁹ the Louisiana supreme court stated that the 1884 amendment granted forced heirs the right to reveal all simulations, regardless of any infringement of the legitime.¹⁰ The true intent of the parties, then, should govern as long as the property remains in the hands of the transferee.¹¹ When the rights of a third party have intervened, however, article 2239 should not have this effect. Being merely an evidentiary rule,¹² it should not be construed to grant a substantive

7. See *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Successions and Donations*, 25 LA. L. REV. 310, 313 (1965).

8. "[F]orced heirs of a deceased person, whose legitime is impaired by an alleged simulated sale by the deceased, are not estopped from attacking the sale on the ground of simulations, but they can only annul to the extent that they are forced heirs." *Guilbeau v. Thibodeau*, 30 La. Ann. 1099 (1878). "[B]eyond that limit they occupy the position of ordinary heirs, and are estopped by the deed of their ancestor in the absence of a counter-letter." *Id.* at 1101.

9. 39 La. Ann. 878, 2 So. 794 (1887).

10. A similar determination was reached in *Spencer v. Lewis*, 39 La. Ann. 316, 1 So. 671 (1887).

11. The true intent of the parties in a non-transfer simulation is that no transfer take place. Consequently, there is no reason for the property to remain under the control of a party who was never intended to have an interest in it. The property should revert to the succession in its entirety.

When a disguised donation is involved, exposure of the simulation reveals the true intent to donate. That donation should then be treated as such. The forced heir has a right under Civil Code article 1502 to reduce donations in excess of the disposable portion. The forced heir does not have a right to annul a disguised donation in its entirety, for to do so would be to annul the donation because it was disguised. As Planiol stated, "In all the cases of this kind, even though the simulations were fraudulent, it is not the simulation which is the cause of the nullity. If the act is null, it is not null because it is simulated, it is because there exists particular reason for annulling it." PLANIOL, no. 1191 at 679. See also *Malbrough v. Roundtree*, 128 La. 39, 54 So. 463 (1911). Thus, the rights of the forced heirs are different in the two kinds of simulations. In a non-transfer simulation, he can recover the property in its entirety by virtue of article 2239. If the simulation is a disguised donation, however, recovery is limited to the legitime.

12. *Byrd v. Pierce*, 124 La. 429, 50 So. 452 (1909); *Wells v. Goss*, 110 La. 347, 34

right to annul a simulated transaction when a third party has relied upon the public intent.

The third party purchaser is granted substantial protection in his reliance on the public intent of the parties. The basis of this protection most frequently stated by Louisiana courts is that found in the "public records doctrine" as embodied in the case of *McDuffie v. Walker*.¹³ This doctrine is based on Civil Code article 2266, which provides in part:

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.

McDuffie involved a claim based on an unrecorded sale. A subsequent purchaser had actual knowledge of the prior unrecorded sale, but the court held that such knowledge was not equivalent to recordation and that it was not fraud on the part of the subsequent purchaser to ignore the unrecorded sale. In view of its absence from the public records, the sale could be treated as non-existent.¹⁴

In many cases following *McDuffie*, however, Louisiana courts have stated a much broader public records doctrine, purportedly based on *McDuffie*:

Ever since the landmark decision of *McDuffie v. Walker* . . . it has been the settled public policy, which is founded upon the articles of our Civil Code, that a party dealing with immovable property need only look to the public records. . . .¹⁵

This statement would seem to allow the prospective purchaser to rely absolutely on the information present in the public records and to prevent attack on a purchaser's title by any party whose claims were

So. 470 (1903); *Reinert v. Rhody*, 52 La. Ann. 2029, 28 So. 277 (1900); *Succession of Clark*, 155 So. 2d 37 (La. App. 4th Cir. 1963).

13. 125 La. 152, 51 So. 100 (1909).

14. Prior to *McDuffie*, a question existed as to whether a person who had knowledge of the simulated intent outside the public records could still rely on the recorded act. *McDuffie* settled this point by providing basically that the private knowledge of a third party was irrelevant.

15. *Hodgeson v. McDaniel*, 233 La. 180, 190, 96 So. 2d 481, 484 (1957). See *Humphreys v. Royal*, 215 La. 567, 41 So. 2d 220 (1949); *Schneidau v. New Orleans Land Co.*, 132 La. 264, 61 So. 225 (1912); *Roberts v. Edwards*, 126 La. 194, 52 So. 272 (1910); *Burt v. Valois*, 144 So. 2d 196 (La. App. 1st Cir. 1962); *King v. Bickham*, 105 So. 2d 301 (La. App. 1st Cir. 1958). See also *Thompson v. Thompson*, 211 La. 468, 30 So. 2d 321 (1947); *Goldsmith v. McCoy*, 190 La. 320, 182 So. 519 (1938); *Coyle v. Allen*, 168 La. 504, 122 So. 596 (1929); *Brewster Development Co. v. Fielder*, 271 So. 2d 299, 302 (La. App. 2d Cir. 1973); *Jackson v. Golson*, 91 So. 2d 394 (La. App. 2d Cir. 1956); *Lawrence v. Joseph*, 35 So. 2d 885 (La. App. 1st Cir. 1948).

not present there. Article 2266, however, covers only sales, contracts, and judgments. R.S. 9:2721 extends this recordation requirement to counterletters, liens, mortgages, and "other instruments of writing related to or affecting immovable property." These provisions thus apply only to *writings* which are *required to be recorded*,¹⁶ and in the absence of such recordation, the writing shall not affect third persons. In relation to simulations, if the document in the public records is feigned, there is nothing in article 2266 or *McDuffie* that would entitle prospective purchasers to rely on the recorded intent.

A third party may still be protected in case of a simulation although the reliance on *McDuffie* is misplaced. This protection may be found in a line of cases protecting the purchaser from "secret equities" between his vendor and a prior owner of the property.¹⁷ Although Louisiana courts have never defined the term "secret equities,"¹⁸ there are a number of cases which have classified certain situations as covered by the term.¹⁹ For example, in *Chachere v.*

16. The case of *Long v. Chailan*, 187 La. 507, 175 So. 42 (1937), is illustrative of the fact that rights which are not based upon a writing need not be recorded. In *Long* the plaintiffs were seeking recognition of their half interest in title to property which belonged to the community of their parents. Plaintiffs' mother had died and their father had sold the property which he had bought in his own name. The court, through Chief Justice O'Neil, recognized the plaintiffs' interest in the property, saying that "it is well settled that article 2266 of the Civil Code, or the doctrine of *McDuffie v. Walker*, is not to be construed so as to defeat the rights of heirs . . ." *Id.* at 522, 175 So. at 48.

17. The origin of this protection in equity is somewhat uncertain. Although article 21 of the Civil Code requires judges "to proceed and decide according to equity" when there is no express law, it appears the secret equity protection may have been borrowed from the common law. The early case of *Pike v. Monget* stated "[t]hat honest purchasers without notice, who have paid the purchase money, are not affected by secret equities between those under whom they hold . . . is a fundamental rule of our system of jurisprudence." 4 La. Ann. 227, 229 (1849). Citing STORY'S EQUITY JURISPRUDENCE the court stated that "[c]ourts of equity will not take the least step imaginable against an innocent purchaser in such a predicament, and will, on the other hand, allow him to take every advantage which the law gives him . . ." *Id.*

18. BLACK'S LAW DICTIONARY 635 (4th ed. rev. 1968) defines a "latent or secret equity" as "an equitable claim or right, the knowledge of which has been confined to the parties for and against whom it exists, or which has been concealed from one or several persons interested in the subject matter."

19. The secret equity protection has been applied in those cases in which a pignorative contract is portrayed as a sale. In the cases of *Caskey v. Standard Oil*, 181 La. 479, 159 So. 722 (1935), *Beard v. Nunn*, 172 La. 155, 133 So. 429 (1931), *Breaux v. Roger*, 129 La. 894, 57 So. 164 (1912), and *Broussard v. Broussard*, 45 La. Ann. 1085, 13 So. 699 (1893), the courts applied the secret equity protection to pignorative contracts and declared that the true intent could not affect third parties who relied on the public intent to sell. See also *Vestal v. Producers Oil*, 135 La. 984, 66 So. 334 (1914); *Harris v. Natalbany Lum. Co.*, 119 La. 978, 44 So. 806 (1907); *Adams v. Brownell-Drews Lum.*, 115 La. 179, 38 So. 957 (1905).

Superior Oil,²⁰ a father executed three separate disguised donations to three of his children. Thereafter, one of his sons transferred his property to a third person. Plaintiffs, as heirs of the father, brought a petitory action against the third party and his lessee. The court dismissed plaintiff's contention saying that the son's vendee had a right to rely on the faith of the recorded title, and was not bound by the "secret equity" between the plaintiff and his father.²¹ This "secret equity" protection, codified in R.S. 9:2721, seems the most logical theory to use in appropriate cases.²² Some Louisiana courts, however, have erroneously continued to cite *McDuffie* as the basis of the protection afforded a third party relying on a simulated act appearing in the public records.²³

The issue of whether a third party holding an option from the simulated transferee of an ancestor is given greater protection than a forced heir of that ancestor was considered in the 1947 case of *Thompson v. Thompson*.²⁴ In that case, a father made a disguised donation to his son, Jesse Thompson, through an act of sale. After the death of his father, Jesse executed a lease with an option to purchase to Arthur Thompson (unrelated), which was duly recorded. Subsequently, when Arthur Thompson demanded specific performance, Jesse Thompson indicated he could not assure a good title. Jesse's mother and sister then sued, alleging "the pretended sale to Jesse Thompson was null, and should be set aside and the property revindicated and brought back to the succession. . . ."²⁵ Arthur

20. 192 La. 193, 187 So. 321 (1939).

21. *Id.* at 196, 187 So. at 321.

22. An alternative means of protection for third parties is set forth in Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 TUL. L. REV. 491 (1965). [hereinafter cited as *Redmann*]. Redmann believes that once a third party has acquired rights in property subsequent to a simulated sale, the recorded instrument becomes "full proof of the agreement" contained in it, and parol evidence cannot be introduced by the forced heirs to vary that intent. *Id.* at 500. He bases his theory primarily on a statement in *Chachere v. Superior Oil*, 192 La. 193, 197, 187 So. 321, 322 (1939), that the forced heirs "cannot now be permitted to introduce evidence tending to vary the public records after the same [property] has passed into the hands of third parties." *Redmann* 501. Redmann goes on to say that, in effect, Civil Code articles 2239 is limited in *Chachere* to suits against the parties to the simulated contract. This theory would have the virtue of protecting the third party without distorting the "basically negative character" of the public records protection, which should create no rights. *Redmann* 500. It would appear, however, that the primary emphasis in *Chachere* is on the secret equity protection and the substantial jurisprudence supporting it.

23. See note 15 *supra*.

24. 211 La. 468, 30 So. 2d 321 (1947).

25. *Id.* at 479, 30 So. 2d at 324.

Thompson then sued for specific performance of his option, and the suits were consolidated for trial.

The court decided that the transaction was "not only a sham and a simulation but that it was a donation in disguise,"²⁶ and proceeded to treat the problem as though the forced heirs had two separate means of recovery available. Considering the transaction as a pure simulation, the court correctly determined that although Civil Code article 2239 allows complete recovery by forced heirs from a purported vendee, it was not intended to affect the rights of a third party. Considering the transaction as a donation in disguise, however, the court reached a different conclusion. It determined that title had not vested in Jesse Thompson since the deed from his father was a donation in disguise, and thus the property was "returned fictitiously" to the succession by operation of law upon the death of his father by virtue of Civil Code article 1505. At the time of the return, the forced heirs became "owners of . . . an undivided interest"²⁷ in the land to the extent necessary to fulfill their legitime. The court determined that because Jesse Thompson could not deliver title to Arthur Thompson free of this interest of the forced heir, specific performance could not be granted. However, if Arthur Thompson had actually purchased the property prior to the assertion by the forced heirs of their rights, rather than acquiring only an option to purchase, the court reasoned that he would have been protected since "considerations of public policy respecting a stability of titles" favor the purchaser.²⁸

The court thus determined that the forced heirs' right to annul a disguised donation, though inferior to the interest of a third party purchaser, was superior to a third party option holder's right to demand specific performance. However, language in the case indicated that the right of forced heirs to annul a pure non-transfer simulation would not prevail against the right of an option holder to exercise his option.²⁹ This result creates a strange anomaly in that the rights of the heirs are given less recognition when their ancestor executes a non-transfer simulation, thereby indicating no intent to divest himself of ownership, than when the ancestor makes a donation disguised as a sale, in which case he clearly has expressed his intent to transfer the property to a purported buyer.³⁰

26. *Id.* at 488, 30 So. 2d at 327.

27. *Id.* at 506, 30 So. 2d at 333.

28. *Id.* at 493, 30 So. 2d at 329.

29. *Id.* at 489, 30 So. 2d at 328.

30. See Succession of Clark, 155 So. 2d 37 (La. App. 4th Cir. 1963); *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Successions and Donations*, 25 LA. L. REV. 310, 314-15 (1965).

The court's determination that the rights of a third party purchaser would defeat the rights of the forced heir in cases of simulated contracts is in line with Louisiana jurisprudence. The court was also correct in concluding that, at the death of an ancestor, title to his property vests in the forced heirs to the extent necessary to satisfy their legitime.³¹ Once these rights have vested, the *subsequent* sale of the property without their concurrence would be the "sale of a thing belonging to another. . . ."³² The forced heirs' rights could be exercised against the purchaser, notwithstanding the public records doctrine, as the rights of the forced heirs in that situation do not require recordation and thus are not covered by the doctrine.³³

However, the court erred in failing to recognize that title transferred to Jesse when his father executed the simulated sale. Title does vest in the donee through a valid donation, even if it is a disguised transaction, though the donation is subject to reduction to the extent it is excessive by the *timely action* of the forced heirs, as long as the property is *held by the donee*.³⁴ Moreover, under the theory applied by the courts, if the transfer had been in reality a pure, or non-transfer simulation, the right of the heirs should have prevailed, because in that case the ancestor would never have divested himself of title.³⁵

By distinguishing a third party purchaser from a third party option holder, the court reached a questionable result and created the potential for what Justice Hamiter called "anomalous situations."³⁶ Suppose, as suggested by Justice Hamiter, that subsequent to executing the recorded lease with option to purchase to Arthur Thompson, Jesse Thompson had sold the property to another party. The purchaser would take the property subject to the previously recorded real right of the option holder who by exercising his option could recover the property from the purchaser; yet the forced heirs under

31. See, e.g., *McDonald v. Richard*, 203 La. 155, 13 So. 2d 712 (1943); *George v. Delaney*, 111 La. 760, 35 So. 894 (1904); *Succession of Heckert*, 160 So. 2d 375 (La. App. 4th Cir. 1964); *Culpepper v. Slater*, 131 So. 2d 76 (La. App. 2d Cir. 1961).

32. LA. CIV. CODE art. 2452.

33. See note 16 *supra*.

34. LA. CIV. CODE art. 1502. Additionally, article 1517 grants forced heirs the right to pursue property donated in excess of the disposable portion in the hands of third parties. When a disguised donation is involved, however, the donative intent is a "secret equity" obscured by the public intent to sell and should not affect a third party. Redmann obtains the same result through his parol evidence theory by stating that the forced heir cannot introduce parol evidence to vary the public intent when a third party has acquired an interest in the property.

35. See *Schalaída v. Gonzales*, 174 La. 907, 142 So. 123 (1932).

36. *Thompson v. Thompson*, 211 La. 468, 512, 30 So. 2d 321, 335 (1947) (dissenting opinion).

Thompson could not recover from the purchaser. The option holder, as possessor of a real right, should have been subject to the same protection as a purchaser. In any event, the subsequent enactment of R.S. 9:2721 with the grant of protection to a third party from "secret equities" and R.S. 9:2722 which defines the third party as any person "acquiring any real or personal right" in immovable property should be considered to have legislatively overruled *Thompson*, thereby giving third party purchasers and option holders the same protection.³⁷

The correct solution to a problem involving an attack by a forced heir on a simulated contract of his ancestor is to allow the revelation of the true intent of the parties through Civil Code article 2239, and then to determine which intent shall govern in view of the relationship of the parties. When a third party has acquired a real right in the property, the existence of the feigned or secret intent, whether in a disguised donation or nontransfer simulation, should be considered a secret equity and should not affect the third party.

Robert Barton Allen

THE LAKE DILEMMA

Six Mile Lake is one of the five largest bodies of water in Louisiana. Although certain of its geological traits are those of a running stream, others are characteristic of a lake, and it is popularly considered a lake. Legal classification of this body of water as a stream would give ownership of its bank to the riparian owners, while if it were deemed a lake, the state would own up to the high-water mark. In an action instituted by the state to determine ownership of the bank of Six Mile Lake, the Louisiana supreme court, applying a multi-factor test, held that Six Mile Lake is legally considered a lake. *State v. Placid Oil Co.*, 300 So. 2d 154 (La. 1974).

By virtue of the equal footing doctrine, lands submerged by navigable waterways belong to the state as sovereign.¹ The state's inter-

37. Whether the third party is protected because the effect of article 2239 is limited to suits against original transferor, as Redmann suggests, or because LA. R.S. 9:2721-22 (1950) protects him against the true intent of the simulated act, appears to be merely two sides of the same coin. In a normal lawsuit brought by a forced heir, one theory would limit the plaintiff, the other would protect the defendant. It seems to be of little significance which one actually determines the outcome.

1. After the American Revolution and upon enactment of the U.S. Constitution, the right to all navigable waters and the soils under them, extending to the present