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THE PUBLIC RECORDS DOCTRINE AND DISGUISED DONATIONS
OMNIUM BONORUM: THIRD PARTIES PREVAIL

I.M. Owen effected three apparent sales to two of his sons, W.H. and J.B. Owen. Each son received full ownership of one tract and they held one in common. After the death of I.M. and his wife, Henrietta, W.H. bought his brother's interest in the tract held in common. He later conveyed the total acreage of his two tracts to Charles and Wayne Bush. Six children of I.M. and Henrietta Owen sued W.H. Owen and Wayne and Charles Bush, asking that the court set aside the transfers from I.M. to his sons and also the transfer from W.H. to the Bushes. The Second Circuit Court of Appeal upheld the trial court's judgment for the plaintiff, concluding that the transfers were donations in disguise as well as donations *omnium bonorum*¹ and as such, were absolutely null *ab initio*.² The Louisiana Supreme Court reversed and held that even if a conveyance is a donation in disguise and a donation *omnium bonorum*, a third party relying in good faith on public records showing an apparently valid sale is protected. *Owen v. Owen*, 336 So. 2d 782 (La. 1976).

The supreme court was faced with a situation that pitted the rights of heirs against the rights of third parties who purchase in reliance on the public records. The third party's rights were based on what has been denominated the "public records doctrine." For the most part, the Louisiana Supreme Court case of *McDuffie v. Walker*³ and jurisprudence following its interpretation⁴ of article 2266 have been the basis for protection of reliance on the public records in Louisiana. Article 2266 essentially states that if a transaction affecting immovables is not recorded, then it is not effective against third parties.⁵ The statute is phrased in the negative,

1. LA. CIV. CODE art. 1497 states: "The donation inter vivos shall in no case divest the donor of all his property; he must reserve to himself enough for subsistence; if he does not do it, the donation is null for the whole."

2. *Owen v. Owen*, 325 So. 2d 283 (La. App. 2d Cir. 1975).

3. 125 La. 152, 51 So. 100 (1909).

4. *E.g.*, *Westwego Canal & Terminal Co. v. Pizanie*, 174 La. 1068, 142 So. 691 (1932); *Jackson v. Creswell*, 147 La. 914, 86 So. 329 (1920); *Dreyfous v. Cade*, 138 La. 297, 70 So. 231 (1915).

5. LA. CIV. CODE art. 2266 states: "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."

Also requiring recordation is LA. R.S. 9:2721 (1950): "No sale, contract, counter letter, lien, mortgage, judgment, surface lease, oil, gas or mineral lease or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where the land or immovable is

protecting what may be called "negative reliance" and allowing a prospective vendee to put his faith on the absence of adverse claims against the property.⁶ *McDuffie* protected reliance on the absence of adverse claims in the public records notwithstanding any actual knowledge that the prospective purchaser had of such claims. The rationale behind *McDuffie* and its progeny is that since the statute declares all non-recorded acts null vis-à-vis third parties, the third party is entitled to treat any transaction not recorded as null, regardless of any personal knowledge dehors the records.

A problem arises in cases where claims are not required by law to be recorded. For instance, community property rights do not require recordation in order to be effective against third parties.⁷ In *Succession of James*⁸ a wife, representing herself as single, purchased property and encumbered it with a mortgage. Following the wife's death, the mortgagee attempted foreclosure on the property. The court held that the property was community property and, as such, could not be mortgaged by the wife.⁹ The court found that the husband's community rights, which arise from a marriage contract and affect immovables, need not be recorded to be effective against the third-party mortgagee. Another jurisprudential exception to the requirement of recordation concerns the rights of forced heirs. In *Long v. Chailan*,¹⁰ the supreme court stated quite plainly that neither article 2266 nor the *McDuffie* doctrine will be construed to defeat the rights of forced heirs.¹¹ In that case, after a wife's death, community property was seized and sold at sheriff's sale to pay her husband's debts. An attack by the children of the spouses, as heirs to the property sold, was held legally viable against the purchaser of the property.

situated; and neither secret claims or equities nor other matters outside the public records shall be binding on or affect such third parties."

La. Const. art. 19, § 19 (1921), *as amended* by La. Acts 1938, No. 35, which was reduced to statutory posture by the 1974 Constitution, states: "No mortgage or privilege on immovable property, or debt for which preference may be granted by law, shall affect third persons unless recorded or registered in the parish where the property is situated, in the manner and within the time prescribed by law [exceptions omitted.]

6. See Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 TUL. L. REV. 491 (1965).

7. *E.g.*, *Succession of James*, 147 La. 944, 86 So. 403 (1920); *Gregory v. Womack*, 300 So. 2d 213 (La. App. 2d Cir. 1974); *Mathews v. D'Asoro*, 14 La. App. 328, 126 So. 246 (La. App. Or. Cir. 1930).

8. 147 La. 944, 86 So. 403 (1920). *But see* *Humphreys v. Royal*, 215 La. 567, 41 So. 2d 220 (1949) (rights of divorced spouses require recordation to be effective against third persons).

9. 147 La. 944, 951, 86 So. 403, 405 (1920).

10. 187 La. 507, 175 So. 42 (1937).

11. *Id.* at 522, 175 So. at 48.

The effect of these cases is to put vendees on notice that when they take a property interest it may be subject to existing community or succession claims. The Louisiana Supreme Court has recognized, however, that in the case of a simulated sale the unrecorded rights of even these persons will not cause them to prevail over innocent third-party purchasers,¹² reasoning that since the face of the document does not reflect the true nature of the transaction the third party should not be forced to take the property right subject to claims that he could not have foreseen.¹³ To protect the purchasers of property which was previously the object of a simulated sale, the supreme court has applied the common law concept¹⁴ of protection against "secret equities."¹⁵ The term was not given statutory recognition in Louisiana until 1950 and even then was not defined.¹⁶ The essence of the concept is that persons who innocently rely on the public records should not be bound by any hidden agreements (secret equities) made by their predecessors in title.¹⁷ In order to procedurally implement this remedy, the courts have refused to allow introduction of counter letters¹⁸ or parol evidencing a previous simulated sale against subsequent third party purchasers.¹⁹

12. See *Thompson v. Thompson*, 211 La. 468, 30 So. 2d 321 (1947); *Chachere v. Superior Oil Co.*, 192 La. 193, 187 So. 321 (1939).

13. See *Thompson v. Thompson*, 211 La. 468, 495 n.1, 30 So. 2d 321, 330 n.1 (1947). The courts have deemed claims by heirs to be more "foreseeable" when the donation is apparent. Note the inconsistency in *Succession of James*, 147 La. 944, 86 So. 403 (1920), where the third party mortgagee should have been protected because, since the woman declared herself to be single, the third party could not have foreseen existing community rights.

14. Chief Justice Marshall applied the doctrine in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133-34 (1810): "If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned."

15. See, e.g., *Chachere v. Superior Oil Co.*, 192 La. 193, 187 So. 321 (1939); *Adams v. Brownell-Drews Lumber Co.*, 115 La. 179, 38 So. 957 (1905); *Broussard v. Broussard*, 45 La. Ann. 1085, 13 So. 699 (1893); *Broussard v. LeBlanc*, 44 La. Ann. 880, 11 So. 460 (1892).

16. LA. R.S. 9:2721 (1950). See note 5, *supra*.

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

18. LA. CIV. CODE art. 2239 allows heirs to use parol evidence and counter letters to expose a simulation.

19. See *Redmann*, *supra* note 6.

This protection against secret equities was already ingrained in Louisiana jurisprudence as early as 1893, when in *Broussard v. Broussard*²⁰ the supreme court refused to allow a secret agreement between a prior vendor and vendee to be asserted against a third party purchaser. The court, quoting from Hennen's Digest, said: "Having placed on the public records the title on the faith of which such purchaser acquired, the vendor must bear the consequences of having presented the vendee's rights in a false aspect."²¹ Commentators have variously explained the basis for the protection given third persons by reference to parol evidence²² or protection against secret equities.²³ The dispute is more apparent than real. When a court speaks of protection against "secret equities," it is using the term as a label for the public policy of protecting against hidden agreements, whereas the parol evidence rule is a device used to implement this protection.

This equitable remedy has been consistently employed by the courts and was reaffirmed in *Chachere v. Superior Oil Co.*²⁴ In that case, Theodore C. Chachere Sr. executed three allegedly disguised donations to three of his children. After his death, Chachere's heirs sought to be declared owners of one of the tracts which was the object of one of the alleged donations. At the time of this petitory action, the property was in the hands of a third person. The supreme court declared that third persons could properly rely on public records affecting immovable property and were "not bound by any secret equities that may exist between their own vendors and prior owners of the land."²⁵ Therefore, since the apparent sales were valid on their faces, the court would permit no evidence tending to vary the public records to the third person's prejudice.²⁶

In order to arrive at this conclusion, the court had to find that the right conferred to forced heirs to "annul absolutely" simulated contracts made by those from whom they inherit did not lie in this factual situation. The court found that the right given by article 2239²⁷ did not apply when the

20. 45 La. Ann. 1085, 13 So. 699 (1893).

21. *Id.* at 1088, 13 So. at 700.

22. *See* Redmann, *supra* note 6.

23. *See* Note, 35 LA. L. REV. 193, 195 (1974).

24. 192 La. 193, 187 So. 321 (1939).

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

26. *Id.* at 197, 187 So. at 322.

27. LA. CIV. CODE art. 2239 provides: "Counter letters can have no effect against creditors or *bona fide* purchasers; they are valid as to all others; but 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]." (Emphasis added).

property was in the hands of a third person in good faith.²⁸ Since the right did not exist, the article's exception to the parol evidence rule was not available to the heirs. In a concurring opinion, Chief Justice O'Niell indicated that he was not so willing to concede the article's inapplicability, and based his decision on other grounds.²⁹

When the issue arose again in *Thompson v. Thompson*,³⁰ there was concern about whether the court would share Chief Justice O'Niell's reservations. Yet, in a similar fact situation,³¹ the court refused to apply article 2239. The court said that the heirs could not prove any equities that existed between the parties to the simulated contract since the third party "was without knowledge of the right (of the forced heirs to annul) and there was nothing in the public records to advise him of its existence."³²

In the instant case, the court correctly afforded the innocent third parties the protection against secret equities that was exemplified by *Chachere*.³³ Since the property involved in *Owen* which had been the subject of a disguised donation was in the hands of a third party purchaser, the heirs of the "vendor" in the original transaction were not entitled to introduce parol evidence to change the transfer document which was now a part of the public records.³⁴ Thus, the supreme court's reasoning here was in line with past jurisprudence.³⁵ But two particular factual findings of the lower courts complicated resolution of the dispute in this case. The first was that the Bushes knew before the purchase that W.H. Owen's title was suspect.³⁶ Second was that the original transfer to W.H. Owen by his father was a donation *omnium bonorum* in contravention of article 1497.³⁷ The supreme court held that, even accepting these findings as correct, a third party purchaser will be protected.

The actual knowledge of a third person from without the public records in this context should be distinguished from actual knowledge in a

28. 192 La. 193, 196, 187 So. 321 (1939).

29. He based his decision on 10-year acquisitive prescription. *Id.* at 199, 187 So. at 322.

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

31. A difference which made for a holding contrary to *Chachere* was that the contract of transfer was executory when the rights of the heirs vested in the property.

32. 211 La. at 501 n.1, 30 So. 2d at 332 n.1 (1947).

33. *Owen v. Owen*, 336 So. 2d 782, 787 (La. 1976).

34. *Id.*

35. *E.g.*, *Thompson v. Thompson*, 211 La. 468, 30 So. 2d 321 (1947); *Chachere v. Superior Oil Co.*, 192 La. 193, 187 So. 321 (1939).

36. 325 So. 2d 283, 289 (La. App. 2d Cir. 1975).

37. *Id.* at 285.

McDuffie-article 2266 situation. Based on a statute that declares certain acts null vis-à-vis third persons, *McDuffie* allowed a vendor to treat an unrecorded act as if it had never been executed.³⁸ On the other hand, the protection against secret equities is a jurisprudential remedy that shields third persons from hidden agreements between prior owners,³⁹ thus allowing a more definite reliance. It can be argued that once the third person gains knowledge, the agreement is no longer hidden, so the basis for the protection is gone. In fact, a majority of common law jurisdictions applying this protection against secret equities would decide against the third person with actual knowledge.⁴⁰ But, given that title security is a goal of public policy, a third party who has paid proper consideration for an interest in property and has committed no fraud⁴¹ should not be forced to defend his title against agreements between prior owners who falsely stated the nature of the transaction that divested them of property. Allowing parol evidence to show knowledge would encourage disputes that could only be resolved on a case by case basis. If public records are to be useful at all, they must be such that they can be relied upon as being what they purport to be. Also, merchantability of title demands that one should not be forced to investigate every suspected defect in a deed. Rumors about possible flaws in a title could make a property interest unmarketable except to speculators and thus could inflate title research costs and deflate property values. So, absent fraud, when dealing with property that was the object of a simulation, one should be able to rely absolutely on the face of a public record.

Should this protection be afforded even where the transaction involved was a donation *omnium bonorum* and as such "absolutely" void *ab initio*?⁴² In *Owen*, the supreme court did not analyze the *omnium*

38. *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909).

39. See notes 14 and 17, *supra*.

40. J. CRIBBETT, PRINCIPLES OF THE LAW OF PROPERTY 221-24 (1962).

41. "This court has often said that fraud vitiates all things." *Broussard v. Doucet*, 236 La. 217, 223, 107 So. 2d 448, 451 (1958).

42. It has repeatedly been held that a donation *omnium bonorum* is absolutely null and, as such, vests no title in the donee. *See, e.g.*, *Broussard v. Doucet*, 236 La. 217, 107 So. 2d 448 (1958); *Litton v. Stephens*, 187 La. 918, 175 So. 719 (1937); *Kirby v. Kirby*, 176 La. 1037, 147 So. 70 (1933); *Welch v. Forest Lumber Co.*, 151 La. 960, 92 So. 400 (1922); *La Grange v. Barre*, 11 Rob. 302 (1845). *But see* *Jenkins v. Svarva*, 131 La. 749, 60 So. 232 (1912) (title which passed afforded donee a basis for 10-year acquisitive prescription); *Succession of Turgeau*, 130 La. 650, 58 So. 497 (1912).

Definitionally, when a transaction has been declared to be an absolute nullity, as in the case of a pure simulation, then it is as if the transaction had never taken place. This being the case, then logically, a vendee in a simulated sale could not pass title that he never obtained. This is the logical dilemma addressed in the text,

bonorum problem extensively. It appeared to adopt the holding of the Second Circuit⁴³ that the transfer was violative of Civil Code article 1497 and hence null from its inception.⁴⁴ This would mean, of course, that title never passed by the violative act. But, the court held that although the "title which passed" to the donee in violation of article 1497 may be declared absolutely null in the hands of the donee, claimants should not be able to recover such property in the hands of a third person who purchased in reliance on the public records.⁴⁵ The court's language might be seen as reflecting a differing view from the appellate court as to the effect of this donation: if the title did pass, subject to being *declared* null in the donee's hands, then the donation was not an "absolute" nullity in a strict sense. It has been suggested that a finding that a violation of article 1497 is not an absolute nullity but only makes the transaction annulable would be consistent with the Spanish authority from which the codal provision was derived.⁴⁶ This approach would avoid what seems to be a logical inconsistency that allows a vendee to transfer title that he never possessed.

Another explanation that has been given is that this transaction is of a class that has been deemed null between some parties and not others, effectively creating the situation whereby the transaction is null between the original parties but not vis-à-vis third parties.⁴⁷ This result would allow vendees to transfer greater rights than they have. Such a result is normally objectionable, but is sanctioned by the code in some instances.⁴⁸

which is to be distinguished from a situation where the practical effect is a translated title because of the operation of the parol evidence rule.

43. 325 So. 2d 283, 288 (La. App. 2d Cir. 1975).

44. Most of the jurisprudence has declared that article 1497 is a prohibitory law and, as such, would require that transactions contravening it be null *ipso facto* and not translatable of title. See, e.g., *Owen v. Owen*, 325 So. 2d 283, 286 n.1 (La. App. 2d Cir. 1975). See also cases in note 41, *supra*.

45. *Owen v. Owen*, 336 So. 2d 782, 788 (La. 1976).

46. *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Successions and Donations*, 37 LA. L. REV. 421, 426 (1977).

47. S. LITVINOFF & W. TÊTE, *LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS* 188 (1969). The authors recognize that the transaction is not an absolute nullity in the logical sense, nor a relative nullity, but something in between. Litvinoff and Tête call this a hybrid category of "inopposable" acts. They are "acts [which] cannot be *opposed* to certain parties, that is, they cannot serve as a bar to the claim of certain parties. . . . Such acts are *valid* as to the parties who make them, but *null* as to those parties to whom they cannot be opposed."

An example given is article 2239 which makes counter letters valid between parties to the act but denies their use against creditors or *bona fide* purchasers.

48. For example, article 2015 provides in part: "but the law establishes the rule that no one can transfer a greater right than he himself has, except where the neglect of some formality required by law has subjected the owner of the real incumbrance to a loss of his right, in favor of a creditor or *bona fide* purchaser."

Regardless of how one interprets and rationalizes the supreme court's methodology in arriving at its decision, the fact is that the court was determined to protect the third party purchasers in this case. The result is correct. This is so even if one considers the public policy favoring the rights of heirs and society's strong interest in not allowing persons to pauperize themselves.⁴⁹ Reliability of the public records is an overriding concern. Since the transfer involved was a simulated sale, the third person was neither put on notice of the possibility of a donation *omnium bonorum* nor of the revocation rights of the heirs arising therefrom. An unwary third party should not be penalized for the hidden intentions of others. Again, title security and merchantability dictate this result.

The uncertainty that shrouds this area of the law makes it necessary that more definitive rules be enacted. The legislature should act to circumvent inevitable court battles over whose rights should prevail in specific public records disputes. The lawmakers must move to elevate and solidify the function of public records in transactions affecting immovables.⁵⁰

Patrick Wise Gray

THE CLASSIFICATION OF CONTINGENT FEE CONTRACTS AS COMMUNITY OR SEPARATE PROPERTY

During the existence of the community, the attorney-husband contracted to supply his services on a contingent fee basis. After the marriage was dissolved and the community voluntarily partitioned, his wife sued to rescind the settlement, claiming that the omitted contingent fee contracts

49. This societal protection against paupers is the basis of article 1497. Therefore, anyone with a sufficient duty of support of the donor should be able to annul the donation. It is also inconsistent that heirs can annul the donation when the donor is dead and the need for protection no longer exists. See *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Successions and Donations*, 37 LA. L. REV. 421, 426 (1977); Comment, 6 LA. L. REV. 98 (1944).

50. One possible change would be to protect positive reliance. For instance, the Germans have what is called a "constitutive" system. Recordation produces self-supporting rights not based on the chain of title. The French system, by comparison, is similar to Louisiana's in that it does not create rights but is merely "declarative" of them. See Kozolchik, *The Mexican Land Registry: A Critical Evaluation*, 12 ARIZ. L. REV. 308 (1970), for a comparative analysis of various systems. A "constitutive" system, coupled with a requirement that the rights of heirs and spouses be recorded, would make for a more reliable public records system in Louisiana.