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Sales - Effect of Recordation on Community Rights

Wade V. Smith

reached since the determination of the lawfulness of the restraint is much the same in civil, as in common law.

THEODORE C. STRICKLAND

SALES—EFFECT OF RECORDATION ON COMMUNITY RIGHTS

Leaving his wife at the marital domicile in Mississippi, Isiah Payne came to Louisiana. He purchased immovable property in Bossier Parish, reciting his marital status as *single* in the recorded act of sale. A divorce was subsequently obtained by the husband in Bossier Parish by substituted service without his wife's knowledge; the judgment was not recorded in the conveyance records of the parish. Defendant then bought the property from the husband and again the recorded sale stated that the husband was a single man. Plaintiff, aware of the husband's true marital status, went to Mississippi and bought the wife's undivided one-half interest in the property. He then immediately brought a petitory action, seeking to be adjudicated owner of a one-half interest in the property. *Held*, under Article 2266 of the Civil Code[1] the unrecorded divorce judgment affecting the immovable property in controversy was utterly null and void as to the defendant, a third party relying on the public records. *Humphreys v. Royal*, 215 La. 567, 41 So. 2d 220 (1949).

Article 2266 is the codal basis for what has come to be known as the doctrine of *McDuffie v. Walker*: third parties who engage in transactions that involve immovable property are entitled to rely upon the public records, even if they have actual notice of unrecorded claims against the property.[2] Behind this established doctrine stands the public policy of protecting the security of real estate transactions.

The doctrine of *McDuffie v. Walker* has at various times come into conflict with other settled rules of law. Among these are the

1. "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.

"The recording shall have effect from the time when the act is deposited in the proper office, and indorsed by the proper officer." Art 2266, La. Civil Code of 1870. See also Arts. 2262, 2264, 2265, La. Civil Code of 1870.

2. McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909), doctrine discussed in: Coyle v. Allen, 168 La. 504, 509, 122 So. 596, 598 (1929); Westwego Canal and Terminal Co., Inc. v. Pizanie, 174 La. 1068, 1071, 142 So. 691, 692 (1932); State ex rel. Hebert v. Recorder of Mortgages, 175 La. 94, 143 So. 15 (1932); Masters v. Cleveland, 158 So. 382, 385 (La. App. 1935); Gulf Refining Co. v. Evans, 181 So. 666, 670 (La. App. 1938). See also Notes, 14 Tulane L. Rev. 16 (1939), 22 Tulane L. Rev. 208 (1947), 23 Tulane L. Rev. 259 (1949).

rules of forced heirship and community property. In the first of three cases involving the rights of forced heirs, *Long v. Chailan*,[3] it was held that this doctrine did not defeat the right of forced heirs who inherited their mother's half of community property, even though there was no positive information of record as to their inheritance rights. Further, there was no information of record, reliance upon which might negate such a claim. In a case arising two years later, *Chachere v. Superior Oil Company*,[4] the court applied the doctrine of *McDuffie v. Walker*. The decision is sometimes considered contrary to *Long v. Chailan*, but in fact in the later case there was positive information of record on which third persons had relied. In the latest case, *Thompson v. Thompson*,[5] the court allowed forced heirs to set aside their ancestor's simulated sale to the detriment of a third party, who had purchased an *option* in reliance on the public records. The court indicated, however, that its decision would not be applicable to a case where the rights of the third party arose from a completed sale instead of an option to purchase. Thus, the court has not established and maintained a consistent policy which would be applicable to all cases involving a conflict between the rules of forced heirship and those of recordation.

In *Succession of James*,[6] the court faced the issue of whether the doctrine of *McDuffie v. Walker* should be given priority over the rules relating to community property. There the wife bought and later mortgaged certain real estate by recorded acts in which her marital status was described as single. After the wife's death, the mortgagee had the property sold to satisfy the mortgage. The husband, a sailor, returned in time to contest the mortgagee's right to the entire proceeds on the ground that the property was acquired during the marriage and hence that he was entitled to the surviving spouse's one-half interest.[7] The court held for the husband, considering settled[8] that the protection of the right of

3. 187 La. 507, 175 So. 42 (1937).

4. 192 La. 193, 187 So. 321 (1939), noted in 2 LOUISIANA LAW REVIEW 387 (1940). See also Note, 23 Tulane L. Rev. 259 (1949).

5. 211 La. 468, 30 So. 2d 321 (1947), noted in 8 LOUISIANA LAW REVIEW 429 (1948), 22 Tulane L. Rev. 208 (1947).

6. 147 La. 944, 86 So. 403 (1920).

7. Arts. 2402, 2405, 2406, La. Civil Code of 1870; Giglio v. Giglio, 159 La. 46, 105 So. 95 (1925); Washington v. Palmer, 28 So. 2d 509 (La. App. 1946). Daggett, The Community Property System in Louisiana, 8-17 (1945).

8. 147 La. 945, 950, 86 So. 403, 405 (1920). In Phillips v. Phillips, 160 La. 813, 826, 107 So. 584, 586 (1926), it was said: "It had been decided, in Dixon v. Dixon's Executors, 4 La. 188, 23 Am. Dec. 478, in 1832, and was repeated in Theall v. Theall, 7 La. 226, 26 Am. Dec. 501, in 1834, that the wife had not a mere expectancy but the absolute ownership of half of the community prop-

a surviving spouse to an undivided one-half interest in the community property operates as an exception to the rule that third parties may safely rely on the public records.

In the present case the court was careful to distinguish *Succession of James*. It pointed out that there was no contract or judgment affecting the immovable that could be recorded in that case, while here there was a divorce obtained by the husband which could have been but was not recorded. From this the court concluded that Article 2266 was applicable in the instant case although not in *Succession of James*. This distinction is open to question. In general, property acquired by either spouse during marriage belongs to the community of acquets and gains.[9] To determine whether the parties were married at a given time, the marriage certificate is as important as the divorce judgment. A recorded marriage certificate is notice that property thereafter acquired may be community property,[10] but a recorded divorce judgment is not necessarily notice to third parties that previously acquired property belongs to the community, for the marriage may have occurred subsequent to the acquisition. Therefore, if the vendee in the present case was not affected by the unrecorded divorce, then it would seem that the mortgagee in the *James* case should not have been affected by the unrecorded marriage certificate.

If the doctrine of *McDuffie v. Walker* has priority over community rights, the court could have simply said as much, without reference to the divorce judgment. By basing its decision on the ground that the defendant was not affected by the unrecorded divorce judgment, and by thus distinguishing the instant case from *Succession of James*, the court apparently was unwilling to hold that the doctrine of *McDuffie v. Walker* has priority every time it conflicts with community rights. The equities in the case may have influenced the court to find for the defendant, and in doing so, to base its decision on the narrow ground just referred to. It is apparent from the opinion that the court viewed the

erty during the existence of the community, subject, of course, to the husband's power of administration." This was affirmed in Succession of Weiner, 203 La. 649, 14 So. 2d 475 (1943). Cf. Gulf Refining Co. v. Evans, 181 So. 666 (La. App. 1938).

9. Art. 2402, La. Civil Code of 1870. See also note 8, supra.

10. While marriage is not recognized as a contract, Rhodes v. Miller, 189 La. 288, 179 So. 430 (1938), it partakes to some extent of that status. Arts. 86, 90, La. Civil Code of 1870. If the property is community, divorce calls for dissolution, but it is marital status that establishes the nature of the property acquired as community or separate.

plaintiff as an opportunist who, knowing the true circumstances, bought the wife's interest in the property solely as a speculation.[11] As between plaintiff and the innocent vendee, who had bought the property in reliance on the records, the equities obviously favor the vendee. But a contrary result might obtain under a different factual situation. If the wife had been plaintiff the court might have been impressed with the fact that she could hardly have recorded a divorce judgment when she had no knowledge of the divorce suit.

The court's narrow holding may be founded on the desire not to commit itself to a definite policy at this time. Litigation involving this issue has arisen only infrequently,[12] and the court may be as yet undecided on the preference to be established between the doctrine of *McDuffie v. Walker* and the right of a spouse in the community at termination of the marriage.

As a result of the narrow basis on which the present decision rests, it is impossible to say definitely that the case represents a policy determination. If the decision was based primarily upon the facts of the case and was not dictated by policy consideration, it would appear that protection of the divorced spouse's rights in the community property will require the divorce to be recorded in the parish conveyance records.[13] Unless the spouse knows in which parish or parishes the immovables are located, adequate protection will require recordation of the divorce judgment in all sixty-four parishes of the state. The question arises whether marriage certificates also should be recorded in the conveyance records of all sixty-four parishes to protect the rights of the spouse in the community property.

If the decision is based strictly on the failure to record the divorce judgment, to what extent may a title examiner rely on a statement of marital status appearing in the public records? For example, suppose the title examiner finds in the recorded sale by which the vendor acquired the property a recitation that the vendor was divorced, whereas in fact the vendor was then

11. "Soon after the development of the Benton Oil Field, in which area this property lies, the plaintiff, obviously with a knowledge of all of the facts, sought out Gertrude Fields Payne at her residence in Mississippi, and, on April 26, 1946, purchased from her an undivided half interest . . . in and to the property." 215 La. 567, 576, 41 So. 2d 220, 221 (1949).

12. Until the present case, the issue had arisen but once, in Johnson v. Johnson, 213 La. 1092, 1102, 36 So. 2d 396, 399 (1948), in the thirty years since *Succession of James*, and then only indirectly.

13. On the death of a parent, will forced heirs now be required to record the death notice, or a judgment of heirship, to protect their inherited community rights?

married but has subsequently been divorced? Could the examiner advise the prospective vendee to rely on the recorded statement of divorce? Assuming that policy does not underlie the present decision, these and similar questions will arise to plague title examiners in the future. In addition, if the equities of this case influenced the court's decision, the outcome of similar future cases may depend on their individual equities.

On the other hand, the decision in the instant case may in fact be one of policy. Failure to record the divorce judgment might well have been merely a convenient peg on which to hang a policy favoring the doctrine of *McDuffie v. Walker* over the protection of community property rights. This view of the majority opinion was taken by Justice Hawthorne in his dissenting opinion,[14] which was based on the policy announced in *Succession of James*, that the community interest is paramount to, and should prevail against, the rules of recordation. If the present decision is considered to enunciate a policy favoring the doctrine of *McDuffie v. Walker* over community property rights, third parties may now safely rely on a statement of marital status appearing on the public records. At least one highly beneficial result becomes apparent immediately. Title examination is made more certain, and considerably easier, if the examiner does not have to inquire into the truth of the statement of marital status appearing in the records. While on the surface this might appear to open the door for fraud,[15] or to be inequitable toward the affected spouse, these results do not necessarily follow. The issue is not one between supporting a fraud and diminishing its occurrence, but rather one drawn solely between the injured spouse and the innocent third party. It presupposes misrepresentations of marital status on the public records and presents for decision the question of whose rights in the contested property shall be protected and who shall be relegated to a personal action against the offending spouse.[16] It cannot be said that the preference accorded the third party by this policy is an inducement to fraud, for in either case an innocent party stands to be shorn of his rights in the property by an antecedent fraud. Nor is it inequitable that the wife should be the one who must resort to a personal action against the errant husband. As between an *innocent* vendee, who

14. 215 La. 567, 574-577, 41 So. 2d 220, 222-223 (1949).

15. See Note, 24 Tulane L. Rev. 375, 378 (1950), where this view is treated.

16. The wife derives her personal action from Art. 2404, La. Civil Code of 1870. The vendee derives his action from the articles on warranty, Arts. 2475, 2476, 2500, 2501, 2505, 2506, La. Civil Code of 1870.

presumably is a stranger with no knowledge of the vendor's character, and the wife, a policy protecting the third party appears equitably justified. But if the vendee has knowledge of the marital status of the husband and chooses to rely solely on statements recorded in the sale, the equities might favor the wife, for in such a case the vendee is not, in fact, "innocent."

It is impossible to say definitely that the *Royal* decision favors the rules of recordation over those protecting community rights, or that the decision is based solely on its peculiar facts and equities. For this reason, the case creates uncertainty in an area of law which had heretofore appeared certain,[17] and which should be certain. A definite statement of policy is clearly needed concerning the extent to which the doctrine of *McDuffie v. Walker* has priority over the rights of the community of acquets and gains. This uncertainty in the law is a proper subject for the forthcoming revision of the Civil Code. It might have been desirable for the court to announce a clearer interim policy.

WADE V. SMITH

SUBSTANTIVE DUE PROCESS—STATUTE SETTING MINIMUM MARK UP HELD UNCONSTITUTIONAL BECAUSE OF FAILURE TO CARRY OUT LEGISLATIVE POLICY

Louisiana Act 360 of 1948[1] provided for wholesale minimum mark ups above cost of 15 per cent on liquor, 20 per cent on cordial liqueurs and specialties, and 25 per cent on sparkling and still wines; and for retail mark ups of 33⅓ per cent on liquor, 45 per cent on cordials, liqueurs and specialties, and 50 per cent on sparkling and still wines. Schwegmann Brothers failed to comply with these requirements, and on revocation of their license instituted suit to enjoin enforcement of the act, alleging denial of due process. The Louisiana Supreme Court affirmed an order granting the injunction: ". . . the provisions of Act 360 of 1948 which relate to the mandatory minimum mark ups (Sections 1[s], 24 and 26) do not tend in a degree that is perceptible and clear, toward the accomplishment of the announced purpose of the statute, namely, the regulation and control of the liquor traffic so that it 'may not cause injury to the economic, social

17. The policy stated in *Succession of James* had been applied as early as Dixon v. Dixon's Executors, 4 La. 188, 23 Am. Dec. 478 (1832), nearly a hundred years before. Since the *James* case, its decision was cited with approval in Johnson v. Johnson, 213 La. 1092, 1101, 36 So. 2d 396, 399 (1948).

1. La. R.S. (1950) 26:1 et seq.