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Substantive Law - Private Law: Conflict of Laws

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vate; this would suffice to prevent the "tacit" dedication of such a road.[6] However, under the statute cited, there was a "forced" dedication of the road which occurs not with reference to the landowner's intent to keep it private but because of the three years' maintenance and expense by the police jury with the full approval of the landowner. A person can always keep his road to himself, or he may be able to establish some sort of a shared conditon by contract, but he cannot have the road maintained at public expense and still keep it private.

OWNERSHIP

In the case of *Lasyone v. Emerson*[7] an incidental question concerned the possibility of a partition in kind of a building, in a horizontal plane instead of the ordinary partition of property in a vertical plane (by lots, or metes and bounds). The horizontal idea was proposed as a separation of ownership between the lower floor of the building and the upper floor. Of course, the court made short shrift of such an unusual thought so foreign to the Louisiana property concepts. However, before completely brushing the idea aside, it might not be untimely to give it some consideration with reference to the basic policies and objectives of our property law. In many states it has proven feasible, and in the general interest, to have separate ownership of individual apartments in a large building, and in France it has been possible for several people to have the separate ownership of each floor of a building. The idea of a horizontal division of ownership in property may ultimately be found unsuitable and undesirable for Louisiana; nevertheless, it may not be amiss to give it some thought for legislative consideration.

CONFLICT OF LAWS

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DIVORCE RECOGNITION

Assertions of status and relationship are often generated for purposes of property succession, but it is unusual to find a person willing to brand herself as a bigamist by alleging seventeen years later the invalidity of the divorce which had been obtained by

6. Bomar v. City of Baton Rouge, 162 La. 342, 110 So. 497 (1926).
7. 220 La. 951, 57 So. 2d 906 (1952).

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her first husband. On the basis of this allegation, the plaintiff in *Rouse v. Rouse*[1] claimed as community all the property acquired by her first husband until the time of his death. The defendant was his fourth wife, who claimed to be the real widow. The divorce in question had been obtained in Mississippi within one year from the marriage, and was rendered in favor of the husband on the grounds of the wife's abandonment after one month of married life. In view of her own remarriage, together with her silence during seventeen years and through the husband's three subsequent remarriages, the court held that she had "acquiesced" in the Mississippi divorce and that she could not be permitted now to attack collaterally its jurisdictional basis. The court pointed out the interest which a state has in the marriage relation and the undesirability of stigmatizing the status of many other innocent people. At the same time, it distinguished its decision on the grounds of "acquiescence" from the authorities in other states which preclude attack against a foreign divorce on the grounds of "estoppel" where the complainant himself (or herself) has acted upon an acceptance of its validity.

On the facts of this case, there may not be much difference between *acquiescence* and *estoppel* although it is conceivable that some significant differences may be found between the two principles. Whether this will develop depends upon the future judicial decisions in subsequent cases of similar import.

An undeveloped element in this case is the divorce jurisdiction of the Mississippi court. It is not clear why the parties admitted that the Mississippi divorce could be attacked for lack of jurisdiction. The original marriage took place in Mississippi and the only matrimonial domicile at which husband and wife lived together (even though less than one month) was in Mississippi. No personal service was made on the defendant wife in the divorce suit, and notice was by publication only. At the same time, there was no showing that the wife had thereafter legally acquired any other domicile in the conflict of laws sense (that is, outside of Mississippi). Assuming that the divorce proceedings had complied with the procedural requirements of Mississippi law, the court had divorce jurisdiction even if the wife had already changed her domicile. Such a divorce decree is now entitled to full faith and credit under the *Williams*[2] doctrine of

1. 219 La. 1065, 55 So. 2d 246 (1951).
2. 317 U.S. 287 (1942).

the United States Supreme Court if the husband's domicile was in Mississippi; and the same would be true even under the older *Atherton*[3] doctrine by reason of Mississippi having also been the last matrimonial domicile.

Had the Louisiana court permitted an attack on the Mississippi divorce, there might well have been a good petition for certiorari to the United States Supreme Court on the grounds of denial of full faith and credit. The outcome would then have depended upon proof of the husband's domicile at the time of the divorce suit, about which there was no clear evidence in the present case—perhaps because the issue on appeal was limited to the lower court's dismissal of the suit on an exception of no right of action and the plea of estoppel.

CUSTODY

Jurisdiction in matters of child custody in conflict of laws has given rise to considerable difficulty. While there is the usual striving toward stability by means of legal concepts and rules, there is also the functional consideration of the welfare of the child as well as the conflicting pressures of separated parents. The strict application of jurisdictional rules, such as domicile or residence or presence, combined with full faith and credit for sister-state judgments, would not bring about the best results for all the interests concerned. The developments in this field of the law of conflict of laws are still fairly new, and the difficulties are still numerous.[4] To alleviate the tension on courts, and to provide flexibility for readjustments, there has been developed the "changed circumstances" doctrine, recently consolidated by the United State Supreme Court in *Halvey v. Halvey*.[5] In the light of this doctrine, the court of one state can re-examine anew the custody problem just as it could be re-examined by the court of another state which had already rendered a prior decree.

In the case of *State ex rel. Girtman v. Ricketson*[6] the remarried Florida father was trying to recover custody in accordance with a Florida custody decree of the child in the actual possession of the remarried mother in Louisiana. The lower court considered itself bound to recognize the Florida judgment, but the Louisiana Supreme Court reversed on the ground of the "changed circum-

3. 181 U.S. 155 (1901).

4. See Graveson, Jurisdiction in Matters of Child Custody, 26 Conn. B.J. 44; Rheinstein, id. at 48; Dainow, id. at 232 (1952).

5. 330 U.S. 610 (1948).

6. 60 So. 2d 88 (La. 1952).

stances" doctrine of the *Halvey* decision, and remanded the case to receive the evidence which had previously been excluded concerning changed conditions which arose subsequent to the Florida judgment. The mother's chances of success are naturally much greater at her domicile in Louisiana than in the Florida court which had already ruled against her.

Little or no consideration is given to the mother's deceit in getting the child for the Christmas holidays and her broken promise to send him right back. If the father had suspected anything of the sort, he could have refused her request, and he could have continued indefinitely his exclusive custody in Florida under the Florida judgment (subject only to reasonable visits by the mother in Florida). In so doing, the father could act selfishly within his rights, but he might not be doing the best thing for the child.

On the basis of the "changed circumstances" doctrine, and the present case, the father might now be encouraged to maneuver the removal (kidnapping?) of the child to Florida and to the protection of the former or a new Florida custody decree. The "changed circumstances" doctrine presents more advantages of an immediate sort than solutions of a permanent nature.

Chattel Mortgages

For some time, it has been a well-established rule of conflict of laws in Louisiana that a chattel mortgage duly executed in another state and properly complying with the requirements (form, recordation, et cetera) of that state, would be recognized and given effect in Louisiana—even as against an innocent Louisiana purchaser—provided that the removal from the state of execution to Louisiana was without the knowledge and consent of the chattel mortgagee.[7] It had not been categorically settled, however, upon whom rested the burden of proof concerning this all-important proviso: whether upon the innocent purchaser to prove such knowledge or consent, or upon the chattel mortgagee to prove its absence.

The question was squarely met in the case of *G.F.C. Corporation v. Rollins*.[8] The plaintiff sought the sequestration of an automobile covered by a Missouri chattel mortgage which had not been recorded in Louisiana. The plaintiff alleged absence of knowledge or consent but insisted that it was not required to

7. General Motors Acceptance Corporation v. Nuss, 195 La. 209, 196 So. 323 (1940).

8. 221 La. 166, 59 So. 2d 108 (1952).

prove this. Assuming, without deciding, that the chattel mortgage would be enforceable in Missouri, the court cut directly to the question of burden of proof. Without the benefit of any authorities,[9] the court reached the logical and reasonable conclusion that "since plaintiff is seeking to have Louisiana recognize and enforce an unrecorded foreign chattel mortgage against an innocent purchaser of the automobile, a plain duty rested upon it to prove that it was without knowledge that the car had been brought to Louisiana as it is only in such circumstances that it can be excused for its failure to comply with our laws of registry."[10]

There still appears to linger the tendency to call it a "rule of comity"[11] when a claim asserted to have originated under the laws of another state (or foreign country) is recognized in the forum. It is submitted that designating the governing precept as the appropriate "Louisiana rule of conflict of laws" would be more specific. Whereas comity looks only to a recognition through courtesy, a rule of conflict of laws would have the advantage of a concrete assertion which can operate not only towards an affirmative protection to an asserted claim but also towards a negative denial. At the same time, it offers more stability and predictability than the constantly shifting sands of the pure discretion or courtesy implied in the idea of comity. In the absence of comprehensive legislative coverage, it is within the authority and responsibility of the court to develop and formulate these Louisiana rules of conflict of laws.

CONVENTIONAL OBLIGATIONS

*J. Denson Smith**

The number of cases wherein the court is called upon to adjust the differences between the parties to contracts to sell real estate has apparently not fallen off despite the fact that the course of decision has of late been particularly clear. Four such cases were presented during the last term.

9. This specific question of burden of proof does not seem to have given much cause for concern because it is not mentioned in the usual conflict of laws references. Stumberg, Principles of Conflict of Laws 396-399 (2 ed. 1951); Goodrich, Handbook of the Conflict of Laws 486-488 (3 ed. 1949); Jones, Chattel Mortgages and Conditional Sales; Restatement, Conflict of Laws, §§ 266, 268, 275; 68 A.L.R. 554, 87 A.L.R. 1298, 148 A.L.R. 375.

10. 59 So. 2d 108, 110.

11. 59 So. 2d 108, 109.

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