Louisiana Law Review

Volume 30 | Number 2
The Work of the Louisiana Appellate Courts for the 1968-1969 Term: A Symposium
February 1970

Public Law: Conflict of Laws

Robert A. Pascal

power to avoid fraudulent conveyances. One is section 67d,[27] largely derived from the Uniform Fraudulent Conveyance Act,[28] which may be considered a re-statement of the common law of fraudulent conveyances.[29] The other is section 70e, which provides in part: "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor."[30] In most states, the law of fraudulent conveyances, made available to trustees in bankruptcy through section 70e, is substantially similar to section 67d; in Louisiana, however, trustees in bankruptcy often have a choice of substantive law.[31] The transfer in *Holohan v. Durand* could have been attacked under section 67d had it not been made more than a year before bankruptcy[32] and promptly recorded.[33] As it was, the trustee necessarily invoked section 70e.

CONFLICT OF LAWS

*Robert A. Pascal**

FULL FAITH AND CREDIT

The decision in *Liebendorfer v. Gayle*[1] raises a fascinating question which the writer finds difficult to answer. Husband and wife, Louisiana domiciliaries, were separated from bed and board in Louisiana and some months later a conventional partition of community assets was executed by them. Thereafter the wife secured from an Arkansas court a divorce judgment in which the conventional partition was "incorporated"—apparently at her request, without opposition of the husband, and without allegation of its defect or invalidity by either spouse. Following this the wife sought a Louisiana declaration of the nullity of the partition, alleging fraud on the husband's part in the classification

27. 11 U.S.C. § 107d (1964).
28. 9B UNIFORM LAWS ANN. 48 (1957).
29. 4 W. COLLIER, BANKRUPTCY § 67.29[2] (1967).
30. 11 U.S.C. § 110e (1964).
31. For a discussion of differences between the common law of fraudulent conveyances and the Louisiana law, *see* Currie, *The First Act of Bankruptcy in Louisiana*, 27 LA. L. REV. 16 (1966).
32. Bankruptcy Act § 67d(2), 11 U.S.C. § 107d(2) (1964).
33. Bankruptcy Act § 67d(5), 11 U.S.C. § 107d(5) (1964).

* Professor of Law, Louisiana State University.

1. 217 So.2d 37 (La. App. 3d Cir. 1968), *cert. denied.*

of certain assets. The judges of the district and appellate courts persistently declared the Louisiana partition "incorporated" in the Arkansas judgment and entitled to full faith and credit unless that judgment were subject to collateral attack in Arkansas. Whether the Arkansas judgment so far as it was a divorce judgment was or was not entitled to full faith and credit will not be discussed here, for this question was irrelevant to the issue involved. What was involved was whether the judgment, so far as it purported to be one on a patrimonial issue (partition of the community of acquets and gains) was entitled to full faith and credit. Assuming both parties were before the court, the ordinary elements of procedural due process for patrimonial issues were satisfied and the judgment was *res judicata* and entitled to full faith and credit if otherwise valid. What causes the writer to doubt the judgment could be considered a valid judgment at all is that apparently no controversy concerning the partition was presented to the court, neither party having challenged its validity. Without a case or controversy there can be nothing to adjudicate. And if there is nothing to adjudicate, it would seem there cannot be a valid judgment or, therefore, entitlement to full faith and credit.[2] By way of analogy, it is noteworthy that under Article 2272 of the Louisiana Civil Code "the act of confirmation or ratification of an obligation is valid only when it contains . . . the mention of the motive of the action of rescission, and the intention of supplying the defect on which that action is founded." A conventional ratification or confirmation, in other words, cannot be valid if the cause for the nullity or rescission of the act is not known and stated at the time of ratification or confirmation. By analogy, it seems proper to conclude that a judgment purporting to ratify or confirm (or "incor-

2. Even if such judicial confirmations of unchallenged juridical acts as occurred in this case had been given the effect of judgments under Arkansas law there would be the question whether such a law were entitled to recognition under the full faith and credit clause. A state cannot enlarge or decrease the scope of full faith and credit by defining "judgment" for itself or creating its own standards for the validity of a judgment. The standards or criteria for full faith and credit are necessarily a federal question. Otherwise the constitutional clause would be but a device by which each state could determine for itself when its laws or judgments were to be recognized by other states. The correctness of this is illustrated by, for example, the United States Supreme Court's refusal to recognize either judgments based on a state's own criteria for jurisdiction or state laws taxing persons or regulating business activities when these do not meet minimal federal standards for delimiting interstate competence. *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310 (1945), on legislative competence to tax certain persons, and Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955), on state or territorial competence to define for itself "domicile" as a basis of legislative or judicial divorce competence.

porate") a previous conventional act should be given effect as such only if the cause for the nullity or rescission of the act is known and mentioned by the party who might claim it. Thus, in the writer's opinion, the "incorporation" of the conventional partition in the Arkansas divorce judgment—itself a separable patrimonial judgment—should not have been considered a bar to such attacks as are permitted by law on conventional partitions. Admittedly, however, the question warrants much more careful study than it is given here.

INTERSTATE JUDICIAL JURISDICTION

Dupre v. Guillory[3] decided that Louisiana could reduce for the future the plaintiff's previously adjudicated liability for alimony to his divorced wife, who had become domiciled in another state, without personal service upon her. The rationale was that the personal jurisdiction which the state had over her at the time of the original judgment "continued" in spite of her ceasing to be domiciled here. Whether the fact that the plaintiff husband had filed his petition in the same suit in which the original judgment had been rendered was considered significant by the court is not clear from the opinion. The court called the question "res nova in Louisiana" and relied on 62 A.L.R.2d 544, section 2(a), for support. The decision reflects the need for Louisiana legislation under which Louisiana courts would be permitted to exercise personal jurisdiction in such and similar cases, but it is, nevertheless, without foundation in the current legislation. The original suit for alimony had terminated. Nothing in the legislation suggests jurisdiction over a person is retained once a suit is terminated. Furthermore, under article 6 of the Code of Civil Procedure, Louisiana courts are limited in their exercise of judicial power to render judgments *in personam* in instances in which there is (1) service on the person or his agent for service of process; (2) service on an attorney appointed by the court to represent an absent or incompetent *domiciliary*; and (3) voluntary submission or waiver of exception to the exercise of judicial power over him. The article does not extend the judicial power of Louisiana courts to persons not domiciled in this state and neither represented here nor submitting voluntarily to its judicial actions.

Legislation authorizing the exercise of personal jurisdiction

3. 216 So.2d 327 (La. App. 3d Cir. 1968).

in such cases as this and similar ones should be passed. Louisiana's original Code of Practice would have allowed such suits.[4] Probably it is only because the redactors of the Code of Civil Procedure thought it necessary to comply with *Pennoyer v. Neff*[5] and its progeny that article 6 was drawn as strictly as it was.[6] Today it should be possible to argue that the rationale of *Pennoyer v. Neff* has been discredited and its rule relaxed for instances in which greater overall fairness can be realized by allowing the exercise of personal jurisdiction over non-domiciliaries. The "doing business," "use of the highways," and "long arm" rules give evidence of the actual movement away from *Pennoyer v. Neff* in the direction of an effective remedy for the local plaintiff where requiring him to sue the defendant at his domicile would cause undue hardship. In a fact situation like the present one, where the plaintiff seeks to *terminate* or *reduce* a continuing obligation to another rather than to establish positively a claim against him, the exercise of personal jurisdiction by the plaintiff's state seems very reasonable. Indeed, if a non-domiciliary expects to enjoy a continuing but variable right—and this is what alimony is—against a domiciliary on the basis of the domiciliary's law, it would seem eminently reasonable to expect the non-domiciliary to submit to the jurisdiction of the courts of the domiciliary's state for adjudications touching the question of decreased entitlement under that law.

Celebration of Marriage

The decision in *Dupre v. Rochester Ropes, Inc.*[7] affirms in effect that parties who began life together in Louisiana as concubine and paramour may be found to have contracted marriage later by living together with the intent of being husband and wife in a state (Texas) which recognizes such conduct as sufficient form for the contracting of marriage. Under the general principle that the capacity of parties to marry is determined by the law of their domicile (or, more exactly, intended domicile after marriage)[8] this decision is certainly correct. It is, however, contrary to the 1957 Louisiana Supreme Court decision in *Brinson*

4. La. Code of Practice arts. 116, 194, 197 (1870), which did not distinguish between absentee domiciliaries and absentee non-domiciliaries and required only service against the curator of the absentee.

5. 95 U.S. 714 (1878).

6. La. Code Civ. P. art. 6, comment (2).

7. 216 So.2d 589 (La. App. 3d Cir. 1969).

8. This is the principle implicit in the rules of the so-called Uniform Marriage Evasion Act in force in Louisiana as La. R.S. 9:221-224 (1950).

v. Brinson.[9] There the parties, whose celebrated marriage in Louisiana was null by reason of the man's undissolved marriage to another, later moved to Mississippi and continued to live together as man and wife after the man's first wife died. The court, admitting at least *arguendo* that under Mississippi law their conduct would have constituted the contracting of marriage, nevertheless presumed the continuation of concubinage in the absence of a formal ceremony of marriage. This decision in *Brinson* was criticized by Professor Dainow on the ground that the *form* of marriage celebration (exchange of consent) should be considered subject to the law of the place of celebration (exchange of consent).[10] The writer also considers this position correct and hence agrees that *Dupre* was decided correctly on this principal issue. It may be pointed out nevertheless that it would be wrong to presume the intent of a couple to be husband and wife simply because they live together in a jurisdiction recognizing informal marriage, especially if their life in common began in plain concubinage or after a marriage ceremony known to be invalid. The intent to be married must be shown to have existed at a time at which the parties could have contracted marriage informally, for the couple might indeed have been content to continue their illicit relationship.

CONSTITUTIONAL LAW

*Hector Currie**

The Louisiana Constitution provides that, except in a capital case, prosecution "shall be by indictment or information."[1] In *State v. La Caze*,[2] defendants, jointly charged in a bill of information with simple burglary,[3] moved to quash the information on the basis of the fifth amendment to the United States Constitution ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."), and the fourteenth amendment. The motions were overruled and the convictions affirmed. *State v. Young*[4] had held the quoted words of the fifth amendment inapplicable

9. 233 La. 417, 96 So.2d 653 (1957).

10. *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Conflict of Laws*, 18 LA. L. REV. 60, 62 (1957).

* Professor of Law, Louisiana State University.

1. LA. CONST. art. I, § 9.

2. 252 La. 971, 215 So.2d 511 (1968).

3. LA. R.S. 14:62 (1950).

4. 249 La. 609, 188 So.2d 421 (1966).