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Promise to Pay Discharged Debt

Though the Bankruptcy Act does not refer to revival of debts, a new promise to pay a debt discharged in bankruptcy is generally actionable without new consideration as a matter of state law.[25] This is true in Louisiana.[26] The promise may be made at any time after filing of the petition in bankruptcy,[27] but it must be "definite, express, distinct, and unambiguous."[28] An expression that does not amount to a clear and unequivocal promise to pay is not sufficient.[29]

The court in *Beneficial Finance Co. v. Lalumia*[30] held that, in the absence of a new promise, the making of payments on a note after the debtor had filed his petition in bankruptcy did not revive liability on the discharged debt or create a new enforceable obligation. This is the uniform result.[31] Giving a new note for a debt discharged in bankruptcy does, however, amount to a new promise that creates an enforceable obligation, as *Booty v. American Finance Corp.*[32] recognized.[33]

CONFLICT OF LAWS

*Robert A. Pascal**

Divorce Jurisdiction

The decision in *Self v. Self*[1] violates the due process clause by denying to a person the application of the only state's law which is applicable to him in the only state which can hear his suit. In so doing it also violates indirectly the full faith and credit and equal protection clauses of the United States Constitution.

Plaintiff and his wife were separated from bed and board while domiciled in Louisiana. Subsequently the wife moved her

25. 1 W. COLLIER, BANKRUPTCY § 17.33 (1969).
26. Irwin v. Hunnewell, 207 La. 422, 21 So.2d 485 (1945), refers to LA. CIV. CODE arts. 1757, 1759, and states: "The law on this subject is the same in Louisiana as it is in the other states." *Id.* at 434, 21 So.2d at 488.
27. 1 W. COLLIER, BANKRUPTCY § 17.36 (1969).
28. *Id.* § 17.34.
29. Securities Fin. Co. v. Marbury, 180 So.2d 737 (La. App. 1st Cir. 1965).
30. 223 So.2d 202 (La. App. 4th Cir. 1969).
31. 1 W. COLLIER, BANKRUPTCY § 17.37 (1969).
32. 224 So.2d 512 (La. App. 2d Cir. 1969). The issue arose on a reconventional demand in the debtor's action for damages for invasion of privacy.
33. *See* Dinger v. Rothery, 10 N.J. Misc. 938, 161 A. 645 (1932).

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1. 228 So.2d 518 (La. App. 3d Cir. 1969).

domicile to Texas and there committed adultery. The plaintiff sued for divorce in Louisiana under the Louisiana legislation authorizing divorce for adultery. The suit was dismissed on the basis of Louisiana Code of Civil Procedure article 10(7), under which Louisiana has attempted to restrict its divorce jurisdiction to instances in which the spouses were domiciled in Louisiana at the time the cause of action arose or in which the cause of action arose in Louisiana and the plaintiff is domiciled here at the time of suit.

Williams v. North Carolina (1942)[2] not only recognized (1) the legislative jurisdiction of the state of the plaintiff's domicile to have its law apply to his cause and (2) the judicial jurisdiction of that state to hear his suit even if the defendant is not subject to the personal judicial jurisdiction of its court, but also, it is submitted, rendered those jurisdictions exclusive. In other words, one who seeks a divorce may do so only under the laws of the state in which he is domiciled and may do so only in the courts of that state.

This view of *Williams*, admittedly different from that of many another doctrinaire's, nevertheless is not difficult to substantiate. In the first place, to permit a state to award a nondomiciliary plaintiff a divorce under the forum's divorce law is to deny to the plaintiff's state full faith and credit to its laws, that is to say, the right to have its laws apply to determine the right of its citizens to claim a divorce; and this, it will not be denied, was at the heart of the decision in *Williams*. In the second place, it should be clear that the decision in *Granville-Smith v. Granville-Smith*[3] impliedly asserts that a state or territory or possession might not exercise *judicial* jurisdiction in a divorce suit filed by a non-domiciliary plaintiff even if it gives full faith and credit to his state's legislative jurisdiction by applying that state's divorce law.[4]

2. 317 U.S. 287 (1942).

3. 349 U.S. 1 (1954).

4. The decision, though involving Connecticut's denial of recognition to a Virgin Islands' judgment, was decided on the basis of the United States Supreme Court's decisions on full faith and credit to sister state judgments, and in considering this matter the United States Supreme Court was fully aware of the strong opinion of Justice Hastie in Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), a case on all fours with *Granville-Smith*, that *in personam* jurisdiction over the defendant should be sufficient if the plaintiff's state's law on divorce is satisfied. *Granville-Smith*, then, should be viewed as rejecting the proposition that such a state of affairs would be sufficient for divorce jurisdiction and implicitly affirming that only divorce at the domicile of the plaintiff by applying that state's law will suffice. *See* the au-

The decision in *Self v. Self*, therefore, must be considered in error, even though it conformed to the letter of Louisiana Code of Civil Procedure article 10(7), not simply because it failed to construe article 10(7) according to its spirit,[5] but also because under United States Supreme Court decisions the Louisiana domiciliary cannot obtain a divorce except under Louisiana law applied in a Louisiana court. And, also, in denying the plaintiff this right while allowing other Louisiana plaintiffs to obtain divorces for adultery under Louisiana law, the plaintiff was denied equal protection of the laws. Of course the basic difficulty is with Louisiana Code of Civil Procedure article 10. A state may not limit or enlarge its legislative or judicial jurisdiction as it pleases. As a state of the Union, Louisiana must neither exercise nor refuse to exercise legislative or judicial jurisdiction over persons and events in such a manner as will violate the full faith and credit, due process, equal protection, or other provisions of the United States Constitution. Even if the United States Constitution were not involved, the philosophically necessary conclusion that the science and art of the conflict of laws must be viewed as the rational delineation of legislative and judicial authority among states and nations would lead to the same result, that a state is not free to act as it pleases in the exercise of legislative or judicial competence, but that it must act with just appreciation of the relevant factors involved.

Divorce Recognition

The Louisiana judiciary continues to overextend the United States Supreme Court's decisions in *Sherrer v. Sherrer*,[6] *Coe v. Coe*,[7] and *Johnson v. Muelberger*,[8] to the point where it may be said, not unjustly, that the Louisiana decisions have the effect of giving aid and comfort to those parties who wish to evade Louisiana's rightful legislative and judicial jurisdiction over the marital status of its citizens.

The main issue in both *Didier v. Didier*[9] and *Staples v. Staples*[10] was whether Louisiana must give full faith and credit

thor's comments on this matter in *The Work of the Louisiana Appellate Court for the 1966-1967 Term—Conflict of Laws*, 28 LA. L. REV. 312, 322-26 (1968).

5. *See* p. 345 for the discussion by Assistant Professor L'Enfant.

6. 334 U.S. 343 (1948).

7. 334 U.S. 378 (1948).

8. 340 U.S. 581 (1951).

9. 230 So.2d 436 (La. App. 1st Cir. 1969).

10. 232 So.2d 904 (La. App. 2d Cir. 1970).

to an Arkansas divorce granted to a person, domiciled in Louisiana under the traditional notions of interstate domicile, on the basis of an Arkansas statute establishing a presumption that a person residing in Arkansas for three months is domiciled there. In each case the Louisiana court considered itself obligated to honor the judgment because Arkansas courts considered the statute in question and the judgments based thereon to be valid! In addition, in *Didier*, but not in *Staples*, the defendant had signed a waiver and entry of appearance, and that factor was considered sufficient to render the issue of true domicile in Arkansas beyond dispute.

Sherrer, *Coe*, and *Johnson* do go far in the direction of treating the jurisdictional essential of domicile as *res judicata* in divorce recognition cases if the defendant *appeared* and *participated* in the divorce suit, even if the issue of the defendant's domicile was not raised. Whatever may be thought of these decisions, it is nevertheless true that the United States Supreme Court has never said that a "waiver of citation" and "entry of appearance" amount to the *appearance* and *participation* contemplated by *Sherrer*, *Coe*, and *Johnson*. To give these United States Supreme Court decisions such extreme application only contributes more than did *Sherrer*, *Coe*, and *Johnson* themselves to assisting spouses who are not permitted divorces under their own states' laws to obtain them by "conferring" jurisdiction on states other than their own. This kind of practice can only bring discredit on the judiciary and encourage the further abuse of law by the members of the bar. *Didier*, therefore, like *Boudreaux v. Welch*[11] before it, cannot be given approval.

The primary question in *Didier* and *Staples*, however, was whether Louisiana must recognize Arkansas as being the "domicile" of the plaintiffs if "domicile" was "proven," not by reference to the traditional law of domicile referred to in *Williams v. North Carolina I*[12] and subsequent decisions, but by an Arkansas statutory *presumption* of domicile based on mere continuous presence in the state for three months. It should stand to reason that if "domicile" is to be used as a criterion of interstate divorce jurisdiction, the definition of domicile cannot be subject to change from state to state; and to establish a presumption of domicile

11. 249 La. 983, 192 So.2d 356 (1966), commented on by the author in *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Conflict of Laws*, 28 LA. L. REV. 312, 322-26 (1968).
12. 317 U.S. 287 (1942).

from circumstances which of themselves do not reasonably lead to the conclusion that a domicile-in-fact has been established, is in effect to change the definition of domicile or to attempt to circumvent the requirement of domicile. The unlawfulness of such legislative attempts to evade the requirements of the full faith and credit clause as construed and applied by the United States Supreme Court has never been considered as such by that court, but it was demonstrated ably in the majority opinion in *Alton v. Alton*.[13] The Louisiana judiciary cannot be obligated by either the legislative or judicial act of a sister state defining for itself an interstate jurisdictional factor, and the judges should not have given any effect whatsoever to the self-serving Arkansas statutes and judgments on the question. Louisiana can, in this respect, be obligated only by acts of Congress or decisions of the United States Supreme Court, for the criteria for interstate legislative and judicial competence are necessarily federal questions under the full faith and credit clause.

Disavowal of Paternity

Stewart v. Stewart[14] disallowed a Louisiana husband's suit to disavow under Louisiana law a child born to his wife during separation from bed and board and while she was domiciled in Tennessee. The narrow ground for the decision was that a suit for disavowal was not included in Code of Civil Procedure article 10 as one of "status" over which Louisiana would exercise judicial jurisdiction even if the defendant were not domiciled in this state, and therefore that the suit must be treated as one *in personam* to be tried where the child's representative could be sued. It is true that Louisiana Code of Civil Procedure article 10 does not list the action for disavowal, but the article's enumeration of causes need not have been regarded as exclusive. It would have been better to recognize that the nature of a suit is determined by its object, and that the object of this suit not only was one of status, but principally one of the status of the husband —his legal relationship to his wife's child, and only incidentally one of the child's relationship to him. It would be a strange notion of the proper allocation of legislative jurisdiction to permit the Louisiana husband's legal relationship to the child to be determined by the law of another state or country simply because his wife happened to move there after separation from

13. 207 F.2d 667 (3d Cir. 1953).
14. 233 So.2d 305 (La. App. 1st Cir. 1970).

bed and board.[15] If Louisiana law applies, and the plaintiff is asking for a determination of his status under that law, then there can be little justification in denying him the application of that law in Louisiana's courts. The analogy to *ex parte* divorce cases should be obvious. In any event, as mentioned in the discussion under "Divorce Jurisdiction" above, the Louisiana Code of Civil Procedure's assertions or denials of jurisdiction in particular instances cannot prevail against what would have to be considered a rational scheme for the delineation of interstate legislative and judicial jurisdiction under the full faith and credit clause of the United States Constitution. The writer, at least, doubts that the judgment in *Stewart* would meet that test.

Tutorship

Two decisions should be noted here. In *Emery v. Emery*[16] an Arkansas father with custody of his daughter under a valid Arkansas judgment brought *habeas corpus* proceedings in Louisiana against his wife for refusing to return the daughter to him after the termination of a period of visitation. Inasmuch as civil *habeas corpus* addresses itself to the *authority* of the respondent to detain another, and the respondent had no such authority under the valid Arkansas judgment, the child should have been returned to her father's custody without other proceedings. The lower and appellate courts, however, permitted the mother by her answer to convert the proceedings into one for "custody" and, on a finding that the child's welfare would be served better if she were in the mother's care, gave "custody" to the mother. Granting that the child's best welfare might be served better in the mother's care, it is nevertheless true that procedural forms should not be misused. The father's right under the Arkansas judgment should have been recognized as a matter of full faith and credit until such time as by judgment in Arkansas and under Arkansas law—Arkansas being the domicile of the child and her father—a change in guardianship or custody had been effected. Decisions like *Emery* and *Lucas v. Lucas*[17] do more to encourage

15. RESTATEMENT OF CONFLICT OF LAWS (SECOND), PROPOSED OFFICIAL DRAFT § 287(2)(a) (1969) confirms this approach by assigning legislative jurisdiction to the state in which the "parent" in question was domiciled at the time the relationship is claimed to have been created.

16. 223 So.2d 680 (La. App. 4th Cir. 1969).

17. 195 So.2d 771 (La. App. 3d Cir. 1967), *cert. denied*, 250 La. 539, 197 So.2d 81 (1967). Discussed by the author in *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Conflict of Laws*, 28 LA. L. REV. 312, 322-26 (1968).

interparental piracy of children than to promote stability in lawfully declared rights. This is not to say that a child physically in Louisiana who proves to be neglected, abandoned, or delinquent might not be taken from whomsoever had custody and placed in the care of another under lawful procedures *in juvenile court*, but the civil courts of this state have no authority to determine "custody" controversies after divorce or separation except in tutorship suits founded on grounds therefor listed in the Code of Civil Procedure. What authority district courts had to separate custody from paternal authority and tutorship were taken from them when R.S. 9:551-9:553 were repealed by Act 111 of 1956.

Legé v. Legé,[18] also a "custody" case, nevertheless presented different legal circumstances. A mother who had been awarded "custody" in Alabama, but who had been forbidden to take the child out of Alabama without judicial authorization, moved to Louisiana with the child without obtaining such authorization. Thereafter the father sought and obtained, in the same Alabama proceeding in which the mother had been awarded custody, a judgment awarding him the child's custody. The mother received notice, but did not participate in these proceedings. The father then brought *habeas corpus* proceedings in Louisiana, using this judgment as his authority to have the child's custody. Judge (now Justice) Tate's opinion affirmed the authority of the Alabama court to render its second judgment awarding custody to the father, asserting it had "continuing jurisdiction" over the mother; but at the same time the opinion upheld the lower court's refusal to return the child to its father on the basis of "circumstances" having "changed" since the date of the second Alabama judgment. The writer agrees that the denial of the father's demand was correct, but for other reasons. The heart of the matter is whether a parent awarded custody can be forbidden to remove the child from the boundaries of the state awarding him or her custody. Here the answer should be in the negative. An affirmative answer would place too great a price on a parent's right to live where he or she chooses to live. If the parent with custody moves to a place in which the child cannot be reared in humanly acceptable circumstances, the other parent certainly would have the right to seek custody in the courts of that place and under its laws. Both solutions have their difficulties, but this writer's judgment is that the parent given tutorship after

18. 228 So.2d 202 (La. App. 3d Cir. 1969).

divorce or separation should not be restricted in his or her right to move with the child where he or she pleases. This would increase the stability of relations of the spouses after a separation or divorce and probably would result in more good to the child by rendering suits over his tutorship less likely.

Matrimonial Regimes

Anglo-American law does not have the concept of a "matrimonial regime," but speaks in terms of the interests of the spouses in the property of the other. As a result, what would be treated as matrimonial regime law in civil law jurisdictions is treated in Anglo-American jurisdictions as aspects of the laws on movable and immovable property, even for purposes of the conflict of laws. Hence it is that in Anglo-American conflicts law, spouses' rights in immovables "arising out of marriage" generally have been placed under the law of the situs of the immovable, and those in movables generally under the law of the domicile of the spouses at the time of acquisition. Louisiana, on the other hand, has attempted to go its own separate way. By Act 292 of 1852 (now article 2400 of the Civil Code), "[A]ll property acquired in this state by non-resident married persons . . . shall be subject to the same provisions of law which regulate the community of acquets and gains between citizens of this state." *Pilcher v. Paulk*[19] and *Crichton v. Succession of Crichton*[20] must be evaluated in these contexts.

In *Pilcher*, the court seemed to apply the Anglo-American conflicts rule, rather than Louisiana Civil Code article 2400, to say an immovable acquired in Louisiana by a Texas husband would be subject to Louisiana law in all matters relating to it. On this basis the court concluded that the immovable was a community asset and that the "settlement" entered into before divorce between the Texas husband and wife would be invalid as to this immovable. In *Crichton*, the court of appeal enforced a New York judgment treating movables acquired in Louisiana by a New York domiciliary as his separate assets in spite of Louisiana Civil Code article 2400, but did so on the basis of full faith and credit even though it regarded the New York judgment based on a "misconstruction" of article 2400.

19. 228 So.2d 663 (La. App. 3d Cir. 1969).
20. 232 So.2d 109 (La. App. 2d Cir. 1970), *cert. denied*, 256 La. 274, 236 So.2d 39 (1970), because "the result is correct."

Both *Pilcher* and the court of appeal decision in *Crichton* may be criticized for misconstruing Louisiana law to mean that any asset acquired in this state by a "non-resident" is to be considered a community asset. Under Louisiana Civil Code article 2334 an asset *acquired with community funds* is a community asset, but not one acquired with separate funds; and whereas article 2400 renders assets acquired by "non-residents" "subject to" the laws on the community of gains, it does not as such make the acquisition a community asset. Indeed, if article 2400 treated acquisitions by "non-residents" differently from the manner it treated acquisitions by domiciliaries, it might be invalid under the equal protection clause. Under the facts in *Pilcher*, the spouses being Texans living under Texas community property law, an application of article 2400 required a determination whether the funds used to purchase the asset would have been considered community funds under that law. The court, however, did not make this inquiry. In *Crichton*, the acquiring spouse having been a New Yorker living under a regime of separation of property, the application of article 2400 should have resulted in a judgment that the movables in Louisiana were his separate assets. The supreme court probably realized this, for it refused to review the court of appeal's decision in *Crichton* on the ground that "the result is correct,"[21] indicating it did not agree with the reasoning of the court in at least some particular.[22]

The court of appeal's opinion in *Pilcher* also denied the validity of a pre-divorce "property settlement" between husband and wife, at least as to the Louisiana land, by applying the *lex rei sitae* to that question. The opinion in this respect is in keeping with the traditional Anglo-American conflict of laws practice, but it is submitted that the rule is to be criticized. Whether spouses may terminate or modify their matrimonial regime by convention during marriage, or otherwise contract during marriage, is a question which should be considered under the legislative jurisdiction of the domicile of the spouses. Why should a state which has no connection with the spouses, other than the fact one or more of them owns something here, seek to prescribe their capacity to contract generally or their power to contract

21. 256 La. 274, 236 So.2d 39 (1970).

22. The issue of the validity of article 2400 of the Louisiana Civil Code is not raised here, but it is a serious question. Unless it conforms to an appropriate assignment of legislative jurisdiction within the framework of the full faith and credit clause, it is invalid. But this issue cannot be discussed at length in this symposium.

with each other? *Restatement of Conflict of Laws (Second), Proposed Official Draft* § 223, comment c, acknowledges that what the court did in *Pilcher* conforms to the general practice, but notes that application of the law of the spouses' domicile would be appropriate in this kind of case. The science and the art of the conflict of laws needs much refinement.

Offenses and Quasi-Offenses

Conflict of laws rules in the United States often shock jurisprudes to whom the law should be the product of the science and the art of the good and the just in societal life. In the last twenty-five years especially, awakened consciences on the bench and in the law schools have produced a literature, not always consistent, not yet completely free of the positivistic, anti-philosophical notions of "sovereignty" and "state power" which deny all obligatory criteria of order save political force, but striving nevertheless to bring some semblance of a reasonable connection between parties and events and the law applied to order them. Of all the conflicts rules, perhaps none has come more to engender a sense of injustice than the rule that the law of the place of events resulting in harm to another should determine whether the acts of the one constitute an actionable wrong (offense or quasi-offense), whether the acts of the other or the particular circumstances constitute a bar to his recovery, whether the relationship of the parties bars a remedy permanently or temporarily, and what should be the measure of recovery. Slowly it has come to be realized that the place of occurrence of events may be purely accidental and have much less relevance to the parties and to what should be their rights and obligations under the circumstances. Why, for example, should husband and wife who are part of the political community of State X, under whose laws spouses are liable to each other for personal injuries, not be considered so entitled or obligated merely because the injuries occurred in State Y, in which they were but temporarily, under whose laws personal injuries do not give rise to legal rights and obligations between husband and wife? Why, again, should a guest passenger be barred from recovery against his host driver merely because the injury occurred in a state denying recovery to guests under the circumstances, when the state in which the host and guest are domiciled—with whose law, or plan of order, they have identified themselves by living there—would give the guest a remedy against his host? In *Johnson v. St. Paul Mercury Insur-*

ance Co.,[23] nevertheless, the Supreme Court of Louisiana reversed the decision of the Court of Appeal for the Second Circuit[24] which had rejected the application of the *lex loci delicti* rule to allow a Louisiana domiciliary recovery against another Louisiana domiciliary for injuries suffered while a guest in the former's automobile and driving in Arkansas on their way from Louisiana to Iowa. The supreme court's majority opinion, to which Justice Sanders dissented, gives sufficient references to the changing thought on the subject; but its stated reasons for continuing to apply the rule of *lex loci delicti*, in spite of their length and argumentative tone, appear to the writer to evidence less concern with a reasonable delineation of legislative jurisdiction—or applying the law applicable to the regulation of the rights and obligations of the parties—than they do with mere judicial convenience.[25] There can be no doubt that a conflicts rule having the force of custom on a national scale should not be discarded lightly; but once any custom has been shown to be unreasonable it becomes necessary to reject it in favor of a more reasonable regulation. The position taken by the *Restatement of Conflict of Laws (Second), Proposed Official Draft* is that conflict of laws rules based on decisions are subject to re-evaluation and change,[26] and in the particular matter of guest passenger liability the Restatement Draft, as noted by the supreme court, leans toward the rejection of the application of the *lex loci delicti*.[27] The supreme court should reconsider the *Johnson* decision at its first opportunity.

CRIMINAL LAW

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Aggravated Arson—Danger to Firemen

Foreseeable danger to human life is an essential and distinguishing element of aggravated arson.[1] Thus, within the Louisiana Criminal Code definition, the burning during business

23. 256 La. 289, 236 So.2d 216 (1970).

24. 218 So.2d 375 (La. App. 2d Cir. 1969).

25. The supreme court rebuked the court of appeal for failing to follow its previous decisions on the matter. *See* the author's and Assistant Professor Tête's discussion of this facet of the decision at p. 185 *supra*.

26. RESTATEMENT OF CONFLICT OF LAWS (SECOND), PROPOSED OFFICIAL DRAFT § 5 (1969).

27. *Id.* § 145, comment(e), under "The place where the relationship between the parties . . . is centered," and Illustration 1 thereunder.

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1. LA. R.S. 14:51 (Supp. 1970).