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CONFLICT OF LAWS

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LEX LOCI DELICTI

By far the most important conflicts decision of recent years is *Jagers v. Royal Indemnity Company*,[1] which overruled *Johnson v. St. Paul Mercury Insurance Co.*[2] In doing so, the supreme court placed itself on the side of reason and among those who understand that the law of the place of the wrong is not, as such, appropriately applicable to determine what rights and obligations flow from that wrong to the persons involved. In each of the above cases the question was that of the liability of a Louisiana host-driver to his Louisiana guest resulting from the host-driver's negligence in another state. *Jagers* decides that Louisiana law, not the law of the place of the wrong, applies to determine that liability; or, to put it more correctly, *Jagers* should be understood to declare that the jurisdiction to legislate on the liability of the host to his guest belongs to the state of their common domicile, the state of the political society to which they both belong.

The *Jagers* decision's broadest principle is a negative one, that a state's being the place of the wrong is not sufficient reason to assign legislative jurisdiction to that state to prescribe the resulting rights and obligations of the parties involved. This is a principle of far-reaching consequences for the conflict of laws in delict cases, for now all the old applications of the rule *lex loci delicti* must be reexamined, not simply those relating to host-driver and guest-passenger situations. The supreme court has indicated sufficiently clearly that it regards the state of the common domicile of the parties as having legislative jurisdiction. But what shall be said, for example, of a collision in Louisiana between Texas and Florida domiciliaries? Louisiana has no greater claim to legislative jurisdiction to determine the rights of the parties against each other in such a case than Arkansas or Mississippi had in *Johnson* or *Jagers*. The members of the supreme court certainly were aware of the implications of their decision. They must be congratulated on having the strength of character to assume their share of the responsibility for discovering the reasonable bases of delineating legislative competence in delict cases, or rewriting the rules of the conflict of laws in this area.

Joy over the *Jagers* decision notwithstanding, the writer cannot

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1. 276 So. 2d 309 (La. 1973). Other comments on *Jagers* appear in the *Law in General* portion of this *Symposium*.

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

avoid mentioning his disappointment over the majority opinion's acceptance of the *Restatement Second's* view of the conflict of laws as a branch of state law.[3] It must be admitted that the *Restatement Second* reproduces accurately the utterances of many, including opinions of various justices of the United States Supreme Court, but these utterances simply may not be accepted as correct. The full faith and credit clause requires each state to give full faith and credit to the laws of every other state. To give full faith and credit requires applying the other state's law *where the other state has legislative jurisdiction.* A state may not determine for itself its own or another state's competence, for then the full faith and credit clause would be not simply meaningless, but a source of bedlam. Legislative jurisdiction, therefore, must be a matter of federal jurisdiction in implementation of the full faith and credit clause.[4] In every instance in which the legislature or the judiciary of a state specifies a conflicts rule, it must be envisioned as simply attempting to formulate a judgment as to what the Congress or the federal courts would say it to be.

RES JUDICATA AND JUDICIAL SYMPATHY

No doubt hard cases often make for poor decisions, for justices, being human, sometimes allow their sympathies to interfere with a strict application of the law. In such instances justice *contra legem* may be done to the parties, but there will be serious harm to the principle of justice through law. Possibly *McNeal v. State Farm Mutual Automobile Insurance Co.*[5] is such a case, for the majority opinion's reasoning scarcely conceals what must have been the motivation for the decision.

The facts are sufficient grist for a legal soap opera. A husband said to have been a Louisiana domiciliary, while driving through Mississippi, allegedly negligently caused his death and injury to his wife and child. The widow and child sued in Louisiana in 1969, presumably relying on Louisiana court of appeal decisions applying the law of the state of the domicile of the parties, rather than the *lex loci delicti.* Before judgment, however, the Louisiana supreme court handed down its decision in *Johnson v. St. Paul Mercury Insurance Co.*,[6] which disallowed any abandonment of the *lex loci delicti.* The widow and child then filed suit in Mississippi against both the hus-

3. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971); 276 So. 2d at 311.

4. See the writer's remarks in previous *Symposia*: 33 LA. L. REV. 276, 278 (1973); 32 LA. L. REV. 295, 296-97 (1972); 31 LA. L. REV. 312, 314 (1971).

5. 278 So. 2d 108 (La. 1973).

6. 256 La. 289, 236 So. 2d 216 (1970).

band's Mississippi executor and the liability insurer. The Mississippi court dismissed the suit against the insurer because Mississippi law does not authorize direct actions, and it dismissed the suit against the husband's executor on the ground that the wife and child "had no standing to maintain a suit in tort against the husband and father, if living, or his estate, if deceased, in the courts of Mississippi."[7] The insurer then filed an exception of *res judicata* in the Louisiana suit. The trial court maintained the exception and the court of appeal affirmed, relying largely on *Johnson's* insistence that Mississippi law be applied to determine the rights of the parties. Before decision on review, however, the supreme court rendered its decision in *Jagers*,[8] overruling *Johnson*. The majority, then, overruled the exception of *res judicata*, construing the Mississippi court's dismissals of suit against the insurer and the husband's executor to be both in the nature of non-suit and not on the merits. Justice Dixon concurred. Justice Summers dissented.

One may agree with the majority that the Mississippi judgment dismissing the suit against the insurer was not itself a judgment on the merits, for under Mississippi law an insurer may not be sued until the insured is found liable. But one must agree with Justice Summers that the Mississippi court's dismissal of the suit against the husband's executor was on the merits, denying the existence of a *cause of action* on which the husband and (after judgment against him) his insurer could be held liable. Justice Dixon explicitly, and the majority implicitly,[9] held this Mississippi judgment to be one merely denying the existence of a cause of action *under Mississippi law* and not denying the existence of a cause of action elsewhere—in effect a dismissal as of non-suit in Mississippi. The construction is strained, for the Mississippi court would have to be understood to have dismissed the suit on the ground *forum non conveniens*, a hardly credible ground for dismissal of a contested suit based on events which had occurred in Mississippi. No doubt the Louisiana supreme court sympathized with the plaintiffs, believing it unjust for the insurer to escape liability if the deceased and his family were Louisiana domiciliaries at the time of the wrong, and perhaps wondering whether their decision in *Johnson* had not contributed to the plaintiffs' difficulties. Be that as it may, the plaintiffs had had their day in court. A decision on the merits, once final, must stand, even if incorrect, or there will be no end to litigation.

7. 278 So. 2d at 109.

8. Jagers v. Royal Ind. Co., 276 So. 2d 309 (La. 1973).

9. The majority opinion does not appear to have expressed its reasoning on this aspect of the Mississippi judgment.

The last observation leads to a consideration of what the writer believes to be the real tragedy in *McNeal*. Given the proper record, the Mississippi judgment against the husband's executor could have been appealed to the United States Supreme Court because of Mississippi's failure to apply Louisiana domestic law to the issue of the existence of a cause of action. If, as the Louisiana supreme court has come to realize in *Jagers*, it is the state of the domicile of the parties which properly has legislative jurisdiction to determine whether a wrong gives rise to a cause and a right of action, then Mississippi was obliged under the full faith and credit clause to apply Louisiana law to the case. A federal constitutional issue was involved. The United States Supreme Court, it is true, yet speaks of the conflict of laws as a branch of state law. The application of this view of the subject in federal diversity cases is proof enough. But, on the other hand, every United States Supreme Court decision on the "applicable" state law is testimony to the failure of that court to be consistent in the matter. *McNeal* at least would have provided a magnificent opportunity to call upon the United States Supreme Court to pronounce authoritatively on the question.

WORKMEN'S COMPENSATION

The First Circuit Court of Appeal decided *Griffin v. Universal Underwriters Insurance Co.*[10] consistently with the United States Supreme Court's 1943 decision in *Magnolia Petroleum Co. v. Hunt*,[11] but before these remarks were written, the Louisiana supreme court already had reversed the appellate decision on the basis of the United States Supreme Court's decision in *Industrial Commission of Wisconsin v. McCartin*.[12] The decision is important practically and theoretically. Practically, unless overruled, *Griffin* will allow one employed outside Louisiana, but injured here, who has already recovered workmen's compensation benefits in the state of employment, the right to recover such additional compensation, and such damages against persons other than his employer, as Louisiana law will allow. Theoretically the decision is important because it raises anew the questions of the legislative jurisdiction of states in workmen's compensation cases.

Magnolia had insisted that both the state of employment and the state of injury had legislative jurisdiction on the subject, but that the final acceptance of an award under one or the other state's laws would

10. 268 So. 2d 702 (La. App. 1st Cir. 1972).
11. 320 U.S. 430 (1943).
12. 330 U.S. 622 (1947).

be *res judicata* as to the employee, barring him from further recovery in the second state. But, the supreme court argued, *McCartin* modified *Magnolia* by allowing additional recovery in the state of injury if the legislation of the state of employment did not exclude recovery in the state of injury. Indeed, not only does *McCartin* appear to say just that, but it is possible to affirm without hesitation that no state may limit another state's legislative competence.[13]

The serious theoretical question, however, is whether there may ever be two states competent to legislate for the same aspect of the same situation. The writer doubts this legitimately can be so. Plural *judicial* jurisdiction over the same persons in the same controversy easily is understood; but plural legislative jurisdiction is, to say the least, a troublesome notion. This does not mean the writer is ready to pronounce *ex cathedra academica* on the thorny question. Perhaps its very thorniness is what has given us the United States Supreme Court decisions we have on the subject. But it is something to which the art of law will have to give more attention.

Divorce Jurisdiction and Domicile

In *Williams v. North Carolina I*,[14] the United States Supreme Court decided that the state of the plaintiff's domicile had both legislative and judicial jurisdiction to determine his right to a divorce. *Williams v. North Carolina II*[15] affirmed the right of a state, claiming to be that of an individual's true domicile as of the time he obtained an *ex parte* divorce in another state, to determine whether he truly had been domiciled in that other state at the time of suit. Both decisions assumed the employment of the usual or traditional notion of interstate domicile with one exception: *Williams II* declared that non-fault could not be a condition of a wife's change of interstate domicile. Finally, the Supreme Court's decision in *Granville-Smith v. Granville-Smith*,[16] though not to be taken to have so decided, at least must be taken to indicate a Supreme Court sentiment that a state is not entitled, through legislative or judicial action, either (1) to eliminate domicile as the criterion of divorce jurisdiction, or (2) to redefine domicile in order to enlarge its divorce jurisdiction beyond that which it would have under the traditional notion of domicile, or (3) to accomplish the same purpose indirectly through the establish-

13. See *Carroll v. Lanza*, 349 U.S. 408 (1955), which also might have been cited by the Louisiana supreme court in support of its position.

14. 317 U.S. 287 (1942).

15. 325 U.S. 226 (1945).

16. 349 U.S. 1 (1955).

ment of presumptions of domicile not reasonably indicative of domicile in fact. Even without the decision in *Granville-Smith*, however, it would be most unreasonable to believe a state could redefine domicile for itself either directly or indirectly. Being a criterion of interstate legislative competence for the purpose of applying the full faith and credit clause, it is necessarily within the province of the federal authority only to define it. Congress has not defined the concept, but the Supreme Court has always accepted the usual or traditional notion of domicile, and this notion has always included physical presence in a state with the intention of making that state the center of one's life.

A state statute defining domicile as residence within the state for three months or more may not reasonbly be taken to define domicile in the traditional manner or to establish a presumption reasonably indicative of the fact of domicile. Yet Arkansas enacted just such a statute[17] and the Arkansas supreme court has declared it constitutional.[18] The United States Supreme Court has not passed on its validity, but one can say without hesitation that the statute does not conform to the notions of domicile accepted in *Williams* through *Granville-Smith*. In spite of this, however, Louisiana has given full faith and credit to *ex parte* Arkansas divorce judgments in cases in which the requirements of the Arkansas statute on domicile were met, but in which the essentials of domicile as understood traditionally certainly were not present.[19]

The latest decision in this line is *Hampson v. Hampson*.[20] The plaintiff did rent a room in an Arkansas town close to the Louisiana border, and he did spend most nights there for a period of three months. At the same time his life in nearby Shreveport and Minden, Louisiana, otherwise continued as before. As soon as three months had expired he sued for and obtained a divorce in Arkansas, and as soon as the judgment was rendered he abandoned his Arkansas rented room and moved back to Shreveport. The Louisiana court of appeal reasoned that the United States Supreme Court had neither defined domicile nor forbidden a state to define it, declared itself obliged therefore to give full faith and credit to the Arkansas statute and through it to the Arkansas judgment of divorce. The writer submits that *Hampson* and similar decisions represent patent failures to

17. ARK. STAT. § 34-1208 (1947), *as amended by* Ark. Acts 1957, No. 36; 1961, No. 146; § 34-1208.1 (1947), *as amended by* Ark. Acts 1957, No. 36.

18. Wheat v. Wheat, 229 Ark. 842, 318 S.W.2d 793 (1958).

19. Staples v. Staples, 232 So. 2d 904 (La. App. 2d Cir. 1970); Reeves v. Reeves, 209 So. 2d 554 (La. App. 2d Cir. 1968).

20. 271 So. 2d 898 (La. App. 2d Cir. 1972).

adhere to the United States Supreme Court's decisions on the subject reasonably construed and constitute open invitations to Louisiana citizens to evade Louisiana's already extremely liberal divorce laws. Such decisions cannot merit respect and can only increase popular distrust of the law and its administration.

ADJUDICATION OF TITLE TO LAND IN ANOTHER STATE

Yawn v. Lamb[21] declared divorced spouses owners of undivided one-half interests each in land acquired by the husband in Mississippi during marriage and presumably under circumstances in which the land would have been a community asset if situated in Louisiana. It is very unusual for the judiciary of one state to adjudicate interests in land in another state and certainly full faith and credit need not be given such adjudications.[22] It would have been safer for the court to order the husband to transfer a one-half interest to his wife, for Mississippi would have been obliged to give full faith and credit to such a judgment.[23]

21. 276 So. 2d 872 (La. App. 3d Cir. 1973).
22. *Fall v. Eastin*, 215 U.S. 1 (1909) is the principal case.
23. *Id.*