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Repository Citation

George H. Mills Jr., *Conflict of Laws: Property Acquired After Marriage*, 35 La. L. Rev. (1974)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol35/iss1/9>

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CONFLICT OF LAWS: PROPERTY ACQUIRED AFTER MARRIAGE

The Restatement's Approach

The *Restatement (Second) Conflict of Laws* treats the conflict of laws as a branch of state law.¹ The general rule, according to the *Restatement*, is that the forum court will apply the statutory directives of its own state in the choice of law, and, if none exist, the court will then consider all of the factors before it in determining the law to be applied.² To the extent that the law in this area is decisional, it is open to reexamination and change just as any other area of nonstatutory law.³

The *Restatement* distinguishes between immovables and movables in the conflict rules applicable to property acquired after marriage. The general rule as to immovables is that the law which would be applied by the court of the situs of the immovable determines the effect of marriage upon the interests in it.⁴ Two reasons are advanced for applying this rule to immovables: the need for certainty of legal

1. RESTATEMENT (SECOND) CONFLICT OF LAWS § 2 (1969) "Conflict of Laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state." However, several commentators have argued that the area of conflict of laws is a federal rather than a state subject. "It is a subject completely under the authority of Congress by reason of the express provisions of full faith and credit clause of the Constitution, and in default of Congressional action, arguably, subject to final determination by the U.S. Supreme Court. The U.S. Supreme Court has admitted this tacitly every time it has rendered a decision on the full faith and credit to be given laws or judgments, for the necessity of giving full faith and credit implies the necessity of criteria for legislative and judicial competence. Were the matter one of state rather than federal competence, the U.S. Supreme Court could have no right to render any decision on the subject." *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Conflict of Laws*, 33 LA. L. REV. 276, 278 (1973); see also A. VON MEHREN & D. FRAUTMAN, *THE LAW OF MULTI-STATE PROBLEMS* (1965).

2. RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (1969): "1. A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. 2. When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of these states in determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in determination and application of the law to be applied."

3. *Id.* § 5.

4. *Id.* § 234.

title and the fact that only officials of the situs state have the power to deal directly with the land.⁵

As between the spouses themselves, the court of the situs usually will apply what commonly has been called the "source doctrine": that immovables assume the same nature as the funds or assets used to acquire them.⁶ Thus, if a husband purchases an immovable in a separate property state with community assets, it most often will be held that the wife has the same interest in the immovable as she had in the funds used for its acquisition. However, the courts are hesitant to apply the "source doctrine" when the rights of third persons are involved.⁷ For example, if a creditor relies upon the laws of the situs state⁸ to protect his interests in the land, the situs state will recognize his rights without regard to the "source doctrine."⁹

5. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 298, 299 (1971).

6. *Rau v. Rau*, 6 Ariz. App. 362, 432 P.2d 910 (1968); *Tomair v. Tomair*, 23 Cal. 2d 754, 146 P.2d 905 (1944); *Depas v. Mayo*, 11 Mo. 202 (1848); *McDowell v. Harris*, 107 S.W.2d 647 (Tex. Civ. App. 1937); *In re Pugh's Estate*, 18 Wash. 2d 501, 139 P.2d 698 (1943).

7. RESTATEMENT (SECOND) CONFLICT OF LAWS § 234, comment (a) (1969).

8. The authority of the situs state to act with respect to immovables within its boundaries is a well settled principle of law. Although there is no question that a situs state can render a valid judgment as to immovables located therein, difficulty arises when a non-situs court renders a judgment which purports to affect immovables in a foreign state. An early line of cases held that a non-situs court could render a judgment which would affect property outside the state if it had personal jurisdiction over the parties. *Cheever v. Wilson*, 76 U.S. (9 Wall.) 108 (1869); *Watts v. Waddle*, 31 U.S. (6 Peters) 389 (1832); *Massie v. Watts*, 10 U.S. (6 Cranch) 148 (1810). These decisions were all couched in terms of in personam judgments directing the parties to act rather than directly affecting the title of the property in the foreign state. In *Carpenter v. Strange*, 141 U.S. 87 (1891), the United States Supreme Court upheld a state court's refusal to enforce a sister state's judgment which attempted to declare a deed of Tennessee land void. Although the Supreme Court upheld Tennessee's refusal to enforce the judgment, it indicated that it would have enforced the judgment had it been phrased as an in personam judgment rather than as an in rem judgment.

The approach taken by the various states is not uniform. A majority of the states, including Louisiana, following the reasoning in *Strange*, holding that the foreign judgment is not entitled to full faith and credit because the court lacks jurisdiction over the subject matter. *Putnam & Norman v. Conner*, 144 La. 231, 80 So. 265 (1918); *Wayne v. Reynolds*, 125 So. 2d 223 (La. App. 3d Cir. 1960); *Butler v. Bolenger*, 133 So. 778 (La. App. 2d Cir. 1931); *but see Yawn v. Lamb*, 276 So. 2d 872 (La. App. 3d Cir. 1973); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Conflict of Laws*, 34 LA. L. REV. 319, 325 (1974). A minority of states have enforced judgments by the non-situs courts for divergent reasons, including estoppel, comity, and full faith and credit. *Weesner v. Weesner*, 168 Neb. 346, 95 N.W.2d 682 (1959); *Fire Assn. v. Patton*, 15 N.M. 304, 107 P. 679 (1910); *McRary v. McRary*, 228 N.C. 714, 47 S.E.2d 27 (1948); *McElreath v. McElreath*, 162 Tex. 190, 345 S.W.2d 722 (1961); *Bailey v. Tully*, 242 Wis. 226, 7 N.W.2d 837 (1943); *Mallette v. Scheerer*, 164 Wis. 415, 160 N.W. 182 (1916).

9. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 337 (1971).

In recognition of the fact that movables can easily be taken from one state to another, the *Restatement* takes the approach that the spouses' interests in movables usually are governed by the law of their domicile at the time of acquisition,¹⁰ unless there is an effective choice of law by the spouses.¹¹ The advantage of this rule, as opposed to the situs rule, is that it allows the domiciliary state to apply one set of laws to movables located in different states. Furthermore, if the parties move from one state to another, the law of the second state is applicable to acquisitions made while the parties are domiciled there, while the law of the first state is applicable to the movables the parties acquired while domiciled in that state. Thus, one must consider not only the domicile of the parties but also the time of acquisition. If one of the spouses takes a movable from one state to another, the spouses' respective interests are preserved,¹² even if the movable is exchanged for other movables or immovables. For example, if a husband from a community property state takes community funds to a separate property state and purchases a car, the wife would have an interest in the property similar to her former interest.¹³

The *Restatement's* handling of this type of situation seems to be equitable, but certain difficulties may arise. Suppose husband (*H*) and wife (*W*), domiciled in a separate property state which gives a wife a right in the husband's separate property at his death, move to a community property state just before *H* dies. If *H* dies intestate, the laws of the domiciliary state would govern the distribution of the movables,¹⁴ and inasmuch as all of *H's* movables would be separate property, they would be distributed according to the community property state's law of succession relating to separate property.¹⁵ This result would defeat the purpose of both the survivorship laws of the separate property state and the community property provisions of the other.¹⁶

An equally unfair result would take place if *H* and *W* moved from

10. RESTATEMENT (SECOND) CONFLICT OF LAWS § 258 (1969).

11. For example, if the spouses entered into an antenuptial contract, a contract after marriage, or a contract designating their respective interests in a particular object (if sanctioned by the state law) the *Restatement* recognizes any of these as an effective choice of law.

12. *Id.* § 259.

13. *Id.* § 259, comment (b) (1969).

14. *In re O'Connor's Estate*, 218 Cal. 518, 23 P.2d 1031 (1933); see also RESTATEMENT (SECOND) CONFLICT OF LAWS § 260 (1969).

15. If the laws of the community property state make no provision for the wife with respect to *H's* separate property, all of *H's* property would go to his descendants or next of kin, leaving the wife with nothing.

16. R. LEFLAR, AMERICAN CONFLICTS OF LAW § 236 at 568 (1959).

a community property state to a separate property state. *H* and *W* would continue to have their respective interests in the movables, but upon the death of one of the spouses the survivor would have a survivor's right to the decedent's property. This would give the surviving spouse a greater interest in the movables than was contemplated by either the community property laws or by the survivorship provisions of the separate property laws.¹⁷

The rights of third parties such as creditors and transferees will be recognized when the property has been taken from one jurisdiction to another. The court will usually apply the law "that would be applied by the courts of the state where the chattel or document was located at the time the interest is claimed to have been acquired."¹⁸ For example, if *H* brings a movable from a community property state into a separate property state, and a creditor acquires an interest in it there, the courts will usually enforce the creditor's interest without regard to *W*'s community interest in the movable.

Louisiana Legislation

The first law in Louisiana dealing with property acquired after marriage was the Spanish law contained in the *Fuero Real*:

Everything which the husband and wife acquire while together, shall be equally divided between them.¹⁹

and in the *Las Siete Partidas*:

And we say, that the agreement they had made before or at the time of their marriage, ought to have its effect in the manner they may have stipulated, and that it will not be avoided by the custom of the place to which they have removed. And so we say it would be, if they had not entered into any agreement; for the custom of the country where they contracted the marriage, ought to have its effect as it regards the dowry, the arras, and the gains they may have made: and not that of the place to which they have removed.²⁰

Article 63 of the Digest of 1808 (Revised Civil Code article 2399) further provided that, absent an antenuptial agreement, every marriage contracted within the territory superinduced of right the community of gains. This Digest provision was completely consistent

17. *Id.*

18. RESTATEMENT (SECOND) CONFLICT OF LAWS § 259, comment (c) (1969).

19. Novísima Recopilación bk. 10, tit. 4, L. 1 (1805).

20. LAS SIETE PARTIDAS bk. 1, tit. 11, L. 23 (Lislet & Carleton transl. 1820).

with the *Partidas'* conflicts rule, and both provisions were in effect until 1828.

Article 2370 of the 1825 Civil Code (Revised Civil Code article 2401) provided that the laws of the community also apply to parties married out of the state, who afterwards come here to reside and then acquire property. In 1852 the legislature passed an act (Revised Civil Code article 2400) which provides for the application of Louisiana's laws of the community to things acquired in Louisiana by a married non-resident.

There is an apparent conflict between the last two cited articles. The former article seems to imply that no community exists until both spouses come to Louisiana to live, while the latter article has no such restriction. Both of these provisions were included in the Civil Code of 1870, the redactors apparently not noting their inconsistency.

Louisiana Jurisprudence

The principle decision in American matrimonial regime conflicts law is *Saul v. His Creditors*,²¹ decided by the Louisiana supreme court in 1827. Saul and his wife were married in Virginia in 1794 and were domiciled there until 1804. They then moved to Louisiana where they acquired a large amount of property. Subsequent to the wife's death in 1819, the children of the marriage claimed one-half of the property as their portion of the community of gains, but Saul's creditors alleged that no community existed inasmuch as the marriage had been contracted in Virginia where no community property laws existed. Since the assets in question had been acquired between 1804 and 1819, the Digest of 1808 and the Spanish law governed. Finding the Digest of 1808 inapplicable to the facts, the court examined the *Fuero Real*, the *Partidas*, and the Spanish jurisprudence, concluding that under the Spanish jurisprudence, although contrary to the *Partidas*, a community existed between Saul and his wife from the time they moved to Louisiana. Although the decision was contrary to the legislation at that time, it would have been correct had article 2370 of the 1825 Code been the governing law.

In 1828, in *Cole's Widow v. His Executors*,²² the Louisiana supreme court was called upon to decide whether the laws of the community of gains applied to things acquired in Louisiana by a husband domiciled here, even though his wife never came to the state to live. The court expanded upon its holding in *Saul* by stating that not only did a community exist between a husband and wife from the time

21. 5 Mart.(N.S.) 569 (La. 1827).

22. 7 Mart.(N.S.) 41 (La. 1828).

that *both* moved to the state, but it existed as to all assets acquired in the state and found within its borders on dissolution of the regime no matter where the spouses had resided.

In 1828 the legislature repealed all of the old Spanish laws.²³ Thus, there was no longer any basis to hold that a community existed where only one spouse had come to Louisiana to live. The court took cognizance of this in *Dixon v. Dixon's Executors*.²⁴ In that case the husband and wife were married in Pennsylvania in 1813, and the husband moved to Louisiana in 1816 and lived here until his death in 1831. The court noted that the husband died after the passage of the 1828 Act, but held that the rights of the wife were governed by the laws in force at the creation of the community rather than at the time of its dissolution, and that the Spanish law had not been repealed at the time the community had been created. In coming to this conclusion the court pointed out that, if the wife's rights had arisen after the 1828 Act, there would have been no provision in the law for the application of the laws of the community of gains to the assets acquired in Louisiana.

The *Dixon* case and a series of subsequent cases²⁵ were the impetus for the enactment of article 2400 of the Revised Civil Code.²⁶ This statute seemed to restore the law to what had been the construction of the Spanish laws in *Saul* and *Cole*. Therefore, in 1923 the Louis-

23. La. Acts 1828, No. 83 § 25.

24. 4 La. 188 (1832).

25. In *Cooper v. Cotton*, 6 La. Ann. 256 (1851), and *Succession of McGill*, 6 La. Ann. 327 (1851), the parties had married out of state, and were also domiciled out of the state. Both of these cases held that no community existed as to property acquired by one of the spouses in Louisiana. The court recognized that this was opposite the result reached in *Cole*, but noted that the Spanish law relied upon in *Cole* had been repealed at the time the assets had been acquired. The court also held that articles 2369 and 2370 of the 1825 Code (articles 2399 and 2401 of the Revised Civil Code of 1870) did not apply because the parties had not contracted the marriage in the state or moved to the state as required by these articles.

In *Huff v. Borland*, 6 La. Ann. 436 (1851), the husband acquired property in the state before moving here with his wife. The court held that a community did not exist as to property acquired by the husband before he and his wife moved here because article 2370 of the 1825 Code (article 2401 of the Revised Civil Code of 1870) only provides that a community exists as to property acquired after the arrival of both husband and wife if the marriage is contracted out of state. It seems that in 1851 if a marriage was contracted out of the state by non-domiciliaries, the community existed only as to property acquired after *both* moved to the state.

26. La. Acts 1852, No. 292: "All property hereinafter acquired in this state, by non-resident married persons, whether the title thereto be in the name of either the husband or wife, or in their joint names, shall be subject to the same provisions of law which now regulates the community of acquets and gains between citizens of this state."

iana supreme court in *Succession of Dill*²⁷ held that a community existed between husband and wife as to *all* property acquired in the state whether either or both of them ever came to reside in the state.²⁸

Comparison of Louisiana Law with the Restatement

As to movable property there is a conflict between the law of other states and that of Louisiana. The general rule that is followed in other jurisdictions is that the law of the domicile at the time of acquisition will determine the spouses' respective interests in a movable. According to the Louisiana rule, as overbroadly expressed in *Succession of Dill*, a community exists as to all property that the spouses acquire in Louisiana whether or not either spouse has ever come here to live. A direct conflict exists under these two rationales. For example, if *H* acquired movable property in Louisiana while he was domiciled in state *X*, Louisiana would assert that a community existed as to the property in Louisiana. On the other hand, state *X* would assert that, under its conflict rules, the law of the domicile at the time of acquisition would be applicable and therefore *X*'s laws should govern ownership of the movables.

The conflict became apparent in *Crichton v. Succession of Crichton*.²⁹ In that case the husband, born in Louisiana, subsequently moved to New York and married there. At the time of his death he owned movable property in Louisiana. The New York court rendered a judgment pursuant to its law because the movable property was acquired while the decedent was domiciled in New York.³⁰ The decedent's children then sought recognition of the New York judgment in Louisiana.³¹ Although the Louisiana court of appeal gave the judgment full faith and credit, it noted that the effect of the New York judgment was contrary to Civil Code article 2400 as construed by *Dill*, in that a community would have existed as to the movable property situated in Louisiana.

The conflict that arises in this decision is due to the construction given to article 2400 in *Succession of Dill*. In *Dill* the court categorically stated that a community exists as to *all* property acquired in Louisiana; however, article 2400 states only that the property "shall be subject to the same provisions of law which regulate the community of acquets and gains between the citizens of the State."

27. 155 La. 47, 98 So. 752 (1923).

28. *Id.* at 57, 98 So. at 755.

29. 232 So. 2d 109 (La. App. 2d Cir. 1970).

30. *In re Estate of Crichton*, 20 N.Y.2d 124, 281 N.Y.S.2d 811, 228 N.E.2d 799 (1967).

31. 232 So. 2d 109 (La. App. 2d Cir. 1970).

Therefore, in determining whether a community exists as to the property in question, it is necessary to look to the law which regulates the community.

Prior to 1912, article 2334 provided that common property consisted of *all* property that either party acquired during the marriage unless acquired by "inheritance or by donation made to him or her particularly." In 1912 article 2334 was amended to provide that separate property also consists of property "acquired during the marriage with separate funds." When article 2400 is read with the amended portion of article 2334, it is easy to reach a different result from that of *Dill*, and to reconcile the conflict that arose in *Crichton*. In a separate property state, all of the funds the husband acquires during marriage are his separate property. Because these funds are the separate property of the husband, under article 2334 the property he acquires in Louisiana should remain his separate property. If the court had followed this line of reasoning in *Dill*, there would have been no conflict between Louisiana's law and New York's law in *Crichton* in that, under both laws, the property would have been the decedent's separate property and not subject to Louisiana's community of gains.

As to immovable property, Louisiana is in accord with the law of other states in that the law of the situs governs the interests of the spouses. However, a conflict does exist as to the application of the "source doctrine"³² which is accepted in other jurisdictions. Louisiana does not apply the "source doctrine" because of the erroneous construction given article 2400 in *Dill*³³ and because of a jurisprudential rule requiring a "double declaration" as established in *Sharp v. Zeller*.³⁴ This rule requires that when a husband intends to purchase an *immovable* for his *separate account*, he must state in the act of sale that he is purchasing with separate funds and for his separate account. If this declaration is not present, the immovable which the husband acquires becomes community property. This rule is jurisprudential and has no basis in legislation.³⁵ *Sharp*, moreover, was decided before article 2334 was amended and should rightly have no

32. See text at note 6 *supra*.

33. The holding in *Dill* that "all property acquired in this state by married persons becomes community property regardless of where both or either of them reside" precludes inquiry into the source of the funds used to acquire the immovable. However, if the courts would construe article 2400 in light of amended article 2334 the "source doctrine" could be applied.

34. 110 La. 61, 34 So. 129 (1902).

35. *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Matrimonial Regimes*, 30 LA. L. REV. 219, 224 (1969).

application after the 1912 amendment in that the legislation only requires that separate funds be used to acquire separate property.

Thus, in determining the rights of non-residents in property (whether movable or immovable) under article 2400, the courts should take into consideration the amended portion of article 2334 which allows property acquired during marriage with separate funds to remain separate property.³⁶

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36. *Id.* See also *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Conflict of Laws*, 31 LA. L. REV. 312, 320 (1971).