Louisiana Law Review

Volume 35 | Number 2
The Work of the Louisiana Appellate Courts for the 1973-1974 Term: A Symposium
Winter 1975

Public Law: Conflict of Laws

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CONFLICT OF LAWS

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A PROFESSOR'S ANNUAL FRUSTRATION

It is not easy to comment on conflict of laws decisions. The problem is not that the decisions of Louisiana appellate courts are worse than those of other American courts. Usually they are not. The difficulty lies in a lack of consensus—indeed, a lack of understanding—on the national level as to the nature and foundation of the conflict of laws. It is impossible to give an adequate critique of any one or of a few decisions without writing a treatise in which the proper foundations of the conflict of laws and the errors often espoused are discussed and the opinions appraised against the exposition. Hints of better things are all that can be given in a *Symposium* of this kind, and the very realization of the unavoidable inadequacy of those hints leads to the writer's annual frustration. But comment one must.

INTERSTATE DOMICILE OF WIFE

Tjadem v. Tjadem[1] correctly notes that since *Williams v. North Carolina (I)*[2] a married woman has ability to acquire an interstate domicile of choice without having been given cause by her husband to live separately from him. It is an important part of the *Williams* decision which frequently has gone unnoticed. The decision in *Tjadem*, moreover, does give a very clear account of the requirements for acquiring a domicile of choice, but the writer finds it difficult to agree with the court's application of those requirements to the facts of the case.

ALIMONY

In re Williams[3] was a curator's suit to obtain alimony for an interdicted divorced wife. She and her husband presumably had been domiciled in Louisiana in 1948 when she obtained a separation from bed and board on the ground of the husband's cruelty. Ten years later the husband obtained a divorce in Mississippi on the ground of the wife's abandonment. In 1971 Mrs. Williams was interdicted and her curator sued the husband, apparently then domiciled in Louisiana, for alimony. The husband contended that the Mississippi court's

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1. 294 So. 2d 846 (La. App. 2d Cir. 1974).
2. 317 U.S. 287 (1942).
3. 288 So. 2d 401 (La. App. 4th Cir. 1974).

finding that the wife had been at fault rendered her ineligible for alimony under Civil Code article 160.[4] Mrs. Williams' curatrix contended the fault issue was been resolved in favor of Mrs. Williams in the 1948 Louisiana separation suit.[5] The court awarded alimony to Mrs. Williams, but based its judgment on the fact that under Mississippi law even a wife at fault in a divorce may be awarded alimony.

It is submitted that the result reached by the court was correct, but not for the reason given. If the divorced husband and wife were both domiciled in Louisiana at the time of the suit for alimony, then the wife's entitlement and the husband's obligation should have been measured by Louisiana law alone. The obligation to demand alimony should be limited to the right granted the plaintiff by his or her state's law at the time of the demand—the law of the society in which he or she has chosen to live and presently applicable to him or her. In like fashion the alimentary obligation of the defendant should be limited by his or her state's law at the time of demand. No one, in other words, should be entitled to demand more alimony than his state's law would permit, or the defendant's state's law would require, whichever is less. The writer believes this formula is a logical extension of the 1933 United States Supreme Court decision in *Yarborough v. Yarborough.*[6] It also conforms in part to the principle sanctioned by the Uniform Reciprocal Enforcement of Support Act, under which the defendant owes alimony according to the law of his domicile, rather than that of the plaintiff's domicile, at the time of suit.[7] Neither party in the *Williams* case having been domiciled in Mississippi at the time of suit, resort should not have been made to the law of that state.

WORKMEN'S COMPENSATION AND DELICT

Griffin v. Universal Underwriters Insurance Co.[8] was reported

4. If the Mississippi divorce was *ex parte,* the finding of fault therein was irrelevant. 301 So. 2d 622 (La. 1974).

5. The argument was based on *Richardson v. Richardson,* 275 So. 2d 845 (La. App. 4th Cir. 1973), now approved of by the Louisiana supreme court in *Fulmer v. Fulmer,* No. 54,510 (Oct. 11, 1974).

6. 290 U.S. 202 (1933). A child domiciled in South Carolina sued her father, domiciled in Georgia, for alimony due under South Carolina law, but not under Georgia law. The court decided for the father, finding him without obligation inasmuch as Georgia law imposed none on him.

7. LA. R.S. 13:1661 (1950) *as amended by* La. Acts 1966, No. 228, §1. *See also* the writer's remarks in *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Conflict of Laws,* 32 LA. L. REV. 295, 297 (1972); R. PASCAL, FAMILY LAW COURSE §20.4 (1973).

8. 283 So. 2d 748 (La. 1973).

early enough in 1973 to be considered briefly in last year's *Symposium.*[9] There a Texas employee of a Texas employer had been injured in Louisiana in the course of his employment and had received a final award under the Texas workmen's compensation law. He was allowed, nevertheless, to recover under the Louisiana workmen's compensation law amounts over and above those recovered under the Texas statute. The rationale of the decision was based on *Industrial Commission of Wisconsin v. McCartin,*[10] decided by the United States Supreme Court in 1947, which declared that both the state of employment and the state of injury could apply their laws to the case and that neither state could prevent the other state from applying its laws to it. The writer commented then that he doubted that two states could be said to have simultaneous legislative jurisdiction on any one issue in the same case at the same time.[11] That critique is reaffirmed here. That either Texas law or Louisiana law might be considered applicable to a case, depending on particular circumstances, is comprehensible. But that both might be applicable on the same issue at the same time is not.

This leads to the discussion of a related problem pronounced upon last year. In *Wayne v. Olinkraft, Inc.,*[12] a Louisiana employee of a Louisiana employer received injuries in Arkansas and died as a result of the alleged negligence of a Louisiana domiciliary doing business in Arkansas as well as in Louisiana and under contract to perform certain operations for the Louisiana employer. Both the employer and the contractor were covered by the same workmen's compensation insurance policy. Under Arkansas law, however, or so it was alleged, the contractor would not have been liable to the employee for workmen's compensation benefits. The deceased employee's widow recovered under the Louisiana workmen's compensation law and then sued the contractor for wrongful death under Arkansas law. The court denied recovery in accordance with *Restatement (Second) Conflict of Laws* §§183 and 184. Under §183 Louisiana's application of Arkansas law to allow the widow recovery is declared permissible under the United States Constitution, but under §184 it is recommended that Louisiana not allow recovery for delict if the plaintiff has recovered or may recover under a workmen's compensation law which is made an exclusive remedy in Louisiana.

9. *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Conflict of Laws,* 34 LA. L. REV. 322 (1974).

10. 330 U.S. 622 (1947).

11. *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Conflict of Laws,* 34 LA. L. REV. 322, 323 (1974).

12. 293 So. 2d 896 (La. App. 2d Cir. 1974).

The writer can agree fully with the result reached in *Wayne*. It is quite difficult to understand why anyone should be considered entitled to recover under the law of another state what he would be denied under the plan of order his own state has enacted out of concern for the common good. It is for the same reason that the writer cannot agree with the result in *Griffin*. In principle the two decisions are inconsistent. On the other hand, the writer cannot agree with *Wayne's Restatement* foundations. The *Restatement (Second) Conflict of Laws* envisions the conflict of laws as a branch of state law under which the state determines for itself — subject to minimal control on the basis of full faith and credit, due process, and other constitutional "limitations" — the occasions and extent of its own legislative and judicial competences. The principle is stated in §2; §183 is merely a further specification of this principle for the particular issue. For the writer, the basis of the conflict of laws rules among the states of the Union — the delineation of their legislative and judicial jurisdictions — is by its very nature suprastate in character and, by the full faith and credit clause, a matter subject to federal determination. Thus neither Louisiana nor any other state is free to apply or not apply another state's law. It is obliged to apply the law of that state which the federal authority — the Congress or, in its default, the Supreme Court, judges reasonably or presumably would judge reasonably to have legislative jurisdiction.[13] The *Restatement's* position, it is true, follows *Klaxon v. Stentor Electric Manufacturing Co.*,[14] but that decision simply cannot be justified in the light of the necessary implications of the full faith and credit clause.[15]

"Party Choice of Law"

Two decisions involved questions of permissible "party choice of law." In *Davis v. Humble Oil & Refining Co.*,[16] the court, on rehearing, applied New York law to find an employee obliged to accept a decision by a company committee on the employee's eligibility for a benefit under an employee benefit plan. The plan's organic document provided for such a committee determination, the provision was valid by New York law, and the employee was deemed to have accepted the applicability of New York law to the plan in electing to avail

13. *See* the writer's comments in the *Symposia* of preceding years: *The Work of the Louisiana Appellate Courts—Conflict of Laws*, 34 La. L. Rev. 319, 320 (1974) (1972-73 Term); 33 La. L. Rev. 276, 278 (1973) (1971-72 Term); 32 La. L. Rev. 295, 296-97 (1972) (1970-71 Term); 31 La. L. Rev. 312, 314 (1971) (1969-70 Term).

14. 313 U.S. 487 (1941).

15. *See* the references in note 13 *supra*.

16. 283 So. 2d 783 (La. App. 1st Cir. 1973).

himself of the plan itself. The rationale of the decision was that the plan applied to employees in many states and the applicability of one state's law rather than many was justifiable in the interest of certainty, uniformity, and economy. Accordingly the court rejected the contention that the plan itself was a contract of adhesion and that the plaintiff should have the right to have his eligibility for benefits determined in proceedings permissible under the law of Louisiana, the state of his domicile in which he was employed and in which the defendant did business. The second decision, that in *United States Leasing Corp. v. Keiler,*[17] refused to recognize as binding on the lessee of a business machine methods of enforcement spelled out in the contract and valid by California law, though not by Louisiana law, simply because the contract provided that California law should apply. Here the court reasoned that the obligations of the contract were to be performed in Louisiana and any agreement on the enforcement of those obligations must be of a kind that is permissible under Louisiana law.

The *Keiler* decision is correct. Parties to an agreement cannot be said, logically, to have the right to "choose the law" applicable to their agreement. Legislation is not a private function. Private persons may be allowed to contract any scheme of order between them which is not forbidden by the law of the state with legislative jurisdiction in the matter. They may, arguably, describe their agreement by reference to the provisions of the laws of another jurisdiction. In so doing, however, they are not choosing a law, but simply describing their agreed upon rights and obligations by reference to the rules of another legal system. The consideration just mentioned causes doubt to be shed on the *rationale* used in *Humble,* even though the *Restatement (Second) Conflict of Laws* would consider it acceptable.[18] Whereas, assuming a true contractual situation, the parties' agreement to accept the applicability of New York law might be construed to be a reference to New York law for convenience in specifying their rights and obligations, it would be impossible to accept a provision of New York law contrary to any Louisiana law considered imperative or mandatory in the interest of good order. It is suggested that under Louisiana law a person employed in Louisiana is entitled, as a matter of public order, to a judicial determination of his rights against an employer domiciled or doing business in Louisiana unless he has agreed to a form of arbitration recognized by Louisiana law. The reasoning used in *Humble,* moreover, long has been rejected in insurance controversies and it is suggested that the analogy is clear.

17. 290 So. 2d 427 (La. App. 4th Cir. 1974).

18. RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(2) (1970).

INAPPROPRIATENESS OF SUMMARY JUDGMENTS IN CONFLICTS CASES

The Third Circuit Court of Appeal declared, in *Hobbs v. Firemen's Fund American Insurance Co.*,[19] that it was inappropriate to grant a summary judgment in a case involving conflict of laws issues, even if those issues are not mentioned by counsel. The writer judges this to be a wise decision which should be followed in all but those rare instances in which there can be no reasonable difference of opinion on the conflicts issue. The court is obliged to apply the proper law and, considering the present state of the subject, it may with good reason require that there be argument on almost any conflicts issue.

THE LONG HORN OF TEXAS LAW

Long arm statutes seem to vie with each other for reach. Texas apparently decided that a long horn statute could gore more easily than a long arm could reach and so enacted one. In what the writer considers a very poorly reasoned majority opinion the Third Circuit Court of Appeal, in *Dodson v. Fontenot*,[20] upheld the application of the Texas statute to a Louisiana individual whose only contacts with Texas were in connection with one purchase of horses at a Texas auction and their shipment to his Louisiana farm. There is no doubt the Texas statute asserts Texas judicial jurisdiction under the circumstances. It deems "entering into a contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State" to be a sufficient basis for the asserted jurisdiction. The plaintiff had sued in Texas using the statute in the effort to obtain personal jurisdiction against the defendant and had recovered a judgment against him. The majority opinion gave full faith and credit to the judgment reasoning (1) that "Texas courts could find the present judgment valid"[21] and (2) that under 28 U.S.C. §1738 and the full faith and credit clause Louisiana is "required to give the Texas judgment the same full faith and credit in Louisiana as that judgment would receive in Texas."[22] Judge Culpepper wrote an able dissent which, unfortunately, was limited to showing that the "doing business" basis of long arm statutes has not ever been deemed to include a "single act of purchase" in a jurisdiction.

Again, adequate comment on this decision would require a volume. A summary must suffice here. Judge Culpepper's dissent, so far as it goes, is correct. But the bases of full faith and credit as the writer

19. 293 So. 2d 608 (La. App. 3d Cir. 1974).
20. 285 So. 2d 328 (La. App. 3d Cir. 1973).
21. *Id.* at 330.
22. *Id.*

understands them to be stated in the majority opinion simply cannot be accepted as correct. The majority opinion seems to say that *if Texas decides* its assertion of jurisdiction is lawful then Louisiana must honor that assertion. If so, then the full faith and credit clause and 28 U.S.C. §1738 require each state to give in to every other state's assertion of jurisdiction. What the full faith and credit clause does mean is that every state must recognize the laws and judgments of other states when enacted or made with interstate legislative or judicial jurisdiction. The full faith and credit clause comes into play only when the statute is to be applied because of the legislative jurisdiction of the enacting state or when a judgment is to be enforced because of the judicial jurisdiction of the rendering state. The full faith and credit clause, in other words, is not to be applied unless and until the jurisdiction of the enacting or rendering state is established, though a presumption of jurisdiction may shift the burden of proof in judicial jurisdiction cases. It may be that 28 U.S.C. §1738 is not a too well-worded statute,[23] but it cannot be understood to have the effect of giving each state the right to determine its own interstate legislative and judicial competences without contradicting the very basis of the full faith and credit clause. That clause assumes that each state has its proper spheres of legislative and judicial jurisdiction based on criteria not determinable by the mere wills of the individual states themselves, but rather through reasonable judgments on the fitness of one state rather than another exercising legislative or judicial power over the particular kind of situation.[24]

23. 28 U.S.C. §1738, para. 3 (1948): "Such Acts, records and judicial proceedings [of each State, Territory or Possession of the United States] or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

24. *See* the writer's remarks in previous *Symposia,* cited in note 13 *supra,* but particularly 32 LA. L. REV. 296 (1972); 31 LA. L. REV. 314 (1971).