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## Public Law: Conflict of Laws

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## CONFLICT OF LAWS

Howard W. L'Énfant, Jr. \*

## COLLATERAL ATTACK ON A FOREIGN JUDGMENT

As part of a marital property settlement, the wife signed a mandate authorizing a Nevada attorney (or his nominee) to enter her appearance and represent her in the Nevada divorce action instituted by her husband. Although she was represented by an attorney in Louisiana, the agreement was signed at a hastily called meeting at which he was not present.<sup>1</sup> When he learned of the incident, he protested the action in a phone call to the husband's attorney but took no action to revoke the mandate. The divorce was granted in Nevada several weeks later. The wife later filed a divorce action in Louisiana and when the husband interposed the Nevada judgment of divorce as a bar to her action, she attacked its validity. The trial court sustained the exception and the Court of Appeal, in *Clay v. Clay*, affirmed.<sup>2</sup>

Under the principles of full faith and credit<sup>3</sup> the judgment rendered by the Nevada court must be given the same effect in Louisiana as in Nevada provided the court which rendered the judgment had jurisdiction.<sup>4</sup> In *Clay*, jurisdiction was based on the plaintiff-husband's claim of domicile in Nevada<sup>5</sup> and Louisiana, as the state in which the judgment is sought to be enforced, can inquire into the jurisdiction of the court where the judgment was rendered.<sup>6</sup> But if a defendant enters an appearance and participates in the original action, he loses his right to challenge the jurisdiction of that court regardless of whether he raises that issue of jurisdiction.<sup>7</sup> Since the wife in this case had entered an appearance through her attorney, her later attack on the judgment would seem to be barred. However, it is generally

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1. There was conflicting testimony on whether she expected her attorney to be notified by the other parties or had expressly rejected having him present. *Clay v. Clay*, 322 So.2d 238, 241 (La. App. 4th Cir. 1975), cert. denied, 325 So.2d 576 (La. 1976) (result correct).

2. *Id.* at 238.

3. U.S. CONST. art. IV, § 1.

4. See *Hanson v. Denckla*, 357 U.S. 235 (1958); *Pennoyer v. Neff*, 95 U.S. 714 (1878).

5. *Williams v. North Carolina*, 317 U.S. 287 (1942).

6. *Williams v. North Carolina*, 325 U.S. 226 (1945).

7. *Johnson v. Muelberger*, 340 U.S. 581 (1951); *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

recognized<sup>8</sup> that if a defendant has been deprived, through fraud, of an opportunity to challenge the validity of the original action or to defend himself on the merits then this becomes grounds for attacking the judgment when enforcement is sought in another forum provided it could be attacked on these grounds in the forum state.<sup>9</sup> Since Nevada would allow a judgment to be attacked on the grounds that the judgment was obtained by fraudulent practices extrinsic to the cause of action,<sup>10</sup> Louisiana courts would entertain a similar attack. The plaintiff's attack on the judgment was that the mandate authorizing an attorney to represent her had been obtained by fraud and bad faith on the part of the defendant. The court found that there had been some coercion with respect to the mandate but concluded that the wife had ratified the mandate by failing to take any action to revoke it even though she was represented by counsel who knew of her actions and who had time to file objections in the Nevada proceedings. The result the court reached was correct and in accord with settled principles. The interesting point is that there was no contention by the wife that she had a valid objection to the proceedings—either with respect to jurisdiction or to the merits—which she had been unable to assert because of the fraudulently procured appearance on her behalf. Yet it is this loss of an opportunity to raise defenses in the original action that is the basis for allowing a subsequent attack on the judgment on the grounds of extrinsic fraud.<sup>11</sup>

#### GUEST PASSENGER STATUTE

If a Louisiana citizen is killed in another state solely as a result of the negligence of another Louisiana citizen what law will govern recovery if suit is filed in Louisiana? In *Johnson v. St. Paul Mercury Insurance Co.*<sup>12</sup> the Louisiana Supreme Court applied the *lex loci delicti* doctrine and held that the law of the state where the wrong occurred applied. Three years later the Louisiana Supreme Court, in *Jagers v. Royal Indemnity Co.*,<sup>13</sup>

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8. See *U.S. v. Throckmorton*, 98 U.S. 61, 65 (1878), and the state cases collected in 55 A.L.R.2d 673 (1957).

9. *Boudreaux v. Welch*, 249 La. 983, 192 So.2d 356 (1966).

10. *Murphy v. Murphy*, 193 P.2d 850 (Nev. 1948).

11. Fraud pertaining to the cause of action (intrinsic fraud) is not grounds for attacking a judgment because the aggrieved party had a full and fair opportunity to uncover this fraud at the trial. But if fraud extrinsic to the cause of action prevents a party from having a fair trial then this is grounds for attacking the judgment. See *West v. Lawrence*, 297 So.2d 443 (La. App. 3d Cir. 1974); *Liebendorfer v. Gayle*, 217 So.2d 37 (La. App. 3d Cir. 1968); *Lee v. Carroll*, 146 So.2d 242 (La. App. 3d Cir. 1962).

12. 256 La. 289, 236 So.2d 216 (1970).

13. 276 So.2d 309 (La. 1973).

specifically overruled *Johnson*, describing it as a false conflicts case because only Louisiana had any interest in the application of its law. Though *Jagers* dealt with a question of intra-family immunity and not a guest passenger statute as in *Johnson*, its overruling of *Johnson* should be interpreted as meaning that Louisiana law would govern in the hypothetical situation posed above. But the court in *Schoelen v. Fidelity & Casualty Co.*<sup>14</sup> thought the matter uncertain enough to hold that an insurer's refusal to pay under its uninsured motorist coverage was not unreasonable and that therefore the plaintiffs were not entitled to penalties and attorney's fees.<sup>15</sup>

In *Schoelen* the plaintiff's daughter was killed in a one-car accident in Nevada as a result of the negligence of the Louisiana driver who fell asleep at the wheel. Nevada had a guest statute which made the driver liable to his passenger only for injuries caused by intoxication, willful misconduct or gross negligence.<sup>16</sup> Since the driver was uninsured, the plaintiffs sought recovery from their own insurer under the uninsured motorist coverage. The insurer was concerned that, if it paid the plaintiffs and brought suit against the uninsured motorist, the court might hold *Jagers* inapplicable because now the suit was between an insurer domiciled outside of Louisiana and a Louisiana defendant whereas in *Jagers* and *Johnson* all parties were Louisiana domiciliaries. As a result the plaintiffs were forced to sue the insurer who filed a third party demand against the driver and after he confessed judgment in favor of the insurer it confessed judgment in favor of the plaintiffs. The trial court awarded penalties and attorney's fees and the court of appeal reversed.

Clearly, if plaintiffs had sued the motorist in a Louisiana court he would not have been able to use the Nevada statute as a defense under *Jagers*. If the insurer had paid under the policy and had been subrogated to the rights of the plaintiffs it would have been in the same position as the insureds against the driver.<sup>17</sup> The action would still be between two Louisiana parties with the insurer entitled to recover only if the insured could have.<sup>18</sup> In support of its position the insurer cited *Brinkley & West*,

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14. 318 So.2d 90 (La. App. 3d Cir.), *cert. denied*, 322 So.2d 780 (La. 1975) (no error of law; three justices dissenting).

15. LA. R.S. 22:658 (1950).

16. NEV. R.S. 41.180 (1972).

17. LA. CIV. CODE art. 2160; LA. R.S. 22:1406(D) (4) (1950), *as amended* by La. Acts 1975, No. 656, § 1. *See* Broadview Seafoods Inc. v. Pierre, 248 La. 533, 180 So.2d 694 (1965); Motors Ins. Corp. v. Employers' Liab. Assurance Corp., 52 So.2d 311 (La. App. 1st Cir. 1951).

18. *See* State Farm Mut. Auto Ins. v. Hecker, 271 So.2d 895 (La. App. 4th Cir. 1973).

*Inc. v. Foremost Insurance Co.*<sup>19</sup> But in that case the federal court was concerned with the defendant's interference with various agency contracts in several states including Louisiana. All of the states except Louisiana recognized interference with a contract as an actionable wrong. Unlike *Jagers* this case presented a genuine conflict of law situation and the court interpreted *Jagers* to mean that Louisiana would follow the interest analysis set forth in the Restatement (Second) Conflict of Laws section 6. Nothing in the opinion indicates that the court was at all in doubt as to what the Louisiana court would do in a false conflicts case like *Johnson, Jagers* and *Schoelen* or in doubt as to whether Louisiana had abandoned *lex loci delicti*. The concern created by *Schoelen* is that it might be read as indicating doubt as to the position of the Louisiana Supreme Court in a *Jagers-Schoelen* type of case when, in fact, the cases give no reasonable basis for such doubt.

#### JUDICIAL NOTICE OF THE LAW OF ANOTHER STATE

In *Cambre v. St. Paul Fire and Marine Insurance Co.*,<sup>20</sup> the plaintiff brought an action in a Louisiana court to recover for medical malpractice which occurred during surgery in Jackson, Mississippi. The defendants were a Mississippi partnership, one of the members of that partnership who had withdrawn from the partnership and was now practicing medicine in Louisiana and their liability insurer. After the action had been dismissed against the partnership and the insurer,<sup>21</sup> the remaining defendant filed an exception of nonjoinder of an indispensable party, namely the partnership.<sup>22</sup> The argument advanced by the defendant was that even though the partnership had been dissolved upon his withdrawal, it nevertheless had a fictitious existence with respect to its prior obligations and that a partner cannot be sued on a partnership obligation unless the partnership is a party. In deciding this question the court ruled that Mississippi law was applicable but since neither litigant had cited or relied on Mississippi law in brief or argument, the court applied the presumption that Mississippi law was the same as that of the forum. Under Louisiana law the creditor of a dissolved

19. 499 F.2d 928 (5th Cir. 1974).

20. 331 So.2d 585 (La. App. 1st Cir.), *cert. denied*, 334 So.2d 435 (La. 1976) (no error of law).

21. The action was dismissed against the insurer on the grounds of no right of direct action—LA. R.S. 22:655 (1950); *Webb v. Zurich Ins. Co.*, 251 La. 558, 205 So.2d 398 (1968). The action against the partnership was dismissed on the grounds of lack of jurisdiction *in personam*—LA. R.S. 13:3201 (1964).

22. LA. CODE CIV. P. art. 737 provides that the partners of an existing partnership may not be sued on a partnership obligation unless the partnership is joined as a defendant.

partnership can sue the partners individually<sup>23</sup> and since former partners of an ordinary partnership are joint obligors,<sup>24</sup> they are necessary parties and suit will not be dismissed if they can not be joined.<sup>25</sup> Accordingly the court of appeal ruled it was error to sustain the defendant's exception of nonjoinder of an indispensable party.

La. Code of Civil Procedure article 1391, which is based on the Uniform Judicial Notice of Foreign Law Act, provides that a Louisiana court shall take judicial notice of the common law and statutes of every state of the United States.<sup>26</sup> Historically, questions concerning the law of other states were treated as questions of fact which had to be pleaded and proved as any other question of fact and could not be judicially noticed.<sup>27</sup> The Uniform Act made two major changes. It provided for judicial notice of the laws of another state and also made such questions an issue of law to be decided by the judge and not one of fact for the jury. When questions concerning the law of another state were treated as questions of fact to be proved by the parties, it made sense to say that in the absence of such proof the law was assumed to be the same as that of the forum especially since both states derived their law from the same source—the common law of England. Under the Uniform Act some courts hold that they can take judicial notice of the law of another state on their own initiative<sup>28</sup> but most require that the applicable law be pleaded, interpreting the Act as only removing the burden of proof.<sup>29</sup>

The decision of the court in *Cambre* was thus in line with prior Louisiana cases<sup>30</sup> and with many cases<sup>31</sup> decided in other states under the Uniform Act. But this approach may be applying the statute too restrictively. The intent was to treat questions of the law of another state the same as questions concerning the law of the forum. Both are questions to be decided by the judge who is to take judicial notice of the appropriate law.<sup>32</sup> It is

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23. *Vernon Co. v. Adams*, 165 So.2d 541 (La. App. 1st Cir. 1964).

24. LA. CIV. CODE art. 2873; *Johnson v. Iowa Rice Dryer, Inc.*, 226 So.2d 194 (La. App. 3d Cir. 1969).

25. LA. CODE CIV. P. art. 643.

26. *Id.* art. 1391.

27. *Welch v. Jacobsmeyer*, 216 La. 333, 43 So.2d 678 (1949); 9 J. WIGMORE, EVIDENCE §§ 2558, 2573 at 525, 554 (3d ed. 1940).

28. *See Annot.*, 23 A.L.R.2d 1437, 1446 (1952).

29. *See note 28, supra.*

30. *Welch v. Jacobsmeyer*, 216 La. 333, 43 So.2d 678 (1949); *Hattiesburg Mfg. Co. v. Pepe*, 140 So.2d 449 (La. App. 1st Cir. 1962); *Succession of Shadrick*, 129 So.2d 606 (La. App. 2d Cir. 1961).

31. *See note 28, supra.*

32. *Pecora v. James*, 150 So.2d 90 (La. App. 4th Cir. 1963).

submitted that it would have been better for the court in *Cambre*, once it determined that Mississippi law applied, to inform itself concerning Mississippi law and as article 1391 provides, "The court may inform itself of such laws in any manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information."<sup>33</sup> Such an approach<sup>34</sup> would have been more in keeping with the intent of the Uniform Act and also the Full Faith and Credit Clause.

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33. LA. CODE CIV. P. art. 1391.

34. More recent Louisiana cases have shown some willingness to do this. *First Nat'l Bank v. Reglin*, 266 So.2d 252 (La. App. 2d Cir. 1972); *Morace v. Morace*, 220 So.2d 775 (La. App. 1st Cir. 1969).