CONFLICT OF LAWS IN THE COMMUNITY PROPERTY FIELD†

WILLIAM Q. DE FUNIAK*

For many years the population shift from the east to the west has primarily concerned the movement of people from non-community property states to community property states. In the conflict of laws field, this has especially involved problems relating to marital property.[1] In California, these problems have been present for many years and will continue to exist. While Arizona has naturally had this problem in the past also, in view of the fact that the state has of recent years been enjoying a tremendous growth through an increased movement of people and property into it, questions in this field of conflict of laws will multiply for Arizona.

Possibly some of the experiences in this field in California may have value for Arizona, even if only to warn of what not to do. In past years, back beyond World War II, it is probable that the majority of people moving into California were reasonably well off, if not describable as well-to-do. Many were retired people who had disposed of small businesses or sizable farms in the middle west. Indeed, Southern California has at times been referred to, with attempted humor, as western Iowa.[2] While it is true that much of its present influx might be describable as a have-not element, California still continues to face questions in the conflict of laws area and perhaps some of its attempted solutions may have some value or hold some interest for Arizona.

I hope that I will be forgiven if, as a basis for some of my statements, I repeat a few obvious principles. It is established as a firm principle that the rights of ownership in realty are fixed, upon its acquisition, by the law of the place of its location. Thus, where a spouse acquires realty during marriage, the extent of the spouse's rights are fixed at the time of acquisition by the laws of the place of location, as are any rights that the other spouse may have in such realty.[3]

---

† This article has been adapted, in part, from a lecture delivered by the author at the Arizona Law Institute on Community Property in December, 1964.

* Professor of Law, University of San Francisco; member, State Bar of California; author, CASES AND MATERIALS ON COMMUNITY PROPERTY (1947); author, law review articles and comments on community property.

[1] See generally 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY §§ 87-92 (1943) [hereinafter cited as DE FUNIAK]; MARSH, CONFLICT OF LAWS IN MARITAL PROPERTY (1952) [hereinafter cited as MARSH].

[2] Tens of thousands of people have sometimes attended these Iowa picnics or get-togethers.

[3] See generally authorities cited note 1 *supra*.

Where personalty is concerned, while there is some slight authority that the law of the place of acquisition governs as to the rights of spouses in the personalty,[4] the more widespread rule — and that favored by the Restatement of Conflict of Laws[5] — is that the law of the matrimonial domicile governs as to the rights and interests of the spouses in the personalty rights and interests which are fixed at the time of the acquisition.[6]

And, of course, once these rights are fixed, they cannot be constitutionally changed during the lifetime of the owner merely by moving the personalty across one or more state lines,[7] regardless of whether there is or is not a change of domiciles. The rules are similar as to the proceeds of a sale of the realty.

The chief problem naturally comes from the differences between the law of the non-community property states and the law of the community property states as to property acquired by labor or industry of a spouse. It is stating the obvious to say that this is usually the husband, since he more often the bread-winner. Equally obvious, in a community property state, is that this type of acquisition is owned by the spouses as equal partners in a marital partnership. This fact and the reasons therefor are excellently presented in the leading Arizona case of *La Tourette v. La Tourette,*[8] and are nowadays equally true in the other community property states.[9] But in the non-community property states, these earnings of the husband are the separate property of the husband. Statutes in these latter states usually make provision for some kind of expectant or inheritable interest on the part of the wife, *i.e.*, some so-called dower right, to be realized upon the husband's death. But if this property is removed from the state on a change of domicile (if realty, then through its sale and the removal of the proceeds of the sale), upon the death of the owning husband, the disposition of the property is now governed by the law of the place of his new domicile at the time of death. If this law recognizes no statutory or common-law dower right, the wife may get nothing. It is true that Professor Marsh in his interesting and concise text on marital property in conflict of laws argues that this dower right is something more than a mere expectancy, since it has certain non-barrable features, and that there actually is some kind of fixed right which should be given

---

[4] An often cited case is Gooding Milling & Elevator Co. v. Lincoln County State Bank, 22 Idaho 468, 126 Pac. 772 (1912), but this case is distinguishable in that the money borrowed must have been the separate property of the wife who borrowed it; hence what she purchased with the money would be her separate property no matter where she purchased it, in or out of her domicile.

[5] RESTATEMENT, CONFLICT OF LAWS § 290 (1934).

[6] 1 DE FUNIAK § 896.

[7] *Id.* §§ 89-92.

[8] 15 Ariz. 200, 137 Pac. 426 (1914); Annot., 1915B L.R.A. 70.

[9] See 1 DE FUNIAK §§ 93-110.

some effect.[10] However, in the case of *Estate of O'Connor*,[11] the California Supreme Court refused to recognize anything more than an expectancy on the part of the wife, which would govern only if the husband died domiciled in a state recognizing such an interest in the wife. Upon the husband bringing the property into California on his change of domicile to that state, on his death the law of California governed and under that law the testamentary disposition on the part of the husband took effect and the wife had no inheritable or other right whatever.[12] This fact is recognized likewise in the other community property states[13] and is certainly confirmed in Arizona by *Stephen v. Stephen*.[14]

California did become concerned about this general problem. Suppose a husband and his wife work long and arduously in the successful operation of a farm in Iowa. The wife works in her way as hard as the husband in earning and saving money from the farming operations. However, if the farm is the property of the husband, all of the earnings and income from working this farm are also his separate property. Eventually, they sell the farm and with the proceeds of such sale and other savings, they move to California to retire and take life easy. Neither does any more work to speak of, at least work which earns money. The husband dies, leaving his property by will to some relative or relatives. Under California law, as is true in all the community property states, the wife has no dower right, indeed no right, in this so-called separate property of the husband. Since he earned nothing which would constitute community property of which the wife would own half, she may be left penniless.

As pointed out recently by Mr. O. J. Wilkinson, Jr., in a comment in the Arizona Law Review,[15] the California legislature, in 1917, in an effort to accomplish something for the wife, amended Section 164 of the California Civil Code to provide that "real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property."[16] Of course in the *Thornton* case,[17] this language was held to be unconstitutional as depriving of property without due process of law. In short, it attempted to take away a half interest in the husband's separate property and vest it in the wife, as of the time they crossed the border into California and changed

---

[10] See MARSH at 29 and following.
[11] 218 Cal. 518, 23 P.2d 1031, 88 A.L.R. 856 (1933).
[12] See MARSH at 138, 207, 229-232, concerning the *O'Connor* case, *supra* note 11.
[13] See 1 DE FUNIAK §§ 91, 92.
[14] 36 Ariz. 235, 284 Pac. 158 (1930).
[15] Comment, *Quasi-Community Property — California's New Property Concept*, 6 ARIZ. L. REV. 121 (1964).
[16] CAL. CIV. CODE § 164 (1872), as amended, (1917).
[17] *In re* Thornton's Estate, 1 Cal. 2d 1, 33 P.2d 1, 92 A.L.R. 1343 (1934). A

their domicile to that state. It may be noticed that there was a vigorous dissent, which argued that it was not the intent of the statute to change the nature or the ownership of the property during the owner's life, but merely to govern its descent upon his death.

Indeed, in 1935 the California legislature enacted a provision in the Probate Code[18] to the effect that property acquired while domiciled elsewhere which would have been community property if acquired while domiciled in California should, on the death of the owner domiciled in California, go one-half to the surviving spouse and the other half could be disposed of by the will of the decedent, but if not so disposed of should then go to the surviving spouse. Notice that, in California, in the case of actual community property, one-half would belong to the wife, the other half might be disposed of by will and if not, then it would pass to the surviving spouse. The validity of this new probate provision was a matter of concern. It was not until 1945 that any direct decision could be obtained on this new section and that decision — one by an intermediate appellate court — was effectively annulled by the state supreme court agreeing to rehear the case, which they never did as a matter of fact, since some compromise was reached by the parties and the appeal dismissed.[19]

However, in 1947, the question came before the California Supreme Court[20] and the validity of the probate code provision was upheld. The section was said to have been enacted definitely as a succession statute in accord with the dissenting opinion in the *Thornton* case.[21] It was pointed out that the statute did not purport to re-arrange property rights between living husbands and wives in marital property brought into the state upon their change of domicile to California. It was applicable only to personal property, *in that form at the death* of the owning spouse.

The owning spouse was thus free to give away the property during his lifetime, if he wished, since it was entirely his property. Or he might convert it into the form of realty and if still in the form of realty at his death, the probate code provision did not apply. The California Supreme Court pointed out that this might seem to be illogical but that was the way the legislature had made the statute read. Subsequently an amendment proceeded to equalize the situation so that whether in the form of realty or personalty at the death of the owner,

---

number of previous attempts to get the constitutionality of the language of the statute passed on had been unavailing.

[18] CAL. PROB. CODE § 201.5.

[19] *In re* Way's Estate, 157 P.2d 46 (Cal. App. 1945). A hearing was granted before the California Supreme Court, May 21, 1945, and the appeal was dismissed November 4, 1946, at the request of the appellant.

[20] *In re* Miller, 31 Cal. 2d 191, 187 P.2d 722 (1947).

[21] 1 Cal. 2d 1, 33 P.2d 1, 92 A.L.R. 1343 (1934).

the statute applied.[22]

Notice that the California lawyer, in dealing with a client in respect to drafting a will, for instance, had to ascertain if his client came originally from another state, especially a common law state, and if so, classify his client's property under three heads; (1) that which was actually and really community property, (2) that which was separate property by the law of some other place, having been acquired while domiciled there but which would have been community property if acquired while domiciled in California, and (3) separate property according to the view of the California law, whether acquired while domiciled in California or domiciled elsewhere.

However, since 1961, the California legislature has been creating what it now calls "quasi-community property" and this term is to be applied to property acquired while domiciled elsewhere which might be separate property by the law of that domicile but which would have been community property if acquired while domiciled in California.[23] The legislature now goes further than the original probate code provision[24] and provides, for example, that upon divorce, this quasi-community property is to be divided in the same way as community property,[25] and it is now also provided that if the husband, after changing his domicile to California, has given away such "quasi-community property," upon his death the surviving wife may recover half of this property from the transferee.[26]

In so far as this latter section seems to affect the exercise of full rights of ownership, it may well be argued that it is not constitutionally valid. And as to the division of "quasi-community property" upon divorce, to the extent that this is a division of what is legally the sep-

---

[22] CAL. PROB. CODE § 201.5 (1954), as amended, (1961), now reads as follows: Upon the death of any married person domiciled in this state, one-half of the following property in his estate shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent and in the absence thereof goes to the surviving spouse: All personal property wherever situated and all real property situated in this State heretofore or hereafter acquired (a) By the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this State at the time of its acquisition; or (b) In exchange for real or personal property, wherever situated acquired other than by gift, devise, bequest or descent by the decedent during the marriage while domiciled elsewhere.

[23] See CAL. CIV. CODE §§ 140.5; 146 (1954), as amended, (1961); 1237.5; CAL. TAX. CODE § 15300. The term "quasi-community property" has also been inserted in a number of other statutory sections.

[24] CAL. PROB. CODE § 201.5 (1954), as amended, (1957), (1961).

[25] CAL. CIV. CODE § 146 (1954), as amended, (1961).

[26] CAL. PROB. CODE § 201.8.

arate property of one spouse,[27] it may well run counter to the California principle heretofore followed of not dividing separate property upon divorce, although this is legally done in some states, *e.g.*, New Mexico and Washington.[28] In Arizona it appears that there is no power in the court to divest a spouse of his or her title in separate property so as to award it to the other spouse.[29]

So far, there has been only one California decision upon the constitutionality of any of these provisions and that has been with respect to property acquired by labor and industry of the husband while domiciled in Illinois and thus his separate property by Illinois law. This property was brought into California upon a change of domicile to that state, and upon divorce was sought to be divided as quasi-community property. The trial court, and an intermediate appellate court, declared that the *Thornton* case determined the present laws as to separate property brought into the state, and those courts did not give effect to the legislative concept of quasi-community property.[30] But upon a rehearing just recently had in the California Supreme Court, in an opinion which replaces that of the intermediate appellate court, the court upholds the constitutionality of the statute permitting division of the so-called quasi-community property upon divorce, as a matter of public policy, and considers that the *Thornton* case is to be distinguished.[31]

Of course, none of these provisions lighten the burden laid upon the lawyer seeking to draft a will, accomplish a property settlement agreement or otherwise deal with his client's property interests. He must classify his client's property under three heads, *i.e.*, community, quasi-community, and separate property, at least until supreme court decisions settle some of the problems.

If the Arizona Bar is debating or contemplating the matter of enacting any legislation similar to that of California, caution is strongly advised. As important as it may be to do something to see that a surviving wife is not left penniless, there appear to be too many questionable constitutional features about much of the new California legislation. It should be asked rather: is it possible to give recognition to the wife continuing to have sole right in the property which she had

[27] In Fox v. Fox, 18 Cal. 2d 645, 117 P.2d 325 (1941), it was held that upon divorce, separate property of one spouse may not be assigned to the other. And no lien can be placed on the husband's separate property to secure payment to the wife of her share of the community property. See Secondo v. Secondo, 218 Cal. 453, 23 P.2d 752 (1933).

[28] See, *e.g.*, as to New Mexico, N.M. STAT. ANN. § 68-506 (1929); and as to Washington, Thompson v. Thompson, 56 Wash. 2d 683, 355 P.2d 1 (1960), under authorization of WASH. REV. CODE § 26.08.110 (1949).

[29] See ARIZ. CODE ANN. § 27-805 (1939). Similarly, in Idaho, see BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO (1962).

[30] Addison v. Addison, 40 Cal. Rptr. 330 (1964).

[31] Addison v. Addison, 43 Cal. Rptr. 97 (1965).

under the governing law at the time the property was acquired? Certainly, Professor Marsh's argument of the fixed nature of some right stronger than a mere expectancy may have merit.[32] The California Probate Code[33] provides that on the death of a married person not domiciled in the state who leaves a will disposing of realty in California which is not community property, then the surviving spouse may elect to take a portion of the property or interest in the property against the will as though the property was situated in the decedent's domicile.[34] While this relates to non-domiciliaries, could similar legislation be enacted as to new domiciliaries of the state? Since the law of the situs governs as to realty, it is to be noted that the provision in favor of quasi-community property could be made applicable to such property if shown to be purchased with funds which would have been community if acquired while domiciled in California.

Another growing matter in the realm of conflict of laws in the field of marital property arises from automobile accidents resulting in personal injuries. The present day mobility by reason of the automobile results in spouses who are domiciled in one state becoming involved in accidents while touring in other states. The cause of action is a property right, as is the recovery. At this point in the community property states we encounter matters involving opposing views. The rule followed in Arizona, Idaho, Texas and Washington is that the cause of action arising from personal injury to a spouse during the marriage and while the spouses are living together, or while they at least have the will to union, is a community property interest. So, all the proceeds of the recovery are community property, whether the damages include items for pain and suffering of the injured spouse as well as other items including loss of earnings and medical expenses.[35] So even though the injury is to the wife, it is usually the place of the husband to sue, as the manager of the community property. However, on the other hand, in Louisiana, New Mexico and Nevada, it is recognized that there are two causes of action, one in the community for losses to it or for obligations imposed upon it, and a cause of action in the injured spouse, the wife, for example, for pain and suffering, in short for the invasion of the spouse's right of personal security.[36] A 1957 statutory enactment would seem to

---

[32] See note 10 *supra.*

[33] CAL. PROB. CODE § 201.6.

[34] One may compare the provision governing the purchase of realty in the state by one who has changed his domicile to California. See CAL. PROB. CODE § 201.5 (1957), as amended, (1961).

[35] See, *e.g.*, Pacific Constr. Co. v. Cochran, 29 Ariz. 554, 243 Pac. 405 (1926); Annot., 35 A.L.R.2d 1199 (1954).

[36] See, *e.g.*, Simon v. Harrison, 200 So. 476 (La. App. 1941); Meagher v. Garvin, 319 P.2d 507 (Nev. 1964); Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952); Annot., 35 A.L.R.2d 1190 (1952).

change California into this latter category, but the statute suffers from ambiguity.[37]

We thus have a problem between some of the community property states themselves, as well as between some of the community property states and the non-community property states, as to whether a personal injury to a wife, for example, in some part creates a separate property right in her or whether the cause of action in its entirety and all the proceeds of the recovery are community property. And who brings the action to recover for the pain and suffering? The second point on which opposing views develop is what state law is applied to determine the nature of the property right. We have to classify the cause of action as being in the nature of personal property. Following this view, many courts (including California and Nevada) declare that regardless of where the injury is incurred, the law of the domicile of the injured spouse governs to determine the nature of the property right.[38]

The other view (as in Louisiana and Texas) is that the law of the place of the tort determines. This seems to be pursuant to the conflict of laws principle that the law of the place of the tort must be looked to for determination of whether there is a cause of action, the extent of liability and other such matters.[39]

Notice that the question of the procedural law of the place of the action as determining who should prosecute the action is also involved, as well as questions of substantive law.[40]

An important point is that to the extent that the right of action is community property, the contributory negligence of the husband may have the effect of preventing the wife's recovery of damages for her pain and suffering.[41]

---

[37] CAL. CIV. CODE § 163.5. See also 1957 CAL. STATE BAR J. 507. The only direct application of the statute has been in a holding that its effect is not retroactive. See Ferguson v. Rogers, 168 Cal. App. 2d 486, 336 P.2d 234 (1959).

[38] See Schecter v. Superior Court, 49 Cal. 2d 3, 314 P.2d 10 (1957) (deciding that there was nothing but community property at the time the cause of action arose); Choate v. Ransom, 74 Nev. 100, 323 P.2d 700 (1958).

[39] See, as to Louisiana, Lewis v. American Brewing Co., 32 So. 2d 109 (La. App. 1947); Matney v. Blue Ribbon, Inc., 202 La. 505, 12 So. 2d 253 (1942), noted in 5 LA. L. REV. 467 (1943); and as to Texas, see Redfern v. Collins, 113 F. Supp. 892 (D. Tex. 1953).

[40] See cases cited note 38 *supra*. In Texas & Pacific Ry. Co. v. Humble, 181 U.S. 57 (1901), where the domicile was Louisiana and suit was brought in Arkansas, it would appear that the right of the wife to sue was considered in light of a procedural matter to be governed by the law of Arkansas. As Professor Marsh points out, whatever right is accorded the wife to sue in Arkansas, the ability of the husband later to demand an interest in the recovery is not affected and his claim could be made in the domicile on a pertinent occasion. See MARSH at 175.

[41] Is the interest of the husband to be determined by the law of the domicile, but imputing of the negligence of the husband to the wife to be determined by the law of the place of the tort? These are the suggested answers according to Professor Marsh. See MARSH at 175.

The problem, while exasperating in some ways, need not bog down the attorney. It may be only necessary that he be familiar with the view in the particular state where the action is brought. This might be an action in the place of domicile of the injured party,[42] an action in the place where the injury occurred[43] or an action in some third state where one can find and prosecute the wrongdoer.[44]

[42] Notice the following case, where an action by a wife domiciled in Wisconsin was brought in Wisconsin for personal injury suffered in California. Haumschild v. Continental Gas Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959). The court applied the law of the domicile.

[43] The cases cited in notes 35 and following indicate that this is the more usual situation.

[44] This is a possibility, although is not the most likely situation.