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A STUDY TO DETERMINE WHETHER THE LAW RELATING TO THE INTER VIVOS RIGHTS OF ONE SPOUSE IN PROPERTY ACQUIRED BY THE OTHER SPOUSE DURING MARRIAGE WHILE DOMICILED OUTSIDE CALIFORNIA SHOULD BE REVISED*

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In 1957 the Law Revision Commission submitted to the Legislature a Recommendation and Study concerning a proposed revision of Section 201.5 of the Probate Code and related statutes dealing with the rights of a surviving spouse in property acquired by either or both of the spouses while they were domiciled outside of California.[1] Pursuant to this recommendation the Legislature at its 1957 session enacted amendments to Sections 201.5 and 661 of the Probate Code, new Sections 201.6, 201.7 and 201.8 of the Probate Code, an amendment to Section 13555 of the Revenue and Taxation Code and new Sections 13552.5, 13554.5 and 13556.5 of the Revenue and Taxation Code.[2] All of these enactments dealt with the rights of a surviving spouse upon dissolution of the marriage by death with respect to property acquired by the deceased spouse while the spouses were domiciled in another state. At the same session the Legislature authorized the Law Revision Commission to study the question as to what changes, if any, during the subsistence of the marriage after the removal of the parties to California, should be made in the respective rights of the spouses in such property acquired while they were domiciled outside of California.[3]

As was pointed out in the above-mentioned study submitted to the 1957 Legislature, the courts have treated property acquired in another non-community-property jurisdiction by spouses who later move their domicile to California as in most respects identical with California separate property so far as the rights of the spouses therein are concerned, even though it was acquired in the foreign jurisdiction during marriage and not by gift, devise or descent. In 1917 the Legislature attempted to transform such property into community property upon the removal of the spouses to California, by an amendment to Section 164 of the Civil Code,[4] but this statute was declared unconstitutional by the California Supreme Court in Estate of Thornton.[5] The scope of that decision is discussed in the above-mentioned study submitted to the 1957 Legislature.

The purpose of the present study is to consider separately each of the major characteristics of community property and separate property during the lifetime of the spouses, in order to furnish a basis for determining whether it might be desirable and constitutionally feasible to alter some or all of the characteristics of property acquired by the spouses while domiciled elsewhere which would have been community property if acquired while domiciled in California.

A preliminary observation which must be made is that it would no longer be adequate simply to declare that such property shall be treated as "community property," even were that considered desirable and constitutionally feasible. The reason is that there are now two separate types of community property

in California with different characteristics -- the general community and the wife's earnings and property derived therefrom. Although they remain community property, the wife's earnings are now to a certain extent subject to her management and control, liable for her debts and not liable for the husband's debts. Therefore, a statute which treated property derived from the wife's earnings while the spouses were domiciled elsewhere as in all respects identical with the general community property would probably be an unconstitutional discrimination against such wives as compared with wives who were always domiciled in California, even if the other constitutional objections stated in Estate of Thornton[6] could be overcome. Aside from the constitutional objection, such a discrimination against wives moving to California from another state could hardly be justified as a matter of policy.

In the discussion which follows, the terms separate property and community property will be confined to such property acquired by spouses while domiciled in California or another community property state, while the term "Section 201.5 Property" will be used for property acquired by the spouses during coverture (otherwise than by gift, devise or descent), while domiciled in a non-community-property jurisdiction, including all personal property wherever situated and all real property situated in California acquired in exchange therefor, since such property is subject to the provisions of Section 201.5 of the Probate Code, as amended in 1957, granting to the nonacquiring spouse a nonbarrable interest

of one-half upon the death of the acquiring spouse. The term "general community property" will be used to refer to all of the community property other than the wife's earnings and property derived therefrom.

Management and Control

In California the husband has the management and control of the general community personal property and of all community real property.[7] On the other hand, the wife has the management and control of "community property money earned by her until it is commingled with other community property."[8] Although this provision has not been interpreted, under it the wife would apparently have the management and control of the actual cash received by her as her earnings and presumably of a separate bank account in which they were deposited, although strictly speaking in the latter case the earnings are no longer in the form of "money" but of a debt owed by the bank to the wife. However, it is fairly clear that if the earnings were used to purchase General Motors stock, the wife would no longer have the right to manage and control the stock. The management and control would pass to the husband and he would have the right to decide whether to sell the General Motors stock and buy American Telephone and Telegraph stock or to buy bonds. A fortiori, if the earnings of the wife were invested in land, the husband would have the management and control of the land.

On the other hand, each spouse has the management and control of his own separate property. Under the present law,

the same is true of the Section 201.5 Property of each spouse. Would it be constitutionally possible for the Legislature to declare that the Section 201.5 Property of each spouse should be treated as community property (general community or the wife's earnings, depending upon its mode of acquisition) so far as management and control is concerned, upon the removal of the spouses to California. Although this question was not actually involved in Estate of Thornton,[9] the clear indication of the opinion in that case is that this is the very sort of thing which the court considered constitutionally objectionable, since the spouse acquiring the property had acquired a "vested right" in it under the law of the foreign jurisdiction which could not be altered merely because the spouses moved to California.

Aside from any constitutional objections, such a statute would produce some rather bizarre results so far as the wife's Section 201.5 Property is concerned. If a husband and wife domiciled in New York moved to California and the wife had a bank account derived from her earnings during coverture which she transferred to this State, she would retain the management and control of that bank account (assuming that our surmise that a bank account will be construed to be "money" is correct). On the other hand, a wife in a similar situation who had purchased stocks and bonds with her earnings in New York would have the management and control of such securities transferred to the husband upon their removal to California. It does not seem to be an answer to this criticism to suggest that few

if any husbands would dare to insist upon their right of management and control in these circumstances. The fact that a statute is so divorced from sociological reality that it will be universally ignored is not an argument for enacting it. So far as the husband's Section 201.5 Property is concerned, such a statute would make little difference since he now has the management and control of such property as his "separate" property and under the statute he would have the management and control of it as quasi-community property.

On the whole it would seem that it would be unwise to attempt to change the law relating to Section 201.5 Property so far as the right to management and control is concerned.

Rights of Creditors

The separate property of neither husband nor wife is generally liable for the debts or liabilities of the other spouse. This is subject to the qualification that the separate property of the husband is liable for the wife's contracts for necessaries if the husband neglects to make adequate provision for her support, because of the husband's common-law liability for such debts as codified in Section 174 of the Civil Code.[10] By statute the separate property of the wife acquired by gift from the husband is liable for the payment of debts contracted by the husband for necessaries while they are living together,[11] and all of her separate property is liable for such debts when the husband has no separate property, there is no community

property and he is unable from infirmity to support himself.[12] Either spouse, and therefore his separate property, would of course be liable under general agency principles for a debt contracted or liability incurred by the other spouse while the second is acting as the agent or servant of the first. The Section 201.5 Property of either spouse would presumably be subject to the same rules as those with respect to separate property.

The general community property is generally liable for the debts and liabilities of the husband and not for those of the wife,[13] except that the general community property other than the husband's earnings is liable for the wife's antenuptial debts. The reason for this exception is that the husband was held liable for the wife's antenuptial debts in California under the common-law rule, and since he was liable then both his separate property and the community property were liable.[14] The Legislature then exempted his separate property and his earnings from liability for the wife's antenuptial debts, leaving the general community property other than his earnings still liable.[15] The general community property is also liable for the wife's contracts for necessaries in cases where the husband is personally liable.[16]

The earnings of the wife are liable for her "contracts"[17] and are not liable for the "debts" of the husband (other than his debts for necessaries).[18] The question has not been decided as to whether the "debts" of the husband for which the wife's earnings are exempt from liability would include his tort

liabilities. It is fairly obvious, since the statute imposing liability for the wife's acts specifies only "contracts," that her earnings would not be liable for her own tort liabilities.[19] However, it is possible that the 1951 statute giving the wife the management and control of her earnings while in the form of "money" may have impliedly made such earnings liable for her torts so long as they remain in that form.[20] Also, such earnings might be liable for her torts in a case where the husband himself, and therefore all of the general community property, would be liable therefor under some agency principle or some statute imposing liability, unless the exemption from liability for his "debts" includes such vicarious liability of the husband.

The exemption of the wife's earnings from the husband's debts attaches also to a bank account into which such earnings are deposited[21] and to personal property which is purchased with such earnings,[22] so long as the earnings can be clearly traced and identified. The exemption is lost if the earnings are so commingled with other community property that they cannot be identified[23] or if the earnings constitute only part of the purchase price of personal property with the other part being paid out of the general community funds.[24] However, it has been held that the commingling of the wife's earnings with other community property does not destroy the liability of such earnings for the wife's contracts, even though they can no longer be identified, and that the burden is upon the husband as against an attaching creditor of the wife to show how much of a particular fund or asset was derived from the community property other than her earnings.[25]

There has been no indication in the decisions as to whether the exemption of the husband's "earnings from the wife's antenuptial debts, the exemption of the wife's "earnings" from the husband's debts and the liability of her "earnings" for her contracts extend also to the income from property in which such earnings are invested.[26] It is probable that these rules would not apply to such income.

A change of the liability rules relating to Section 201.5 Property of the spouses from those concerning separate property to those concerning the two types of community property would make little difference with respect to the husband's Section 201.5 Property. Both the general community property and the husband's separate property are liable for the husband's obligations and are not liable for the wife's obligations, except that the general community property other than the husband's earnings is liable for the wife's antenuptial debts. The wife's Section 201.5 Property would ordinarily be derived from her earnings during coverture (since property acquired before marriage and that acquired by gift, devise or descent after marriage are excluded by definition from such property). A change with respect to the wife's Section 201.5 Property to the liability rules relating to community property would introduce all of the foregoing uncertainties and irrationalities as to whether such property would be liable for her tort as well as her contract obligations, whether its exemption from liability for the husband's "debts" includes his tort obligations and at what point such liability and such exemption cease because of a "commingling" of the property with community property.

In any event, such a change in the liability rules would probably make some of the Section 201.5 Property of the wife liable for the debts of the husband, whereas prior to their removal to California it had been her "separate" property which had not been liable for her husband's debts under the law of the foreign state. Would it be constitutionally possible for the Legislature to make such a change in property rights upon the removal of the spouses to California? Again the opinion in Estate of Thornton seems to indicate that the Legislature lacks any such power. However, there is considerable doubt whether the court would strike down a statute which was confined to regulation of the liability of the property of the spouses for their respective debts (rather than being an attempt to transform "separate" property into "community" property) and which established the same rules with respect to property acquired elsewhere as would have obtained had the spouses been domiciled in California when the property was acquired. The State should have a sufficient interest in the property rights of married people domiciled here and the rights of creditors within its borders to permit it to disturb to this extent the rules previously applicable to property owned by persons who move their domicile to California.

The wisdom of such a change is another matter, however. The evident trend of the piecemeal California statutes relating to the wife's earnings, as well as those in some other community-property states,[27] is to establish a second type of community property consisting of the wife's earnings and property acquired

therewith and the income therefrom, which would be as fully traceable as separate and community property now are and which would be subject to the wife's management and control and liable for her obligations and exempt from the husband's obligations. If the statutes in California had reached this point, there would be no problem with respect to the liability of the wife's Section 201.5 Property -- the rules relating to the liability of the wife's separate property and of her earnings and property derived therefrom would be the same, and it would make no difference which rules were applied to her Section 201.5 Property. However, to apply the existing fragmentary, ambiguous and irrational rules relating to the liability of the wife's earnings and property derived therefrom to her Section 201.5 Property would merely extend the area of confusion.

Inter Vivos Transfers

a. Gratuitous. Under California law either spouse may make a gift of his or her separate property without any consent from the other spouse. The same is true at the present time of the Section 201.5 Property of either spouse. On the other hand, the husband may not make a gift of the community personal property under his management and control[28] and the wife may not make a gift of her "money" earnings under her management and control[29] without the written consent of the other spouse. The same is true of the community real property under the management and control of the husband, since the wife must join in any

transfer or encumbrance of such community real property or any lease thereof for a period longer than one year, whether gratuitous or for value.[30]

However, the rules with respect to a gift of Section 201.5 Property have been qualified to some extent by Section 201.8 of the Probate Code enacted in 1957.[31] That section provides that the surviving spouse can claim his or her nonbarrable share of one-half in Section 201.5 Property even with respect to property transferred by the deceased spouse during his lifetime if (1) the transfer was made "without receiving in exchange a consideration of substantial value" and (2) the deceased spouse at the time of his death still had "a substantial quantum of ownership or control of the property." This section does not inhibit an outright gift by one spouse of his Section 201.5 Property or permit the other spouse to claim any interest therein after his death; it applies only if the gratuitous transfer by the deceased spouse was in effect a will substitute in that the deceased spouse retained strings on the property until the time of his death; e.g., a revocable trust where the right of revocation was only extinguished by the death of the settlor. Nor does this section permit any attack on the transfer during the lifetime of the transferring spouse. The other spouse can only claim his or her nonbarrable interest in such property after the death of the transferring spouse and only if the other spouse survives the transferring spouse.

If the rules applicable to community property were to be applied to Section 201.5 Property, then any gift of such property,

even an outright and irrevocable gift, without the written consent of the other spouse would be voidable at the election of the other spouse and the entire property could be recovered during the lifetime of both spouses.[32] After the death of the transferring spouse, the other spouse could only recover one-half of the property transferred.[33] Any such absolute requirement of a written consent to all gifts of Section 201.5 Property would of course render Section 201.8 of the Probate Code, which was designed merely to protect the surviving spouse's right of election under Section 201.5 from being evaded by what are essentially testamentary transfers, no longer necessary.

A proposal to require the consent of the other spouse to any gift of Section 201.5 Property by the spouse owning it would raise serious problems both of the constitutional validity of such a requirement and of its desirability as a matter of policy.

If such a statute applied all of the rules relating to community property to Section 201.5 Property, it would permit the other spouse to recover during the lifetime of both spouses all of the Section 201.5 Property given away and to thrust it unwillingly back into the hands of the donor spouse. The validity of such a serious curtailment of the rights of the spouse owning the Section 201.5 Property would certainly be of doubtful constitutionality. However, if the right of the other spouse to recover the property given away were limited to one-half of the property after the death of the donor spouse, it would seem that the curtailment could be sustained.

If California had the common law of dower in effect, undoubtedly a husband who moved here from another state which did not have such law and invested his funds in California land would have to obtain the wife's joinder to any conveyance of such land, whether gratuitous or for value, in order to transfer it free of her dower right. In other words, the wife not having joined in such a conveyance could recover a fraction of the property after his death which she would have been entitled to if he had retained the ownership until the time of his death. There would also seem to be little doubt that California could apply the same rule to personal property such as stocks and bonds acquired by the husband with funds brought from the foreign state. The failure of the common law and of the statutory modifications of it in the United States to give the wife an "inchoate" right of dower in personal property undoubtedly stemmed from a desire not to encumber the free alienability of personal property as a matter of policy rather than from any lack of constitutional power to do so. Assuming that California could apply this rule to personal property acquired here in exchange for personal property brought from the former domicile, there would seem to be little reason why it could not also apply such rule to personal property acquired in the former domicile and retained in the same form after being brought to California. Of course, if the "situs" of the personal property were in another state, more serious constitutional difficulties would arise. California probably could not apply its rule to the transfer of such property if the jurisdiction of the situs of

the property at the time of the transfer refused to recognize it.[34]

If the Legislature could constitutionally require the consent of the other spouse to any gift of Section 201.5 Property in order to cut off the other spouse's nonbarrable share of one-half under Section 201.5 of the Probate Code, the question still remains as to the desirability of that extensive a curtailment of the rights of the spouse owning the Section 201.5 Property. In recommending the enactment of Section 201.8 of the Probate Code, which does not require such consent to all gifts but only to those which are in effect will substitutes, the Law Revision Commission stated that it was attempting to "balance two competing considerations: (1) a desire to preserve to the surviving spouse the benefits intended to be conferred by Section 201.5; and (2) a desire to avoid undue interference with the owner's control during his lifetime of Section 201.5 property which is, until his death, his sole property."[35] The resolution of these competing values adopted by the Legislature in Section 201.8 of the Probate Code would appear to be sound. The abandonment of that decision in favor of one which would require the consent of the other spouse to all gifts of Section 201.5 Property in order to cut off the nonbarrable share of the other spouse would not seem justified.

b. For value. With respect to personal property generally there is no requirement in California law that the spouse having the management and control of such property, community or separate, secure any consent or joinder by the other spouse

for any conveyance or encumbrance of it for value. The desirability of this rule from a business standpoint is obvious, and there would be no justification for suggesting that such a requirement be imposed upon the spouse having the management and control of Section 201.5 Property.

However, the husband is prohibited from transferring or encumbering for value without the written consent of the wife community personal property consisting of the "furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children."[36] Should the husband be prohibited from transferring or encumbering his Section 201.5 Property consisting of the same items without the consent of the wife, and should the wife be prohibited from transferring or encumbering her Section 201.5 Property consisting of the furniture, furnishings, or fittings of the home without the consent of the husband?

With respect to the wearing apparel of the wife and minor children, it would be a rare case in which it could not be shown that the husband had made a gift of such property to the wife and minor children, and therefore there is little practical significance to the existing statute with respect to such wearing apparel and little need for a statute imposing the same requirements as to Section 201.5 Property. With respect to the furniture, furnishings and fittings of the home, probably in most cases they could be established to be community property whatever the origin of the funds used to pay for them in view

of the extremely liberal rules in California concerning the transformation of other property into community property by oral agreement of the spouses. The omission to include separate property within the scope of this statute apparently has caused no great difficulty in the past, and the omission of Section 201.5 Property would similarly seem to be of minor importance. In view of the constitutional problems which would be raised by an attempt to include the Section 201.5 Property of the spouses within the scope of this statute, such an amendment would probably not be of sufficient practical importance to justify its enactment.

With respect to community real property, the wife is required to join in any instrument by which such property is leased for a period longer than one year or is sold, conveyed or encumbered.[37] In the absence of her joinder she can recover all of the real property conveyed during the lifetime of both spouses[38] or one-half after the death of the husband.[39] However, any such action to set aside such a conveyance of property standing in the name of the husband alone must be commenced within one year after the filing of the transfer for record.[40] With respect to the separate real property of either spouse and the Section 201.5 Property of either spouse, no such requirement for a joinder by the other spouse in a transfer for value exists.

If the rules relating to community property were applied to Section 201.5 Real Property so that the spouse having the management and control of such property had to secure the

joinder of the other spouse in any conveyance or encumbrance of such real property or any lease of it for a period of more than one year, this would raise a serious constitutional question if the other spouse were permitted to recover such property during the lifetime of the owning spouse, as previously pointed out in the discussion of gifts. However, as also pointed out above, a requirement that the other spouse join in any such transfer, encumbrance or lease in order to cut off his nonbarrable interest in such real property after the death of the owning spouse would undoubtedly be constitutional, since it would merely be equivalent to an inchoate right of dower or curtesy.

It might be argued that this question is entirely academic, since any purchaser of real property from a married person will insist upon the other spouse's signature regardless of the character of the property. Since both spouses must already join in any conveyance of community real property, and separate property, whether real or personal, can be transformed into community property merely by an oral agreement of the spouses, any purphaser of separate real property from a married person would be wise to insist upon the signature of both spouses whatever the state of the record title or the manner of its acquisition.[41] Similarly, if a spouse owning Section 201.5 Real Property desires to sell it, the purchaser should insist upon the signature of his spouse whatever the law requires, since for all the purchaser knows the property may have been transformed into community property by a secret oral agreement of the spouses.

However, since the standard California title policy excludes from its coverage unrecorded rights or claims of persons in possession and unrecorded rights or claims which could be ascertained by making inquiry of persons in possession, presumably a title company would be willing to insure a title on the basis of the sole deed by a spouse of property appearing by the record to be his separate property or his Section 201.5 Property if both spouses were in possession or perhaps if only one were. This of course would not protect the purchaser against a claim by the nonjoining spouse that the property had been transformed into community property by an oral agreement, but since the great majority of real estate purchases are closed solely upon the basis of a title policy without independent legal advice, the purchaser would probably accept the sole deed of one spouse if the title company will issue a title policy, without realizing that this particular danger was not insured against. Therefore, this problem cannot be said to be entirely moot as a practical matter.

Whether a positive requirement of joinder by the non-owning spouse should be imposed in connection with any conveyance of Section 201.5 Real Property depends upon the extent to which it is thought desirable to curtail the power of control and disposition of such property by the spouse owning it. Certainly if the conclusion is accepted that an outright gift of personal property which is Section 201.5 Property can be made by the owning spouse without any consent by the other spouse, there could be no justification for requiring the joinder

of the other spouse in any conveyance of Section 201.5 Real Property, either gratuitously or for value. The days when real property was the most important source of wealth have long since passed. While at the time of the development of the doctrine of inchoate dower and even at the time of the original passage of the community property laws, there was a valid reason for concentrating on providing protection for a wife or husband with respect to his interest in real property acquired by the other, and largely ignoring personal property, such an attitude could not be justified today. On the whole there would seem to be insufficient justification for the imposition of the requirement of joinder by the other spouse in any conveyance for value of Section 201.5 Real Property.

Declaration of Homestead

The California statutes permit the filing of a declaration of homestead by both of the spouses jointly upon any of their property, community or separate, constituting the homestead, by the wife alone upon the community property or either spouse's separate property, and by the husband alone on the community property or his own separate property but not upon the wife's separate property.[42] Section 1265 of the Civil Code provides that if the selection is made from the community property or from the separate property of the person making or joining in the declaration, upon the death of either spouse the homestead vests in the survivor rather than the heirs or devisees of the deceased spouse. As a result of these provisions, if the wife

alone files a declaration of homestead on community property, upon the husband's death the property vests in her; but if she alone files a declaration of homestead on the husband's separate property, upon his death the property goes to the husband's heirs or devisees.

The question has not arisen as to whether the husband's Section 201.5 Property will be treated as separate property or as community property for the purpose of these provisions, but in view of the analogous decisions under Section 661 of the Probate Code (before its amendment in 1957) it is probable that Section 201.5 Property would be treated as separate property.[43] In providing that the husband may not alone select the homestead from the "separate" property of the wife and that if the wife alone selects the homestead from the "separate" property of the husband she will not take such homestead in preference to his heirs or devisees upon his death, it is doubtful if the Legislature was thinking of real property derived from funds acquired in the same manner as community property but while the spouses were domiciled in a foreign, non-community-property jurisdiction.

There would seem to be little reason why Section 201.5 Real Property should not be treated like community property for the purpose of these homestead provisions, especially since under the 1957 amendment to Section 661 of the Probate Code[44] it is now treated like community property for the purpose of the selection of a probate homestead by the court after the death of either spouse. There could be no possible constitutional

objection to such a provision since it would concern merely the method of selection of a homestead and the devolution of such homestead upon the death of its owner in a case where it was selected by one spouse alone out of the Section 201.5 Real Property of the other spouse without his consent.

Division on Divorce

Under Section 146 of the Civil Code, upon a divorce of the spouses, the court has the power to divide the community property of the spouses in such proportions as the court may "deem just" if the divorce is granted on the ground of cruelty, adultery or incurable insanity. In the case of a divorce for any other cause the court must divide the community property equally between the spouses.[45] The court does not have the power to divide the separate property of either spouse upon a divorce for any cause.[46] It has been held that Section 201.5 Property is to be treated as "separate" property for the purpose of applying these rules, i.e., the court has no power to divide it upon a divorce of the spouses.[47]

There could be no valid constitutional objection to giving the court the power to divide the Section 201.5 Property of the spouses upon divorce in a manner which the court may deem just. The statutes of a large number of other states have long granted to the divorce court the power to divide between the spouses the separate property of the husband or the wife or both upon the granting of an absolute divorce, in such manner as the court

may consider "just and reasonable," or words of similar import. In twelve states such division is permitted of the real and personal property of both spouses;[48] in seven states of the real and personal property of the husband;[49] and in one other state of the personal property only of the husband.[50] In addition, other states permit in some cases the award of a portion of the property of the spouse against whom the divorce is granted as alimony to the prevailing spouse in the divorce action.[51] These statutes have been applied for many years without any question being raised or suggested as to their constitutional validity.[52]

There would, however, be a serious constitutional problem if the Legislature should merely provide that the Section 201.5 Property of the spouses should be treated as community property under the statutes mentioned above. This would mean that if the divorce were granted on any ground other than cruelty, adultery or incurable insanity the court would be forced to divide the Section 201.5 Property of each spouse equally with the other spouse. For example, in a case where a husband and wife moved to California from New York and she brought with her a large amount of property derived from her earnings while they were domiciled in New York, and he then deserted her, if she obtained a divorce on the ground of desertion the court would be forced under such a provision to take half of this property belonging to her and give it to the absconding husband.

It is no answer to this problem to suggest that the injustice would be just as glaring in a case where she had earned

the money in California and it therefore constituted community property. Although the injustice would perhaps be just as great the constitutional problem would not be the same because in the case where the earnings are community property the husband would have been considered the "owner" of "one-half" of them from the moment they were earned. The divorce would merely sever the ownership in community and make him the owner of his one-half as a tenant in common with the wife in the absence of any contrary provision in the statute. In a case, however, where the property derived from her earnings was her "sole and separate property" under the law of the foreign state prior to the removal of the spouses to California and continued to be such after the removal, it shocks the conscience to say that the act of the husband in deserting her may result in a compulsory transfer of one-half of her property to him.

In all of the three states where there are statutory provisions for an arbitrary division of property of the spouses into fixed shares upon divorce, these provisions apply only to the property of the party at fault.[53] In none of them is there any attempt to take an arbitrary fraction of the property of the innocent plaintiff and hand it over to the guilty defendant. It is true that in many of the states which permit a division of property in the discretion of the court in such proportions as the court deems just and equitable, the court may divide the property of both the plaintiff and the defendant. However, this is done only after both parties have had their day in court and the court has taken into consideration the relative fault of the

parties and all other circumstances bearing upon the equity of the division. Therefore, such a division could hardly be said to deprive an innocent plaintiff in the divorce action of his or her property without due process of law, whereas an arbitrary statutory division of the property of the innocent plaintiff might very well do so.

In view of the serious constitutional problems in attempting to apply the rules relating to division of community property upon divorce to Section 201.5 Property, as well as the apparent lack of rationality in the random selection of only three causes of divorce which permit an unequal division of community property, it is suggested that the Legislature should deal with Section 201.5 Property separately and authorize the court in the case of a divorce for any cause to divide such property in a manner which the court "deems just."

Gift Tax

The California Gift Tax Statute provides that where community property is transferred from one spouse to the other only one-half is subject to tax and that any gift of community property is to be treated as a gift by each spouse to the extent of one-half.[54] Between 1939 and 1947 a provision was included that Section 201.5 Property in the form of "intangible personal property" should be treated as community property for the purpose of these provisions.[55] In 1947 this provision was repealed.[56]

Since 1925 there has been a provision in the Inheritance Tax Act providing for the treatment of Section 201.5 Property to some extent as community property for inheritance tax purposes, and in 1957 this provision was revised to correlate it with the amendments made to Section 201.5 in that year.[57] It is difficult to see why the initial impulse in 1939 to do the same thing in connection with the gift tax was abandoned in 1947. The two taxes are merely complementary aspects of the same scheme of taxation, i.e., to subject to a tax the gratuitous transfer of wealth whether it takes place during the lifetime of the owner or at his death. Perhaps it was thought that there was a difficulty in treating the nonowning spouse as the donor of one-half of the gift in the case of Section 201.5 Property, thereby making him liable for one-half of the tax,[58] when he had no control over the making of the gift. Obviously there might be some constitutional objection to imposing a tax on A because B has made a gift of B's property. However, this difficulty could easily be solved as a practical matter by permitting the gift of Section 201.5 Property to be treated as a gift of one-half by each spouse at the election of both spouses. Normally they would elect so to treat it since that treatment would result in lower rates and larger exemptions. With this modification, it would seem that Section 201.5 Property should be treated as community property for the purpose of the gift tax since it is so treated for the purpose of the inheritance tax.[59]

Repeal of the 1917 Amendment to Section 164 of the Civil Code

In 1917 the Legislature amended Section 164 of the Civil Code to provide that Section 201.5 Property should be transformed into community property upon the removal of the spouses to California.[60] Although that amendment was declared unconstitutional in Estate of Thornton, the Legislature has never removed the amendment from the statute and there are unresolved questions as to whether the decision in that case rendered the amendment invalid in toto.[61] In 1957 the Legislature enacted a series of amendments to the Probate Code and the Revenue and Taxation Code dealing with the rights of the spouses in Section 201.5 Property upon the death of one spouse. If the Legislature enacts amendments to the statutes or by failing to act preserves the existing rules with respect to the foregoing topics, it will have dealt with all of the rights of the spouses inter vivos in such property which are likely to raise any problems. Thus there is no further function for the 1917 amendment to Section 164 of the Civil Code to perform, even if it were held to be still effective to some extent, and for it to remain on the statute books can only lead to confusion. It is suggested that the Legislature should repeal that portion of Section 164 of the Civil Code which purports to transform Section 201.5 Property into community property.

FOOTNOTES

1. Recommendation and Study relating to Rights of Surviving spouse in Property Acquired by Decedent While Domiciled Elsewhere, 1 Cal. Law Revision Comm'n Rep., & Studies E-1 (1957).
2. Cal. Stat. 1957, c. 490.
3. Cal Stat. 1957, res. c. 202, p. 4589.
4. Cal. Stat. 1917, c. 581, § 1, p. 827.
5. 1 Cal.2d 1, 33 P.2d 1 (1934).
6. Ibid.
7. Cal. Civ. Code §§ 172, 172a.
8. Cal. Civ. Code § 171c. [Emphasis added.]
9. See note 5 supra.
10. Cal. Civ. Code § 174; St. Vincent's Institution for the Insane v. Davis, 129 Cal. 17, 61 Pac. 476 (1900); Davis v. Fyfe, 107 Cal. App. 281, 290 Pac. 468 (1930).
11. Cal. Civ. Code § 171; Wahl v. Martinelli, 101 Cal. App.2d 869, 226 P.2d 668 (1951); Medical Finance Assoc. v. Allum, 22 Cal. App.2d Supp. 747, 66 P.2d 761 (1937); Ackley v. Maggi, 86 Cal. App. 631, 261 Pac. 311 (1927); Turner v. Talmadge, 42 Cal. App. 794, 187 Pac. 969 (1919). In addition, the earnings of the wife while she is living separate from the husband, which are separate property (Cal. Civ. Code § 169), and her separate property constituting the income from other separate property would probably be liable for the husband's contracts for necessaries made while they are

living together, since neither of these types of separate property of the wife are described in the exempting clause of Section 171 of the Civil Code.

12. Cal. Civ. Code § 176.

13. Cal. Civ. Code §§ 167, 170, 171a; Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641 (1941), cert. denied, 314 U.S. 612 (1941); Bashore v. Parker, 146 Cal. 525, 80 Pac. 707 (1905); McClain v. Tufts, 83 Cal. App.2d 140, 187 P.2d 818 (1947); Sellman v. Sellman, 82 Cal. App.2d 192, 185 P.2d 846 (1947); Smedberg v. Bevilockway, 7 Cal. App.2d 578, 46 P.2d 820 (1935).

14. Van Maren v. Johnson, 15 Cal. 308 (1860); Vlautin v. Bumpus, 35 Cal. 214 (1868).

15. Cal. Civ. Code § 170.

16. See note 10 supra.

17. Cal. Civ. Code § 167.

18. Cal. Civ. Code § 168.

19. It is difficult to believe that any court would hold, as suggested in Tinsley v. Bauer, 125 Cal. App.2d 724, 271 P.2d 116 (1954), that the statute imposing liability for the wife's "contracts" includes liability for her torts. See Henley v. Wilson, 137 Cal. 273, 70 Pac. 21 (1902), holding that the exemption of the community property merely from liability for the wife's "contracts," prior to the enactment of Civil Code § 171a, did not exempt such property from liability for her torts. The actual holding of the Tinsley case that liability for "contracts" includes liability for quasi-contracts would seem to be sound.

20. See 1 Armstrong, California Family Law 706 (1953).

21. Finnigan v. Hibernia Savings & Loan Society, 63 Cal. 390 (1883).

22. Street v. Bertolone, 193 Cal. 751, 226 Pac. 913 (1924).

23. Tedder v. Johnson, 105 Cal. App.2d 734, 234 P.2d 149 (1951); Truelsen v. Nelson, 42 Cal. App.2d 750, 109 P.2d 996 (1941).

24. Pfunder v. Goodwin, 83 Cal. App. 551, 257 Pac. 119 (1927).

25. Tinsley v. Bauer, 125 Cal. App.2d 724, 271 P.2d 116 (1954).

26. See Street v. Bertolone, 193 Cal. 751, 754, 226 Pac. 913, 914 (1924).

27. See Marsh, Marital Property in Conflict of Laws 21-22 (1952).

28. Cal. Civ. Code § 172.

29. Cal. Civ. Code § 171c.

30. Cal. Civ. Code § 172a.

31. Cal. Stats. 1957, c. 490.

32. Lynn v. Herman, 72 Cal. App.2d 614, 165 P.2d 54 (1946).

33. Ballinger v. Ballinger, 9 Cal.2d 330, 70 P.2d 629 (1937).

34. For a discussion of the applicable choice-of-law rule see Marsh, Marital Property in Conflict of Laws 161-163 (1952).

35. Recommendation and Study relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere, 1 Cal. Law Revision Comm'n Rep., Rec. & Studies E-8 (1957).

36. Cal. Civ. Code § 172.

37. Cal. Civ. Code § 172a.

38. Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221 (1935).

39. Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933).

40. Cal. Civ. Code § 172a.

41. Cf. Horton v. Horton, 115 Cal. App.2d 360, 252 P.2d 397 (1953); MacKay v. Darusmont, 46 Cal. App.2d 21, 115 P.2d 221 (1941).

42. Cal. Civ. Code §§ 1238, 1239, 1265.

43. Estate of Niccolls, 164 Cal. 368, 129 Pac. 278 (1912); Estate of Jenkins, 110 Cal. App.2d 98, 242 P.2d 107 (1952).

44. Cal. Stats. 1957, c. 490.

45. Cal. Civ. Code § 146.

46. Fox v. Fox, 18 Cal.2d 645, 117 P.2d 325 (1941).

47. Latterner v. Latterner, 121 Cal. App. 298, 8 P.2d 870 (1932). Cf. Gelfand v. Gelfand, 136 Cal. App. 448, 29 P.2d 271 (1934); Brunner v. Title Ins. & Trust Co., 26 Cal. App. 35, 145 Pac. 741 (1914).

48. Colo. Rev. Stats. § 46-1-5 (1953); Iowa Code Ann. § 598.14 (1946); Minn. Stats. § 518.58 (1953); N.D. Rev. Code § 14-0524 (1943); Okla. Stats. tit. 12, § 1278 (1951) ("jointly acquired property" only); Ore. Rev. Stats. § 107.100 (1955); S.D. Code § 14.0726 (1939); Tex. Rev. Civ. Stats. Art. 4638 (Vernon 1948) (except that court may not divest title to real estate); Utah Code Ann. § 30-3-5 (1953); Vt. Stats. § 3251 (1947); Wash. Rev. Code § 26.08.110 (1951); Wyo. Comp. Stats. § 3-5916 (1945).

49. Conn. Gen. Stats. § 7335 (1949); Del. Code tit. 13, § 1531 (1953); Kan. Gen. Stats. § 60-1511 (1949); Neb. Rev. Stats. §§ 42-318, 42-321 (1943); N.H. Rev. Stats. Ann. § 458.19 (1955); Tenn. Code Ann. § 36-821 (1956); Wisc. Stats. Ann. § 247.26 (1957).

50. Mich. Comp. Laws § 552.23 (1948).

51. Ga. Code § 30-209 (1933); Ky. Rev. Stats. § 403.060 (Baldwin 1955); Mass. Laws.Ann. c. 208, § 34 (1955); Nev. Rev. Stats. § 125.150 (1957); N.M. Stats. § 22-7-13 (1953); Ohio Rev. Code § 3105.18 (1953).

52. Shapiro v. Shapiro, 115 Colo. 505, 176 P.2d 363 (1946); Allen v. Allen, 43 Conn. 419 (1876); Farrand v. Farrand, 246 Iowa 488, 67 N.W.2d 20 (1954); Reedy v. Reedy, 175 Kan. 438, 264 P.2d 913 (1953); Albertson v. Albertson, 243 Minn. 212, 67 N.W.2d 463 (1954); Swanson v. Swanson, 243 Minn. 516, 68 N.W.2d 418 (1955); Washington v. Washington, 78 Neb. 741, 111 N.W. 787 (1907); Metschke v. Metschke, 146 Neb. 461, 20 N.W.2d 238 (1945); Lippincott v. Lippincott, 144 Neb. 486, 13 N.W.2d 721 (1944); Fansler v. Fansler, 344 Mich. 569, 75 N.W.2d 1 (1956); Whittaker v. Whittaker, 343 Mich. 267, 72 N.W.2d 207 (1955); LeBel v. LeBel, 327 Mich. 318, 41 N.W.2d 881 (1950); Kibbee v. Kibbee, 99 N.H. 215, 108 A.2d 46 (1954); Hill v. Hill, 197 Okla. 697, 174 P.2d 232 (1946); Tobin v. Tobin, 89 Okla. 12, 213 Pac. 884 (1923); Shields v. Bosch, 190 Ore. 155, 224 P.2d 560 (1950); Morrow v. Morrow, 187 Ore. 161, 210 P.2d 101 (1949); Flanagan v. Flanagan, 188 Ore. 126, 213 P.2d 801 (1950); Williams v. Williams, 146 Tenn. 38, 236 S.W. 938 (1922); Hamby v. Northcut, 25 Tenn. App. 11, 149 S.W.2d 484 (1940); Hedtke v. Hedtke, 112 Tex. 404, 248 S.W. 21 (1923); Rylee v. Rylee, 244 S.W.2d 717 (Tex. # Civ. App. 1951); Hamm v. Hamm, 159 S.W.2d 183 (Tex. Civ. App. 1942); Woolley v. Woolley,

113 Utah 391, 195 P.2d 743 (1948); Schilling v. Schilling, 42 Wash.2d 105, 253 P.2d 952 (1953); Shaffer v. Shaffer, 43 Wash.2d 629, 262 P.2d 763 (1953); Bodine v. Bodine, 34 Wash.2d 33, 207 P.2d 1213 (1949); Hull v. Hull, 274 Wisc. 140, 79 N.W.2d 653 (1956); Hoffman v. Hoffman, 270 Wisc. 357, 71 N.W.2d 401 (1955); Julien v. Julien, 265 Wisc. 85, 60 N.W.2d 753 (1953); Lovejoy v. Lovejoy, 36 Wyo. 379, 256 Pac. 76 (1927); Williams v. Williams, 68 Wyo. 175, 231 P.2d 965 (1951).

53. Ark. Stats. Ann. § 34-1214 (1947); Myers v. Myers, 226 Ark. 632, 294 S.W.2d 67 (1956); Reed v. Reed, 223 Ark. 292, 265 S.W.2d 531 (1954); Me. Rev. Stats. c. 166, §§ 63, 65 (1954). Poulson v. Poulson, 145 Me. 15, 70 A.2d 868 (1950); Leavitt v. Tasker, 107 Me. 33, 76 A.2d 953 (1910); R.I. Gen. Laws §§ 15-5-6, 15-5-7 (1956); Laranjeiras v. Laranjeiras, 67 R.I. 1, 20 A.2d 278 (1941); Brown v. Brown, 48 R.I.420, 138 Atl. 179 (1927).

54. Cal. Rev. & Tax. Code §§ 15301, 15302.

55. Cal. Rev. & Tax. Code § 15305.

56. Cal. Stat. 1947, c. 735, § 4, p. 1790.

57. Cal. Stat. 1957, c. 490.

58. Cal. Rev. & Tax. Code § 15901.

59. The adoption of this proposal would also require an amendment to Revenue and Taxation Code § 15303. If Section 201.5 Property is to be treated as community property for the purpose of the gift tax, then obviously no tax should be levied upon the transformation of such property into actual community property.

60. Cal. Stat. 1917, c. 581, § 1, p. 827.

61. See Recommendation and Study relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere, 1 Cal. Law Revision Comm'n. Rep., Rec. & Studies E-20-23 (1957).