Minutes

Date of Meeting: June 19-20, 1959
Date of Memo: June 9, 1959

MEMORANDUM NO. 3

Subject: Study #38 - Inter Vivos Rights in Quasi-Community Property

Attached is a draft of a bill on this subject prepared pursuant to action taken by the Commission at its May meeting. This Memorandum comments on the provisions of the bill and related matters.

Civil Code Section 164. The substantive changes made in the language which remains in this section were approved at the May meeting. We have transferred the remainder of the section to proposed new Civil Code Section 164.3. The reason for the transfer is set forth in discussing that section infra.

Civil Code Section 164.1. This section has been drafted in accordance with the view expressed at the May meeting that there ought to be a section in the Civil Code giving a label to property owned by persons domiciled in this State who acquired it during marriage while domiciled elsewhere. The term "quasi-community property" was suggested at the meeting and appears to be quite suitable for this purpose. The following points should be noted in considering this section:

1. Section 164.1 makes it clear that property acquired while domiciled elsewhere becomes quasi-community property immediately upon acquisition of a domicile in this State. This, of course, is directly in the teeth of the rationale of the Thornton case. However, the

consequences of this transformation are spelled out in the other sections in the bill, which the Commission has already adopted in principle, and these are no different than they would be in the absence of Section 164.1.

2. As Section 164.1 is drafted the property in question would continue to be quasi-community property, at least insofar as California is concerned, if the acquiring spouse, having become domiciled in California, later becomes domiciled in a noncommunity property state.

3. As drafted Section 164.1 applies only if the acquiring spouse is still married when he establishes his domicile here to the person to whom he was married when he acquired the property. Thus, if a man were divorced in New York and later moved to California bringing with him the proceeds of his earnings during his New York marriage, his ex-wife would have no rights therein under Section 164.1 or any other provision of the Civil Code.

4. A question which has occurred to us in the course of drafting Section 164.1 is whether it should be applicable only if the non-acquiring spouse as well as the acquiring spouse becomes domiciled in California, on the theory that California is interested in extending quasi-community property benefits and protection only to its domiciliaries. If this view were taken it would probably be necessary, to make it clear that the common law rule that the domicile of the wife is that of the husband does apply in this situation, to add to the section some such language as "For the purposes of this section the domicile of a person in this State shall be determined as though such person were not married."

Civil Code Section 164.2. This section is new to the present draft. It is added to fill what would appear otherwise to be a gap in California law respecting the nature or status of real property in this State acquired during marriage by either husband or wife while domiciled outside of this State where no domicile in this State has subsequently been acquired. In this connection the table set forth in Appendix A of this Memorandum will be of some interest. As is there indicated, the Civil Code, as proposed to be revised, will contain no provision defining the nature or status of property acquired during marriage in the following cases:

1. California domiciliary acquires real property in another State.

2. Non-California domiciliary acquires real property in another State and remains domiciled there.

3. Non-California domiciliary acquires real property in another State and later becomes domiciled here.

4. Non-California domiciliary acquires personal property in California and remains domiciled outside California.

5. Non-California domiciliary acquires personal property in another State and remains domiciled elsewhere.

If a case were to arise in a California court involving property in any of these five categories, the court would find no direction in the Civil Code as to how such property should be treated. As to real property located outside California the court would doubtless apply the common law choice of law rule that the law of the situs of the property determines the interests in it. (Incidentally, as we

discussed at the May meeting, he would probably find that the situs state would attempt to create an interest therein on the part of the spouse identical with or analagous to the spouse's interest in the consideration paid for the property.) As to personal property, the choice of law rule is less clear; in an earlier day reference would have been made to the law of the domicile of the person acquiring the property but the more recent trend is to refer the question to the law of the situs of the property at the time of its acquisition. It is probably just as well not to attempt to deal in the Civil Code with property in the five categories listed above, although an argument could be made that California should deal by statute with property in category No. 4 -- i.e., where a non-California domiciliary acquires personal property having a situs in California and remains domiciled outside California. One difficulty with this last would be that the problem of the "situs" of personal property is a difficult one, particularly in respect of intangibles.

Civil Code Section 164.3. This language has been transferred from Section 164 with minor changes in form but none, we believe, in substance. Placing the language in a separate section is intended to make it applicable to all litigation in California courts where the acquisition of property by a married woman is involved -- that is, to all of the categories of property listed in the table in Appendix A. If the Commission questions the desirability of doing this either of two things might be done: (1) the language could be moved back into Section 164, in which case it would be somewhat unclear, we think,

whether or not it would apply to all types of property listed in the table in Appendix A; or (2) Section 164.3 could be revised to state specifically the kinds of cases in which the presumptions involved would be applicable.

Civil Code Sections 146, 172b, 172c, 1238, 1239, 1245 and Revenue and Taxation Code Sections 15301, 15302 and 15303. These sections were approved in principle at the May meeting; the only change in this draft is that the sections are revised to speak in terms of "quasi-community property." It should be noted that whenever this term is used it could be followed by "as defined in Section 164.1 of this code" [or "of the Civil Code"]. This longer phrase would be somewhat clumsier and should, we think, be avoided if possible.

The amendment to Civil Code Section 1239 should not be necessary since, by definition, separate property does not include quasi-community property. However, it is probably desirable to make this explicit.

Probate Code Section 201.5. This is new in the present draft. The proposed revision is made possible by the new definition of quasi-community property. There is some question we believe as to whether Probate Code Section 201.5 should continue to contain the sentence:

> All such property is subject to the debts of the decedent and to administration and disposal of the provisions of Division 3 of this Code.

In its 1957 report the Commission said:

> Section 201.5 should also be revised to make it clear that all property to which it applies is subject to the debts of the acquiring spouse and to administration in his estate. Since the property was that of the acquiring spouse prior to his death it should be chargeable with all of his or her debts and putting it into the estate will make it easier for creditors to reach it.

Under the revisions now proposed by the Commission the property in question will be somewhat less "that of the acquiring spouse prior to his death" than heretofore. If all or part of the community property is not subject to the debts of the decedent and to administration in his estate, there may be a question as to whether quasi-community property should be.

Probate Code Section 201.6. This proposed amendment reflects the point made earlier, that once property becomes quasi-community property by the operation of Civil Code Section 164.1 it remains such and is thus subject to Probate Code Section 201.5 even though the acquiring spouse has changed his domicile from California to another State prior to his death.

Inheritance Taxation of Quasi-Community Property. At the May meeting Mr. Balthis raised the question whether the Commission should reconsider the recommendation which it made in 1957 that transfers

at the time of death of 201.5 property from the wife to the husband be subject to the inheritance tax to the extent of one-half thereof. He pointed out that this treats transfers of quasi-community property from the wife to the husband differently for inheritance tax purposes than such transfers of community property. In the Commission's 1957 recommendation it said on this point:

> The latter [i.e., community property] rule is in the nature of a "throwback" to the pre-1957 theory of community property and doubtless reflects the view that in most cases the community property of spouses is traceable to the husband's earnings and therefore ought not to be taxed when it is transferred to him at his wife's death. This view has no application, of course, to Section 201.5 property in the wife's estate which was her sole property until her death. Hence, the Commission, while proposing revisions which treat Section 201.5 generally like community property for inheritance tax exemption purposes, has not done so in this case.

Under the changes now proposed to be made it will be less true that the property in question is the wife's "sole property until her death." This may suggest the desirability of reexamining the Commission's 1957 view of the matter.

Respectfully submitted,

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Executive Secretary

APPENDIX A

## STATUS OF PROPERTY ACQUIRED BY MARRIED PERSONS AS PROVIDED IN CIVIL CODE AS PROPOSED TO BE REVISED

| | Property Acquired While Domiciled in California | | | | Property Acquired While Domiciled Elsewhere | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | Status Prior to Acquiring Spouse Becoming Domiciled in California | | | | Status After Acquiring Spouse Becomes Domiciled in California | | | |
| | Real Property | | Personal Property | | Real Property | | Personal Property | | Real Property | | Personal Property | |
| | Cal | Other | Cal | Other | Cal | Other | Cal | Other | Cal | Other | Cal | Other |
| Property Acquired Before Marriage | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 |
| Property Acquired During Marriage by Gift Device or Bequest | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 | Sep 162, 163 |
| Property Otherwise Acquired During Marriage | CP 164 | No Prov | CP 164 | CP 164 | Sep 164.2 | No Prov | No Prov | No Prov | Q-CP 164.1 | No Prov | Q-CP 164.1 | Q-CP 164.1 |

Proposed Civil Code § 164.3 would, as drafted, apply to every type of property listed

Sep = Separate Property

CP = Community Property

Q-CP = Quasi-Community Property

No prov = There is no section in the Civil Code which defines the character of this property as among separate property, community property or quasi-community property

All numbers are numbers of sections of the Civil Code

An act to add Sections 164.1, 164.2, 164.3, 172b and 172c to the Civil Code, to amend Sections 146, 164, 1238, 1239 and 1265 of said code, to amend Sections 201.5 and 201.6 of the Probate Code, to repeal Section 201.8 of said code and to amend Sections 15301, 15302 and 15303 of the Revenue and Taxation Code, all relating to property acquired by persons during marriage at a time when they were not domiciled in this State.

The people of the State of California do enact as follows:

SEC. 1. Section 164 of the Civil Code is amended to read:

164. All other real property situated in this State and all personal property wherever situated acquired ~~after~~ during marriage by either husband or wife, or both, while domiciled in this State ~~including-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. ~~but--whenever-any-real-or-personal property,-or-any-interest-therein-or-encumbrance-thereon,-is acquired-by-a-married-woman-by-an-instrument-in-writing,-the presumption-is-that-the-same-is-her-separate-property,-and-if acquired-by-such-married-woman-and-any-other-person-the~~

[Revision adopted at May meeting]

[Proposed new revision see new Section 164.3 infra]

~~presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument, except, that when any of such property is acquired by the husband and wife while domiciled in this State by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.~~

~~In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889 the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.~~

Within the meaning of this section real property includes a leasehold interest in real property.

SEC. 2. Section 164.1 is added to the Civil Code, to read:

164.1. All real property situated in this State and all personal property wherever situated heretofore or hereafter (a) acquired during marriage by either husband or wife or both while domiciled outside of this State which would have been the community property of the person acquiring it and his spouse had such person been domiciled in this State at the time of its acquisition or (b) acquired in exchange for real or personal property wherever situated and so acquired, becomes quasi-community property when, during such marriage, the acquiring spouse becomes domiciled in this State. Property acquired in exchange for quasi-community property is also quasi-community property.

[New per discussion at May meeting]

Within the meaning of this section real property includes a leasehold interest in real property.

SEC. 3. Section 164.2 is added to the Civil Code, to read:

164.2. Except as provided in Section 164.1 of this code and in Section 201.6 of the Probate Code, all real property situated in this State acquired during marriage by either husband or wife or both while domiciled outside of this State is the separate property of the spouse or spouses acquiring it.

[New]

SEC. 4. Section 164.3 is added to the Civil Code to read:

164.3. Whenever any real or personal property or any interest therein or encumbrance thereon is acquired by a married woman by an instrument in writing, there is a presumption

[Transferred from Section 164 with some changes in language but not substance]

that the same is her separate property. If such property is acquired by a married woman and any other person by an instrument in writing, there is a presumption that she takes the part acquired by her as a tenant in common, unless a different intention is expressed in the instrument; provided, that when any such property is acquired by husband and wife while domiciled in this State by an instrument in which they are described as husband and wife, there is a presumption that such property is the community property of the husband and wife, unless a different intention is expressed in the instrument.

The presumptions created in this section are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after the acquisition of the property; in all other cases the presumptions are disputable.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband of such married woman, or his heirs or assigns, are barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

SEC. 5. Section 172b is added to the Civil Code, to read:

172b. The spouse who originally acquired quasi-community personal property has the management and control of such property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot, without the written consent of the other spouse, make a gift of such property, or dispose of the same without a valuable consideration, or sell, convey, or encumber any such property which constitutes furniture, furnishings, or fittings of the home, or clothing or wearing apparel of the other spouse or the minor children.

[Approved in principle at May meeting]

SEC. 6. Section 172c is added to the Civil Code, to read:

172c. The spouse who originally acquired quasi-community real property has the management and control of such property, but the other spouse, either personally or by duly authorized agent, must join with the acquiring spouse in executing any instrument by which such real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that (a) Nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; and (b) The sole lease, contract, mortgage or deed of either spouse holding the record title to such real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid.

[Approved in principle at May meeting]

No action to avoid any instrument mentioned in this section affecting any property standing of record in the name of either spouse alone, executed by him alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, which was executed by him alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

SEC. 7. Section 1238 of the Civil Code is amended to read:

1238. If the claimant be married, the homestead may be selected from the community property, the quasi-community property or the separate property of the husband or, subject to the provisions of Section 1239, from the property held by the spouses as tenants in common or in joint tenancy or from the separate property of the wife. When the claimant is not married, but is the head of a family within the meaning of Section 1261, the homestead may be selected from any of his or her property. If the claimant be an unmarried person, other than the head of a family, the homestead may be selected from any of his or her property. Property, within the meaning of this title, includes any freehold title,

[Approved in principle at May meeting]

interest, or estate which vests in the claimant the immediate right of possession, even though such a right of possession is not exclusive.

SEC. 8. Section 1239 of the Civil Code is amended to read:

1239. The homestead cannot be selected from the separate property of the wife, without her consent, shown by her making or joining in making the declaration of homestead. This section does not apply to quasi-community property originally acquired by the wife.

[Same]

SEC. 9. Section 1265 of the Civil Code is amended to read:

1265. From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the quasi-community property or from the separate property of the spouse making the selection or joining therein and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1242 of the Civil Code, the land so selected, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to the

[Same]

heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent, but in no case shall it, or the products, rents, issues or profits thereof be held liable for the debts of the owner, except as provided in this title; and should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale.

SEC. 10. Section 146 of the Civil Code is amended to read:

146. In case of the dissolution of the marriage by decree of a court of competent jurisdiction or in the case of judgment or decree for separate maintenance of the husband or the wife without dissolution of the marriage, the court shall make an order for disposition of the community property and the <u>quasi-community property</u> and for the assignment of the homestead as follows:

[Approved in principle at May meeting]

One. If the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property <u>and the quasi-community property</u> shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just.

Two. If the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property and the quasi-community property shall be equally divided between the parties.

Three. If a homestead has been selected from the community property or the quasi-community property it may be assigned to the party to whom the divorce or decree of separate maintenance is granted, or, in cases where a divorce or decree of separate maintenance is granted, or, in cases where a divorce or decree of separate maintenance is granted upon the ground of incurable insanity, to the party against whom the divorce or decree of separate maintenance is granted. The assignment may be either absolutely or for a limited period, subject, in the latter case, to the future disposition of the court, or it may, in the discretion of the court, be divided, or be sold and the proceeds divided.

Four. If a homestead has been selected from the separate property of either, in cases in which the decree is rendered upon any ground other than incurable insanity, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the party to whom the divorce or decree of separate maintenance is granted, and in cases where the decree is rendered upon the ground of incurable insanity, it shall be assigned to the former owner of such property, subject to the power of the court to assign it to the party against whom the divorce or

decree of separate maintenance is granted for a term of years not to exceed the life of such party.

This section shall not limit the power of the court to make temporary assignment of the homestead at any stage of the proceedings.

Whenever necessary to carry out the purpose of this section, the court may order a partition or sale of the property and a division or other disposition of the proceeds.

SEC. 11. Section 201.5 of the Probate Code is amended to read:

201.5. Upon the death of any married person domiciled [New] in this State one-half of the ~~following-property-in-his-estate~~ quasi-community property 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-(a)-acquired-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)-acquired-in-exchange-for-real-or-personal property-wherever-situated-and-so-acquired~~. All such property is subject to the debts of the decedent and to administration and disposal under the provisions of Division 3 of this code.

~~As used in this section personal property does not include and real property does include leasehold interests in real property.~~

SEC. 12. Section 201.6 of the Probate Code is amended to read:

[New]

201.6. Upon the death of any married person not domiciled in this State who leaves a valid will disposing of real property in this State which is not the community property or the quasi-community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property were situated in decedent's domicile at death. As used in this section real property includes leasehold interests in real property.

[Approved May meeting]

SEC. 13. Section 201.8 of the Probate Code is hereby repealed.

SEC. 14. Section 15301 of the Revenue and Taxation Code is amended to read:

[Approved in principle at May meeting]

15301. In the case of a transfer to either spouse by the other of community property ~~to either spouse~~ or quasi-community property one-half of the property transferred is not subject to this part.

SEC. 15. Section 15302 of the Revenue and Taxation Code is amended to read:

[Approved in principle at May meeting]

15302. If any community property or quasi-community property is transferred to a person other than one of the spouses, all of the property transferred is subject to this part, and each spouse is a donor of one-half.

SEC. 16. Section 15303 of the Revenue and Taxation Code is amended to read:

[Same]

15303. If the separate property of either spouse is transferred by agreement into the community property of both spouses:

(a) One-half of the property transferred is subject to this part as a gift from the spouse whose property it was to the other spouse, and the other one-half is not subject to this part.

(b) The one-half which is subject to this part is the one-half of the community property which is not subject to Part 8 of this division on the death of the spouse whose separate property is transferred.

(c) If the wife is the spouse whose separate property is transferred, and upon her death and survival by her husband the entire community property passing to her husband is not subject to Part 8 of this division, the one-half of the separate property not subject to this part under subdivision (a) is subject to this part upon the death of the wife as a gift from the wife to her surviving husband at the time of her death.

Neither this section nor this part applies to quasi-community property which is transferred by agreement into community property.