

7/19/60

Second Supplement to Memorandum No. 62 (1960)

Subject: Study No. 38 - Inter Vivos Rights.

Professor Harold Marsh, Jr., our consultant on this study, has examined Memorandum No. 62 (1960) and has one basic objection, discussed below. His letter is attached hereto.

Professor Marsh objects to the revision of Section 164 of the Civil Code (page 10 of Recommendation and Statute attached to Memorandum No. 62 (1960)). He points out that revised Section 164 provides that community property is "real property situated in this State." He refers to two cases. These cases -- Tomaier v. Tomaier, 23 C.2d 754, 146 P.2d 905 (1944) and Rozan v. Rozan, 49 C.2d 322, 317 P.2d 11 (1957) -- held that real property purchased in a noncommunity property state by a California domiciliary with community funds was community property and subject to division on divorce granted by a California court. The Court said in the Tomaier case, 23 C.2d at 759: "The separate property of a nonresident husband or wife invested in California land remains separate property [citations omitted]; conversely, the rights of California spouses are protected when community funds are invested in land in another state." Professor Marsh believes that the revision of Section 164 proposed by the Commission might be interpreted to overrule these cases. He believes that this is not desirable, is probably unconstitutional and is clearly beyond the authority given to the Commission by the Legislature in connection with this study. He suggests, in effect, that the first portion of Section 164 read: "all other property acquired during the marriage by a married person while domiciled in this State is community

property; . . . " He would not necessarily include the words "while domiciled in this State" in Section 164 but he did not specifically object to these words.

If Professor Marsh's suggestion is adopted, paragraph "5." of the tentative recommendation (pages 8 and 9) should be revised to read:

5. Community Property Definition. Section 164 of the Civil Code, which defines community property, should be amended to delete the unconstitutional 1917 amendment. Under revised Section 164 California does not undertake to give a married person a community property interest in property acquired by his spouse unless the acquiring spouse is domiciled in California at the time of acquisition, even if the property in question is real or personal property situated in this State. California does not, in the opinion of the Commission, have sufficient interest in the marital property rights of nondomiciliaries to justify the application of its community property system to them.

If the above change is made in Section 164 of the Civil Code, paragraph "6." of the tentative Recommendation (page 9) should be deleted and the amendment of Section 201.5 of the Probate Code (page 21) should also be deleted.

I assume, since Professor Marsh makes no other objections to the tentative recommendation and statute, that in all other respects the tentative recommendation and statute are satisfactory to him.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

UNIVERSITY OF CALIFORNIA

School of Law  
Los Angeles 24, California

July 18, 1960

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
School of Law  
Stanford, California

Dear John:

I have your letter of July 13, 1960, and I have the following comments on the Memorandum No. 62 which you enclosed.

1. It seems to me that the statements in paragraph (3) on page 3 are erroneous. Even under the original wording of Section 201.5 Estate of Schnell, 67 C.A.2d 268, 154 P.2d 437 (1944), held that personal property acquired in exchange for real property acquired in the foreign state (during marriage and not by gift, devise or descent) was subject to Section 201.5. Nothing was done to overrule the Schnell case in the 1957 revision; on the contrary it was specifically affirmed. The new section applies to "personal property wherever situated ... (b) acquired in exchange for real ... property, wherever situated, ... so acquired [i.e., during marriage while domiciled elsewhere which would have been community property]." This was not accidental; the point was specifically considered and the statute drafted so as to include the situation of the Schnell case. How it can be read otherwise is beyond my comprehension.

If your point is that the proposed revision of Section 164 (see below), because it excludes from the category of community property real property in another state, makes this amendment of Section 201.5 necessary, then it seems to me that you should say so rather than stating that 201.5 does not presently cover the situation, particularly in view of the fact that the Legislature may not enact the proposed legislation and the Commission will have gone on record with an interpretation of Section 201.5 which in my opinion is flatly wrong. Even an argument based on the revision of Section 164 seems to me to be rather frivolous. You do not transport the man to California leaving the property where it is; you consider what the result would have been had the state in which he lives been California -- and of course real property acquired in the domicile by a person domiciled in California is community, if acquired during marriage and not by gift, devise or descent.

2. With respect to paragraph 5 of the recommendation on page 8 and the amendment of Section 164 on page 10, it seems to me that you should state whether you intend to overrule Tomaier v. Tomaier, 23 C.2d 754, 146 P.2d 417 (1944), and Roza v. Roza, 49 C.2d 322, 317 P.2d 11 (1957);

if not, how you avoid it; if so, why, and what the result is that you desire contrary to those cases. Is it intended to prescribe that the community property become the husband's separate property in these situations, and if so is this constitutional?

Secondly, it seems to me that the recommendation should state how the Commission interprets its mandate from the Legislature to study the inter vivos aspects of quasi-community property to include the rewriting of the definition of community property, and upon the basis of what study the Commission reached its conviction that it can wisely and accurately deal with the subject of community property in conflict of laws with a couple of off-hand phrases.

Incidentally, the words "while domiciled in this State" in Section 164 on page 10 should be underlined, since they are not in the present statute.

Sincerely yours,

(Signed) Harold Marsh, Jr.