Date of Meeting: July 24-25, 1959
Date of Memo: July 15, 1959

Memorandum No. 4

Subject: Study #38 - Inter-vivos Rights in Property Acquired During Marriage While Domiciled Elsewhere.

Attached are two items:

1. A draft of proposed statutes dealing with inter-vivos rights in property acquired during marriage while domiciled elsewhere. (The section numbers of the bill have been underlined to make it easy to pick them out.) Each section is followed by a comment. These comments are designed to raise questions for discussion at the July meeting.

2. An exchange of correspondence with Harold Marsh relating to this subject.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

(#38) 7/1/59

An act to add Sections 154, 164.1, 164.3, 172b and 172c to the Civil Code, to amend Sections 146, 161, 164, 1238 and 1265 of said code, to add Section 201.4 to the Probate Code, to amend Sections 201.5 and 201.6 of said code, to repeal Section 201.8 of said code and to amend Sections 13552.5, 13554.5, 13555, 15301, 15302, 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:

SECTION 1. Section 154 is added to the Civil Code to read:

154. As used in this chapter real property includes leasehold interests in real property.

Comment: This reflects action taken at the June meeting, substituting a single provision for specific provisions in particular sections. I have some doubt about the wisdom of having a separate section for this purpose. All that is saved is the addition of language to this effect in Civil Code Sections 164 and 164.1. By putting the language in a separate section we run the risk of making an unintended change in some other existing or future section and also the risk that the reader of Sections 164 and 164.1 (or other sections in the chapter) will fail to look at Section 154 and thus will fail to appreciate that "real property" as used in those sections includes leasehold interests in real property.

SEC. 2. Section 161 of the Civil Code is amended to read:

161. ~~May-be-joint-tenants,-etc.~~ A husband and wife may hold property as joint tenants, tenants in common, ~~or~~ as community property or as quasi-community property.

Comment: This reflects action taken at the June meeting.

SEC. 3. 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 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.

Comment: As approved at the June meeting.

SEC. 4. 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, both spouses become domiciled in this State and, subject to the provisions of Probate Code Sections 201.4 and 201.5, remains quasi-community property so long as either spouse remains domiciled in this State.

In determining the domicile of a wife under this section the court shall not apply a rule of law or presumption that the domicile of a wife is that of her husband.

Comment: As approved at the June meeting except that:

(1) "becomes" is substituted for "is" in the phrase "becomes quasi-community property when, during such marriage, etc." While it is true that "is" was substituted for "becomes" at the June meeting, the Commission thereafter added the clause "and remains quasi-community property so long as either spouse remains domiciled in this State." The sentence seems to read better as "becomes . . . and remains" than it does as "is . . . and remains."

(2) "subject to the provisions of Probate Code Sections 201.4 and 201.5" is added to avoid any possible ambiguity.

SEC. 5. 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 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 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 presumption mentioned 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.

Comment: As approved at the June meeting.

SEC. 6. 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.

Comment: As approved at June meeting. The Commission rejected a proposal to give the husband the management and control of quasi-community property in all cases.

SEC. 7. 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 the husband 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.

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 section 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.

Comment: As approved at June meeting. The Commission rejected a proposal to give the husband the management and control of quasi-community property in all cases.

SEC. 8. 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, interest, or estate which vests in the claimant the immediate

right of possession, even though such a right of possession is not exclusive.

Comment: As approved at June meeting.

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 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.

Comment: As approved at June meeting.

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 quasi-community property and for the assignment of the homestead as follows:

One. If the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property and the quasi-community property 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 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.

Comment: As approved at June meeting.

SEC. 11. Section 201.4 is added to the Probate Code to read:

201.4. Upon the death of any married person the surviving spouse holds any property originally acquired by such surviving spouse free of any quasi-community property interest which the decedent had therein at the time of his death.

Comment: This is a new section proposed by the staff. The sense of the June meeting was that upon the death of the non-acquiring spouse quasi-community property should in effect become or revert to being the separate property of the acquiring spouse. If this is to be the case should there not be a provision to this effect in the Probate Code to avoid any ambiguity on the matter, even though the existence of such a

provision might encourage federal taxing authorities to consider the termination of the non-acquiring spouse's interest as a transfer taxable at death?

SEC. 12. Section 201.5 of the Probate Code is amended to read:

201.5. Upon the death of any married person ~~domiciled in this State~~ one-half of ~~the following property in his estate~~ any quasi-community which was originally acquired by the decedent 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.~~

Comment: As approved at the June meeting with minor textual changes.

SEC. 13. Section 201.6 of the Probate Code is amended to read:

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.

Comment: As approved at the June meeting.

SEC. 14. Section 201.8 of the Probate Code is hereby repealed.

Comment: As approved at the June meeting.

SEC. 15. Section 15301 of the Revenue and Taxation Code is amended to read:

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

In the case of a transfer of quasi-community property to the spouse who originally acquired such property by the other spouse, none of the property transferred is subject to this part.

Comment: The first paragraph is as approved at the June meeting. The second paragraph is new and is believed to reflect the sense of the June meeting. The change made at the June meeting in the first paragraph, limiting it to transfers of quasi-community property by the acquiring spouse, and the change made by the addition of the second paragraph are believed to be of doubtful wisdom. If the non-acquiring spouse has so little interest that his transfer is nontaxable, should not a transfer by the acquiring spouse be fully taxable?

I believe that all transfers should be treated like transfers of community property.

SEC. 16. Section 15302 of the Revenue and Taxation Code is amended to read:

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.

Comment: As approved at the June meeting. Quaere, however, whether the last clause of this section is consistent with Section 15301 as revised; see comment on Section 15301.

SEC. 17. Section 15303 of the Revenue and Taxation Code is amended to read:

15303. If the separate property of either spouse is tranferred 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 tranferred.

(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 us 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.

Comment: As approved at the June meeting.

SEC. 18. Section 13555 of the Revenue and Taxation Code is revised to read:

13555. Upon the death of any married person:

(a) No property to which Section 201.4 of the Probate Code is applicable is subject to this part.

~~(a)~~ (b) At least one-half of any property ~~in the decedent's estate~~ to which Section 201.5 of the Probate Code is applicable, ~~except property restores to the estate under Section 201.8 of the Probate Code,~~ is subject to this part.

~~(b)~~ (c) The one-half of any property which, under Section 201.5 of the Probate Code, belongs to the surviving spouse whether or not the decedent attempted to dispose of it otherwise by will, ~~and all of any property restores to the decedent's estate under Section 201.8 of the Probate Code are~~ is not subject to this part.

~~(c)~~ (d) All of any property in the decedent's estate to which Section 201.5 of the Probate Code is applicable passing to anyone other than the surviving spouse is subject to this part.

Comment: These revisions (a) delete all references to Probate Code Section 201.8 (which is repealed, supra); and (b) conform the inheritance tax provisions to the gift tax provisions, supra. It should be noted that the section as revised is

different from the provisions applicable to community property in two respects: (1) transfers by the wife to the husband of quasi-community property which she originally acquired are taxable to the extent of one-half thereof and (2) transfers by the non-acquiring spouse to the acquiring spouse are not taxable at all. For the reasons indicated in my comments on the gift tax provisions, I question the desirability of these provisions.

SEC. 19. Section 13552.5 of the Revenue and Taxation Code is revised to read:

13552.5. Whenever a married person dies having provided by will for his surviving spouse and having also made a testamentary disposition of any property to which Section 201.5 of the Probate Code is applicable ~~or having made an inter vivos transfer to which Section 201.8 of the Probate Code is applicable~~, and the surviving spouse is required to elect whether to share in the estate under the will or to take a share of the decedent's property under Section 201.5 of the Probate Code, and the spouse elects to take under the will, the property thus taken up to a value not exceeding one-half of the value of any property to which Section 201.5 of the Probate Code is applicable ~~and the full value of any property which the surviving spouse might have required to be restored to the decedent's estate under Section 201.8 of the Probate Code~~ is not subject to this part.

SEC. 20. Section 13554.5 of the Revenue and Taxation Code is revised to read:

13554.2. Where quasi-community property ~~to which Section 201.5~~

~~of the Probate Code is or would have been applicable~~ is transferred ~~from one spouse to the other~~ by the spouse who originally acquired the property to the other spouse within the provisions of Chapter 4 of this part other than by will or the laws of succession, the property transferred is subject to this part up to a value not exceeding one-half of the clear market value thereof.

Where quasi-community porperty is transferred to the spouse who originally acquired the property by the other spouse within the provisions of Chapter 4 of this part other than by will or the laws of succession, the property transferred is not subject to this part.

Comment: Conforms to other changes made in the Inheritance Tax provisions.

UNIVERSITY OF CALIFORNIA

July 7, 1959

Professor John R. McDonough
Executive Secretary
California Law Revision Commission
Stanford, California

Dear John:

In reply to your letter of July 1, 1959, I agree with you that the California community property statutes have been interpreted by the courts as not containing any conflicts rules, but as merely furnishing the local substantive rules to be applied if the appropriate common law conflicts rule indicates that California law is applicable. Of course, most statutes are expressed in unqualified terms and if they had all been interpreted as requiring the application of the local statute in all inter-state situations, this would, fortunately or unfortunately, have abolished the subject of conflict of laws before it ever got started. I don't quite see what the significance is of the fact that the situation would have been otherwise if the courts had interpreted the statutes in some other way. Of course, they could not have done so in all cases because of constitutional limitations.

Since the present statutes contain no conflicts rules, I take it that you desire either to codify or to revise the common law rules by specific statutory provisions. I am not quite clear which it is that you want to do. With respect to the specific problem which was referred to in my letter of May 11, 1959, that concerned the case where a husband domiciled in a common law state acquires real property in California directly in payment for his services (performed either in California or elsewhere). For example, suppose that a husband domiciled in Utah performs services in California and is deeded an oil royalty interest in payment for his services (he is not given money with which he buys the royalty interest, but is given it directly for his services). The cases which I cited in my letter hold that such real property is community property because its nature is governed by the law of the <u>situs</u>. Your proposed section 164.2 would have expressly and directly changed this result, and the language in the proposed section 164 may impliedly change it since the definition of community property (both real and personal) is limited to property acquired by a California domiciliary; therefore, under this statute such real property will or may be held to be the separate property of the husband. Whether you say that you are changing the California

substantive law or the California conflicts law, you are changing the result, which is more important to the litigants than such theories. I am not sure whether I would favor changing this result if I had the power. What disturbs me is that apparently no one has considered whether this result is right or wrong or whether it should be changed.

As to your statement that California could if it wanted to make all real property in California acquired during marriage by a non-domiciliary community property, even though purchased with separate funds, the only case that I know of expressly considering the constitutionality of such a provision, Brookman v. Durkee, 46 Wash. 578, 90 P. 914 (1907), held that it would be unconstitutional. While I do not agree with this decision, I do not believe that your statement is quite as axiomatic as you seem to think it.

The language in the proposed section 164 might also be argued, if interpreted literally, to overrule Tomaier v. Tomaier, 23 Cal.(2d) 754, 146 P. (2d) 905 (1944), which held that land purchased in a common law state by a California domiciliary with community funds remained community property so far as California is concerned. Of course, any holding that it became the husband's separate property would probably be unconstitutional.

It seems to me that these comments indicate, what I firmly believe to be the fact, that the conflicts rules relating to community property are not so simple that they can be accurately summarized by a half-dozen words thrown into a statute as a sort of rider to an entirely different subject and without a complete study of the matter.

Since you do not mention the point, I gather that you agree with me that the Legislature has not authorized any study or recommendation on this subject by the Commission, either by way of codification or revision.

With regard to your discussion of proposed section 164.1, I of course agree that the indiscriminate treatment of the foreign acquired property as separate property by the courts was what caused all the difficulties in this area in the first place, and all of the statutes enacted and proposed so far are for the purpose of reversing that treatment in specific situations. My objection to section 164.1 in its present form is that I do not know (and I gather no one knows) exactly what its effect will be in the innumerable situations which may arise.

With respect to your reference to the ricochet theory of conflicts, although I do not believe that it has any significant

#38

State of California
CALIFORNIA LAW REVISION COMMISSION

July 1, 1959

Professor Harold Marsh
School of Law
University of California
at Los Angeles
Los Angeles 24, California

Dear Harold:

The comments made and questions raised in your letters of May 11 and June 22 relating to the draft legislation on the inter vivos treatment of Probate Code Section 201.5 property which the Commission is currently considering are, as usual, very helpful. We appreciate your continued willingness to give us the benefit of your views. Hence I enclose some new material on which your comments are solicited. I should add that the Commission is very much in the position of feeling its way along in its present effort and is open to argument and enlightenment on what it is trying to do.

Before discussing the new material, however, I would like to refer to a couple of points in your recent letters. The first relates to your view that the proposed inclusion of "domiciled in this State" in Civil Code Section 164 and the proposed enactment of Civil Code Section 164.2 (which, as you will see, was rejected by the Commission) are at odds with the established choice of law rule, stated in your letter of May 11, "that the character of real property acquired in a foreign state in exchange for services is determined by the law of the situs." It seems to me that under the proposed revisions California law (Civil Code Sections 162, 163, 164, 164.1 and 164.2) would have governed the marital property incidents of all real property situated in this State. No other State's law would have been consulted for that purpose. It is true that not all California real property owned by married persons would have been treated in the same way. Thus, as to property acquired during marriage Sections 164 and 164.2 would have provided two substantive rules rather than one -- i.e., the property would have been community property when acquired if the spouses were domiciled here at the time and separate property if they were domiciled elsewhere. But the property would have been community or separate, as the case might be, by virtue of the application of California law -- the law of the situs -- to determine its character. (Whether or not one agrees that California real property should have different marital property incidents depending on the domicile of the spouses at the time of acquisition or upon a subsequent change in the domicile of

one or both of them is, of course, another matter. Certainly, all real property in California acquired by husband and wife or both could be made community property by the law of this State, whether they were domiciled here or elsewhere at the time of the acquisition or at any later time. Do I gather that you would favor this resolution of the policy question involved?)

I would also raise some question about the statement in your letter of June 22 that "there is a complete absence of any such conflict of laws rules in the present Civil Code" -- meaning rules relating to what law shall be applied to determine the marital property incidents of property acquired by married persons. Whether this is true depends, it seems to me, on an assumption as to how Sections 162, 163 and 164 of the present Civil Code are to be read and interpreted. If they were to be given a literal interpretation these sections, which speak in universal terms, would appear to be broad enough to cover every case that might conceivably come before a California court. Thus, Sections 162 and 163 would direct a California court to consider all property to which they apply in terms as separate property in litigation arising in this state, regardless of whether the property were real or personal, or where it was situated at the time of its acquisition, and of where the parties were then domiciled. Similarly, Section 164 (apart from the 1917 amendment) would direct a California court to consider "all other property" as community property -- again, without regard to whether it is real or personal, to where it is located, and to the domicile of the spouses at the time of its acquisition. Of course, these code sections have not been given such a literal interpretation but have been construed by California courts in light of accepted common law choice of law rules, thus making relevant in particular cases consideration of whether the property is real or personal, where it is located, and where the spouses involved were domiciled when it was acquired. But the statutory language does not contain such qualifications. The words of Sections 162, 163 and 164 are perfectly susceptible of the interpretation that each embodies an all-embracing choice of law rule as well as a substantive rule. What the Commission has under consideration currently is the possibility that (1) such choice of law rules as ought be taken into account by a court in interpreting and applying Sections 162, 163, 164 et al. should be made explicit on the face of the statutes and (2) that some of these sections should be so drafted as to differentiate legally among spouses whose situations are factually dissimilar. At the moment the second of these questions has been answered negatively by the Commission with respect to Sections 162 and 163. As to the general subject presently covered by Section 164, on the other hand, the Commission is considering the possibility at this point that some differentiation might be made depending on where the persons acquiring the property are domiciled at the time and later.

The statement made in my memorandum of June 9 that "the most recent trend is to refer the question [of the nature of the interests acquired in personal property] to the law of the situs of the property at the time of its acquisition" was undoubtedly inaccurate insofar as determining marital property incidents is concerned. What I had in mind, of course, was that many if not most recent cases which deal generally with the nature of the property interests arising upon inter vivos acquisitions of personal property have applied a different law than that of the domicile -- often the law of the situs but usually with considerable reference to the intent of the parties on the "contacts" of the transaction. I am not aware of any cases which have yet referred to situs, intent or contacts in determining what law governs the nature of marital property incidents in personal property. I would not, however, be surprised to see a number of such cases come along over the years. Incidentally, is it perfectly clear that the initial reference is made to the law of the domicile in marital personal property cases or is it possible that what the forum court does (or ought to do) is to refer first to the whole law of the state indicated by a situs-intent-contacts analysis and then to proceed to the law of the domicile, if at all, only by following that state's choice of law rule?

Now, with respect to the material enclosed: this is a preliminary draft of some material I am preparing for the Commission's July meeting. I hope that it will be self-explanatory. I plan to go over it with Sam Thurman and the people on the staff here and it will probably be revised in the process. It would be very helpful to have your candid comments both on substance and draftsmanship before putting it in final form to distribute to the members of the Commission. The following are some questions which have occurred to me:

1. Your point (June 22 letter) that Section 164.1 might take the form of a definition section (or, I suppose, separate definition sections in the various codes in which the term "quasi-community property" is used) rather than its proposed form raises a good question. There may be danger in undertaking to create a new type of property, particularly one to continue in existence only so long as the nonacquiring spouse lives (See proposed new Probate Code Section 201.4) and both parties remain domiciled in California. But are you correct in stating that such property is now "separate" property? It is not within the meaning of Sections 162 and 163 of the Civil Code. And I take it that common law states do not in fact call any property "separate" since the term is meaningful only in contradistinction to community property. Indeed, I had thought that one of the points made in your studies for us is that such property is not really either separate or community and that the courts have often failed to realize this, tending to call it separate merely because it is not community, without adequate analysis of whether it makes sense to do so for the matter in hand. Might it not be desirable, therefore, (even if it created some short-run

problems) for California to create a new type of property called "quasi-community property" for the very purpose of forcing the legislature, the courts, and lawyers generally to recognize that this property is not quite the same as either separate or community property? (If this were done, would it be helpful, at least as a stop-gap measure until all necessary statutory revisions are made, to provide that except where otherwise specifically provided by statute such property should be treated the same as separate property?)

2. Re Section 164. (This is to some degree repetitious of what is said above) Would you treat real property in California acquired by a man domiciled in a noncommunity property state with earnings during marriage as community property upon acquisition? Would you have California determine the nature of the marital property interest in such California real property by determining the interest of the spouses in the consideration paid for it? Would you treat the real property as separate property, as proposed Section 164.2 would have done? (This was rejected by the Commission, incidentally, because of concern about the situation where California property is acquired with community funds acquired in another community property state. The Commission's theory was that in the absence of a specific provision California courts will continue to "trace" to the consideration paid and give the property the same character.) Or would you do something other than any of these with such real property? What would you do if the circumstances were otherwise the same but the property were personal property? (As to this property, incidentally, does not "while domiciled in this State" in Section 164 merely express the rule which a California court would otherwise apply?

3. Re Section 164.1. This was considerably changed from the earlier version at the June meeting. I am, frankly, somewhat concerned about the notion that by operation of law property becomes quasi-community property upon arrival of the spouses and ceases to be upon their departure or the death of the nonacquiring spouse. As yet, however, I have not detected any problems in considering the application to such property of the other sections in the proposed bill. Do you see "bugs" in Section 164.1? Of course, it would have to be clear that if action were taken respecting the property while it was quasi-community property (e.g., creation of a homestead, division on divorce, inter vivos transfer without joinder of nonacquiring spouse), the subsequent removal of the domicile of the spouses to another state would not have any effect on the legal rights arising out of the action. Would it be necessary in your opinion to say so specifically to make this clear?

Note: The presumption contained in Section 172c is limited to the husband because the presumption applicable to a transfer by the wife is stated in Section 164.3.

Sincerely yours,

John R. McDonough, Jr.
Executive Secretary

JRM:imh
Enclosure

UNIVERSITY OF CALIFORNIA
School of Law
Los Angeles 24, California

June 22, 1959

Professor John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
Stanford, California

Dear John:

While I understand that the draft statutes enclosed with your letter of June 18, 1959 have already been considered by the Commission at a meeting held on June 19, I will nevertheless submit the following general comments.

The new section 164.1 of the Civil Code is drafted in the form of a substantive provision creating a new category of property ("quasi-community property") which I gather is intended to be neither community property nor separate property. This creates the problem that in every instance where the California statutes establish a rule for community property and another for separate property there is now no rule for this new third category of property. It is not possible to say how serious this problem may be without checking every section of every California Code. The problem could be avoided by making this new section 164.1 what I gather was the original suggestion, namely merely a definition section. In that case it might read: "Whenever used in this code, in the Probate Code and in the Revenue and Taxation Code, the phrase 'quasi-community property' shall mean: etc."

The italicized language which has been inserted in section 164 and the new section 164.2 of the Civil Code deal with the conflict of laws rules for determining the character of property as separate or community upon its original acquisition. Section 201.5 of the Probate Code and all of the related statutes considered up to this point deal with the treatment to be accorded by California to property which is admittedly separate property at the time of its original acquisition. Neither study which I prepared for the Commission dealt at all with the former subject since no study or recommendation on that subject has been authorized by the Legislature. If it is nevertheless to be covered in the proposed legislation, I would urge that this be done only after more careful consideration of the matter than is evidenced by these draft statutes. The so-called "gaps" which are pointed out of course do not exist in the present statutes--there is a complete absence of any such conflict of laws rules in

the present Civil Code. These gaps are created by the inadequate and, if they were intended to restate the common law, erroneous provisions which have been inserted in section 164 and 164.2.

Incidentally, I would be very interested in knowing upon what cases you base your statement that the "more recent trend" is to determine the character of personal property as community or separate by the law of the "situs" rather than the law of the domicile. None are cited, and I know of no case which would furnish any basis for that statement.

Sincerely yours,

/s/ Harold

Harold Marsh, Jr.

HMJ/gw