10/4/60

Memorandum No. 90(1960)

Subject: Study No. 38 - Inter Vivos Rights

The Recommendation on Inter Vivos Rights herewith is presented to the Commission for final approval prior to printing the Recommendation and Study. The State Bar will not be able to give us a report on this recommendation prior to the time we must send it to the printer. A copy of the Recommendation is attached. The Recommendation was approved as a tentative recommendation by the Commission at its September meeting. No changes in the tentative recommendation are recommended by the staff.

The Recommendation was submitted to our consultant, Professor Harold Marsh, Jr., for his comments. His comments are contained in the attached letter (blue page). He objects to the footnote on page 17 and to the accompanying text. The staff recommends that no change be made in this portion of the Recommendation. In addition to the material in the Recommendation, the following quotation from Goodrich, Conflict of Laws (3rd Ed, 1949), pp. 378-380 is pertinent:

> 122. The interest which one spouse gets by virtue of the marriage relation in the immovable property of the other is governed by the law of the situs. However, land purchased by a spouse with money which was his separate property remains the separate property of the purchaser and land purchased by a spouse with money which was community property is acquired subject to the community interests of the other spouse. . . .
>
> It is a general rule that all questions concerning the creation of interests in land are governed by the lex rei sitae. It is to be expected, then, that the law of the situs of the land will determine what, if any, interest one spouse gets in the other's land as an incident to the marriage relation, and such is the law.

And the law where the property is situated determines whether it is to be considered as immovable and governed by the law of the situs.

An important practical limitation of the effect of this rule is shown in a line of decisions of which the Washington case of Brookman v. Durkee is typical. A husband, domiciled in a common law state, there acquires money which he invests in land in a jurisdiction where the community system of marital property is in force. At common law, the money belongs solely to the husband. Does the wife acquire an interest in the land in the second state? The answer is uniformly in the negative, even though the land was purchased by the husband with the proceeds of property originally belonging to the wife, title to which he acquired by the marriage under the common law rule. This is entirely sound, and for the reason generally given: the husband's title is not lost by moving his money across a state line and turning it into some other form of property.

The same principle applies to land purchased in a common law jurisdiction with the separate or community funds of spouses domiciled in a community property state. If separate funds are used then a fortiori the land remains separate property. If, however, the land is purchased by one of the spouses with community funds and in his name only, the interest of the other spouse survives to the extent of enabling that spouse to follow, by analogy to constructive trust principles, her community interest in the money into the land purchased with it. Thus when a husband wrongfully took funds belonging to the community from Louisiana and invested them in Missouri land, taking title in his own name, he was compelled to hold the title in trust to protect the wife's interest. However, third party rights may intervene between the time of the purchase by one spouse and the assertion of the other spouse's interest. Thus that interest might be cut off by a sale to a bona fide purchaser.

If the land is purchased one half with separate property and one half with funds of the community the question becomes more complicated as a mathematical problem, but the principle of law does not change.

To the same effect is Strumberg, Conflict of Laws (2nd Ed.) pp. 314-315.

Respectfully submitted,

John H. DeMoully
Executive Secretary

UNIVERSITY OF CALIFORNIA

School of Law
Los Angeles 24, California

September 22, 1960

John H. DeMoully, Esquire
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California

Dear John:

I have reviewed the material which you enclosed with your letter of September 19, 1960. I have no objection to the revision of the section of my study on "Division on Divorce" along the lines indicated in the marked copy which you enclosed. I would also suggest that the last paragraph of that section be deleted entirely in view of the recommendation being made by the Commission.

I have only one comment on the proposed recommendation. The footnote on page 17 and the accompanying text is not an accurate statement of the holding of the two cases cited. Without getting into any argument about what the court said as distinguished from what someone would have liked for it to say or interprets its language as "really meaning", the two cases necessarily held that the real property in the foreign jurisdiction was community property. This is so because the question involved was whether the property could be divided in a divorce action in this state and the court held that it could be so divided. Only community property can be so divided. In addition to the Tomaier and Rozan cases, the case of Tischhauser v. Tischhauser, 142 Cal. App.2d 252, 298 P.2d 551 (1956), is to the same effect. The precise holding of these cases will therefore be overruled by your proposed amendment of section 164. Therefore, it seems to me that the suggestion in the footnote that nothing is changed concerning these cases is highly misleading.

Sincerely yours,

S/ HAROLD
Harold Marsh, Jr.

HM:AS