#38 2/12/65

Memorandum 65-7

Subject: Study No. 38 - Quasi-community property

At the 1961 legislative session, legislation relating to quasi-community property was enacted upon recommendation of the California Law Revision Commission. We are aware of two problems in connection with this legislation. At the January meeting, the Commission requested the staff to prepare a memorandum setting out these problems and any materials pertinent thereto.

Amendment of Civil Code Section 164

At the 1961 legislative session, upon recommendation of the Commission, Civil Code Section 164 was amended to read:

> 164. All other real property situated in this State and all other personal property wherever situated acquired during the marriage by a married person 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 husband and wife 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.
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> 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.
>
> As used in this section, personal property does not include and real property does include leasehold interests in real property.

The last sentence of Section 164 presents a problem. What effect, if any, does this sentence have on Civil Code Section 172a, which reads:

> 172a. Except as provided in Section 172b, the husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that 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; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community 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 the husband alone, executed by the husband 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 the husband alone, which was executed by the husband 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.

Two reports of the California Law Revision Commission are pertinent to this matter: Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere (October 1960); Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere (December 20, 1956). Attached is a copy of each of these reports.

The reason for the amendment to Civil Code Section 164 is stated on pages I-12--I-13 of the 1960 report. As this statement points out, the 1961 amendment was intended to make clear the status of real property acquired in a separate property state. The report does not contain any specific statement concerning the last sentence of Civil Code Section 164. It is

significant to note, however, that this same sentence also is found in Civil Code Section 140.5 (enacted in 1961), defining "quasi-community property," and in Probate Code Section 201.5 (which was amended in 1957 to add this sentence).

Since the last sentence of Civil Code Section 164 is the same language as that added in 1957 to Probate Code Section 201.5, a determination of the reason why this language was added to Section 201.5 may be helpful in determining the reason why the same language was added in 1961 to Civil Code Section 164 and Civil Code Section 140.5.

All three of these sections--Civil Code Sections 140.5 and 164 and Probate Code Section 201.5--involve a problem of conflict of laws: To what extent can California determine the interest acquired in property located in another state. The research study published in the report that resulted in the 1957 amendment sheds considerable light on this matter. The study states at page E-18:

> It should first be pointed out that in conflict of laws the rules in this area are framed with reference to "movable" and "immovable" property. However, the California statutes which deal with this problem have all used the terms "real" and "personal" property. The two sets of terms are by no means synonymous. A leasehold interest is an immovable for the purpose of conflict of laws, although it is "personal property." Therefore, insofar as Section 201.5 attempts to control the devolution of a leasehold interest in a foreign jurisdiction, by referring to "personal property, wherever situated," it would probably not be recognized elsewhere, since succession to such an immovable is generally held to be controlled by the law of the situs. On the other hand, the reference in the 1917 Amendment to "real property situated in this State" should have been to "immovable property situated in this State" for the statute to be properly correlated to the doctrines of conflict of laws.
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> However, all of the statutes in this State have used the terms real and personal property, and no case has arisen in the appellate courts where the above-mentioned distinction was of significance. Therefore, in the discussion which follows, in order to avoid constant repetition of this point, it has been found convenient to discuss the problems in the statutory terms. However, the proper terms should be used in any proposed revision of the statutes.

The reason for the use of the sentence that concerns us is thus apparent. It is included to deal with the conflict of laws problem: "A leasehold interest is an immovable for the purpose of conflict of laws, although it is 'personal property.'" See extract from 1956 report quoted above.

It seems reasonable to assume that the same language was added to the definitions of community property and quasi-community property for the same reason. The 1960 report (at pp. I-12--I-13) bears this out. If this was the intent of the Commission, it also seems reasonable to assume that there was no intent (and none is expressed in its 1960 report) that any change be made in the substance of Civil Code Section 172a. This construction of the 1961 amendment is supported by the fact that the last sentence of Civil Code Section 164 is phrased in the form of a definition that applies to the to the phrases "as used in this section."

At the same time, it can be argued that the definition in Section 164 applies to the terms "community real property" and "community personal property" wherever used in the statutes dealing with these subjects; although this argument seems to require that the limiting language--"as used in this section"--be disregarded.

We have checked the Commission minutes and find no discussion of why the last sentence was added, although the previous discussion in this memorandum makes the reason clear. There was considerable discussion in letters and various memoranda indicating that the amendment to Section 164 was needed so the section on its face would reflect the fact that the nature of the interests acquired in real property located in another state would be determined by the law of that state. (See Exhibit I attached.)

This problem was brought to our attention by Justice Regan (former Chairman of the Senate Judiciary Committee). He stated that if a leasehold interest is now real property for the purposes of Section 172a, a substantial (and in his opinion undesirable) change has been made in the previously existing law. He states that it is a common practice in his area to take leasehold interests in the name of one spouse in order to permit the sale or encumbrance thereof without the consent of the other spouse. He feels that lawyers are not generally aware of the possibility that this change has been made and he doubts that the Senate Judiciary Committee would have approved the bill had it been aware of this possible interpretation.

To clarify the Commission's intent on this matter, the staff suggests that the following sentence be substituted for the last sentence of Section 164 (text of Section 164 on page 1):

> A leasehold interest in real property situated outside this State is not made community property by this section.

Since the Commission no longer has authority to study this topic, we would ask one of our legislative members to introduce the corrective bill. The staff would, however, be available to explain the need for the bill if the legislative member considered that necessary.

Gift Taxes

The legislation relating to quasi-community property enacted in 1961 contained provisions providing for the treatment of such property under the law relating to gift taxes. The legislation relating to quasi-community property enacted in 1957 contained provisions providing for the treatment of such property under the inheritance tax laws.

In 1961, after the Commission's recommended legislation was enacted, a substantial revision of the inheritance tax law treatment of community property was enacted. The Commission's recommended legislation was based on the previously existing law relating to the tax treatment of community property. The fact that the revision of the tax treatment of community property was pending was called to the Commission's attention. The staff suggested that amendments to our recommended legislation be drafted to keep the tax treatment of community and quasi-community property generally consistent. The Commission declined at that time to undertake to make such a recommendation.

We have examined the inheritance and gift tax laws and have concluded that considerable research would be needed before a research study could be prepared on this matter. Time did not permit us to prepare this study for the February meeting. Moreover, we no longer have authority to study this topic. If the Commission wishes to undertake a study of this rather complex (and perhaps controversial) matter, we suggest that we request such authority at the current legislative session and obtain a research consultant to prepare the necessary study. This would seem, however, to be an area where the administrative agency involved

should assume responsibility for correcting the defects, if any. Those defects were not created by the Commission's recommendations; rather they were created by legislation enacted after the Commission's recommendations had been enacted as law.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

SUMMARY OF COMMISSION ACTION CONCERNING SECTION 164

In Memorandum No. 22 (1960)(March 9, 1960), the staff proposed that "Section 164 of the Civil Code be amended to delete the portion of that section held unconstitutional in Estate of Thornton."

At the April meeting the Commission determined to revise Section 164 to provide that "all other real property situated in this State and personal property wherever situated, acquired after marriage by either husband or wife, or both, while the acquiring spouse is domiciled in this State is community property. . . ." Although the minutes do not so indicate, the purpose of so revising Section 164 was to deal with the conflict of law problem.

Memorandum No. 64 (1960)(May 4, 1960) and the Second Supplement to Memorandum No. 62 (July 19, 1960) contain further information concerning this matter. Copies of the pertinent portions of these memoranda follow.

Distributed May 4, 1960

Memorandum No. 46 (1960)

Subject: Study No. 38 - Inter Vivos Rights.

This memorandum presents various policy matters to the Commission for decision.

Policy Questions Presented by Attached Draft

Attached as Appendix I is a draft of a bill designed to carry out the recommendations of the consultant. The draft includes the substance of the revisions made by the Commission at its April 1960 meeting. The draft presents the following policy decisions for approval or rejection by the Commission.

(1) Section 164 of the Civil Code is amended to delete the portion of that section held unconstitutional in Estate of Thornton and to substitute language specifically indicating what is required as far as domicile is concerned in order that property be community property.

Our consultant had recommended that the unconstitutional portion be deleted but that no attempt be made to state the extent of domicile required to make property community property. He took this position because of his concern that revision of Section 164 might be interpreted as a legislative attempt to make the "tracing principle" no longer applicable. Our recommendation could state that our revision is not intended to have this effect.

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. DeMoully
Executive Secretary

UNIVERSITY OF CALIFORNIA

School of Law
Los Angeles 24, California

July 18, 1960

Mr. John H. DeMoully
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 Rozan v. Rozan, 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.