

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

**Rights of Surviving Spouse in Property
Acquired by Decedent While
Domiciled Elsewhere**

December 20, 1956

LETTER OF TRANSMITTAL

To HIS EXCELLENCY GOODWIN J. KNIGHT
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 207 of the Statutes of 1955 to make a study to determine whether Section 201.5 of the Probate Code, which relates to the rights of a surviving spouse in property acquired by his or her deceased spouse during marriage while not domiciled in California, should be revised. The commission herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Mr. Harold Marsh, Jr. of San Francisco, a member of the State Bar.

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere

Married persons who move to California from noncommunity property states often bring with them personal property acquired during marriage while domiciled in such states. This property may subsequently be retained in the form in which it is brought to this State or it may be exchanged for real or personal property here. Other married persons who never become domiciled in this State purchase real property here with funds acquired during marriage while domiciled in noncommunity property states. This recommendation is concerned with what the rights of the surviving spouse in such property should be upon the death of the spouse who acquired the property.*

Under the law of most noncommunity property states, when a married person dies his surviving spouse has some protected interest, such as dower, curtesy, or their modern counterparts, in property which the decedent acquired during marriage. The courts of this State have held that this expectancy is lost by bringing or investing the property here, applying the rule that the disposition of a decedent's property is governed by the law of its situs in the case of real property and of the domicile of the decedent at the time of death in the case of personal property. The courts have also held that California community property law does not apply to property acquired elsewhere and brought here because the acquiring spouse was not domiciled here when it was acquired. And they have held that our community property law does not apply to property purchased here (whether or not the acquiring spouse was domiciled here) if the consideration given was not community property. Thus, in the absence of statute a surviving spouse has no protected interest in such property on the death of the acquiring spouse—neither the common law rights which he or she would have had if the decedent had not come to California or purchased real property here, nor California community property rights.

To fill in this gap in the law the Legislature in 1935 enacted Section 201.5 of the Probate Code (hereinafter referred to as "Section 201.5"). The effect of Section 201.5 is to treat the property to which it applies (hereinafter referred to as "Section 201.5 property") substantially like community property on the death of either spouse; it provides that one-half of the property shall belong to the surviving spouse and that the other one-half is subject to the testamentary disposition of the decedent and in the absence thereof goes to the surviving spouse. One effect of Section 201.5 is to give the nonacquiring spouse testa-

* This problem can also arise when the property was acquired in a community property state whose laws concerning such property are different from those of this State. What is said herein and the statutes recommended by the commission are also applicable in such situations.

mentary power as to one-half of such property if he or she predeceases the spouse who acquired the property.

Section 201.5 applies in terms to all personal property in a decedent's estate which was acquired while he was domiciled elsewhere if the property would not have been his separate property had he been domiciled in California at the time of its acquisition. Thus, it applies to personal property acquired by the decedent during marriage other than by gift, devise or bequest. Section 201.5 has also been held applicable to any other personal property in the estate which can be traced to such property. However, Section 201.5 does not apply to real property and when property to which the section does apply is exchanged for real property in this State the surviving spouse has no protected interest therein.

The commission believes that in several respects the law of this State just summarized does not adequately protect the interests of the persons affected by it, and recommends that the law be revised as follows:

1. Section 201.5 should be revised to eliminate the provision which purports to give the nonacquiring spouse testamentary power over the acquiring spouse's property during the latter's lifetime. As is pointed out in the research consultant's report, the courts of this State have repeatedly held similar legislation to be an unconstitutional infringement of vested property rights, in violation of the due process clauses of the Federal and State Constitutions.

2. Section 201.5, as limited in accordance with the commission's third recommendation, *infra*, should be made applicable to real property in this State acquired in exchange for real or personal property which would have been community property had the owner been domiciled here when he acquired it. The commission believes that there is no justification for the distinction presently taken between real and personal property. As has been noted above, the surviving spouse would, in most cases, have had a protected interest in the property for which the California real property is exchanged had the spouses and their property remained in the noncommunity property state from which they came. It is unjust for those rights to be destroyed with no other rights substituted for them merely because the property is exchanged for real property here.

3. Section 201.5, as revised in accordance with the commission's first two recommendations, should be limited in application to cases in which the owner of the real or personal property involved is domiciled in this State at the time of his death. This would make no change in the law insofar as personal property is concerned for it is well settled that the law of the decedent's domicile at death governs the disposition of his personal property. The limitation recommended would make it clear, however, that Section 201.5, as revised in accordance with the commission's second recommendation to include real property, is not intended to apply to real property acquired in this State by a married person domiciled elsewhere at the time of acquisition unless the owner is a domiciliary of California at the time of his death.

4. 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. As Section 201.5 is presently written there is some doubt whether the one-half of the property which the surviving spouse may take against the decedent's will is subject to debts and administration. This ambiguity should be eliminated.

5. A statute should be enacted providing that when a person dies domiciled elsewhere leaving a valid will disposing of real property in this State, the surviving spouse shall have the same right to elect to take a portion of or interest in such property against the will as he or she would have had if the property were situated in the decedent's domicile at death. The effect of this statute would be to give the survivor the same protected interest in real property here as he or she would have by the law of the decedent's domicile, whereas today the spouse has no interest in such property. The commission believes that Section 201.5 should not be applied to such property for two reasons: (a) California has little, if any, interest in extending the benefits of its community property system to nondomiciliaries; (b) the rights of a surviving spouse should be determined, insofar as practicable, under a single system of law rather than under several different systems based on different basic theories. It is not necessary to include personal property in this statute because, as is noted above, the courts of this State apply the law of the decedent's domicile to such property. Nor does the commission believe that it is necessary to include in the statute real property passing by intestate succession since the surviving spouse is given a substantial share of such property under our law.

6. A statute should be enacted providing that when any person dies leaving a valid will which provides for the surviving spouse and which also leaves to a third person property which the surviving spouse may claim against the will under Section 201.5, the spouse shall be required to elect whether to take under the will or to take against the will under Section 201.5 unless it appears from the will that the testator did not wish such an election to be required. A requirement of election is generally applied by the courts as a concomitant of a statutory provision for forced heirship (which is what Section 201.5 is) in both common law and community property states. It should be noted that under the statute proposed by the commission an election to take property to which Section 201.5 is applicable against the will would operate to forfeit rights under the will not only to such property but also to separate property and community property.

7. A statute should be enacted providing that the right which Section 201.5 gives the nonacquiring spouse cannot be defeated by certain inter vivos transfers made by the acquiring spouse without receiving in return a consideration of substantial value. In many states having forced heirship provisions the courts have developed a body of decisional law to protect the persons intended to be benefited thereby from being deprived of such benefits by certain types of gratuitous inter vivos transfers. In some states the courts have made this result turn on whether the transfer was made with intent to "defraud" the surviving spouse; the commission does not recommend the enactment of such a rule, however, in the belief that it would be difficult of administration and a source of much litigation. Other states have permitted the surviving spouse to set aside various kinds of will-substitute transfers

which leave substantial elements of ownership or control of the property in the transferor spouse during his lifetime—*e.g.*, transfers in trust which are revocable or in which the income is reserved to the transferor for life. The commission believes that this is a sounder approach to the problem and recommends that such a statute be enacted. The commission has drafted a statute for this purpose (see proposed Section 201.8 of the Probate Code *infra*); several points should be noted concerning it:

(a) The statute does not apply to all inter vivos transfers of property to which Section 201.5 is applicable. It does not reach transfers for which a consideration of substantial value is received nor does it reach an outright transfer, even though wholly gratuitous, under which no interest in or power over the property is retained by the transferor. The commission has attempted in drafting the statute to balance two competing considerations: (1) a desire to preserve to the surviving spouse the benefits intended to be conferred by Section 201.5; and (2) a desire to avoid undue interference with the owner's control during his lifetime of Section 201.5 property which is, until his death, his sole property. A constitutional question may be raised by even the modest curtailment of the owner's rights in such property which is proposed. However, the commission believes that the limitation of property rights involved in refusing to give effect after death, to the extent of one-half thereof, to a transfer for which no consideration of substantial value was received and under which the transferor continued to enjoy substantial rights in or power over the property until his death would not be held invalid.

(b) The statute provides that a transfer may be set aside only if the decedent made it "without receiving in exchange a consideration of substantial value." The commission believes that this is preferable to providing that "gratuitous" transfers may be set aside. If the latter language were used, the statute might be interpreted not to apply to an inter vivos transfer if any legal consideration, however insignificant and disproportionate to the value of the property transferred, were received by the transferor. On the other hand, the commission does not recommend adopting in this statute the standard which is used to determine whether certain inter vivos transfers are subject to the inheritance tax law. Section 13641 of the Revenue and Taxation Code provides that certain transfers are taxable at death if made "without a valuable and adequate consideration" defining this as "a consideration equal in money or in money's worth to the full value of the property transferred." The commission believes that this standard should not be incorporated in the present statute for two reasons: (1) such a statute would interfere unduly with the transferor's power to deal with Section 201.5 property during his lifetime; (2) no provision is made in the statute for a return by the surviving spouse of any consideration which was given by the transferee to the transferor and where a substantial consideration is given, even though not equal in value to the Section 201.5 property transferred, it would be unfair to deprive the transferee of the property. No provision is made for return of the consideration given by the transferee when property is restored to the decedent's estate because only one-half of the property transferred is required to be restored. It is not expected that a transfer will be set

aside under the statute if the transferee gave a consideration equal to one-half or more of the value of the property received. Thus, in cases in which the transfer is set aside the one-half which the transferee keeps will be at least equal in value to any consideration given.

(c) The statute provides that a transfer may be set aside only if the transferor had a substantial quantum of ownership or control of the property transferred at the time of his or her death. Thus, it is not intended to reach inter vivos transfers of Section 201.5 property unless they are, in effect, will substitutes in that the transferor does not give up his interest in the property until the date of his death. A married person is not, in other words, permitted both to retain a substantial interest in Section 201.5 property during his lifetime and at the same time defeat the rights of his spouse in the property at his death. A somewhat analagous situation is involved in the application of death transfer taxes to gratuitous inter vivos transfers where the transferor retains an interest in or power over the property transferred until his death, as provided in Sections 13643, 13644, 13646 and 13648 of the Revenue and Taxation Code.

(d) The statute provides that the inter vivos transfer may be set aside only to the extent of one-half of the property transferred, its value or its proceeds. This would be true even in cases in which, but for the transfer, all of the property would have gone to the spouse because the decedent died intestate insofar as his Section 201.5 property is concerned. The reason for this provision is that the decedent has manifested an intention to deprive the surviving spouse of the property; it is believed that his intention should be given effect to the extent to which he could have accomplished the same result by will.

(e) The statute provides that all of the property restored to the estate shall go to the surviving spouse under Section 201.5. Such property is, in effect, the one-half which the surviving spouse could have claimed against the decedent's will. The one-half which the transferee is permitted to retain is, in effect, the one-half which the decedent could have given to the transferee by will. The spouse is entitled to all of the first half.

(f) The statute provides that the property shall be restored to the decedent's estate rather than that the spouse may recover it directly from the transferee. The reason for this method of getting the property from the transferee to the surviving spouse is to make it available to creditors of the decedent to the extent that it would have been available to them if no inter vivos transfer had been made.

(g) The statute provides that if the decedent has provided for the surviving spouse by will, the spouse may not require the transferee to restore property to the decedent's estate unless he has elected not to take under the will. Thus, for example, if the decedent has made a will giving all of his property to his spouse, the spouse may not force a restoration of property to the estate, thereby making it a part of the property passing under the will. To permit this would defeat the decedent's desire to have a part of his property go to the inter vivos transferee. The underlying principle of election—that one cannot both take benefits under the decedent's testamentary plan and also defeat it—would appear to be as applicable here as in other cases where it is applied.

(h) The statute is limited in application to transfers made at a time when the surviving spouse has an expectancy under Section 201.5—*i.e.*, at a time when the transferor is domiciled in this State. This is to avoid the application of the statute to transfers made before the transferor moved here and when he could not reasonably have anticipated that the transfer would later be subjected to California law.

8. Section 661 of the Probate Code should be revised to put property covered by Section 201.5 in the same category as community property for the purposes thereof. Section 661 empowers a probate court to create a "probate homestead" for the benefit of the surviving spouse or minor children in certain circumstances. It provides that if the property from which the probate homestead is created is the separate property of the decedent, the court may set it aside only for a limited period but if the homestead is set aside from community property or property owned in common by the decedent and the claimant an interest in fee may be created. Neither the term "community property" nor the term "separate property" used in the statute is, strictly speaking, applicable to property covered by Section 201.5 and it is desirable to clarify the application of Section 661 to such property. The commission recommends that the property be treated like community property for this purpose because it is so treated for other purposes at the time of the owner's death.

9. The inheritance tax law should be revised to conform to the changes made in Section 201.5 of the Probate Code and by the other statutes proposed by the commission. At the present time Section 13555 of the Revenue and Taxation Code deals with property to which Section 201.5 is applicable by providing, in effect, that such property shall be considered to be community property for inheritance tax purposes. In view of the substantial revision of Section 201.5 proposed herein, the commission recommends that special inheritance tax law provisions relating to Section 201.5 property be enacted.

Two matters relating to the inheritance tax law provisions which the commission proposes require special mention:

(a) In proposed Section 13555 of the Revenue and Taxation Code, which deals with the inheritance tax exemption for property passing from one spouse to the other at death, the commission has provided that only one-half of any property to which Section 201.5 is applicable in the estate of either spouse which goes to the surviving spouse shall be exempt from tax. Section 13553 provides that *all* community property in the wife's estate which goes to her husband is exempt from tax. The latter rule is in the nature of a "throwback" to the pre-1927 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 transmitted 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 property generally like community property for inheritance tax exemption purposes, has not done so in this case. This may represent a substantive change in the law as to property to which Section 201.5 is presently applicable inasmuch as present Section 13555 of the Revenue and Taxation Code provides that

all such property is to be treated like community property for inheritance tax purposes.

(b) A word should also be said about the application of the proposed inheritance tax law provisions to property which is restored to the decedent's estate under Section 201.8 of the Probate Code which the commission has recommended be enacted. Section 201.8 provides that *all* Section 201.5 property restored to the decedent's estate by an inter vivos transferee shall go to the surviving spouse under Section 201.5. As explained above, this is because only one-half of the property transferred must be restored and this one-half is the equivalent of the share of Section 201.5 property which the spouse could have taken against the decedent's will had there been no inter vivos transfer. This share is, in turn, the portion of Section 201.5 property which is exempt from tax. It follows that when such restored property goes from one spouse to the other at death under Section 201.5 it should be exempt from the inheritance tax to its full value. Proposed new Section 13555 of the Revenue and Taxation Code so provides.

Suppose, however, that the surviving spouse elects to take under the decedent's will, permitting the transferee to keep the Section 201.5 property. Should the spouse be entitled to an inheritance tax exemption as to property taken under the will up to one-half of the value of the Section 201.5 property which remains in the hands of the transferee? It will be noted that under Section 13552 of the Revenue and Taxation Code, which deals with the inheritance tax exemption in cases where a wife elects to take under her husband's will rather than claiming her share of community property under Section 201 of the Probate Code, the property taken up to a value not exceeding one-half of the value of the community property is exempt from tax. Under the regulations, this is true not only when community property passes to the wife under the will but also when she receives separate property under the will. This is apparently on the theory that since the transfer of the community property would have been tax exempt if the wife had taken it against the will under Section 201 of the Probate Code, she should be in the same position when she takes any property of equivalent value under the will.

On a parity of reasoning, the commission believes that in a case to which proposed Section 201.8 is applicable a spouse should receive an exemption equal to one-half of the Section 201.5 property retained by the transferee. If the transfer had been set aside, the property would have come to the surviving spouse free of tax; the result should not be different because the spouse elects to take property of equivalent value under the will. Proposed Section 13552.5 of the Revenue and Taxation Code so provides.

The Revenue and Taxation Code does not provide, in the case of *community* property, an exemption for the husband equivalent to that provided in Section 13552 for the wife in the event that the husband elects to take under his wife's will and receives separate property, the community property going under the will to another. Nor is there any regulation which makes such provision. The commission believes that Section 13552 of the Revenue and Taxation Code should be revised to deal with elections by both spouses rather than only with the election by the wife. However, such a revision is beyond the scope of this study.

The commission's recommendation would be effectuated by the enactment of the following measure:*

An act to amend Sections 201.5 and 661 of the Probate Code and Section 13555 of the Revenue and Taxation Code, and to enact Sections 201.6, 201.7, and 201.8 of the Probate Code and Sections 13552.5, 13554.5, and 13556.5 of the Revenue and Taxation Code, all relating to the right of a surviving spouse in noncommunity property.

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

SECTION 1. Section 201.5 of the Probate Code is amended to read:

201.5. Upon the death of ~~either husband or wife~~ *any married person domiciled in this State* one-half of ~~all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, the following property in his estate 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 ; , subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this code. 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 so acquired. All such property is subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this code. As used in this section personal property does not include and real property does include leasehold interests in real property.~~

SEC. 2. Section 201.6 is added to the Probate Code 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 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 the decedent's domicile at death. As used in this section real property includes leasehold interests in real property.

SEC. 3. Section 201.7 is added to the Probate Code to read:

201.7. Whenever a decedent has made provision by a valid will for the surviving spouse and the spouse also has a right under Section 201.5 of this code to take property of the decedent against the will, the surviving spouse shall be required to elect whether to take under the will or to take against the will unless it appears by the will that the testator intended that the surviving spouse might take both under the will and against it.

SEC. 4. Section 201.8 is added to the Probate Code to read:

201.8. Whenever any married person dies domiciled in this State who has made a transfer to a person other than the surviving spouse,

* Matter in italics would be added to the present law; matter in "strikeout" type would be omitted.

without receiving in exchange a consideration of substantial value, of property in which the surviving spouse had an expectancy under Section 201.5 of this code at the time of such transfer, the surviving spouse may require the transferee to restore to the decedent's estate one-half of such property, its value, or its proceeds, if the decedent had a substantial quantum of ownership or control of the property at death. If the decedent has provided for the surviving spouse by will, however, the spouse cannot require such restoration unless the spouse has made an irrevocable election to take against the will under Section 201.5 of this code rather than to take under the will. All property restored to the decedent's estate hereunder shall go to the surviving spouse pursuant to Section 201.5 of this code as though such transfer had not been made.

SEC. 5. Section 661 of the Probate Code is amended to read:

661. If ~~none~~ *no homestead* has been selected, designated and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court, in the manner hereinafter provided, must select, designate and set apart and cause to be recorded a homestead for the use of the surviving spouse and the minor children, or, if there be no surviving spouse, then for the use of the minor child or children, out of the community property *or property to which Section 201.5 of this code is applicable* or out of real property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or if there be no community property *or property to which Section 201.5 of this code is applicable* and no such property owned in common, then out of the separate property of the decedent. If the property set apart is the separate property of the decedent, *other than property to which Section 201.5 of this code is applicable*, the court can set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority; and, subject to such homestead right, the property remains subject to administration.

SEC. 6. Section 13555 of the Revenue and Taxation Code is amended to read:

13555. ~~For the purpose of this part, community property includes any personal property acquired while domiciled elsewhere, which would not have been the separate property of either spouse if acquired while domiciled in this State.~~

Upon the death of any married person:

(a) *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 restored to the estate under Section 201.8 of the Probate Code, is subject to this part.*

(b) *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 restored to the decedent's estate under Section 201.8 of the Probate Code are not subject to this part.*

(c) *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.*

SEC. 7. Section 13552.5 is added to the Revenue and Taxation Code 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. 8. Section 13554.5 is added to the Revenue and Taxation Code to read:

13554.5. Where property to which Section 201.5 of the Probate Code is or would have been applicable is transferred from one spouse to the other 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.

SEC. 9. Section 13556.5 is added to the Revenue and Taxation Code to read:

13556.5. As against any claim made by the State for the tax imposed by this part, there is no presumption that property acquired by a spouse after marriage is property to which Section 201.5 of the Probate Code is applicable. Any person who claims that any property acquired after marriage is property to which Section 201.5 of the Probate Code is applicable has the burden of proving that it is such.

A STUDY TO DETERMINE WHETHER SECTION 201.5 OF THE PROBATE CODE SHOULD BE REVISED *

INTRODUCTION

Scope of Study

The purpose of this study is to discuss the legal problems which arise in connection with property which is acquired by a married couple in a foreign jurisdiction and later subjected to the law of California, either because the spouses move their domicile to this State or because the original property is exchanged for immovable property in this State. It is concerned particularly with the operation of Section 201.5 of the Probate Code (hereinafter called simply "Section 201.5") in controlling the devolution of such property upon the death of one of the spouses.

Section 201.5 provides:

§ 201.5. Upon the death of either husband or wife one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, shall belong to the surviving spouse; the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this code.¹

The 1955 Report of the Law Revision Commission requested authorization from the Legislature, which was granted, to make a study to determine whether this section should be revised.² Two particular problems in connection with this section were mentioned in the commission's report, although the request and the authorization were not limited to them. First, it was suggested that the attempt to give the nonacquiring spouse a power of testamentary disposition over one-half of the other spouse's property acquired in a foreign jurisdiction might be unconstitutional. Second, the question was raised whether the section should be made applicable to real property as well as personal property.

However, in order to prepare a useful and complete study of Section 201.5, it was found to be desirable that the study not be restricted solely to the two problems mentioned in the commission's report. Also, in order to deal adequately with the basic problem with which Section 201.5 is concerned, *i.e.*, the treatment to be given in California to marital property acquired while the spouses were domiciled in a foreign jurisdiction, it was found to be necessary to refer to other sections of the California statutory law which affect this same problem. For example, the California Legislature first attempted to deal with this problem in the 1917 amendment to Section 164 of the Civil Code,³ which

* This study was made at the direction of the Law Revision Commission by Mr. Harold Marsh, Jr. of San Francisco, a member of the State Bar.

¹ CAL. PROB. CODE § 201.5.

² Cal. Stat. 1955, res. c. 207, p. 4207.

³ Cal. Stat. 1917, c. 581, §1, p. 827.

purported to convert into community property for all purposes the acquisitions of husband and wife while domiciled elsewhere which would not have been separate property of either if acquired while domiciled in California. (This statute is hereafter in this study referred to as the "1917 Amendment.") Section 201.5, enacted in 1935, was to some extent a substitute for the 1917 Amendment, after the latter was declared unconstitutional in *Estate of Thornton*.⁴ The 1917 Amendment was not repealed upon the enactment of Section 201.5, however, but still remains in the California statutes. Therefore, in order to determine to what extent revisions of Section 201.5 would be desirable, it is necessary to determine first the scope of the 1917 Amendment and the extent to which it was invalidated by *Estate of Thornton*.

In addition, it was found to be necessary to an adequate analysis of the problem to consider the extent to which the objectives of the Legislature in enacting the 1917 Amendment could constitutionally be achieved with respect to legal issues arising during the lifetime of both spouses, as well as the problems of the devolution of property upon the death of one of the spouses. Although Section 201.5 was evidently intended as a substitute pro tanto for the 1917 Amendment, it deals only with the question of succession to marital property acquired while the spouses were domiciled in a foreign jurisdiction. However, the legislative history of this subject in California indicates quite clearly that the Legislature has desired for some years to treat such marital property as nearly like community property as may be done under the State and Federal Constitutions. Therefore, it was considered desirable as a part of this study to deal with other legal issues arising with respect to such property, in addition to the rights of succession upon the death of one of the spouses.

Consequently, this study undertakes to survey all of the legal problems which have arisen in connection with property acquired by married couples in a foreign jurisdiction and later subjected to the law of California, and to discuss the present law of California with respect thereto.

Nature of the Problem

The basic problem with which the Legislature attempted to deal both in the 1917 Amendment and in Section 201.5 was created by the inadequacies of the theories of conflict of laws formulated and applied by the courts in dealing with marital property.

In almost all of the common law jurisdictions, a husband or wife is given extensive and valuable marital rights in property acquired by the other. For example, in 38 of the 40 noncommunity property states a wife is given a nonbarrable interest in the husband's real property upon his death and in 21 of those states the quantum of this interest ranges from one-fourth in fee to one-half in fee.⁵ Similarly, in 31 of the 40 noncommunity property states a wife is given a nonbarrable interest in the husband's personal property upon his death, and in 23 of those states the quantum of the interest ranges from one-fourth in fee to one-half in fee.⁶ These interests of the wife upon the death of the husband are frequently protected by restrictions upon the inter

⁴ 1 Cal.2d 1, 33 P.2d 1 (1934).

⁵ MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 40-41 (1952).

⁶ *Id.* at 42-43.

vivos transfer of the property and upon the subjection of the property to the claims of the husband's creditors. Similar rights and interests exist in many of the noncommunity property states in favor of a husband with respect to the property acquired by his wife.⁷

However, when a married person acquires property in a noncommunity property state and subsequently the spouses move their domicile to California or the property is exchanged for immovable property in California, it has been held that the surviving spouse can no longer claim these rights granted by the law of the domicile at the time of acquisition.⁸ The reason for this is that such rights are characterized by the courts as rights of "succession." The conflict of laws rule is that succession to movable property is governed by the law of the last domicile of the decedent and succession to immovable property is governed by the law of the situs of the immovable. Since in these cases the last domicile and the situs, respectively, are California, the rights granted by the law of the former domicile are destroyed as a result of the subjection of the property to the jurisdiction of California.

On the other hand, the rights of one spouse with respect to property acquired by the other spouse under California law, which comprise the community property interest, are characterized for conflict of laws purposes as "marital property" rights. The conflict of laws rule is that marital property rights in movable property are governed by the law of the domicile of the spouses at the time of acquisition of the property, and that the subsequent exchange of such movable property for other property, movable or immovable, does not change these rights. Therefore, it was held that no California community property interest would exist with respect to property traceable to movable property originally acquired while the spouses were domiciled in a foreign, noncommunity property jurisdiction.⁹

The result of these two doctrines was that with respect to property traceable to movable property originally acquired while the spouses were domiciled elsewhere, a spouse could claim neither the rights granted by the law of California nor the rights granted by the law of the domicile at the time of acquisition.

This situation has been judicially recognized as involving an injustice which called for legislative correction. Presiding Justice Peters stated in *Estate of Way*:

If property is acquired in a common law state by a husband from his earnings it is his sole property, but his wife has certain very important rights in the property known as dower rights. Prior to 1917 it had been established that, if such a couple, after so acquiring marital property, became domiciled in California, and brought the property with them, the property remained the sole and separate property of the husband, but the rights of the husband became much greater than they were in the common law state in that the wife's dower rights were entirely lost.¹⁰

⁷ *Id.* at 56-58.

⁸ *Estate of O'Connor*, 218 Cal. 518, 23 P.2d 1031 (1933). Although the result of this case has been criticized by the author elsewhere, MARSH, *op. cit. supra* note 5, at 228-33, there is no doubt that it represents the present law of California and probably of the other community property states.

⁹ Cases cited notes 13, 16 and 18 *infra*.

¹⁰ 157 P.2d 46, 49-50 (Cal. App. 1945).

And the California Supreme Court in *Estate of Allshouse* commented with respect to the separate property of the husband in a common law jurisdiction as follows:

Such ownership, as heretofore mentioned, differs in substantial aspects from that of either community or separate property as those terms are employed in a community property jurisdiction. It differs from community property in that it vests a greater right in the husband. It differs from the husband's separate property in that it includes the wife's right of dower, which although inchoate is exceedingly valuable.¹¹

It was the obvious purpose of the Legislature in enacting the 1917 Amendment and later Section 201.5 to fill this gap in the law and thereby correct the injustice which had resulted from it.

Three Categories of Property to Be Discussed

The problem which is outlined above exists with respect to three categories of property, of which only one is presently included within the scope of Section 201.5. These three categories are described briefly below.

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.¹² 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.

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.

Category 1. Personal Property Acquired by Nonresident Spouses Prior to Removal of Their Domicile to California, Which Remains in Its Original Form or Is Exchanged for Other Personal Property After Removal. This is the category to which Section 201.5 presently applies. Although a distinction might have been made within this category

¹¹ 13 Cal.2d 691, 699, 91 P.2d 887, 891 (1939). As indicated in the discussion below, this case is unsatisfactory because the court thought that there is some difference, which in fact does not exist, between property acquired before marriage and that acquired afterwards in the common law states. However, this mistake does not affect the truth of the above-quoted observation.

¹² 2 BEALE, CONFLICT OF LAWS § 208.1 (1935).

between personal property which remained in its original form and that which was exchanged for other personal property here, there is no evidence that such a distinction has in fact ever been made either under the common law rules¹³ or under any of the California statutes.¹⁴ Therefore, both may be treated as a single category for our purposes. Also, where one of the spouses acquires real property in a foreign jurisdiction while they are domiciled there, and such real property is later exchanged for personal property after the spouses move their domicile to California, such personal property has also been held to be subject to Section 201.5.¹⁵ Therefore, this type of personal property may be considered as within Category 1 even though not included in the descriptive heading above. Of course, if the real property in the foreign jurisdiction is retained in its original form, it remains subject to the laws of the situs and never becomes subject to the jurisdiction of California.

Category 2. Personal Property Acquired by Nonresident Spouses Prior to Removal of Their Domicile to California, Which Is Exchanged for Real Property in California After Removal. Although the common law rules did not distinguish between this category of property and that in Category 1,¹⁶ and the 1917 Amendment attempted to deal with both, Section 201.5 omitted the phrase "real property situated in this State" which had been contained in the former statute. Therefore, it has been held that Section 201.5 does not apply to this category of property.¹⁷

Category 3. Real Property in California Acquired by Nonresident Spouses in Exchange for Personal Property. This category concerns real property in California acquired by nonresident spouses who never move their domiciles to California. Since "succession" to real property is governed by the law of the situs, the marital rights under the law of the spouses' domicile (which existed with respect to the property which constituted the *purchase price* for the California realty) are held to be destroyed by the investment of the personal property in California realty.¹⁸ There is some doubt whether the 1917 Amendment was intended to apply to this category of property. This question is discussed below. It would appear that Section 201.5 does not apply to it, since *Estate of Miller*¹⁹ held that section applicable only to property which is in the form of personal property at the death of one of the spouses.

¹³ *Estate of Drishaus*, 199 Cal. 369, 249 Pac. 515 (1926); *Estate of Frees*, 187 Cal. 150, 201 Pac. 112 (1921); *Estate of Boselly*, 178 Cal. 715, 175 Pac. 4 (1918); *Estate of Bruggemeyer*, 115 Cal. App. 525, 2 P.2d 534 (1931).

¹⁴ *In re Miller*, 31 Cal.2d 191, 187 P.2d 722 (1947); *Estate of Thornton*, 1 Cal.2d 1, 33 P.2d 1 (1934); *Logan v. Forster*, 114 Cal. App.2d 587, 250 P.2d 730 (1952).

¹⁵ *Estate of Schnell*, 67 Cal. App.2d 268, 154 P.2d 437 (1944).

¹⁶ *Estate of Nickerson*, 187 Cal. 603, 203 Pac. 106 (1921); *Estate of Niccolls*, 164 Cal. 368, 129 Pac. 278 (1912); *Estate of Burrows*, 136 Cal. 113, 68 Pac. 488 (1902); *Estate of Higgins*, 65 Cal. 407, 4 Pac. 389 (1884).

¹⁷ *In re Miller*, 31 Cal.2d 191, 187 P.2d 722 (1947).

¹⁸ *Estate of Arms*, 186 Cal. 554, 199 Pac. 1053 (1921); *Estate of Warner*, 167 Cal. 686, 140 Pac. 583 (1914); *Melvin v. Carl*, 118 Cal. App. 249, 4 P.2d 954 (1931).

¹⁹ 31 Cal.2d 191, 187 P.2d 722 (1947).

HISTORY OF THE PERTINENT STATUTES

The 1917 Amendment to Section 164 of the Civil Code

In 1917 the Legislature first attempted to solve the problem under discussion by an amendment to Section 164 of the Civil Code, which defines community property. That section was amended to include in the definition of community property "real property situated in this State and personal property wherever situated, acquired [by either husband or wife] while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State."²⁰

This amendment was held to be inapplicable where the spouses had moved to California prior to 1917.²¹ In order to reverse this ruling, the Legislature in 1923 added the words "heretofore or hereafter" before the word "acquired,"²² but this attempt to make the provision retroactive was declared to be unconstitutional.²³

It is apparent that this amendment was intended to apply to property in our Categories 1 and 2. Was it also intended to apply to property in Category 3—real property purchased in California by spouses who never move to California? On the face of the statute there is no requirement that the spouses be domiciled in California at any time in order for the provision to apply. In *Estate of Arms*²⁴ the California Supreme Court obviously assumed that the 1917 Amendment was intended to apply to this category of property, although it was held inapplicable in that case because the husband died prior to the passage of the amendment. And the District Court of Appeal held the 1917 Amendment applicable to real property in our Category 3 in *Melvin v. Carl*,²⁵ although as so applied the statute was declared to be unconstitutional.

However, in its first opinion in *Estate of Thornton*²⁶ the Supreme Court declared this construction of the statute to be erroneous. It said: "Section 164 of the Civil Code obviously can apply only where a domicile has been acquired in this state."²⁷ Although this proposition may not be as obvious as the Supreme Court thought, this dictum suggests that care must be exercised in drafting a statute which is intended to apply to this category of property so that such intention will appear unmistakably from the face of the statute.

Estate of Thornton

In 1933 in *Estate of Thornton*²⁸ the California Supreme Court was presented for the first time with the question of the constitutional validity of the 1917 Amendment as applied to a case where the spouses moved to California after 1917. In that case, the husband and wife had been domiciled in Montana, where the husband acquired personal

²⁰ Cal. Stat. 1917, c. 581, § 1, p.827.

²¹ *Estate of Frees*, 187 Cal. 150, 201 Pac. 112 (1921).

²² Cal. Stat. 1923, c. 360, § 1, p.746.

²³ *Estate of Drishaus*, 199 Cal. 369, 249 Pac. 515 (1926).

²⁴ 136 Cal. 554, 199 Pac. 1053 (1921).

²⁵ 118 Cal.App. 249, 4 P.2d 954 (1931).

²⁶ *In re Thornton's Estate*, 19 P.2d 778 (1933), *rev'd on rehearing sub nom. Estate of Thornton*, 1 Cal.2d 1, 33 P.2d 1 (1934).

²⁷ *Id.* at 783.

²⁸ *In re Thornton's Estate*, 19 P.2d 778 (1933), *rev'd on rehearing sub nom. Estate of Thornton*, 1 Cal.2d 1, 33 P.2d 1 (1934).

property. In 1919 they moved to California, bringing this property with them. The opinion does not state whether any of the property was exchanged for other personal property after the removal of the spouses, but the briefs in the District Court of Appeal indicate that some of it was.²⁹ However, none of it was exchanged for real property. In 1927 the husband died and attempted to dispose of all of this property by will. The wife claimed one-half of it as her one-half of community property under the 1917 Amendment, over which the husband had no power of testamentary disposition under Section 201 of the Probate Code.

The Supreme Court in its first opinion in the case³⁰ unanimously held that the 1917 Amendment was constitutional as applied to property brought to the State by spouses moving here after 1917. However, a rehearing was granted and in its second opinion³¹ the court held that the statute violated both the due process clause and the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution, on the ground that a man's ownership of property cannot be modified during his lifetime merely because he moves to California and brings the property with him.

In the decision on rehearing, Justice Langdon, while not disagreeing with the majority on the basic constitutional question, dissented on the ground that the precise issue before the court was simply a question of devolution of property upon death.³² Since a state admittedly has plenary power to regulate the devolution of personal property owned by a domiciliary within the state upon his death, Justice Langdon argued that it should not be an objection to such regulation that it takes the form of relabeling the property as "community property." He thought that the questions of the validity *vel non* of the statute as it affects inter vivos transfers, claims of creditors, etc., should be reserved until they were presented by the facts of a litigated case.

The majority of the court, however, refused to consider the statute in this atomistic fashion, but held that it must be sustained or struck down as a whole. Although the court did not analyze the problem in these terms, it would appear that the basic question here involved is whether the Legislature would have intended that the statute be applied in those cases where it constitutionally can apply, even though as applied to other issues it must be declared invalid. Whether the Supreme Court correctly divined the intention of the Legislature in this regard may be seriously doubted, especially in view of the Legislature's prompt action to nullify the decision in this very case by the enactment of Section 201.5. But however that may be, so long as *Estate of Thornton* stands unimpeached there would appear to be no possibility

²⁹ "Hereafter it appears that Mr. Thornton, while a resident of California, between the years 1919 and 1929, engaged in no business or occupation in the State of California. * * * [I]t further appears that with the money that he realized from his securities brought with him from Montana to the State of California, he invested in stocks and bonds which he sold and reinvested up to the time of his death. * * * This is all now admitted by the stipulation under which this proceeding was appealed to this court, but is inserted here to show how we arrived at the result that the property of which Mr. Thornton died possessed was the property he accumulated in Montana, together with the increase thereof by judicious investments, but not through community business." Brief of Contestants and Respondents, pp. 9-10, *Estate of Thornton*, District Court of Appeal, First Appellate District, Civ. No. 8113.

³⁰ *In re Thornton's Estate*, 19 P.2d 778 (1933).

³¹ *Estate of Thornton*, 1 Cal.2d 1, 33 P.2d 1 (1934).

³² *Id.* at 5, 33 P.2d at 3.

of the 1917 Amendment being applied in the piecemeal fashion advocated by Justice Langdon.

Does *Estate of Thornton* also invalidate the 1917 Amendment as applied to real property in our Categories 2 and 3? This is a different question from that of whether the statute will be judged separately as applied to issues of inter vivos transfer, succession, etc. The statute itself furnishes a basis for separability as between real property and personal property, since it separately refers to each type of property. And it could be argued that even though the two factors of change of domicile by the spouses plus exchange of the personal property acquired in the foreign jurisdiction for other *personal* property were not sufficient to permit the Legislature to transform the property into community property, the additional factor of an investment of the personal property in California realty would tip the scales in favor of the legislative power because of the great power which a state has with respect to real property within its boundaries.

This argument is strengthened by the fact that the majority of courts originally adopted the rule in the absence of statute that realty acquired by a married person in a community property state was community (unless acquired by gift, devise or descent), even though the spouses were domiciled in a common law state and the "separate property" of one was used in purchasing the realty.³³ This was considered merely an application of the general rule that marital property interests in real property are governed by the law of the situs of the realty. It is true that all of these cases were subsequently overruled,³⁴ and the doctrine of "tracing" extended to determine the marital property interest in the realty by those previously existing in the personal property in exchange for which it was acquired. However, it seems somewhat extreme to say that the original common law rule was unconstitutional. The Washington Supreme Court did declare that the former rule would be unconstitutional,³⁵ but it omitted to state that it had previously followed it.³⁶

Whether or not it had these arguments in mind, the California Supreme Court in *Estate of Thornton* carefully refrained from ruling upon the validity of the 1917 Amendment as applied to real property. The court stated the question for decision as the

constitutionality of *so much of* section 164 of the Civil Code as provides that all other property (than separate property as defined by sections 162 and 163 of said code) "acquired after marriage by either husband or wife, or both, including . . . personal property wherever situated, heretofore or hereafter acquired while

³³ *Bryan & Wife v. Moore's Heirs*, 11 Mart. (o.s.) 26 (La. 1822); *Duncan v. Dick*, Walk. 288 (Miss. 1827); *Heidenheimer v. Loring*, 6 Tex. Civ. App. 560, 26 S.W. 99 (1894); *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925 (1892); *Gratton v. Weber*, 47 Fed. 852 (C.C.N.D. Wash. 1891). See *Dye v. Dye*, 11 Cal. 163, at 169 (1858), where the California Supreme Court indicates that this might be the rule.

³⁴ *Estate of Warner*, 167 Cal. 686, 140 Pac. 583 (1914); *Succession of McGill*, 6 La. Ann. 327 (1851); *Vertner v. Humphreys*, 14 Smedes & M. 130 (Miss. 1850); *Thayer v. Clarke*, 77 S.W. 1050 (Tex. Civ. App. 1903), *aff'd per curiam sub nom. Clark v. Thayer*, 98 Tex. 142, 81 S.W. 1274 (1904); *Elliott v. Hawley*, 34 Wash. 585, 76 Pac. 93 (1904).

³⁵ *Brookman v. Durkee*, 46 Wash. 578, 583, 90 Pac. 914, 915 (1907).

³⁶ In *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925 (1892).

domiciling [*sic*] elsewhere, which would not have been the separate property of either if acquired while domiciled in this state is community property . . ." [Emphasis added.]³⁷

It is to be noted that the court has omitted in its quotation of the statute the portion dealing with real property. Later in the opinion, the court declared that the *above-quoted portion* of the statute was unconstitutional. Clearly, the case does not purport to rule on the validity of the statute as applied to real property in our Categories 2 and 3.

It is true that the 1917 Amendment was declared unconstitutional as applied to real property in *Melvin v. Carl*,³⁸ decided by the District Court of Appeal before *Estate of Thornton*. But this case was distinguished in the first opinion of the Supreme Court in *Estate of Thornton*, and its careful exclusion of real property from the scope of its ruling in its second opinion would seem to be an invitation to the profession to consider this question open. If so, the invitation appears to have fallen on deaf ears.

Since the decision of *Estate of Thornton* the California bar and the California courts have assumed that that case rendered the 1917 Amendment a dead letter with respect to real as well as personal property. In *Tomaier v. Tomaier*³⁹ the California Supreme Court remarked, as though the proposition were axiomatic, that "The separate property of a nonresident husband or wife invested in California land remains separate property * * *" ⁴⁰ citing, *inter alia*, *Estate of Thornton*. And the District Court of Appeal in *Estate of Jenkins*⁴¹ held that real property in California acquired with funds earned by the husband while the spouses were domiciled in a common law state was his separate property, without even mentioning the 1917 Amendment or *Estate of Thornton*.

A strong indication that the profession has considered the 1917 Amendment a dead letter is furnished by *In re Miller*.⁴² In that case the taxpayer lost because it was held that the exemption from inheritance tax provided by Section 13555 of the Revenue and Taxation Code did not extend to real property. The 1917 Amendment, which is still unrepealed, was clearly applicable in terms to the case, and if valid as applied to real property it would have resulted in victory for the taxpayer. The California Supreme Court had never declared it invalid as applied to real property. Yet counsel for the taxpayer did not even make an argument to the court on the basis of that statute.

It would appear that the unconstitutionality in toto of the 1917 Amendment has been tacitly assumed by both the bar and the courts, and that its continuing presence in the statute books can only be a source of confusion. It would seem desirable as a part of any revision of the statutes relating to this subject that that amendment be repealed.

³⁷ 1 Cal.2d 1, 2, 33 P.2d 1-2 (1934).

³⁸ 118 Cal. App. 249, 4 P.2d 954 (1931).

³⁹ 23 Cal.2d 754, 146 P.2d 905 (1944).

⁴⁰ *Id.* at 759, 146 P.2d at 908.

⁴¹ 110 Cal. App.2d 98, 242 P.2d 107 (1952).

⁴² 31 Cal.2d 191, 187 P.2d 722 (1947).

Section 201.5 of the Probate Code

At its first session after the decision of *Estate of Thornton*, the California Legislature added a new Section 201.5 to the Probate Code, which has been quoted at the beginning of this study. Taking a cue from Justice Langdon's dissenting opinion in the *Thornton* case, the Legislature this time dealt only with rights of succession upon the death of one of the spouses. It purported to treat as community property, for the purpose of succession only, all "personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State." Two problems immediately arise as to the construction and applicability of this statute.

Applicability to Real Property. It is to be noted that whereas the 1917 Amendment included within its scope "real property situated in this State and personal property wherever situated," the reference to real property was omitted in Section 201.5. Although it has been judicially stated that the reason for this omission "does not appear,"⁴³ it might be suggested that the omission was because the 1917 Amendment (for which this statute was a partial substitute) had not been declared unconstitutional as applied to real property. But this is merely speculation.

Whatever the reason for the omission, it seems clearly to exclude from the scope of the statute property in our Categories 2 and 3. It is possible to argue that the phrase "personal property" in the statute refers to property in that form at the time of its acquisition in the foreign jurisdiction, and that its subsequent exchange for other property, real or personal, after the removal of the spouses to California does not take it out of the statute. However, this argument ignores the history of the legislation and the deliberate omission in this statute of the reference to real property contained in the statute it was designed to replace.

In *In re Miller*⁴⁴ the California Supreme Court stated that Section 201.5 applies only to property in the form of personal property at the death of the husband or wife. Although the actual issue in that case was the construction of the cognate provision in Section 13555 of the Revenue and Taxation Code, the Supreme Court stated that the two sections should be considered *in pari materia* and purported to construe Section 201.5 as well. There seems little reason to doubt that the statement regarding the latter section represents the law of California.

Although on the basis of statutory construction it would be difficult to criticize the decision in *In re Miller*, it seems equally clear that as a matter of legislative policy there is no reason to deny a surviving spouse the benefit of Section 201.5 merely because the property brought from the former domicile happens to have been invested in real property in California. None has ever been suggested by any of the courts which have discussed the problem, nor, so far as I am aware, by anyone else. Under the present California law, a spouse who desires to escape

⁴³ *In re Miller*, 31 Cal.2d 191, 198, 187 P.2d 722, 726 (1947).

⁴⁴ 31 Cal.2d 191, 187 P.2d 722 (1947), overruling *Estate of Way*, 157 P.2d 46 (Cal. App. 1945). The latter case was settled after a hearing had been granted by the Supreme Court, and therefore it was never officially reported.

the restrictions of Section 201.5 with respect to property acquired in a former domicile can merely invest all of such property in real property prior to his death, and he is then free to devise all of it to a third person to the exclusion of his surviving spouse.

Applicability and Constitutionality Upon Death of Nonacquiring Spouse. Section 201.5 provides that "Upon death of *either* husband or wife" one-half of the property subject to that section "acquired after marriage by *either* husband or wife * * * is subject to the testamentary disposition of the decedent * * *." [Emphasis added.] The significance of this provision is illustrated by the following hypothetical case: H and W are married and live in New York for 30 years, during which time H accumulates \$100,000 from his earnings. This property is H's "separate property" under the law of New York. H and W then move their domicile to California, and H brings the \$100,000 savings with him, which is retained in the form of personal property. W dies testate, bequeathing the residue of her estate to X. X claims one-half of "H's" \$100,000.

No reported case has yet arisen in California directly dealing with this question. However, it is clear that Section 201.5 says that X is entitled to one-half of the \$100,000. Is such a provision within the constitutional power of the Legislature?

Although this precise question has not yet been considered by the California appellate courts, there are California cases which furnish an apparently inescapable answer to the question. In 1923 the California Legislature gave to a wife for the first time a power of testamentary disposition over one-half of the *community* property in California.⁴⁵ The California Supreme Court held that to apply this amendment to pre-existing community property, with respect to which no power of testamentary disposition had theretofore existed in the wife, would be unconstitutional,⁴⁶ and that this same rule applied to the income subsequently accrued on pre-1923 community property.⁴⁷ In the latter case of *Boyd v. Oser* the Supreme Court used language which would apply almost in terms to the question under discussion:

To hold that the income of property vested in the husband, whether separate or community in tenure, can be taken from him by the Legislature and given to the wife *or her testamentary beneficiaries*, would be destructive of the principle which it is necessary to maintain if either husband or wife is to be protected in the fruits of his or her separate property. [Emphasis added.]⁴⁸

The fact that in the foregoing cases community property was involved, whereas here it is one spouse's separate property, would make this an a fortiori case. The wife's interest in pre-1923 community property in California was greater than is her interest in the husband's "separate" property in the common law states. Yet the court held that to add thereto a previously nonexistent power of testamentary disposition would violate the husband's constitutional rights.

⁴⁵ Cal. Stat. 1923, c. 18, § 1, p. 29.

⁴⁶ McKay v. Lauriston, 204 Cal. 557, 269 Pac. 519 (1928).

⁴⁷ Boyd v. Oser, 23 Cal.2d 613, 145 P.2d 312 (1944).

⁴⁸ *Id.* at 621, 145 P.2d at 317.

Nor would the fact that there was a change of domicile in this case from a foreign jurisdiction to California furnish a valid distinction. The Supreme Court declared in *Estate of Thornton*:

If the right of a husband, a citizen of California, as to his separate property, is a vested one and may not be impaired or taken by California law, then to disturb in the same manner the same property right of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him, is clearly to abridge the privileges and immunities of the citizen.⁴⁹

It would appear that in, order for this aspect of Section 201.5 to be upheld it would be necessary to overrule *Boyd v. Oser* or *Estate of Thornton* or both.

Although, as stated above, there is no appellate case in California directly dealing with the question here under discussion, the District Court of Appeal for the Second District, in *Estate of Ball*,⁵⁰ did assume the validity of Section 201.5 as applied to a case where the nonacquiring spouse dies first. This case is discussed fully below in the section of this study dealing with Sections 228 and 229 of the Probate Code, since it can be better understood in that context. Suffice it to say here that the case is not persuasive authority on the constitutional question being discussed.⁵¹

The death of the nonacquiring spouse prior to that of the acquiring spouse raises a problem not only with respect to property acquired while the spouses were domiciled in a common law state, but also with respect to property acquired in certain of the community property states. Under the community property laws of Nevada and New Mexico, the wife has no power of testamentary disposition over the community property—it all belongs to the surviving husband upon her death testate or intestate.⁵² (The same situation prevailed in California prior to 1923.) If the spouses' domicile when the husband acquired property was either of these states, and they change their domicile to California, Section 201.5 purports to give to the wife a power of testamentary disposition over one-half of such Nevada or New Mexico community property if within our Category 1 (*i.e.*, in the form of personal property at the time of her death). Section 201.5 is not limited to property acquired in common law states but applies to property acquired in any foreign state. Such an application of the section, however, would seem to raise as serious a constitutional objection as its similar application to property brought from a common law state. The California Supreme Court held that the application of the 1923 California statute, giving the wife

⁴⁹ 1 Cal.2d 1, 5, 33 P.2d 1, 3 (1934).

⁵⁰ 92 Cal. App.2d 93, 206 P.2d 1111 (1949).

⁵¹ After the foregoing was written, a decision was handed down on July 17, 1956 in the case of *Paley v. Bank of America* in the Los Angeles Superior Court. In that case Judge Richards held that, despite the clear language of the statute, Section 201.5 should not be interpreted as giving the nonacquiring spouse a power of testamentary disposition over the separate property of the surviving spouse acquired in a foreign jurisdiction during coverture, primarily on the ground that if the statute were so interpreted it would be unconstitutional. In his memorandum opinion, Judge Richards said: "To construe section 201.5 as operative on the property of a surviving spouse would result in subjecting one-half of the separate property of such survivor, brought to this state as his or her separate property, to the last will of the deceased spouse and so construed would be unconstitutional under the authorities cited."

⁵² NEV. COMP. LAWS §§ 3395.01, 3395.02 (Hillyer, 1931-41 Supp.); N.M. STAT. ANN. §§ 29-1-8, 29-1-9 (1953).

a power of testamentary disposition over one-half of the community property, to property acquired before its passage would violate the due process clause. And the court expressly stated in the *Thornton* case that the mere fact that a married man moved his domicile to California from a foreign state would not permit the Legislature to impair any of his property interests if it could not do so in the case of the similar interests of a man always domiciled here. Thus it would seem that the application of Section 201.5 in this situation would be unconstitutional.

SPECIFIC PROBLEMS CONCERNING FOREIGN MARITAL PROPERTY

It is proposed in this part of this study to discuss various problems which have arisen concerning foreign marital property in our three categories and to attempt to determine the present California law regarding them. In the following discussion the conclusions which we have reached above concerning the 1917 Amendment and Section 201.5 will be assumed to be correct. That is, it will be assumed that the 1917 Amendment is invalid in its entirety (or at least that, as a practical matter, it is a dead letter); that Section 201.5 applies only to property in the form of personal property at the death of one of the spouses; and that Section 201.5 is unconstitutional insofar as it attempts to give the nonacquiring spouse a power of testamentary disposition over one-half of the other spouse's "separate property" acquired in a foreign jurisdiction (or to treat one-half thereof as "passing" to its owner upon the death of the nonacquiring spouse intestate, subject to administration and to the debts of the decedent).

Devolution Upon Death of Acquiring Spouse

Since a state has plenary power to regulate the devolution of property subject to its jurisdiction upon the death of its owner, there is no constitutional problem involved here, but only the interpretation of the pertinent statutes.

Intestate Succession. Upon the death intestate of a spouse who owns personal property acquired during marriage (not by gift, devise or descent) while domiciled in a foreign jurisdiction or personal property derived from real or personal property so acquired (Category 1), all of such personal property descends to his surviving spouse to the exclusion of his children or other heirs, under the provisions of Section 201.5. However, any real property in his estate in our Categories 2 or 3 descends only one-third to his surviving spouse if two or more children or their issue survive, one-half to such surviving spouse if only one child or its issue or any one or more parents, brothers, sisters or their issue survive, and all to such surviving spouse if none of the foregoing survive the decedent.⁵³

Any property in his estate, real or personal, which, although derived from property acquired while domiciled in a common law jurisdiction, was originally acquired before marriage or by gift, devise or descent after marriage, also descends as indicated above with respect to real property in our Categories 2 and 3.⁵⁴

⁵³ CAL. PROB. CODE §§ 221, 223, 224.

⁵⁴ Such property is expressly excluded from the scope of Section 201.5, and its descent would therefore be governed by the sections of the Probate Code cited note 53 *supra* dealing with "separate" property.

Forced Heirship. Upon the death of a spouse testate, leaving a will in which he purports to bequeath personal property in Category 1 to some third person, Section 201.5 gives one-half of such property to the surviving spouse despite the contrary provisions of the will.⁵⁵ This rule again does not apply to real property in our Categories 2 and 3, nor to any property derived from property acquired before marriage or afterwards by gift, devise or descent.⁵⁶

If the will makes a provision for the surviving spouse, is he required to elect between the provision made for him by the will and his statutory rights under Section 201.5? To take a concrete case, suppose H and W are domiciled in New York for ten years, during which time H accumulates \$100,000 which would have been community property if acquired in California. They then move their domicile to California, bringing the \$100,000 with them, which remains in the form of personal property. Thereafter, H acquires another \$100,000, which is community property. H dies leaving a will in which he bequeaths all of his interest in the community property to W and the \$100,000 acquired in the foreign jurisdiction to X, their only son. Can W keep all of the community property and also claim \$50,000 of the other property under Section 201.5?

There is nothing in Section 201.5 which specifically requires that W elect between the provision made for her by the will and her rights under Section 201.5. The forced heirship provisions in the common law states do specifically require such an election. It is true that where a husband purports to devise and bequeath all of the community property as well as his separate property, a surviving wife may in some cases be required to elect whether to claim her community interest or to take under the will.⁵⁷ This rule is based on the common law doctrine that where a testator purports to devise or bequeath property belonging to another, and also makes provision for the owner of such property in his will, the person whose property is thus dealt with may in some cases be required to elect whether to claim his own property or to accept the provision made for him by the testator.⁵⁸

However, in the case under discussion H did not attempt to dispose of any property belonging to W. He bequeathed "his half" of the community property to her, and attempted to give all of his "separate property" acquired in New York to X. Although no case has considered this question, it would be difficult to require W to make an election under the traditional doctrines. However, it seems obvious that in this situation the Legislature would never have intended that W could demand \$150,000 out of the sum total of \$200,000 acquired by H during marriage. If W were required to elect whether to take under the will or against it, and renounced the will, she would receive only \$50,000 as her share of the community property and \$50,000 under Section 201.5—*i.e.*, the same amount she would receive under the will. Perhaps a court might find some way to carry out this presumed legislative intention, although it is difficult to see upon what rationale.

⁵⁵ Estate of Schnell, 67 Cal. App.2d 268, 154 P.2d 437 (1944).

⁵⁶ Logan v. Forster, 114 Cal. App.2d 587, 250 P.2d 730 (1952).

⁵⁷ 1 ARMSTRONG, CALIFORNIA FAMILY LAW 711-13 (1953); MCKAY, COMMUNITY PROPERTY §§ 1440-56 (2d ed. 1925).

⁵⁸ Note, 156 A.L.R. 820 (1945).

It is submitted that Section 201.5 should be framed, as are the similar statutes in the common law states, in terms of a right to elect to take a statutory share against the will of the decedent, but only by renouncing any provisions under the will. Whether such a right of election is purely personal to the surviving spouse or survives to his personal representative in case of his death prior to distribution of the other spouse's estate,⁵⁹ and the time in which and method by which the election must be made, should also be prescribed by the statute, instead of being left to conjecture until the courts have an opportunity to establish the governing rule through the slow process of litigation.

Effect of Election in Foreign Jurisdiction. So long as Section 201.5 applies only to personal property owned by a person dying domiciled in California, there is no need to consider any probate proceedings except those in California. However, if Section 201.5 is expanded to include real property in our Category 3 (where the spouses never change their domicile to California), it will be necessary to consider the effect of an election to take against the will made by the surviving spouse in the domiciliary administration under the forced heirship statutes of the foreign jurisdiction. Those statutes cannot, of course, control the devolution of the real property in California. The question is whether the manner and time of making an election are controlled by the laws of the state of domiciliary administration or by the laws of the situs of the real property. The courts have considered this question where the decedent died domiciled in one common law state and owning real property in another, both of which had forced heirship provisions but with differing regulations of the time and manner of making an election. The results of the cases, as might be expected in the absence of legislative guidance, have been conflicting.⁶⁰

The Legislature should deal with this question if real property in Category 3 is to be included within the scope of Section 201.5. It would appear reasonable to provide that an election to take under the will or against the will made in the domiciliary administration, in the time and manner there required, would be effective also with respect to the California realty under Section 201.5.

⁵⁹ It was assumed in *Estate of Schnell*, 67 Cal. App.2d 268, 154 P.2d 437 (1944), that the right of election under Section 201.5 would survive to the personal representative (here the Public Administrator) of the surviving spouse. However, there was no argument on the point, and the holding is dubious. *Cf. Estate of Kelley*, 122 Cal. App.2d 42, 264 P.2d 210 (1953), dealing with community property.

⁶⁰ It is clear that an election to take *under* the will at the domicile will prevent the surviving spouse from taking against it as to the immovable in a foreign jurisdiction. *Lawrence's Appeal*, 49 Conn. 411 (1881); *Martin v. Battey*, 87 Kan. 582, 125 Pac. 88 (1912); *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N.W. 324 (1884); *Lindsley v. Patterson*, 177 S.W. 826 (Mo. 1915); *Wood v. Conqueror Trust Co.*, 265 Mo. 511, 178 S.W. 201 (1915); *Lee's Summit B. & L. Ass'n v. Cross*, 345 Mo. 501, 134 S.W.2d 19 (1939). However, as to the effect of an election to take *against* the will at the domicile, the cases are divided. To the effect that such election is effective everywhere and that the spouse can claim his nonbarrable share in the immovable in the foreign jurisdiction without complying with the statutory requirements in that jurisdiction as to elections: *Russell v. Shapleigh*, 275 Mass. 15, 175 N.E. 100 (1931) (dictum); *Colvin v. Hutchison*, 338 Mo. 576, 92 S.W.2d 667 (1936); *Mettler v. Warner*, 98 Neb. 111, 152 N.W. 327 (1915); *Coble v. Coble*, 227 N.C. 547, 42 S.E.2d 898 (1947). *Contra*: *Apperson v. Bolton*, 29 Ark. 418 (1874); *Bish v. Bish*, 181 Md. 621, 31 A.2d 348 (1943); *McGinnis v. Chambers*, 156 Tenn. 404, 1 S.W.2d 1015 (1928); *Rannels v. Rowe*, 166 Fed. 425 (8th Cir. 1908).

Inter Vivos Transfers

For Value. There is no requirement that a wife join in a conveyance of real property in Categories 2 and 3 owned by her husband, as is required with respect to community real property by Section 172a of the Civil Code.⁶¹ Even if the forced heirship provisions of Section 201.5 were made applicable to these two categories of property, the opinions in *Estate of Thornton*⁶² intimate that the Legislature could not constitutionally apply the provisions of Section 172a to them. However, it would undoubtedly be within the power of the Legislature to provide, as is done in many of the common law states, that the nonacquiring spouse must join in any conveyance of such real property or, in the absence of such joinder, may still claim his nonbarrable share therein after the death of the other spouse. The wisdom of such a provision is doubtful, however.

Gratuitous. Similarly, the requirement that the wife consent in writing to any gift of community personal property, contained in Section 172 of the Civil Code,⁶³ is not applicable to personal property subject to Section 201.5, since it is not community property. However, the right of the surviving spouse to a nonbarrable share of one-half of the property subject to Section 201.5 may extend to some property transferred by the deceased spouse prior to his death.

In the common law states the statutes granting a nonbarrable share to a surviving spouse in the personal property of his deceased spouse in terms apply only to property owned at death and not to any part of the property of the deceased spouse transferred inter vivos. Nevertheless, most courts in those states have also extended the right to property which the courts find was transferred gratuitously by the deceased spouse "in fraud" of the surviving spouse's rights.⁶⁴

However, there is no agreement as to what facts are necessary to support a finding that a particular transfer is "in fraud" of the surviving spouse's rights. Some courts require that the deceased spouse retain such dominion over the property transferred (as, for example, in a "Totten trust" bank account) that the court will label the transfer "illusory," before it will be held to be "in fraud" of the surviving spouse's rights.⁶⁵ Others require a finding that the transfer was made with the intent to defeat the nonbarrable share of the surviving spouse, and if such intent is found the transfer is held to be "in fraud" of the surviving spouse's rights even if no strings were retained on the property by the deceased spouse.⁶⁶ Others hold that any transfer to a revocable trust is "in fraud" of the surviving spouse's rights, although this factor alone would be insufficient under either of the first-mentioned rules.⁶⁷

Although there are no cases considering this problem in California with respect to property subject to Section 201.5, it is possible—indeed, probable in view of the experience in the common law states—that the

⁶¹ CAL. CIV. CODE § 172a. See *Melvin v. Carl*, 118 Cal. App. 249, 4 P.2d 954 (1931).

⁶² *In re Thornton's Estate*, 19 P.2d 778 (1933), *rev'd on rehearing sub nom. Estate of Thornton*, 1 Cal.2d 1, 33 P.2d 1 (1934).

⁶³ CAL. CIV. CODE § 172. See *Scott v. Remley*, 119 Cal. App. 384, 6 P.2d 536 (1931).

⁶⁴ *Notes*, 157 A.L.R. 1184 (1945); 112 A.L.R. 649 (1933); 64 A.L.R. 466 (1929).

⁶⁵ *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937); *Krause v. Krause*, 285 N.Y. 27, 32 N.E.2d 779 (1941); *Comment*, 44 MICH. L. REV. 151 (1945).

⁶⁶ *Ibey v. Ibey*, 93 N.H. 434, 43 A.2d 157 (1945); 94 N.H. 425, 55 A.2d 872 (1947).

⁶⁷ *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (1944).

California courts will hold that the right created by that statute extends to some property transferred inter vivos by the deceased spouse. For example, suppose H and W are married and live in New York for 40 years, during which time H accumulates \$1,000,000. H leaves W and moves to California, where he becomes acquainted with a young actress, X, in whose career he is interested. He wishes to leave the \$1,000,000 to X when he dies and does not particularly care for W to get one-half of it under Section 201.5. Having consulted his attorneys, he transfers all of the property to a revocable trust with his bookkeeper as trustee, the income to be paid to H for life, and the corpus to be distributed to X upon his death. Would W be entitled to any part of this property upon the death of H?

Whatever answer the courts may give to this question under the present terms of Section 201.5, it seems obvious that a statute which could be thus easily evaded would be a travesty. And in view of the fact that there is substantial authority in the common law states that transfers to revocable trusts are not so "illusory" as to subject the property to the surviving spouse's nonbarrable share,⁶⁸ it would seem wise for the Legislature to indicate specifically to the courts the transfers which it intends will be considered "in fraud" of the surviving spouse's rights.

In establishing such a rule, the difficulties and confusion which result from attempting to make the criterion the intention of the deceased spouse are obvious. On the other hand, it seems entirely just to subject to Section 201.5 any property transferred inter vivos by gratuitous transfers which are commonly considered will-substitutes—*e.g.*, joint tenancy in real or personal property, joint bank accounts, Totten trust bank accounts, revocable trusts, transfers in trust with right to the income reserved for life in the settlor, and legal transfers with life estate reserved in the conveyor.

Inheritance and Gift Taxation

The history of the provisions in the Revenue and Taxation Code dealing with inheritance and gift taxation of foreign marital property reveals a number of revisions of such provisions which do not appear to have any logical explanation.

When the 1917 Amendment was enacted, purporting to convert into community property marital property acquired by the spouses while domiciled elsewhere which would not have been separate property if acquired while domiciled in California, no provision relating to this subject was added to the inheritance tax act. Nor was there any need for such a provision. If the statute had accomplished its purpose of converting such property into community property, then one-half thereof upon the death of the husband and all upon the death of the wife would have been automatically exempted from inheritance tax as community property, as the inheritance tax act then read.

⁶⁸ *Beirne v. Continental-Equitable T. & Tr. Co.*, 307 Pa. 570, 161 Atl. 721 (1932). *Cf. Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937), where the New York Court of Appeals apparently did not consider that the reservation by a spouse of a power of revocation and the income for life would make the transfer "illusory," since it heavily relied on the additional fact in that case that the right to control the management of the trust was also expressly reserved to the settlor.

However, in 1925 the Legislature added a specific exemption provision to the inheritance tax act. This statute provided that for the purposes of that act all "*personal property* wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either husband or wife if acquired while domiciled in this state shall be deemed to be community property * * *." [Emphasis added.]⁶⁹ Why this exemption provision was introduced into the inheritance tax act at this time it is impossible to say. *Estate of Frees*⁷⁰ had held the 1917 Amendment not to apply to property brought to California before its enactment, but the Legislature in 1923 had made the statute expressly retroactive.⁷¹ *Estate of Drishaus*,⁷² which declared such retroactive application unconstitutional, was not decided until the following year, 1926. Granted that the motive for the statutory exemption may have been fear that retroactive application or any application of the 1917 Amendment would be held unconstitutional, why was the inheritance tax exemption limited to *personal* property when the 1917 Amendment applied to both real and personal property? Did the Legislature intend that one-half of such real property, even though converted into community property by the 1917 Amendment, would *not* be exempt from inheritance tax upon the death of the husband?

The inheritance tax provision was retained in this form until after the 1917 Amendment was declared unconstitutional in *Estate of Thornton*. Then in 1935 Section 201.5 was enacted, which also, as we have seen, applies only to personal property. Therefore, the substantive provision and the taxation provision would have become consistent, except for the fact that the Legislature at the same session changed the inheritance tax provision to refer only to "*intangible* personal property."⁷³

The California Supreme Court in *In re Miller*⁷⁴ explained this 1935 change in the inheritance tax act as being a result of the decision by the United States Supreme Court in *Frick v. Pennsylvania*,⁷⁵ which held that a state could not constitutionally levy an inheritance tax on *tangible* personal property situated in another state. But this was an exemption provision. There was no reason to be concerned that property might be exempted which could not constitutionally be taxed anyway. And by restricting the provision to *intangible* personal property, the exemption was eliminated for tangible personal property situated in California, which California certainly could and did tax, as well as for that situated elsewhere.

The Legislature apparently realized the quixotic nature of this change, for it was reversed in 1947, when the word "*intangible*" was deleted from the inheritance tax provision.⁷⁶ Thus, the inheritance tax exemption provision and the substantive provision in Section 201.5 finally were made to conform.

⁶⁹ Cal. Stat. 1925, c. 284, § 1, pp. 472, 473.

⁷⁰ 187 Cal. 150, 201 Pac. 112 (1921).

⁷¹ Cal. Stat. 1923, c. 360, § 1, p. 746.

⁷² 199 Cal. 369, 249 Pac. 515 (1926).

⁷³ Cal. Stat. 1935, c. 358, § 1, pp. 1266, 1267.

⁷⁴ 31 Cal.2d 191, 187 P.2d 722 (1947).

⁷⁵ 268 U.S. 473 (1925).

⁷⁶ Cal. Stat. 1947, c. 734, § 2, p. 1788 (amending Section 13555 of the Revenue and Taxation Code).

The foregoing recital by itself should be sufficient warning that if any change is made in Section 201.5 an amendment to Section 13555 of the Revenue and Taxation Code to conform thereto should not be overlooked.⁷⁷

In 1939 a provision was also included in the gift tax act treating as community property for the purpose of that tax any "intangible personal property [the phrase then current in the inheritance tax act], wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either husband or wife if acquired while domiciled in this State * * *." ⁷⁸ By virtue of this provision one-half of such property was exempted from gift tax in case of a transfer from one spouse to the other, and a gift of such property to a third person was treated as made one-half by each spouse.⁷⁹ In 1947, when the word "intangible" was removed from the provision in the inheritance tax act, this provision in the gift tax act was repealed entirely.⁸⁰

It is difficult to see why this type of property should be treated differently for inheritance tax purposes and for gift tax purposes. There is substantial agreement among students of taxation that the gift tax and the inheritance or estate tax are complementary taxes, the provisions of which should be correlated as far as possible.

Sections 228 and 229 of the Probate Code

Sections 228 and 229 of the Probate Code establish a special rule of inheritance with respect to certain property upon the death of a sur-

⁷⁷ The question should also be considered whether merely declaring that such property "shall be deemed to be community property" is the best way to handle the problem. Section 13551 of the Revenue and Taxation Code provides that upon the death of the husband the "one-half of the community property which belongs and goes to the surviving wife pursuant to Section 201 of the Probate Code is not subject to this part." However, none of the property under discussion goes to the surviving wife under Section 201 of the Probate Code; one-half may go to her under Section 201.5 of the Probate Code, but Section 13551 of the Revenue and Taxation Code does not mention that section. The same problems arise under Section 13553 of the Revenue and Taxation Code upon the death of the wife.

It would seem to be much simpler to provide that property going to a surviving spouse pursuant to the provisions of Section 201.5 of the Probate Code is not subject to the inheritance tax, with an appropriate provision (similar to that in Section 13552 of the Revenue and Taxation Code) to take care of the situation where the surviving spouse elects to take under the will of the decedent.

It might be argued that Section 13805 of the Revenue and Taxation Code, which exempts from the inheritance tax one-half of the separate property of a spouse "transferred to" the other spouse upon death, makes any section dealing with foreign marital property unnecessary. However, it is doubtful if the one-half of foreign marital property passing to a surviving spouse under Section 201.5 could be considered as "transferred to" him by the decedent within the meaning of this section. It would seem best to cover the question specifically in another section.

⁷⁸ Cal. Stat. 1939, c. 652, § 3, pp. 2079-80.

⁷⁹ CAL. Rev. & Tax. Code §§ 15301, 15302.

⁸⁰ Cal. Stat. 1947, c. 735, § 4, p. 1790 (repealing Section 15305 of the Revenue and Taxation Code).

viving husband or wife.⁸¹ Although the provisions appear to be formidably complicated, the basic purpose of these sections can be simply stated. It is to return to the relatives of the predeceased spouse all or part of the property acquired from him by the surviving spouse, rather than permitting it to go to relatives of the surviving spouse. The sections only apply if the surviving spouse dies intestate and without leaving either issue or a surviving (second) spouse.

A distinction is made in the sections between property which was formerly the separate property of the predeceased spouse and was acquired from him by gift, devise or descent by the surviving spouse, and property which was formerly the community property of the two spouses and was acquired by the surviving spouse by gift, devise or descent from the predeceased spouse or "belonged or went" to the surviving spouse by virtue of its community character upon the other's death. If there are surviving issue of the predeceased spouse, they take both types of property to the exclusion of the parents or collateral relatives of the surviving spouse. However, where only parents or certain collateral relatives of both spouses survive, the parents or collateral relatives of the predeceased spouse get all of the property which was formerly his "separate property;" but the parents or collateral relatives of each spouse get one-half of the property which was formerly the "community property" of the two spouses.

How do these distinctions apply in the case of property acquired by the spouses while domiciled in a common law state? Three theoretical approaches to this question might be suggested. (1) This property is called "separate property" in the common law state; therefore, it is to be treated as separate property for the purpose of these sections. This might be called the "epithetical approach." (2) Such property, at least as long as it remained in the common law state, was unlike either "community" or "separate" property under California law; therefore, these sections do not apply at all to such property. (3) The expressions in the statute—"separate property" and "community property"—are merely shorthand expressions for "property acquired before marriage, or afterwards by gift, devise or descent" and "property otherwise acquired;" therefore, the property acquired while the

⁸¹ "If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead, or in a joint tenancy between such spouse and the decedent or was set aside as a probate homestead, such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of said deceased spouse and to their descendants by right of representation." CAL. PROB. CODE § 228.

"If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead or in a joint tenancy between such spouse and the decedent, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation." CAL. PROB. CODE § 229.

spouses were domiciled in the foreign jurisdiction is to be treated as separate or community for the purpose of these sections depending upon its manner of acquisition.

In *Estate of Allshouse*⁸² the California Supreme Court adopted both of the first two approaches mentioned with a dash of the third thrown in for good measure. It said that property acquired before marriage in a common law jurisdiction is called "separate property" and does not differ substantially from California separate property; therefore, it is to be treated as "separate property" for the purpose of these sections. But, it said, property acquired by a husband after marriage in a common law jurisdiction is subject to the wife's dower right and is unlike either California community or separate property; therefore, these sections do not apply to it at all. What the court overlooked was that property acquired before marriage and that acquired afterwards in the common law jurisdictions are absolutely identical as far as marital property rights are concerned. No distinction between those two categories of property exists in any of the common law states.

The California Supreme Court apparently recognized the unsatisfactory nature of this decision, since it overruled *Estate of Allshouse* when it next considered the question. In *Estate of Perkins*⁸³ the court adopted the third approach mentioned above. It said:

As those statutes affect succession only, their purpose is fully carried out if the probate court distributes the property upon the basis of its classification *had it been* acquired in California. [Emphasis added.]⁸⁴

It should be noted that, although in *Estate of Perkins* the husband died in the foreign jurisdiction before the widow alone moved to California, where she died domiciled, the rule laid down by the court is not limited to that situation. It would also apply where both spouses moved to California and then successively died intestate domiciled here.

*Estate of Ball*⁸⁵ involved the application of Sections 228 and 229 to the latter situation. The facts were that H and W were domiciled in a common law state where H acquired personal property during coverture. In 1917 they moved their domicile to California, bringing the personal property with them. In 1933 W died intestate. In 1949 H died intestate, and his estate included both real and personal property derived from the personal property acquired in the common law state or its income. The collateral heirs of W claimed one-half of the estate under Section 228 of the Probate Code, as against the collateral heirs of H, on the ground that it was property which "belonged or went to the decedent [H] by virtue of its community character on the death of" W.

⁸² 13 Cal.2d 691, 91 P.2d 887 (1939).

⁸³ 21 Cal.2d 561, 134 P.2d 231 (1943). Cf. *Estate of Donohoe*, 128 Cal. App. 544, 17 P.2d 1010 (1933).

⁸⁴ 21 Cal.2d 561, 571, 134 P.2d 231, 237 (1943).

⁸⁵ 92 Cal. App.2d 93, 206 P.2d 1111 (1949). Cf. *Estate of Frary*, 26 Cal. App.2d 83, 78 P.2d 760 (1938).

The court first assumed that the doctrine of *Estate of Perkins*⁸⁶ only applied to property subject to Section 201.5. There is no justification for this assumption, since the property involved in *Estate of Perkins* itself could never have been subject to Section 201.5 because in that case the spouses never moved their domicile to California during coverture. On the basis of this erroneous assumption, the court held that the collateral heirs of W were entitled to one-half of the personal property in the estate, but to none of the real property because under *In re Miller* real property is not subject to Section 201.5.

The court thus apparently assumed that Section 201.5 could constitutionally apply upon the death of W (the nonacquiring spouse) in 1933. There is no discussion of this constitutional question in *Estate of Ball*, nor even any mention that a constitutional question might be involved. In fact, the court does not say in so many words that Section 201.5 was applicable on the death of W; that has to be inferred (although it seems a necessary inference) from the fact that it quotes at length from *In re Miller* and rules differently with respect to real and personal property. Since there is no such distinction in Section 228, this result must have come in some fashion from Section 201.5. How Section 201.5 could have been applicable on the death of W in 1933, which was prior to the enactment of that section, the court does not explain. This decision, which gives wholly inadequate consideration to the problems involved, can hardly be considered persuasive authority when this constitutional question is directly presented for adjudication.

A further problem was involved in *Estate of Ball*, however, which is more troublesome. According to *Estate of Perkins*, the property acquired by H in the common-law state during coverture should be treated as community property for the purpose of Sections 228 and 229, since it was acquired in the same manner as California community property. However, did it "belong or go" to H upon the death of W "by virtue of its community character," as required by Section 228, or did it simply remain H's property as it always had been? This problem was not present in *Estate of Perkins* because there the acquiring spouse died first, and the property clearly went to the surviving spouse by gift, devise or descent from the predeceased spouse. The only problem there was whether it was to be treated as community property or separate property or neither.

The opinion in *Estate of Ball* does not answer, nor even ask, the question posed in the preceding paragraph. It would seem to be an extension of the holding of *Estate of Perkins*, although perhaps a logical one, to hold that if the property is to be treated as community property for the purpose of these sections, then it "belonged or went" to its owner by virtue of such character upon the death of his spouse.

Probate Homestead

A problem which is in all essential respects identical with that considered in the preceding section of this study has arisen in connection

⁸⁶ 21 Cal.2d 561, 134 P.2d 231 (1943).

with Section 661 of the Probate Code.⁸⁷ However, the courts have reached a different result.

Where the spouses have not established a declared homestead during their marriage, the surviving spouse or minor children or both are entitled to have the probate court set aside a "probate homestead" out of the real property of the decedent. However, under Section 661 of the Probate Code if such homestead is set apart from "community property" it may be vested in the surviving spouse and/or minor children in fee; but if it is set apart from "separate property" of the decedent, it can only be set apart for a limited period, in no case beyond the lifetime of the surviving spouse and the minority of the children.

Is a surviving spouse entitled to a probate homestead in fee or only for a limited period (assuming the other requirements are met) in real property in our Category 2 (*i.e.*, real property derived from property acquired by the decedent during coverture while domiciled in a common law state)? In other words, is such property to be treated as "separate" or as "community" property for the purpose of Section 661? In decisions rendered before *Estate of Perkins*, and followed in *Estate of Jenkins*⁸⁸ since that case, the California courts have adopted the first approach mentioned above in dealing with this problem. They have held that the property was "separate property" in the common law state; therefore, the real property in California derived from it is "separate property" and the surviving spouse is entitled to a probate homestead for a limited period only.⁸⁹

It would seem to be obvious that the Legislature was not thinking specifically of the type of property here under discussion, when it enacted Section 661 of the Probate Code providing for a homestead in fee in "community property," but one for a limited period only in "separate property." In determining what the probable intention of the Legislature would have been if it had considered the problem, *Estate of Perkins* seems to have adopted a much more imaginative and reasonable approach than the cases construing Section 661. The attempt of the Legislature in the 1917 Amendment to change this type of property into community property indicates that *Estate of Perkins* more nearly effectuates the legislative policy.

⁸⁷ "If none [no homestead] has been selected, designated and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court, in the manner hereinafter provided, must select, designate and set apart and cause to be recorded a homestead for the use of the surviving spouse and the minor children, or, if there be no surviving spouse, then for the use of the minor child or children, out of the community property or out of real property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or if there be no community property and no such property owned in common, then out of the separate property of the decedent. If the property set apart is the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority; and, subject to such homestead right, the property remains subject to administration." CAL. PROB. CODE § 661.

⁸⁸ 110 Cal. App.2d 98, 242 P.2d 107 (1952).

⁸⁹ *Estate of Nicolls*, 164 Cal. 368, 129 Pac. 278 (1912). *Cf. Estate of Burrows*, 136 Cal. 113, 68 Pac. 488 (1902); *Estate of Higgins*, 65 Cal. 407, 4 Pac. 389 (1884). These two cases last cited could be reconciled with *Estate of Perkins* on the ground that the property was acquired before marriage in the foreign jurisdiction, and therefore would have been separate property even if acquired in California. That is, in part, the rationale of the decisions.

Divorce

In a divorce action, Section 146 of the Civil Code gives the court the power to divide the "community property" of the parties in such proportions as the court may "deem just" if the divorce is granted on the ground of cruelty, adultery or incurable insanity, and equally in all other cases.⁹⁰ No statutory provision is made for the division by the court of the separate property of either spouse, and the courts have held that they do not possess such power.⁹¹

Does the court have any power to divide property acquired while the spouses were domiciled in a common law state? Although this question in principle is virtually identical with that considered in the two preceding sections of this study, it may be arguable that as a matter of statutory construction the problem here is somewhat more difficult. In Sections 228 and 229 and in Section 661 of the Probate Code the Legislature made provision for both "community" and "separate" property in a manner which indicated an intention to include in these two categories all of the property of the spouses. Therefore, the court was required to determine under which rubric the foreign marital property should be included. However, in Section 146 of the Civil Code the Legislature dealt only with "community property"; therefore, it might be argued, if the property is not community property the court has no power to divide it, whatever its character may be. This argument, however, would be largely a preoccupation with words. By failing to mention separate property, the Legislature has as effectively provided that it shall not be divided by the divorce court as if such an express statement were contained in the statute.

In the only case in which this question has been squarely presented, the District Court of Appeal held in *Latterner v. Latterner*⁹² that the divorce court had no power to divide property acquired by one spouse during coverture while the spouses were domiciled in a common law state. The court simply recited the syllogism that this property is called "separate property" in the common law state; the court has no power to divide "separate property;" therefore, it cannot divide this property.

If it were desired to give the divorce court power to divide such property as though it were community property, no constitutional problem would be raised. In 19 of the 40 noncommunity property states, a divorce court is given the power to divide, in any manner which is

⁹⁰ "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 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 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 shall be equally divided between the parties. * * *

CAL. CIV. CODE § 146. The balance of the section deals with the disposition of the homestead of the parties, and also makes a distinction between community and separate property.

⁹¹ *Fox v. Fox*, 18 Cal.2d 645, 117 P.2d 325 (1941).

⁹² 121 Cal. App. 298, 8 P.2d 870 (1932). *Cf. Gelfand v. Gelfand*, 136 Cal. App. 448, 29 P.2d 271 (1934); *Brunner v. Title Ins. & Trust Co.*, 26 Cal. App. 35, 145 Pac. 741 (1914).

“just and equitable,” the separate personal property of the husband; ⁹³ and in 12 of such states the court may so divide the separate personal property of the wife. ⁹⁴ Furthermore, in four of the eight community states the separate property (as understood in the community jurisdictions) of the husband may be divided by the court upon divorce in a manner which is “just and equitable;” ⁹⁵ and in two of such states the separate property of the wife may be so divided. ⁹⁶ No constitutional challenge has apparently been made to any of these statutes. ⁹⁷

CONCLUSION

The foregoing survey has discussed all of the problems which have actually arisen, as revealed by the reported California decisions, in connection with property acquired by husband and wife while domiciled in a foreign jurisdiction. None of them, with the exception of the attempt to give the nonacquiring spouse a power of testamentary disposition over one-half of the other spouse's separate property, involve any constitutional question but merely questions of legislative policy. Therefore, it is unfortunate that Justice Langdon's view, that the constitutionality of each specific application of the 1917 Amendment should be judged separately, did not prevail, instead of the statute being stricken down with respect to all possible applications, even though constitutionally innocuous as to many of them, because some conceivable application might violate the Constitution. It may well be doubted whether the California Supreme Court would rule the same way if this issue were presented *de novo* today. Nevertheless, it would be unreasonable to expect *Estate of Thornton* to be overruled on this point at this late date.

However, it is open to the Legislature, in any reconsideration of this subject, substantially to accomplish the objectives of the 1917 Amendment by dealing specifically with each separate problem and providing for the treatment of foreign marital property in the same manner as community property in almost all cases where such treatment might be desired. A start has already been made in this direction by the enactment of Section 201.5. Of course, the defects of that statute—its unaccountable failure to include real property within its scope, and its perpetuation of the most serious constitutional infirmity of the 1917 Amendment by attempting to give a power of testamentary disposition to the nonacquiring spouse—should be remedied in connection with any such reconsideration.

⁹³ MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 39-40 (1952).

⁹⁴ *Id.* at 55.

⁹⁵ *Id.* at 39-40.

⁹⁶ *Id.* at 55.

⁹⁷ See *Divorce* §§ 291-94, 27 C.J.S. 1113-24 (1941).

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