

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

Inter Vivos Marital Property Rights
in Property Acquired While'
Domiciled Elsewhere

October 1960

LETTER OF TRANSMITTAL

To HIS EXCELLENCY EDMUND G. BROWN
Governor of California
and to the *Members of the Legislature*

In 1957 the California Law Revision Commission made a number of recommendations to the Legislature relating to the rights of a surviving spouse in property acquired by a decedent during marriage while domiciled elsewhere. The bill which embodied these recommendations was enacted as law, becoming Chapter 490 of the Statutes of 1957. At the same legislative session the Commission was authorized to make a study to determine whether the law relating to inter vivos rights of one spouse in property acquired by the other spouse during marriage while domiciled outside California should be revised (Resolution Chapter 202 of the Statutes of 1957). The Commission herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Mr. Harold Marsh, Jr., of the School of Law, University of California at Los Angeles.

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TABLE OF CONTENTS

	Page
RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION -----	I- 5
A STUDY RELATING TO INTER VIVOS RIGHTS IN PROP- ERTY ACQUIRED BY SPOUSE WHILE DOMICILED ELSEWHERE -----	I-21
INTRODUCTION -----	I-21
MANAGEMENT AND CONTROL -----	I-22
RIGHTS OF CREDITORS -----	I-23
INTER VIVOS TRANSFERS -----	I-26
GRATUITOUS -----	I-26
FOR VALUE -----	I-28
DECLARATION OF HOMESTEAD -----	I-31
DIVISION ON DIVORCE -----	I-32
GIFT TAX -----	I-34
REPEAL OF THE 1917 AMENDMENT TO SECTION 164 OF THE CIVIL CODE -----	I-35

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to

Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere

Background

Married persons who move to California often bring with them personal property which was acquired during the marriage while they were domiciled elsewhere and which would have been community property had they been domiciled here when it was acquired. This property is in some cases retained in the form in which it is brought to this State; in other cases it is 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 elsewhere. The Legislature and the courts of this State have long been concerned with the problem of what rights, if any, the spouse of the person who originally acquired such property should have therein, or in the property for which it is exchanged, both during the lifetime of the acquiring spouse and upon his death.

The first legislation enacted to deal with property brought here by married persons domiciled elsewhere at the time of its acquisition took the form of a 1917 amendment to Section 164 of the Civil Code which purported to treat such property as community property if it would not have been separate property had the owner been domiciled in California when it was acquired. However, in *Estate of Thornton*,¹ decided in 1934, the California Supreme Court held the 1917 amendment unconstitutional under the due process and privileges and immunities clauses of the Fourteenth Amendment to the United States Constitution on the ground that a spouse's ownership of property acquired while domiciled elsewhere cannot be substantially modified during his lifetime merely because he moves to California and brings the property with him. Although the 1917 amendment has never been repealed, it has been tacitly assumed by both the bar and the courts to be a dead letter since *Estate of Thornton* was decided.

Legislation was enacted in 1935 and 1957 which, in effect, treats property acquired other than by gift, devise, bequest or descent by a married person while domiciled elsewhere substantially like community property upon his death.² However, such property heretofore has been considered to be the separate property of the acquiring spouse prior to his death except insofar as Section 201.8 of the Probate Code, enacted

¹ 1 Cal.2d 1, 33 P.2d 1 (1934).

² There is believed to be no valid constitutional objection to this legislation in its present form in view of the plenary power of the State over a decedent's property. See *Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 CAL. LAW REVISION COMM'N REP., REC. & STUDIES at E-1 et seq. (1957).

in 1957, places limitations on the owner's power to make "will substitute" gifts of such property during his lifetime. This study and recommendation is concerned with whether and to what extent such property should no longer be treated as separate property during the owner's lifetime.

Recommendation

The Law Revision Commission believes that property acquired by a married person while domiciled in a noncommunity property state should continue to be treated as his separate property during his lifetime for most purposes. This probably conforms to the owner's expectation and in most cases little, if any, useful purpose would be served by treating the property differently. Furthermore, any general attempt to convert such property into community property not only might be thought to raise constitutional issues in view of *Estate of Thornton* but would also create practical difficulties.

The Commission has concluded, however, that there are certain specific purposes for which property acquired during marriage other than by gift, devise, bequest or descent by a married person while domiciled elsewhere should no longer be treated as that person's separate property during his lifetime. The three most important of these are:

- (1) Treatment of the property in case of divorce or separate maintenance;
- (2) Declaration of a homestead during the lifetime of the spouse who acquired the property; and
- (3) Treatment of the property for gift tax purposes.

The Commission recommends that special statutory provisions be enacted to deal specifically with each of these situations. In addition, various other revisions of the law, indicated below, should be made. Accordingly, the Commission makes the following recommendations:

1. *Identification as "Quasi-Community Property."* The Commission recommends that property acquired other than by gift, devise, bequest or descent by a married person while domiciled elsewhere should be referred to as quasi-community property in the special statutory provisions that treat such property differently from other separate property.³ To this end the recommended statute includes several definitions of quasi-community property, each carefully phrased to cover the particular situations to which it is applicable.

A major advantage of the quasi-community property label is that it makes it possible to draft statutes without repeating interminably the phrase "property acquired other than by gift, devise, bequest or descent during the marriage by a married person while domiciled elsewhere." In addition, this designation calls attention to the fact that the property is being given a unique status for some purposes and suggests that for these purposes the property is more analogous to community property than to separate property.

2. *Divorce or Separate Maintenance.* Under existing law a court has no authority to divide separate property in divorce or separate

³ Of course, in situations not covered by the special statutes recommended herein such property will continue to be, and to be referred to as, separate property.

maintenance cases. Hence, a court may not divide quasi-community property in such cases, for such property is separate property. The Civil Code should be amended to provide for the division of quasi-community property in the same manner as community property when a divorce or decree of separate maintenance is granted.

The basic California theory of division of property on divorce is that each spouse retains his own property unless exceptional circumstances warrant taking property of one spouse and giving it to the other. Thus, each spouse retains his own separate property upon divorce in *all* cases. Similarly, community property is divided evenly between the spouses except in special situations. Here, too, each spouse retains his own property, the underlying theory of the community property system being that both spouses have substantially equal rights of ownership in such property because both contribute in substantial part to the effort by which it is accumulated regardless of which of them is formally the recipient of the property. The only exception to this treatment of property on divorce under California law occurs when a divorce is granted on the ground of adultery, incurable insanity or extreme cruelty, in which event the divorce court is authorized to divide the community property in such proportions as the court, from all the facts of the case and the condition of the parties, may deem just.

There is no reason why California should treat quasi-community property differently from community property on divorce or separate maintenance; the relationship of the spouses to quasi-community property is far more analogous to their relationship to community property than to separate property. To take an example, suppose that a man and woman are married in New York and live there for 20 years, that they then move to California and live for a second 20 years and that at the end of the period they have \$100,000 worth of property which was accumulated out of the husband's earnings over the 40 years involved. The wife's contribution to the accumulation of the \$100,000 would in all probability have been no different during the second 20-year period than it was during the first.

The Commission believes that as a matter of policy California may quite appropriately treat property acquired by married persons living elsewhere as having been jointly acquired by them in the same sense as community property is jointly acquired by California spouses. Even though such property was technically conveyed or paid to only one spouse and even though that spouse acquired "title" thereto under the law of his domicile at the time of its acquisition, a community property state is justified in treating the acquisition as attributable to the contribution of both spouses to the joint marital enterprise upon which they were then engaged.

Some may question, however, whether California may, consistently with *Estate of Thornton*, treat quasi-community property like community property for purposes of division on divorce.⁴ In this connection it must be recognized that the statute involved in the *Thornton*

⁴ The United States Supreme Court has never had occasion to say whether it approves the California Supreme Court's construction of the Fourteenth Amendment in the *Thornton* case. Moreover, both courts take a rather different view today than they did when the *Thornton* case was decided of the Fourteenth Amendment as a limitation on the power of the several states to enact legislation regulating the ownership and use of property.

case purported to convert quasi-community property into community property for all purposes. In contrast, the Commission's recommended legislation merely specifies how quasi-community property is to be treated when a homestead is declared, when divorce or separate maintenance is granted and when liability for state gift tax is determined. As far as divorce or separate maintenance is concerned, the constitutional question presented is whether quasi-community property may be divided and, if so, whether the method of division provided in the recommended legislation is reasonable. This question can only be answered, the Commission believes, by analyzing separately the different situations to which the recommended legislation would apply.

The great majority of divorce and separate maintenance cases are based on the ground of adultery, incurable insanity or extreme cruelty.⁵ In these cases the recommended statute authorizes the court to divide the quasi-community property in such manner as the court considers just. No valid constitutional objection could be made to such a division. The statutes of a large number of states have long granted to the divorce court the power to divide what we regard as separate property in such manner as the court considers just and reasonable. These statutes have been applied for many years without any question being raised or suggested as to their constitutional validity insofar as the Commission is aware.

Only a small percentage of divorce or separate maintenance cases are based on a ground other than adultery, incurable insanity or extreme cruelty. In these relatively few cases the recommended statute requires that the quasi-community property of both spouses be divided equally between them. There could be no serious constitutional question as to this method of division where one-half of the quasi-community property of the spouse at fault is awarded to the innocent party. Several states have statutes providing for a division of what we would regard as the separate property of the party at fault into fixed shares upon divorce. The Commission is not aware of any case where the question of the constitutionality of one of these statutes has been raised. Moreover, such an award may be regarded as one which, in effect, simply makes a lump sum award of future alimony. California courts are presently authorized to enforce an order for support or alimony by resorting to the separate property of a party required to make such payments. There seems to be no constitutional reason why the separate property could not be awarded directly to the innocent spouse to provide what is in effect merely security for the payment of alimony. Several states have statutes that permit the award of a portion of the separate property of the spouse against whom the divorce is granted as alimony to the prevailing spouse in the divorce action.

There remain only those cases where divorce or separate maintenance is granted on a ground other than adultery, incurable insanity or extreme cruelty and where one-half of the quasi-community property of the innocent party would be awarded to the party at fault. Here alone might it be thought that a constitutional question of some sub-

⁵ "Fully ninety per cent of divorce cases are based upon the ground of extreme cruelty." Livingston, *Some Practical Phases of Divorce Litigation*, in CONTINUING EDUCATION OF THE BAR, FAMILY LAW FOR CALIFORNIA LAWYERS 32 (1956).

stance would be presented by the recommended statute. But even in this case the Commission believes that the statute would be constitutional.⁶ The Commission does not believe that the courts of this State or of the United States would declare that California had acted arbitrarily in taking the position that in its courts *every* husband and wife will be regarded as having an equitable interest in property acquired by the spouses during their marriage which will be recognized when the marriage is dissolved or modified by a divorce or maintenance decree.

The Commission has included a severability clause in the recommended statute so that even if the statute is held unconstitutional as applied to a particular case, the application of the statute to all other cases will not be affected.

Related to the question of division of property is the question of payment of alimony, child support, attorney fees and costs. Under existing law a decree, judgment or order rendered in an action for divorce or separate maintenance may provide for the payment of temporary or permanent alimony, child support, attorney fees and costs. In the enforcement of such a decree, judgment or order, the court is presently required to resort first to the community property and then to the separate property of the party required to make the payment. The existing law makes no distinction between quasi-community property and other separate property. The law should be changed to require the court to resort to the quasi-community property before it resorts to the separate property of the party required to make the payment. The same reasons that justify the division of quasi-community property in an action for divorce or separate maintenance justify this change. To effectuate this recommendation, Sections 141, 142, 143 and 176 of the Civil Code are amended in the recommended statute.

3. *Homestead.* Quasi-community property should be treated like community property insofar as declared homesteads are concerned. Under existing law, quasi-community property is considered separate property for this purpose. Therefore, the wife, but not the husband, can declare a homestead in the quasi-community property of the other spouse without that spouse's consent; and, if such a declaration is made, the property goes on the husband's death to his heirs and devisees rather than to the surviving wife. In contrast, either spouse can declare a homestead upon community property whether or not the other spouse joins in the declaration and when such a declaration has been made the property goes on the death of either spouse to the surviving spouse.

Quasi-community property should be treated like community property for the purpose of a declared homestead for the same reason the Commission has recommended it be treated like community property in the case of divorce or separate maintenance—*i.e.*, because both spouses have contributed to the acquisition both should have substantial rights with respect to such property. Quasi-community property already is treated substantially the same as community property for probate homestead purposes.

⁶ The answer seems particularly clear in favor of constitutionality in those cases in which property brought to this State by married persons is used to acquire property here at a time when the owner is domiciled here.

The principal effects of this recommendation are that upon the death of the acquiring spouse a quasi-community property homestead will vest in his surviving spouse rather than in his heirs or devisees and that either spouse will be able to declare a homestead in the quasi-community property of the other spouse whether or not the other spouse consents.

Where the right of one spouse to a declared homestead or probate homestead in community property or separate property otherwise exists, the fact that the other spouse is not domiciled in California or died not domiciled here does not prevent the creation of the homestead. The same principle should apply in the case of quasi-community property. Accordingly, the Commission recommends (1) that a quasi-community property homestead created during the lifetime of the acquiring spouse be treated like a community property homestead, whether or not the spouse who originally acquired the homestead property is domiciled in California at the time of the declaration or thereafter and (2) that Section 661 of the Probate Code be amended to eliminate the present requirement that the decedent be domiciled here at the date of death.

To effectuate these recommendations, the recommended statute includes the following provisions:

(a) A new Section 1237.5 is added to the Civil Code and amendments are made to Sections 1238 and 1265 of the Civil Code to permit either spouse to declare a homestead in the quasi-community property of either spouse during the lifetime of the acquiring spouse and to treat such homestead the same as a homestead selected from community property.

(b) Section 661 of the Probate Code is amended to delete the references to Section 201.5 of the Probate Code; this will eliminate the present requirement that the decedent be domiciled here at the time of his death.

(c) A technical amendment is made to Section 663 of the Probate Code.

The Commission believes that no serious constitutional question would be precipitated by permitting the husband to declare a homestead in the quasi-community real property of his wife without her consent. It is true that one effect of the declaration of a homestead is that concurrence of both spouses is thereafter required to convey or encumber the homestead. But California now permits the wife to declare a homestead on the separate property of her husband without his consent and to so restrict his right to convey or encumber his property. No case has been found where the constitutionality of this restraint on alienation has been raised or considered. Furthermore, homestead statutes in other states permit the selection of a homestead from the separate property of one or both of the spouses. These statutes very often require the concurrence of both spouses to convey or encumber the homestead. Their constitutionality has been upheld, even where the homestead property was acquired before the passage of the homestead law.⁷

⁷ 26 AM. JUR. *Homestead* § 132 (1940). The leading case is *Bushnell v. Loomis*, 234 Mo. 371, 137 S.W. 257 (1911). Two very early cases upheld the application of the 1851 Homestead Act to homesteads acquired before its enactment. *Moss v. Warner*, 10 Cal. 296 (1858); *Cook v. McChristian*, 4 Cal. 23 (1854). See also, *Gluckauf v. Bliven*, 23 Cal. 312 (1863); *Cohen v. Davis*, 20 Cal. 187 (1862).

Nor does the Commission believe that any substantial constitutional question is raised by its recommendation that on the death of the acquiring spouse a homestead selected from quasi-community property goes to the surviving spouse rather than to the heirs or devisees of the acquiring spouse. It is well established that the State has virtually plenary power over the property of a decedent.

4. *Gift Tax.* New sections should be added to the Revenue and Taxation Code and other sections of that code should be amended to treat quasi-community property substantially like community property for purposes of the California gift tax. For inheritance tax purposes, quasi-community property is now treated substantially like community property. Accordingly, the recommended statute includes these provisions:

(a) A new Section 15300 is added to the Revenue and Taxation Code to define quasi-community property.

(b) Section 15301 of the Revenue and Taxation Code is amended to exclude one-half of the property from the gift tax in the case of a gift of quasi-community property by one spouse to the other. The same reasons that justify exclusion of one-half of the property from tax in the case of a gift of community property by one spouse to the other would appear to be applicable to a similar gift of quasi-community property.

(c) Analogous reasoning justifies the enactment of new Section 15302.5 of the Revenue and Taxation Code giving the spouses the election to treat a gift of quasi-community property to a person other than either of the spouses as being made one-half by each spouse. Unless both spouses make such an election, however, the gift will continue to be considered as a gift made by the spouse who originally acquired the property. The Commission has provided for an election to treat the gift as being made one-half by each spouse because to treat it the same as a gift of community property would require the nonacquiring spouse who had no control over the gift to pay one-half of the gift tax. In addition, in a case where the donee is a close relative of the spouse who originally acquired the property and is not a relative of the other spouse, the gift tax on the gift might be increased if the gift were required to be considered as being made one-half by each spouse.

(d) A new Section 15303.5 is added to the Revenue and Taxation Code to exclude from the gift tax a transfer of quasi-community property into community property or into property held by the spouses as joint tenants or as tenants in common. For inheritance tax purposes, quasi-community property is now treated substantially like community property upon the death of the acquiring spouse. Thus, under the present law if the acquiring spouse wishes to convert his quasi-community property into true community property during his lifetime, he must pay a gift tax; and, upon his death, his surviving wife pays the same inheritance tax she would have paid had no conversion been made. To avoid this, the Commission recommends that no gift tax be imposed when quasi-community property is converted into true community property. Because no gift tax is imposed when community property is converted to any other form of co-ownership between the spouses, a similar conversion of quasi-community property should also be excluded from the gift tax. It is necessary, however, to enact one special provision to forestall an opportunity for tax evasion. Upon the death of the husband,

one-half of any community property or quasi-community property which goes to the surviving wife is subject to the inheritance tax. Similarly, upon the death of the wife one-half of her quasi-community property which goes to the surviving husband is subject to the inheritance tax. However, *all* community property in the wife's estate which goes to her surviving husband is excluded from the inheritance tax. Thus, in the absence of a special provision a tax on a transfer of quasi-community property from the wife to the husband could be avoided by transmuting it into community property during her lifetime. To prevent this the Commission recommends that upon the death of the wife one-half of any quasi-community property owned by the wife that was converted into community property be taxed under the gift tax law as a gift from the wife to her surviving husband at the time of her death.

(e) A new Section 13672 is added to the Revenue and Taxation Code so that property held by a husband and wife in joint tenancy which had its source in quasi-community property will be treated for inheritance tax purposes as if one-half of the consideration for the acquisition of such property were furnished by each spouse.

The recommended changes in the gift tax law are favorable to the taxpayer and it is unlikely that any question concerning their constitutionality will ever be raised. In any case, the Commission is satisfied that the recommended changes are constitutional.

5. *Community Property Definition.* Section 164 of the Civil Code, which defines community property, should be amended in two respects.

First, the 1917 amendment thereto which was held unconstitutional in *Estate of Thornton* should be eliminated inasmuch as the Commission has recommended above that property acquired by married persons while domiciled elsewhere be treated like community property during the lifetime of the acquiring spouse only for certain limited purposes.

Second, language should be added to Section 164 to limit the definition of community property which it expresses to real property situated in this State and personal property wherever situated which is acquired during marriage by a married person while he or she is domiciled in this State. Unless it is so amended Section 164 would, after the elimination of the 1917 amendment, be literally a directive to California courts to treat all property acquired by married persons during marriage as community property, without regard to whether the property is real property or personal property, whether it is located in this State or elsewhere, or whether the acquiring spouse is domiciled in California or in another State or country at the time of its acquisition. As interpreted and applied by our courts, however, Section 164 has never been given such broad application. For example, it has long been held, in the teeth of the broad language of Section 164, that when real property in California is purchased by a married person domiciled elsewhere the property is separate property rather than community property even though the funds used to make the purchase were accumulated from earnings during marriage; in these cases a "tracing principle" is applied to give the person acquiring the property the same interest therein which he had in the funds used to make the

purchase.⁸ Again, although there is no authority on the point, it seems exceedingly unlikely that our courts would hold that real property acquired in a separate property state by a married person domiciled in California is community property by virtue of Section 164 even if the purchase were made with community funds. Rather, our courts, applying the universally accepted choice of law rule that the law of the situs of real property governs the nature of the interests acquired therein, would take the position that it is for the situs state to define the kinds of estates in real property which exist there and to determine which of these is acquired in consequence of a purchase by a married person domiciled in California.⁹

The Commission believes that application of the very broad language of Section 164 should continue to be limited by long established and generally accepted choice of law principles stated in its proposed amendment thereto¹⁰ and that it is desirable that Section 164 should reflect these limitations on its face for the guidance of all who may have occasion to consider its application in a situation involving persons or property located in other states or countries.

6. *Adjustment of Section 201.5 of the Probate Code.* Section 201.5 of the Probate Code should be revised to clarify the section and to make its form consistent with the other definitions of quasi-community property in the statute recommended by the Commission.

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

An act to add Sections 140.5, 140.7 and 1237.5 to, and to amend Sections 141, 142, 143, 146, 148, 149, 164, 176, 1238 and 1265 of, the Civil Code, to amend Sections 201.5, 661 and 663 of the Probate Code, to add Sections 1367.2, 15300, 15302.5 and 15303.5 to, and to amend Sections 15301 and 15306 of, the Revenue and Taxation Code, relating to property acquired by married persons.

⁸ Estate of Warner, 167 Cal. 686, 140 Pac. 583 (1914).

⁹ In *Tomaier v. Tomaier*, 23 Cal.2d 754, 146 P.2d 905 (1944), and *Rozan v. Rozan*, 49 Cal.2d 322, 317 P.2d 11 (1957), it was held that when real property is acquired in another state with community funds the nonacquiring spouse has an equitable interest therein which will be recognized by the courts of this State. Those courts did not say, however, that such real property is community property. They said only that the interest of the other spouse survives to the extent of enabling that spouse to follow her community property interest in the money into the real property purchased with it. The proposed amendment of Section 164 of the Civil Code would, of course, have no effect on the application of this well established "tracing" principle.

¹⁰ Under Section 164, as revised by the Commission, the character of real property acquired in this State in exchange for services rendered here will be determined according to the marital property system of the state or country in which the spouse rendering the services is domiciled. Some cases in other jurisdictions suggest that under these circumstances the real property would be community property although it would have been separate property if acquired in exchange for separate property—i.e., money instead of services. The Commission sees no justification for making a distinction as to the marital interests in real property acquired in this State by a person domiciled in another state depending upon whether the property is acquired directly in exchange for services or in exchange for money paid for such services. No California case has been found which makes this distinction.

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

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

SECTION 1. Section 164 of the Civil Code is amended to read:

164. All other real property situated in this State and all other personal property wherever situated acquired ~~after~~ during the marriage by either husband or wife, or both, a married person while domiciled in this State including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

As used in this section, personal property does not include and real property does include leasehold interests in real property.

SEC. 2. Section 140.5 is added to the Civil Code, to read:

140.5. As used in Sections 140.7, 141, 142, 143, 146, 148, 149 and 176 of this code, "quasi-community property" means all personal property wherever situated and all real property situated in this State heretofore or hereafter acquired:

(a) By either spouse while domiciled elsewhere which would have been community property of the husband and wife had the spouse acquiring the property been domiciled in this State at the time of its acquisition; or

(b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

For the purposes of this section, personal property does not include and real property does include leasehold interests in real property.

SEC. 3. Section 140.7 is added to the Civil Code, to read:

140.7. As used in Sections 141, 142, 143, 146, 148, 149 and 176 of this code, "separate property" does not include quasi-community property.

SEC. 4. Section 146 of the Civil Code is amended to read:

146. In case of the dissolution of the marriage by decree of a court of competent jurisdiction or in the case of judgment or decree for separate maintenance of the husband or the wife without dissolution of the marriage, the court shall make an order for disposition of the community property *and the quasi-community property* and for the assignment of the homestead as follows:

~~One.~~ (a) If the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property *and quasi-community property* shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just.

~~Two.~~ (b) If the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property *and quasi-community property* shall be equally divided between the parties.

~~Three.~~ (c) If a homestead has been selected from the community property *or the quasi-community property*, it may be assigned to the party to whom the divorce or decree of separate maintenance is granted, or, in cases where a divorce or decree of separate maintenance is granted upon the ground of incurable insanity, to the party against whom the divorce or decree of separate maintenance is granted. The assignment may be either absolutely or for a limited period, subject, in the latter case, to the future disposition of the court, or it may, in the discretion of the court, be divided, or be sold and the proceeds divided.

~~Four.~~ (d) If a homestead has been selected from the separate property of either, in cases in which the decree is rendered upon any ground other than incurable insanity, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the party to whom the divorce or decree of separate maintenance is granted, and in cases where the decree is rendered upon the ground of incurable insanity, it shall be assigned to the former owner of such property, subject to the power of the court to assign it to the party against whom the divorce or decree of separate maintenance is granted for a term of years not to exceed the life of such party.

This section shall not limit the power of the court to make temporary assignment of the homestead at any stage of the proceedings.

Whenever necessary to carry out the purpose of this section, the court may order a partition or sale of the property and a division or other disposition of the proceeds.

SEC. 5. Section 148 of the Civil Code is amended to read:

148. The disposition of the community property, *of the quasi-community property* and of the homestead, as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court.

SEC. 6. Section 149 of the Civil Code is amended to read:

149. When service of summons is made pursuant to the provisions of Sections 412 and 413 of the Code of Civil Procedure upon a spouse sued under the provisions of this chapter, the court, without the aid

of attachment thereof or the appointment of a receiver, shall have and may exercise the same jurisdiction over :

(a) The community real property of the spouse so served situated in this State as it has or may exercise over the community real property of a spouse sued under the provisions of this chapter and personally served with process within this State.

(b) *The quasi-community real property of the spouse so served situated in this State as it has or may exercise over the quasi-community real property of a spouse sued under the provisions of this chapter and personally served with process within this State.*

SEC. 7. Section 141 of the Civil Code is amended to read:

141. In the enforcement of any decree, judgment or order rendered pursuant to the provisions of this article, the court must resort:

1. (a) To the community property; then,

(b) *To the quasi-community property; then,*

2. (c) To the separate property of the party required to make such payments.

SEC. 8. Section 142 of the Civil Code is amended to read:

142. When the prevailing party in the action has either a separate estate, or is earning his or her own livelihood, or there is community property *or quasi-community property* sufficient to give him or her alimony or a proper support, or if the custody of the children has been awarded to the other party, who is supporting them, the court in its discretion, may withhold any allowance to the prevailing party out of the separate property of the other party. Where there are no children, and either party has a separate estate sufficient for his or her proper support, no allowance shall be made from the separate estate of the other party.

SEC. 9. Section 143 of the Civil Code is amended to read:

143. The community property, *the quasi-community property* and the separate property may be subjected to the support and education of the children in such proportions as the court deems just.

SEC. 10. Section 176 of the Civil Code is amended to read:

176. The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property, and there is no community property *or quasi-community property*, and he is unable, from infirmity, to support himself.

For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms by Sections 140.5 and 140.7 of this code.

SEC. 11. Section 1237.5 is added to the Civil Code, to read:

1237.5. As used in this title:

(a) "Quasi-community property" means real property situated in this State heretofore or hereafter acquired:

(1) By either spouse while domiciled elsewhere which would have been community property of the husband and wife had the spouse acquiring the property been domiciled in this State at the time of its acquisition; or

(2) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

(b) "Separate property" does not include quasi-community property.

SEC. 12. Section 1238 of the Civil Code is amended to read:

1238. If the claimant be married, the homestead may be selected :

(a) From the community property ; or

(b) *From the quasi-community property*; or

(c) *From the separate property of the husband* ; or ;

(d) Subject to the provisions of Section 1239, from the property held by the spouses as tenants in common or in joint tenancy or from the separate property of the wife.

When the claimant is not married, but is the head of a family, within the meaning of Section 1261, the homestead may be selected from any of his or her property. If the claimant be an unmarried person, other than the head of a family, the homestead may be selected from any of his or her property. Property, within the meaning of this title, includes any freehold title, interest, or estate which vests in the claimant the immediate right of possession, even though such a right of possession is not exclusive.

SEC. 13. Section 1265 of the Civil Code is amended to read :

1265. From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, *or from the quasi-community property*, or from the separate property of the spouse making the selection or joining therein, and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1242 of the Civil Code, the land so selected, on the death of either of the spouses, vests in the survivor, except in the case of a married person's separate homestead, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to the heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it, or the products, rents, issues or profits thereof be held liable for the debts of the owner, except as provided in this title; and should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale.

SEC. 14. Section 661 of the Probate Code is amended to read :

661. If 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~~ *quasi-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 or ~~property to which Section 201.5 of this code is applicable~~ *quasi-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, ~~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.

For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms in Section 1237.5 of the Civil Code.

SEC. 15. Section 663 of the Probate Code is amended to read:

663. If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, other than a married person's separate homestead, was selected from the community property or *quasi-community property*, or from the separate property of the person selecting or joining in the selection of the same, and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1242 of the Civil Code, the homestead vests, on the death of either spouse, absolutely in the survivor.

If the homestead was selected from the separate property of the decedent without his consent, or if the surviving spouse has conveyed the homestead to the other spouse by a conveyance which failed to expressly reserve homestead rights as provided by Section 1242 of the Civil Code, the homestead vests, on death, in his heirs or devisees, subject to the power of the court to set it apart for a limited period to the family of the decedent as hereinabove provided. In either case the homestead is not subject to the payment of any debt or liability existing against the spouses or either of them, at the time of the death of either, except as provided in the Civil Code.

For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms in Section 1237.5 of the Civil Code.

SEC. 16. Section 15300 is added to Chapter 3 of Part 9 of Division 2 of the Revenue and Taxation Code, to read:

15300. For the purposes of this chapter, property is "quasi-community property" if it is heretofore or hereafter acquired:

(a) By either spouse while domiciled elsewhere and would have been the community property of the husband and wife had the spouse acquiring the property been domiciled in this State at the time of its acquisition; or

(b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

SEC. 17. Section 15301 of the Revenue and Taxation Code is amended to read:

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

SEC. 18. Section 15302.5 is added to the Revenue and Taxation Code, to read:

15302.5. If any quasi-community property is transferred to a person other than one of the spouses, all of the property transferred is subject to this part, and:

(a) The spouse owning the property is the donor; or

(b) At the election of both of the spouses, each spouse shall be considered to be the donor of one-half.

SEC. 19. Section 15303.5 is added to the Revenue and Taxation Code, to read:

15303.5. A transfer of quasi-community property of either spouse into community property of both spouses or into property held by the spouses as joint tenants or as tenants in common with equal interests is not subject to this part; but if the property so transferred is the property of the wife and is transferred into community property and upon her death and survival by her husband the entire community property passing to her husband is not subject to Part 8 (commencing with Section 13301) of this division, one-half of the property so transferred is subject to this part upon the death of the wife as a gift from the wife to her surviving husband at the time of her death.

SEC. 20. Section 15306 of the Revenue and Taxation Code is amended to read:

15306. 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 community property or *quasi-community property*. Any person who claims that any property acquired after marriage is community property or *quasi-community property* has the burden of proving that it is such.

SEC. 21. Section 13672 is added to the Revenue and Taxation Code, to read:

13672. Where husband and wife hold property in joint tenancy, or deposit property in a bank or similar depository in their joint names subject to payment to either or the survivor, and such property had its source in quasi-community property of the marriage of the husband and wife, then upon the death of either of them, such property shall be treated for inheritance tax purposes as if one-half of the consideration for the acquisition of such property were furnished by each spouse.

For the purposes of this section, the term "*quasi-community property*" has the meaning given that term by Section 15300.

SEC. 22. Section 201.5 of the Probate Code is amended to read:

201.5. Upon the death of any married person domiciled in this State one-half of the following property in his estate shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse: all personal property wherever situated and all real property situated in this State heretofore or hereafter *acquired*:

(a) ~~acquired~~ By the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this State at the time of its acquisition; or

(b) ~~acquired~~ In exchange for real or personal property, wherever situated, ~~and so acquired other than by gift, devise, bequest or descent by the decedent during the marriage while domiciled elsewhere.~~

All such property is subject to the debts of the decedent and to administration and disposal under the provisions of Division 3 of this code.

As used in this section personal property does not include and real property does include leasehold interests in real property.

SEC. 23. If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances, shall not be affected thereby.

A STUDY RELATING TO INTER VIVOS RIGHTS IN PROPERTY ACQUIRED BY SPOUSE WHILE DOMICILED ELSEWHERE *

INTRODUCTION

In 1957 the Law Revision Commission submitted to the Legislature a recommendation and study concerning a proposed revision of Section 201.5 of the Probate Code and related statutes dealing with the rights of a surviving spouse in property acquired by either or both of the spouses while they were domiciled outside of California.¹ Pursuant to this recommendation the Legislature at its 1957 Session amended Sections 201.5 and 661 of the Probate Code, added new Sections 201.6, 201.7 and 201.8 to the Probate Code, amended Section 13555 of the Revenue and Taxation Code and added new Sections 13552.5, 13554.5 and 13556.5 to the Revenue and Taxation Code.² All of these enactments dealt with the rights of a surviving spouse upon dissolution of the marriage by death with respect to property acquired by the deceased spouse while the spouses were domiciled in another state. At the same session the Legislature authorized the Law Revision Commission to study the question as to what changes, if any, during the subsistence of the marriage after the removal of the parties to California, should be made in the respective rights of the spouses in such property acquired while they were domiciled outside of California.³

As was pointed out in the above-mentioned study submitted to the 1957 Legislature, the courts have in most respects treated property acquired in a non-community-property jurisdiction by spouses who later moved their domicile to California as identical to California separate property insofar as the rights of the spouses therein are concerned, even though it was acquired in the foreign jurisdiction during marriage and not by gift, devise or descent. In 1917 the Legislature attempted by an amendment to Section 164 of the Civil Code to transform such property into community property upon the removal of the spouses to California,⁴ but this statute was declared unconstitutional by the California Supreme Court in *Estate of Thornton*.⁵ The scope of that decision is discussed in the above-mentioned study submitted to the 1957 Legislature.

The purpose of the present study is to consider separately each of the major characteristics of community property and separate property during the lifetime of the spouses, in order to furnish a basis for determining whether it might be desirable and constitutionally feasible

* This study was made at the direction of the Law Revision Commission by Professor Harold Marsh, Jr., of the School of Law, University of California at Los Angeles.

¹ *Recommendation and Study relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 CAL. LAW REVISION COMM'N REP., REC. & STUDIES at E-1 et seq. (1957).

² Cal. Stat. 1957, ch. 490, p. 1520.

³ Cal. Stat. 1957, res. ch. 202, p. 4589.

⁴ Cal. Stat. 1917, ch. 581, p. 827.

⁵ 1 Cal.2d 1, 33 P.2d 1 (1934).

to alter some or all of the characteristics of property acquired by the spouses while domiciled elsewhere which would have been community property if acquired while domiciled in California.

A preliminary observation which must be made is that it would no longer be adequate simply to declare that such property shall be treated as "community property," even were that considered desirable and constitutionally feasible. The reason is that there are now two separate types of community property in California having different characteristics—the general community and the wife's earnings and property derived therefrom. Although they remain community property, the wife's earnings are now to a certain extent subject to her management and control, liable for her debts and not liable for the husband's debts. Therefore, a statute which treated property derived from the wife's earnings while the spouses were domiciled elsewhere as in all respects identical with the general community property would probably be an unconstitutional discrimination against such wives as compared with wives who have always been domiciled in California, even if the other constitutional objections stated in *Estate of Thornton*⁶ could be overcome. Aside from the constitutional objection, such a discrimination against wives moving to California from another state could hardly be justified as a matter of policy.

In the discussion which follows, the terms "separate property" and "community property" will be confined to such property acquired by spouses while domiciled in California or another community property state. The term "Section 201.5 property" will be used for property acquired by the spouses during coverture (other than by gift, devise or descent) while domiciled in a non-community-property jurisdiction, including all personal property wherever situated and all real property situated in California acquired in exchange therefor, since such property is subject to the provisions of Section 201.5 of the Probate Code, as amended in 1957, granting to the nonacquiring spouse a non-barrable interest of one-half upon the death of the acquiring spouse. The term "general community property" will be used to refer to all of the community property other than the wife's earnings and property derived therefrom.

MANAGEMENT AND CONTROL

In California the husband has the management and control of the general community personal property and of all community real property.⁷ On the other hand, the wife has the management and control of "community property money earned by her until it is commingled with other community property."⁸ Although this provision has not been interpreted, under it the wife would apparently have the management and control of the actual cash received by her as her earnings and presumably of a separate bank account in which they were deposited, although strictly speaking in the latter case the earnings are no longer in the form of "money" but of a debt owed by the bank to the wife. However, it is fairly clear that if the earnings were used to purchase General Motors stock, the wife would no longer have the right to

⁶ *Ibid.*

⁷ CAL. CIV. CODE §§ 172, 172a.

⁸ CAL. CIV. CODE § 171c (Emphasis added).

manage and control the stock. The management and control would pass to the husband and he would have the right to decide whether to sell the General Motors stock and buy American Telephone and Telegraph stock or to buy bonds. *A fortiori*, if the earnings of the wife were invested in land, the husband would have the management and control of the land.

On the other hand, each spouse has the management and control of his own separate property. Under the present law the same is true of the Section 201.5 property of each spouse. Would it be constitutionally possible for the Legislature to declare that the Section 201.5 property of each spouse should be treated as community property (general community or the wife's earnings, depending upon its mode of acquisition) so far as management and control is concerned, upon the removal of the spouses to California? Although this question was not actually involved in *Estate of Thornton*,⁹ the clear indication of the opinion in that case is that this is the very sort of thing which the court considered constitutionally objectionable, since the spouse acquiring the property had acquired a "vested right" in it under the law of the foreign jurisdiction which could not be altered merely because the spouses moved to California.

Aside from any constitutional objections, such a statute would produce some rather bizarre results so far as the wife's Section 201.5 property is concerned. If a husband and wife domiciled in New York moved to California and the wife had a bank account derived from her earnings during coverture which she transferred to this State, she would retain the management and control of that bank account (assuming that a bank account will be construed to be "money"). On the other hand, a wife in a similar situation who had purchased stocks and bonds with her earnings in New York would have the management and control of such securities transferred to the husband upon their removal to California. It does not seem to be an answer to this criticism to suggest that few if any husbands would dare to insist upon their right of management and control in these circumstances. The fact that a statute is so divorced from sociological reality that it will be universally ignored is not an argument for enacting it. So far as the husband's Section 201.5 property is concerned, such a statute would make little difference since he now has the management and control of such property as his "separate" property and under the statute he would have the management and control of it as quasi-community property.

On the whole it would seem that it would be unwise to attempt to change the law relating to Section 201.5 property so far as the right to management and control is concerned.

RIGHTS OF CREDITORS

The separate property of neither husband nor wife is generally liable for the debts or liabilities of the other spouse. This is subject to the qualification that the separate property of the husband is liable for the wife's contracts for necessities if the husband neglects to make adequate provision for her support, because of the husband's common-law liability for such debts as codified in Section 174 of the Civil Code.¹⁰

⁹ 1 Cal.2d 1, 33 P.2d 1 (1934).

¹⁰ CAL. CIV. CODE § 174; *St. Vincent's Ins. etc. v. Davis*, 129 Cal. 17, 61 Pac. 476 (1900); *Davis v. Fyfe*, 107 Cal. App. 281, 290 Pac. 468 (1930).

By statute the separate property of the wife acquired by gift from the husband is liable for the payment of debts contracted by the husband for necessities while they are living together,¹¹ and all of her separate property is liable for such debts when the husband has no separate property, there is no community property and he is unable from infirmity to support himself.¹² Either spouse, and therefore his separate property, would of course be liable under general agency principles for a debt contracted or liability incurred by the other spouse while the second is acting as the agent or servant of the first. The Section 201.5 property of either spouse would presumably be subject to the same rules as those with respect to separate property.

The general community property is generally liable for the debts and liabilities of the husband but not for those of the wife,¹³ except that the general community property other than the husband's earnings is liable for the wife's antenuptial debts. The reason for this exception is that the husband was held liable for the wife's antenuptial debts in California under the common-law rule, and since he was liable then both his separate property and the community property were liable.¹⁴ The Legislature subsequently exempted the husband's separate property and his *earnings* from liability for the wife's antenuptial debts, leaving the general community property other than his earnings still liable.¹⁵ The general community property is also liable for the wife's contracts for necessities in cases where the husband is personally liable.¹⁶

The earnings of the wife are liable for her "contracts"¹⁷ and are not liable for the "debts" of the husband (other than his debts for necessities).¹⁸ The question has not been decided as to whether the "debts" of the husband for which the wife's earnings are exempt from liability would include his tort liabilities, although two cases have indicated in dicta that such tort liabilities would be included.¹⁹ It is fairly obvious, since the statute imposing liability for the wife's acts specifies only "contracts," that her earnings would not be liable for her own tort liabilities.²⁰ However, it is possible that the 1951 statute

¹¹ CAL. CIV. CODE § 171; *Wahl v. Martinelli*, 101 Cal. App.2d 869, 226 P.2d 668 (1951); *Medical Finance Assn. v. Allum*, 22 Cal. App.2d Supp. 747, 66 P.2d 761 (1937); *Ackley v. Maggi*, 86 Cal. App. 631, 261 Pac. 311 (1927); *Turner v. Talmadge*, 42 Cal. App. 794, 187 Pac. 969 (1919). In addition, the earnings of the wife while she is living separate from the husband which are separate property (Civil Code Section 169) and her separate property constituting the *income* from other separate property would probably be liable for the husband's contracts for necessities made while they are living together, since neither of these types of separate property of the wife are described in the exempting clause of Section 171 of the Civil Code.

¹² CAL. CIV. CODE § 176.

¹³ CAL. CIV. CODE §§ 167, 170, 171a; *Grolemund v. Cafferata*, 17 Cal.2d 679, 111 P.2d 641 (1941), *cert. denied*, 314 U.S. 612 (1941); *Bashore v. Parker*, 146 Cal. 525, 80 Pac. 707 (1905); *McClain v. Tufts*, 83 Cal. App.2d 140, 187 P.2d 818 (1947); *Sellman v. Sellman*, 82 Cal. App.2d 192, 185 P.2d 846 (1947); *Smedberg v. Bevilockway*, 7 Cal. App.2d 578, 46 P.2d 820 (1935).

¹⁴ *Vlautin v. Bumpus*, 35 Cal. 214 (1868); *Van Maren v. Johnson*, 15 Cal. 308 (1860).

¹⁵ CAL. CIV. CODE § 170.

¹⁶ See note 10 *supra*.

¹⁷ CAL. CIV. CODE § 167.

¹⁸ *Grolemund v. Cafferata*, 17 Cal.2d 679, 111 P.2d 641 (1941), *cert. denied*, 314 U.S. 612 (1941); *Melvin v. State*, 121 Cal. 16, 53 Pac. 416 (1898).

¹⁹ CAL. CIV. CODE § 168.

²⁰ It is difficult to believe that any court would hold, as suggested in *Tinsley v. Bauer*, 125 Cal. App.2d 724, 271 P.2d 116 (1954), that the statute imposing liability for the wife's "contracts" includes liability for her torts. See *Henley v. Wilson*, 137 Cal. 273, 70 Pac. 21 (1902), holding that the exemption of the community property from liability for the wife's "contracts" prior to the enactment of Civil Code Section 171a did not exempt such property from liability for her torts. The actual holding of the *Tinsley* case, that liability for "contracts" includes liability for quasi-contracts, would seem to be sound.

giving the wife the management and control of her earnings while in the form of "money" may have impliedly made such earnings liable for her torts as long as they remain in that form.²¹ Also, such earnings might be liable for her torts in a case where the husband himself, and therefore all of the general community property, would be vicariously liable therefor under some agency principle or some statute imposing liability, unless the exemption from liability for his "debts" includes such vicarious liability of the husband.

The exemption of the wife's earnings from the husband's debts attaches also to a bank account into which such earnings are deposited²² and to personal property which is purchased with such earnings,²³ if the earnings can be clearly traced and identified. The exemption is lost if the earnings are so commingled with other community property that they cannot be identified²⁴ or if the earnings constitute only part of the purchase price of personal property with the other part being paid out of the general community funds.²⁵ However, it has been held that the commingling of the wife's earnings with other community property does not destroy the liability of such earnings for the wife's contracts, even though they can no longer be identified; the burden is upon the husband as against an attaching creditor of the wife to show how much of a particular fund or asset was derived from the community property other than her earnings.²⁶

There has been no indication in the decisions as to whether the exemption of the husband's "earnings" from the wife's antenuptial debts, the exemption of the wife's "earnings" from the husband's debts and the liability of her "earnings" for her contracts extend also to the *income* from property in which such earnings are invested.²⁷ It is probable that these rules would not apply to such income.

A change of the liability rules relating to Section 201.5 property of the spouses from those concerning separate property to those concerning the two types of community property would make little difference with respect to the husband's Section 201.5 property. Both the general community property and the husband's separate property are liable for the husband's obligations and are not liable for the wife's obligations, except that the general community property other than the husband's earnings is liable for the wife's antenuptial debts. The wife's Section 201.5 property would ordinarily be derived from her earnings during coverture (since property acquired before marriage and that acquired by gift, devise or descent after marriage are excluded by definition from such property). A change with respect to the wife's Section 201.5 property to the liability rules relating to community property would introduce all of the foregoing uncertainties and irrationalities as to whether such property would be liable for her tort as well as her contract obligations, whether its exemption from liability for the husband's "debts" includes his tort obligations and at what point such liability and such exemption cease because of a "commingling" of the property with community property.

²¹ See 1 ARMSTRONG, CALIFORNIA FAMILY LAW 706 (1953).

²² *Finnigan v. Hibernia S. & L. Soc.*, 63 Cal. 390 (1883).

²³ *Street v. Bertolone*, 193 Cal. 751, 226 Pac. 913 (1924).

²⁴ *Tedder v. Johnson*, 105 Cal. App.2d 734, 234 P.2d 149 (1951); *Truelsen v. Nelson*, 42 Cal. App.2d 750, 109 P.2d 996 (1941).

²⁵ *Pfunder v. Goodwin*, 83 Cal. App. 551, 257 Pac. 119 (1927).

²⁶ *Tinsley v. Bauer*, 125 Cal. App.2d 724, 271 P.2d 116 (1954).

²⁷ See *Street v. Bertolone*, 193 Cal. 751, 754, 226 Pac. 913, 914 (1924).

In any event, such a change in the liability rules would probably make some of the Section 201.5 property of the wife liable for the debts of the husband, whereas prior to their removal to California it had been her "separate" property which had not been liable for her husband's debts under the law of the foreign state. Would it be constitutionally possible for the Legislature to make such a change in property rights upon the removal of the spouses to California? Again the opinion in *Estate of Thornton* seems to indicate that the Legislature lacks any such power. However, there is considerable doubt whether the court would strike down a statute which was confined to regulation of the liability of the property of the spouses for their respective debts (rather than being an attempt to transform "separate" property into "community" property) and which established the same rules with respect to property acquired elsewhere as would have obtained had the spouses been domiciled in California when the property was acquired. The State should have a sufficient interest in the property rights of married people domiciled here and the rights of creditors within its borders to permit it to disturb to this extent the rules previously applicable to property owned by persons who move their domicile to California.

The wisdom of such a change is another matter, however. The evident trend of the piecemeal California statutes relating to the wife's earnings, as well as those in some other community property states,²⁸ is to establish a second type of community property consisting of the wife's earnings and property acquired therewith and the income therefrom, which would be as fully traceable as separate and community property now are and which would be subject to the wife's management and control and liable for her obligations and exempt from the husband's obligations. If the statutes in California had reached this point, there would be no problem with respect to the liability of the wife's Section 201.5 property—the rules relating to the liability of the wife's separate property and of her earnings and property derived therefrom would be the same; it would make no difference which rules were applied to her Section 201.5 property. However, to apply the existing fragmentary, ambiguous and irrational rules relating to the liability of the wife's earnings and property derived therefrom to her Section 201.5 property would merely extend the area of confusion.

INTER VIVOS TRANSFERS

Gratuitous

Under California law either spouse may make a gift of his or her separate property without any consent from the other spouse. The same is true at the present time with respect to an outright gift of the Section 201.5 property of either spouse. On the other hand, the husband may not make a gift of the community personal property under his management and control²⁹ and the wife may not make a gift of her "money" earnings under her management and control³⁰ without the written consent of the other spouse. The same is true of the community real property under the management and control of

²⁸ See MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 21-22 (1952).

²⁹ CAL. CIV. CODE § 172.

³⁰ CAL. CIV. CODE § 171c.

the husband, since the wife must join in any transfer or encumbrance of such community real property or any lease thereof for a period longer than one year, whether gratuitous or for value.³¹

However, the rules with respect to a gift of Section 201.5 property are qualified to some extent by Section 201.8 of the Probate Code enacted in 1957.³² That section provides that the surviving spouse can claim his or her nonbarrable share of one-half in Section 201.5 property even with respect to property transferred by the deceased spouse during his lifetime if (1) the transfer was made "without receiving in exchange a consideration of substantial value" and (2) the deceased spouse *at the time of his death* still had "a substantial quantum of ownership or control of the property." This section does not inhibit an outright gift by one spouse of his Section 201.5 property or permit the other spouse to claim any interest therein after his death; it applies only if the gratuitous transfer by the deceased spouse was in effect a will substitute in that the deceased spouse retained strings on the property until the time of his death; e.g., a revocable trust where the right of revocation was only extinguished by the death of the settlor. Nor does this section permit any attack on the transfer during the lifetime of the transferring spouse. The other spouse can only claim his or her nonbarrable interest in such property after the death of the transferring spouse and only if the other spouse survives the transferring spouse.

If the rules applicable to community property were to be applied to Section 201.5 property, then any gift of such property, even an outright and irrevocable gift, without the written consent of the other spouse would be voidable at the election of the other spouse and the entire property could be recovered during the lifetime of both spouses.³³ After the death of the transferring spouse, the other spouse could only recover one-half of the property transferred.³⁴ Any such absolute requirement of a written consent to all gifts of Section 201.5 property would of course supersede Section 201.8 of the Probate Code, which was designed merely to protect the surviving spouse's right of election under Section 201.5 from being evaded by what are essentially testamentary transfers.

A proposal to require the consent of the other spouse to any gift of Section 201.5 property by the spouse owning it would raise serious problems both of the constitutional validity of such a requirement and of its desirability as a matter of policy.

If such a statute applied all the rules relating to community property to Section 201.5 property, it would permit the other spouse to recover during the lifetime of both spouses all of the Section 201.5 property given away and to thrust it unwillingly back into the hands of the donor spouse. The validity of such a serious curtailment of the rights of the spouse owning the Section 201.5 property would certainly be of doubtful constitutionality. However, if the right of the other spouse to recover the property given away were limited to one-half of the property after the death of the donor spouse, it would seem that the curtailment could be sustained.

³¹ CAL. CIV. CODE § 172a.

³² Cal. Stat. 1957, ch. 490, p. 1520.

³³ *Lynn v. Herman*, 72 Cal. App.2d 614, 165 P.2d 54 (1946).

³⁴ *Ballinger v. Ballinger*, 9 Cal.2d 330, 70 P.2d 629 (1937).

If California had the common law of dower in effect, undoubtedly a husband moving here from another state that did not have such law and investing his funds in California land would have to obtain the wife's joinder to any conveyance of such land, whether gratuitous or for value, in order to transfer it free of her dower right. In other words, the wife, not having joined in such conveyance, could recover after his death a fraction of the property to which she would have been entitled if he had retained the ownership until the time of his death. There would also seem to be little doubt that California could apply the same rule to personal property such as stocks and bonds acquired by the husband with funds brought from the foreign state. The failure of the common law and of the statutory modifications of it in the United States to give the wife an "inchoate" right of dower in personal property undoubtedly stemmed from a desire not to encumber the free alienability of personal property as a matter of policy rather than from any lack of constitutional power to do so. Assuming that California could apply this rule to personal property acquired here in exchange for personal property brought from the former domicile, there would seem to be little reason why it could not also apply such rule to personal property acquired in the former domicile and retained in the same form after being brought to California. Of course, if the "*situs*" of the personal property were in another state, more serious constitutional difficulties would arise. California probably could not apply its rule to the transfer of such property if the jurisdiction of the *situs* of the property at the time of the transfer refused to recognize it.³⁵

If the Legislature could constitutionally require the consent of the other spouse to any gift of Section 201.5 property in order to cut off the other spouse's nonbarrable share of one-half under Section 201.5 of the Probate Code, the question still remains as to the desirability of so extensive a curtailment of the rights of the spouse owning the Section 201.5 property. In recommending the enactment of Section 201.8 of the Probate Code, which does not require such consent to all gifts but only to those which are in effect will substitutes, the Law Revision Commission stated that it was attempting 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."³⁶ The resolution of these competing values adopted by the Legislature in Section 201.8 of the Probate Code would appear to be sound. The abandonment of that decision in favor of one which would require the consent of the other spouse to all gifts of Section 201.5 property in order to cut off the nonbarrable share of the other spouse would not seem justified.

For Value

With respect to personal property generally there is no requirement in California law that the spouse having the management and control

³⁵ For a discussion of the applicable choice-of-law rule see MARSH, *op. cit. supra* note 28, at 161-163.

³⁶ *Recommendation and Study relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 CAL. LAW REVISION COMM'N REP., REC. & STUDIES at E-8 (1957).

of such property, community or separate, secure consent or joinder by the other spouse for any conveyance or encumbrance of it for value. The desirability of this rule from a business standpoint is obvious, and there would be no justification for suggesting that such a requirement be imposed upon the spouse having the management and control of Section 201.5 property.

However, the husband is prohibited from transferring or encumbering for value without the written consent of the wife community personal property consisting of the "furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children."³⁷ Should the husband be prohibited from transferring or encumbering his Section 201.5 property consisting of the same items without the consent of the wife, and should the wife be prohibited from transferring or encumbering her Section 201.5 property consisting of the furniture, furnishings or fittings of the home without the consent of the husband?

It would be a rare case in which it could not be shown that the husband had made a gift of the wearing apparel to his wife and minor children; there is, therefore, little practical significance to the existing statute with respect to wearing apparel and little need for a statute imposing the same requirements to Section 201.5 property. Furniture, furnishings and fittings of the home could probably in most cases be established to be community property, whatever the origin of the funds used to pay for them, in view of the extremely liberal rules in California concerning the transformation of other property into community property by oral agreement of the spouses. The omission to include separate property within the scope of this statute apparently has caused no great difficulty in the past, and the omission of Section 201.5 property would similarly seem to be of minor importance. In view of the constitutional problems which would be raised by an attempt to include the Section 201.5 property of the spouses within the scope of this statute, such an amendment would probably not be of sufficient practical importance to justify its enactment.

With respect to community real property, the wife is required to join in any instrument by which such property is leased for a period longer than one year or is sold, conveyed or encumbered.³⁸ In the absence of her joinder she can recover all of the real property conveyed during the lifetime of both spouses³⁹ or one-half after the death of the husband.⁴⁰ However, any such action to set aside such a conveyance of property standing in the name of the husband alone must be commenced within one year after the filing of the transfer for record.⁴¹ No such requirement of joinder by the other spouse in a transfer for value exists with respect to the separate real property or the Section 201.5 property of either spouse. Application of the rules relating to community real property to Section 201.5 real property, so that the spouse having the management and control of such property had to secure the joinder of the other spouse in any conveyance or encumbrance of such real property or any lease of it for a period of more than one year,

³⁷ CAL. CIV. CODE § 172.

³⁸ CAL. CIV. CODE § 172a.

³⁹ *Britton v. Hammell*, 4 Cal.2d 690, 52 P.2d 221 (1935).

⁴⁰ *Trimble v. Trimble*, 219 Cal. 340, 26 P.2d 477 (1933).

⁴¹ CAL. CIV. CODE § 172a.

would raise a serious constitutional question if the other spouse were permitted to recover such property during the lifetime of the owning spouse, as previously pointed out in the discussion of gifts. However, as also pointed out above, a requirement that the other spouse join in any such transfer, encumbrance or lease in order to cut off his nonbarrable interest in such real property after the death of the owning spouse would undoubtedly be constitutional, since it would merely be equivalent to an inchoate right of dower or curtesy.

It might be argued that this question is entirely academic, since any purchaser of real property from a husband will insist upon the wife's signature regardless of the character of the property. It is true that any purchaser of separate real property from a husband would be wise to insist upon the signature of the wife whatever the state of the record title or the manner of its acquisition inasmuch as the wife must join in any conveyance of community real property; and separate property, whether real or personal, can be transformed into community property merely by an oral agreement of the spouses.⁴² Similarly, if a husband owning Section 201.5 real property desires to sell it, the purchaser should insist upon the signature of his wife whatever the law requires, since the property may have been transformed into community property by a secret oral agreement of the spouses. Nevertheless, a purchaser may not in fact always insist upon such joinder under the present law. If the title company insuring the title were satisfied that the property was originally the Section 201.5 real property of the husband, it would probably insure the title on his sole signature in some circumstances, since the standard form of California title policy excludes from its coverage unrecorded rights or claims of persons in possession and unrecorded rights or claims which might be ascertained by making inquiry of persons in possession. If the title company will issue a standard form policy, few purchasers would impose additional requirements of their own.

On the other hand, the conveyance of real property in the name of the wife is affected by the presumption of Section 164 of the Civil Code that property acquired by a married woman by an instrument in writing is her separate property, which presumption is conclusive in favor of any bona fide purchaser.⁴³ Therefore, a purchaser of Section 201.5 real property of the wife which stands of record in her name alone would normally not need to secure the joinder of the husband in the conveyance in order to protect himself. Obviously, this presumption would have to be modified if a joinder by the husband in a conveyance of the wife's Section 201.5 real property were to be required in order for that requirement to have any practical effect.

Whether a positive requirement of joinder by the non-owning spouse should be imposed in connection with any conveyance of Section 201.5 real property depends upon the extent to which it is thought desirable to curtail the power of control and disposition of such property by the spouse owning it. Certainly if the conclusion is accepted that an out-

⁴² Cf. *Horton v. Horton*, 115 Cal. App.2d 360, 252 P.2d 397 (1953); *MacKay v. Darusmont*, 46 Cal. App.2d 21, 115 P.2d 221 (1941).

⁴³ [W]hensoever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest. . . . CAL. CIV. CODE § 164.

right gift of personal property which is Section 201.5 property can be made by the owning spouse without any consent by the other spouse, there could be no justification for requiring the joinder of the other spouse in any conveyance of Section 201.5 real property, either gratuitously or for value. The days when real property was the most important source of wealth have long since passed. While at the time of the development of the doctrine of inchoate dower and even at the time of the original passage of the community property laws, there was a valid reason for concentrating on providing protection for a wife or husband with respect to his interest in real property acquired by the other, and largely ignoring personal property, such an attitude could not be justified today. On the whole there would seem to be insufficient justification for the imposition of the requirement of joinder by the other spouse in any conveyance for value of Section 201.5 real property.

DECLARATION OF HOMESTEAD

The California statutes permit the filing of a declaration of homestead by both of the spouses jointly upon any of their property, community or separate, constituting the homestead, by the wife alone upon the community property or either spouse's separate property, and by the husband alone on the community property or his own separate property but not upon the wife's separate property.⁴⁴ Section 1265 of the Civil Code provides that if the selection is made from the community property or from the separate property of the person making or joining in the declaration, upon the death of either spouse the homestead vests in the survivor rather than the heirs or devisees of the deceased spouse. As a result of these provisions, if the wife alone files a declaration of homestead on community property, the property vests in her upon the husband's death; but if she alone files a declaration of homestead on the husband's separate property, upon his death the property goes to the husband's heirs or devisees.

The question has not arisen as to whether the husband's Section 201.5 property will be treated as separate property or as community property for the purpose of these provisions, but in view of the analogous decisions under Section 661 of the Probate Code (before its amendment in 1957) it is probable that Section 201.5 property would be treated as separate property.⁴⁵ Yet it seems doubtful that the Legislature was thinking of real property derived from funds acquired in the same manner as community property but while the spouses were domiciled in a foreign, non-community-property jurisdiction in providing that the husband may not alone select the homestead from the "separate" property of the wife and that if the wife alone selects the homestead from the "separate" property of the husband she will not take such homestead in preference to his heirs or devisees upon his death.

There would seem to be little reason why Section 201.5 real property should not be treated like community property for the purpose of these homestead provisions, especially since under the 1957 amendment to Section 661 of the Probate Code⁴⁶ it is now treated like community

⁴⁴ CAL. CIV. CODE §§ 1238, 1239, 1265.

⁴⁵ Estate of Niccolis, 164 Cal. 368, 129 Pac. 278 (1912); Estate of Jenkins, 110 Cal. App.2d 98, 242 P.2d 107 (1952).

⁴⁶ CAL. STAT. 1957, ch. 490, p. 1520.

property for the purpose of the selection of a probate homestead by the court after the death of either spouse. There could be no possible constitutional objection to such a provision since it would concern merely the method of selection of a homestead and the devolution of such homestead upon the death of its owner in a case where it was selected by one spouse alone out of the Section 201.5 real property of the other spouse without his consent.

DIVISION ON DIVORCE

Upon a divorce of the spouses, the court has the power under Section 146 of the Civil Code to divide their community property in such proportions as the court may "deem just" if the divorce is granted on the ground of cruelty, adultery or incurable insanity. In the case of a divorce for any other cause the court must divide the community property equally between the spouses.⁴⁷ The court does not have the power to divide the separate property of either spouse upon a divorce for any cause.⁴⁸ It has been held that Section 201.5 property is to be treated as "separate" property for the purpose of applying these rules, *i.e.*, the court has no power to divide it upon a divorce of the spouses.⁴⁹

There could be no valid constitutional objection to giving the court the power to divide the Section 201.5 property of the spouses upon divorce in a manner which the court may deem just. The statutes of a large number of other states have long granted to the divorce court the power to divide between the spouses the separate property of the husband or the wife or both upon the granting of an absolute divorce, in such manner as the court may consider "just and reasonable," or words of similar import. In twelve states such division is permitted of the real and personal property of both spouses;⁵⁰ in seven states of the real and personal property of the husband;⁵¹ and in one other state of the personal property only of the husband.⁵² In addition, other states permit in some cases the award of a portion of the property of the spouse against whom the divorce is granted *as alimony* to the prevailing spouse in the divorce action.⁵³ These statutes have been applied

⁴⁷ CAL. CIV. CODE § 146.

⁴⁸ Fox v. Fox, 18 Cal.2d 645, 117 P.2d 325 (1941).

⁴⁹ Latterner v. Latterner, 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).

⁵⁰ COLO. REV. STAT. ANN. § 46-1-5 (1953); IOWA CODE § 598.14 (1958); MINN. STAT. § 518.58 (1957); N.D. REV. CODE § 14-0524 (1943); OKLA. STAT. tit. 12, § 1278 (1951) (jointly acquired property only); ORE. REV. STAT. § 107.100 (1959); S.D. CODE § 14.0726 (1939); TEX. STAT. REV. CIV. art. 4638 (Vernon 1948) (except that court may not divest title to real estate); UTAH CODE ANN. § 30-3-5 (1953); VT. STAT. ANN. tit. 15, § 751 (1959); WASH. REV. CODE § 26.08.110 (1953); WYO. COMP. STAT. § 20-63 (1957).

⁵¹ CONN. GEN. STAT. § 46-21 (1958); DEL. CODE ANN. tit. 13, § 1531 (1953); KAN. GEN. STAT. ANN. § 60-1511 (1949); NEB. REV. STAT. §§ 42-318, 42-321 (1952); N.H. REV. STAT. ANN. § 458.19 (1955); TENN. CODE ANN. § 36-821 (1955); WIS. STAT. § 247.26 (1959).

⁵² MICH. COMP. LAWS § 552.23 (1948).

⁵³ GA. CODE § 30-209 (1933); KY. REV. STAT. § 403.060 (1956); MASS. ANN. LAWS ch. 208, § 34 (1955); NEV. REV. STAT. § 125.150 (1959); N.M. STAT. ANN. § 22-7-13 (1953); OHIO REV. CODE ANN. § 3105.18 (Page 1953).

for many years without any question being raised or suggested as to their constitutional validity.⁵⁴

A more serious constitutional problem would be presented, however, if the Legislature should merely provide that the Section 201.5 property of the spouses should be treated as community property for purposes of divorce. This would mean that if the divorce were granted on any ground other than cruelty, adultery or incurable insanity the court would be forced to divide the Section 201.5 property of each spouse equally with the other spouse. For example, in a case where a husband and wife moved to California from New York and she brought with her a large amount of property derived from her earnings while they were domiciled in New York and he then deserted her, the court would be forced under such a provision to take half of this property and give it to the absconding husband if she obtained a divorce on the ground of desertion.

It is no answer to this problem to suggest that the result would be the same had she earned the money in California and it therefore constituted community property. Although the result would be the same, the constitutional problem would be different because in the case where the earnings are community property the husband would have been considered the "owner" of "one-half" of them from the moment they were earned. The divorce would merely sever the ownership in community and make him the owner of his one-half as a tenant in common with the wife in the absence of any contrary provision in the statute. In a case, however, where the property derived from her earnings was her "sole and separate property" under the law of the foreign state prior to the removal of the spouses to California and continued to be such after the removal, a statute providing that the act of the husband in deserting her will result in a compulsory transfer of one-half of her property to him might be held to deprive her of her property without due process of law on the grounds that such statute is unreasonable and arbitrary.

The three states which have statutory provisions for an arbitrary division of property of the spouses into fixed shares upon divorce,

⁵⁴ *Shapiro v. Shapiro*, 115 Colo. 505, 176 P.2d 363 (1946); *Allen v. Allen*, 43 Conn. 419 (1876); *Farrand v. Farrand*, 246 Iowa 488, 67 N.W.2d 20 (1954); *Reedy v. Reedy*, 175 Kan. 438, 264 P.2d 913 (1953); *Fansler v. Fansler*, 344 Mich. 569, 75 N.W.2d 1 (1956); *Whittaker v. Whittaker*, 343 Mich. 267, 72 N.W.2d 207 (1955); *LeBel v. LeBel*, 327 Mich. 318, 41 N.W.2d 881 (1950); *Swanson v. Swanson*, 243 Minn. 516, 68 N.W.2d 418 (1955); *Albertson v. Albertson*, 243 Minn. 212, 67 N.W.2d 463 (1954); *Metschke v. Metschke*, 146 Neb. 461, 20 N.W.2d 238 (1945); *Lippincott v. Lippincott*, 144 Neb. 486, 13 N.W.2d 721 (1944); *Washington v. Washington*, 78 Neb. 741, 111 N.W. 787 (1907); *Kibbee v. Kibbee*, 99 N.H. 215, 108 A.2d 46 (1954); *Hill v. Hill*, 197 Okla. 697, 174 P.2d 232 (1946); *Tobin v. Tobin*, 89 Okla. 12, 213 Pac. 884 (1923); *Shields v. Bosch, Ex'r*, 190 Ore. 155, 224 P.2d 560 (1950); *Flanagan v. Flanagan*, 188 Ore. 126, 213 P.2d 801 (1950); *Morrow v. Morrow*, 187 Ore. 161, 210 P.2d 101 (1949); *Williams v. Williams*, 146 Tenn. 38, 236 S.W. 938 (1921); *Hamby v. Northcutt*, 25 Tenn. App. 11, 149 S.W.2d 484 (1940); *Hedtke v. Hedtke*, 112 Tex. 404, 248 S.W. 21 (1923); *Rylee v. Rylee*, 244 S.W.2d 717 (Tex. Civ. App. 1951); *Hamm v. Hamm*, 159 S.W.2d 183 (Tex. Civ. App. 1942); *Woolley v. Woolley*, 113 Utah 391, 195 P.2d 743 (1948); *Shaffer v. Shaffer*, 43 Wash.2d 629, 262 P.2d 763 (1953); *Schilling v. Schilling*, 42 Wash.2d 105, 253 P.2d 952 (1953); *Bodine v. Bodine*, 34 Wash.2d 33, 207 P.2d 1213 (1949); *Hull v. Hull*, 274 Wis. 140, 79 N.W.2d 653 (1956); *Hoffman v. Hoffman*, 270 Wis. 357, 71 N.W.2d 401 (1955); *Julien v. Julien*, 265 Wis. 85, 60 N.W.2d 753 (1953); *Williams v. Williams*, 68 Wyo. 175, 231 P.2d 965 (1951); *Lovejoy v. Lovejoy*, 36 Wyo. 379, 256 Pac. 76 (1927).

apply these provisions only to the property of the party at fault.⁵⁵ In none of them is there any attempt to take an arbitrary fraction of the property of the innocent plaintiff and hand it over to the guilty defendant. It is true that in many of the states that permit a division of property in the discretion of the court in such proportions as the court deems just and equitable, the court may divide the property of both the plaintiff and the defendant. However, this is done only after both parties have had their day in court and the court has taken into consideration the relative fault of the parties and all other circumstances bearing upon the equity of the division. Therefore, such a division could hardly be said to deprive an innocent plaintiff in the divorce action of his or her property without due process of law, whereas an arbitrary statutory division of the property of the innocent plaintiff might very well do so.

GIFT TAX

The California Gift Tax Statute provides that where community property is transferred from one spouse to the other only one-half is subject to tax and that any gift of community property is to be treated as a gift by each spouse to the extent of one-half.⁵⁶ Between 1939 and 1947 a provision was included that Section 201.5 property in the form of "intangible personal property" should be treated as community property for the purpose of these provisions.⁵⁷ In 1947 this provision was repealed.⁵⁸

Since 1925 there has been a provision in the Inheritance Tax Act providing for the treatment of Section 201.5 property to some extent as community property for inheritance tax purposes, and in 1957 this provision was revised to correlate it with the amendments made to Section 201.5 in that year.⁵⁹ It is difficult to see why the initial impulse in 1939 to do the same thing in connection with the gift tax was abandoned in 1947. The two taxes are merely complementary aspects of the same scheme of taxation, *i.e.*, to subject to a tax the gratuitous transfer of wealth whether it takes place during the lifetime of the owner or at his death. Perhaps it was thought that there was a difficulty in treating the nonowning spouse as the donor of one-half of the gift in the case of Section 201.5 property, thereby making him liable for one-half of the tax⁶⁰ when he had no control over the making of the gift. Obviously there might be some constitutional objection to imposing a tax on *A* because *B* has made a gift of *B*'s property. However, this difficulty could easily be solved as a practical matter by permitting the gift of Section 201.5 property to be treated as a gift of one-half by each spouse at the election of both spouses. Normally they would elect so to treat it since that treatment would result in lower rates and larger exemptions. With this modification, it would seem

⁵⁵ ARK. STAT. ANN. § 34-1214 (1947); *Myers v. Myers*, 226 Ark. 632, 294 S.W.2d 67 (1956); *Reed v. Reed*, 223 Ark. 292, 265 S.W.2d 531 (1954); ME. REV. STAT. ch. 166, §§ 63, 65 (1954); *Foulson v. Foulson*, 145 Me. 15, 70 A.2d 868 (1950); *Leavitt v. Tasker*, 107 Me. 33, 76 Atl. 953 (1910); R.I. GEN. LAWS §§ 15-5-6, 15-5-7 (1956, Supp. 1959); *Laranjeiras v. Laranjeiras*, 67 R.I. 1, 20 A.2d 278 (1941); *Brown v. Brown*, 48 R.I. 420, 138 Atl. 179 (1927).

⁵⁶ CAL. REV. & TAX. CODE §§ 15301, 15302.

⁵⁷ CAL. REV. & TAX. CODE § 15305.

⁵⁸ Cal. Stat. 1947, ch. 735, § 4, p. 1790.

⁵⁹ Cal. Stat. 1957, ch. 490, p. 1520.

⁶⁰ CAL. REV. & TAX. CODE § 15901.

that Section 201.5 property should be treated as community property for the purpose of the gift tax since it is so treated for the purpose of the inheritance tax.⁶¹

REPEAL OF THE 1917 AMENDMENT TO SECTION 164 OF THE CIVIL CODE

In 1917 the Legislature amended Section 164 of the Civil Code to provide that Section 201.5 property is transformed into community property upon the removal of the spouses to California.⁶² Although that amendment was declared unconstitutional in *Estate of Thornton*, the Legislature has never removed the amendment from the statute and there are unresolved questions as to whether the decision in that case rendered the amendment invalid *in toto*.⁶³ In 1957 the Legislature enacted a series of amendments to the Probate Code and the Revenue and Taxation Code dealing with the rights of the spouses in Section 201.5 property upon the death of one spouse. If, on the basis of the instant study and the Commission's recommendations based thereon, the Legislature enacts amendments to the statutes or by failing to act preserves the existing rules with respect to various matters, it will have dealt with all of the rights of the spouses *inter vivos* in such property which are likely to raise any problems. Thus there is no further function for the 1917 amendment to Section 164 of the Civil Code to perform, even if it were held to be still effective to some extent, and for it to remain on the statute books can only lead to confusion. It is suggested that the Legislature should repeal that portion of Section 164 of the Civil Code which purports to transform Section 201.5 property into community property.

⁶¹ The adoption of this proposal would also require an amendment to Revenue and Taxation Code Section 15303. If Section 201.5 property is to be treated as community property for the purpose of the gift tax, then obviously no tax should be levied upon the transformation of such property into actual community property.

⁶² Cal. Stat. 1917, ch. 581, p. 827.

⁶³ See *Recommendation and Study relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 CAL. LAW REVISION COMM'N REP., REC. & STUDIES at E-20-23 (1957).

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