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Rules of Descent Under Probate Code Sections 228 and 229, and Proposed Amendments

IN THE year 1880 there was placed in the California statutes on intestate succession an apparently innocuous and not unreasonable amendment which was destined to undergo material alterations at the hands of subsequent legislatures, and in its later form, as interpreted and applied by the courts, to be productive of complexities, anomalies, and injustices in the law of descent. Prior to 1880 there had been no provision in the statutes of this state which resembled those of sections 228 and 229 of the present Probate Code. In that year what was apparently the germ of these sections was introduced as subdivision 9 of section 1386 of the Civil Code.¹ Its effect was simply this: if the property had been community property of the decedent and a predeceased spouse and the decedent was a widow or widower who had no relatives, instead of the property escheating to the state, as it had theretofore, it was provided that it should go to certain designated relatives of the predeceased spouse. The law remained in this form for twenty-five years. Then in 1905, when subdivision 9 was renumbered and made subdivision 8 of section 1386 of the Civil Code, an apparent oversight in the original amendment was corrected, in accordance with the recommendations of the Code Commissioners in 1898.² Issue of the predeceased spouse had not previously been mentioned along with parents and brothers and sisters in the enumeration of the relatives of such spouse entitled to share in decedent's property. The issue were now included and very properly given the preferential position among those entitled. At the same time the scope of this particular provision was reasonably enlarged so that it would not only apply to property which had been

¹ "9. If the decedent be a widow or widower, and leave no kindred, and the estate, or any portion thereof, was common property of such decedent, and his or her deceased spouse, while such spouse was living, such common property shall go to the father of such deceased spouse, or if he be dead, to the mother. If there be no father nor mother, then such property shall go to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brothers or sisters of such deceased spouse, by right of representation."

² REPORT ON REVISED CIVIL CODE (1898) 309.

community property of the decedent and a predeceased spouse but would also include that which had been separate property of the predeceased spouse. In addition, however, a material change was made in the requirement that decedent should have left no kindred of his own before relatives of the predeceased spouse should be entitled to inherit his property. It was now provided that in case the decedent left no *issue*, decedent's property of either of these two classes should go to relatives of the predeceased spouse.³ This substitution of "issue" for "kindred" changed the provision from one which afforded a mere last resort before escheat to a startling alteration in the rules of descent. It went to the extreme of taking all the property which had been community property of the decedent and the predeceased spouse away from such close relatives of the decedent as his own parents or brothers and sisters and giving it all to the same relatives of the predeceased spouse. The legislature permitted the law to remain in this extreme form only until the next regular session in 1907, when it was changed to provide, as does the present Probate Code, for an equal division between certain designated relatives of the decedent and of the predeceased spouse of that which had previously been community property of the two spouses.⁴ Only when there were issue of the predeceased spouse or when the property

³ "If the decedent is a widow or widower, and leaves no issue, and the estate or any portion thereof was common property of such decedent and his or her deceased spouse, while such spouse was living, or was separate property of his or her deceased spouse, while such spouse was living, such property goes to the children of such deceased spouse and the descendants thereof, and if none, then to the father of such deceased spouse, or if he is dead, to the mother. If there is no father nor mother, then such property goes to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister of such deceased spouse by right of representation." Cal. Stats. 1905, p. 608.

⁴ "8. If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation.

"If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation."

had been the separate property of the predeceased spouse, was it permitted to go exclusively to relatives of that spouse. The law still provided, as it had ever since the original amendment of 1880, that these particular rules of descent, by which decedent's property went to relatives of his or her predeceased spouse, should be applicable only "if the deceased was a widow or a widower."

A SURVIVING SPOUSE NOW UNPROVIDED FOR

In 1930 this phrase "if the deceased was a widow or a widower" was interpreted by the supreme court in *Estate of McArthur*⁵ as including a person who had remarried after the death of the former spouse and died leaving the second spouse surviving. The following year the legislature in re-enacting the provision of subdivision 8 of section 1386 of the Civil Code as sections 228⁶ and 229⁷ of the new Probate Code codified the rule of the *McArthur* case. As a result of this decision and its subsequent codification, the law in California today is that a surviving spouse is generally entitled to no share of the estate of his or her deceased spouse in the two situations covered by these code sections. That is to say, if the decedent leaves no issue and if the property had previously been community property of the decedent and a predeceased spouse, or if it had previously been separate property of a predeceased spouse, then all of it will go to relatives of the predeceased spouse or to other relatives of the decedent, to the complete exclusion of the surviving wife or husband. It seems to the present writer that if the effect of the present law were generally understood there would be an immediate and widespread demand for a change which would make some provision for the surviving spouse.

A typical situation under the law as it now stands is the following:

⁵ (1930) 210 Cal. 439, 292 Pac. 469, Note (1931) 19 CALIF. L. REV. 313.

⁶ "228. If the decedent leaves no issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and to their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of such deceased spouse and to their descendants by right of representation."

⁷ "229. If the decedent leaves no issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation."

A and *B* are married and live together for a number of years, during which time they accumulate a considerable community estate through the earnings of the husband, *A*. *B*, the wife, then dies and *A* marries *C*. While *A* and *C* are husband and wife they accumulate no community estate. This may be due either to the fact that they spend all their earnings or to the fact that neither of them engages in any gainful occupation. Then *A*, the husband, dies without a will. If he leaves no issue, *C*, the surviving wife, generally gets nothing. If there are any issue of *B*, the predeceased first wife, by some other husband than the decedent, *A*, all of the property goes to such issue. If there are no such issue of *B*, the property is divided half and half between the parents of *A*, or his brothers or sisters or their descendants, on the one hand, and the same class of relatives of *B*, the predeceased first wife, on the other. Only in case there should be neither parent, brother, sister, nor descendant of deceased brother or sister of the decedent, *A*, or in case there should be none of the same class of relatives of *B*, his predeceased first wife, would *C*, the surviving second wife, be entitled to succeed to any of the property.⁸

If, on the other hand, the decedent, *A*, had left any issue surviving, regardless of whether such issue were by the predeceased wife, *B*, by the surviving wife, *C*, or by some other wife, a substantial share of the property would go to *C*. Section 228⁹ of the Probate Code would be inapplicable and the succession would be governed by section 221,¹⁰

⁸ It is by no means certain that even in the absence of any of the designated relatives of the predeceased spouse or of the decedent, the surviving spouse would be entitled to a share of the estate. This was the situation in the *McArthur* case, *supra* note 5, where there were no relatives of the decedent of the classes mentioned, and the surviving spouse was, therefore, permitted to inherit the half of the estate which would otherwise have gone to such relatives. In the enactment of the Probate Code, however, sections 228 and 229 were followed by a new provision which reads as follows:

"230. If there is no one to succeed to any portion of the property in any of the contingencies provided for in the last two sections, according to the provisions of those sections, such portion goes to the next of kin of the decedent in the manner hereinbefore provided for succession by next of kin."

Mr. Perry Evans of the Code Commission has pointed out that, unfortunately, the phrase "next of kin" in Section 230 will now exclude a surviving spouse from taking one-half of the estate even in a situation such as that involved in the *McArthur* case. *Comments on the Probate Code of California* (1931) 19 CALIF. L. REV. 602, at 615. It is true that the phrase "next of kin" is perhaps generally understood to refer only to blood relatives. *Wilcox v. Bierd* (1928) 330 Ill. 571, 162 N. E. 170, 175; *Supreme Council v. Bennett* (1890) 47 N. J. Eq. 39, 19 Atl. 785. There is, however, authority for its having a broader meaning so as to include a spouse as well. *French v. French* (1892) 84 Iowa 655, 51 N. W. 145, 15 L. R. A. 300; *Seabright v. Seabright* (1886) 28 W. Va. 412, 465-6. Cf. CAL. PROB. CODE §108. It would seem entirely proper for it to be so interpreted in section 230.

⁹ *Supra* note 6.

¹⁰ "221. If the decedent leaves a surviving spouse, and only one child or the

which applies to separate property, generally. *C* would take one-half or one-third of the property, according as there were one or more children of *A*, or issue of his deceased children, living. Thus we have the curious anomaly that the children of the predeceased wife of decedent by a former marriage take all the property to the exclusion of his widow, although the decedent's own children are compelled to share with the widow. It is similarly anomalous that if there are children both of the decedent and of his predeceased wife, the presence of the decedent's children completely excludes the other children from any share, but the decedent's children, unlike the children of the predeceased wife, are nevertheless required to share with his widow. In other words, *X* takes all as against *Y* and *Y* takes all as against *Z* but *Z* shares equally with *X*. Or to put it in a slightly different form, if all the property is available (because decedent left no issue), the children of the predeceased spouse take it all and the widow takes nothing; but if only a half or a third is available (because the decedent left one or more issue) the widow takes it all and the children of the predeceased spouse take nothing.

Now it is, of course, possible to remove these anomalies by changing the statute in other ways than by providing for a share for the surviving second spouse in all situations. Removing them in any other way, however, will only increase the injustice to the surviving spouse by adding to the situations in which he or she will receive no share of the decedent's property.

Although the writer is strongly of the opinion that as a matter of statutory interpretation the court reached the wrong conclusion in its decision in *Estate of McArthur*,¹¹ it is not here proposed to enter into any detailed argument as to the validity of that decision. In that case the decedent was a woman who had been previously married and who was survived by her second husband. The property in question had been community property of the decedent and her first husband, from whom she had inherited it. Apparently no blood relatives of the decedent survived her, and the second husband claimed the entire estate under

lawful issue of a deceased child, the estate goes one-half to the surviving spouse and one-half to the child or issue. If the decedent leaves a surviving spouse, and more than one child living or one child living and the lawful issue of one or more deceased children, the estate goes one-third to the surviving spouse and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; but if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take by right of representation."

¹¹ *Supra* note 5. *Cf. Estate of Wilson* (1924) 65 Cal. App. 680, at 683, 225 Pac. 283, at 285, where the court in referring to the provisions of subdivision 8 of section 1386 of the Civil Code gives to the words "widow or a widower" their natural meaning, "without spouse."

subdivision 4 of section 1386 of the Civil Code.¹² A sister of the predeceased first husband contended that subdivision 4 was inapplicable, and that succession was governed by the provision of subdivision 8,¹³ which entitled her to one-half of the property. The sole question was whether the decedent was a "widow" within the meaning of subdivision 8, when she left a second husband surviving. The supreme court held that her status as a widow was fixed at the date of the death of the first husband from whom she acquired the property, thus making her subsequent marriage and the survival of her second husband immaterial, and awarded the sister of the first husband one-half of the property. Since no relatives of the decedent of the classes mentioned in subdivision 8 were in existence to claim the other half of the property, and since the state made no claim to it by way of escheat, the court awarded that half to the surviving husband. Thus a result which was not inequitable was reached in the particular case. It is not certain, however, that the court fully appreciated that the consequence of its decision was that a surviving husband or wife could receive no share of the decedent's property in what might be termed the normal case where there were the designated relatives both of the decedent and of the predeceased spouse.¹⁴ In such a case one-half of the property would go to the relatives of the decedent and the other half to the relatives of the predeceased spouse, and nothing would be left for the surviving husband or wife.

In the year following the decision in the *McArthur* case, the provisions of subdivision 8 of the Civil Code were re-enacted as sections 228¹⁵ and 229¹⁶ of the new Probate Code. As a note by the Code Commission indicates,¹⁷ the words "is a widow or widower and" in the introductory phrase "If the deceased is a widow or a widower and leaves no issue" were omitted to conform to the decision in the *McArthur* case.¹⁸ These words had been rendered meaningless by that decision and their continued

¹² "4. If the decedent leaves a surviving husband or wife, and neither issue, father, mother, brother, sister, nor the children or grandchildren of a deceased brother or sister, the whole estate goes to the surviving husband or wife."

¹³ *Supra* note 4.

¹⁴ The opinion in the *McArthur* case does refer, however, to the situation where the predeceased spouse had a child by a former marriage and to the fact that under the court's interpretation of the section such child will take all the property to the exclusion of decedent's second and surviving spouse. *Estate of McArthur*, *supra* note 5, at 447, 292 Pac. at 473.

¹⁵ *Supra* note 6.

¹⁶ *Supra* note 7.

¹⁷ REPORT OF THE CALIFORNIA CODE COMMISSION (1930) 31.

¹⁸ However, the particular member of the Code Commission who drafted the Probate Code, Mr. Perry Evans, has recommended that a change be made in these code sections so as to make them applicable only where the decedent leaves neither spouse nor issue, or that some specific provision for a widow be made. *Comments on the Probate Code of California* (1931) 19 CALIF. L. REV. 602, at 614.

presence in the statute would certainly have been misleading. The omission of these words, however, made it virtually impossible for the supreme court to overrule its decision in the *McArthur* case, as it conceivably might have done had the question been reconsidered in a subsequent case where the presence of relatives on both sides would deprive the surviving spouse of any share in the property if that decision were followed.

PROPOSED AMENDMENTS TO PROVIDE FOR SURVIVING SPOUSE

In 1933 an unsuccessful attempt was made to amend sections 228 and 229 of the Probate Code so as to provide for the surviving spouse. By Assembly Bill No. 634 it was proposed to change the provision of the sections as they now read, that they are applicable if the decedent leaves no issue, so as to make them applicable only if the decedent leaves neither spouse nor issue. The bill passed the Assembly but failed to receive the recommendation of the judiciary committee of the Senate, to which it was subsequently referred. The reason for such failure is not known to the present writer. It is apparent, however, that this precise form of amendment, although taking care of the surviving spouse, introduces certain other anomalies and injustices which could easily be avoided. It operates unfairly on both the issue of the predeceased spouse and upon the other relatives of the latter. For example, under this amendment (just as under the present law) if the decedent left neither spouse nor issue, all the property would go to the issue of the predeceased spouse. But under the amendment, if there is a surviving spouse but no issue, although the surviving spouse might receive only one-half of the property,¹⁰ the issue of the predeceased spouse would take nothing. The other half would go to the decedent's parents or brothers and sisters and their descendants,²⁰ although the issue of the predeceased spouse would have been entitled to all the property as against these same relatives of the decedent had there been no surviving spouse. If when there is no surviving spouse the issue of the predeceased spouse are entitled to all as against decedent's relatives, when there is a surviving spouse the half not given to that spouse should certainly go to such issue rather than to the decedent's relatives.

The foregoing discussion with reference to the claims of issue of the predeceased spouses is applicable to situations arising either under section 228 concerning property which had been community property of the decedent and a predeceased spouse, or under section 229 concerning property which had been the separate property of the predeceased spouse.

¹⁰ The surviving spouse takes all the property only if the decedent leaves neither father, mother, brother nor sister, nor descendants of a deceased brother or sister. CAL. PROB. CODE § 224.

²⁰ CAL. PROB. CODE § 223.

If, however, there were no issue of the predeceased spouse, a similarly unfair result would obtain as to other relatives of the predeceased spouse under the proposed amendment to section 229 concerning property which had been the separate property of the predeceased spouse. Under the amendment (just as under the present law) if the decedent left neither spouse nor issue, all the property would go to the designated relatives of the predeceased spouse. But under the amendment, in order to give one-half of the property to a surviving spouse, all of it would be taken away from the relatives of the predeceased spouse, and the other half given to relatives of the decedent.²¹ In other words, if all the property is available, the relatives of the predeceased spouse are entitled to it all and the relatives of the decedent receive nothing; but if only half is available, the relatives of the decedent are to receive it all and the relatives of the predeceased spouse are to receive nothing!

This anomalous and unfair treatment of the issue and other relatives of the predeceased spouse which would result from the proposed 1933 amendment can be readily avoided, however, by adding a simple provision at the end of each section as thus amended. At the end of section 228,²² add the following:

"If the decedent leaves a spouse but no issue, one-half of such community property goes to the spouse and the other one-half goes as if the decedent had left neither spouse nor issue."

At the end of section 229,²³ add the following:

"If the decedent leaves a spouse but no issue, one-half of such separate property goes to the spouse and the other one-half goes as if the decedent had left neither spouse nor issue."

As thus qualified, the effect of the provision in favor of the surviving spouse in both sections is merely to take away from those who would otherwise be entitled to the property such portion of it as is given to the surviving spouse. The amendment does not, as it would without such qualification, take away all of the property from the issue or other relatives of the predeceased spouse in order to provide for the surviving spouse, and then inconsistently give half to other persons who would not have been entitled at all had there been no surviving spouse.

It is, of course, debatable whether the share of the surviving spouse should be as large as one-half of the property. In analogous situations involving succession to ordinary separate property of the decedent, a surviving spouse is sometimes entitled to one-half and sometimes only to one-third. As against parents or brothers or sisters or their descend-

²¹ *Ibid.*

²² *Supra* note 6.

²³ *Supra* note 7.

ants,²⁴ and as against a single child,²⁵ she takes half. If there are two or more children or their issue, however, she takes only one-third and the other two-thirds is divided between the children or issue.²⁶ If this analogy is to be followed as closely as possible, the surviving spouse would be given one-half of the property in all cases except where there are two or more children of the predeceased spouse, in which case she would receive only one-third, leaving the other two-thirds to be divided among the children. On the other hand, it is arguable that the children of a predeceased spouse are not entitled to as favorable treatment as children of decedent. Certainly at no stage in the history of this descent statute have the decedent's children been compelled to share in any degree with children of the predeceased spouse. It does not seem to be essential, therefore, that the share of such children as against the surviving spouse should be the same under an amended section 228 or 229 as the share of the decedent's own children as against the surviving spouse under section 221. It may also be contended that in certain other situations the share of the wife should be only one-third, in order that the same amount can be given both to the relatives of the decedent and to the relatives of the predeceased spouse, in situations where both are entitled. Since, under section 223, in the case of ordinary separate property, the surviving spouse and certain relatives share equally, why, it may be asked, not take from them equally when a portion is to be given to relatives of the predeceased spouse? But the surviving spouse and the relatives of the decedent are not always treated equally in the division of ordinary separate property. If there is a child or children of the decedent, under section 221 the surviving spouse takes the one-half or one-third not given to the children, to the complete exclusion of the parents and brothers and sisters of the deceased, with whom the surviving spouse must share under section 223 when there are no children. Furthermore, to provide that the surviving spouse take one-half in certain cases and one-third in others, would increase the complexities of an already complex succession statute.

EFFECT OF PREDECEASED SPOUSE EXERCISING POWER OF
TESTAMENTARY DISPOSITION

In cases where there are no surviving issue of either the predeceased spouse or the decedent, section 228²⁷ of the Probate Code provides (as did its predecessor, subdivision 8 of section 1386 of the Civil Code, since 1907)²⁸ for an equal division of the community property between speci-

²⁴ CAL. PROB. CODE §223.

²⁵ CAL. PROB. CODE §221, note 10, *supra*.

²⁶ *Ibid*.

²⁷ *Supra* note 6.

²⁸ *Supra* note 4.

fied relatives of the decedent and of the predeceased spouse. Consideration should be given, in the light of this provision, to the situation where the predeceased spouse has exercised the privilege of willing one-half of the community property²⁹ and has left it to his or her parents or to brothers or sisters or their descendants. In that event, on the death of the predeceased spouse only the other half of the property came to, or was retained by, the decedent by virtue of its community character; and only this other half, therefore, is subject to the provisions of section 228. But should the parents or other relatives of the decedent be compelled to divide this second half with the parents or other relatives of the predeceased spouse who have already received all the first half of the property? Under the law as it now stands there is apparently no escape from that result. Of course, the decedent might have made a will giving all this second half to his or her parents and thus have prevented the parents of the predeceased spouse from ultimately receiving a total of three-quarters of the original community property, while his or her own parents received only one-quarter. But in the great majority of cases it would undoubtedly never occur to the decedent that it would be necessary to make a will to prevent such an anomalous division. If the general scheme of Probate Code sections 228 and 229 is to be retained and descent determined by the source or character of the property, it would seem only fair to add to section 228³⁰ some such provision as the following:

"In case the previously deceased spouse exercised in full his or her power of testamentary disposition of the community property of the decedent and such spouse in favor of beneficiaries other than the decedent or relatives of the decedent, any share of the estate of the decedent to which the parents or brothers and sisters of the predeceased spouse and their descendants would otherwise be entitled shall go to the parents or brothers and sisters of the decedent and their descendants by right of representation. In case the previously deceased spouse exercised in part, only, his or her power of testamentary disposition of such community property in favor of beneficiaries other than the decedent or relatives of the decedent, any share of the estate of the decedent to which the parents or brothers and sisters of the predeceased spouse and their descendants would otherwise be entitled shall be diminished, and any share of said estate to which the parents or brothers and sisters of the decedent and their descendants are entitled shall be increased, in the proportion which that part of the community property as to which such power of testamentary disposition was exercised bears to all the community property as to which such power of testamentary disposition existed."

It is, of course, arguable just how far such a provision should go in deducting from the share of the relatives of the predeceased spouse property as to which that spouse has exercised the power of testamentary disposition. There would seem to be little ground for questioning the justice

²⁹ CAL. PROB. CODE §201.

³⁰ *Supra* note 6.

of such a deduction when the beneficiaries in whose favor the power is exercised were the same relatives, *e.g.* the parents, to whom a share of the property ultimately would have gone had the power not been exercised. The case may not be quite so strong where the testamentary disposition was in favor of some more distant relative of the predeceased spouse; and perhaps diminishes a little more when the disposition was in favor of a third person or a charity. Even here, however, it seems fair because of such disposition to make a deduction from what may be termed the predeceased spouse's half of the property.

Should the fact that the beneficiaries under the will of the predeceased spouse were relatives of the decedent, however remote, be sufficient to prevent any deduction from the predeceased spouse's half? This is the provision in the proposed amendment. Possibly the cases where there is to be no deduction should be restricted to testamentary dispositions by the predeceased spouse in favor only of the decedent or of those very relatives of decedent who subsequently share in decedent's half of the property. If this be desired, the wording of the proposed amendment may readily be changed to so provide.

Suppose the predeceased spouse did will his or her half to the very relatives of the decedent who otherwise would subsequently be entitled to decedent's half. In addition to there being in such case no deduction from what is termed the share of the predeceased spouse, should this gift by the predeceased spouse be considered decedent's share so that on the decedent's death the entire half which came to him on the death of the predeceased spouse would go to the relatives of the predeceased spouse? Although the actual cases where such dispositions would occur would probably not be numerous, a provision to the effect indicated could be inserted in the proposed amendment, if desired.³¹ It would, however, add to the complexity of both the wording and the administration of the law.

EFFECT OF INTER VIVOS GIFT BETWEEN SPOUSES

Suppose the property in question came to the decedent not by will or succession from the predeceased spouse but as an inter vivos gift from

³¹ It is by no means clear that a fair division would always require that the predeceased spouse's gift to the decedent's relatives, his parents, for example, should cause a cutting down of the share which the latter would otherwise subsequently receive from decedent's estate. The very fact that the predeceased spouse chose to exercise the power of testamentary disposition in favor of relatives of the surviving spouse rather than in favor of relatives of his or her own, suggests that there may have been a particular need on the part of these beneficiaries. This need might still exist at the death of the surviving spouse (the decedent), and it would not be unfair, therefore, to allow these relatives of decedent to share equally with relatives of the predeceased spouse in a division of the decedent's half of the original community property.

the latter. The subject matter of such a gift might be either separate property of the donor spouse or community property of that spouse and the decedent. Do the provisions of sections 228 and 229 apply to either of these situations? In the case of the gift of the separate property the wording of section 229 leaves no opportunity for doubt as to its applicability. It reads: "If . . . the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, . . ." Prior to the enactment of the Probate Code in 1931, the corresponding provision of subdivision 8 of section 1386 of the Civil Code had contained the phrase "by descent, devise or bequest" but made no reference to gift. In the drafting of the Probate Code, the word "gift" was added, according to the Commission's note, "to make the section logically complete."³²

Section 228, however, which is the counterpart of section 229, and deals with the property which had previously been community property, contains no reference to gift, either expressly or by any apparent implication. In fact, there is no provision in section 228 corresponding to the "gift, descent, devise or bequest" clause of 229 and stating the manner in which the community property shall have come to the decedent in order that the provisions of the section may apply. In *Estate of McCauley*,³³ however, decided in 1903, the supreme court held that the community property must have come to the decedent on the death of the predeceased spouse if descent was to be governed by subdivision 9 of section 1386 of the Civil Code (the original provision introduced in 1880).³⁴ An inter vivos gift of the community property by the predeceased spouse to the decedent, the court held, made this particular rule of descent inapplicable. At the date of the *McCauley* case, subdivision 9 (out of which Probate Code section 228 grew by successive stages as heretofore stated³⁵) referred to the property which had been common property of the decedent and the predeceased spouse "while such spouse was living". Counsel for the unsuccessful claimant in that case apparently relied strongly upon that clause in support of his contention that the inter vivos gift would not prevent the application of the section.³⁶ He argued that the common property mentioned included all

³² *Supra* note 16. The Commission's note also refers to the similar provision in this regard contained in section 254 of the Probate Code. The latter section (which was not changed in this respect from its predecessor, section 1394 of the Civil Code) imposes certain limitations on the right of the half blood to inherit in case the property came to the decedent "by descent, devise or gift" from one of his ancestors. Query, as to the effect of the absence of the word "bequest" in this provision.

³³ (1903) 138 Cal. 546, 71 Pac. 458.

³⁴ *Supra* note 1.

³⁵ *Supra* pp. 261-263.

³⁶ Appellant's Points and Authorities in Reply, p. 4.

property which was ever, or at any time, common property of the two spouses.³⁷ The court decided, however, that "the more reasonable construction of the words 'while such spouse was living' is, that the common property referred to must be such as remains undisposed of by such spouse at his or her death."³⁸

The wording of the provision was not changed in this respect when it was subsequently renumbered subdivision 8 of section 1386 and materially altered in the particulars hereinbefore mentioned. However, when section 1386 of the Civil Code was taken over into the Probate Code, this clause, "while such spouse was living," was omitted. No comment on the omission appears in the Code Commission's notes. Either one of two diametrically opposite conclusions as to the present meaning of the section by reason of the omission is possible. (1) The effect of the omission may be to change the rule of the *McCauley* case. This necessitates the view that the effect of the words "while such spouse was living" was definitely restrictive; that without them the community property referred to would have included property of the decedent which had been community property at any time during the existence of the marriage relationship, although it did not keep its community character throughout that relationship because the predeceased spouse subsequently made a gift of all his or her interest in it to decedent. (2) The omission may have no effect on the rule of the *McCauley* case. This necessitates the view that the words "while such spouse was living" as interpreted in the *McCauley* case did not change the meaning of the section from that which it would have had without them. That is to say, the common property referred to, whether or not qualified by the words "while such spouse was living," is that which remains undisposed of by the predeceased spouse at his or her death. The opinion in the *McCauley* case does not seem to aid materially in solving the dilemma. In view of the fact that the Code Commission, in its report submitting the proposed Probate Code to the Governor and Legislature, called attention to material changes which would be effected by its enactment, the absence of any reference by the Commission to the matter in question would seem to indicate that that body did not intend

³⁷ Appellant's Petition for Rehearing in Bank, p. 8.

³⁸ Estate of McCauley, *supra* note 33, at 549. The particular factual situation in the McCauley case was not conducive to an interpretation of the statute to include community property which the predeceased spouse had given to the decedent in the latter's lifetime. In that case the decedent's will left more than one-third of her estate to charity. A portion of the property had been community property of the decedent and her husband which he had given to her in his lifetime. She left no relatives of her own but two nieces of her predeceased husband claimed that as to this property they were her heirs, and that the will was therefore invalid as to part of the property under CAL. CIV. CODE §1313.

to abrogate the doctrine of the *McCauley* case.³⁹ It also seems probable that the Legislature did not intend to abrogate it.

It is arguable, however, that the addition of the word "gift" to the "descent, devise or bequest" clause of section 229 dealing with separate property changed by implication the meaning of section 228 dealing with community property. As hereinbefore stated, there is in section 228 no counterpart of the clause in section 229 stating the manner in which the property shall have come to decedent in order that the provisions of the section may apply. In the opinion of the supreme court in *Estate of Simonton*,⁴⁰ in which the rule of the *McCauley* case was approved, language is used which might possibly afford some slight support for the contention that a change in the enumeration of the ways in which the separate property may have come to decedent would effect a similar change as to community property.⁴¹ However, the interpretation of the provision as

³⁹ In connection with the question whether the rule of the *McCauley* case, *supra* note 33, has been changed by the difference in wording introduced by these two Probate Code sections, it would seem appropriate to call attention to the following statement in a former Commissioner's note with reference to the 1905 and 1907 amendments of subdivision 8 of section 1386 of the Civil Code: "In the second line of subdivision 8, the word 'issue' was substituted for 'kindred,' and the subdivision amended to overcome such cases as *Estate of McCauley*, 138 Cal. 546. Upon further consideration the section, as thus amended, being deemed to be still unsatisfactory, it was again amended in 1907 by entirely recasting subdivision 8." (*Notes on Certain Amendments to the Codes, 1905 and 1907*, INDEX TO THE LAW OF CALIFORNIA (1908) p. 1023.). Changes effected by the 1905 amendment in three respects have hereinbefore been referred to (*supra* pp. 261-262). They consisted of (1) the inclusion of issue of a predeceased spouse among the relatives of the latter who were entitled to succeed to the decedent's property, (2) the enlarging of the scope of the section so as to include property which had been the separate property of the predeceased spouse as well as that which had been common property of the two spouses, and (3) the substitution, referred to in the Commissioner's note, of "issue" for "kindred" in the provision "If the decedent . . . leave no kindred." After the 1905 amendment, subdivision 8 still provided, as it did when construed in the *McCauley* case, that it should be applicable to such property as "was common property of such decedent and his or her deceased spouse, while such spouse was living." The provision introduced by the amendment concerning separate property of the predeceased spouse subsequently acquired by the decedent did not affect the situation involved in the *McCauley* case, where community property became separate property of the decedent by inter vivos gift of the predeceased spouse. It would seem, therefore, that the learned Commissioner was in error if he meant, by the statement above quoted, that the 1905 amendment had changed the doctrine of the *McCauley* case that subdivision 8 is inapplicable where there had been an inter vivos gift of community property from the predeceased spouse to the decedent.

⁴⁰ (1920) 183 Cal. 53, 190 Pac. 442.

⁴¹ "This language [that of CAL. CIV. CODE §1386 (8)] is specific as to how the property must come to the decedent in order that the provision [with regard to separate property] must apply. The equivalent provision in the case of community property would be one limited to property received or retained by the survivor of the community either by will or by inheritance or by virtue of its character as community property. There is a fair presumption that upon this point the provisions with regard to community and separate property were intended to be equivalent, for no reason for a difference exists." *Estate of Simonton* (1920) 183 Cal. 53, at 58, 190 Pac. 442, at 444.

to community property by the supreme court in the *McCauley* case was made at a time when there was no provision whatsoever in the statute with reference to separate property and necessarily, therefore, no specification as to the manner in which separate property should have come to decedent, which could be applied by analogy to community property. When the provision with reference to separate property was subsequently added, it would seem that the clause "and came to the decedent from such spouse by descent, devise or bequest" was itself based on the interpretation of the provision with reference to community property made by the supreme court in the *McCauley* case. The subsequent addition of "gift" to the specified methods by which separate property may be acquired, should not, therefore, change the meaning of the statute with reference to community property.

If the general scheme of sections 228 and 229 is to be retained in our law, however, and decedent's acquisition by inter vivos gift from a predeceased spouse of what was previously separate property of the latter is to make its descent governed by the provisions of section 229, it would seem anomalous not to provide that a similar acquisition of what had previously been community property would make the descent governed by the analogous provisions of section 228. If "gift" is to be included along with "devise, descent and bequest" as a method of acquisition of separate property which calls for the application of these special rules of descent, a desirable consistency would seem to require that the property which was previously community, and is to be governed by similar special rules, should include that which the decedent acquired by gift from the predeceased spouse as well as that which the decedent received or retained by virtue of its community character on the death of the predeceased spouse. This could be effected by amending section 228 by inserting the following italicized words (in addition to the amendment to provide for the surviving spouse) so that the section would then read as follows:

"If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, *and came to the decedent by gift, devise or bequest from such spouse or belonged or went to the decedent by virtue of its community character on the death of such spouse*, such property goes in equal shares," etc.

THE EFFECT OF SECTIONS 228 AND 229 ON JOINT TENANCIES

Prior to the adoption of the Probate Code and the addition of the word "gift" to "descent, devise or bequest" when the latter phrase was taken over from subdivision 8 of section 1386 of the Civil Code, it seems clear that the special rules of descent laid down by that subdivision did not apply to property which had been held in joint tenancy by the decedent and a predeceased spouse and which vested in decedent by right

of survivorship on the death of that spouse. Whether the funds with which the spouses acquired the property held in joint tenancy were separate or community property, the joint tenancy property was the separate property of each spouse in equal shares.⁴² Whatever interest in that property may be said to have come to decedent from the predeceased spouse necessarily came either by way of gift at the time the joint tenancy was created or by right of survivorship on the death of the predeceased spouse. Neither method of acquisition, *i.e.* by gift or by right of survivorship, was within the purview of subdivision 8 of section 1386 of the Civil Code.

Section 229 of the Probate Code did not add "or by right of survivorship" to the clause "and came to the decedent from such spouse by descent, devise or bequest." It did, however, insert the word "gift," before "descent." How does this change affect a situation, for example, where property held in joint tenancy was purchased entirely with funds of the predeceased spouse? It would seem clear that on the death of the survivor, the descent of at least a one-half interest in the property is governed by section 229. So much of the property, at least, came to the decedent by gift from the predeceased spouse. But the conclusion may be reached that decedent acquired the entire property by gift from such spouse. The decision of the supreme court in *Estate of Putnam*⁴³ would seem so to indicate. In the *Putnam* case the decedent had inherited certain property from her first husband. She sold this property and invested the proceeds in stock which she had issued to herself and her second husband as joint tenants. He later transferred his interest in the stock to her and new certificates were issued in her name. On her death intestate, a daughter of the first husband by a former marriage claimed the property in opposition to the surviving second husband and other relatives of the decedent, on the ground that the property had come to decedent by descent from the first husband and was therefore within the provisions of section 229. The supreme court held, however, that this section was not applicable. The reason for its decision was that decedent's creation of the joint tenancy between herself and her second husband (who ultimately proved the survivor) had the effect, apparently, of a gift from her to him in severalty, so that when he later transferred his interest back to her, he and not the first husband was the source of her title to the property for purposes of descent.⁴⁴ In this case, of course, the question

⁴² *Siberell v. Siberell* (1932) 214 Cal. 767, 7 P. (2d) 1003.

⁴³ (1933) 219 Cal. 608, 28 P. (2d) 27.

⁴⁴ Although the court does not use the word "gift" in its opinion in the *Putnam* case, *supra* note 43, the conclusion which it reached, that the act of decedent in placing the property in joint tenancy removed it from the status it had formerly held as property inherited from her first husband, seems necessarily to rest upon a gift theory. See (1934) 22 CALIF. L. REV. 450.

was not whether the decedent had acquired property by gift but whether for the purposes of descent she had not destroyed the original title inherited from her first husband by giving the property away and later reacquiring it. But if the act of a spouse in placing property in joint tenancy with the other spouse (who proves to be the survivor) amounts to a gift of the entire property to that spouse where the question involved is one as to descent from the first spouse, to whom the surviving spouse gave the property back, it would seem to follow that the same act should have the same effect, *i.e.* of a gift, where the question involved is one as to descent from the surviving spouse, who kept the property placed in joint tenancy by the predeceased spouse.

Where the property held in joint tenancy was purchased with the separate property of each spouse in equal shares, section 229 is not applicable as to the half of the property paid for with decedent's funds. Whether that section is applicable as to the half which was paid for with the funds of the predeceased spouse, and which vested in decedent by right of survivorship, depends upon whether the theory of gift suggested by the decision in *Estate of Putnam* is followed.

Where the joint tenancy property was purchased with community funds and held in joint tenancy by consent of both spouses, the share of each spouse became the separate property of each.⁴⁵ In such a situation, under the law as stated in subdivision 8 of section 1386 of the Civil Code just prior to the adoption of the Probate Code, the supreme court held that descent from the surviving spouse was not governed by subdivision 8, for the reason that the decedent had succeeded to her husband's separate interest by right of survivorship, a method of acquisition not within the provisions of that subdivision.⁴⁶ As it has previously been attempted to point out,⁴⁷ it is problematical whether the addition of "gift" to the methods of acquisition of separate property, or the omission of the phrase "while such spouse was living" with reference to community property, in the Probate Code, has had the effect of changing the rule of the *McCauley* case and making section 228 applicable where there has been an inter vivos gift of community property to the decedent by the predeceased spouse. Even if section 228 should be construed to include cases where the property came to decedent by inter vivos gift of community property from the predeceased spouse, however, it is by no means clear that the section would be applicable to joint tenancy property purchased with community funds and acquired by decedent by right of survivorship. If the conversion of the community property into the separate property of each spouse (the share of each in the joint tenancy being separate

⁴⁵ *Siberell v. Siberell*, *supra* note 42.

⁴⁶ *Estate of Kessler* (1932) 217 Cal. 32, 17 P. (2d) 117.

⁴⁷ *Supra* pp. 273-275.

property) amounted to a gift from each spouse to the other, section 228 might apply. The preferable view, however, would seem to be that in such a case no gift was involved, but that each spouse transferred his or her interest in one-half of the property to the other spouse in consideration of the latter doing the same in favor of the former as to the other half.

If the property, instead of having been held in joint tenancy by the two spouses, was impressed with a homestead and became vested in the decedent on the death of the predeceased spouse by reason of its homestead character, situations result which are somewhat similar to those just considered in connection with joint tenancies, insofar as sections 228 and 229 are concerned. Prior to the addition of the word "gift" in section 229 when the provisions of subdivision 8 of section 1386 were taken over into the Probate Code,⁴⁸ the supreme court held that these particular rules of descent were inapplicable to property which had vested in the decedent by virtue of its homestead character.⁴⁹ The only possibility of any change in the law having resulted is through the addition of the word "gift" in section 229. Although the act of the predeceased spouse in converting his or her separate property into a joint tenancy with the decedent would seem clearly to amount to a gift to the latter of at least a half interest in the property, the argument in support of a gift in the corresponding situation where the predeceased spouse made a declaration of homestead, is obviously much weaker.

In the interest of consistency and certainty, it would seem desirable to place property which comes indirectly to the decedent from the predeceased spouse by right of survivorship in the cases of homesteads and joint tenancies on a similar basis, as far as descent from the decedent is concerned, to the property now within the rules of sections 228 and 229. To this end, it is suggested that in addition to the amendment to provide for the surviving spouse, section 229 be amended by inserting the italicized portion so that it will then read as follows:

"If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, *or became vested in the decedent on the death of such spouse by right of survivorship in a homestead or in a joint tenancy between such spouse and the decedent, such property goes in equal shares,*" etc.

Such an amendment would also settle the question suggested by the decision in *Estate of Putnam*⁵⁰ as to whether the purchase of joint tenancy property with separate funds of the predeceased spouse constitutes a gift of the entire property from such spouse to the decedent who proves to be

⁴⁸ *Supra* p. 272.

⁴⁹ *Estate of Beer* (1918) 178 Cal. 54, 171 Pac. 1062; *Estate of Simonton* (1920) 183 Cal. 53, 190 Pac. 442.

⁵⁰ *Supra* note 43.

the survivor, and thus renders section 229 applicable to the entire property. Whether or not such a gift results, the section as thus amended would be applicable by reason of the words "or became vested in the decedent by right of survivorship." It would seem unnecessary to introduce the same provision with reference to joint tenancy into section 228 which refers to community property, inasmuch as the share of each spouse in a joint tenancy is necessarily the separate property of each.⁵¹ Since community property which is selected as a homestead does not lose its community character, however, section 228 should also be amended to include a provision with reference to homesteads similar to that in the proposed amendment to section 229. It would also seem proper to include within the provisions of section 228 property which came to the decedent by being set aside as a probate homestead.⁵² As thus amended (and as also amended to provide for a surviving spouse and to include community property acquired by inter vivos gift from the predeceased spouse) section 228 would read as follows:

"If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, and came to the decedent by gift, devise or bequest from such spouse, or belonged or went to the decedent by virtue of its community character on the death of such spouse, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead, or was set aside to the decedent as a probate homestead, such property goes in equal shares," *etc.*

SHOULD SECTIONS 228 AND 229 BE REPEALED?

Amendment of Probate Code sections 228 and 229 along the lines hereinbefore indicated, so as (1) to give a surviving spouse of decedent a share in decedent's property, (2) to provide for a fair apportionment of the community property between the relatives of the decedent and those of the predeceased spouse in case the latter exercised the power of testamentary disposition, (3) to place inter vivos gifts of both community and separate property between the spouses on a similar basis in so far as the applicability of the particular rules of descent laid down by these code sections is concerned, and (4) to make these rules applicable when

⁵¹ *Siberell v. Siberell*, *supra* note 42; *Estate of Kessler*, *supra* note 46.

⁵² Since separate property of the deceased spouse cannot be set aside as a probate homestead for a longer period than the life of the surviving spouse, there is no interest in such homestead capable of being transmitted on the latter's death. CAL. PROB. CODE §661. If, however, the homestead is set aside out of community property, there is such a transmissible interest. CAL. PROB. CODE §667. There would seem to be no reason for excluding property which came to the decedent in this particular manner from the rules of descent imposed by section 228 for the property which came to the decedent in other so similar ways. Perhaps other property exempt from execution, *e. g.* the proceeds of life insurance, which the court might set aside to the surviving spouse under CAL. PROB. CODE §660, should also be included within the provisions of sections 228 and 229.

the property vests in the decedent on the death of the predeceased spouse by right of survivorship in a homestead or joint tenancy as well as when it comes from such spouse by gift, descent, devise or bequest, will eliminate most of the unfairness and inconsistency of these rules of descent as they now exist.⁵³

It should be considered, however, whether the complete elimination of these code sections from our rules of descent might not be preferable to their amendment along the lines indicated. They seem to represent an extreme application of the old common law rule as to the descent of ancestral property which is being looked upon with increasing disfavor in the states where it still exists.⁵⁴ At common law, collateral relatives of the person last seised were entitled to inherit only when they were of the blood of the first purchaser, by whom the land was brought into the family.⁵⁵ For example, if the decedent inherited the property from a

⁵³ Attention should be directed to another situation which occasionally occurs and is not within the provisions of sections 228 and 229 as they now exist or of the amendments suggested. In certain states the common law dower right of a surviving wife has been enlarged from a life interest to a fee simple. It has frequently been held, however, that this enlarged interest is still in the nature of dower and does not come to the wife by descent. See 1 TIFFANY, REAL PROPERTY (2d ed. 1920) 825. Suppose land in another state is acquired by a surviving wife in this manner on her husband's death. She subsequently sells the land and reinvests the proceeds in personal property, or in land situated in California. If she dies domiciled in California, her personal property is subject to the California law of descent. Her California land is subject to that law regardless of her domicile. Nevertheless section 229 of the Probate Code is not applicable in either case because the property did not come to the decedent from her predeceased husband by "gift, descent, devise or bequest." *Pickens v. Merriam* (C. C. A. 9th, 1921) 274 Fed. 1. However, does not the situation fall with the "equity" of the statute—if there be any "equity" in it?

⁵⁴ "If experience means anything, the ancestral distinction has been weighed in the balances and found wanting. Is it not time to remove it from our [Ohio] code and enact in its place a simple, workable statute of descent?" Simes, *Ancestral and Non Ancestral Realty* (1928) 2 U. OF CINN. L. REV. 387, at 408.

"However, the ancestral property doctrine is a waning one." Atkinson, *Succession Among Collaterals* (1935) 20 IOWA L. REV. 185, at 199.

"At present it may often happen [in North Carolina] that purchased property will go to one set of heirs, while ancestral or descended property will go to another set. This situation cannot be justified if it be admitted that the purpose of the law is simply to carry an intestate's property to those dearest to him in an effort to provide for those who probably would have been the objects of his bounty had he expressed his wishes in the matter." McCall & Langston, *A New Intestate Succession Statute for North Carolina* (1933) 11 N. C. L. REV. 266, at 279-280.

"Our [New York] statute of descent is undesirable . . . It complicates title by requiring an investigation in certain cases, of the source of an inheritance or gift of the real estate and whether from the father's or mother's side of the family." REPORT OF THE COMMISSION TO INVESTIGATE DEFECTS IN THE LAWS OF ESTATES, submitted to New York Legislature of 1928, Combined Reports 1928-1933 (Reprint, 1935) p. 14. The recommendations of the commission were subsequently adopted by the legislature, so that the source of the decedent's title is no longer material in determining descent in New York. See note 57, *infra*.

⁵⁵ 2 BL. COMM. 220; 2 TIFFANY, *op. cit. supra* note 53, 1902.

maternal uncle who had acquired it by purchase, only the collateral relatives of the decedent on his mother's side would be entitled to inherit the property. A similar rule is, or was, to be found in the statutes of certain states which provide that, if the land came to the decedent by gift, devise or descent from a particular parent or from an "ancestor,"⁵⁶ only such of decedent's kindred as are related to that parent or "ancestor" are entitled to inherit the property.⁵⁷ Such a scheme for the descent of so-called ancestral property is probably not in accord with what the average intestate would have desired.⁵⁸ The chief objection to it, how-

⁵⁶ "The term ancestor used in these statutes is not to be understood as applicable only to progenitors in the usual acceptation, but in its technical significance, one from whom an estate came directly—not mediately—to the intestate by gift, devise or descent." WOERNER, *THE AMERICAN LAW OF ADMINISTRATION* (3d ed. 1923) §73. There is authority for interpreting "ancestor" as used in such a statute as including a spouse from whom the property in question was inherited. *Cornett v. Hough* (1893) 136 Ind. 387, 35 N. E. 699. See (1927) 16 CALIF. L. REV. 162, commenting on *Estate of Edwards* (1927) 202 Cal. 130, 259 Pac. 440, where the court found it unnecessary to pass upon the question whether under the provisions of section 1394 of the Civil Code a husband might be the "ancestor" of his surviving wife. *Cf. Brower v. Hunt* (1868) 18 Ohio St. 311 and *Stembel v. Martin* (1893) 50 Ohio St. 495, 35 N. E. 208, where it was held that under the system of descent provided for by the statutes there under consideration one spouse was not the "ancestor" of the other.

⁵⁷ *E. g.* NORTH CAROLINA CODE (Michie, 1935) §1654, rule 4; NEW YORK DECEDENT ESTATE LAW (1909) §§84, 85 and 88. Material changes in the New York laws of inheritance were made by amendments to the DECEDENT ESTATE LAW by L. 1929, ch. 229, as amended by L. 1930, ch. 174, so that the doctrine of ancestral property is no longer a part of the laws of descent of that state.

At the present time the most common form of statute providing special rules of descent for ancestral property is probably that with regard to the right of relatives of the half blood to inherit. Note (1932) 42 YALE L. J. 101, 104. California has such a statute in section 254 of the Probate Code which provides:

"Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance in favor of those who are."

⁵⁸ In addition to causing property to descend in a different manner than the majority of decedents who die intestate would have preferred, the complicated scheme set up by subdivision 8 of section 1386 of the Civil Code and continued in the Probate Code has occasionally been responsible for the thwarting of a testator's wishes. A disposition in a will of the residue of the estate to "my heirs" is not uncommon. Not only have relatives of a predeceased spouse been held entitled under this designation, but oral declarations to show that the testator intended to refer to his own relatives, only, have been excluded. *Estate of Watts* (1918) 179 Cal. 20, 175 Pac. 415, (1921) 186 Cal. 102, 198 Pac. 1036. Technical justification for such a result probably exists in section 1334 of the Civil Code (now section 108 of the Probate Code) which provides that a testamentary disposition to "heirs" of any person, without other words of qualification, when used as words of donation, vests the property in those entitled to succeed to the property of such person according to the provision of the code on succession. A questionable application of this principle, however, was made in *Estate of Page* (1919) 181 Cal. 537, 185 Pac.

ever, seems to be the complexities which it introduces from an administrative standpoint and the general undesirability of having the descent of property depend upon the particular way in which it was acquired by the decedent.⁵⁹ The administrative complexities are greatly multiplied by the form which the scheme has taken in California under subdivision 8 of section 1386 of the Civil Code and sections 228 and 229 of the Probate Code. At common law and in other states recognizing the doctrine of ancestral estates, a sale or exchange of the land extinguishes its ancestral character and the land subsequently purchased with the proceeds of the sale or acquired in exchange, is not regarded as ancestral.⁶⁰ Furthermore, the doctrine is not usually applicable to personal property.⁶¹ In California, however, the rule of these two Code sections applies not only to both the real and personal property originally acquired by the decedent in the specified manner, but also to all property of either kind into which that originally acquired may have been subsequently converted.⁶² The difficulties of the task with which attorneys and courts are thus confronted after the death of both spouses of tracing the funds into which the property has been invested and re-invested are readily apparent.

There is apparently nothing in the community property system which necessitates the rules of descent laid down by sections 228 and 229 of the Probate Code. While California has always had the law of community property, the principle of these Probate Code sections was not introduced into our law until 1905.⁶³ With the exception of New Mexico,⁶⁴ none of

383, where the testatrix's will provided that in the event that her husband should predecease her, one-fourth of the residue of her estate should go to his lawful heirs "and the balance, after deducting said one-fourth, to be equally divided among my lawful heirs." A portion of the estate had been community property of the testatrix and her predeceased husband and another portion had been separate property of the latter. As to both these classes of property the court held that the words "my lawful heirs" used in the will were to be interpreted according to the provisions of subdivision 8 of section 1386 of the Civil Code. The result was that instead of the husband's relatives receiving only one-fourth of the property, as the testatrix probably intended, they took all the property which had originally been separate property of the predeceased husband and five-eighths of that which had been community property of the testatrix and the predeceased husband. In this case, did not the testatrix's gift of one quarter of her property to her husband's heirs constitute a "qualification," within the meaning of Civil Code §1334 of the words "my heirs," to whom she gave the remaining three quarters?

⁵⁹ Note (1932) 42 YALE L. J. 101, 102.

⁶⁰ Note (1912) 12 COL. L. REV. 625; 2 TIFFANY, *op. cit. supra* note 53, 1905.

⁶¹ WOERNER, *THE AMERICAN LAW OF ADMINISTRATION* (3d ed. 1923) §73.

⁶² Estate of Brady (1915) 171 Cal. 1, 151 Pac. 275.

⁶³ *Supra*, p. 262.

⁶⁴ In 1927 New Mexico apparently copied practically verbatim into its law of descent the provisions of subdivision 8 of section 1386 of the California Civil Code. Laws of New Mexico, 1927, p. 424. As this was prior to the date of the decision in Estate of McArthur (1930) 210 Cal. 439, 292 Pac. 469, the New Mexico courts should not be fettered by the precedent of the interpretation of the phrase "if the deceased is a widow or widower" in the California decision.

the other states⁶⁵ in which the community property system exists have any such rules of descent. The property rights of a surviving spouse must necessarily be determined by the law of community property, where that system exists. But on the death of the surviving spouse, the community property system does not require that the circumstance that the property came to the decedent from the predeceased spouse, either as community or as separate property, be a material factor in determining its descent from the decedent.

It seems to be a characteristic of the community property system, however, that on the death of one spouse the entire property, under certain circumstances, vests in the surviving spouse to the entire exclusion of other close relatives of the decedent. Because of this fact there is perhaps more justification for special rules for the descent of such property on the death of the surviving spouse than there is in the case of inherited property generally. In at least one situation, the rules of descent of sections 228 and 229 effect a very equitable result under the present California law of community property, and in spite of the complexities which they introduce, to repeal them entirely would seem undesirable as long as one feature of the community property law remains as it is. That law now provides that on the death of either spouse without a will, the entire community property belongs to the surviving spouse, and makes no provision for issue of the decedent.⁶⁶ Where such issue are children by a former marriage, it is only by reason of section 228 that they have any chance of succeeding to the property on the death of the surviving spouse. The rule of this section constitutes, of course, a very inadequate provision in their behalf. Their rights are contingent upon the surviving spouse not having willed the property to others and not having left any issue of his or her own. Such a provision, nevertheless, seems decidedly preferable to bestowing the property upon remote relatives of the surviving spouse on the latter's death, to the entire exclusion of the issue of the predeceased spouse. If it should be desired to retain simply this provision for issue of the predeceased spouse, sections 228 and 229 might be combined to read as follows:

⁶⁵ Arizona, Idaho, Louisiana, Nevada, Texas and Washington. In Idaho the original subdivision 9 of section 1386 of the California Civil Code (see note 1, *supra*) was apparently taken over as subdivision 8 of section 5702 of the Idaho Revised Statutes of 1887. This provision was subsequently amended (*Ibid.* Session Laws 1907, p. 339) so as to place both parents on an equal basis instead of giving a preference to the father. As previously pointed out (*supra* p. 261) a statute of this nature is simply a last resort before escheat and is a far cry from sections 228 and 229 of the Probate Code. It might also be noted that the Idaho statute, unlike the California act as subsequently amended, makes no provision for any issue of the predeceased spouse.

⁶⁶ CAL. PROB. CODE §201.

"If the decedent leaves neither spouse nor issue and the estate or any portion thereof was community property of the decedent and a previously deceased spouse or separate property of a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from such spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead or in a joint tenancy between such spouse and the decedent, or was set aside to the decedent as a probate homestead, such property goes in equal shares to the children of the predeceased spouse and to their descendants by right of representation. If the decedent leaves a spouse but no issue, one-half of such property goes to the spouse and the other half goes to the children of the deceased spouse and to their descendants by right of representation."

It is not essential that property which has been separate property of the predeceased spouse be included in the above provision. When the first spouse dies intestate, all his or her separate property does not vest in the surviving spouse. Unlike the community property, part of it goes to the issue of the decedent. They are not, therefore, as in the case of the community property, dependent upon this rule of descent for a share in property. The inclusion of separate property within the rule, however, does not seem unfair, and has the advantage from an administrative standpoint of making it unnecessary to distinguish as to whether the property in question was community or separate property, so long as it was received by the decedent in any of the specified ways from the predeceased spouse.

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