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## Rights of a Surviving Spouse in Property Acquired by a Decedent While Domiciled Outside California\*

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The major portion of the burgeoning population of California consists of persons who have migrated to this state from other parts of the country. Statistics show that "Most Californians came to this state from somewhere else."<sup>1</sup> And most of these migrants have been married adults.<sup>2</sup> These facts have created a problem concerning the treatment by the law of this state of the marital property rights of such spouses in property owned by them when they came here. This problem has occupied the attention of the California Legislature and courts for a period of more than forty years. The latest enactments concerning this subject were a series of statutes adopted by the 1957 Legislature upon the recommendation of the Cali-

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<sup>1</sup> COMMONWEALTH CLUB, THE POPULATION OF CALIFORNIA 130 (1946); THOMPSON, GROWTH AND CHANGES IN CALIFORNIA'S POPULATION 67 (1955); United States Census of Population, Report P-E, No. 4A, p. 15 (1958) (Table 8).

<sup>2</sup> The percentage of migrants who are married has been estimated as high as 78% in some areas of the state. See COMMONWEALTH CLUB, THE POPULATION OF CALIFORNIA 125 (1946) (Table 49 and text), discussing wartime influx of married couples.

fornia Law Revision Commission.<sup>3</sup> It is the purpose of this article to discuss the effect of these statutes and to suggest in some instances possible improvements in them.

## I. INTRODUCTION

The basic problem concerning the marital property rights of persons moving to California from other jurisdictions is created by the inadequacies of the theories of conflict of laws as formulated and applied by the courts in this area.

In almost all of the common law jurisdictions in this country, a husband or wife is given extensive and valuable marital rights in property acquired by the other. At the time of a survey made in 1952, 38 of the 40 non-community property states granted the wife a non-barrable interest in the husband's real property upon his death, which in 21 of these states amounted to a fee interest in from one-fourth to one-half of such real property.<sup>4</sup> Similarly, 31 of the 40 non-community property states granted the wife a non-barrable interest in the husband's personal property upon his death, which in 23 of these states amounted to a fee interest in from one-fourth to one-half of such personal property.<sup>5</sup> Slightly fewer of the non-community property states granted similar rights and interests in favor of a husband with respect to property acquired by his wife.<sup>6</sup>

However, when a married person acquired property in a non-community property state and the spouses subsequently moved their domicile to California, it was held that the surviving spouse could no longer claim these rights granted by the law of the domicile at the time of acquisition. The reason for this was that such rights are characterized by the courts as rights of "succession." The conflict of laws rule is that succession to movable property is governed by the law of the last domicile of the decedent. Since in this case the last domicile was in California, the rights granted by the law of the former domicile were destroyed as a result of the subjection of the property to the jurisdiction of California.<sup>7</sup> Also, if such property were invested in real property in California, the law of California as the *situs* of the immovable property governed the succession thereto, and the same result followed.

On the other hand, the rights of one spouse with respect to property acquired by the other spouse under California law, which comprise the

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<sup>3</sup> Cal. Stat. 1957, ch. 490. See CALIFORNIA LAW REVISION COMM'N, RECOMMENDATION AND STUDY RELATING TO RIGHTS OF SURVIVING SPOUSE IN PROPERTY ACQUIRED BY DECEDENT WHILE DOMICILED ELSEWHERE (Dec. 20, 1956) [hereinafter cited as RECOMMENDATION AND STUDY].

<sup>4</sup> MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 40-41 (1952).

<sup>5</sup> *Id.* at 42-43.

<sup>6</sup> *Id.* at 56-58.

<sup>7</sup> Estate of O'Connor, 218 Cal. 518, 23 P.2d 1031 (1933).

community property interest, are characterized for conflict of laws purposes as "marital property" rights. The conflict of laws rule is that marital property rights in movable property are governed by the law of the domicile of the spouses at the time of acquisition of the property, and that the subsequent exchange of such movable property for other property, movable or immovable, does not change these rights. Therefore, it was held that no California community property interest would exist with respect to property traceable to movable property originally acquired while the spouses were domiciled in a foreign, non-community property jurisdiction.<sup>8</sup>

A similar problem existed concerning real property in California acquired by non-resident spouses who never moved their domicile to California. Since succession to immovable property is governed by the law of the *situs*, the marital rights under the law of the spouses' domicile (which existed with respect to the property constituting the *purchase price* for the California land) were held to be destroyed by the investment of the personal property in California realty.<sup>9</sup> On the other hand, despite the purported rule that the law of the *situs* governs marital property interests in immovables,<sup>10</sup> the nature of the California realty as separate or community was determined under the "tracing doctrine" by the nature of the consideration paid for it.<sup>11</sup> Since by hypothesis this was the property of a married person in a non-community property state, it would be separate property.

As a result of these doctrines, a spouse could claim neither the rights granted by the law of California nor the rights granted by the law of the original domicile with respect to these categories of property. In other words, even though both jurisdictions involved attempted to give a spouse protection with respect to property acquired by the other, such protection was lost merely because the couple moved from the first jurisdiction to the second.

The situation was generally recognized as involving an injustice which

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<sup>8</sup> Estate of Drishaus, 199 Cal. 369, 249 Pac. 515 (1926); Estate of Nickerson, 187 Cal. 603, 203 Pac. 106 (1921); Estate of Frees, 187 Cal. 150, 201 Pac. 112 (1921); Estate of Boselly, 178 Cal. 715, 175 Pac. 4 (1918); Estate of Niccolls, 164 Cal. 368, 129 Pac. 278 (1912); Estate of Burrows, 136 Cal. 113, 68 Pac. 488 (1902); Estate of Higgins, 65 Cal. 407, 4 Pac. 399 (1884); Estate of Bruggeneyer, 115 Cal. App. 525, 2 P.2d 534 (1931).

<sup>9</sup> Estate of Arms, 186 Cal. 554, 199 Pac. 1053 (1921); Estate of Warner, 167 Cal. 686, 140 Pac. 583 (1914); *Melvin v. Carl*, 118 Cal. App. 249, 4 P.2d 954 (1931).

<sup>10</sup> RESTATEMENT, CONFLICT OF LAWS § 238 (1934).

<sup>11</sup> Cases cited note 9 *supra*. See also *Stephen v. Stephen*, 36 Ariz. 235, 284 Pac. 158 (1930); *Heirs of Dohan v. Murdock*, 41 La. Ann. 494, 6 So. 131 (1889); *Thayer v. Clarke*, 77 S.W. 1050 (Tex. Civ. App. 1903), *aff'd*, 98 Tex. 142, 81 S.W. 1274 (1904); *Brookman v. Durkee*, 46 Wash. 578, 90 Pac. 914 (1907). Some earlier cases were to the contrary, but they have been overruled. *Bryan & Wife v. Moore's Heirs*, 11 Mart. (o.s.) 26 (La. 1822); *Heidenheimer v. Loring*, 6 Tex. Civ. App. 560, 26 S.W. 99 (1894); *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925 (1892).

required legislative correction. Presiding Justice Peters, for example, stated in *Estate of Way*:

If property is acquired in a common law state by a husband from his earnings it is his sole property, but his wife has certain very important rights in the property known as dower rights. Prior to 1917 it had been established that, if such a couple, after so acquiring marital property, became domiciled in California, and brought the property with them, the property remained the sole and separate property of the husband, but the rights of the husband became much greater than they were in the common law state in that the wife's dower rights were entirely lost.<sup>12</sup>

In our further discussion of the attempts of the California courts and Legislature to solve this problem, for the purpose of clarity we will assume in all cases that it is the wife who is claiming some interest in the property of the husband, since this is the usual situation. However, it should be recognized that all of the legal rules discussed apply equally, unless otherwise stated, where the husband is claiming some interest in the property acquired by the wife.

## II. BACKGROUND OF THE 1957 LEGISLATION

The California Legislature first attempted to deal with the problem which we are discussing by an amendment in 1917 to Section 164 of the Civil Code, which defines community property. That section was amended to include in the definition of community property "real property situated in this State and personal property wherever situated, acquired [by either husband or wife] while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State."<sup>13</sup> The California Supreme Court, after first holding that this statute could not be applied retroactively to the property of married persons moving here prior to its enactment<sup>14</sup> even though the Legislature expressly attempted to make it applicable,<sup>15</sup> finally held in *Estate of Thornton*<sup>16</sup> that the statute was unconstitutional even as applied to property brought to the state by spouses moving here after 1917. The Supreme Court held that the attempt by the state to give the wife a community property interest in the separate property of the husband acquired in the foreign jurisdiction invaded his vested rights in such property and constituted a violation of both the due process clause and the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution. The court also

<sup>12</sup> 157 P.2d 46, at 49-50 (Cal. App. 1945). See also, *Estate of Allshouse*, 13 Cal. 2d 691, 699, 91 P.2d 887, 891 (1939).

<sup>13</sup> Cal. Stat. 1917, ch. 581, § 1.

<sup>14</sup> *Estate of Frees*, 187 Cal. 150, 201 Pac. 112 (1921).

<sup>15</sup> *Estate of Drishaus*, 199 Cal. 369, 249 Pac. 515 (1926); Cal. Stat. 1923, ch. 360, § 1.

<sup>16</sup> 1 Cal. 2d 1, 33 P.2d 1 (1934).

held that the state had no power to exact of the husband a surrender of his vested property rights as a condition of permitting him to move to California.

*Estate of Thornton* involved only personal property and there is some question whether it invalidated the 1917 enactment as applied to real property purchased by the husband in California with his separate property acquired in the foreign jurisdiction.<sup>17</sup> The argument can be made that in view of the traditionally greater power of a state with respect to the ownership of real property within its boundaries, the 1917 enactment could be constitutionally applied to transform such real property from the separate property of the husband to community property. However, the bar and the courts have apparently assumed since the decision of *Estate of Thornton* that the 1917 enactment is a dead letter with respect to real as well as personal property.<sup>18</sup>

At its first session following the decision of *Estate of Thornton*, the Legislature in 1935 added a new Section 201.5 to the Probate Code (hereinafter "section 201.5") providing that upon the death of the husband or wife "one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, shall belong to the surviving spouse" and only the other one-half should be subject to the decedent's testamentary disposition.<sup>19</sup> This enactment adopted the suggestion of Justice Langdon in his dissenting opinion in *Estate of Thornton* that the Legislature could at least regulate the succession of property acquired in the foreign jurisdiction as though it were community property, since a state has plenary power to regulate the succession to property owned by its domiciliaries within its borders.<sup>20</sup>

Two major problems arose as to the construction of section 201.5 in its original form. This section referred only to "personal property," whereas the 1917 enactment—for which this section was intended at least in part as a substitute—had referred to both "real property situated in this State and personal property wherever situated." The California Supreme Court

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<sup>17</sup> See the statement by Burby in CONTINUING EDUCATION OF THE BAR, FAMILY LAW FOR CALIFORNIA LAWYERS 378 (1956).

<sup>18</sup> *In re Miller*, 31 Cal. 2d 191, 187 P.2d 722 (1947); *Estate of Jenkins*, 110 Cal. App. 2d 98, 242 P.2d 107 (1952); see *Tomaier v. Tomaier*, 23 Cal. 2d 754, 759, 146 P.2d 905, 908 (1944).

<sup>19</sup> Cal. Stat. 1935, ch. 831, § 1.

<sup>20</sup> See *Estate of Thornton*, 1 Cal. 2d 1, 5, 33 P.2d 1, 3 (1934) (dissenting opinion); and *In re Miller*, 31 Cal. 2d 191, 196, 187 P.2d 722, 725 (1947). "Since the right of inheritance is not an inherent or natural right but one which exists only by statutory authority, the law of succession is entirely within the control of the Legislature." *Estate of Perkins*, 21 Cal. 2d 561, 569, 134 P.2d 231, 236 (1943).

in *In re Miller*<sup>21</sup> held that this omission rendered section 201.5 inapplicable to real property in California purchased by the husband with personal property acquired while the spouses were domiciled elsewhere. The California Supreme Court rejected the argument which had been successfully advanced in *Estate of Way*<sup>22</sup> that the phrase "personal property" referred to the character of the property at the time it was acquired in the foreign jurisdiction. It held that this phrase referred to the character of the property at the time of the death of the husband in California. As a result of this decision, a husband could evade the protection given to the wife by section 201.5 simply by investing his wealth in real property.

Section 201.5 also provided in its original form that "Upon the death of *either* husband or wife" one-half of the property subject to that section "acquired after marriage by *either* husband or wife . . . is subject to the testamentary disposition of the decedent. . . ." This wording apparently attempted to give to the wife a power to dispose by her will of one-half of the husband's separate property acquired in the foreign jurisdiction when the wife pre-deceased the husband. This attempt to take one-half of the husband's separate property and give it to the testamentary beneficiaries of the wife seemed to be subject to the same constitutional objections which the court had upheld in *Estate of Thornton*.<sup>23</sup> Shortly after the 1957 revision of section 201.5, the District Court of Appeal held this application of the original statute to be unconstitutional in *Paley v. Bank of America*.<sup>24</sup>

### III. SECTIONS 201.5 AND 201.7

The Legislature in 1957 enacted a bill designed to clarify and revise section 201.5 and to deal with related problems.<sup>25</sup> The two basic sections in the new legislation dealing with the rights of a wife in the estate of a husband dying domiciled in California, in which some of the property consists of property acquired while they were domiciled in another jurisdiction, are the revised Section 201.5 and a new Section 201.7 of the Probate Code. These sections now read as follows:

*Section 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 (a) acquired by the decedent while domiciled elsewhere which would have been the community

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<sup>21</sup> 31 Cal. 2d 191, 187 P.2d 722 (1947).

<sup>22</sup> 157 P.2d 46 (Cal. App. 1945). This case was settled after a hearing had been granted by the Supreme Court, and therefore it was never officially reported.

<sup>23</sup> Note 16 *supra*.

<sup>24</sup> 159 Cal. App. 2d 500, 324 P.2d 35 (1958).

<sup>25</sup> Cal. Stat. 1957, ch. 490.

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. 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.

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

The revised language of section 201.5 as quoted above was intended to solve the two major problems arising under the old section. No attempt is made in the new section to give the wife a power of testamentary disposition over any of the husband's separate property when she dies first. The section applies only to restrict the testamentary power of the decedent over "property in his estate," and does not attempt to give any testamentary power over such property to anyone else. Also, the section has been expanded to include "real property situated in this State" as well as personal property. It thus effectively overrules *In re Miller*.<sup>26</sup>

Naturally, certain problems will arise concerning the construction of the new wording of section 201.5. Most of these problems would have arisen also under the old wording.

One of the questions which probably should have been specifically covered in the new statute is the question whether section 201.5 applies to the *income* from property acquired in the foreign jurisdiction which accrues after the property is brought to California. The statute includes within its scope any real or personal property in California "acquired in exchange for" any property acquired during marriage in the foreign jurisdiction and not by gift, devise, or descent. It would probably have been better to refer to property "derived from" the foreign acquired property, since that language would clearly include both property exchanged for the original capital and also the income from the original capital. However, it is believed that the purpose of the legislation to give full protection to the wife and the traditional tendency of the California courts in the case of community and separate property to insist that the income from property should be given the same characteristics as the property itself<sup>27</sup> will lead the courts to hold that the present wording of the statute includes such income within its scope.

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<sup>26</sup> Note 21 *supra*.

<sup>27</sup> *George v. Ransom*, 15 Cal. 322 (1860); *Boyd v. Oser*, 23 Cal.2d 613, 145 P.2d 312 (1944).

The present statute also does not answer the question of what rights, if any, a "putative wife" may have under this section. Even in the absence of any statutory provision, the California courts have granted to such a putative wife "quasi community property rights" equivalent to the rights of a lawful wife<sup>28</sup> and furthermore have granted to her the rights of inheritance of a lawful wife.<sup>29</sup> In view of these judicial decisions reached without the aid of any specific statute, the courts will probably hold that a putative wife may claim under section 201.5 in the same way as a lawful wife.

The statute also does not make any specific provision regarding the effect on a wife's rights under section 201.5 of the permanent separation of the spouses, her abandonment of the husband, a decree of separate maintenance, or an interlocutory decree of divorce. Specific statutes have been enacted in California taking away the wife's community property interest in the subsequent earnings of the husband after she has abandoned him,<sup>30</sup> taking away the community property interest of the husband in the wife's subsequent earnings and accumulations after they are permanently separated,<sup>31</sup> and taking away the community property interest of each spouse in the subsequent earnings and accumulations of the other after a decree of separate maintenance.<sup>32</sup> In view of the necessity for these specific statutory enactments to effect any forfeiture of community property rights by virtue of marital misconduct or the break up of the marriage, it is probable that the courts will hold that only a final decree of divorce terminates the wife's right of election under section 201.5. It would probably be desirable for the Legislature to consider including a spouse's right of election under section 201.5 within the scope of the forfeiture sections mentioned above.

There is also no specific provision in section 201.5 concerning the presumption to be indulged with respect to the character of the property which assertedly is subject to that section. For example, if the husband inherits substantial property and also acquires substantial property in the foreign jurisdiction by virtue of his earnings during marriage, but it is impossible after his death subsequent to the removal of the spouses to California to prove exactly how much of his estate is derived from each of these sources, will the property in the estate be presumed to have been acquired during marriage otherwise than by gift, devise, or descent, as would be true in the case of a decedent always domiciled in California,<sup>33</sup> or will the surviving

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<sup>28</sup> *Schneider v. Schneider*, 183 Cal. 335, 191 Pac. 533 (1920).

<sup>29</sup> *Feig v. Bank of America*, 5 Cal. 2d 266, 54 P.2d 3 (1936); *Kunakoff v. Woods*, 166 A.C.A. 56, 332 P.2d 773 (1958).

<sup>30</sup> CAL. CIV. CODE § 175.

<sup>31</sup> CAL. CIV. CODE § 169; *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313 (1910); *Christiana v. Rose*, 100 Cal. App. 2d 46, 222 P.2d 891 (1950); *Makeig v. United Security Bank & Trust Co.*, 112 Cal. App. 138, 296 Pac. 673 (1931).

<sup>32</sup> CAL. CIV. CODE § 169.1.

<sup>33</sup> *Meyer v. Kinzer*, 12 Cal. 247 (1859).

wife asserting a right under section 201.5 have the burden of proving what portion of the estate is subject to her claim? It would seem that the wife should have the benefit of such a presumption, but it is doubtful whether the courts will be willing to establish it without specific statutory authority.

The revised section also fails to specify whether the right of election is personal to the surviving wife or whether it survives to the personal representative of the surviving wife in the case of her death prior to distribution of the husband's estate. In *Estate of Schnell*<sup>34</sup> the court assumed that the right of election under former section 201.5 would pass to the personal representative of the surviving wife, as in the case of community property,<sup>35</sup> but it would seem that this analogy is rather doubtful.

The new section 201.7 establishes a specific requirement that the wife elect to take property to which she is entitled under section 201.5, or to take under the will of the husband if he has made some provision for her. Consequently, she will have to give up any provision for her in the will in order to assert her rights under section 201.5. This specific requirement of election was considered necessary in view of the fact that the similar requirement of election in the case of community property is based upon the legal principle that any beneficiary under a will which purports to dispose of property belonging to the beneficiary must elect either to take under the will and permit his property to pass pursuant thereto, or to renounce the will and reclaim his property.<sup>36</sup> Since the wife is considered to be in some sense the owner of one-half of the community property, an attempt by the husband to dispose of all the community property by his will rendered this legal principle applicable.<sup>37</sup> However, the wife has no interest in the husband's section 201.5 property prior to his death. If the husband attempted to will all of his section 201.5 property to a third person and at the same time willed all of the community property to his wife, she might be able to take under the will and also to take one-half of the section 201.5 property against the will, in the absence of a specific requirement of election.<sup>38</sup>

While the doctrine of election as set forth in section 201.7 with respect to foreign acquired property is substantially identical with that applied in the case of community property, the practical operation of the two will probably be different because of California doctrines relating to the construction of wills. In a case where a husband in general terms purports to devise and bequeath one-half of "all of my property" or "all of my estate"

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<sup>34</sup> 67 Cal. App. 2d 268, 154 P.2d 437 (1944).

<sup>35</sup> *Estate of Kelley*, 122 Cal. App. 2d 42, 264 P.2d 210 (1953).

<sup>36</sup> Annots., 60 A.L.R.2d 736 (1958); 60 A.L.R.2d 789 (1958); 156 A.L.R. 820 (1945).

<sup>37</sup> *In re Smith*, 108 Cal. 115, 40 Pac. 1037 (1895); *Morrison v. Bowman*, 29 Cal. 337 (1865).

<sup>38</sup> RECOMMENDATION AND STUDY, p. E-28.

to his wife and the other one-half to his children or other third persons, the California courts have held that the will must be interpreted as applying only to his one-half of the community property, since the other one-half belongs to the wife. Therefore, the wife can take her one-half of the community property unaffected by the will and take one-half of the other one-half pursuant to the husband's testamentary disposition.<sup>39</sup> The doctrine of election never comes into play because the husband's will, as interpreted, does not attempt to dispose of the wife's one-half of the community property.

However, it would be difficult to hold that a disposition by the husband of "all of my property" does not include all of his foreign acquired property, since it all *was* his property until the moment of his death and the wife had no *inter vivos* interest therein. Therefore, if the husband owns \$100,000 of community property and \$100,000 of section 201.5 property, and he devises and bequeaths one-half of "all of my property" to his wife and the other one-half to his children, the wife under the above-mentioned authorities can take one-half of the community property outside of the estate and one-fourth of the community property under the will, or a total of three-fourths of the community property. On the other hand, she would probably be required under the terms of section 201.7 to take only one-half of the section 201.5 property under the will or to renounce all provision for her in the will (including the one-fourth of the community property) in order to take one-half of the section 201.5 property against the will. Clearly in such a case it would be to the wife's advantage to take under the will; and she would be entitled thereunder to three-fourths of the community property but probably to only one-half of the section 201.5 property.

If, as seems highly probable to us, the average testator in this case would have intended that his wife get only \$100,000 not \$125,000, then the Legislature should consider the modification of this doctrine relating to the interpretation of wills disposing of community estates.

#### IV. SECTION 201.8

Statutes in the common law states granting a non-barrable share to a surviving wife in the personal property of a deceased husband generally apply in terms only to property owned by him at death and not to property transferred by him *inter vivos*. This means that a husband during coverture can generally, without the consent of his wife, dispose freely of all of his personal property since the wife has no interest in it until his death. However, in order to protect the surviving wife against gratuitous *inter vivos*

<sup>39</sup> Estate of Rossi, 169 Cal. 148, 146 Pac. 430 (1915); Estate of Prager, 166 Cal. 450, 137 Pac. 37 (1913); cf. Estate of Dargie, 179 Cal. 418, 177 Pac. 165 (1918); Estate of Vogt, 154 Cal. 508, 98 Pac. 265 (1908); see 6 U.C.L.A.L. Rev. 178 (1959).

transfers by the husband which deplete the estate in which she can claim a non-barrable share, the courts in the common law states have developed rules of law permitting her to claim her statutory share in some property so transferred, based on the test of whether the transfer in question was made by the husband "in fraud of" the marital rights of his surviving wife.<sup>40</sup> There has been no uniformity in the decisions in those states as to the criteria for determining when a particular gratuitous transfer is "in fraud of the wife's rights." The cases fall generally, however, into two categories.

One line of decisions turns on whether the transfer was made with the intent to cut off the non-barrable interest of the wife. If the court finds collusion or fraudulent intent on the part of the husband to deprive the wife of her share, the transfer will be held to be in fraud of the wife's rights even though no strings were retained on the property by the husband. In these states—for example, Kentucky,<sup>41</sup> Missouri,<sup>42</sup> and New Hampshire<sup>43</sup>—it is the intent to defeat the wife's contingent rights which creates the invalidity of the transfer. A transfer by the husband of his property during his lifetime to his children by a former marriage, because of love and affection for them and not with intent to cut off the rights of his unloved wife, will be valid even though its effect is still to deprive her of a share of his property at the time of his death. Therefore, this rule seems to be inadequate from the standpoint of the wife. The test has also been condemned for other reasons. "Motive or intent is an unsatisfactory test of the validity of a transfer of property. In most jurisdictions it has been rejected, sometimes for the reason that it would cast doubt upon the validity of all transfers made by a married man, outside of the regular course of business; sometimes because it is difficult to find a satisfactory logical foundation for it."<sup>44</sup>

In another line of cases the decision turns upon the extent of control retained by the transferring husband during his lifetime. Examples of retention of control which may make the transfer voidable by a surviving wife to the extent of her non-barrable share include the placing of property or securities in a joint tenancy, the deposit of funds in a joint bank account, and a revocable transfer of property in trust with a retention of the income for life. Such types of transfers may be labeled "illusory" and in fraud of

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<sup>40</sup> Annots., 49 A.L.R.2d 521 (1956); 157 A.L.R. 1184 (1944); 112 A.L.R. 649 (1937); 64 A.L.R. 466 (1929).

<sup>41</sup> *Benge v. Barnett*, 309 Ky. 354, 217 S.W.2d 782 (1949); *Rudd v. Rudd*, 184 Ky. 400, 214 S.W. 791 (1919).

<sup>42</sup> *Potter v. Winter*, 280 S.W.2d 27 (Mo. 1955); *Wahl v. Wahl*, 357 Mo. 89, 206 S.W.2d 334 (1947).

<sup>43</sup> *Ibey v. Ibey*, 93 N.H. 434, 43 A.2d 157 (1945), *second appeal*, 94 N.H. 425, 55 A.2d 872 (1947).

<sup>44</sup> *Newman v. Dore*, 275 N.Y. 371, 379, 9 N.E.2d 966, 968 (1937).

the surviving wife's rights. States adopting this test include Illinois,<sup>46</sup> New York,<sup>46</sup> and Ohio.<sup>47</sup> However, within this group of states there is no agreement as to the degree of control which must be retained in order to make the transfer voidable by the surviving wife. Some states, such as New York, appear to require the retention of a greater degree of control than others, such as Ohio.<sup>48</sup>

Other jurisdictions adopt a test combining several factors, including both motive or intent and the degree of control retained,<sup>49</sup> while others do not appear to give the wife any protection at all.<sup>50</sup>

There were no reported cases dealing with this problem in connection with the non-barrable share given to the wife in the husband's estate by section 201.5 prior to its amendment in 1957. It is possible that one or the other of the judicial doctrines referred to above might have been applied by the California courts under that section. In any event, in connection with the 1957 revision of section 201.5 the Law Revision Commission recommended and the Legislature enacted a new Section 201.8 of the Probate Code to deal specifically with this problem. This new section reads as follows:

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

As can be seen from the wording of this section, the Legislature adopted the test of retention of control, as in the second line of decisions referred to above, and rejected the test of the intent with which the transfer is made by the husband. The statute requires both that the transfer must have been

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<sup>46</sup> *Holmes v. Mims*, 1 Ill.2d 274, 115 N.E.2d 790 (1953); *Smith v. Northern Trust Co.*, 322 Ill. App. 168, 54 N.E.2d 75 (1944).

<sup>46</sup> *Re Halpern's Estate*, 303 N.Y. 33, 100 N.E.2d 120 (1951); *Krause v. Krause*, 285 N.Y. 27, 32 N.E.2d 779 (1941); *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937).

<sup>47</sup> *Harris v. Harris*, 147 Ohio St. 437, 72 N.E.2d 378 (1947); *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (1944).

<sup>48</sup> Compare *Newman v. Dore*, note 46 *supra*, with *Bolles v. Toledo Trust Co.*, note 47 *supra*.

<sup>49</sup> *Whittington v. Whittington*, 205 Md. 1, 106 A.2d 72 (1954).

<sup>50</sup> *Kerwin v. Donaghy*, 317 Mass. 559, 59 N.E.2d 299 (1945).

made by the husband "without receiving in exchange a consideration of substantial value" and that the husband must have retained during his lifetime "a substantial quantum of ownership or control of the property." Thus, if the transfer is made as an outright gift by the husband with no strings attached, it cannot be set aside by the surviving wife. Also, the surviving wife cannot attack any sales of property by the husband during his lifetime. There is no requirement that she consent to or join in any such transfers for value, as, for example, there is in the case of community real property.<sup>51</sup> The use in the statute of the phrase "transfer . . . without receiving in exchange a consideration of substantial value," rather than the familiar phrase "gift" used in the community property statutes,<sup>52</sup> may cause some difficulties of interpretation, but it is believed that no serious problem should exist. The report of the Law Revision Commission indicates<sup>53</sup> that it avoided the phrase "gratuitous transfer" solely because of a concern, which would seem to be completely unfounded, that the proverbial "peppercorn" given as consideration would prevent the transfer from being considered "gratuitous."

As to what constitutes "a substantial quantum of ownership or control of the property," the Law Revision Commission Report indicates that the statute is intended to go considerably further in this regard than most of the courts have gone which adopt the "illusory transfer" doctrine. The Report indicates, for example, that the retention of a life estate in the property would make section 201.8 applicable even though the remainder were transferred irrevocably.<sup>54</sup> In general, the Law Revision Commission has indicated that the section is intended to apply to any transfers which are in economic effect "will substitutes" in that the transferor does not give up his interest in the property until the date of his death. The Report also suggests that "a somewhat analogous situation is involved in the application of death transfer taxes to gratuitous *inter vivos* transfers where the transferor retains an interest in or power over the property transferred until his death, as provided in Sections 13643, 13644, 13646 and 13648 of the Revenue and Taxation Code."<sup>55</sup> These sections of the Inheritance Tax Law should therefore provide a general guide to the types of transfers subject to section 201.8, although it would not be wise to attempt to import their provisions literally into section 201.8 since the purposes of the provisions differ.

One problem which undoubtedly will arise and which is not specifically covered by section 201.8 nor mentioned in the Law Revision Commission

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<sup>51</sup> CAL. CIV. CODE § 172a.

<sup>52</sup> CAL. CIV. CODE § 172.

<sup>53</sup> RECOMMENDATION AND STUDY, p. E-8.

<sup>54</sup> *Ibid.* Compare cases cited notes 45-47 *supra*.

<sup>55</sup> *Id.* at p. E-9.

Report is the question whether and to what extent a surviving wife may recover the proceeds from an insurance policy on the life of the husband from a third person named as beneficiary or from the insurance company. The naming by the husband without the wife's written consent of someone other than the wife as beneficiary of an insurance policy purchased with community funds has of course long been held to be a gratuitous transfer of the proceeds of such policy which permits the wife to recover one-half of such proceeds.<sup>56</sup> It would seem that the similar designation by the husband of a third person as beneficiary of an insurance policy purchased with funds subject to section 201.8 would permit the wife to recover one-half of the proceeds if the husband retained the right to change the beneficiary and to surrender the policy for cash until the time of his death. The husband in that case has retained a "substantial quantum of ownership or control" and the community property cases establish that it is the proceeds which are transferred and not merely the premiums. On the other hand, it would seem likely that the use by the husband of funds subject to section 201.8 to purchase an insurance policy in which he does not retain any of the incidents of ownership would not give the wife any right to recover any part of the proceeds, since he has retained no control of the property during his lifetime. The community property cases would not be in point in this situation since the wife may avoid even an outright and absolute gift of community property made without her written consent.

There is also a problem of the extent to which an insurance company might be subjected to double liability if it pays to the named beneficiary without a release from the wife the proceeds of a policy to which the wife has a claim under section 201.8. Section 10172 of the Insurance Code provides that "notwithstanding the provisions of Section 161a and Section 172 of the Civil Code," an insurance company may pay such proceeds to a named beneficiary in full discharge of its liability if such payment is made prior to the receipt of any written claim on behalf of the wife. However, Section 161a and Section 172 of the Civil Code deal only with community property, and therefore this section might not furnish protection to the insurance company where the wife's claim is made under Section 201.8 of the Probate Code. The Legislature should amend this section of the Insurance Code to add a reference to Section 201.8 of the Probate Code.

Section 201.8 provides that the surviving wife is entitled to the benefits of the section whenever the husband "has made a transfer to a person other than the surviving spouse" of property subject to the section. A defect in this language is the failure to provide that the wife at the time the transfer

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<sup>56</sup> *Travelers Ins. Co. v. Fancher*, 219 Cal. 351, 26 P.2d 482 (1933); *Blethen v. Pacific Mut. Life Ins. Co.*, 198 Cal. 91, 243 Pac. 431 (1926); *Union Mut. Life Ins. Co. v. Broderick*, 196 Cal. 497, 238 Pac. 1034 (1925). *But cf.*, *Wissner v. Wissner*, 338 U.S. 655 (1950).

is made may waive her statutory right to set it aside. It would have been preferable to insert after the word "transfer" the words "without the written consent of his spouse" as is done in the statute relating to gifts of community property.<sup>57</sup> It is believed, however, that the courts will hold that there was no intent to preclude the wife from consenting in advance to such a transfer, and that where she signs a written consent to the transfer she will be estopped to question it after the husband's death.<sup>58</sup>

Section 201.8 also provides that the surviving wife must have had "an expectancy" in the property transferred "under Section 201.5 of this code at the time of such transfer" in order to have any rights under this section. This means that any transfer made by the husband in the former domicile prior to their moving to California cannot be set aside under this section. The Law Revision Commission indicated that it would not favor making the section applicable in these circumstances since the husband "could not reasonably have anticipated that the transfer would later be subjected to California law."<sup>59</sup> This provision may lead to some difficult factual determinations as to the precise time at which a husband and wife have accomplished a change of their domicile from another state to California, in situations where they visit this state frequently and for extended periods prior to abandoning their out-of-state domicile completely. Litigation in the estate of W. C. Fields indicates the sort of problems which may be encountered,<sup>60</sup> although the time when a new domicile was acquired was significant there for a different reason. Also, the comment of the Law Revision Commission quoted above raises the question whether a revocable trust established by the husband while still domiciled in the foreign state but in anticipation of the imminent removal of the spouses to California might not be held to be within section 201.8.

In addition, a further problem arises where the trust is established in the foreign jurisdiction prior to the removal of the spouses to California, but is amended by an instrument executed by the husband in California after they establish their domicile here. In such a case, will the "republication" of the trust by the amendment bring the transfer within section 201.8? Will it make any difference in this connection whether or not the

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<sup>57</sup> CAL. CIV. CODE § 172.

<sup>58</sup> Although § 172a of the Civil Code requires that the wife "join . . . in" any instrument by which community property is transferred or encumbered or leased for longer than one year, the cases have held that even if she does not join she may in certain circumstances be "estopped" to assert the invalidity of the instrument or be held to have "waived" her community interest. *Bush v. Rogers*, 42 Cal. App. 2d 477, 109 P.2d 379 (1941).

<sup>59</sup> RECOMMENDATION AND STUDY, p. E-10.

<sup>60</sup> *Fields v. Fields*, 178 F.2d 200 (9th Cir. 1949), *affirming* 81 F. Supp. 54 (S.D. Cal. 1948); *In re Fields' Trust*, 302 N.Y. 262, 97 N.E.2d 896 (1951), *modifying and affirming* 276 App. Div. 916, 93 N.Y.S.2d 267 (1949), *modifying and affirming* 193 Misc. 767, 770, 781, 84 N.Y.S.2d 645, 649, 656 (1948); *Fields v. Michael*, 91 Cal. App. 2d 443, 205 P.2d 402 (1949).

amendment expressly purports to "republish" the trust or how extensive the changes made by the amendment are? The answers to such questions will have to await judicial decision for a definitive answer.<sup>61</sup>

A further conflict of laws problem under this section concerns the question whether it will be applicable to a transfer of personal property made by the husband in a foreign jurisdiction after the removal of the spouses to California. If the section does not cover such a transfer, then it may be possible for the husband to evade it simply by transferring his property to a revocable trust under which a bank in Nevada or some other state is appointed the trustee.

The Massachusetts Supreme Court in *National Shawmut Bank of Boston v. Cumming*<sup>62</sup> held that the law of the *situs* of the trust governs this question and that the wife could claim no interest in the trust if not entitled thereto under the law of the *situs* regardless of her rights under the law of the domicile. In that case a settlor domiciled in Vermont established in Boston a trust of the greater part of his personal property with the National Shawmut Bank as trustee. If the trust was established with fraudulent intent to disinherit his wife, it was conceded that under the law of Vermont the widow could claim her statutory share after his death. However, the court held that the law of Massachusetts governed and that the transfer was valid, because under that law the wife had no claim "even if his sole purpose had been to deprive his wife of any portion" of the trust property. The court said:

The general tendency of authorities elsewhere is away from the adoption of the law of the settlor's domicil where the property, the domicil and place of business of the trustee, and the place of administration intended by the settlor are in another State. . . . The situation is unchanged by the fact that the one seeking to set aside the transaction is the widow of the settlor.<sup>63</sup>

It is respectfully suggested that the Massachusetts court was applying this rule, designed to promote ease of administration of trusts, to a situation in which there was an overriding contrary policy. It would seem that a state should not lend its aid to an evasion of the law of a neighboring state by husbands wishing to disinherit their wives merely to provide business for its trust companies. Requiring the trustee to recognize the statutory

<sup>61</sup> Section 18 of the N.Y. DECEDENT ESTATE LAW giving the wife a right of election to take a portion of her husband's estate against his will applied in terms only to a "will . . . executed" after August 31, 1930, but it was held that the "republication" of a previously executed will by a codicil executed after that date brought it within the section. *Matter of Greenberg*, 261 N.Y. 474, 185 N.E. 704 (1933).

<sup>62</sup> 325 Mass. 457, 91 N.E.2d 337 (1950); *accord*, *Roberts v. Chase*, 25 Tenn. App. 636, 166 S.W.2d 641 (1942).

<sup>63</sup> 325 Mass. at 463-64, 91 N.E.2d at 341 (1950).

rights of the surviving wife of the settlor under the law of their domicile would not seem to impose any serious burden on the trustee's administration or distribution of the trust property. However, in view of the contrary authority, even though slight, it must be recognized that some husbands may attempt to evade the operation of this section by establishing trusts in foreign jurisdictions which do not protect the wife against illusory transfers to the extent that California does.

Perhaps the procedural problem of getting adequate service upon all of the interested parties will be as troublesome to the wife as the choice-of-law question in attempting to recover a portion of a foreign trust under section 201.8. The trustee will normally be a foreign banking corporation which is doing no business in California; the beneficiaries of the trust may be residents of California, or of the foreign state where the trustee is located, or of some other foreign state or of any combination of these jurisdictions; and the domiciliary executor or administrator of the deceased husband will be a California resident or trust company. If all of these persons were required to be personally served within the forum state in order to institute an action under section 201.8, then in most of these cases there would be no jurisdiction in which the suit could be maintained.

From the point of view of the wife, the most advantageous place to litigate the question would be California, since the California courts would probably be more sympathetic to her claim under this statute than the foreign court. If the trustee is an indispensable party to the litigation, however, it will be impossible to bring the action in California even if all of the beneficiaries of the trust reside here, since the trustee cannot be served within California and the United States Supreme Court held in the recent case of *Hanson v. Denckla*<sup>64</sup> that it was a violation of the due process clause for a state to attempt to secure personal jurisdiction over such a foreign trustee by substituted service. Usually the trustee has been held to be an indispensable party to litigation involving the trust assets,<sup>65</sup> but the United States Supreme Court in the *Hanson* case as a matter of constitutional law left it open to a state to adopt a contrary rule. The court said: "With personal jurisdiction over the executor, legatees, and appointees [under the trust instrument], there is nothing in federal law to prevent . . . [a State] from adjudicating concerning the respective rights and liabilities of those parties [with respect to the trust corpus, even in the absence of the trustee]."<sup>66</sup> Therefore, it is possible that the California court might assume jurisdiction of such a controversy, provided the beneficiaries of the trust can be served in this state.<sup>67</sup>

<sup>64</sup> 357 U.S. 235 (1958). See Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695 (1959).

<sup>65</sup> 3 MOORE, FEDERAL PRACTICE ¶ 19.12, p. 2171 (2d ed. 1948); cf., *Massachusetts & So. Constr. Co. v. Crane Creek Township*, 155 U.S. 283 (1894).

<sup>66</sup> 357 U.S. at 254 (1958).

<sup>67</sup> Cf. *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957).

If the wife brings a suit at the domicile of the trustee, it may be impossible to serve the beneficiaries of the trust or the executor or administrator of the deceased husband in that state and the defense may be raised that they are indispensable parties. So far as the executor or administrator is concerned, the statute gives the cause of action to the surviving wife and it would seem that he is not an indispensable party despite the fact that the recovery will go initially to the estate. In any event, the wife should be able to get an order from the California probate court requiring the executor or administrator to appear in the foreign action. With respect to the beneficiaries of the trust, while there is some authority that they might be indispensable parties,<sup>68</sup> it would seem that either they could be served by substituted service on the theory that the action is "quasi in rem"<sup>69</sup> (assuming that the local statute governing substituted service can be interpreted to permit this), or their presence could be dispensed with on the theory that the trustee adequately represents their interests.<sup>70</sup>

While it is unlikely that the courts will leave the wife without any forum in which she can litigate her claim, the opportunities for procedural delay and harassing litigation on the part of the persons resisting the wife's claim in this situation are obvious.

A few further points concerning the operation of section 201.8 should be noted. The surviving wife is entitled to recover back only one-half of the property transferred, or its value or proceeds, since the husband could have transferred one-half of the property by will and his gift is permitted to stand to that extent. The one-half recovered is returned to the husband's estate rather than being paid directly to the surviving wife. This has the effect of subjecting the property recovered to the claims of the husband's creditors to the same extent as if no transfer had been made. This may lead to *sub rosa* deals between the wife and creditors in the event that the estate is insolvent. There is no indication that the creditors could be subrogated to the rights of the wife to set aside the transfer, and the transfer may have put the assets beyond their reach.<sup>71</sup> On the other hand, the surviving wife presumably would not be willing to exercise her right solely for their benefit. The surviving wife is also required to renounce all provision for herself in the husband's will in order to exercise her right to set aside a transfer under section 201.8. This is contrary to the rule applicable in the case of community property, where the surviving wife may recover one-half of any

<sup>68</sup> 3 MOORE, FEDERAL PRACTICE ¶ 19.08, p. 2155, ¶ 19.18, p. 2198 (2d ed. 1948); 2 WITKIN, CALIFORNIA PROCEDURE 1058-59 (1954).

<sup>69</sup> Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>70</sup> 3 BOGERT, TRUSTS & TRUSTEES § 593 (1935); *Alexander v. Title Ins. & Trust Co.*, 48 Cal. App. 2d 488, 119 P.2d 992 (1941).

<sup>71</sup> 3 SCOTT, TRUSTS § 330.12 (2d ed. 1956); GRISWOLD, SPENDTHRIFT TRUSTS § 475 (2d ed. 1947); cf. ATKINSON, WILLS 177-83 (2d ed. 1953).

unauthorized gifts made during the husband's lifetime without surrendering anything given to her in his will.<sup>72</sup> The rule of section 201.8 seems clearly preferable.

Section 201.8 does not specify the time during which the surviving wife must act in order to take advantage of the section. Since the recovery is to go into the estate of the deceased husband, it will probably be held that she must act before the final distribution of his estate and that she does not have to act before that time.<sup>73</sup> In estates of substantial size, this might involve a delay of two years or more, and during this time a trust company administering a trust which is vulnerable to a wife's claim under section 201.8 could not safely make final distribution of the trust property in the absence of a release from the wife. This matter should probably be clarified by additional legislation.

#### V. SECTION 201.6

The new sections 201.5, 201.7 and 201.8 deal only with a case where the husband dies domiciled in California. The related problem noted above concerning a husband who never becomes domiciled in California but acquires real property situated here is dealt with in a new Section 201.6 of the Probate Code. This section reads as follows:

Upon the death of any married person not domiciled in this State who leaves a valid will disposing of real property in this State which is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property were situated in the decedent's domicile at death. As used in this section real property includes leasehold interests in real property.

There are in general two approaches which might have been taken to this problem. One would have been to make the revised section 201.5 applicable to such real property located in California and owned by a non-domiciliary decedent, thus giving the wife a non-barrable interest of one-half in such real property. The other, which was actually adopted by the Law Revision Commission and the Legislature, was to provide that the law of the domicile of the husband at the time of his death should be applied to determine any non-barrable interest of the wife in such land as though it were situated there. The reasoning behind this decision is that it is ordinarily desirable to treat the estate of a decedent as a unit with all parts of it governed by the same law to the extent feasible, and that such law should

<sup>72</sup> *Ballinger v. Ballinger*, 9 Cal. 2d 330, 70 P.2d 629 (1937).

<sup>73</sup> Where the wife has an election either to take under the will or to take her community share, she must make such election before the final decree of distribution and does not have to act before that time. *Estate of Roberts*, 27 Cal. 2d 70, 75, 162 P.2d 461, 464 (1945); *Cunha v. Hughes*, 122 Cal. 111, 64 Pac. 535 (1898).

usually be the law of the decedent's domicile. This is the rule which has always been applied with respect to movable property, including any non-barrable interest or forced heirship with respect to such movable property.<sup>74</sup> On the other hand, it was felt that if the domiciliary state did not see fit to give the wife any non-barrable interest with respect to land situated there, California did not have any special interest in extending protection to such a non-resident wife.

This new section 201.6 is not restricted to property acquired during marriage otherwise than by gift, devise, or descent as is section 201.5 and related statutes. The non-barrable interest given to the surviving wife by section 201.6 extends to any real property with respect to which the wife would have such an interest if the land were situated in the domicile of the deceased husband. Since few or none of the common law states make any distinction between property acquired before marriage and that acquired afterwards, or between property acquired by gift, devise, or descent and that acquired otherwise, as regards a surviving wife's non-barrable interest,<sup>75</sup> no such distinction will exist with respect to the California land owned by the non-resident husband. The right of the surviving wife will be determined entirely by the law of the foreign state.

Section 201.6 only applies where the non-resident husband dies testate with respect to the California land. If the husband dies intestate with respect to such land, the surviving wife will inherit a substantial portion thereof under the California law. Specifically, if there are two or more children or their issue, the surviving wife will inherit one-third; if there is only one child or its issue or any one or more parents, brothers, sisters, or their issue, the surviving wife will inherit one-half; and if none of the foregoing survive the husband, the surviving wife will inherit all of his separate property.<sup>76</sup> Therefore, it was believed to be unnecessary to give the wife any additional rights where the husband died intestate. The surviving wife must also renounce any provision made for her in the husband's will in order to claim under section 201.6 if that is the rule under the law of the domicile, which it generally would be.

Section 201.6 does not purport to give to the wife any rights prior to the husband's death in the land owned by him in California. Therefore, she would have no "inchoate dower" or other *inter vivos* interest which would require any joinder by her in transfers or encumbrances of the land. However, there is some possibility that a gift of such land which is "in fraud of the wife's rights" under the law of the domicile may be subject to attack in California by the surviving wife after his death. Since this section makes

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<sup>74</sup> MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 138-41 (1952).

<sup>75</sup> *Id.* at 14-18.

<sup>76</sup> CAL. PROB. CODE §§ 221, 223, 224.

the law of the domicile applicable to determine her non-barrable interest in the land, such foreign law may also be applicable to the extent of determining whether an *inter vivos* transfer may be set aside by her in order to claim such non-barrable interest.

Section 201.6, as well as section 201.5, classifies a leasehold interest in land as real property for the purpose of applying these sections. The reason for this is that such a leasehold interest is an "immovable" under conflict of laws doctrine and is generally subject to the same conflicts rules as real property.<sup>77</sup>

#### VI. INHERITANCE TAXATION OF SECTION 201.5 PROPERTY

Prior to 1957, certain provisions were included in the Inheritance Tax Law of California dealing with the property described in the 1917 amendment of Section 164 of the Civil Code and in Section 201.5 of the Probate Code. These provisions were apparently intended to treat such property like community property for the purpose of the inheritance tax and to parallel the substantive provisions. However, this apparent intention was not accomplished until 1947. In 1925 the Legislature granted a community property exclusion to "personal property" acquired by husband or wife while domiciled elsewhere which would not have been separate property if acquired while domiciled here.<sup>78</sup> At that time Section 164 of the Civil Code purported to transform into community property not only such "personal property" but also similar "real property situated in this State." Then in 1935 Section 201.5 of the Probate Code was enacted applying only to "personal property," but at the same time the inheritance tax provision was further restricted to apply only to "intangible personal property."<sup>79</sup> Finally, in 1947 the word "intangible" was deleted from the inheritance tax provision so that it and section 201.5 were finally coordinated.<sup>80</sup>

In view of this history, care was taken in the 1957 legislative program to revise the inheritance tax provisions to make them completely consistent with the new provisions of the Probate Code and at the same time to make certain changes in these inheritance tax provisions. The new sections of the Revenue and Taxation Code are set forth in a footnote.<sup>81</sup>

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<sup>77</sup> See 2 BEALE, CONFLICT OF LAWS § 208.1 (1935).

<sup>78</sup> Cal. Stat. 1925, ch. 284, § 1.

<sup>79</sup> Cal. Stat. 1935, ch. 358, § 1.

<sup>80</sup> Cal. Stat. 1947, ch. 734, § 2.

<sup>81</sup> § 13552.5. Whenever a married person dies having provided by will for his surviving spouse and having also made a testamentary disposition of any property to which Section 201.5 of the Probate Code is applicable or having made an *inter vivos* transfer to which Section 201.8 of the Probate Code is applicable, and the surviving spouse is required to elect whether to share in the estate under the will or to take a share of the decedent's property under Section 201.5 of the Probate Code, and the spouse elects to take under the will, the property thus taken up to a value not exceeding

The main effect of these sections is to give the surviving wife the benefit of the community property exclusion with respect to all section 201.5 property passing to her, either under or against the husband's will, up to one-half of the total value of such property. These provisions are now applicable to both real and personal property as is section 201.5 itself, and the case of *In re Miller*<sup>82</sup> is thus effectively overruled in the inheritance tax field as well as in the probate field.

Without any specific provision in the Inheritance Tax Law dealing with section 201.5 property, it probably would have been possible for the surviving wife since 1950 to claim a "marital exemption" with respect to such property passing to her. There possibly might be some argument as to whether, in a case where she takes against the husband's will, such property is "transferred to" her by the husband as required by Section 13805 of the Revenue and Taxation Code. In any event, the marital exemption provided for in section 13805 is considerably less valuable than the community property exclusion. In the first place, the amount of the marital exemption is limited to one-half of the "clear market value" of the decedent's estate and this is determined after subtracting allowable deductions including the federal estate tax.<sup>83</sup> On the other hand, the community property exclusion amounts to one-half of the value of the estate prior to the deduc-

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one-half of the value of any property to which Section 201.5 of the Probate Code is applicable and the full value of any property which the surviving spouse might have required to be restored to the decedent's estate under Section 201.8 of the Probate Code is not subject to this part.

§ 13554.5. Where property to which Section 201.5 of the Probate Code is or would have been applicable is transferred from one spouse to the other within the provisions of Chapter 4 of this part other than by will or the laws of succession, the property transferred is subject to this part up to a value not exceeding one-half of the clear market value thereof.

§ 13555. Upon the death of any married person:

(a) At least one-half of any property in the decedent's estate to which Section 201.5 of the Probate Code is applicable, except property restored to the estate under Section 201.8 of the Probate Code, is subject to this part.

(b) The one-half of any property which, under Section 201.5 of the Probate Code, belongs to the surviving spouse whether or not the decedent attempted to dispose of it otherwise by will, and all of any property restored to the decedent's estate under Section 201.8 of the Probate Code is not subject to this part.

(c) All of any property in the decedent's estate to which Section 201.5 of the Probate Code is applicable passing to anyone other than the surviving spouse is subject to this part.

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

<sup>82</sup> 31 Cal. 2d 191, 187 P.2d 722 (1947).

<sup>83</sup> CAL. REV. & TAX. CODE §§ 13312, 13981-13989; Estate of Law, 50 Cal. 2d 345, 325 P.2d 449 (1958).

tion of the federal estate tax although after other deductions.<sup>84</sup> Therefore, the community property exclusion may give a much larger deduction to the estate. Secondly, the marital exemption is in effect taken off the bottom of the total taxable estate, and thus uses up or exhausts the lower tax brackets, with the result that the balance of the property is taxed at the higher rates which would be applicable in the absence of any exemption.<sup>85</sup> The community property exclusion, however, is taken off the top of the estate and the balance is taxed at lower rates beginning with the primary rates.<sup>86</sup> In view of these two differences, it is obvious that the marital exemption was not an adequate substitute for the new provisions of the Revenue and Taxation Code.

In one respect, the new provisions treat section 201.5 property differently than community property. Upon the death of the wife there is no inheritance tax payable upon community property.<sup>87</sup> This is a hold-over from the pre-1923 days when the wife had no power to devise or bequeath any of the community property and the husband was considered to have sole ownership of it. Although this has not been the substantive law for many years, the Inheritance Tax Law has not been changed. In the new sections dealing with section 201.5 property, however, it is provided that upon the death of the wife the husband gets only a one-half community exclusion with respect to *her* section 201.5 property, just as she gets only a one-half community exclusion with respect to *his* section 201.5 property.<sup>88</sup> The reason the Law Revision Commission felt justified in treating section 201.5 property differently than community property in this particular instance was that in the typical case the husband has acquired all the community property and there is still some justification, however slight, for not levying any inheritance tax when the wife dies. Of course, no inheritance tax will be levied on the husband's section 201.5 property when the wife dies because she has no ownership of or interest in it. On the other hand, all of *her* section 201.5 property was by hypothesis acquired by her, and no good reason could be seen for giving the husband any larger exclusion on her death than she gets with respect to his property on his death.

If the wife succeeds in having one-half of any property transferred *inter vivos* by the husband restored to his estate under section 201.8, all of such property restored to the estate is excluded from inheritance tax since

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<sup>84</sup> Estate of Coffee, 19 Cal. 2d 248, 120 P.2d 661 (1941); Estate of Cushing, 113 Cal. App. 2d 319, 248 P.2d 482 (1952); CAL. REV. & TAX. CODE § 13551, § 13557 as added by Cal. Stat. 1957, ch. 403, § 1.

<sup>85</sup> CAL. REV. & TAX. CODE § 13403; Estate of Harrison, 110 Cal. App. 2d 717, 243 P.2d 528 (1952).

<sup>86</sup> CAL. REV. & TAX. CODE §§ 13551, 13552.

<sup>87</sup> CAL. REV. & TAX. CODE § 13553.

<sup>88</sup> CAL. REV. & TAX. CODE § 13555.

this is the one-half that will go to the wife subject to expenses of administration and debts.<sup>89</sup> Of course, if the one-half not recovered would otherwise be subject to inheritance tax, for example because the husband retained a power of revocation,<sup>90</sup> no exclusion is provided for such other one-half of the property.

#### VII. HOMESTEAD ON SECTION 201.5 PROPERTY

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

Prior to 1957 the cases held that real property owned by the decedent husband in California which was derived from property acquired during marriage in a foreign jurisdiction should be treated as "separate property" under section 661. Therefore, the surviving wife or minor children were entitled to a probate homestead in such real property only for a limited period.<sup>91</sup> In the 1957 legislation, section 661 was amended to treat "property to which Section 201.5 of this code is applicable" in the same way as community property for the purpose of assigning the probate homestead.<sup>92</sup> Under this amendment the court can now assign such real property to the wife or minor children in fee.

An analogous problem may arise under the statutes regulating the selection of a homestead by the spouses during their lifetime and the succession to such homestead property upon the death of one of the spouses. Under the California statutes, the husband is not permitted to declare a homestead upon the wife's separate property without her joinder,<sup>93</sup> although the wife is permitted to declare a homestead upon the husband's separate property without his joinder.<sup>94</sup> However, if the wife has alone filed a declaration of homestead on the husband's separate property, such property passes to his heirs or devisees upon his death and not to the surviving wife.<sup>95</sup> Either

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<sup>89</sup> CAL. REV. & TAX. CODE § 13552.5.

<sup>90</sup> CAL. REV. & TAX. CODE § 13646.

<sup>91</sup> *Estate of Niccolls*, 164 Cal. 368, 129 Pac. 278 (1912); *Estate of Jenkins*, 110 Cal. App. 2d 98, 242 P.2d 107 (1952); *cf.*, *Estate of Burrows*, 136 Cal. 113, 68 Pac. 488 (1902); *Estate of Higgins*, 65 Cal. 407, 4 Pac. 389 (1884).

<sup>92</sup> Cal. Stat. 1957, ch. 490.

<sup>93</sup> CAL. CIV. CODE § 1239.

<sup>94</sup> CAL. CIV. CODE § 1238.

<sup>95</sup> CAL. CIV. CODE § 1265.

spouse may file a declaration of homestead on community property and such community property homestead will pass to the surviving spouse rather than the heirs or devisees of the decedent, as will a homestead declared on separate property by both spouses.<sup>96</sup> Although the question has apparently not arisen in litigation, the same problem as to whether section 201.5 real property should be treated as "community property" or "separate property" exists under these provisions as under section 661 of the Probate Code. It is probable that the courts will hold that such property is to be treated as "separate property" under these provisions also. No amendments were enacted to these sections in the 1957 legislation. It would seem that the same treatment should be accorded to section 201.5 real property in connection with an *inter vivos* declaration of homestead and the succession thereto which has now been accorded to such property in connection with the assignment of a probate homestead, *i.e.*, it should be treated like community property.

#### VIII. INTER VIVOS RIGHTS IN SECTION 201.5 PROPERTY

The Law Revision Commission did not consider that its mandate from the Legislature to study possible revisions of Section 201.5 of the Probate Code permitted it to make any recommendations concerning possible changes in the *inter vivos* rights of the spouses in property subject to that section. Consequently, no such changes were included in the Commission's recommendations nor in the legislation enacted pursuant thereto. This restraint was even carried to the extent of a failure to recommend the repeal of the 1917 amendment to Section 164 of the Civil Code purporting to transform all such property into community property, which had been held unconstitutional in *Estate of Thornton*,<sup>97</sup> and that provision is still on the statute books. However, the Law Revision Commission did request and receive authorization from the Legislature to make a further study as to whether any changes should be made in such *inter vivos* rights of the spouses.<sup>98</sup> No recommendations have as yet been submitted to the Legislature as a result of this study.

Two areas were discussed in the original Study for the Law Revision Commission<sup>99</sup> in which some modification should probably be made in the *inter vivos* rights of the spouses with respect to property subject to section 201.5. One of these concerns the power of the court to divide such property in connection with a divorce and the other concerns the treatment of such property for the purpose of the gift tax.

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<sup>96</sup> CAL. CIV. CODE §§ 1238, 1265.

<sup>97</sup> 1 Cal. 2d 1, 33 P.2d 1 (1934).

<sup>98</sup> Cal. Stat. 1957, Res. ch. 202, p. 4589.

<sup>99</sup> RECOMMENDATION AND STUDY, pp. E-38-E-39.

Under Section 146 of the Civil Code, upon a divorce of the spouses, the court has the power to divide the community property of the spouses 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.<sup>100</sup> The court does not have the power to divide the separate property of either spouse upon a divorce for any cause.<sup>101</sup> 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.<sup>102</sup> It would seem that the court in a divorce action should have the power to some extent to divide property acquired during marriage in a foreign state, otherwise than by gift, devise or descent.

The California Gift Tax Law 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.<sup>103</sup> 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.<sup>104</sup> In 1947 this provision was repealed.<sup>105</sup> Since 1925 there has been a provision in the Inheritance Tax Law 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. It would seem that section 201.5 property should also be treated to some extent like community property for the purpose of the gift tax, as the Legislature started to do in 1939.

It is possible that other changes can and should be made in the *inter vivos* rights of the spouses with respect to section 201.5 property in order to make the rights of the spouses in such property conform more closely to their rights in community property. The additional recommendations of the Law Revision Commission when they are submitted to the Legislature should further clarify this matter.

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<sup>100</sup> CAL. CIV. CODE § 146; *Randolph v. Randolph*, 118 Cal. App. 2d 584, 258 P.2d 547 (1953).

<sup>101</sup> *Fox v. Fox*, 18 Cal. 2d 645, 117 P.2d 325 (1941).

<sup>102</sup> *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).

<sup>103</sup> CAL. REV. & TAX. CODE §§ 15301, 15302.

<sup>104</sup> CAL. REV. & TAX. CODE § 15305. This was the phrase then used in the Inheritance Tax Law. See notes 78-80 *supra*, and accompanying text.

<sup>105</sup> Cal. Stat. 1947, ch. 735, § 4.

### IX. CONCLUSION

The 1957 legislation dealing with the rights of a surviving spouse in property acquired by a decedent while domiciled elsewhere has gone far towards finally solving this problem which has been causing concern to the Legislature and the courts for nearly half a century. As is indicated in the foregoing discussion, there are certain parts of the new legislation which should probably be clarified and certain omissions which should probably be remedied. Despite these defects, it is believed that the basic framework of the legislation is sound and that with a few minor amendments the provisions will be both workable and fair in operation to all concerned.