

January 1950

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Recommended Citation

Ann Van Thomas & A. J. Thomas, *Community Property and the Conflict of Laws: A Recapitulation*, 4 Sw L.J. 46 (1950)

<https://scholar.smu.edu/smulr/vol4/iss1/4>

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COMMUNITY PROPERTY AND THE CONFLICT OF LAWS: A RECAPITULATION

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INTRODUCTION

STUDENTS of the law, matured under the civil law theories of community property, have long gazed with wondering pity upon the plight of their common law brethren in their attempts to modernize the primitive concept of the role of married women in today's economic world. By faltering steps the common law has been forced to retreat from the medieval concept that a married woman was entitled only to her immortal soul, all else being naturally and properly her husband's, to the position now held in most common law areas where statutory decrees permit married women rights in their own property.

Under the community property system, few, if any, fundamental alterations have been necessary to adapt it to the present day needs of husbands and wives. The concept of marriage as a partnership in which all property possessed by the husband and wife is presumed to be common property, belonging to both by halves, with the husband as the managing partner, needs neither rationalization nor apologia.

Nevertheless, these two radically different concepts flourish side by side throughout the western world, and in some instances, notably the United States, are found beneath the same flag. Because of their proximity and the modern tendency to move onward and try other pastures, there has arisen a field of legal problems concerning the law which governs the marital ownership of property,

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both movable and immovable,¹ acquired by spouses in states other than that in which they are presently domiciled, or in which they were married, or to which they moved after marriage.²

EXPRESS AGREEMENTS AND CONTRACTS

It is no longer a customary part of the marriage ceremony in the United States for spouses to enter into an express contract governing their rights and interests in property they presently own or that they will acquire in the future. Occasionally such a contract crops up where a couple wishes to be governed by an arrangement other than that provided for by the marital property laws of the domicile or where one spouse wishes to settle a sum of money on the other as separate property. On the other hand, pre-nuptial agreements are almost a traditional part of matrimony in Europe, and a goodly portion of the Europeans immigrating to these shores and to other lands are parties to express pre-nuptial contracts. It is from this situation that most of the present day problems relating to express contracts and matrimonial property arise.

The first question frequently encountered is whether or not future acquisitions are within the scope of the pre-nuptial contract. For example, an ante-nuptial contract is made in one state and later the parties change their domicile and acquire property in

¹ See GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS, 453 (3rd ed. 1949) for the meaning of movables and immovables in conflict of laws.

² For discussion of this subject, see the following authorities: 2 BEALE, A TREATISE ON THE CONFLICT OF LAWS, §§ 237.1, 238.1, 238.2, 289.1, 290.1, 292.1, 292.2, 293.1, 293.2 (1935); DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA, 102-118 (1945); I DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, 236-254 (1943); DICEY, CONFLICT OF LAWS, 557-558, 565-569, 711-721 (4th ed. 1927); GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS, 376-392 (3rd ed. 1949); RESTATEMENT, CONFLICT OF LAWS, §§ 237, 238, 289-293 (1934); RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY, 328-382 (1945); STORY, COMMENTARIES ON THE CONFLICT OF LAWS, 192-225 (7th ed. 1872); STUMBERG, CONFLICT OF LAWS, 284-290 (1937); 1 WHARTON, TREATISE ON THE CONFLICT OF LAWS, 400-434 (3rd ed. 1905); Harding, *Matrimonial Domicile and Marital Rights in Movables*, 30 MICH. L. REV. 859 (1932); Horowitz, *Conflict of Law Problems in Community Property*, 11 WASH. L. REV. 121, 212 (1936); Leflar, *Community Property and the Conflict of Laws*, 21 CALIF. L. REV. 221 (1932); Neuner, *MARITAL PROPERTY AND THE CONFLICT OF LAWS*, 5 LA. L. REV. 167 (1943); Stone, *The Law Governing Rights in Property under a Pre-Nuptial Contract*, 13 B. U. L. REV. 219 (1933); Stumberg, *Marital Property and the Conflict of Laws*, 11 TEX. L. REV. 53 (1934); Note, *Marital Property and Conflict of Laws*, 43 HARV. L. REV. 1286 (1930).

another state. It has frequently been reiterated that a change of domicile does not work any change of law governing the construction of a contract.³ This is undoubtedly true with respect to property, wherever situated, *which falls within the scope of the contract*. Thus, in cases involving ante-nuptial agreements, the courts will first determine what property falls within the boundaries of the agreement, and this is to be gleaned by surveying the intentions of the parties to be gathered from the instrument itself in the light of all its surrounding circumstances.⁴

The general line of decisions have dealt harshly with pre-nuptial contracts, holding, as illustrated by the famous Texas case of *Castro v. Illies*,⁵ that where there has been a change of domicile after making an express pre-nuptial contract, the law of the after-acquired domicile will govern as to all after-acquired property unless the contract was made with reference to that law, or in view of a change of domicile, and it was the clear intention of the parties that the contract should govern wherever they should reside.

Where there is an express nuptial contract, and, to quote Justice Story, "if it speaks fully to the *very point*"⁶ it will generally be admitted to govern all the property of the parties, not only in the matrimonial domicile, but in every other place under the limitations and restrictions which apply to other cases of contracts, that is, that they are not in contravention of the laws or policy of the country where they are sought to be enforced, nor prejudicial to the rights of its own citizens who contract with such parties with regard to notice of their marriage contract.⁷

It has been the established policy in the American community

³ *DeLane v. Moore*, 14 How. 253 (1852); *Murphy v. Murphy*, 5 Mart. 83, 12 Am. Dec. 475 (La. 1817); *Lyon v. Knott*, 26 Miss. 548 (1853); *Lemye v. Sirkee*, 226 App. Div. 159, 235 N. Y. S. 273 (1929); *LeBreton v. Miles*, 8 Paige 261, 4 N. Y. Chan. Rep. 422 (1840); *McLeod v. Board*, 30 Tex. 238, 94 Am. Dec. 301 (1867).

⁴ 2 BEALE, *op. cit. supra*, note 2, at 1015; GOODRICH, *op. cit. supra*, note 2, at 333, n. 40; LEFFLAR, *supra*, note 2, at 224.

⁵ 22 Tex. 479, 73 Am. Dec. 277 (1858).

⁶ STORY, *op. cit. supra*, note 2, at §§ 143, 184, 185.

⁷ 1 WHARTON, *op. cit. supra*, note 2, at § 201, p. 434.

property states to permit their citizens to make pre-nuptial contracts that their matrimonial property rights shall be governed by an arrangement other than that provided for by local law.⁸ Some community property states have even gone so far as to recognize post-nuptial agreements for this purpose. Thus it cannot be said to be against the strong public policy of community property law to enforce pre-nuptial contracts made elsewhere even though they have the effect of nullifying the community of holdings.

Nevertheless, from the leading decisions⁹ in both community property and civil law states it would appear that a heavier burden is placed upon the ante-nuptial contract to test its effects as to after-acquired property when the parties have effected a change of domicile than would have been the case if the contract were construed at the place of making, for, in the latter instant, the court would merely ascertain the intentions of the parties from the terms of the particular agreement and the conditions existing at the time of its execution to discover whether or not the contract covered after-acquired property; and, if it was found to do so, theoretically a change of domicile should have no effect thereon.

If a marriage contract makes no provision with regard to after-acquired property, the contract would have no influence beyond the jurisdictional laws of the country where it was made, and the law of the actual domicile will govern the rights of the parties as to all future acquisitions.¹⁰

The second question which arises in connection with pre-nuptial agreements is which law governs the interpretation of such con-

⁸ 1 DE FUNIAK, *op. cit. supra*, note 2, at § 90, p. 244. ARIZONA CODE ANN., 1939, § 63-201; CALIF. CIVIL CODE, 1941, § 177-181; IDAHO CODE ANN., 1932, §§ 31-917, 31-921; LA. CIVIL CODE, 1932, Art. 1743; NEVADA COMPILED LAWS, 1929, § 3373; NEW MEX. STAT. ANN., 1929, §§ 68-201, 68-204; ORE. LAWS, 1943, Chap. 440, § 10; TEX. REV. CIV. STAT. (Vernon, 1936), Art. 4610-4612; WASH. REV. STAT. (Remington, 1932), § 6894.

⁹ Long v. Hess, 154 Ill. 482, 40 N. E. 335, 27 A. L. R. 791 (1895); Besse v. Pellochoux, 73 Ill. 285, 24 Am. Rep. 242 (1874); Clark v. Baker, 76 Wash. 110, 135 Pac. 1025 (1913); Fuss v. Fuss, 24 Wis. 256, 1 Am. Rep. 180 (1869); Kneeland v. Ensley, 19 Tenn. 60, 33 Am. Dec. 168 (1838); See Hoefer v. Probasco, 80 Okla. 261, 196 Pac. 138 (1921) wherein additional cases are cited.

¹⁰ Besse v. Pellochoux, 73 Ill. 285, 24 Am. Rep. 242 (1874); Gale v. Davis Heirs, 4 Mart. (O. S.) 645 (La. 1817); Lyon v. Knott, 26 Miss. 548 (1853); LeBreton v. Miles, 8 Paige 261, 4 N. Y. Chan. Rep. 422 (1840).

tracts. It has been held in the majority of cases¹¹ that ante-nuptial agreements, in absence of good reason to the contrary, must be construed with reference to the law of the husband's actual domicile at the time of the marriage. A good reason to the contrary would appear to be illustrated by a case where the parties do intend to settle in some place not the domicile of the husband; thus, in a British case,¹² the husband was domiciled in Turkey and the bride was an Englishwoman; at the time of the pre-nuptial agreement the husband had expressed the intention of immediately moving to England and making his domicile there; the British court held that the parties contracted with the intention that England should be the matrimonial domicile, and therefore the pre-nuptial contract should be construed according to British laws.

Suppose a husband and wife, French citizens residing in Paris, provide in their nuptial agreement that the contract shall not be construed by the matrimonial domiciliary law but by some foreign law, say the law of China. Would such a provision be valid? There is no clear line of decisions on this point. In England the validity of such a provision has been affirmed,¹³ on the other hand both Germany¹⁴ and Louisiana¹⁵ have refused to enforce such provisions. This would appear to be the better rule unless the law designated is that of the country to which the parties intend to move immediately after marriage, or unless it is the law of the place where certain property mentioned in the contract is situated.

One final question occasionally occurs in connection with express marital agreements, and that is whether, after marriage, a pre-nuptial contract can be changed or amended or a new contract entered into by the consent of the parties. It has been held that

¹¹ *Le Breton v. Miles*, 8 Paige 261, N. Y. Chan. Rep. 422 (1840); *Vidtz v. O'Hagan*, 2 Ch. 87 (1900); *DICEY, op. cit. supra*, note 2, at 713.

¹² *Colliss v. Hector*, L. R. 19 Eq. 334, 44 L. J. Ch. N. S. 267, 32 L. T. N. S. 223, 23 Week Rep. 485 (1875).

¹³ *Este v. Smyth*, 18 Beav. 112, 23 L. J. Ch. N. S. 705, 18 Jur. 300, 12 Week Rep. 148 (1854); *See also, Re Megret*, 1 Ch. 547, 84 L. T. N. S. 192 (1901).

¹⁴ GERMAN CIVIL CODE, § 1433 as cited in 1 RABEL, *op. cit. supra*, note 2, at 365.

¹⁵ *Morales v. Marigny*, 14 La. Ann. 855 (1859); *Bourcier v. Lanusse*, 3 Mart. 581 (La., 1815).

this is a matter to which the law of the actual domicile must be applied.¹⁶ The French law¹⁷ forbids this; Louisiana, following the law of France, declares that the contract must be made prior to marriage, yet it takes a queer quirk by permitting express contracts to be made after marriage in cases of persons moving into Louisiana after they have been married and resided elsewhere.¹⁸ Under English common law, a married woman is incapable of thus modifying or surrendering her estate.¹⁹ In the Soviet Union, the 1926 Code on Marriage, which introduced the marital community property system, prohibits any agreement between spouses intended to restrict the property rights of either one.²⁰ Germany, on the other hand, in the interest of domestic harmony permits the making of post-nuptial agreements,²¹ particularly in cases where spouses have changed domiciles, under the theory that parties should be permitted to adapt their property relations to their new legal surroundings, irrespective of the municipal law of the first state and the general conflicts rule of the second.

An interesting case on a post-nuptial agreement recently arose in Texas.²² Two spouses were desirous of partitioning their community property and establishing separate funds. They went to New York and transferred \$5,800 of their community funds to a New York bank. There the husband withdrew \$4,000 of the amount which he had paid to him in two containers each consisting of 2,000 silver dollars. The remainder of the money was drawn in four cashier's checks which were endorsed by the spouses and placed in the respective containers. The husband and wife then entered into a contract whereby each transferred to the other the

¹⁶ 1 WHARTON, *op. cit. supra*, note 2, at 429, n. 10.

¹⁷ CODE NAPOLEON, Arts. 1394, 1395, as cited in DAGGETT, *op. cit. supra*, note 2, at 114.

¹⁸ Act 236 of 1910, amending Art. 2329, LA. CIVIL CODE OF 1870 (Merrick's 3rd ed. 1925).

¹⁹ *Fuss v. Fuss*, 24 Wis. 256, 1 Am. Rep. 180 (1869).

²⁰ 1 GSOVSKI, SOVIET CIVIL LAW 132 (1948).

²¹ *Fuss v. Fuss*, 24 Wis. 256, 1 Am. Rep. 180 (1869); *See also* *Pattison v. Pattison*, 129 Kan. 558, 283 Pac. 483 (1930).

²² *King v. Bruce*, 145 Tex. 647, 201 S. W. (2d) 803 (1947).

contents of his container. Thereafter the wife deposited her share in a bank in Fort Worth, where it was immediately garnished by a judgment creditor of the husband. The husband set up the New York contract to defeat the garnishment. The court held that the property was not the separate property of the wife in spite of the post-nuptial contract. It supported its decision on two grounds: (1) that such a contract was against the public policy of Texas; and (2) that although generally the validity of a contract is controlled by the laws of the state where it is made and performed, yet, as between spouses, the rule of domicile dominates.

Although in the issue at hand the court did not enter into a discussion of post-nuptial contracts, yet the agreement between these spouses falls under the definition of that term, and it is submitted that the Texas Supreme Court might well have based its ruling on the theory that Texas does not permit post-nuptial contracts to govern the rights and interests of the spouses in their presently owned property.

It is conceded that the above discussion is purely academic for, as a result of the decision in *King v. Bruce*, an amendment²³ to the state constitution was adopted in November, 1948, which permits husband and wife to partition community property, by an instrument in writing, into undivided shares or in severalty, which shall be the separate property of each spouse, provided such partition does not prejudice the rights of prior creditors or bona fide third parties dealing with the spouses. Thus, it would appear that Texas has veered completely from the orbit of the British and French decisions which prohibit post-nuptial contracts, and has come to accept the German view that such contracts are permissible.

IMPLIED CONTRACTS

Early in the history²⁴ of the development of conflict of laws and its relationship to marital property, a French writer, Dumou-

²³ TEX. CONST., Art. XVI, § 15, as amended Nov. 2, 1948.

²⁴ The year 1525.

lin, gave birth to a theory which has ever since been a stumbling block to courts and legal writers alike.

Dumoulin's theory itself was simple, but complicated developments followed in its wake. He declared that at the time of marriage the parties were free to make any settlement they chose and the effects of that marriage upon the property of the spouses should be determined primarily by the intentions of the parties.²⁵ Beginning with this theorem, the French courts developed the corollary which stated that if parties to a marriage do not make an express pre-nuptial contract, it is assumed that the parties intended by a tacit or implied contract to submit themselves to the control of the law of their first matrimonial domicile.²⁶ Therefore, according to French reasoning, once the marital domicile was established, a wife's matrimonial rights to her husband's estate had been vested,²⁷ and could not be subsequently stripped from her by moving elsewhere.²⁸

The justification for this rule is based on the reasoning that before marriage a woman has a freedom of choice as to where she shall be domiciled and which law shall govern her. If she does not make a pre-nuptial contract to secure her rights, it is assumed that she is willing to submit to the laws of the intended marital domicile. After marriage a wife no longer can exercise an option as to where her domicile will be and what laws shall govern her, for, except in the instances of divorce, legal or actual separation, the choice of domicile is now the husband's.²⁹ Thus, the French reasoned, where there is no pre-nuptial contract the courts will imply a contract embodying the law of the first marital domicile, which cannot be displaced or altered by a change either of national status or of domicile on the part of the husband.³⁰ For example,

²⁵ 1 RABEL, *op. cit. supra*, note , at 343-345.

²⁶ 1 WHARTON, *op. cit. supra*, note 2, at 426; 1 RABEL, *op. cit. supra*, note 2, at 343-345.

²⁷ For discussion of vested rights see *infra*.

²⁸ 1 WHARTON, *op. cit. supra*, note 2, at 417.

²⁹ *Id.* at 418; Beale, *The Domicile of a Married Woman*, 2 So. L. Q. 93 (1917); Parks, *The Domicil of a Married Woman*, 8 MINN. L. REV. 28 (1923).

³⁰ 1 RABEL, *op. cit. supra*, note 2, at 345; 1 WHARTON, *op. cit. supra*, note 2, at 418.

a husband and wife were married in England, domiciled there for some time, and later moved to France where the husband was naturalized and where he acquired jointly with his wife immovable property. The French court held that this property was not vested in a community of property as it would have been under French law, but inured solely to the husband, this being the English law which was that of the first matrimonial domicile.³¹

English courts, on the other hand, have long voiced an opposition to this continental theory of implied contract. In the famous case of *Lashley v. Hog*,³² where the spouses moved from England to Scotland, it was held that where there is no pre-nuptial contract and a subsequent change of domicile, the rights of the husband and wife to each other's property are governed by the law of the new domicile, Scotland in this particular instance.³³

Yet in the *DeNicols v. Curlier* cases³⁴ the British courts applied the theory of implied contract. There the husband and wife were French citizens, domiciled in France, married in Paris, and subject to the community property system of France. They had not made a pre-nuptial contract before marriage. Afterwards they acquired domicile in England, and the husband made a fortune in British trade, became a British subject, and purchased freehold and leasehold lands in England. On the death of the husband the British court held that the wife's rights to such movables and immovables were governed by the first matrimonial domicile, namely France, and the wife was entitled to have a share of the property under the community property system.

The British courts distinguished *Lashley v. Hog* and the *DeNicols* cases on the grounds that under French law³⁵ the failure

³¹ 4 PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 294 (1879).

³² 4 Patton (Scotch Appeals Case) 518 (1804).

³³ DICEY, *op. cit. supra*, note 2, at 718, rule 186; RABEL, *op. cit. supra*, note 2, at 355; STORY, *op. cit. supra*, note 2, at 187.

³⁴ *De Nicols v. Curlier*, House of Lords 1899 (1900) Appeal Cases 21 (Concerning Personal Property); *De Nicols v. Curlier*, 2 Ch. 410 (1900) (Concerning Real Property).

³⁵ Articles 1401-1496 of the French Civil Code.

to make a pre-nuptial contract amounts to the formation of an express contract for community of property, and thus, had the case come up before the French court, it would have administered the law of the first marital domicile.³⁶ Under British law, a contract operating by force of law is as complete and obligatory as an express contract and must be given effect on the same footing; therefore, the British court felt it had no choice but to recognize the implied contract set up by the first matrimonial domicile. It must be added that the British court found sufficient evidence that it was the *intention* of the parties to be governed by the system of community property. Lord Brampton, in his judgment stated:

"In the present case, if credit is given to the fourth paragraph of Mrs. De Nicol's affidavits, their so marrying (i.e. under the system of community property) was the result of a previous provisional agreement between them that it should be so.

"This," he continues, "is valuable as evidence, if evidence were needed, that the spouses knew, apart from the ordinary presumption of knowledge of the law of their own country, what were the legal obligations toward each other they were about to contract regarding their property, and that they vountarily undertook them with the knowledge that they would, and with the common intention that they should, be binding upon them so long as they both lived."³⁷

Writers on French legal theory have labelled the implied contract as a fictitious assumption, none the less the French courts still apply the theory and in Switzerland and many Latin American countries,³⁸ the law of the first domicile actually established by the husband and wife in common is declared to govern all future acquisitions of property even after the parties have moved to a new domicile that has contrary laws or customs.

American writers have bitterly upbraided the British court for its decision in the *DeNicols v. Curlier cases*,³⁹ yet, in Canada in

³⁶ DICEY, *op. cit. supra*, note 2, at 719.

³⁷ *De Nicols v. Curlier*, House of Lords 1899 (1900) Appeal Cases 21, Lord Brampton's Opinion at p. 44.

³⁸ RABEL, *op. cit. supra*, note 2, at 350.

³⁹ Goodrich and Coleman, *Pennsylvania Marital Communities and Common Law*

1937 the same result was reached by an Ontario court concerning property acquired in Ontario by spouses who had moved there from Quebec. And again the reasoning was founded on the basis that although the courts of Ontario do not generally imply a contract that the first matrimonial domicile governs, yet, where the law of the first matrimonial domicile presumes such a contract operating by force of law, it will be given effect in Ontario courts. In this instance Quebec's law is based on that of France.⁴⁰

In the Louisiana case of *Saul v. His Creditors*,⁴¹ the American court held to Dumoulin's original thesis that the effects of marriage upon property should be determined by the intentions of the parties, and in order to discover the presumed intentions all facts of the individual case are taken into consideration. But the Louisiana court flatly rejected the French corollary that where the parties had made no pre-nuptial contract they have tacitly agreed to subject themselves to the law of the first marital domicile to all future acquisitions, even after they have moved to a new domicile having contrary laws.

The general American view was clearly stated in *In Re Majot's Estate*⁴² which declared that the spouses impliedly contract according to the law of the place of their matrimonial domicile *as long as they are in that domicile*, but that implied contract does not govern their after-acquired property when they have subsequently changed their domicile to a jurisdiction where a contrary law governs marital property rights. The property acquired in the new domicile is considered controlled by the law of that jurisdiction in the absence of any express agreement between the spouses.

It cannot be gainsaid that the American rule is the more logical and the easier to apply, although the French rule has something

Neighbors, 96 U. OF PA. L. REV. 1 (1947); Stone, *The Law Governing Rights in Property Under a Pre-Nuptial Contract, According to the English and American Cases*, 13 B. U. L. REV. 219 (1933); Neuner, *supra*, note 2; Harding, *supra*, note 2; Stumberg, *supra*, note 2.

⁴⁰ Beaudoin v. Tudel, 1 Dom. Law Rep. 216 (Ontario Crt. of App. 1936).

⁴¹ *Saul v. His Creditors*, 5 Mart. (N. S.) 569 (La., 1827).

⁴² 199 N. Y. 29 (1910).

to recommend it as far as it applies to those establishing a first marital domicile in a community property area for it would signify that the democratic institution of community property would follow the parties wherever they sojourned.

In any event, in Texas, the matter is now governed by statute⁴³ which provides that, upon moving to Texas, property acquired by spouses in Texas during the marriage is to be regulated by the local law. This statute and similar statutes which have been passed in most community property states are postulated on the ground that the community property laws of the state are real statutes and not personal statutes, that is they attach to and govern the property acquired in the state rather than affecting the persons, who may, as a matter of fact, at the time of the marriage have been domiciled elsewhere and who, after some time, may again remove their domicile to a common law state.

There is one further rule which has been adopted to determine the effect of a marriage on the mutual rights of husband and wife to marital property, that is the nationality test. In a number of European countries⁴⁴ the courts have laid down the principle that the nationality of the husband determines the law which governs the effects of a marriage on property. Thus, an Italian citizen migrated to Argentina and was there married and domiciled. The Italian Supreme court held that the community property laws of Argentina were inapplicable to this marriage because community of property was forbidden to Italian nationals by Article 1433 of the Italian Civil Code of 1865.⁴⁵ There can be no doubt that British and American courts in such a case would disregard the Italian Code and apply the law of the domicile — Argentina. France, too, under its theory of implied contract would ignore the Italian code and apply community of property.

⁴³ TEX. REV. CIV. STAT. (Vernon, 1936), Art. 4627.

⁴⁴ Germany, Bulgaria, Finland, Greece, Hungary, Italy, Rumania.

⁴⁵ 1 RABEL, *op. cit. supra*, note 2, at 351, sets forth the Italian case, Cass. Roma (April 16, 1932), *Foro Ital.* II Massimario, 282 No. 1376.

IMMOVABLE PROPERTY

In the United States it is an established rule that the law of the situs governs the interests which one spouse acquires by virtue of marriage in the immovable property of the other.⁴⁶ The foundation of this theory is a practical one for ultimately, of course, the state in which an immovable is located may determine title to property lying within its boundaries as it pleases as long as no constitutional principle has been transgressed.⁴⁷ Therefore when a foreign court is called upon to determine property interests in immovables situated within a neighbor's domain, it will tread charily, voicing the face-saving sentiment that each state has exclusive dominion within its geographic limits, which, in the last analysis, is but a deferential admittance of the unidealistic realization that foreign states are unable to enforce decrees *in rem* which transfer the title to land outside their own jurisdiction.⁴⁸

This bowing to the inevitable is carried one step farther by the pronouncement of courts that classification of property, whether it be considered movable or immovable, personal or real, is also governed by the law of the state where the property is situated.⁴⁹ This was clearly illustrated in the Maryland case of *Craig v. Craig*⁵⁰ where the court distinguished only between real and personal property, rejecting the classification of movable and immovable. The court held that a leasehold estate was personal property subject to the laws of distribution of the domicile of the decedent (Pennsyl-

⁴⁶ *Nott v. Nott*, 111 La. 1028, 36 So. 109 (1904); *Vertner v. Humphreys*, 14 Smedes and M. 130 (Miss. 1850); *McCollum v. Smith*, Meigs 342, 33 Am. Dec. 147 (Tenn. 1838); *Heidenheimer v. Loring*, 6 Tex. Civ. App. 560, 26 S. W. 99 (1894); *RESTATEMENT, CONFLICT OF LAWS*, §§ 237, 238; *DICEY, op. cit. supra*, note 2, at 588, 597; *GOODRICH, op. cit. supra*, note 2, at 378; *Neuner, supra*, note 2, at 167, 174.

⁴⁷ *Horowitz, supra*, note 2, at 215; *Stumberg, supra*, note 2, at 65; Note, 43 HARV. L. REV. 1286, *supra*, note 2.

⁴⁸ *GOODRICH, op. cit. supra*, note 2, at 639; *RESTATEMENT, CONFLICT OF LAWS*, § 447 denies application of the full faith and credit clause to anything but a judgment or decree for payment of money.

⁴⁹ *McCollum v. Smith*, Meigs, 342, 33 Am. Dec. 147 (Tenn. 1838); *RESTATEMENT, CONFLICT OF LAWS*, § 227; *DICEY, op. cit. supra*, note 2, at 579.

⁵⁰ *Craig v. Craig*, 117 Atl. 756 (Md. Ct. of App. 1922); *See also Kneeland v. Ensley*, 19 Tenn. 60, 33 Am. Dec. 168 (1838).

vania), though the land affected by the leasehold was situated in Maryland. Under the usual legal concept, a leasehold estate is considered a chattel real subject to the law of the situs.⁵¹

It has been argued⁵² that under modern conditions there are three valid reasons for applying the law of the situs in the United States over and beyond the difficulties inherent in attempting to gain recognition of decrees *in personam* as to foreign immovables under full faith and credit clauses. These three reasons are: (1) All states have developed some system of recordation with regard to immovables which can only function if the law of the situs is applied; (2) those dealing with regard to immovables expect, in most instances, that the law of the situs will be applicable; and (3) the enforcement of rights in immovables depends upon the agencies of the law of the situs, and thus, to simplify matters, this law must be followed.

Of course, it can be demonstrated that the American view point leaves much to be desired, for it brings a multiplicity of laws and regulations into the marital relationship.⁵³ If immovables are owned by spouses in three or four different states, a different law applies to each, and each state has the power to determine questions relating to the effects of that marriage on property. For example, a husband and wife are married and domiciled in a state which excludes the wife's separate property from liability for the husband's debts; the wife owns property in a state which declares such property is liable for the debts of either spouse. The law of the situs of the immovable in this case would have a direct economic effect on the marriage, and, in contrast to movables as will be later shown, the law of the situs would formulate a public policy concerning that marriage.

In many Central European countries the view is maintained that the whole marriage relationship should be governed by one

⁵¹ RESTATEMENT, CONFLICT OF LAWS, § 208, special note; GOODRICH, *op. cit. supra*, note 2, at 453; TIFFANY ON REAL PROPERTY, § 72 (3rd ed. 1920).

⁵² NEUNER, *supra*, note 2, at 168.

⁵³ RABEL, *op. cit. supra*, note 2, at 337; NEUNER, *supra*, note 2, at 175.

law, i.e. a marital property law.⁵⁴ Under this theory all the assets of the spouses are visualized as forming one part of the estate and all the debts of the spouses the other—the *estate* here being the aggregate whole to be treated by law.

Under the American doctrine of *immobilia reguntur lege loci*⁵⁵ the point of contact, as one writer indicates:

"... is the immovable itself. The place where the spouses are or where the assets are managed is irrelevant. This conception implies that no problem arises other than that of determining the interest of one spouse in the lands of the other."⁵⁶

The Central European concept, on the other hand, develops the inquiry on a broader basis, the courts going into the question of obligations that may arise between the spouses; the liability of either to creditors; the effects of voluntary or judicial separation, divorce; post-nuptial agreements; bankruptcy; the management of the wife's goods other than those pertaining to her separate estate; presumptions as to ownership and so on. These factors are all considered as a part of a complex unit, the estate, which is to be treated as an aggregate, similar to an inheritance, to which one conflict rule applies.

Arguments can be mustered for both systems,⁵⁷ for each contains benefits and each pitfalls. Thus it would be useless to designate one or the other as the theory to be preferred. If it be conceded that uniformity of results is one of the most important aims of law,⁵⁸ then deviation from the well established principle that all questions concerning the creation of interests in land in the United States are governed by the *lex rei situs* would bring about a

⁵⁴ RABEL, *op. cit. supra*, note 2, at 331.

⁵⁵ STORY, *op. cit. supra*, note 2, at §§ 158, 186, 188; WHARTON, *op. cit. supra*, note 2, at § 191.

⁵⁶ RABEL, *op. cit. supra*, note 2, at 329.

⁵⁷ *Id.* at 342.

⁵⁸ To those not willing to make this conclusion the authors recommend a perusal of the following: BEROLZHEIMER, *THE WORLD'S LEGAL PHILOSOPHIES* (1912); DEMOGUE, *ANALYSIS OF FUNDAMENTAL NOTIONS, MODERN FRENCH LEGAL PHILOSOPHY* (1916); KOHLER, *PHILOSOPHY OF LAW* (1914); MIRACLIA, *COMPARATIVE LEGAL PHILOSOPHY* (1912); VON IHERING, *LAW AS A MEANS TO AN END* (1913).

chaotic retrogression, obscuring titles, disturbing existing interests, and harrying courts and legal writers alike in the morass of confusion which would follow a change over to the "estate" concept. The general benefits, if there be any, from such a legal revolution would be infinitesimal and far outweighed by the problems which conversion would give rise to. Thus no American modernist in legal thought has seriously supported a deviation from the accepted doctrine that the state in which the an immovable is situated will determine what, if any, interest one spouse obtains in the other's land as an incident to marriage.

However, as to most hard and fast rules, there is an exception, or, to be more accurate, there is a limitation upon the application of the *lex situs* in most American jurisdictions, namely, the "replacement" or "source" doctrine which declares that immovables purchased by a spouse with assets which were his separate property remain his separate property; and, conversely, when an immovable is acquired with community property, it is acquired subject to the community interest of the other spouse.⁵⁹ In justification of this limitation it is said that title is not lost by moving assets across state lines and converting them into other forms of property.

It should be noted here that the "source" or "replacement" doctrine is purely local law.⁶⁰ In reality, it has nothing at all to do with the law of conflict of laws for it is a part of the domestic property law of the state in which the transaction occurs. But it is so closely interwoven with the law of conflict of laws that the practical result is often almost the same as if the opposing conflict of laws principle, that the law of the domicile governs all matrimonial property, had been applied. Therefore, under this doctrine, the law of the situs is considerably qualified by the operation of the law of the domicile, and in this single instance, decisions ap-

⁵⁹ *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88 (1848); *Edwards v. Edwards*, 108 Okla. 93, 233 Pac. 477, 92 A. L. R. 1347 (1924). *In re Wilson's Estate*, 56 Nev. 353, 53 P. (2d) 339 (1936).

⁶⁰ *Jacob, The Law of Community Property in Idaho*, 1 IDAHO L. J. 1, 36 (1931); *Leflar, supra*, note 2, at 229.

proach closely to the European concept of a single marital unit to which the law of the domicile applies. *E.g.*, a husband and wife are domiciled in a common law state; the husband purchases immovables in a community property state with money which he earned after marriage. Under the common law, this is separate property, and under the replacement doctrine, the land purchased therewith remains his separate property.

If, as de Funiak claims,⁶¹ the underlying basis for the marital community property system is the idea of a conjugal partnership, economic in nature and democratic in origin, the line of reasoning dictated by the source doctrine in the above illustration, defeats the spirit of the community property system, for the money with which the immovable is acquired in this case necessarily belongs to one of the spouses as his or her separate property because under the law of their domicile nothing but separate property exists, and no acquisition of immovable property can ever become community property as long as the spouses remain domiciled in a common law state. It could therefore be justifiably argued that in community property states, as far as immovables are concerned, the law of the suits should prevail in every case⁶² as a matter of strong public policy, and the purely local theory involved in the replacement or source doctrine should have no part in internal community property law.

It is a general rule,⁶³ however, both in common law and in community property states, that the character of interest in the new property is the same as that of the old. Thus, if land is purchased by one of the spouses with community funds and in his name only,

⁶¹ DE FUNIAK, *op. cit. supra*, note 2, at § 11, p. 27.

⁶² The result was reached in the following community property cases: *Gratton v. Weber*, 47 Fed. 852 (C. C., D. Wash., N. D. 1891); *Smith v. Gloyd*, 182 La. 770, 162 So. 617 (1935); *Rush v. Landes*, 107 La. 549, 32 So. 95 (1902).

⁶³ *In re Arms' Estate*, 186 Cal. 554, 199 Pac. 1053 (1921); *Kraemer x. Kraemer*, 52 Cal. 302 (1877); *Mayor v. Breeding*, 24 S. W. (2d) 542 (Tex. Civ. App. 1930); *Thayer v. Clark*, 77 S. W. 1050 (Tex. Civ. App. 1903), *affirmed* 81 S. W. 1274; *McDaniel v. Harley*, 42 S. W. 323 (Tex. Civ. App. 1897). See note, 92 A. L. R. 1347, 1352. See cases cited 64 A. L. R. 246 (1929); 31 C. J. 28, 37, 72 (1923).

the interest of the other spouse survives and is technically protected by means of a resulting or constructive trust.⁶⁴

In the event that the purchase price of an immovable was paid for partially from separate funds and partially from community funds the question becomes mathematically more complicated. In theory the principle of law should be the same in such a situation, yet the courts are prone to shy from complex evaluations, and only if the assets are clearly traceable will they continue to apply the source doctrine.⁶⁵ When separate and community property are so commingled and confused as to be no longer clearly traceable, the whole will be deemed community, at least in community property states.⁶⁶

It may be noted that some decisions have created a great inconsistency in the source doctrine when immovables are converted into movables. For example, a husband and wife are domiciled in a separate property state and the wife inherits land situated in a community property state. The land is sold, and the money thus received is sent into the separate property state. Logically, under the replacement doctrine, the money thus acquired should be substituted for the land and remain subject to the law of the situs of the land; but, in a similar situation, a Maryland court⁶⁷ evaluated the treatment given the money in such instances by declaring that conversion from an immovable to a movable effectuated the application of the law of the domicile to the movable and the husband acquired the money under the rule of the law of the domicile.

The court stated:

"The mutation from realty to personalty may be determined to be

⁶⁴ Neuner, *supra*, note 2, at 172.

⁶⁵ Succession of Anders, 131 La. 154, 103 So. 623 (1913); *In re Gulstine's Estate*, 166 Wash. 326, 6 P. (2d) 628 (1932); *Rogers v. Joughin*, 152 Wash. 448, 277 Pac. 388 (1929); *Zintheo v. B. F. Goodrich Rubber Co.*, 136 Wash. 196, 239 Pac. 391 (1925); *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. Rep. 937 (1907).

⁶⁶ *Estate of Woods*, 23 Cal. App. (2d) 187, 72 P. (2d) 258 (1937); *In re Gulstine's Estate*, 166 Wash. 325, 6 P. (2d) 628 (1932); *In re Carmock's Estate*, 133 Wash. 374, 233 Pac. 942 (1925); *Jacobs v. Hoitt*, 19 Wash. 283, 205 Pac. 414 (1922).

⁶⁷ *Newcomer v. Orem*, 2 Md. 297, 56 Am. Dec. 717 (1857).

complete when the sale is ratified and the purchaser has complied with the terms of it by paying the money . . .

"The property having undergone this change, we are of the opinion that the interest of Mrs. Orem ceased to be governed by the laws of Louisiana [where the land was located] and became subject to those of their domicile, by virtue of which the husband is the owner of the wife's choses in action . . ."⁶⁸

The question now arises: which law determines the rights to the profits and fruits of land? It is axiomatic that profits and fruits do not necessarily belong to the owner of the land,⁶⁹ and it must be emphasized that fruits and profits of an immovable are movables.

Take the following case: a husband and wife reside in a community property state; the husband owns a separate farm in a common law state; on this land he has a house and an orchard; he obtains rent from the house, sells fruit from the orchard, and finally disposes of the whole farm for \$1,000 more than he originally paid for it. Do the funds thus acquired remain separate property under the replacement doctrine or are they converted into community property?⁷⁰

The courts usually declare that the ownership of the income from land should be determined by the law of the domicile of the spouses unless, by statute, a different law is applicable.⁷¹ Thus, under Louisiana statutory law,⁷² the fruit of the husband's separate property falls into the community. While, Nevada, on the other hand,⁷³ applies the law of the situs of the land and maintains that income from separate property remains separate property if the

⁶⁸ *Id.* at 306.

⁶⁹ TIFFANY, *op. cit. supra*, note 51, at § 599.

⁷⁰ Under Spanish Community property laws, fruits and profits of the spouses' separate property are community property based on the conception that fruits and income of all property of each spouse was naturally devoted to the benefit of the marital union. See DE FUNIAK, *op. cit. supra*, note 2, at § 71, p. 180.

⁷¹ *Gilkey v. Pollock*, 82 Ala. 503, 3 So. 99 (1887).

⁷² DACCETT, *op. cit. supra*, note 2, at 143. See LA. CIVIL CODE OF 1870 (Merrick's 3rd ed. 1925), articles 2402, 2334, 2386; *Peters v. Klein*, 161 La. 664, 109 So. 349 (1926).

⁷³ *Grimes v. Grimes*, 52 F. (2d) 171 (D. Nev. 1931); See also, *State ex rel. Van Moss v. Sailors*, 39 P. (2d) 397, 180 Wash. 269 (1935).

immovable is located in a common law state. There are decisions,⁷⁴ compelled by the Texas Constitution,⁷⁵ that rents and profits of separate lands in Texas are community property.

When property or money is derived from separate property without the impairment of the original capital, it seems clearly to fall within the term "rents and profits," but what of the \$1,000 the husband made by selling the farm? The courts, in the majority of cases,⁷⁶ have insisted on tracing the *unit* back to its source, saying that exchanges of separate property for new property remain separate property regardless of profit or loss involved in the transaction.⁷⁷ In Texas, where the statute provides that "rents, issues and profits" of separate property are community property, "increases of land" are specifically excepted therefrom.⁷⁸

MOVABLES OWNED AT THE TIME OF MARRIAGE

The property rights acquired by the husband and wife in the pre-nuptial movable property of the other are usually said to be determined by the law of the husband's domicile at the time of the marriage in the absence of an express pre-marital contract.⁷⁹ This conflict of laws rule with its emphasis on domiciliary law is ob-

⁷⁴ *Commissioner of Internal Revenue v. Terry*, 69 F. (2d) 969 (C. C. A. 5th, 1934); *Robbins v. Robbins*, 125 S. W. (2d) 666 (Tex. Civ. App. 1939); *Frame v. Frame*, 120 Tex. 61, 36 S. W. (2d) 152, 73 A. L. R. 1512 (1931). It was held here that a statute declaring rents and revenues derived from a wife's separate real estate to be her separate property violated the Texas constitutional provision declaring what constitutes wife's separate property.

⁷⁵ TEX. REV. CIV. STAT. (Vernon, 1936), Art. 16, § 15.

⁷⁶ *Gump v. Commissioner of Internal Revenue*, 124 F. (2d) 540 (C. C. A. 9th, 1942). *In re Buchanan's Estate*, 89 Wash. 172, 154 Pac. 129 (1916); *Jacobs, supra*, note 60, at 46.

⁷⁷ *But see Beals v. Fontenot*, 111 F. (2d) 956 (C. C. A. 5th, 1940) decided under LA. CIVIL CODE 1870, § 2408, declaring that where separate property of either spouse increased during marriage the other spouse should be entitled to one-half of the increase if it proved that the increase is the result of common labor or industry, but not if it is due only to the ordinary course of things such as the rise in the value of property or the chances of trade.

⁷⁸ TEX. REV. CIV. STAT. (Vernon, 1936), Arts. 4613, 4614.

⁷⁹ RESTATEMENT, CONFLICT OF LAWS, § 289 (1934); 2 BEALE, THE CONFLICT OF LAWS, § 289.1 (1935); GOODRICH, CONFLICT OF LAWS, 382 (1949); STUMBERG, CONFLICT OF LAWS, 285 (1937); *Harding, supra*, note 2; *Horowitz, supra*, note 2; *Leflar, supra*, note 2; Note, *Marital Property and the Conflict of Laws, supra*, note 2.

vously an outgrowth of the ancient maxim, *mobilia sequuntur personam*, which was developed in medieval times when mankind travelled little with the result that man and his property were usually located at the same place, the owner's domicile. Hence, it was assumed that movables had no location apart from their owner, no situs of their own, and since they and the owner were in most instances located at the owner's domicile, the domiciliary law was held controlling in the creation of rights in personal property.⁸⁰

Today, by reason of modern travel as well as because of the fact that property is often owned in more than one state, the thought that tangible movables may not have a situs of their own is mere fiction. With respect to title or interests in movable property resulting from transactions *inter vivos*, the maxim that movables follow the person has been rejected as unrealistic, and the law of the domicile has given way to the law of the situs of the movable.⁸¹ Nevertheless, the old maxim lingers on as the weight of authority in cases where matrimonial property rights are at bar and also in cases concerning devolution of personal property at death, the distribution of property on testate or intestate succession.⁸²

Returning to marital property rights arising in the spouses at the time of the marriage, the law of the place of performance of the marriage is held not controlling inasmuch as the place of celebration may be purely happenstance.⁸³ Thus, the issue as to the applicable law becomes a conflict between the law of the situs and

⁸⁰ See STORY, *op. cit. supra*, note 2, at §§ 376, 377, 379.

⁸¹ BEALE, *op. cit. supra*, note 2, at §§ 255.2, 255.5-259.1; GOODRICH, *op. cit. supra*, note 2, at 470; STUMBERG, *op. cit. supra*, note 2, at 357. THE RESTATEMENT, CONFLICTS OF LAWS, §§ 255, 256, 257 and 258, states that capacity to make a valid conveyance of a chattel, the formalities of such conveyance, the substantial validity of such conveyance and the nature of the interest created by a conveyance are all to be determined by the law of the place where the chattel is at the time of conveyance. See also Carnahan, *Tangible Property and Conflict of Laws*, 2 U. OF CHI. L. REV. 345 (1935).

⁸² RESTATEMENT, CONFLICT OF LAWS, §§ 303 and 306; GOODRICH, *op. cit. supra*, note 2, at 501 and 512; STUMBERG, *op. cit. supra*, note 2, at 378-386.

⁸³ Allen v. Allen, 6 Rob. 104, 39 Am. Dec. 553 (La. 1843); Land v. Land, 22 Miss. 99 (1850); Harral v. Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17 (1884); RESTATEMENT, CONFLICT OF LAWS, § 289, comment a; Harding, *supra*, note 2, at 865; Note 43 HARV. L. REV., *supra*, note 2, at 1287.

the domiciliary law. Since it is now recognized that movables may have a situs of their own, it can be contended that the law of the situs of the movable should be the applicable law to determine the interests of the husband and wife in pre-marital movables. The state wherein the *res* is located may ignore the law of the domicile and apply its own law if it so desires since it has control over the *res*.⁸⁴ Even so, the courts of the situs, have, in the majority of instances, adopted the usual conflict of laws rule and have referred the question of the interests of the spouses in movables owned at the time of the marriage to the domiciliary law.

It is within the realm of possibility that a court at the situs of the *res* will concede that the law of the domicile should govern, but then will refuse to give effect to the foreign law because in the particular case and on the particular facts at bar, it would be contrary to the public policy of the state.⁸⁵

To refer the interests of the spouses arising in each other's movables at the time of marriage to the domiciliary law may be justified on the grounds of convenience. It is argued in this respect that marital property rights should be determined as a single unit with one law applicable.⁸⁶ It often occurs that the movable property of the spouses is scattered in many states at the time the marriage is performed. To apply the law of the situs wherein each piece of movable property was located would mean the application of numerous laws, and it could happen that the interest of the spouses in each and every movable would therefore be governed by a different law. To apply a single law, that of the domicile, to all the personal estate is more convenient and far simpler.⁸⁷

Although modern writers are in accord with the rule stated above, to the effect that rights of the spouses in their respective pre-marital movables are to be referred to the law of the husband's

⁸⁴ Leflar, *supra*, note 2, at 225.

⁸⁵ *Ibid*; See *Locke v. McPherson*, 263 Mo. 493, 638 S. W. 726, 52 L. R. A. 420 (1901).

⁸⁶ See *supra*.

⁸⁷ Leflar, *supra*, note 2, at 225; Horowitz, *supra*, note 2, at 218; Note, 43 HARV. L. REV. *supra*, note 2, at 1286.

domicile,⁸⁸ the courts and earlier writers usually couch their theories in the term "matrimonial domicile"⁸⁹ rather than "husband's domicile." For example in the case of *Harral v. Harral*⁹⁰ the court said:

"The authorities are quite generally in accord in selecting the matrimonial domicile as the place which shall furnish the law regulating the interests of husband and wife in the movable property of either which was *in esse* when the marriage took place."⁹¹

This opinion then went on to add that by matrimonial domicile was meant the husband's domicile. It was stated:

"On the marriage, the legal presumption is that the wife takes the domicile of her husband, and her rights are subject to the laws of his domicile."⁹²

In spite of this language and similar expressions by other courts, there is some difference of opinion as to whether "matrimonial domicile" is always to be placed at the husband's domicile at the time of marriage in order to determine marital ownership of pre-nuptial movables. In the majority of cases the spouses are both domiciled in the same state at the time of marriage with no intention of removing therefrom. Here then there could be no question but that such state would be considered the matrimonial domicile. But suppose the parties are domiciled in different states at the time of marriage and intend to make the domicile of the wife their home after marriage; or suppose the husband and wife intend to fix their domicile in still a third state after marriage. In these latter instances would the husband's domicile at the time of marriage be

⁸⁸ See authorities cited in note 79, *supra*.

⁸⁹ *Arendell v. Arendell*, 10 La. Ann. 566 (1855); *Allen v. Allen*, 6 Rob. 104 (La. 1843); *Ford v. Ford*, 2 Mart. (N. S.) (La. 1824); *Harral v. Harral*, 39 N. J. Eq. 279, 51 Am. Rep. 17 (1884); *Kneeland v. Ensley*, 19 Tenn. 620 (Meigs 1838); *State v. Barrow*, 14 Tex. 179 (1855); *McIntyre v. Chappell*, 4 Tex. 187 (1849); See *STORY, op. cit. supra*, note 2, at § 186.(3); *WHARTON, op. cit. supra*, note 2, at § 190; *Notes*, 57 L. R. A. 352 (1903) and 85 Am. St. Rep. 552 (1901).

⁹⁰ 39 N. J. Eq. 279, 51 Am. Rep. 17 (1884).

⁹¹ *Id.* at 288.

⁹² *Ibid.*

considered the matrimonial domicile whose law should govern the property interests of the husband and wife at that time?

Story in his treatise would answer the question in the negative:

"But suppose a man domiciled in Massachusetts should marry a lady domiciled in Louisiana, what is then to be deemed the matrimonial domicile? Foreign jurists would answer that it is the domicile of the husband, if the intention of the parties is to fix their residence there; and of the wife, if the intention is to fix their residence there; and if the residence is intended to be in some other place, as in New York, then the matrimonial domicile would be in New York."⁹³

By this rule then, the matrimonial domicile by which pre-marital rights in movables are to be determined would not necessarily be that of the husband's domicile at the time of marriage, but rather that intended by the parties, or, as the rule was finally formulated:

"The question as to what place is to be regarded as the matrimonial domicile, the law of which will determine the effect of the marriage upon personal property owned by either party at the time, or subsequently acquired by either or both during the existence of such domicile, is, in its last analysis, *one of intention of the parties at the time of the marriage as to where they shall establish residence, assuming that such intention is carried out within a reasonable time.*"⁹⁴ (Italics supplied.)

The courts do often give notice to Story's intention rule in resolving the issue of matrimonial domicile. However, upon examination of the facts of such cases, it will usually be found that the intended domicile and the domicile of the husband are one and the same.⁹⁵ Hence, under such facts, the outcome is identical no matter which doctrine is applied.

In the early Texas case, *McIntyre v. Chappel*,⁹⁶ the intended

⁹³ STORY, *op. cit. supra*, note 2, at § 194.

⁹⁴ Note, 57 L. R. A. 352, at 360 n. (1903).

⁹⁵ See *Jaffray v. McGough*, 83 Ala. 202, 3 So. 594 (1888); *Mason v. Fuller*, 36 Conn. 160 (1869); *Harral v. Harral*, 39 N. J. Eq. 279, 51 Am. Rep. 17 (1884); *Layne v. Pardee*, 2 Swan 232 (Tenn., 1852), and others collected in 57 L. R. A. 352 (1903); See Goodrich, *Matrimonial Domicile*, 27 YALE L. J. 49, 53-54 (1917).

⁹⁶ 4 Tex. 187 (1849).

domicile of the spouses and the husband's domicile at the time of marriage did not coincide. The court held the matrimonial domicile to be that of the husband's domicile at the time of marriage (Tennessee) until the parties arrived at their intended domicile (Texas). The court said:

"The national domicile of these parties was, we think, unquestionably in the state of Tennessee; and we are aware of no principle which, under the circumstances, would justify the conclusion that their matrimonial domicile was elsewhere. . . . We conclude that the matrimonial domicile of the parties to this marriage was in the state of Tennessee, and that, previous to the acquisition of a domicile, *facto et animo*, by the husband in this country, the laws of that State must furnish the rule of decision as to their rights."⁹⁷

However a later Texas case, *State v. Barrow*,⁹⁸ casts some doubt upon the *McIntyre* decision and muddies the water, for there the court held that where the parties intended to make their domicile in Texas, but had not yet reached the state and had acquired movables en route, the Texas law governed as to the marital interests in these movables.⁹⁹ The case seems to be out of line with current notions as to what goes to make up domicile.¹⁰⁰

Story, in setting forth the intention thesis, was influenced by continental writers and Louisiana decisions.¹⁰¹ He reasoned in

⁹⁷ *Id.* at 197.

⁹⁸ 14 Tex. 179 (1855).

⁹⁹ In the *Barrow* case the husband and wife were domiciled in Mississippi. They determined to remove to Texas and while in transit visited in Tennessee where the wife's father gave to her a slave. Thereafter, they continued their journey to Texas and resided in the latter state until the husband died. Thereupon a creditor sought to levy on the slave as the property of the husband. The wife claimed the slave as her separate property. Under both the laws of Texas and Mississippi, the slave was recognized as the wife's separate property. Under Tennessee law, the slave would have become the property of the husband. The court said the question was whether Tennessee or Texas law governed as to marital rights in the slave and concluded that Texas law governed because husband and wife intended to make Texas their domicile and looked to the laws of Texas, as their future domicile, to control. The court did recognize that there would be more reason to apply Mississippi law (the result would have been same under Mississippi or Texas law, *i.e.*, the slave would have been adjudged the separate property of the wife) under doctrine of domicile to the effect that Mississippi domicile would have been retained until the new domicile—Texas, acquired.

¹⁰⁰ Harding, *supra*, note 2, at 866-867.

¹⁰¹ STORY, *op. cit. supra*, note 2, at §§ 194, 195, 196, 197, 198, 199. The two cases

accord with a civil law viewpoint that marriage was a contract. Since the spouses could expressly contract as to their marital property rights, Story believed that, in the absence of such an express contract, the husband and wife impliedly or tacitly agreed that their marital interests in property should be determined by reference to the law of the matrimonial domicile. According to Story, the interpretation of a contract is governed by the law of the place of performance.¹⁰² If marriage is a contract, contract principles must be applied. Therefore the domicile intended by the parties, *i.e.*, the place where they are going to live, will be the place of performance. The matrimonial domicile discovered from the intent of the parties is the place of performance, and is thus controlling.

Viewing marriage as a contract has been criticized as not in accord with the common law conception of marriage which treats it as a status.¹⁰³ Under the common law, the marriage relationship is said to be entered as a contract, but once entered, the rights and duties of the relationship are not subject to the wills or consent of the parties but are prescribed by law. Marital rights in property arise not by implied contract, but the interests are created by law. Moreover to say that spouses tacitly contract as to marital interests in property in accord with the law of a certain jurisdiction rests upon a proposition that the parties are acquainted with the law and thus consent to its application, which, it has been said, can hardly state the fact.¹⁰⁴

The intention rule also conflicts with the general doctrine of domicile. Two operative facts are said to be necessary in order to establish a domicile of choice: (1) physical presence in the

were: *Le Breton v. Nouchet*, 3 Mart. 60, 5 Am. Dec. 736 (La. 1813); *Ford's curator v. Ford*, 2 Mart. (N. S.) 574, 14 Am. Dec. 201 (La. 1824). It would seem that in both cases, the husband's domicile and the intended domicile were the same.

¹⁰² STORY, *op. cit. supra*, note 2, at § 199, states: "... for in England as well as in America, in the interpretation of other contracts, the law of the place where they are to be performed has been held to govern."

¹⁰³ See Harding, *supra*, note 2, at 859-863, wherein he exposes the fallacy of Story's reasoning as applicable to common law theory.

¹⁰⁴ Goodrich, *supra*, note 95, at 58.

place where the domicile is to be acquired, and (2) the intention to make that place the home.¹⁰⁵ To acquire a domicile of choice, these two elements, presence and intention, must be proven.

Story's rule seems to permit the matrimonial domicile to be established by mere intent alone in a fact situation where neither the husband nor wife is present or domiciled in the intended domicile at the time of marriage.¹⁰⁶ Perhaps this is not a fundamental objection inasmuch as the authorities have concluded that intention alone cannot establish domicile so Story's intention rule has been qualified by a statement that the intention of the parties govern " . . . assuming that such intention is carried out within a reasonable time."¹⁰⁷

Apparently, then a matrimonial domicile is not established until the spouses are present within the intended state of domicile and this presence must be accomplished within a reasonable time. Yet, this too, is open to objection for if neither spouse is domiciled at the time of marriage in the state of intended domicile their marital rights in property are held in abeyance until their intention is carried out, thus making for uncertainty with respect to important interests.¹⁰⁸

In the face of these obstacles there seems to be no reason to depart from the common law rule to the effect that upon marriage the wife's domicile becomes, by operation of law, that of the husband and so continues unless she is justifiably separated from him.¹⁰⁹ Although the cases do give lip service to the term "matrimonial domicile" in reality it would appear that controlling weight is given to the husband's domicile at the time of the marriage in deciding which law governs the interests acquired by each spouse in the pre-nuptial movable property of the other. Thus matrimonial

¹⁰⁵ RESTATEMENT, CONFLICT OF LAWS, § 15; STUMBERG, *op. cit. supra*, note 2, at 18.

¹⁰⁶ Goodrich, *supra*, note 95, at 51; Harding, *supra*, note 2, at 863-864.

¹⁰⁷ See note 94, *supra*.

¹⁰⁸ Goodrich, *supra*, note 95, at 51; Harding, *supra*, note 2, at 864; STUMBERG, *supra*, note 2, at 56.

¹⁰⁹ RESTATEMENT, CONFLICT OF LAWS, §§ 27, 28; STUMBERG, *op. cit. supra*, note 2, at 38-42.

domicile actually means husband's domicile. The Restatement takes this position when it declares:

"At marriage the husband and wife respectively acquire such rights or other interests in movables then belonging to the other as are given by the law of the domicil of the husband at the time of the marriage."¹¹⁰

Considering this rule from the standpoint of a functional approach, can the application of the law of the husband's domicile in this situation be justified?¹¹¹ The trend of modern day thought is to the effect that property owned by the spouses prior to the marriage should remain the separate property of the spouses after the marriage. Thus, if the law of the husband's domicile followed the old common law doctrine which gave the wife's pre-marital movables to the husband, or if the law of the husband's domicile made such movables part of the community estate,¹¹² hardship would be suffered by the wife. However, such rules have now been abrogated in American jurisdictions and, in so far as the conflict of laws rules applicable to determine the interests each spouse gains in the movable property of the other at marriage, the matter is of little import.

With respect to ante-nuptial property, the law, as modified, states that such property of either party remains the separate property of that party after the marriage. Therefore, it matters but little whether the law of the situs, the law of the intended domicile, or the law of the husband's domicile is held controlling, for under all the pre-marital property is considered to be the separate property of the spouse owning it at the time of marriage.¹¹³

MOVABLES ACQUIRED AFTER MARRIAGE

That the law of the husband's domicile at the time of the acquisition determines the mutual rights of the husband and wife in

¹¹⁰ RESTATEMENT, CONFLICT OF LAWS, § 289. See authorities cited *supra*, note 79, accepting this viewpoint.

¹¹¹ See Horowitz, *supra*, note 2, for an excellent exposition of this approach.

¹¹² In Roman-Dutch law, all property of spouses owned at the time of marriage becomes community property. DE FUNIAK, *op. cit. supra*, note 2, at 1.

¹¹³ *Id.* at § 89.

post-nuptial movables is the proposition accepted by the weight of American authority in the absence of an express contract to the contrary.¹¹⁴ Thus, as to movable property acquired after the marriage at a time when the husband's domicile at marriage is unchanged, the law of that domicile governs the spouses' interests.

On the other hand, if the husband's domicile is changed after marriage, the law of the husband's domicile at the time the movable property is acquired will be determining with respect to marital interests in that property. In short, the actual domicile of the spouses at the time of acquisition of the movable is controlling.¹¹⁵

This doctrine has evolved in American jurisdictions through a rejection of the rule of implied contracts¹¹⁶, i.e., that parties upon marriage impliedly contract with reference to marital rights in property according to the law of the matrimonial domicile at the time of marriage, and that such an implied agreement will bring into operation the law of the first matrimonial domicile as to all future acquisitions even though acquired after the parties have established a new domicile. In an early leading case, *Saul v. His Creditors*,¹¹⁷ the court refused to follow the theory of implied contract and decided that the interest of the spouses in property acquired after removal to Louisiana would be governed by the community property laws of Louisiana and would not be the separate property of the husband as would have been the case under Virginia law, the place where the parties were domiciled at the time of marriage.

¹¹⁴ RESTATEMENT, CONFLICT OF LAWS, § 290; *Shelkret v. Helvering*, 138 F. (2d) 925 (App. D. C. 1943); *Ellington v. Harris*, 127 Ga. 85, 56 S. E. 134 (1906); *Matter of Majot*, 199 N. Y. 29, 92 N. E. 402 (1910); *Powell v. De Blane*, 23 Tex. 661 (1859); *Castro v. Illies*, 22 Tex. 479 (1858); *BEALE, op. cit. supra*, note 2, at 1013; *STUMBERG, op. cit. supra*, note 2, at 286-287; *Goodrich and Coleman, supra*, note 39, at 6-7; *Horowitz, supra*, note 2, at 215; *Leflar, supra*, note 2, at 230-236.

¹¹⁵ The *Restatement of Conflict of Laws* is stated in terms of the law of the domicile of the parties as controlling. This is taken to be the husband's domicile if the parties have not established separate domicile. Where the spouses have separate domiciles at the time of acquisition, it is stated that: "... the law of the domicile of that spouse who acquires the movables determines the extent of the interest of the other spouse therein." § 290, comment c.

¹¹⁶ See section on implied contracts, *supra*.

¹¹⁷ 5 Mart. (N. S.) 569, 16 Am. Dec. 212 (La. 1827).

In rejecting the implied contract theory, the choice of law to be followed in determining marital interests in acquisitions of movable property subsequent to marriage has been narrowed to the law of the situs or alternatively, to that of the husband's domicile at the time of the acquisition of the property in question.

As stated, the application of a domiciliary law may be traced back to the *mobilia* doctrine, a fiction which has ceased to be applied in cases of *inter vivos* transfers of tangible personality since the recognition has come about of the irrefutable fact that a tangible movable may have a location of its own. Therefore the rule has generally been accepted that the law of the situs at the time a chattel is acquired is the applicable law in transactions *inter vivos*, and there is also some authority for a situs rule with respect to marital interests in movables acquired subsequent to the marriage. However, the domiciliary rule has now prevailed in the Restatement of the Conflict of Laws, although an original proposed draft, published prior to the Restatement, accepted the situs rule in the following words:

"An interest in movables acquired by either or both of the spouses during coverture is in one or the other, or both, according to the law of the place where the movables are situated when [they were] acquired."¹¹⁸

The law of the situs does have final control over all property situated within its boundaries, and thus may refer the question of marital interests to domiciliary law or may apply its own law. This control of the situs state is exemplified by the fact that certain states have enacted statutes to the effect that the law of the state shall determine marital interests in all property acquired in the state. Article 2400 of the Louisiana Civil Code provides:

¹¹⁸ RESTATEMENT OF THE LAW OF CONFLICTS OF LAWS, Proposed Final Draft No. 2, § 311 (1931); Harding, *supra*, note 2, favors a situs rule because the maxim *mobilia sequuntur personam* today states but a fiction; because a reference to domiciliary law arises out of a contract theory as to marriage and such is unacceptable in common law jurisdictions; and further by an application of a domiciliary rule, one state by its law is permitted to pass title to movables located in another which goes against notions of jurisdiction.

"All property acquired in this State by nonresident married persons . . . shall be subject to the same provisions of law which regulate the community of acquets and gains between citizens of this State."¹¹⁹

The control of the situs is also illustrated by cases such as *Smith v. McAtee*¹²⁰ where, in the absence of legislation similar to that illustrated above, the courts of a situs state refused to refer the question of marital interests to the law of the domicile because of a strong public policy of the state in the particular case which precluded such reference.¹²¹

In most instances the state of the domicile and the situs are the same, so the question does not become a vital issue, though the courts do usually cite the domiciliary law as governing interests in movables acquired after marriage. The problem of the choice of law becomes acute in instances where the domicile and situs do not coincide, and here the weight of authority again cites the domiciliary law with approval.¹²²

As in the case of the application of the domiciliary law to movables owned prior to the marriage, the convenience of a domiciliary rule is strongly contended to be of overruling weight in controlling marital interests in post-nuptial movables inasmuch as it makes for greater simplicity to have one single uniform law determine

¹¹⁹ 2 LA. CIVIL CODE (2nd ed. 1932); See DACCETT, *op. cit. supra*, note 2, at 109-113, for a discussion of Article 2400. Texas has not gone as far as Louisiana. TEX. REV. CIV. STAT. (Vernon, 1948), Art. 4627 states: "The marital rights of persons married in other countries who may remove to this state shall, in regard to property acquired in this state, during the marriage, be regulated by the laws of this state."

¹²⁰ 27 Md. 420, 92 Am. Dec. 641 (1867).

¹²¹ In *Smith v. McAtee*, creditors of the husband sought to attach in Maryland proceeds of realty devised to the wife. By the law of domicile, Illinois, such proceeds become property of the husband, but in Maryland they were protected by statute from the debts of the husband. The Maryland court refused to permit the attachment. It seemed to be applying local public policy for the protection of married women in refusing to apply the general domiciliary rule. *Shumway v. Leakey*, 67 Cal. 458, 8 Pac. 12 (1885), and *Gooding Mill & Elevator Co. v. Lincoln Bank*, 22 Idaho 468, 126 Pac. 777 (1912), also apply situs law; however, other reasons were present to influence the decisions, e.g., in the *Gooding* case, estoppel was relied upon and in the *Shumway* case, the laws of Nevada, the situs, were presumed to be the same as those of the forum.

¹²² *Birmingham Waterworks Co. v. Hume*, 121 Ala. 168, 25 So. 806 (1899); *Nelson v. Goree's Administrator*, 34 Ala. 565 (1859); *Hicks v. Pope*, 8 La. 554 (1835); *McLean v. Hardin*, 3 Jones Eq. (56 N. C. 283) 294 (1857); *Snyder v. Stringer*, 116 Wash. 131, 198 Pac. 733 (1921); *Cope v. Lindbloom*, 57 Wash. 106, 106 Pac. 634 (1910).

the interests of the spouses in the entire movable estate. A situs rule, on the other hand, would call for a consideration of many laws, *i.e.*, the laws of the states of the situs at the time of the acquisition in instances where tangible movables are acquired in different states. Further justification for the domiciliary rule lies in the fact that there is a tendency to collect all movable property at one place, even though acquired elsewhere, and, since disputes pertaining to the interests of the spouses arising at the time of the dissolution of the marriage generally occur at the domicile, all parties concerned will have greater knowledge of the domiciliary law.¹²³

The argument advanced in favor of the domiciliary law, that of having single uniform regime applicable to the whole movable estate, loses some force when consideration is taken of the fact that marital interests in movables acquired in every new domicile will be governed by a different law since the marital interests in post-nuptial movables are to be determined by the law of the actual domicile at the time of acquisition. It has been suggested however, in answer to this criticism, that during the course of the marriage there will, in all probability, be fewer changes of domicile than acquisition of property in different locations.¹²⁴ In order to have a single law always controlling as to marital ownership, it would be necessary to accept the view of French jurists that where there is no express contract at the time of marriage governing the respective property rights of the spouses in presently owned property or property to be acquired in the future, the law of the first matrimonial domicile governs throughout the whole of the marital relationship, irrespective of where the parties later acquire domicile or the laws of the after-acquired domicile.

The inconvenience to the state of the situs in being forced to apply rules of law of other jurisdictions and the fact that the interests of bona fide third persons who place reliance upon the appearance of the property being subject to the marital interests

¹²³ Horowitz, *supra*, note 2, at 218-219; Leflar, *supra*, note 2, at 233-234.

¹²⁴ Leflar, *supra*, note 2, at 234, n. 51.

defined by the place where such property is located, have been advanced as reasons to militate against the rule of domicile. With respect to the inconvenience argument, it can be rejected on the grounds that the situs state, in most cases, will still be forced to look to the law of another state, the domicile, for movables will probably be purchased with property acquired in the state of domicile, and, under the "source" or "replacement" doctrine, the community or separate interests of the spouses, as the case may be, will be retained and reappear in the movable acquired. To the state of the situs this would be equally inconvenient. Moreover, in any event, inconvenience to the situs state would be offset by the greater inconvenience to the state of domicile where, in all likelihood, the movable will be taken after purchase inasmuch as the state of domicile would be forced to look to many laws if the movables are acquired in more than one state when the issue of matrimonial interests in marital property are at stake.¹²⁵

A situs rule will not afford complete protection to the interests of bona fide creditors or purchasers either. It is true that creditors and purchasers and other innocent third parties may expect the law of the place where the property is located to govern, but the situs rule declares that the interest of the spouses are determined by the law of the *place where acquired*. It is not beyond the realm of possibility that movables acquired in one state may be moved to another, not necessarily the domicile of the spouses. In such instance if the situs theory were applied the law of the original situs of acquisition would control the husband's and wife's interests, and bona fide third parties relying on the law where the property is presently situated would be no better off and would be subject to the danger of having their interests defeated by the law of the situs where acquired. It has been stated that, to protect the interests of bona fide third persons, each state should enact such legislation as it deems necessary.¹²⁶

If, as in a community property jurisdiction, it is recognized that

¹²⁵ *Id.* at 235.

¹²⁶ *Ibid.*; Horowitz, *supra*, note 2, at 217; note, 43 HARV. L. REV., *supra*, note 2.

a husband and wife share a joint ownership or partnership interest in the fund which they acquired by their common labor during coverture, then an automatic reference to either a situs law or to the law of the husband's domicile will at times deprive the wife of her joint interest. For example, if the property is acquired in a common law state where it is considered the separate property of the husband, the parties being domiciled at the time in a community property jurisdiction, and community funds are used to acquire the property, the court, if it determines to apply the law of the situs and ignores the source doctrine, may not preserve the partnership interests.¹²⁷ On the other hand, if the parties are domiciled in a common law state and property is acquired in a community property state, should the court look to the domiciliary law, once again the partnership interest will not be retained. Thus, proceeding with reference to a functional viewpoint, it has been said that, as to movable property acquired by the joint efforts of the husband and wife during the conjugal association, the law of any jurisdiction should be applied which tends to uphold the partnership interests of the husband and wife and with which the movables have some substantial connection.¹²⁸

CHANGE OF DOMICILE AND REMOVAL OF PROPERTY TO ANOTHER STATE

Rights in pre-marital movables are determined by the law of the matrimonial domicile at the time of marriage, and the spouses interests in movables acquired subsequent to the marriage are to be determined by the law of the matrimonial domicile at the time of acquisition. In either instance the matrimonial domicile signifies the husband's domicile. Suppose now that the spouses at the time of marriage own movable property and the husband's domicile is in a community property state; then, subsequent to the mar-

¹²⁷ This is not true if the source or replacement doctrine is applied, for if community property is used to acquire other property the interests of the husband and wife will be retained by application of the source doctrine through creation of a resulting or constructive trust.

¹²⁸ See Horowitz, *supra*, note 2, for a discussion of the functional approach.

riage, additional movable property is acquired at the husband's domicile in this community property state. Thereafter the domicile is changed and the property removed to a state where community property laws do not prevail. Or, carrying the hypothesis another step, suppose, in the first instance the spouses are domiciled in a common law state where the property in question is the separate property of the husband, and later the spouses remove the property and change their domicile to a community property state. In the first hypothetical case, does the property upon removal and change of domicile become the separate property of the husband? Or, in the second, does the character of ownership change so that the property is now held subject to a community of interests according to the community property law of the latter state?

The answer in each instance is in the negative. This is somewhat surprising in view of the American theory to the effect that when spouses change their domicile there is also a change in the system of laws governing marital interests in movables. With the rejection of the implied contract rule, that the law of the original matrimonial domicile governs the entire marital interests permanently, it was held that if the domicile were changed the law of the new matrimonial domicile became applicable to determine the marital interests of husband and wife. Nevertheless this doctrine has been abridged by another. It is well settled in the United States that only movables acquired after a change of domicile are governed by the law of the new domicile, and interests acquired under the law of one domicile are not affected by the law of a later domicile. Vested marital interests existing prior to a removal of the property or change of domicile are not divested by either such removal or change of domicile or both.¹²⁹

This doctrine has been protected by constitutional dogma as

¹²⁹ *Stephen v. Stephen*, 36 Ariz. 235, 284 Pac. 158 (1930); *In re Thornton's Estate*, 1 Cal. (2d) 1, 33 P. (2d) 1, 92 A. L. R. 1343 (1934); *Kraemer v. Kraemer*, 52 Cal. 302 (1877); *Douglas v. Douglas*, 22 Idaho 336, 126 Pac. 772 (1912); *Popp's Succession*, 146 La. 464, 83 So. 765 (1919); *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. (1848); *Edwards v. Edwards*, 108 Okla. 93, 233 Pac. 477 (1924); *Bosma v. Harden*, 94 Ore. 219, 185 Pac. 741 (1919); *Thayer v. Clark*, 77 S. W. 1050 (Tex. Civ. App. 1903); *Blethen v. Bonner*, 30 Tex. Civ. App. 583; 71 S. W. 290 (1902); *McDaniel v. Harley*, 42 S. W.

illustrated by the case of *In re Thornton's Estate*.¹³⁰ In that case the property involved had been acquired while the spouses were domiciled in Montana, where it was the separate property of the husband subject to the wife's right of dower. Subsequently the domicile was changed to California and the property removed to that state. The husband died domiciled in California, and by the terms of his will disposed of all the property as his separate property. The widow sought to have one-half of the property distributed to her as community property upon the theory that the Montana property had been converted into community property, in accordance with a California statute, when the change of domicile was effected. The court said:

"The basic question is that of the constitutionality of so much of section 164 of the Civil Code as provides that all other property . . . 'acquired after marriage by either husband or wife or both, including . . . personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property . . . ' "¹³¹

The court then held that this section of the code could not interfere with rights vested under the law of some other state, and in attempting to do so the statute was unconstitutional. Therefore, the husband was permitted to dispose of the estate as his sole and separate property.

If the state of new domicile or the state to which the property is removed seeks to divest interests already vested such divestment will apparently be held to violate the Fourteenth Amendment of the Federal Constitution.¹³² Only property acquired at the new domicile partakes of its law governing marital interests.

323 (Tex. Civ. App. 1897); *Oliver v. Robertson*, 41 Tex. 422 (1874); *Brookman v. Durkee*, 46 Wash. 578, 90 Pac. 914 (1907); RESTATEMENT, CONFLICT OF LAWS, § 291; BEALE, *op. cit. supra*, note 2, at §§ 292.1 and 292.2; GOODRICH, *op. cit. supra*, note 2, at § 124; STUMBERG, *op. cit. supra*, note 2, at 288; Horowitz, *supra*, note 2, at 220-225; Leflar, *supra*, note 2, at 225-230, 236-238.

¹³⁰ 1 Cal. (2d) 1, 33 P. (2d) 1 (1934).

¹³¹ *Ibid.*

¹³² Two provisions of the Fourteenth Amendment were said to be violated. The court

This rule does not always make for beneficial results, for certain important consequences or incidents of ownership may be lost by its application inasmuch as only vested rights come within the constitutional orbit. For example, consider an instance where the spouses have maintained their matrimonial domicile in a state where the common law system of separate property is in being wherein they have accumulated, by their common efforts during coverture, property, real and personal, and subsequently they remove to a community property state selling all property and taking the proceeds with them. Under the law of the first state the wife would have a dower interest in the proceeds and a widow's share in the personal property at the time of the death of the husband. Assume that shortly after they establish a new domicile in the community property jurisdiction, the husband dies intestate. Dower is not a part of the community property system, and the wife would therefore lose all her dower interests.¹³³ The widow would only receive a portion of the separate property of the husband as prescribed by the laws of descent and distribution of the last domicile. Ordinarily a wife's interest in a community property state are protected by her half of the community property; therefore, her share of the husband's separate property might conceivably be smaller than in a separate property state where she does not obtain a half interest in all property which is a fruit of joint efforts. Thus, the widow would possibly receive a smaller share than she would have obtained if the change of domicile had not been made, and more drastically still, if the parties had removed to Louisiana she would obtain no share at all if there were

stated: "If the right of a husband, a citizen of California, as to his separate property, is a vested one and may not be impaired or taken by California law, then to disturb in the same manner the same property right of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him, is clearly to abridge the privileges and immunities of the citizen. Again, to take the property of A and transfer it to B because of his citizenship and domicile, is also to take his property without due process of law." *Id.* at 3.

¹³³ A widow's right to dower is said to be determined by the law of the situs of the land. RESTATEMENT, CONFLICT OF LAWS, § 248 (1).

heirs.¹³⁴ To recapitulate, under the vested rights theory the widow does not receive half of the property as it is not community property, but the separate property of the husband which vested according to the laws of the former matrimonial domicile where acquired. She receives only a share of the husband's personal property according to the laws of descent and distribution of the last domicile of the deceased, for the rights of the spouses to share in the distribution of the other's personal estate at the time of death are not vested rights but mere expectancies to be determined by the laws as to devolution of estates of the domicile at death.¹³⁵

The difficulty, as can be readily discerned, is that in community property states, the wife's interests are protected in the community acquests and gains by the law which gives her a one-half ownership. The laws in community property areas pertaining to separate property and the wife's share in such are made with reference to property which is not a product of joint marital effort, but rather property owned or acquired by one of the spouses prior to marriage, or through gift or inheritance. Thus, in a situation where the spouses move from a separate property state to a community property state taking with them the proceeds of property acquired through their joint effort, the community property state, under the vested rights theory which recognizes this property as separate property of the husband applies rules of the state applicable to property not acquired by joint efforts but rules applicable to property acquired prior to the marriage or by gift or inheritance.¹³⁶

A more just result would be reached by upholding the constitutionality of a statute, such as that of California in the *Thornton* case, which would give the wife, upon the spouses' removal to a community property state, a community interest in her husband's

¹³⁴ LA. CIVIL CODE OF 1870, Art. 924; for Texas rule, see TEX. REV. CIV. STAT. (Vernon, 1948), Art. 2571.

¹³⁵ See WHARTON, *op. cit. supra*, note 2, at §§ 193 and 193 (a); Horowitz, *supra*, note 2, at 221-22; Leflar, *supra*, note 2, at 226-228; Neuner, *supra*, note 2, at 176-178. Some other examples of consequences or incidents of ownership which receive no constitutional protection are: exemption from attachment, curtesy, homestead, and character of property whether real or personal.

¹³⁶ See Neuner, *supra*, note 2, at 176.

property when that property is a product of the common efforts of the spouses during coverture. However, if the interests are recognized as vested subject to constitutional protection, such an approach is made impossible.¹³⁷

A subsequent change of domicile or removal of property to another state will not affect vested marital interests therein, but it is quite possible that the property will be used to procure new property in the state to which it was removed, or that rents and profits will be derived therefrom in the new state after removal. The Restatement of the Conflict of Laws recognizes that new dealings or subsequent transactions concerning the property in the new state are subject to the laws of that state.¹³⁸ The new dealings will be dealt with according to the law of the situs. However, under the "source" or "replacement" doctrine, existing as local law of the state to which the property is removed, it is usually held that property acquired with the proceeds of separate property or property acquired with community property remains separate or community property,¹³⁹ as the case may be, so long as such proceeds can be traced.¹⁴⁰

It may be noted once again that the impact of the source doctrine tends to place American decisions further in an analogous position with civil law doctrine to the effect that the law of the original matrimonial domicile governs marital interests in property acquired during the entire period of coverture. When the spouses change their domicile and remove movables to the new domicile, it is said that the law of the old domicile governs interests in movables acquired there and in addition, when the source doctrine is applicable, the law of original domicile governs acqui-

¹³⁷ Horowitz, *supra*, note 2, at 224-225; Leflar, *supra*, note 2, at 226-227, 236-237.

¹³⁸ RESTATEMENT, CONFLICT OF LAWS, § 293b.

¹³⁹ Lattimer v. Lattimer, 121 Cal. App. 298, 8 P. (2d) 870 (1932); Kraemer v. Kraemer, 52 Cal. 302 (1877); Douglas v. Douglas, 22 Idaho 336, 125 Pac. 796 (1912); Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 S. W. 290 (1902); McDaniel v. Harley, 42 S. W. 323 (Tex. Civ. App. 1897); Oliver v. Robertson, 41 Tex. 422 (1874); Brookman v. Durkee, 46 Wash. 578, 90 Pac. 914 (1907); 1 DE FUNIAK, *op. cit. supra*, note 2, at § 91; STUMBERG, *op. cit. supra*, note 2, at 288; Harding, *supra*, note 2, at 867; Horowitz, *supra*, note 2, at 222-224; Leflar, *supra*, note 2, at 228-229.

¹⁴⁰ *In re Gulstine's Estate*, 166 Wash 325, 6 P. (2d) 629 (1932).

sitions and later transactions in the new domicile to the extent of the proceeds of property acquired at the original domicile are used therein.¹⁴¹ Apparently, absolutely new gains and profits unconnected with proceeds of property acquired at the old domicile would lose all traces of and be unaffected by the law of the original domicile.¹⁴²

CONCLUSION

If the thesis is accepted that marital property rights should be governed by a single uniform law, then two alternative methods present themselves for consideration: (1) the French theory of implied contracts which declares that the first matrimonial domicile established governs all marital property rights, present or future, of the spouses wherever they reside; or (2) the Central European concept which holds that the whole marriage relationship should be governed by one marital property law applying to the "estate" of the spouses.

However, the rule that the law of the situs of an immovable governs the interests which spouses acquire in each other's immovable property seems to be too solidly embedded in the internal law of the United States to ever visualize a deviation therefrom. And, as to movables, the theory that change of domicile imports a change of law governing marital interests therein has also become an American legal cornerstone. Yet it must be emphasized that the "source" or "replacement" doctrine does often bring the American decisions very near to the orbit of a single uniform law applying to marital property for there the original domiciliary law is often again brought into play.

¹⁴¹ See Neuner, *supra*, note 2, wherein this view is expounded.

¹⁴² The fact that the proceeds of the property acquired in the old state of domicile may be a source of gains and profits in the new state of domicile, may bring about some complicated accounting problems under the source doctrine. *E.g.*, if a husband and wife leave a community property state, removing considerable property to a new domicile in a common law state, the funds or property will often be used by the husband in his business in the new state. The husband's earnings after the change of domicile would be his separate property. But the wife under the source doctrine still maintains an interest and is entitled to a portion of the profits to the extent that those profits are made from the capital investment brought about by her one-half of the community property left in the husband's business. See *Johnson v. Commissioner of Internal Revenue*, 88 F. (2d) 952 (C. C. A. 8th, 1937).

The theory of implied contracts would not always bring about the most just result if the basis underlying the community property system, that property acquired during coverture by the joint efforts of the parties should be treated as a partnership of interests between the spouses, is desirable. For example, under the implied contract rule, if spouses were originally domiciled in a common law state, property acquired during coverture could never become subject to community property laws no matter where the parties might later establish their domicile. It would also seem to be plausible that the so-called consequences of ownership could be lost by a removal of the spouses to other jurisdictions, for only the actual ownership of the spouses could be preserved according to the laws of the original matrimonial domicile.

Therefore, as far as the United States is concerned, a functional approach¹⁴³ to the whole problem will probably bring about the most enlightened results in the retention of the joint interests of the spouses. Under such a theory any law which would uphold the joint interests of the spouses in post-nuptial property and with which the property has a material relation or connection, situs or domicile, could be applied. As opposed to the theory of territoriality which creates rules for the enforcement of foreign created rights regarded as vested, it is said of the functional theory that in cases where there is a foreign fact element, the court of the forum does not enforce foreign created rights, but enforces only domestic rights with the foreign rules or foreign rights only a part of the operative facts. Effect therefore is given to the foreign rules, under a functional approach, only as justice in the case requires. Application of such a theory would effectively abrogate the doctrine that marital rights vested in one state may not be divested upon removal of the domicile or the property to another jurisdiction, for the functional approach recognizes no vested foreign rights, but allows each state to create and enforce only domestic rights.

¹⁴³ The functional approach is defined by COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942), and by Horowitz, *supra*, note 2.

SOUTHWESTERN LAW JOURNAL

Published quarterly by Southern Methodist University Law Students.

Subscription price \$4.00 per year, \$1.50 per single copy.

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