Marital Property
In Conflict of Laws

By Harold Marsh, Jr.
Marital Property
IN CONFLICT OF LAWS

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Things are said to be named "equivocally" when, though they have a common name, the definition corresponding with the name differs for each.

ARISTOTLE, Categoriae

If the expression of widely different ideas by one and the same term resulted only in the necessity for these clumsy periphrases, or obviously inaccurate paraphrases, no great harm would be done; but unfortunately the identity of terms seems irresistibly to suggest an identity between the ideas expressed by them.

HOLLAND, The Elements of Jurisprudence
Preface

The purpose of this book is to present a comprehensive survey of one segment of the subject of Conflict of Laws, both from a theoretical and a doctrinal point of view. That is, I have attempted to collect and discuss all of the American cases and statutes in this field and thereby to make this work as useful as possible to the practicing attorney, whether for the purpose of counseling or of advocacy; but I have tried to make the book something more than a mere collection or digest of the reported cases or even a critical analysis of them. There is also presented a theoretical framework in which to consider the decisions (without which the law is incapable of growth) and a discussion of the purposes and policies underlying the rules (which must be constantly borne in mind if that growth is to be in the direction of justice). The theories and conclusions here advanced are not, of course, thought to be the only logical theories or reasonable conclusions possible, but I have attempted to present clearly in each case the bases for my judgment so that the reader may form his own opinions.

The citations of cases and statutes in this book purport to be complete to January 1, 1950; circumstances have prevented the inclusion of decisions rendered and statutes enacted since that date.

The writing of this book was begun while I was a University Fellow in Law at Columbia University and it comprises my dissertation for the degree of Doctor of the Science of Law from that institution. I should like to record my gratitude to Columbia University for the opportunities and rewarding experiences, including the undertaking of the present work, which the award of that fellowship gave to me.

I also should like particularly to express my appreciation and record my indebtedness to Professor Elliott E. Cheatham of Columbia University and Professor John B. Sholley of the University of Washington. Professor Cheatham was my principal adviser during
the course of my graduate work at Columbia and the one who first interested me in work in the field of Conflict of Laws. His constant aid and encouragement throughout the preparation of this book, his experienced and acute criticism of successive drafts of the manuscript, and his valuable suggestions both substantive and stylistic entitle him to recognition as a collaborator in the writing of this book, although his habitual generosity, as well as the fact that on a very few points I have been unable to accept his arguments, would probably lead him to disclaim that degree of responsibility. I must gratefully acknowledge, at least, that he was my instructor in the field of Conflict of Laws—those acquainted with Professor Cheatham will realize that I was privileged to have an incomparable teacher.

Professor Sholley, a friend and former colleague on the University of Washington faculty, was kind enough to read the entire manuscript of this book during the course of its preparation and to make many valuable criticisms and suggestions.

My debt to prior writers on the subject of Conflict of Laws, particularly Dean John D. Falconbridge and Dr. Ernst Rabel, will be sufficiently evident in the pages that follow.

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CHAPTER 1

Introduction

This book surveys in detail one segment of the field of Conflict of Laws, namely, choice-of-law problems involving marital property. This undertaking is useful not merely because the practical importance of the subject matter is fairly large and increasing, but also because many of the basic problems involved in choice-of-law cases generally are presented with special vividness in marital-property cases and are encountered perhaps more frequently there than in many other areas. Therefore, a survey of this area furnishes an opportunity to examine the various methods which have been suggested of dealing with these ultimate difficulties in the choice-of-law field.

In geographical scope this book is limited to a consideration of the rules prevailing in the United States. Occasionally a reference has been made to the English or Continental rules by way of illustration or comparison, but the original research has been confined to the decisions and statutes in this country. An effort has been made to cite all the reported American decisions bearing on the major problems discussed.

The purpose of this introductory chapter is to indicate the scope of the succeeding chapters and to outline the intended method of treatment. The first, indispensable requisite for a proper under-
standing of the choice-of-law questions which are the main theme of this volume is an understanding of the various substantive laws, among which a "choice" is being made. In most conflict-of-law discussions, this underlying knowledge may be taken for granted since there is a common heritage of basic concepts prevailing in almost all of the states of the Union. However, in the field of marital property, the rules presently prevailing in the different states have evolved from two completely different systems—the English common law in the Eastern and Middle Western states and the Spanish civil law in eight states of the Southwest and Far West. Most lawyers raised in the common-law tradition probably have only a very slight understanding of the rules of community property; and, similarly, it is likely that few lawyers in the community-property states have more than a very slight acquaintance with the statutory marital-property systems which have been largely substituted for common-law dower and curtesy in the common-law states.

In Chapter II, therefore, there is presented an analysis and comparison of the present-day marital-property laws in this country. In § 1 of this chapter an attempt is first made to formulate an accurate and precise definition of marital property in order to indicate the scope of this book (¶ A). Then the historical backgrounds of the present marital-property laws in both the common-law and the community-property jurisdictions are sketched in very brief compass (¶¶ B and C). In § 2 of this chapter there is set forth an analysis of the wife's interests in the acquisitions of the husband (¶ A) and the husband's interests in the acquisitions of the wife (¶ B), both in the common-law and the community-property states. This is presented in outline form, in an attempt to show the precise characteristics of the interest of one spouse in property acquired by the other spouse (i.e., the actual rights, powers, privileges, and immunities, which arise in favor of the nonacquiring spouse). The author has not attempted to add another chapter to the apparently interminable discussion of the "nature" of the wife's interest in community property, or the "vestedness" of that interest. If the rights, powers, privileges, and immunities, which make up the bundle called her "interest," are understood, the addition of such epithets or labels is a useless, although harmless, procedure; if these characteristics are not understood, an attempt to substitute epithets for that knowledge is at best misleading, and at worst stultifying.
In the final part of this section (¶ C), two of the common types of "co-ownership" by husband and wife in the common-law states (tenancy by the entirety and tenancy in common) are contrasted with community property, in order to demonstrate the fallacy of treating either of these two forms of ownership as synonymous with community property.

The objective in Chapter II is merely to present a panoramic picture of the community-property and the common-law-statutory systems of marital property. In order to do this, it is necessary that a great many details be slighted or even omitted entirely. Thus, it has been necessary to ignore, in discussing these rules, any deviations which might exist because of separation, abandonment, infancy, insanity, nonresidence, alienage, adultery, or other similar departures from the hypothetical "normal" married life, and any variations which might be caused by the ownership by one spouse of less than a fee simple absolute or absolute property in the thing as to which the marital-property interest arises. Also it has not been possible, in the case of the statutory systems in the common-law states, to investigate in detail the decisions interpreting the various statutes, since such an investigation in itself would occupy a volume of larger bulk than the present. Therefore, the caveat must be made that in any specific instance the author’s reading of the statutes may be contradicted by the cases interpreting them—one cannot always rely upon the "plain meaning" of a statute, no matter how "plain" it is. However, it is believed that this margin of inaccuracy is sufficiently small that it does not defeat the purpose of the chapter, which is simply to give a general picture of the extent of one spouse’s interest in the acquisitions of the other in the common-law and the community-property jurisdictions, and not to state the “rule” in any specific state.

There is a second task which is a necessary preliminary to detailed consideration of the decisions in this field. It is an analysis of the basic choice-of-law problems in Conflict of Laws and the various theories which have been formulated in an attempt to solve these problems. This task is the subject matter of Chapter III, "Basic Aspects of the Choice-of-Law Problem." These basic problems are not peculiar to marital-property cases, although they are, of course, discussed here especially with reference to their bearing upon such cases. The problems considered in Chapter III naturally
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divide themselves into three types, which have been labeled “characterization” (§ 1), “selection” (§ 2), and “application” (§ 3). The basis of this division can be illustrated by considering the typical form of a choice-of-law rule: “An issue of marital property is governed by the law of X.”

In formulating and applying such a rule, the first question which naturally arises is, What do we mean by “an issue of marital property”? This question has been termed the problem of “characterization” (§ 1). For example, assume that H and W are domiciled in New York and that H acquires during coverture certain oil “royalties” in Texas, from which he is paid a certain sum of money. Thereafter, the spouses change their domicile to California. Suppose further that H transfers this money in trust in New York for the benefit of his children and W attempts to have the transfer set aside as an invasion of her interest. Is the issue thus raised one of “marital property” or is it an issue of “transfer of movables,” as to which Y law may be applicable, rather than X law? Or suppose that H dies domiciled in California, and W claims some portion of this property despite his attempt to bequeath it all to other persons. Is the issue thus raised one of “marital property” or of “succession to movables,” as to which Z law may be applicable, rather than X law? Thus, the characterization of the issue determines the conflicts category under which the case will be considered and thereby the appropriate choice-of-law rule to be used. In other words, we may have several rules, such as, “An issue of marital property is governed by the law of X,” “An issue of the transfer of movables is governed by the law of Y,” and “An issue of succession to movables is governed by the law of Z,” and each of these rules may be a fully accepted rule of Conflict of Laws. But it is necessary to know which one applies to the case.

A subsidiary problem to be solved under this heading is to secure a more precise definition of what we mean by “issue” in the phrase “issue of marital property.” This is attempted to be done in (§ A, “What is it that is characterized?” Then the central problem in this area is taken up, namely, by just what method do we perform this process of “characterization” (§ B). The final part of this section contains a brief discussion of the proper characterization of marital-property interests (§ D). (§ C of this section is discussed below, in connection with the subject of “application.”)
The second question which naturally arises in formulating and applying our choice-of-law rule is, What shall be substituted for “X” in our equation? For example, should an issue of marital property be governed by the law of the domicile, or the law of the situs, or of some other jurisdiction? In other words, it is necessary to select the “connecting factor” or “point of contact” which will indicate the governing law. This is done by choosing a relationship which the factual situation typically sustains to some jurisdiction as the indicator of the law district which is to furnish the governing law. This question has been termed the problem of “selection.” In § 2 of Chapter III this problem is discussed and the principal connecting factors which have been suggested as appropriate ones in the field of marital property are considered and an evaluation of them is attempted in the light of the basic policies to be promoted. The arrangement of the discussion is based upon the three principal choices to be made, between nationality and domicile ([A]), between situs and domicile ([B]), and between original domicile and subsequent domicile ([C]). No attempt is made in this section to analyze the cases to discover the precise rules which have been followed in this country; that task is reserved to Chapter V.

The third question which arises in the formulation and application of a choice-of-law rule concerns the meaning of the word “law” in the prescription of the rule that “X law” shall apply. Should we attempt to apply all the law of the selected jurisdiction which is applicable to the facts of the case, or must certain portions of it be excluded? This question has been termed the problem of “application.” There are two subsidiary problems involved in this question.

The first of these subsidiary problems is the question whether rules of law, which have been labeled something other than “marital property” by the internal categories of the selected jurisdiction, should be applied to the case. In other words, suppose we characterize an issue as one of “marital property” and refer to the law of state X for the substantive rules to resolve the issue; and we find that state X has a rule which is applicable to the facts of the case, had they all occurred in that jurisdiction, but that the rule is labeled one of “succession” rather than “marital property” by the internal law of state X. Should this rule be applied by the forum in the
conflicts case? This question has been termed the problem of “secondary characterization.” Although this problem logically falls in the subject matter of § 3 (“application”) of Chapter III, it has been discussed in (C of § 1 (“characterization”), for the reason that it is intimately connected with the main problem of characterization and the theory of characterization by the lex causae which are treated in (B of § 1. Hence, it was believed that the discussion could be better presented in that context.

The second subsidiary problem of application is the question of what effect, if any, should be given to the choice-of-law rules of state X, where those differ from the choice-of-law rules of the forum. This question is normally called the problem of renvoi, and it is discussed in § 3 of Chapter III. Such a conflict of choice-of-law rules may arise because the indicated jurisdiction has adopted a different connecting factor for marital-property issues than that adopted by the forum, and the choice-of-law rules consequently differ on their face. This problem is treated in (A of § 3 (“Patent conflict of choice-of-law rules”). On the other hand, this conflict may arise because the forum and the foreign jurisdiction have adopted differing definitions of connecting factors which are ostensibly the same because they are designated by the same word; or it may arise because the forum and the foreign jurisdiction have adopted differing characterizations of the same issue, and would thus reach different results in a specific choice-of-law case, although their rules are ostensibly the same. The problems raised by these latter two situations are dealt with in (B of § 3 (“Latent conflict of choice-of-law rules”).

Chapter III, in short, presents an analysis and a consecutive discussion of all these conflict-of-law problems in one place. In reading the detailed consideration of the cases, dealing with specific problems of marital property, in the following chapters, this discussion should be borne in mind—the pertinent portion of Chapter III should be considered incorporated by reference into each of the chapters which follow. That is, § 1 of Chapter III should be read in connection with Chapter IV; § 2 in connection with Chapter V; and § 3 in connection with Chapter VI. In these remaining chapters of the book (IV, V, and VI), there is presented an analysis and evaluation of all of the American authorities, which could be dis-
covered by the author, bearing upon each of these three major problems of marital property in Conflict of Laws.

Chapter IV considers various claims which are made by and against married persons, in order to determine which of these claims have been characterized as "marital property issues," for choice-of-law purposes, and which have been characterized as something else. Such claims can be classified into certain groups, upon the basis of who is making the claim, the person against whom it is made, the time when it is made, etc. Therefore, this discussion has been distributed into seven sections, dealing with characterization problems which arise in connection with distribution on death (§ 1), division on divorce (§ 2), the rights of creditors (§ 3), transfers of property (§ 4), rights of the spouses inter se (§ 5), income from property (§ 6), and the acquisition of tort claims (§ 7).

In Chapter V an analysis is made of the cases to determine what connecting factor or factors have been adopted by the American courts to govern marital-property issues. This discussion has been divided into four sections dealing, respectively, with property owned by the spouses at the time of marriage (§ 1), property acquired by the spouses in a state other than their domicile (§ 2), property acquired before a change of domicile, where a marital-property issue concerning it arises after such change (§ 3), and property acquired after a change of domicile, either in the new domiciliary jurisdiction or elsewhere (§ 4). In each of the first three sections it is necessary to treat separately of immovables and movables, and also of such statutory modifications as have been made in the common-law rules. In § 4, the effect of a change of domicile is considered where both spouses move their domicile to a new jurisdiction (¶ A) and also where one only changes his domicile to a new jurisdiction, leaving the other in the first domicile (¶ B). In the final part of this section, the effect of an antenuptial agreement upon these rules is discussed (¶ C).

In the final chapter of the book, Chapter VI, the problems of application which seem to arise most frequently in this country are considered. The two situations in which these problems are most likely to arise, and are most difficult of solution, are where property acquired by the husband in a common-law state (his statutory "separate" property) is taken into a community state (§ 1), and
where property acquired by the husband during coverture in a community state ("community property") is taken into a common-law state (§ 2). All of the cases discovered have involved these two factual patterns and on some questions they are too few, even here, to draw any positive conclusions from authority. It is not at all impossible, of course, for the same problems to arise in other situations, but the principles for their resolution would be the same as in the two discussed. In each of these two sections the questions of application which have arisen are discussed under the headings: distribution on death ([A]), division on divorce ([B]), and rights of creditors and transferees ([C]).
CHAPTER II

Analysis of Marital-Property Laws in the United States

The prerequisites of a choice-of-law problem in marital-property law are: (1) that the operative facts of the case occur in two or more jurisdictions, or in a jurisdiction other than the forum, (2) that an issue of marital property is raised in the case, and (3) that the substantive rules of the jurisdictions involved are in conflict on the issue raised. Therefore, it is necessary to gain a clear conception of what "marital property" is, and wherein the various laws of marital property differ. Unless the different systems of marital property are clearly understood, an intelligent choice cannot be made when such a problem is presented. The laws of the various states of the Union in this field are more divergent than in almost any other branch of the law. As of January 1, 1950, in eight states the civil-law community-property system, derived from Spain via Mexico (with the addition of French influence in Louisiana), was in force. As of the same date, in forty states, Hawaii, and the District

1 In addition to the eight old-line community-property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington), six jurisdictions, Hawaii, Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania, partially adopted the community-property system in 1945 and 1947 in order to secure federal income-tax advantages for their more affluent citizens.
of Columbia the English common law provided the historical background from which the modern laws of marital property have been derived. Both systems have, of course, been subjected to more or less extensive revision. In the common-law states, for example, some jurisdictions, while making substantial modifications, have retained the essential framework of the old common-law system of dower and curtesy; others have scrapped that system completely and provided a statutory substitute. When this great diversity of substantive provisions is considered in the light of the constantly increasing mobility of our population, it is clear that the importance of choice-of-law problems in this field is not likely to diminish.

Before considering these choice-of-law questions, however, it is first necessary to analyze carefully the substantive law of marital property in the United States and to compare the common-law and community-property systems. "Choice-of-law rules" in any field are largely meaningless except when considered against a background of a rather detailed knowledge of the different substantive rules, among which a "choice" is being made. In many cases this background knowledge of the substantive rules can be tacitly assumed, since they do not present any special difficulties; but in the field of marital property there has been an unfortunate tendency on the part of many courts and commentators to resolve choice-of-law issues by the use of vague and misleading epithets, such as "vested interest," "title," or "ownership," accompanied in many cases by a regrettable failure to isolate and define precisely the issue presented and, apparently, to understand the nature of the foreign marital-property system with which they deal. This situation demands a clarification of the nature of modern marital-property laws before choice-of-law rules can be intelligently considered. Hence,

in the introductory section of this chapter, an attempt is made to formulate an accurate definition of marital property and to trace briefly the development of the common-law and community-property systems. Then, in the second section, there is offered an analysis and comparison of modern marital-property laws in this country, in order to see clearly the "conflicts" which may occur.

§ 1. MARITAL PROPERTY AND ITS DEVELOPMENT

[A. Marital property defined. At the outset, it is desirable to define clearly the term "marital property." By that term is meant any interest (right, power, privilege, or immunity) or aggregate of interests which arise in one spouse, with respect to things owned or acquired by the other spouse, solely by virtue of the existence of the marital relation, but excluding from it the "bare expectancy" of inheriting upon the death intestate of the other. In other words, any interest which a wife qua wife receives by operation of law with respect to things owned or acquired by her husband is a "marital-property interest." Similarly, the aggregate of interests received by the husband in things owned or acquired by the wife are his "marital-property interests." The interests of the acquiring spouse with respect to the things are not, under this definition, marital property interests; however, the diminution of his interests pari passu with the interests arising in the other spouse—i.e., the duty, liability, no-right, or disability corresponding in each instance to a correlative interest which arises in the other spouse—may be considered marital property "burdens" with respect to the things acquired by him.

This definition can be supported by a practical justification—the common purpose underlying the creation of these interests. What is the purpose of the law in recognizing such interests? The main purpose, it is submitted, is to give recognition to the fact that a married couple were in earlier days, and are still in many respects despite the individualistic tendencies of the last century, a cooperative producing and consuming unit. Therefore, a spouse is given these interests because of the probable contribution which he or she has made to the acquisition of these things, although nominally "acquired" by the other. This idea was expressed in a crude and primitive form by the common-law fiction that husband and
wife were "one." Though this fiction naturally has been discarded, the law would be blind to reality if it treated husband and wife with respect to things acquired by each of them as though they were strangers: Simply to state such a view should be sufficient to demonstrate its inadequacy. The primitive mind expressed its recognition of this economic unity by giving to the husband, representing superior physical force, the dominion over all things acquired by either marital partner. The tendency of the modern law, however, is to recognize this "unity" of husband and wife by giving to each complete ownership of a portion of the things acquired by the other, after the termination of the marital relation, while preserving to the acquiring spouse most of the rights of present possession and enjoyment during coverture.

This possibility of receiving complete ownership of a quota of the things acquired by the other spouse is more than the bare expectancy of an heir apparent for it is protected during coverture by restrictions upon the rights, powers, privileges, and immunities of the acquiring spouse, e.g., upon his power of testamentary disposition, power of *inter vivos* transfer, etc.; and the correlative interests which arise in the other spouse are what we have defined above as "marital property." These interests are commonly not so extensive as those recognized in the holders of typical common-law future interests, even contingent remainders. Normally, for example, the holder of such marital property has no immunity to having his interests extinguished by an attaching creditor of the acquiring spouse. The substantiality of the interest recognized in a husband or wife in things acquired by the other usually falls somewhere between the "bare expectancy" of an heir and a common-law "estate."

We have excluded by definition from the category of "marital property" the bare expectancy of inheriting by one spouse upon the death of the other intestate, though it is, of course, an interest which arises in one spouse, with respect to things acquired by the other, solely by reason of the marital relation. The tenuous nature of this interest as compared with those other interests which are protected by present disabilities and duties upon the acquiring spouse permits this line to be drawn between the two, in the same way that the interest of an heir apparent is commonly excluded from the category of future interests. A justification for thus drawing the line lies in the fact that the social purpose of making each
spouse an heir of the other differs (it is believed substantially) from that of the more extensive interests which have been labeled "marital property." It has been argued above that the purpose of the latter is to recognize the probable contribution of each spouse to the acquisitions of the other; the mere right of intestate succession to a portion of the property owned by the other spouse is the completion and rounding out of a different scheme: Its purpose is to provide for distribution to those who, it is conceived, would be the natural objects of the decedent's bounty in cases where he has failed to indicate a choice, regardless of their contribution to the acquisition of the estate.

It is equally important to distinguish modern marital-property interests from the complete ownership of the wife's tangible chattels which the early common law gave to the husband. The prospective expectation of receiving such increments to his wealth might be and usually was called a "marital right" or sometimes a "marital-property right" of the husband. Strictly speaking, however, this possibility was not "property," until chattels were acquired by the wife; since there were no definite things to which it related. And once the things had been acquired by the wife, the husband's interest was not a "marital-property interest," since he had an ownership of such things indistinguishable from his ownership of things acquired by himself (and no interest at all remained in the wife). This is the reason for the treatment, by some English writers on Conflict of Laws, of the subject of "marital property" as a subdivision of the heading "transfers by operation of law." Such a view of marital-property choice-of-law problems and the use of some analogies employed by these writers, e.g., the analogy to the title of a trustee to the assets of his bankrupt, may be misleading if applied to modern marital-property interests in the United States. These latter interests do arise by operation of law, but there is normally no transfer of "title" or "ownership" until the death of the acquiring spouse. Although, as stated above, these interests are not as substantial as those commonly regarded as future interests, they are in fact interests which are not now but may become possessory, and hence satisfy the traditional definition of future interests. Precedents dealing with the transfer of ownership of the

2 Cheshire, Private International Law xvi (3d ed. 1947); Dicey, Conflict of Laws 685 (3d ed. 1922).
wife's chattels at common law should be used with circumspection. Unfortunately, they are frequently the most numerous, and on some points the only ones, available.

(B. The common-law system and its development. In order to understand the conflicts which arise between the marital-property laws of the various states of the United States, it will be helpful to examine briefly the historical background and development of these systems, both community-property and common-law. The ancient common law gave to the husband more than a nonpossessory interest with respect to the things owned or acquired by his wife—it gave him the present possession and enjoyment of such things, and transferred to him complete ownership of some of them. The major distinction in this system was between real and personal property. The husband received complete ownership of all tangible chattels acquired by the wife and of all her choses in action which he reduced to possession. With respect to real property acquired by the wife, the husband received the right to possession and enjoyment during their joint lives, and this estate was extended to one for his sole life upon the birth of issue. On the termination of this interest, however, the wife or her heirs regained an unencumbered ownership of the land.

The marital-property interests of the wife also depended upon the distinction between real and personal property. She received no interest in the husband's chattels nor in those acquired by her, the ownership of which passed to him by operation of law. With respect to any estate of inheritance in land of which the husband was seized during coverture, the wife received the right to the use and enjoyment of one-third thereof for her life if she survived the husband; and this contingent inchoate interest of the wife during coverture could not be destroyed by the unilateral action of the husband, or his transferees or creditors.

This scheme was early modified by the Chancellor, who at-

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9 2 Tiffany, Real Property § 484 (3d ed. 1939); “The wife's chattels real followed a slightly different course.” 3 Vernier, American Family Laws 167 (1935); Eversley, Domestic Relations 168 (4th ed. 1926).

6 Blackstone, Commentaries * 129–39.
tempted to alleviate the disadvantageous position of the wife. By the device of a trustee, and later merely by the use of the phrase “to her sole and separate use” which equity utilized to impress a fiduciary obligation upon the husband, property could be conveyed to the wife in a manner which excluded the marital-property interests of the husband. With regard to things thus acquired by the wife (both land and things other than land), the husband received no marital-property interests. Such things were the wife’s “separate property” in equity. Also, even as to other property of the wife, when the husband sought to enlist the aid of equity to enforce his common-law rights, he might be required to set aside property for the wife’s separate use, out of the assets which he acquired through her.

The development of the chancery jurisdiction also affected the wife’s marital-property interests. The wife’s dower right did not attach to land which the husband held by equitable title only during coverture, since “seisin” of the husband was a prerequisite of the existence of this interest. With regard to land thus acquired by the husband, the wife received no marital-property interest.

Naturally this contradictory, overlapping, and irrational scheme could not survive the progressive emancipation of women and the shift in the nature of the bulk of wealth from land to intangible personalty. Two possible methods presented themselves as solutions to the problem. One was to abolish all marital-property interests. By this method all things acquired by either spouse become his “separate” property, as formerly some things acquired by the wife were her “separate” property in equity. No interest arises in the other spouse except the possibility of inheriting upon the death intestate of the acquiring spouse. This was the solution adopted in England until recently. Only in North Dakota and South Dakota

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7 However, the husband’s “curtesy” persisted as a right of intestate succession with respect to lands held by the wife as her equitable “separate” property; that is, applying only to the property she did not dispose of by deed or will, as she might have done. Id. at 167, 205.
8 Id. at 193-200.
9 Id. at 208. With respect to the husband’s “equitable” real property, the dower right of the wife did not attach even as a right of intestate succession, prior to 1833 (Dower Act, 3 & 4 Wm. IV, c. 105, § 2).
10 By the Dower Act, 3 & 4 Wm. IV, c. 105, § 4 (1833), power was put into the hands of the husband to deprive the wife of any interest in his lands by
in the United States have the legislatures gone to this extreme. The other method was to attempt to rationalize the scheme by eliminating its diversities. This path was chosen by the great majority of American jurisdictions. Although the attempt was by no means successful, certain major trends are discernible. First, the wife was given by statute the right to the present control and enjoyment during coverture of all things acquired by her, both land and chattels, and not merely the restricted number of things in control of which she had been protected by equity. These things were called her *statutory* "separate" property. But marital-property interests of the husband were not excluded. The curtesy interest of the husband in the lands of the wife usually was retained (sometimes under a different name), although of course it did not now give him present control—it became in the nature of a future interest, contingent upon his survival of the wife. It was commonly cut down quantitatively from an interest in the whole to some lesser portion, frequently one-third, to conform to the wife's dower interest. At the same time, it was in many instances extended qualitatively to an interest in fee, rather than merely an estate for life. Furthermore, the husband was commonly given a marital-property interest in the statutory "separate" *personalty* of the wife—not, of course, the absolute ownership he had formerly received, but a possibility of receiving a fraction of such property on the wife's death, protected by present disabilities of the wife. The wife's marital-property interests generally were extended to

deed or will; however, the wife's "dower" remained as a right of intestate succession. By the Married Women's Property Act, 45 & 46 Vict., c. 75 (1882), the wife was given control over her property, both real and personal, during coverture, with power to convey it *inter vivos* or by will; however, the husband's "curtesy" remained as a right of intestate succession. By the Administration of Estates Act, 15 Geo. V, c. 23, § 45 (1925), both interests were abolished completely. However, by the Inheritance (Family Provision) Act, 1 & 2 Geo. VI, c. 45 (1938), a very limited marital-property interest was again given to a surviving spouse. Under that Act, the court may order that "such reasonable provision as the court thinks fit shall . . . be made out of the testator's net estate for the maintenance" of a surviving spouse, despite contrary provisions of the decedent's will. See Dainow, *Limitations on Testamentary Freedom in England* 25 CORN. L. Q. 337 (1940); Notes 185 LAW TIMES 280 (1938); 53 HARV. L. REV. 465 (1940).


12 *3 Vernier, American Family Laws* § 216 (1935).
"equitable" interests in land owned by the husband and to things other than land acquired by the husband. However, history maintained its influence here, as it had in the changes in the husband’s marital-property interests discussed above. The statutes which accomplished these changes, in the majority of states, still retained in some form the “inchoate” interest of the wife in the lands of the husband, so that her interests could not be extinguished by his sole conveyance inter vivos nor by execution sale procured by his creditors. On the other hand, the statutes giving her an interest in things other than land acquired by the husband in terms merely placed a restriction upon his power of testamentary disposition and did not alter his power of conveyance inter vivos nor the liability of the property to his creditors. In the case of the husband’s marital-property interests, also, there remained a similar distinction as to the extent of the protection given to his interests in land and to his interests in things other than land.

From the foregoing discussion, it is evident that the phrase “separate property,” when used with respect to the wife’s acquisitions, has at least two meanings, with widely different connotations. It may mean the wife’s equitable “separate property,” or her statutory “separate property” in North Dakota and South Dakota, in which the husband has no marital-property interests; or it may mean her statutory “separate property” in many of the common-law states of the United States, which is held “separate” from her husband’s common-law power of management and control, but which is subject to (more or less extensive) marital-property interests in the husband and a corresponding diminution of the wife’s interests. In addition, by an association of ideas, the husband’s property in the common-law states came to be called his “separate property.” The term is misleading, since the wife’s interests in these things usually were not diminished but, on the contrary, increased; and, since the wife never had any power of present control or enjoyment over any

13 3 id. at 376–77.
14 3 id. §§ 189, 190.
15 3 id. at 399.
16 This brief summary of the developments in this field in the common-law states has attempted to crystallize some general trends from a welter of confused legislation. It should not be assumed that the developments in most of the states were as uniform as they have been made to appear here.
of the things acquired by the husband, there is nothing from which they were "separate." In paragraph C, we shall encounter yet a third meaning of this chameleon phrase.

Two important points should be noted in this outline of the historical development in the states with a common-law background. First, no distinction has ever been made regarding marital-property interests in those states, based on the time of acquisition of the things which are the objects of those interests. Things owned by husband and wife at the time of marriage and those thereafter acquired during coverture are treated alike. Second, the major historical distinction in this field has been between land and things other than land; and, although the tendency has been to diminish this distinction, it has not generally been obliterated. Recently, in a minority of states, this distinction has been completely wiped out; but in the great majority it still retains some efficacy.

4 C. The community-property system and its development. The civil-law marital-property regime of community property was opposed to the common law on both of the points mentioned in the last paragraph. In this system no distinction was made between land and things other than land. The primary differentiation within the system was between things owned at the time of marriage or acquired afterwards by gift, devise, or descent ("separate" property) and those things otherwise acquired by either spouse during coverture ("community" property). In this short historical survey of the community-property system as it affects our subject we will begin with the system as it was known and adopted by the states of the American Southwest and West at the time of their admission to the Union. This system of course differed in many details from the community-property law of Mexico, or Spain, or France, and probably even more from that of the Visigoths at the time of their irruption into the Iberian Peninsula.

Under this system, the wife received no marital-property interest with respect to those things owned by the husband at the time of marriage (his "separate" property). He could convey them freely inter vivos or by testamentary disposition. Those things owned by

17 The author does not believe that the edicts of a barbaric Gothic King in Spain several centuries ago are compelling authority on the subject of community property in the United States today, on any legal or policy basis. Compare 1 DE FUNIAK, COMMUNITY PROPERTY passim (1943).
the wife at the time of marriage (i.e., her "separate" property) fell under the husband’s management and control as did the wife’s land at common law; however, upon the termination of the marriage by the death of either husband or wife, the unencumbered ownership of these things remained in the wife or her heirs; the husband received no interest with respect to them which could continue beyond the duration of the marriage. All things acquired by either spouse after marriage (except those acquired by gift, devise, or descent, which fell into the category of “separate” property) became the community property of the spouses. The husband had the present right to the use and enjoyment of this property and the wife only a nonpossessory interest; the interest of the wife was not given as much protection as her common-law dower interest in the lands of the husband: The husband could transfer complete ownership of community property by his sole conveyance inter vivos, and his creditors could extinguish the wife’s interest by sale on execution. However, in one respect the wife’s interest was more substantial than the common-law dower and statutory substitutes therefor: Her interest was not extinguished by the fact that she predeceased the husband. If the property was not transferred by the husband or taken by his creditors, she or her heirs received one-half thereof upon the termination of the marriage by the death of either spouse; in other words, her interest was an inheritable and devisable one.

This system has not remained static, of course, in the jurisdictions of this country which have adopted the community-property system. The first major change was to remove the husband’s power of management and control over the wife’s “separate” property. This placed the two spouses upon a parity in this regard and eliminated any marital-property interest in the things acquired by either before marriage, or by gift, devise, or descent after marriage. This is the civil-law “separate” property of husband and wife in the

18 McKay, Community Property §§ 662, 665 (2d ed. 1925).
19 Id. ch. 9.
20 Id. § 672.
21 Vernier, American Family Laws § 178 (VI) (1935).
22 McKay, Community Property §§ 662, 665 (2d ed. 1925).
23 This term—“civil-law separate property”—is used in this book to designate that property of each spouse which is called “separate property” in the community-property jurisdictions of the United States.
United States. A second major change was to import into the system a distinction between land and things other than land, by the enactment of statutes in five of the eight jurisdictions requiring the wife’s joinder in a conveyance of community real property, thereby affording greater protection to her interests.24

A third major development, which is still very incomplete, was apparently motivated by the same forces which produced the Married Women’s Acts in the common-law jurisdictions and was designed to place the wife in a position more nearly equal to that of the husband with respect to the community property. It was still true, after the two developments mentioned above, that the wife’s acquisitions during coverture (e.g., her earnings and the income from her “separate” property) were subject to the husband’s control—they were liable for his debts, and not the wife’s, and (with the exception of real property in those states requiring her joinder) subject to his sole conveyance inter vivos. However, the common objective of improving the position of the wife with respect to community property produced two completely different lines of development in the community-property states.

In six of these states (California, Idaho, Louisiana, Nevada, New Mexico, and Texas) the tendency has been to segregate those things acquired by the wife during coverture from those acquired by the husband, and to restrict the powers of control of the husband over the portion of the community property acquired by the wife, while increasing the powers of the wife. The apparent goal of this development is to give to the wife the present control and enjoyment of those things acquired by her, subject to marital-property interests in the husband (similar to her interests with respect to the things acquired by him). The two major sources of such acquisition are her earnings and the income from her “separate” property. As to the latter, the civil-law rule that the rents and profits of “separate” property fall into the community estate has been changed in California, Nevada, and New Mexico, which have provided by statute or decision that such income is the “separate” property of the spouse owning the property from which it is derived.25 It is

25 Deering’s Calif. Civ. Code §§ 162, 163 (1941); George v. Ransom,
highly probable that this change resulted from a desire to free the acquisitions of the wife from the control of the husband, since the old rule that the income of his "separate" property became community was no great hardship on him. In Louisiana, also, the income from the wife's "separate" property will be her "separate" property if she elects to retain the management and control of such property and files a notarized statement of that intention (although income from the husband's "separate" property perforce falls into the community). In Idaho and Texas the income from the wife's "separate" property remains community, but it is exempted from liability for the debts of the husband and made liable for the debts of the wife.

With respect to the earnings of the wife, the Louisiana Legislature attempted to make all earnings of the wife when carrying on a business "separate from her husband" her "separate" property, but the Supreme Court of that state rendered this statute largely nugatory by holding that it only applied to earnings of the wife "when carrying on a business while separated from her husband." In each of the other five jurisdictions in this group (California, Idaho, Nevada, New Mexico, and Texas) the earnings of the wife, although still community property, are exempted from liability for the debts of the husband; and in California, Idaho, and Texas they are expressly made liable for the debts of the wife.

The law of Idaho probably comes close to representing the ultimate goal of this tendency in these six states. In that state the wife has been given the same power of "management and control" over her earnings and the income from her "separate" property (although both remain community) as the husband is given over "ordinary" community property. Thus there are two distinct types of property ownership by husband and wife with respect to property acquired after marriage by onerous title: the community property acquired by the husband plus acquisitions of either spouse not falling in the next category; and the "special community"—the earnings of the wife and the income from her "separate" property. In Idaho, the situation in general is that each spouse has a present possessory interest in those things acquired by him and has marital-property interests in the nature of future interests with respect to the things acquired by the other during coverture (not by gift, devise, or descent).

In the other two community-property states (Washington and Arizona) this effort to increase the interest of the wife in the community property developed in a different direction. In both of these states, also, the income from the "separate" property of each spouse was made the "separate" property of the one owning the principal from which it was derived, thus augmenting the "separate" property at the expense of the community. As to the remainder of the community property, however, there was no tendency to segregate this into two different classes; rather the tendency has been to restrict the powers of the husband with respect to all of the community property (thus giving greater protection to the wife), and to increase somewhat the powers of the wife. The conceptual instrumentality by which this has been explained is the so-called "entity theory" of community property. According to this theory there is a neuter tertium quid, to some undefined ex-

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33 "Nononerous" and "onerous" title are civil-law terms, used in this book, which mean, respectively, property acquired by gift, devise, or descent (i.e., a donation), and property otherwise acquired.
34 This statement is not entirely true, since the previously existing statutes exempting the acquisitions of the wife from the debts of the husband were not adequately correlated with the new "management and control" provision. See Jacob, The Law of Community Property in Idaho 37 (1943).
tent a juristic entity, hovering between husband and wife. This tertium quid is called "the community"; and it "owns" the community property. The husband is the "agent" of "the community," and as such normally has the power of management over community property. It is not possible at this time to detail the injustices to third persons dealing with the spouses, which have resulted from this absurd fiction; however, a few of its practical effects will be noted.

The most important result of the "entity theory" is to reduce the liability of the community property for the obligations of the husband. Since the husband is only the "manager" of the community property on behalf of this fictitious entity, such property is only liable for his contractual obligations when the contracts creating the obligations are for the "benefit" of "the community" and is only liable for his delictual obligations when they are incurred "in the scope of his employment." The result is that all debts of the husband are divided into two categories: "community debts" and "non-community debts." The community property is liable only for a debt of the former category. The precise definition of these phrases is very uncertain. However, all antenuptial debts of the husband, since they were incurred before the creation of this fictitious entity and therefore could not have been incurred for its "benefit" or in the course of his activity as its "agent," are "non-community debts" and the community property cannot be reached in satisfaction of them. As to the postnuptial debts of the hus-

36 The Washington Court at intervals retreats from the "entity theory" in dictum [see, e.g., Bortle v. Osborne, 155 Wash. 585, 285 P. 425 (1930)], but it always immediately relapses into the habit of speaking of "the community" as an existent "some third thing."


38 This latter phrase is not normally used by the courts, but it expresses the essential idea. The same general idea was expressed another way in the recent community-property acts, which provided that the community property was liable for the torts of the husband "committed in the course of acquiring, managing, holding, or disposing of the community property, but not otherwise." Okla. Laws 1945, Title 32, § 7. On occasions the "benefit" test is applied to delictual obligations, and the "agency" test to contractual obligations, but normally it is the other way around as stated in the text.

39 Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917); Cosper v. Valley Bank, 28 Ariz. 373, 237 P. 175 (1925).

40 Katz v. Judd, 108 Wash. 557, 185 P. 613 (1919); Forsythe v. Paschal, 34
band, they are presumptively "community debts" and the community property will be held liable for the vast majority of them. Precisely what postnuptial debts of the husband are in this small category of "non-community debts" is still very uncertain, and about the only result of the theory in this regard has been to produce a flood of litigation. The net result, however, undoubtedly has been to increase the interest of the wife in the community property at the expense of the husband. Washington and Arizona are also among those five jurisdictions mentioned above which require the joinder of the wife for any conveyance or encumbrance by the husband of community real property, and here again his powers have been reduced and greater protection afforded to the wife.

The "entity theory" has also made possible a somewhat greater liability of the community property for the obligations of the wife. In the "non-entity-theory" states the community property is not

Ariz. 389, 271 P. 865 (1928). But cf. Fisch v. Marler, 1 Wash.(2d) 698, 97 P.(2d) 147 (1939), with which compare Stafford v. Stafford, 10 Wash.(2d) 649, 117 P.(2d) 753 (1941). Since marriage relieves the husband from any obligation to pay his preexisting debts, except to the extent of property already owned (and any property which may possibly be acquired in the future by nononerous title), it has frequently been called (in more than a facetious sense) an "act of voluntary bankruptcy" in Washington.


42 Compare Horton v. Donohoe Kelly Banking Co., 15 Wash. 399, 46 P. 409, 47 P. 435 (1896), with Spinning v. Allen, 10 Wash. 570, 39 P. 151 (1895); McHenry v. Short, 29 Wash.(2d) 263, 186 P.(2d) 900 (1947), with Furuheim v. Foe, 188 Wash. 368, 62 P.(2d) 706 (1936); United Brotherhood of Carpenters and Joiners of America v. Taylor, 197 Wash. 515, 85 P.(2d) 1116 (1938), with Bergman v. State, 187 Wash. 622, 60 P.(2d) 699 (1936); Beakley v. City of Bremerton, 5 Wash.(2d) 670, 105 P.(2d) 40 (1940), with Kies v. Wilkinson, 114 Wash. 89, 194 P. 582 (1921); King v. Williams, 188 Wash. 350, 62 P.(2d) 710 (1936), with Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917); Geoghegan v. Dever, 194 P.(2d) 397 (Wash. 1948), with Calvin Philips & Co. v. Bergman, 130 Wash. 346, 227 P. 321 (1924). See Marsh v. Fisher, 69 Wash. 570, 125 P. 951 (1912), holding that the Washington statute purporting to exempt the wife's earnings from the husband's debts, REMINGTON'S WASH. REV. STATS. § 570 (1932), exempted them only from his "noncommunity" debts, for which, of course, they were not liable under the Washington theory absent the statute.

liable for any delictual obligation of the wife unless the husband is himself liable, 44 and it is not liable for any of her contractual obligations except those incurred for necessaries or when she is acting with the husband's authorization and as his agent. 45 In Washington and Arizona, however, it is possible to find that the wife is acting as the “agent” of “the community,” and thus to find a delictual liability of the community property. 46 Of course, the husband is the statutory “agent” of “the community” and the community property cannot normally be reached in satisfaction of the wife’s contract and tort obligations. 47

A further major departure from the civil-law tradition occurred in New Mexico and Nevada (and in California prior to 1923). By statute in those states the wife is deprived of any power of testamentary disposition over the community property, 48 and the realization by her of a possessory interest in any portion of the community property is made contingent upon her husband dying first (as in the statutory substitutes for dower in the common-law states).

44 McKay, Community Property §§ 793, 808–810 (2d ed. 1925). Except in New Mexico. See text at note 49, infra.
45 Id. § 793.
47 The late, unlamented community-property laws adopted in Hawaii, Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania, supra note 1, incorporated with a rather amazing impartiality both of these opposite tendencies from the old-line community-property states. These statutes set up two separate classes of community property: the community property acquired by the husband or to which he held record title; and the community property acquired by the wife or to which she held record title. The community property acquired by the wife was under her “management and control” and subject to her debts in the same way that the husband had the present control of property acquired by him. Thus, the tendency in the first group of states was carried to its ultimate conclusion. In addition, the obligations of both husband and wife were divided into “community” and “noncommunity” categories, as in the “entity-theory” states, and the property acquired by each spouse during coverture by onerous title was only subject to his “community debts.” This scheme was mitigated somewhat in Hawaii and Michigan by special provisions making the acquisitions of each spouse subject to his antenuptial obligations (despite the “community debt” idea), and making both classes of community property liable for the “community debts” of either spouse.
Finally, a startling innovation, allegedly derived from the old Spanish law, was made in the law of New Mexico in 1949 by the case of *McDonald v. Senn*.

That case held that *one-half* of the community property was liable for all postnuptial *torts* of the wife, although the wife has a smaller interest in community property there than in any other state except Nevada, and all of the community property is expressly exempt by statute from liability for her contracts. This is the first case in the United States which has permitted a compulsory partition of community property during coverture, either by one of the spouses or his creditors or transferees. The court bases this result on the fact that they had previously asserted, in another context, that the wife had a “vested interest” in “one-half” of the community property and the statute did not expressly exempt that interest from liability for her torts. Although the courts in all of the other community states have made the same assertion, none has ever held that there could be a compulsory partition of community property during coverture or that community property was generally liable for obligations of the wife, other than those for which the husband himself was personally liable. It should be noted that the case of *McDonald v. Senn* was a three to two decision and that two of the justices of the New Mexico Supreme Court did not participate; it remains to be seen whether the decision will be followed in that state.

Even this brief sketch of the historical background and development of the marital-property systems of the United States will suffice to make clear the wholly ambiguous nature of such words as “separate” property or “common” property (which is often used in the civilian writings as a synonym for community property and also refers to common-law tenancy in common). It should also point up the necessity for a more detailed analysis of the precise characteristics of these various marital-property interests, which will be made in Section 2, before embarking on the main theme of this work. In connection with choice-of-law problems especially, where courts are often called upon to interpret laws strange to them, it would be indeed surprising if at times the equivocal nature of these...
terms had not irresistibly suggested "an identity between the ideas expressed by them." 51

§ 2. MARITAL-PROPERTY LAWS IN THE UNITED STATES: ANALYSIS AND COMPARISON

Assuming that these unqualified phrases "separate property" and "community property" are equivocal, is it possible to give them precise meaning by dividing them into further categories and using a qualified phrase for each of these subdivisions? Could we, in dealing with property owned or acquired by one of the spouses, use the phrases "equitable separate property," "statutory separate property," "civil-law separate property," "community property acquired by the husband," and "community property acquired by the wife," and be sure that these phrases would always mean the same thing? To answer these questions it is necessary to know what variations, if any, exist in the characteristics of each of these five types of property as between the various states of the common-law group or between various states of the community-property group. If "civil-law separate property" has the same legal characteristics in all of the eight community-property states where it exists, for example, then it is a term which may be used without hesitation as having a definite and precise meaning; and if "statutory separate property" similarly has identical characteristics in all of the common-law states, then it also may be used as a scientific legal term.

In this section an attempt is made to answer the questions posed in the preceding paragraph. We have defined marital property as those interests arising in the nonacquiring spouse. The phrases used in the preceding paragraph are designed to indicate the extent to which the ownership of the acquiring spouse is restricted by the existence of such marital-property interests in the other spouse; therefore, the analysis here will be from the viewpoint of the nonacquiring spouse. To whatever extent we find marital-property interests existing in favor of the other spouse, the unqualified ownership of the acquiring spouse is diminished. An analysis is first made in paragraph A of some of the interests arising in the wife with respect to things acquired by the husband. Since in the common-law jurisdictions these interests are the same regardless of when

51 Holland, Elements of Jurisprudence 80-81 (10th ed. 1906).
the property is acquired, there is in these states only one class of property with which we are concerned—the husband’s “statutory separate property.” However, in the community-property jurisdictions a distinction must be drawn between those things acquired by the husband before marriage and those acquired after marriage. In these jurisdictions we have the two classes of property: the husband’s “civil-law separate property,” and “community property acquired by the husband.”

In paragraph B the same analysis is made of the interest arising in the husband with respect to those things acquired by the wife. Here, however, the analysis is incomplete because it has not been found possible to include any useful statements regarding the “community property acquired by the wife” (i.e., those things acquired by her after marriage by onerous title). The law on the characteristics of this type of property in the community-property jurisdictions is so unsettled that no useful generalizations can be made.\(^52\)

Finally, in paragraph C, a parallel comparison is made of some of the characteristics of the more frequent types of co-ownership by husband and wife in the common-law jurisdictions—tenancy by the entirety and tenancy in common—and of community property acquired by the husband. This is done, not because these types of ownership are analytically or theoretically comparable, but to correct the widespread misconception that community property is similar to such common-law interests.

In each instance, the powers and immunities of the nonacquiring spouse are emphasized to show the extent of the protection given to the possibility of receiving a possessory interest in some portion of the other spouse’s acquisitions at the termination of the marriage. (The rights and privileges of the nonacquiring spouse are not considered in the first two paragraphs because they are not very extensive or important, since his interest is a nonpossessory one.)\(^58\) The corresponding burdens upon the acquiring spouse are, of course, implicit in these statements, i.e., if it is stated that the

\(^52\) Note 173, infra.

\(^58\) These terms—right, power, privilege, and immunity—are used here, and hereafter in this chapter, in the Hohfeldian sense. For definition and discussion see 1 Restatement, Property §§ 1-4 (1936); Hohfeld, Fundamental Legal Conceptions (1919); Corbin, Legal Analysis and Terminology 29 Yale L. J. 163 (1919).
wife has a particular immunity, then the husband is under a corresponding disability with respect to the same property, or if it is stated that the wife has a particular power, then the husband is under a corresponding liability. In all instances, it is assumed that the acquiring spouse has a legal fee simple absolute or absolute property in the thing, except for the existence of these marital-property interests, and also that no facts exist which would alter the normal incidents of marital property, such as, insanity of one spouse, separation, abandonment, etc.54

(A. Things acquired by the husband. Even in this day of “equality” of the sexes, the husband is the normal breadwinner of the family. Therefore, the great majority of disputes about marital-property interests arise concerning things acquired by him, either before or after marriage. In the jurisdictions with a common-law background his interests with respect to all such things are termed his (statutory) “separate property” (eliminating for the present the situation where he makes a gift to the wife by creating some form of co-ownership). In the community-property jurisdictions, his property with respect to things acquired before marriage, or acquired afterwards by gift, devise, or descent, is also termed his (civil-law) “separate property”; property acquired by him after marriage otherwise than by gift, devise, or descent, is termed the “community property” of the spouses.

In general, in all these three types of ownership mentioned in the preceding paragraph the interest of the wife, if any, is a non-possessory interest. The property is not liable for her obligations, delictual or contractual (except her contracts for necessaries and obligations incurred while she is acting as an agent of the husband); she has no power of inter vivos conveyance with respect to it; she has no privilege to collect the rents and revenues; she has no power to compel partition. Her interest will become possessory, if at all, only upon the disruption or termination of the marital relation. There are only a few exceptions to these statements.

At early common law, the husband, and therefore his “separate” property, was liable for all antenuptial obligations of his wife; and this is still true in a few of the common-law jurisdictions where such

54 In each of the outlines below, most of the statutes defining the common-law marital-property interests are cited from Vols. 1 and 2 of PRENTICE-HALL, WILLS, ESTATES AND TRUST SERVICE (1949).
liability has not been abolished by specific enactment and has not been deemed impliedly abolished by the Married Women’s Acts.\(^{55}\) In California the community property acquired by the husband was held to be liable for all of the wife’s antenuptial obligations, but not on the theory that the wife had a possessory interest in such property. In the state there is a statute exempting the husband’s “separate property” from liability for the wife’s antenuptial obligations.\(^{56}\) The court held that this left the husband himself still liable (under the common-law rule) for such obligations. Since the husband was still personally liable for the wife’s antenuptial obligations, and the community property was liable for all of his obligations, ergo it was liable for the wife’s antenuptial obligations.\(^{57}\) In Texas, where there is a similar statute,\(^{58}\) the same result was reached,\(^{59}\) although the court did not base its conclusion on the old common-law rule but merely upon the legislative intent as shown by the statutory provisions. By statute in California the husband’s earnings were exempted from such liability.\(^{60}\) In four of the other community-property jurisdictions the community property acquired by the husband is not liable for the antenuptial obligations of the wife;\(^{61}\) but in Idaho and New Mexico there are statutes similar to those in California and Texas which might produce similar results.\(^{62}\)

By the same process of reasoning, the community property was

\(^{55}\) 3 Vernier, American Family Laws § 151 (1935).


\(^{57}\) Van Maren v. Johnson, 15 Calif. 308 (1860).

\(^{58}\) Vernon’s Tex. Stats. art. 4613 (1936).


\(^{62}\) Idaho Code § 32-910 (1947); N. M. Stats. Ann. § 65-308 (1941). However, if the rationale of McDonald v. Senn, supra note 49, is applied also to antenuptial obligations, only one-half of the community property will be liable for such obligations in New Mexico.
held liable for the postnuptial torts of the wife in Texas and California, and the husband's earnings were exempted from such liability by statute in California. Also in Washington, as we have seen, the community property may be held liable for some postnuptial torts of the wife, by virtue of the "entity theory." And by the recent aberration in New Mexico, one-half of the community property is held liable for the postnuptial torts of the wife. In none of the community-property states is such property liable for the postnuptial contractual obligations of the wife, other than for necessaries, unless the husband has authorized her to act as his agent or as agent of "the community."

Subject to these exceptions, however, the interest of the wife is a nonpossessory one in all of the three types of property being considered here. Her present legal relations with respect to the things are designed to protect her possibility of acquiring a possessory interest in some part of the property. Hence, a comparison of these present legal relations in each of these three types of ownership should furnish a general picture of the substantiality of her interests. The following outline sets out such a general picture of some of the usual characteristics of these types of marital property, in order to illuminate the problems which arise in the field of Conflict of Laws. The various headings refer to (1) things acquired by the husband after marriage by onerous title in a community-property jurisdiction ("community property acquired by the husband"); (2) things acquired by the husband, before or after marriage, in a common-law jurisdiction ("statutory separate property of the husband"); and (3) things acquired by the husband before marriage in the community-property jurisdictions ("civil-law separate property of the husband"). In each instance, it is assumed that no act is done by the husband to create an interest in the wife other than that which necessarily arises by operation of law.

1. Immunity of the wife to have her interests extinguished on execution sale by an antenuptial obligee of the husband:

Real property:

Community property acquired by the husband: Such an immu-

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63 Supra, notes 56–60.
64 Supra, note 46.
65 Supra, note 49.
66 That is, an unsecured antenuptial obligee, who does not obtain a judgment or levy execution until after the marriage.
nity exists in two of the community-property jurisdictions; it does not exist in the other six jurisdictions.\(^6^8\)

**Statutory separate property of the husband:** Such an immunity exists in twenty-one of the common-law jurisdictions; it does not exist in seventeen.\(^7^0\) In four jurisdictions the wife can recover a


\[^6^9\] Ala. Code, Title 34, §§ 40, 41 (1940) [but if estate insolvent, dower is reduced to one-third]; Ark. Stats. Ann. §§ 61-207, 61-208, 61-201, 61-206 (1947) [but amount of wife's share reduced as to creditors]; Del. Rev. Code § 3767 (1935); D. C. Code § 18-201 (1940); Fla. Stats. § 731.34 as amended by Fla. Laws 1945, ch. 22847, § 1 (1941); Hawaii Rev. Laws §§ 12100, 12103 (1945); Smith-Hurd's Ill. Stats. Ann., Ch. 3, § 189; III. 82, § 1 [as to one-third-for-life interest only]; Burns' Ind. Stats. Ann. § 6-2313 (1933) [but amount of wife's share reduced as against creditors]; Ky. Rev. Stats. § 392.020 (1948); Me. Rev. Stats., Ch. 156, § 9 (1944); Mont. Rev. Codes § 5821 (1935); Swartz v. Smole, 91 Mont. 90, 5 P. (2d) 566 (1931) [as to one-third-for-life interest only]; N. J. Rev. Stats. § 3:37-1 (1937); N. C. Gen. Stats. § 30-3 (1943); Throckmorton's Ohio Code §§ 10502-1, 10504-55 (1940); Disher v. Disher, 35 N.E. (2d) 582 (Ohio App. 1936) [as to one-third-for-life interest only]; Ore. Comp. Laws § 17-101, as amended by Ore. Laws 1949, ch. 82 (1940); R. I. Gen. Laws, Ch. 418, § 1; Ch. 567, § 8 (1938); S. C. Code §§ 8586, 8587 (1942); Utah Code §§ 101-4-3, 101-4-4 (1943); Va. Code § 5119 (1942); W. Va. Code §§ 4098, 4099 (1943); Wis. Stats. §§ 233.04, 233.05 (1947).

\[^7^0\] Colo. Stats., Ch. 176, §§ 1, 37 (1935); Conn. Gen. Stats. § 7309 (1949); Iowa Code § 636.5 (1946); Kan. Gen. Stats. § 59-505 (1935); Minn. Stats. Ann. § 525.16 (1945); Miss. Code §§ 453, 668-670, 470 (1942); Neb. Rev. Stats. §§ 30-105, 30-101 (1943); N. H. Rev. Laws, Ch. 359, §§ 1, 3 (1942); McKinney's N. Y. Cons. Laws, Decedent Estate Law, § 18 as amended by N.Y. Laws 1947, ch. 379; § 83; Real Property Law, § 190; Okla. Stats., Title 84, § 44 as amended by Okla. Laws 1941, Tit. 84, ch. 2; Title 84, § 213 (1941); Briegel v. Briegel, 307 Pa. 93, 160 A. 581 (1931); Ohio-Pennsylvania Joint Stock Land Bank v. Blough, 180 A. 45 (Pa. Super. Ct. 1935); Wyo. Comp. Stats. §§ 6-301, 6-2501 (1945). In the following three jurisdictions the interest of the wife can be extinguished by a creditor who procures execution sale before the death of the husband, since her interest only attaches to land of which the husband "died seized," but is apparently superior to the unsecured debts of the husband at his death: Ga. Code §§ 31-101, 31-109 (1933) [apparently superior even to secured creditors at death]; Williams'
one-third interest for life in lands seized on execution during the lifetime of the husband, but to do so she must relinquish what would normally be more advantageous provisions in fee in the lands owned by the husband at his death.71

Civil-law separate property of the husband: The wife does not have such an immunity.72

Personal property:

Community property acquired by the husband: Such an immunity exists in two of the community-property jurisdictions; it does not exist in the other six jurisdictions.78

Statutory separate property of the husband: The wife does not have such an immunity.74

Civil-law separate property of the husband: The wife does not have such an immunity.75

2. Immunity of the wife to have her interests extinguished on execution sale by a postnuptial obligee of the husband:

Real property:

Community property acquired by the husband: Such an immunity does not exist in six jurisdictions;76 it does not exist in the other two jurisdictions, except that the community property cannot be

TENN. CODE §§ 8353, 8351 (1934); Crenshaw v. Moore, 124 Tenn. 528, 137 S.W. 924 (1911); VT. Stats. § 3042 (1947); Blanchard v. Blanchard, 109 Vt. 454, 199 A. 233 (1938). In two jurisdictions the wife does not have any marital-property interest in the husband’s realty. Note 124, infra.

77 Md. Code Ann. art. 46, §§ 3, 4; art. 45, § 6 (1939); Mass. Gen. Laws, Ch. 236, § 55 (1932); MICH. COMP. LAWS § 558.1 (1948); MO. REV. STATS. §§ 327, 328 (1939).

78 McKay, Community Property §§ 792, 1426 (2d ed. 1925).

79 Notes 67 and 68, supra.

74 The wife has no marital-property interest in the husband’s statutory “separate” personality in nine jurisdictions. Note 131, infra. In the other thirty-three jurisdictions, her interest is subject to the debts of the husband during his lifetime. See the statutes cited in notes 132 through 137, infra. However, in Arkansas and Florida the rights of unsecured creditors who have not yet levied execution at the time of the husband’s death are apparently subordinated to the interest of the wife. Ark. Stats. Ann. §§ 61–202, 61–206 (1947); Fla. Stats. § 731.34 as amended by Fla. Laws 1945, ch. 22847, § 1 (1941); Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936); Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936).

75 Note 72, supra.

76 McMurray, Community Property, in 3 CALIF. JURIS. TEN-YEAR SUPP. (1936) §§ 146, 147; Jacob, The Law of Community Property in Idaho 37 (1943); DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 48–49 (1931); HILLYER’S NEV. COMP. LAWS § 3395.02 (1931–41 Supp.) [see McKay, Community Property § 798 (2d ed. 1925)]; N. M. Stats. ANN.
seized to satisfy a "noncommunity" obligation of the husband.77 This exception is a rather narrow one.78

Statutory separate property of the husband: Such an immunity exists in twenty-one of the common-law jurisdictions; it does not exist in seventeen; in four jurisdictions the wife can recover a one-third interest for life in lands seized on execution during the lifetime of the husband, but to do so she must relinquish what would normally be more advantageous provisions in fee in the lands owned at the husband's death.79

Civil-law separate property of the husband: The wife does not have such an immunity.80

Personal property:

Community property acquired by the husband: Such an immunity does not exist in six jurisdictions; it does not exist in the other two jurisdictions, except that the community property cannot be seized to satisfy a "noncommunity" obligation of the husband.81

Statutory separate property of the husband: The wife does not have such an immunity.82

Civil-law separate property of the husband: The wife does not have such an immunity.83

3. Immunity of the wife to have her interests extinguished by a sole inter vivos transfer for value by the husband:

Real property:

Community property acquired by the husband: Such an immunity exists in five of the community-property jurisdictions;84 it does not exist in the other three jurisdictions.85

§ 31-109 (1941) [see McKay, loc. cit.]; Speer, Law of Marital Rights in Texas § 334 (2d ed. 1916).

77 Cosper v. Valley Bank, 28 Ariz. 373, 237 P. 175 (1925); Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917).
78 Notes 41 and 42, supra.
79 Notes 69–71, supra.
80 Note 72, supra.
81 Notes 76–77, supra.
82 Note 74, supra.
83 Note 72, supra.
84 ARIZ. CODE § 71–409 (1939); DEERING'S CALIF. CIV. CODE § 172a (1941); IDAHO CODE § 32–912 (1947); N. M. STATS. ANN. § 65–403 (1941); REMINGTON'S WASH. REV. STATS. § 6893 (1932) [cf. id. §§ 10577, 10578; Campbell v. Sandy, 190 Wash. 528, 69 P.(2d) 808 (1937)].
85 DART'S LA. CIV. CODE, art. 2404 (1945); HILLYER'S NEV. COMP. LAWS § 3360 (1929); VERNON'S TEX. STATS. art. 4619 (1936).
Statutory separate property of the husband: Such an immunity exists in twenty-six jurisdictions; it does not exist in eleven jurisdictions. In five jurisdictions the wife can recover a fractional share for life of lands aliened by the husband without her joinder, but to do so she must relinquish what would normally be more advantageous provisions in fee in the lands owned by the husband at his death.

Civil-law separate property of the husband: The wife does not have such an immunity.

Personal property:

Community property acquired by the husband: The wife does not have such an immunity.

Statutory separate property of the husband: The wife does not have such an immunity.


87 Colo. Stats., Ch. 176, §§ 1, 37 (1935); Conn. Gen. Stats. § 7309 (1949); Ga. Code § 31-101 (1933); Miss. Code §§ 668-670, 470, 453 (1942); McKinney's N.Y. Cons. Laws, Decedent Estate Law, § 18 as amended by N.Y. Laws 1947, ch. 379; Real Property Law, § 190; Okla. Stats., Title 84, § 44 as amended by Okla. Laws 1941, Tit. 84, ch. 2; Title 84, § 213 (1941); Williams Tenn. Code §§ 8353, 8351 (1934); Vt. Stats. §§ 3027, 3031, 3042 (1947); Wyo. Comp. Stats. §§ 6-301, 6-2501 (1945). In two other jurisdictions the wife does not have any marital-property interest in the husband's statutory "separate" real property. Note 124, infra.


89 McKay, Community Property §§ 672, 673, 678 (2d ed. 1925).

90 Notes 131-37, infra.
Civil-law separate property of the husband: The wife does not have such an immunity.

4. Immunity of the wife to have her interests extinguished by a sole gratuitous transfer by the husband:

Real property:

Community property acquired by the husband: Such an immunity exists in six jurisdictions; it does not exist in two jurisdictions, unless the transfer can be said to be “in fraud” of the wife’s rights.

Statutory separate property of the husband: Such an immunity exists in twenty-six jurisdictions; it does not exist in nine jurisdictions unless the transfer can be said to be “in fraud” of the wife’s rights. In five jurisdictions the wife has such an immunity as to a fractional interest for life in the lands aliened; she does not have such an immunity as to the alternative provision for an interest in fee in the lands owned at death, unless the transfer can be said to be “in fraud” of the wife’s rights. Such an immunity does not exist in two jurisdictions.

Civil-law separate property of the husband: The wife does not have such an immunity.

Personal property:

Community property acquired by the husband: Such an immunity exists in two jurisdictions; it exists in the other six jurisdictions only if the transfer can be said to be “in fraud” of the wife’s rights. The meaning of this phrase—“in fraud of the wife’s rights”


92 The three jurisdictions cited in note 85, supra, minus Louisiana. See note 99, infra, as to the meaning of “fraud.”

93 Note 86, supra.

94 Note 87, supra. See notes 102–105, infra, as to the meaning of “fraud.”

95 Note 88, supra.

96 Note 124, infra.


98 McKay, Community Property, ch. 40 (2d ed. 1925) [Note that the
is not entirely clear. Apparently, retention of control and enjoyment by the husband during his life is sufficient to establish "fraud." In Nevada, if the gift is excessive in relation to the entire community estate, the wife can have it set aside. In Texas the cases have seemed to turn on whether the principal motive of the husband was to deprive the wife of her interest. Otherwise, the cases do not clarify the meaning of the term "fraud." Some significant factors are: identity of the donee; proportion of the community assets given; motive of the donor.

Statutory separate property of the husband: Such an immunity does not exist in nine jurisdictions; it exists in the other thirty-three jurisdictions only if the transfer can be said to be "in fraud" of the wife's rights. Here, too, the meaning of this phrase—"in fraud of the wife's rights"—is not entirely clear, although it undoubtedly has a more restricted scope than the same phrase as used in connection with community property. In some states a transaction whereby the husband retains beneficial enjoyment and a power of revocation during his life will be set aside, although a mere purpose to deprive the wife of her statutory share is not sufficient to establish "fraud"; in others, a purpose to defeat the interest of the wife will vitiate the transfer; and in some states, such as New York, the transfer must be found to be "illusory" before it will be held to be a fraud on the wife.

Civil-law separate property of the husband: The wife does not have such an immunity.

[Notes and references follow.]
5. Power of the wife to secure division of the property upon absolute divorce: 108

Real property:

Community property acquired by the husband: The wife has a power to secure such division as is "just and equitable" (or words of similar import) in the discretion of the court in four jurisdictions; 108 in two jurisdictions the wife has a power to secure a division into fixed shares (½ to each spouse). 108 In two jurisdictions, if the divorce is on the ground of adultery or cruelty, the wife has a power to secure such division as is "just and equitable" in the discretion of the court; if the divorce is on other grounds, one-half of the community property must be awarded to each spouse. 108

Statutory separate property of the husband: The wife has no power to secure a division of the property in twelve jurisdictions; 110 in seventeen jurisdictions the wife has a power to secure such division as is "just and equitable" in the discretion of the court; 110

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108 It is assumed in each instance that the wife is the prevailing party in the divorce action, since some of the statutes cited below restrict the right to secure a division of the property to the spouse to whom the divorce is granted. 107 Ariz. Code Ann., § 27-805 (1939); Nev. Laws 1945, ch. 91; Vernon's Tex. Stats., art. 4638 (1936) [but the court cannot divest title to real estate]; Remington's Wash. Rev. Stats. § 989 (1932).


109 Deering's Calif. Civ. Code § 146 (1941); Idaho Code § 32-712 (1947). In California, "incurable insanity" was added as a third ground upon which the court could divide community property in a manner which is "equitable and just" by Calif. Laws 1949, ch. 1589.

110 No statute granting such power has been found in Alabama, Florida, Hawaii, Indiana, Maryland, Mississippi, Montana, New Jersey, New York, North Carolina, Pennsylvania, or South Carolina. In the absence of statute the court normally has no power to award specific property of the husband to the wife under its alimony powers. Note 133 A.L.R. 860 (1941).

110 Colo. Stats., Ch. 56, §§ 8, 28 (1935); Del. Rev. Code §§ 3511, 3512 (1935); Iowa Code § 598.14 (1946); Kan. Gen. Stats. §§ 60-1511, 60-1512 (1935); Ky. Rev. Stats. §§ 392.090(1), 403.060(1) (1948) [but such allowance to the wife shall not divest the husband of fee simple title to real estate]; Minn. Stats. Ann. § 518.22 (1945) [not to exceed one-third; such division can be made if divorce for any cause except adultery by the wife]; Neb. Rev. Stats. § 42-321 (1943); Maxwell v. Maxwell, 106 Neb. 689, 184 N.W. 227 (1921); Gaster v. Gaster, 92 Neb. 6, 137 N.W. 900 (1912); N. H. Rev. Laws, Ch. 339, § 16 (1942); N. D. Code § 14-0524 (1943); Ore. Laws 1947, ch. 557, § 1; S. D. Code § 14.0726 (1939); Williams' Tenn. Code §§ 8446, 8447 (1934); Utah Code § 40-3-5 (1943); Vt. Stats. § 3251 (1947); Va.
in nine jurisdictions the wife has a power to secure a division into fixed shares; and in four jurisdictions the court may award the wife a share of the husband’s statutory separate property as alimony.

Civil-law separate property of the husband: The wife has a power to secure such division as is “just and equitable” in the discretion of the court in four jurisdictions; the wife has no power to secure a division of such property in four jurisdictions.

Personal property:

Community property acquired by the husband: Same power as that with respect to real property.

Statutory separate property of the husband: The wife has no power to secure a division of the property in seventeen jurisdictions; in nineteen jurisdictions the wife has a power to secure such division as is “just and equitable” in the discretion of the court; in one jurisdiction the wife has a power to secure a di-
vision into fixed shares; \(^{118}\) and in five jurisdictions the court may award the wife a share of the husband’s statutory separate property as alimony. \(^{120}\)

Civil-law separate property of the husband: Same power as that with respect to real property. \(^{121}\)

6. Power of the wife to secure a partition of the property after divorce when the decree is silent as to property:

Real and personal property:

Community property acquired by the husband: The wife does have such a power, since she is the owner, after divorce, of an undivided one-half of the real and personal property as tenant in common. \(^{122}\)

Statutory separate property of the husband: The wife has no such power.

Civil-law separate property of the husband: The wife has no such power.

7. Immunity of the wife to have her interests extinguished by the will of the husband (fraction of the property to which such immunity extends):

Real property:

Community property acquired by the husband: The wife has such an immunity in all jurisdictions. This immunity extends to one-half of the property in fee. \(^{123}\)

Statutory separate property of the husband: The wife has such an immunity in forty jurisdictions; she does not have such an immunity in two jurisdictions. \(^{124}\) The immunity extends to one-fourth to one-half in fee in twenty-one jurisdictions; \(^{125}\)

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\(^{120}\) Same citations for four jurisdictions as those in note 113, supra, plus: Me. Rev. Stats., Ch. 153, § 62 (1944).

\(^{121}\) Notes 114–115, supra.

\(^{122}\) 2 VERNIER, AMERICAN FAMILY LAWS 253 (1932).


\(^{124}\) N. D. Code § 14–0709 (1943); S. D. Code §§ 56.0103, 14.0206 (1939).

\(^{125}\) One-half in fee in all circumstances: Colo. Stats., Ch. 176, § 37 (1935);
third to one-half for life in fifteen jurisdictions; \(^{126}\) to one-third for life to one-half in fee in three jurisdictions; \(^{127}\) and in one jurisdiction to a child's part in fee to one-half in fee less the separate estate of the wife.\(^{128}\)

Civil-law separate property of the husband: The wife does not have such an immunity.\(^{129}\)

\(^{126}\) KAN. GEN. STATS. §§ 59-602(2), 59-2233, 59-603 (1935). One-third in fee in all circumstances: FLA. STATS. § 731.34 as amended by Fla. Laws 1945, ch. 22847, § 1 (1941); BURNS' IND. STATS. ANN. §§ 6-2313, 6-2353 (1933); IOWA CODE §§ 636.5, 636.21 (1946); UTAH CODE §§ 101-4-3, 101-4-4 (1943). One-third to one-half in fee depending on whether there are surviving descendants, number of stirpes, etc.: ME. REV. STATS., Ch. 156, § 1(1), as amended by Me. Laws 1949, ch. 439; Ch. 156, § 14 as amended by Me. Laws 1945, ch. 76 (1944); MINN. STATS. ANN. § 525.16 (1945); N. H. REV. LAWS, Ch. 359, §§ 3, 1 (1942); McKinney's N. Y. CONS. LAWS, Decedent Estate Law, § 83, § 18 as amended by N. Y. LAWS 1947, ch. 379; Real Property Law, § 190; OKLA. STATS., Title 84, § 44 as amended by Okla. Laws 1941, Tit. 84, ch. 2; Title 84, § 213 (1941); Pa. Laws 1947, ch. 37, § 5(a); ch. 38, §§ 8(a), 8(b); VT. STATS. §§ 5027, 3031, 3042 (1947). One-fourth to one-half in fee depending on whether there are surviving descendants, number of stirpes, etc.: NEB. REV. STATS. §§ 30-101, 30-107 (1943); WYO. COMP. STATS. §§ 6-301, 6-2501 (1945). One-third to one-half in fee of lands owned at death plus one-third for life of lands aliened by husband without the wife's joinder or sold on execution against him during coverture: SMITH-HURD'S ILL. STATS. ANN., Ch. 3, §§ 168, 170; THROCKMORTON'S OHIO CODE §§ 10502-1, 10504-55, 10503-4 (1940). One-third to one-half in fee of lands owned at death or one-third for life of all lands owned at any time during coverture: Md. CODE ANN., art. 45, § 6 as amended by Md. Laws 1945, ch. 342; art. 93, § 314 as amended by Md. Laws 1947, ch. 29; art. 16, §§ 3, 4 (1939); Mass. GEN. LAWS, Ch. 189, § 1; Ch. 191, § 15; Ch. 190, § 1 as amended by Mass. Laws 1945, ch. 238 (1932); Mich. COMP. LAWS §§ 558.1, 702.69, 702.80 (1948); Mo. REV. STATS. §§ 318, 325, 327, 328 (1939) [a child's share in fee to one-half in fee of lands owned at death, rather than one-third to one-half].

\(^{127}\) One-third for life: CONN. GEN. STATS. § 7309 (1949); DEL. REV. CODE § 3767 (1935); D. C. CODE § 16-411 (1940); HAWAI'I REV. LAWS § 12100 as amended by Hawai'i Laws 1945, ch. D-201 (1945); KY. REV. STATS. § 392.020 (1948); N. C. GEN. STATS. §§ 30-4, 30-5 (1943); R. I. GEN. LAWS, Ch. 418, § 1; Ch. 567, § 8 (1938); S. C. CODE §§ 8586, 8587 (1942); WILLIAMS' TENN. CODE §§ 8533, 8531 (1934); VA. CODE § 5117 (1942); W. VA. CODE § 4096 (1943); WIS. STATS. § 233.01 (1947). One-half for life: N. J. REV. STATS. § 3:37-1 (1937); ORE. COMP. LAWS § 17-101, as amended by Ore. Laws 1949, ch. 82 (1940). One-third to one-half in fee depending on the circumstances, less the separate estate of the wife: ALA. CODE, Title 34, §§ 40, 41 (1940).


\(^{129}\) Miss. CODE §§ 668-670, 470 (1942).

\(^{129}\) Except in Louisiana, if the surviving spouse is in necessitous circumstances
Personal property:

Community property acquired by the husband: The wife has such an immunity in all jurisdictions; it extends to one-half of the property in fee.\textsuperscript{180}

Statutory separate property of the husband: The wife has such an immunity in thirty-three jurisdictions; she does not have such an immunity in nine jurisdictions.\textsuperscript{181} The immunity extends to one-fourth to one-half in fee in twenty-four jurisdictions;\textsuperscript{182} to a child’s share in fee to one-half in fee in three jurisdictions;\textsuperscript{183} and the deceased spouse “died rich.” Dart’s LA. CIV. CODE § 2382 (1945). See Daggett, The Community Property System of Louisiana, ch. 16 (1931);

Note 2 Loyola L. Rev. 58 (1943).

\textsuperscript{180} Note 123, supra.

\textsuperscript{181} No statute giving the wife a nonarrable share in her husband’s statutory “separate” personalty has been found in the following jurisdictions: Delaware, Georgia, Iowa, New Jersey, North Dakota, Rhode Island, South Carolina, South Dakota, and Utah.


\textsuperscript{183} Mo. Rev. Stats. §§ 323, 325, 327 (1939); N. C. Gen. Stats. §§ 30-1, 30-2, § 28-149 as amended by N. C. Laws 1945, ch. 46 (1943); Williams’ Tenn. Code §§ 8358, 8360 (1934) [a child’s share in fee to one-third in fee].
to one-fifth to all in fee in three jurisdictions; \(^{134}\) to one-third for life in one jurisdiction; \(^{135}\) to one-half in fee if there are no surviving descendants of the husband in one jurisdiction; \(^{136}\) and in one jurisdiction to a child's share in fee to one-half in fee less the separate estate of the wife.\(^{137}\)

**Civil-law separate property of the husband:** The wife does not have such an immunity.\(^ {138}\)

8. **Power of the wife to extinguish the husband's interests by will (fraction of the property to which such power extends):**

**Real and personal property:**

**Community property acquired by the husband:** The wife does not have such power in two jurisdictions; \(^ {139}\) she does have such a power, which extends to one-half of the property in fee, in the other six jurisdictions.\(^ {140}\)

**Statutory separate property of the husband:** The wife does not have such power.

**Civil-law separate property of the husband:** The wife does not have such power.

Three important points, which appear from the information in the above outline, deserve stress: (1) there is a great variation in the laws of the states, with a corresponding increase in problems of Conflict of Laws; (2) this variation exists within each major category or type of property discussed—community property acquired by the husband, statutory separate property of the husband, and civil-law separate property of the husband—so the use

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\(^ {134}\) ALA. CODE, Title 16, § 10; Title 61, §18 (1940) [one-fifth to all in fee, less the separate estate of the wife]; D. C. CODE §§ 18-211, 18-701, 18-702, 18-703, 18-704 (1940) [one-third to all in fee]; MONT. REV. CODES §§ 5819, 5820, § 7073 as amended by MONT. LAWS 1941, ch. 140, and LAWS 1947, ch. 60 (1935) [one-third to all in fee].

\(^ {135}\) CONN. GEN. STAT. § 7309 (1949).

\(^ {136}\) VT. STATS. § 3042 (1947).

\(^ {137}\) MISS. CODE §§ 668-670, 470 (1942).

\(^ {138}\) See note 129, supra.

\(^ {139}\) HILLYER'S NEV. COMP. LAWS § 3395.01 (1931-41 Supp.); N. M. STATS. ANN. § 31-108 (1941).

\(^ {140}\) ARIZ. CODE ANN. § 39-109 (1939); DEERING'S CALIF. PROBATE CODE § 201 (1941); IDAHO CODE § 14-113 (1947); DART'S LA. CIV. CODE, art. 915 (1945); Girard Fire & Marine Ins. Co. v. Winfrey, 26 S.W.(2d) 701 (Tex. Civ. App. 1930), aff'd, 120 TEX. 436, 38 S.W.(2d) 1099 (1931); REMINGTON'S WASH. REV. STATS. § 1342 (1932).
of any one of these terms may conceal important differences; and (3) there is a close similarity between the laws of some of the states which are ordinarily placed in different categories. In North Dakota and South Dakota, noncommunity-property states, for example, the wife is not given a nonbarrable share in the husband’s “separate” real or personal property. The only powers which she has with respect to such property are the power to subject it to liability by her contracts for necessaries and the power to secure a division of the property on absolute divorce. She has, in effect, no marital-property interests with respect to the things acquired by the husband. Therefore, the statutory “separate” property of the husband in North and South Dakota is in fact substantially identical with the civil-law “separate” property of the husband in the community-property jurisdictions (since it also, by importation from the common law, is liable for debts contracted by the wife for necessaries).

On the other hand, the statutory “separate” property of the husband in another noncommunity-property state such as Kansas, which gives the wife a nonbarrable share of fifty percent in fee in both realty and personality and retains an inchoate “dower” interest in realty requiring her joinder in conveyances *inter vivos,* is substantially identical with the community property acquired by the husband in Nevada and New Mexico, which do not give the wife a devisable or descendable interest in such property. The only substantial differences in the marital-property interests of the wife, with respect to things acquired by the husband after marriage, as between Kansas on the one hand and Nevada and New Mexico on the other, are that the wife in the latter states may sue for partition of the property after an absolute divorce when the decree is silent as to property, and the different scope of the rules

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143 Hillyer’s Nev. Comp. Laws § 3364 (1929), repealed in 1935, Hillyer’s Nev. Comp. Laws § 3364 (1931-41 Supp.), but reinstated in 1937, Hillyer’s Nev. Comp. Laws §§ 3395.01, 3395.02 (1931-41 Supp.). In the interim between 1935 and 1937 neither spouse had any power of testamentary disposition over the community property; the whole went to the survivor. The same law prevailed in Washington between 1875 and 1879.
as to what constitutes a "fraud" on the rights of the wife in a gratuitous transfer of personalty inter vivos by the husband.\textsuperscript{145} In addition, in New Mexico since 1949 one-half of the acquisitions of the husband after marriage are liable for the wife's torts; but with this rule may be compared the "family-car doctrine," which indicates a tendency, even in some common-law states, to hold the husband's acquisitions liable for the wife's torts in some circumstances.

Obviously, in view of the great differences between these three categories of property and the great variations in characteristics as between different states which have a particular type, all unqualified generalizations using these terms are misleading. In any conflict-of-laws situation, the resort to such shibboleths as "separate property," "common property," or "vested interest," can only result in a mechanical jurisprudence which ignores the real nature of the dispute being litigated. It is not possible to frame meaningful rules in these general terms. The two (or more) particular jurisdictions, in which the operative facts occurred, must be known before an intelligent choice of law can be made. Such statements as "movables held by spouses in community continue to be held in community" when taken into a common-law state,\textsuperscript{146} or "movables held separately by either spouse remain separate interests" when taken into a community-property state,\textsuperscript{147} have a pleasant sound but contain such margins of inaccuracy that they are of little help in deciding cases.

A qualified generalization which can be made, on the basis of the information in the outline above, is that the wife's interest in the so-called statutory "separate" property of the husband in a majority of the common-law states is afforded a protection nearly equal to that given to her interest in the community property acquired by the husband in the majority of community-property jurisdictions. The statutory "separate" property, in most states, is completely unlike the civil-law "separate" property, in which the wife has no interest except the expectancy of an heir and the possibility of acquiring some of the property upon divorce (in four of the eight jurisdictions).

\textsuperscript{145} See notes 99, 102, \textit{supra}.
\textsuperscript{146} \textit{Restatement, Conflict of Laws} § 292 (1934).
\textsuperscript{147} \textit{Id.}, § 293 [italics added].
In two respects, however, the interest of the wife in the husband's statutory "separate" property (in those states where she receives the greatest protection) still falls short of her interest in community property. In the first place, the wife has power to compel a partition of the property after divorce, when the court makes no disposition of the property of the parties, in the case of community property, but cannot do so in the case of the husband's statutory "separate" property. This difference is of relatively minor significance, since the court in most states can divide either type of property in the divorce action itself in a manner which is "just and equitable." The most important difference, however, is the fact that the possibility of the wife's interest becoming possessory in the case of statutory "separate" property is contingent upon her husband predeceasing her; if she predeceases the husband, she has no power of testamentary disposition nor any interest capable of descending to her heirs upon her death intestate. In six of the eight community-property jurisdictions, on the other hand, she has power of testamentary disposition over fifty percent of the community property, and in four of the eight one-half descends to her heirs upon her death intestate during the lifetime of her husband (California and Idaho, while allowing her a power of testamentary disposition, nevertheless give the whole to the husband if she dies intestate). It is probable that this important difference is the explanation of the fact that the courts are prone to find that the wife has a "vested interest" in community property, while denying this magic epithet to her interests in the husband statutory "separate" property.

This hypothesis seemingly is borne out by the federal decisions regarding the wife's interest in community property. In Arnett v. Reade the issue was whether a New Mexico statute requiring the wife's joinder for a valid conveyance of community real property could be applied retroactively to property acquired before its passage. At that time the New Mexico law provided that the wife had a power of testamentary disposition over one-half of the community property. The approach of the Supreme Court to the problem was that if the wife had a "vested interest" in community property at

148 Deering's Calif. Probate Code § 201 (1941); Idaho Code § 14-113 (1932).
149 220 U.S. 311 (1911).
the time of the passage of this statute, then the husband’s interest was not “so vested” that his power of “management and control” could not be retroactively curtailed. In holding that the interest of the wife was thus “vested,” Justice Holmes seemed to place his decision squarely upon this inheritable quality of her interest:

“We do not perceive how this statement [that the wife has a ‘bare expectancy’] can be reconciled with the old law of New Mexico . . . that after . . . the deduction of the survivor’s separate property and his half of the acquest property, . . . the remainder” shall constitute the estate of the deceased spouse. “We should require more than a reference to Randall v. Krieger, 23 Wall. 137, as to the power of the legislature over an inchoate right of dower to make us believe that a law could put an end to her interest without compensation. . . .”

In 1907 the New Mexico Legislature abolished the wife’s power of testamentary disposition over the community property and provided that it all should belong to her husband upon her death. Thereafter, the Tenth Circuit Court of Appeals in Hernandez v. Becker held that her interest was now so “non-vested” that no estate tax was due when she predeceased the husband, and stated by way of dictum that a tax would be due upon the whole when he predeceased her.

In California prior to 1923 the wife had no power of testamentary disposition over community property; the possibility of her interest ever becoming possessory was contingent upon her outliving her husband. With respect to property acquired before that date,
the Ninth Circuit Court of Appeals in *Talcott v. United States* and the Supreme Court in *United States v. Robbins* held that her interest was so “non-vested” that an estate tax must be paid on the whole when the husband predeceased her, and that the husband must pay income tax upon the entire income. In 1923 the California Legislature amended the law to give the wife a power of testamentary disposition over one-half of the community property. Thereafter, the Supreme Court in *United States v. Malcolm* and the Ninth Circuit Court of Appeals in *United States v. Goodyear* held that the interest of the wife was now so “vested” that the husband must pay income tax on only one-half the income, and an estate tax was due on one-half only when the husband died first.

No other legislation was passed by California in the interim between these decisions which altered in any way the respective interests of husband and wife in the community property; however, in 1927 that Legislature passed a statute merely declaring that the wife has a “present, existing and equal interest” in the community property. Because the Supreme Court of California said in *dictum* that the legislation of 1923 did not give the wife a “vested interest” in the community property, lower federal courts have made the issue of taxability vel non turn upon the question whether the property was acquired before or after 1927, rather than 1923. But

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155 269 U.S. 315 (1926).

156 Calif. Laws 1923, ch. 18, § 1 [now § 201 of DEERING’S CALIF. PROBATE CODE (1941)].

157 282 U.S. 792 (1931).


159 Compare Peterson v. Peterson, 35 Idaho 470, 207 P. 425 (1922), declaring that the wife has a “vested” interest in community property and overruling *Bedal v. Sake*, 10 Idaho 270, 77 P. 638 (1904), where a supervening statute, Idaho Laws 1907, p. 346, had for the first time given the wife a desirable interest in community property in Idaho.

160 Calif. Laws 1927, ch. 265 [now § 161a of DEERING’S CALIF. CIV. CODE (1941)].


162 Rogan v. Delaney, 110 F. (2d) 336 (C.C.A. 9th, 1940) [income tax];
the mere legislative declaration of 1927 has been held by the California courts to have conferred no additional interest upon the wife: The wife need not be named as grantor in a deed of community realty, although by specific statute, before and after 1927, she must sign; the community property is still liable for any tort of the husband; the entire community property is liable for the contractual obligations of the husband after his death; the community property is liable for the obligation of the husband as an accommodation maker of a note; a contract to sell community property made by the wife without the authorization of the husband is void; the wife's trustee in bankruptcy cannot reach any of the community property; and the wife is not liable for the purchase price of community property after the husband's bankruptcy. All of these decisions concerned property

Hirsch v. United States, 62 F.(2d) 128 (C.C.A. 9th, 1932) [income tax]; Pedder v. Commissioner, 60 F.(2d) 866 (C.C.A. 9th, 1932) [income tax]; United States v. Goodyear, 99 F.(2d) 523 (C.C.A. 9th, 1938) [estate tax]; Sampson v. Welch, 23 F. Supp. 271 (S.D. Calif. 1938) [estate tax]. This confusion was partly caused by the fact that the second certified question of the Circuit Court of Appeals in the Malcolm case had read: “Has the wife, under section 161a of the Civil Code of California, such an interest’’ that she should pay tax on one-half of the income? (italics added) The Supreme Court answered this question “Yes.” United States v. Malcolm, 282 U.S. 792 (1931). However, that case concerned the taxable year 1928, and hence the question whether the 1923 or the 1927 amendment had altered the rule of the Robbins case was not before the court. The question is still of importance in California because of the rule of the California courts that not only is property acquired prior to any of the various amendments to the community-property laws unaffected by such amendments, but also income from such property even though accrued after the amendments is likewise unaffected. Boyd v. Oser, 23 Calif.(2d) 613, 145 P.(2d) 312 (1944).

163 Strong v. Strong, 22 Calif.(2d) 540, 140 P.(2d) 386 (1943).
acquired after 1927, and in no instance was the rule held to be different from that obtaining prior to that date. 172

(B. Things acquired by the wife. The wife’s interests in the common-law jurisdictions in all things acquired by her, whether before or after marriage, are termed her statutory “separate” property; however, marital-property interests in the husband still arise, in the great majority of these jurisdictions, with respect to such things. On the other hand, the husband in the community-property jurisdictions has no marital-property interests with respect to things acquired by the wife before marriage, or after marriage by gift.

172 It was suggested, 3 CALIF. JURIS. TEN-YEAR SUPP. 598-99 (1936), that the 1927 amendment had changed the rule concerning testimony of a wife under the California Dead-Man’s Statute, in a suit against the estate of a decedent to recover community property. She had formerly been allowed to testify since she had no “interest” in the recovery. The California Supreme Court admitted that it might have had this effect, Roy v. Salisbury, 21 Calif. (2d) 176, 130 P.(2d) 706 (1942), but held that, if so, it could be avoided by the assignment before suit of the wife’s interest in the community claim to the husband as his “separate” property. Ibid. Hence, this point is of no practical significance. In Rothchild v. Superior Court of California, 109 Calif. App. 345, 293 P. 106 (1930), there is a dictum that after 1927 in a suit for community property the wife is a “person for whose immediate benefit” the action is prosecuted and hence her deposition may be taken by the opposing party under § 2021 of the Code of Civil Procedure, but the case held that she may claim the privilege to refuse to testify “against” her husband. Here, also, there was actually no change. See also, Caminetti v. Prudence Mutual Life Ins. Ass’n 142 P.(2d) 41 (Calif. App. 1943), reversed on rehearing on another ground, 62 Calif. App. 945, 146 P.(2d) 15 (1944), where the court held in § 161a as a specious reason to overrule a wrongly decided previous case. In any event, even if these privileges were denied to the wife because of § 161a, it is difficult to see how this would increase her interest to a status of “vestedness,” in any rational scheme.

172 The other four income-tax cases decided by the Supreme Court, which held that the wife’s interest in the community property was “vested,” arose in states in which the wife had an inheritable interest in the community property. Goodell v. Koch, 282 U.S. 118 (1930) (Arizona); Bender v. Pfaff, 282 U.S. 127 (1930) (Louisiana); Hopkins v. Bacon, 282 U.S. 122 (1930) (Texas); Poe v. Seaborn, 282 U.S. 101 (1930) (Washington). It is a rather amazing fact, however, that the Treasury, before the Revenue Act of 1948, apparently never brought a test case on the question of the privilege to split community-property income in either New Mexico or Nevada, where the wife does not have an inheritable or devisable interest in the community property. Cf. Norman DeVaux, 14 B.T.A. 205 (1928). In any event, it would seem that the appellation “vested” is more often used as a substitute for thought than to announce the results of thought: “To declare an interest non-taxable because it is vested, when the only consequence claimed to flow from vestedness is non-taxability, is to resort to question begging.” Sampson v. Welch, 23 F. Supp. 271, 279 (S.D. Calif. 1938). These questions have not been rendered entirely academic by the enactment
devise, or descent, and (in six of the eight) the rents and profits of such property—i.e., the wife's civil-law "separate" property. In neither type of property does the husband have a possessory interest during coverture; it is not subject to liability for his obligations; he has no power of transfer, *inter vivos* or testamentary; and he has no power to secure a partition of the property during wedlock or after divorce when the decree is silent as to property. The following outline is designed to set out some of the important legal relations of the husband with respect to such property, where they differ as between the two types of property or as between realty and personalty within a single type.

To make this picture complete there should also be included the category of "special community"—those things acquired by the wife in a community-property jurisdiction after marriage (not by gift, devise, or descent). But the evolution of this type of property has not yet reached its apparent goal, and the law is in confusion on this topic. It is frequently impossible, even within a single state, to discover just what effect is to be given certain fragmentary statutes; and uniformity as between the various states is nonexistent.\(^{172}\) It has not been possible to discover any general rules which could be usefully stated in this paragraph B.

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1. Immunity of the husband to have his interest extinguished on execution sale by an obligee of the wife:

Real property:

Statutory separate property of the wife: Such an immunity exists in eleven jurisdictions; 174 it does not exist in twenty-seven. 175 In four jurisdictions the husband can recover a fractional interest for life in lands seized on execution during the lifetime of the wife, but to do so he must relinquish what would normally be more advantageous provisions in fee in the lands owned at the wife's death. 176


174 Wilmington Trust Co. v. Boden, 38 A.(2d) 168 (Del. Ch. 1944); SMITH-HURD'S ILL. STATS. ANN., Ch. 3, § 189; Ch. 82, § 1 [husband takes only one-third for life interest as to lands sold on execution against the wife during coverture]; BURNS' IND. STATS. ANN. §§ 6-2321 (1933); Shuey v. Lambert, 53 Ind. App. 567, 102 N.E. 150 (1913) [however, interest of the husband is not superior to antenuptial debts of the wife]; KY. REV. STAT. §§ 392.020, 392.010 (1948); ME. REV. STATS., Ch. 156, § 9 (1944); N. J. REV. STATS. § 3:37-2 (1937); THROCKMORTON'S OHIO CODE §§ 10502-8, 10502-1, 10504-55 (1940); Disher v. Disher, 35 N.E.(2d) 582 (Ohio App. 1936) [husband takes only one-third-for-life interest as to lands sold on execution against the wife during coverture]; ORE. COMP. LAWS §§ 17-401 (1940); R. I. GEN. LAWS, Ch. 566, § 12; Ch. 567, § 8 (1938); VA. CODE §§ 5139a, 5139b (1942); W. VA. CODE §§ 4098, 4099, 4113 (1943).

175 COLO. STAT., Ch. 176, §§ 1, 37 (1935); CONN. GEN. STATS. § 7309 (1949); HAWAII REV. LAWS § 12115 as amended by Hawaii Laws 1945, chs. D-192, D-201 (1945); IOWA CODE § 636.5 (1946); KAN. GEN. STATS. § 59-505 (1935); MINN. STATS. ANN. § 525.16 (1945); MISS. CODE §§ 668-670, 470, 455 (1942); NEB. REV. STATS. §§ 30-105, 30-101 (1943); McKinney's N. Y. CONS. LAWS, Deedent Estate Law, § 83, § 18 as amended by N.Y. LAWS 1947, ch. 379; REAL PROPERTY LAW, § 189; OKLA. STAT., Title 84, § 213, § 44 as amended by Okla. Laws 1941, Tit. 84, ch. 2 (1941); PA. LAWS 1947, ch. 37, § 5(b); WILLIAMS' TENN. CODE §§ 8460, 8461, 8098 (1934); Henderson Grocery Co. v. Johnson, 141 Tenn. 127, 207 S.W. 723 (1918); VT. STATS. §§ 3040, 3041, 3042 (1947); WYO. COMP. STATS. §§ 6-301, 6-2501 (1945). In addition to these fourteen jurisdictions, the husband has no marital-property interest in the wife's statutory "separate" realty in thirteen jurisdictions. Note 194, infra.

176 MD. CODE ANN., art. 45, §§ 7, 12; art. 46, §§ 3, 4 (1939); MASS. GEN. LAWS, Ch. 236, § 55 (1932); MO. REV. STATS. §§ 327, 328 (1939); N. H. REV. LAWS, Ch. 359, §§ 9, 13 (1942).
ANALYSIS OF MARITAL-PROPERTY LAWS

Civil-law separate property of the wife: The husband does not have such an immunity.

Personal property:

Statutory separate property of the wife: The husband does not have such an immunity.177

Civil-law separate property of the wife: The husband does not have such an immunity.

2. Immunity of the husband to have his interests extinguished by a sole inter vivos transfer for value by the wife:

Real property:

Statutory separate property of the wife: Such an immunity exists in sixteen jurisdictions;178 it does not exist in twenty-three jurisdictions.179 In three jurisdictions the husband can recover a fractional

177 Statutes cited in notes 200-205, infra.
179 Colo. Stats., Ch. 176, §§ 1, 37 (1935); Conn. Gen. Stats. § 7309 (1949); Haw. Rev. Laws § 12115 as amended by Haw. Laws 1945, chs. D-192, D-201 (1945); Miss. Code §§ 453, 668–670, 470 (1942); Mo. Rev. Stats. §§ 318, 319, 324, 328 (1939); Scott v. Scott, 324 Mo. 1055, 26 S.W.(2d) 598 (1930); McKinney's N. Y. Cons. Laws, Decedent Estate Law, § 18 as amended by N. Y. Laws 1947, ch. 379; Real Property Law, § 189; Okla. Stats., Title 84, § 213, § 44 as amended by Okla. Laws 1941, Tit. 84, ch. 2 (1941); Williams' Tenn. Code §§ 8460, 8461, 8098 (1934); Hull v. Hull, 139 Tenn. 572, 202 S.W. 914 (1918); Vt. Stats. §§ 3040, 3041, 3042 (1947); Wyo. Comp. Laws §§ 6–301, 6–2501 (1945). In addition to these ten jurisdictions, the husband has no marital-property interest in the wife's statutory "separate" realty in thirteen jurisdictions. Note 194, infra. In three of the jurisdictions listed in note 194, infra, a husband is required to join in any conveyance inter vivos of his wife's "separate" real property. Ala. Code, Title 34, § 73, as amended by Ala. Laws 1943, Act 445 (1940); Fla. Laws 1943, ch. 21932; N. C. Gen. Stats. §§ 52–2, 52–4 (1943). However, the wife may by will deprive the husband of any interest in her real property and therefore he has no nonbarrable interest which would be protected by his refusal to join. Statutes cited infra,
share for life in lands aliened by the wife without his joinder, but to do so he must relinquish what would normally be more advantageous provisions in fee in the lands owned at the wife’s death.\footnote{180}

**Civil-law separate property of the wife:** The husband does not have such an immunity.\footnote{181}

**Personal property:**

**Statutory separate property of the wife:** The husband does not have such an immunity.\footnote{182}

**Civil-law separate property of the wife:** The husband does not have such an immunity.

3. **Privilege of the husband to collect the rents and revenues:**

**Real and personal property:**

**Statutory separate property of the wife:** The husband does not have such a privilege.

**Civil-law separate property of the wife:** The husband does not have such a privilege.\footnote{183}

4. **Power of the husband to secure division of the property upon absolute divorce:**\footnote{184}

**Real property:**

**Statutory separate property of the wife:** The husband has no power to secure a division of the property in twenty-four jurisdictions;\footnote{185} in eleven jurisdictions the husband has a power to secure

\footnote{180}\footnote{181}\footnote{182}\footnote{183}\footnote{184}\footnote{185}
such division as is "just and equitable" in the discretion of the court; in four jurisdictions the husband has a power to secure a division into fixed shares; and in three jurisdictions the court may award the husband a share of the wife's statutory separate property "in the nature of alimony."  

Civil-law separate property of the wife: The husband has a power to secure such division as is "just and equitable" in the discretion of the court in two jurisdictions; the husband has no power to secure a division of such property in six jurisdictions.  

Personal property:  

Statutory separate property of the wife: The husband has no power to secure a division of the property in twenty-seven jurisdictions; in twelve jurisdictions the husband has a power to secure such division as is "just and equitable" in the discretion of the court; and in three jurisdictions the court may award the husband a share of the wife's statutory separate property as alimony.  

Civil-law separate property of the wife: Same power as that with respect to real property.


Vernon's Tex. Stats., art 4636 (1936) [but the court may not divest title to real estate]; Remington's Wash. Rev. Stats. § 989 (1932).

The twenty-four jurisdictions listed in note 185, supra; minus Maryland; plus Nebraska, Illinois, Rhode Island, and West Virginia.

The eleven jurisdictions cited in note 186, supra, except Nebraska; plus Me. Rev. Stats., Ch. 153, § 64 (1944); Md. Laws 1947, ch. 220.

Note 188, supra.

Note 189, supra.
5. Immunity of the husband to have his interests extinguished by the will of the wife (fraction of the property to which such immunity extends):

Real property:

Statutory separate property of the wife: The husband has such an immunity in twenty-nine jurisdictions; he does not have such an immunity in thirteen jurisdictions. The immunity extends to one-fourth to one-half in fee in seventeen jurisdictions, to one-third for life to all for life in ten jurisdictions, to a child’s share

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in fee to one-half in fee in one jurisdiction; 187 and in one jurisdiction to a child's share in fee to one-half in fee less the separate estate of the husband. 188

Civil-law separate property of the wife: The husband does not have such an immunity. 189

Personal property:

Statutory separate property of the wife: The husband has such an immunity in twenty-five jurisdictions; he does not have such an immunity in seventeen jurisdictions. 200 The immunity extends to one-fourth to one-half in fee in nineteen jurisdictions; 201 to a child's share in fee to one-half in fee in three jurisdictions; 202 to

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187 Mo. Rev. Stats. §§ 319, 324, 327, 328 (1939) [or one-third for life of all lands owned during coverture].


189 Except in Louisiana if the husband is in necessitous circumstances and the wife "died rich." See note 129, supra.

200 No statute giving the husband a nonbarrable share in the wife's statutory "separate" personality has been found in the following jurisdictions: Alabama, Arkansas, Delaware, Florida, Georgia, Indiana, Iowa, Michigan, Montana, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Utah, and Wisconsin.


202 Child's share in fee to one-third in fee: Williams' Tenn. Code § 8359 (1934); child's share in fee to one-half in fee: Mo. Rev. Stats. §§ 323, 319,
one-third in fee to all in fee in one jurisdiction; \( ^{203} \) to one-third for life in one jurisdiction; \( ^{204} \) and in one jurisdiction to one-half in fee if, but only if, there are no surviving issue of the deceased wife. \( ^{205} \)

**Civil-law separate property of the wife:** The husband does not have such an immunity. \( ^{206} \)

It can readily be seen, from the information in the above outline, that here as in the case of property acquired by the husband a great danger inheres in the uncritical use of marital-property terms in a conflict-of-law case. There is a great variation in the actual marital-property characteristics of what is indiscriminately called statutory “separate” property of the wife in all of the common-law states. Although the differences among the community states with respect to civil-law “separate” property of the wife are not so great, this property resembles closely the statutory “separate” property in a very few of the common-law states but differs widely from such property in most of the common-law states. The identity of the name which has been given all of these interests (“separate property”) should not be allowed to obscure these important variations in legal relations.

**C. Co-ownership by husband and wife.** In addition to the above types of ownership by husband and wife in the United States, there are also several types of “co-ownership” in which each spouse has a present possessory interest. These types of ownership do not arise automatically when one spouse acquires some things; in order for them to arise it is necessary (1) that the things actually be jointly acquired, or (2) that a form of present co-ownership be created by the terms of the conveyance or transfer—i.e., a gift of a present possessory interest in some undivided fraction of the property by the acquiring spouse to the other, accomplished by the form in which he requests and receives title.

Among the most important of these types of ownership in the common-law jurisdictions are “tenancy by the entirety” (where it is still recognized \( ^{207} \)) and “tenancy in common.” Since the in-

\[ \begin{align*}
^{203} & \text{Miss. Code §§ 668–670, 470, 453 (1942).} \\
^{204} & \text{D. C. Code §§ 18–211, 18–703, 18–704, 18–702, 18–701 (1940).} \\
^{205} & \text{Conn. Gen. Stats. § 7309 (1949).} \\
^{206} & \text{Vt. Pub. Laws § 3042 (1947).} \\
^{207} & \text{Note 199, supra.} \\
\end{align*} \]
cident of survivorship attaches to the tenancy by the entirety, other marital-property interests are excluded. The characteristics of this type of ownership are determined solely by the special rules applicable to tenancy by the entirety, and the law of "dower" and "curtesy" or substitutes therefor does not apply. Although the wife did not have a possessory interest at common law in property held by the entirety, she generally has been given such an interest in modern times.

On the other hand, the incidents of tenancy in common as between husband and wife in a common-law jurisdiction are not determined solely by the rules concerning this type of ownership as between strangers. The marital-property interests of the wife (see paragraph A, above) attach to the husband’s undivided one-half (or other fraction), since this undivided one-half is his “separate” property. Conversely, the husband’s marital-property interests (see paragraph B, above) attach to the wife’s undivided one-half (or other fraction), since that is her “separate” property. Therefore, to determine the incidents of this type of ownership as between husband and wife, one must look to the marital-property law of the particular jurisdiction as well as to the law of tenancy in common.

In the community-property jurisdictions, also, there are forms of “co-ownership” which give to both spouses present possessory interests. Tenancy by the entirety usually has not been recognized in the community-property states, but tenancy in common between husband and wife is possible and also, in some of them, joint tenancy. Here, too, the present possessory interest of the husband in an undivided one-half (or other fraction) may be held either as his civil-law “separate” property (in which case the

Married Women’s Property Acts. 2 TIFFANY, REAL PROPERTY § 433 (3d ed. 1939); 4 THOMPSON, REAL PROPERTY § 1806 (Perm. ed. 1940). Contra: Lawler v. Byrne, 252 Ill. 194, 96 N.E. 892 (1911); Appeal of Robinson, 88 Me. 17, 33 A. 652 (1895); cf. Semper v. Coates, 93 Minn. 76, 100 N.W. 662 (1904). And acts abolishing survivorship in joint tenancy are generally held not to apply to tenancies by the entirety. TIFFANY, loc. cit.; 4 THOMPSON, REAL PROPERTY § 1813 (Perm. ed. 1940). In a minority of states tenancies by the entirety, although recognized in real property, are not recognized in personal property. Franklin National Bank v. Freile, 116 N.J. Eq. 278, 173 A. 93 (1934), aff’d, 117 N.J. Eq. 405, 176 A. 167 (1935); In re McKelway’s Estate, 221 N.Y. 15, 116 N.E. 348 (1917); Dozier v. Leary, 196 N.C. 12, 144 S.E. 368 (1928); Holman v. Mays, 154 Ore. 241, 59 P.(2d) 392 (1936).
marital-property interests of the wife are excluded) or as community property (in which case the normal marital-property interests of the wife, detailed in paragraph A above, will attach to that one-half). The wife's undivided interest is usually her civil-law "separate" property.

The types of ownership discussed in the preceding paragraphs are strictly comparable, and in order to complete the logical analysis begun in paragraphs A and B it would be necessary to make a parallel comparison of them. However, the resulting analysis would probably be so elaborate that it would be of little practical use in giving a general picture of marital-property ownership. In addition, the most important point to be made is that community property acquired by the husband is in no wise comparable to tenancy by the entirety or tenancy in common between husband and wife in a common-law jurisdiction, although it is sometimes loosely called "common property" or a form of "joint ownership." Therefore, we shall restrict ourselves here to a contrast of community property acquired by the husband with tenancy in common and tenancy by the entirety in the common-law jurisdictions. It is assumed that the conveyance or transfer creating the tenancy in common in each instance is such as to vest a one-half interest in each spouse. The following outline contrasts these three forms of ownership from the point of view of the wife's legal relations.

1. Liability of the property for the postnuptial obligations of the wife, other than contracts for necessaries:

   Real and personal property:

   Community property acquired by the husband: 208 It is not liable for contractual obligations of the wife. It is not liable for the tort obligations of the wife, except in Texas and California, 209 a few such obligations in Washington, 210 and to the extent of one-half of the property in New Mexico. 211

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208 Under this heading in the outline below, except when otherwise indicated, see the citations for the same statements in the first outline under paragraph A, above.

209 Notes 57-60, supra. However, this liability arises because of the husband's common-law personal liability for his wife's postnuptial torts. The husband's earnings have been exempted from such liability in California.

210 Note 46, supra.

211 Note 49, supra.
Tenancy by the entirety in a common-law state: It is not liable for such obligations. 212

Tenancy in common in a common-law state: It is liable for all such obligations to the extent of one-half of the property. 213

2. Immunity of the wife to have her interests extinguished on execution sale by a postnuptial obligee of the husband:

Real property:

Community property acquired by the husband: Such an immunity does not exist in six jurisdictions; it does not exist in the other two jurisdictions, except that the community property cannot be seized to satisfy a "noncommunity" obligation of the husband. This exception is a rather narrow one.

Tenancy by the entirety in a common-law state: The wife has such an immunity. 214

Tenancy in common in a common-law state: The wife has such an immunity as to fifty percent of the property. As to the other fifty percent of the property, the wife has such an immunity in twenty-five jurisdictions; she does not have such an immunity in seventeen jurisdictions. 215

Personal property:

Community property acquired by the husband: Such an immunity does not exist in six jurisdictions; it does not exist in the other two jurisdictions, except that the community property cannot be seized to satisfy a "noncommunity" obligation of the husband.

Tenancy by the entirety in a common-law state: The wife has such an immunity. 216

Tenancy in common in a common-law state: The wife has such an immunity.

212 2 Tiffany, Real Property § 434 (3d ed. 1939); 4 Thompson, Real Property § 1824 (Perm. ed. 1940); cf. Finnegan v. Humes, 252 App. Div. 385, 299 N.Y.S. 501 (1937), aff'd, 277 N.Y. 682, 14 N.E.(2d) 389 (1938). In Oklahoma by statute one-half of property held by the entirety is made liable for the debts of each spouse. Okla. Laws 1945, Title 60, ch. 2.

213 However, in eleven of the common-law jurisdictions, creditors of the wife would take this one-half of the real property subject to the husband's marital-property right. Note 174, supra.

214 Note 212, supra. In Vermont the entire property held by the entirety is chargeable during the lifetime of the husband for the debts contracted by him for the necessary upkeep of the property. Vt. Stats. § 3167 (1947).


216 Notes 212, 214, supra.
an immunity as to fifty percent of the property. This immunity does not exist as to the other fifty percent of the property.\textsuperscript{217}

3. Immunity of the wife to have her interests extinguished by a sole inter vivos transfer for value by the husband:

\textbf{Real property:}

Community property acquired by the husband: Such an immunity exists in five jurisdictions; it does not exist in the other three jurisdictions.

\textit{Tenancy by the entirety in a common-law state:} The wife has such an immunity.\textsuperscript{218}

\textit{Tenancy in common in a common-law state:} The wife has such an immunity as to fifty percent of the property. As to the other fifty percent of the property, the wife has such an immunity in thirty-one jurisdictions; she does not have this immunity in eleven jurisdictions.\textsuperscript{219}

\textbf{Personal property:}

Community property acquired by the husband: The wife does not have such an immunity.

\textit{Tenancy by the entirety in a common-law state:} The wife has such an immunity.\textsuperscript{220}

\textit{Tenancy in common in a common-law state:} The wife has such an immunity as to fifty percent of the property. This immunity does not exist as to the other fifty percent of the property.\textsuperscript{221}

4. Immunity of the wife to have her interests extinguished by a sole gratuitous transfer by the husband:

\textbf{Real property:}

Community property acquired by the husband: Such an immunity exists in six jurisdictions; it does not exist in two jurisdictions unless the transfer can be said to be "in fraud" of the wife's rights.

\textit{Tenancy by the entirety in a common-law state:} The wife has such an immunity.\textsuperscript{222}

\textit{Tenancy in common in a common-law state:} The wife has such

\textsuperscript{217} Notes 74, 82, supra.
\textsuperscript{218} 2 TIFFANY, REAL PROPERTY § 435 (3d ed. 1939); 4 THOMPSON, REAL PROPERTY § 1817 (Perm. ed. 1940); cf. Hiles v. Fisher, 144 N.Y. 306, 39 N.E. 337 (1895).
\textsuperscript{219} Notes 86-88, supra.
\textsuperscript{220} Note 218, supra.
\textsuperscript{221} Note 90, supra.
\textsuperscript{222} Note 218, supra.
an immunity as to fifty percent of the property. As to the other fifty percent of the property, such an immunity exists in thirty-one jurisdictions; it does not exist in nine jurisdictions unless the transfer can be said to be “in fraud” of the wife’s rights; it does not exist in two jurisdictions.  

Personal property:

Community property acquired by the husband: Such an immunity exists in two jurisdictions; it exists in the other six jurisdictions only if the transfer can be said to be “in fraud” of the wife’s rights.

Tenancy by the entirety in a common-law state: The wife has such an immunity.

Tenancy in common in a common-law state: Such an immunity exists as to fifty percent of the property. As to the other fifty percent of the property, such an immunity exists in thirty-three jurisdictions only if the transfer can be said to be “in fraud” of the wife’s rights; it does not exist in nine jurisdictions.

5. Power of the wife to extinguish the husband’s interests by a sole inter vivos transfer:

Real property:

Community property acquired by the husband: The wife does not have such a power.

Tenancy by the entirety in a common-law state: The wife does not have such a power.

Tenancy in common in a common-law state: The wife does not have such power as to fifty percent of the property. As to the other fifty percent of the property, the wife has such power in twenty-three jurisdictions; she does not have this power in nineteen jurisdictions.

Personal property:

Community property acquired by the husband: The wife does not have such power.

Tenancy by the entirety in a common-law state: The wife does not have such power.

Notes 93–96, supra.

Note 218, supra.

Notes 100–105, supra.

2 Tiffany, Real Property §§ 434, 435 (3d ed. 1939); 4 Thompson, Real Property § 1816 (Perm. ed. 1940).

Notes 178–180, supra.
Tenancy in common in a common-law state: The wife does not have such power as to fifty percent of the property; she does have this power as to the other fifty percent of the property.\(^{228}\)

6. Privilege of the wife to exercise the rights of possession: Real and personal property:

Community property acquired by the husband: The wife does not have this privilege.

Tenancy by the entirety in a common-law state: The wife does have this privilege.\(^{229}\)

Tenancy in common in a common-law state: The wife does have this privilege.\(^{230}\)

7. Power of the wife to secure partition during wedlock:

Real and personal property:

Community property acquired by the husband: The wife does not have such power.

Tenancy by the entirety in a common-law state: The wife does not have such power.\(^{231}\)

Tenancy in common in a common-law state: The wife does have such power.

8. Power of the wife to secure partition after divorce when the decree is silent as to property:

Real and personal property:

Community property acquired by the husband: The wife has such power.

Tenancy by the entirety in a common-law state: The wife has such power.\(^{232}\)

Tenancy in common in a common-law state: The wife has such power.

9. Immunity of the wife to have her interests extinguished by the will of the husband (fraction of the property to which such immunity extends):

\(^{228}\) Note 182, supra.

\(^{229}\) 4 Thompson, Real Property §§ 1823, 1824, 1825 (Perm. ed. 1940).

\(^{230}\) Ibid.

\(^{231}\) 2 Tiffany, Real Property § 436 (3d ed. 1939); 4 Thompson, Real Property §§ 1803, 1804 (Perm. ed. 1940).

Real property:

Community property acquired by the husband: The wife has such an immunity as to one-half of the property in fee.

Tenancy by the entirety in a common-law state: The wife has such an immunity as to 100 percent of the property in fee.

Tenancy in common in a common-law state: The wife has such an immunity in all jurisdictions. The immunity extends to one-half in fee in two jurisdictions; to five-eighths to six-eighths in fee in twenty-one jurisdictions; to fifty percent in fee plus a life estate in one-third to one-half of the other fifty percent in fifteen jurisdictions; and miscellaneous fractions in the other four jurisdictions.233

Personal property:

Community property acquired by the husband: The wife has such an immunity as to one-half of the property in fee.

Tenancy by the entirety in a common-law state: The wife has such an immunity as to 100 percent of the property in fee.

Tenancy in common in a common-law state: The wife has such an immunity in all jurisdictions. The immunity extends to one-half in fee in nine jurisdictions; to five-eighths to six-eighths in fee in twenty-four jurisdictions; to six-tenths to all in fee in three jurisdictions; and miscellaneous fractions in the other six jurisdictions.234

10. Power of the wife to extinguish the husband's interests by will (fraction of the property to which such power extends):

Real property:

Community property acquired by the husband: The wife has such power as to one-half of the property in fee in six jurisdictions; she does not have such power in two jurisdictions.

Tenancy by the entirety in a common-law state: The wife does not have such power.

Tenancy in common in a common-law state: The wife has such power in all jurisdictions. This power extends to one-half in fee in thirteen jurisdictions; to one-fourth to three-eighths in fee in seventeen jurisdictions; to fifty percent in fee subject to a life estate in

233 That is, to her undivided one-half plus her nonbarrable share in the husband's one-half. Notes 124–128, supra.

234 That is, to her undivided one-half plus her nonbarrable share in the husband's one-half. Notes 131–137, supra.
one-third to all of that fifty percent in ten jurisdictions; and miscellaneous fractions in the other two jurisdictions.\(^{235}\)

**Personal property:**

**Community property acquired by the husband:** The wife has such power as to one-half of the property in fee in six jurisdictions; she does not have such power in two jurisdictions.

**Tenancy by the entirety in a common-law state:** The wife does not have such power.

**Tenancy in common in a common-law state:** The wife has such power in all jurisdictions. This power extends to one-half in fee in seventeen jurisdictions; to one-fourth to three-eighths in fee in nineteen jurisdictions; and miscellaneous fractions in the other six jurisdictions.\(^{236}\)

It is apparent from the outline above that civil-law "common" property of the husband and wife (i.e., "community") and common-law tenancy by the entirety or tenancy in common between husband and wife are very different types of property ownership. The actual characteristics of these categories of property, while coinciding in some respects, differ in many other important respects. The most important distinction is that the community interest of the wife in property acquired by the husband is a nonpossessory interest; whereas, the wife's interests in a tenancy in common and also, by the weight of authority since the Married Women's Acts, in a tenancy by the entirety in the common-law states are possessory interests.\(^{237}\)

It is true that all three are, in some sense, forms of "co-ownership," but this statement is of little value in an attempt to decide an actual choice-of-law problem: Such a problem only exists because of their differences, and their likenesses are not very important. Therefore, the statement in the black letter of the Restatement\(^{238}\) that "movables held by spouses in community continue to be held in community" when taken into a common-law state, and the statement in the "Illustration" to the same section, that the law of the second state "with regard to . . . property owned in com-

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\(^{235}\) That is, to her undivided one-half minus the husband's nonbarrable share in that one-half. Notes 194–198, supra.

\(^{236}\) That is, to her undivided one-half minus the husband's nonbarrable share in that one-half. Notes 200–205, supra.

\(^{237}\) Note 229, supra.

\(^{238}\) CONFLICT OF LAWS § 292 (1934) (italics added).
"mon" applies to such property, are directly in conflict, or else the meaning is wholly ambiguous. If the first statement is true, then, after the removal, creditors of the husband can reach the entire property; and creditors of the wife can reach none of it. If the second statement means that the property is held in a tenancy in common, then creditors of the husband can reach no more than one-half; but creditors of the wife can also reach one-half.

It may be worthwhile to summarize here the points which have been, made in this chapter. A great variety of marital-property interests exists in the many jurisdictions of the United States. These interests have been labeled upon a historical basis, so that, for example, there is one name for all acquisitions of the husband in all of the states deriving their marital-property system from the English common law—"separate property." On the other hand, there are two names for the acquisitions of the husband in the states deriving their marital-property system from the Spanish civil law (depending roughly upon whether acquired before or after marriage)—"separate property" and "community property." However, it has been demonstrated that these names reflect very inadequately, if at all, what they purport to reflect—the extent of the wife's interest in such acquisitions. Upon examining the actual characteristics of these types of property in the different states, it is seen that the wife's interest varies greatly. The states might be arranged in an almost continuous series, on the basis of the extent of the wife's interest in the husband's acquisitions during coverture, running from North Dakota and South Dakota where that interest is smallest to Washington where it is probably largest. But no rational division of this series could be made which would correspond to the traditional labels.

As a result of this situation, the danger of deciding cases upon the basis of misleading labels—or what has been called "epithetical jurisprudence"—is probably greater than in any other branch of Conflicts of Laws. Therefore, in the remainder of our discussion, we must be constantly upon guard against this fallacy and keep carefully in mind in each instance the actual characteristics of the marital-property interest involved in a choice-of-law problem.

239 Except by the law of New Mexico one-half of the property is liable for the wife's tort obligations. Note 49, supra.
CHAPTER III

Basic Aspects
of the Choice-of-Law Problem

The purpose of this chapter is to discuss the steps in the decision of a conflicts case. These steps are necessary in every conflicts case and they should always be borne in mind. But in a field like marital property it is especially important to be clear as to the procedure. The preceding chapter has shown that the same term in local law may have different meanings depending on the states involved, and this may readily lead to confusion and injustice unless there is clarity as to the method to be followed. There are three steps in a choice-of-law decision, as this chapter will show. The chapters following this one will be concerned in turn with each of those steps in a marital-property case.

A problem of choice of law as between the various marital-property systems arises whenever a claim or defense asserting the existence of a marital-property interest is based on operative facts which occurred in two or more jurisdictions, or in a jurisdiction other than the forum. The connection which the operative facts thus have with several jurisdictions raises the question of what law should be applied to determine the substantive claim or defense. "Choice-of-law rules" have been evolved in the various jurisdic-
tions to answer this question. To illustrate, a typical choice-of-law rule may be stated in abbreviated form as follows: "An issue of marital property is determined by the law of the domicile of husband and wife at the time of acquisition of the property." The formulation and application of such a rule logically involves, in Dean Falconbridge's excellent analysis, three separate problems, that is, when a court is faced with a situation which has factual connections with two or more jurisdictions and this choice-of-law rule is urged to it as indicating the substantive rules which govern a particular claim or defense, it must do three things:

First, it must determine whether the claim or defense in question is an "issue of marital property." This determination is necessary in order to know, in the first instance, whether this particular choice-of-law rule is the correct one to be employed; if the claim or defense raises an "issue of succession," for example, then a different choice-of-law rule (e.g., "An issue of succession is determined by the law of the last domicile of the decedent") would be applicable. This determination of the analytical legal category into which the claim or defense should be placed is variously called the problem of "qualification," "classification," or "characterization." The last name seems to have found the greatest favor among Anglo-American writers, and it will be so styled in this book. In the first place, then, the court must characterize the issue before it.

Second, the court must select the state or country whose substantive law is to be used as a basis for decision. The solution of this problem involves two operations. First, if the choice-of-law rule for this type of issue has not been established, the "connecting factor" to be used must be chosen. For example, it may be argued that the rule given above should not be adopted; that the court

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2 Whenever in this paper the statement is made that the law of a particular jurisdiction "governs," or "is applied," or similar expressions, what is meant is merely that the substantive rules contained in the corpus of the law of that jurisdiction are used as a basis for decision of an issue before the court. It is not the intention of the writer to enter into the "Vested-rights—Local-law" controversy. It is obvious that, when such substantive rules are used as a basis for decision, the law of that jurisdiction is in some sense "applied." It is also obvious that the entire law of a foreign jurisdiction is never applied, since the procedural requirements of the forum are followed. Whether or not the substantive rules so used become "a part" of the "local law" can safely be left to the metaphysicians, in the opinion of the author.
should, on the contrary, adopt the rule that "An issue of marital property is determined by the law of the situs of the property at the time of acquisition." The court must then decide, in the absence of legislation or a controlling decision on the question, which connecting factor, the "domicile of husband and wife" or the "situs of the property," is to be embodied in the choice-of-law rule of that jurisdiction. This decision can only be made intelligently in the light of policy considerations urged in support of each suggested rule. When the connecting factor has been determined, the second operation under this heading is to determine the specific jurisdiction to which this connecting factor points in the case at hand, e.g., the "domicile of the husband and wife at the time of acquisition" in this case was state Y.

Third, the court must apply the law of the jurisdiction thus selected. The problems involved here are questions as to how much of the law of this jurisdiction should be applied to the case at hand, i.e., the problems of "secondary characterization" and of renvoi. The so-called problem of "secondary" characterization arises when the law of the jurisdiction selected as applicable contains a substantive rule which is pertinent to the issue presented, but that rule is in an analytical legal category of the foreign law different from the analytical legal category in which the issue has been placed by the forum to refer it to such foreign law. In other words, should only those substantive rules in the law of state Y which are labeled "marital-property law" by that jurisdiction be used as a basis for decision of this issue; or should any substantive rule of that jurisdiction which is pertinent to the issue, regardless of its foreign classification, be used? The "issue," as used here, means the precise legal issue raised, devoid of preconceptions carried with its internal characterization in any jurisdiction; that is, the existence vel non of a right, power, privilege, or immunity, such as those analyzed in the previous chapter.

The problem of renvoi arises when the choice-of-law rule of the foreign state selected differs from that of the forum and ostensibly would refer the issue back to the law of the forum or to the law of a third jurisdiction. The question here is whether "the law" of state Y which is to be applied to the issue includes its choice-of-law rules, or whether only the substantive rules of that jurisdiction are
to be considered; and, if the former, what effect is to be given to these choice-of-law rules in particular cases or types of cases.

In each of these logical stages of decision—characterization, selection, and application—there are really three levels of inquiry or "logical dimensions," although these three levels of inquiry have been here spelled out as separate "operations" only in the second stage above. The first and basic one is, of course, the level of policy or purpose. The rules and principles are merely tools by which some social purpose is achieved; and, if these basic policy considerations are lost sight of, the application of the rules becomes mere mechanical jurisprudence. Secondly, there is the level of logical universals—rules, principles, and standards formulated to effectuate the social purpose. Finally, there is the concretization of the universal, its application to a particular factual controversy. In making this concrete application, the court should ever be alert to look through the words of the rule being applied to the social purpose behind it. In each instance, this last level of inquiry might be called "characterization," since the concretization of the rule from case to case results in a continuous process of definition or "characterization" of the words (logical universals) used in the rule, by a process of inclusion and exclusion.

Thus, it might be said that each of the stages above involves a problem of "characterization." In the first, the general area or type of claims and defenses to be covered by the choice-of-law rule is determined in the light of policy considerations and given the shorthand name: "issue of marital property." Then, in each specific case a concrete claim or defense is "characterized" as falling in or outside of this general area, and thus the definition of the phrase "issue of marital property" is gradually delimited. Also, in the second stage, it might be said that the jurisdiction whose law is to determine the issue is indicated in a general way by the shorthand connecting factor: "domicile." And the pertinent operative facts of each concrete case are "characterized" by the determination of which jurisdiction is in fact the "domicile"; and in this way the definition of the term "domicile" is progressively formulated. Finally, even in the last stage, it might be said that the formulation of a renvoi rule and the "characterization" of concrete facts as calling for the application of one branch or the other of this rule gradually define
the meaning of the term "the law" in the prescription of the rule that "'the law' of the domicile" shall apply.

This use of the term "characterization," however, might obscure an important difference between the meaning of that term in the first stage and in the other two. Under the structure of choice-of-law rules, the first stage is basic; the "characterization" there determines whether or not the rule itself is pertinent to the case at hand. This difference is indicated by the fact that what is characterized there is the "claim or defense"—if it is determined not to be an "issue of marital property" then the court must proceed along a different path by means of some other choice-of-law rule. The determination that the claim or defense is not an issue of marital property merely narrows its search; it does not prescribe what other path it shall take. On the other hand, in the second stage, what are "characterized" are the operative facts to determine which jurisdiction is the "domicile." In other words, the "characterization" at this stage is the concrete application of the rule to a specific case; whereas, in the first stage the "characterization" determines whether or not the rule is applicable.

The distinction which has been suggested in the last paragraph may perhaps be made clearer by considering "characterization" outside of the field of Conflict of Laws. "Characterization" in the sense of "application" of general rules to specific situations is necessary in the decision of any legal controversy. For example, Section 18 of the New York Decedent Estate Law provides: "Where a testator dies . . . and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy . . . ." As specific controversies arise, the court must supply the "characterization" of each of the terms of this dispositive rule; or, considered from the obverse aspect, must "characterize" the operative facts of each case to determine whether they fall within the terms of the rule, insofar as these detailed definitions are not supplied by the provisions of the statute itself. For example: Is a divorced spouse a "surviving spouse"? Is prop-

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3 This statement is not true in those special situations where there are complementary choice-of-law rules competing for application, and the characterization of a claim or defense as "not-one" necessarily means that it is "the other," e.g., a characterization of an issue as "not-procedure" means that it is "substance." This is the reason that "secondary" characterization is logically possible in those situations. See pp. 88–90, infra.
property passing under a general power of appointment part of “the estate”? Is property transferred by means of a Totten Trust part of “the estate”? And so forth.

In addition to this “characterization” (which merely supplies detailed definitions of the words of the rule), all dispositive rules (claims; legal relations) are grouped into various analytical legal categories, e.g., contracts, quasi-contracts, torts, succession, marital property, etc. In a nonconflicts case, this second type of “characterization” is immaterial if the rule is conceded to be pertinent to the case. If by the first type of “characterization” the operative facts fit the terms of the rule and it directs judgment for the plaintiff, then it is of no concern to the litigants or the court whether he recovered under quasi-contract or tort, succession or marital property. Such a classification may be supplied a posteriori by the legal scholar. On the other hand, selective rules (such as choice-of-law rules), since they are one step removed from the actual decision of the issue and merely point out the pertinent dispositive rules, are concerned principally with the second type of “characterization.”

In the first stage of the application of a choice-of-law rule, the court must “characterize” a claim or defense (hence, a legal relation and any dispositive rule which establishes such legal relation).

To illustrate this ambiguity in the term “characterization,” suppose that a court in Texas, for example, is presented with a claim which it “characterizes” as an issue of “marital property,” and that it selects New York by an appropriate choice-of-law rule as the jurisdiction whose dispositive rule will decide the issue. Assume that the operative facts are such that Section 18 of the New York Decedent Estate Law would be pertinent, had they all occurred in New York State. The question may arise: Is New York’s “characterization” of Section 18 to be given any consideration? Obviously, its “characterization” in the first sense must be used, or the court in Texas would be trying to apply a rule consisting of hieroglyphics for which it has no Rosetta Stone. It is far from obvious, however, that its “characterization” of the rule in the second sense (i.e., the New York “label” which has been placed on the rule) is of any significance, since it would be of no importance in the application of this rule to a wholly internal situation.

*See Section 1, ¶ A, “What is it that is characterized?,” infra, this chapter.*
(It is important for other internal questions in New York, e.g., whether property passing under this section is subject to a succession tax; and it might, of course, be characterized differently for different local law purposes.)

It seems helpful to the author to emphasize the distinctive nature of “characterization” at the first stage of a choice-of-law problem by the use of a distinctive term. Hence, in this book the term “characterization” is used as a word of art to mean the determination of the analytical legal category into which the claim or defense is placed for choice-of-law purposes. “Characterization” at the other stages is referred to merely as the “definition” of the terms of the rule.

The three general choice-of-law problems described above (characterization, selection, and application) will be analyzed for the field of marital property in the next three sections of this chapter. However, it seems desirable to set forth at this time the general opinion of the author as to the proper way of solving these problems, before venturing upon a criticism of some of the proposals advanced by other writers. The position advocated here is that the correct procedure, in the three logical stages of a choice-of-law problem, is as follows:

I. Characterize the claim or defense presented in the light of the applicable facts. This process should be performed as a part of the conflict-of-laws jurisprudence of the forum. The analytical legal category into which the claim or defense is placed for this purpose is not necessarily the same as that adopted for purely internal purposes of the forum or of any foreign jurisdiction with which the case has some factual connection. The purpose of characterization for choice-of-law problems is, or may be, different from the purpose of such characterization for internal problems in any jurisdiction; and an intelligent classification can only be made in the light of the purpose for which it is made. Whenever possible, characterization in the choice-of-law field should be performed in the light of sociological jurisprudence, grouping together those rules in all jurisdictions “serving the same legislative purpose.”

II. Select the jurisdiction whose law is to govern an issue falling in this analytical category, by weighing the relative desirability

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6 1 RABEL, CONFLICT OF LAWS 60 (1945).
of possible choice-of-law rules in view of their actual or probable consequences. The definition of the connecting factor chosen, such as "domicile" or "situs," must obviously be provided by the conflict-of-laws decisions of the forum; otherwise, it would be adopting a choice-of-law rule the meaning of which was unknown—an absurdity. The specific jurisdiction indicated by the choice-of-law rule is then determined by the application of this definition to the facts of the case at hand.

III. Apply the law of the jurisdiction selected as a whole—not merely parts of such foreign law "prematurely chosen." If there is a substantive rule in the law of such foreign jurisdiction which would decide the legal issue involved, it should be applied even though it may be characterized differently, for internal purposes in such foreign system, than the characterization of the issue adopted in step I for choice-of-law purposes. If a conflict of choice-of-law rules exists between the forum and the foreign jurisdiction selected in step II, this conflict presents the renvoi problem and calls into question the correctness of the reference to the local law of that jurisdiction. In such a case, the court should make a decision whether to apply the law indicated by its own choice-of-law rule or that indicated by the foreign choice-of-law rule (sometimes its own internal law, sometimes that of yet a third state) on the basis of pertinent policy considerations.

§ 1. THE PROBLEM OF CHARACTERIZATION: CONFLICT OF ANALYTICAL CATEGORIES

[A. What is it that is characterized? In approaching the problem of characterization, it is first necessary to inquire just what it is that is being "characterized." The answers to this question which have been given by the writers on the subject have been far from unanimous, and all, it is believed, are more or less unsatisfactory. The most popular seems to be that adopted by Professor Robertson in his Characterization in the Conflict of Laws. He says that the court must characterize the "factual situation." It is the belief of

7 Falconbridge, supra note 1, at 551.
8 1 RABEL, CONFLICT OF LAWS 66-67 (1945).
9 They are listed in ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 59-66 (1940).
10 Id. at 63.
the author that Dr. Cheshire comes nearest to the correct answer when he says that what is characterized is the “issue made by the pleadings.” However, the meaning of this phrase is not entirely free from ambiguity.

What is characterized, it is suggested, is “a claim or defense in the light of the pertinent facts.” A bare “factual situation” cannot be characterized. Suppose that a narrative of the happening of a number of events is set out, and the question is asked: How is this “factual situation” characterized? What would be the answer? To take a concrete example, how does one characterize the following “factual situation”?

_H and W_ are married in Texas and live there thirty years, during which time _H_ accumulates $50,000 out of his salary. They then move to New York, and thereafter _H_ accumulates another $10,000. _H_ is committed to an insane asylum; two years later, however, he is released and he then draws up a will bequeathing $60,000 in trust for _W_ for life, remainder to _M_ and _N_. _H_ then dies.

How is this factual situation characterized in the law? Obviously it cannot be; it is first necessary to know who is claiming what and on what basis. The claim or defense with its factual justification is characterized in the light of all the pertinent facts. Of course, it is similarly impossible to “characterize” a bare claim without reference to the facts. The mere prayer for judgment, e.g., that the defendant be ordered to pay the plaintiff $30,000, is not susceptible of “characterization.”

In a secondary sense, however, it is correct to say that the “legal relation” (or the rule of law which establishes such legal relation) is characterized. Admittedly this is getting the cart before the horse; philosophically, the claim is prior to the “legal relation.” However, if a claim or defense is characterized as one of “marital property,” then the legal relation which will be held to have subsisted between the plaintiff and the defendant (or some third party) _if this claim is granted_ will also, by the same process, be categorized as a legal relation falling in the class of “marital property.” It is usually convenient to characterize a legal relation (_hypothetical_), and at the same time any claim which asserts such legal relation to have subsisted will automatically be characterized. It is almost necessary to

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11 Cheshire, Private International Law 32 (2d ed. 1938); cf. id. at 61 (3d ed. 1947) (“juridical question raised by the pleadings”).
THE CHOICE-OF-LAW PROBLEM

proceed in this fashion in a theoretical discussion, if any generalizations are to be drawn; otherwise, it would be necessary to discuss only specific factual situations and claims based upon them, and no general rules could be stated. For example, it is entirely possible to characterize as a legal relation in the category of "marital property" the following: Any immunity of the wife from having her interests with respect to things acquired by the husband extinguished by his testamentary disposition, if such immunity arises solely because of the fact of marriage. By the same token, any substantive rule of a particular jurisdiction which establishes such an immunity may be characterized as a "marital-property law," and when a claim is made under this statute or decision it will automatically be characterized in the same way.

Robertson has metaphysical difficulty with the theory just advanced. He says: "The legal relation which arises from a given set of facts is only determined after the process of characterization has been performed. Therefore, it cannot be fairly said that any legal relation exists before the process of characterization is performed." 12 The answer to this statement is that the legal relation never "exists" in any metaphysical sense such as that causing the difficulty here—it is only the "hypostatization of a prophecy" at all times. It is possible to characterize a hypothetical prophecy as well as a categorical one. Of course, for clarity of thought it should always be remembered that the claim is basic, whereas the "legal relation" is merely a mental construction; but since the characterization of one necessarily involves the characterization of the other, one may use whichever is convenient for the purpose at hand.

B. Conflict of analytical categories. The suggestion has been advanced above 13 that the characterization of a claim or defense should be made as part of the conflicts law of the forum, and that this characterization need not be the same in all cases as that adopted for purely internal purposes by either the forum or the foreign jurisdiction (or jurisdictions) with which the case is factually connected. This thesis is based on the fact that the purpose for which the characterization is made may be different in choice-of-law cases than the purpose of the internal classification; and a meaning-

12 ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 60 (1940)
(italics added).
13 See p. 74, supra.
ful classification can only be made in the light of the purpose which it serves. The United States Supreme Court decided in the Attrill case that the claim embodied in a judgment rendered in state X and sued on in state Y should not be characterized as "penal" for conflict-of-law purposes, and hence the judgment denied full faith and credit in state Y, even though for internal purposes the laws of both state X and state Y thus characterized the claim in question. A fortiori, this independent characterization should be made in a case where the internal characterizations of state X and state Y differ. Although in an ordinary choice-of-law case the Federal Constitution may not require this result, it is the only method which will give effect to the policies embodied in the choice-of-law rules.

The theories which are advanced in opposition to this view are two. The first advocates adopting in toto the internal characterizations of the forum for choice-of-law cases. The arguments given in the last paragraph indicate why this view is inadequate. However, its proponents urge the idealistic and impractical nature of Dr. Rabel's proposal, which is adopted here, that characterization for choice-of-law purposes should be made in the light of comparative, or sociological, jurisprudence, grouping together those rules of all jurisdictions "serving the same legislative purpose." After acknowledging the desirability of this objective, if it could be attained, the critics say that comparative jurisprudence can furnish no compre-

14 "The naive argument . . . attributes an absolute character to juridical concepts, irrespective of their purposes; it presupposes that the concepts of domicil, contract, capacity are identical in the laws of property, family, jurisdiction, taxation—and conflicts! Only the ancient 'realism of concepts,' which had some force in Greco-Roman philosophy and a disputed role in Roman jurisprudence, and the Begriffsjurisprudenz of the Nineteenth Century, ridiculed in Jhering's 'Heaven of Concepts,' present equal errors. The relativity of legal concepts is a mere commonplace in all other departments of law." 1 RABEL, CONFlict OF LAWS 55 (1945).


18 See Lorenzen, The Theory of Qualifications and the Conflict of Laws 20 Col. L. Rev. 247 (1920); Falconbridge, supra note 1. Lorenzen's article cited above was the first one which brought the "characterization problem" to the attention of the American bar, and at that time he accepted the prevailing view on the continent that the internal characterizations of the forum should be adopted. In his later paper, however, The Qualification, Classification, or Characterization Problem in the Conflict of Laws 50 YALE L. J. 743 (1941), Lorenzen advocated the view (adopted in this book) of characterization by the conflicts law of the forum. Id at 749, 752.
hensive scheme, thus categorizing, to the satisfaction of all, the substantive rules of all countries.17 Surely this is not a tenable objection with respect to the Anglo-American legal system where "Continuity of growth not atomism is . . . the alternative to fixity of principles. . . ." 18 No one has suggested that any such a priori scheme can, or should, be adopted; what is urged is that an approach which embodies this ideal be substituted for a blind acceptance of distinctions made for other purposes and hence unacceptable, on any rational basis, without reexamination.19

The second theory opposed to that taken in this book is of importance only when there is a conflict of analytical categories between the forum and another jurisdiction with which the case has points of contact. However, this is the situation where the problem of characterization is most acute—in most instances where the foreign law and the domestic law both agree on the characterization of a claim or defense for internal purposes, this characterization is also perfectly acceptable for choice-of-law purposes, and no characterization issue is raised in the case. But when these two internal characterizations diverge, the so-called "problem" of characterization, as it is usually discussed, arises. And one of the most important types of cases in which this "problem" is encountered is the case where a claim or defense is characterized as "marital property" in one jurisdiction and as "succession" in another. The case made famous by M. Bartin, which originally started widespread international discussion of the "characterization problem," was allegedly such a case—the Maltese Marriage Case.20 The second theory referred to is

17 "It would seem that characterization on the basis of comparative law, notwithstanding the benediction thus given to it by two English writers [Beckett and Cheshire—actually, Cheshire's "benediction" is rather equivocal], must be regarded as a theoretical, and not a practical method of characterization in English conflict of laws." Falconbridge, supra note 1, at 245.
18 DEWEY, HUMAN NATURE AND CONDUCT 245 (1922).
19 Cheatham, supra note 15, at 589–90.
20 Court of Appeals of Algiers, Dec. 24, 1889, 18 JOURNAL DU DROIT INTERNATIONAL 1171 (France 1891). See Beckett, The Question of Classification in Private International Law 15 BRIT. Y. B. OF INT. LAW 46, 50 n. 1 (1934); Falconbridge, supra note 1 at 540; Wolff, PRIVATE INTERNATIONAL LAW 149–52 (1945); Robertson, Characterization in the Conflict of Laws 158–63 (1940). In this case, two Maltese nationals, after marrying in Malta and residing there some time, moved their domicile to Algeria and the husband acquired land there. The husband died, apparently intestate, and the widow claimed some portion of the land. As to one-half of the land, this claim was characterized as a "marital-property" claim in both French and Maltese law,
that the characterization must be made according to the law which ultimately will govern the case, i.e., characterization by the lex causae.

Although this theory of characterization by the lex causae, as opposed to the classic view of characterization by the lex fori, has been generally rejected by jurists, it has been revived recently by Martin Wolff; 21 and it is a particularly seductive error in the field of marital property. 22 Hence, it deserves careful scrutiny. That the position involves a patent logical fallacy has not prevented its reappearance. This fallacy is stated by Dr. Cheshire: "It is impossible to classify [i.e., characterize] according to the law that is ultimately to govern the legal relationship, for until the process of classification is complete the legal relationship is unknown. If the law which is finally to regulate the matter . . . depends upon classification, how can a classification be made according to that law?" 23 In other words, in order to determine which law is ultimately to govern an issue, whether that of the "domicile at the time of acquisition" or that of the "last domicile of the decedent," it is first necessary to determine whether it is an issue of "marital property" or of "succession"; how then can we determine which type of issue it is according to the law which is ultimately to govern? The "impossibility" mentioned by Dr. Cheshire, however, is only a logical and not a factual impossibility; the characterization can in fact be made by

and both gave the widow one-half as "marital property." Hence, the fact that the French choice-of-law rule indicated the Maltese law as the applicable law was of no particular significance. However, Maltese marital-property law gave the surviving spouse an additional one-fourth if he was poor. French law had no such provision, but M. Barten thought that if it had had, it would have been characterized as a claim of succession (this point is rather difficult to follow). Hence, he said that the French court should characterize this claim as one of succession (by the lex fori) and refer to the lex rei sitae; since this law (the French law) granted no such right, the claim of the widow for one-fourth should be denied (the result actually reached in the case). Apparently, however, the widow was not poor, so that she was not entitled to this additional one-fourth in any event, under either law. (This summary is adapted from Beckett, supra, at 50 n. 1, and Robertson, supra, at 160 n. 6.)


22 I Rabel, Conflict of Laws 60 (1945): "For conflicts law, characterization according to the law declared applicable in the conflicts rule also is by no means excluded, but only for special situations. Martin Wolff was perhaps inspired by the problems of marital property with which he first happened to deal, to suggest this method of characterization."

the law which is ultimately to govern by a process of *pseudo* logic, with, of course, a completely irrational result. This fallacious procedure will be made clearer by some illustrations.

Suppose $H$ and $W$ are married in New York and remain domiciled there for thirty years. During this time $H$ saves $50,000 from his salary. $H$ and $W$ then move to Texas, taking this money with them, and $H$ dies leaving a will bequeathing it all to $M$. $W$ claims some portion of this property as against the will of $H$.

It is clear, of course, that had all the operative facts occurred in New York $W$ would have been entitled to one-third of this property as a “nonbarrable” share of “$H$’s” property (assuming that there are surviving children of the marriage). Had they all occurred in Texas, she would have been entitled to one-half as “community” property. However, by the internal classification of New York, its rule is characterized as one of “succession” ($§$ 18, Decedent Estate Law); but by the internal classification of Texas its rule is characterized as one of “marital property” (Title 75, Husband and Wife, Texas Revised Civil Statutes). The theory of “characterization by the *lex causae*” would require the court in Texas in deciding this case to reason as follows:

I. *If* this is a question of marital property, the law of the domicile at the time of acquisition applies.

   It is not a question of marital property *according to the law of the domicile at the time of acquisition* (New York).

   Therefore, the law of the domicile at the time of acquisition does not apply.

II. *If* this is a question of succession, the law of the decedent’s domicile at the time of death applies.

   It is not a question of succession *according to the law of decedent’s domicile at the time of death* (Texas).

   Therefore, the law of decedent’s last domicile does not apply.

III. Therefore, *neither* law applies; the wife gets nothing.

This is not a “choice of law,” but a *failure* to choose. The original assumption was that the claim was either an issue of “marital property” or an issue of “succession.” The decision (in result) is that it is neither. What is it? The fallacy here is that characterization is not determined as the logically anterior question, and two characterizations are applied to the same claim. Dr. Wolff actually approves of this result as stated, as indeed he must under his theory,
although he temporizes by saying that, since neither law applies, the judges should make up a new law of their own to apply to this case and give the wife something.\footnote{Wolff, Private International Law 165–66, § 156(2) (b) (1945).}

To take another illustration, consider the reverse of the situation posited above: $H$ and $W$ are married in Texas and remain domiciled there for thirty years. During the marriage $H$ saves $50,000 from his salary. $H$ and $W$ then move to New York, taking this money with them, and $H$ later dies leaving a will bequeathing it all to $M$. $W$ claims some portion of this property as against the will of $H$.

Had all of the operative facts occurred in Texas, $W$ would have been entitled to one-half as “community” property. Had they all occurred in New York, she would have been entitled to one-third as a “nonbarrable” share of her “husband’s” property (assuming that there are surviving children). According to the theory of characterization by the lex causae, the case should be decided as follows:

1. If this is a question of marital property, the law of the domicile at the time of acquisition applies.

It is a question of marital property\textit{ according to the law of the domicile at the time of acquisition} (Texas).

Therefore, the law of the domicile at the time of acquisition applies: $W$ gets one-half.

II. If this is a question of succession, the law of the decedent’s domicile at the time of death applies.

It is a question of succession\textit{ according to the law of decedent’s domicile at the time of death} (New York).

Therefore, the law of decedent’s last domicile applies: $W$ gets one-third of $H$’s one-half, i.e., one-sixth. (To apply this theory to its full illogical conclusion, she would be given one-third of the whole under this step; however, it is doubtful if even a court seduced by this false theory would go to this length, since the wife had a “vested” right under the Texas law prior to removal as to one-half and that one-half probably would not be considered “his property” at the time of death so as to make Section 18 of the New York Decedent Estate Law applicable. Therefore, if this theory were adopted, the wife probably would be given under this step one-third of one-half—i.e., one-sixth.)
III. Therefore, the wife gets one-half plus one-sixth (two-thirds) [or possibly one-half plus one-third].

This is not a choice of law but a “cumulative” application of laws. Presumably, this result would follow from Professor Beale’s view that when community property is taken into a common-law state, the “rights” of the spouses “continue,” “in the form, probably, of a joint title.” If the wife’s marital-property interests in the community property acquired by the husband were considered to be transformed into a possessory fee in an undivided one-half of the property, the other undivided one-half would presumably be property “owned” by the husband at the time of his death, to which Section 18 of the New York Decedent Estate Law would be applicable (if the claim were thus doubly classified as both “marital property” and “succession”). By this illogical reasoning, the wife would be given two-thirds. Obviously, neither the policy of the Texas law nor of the New York law intended her to get more than one-half (or less than one-third). The policy of both statutes would be violated by a decision giving her two-thirds.

Some might say that it is perfectly all right to apply both laws, but the belief that two laws are applied “cumulatively” here is no more than an illusion. This fact is better illustrated by another case discussed by Dr. Wolff. H and W, who are domiciled in and nationals of Germany, marry and establish a community of goods. Later they move their domicile to the Netherlands, where they become naturalized. H dies. Is the community to be continued between W and C (the only child of the couple, who is of age)? The Dutch law of parent and child provides that the community is to be continued between a surviving spouse and children of the marriage only when the children are minors (in this case, no); the German matrimonial-property law says that the community continues regardless of the age of the children (in this case, yes). Under the Dutch choice-of-law rules, the Dutch law of parent and child and the German matrimonial-property law are applicable.

How can this case be decided under this theory of characterization by the lex causae? Wolff says that “it [the Dutch court] will

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26 Wolff does. PRIVATE INTERNATIONAL LAW 164 (1945).
27 Id. at 156–57.
have to accept German classification of German rules." 28 But under his theory, it must also accept Dutch classification of Dutch rules, and we're right back where we started. 29 He states that the court should apply both laws and that the community continues, apparently on the theory that one plus zero equals one. But one law says that it does; the other says that it does not. The court is not adding one and zero, but one and minus one, which equal zero. There is no way the court can decide this case without making its own characterization for choice-of-law purposes or developing schizophrenia. This case only illustrates in balder form the illogicality of the result in our second hypothetical case above. There, the New York law says that W gets one-third only; the Texas law says that she gets one-half only. If she were given two-thirds, or five-sixths, neither law would be applied, nor would both be applied, since they cannot be applied in conjunction when stated in this form. A third rule would be applied to the case, manufactured by the court.

It is not denied, of course, that in the case of a mere prohibitory rule, which is entirely negative in its operation, two rules may be applied to the same issue. For example, the forum might decide that due to a strong social policy of prohibiting stale claims, a suit will be barred by limitations if it would be so barred by a statute either in the forum or in a foreign jurisdiction with which the case has points of contact. This is in fact substantially the effect of certain statutes in the United States. 80 On the other hand, due to policy considerations, the choice-of-law rule might always select that prohibitory statute which is least rigorous in its application. For example, in connection with an issue of the claimed invalidity of a marriage because of lack of parental consent, the forum might decide that, due to a strong social policy of upholding the validity of marriages, the marriage will be sustained if valid either by the law of the domicile or by the lex loci celebrationis. 81 However, this

28 Id. at 157.
29 Cf. Robertson, Characterization in the Conflict of Laws 188–90 (1940).
selection of multiple or alternative points of contact, where feasible and desirable, should be a conscious process based on articulate policy considerations and not a haphazard result based on the pseudo logic of the lex causae theory, under which the application of both laws or neither depends on the accident of the circumstances in the particular case.32

3 C. "Secondary" characterization: a spurious characterization problem. The devil of illogical thought which we have just attempted to exorcize is a hardy one, however. It is difficult to be permanently rid of him. Beckett and, to a certain extent, Robertson join heartily in casting him out the front door and at the same time allow him to slip back in through the rear door under the guise of a theory called "secondary" characterization. This theory is, according to Beckett, that "once it is ascertained that a given foreign law applies, it must be applied in toto, with all its relevant subsidiary classifications." 33 Dean Falconbridge, while rejecting "secondary" characterization eo nomine, 34 advances a somewhat similar theory of characterization of foreign laws "in their context, in accordance with the lex fori." This theory is that "... any provision or rule of a foreign law which may be the proper law under

Act § 7, 9 Unif. Laws Ann. 281 (1942) [formerly the Uniform Wills Act, Foreign Executed].

32 That the proponents of the lex causae theory usually are unable to accept the results of their own "logic" is illustrated by Wolff's discussion of the celebrated German-Tennessee statute-of-limitations case. There the plaintiff sued in a German court, on a note made in Tennessee, more than six years after the debt had become due. The German statute of limitations, which was characterized in German law as a "substantive" provision, was three years. The Tennessee statute of limitations, which was characterized in Tennessee law as a "procedural" provision, was six years. The court held that since the Tennessee substantive law and the German procedural law were applicable, neither statute applied and the plaintiff was allowed to recover although he would have been barred by either statute in a purely domestic situation! This decision is precisely in point and fully supports Wolff's thesis, but he disapproves the result. He says: "It follows that the continental court must not simply translate the English expression by a similar continental expression used in a narrower sense." Wolff, Private International Law 162 (1945). In all cases where there is a conflict of analytical categories and hence a "problem" of characterization, there are two similar expressions (categories) used, one in a broader, the other in a narrower sense. Wolff's original contention was that you must give each precisely the same scope that it has in the internal law; therefore, this concession actually is an abandonment of his basic position.

33 Beckett, supra note 20, at 74–75 (italics added).

the conflict of laws of the forum should be characterized, in its context in the foreign law, in accordance with the lex fori." 85 This Janus-faced statement, "in its context in the foreign law, in accordance with the lex fori," apparently means, at least in most of the illustrations which Falconbridge gives, a characterization which is identical with that of the foreign internal law. So far as can be ascertained from his illustrations, Falconbridge's theory seems to reach much the same results as the theory of "secondary" characterization.37

This theory of "secondary" characterization has a seductive rationale. It is said that if we refuse to adopt it, the forum will be "not merely refusing to apply [the foreign] law when according to [foreign] ideas it should be applied, but also applying [the foreign] law in cases where, according to [foreign] ideas it is not applicable at all; in other words, applying a law which is not [domestic or foreign], or indeed, the law of any country whatever." 38

In order to bring this theory down to earth, let us consider how it would operate in the first hypothetical case which we considered above: H and W are married in New York and accumulate property there; they move to Texas taking the property with them; H dies and leaves a will bequeathing all the property to a third party. W claims a nonbarrable share in this property which was purchased with the earnings of H during coverture.

As stated above, if this were a purely domestic New York case, she would get one-third (assuming there were surviving children); if a purely domestic Texas one, she would get one-half. The theory

85 Falconbridge, supra note 1, at 542–43 (italics added).
86 Compare Rheinstein, Book Review, 15 U. CHI. L. Rev. 478, at 482 (1948): "In some way which I just cannot understand, the author [Falconbridge] has tried to tie up the secondary characterization with the characterization of the problem with which we have to start in every choice-of-law case. He repeatedly emphasizes that in this characterization of the question we should not look exclusively to the system of concepts prevailing at the forum but that we should throw preliminary glances to the legal system of the country or countries that may presumably turn out to be applicable and that in our characterization of the question we should allow ourselves to be influenced by what we find in that presumably applicable foreign law. I have to confess not only that I do not understand how this mental process is to be carried out but that I am also afraid that any effort to follow this prescription will to a large extent undo the author's own efforts at mental clarification."
of “secondary” characterization would have the Texas court reason as follows:

I. This claim, according to the conflict of laws of the forum, is one of “marital property,” which is governed by the law of the domicile at the time of acquisition (New York).

II. The New York law of marital property does not give the wife a nonbarrable share in the husband’s property.

III. Therefore, W is not entitled to any share of this property.

Obviously, this is the same fallacy discussed above as characterization by the lex causae in another guise. The New York law does give to the wife a nonbarrable share of one-third. The fact that this provision is found in the “Decedent Estate Law” rather than the “Domestic Relations Law” of the New York Code is of no practical significance for this case (though it is, or may be, for some internal purposes of New York). The function of characterization has been exhausted in step I; it can and should be dispensed with. The precise legal issue is whether the wife has a right to a nonbarrable share in property purchased with the earnings of the husband during coverture; New York law gives her such a right; it has been decided that New York law governs. Therefore, it is certainly irrational to deny her this right because of the internal-law classifications of New York which were made for other purposes.39

It is also apparent from this illustration that the statement that without such “secondary” characterization the forum will be applying New York law in a case “where, according to [New York] ideas that law is not applicable at all” is simply not true. As we have seen, if this were a wholly domestic New York situation, the New York court would apply this provision (under whatever name); and the question whether New York would apply this provision in a conflict-of-laws situation (like the present) depends upon what characterization of the claim it adopts. It is certainly permissible for the New York court to adopt an independent characterization for choice-of-law purposes which may differ from its own internal distinctions—if it did so, and characterized this claim as one of “marital property,” it would also apply this provision in

39 Compare 1 RABEL, CONFLICT OF LAWS 66 (1945): The theory of “secondary” characterization is "evidently absurd"; Lorenzen, supra note 16, 50 YALE L. J. 743 at 760: "Results like these would seem sufficient to prove the unsoundness of the secondary classification theory."
a conflict-of-laws situation. If it is shown that the New York court has *in fact* adopted a different characterization in a *choice-of-law case* and would apply the Texas substantive provision (assuming that it could do so consistently with the federal Constitution), then the problem presented is a *renvoi* problem and not a characterization problem at all.

The argument here advanced does not, of course, deny that there are some situations where it is *logically* possible to characterize according to the *foreign* law. When only one choice-of-law rule is involved in a case, it is not logically possible to characterize by the foreign law in the first instance, since one must determine what characterization (and hence what choice-of-law rule) is to be adopted before the pertinent foreign jurisdiction is revealed. And to say that only so much of the foreign law will be applied as is included, by its internal classifications, in the same legal category as that in which the claim was placed for reference to that law will produce the same unfortunate results as the *lex causae* theory. No practical justification has been offered for thus limiting the reference to the foreign law. On the other hand, the situations where it is logically possible to characterize according to the foreign law are those where two *complementary* choice-of-law rules are involved in a case, one of which can logically be treated as an *exception* to the other.

For example, in a contract case where the place of making was a foreign jurisdiction, the court might adopt two choice-of-law rules, as follows: A question of contract is governed by the *lex loci contractus*, and a question of procedure is governed by the *lex fori.* The latter of these rules might logically be treated as an exception to the first, so that we would have one rule which read: A question of contract is governed by the *lex loci contractus,* except those rules “procedural” in character (in which case the *lex fori* will apply). It is logically possible here to characterize a “procedural issue” according to the foreign law since a particular foreign law is known, as the general issue has already been referred to it at this stage. In other words, it is possible to create and state an exception in any one of three ways: (1) except those rules characterized as “procedural” by the internal *lex loci contractus*; (2) except those rules characterized as “procedural” by the internal law of the

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40 See pp. 123–25, infra.
forum; or (3) except those rules characterized as "procedural" by the conflicts law of the forum.

This is apparently the basic idea of Robertson concerning "secondary" characterization: "... but this argument [that to characterize by the foreign law is reasoning in a circle] has no reference whatever to secondary characterization (i.e., the delimitation of the exact scope the proper law after it has been selected as applicable). In the latter case it is clearly not arguing in a circle to say that when the judge has already determined that some particular foreign law shall be applied to a certain transaction, such as the making of a contract, he shall thereafter determine that that same foreign law shall govern all subsequent characterizations, such as limitation of actions." 41 This is true, but Robertson does not follow through on this basis, but falls into the error of applying two characterizations to the same issue—i.e., treating "'procedure' shall be governed by the law of the forum" and "'substantive' questions of contract shall be governed by the lex loci contractus" as independent rules, and applying to both rules the characterization of the "lex causae." Hence, in all cases where there is a conflict of analytical categories, he either applies both laws "cumulatively" or neither. He says: "... having determined that 'substance' is governed by French law, and 'procedure' by English law, he [the English judge] should enquire just how much of French law relates to substance according to the French characterization, and how much of English law relates to procedure according to the English characterization." 42 Since these two concepts are complementary, he is applying two characterizations to the same issue (a characterization of a claim or defense as "substance" is automatically a characterization that it is "not-procedure," and vice versa). 43

The only other type of case in which Robertson admits that the

41 ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 31–32 (1940).
42 Id. at 121 (italics added). See the acute criticism of this lapse of Robertson in CHESIRE, PRIVATE INTERNATIONAL LAW 82 (3d ed. 1947).
43 Notice both Robertson’s and Beckett’s trouble with the German-Tennessee statute-of-limitations case: ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 252–53 (1940); Beckett, supra note 20, at 77 (“This decision is entirely logical, but clearly unsatisfactory, and one is tempted to consider in what respect it should be regarded as being wrong.”). This travail indicates strongly that the usual “theory” of “secondary” characterization is merely characterization by the lex causae in another guise.
theory of "secondary" characterization is valid is one involving the two complementary choice-of-law rules concerning the "form" of an instrument or contract and the "capacity" of the actor. However, there seems to be no more pragmatic justification for regarding the "form" rule as an exception to the "capacity" rule than for regarding the "capacity" rule as an exception to the "form" rule. This observation raises the question whether there is any pragmatic justification for the theory at all, even in those cases where it logically can be applied and the characterization by a particular foreign law of a subsidiary issue treated as an exception is rigorously adopted, rather than attempting to characterize the same issue twice. If we regard the "procedure" rule as an exception in favor of the law of the forum carved out of the general reference of the question to a foreign law, this exception must have been made for reasons of policy. The policy here is obvious: the fact that the adoption of foreign procedural rules for each choice-of-law case would be impractical and burdensome and would not benefit the litigants. It is rather strange to say that our policy demands this exception to the general reference of the issue to a foreign law, but we don't know what the exception is—we'll have to look to the foreign law to determine that, and its scope may vary from case to case (as it would if characterized according to the foreign law, which would alter the scope of the exception as different foreign jurisdictions were involved). For the same reason, it is apparent that an independent characterization by the conflicts law of the forum should be made, rather than blindly adopting the internal distinctions of the forum which were made for other purposes. It is submitted that an attempt to support the theory of "secondary" characterization on the basis of "affirmative rules" and "exceptions," while logically possible in some cases, lacks any realistic foundation.

44 See Robertson, Characterization in the Conflict of Laws, ch. IX (1940), which is divided into two sections: "Capacity and Formality," and "Substance and Procedure."

45 "Whenever [a court] . . . is called upon to decide for the first time, in cases of this kind, whether a given rule of the purely 'domestic' law of the foreign state shall be classified ('characterized') as 'substantive' or 'procedural,' its problem is to decide from the standpoint of its own practical convenience, whether the rule in question is important enough to justify spending the time required to ascertain what that rule is and how it is to be applied." Cook, "Characterization" in the Conflict of Laws, 51 Yale L. J. 191, 201 (1941).
D. Characterization of marital-property interests. In the light of these arguments, it can now be seen why we previously characterized, for choice-of-law purposes, a marital-property interest as any interest or aggregate of interests which arise in one spouse with respect to things owned or acquired by the other spouse, solely by reason of the existence of the marital relation (excepting the "bare expectancy" of inheriting). (Any claim or defense asserting such an interest to exist would be characterized as a marital-property claim or defense.) The reason is that the legal rules in all jurisdictions which establish such interests serve the same legislative purpose: namely, a recognition of the "unity" of the spouses and the probable contribution made by each to acquisition of things by the other.

We may subject this hypothesis to an acid test by considering an alleged reductio ad absurdum of it propounded by Wolff (specific American jurisdictions have been inserted which fit the requirements of his supposititious case): "A married man dies leaving a widow and child; his first matrimonial domicile was [North Dakota]; his last domicile [Kansas]; the widow claims some part of the property in a court of country Z. Is this claim one under matrimonial property law, or one of succession? Suppose the [conflicts] law of forum Z characterizes the facts as relative to matrimonial property, and the conflict rule of Z in respect of matrimonial property points to the law of the first matrimonial domicile, i.e., of [North Dakota]. By this primary classification the law of [Kansas] is definitively excluded from application (if I understand Mr. Robertson rightly). This may lead to injustice. Suppose the law of [North Dakota] gives the widow no share at all in the matrimonial property, but the [internal] law of [Kansas] would give her a right of succession. Then the primary classification would debar her of claiming such right (in the court of country Z)."

This case is hardly the reductio ad absurdum that Wolff supposes. Assume that H and W live in North Dakota (which gives the wife no rights against the will of her husband) for fifty years and he accumulates $50,000 out of his salary; they move to Kansas (which gives the wife a "nonbarrable" share of one-half); one year later H dies. Before removal he had power of testamentary disposition over

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46 Chap. II, § 1, (A, supra.
47 Wolff, Private International Law 155 n. 2 (1945).
100 percent of this property. If W is now given a nonbarrable share of one-half, the result is that by crossing the state line his power of testamentary disposition was abolished as to fifty percent. If the principle is accepted that acquired interests should be protected, Wolff’s quarrel is with the substantive law of North Dakota. On the other hand, if North Dakota would characterize the issue as one of succession, we have a renvoi, not a characterization, problem.

Kansas could, and should, hold the same way—i.e., characterize the claim as one of marital property and refer to the law of North Dakota even though by the internal law of Kansas this is a question of “succession.” That is a characterization for succession tax and other purposes which have no relevancy here. Conceivably, of course, it might be held by the Kansas court that this provision in the law of Kansas serves other purposes than recognition of the contribution of the wife to the earnings of the husband, e.g., to prevent the wife from becoming a public charge, in which case the overriding interest of the forum might require its own law to be applied in this case, where the controversy arises in Kansas. This possible argument loses most, if not all, of its cogency when it is realized that in the typical case the will, which the widow is attacking, leaves her a portion or all of the estate for life, with remainder over, and she merely wants her share in fee.

§ 2. THE PROBLEM OF SELECTION: POLICY CONSIDERATIONS AND POINTS OF CONTACT

When a claim or defense has been characterized as one of “marital property” for the purpose of choice of law, the next step is to select the proper jurisdiction whose law is to be used as a basis for decision of a claim or defense falling within this category. This process is normally carried out by adopting a “point of contact,” or “connecting factor,” which the particular type of factual situation has with a jurisdiction, as the indicator in each case of the jurisdiction to be thus selected: e.g., domicile of the parties, nationality of the parties, situs of the property involved, etc. It has been suggested above that this should be a pragmatic choice among the various choice-of-law rules, with different connecting factors, competing for recognition, made in the light of the actual or probable consequences of the various rules proposed.
Before proceeding to examine some of these policy considerations, however, it might be well to note the objection made by Professor Cavers that this entire procedure for “choice of jurisdiction” is “unrealistic”; that the court should simply select from among the alternative substantive rules that one which it likes best, or which produces a judgment for that party to whom it is favorably disposed in the action before it. In other words, it should simply decide on a result which is “just” and “makes sense” and then adopt a posteriori the choice-of-law rule which will lead it to this predetermined result. This proposal is probably not entitled to be regarded as a serious one until Professor Cavers reveals, as he does not do, how one goes about determining what result is in accordance with “justice” and “sense.” He gives the example of a sale to a married infant female of a number of books by the traveling agent of a publishing house, a refusal to pay for the books, and a suit on the contract; and he says that it should be regarded as material whether the law of the state, where the defendant resides, is “backward” in that it does not give a married woman full power to contract; the nature of the sales campaign of the plaintiff; etc. Would it also be material whether Colonel McCormick or Marshall Field owned the publishing house in question? Obviously, Professor Cavers did not intend to suggest that such an extraneous fact would be of any significance, but he offers no criteria which would exclude it. Until the proponents of this theory are able to be a little more specific about just what “makes sense,” it is suggested that the courts might well be cautious about adopting a theory which contains, even in embryo, the elements of such Byzantine justice.

This criticism of Professor Cavers’ suggestion is not intended as an assertion that rules of law mechanically produce results with apodictic certainty, as some of the extreme Rationalists seem to believe. It may freely be admitted that the rules of law are no more than a check upon the trained intuition of the judge—a function which all of the Realists, in their responsible moments, apparently concede. But this proper and necessary function will not be fulfilled if the rules are stated in terms of the judge’s intuition. A rule that “the judge shall decide the case in accordance with his

intuitive sense of justice” is no check except a carte blanche. “Only a saint, such as Louis IX under the oak of Vincennes, may be trusted with the wide powers of a judge restrained only by a desire for just results in each case.”

It may be well to list at this point those policy considerations which the writer believes to be among the most important in making a decision as between various possible choice-of-law rules for marital property and to reserve more extensive discussion of them until the following subsections, with respect to their bearing upon each specific choice. They are:

1. Policy in favor of treating the estate of each spouse as a unit, with all elements of it governed by the same rules.
2. Policy of fulfilling the normal expectation of the spouses as to the applicable law, insofar as this is ascertainable.
3. Policy of fulfilling the normal expectation of purchasers and attaching creditors of the spouses as to the applicable law, insofar as this is ascertainable.
4. Policy of protecting and continuing acquired interests (rights, powers, privileges, and immunities) in either spouse with respect to things acquired by the other or by himself.
5. Policy in favor of adopting rules which are susceptible of the most efficient administration at the forum.

The various factors which might be proposed as points of contact to indicate the proper law seem to divide themselves into three groups: (1) personal law, which would follow the person wherever he might be temporarily located; (2) territorial law, or the situs of the thing with respect to which the marital-property interests are claimed; and (3) the place where a juridical act is performed. With respect to the first type of factor, such as domicile or nationality, it is clear that this may change and therefore a choice in time may become necessary. On the other hand, if the situs of a thing is selected it would likely be the situs at the time of acquisition of the thing. Among the factors which might be proposed to indicate the applicable law to govern a marital-property claim or defense, therefore, are the following:

1. Personal law:
   a. Domicile or nationality of the spouses (or of the husband) at the time of marriage.

b. The *intended* domicile of the spouses at the time of marriage.

c. Domicile or nationality of the spouses acquired after marriage.

2. The *situs* of the thing, with respect to which a marital-property interest is claimed, at the time of marriage (if then owned) or at the time of its acquisition.

3. The place of a juridical act:
   a. Place of marriage.
   b. Place where a conveyance is executed by which a spouse acquires property.\(^{50}\)

   It is not necessary, of course, that a single contact always govern. These factors might be taken singly, or several of them might be taken cumulatively or alternatively. Or one factor might be held to govern certain aspects of marital property, or as between certain types of disputants, and another factor held to govern other aspects, or as between other types of disputants.

   Some of these factors may be dismissed without extended consideration. The place of marriage is a purely fortuitous circumstance which should not be allowed to control the marital-property rights of the parties, in those cases where it does not coincide with any of the other factors. If a couple cross the state line from New York, say, into Connecticut to get married and immediately leave that state and never return, it would certainly not be wise to hold that their marital-property interests with respect to things acquired in New Jersey should be determined by the law of Connecticut. No one has apparently ever suggested that this factor should control.\(^{51}\) The "intended domicile" of the spouses has also been almost universally rejected as a suitable connecting factor; it was advanced by Justice Story on the basis of the writings of French jurists\(^{52}\) and finds some support in the French decisions\(^{53}\) but has been condemned by almost every American writer since Story.\(^{54}\)

\(^{50}\) Compare *Savigny, Conflict of Laws* 96 (Guthrie trans. 1869).

\(^{51}\) There is some language in Story which standing alone seems to suggest that the law of the "place of marriage" should govern; but in the context or as explained by other passages it is clear that he intended to say the *domicile* of the parties at the time of the marriage. See, e.g., *Story, Conflict of Laws* § 159 (3d ed. 1846), as contrasted with §§ 191–93.

\(^{52}\) Id. §§ 191–301.


\(^{54}\) See Harding, *Matrimonial Domicile and Marital Rights in Movables*, 30
jection to this factor is obvious—it would make legal rights turn entirely upon a subjective intent. Of course, Story added the requirement that the couple actually do move to the intended domicile within a reasonable time, but this would require holding a determination of their rights in abeyance in the interim and would introduce equal uncertainties as to what is a reasonable time. Similarly, the place where a conveyance is executed has not been advanced as an important point of contact with respect to this field of law; it also may be entirely fortuitous and would be reasonably expected by no one to indicate the law determining marital-property interests.

We have, then, three principal choices to make as to connecting factors: between situs and personal law; if personal law is to be determinative, then between domicile and nationality; and, finally, between domicile (or nationality) at the time of marriage, and a subsequently acquired domicile (or nationality). The second choice will be discussed first, on the assumption that a personal law is to govern, since a more intelligent discussion of the choice between situs and personal law can be presented if the factor on either side is made concrete and a specific personal law has been adopted. Finally, the question of time, where domicile is used as the connecting factor, will be explored.

(A. Nationality and domicile. Assuming for the moment that the policy in favor of treating the estate of each spouse as a unit is the most impelling in this field, it is necessary to select a personal law with which to achieve this result; if the connecting factor used is the location of a thing or the place of an act, the jurisdiction selected will vary as to different portions of the property of the spouses. The “personal” connecting factors which historically have gained acceptance have been two: domicile in the Anglo-American common law, and nationality in most civil-law jurisdictions on the Continent. A choice must be made between these two opposing principles.

A defect in the nationality principle should be noticed at the
outset: It is of more restricted applicability than the domicile principle. In the first place, a fairly substantial number of persons are nationals of more than one country, others of none. Since the question of nationality is referred in each instance to the law of the putative fatherland, an unavoidable dilemma may be presented in that a person is held to be a national of several countries simultaneously. On the other hand, those expatriated persons, of whom there have been large numbers following both World Wars, who have not yet been naturalized in a foreign country, are nationals of no country. A state adopting the nationality principle must always have some alternative rule to apply to these cases, if they are to be decided. Also, in a nation such as the United States which has multiple internal law districts, it is not possible to apply the nationality principle in making a choice of law as between these internal law districts. Even though all the actors in a transaction may be United States citizens and all the events may have occurred within the borders of the United States, it is still necessary in many cases to make a choice of law between two states of the United States (since there is no "national" marital-property law, but only Texas marital-property law, New York marital-property law, etc.). In this situation, if a personal law is to govern, the domicile principle necessarily must be preferred.

Even as between different sovereignties, the nationality principle may not be sufficiently precise, unless supplemented in some manner, to point to any specific substantive law. For example, suppose that a suit arises in a foreign country involving a United States citizen and the applicable choice-of-law rule of that nation points to the "national" law of the United States citizen as the governing law. Unless supplemented in some manner, "a reference to the national law of a citizen of the United States of America would be futile because it does not point to a particular State of the Union." 55 The same would be true of a reference to the "national" law of a British subject, since it would point to no particular unit of the British Empire. This second difficulty can be overcome, however, if the foreign court supplements its nationality principle by some principle which will enable it to make a further choice within the multiple-jurisdiction sovereignty to which the nationality principle has referred it. This further principle should naturally be the princi-

ple which is generally in use within the particular multiple-jurisdiction sovereignty in solving intra-national conflicts.\textsuperscript{56} That is, if the foreign court refers to the "national" law of a United States citizen, then it should select the particular state whose law is to be applied by the domicile principle, since that principle is generally in use in solving interstate conflicts within this country.

A further difficulty arises, however, when the national of a multiple-jurisdiction sovereignty is no longer domiciled within that sovereignty and an attempt is made to refer to his "national" law. For example, suppose that a United States citizen has established his domicile in Germany, and that he sues in a German court asserting a marital-property claim. The German choice-of-law rule would attempt to refer to the "national" law of this person as the governing law. Here, it would be necessary to ignore the present domicile in Germany. Either one of two principles might then be used to make a selection of the particular law district within the United States whose law is to be applied: The foreign court might select the law district which was his domicile of origin, or that which was his last domicile of choice, within this country. The English cases on renvoi have concluded, sometimes on the basis of expert testimony as to the foreign law, that a foreign court which espouses the nationality principle would select the domicile of origin of a British subject when faced with this situation.\textsuperscript{57} This solution would seem to be natural in view of the emphasis in English law upon the domicile of origin and the rule that a person automatically regains his

\textsuperscript{56} \textit{Id.} at 202. Falconbridge thinks that this solution is "indefensible from any point of view." He objects to supplementing the nationality principle with the domicile principle when referring to the "national law" of a British subject, because, he says, the assumption is false that the domicile principle is "universally" in use within the British Empire; there would appear to be no reason, however, why it would have to be "universally" in use so long as it is "generally" in use. It is the choice-of-law rule of the nation espousing the nationality principle which is being supplemented; and whatever subsidiary rule is adopted is also a choice-of-law rule of that nation. Unless it is going to abandon the nationality principle, the sensible thing for its courts to do would seem to be to supplement that principle by making it sufficiently precise to reach a definite result, in those cases where unaided it does not point to a specific law district.

Falconbridge's position is that it should simply give up the attempt to make any reference to a foreign law when thus frustrated and apply its own substantive law (a theory somewhat similar to Westlake's \textit{desistement} theory in connection with renvoi).

\textsuperscript{57} \textit{Id.} at 197–208, 223–239.
domicile of origin whenever a domicile of choice is relinquished, until another is established. However, if a foreign court refers to the “national” law of a United States citizen in this situation, it would seem preferable to select the particular state which was that person’s last domicile of choice within the United States, since the general rule in this country is that a person retains his last domicile of choice until a new domicile of choice is established.\(^{58}\) Of course, if the person, to whose “national” law an attempted reference is made, has never been domiciled within the country to which he owes allegiance (which is not inconceivable), and it is a multiple-jurisdiction sovereignty, then the nationality principle is impossible of application.

These comments show that the nationality principle is impossible of application in some situations and is deficient and needs to be supplemented by the domicile principle in others. In those situations where the nationality principle will work, however, what are the policy arguments for it and for the opposing domicile principle? It is probable that the normal expectation of spouses is that their personal rights, including marital-property interests, will be governed by the law of their new home, when they have so fixed their residence in a foreign country as to acquire a permanent home there without becoming naturalized. Another argument for the domicile principle, especially in a country like the United States which has had great waves of immigration from foreign countries, is the policy in favor of efficient administration at the forum. If all of the nonnaturalized foreign-born persons in this country were held to be still governed by the laws of their country of origin, it would be almost impossible for the courts to settle disputes efficiently, since expert testimony regarding foreign laws would have to be received in large numbers of cases. This argument was more cogent in the past than today, and presumably with the decline in immigration will become increasingly less so. Regardless of convenience, however, when a person has so substantially severed his connections with his country of nationality as to establish a

\(^{58}\) See Perkins v. Guaranty Trust Co., 274 N.Y. 250, 8 N.E.(2d) 849 (1937), modified, 276 N.Y. 553, 12 N.E.(2d) 571 (1937), where the court assumed without any discussion at all (or any apparent recognition of the problem) that this would be the meaning of a reference to the “national” law of a United States citizen, where he is no longer domiciled within the United States.
domicile in a foreign country, he should submit to the laws thereof, and the country of his birth should no longer attempt to control him by its laws.\textsuperscript{59} It is believed that the Anglo-American principle of domicile is socially the more desirable principle of the two.

(B. Situs and domicile.\textsuperscript{60} If it be admitted that domicile as a connecting factor is preferable to nationality, there still remains the choice, postponed above, between that factor and the situs of the thing with respect to which the marital-property interest is asserted. It is apparent here that the policy in favor of treating the estate of each spouse as a unit favors the use of domicile (since the situs of different units of that estate at the time of acquisition would vary). Also it is probable that the normal expectation of spouses would be that the law of their permanent home would govern each’s interest in the property of the other, wherever located. However, the policy in favor of protecting purchasers and attaching creditors looks in the opposite direction, since it is probable that they normally would expect that they could rely upon the law of the jurisdiction in which the thing is located to determine what rights the transferor or debtor has. This is particularly true if the purchaser or creditor is himself a domiciliary of that jurisdiction.

However, the situs rule is subject to some very drastic restrictions even upon the basis of the policy argument in its favor. Since intangible property has only a fictional situs, it is not possible to apply to it a situs rule (based on physical location of a thing).\textsuperscript{61} In addition, tangible chattels probably tend to be gathered at the domicile of the spouses.\textsuperscript{62} Therefore, the argument for protecting transferees and creditors in connection with a tangible chattel is one against the situs rule rather than for it, once the chattel has been removed from its situs at the time of acquisition and taken to the domicile of the spouses, or another state. This rule is almost universally rejected with respect to movables. Although the “neo-territorial”\textsuperscript{63} inspiration of the framers of the American Restatement caused the


\textsuperscript{60} See, in general, Stumberg, supra note 54; Leflar, supra note 54; Harding, supra note 54; Horowitz, Conflict of Law Problems in Community Property, 11 Wash. L. Rev. 121, 212 (1936).

\textsuperscript{61} Even Harding, while arguing for a situs rule as to movables, admitted that it could not apply to intangibles. Supra note 54, at 870, 877.

\textsuperscript{62} Stumberg, supra note 54, at 62–64; Leflar, supra note 54, at 232.

\textsuperscript{63} Dr. Rabel’s term for the theories of Professor Beale and his followers. I Rabel, Conflict of Laws 61 (1945).
adoption of a *situs* rule for movables in the Proposed Final Draft,64 this was abandoned, after some criticism appeared,65 and the domicile rule incorporated in the Final Draft.66

The argument just made cannot, however, be applied to immovables: Their *situs* cannot be changed. Hence, the policy of protecting transferees and creditors still furnishes some justification for retaining the *situs* rule as to immovables, although probably a major reason for such retention in the Anglo-American countries was the historical one of the feudal identification of land ownership with political power and the consequent insistence that the land law be wholly autarkic. In most of the civil-law jurisdictions the distinction between movables and immovables has been abandoned.67 It is not necessary, though, to ignore completely this policy consideration in favor of transferees and attaching creditors, even if the law of the domicile is held to govern as to the rights of the spouses inter se. It would be entirely possible, and, in the opinion of the writer, socially desirable, to hold that the law of their domicile shall govern the interests of husband and wife, their heirs and devisees, and others standing in their shoes (as between themselves); whereas *quoad* creditors and transferees the law of the *situs* shall be applied. The German law adopted this principle and provided for the entry in the public record of matrimonial-property rights in any case where such rights were determined by a foreign law under the applicable German choice-of-law rules; in the absence of such notice, as to third persons dealing with the spouses, the German law was applied.68 This is an eminently sensible solution of the problem.

The American rule is generally stated to be, in the language of the *Restatement*, that “The effect of marriage upon an interest in

67 *L Rabel, Conflict of Laws* 337 (1945); *Wolff, Private International Law* 365 (1945).
68 *L Rabel, Conflict of Laws* 372 (1945). Cf. *id.* at 335: “The *lex situs* determines quite naturally the kinds of property interests and the modes of their creation, transfer, modification, and termination, and it decides to what extent, if at all, bona fide purchasers and attaching creditors are protected in their expectations.”
land acquired by either or both of the spouses during coverture is determined by the law of the state where the land is.” 68 However, this situs rule as to immovables is largely a paper rule; it is to a very important degree nullified by another rule announced by the American courts, called the “replacement” or “source” doctrine. Suppose, for example, that H and W, domiciled in Illinois, purchase land in California during coverture.70 Under the situs rule, since property acquired during coverture is “community” property by the law of California and that law is stated to be applicable, one would expect that this land would be held to be community property. However, the “source” doctrine states that any property (movable or immovable) acquired in exchange for other property will retain the same marital-property characteristics as that for which it is exchanged.71 It seems to be unrealistic to say, as the Restatement says,72 that this rule is a “local” rule whereas the rule given above is a “conflicts” rule: The latter rule purports to determine what law is to be applied as much as the former; therefore, basically it is a choice-of-law rule. However, Neuner is incorrect,73 as Rabel points out,74 in saying that this “source” doctrine prevents the situs rule as to immovables from ever being applied. It would never be applicable as to land acquired by purchase, since marital-property interests as to it would be determined by the characteristics of the property paid for the land rather than by the law of the situs; however, as to immovables acquired by “primary” acquisition, i.e., by direct payment for services, and by gift, devise, and descent, the situs doctrine theoretically would still be applicable.75 Since in

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68 Restatement, Conflict of Laws § 238 (1934).
70 See Kraemer v. Kraemer, 52 Calif. 302 (1877).
71 The “source” doctrine came into the law of this country from the civil law of marital property, in which it is well established that community or “separate” property can be “traced” through any number of transformations, including transformations from movables to immovables, and vice versa. It was not a part of the common law, and under the early common law very great changes in marital-property interests were effected by a transformation of the property of husband or wife from real to personal property, or vice versa. Hence, some of the early decisions in the common-law states of the United States ignore this doctrine. See Newcomer v. Orem, 2 Md. 297 (1852); Castleman v. Jeffries, 60 Ala. 380 (1877).
72 Restatement, Conflict of Laws § 293, comment b (1934).
73 Neuner, Marital Property and the Conflict of Laws, 5 La. L. Rev. 167, at 170 (1943).
74 1 Rabel, Conflict of Laws 339 (1945).
75 In Trapp v. United States, 177 F.(2d) 1 (C.C.A. 10th, 1949), the tax-
these days one is rarely rewarded for his labor by a deed to land, the situs doctrine is largely limited as a practical matter to immovables acquired by gift, devise, or descent. The theoretical American rule as to immovables might be rephrased as follows: The law of the domicile of husband and wife will determine marital-property interests in immovables acquired by "secondary" acquisition during coverture; the law of the situs will determine marital-property interests in immovables acquired by "primary" acquisition during coverture.

C. Original domicile and subsequent domicile. Thus far it has been assumed that the married couple had their domicile in a particular jurisdiction at the time of the marriage and retained this same domicile during the remainder of their married life. Accepting the proposition, espoused in this book, that marital-property interests should generally be determined by the law of the domicile of husband and wife, what about the situation where the spouses live in Jurisdiction A for a period of time and then change their

payer acquired real property (oil "leases") in Texas while domiciled in Oklahoma. The property was paid for partly by personal services and partly by cash previously acquired in Oklahoma. Held: The real property in Texas is community property to the extent that it was paid for by personal services and is statutory "separate" property to the extent that it was paid for by cash. Accord, as to real property acquired in exchange for services: Hammonds v. Commissioner, 106 F.(2d) 420 (C.C.A. 10th, 1939); as to real property acquired by purchase: Noble v. Commissioner, 138 F.(2d) 444 (C.C.A. 10th, 1943).

But see note 75, supra. During the existence of frontier conditions in this country, it is probable that such transactions were not infrequent. [See Estate of Hale, 2 Cof. 191 (San Francisco Superior Ct. 1906), where the decedent had acquired lands in Baja California as compensation for surveying services performed for the Mexican government.] However, at the present day they would be uncommon.

That is, assuming (as would normally be the case) that movables are acquired in the domiciliary state or a foreign state, and the land in the foreign state is purchased with these movables. Since the law of the domicile at the time of acquisition would govern the characteristics of the movables, it would also (according to the "source" doctrine) govern the characteristics of the immovables bought with them. The statement in the text would not be accurate in a case where there had been a change of domicile after the acquisition of the movables which are paid for the immovables in a foreign state; in that case the law of the first domicile would govern (i.e., the domicile at the time of the acquisition of the movables, and not of the immovables). It would also not be accurate in the unusual situation where an immovable is acquired by gift, devise, or descent in Foreign State A, and this is exchanged for an immovable in Foreign State B—in that case the law of Foreign State A, rather than the law of the domicile, should govern the characteristics of the immovable in Foreign State B.
domicile to Jurisdiction B and remain there for a further period? Should the law of Jurisdiction A apply, the law of Jurisdiction B, or the law of each jurisdiction as to different portions of their property? This is one of the most vexed questions in this choice-of-law field, and in fact each of these three answers has been adopted in Great Britain or America at some time. The question has been described by Dr. Rabel as one of the “mutability” vel non of the matrimonial regime, and that nomenclature will be adopted here.

1. Full mutability. The House of Lords in 1804, in the famous case of *Lashley v. Hog*, held that the law of Jurisdiction B (the second domicile) should determine marital-property interests with respect to all property of the spouses, acquired before or after removal. In that case Roger Hog, a native of Scotland, having settled in London as a merchant, married Miss Rachael Missing there in 1737. He acquired a fortune in London and moved his domicile to Scotland sometime prior to 1760. In that year his wife died; he later died in 1789 and by will left all of his property to his son. His daughter, Rebecca Hog Lashley, sued the son and legatee to recover a portion of the property as “community property” (under the Scottish law of *communio bonorum*) which descended to her as heir of her mother upon the latter’s death in 1760.

Mrs. Lashley was allowed to recover and the House in its judgment stated that she “has therefore a claim in right of her mother . . . to a share of the movable estate of her father at the time of her mother’s death.” Under the rules of the Scottish law, the interest of the wife varied according to whether there were or were not children of the marriage (in the latter case she took one-half; in the former only one-third); but in either case her interest was an inheritable one which became possessory upon the death of the husband or descended to the wife’s heirs upon her death. Hence,

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80 See note 82, infra.
82 2 FRASER, *HUSBAND AND WIFE ACCORDING TO THE LAW OF SCOTLAND* 977 (2d ed. 1878): “… a division of movable estate belonging to the husband took place at the wife’s death equally as at his death. If she predeceased her husband, a share of the goods in communion (which was a half if the husband had no children, or a third if he had) went to her representatives or executors. The surviving husband was thus obliged frequently to hand over the half of his fortune to his wife’s relatives. . . .” (The feeling this state of affairs
if this was a case of "succession" with Mrs. Hog as an heir of Mr. Hog, as the learned Lord Chancellor, Lord Halsbury, later asserted, it was a very peculiar type of "succession": It was a case of the dead "inheriting" from the living. It is true that Lord Eldon in his opinion in Lashley v. Hog speaks of the "jus relictae," but, as the Earl of Rosslyn points out in the other opinion in the case, this term was a misnomer since Rachael Hog never was a widow.

The rule in Lashley v. Hog seems to implement some of the policy considerations which we have set out above, e.g., that in favor of treating the estate of each spouse as a unit, that in favor of ease of administration at the forum, and probably that of protecting creditors and transferees. However, it conflicts sharply with the policy of protecting and continuing acquired interests held by either spouse, and this reason should be enough to condemn it. The adoption of this principle of "full mutability" in the United States would probably violate the federal Constitution. In 1917 and 1923 the California Legislature passed statutes adopting this aroused in Scotland can well be imagined.) Fraser argues vigorously that the phrase communio bonorum does not accurately describe the marital-property law of Scotland and that the wife has never had a "community interest" in the acquisitions of the husband under Scottish law. However, Gardner seems to have shown rather clearly that, historically at least, Fraser was mistaken and that the communio bonorum of Scotland was in origin essentially similar to the "community-property" systems of the Continent. Gardner, The Origin and Nature of the Legal Rights of Spouses and Children in the Scottish Law of Succession, 39 JURIDICAL REV. 209, 313, 434 (1927), 40 id. 72 (1928). Compare 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 399-403, 427-433, especially 401 n. 5 (2d ed. 1899). Whatever the outcome of this learned controversy, and whether or not the wife ever had a "community interest" in the acquisitions of the husband under the Scottish law, it is certain that she had a "marital-property interest" as that term is defined in this paper and that such interest at the time of the Hog case was an inheritable one. [Subsequent to the time of the Hog case, this inheritable quality of the wife's interest was abolished by statute, 18 & 19 Vict., c. 23, § 6 (1855), so that now her interest becomes possessory only in the event that her husband predeceases her.]

84 See Gardner, supra note 82, 40 JURIDICAL REV. 72, at 75 (1928).
80 Of course, Lord Eldon was merely following Scottish usage in employing this terminology. 2 FRASER, HUSBAND AND WIFE ACCORDING TO THE LAW OF SCOTLAND 1058-1070 (2d ed. 1878).
87 Calif. Laws 1917, ch. 581 [§ 164 of the Civil Code].
88 Calif. Laws 1923, ch. 360 [§ 164 of the Civil Code].
principle for spouses moving to California from other states. In In re Thornton's Estate the California Supreme Court held these statutes unconstitutional as violative of both the privileges-and-immunities clause and the due-process clause of the United States Constitution.

2. Immutability. The House of Lords, ninety-six years after their decision in the Hog case, held in the equally famous case of De Nicolas v. Curlier that the law of Jurisdiction A (i.e., the first domicile), in our hypothetical case, should determine marital-property interests with respect to all property of the spouses, acquired before or after removal. In that case, De Nicolas and his wife were married in France in 1854; since they did not enter into an express marriage contract, under French law their matrimonial-property rights were governed by the law of communauté des biens. In 1863 they changed their domicile to England, bringing about £400 with them. The husband thereafter acquired the Café Royal in Regent Street and amassed a large fortune. He died in 1897 and the widow claimed one-half of the estate as “community property.” This claim was granted by the English courts as to the entire estate, both realty and personalty, acquired before and after removal.

This principle of “immutability” seems to be supported by the policies in favor of treating the estate of each spouse as a unit and of protecting and continuing acquired interests; but it seems to run counter to those of fulfilling the normal expectations of the spouses and of those dealing with them (unless by a stretch of the imagination one is willing to say that the “implied” contract which some of the Lords found in the De Nicolas case was one implied in fact as well

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89 1 Calif.(2d) 1, 33 P.(2d) 1 (1934).
91 De Nicolas v. Curlier, [1900] 2 Ch. 410, decided by Kekewich, J., after the remand from the House of Lords. The question concerning the realty had not been presented on the former appeal; and this decision was not appealed.
92 De Nicolas v. Curlier, [1898] 1 Ch. 403, reversed by the Court of Appeal, on the authority of Lashley v. Hog, in [1898] 2 Ch. 60, which was in turn reversed by the House of Lords, [1900] A.C. 21.
93 Most of the Continental jurisdictions have adopted this alternative. See 1 Rabel, Conflict of Laws 357-59 (1945); Wolff, Private International Law 366 (1945). Since those countries have for the most part adopted the nationality principle, the application of this doctrine there is that the matrimonial regime does not alter upon a change of nationality, rather than domicile.
as law). This principle is also opposed to the policy of efficiency of administration at the forum, since all married persons who immigrate into a country, under this rule, would be living under a foreign matrimonial regime. Especially in a country such as the United States, into which many persons have immigrated (usually without property upon their arrival, so that the problem of protecting acquired interests does not arise), the difficulty would be very great of applying this doctrine. In addition, it is probably contrary to the normal expectations of immigrants to the "New World," who are burning their bridges behind them and cannot be said to have made an "implied contract" (in fact) that their property interests shall continue to be determined by the Continental laws.

It is not intended at this time to attempt to determine the exact state of English law in the light of these two decisions. Obviously, they are prima facie in conflict. Dicey and Westlake (both of whom were of counsel in the De Nicols case) believed that the De Nicols case overruled the Hog case (or "explained" it as a "succession" case). Falconbridge apparently thinks that the Hog case was a succession case. This view is supported by the opinion of the Lord Chancellor in the De Nicols case, in which he thus distinguished the prior case. Dr. Cheshire at first "explained" the De Nicols case as based on the doctrine of French law that each couple upon marriage, in the absence of contrary stipulation, makes an "implied" or "tacit" contract that their property rights shall be governed by the "community of movables." In this view, the De Nicols decision is merely an exception to the more embracing doctrine of Lashley v. Hog, which is still the English law. Dicey's editor Keith abandoned Dicey's position and went over to that of Cheshire, although he cited no case subsequent to 1900 to support this reversal. This view is supported by the opinion of Lord Brampton in the De Nicols case, in which he thus distinguished

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94 There is an amusing footnote in Westlake pointing out that in the report of the case "On p. 22, 'Westgate, Q.C.' is a misprint for 'Westlake, Q.C.'" Westlake, Private International Law 79 n. (5th ed. 1912).
95 Dicey, Conflict of Laws 644, n. 1 (Rule 175) (3d ed. 1922); Westlake, Private International Law 79–80 (5th ed. 1912).
96 Falconbridge, supra note 1, at 539–40.
the Hog case.\textsuperscript{100} Wolff has a theory that the present English law is that upon a change of domicile from a common-law to a civil-law jurisdiction there is full mutability of the matrimonial regime, but that upon the reverse move there is partial mutability (i.e., only as to after-acquired property).\textsuperscript{101} Cheshire has now abandoned his first view, in the latest edition of his treatise (1947—it is necessary to date these views rather precisely), and has gone over to that of Wolff, with reservations, “explaining” the Hog case after Falconbridge as a “succession” case.\textsuperscript{102} Although neither the House of Lords nor most of the English writers seem to recognize the fact, there is no need to reconcile the two decisions. In Lashley v. Hog the case came up to the House of Lords on appeal from a Scottish court, and therefore the House was itself sitting as a Scottish court and it laid down a Scottish choice-of-law rule. In De Nicols v. Curlier the case arose on appeal from an English court, and therefore the House was itself sitting as an English court and it laid down an English choice-of-law rule.\textsuperscript{103}

3. \textit{Partial mutability}. A third possible decision of this question, as suggested above, is to say that the law of Jurisdiction A shall govern with respect to property acquired before the change of domicile and that the law of Jurisdiction B shall determine the marital-property interests with respect to property acquired after the change of domicile; or, simply, that the law of the domicile at the time of acquisition shall determine marital-property interests (with, however, all property acquired by “secondary” acquisition having the same characteristics as that for which it was exchanged). This is stated to be the American doctrine by the Restatement.\textsuperscript{104}

The leading case on the subject in the United States, the Louisiana decision of Saul v. His Creditors,\textsuperscript{105} was decided in 1827. In that case, Saul and his wife married in Virginia in 1794; they changed their domicile from that state to Louisiana in 1804, apparently bringing no property with them; between that date and 1819, when the wife died, a large quantity of property was acquired in Louisiana.

\textsuperscript{100} [1900] A.C. at 44. The other Lords divided about evenly between these two theories.
\textsuperscript{101} Wolff, \textit{Private International Law} 365–69 (1945).
\textsuperscript{103} The author is indebted to Professor John B. Sholley for this observation.
\textsuperscript{104} Restatement, \textit{Conflict of Laws} §§ 290–293 (1934).
\textsuperscript{105} 5 Mart. (n.s.) 569 (La. 1827).
This property remained in the possession of the husband until he became insolvent; the children of the marriage then claimed one-half of it as "community property" inherited from their mother, as against his creditors. The court held that the Louisiana law applied, and the children prevailed. The doctrine of "tacit" contract was urged upon the court (hence, the principle of "immutability" of the matrimonial regime) and the court strongly criticized this doctrine. However, it actually adopted a *situs* rule, making this discussion, as the court expressly said,\(^{106}\) immaterial. Nevertheless, upon the high authority of Justice Story,\(^{107}\) the case has been accepted through the years as establishing the "partial mutability" rule in the United States.

This rule is obviously a compromise between the two extremes previously discussed. In terms of the policy considerations previously set forth, it would seem to promote those of protecting acquired interests and of fulfilling the normal expectations of spouses. It obviously runs counter to the policy of treating the estate of each spouse as a unit. It also possibly runs counter to the policy of protecting creditors and transferees (as to movables acquired *before* removal and taken into the new domiciliary state). In this respect, so far as tangible movables are concerned, it is easily subject to the amendment previously suggested with respect to immovables acquired in a nondomiciliary state: *quoad* creditors and transferees, marital-property interests should be determined by the law of the *situs* of the property at the time the debt arises or the transfer is made (i.e., in this instance, the new domicile). As thus modified, this principle seems to be the most acceptable of the three. The question is a difficult one to solve satisfactorily and, of course, no principle has yet been suggested which is perfect; but the third

\(^{106}\) 5 Mart. (n.s.) at 602, 606. Cf. Cole's Widow v. His Executors, 7 Mart. (n.s.) 41, 51 (La. 1828): "We cannot take into our consideration the property in New York. Our statute is real, and where the parties are not married here, can only act on the property *found in Louisiana*.

\(^{107}\) Story, *Confli ct of Laws* §§ 157–58, 170, 174–77, 187 (3d ed. 1846). See Doss v. Campbell, 19 Ala. 590, 592–93 (1851): "This is the rule recognized in the case of Gayle v. Davis' Heirs, 4 Martin's La. 645; nor is there anything inconsistent with this principle, in the case of Saul v. His Creditors, 3 Cond. La. 563. Judge Story, in treating of these two decisions, considers that they *recognize* this rule: 'where there is no express nuptial contract, the law of the matrimonial domicile is to prevail, as to the antecedent property; but the property acquired after removal is to be governed by the actual domicile'" (italics added).
alternative seems to come closest to satisfying the conflicting policy considerations.

To recapitulate, it is the opinion of the author that the following choice-of-law rules with respect to marital property would be the most desirable socially: (1) In connection with issues between the spouses or their heirs and devisees, the law of their domicile at the time of acquisition (or at the time of marriage as to things acquired before marriage) should govern marital-property interests in both movables and immovables; (2) In connection with issues between the spouses (or others standing in their shoes) and third parties (creditors and transferees), the law of the situs of immovables, and of the situs of tangible movables at the time the debt arises or the transfer is made, should govern; (3) As to intangibles, the law of the domicile of husband and wife at the time of acquisition should govern all issues.

§ 3. THE PROBLEM OF APPLICATION: CONFLICT OF CHOICE-OF-LAW RULES

The third task to be performed by a court presented with a choice-of-law problem, assuming that the claim has been characterized as one of marital property and an indicator adopted to determine the jurisdiction whose law will govern, is the application of the law thus indicated. The position has already been taken, and the reasons therefor given, in the discussion of the so-called "secondary" characterization, that any pertinent substantive rule of the selected jurisdiction should be applied to the case, regardless of the characterization which it may have been given for internal purposes by such foreign jurisdiction.

The remaining question of application, i.e., of how much of the foreign law should be applied, is whether the foreign choice-of-law rule, in cases where it differs from that of the forum, is to be given any weight in the decision of the case. This problem of conflict of choice-of-law rules may take either of two forms: the two choice-of-

108 No attempt is made in this section to cite even a small portion of the immense quantity of literature on the renvoi. Voluminous citations may be found in all of the standard treatises on Conflict of Laws. The objective here is to present a slightly different, and it is hoped more fruitful, approach to the problem.
law rules may differ on their face (as where one jurisdiction has adopted the domicile principle and the other the nationality principle); or, secondly, the choice-of-law rules of the two jurisdictions, although *prima facie* identical, may in fact lead to different results. This latter conflict results from one of two circumstances: (1) Although each jurisdiction has adopted the same *name* for the connecting factor chosen (such as "domicile"), the *definitions* of this term differ—in such a case, the choice-of-law rules are actually in conflict, although apparently the same, since two different concepts have been expressed by the same word; (2) Although both jurisdictions have identical choice-of-law rules (in fact as well as name), the results which would be reached by the two *in this case* differ, because they have adopted conflicting characterizations, *for choice-of-law purposes*, of the particular claim presented in the case.

(A. *Patent conflict of choice-of-law rules.* A "patent" conflict of choice-of-law rules arises when such rules, adopted by the forum and the jurisdiction to which it refers the issue, differ on their face. For illustration, consider the following case. Suppose H and W, United States citizens, are married in the Philippines and remain domiciled there for twenty years following their marriage. Before going to the Philippines, they had formerly been domiciled in New York State. W acquires personal property by onerous title during the existence of the marital relation, and the property is deposited with a custodian in New York City. Suit is brought in the New York court by H against T (the custodian) to recover such property. T interpleads W.

Under the community-property law of the Philippines, property acquired during the marriage by W (by onerous title) is "community" property, and H is entitled to possession. Under the law of New York, property acquired by W during coverture is her statutory "separate" property, and H has no right to possession. The choice-of-law rule of New York is that the law of the *domicile* of the spouses at the time of acquisition shall govern questions of marital property. The choice-of-law rule of the Philippines is that

109 See pp. 97–99, *supra*, for a discussion of the meaning of a reference to the "national law" of a United States citizen. It is assumed throughout the discussion here that such a reference would mean the law of the particular state of the United States where that person had his last domicile of choice within this country.
the law of the *nationality* of the husband shall govern questions of marital property.\(^{110}\) The so-called "renvoi problem" consists of the possibility that the application of the New York choice-of-law rule will require an application of Philippine law, which will require an application of New York law, which will require an application of Philippine law, etc., *ad infinitum*.

Three methods of legal reasoning have been proposed to avoid this possibility of an infinite regression of applications. Each method (with a partial exception) is as "logical" as the others, i.e., each consists of avoiding such a result by postulating it away, which is what necessarily must be done.\(^ {111}\)

**Alternative I.** Under this first method, the reference to the law of the Philippines in the New York choice-of-law rule is assumed to be to the substantive (internal) law of the Philippines. This is known as "rejecting the renvoi." This result is defended on the ground (aside from its spurious "logical" necessity) that to allow the reference back would be stultifying the choice-of-law rule of the forum and in fact abandoning that choice-of-law rule for one preferred in another state. This alternative exalts the policy behind the local choice-of-law rule to one of paramount importance and allows it to override *in all these cases* all other considerations. The fact that there is a conflict of choice-of-law rules is ignored. It is correctly characterized by Dean Griswold as a "head-in-the-sand attitude."\(^ {112}\)

**Alternative II.** Under the second method, the reference to the law of the Philippines in the New York choice-of-law rule is assumed to be to the choice-of-law rule of that jurisdiction, and the reference back to New York by the Philippine choice-of-law rule is assumed to be to the substantive (internal) law of New York. This is known as "accepting the renvoi." This result is defended on the ground that the forum should not insist on applying the foreign internal

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\(^{110}\) *The Civil Code, Philippine Islands*, arts. 10, 22 (Sinco and Capistrano 1932): Movable property is subject to the national law of the owner (la ley de la nación del propietario); a married woman follows the condition and nationality of her husband. See, however, *Sy Joc Lieng v. Sy Quia*, 16 Phil. 137 (1910), aff'd, 228 U.S. 335 (1913).

law in a type of case where the foreign courts would not themselves apply it; that for ease of administration it is much better to apply the local law; and that the local substantive rule is the better rule in the eyes of the forum. The first "reason," of course, is invalid, since the foreign court if it adopts this same attitude will apply its own local law. And the second reason can be urged in any conflict-of-laws situation, but is not ordinarily allowed to override the application of a foreign substantive law, when that law is the appropriate one under choice-of-law rules. This alternative exalts the policy behind the local substantive rule applicable to the case to a position of paramount importance and allows it to override in all these cases all other considerations.

Alternative III. It is apparent that either of these first two alternatives will produce diversity of result depending on the forum in which the suit arises, if adopted by both jurisdictions involved (and no reason is given why the arguments should apply to one jurisdiction more than the other). Under the first alternative, New York and the Philippines would each apply the other's internal law; under the second, each would apply its own internal law. Therefore, in an attempt to achieve uniformity of result, a third approach has been suggested by some of the English cases. This is to interpret the choice-of-law rule of the forum as referring to the foreign choice-of-law rule and to its renvoi rule. Therefore, in the illustration, if the Philippine courts had adopted alternative II, they would have applied Philippine internal law to the case and the New York court should do likewise. If, on the other hand, the Philippine courts had adopted alternative I, they would have applied New York internal law to the case and the New York court should do likewise. The first comment which should be made on this suggestion, of course, is that it is a self-defeating proposal. It will work perfectly well as between the forum (e.g., England) and another jurisdiction (e.g., France), when the foreign jurisdiction has definitely accepted alternative I or II. And it will achieve uniformity as between these two jurisdictions. This is in fact the situation in which the doctrine arose. But suppose the conflict of choice-of-law rules arises between two jurisdictions, both of which have adopted this solution. If New York adopts this proposal and upon referring to the law of the Philippines find that it has also adopted it, then there is no

the foreign law here because under the New York law mere “nationality” is not a “foreign element” sufficient to cause even initial reference to the law of a foreign country; hence no renvoi question could ever arise. New York internal law would automatically be applied since this would be a “wholly domestic” situation under the theory of the New York choice-of-law rules. The same would be true if the suit arose in the country of nationality and the only “foreign element” was the New York domicile. Hence, under the existing approach to this conflict of choice-of-law rules (between the domicile and nationality principles), the achievement of uniformity in all cases is impossible. It is submitted that New York should “reject” the renvoi in this case.

By a similar line of reasoning, the renvoi should be “accepted” by the Philippine court if the case were to arise in that jurisdiction, and uniformity might be achieved in the situation of an American domiciled in a country which espouses the nationality principle. This seems to be the result (although not the theory) of the English and French cases on succession, where the decedent (a British national) was “domiciled” in France, i.e., France “accepts” the renvoi; England “rejects” it.116 (That situation, of course, presents a conflict between two concepts of domicile, rather than between the domicile principle and the nationality principle; but the French concept of “domicile” in those cases is almost equivalent to “nationality.” 117)

There remains to be considered the factor of the relative strength of the policy behind the local substantive rule as contrasted with the foreign substantive rule. This factor should not ordinarily be decisive. The fact that a civilized nation has adopted a particular rule of law should be at least prima facie evidence that it is not abhorrent to principles of “natural law,” and some criteria must be advanced upon which to base a preference for one rule or the other if this factor is not to degenerate into chauvinism. One should hesitate to transfigure his own predilections as to the substantive outcome of a case into an eternal principle of “justice” or “sense.”

Nevertheless, where there is a conflict of choice-of-law rules, this factor has a legitimate function whenever the other policy considera-

116 Griswold, supra note 112, at 1168–69.
tions are balanced in doubt. In such a case, a strong policy of the forum in favor of its substantive rule on this particular question legitimately may be allowed to override the weakened policy of its choice-of-law rule (due to the conflict), and to lead to the application of domestic law. Conversely, where the rule of the forum rests solely on *stare decisis* and inertia (and the court would never adopt it as a novel proposition today), and the foreign substantive rule is thought to be more in the spirit of the times, the court legitimately may apply the foreign rule. This would not lead to a case by case atomism; the rule formulated could be definite and concrete: In all conflict of choice-of-law situations involving such and such a provision of the local code, the internal domestic law will be applied (or contrawise). Of course, the policy reasons for preferring one law over the other should be spelled out; and the *renvoi* rule naturally would no longer be binding when there was a change in the domestic internal law on this point.

How strong is this factor in the situation first posed? In *Perkins v. Guaranty Trust Co.* involving substantially that state of facts, the New York Court of Appeals in terms “accepted” the *renvoi* and applied New York internal law, awarding the property to the wife as her statutory “separate” property. If one reads between the lines of the opinion, it seems probable that the court was motivated very largely by its preference for the New York law of marital property and the repugnance to it of the doctrines of community property. But one may perhaps question this condemnation out of hand (and *sub silentio*) of a regime adopted and defended by “a great portion of civilized society.” And, although the New York law was more favorable to the wife in this particular litigation, the Philippine law would be more favorable to her on other issues of

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120 The court, commenting on the statement by the lower court that the choice-of-law rule of the Philippines was immaterial, stated: “On the contrary, it [Art. 10, Philippine Civil Code, adopting the nationality principle] specifically defines the law that governs property rights of citizens of the United States residing in the Philippines while living and rights of succession by death.” 274 N.Y. at 260, 8 N.E.(2d) at 853.
marital property.\textsuperscript{122} The case probably cannot be cited as authority that New York will "accept the renvoi" in this type of situation, since the court in its headlong dash to award judgment for Mrs. Perkins broke so much legal chinaware that the net effect of each ruling, so far as one is able to discern, was to cancel out all of the others.\textsuperscript{123} This uselessness of the case as an authority may have been a not-wholly-unintended result.\textsuperscript{124}

It is submitted that one cannot confer an overriding virtue upon either the "community" or the "separate" property marital regime.\textsuperscript{125} Therefore, it is believed that in this field of law an Anglo-American court should insist upon the application of its choice-of-law rule based on domicile in preference to abandoning it in favor of the nationality principle. This is the only major competing principle and, in fact, most of the conflicts of choice-of-law rules will involve a clash between these two policies. Hence, renvoi should generally be "rejected" by an American court when the issue before the court is one of marital property.

\textsuperscript{122} Compare Helvering v. Campbell, 139 F. (2d) 865 (C.C.A. 4th, 1944); Commissioner v. Cadwallader, 127 F. (2d) 547 (C.C.A. 9th, 1942). In these cases, it was held that for the purposes of Federal Income Tax and Estate Tax the law of the Philippines would govern the marital-property rights of United States citizens domiciled there. Of course, no issue of renvoi was raised in these cases (although it could have been by the government); hence, they are not authority for "rejecting" the renvoi in this situation. It would seem that if the issue were raised in a tax case the court should apply alternative III to the case, since the important thing for tax purposes is what marital-property interests the Philippine court would actually hold to be subsisting.

\textsuperscript{123} The court in another part of the opinion seemed to hold that, as a matter of law, Perkins had not acquired an actual domicile in the Philippines (it is difficult to believe that he could have resided there from 1913 until 1936 and there be no evidence that he had acquired a domicile); if this were true, of course, there would have been no reference to the foreign law and no question of renvoi could have arisen. In yet another part of the opinion, the court seems to hold that he could not have acquired a domicile in a foreign country while he remained an American citizen! The court also ignores two previous actions in the Philippine courts between the same parties concerning this same property, and states that they are not \textit{res judicata} because the choice-of-law issue was not "raised" in them. Finally, on the motion for rehearing, the court appears to \textit{affirm} the action of the trial court on the only ruling appealed from (dismissal of the counterclaim for judicial separation and award of the property incident to such separation), and still directs judgment for the appellant!

\textsuperscript{124} One is reminded of Professor T. R. Powell's remark as reported by Professor Llewellyn: The Supreme Court are not "such fools as they talk, or as the people are who think them so." \textit{Llewellyn, The Bramble Bush} 43 (1930).

\textsuperscript{125} Compare Powell, \textit{Community Property}, 11 Wash. L. Rev. 12 (1936); with Horowitz, \textit{supra} note 60.
A different situation exists where the choice-of-law rule of the second state points, not back to the law of the forum, but to the law of some third jurisdiction. For example, suppose that in the hypothetical situation H and W had been nationals of Germany domiciled in the Philippines and suit had been brought in New York. The court in New York would find upon referring, by its choice-of-law rule, to the law of the Philippines that that law referred to Germany, as the law of the nationality; and German law, finally, agreed with Philippine law that German substantive rules should be applied. It seems obvious here that New York should not insist upon applying Philippine substantive law when the courts of both the Philippines and Germany would agree in applying German substantive law. If New York had no substantial connection with the operative facts, then the United States Constitution possibly might require that German law be applied. The forum cannot, in a case where it does not have a substantial connection with the transaction, capriciously apply a rule not applied by any of the other jurisdictions involved.\footnote{Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934); Home Insurance Co. v. Dick, 281 U.S. 397 (1930).} The policy in favor of uniformity in this situation, where there are more than two states involved, should override other considerations. Of course, no “logical” problem of renvoi is encountered here. This is a simple case of “transmission.”

Suppose, however, that upon referring to Philippine law the New York court finds that its choice-of-law rule refers to California or to England. In such a case, the third state (since it follows the domicile principle) would refer back to state number two, and there would be a true renvoi situation as between states two and three. In this situation the policy considerations behind the New York substantive rule are not of any moment, since that law will not be applied in any event. New York should look to the renvoi rules of both the Philippines and California (or England) to ascertain whether the courts of those two jurisdictions would in fact reach a uniform result despite the \textit{prima facie} conflict between their choice-of-law rules. If so, then New York should apply the same internal law. The policy of achieving uniformity of result is of paramount importance here.

If the two foreign jurisdictions would in fact reach contrary re-
suits, then uniformity is impossible; the only major policy consideration left is the one behind the choice-of-law rules—therefore, New York should apply its own choice-of-law rule and determine the case by the internal law of the Philippines. In so doing, it would be achieving uniformity with one of the other two jurisdictions involved, which is as much uniformity as is possible. That is, if both the Philippines and California had adopted alternative I, New York would reach the same result as California; if both had adopted alternative II, New York would agree with the Philippines; any other combination would not in fact produce a diversity of result as between the two foreign jurisdictions. The same decision should be made if the New York court cannot discover from its investigation what the renvoi rules of the two jurisdictions are.

(B. Latent conflict of choice-of-law rules. The first type of “latent” conflict of choice-of-law rules arises where two jurisdictions ostensibly have adopted the same connecting factor to indicate the law which determines a particular claim or defense, but the two definitions of this same term are not coextensive. For example, suppose M, an American citizen from New York, died in France prior to 1927, after having settled there with the intention of making that country his permanent home, but without having complied with Article 13 of the French Civil Code. Assume further that both the New York and the French choice-of-law rules provide that an issue of “succession” is determined by the law of the last “domicile” of the decedent. However, he was “domiciled” in France according to New York law and “domiciled” in New York according to French law, because actually two different concepts have been adopted as connecting factors and referred to by the common name “domicile.” Hence, this is merely a renvoi problem which should be determined according to the same considerations discussed above. The fact that it is a latent rather than a patent conflict is of no practical significance, other than the fact that in

127 See French Civil Code 8, 21 (Cachard trans. rev. ed. 1930). This article was repealed August 10, 1927. It had provided that “An alien who has been authorized by decree to establish his domicile in France, shall enjoy all civil rights.” The French courts held that when there had been no authorization by decree the alien was not “domiciled” in France, at least for purposes of choice of law in succession cases. See Falconbridge, Essays on the Conflict of Laws 116–18 (1947).
some cases it may mislead a court into erroneously overlooking the existence of the conflict.

Dean Falconbridge does not agree with this last statement. He says that the "... doctrine of renvoi is peculiarly indefensible [in] ... cases in which there is a latent conflict of [choice-of-law] ... rules arising from different characterization of the connecting factor. ..." 128 The first thing to be noted is the confusion which may result from treating this situation as a "characterization" problem. There is no question here of placing a claim or defense into an appropriate analytical legal category; it is merely a matter of definition of the word "domicile" in each choice-of-law rule. 129 Obviously, the forum must provide its own definition of the word "domicile" in its rule, else it could never refer the issue to a foreign state. 130 Just as obviously the meaning of the word "domicile" in the foreign rule must be accepted as that word is defined in the foreign conflicts law; otherwise, the forum would be ignoring a conflict of choice-of-law rules merely because of the accidental identity of names. And it is hard to see why that accidental identity of names should make the "doctrine of renvoi" (by this Falconbridge means "accepting" the renvoi) "peculiarly indefensible." This statement is, of course, merely a particular manifestation of Falconbridge's general hostility to "accepting" the renvoi, but insofar as he makes a distinction between latent and patent conflict of choice-of-law rules, it is suggested that such a position is untenable. Admittedly, if the French choice-of-law rule provided that "An issue of succession shall be determined by the law of 'Y,' which is New York in this case," and the New York choice-of-law rule provided that "An issue of succession shall be determined by the law of 'X,' which is France in this case," the court would be presented with a problem of conflict of choice-of-law rules. Why should

128 Falconbridge, supra note 1, at 554 (italics added). In the reprinting of this article in his ESSAYS ON THE CONFLICT OF LAWS (1947), this sentence was changed to read: "Possibly different considerations apply to patent conflicts of connecting factors ... and latent conflicts of connecting factors ..." p. 97 (italics added). However, in another place in the same work, he states: "... a class in which ... the renvoi is peculiarly open to objection ... is a conflict as to the characterization or definition of the connecting factor ..." pp. 179–80 (italics added). But cf. id. at pp. 141–42.

129 See pp. 71–74, supra.
130 ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 107–110 (1940).
the fact that “X” and “Y” happen to have been given the same name require a difference in treatment? In Dean Falconbridge’s own lucid terms, which have been adopted here, the conflict is merely “patent” in the one case and “latent” in the other.

The New York courts, when presented with this hypothetical situation, have considered, and it is believed rightly so, that they were dealing with a renvoi problem. In Dupuy v. Wurtz 131 the New York Court of Appeals stated in dictum that the renvoi would be “accepted” in this situation. However, the court actually held, after a careful examination of the facts, that the decedent had not acquired a domicile in France under the New York definition of domicile. In Matter of Tallmadge 132 a Referee in the Surrogate’s Court, in a lengthy and widely cited opinion, held contra, “rejecting” the renvoi.

The second situation which gives rise to a latent conflict of choice-of-law rules is that in which the forum and the foreign jurisdiction have adopted identical choice-of-law rules, but each characterizes differently for choice-of-law purposes the type of claim or defense involved in the case at hand. It is probably unnecessary to emphasize here, in view of what has been said above, that the court of the forum cannot assume that a latent conflict exists merely from the fact that there are internal law decisions of the foreign jurisdiction characterizing the claim or defense differently. Such a latent conflict arises only when there is a choice-of-law decision of the foreign jurisdiction definitely adopting for choice-of-law purposes a divergent characterization. When it does exist, it should be resolved, in general, by the same sort of process as that suggested above for a patent conflict of choice-of-law rules. 133

For example, in the hypothetical situation previously discussed, in which H and W acquired property while domiciled in North Dakota and removed their domicile to Kansas where H died, suppose that the forum characterizes the claim of the wife for a nonbarrable share as one of “marital property.” Upon reference to the law of the domicile at the time of acquisition,” however, it finds, let us as-

131 53 N.Y. 556 (1873).
133 Cf. FALCONBRIDGE, ESSAYS ON THE CONFLICT OF LAWS 186 (1947).
sume, that North Dakota has definitely characterized this claim for choice-of-law purposes as one of “succession.” North Dakota therefore refers the issue to the law of Kansas; assume, further, that Kansas agrees with North Dakota in this choice-of-law characterization. This is merely a latent situation of “transmission,” and the forum should apply the law of Kansas; indeed, if our previous suggestion is correct, it might in some cases be required to do so by the federal Constitution. 134

The possible field of latent conflict of choice-of-law rules arising from divergent choice-of-law characterization is narrowed by the existence of constitutional considerations. In some instances, a logically possible characterization for choice-of-law purposes would probably be interdicted by the United States Constitution. The reason lies in the interaction of property and constitutional concepts. For example, suppose H acquires property during coverture while domiciled in New York and H and W then change their domicile to Texas, leaving some of the property in New York. H later dies, survived by W and two children. W claims some portion of the property as a nonbarrable share as against the will of H. As to property in Texas, assume that the Texas court would characterize the issue as one of marital property and refer it to the law of New York. Could New York adopt a different characterization here, thus causing a latent conflict of choice-of-law rules? In other words, is it possible for New York to characterize the issue as one of “succession” and apply Texas law, giving W one-half? It seems likely that the Constitution would prohibit such a result, since H had a “vested interest” in the property, the sanctity of which would be violated by reducing his power of testamentary disposition from two-thirds to one-half upon his crossing the state line. 135 Therefore, as to movables which remained in New York, that jurisdiction probably could not give the wife more than one-third, assuming that there are surviving children.

However, a similar attempt by Texas in this case probably would not evoke this same prohibition. That is, suppose Texas by statute definitely characterized this issue as one of “succession” and provided that the wife should receive, as a nonbarrable share, one-half of all property acquired by H during coverture by onerous title in a

134 See note 126, supra.
135 Cf. Estate of Thornton, 1 Calif.(2d) 1, 33 P.(2d) 1 (1934).
foreign jurisdiction, if the husband died domiciled in Texas. In this case also, the husband’s “vested interest” would be invaded by cutting down his power of testamentary disposition. However, because of the historical concept that a jurisdiction may regulate in any manner it chooses the devolution of property owned by its domiciliaries within its borders, upon the death of such owner, it is probable that such a statute would be upheld. In California, Section 201.5 of the Probate Code, enacted in 1935, provides that the wife shall receive a nonbarrable share of one-half of all personal property acquired by the husband during coverture, while the spouses were domiciled elsewhere, when the husband dies domiciled in California. This aspect of the statute has been upheld by the California courts. However, this California statute goes further and attempts to give the wife a power of testamentary disposition over one-half of such property when she predeceases the husband. This aspect of the statute has not been passed on by the California courts, but there would seem to be grave doubt whether it is constitutional under the rule of In re Thornton’s Estate.

If a statute giving the wife such an immunity existed in Texas, in the hypothetical case above, then probably New York could also constitutionally characterize the issue as one of “succession” and give the wife one-half of the movables remaining in New York, by referring to the law of Texas. However, no conflict of choice-of-law rules would exist here. Nor, on the other hand, would any “problem” of conflict of choice-of-law rules exist if New York still characterized the issue as one of “marital property,” since each jurisdiction would then refer to its own law in the first instance.

In the converse case, where H acquires property by onerous title during coverture while domiciled in Texas, and the marital domicile is thereafter changed to New York, it is believed that neither New


Estate of Schnell, 67 Calif. App.(2d) 268, 154 P.(2d) 437 (1944); Estate of Way, 157 P.(2d) 46 (Calif. App. 1945). In In re Miller, 31 Calif.(2d) 191, 187 P.(2d) 722 (1947), the California Supreme Court went out of its way to overrule (in dictum) Estate of Way, supra, on a point of interpretation of § 201.5; but the Supreme Court did not question the constitutionality of the act, insofar as it gives the wife a nonbarrable share of one-half when the husband predeceases her.

See note 89, supra.
York nor Texas could constitutionally characterize the claim of the wife for a nonbarrable share upon the death of the husband as an issue of "succession," thus giving the wife only one-third under New York law. This prohibition results from the view that the wife has a "vested interest" in one-half of the property, which could not be "divested" by the court. No conflict of choice-of-law characterization is possible. Since the husband also has a "vested interest" in the community property, the Constitution should also prohibit the double characterization previously discussed which would give the wife two-thirds or five-sixths; however, because of that same conceptualism which regards the husband as "owning" one-half of the community property and the idea that the state of his last domicile can regulate the devolution upon his death of that which is "his," this result is improbable. There is, of course, no quarrel with decisions protecting a "vested interest" in the absence of a cogent reason to deny such protection; however, the reasoning is circular: As Neuner says,\textsuperscript{140} an interest is protected because it is "vested," and being "vested" means only that it is protected. The courts should strive to protect and continue all acquired marital-property interests in the absence of an overriding contrary policy in the particular case at hand.

\textsuperscript{140} Neuner, \textit{supra} note 73, at 175, n. 32.
CHAPTER IV

Problems of Characterization

When a surviving spouse claims some part of the property of a deceased spouse, and no question of Conflict of Laws is involved, such a claim is normally based on a local statute regulating the property interests of married persons. For example, it may be based upon a local statute permitting a surviving spouse to renounce the will of the deceased spouse and “elect” to take one-half (or some other fraction) of his property in fee. Or it may be based on a local statute declaring certain property to be “community property” and providing that, upon the death of one spouse, one-half of such property “belongs” to the survivor. Whether the particular local rule is said to be a rule of “succession” or of “marital property” is ordinarily immaterial in such a case; if the survivor brings himself within the terms of the statute, he is entitled to prevail regardless of the label placed upon his interest. However, for certain collateral local purposes it is important to determine whether the surviving spouse is claiming under the law of succession or the law of marital property. For example, the question of whether the one-half of the property going to such survivor is subject to local inheritance taxes will normally be determined by whether the court considers it a right of “succession” or of “marital property,” since the latter is usually thought to be “vested,” while the former is “nonvested.” Similarly, the validity
of an attempt by the legislature retroactively to abolish or curtail such a right may turn upon the same distinction.

In other situations involving the property rights of spouses, where no conflict-of-laws issue is involved, there are also various local law rules which may be labeled in various ways for local purposes. For example, if a creditor of one spouse attempts to levy on certain of his property, movable or immovable, the other spouse may assert, at that time or after the death of the acquiring spouse, that his interest in the property cannot be affected by the action of the creditor. If this claim is sustained, the right thus established may be considered part of the "marital-property law" of that jurisdiction, or as an incident of the right of "succession" accorded a spouse by that law. Similarly, there are different local rules with respect to transfers by one spouse, transactions between the spouses, etc., and these rules have been labeled in various ways for local purposes.

Any of the claims sketched above may arise in a conflict-of-laws situation, that is, where two or more jurisdictions have some relationship to the claim being asserted. For example, some of the facts giving rise to the alleged claim may have occurred in one state, and the rest in a second state, and the claim may be asserted in yet a third state. It is then necessary to determine what law will be used to govern the asserted claim. This determination is made by selecting the local law of that state which is deemed to have the most important connection with the factual situation, and the rules by which this selection is made are the choice-of-law rules in Conflict of Laws.

Such choice-of-law rules may embody various possible "connecting factors" or "points of contact" to determine a given issue. For example, the choice-of-law rule in one jurisdiction may be that an issue of marital property is determined by the law of the domicile of the spouses (at some point of time), whereas, in another, the rule may be that such an issue is determined by the law of the situs of the property (at some point of time). This chapter is not concerned with this problem of selection. In this discussion, various choice-of-law rules, adopted principally from the Restatement, are assumed as established in order to discuss adequately the results of different possible characterizations; but it is obviously not possible, or desirable in view of the purpose of the present chapter, to go into an investigation here as to whether these rules are those in fact supported by
policy and authority. That investigation, with respect to marital-property choice-of-law rules, is the subject of the next chapter.¹

This chapter is concerned with the operation usually called “characterization” in Anglo-American law.² A court must always perform this operation, which is simply the selection of the choice-of-law rule to be employed in the case, when presented with a choice-of-law problem. The choice-of-law rules will vary according to whether the claimed interest is one of succession or of marital property or of some other category, and it is necessary to determine into which of these categories a specific claim falls. For example, if a court is presented with a case in which a surviving wife is claiming some portion of the estate accumulated by her deceased husband despite his attempt to bequeath it all to a third person, the court must decide whether to use the choice-of-law rule that “An issue of succession is governed by the law of the last domicile of the decedent” or the rule that “An issue of marital property is governed by the law of the domicile of husband and wife at the time of acquisition of the property.” In making this selection, the court “characterizes” the issue presented as an issue of “succession” on the one hand, or of “marital property” on the other. Thus, characterization is merely the placing of the issue presented by the case in one of several possible legal categories, and thereby selecting the choice-of-law rule to be employed, since these rules have been constructed with reference to such categories.

It has been argued above ³ that this determination should be in accordance with the conflicts law of the forum, since the characterization is being made for conflicts purposes. The temptation is often strong to follow the local-law categories, since categories are also made for many internal-law purposes, and the names of the categories are generally the same as those in Conflict of Laws, and their scope is often roughly equivalent. However, such local “characterization,” either in the forum or in any foreign state, should not control the characterization for choice-of-law purposes. For example, as we have noted, whether a claim is considered a marital-property claim or a claim of succession, in a conflicts case, may determine which of two jurisdictions is to furnish the governing law; and, in

¹ Chap. V, infra, passim.
² And on the Continent, “qualification.”
³ Chap III, § 1, ¶ B, supra.
PROBLEMS OF CHARACTERIZATION

a local-law case, whether a claim is considered one of marital property or of succession may determine a question of constitutional law or of taxation. It is obvious that the social policies, which are important in making these respective determinations of choice-of-law on the one hand and of constitutional law or taxation on the other, may be entirely different and they may, and should in some cases, lead to a “characterization” of an identical claim in one way for one purpose, and in another way for another. The “characterization” of a claim, in other words, is not some inherent metaphysical characteristic of it, which can be discovered by observation or by deduction; it is simply a decision that a particular claim will be grouped with certain other claims for a certain purpose.

In this chapter a survey is made of the more important types of claims involving the property relations of husband and wife and of third parties, and the decisions in the United States are examined to see which have been characterized as “marital-property claims” and which characterized as something else, for choice-of-law purposes. An effort is made also to evaluate these decisions upon the basis of pertinent policy considerations. This task is difficult because the courts rarely discuss the policy bases of their characterizations, and in fact rarely make any articulate decision of this question at all: The normal procedure is simply to assume the characterization question and to go on from there. Of course, in many cases the characterization of the particular issue is so well settled that there is no need to discuss it. But too often, in cases where the characterization problem is really the crucial issue in the case, it is still impossible to find any discussion of it in the court’s opinion. This situation is unfortunate since the real issues are obscured and may be overlooked by commentators and subsequent courts and thus escape the criticism and correction to which decisions are normally subjected. The problem is more acute because these characterization problems are among the most important in the conflicts field, as well as among the most difficult. Probably in a majority of the difficult choice-of-law cases the real problem will be found upon analysis to be a characterization problem: The rules themselves are fairly well settled; it is the selection among the competing rules which causes difficulty.

The major policy by which a characterization should be tested, in the opinion of the writer, is the objective of grouping together, for choice-of-law purposes, those rules of law in different jurisdictions
which serve the same legislative purpose. A choice-of-law rule is basically simply a judgment (judicial or legislative), founded upon considerations of convenience and social justice, that a certain type of issue should be determined by the law of the jurisdiction with which the case has a specified type of factual connection. This judgment is necessarily made in the light of the legislative purpose behind the rules of law included in this category. If, however, there are thrown in the same category, for choice-of-law purposes, other rules of law which are the embodiment of an entirely different legislative purpose, this delicate structure is thrown out of balance. If this happens, then the choice-of-law rule will be used in a case where the original policy basis of the rule does not justify its use, and if the result is a good one it will be purely accidental. In addition, a failure to follow this guiding principle will inevitably result in conflicting characterizations as between different jurisdictions and the difficult problems to which these give rise in the form of latent conflict of choice-of-law rules.

The discussion which follows has been divided, for convenience, into seven major areas involving the property relations of husband and wife and third parties: Distribution on Death, Divorce, Rights of Creditors, Transfer of Property, Rights of the Spouses Inter Se, Income from Property, and Acquisition of Tort Claims.

§ 1. DISTRIBUTION ON DEATH

Under this heading are considered those issues arising when there is a dispute over property between a surviving spouse and the heirs, or devisees, of the deceased spouse (or others standing in his shoes).

In these disputes the more important choice-of-law rules are directed to “succession” and “marital property” respectively. It is generally stated that an issue of succession to movables is governed by the law of decedent’s last domicile, but that an issue of marital property is governed by the law of the spouses’ domicile at the time of acquisition of the property. Therefore, if there has been a change of domicile between the time certain property is acquired and the death of one of the spouses, and the survivor claims some portion of this property, it may be decisive of the issue whether the surviving

4 1 Rabel, Conflict of Laws 60 (1945).
5 Chap. III, § 3, ¶ B, supra.
spouse's claim is deemed one of succession or one of marital property.

We will consider the following claims by or against surviving spouses, to determine what characterizations have been adopted by the courts: (1) a claim under the statutes of distribution by a surviving spouse upon the death intestate of the other; (2) a claim by the husband or his heirs to the wife's chattels under the common-law *jus mariti*; (3) a claim of a "community interest" by the surviving spouse or the heirs of the decedent; and (4) a claim of a non-barrable share by the surviving spouse, under the forced-heirship statutes in the common-law states.

(A. *Intestate succession.* It is, of course, well settled that a mere right of intestate succession as between spouses is characterized for choice-of-law purposes as a "succession" issue; in fact, no one seems to have ever raised any question about this.

(B. *The common-law *jus mariti*. There is a large group of cases in which an issue arising on the death of one spouse is invariably characterized as a marital-property issue for choice-of-law purposes —where the husband is claiming as against the heirs or legatees of the wife that certain personal property owned or acquired by her passed to him under the common-law rule that the chattels of the wife vested in the husband *jure mariti*; or where the heirs or legatees of the husband are making the same claim as against the surviving wife. This rule of law is of course no longer in effect in any of the United States, and therefore this characterization is mainly of historical interest; however, a segregation of these cases does serve to point out the precedents which were concerned only with a now obsolete rule of law and which therefore may reasonably be viewed with some suspicion as authorities on modern problems.

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*Irwin v. Bailey, 72 Ala. 467 (1882); Ellington v. Harris, 127 Ga. 85, 56 S.E. 134 (1906); Parrett v. Palmer, 8 Ind. App. 356, 35 N.E. 713 (1893); Le Breton v. Nouchet, 3 Mart. (o.s.) 60 (La. 1813); Ford's Curator v. Ford, 2 Mart. (n.s.) 574 (La. 1824); Tanner v. Robert, 5 Mart. (n.s.) 255 (La. 1826); Hicks v. Pope, 8 La. 554 (1835); Penny v. Weston et al., 4 Rob. 165 (La. 1843); Allen v. Allen, 6 Rob. 104 (La. 1843); Marcenaro v. Bertoli, 2 La. Ann. 980 (1847); Walker v. Duverger, 4 La. Ann. 569 (1849); Percy v. Percy, 9 La. Ann. 185 (1854); Newcomer v. Orem, 2 Md. 297 (1852); Turton's Executors v. Turton, 6 Md. 375 (1854); Land v. Land, 14 Smedes & M. 99 (Miss. 1850); McCollum v. Smith, Meigs 342 (Tenn. 1838); Knee­land v. Ensley, Meigs 620 (Tenn. 1838); Layne v. Pardee, 2 Swan 232 (Tenn. 1852); Avery v. Avery, 12 Tex. 54 (1854); McDaniel v. Harley, 42 S.W. 323 (Tex. Civ. App. 1897).*
When the first tentative Married Women’s Property Acts were passed, modifying but not completely abolishing the common-law interest of the husband in his wife’s chattels, some interesting characterization problems were raised. For example, in Connecticut a statute was passed making the husband a trustee of the wife’s chattels; she was entitled to regain them upon his death or, if she died first, they were to go to her heirs subject to a life estate in the husband. Both the Massachusetts and the Connecticut courts characterized the claim of the husband to this life interest after the death of the wife as a marital-property issue, apparently on the theory that this was a remnant of his former “marital-property right” and therefore must necessarily be a marital-property right itself, without any reexamination of whether the right had been so changed as to call for a different characterization for choice-of-law purposes.

Similarly, in Mississippi a statute was passed exempting the slaves of the wife from the debts of the husband, leaving to him their management and control, and providing that upon her death they should descend to the children of the husband and wife, or, if she die without issue, to the husband. Both the Mississippi and the Texas courts characterized the claim of the husband to the slaves of his deceased wife under this statute as an issue of marital property rather than an issue of succession, and therefore applied the law of the domicile at the time of acquisition (Mississippi), rather than the law of the last domicile. The Mississippi court rested its conclusion principally on the argument that under this statute the husband had a right “of a fixed and definite character [although contingent upon the wife dying without issue], and of which he cannot be deprived without his own consent.” This was apparently a reference to the inability of the wife to make a will at common law without the consent of the husband; but surely this was a purely personal incapacity which would no longer prevail if the last domicile was a jurisdiction having the contrary rule. The Texas court simply said that they must characterize the issue thus because that was the way the Mississippi

8 Mason v. Fuller, 36 Conn. 160 (1869); cf. Townes v. Durbin, 60 Ky. (3 Metc.) 352 (1860).
9 Lyon v. Knott, 26 Miss. 548 (1853).
11 26 Miss. at 561 (1853).
court had characterized it—the classic error of attempting to characterize for choice-of-law purposes by the *lex causae*.  

The case of *Locke v. McPherson*, which involved a third type of transition statute once in effect in New York and New Jersey, illustrates how cases in which the court is struggling principally with a characterization problem may be considered as precedents for unorthodox choice-of-law rules. The New York statute had provided that the wife was to have complete control over her chattels, during her lifetime, with power of disposal both *inter vivos* and by will; and, if she died intestate leaving descendants, the chattels were to go to such descendants; but, if she died *intestate* without issue, then they were to go to the husband. The New York court had held, for some *internal* law purpose, that under this statute the husband did not take by "succession," but by virtue of a remnant of his common-law "marital right," where the wife died intestate without issue. In the *Locke* case, H, domiciled in New York, married W in Missouri, where she was domiciled. H went back to New York; W delayed joining him for a few months in order to sell her house and suddenly died *intestate* without ever having left Missouri, and owning a considerable personal estate. H claimed this estate under the New York statute. The court held that Missouri law applied and that H had no claim to the property against the brothers and sisters of W.

The case has sometimes been cited to support a *situs* rule with respect to marital-property issues, but what really bothered the court was the problem of characterizing this claim of the husband. They said: If we characterize this claim as one of "succession" and refer to the law of the last domicile (New York, since W took her husband’s domicile upon marriage), then we are confronted with the fact that New York has no law of "succession" for this case since its court has characterized the husband’s right under this statute as a "marital-property" right. (The obvious fallacy of this reasoning is that the court is using *internal*-law characterization in New York for choice-of-law purposes.) Hence, the court said, we will have to apply our own law by default—an application of the erroneous

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12 Supra, Chap. III, § 1, ¶ B.
13 163 Mo. 493, 63 S.W. 726 (1901).
14 Robins v. McClure, 100 N.Y. 328, 3 N.E. 663 (1885).
15 See Chap. III, § 1, ¶ C, supra.
theory of "secondary" characterization. On the other hand, the court said, if we characterize this claim as a marital-property issue, we are confronted with the fact that "our married woman's statute makes no exception in favor of a nonresident husband." It is apparent that what the court disliked was not the rule that the domicile of the spouses rather than the situs of personal property controls questions of marital property, but the fiction that a woman upon marriage automatically acquired the domicile of her husband.

The correct procedure in this case would have been to make an independent characterization of this claim by the conflicts law of the forum; upon this basis, it is fairly obvious that a mere right of intestate succession (which was all the New York statute left the husband) should be characterized as a question of "succession" rather than of "marital property." A reference should have then been made to the law of New York, since it was the last domicile of the decedent, if the court was willing to adhere to the fiction that a wife took the domicile of her husband upon marriage; if not, the court should have referred to the law of Missouri. If the reference were made to the law of New York, any rule of that jurisdiction which would decide the issue should have been applied, regardless of whether its characterization for internal-law purposes in New York conflicted verbally with the choice-of-law characterization adopted by the Missouri court. This is the procedure adopted by the Kentucky court in the later case of Lee v. Belknap, which expressly refused to follow the confused reasoning of Locke v. McPherson.

(C. Community-property interest. The more important problems in this section concern a claim of succession under the community-property statutes in some states and under the statutes giving a "nonbarrable" share to a surviving spouse in the common-law states. In a case where the wife dies first and her heirs or legatees claim one-half of the acquisitions of the husband during marriage, on the basis that they were the community property of him and his deceased wife, this claim is uniformly characterized for choice-of-law purposes as a marital-property issue. Similarly, if the

16 Ibid.
17 163 Mo. at 504, 63 S.W. at 728 (1901).
18 Chap. III, § 1, C. supra.
19 163 Ky. 418, 173 S.W. 1129 (1915).
20 Estate of Bruggemeyer, 115 Calif. App. 525, 2 P.(2d) 534 (1931); Jacob-
heirs of the deceased husband make the same claim as against the surviving wife, with respect to her acquisitions during marriage, the issue is characterized in the same way, although this case rarely arises.21 Also, when the surviving spouse is claiming one-half of the acquisitions of the deceased spouse on the basis that they were community property, this issue is characterized for choice-of-law purposes as one of marital property. Normally, it is the surviving wife who is claiming such an interest in the estate of her deceased husband; 22 although the converse case sometimes occurs.23


21 In re Donohoe's Estate, 128 Calif. App. 544, 17 P.(2d) 1010 (1933).

22 Stephen v. Stephen, 36 Ariz. 235, 284 P. 158 (1930); Simmons v. Simmons, 203 Ark. 566, 158 S.W.(2d) 42 (1942); Estate of Warner, 167 Calif. 686, 140 P. 583 (1914); State of Bosely, 178 Calif. 715, 175 P. 4 (1918); Estate of Arms, 186 Calif. 554, 199 P. 1053 (1921); Estate of Frees, 187 Calif. 150, 201 P. 112 (1921); Estate of Nickson, 187 Calif. 603, 203 P. 106 (1921); Estate of Drishaus, 199 Calif. 369, 249 P. 515 (1926); Estate of Thornton, 1 Calif.(2d) 1, 33 P.(2d) 1 (1934); Beemer v. Roher, 137 Calif. App. 293, 30 P.(2d) 547 (1934); Cooke v. Fidelity Trust & Safety-Vault Co., 104 Ky. 473, 47 S.W. 325 (1898); Bryan & Wife v. Moore's Heirs, 11 Mart. (o.s.) 26 (La. 1822); Cole's Widow v. His Executors, 7 Mart. (n.s.) 41 (La. 1828); Dixon v. Bunker Hill & Sullivan Mining & Concentrating Co., 3 Ida. 126, 28 P. 396 (1891); Douglas v. Douglas, 22 Ida. 336, 125 P. 796 (1912); Besse v. Pellochoux, 73 Ill. 285 (1874); Gale v. Davis' Heirs, 4 Mart. (o.s.) 645 (La. 1817); Saul v. His Creditors, 5 Mart. (n.s.) 569 (La. 1827); Succession of Packwood, 12 Rob. 334 (La. 1845); Young v. Young, 5 La. Ann. 611 (1850); Huff v. Borland, 6 La. Ann. 436 (1851); Lecch v. Guild, 15 La. Ann. 349 (1860); Succession of Waterer, 25 La. Ann. 210 (1873); Succession of Popp, 146 La. 464, 83 So. 765 (1919); Smith v. Gloyd, 182 La. 770, 162 So. 617 (1935); Fleming v. Fleming, 211 La. 860, 30 So.(2d) 860 (1947); Oliver v. Robertson, 41 Tex. 422 (1874); Thayer v. Clarke, 77 S.W. 1050 (Tex. Civ. App. 1903), aff'd per curiam, 98 Tex. 142, 81 S.W. 1274 (1904); Morgan v. Bell, 3 Wash. 578, 90 P. 914 (1907); Witherill v. Fraunfelter, 46 Wash. 699, 91 P. 1086 (1907).
(D. Nonbarrable share. A more difficult problem is the characterization of a claim by a surviving spouse of a nonbarrable share in the estate of his deceased spouse, under one of the statutes in the common-law states. Such statutes normally provide that the surviving spouse can take his “intestate share” by “electing” against the will of the other spouse; and this right is characterized for internal purposes as a right of “succession.” However, for choice-of-law purposes it would seem that this right more closely resembles the community interest of a surviving spouse in the estate of the other than it does a mere right of intestate succession. Both the “community interest” and the “nonbarrable share” are apparently designed to serve the same legislative purpose—that is, a recognition of the contribution made by either spouse to the acquisition of things by the other, although in the absence of such a provision the acquiring spouse would have absolute ownership. It might be argued that the “nonbarrable share” serves the purpose of protecting the state by preventing the surviving spouse from becoming a public charge, but the facts would seem to belie this interpretation. In most states there are exemption statutes and statutes providing for a “widow’s allowance” or “allowance in lieu of homestead,” which give outright to the surviving spouse all property up to a certain value even as against creditors; and the nonbarrable share is of no importance unless the estate exceeds this amount. Of course, arguably this amount should be greater as against the deceased spouse’s legatees than as against his creditors, but in fact there is rarely any monetary limit at all upon the surviving spouse’s right of election. Surely it is difficult to argue, for example, that it is necessary to give a surviving wife one-half of a two or three million dollar estate in order to prevent her from becoming a public charge. Regardless of these policy arguments, however, the

v. Reed, 64 Tex. 705 (1885); Heidenheimer v. Loring, 6 Tex. Civ. App. 560, 26 S.W. 99 (1894); Grange v. Kayser, 80 S.W.(2d) 1007 (Tex. Civ. App. 1936); Meyers v. Albert, 76 Wash. 218, 135 P. 1003 (1913); In re Gulstine’s Estate, 166 Wash. 325, 6 P.(2d) 629 (1932).

23 Fountain v. Maxim, 210 Calif. 48, 290 P. 576 (1930). Of course, if the Legislature gives an interest to a spouse which is identical with a “community-property interest” so far as succession is concerned, but expressly designates it for choice-of-law purposes as a “succession” statute, then this characterization should be respected by the court. Estate of Schnell, 67 Calif. App.(2d) 268, 154 P.(2d) 437 (1944); Estate of Way, 157 P.(2d) 46 (Calif. App. 1945); cf. In re Miller, 31 Calif.(2d) 191, 187 P.(2d) 722 (1947).
claim of a surviving spouse for a nonbarrable share in the common-law states has invariably been characterized as an issue of succession for choice-of-law purposes, rather than an issue of marital property, and almost always without any discussion of the problem.

A claim by the surviving spouse for a nonbarrable share in the immovables of a deceased spouse is characterized as an issue of succession and reference is made to the law of the situs.24 *Prima

facie, it would seem that this choice of characterization would be immaterial, because the rule is said to be that the law of the *situs* of immovables governs an issue of marital property also.\footnote{25} However, this is true only in a very limited sense; the “source doctrine” in connection with marital-property issues requires that the marital-property characteristics of the immovable be determined by those of the property exchanged for it, where an immovable is *purchased*, rather than by the law of the *situs*\footnote{26} No such doctrine has been recognized in connection with claims for a nonbarrable share in an immovable in a foreign jurisdiction, and the existence and extent of any such interest is determined by the law of the *situs*. In only one case discovered by the writer was the question of the proper characterization of this issue argued to the court, and then such argument was summarily dismissed.\footnote{27}

A claim by the surviving spouse for a nonbarrable share in the movables of a deceased spouse is also characterized as an issue of succession, and reference is made to the law of the last domicile of the decedent.\footnote{28} The Mississippi case of *Hairston v. Hairston*\footnote{29} is

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\textbf{Apperson v. Bolton,} 29 Ark. 418 (1874); Bish v. Bish, 181 Md. 621, 31 A.(2d) 348 (1943); McGinness v. Chambers, 156 Tenn. 404, 1 S.W.(2d) 1015 (1928); Rannels v. Rowe, 92 C.C.A. 177, 166 F. 425 (C.C.A. 8th, 1908) [Arkansas law].

\footnote{25} \textit{Restatement, Conflict of Laws} § 238 (1934).

\footnote{26} See Chap. III, \textit{supra}, at notes 70–74.

\footnote{27} Ehler v. Ehler, 214 Iowa 789, 243 N.W. 591 (1932).


In Mississippi the rule was originally adopted that the law of the *situs* of movables governed the question of a nonbarrable share therein. Duncan \textit{v. Dick}, \textit{Walk.} 288 (Miss. 1827). This case was overruled by Garland \textit{v. Rowan}, 2 Smedes & M. 617 (Miss. 1844). The Legislature then provided in the Code
the only case which the writer has found where the contention was made that this claim should be characterized as an issue of marital property. In that case H and W had been domiciled in Virginia and H acquired certain slaves there. They moved their domicile to Mississippi, bringing the slaves with them. H died testate, but W renounced the will and claimed her statutory nonbarrable share. By the law of Mississippi this share was one-half in fee; by the law of Virginia it was one-half for life only. The legatees of H argued that this claim should be characterized as an issue of marital property and referred to the law of Virginia (the domicile at the time of acquisition). The court rejected this argument and characterized the issue as one of succession, thus applying the law of the last domicile (Mississippi). They said: "In the ingenious and very learned argument of counsel [things look black already], it was assumed that the widow, under the law of Virginia, does not take her share of the deceased husband's estate by virtue of the general statute of distribution; but is entitled to it under a separate and independent provision of the law. This may be conceded. . . . But the concession will avail nothing, unless it can be shown that the right of the feme covert in the personal estate of the husband, during the subsistence of the marriage, are [sic] of a superior character and different nature to those of the next of kin; or, in other words, unless it can be proved that by the consummation of the marriage, the wife acquires a vested interest in the personal estate of the husband, possessed at the time of the marriage, or acquired subsequently and before there has been a change of domicil. It is evident to us, that this position is not maintainable." 30

The court argues, in other words, that this claim cannot be characterized as a marital-property issue for choice-of-law purposes unless of 1857, Art. 110, that: "All personal property situated in this State, shall descend and be distributed according to the laws of this State, regulating the descent and distribution of such property, regardless of all marital rights which may have accrued in other States, and notwithstanding the domicile of the deceased may have been in another State. . . ." Slaughter v. Garland, 40 Miss. 172 (1866), held this statute not to apply to a claim for a nonbarrable share, which was still to be regulated by the law of the domicile; but this case was overruled by Bolton v. Barnett, 131 Miss. 802, 95 So. 721 (1923).

27 Miss. 704 (1854). This case was decided during one of the intervals when Mississippi was applying the law of the domicile to questions of succession. See note 28, supra.

28 27 Miss. at 722–23 (1854) [italics added].
the right being claimed by the wife is a “vested right” during marriage. It is not apparent what this has to do with the question. Whether she is said to have a “vested right” will determine certain internal-law questions, for example, certain taxation questions or certain constitutional questions as to whether the legislature can alter her interest by subsequent legislation, and in connection with those issues it may be proper to say that she takes by “succession” from the husband; but these decisions should not foreclose the choice-of-law characterization which is made for an entirely different purpose. The choice-of-law characterization should be made on the basis of grouping together certain rules of law which serve a common legislative purpose, to determine the applicable law in conflicts situations; and it should not be an objection to such a grouping that it includes claims asserting both “vested” and “nonvested” rights. Under the reasoning of the Mississippi court, the claim of a surviving wife to one-half of the acquisitions of her deceased husband as community property in California before 1923 should have been characterized as a succession issue for choice-of-law purposes, because it was an assertion of a “nonvested” right; yet such claims were in fact uniformly characterized as marital-property issues.51

The Mississippi court goes on to say: “It is true that the husband is incapable, by a testamentary disposition, which can only take effect after his death, to deprive the wife of her statutory portion of his effects of which he may die possessed. In this respect only does the wife stand on a different or better foundation than those persons who, as next of kin, would be entitled to the succession, as heirs or distributees, in the event the husband should die intestate.” 52 This is a rather substantial difference, however, and the question is whether that difference makes the nonbarrable share of the wife in the common-law states more like the community interest of a wife in the community-property states or the interest of a mere intestate distributee, for choice-of-law purposes, on a policy basis. But the court does not discuss this question.

Despite these theoretical and practical objections, and the fact that the conclusion has been reached without adequate exploration of the problem, it is nevertheless established that a claim of a surviving spouse for a nonbarrable share in the common-law states

51 Notes 20–23, supra.
52 27 Miss. at 723 (1854).
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is characterized as an issue of succession, rather than marital property. This means that essentially similar interests have been characterized differently for choice-of-law purposes in the community-property states and in the common-law states; and this situation will obviously give rise to many latent conflicts of choice-of-law rules.\(^\text{33}\)

§ 2. DIVORCE

With respect to the property rights of husband and wife as affected by divorce, two general problems have been presented by the cases involving foreign elements. The first concerns a claim by a divorced spouse of some interest in the acquisitions of the other, where the decree did not purport to affect property rights; the second concerns the right to a division of property in the divorce action itself.

As to the first problem, it is well settled that a claim of a nonbarrable interest in immovables of a decedent by a former spouse (divorced during the lifetime of the decedent) is characterized as an issue of succession to be governed by the law of the situs,\(^\text{34}\) as are other claims for such a nonbarrable interest in immovables. Also, although the authority is scanty, a claim for a nonbarrable share of movables by a divorced spouse would presumably be characterized as an issue of succession and referred to the law of the last domicile of the decedent.\(^\text{35}\) On the other hand, a claim by a divorced spouse to one-half of certain property acquired by the other spouse, on the ground that it had formerly been community property, is characterized as an issue of marital property and referred to the

\(^{33}\) See Chap. III, § 3, ¶ B, supra.


law of the domicile at the time of acquisition of the property in question. These results are consistent with the basic characterization of claims under the same statutes in the cases of distribution on death.

As to the second problem, a claim by one spouse to be entitled to a division of certain property in a divorce action, under widespread statutes permitting such division in fixed shares or in such proportions as are “equitable and just,” might conceivably have been characterized either as an issue of marital property to be governed by the law of the domicile at the time of acquisition, or as an issue of divorce to be governed by the law of the forum. In only one case found by the author was this question expressly raised, and there the court characterized the issue as one of divorce to be governed by the law of the forum. The absence of authority on the question indicates that it is generally understood that the issue is governed by the law of the forum, since an assertion that the law of some other state governed would probably be resisted and lead to an appellate court decision on the point.

§ 3. RIGHTS OF CREDITORS

A. Capacity. Some of the most interesting problems of characterization in the field of marital property have arisen in connection with the attempt by a creditor of one of the spouses to collect his debt. As a preliminary matter, it should be noted that a question of the capacity of a spouse to enter into the contract which created the debt is characterized as an issue of contract, rather than of property or marital property. For example, where the wife denies liability on the ground that she contracted merely as surety for her husband or some other person, the question of her capacity to make such an engagement is characterized as an issue of contract and referred to the place of making, place of performance, or other juris-

87 Lattner v. Lattner, 121 Calif. App. 298, 8 P.(2d) 870 (1932).
diction indicated by the general choice-of-law rule of the forum for “contract” issues. 38 Similarly, where the wife denies liability on the ground that her common-law disabilities of coverture have not been removed, or have been only partially removed, this question is also characterized as an issue of contract. 39

No contention apparently was made in these cases that the law


And it is also true where the wife is domiciled in a state permitting such a contract and the “proper law” of the contract is furnished by a jurisdiction where it is invalid: Nichols & Shepard Co. v. Marshall, 108 Iowa 518, 79 N.W. 282 (1909); Union Trust Co. of N. J. v. Knabe, 122 Md. 584, 49 A. 544 (1898).


That such a contract is invalid where the wife is domiciled in a jurisdiction in which married women are fully emancipated and the “proper law” of the contract is furnished by a jurisdiction which retains in whole or in part her common-law disabilities: Burr v. Beckler, 264 Ill. 230, 106 N.E. 206 (1914); Greenlee v. Hardin, 157 Miss. 229, 127 So. 777 (1930).
of the domicile of the wife, at the time of the acquisition of the property which the creditor was attempting to reach, should govern; the main question was whether the law of the domicile at the time of contracting, on the one hand, or the law of the place of making, place of performance, or other jurisdiction furnishing the proper law of the contract, on the other, should govern an issue of capacity. However, in another group of cases the domicile of the wife at the time of the contract and the place of contracting coincided, and the creditor was attempting to enforce her liability in a second jurisdiction in which she later acquired property. The courts have uniformly held in this situation that the law of the first jurisdiction governs, thus refusing to characterize the issue as one of marital property and apply the law of the domicile at the time of acquisition. 40

The law was formerly to the contrary in Mississippi, where a long line of decisions characterized the question of the capacity of a married woman to contract as an issue of marital property, to be governed by the law of her domicile at the time of acquisition of the property which the creditor was attempting to reach. 41 This rule was abandoned, however, in the case of Greenlee v. Hardin, 42 although the court attempted to distinguish the earlier cases without much evident success. It seems clear that this issue should not be characterized as a marital-property issue. The legislative policy behind the statutes or common law rules restricting the wife's capacity to contract is not to recognize an interest of the husband in the ac-


42 157 Miss. 229, 127 So. 777 (1930).
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quisitions of the wife, but to protect her supposed incompetence against the importunities of the husband or third parties.

B. In the common-law states. Another major question found in the cases, although now obsolete, is the question arising when a creditor of the husband attempts to levy upon chattels acquired by the wife, asserting that ownership of them passed to the husband by virtue of his common-law right. This question was uniformly characterized as an issue of marital property. So also was the similar question which arose when a creditor attacked a conveyance by the husband to his wife as being in fraud of his creditors, and the wife attempted to sustain the transaction on the ground that it was a repayment for her property formerly appropriated by the husband. The question whether the ownership of her chattels had passed to the husband under the common-law, characterized as an issue of marital property, determined whether his subsequent conveyance to her was a simple preference or a voluntary transfer in fraud of his creditors.

43 Doss v. Campbell, 19 Ala. 590 (1851); Castleman v. Jeffries, 60 Ala. 380 (1877); Gluck v. Cox, 75 Ala. 310 (1883), on second appeal, 90 Ala 331, 8 So. 161 (1890); Kirkpatrick v. Buford, 21 Ark. 268 (1860); Allen v. Hightower, 21 Ark. 316 (1860); Parrott v. Nimmo, 28 Ark. 351 (1873); Brown v. Wright, 58 Ark. 20, 22 S.W. 1022 (1893); Jones v. Aetna Insurance Co., 14 Conn. 501 (1842); Smith v. Chapell, 31 Conn. 589 (1863); Hinman v. Parkis, 33 Conn. 188 (1866); Farrell v. Patterson, 43 Ill. 52 (1867); Hanchett v. Rice, 22 Ill. App. 442 (1886); Van Ingen v. Brabook, 27 Ill. App. 401 (1888); Smith v. Peterson, 63 Ind. 243 (1878); Slocomb v. Breedlove, 8 La. 143 (1835); Routh v. Routh, 9 Rob. 224 (La. 1844); Jeter v. Deslondes, 6 La. Ann. 379 (1851); Smith, Garnishee of Leister v. McAttee, 27 Md. 420 (1867); Coombs v. Reed, 16 Gray 271 (Mass. 1860); Woodcock v. Reed, 5 Allen 207 (Mass. 1862); Minor v. Cardwell, 37 Mo. 350 (1866); State v. Carroll, 6 Mo. App. 263 (1878); State v. Chatham National Bank, 10 Mo. App. 482 (1881), aff'd, 80 Mo. 626 (1883); State v. Smit, 20 Mo. App. 50 (1885); Stokes v. Macken, 62 Barb. 145 (N.Y. Sup. Ct. 1861); King v. O'Brien, 33 N.Y. Super. Ct. (1 Jones & S.) 49 (1871), app. dis'm., 57 N.Y. 653 (1874); Craycroft v. Morehead, 67 N.C. 422 (1872); Davis v. Zimmerman, 67 Pa. 70 (1870); Pearl v. Hansborough and Wife, 28 Tenn. (9 Humpf.) 426 (1848); State v. Barrow, 14 Tex. 179 (1855); Keyser v. Pilgrim, 25 Tex. Supp. 217 (1860); Hill v. Wynn & Co., 4 W.Va. 453 (1871).

The present-day interests of one spouse in the acquisitions of the other in the common-law states have given rise to very few choice-of-law cases involving the rights of creditors. In many states the nonbarrable share of one spouse in the immovables acquired by the other is not subject to be destroyed by the acquiring spouse’s creditors during coverture. This rule undoubtedly should be characterized as an issue of property or of succession (in accordance with the characterization of the nonbarrable share itself) to be governed by the law of the situs of the immovable, although only one case has been found so holding. In no common-law state is the interest of one spouse in the movables acquired by the other superior to the rights of the acquiring spouse’s creditors during coverture; however, in a few jurisdictions, the nonbarrable share of the surviving spouse is superior to the rights of the decedent’s creditors after his death. This rule would, presumably, also be characterized as an issue of succession, and the law of the last domicile of the decedent would govern.

(C. Liability of community property. In the community-property states, one problem concerns an attempt by a creditor of the husband to levy on certain property as community property, and a claim by the wife that the property in question is her “separate” property and therefore not liable for the obligation of the husband. This question—the character of the property as “separate” property of the wife or community—is characterized as an issue of marital property and referred to the law of the domicile of the husband and wife at the time of acquisition

Insofar as liability of community property for obligations of the husband is concerned, different problems have arisen in Washington and Arizona, on the one hand, and the other six community-property jurisdictions, on the other. In California, Idaho, Louisiana, Nevada, New Mexico, and Texas, community property acquired by the husband is subject to any obligation incurred by him,

46 Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936); Henderson v. Usher, 125 Fla. 709, 70 So. 846 (1936).
either before or after marriage. Hence, it makes no difference insofar as the rights of his creditors are concerned whether certain property is his "separate" property or community property. In Washington and Arizona, however, the community property is not liable for "separate" obligations of the husband (all antenuptial obligations and certain ill-defined postnuptial obligations). If the obligation of the husband is admitted to be such that the community property is not liable, then the only question is whether the property which the creditor is attempting to levy upon is community property or the husband's "separate" property (which is, of course, liable for his "separate obligations"), and this question is characterized as an issue of marital property.48

The characterization of the rule itself that community property is not liable for so-called "separate," or "noncommunity," obligations of the husband is more troublesome. Conceivably, it might be characterized as a marital-property rule, to be governed by the law of the domicile of the husband and wife at the time of the acquisition of the property; or it might be characterized as analogous to an exemption statute 49 to be governed by the law of the forum. The practical difference between these two approaches would appear in the case where the husband acquired community property while domiciled in California, for example, where such property is liable for all obligations of the husband, and the spouses then moved to Washington bringing this property with them. If an antenuptial creditor of the husband attempted in the Washington court to levy upon the community property acquired in California, the characterization of the rule as one of marital property would permit him to do so, whereas, its characterization as an exemption provision would not. It seems to the author that the correct characterization is that the rule is one of marital property. Undoubtedly, the purpose of the court in adopting this rule was to recognize an interest of the wife in the acquisitions of the husband during coverture—the court thought that the wife should be given an interest in these acquisitions which would be superior to the rights of a "separate" creditor of the husband. The fact that the same rule applies whether the community property amounts to ten million dollars or five dollars

49 Although a court-created exemption insofar as personal property is concerned.
indicates how much its purpose differs from ordinary exemption statutes.

Although only two characterizations of this rule were indicated as theoretically "possible" in the preceding paragraph, the Washington court has purported to characterize this rule as one of contract law or tort law to be governed by the law of the place of contracting or of the place where the tort was committed. The story of how the Washington court reached this conclusion is an interesting one for a student of semantics. The first case in which this question arose was La Selle v. Woolery. In that case H and W were married in Wisconsin and were domiciled there; H was a contractor and builder and purchased supplies for his business from P after marriage. When H did not pay for the supplies, P sued him in the Wisconsin court and recovered judgment. Thereafter, H and W moved their domicile to Washington and P sued in the Washington court to subject certain property, acquired by H after removal, to the lien of his judgment. It is difficult to see how this case could cause any difficulty. By the law of Wisconsin, any property acquired by H was subject to execution for any obligation incurred by him at any time. By the law of Washington, property acquired by H after marriage was not, it is true, subject to a contractual liability incurred by him before marriage nor to a very few contractual liabilities incurred by him after marriage; however, it undoubtedly was subject to execution for a contractual liability incurred by H in the course of his ordinary business after marriage. Hence, there was no conflict of law in this case and it made no difference whether Wisconsin or Washington law was applied: P would win in either event.

The Washington court, in an excellent opinion by Hoyt, C. J., expressly recognized this fact on the first hearing of the case: "It appears from the statutes set out in the answer that in that state [Wisconsin] there is no such thing as community property as understood here, nor is there any such thing as separate property of the husband as defined by our laws. . . . In our opinion the comity which one state owes to another state goes to the substance rather

50 11 Wash. 337, 39 P. 663 (1895), rev'd on rehearing, 14 Wash. 70, 44 P. 115 (1896).
51 Oregon Improvement Co. v. Sagmeister, 4 Wash. 710, 30 P. 1058 (1892); Diamond v. Turner, 11 Wash. 189, 39 P. 379 (1895).
than the form of things. If a certain right is given in one state as to property of a certain nature, comity would require that those rights should be enforced in another state as to property of the same nature though it might be called by a different name. In the State of Wisconsin property which was acquired by the joint labors of the husband and wife, though called the property of the husband, was subject to the payment of debts incurred by the husband in the prosecution of business for the support of the family. Property acquired in the same manner in this state belongs to the community but is subject to a liability incurred by the husband alone in the prosecution of business for the same object.”

It is startling that a court, after having the correct reasoning pointed out to it so lucidly, could reverse itself on rehearing upon the basis of demonstrably fallacious logic; but this the court proceeded to do over the dissent of the Chief Justice. In this opinion, Justice Gordon attempted to separate the marital-property issue from the question of liability and deal with them separately. He said: “The character of the property, as regards the question of its being the separate property of either of the spouses, or the property of the community . . . , is fixed by the law of the state where such property, if real property, is situated. So, too, the character of the debt is determined by the law of the place where it arose.” It may seem, at first glance, that this is not an impossible procedure. If the contract were made in Arizona and sued on in Washington, it would be possible to determine the question of whether the debt was a “community” debt, or a “noncommunity” or “separate” debt, by the law of Arizona, if that differed from the law of Washington. But these terms are nothing more than shorthand expressions for “debt for which community property is liable” on the one hand, and “debt for which community property is not liable” on the other. Obviously, no state in the United States except Washington and Arizona has any statutes or decisions dividing debts of the husband into these two categories: in the common-law states because there is no community property, and the courts have had no occasion to separate debts into those for which such property would be liable and those for which it would not; in the other community-property states because there community property is

52 11 Wash. at 340-41, 39 P. at 664-65 (1895) [italics added].
53 14 Wash. at 71-72, 44 P. at 115 (1896) [italics added].
liable for any obligation of the husband, and so there is no reason to divide his debts into two categories.

Nevertheless, the court purported to find that by the law of Wisconsin this debt was a "separate" or "noncommunity" debt of H, and gave judgment for the defendants. How was it possible to find such a rule in the law of Wisconsin? The reasoning is very simple. The court found assertions in the Wisconsin decisions that debts incurred by the husband in that state were his "separate" debts, meaning thereby that the "separate" property of the wife was not liable for them. Of course, every debt contracted by the husband in Wisconsin would be a "separate" debt in this sense. The Washington court then reasoned as follows: This debt of the husband is a "separate" debt by the law of Wisconsin [meaning, "not chargeable upon the wife's 'separate' property"]. The law of the place of making of the contract [Wisconsin] governs the "character" of the debt. Therefore, this is a "separate" debt of the husband [meaning, "not chargeable upon the community property of husband and wife"]. The verbal fallacy in this argument is about as obvious as that in the old syllogism: All batteries are torts. An automobile has a battery. Therefore, an automobile is a tort.

The case of La Selle v. Woolery and the line of cases in Washington which follow it might conceivably be justified (recognizing that it is Washington law which the court is applying), if one were willing to adopt the approach which the Washington court habitually uses in dealing with the field of community property. That court has personified a fictitious entity called "the community," which purportedly "owns" the community property, and normally refers to it as though it were an existent person. For example, it was held in Brotton v. Langert that a wrongful levy by a married constable did not create a "community" liability; later, in

54 Clark v. Eltinge, 29 Wash. 215, 69 P. 736 (1902); Huyvaerts v. Roedtz, 105 Wash. 657, 178 P. 801 (1919); Curtis v. Hickenbottom, 158 Wash. 198, 290 P. 822 (1930); First National Bank of Juneau v. Estus, 185 Wash. 174, 52 P.(2d) 1243 (1936); Meng v. Security State Bank of Woodland, 16 Wash.(2d) 215, 133 P.(2d) 293 (1943). In the Meng case, supra, both the husband and wife signed a note while domiciled in the common-law state; after their removal to Washington, it was held that it was the "separate" debt of both, but could not be collected out of their community property, even though the husband had signed a renewal note after the removal.

55 1 Wash. 73, 23 P. 688 (1890).
Milne v. Kane \(^56\) it was held that a negligent injury to his passenger by a married taxicab driver did create a "community" liability. In Day v. Henry \(^57\) the plaintiff contended that the latter case had overruled the former; but the court said, no, "the community" cannot be a constable, but "the community" can be a taxicab driver: "The distinction is as clear as any distinction can be. The community drives the automobile; the community does not make the levy." \(^58\)

This "entity theory" is mainly responsible for the rule in Washington that all antenuptial debts of the husband are "noncommunity" or "separate" debts: Since "the community" did not exist when they were incurred, then "the community" could not have been "benefited" by the transaction nor could the husband have been acting as its "agent." By similar scholastic reasoning, it could be argued that "the community" does not exist as long as the husband and wife are domiciled in a common-law state, because that jurisdiction does not have a community-property law; therefore, any debt incurred by the husband is a "separate" debt and cannot be satisfied out of the "property" of "the community" after they move their domicile to Washington. The obvious objections which might be made to this discrimination against foreign creditors, on the basis of the contract clause and the due-process clause of the federal Constitution, have never to the author's knowledge been urged to either the Washington courts or the federal courts. \(^59\)

\(^{56}\) 64 Wash. 254, 116 P. 659 (1911).

\(^{57}\) 81 Wash. 61, 142 P. 439 (1914).

\(^{58}\) 81 Wash. at 64, 142 P. at 440 (1914).

\(^{59}\) Cf. Cook v. Moffat, 5 How. 295 (U.S. 1847); M'Millan v. M'Neill, 4 Wheat. 209 (U.S. 1819), which held that a state bankruptcy act was unconstitutional, as a violation of the contract clause, insofar as it attempted to discharge a debt created by a contract made in another state with a foreign domiciliary. Compare Sturges v. Crowninshield, 4 Wheat. 122 (U.S. 1819), which held that a state bankruptcy act was unconstitutional, as a violation of the contract clause, insofar as it attempted to discharge a debt created by a contract made in another state with a foreign domiciliary. Compare Sturges v. Crowninshield, 4 Wheat. 122 (U.S. 1819); Ogden v. Saunders, 12 Wheat. 213 (U.S. 1827). The Washington rule, it is true, would not discharge the "personal" liability of the debtor, although it would render the debt uncollectible out of any assets acquired in the future (except those acquired by gift, devise, or descent). But compare the dictum by Chief Justice Marshall in Sturges v. Crowninshield, 4 Wheat. at 198: "... it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity, constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation."
Although the case of *La Selle v. Woolery* might possibly be justified if one were willing to adopt the Washington court's attitude toward community property, the case of *Mountain v. Price* cannot. In that case, *H* and *W* were married in Washington and were domiciled there. *H* drove into Oregon in his automobile on “community business,” under such circumstances that if he had negligently injured someone in Washington the resulting obligation would clearly have been a “community” obligation. *H* negligently injured *P* in Oregon; *P* sued *H* in the Oregon court and recovered judgment. In the *Price* case, *P* attempted to secure a judgment which would permit him to levy upon the community property of *H* and *W* in Washington, on the basis of his foreign judgment. The Washington court held that he could not do so, reasoning on the basis of the *La Selle* case that the law of the place of the tort determines the “character” of the obligation; in Oregon this was a “separate” obligation of the husband; therefore, the plaintiff could not levy upon community property in Washington. The same argument would apply with as much reason to any contract entered into by a married resident of Washington outside of that state. In view of this situation, it behooves creditors in the other forty-seven states to be careful about extending credit to Washington domiciliaries. But there is not much precaution one can take against being run down by a Washington married man.

The decision in *Mountain v. Price* is so patently unjust that one has an instinctive feeling that it should be unconstitutional, but there is some difficulty in pointing to a specific reason for its invalidity. At first glance, one might think that the decision violates the full-faith-and-credit clause, but upon analysis this conjecture seems to be unfounded. The Washington court, it is true, has refused to permit certain property (in practice probably all that the defendant has) to be subjected to the plaintiff's claim, where property of that nature (the husband's acquisitions during mar-
PROBLEMS OF CHARACTERIZATION

riage) would be so subject had the transaction been an entirely local one in either jurisdiction. It is well settled, however, that the forum may apply its own exemption provisions to a claim under a foreign judgment. Of course, the forum probably could not discriminate against the foreign judgment as compared to a local one, but according to the reasoning of the Washington court, if the plaintiff in Mountain v. Price had not gotten a judgment in the Oregon court but had sued first in Washington, he still would not have been permitted to levy on community property. By the rationale of this case, if a married man domiciled in Washington should drive down the highway on "community business" and negligently strike Plaintiff A ten feet on the Washington side of the state line, and then negligently strike Plaintiff B ten feet on the Oregon side of the line, and both sued in the Washington court, Plaintiff A could levy on community property to satisfy his obligation but Plaintiff B could not. This is not the result of applying Oregon law to the second case (although the court thought so), but an arbitrary discrimination by the Washington court.

This discrimination might seem to be the basis for an attack upon the case under the equal-protection clause, but this also would be doubtful of success. The equal-protection clause possibly would not apply because Plaintiff B (in the hypothetical case), who is undoubtedly denied the equal protection of the laws, was not "within the jurisdiction" of Washington at the time the injury occurred, and it might not be sufficient that he afterwards merely came into Washington to bring his suit. In addition, the privileges-and-immunities clause of Article IV presumably would not apply because the discrimination is not against citizens of foreign states, but against persons who are injured in foreign states; the result would be the same even though Plaintiff B were a resident of Washington.

This analysis suggests that in essence the decision enforces an arbitrary and capricious discrimination against a foreign cause of action and that it probably could be successfully attacked under the due-process clause. The Supreme Court has indicated that a mani-

62 This apparently has not been questioned since M'Elmoyle for the use of Bailey v. Cohen, 13 Peters 312 (U.S. 1839). See 3 Freeman, Judgments § 1358 (5th ed. 1925); 2 Freeman, Executions § 209 (3d ed. 1900).

festly erroneous and unjust choice of law by a state court may be prohibited by the due-process clause. Although the cases coming within this principle have never been defined with precision, it would seem that Mountain v. Price should be such a case if the principle retains any vitality.\footnote{Cf. Western Union Telegraph Co. v. Brown, 234 U.S. 542 (1914); see Alaska Packers Ass'n v. Industrial Accident Commission, 294 U.S. 532, 541-42 (1935) (per Stone, J.): “Objections [to the manner in which a state deals with a foreign transaction] which are founded upon the Fourteenth Amendment must ... be directed, not to the existence of the power to impose liability for an injury outside state borders, but to the manner of its exercise as being so arbitrary or unreasonable as to amount to a denial of due process.” See Overton, State Decisions in Conflict of Laws and Review by the United States Supreme Court under the Due-Process Clause, 22 Ore. L. Rev. 109 (1943), for an exhaustive collection of the authorities on this question.}

The case of Babcock v. Tam \footnote{65 156 F.(2d) 116 (C.C.A. 9th, 1946).} in the Ninth Circuit Court of Appeals, involving Arizona law, approaches the problem in Mountain v. Price from the correct angle and simply applies Arizona law to determine whether the tort committed by the husband in California created a “separate” or “community” liability. Unfortunately, an examination of the briefs in that case shows that there was no argument on the choice-of-law question, and no one urged that California law should be “applied” in the way the Washington court thought it was “applying” Oregon law.\footnote{The case of Jones v. Weaver, 123 F.(2d) 403 (C.C.A. 9th, 1941), although distinguishable, is contra in tendency to Mountain v. Price.}

The heights of confusion to which the combination of the Washington court’s approach to community property and its approach to Conflict of Laws can lead is illustrated by the case of Great American Indemnity Co. v. Garrison.\footnote{75 F.Supp. 811 (E.D.Wash. 1948).} In that case H and W were domiciled in Idaho, where H was the county treasurer for Clearwater County. H embezzled some $32,000 and later moved to Washington. The surety company, which had to make good the losses of the state of Idaho, sued H in the Federal District Court in Washington for reimbursement and sought to have the judgment declared a “community obligation.” The District Judge, a former member of the Washington Supreme Court, held that it was not a “community” debt. He stated that the federal court sitting in Washington must apply the Washington choice-of-law rule, by which
the "character" of the obligation is determined by the place where the tort was committed. The plaintiff had cited two Idaho cases holding that community property in Idaho is liable for any obligation of the husband; these happened to involve contractual liabilities. The judge said that he could not accept these cases as authority that Idaho would apply the same rule to torts in view of the "general rule" and the "almost universally accepted principle" that community property is not liable "for the husband's torts, unconnected with community business," citing three Washington cases and Corpus Juris. [This "general rule" is in force in only two out of the eight community-property states.] Therefore, he said, in the absence of authority in Idaho this question must be decided by the "weight of authority." By the "weight of authority," citing nothing but Washington cases, he decided that the tort of a public official does not create a "community" liability. Beakley v. City of Bremerton, 68 which held that a tort of a married public official such as embezzlement would create a "community" liability (because the tort itself resulted in the acquisition of property), was not cited. 69

(D. The tacit mortgage. A final interesting problem of characterization in this area, although of limited applicability, concerns the characterization of the "tacit mortgage" which is given to the wife, in Louisiana and a number of foreign civil-law jurisdictions, to protect her "separate" or "paraphernal" property. By that law, when the husband wrongfully disposes of the wife's "paraphernal" property, which he is entitled to administer, the wife is treated as

68 5 Wash.(2d) 670, 105 P.(2d) 40 (1940).
69 The court reasoned in the Beakley case that the property acquired by the tort was community (since it was acquired after marriage and not by gift, devise, or descent), and therefore the community estate should be liable since it benefited from the wrongful act. Judge Driver, who decided the Great American Indemnity Co. case, was a member of the Washington Supreme Court in 1940 when Beakley v. City of Bremerton was decided; and the Beakley case was an en banc decision in which, according to the report, "all concurred."

The torts of public officials are treated differently from those of other married men under the Washington theory purely because of historical accident. The court held that a postnuptial tort by a married man did not create a "community" liability, on the theory that no such torts would. Brotton v. Langert, supra note 55. Later, the court held that some postnuptial torts of married men would create "community" liabilities, but instead of overruling the earlier case it seized upon the fact that the married man there was a public official as a distinguishing fact. Day v. Henry, supra note 57. The Beakley case represents a partial reaction against this irrational discrimination.
a preferred creditor, or has a "tacit mortgage," as to all of the husband's immovable and/or movable property (in Louisiana only the former), for the amount of her property converted. Several characterizations of this rule might be suggested. It might be characterized as a rule of marital property, to be determined by the domicile of the husband and wife at the time of the acquisition of the property upon which the wife claims the "tacit mortgage." Possibly it might be characterized as a rule of tort or contract (depending on whether or not the husband's act in disposing of the wife's property was with her consent), to be determined by the law of the place where the appropriation of the wife's property took place. Or it might be characterized as a remedy given to the wife, to be determined by the law of the forum. The last would seem to be the preferable characterization. It would certainly be unreasonable to expect any country, especially one where the common law with its abhorrence of secret liens prevails, to recognize such an extraordinary right in favor of the wife, unknown to its own law, and to the prejudice of its own citizens.

The excellently reasoned decision by Chancellor Sandford in *Ordronaux v. Rey* supports this analysis. There H and W were married in France in 1815, and H received 200,000 francs which were the "separate" property of the wife, but over which he had the right of management under the Code Napoleon. In 1818 they moved their domicile to New York. H appropriated the 200,000 francs of the wife for his own use, and after his death in 1841 she claimed a preference over his other creditors. This claim was denied, although she was permitted to share *pro rata* as an ordinary creditor. The Chancellor said: "Creditors of persons domiciled and having property here, have a right to look to those laws and those only for the administration of their debtors' estates. Justice to our own citizens forbids that we should yield a priority, such as is here claimed, upon the faith of a secret agreement made and registered in a foreign country twenty years before the parties had an interest in the property in question." The two Texas decisions of

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70 *Brisaud, History of French Private Law* §§ 568, 572 (1912); Daggert, *The Community Property System of Louisiana* Ch. VIII (1931).
71 2 Sandf. Ch. 33 (N.Y. Ch. 1844).
72 2 Sandf. Ch. at 44-45 (N.Y. Ch. 1844).
Hall v. Harris \(^{78}\) and Castro v. Illies \(^{74}\) are in accord with this holding.

Two cases which might appear at first glance to support a contrary characterization are, it is believed, distinguishable. In Kendall and Wife v. Coons \(^{75}\) and Bonati v. Welsch \(^{76}\) it was said, where the wife's "paraphernal" property was appropriated by the husband in a civil-law jurisdiction and their domicile was later changed to a common-law state in which the husband died, that the wife was entitled to the status of a preferred creditor. However, in neither of those cases does it appear that the husband's estate was actually insolvent (which would be necessary before the "tacit mortgage" became of any importance), so those statements are mere dicta. The dispute in those cases was between the wife and the husband's heirs or legatees, and of course the wife should be recognized as a creditor (having a superior right to the husband's heirs) regardless of this question of her remedy. The separability of these two questions was apparently overlooked by the Texas court in Castro v. Illies.\(^{77}\)

What would be the correct decision in the reverse situation to that discussed above? That is, suppose \(H\) and \(W\) are married and domiciled in a common-law state, and that he appropriates her "separate" property there. Later they move their domicile to Louisiana, and the wife claims a "tacit mortgage" on the husband's immovable property in Louisiana. The Louisiana courts have uniformly held that she is not entitled to such mortgage.\(^{78}\) Do these

\(^{78}\) II Tex. 300 (1854). It should be noted that, although the Ordronaux case may not necessarily be contra to a characterization of the issue as one of contract or tort, to be governed by the law of the place where the appropriation occurred, the Hall case is, for there the appropriation took place in Louisiana before the change of domicile.

\(^{74}\) 22 Tex. 479 (1858).

\(^{75}\) 65 Ky. (1 Bush) 530 (1866).

\(^{76}\) 24 N.Y. 157 (1861).

\(^{77}\) 22 Tex. 479 (1858). There the husband transferred certain property to the wife in payment for her "paraphernal" property previously appropriated by him; the court ignored the wife's argument that, conceding there was no "tacit mortgage" in the husband's property in Texas, still he owed the wife for her "paraphernal" property and his conveyance to her was a simple preference, which he had a right to make, and not a voluntary conveyance in fraud of creditors.

decisions conflict with the contention that the question is one of remedy to be governed by the law of the forum? Not necessarily. Conceding that the law of the forum applies, it is necessary to determine what that law is, and to do this one in turn must look to the legislative purpose in granting this remedy to the wife. This purpose is fairly apparent when it is recalled that the husband is given the management and control of the wife’s “paraphernal” property; she is given this extraordinary remedy to protect her rights, since otherwise she would be practically at his mercy. In the light of this legislative purpose, the same remedy should not be extended to the wife where her statutory “separate” property in a common-law state has been converted by the husband, since she has complete control over it at all times. The Louisiana court was completely justified in declaring, in Rush v. Landers,\(^7\) that the debt of a husband to his wife for her statutory “separate” property converted by him “would not be held, in this State, to stand upon the same footing as the debt of a citizen of Louisiana to his resident wife for paraphernal or dotal funds received by him.”

There remains to be noted the Louisiana case of Prats v. His Creditors,\(^8\) which is not consistent with this analysis, nor indeed with any permissible characterization of this issue. There H and W were married in Campeche, Mexico, and while domiciled there H appropriated her “paraphernal” property. They changed their domicile to Louisiana and the wife claimed a “tacit mortgage” on immovable property of the husband. The law of both jurisdictions gave the wife such a mortgage, and those laws were the same in all other significant respects; no other jurisdiction had any factual connection with the case. It would seem that the wife must win regardless of the characterization adopted and regardless of which law was applied, but the court refused to grant her the preference. Although one may sympathize with the court’s obvious prejudice against the “tacit mortgage,”\(^9\) and despite the fact that

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\(^7\) Rush v. Landers, 107 La. 549, 32 So. 95 (1902).
\(^8\) Prats v. His Creditors, 80 Rob. 501 (La. 1842).
\(^9\) Rush v. Landers, 107 La. 549, 32 So. 95 (1902).

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"The inconveniences resulting from tacit mortgages in this State, are daily and deeply felt, notwithstanding the precautions taken by law to lessen the difficulty and danger attending them."
this decision has been followed twice in Louisiana,\(^{82}\) the case seems clearly wrong.

\section*{§ 4. TRANSFER OF PROPERTY}

The cases involving characterization problems in connection with the transfer of property by the spouses during marriage are fewer than those concerning the rights of creditors, and the problems seem to be inherently less difficult. It is clear that a question of the capacity of a married woman to transfer her "separate" property, or a question of the formalities necessary thereto, should be characterized as a question of the transfer of property, to be governed by the law of the \textit{situs} at the time of the transfer, rather than one of marital property.\(^{83}\) Also, where the husband attempts to transfer chattels acquired by the wife, without her consent, and the transferee defends a suit by the wife on the ground that the ownership of the chattels passed to the husband under his common-law marital right, it is clear that this question is characterized as one of marital property.\(^{84}\)

Problems concerning the transfer of property under modern marital-property systems can best be discussed by dealing separately with the subjects of immovables and movables. In those community-property states requiring the joinder of the wife in any "conveyance or encumbrance" of community real property, the

\begin{footnotes}
\item[83] Drake and Wife v. Glover, 30 Ala. 382 (1857); Clanton v. Barnes, 50 Ala. 260 (1874); Thomson v. Kyle, 39 Fla. 582, 23 So. 12 (1897); Connor v. Elliott, 79 Fla. 513, 524, 85 So. 164 (1920), \textit{cert. dis'm.}, 254 U.S. 665 (1920); Hawkes v. Mobley, 174 Ga. 481, 163 S.E. 494 (1932); Lapic v. Gereaudeau, Walk. 480 (Miss. 1831); Smith v. Ingram, 130 N.C. 100, 40 S.E. 984 (1902), \textit{on rehearing}, 132 N.C. 959, 44 S.E. 643 (1903); cf. Miller v. Campbell, 140 N.Y. 457, 35 N.E. 651 (1893).
\item[84] Cahalan v. Monroe, Smaltz & Co., 70 Ala. 271 (1881); Birmingham Waterworks Co. v. Hume, 121 Ala. 168, 25 So. 806 (1899); Hydrick v. Burke, 30 Ark. 124 (1875); Thorn v. Weatherly, 50 Ark. 237, 7 S.W. 33 (1888); Dubois v. Jackson, 49 Ill. 49 (1868); Tinkler v. Cox, 68 Ill. 119 (1873); Schurman v. Marley, 29 Ind. 458 (1868); Lichtenberger v. Graham, 50 Ind. 288 (1875); Beard's Executor v. Basye, 46 Ky. (7 B. Mon.) 133 (1846); Arendell v. Arendell, 10 La. Ann. 566 (1855); McLean v. Hardin, 56 N.C. (3 Jones Eq.) 294 (1857); Vardeman v. Lawson, 17 Tex. 10 (1856); Hill v. Townsend, 24 Tex. 575 (1859); Franklin v. Piper, 5 Tex. Civ. App. 253, 23 S.W. 942 (1893).
\end{footnotes}
validity of the husband’s attempted sole transfer of an immovable will depend on the question of whether it is his “separate” property or community property, and this question is, of course, characterized as an issue of marital property.\textsuperscript{85} In those states permitting a transfer of community real property by the husband alone, such as Texas and Louisiana, this question would be unimportant; however, if there is a claim by the wife that the immovable transferred by the husband was her “separate” property rather than community property, this is also characterized as an issue of marital property.\textsuperscript{86}

In Texas, however, this rule has been sharply modified by the doctrine that a purchaser is entitled to rely upon the presumption that property acquired by husband and wife during coverture is community property. For example, where a spouse domiciled in a common-law state acquires an immovable in Texas by purchase, it is his “separate” property, but, when one spouse dies, a purchaser from the survivor is entitled to rely on the presumption that it was community property and descended to the survivor rather than the collateral heirs of the decedent.\textsuperscript{87} And a recital in the deed to the spouse showing that he was domiciled in a common-law state is not sufficient to put the purchaser upon inquiry.\textsuperscript{88} Presumably, although the case apparently has not arisen, the same rule would apply to a conveyance of an immovable, record title to which is in the wife’s name, by the husband during coverture. The rule in Texas is that such property, if acquired during marriage, is presumptively community and can be conveyed by the husband alone to a \textit{bona fide} purchaser, although in fact the property is the wife’s “separate” property.\textsuperscript{89} It is apparent from these decisions that the practical effect is substantially the same as if the Texas

\textsuperscript{85} Melvin v. Carl, 118 Calif. App. 249, 252, 4 P.(2d) 954 (1931).
\textsuperscript{86} Heirs of Dohan v. Murdock, 41 La. Ann. 496, 6 So. 131 (1889).
court characterized the issue as one of transfer of property to be governed by the law of the situs of the immovable.

In the common-law states, the question of the necessity for one spouse to join in the conveyance of an immovable in order to release his nonbarrable share is characterized as an issue of succession or transfer of property to be governed by the law of the situs.\textsuperscript{90}

With respect to movables, the authority is more scanty. If the wife makes an attempted transfer of personal property in a community-property state, its validity would depend on whether the property was her "separate" property or community property (over which, normally, she has no power of disposition). On principle, this question is clearly an issue of marital property.\textsuperscript{91} Also, if the husband makes a gift of movables in California or Washington, where all such gifts of community property are void as to the wife, the validity of the gift would depend on whether the movables transferred were the husband's "separate" property or community, and this issue should be characterized as one of marital property.\textsuperscript{92} The same characterization should be made if the gift were claimed to be invalid as being "in fraud" of the wife's rights under the law of the other community-property states.

A somewhat more difficult problem is the characterization of the issue raised by the asserted invalidity of a transfer of movables as "in fraud" of a spouse's nonbarrable share in the common-law states. Two situations might arise. For example, suppose the husband and wife are domiciled in New York, and the husband there transfers movables in trust, reserving a life estate and power of revocation, but relinquishing sufficient control so that the transfer would not be deemed "illusory" so as to subject the corpus to the wife's nonbarrable share under the New York rule. Thereafter, the spouses move to Ohio, where such a trust is held to be "in fraud" of the wife's rights, and the husband dies domiciled there. Or sup-

\textsuperscript{90} Small v. Small, 56 Kan. 1, 42 P. 323 (1895); Vertner v. Humphreys, 14 Smedes & M. 130 (Miss. 1850); Richardson v. De Giverville, 107 Mo. 422, 17 S.W. 974 (1891).

\textsuperscript{91} Gooding Milling & Elevator Co. v. Lincoln County State Bank, 22 Ida. 468, 126 P. 772 (1912); Alexander v. Shillaber, 64 How. Prac. 530 (N.Y. Sup. Ct. 1882).

heirs of the deceased husband make the same claim as against the surviving wife, with respect to her acquisitions during marriage, the issue is characterized in the same way, although this case rarely arises.\textsuperscript{21} Also, when the surviving spouse is claiming one-half of the acquisitions of the deceased spouse on the basis that they were community property, this issue is characterized for choice-of-law purposes as one of marital property. Normally, it is the surviving wife who is claiming such an interest in the estate of her deceased husband;\textsuperscript{22} although the converse case sometimes occurs.\textsuperscript{23}

\textsuperscript{21} In re Donohoe’s Estate, 128 Calif. App. 544, 17 P.(2d) 1010 (1933).
pose the husband and wife are domiciled in New Hampshire, and
the husband makes an outright transfer of movables in New York,
with intent to defeat his wife’s nonbarrable share, which under the
New Hampshire rule is sufficient to vitiate the transfer as to her
after the husband’s death, but is insufficient under the New York
rule. It is evident that if the issue in either of these cases is charac-
terized as an issue of transfer of movables, to be governed by
the law of the *situs*, the wife will be unable to claim her nonbarrable
share in this property; but if it is characterized as an issue of suc-
cession (in accordance with the characterization of the nonbarrable
share itself), the wife will prevail.

It seems clear to the writer that the issue should be characterized
as one of succession. To characterize it as an issue of transfer of
movables to be governed by the law of the *situs* will permit a hus-
band to evade the law of his domicile as to the nonbarrable share
of his wife simply by stepping across the state line. On the other
hand, there is no policy of the *situs* which requires that its law
apply. These transactions are gratuitous transfers and not com-
ercial transactions, so that it has no interest in protecting its
domiciliaries, unless it is willing to lend its aid to an evasion of the
law of a neighboring jurisdiction just to provide business for its
trust companies. Of course, if the issue were characterized as one
of succession, it would not be possible to know whether the trans-
fer were valid as to the wife until the husband died and his last
domicile was ascertained; but this difficulty is inherent in the char-
acterization of the nonbarrable share itself as an issue of succession.
Until the husband’s last domicile is ascertained, the very existence

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93 Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.(2d) 381 (1944),
held that the corpus of a trust wherein the settlor had reserved a life estate
and a power to revoke was subject to his widow’s nonbarrable share. It is
said that the “Ohio Fiduciaries Research Association” filed a brief as *amicus
curiae*, in a subsequent case, urging that the *Bolles* case be overruled and
arguing that, since the Michigan courts did not allow the widow to reach
property placed in a revocable and amendable trust, an Ohio settlor need only
go to Detroit to do what he wished, and that this would produce a “flight of
revocable trust capital” from Ohio. See Leach, Cases on Wills 35, n. 13 (2d
ed. 1947). Of course, whether or not an Ohio settlor could thus accomplish
his purpose would depend, not solely upon the local law of Michigan, but
upon what characterization of the issue the Michigan court adopted. If the
case arose in Michigan, the “Michigan Fiduciaries Research Association” could
probably be depended upon to file a brief urging that it be characterized as an
issue of transfer of movables to be governed by the law of the *situs*. 
of the nonbarrable share is uncertain. In any event, a similar uncertainty exists in a wholly domestic situation, because it is not known whether the wife will outlive the husband; and, since the trust is valid in all other respects, as a practical matter this uncertainty would not cause serious difficulty.

Surprisingly, there is practically no authority on this question. The only case expressly dealing with it that the author has found is Roberts v. Chase, a Tennessee intermediate court case. That court, without an adequate discussion of the problem, characterized the issue as one of transfer of movables to be governed by the law of the situs, stating: "The securities were at all times in Tennessee; and the rule now generally accepted is that the validity of a conveyance of chattels or negotiable securities is determined by the law of the state where they are at the time of the conveyance," and citing the Restatement and Hutchison v. Ross.

§ 5. RIGHTS OF THE SPOUSES INTER SE

If a dispute arises between the husband and wife over the right to possession of certain movables, with the husband claiming them as chattels of the wife which passed to him under the common-law and the wife claiming them as her "separate" property, this issue is characterized as an issue of marital property. Similarly, a dispute over the possession of certain property, which H claims the right to possess as community property over which he has management and control and W claims as her "separate" property, is characterized as an issue of marital property.

However, with respect to choses in action, where the rights of the debtor are involved, the characterization may well be different.


95 It could be argued that this statement was mere dictum, since the court found the conveyance to be ineffective anyway under Tennessee law.

96 262 N.Y. 381, 187 N.E. 65 (1933), motion for reargument denied, 262 N.Y. 643, 188 N.E. 102 (1933), discussed infra, § 5, this chapter.

97 Glenn v. Glenn, 47 Ala. 204 (1872); Meyer v. McCabe, 73 Mo. 236 (1880).

In *Graham v. First National Bank of Norfolk* 99 H and W were domiciled in Maryland, which had a Married Women's Property Act. W acquired shares of stock in a Virginia bank, where the common law still prevailed. The bank declared a dividend and paid W's share over to H. Upon a suit by an assignee of W, the bank interposed the defense of payment, which was upheld. The court apparently characterized the issue as one of performance of the contract represented by the shares of stock, to be governed by the law of the place of performance, or of corporation law to be governed by the law of the domicile and place of business of the corporation. That they did not adopt a *situs* rule with respect to marital-property issues nor characterize this as such an issue is apparent from their statement: "The rights of the wife after such payment, as between herself and her husband under the law of Maryland, might prove to be a very different question." 100

With respect to transactions between the spouses, a question of the capacity of the husband and wife to enter into a simple executory contract with each other is, of course, one of contract law to be decided by the choice-of-law rule governing contracts between spouses. 101 Where a transaction between the spouses relates to specific property, however, the cases are in hopeless conflict and no general rule can be stated. For example, in Massachusetts 102 and Nebraska 108 it has been held that, where one spouse owns land in a jurisdiction other than the domicile of the spouses, the capacity of the other spouse to enter into a contract during coverture relinquishing his non-barrable share in such land is a question of contract to be governed by the law of the domicile and place of making (which coincided in these cases); and if such a contract is valid by that law it will be upheld even though prohibited by the

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99 84 N.Y. 393 (1881).
100 84 N.Y. at 402 (1881).
101 Kelly v. Davis, 28 La. Ann. 773 (1876); Eaton v. Schild, 8 N.J. Misc. 245, 149 A. 637 (N.J. Dist. 1930); Hendricks v. Isaacs, 46 Hun 239 (N.Y. Sup. Ct. 1887); Markland v. Markland, 179 Misc. 442, 39 N.Y.S.(2d) 67 (Sup. Ct. 1943); Dougherty v. Snyder, 15 Serg. & R. 84 (Pa. Sup. Ct. 1826). The court, of course, might adopt a different contact for questions of capacity than for other contract issues. In all of the cases cited, the domicile of the spouses and the place of contracting coincided, so that the court did not have to choose between these contacts. Compare notes 38, 39, *supra*.
PROBLEMS OF CHARACTERIZATION

law of the situs. The Iowa court in *Caruth v. Caruth*, 104 however, characterized the issue as one of succession to be governed by the law of the situs of the immovable. Also, the New Hampshire court in *Shute v. Sargent* 105 characterized the capacity of a spouse to make such a contract with respect to movables as an issue of succession, to be governed by the law of the last domicile, and held it invalid under New Hampshire law although by the law of the domicile at the time of making and the place of making (Massachusetts) it was effective.

Distinguishable from these factual situations is that involved in the Kentucky case of *Redwine's Executor v. Redwine*. 106 There H and W were domiciled in Kentucky and H owned both moveables and immovables situated in that jurisdiction; while temporarily in Florida they entered into a contract whereby W relinquished her nonbarrable share in his estate. The court characterized the issue of the capacity of the wife to make such a contract as an issue of contract law, but applied the law of Kentucky on the ground that it was the place of performance: "The estate of Judge Redwine was here, and here it was contemplated by all parties the papers would become operative and the contract be performed. Under circumstances like these the law of the place where the contract is to be and must be performed, and not the place where it is made, controls its validity and effect." 107

In the recent Texas case of *King v. Bruce* 108 H and W were domiciled in Texas. H had $4,000 in community funds transferred to a New York bank. H and W then went to New York and drew 4,000 silver dollars out of the bank; they placed this in two containers of $2,000 each and then drew up a contract which each signed, whereby the husband "sold" his interest in the "wife's one-half" to her in return for her interest in "his one-half." It was stipulated in the contract that the transaction was not to be construed as a gift. They then redeposited the money in the New York bank, $2,000 in the name of each, and had it transferred back to Texas. The purpose of this rigmarole was an attempt to avoid federal estate

104 128 Iowa 121, 103 N.W. 103 (1905).
106 160 Ky. 282, 169 S.W. 864 (1914).
107 160 Ky. at 294, 169 S.W. at 868-69 (1914).
and gift taxes. The Texas court had held that the husband could give the wife his interest in any specific community property (a transaction which would be subject to federal gift taxes), but that neither spouse could "sell" his interest in the community property to the other, because any property acquired during coverture otherwise than by gift, devise, or descent is community property, and such a transaction would still leave each half community property. In an apparently inspired suit by a creditor of H, who attempted to levy on the $2,000 which W now claimed as her "separate" property after the return of the spouses to Texas, the Texas Supreme Court held that the law of Texas governed and that the property was still community property. The result seems to indicate, although the Texas court does not expressly say so, that it was characterizing the issue as one of marital property to be governed by the law of the domicile at the time of acquisition; and this would seem to be the correct characterization. H and W were still domiciled in Texas when she "acquired" this $2,000, and since it was not acquired by gift, devise, or descent, by the law of the domicile it was still community property.

The husband (he argued the case pro se) urged that the issue was one of contract law to be governed by the law of the place of making, and that by the law of New York such a contract was effective to make the property the "separate" property of each spouse. The Court of Civil Appeals had upheld this contention on the basis of general provisions in the New York code stating that a married woman could own property as if unmarried, could contract as a feme sole, with her husband as with others, etc. These provisions would seem to be beside the point, however; there is no prohibition in

109 See Bruce v. Permian Royalty Co. No. 2, 186 S.W.(2d) 686 (Tex. Civ. App. 1945), holding ineffective a previous agreement, made in Texas, between the same spouses involved in King v. Bruce. This rule was abrogated by Tex. Laws 1949, ch. 242 [4 Vernon's Tex. Sess. Law Serv. 450 (1949)], which provided that a husband and wife may partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other property, by written instrument, acknowledged and recorded, and approved by the court in certain cases.

Texas of contracts between the spouses—the difficulty was that the Texas court had held that community property was such that it could not be transformed into "separate" property otherwise than by gift, which didn’t suit the husband’s purpose here. If New York law were considered applicable, the question would be whether or not, under that law, community property could be transformed into "separate" property of one of the spouses otherwise than by gift. Obviously, there is unlikely to be any law on this question in New York because it does not have community property.

The same characterization of this issue is supported by the case of Black v. Commissioner. In that case H and W were domiciled in Washington, and H inherited land in that state from his father. Thereafter, they moved their domicile to Oregon and, after the removal, entered into a contract purporting to convert all property then owned by them into community property. This agreement was held to be effective as to the land in Washington for federal income-tax purposes, applying the law of the situs.

An even more difficult problem concerns the characterization of the rule in some civil-law jurisdictions which prohibits any change in the property relations of husband and wife during coverture and makes voidable an attempted gift from one spouse to the other. In the famous New York case of Hutchison v. Ross this issue was characterized as one concerning the transfer of movables, to be governed by the law of the situs of the movables at the time of the attempted transfer. In that case H and W were domiciled in Quebec and had entered into an antenuptial contract whereby H agreed to transfer $125,000 in trust for her. After marriage, they executed a purported contract in Montreal whereby W renounced her right to this $125,000 trust (which had not yet been set up) in return for H’s agreement to establish a $1,000,000 trust fund for her. Pursuant to this agreement, H transferred securities physically in New York City to a New York trustee. Thereafter, H’s trustee in bankruptcy sought to have the trust declared invalid under the

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law of Quebec. The New York Court of Appeals held that New York law applied. Directly contrary to this ruling is that of the Louisiana court in *McVey v. Holden*. In that case *H* and *W* were married in Louisiana and *H* acquired certain slaves there after marriage, which were therefore community property. They changed their domicile to Mississippi and while in that state *H* transferred certain of these slaves to a trustee for the sole and separate use of *W*. They again changed their domicile to Louisiana, and *W* sued *H* for a recovery of the slaves as her separate property. The Louisiana court denied her recovery on the ground that the Louisiana law prohibited any change in the rights of the spouses after marriage and made donations by one to the other always revocable. This case impliedly characterizes this rule as a rule of marital property, since the *situs* of the movables, the domicile of the spouses, and the place of contracting were all in Mississippi at the time of the attempted transfer, and Louisiana was merely the domicile at the time of acquisition of the property.

It seems to the author that both of these decisions are difficult to justify. The prohibition is against any contract between husband and wife which affects their property relations during marriage and is not related to specific property; therefore, it should not obtain after a change of domicile to a jurisdiction which has a contrary rule. On the other hand, to characterize the rule as one of transfer of movables permits the spouses to evade the law of their domicile simply by moving their property to another jurisdiction. Of course, if the rights of third parties intervene, then undoubtedly the court at the *situs* should apply its own law to protect its own domiciliaries; but in *Hutchison v. Ross* the creditors of the husband were urging the application of the law of the domicile and it was the wife who was relying on the law of the *situs*. Of course, the wife was greatly benefited by the transaction in that particular case, and it would probably be dangerous to rely upon it too strongly in a similar situation where the wife was attempting, as against the husband, to rescind such a transaction as being detrimental to her interests. As far as this aspect of the case is concerned, the decision possibly might be limited to its precise facts. As intimated in these comments, it seems to the author that on the basis of policy, barring the intervention of the rights of third parties, this rule should be char-


§ 6. INCOME FROM PROPERTY

The problem of characterization in connection with income from property owned by the spouses is whether the character of such income is to be determined as an incident or characteristic of the principal which produces it, or is to be treated as an independent acquisition of property. For example, suppose $H$ and $W$ are domiciled in Texas and $H$ inherits an immovable in California. The immovable is his "separate" property under the law of California (as it is also under the law of Texas). He receives rent from this property. By the law of California, income from "separate" property is itself "separate"; by the law of Texas, income from "separate" property is community property. Is the question whether the rent is the "separate" property of $H$ or the community property of $H$ and $W$ to be treated as a question of the characteristics of the immovable in California, and governed by the law of the situs; or is it to be treated as an acquisition of movables (the rent), and governed by the law of the domicile? In Commissioner v. Skaggs the Fifth Circuit Court of Appeals, one judge dissenting, held that it was the former and was governed by the law of the situs.

The Tax Court in the case of W. D. Johnson applied the same rule to a case where $H$ and $W$ were domiciled in a common-law jurisdiction and $H$ purchased an immovable in Texas, holding that the income therefrom was community property. This seems to be carrying the rule too far, even if the characterization is conceded to be correct. The immovable in Texas is the "separate" property of $H$, not because acquired before marriage, or by gift, devise, or descent, under the Texas law, but because it takes its character from the fund used to purchase it, which was the statutory "separate" property of the husband in the common-law state. It would seem that this doctrine of "tracing" could be carried one step further, and that it should be said that this immovable does not

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115 122 F.(2d) 721 (C.C.A. 5th, 1941), cert. denied, 315 U.S. 811 (1942).
116 Accord, Estate of Hale, 2 CoF. 191 (San Francisco Super. Ct. 1906).
117 1 T.C. 1041 (1943), app. dis'm., 139 F.(2d) 491 (C.C.A. 8th, 1943).
have the characteristic that income produced by it is community property, since it is not civil-law "separate" property.

The Louisiana case of *Succession of Packwood* characterized this issue as one of acquisition of movables and applied the law of the domicile, although with very little discussion of the problem. However, it is possible that this decision was overruled *sub silentio* by *Succession of Robinson*. There seems to be no strong policy argument in favor of either of these characterizations over the other; it will probably make little difference which rule a court adopts, although of course it does have to choose one or the other.

The same problem does not normally arise in connection with income from movables. Since the marital-property characteristics of movables are governed by the law of the domicile, it makes no difference whether the income from such movables is treated as a new acquisition of movables or as a question of the characteristics of the corpus, unless there has been a change of domicile in the meantime. For example, in *Commissioner v. Porter* *H* and *W* were domiciled in Texas and the father of *W* established a trust for her in New York. Her interest in the trust was of course her "separate" property since it was acquired by gift, but it was held that the income was community property. The main argument in the case was that, since the trust was a spendthrift trust, each payment of income to *W* was an independent gift to her and thus her "separate" property; but the court declined to so hold, on the ground that she had an interest in the corpus which was her "separate" property (even though inalienable) and that this was the principal fund which was producing the income. Presumably, the same would not be true of a discretionary trust.

*9 Rob. 438 (La. 1845).*

*23 La. Ann. 174 (1871).* In that case *H* owned an immovable in a foreign jurisdiction as "separate" property; after the death of *W*, the children demanded that certain income from the immovable be included in the community estate being administered. The court denied this petition. However, it is not clear from the opinion of the court whether the income accrued before or after the death of the wife. If it did not accrue until after the wife's death, of course, it would not be community property on any theory, since it was acquired after the termination of coverture.

*148 F. (2d) 566 (C.C.A. 5th, 1945).*

*In Estate of Ernest Hinds, 11 T.C. 314 (1948),* the Tax Court applied the rule of the *Porter* case to a situation where the husband himself transferred movables in trust for his wife in New York, while they were domiciled in Texas. Three judges dissented on the ground that the husband had manifested
Problems of characterization do not frequently arise in this field in connection with the acquisition of property. Marital-property questions involve an asserted interest by one spouse in the acquisitions of the other, and of course property has to be acquired for these questions to arise; but questions concerning the acquisition itself are, in the usual case, clearly not marital-property issues. However, occasionally the putative marital-property characteristics which will attach to the property, once acquired, will affect the acquisition. The problems which have given the courts the most difficulty in this area have grown out of the tortious injury of one of the spouses in a jurisdiction other than their domicile. The questions dealt with in the cases will be considered under the following categories: capacity of one spouse to sue the other for a tort; release of a cause of action against a third person; necessary parties to an action for tortious injury to one spouse; and the question whether negligence of one spouse will be imputed to the other.

The courts have normally characterized the question of the capacity of one spouse to sue the other for a tort committed during coverture as an issue of tort, governed by the *lex loci delicti.* A somewhat closer question concerns the extinguishment of a delictual cause of action acquired by one spouse against the other before marriage. For example, in *Coster v. Coster* the *H* and *W* were domiciled in New York and *W* was injured by the negligence of *H* in Massachusetts. *W* instituted suit in New York against *H*, and

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121 This is true where the spouses are domiciled in a jurisdiction forbidding such suit, and the injury occurs in a jurisdiction permitting it. Lumbermans Mutual Casualty Co. v. Blake, 94 N.H. 141, 47 A.(2d) 874 (1946); Forbes v. Forbes, 226 Wis. 477, 277 N.W. 112 (1938). Contra, where suit is brought at the domicile, on the ground of "public policy": Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); and cf. Mertz v. Mertz, 271 N.Y. 466, 3 N.E.(2d) 597 (1936).


123 289 N.Y. 438, 46 N.E.(2d) 509 (1943).
they were thereafter married to each other. By the law of Massa-
chusetts such a cause of action would be extinguished by the mar-
riage; by the law of New York it would not be. The New York
Court of Appeals held that the issue was one of tort to be gov-
erned by the law of Massachusetts and gave judgment for H. It
might be argued that this issue was one of marital property, to be
governed by the law of the domicile of the spouses at the time of
the marriage. Such a cause of action in favor of the wife against
the husband was extinguished by marriage of the parties to each
other for two reasons at common law: first, because the chose in
action became the husband’s upon marriage and he could not sue
himself; and, second, because the “unity” of the spouses prevented
a suit by one against the other. Since, in states where this rule
still prevails, other property belonging to the wife at marriage re-
mains hers and no longer passes to the husband, it is apparent
that the second basis is the one underlying the rule today. Hence,
a characterization of the rule as one of marital property would be
erroneous. An effective argument could be made that the issue
should be characterized as one of status or capacity, to be governed
by the law of the domicile at the time of the suit, but this argu-
ment has been rejected by most courts in the cases involving torts
committed during coverture, and there is probably no more rea-
son to adopt it as to antenuptial torts.

A question as to the power of one spouse to release a cause of
action for tortious injury to himself or the other spouse would
seem to be simply a question of the ownership of the cause of
action and, therefore, in appropriate cases, one of marital property.
This statement is contradicted, however, by the case of 

Snashall v. Metropolitan R.R. Co. There H and W were domiciled in Wis-
consin; W was injured by the negligence of defendant railroad in
the District of Columbia and executed a release of her claim. Wis-
consin had a Married Women’s Property Act which gave such a
chose in action to a wife as her “separate” property; in D.C. it
would still vest in the husband under the common law. When sued
by H, the railroad set up the release by W as a defense. The court
characterized the issue as one of tort to be governed by the lex loci

124 Supra, note 121.
125 19 D.C. (8 Mackey) 399 (1890).
delicti and gave judgment for the plaintiff. This action was based on the belief of the court that “a right of action for a personal injury has never been considered property within the meaning of private international law . . . certainly not as property in the sense employed in speaking of movables.” 126 Since this reasoning seems erroneous under modern decisions, the case should no longer be considered as an authority. The California Court of Appeals reached the opposite conclusion to the Nashall case in Justis v. Atchison, T. & S.F. Ry. Co., 127 characterizing the issue as one of marital property.

Under the law of most of the community-property states a cause of action for tortious injury to the wife during coverture is community property and the husband is a necessary party to any action against the tortfeasor, because he has the “management and control” of community property. 128 Should this rule requiring the husband to be a party plaintiff be characterized as one of substance or procedure, and, if a question of “substance,” is it one of marital property or tort? In Texas and Pacific Ry. Co. v. Humble 129 H and W were domiciled in Louisiana, and W was injured by the defendant in Arkansas. W alone brought an action in the Arkansas court, which was removed by the defendant to the federal court. The United States Supreme Court, on appeal, overruled the objection by the defendant that the suit could not be maintained because the husband was not a party plaintiff. The case has been cited to support a situs rule with respect to issues of marital property, 130 but it is clear that the court could not decide anything in this suit concerning the possible interest of the husband in the recovery. And it is not at all clear that they thought they were deciding such a question. The court said: “. . . whether the objection be that under the laws of Louisiana she could not recover in her own name at all, or could not, except her husband was a co-plaintiff, because the damages claimed were community property,

126 19 D.C. (8 Mackey) at 409–10 (1890). The italics are the Court’s.
128 McKay, Community Property Ch. 22 (2d ed. 1925); 1 De Funiak, Community Property § 82 (1943). Contra: Frederickson & Watson Construction Co. v. Boyd, 60 Nev. 117, 102 P.(2d) 627 (1940).
129 181 U.S. 57 (1901).
130 In Traglio v. Harris, 104 F.(2d) 439 (C.C.A. 9th, 1939), cert. dis’m., 308 U.S. 629 (1939), discussed infra, pp. 175–76.
we agree . . . that the plaintiff's rights in suing in Arkansas for an injury sustained there did not differ from those of any married woman domiciled in that State; . . . these laws [of Arkansas permitting a married woman to sue for such injuries] necessarily inured to the benefit of every married woman who subsequently sued in the courts of the state for personal injuries there sustained. . . .”

It would seem that the simplest explanation of this case is that the court was characterizing the issue as one of procedure to be governed by the law of the forum. That the requirement that the husband be a party is not a necessary concomitant of the community character of the recovery is shown by the California statute permitting the wife to sue alone for her personal injuries, although retaining the community character of the proceeds of the action.

The decision in Williams v. Pope Mfg. Co. seems at first glance to be contra to the Humble case, but the two cases are probably distinguishable. In the Williams case, H and W were domiciled in Mississippi. The defendant committed a tort against W in Louisiana and she sued alone in that state. The defendant demurred on the ground that damages for a civil wrong were community property under the law of Louisiana and recoverable by the husband alone. This demurrer was overruled by the Louisiana Supreme Court. In an extraordinarily confused opinion, the court said: (1) that a cause of action in tort is not "property acquired in this State" by a nonresident married person within the meaning of Art. 2400 of the Louisiana Civil Code, which adopts for nonresidents a situs rule as to marital property; (2) therefore, the marital-property characteristics of the property are governed by the law of the domicile, Mississippi, and the cause of action is W's "separate" property; (3) hence, she can maintain an action thereon in her own name in Louisiana. This decision is not necessarily inconsistent with a characterization of the issue as one of procedure. Assuming that it is so characterized, the question still remains
whether the procedural rule of the forum was intended to apply to this case. The Louisiana court might well decide that its rule requiring joinder of the husband was not intended to apply to a case where he would have no community interest in the recovery; on the other hand, the Arkansas court in the Humble case might well decide that its rule was intended to apply to all suits for personal injuries by a wife in the Arkansas courts, regardless of any marital-property interest of her husband in the proceeds of the action. This suggested distinction possibly is supported by the case of Matney v. Blue Ribbon, Inc., discussed below.

The final difficulty which has plagued the courts in this area is the question of imputed negligence. As we have noted, in most of the community-property states a cause of action for personal injury to the wife is community property, and for that reason contributory negligence of the husband will be imputed to the wife to bar recovery by her. Suppose $H$ and $W$ are domiciled in California, where both of these rules obtain, and $W$ is injured in an automobile accident in Oregon. The accident is caused by the negligence of the defendant, a third party, but $H$ is contributorily negligent. Will the negligence of $H$ be imputed to $W$ in a suit by her in the Oregon court? In Traglio v. Harris the Ninth Circuit Court of Appeals held that it would not.

Actually there are two different questions involved in this issue, which should be characterized differently. First, there is the question of what interest, if any, the husband will have in a possible recovery by the wife; this seems clearly to be an issue of marital property to be determined by the law of the domicile. Second, there is the question whether such interest will cause the negligence of the husband to be imputed to the wife; this is as clearly a tort question to be governed by the lex loci delicti. In this case the Oregon court should decide under its own law whether the fact, that any recovery by the wife will be community property in the domicile, should impute the husband’s negligence to her. Since the forum is in a common-law state, it probably has no rule on this question and will have to construct one. But it does have analogies to rely on: Under the decisions of such common-law state it was probably true that, when the wife’s chattels formerly passed to the

185 202 La. 505, 12 So.(2d) 253 (1942).
186 104 F.(2d) 439 (C.C.A. 9th, 1939), cert. dis'm., 308 U.S. 629 (1939).
husband, his negligence was imputed to her because the recovery would be his in toto; on the other hand, it is probably true at the present time that his nonbarrable interest (if any) in such recovery would not have the same effect. The court in the common-law state should decide whether the community interest of the husband should be treated in the one way or the other, aided of course by the decisions of this question in the community-property states, in the same way that foreign precedents are used in any decision of local law. Under this analysis, it would seem that the husband’s negligence should be imputed to the wife, and this is substantially the approach adopted by Judge Stephens in his excellent dissenting opinion.

The majority of the court in Traglio v. Harris seems to waver between two theories: first, that this question in its entirety should be characterized as an issue of tort to be governed by the *lex loci delicti*, which seems clearly wrong; and, second, that an issue of marital property, as to claims for personal injuries, should be governed by the law of the place of injury, which is unrealistic. If W is permitted to recover, she and H undoubtedly will take the recovery and return to their domicile, California. It is unlikely that the Oregon court will ever have the power to decide any question of marital property with respect to this fund; in all probability, such issues will be decided by the California courts, and there is no indication that they will apply anything other than the general rule that the law of the domicile governs issues of marital property. Certainly the decision in Traglio v. Harris would not be *res judicata* as to the marital-property characteristics of this fund in any dispute in the California court between H and their children after the death of W, or between W and the children after the death of H. Therefore, the court is simply closing its eyes to reality when it says that H’s negligence will not be imputed to W because the cause of action is her “separate” property in which he has no interest. The case of Traglio v. Harris, although followed by Clyde v. Dyess 137 in the Tenth Circuit, has been questioned by the same court which decided it in Jones v. Weaver.138

138 123 F.(2d) 403, at 405–06 (C.C.A. 9th, 1941): “It is true that in Traglio v. Harris this Court, one member dissenting, rejected the argument that the ownership of the cause of action should be determined by the law of the domicile of the plaintiff instead of by the law of the place of the tort.
The only state court case that the author has discovered which touches on this question is *Matney v. Blue Ribbon, Inc.*, decided by the Louisiana Supreme Court. Between the time of *Williams v. Pope Mfg. Co.*, discussed above, and the date of the *Matney* case, the Louisiana Legislature passed a statute making a recovery for personal injury to the wife her “separate” property and permitting her to sue therefor in her own name. In the *Matney* case *H* and *W* were domiciled in Texas, which still adhered to the rule that such damages were community property, and *W* was injured by the negligence of *H* in Louisiana, while he was engaged in his employer’s business. She sued his employer in the Louisiana court, and the defendant demurred on the ground that, under the law of Texas, “an action for damages for the personal injuries received by a married woman was community property and could be asserted by her husband only.” This demurrer was overruled by the Louisiana Supreme Court.

It is apparent that the only point technically in issue in the *Matney* case was the question of the proper parties plaintiff, and this seems to be the basis of the decision by the Louisiana court, at least in part of the opinion. The court said: “The right given by Articles 2334 and 2402 of the Civil Code to a married woman to claim damages for her personal injuries as her separate property and in her own name is both substantive and remedial. The declaration of the law that the right of action is her personal property is substantive, and the provision that it is recoverable by her ‘alone’

And it may be that a logical conclusion to be drawn from the *Traglio* case would lead to a decision for the defendant herein. However, the United States Supreme Court has spoken upon the subject since this Court’s decision in *Traglio v. Harris*, in the case of *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.* [holding that the federal courts must follow the choice-of-law rules of the state wherein they are sitting], . . . and the latter case prevents any such construction of *Traglio v. Harris*. . . .” Thus, the court impliedly recognizes that their decision was *contra* to the general choice-of-law rule as to marital-property issues prevailing in the states.

140 Supra, note 133.
is remedial. Therefore, should it be suggested that the substantive right given is governed by the domicile of the party claiming it, it suffices to answer that the remedial right is cognizable under the law of the forum. It is clearly settled that, where remedial rights are involved, the case must be governed by the law of the place where the remedy is sought." 143 Of course, this decision is contrary to that in the Williams case, but this result could easily be justified on the ground that the procedural rule of the forum had been changed, and that the present statute was intended to apply to all actions by married women in the Louisiana courts whereas the former one was not. Actually, the court purports not to overrule the Williams case, and apparently adopts the rule that if the plaintiff is the proper party under either the law of the forum or that of the domicile the suit will be maintainable in Louisiana. 144

Of course, the court is correct that the only issue involved in the Matney case on the state of the record was the procedural one of the proper parties plaintiff. But the husband did not fail to join in the suit because he was unavailable, as was the case in the Williams and Humble cases; it is obvious that he did not join because he thought that there could be no recovery if he did, since the action was based on his own negligence. The question whether the husband’s negligence should be imputed to the wife in this situation was the real issue in the case, and it seems that the court should have disposed of it, since all the facts raising that issue appeared in the plaintiff’s petition. And in other parts of the opinion the court appears to be considering this question and ruling that the cause of action is the wife’s “separate” property under the law of Louisiana (and therefore would not be barred by the husband’s negligence). 145 The court could easily have reached this result, if

143 202 La. at 518, 12 So.(2d) at 258 (1942).
144 “The question in Williams v. Polk Manufacturing Co. presents the reverse of the situation here. . . . The court did not say that, if her husband had brought the suit to recover for the plaintiff’s injuries, his right to proceed under Louisiana law would have been denied because whatever judgment he might obtain would belong to his wife under Mississippi law. . . . If plaintiff’s husband had brought suit here to recover for the personal injuries, as head and master of the community existing between the parties in Texas, the decision in the Williams case would be applicable.” 202 La. at 517-18, 12 So.(2d) at 257 (1942).
145 “Viewing the right of action solely as a substantive right granted by the law of Texas, counsel for defendants insist that it is exclusively vested in plaintiff’s husband. And they say that it is well established under our law
it desired, by overruling the dubious holding of the Williams case that such a chose in action is not “property acquired in this state” within the meaning of Art. 2400 of the Louisiana Code; but this the court expressly refused to do. The result is that it is nearly impossible to tell from reading the opinion upon what ground the court decided the case. The holding is simply that such a complaint by the wife is not subject to a special demurrer on the ground of lack of proper parties plaintiff.

The available authority upon this question is therefore wholly inconclusive. The only rule which is consistent with all of the cases discussed is that the married-woman plaintiff will be permitted to recover against the thirty-party tort feasor, and that law will be applied which gives this result; and perhaps the courts have been strongly influenced by a desire to protect married women. But it seems rather doubtful whether such an attitude is justifiable under modern conditions. Married women have demanded, on the whole successfully, an equality of legal rights, and it seems inconsistent still to accord them special protection and favor. It is submitted that a court presented with the problem would do well to adopt the cogent reasoning of Judge Stephens’ dissenting opinion in the Traglio case. Whether or not it would reach the same result that he did in that case would, of course, depend on its decision of the issue of imputed negligence (as distinguished from the issue of marital property) under the law of the place of injury.

that community-property rights in Louisiana are confined to married women domiciled in this State. The answer to this contention is that counsel overlook the fact that the plaintiff is not asserting a community-property right in this action because, under Louisiana law, the action for damages is her own personal property. Moreover, we do not find any limitation in the Civil Code declaring that the grant to married women of the right of action shall apply exclusively to women domiciled in Louisiana. In cases of tort, the law of the place where the wrong was committed is paramount. The law of the domicile will not ordinarily be recognized in such matters.” 202 La. at 519, 12 So.2d at 258 (1942) [Italics added].

But compare the proposed Constitutional Amendment [Senate Joint Res. 25, 81st Cong., 2d Sess.], passed by the Senate on January 25th, 1950, guaranteeing to women equal “rights,” but preserving all their special privileges. 96 Cong. Rec. 891–903 (Jan. 25, 1950). Perhaps the Senate is also considering implementing the suggestion of Professor Bishop, made after the passage of the Massachusetts Married Women’s Property Act, that “It remains only to add a provision compelling every young man to marry instantly the girl who chooses him, and the end of domestic woe will have to come in Massachusetts.” 2 Bishop, Law of Married Women 525–26 (1875).
CHAPTER V

Problems of Selection

When a court is presented with a multi-state transaction, involving the property of married persons, the first step which it must take is to categorize the issue presented as one of marital property, or succession, or contract, or something else. This stage of the decision has been discussed above. Assuming that it has characterized the issue of one of “marital property,” it must then select, from among the two or more states with which the case has some factual connection, that state whose law is to be used to resolve the issue. For example, suppose H and W are domiciled in state A at a time when H acquires movable property in state B; these moveables are taken to their domicile, state A. Thereafter, they change their domicile to state C and carry the moveables with them. Subsequently, an issue concerning these moveables arises in a lawsuit in state D, which the court of that state characterizes as an issue of marital property. The court must then select one of these four states as the one whose law will govern.

This process of selection obviously is not done in a haphazard or ad hoc fashion for each individual case. If that were so, there would of course be no conflicts rules but only a welter of unique decisions. It is done by applying or formulating a rule of choice-of-law which

1 Chap. IV, supra.
indicates, in a generalized manner, the state to furnish the governing rule. For example, the court may say, "The law of state A governs because it was the domicile of the husband and wife at the time of acquisition of this property." Or, "The law of state B governs because it was the situs of the property at the time it was acquired." Or, "The law of state C governs because it was the domicile of the husband and wife at the time the issue arose." It is apparent that the court is here formulating or applying a choice-of-law rule which selects a particular state by virtue of the relationship which that jurisdiction sustains to the factual situation.

One element of the choice-of-law rule, called the connecting factor or point of contact, e.g., "domicile," or "situs," expresses this relationship and is the indicator of the state to be selected. But something more is needed to construct such a rule than merely the connecting factor; a decision must also be made as to what portion of the facts must sustain the relationship specified. For example, we may say that "domicile" is to be the connecting factor. It is clear that those parts of the facts involving the physical location of things have been ignored, since domicile is a word which is used to refer to a person, not to a thing; but the questions still remain: Domicile of whom? Domiciled when? A complete choice-of-law rule, for example, might direct the court to apply the law of that state which was the "domicile of the husband and wife at the time of the acquisition of the property." Or, to state it as a rule, an issue of marital property is governed by the law of the domicile of the husband and wife at the time of acquisition.

In the field of marital property the principal connecting factors to be considered in formulating a choice-of-law rule concern the domicile of the parties and the location of the property involved. The actual intention of the parties as to the governing law is of little significance for the reason that in the great majority of cases no intention can be discovered. If the spouses do have an actual intention as to what law should govern their marital property rights, it is normally expressed in an antenuptial contract and, of course, should then be given effect unless the result would violate some strong public policy of the forum. The only problem normally arising in that case, which is discussed in the final section of this chapter, is the question whether such an agreement should still be controlling after a change of domicile by the spouses. In the
typical case, however, no intention of the spouses as to choice-of-law
has been expressed, and the court must select the governing law on
the basis of the relationship of the spouses and their property to the
various jurisdictions concerned.

This chapter is concerned with an analysis of the precedents in
the United States to discover the choice-of-law rules which have
been adopted for various problems in the marital-property field.
The decisions are discussed under four headings: those concerning
property owned by the spouses at the time of the marriage; those
concerning property acquired by the spouses after marriage, in a
state other than their domicile; those concerning property acquired
by the spouses before a change of domicile, where the issue arises
after such change; and, finally, those concerning property acquired
after a change of domicile, either in the new domicile or elsewhere.
Extended criticism of the decisions on policy grounds is not at­
tempted here, since the basic policies in this field have already been
examined above.²

§ 1. PROPERTY OWNED AT MARRIAGE

Under the common law, all chattels owned by the wife at mar­
riage passed to the husband in absolute ownership by virtue of his
marital right. In the nineteenth century a fairly substantial body
of cases were decided in this country concerning the proper choice­
of-law rule to govern such a claim of ownership by the husband.
The last case which was thought to involve this problem was Locke
v. McPherson ³ decided in 1901. The reason that there have been
no cases since that date is simply that in none of the United States
at the present time does either spouse acquire a marital-property
interest in the property of the other owned at the time of marriage,
whether movable or immovable. In the eight community-property
states, such property owned at marriage by either spouse remains his
“separate” property and no marital-property interest is acquired by
the other spouse. In most of the common-law states a spouse does
acquire a “nonbarrable interest” in the property (usually both
movable and immovable) of the other spouse owned at the time
of the marriage; however, this interest is not characterized as a

² Chap. III, § 2, supra.
³ 163 Mo. 493, 63 S.W. 726 (1901).
"marital-property interest" for choice-of-law purposes.⁴ Therefore, in no state does one spouse acquire an interest in the property owned by the other at marriage, which is characterized as a "marital-property interest" for conflicts purposes.

It is obvious in view of this situation that the problems to be considered under this heading are nearly obsolete, although the Restatement devotes to them two sections out of a total of seven concerned with marital property.⁵ It is still worthwhile to consider these problems briefly, for two reasons: first, for the light they may shed on other problems by way of analogy; and, second, because the problems may still arise (although infrequently) when the case has a contact with some foreign country whose law gives rights to a spouse in property owned at the marriage. For example, in Harral v. Harral ⁶ H and W were married in France while both were domiciled there; at that time, H (an American citizen) owned movables which were situated in New Jersey. By the law of France, a marriage without special contract established a universal community of movables, under which all movable property owned at the time of the marriage by either spouse, as well as that acquired thereafter, became community property. The wife was held to be entitled to a community interest in the movables in New Jersey, under this law, after the death of the husband. Such a problem may still arise today if the case has a contact with a foreign country where such community of movables obtains, as distinguished from the Spanish community of acquisitions which was the prototype for the community-property laws in the American Southwest.

(A. Immovables. The Restatement asserts that "The effect of marriage upon interests in land owned by a spouse at the time of marriage is determined by the law of the state where the land is." ⁷ This statement is in accord with numerous textbook statements and dicta in the opinions of the courts,⁸ but it is difficult to find a decision squarely so holding. Presumably, the freehold estate which the husband formerly acquired at common law in the lands of his wife upon marriage would have been characterized as a

⁴ See Chap. IV, § 1, C. D, supra.
⁵ RESTATEMENT, CONFLICT OF LAWS §§ 237, 289 (1934).
⁶ 39 N.J. Eq. 279 (Ct. Err. & App. 1884).
⁷ RESTATEMENT, CONFLICT OF LAWS § 237 (1934).
marital-property interest, and a claim to such interest would have been governed by the law of the *situs* of the land under this rule.\(^9\) A claim to a nonbarrable share by one spouse in the land of the other after his death is held to be governed by the law of the *situs*, but such a nonbarrable share in both movables and immovables is characterized as an issue of succession rather than of marital property.\(^10\) In the community-property states no marital-property interest is acquired by either spouse in land owned by the other at the time of the marriage.

(B. Movables. It is clear under the American authorities that the law of the domicile of the spouses, and not that of the *situs* of the property, governs with respect to marital-property interests in movables owned by either spouse at the time of the marriage.\(^11\) This rule causes no difficulty in the case where the domiciles of husband and wife are the same at the time of the marriage and continue unchanged thereafter. However, where the domiciles of the husband and wife are different at the time of the marriage, a further choice must be made between these two. It is generally asserted that in such a case the law of the husband’s domicile will govern, based on the common-law view that the wife instantly acquires her husband’s domicile upon marriage, and this position is supported by almost all of the cases.\(^12\)

It should be noted, however, that all of these cases were decided in the nineteenth century when the position of women was greatly different from what it is today. In fact, the latest case found on this question, *Locke v. McPherson*,\(^18\) decided in 1901, refused to apply the law of the husband’s domicile. In that case, \(W\) was domiciled in Missouri and owned movables situated there. \(H\) was domiciled in New York, and he and \(W\) were married in St. Louis. \(W\) died within a few weeks after the marriage, and \(H\) claimed the movables in Missouri by virtue of his common-law right under the law of New York. The court applied the law of Missouri and awarded the property to the brothers and sisters of \(W\). This decision might stand

\(^9\) Richardson v. De Giverville, 107 Mo. 422, 17 S.W. 974 (1891).
\(^10\) Supra, Chap. IV, at n. 24.
\(^12\) Cases cited infra, notes 16–20.
\(^18\) 163 Mo. 493, 63 S.W. 726 (1901).
for either of two propositions: that the law of the wife’s domicile governed, or that the law of the situs governed; and support for both can be found in the opinion. However, it may be seriously doubted that the court would have reached the same result if both H and W had been domiciled in New York and the only contact with Missouri had been the situs of the movables.

This case suggests a rule which would be more in accord with modern views as to the separate legal personality of women, namely, that a claim by the husband of a marital-property interest in movables owned by the wife at marriage should be governed by the law of her domicile; and, conversely, a claim by the wife of a marital-property interest in movables owned by the husband at marriage should be governed by the law of his domicile. For example, suppose W, domiciled in New York and owning movables situated there, married H, domiciled in France, without an express ante-nuptial contract. H sues for possession of W’s property on the ground that it fell into the community of movables established by the French Civil Code in the absence of express stipulation to the contrary. It seems extremely doubtful whether the New York court would permit him to recover;14 despite the existence of these ancient authorities supporting his position.

A further possibility to be considered in connection with movables owned at marriage, whether the domiciles of husband and wife are the same or different, is the famous “intended-domicile” rule advocated by Justice Story. This rule is that, if the parties intend to establish a new domicile and do so within a “reasonable time” after marriage, the law of this “intended domicile” will govern marital-property interests in movables owned by the spouses at marriage, even though it be a different jurisdiction than the domicile of either at the time of the marriage. In Story’s own words: “... the law of the place, where at the time of marriage the parties intend to fix their domicil, is to govern all rights resulting from the marriage. ... But, suppose a man, domiciled in Massachusetts, should marry a lady, domiciled in Louisiana, what is then to be deemed the matrimonial domicil? Foreign jurists would answer, that it is the domicil 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 domicil would be in New York.”

The majority of American cases have followed Story in giving lip service to this rule; however, in every such case the statement of the rule may be considered *dictum*. In a number of cases, H, domiciled in state A, married W, domiciled in state B; the parties immediately established their domicile in state A after marriage, pursuant to a previous intention. The cases uniformly hold that the law of state A governs marital-property interests in movables owned at marriage. Obviously, this result can be justified on the ground that A was the husband’s domicile, which is admitted to control in the absence of any evidence of an intention to establish a different domicile, even by the advocates of this theory. Actually, nine of these cases explained the holding on the ground that state A was the intended domicile; three on that ground, or, in the alternative, that it was the husband’s domicile; and two solely on the ground that it was the husband’s domicile.

A more crucial case to test this theory is the one where H and W are both domiciled in state A at the time of the marriage, but intend to move their domicile to state B and do so within a reasonable time thereafter. According to the intended-domicile theory, the law of state B should govern. The two cases which involved this situation, both rather unsatisfactory as authority, nevertheless refused to apply the law of state B. In *Le Breton v. Nouchet* W was a minor and she and H were both domiciled in Louisiana. They ran away to get married and stayed in Mississippi for a few weeks. The court said that it did not believe the evidence presented by H that

15 *Story, Conflict of Laws* §§ 193, 194 (3d. ed. 1846).
17 Mason v. Fuller, 56 Conn. 160 (1869); Ford’s Curator v. Ford, 2 Mart. (n.s.) 574 (La. 1824); Kneeland v. Ensley, Meigs 620 (Tenn. 1838).
19 3 Mart. (o.s.) 60 (La. 1813).
the parties intended to make their domicile in Mississippi at the
time of the marriage; but it held, in the alternative, that, even
accepting this evidence, the law of Louisiana would govern. The
court put this holding on the basis that the “incapacity” of W
(being a minor) to “give away” her movables under the law of
Louisiana “followed” her into Mississippi; but the court did not
question the validity of the marriage. This is merely another way
of saying that the law of the intended domicile does not govern,
at least in this case. Thus the first case in the United States to talk
about the intended-domicile theory, and one of two upon which
Story relied, refused to apply it.

The second case in which this factual pattern existed was McIn-
tyre v. Chappell.20 There H and W were domiciled in Tennessee
and married there, with the intention of removing to Texas, which
they did within a reasonable time. The Texas Supreme Court ex-
amined the intended-domicile theory and squarely rejected it,
holding that the law of Tennessee governed. However, there was
no conflict between the substantive law of Texas and that of Ten-
nessee on the point in issue, and it therefore made no difference
which law was applied. Hence, the statements might be considered
dicta; and McIntyre v. Chappell was questioned in the subsequent
Texas case of State v. Barrow,21 which argued in dictum for the
intended-domicile theory.

The intended-domicile theory is obviously unsatisfactory on a
number of grounds and has been subjected to repeated criticism.22
What was the original reason for the formulation of this theory? The
great majority of American cases simply take it from Story’s treatise
without question; and Story in turn adopted it from the French
jurists without reexamining the policy arguments for and against
it. What led the French jurists to formulate the doctrine originally?
It is believed that the answer lies in another doctrine adopted by
them and the law of France (and generally on the Continent),
which has been called by Rabel the “immutability” theory. This

20 4 Tex. 187 (1849).
21 14 Tex. 179 (1855).
22 See Harding, *Matrimonial Domicile and Marital Rights in Movables*,
30 Mich. L. Rev. 859 (1932); Goodrich, *Matrimonial Domicile*, 27 Yale
L. J. 49 (1917); Lefler, *Community Property and the Conflict of Laws*, 21
Calif. L. Rev. 221 (1933); Stumberg, *Marital Property and the Conflict of
Laws* 11, Tex. L. Rev. 53 (1932).
doctrine holds that, where there is a change of domicile after marriage, the matrimonial-property law of the first domicile still governs the rights of the parties married thereunder, even after their removal to another jurisdiction. This doctrine was usually justified on the basis of a “tacit contract” between husband and wife. Obviously, where the removal occurred within a few days or weeks after marriage, and pursuant to an intention entertained by the parties at the time of the marriage, it would be carrying this doctrine to absurd lengths to hold that the marital-property rights of the parties should forever after be governed by the law of the first domicile. Furthermore, where there is an intention to effect a change of domicile at the time of the marriage, the theory of “tacit contract” loses whatever slight plausibility it may have originally possessed as an excuse for applying the law of the first domicile. Therefore, an exception was made to the rule in this situation.

It is apparent that Cheshire, who still advocates the intended-domicile theory, is making the same assumption as to the normal rule with respect to a change of domicile. He says: “A man, domiciled in England, who has decided to settle on a farm that he has bought in the Transvaal, marries in London a woman domiciled in South Africa, and on the day of the wedding sails with his wife for Cape Town. It seems strange that the law of the country in which these parties intend to settle and in which, as far as can be foreseen, they will remain for the rest of their lives should be excluded from regulating their proprietary rights merely because the husband possessed an English domicil at the time of the marriage and for a few hours afterwards.” 23 Of course, if the doctrine is adopted that upon a change of domicile the law of the new domicile will govern all subsequent acquisitions, then the law of South Africa would by no means be excluded. It would govern all acquisitions after the change of domicile, and the law of England would govern only rights in property owned at marriage and whatever might be acquired during the “few hours” before the change.

Story apparently adopted the intended-domicile theory without realizing the effect thereon of his rejection of the “immutability” rule and the theory of “tacit contract.” In the United States, as we shall see, the rule is practically universal that the matrimonial

23 CHESHIRE, PRIVATE INTERNATIONAL LAW 652 (3d ed. 1947) [italics added].
regime changes upon a change of domicile; therefore, the rule to which the intended-domicile theory was an exception does not exist, and the exception should also be ignored. It is believed that the Restatement was justified in rejecting the intended-domicile rule in the absence of compelling authority in support of it.

§ 2. PROPERTY ACQUIRED IN A STATE OTHER THAN THE DOMICILE

When both husband and wife are domiciled in state A, and one acquires property, movable or immovable, in state B during marriage, what law governs the marital-property interests of the other spouse in this property? This is the problem considered in this section. The case where the husband and the wife have different domiciles is considered subsequently, under the topic dealing with a change of domicile; in the normal case, one spouse must have changed his domicile for those of husband and wife to be different, since they usually start out with the same domicile. Under the present heading, it is necessary, of course, to distinguish between movables and immovables, and also between different methods of acquisition of the property in the nondomiciliary state. Property acquired in return for services, or by gift, devise, or descent, may be considered to be acquired by “primary acquisition”; and that acquired in exchange for other property by “secondary acquisition.” These two types of acquisition must be distinguished, since they are treated differently in the cases.

[A. Immovables. The Restatement asserts that “The effect of marriage upon an interest in land acquired by either or both of the spouses during coverture is determined by the law of the state where the land is.” Let us consider how far this assertion is justified by the decisions. Presumably it would be accurate with respect to land acquired by gift, devise, or descent in a nondomiciliary state. If the repeated statements in textbooks and cases that the lex rei sitae governs are to be given any effect, the Restatement rule would undoubtedly be true in this case. However, it is difficult, if not impossible, to find authority to support this statement, because in

24 RESTATEMENT, CONFLICT OF LAWS § 289, comment b (1934).
25 RESTATEMENT, CONFLICT OF LAWS § 238 (1934).
none of the United States is either spouse given an interest in land acquired by the other by gift, devise, or descent, which is characterized as a "marital-property interest" for choice-of-law purposes. In the community-property states such property is the "separate" property of the acquiring spouse and no marital-property interest arises in the other. In the common-law states the nonacquiring spouse does get a "nonbarrable interest" in such land, and the law of the situs is held to govern with respect to such interest, but it is not characterized as a marital-property interest for choice-of-law purposes.

With respect to an immovable acquired in a nondomiciliary state in exchange for services, the slight existing authority supports the view that the law of the situs governs.\(^{27}\) The cases are not numerous because it is rather unusual for a person's wages to be paid in land.

The great majority of cases concern an immovable which is purchased in the nondomiciliary state, since this is the usual method of acquiring land. With respect to such a case, the Restatement position is erroneous. A few early cases held in this situation that the law of the situs governed;\(^{28}\) but these have all been overruled. All of the later cases hold that the character of the funds or other property exchanged for the land, and not the law of the situs, determines the marital-property characteristics of an immovable acquired by purchase in a nondomiciliary jurisdiction.\(^{29}\) As stated

\(^{27}\) Hammonds v. Commissioner, 106 F.(2d) 420 (C.C.A. 10th, 1939); Trapp v. United States, 177 F.(2d) 1 (C.C.A. 10th, 1949); Estate of Hale, 2 Cof. 191 (San Francisco Super. Ct. 1906).


by the Arizona court in *Stephen v. Stephen*: "When parties acquire property, it is to be presumed they do it in view of the law as it exists at the time and place, and its character as community or separate estate is determined with its first acquisition. . . . Nor does changing its character from personalty to realty, and vice versa, affect the situation." 30 Indeed, the Washington Supreme Court went so far as to question the constitutionality of the contrary rule in *Brookman v. Durkee*, 31 although it had itself previously applied it. 32

Does the same rule apply where the rights of third parties—creditors and transferees—are involved? It has been suggested that a distinction should be made in this case, and that such third parties should be entitled to rely upon the law of the situs with respect to marital-property interests in their dealings with either spouse. 33 The Texas Supreme Court in *Marshburn v. Stewart* 34 held that the law of the situs would govern in determining the rights of a bona fide purchaser of an immovable, and that knowledge that the acquiring spouse was domiciled in another state at the time of the acquisition would not charge him with notice that a different marital-property law governed. This decision has been followed in


30 36 Ariz. 235, 239, 284 P. 158, 159 (1930) [Italics added].
31 See 46 Wash. 578, 583, 90 P. 914, 915 (1907).
32 See Morgan v. Bell, 3 Wash. 554, 28 P. 925 (1892).
33 Supra, Chap. III, § 2, ¶ B.
34 113 Tex. 507, 254 S.W. 942, 256 S.W. 575, 260 S.W. 565 (1924).
two subsequent cases in the Courts of Civil Appeals of that state.\textsuperscript{35} However, the Louisiana court reached the opposite conclusion in \textit{Heirs of Dohan v. Murdock} \textsuperscript{36} and applied the foreign law as against a \textit{bona fide} purchaser, where the deed to the spouses recited that they were domiciled in a common-law state at the time of their purchase. With regard to creditors of the spouses, the Arkansas court also applied the foreign law in \textit{Parrott v. Nimmo},\textsuperscript{37} and the Washington court purported to do so in \textit{Elliott v. Hawley}.\textsuperscript{38} However, in the latter case the creditor would also have lost under Washington law, so that it really made no difference which law was applied.\textsuperscript{39} Thus, although the authority on this problem is inconclusive it should not be assumed that the rule governing as between the spouses and their privies will necessarily be applied when the rights of third parties are involved.

**B. Movables.** Marital-property interests in movables acquired by one spouse by gift, devise, or descent in a nondomiciliary jurisdiction are governed by the law of the spouses' domicile at the time of acquisition, and not by the law of the \textit{situs} of the property.\textsuperscript{40} This rule is largely of historical interest because all of these cases, with one exception, involved a claim by the husband of complete ownership of his wife's chattels under the common law. This right of the husband of course no longer exists, and no interest characterized as a marital-property interest for choice-of-law pur-
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...poses is acquired by either spouse in acquisitions of the other by gift, devise, or descent under the law of any state in the Union. The one case involving a different claim is *Muus v. Muus*, where *H* and *W* were domiciled in Minnesota, and *W* inherited movables from her father in Norway. The law of Norway established a universal community of movables, and it was contended that the property inherited by *W* was community property under this law. The court held, however, that the law of the domicile of the spouses governed. A similar problem might arise today where the case has a contact with a foreign nation with similar substantive law.

Where movables are acquired by one spouse in a nondomiciliary state in return for services, the law is also fairly well established that marital-property interests will be determined by the law of the domicile. This has been squarely held in a number of cases, mostly in the federal courts. In several other cases marital-property interests in movables acquired in a nondomiciliary jurisdiction were determined by the law of the domicile, although it is not clear from the opinions whether such movables were acquired by services or by exchange for other movables previously owned. Only one case, *In re Pompal’s Estate*, has been found which applied the law of the *situs*. But that hasty and offhand decision by the Washington Supreme Court can hardly be considered to overrule the contrary, well-considered case of *Snyder v. Stringer*, which the court did not discuss nor even cite.

Where the movable acquired in a nondomiciliary state is a

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41 *29 Minn. 115, 12 N.W. 343 (1882).*
42 *Colpe v. Lindblom, 57 Wash. 106, 106 P. 634 (1910); Snyder v. Stringer, 116 Wash. 131, 198 P. 733 (1921); Shilkret v. Helvering, 78 App. D.C. 178, 138 F.(2d) 925 (1943); Wrightsman v. Commissioner, 111 F.(2d) 227 (C.C.A. 5th, 1940), aff’ing, C. J. Wrightsman, 40 B.T.A. 502 (1939); Norman De Vaux, 14 B.T.A. 205 (1928); Herbert Marshall, 41 B.T.A. 1064 (1940); David L. Loew, 7 T.C. 363 (1946).*
44 *150 Wash. 242, 272 P. 980 (1928).*
45 *116 Wash. 131, 198 P. 733 (1921).*
cause of action in tort, the authorities are not so clear. The majority of the few available cases suggest, or proceed upon the theory, that the marital-property interests in the recovery would be determined by the law of the place of injury; although there are also cases stating that the general rule, that the law of the domicile governs, would apply to such a case. These cases have been analyzed by the author elsewhere, and it is only necessary here to make two observations: (1) The real problem involved in these cases was one of characterization, rather than selection; and, (2) All of the cases concerned issues arising in a suit by one spouse against the third-party tortfeasor, and the decisions would not be res judicata in subsequent litigation between one spouse and heirs of the other over the marital-property interests in the recovery; therefore, in a sense, these statements might be considered dicta.

Where movables are acquired by purchase in a nondomiciliary jurisdiction, it is usually stated that the law of the domicile governs marital-property interests therein. This expression is accurate enough in the cases in which it is used, since the funds, with which the purchase was made, apparently were earned in the domiciliary jurisdiction. However, this formulation of the rule would be inadequate in a case where funds were earned while the spouses were domiciled in state A; the domicile of the spouses was then changed to state B; and movables were thereafter purchased with the funds in state C. In such a case, the law of state A, rather than state B, should govern. A more accurate statement of the rule would be that the marital-property characteristics of the movables purchased are determined by the character of the funds paid therefor.


48 Chap. IV, § 7, supra.


50 This would not be entirely accurate where the spouses were domiciled
PROBLEMS OF SELECTION

There are a number of old cases which seem to contradict this statement of the rule, but their holdings are clearly obsolete. Under the early common law the wife retained title to her real property owned at marriage, although the husband acquired a freehold interest therein; however, when the real property was sold, the funds received therefor became his absolutely, just as did other chattels acquired by the wife. This doctrine was extended to conflict of laws, and it was held that, where an immovable belonging to the wife in a nondomiciliary state was sold, the movables received therefor were to be treated as a new acquisition; and the marital-property interests would be determined by the law of the spouses' domicile at the time of the sale. However, the Maryland court refused to apply this rule in Smith, Garnishee of Leister v. MclAtee, where the sale was by court order and the wife requested the court at the situs of the land to protect her separate interest in the proceeds of the sale. In any event, since these cases were concerned with now discarded substantive rules, they are of no importance as authorities today.

There are three cases which might be thought to lend some support to the view that the law of the situs should govern marital-property interests in movables acquired by purchase in a nondomiciliary state. The first of these, Bush v. Garner, an early Alabama case, must be considered overruled by Birmingham Waterworks Co. v. Hume. The second, Graham v. First National Bank of Norfolk, simply holds that the defense of payment (in a suit against a bank for a dividend) will be governed by the law of the

in Louisiana and the husband acquired a movable by purchase in another state with his "separate" funds. The local rule in Louisiana in such a case, contrary to that in the other community-property states, is that the movable purchased would be community property, unless the husband had inserted in the instrument of conveyance that he intended to acquire title for the benefit of his separate estate. Daggett, The Community Property System of Louisiana 27-28 (1931). This rule has also been applied to the case where the husband purchased a movable in a foreign state. Young v. Young, 5 La. Ann. 611 (1850). Castleman v. Jeffries, 60 Ala. 380 (1877); Slocomb v. Breedlove, 8 La. 143 (1835); Henderson v. Trousdale, 10 La. Ann. 548 (1855); Hyman v. Schlenker, 44 La. Ann. 108, 10 So. 623 (1892); Hill v. Wynn & Co., 4 W.Va. 453 (1871); cf. Cooke v. Fidelity Trust & Safety-Vault Co., 104 Ky. 473, 47 S.W. 325 (1898).

27 Md. 420 (1867).
73 Ala. 162 (1882).
121 Ala. 168, 25 So. 806 (1899).
84 N.Y. 393 (1881).
domicile of the debtor, and expressly refuses to pass on any marital-property question. The third, Gooding Milling & Elevator Co. v. Lincoln County State Bank, does purport to adopt the situs rule as an alternative ground of the decision. There H and W were domiciled in Idaho and W purchased goods, partly for cash and partly on credit, from a firm in Chicago, Illinois. The court said that the goods were "separate" property of the wife because the law of Illinois governed. However, it is clear that the same result would have been reached under the law of Idaho. Property purchased with the wife's "separate" funds is her "separate" property, under community-property law; and also that purchased by her on credit, since she does not have power to create an obligation binding community property. In view of this fact, the Gooding case is probably little indication of the reaction of the Idaho court in a case where there is an actual conflict of law.

Granted that the law of the domicile will ordinarily be applied to determine the rights of the spouses inter se, will the same be true in a case where the rights of third parties are involved? If the movable has been carried to the domicile of the husband and wife from the state in which it was acquired, and the creditor or transferee is also domiciled in the same state, there would seem to be no reason to apply a different rule as to him, and the cases do not make any distinction in this situation. Even if the movable is still situated in the nondomiciliary state in which it was acquired, if the creditor or transferee is domiciled in the same state with the spouses, he would hardly be relying upon the law of the situs and there would seem to be no reason to permit him to invoke it. Finally, if the creditor or transferee is invoking the law of the domicile of the spouses, and not that of the situs, he should be permitted to do so since he should be entitled to assert any right his vendor or debtor had. However, where the movable is still

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59 Birmingham Waterworks Co. v. Hume, 121 Ala. 168, 25 So. 806 (1899); Hyman v. Schlenker, 44 La. Ann. 108, 10 So. 623 (1892); Kerr v. Urue, 86
situated in the nondomiciliary state in which it was acquired and the creditor or transferee is himself domiciled in that state, he should be permitted to rely upon the law of the situs and marital-property interests in the movable, insofar as they affect his rights, should be determined by that law. There does not seem to be any direct authority upon this question. However, the Washington court in Snyder v. Stringer 60 apparently had such an exception to the domicile rule in mind when it said: "... the situs of the property, to-wit, the automobile, must be deemed to be that of the domicile of respondents [husband and wife]; whatever may be said as to its situs for the purpose of determining its liability to seizure and sale to satisfy the individual debts of respondent Snyder while it was in Montana, or Iowa, by the courts of those states." And the New York case of Graham v. First National Bank of Norfolk 61 seems to lend some support to the suggested rule, at least by analogy.

[C. Statutory modifications. The only state in which statutes have played an important role with respect to property acquired by husband and wife in a nondomiciliary state is Louisiana. The original statutory provision in that state with respect to marital property and conflict of laws was contained in the Civil Code of 1808: "Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary." 62 This provision, which might conceivably have been interpreted as adopting a "place-of-marriage" rule with respect to marital property, has never in fact had any discernable effect upon the decisions of Louisiana. At the time this provision was adopted, and thereafter until 1828, the original Spanish law of community property, or Fuero Real, was in force in Louisiana, and the court interpreted this law as being a "statute real" and applied a situs rule with respect to marital property.63

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60 116 Wash. 131, 198 P. 733 (1921) [italics added].
61 84 N.Y. 393 (1881).
62 LA. CIV. CODE art. 63 (1808), now LA. CIV. CODE art. 2399 (Dart 1945).
63 Bryan & Wife v. Moore's Heirs, 11 Mart. (o.s.) 26 (La. 1822). See, also,
The Civil Code of 1825 provided: "A marriage, contracted out of this State, between persons who afterwards come here to live, is also subjected to community of acquets, with respect to such property as is acquired after their arrival." And the Fuero Real was repealed in 1828. The court interpreted these changes as abolishing the old choice-of-law rule, and from 1828 until 1852 it applied a domicile rule with respect to marital property.

In 1852 the Louisiana Legislature adopted what is now Art. 2400 of the Civil Code: "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." This provision applies only to property acquired in Louisiana by persons domiciled elsewhere and does not affect the rule with respect to property acquired in another state by residents of Louisiana. As to acquisitions in other states by Louisiana domiciliaries, the domicile rule is still applied in that state.

This statute is probably of no importance insofar as immovables acquired by gift, devise, or descent, or by personal services are concerned, since the general rule apparently is that the law of the situs governs in such cases, even in the absence of statute. If the statute has any effect with respect to immovables, it must be in the case where an immovable is purchased in Louisiana by a nonresident spouse. In fact, this seems to be the precise situation in the mind of the legislature, because there were three cases decided immediately prior to the passage of the statute in which an immovable in Louisiana was held to be the "separate" property of the nonresi-

Gale v. Davis' Heirs, 4 Mart. (o.s.) 645 (La. 1817); Saul v. His Creditors, 5 Mart. (n.s.) 569 (La. 1827); Cole's Widow v. His Executors, 7 Mart. (n.s.) 41 (La. 1828); Dixon v. Dixon's Executors, 4 La. 188 (1832). These latter cases concerned property acquired in Louisiana after a change of domicile; their rationale, however, was not that the law of the new domicile governed, but that the law of the situs of the property governed.


As to movables, see the Louisiana cases cited in notes 40, 49, 50, and 51, supra; and as to immovables acquired by purchase, see the Louisiana cases cited in note 29, supra.

La. Laws 1852, Act No. 292.

Succession of McKenna, 23 La. Ann. 369 (1871).

Supra, note 27.
dent spouse purchasing it. Of course, as we noted above, it was suggested in *Brookman v. Durkee* that if a statute were to attempt to make such property community property it would violate the due-process clause; and the argument in *In re Thornton's Estate* tends to support the same conclusion. However, it is difficult to justify such a position if a right to reimbursement as against the community estate is given to the spouse whose "separate" funds are invested. Surely the interest which a state has in titles to real property within its jurisdiction would justify a statute applying the local law of marital property to all such property regardless of the domicile of the spouses; and no "vested rights" would be destroyed without compensation because the right to reimbursement would exist.

An argument which would probably have a greater chance of success, in most of the community-property states, is that such a statute would violate the privileges-and-immunities clause of Art. IV, Sec. 2: Where a local resident invests his "separate" funds in an immovable, the immovable will be his "separate" property; however, where a nondomiciliary invests his "separate" funds in an immovable, the statute makes such immovable community property. This argument is not entirely valid, because the phrase "separate property" is used with two different meanings, but it would probably be a potent one. However, it is not available in Louisiana. There, in contrast with the other community-property states, when a resident husband invests his "separate" funds in an immovable, the immovable will be community property, unless he has inserted in the deed a stipulation that he intends to invest for his separate benefit. The same privilege would be available to nondomiciliaries, since the statute does not say that the immovable will be community property, but that it will be "subject to the same provisions of law" which apply to citizens of Louisiana.

Although it seems clear as a matter of construction that the

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71 46 Wash. 578, 90 P. 914 (1907).
72 1 Calif. (2d) 1, 33 P. (2d) 1 (1934).
statute applies to an immovable purchased in Louisiana, the cases in that state since the passage of the statute leave the matter in some doubt.\(^7\) In two cases the court stated that an immovable purchased in Louisiana by a nonresident was community property under Art. 2400, but the decision did not turn upon the application of this statute in either case: in *Rush v. Landers*\(^7\) because there a creditor of the husband was attempting to subject the property to his debt, and it would be so subject whether it was community property or the “separate” property of the husband; and in *Carlton v. Durr*\(^7\) because the domicile of the nonresident spouse was in Texas and the property would have been community property even if the normal rule were applied. And in *Marlatt v. Citizens’ State Bank & Trust Co.*,\(^7\) the court held that an immovable in Louisiana purchased by a spouse domiciled in a common-law state was his “separate” property without citing or discussing Art. 2400. Finally, in *Smith v. Gloyd*\(^7\) the court held that an immovable in Louisiana, acquired in exchange for movables by a husband domiciled in a common-law state, was community property. This result was not based upon Art. 2400, however, which again was not even cited, but upon the fact that there was no proof where the husband was domiciled at the time he acquired the movables. The court stated that in the absence of such proof it would be presumed that he was domiciled in Louisiana at that time, and therefore the movables with which he acquired the immovable were community property; hence the immovable itself would be.

With respect to movables, the authority as to the effect of Art.

\(^7\) The statute was applied in *Stanton v. Harvey*, 44 La. Ann. 511, 10 So. 778 (1892), where property was rented in Louisiana by a nonresident husband, and he defended an action against him for the rent on the ground that he was merely acting as agent for his wife. The court said that the *leasehold* would be community property under Art. 2400 and therefore the husband would be liable for its “purchase price.” However, in a similar situation where the nonresident wife rented property, the court in *Freret v. Taylor*, 119 La. 307, 44 So. 26 (1907), ignored Art. 2400 and stated that “... there is nothing before us tending to show that she acquired any property here.” It should be noted that the landlord was enabled to collect his rent in both of these cases, and they probably do not throw too much light on Art. 2400.

\(^7\) 107 La. 549, 32 So. 95 (1902).

\(^7\) 9 La. App. 269, 120 So. 124 (1928).

\(^7\) 180 La. 387, 156 So. 426 (1934).

\(^7\) 182 La. 770, 162 So. 617 (1935).
2400 is even more scanty. The statute would seem, on its face, to apply to any movable acquired in Louisiana; the same constitutional difficulties as those discussed above with respect to immovables would exist as to movables purchased, in a somewhat accentuated form since a state probably has less control over movables within its borders than immovables. The only cases have involved causes of action in tort arising in Louisiana in favor of nonresident married persons. In Williams v. Pope Mfg. Co. the Louisiana court held that Art. 2400 did not apply to such a cause of action and that the law of the domicile still governed marital-property interests therein. The court based this decision on the reasoning that the cause of action was transitory and could be sued on in any jurisdiction where the defendant could be served with process, and therefore it was not “property acquired in this state” within the meaning of the statute. This rationale seems to deny that the cause of action is itself property, regardless of where it may be sued on and before it is ever sued on at all, and therefore seems clearly wrong. In Matney v. Blue Ribbon, Inc. the Louisiana court seems to indicate that it will apply Louisiana law to any cause of action for personal injuries to a wife which arises in Louisiana, regardless of her domicile, but the court bases this statement on the statutes making such a cause of action the wife’s “separate” property and expressly refuses to overrule the Williams decision as to the inapplicability of Art. 2400. This would seem to leave the Williams case still the law in Louisiana with respect to causes of action in tort in favor of a nonresident husband, at least.

81 The Federal Circuit Court in Louisiana had formerly reached the contrary conclusion on reasoning which seems clearly preferable: “It is not necessary to give any technical meaning to the word ‘property’ as used by the legislature. The object of the legislature, namely, to subject nonresidents who acquire rights within this state to the same rules as those which govern resident citizens, is manifest, and leaves no doubt but that the word ‘property’ included not only land and chattels, real and personal, but also all choses in action.” Meyerson v. Alter, 11 F. 688, at 688-89 (C.C.E.D. La. 1882).
82 202 La. 505, 12 So. (2d) 253 (1942).
83 LA. C1v. CODE arts. 2334, 2402 (Dart 1945).
84 In California the Amendment of 1917 to Section 164 of the Civil Code provided: “... real property situated in this State, and personal property wherever situated, heretofore or hereafter acquired [by husband or wife] while domiciled elsewhere which would not have been the separate property of either if acquired while domiciled in this State is community property. ...” The primary purpose of this legislation was to provide for the case where the hus-
§ 3. PROPERTY ACQUIRED BEFORE A CHANGE OF DOMICILE

This section is concerned with the problems which arise where a husband or wife acquires property while they are domiciled in state A, and thereafter the domicile of the spouses is changed to state B. Does the law of the first domicile, which was the domicile at the time the property was acquired, or the law of the new domicile govern marital-property interests in the property after the removal?

As a preliminary matter, it should be noted that the mere transportation of a movable into another jurisdiction without a change of domicile on the part of the spouses does not alter the marital-property characteristics thereof. The Restatement states this proposition in Section 291 as follows: "Interests in movables acquired by either or both of the spouses in one state continue after the movables have been brought into another state until the individuals move their domicile to California from a common-law state; however, the language might possibly have applied to the case where immovable property was acquired in California even though there was no change of domicile. At least, the California court seemed to think so in Estate of Arms, 186 Calif. 554, 199 P. 1053 (1921). However, the decision in In re Thornton's Estate, 1 Calif.(2d) 1, 33 P.(2d) 1 (1934), holding this statute unconstitutional where there had been a change of domicile, has apparently rendered it a dead letter. The Amendment of 1935 adding Section 201.5 to the Probate Code, which was intended to replace the above statute after In re Thornton's Estate, gave to a surviving spouse a right of succession, similar to a community-property right, in property acquired during coverture while the spouses were domiciled in a common-law state. However, this statute is limited to personal property, In re Miller, 31 Calif.(2d) 191, 187 P.(2d) 722 (1947), and it would only be applicable if the decedent spouse died domiciled in California.

The provisions of the Field Code ["If there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile," and "Real property within this state is governed by the law of this state, except where title is in the United States"], adopted in five states [CALIF. CIV. CODE §§ 946, 755 (1941); MONT. REV. CODES §§ 6803, 6722 (1935); N. D. CODE §§ 47-0701, 47-0401 (1943); OKLA. STATS., Title 60, §§ 311, 21 (1941); S. D. CODE §§ 51.0801, 51.0401 (1939)], have apparently never had any influence upon the courts in marital-property choice-of-law cases.

terests are affected by some new dealings with the movables in the second state." 86 This formulation is, of course, accurate in what it states affirmatively, i.e., that the marital-property interests are unchanged in the absence of "new dealings." However, there is no support for what it negatively implies, but carefully fails to state, i.e., that the marital-property interests are changed [and the law of the new situs governs?] when there have been "new dealings" with the movables. Nor can any explanation of what constitutes a "new dealing" be found in the Restatement, and it could hardly be contended that this is a self-evident concept. There is no hint of any such limitation to the rule in the older cases, and the Texas court rejected it in King v. Bruce, 87 the only case discovered, since the publication of the Restatement, in which the negative implication of this section was urged upon the court.

What the authors of the Restatement were apparently attempting to do was to state a general rule which would apply to any case where movables were transported into another state, with or without a change of domicile. 88 As near as one can understand this cryptic limitation, it seems to mean that, when movables are taken into a new domicile and there exchanged for other movables or for immovables, the law of the new domicile will govern marital-property interests in the new property acquired there. If this was intended to be the meaning of this provision, then the Restatement was successful, as we shall see, in stating in a partially accurate fashion the law of one state.

(A. Immovables. If H and W are domiciled in state A and acquire an immovable situated therein, and they thereafter move their domicile to state B, the law of state A will continue to govern marital-property interests in the immovable situated there. 89 This seems almost a self-evident proposition, and there are only a few cases involving the point, probably because few counsel have

86 Restatement, Conflict of Laws § 291 (1934) [italics added].
88 See the comments to §§ 292 and 293, in which it is stated that these rules are "special applications" of the rule in § 291. The draftsmen may have had in mind the rules of §§ 269 and 276, dealing with the removal of chattels mortgaged or sold on conditional sale. This is a misleading analogy.
thought of arguing that the change of domicile would effect a change in this situation.

(B. Movables. The question of the effect of a change of domicile upon a marital-property interest in movables may be subdivided into several further questions. Where H and W acquire a movable while domiciled in state A, and they then move their domicile to state B, the movable may have been an intangible chose in action, in which case the "situs" of the movable (if it can be said in any real sense to have one) would be changed by the change of domicile if such "situs" were considered the domicile of the creditor, but not otherwise. If the movable were a tangible chattel, or an intangible (like stocks and bonds) of such a nature that the physical evidence of the debt is treated for many purposes as the property itself, then several additional possibilities may be distinguished: The movable may have been left in the old domicile; or it may have been carried to the new domicile; or it may have been carried to the new domicile and there exchanged for other movables; or, finally, it may have been carried to the new domicile and exchanged for an immovable.

Where a husband or wife acquires an intangible chose in action, while domiciled in one state, and the spouses thereafter change their domicile to a second state, the cases hold that the change of domicile does not affect the marital-property interests in the intangible.90 Also, where a tangible movable is acquired by one of the spouses while they are domiciled in one state and they thereafter change their domicile to a second state, leaving the movable in the first jurisdiction, such change of domicile does not affect the marital-property characteristics of the movable.91 Litigation over these problems is not of frequent occurrence; most of the controversy has arisen over the effect of a change of domicile and a


simultaneous transportation of movables owned by the spouses into the new domicile.

The practically unanimous holding of the American cases is that a change of domicile, accompanied by a transportation of a movable owned by one of the spouses into the new domicile, does not cause any change in the marital-property interests in the movable—the law of the first domicile (i.e., the domicile at the time of acquisition) still governs. The only case discovered by the writer which takes the contrary position (that the law of the new domicile will govern) is the Missouri case of Minor v. Cardwell, and that case has been ignored by subsequent Missouri cases and undoubtedly would not be followed in that state today.

If the intended-domicile theory, discussed above, were adopted, there would of course be an exception to this general rule: If the removal of the spouses was within a “reasonable time” after marriage and pursuant to an intention entertained at that time, the law of the second domicile would govern marital-property characteristics of any movables acquired by the spouses during their short residence in the first. No case has been found so holding, and all of the reasons for rejecting the intended-domicile theory as to

92 Doss v. Campbell, 19 Ala. 590 (1851); Hydrick v. Burke, 30 Ark. 124 (1875); Dye v. Dye, 11 Calif. 163 (1858); Estate of Frees, 187 Calif. 150, 201 P. 112 (1921); Estate of Drishaus, 199 Calif. 369, 249 P. 515 (1926); Estate of Thornton, 1 Calif. (2d) 1, 33 P. (2d) 1 (1934); Williams v. Sutphen, 92 Calif. App. 697, 268 P. 946 (1928); Dubois v. Jackson, 49 Ill. 49 (1868); Tinkler v. Cox, 68 Ill. 119 (1873); Schurman v. Marley, 29 Ind. 458 (1868); Lichtenberger v. Graham, 50 Ind. 288 (1875); Smith v. Peterson, 63 Ind. 243 (1878); Beard’s Executor v. Basye, 46 Ky. (7 B. Mon.) 133 (1846); Townes v. Durbin, 60 Ky. (3 Metc.) 352 (1860); Tanner v. Robert, 5 Mart. (n.s.) 255 (La. 1826); Penny v. Weston et al., 4 Rob. 165 (La. 1843); Cooper and Co. v. Cotton, 6 La. Ann. 256 (1851); Jeter v. Deslondes, 6 La. Ann. 379 (1851); Henderson v. Trousdale, 10 La. Ann. 548 (1855); Arendell v. Arendell, 10 La. Ann. 566 (1855); Martin v. Boler, 13 La. Ann. 369 (1858); McVey v. Holden, 15 La. Ann. 317 (1860); Lyon v. Knott, 26 Miss. 548 (1853); Meyer v. McCabe, 73 Mo. 236 (1880); State v. Carroll, 6 Mo. App. 263 (1878); McClain v. Abshire, 72 Mo. App. 390 (1897); Estate of Themans, 110 N.Y. L.J. 1368 (Surr. Ct. N.Y. Co. Nov. 17, 1943); Bosma v. Harder, 94 Ore. 219, 185 P. 741 (1919); Hill v. M’Dermot, Dallam 419 (Tex. 1841); Powell v. De Blane, 23 Tex. 66 (1859); T. C. Phillips, 9 B.T.A. 153 (1927); cf. Estate of Boselly, 178 Calif. 715, 175 P. 4 (1918); Savage v. O’Neil, 44 N.Y. 298 (1871); Avery v. Avery, 12 Tex. 54 (1854).

93 37 Mo. 350 (1866).

94 See the Missouri cases cited supra, note 92, and infra, notes 98, 99.

95 Supra, § 1, ¶ B, this chapter.
property owned at marriage would apply with equal or greater force to this case. There is a *dictum* favoring the intended-domicile theory in this situation in *State v. Barrow.* In that case the husband and wife were first domiciled in Mississippi and then moved their domicile to Texas; while *en route* the wife acquired a movable in Tennessee. By the law of both Mississippi and Texas the movable was the "separate" property of the wife, and the court so held, rejecting the plaintiff's contention that the law of the *situs* of the property at the time of acquisition should govern. In the course of the opinion the court expressed a preference for the intended-domicile theory, but this was not a case where the intended-domicile theory would apply even if it were adopted, since the removal was not within a short time after marriage nor pursuant to any previous intention; and it made no difference in this case whether the law of the first or second domicile was applied.

If the movables transported by the husband or wife into a new domicile are there exchanged for other property, does the law of the second domicile govern the marital property characteristics of the new property acquired there in exchange for movables acquired while the spouses were domiciled elsewhere; or does the new property have the same marital-property characteristics as the movables for which it was exchanged? This would seem to be a "new dealing" with the property, after which, the *Restatement* implies in Section 291, the law of the first domicile would cease to control. However, the cases hold, in all except one state, that when movables brought by the spouses into their new domicile are there exchanged for other property, movable or immovable, the marital-property

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96 14 Tex. 179 (1855).
97 The court stated that, as between the contention of the plaintiff that the law of Tennessee should govern and the contention of the wife that the law of Texas which was the domicile "they had in contemplation" at the time of acquisition would prevail. But it also stated: "There would be more reason to hold that the laws of Mississippi rather than those of Tennessee ... should govern the marital rights of the parties in the acquisition of this property, upon the principle that not having acquired a domicile in Texas, facto et animo, they still retained their former domicile in Mississippi. ..." 14 Tex. at 180–82.
98 Gluck v. Cox, 75 Ala. 310, *second appeal*, 90 Ala. 331, 8 So. 161 (1890); Gilkey v. Pollock, 82 Ala. 503, 3 So. 99 (1887); *Estate of Nickson*, 187 Calif. 603, 203 P. 106 (1921); Scott v. Remley, 119 Calif. App. 384, 6 P.(2d) 536 (1931); *Estate of Bruggemeyer*, 115 Calif. App. 525, 2 P.(2d) 534 (1931); *In re Donohoe's Estate*, 128 Calif. App. 544, 17 P.(2d) 1010 (1933); Smith
characteristics of the new property are still determined by the law of the first domicile.

The exception to this rule is the state of Louisiana, where the local community-property rule is to the effect that, where “separate” property of the husband is exchanged for other property during marriage, the new acquisition is community property unless the husband takes certain steps at the time of the exchange to preserve its “separate” character. In Fleming v. Fleming this rule was applied to a case where the spouses had moved to Louisiana from a common-law state and the “separate” property invested


99 Cahalan v. Monroe, Smaltz & Co., 70 Ala. 271 (1881); Irwin v. Bailey, 72 Ala. 467 (1882); Kirkpatrick v. Buford, 21 Ark. 268 (1860); Allen v. Hightower, 21 Ark. 316 (1860); Thorn v. Weatherley, 50 Ark. 237, 7 S.W. 33 (1888); Brown v. Wright, 58 Ark. 20, 22 S.W. 1022 (1893); Estate of Higgins, 65 Calif. 407, 4 P. 389 (1884); Estate of Burrows, 136 Calif. 113, 68 P. 488 (1902); Estate of Nicolls, 164 Calif. 368, 129 P. 278 (1912); Estate of Nickson, 187 Calif. 603, 203 P. 106 (1921); Melvin v. Carl, 118 Calif. App. 249, 252, 4 P.(2d) 954 (1931); Latterner v. Latterner, 121 Calif. App. 298, 8 P.(2d) 870 (1932); Hinman v. Parkis, 33 Conn. 188 (1866); Ellington v. Harris, 127 Ga. 85, 56 S.E. 134 (1906); Douglas v. Douglas, 22 Ida. 356, 125 P. 796 (1912); Depas v. Mayo, 11 Mo. 314 (1848); Edwards v. Edwards, 108 Okla. 93, 233 P. 477 (1924); Cressy v. Tatom, 9 Ore. 541 (1881); Vardeman v. Lawson, 17 Tex. 10 (1856); Oliver v. Robertson, 41 Tex. 422 (1874); Duke v. Reed, 64 Tex. 705 (1885); McDaniel v. Harley, 42 S.W. 323 (Tex. Civ. App. 1897); Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 S.W. 290 (1902); Carlson v. Rea, 94 Wash. 218, 161 P. 1195 (1917); In re Gulstine’s Estate, 166 Wash. 325, 6 P.(2d) 628 (1932); cf. Brunner v. Title Ins. & Trust Co., 26 Calif. App. 35, 145 P. 741 (1914). But cf. Fuss v. Fuss, 24 Wis. 256 (1869); Fountain v. Maxim, 210 Calif. 48, 290 P. 576 (1930); Cooper v. Standley, 40 Mo. App. 138 (1890); Dormitzer v. German Savings & Loan Soc., 23 Wash. 132, 62 P. 862 (1900).

100 211 La. 860, 30 So.(2d) 860 (1947).
was brought from the former domicile by the husband. The Restatement declares that the new domicile "may provide that additional property acquired with the proceeds of separate property still remain separate property, though the parties are now domiciled in a community state. On the other hand, such community state may declare the new acquisition to be community property, leaving to the spouse whose separate property contributed to the purchase a claim against the community for contribution." This comment is somewhat misleading since the second rule is in force in only one state, and the first rule prevails in all others. Even as to Louisiana the Restatement comment is not entirely applicable since the husband may preserve the "separate" character of the new acquisition by having the deed recite that the price is paid with his "separate" funds and that his intention is to acquire property for the benefit of his separate estate. Furthermore, the same rule does not apply to the wife, who may show by oral evidence the "separate" character of the purchase price and thus preserve the "separate" character of the new acquisition. This is substantially the same rule that is applied to both spouses in the other community-property states.

There does not appear in the existing cases any distinction based upon whether the rights of third parties in the new domicile (creditors and transferees) are involved. The courts have applied the general rule that the law of the domicile at the time of acquisition governs, whether the litigation has arisen between the spouses themselves (or others claiming under them), or between one spouse and a creditor or transferee of the other. However, all of the cases involving the latter type of dispute have concerned

101 Before the decision of the Louisiana Supreme Court in Fleming v. Fleming, supra, the Tax Court had held with respect to the same property that it was the "separate" property of the husband, Albert Fleming, 4 T.C. 168 (1944), aff'd, 153 F. (2d) 361 (C.C.A. 5th, 1946), applying the general rule in states other than Louisiana. Mr. Fleming was thus put in the unhappy position of having to pay a capital-gains tax on all of the property as though it were his "separate" property, and then being required to cough up one-half of it to his children as community property.

102 Restatement, Conflict of Laws § 293, comment b (1934).


104 Id. at 32.
either the common-law *jus mariti*, an outmoded marital regime, or the transportation of statutory "separate" property into a community state, where application of the law of the first domicile was more favorable to the creditor or transferee than the local law. There is no case concerning the rights of creditors and transferees in community property transported to a common-law state and consequently nothing to prevent a court, if it so desires, from adopting the rule, advocated in Chapter VI below, that the law of the second domicile will govern in that case.

[C. Statutory modifications. Only in California has there been an attempt to change the general rule by statute, and provide that the law of the new domicile shall govern even with respect to property acquired while the spouses were domiciled elsewhere.105 In 1917 in that state an amendment to Section 164 of the Civil Code was enacted, which provided that all property "acquired [after marriage by husband or wife] while domiciled elsewhere which would not have been the separate property of either if acquired while domiciled in this State is community property ...." 106 This statute was never enforced by the California courts. It was first declared not to apply to the property of spouses who removed to California before 1917.107 Thereafter, in 1923, the legislature passed another amendment expressly declaring the statute to be retroactive; 108 however, the court held this attempt to make it so unconstitutional.109 Finally, in *In re Thornton's Estate*,110 when the court was presented with a case where the removal

105 There are statutory provisions in three jurisdictions which seem to reinforce the general rule that marital-property characteristics of property continue unchanged after a change of domicile and transportation of the property into the new domiciliary jurisdiction. In Louisiana, Arizona, and Texas there are provisions in the community-property statutes that they shall apply to married persons who remove to those jurisdictions, with respect to "property . . . acquired after their arrival," *La. Civ. Code* art. 2401 (Dart 1945), or "property acquired in this state," *Ariz. Rev. Code* § 63-306 (1939); *Vernon's Tex. Stats.* art. 4627 (1936) [italics added]. These provisions seem to indicate that the marital-property laws of these jurisdictions do not apply to property acquired in the old domicile and brought with the spouses upon removal.

107 *Estate of Frces*, 187 Calif. 150, 201 P. 112 (1921).
108 *Calif. Laws* 1923, ch. 360 [now in § 164 of the Civil Code].
110 1 Calif.(2d) 1, 33 P.(2d) 1 (1934).
occurred after 1917, it declared the entire statute to be unconsti-
tutional.\textsuperscript{111}

The opinion in \textit{In re Thornton’s Estate}, which was not very
revealing, rested this holding upon two grounds: that the statute
violated the privileges-and-immunities clause of the Fourteenth
Amendment to the federal Constitution and the due-process clauses
of the state and federal constitutions. The first ground seems rather
weak in view of the fact that this clause has always been rather
narrowly construed by the United States Supreme Court. The
second ground raises a more basic objection, since the statute ap-
parently envisaged no right to reimbursement in the spouse whose
“separate” property was transformed into community property.
Although the common-law “separate” property is, in some respects,
like community property, in many important respects it differs
greatly, and to transform it into community property would destroy
many interests of the acquiring spouse which have traditionally
been considered “vested.”

If a right to reimbursement out of the community estate were
given to the spouse whose “separate” property was affected, upon
the dissolution of the marriage, then it is difficult to see how the
due-process objection could still prevail, particularly if the statute
were restricted to such “separate” property as was exchanged for
other property in the new domicile. This is, of course, the rule in
Louisiana (with respect to the husband’s “separate” property) un-
der \textit{Fleming v. Fleming}.\textsuperscript{112} However, in the other community-
property states another objection could then be raised, which is not
available in Louisiana, i.e., that the statute constituted an un-
lawful discrimination, under the equal-protection clause, between
spouses moving into the state and those always domiciled there.
If the local spouse’s “separate” property is not transformed into
community property by exchanging it for other property during
marriage, so the argument might run, then the equal-protection

\textsuperscript{111} In two previous cases, intermediate courts had been presented with situ-
tions where the spouses removed to California after 1917, but they stated
that the statute could not be retroactively applied to property acquired in the foreign
534 (1931); \textit{Melvin v. Carl}, 118 Calif. App. 249, 252, 4 P.(2d) 954 (1931).
It is difficult to see, if the statute were to be held constitutional in any respect,
how the time of acquisition in the foreign jurisdiction could have any bearing
on the question.

\textsuperscript{112} \textit{Supra}, note 100. \textit{Cf.} \textit{Cameron v. Rowland}, \textit{supra}, note 73.
clause prohibits attaching such a consequence to the exchange of the “separate” property of a spouse formerly domiciled elsewhere. And this appears to be the real idea in the mind of the California court when it talked about the privileges-and-immunities clause of the Fourteenth Amendment. It is difficult to predict whether such an argument would prevail with the courts. Although, as pointed out previously, it contains a verbal fallacy in that it uses the phrase “separate property” in two different senses, it has sufficient surface plausibility that some courts might be impressed with it.

After the decision in *In re Thornton’s Estate* the California Legislature passed a statute in 1935 giving to spouses moving to California from other states rights of succession in certain property acquired in the former domicile, identical with community-property rights, but leaving their rights inter vivos unchanged. Where the spouse who acquired the property in the foreign state, and “owns” it as his “separate” property, dies first, this statute in effect gives to his surviving spouse a nonbarrable share of one-half. Undoubtedly it is within the power of the legislature to so provide; in fact, this right is probably very similar to one the surviving spouse would have had if they had remained domiciled in the state of acquisition. However, the statute of 1935 mentioned only “personal property,” in contrast to the amendment of 1917 which had applied to “real property situated in this State, and personal property wherever situated.” The California Supreme Court has stated that this change means that the new statute ap-

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113 “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.” 1 Calif. (2d) at 5, 33 P. (2d) at 3 (1934).

114 *CALIF. PROBATE CODE* § 201.5 (Deering 1941): “Upon the death of either husband or wife one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, shall belong to the surviving spouse; the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this code.”

plies only to property which is in the form of personal property at the time of death; so that, where the movables transported to California upon a change of domicile are invested in real property, this statute does not apply to give the surviving spouse any rights in the realty.\footnote{116}

A more difficult problem as to the validity of this statute, which has not yet been presented to the California courts, is raised in the case where the nonacquiring spouse, who is not the “owner” of the “separate” property, dies first. The statute apparently would give to such first-dying spouse a power of testamentary disposition over one-half of such property; in other words, it would take the “separate” property of the surviving spouse and give one-half of it to the legatees of the other spouse.\footnote{117} To give such effect to the statute would seem to be subject to the same objections made to the amendment of 1917, which were sustained in In re Thornton’s Estate.

\section*{§ 4. PROPERTY ACQUIRED AFTER A CHANGE OF DOMICILE}

In this section we are concerned with the question of what law governs marital-property interests in property acquired by the spouses, after a change of domicile, by “primary acquisition,” i.e., by gift, devise, or descent, or in exchange for services. The problem raised where property is acquired after a change of domicile in exchange for other property previously acquired has already been considered in the preceding section. Since immovables acquired by primary acquisition are apparently governed by the law of the \textit{situs},\footnote{118} our concern here is with movables.

With respect to movables thus acquired by married persons after a change of domicile, there are two possible views as to the govern-

\footnote{116}{In re Miller, 31 Calif. (2d) 191, 187 P. (2d) 722 (1947), \textit{overruling} Estate of Way, 157 P. (2d) 46 (Calif. App. 1945). This case actually concerned an inheritance-tax statute passed at the same time as Section 201.5 of the Probate Code, but the court expressly stated that the two statutes were to be construed in the same manner and purported to pass upon the construction of the substantive provision also. It seems clear that the California court would so hold in a case directly involving the provision of the Probate Code.}

\footnote{117}{The problem would only be raised where the nonacquiring spouse died \textit{testate}, since under California law all of the community property goes to the surviving spouse where the other dies intestate.}

\footnote{118}{\textit{Supra}, note 27.}
ing law (assuming that the situs rule has been rejected): that the law of the new domicile will govern marital-property interests in such acquisitions, or that the law of the first domicile will continue to govern. The latter rule, which has been generally accepted on the Continent, rests historically upon the theory of “tacit contract” first elaborated by the French jurists. This theory is that, when persons marry in a particular jurisdiction, they contract with reference to the marital-property laws in force in that jurisdiction and “tacitly” agree that their property relations shall be governed by those laws; hence, when they move to another jurisdiction, their property relations, by virtue of this contract, are still governed by the law of the first domicile. It is apparent that this is simply another way of stating the result, rather than a justification for it. As Justice Porter so ably pointed out in Saul v. His Creditors,\(^{119}\) this reasoning assumes the answer. It may be admitted that there is a “tacit contract” between the parties that the marital-property laws of their domicile shall govern (although this is extremely doubtful as a matter of fact in most cases); the question still remains as to the terms of that contract. Is it to the effect that the laws of the first domicile shall govern the property relations of the parties wherever they may live; or is it that such laws shall govern their property relations only while they are domiciled in that jurisdiction? There is, of course, no reasonable basis for assuming the first alternative, which this theory does without argument, rather than the second.

\(^{119}\) 5 Mart. (n.s.) 569, at 602–03 (La. 1827): “That in supposing when parties marry, they intend the laws of the place where the contract is made, should govern them wherever they go, he [Dumoulin] begs the question; and that the first thing to be settled is, whether these laws do govern them wherever they go. . . . The presumption must be, they intended their rights to property should be governed by the laws of the country where they married. This is admitted. But then this presumption, as to their agreement, cannot be extended so as to give a greater effect to those laws than they really had. If it be true those laws had no effect beyond the limits of the state where they were passed: —then it cannot be true to suppose, the parties intended they should have effect beyond them. The extent of the tacit agreement depends on the extent of the law.”
that jurisdiction will govern all future acquisitions. The one exception is Keyser v. Pilgrim, an ill-considered opinion by the Texas Supreme Court. That case held, with no citation of authority and only a one paragraph explanation, that the law of the first domicile still governed acquisitions after the removal. In that case the movable was acquired after removal in the first domicile; hence, the case might be explained as an adoption of a situs rule. But the court stated that the marriage was not contracted with a view to removal to another jurisdiction, and it apparently thought that, from its espousal of the intended-domicile theory in State v. Barrow, it followed that the law of the first domicile would govern property acquired after removal, in the absence of such intention. The court was correct that the intended-domicile theory and the tacit-contract theory were evolved together and historically were mutually dependent upon each other; however, the intended-domicile theory has always been advocated in this country in apparent ignorance of its origin and purpose and has never been held, in other states, to imply that the law of the first domicile will govern acquisitions after a change of domicile, in the absence of such intention. The case of Keyser v. Pilgrim has never been followed in Texas, and this decision can hardly be considered to have overruled the previous case of Hall v. Harris, in which the tacit-contract theory was carefully considered by the court and rejected.

120 Besse v. Pellochoux, 73 Ill. 285 (1874); Gale v. Davis’ Heirs, 4 Mart. (o.s.) 645 (La. 1817); Saul v. His Creditors, 5 Mart. (n.s.) 569 (La. 1827); Cameron v. Rowland, 215 La. 177, 40 So. (2d) 1 (1949); Muus v. Muus, 29 Minn. 115, 12 N.W. 343 (1882); Pratt v. Douglas, 38 N.J. Eq. 516 (Ct. Err. & App. 1884); Matter of Majot, 199 N.Y. 29, 92 N.E. 402 (1910); Gidney v. Moore, 86 N.C. 485 (1882); Castro v. Illies, 22 Tex. 479 (1858); Johnson v. Commissioner, 88 F.(2d) 952 (C.C.A. 8th, 1937), 105 F.(2d) 454 (C.C.A. 8th, 1939), cert. denied, 308 U.S. 625 (1940); Commissioner v. Cadwallader, 127 F.(2d) 547 (C.C.A. 9th, 1942); Helvering v. Campbell, 139 F.(2d) 865 (C.C.A. 4th, 1944); David L. Loew, 7 T.C. 363 (1946); cf. Dow v. Gould & Curry Silver Mining Co., 31 Calif. 629 (1887); Lapice v. Gereauadeau, Walk. 480 (Miss. 1831); Ordronaux v. Rey, 2 Sandf. Ch. 33 (N.Y. Ch. 1844); Hall v. Harris, 11 Tex. 300 (1854); see Tourné v. Tourné, 9 La. 452, 457 (1836); Morales v. Marigny, 14 La. Ann. 855, 857 (1859). But cf. Kendall and Wife v. Coons, 64 Ky. (1 Bush) 530 (1866).


122 Supra, note 96.

123 See discussion supra, § 1, ¶ B, this chapter.

124 11 Tex. 300 (1854).
In Louisiana two early cases, Gale v. Davis' Heirs\(^{126}\) and Saul v. His Creditors,\(^{128}\) held that the law of the new domicile governed acquisitions after removal of the spouses, but these cases were actually based upon the adoption of a \textit{situs} rule. However, the Civil Code of 1825 provided: “A marriage, contracted out of this State, between persons who afterwards come here to live, is also subjected to community of acquests, with respect to such property as is acquired after their arrival.”\(^{127}\) This statute, of course, does not overrule the actual holding of the earlier cases, but it departs from their rationale; and the Louisiana Court later remarked that “the reasoning of the court in that case [Saul v. His Creditors] . . . has not so generally commanded the approbation of the bar and bench as the decision itself.”\(^{128}\) In Arizona\(^{129}\) and Texas,\(^{130}\) also, there are statutes which tend to support the general rule that the law of the new domicile governs marital-property interests in property acquired after removal.

\(\text{B. Removal of one spouse only.}\) A further problem arises when only one of the spouses removes to another jurisdiction. Three different solutions to this problem have been advocated. The first solution is based on the common-law theory that the wife cannot acquire a domicile different from her husband’s and, therefore, that her “domicile” should simply be ignored. By this theory, the law of the husband’s domicile would govern future acquisitions of either spouse, whether it is he or his wife who has removed to another jurisdiction. This rule is supported by most of the existing cases.\(^{131}\) The second solution, which is advocated by two New York cases,\(^{132}\) is based on the theory that neither spouse should have the power, by alone removing to another jurisdiction, to alter the marital-

\(^{125}\) 4 Mart. (o.s) 645 (La. 1817).
\(^{126}\) 5 Mart. (n.s.) 569 (La. 1827).
\(^{129}\) Ariz. Rev. Code § 63–306 (1939): “The marital rights of persons married out of this state, who may move to this state, shall in regard to property acquired in this state during the marriage be regulated by the laws of this state.”
\(^{130}\) Vernon’s Tex. Stats. art. 4627 (1936): “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.”
\(^{131}\) \textit{Infra}, notes 134, 136.
\(^{132}\) \textit{Infra}, notes 135, 137.
property relations of the parties. By this theory, the law of the first jurisdiction would continue to govern future acquisitions of both spouses, whether it was the husband or the wife who removed to another jurisdiction. The third solution, which is advocated by the Restatement 188 and which as yet has no firm support in the cases, is based on the recognition of the independence of husband and wife. By this theory, separate domiciles of husband and wife should be recognized for this purpose, and the law of the domicile of each spouse would govern the marital-property interests of the other in his acquisitions.

Where the husband has alone removed to another jurisdiction, leaving his wife in the first domicile, the cases have held that her marital-property interests in his acquisitions are governed by the law of the second jurisdiction. 184 This is put on the basis that the wife's domicile follows that of her husband. The actual holdings of these cases are not opposed to the Restatement position, but their rationale does not support that position. The one case which is opposed to this view is Bonati v. Welsch. 185 There the New York court stated that the law of the first jurisdiction governed, because the husband alone should not have the power, by removing to a foreign jurisdiction, to affect his wife's marital-property rights. However, the case is weakened by the fact that no marital-property issue was actually involved. The husband and wife had been domi-

188 Restatement, Conflict of Laws § 290, comment c (1934): "If the spouses have separate domiciles at the time of the acquisition of movables, the law of the domicile of that spouse who acquires the movables determines the extent of the interest of the other spouse therein."

184 Beemer v. Roher, 137 Calif. App. 293, 30 P. (2d) 547 (1934); Jacobson v. Bunker Hill & Sullivan Mining & Concentrating Co., 3 Ida. 126, 28 P. 396 (1891); Commissioner v. Cavanaugh, 125 F. (2d) 366 (C.C.A. 9th, 1942); Penn Mutual Life Ins. Co. v. Fields, 81 F. Supp. 54 (S. D. Calif. 1948); Herbert Marshall, 41 B.T.A. 1064 (1940); cf. Succession of McKenna, 23 La. Ann. 369 (1871). In the following cases the Washington court assumed that the husband's acquisitions after removal to Washington would be community property in this situation, but they held that the statute requiring the wife's joinder in a conveyance of community real property could not be invoked against an innocent purchaser from the husband without knowledge of the marriage relation. Sadler v. Niesz, 5 Wash. 182, 31 P. 630, 1030 (1892); Nuhn v. Miller, 5 Wash. 405, 31 P. 1031, 34 P. 152 (1892); Canadian and Am. M'tge. & Trust Co. v. Bloomer, 14 Wash. 491, 45 P. 34 (1896); Daly v. Rizzutto, 59 Wash. 62, 109 P. 276 (1910). Compare Campbell v. Sandy, 190 Wash. 528, 69 P. (2d) 808 (1937).

186 24 N.Y. 157 (1861).
ciled in France, and the husband had there appropriated the wife’s “separate” property in the amount of 19,000 francs. He alone removed to New York, and it was held that the wife could recover this amount from his estate as a creditor, after his death. Here the husband owed a debt to his wife under the law of France at the time of the removal, and of course his change of domicile should not have been held to discharge this debt. It would be a different thing to hold that the wife could claim a community interest in the husband’s acquisitions in New York after the removal, and the wife made no such claim in this case.

In the case where the wife alone removes to another jurisdiction, and the question concerns the husband’s marital-property interests in her acquisitions, there is very little authority. Payne v. Commissioner \(^{186}\) held, in this situation, that the law of the first jurisdiction governed, on the ground that the wife’s domicile remained that of her husband. Strebler v. Wolf,\(^ {187}\) in the New York Supreme Court, reached the same result, but on the rationale of Bonati v. Welsch that neither spouse could by unilateral action affect their marital-property interests. The Payne case and the Strebler case are the only two cases which are opposed in actual result to the Restatement position that the domicile of each spouse should govern marital-property interests in his acquisitions. It is true that there is no positive support for this rule in the cases, but it may well be that this Restatement rule will be adopted in the future, since it seems to more nearly comport with modern ideas of equal privileges for the spouses, even in the establishment of a new domicile.

There remains a word to be said about the rule in Louisiana. The early cases held that the law of Louisiana governed where the husband alone removed to that jurisdiction,\(^ {188}\) but this rule was based upon a *situs* doctrine. Then the statute was adopted which provided that the law of Louisiana should apply to the subsequent acquisitions of “persons who . . . come here to live. . . .” \(^ {189}\) The


\(^{187}\) 152 Misc. 859, 273 N.Y.S. 653 (Sup. Ct. 1934).

\(^{188}\) Cole’s Widow v. His Executors, 7 Mart. (n.s.) 41 (La. 1828); Dixon v. Dixon’s Executors, 4 La. 188 (1932); Hubbell v. Inkstein, 7 La. Ann. 252 (1852).

\(^{189}\) La. CIV. CODE art. 2401 (Dart 1945) [italics added].
court stated in Dixon v. Dixon’s Executors \footnote{140} that the use of the plural word “persons” in this statute meant that after 1828 \footnote{141} the Louisiana law would not govern when one spouse only removed to that state. When this problem was again raised in Succession of Dill, \footnote{142} however, the court, nevertheless, held that Louisiana law governed the wife’s marital-property interests in acquisitions of the husband, where he alone moved to that state; but they based this result upon the statute of 1852 \footnote{143} which adopted a \textit{situs} rule with respect to “nonresident married persons.” The court stated that under this statute “all property acquired \textit{in this state} by married persons becomes community property regardless of where both or either of them reside.” \footnote{144} The court apparently approved the \textit{dictum} in Dixon v. Dixon’s Executors as to the effect of the statute of 1825. If this is true, it would mean that, where the husband alone removes to Louisiana and thereafter acquires property \textit{outside of Louisiana}, the law of his former domicile will govern, since the case does not fall under the statute of 1825 nor that of 1852. There may be some doubt, however, whether the Louisiana court would actually reach this anomalous result upon a narrowly technical reading of the statutes, were the case actually presented to it. \footnote{145} It should also be noted that, upon this construction of the statutes, the law of Louisiana will clearly govern the acquisitions of the wife \textit{in Louisiana} where \textit{she} alone removes to that state; since this result is based on a \textit{situs} rule, it would make no difference whether she were considered to retain her husband’s domicile or not.

\textbf{\textit{C. Effect of antenuptial agreements.}} The general rule, that the law of the second jurisdiction governs marital-property interests in subsequent acquisitions of the spouses after a change of domicile, is of course subject to modification by an express antenuptial agreement between the spouses. If the spouses agree by such a contract, which complies with the necessary formalities, that their marital-

\footnote{140} Supra, note 138.  
\footnote{141} After 1828 because, although the statute was passed in 1825, the \textit{Fuero Real} upon which the \textit{situs} rule was based was not repealed until three years later. See notes 64, 65, \textit{supra}.  
\footnote{142} 155 La. 47, 98 So. 752 (1923).  
\footnote{143} La. Civ. Code art. 2400 (Dart 1945).  
\footnote{144} 155 La. at 58, 98 So. at 755 (1923) [italics added].  
\footnote{145} A similar constructional problem may arise under the Arizona and Texas statutes, Ariz. Rev. Code § 63–306 (1939); Vernon’s Tex. Stats. art. 4627 (1936), quoted \textit{supra}, notes 129–130.
property interests shall continue to be governed by the law of their first domicile even after removal to another jurisdiction, there is no reason why such an agreement should not be given effect as between the parties. The leading case enforcing such a contract in this country is *DeCouche v. Savetier*, decided by Chancellor Kent in 1817. There the spouses had been married in France and had agreed by antenuptial contract that the custom of Paris should govern their property rights, "though the parties should hereafter settle in countries where the laws and usages are different or contrary." Chancellor Kent held that the contract applied to property acquired by the husband in New York after he had changed his domicile to that state.

Although there is no dissent from the proposition that such a contract will be enforced in the second domicile if an intent is found that it should apply despite the change of domicile, there is more diversity with respect to the principles of construction to be used in ascertaining such intent. There would seem to be little reason to depart from the general rule that the intent of the parties is to be gathered from all of the language of the contract and all of the circumstances at the time of its creation. However, some courts have seized upon an offhand remark of Justice Story as justification for applying a different rule to antenuptial contracts. Story remarked: "Where there is an express nuptial contract, that, *if it speaks fully to the very point*, will generally be admitted to govern all the property of the parties, not only in the matrimonial domicil, but in every other place, under the same limitations and restrictions, as apply to other cases of contract." It is very clear, from later passages in the same chapter, that Story did not intend to lay down any hard and fast rule nor to treat such contracts any differently than other contracts. However, a number of courts have relied upon

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146 3 Johns. Ch. 190 (N.Y. Ch. 1817).
147 Compare Murphy's Heirs v. Murphy, 5 Mart. (o.s.) 83 (La. 1817), to the effect that such an agreement, although operative to continue the community between the spouses after the removal, would not be permitted to continue it between a surviving spouse and the children of the marriage, according to the custom of Paris, since the children were strangers to the contract.
148 *STORY, CONFLICT OF LAWS* 254 (3d ed. 1846) [italics added].
149 Id. at § 159: "Where there is any special nuptial contract, between the parties, that will furnish a rule for the case; and as a matter of contract, ought to be carried into effect everywhere, *under the general limitations and exceptions belonging to all other classes of contracts*" [italics added]. Id. at § 184: "Where
the italicized portion of this passage as authority for holding that the antenuptial contract will not be enforced in the second domicile unless it expressly provides for the contingency of a change of domicile. 150 An approximately equal number of cases have not recognized any such mechanical rule in the construction of antenuptial contracts and have enforced them in the second domicile, although it does not appear that there were express provisions that the contracts should govern in a subsequent domicile. 151

It is difficult to justify the adoption by some courts of the narrow and illiberal rule which refuses to find an intent that the contract shall govern in a second domicile, unless such intent is expressed in so many words. Perhaps a partial explanation can be found in the disinclination of some courts to apply a foreign law with which they are unfamiliar and which is difficult to understand. At least, this explanation is suggested by the words of the Illinois court in Besse v. Pellochoux: "The words [in the contract] that are supposed to create an estate in the wife ... are of doubtful meaning. They have no definite signification, like well understood legal terms." 152 If one rejects such provincialism, however, it is submitted that this mechanical rule of construction should also be rejected.

Although there is apparent unanimity that an antenuptial contract will be enforced as between the spouses and their privies in the second domicile, if that was the intent of the parties (the only disagreement being over what is necessary to show such intent), another factor is injected into the equation where the rights of third parties are involved. There is a marriage between parties in a foreign country, and an express contract respecting their rights and property, present and future, that, as a matter of contract, will be held equally valid everywhere unless, under the circumstances, it stands prohibited by the laws of the country, where it is sought to be enforced. ... Where such an express contract applies in terms or intent only to present property, and there is a change of domicil, the law of the actual domicil will govern the rights of the parties as to all future acquisitions" [italics added].

150 Besse v. Pellochoux, 73 Ill. 285 (1874); Long v. Hess, 154 Ill. 482, 40 N.E. 335 (1895); Hoefer v. Probasco, 80 Okla. 261, 196 P. 138 (1921); Fuss v. Fuss, 24 Wis. 256 (1869); Clark v. Baker, 76 Wash. 110, 135 P. 1025 (1913); see Tourne v. Tourne, 9 La. 452, 457 (1836).


152 Besse v. Pellochoux, 73 Ill. 285, at 287 (1874).
parties are involved. The cases are in substantial agreement that such a contract will not be enforced in the second domicile in a case where its enforcement would prejudice the rights of creditors \footnote{Wheeler v. Walker, 64 Ala. 560 (1879); Ordonaux v. Rey, 2 Sand.f. Ch. 33 (N.Y. Ch. 1844); Castro v. Illies, 22 Tex. 479 (1858); cf. Davenport v. Karnes, 70 Ill. 465 (1873); see Rochereau v. Jonau, 11 La. Ann. 598, 599 (1856). Apparently contra: Scheferling v. Huffman, 4 Ohio St. 241 (1854).} or transferees \footnote{Heine v. Mechanics' & Traders' Ins. Co., 45 La. Ann. 770, 13 So. 1 (1893); Richardson v. De Giverville, 107 Mo. 422, 17 S.W. 974 (1891).} of the spouses. As was stated by the Texas court in \textit{Castro v. Illies}: "... whatever may be the rights of the parties to the contract, as between themselves and their representatives in the succession to their property, it is clear, that the contract in question cannot have the effect to govern their rights in their real property, acquired and situate here, to the prejudice of the rights of other citizens, who have contracted, on the faith of the property, and without notice of a contract giving it a different status from that of other parties, or establishing a rule for its government, variant from the law of the land." \footnote{Castro v. Illies, 22 Tex. 479, at 502 (1858).}
CHAPTER VI

Problems of Application

When an issue before a court has been characterized by it for choice-of-law purposes as a "marital-property issue," and a connecting factor adopted to indicate the jurisdiction whose law should be used to resolve that type of issue, a final step remains to achieve a solution of a conflicts case. That step is merely the application of the law thus indicated. It is apparent that in most cases this problem of application will cause no difficulty. The court at the forum will simply consider the statutes and decisions of the indicated jurisdiction, which may have to be pleaded and proved, or of which the court may be permitted by statute to take judicial notice, and will apply the rule which it derives from these authorities to the issues of the case. This simplicity is usually present where the forum and the jurisdiction whose law is to be applied have the same general system of marital property, and the differences are merely differences in detailed rules. However, where the forum and the jurisdiction whose law is to be applied have entirely different systems of marital property (as where the case arises in a common-law state and the indicated law is that of a community-property state, or vice versa), the problem of application becomes more difficult. This is due in part merely to the increased danger that the court at the forum will misunderstand the law which it is attempting to apply.
and consequently will misapply it. There are also several theoretical difficulties of application, however, which usually arise in this situation, i.e., where the conflict is between two different systems of marital-property law.

The first of these difficulties is the problem of renvoi, or patent conflict of choice-of-law rules. This problem arises where the foreign jurisdiction to which the issue is referred has a choice-of-law rule, embodying a different connecting factor than that of the forum, which ostensibly would refer the issue back to the law of the forum or on to a third jurisdiction. This problem is unlikely to arise in this country in marital-property cases where the conflict is between two states of the Union, because there is almost unanimous agreement on the connecting factors to be used in this field. It sometimes does arise where the case has a contact with a foreign country, but such cases have been very infrequent and it is only possible to discuss the problem from a theoretical point of view. This has been done above, and the problem of patent conflict of choice-of-law rules will not be considered further in this chapter.

The second difficulty which arises in applying the foreign law is the so-called problem of “secondary” characterization. This difficulty is presented when the forum finds that the foreign law referred to has a rule of law which is applicable to the facts of the case and which would decide the issue presented, but that this rule of law has been categorized, for internal purposes in the foreign system, differently from the way the issue itself was characterized by the forum for reference to that system. The writer has attempted to demonstrate above that this difference in characterization should be ignored by the forum, though some writers have urged that it should have a material bearing in some of the cases considered in this chapter.

The third difficulty of application is the problem of latent conflict of choice-of-law rules. This problem arises where the foreign jurisdiction to which the issue is referred has the same choice-of-law rules as the forum, but the issue presented in the instant case has been characterized differently by it, for choice-of-law purposes, than the characterization adopted by the forum. For example, suppose that state A, the forum, was the domicile of H and W at the

1 Chap. III, § 3, ¶ A, supra.
2 Chap. III, § 1, ¶ C, supra.
time of the death of H; and state B was the domicile at the time of the acquisition of certain property by H. An issue may be presented in the settlement of H's estate which state A characterizes as an issue of "marital property" and refers to the law of state B. The court may find that, although state B has identical choice-of-law rules with its own, state B has characterized this same issue as one of "succession" and would, if the case arose there, refer under another choice-of-law rule to the law of the last domicile, i.e., state A. It is obvious that this is merely a concealed problem of renvoi, arising from a conflict of characterizations rather than a conflict of connecting factors.\(^8\)

The final difficulty of application which the courts have encountered in the field of marital property might be called the problem of semantics. Where the conflict occurs between a common-law state and a community-property state, the difficulty is presented that the same or similar words are used in these two different systems of marital property to mean different things. For example, the statutory "separate" property of a husband or wife in a common-law jurisdiction is entirely distinct, both as to the operative facts which make it "separate" property and the legal characteristics of that type of property, from the civil-law "separate" property of husband or wife in a community-property state.\(^4\) Also, ownership "in common" between husband and wife (i.e., a tenancy in common) in the common-law states is greatly different from ownership "in common" between husband and wife (i.e., community property) in the community-property states.\(^5\) Of course, this difficulty evaporates once it is recognized: It is merely a booby trap. But, unfortunately, courts and commentators have not always avoided it.

The last three problems of application outlined above usually arise in the United States in cases where statutory "separate" property of husband or wife has been taken into a community-property jurisdiction, or where community property has been taken into a common-law jurisdiction. This transportation may or may not be accompanied by a change of domicile, and the property may or may not be exchanged for other property, movable or immovable, in the second jurisdiction: In all of these cases the choice-of-law rule is

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\(^8\) See Chap. III, § 3, ¶ B, supra.

\(^4\) Chap. II, § 2, ¶¶ A, B, supra.

\(^5\) Chap. II, § 2, ¶ C, supra.
the same—that the law of the domicile of the husband and wife at the time of the first acquisition governs issues of marital property. These problems of application will, therefore, be discussed in the light of the two factual situations where they most commonly arise.

The problems which are raised by such transportation of one type of marital-property into a jurisdiction where it is not indigenous differ to a significant degree from the problems involved in the normal conflicts case. These more usual cases concern static or completed situations, such as, a tort having been committed, or a contract having been made and violated. The situation under discussion, however, is a dynamic or continuing one, and it is necessary to take into consideration policies and legal theories appropriate to it. For example, suppose \( H \) and \( W \) acquire property while domiciled in state A, which is “community property” under the law of that jurisdiction. Thereafter, they move their domicile to state B, where community property does not exist, taking the property with them. To what extent will or should state B recognize and continue the bundles of interests which existed in the husband and wife in state A with respect to this property?

The position taken in this study is that state B should, as a general rule, recognize the interests created by state A, as between the husband and wife, and enforce these rights in a manner as closely approaching their enforcement in state A as is possible under the local forms of procedure. However, it is obvious that there is a limit to the extent to which state B should go in recognizing these interests which are foreign to its own system of law. In general, this limit should be held to have been reached when there are commercial dealings with the property in state B between the spouses and third persons. In the absence of an effective recordation procedure for marital-property interests, such third persons should be entitled to rely upon the law of state B as to any possible marital-property interest of one spouse in property acquired by the other.

§ 1. STATUTORY “SEPARATE” PROPERTY TAKEN INTO A COMMUNITY-PROPERTY STATE

The typical situation with which we are concerned in this section is the case where a husband and wife are first domiciled in a
common-law jurisdiction (e.g., New York). While they are domiciled there the husband acquires movable property during coverture. Thereafter, they change their domicile to a community-property state (e.g., California), taking the movable property acquired in New York with them. The general rule adopted in this situation is that the law of the domicile of husband and wife at the time of acquisition (New York) governs the marital-property characteristics of the property after removal, whether it continues in the same form or is exchanged for other property in California, movable or immovable. The problem to be considered here is the application of the New York law by the court in California.

The most important point to keep in mind in dealing with this situation is that property acquired by the husband, whether before or after marriage, while domiciled in New York has different marital-property characteristics from any property acquired by either husband or wife while domiciled in California (or the other community-property states). Such property is called the "separate" property of the husband in New York, but its marital-property characteristics vary as greatly from those of "separate" property acquired in California as they do from those of what is there called "community property." The California court should not be misled by this identity of names into deciding issues concerning this property on the basis of the California rules concerning "separate" property. If they are, then they will be applying neither New York nor California law, because this property would not have been "separate" property had it been acquired in California, but would have been community property.

The specific problems of application in connection with statutory "separate" property transported into a community-property state will be considered under the following three headings, representing areas in which they most commonly arise: Distribution on death; Division on divorce; and Rights of creditors and transferees.

A. Distribution on death. The problem of distribution of property upon the death of one of the spouses is the one which

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6 Chap. V, § 3, ¶ B, supra.
7 The same problems, of course, arise where there has been a transportation of the statutory "separate" property of the wife from a common-law to a community-property jurisdiction, but since most of the cases deal with acquisitions of the husband we will use that more common situation for illustrative purposes.
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bulks largest in the cases. It is important, in this connection, whether
the spouse who acquired and "owns" the statutory "separate"
property dies first, or whether the other spouse dies first. Therefore,
these two situations will be considered separately. Suppose that \( H \)
and \( W \) are domiciled in a common-law state, and \( H \) acquires
property during coverture. Thereafter, \( H \) and \( W \) move their domici-
to a community-property state. \( W \) dies, and her heirs or legatees
claim some portion of this property as against \( H \). Clearly, \( H \) should
prevail in this situation, and the cases so hold. The rule is that the
law of the first state, as the domicile at the time of acquisition,
governs. By the law of all of the common-law states the wife has
no interest in the acquisitions of her husband which will survive
her death prior to his, i.e., an interest which she can transmit to
her heirs or legatees. Therefore, regardless of which common-law
state the husband and wife came from, the husband should prevail
in this case.

A more difficult problem is posed by the case where the facts are
identical with those of the case just stated, except that the husband
dies first, and the dispute is between the surviving wife and his
legatees. If the wife merely claims that one-half of the property is
not subject to the husband's power of testamentary disposition
because it is community property under the statutes of the second
state, this claim should be denied, since the rule is that the law of
the first jurisdiction governs. And this is the result which is reached
in the cases.\(^8\)

\(^8\) In re Donohoe's Estate, 128 Calif. App. 544, 17 P.(2d) 1010 (1933);
Douglas v. Douglas, 22 Idaho 536, 125 P. 796 (1912); Gale v. Davis' Heirs, 4
Mart. (o.s.) 645 (La. 1817); Huff v. Borland, 6 La. Ann. 436 (1851); Leech
(1873); Oliver v. Robertson, 41 Tex. 422 (1874); McDaniel v. Harley, 42
App. 1903), aff'd per curiam sub nom. Clark v. Thayer, 98 Tex. 142, 81 S.W.
1274 (1904); Brookman v. Durkee, 46 Wash. 578, 90 P. 914 (1907); Witherill
v. Fraunfelter, 46 Wash. 699, 91 P. 1086 (1907); cf. Estate of Bruggemeyer,
115 Calif. App. 525, 2 P.(2d) 534 (1931).

\(^8\) Stephen v. Stephen, 36 Ariz. 235, 284 P. 158 (1930); Estate of Warner,
167 Calif. 686, 140 P. 583 (1914); Estate of Nickson, 187 Calif. 603, 203 P.
106 (1921); Estate of Thornton, 1 Calif. (2d) 1, 33 P.(2d) 1 (1934); Penny
v. Weston et al., 4 Rob. 165 (La. 1843); Succession of McGill, 6 La. Ann. 327
(1851); Wolfe v. Gilmer, 7 La. Ann. 583 (1852); Conner's Widow v. Ad-
ministrator and Heirs of Conner, 10 La. Ann. 440 (1855), aff'd sub nom.
Conner v. Elliot, 59 U.S. 591 (1855); McIntyre v. Chappell, 4 Tex. 187 (1849);
Duke v. Reed, 64 Tex. 705 (1885); Grange v. Kayser, 80 S.W.(2d) 1007
Suppose, however, that the wife proves that the law of the first state would give her a nonbarrable share of one-third in all acquisitions of the husband, and claims this one-third in the property acquired while they were domiciled there. Her claim to a share of the acquisitions of the husband free from his attempted testamentary disposition has been characterized as an issue of marital property by the community-property state, and the choice-of-law rule refers the court to the law of the first domicile as the governing law. By that law, she is entitled to one-third of the husband’s acquisitions despite his attempt to bequeath the property to a third person. Therefore, it would seem that, by applying this law, the wife should prevail.

Two objections might be urged to giving the wife one-third in this situation. The first is that the rule in the law of the first state giving her such nonbarrable share is there classified for internal purposes as a rule of "succession." That is, for purposes of taxation, constitutional law, and other local questions, the courts of the first state have said that this right of the wife is a mere right of "succession," rather than one of "marital property"; but reference has been made to that law because the issue was characterized for conflicts purposes as one of "marital property." Therefore, it has been said by some, we cannot apply any rule of the lex causae which has a "succession" label on it. This apparent difficulty is entirely illusory. No one has suggested any reason in policy or logic why the internal classifications of the foreign state should have any relevancy for this case, since they were made for a different purpose. Having referred an issue to the law of a particular state, the forum should apply any rule of law of that state which will decide the issue in question, regardless of its internal classification.\(^{10}\)

A second objection to giving the wife one-third is the fact that a claim by the wife for a nonbarrable share is characterized for conflicts purposes in the common-law states as an issue of "succession."\(^{11}\) Therefore, when the forum characterizes the issue as one of "marital property" and refers to the law of the domicile at the

\(^{10}\) Chap. III, § 1, ¶ C, supra.

\(^{11}\) Chap. IV, § 1, ¶ D, supra.
time of acquisition, it is faced with a latent conflict of choice-of-law rules, since the same claim of the wife, had the case arisen in the common-law state, would have been characterized as an issue of “succession” and referred to the law of the last domicile of the decedent. In this situation, the community-property state should do one of two things: It should reject the renvoi and apply the internal law of the common-law state, giving the wife one-third of the property, regardless of when it was acquired by the husband; or it should accept the renvoi and apply the law of the forum, giving the wife one-half of the property if it was acquired by the husband after marriage other than by gift, devise, or descent, and giving her nothing if it was otherwise acquired. It is suggested by the author that the court should reject the renvoi in this situation. If the renvoi were accepted, the result would be that the husband’s power of testamentary disposition over property acquired during marriage would be reduced, and that over property acquired before marriage would be enlarged.\(^\text{12}\) It seems doubtful that a mere change of domicile should be held to alter the respective interests of the spouses in property, in the absence of some special reason, and none suggests itself here.

In only one case discovered by the author has this specific contention been presented to the court. In *In re O’Conner’s Estate*,\(^\text{18}\) H and W were domiciled in Indiana and were married there in 1925. At the time of the marriage, H owned $200,000 worth of stocks and bonds. Some time after the marriage, H moved his domicile to California and died domiciled there. Part of the property in his estate was the $200,000 worth of stocks and bonds or other property acquired in exchange therefor. W claimed a portion of this

\(^{12}\) That is, assuming the nonbarrable share in the common-law state extends (as it normally does) to some fraction of the property less than one-half. If such nonbarrable share were one-third, for example, the husband’s power of testamentary disposition over property acquired during marriage would have extended to two-thirds of the property in the common-law state before removal. But if the renvoi were accepted and the law of the community state applied after removal, his power of testamentary disposition would extend to only one-half of such property. On the other hand, since the nonbarrable share also exists in property acquired before marriage, the husband’s power of testamentary disposition would have extended to only two-thirds of that too in the common-law state. But to apply the law of the community state (by accepting the renvoi) would give him power of testamentary disposition over the whole of such property.

\(^{18}\) 218 Calif. 518, 23 P. (2d) 1031 (1933).
property despite $H$'s attempt to bequeath it to a third person. Since this claim had been characterized for choice-of-law purposes by California as a marital-property issue, the law of the domicile at the time of acquisition (Indiana) should govern. $W$ introduced evidence that by the law of Indiana, she was entitled to a nonbarrable share of one-third in fee of all property acquired by $H$, whether before or after marriage. But the court refused to apply this law, and gave her nothing.

It is possible to explain this case on the basis that the California court accepted the renvoi and applied California law. The wife would not have had a nonbarrable interest in this property had it been acquired in California, because it was acquired before marriage. However, the court does not refer to the choice-of-law rules of Indiana at all. And, although the court says at one point that "Appellant concedes that the property in question if governed by the California law would be the separate property of decedent and subject to his testamentary disposition," the opinion as a whole seems to proceed on the theory that a wife would not have a nonbarrable interest in any property brought by a husband from a common-law state, whether acquired before or after marriage. The opinion completely fails to justify such a rule, however. The court says: "The mere fact that under the Indiana laws ... the power of the husband to dispose of his personal property by will was subject to the right of his wife at her election to claim a third thereof gave her no more than an expectancy in this portion of his estate. ... Such a limitation of the husband's right would give the wife no interest in his property during his lifetime. [But $W$ is not here asserting any interest during his lifetime, but after his death.] We are satisfied that appellant had no present fixed right or interest in decedent's personal estate, or more than a mere expectancy, which depended upon survivorship to become a vested right. [But $W$ has survived $H$ in this case.] This being true, and he having established his domicile in California, ... the property was subject to the law of this state, which governs its disposition and distribution whether he died testate or intestate." It is apparent that the first two statements have no application to this case, whatever may be their

14 218 Calif. at 523, 23 P. (2d) at 1033 (1933).
15 218 Calif. at 526, 23 P. (2d) at 1034 (1933).
abstract validity, and that the final statement is a mere announce-
ment of the result and not a reason for it.

The argument of the California court in *In re O'Conner's Estate*,
set forth above, is probably a perfectly valid argument that the
California Legislature, if it so desired, could constitutionally abol-
ish this inchoate, "nonvested" interest of the wife upon the removal
of the spouses to California. But the fact that a property interest
can constitutionally be destroyed is certainly not in itself an argu-
ment that it *should* be destroyed. And the California Legislature
was clearly interested in giving the wife more protection in this
situation rather than less. At the time of the *O'Conner* case it had
passed a statute attempting to make statutory "separate" property,
if acquired during coverture, the community property of the spouses
when it was brought into California from a common-law state; and,
when this statute was later declared unconstitutional, it passed
Section 201.5 of the Probate Code in 1935 giving the wife a non-
barrable share of one-half in such property. Had the *O'Conner*
case been correctly decided, Section 201.5 would probably have
been unnecessary.

16 Estate of Thornton, 1 Calif. (2d) 1, 33 P. (2d) 1 (1934).
17 See Estate of Schnell, 67 Calif. App. (2d) 268, 154 P. (2d) 437 (1944);
 In re Miller, 31 Calif. (2d) 191, 187 P. (2d) 722 (1947).
 App. 1945), H and W were domiciled in Missouri and H purchased land in
 Texas with his statutory "separate" property acquired in Missouri (the court
does not say whether before or after marriage). The husband died testate,
owning property in Missouri, as well as the Texas land which was worth $60,000.
The wife renounced the will in Missouri, and filed a copy of this renunciation
in the Texas ancillary administration proceedings. By the law of Missouri, this
renunciation entitled her to a child's share in fee (which would have been one-
tenth in this case) in both real and personal property. W claimed one-third for
life in the Texas land, under the Texas statute of intestate distribution, on the
theory that her renunciation had the effect of making the husband die intestate
as to her everywhere. The Texas court properly held that this Texas statute
only applied to the property of a person dying intestate, and that there was
no provision making it operative merely because someone had renounced a will.
Of course, it would have applied to the interest renounced by the widow
(which was a life estate), if the court had adopted the rule of partial intestacy
as to that portion, but they adopted the rule of acceleration of the remainder
interests so that this interest also passed under the will.

It would seem that had the wife claimed a child's share in fee in this Texas
land, under the Missouri statute, she should have prevailed. The rule is that
marital-property interests in immovables purchased are determined by the fund
paid for the immovables, which was statutory "separate" property here under
Although the O'Conner case is the only case found in which the wife specifically claimed a nonbarrable interest under the statutes of the former domicile, it is true that she might have done so in many, if not most, of the cases cited above denying her a community interest in the property upon the death of the husband. Can those cases be said, in any sense, also to be authority against allowing the former claim? In practically all of those cases the opinion states that it was conceded by the wife, or the legatees of the husband proved, that "the common law prevailed" in the former domicile and all property acquired there by the husband was his "separate property." Clearly, upon this state of the record, it was incumbent upon the wife, if she desired to claim a nonbarrable interest under the law of the former domicile, to prove that the statutes of that state gave her such an interest and to bring the facts of her case within the terms of those statutes. There would be no presumption that the law of the former domicile gave the wife a nonbarrable interest merely because it was a common-law state, since the common law gave her no such interest in movables and she has only been accorded it in modern times by statute, in most states. Therefore, those cases cannot be said to be authority against the contention made here that the wife should be given the nonbarrable interest granted her by the law of the former domicile. It may be true that the failure to assert such a claim in those cases reflects a belief on the part of many members of the bar that it would not be successful; but there is no judicial authority which would prevent a court, outside of California, from upholding such a claim if it were convinced that a correct approach to the problem requires that result.

That a correct approach to the problem does so require can, it is believed, be demonstrated by assuming a case where the common-law state gives the wife a nonbarrable share of one-half in property acquired by the husband during coverture (as New York does when the law of Missouri. A claim for a nonbarrable interest is characterized by the Texas court as a marital-property issue for choice-of-law purposes. Therefore, the issue should be referred to the law of Missouri, and, if the Texas court refuses to accept the renovi as has been suggested, then the internal law of Missouri should be applied to the case.

See also the similar situation in Estate of Arms, 186 Calif. 554, 199 P. 1053 (1921), where the wife only attempted to claim a community interest under the law of the situs. This claim was properly denied.

19 Note 9, supra.
there are no children); and the community state gives her an identical share under the name of “community property,” in property acquired in the same way. The husband acquires property during coverture while the spouses are domiciled in the common-law state; and they thereafter change their domicile to the community state, where the husband dies. He leaves a valid will bequeathing all his property to a third person. The wife claims one-half of this property. She proves that the law of both states would give her one-half on these facts and says: “I am claiming one-half of the property under one or the other of these rules—I don’t care which one. One of them must be applicable since the case has no factual connection with any other jurisdiction.” Obviously, in order to deny this claim altogether, as the court which decided the O’Conner case apparently would, it is necessary to characterize it as an issue of “marital property” when the wife attempts to bring it under the community-property statutes of the last domicile (thereby referring to the former domicile); and then to turn around and characterize it as an issue of “succession” when she attempts to bring it under the forced-heirship statutes of the former domicile (thereby denying the applicability of that law, which in the previous breath was said to be applicable). This procedure is, of course, merely characterization by the lex causae, or double characterization of the issue—an exploded theory in conflict of laws. Such a result is clearly both illogical and unjust, and a correct analysis of the problem does not support it.

(B. Division on divorce. Two problems arise in connection with the division of property on divorce, depending on whether the request for such a division is made in the divorce action itself, or whether a right to a share of the property is asserted after a divorce decree which is silent as to the property rights of the parties. In the latter situation the claim is characterized as an issue of marital property and referred to the domicile at the time of acquisition of the property. No special problem of application arises here. When the property is the statutory “separate” property of the husband, the law of the common-law state where it was acquired gives the wife no right to claim an interest in the property after an absolute divorce, and therefore the court in the community-property state to

\[20\text{ See discussion of this theory in Chap. III, § 1, }\]
\[21\text{ Chap. IV, § 2, supra.}\]
which the property has been transported does not give her such an interest.\textsuperscript{22}

Where the wife claims a right to a division of property in the divorce action itself, this claim is apparently characterized as an issue of divorce and referred to the law of the forum.\textsuperscript{23} Where the law of the community-property state gives the court the right to divide all property owned by husband or wife in a divorce action, it can, of course, also divide the statutory “separate” property. However, in some of the community-property states, in which community property and “separate” property are treated differently for the purpose of division in a divorce action, a more difficult problem is presented.

For example, in California the court is given authority by Section 146 of the Civil Code to divide community property between the parties in such proportions as the court may “deem just,” where the divorce is for certain specified causes, but is not given any authority to divide “separate” property. In several cases, the husband acquired property after marriage while he and his wife were domiciled in a common-law state; the spouses then moved to California bringing this property with them; thereafter, the wife instituted an action for divorce on one of the specified grounds and requested a division of this property. Under the rule that marital-property interests are governed by the law of the domicile at the time of acquisition this property was the statutory “separate” property of the husband. The legislature undoubtedly was not thinking of such a case, when it gave authority to the court to divide “community property” but not “separate property.” Two solutions of the problem might be urged. Under the first, it might be said that the court would divide this property under the authority to divide “community” property only if it had substantially identical characteristics as California community property. By this test, of course, the property could not be divided because the statutory “separate” property, although unlike civil-law “separate” property, also differs from community property in many respects. Under the second, it might be said that the court would divide this property if it were


\textsuperscript{23} Chap. IV, § 2, \textit{supra}.
acquired in the same manner as California community property; in other words, that the phrase "community property" in the statute is simply a shorthand expression for "property acquired after marriage otherwise than by gift, devise, or descent." Under this approach, of course, the property could be divided, since it would fit the terms of the statute as interpreted. Actually the California courts have refused to divide the property simply on the basis that it is "separate" property, without apparently realizing the difficulty concealed by this use of the same term to designate two different things.24

This failure is surprising in view of the difficulties experienced by the California courts in dealing with the same problem under Sections 228 and 229 of the Probate Code. Those sections set up a rule analogous to the ancestral-property doctrine. They provide that, where an intestate leaves property which came to the intestate by gift, devise, or descent from his predeceased spouse, the predeceased spouse's collateral heirs inherit in preference to the intestate's collateral heirs; however, if this property was formerly the "separate" property of the predeceased spouse, it all goes to his collateral heirs; whereas, if it was formerly the "community property" of the intestate and the first dying spouse, one-half goes to the collateral heirs of each. The situation arose in which H and W had been domiciled in a common-law state until the death of H; W took the property inherited from him and moved to California, dying there intestate. Do the collateral heirs of H take one-half or all of this property which had formerly been his statutory "separate" property, as against the collateral heirs of W? In Estate of Allshouse25 the court said, we will look to the characteristics of this property to see whether it is like California "separate" or community property. On that basis, they said, property acquired by H during marriage in the common-law state is subject to the wife's "dower right" and is unlike either "separate" or community property—therefore the statute does not apply to it at all. However, they said, property acquired by H before marriage is like our "sep-


25 13 Calif.(2d) 691, 91 P.(2d) 887 (1939).
arate” property and all of that goes to his collateral heirs. The obvious fact which the court failed to perceive was that the “dower right” of the wife in the common-law state applied to all property of the husband, whenever it was acquired. There is no distinction in the common-law states between property acquired before and that acquired after marriage—the marital-property characteristics are the same in both cases. This case was overruled by Estate of Perkins, in which the court decided to take the other approach and to treat property as “separate” or community for the purpose of these sections depending upon its method of acquisition. The court said in effect: These phrases “separate property” and “community property” in the statute are simply shorthand expressions for “property acquired before marriage, or afterwards by gift, devise, or descent” and “property otherwise acquired.”

There are two possible distinctions which might be suggested between Estate of Perkins and the divorce cases. One is that the court in a divorce case is only given authority to divide “community” property, and its inability to divide any other type of property results from a simple omission for the statute. Hence, whether the property acquired elsewhere is “civil-law ‘separate’ property” or “statutory ‘separate’ property,” the court still has no authority to divide it. On the other hand, in Sections 228 and 229 the legislature purported to occupy the whole field and the court should try to ascertain their probable intention in the case with foreign elements. The other possible distinction is that in the divorce cases the property was brought to California during coverture, whereas in Estate of Perkins it was brought to California only after the ter-


27 The same problem has also arisen with respect to the statute in California which gives the wife a homestead in fee in community property but a homestead for life only in the husband’s “separate” property. Where the property was acquired while the spouses were domiciled in a common-law jurisdiction, the courts have given her a homestead for life only, with nothing more than a reference to the equivocal label, “separate” property, as in the divorce cases: Estate of Higgins, 65 Calif. 407, 4 P. 389 (1884); Estate of Burrows, 136 Calif. 113, 68 P. 488 (1902); Estate of Nicolls, 164 Calif. 368, 129 P. 278 (1912); cf. In re Pompal’s Estate, 150 Wash. 242, 272 P. 980 (1928); In re Pugh’s Estate, 18 Wash.(2d) 501, 139 P.(2d) 698 (1943).

28 This reasoning, however, will not explain the homestead cases, supra, note 27, for there too the legislature purported to occupy the whole field.
mination of coverture. The court in *Estate of Allshouse* apparently had this distinction in mind when it said that it was impossible to "reclassify" property acquired during marriage in a common-law state as either "separate" or "community" property under the California system, unless the spouses had moved to California during coverture bringing the property with them, in which case it would be "reclassified" as the husband's "separate" property under California law because you have to do something with it, i.e., you must treat it as community property or as California "separate" property. This alleged necessity is far from apparent, however. The choice-of-law rule refers the court to the domicile at the time of acquisition as the jurisdiction to furnish the governing law. That law establishes the character of the property as the husband's statutory "separate" property. Why, then, must the court in the community-property state transform it into one of the two different forms of ownership known to its own law? The author believes the court should simply recognize that it is a third form of ownership under the law of the foreign state, differing from both of the local categories, and apply such statutes to it in the manner which will most nearly effectuate the apparent legislative policy. This seems to be what the court did in *Estate of Perkins* and should have done in the other cases.

(C. Rights of creditors and transferees. Where the rights of third parties such as creditors and transferees are involved, a new factor must be considered—the public policy of the forum in protecting its own citizens who deal with the spouses. In appropriate cases this policy may be allowed to override the application of the foreign law indicated by the choice-of-law rule. However, in the case with which we are concerned here—statutory "separate" property taken into a community-property state—the third party who has dealt with the spouse "owning" the "separate" property will normally be urging the application of the foreign law, since that law normally allows such spouse greater freedom in dealing with the property than he would have with respect to community property.

With respect to liability to creditors, no special problems of application arise in this situation. The statutory "separate" property is liable for any obligation of the spouse who acquired it, sub-
ject of course to all statutory exemptions under the law of the forum; and it is not liable for the obligations of the other spouse.\textsuperscript{29}

With respect to the transfer of movables, it seems clear, although no cases have been found on the point, that the husband will be permitted to transfer his statutory "separate" property for value without the joinder of the wife, after its removal to a community-property state. This is the rule in all of the common-law states, and undoubtedly would be applied in the second state after removal. Under the law of most of the common-law states, some gifts of such property by the husband are voidable at the election of the wife, if they can be said to be "in fraud" of her rights. If the wife's nonbarrable interest is held to be destroyed by the transportation of the movable to a community-property state, then this right, which is merely ancillary to that interest, probably would not survive either. However, if her nonbarrable interest is preserved, then the community-property state should also permit her to attack fraudulent gifts by the husband, which would defeat that interest, applying the rules of the common-law state where the property was acquired to determine what gifts are "in fraud" of her rights.\textsuperscript{30}

When the movables transported to a community-property state are there exchanged for immovables, a different problem is presented. By the law of a large number of common-law states, the joinder of the wife is required in any transfer of immovables, either gratuitously or for value, in order for the transfer to cut off her right to a nonbarrable interest therein. If the "source" doctrine were carried to a dryly logical extreme, this rule would apply to the immovables in the community-property state. It seems clear in this situation, however, that the community-property state, for the protection of its own citizens, should and would refuse to apply this rule.\textsuperscript{31} The precise requirements for an effective joinder by the wife are unknown to the persons dealing with real estate in the community-property state, and to apply the law of a foreign state

\textsuperscript{29} Eager \textit{v.} Brown, 14 La. Ann. 684 (1859); Marlatt \textit{v.} Citizens' State Bank \& Trust Co., 180 La. 387, 156 So. 426 (1934); Elliott \textit{v.} Hawley, 34 Wash. 585, 76 P. 93 (1904); Carlson \textit{v.} Rea, 94 Wash. 218, 161 P. 1195 (1917); State ex rel. Van Moss \textit{v.} Sailors, 180 Wash. 269, 39 P.(2d) 397 (1934); cf. State \textit{v.} Barrow, 14 Tex. 179 (1855).


\textsuperscript{31} Melvin \textit{v.} Carl, 118 Calif. App. 249, 252, 4 P.(2d) 954 (1931); Vertner \textit{v.} Humphreys, 14 Smedes \& M. 130 (Miss. 1850).
upon this point would have a highly disruptive effect upon the
security of titles. The community-property state may be one of
those which require the joinder of the wife for a valid conveyance
of community real property, but the property brought from the
common-law state is not community property and therefore this
rule would not be applicable either. The result is that the husband
should be free to convey such immovables for value without any
requirement of joinder by his wife.

§ 2. COMMUNITY PROPERTY TAKEN INTO A
COMMON-LAW STATE

The typical case with which we are concerned in this section is
one where H and W are domiciled in a community-property state,
and H acquires movables by onerous title during coverture. There-
after, they move their domicile to a common-law state, taking these
movables with them. A dispute arises in the courts of the second
domicile concerning this property, and the issue presented is char-
terized as one of “marital property” for choice-of-law purposes.
The choice-of-law rule for such issues refers the court to the first
domicile as the jurisdiction to furnish the governing law. The
problems to be considered here concern the application of that
law to the facts.

A preliminary question must be considered, however, before
discussing specific problems of application. This question is raised
by the contention that the change of domicile automatically trans-
forms the property, which was community property under the law
of the first domicile, into a tenancy in common between husband
and wife, each owning an undivided one-half interest in fee. For
example, Professor Beale says: “When the spouses while domiciled
in a community-property state acquire movables, which they carry
with them into a new common-law domicil, their rights acquired
in the community state continue in the common-law state, in the
form, probably, of a joint title.” The language italicized probably
refers to a tenancy in common between husband and wife, since
32 Those community-property states other than Louisiana, Nevada, and Texas.
33 Melvin v. Carl, supra, note 31.
34 2 Beale, Conflict of Laws 1016 (1935) [italics added].
by the entireties or a joint tenancy, and there is no judicial authority for so treating it. Also the Restatement puts the case of chattels acquired in a community-property state and held in community by husband and wife; thereafter, they take the chattels to a common-law state: "The chattels are there attached by a creditor of the husband. The validity of the attachment is determined by the law of [the common-law state] with regard to the attachment of property owned in common for a debt of one of the owners." The italicized language here seems clearly to refer to the law of tenancy in common between husband and wife, since the law of the common-law state has no rules with respect to the liability of property held in community between husband and wife.

As a matter of principle, it is difficult to see any justification for a rule that community property is transformed into a tenancy in common, by a change of domicile and transportation of the property to a common-law state, and none is offered by the authorities cited above. If this were in fact the rule, the court in the common-law state would be applying the law of neither the first nor the second domicile to the case. By the law of the first domicile, which is indicated by the choice-of-law rule, property so acquired is community property. This differs more from a tenancy in common between husband and wife than it does from the husband's statutory "separate" property in the common-law state. In general, it is liable for the husband's obligations and not for those of the wife; whereas, if a tenancy in common, one-half, and only one-half, of the property would be liable for the obligations of each spouse. It can be transferred for value by the husband without the wife's concurrence (if personal property), and cannot be transferred by the wife; whereas, if a tenancy in common, one-half, and only one-half, could be transferred by each spouse; etc. On the other hand, by the law of the second domicile, property acquired in this manner is the husband's statutory "separate" property, not a tenancy in common between the spouses. Therefore, by the law of neither jurisdiction is the property held as a tenancy in common, and to so rule would be applying the law of neither state.

86 Restatement, Conflict of Laws § 292, Illus. 1 (1934) [italics added].
86 This statement in the illustration, it should be noted, contradicts the black-letter statement in the same section.
It is apparent that, if such a theory is to be justified, it can only be on the basis of authority and not of principle. Does the theory have any support in the authorities? Professor Beale cites two cases in support of his statement, and the writer has found no others which tend to support it. The first of these is *Depas v. Mayo*, decided by the Missouri Supreme Court in 1848. In that case, H and W were domiciled in Louisiana and H acquired movable property there during coverture. Thereafter, they changed their domicile to Missouri, and this movable property was invested in Missouri land. Subsequently, they returned to Louisiana and W secured a divorce from H. This was a suit by W against H to recover one-half of the Missouri land. Judgment for W was affirmed. This decision was clearly correct under the Louisiana law. Although at that time in Louisiana a wife was held to have renounced the community by failing to claim a division of community property in the divorce action, the wife here did claim such a division in the Louisiana action, although of course that court could not divide the Missouri land.

This case could hold nothing about the nature of the ownership of the Missouri land before the community was dissolved by divorce, since no such question was before the court; however, it is true that the court seemed to indicate in *dicta* that it thought that the spouses each owned an undivided one-half interest as tenants in common from the time the property was removed to Missouri. The reason for this is not hard to find. The court thought that “community property” was simply another name for tenancy in common. They said: “By the laws of Louisiana, it is stated, one-half of all property acquired during the coverture belongs to the wife, and cannot be conveyed by the husband or otherwise disposed of, so as to defeat the wife’s interest, nor is it subject to the husband’s debts.” These assertions are erroneous as statements of Louisiana law: The husband could convey the community property for value without the wife’s joinder, or even gratuitously if the transfer were not held to be “in fraud” of her rights; and the community property was subject to his debts. All this case indicates on the question we

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38 11 Mo. 314 (1848).
40 11 Mo. at 316 (1848).
are considering is that the Missouri court was misinformed about the law of Louisiana.

However, the misconception did not affect the result of this case. The court held that the husband was a "constructive trustee" for the wife as to one-half of the property after the divorce. Since Missouri does not have community property, its procedure of course does not contain the same remedies for protecting the interest of the wife which would be available in Louisiana; but the device of a constructive trust is capable of being used to enforce the kind of rights which the wife had under Louisiana law, and it should be used flexibly for that purpose.

The second case cited by Professor Beale is the Oklahoma case of Edwards v. Edwards.

In that case, H and W moved their domicile from Oklahoma to Ranger, Texas, which was "then booming," in June, 1919. In the space of some seventeen months they had acquired $50,000, by means which the court is loath to discuss in detail. However, "After she had found him in bed with another woman, in Ranger, Texas, . . . infelicity arose." In November, 1920, they returned to Oklahoma, and H deposited part of the $50,000 in a bank in the name of his mother and purchased real estate in her name with the balance. Shortly thereafter, H died as a result of being shot. (The finger that pulled the trigger was W's, but she apparently was acquitted of murder.) This was a suit by W against the mother of H to recover one-half of the $50,000, and judgment in the wife's favor was affirmed.

It is clear that this result was correct under the law of Texas, which was the applicable law under the choice-of-law rule. If the mother of H was merely given legal title to the property, and H retained the beneficial interest, then the property was community property owned by H and W at the death of H, and W was entitled to one-half thereof. On the other hand, if we assume that H was attempting to make a gift of the property to his mother, certainly such an attempted gift of all of the community property would be "in fraud" of the wife's rights under the Texas rule, and W would be entitled to recover one-half thereof after the husband's death. It is true that the Oklahoma Supreme Court indicated that it agreed with the trial judge's view that "... on removing to Oklahoma

41 108 Okla. 93, 233 P. 477 (1924).
42 108 Okla. at 98, 233 P. at 482 (1924).
with the property so acquired, the laws of Texas cease to operate with reference to the right to possession and control of said property, but thereupon the laws of this state determine the status of the same, and the relation of the parties thereto, and that one-half of such property belonged to the plaintiff, and the other one-half to her husband, and that neither could dispose of the other's interest therein without the other's consent. . . ." 43 But it is clear that this statement is pure dictum, and the actual decision in this case cannot be authority on a question of the power of the husband to transfer such property for value or its liability to creditors of the spouses.

Opposed to these two dicta (one of which is hardly more than a misapprehension) are two decisions of the Louisiana Supreme Court. Neither of these two decisions is directly in point, since the cases concerned a change of domicile to a common-law state without a transportation of the property owned in community, i.e., the property was left in Louisiana when the spouses removed to a common-law state. But the two cases of Succession of Packwood 44 and Succession of Popp 45 clearly hold that a change of domicile alone does not transform community property into some other form of ownership. In the former case it was stated: "That on the change of domicil in 1836, the title to the property already acquired here, did not vest in the parties each for one undivided half, separately from the other, but the husband, so long as the marriage existed, retained his power over it; that it was subject to his debts contracted after, as well as before the change of domicil, and that he had a right to enjoy the fruits of the property, and to sell it without fraud, and that no distinct separate interest vested in Mrs. Packwood before the dissolution of the marriage by her death. . . ." 46 That case concerned an immovable, but the holding was reiterated with respect to movables in Succession of Popp. Also, in King v. Bruce 47 the Texas Supreme Court held that the transportation of a community movable to a common-law state without a change of domicile did not affect the nature of the ownership. No reason is apparent why a change of domicile accompanied

43 108 Okla. at 99, 233 P. at 483 (1924).
44 9 Rob. 438, 12 Rob. 334 (La. 1845).
45 146 La. 464, 83 So. 765 (1919).
46 12 Rob. at 362 (La. 1845).
by a transportation of the property to the new domicile should have the effect of transforming its ownership, when neither factor alone would do so.

Viewed in the light most favorable to Professor Beale's theory, it certainly cannot be said that these authorities support that theory. They do not, it is true, establish with certainty that community property taken into a common-law state continues to be held as community property, but that result follows simply from the application of the choice-of-law rule that the law of the first domicile governs. No reason has been suggested why the court of the common-law state should transform the property into some species of ownership which it would not be under the law of either state, had all of the events occurred in either one. A court certainly should try to apply the law indicated by its choice-of-law rule and not pretend to be applying that law while actually applying a law of its own, which is not applicable to the facts of the case.

Once we reject this erroneous notion that the court in the common-law state should transform the community property into some other species of ownership, the remaining problems of application are fairly simple. These problems will be considered, as in the first section, under the three headings of Distribution on death; Division on divorce; and Rights of creditors and transferees.

(A. Distribution on death. Where the husband acquires moveables during coverture in a community-property state, and thereafter the spouses remove to a common-law state with these moveables, slightly different problems are presented, in connection with the distribution of this property upon death, in the case where the husband dies first and in the case where the wife dies first. The situations will be considered in that order.

When the husband dies domiciled in a common-law state, leaving property acquired during coverture while the spouses were domiciled in a community state, the wife may claim a portion of this property despite the husband's attempt to devise or bequeath it to some third person. The law of the community-property state (the domicile at the time of acquisition) gives the wife a nonbarrable interest of one-half of this property. The courts of the common-law states have applied this rule and given the wife one-half of the property. It will readily be seen that this decision involves

48 Matter of James, 172 App. Div. 800, 159 N.Y.S. 140 (1916), rev'd on
a characterization of the claim of the wife as an issue of “marital property” in order to refer to the law of the domicile at the time of acquisition. It may be suggested that this characterization is contrary to the general rule in such common-law states that a claim for a nonbarrable share is characterized as an issue of “succession” and referred to the law of the last domicile.\textsuperscript{49} Undoubtedly, this is true. Had the spouses moved from another common-law state, any claim by the wife for a nonbarrable share in the husband’s acquisitions would have been characterized as an issue of succession and decided by the law of the last domicile (the forum). However, there is a good reason why this normal characterization of this claim must be changed in the situation with which we are concerned. Here the wife is said to have a “vested” interest in the community property, and a characterization which referred her claim to the law of the last domicile, thus refusing her any nonbarrable interest or reducing it to one-third or some other fraction less than one-half, would invade such “vested interest” and therefore probably be unconstitutional. No such obstacle is present in the case where the spouses moved from another common-law state, since her interest in the husband’s acquisitions in that case is said to be “nonvested” and hence can be invaded or destroyed by the second domicile with impunity.

Suppose the wife, in such a case, claims not only one-half of the property under the community-property law of the former domicile, but also a nonbarrable interest of one-third (let us say) in the property (or the “husband’s one-half”), under the law of the last domicile. It is apparent that the wife should not be given more than one-half of the property, since the “community interest” and the “nonbarrable interest” of the two states were designed to serve exactly the same purpose and neither law gives her more than one-half. Nor is there any valid theory by which the wife can claim an interest under both laws. Yet that would be the result of the

\textsuperscript{49} Chap. IV, § 1, ¶ D, supra.
erroneous theory of characterization by the *lex causae* (i.e., a double characterization of the same issue), which has been discussed elsewhere.\(^{50}\) It would also be the result of the theory that there is an automatic transformation of the community property into a tenancy in common upon the change of domicile—by that theory, after the removal the wife would "own" one-half of the property in fee and the husband would "own" the other one-half; no reason is apparent why the nonbarrable share in his "estate," given her by the law of the last domicile, would not then apply to the "husband's one-half." Such a result demonstrates the unsoundness of the theory. The court should concern itself with the precise issues presented to it—i.e., the operative facts and the law of the pertinent jurisdictions as applied to those operative facts—not with such vague and nearly meaningless concepts as "ownership," "vested interest," etc. No case has been discovered where the wife made a claim under both laws in this situation; if such a claim were advanced, clearly the court in the common-law state should reject it.

In the case where the wife dies first, after the removal of the community property to a common-law state, the problem is more easily solved. Since none of the common-law states gives the wife an interest in the husband's acquisitions which will survive her death prior to his, there are no cases characterizing a claim by her heirs or legatees to a portion of such property as an issue of succession. Such a claim can only be made where the prior domicile was a community-property state, and clearly it should be characterized as an issue of marital property. Once this characterization is adopted, it merely remains to give the wife's heirs or legatees such interest as they are accorded by the law of the domicile at the time of acquisition. Of course, it should not be assumed, merely because the property is "community property," that the wife's heirs or legatees will have any interest. If the former domicile was New Mexico or Nevada, then that law gives the wife no inheritable or devisable interest in the husband's acquisitions \(^{51}\) and certainly the common-law state should not do so merely because the property has been transported there. If the former domicile was any of the other community-property states, then the wife's heirs or legatees should

\(^{50}\) Chap. III, § 1, ¶ B, *supra*.

be given one-half. It is apparent again in this situation that the theory that the property becomes a tenancy in common upon change of domicile to a common-law state might dictate a result which cannot be reached by applying the law of either state with which the case is connected. If the first domicile were New Mexico and the second New York, neither state gives the wife an inheritable or devisable interest in the husband’s acquisitions, but this theory would do so merely because the property was acquired in one of these two states and then transported to the other.

[B. Division on divorce. A divorce of the spouses after community property has been transported to a common-law state does not pose any difficult problems of application. By the law of all the American community states at the present time, an absolute divorce, with no division of property in the decree, makes the spouses tenants in common of the former community property, and the wife can recover one-half thereof from the husband. Hence, she should also be permitted to do so in the common-law state. If the law governing the property requires the wife to “accept” the community in order to claim a portion of the community property after a divorce, then that law should be applied to determine whether she has “accepted” or “renounced.”

If a claim is made for a division of the property in the divorce

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52 It is apparent, in view of the great differences in the characteristics of community property among the various community states, that choice-of-law problems may also arise in connection with the transportation of property from one community state to another. Suppose property were acquired by the husband during marriage while domiciled in New Mexico or Nevada, for example, and the spouses later moved their domicile to California or Texas, where the wife died. Her legatees could claim no part of the property as against the husband, if the issue were referred to the law of the first domicile, even though such a claim would succeed as to “community property” governed by the local law. Since the issue is clearly one of “marital property” and the general rule is that such issues are governed by the law of the domicile at the time of acquisition, the reference to the law of the first domicile here would appear to be correct. However, no cases have been discovered which deal with this problem of removal from one community state to another.

54 Lemye v. Sirker, 226 App. Div. 159, 235 N.Y.S. 273 (1929) [French law]. This rule formerly prevailed in Louisiana, but that law apparently has been changed and is presently in accord with that of the other community-property states. Daggett, The Community Property System of Louisiana 83 (1931).
action itself, in the common-law state, then the forum will apparently apply its own law to this issue, characterizing it as an issue of "divorce." 55 If that law permits the court to divide all property owned by either spouse in a manner which it "deems just," then it should also divide community property. If the law of the forum permits the court to divide only the "husband's property," then the court should divide the community property if it was acquired by the husband, since the language of the statute was obviously not designed to cover this particular case and the general intent of the legislature apparently was that the court should divide the husband's acquisitions although not those of the wife.

(1C. Rights of creditors and transferees. No cases have been discovered dealing with the rights of creditors and transferees with respect to community property taken into a common-law state. Therefore, the following discussion must of necessity be an entirely theoretical one. If the property was acquired by the husband in one of the community-property states other than Washington and Arizona, then it should be held liable in the common-law states for any obligation of the husband, since it is so liable under the law of the domicile at the time of acquisition. It would be also, of course, under the law of the second state—there is no conflict of law here. If acquired in Washington or Arizona, then the property was not liable for antenuptial obligations of the husband nor some postnuptial obligations (principally accommodation endorsements and willful torts), under the law of the former domicile. If this rule of nonliability for the "separate" debts of the husband were characterized as a rule of "marital property," then the ordinary choice-of-law rule would direct that it be applied in the second domicile. 56

As has been intimated, however, the author believes that this incident of community property is one which should not be continued in the new domicile. It is difficult to imagine a court in a common-law state cheerfully applying to the prejudice of its own citizens this rule, which in effect "licenses" a man to commit certain willful torts, insofar as civil liability is concerned, merely because he hap-

55 Chap. IV, § 2, supra.
56 If it is characterized as an "exemption" provision, with respect to which the law of the forum normally is held to govern, then of course it would no longer be applicable to such community property after its transportation to a common-law state if the suit arose there, as it normally would. See Chap. IV, § 3, ¶ C, supra.
pens to be married. The common-law state should apply its own law and hold that all acquisitions of the husband are liable for his obligations, subject to specific statutory exemptions.

The community property acquired by the husband and taken to a common-law state should not in general be held liable for any obligation of the wife, unless the husband would be personally liable therefor. This is subject to the exception that where the former domicile was New Mexico one-half of the property should be held liable for the tort obligations of the wife, although not for her contractual obligations. The liability of all of the community property in California and Texas for the torts of the wife should not survive the change of domicile and transportation of the property to the common-law state, since it is based upon the common-law personal liability of the husband for his wife's torts in those states, unless the new domicile also has retained the common-law rule in this respect.

In all cases the husband should be held to have the power to transfer movables for value without the joinder or consent of the wife, since that is the rule in all of the community-property states, and is the same rule which would obtain had the property been acquired in the common-law state. If the governing law is that of Washington or California, the husband should be held to have no power to make gifts of the property without the consent of the wife. If the governing law is that of one of the other community states, the husband should be held to have the power to make some gifts of such property but not those which would be "in fraud" of the wife's rights under the rules of the particular state to which reference is made.

Where the community property transported to the common-law state is there invested in immovables, a rigid application of the normal choice-of-law rule would mean that the wife's joinder in any transfer of such immovables would be required, where the spouses came from one of the community states other than Louisiana, Nevada, and Texas; and that the husband alone could convey even if the title was in the name of the wife, where they came from one of the latter three states. It is clear here, as in the converse case, that the interest of the forum in land transactions within its own
borders requires that a different choice-of-law rule be applied here. The holder of the record title to such immovable should have the power to transfer it for value without any joinder of the other spouse under the law of the situs. This holding may be rationalized, if one wishes, by saying that the interest of the spouse who is not the record title holder is merely an “equitable” interest; but, if this rationale is adopted, the court should not be misled by it into conceiving that such spouse is the equitable “owner” of “one-half” of the property and permitting this misconception to influence the decision of questions concerning the rights of creditors and distribution on death.
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