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## PENNSYLVANIA MARITAL COMMUNITIES AND COMMON LAW NEIGHBORS

By HERBERT F. GOODRICH † AND WILLIAM T. COLEMAN, JR. ‡

The new Pennsylvania community property statute<sup>1</sup> contains nothing indicating a consciousness of geography except in the enacting clause where the law making function is in the name of the General Assembly of the Commonwealth of Pennsylvania. The Preamble of the Act speaks of its application to "husbands and wives and their property subsequent to the effective date of the act." Which husbands and wives? And what property? These questions must be thought about and eventually answered by courts. For Pennsylvanians do acquire goods and chattels outside of the borders of the Commonwealth and non-Pennsylvanians do come here, make money and with it sometimes buy local land. Among the questions which those advising clients, trying cases, or deciding lawsuits must eventually face, therefore, will be those which determine the applicability of this sleep disturbing statute to acts which Pennsylvanians do in other states and those which non-Pennsylvanians do here.

It is not suggested that the Act is defective in failing to answer in advance the various conflict of laws questions which may arise. Had that been attempted the statute would have become much more complicated. Furthermore no one, even though he has considerable familiarity with the subject, can tell in advance what all the questions are which may arise.

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† A. B., 1911, Carleton College; LL. B., 1914, Harvard University; LL. D., 1929, University of Pennsylvania; author, CONFLICT OF LAWS (1927) and (1938); co-author, CASES AND MATERIALS ON CONFLICT OF LAWS (1941); Reporter for Chapter on Administration, and Adviser, RESTATEMENT, CONFLICT OF LAWS (1934); Dean of the Law School, University of Pennsylvania, 1929-1940; Associate in Law, University of Pennsylvania; Director, American Law Institute; Judge of the United States Circuit Court of Appeals for the Third Circuit.

‡ A. B., 1941, University of Pennsylvania; LL. B., 1943/46, Harvard University; Member of the Philadelphia Bar.

1. Penna. Acts 1947, No. 550 (July 8, 1947).

We may, nonetheless, postulate three propositions. The first is that the Pennsylvania Legislature was doing in this statute what it does in the course of its day to day legislative work, that is provide rules for places and persons over which it has legal authority.

The second postulate is that this law, like others, will be examined by lawyers and judges with the general principles of conflict of laws in mind.<sup>2</sup> Statutes seldom contain conflict of laws provisions. But courts, in applying them do so with the limitations called for by conflict of laws rules.

The third postulate is, that inasmuch as the law of community property has been in force for quite a number of years in several states of this country,<sup>3</sup> the rules of conflict of laws worked out by them in different situations are in point in discussing the subject in Pennsylvania, although, of course, not binding as authorities upon our courts. The extent to which this reference to community property law is to be carried back is a matter not to be determined by any sweeping rule *a priori*. Community property had its origin in the Spanish law. But the study of that origin in Spanish law and developments through several centuries would seem not to be a very helpful way of finding the pertinent considerations which should settle a Pennsylvania lawsuit in 1955.<sup>4</sup> Some background of community property law we shall all have to acquire.<sup>5</sup> But the helpful precedents, it is submitted, will be those of American courts settling disputes in our day and age regard-

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2. They will derive help from the various articles and a few textbooks which deal with the conflict of laws problems encountered when a state has the community property regime. See BALLINGER, *COMMUNITY PROPERTY* (1895); 2 BEALE, *CONFLICT OF LAWS* §§ 237.1-238.2, 289.1-293.2 (1935); DAGGETT, *THE COMMUNITY PROPERTY SYSTEM IN LOUISIANA* (1931); GOODRICH, *CONFLICT OF LAWS* c. IX (2d ed. 1938); MCKAY, *THE LAW OF COMMUNITY PROPERTY* (2d ed. 1925); *RESTATEMENT, CONFLICT OF LAWS* §§ 237, 289-293 (1934); Leflar, *Community Property and Conflict of Laws*, 21 CALIF. L. REV. 221 (1933); Neuner, *Marital Property and the Conflict of Laws*, 5 LA. L. REV. 167 (1943); Harding, *Matrimonial Domicil and Marital Rights in Movables*, 30 MICH. L. REV. 859 (1932); Stumberg, *Marital Property and the Conflict of Laws*, 11 TEX. L. REV. 53 (1932); Horowitz, *Conflict of Laws Problems in Community Property*, 11 WASH. L. REV. 121, 212 (1936); Goodrich, *Matrimonial Domicile*, 27 YALE L. J. 49 (1917); Notes, 32 CALIF. L. REV. 182 (1944) and 43 HARV. L. REV. 1286 (1930).

3. The territories acquired by the United States from the former Spanish possessions here, recognized community property, and when those territories were given statehood, they incorporated the community property concept into their property law. The states of California, Louisiana, New Mexico, and Texas come under this category. The system was later adopted in Arizona, Idaho, Nevada, Washington, and Oklahoma. Just recently Michigan enacted a community property law which is quite similar to the Pennsylvania statute.

4. Thus the American jurisdictions will perhaps not follow the civilian notion that a community property statute is a "statute real" rather than a "statute personal" and therefore applicable only to things actually situated in the state. Cf. *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 27 So. 851 (1900) (holding a "real statute" inapplicable to cause of action for injuries suffered within the state). *But cf.* *Commissioner v. Skaggs*, 122 F. 2d 721 (C. C. A. 5th 1941); *Smith v. McAtee*, 27 Md. 420 (1867).

5. See KEPHART, *ORIGIN OF THE CONJUGAL COMMUNITY* (1938); MCKAY, *op. cit. supra* note 2, at c. 3.

ing their present day rules for property interests of husband and wife.<sup>6</sup> Here, too, our most helpful precedents will be found in those courts which are faced with the same problem which we meet in Pennsylvania, that is the articulation of this community property rule into our common law and separate property rules which existed before the statute was passed. The difficulty about this last type of precedent is its absence, for the problem is as new to several of our neighbors as it is to us.

In the following discussion an attempt will be made to put a few of the common concrete cases of the two state questions arising out of our new law. The list is not complete. Obviously, the answers cannot be conclusive. The most the discussion can do is to suggest the possibilities which the answer could take and to indicate an inclination for the one which seems to be, on the whole, preferable.

#### EFFECT OF MARRIAGE UPON OWNERSHIP OF THEN HELD PROPERTY

The Pennsylvania statute escapes one difficult problem because it expressly states in the first two sections that property owned by either spouse prior to marriage is not affected by the Act.<sup>7</sup> Lest the authors be accused of making this particular heading of the discussion like the famous chapter heading: "Snakes in Ireland", let it be added that the question of the determining law with regard to the effects of marriage upon the property of the spouses has caused not a little litigation and has been the source of not a little confusion. For instance: It is the general conflict of laws rule that the domicile at the time of marriage determines the interests acquired by each spouse in the then owned personal property of the other.<sup>8</sup> What domicile? Some courts<sup>9</sup> and writers<sup>10</sup> have talked about a "matrimonial domicile".

6. The Pennsylvania Act is, in all its material aspects, identical with the community property act adopted by the Legislature of Oklahoma. OKLA. STAT. ANN. tit. 32, §§ 66-82 (Supp. 1946). The Oklahoma law, in turn, is modeled generally on the law of Texas which has been interpreted by the Texas courts in a number of decisions for over a century. See TEXAS CIVIL STATUTES §§ 4613-4624 (Vernon, 1925). For discussions and analyses of some of these earlier laws usually without regard to the conflict of laws possibilities see Daggett, *The Oklahoma Community Property Act*, 2 LA. L. REV. 575 (1940); De Funiak, *A Review in Brief of Principles of Community Property*, 32 KY. L. J. 63 (1943); Jacob, *Law of Community Property in Idaho*, 1 IDAHO L. REV. 1 (1931).

7. "All property of the husband, both real and personal, owned or claimed by him before marriage, or before the effective date of this act, whichever is later, . . . shall be his separate property." Penna. Acts 1947, No. 550, § 1 (July 8, 1947). (Section 2 has the same provisions in so far as the wife's property is concerned.)

8. 2 BEALE, CONFLICT OF LAWS § 289.1 (1935); GOODRICH, CONFLICT OF LAWS § 120 (2d ed. 1938); RESTATEMENT, CONFLICT OF LAWS § 289 (1934). This book hereinafter will be cited as "RESTATEMENT."

9. *Payne v. Commissioner*, 141 F. 2d 398 (C. C. A. 5th 1944); *Jaffrey v. McGough*, 83 Ala. 202, 3 So. 594 (1888); *Glenn v. Glenn*, 47 Ala. 204 (1872); *Mason v. Fuller*, 36 Conn. 160 (1869); *Ford's Curators v. Ford*, 2 Mart. (N. S.) 574 (1824); *Hayden v. Nutt*, 4 La. Ann. 65 (1849).

10. STORY, CONFLICT OF LAWS § 194 (8th ed. 1883); WHARTON, CONFLICT OF LAWS § 190 (3d ed. 1905).

Then the question arises whether this matrimonial domicile is that of the husband at the time the parties are married or whether it may be some other place to which they may in the future intend to go and set up their household establishment.<sup>11</sup> However, the notion of a separate matrimonial domicile in this connection has been pretty well exploded as it is now exploded in the field of divorce law.<sup>12</sup>

All this makes interesting learning and no doubt happy litigation for lawyers. But we may dismiss it so far as the bearing of the Pennsylvania Act is concerned. None of the other questions arising under the Act can be answered so easily.<sup>13</sup>

#### EXTRASTATE ACTIVITIES OF PENNSYLVANIANS

Let us start with some concrete cases. Arthur and Barbara are married and live in Pennsylvania. Arthur practices medicine. On September 5, 1947, he is called to Wilmington to consult with a Delaware physician. At the conclusion of the conference an operation is decided upon which Arthur performs. For this he receives a fee of \$5,000 which is paid to him by the patient in Wilmington two weeks later. If Arthur dies or the community comes to an end by a divorce, may half of this fee be claimed by Barbara as part of her share in the

11. To Story, matrimonial domicile meant "the domicile of the husband, if the intention of the parties be to fix their residence there; and of the wife, if the intention is to fix their residence there; and if the residence is intended to be in some other place, as in New York, then the matrimonial domicile would be in New York." STORY, *CONFLICT OF LAWS* § 194 (8th ed. 1883). In all the American cases cited by Story to establish the definition, the facts reveal that the intended domicile and the domicile of the husband coincided, so that the result would have been the same if the concept of matrimonial domicile had been rejected. See Harding, *Matrimonial Domicil and Marital Rights in Movables*, 30 MICH. L. REV. 859, 865 (1932); Goodrich, *Matrimonial Domicil*, 27 YALE L. J. 49, 58 (1917). Story's definition has been vigorously criticized by the above two writers. See also Note, *Marital Property Rights and the Conflict of Laws*, 43 HARV. L. REV. 1286, 1288 (1930). *But cf.* COOK, *LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 448 (1942). Professor Cook has substituted the words "intended family domicile" for "matrimonial domicile," but he proposes that the same legal consequences be given to the term substituted as Story said should accompany his concept of "matrimonial domicile." Thus his suggestion is open to all of the criticisms, except the one of meaningless terminology, which were justifiably heaped upon Story's definition. For these criticisms see Harding, *supra* at 860.

12. See GOODRICH, *CONFLICT OF LAWS* § 30 (2d ed. 1938); WOLFF, *PRIVATE INTERNATIONAL LAW* 366 (1945); Leflar, *Community Property and Conflict of Laws*, 21 CALIF. L. REV. 221, 222 (1933); Stumberg, *Marital Property and the Conflict of Laws*, 11 TEX. L. REV. 53, 54-56 (1932).

13. It is safe to predict that the Act will not affect the present result in another conflict of laws situation. The statute reads that any property received as compensation for personal injuries shall remain the injured spouse's separate property. The wrongdoer will, therefore, be prevented from advancing the argument that the contributory negligence of one spouse should reduce any recovery by one-half since the guilty spouse will share in the recovery. *Vitale v. Checker Cab Co.*, 166 La. 527, 117 So. 579 (1928); *cf.* *Traglio v. Harris*, 104 F. 2d 439 (C. C. A. 9th 1939), noted in 28 CALIF. L. REV. 211 (1940); *Matney v. Blue Ribbon, Inc.*, 202 La. 505, 12 So. 2d 253 (1943), 5 LA. L. REV. 467. This Act, therefore, should have no effect on tort problems having a foreign element.

community? Assume the property law of Delaware, when there is no problem of conflict of laws, to be that acquisitions by either spouse are that spouse's separate property.

We need take no time in pointing out that the acts and resolves of the Pennsylvania Legislature are not operative in Delaware. Nor need we take many lines of type to indicate that a state has a very considerable amount of power over persons domiciled therein, even though they are temporarily absent.<sup>14</sup> But neither of these considerations seems to get us very far. Once upon a time one might have cited the maxim *mobilia sequuntur personam*, but nowadays few of us know enough Latin to be intimidated by it. And it is quite obviously the physical fact that movables follow the person of the owner only if he decides to take them with him. The most, therefore, that the maxim can do is to state a result and we are trying to find reasons.

There are several places in the law where it is the generally recognized rule that all of an owner's personal property moves as a unit or whole. That is the conflict of laws rule with regard to acquisition of interests in the other spouse upon marriage.<sup>15</sup> Property passes en masse on bankruptcy.<sup>16</sup> And according to the general conflict of laws rule, personal property is distributed, after the owner's death, in accordance with his domiciliary law no matter where it lies.<sup>17</sup> In other words, there are instances where, for considerations of convenience, it has been thought best to treat all of a man's personal interests as one block instead of individually by separate pieces.

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14. *Skiriotes v. Florida*, 313 U. S. 69 (1941); *Milliken v. Meyer*, 311 U. S. 457 (1940), 41 COL. L. REV. 724 (1941), 29 GEO. L. J. 784, 25 MINN. L. REV. 798; *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U. S. 532 (1935); *cf. Cole v. Cunningham*, 133 U. S. 107 (1890); *Blackmer v. United States*, 284 U. S. 421 (1932), 32 COL. L. REV. 747, 17 CORN. L. Q. 117, 1 GEO. WASH. L. REV. 132, 2 IDAHO L. REV. 211, 30 MICH. L. REV. 137, 30 MICH. L. REV. 968, 17 ST. LOUIS L. REV. 85, 6 SO. CALIF. L. REV. 60; see Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1219-1225 (1946).

15. See 2 BEALE, CONFLICT OF LAWS § 289 (1935); GOODRICH, CONFLICT OF LAWS § 121. (2d ed. 1938); RESTATEMENT § 289. Here, however, the rule has ceased to have much significance because it is generally the law that spouses retain the same interest in their property after marriage that they had before. See KUHN, COMPARATIVE COMMENTARIES IN PRIVATE INTERNATIONAL LAW 147 (1937). This system, called "separation of goods" was adopted in England in 1882. It was taken over from the continent where it still is in force in Austria, Hungary, Italy, and the Balkan States and adopted in nearly all common law countries, including most of our states. See WOLFF, PRIVATE INTERNATIONAL LAW 362 (1945).

16. The trustee in bankruptcy is vested by operation of law with the title of the bankrupt to all property, including rights of action, "which prior to the filing of the petition he could by any means have transferred. . . ." 30 STAT. 566 (1898), 52 STAT. 880 (1938), 11 U. S. C. § 110(a) (5) (1940). It is clear that all property in the United States passes en masse and it is strongly urged that the section applies to assets located abroad. See Nadelmann, *The National Bankruptcy Act and the Conflict of Laws*, 59 HARV. L. REV. 1025, 1030 (1946). But a general assignment for creditors "will not be effective" as to property situated in another state. RESTATEMENT § 264.

17. *Bullen v. Wisconsin*, 240 U. S. 625 (1916); 2 BEALE, CONFLICT OF LAWS § 301 (1935); GOODRICH, CONFLICT OF LAWS § 161 (2d ed. 1938); RESTATEMENT § 303.

Conceivably this acquisition of money or chattels outside the state by a Pennsylvanian might be subject to the same rule. Intangibles having no actual location would naturally be governed by the rule prevailing at the owner's domicil.<sup>18</sup> Tangibles may or may not be brought there, although at a guess one would be justified in asserting that they probably would eventually get to their owner's home. It would be convenient to have all of these acquisitions covered by one rule and to that extent eliminate the difficult accounting problems which are bound to arise in the assimilation of our new law into our old system.

With regard to original acquisitions of chattels the law is now pretty well settled that the rule to be applied is the law of the place where the chattel was acquired.<sup>19</sup> But in the case of the acquisition of marital property the rule generally applied is that the law of the domicil of the parties is applicable.<sup>20</sup> The reason that it is suggested that the exception should prevail here, rather than the general rule, is that this community property law is something more than the acquisition by a corporation of a new piece of machinery. The community property rule establishes a matrimonial regime and comes close to that kind of regulation of the relation of husband and wife which is by general consent left for the domicil to determine. We have numerous striking examples of such domiciliary control. Thus we have the domicil furnishing the forum for and causes for divorce,<sup>21</sup> the ultimate dictator in determining the validity of a marriage,<sup>22</sup> the place where

18. *Wrightsmen v. Commissioner*, 111 F. 2d 227 (C. C. A. 5th 1940); *Jones v. Aetna Ins. Co.*, 14 Conn. 501 (1842); *Birmingham Water Works v. Hume*, 121 Ala. 168, 25 So. 806 (1899); *cf. Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 27 So. 851 (1900); *Morson v. Second Nat. Bank of Boston*, 306 Mass. 588, 29 N. E. 2d 19 (1940), 54 HARV. L. REV. 331. Even where the intangible has acquired a situs in fact, under some law other than that of the domicil, the decisions seem to retain the domiciliary law as controlling. See *Harding*, *supra* note 2, at 871.

19. *Green v. Van Buskirk*, 7 Wall. 139 (U. S. 1868); *Cammell v. Sewell*, 5 H. & N. 728 (1860); see *Carnahan*, *Tangible Property and the Conflict of Laws*, 2 U. OF CHI. L. REV. 345 (1935); *Robinson*, *Conflict of Laws in Contracts of Sale*, 16 GEO. L. J. 387 (1928).

20. *Shilkret v. Helvering*, 138 F. 2d 925 (App. D. C. 1943); *Ellington v. Harris*, 127 Ga. 85, 56 S. E. 134 (1906); *Douglas v. Douglas*, 22 Idaho 336, 125 Pac. 796 (1912); *Succession of Dill*, 155 La. 47, 98 So. 752 (1923); *Edwards v. Edwards*, 108 Okla. 93, 233 Pac. 477 (1924); *Snyder v. Stringer*, 116 Wash. 131, 198 Pac. 733 (1921); *Powell v. DeBlane*, 23 Tex. 66 (1859); see *GOODRICH*, *CONFLICT OF LAWS* § 121 (2d ed. 1938); *RESTATEMENT* § 290. *Contra*: *Gooding Milling & Elevator Co. v. Lincoln County State Bank*, 22 Idaho 468, 126 Pac. 772 (1912); *Kerr v. Urie*, 86 Md. 72, 37 Atl. 789 (1897); *Smith v. McAtee*, 27 Md. 420 (1867); see *Brown v. Daugherty*, 120 Fed. 526 (C. C. D. Mo. 1903).

21. *Streitwolf v. Streitwolf*, 181 U. S. 179 (1901); *Bell v. Bell*, 181 U. S. 175 (1901). See *NUSSBAUM*, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 142 (1943); *CHESHIRE*, *PRIVATE INTERNATIONAL LAW* 360 (2d ed. 1938); *RESTATEMENT* § 110.

22. The general chant is that a marriage if valid where contracted is valid everywhere. *Medway v. Needham*, 16 Mass. 157 (1819); *Thorp v. Thorp*, 90 N. Y. 602 (1882). But actually the marriage is declared valid only because the law of the domicil usually makes the reference to the place the marriage ceremony was performed. Since the domicil is the ultimate dictator it can refuse to make the reference and de-

custody of children can be awarded,<sup>23</sup> and the like. There is strong argument for treating acquisitions of community property as governed by the same rule, *i. e.* the domicile of the parties. Considerations for the applicability of the domiciliary law have been sufficient to make it the rule stated in the *Restatement* as the prevailing one.<sup>24</sup> The cases on which the *Restatement* conclusion is based are not overwhelming in support, although they represent the majority. The fact that there are not more of them is not surprising. It takes a long time to build up a line of cases on a conflict of laws point and it is only when the state property laws differ that the choice of law question becomes of any significance.<sup>25</sup> Possibly, too, the lack of authority in part may be due to the failure of counsel always to recognize the possibility of a conflict of laws problem. This is especially true in cases arising more than forty years ago.

There is no conclusive authority in Pennsylvania on the rule to be applied in determining what law governs acquisitions of property by a spouse outside the state.<sup>26</sup> The two instances where the matter was involved presented no real choice of law problem between domicile and place of acquisition since both were the same.<sup>27</sup> Pennsylvania courts start writing, therefore, with a clean slate. Unless someone shows reason to the contrary, we may expect them to follow the *Restatement* and the weight of authority upon this point.

An interesting and tantalizing version of our hypothetical case is presented if we assume Arthur to have his domicile in Ohio and Barbara

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clare the marriage valid or invalid depending upon its own law despite the fact that the place of contracting would have reached the opposite result in a case where no foreign element was present. *In re Takahashi's Estate*, 113 Mont. 490, 129 P. 2d 217 (1942); *cf.* Succession of Hernandez, 46 La. Ann. 962, 15 So. 461 (1894); see RESTATEMENT §§ 121, 131, 132, comment *a*. The marriage would be invalid even at the place of contracting. *Id.* at § 132.

23. *Glass v. Glass*, 260 Mass. 562, 157 N. E. 621 (1927); *Pieretti v. Pieretti*, 13 N. J. Misc. 98, 176 Atl. 589 (Ch. 1935); *People ex rel. Winston v. Winston*, 31 App. Div. 121, 52 N. Y. Supp. 814 (1st Dept. 1898); *Harris v. Harris*, 115 N. C. 587, 20 S. E. 187 (1894); see RESTATEMENT § 142; Beale, *The Status of the Child and the Conflict of Laws*, 1 U. OF CHI. L. REV. 13 (1933).

24. RESTATEMENT § 290.

25. See, *e. g.*, *State v. Barrow*, 14 Tex. 179 (1855).

26. The Pennsylvania Annotators, however, state that their state is in accord with the RESTATEMENT, CONFLICT OF LAWS; PA. ANNOT. § 107 (1936).

27. In *Bollinger v. Gallagher*, 163 Pa. 245, 29 Atl. 751 (1894) *H* and *W* were domiciled in Maryland. *W* bought *H*'s goods at sheriff's sale in Maryland. Under the law of Maryland *H* had to sign note before wife could make a purchase on credit but the property would be her separate property. *H* brought the property into Pennsylvania and it was attached by his creditors. *Held*, for *W*, the title that the wife had in the property should be determined by the law of Maryland.

In *Davis v. Zimmerman*, 67 Pa. 70 (1870), *H* and *W* were domiciled in West Virginia. The law of West Virginia was that all property obtained by wife during coverture immediately became the property of the husband. *W* purchased a horse in West Virginia. *H* brought the horse into Pennsylvania and it was levied upon by *H*'s creditors. *Held*, horse belonged to husband and could be seized and sold for his debts.

It is obvious that in both cases the place of acquisition and the domicile of the parties were the same.

to have her domicil in Pennsylvania.<sup>28</sup> Does Barbara's Pennsylvania domicil convert Arthur's Ohio earnings into community property and, by the same token let him split his income with her on his income tax form? It is hard to give an authoritative answer to this question, although it has come up a time or two. In general, courts are inclined to take "domicil" in this type of situation as meaning the domicil of the husband.<sup>29</sup> Generally he is the earning spouse and it is natural enough to look to his domiciliary law to determine ownership of what he makes. However, if the situation is reversed and the wife is earning the money, or what is more common, each spouse is engaged in gainful occupation, it could well be that the rule of the domicil of the spouse the ownership of whose earnings may be in question should be applied.<sup>30</sup>

In our initial case we had Arthur earning a fee by the performance of the operation in Delaware. Suppose instead of acquiring personalty in that state he acquires real estate. Is the land thus acquired in Delaware held in community? Section 3 of the Pennsylvania statute, read literally, would seem to say so.<sup>31</sup> And much of the discussion already set out as to the desirability of one rule to govern all of our Pennsylvania spouse's acquisitions after September 1, 1947, would point to a conclusion which made no distinction between real estate and personal property. There is, nevertheless, another rule so well established that there seems little chance that the acquisition of Delaware land will be governed as to marital interest by the Pennsylvania law. That rule is the almost universally recognized one of referring all questions of interest in land to the law of the place where the land is.<sup>32</sup> You may call it a relic of feudalism if you will, or you may justify it on practical grounds by the desirability of having a local record title tested by reference to local rules of law.<sup>33</sup> Whatever the

28. It is well established in Pennsylvania that a wife under certain circumstances can acquire a separate domicil as long as it does not make her guilty of desertion. *Colvin v. Reed*, 55 Pa. 375 (1867); *Bishop v. Bishop*, 30 Pa. 412 (1858); *Hollister v. Hollister*, 6 Pa. 449 (1847); *Commonwealth v. Parker*, 59 Pa. Super. 74 (1915). This is in accord with section 28 of the RESTATEMENT prior to its 1947 amendment.

29. *Succession of Dill*, 155 La. 47, 98 So. 752 (1923); *cf. Payne v. Commissioner*, 141 F. 2d 398 (C. C. A. 5th 1944).

30. RESTATEMENT § 290, comment *c.* *But cf. Payne v. Commissioner*, 141 F. 2d 398 (C. C. A. 5th 1944).

31. "All property acquired by either the husband or wife during marriage and after the effective date of this act, except that which is the separate property of either, as hereinabove defined, shall be deemed the community or common property of the husband and wife and each shall be vested with an undivided one-half interest therein, and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains unless the contrary be satisfactorily proved." *Penna. Acts 1947, No. 550, § 3* (July 8, 1947).

32. See CHESHIRE, *PRIVATE INTERNATIONAL LAW* 536 (2d ed. 1938); GOODRICH, *CONFLICT OF LAWS* § 144 (2d ed. 1938); STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 345 (1937); RESTATEMENT §§ 214-24, 245-54.

33. Other reasons for the rule that immovables are governed by the law of the situs are summarized in Neuner, *Marital Property and the Conflict of Laws*, 5 LA. L. REV. 167, 168 (1942). For examples of qualifications and limitations of the universal



reason, the rule is there with little or no indication of its being weakened.

But to state that the law of the situs determines the nature of one's interest in land does not tell the whole story in this connection. Suppose that Arthur has taken funds earned after September 1, 1947, and with them buys land in Ohio. Assume that by the Ohio law when an Ohioan purchases land in Ohio and takes title in his own name the land is his. No doubt a sale by Arthur of this Ohio land would pass a free and clear title to a bona fide purchaser.<sup>34</sup> But if the land was purchased with community funds and no third party rights intervened, it is pretty clear that Barbara, when the community comes to an end, can get protection which will enable her to follow her community interest in the money into the land purchased with the money. There have been a number of decisions on this point and they have all come out the same way.<sup>35</sup> Perhaps it is nothing more than an application of the well known doctrine of constructive trust. At least the result is the same.

If this Ohio land had been purchased, one half with separate property owned by Arthur and one half with funds of the community, the question becomes a little more complicated as a mathematical problem, but the principle of law applicable does not change. Here, too, our constructive trust analogy provides the extent to which Barbara as owner of one half of the community interest can pursue that interest into the land.<sup>36</sup>

A more difficult question arises about the income from the land. Suppose that the foreign realty purchased consists of a piece of land with a dwelling house thereon. Arthur has bought it, has leased it,

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reference to the law of the situs, see Goodrich, *Two States and Real Estate*, 89 U. OF PA. L. REV. 417 (1941).

34. Cf. Neuner, *supra* note 33, at 172. The wife must do something in the state in which the land is located to protect her interest in the land against a bona fide purchaser. Cf. *Heirs of Dohan v. Murdock*, 41 La. Ann. Rep. 494, 6 So. 131 (1889). If the husband, however, carried tangible property owned by the community into a common law state and sold it, a bona fide purchaser would probably not get a good title, except that power to dispose of community assets may be given by the statute, as in Section 4 of the Pennsylvania Act. *Bank of United States v. Lee*, 13 Pet. 107 (U. S. 1839); *DeLane v. Moore*, 14 How. 253 (U. S. 1852); *O'Neill v. Henderson*, 15 Ark. 235 (1854). Cf. Leflar, *Community Property and Conflict of Laws*, 21 CALIF. L. REV. 221, 235 (1933); Note, *Marital Property Rights and the Conflict of Laws*, 43 HARV. L. REV. 1286, 1288 (1930). A few continental systems grant protection to the bona fide purchaser by declaring all foreign matrimonial regimes to be inoperative as against him unless the spouses have made their property regime publicly known. See WOLFF, *PRIVATE INTERNATIONAL LAW* 369 (1945).

35. *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88 (1848); *Hendricks v. Issacs*, 46 Hun. 239, 11 N. Y. St. Rep. 527 (1887); cf. *Walker v. Marseilles*, 70 Miss. 283, 12 So. 211 (1892); *Edwards v. Edwards*, 108 Okla. 93, 233 Pac. 477 (1925); see Note, *Community Property*, 32 CALIF. L. REV. 182, 186 (1944); cf. *Parrott, Adm'r. v. Nimmo*, 28 Ark. 351 (1873). Even if the land were purchased with community funds in a "separate property" state with the wife's consent the result should be the same. Note, 32 CALIF. L. REV. 182, 187 (1944).

36. Cf. *In re Gulstine's Estate*, 166 Wash. 325, 6 P. 2d 628 (1932).

and is now collecting rent. Is the rent community property? We are assuming, first, that Arthur bought this house with community funds, but that the title to the premises is in his own name. The answer here is not difficult, since something analogous to the constructive trust device would give Barbara protection to her community interest in the land. The same protection would be afforded to protect her interest in the income from the land. This result is indicated by the language in several cases.<sup>37</sup>

More difficult is the question which arises if Arthur has bought the land with his separate funds. These may be funds he owned before September 1, 1947, or they may have come to him since by gift or inheritance. With these he buys the dwelling house in Ohio and leases it to a tenant. May he keep the rent? Arguments can be made to the contrary. The money which is given for rent is not usually regarded as land and it may well be urged that the general rule with regard to the domiciliary law controlling interests in personalty should apply.<sup>38</sup> However, it seems to be clear that Arthur's interest in the rent from the Ohio real estate should not subject him to greater responsibility to the community than he would have if the money came as rent from Pennsylvania real estate. Now if he had bought Pennsylvania land with his separate property, there is authority for saying that he could keep the money which comes from the land as his separate property.<sup>39</sup> This is an extension of the "source" or "replacement"

37. Cf. *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88 (1848); *Bonati v. Welsch*, 24 N. Y. 157 (1861).

38. Rent is a substitute for the feudal incidents, therefore, it is arguable that the law of the situs should control. Thus the answer may depend upon a solution of the problem of characterization. If Ohio regarded the lessor's interest in the rent as land, would Pennsylvania after noting that fact apply the Ohio rule of separate property? Cf. *Commissioner v. Skaggs*, 122 F. 2d 721 (C. C. A. 5th 1941); *Richardson v. Neblett*, 122 Miss. 723, 84 So. 695 (1920). In *McCullum v. Smith, Meigs*, 342 (Tenn. 1838) a person who died domiciled in Tennessee left slaves on a Louisiana plantation; according to Louisiana law slaves were considered immovables. The court held that the slaves passed as immovables under the law of Louisiana. *But cf. Williamson's Adm'rs v. Smart, Taylor* 219 (La. 1801). For a reconciliation of these *prima facie* inconsistent cases, see ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 208-209 (1940). It is the law of the state in which the property is situated which determines the property's character as real or personal, movable or immovable. *Duncan v. Lawson*, 41 Ch. D. 394 (1889); *Young v. Young*, 5 La. Ann. Rep. 611 (1850); *Kneeland v. Ensley*, 19 Tenn. 620 (1838); RESTATEMENT § 208. And for some purposes a leasehold interest is characterized as an immovable. *E. g.*, *Duncan v. Lawson*, *supra*.

39. *Robinson's Succession*, 23 La. Ann. Rep. 174 (1871) (marital community unsuccessfully sought to have the husband's separate estate account for cotton raised on his separately owned farm in a common law state); *In re Pepper*, 158 Cal. 619, 112 Pac. 62 (1910); *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228 (1897); *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49 (1864). This result is usually reached only if the Spanish Law has been modified by statute. *Commissioner v. Skaggs*, 122 F. 2d 721 (C. C. A. 5th 1941). The natural enhancement in value during coverture of separate property is not property acquired during the marriage so that it falls into the community. See *Conley v. Moe*, 7 Wash. 2d 355, 357, 110 P. 2d 172, 175 (1941). The authorities are not in agreement on how royalties on oil leases from separate property should be treated. *Stephens v. Stephens*, 292 S. W. 290 (Tex. App. 1927) (separate property); *Harmon v. Oklahoma Tax Comm.*, 189 Okla. 475, 118 P. 2d 205 (1941) (community income); see 21 TUL. L. REV. 675 (1947).

doctrine.<sup>40</sup> That application as applied to a situation of the kind just mentioned is none too clear, however. A simple illustration will show why it is not. Suppose a wealthy Montana mine owner moves to California. He engages in no further gainful occupation, being content to bask in the sunshine and be supported by the royalties from his Montana mines, which under Montana law are his separate property. Does his wife get any benefit from California community property law with regard to income which the husband now receives as a Californian? There is no case which answers this.<sup>41</sup> But in the converse situation a taxpayer's argument that although he was living in a separate property state he should be able to split his income because it all grew out of community property which he had acquired in Texas was rejected.<sup>42</sup>

Perhaps we will get some help in the solution by approaching the question this way: If a state is to have a community property regime it seems desirable that that regime be accepted, so far as the state's authority extends, as to all matters not expressly excluded by the statute. Establishment of community property in Pennsylvania may have been motivated by a desire to reduce income tax for Pennsylvania taxpayers. Nevertheless, the statute is not in terms a tax-avoiding statute,<sup>43</sup> but an enactment which sets up a method of regulating interests of spouses in acquisitions during marriage. It ought to be consistently applied, so far as Pennsylvania's jurisdiction extends, to accomplish that result. There is, therefore, good argument for supporting a conclusion that rent, whether from Pennsylvania land<sup>44</sup>

40. The doctrine has also been called the doctrine of "transformation." DAGGETT, *THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA* 27 (1931); see Jacobs, *Law of Community Property in Idaho*, 1 *IDAHO L. J.* 37 (1931). When a husband domiciled in a common law state there acquires money and invests it in land in a jurisdiction where the community property regime prevails he does not have to share ownership of the property with the wife. *In re Warner's Estate*, 167 Cal. 686, 140 Pac. 583 (1914); *Ellington v. Harris*, 127 Ga. 85, 56 S. E. 134 (1902); *Clark v. Thayer*, 98 Tex. 142, 81 S. W. 1274 (1904); *Grange v. Kayser*, 80 S. W. 2d 1007 (Tex. Civ. App. 1935); *Blethen v. Bonner*, 30 Tex. Civ. App. 585, 71 S. W. 290 (1902); *Brookman v. Durkee*, 46 Wash. 578, 90 Pac. 914 (1907). This is true even though he has become domiciled in the community property state prior to making the purchase. *In re Nicolls*, 164 Cal. 368, 129 Pac. 278 (1912); *In re Burrow's Estate*, 136 Cal. 113, 68 Pac. 488 (1902); *Latterner v. Latterner*, 121 Cal. App. 298, 8 P. 2d 870 (1932). The decision has been the same even where the husband's separate property was acquired under the common law rule that upon marriage the wife's personal property becomes the husband's. *McDaniel v. Harley*, 42 S. W. 323 (Tex. Civ. App. 1897). A state may, of course, provide that the rule be otherwise. See GOODRICH, *CONFLICT OF LAWS* 325, fn. 5 (2d ed. 1938).

41. See MCKAY, *COMMUNITY PROPERTY* § 655 (2d ed. 1925).

42. *Johnson v. Commissioner*, 88 F. 2d 952 (C. C. A. 8th 1937).

43. This statute has been approved by the Commissioner of Internal Revenue, *Philadelphia Legal Intelligencer*, Aug. 29, 1947, p. 1, col. 3.

44. There are decisions to the effect that the rents and profits of separate land are community property. *Frame v. Frame*, 120 Tex. 61, 36 S. W. 2d 152 (1931) (result compelled by Texas Constitution); *Mellie Esperson Stewart*, 35 B. T. A. 406, *aff'd.*, 95 F. 2d 821; *C. C. Harmon*, 1 T. C. 40, *aff'd.*, 139 F. 2d 211, *rev'd. on other grounds*, 323 U. S. 44 (1944). In all of these cases the land was situated in the community property state and the spouses were also domiciled in the community property state.

or land anywhere else,<sup>45</sup> should be treated as falling into the community even though the land itself is separate property.

### DEBTS

Suppose on September 8, 1947, Barbara went to New York and there made some purchases. She bought an expensive rug for the living room, she bought a fur coat for herself, and another for her sister. If these goods are not paid for, what are the creditor's rights? If the creditor proceeds against Barbara to what property does he have recourse?<sup>46</sup> Are community funds liable? It is being assumed, of course, that New York law knows neither community funds nor community debts.

These cases present some trouble. A community debt incurred in one state, of course, may be collected out of community property in another state. That is clear and easy.<sup>47</sup> But can a debt incurred in a non-community state by one spouse be enforced against community assets in Pennsylvania? The subject has been litigated several times and the majority of the decisions hold that a separate debt cannot be collected out of community assets, even though, had the obligation been incurred locally, it would have been considered a community obligation.<sup>48</sup>

This result is hard on the creditor and, it is submitted, unnecessarily so. Note the way the hardship develops. If a New York merchant had sold the coat to Barbara in New York and she had been domiciled in that state, it is true he would have had a claim only against

45. The all-inclusive language of the Pennsylvania Act together with the considerations above expressed should lead the courts to hold that rents from foreign real estate, though the land was purchased with separate funds, are community funds. One writer predicts otherwise. See Lentz, *An Analysis of the Basic Income Tax Problems Arising Under the Law* (published by the Philadelphia Legal Intelligencer), p. 11, n. 8. The two cases cited to support this prediction do not compel the conclusion suggested. *Hammond v. Commissioner*, 106 F. 2d 420 (C. C. A. 10th 1939) turned on the fact that the situs of the land characterized an oil lease as an immovable. Thus the law of the situs was applied. See note 38 *supra*. The other case involved the effect of a post-nuptial contract on land in another state. *Black v. Commissioner*, 114 F. 2d 355 (C. C. A. 9th 1940).

46. Presumably, he could go against any of Barbara's separate property owned prior to or acquired subsequently to September 1, 1947. *Gooding Milling & Elevator Co. v. Lincoln County State Bank*, 22 Idaho 468, 126 Pac. 772 (1912). In that case the court held, contrary to the view it had previously taken, that the property purchased in the common law state by the wife, while domiciled in a community property state, was separate property. *Cf. Douglas v. Douglas*, 22 Idaho 336, 125 Pac. 796 (1912). Once it reached this conclusion, however, it correctly held that the property was subject to her separate debts.

47. See MCKAY, *COMMUNITY PROPERTY* § 816 (2d ed. 1925); *cf. Pillatos v. Hyde*, 11 Wash. 2d 403, 119 P. 2d 323 (1941).

48. *Gibson v. Sublett*, 82 Ky. 596, 6 Ky. Law Rep. 645 (1885); *Spearman v. Ward*, 114 Pa. 634, 8 Atl. 430 (1887); *Merrielles v. State Bank of Keokuk*, 5 Tex. Civ. App. 483, 24 S. W. 564 (1893); *Mountain v. Price*, 20 Wash. 2d 129, 146 P. 2d 327 (1944); *Meng v. Security State Bank of Woodland*, 16 Wash. 2d 215, 133 P. 2d 293 (1943); *Huyvaerts v. Roedtz*, 105 Wash. 657, 178 Pac. 801 (1919); *LaSelle v. Woolery*, 14 Wash. 70, 44 Pac. 115 (1896); see GOODRICH, *CONFLICT OF LAWS* § 119 (2d ed. 1938). *Contra: Holt v. Empey*, 32 Idaho 106, 178 Pac. 703 (1919); *but see*

Barbara but, at the same time, the coat and other assets which grew out of money earned by her would have been hers. Subject to New York exemption laws, the creditor could have seized these assets in satisfaction of a judgment obtained for the price of the coat. But earlier in this paper it was indicated that the rule with regard to acquisitions of Pennsylvanians should be that the community rule applies after September 1, 1947, even if the property was acquired out of the state.<sup>49</sup> We assume that Barbara's purchase of this coat would have been a community acquisition if the purchase had been made in Pennsylvania. It is a community acquisition, therefore, even though purchased in New York. Now, if the creditor comes to enforce his claim, it seems exceedingly unfair to tell him that this coat has become a community asset but that his claim for its price is an individual claim against Barbara only and not collectible out of community assets. The Act probably will avoid this result since the debt was "one contracted by the wife . . . in the course of acquiring community property. . . ." But if the coat is destroyed the creditor could not levy on other assets which the wife had caused to come into the community. This treats the New York creditor in a harsher fashion than a Pennsylvania creditor would be treated under the same set of facts. Such treatment does not raise the faintest odor of a violation of the privileges and immunities clause,<sup>50</sup> but is unfair, nevertheless.

There is, however, a way out. We grant that Pennsylvania law does not determine who is bound on the obligation arising out of the New York transaction,<sup>51</sup> but Pennsylvania can, for reasons of fairness, give a creditor the same relief as if the transaction creating the debt had occurred in Pennsylvania. This would require some boldness in establishing a rule in conflict of laws differing from that which other states have taken.<sup>52</sup> But it would not require any fundamental change

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Neuner, *supra* note 33, at 173. Where the debt is the husband's separate debt, however, some authorities give his creditors the right to collect the debts out of community property. *Vlautin v. Bumpus*, 35 Cal. 214 (1868); *Van Maren v. Johnson*, 15 Cal. 308 (1860); *Tourne v. His Creditors*, 6 La. 459 (1833). This result is justified on the ground that the husband's power and control over the community assets make him the virtual owner thereof. See MCKAY, *COMMUNITY PROPERTY* §§ 794-797 (2d ed. 1925). The Pennsylvania courts should reject such a contention. Although the unfairness of the result in *LaSelle v. Woolery*, *supra*, is obviated, the husband is permitted under the threat of legal process to use the community assets for his sole and separate use. This, under other circumstances, has been held to constitute a breach of trust. *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88 (1848); *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111 (1916). The Pennsylvania Act, moreover, does not give the husband such complete control over all the community property that he should be treated as the owner of these assets.

49. *Supra*, pp. 6-8.

50. The difference in legal consequence is because of the place where the obligation occurred rather than the persons involved. Thus if the contracting parties had been Pennsylvanians but the sale occurred in New York the result would have been the same. Cf. *Douglas v. New York, New Haven R. R. Co.*, 279 U. S. 377 (1929).

51. *RESTATEMENT* § 364.

52. See cases cited *supra* note 48.

in conflict of laws principles. All we would be doing here would be to give the creditor in a foreign transaction the same rights we would give a creditor had the transaction taken place locally.<sup>53</sup> Some support for this conclusion is found in the language of Section 7 of the Pennsylvania Act. The last sentence of Section 7 reads as follows: "All debts created by the husband or wife after marriage, . . . shall be regarded as community debts, unless the contrary be satisfactorily proved." Pennsylvania could well "regard" the New York transaction as creating a community debt. And it could properly refuse to say that the contrary is proved simply by the showing that under New York law such a transaction gives rights only against the contracting member of the community.<sup>54</sup>

#### ACTIVITIES OF FOREIGNERS IN PENNSYLVANIA

Charles and Doris are married and are domiciled in New Jersey. Charles works in Philadelphia. By New Jersey law his earnings are his separate property at least when there is no foreign element present. Does the fact that he earns money in Pennsylvania after September 1, 1947 create a community property regime with regard to such earnings? The problem, of course, depends for its solution upon the proper construction of the statute. On the basis of what has been said above, the answer to the question must be no.<sup>55</sup> Like most statutes, the language is general and not framed so as to give an explicit answer to problems in the conflict of laws. But all the arguments which go to say that outside acquisitions by Pennsylvanians after September 1, 1947, shall be subject to the community regime go to negative the conclusion that inside earnings by outsiders after September 1, 1947 shall go into the community regime. We urge the conclusion, therefore, that personalty acquired by Charles in Pennsylvania remains his and that no community regime is set up.<sup>56</sup>

53. *Cf.* *LaSelle v. Woolery*, 11 Wash. 337, 39 Pac. 663 (1895), *rev'd. on rehearing* in 14 Wash. 70, 44 Pac. 115 (1896). But if Pennsylvania would have refused to permit a levy of attachment if the debt had been incurred locally, a creditor seeking to collect a foreign debt, of course, could not attach the local assets. *Ruhe v. Buck*, 124 Mo. 178, 27 S. W. 412 (1894).

54. *But cf.* *Thayer v. Clarke*, 77 S. W. 1050 (1903), *aff'd.* 98 Tex. 142, 81 S. W. 1274 (1904), in which the presumption that immovables acquired in a community property state were community property was rebutted by showing the spouses were domiciled in a common law state.

55. We here assume that the courts will reject the civilian concept of a "statute real," note 4 *supra*.

56. *Shilkret v. Helvering*, 138 F. 2d 925 (App. D. C. 1943); *cf.* *Payne v. Commissioner*, 141 F. 2d 398 (C. C. A. 5th 1944); *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 27 So. 851 (1900). Such an interpretation will not cause the statute to be declared unconstitutional as a violation of the privileges and immunities clause of the Federal Constitution. The rights given by the community property system are rights attaching by virtue of marriage rather than a privilege. *Conner v. Elliott*, 18 How. 591 (U. S. 1855).

Suppose Charles purchases a house and lot in Pennsylvania after the effective date of the statute and later decides to sell it. We may get some complications here. Should a title insurance company insist that the conveyance be made by members of the community or the Pennsylvania executor of the wife if she has died? After all, Section 3 of the statute does say that acquisitions subsequent to the effective date of the Act are to be regarded as community property. We have here the same problem we had above, when a husband took community property to a non-community state and bought land.<sup>57</sup> Here, however, the situation is reversed. Should Charles take separate property from his non-community state and buy land here in Pennsylvania, a community state, the land should be treated as remaining his separate property.<sup>58</sup> But that he will be able to get a purchaser to accept it as his separate property without some sort of legal proceedings to establish the fact that it is so separate is, perhaps, too much to hope.<sup>59</sup>

#### CHANGE OF DOMICIL

Outlanders come to live in Pennsylvania and occasionally Pennsylvanians go to live elsewhere. These situations, also, can make some trouble under the community property statute. But, if what has been said heretofore has been correct, the trouble can be resolved without undue difficulty.

Suppose Edward and Faith, Pennsylvania husband and wife, have done so well since September 1, 1947, that they decide to retire and go to Florida to live. They convert their Pennsylvania land into money and take their personalty with them. We shall assume that they have been guided by such competent legal advice that there is no difficulty in distinguishing, at this point, what is individual property of husband and wife and what part of the sum total of their assets is community. They go to Florida, a non-community property state. Is the nature of the ownership changed or does that which was community in Pennsylvania remain community when they go to Florida?

Now put the converse case. George and Helen became domiciled in Pennsylvania in November, 1947. Each owns at the time a fair amount of property which, by the law of their former domicil, Dela-

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57. *Supra*, pp. 8-9.

58. *In re Burrow's Estate*, 136 Cal. 113, 68 Pac. 488 (1902); *Ellington v. Harris*, 127 Ga. 85, 56 S. E. 134 (1906); *Clark v. Thayer*, 98 Tex. 142, 81 S. W. 1274 (1904); *Blethen v. Bonner*, 30 Tex. Civ. App. 585, 71 S. W. 290 (1902); *Brookman v. Durkee*, 46 Wash. 578, 90 Pac. 914 (1907).

59. If husband and wife buy the property jointly the community property statute creates no additional problem in protecting the wife since the purchaser would have notice that the wife has some type of interest in the property. *Heirs of Dohan v. Murdock*, 41 La. Ann. 494, 6 So. 131 (1889). Whether the Act makes property purchased jointly by husband and wife community property rather than tenants by the entirety or joint tenants is obviously not within the scope of this paper. Cf. Note, 32 CALIF. L. REV. 182 (1944).

ware, is separately owned. Does that become community property when they come to Pennsylvania? Let us assume that the property was acquired by each after September 1, 1947, but before the spouses came to Pennsylvania to live. The language of Section 3 of the statute would seem to say that such acquisitions of property were held in the community regime.<sup>60</sup> But such is not the law. The courts have held with considerable uniformity in this type of case that the nature of the owner's interest is not changed by his or her acquisition of a domicile in a state having a different regime.<sup>61</sup> Indeed, when California attempted, by statute,<sup>62</sup> to provide that the community rule should apply to all property brought into the state, although acquired under a law giving separate ownership, the statute was held unconstitutional.<sup>63</sup> We may say with a fair degree of certainty then, that if Pennsylvanians leave the state to live elsewhere, the ownership in acquisitions since September 1, 1947, while they were Pennsylvania domiciliaries, will be treated as community property elsewhere.<sup>64</sup> Likewise, if spouses become domiciled in the state after acquiring property elsewhere, the existing interests in that property will not be changed by the subsequent acquisition of a domicile here.<sup>65</sup> All of this raises problems in accounting, of course. The application of the community property law is

60. "All property acquired by either the husband or wife during marriage and after the effective date of this act, except that which is the separate property of either, as hereinabove defined shall be deemed the community or common property of the husband and wife, and each shall be vested with an undivided one-half interest therein, and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains unless the contrary be satisfactorily proved." Penna. Acts 1947, No. 550, § 3 (July 8, 1947).

61. Thus, upon a change of domicile, the removal of property acquired while the spouses were domiciled in a community property state into a separate property state does not alter the interests of the respective spouse therein. *Popp's Succession*, 146 La. 464, 83 So. 765 (1919); *Packwood's Succession*, 9 Rob. 438, 41 Am. Dec. 341 (La. 1845); *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88 (1848); *Edwards v. Edwards*, 108 Okla. 93, 233 Pac. 477 (1924). In the converse situation the interest of the acquiring spouse is not altered. *In re Drishaus' Estate*, 199 Cal. 369, 249 Pac. 515 (1926); *In re Boselly's Estate*, 178 Cal. 715, 175 Pac. 4 (1918); *Latterner v. Latterner*, 121 Cal. App. 298, 8 P. 2d 870 (1932); *Scott v. Remley*, 119 Cal. App. 384, 6 P. 2d 536 (1931); *Douglas v. Douglas*, 22 Idaho 336, 125 Pac. 796 (1912); *Bosma v. Harder*, 94 Ore. 219, 185 Pac. 741 (1919).

62. Until the statute was amended so as specifically to require its application in the situation in which the property was acquired while the spouses were domiciled elsewhere the California courts refused so to do. See, *e. g.*, *In re Frees' Estate*, 187 Cal. 150, 201 Pac. 112 (1921).

63. *In re Thornton's Estate*, 1 Cal. 2d 1, 33 P. 2d 1, 92 A. L. R. 1343 (1934); see *Brookman v. Durkee*, 46 Wash. 578, 583, 90 Pac. 914, 917 (1907). This holding, however, has been criticized. See *Neuner, supra* note 33, at 176.

64. See cases cited *supra* note 61.

65. See cases cited *supra* note 61. The RESTATEMENT § 293, comment *b*, states that rights in already acquired property shall remain unaffected by transportation into a state having a different property system until there is a subsequent transaction concerning the property. The second state determines whether additional property acquired with the proceeds of the property shall retain the character of the proceeds. It is generally held that a single exchange or investment in the land does not change the nature of the property rights. *Stephen v. Stephen*, 36 Ariz. 235, 284 Pac. 158 (1930); *Estate of Arms*, 186 Cal. 554, 199 Pac. 1053 (1921); *In re Nicolls*, 164 Cal. 368, 129 Pac. 278 (1912); *Brookman v. Durkee*, 46 Wash. 578, 90 Pac. 914 (1907). *Contra*: *Succession of Packwood*, 9 Rob. (La.) 438, 41 Am. Dec. 341 (1845).



going to create such problems, and they are going to be magnified when courts are presented with two state instead of one state questions.

There is one further question about George and Helen who came to Pennsylvania with separate property and are now living and are domiciled here. There is no doubt about the community property nature of earnings of either of the spouses here in this state. But what about the gains made from property which they brought in as the separate property of each? Do these gains go into the community?

It can be argued, on the one side, that if the tree, that is the fund which produces the gains, is separate property, then the fruit should be separate.<sup>66</sup> On the other hand, these people have now become domiciled in Pennsylvania and Pennsylvania is the state which, for reasons of policy, has adopted the community property regime. Pennsylvania cannot change the nature of what they acquired before they became Pennsylvanians, but Pennsylvania can say: "What you do after you become domiciled here is governed by our marital property rule. Your acquisitions, therefore, as Pennsylvanians become community property." To support this conclusion is in line with the point of view previously expressed in this discussion.<sup>67</sup> It carries out the general principle of extending the community property regime to the situations where the Pennsylvania Legislature can constitutionally extend it. If that is a sound principle the result indicated should follow. Authorities on the subject are not unanimous.<sup>68</sup> It must also be borne in mind that when federal courts are deciding questions concerning the nature and incidents of federal taxation they are not settling for the state the question of its local property law.<sup>69</sup>

#### CONTRACTS—ANTE-NUPTIAL AND POST-NUPTIAL

May husbands and wives change the nature of marital property ownership by contract? They certainly can under the law of European

66. *In re Frees' Estate*, 187 Cal. 150, 201 Pac. 112 (1921); *cf.* *Stephens v. Stephens*, 292 S. W. 290 (Tex. Civ. App. 1927).

67. *Supra* at pp. 6-8, 14.

68. Compare *In re Frees' Estate*, 187 Cal. 150, 201 Pac. 112 (1921) and *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49 (1864), with *Oliver v. Robertson*, 41 Tex. 422 (1874) and *Stewart v. Commissioner*, 95 F. 2d 821 (C. C. A. 5th 1938). Where the spouse has to contribute time and energy to produce the income from the separate property the courts more readily hold that such income is community property. See LeSourd, *Community Property Status of Income From Business Involving Personal Services and Separate Capital*, 22 WASH. L. REV. 19 (1947). In most European countries the rule is that the law of the husband's first domicile at the time of marriage, or the law of his nationality where the nationality principle obtains, governs all acquisitions even though the domicile changes. WOLFF, *PRIVATE INTERNATIONAL LAW* 366 (1945).

69. State decisions and state property law need be followed only if the Tax Statute impliedly or explicitly so requires. *Morgan v. Commissioner*, 309 U. S. 78 (1940); *Burnet v. Harmel*, 287 U. S. 103 (1932). For a discussion of this general problem, see Cahn, *Local Law in Federal Taxation*, 52 YALE L. J. 799 (1943); Polisher, *Disregarding the Common Law Concepts in Federal Taxes*, 23 TAX MAG. 594 (1945).

countries, the home of community property rules.<sup>70</sup> Indeed, the English House of Lords went so far as to say that where a man and wife were married in France without an ante-nuptial agreement that the provisions of the French law which brought them into the community property regime became an implied contract which imposed that regime upon the husband's very substantial earnings after he had been domiciled in England for many years.<sup>71</sup> There are plenty of criticisms of this absurd result to be found elsewhere and time will not be taken to go into it here.<sup>72</sup> American cases have reached the contrary conclusion.<sup>73</sup> One can hardly take seriously an argument that if Irving and Julia are married in Pennsylvania December 8, 1947, they have impliedly made a contract for the ownership of their joint acquisitions for the rest of their lives, regardless of their future migrations. The fact is that Pennsylvania law will govern them so long as they remain Pennsylvanians. If they go to Minnesota to live, their future acquisitions will be governed by the rule of their new domicile.<sup>74</sup>

Suppose, however, we have a husband and wife, Karl and Lucy, who have come to live in Pennsylvania subsequent to September 1, 1947. Each is a successful wage earner and back in Missouri, where they were formerly domiciled and where they could validly contract, they made an agreement that each should always keep his or her earnings and their acquisitions as separate property. Some courts have cautiously said that such contracts, especially ante-nuptial contracts, would not be applied after the parties had moved to another state, unless the intent that they should be so applied clearly appeared.<sup>75</sup> But, on the facts stipulated here, that intent is clearly shown. Will such a contract escape the effects of the provisions of the Pennsylvania law as to marital property? The answer is probably yes. We turn again to Section 7 of the statute<sup>76</sup> providing for community debts which ends with the phrase "unless the contrary be satisfactorily

70. See KUHN, *COMPARATIVE COMMENTARIES ON PRIVATE INTERNATIONAL LAW* 151-154 (1937).

71. *De Nicols v. Curlier*, [1900] A. C. 21; *In re De Nicols*, [1900] 2 Ch. D. 410; *accord*, *Beaudoin v. Trudel*, [1937] 1 D. L. R. 216.

72. See, *e. g.*, GOODRICH, *CONFLICT OF LAWS* § 121 (2d ed. 1938).

73. The doctrine of an implied contract was expressly repudiated in *Saul v. His Creditors*, 5 Mart. (N. S.) 569 (La. 1827); *In re Majot*, 199 N. Y. 29, 92 N. E. 402 (1910).

74. *Birmingham Waterworks Co. v. Hume*, 121 Ala. 168, 25 So. 806 (1899); *In re Majot's Estate*, 199 N. Y. 29, 92 N. E. 402 (1910).

75. *Long v. Hess*, 154 Ill. 482, 40 N. E. 335 (1895); *Fuss v. Fuss*, 24 Wis. 256 (1869); see Note 27 *ILL. L. REV.* 202 (1932). *Contra*: *Kleb v. Kleb*, 70 N. J. Eq. 305, 62 Atl. 396 (1905), *aff'd.*, 71 N. J. Eq. 787, 65 Atl. 1118 (1907).

76. ". . . All debts created by the husband or wife after marriage, or after the effective date of this act, whichever is later, shall be regarded as community debts, unless the contrary be satisfactorily proved." Penna. Acts 1947, No. 550, § 7 (July 8, 1947).

proved." Then, again, Section 9 provides for the transfer of community interests between the spouses.<sup>77</sup> These indications are not conclusive. But coupled with the general recognition of the possibility of contractual modification of the community property rule,<sup>78</sup> it does not seem a violent conclusion that Pennsylvania spouses may, by appropriate action, contract themselves out of the regime if they wish to do so.<sup>79</sup> It seems, likewise, to follow that Pennsylvania courts would recognize and give effect to a similar contract made by outsiders if the agreement was valid where made.<sup>80</sup>

Ante-nuptial and post-nuptial contracts have not been common in this country and there is comparatively little litigation concerning them, in the conflict of laws aspect at any rate. Whether the growth of community property laws will increase this type of bargaining remains to be seen. Perhaps that will depend upon whether a favorable situation for the married taxpayer is dependent upon his subjecting all gains to the community property rule.

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77. "The husband may give, grant, bargain, sell, or convey directly to his wife and a wife may give, grant, bargain, sell or convey directly to her husband his or her community property in esse. Every deed and conveyance made from the husband to the wife, or from the wife to the husband shall operate to divest the property therein described of every claim or demand as community property to the extent herein provided, and shall vest the same in the grantee as the separate property of the grantee. . . ." Penna. Acts 1947, No. 550, § 9 (July 8, 1947).

78. See LEFLAR, *CONFLICT OF LAWS* § 143 (1938); STUMBERG, *CONFLICT OF LAWS* 288 (1937).

79. But a statute which gives the spouses an election to adopt the community property system runs afoul of the rationale of *Earl v. Lucas*, 281 U. S. 111 (1930) and for income tax purposes will not be recognized. *Commissioner v. Harmon*, 323 U. S. 44 (1944).

80. The contract should be enforced in the absence of a strong opposing policy of the state of the situs. *Black v. Commissioner*, 114 F. 2d 355 (C. C. A. 9th 1940), and cases cited therein; *Caruth v. Caruth*, 128 Iowa 121, 103 N. W. 103 (1905); see 2 BEALE, *CONFLICT OF LAWS* § 238.2 (1935); *RESTATEMENT* § 238, comment *b* (land), comment *c* (personalty). *But cf.* BEALE, *op. cit. supra* at § 290.1 (personalty).