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***Marital Property in Conflict of Laws*, by Harold Marsh, Jr. (1952)**

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BOOK REVIEWS

MARITAL PROPERTY IN CONFLICT OF LAWS, by Harold Marsh, Jr. Seattle: The University of Washington Press, 1952. Pp. 263. \$4.50.

If a childless husband and wife have lived in New York and there acquired property during their marriage, the wife is entitled to a nonbarrable one-half share. If the childless husband and wife have lived in Washington and acquired property during their marriage, the wife has one half as her community interest, not subject to disposition by the will of the husband. But if these persons have acquired the property in New York during their marriage and thereafter have changed their domicile to Washington and the husband at his death has left a will bequeathing all "his" property to a third person, does the wife have any claim which she can successfully assert? If the Washington court regards the property as "separate" property of the husband—and it might be so described in New York where the parties were domiciled at the date of acquisition—and further regards the claim of the wife as a problem of "succession"—to be governed by the law of the domicile at the time of the husband's death—the result would be that the wife would be denied any claim. "This procedure is, of course," says Mr. Marsh, "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."¹

The avowed purpose of MARITAL PROPERTY IN CONFLICT OF LAWS is to demonstrate the "correct analysis" for the problem above and a host of similar intriguing choice-of-law questions involving marital property. Laid out between the covers of this comparatively thin volume is as fine a study, as lucid an explanation, and as great a number of practical guideposts for the rational solution of these problems as has yet been made available. The value of the work to the practicing attorney is considerably enhanced by the author's careful attention to the statutes and cases, a welcome change of fare from the too prevalent generalized and theoretical discussions to which resort must normally be made.

Because much of the difficulty in this area of law is basically semantic, the author wisely devotes an entire chapter to definition of terms employed to designate marital property. The precise interest of one spouse in property acquired by the other cannot be adequately described by labels until such labels are understood in light of the "actual rights, powers, privileges, and immunities, which arise in favor of the non-acquiring spouse." Chapter II undertakes analysis of such interests by painstaking dissection of the phrases "separate property" and "community property" into such phrases as "statutory separate property," "civil-law separate property," "community property acquired by the husband," and "community property acquired by the wife," and then doggedly pursues the meaning of these phrases with reference to real and personal property, acquired before or after marriage, in common law or community property jurisdictions, in every obvious type of transaction. The result is somewhat comparable to a limited, vest-pocket edition of Vernier's, AMERICAN FAMILY LAWS. In this chapter the text is fairly slow, dull reading—but of prime importance if the following pages are to be meaningful.

Nor is the reader permitted to view the law in action when the definitions have been

¹ Page 233. That the problem is not moot nor the result unlikely is amply demonstrated by the author's discussion of an analogous case, *In re O'Connor's Estate*, 218 Calif. 518, 23 P. 2d 1031 (1933).

mastered. First he must refresh his understanding of the procedure in a conflicts case. There are, the reader learns, three steps in the choice-of-law decision: *characterization* of the issue before the court, *selection* of the jurisdiction whose law is to govern the issue, and *application* of the law of that jurisdiction. It is here that the author considers the basic problems in Conflict of Laws and the various theories advanced for their solution. This chapter (the third) is the talisman to the "correct analysis" by which the basic policies and social purposes of the rules and principles are to be preserved. Somehow the author manages to keep on a comprehensible and helpful plane what might quickly deteriorate into a technically complex quarrel over theory. Only rarely does the discussion approach something resembling an argument over how many angels can dance simultaneously on the head of a pin. His premises and conclusions are logically advanced; theories antecedent and opposed to his own are dealt with sharply, sometimes scathingly, always with the vigor of one convinced that he is indeed exorcising the "devil of illogical thought." What Marsh has to say in this chapter will be of interest to any lawyer with a conflicts question, whether in the area of marital property or not, because the approach should be usable for any situation in which a choice-of-law problem appears.

When the second and third chapters have been digested, the remaining pages are a pleasant jaunt through already familiar terrain for the fourth, fifth, and sixth chapters are simply detailed examination of the three step characterization-selection-application technique developed above, one chapter for each. Marsh obviously enjoys himself in these chapters, and he has a right to, for the cases provide persuasive documentation for his thesis that his suggestions are far more plausible than what most courts thus far have had to offer. Why a creditor, who could satisfy a judgment resulting from post-nuptial contractual liability incurred by the husband in the course of ordinary business from post-nuptial earnings of the husband in *either* Wisconsin or Washington if the entire transaction (obligation-judgment-execution) occurred in either state, should not be able to maintain the same sort of levy in Washington on a Wisconsin judgment;² and why Plaintiff A, struck by an auto negligently driven by husband on "community business" ten feet inside the Washington boundary line, could levy on community property to satisfy a judgment, while Plaintiff B, struck ten feet on the Oregon side of the line could not do so;³ are pretty clearly instances bearing out the theme that all is not well with the present choice-of-law cases.

Among other virtues of the book, a particularly significant one is the cross introduction to and comparison of the common law and community property marital property systems. It is gratifying to have a writer well enough informed in both systems to appreciate the fact that both have strength and weakness, and able to resist the temptation to subject either to derision. Some community property trained lawyers will be disappointed by the author's insistence that Washington and Arizona have a "community entity" in fact rather than merely as a matter of expression, but Marsh's misapprehension here—if such it actually is—must certainly be forgiven in light of the numerous decisions using "entity" language.

In final appraisal the book seems too light in one area only; the failure adequately to consider what progress toward solution of these problems can be made by legislation. Possibly the author is convinced that attempts at uniformity by legislation would fail because of the deep set local prejudices surrounding marital property questions. His own passing discussion at several points of legislative reform in California would

² *La Salle v. Woolery*, 11 Wash. 337, 39 Pac. 663 (1895), *rev'd on rehearing*, 14 Wash. 70, 44 Pac. 115 (1896).

³ A hypothetical case posed by the author on page 153. His hypothetical is suggested, however, by analogous case authority which he cites.

seem partial refutation of this idea. More probably he did not consider this possibility to be fairly within the scope of his conflict of laws study. The thought of legislative correction is mentioned here because Marsh's book not only demonstrates the need for "correct analysis" of the choice-of-law questions but also rather vividly portrays the many pitfalls which must be avoided, and inferentially raises the question whether such a hazardous route is advisable if a safer, simpler alternative is available.

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