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Marital Property and the Conflict of Laws

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MARITAL PROPERTY AND THE CONFLICT OF LAWS

"Mine is better than ours."

Benjamin Franklin, Poor Richard's Almanac (1756)

There exist in the United States today two distinctly dissimilar systems of law governing marital property. The majority of the states essentially follow the common law rule with certain statutory modifications of dower and courtesy. Of these common law states, only North Dakota[1] and South Dakota[2] have abolished all marital property interests. The second system of marital property law exists in a number of southern and western states.[3] This is the so called community property system largely derived from the civil law. When two such divergent systems of law prevail in a country with so mobile a populace as the United States, a boundless variety of conflict of laws questions must inevitably arise. A significant number of these must necessarily accompany divorce and settlement, when property, real and personal, may have been acquired in a number of states across the country. The frequency of such problems is not diminished by the ever increasing number of divorces each year. I shall attempt to limit the scope of this discussion to general considerations of marital property with particular emphasis upon marital property law as it pertains to divorce and subsequent property settlement. This will be followed by some indications of the problems in the enforcement of these decrees. Necessarily, I must refer to cases dealing with descent and distribution, creditors rights, etc., in those rather frequent areas which are lacking in divorce litigation.

MARITAL PROPERTY

At the inception, it is only fitting that a property definition of marital property be made. Professor Marsh, in his most eminent treatise, *Marital Property and the Conflict of Laws,* has given the following definition:

"Any interest which a wife *qua* wife receives by opera-

1. N.D. Cent. Code §§ 14-07-04, 14-07-09, 56-01-02.
2. S.D. Code § 14.0203, 14.0206, 56.0103 (1939).
3. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

> tion 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 interest."[4]

It must be noted that in considering conflict of laws problems in relation to divorce the majority of conflict of laws questions arising appear during litigation subsequent to the divorce in which the former spouse is praying for a division of property not obtained in the initial divorce proceeding. This is true since any property settlement question presented during the divorce action will probably be characterized by the court as a question of divorce, not of marital property[5] and thusly, they will apply the *lex fori* which usually provides merely for an equitable distribution making no distinction between separate and marital property.[6] It is rather when the divorce proceedings have been silent as to any property settlement, and the former spouse comes into court requesting a division of property, that conflict of laws questions concerning marital property present themselves.

There are two widely accepted and generally prevailing rules governing marital property: (1) the law of the domicile governs movables,[7] "mobilia personam sequuntur," (2) the law of the situs governs immovables.[8] These rules are not all inclusive and are subject to some modification.

MOVABLES

The first area into which I shall delve is that concerning movables. One of the early theories propounded in this field was the "intended domicile" theory of the noted conflict of laws authority, Justice Story.[9] In substance, this proposition was that property acquired subsequent to the marriage and before the spouses have reached their intended domicile, will be governed by the laws of their intended domicile. This

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4. MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 11 (1st ed. 1952).
5. Id. at 142.
6. See, e.g., N.D. Cent. Code § 14-05-24 (1961).
7. Restatement, Conflict of Laws § 289 (1934); Rozan v. Rozan, 49 Cal. 2d 322, 317 P.2d 11 (1957); Douglas v. Douglas, 22 Idaho 336, 125 Pac. 796 (1912); Muus v. Muus, 29 Minn. 115, 12 N.W. 343 (1882); Boxman v. Horder, 94 Ore. 219, 185 Pac. 741 (1919).
8. RESTATEMENT, CONFLICT OF LAWS § 237 (1934); GOODRICH, CONFLICT OF LAWS § 122 (3rd ed. 1949); STUMBERG, CONFLICT OF LAWS at 7 (2nd ed. 1951); see, e.g., Newcomer v. Oren, 2 Md. 297, 56 Am. Dec. 717 (1852).
9. STORY, CONFLICT OF LAWS §§ 193, 194 (3rd ed. 1846).

theory has not been widely accepted and is often criticized in its application to marital property.[10] It is offered here only to serve as a bit of history on the matter. Interestingly enough, in the number of old cases in which this rule has found favor, the intended domicile and the actual domicile of the husband were one and the same.[11]

A second early theory which also has fallen into ignominy is the "tacit contract" theory.[12] This theory was that marriage is in the nature of a contract and contract principles should apply insofar as making the law of the place where the contract was consummated applicable. This theory was rather quickly disposed of in the land mark case of *Saul v. His Creditors*.[13]

Various circumstances which prevail upon the acquisition of movables preclude the strict application of the fundamental rule regarding this type of property. For example, if property is acquired by the spouses in a community property state and they subsequently remove to a common law state, there establishing domicile and purchasing property with the proceeds realized from the sale of property previously acquired in their former domicile, what law shall then govern? If the law of their present domicile governs, then the spouse may have no interest in the newly acquired property and is thus divested of her property. The Supreme Court of North Dakota in the case of *Fleck v. Fleck*[14] took cognizance of this problem in quoting from a Washington case.[15]

> "The rule is well settled that the status of property as community or separate is to be determined as of the date of acquisition and that if it is separate property at that time it will remain separate property through all of its changes and transitions as long as it can be traced and identified; and further, that its rents, issues and profits remain separate property."[16]

Thus it may be stated that movable marital property will

10. MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 185-187 (1st ed. 1952); Goodrich, MATRIMONIAL DOMICILE, 27 Yale L. J. 49 (1917); Leflar, **Community Property and the Conflict of Laws,** 21 Calif. L. Rev. 221 (1933); Stumberg, **Marital Property and the Conflict of Laws,** 11 Texas L. Rev. 53 (1932).
11. See **e.g.,** Glenn v. Glenn, 47 Ala. 204 (1872); Mason v. Fuller, 36 Conn. 160 (1869); Ford's Curator v. Ford, 2 Mart. N.S. 574, 14 Am. Dec. 201 (1824); Connor v. Connor, 10 La. Ann. 440 (1855); Routh v. Routh, 9 Rob. 224, 41 Am. Dec. 326 (La. 1845).
12. DeNichols v. Curlier, 2 Ch. 410 (1900).
13. 5 Mart. 569 (La. 1827).
14. 79 N.D. 561, 58 N.W.2d 765 (1953).
15. Burch v. Rice, 37 Wash. 2d. 185, 222 P.2d 847 (1950).
16. **Id.** at 849.

be governed by the law of the domicile of the spouses at the time of its original acquisition and any property exchanged therefore in a subsequent domicile will be governed by the law affecting the original property. It quite logically follows that property acquired by husband and wife while domiciled in a separate property state will remain separate even after their domicile is removed to a community property state.[17] California attempted to change this long standing rule by enacting a statute which made any property brought into California community property if when acquired it would have been community had the purchaser been domiciled in California.[18] This statute was held to be unconstitutional by the Supreme Court of California in the case of *In Re Thornton's Estate*[19] as a violation of the privileges and immunities clause of the United States Constitution.

Quite obviously, it must also be true that movables acquired in a community property state which are subsequently taken to a separate property state will retain their community characteristics although they may be there traded for other property.[20] The curious situation then arises in which a state entirely unfamiliar with community property may be called upon to enforce a community interest, which being foreign in nature, the state has not the proper judicial machinery to handle. This problem has generally been solved by the application of a constructive trust to one-half of the property.[21]

Another point of particular interest becomes apparent when spouses domiciled in a community property state attempt to divide such property into the separate property of each by their own action. It was held by the Texas Supreme Court[22] that spouses domiciled in Texas could not, by dividing $5800 in cash in a non-community state, divest such property of its community characteristics. The court however, granted the

17. Stephen v. Stephen, 36 Ariz. 235, 284 Pac. 158 (1930); Douglas v. Douglas, 22 Idaho 336, 125 Pac. 796 (1912); Huff v. Borland, 6 La. Ann. 436 (1851); Brookman v. Durkee, 46 Wash. 578, 90 Pac. 914 (1907); RESTATEMENT, CONFLICT OF LAWS § 293 (1934).

18. Calif. Civ. Code § 164 (1917) "All other property acquired after marriage by either husband or wife, or both, including . . . personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if domiciled in this state, is community property. . . ."

19. 1 Cal. 2d. 1, 33 P.2d 1 (1934).

20 and 21—No reference—Eliminated by printer to expedite production.

22. King v. Bruce, 145 Tex. 647, 201 S.W.2d 803, **cert. denied** 332 U.S. 769 (1947).

partition on the basis that there was "some new dealing" in accordance with the Restatement.[23] Texas has subsequently changed its statute to permit a division of community property.[24] Generally, most community property states presently allow partition of the community property by the parties.[25]

IMMOVABLES

The general rule regarding immovables is subject to the same restrictions as that concerning movables. That is, the rule of original acquisition.[26] Thus, community real property exchanged for real property in a separate property state will retain its community property characteristics. This too may be enforced by the common law state by the use of a constructive trust.[27]

The rule that the law of the situs applies to realty is one jealously guarded by the state courts. In *Hammonds v. Commissioner*,[28] the court held that realty purchased by a nondomiciliary spouse during coverture by his "toil, talent, or productive faculty," was community property. The court reasoned that the community property statute in Texas was a real statute; that it operated on things, and not persons. The basis for this holding seems to be that the purchase was not made with separate funds, but rather with labor. This then being the "original acquistion," it is entirely in accord with the general rule. Louisiana probably has the strictest rule regarding property within its jurisdiction in that the original acquisition rule is partially rejected. The Louisiana Code[29] provides:

> "All property acquired in this state by non-resident married persons, whether the title thereto be in the name of either the husband or wife or in their joint names, shall be subject to the same provisions of the law which reg-

23. RESTATEMENT, CONFLICT OF LAWS § 291 (1934).

24. Vernon's Texas Stat. art. 4624 a (1949).

25. See, **e.g.**, Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932); **In re** Nielson's Estate, 16 Cal. Rptr. 634 (1961); Rev. Code Wash. Ann. § 123.080.

26. Stephen v. Stephen, 36 Ariz. 235, 239, 284 Pac. 158, 159 (1930); Joiner v. Joiner, 131 Tex. 27, 112 S.W.2d 1049 (1938).

27. Heir of Dolan v. Murdock, 41 La. Ann. 494, 6 So. 131 (1889); Chichester v. Chichester, 209 Miss. 628, 48 So.2d 123 (1950); Depas v. Mayo, 11 Mo. 314, 49 Am. Dec. 88 (1848).

28. 106 F.2d 420 (10th cir. 1939).

29. La. Civ. Code art. 2400 (1870).

ulate the community of acquets and gains between the citizens of this state."

This Louisiana law can be distinguished most satisfactorily from the previous unconstitutional California law in that it applies only to property acquired in Louisiana[30] and appears to be a strict application of *lex rei sitae.*

RENTS AND PROFITS, ETC.

In most civil and common law jurisdictions, income from property is deemed a separate movable at the time it accrues. Thus, the law of the domicile of the spouses would determine whether the movable so acquired is separate or community.[31] Under Texas law however, all rents, profits and issues derived from Texas land are community property even though the land may be separate property and regardless of owners domicile.[32] All future acquisitions with this income must then be necessarily community property. Louisiana, quite understandably, is in accord with this rule.[33]

The following sections shall deal with two particular areas of conflict of laws concerning the enforcement of decrees purporting to make property settlements respecting assets held by the family prior to dissolution of the marriage. The first of these is alimony and the second deals with decrees attempting to convey or require conveyance of real property located within another jurisdiction.

ALIMONY

Most states, in providing for a distribution of property upon dissolution of the marriage, also provide for alimony to be paid for the maintenance of one of the parties and the children.[34] Alimony by its inherent nature is often a continuing thing, requiring payments at regular intervals. The enforcement of such a creature must necessarily involve difficulties in its application to the conflict of laws. The Supreme Court of the United States, beginning with its decision in *Barber v. Bar-*

30. See Succession of Dill, 155 La. 47, 98 So. 752 (1923).
31. **Supra** note 29.
32. See Benjamin H. McElhinney Jr. 17 T.C. 7 (1951); Johnson v. Commissioner, 1 T.C. 1043 (1943).
33. Magnolia Petroleum Co. v. Crigler, 12 So. 2d 511 (La. App. 1942); Drewett v. Carnahan, 183 So. 103 (La. App. 1938); Succession of Ferguson, 146 La. 1010, 848 So. 338 (1920).
34. See, **e.g.,** N.D. Cent. Code § 14-05-24.

ber,[35] has held that alimony decrees are properly subject to full faith and credit.[36] Such a decree then, cannot be evaded merely by fleeing the jurisdiction of the court.[37] The second important case dealing with alimony decrees as they are to be applied under the full faith and credit clause was *Lynde v. Lynde*.[38] The court herein ruled that a judgment of alimony in one state is a debt of record entitled to full faith and credit in any other state, but it must be made a judgment in the second state before it can be executed.[39] Further, if the decree providing for future alimony was subject to the discretion of the court, then an action brought upon that accrued alimony was not properly entitled to full faith and credit.[40] Subsequently, in *Sistare v. Sistare*, [41] the court held:

> "Where a decree is rendered for alimony and is made payable in future installments, the right to such installments becomes absolute and vested upon becoming overdue, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments . . ."[42]

It was also added that this rule would not apply where the first state in which the judgment was entered had such discretion that no vested right could accrue. *Sistare v. Sistare* has not been overruled and the courts of certain states,[43] including North Dakota,[44] appear to have somewhat extended the rule in deciding that future alimony accrued, if it has not actually been modified, is final and will be granted full faith and credit. While the rule in the *Sistare* case and subsequent decisions gave the former spouse a remedy, it was a cumbersome and difficult one to enforce. It necessitated the bringing of an action in the particular jurisdiction in which the defaulting spouse might be located, causing great inconvenience and ex-

35. 21 How. 582 (U.S. 1858).
36. U.S. Const. art. IV § 1.
37. **Supra** note 35 at 591 "The decree . . . is a judgment of record and will be received as such by other courts . . . when that has been done, it becomes a judicial debt of record against the husband which may be enforced by execution or attachment against his person, issuing from the court which gave the decree; and when that cannot be done on account of the husband having left or fled from that jurisdiction to another . . . the wife, by her next friend, may sue him wherever he may be found . . . to carry the decree into judgment there with the same effect that it has in the state in which the decree was given."
38. 181 U.S. 183 (1900).
39. **Id.** at 187.
40. **Id.**
41. 218 U.S. 1 (1909).
42. **Id.** at 16 and 17.
43. See Holten v. Holten, 153 Minn. 346, 190 N.W. 542 (1922).
44. Weldy v. Weldy, 74 N.D. 165, 20 N.W.2d 583 (1945.

pense. It was only natural that some sort of uniform law be promulgated, *i.e.*, The Uniform Reciprocal Enforcement of Support Act.[45] This Act has been enacted in nearly all the jurisdictions including North Dakota.[46] It is not within the purview of this article to discuss the intricacies of this Act. There is much other adequate coverage of that subject.[47] This Act eliminates the necessity for the complaining spouse to personally commence an action in a foreign jurisdiction and provides an efficient and expedient method of reaching a nonproviding spouse in another state.

The subject of alimony as a result of this legislation is definitely not now an area of controversy in conflict of laws. A bit of historical background and the present status does present some view of this segment of the overall problem of property settlement in the field of domestic relations in conflict of laws.

ENFORCEMENT OF LAND DECREES IN FOREIGN JURISDICTIONS

The enforcement of property settlements upon divorce, separation, or upon a subsequent action for a division of property presents a variety of knotty problems. The greatest difficulty in this area lies not with respect to movables but rather with immovables. The rule is well settled that a court in one jurisdiction cannot directly affect land located in a foreign jurisdiction.[48]

The constructive trust has been employed in certain particular instances, *E.g.*, Texas courts in two cases charged one-half the value of the husband's foreign lands to his lands located within the forum.[49] This device, however, will not solve the problems most often encountered. It will more often be necessary to resort to some more direct method.

Thus we enter one of the most difficult and confused areas of the law *i.e.*, the enforcement of a decree which purports to convey real property located in another state. Since the early

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45. 9 A U.L.A. 1 (1957).
46. See N.D. Cent. Code § 14-12 (1961).
47. See **e.g.** note, **The Uniform Reciprocal Enforcement of Support Act,** 37 N.D. L. Rev. 421 (1961).
48. See **e.g.,** Fall v. Eastin, 215 U.S. 1 (1909); Tolley v. Tolley, 210 Ark. 144, 194 S.W.2d 687 (1946); Rodgers v. Rodgers, 56 Kan. 483, 43 Pac. 779 (1896); McRary v. McRary, 228 N.C. 714, 47 S.E.2d 27 (1948); Higgins v. Higgins, 60 S.D. 576, 245 N.W. 397 (1932).
49. Walker v. Walker, 231 S.W.2d 905 (Tex. Civ. App. 1950); Askew v. Roundtree, 120 S.W.2d 117 (Tex. Civ. App. 1938).

case of *Penn v. Lord Baltimore,*[50] it has been an accepted rule that the forum which obtains personal jurisdiction over the parties may require a conveyance of property situated in another jurisdiction. Unfortunately, if the party who has been directed to make the conveyance flees the jurisdiction, failing to execute the conveyance, the court decree is rendered powerless since the court may not directly affect the title to foreign real property.[51] Consequently the only solution by which such a decree may be made effective is if the foreign court will give the decree full faith and credit. Authorities in the field have argued that such *in personam* judgments directing conveyances should be entitled to full faith and credit.[52]

> "If the defendant is personally before a court of equity, the court has power to order him to convey foreign land. Such a decree is an effective judgment and determines conclusively his obligation to convey and this obligation remains binding upon the person of the defendant wherever found. Such a decree ought to be entitled to full faith and credit at the situs of the land."[53]

The courts have not taken particular cognizance of these views. The leading case dealing with this problem is *Fall v. Eastin.*[54] This case originally arose in Washington, wherein the defendant was ordered to convey land in Nebraska pursuant to a divorce decree. The defendant left Washington before he could be compelled to execute the conveyance. An action was then begun in Nebraska on the foreign judgment and the trial court ruled to enforce the decree on the basis of full faith and credit.[55] This decision was reversed on appeal.[56] The husband meanwhile conveyed to a third party and the case came to the Supreme Court as *Fall v. Eastin.*[57] The Supreme Court decided the case on the question whether a commissioner's deed executed in Washington in favor of W was a valid conveyance of the property and prevailed over the subsequent purchaser. It was held that the judgment ought not to be en-

50. 1 Ves. 444, 27 Eng. Rep. 1132 (Ch. 1750).
51. **Supra** note 48.
52. Barbour, **The Extra-Territorial Effect of the Equitable Decree,** 17 Mich. L. Rev. 527 (1919); Currie, **Full Faith and Credit to Foreign Land Decrees,** 21 U. Chi. L. Rev. 620 (1954); Lorenzen, **Application of the Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land,** 34 Yale L.J. 591 (1925).
53. Barbour, **The Extra-Territorial Effect of the Equitable Decree, supra** note 52 at 532-533.
54. 215 U.S. 1 (1909).
55. Fall v. Fall, 75 Neb. 104, 106 N.W. 412 (1906).
56. Fall v. Fall, 75 Neb. 120, 113 N.W. 175 (1907).
57. **Supra** note 54.

titled to full faith and credit. Justice Holmes in his concurring opinion apparently realized the real problem presented and made the following observation:

> "So I conceive that a Washington decree for the specific performance of such a contract would be entitled to full faith and credit as between the parties in Nebraska."[58]

Such specific performance decrees have often been given effect at the situs when it can be shown that some pre-existing obligation was in force.[59] However, in the area of land division upon divorce, the cases have been extremely reluctant to give full faith and credit.[60] On the other hand, the early case of *Matson v. Matson*[61] has been something of a guiding light for those jurisdictions taking the opposite view. The facts in this case are largely similar to those in *Fall v. Eastin,*[62] but the Iowa Court distinguished this case in that H, in the *Fall Case* was not personally served nor did he appear. Further, herein there was no conflict of the public policy.[63] The Nebraska Court since *Fall v. Fall*[64] appears to have taken a somewhat more liberal view. In the recent case of *Weesner v. Weesner,*[65] the court distinguished *Fall v. Fall* in that Nebraska public policy was no longer violated by this type of decree and that the parties in this action had been personally served.[66]

> "It is well established that a court . . . in one state with all the necessary parties properly before it in an action for divorce, generally has the power . . . to render a decree ordering execution and delivery of a deed to property in another state in lieu of alimony for the wife . . . if the related public policy of the situs state is in substantial accord with that of the other state."[67]

In the recent case of *McElreath v. McElreath,*[68] W sought to have a Texas court enforce an Oklahoma decree directing H to convey Texas land to her. The Texas court held that it would enforce the Oklahoma decree on the basis of comity

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58. **Id.** at 15.
59. See Messner, **The Jurisdiction of a Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State,** 14 Minn. L. Rev. 494 (1930).
60. See Bullock v. Bullock, 52 N.J.Eq. 561, 30 Atl. 676 (1894); Fall v. Fall, 75 Neb. 120, 113 N.W. 175 (1907).
61. 186 Iowa 607, 123 N.W. 127 (1919).
62. 215 U.S. 1 (1909).
63. 75 Neb. 120, 113 N.W. 175 (1907).
64. **Ibid.**
65. 168 Neb. 346, 96 N.W.2d 682 (1959).
66. **Id.** at 689.
67. **Id.** at 689-690.
68. 345 S.W.2d 722 (Texas 1961).

rather than full faith and credit.[69] This particular avenue of approach has invoked some criticism[70] since the court should have had sufficient temerity to employ the stronger full faith and credit. There would seem to be no logical basic for a situs court, finding no contrary public policy, to refuse to give full faith and credit to a decree rendered *in personam* by a foreign court having personal jurisdiction over the parties.

CONCLUSION

The area of conflict of laws in domestic relations generally, is one confused and seemingly in need of uniformity. This is particularly true with regard to property settlements wherein substantial inequities and hardships can result which were not anticipated by the court granting the divorce or decree of separation. It is, however, quite evident that the established systems of law regarding property and marriage are not susceptible to any great change, and attempts at uniformity of law in these areas would be met with substantial resistance. The advance made with respect to alimony and support is a great one and definitely a meritorious attempt to reduce unnecessary conflict of laws problems.

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69. Id. at 733.
70. See 50 Geo. L.J. 157 (1961).