Marital Property and the Conflict of Laws

Robert Neuner
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ROBERT NEUNER*

The conflict of laws rules regarding property relations between husband and wife center around two basic principles: (1) the lex rei sitae is applicable to immovables, and (2) a change of domicile imports a change of the marital property system. These principles seem to be regarded as statements of sound policy and also as correct generalizations drawn from the decided cases. This was to be expected. Most cases can be interpreted as instances of or as exceptions to a general principle. The question of whether one view or the other is taken depends upon the interpreter's attitude toward the general principle. Only if he approves the principle is he inclined to regard a case as its embodiment. Consequently, no analysis of cases is possible without a previous decision on the advantages or disadvantages of certain general policies. This is particularly true of a system of case law, since a characteristic of case law is that it is always in an unfinished state. Many questions—very often a surprisingly large number—are undecided. If all logically possible situations had been decided it would be possible, at least logically, to ascertain the common underlying principle—if there is one. But as long as many questions remain open, the decided cases can be interpreted in a double way. On the other hand, it is clear that the validity of a principle of general policy is constantly checked by the actual decisions. A principle of policy, which exists only in the exceptions made to it, is probably an illusion.

I. LEX REI SITAE AND LEX DOMICILII

The rule that rights in immovables are governed by the lex rei sitae is a heritage from feudal times. The place of the in-

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* Special Counsel of the Federal Communications Commission.
2. See infra notes 27, 28, 29.
individual in society, his duties and rights depended upon his relation to immovable property; no state could allow the application of foreign law to rights in immovables situated within its boundaries without disturbing its own social structure. This justification of the rule lost its validity several hundred years ago, but new reasons have replaced the outmoded ones and have given a new foundation to the old principle. There remains only one question: Is it not necessary to restate the axiom according to the new rationale? Is it necessary to restrict it? 3

Today the rule that immovables are governed by the lex rei sitae seems to rest on the following grounds. 4 Most countries have developed some system of recordation. Such a system can only function if a single law, the lex rei sitae, is applied to all matters connected with the system of recordation. This explains the application of the lex rei sitae to all questions of transfers inter vivos. In addition, the application of the lex rei sitae can be justified by the argument that parties who contract with regard to immovables usually expect the application of this law. Finally, it might be said that the enforcement of rights in immovables depends upon the agencies of the lex rei sitae, and consequently their law must be followed. This last argument begs the question; it presupposes that the agencies of the enforcing state insist on the application of their own law because the lex rei sitae is the law to be applied. But as long as one discusses policy he should ask whether they are correct in this position. If they do insist on the application of the lex rei sitae, it is, of course, wise policy to cede to the stronger force.

No one will pretend that these arguments are strong enough to give that supposedly overriding general application to the principle that rights in immovables are governed by the lex rei sitae. It is necessary to reconsider its application in the separate fields of law, especially in that of marital property.

First of all, what does this principle mean if it is applied in the field of marital property? It seems to be this: If spouses domiciled in one jurisdiction own immovables in another, their respective rights in these immovables are determined by the lex rei sitae and not by the law governing their property relations in general which is, according to the prevailing opinion, the law of the husband's domicile. If they acquire immovables during

the marriage the lex rei sitae, not the law of the domicile, determines the kind of interests they acquire.

In order to check this statement it is advisable to examine the different situations.

(1) The first matrimonial domicile is in a jurisdiction where the common law system of separate property prevails, and one of the spouses owns land in a community property state. As far as I can see the cases have dealt with community systems under which immovables owned by the spouses at the beginning of the marriage do not fall into the community. The immovables remain separate property. If we further consider that in almost all jurisdictions the wife has the right to dispose of her separate property as if she were feme sole, we discover that the practical effect of the application of the lex rei sitae is not great. The practical result would be the same if the lex domicilii is applied. The immovable remains separate property. We do not know how a case would be decided which involves a system of “initial and complete community property,” that is, where immovables owned by one of the spouses at the beginning of the marriage becomes community property. The Restatement, in the illustration of Section 237, applies the traditional principle to this situation also, but its value as prediction might be questioned. Suppose that the lex rei sitae adheres to the principle that matrimonial rights in immovables are governed by the lex domicilii or the lex patriae as the German law does. Would it be wise for an American court to apply the lex rei sitae in this situation?

(2) The first matrimonial domicile is situated in a community property state and one of the spouses owns land in a state where the common law system of separate property prevails. The situation is analogous. Both laws agree that the land is separate property.

(3) Immovables are acquired during the marriage by one of the spouses in a community property state while the matrimonial domicile is in a separate property state. Article 2400 of

5. It is usually the domicile of the husband at the moment the marriage is concluded. Whether there are jurisdictions where the notion of “matrimonial domicile” is defined in another way, e.g., Louisiana, shall not be discussed in this paper. Cf. Harding, Matrimonial Domicile and Marital Rights in Movables (1932) 30 Mich. L. Rev. 859, 860 et seq.

6. Only in exceptional cases will an American court have to decide such a question; e.g., in the course of the distribution of an estate or when the value of the estate or a testamentary share has to be ascertained. Cf. Cook, supra note 4, at 1270. The case discussed in the text is one of the exceptional situations where the renvoi should be accepted. Cf. Neuner, Policy Considerations in the Conflict of Laws (1942) 20 Can. B. Rev. 479, 483.
the Louisiana code and Section 238 of the Restatement prescribe the application of the lex rei sitae. The conclusion seems to follow that a newly acquired immovable is community property if it is a matrimonial gain. But the courts have applied the doctrine of replacement in this situation. Under it acquisitions made with separate property are themselves separate property. This doctrine has been developed for purely internal situations and is hardly in harmony with the spirit of the community property system. Applied to conflict of laws situations it has the surprising consequence that no acquisition of immovable property can ever become community property. For the money with which the immovable is acquired necessarily belongs to one of the spouses as his or her separate property because under the law of their domicile nothing but separate property exists. Consequently the newly acquired immovable becomes separate property of one of the spouses. Formally, the lex rei sitae is applied, for the doctrine of replacement is a part of the domestic law of the lex rei sitae.


8. This doctrine has been called doctrine of “transformation,” by Daggett, op. cit. supra note 7, at 27, “source doctrine” by Jacobs, Law of Community Property in Idaho (1931) 1 Idaho L.J. 1, 37.

9. Stephen v. Stephen, 36 Ariz. 235, 264 Pac. 158 (1930); Kraemer v. Kraemer, 52 Cal. 302 (1877); In re Arms' Estate, 186 Cal. 554, 199 Pac. 1053 (1921); Cressey v. Tatom, 9 Ore. 541 (1881); McDaniel v. Harley, 42 S.W. 323 (Tex. Civ. App. 1897); Thayer v. Clarke, 77 S.W. 1050 (1903); affirmed 98 Tex. 142, 81 S.W. 1274 (1904); Mayor v. Breeding, 24 S.W. (2d) 542 (Tex. Civ. App. 1930); Brookman v. Durkee, 46 Wash. 578, 90 Pac. 914 (1907); Meyers v. Albert, 76 Wash. 218, 135 Pac. 1003 (1913). Louisiana originally adhered to a moderate form of this doctrine, but in 1912 Article 2334 of the Code was amended and now seems to adopt the view taken in the common law states with community property. See Wolfe v. Gilmer, 7 La. Ann. 583 (1852); Armorer v. Case, 9 La. Ann. 288 (1854); McKay, A Treatise on the Law of Community Property (2 ed. 1925) 281, § 423; Daggett, op. cit. supra note 7, at 27 et seq. Cf. Land v. Land, 14 Smedes & M. 99 (Miss. 1850).

10. But there are cases which assume that immovables acquired in a community property state are community property although the spouses are domiciled in a common law state. Sometimes no particular reason is given. See, e.g., Gratton v. Weber, 47 Fed. 852 (D.C. Wash. 1891); Rush v. Landes, 107 La. 549, 32 So. 95 (1902); Smith v. Gloyd, 182 La. 770, 162 So. 617 (1935). Sometimes the result is reached by the application of the presumption that acquisitions are community property: Carlton v. Durr, 9 La. App. 269, 120 So. 124 (1928) (the matrimonial domicile was in another community property state, Texas); Stanton v. Harvey, 44 La. Ann. 5111, 10 So. 778 (1890); Heidenheimer v. Loring, 6 Tex. Civ. App. 560, 26 S.W. 99 (1894); Mayor v. Breeding, 24 S.W. (2d) 542 (Tex. Civ. App. 1930). The decision in Thayer v. Clarke, 77 S.W. 1050 (1903), affirmed 98 Tex. 142, 81 S.W. 1274 (1904), shows that the presumption is rebutted by the circumstances, if the domicile of the spouses was in a common law state. Cf. Leflar, Community Property and Conflict of Laws (1933) 21 Cal. L. Rev. 221, 233.

Community system is restricted and the unity of the marital system under the lex domicilii is re-established.\(^{12}\)

The doctrine of replacement has not been applied when leading to an expansion of the application of the lex rei sitae. A wife domiciled in a separate property state inherited land situated in a community property state. The land was sold for the purpose of partition and the wife's share of the price sent into the separate property state. It was held that the husband acquired the money under the rule of the lex domicilii.\(^{13}\) The price was not treated as a surrogate of the immovable. It seems that the doctrine of replacement is used in order to counteract the results following the application of two laws to one matrimonial relation. If it does not tend to restore the unity of the matrimonial system under the law of the domicile it is not applied.

(4) Spouses with a domicile in a community property state acquire land in a separate property state. Few authorities can be found on this situation. As regards the relations between the spouses themselves the solution of the question of who owns newly acquired land cannot depend upon whose name the title is taken in. It is a general principle of the common law as well as of the civil law that the legal relations appearing in title deeds can be rectified in order to correspond to the underlying economic and personal relations. For example, one spouse domiciled in a community property state takes title to land in a common law state. If he acquired the land with community means the interest of the other spouse must be protected. So far the lex domicilii, as the law which generally governs the property relations of husband and wife,\(^{14}\) must be applied. It decides what kind of interest the spouses had in the price and—probably—whether the

\(^{12}\) This argument has been used in Hammonds v. Commissioner of Internal Revenue, 106 F. (2d) 420 (C.C.A. 10th, 1939), in order to include the doctrine of replacement in a case where a wife with the domicile in Oklahoma rendered services in Texas and received as compensation oil leases in Texas. It was held that these oil leases and the profits derived therefrom are community property.

\(^{13}\) Newcomer v. Orem, 2 Md. 297 (1852). In the cases of Castleman v. Jeffries, 60 Ala. 380 (1877) and Kneeland v. Ensley, 19 Tenn. 620 (1839), the courts indicate that other forms of conversion would be treated differently. But see Henderson v. Trousdale, 10 La. Ann. 548 (1855). For a situation involving two common law jurisdictions see Glenn v. Glenn, 47 Ala. 204 (1872) (accord) and Smith v. Mcalees, 27 Md. 420 (1861) (contra). Cf. Hitchcock v. Clendinen, 12 Beav. 534, 50 Eng. Reprints 1165 (1850), where the husband's right to an English immovable was determined by Scottish law because it should have been sold. But in Welch v. Tennent [1891] A.C. 639 H.L. Sc., the price was treated in the same way as the immovable.

\(^{14}\) Walker v. Marselles, 70 Miss. 283, 12 So. 211 (1892); Hendricks v. Isaacs, 46 Hun 238, 11 N.Y. St. Rep. 527 (1887); Dougherty v. Snyder, 15 Sergeant & R. 84 (Pa. 1826).
purchase is to be regarded as related to the community or to separate property. The lex rei sitae comes into play only with respect to the technical form by which the interest of the other spouse is protected. The appropriate means seems to be the resulting or constructive trust. It has been used by a Missouri court, which treated the husband who had acquired land with community means as trustee for the benefit of the wife as to one-half of the interest.

The conflict of laws rules which are discussed in the foregoing pages determine the law governing questions of legal and equitable "ownership" of an interest. The question of which spouse is to be regarded as owner if it comes to an accounting between the spouses and what is the estate of the predeceasing spouse is answered. But ownership is only a bundle of rights and privileges. We must reckon with the possibility that a different conflict of laws rule may be applied to certain incidents of ownership.

How is the right to administer and to dispose of immovables to be treated, if they belong either to one of the spouses or to the community? One would expect the impact of the lex rei sitae to be very great. If a third party concludes a contract with one of the spouses with regard to an immovable he will probably assume that the right of the spouse to make the contract is determined by the marital property law of the lex rei sitae. Consequently the application of the lex rei sitae is justified. But it does not follow that the effects of the transaction upon the relations between husband and wife are determined by the lex rei sitae.

15. Depas v. Mayo, 11 Mo. 314 (1848), a case where a change of domicile had taken place. Parrott Adm'r v. Nimmo, 28 Ark. 351 (1873) applies the same principles to a situation where two common law systems were in conflict; land bought in another jurisdiction with separate property of the wife is her separate property as regards the relations between the spouses, though the husband had taken title. See further Gidney v. Moore, 86 N.C. 484 (1882). Contra: Gooding Milling & E. Co. v. Lincoln County State Bank, 22 Idaho 468, 126 Pac. 772 (1912). In this case the lex rei sitae was applied even to the right in a movable.


17. The question which law determines the capacity of a married woman to dispose of her property has been discussed so often that it shall not be taken up in this paper.

18. Village of Western Springs v. Collins, 98 Fed. 933 (C.C.A. 7th, 1900); Heine v. Mechanics' & Traders' Insurance Co., 45 La. Ann. 770, 13 So. 1 (1883); Monroig v. Parker, 6 Puerto Rico Fed. Rep. 595 (1914); Richardson v. De Giverville, 107 Mo. 422, 17 S.W. 974 (1891). Drake v. Glover, 30 Ala. 382 (1857), holds that the mode of conveying is governed by the lex rei sitae but that the law governing the original character of the property determines whether both spouses must participate in the conveyance (this case involved
Profits and fruits do not necessarily belong to the owner of the fruitbearing object. Which law determines the right to the profits, especially in view of the fact that the fruits and profits of an immovable are moveables: the lex rei sitae or the law governing the matrimonial relations in general? Some cases apply the lex rei sitae.19

The question of how far contracts bind separate estate or community property has two aspects: the relation to the creditor, and the accounting between the spouses.

The first question is usually put in the following way: Which law determines whether a wife's contract binds her separate estate as far as it is composed of immovables? The courts hesitate between the lex loci contractus20 and the lex rei sitae.21 Each of the solutions apparently seeks to satisfy the expectations of the parties. That accounts for the fact that the law governing marital property (the law of the domicile) is disregarded. Since the application of the law of the place of making very often leads to wholly irrational results, much can be said for the application of the lex rei sitae.

Other principles come into play when the question arises whether one of the spouses has a claim for reimbursement against the other or against the community after a binding debt has been contracted by one of them under the lex rei sitae or under the lex loci contractus, or if one of the spouses has loaned money to the other spouse. If in such a case the law of the matrimonial domicile gives a claim for reimbursement, it can be enforced

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20. Gibson v. Sublett, 82 Ky. 596, 6 Ky. Law Rep. 645 (1885); Griswold v. Goldberg, 8 Ky. Law Rep. 777, 3 S.W. 535 (1887) (in this case the court says that the lex rei sitae would have been applied if the contract had been concluded with a view to its performance in Kentucky or to its being a charge upon the land in Kentucky); Young's Trustee v. Bullen, 19 Ky. Law Rep. 1561, 43 S.W. 687 (1897); Toof v. Brewer, 3 So. 571 (Miss. 1888); Spearman v. Ward, 114 Pa. 634, 8 Atl. 430 (1887); Merielles v. State Bank of Keokuk, 5 Tex. Civ. App. 483, 24 S.W. 564 (1893) (in this case and in Gibson v. Sublett, lex domicilii and lex loci contractus coincided). Cf. Bowles v. Field, 78 Fed. 742 (D.C. Ind. 1897); Dulin v. McCaw, 39 W. Va. 721, 20 S.E. 681 (1894).
21. Shacklett v. Polk, 51 Miss. 375 (1875); Friersen v. William, 57 Miss. 451 (1879); Read v. Brewer, 16 So. 350 (Miss. 1894) (in this case the lex rei sitae and the lex domicilii coincided); Ruhe v. Buck, 124 Mo. 178, 27 S.W. 412 (1894) (in this case the lex rei sitae and the lex fori coincided). Wick v. Dawson, 42 W. Va. 43, 24 S.E. 587 (1896), applies both laws cumulatively, a view which apparently has been taken in Johnston v. Gawtry, 11 Mo. App. 322 (1882), affirmed in 53 Mo. 338 (1884).
against immovables situated in another jurisdiction.\textsuperscript{22} Only the rank of this claim with regard to the claims of other creditors is determined by the lex rei sitae.\textsuperscript{23} It is worthy of mention that we have found again a situation where the law of the matrimonial domicile prevails over the law of the situs.

There remains one situation where the application of the lex rei sitae is undisputed and undisputable, that is, if after the death of one of the spouses\textsuperscript{24} the rights of curtesy and dower have to be ascertained.\textsuperscript{25} The reason is clear. These rights have the same function as the rights arising under statutes of distribution and succession. As long as the principle that the lex rei sitae is held applicable to the inheritance of immovables, it must also be held applicable to questions of curtesy and dower. Only in this way can a harmonious settlement of the estate be achieved.

If we leave the questions of curtesy and dower aside as belonging to the field of inheritance law, and try to get a synoptic view of the conflict of laws rules on marital property, we hesitate to lay down the rule that the lex rei sitae governs immovables. In an abstract way this statement is correct. But if we analyze the practical application of this rule in its interaction with certain principles of the domestic law, especially the doctrine of replacement, we find that the practical result is often almost the same as if the opposing conflict of laws principle that the lex domicilii governs all matrimonial property had been applied. This is not surprising as weighty policy considerations recommend this principle.\textsuperscript{26} Economically and socially the property relations between husband and wife are a whole as are systems of matrimonial property law. When a relation which is economically a unit is judged by different laws, contradictory results are apt to arise. But there are, of course, situations where sound policy requires the application of the lex rei sitae and the better solu-

\textsuperscript{22} Rush v. Landers, 107 La. 549, 32 So. 95 (1902). The cases involving a change of domicile are discussed infra.
\textsuperscript{23} Hall v. Harris, 11 Tex. 300 (1854), a case which involved a change of domicile and movables.
\textsuperscript{24} Or if for another reason the dower rights must be ascertained before the dissolution of the marriage, e.g., in case of bankruptcy, see Thomas v. Woods, 173 Fed. 585 (C.C.A. 8th, 1909).
\textsuperscript{26} Cf. Stumberg, Marital Property and the Conflict of Laws (1932) 11 Tex. L. Rev. 65, 68.
tion seems to be to draw a line between the two conflict of laws rules according to the policy principles which they embody.

II. Change of Domicile

A change of the domicile imports a change of the system of matrimonial property. This principle is supposed to be embodied in the early American case of Saul v. His Creditors and the English case of Lashley v. Hog. In spite of DeNicols v. Curlier, this rule is still valid in England, for this case predicates the immutability of the marital property system only for the cases where a marriage contract can be implied. But in America the practical effects of this rule are offset by a second doctrine, namely, that rights acquired by one of the spouses under the law of the first matrimonial domicile remain intact and cannot be changed by the law of the new domicile. This doctrine has even been vested with the cloak of constitutional protection, but hardly with justification. It would be strange indeed if the constitution allowed the wife to lose all her personal property by entering into a marriage in a common law jurisdiction (which it undoubtedly does), but forbade a more rational adjustment of the relations of husband and wife by the law of the new domicile after the law of the first domicile had had its effect. It should be kept in mind however that this doctrine, though not justifiable by the theory of vested rights, may have another more rational basis.

27. 5 Mart. (N.S.) 569 (La. 1827). An earlier case adopting this doctrine is Gale v. Davis’ Heirs, 4 Mart. (O.S.) 645 (La. 1817). See further In re Majot’s Estate, 199 N.Y. 29, 92 N.E. 402 (1910).

28. 4 Paton 581 (1804). See Dicey-Keith, op. cit. supra note 1, at 766, Morris, Capacity To Make a Marriage Contract in English Private International Law (1938) 54 L.Q. Rev. 78, 79. The law of Quebec is different, see Astill v. Hallee, 4 Q.L.R. 120 (1870); Lafleur, The Conflict of Laws in the Province of Quebec (Montreal 1898) 173; Rogers v. Rogers, 3 Lower Canada Jurist 64 (1848).


31. In re Drishaus’ Estate, 199 Cal. 369, 249 Pac. 515 (1926); In re Thorton’s Estate, 1 Cal. (2d) 1, 33 P. (2d) 1 (1934).

32. The reasoning is apt to be circular: It says the husband cannot be deprived of his property because he has a vested right. But having a vested right means nothing but being protected from expropriation. Consequently one reasons from being protected to being protected. Further, as
In order to understand the interaction of the two principles and to evaluate their practical effect it is advisable to distinguish the different situations:

(1) The spouses remove their domicile from a separate property state into a community property state. The courts ascribe to the removal the effect of a new marriage concluded in the new jurisdiction at the moment of the change of domicile. Whatever the spouses own at this moment remains their separate property, only new gains and profits become community property and this impact of the community system is further restricted by the effects of the doctrine of replacement discussed above. A functional approach would suggest that so much of the “separate property” of the spouses as is the fruit of common labor of the spouses before their immigration should be treated as community property. The prevailing contrary opinion which declares all the property of the spouses at the moment of immigration to be and to remain separate property subjects these assets to rules which are framed for a different type of acquisitions, for property which the spouses have acquired independently of the cooperation of the other spouse through inheritance, gift, and work done before the marriage.

The unjust results of this theory are apparent in a situation which has become typical. After a long and busy life in one of the eastern or midwestern states the spouses move to California in order to pass the remaining days of their lives in a milder climate. It is quite possible that one is protected against certain types of expropriation only, even the argument that the husband was protected against certain interferences before the removal of the domicile is inconclusive. Cf. Lyon v. Knott, 26 Miss. 548 (1853). See further Comment (1933) 8 So. Cal. L. Rev. 221, 224.

33. In re Nicoll’s Estate, 164 Cal. 368, 129 Pac. 278 (1912); In re Warner’s Estate, 167 Cal. 686, 140 Pac. 553 (1914); Douglas v. Douglas, 22 Idaho 336, 125 Pac. 796 (1912); Vardeman v. Lanson, 17 Tex. 9 (1856); Oliver v. Robertson, 41 Tex. 422 (1874) (but income of the stock of cattle is community property); Duke v. Reed, 64 Tex. 705 (1885); McDaniel v. Harley, 42 S.W. 323 (Tex. Civ. App. 1897); Griffin v. McKinney, 25 Tex. Civ. App. 432, 62 S.W. 78 (1901); Freesburger v. Gazzam, 5 Wash. 772, 32 Pac. 732 (1893); Witherill v. Prunefelter, 46 Wash. 699, 91 Pac. 1086 (1907). But cf. Avery v. Avery, 12 Tex. 54 (1854). The functioning of the principle is well illustrated by the case In re Gulstine’s Estate, 186 Wash. 325, 8 P. (2d) 628 (1932) (A couple immigrants from South Dakota into Washington and buys a farm for $11,000. $3,000 is paid in cash with money the husband had earned in South Dakota, the rest is paid in monthly installments. The court says three-elevenths of the farm are separate property of the husband, eight-elevenths community property.) It seems that in Scotland a different doctrine is applied. The community embraces the entire property of the spouses at the moment of immigration: Bell v. Kennedy, 2 M. 837, 2 Sc. R.R. 647 (1864).
In this situation the husband usually owns most of the fortune of the spouses. If he dies shortly after the removal, the widow does not get half of this fortune, because it is not community property, but only a share of the separate property, according to the law of the new domicile on descent and distribution. The share given by Section 221 of the Probate Code is probably smaller than the share she would have received under the law of the first domicile and it is not protected against a contrary disposition in the will of the husband. This rule is perfectly rational under the assumption that the widow is provided for by half of the community property, but in our example the condition is not satisfied, because there is no community property which could be divided. Had the spouses immigrated into Louisiana the widow would be even worse off. If there were "heirs" she would get nothing at all.

The rule that property of the spouses, though a fruit of common labor before the immigration, is separate property is a rule of the domestic law of the new domicile. In theory the principle that change of the domicile imports change of the matrimonial system is observed. But the picture is different if taken from the point of view of the practical results. Then it appears that the field of application of the rules on community property is very much restricted, especially in the situations analyzed above. The practical results are almost the same as if the civil law principle had been adhered to. The first marital property system remains unchanged throughout the whole marriage. A good argument can be made for this principle and it is probable that the American courts sensed its advantages when they reached their results which somewhat correspond to the civil law principle. But immediately they encounter the same obstacle as the jurists of the civil law countries: Different laws are applied to questions of matrimonial property and to questions of devolution of estates,

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the law of the earlier domicile to the first, the law of the last domicile to the latter.\textsuperscript{86}

The removal of the domicile from a separate property state into a community property state cannot impair the debts contracted before the change of the domicile nor bring about a change in the person of the debtor. But common creditors do not have a vested right in the assets of their debtor. Consequently the question arises as to what property can be attached after the removal of the domicile. Is it only the separate property of the spouse who was the obligee before the immigration, or is community property also liable? From the principle that after the removal of the domicile the marital property system of the new domicile obtains, it would follow that community property can be charged if the claim belongs to one of the categories of debts for which community property is liable and that it does not make any difference that the debt originated before the removal of the domicile.\textsuperscript{87} But there is a distinct tendency toward a different approach. The law of the time and of the place of the creation of the debt determines once and for all its character.\textsuperscript{88} Consequently an obligation arising while the spouses were domiciled in a separate property state retains its character as a separate debt and can never be enforced against community property. This solution is again a step toward the immutability of the matrimonial property system.

The above mentioned principles are applicable to debts which husband and wife owe each other.\textsuperscript{3} But here an additional problem arises. Under what conditions does the wife enjoy the mortgages and privileges which the law of Louisiana and other legal systems under French and Spanish influence grant to some of her claims? Some Louisiana decisions have denied these privileges to claims which had arisen before the immigration into Louisiana.\textsuperscript{40} The reason given for this solution, that the place and time of the origin of the debt determines its nature, is hardly

\textsuperscript{36} See Infra p. 186 et seq.
\textsuperscript{37} Le Selle v. Woolery, 11 Wash. 337, 39 Pac. 663 (1895).
\textsuperscript{38} Hyman v. Schlenker, 44 La. Ann. 108, 10 So. 623 (1892); Huyvaerts v. Roedtz, 105 Wash. 367, 178 Pac. 801 (1919), reconcilable with the language, but hardly with the result of Le Selle v. Woolery, 11 Wash. 337, 39 Pac. 663 (1895); Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736 (1902).
\textsuperscript{39} In Bonati v. Welsh, 24 N.Y. 157 (1861) the wife was allowed to prove such a claim against her husband's estate.
correct; this would compel the court to recognize privileges created by the law of the former domicile.\textsuperscript{41} The true reason seems to be that "secret liens" should be avoided wherever possible.\textsuperscript{42}

(2) If spouses migrate from a community property state into a separate property state an interesting question arises. What happens to community property? Under the principles developed for the inverse situation, community property remains community property even if brought into the new jurisdiction. But that cannot mean that the rules of administration and liability of community property are applied after the removal of the domicile.\textsuperscript{43} It seems much more correct to assume that the community is dissolved and that each spouse acquires a half interest in the assets which had been community property. This interest is protected by the legal forms provided by the new lex domicilii, that is, by a constructive trust.\textsuperscript{44} In the usual situation the husband will continue to use the assets of the community in his new domicile. Then very complicated problems of accounting arise which have been mentioned in a decision by the court of appeals of the eighth circuit.\textsuperscript{45} The earnings made after the immigration belong to the husband. Only that part of the profits which is to be attributed to the capital investment made by the wife by leaving her half of the community property in her husband's business belongs to her. In order to ascertain this part it is necessary to find out how much of the gains is due to the use of the husband's personal credit and how much to the use of the invested capital, certainly a difficult procedure.

(3) Conflicts between different systems of separate property states are less conspicuous than those between community property systems and separate property systems, and they tend to become less so as the equality of husband and wife is increasingly

\begin{itemize}
  \item \textsuperscript{41} They were denied in Ordronaux v. Rey, 2 Sandf. Ch. 33 (N.Y. 1844); Hall v. Harris, 11 Tex. 300 (1854).
  \item \textsuperscript{42} This tendency becomes apparent in the case of Hyman v. Schlenker, 44 La. Ann. 108, 10 So. 623 (1892), which denied the privilege because the lex domicilii denied it. See especially the words used by the court in Prats v. His Creditors, 2 Rob. 501, 508 (La. 1842); and further Hall v. Harris, 11 Tex. 300 (1854).
  \item \textsuperscript{43} Contra the words but not the result of Succession of Packwood, 9 Rob. 438 (La. 1845). This decision deals with profits earned from a plantation in Louisiana; the case would probably be decided today otherwise after the provision of the Code has been changed. Cf. Succession of Popp, 146 La. 464, 83 So. 765 (1919).
  \item \textsuperscript{44} Edwards v. Edwards, 108 Okla. 93, 233 Pac. 477 (1924).
  \item \textsuperscript{45} Johnson v. Commissioner of Internal Revenue, 88 F. (2d) 952, 956 (C.C.A. 8th, 1937). The tax problem would disappear if the joint return of husband and wife were introduced, but the question of ascertaining the estates in case of death or attachment would remain.
\end{itemize}
obtained. Yet a fair number of conflict situations is still to be expected. They are solved upon the same principles: Interests and rights which one of the spouses had acquired under the law of the first domicile retain their character; practically speaking, property of the wife which had become the husband's property under the law of the first domicile remains the husband's property though the law of the new domicile has abolished the old common law rule. Sometimes this principle works in favor of the wife. If she had separate property under the law of the first domicile she retains it although the law of the new domicile would treat it differently had the marriage been concluded in its jurisdiction. The doctrine of replacement is applied in this situation too; that is, property, including immovables, acquired in the new jurisdiction by means of separate property are themselves separate property. If title has been taken in the name of one of the spouses the interest of the other spouse whose means have been employed are protected by a resulting trust. Bona fide purchasers for value will probably acquire an indefeasible title from the husband if they did not know and had no reason to know that the property was separate property of the wife according to the rule of the first domicile.

The proposition that separate property remains separate property has to be taken with caution. It does not mean that all the rules of the first domicile on separate property are applied after the removal of the domicile. On the contrary, the idea seems to be that the rules of the new domicile on separate property are applicable, e. g. the rules defining the conditions under which

46. Parrot Adm'r v. Nimmo, 28 Ark. 351 (1873); Hydricke v. Burke, 30 Ark. 124 (1875); Grote v. Pace, 71 Ga. 231 (1883); Schurman v. Marley, 29 Ind. 458 (1868); Schluter v. Bowery Sav. Bank, 117 N.Y. 125, 22 N.E. 572 (1889); State v. Chatham National Bank, 10 Mo. App. 482 (1881); State v. Smit, 20 Mo. App. 50 (1885) apply this principle to the case of an immigration from Russia. Dubois v. Jackson, 49 Ill. 49 (1868) and Stocker v. Macken, 62 Barb. 145 (1861) to an immigration from England. In most cases the principle worked in favor of the husband. See e.g., Thorn v. Weatherly, 50 Ark. 237, 7 S.W. 33 (1887); Tinkler v. Cox, 68 Ill. 119 (1873); Smith v. Peterson, 63 Ind. 243 (1878).

47. Gluck v. Cox, 90 Ala. 331, 8 So. 161 (1890); Parrot Adm'r v. Nimmo, 28 Ark. 351 (1873); Van Ingen v. Brabrook, 27 Ill. App. 401 (1888); Meyer v. McCale, 73 Mo. 236 (1880); Cooper v. Standley, 40 Mo. App. 138 (1890); Cressy v. Tatom, 9 Ore. 541 (1881) (assuming that in California the common law is in force).


49. Minor v. Cardwell, 37 Mo. 350 (1866) goes even further, it protected the creditors of the husbands which had levied upon slaves of the wife. But debts of the husband to the wife need not be recorded: Bank of Columbia v. Walker, 14 Lea 299 (Tenn. 1834). Cf. Harding, supra note 5, at 875; Leffar, supra note 10, at 235.
separate property is liable for the debts of one or the other spouse\textsuperscript{50} or the rules on the administration of the wife's separate estate by the husband.\textsuperscript{51} The result of this procedure is that a separate estate created by the law of the first domicile is transformed into a separate estate according to the law of the new domicile.

If the existing property relations of husband and wife are not changed by the removal of the domicile, debts which the husband had contracted toward his wife cannot be changed either. Such debts remain, though they never could have arisen under the law of the new domicile.\textsuperscript{52}

The working of the rules which have been discussed in the preceding paragraphs can be judged from the case of King v. O'Brien.\textsuperscript{58} Creditors of the husband levied upon the stocks of a business which had been carried on by the wife for many years. They succeeded. The shop had been bought shortly after the couple had arrived from England. Under the then obtaining English law, the money with which the shop had been bought had belonged to the husband. From this the conclusion was drawn that the stock and the profits of the shop became the husband's property. Only "such new stock which the wife can identify and prove as having been bought on her credit and not paid for, or with her money with the intent that the property therein should be hers"\textsuperscript{54} was not subjected to the claims of the husband's creditors. The result is startling. If the objects are paid for they can be attached by the husband's creditors; if not, they are beyond their reach. The defect of the reasoning apparently lies in the exaggeration of the doctrine of replacement. From the principle that the spouses keep the property they had acquired under the law of the first domicile, it does not necessarily follow that all gains made by the profitable use of this property belong to its owner. It would be possible to assume that the spouse acquires only a claim of reimbursement against the other spouse who had used the first one's means. This is the approach of the community property systems in their original French form.

It is worthwhile to emphasize again the main feature of the American cases: the rule that change of the domicile imports

\textsuperscript{50} Cooper v. Standley, 40 Mo. App. 138 (1890).
\textsuperscript{52} Bank of Columbia v. Walker, 14 Lea 299 (Tenn. 1884).
\textsuperscript{53} 33 N.Y. Super. Ct. 49 (1871).
\textsuperscript{54} L.C. p. 55.
change of the matrimonial property system has not too much practical effect. There is a clear tendency to continue the first matrimonial system after an immigration into a jurisdiction with a different matrimonial property system. Where the line between the principle of mutability and immutability of the marital property system lies is not yet clear. For in spite of the great number of reported cases on the subject only few of the conflict situations which can arise have been decided.

III. Marriage Contracts

Very different considerations come into play in the cases where the property relations between husband and wife are wholly or partially regulated by a marriage settlement or a marriage contract. The various legal systems have developed a great variety of such contracts. As it is quite probable that different types cannot be treated alike in a conflict of laws situation some of the seeming contradictions which are found in the cases can probably be explained by the necessity for treating different types of marriage contracts differently.

The courts do not make a distinction between marriage contracts and ordinary contracts when the question arises which law governs their validity and construction. According to English and Scottish law it is the proper law of the contract that governs marriage contracts and marriage settlements. The proper law of a marriage contract is found according to the circumstances of the case; it is the law whose application corresponds to the intentions or expectations of the parties. Failing an express declaration on the applicable law, it can be the law of the place where the property to be settled is situated, the law of the matrimonial domicile, the law the forms of which have been used by the contracting parties, or the law of the place of con-

tracting. Often more than one of these points of contact are given at the same time. Then the task of finding the proper law is facilitated. On the other hand it has been decided that a settlement can be divided into two parts subject to different laws if there are contacts with two legal systems.

In the American decisions this problem is less elaborately discussed. More stress is laid on the place of contracting, but the practical results are much the same as an English court would have achieved.

A special problem arises if the parties of a marriage contract adopt the marital property system of a foreign country en bloc, that is, if they declare that they adopt the community system of the French Code. If such a contract has points of contact with French law, e.g., if a part of the property of the spouses is situated in France or if the domicile of one of the spouses is in France, such a declaration indicates that French law is the proper law of the contract; but if the contract does not have any other points of contact with the jurisdiction the matrimonial system of which has been adopted, the question must be asked whether the law governing the contract allows such an incorporation of a foreign matrimonial system. Sometimes such incorporation has been held invalid.

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60. Collins v. Hector, L.R. 19 Eq. 334 (1875); Ex parte Sibeth, 14 Q.B.D. 417 C.A. (1885).

61. See the cases cited in note 55 and especially Battye’s Trustee v. Battye [1917] Sess. Cas. 385, 400.


64. Mueller v. Mueller, 127 Ala. 356, 28 So. 465 (1900) (the law of the first matrimonial domicile); Davenport v. Karnes, 70 Ill. 465 (1873); Spears v. Shropshire, 11 La. Ann. 559 (1856) (law of the first matrimonial domicile and of the place of contracting); Succession of Wilder, 22 La. 219 (1870) (the same, but capacity and form is to be judged by the lex loci contractus); Suarez v. De Montigny, 12 Misc. Rep. 259, 33 N.Y. Supp. 292 (1895) (law of the place where the property to be settled is situated); Le Breton v. Miles, 8 Paige 261 (N.Y. 1840) (law of the intended domicile which was at the same time the law the application of which was intended by the parties).

65. Le Breton v. Miles, 8 Paige 261 (N.Y. 1840) (the spouses had the intention to return to France).

66. Bourcier v. Lanusse, 3 Mart. (O.S.) 581 (La. 1815) (the law governing the contract was the lex rel sitae). Contra: Este v. Smyth, 18 Beav. 112, 52 Eng. Reprint 44 (1854) (proper law of the contract was English law, the adoption of the Custom of Paris has been held valid). German Civil Code, § 1433, expressly forbids the incorporation of a foreign matrimonial system. French Civil Code, § 1390, forbids the incorporation of a matrimonial system.
The proper law of a marriage contract which concerns immovables is in most cases the lex rei sitae. This leads to the splitting up of the contract if the immovables to be settled are situated in different jurisdictions. But it might happen that a marriage contract has been drafted in such a way that a partition is impossible because all its provisions are mutually interdependent. Then the principle that the lex rei sitae governs must be sacrificed as to a part of the immovables. This principle has further been held inapplicable if, after the conclusion of the marriage contract, immovables are acquired in a country different from that whose laws govern the marriage contract. There are other cases where a court did not hesitate to subject immovables to a marriage contract governed by a law different from that of the situs. From this it would appear that the statement that the lex rei sitae governs marriage contracts on immovables is too broad. Of course, the lex rei sitae is, as said before, often the proper law of the contract. But if that is not the case, the applicability of the lex rei sitae must be based upon specific grounds according to the specific problem to be decided. It seems to be applicable to the following questions: (1) It decides what kind of interests in immovables can be created. If a marriage contract under its proper law creates an interest which is not known to the lex rei sitae, this interest will be transformed into an interest which the lex rei sitae allows and which is most closely analogous to that provided by the law of the contract. The technique developed for the cases of a migration from a community property state into a separate property state and vice versa would be followed. (2) The lex rei sitae determines the conditions of a transfer inter vivos.

valid before the introduction of the code. Comment (1932) 6 Tulane L. Rev. 454, 466 et seq.
67. See cases cited in note 57, supra.
68. See note 62, supra.
71. This principle has been applied to movables in Sherrod v. Calleighan, 9 La. Ann. 510 (1884) and Peake v. Yelded, 17 Ala. 636 (1850).
The intention of the parties to a marriage contract is rarely limited to the regulation of the property relations while the marriage lasts. In most cases the parties want at the same time to dispose of their property after death. Many of the marriage contracts contain express provisions on this subject; they give a life estate to the surviving wife and the remainder to the children. But even if a marriage contract does not contain such a provision, it influences indirectly the rights of the heirs and distributees of the spouses by rendering the estate of the spouses larger or smaller. For example, the adoption of the community property system in a marriage contract has often the effect of reducing the estate of the husband by one-half. Further, under ordinary circumstances the parties want to regulate through their contract all their property relations until the marriage is dissolved by divorce or death. If that is true the change of the matrimonial domicile should not have any influence upon the marriage contract. This appears the more plausible if one considers the fact that the law of the first domicile by no means necessarily governs the marriage contract.

But following Story American courts have often adopted a different theory, namely, that a marriage contract embraces the property relations of husband and wife after the change of their domicile only if it expressly or impliedly provides for it. The explanation of this surprising attitude lies in the particular features of the cases brought before American courts. They had to deal with continental marriage contracts of immigrants. Contracts of this type are unfamiliar to American judges, for

cannot rely on his belief that the husband has the power to dispose of them even if the marriage settlement which created the right of the wife to the purchased movable has not been recorded. Bank of United States v. Lee, 13 Pet. 107, 10 L.Ed. 81 (1839); DeLane v. Moore, 14 How. 233, 14 L.Ed. 409 (1852); O'Neill v. Henderson, 15 Ark. 235 (1854); Bernstein v. Bernstein's Trustee, 14 S.C. 161 (Cape Colony 1897); Bosman's Trustee v. Bosman, 14 S.C. 323 (Cape Colony 1897).


76. Cf. the remark of the court in Besse v. Pellochox, 73 Ill. 285, 287 (1874) (the words of the marriage contract) "have no definite signification like well understood legal terms."
example, an "Einkindschaftsvertrag," and American judges rarely have the means to inform themselves on the meaning of the highly technical terms in which these contracts are expressed. No wonder that they evaded the difficulty of interpretation by assuming that the contract is no longer applicable after immigration into America. But if there were no particular difficulties in understanding the foreign marriage contract the courts were willing to extend its effects to acquisitions made after the immigration into the United States.  

IV. RULES ON MARITAL PROPERTY AND RULES ON SUCCESSION

As pointed out above, many marriage contracts, especially the English marriage settlements, contain provisions on the devolution of the estates of the spouses in case of death. These provisions are governed by the proper law of the marriage contract which is often not the law which governs the question of inheritance, the law of the last domicile. If the latter law contains provisions which are in conflict with the provisions of the marriage contract puzzling conflict of laws problems arise.

The general distribution approach is to apply first the rules of the marriage contract and then the rules of the last domicile, if there is still an estate left which can be distributed. In some situations the decision depends upon the construction of the marriage settlement. Its interpretation might lead to the conclusion that the beneficiary of a settlement can claim the share given by the law of the last domicile in addition to the gift contained in the settlement.

The question might, however, be asked whether the marriage contract and the law by which it is governed can entirely exclude the application of the law of the last domicile on succession.

77. Long v. Hess, 154 Ill. 482, 40 N.E. 335 (1895).
78. DeLane v. Moore, 14 How. 253, 14 L.Ed. 405 (1852); Smith v. Chapell, 31 Conn. 589 (1853); Kleb v. Kleb, 70 N.J. Eq. 305, 62 Atl. 396 (1905); Murphy's Heirs v. Murphy, 5 Mart. (O.S.) 83 (La. 1819); Decouche v. Savetier, 3 Johnson's Ch. 190 (N.Y. 1817) (in these two cases the marriage contract itself provided that "the Custom of Paris should govern the disposition of the property of the parties, though the parties should thereafter settle in countries where the laws and usages were different"); Crosby v. Berger, 3 Edw. Ch. 538 (N.Y. 1842); Scheferling v. Huffman, 4 Ohio St. 241 (1854).
79. Ford's Curator v. Ford, 2 Mart. (N.S.) 574 (1824); Estate of J. B. Baubichon, 49 Cal. 18 (1874); Decouche v. Savetier, 3 Johnson's Ch. 190 (N.Y. 1817). Cf. McLeod v. Board, 30 Tex. 239 (1867); Foubert v. Turst, 1 Bro. P.C. 129, 1 Eng. Reprint 464 (1703); In re Mackenzie [1911] 1 Ch. 578.
There are certain systems of community property which contain the provision that the community can be continued between the surviving spouse and the children. If this is the case there is no estate of the predeceasing spouse left which could be distributed and the law of the last domicile cannot come into play. As the rules on the continuation of the community are an integral part of the community system the sounder solution seems to be to apply them together with the other provisions on community property. The argument upon which a Louisiana court based a contrary decision is not very convincing, e.g., that the possibility of the continuation was not foreseen by the contract but by a law which was not in force at the deceased's last domicile. This argument overlooks the fact that the contract and the law governing its construction are one whole.

Still greater difficulties arise if the rules governing matrimonial property come into conflict with rules of the deceased's last domicile giving the surviving spouse or relatives an indefeasible right to get a part of the estate. These rules appear in two forms. In common law jurisdictions, the widow has often a right to take her share against the will; the civil law has the institution of forced heirship. The prevailing opinion seems to be that these rules of the law of the last domicile override the provisions of the marriage contract, and that the marriage contract does not have effect as far as it violates the rules of the last domicile on forced heirship or indefeasible statutory shares.

On the other hand it has been held that the exercise of a power of appointment granted in an English settlement is not subject to the restrictions imposed upon testamentary freedom by the law of the last domicile. This solution seems to be correct if one accepts the rather conceptualistic argument that the exercise of

82. Supposing that he or she did not own separate property.
83. Murphy's Heirs v. Murphy, 5 Mart. (O.S.) 83 (La. 1819).
84. Decouche v. Savetier, 3 Johnson's Ch. 190 (N.Y. 1870); Estate v. J. B. Baubichon, 49 Cal. 18 (1874); Caruth v. Caruth, 128 Iowa 121, 103 N.W. 103 (1905); In re Florance's Will, 54 Hun 328, 7 N.Y. Supp. 578 (1889).
85. Contra: In re Hernando, 27 Ch. D. 284 (1884). The decision in In re Martin (1900) P. 211 C.A. presents in a certain sense the inverse situation: Does a last will become invalid by the conclusion of a marriage if the law governing the matrimonial relations contains a provision that former wills are revoked if a wife enters into a marriage? The court of appeal, reversing Sir F. H. Jeune's judgment, gave an affirmative answer, declaring that this rule is a part of the matrimonial law. Cf. Robertson, op. cit, supra note 81, at 166; Falconbridge, Conflict of Laws: Examples of Characterization (1937) 15 Can. Bar Rev. 215, 227; Breslauer, supra note 25, at 441.
86. In re Mégret (1901) 1 Ch. 547; Pouey v. Hordern (1900) 1 Ch. 482.
the power of appointment is an implementation of the deed or will granting the power, not a new testamentary disposition. 87

If a marriage contract contains provisions to which the rule in Shelley's case is applicable the problem arises whether this rule has to be given the meaning of the law governing the contract or of the law governing the succession. The former view which has been taken by a Mississippi court 88 seems to be preferable because the parties when concluding the contract cannot take any other rule into account.

The problems discussed in the preceding paragraphs could be formulated as problems of qualification. 89 For example, one could ask the question: Is the rule in Shelley's case, the rule giving the widow the right of election between a statutory share and a gift in a will, the rule declaring a release of the widow's rights void, 90 or the rule under which the husband acquires his wife's movables, a rule of the marital property law or a rule of the laws on descent and distribution? Under this view the application of one or the other legal system would depend on the qualification of the question involved. But qualifications are more or less arbitrary; 91 they are devices for bringing order into our concepts. If the notions of "marital property law" and "laws on descent and distribution" had an a priori meaning, a decision based on the subsumption of a question under one or the other concept would at least be certain though its policy would not be understandable. But as the definitions themselves are arbitrary the result to be reached by the qualification is implied beforehand when the concept is defined.

Another way of solving these problems must be found. For real problems they are, as has become apparent from the examples given. First it is necessary to know the source of the difficulty.

87. Cf. Pouey v. Hordern [1900] 1 Ch. 492, 494, where the rule is restricted to special powers of appointment.
88. Carroll v. Renich, 7 Smedes & M. 798 (Miss. 1846).
90. Caruth v. Caruth, 128 Iowa 121, 103 N.W. 103 (1905).
91. A more detailed exposition of my views on the problem or better problems of qualification is to be found in my book, Der Sinn der internationalrechtlichen Norm. Kritik der Qualificationstheorie. Brün 1931, and in Die Anknüpfung im internationalen Privatrecht (1934) 8 Zeitschrift für ausländisches und internationales Privatrecht 31. As I understand him, Cook, in his article, "Characterization" in the Conflict of Laws (1941) 51 Yale L.J. 191, arrives at conclusions which are similar to my opinions on the problem of qualification. But he does not lay the same emphasis on a thorough analysis of what the conflict of laws rule really does.
Different laws are to be applied to questions of marital property and to questions of descent and distribution, although these questions are economically interdependent. This type of conflict does not arise in the common law countries as often as in the continental jurisdictions, thanks to the principle that change of the domicile imports change of the system of matrimonial property. This principle has the effect that generally the same law governs both questions. But exceptional situations have been mentioned: The doctrines of vested rights and of replacement applied in the case of a change of domicile have the effect that in case of the death of one of the spouses many rules of the former domicile on marital property must be applied together with the rules of the deceased's last domicile on descent and distribution. The second and better known case of different laws being applicable to questions of marital property and to problems of descent and distribution is the case of a marriage contract, the proper law of which is different from the law of the deceased's last domicile.

As pointed out before, the rules on the property relations between husband and wife have a dual function. They regulate these relations during the marriage and they influence directly or indirectly the distribution of the property of the spouses after their death. The latter is the object of the rules on descent and distribution as well. If both rules are taken from the same legal system, consistency can be expected because a single law-making authority, be it court or legislature, will generally create consistent rules. But as soon as these rules are taken from different legal systems, overlappings, gaps or contradictions are apt to arise. The best way to solve these problems seems to be to deal with the different situations one by one and to try to find a reasonable solution upon considerations of policy. Two considerations should be decisive: the function of the rules involved, and the reasonableness and justice of the result reached.

The main function of the rules on dower and curtesy and on their statutory substitutes is to provide for the surviving spouse. Consequently the rational solution is to apply the law of the last domicile to these questions (with the above mentioned exceptions in favor of the lex rei sitae) however the right of the surviving spouse might be "qualified." The rules granting the surviving

92. The question of qualification of the husband's rights was brought up in two cases. The view advocated in this article has been taken in Lee v. Belknap, 163 Ky. 418, 173 S.W. 1129 (1915) where it is said that the share of the husband in the deceased wife's property is determined by the law of the last domicile, whether it be common law or statute law, or, by whatever
spouse a part or the whole of the other spouse's estate are, however, supplemented by rules which interfere during the marriage with the property relations of husband and wife in order to secure these rights. There is, for example, a rule in the making which restricts gratuitous transfers of the spouse.93 The old common law rule too, under which the husband acquires all the movables of his wife, has as its main function the distribution of the estates of the spouses after death. During the marriage both enjoy the fruits of their property together, or at least they should do so. Only after the death of one of the spouses does the question of who was the owner become important.94 From this, it would follow that after the death of one of the spouses all questions which are connected with the determination of the estate and of the share which is to be given to the surviving spouse should be judged by the law of the last domicile.95 Such a statement would be in harmony with the actual decided cases were it not for one exception: the vested right theory. It is generally held that the law of an earlier domicile is applied as far as it has created vested rights before the change of the domicile. This has the unfortunate and unjust result that husband and wife are treated differently. It is usually assumed that by common law the husband acquires a vested right in the wife's movables96 while the wife is

94. The question who has the right to dispose of the property while the marriage lasts is not necessarily dependent upon ownership. It is possible that the husband has the power to dispose of the wife's property or of community property though he does not own it. It seems that either the lex domicilii or the lex loci contractus is applicable.
95. E.g., the question whether an asset is to be regarded as a surrogatum. Bank of Scotland v. Hall's Trustees, 16 Dunlop 1057, 1061, 8 Sc. R.R. 1232, 1236 (1854).
denied a comparable right. As soon as one recognizes that qualifying a right as "vested" is begging the question if one wants to deduce from it its indestructibility, the reasons for the different treatment of husband and wife disappear and a uniform application of the law of the last domicile appears to be feasible.

A similar argument could be applied in the cases where spouses immigrated from a separate property state into a community property state and one of the spouses dies. Should it not be possible to say that the rules on descent and distribution of the last domicile presuppose that first the matrimonial gains are divided, that they do not make sense without them, and that consequently the part of the community property law which gives the surviving spouse a share in the matrimonial gains should be applied together with the laws on descent and distribution in the strict sense of the word? The vested right theory is certainly not a serious obstacle. At least some courts have treated institutions not according to their name but to their economic and social function. In the case of Cooke v. Fidelity Trust & Safety Vault Company the widow had elected to take under her husband's will. At the same time she claimed half of her husband's real property situated in Texas, alleging that it was community property. The court declared that the claim to half of the real property under the system of community property is "analogous to the dower of the common law" and is consequently excluded by the election to take under the will, just as a claim to dower in the proper sense of the word would have been.

**CONCLUSION**

(1) The conflict of laws rule prescribes the application of the marital property law, of the contract law, et cetera, of a certain country if there exists a point of contact with this country. In doing so it presupposes that these various groups of rules have a certain general content and pursue certain policies. This must be kept in mind when an abstract conflict of laws rule is applied in a single case and when from cases a general rule is abstracted.

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98. Such an argument was unsuccessfully invoked by counsel in In re Arms' Estate, 186 Cal. 554, 563, 199 Pac. 1053, 1056 (1921) and in Beaudoin v. Trudel [1937] 1 D.L.R. 216, 223.
99. 104 Ky. 478, 47 S.W. 325 (1898). See further the cases cited note 92, supra.
The two discussed principles, that the lex rei sitae is applicable to immovables and that a change of domicile imparts a change of the marital property system, have been developed together with two principles of domestic law; the doctrine of replacement and the vested right theory. Their interaction has the effect that often a result is reached similar to that at which the opposing conflict of laws principles arrive if they have to deal with domestic laws which do not have a vested right theory nor a doctrine of replacement. Consequently the argument that the cases prove the general practicability of the spatial and temporal splitting up of the marital property relations has lost much of its force. It remains undisputable that many difficulties can be avoided if only one law is applied to the whole of the property relations between husband and wife. This tendency of simplification comes, however, in conflict with other interests; the smooth functioning of the recording system must not be disturbed, the security of credit transactions must be safeguarded. The right approach seems to be to define exactly the situations where special policy considerations override the general policy of unified treatment and to formulate special conflict of laws rules for these situations.

(2) One of the economic functions of marital property law is to regulate the property situation of the surviving spouse after the marriage has been dissolved. Rules on descent and distribution pursue the same ends. It often happens that laws of different countries must be applied to questions of marital property on one hand and to problems of descent and distribution on the other. As these different laws cover partially the same field with different views on policy and starting from different presupposition, difficult problems of delimitation and adjustment between the two groups of norms arise. Conceptualistic arguments as those which are applied by the doctrine of qualification cannot bring these problems to a satisfactory solution. The economic function and purpose of the various rules and the economic result of the application of two sets of rules to one situation must receive more attention than they did up to now. Policy considerations alone can be the ground upon which the system of conflict of laws rules is to be built.100

100. See Neuner, supra note 6.