Conflict of Laws - Rules on Marital Property

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Conclusion

The court has evidenced a general tendency to view expropriation not so much as a taking of corporeal property as a situation involving injury to an owner through a destruction of his rights which he holds in relation to his property.\textsuperscript{351}

Apart from the differences relative to forced sales and assessment value, Louisiana is generally in line with other jurisdictions on matters of eminent domain. The litigation has come about for the most part in simple factual situations. Thus the extensive judicial refinement and elaboration of rules which is found in certain other states is not found in Louisiana. The existing rules are, however, quite practically workable and generally sufficient.

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Conflict of Laws—Rules on Marital Property

"Marital property" means the interests which arise in one spouse, with respect to things owned or acquired by the other spouse, solely by virtue of the marriage relation. Though each of the United States has its own particular set of laws governing marital property, the systems of marital property law of our country may be considered as belonging to one or the other of two greatly different categories: separate property states form one category; community property states the other. The present ease of transportation coupled with the constant growth of our country provide an ever-increasing volume of choice of law problems concerning the divergencies of these two systems.

Conflict of laws rules arise because different jurisdictions have different laws; when operative facts of a case involve two or more jurisdictions, the laws of which differ on the point at issue, the forum must make a choice of law. The forum which undertakes this choice does so in pursuance of certain policies. Five of the most important policy considerations have been listed as:

1. Policy in favor of treating the estate of the spouses as a unit with all elements of it governed by the same rules.

\textsuperscript{351} Property may be looked on as corporeal property or as a "bundle of rights." Two interesting articles dealing with the concept of property are Bowen, \textit{The Concept of Private Property}, 11 \textit{Corn. L.Q.} 41 (1925); Cormack, \textit{Legal Concepts in Cases of Eminent Domain}, 41 \textit{Yale L.J.} 221 (1931).
"2. Policy of fulfilling the normal expectations of the spouses as to the applicable law.

"3. Policy of fulfilling the normal expectations of purchasers and creditors.

"4. Policy protecting and continuing acquired interests in either spouse with respect to things acquired by the other or by himself.

"5. Policy in favor of adopting rules which are susceptible of the most efficient administration at the forum."¹

Often cases arise in which these policies cannot be reconciled one with the other. For instance, the fulfillment of the expectations of a creditor may preclude the protection of one spouse's acquired interest. In such cases the forum must determine which policy or policies it deems most important and accordingly apply the law of one or the other of the jurisdictions involved.² After weighing the policies, the court enunciates its decision in the form of a conflict of laws rule; these rules designate a particular jurisdiction so that the laws of that jurisdiction will be applied to the facts at hand.

Ante-Nuptial Contracts

Obviously, problems in the law concerning marital property would be considerably simplified if all property of a husband and wife were governed by the law of some single jurisdiction. It was early realized that this convenient state of affairs could be achieved by a valid ante-nuptial contract which would determine all present and future property relations of the spouses wherever they might go.

Express ante-nuptial contracts became common in parts of Europe. In fact, the ease of determination of property rights made these contracts so popular with the Continental courts that they began to find "tacit" contracts on the part of marrying

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¹ Marsh, Marital Property in Conflict of Laws 94 (1952).
² There is controversy among the legal writers as to whether the forum should choose the law of one of the jurisdictions involved and apply it in its entirety, or whether the forum should choose the result that would be granted in one jurisdiction and then achieve that result through the most similar laws of its own jurisdiction, or, third, whether the forum should meld parts of both laws and thus apply a new body of law found only in conflict of laws cases. Of course, in the interest of uniformity and predictability, established conflict of laws rules are to be followed in stereotyped cases. See 1 Rabel, The Conflict of Laws: A Comparative Study 47-60 (1948).
couples, such that by the act of marrying in a jurisdiction the spouses were deemed to have tacitly contracted that the laws of that jurisdiction govern their marital property. The conflict of laws rule embodying the tacit contract theory is: The law of the place of the marriage determines the marital property rights.

However, it was unreasonable to apply the laws of the place of the marriage to the property, present and future, of couples who were married in transit, or in some vacation area, and who might never physically be in that geographical jurisdiction again. To remedy this, a modification of the tacit contract theory was soon developed. This modification is called the “intended domicile” theory, and as stated by the courts, is: The laws of the jurisdiction in which the spouses intend, at the time of their marriage, to establish their home shall determine their property rights.

The unity of marital property laws achieved in Europe by express and tacit contracts was not so readily available in the United States. This was due to administrative difficulties. Because of the heavy immigration into the United States, coupled with the inaccessibility of the foreign laws, or at least their unfamiliarity to our judges, American courts have followed a policy of construing written ante-nuptial contracts as intended to govern only that marital property acquired in the first matrimonial domicile. Mr. Justice Story’s remark that these contracts should have extra-territorial effect only “if they speak to that very point” has set the standard for enforcement by American courts. The same reason for their aversion to written ante-nuptial contracts has also kept our courts from applying the tacit contract theory.

3. See id. at 368. It is still unsettled as to whether England implies ante-nuptial contracts. See Dicey, Conflict of Laws 797 (6th ed. 1949) and the ensuing discussion of the famous case of Lashley v. Hog, 4 Paton 581 (H.L. 1804).


5. Tourné v. Tourné, 9 La. 452 (1836); Hoefer v. Probasco, 80 Okla. 261, 190 Pac. 188 (1921); Clark v. Baker, 76 Wash. 110, 135 Pac. 1025 (1913); Restatement, Conflict of Laws § 289, Comment b (1934). But now that foreign laws are more easily accessible, and the vast majority of conflicts problems today involve the construing of laws of another of the states of the Union, there is no reason for not giving full effect to written ante-nuptial contracts. Accord: Sanger v. Sanger, 132 Kan. 596, 296 Pac. 355 (1931). See Marsh, Marital Property in Conflict of Laws 230 (1952).


7. The leading case is Saul v. His Creditors, 5 Mart. (N.S.) 569, 16 Am. Dec. 212 (La. 1827); Restatement, Conflict of Laws § 289 (1934); I Rabel, The Conflict of Laws: A Comparative Study 347 (1945). However, the intended domicile was discussed in a few early cases, but only one was found which was decided solely on that basis: State v. Barrow, 14 Tex. 179 (1855).
First Matrimonial Domicile

Instead of looking to the place of the marriage or the intended domicile, American courts have employed the common law rule that the domicile of the husband at the time of the marriage is the first matrimonial domicile. The determination of the first matrimonial domicile was at one time very important because of the vast differences that existed between the laws of community property states and of separate property states relative to property owned by the individual spouses before marriage. In community property states, property owned by either spouse before marriage remained his or hers after marriage. But by the laws of the separate property states which retained the common law in regard to marital property, previously owned personal property of the wife passed to the husband in complete ownership at the marriage. Thus, whether or not the wife retained her personal property owned before marriage hinged upon this selection. But today the decision as to just which was the first matrimonial domicile has lost a great deal of its importance since by the passage of the Married Women's Emancipation Acts the wife has much the same rights in her previously owned property under either property system. The problems which arise now are mainly those involving property acquired after marriage.

No conflict of laws problem is presented when husband and wife acquire property within their matrimonial domicile. However, in rejecting the tacit contract theories, American courts recognize that there may be subsequent matrimonial domiciles. They further recognize that each domicile should provide the law for its present domiciliaries. Thus problems arise concern-
ing what happens to the property rights if the domicile is changed to another type jurisdiction, or if property is acquired in a jurisdiction having a different system of laws from that of the present domicile. The rules regulating these problems are the products of the policy considerations mentioned previously.

**Movables**

In recognition that movables are likely to be taken to the domicile of the acquirers, the rule has been formulated that the law of the domicile at the time of acquisition governs interests in movables.\(^{14}\) This rule embodies the policies of unity of laws and convenience at the forum; the court need apply only one set of laws, that of the domicile, to any number of movables acquired in any number of jurisdictions so long as a single domicile has been retained. When the domicile is changed, however, another single set of laws, that of the new domicile, is applied to all movables acquired while that new domicile is retained. Thus the conflict of laws rule for movables has not only a particular geographical factor, the domicile, but also a time factor, the time of acquisition. It is through this time factor that the laws of the subsequent domicile are applied; without it, American courts would be recognizing a rule having the same effect, including the difficulties, of the tacit contract theory previously discussed, i.e., the law of the first matrimonial domicile would govern all future acquisitions. The leading case disclaiming the tacit contract effect and proclaiming that property acquired after a change in domicile is governed by the laws of the new domicile is *Saul v. His Creditors*.\(^{15}\) In that case Saul and his wife were first domiciled in Virginia, a separate property state, but Saul acquired the property in question after they changed their domicile to Louisiana. The wife died and the children claimed one-half of it as community property against the creditors of the husband, who relied on the theory that the law of the first domicile, Virginia, would govern all acquisitions. The decision of the court in favor of the children, and Mr. Justice Story's comments on the case,\(^{16}\) have firmly established the "par-

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14. GOODRICH, CONFLICT OF LAWS § 124 (3d ed. 1949); STUMBERG, CONFLICT OF LAWS 313 (2d ed. 1951); RESTATEMENT, CONFLICT OF LAWS § 290 (1934).
15. 5 Mart.(N.S.) 569 (La. 1827).
16. STORY, CONFLICT OF LAWS §§ 157-58 (5th ed. 1857). There Story said that marital property laws have only territorial effect, being statutes real and not statutes personal, i.e., they can only extend to the domiciliaries while the domiciliaries are within the jurisdiction. That this view is not entirely correct will be
tial mutability," or time element, in our conflict of laws rule governing movables.

The policy of protecting an acquired interest requires that when a change of domicile occurs the rights in property acquired while in the former domicile be retained. Thus property acquired by a husband or wife while domiciled in a separate property state remains separately his or hers after the domicile is changed to a community property state. That separate property is treated by the community property state's courts essentially the same as the separate property of the spouses provided for by the domestic law of the community state, e.g., that property owned by either spouse before marriage. Since there is no provision for community property in the domestic law of separate property states, their laws or rules on trusts have been employed to determine the manner in which the community property is "owned" in the separate property state. A husband who holds community funds while newly domiciled in a separate property state has been deemed to be in the same position as any other domiciliary of that state who holds the property of another person in his own name; a constructive trust is held to be established with the husband as trustee of the wife's portion of the funds. The new jurisdiction, then, is protecting the interest granted by the laws of the domicile at the time of acquisition.

The marital property of a couple who have changed domicile several times may be apportioned in groups, the respective groups being designated by two factors: domicile and time. To remedy possible confusion by these double factors and to provide convenience at the forum, the California Legislature attempted to provide for "full mutability" of marital property rights by

shown at page 567 infra. Nonetheless, his commentary added greatly to the establishment of mutability in marital property rights in movables.

17. "Partial mutability" in that the marital interests in the part of the property acquired prior to the change in domicile are retained, but the marital interests in property acquired after the change in domicile are governed according to the present domicile. Partial mutability is to be contrasted with the concept of "full mutability" in which, after a change in domicile, marital interests in all the property owned (acquired previous to the change in domicile or not) are determined according to the law of the presently existing domicile.


passing statutes\textsuperscript{20} whereby all property brought to California by persons who became California domiciliaries would become community property according to the California system. The attempt was unsuccessful, however, as the Supreme Court of that state held the statute unconstitutional on the ground that it operated to deprive a spouse of interests previously vested.\textsuperscript{21}

This same policy protecting an acquired interest is responsible for what has been termed the "source doctrine."\textsuperscript{22} This doctrine states that a spouse's interests in property acquired by exchange are the same as the interests he had in the property previously held. The source doctrine could be said to be an exception to the established rule that the law of the domicile at the time of acquisition governs marital property rights in movables. Separate or community property can be traced through any number of transactions so that if property is obtained (when the spouses have a new domicile) in exchange for property acquired while in their former domicile, the rights granted by the property system of the former domicile are carried over to the newly acquired property. Thus movables acquired while domiciled in a community property state, but purchased with funds separate by the laws of the former domicile (e.g., those that were acquired while domiciled in a separate property state) would be separate property held in exactly the same manner as the funds brought into the new domicile.\textsuperscript{23} Similarly, when movables are acquired while newly domiciled in a separate property state, but with community funds, the purchaser is held to be the trustee of the other spouse holding the one-half interest in a constructive trust.\textsuperscript{24} From this it can be seen that a more accurate statement of the conflict of laws rule governing marital rights in movables would be: Interests in movables acquired by "primary" acquisition are determined according to the law of the

\textsuperscript{20} These statutes were amendments to \textsc{cal. civ. code} § 164 (Deering 1949). They are Cal. Stats. 1917, p. 827, and Cal. Stats. 1923, p. 746 (the latter made the former expressly retroactive). Therein it was provided that property "acquired after marriage by either husband or wife, including . . . personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere is community property."

\textsuperscript{21} Estate of Bruggemeyer, 115 Cal. App. 525, 2 P.2d 534 (1931) held that the 1917 amendment was not to be given retroactive effect. The 1923 amendment, expressly providing that the 1917 act be retroactive, was held to be deprivation of property without due process of law in violation of U.S. Const. amend. XIV. Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343 (1934).

\textsuperscript{22} This term came into modern usage through Jacobs, \textit{Law of Community Property in Idaho}, 1 Idaho L.J. 1, 37 (1931).

\textsuperscript{23} Brookman v. Durkee, 46 Wash. 578, 90 Pac. 914, 12 L.R.A.(N.S.) 921, 123 Am. St. Rep. 944, 13 Am. Cas. 839 (1907) is the leading case.

\textsuperscript{24} Depas v. Mayo, 11 Mo. 314, 49 Am. Dec. 98 (1849) is the leading case.
domicile at the time of acquisition; interests in movables acquired by exchange, including purchase, are substantially the same as those existing in the property given in exchange.

**Immovables**

A state as a unit of power has as its very purpose the proper provision of law and order. As the enunciator of policies chosen for the good of its jurisdiction, the state must provide its own law and carry it out, whether or not it is at variance with the general rule in other states. States establish systems of recordation consistent with their own pattern of property laws. Purchasers and creditors in a state depend on its particular system being carried out. Stated negatively, if a state were not able to insure that its law concerning its own property would be carried out, the uncertainty on the part of prospective creditors and purchasers would result in a lower valuation of property throughout the state as well as a substantial hindrance to business activity due to the greater risk and thus higher price of secured loans. These economic factors, as well as the policy of providing convenient administration at the forum, have led to the much-reiterated conflict of laws rule: The law of the place of the immovable (law of the situs) governs marital interests in immovables. With the law of the situs governing, the domicile of the owner would not be a factor in the determination of the marital property rights. But this rule, like the rule concerning movables, has the provision protecting vested interests—the source doctrine. Thus if property acquired in a separate property state is exchanged during marriage for immovable property in a community state, that immovable property is treated as local separate property. Similarly, if an immovable in a separate property state is acquired in the name of one spouse, but in exchange for community property, a constructive trust is held to have been formed as would have been the case

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25. Newcomer v. Orem, 2 Md. 297, 56 Am. Dec. 717 (1852); Restatement, Conflict of Laws §§ 237, 238 (1934); Goodrich, Conflict of Laws § 122 (3d ed. 1949). This rule stems from the old theory of territoriality of law, i.e., that law has effect only on that which is within its borders. The principle of comity, particularly in the United States, has made great inroads on this theory. See Stumberg, Conflict of Laws 7 (2d ed. 1951).

26. "When parties acquire property, it is to be presumed that they do it in view of the law as it exists at the time and place, and its character as community or separate estate is determined with its first acquisition—nor does changing its character from personalty to realty, and vice versa, affect the situation." Stephen v. Stephen, 36 Ariz. 235, 228 Pac. 158 (1930).

if the property acquired were movable. A case illustrating the conflicts rule regarding immovables, with the vested interests exception, is Trapp v. United States. In that case a taxpayer husband acquired oil leases in Texas (a community property state) while domiciled in Oklahoma (a separate property state). He paid for the property partly with cash acquired in Oklahoma and partly by personal services rendered to the vendor in Texas. The court held that the leases were his separate property to the extent paid for by cash and that they were community property to the extent paid for by personal services. Note that had the personal services been paid for by cash and the cash exchanged for the leases, the leases would have been entirely separate property because they would have been acquired in exchange for a movable acquired while domiciled in a separate property state. The court here considered the rendering of personal services in direct exchange for the immovable a "primary" acquisition. Obviously the distinction is an artificial one, denying that services rendered are "acquired exchangeable property"; but from a functional standpoint this distinction is desirable in that it operates to have marital rights in immovables determined according to the law of the situs. As illustrated by this case, a more accurate statement of the conflict of laws rule governing immovables would be: The law of the situs governs immovables acquired by "primary" acquisition; when immovables are acquired by exchange, the marital interests in such immovables are of the same category as those existing in the property given in exchange.

Income from Property

In most civil and common law jurisdictions, income from property is deemed a separate movable at the time it accrues.

29. 177 F.2d 1 (10th Cir. 1949).
30. The industry, or services, of a man are certainly his property which he may legitimately exchange. There is no apparent reason why that property being given in exchange for an immovable should have different consequences than if the services had been exchanged for money and the money immediately exchanged for the immovable. There being no strictly legalistic reason for this distinction, the policy pursuits are shown in relief.
31. Other cases employing this same distinction are Jones v. Trapp, 186 F.2d 951 (10th Cir. 1950); Hammonds v. Commissioner, 106 F.2d 420 (10th Cir. 1939); Johnson v. Commissioner, 88 F.2d 952 (8th Cir. 1937). Cases in which immovables are exchanged directly for services are rare today, but they serve to illustrate the build-up of policies in conflict of laws decisions; this is especially true with tax cases in which there are no third parties with which to reckon.
32. 32 A.M. Jur. 348 (1941); Am. Cas. 1918A 151 et seq. (1918).
In those jurisdictions the law of the domicile of the spouse would determine whether the movable thus acquired is community or separate property. However, some states have passed statutes characterizing income from an immovable as a mere incident or characteristic of that immovable. These statutes make possible a kind of "double-linked" conflict of laws problem. Suppose, for example, that an immovable is owned by one spouse separately and this immovable has as its situs a state, the laws of which make income from an immovable a mere incident of that immovable. Suppose also that the owning spouse resides in a community property state the laws of which make income from an immovable a newly acquired movable. Obviously, if the law of the situs is to govern in this situation making the income an incident of the immovable, the income will be the separate property of the owner. But the income would be community property if the law of the domicile were held to govern because this law would have the double function of first designating the income as a newly acquired movable, which makes the conflict of laws rule regarding movables applicable, and then applying its domiciliary law to the marital interests making the income community property. The only case found which involved this particular "double-linked" type conflict is Commissioner v. Skaggs.

There the court held that the income was an incident of the immovable and therefore separate property. They employed the following reasoning: "Community property laws were statutes real and not statutes personal; that is to say they apply to things within a country's jurisdiction rather than to persons wherever they may be or go. It should follow that things, whether movable or immovable, actually situate in a state and effectively within its power should be governed by the law of that state." When the thought of the all-important policies behind conflict of laws decisions is abstracted from the reasoning of the court, it ap-

33. "Double-linked" because the determination of the conflict of laws question of whether or not the property is separate depends on the determination of the conflicts question of whether or not the income was a newly-acquired movable.

34. The situs could be either a community or separate property state; if the spouse had acquired it while domiciled in a separate property state, or if he acquired while domiciled in a community state but previous to the marriage, the property would be owned separately.

35. 122 F.2d 721 (5th Cir. 1941), cert. denied, 315 U.S. 811 (1942). In this case a husband domiciled in Texas was receiving income from a building in California which he had acquired prior to his marriage. The domestic law of California provided that income from an immovable was a mere incident of the immovable; the Texas law provided that income from an immovable became a movable at the time of accrual. Cf. In re Berchtold, 1 Ch. Div. 192 (Ch. Civ. 1923).

36. 122 F.2d at 723.
pears that their argument is based on a questionable premise (i.e., that the property system does not follow its domiciliary with respect to his property in a foreign jurisdiction). That this premise is at least questionable in this day and time has been the heart of the previous discussion concerning movables and immovables. However, when the policies are considered, the conclusion appears desirable. It provides for convenience at the forum, the local system of title and property ownership is kept intact, and there is no conflict with the policy protecting acquired interests; in fact, the original interests in the property are imparted to the produced income.

Rights of Third Parties

The economic policy in having a reliable recordation system, mentioned as responsible for the situs rule in regard to immovables, as well as the powerful feeling that good faith purchasers and creditors ought in justice to be protected, have come in conflict with the policy protecting acquired interests. Creditors and purchasers who rely on the public records should not be thwarted by secret liens existing by virtue of the law of some foreign jurisdiction; on the other hand a spouse should not lose his or her interest in property merely because of its being exchanged for other property. A "compromise" has been effected between these two opposing propositions. The key to this compromise is found in the limiting phrase "as between themselves." The source doctrine is given full scope in controversies between the spouses themselves where there is no reason not to protect acquired interests. In controversies in which good faith creditors and purchasers pit their claim of reliance on the public records against the claim of a hidden interest in the property, the economic policies protecting transactions prevail.

37. This conclusion, that the law of the situs determines whether income from property is an acquired movable or not, was followed in Stone v. Sample, 216 Miss. 287, 62 So.2d 307 (1953); Succession of Packwood, 9 Rob. 438 (La. 1845); Johnson v. Commissioner, 1 T.C. 1041 (1943), appeal dismissed, 139 F.2d 491 (8th Cir. 1943); Estate of Hale, 2 Cof. 191 (San Francisco Super. Ct. 1906). In Commissioner v. Porter, 148 F.2d 566 (5th Cir. 1945) the income to a Texas spouse was from a spendthrift trust established as a gift in New York; there was no conflict of laws as to this income being movable, but the court went on to say that because the trust was a spendthrift trust the income was to be treated as income and not as separate gifts. Presumably, the same would not be true of a discretionary trust. Accord: Estate of Ernest v. Hinds, 11 T.C. 314 (1948).

38. Castro v. Illies, 22 Tex. 479 (1858) and Hall v. Harris, 11 Tex. 300 (1854) are the leading cases. See cases cited in 13 L.R.A. 236 (1891); 45 AM. JUR. 465, § 82 (1943). Cf. Neuner, Marital Property and the Conflict of Laws, 5 LOUISIANA LAW REVIEW 167, 180 (1943).
facto power over its immovables and obvious interest therein are overwhelming factors serving to defeat the source doctrine when they are in conflict with it.

The policy protecting creditors and purchasers is not as strong in regard to movables as it is to immovables. With movables, the sacredness of the public records is usually not an issue. Also, due to the very mobility of the property, there is a feeling that creditors and purchasers should be on their guard against the possibility of rights granted in other jurisdictions. This notion of *caveat emptor* is certainly one which could be enunciated as a counter-balancing policy so that the policy protecting acquired interests of spouses could be effected in face of the opposing policy protecting third parties. In this area of the law the clashing policies so nearly balance that each state may pick its policy without fear of overwhelming counter-argument.

The position protecting acquired interests of the spouses appears to be slightly preferable because of the language used in the *Restatement* illustration concerning marital rights in community-owned movables newly situated in a separate property state. There it is said that when a creditor of the husband attaches the chattels, the validity of the attachment is determined by the law of the separate property state which would be applied to the attachment of property *owned in common* for a debt of one of the owners. Considering the dearth of decisions and their lack of uniformity in this area of the law, it would perhaps be best, in the interest of uniformity throughout the states, to follow the lead of the *Restatement* and entrench the policy protecting spouses’ acquired interests in movables.

*Louisiana Rule*

The Louisiana Legislature has exerted its power over the marital property within its jurisdiction to a greater extent and intensity than has any other state. Article 2400 of the Louisiana Civil Code provides: “All property acquired in this state by non-

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40. The registration of automobiles may be an exception to this.
41. GOODRICH, CONFLICT OF LAWS 380, n. 11 (1949); 1 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 372 (1945); Harding, Marital Domicile and Marital Rights in Movable, 30 MICH. L. REV. 859 (1932).
42. RESTATEMENT, CONFLICT OF LAWS § 292 (1934).
43. That rights of owners in common are protected in co-owners’ dealings with third parties, see 2 TIFFANY, REAL PROPERTY § 426 (3d ed. 1939).
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 law which regulate the community of acquets and gains between citizens of this state.” The legislative policy involved, clarifying titles and thereby protecting creditors and purchasers, is the same as that envisioned by the California Legislature in 1923. The California Legislature’s attempt to enforce this policy was held unconstitutional, since it divested acquired interests of spouses in marital property. The Louisiana situation can be readily distinguished. Only property acquired in Louisiana is affected; property acquired elsewhere is not altered, as the California statute provided. Probably, then, the only point at which interests would be divested under the Louisiana rule would be in the use of funds, separate by the laws of the state of acquisition, in exchange for property which becomes community at the exchange. But note that the Louisiana Civil Code article provides that the same provisions of law which regulate the community of acquets and gains between its citizens shall be applied. And according to Louisiana internal law a right of reimbursement is given to a spouse whose separate funds are used as community property. Also according to Louisiana internal law, in absence of specific affirmative acts on the part of the wife, the husband is the administrator of the wife’s separate property; in this capacity he is similar to the constructive trustee provided for in separate property states for the administration of community property. Thus, with the provisions for reimbursement and administration applicable to non-domiciliaries, Louisiana protects acquired separate property interests in much the same manner as the separate property states protect community property interests.

Article 2400 on its face purports to apply the Louisiana law

44. See note 20 supra.
45. Another situation where it could possibly be claimed that there is a divesting of an acquired interest would be where a spouse is domiciled in a separate property state and works in Louisiana; the money acquired would be community property according to Article 2400. However, that this is a divesting of his separate property could probably be denied on the theory that before he went to work the worker had no “interest,” and from the moment of acquisition the property was and continued to be community property. See Succession of Dill, 155 La. 47, 98 So. 752 (1923). There the court stated that under Article 2400 “all property acquired in this state by married persons becomes community property regardless of where both or either of them reside.” Id. at 58, 98 So. at 755.
47. L.A. CIVIL CODE art. 2385 (1870).
to all property acquired in this state, immovable and movable. The Louisiana court has made one exception, however, in the case of *Williams v. Pope Mfg. Co.* There the court held a cause of action in tort to be “transitory” since it could be sued on in any jurisdiction where the defendant could be served with process and therefore the cause of action was not “property acquired in this state” within the meaning of the statute. By this rationale the Louisiana court enabled a wrongfully injured woman, whose husband had disappeared, to bring suit against her wrongdoer. Whether the making of this exception was justifiable logically, or only by the equities of the particular situation, or not at all, the exception remains as a fact of the Louisiana law. The court enunciated its policy; the decision has never been overruled.

It is to be remembered that the conflict of laws rules provided by the Louisiana Legislature in Article 2400 and the interpretation the courts have put on it affect only property acquired in Louisiana. They do not affect property acquired elsewhere by Louisianans. The ordinary conflict of laws rules prevail in those situations.

**Mathematical Rule-Applying: An Abuse**

The preceding discussion focusses attention on rules and policies for conflict of laws. As the forum confronted with a conflict of laws must fit pieces of different puzzles together, it should conduct its undertaking along equitable principles; it should not hamper or restrict itself by a rigid, mathematical application of rules without regard for the policies behind them. Marital interests in property are particularly susceptible of abuse in the mathematical rule-applying in conflict of laws situations. While certain sets of conflict of laws rules are formulated to correspond and apply to certain categories of relationships or interests, sometimes virtually the same interest may be placed in one category by domestic laws of one state and in another category by domestic laws of another. Thus marital property laws in one state may protect the interest that is protected by laws of succession in another state. Community property states

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49. In Matney v. Blue Ribbon, Inc., 202 La. 505, 12 So.2d 253 (1942), the Louisiana court expressly refused to overrule the *Williams* case, but they did allow recovery for the personal injuries to the wife on the basis of LA. CIVIL CODE arts. 2334, 2402 (1870), making the cause of action the wife's separate property.
recognize that marriage is a partnership in which a wife, though not personally bringing in the income, may nevertheless be partially responsible for it because of her proper fulfillment of wifely duties. For that reason, the marital property laws of those states give the wife, as her portion of the community, one-half of the property earned by her husband. This same interest due the non-acquiring wife is recognized in the separate property states which provide her with a non-barrable share, by laws of succession, in the acquisitions of her husband. The conflict of laws rules for succession, however, are different from those for marital property. The pertinent conflict of laws rule for successions is: The domicile of the decedent at the time of his death provides the law for the succession. The conflict of laws rule for marital property, regarding such earnings, is: The law of the domicile at the time of acquisition determines the interests in the property acquired. Within any single jurisdiction the laws of succession and marital property are set up to complement one another. Obviously, a state which protects the wife's interest by giving her a community interest need not provide for her in the laws of succession and, conversely, a state which provides for her by succession laws need not give her a community interest in her husband's earnings.

Though the laws of more than one state are involved in these conflict of laws situations, the general policies or objectives of the laws of each state are the same. But note the anomaly created by a rigid application of the conflict of laws rules. A husband and wife had been domiciled in a separate property state for the major part of their lives; the husband's unexpended earnings amounted to about $200,000.00. Upon retirement the couple moved to a community property state, California, and established their domicile. At the death of the husband the wife claimed a portion of this money against a third party to whom the entire amount had been willed. With mathematical exactness the court applied the rules of conflict of laws: The domicile at the time of acquisition classifies the property as to whether it is separate or not, and that domicile (the separate property state) classifies all the property as the “separate” property of the husband. The domicile at death (the community property state) provides the

50. GOODRICH, CONFLICT OF LAWS 501 (1949); RESTATEMENT, CONFLICT OF LAWS §§ 301, 303 (1934).
51. See note 14 supra. LA. CIVIL CODE art. 2400 (1870) makes Louisiana an exception to this. See discussion of the Louisiana rule at page 568 supra.
succession laws, and by those laws the wife gets no non-barrable share of her husband's "separate" property. Therefore, the wife gets nothing.\(^{53}\)

Obviously such a result was not contemplated by the laws of either state. The fallacy in the reasoning lies in the use of the term "separate property." This term is used by the court as if it had the same meaning in every state; but actually the meanings are different because each type jurisdiction has employed the term "separate property" in accordance with its own method of accomplishing the same desired end or policy. In the internal law of the separate property state, the term is used to mean property earned by the husband during married life. In the community property state, on the other hand, it is used to mean property which, though the husband's, was specifically not earned during the married life. Thus the terms are given exactly contradictory meanings. The policy behind both jurisdictions was defeated because the court overlooked the divergency of these two property systems since both systems happened to employ the same term. In these dual approach areas of law the forum, in making a choice of law, should view the law of the respective states as a whole, and then make its choice.

Assuming that in the future the fallacy involved in this decision will be recognized as such, the courts will be faced with the problem of whether to apply the entire law of the domicile at the time of acquisition, which in the case above would have allowed the wife a one-third non-barrable share, or to apply the entire law of the domicile at the time of death, which would here have given the wife one-half of the earnings of her husband as community. It appears that two considerations form the basis for the proper choice: (1) The realization that marital property laws have been held to vest present interests — attempts to divest them have been held unconstitutional.\(^{54}\) (2) The realization that interests granted by succession laws are inchoate, mere ex-

\(^{53}\) The theoretical problems involved in this type situation and the injustice of such a conclusion has been often discussed, usually in connection with the famous Maltese Marriage Case, Court of Appeals of Algiers, Dec. 24, 1889, 18 JOURNAL DU DROIT INTERNATIONAL 1171 (France 1891), in which case the same type reasoning was employed and the same conclusion reached as in the O'Conner case. See CHEShIRE, PRIVATE INTERNATIONAL LAW 34 (2d ed. 1938); MARSH, MARITAL PROPERTY AND THE CONFLICT OF LAWS 77-90 (1952); WOLF, PRIVATE INTERNATIONAL LAW 34 (2d ed. 1938). It is agreed that the failure to choose one or the other entire system of law was the wrong course of action, but there is little discussion as to what law should have been chosen and as to what was the proper reasoning process by which to choose.

\(^{54}\) See note 21 supra.
pectancies — it is well established that any state may change its succession laws leaving unfulfilled the succession expectancies in presently owned property. With these two considerations in mind the proper step would appear to be to apply the entire law of the domicile of acquisition. This conforms the “non-vested” succession law to the vested marital property law and not vice versa. The issue in question would be treated for conflict of laws purposes as entirely one of marital property, so the law of the domicile would be applied. The succession laws of the domicile of acquisition would then be applied as part of the marital property laws of that domicile, which in one true sense they are — being complements, corollaries to marital property laws.

Had such a conclusion, protecting the interests of the spouses, been reached in the case discussed above, the property would have remained the separate property of the husband during his lifetime and a one-third non-barrable succession interest would have gone to the widow at his death, as would have been provided by the entire law of the domicile of acquisition. That she should be protected was surely contemplated in the laws of both states.

It is well to keep in mind the truism that conflict of laws rules are mere enunciations of policy. The rules are helpful as a means of reaching decisions when certain set-of-fact situations are involved, but it is the policies (the substance) not the rules (mere forms) which are important. Conflict of laws rules exist because of their function of carrying out policies; they should be used accordingly.

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