CONFLICT OF LAWS BETWEEN COMMUNITY PROPERTY AND COMMON LAW STATES IN DIVISION OF MARITAL-PROPERTY ON DIVORCE

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INTRODUCTION

Whatever may be the quest of those who migrate in increasing numbers to the southwestern states, and whatever may be their fortune in attaining individual goals, in addition to that which they seek will also be found that favorite child of the civil law, the community property system.

Since the income-splitting provisions were added to the Internal Revenue Code, citizens whose marital-property rights are governed by common law concepts have ceased to look with envy upon their neighbors in community property states, and it is doubtful if it occurs to housewives in common law jurisdictions, absorbed as they are in ministering to endless family needs, to covet the lot of their sisters in the eight states which follow the civil law system of marital-property. "In the southwest where community property is recognized," a Florida court has said,

> the husband and wife share equally in all property accumulated during coverture. There is a perfectly sound basis for this rule and it will be applied in this State when the circumstances warrant. Viewed solely as a matter of economy, the labor, pain, and drudgery required of the mother in sustaining the home, giving birth to and rearing the children will often more than offset the contribution of the father to the family budget. There are no five or six day weeks in her cycle of duties, nor is she awarded extra pay for overtime. She is subject to call at all hours of the day and night and in nine cases out of ten, where there comes a rift in the marital ties, she is awarded the custody of the minor children. This of course has reference to the mother who takes motherhood seriously, who knows the virtue in the catechism, castor oil, paragoric, and hickory tea.[1]

If the question is otherwise open to doubt, one only need scan the efforts of legislatures in noncommunity states, through the Married Women's Property Acts, to raise the property rights of married women up from a level similar to that once occupied by slaves, to be con-

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1. Strauss v. Strauss, 148 Fla. 23, 27-8, 3 So.2d 727, 728-9 (1941).

vinced that of the two systems of marital-property in the United States, the one most suited to the realities of modern domestic life is the community property system.

Because these divergent systems exist side by side, it is not surprising that conflict of laws problems arise, nor are such problems of recent origin. The earliest American case of importance is *Saul v. His Creditors*[2] which was decided in Louisiana in 1827, but the question was not a novel one at that early date, for the court said:

> (Q)uestions of this kind are the most embarrassing and difficult of decision that can occupy the attention of those who preside in courts of justice . . . the vast mass of learning which the research of counsel has furnished, leaves the subject as much enveloped in obscurity and doubt, as it would have appeared to our own understandings, had we been called on to decide, without the knowledge of what others had thought and written upon it.

Were this learned court to sit today, after more than a century and a quarter, for the purpose of unraveling Mr. Saul's financial difficulties, it might well change none of this language. Conflict of laws problems which are equally as perplexing continue to come before our courts, the most frequent cases being those which involve creditors and transferees, decedents' estates, and division upon divorce. It shall be the purpose of this paper to cast whatever light may be possible upon the last of this trilogy, and situations involving the rights of creditors and transferees and decedents' estates will not be included except where necessary for the purpose of historical continuity or for lack of divorce litigation. Futher, for the sake of economy primary emphasis will be placed on cases from Texas and California, to the general exclusion of the six remaining community property states.[3]

I.

The *Restatement*[4] takes the view that marital-property rights in movables acquired during coverture are governed by "the law of the domicile of the parties when the movables are acquired." McKay, in his treatise on community property, states:

> It is a very convenient working rule and almost universally applied that marital rights in personal property are determined by the law of the domicile. And this rule applies to persons domiciled in a community property state who acquire chattels in a state where the law of community does not

2. 5 Mart. (N.S.) 569, 571 (La. 1827).
3. Arizona, Idaho, Louisiana, Nevada, New Mexico and Washington.
4. RESTATEMENT, CONFLICT OF LAWS §290 (1934).

> prevail, and it applies as well to chattels acquired in a community property state by married persons domiciled in a state where the law of the community does not prevail.[5]

Although the language of many of the cases[6] as well as the California statute[7] are substantially to the effect that the law of the domicile controls the character of movables, Professor deFuniak's thorough analysis[8] shows that this statement is not complete, and Professor Marsh criticizes the view[9] because it does not account for the situation in which property is acquired in State A before removal of the spouses to State B, and subsequently exchanged for movables in State C. The character of property so acquired should be determined according to the character of the property exchanged, which would be governed by the law of the state in which it was acquired while the parties were domiciled there. Properly stated, then, the general rule should be to the effect that the marital-property characteristics of movables are determined by the character of the property exchanged therefor.[10] A different rule may obtain in Louisiana.[11]

Historically, a theory sometimes urged, usually by creditors, for determining the law applicable to the acquests of married persons, was that the domicile at the time of marriage should control. The reasoning was based on the fiction that, where spouses made no express contract at the time of their marriage, they tacitly contracted that all their subsequent acquisitions were to be governed by the law prevailing in the jurisdiction in which they contracted the marriage. This theory appears to have been applied in the famous case of *DeNichols v. Curlier,*[12] and it was strongly urged by the creditors in *Saul v. His Creditors*[13] that the common law which prevailed in Virginia where Saul and wife were married should apply to the property acquired by them in Louisiana. The court rejected the theory on the ground that the law relating to acquests and gains made during marriage is a real, not a personal law, and has no effect beyond the borders of the enacting jurisdiction. Since the *Saul* case, the "tacit contract" theory has faded into deserved obscurity in the United States.

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5. McKay, THE LAW OF COMMUNITY PROPERTY §648 (2d Ed. 1925).
6. See, *e.g.*, Rozan v. Rozan, 49 Cal.2d 322, 317 P.2d 11 (1957).
7. CAL. CIV. CODE §946: "If there is no law to the contrary, in the place where the personal property is situated, it is deemed to follow the person of its owner, and is governed by his domicile."
8. 1 deFuniak, PRINCIPLES OF COMMUNITY PROPERTY §92 (1943).
9. Marsh, MARITAL PROPERTY IN CONFLICT OF LAWS, p. 194 (1952).
10. It will be assumed throughout this paper that the original character of property can be traced through its various transmutations. Problems of tracing are not within the scope of this discussion.
11. Marsh, *op. cit. supra* note 9, at 195 n. 50.
12. [1900] 2 Ch. 410.
13. *Supra* note 2.

A second consideration in connection with the law to be applied to movables acquired by married persons is the so-called "intended-domicile" rule propounded by Justice Story,[14] which is to the effect that if the parties intend to remove to a new domicile, and in fact do so within a reasonable time, the intended domicile will control the property interests of the spouses in property acquired while in route to the new domicile. This theory has been variously applauded and decryed by writers subsequent to Justice Story.[15]

It is axiomatic that a court in one state cannot directly effect title to real estate located in another, and divorce courts have been quick to renounce any such power.[16] This prohibition does not, however, leave the divorce court powerless to effect an equal distribution of the marital-property, for a court having jurisdiction over the parties can, by a decree operating *in personam,* and enforced by contempt, require execution of conveyances to foreign land to ensure a complete determination of the controversy.[17]

Recognizing that it was powerless to partition land bought in Florida by the husband, a Texas court nevertheless held that under the statute authorizing the divorce court to "decree and order a division of the estate of the parties in such a way as the court shall deem just and right, . . . "[18] it could take into consideration the value of the community funds invested in the foreign land and charge the husband with one-half the value of such funds in dividing the property that remained within the court's jurisdiction. "A denial of such equitable power . . . " said the court, "would aid and lead to gross injustice instead of a fair, just and equitable division of the whole of the community."[19]

While her divorce suit in California was pending, a wife filed an action in Texas to enjoin her husband from contracting any debts against the community property, and from disposing of it during the pendency of the divorce. Her husband contended that she was barred by Texas law from suing him except for divorce or to protect her separate estate, but the court held the injunction authorized under

14. Story, CONFLICT OF LAWS §§193, 194 (3d Ed. 1846).
15. de Funiak, *op. cit. supra* note 8, § 91; Marsh, *op. cit. supra* note 9, at 185-7; McKay, *op. cit. supra* note 5 § 622; Goodrich, *Matrimonial Domicile,* 27 YALE L. J. 49 (1917); Leflar, *Community Property and the Conflict of Laws,* 21 CALIF. L. REV. 221 (1933); Stumberg, *Martial Property and the Conflict of Laws,* 11 TEXAS L. REV. 53 (1932).
16. Moor v. Moor, 24 Tex. Civ. App. 150, 255 S.W. 231 (1900); CAL. CIV. CODE §755; Annot: 51 A.L.R. 1081.
17. Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905 (1944); Currie, *Full Faith and Credit to Foreign Land Decrees,* 21 U. OF CHI. L. REV. 620 (1954).
18. Art. 4638, TEX. REV. CIV. STAT. 1925.
19. Walker v. Walker, 231 S.W.2d 905, 907 (Tex. Civ. App. 1950); *accord;* Askew v. Roundtree, 120 S.W.2d 117 (Tex. Civ. App. 1938) (land located in Mexico)

statutes allowing the wife during a divorce action to require an injunction protecting her interests in the community property, and allowing the judge to make such temporary orders respecting the property as he deems necessary.[20] The decision was predicated in part upon the reasoning that, since only the California court could act upon the divorce, and only the Texas court could adjudicate rights to the Texas realty, the wife's suit was properly ancillary to the California divorce action, and necessary to give her the full relief to which she was entitled.[21]

It may be stated as a general rule that property acquired in a common law jurisdiction and subsequently removed to a community property state retains the marital-property characteristics determined at the domicile of the spouses at the time of acquisition, without regard to the law of any subsequent domicile.[22]

In *Blethen v. Bonner*[23] the divorced wife claimed a community half interest in Texas land bought by her husband with funds accumulated in Massachusetts. The court reversed a trial court finding that the land was the separate property of the husband, holding he had failed to meet the burden of proving that Massachusetts law regarding the funds so invested was different from Texas law. On a later appeal from a similar trial court judgment[24] it appears that the husband took the Supreme Court's suggestion, for the court held that the Texas land, purchased by the husband after moving there with money earned in Massachusetts where the common law obtained, was not community property.[25]

Several years previously the California Supreme Court held in a similar situation that land bought by married persons after removal to that state with funds acquired while in Illinois, under the laws of which state the money was the separate property of the husband, remained his separate property.[26]

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20. Arts. 4635, 4646, TEX. REV. CIV. STAT. 1925.

21. Turner v. Turner, 204 S.W. 133 (Tex. Civ. App. 1918).

22. RESTATEMENT, CONFLICT OF LAWS §§291, 292, 293 (1934); Annot: 92 A.L.R. 1347.

23. 93 Tex. 141, 53 S.W. 1016 (1899); *cf.* McDaniel v. Harley, 42 S.W. 323 (Tex. Civ. App. 1897); ART. 4627, TEX. REV. CIV. STAT. 1925.

24. Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 S.W. 290 (1902).

25. For cases informative on this point though not concerned with divorce litigation, see: Avery v. Avery, 12 Tex. 54 (1854); Grange v. Kayser, 80 S.W.2d 1007 (Tex. Civ. App. 1935).

26. Kraemer v. Kraemer, 52 Cal. 302 (1877); *accord,* Tomaier v. Tomaier, *supra* note 17; Latterner v. Latterner, 121 Cal. App. 298, 8 P.2d 870 (1932); *cf.* Estate of Higgins, 65 Cal. 407, 4 Pac. 398 (1884); Brunner v. Title Ins. & Trust Co., 26 Cal. App. 35, 145 Pac. 741 (1914).

II.

If called upon to determine marital rights in property to which community characteristics attached prior to removal of the parties to a noncommunity property state, a court in the latter state would undoubtedly hold that the community character was not altered by the change in domicile.[27] There has been little litigation on this point, and few of the cases involve actions growing out of division on divorce.

The first significant decision in America is the Missouri case of *Depas v. Mayo*.[28] Depas and his wife moved from New Orleans to St. Louis, taking a large sum of money which was community property under the law of Louisiana where it was acquired. Depas used this money to purchase a lot in St. Louis, taking title in his own name. After a time the parties moved back to New Orleans, where they were later divorced, Mrs. Depas subsequently marrying Mayo. The divorced wife then sought half interest in the St. Louis property on the ground that it was part of the community. In allowing her claim, the court argued as follows:

> Mrs. Depas was, by the laws of Louisiana, entitled to one-half of the estate, both real and personal, belonging to the community of which her husband was the head, and Depas invested a portion of this community property in the real estate. Did he acquire, by this investment, an equitable as well as a legal title, to the real estate thus purchased, or is he still to be regarded as a trustee for his wife to the extent of her interest in the fund by which the purchase was affected? This question must be *determined by our law and not by the law of Louisiana*. (Emphasis added.)
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> The removal of Depas and his wife from Louisiana to this State, does not alter the character of this transaction. Had Depas, whilst residing in Louisiana, remitted a sum of money belonging to the community, and procured its investment in Missouri lands, would the rights of the parties in Louisiana have changed? What difference can it make, that previous to the investment the parties changed their domicile. It was a change of the character of the property from personalty to realty.[29]

Declaration of a constructive trust, as was done in *Depas v. Mayo*, constitutes an interesting blend of common law and civil law, for the trust is unknown to the latter system, and the interest of the wife in the community in those states which adhere to the civil rule is not an

27. RESTATEMENT, CONFLICT OF LAWS §292 (1934); see generally, Annot., 92 A.L.R. 1352.
28. 11 Mo. 314 (1848).
29. *Id.* at 319.

equitable one. Rather, it is a type of ownership which is not readily definable in common law terms. Application of a trust theory, however, is a useful tool for assuring protection of the wife's rights when community property is transported into a common law state, and its use should, and no doubt will, be continued.

The familiarity of common law judges with the theory of constructive trusts accounts for the holding of the amusing Oklahoma case of *Edwards v. Edwards*.[30] H and W acquired $50,000.00 during the early days of the Texas oil boom through some means which the court considered too indelicate to discuss, but which was nevertheless community property. Subsequently the spouses removed to Oklahoma where H invested the money in real property and took title in the name of his mother. Thereafter, W precipitated her husband's demise due to "infelicity" which had arisen in Texas when she discovered him in bed with another woman. After W's acquittal, she sued H's mother to recover a community half interest in the land. The court held that the wife, having acquired a vested interest in the money at the time of its acquisition in Texas, could not be divested by the husband's dealings in Oklahoma, and that H's mother therefore held one-half of the land on a constructive trust for W.

An Illinois court inferrentially indicated that a community interest in property located in Illinois would be recognized if acquired by a Texas domiciliary. Most of the property in question was earned by H in Illinois, but W, in her divorce action brought in that state, asked for an accounting on the ground that the parties were domiciled in Texas at the time it was earned. Without actually discussing the treatment of the property if it were in fact community, the court found as a matter of fact that all of the property prayed for was acquired while H was domiciled in Illinois. It is interesting to note that little weight was given to an affidavit made by H to the Department of Internal Revenue, in which he swore that his domicile was in Texas during the period in question.[31]

The only decision of comparatively recent date involving a community interest in property litigated in a common law jurisdiction is the well reasoned opinion of the Georgia court in *Wallack v. Wallack*.[32] H and W lived in Texas during their marriage, and were divorced there, after which both parties became residents of Georgia. W sought by equitable partition to enjoin H from disposing of described personalty, and to recover her community half interest of the

30. 108 Okla. 93, 233 Pac. 477 (1924).
31. Fry v. Fry, 332 Ill. App. 484, 76 N.E.2d 225 (1947).
32. 211 Ga. 745, 88 S.E.2d 154 (1955).

property, on the ground that it was acquired in Texas, the laws of which state W pleaded and proved. Relying principally upon Professor Marsh[33] and section 290 of the *Restatement,* the court held that W's property interests acquired while domiciled in another state will be determined by the laws of such foreign state, where those laws are properly before the court, and that the community property laws of Texas as they are construed by Texas courts would determine the rights of the parties to the personalty in question. By giving currency to ideas which were theretofore largely to be found in scholarly treatises, the Georgia court has set a course which future tribunals will do well to follow in the infrequent cases involving community interests litgiated in noncommunity jurisdictions.

III.

When a spouse claims rights in marital-property in a divorce action, for choice of law purposes the issue will usually be considered one of divorce and referred to the law of the forum, with the forum then applying its own conflict of laws rule to determine the character of the property as separate or community. The only case found in which the point is discussed is the leading California case of *Latterner v. Latterner,*[34] in which the plaintiff was granted a divorce from her husband, but appealed a finding of no community property. The trial court had found as a matter of fact that certain California real property was purchased by the husband with funds earned by him in Massachusetts and Connecticut where the common law obtained. The court on appeal agreed that the property was owned separately by the husband, applying the general rule that the domicile at the time of acquisition of the funds controlled.[35] Having thus determined the *character* of the property, the court held that the *distribution* of separate property at divorce would not be governed by the laws of Massachusetts and Connecticut, but by the law of California relating to the disposition of separate property at divorce.

After the marriage has been dissolved, a subsequent action brought claiming rights in property will be considered a question of marital-

33. Marsh, *op. cit. supra* note 9, at 141.
34. 121 Cal. App. 298, 8 P.2d 870 (1932).
35. The court found that the property was brought to California prior to the amendment to the community property law [CAL. CIV. CODE §164] which attempted to enlarge the definition of community property to include personal property acquired by either spouse after marriage while domiciled elsewhere, which would not have been separate if acquired while domiciled in California. This statute was later held unconstitutional in Re Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343 (1934).

property and referred to the domicile of the spouses at the time of acquisition to determine the character as separate or community.[36]

In *Joiner v. Joiner*[37] the spouses were domiciled in Oklahoma, but lived separately for some years before the husband secured a divorce. During the period of separation, H acquired Texas oil leases which became quite valuable, and after the divorce W sought to establish a community interest in the Texas property. The Texas court held, however, that the law of Oklahoma, not the law of Texas, was controlling, and that under the former the wife would not have an interest in the leases.

The language of the court was perhaps unfortunate wherein it said, "In the trial court the jury found that the residence of the parties was in the state of Oklahoma, and that finding is not questioned. This takes out of the case all questions of title in the plaintiff (wife) by reason of the laws of this state." This is not strictly accurate; the residence of the parties controlled the character of the funds with which the Texas property was purchased, but could not determine the title to Texas real property, for it was Texas law that controlled as to the effect of the investment of separate funds in Texas—only the character of those funds was determined by foreign law.[38]

It should be noted that the Texas rule provides that income, rents and revenues from separate property become community property.[39] Thus, if H, a married man domiciled in Illinois, buys a farm in Texas with separate funds, the income derived from that farm would be community property of H and his wife, even though their domicile at all times remained in Illinois, since the character of income from real estate is determined by the *lex loci rei sitae,* regardless of domicile.[40] This would not apply in the *Joiner* case, however, because oil and gas royalties from separate property are considered payment for a portion of the real estate, and remain separate.[41]

36. Dye v. Dye, 11 Cal. 163 (1858); Depas v. Mayo, 11 Mo. 314 (1848); Joiner v. Joiner 112 S.W.2d 1049 (Tex. Com. App. 1938); Cox v. McClave, 22 S.W.2d 961 (Tex. Civ. App. 1929); Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 S.W. 290 (1902).
37. 112 S.W.2d 1049 (Tex. Com. App. 1938).
38. *Cf.* Heidenheimer v. Loring, 6 Tex. Civ. App. 560, 26 S.W. 99 (1894) (holding that the Texas statutes defining community property apply to Texas real estate owned by nonresidents).
39. Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925). *Contra,* George v. Ransom, 15 Cal. 322, 76 Am. Dec. 490 (1890) (followed by other community property states except Texas and Louisiana, 1 deFuniak, *op. cit. supra* note 8, §71).
40. Skaggs v. Commissioner, 122 F.2d 721 (5th Cir. 1941); Johnson v. Commissioner, 1 T.C. 1041 (1943).
41. Huston v. Colonial Trust Co., 266 S.W. 231 (Tex. Civ. App. 1954) (Texas mineral interest purchased by Pennsylvania resident with separate funds).

The *Restatement*[42] declares that marital-property interests in real property acquired by either or both spouses during coverture are governed by the *situs* of the land, regardless of the marital domicile. Professor Marsh is somewhat hasty in his criticism of the *Restatement* position, saying, "All of the later cases hold that the character of the funds or other property exchanged for the land, and not the law of the *situs,* determines the marital-property characteristics of an immovable acquired by purchase in a nondomiciliary jurisdiction."[43]

Professor Marsh is correct; the *Restatement* is also correct, but neither states the proposition fully. In *Kraemer v. Kraemer,*[44] (cited among many others by Professor Marsh) the court held that realty purchased during coverture with separate funds remains separate *under California law.* Application of the conflict of laws rule of California required the court to look to the law of Illinois where the funds were acquired to determine the character of those funds. Having decided that the money was separate property when acquired in Illinois, the court ruled, in accordance with the California law, that the land was separate because purchased with separate funds, and treated it as it would any other separately owned California real estate. This is as it should be. While it must be conceded that the courts have employed language similar to that of the *Restatement* and Professor Marsh,[45] this results from a shorthand rendition of the courts' reasoning, rather than any hiatus in the reasoning itself, for the results are usually substantially as outlined above.

IV.

After a decree of divorce dissolves the community, there can be, *a fortiori,* no community property, and it is the general rule that where the decree is silent as to the division of the community, the parties thereafter hold undivided half interests as tenants in common.[46] Thereafter they may obtain a partition of the property between them in an action before a court of competent jurisdiction.[47]

An allegation that there was no community property was made by the complainant in *Brown v. Brown,*[48] and the defendant did not appear, although duly served. The decree of divorce recited that all the allegations of the complaint were supported by the evidence and

42. RESTATEMENT, CONFLICT OF LAWS §238 comment a (1934).
43. Marsh, *op. cit. supra,* note 9, at 190.
44. 52 Cal. 302 (1877).
45. *Cf.* Tomaier v. Tomaier, *supra* note 17; Depas v. Mayo, *supra* note 28; Joiner v. Joiner, *supra* note 37.
46. See generally, Annot., 85 A.L.R. 339.
47. Godey v. Godey, 39 Cal. 157 (1870); Whetstone v. Coffey, 48 Tex. 269 (1877).
48. 170 Cal. 1, 147 Pac. 1168 (1915).

were true, although there was no mention of property rights or of community property in the decree. When the defendant later claimed an interest in property alleged to be community, the court held that the judgment had become tantamount to a contract between the parties, and was final as to everything properly before the court, and although silent as to property rights, the decree was *res judicata* on the question of the existence of community property. A decree based on an allegation and admission that there is no community property will operate as an estoppel to the extent of property within the jurisdiction of the court,[49] but where the wife had no actual notice of her husband's Texas divorce suit, in which service was by publication, the court held that the Texas decree, which was silent on the subject of property, merely left the parties as tenants in common, and that the wife could subsequently secure a partition of community property in California.[50]

By statute in California an equal division is not required of the court where a divorce is granted for cruelty or adultery,[51] and the Brown case said, in dicta, that if given for either of those causes, the interests of the parties in the community property left undisposed of by the decree would be subject to the determination of a court of competent jurisdiction in a subsequent action. This proposition has also been held to apply when the divorce is obtained in a foreign jurisdiction upon substituted service, leaving the community property in California undistributed.[52] On the other hand, community property acquired in California and not disposed of by a property settlement agreement between the parties was not affected by a foreign divorce decree, but became the property of the divorced spouses as tenants in common.[53] And where the wife secured a divorce in Maryland in an action in which her husband appeared by his attorney, a California court held in a subsequent divorce action brought by the husband in that state that the property of the parties which had been community became the common property of the parties, and could not be awarded to the husband by the California court.[54]

A Kansas decision held that a decree obtained in Texas which made no reference to the property of the parties was not *res judicata* as to property in Kansas, because the Texas court had had no jurisdiction over such property, although the decree would have foreclosed the

49. Taylor v. Taylor, 192 Cal. 71, 218 Pac. 756, 51 A.L.R. 1074 (1935).
50. Lorraine v. Lorraine, 8 Cal. App. 2d 687, 48 P.2d 48 (1935).
51. CAL. CIV. CODE §146 subdiv. 1, 2.
52. Calhoun v. Calhoun, 81 Cal. App. 2d. 659, 183 P.2d 922 (1947).
53. Stewart v. Shearman, 22 Cal. App. 2d 198, 70 P.2d 702 (1937).
54. Daut v. Daut, 98 Cal. App. 2d 375, 220 P.2d 63 (1950).

Kansas action if the Texas court had in fact had jurisdiction but remained silent on the subject.[55]

The Kentucky case of *Pinkley v. Pinkley*[56] is a curious decision. W brought suit in Kentucky alleging that she and H had been divorced by a California court which decreed that "all of the community property belonging to the plaintiff and defendant be equally divided between them." She also pleaded the California statutes which define community property,[57] and alleged that certain Kentucky real estate bought by the husband in his name during coverture was "purchased by the defendant with money earned by her and the defendant during the marital relationship, . . . " and prayed that the court adjudge her one-half of such real estate. Significantly, the opinion does not state where H and W were domiciled at the time the money so invested was earned—which should have been the controlling factor. The opinion merely states, "The Legislature of California may define what shall be community property in California, but these statutes are of no force in Kentucky . . . Land titles are governed by the law of the forum . . . The lots were not community property under the laws of Kentucky in any sense of the word."

If the parties were domiciled in California when the money was earned, the decision is clearly erroneous, for the wife's vested community interest should not be destroyed simply because the husband transported the funds across state lines.[58] If the domicile was in Kentucky at such time (or some other noncommunity state) the result may be correct, but based on erroneous reasoning, for the court should have looked to the character of the *funds* invested.

Failure to seek a determination of property rights which could or should have been adjudicated in the foreign divorce action may be evidence in a subsequent action at the *situs* of property that the plaintiff in the divorce suit did not consider the property a part of the community, and in the absence of evidence that the law of the foreign jurisdiction in which the divorce was rendered is different from the law of the *situs,* the latter will determine under its own law whether property rights could or should have been litigated.[59]

A pleading that there was no community property was held to be of no binding effect on the plaintiff in *Sidebotham v. Robison,*[60] because it was not personally served on the nonresident defendant. The

55. Cummings v. Cummings, 138 Kan. 359, 26 P.2d 440 (1933).
56. 155 Ky. 203, 159 S.W. 795 (1913).
57. CAL. CIV. CODE §§146, 163, 164, 687.
58. See discussion in Part II, *supra.*
59. Nivens v. Nivens, 129 Cal. App. 2d 150, 256 P.2d 655 (1954).
60. 216 F.2d 816 (9th Cir. 1955).

court relied on the *Brown* case in holding that if the service is personal rather than substituted, it is assumed that the allegation of no community property *induced* nonappearance and a finding based on that pleading is in effect a contract. There, however, the fact that the plaintiff herself filed the complaint alleging no community property was held not controlling in the absence of a showing of prejudice, where the statement was merely a mistake on the part of her attorney. The *Sidebotham* case was distinguished in *Spurr v. Daniels*,[61] in which it was found that the wife, as plaintiff in a foreign divorce action, alleged in her complaint that there was no community property, and her husband, at the request of the wife's attorney, filed an appearance and consent to default, giving the court personal jurisdiction over both parties. An express finding of no community property was made, and in the wife's subsequent suit in California the court held that the foreign court, although without authority to make a decree distributing community real property outside its jurisdiction, nevertheless had jurisdiction over both parties and was competent to adjudicate the non-existence of community property. The wife, having induced her husband to enter a personal appearance in the foreign action, was estopped from denying jurisdiction of the court to pass upon that issue.[62] The husband's failure to bring the question of marital-property rights before the foreign divorce court was held to constitute a waiver of any claim he might have in property in which his wife was interested at the time in *Ross v. Ross*,[63] and the foreign decree was held not to vitiate a later divorce decree obtained by the wife in California, which awarded her as community property land within that state.

When property rights are litigated at the *situs* of the property after a foreign divorce, it has been seen that the type of service, the pleadings before the foreign court, and the language of the decree are all important factors in determining the effect of the decree upon marital-property rights. Needless to say, the foreign divorce must be valid to effect property rights. In a partition suit based on an invalid foreign divorce it was held that because of the failure to prove a valid decree, " . . . the whole fabric of the case collapsed."[64]

61. 152 Cal. App. 2d 867, 313 P.2d 621 (1957).
62. *Accord*, Kirkland v. Greer, 295 Ky. 535, 174 S.W.2d 745 (1943).
63. 79 F. Supp. 716 (S.D. Cal. 1948).
64. Givens v. Givens, 195 S.W. 877, 879 (Tex. Civ. App. 1917).