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Herbert F. Goodrich

University of Michigan Law School

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MATRIMONIAL PROPERTY AND THE CONFLICT OF LAWS*

HERBERT F. GOODRICH **

That marriage made important changes in property rights is well known to anyone acquainted with the position of the married woman at common law. By common law rules, and without any act on the part of the persons concerned other than going through the required marriage ceremony, the husband became the owner of the wife's chattels, acquired an interest in her land and was empowered to reduce to possession her choses in action. While this state of affairs has been changed by legislation, the statutes, passed differ in the thoroughness with which the old rules have been abolished. Moreover in several of our states, as well as in some of the European countries, that form of common ownership by husband and wife known as community property is in force; a system which differs both from the common law scheme and its statutory successor—individual ownership by each spouse of his or her own property, except for statutory rights of dower.

Conflict of Laws questions arise concerning both the property owned by the parties at the time of their marriage and that acquired subsequently thereto. A of Michigan marries B of California. Each has possessions both in and out of the home state. What law determines the rights each acquires by reason of the marriage in the property of the other? Suppose after some years in Michigan, they move to Louisiana and then make further acquisitions. What effect, if any, does the change make in property owned at

* This discussion forms the basis of a chapter in a text book on conflict of laws in preparation by the writer for The West Publishing Co., and appears with the permission of the publishers.

** Professor of Law, University of Michigan.

the time of their removal; by what law are rights in further additions to their wealth to be governed.

The situation will first be discussed on the assumption that the parties have made no express contract with regard to their property.

IMMOVABLES

It is a general rule that all questions concerning the creation of interests in land are governed by the *lex rei sitae*. It is to be expected, then, that the law of the *situs* of the land will determine what, if any, interest one spouse gets in the other's land as an incident to the marriage relation, and such is the law.¹ And the law where the property is situated determines whether it is to be considered as immovable to be governed by the law of the *situs*.²

An important practical limitation of the effect of this rule is shown in a line of decisions of which the Washington case of *Brookman v. Durkee*³ is typical. A husband, domiciled in a common law state, there acquires money which he invests in land in a jurisdiction where the community system of marital property is in force. At common law, the money belongs solely to the husband. Does the wife acquire an interest in the land in the second state? The answer is uniformly in the negative,⁴ even though the land was purchased by the husband with the proceeds of property originally belonging to the wife, title to which he acquired by the marriage under the common law rule.⁵ This is entirely sound, and for the reason generally given; the husband's title is not lost by moving his money across a state line and turning it into some other form of property. The same limitation is effective to protect an interest acquired in a community property state. Thus when a husband wrongfully took funds belonging to the community from Louisiana and invested them in Missouri land, taking title in his own name,

¹ *Nott v. Nott*, 111 La. 1028, 36 So. 109; *Newcomer v. Orem*, 2 Md. 297, 56 Am. Dec. 717; *Vertner v. Humphreys*, 14 S. & M. (Miss.) 130; *Re Majot*, 199 N. Y. 29, 92 N. E. 402, 29 L. R. A. (N. S.) 780; *Heidenheimer v. Loring*, 6 Tex. Civ. App. 560, 26 S. W. 99. In *re DeNicols*, [1900] 2 Ch. Div. 410, applied the French rule to English realty on the basis of a tacit contract. This point receives discussion below. Prior to the statute of 1852, the community property rule was not applied to real property acquired in Louisiana by nonresidents not married there. See *Dohan v. Murdock*, 41 La. Ann. 494, 6 So. 131 and *Conner v. Elliott*, 18 How. 591, 15 L. ed 497. Louisiana law governed, but a different rule was applicable to residents and nonresidents.

² *Newcomer v. Orem*, *supra*; *Vertner v. Humphreys*, *supra*.

³ 46 Wash. 578, 90 Pac. 914, 12 L. R. A. (N. S.) 921, followed in *Witherill v. Fraunfeiler*, 46 Wash. 699, 91 Pac. 1086.

⁴ In addition to the cases in note 3, see *In re Burrow's Estate*, 136 Cal. 113, 68 Pac. 488; *Ellington v. Harris*, 127 Ga. 85, 56 S. E. 134; *Blethen v. Bonner*, 30 Tex. Civ. App. 585, 71 S. W. 290; *Thayer v. Clarke*, 77 S. W. 1050, 81 S. W. 1274.

⁵ *McDaniel v. Hartley*, — Tex. Civ. App. —, 42 S. W. 323.

he was compelled to hold the title in trust to protect the wife's interest.⁶

Whether or not a debt is to be regarded as a separate debt or as a community debt, and thus chargeable to the community land, by the law of the *situs*, depends upon the law where the claim arose, even though it would have been a community debt had it arisen where the land is located.⁷

MOVABLES

In cases where the question concerns other property interests than "immovables," which term is generally equivalent to interests in land,⁸ there must be considered separately the interests which spouses acquire in each other's movable property owned at the time of the marriage, and that subsequently acquired. The rule here is that upon marriage each spouse gets such interest in the movable property then owned by the other as the law of the matrimonial domicile provides, no matter where the property is located at the time.⁹ The place where the marriage occurs is not material.¹⁰ To explain the result by saying that the *lex domicilii* governs because this personal property has no actual location is to state that which is not true in fact. But a sound explanation might well be rested upon the convenience of such a rule. Just as in the case of intestate succession it is less complicated to have the entire personal estate pass according to some one rule, so here it seems convenient to have one test for determining mutual property rights of husband and wife. In the absence of legislative determination to the contrary by the sovereign where the property has its *situs*, one uniform rule, that of the matrimonial domicile, governs.

Marital rights in movable property, it is said, are determined by the law of the matrimonial domicile. What is the matrimonial

⁶ *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88. See *Bonati v. Welsch*, 24 N. Y. 157. In *Smith v. McAtee*, 27 Md. 420, 92 Am. Dec. 641, a married woman, domiciled in Illinois, was left an interest in land in Maryland. The land was sold in court proceedings and the money from the sale ordered held to her sole and separate use. It was held that she was entitled to the protection of the Maryland statute by which the separate property of the wife was not liable for debts of the husband.

⁷ *La Selle v. Woolery*, 11 Wash. 337, 39 Pac. 663; *id.* 14 Wash. 70, 44 Pac. 115; *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736.

⁸ As *Dacey*, 3rd ed. p. 76, states it, immovables are equivalent to realty, with the addition of chattels real or leaseholds; movables are equivalent to personalty, with the omission of chattels real.

⁹ *Mason v. Fuller*, 36 Conn. 160; *Lyon v. Knott*, 26 Miss. 548; *Harral v. Wallis*, 37 N. J. Eq. 458, *affd. sub nom. Harral v. Harral*, 39 N. J. Eq. 279; *Craycroft v. Morehead*, 67 N. C. 422; see also cases cited, note 14. The court evidently lost sight of this rule or refused to apply it in *Locke v. McPherson*, 163 Mo. 493, 63 S. W. 726, 85 Am. St. Rep. 546.

¹⁰ *Harral v. Harral*, 39 N. J. Eq. 279 and cases cited.

domicile? The natural meaning of the term is that it indicates the domicile of the husband at the time of the marriage. This domicile becomes that of the wife, upon marriage, by operation of law. There are authorities which define it differently, however. The matrimonial domicile is said to be the place where the parties intend, at the time of their marriage, to establish their residence, assuming that their intention is carried out within a reasonable time.¹¹ If the previous domicile of the husband is shown, this will be regarded as the matrimonial domicile, it is said, in the absence of any thing showing a contrary intention.¹²

This peculiar innovation in the law of domicile goes back to Mr. Justice Story's work on the Conflict of Laws. He discussed the doctrines of the continental law writers who had made pronouncements upon the subject and concluded, in the absence of common law authority, with a cautious venture that "it is not too much to affirm that a contrary doctrine will scarcely hereafter be established."¹³ Subsequent writers and judges have repeated the language. The conception is contrary to well settled and well established rules of domicile which always require physical presence and intent to establish a home in a place to concur before a domicile of choice can be acquired. It leaves property rights unsettled until the requisite "reasonable time" has elapsed in which the parties can carry out their intention to settle at the place of intended abode. In most of the cases, the "matrimonial domicile" whose law governed marital rights in property was in fact that of the husband at the time of marriage.¹⁴ In the only case found in which it appeared that the intention was to establish a domicile elsewhere, the applicability of the rule was denied.¹⁵ In spite of verbal deference to a wider meaning, it seems safe to say that matrimonial domicile, as the term is actually applied, means the domicile of the husband at the time of the marriage of the parties.¹⁶

The interests thus acquired by one spouse in the property of the other, if a vested property right, continue so far as this property is concerned, even though the domicile of the spouses is subse-

¹¹ 5 R. C. L. 1007; 85 Am. St. Rep. 557, Story, Conflict of Laws, 7th ed. § 186; Wharton, same, 3rd ed., § 190; 57 L. R. A. 360, note.

¹² 57 L. R. A. 360, note.

¹³ Story, 7th ed. §§ 191-199.

¹⁴ In addition to authorities in note 9, see *Jaffray v. McGough*, 83 Ala. 202, 3 So. 594; *Parrett v. Palmer*, 89 Ind. App. 356, 35 N. E. 713; *Townes v. Durbin*, (Ky.) 3 Metc. 352; *Routh v. Routh*, 9 Rob. 224; *Fisher v. Fisher*, 2 La. Ann. 774; *Walker v. Duverger*, 4 La. Ann. 569; *Arendell v. Arendell*, 10 La. Ann. 566; *Mason v. Homer*, 105 Mass. 116; *Kneeland v. Ensley*, (Tenn.) Meigs. 620.

¹⁵ *McIntyre v. Chappell*, 4 Tex. 187. The Louisiana court has, however, been consistent in clear enunciation of the special rule for this particular kind of domicile.

¹⁶ *Accord, Minor, Conflict of Laws*, § 81. See "Matrimonial Domicile," 27 Yale L. Jour. 49, where authorities are fully analyzed.

quently changed to another state.¹⁷ Interesting questions of constitutional law, not yet answered by authority, are raised when an attempt is made by the state where domicile is subsequently acquired by the husband and wife to extend its local rule of marital property to that owned by the parties prior to the acquisition of a domicile therein.¹⁸

Rights in Movables Acquired after Marriage.

Movable property acquired by husband or wife subsequent to the marriage, but while the domicile of the husband at the time of the marriage is still retained, is governed, as to the rights of the spouses, by this law.¹⁹ Suppose they then change their domicile, and acquire more property at their new home. As seen above, the move does not divest rights in property previously acquired. Does the law of the former or the newly acquired domicile govern the respective rights in the property acquired after acquisition of the new home? The point came before the House of Lords in the case of *De Nicols v. Curlier*.²⁰ The husband and wife, citizens of and domiciled in France, married there, without making any express contract about property. Subsequently they came to England where they became domiciled and the husband was naturalized. He became the proprietor of a famous restaurant and amassed a fortune. By the law of France, parties who married

¹⁷ *Jaffray v. McGough*, 83 Ala. 202, 3 So. 594; *Thorn v. Weatherly*, 50 Ark. 237, 7 S. W. 33; *Kraemer v. Kraemer*, 52 Cal. 302; *Lichtenber v. Graham*, 50 Ind. 288; *Cressey v. Tatom*, 9 Ore. 541; *Oliver v. Robertson*, 41 Tex. 422. See *Bond v. Cummings*, 70 Me. 125. These are cases where the right of the husband, vesting under the law of the matrimonial domicile, were recognized in a second state. The same protection is given to a vested interest which a wife has acquired in separate property. *Doss v. Campbell*, 19 Ala. 590; *Parrott v. Nemmo*, 28 Ark. 351; *Grote v. Pace*, 71 Ga. 231; *Fowell v. DeBlaine*, 23 Tex. 66; *Brown v. Daugherty*, 120 Fed. 526. The interest thus to be protected in the second state must have vested in the person seeking its protection. *Lyon v. Knott*, 26 Miss. 548; *Fowell v. DeBlaine*, 23 Tex. 66.

¹⁸ See 10 Calif. L. Rev. 154 discussing the 1917 amendment to § 164 of the California Civil Code.

¹⁹ *Kraemer v. Kraemer*, 52 Cal. 302; *Newcomer v. Orem*, 2 Md. 297, 56 Am. Dec. 717; *Lyon v. Knott*, 26 Miss. 548; *Davis v. Zimmerman*, 67 Pa. 70; *Dacey*, *Conflict of Laws*, 3rd ed., p. 690. Choses in action, as well as tangible chattels are within the rules herein discussed. *Jones v. Aetna Ins. Co.*, 14 Conn. 501; *Frank v. Hirsch*, 3 App. D. C. 491; *Dempster v. Stephen*, 63 Ill. App. 126. In *Graham v. First National Bank*, 84 N. Y. 393, 38 Am. Rep. 528, a bank which had paid, in Virginia, the proper place of payment, dividends on shares of stock in the bank owned by the wife, was held to be discharged from further liability by such payment. The common law prevailed in Virginia, but the husband and wife were domiciled in Maryland. The case does not decide that the husband could keep the money, only that the bank fulfilled its obligation in paying him.

Claims for a personal tort cause difficulty. In *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 27 So. 851, a claim for false imprisonment was held not to be "property acquired within the state," so as to make the community property rule of Louisiana applicable to it. In *Snashall v. Met. R. Co.*, 8 Mackey 399, 10 L. R. A. 746, a claim for personal injury was held not to be property so that the statutory right of action given by Wisconsin where a wife resided would give her the action for injuries sustained in the District of Columbia. The correctness of the decision seems doubtful. A question of procedure, as whether the wife sues alone or must have the husband join is a matter of the *lex fori*. *Texas & P. R. Co. v. Humble*, 181 U. S. 57, 21 Sup. Ct. 526.

²⁰ [1900] A. C. 21.

without express agreement as to property became subject to the system of community of goods.²¹ The husband left a will by which he disposed of the whole estate as if he were the sole owner. The widow claimed her share as of a community and the House of Lords decided in her favor as to the personal chattels. The basis of the decision was a tacit agreement that the community property rule should govern. Since the parties could have expressly contracted as to marital property rights, it was thought that such an express contract was of no superior force as evidencing the agreement "than a known consequence of entering into the marriage status." In further litigation concerning the same estate this decision was followed, notwithstanding the statute of frauds, in determining the marital rights in the English land—and for the same reason, that there was a tacit agreement between the parties that the community of goods rules should govern.²²

There seems great difficulty involved in the position thus taken. To say that the parties contracted with reference to marital rights by accepting the provisions of the law in that respect when they did not in fact make a contract is to say that which is not in accord with the facts. The doctrine assumes a knowledge of the legal effect of marriage which few laymen possess. The addition of the adjective "tacit" brings it no nearer the facts. There are many incidents of the marriage relation, especially when common law doctrines are (or were) in full flower, which it is absurd to pretend are matters of contract between the parties. The husband's authority to discipline the wife may serve as an instance. The tacit contract explanation is not applied in other situations where it would be as appropriate as in determining marital property rights. If one dies without a will, we do not say he tacitly accepted the statute of distributions, but that the statute governs because he in fact died intestate. If one commits a battery upon another, his liability to pay damages is not a matter of contract, tacit or otherwise, but a legal obligation imposed regardless of his consent. It seems more accurate to say that rights in marital property are given by the law as an incident of the marriage relation. It must be stated, however, that the tacit contract

²¹ Elaboration of this system of ownership is outside the scope of this discussion. For notes on various phases, see 24 Harv. L. Rev. 652; 11 Col. L. Rev. 668; 10 Calif. L. R. 154. On its theory, see discussions in 35 Harv. L. Rev. 47; and in general, Ballinger on Community Property.

²² *In re de Nicols*, [1900] 2 Ch. Div. 410.

theory, as applied to marital property, has found favor with some authorities.²³

De Nicols v. Curlier has been explained on the ground that it proceeded solely on the finding that the settlement made by the French law must be deemed equivalent to an express contract to adopt it. Since the foreign law was only found as a fact, "it may in the future fail to be shown even for France; and certainly it may fail to be shown in the case of other countries."²⁴ And the last edition of Dicey²⁵ states the English rule to be that where there is no marriage contract and where there is a subsequent change of domicile, "the rights of husband and wife to each other's movables are governed by the law of the new domicile."

The American cases are quite uniform in holding that the law of the domicile at the time the property is acquired governs, not that of the original matrimonial domicile nor of any intermediate domicile.²⁶ Even if there were a tacit contract, it is said in a leading case, it would still be controlled by the positive laws of the country into which the parties might remove.²⁷

The language used in the cases is that the law of the domicile governs. This ignores the effect of a different rule where the property is actually located when acquired. In most of the cases the point is not raised; either the *situs* of the property was the domicile of the parties or no difference in the laws of the two was shown. But the domiciliary law has been applied where it differed from the law of the *situs*.²⁸ The correctness of the result must depend upon some other reason than the outworn fiction that personal property has no location apart from its owner. That it does have an independent *situs* is recognized in many other situations. It may well be, however, that it is convenient to have subsequent acquisitions governed by a single rule for ownership, just as one rule applies to the acquisitions of marital rights of property owned at the time of the marriage, regardless of its location. A

²³ See Story, *Conflict of Laws*, 7th ed., § 147 *et seq.* (but compare § 190); Wharton, § 190; Westlake, *Private International Law*, 5th ed., 74 *et seq.*

²⁴ *Baty*, *Polarized Law*, 96.

²⁵ *Conflict of Laws*, 3rd ed. p. 691.

²⁶ *Birmingham Water Works Co. v. Hume*, 121 Ala. 168, 25 So. 806; *Saul v. His Creditors*, 5 Martin (N. S.) 569, 16 Am. Dec. 212, *Lorenzen's Cas.* —; *Hicks v. Pope*, 8 La. 554, 28 Am. Dec. 142; *Muus v. Muus*, 29 Minn. 115; *Re Majot*, 199 N. Y. 29, 92 N. E. 402, 29 L. R. A. (N. S.) 780 (see comment in 10 Col. L. Rev. 147); *McCollum v. Smith*, (Tenn.) Meigs 342, 33 Am. Dec. 147; *Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277.

²⁷ *Saul v. His Creditors*, *supra*.

²⁸ *Hicks v. Pope*, 8 La. 554, 25 Am. Dec. 142; *Pearle v. Hansborough*, 9 Humph. (Tenn.) 426; *Edrington v. Mayfield*, 5 Tex. 363. But see language in *Shumway v. Leakey*, 67 Cal. 458, 8 Pac. 12

statute could presumably change the rule so as to make its local laws applicable to all property within its borders.²⁹

Effect of Express Contract.

Cases involving the effect of contracts on marital property rights are not numerous in the American reports, due probably to the comparative infrequency of such transactions in this country. The contract, if valid by the proper law,³⁰ will be held valid everywhere, and will govern the rights of the parties, unless for some reason it stands prohibited by the law where it is sought to be enforced.³¹ Story's statement to this effect³² has been the subject of frequent judicial citation.³³ The effect of the agreement in creating an interest in foreign land will, following the usual rule, be governed by the *lex rei sitae*.³⁴

Some apparent difficulty arises in the decisions where the property concerned is acquired subsequently to the contract in another jurisdiction than the matrimonial domicile, especially if at the time of acquisition the parties have acquired a new domicile. If the agreement, to use the language of Story, "speaks fully to the very point."³⁵ it will govern subsequent acquisitions as well as property owned at the time of the marriage. Whether the contract is broad enough to include such property seems nothing more than a problem of interpretation—the determination of the intent of the parties from the language they have used and the

²⁹ See *Texas & P. R. Co. v. Humble*, 131 U. S. 57, 21 Sup. Ct. 526. For the Louisiana rule, see *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 27 So. 351.

³⁰ This would seem to be governed by the same rules that determined the validity of any other contract, a subject on which the authorities are in confusion. In *Decouche v. Savetier*, 3 Johns. Ch. 190, 8 Am. Dec. 478 it was said to be the *lex loci contractus* which governed. See cases collected in 57 L. R. A. 368 for this phase of the matter.

³¹ See *Dacey, Conflict of Laws*, 3rd. ed. 685 et seq. The cases cited in following notes all expressly declare the proposition or assume it as a starting point. In *Caruth v. Caruth*, 123 Ia. 121, — N. W. — husband and wife made a contract in Illinois which was apparently valid there. The husband died domiciled in Iowa, leaving personal property. An Iowa statute declared that neither spouse had such interest in the property of the other as could be the subject of a contract between them. This the court said was in effect a statute of descent and distribution so that in spite of a contract excluding her the widow could claim her statutory share in the husband's estate.

³² *Story on Conflict of Laws*, § 143 and § 184. Story goes on to say that such contract "will act directly on movable property everywhere. But as to immovable property in a foreign territory, it will at most confer only a right of action, to be enforced according to the jurisprudence *rei sitae*." Reason or authority for this distinction is not given, nor does it seem to be discussed in the cases. It seems difficult to see how in case of either type of property more than an enforceable claim arises. See 13 Harv. L. Rev. 601.

³³ *Long v. Hess*, 154 Ill. 482, 40 N. E. 335; *Kleb v. Kleb*, 70 N. J. Eq. 305, 62 Atl. 396, affirmed in 71 N. J. Eq. 787, 65 Atl. 1118; *Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277; *Fuss v. Fuss*, 24 Wis. 356, 1 Am. Rep. 180.

³⁴ *Heine v. Mechanics & Traders Ins. Co.*, 45 La. Ann. 770, 13 So. 1; *Richardson v. De Giverville*, 107 Mo. 422, 17 S. W. 974.

³⁵ *Conflict of Laws*, § 143.

circumstances under which the transaction was entered into.³⁶ In several of the cases there seems a marked disinclination to hold subsequently acquired foreign property, especially land, within the scope of the agreement,³⁷ though more recent authority rejects the notion that such property must be specifically mentioned in order to be affected by the contract.³⁸

³⁶ Thus in *Le Breton v. Miles*, 8 Paige 261, the contract though made in New York was expressed in the French language between persons who declared their intention to live in France. It provided for a form of marital property ownership well known to the French law. In saying that the contract was governed by the law of France the court surely meant no more than that it would look to French law to see what the parties were endeavoring to effect by their agreement. The same may be said of *Mueller v. Mueller*, 127 Ala. 356, 28 So. 465. See also *McLeod v. Board*, 30 Tex. 238, 94 Am. Dec. 301.

³⁷ *Besse v. Pellochoux*, 73 Ill. 285, 24 Am. Rep. 242; *Long v. Hess*, 154 Ill. 482, 40 N. E. 335; *Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277 (here the court is obviously misled by the analogies from the "tacit contract" doctrine); *Fuss v. Fuss*, 24 Wis. 356, 1 Am. Rep. 180. But cf. *Scheferling v. Huffman*, 4 Oh. St. 241, 62 Am. Dec. 281.

³⁸ *Kleb v. Kleb*, *supra*, note 33, and see *Scherferling v. Huffman*, *supra*, note 37..