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REVIEW

COMMUNITY PROPERTY LAW

Harry M. Cross*

PRINCIPLES OF COMMUNITY PROPERTY. By William Q. deFuniak and Michael J. Vaughn. Tucson: The University of Arizona Press, 2d ed., 1971. Pp. 556. \$28.50.

The original edition of this work was published in 1943 in two volumes. Only the first has been revised. Volume Two of the 1943 edition contains background material, particularly the Spanish sources, and is still essential to the full utility of the work. This review first summarizes the subjects covered in the revised edition and then examines certain areas more specifically in analyzing the usefulness of the work.

The text is an exposition of the community property principles of the Spanish law. The rules of American states with community property systems are identified and compared with Spanish law. In the introductory chapter Professor deFuniak asserts that a failure to resort to primary sources has resulted in a mixture of common law principles with previous case law and has led to some unfortunate and confusing rules. He urges that when it is observed that an earlier decision or approach is erroneous, the error should be abandoned and a proper course taken. This theme appears throughout the text.

The discussion in chapter two on the origin and extent of community property indicates that the system evolved from the economics of husband-wife relationships in which both spouses contribute significantly to property acquisitions. Additional historical background of the Spanish and various American community property laws comprises the next two chapters, followed by a chapter examining solutions to property problems of unmarried persons who live together either innocently or illicitly.

Chapter six, "Community and Separate Property," covers acquisi-

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tion and characterization problems. The fundamental distinction between onerous and lucrative titles is frequently noted. Also noted is the fact that the mechanics of a transfer—a devise, for example—do not preclude the existence of an onerous acquisition. The overlap situations, acquisitions partly while married and partly while unmarried, are explored in this chapter, as are such areas of growing importance as pensions and unemployment insurance. The specialized separate-community source complication of a change of domicile is included with a recognition of California's useful "quasi-community" property solution.

Problems of mixed sources are also analyzed in chapter six. Although rents, issues and profits of separate property are community property under Spanish law, in some American states they are separate. Other mixed source problems include the product of a spouse's labor (community property) on a separate asset.¹

The Spanish law concept of full equal ownership of the wife, with fiduciary management in the husband for convenience, and misconceptions by some American courts are the principal topics of chapter seven. Details of the variations among the American states and the Spanish rules tending toward an ultimate balancing of the respective shares at dissolution are included. Chapter eight elaborates on the Spanish law freedom of the spouses to contract with each other and points out the sometimes insufficient realization, by critics, of this aspect of the law. Chapter nine covers debts, obligations and liabilities of the spouses, and chapter ten examines the dissolution of the marital community. Finally, chapter eleven presents a brief discussion of taxation.

The second edition of the principal text of Professor deFuniak's work is probably of some greater use to the practicing attorney than was the 1943 edition. There are more references to state laws and a more extensive discussion of state rules. The discussion is still generally sketchy. Positions of particular courts are sometimes projected from minimal authority which other cases in the same jurisdiction will not support. Hence, some care is needed in using the statements of

1. The text reveals an uncertainty in the analysis of this problem. Usually there is a community property right, but is it an equitable lien only, a right to reimbursement only, or a right to reimbursement protected by an equitable lien? Is the right measured by the amount of the contribution or by the value of the improvement made by the contribution?

local authority. For the most part, the discussion is reasonably clear and certainly interesting. The internal organization of the text is good. Discussion of general community property problems can easily be found either directly or through the usually adequate cross-references. The work is interesting and useful as a framework or background, and presents a good analytical method for measuring the community property law of the eight American states which have adopted that system. Professor deFuniak recognizes that much of the development of the community property law in these states does not fit the pattern of the Spanish principles. Both editions reflect his hope that the further development of the law will give adequate recognition to and be molded by those fundamental principles. Unfortunately, the first edition was published too late to have much effect on the development of the local rules, and this new restatement is, of course, even more years too late.² The author's exhortation to return to the basic principles of Spanish law is of questionable value. It may be that an understanding of the principles of the background of Spanish law can still help mold the local community property law so that there will be greater harmony of rules than would otherwise develop, but certainly the practice of referring to earlier case law in developing a new application of that earlier law makes a fundamental analysis of the Spanish writers unlikely. There is the further difficulty that the works of other, earlier authors were prepared on the assumption that common law principles should be applied in formulating the answers to problems which arose.³ Thus the thrust of authority developed prior to the appearance of deFuniak's first edition runs against the goal he believes to be sound. If the primary result to be sought is compatibility or identity with the Spanish law principles in the local community property law, his exhortation would be appropriate and required, but there is something to be said for some continuity in local results even though there may be some inconsistencies which may ultimately have to be resolved when conflicting lines of authority merge. Also, it is unlikely that a

2. This is not to say that the work has been without any influence. For example, in Washington the first edition had a substantial impact in an area of some importance when the court concluded that a gift to both husband and wife resulted in a community property holding by them. *In re Salvini's Estate*, 65 Wn.2d 442, 397 P.2d 811 (1964). This result was reached despite the separate property statutes which, narrowly read, would seem to dictate a co-ownership of separate property. WASH. REV. CODE §§ 26.16.010, .020 (1959).

3. G. MCKAY, *COMMUNITY PROPERTY* (2d ed. 1925).

general reorganization of adopted rules in a particular jurisdiction will occur merely because of the academic preferability of a "proper" analysis on the basis of the fundamental background.

The discussion of Washington law presents some particular difficulties. For example, in the discussion of combined income problems in chapter six, the authors, I believe, misstate the effect of recent Washington cases when they conclude that the separate income all becomes community property as a practical matter on the basis of the community property presumption involved in the commingling rule. *Hamlin v. Merlino*,⁴ which is cited, reached an opposite result. It is probably correct to say that the preference for community property, reflected in putting the burden of proof on the proponent of the separate character of the asset onerously acquired, may result as a practical matter in approaching the Spanish view that rents, issues and profits will be community property. The editors do say this. But the additional thrust of their comment seems not to identify the Washington position carefully enough.

Projections from earlier Washington credit acquisition cases reflect an oversimplification of the rules of this state and perhaps are flatly wrong. There is also some doubt as to whether the analysis of the California cases is complete enough. In this section, too, the discussion does not come through clearly as being either an assertion of what the rule should be on the basis of the Spanish law prototype or an attempt to analyze and correctly reflect the law in the particular jurisdiction under discussion. This confusion may well be removable by careful and close reading but I think a better presentation of the ideas of the section would have prevented this doubt from arising.

The rules with regard to property acquisitions by unmarried individuals, developed in the respective American states, are stated adequately, except to the extent that the propositions may be based upon only a case or two in each instance. The Washington positions were not significantly weakened by the brief statement. Perhaps this is also true for other jurisdictions. The problem areas are identified in chapter six, and the case law of any particular jurisdiction can probably be found.

4. 44 Wn.2d 851, 272 P.2d 125 (1954).

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It is difficult to reflect the most recent rules in several jurisdictions in any work such as this. The weakness of relying on partial information appears in a statement in §124 concerning prosecution of civil actions. The authors assert that the wife is the one who sues when she has the management, because R.C.W. 26.16.130⁵ gives her the power to manage and control her earnings and to maintain an action in her own name. The statute appears to do this, but the Washington court has not found the statute to have as much force as the authors suggest. In *Abbott v. Wetherby*,⁶ the court concluded the statute only related to the wife's separate property. On the other hand the authors did correctly point out that the identification of the spouse to be involved in the litigation depends upon the managing position of that spouse.

Although much of the preceding comment is disapproving or critical I find myself still unclear as to the utility of the work. Certainly this edition's additional citation of case and other law of the American jurisdictions, expanded discussion of the rules developed in the American states, and identification of positions taken or cases decided since 1943 are all helpful and can be matters of importance to a lawyer at this time. I remain skeptical about the likelihood of the study having a major impact on the development of the rules in most of the American jurisdictions, or at least in those in which many or most of the major problems have already been resolved in decisions which fix the probable course of later developments. If the earlier decisions are compatible with the Spanish principles, this work may play a very large part in keeping the law of that particular jurisdiction in harmony with the fundamental principles the writers identify, but it can have only limited effect in being a guide in other jurisdictions where the "common law mistake" is largely established now. Washington would appear to be substantially in the latter category, although certainly there are large parts of the Washington law which do fit the Spanish principles, perhaps by happenstance. The incompleteness of the identification of local law is a weakness in the book from the standpoint of the typical practicing attorney, but that weakness is not so great that the work has no utility. Certainly, in cases which might go on appeal, some understanding of the Spanish principles and the extent to which the local law accords with them can be important. In substance, I think the work

5. WASH. REV. CODE § 26.16.130 (1959).

6. 6 Wash. 507, 33 P. 1070 (1893).

is one which should not be overlooked by the lawyer confronted with a new problem within his jurisdiction, or by the one who might hope to persuade the court that a previous position ought to be modified. How useful such a work is for the lawyer in his day-to-day practice is a question only he can answer.