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Community Property Trend

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THE COMMUNITY PROPERTY TREND

The present trend toward the adoption by former common law states of community property law to govern marital property rights may be accounted for in two words—"tax advantages." However, if I stopped short at this point, I would undoubtedly forfeit my standing as a professor of law.

This is not the first trend or movement toward the adoption of community property law to govern marital property rights. The first movement may be placed, roughly, at one hundred years ago. At that time our territorial expansion encompassed the acquisition of the Louisiana Purchase, the Floridas, the accession of Texas, and the acquisition of a vast region from Mexico. Americans moving into the settled portions of these regions found existent there a law of marital property very different from that comprised in the English common law. Under the latter law, the wife had little or no proprietary capacity and her legal position was little more than that of a chattel of the husband. In the legal system unfolded to view in these new regions, the wife could not only own separate property but retained its management. Moreover, marriage itself was viewed as a form of partnership, with the wife having the status of a partner entitled to share equally in the gains and acquisitions of the marital partnership.[1]

The Americans first coming into these settled regions responded favorably to this viewpoint. It seems undoubted that there was at that time a growing dissatisfaction with the English common law viewpoint as to the status of married women; [2] a dissatisfaction that, even in the so-called

1 See generally, DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY c. IV (1943).

2 According to MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW, Columbia Univ. Press, pp. 126-200, the strict English common law concept did not prevail in this country and the married woman's position was always much superior to that of her English sister. This is arguable. See, e. g., BURGE, COLONIAL AND FOREIGN LAWS, 567-598.

common law states, has gradually seen the enactment of various Married Women's Property Acts.[3] Moreover, in those days, the wife who accompanied her husband to these new regions bore equally with him the dangers and burdens in migrating to and settling in a new country. This influenced the newcomers in the continuation of the existing law which treated the wife as an equal partner and an equal owner in the gains and acquisitions of the married state, as giving the wife her just dues. Accordingly, not only do we find the continuation of the existing community property or community partnership law in the more settled regions, such as Texas, New Mexico and California, but we find such law voluntarily chosen by American settlers in hitherto unsettled portions, such as the territory comprising the present states of Nevada, Washington and Idaho, as preferable to the English common law relating to marital property.[4] There seems also to have been an abortive attempt to adopt the community property law in Montana.[5]

In almost all other respects in these regions the Americans enacted the English common law as the rule of decision. The deliberate exception in the case of marital property was due to the recognition of the more progressive and more just viewpoint of the civil law.[6]

At the time of the adoption of the constitutional amendment permitting the federal government to levy income taxes, the community property law had been established for years in eight of our states.[7] In the other states, the disabilities of

3 Generally, see 3 VERNIER, AMERICAN FAMILY LAWS § 178 (1935).

4 DE FUNIAK, *op. cit. supra* note 1, c. IV.

5 Chadwick v. Tatem, 9 Mont. 370, 23 Pac. 729 (1890); BALLARD, REAL PROPERTY, 83.

6 "In California, as in Texas, the common law is the general rule of decision, but in both states the law regulating the mutual property rights of married persons is radically different from that law. . . .". Schneider v. Schneider, 183 Cal. 335, 191 Pac. 533, 11 A. L. R. 1386 (1920). Similarly, see Nixon V. Brown, 46 Nev. 439, 214 Pac. 524 (1923); Laughlin v. Laughlin, 49 N. M. 20, 155 P. (2d) 1010 (1945); Lee v. Lee, 112 Tex. 392, 247 S. W. 828 (1923).

7 Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

the English common law imposed on married women had been modified by the various Married Women's Property Acts, already referred to, to the extent that married women could hold title to and manage separate property. However, so far as her position in the marriage was concerned she was legally subservient to the husband and did not have the legal status of a partner in the marriage. Her contribution to the success of the marriage and the maintenance and care of the home and family did not entitle her to share as a partner in the earnings and gains of the marriage. Her rights were, at the most, that she should be adequately clothed, housed and fed.

The advent of the federal income tax brought out the fact that in the community property states the spouses were equal owners of income and earnings, no matter by which spouse acquired. The spouses were and, of course, still are entitled to file separate returns, dividing the income equally between them and thus frequently escape the higher tax brackets.[8] The husband in the common law state, earning the same amount of money as his brother in a community property state, cannot avail himself of this division. Consequently, he finds himself paying a higher rate of income tax, although the difference for the average person has been greatly exaggerated for propaganda purposes. For instance, offering myself as an illustrative guinea pig, my wife and I have paid a tax on my earnings for 1947 of $1066. If I had lived in a common law state, the tax would have been $26 higher. This certainly offers very little to warrant sending my common law neighbor into dithers of indignation over my "favored" position.

However, the fact that there is a tax advantage possessed by spouses in community property states has fed the flames of controversy for some years. The legal periodicals and tax magazines have been filled for years with articles on this

8 See MERTENS, LAW OF FEDERAL INCOME TAXATION, c. 19 (1942).

situation, some calm and analytical, some indignant, some anguished. The discussion has more recently been carried into the periodicals read by the general public, such as the Saturday Evening Post [9] and the American Magazine.[10] Periodic attempts have been made in Congress to find some method of equalizing the situation for spouses in the common law states. In the face of repeated failures to accomplish such equalization—whatever the reasons therefor [11]—several of the common law states have become impatient and taken the matter into their own hands. They have begun to enact community property laws which would entitle their citizens to the same tax advantages enjoyed by spouses in the old community property states (like paying $1066 instead of $1092).

The states which have adopted community property in recent years and the dates thereof, I have discussed at another place.[12] But to repeat briefly, the first was Oklahoma in 1939, which then enacted a new law in 1945, upon the first law being found unsuccessful to accomplish the desired purpose. Hawaii also adopted community property in 1945 and Oregon joined the fold in the early part of 1947. Oregon, like Oklahoma, had previously experimented unsuccessfully with an act in force from 1943 to 1945. It is easy to recognize that Oklahoma and Oregon, bounded by community property states, had been at a definite disadvantage, for much wealth was moving across their borders to the more favored regions close by. In a sort of act of economic self-defense, as well as for the tax advantages, those two states

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9 Robert M. Yoder, *How Nine States Beat the Income Tax,* Saturday Evening Post, May 24, 1947.

10 Sen. McClellan (D. Ark), *Our Unfair Income Taxes,* American Magazine, p. 36, Jan. 1948.

11 In the past, representatives of the community property states have frequently opposed such equalization. This is not true at the moment, according to my information.

12 de Funiak, *The New Community Property Jurisdiction,* 22 TULANE L. REV. 264 (1947).

found it necessary to take action.[13] The competition from neighboring community property states has not existed in the cases of Michigan, Nebraska and Pennsylvania, to the same extent as in the case of Oklahoma and Oregon, but those states also enacted community property laws in 1947. That of Pennsylvania was shortly afterward declared unconstitutional and invalid by the state supreme court.[14]

Efforts to enact community property legislation were unsuccessful in several other states, notably in Indiana and Massachusetts. In still others there was concerted agitation to enact community property laws, but the agitation did not reach the point of submission of a bill in the legislature.

At the moment that this is written, in early 1948, the trend toward enactment of community property laws in common law states may be described as momentarily marking time. The present Congress is considering the enactment of a tax bill which will include a provision allowing spouses in common law states to figure their tax rate on the same basis as spouses in community property states. It is not an extension of community property to all states, as it has sometimes been erroneously described. If the bill is enacted with this provision, it is undoubted that the present trend or movement will come to a halt, inasmuch as its momentum depends upon obtaining tax benefits and only on that. The married women in these states have not yet sufficiently recognized the general advantages to them, apparently, to bring them to insistence upon enactment of community property laws, tax benefits or no tax benefits.

Another result of such Congressional enactment may well be the repeal of community property laws in those states which have recently enacted such laws. If they do so, they

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13 See Daggett, *The Oklahoma Community Property Act—A Comparative Study*, 2 LA. L. REV. 575, 576 (1940); Randolph, *Oklahoma Community Property Act of 1939*, 10 OKLA. ST. B. J. 850 (1940).

14 Willcox v. Penn Mut. Life Ins. Co., ...Pa....., 55 A. (2d) 521 (1947). (This case is reviewed at page 384.—*The Editor.*)

will not be through with community property, however. Having had it for a period, no matter how brief, they will find themselves plagued with litigation for the next fifty years, growing out of the existence of such property or the origination of such property during the period of the existence of the community property acts.

If for any reason, the present Congress does not include such an equalizing provision in its tax bill, or if the tax bill does not become law, it is probable that several more common law states will promptly enact community property laws in order to obtain the tax reductions they have been so long honing for. New York, according to the New York Times, will perhaps be one of these states. And, according to information I have received, the trend may invade Kentucky.

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