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A REVIEW IN BRIEF OF PRINCIPLES OF COMMUNITY PROPERTY.*

By William Q. de Funiak†

At periodic intervals there blossom out in the law reviews and journals articles on the community property system. In my investigation of these articles during the past year, necessitated by the work I have been engaged upon, I have found dozen after dozen. Unfortunately, of this vast number, only a limited few by certain writers show a high technical ability and extended research or a first hand knowledge of the civil law from which community of property springs. Among some of those which are worthy of examination are those by Judge Lobinger, John Vance, Walter Loewy, Harrnett Daggett, W. O. Hue, Alvin E. Evans, M. R. Kirkwood, to name but a few.1 But as numerous as the excellent writers are, the mediocre writers far outnumber them. And by mediocre, I mean those without a clear understanding of the basic principles of community of property. Indeed, if it were not because of this regrettable lack of comprehension of so many writers as to the basic principles, I should hesitate to add one more article to the great number already written on the subject. But a re-survey of some of the basic principles may not be amiss, especially in view of questions of taxation of community property.2

By community property I mean, of course, that property owned in common by husband and wife during marriage. A

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2 Reference to the Index to Legal Periodicals, under the head "Husband and Wife", will make available numerous articles.

1Citations throughout are made to Matienzo, Commentaria (1580), Azevedo, Commentarium Jurs Civilis in Hispanae Regis (1597); Gutierrez, Practicarum Quaestionum (1606); Llamas y Molina, Commentario Critico-Juridico Literal a las 83 Leyes de Toro (1827); Asso and Manuel, Instituciones del Derecho Civil de Castilla (1771); Schmidt, Civil Law of Spain and Mexico (1851); Sala, Novísimo Sala Mexicano (1870); Febrero, Librería de Escribanos (1828), etc.
common development of the law of the civil law countries, although having no origin in the Roman law but coming rather from the Celtic and Germanic races, it exists in various forms. As it existed in Spain, from which comes the community property system of several of our states, it was a form of joint and equal ownership by husband and wife of all earnings and gains by either or both spouses during marriage. But by earnings and gains was meant that property acquired by "onerous title," that is, by the industry and labor of the spouses. It did not include property which was received by one spouse alone by reason of gift, inheritance, devise or bequest.

Nor did the community property include the property which either spouse had separately owned before marriage. That property continued to remain the separate property of the spouse owning it, even after marriage, regardless of whether the spouse was the husband or the wife. Nor in the case of the wife's separate property, did such separate property of hers in any way come under the husband's management and control, unless she expressly wished it to. In other words, even after

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3 See Brissaud, History of French Private Law; Huebner, History of Germanic Private Law; Burge, Colonial and Foreign Law.

4 In the Roman-Dutch community property system, carried from the Netherlands to South Africa, all property owned before marriage as well as any acquired after marriage, from whatever source, goes into the common fund. See Lee, Roman-Dutch Law.

5 Introduced into Spain by the Visigoths, it is found as early as 693 A.D. in the code Forum Judicium or Fuero Juzgo. It appears also in the Law of the Westgoths, according to the Manuscript of Aeskil, circa 1200 A.D.

6 It was well established, of course, in such states as Louisiana, Texas, New Mexico and California, at the time of their acquisition by the United States.

7 See Escriche, Diccionario, "Oneroso" and "Bienes Gananciales."

8 "Everythung that the husband and the wife may earn or pur-chase during union, let them both have it by halves; and if it is a gift from the king or other person, and given to both, let husband and wife have it; and if given to one, let that one alone have it to whom it may have been given." Nueva Recopilacion of 1567, Book 5, Title 9, Law 2; Novisima Recopilacion of 1805, Book 10, Title 4, Law 1.

9 "A wife can have property of three kinds, dowry, paraphernalia, and separate property of which the husband has not the right of administration. To this you should add a fourth kind, viz., property acquired during marriage (as by gift)." Matienzo, Gloss III to Law 11, Title 9, Book 5, Nueva Recopilacion. See also Schmidt, Civil Law of Spain and Mexico.
marriage her separate property remained subject to her own administrative control and in her own hands.10

The fact was that in the Spanish law of marital community of property, the wife was considered an individual in her own right, just as the husband was in his. Marriage did not merge her individuality into that of the husband, and make her the mere shadow of the husband as has been the case in the English, and the English-derived, common law. As far back as the Spanish code, Las Siete Partidas, of the year 1263, the right of husband or wife to bring action against the other spouse was authorized in order that property rights and interests of one might be protected from wrongs or injuries by the other spouse.11 And while the wife was required to have the consent of the husband to the making of any contracts or the institution of legal actions, this was a formality, for the codes provided that if the husband refused such consent or was absent, she might apply to the court for any necessary sanction.12 Indeed, if any contract into which she entered benefited or profited her, it was considered a perfectly valid contract, whether or not the husband had given his formal consent.13 And if she was engaged in the operation of a business of her own or held a public office, she could contract freely in regard thereto, without any necessity of formal consent from the husband.14

10 The wife is accustomed to bring beside her dowry other property which is called paraphernalia and which are the property and things whether personal or real which wives retain as their separate property and which are not considered part of the dowry. From this definition it follows that if the wife turns this property over to the husband with the intention that he may administer it, he shall possess it during marriage; if she should not do this expressly in writing, the administration of such property will always remain in the wife.” Asso and Manuel, Book I, Title VII, Cap. 2. “Where they (i.e., the wife’s separate properties) are not specifically given to the husband and it was not the intent of the wife that he should have the administration of them, she always retains their ownership; and the same rule is applicable whenever there is doubt as to whether she gave them to him or not.” Las Siete Partidas of 1263, Part 4, Title 11, Law 17.

11 Las Siete Partidas, Part 3, Title 2, Law 5. And Azevedo pointed out that where property of the wife is spoken of, it means her share of the community property during the marriage as well as her separate property, since the word property denotes, in law, that which is owned.

12 Asso and Manuel, Instituciones del derecho Civil de Castilla; Schmidt, Civil Law of Spain and Mexico.

13 Llamas y Molina, Commentaries.

14 Schmidt, Civil Law of Spain and Mexico.
In respect of the community property itself, the administration thereof was placed in the hands of the husband. This has caused the greatest misunderstanding among our judges and lawyers. For having been trained in the common law, they tend to picture this administrative control in terms of the control which a husband exercised over the wife’s property at common law. Following the concepts of the common law, they seem to feel, only too frequently, that this means that in the community property system, the husband can use the community property solely for his own benefit and enjoyment. But such is far from the case. The husband is only administrator of the community property, subject to all the fiduciary obligations of any administrator. This was the principle of the Spanish system in Spain and Mexico and properly continues to be the principle of that system in force in our American states. The husband cannot alienate or otherwise administer the community property in fraud of or to the prejudice of the rights of the wife. So soon as he attempts to use the community property entirely for his own benefit or enjoyment, he is acting in fraud of or to the prejudice of her rights, and she is immediately entitled to enforce her rights in the property most vigorously. She may maintain an action against him or against anyone who has par-

35 Note that although the husband is permitted to alienate property acquired during marriage, it must be understood that he must not alienate with wrongful intent or in fraud of the wife. In no case whatsoever may an administrator who has full powers commit any act with wrongful intent; if such acts are committed they do not bind the owner.” Matienzo, Gloss VII to Law 5, Tit. 9, Bk. 5, Nueva Recopilacion. “The husband alone administers the property of the conjugal partnership during the existence of the marriage, and he can sell and dispose of the same as he thinks proper, provided he always do so without the intention of injuring his wife. The husband is liable for deteriorations which happen through his fault to the property of his wife.” Schmidt, Civil Law of Spain and Mexico. Alienation in fraud of the wife “is not allowed and no one is permitted to be guided by wrongful intent. Nor is anyone who has full and general power of administration allowed to do anything with wrongful intent; if he does so he will not bind the owner.” Azevedo, No. 10 to Law 5, Nueva Recopilacion.


37 See note 15, supra; and Manresa in his Comentarios al Codigo Civil Espanol, points out that the wife’s ownership is passive only so long as the husband administers properly and that the minute he fails to do so, the wife’s rights give rise to most vigorous action on her part.
ticipated with him in such wrongful use of the property or against both of them together.\(^{18}\)

So long only as the husband was administering the property honestly and efficiently was he entitled to continue such administration without interruption. Even then, the wife had sufficient voice to object to any plan of action and specify that she was not to take part in the projected transaction either as to sharing the profits or bearing the burdens.\(^{19}\) And upon the absence of the husband from home or upon showing his incapacity, she might have herself substituted as administrator of the community property\(^{20}\)

Much has been attempted to be made of the argument sometimes advanced that the wife did not actually own half of the community property but had only a sort of an expectant interest which became vested in her upon the husband’s death. This was most definitely not true, and is now well recognized in all our community property states.\(^{21}\) Such beliefs are again influenced by common law concepts as to dower rights and the husband’s “control” at the common law. The California courts, alone of those of our community property states, for some time consistently maintained that the wife did not have an actual ownership of half the community property during marriage but had only an expectant interest which she took as an “heir” upon the husband’s death.\(^{22}\) In so holding, the California court professed to be applying the Spanish-Mexican law of community property, and did so in the very face of the pronouncements of that law that the wife did not take as an heir upon her husband’s death but already owned her half of the property during marriage.\(^{23}\)

\(^{18}\) See notes 11, 17, supra; see also Chavez v. McKnight, 1 N.M. 147 (1857), Kashaw v. Kashaw, 3 Cal. 312 (1853).

\(^{19}\) “This rule may also be understood to apply even in cases where the wife during marriage renounces her right to profits either generally or specially as where she says that she does not wish to share a building purchased by her husband or a lease of state revenues taken by him; an agreement to that effect is valid.” Matienzo, Gloss I to Law 9, Title 9, Book 5.

\(^{20}\) Asso and Manuel, Institutes del derecho Civil de Castilla; Schmidt, Civil Law of Spain and Mexico.


\(^{23}\) Moreover a wife receives her half of the community property as her own by virtue of our law and similar enactments, and as
The fact was that whichever of the spouses acquired the property during the marriage, by operation of law automatically and without the necessity of any delivery, the other spouse immediately owned and possessed half of such acquisition. This did not result from contract or the liberality of the spouse earning or acquiring the property, but by operation of law itself.

Somewhat similarly with us, earnings or acquisitions by one partner in pursuance of partnership business accrue to all the other partners. Or if an unemancipated minor earns anything, such earnings are by operation of law the property of the parents.

The Spanish law, as to community property, applied the distinctions of the Roman law, as to habere (to have or own), tenere (to hold), and possidere (to possess). Both husband and wife "owned" (i.e., in the sense of "having") and "possessed" -the property equally during marriage from the moment of its acquisition. The husband also "held" it for purposes of ad-

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24 The law (quoted above, note 8) provided, said Gutierrez, that everything acquired during marriage by husband or wife, "let them both have it by halves" "But if the husband alone acquired ownership and possession of goods acquired during marriage, and not the wife, there would be no equal division, nor would an equal share belong to each, but an unequal one, contrary to the intention and the language of our laws. And so the wife too will be the owner of her half share during marriage, no less than the husband, since the law has not contradicted this, though the husband alone has the administration of these goods during marriage." Gutierrez Quaestio CXVIII. "In the second place you should note from the words 'let them both have it by halves' that ownership and possession of a moiety of the property acquired during marriage passes upso jure to the wife without delivery and the wife is owner even during marriage of the share which belongs to her." Matienzo, Gloss III, to Law 2, Tit. 9, Bk. 5, of Nueva Recopilacion. The spouses are partners in a partnership, says Febrero, and thus share equally whatever is acquired during the marriage, whether or not one acquires more than the other; and on the husband's death, there is no necessity upon the wife to demand her half of the property from the husband's heirs, because it is already hers. Febrero, Libreria de Escribanos. "It is evident according to law that what is gained by husband and wife while they are together is the common property of both and they must divide it in two, and there is no one amongst the authors who dares to doubt it." Llamas y Molina, Commentary to Law 16 of Toro.

25 "From which it may be inferred that such profit accrues to a spouse by operation of law and not by the liberality of the other spouse or by contract." Matienzo, Gloss III, to Law 2, Tit. 9, Bk. 5, of Nueva Recopilacion.
Thus, husband and wife both had a *habitus* (i.e., act of having or owning), and the ownership of each was often spoken of as an ownership *in habitu*. Since the husband also administered the property he had attached to his ownership *in habitu* the *actus*, that is the active administration. The impression seems to have prevailed among some American writers that the husband’s ownership was described only as an ownership *in actu* and the wife’s *as in habitu*, and that this meant that the husband’s was “actual” and the wife’s “constructive”. But both owned *in habitu* for that was the actual “having” or owning, and both “had” or owned the property. A person with only the *actus* of property without the *habitus* would be only a person having a managerial duty, such as an agent, without having any ownership.

A survey of many of the leading jurists and commentators on the Spanish law reveals that they were, with one early exception, unanimous in the view that both spouses owned and possessed the property by halves during the marriage itself.

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26 See note 24 supra. As to “having”, “holding” and “possessing,” see Buckland & McNair, Roman Law and Common Law. “Civil law possession which is transferred without any act, actual or constructive, is called real and not constructive possession. From which it may be inferred that the wife is entitled to all the possessory interdicts in respect of her moiety of the property acquired during marriage, viz. to acquire, to retain, and to recover possession.” Matienzo, Gloss III to Law 2, title 9, Bk. 5 of Nueva Recopilacion.

27 That the ownership of the wife was *in habitu* and that of the husband *in habitu* and *in actu* was so described by Matienzo, Azevedo, Sala, Gutierrez, Covarruvias, Palacios Ruvios, Llamas y Molina and numerous other jurisconsults. “The husband alone has the administration of these goods, whereas the ownership belongs to both parties alike.” Gutierrez, Quaestio CXVIII.

28 See notes 24-26 supra. The exception seems to have been an early author, Tello or Tellius Fernandez, who maintained that only if the husband and wife conjointly acquired the property did both own it equally during the marriage itself, and that as to other acquisitions by the husband separately the wife succeeded to half only on the husband’s death, etc. The unanimous view of the other jurisconsults over the centuries discounted this view, and it has never seriously been considered for some five hundred years. For that matter it was not agreed to by contemporaries of Tello. “The properties which, as marital gains or increases, should be divided equally between husband and wife are not only such as are purchased jointly by them during the marriage with the common money and capital, but are also those which the husband purchases alone, or the wife purchases with his tacit or express consent, whether it be with the common money or that of either of them, as the properties are in either event shared between them in the manner expressed, because attention is given to the time of its acquisition and not to the person in whose name the sale is made and by whom they appear to be purchased.” Febrero, Libreria de Escribanos.
Some misapprehension has resulted in some few of the American cases from relying on a mistranslation of the work of Febrero, a Spanish notary, who, in discussing the husband's right to administer the community property, pointed out that the wife must not interfere therewith by claiming that she *tiene* (i.e., holds) the property. The word *tiene* was mistranslated to mean "owns" the property. Since it was the word *haber* which indicated "having" or owning and the word *tiene* related to holding for purposes of administration, it is clear that the author was not saying that the wife must not claim that she owns the property, but rather that she must not say she holds it for purposes of administering it, since that duty was rested in the husband.  

This is also clear from the very fact that on numerous occasions in other parts of his work, the author in question refers to the fact that both spouses owned the property during marriage.

Both husband and wife might, in the Spanish community property system, contract freely with each other during the marriage concerning their property rights. Either might renounce his or her share in all or a part of the community property. Such agreements or transactions between husband and wife have been confused by many of our writers and courts with the donation of the civil law. A donation was revocable by the spouse making it, at any time up to his or her death, but if the donor spouse died without having revoked, the donation then became final and conclusive. But donations related to gifts from the separate property of one spouse made to the other spouse.

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29 The husband "may therefore administer, exchange, sell and convey the (community property) at his discretion, in the absence of deceitful intent to defraud his wife. Therefore while the husband lives, and the marriage is not dissolved, or there is no divorce, the wife should not say that she holds (tiene) the community property, nor impede him in his lawful administration on the ground that the law grants her half, for this grant is for the situations mentioned and for no other (i.e., not for purposes of administration), despite what some wives believe." Febrero, *Librería de Escríbanos*.

30 See quotation from Febrero, note 28, supra. Just after the text of Febrero quoted in note 29, supra, Febrero proceeds to explain that upon the death of the husband the wife need make no formal demand for her half of the property because it already belongs to her.

31 See Matienzo, Azevedo, and Gutierrez, Commentaries to Law 9, Tit. 9, Bk. 5, of Nueva Recopilacion, which was formerly Law 60 of Laws of Toro of 1505; Llamas y Molina, Commentaries on Law 60 of Toro. Such agreements could not, however, be made in fraud of rights of creditors.

It was felt that love and affection between the spouses might tend to influence one to make excessive gifts to the other. But this principle as to donations related to separate property, as I have said, and had no relation to transactions relating to the community property, although even there, too, the law was quick to scrutinize such transactions most closely, to see that they had not been obtained by exercise of intimidation, undue influence, etc., to the detriment of the other spouse.

This right of the spouses to contract with each other during marriage, in respect to their property, has been continued in several of our community property states, but prohibited in others, perhaps through the influence of common law concepts that spouses cannot contract with each other during marriage.

The impression seems to prevail sometimes that the husband, by virtue of his administration of the community property, could give it away if he desired. But a comparative study of numerous Spanish jurists and commentators reveals that no unlimited right to give away community property existed in the husband. To give was to lose, said one of them, and to give away the property was equally a fraud on the wife's rights as to transfer the property for an inadequate consideration. All that was permitted, according to unanimous view, was that the husband might make moderate gifts, not out of proportion to the total amount of the community property, to children, or relatives or those dependent upon his bounty, where necessity existed, as to keep them from want, or the like.

Asso and Manuel, Instituciones del derecho Civil de Castilla.

"It should not be thought that such an act (property agreement as to community property) is a gift between husband and wife and so prohibited." Matienzo, Gloss I, to Law 9, etc. Contracts between husband and wife relating to the wife's interest in the community property should be closely scrutinized "for the husband can by entreaty, by importunity, sometimes even by threats persuade the wife to make renunciation in his favor." Gutierrez, Quaestio CXXVI.

E.g., California and Washington.

E.g., Louisiana and Texas.

"Thus we must say that the husband can from the community property make gifts in moderation and for good cause, e.g. he can dower a daughter of the marriage without the wife's consent, provide maintenance for a daughter of the marriage, or make the customary moderate gifts to kinsmen, friends, and members of the household, and do similar things in which no presumption of fraud or prodigality can arise. But gifts which are excessive or are made for no legitimate reason or waste the community property cannot
The equally erroneous impression has also sometimes existed that the husband could waste the community property in debauchery and dissolute living, without any right in the wife to object. Here again, in the Spanish law, a realistic view actually was taken that a man is apt to make a fool of himself at times, and that he should not be held responsible for some wastage in that manner. But it was pointed out that if such wastage was disproportionate so as to amount to a fraud on the rights of the wife or began to prejudice her rights she could object thereto, and might indeed remove the administration of the community property from the husband's hands.

As far back as the Fuero Real (Royal Code) of 1255, it was provided that neither spouse should be liable for the antenuptial debts of the other and that the community property should be liable only for debts contracted during marriage for the common benefit. Only after community debts were paid and the residue of the community property then partitioned between the spouses or between a surviving spouse and the heirs of the other, could the share of each in the community property be reached either for the antenuptial debts or the separate individual postnuptial debts of a spouse. The application in full of these principles seems to be found only in Arizona and Washington, among our community property states. The others, be validly made; for such cases reek of fraud and wrongful intent, and prejudice the wife.” Azevedo, Commentaries to Law 5, etc. Matienzo and Gutierrez to the same. See also Felipe Sanchez Roman, Estudios de derecho Civil; Laws 54–59 of Toro.

“Every debt that husband and wife contract in common, let them likewise pay it in common; and if before union in marriage either of them contracted a debt, let that one pay it and the other shall not be liable to pay it from his properties.” Fuero Real, Book 3, Title 20, Law 14. See also Law 206, of Laws of Estilo of 1310, to same effect as to debts contracted during marriage for the common benefit; Novusuma Recopilacion of 1806, Book 10, Title 11, Law 2, as to neither wife nor her properties being liable for separate debts of husband contracted during the marriage. By properties of the wife was meant, as Azevedo explained, both her separate property and her share of the community property since both were owned by her during marriage.

Febrero, Librería de Escritanos.


again influenced no doubt by common law considerations, seem
to have the tendency to view the community property as if it
belonged wholly to the husband and to make it liable for his
separate debts, at least those contracted during marriage. The
situation is in such a state of confusion in our states, however,
that it is impossible to go into the matter fully, in an article of
this length.^

In speaking of obligations, it may not be amiss to refer to
tort obligations or liabilities, since the principles governing in
the Spanish law were entirely different from those of the com-
mon law. A tort committed against the person of one of the
spouses was a wrong committed against that spouse as an indi-
vidual, and whether it was the husband or the wife, the spouse
injured had a right of action against the wrongdoer, and the
proceeds of the recovery, briefly, belonged to the injured
spouse. In the case of the wife herself committing a tort
against someone, hers was the liability. As a separate
individual in her own right, hers was the responsibility, not the
husband's.^

The marital community of property might be dissolved by
agreement of the spouses during the marriage, although the
marriage itself continued to subsist, and it was necessarily dis-
olved by the death of one of the spouses, and also in some
cases or to some extent by divorce. A divorce, using the term
in its old civil law meaning, which annulled the marriage com-
pletely, dissolved the community of property from the time of
the decree of nullity, and any property thereafter acquired by
either of the former spouses remained wholly the property of the
one acquiring it. It may well be asked how there could be
any community of property even to the date of the decree if
the marriage was annulled from its inception. However, it was
considered that if one or both of the parties had in good faith

^Las Siete Partidas of 1263, Part 7, Titles 9 and 10.
^Nueva Recop. Book 5, Tit. 9, Laws 10 and 11; Novisima
Recop. Book 10, Tit. 4, Laws 10 and 11.
^Schmidt, Civil Law of Spain and Mexico.
^Matienzo, Azevedo and Gutierrez, Commentaries to Law 2, etc.
^"For then the marriage no longer subsists, and it was the
marriage which was the cause of sharing, by this and similar laws;
and if the cause ceases then the sharing must cease too." Matienzo,
Gloss 1 to Law 2, etc.
^Matienzo and Azevedo, Commentaries to Law 2, etc.
entered into the marriage without knowledge of any impediment which would invalidate the marriage, a putative marriage was considered to have existed with community of property existing between the putative spouses. If the divorce was one of cohabitation, that is from bed and board, the spouse whose wrong had caused the divorce had to share his or her acquisitions with the other spouse, both those acquisitions obtained prior to the divorce and those obtained after. But the innocent spouse was not required to share his or her acquisitions with the guilty spouse. There was no absolute divorce in the Spanish law, as we have it, due to the influence of the tenets of the Catholic church.

Since marital community of property, the law of water rights, and some other matters, in some of our states, are based on the Spanish law rather than on the English common law, it is to the principles of the Spanish law that we should look for interpretation and understanding of those various matters. Certainly where marital community of property is concerned it is obviously absurd to try to attempt its interpretation and understanding by concepts of the English common law which had no marital community of property and thus can provide no correct guides. Nevertheless, many writers and many judges have attempted to do just that. But just as we look to the English common law to determine and understand such of our law as is derived therefrom, so we should look to the sources of the Spanish law for enunciation of the principles governing our marital community of property in those states having that system. Since the Spanish law did not depend upon judicial precedent as did the English common law but upon the codes and the commentaries of jurists and jurisconsults thereon, it is to the codes and the commentaries that we should look to determine such principles and concepts. The continuation in force or the adoption of the Spanish community property system necessarily continues it or adopts it governed by the principles applicable to it.

Matienzo, Azevedo and Gutierrez, Commentaries to Law 2, etc.
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