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Book Reviews

Harold W. Holt (reviewer)

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BOOK REVIEWS

MARITAL PROPERTY IN CONFLICT OF LAWS. By Harold Marsh, Jr. Seattle: University of Washington Press, 1952. Pp. 250. $4.50.

More than eighteen million people live in those states of the United States which, because of their Mexican or Spanish backgrounds, have developed what is commonly called the "community property system." In France and Spain, countries of the civil law, as well as in England, it was long ago recognized that a spouse, solely by virtue of the marriage relationship, should have legal relations with respect to things owned or acquired by the other spouse. Why? Perhaps because it was recognized that each party to a marriage contributes in some measure and manner to the acquisitions of the other and, therefore, each spouse should have an interest recognized by law in such acquisitions. For the sake of brevity the aggregate of these legal relations in a spouse may be termed "marital property." In those portions of the United States settled by French, Spanish or Mexicans and formerly subject to French, Spanish or Mexican law, it was only natural that a system of marital property should develop that differed from the system of marital property developed in those states that had a strong English or common law tradition.

The civil law system of marital property has differed from the common law system in at least two important respects:

First: The civil law system made a primary differentiation between things owned at marriage or afterwards acquired by gift, devise or descent ("separate" property) and those things otherwise acquired by either spouse during coverture ("community" property).

Secondly: Originally there was no distinction between land and things other than land.

Over the course of years, however, changes have occurred in the civil law system, chiefly in the removal of the husband's power of management and control over the wife's "separate" property and the extension of greater protection to the wife's interests in community realty by requiring her joinder in a conveyance thereof.

It is particularly important to note that the civil law system of community property gave the wife an interest in community property that was not extinguished by her failure to survive her husband. This interest was inheritable and devisable.

With the growing importance of the community property states, especially in view of the mobility of the American population, many a lawyer, especially one specializing in "property law," may find himself

required to give some consideration to a system of marital property with which he is not familiar and in which he very likely received no formal training. For such a lawyer Mr. Marsh has written a book that will be exceedingly helpful. Mr. Marsh says:

> "Most lawyers raised in the common-law tradition probably have only a very slight understanding of the rules of community property; and, similarly it is likely that few lawyers in the community-property states have more than a very slight acquaintance with the statutory marital-property systems which have been largely substituted for common-law dower and curtesy in the common-law states" (p. 2).

Mr. Marsh has done an excellent piece of work in giving instruction to both groups of lawyers, particularly to those raised in the common law tradition who like this reviewer feel the need of being continually legally educated. He has gathered pertinent decisions and statutes from all over the United States and his discussion is scholarly and thorough. Lawyers and law teachers will read with interest his discussion and criticism of such cases as *Hutchison v. Ross*,[1] that landmark in conflicts of law relative to Trusts, and *Traglio v. Harris*.[2] Furthermore, Mr. Marsh discusses the problems of characterization and renvoi with lucidity and in a spirit of fairness to the views of others who have written on the subjects, *e.g.*, Cheshire, Cook, Falconbridge, Rabel and Wolff.

What is the type of problem that Mr. Marsh considers? Here is an example:

H acquires movable property during his marriage to *W* while both *H* and *W* are domiciled in New York. *H* and *W* later become domiciled in Texas, leaving some of the movables in New York. *H* dies, survived by *W* and two children. As against *H*'s last will and testament, *W* claims some portion of his movables as her nonbarrable share by virtue of her marriage to *H*.

Whether asserted in New York or Texas, how is the claim of *W* to be characterized? Whatever the forum, this characterization of her claim should be made as part of the conflicts law of the forum, so Mr. Marsh contends, and the characterization need not be the same as that followed for purely internal or domestic purposes by either the forum or any other state with which the case has factual contacts (p. 77). It seems likely that *W*'s claim for a nonbarrable share in a common law state would be characterized as an issue of succession, rather than marital property. Consequently, then, "essentially similar interests have been characterized differently for choice-of-law purposes in the community-property states and in the common-law states; and this

1. 262 N.Y. 381 & 643, 187 N.E. 65, 188 N.E. 102 (1933), discussed at 188 N.E. 167 *et seq.*
2. 104 F.2d 439 (9th Cir. 1939), discussed at 175-76.

situation will obviously give rise to many latent conflicts of choice-of-law rules" (p. 141).

Similar problems of characterization arise in other cases involving property relations of spouses and third parties, *e.g.*, on divorce, on attempts by a creditor of one of the spouses to collect his debt, on attempts by one spouse to transfer property, on disputes between spouses as to right to possession of certain movables, on disputes over income from property owned by the spouses and on the assertion of an interest by one spouse in a tort claim acquired by the other.

If the claim of a spouse, such as *W* in our hypothetical case, has been characterized as a marital property claim, what shall be the choice of law rule? In other words, what state shall be selected to supply the law or rule of law as the basis for deciding the case presented by the wife's claim? Mr. Marsh concludes that:

> "(1) In connection with issues between the spouses or their heirs and devisees, the law of their domicile at the time of acquisition (or at the time of marriage as to things acquired before marriage) should govern marital-property interests in both movables and inmovables; (2) In connection with issues between the spouses (or others standing in their shoes) and third parties (creditors and transferees), the law of the *situs* of immovables, and of the *situs* of tangible movables at the time the debt arises or the transfer is made, should govern; (3) As to intangibles, the law of the domicile of husband and wife at the time of acquisition should govern all issues" (p. 110).

The fifth chapter is devoted to a thorough discussion of the problems of a selection of choice of law.

Once the selection has been made for choice of law, the third task is concerned with the application of the law so indicated. The sixth chapter of Mr. Marsh's book is devoted to a discussion of the problems of application.

This reviewer considers the fourth chapter, which is devoted to a discussion of the problems of characterization, the most interesting, particularly the part given to a discussion of the "tacit mortgage" a wife has in Louisiana for the protection of her "separate" or "paraphernal" property and, as has already been indicated, the part given to a discussion of *Hutchison v. Ross*.[3]

To conclude, one may disagree reasonably with some of Mr. Marsh's conclusions, but anyone who peruses this book will congratulate him, the Columbia University Law School under whose auspices he studied Conflict of Laws, and the University of Washington Press, the publisher, on the publication of a helpful and scholarly piece of legal research.

HAROLD WRIGHT HOLT*

3. See note 1 *supra*.

* Professor of Law, University of Illinois.

LIFE INSURANCE AND ESTATE TAX PLANNING. By William J. Bowe. Nashville: Vanderbilt University Press, November 1952 Revision. Pp. 109. $2.10.

From 1942 to 1952, the total amount of life insurance in the United States increased from 128 to 276 billion dollars. In the same period, the number of life insurance policy holders increased from 67 to 88 million.[1] These figures would seem to indicate that more and more life insurance is being sold to proportionately fewer policy holders. To what extent this can be attributed to estate planning can only be imagined. There is no doubt, however, that rapid progress has been made in the field of estate planning, especially since the Revenue Act of 1948 brought the marital deduction into existence. In this development, the life insurance underwriter has led the way. The lawyer, with his aversion for figures, has shied away from a potentially lucrative field. Meanwhile insurance companies are educating their personnel and, in some cases, hiring specialists to develop plans for potential customers. Institutes in estate planning are becoming popular at universities throughout the country.[2]

Unfortunately, the process of educating professional persons, as well as the general public, in the advantages of planning the distribution of one's property, has been handicapped by a dearth of material capable of providing the necessary technical knowledge which would be readable by lawyer and layman alike. Through his writing, Mr. Bowe has done much to help fill this void.[3] His work has been particularly notable because of his ability to furnish the reader with accurate technical information, and still maintain a highly lucid style. His most recent book is a revision of his earlier *Life Insurance and Estate Tax Planning*.[4] In slightly more than a hundred pages, he has brought together a complete discussion of the taxation of insurance, as well as the various uses of insurance in estate planning.

For most insurance men, estate planning simply means providing insurance to *create* the previously nonexistent estate, or to *conserve* the existing, but nonliquid, estate. In either case, it follows that the potential customer will want to purchase some life insurance. But if the tax consequences of such purchases receive little attention, what may have seemed a good "estate plan," may prove to be very costly for the insured.

1. Figures prepared by the Institute of Life Insurance, 488 Madison Avenue, New York 22, New York.

2. Within the past two years, institutes on estate planning have been held at the Universities of Connecticut, Georgia, Kansas, Oklahoma and Tennessee. On May 1-2, 1953, the University of Mississippi will hold an Estate Planning Conference at Oxford, Mississippi. Mr. Bowe will be one of the principal speakers at this meeting.

3. Other books by Mr. Bowe are *Income Tax Treatment of Life Insurance Proceeds* (Vanderbilt University Press, 1951) and *Tax Planning for Estates* (2d ed., Vanderbilt University Press, 1952).

4. Vanderbilt University Press, 1950.

To use one of Mr. Bowe's examples, assume that our client is a family man whose sole substantial asset is his interest in his business, valued at $300,000. Prior to 1948, in order for him to be sure that his estate would not suffer the attrition that death usually brings, he would have to purchase $92,000 worth of insurance. Since 1948, however, it would be necessary for him to purchase only $25,000, provided he was careful to take maximum advantage of the marital deduction and beat his wife to the grave. But, suppose she should predecease him. In that event, his executors would have to raise $70,000 to pay death taxes, while he would have provided only $25,000 ready cash. Says Mr. Bowe:

> "This suggests that a very real risk to be insured against is the premature death of the wife as the husband's death tax may, in that event, be increased by as much as $45,000. He may protect himself against this risk by purchasing insurance on her life. The proceeds will be received free of estate tax on her death since she neither owned the policy, nor paid the premiums. If he is wise he will transfer the policy to an irrevocable trust for the benefit of his children, thus avoiding any increase in the value of his estate which would result from the ownership of the contract, should he predecease his wife, or from receipt of the proceeds should he survive her. The insurance fund may nevertheless be made available to meet his increased estate taxes if he authorizes the trustee to purchase assets from his estate." (p. 16).

Such down-to-earth advice might cause the bachelor with nonliquid assets to reconsider his state of single blessedness.

Indeed, if a bachelor should read on to Chapter IV, he may begin to doubt if he should delay a moment longer in raising a family. Consider the advantages of the funded insurance trust: A grandfather irrevocably transfers securities to a trustee with directions to use the income from the trust to buy insurance on the life of his son for the benefit of his grandchildren. He can transfer up to $60,000 worth of securities without paying any gift tax, so long as his wife consents. But this is only the beginning. Says Mr. Bowe:

> "1. . . . the income from the securities will be taxed to the trustee at the lowest rates rather than to the grandfather or the son at either's highest bracket rate.
> 2. No gift taxes will be paid by him on the death of the insured when the proceeds become available to the beneficiaries of the trust.[5]
> 3. No estate taxes will be incurred on the grandfather's death since he does not own the policy.
> 4. No estate tax will be incurred on the death of the insured son since he neither owned the policy nor paid the premiums.
> 5. The funds may be made available to the estate of the son if the trustee is authorized to purchase assets from his executor." (p. 56-58).

5. Use of the trust makes the Goodman rule inapplicable. Commissioner v. Goodman, 156 F.2d 218 (1946). (Footnoote by Mr. Bowe.)

Mr. Bowe's book is full of such practical insurance planning. The treatment of business life insurance has been greatly expanded in the present revision. Such insurance is of three types: (1) keyman insurance—to indemnify the business for loss through the death of key personnel; (2) business liquidation insurance — to provide the necessary funds to purchase the interest of a deceased partner or shareholder; (3) stockholder-beneficiary insurance — to provide funds for the insured's family at his death. The first two are well recognized forms of business life insurance which can be used in developing a plan for the business man whose estate consists largely of a partnership interest or stock in a close corporation. But where the insured is the controlling stockholder or principal employee of a one man corporation, a plan to provide insurance for the insured's family by having the corporation own the policies and pay the premiums, may prove to be disastrous. The corporation will be treated as the *alter ego* of the insured who will be taxed on the premium payments as dividends or as additional compensation. Further, the proceeds of the policy will be included in his estate for estate tax purposes.

Mr. Bowe has also added a chapter with reference to the income tax treatment of life insurance proceeds. Normally, such proceeds will escape income taxation if received by reason of the death of the insured. But one of the traps for the unwary is the situation where the proceeds are received by the purchaser of an existing policy. A corporation may buy up the policy of one of its key personnel or a father might provide a son with funds in exchange for the latter's assignment of his life insurance policy. In either case, the difference between the proceeds of the policy and its original cost plus any additional premiums which the buyer pays will constitute income, taxable at ordinary income rates.

Other than the deletion of some technical notes and a few minor changes to bring the book up to date, the balance of the present revision remains as it originally appeared. Mr. Bowe has thus made available a new and complete discussion of life insurance problems which the estate planner — whether he be an insurance man, a lawyer, a trust officer or an accountant — is sure to find both instructive and readable.

HAROLD G. WREN*

* Associate Professor of Law, University of Mississippi.

CARUTHERS' HISTORY OF A LAWSUIT. Seventh Edition by Sam Gilreath. Cincinnati: The W. H. Anderson Company, 1951. Pp. 1088. $17.50.

The Bench and Bar of Tennessee are deeply indebted to Professor Sam B. Gilreath of Cumberland University for the Seventh Edition of *Caruthers' History of a Lawsuit.* Fifteen years have passed since the Sixth came from the press of W. H. Anderson Company, and an unusual number of changes have taken place in pleading and practice, making the new edition very timely.

To build well on foundations laid by others is an achievement, and Professor Gilreath has succeeded admirably, adding many new paragraphs (fifty-nine to be exact), removing outmoded forms, making changes to conform to the code supplement, and adding, especially, the applicable decisions of our appellate courts since 1937. The footnotes are both comprehensive and inclusive, and noteworthy improvements have been made in the index, with an entirely new index to forms. A separate list of forms also is included in the contents, and a convenient parallel reference table is placed at the opening of the Seventh Edition.

Of exceptional value to the reader is the improvement in the printing of the new volume. Excellent examples are the large type in the compilation of the rules of the Supreme Court and the Court of Appeals, and in the definitions of words and phrases. In the paragraph headings, the general subject is repeated before each topic under consideration; and, when the new edition is examined carefully, the examiner will be attracted by the number and variety of subjects enlarged upon and discussed in detail.

For more than sixty years, the lawyers and judges of Tennessee have been blessed by the availability of two unexcelled guides and teachers in the step by step conduct of proceedings at law and in equity — *Caruthers' History of a Lawsuit,* and Gibson's *Suits in Chancery.* Works designed to meet similar needs will be found in other States, but, without undervaluing any other comparable writings, the great productions of Judge Abram Caruthers and Chancellor Henry R. Gibson, revised by competent law writers, remain preeminent.

Indeed, as was asserted by the reviser of the third edition, Dr. Andrew B. Martin, the system of pleading taught in *Caruthers' History of a Lawsuit* prepared "the lawyer for practice in any system prevailing in the United States." This statement is true today, and the Tennessee lawyer does not find himself an absolute stranger in any jurisdiction, although he may not feel entirely at home in the federal courts under the new and controversial Rules of Procedure there.

When it is recalled that the system of pleading which prevails in the state courts in Tennessee is neither entirely common law nor entirely

code pleading, the importance of keeping *Caruthers' History of a Lawsuit* current is all the more obvious. With the experienced pleader, the tendency is to rely on memory, generally a hazardous expedient, and the alert practicioner will find that the Seventh Edition of Caruthers, at hand on the top of his office desk, is far preferable to any recollection, however clear.

So, with the never ending quest for more knowledge of the law, it is not unreasonable to predict a revival of interest in the vanishing art of Pleading when the profession's acquaintance with the new and definitive edition of that indispensable *vade mecum, Caruthers' History of a Lawsuit,* becomes intimate and extensive.

WALTER CHANDLER*

LEGAL STATUS OF THE TENANT FARMER IN THE SOUTHEAST. By Charles S. Mangum. Chapel Hill: University of North Carolina Press, 1952. Pp. viii, 478, $7.50.

The title of this book prompts one to ask three questions: How is the material organized? How thoroughly have statutes and cases been explored? With what meaning and purpose has the author clothed the myriad of legal conclusions, both judge-made and statutory, which a work of this kind is bound to contain? The first two questions are easy to answer. The material is well organized — though one might debate the value of a more or less traditional legal-treatise breakdown versus a functional or problem breakdown — and the statutes and reported cases of the eleven states involved were thoroughly explored. It's encyclopedic value to lawyers is extensive — even outside the southeastern states.

An answer to the third question is more difficult to formulate. The writer tried to give his material social and economic meaning. But this apparently did not come easily, and in many parts and passages one is left with the feeling that he had to struggle to say what he did. For example this conclusion to the chapter on "Waiver of Lien and Estoppel" would be fitting in countless other discussions of the law: "On the whole it may be said that the law . . . is in a fairly satisfactory condition. Of course, there are a few situations which need clarification. The courts . . . must study the past opinions of the judges with a view to broadening the law and putting aside outworn theories." A certain naivete regarding the fundamentals of farm management and the character of landlords and tenants crops out now and then. For example, a farm manager would wonder about the soundness of the

* Member, Memphis Bar; formerly United States Congressman and Mayor of Memphis.

writer's proposals for reform of the tenancy system if he were to read from the opening chapter that "there is a great advantage to be gained in not concentrating on one crop alone. There might be a special demand for one of the many crops raised, and this would prove very advantageous to the farmer. The problem is to select the crop which is going to have the best price. . . ."

Having been impressed by the great variety of agreements and legal relations which are possible when one man occupies another man's farmland, the writer seems impelled toward these conclusions — leases should be written (though he admits that written leases are no panacea); the possible relationships of landowner and land occupant should be reduced to fewer categories, each having more distinctive features than presently possessed; and state legislators should concern themselves more actively with some of the problems discussed in this study — the confusion of remedies for the enforcement of the landlord's lien for example.

The book itself does not bear out in any marked degree the statement in the preface that "the development of tenancy law from the time of the feudal system has favored the landowner at the expense of the tenant." The writer himself feels, for example, that the highly developed system of crop liens used in the southeast will need to continue in some form, though many evils may be attributed to it. Repeatedly too, he shows how the courts have managed the law so as to achieve substantial justice, suggesting that perhaps reform lies as much in the direction of a wise and understanding bench and bar as it does in the direction of the state legislatures. In this connection one might suggest that to show more clearly what impact the law has had on the social and economic factors involved in the tenancy system, an intensive study of a few court cases and of all the circumstances surrounding these cases would be better than a more comprehensive coverage of decisions as reported from higher tribunals.

He styles the tenancy from year to year as an outmoded handown from the feudal system "not adapted to this day of definite contracts." Though his discussion of tenancies from year to year is excellent such a conclusion seems to overlook two things — that this device is essential to give status to landlords and tenants who do not have written leases, and that it lends itself admirably to legislative definition — hence, to a general improvement of agricultural tenures not covered by a written lease.

The concluding chapter on suggested reforms is not convincingly organized and it departs from a premise expressed earlier in the book, "that any effort to reform the tenancy laws should be addressed primarily to the state legislative bodies," by devoting many pages to a discussion of President Roosevelt's tenancy committee and activities

of the Federal Government. The formulation of a "proposed farm tenancy code for the southeastern states" would have been an interesting and helpful way to conclude this book.

Lest criticism overshadow worth let it be said that it is not easy to probe into every vein of the law and come out with a gold nugget. Mr. Mangum, through painstaking and thorough search and organization has made a significant "discovery." He is certainly justified in feeling that others can now do some of the mining.

HAROLD W. HANNAH*

* Professor of Agricultural Law, University of Illinois; member, Illinois Bar; author, *Law on the Farm* (1948).