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Basic Spanish Principles

The Texas community property system is derived from the Spanish law. The Spanish community property rules, which were the law of the land when Texas was under the sovereignty of Spain and Mexico, were retained by the Texas Republic when the English common law was adopted in 1840.[1] But the original Spanish rules have been greatly modified during the intervening century. Some of the changes have been intentional, reflecting a change in ideas as to the proper status of married women. Others have resulted from the infiltration of rules and principles of English common law and equity, sometimes because of lack of full information and understanding of the original civil law principles.

Under the Spanish law the spouses were equal partners[2] as to all financial enterprises during the continuance of the marriage, unless otherwise agreed in a marriage contract. Both spouses contributed to the partnership their time and efforts and the use of and revenue from their individual wealth. The individual capital of each spouse consisted of the property owned at marriage and the property acquired after marriage by inheritance or by gift to the individual.[3] At the dissolution of the partnership the separate capital of each spouse was restored before the division of the profits either by recognizing individual ownership of specific property on hand or by allowing reimbursement from the property on hand,[4] all of which was presumed to be community property.[5]

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1. Tex. Laws 1840, p. 3, 2 LAWS OF TEXAS 177 (Gammel 1898).
2. See 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 264 (1943).
3. 1 *id.* §§ 63, 69.
4. As to reimbursement, see the translations of Spanish commentaries in the second volume of de Funiak's work: Matienzo, 2 *id.* at 143, 213, 214, 246, 268, 269; Gutierrez, 2 *id.* at 186, 187; Azevedo, 2 *id.* at 170, 171; Llamas y Molina, 2 *id.* at 411.
5. 1 *id.* § 60.

Texas has retained many of the basic principles of the Spanish law. The idea of a marital partnership has been retained, and the Texas definitions of separate and community property closely resemble those of the Spanish law. Separate ownership of specific property was confined within narrow limits by the definitions of the 1840 statute,[6] but in the Constitution of 1845 the wife's separate property was defined as "all property, both real and personal . . . owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent,"[7] and an 1848 statute contained a similar definition of the separate property of both husband and wife.[8] All other property acquired during the marriage by either the husband or the wife was community, the statute said. Later constitutions have contained the same definition of the wife's separate property,[9] and there has been no effective change of the statutory definitions.[10] In Texas today, as under the Spanish law, each spouse retains separate ownership of the property owned at marriage and of the property received by gift or inheritance during the marriage, but property acquired during the marriage by the personal efforts of either spouse is community, and the revenue from the separate property of both spouses goes into the community.

Tracing Separate Property Through Changes in Form

Under the Spanish law it was possible in certain exceptional cases to establish separate ownership of particular property by tracing separate property into its product. For example, land received in exchange for separate land was separate.[11] Also separate land could be sold and the proceeds reinvested in separately owned land.[12] But the tracing of separate property to establish separate ownership of the product was narrowly con-

6. Tex. Laws 1804, p. 3, 2 LAWS OF TEXAS 177 (Gammel 1898).

7. TEX. CONST. Art. 7, § 19 (1845), 2 LAWS OF TEXAS 1923 (Gammel 1898).

8. Tex. Laws 1848, c. 79, p. 77, 3 LAWS OF TEXAS 77 (Gammel 1898).

9. TEX. CONST. ANN. Art. 16, § 15 (Vernon, Supp. 1954).

10. An attempt to change the definitions by putting the revenue from separate property into the separate estate was held invalid as to the revenue from the wife's separate property in Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925), and in 1929 the legislature restored the older definitions of the separate estates of both spouses, Tex. Laws 1929, c. 32, p. 66, 26 LAWS OF TEXAS 66 (Gammel 1929). For the present statutory definitions, see TEX. REV. CIV. STAT. ANN. Arts. 4613, 4614, 4619 (Vernon, 1951).

11. It is clear that tracing to establish separate ownership was permitted upon an exchange of land. Judging from the broad language of the writers, the same principle may have been applied to other kinds of property acquired by exchange as distinguished from purchase. See the translations from Matienzo, 2 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 142 (1943), and Gutierrez, 2 *id.* at 186.

12. See the translations from Matienzo, 2 *id.* at 143, Azevedo, 2 *id.* at 174, 175, and Gutierrez, 2 *id.* at 186.

fined. The general rule was that property bought during the marriage with separate funds was community property,[13] the spouse whose funds were used receiving reimbursement from community assets at the dissolution of the marital partnership.[14]

In Texas the ownership tracing principle has been greatly extended. The leading case was *Love v. Robertson*,[15] decided in 1851. The opinion in that case shows that the departure from Spanish law resulted from a failure to understand fully the Spanish rules. The husband had used his separate money to buy two slaves, Peter and Finn. He paid cash for Peter. For Finn he paid in cash with separate funds $330 of a total purchase price of $800; the balance was paid later out of community funds. After the husband's death a controversy arose over whether the slaves were separate property or community property. It appears from the authorities now available that the Spanish law would have awarded ownership of the slaves to the community, and the husband's heir would have received reimbursement from the community for the separate funds used in making the purchase, but apparently no adequate exposition of the Spanish law was available. Language of a prior case indicated that under the Spanish law property bought by either spouse after marriage was community property even though it was paid for with separate funds, but there had been no recognition in the authorities brought to the court's attention of the Spanish rule that the separate capital so invested in community property was to be restored at the dissolution of the community. The possibility of reimbursement as an alternative to ownership was not suggested by counsel nor considered by the court.[16] In the absence of

13. See Savenant v. Le Breton, 1 La. 520, 522 (1830). According to Matienzo, the money brought by the spouses to the marriage became community property forthwith; hence anything bought with it became community property. See the translation in 2 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 143 (1943). See also the translation of Gutierrez, 2 *id.* at 186, 187. There was not complete harmony among the Spanish writers, and although the rule stated above seems to have been accepted by most of them, Professor de Funiak has concluded that there was only a rebuttable presumption that property bought with separate funds was bought for the community. See 1 *id.* § 77.

14. See the translations from Matienzo and Gutierrez, *supra* note 13.

15. 7 Tex. 6 (1851).

16. Although the Texas court was looking to Louisiana cases for guidance, the Louisiana cases directly in point were not brought to the court's attention. In Brown v. Cobb, 10 La. 172 (1836), it had been held that a slave bought by the husband with his separate funds was community property because the conveyance to the husband contained no language to indicate that he intended for the slave to be his separate property. In Young v. Young, 5 La. Ann. 611 (1850), it had become established that in such a case the husband would be allowed reimbursement from the community for the amount of his separate funds used in making the purchase.

compensation to the husband for his separate funds, awarding the slaves to the community would have been a very unjust result. To avoid what it deemed an obvious injustice to the husband, the court concluded that property bought with separate funds should be separate, and that payment of part of the purchase price with separate funds should give a fractional separate interest. Peter was separate; Finn was owned by a mixed title, 330/800ths separate and 470/800ths community.

From the time of that decision it has been established in Texas that the principle of tracing separate property through changes in form to establish separate ownership of the product is one of general applicability.[17] It is not confined to exceptional situations, as was true under the Spanish law, but is applied to usual transactions, such as a purchase of property with separate funds. It is applied even though only a fraction of the total consideration is paid with separate funds.[18]

Intention as Sometimes Controlling under Application of Trust Principles

The opinion in *Love v. Robertson*[19] cited no trust cases and did not use trust terminology, but the ownership tracing principle the court was applying in that case is the same principle which enables the beneficiary of a trust to trace the trust property through changes in form to establish separate ownership of new acquisitions by the trustee. Within a few years the Texas courts were using trust language and were looking to trust cases as controlling precedents.

In *Smith v. Strahan*,[20] decided in 1856, the husband had used his separate property to buy land in his wife's name. Looking to the law of trusts as developed in common law jurisdictions, the court held that an intent to make a gift of the property to the wife would be presumed in the absence of evidence to the contrary, but that the presumption could be rebutted by parol evidence that a gift was not intended. Rebutting the presumption of gift would raise a purchase-money resulting trust in favor of the husband, equitable ownership vesting in him as separate property, unless a loan to the wife was intended.

In the converse case, where the wife's funds are used to

17. Rose v. Houston, 11 Tex. 324, 62 Am. Dec. 478 (1854); SPEER, LAW OF MARITAL RIGHTS IN TEXAS § 426 (3d ed. 1929).
18. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881 (1937).
19. 7 Tex. 6 (1851).
20. 16 Tex. 314, 67 Am. Dec. 622 (1856).

buy land in the husband's name, there is a presumption of a resulting trust in favor of the wife as her separate property,[21] a presumption which can be rebutted by oral evidence that a gift or loan[22] to the husband was intended. Evidence of a gift would place ownership in the husband as his separate property. If the wife's funds are loaned to the husband, the money thereby becomes community property in the absence of further evidence,[23] and property bought with the money would likewise be presumed to be community property.

The likelihood that a gift to the wife is intended would seem as great in a case where the husband uses community funds to buy property in the wife's name as in a case where he uses his separate funds to make such a purchase. But in the former case a gift to the wife is not presumed in the absence of further evidence. Where community funds are used to make the purchase in the wife's name it was first thought that the community property law fixed ownership in the community and that an intent to make a gift to the wife could not be given effect.[24] That notion was soon rejected and an intent to make a gift to the wife was given effect although proved merely by parol evidence,[25] but the civil law tradition, under which property standing in the name of either spouse is presumed to be community, was strong enough to prevent a presumption of gift from the mere fact that the husband takes title in the wife's name when he buys property with community funds.

When title to property bought with separate funds is taken in the name of both spouses, the equitable ownership will again depend, in the final analysis, upon the intention of the parties at the time of acquisition. There are several possibilities as to

21. There is substantial conflict in other jurisdictions whether a gift to the husband or a resulting trust to the wife should be presumed, most courts presuming a trust to the wife. 2A BOGERT, TRUSTS AND TRUSTEES § 460 (1953); Note, 113 A.L.R. 339 (1938). In Texas it has been assumed without discussion that there is a presumption of a trust to the wife. Matador Land & Cattle Co. v. Cooper, 87 S.W. 235 (Tex. Civ. App. 1905). In accord are cases where proof that a wife's funds were used to buy property, title being taken in the husband's name, was held sufficient to establish separate ownership in the wife. Evans v. Welborn, 74 Tex. 530, 12 S.W. 230, 15 Am. St. Rep. 858 (1889); Blum v. Rogers, 71 Tex. 668, 9 S.W. 595 (1888); Yoe v. Montgomery, 68 Tex. 338, 4 S.W. 622 (1887); Ross v. Kornrumpf, 64 Tex. 390 (1885).

22. Levy v. Williams, 50 S.W. 528 (Tex. Civ. App. 1899), *writ of error refused.*

23. Money borrowed by the husband during the marriage is presumed to be community property. Foster v. Hackworth, 164 S.W.2d 796 (Tex. Civ. App. 1942). The problem of determining the separate or community character of property acquired on credit is discussed page 615 *infra.*

24. See Smith v. Strahan, 16 Tex. 314, 323, 67 Am. Dec. 622, 626 (1856).

25. Higgins v. Johnson's Heirs, 20 Tex. 389, 70 Am. Dec. 394 (1857).

intent. One is that the spouse whose funds were used is to have separate equitable ownership of the entire title. A second possibility is that each of the spouses is to own an undivided half interest as separate property. A third possibility is that community ownership is intended. The fact that title is taken in the name of both spouses would seem to furnish a strong indication that the property is intended to belong to both spouses, either as community property or as co-owners by separate titles. However, the Texas cases involving the problem have extended the presumption of a resulting trust to the situation where title is taken in the name of both spouses. According to those cases, the presumption of community is rebutted merely by evidence that the property was paid for with separate funds; that evidence alone will be sufficient to establish separate equitable ownership of the entire title in the spouse whose funds were used in the absence of further evidence to rebut the presumption of a resulting trust.[26] No real consideration of whether the presumption of a resulting trust will effectuate the probable intention of the parties is indicated by the opinions in those cases, and perhaps a full consideration of the question would result in a conclusion that the presumption of community should be given controlling effect in the absence of evidence that separate equitable ownership was intended.

Where the evidence establishes that title was taken in the name of both spouses with the intent that the property should be community property, the Texas cases have given effect to the intent, holding that the property is community property although bought with separate funds.[27] In such a case the spouse whose separate funds were used would ordinarily be entitled to reimbursement from community assets at the dissolution of the

26. See Foster v. Christensen, 67 S.W.2d 246, 249 (Tex. Com. App. 1934), and Sparks v. Humble Oil & Refining Co., 129 S.W.2d 468, 470 (Tex. Civ. App. 1939), *error ref.* (separate funds of wife); Jones v. Jones, 181 S.W.2d 988, 991 (Tex. Civ. App. 1944), *writ of error refused for want of merit*; and Cummins v. Cummins, 224 S.W. 903, 904 (Tex. Civ. App. 1920) (separate funds of husband).

27. Jones v. Jones, 181 S.W.2d 988, 991 (Tex. Civ. App. 1944); Cummins v. Cummins, 224 S.W. 903, 904 (Tex. Civ. App. 1920). But see Sparks v. Humble Oil & Refining Co., 129 S.W.2d 468, 470 (Tex. Civ. App. 1939), *error ref.*, where the court expresses a contra view, relying on the opinion in Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881 (1937). The statements in those opinions are derived from a misapplication of the well-established Texas view that the separate or community character of property depends on the application of the law to the facts, not on the mere intention of the parties. That principle, which is discussed pages 611-615 *infra*, does not prevent the intention of the spouses from being a controlling operative fact in certain cases.

marital partnership.[28] The general rule that property bought with separate funds becomes separate is therefore not a fixed rule of uniform application; it is a rule of presumed intent, justifiable only in those circumstances where a presumption of a resulting trust will effectuate the probable intention of the parties.

Full recognition that the rule under which property bought with separate funds becomes separate is based on a presumption that separate ownership is intended will result in significant restrictions on the application of the rule, for there are a number of situations where an inference of an intention to invest separate funds for community benefit would be more reasonable than an inference of an intention to invest for the benefit of the separate estate. For example, where separate funds are invested in a stock of merchandise, it would be virtually impossible to preserve the corpus of the separate estate in the form of specific identifiable assets into which the original separate funds could be traced; mingling of principal and income is almost inevitable. It would be reasonable to assume that a spouse who makes such an investment of separate funds would prefer to preserve his or her separate capital in the form of a claim for reimbursement from community assets, thereby avoiding the difficulties involved in trying to trace separate funds through changes in form.

The results of the Texas cases furnish support for a conclusion that reimbursement from community assets is the only remedy that will actually be available to a spouse who invests separate funds in a mercantile enterprise. The courts have never expressly stated that the ownership tracing principle is not appropriate in that kind of case, but the claims to ownership of specific property have usually been denied because of the mingling of separate and community funds,[29] while under similar facts claims to reimbursement of separate funds or property absorbed in the operation of a business have been successfully maintained.[30] The analysis that will go far to explain and reconcile the results of the cases is simply that the ownership tracing

28. Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935).

29. Hardee v. Vincent, 136 Tex. 99, 147 S.W.2d 1072 (1941); Gibson v. Gibson, 202 S.W.2d 288 (Tex. Civ. App. 1947); Walker-Smith Co. v. Coker, 176 S.W.2d 1002 (Tex. Civ. App. 1943), *error ref. w.o.m.*

30. Schmidt v. Huppmann, 73 Tex. 112, 11 S.W. 175 (1889); Tittle v. Tittle, 221 S.W.2d 576 (Tex. Civ. App. 1948). A reimbursement theory also seems to be the proper explanation for the holdings in Hartman v. Hartman, 253 S.W.2d 480 (Tex. Civ. App. 1952), and Farrow v. Farrow, 238 S.W.2d 255 (Tex. Civ. App. 1951).

principle is not applicable to separate money spent in the operation of a business for community benefit; in those cases, instead of presuming that individual ownership of property bought with separate funds is intended, it is proper to presume an intention to invest the separate funds for community benefit, the individual spouse to receive reimbursement later from community assets.

That approach may also furnish an explanation for the recent holding of the Texas Supreme Court in *Norris v. Vaughan*.[31] One of the important holdings in that case was that interests in oil and gas leases acquired by the husband during the marriage were community property although the interests were paid for and developed with the husband's separate funds. Since the basis for the court's conclusion is not entirely clear, the circumstances of the case will be stated in some detail.

The leasehold interests in controversy were acquired during the marriage by partnerships of which the husband was a member at the time of the marriage. Some of the interests, referred to in the opinion as the McDowell and Taylor wells, were acquired under "farmout" agreements negotiated by the husband, under which one of the partnerships drilled certain wells in return for assignments of leasehold interests. Two other leases, referred to in the opinion as the Hill and Cantrell leases, were acquired direct from the lessors. The latter leases were not negotiated by the husband; they were procured by other members of a partnership in which the husband owned a one-fourth interest. Only nominal amounts were recited as the cash consideration for the Hill and Cantrell leases; one recited five dollars and the other ten. The drilling of the leases was done by the partnerships with partnership funds. From an audit of the partnership books it was concluded that no community funds had been used in the drilling of the wells; apparently all of the net income earned subsequent to the marriage had been withdrawn from both partnerships, and the court treated the case as if the drilling had been done with the husband's separate funds. Presumably the court also took the same view as to the partnership funds used in paying the nominal cash bonuses and delay rentals of the Hill and Cantrell leases, although the opinion contains no express statement to that effect.

If the leasehold interests were acquired for the partnerships, not for the partners individually, there might be some difficulty

31. 260 S.W.2d 676 (Tex. 1953).

in reconciling the court's analysis with the usual concept of the nature of a partner's interest in partnership property, but assuming the correctness of the court's basic approach, the holding can be stated in a simple form that eliminates the partnership aspect of the case. Viewing the case as one where a husband has acquired leasehold interests during the marriage and has used his separate funds to pay for and develop the leases, the Supreme Court refused to determine the ownership of the interests by looking to the character of the funds so used. Reversing the court of civil appeals on that point, the Supreme Court held that the leasehold interests were community property and that the separate estate should be reimbursed from community assets the amount of the separate funds spent. The court reasoned that the leases should be regarded as a product of the husband's personal efforts, referring to the talent and labor involved in the making of the deals by which the leases were acquired. The Hill and Cantrell leases, which were acquired through the efforts of the husband's partners, were also held to be community property. As to them it was reasoned that the efforts of the husband's partners should be regarded as the husband's own efforts for the purpose of deciding the question before the court.

The reasoning in the opinion does not furnish an entirely satisfactory explanation for the court's decision. The effort, skill, and judgment involved in making investments of separate funds have not in the past been regarded as a sufficient basis for awarding ownership to the community of property acquired with separate funds.[32] Why in this case did the court feel it was necessary to regard the leases as a product of the husband's efforts instead of looking to the character of the consideration given in exchange for them?

Perhaps the court's decision can be justified on the ground that the ownership tracing principle was not an appropriate one for the solution of the problem before the court. When the husband uses $20,000 of his separate money to buy a tract of land, it can properly be said that the money has been exchanged for the land, and a presumption of a resulting trust in favor of the husband's separate estate arises, under the established Texas rule. But the leasing of property for mineral development does not involve a comparable exchange of value equivalents. The bonus paid for the lease may be very large or very small; in

32. Cabell v. Menczer, 35 S.W. 206 (Tex. Civ. App. 1896); Evans v. Purinton, 34 S.W. 350 (Tex. Civ. App. 1896), *error ref.*

many cases it would be only a nominal part of the total return the lessor would expect from the lease. Strange results could be obtained if the separate or community character of a mineral lease were allowed to depend on the separate or community character of the funds used to pay the bonus. The husband could use five dollars of his separate funds to acquire a lease in unproven territory, risk many thousands of dollars of community funds in drilling a test well, and then claim the lease for his separate estate after its value had been established by production. Nor would it be desirable to let the separate or community character of the lease depend upon whether separate or community funds are used to pay the delay rentals, the payment of which merely entitles the lessee to defer the commencement of drilling operations. The desire on the part of the lessor to obtain development of the minerals is normally the principal inducing cause for his execution of a mineral lease, and it would not be entirely unrealistic to say that the lessee receives the leasehold interest in exchange for a total consideration consisting of the bonus, the delay rentals, and whatever time and money the development and operation of the leased premises may involve. But the leasehold must be given a separate or community character at the time it is acquired; at that time the amount that may be spent in the future on delay rentals and on drilling and operating expenses cannot be known.

The simplest solution of the problem would be to regard mineral leases acquired by either spouse during the continuance of the marriage as community property, allowing reimbursement at the dissolution of the community to the spouse whose separate funds have gone into the acquisition and development of the leases. That is the solution that was actually found by the Supreme Court in *Norris v. Vaughan*, and although the court's explanation of its decision causes uncertainty as to the circumstances under which the case will be controlling, it should be regarded as an important precedent establishing that there are some situations where the ownership tracing principle is not appropriate and will not be used, and that cases where separate funds are used to acquire and develop mineral leases fall within that category.

If a conclusion of community ownership of certain types of property acquired with separate funds is based on a presumption of intent to acquire the property for the community, a different conclusion could be expected in cases where an intent to acquire

for the separate estate is clearly manifested by reliable evidence at the time the property is acquired. But from the opinion in *Norris v. Vaughan*, which relies upon the theory that the effort involved in finding and negotiating the leases gave them a community character, it seems possible that intention will not be controlling in cases where oil and gas leases are acquired with separate funds. It may be that in those cases the Texas court is returning to an approach essentially like that of the Spanish law and will simply say that the property is community because acquired during the marriage otherwise than by gift, devise, or descent, even though acquired with separate funds.

Property Acquired on Credit

The character of property as separate or community is fixed at the time it is acquired, whether it is bought with cash or on credit. When property is bought for cash it can be regarded as standing in the place of and taking its character from the money for which it is exchanged. But when property is bought on credit it is received in exchange not for money or other property but for a mere promise to pay. Since the character of the property must be fixed at the time it is acquired, the character of the funds that are later used to pay the purchase-money debt cannot control. If property is community at the time it is acquired, the later use of separate funds to pay the purchase-money debt will not give the property a separate character.[33] A right of reimbursement can be established by tracing separate funds into the payment of the purchase-money debt,[34] with subrogation in some cases to the rights of the creditor,[35] but not ownership of the property.

The controlling rule in most credit acquisition cases is the presumption that property acquired on credit during the marriage is community;[36] usually there will be no evidence to rebut the presumption. If property is acquired partly for cash and partly on credit, the presumption of community is applied to the credit portion of the purchase price even though the down payment is made in whole or in part with separate funds. If the husband buys land for a total purchase price of $20,000, using his separate funds to make a down payment of $5,000 at the

33. Goddard v. Reagan, 28 S.W. 352 (Tex. Civ. App. 1894).
34. Allen v. Allen, 101 Tex. 362, 107 S.W. 528 (1908).
35. Van v. Webb, 147 Tex. 299, 215 S.W.2d 151 (1948).
36. Foster v. Hackworth, 164 S.W.2d 796 (Tex. Civ. App. 1942); SPEER, LAW OF MARITAL RIGHTS IN TEXAS § 369 (3d ed. 1929).

time of the deed and giving his notes for the balance, in the absence of further evidence the husband will own an undivided one-fourth interest in the land as his separate property and the community will own an undivided three-fourths interest.[37] To the extent of the credit portion of the purchase price, the undivided three-fourths, the courts say that the property is bought on community credit.

What evidence will be sufficient to rebut the presumption of community in cases involving credit acquisitions? On that question there is an area of uncertainty in the Texas law, and some confusion. The courts speak of separate and community credit, and sometimes seem to have in mind a characterization of an obligation as separate or community on the basis of the character of the property that the creditor can reach to satisfy the obligation. But such a concept will not explain the holdings of the cases. For example, when a married woman buys land on credit, the seller is usually unable to hold her liable for the purchase price and therefore cannot force payment out of her separate estate,[38] but that fact does not prevent a court from holding that the land belongs to the wife as her separate property if there is an agreement at the time of acquisition that the purchase-money debt is to be discharged with the wife's separate funds. Furthermore, it is possible for the property to become the wife's separate property even though the seller does hold a legally enforceable claim for the purchase price against the husband and the community. There have been several cases holding that land conveyed to the wife was entirely her separate property although the purchase-money note was signed by both the husband and the wife and the vendor could have held the husband and the community liable but could not have reached the wife's separate estate; in those cases the controlling fact was that the husband and the wife had agreed at the time the property was acquired that the purchase-money debt was to be paid out of the wife's separate estate.[39]

But some uncertainty in the law was introduced by language in *Gleich v. Bongio*.[40] In that case the court said:

37. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881 (1937).

38. Houston Loan & Investment Co. v. Abernathy, 131 Tex. 601, 117 S.W.2d 1089 (1938).

39. McClintic v. Midland Grocery & Dry Goods Co., 106 Tex. 32, 154 S.W. 1157 (1913); Schuster v. Bauman Jewelry Co., 79 Tex. 179, 15 S.W. 259, 23 Am. St. Rep. 327 (1890); Foster v. Christensen, 67 S.W.2d 246 (Tex. Com. App. 1934) (conveyance to husband and wife).

40. 128 Tex. 606, 612, 99 S.W.2d 881, 884 (1937).

> "The mere intention of the husband and wife cannot convert property purchased with an obligation binding upon the community into the separate estate of either spouse. To accomplish that purpose the vendor must have agreed with the vendee to look only to his or her separate estate for the satisfaction of the deferred payments."

Although that language seems to have been intended by the court as a statement of existing law as derived from prior cases, actually it contained two new requirements for rebutting the presumption of community in cases where property is acquired on credit: (1) the vendor must participate in an agreement that the purchase-money debt is to be paid from the separate estate, and (2) the agreement must be that the vendor will look only to the separate estate for satisfaction. Both of the new propositions are inconsistent with prior decisions. In several cases holding that separate ownership in the wife had been established it affirmatively appeared that the husband had signed the purchase-money notes, with nothing to rebut the inference that in the event of default the creditor could reach community assets through a judgment against him.[41] And in one of the prior Supreme Court cases the vendor was not a party to the agreement that the purchase-money obligation would be paid with the wife's separate funds; the court's conclusion that the land was separate was based explicitly upon an agreement between the husband and the wife, with no mention of any participation by the vendor.[42]

The actual holding in *Gleich v. Bongio*[43] was not inconsistent with those prior decisions; only the language was. The case was one where the husband used his entire separate estate to make a down payment on the purchase price of land bought largely on credit. It was a clear case for the application of the presumption of community as to the credit portion of the purchase price. There was no agreement between the husband and the wife as to how the balance of the purchase price would be paid and no other evidence to justify a claim that the presumption of community as to the credit portion had been rebutted.

It is very doubtful, therefore, that the language quoted above will be followed. A few later civil appeals opinions have

41. Note 39 *supra*.
42. McClintic v. Midland Grocery & Dry Goods Co., 106 Tex 32, 154 S.W. 1157 (1913).
43. 128 Tex. 606, 99 S.W.2d 881 (1937).

purported to follow it,[44] but the decisions can be justified on other grounds, and there has been at least one inconsistent holding by a court of civil appeals.[45]

It seems probable, therefore, that Texas will continue to permit the husband to lend community credit to the wife in order that she may buy property for her separate estate. An agreement between the husband and the wife at the time of the deed that the purchase-money debt will be paid out of the wife's separate estate will probably continue to be sufficient to rebut the presumption of community even though the vendor relies on the husband's promise to pay. Also, despite the language quoted above, Texas courts will doubtless continue to hold that the husband can make gifts to the wife by buying property for her on credit, including community credit.[46]

A somewhat different problem is presented in the situation where the husband attempts to rebut the presumption of community and establish separate ownership in himself of property bought on credit. From the language in *Gleich v. Bongio*[47] it appears that it would be sufficient to prove an agreement between the husband and the vendor at the time of the acquisition that the vendor will look only to the husband's separate estate for satisfaction of the obligation. But if the property is bought on the husband's general credit without any agreement of that kind, the community being reachable by the vendor to satisfy the obligation, would an agreement between the husband and the wife at the time of the acquisition that the purchase-money debt will be paid out of the husband's separate estate be effective to establish separate ownership? It could be argued that the husband can lend community credit to the wife to enable her to acquire property for her separate estate because the husband is the manager of the community[48] and that, since the wife does not have general managerial power over the community, she does not have power to bind herself by a consent to the husband's use of community credit in the acquisition of property for his separate estate.

44. Gorman v. Gorman, 180 S.W.2d 470 (Tex. Civ. App. 1944), *error dism.*; Price v. Service Bureau, 165 S.W.2d 794 (Tex. Civ. App. 1942), *error ref. w.o.m.*

45. Edsall v. Edsall, 240 S.W.2d 424 (Tex. Civ. App. 1951). The holding in Rath v. Rath, 218 S.W.2d 217 (Tex. Civ. App. 1949), also seems difficult to reconcile with the language in *Gleich v. Bongio*.

46. Goldberg v. Zellner, 235 S.W. 870 (Tex. Com. App. 1921).

47. 128 Tex. 606, 99 S.W.2d 881 (1937).

48. The management of the community during the continuance of the marriage is discussed page 629 *infra*.

At the opposite extreme it is arguable that even without the wife's consent the husband should be able to use his general credit to acquire property for his separate estate. A recent decision by a court of civil appeals permits him to do so if he has the intention at the time of the credit acquisition to discharge the obligation with his separate funds. In *Edsall v. Edsall*[49] the husband desired to sell a tract of his separate land and use the proceeds to buy a different tract, but he consummated the purchase of the new tract before the sale of the old tract, using his general credit to obtain the money to pay for the new tract. He borrowed the money from a bank, giving his promissory note, and used the money to pay for the new tract. One week later he sold the old tract and used the proceeds to discharge the note. In subsequent litigation over the separate or community character of the new tract the trier of fact found that at the time the husband obtained the loan he had the intention to sell his separate land and pay the note with the proceeds of the sale. In view of that finding, a conclusion that the borrowed money and the land bought with it belonged to the husband's separate estate was upheld.

In another civil appeals case involving a similar situation the husband secured the wife's consent to the use of community cash in the acquisition of a new tract of land for the husband's separate estate, it being agreed at the time of the purchase contract that other land belonging to the husband's separate estate would be sold and the proceeds used to pay the balance of the purchase price and to reimburse the community for community funds used in making the down payment. It was the view of the court that under the circumstances there was no impediment to effectuating the agreement of the spouses that the new acquisition should be the husband's separate property.[50]

If the husband owns an ample separate estate at the time of the credit acquisition there would be little risk of injustice to the wife in allowing the husband to use his general credit to acquire property for his separate estate provided his intention to buy for his separate estate and pay the purchase-money debt with his separate funds could be established by reliable evidence contemporaneous with the purchase. If the husband's subjective intent were allowed to control in the absence of evidence of that kind, he might be tempted to claim the best investments for his

49. 240 S.W.2d 424 (Tex. Civ. App. 1951).
50. Rath v. Rath, 218 S.W.2d 217 (Tex. Civ. App. 1949).

separate estate and leave the others for the community. In the *Edsall* case[51] the husband's intent to borrow the money for his separate estate and repay the loan with separate funds seems not to have been manifested by any recital in the note or any other reliable evidence exactly contemporaneous with the loan, but since only a week elapsed between the borrowing of the money and the repayment of the loan with separate funds, the court's decision involved no great risk of injustice to the wife.

Agreements Between the Spouses

In Texas the general rule is that the spouses cannot change the separate or community character of property by mere agreement. That contractual disability has two aspects. They are unable by contract to change in advance the character of property to be acquired in the future; that is, they cannot by contract substitute new rules for the rules of law by which the separate or community character of property is determined.[52] And after property has been acquired they cannot change the ownership from separate to community or vice versa merely by declaring their intention in a formal transfer.[53] Property takes its character as separate or community by reason of the law operating on the facts, and if the spouses wish to change the character of property, they can do so only by providing the proper facts on which the law can operate.

That the spouses would be unable to modify the rules determining the character of property by a postnuptial contract was made clear by the language of the 1840 statute which retained the Spanish community property system upon the adoption of the English common law.[54] The same statute also indicated that prospective spouses would as a general rule be free to alter their marital property rights by a written contract entered into prior to the marriage. The statute was derived from the Louisiana Civil Code,[55] under which the general validity of antenuptial marriage contracts is well established,[56] and if the question had

51. Edsall v. Edsall, 240 S.W.2d 424 (Tex. Civ. App. 1951).

52. Brokaw v. Collett, 1 S.W.2d 1090 (Tex. Com. App. 1928); Cox v. Miller, 54 Tex. 16 (1880).

53. Tittle v. Tittle, 148 Tex. 102, 220 S.W.2d 637 (1949); King v. Bruce, 145 Tex. 647, 201 S.W.2d 803 (1947); Kellett v. Trice, 95 Tex. 160, 66 S.W. 51 (1902); Bruce v. Permian Royalty Co., 186 S.W.2d 686 (Tex. Civ. App. 1945), *error ref. w.o.m.*

54. Tex. Laws 1840, p. 3, 2 LAWS OF TEXAS 177 (Gammel 1898); TEX. REV. CIV. STAT. Arts. 4610-4612 (1925).

55. Arts. 2305-2310, LA. CIVIL CODE of 1825; Arts. 2325-2330, LA. CIVIL CODE of 1870.

56. DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 114 (2d ed. 1945).

been litigated at an earlier time probably the Texas courts would have been generous in upholding the validity of such contracts. But not until the case of *Gorman v. Gause*[57] in 1933 was it contended that the contractual disability of the spouses extended to antenuptial as well as postnuptial contracts. By that time the court seems to have lost touch with the civil law tradition under which marriage contracts were encouraged and freely upheld. Landmark decisions in the early twentieth century had given sanctity to the statutory definitions of separate and community property and to the constitutional definition of the wife's separate property.[58] In *Gorman v. Gause* an antenuptial contract stipulating against the community regime and providing for separate ownership of all property acquired during the marriage was held invalid as an attempt to modify in advance the character of property to be acquired. The statute only permits such contracts as are not contrary to some rule of law, it was reasoned, and "[c]ertainly the Constitution and statutes defining the status of property acquired during the marriage constitutes a 'rule of law.'"[59] Furthermore, the opinion of the commission of appeals added, if the legislature does not have the power to add to the wife's separate estate, surely the parties themselves cannot do so by an antenuptial agreement.[60]

There was dictum in *Gorman v. Gause* that some antenuptial contracts affecting marital property rights could be sustained as not contravening any law of the state. For instance, it could be agreed that the husband would convey to the wife one-half of property he might acquire during the marriage by gift, devise or descent, or that a certain portion of the community estate, when acquired, would be conveyed by him to the wife and made her separate property. In such a case the property would take the character given it by law, the court reasoned, and then would be subject to being disposed of as the parties had obligated themselves to do in the antenuptial contract.[61] But as will be seen from the discussion to follow, there is reason to doubt that the types of contracts mentioned in the court's dictum could be sustained. The difficulty lies in the requirement that the character of property be determined by the law operating on the facts, not by mere agreement of the parties.

57. 56 S.W.2d 855 (Tex. Com. App. 1933).
58. Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925); Kellett v. Trice, 95 Tex. 160, 66 S.W. 51 (1902).
59. Gorman v. Gause, 56 S.W.2d 855, 858 (Tex. Com. App. 1933).
60. *Ibid.*
61. *Ibid.*

As an original proposition it would seem that the legal definitions by which the separate or community character of property is to be determined were intended to fix the rights of the spouses in acquisitions from third persons and were not intended to apply to transactions between the spouses affecting the ownership of property already acquired. However, the opposite view taken in the leading case of *Kellett v. Trice*[62] is the established Texas law. The legal definitions, as modified by the ownership tracing principle, are given controlling effect in transactions between the spouses. If the husband and wife want to convert their separate property into community property or vice versa, they must do it in such a way that the transaction can be fitted into the legal definitions. The wife's separate property cannot be converted into community property by gift, it was held in *Kellett v. Trice*, because the law says that property acquired by gift is separate. But the wife's separate property can be changed by a gift into the husband's separate property[63] because the law says that property the husband receives by gift is separate; the transaction fits into the legal definition and the law operating on the facts accomplishes the desired result. The husband can convert community property into the wife's separate property by a gift to her,[64] and it seems that the wife can convert community property into the husband's separate property by a gift to him.[65]

In Texas there is no general disability on the part of the spouses to bargain with each other, and they can change the character of property if the transaction can be fitted into the legal definitions or rules for determining the separate or community character of property. For example, the wife can lend her separate money to the husband[66] and thereby change the money into community property. The manner by which the husband acquires the money is such that under the established rules of law it becomes community property; it comes to the husband during the marriage, not by gift, devise, or descent, and not in exchange for separate property. Likewise, if the wife sells separate property to the husband, receiving payment in community funds, the property would be changed into community

62. 95 Tex. 160, 66 S.W. 51 (1902).
63. Riley v. Wilson, 86 Tex. 240, 24 S.W. 394 (1893).
64. Story v. Marshall, 24 Tex. 305 (1859).
65. Stratton v. Robinson, 67 S.W. 539 (Tex. Civ. App. 1902), *error ref.*; King v. Bruce, 145 Tex. 647, 657, 201 S.W.2d 803, 809 (1947).
66. Ryan v. Ryan, 61 Tex. 473 (1884); Cadwell v. Dabney, 208 S.W.2d 127 (Tex. Civ. App. 1948), *writ of error refused, no reversible error.*

property and the money would become the wife's separate money.[67] The rule that a new acquisition takes the character of what is given in exchange for it can be applied in a situation of that kind. It should follow that by either an antenuptial or a postnuptial contract Texas spouses can turn over their separate assets to the community at an agreed valuation under an agreement that restitution of a fixed amount will be made from community assets at the dissolution of the community. The practical operation of the community property system could be greatly simplified if contracts of that kind would become a matter of common custom.

The result of applying the legal definitions to transactions between the spouses has been to defeat the intention of the spouses in certain situations without any inquiry into whether or not there was any policy justification for doing so. The desires of the spouses have been frustrated by the application of the legal definitions in two types of situations: (1) gifts to the community, and (2) partitions of community property.

Gifts to the Community

Because of the legal definitions an attempted gift by one of the spouses to the community will not be effective to vest ownership in the community.[68] Will the attempted gift have any effect? If a third person attempted to make a gift to the community, presumably each of the spouses would acquire an undivided half interest as separate property.[69] Similarly, it could have been held that an attempted gift to the community by the husband or wife would at least be effective as a gift to the other spouse of an undivided half interest as separate property, but in the cases where the deeds disclosed the intent to vest title by gift in the community it was held that the attempted transactions were entirely ineffective.[70] Where the deeds did not disclose an intent to make a gift to the community, however, a different result was reached. In *Belkin v. Ray*[71] a conveyance of the wife's separate property to a trustee and a reconveyance to both the husband and the wife were held effective to vest an undivided half interest in each of the spouses, and oral evidence of an

67. See Kellett v. Trice, 95 Tex. 160, 171, 66 S.W. 51, 54 (1902).

68. Tittle v. Tittle, 148 Tex. 102, 220 S.W.2d 637 (1949); Kellett v. Trice, 95 Tex. 160, 66 S.W. 51 (1902).

69. *Cf.* Bradley v. Love, 60 Tex. 472 (1883).

70. See note 68 *supra*. For an excellent review of the cases, see Note, 28 TEXAS L. REV. 275 (1949).

71. 142 Tex. 71, 176 S.W.2d 162 (1943).

intent to vest title in the community was held inadmissible for the purpose of invalidating the conveyances.

Partitions of Community Property

The application of the legal definitions to transactions between the spouses also resulted in a conclusion that the husband and wife, while living together, could not convert community property into separate property by a voluntary partition.[72] However, the decisions striking down attempted partitions came at a time when there was thought to be a need for effective transactions of that kind.[73] The statutes and the constitutional definition of the wife's separate property were therefore amended expressly to allow voluntary partitions of community property at any time the spouses desire it.[74] It is expressly provided that the rights of existing creditors cannot be prejudiced by such a partition. A writing is required, and whenever the partition involves a valuation problem it is not effective until it has been approved by the district court, a requirement imposed for the protection of the wife.

The change in the law allows only voluntary partitions. It does not affect the Texas rule that neither spouse can compel a partition of community property during the continuance of the marriage.[75]

Agreements on Permanent Separation

Permanent separation of the spouses without a divorce does not dissolve the community. The usual rules for determining the separate or community character of property continue to apply to property acquired after a separation in the absence of an agreement to the contrary.[76] And neither spouse can compel a dissolution of the community except by obtaining a dissolution of the marriage.[77]

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72. King v. Bruce, 145 Tex. 647, 201 S.W.2d 803 (1947); Bruce v. Permian Royalty Co., 186 S.W.2d 686 (Tex. Civ. App. 1945), *error ref. w.o.m.*

73. Under the Revenue Act of 1942 there was discrimination against the residents of community property states in the application of the federal estate tax. It was thought that permitting a partition of community property would furnish a possible remedy. See Comment, 24 TEXAS L. REV. 483 (1946).

74. The Constitution was amended in 1948. See TEX. CONST. ANN. Art. 16, § 15 (Vernon, Supp. 1954). The statutory provisions were enacted in 1949. Tex. Laws 1949, c. 242, p. 450; TEX. REV. CIV. STAT. ANN. Art. 4624a (Vernon, 1951).

75. Martin v. Martin, 17 S.W.2d 789 (Tex. Com. App. 1929).

76. Carter v. Barnes, 25 S.W.2d 606 (Tex. Com. App. 1930).

77. Martin v. Martin, 17 S.W.2d 789 (Tex. Com. App. 1929).

But the community property rules were not designed for the situation where the spouses have permanently separated and are not very appropriate in that context. There is likely to be a need at that time for an adjustment of the property rights of the spouses, and they ought to have contractual power to meet the need with a property settlement dissolving the community. Realizing the needs of the situation, the Texas courts have extended to spouses who have permanently separated or who are in the process of separating contractual powers denied to married couples who are living together. Property settlements on permanent separation are upheld if they are fair and equitable, even though they involve changing community property into separate property by a transaction that does not fit into the legal definitions.[78] One civil appeals case held invalid the part of a property settlement providing that future acquisitions would be owned as separate property, invoking the usual rule that the spouses cannot by agreement change in advance the character of property to be acquired in the future.[79] But the contrary view seems to be the prevailing view. According to the more authoritative cases a property settlement on permanent separation need not be confined to the property on hand at the time; the spouses can also validly stipulate against the continuance of the community and provide for individual ownership of property to be acquired in the future.[80]

The Statute of Frauds

An oral agreement between the spouses as to the separate or community character of land is sometimes ineffective because some statute requires a writing. An oral gift of community land by the husband to the wife would be ineffective because of the statute requiring conveyances of land to be in writing.[81] An oral agreement between the husband and the wife for the sale of community land to the wife as her separate property would be unenforceable because of the provision of the Statute of Frauds relating to contracts for the sale of interests in land.[82] Under the

78. Rains v. Wheeler, 76 Tex. 390, 13 S.W. 324 (1890); Speckels v. Kneip, 170 S.W.2d 255 (Tex. Civ. App. 1942), *error ref.*; Corrigan v. Goss, 160 S.W. 652 (Tex. Civ. App. 1913), *error ref.*

79. George v. Reynolds, 53 S.W.2d 490 (Tex. Civ. App. 1932), *error dism.*

80. Speckels v. Kneip, 170 S.W.2d 255 (Tex. Civ. App. 1942), *error ref.*; Corrigan v. Goss, 160 S.W. 652 (Tex. Civ. App. 1913), *error ref.* And see Coborn v. Collins, 244 S.W.2d 526 (Tex. Civ. App. 1951).

81. TEX. REV. CIV. STAT. Art. 1288 (1925).

82. TEX. REV. CIV. STAT. Art. 3995 (1925).

provisions of the Texas Trust Act enacted in 1943 an express trust of land is invalid unless there is a writing.[83]

Resulting and constructive trusts are not invalidated by the Texas Trust Act even though they are not evidenced by any instrument in writing.[84] A theory of resulting or constructive trust is often available to establish equitable ownership in one of the marital estates through the tracing of funds into the purchase although the legal title is vested in another of the estates. Thus, if the wife's separate funds are used with her permission to buy land in the husband's name, the purchase price being paid in cash at the time of the deed, in the absence of further evidence the equitable ownership of the land would be in the wife as her separate property under a presumption of a purchase-money resulting trust.[85]

If the wife turns her separate funds over to the husband to be used by him in buying property in her name for her separate estate, and the husband, violating her instructions, uses the money to buy property in his own name, the wife would have a choice of remedies. She could claim separate equitable ownership of the property as the beneficiary of a constructive trust,[86] or she could claim a right to restitution of her money with an equitable lien on the property as security.[87]

But as a general rule a resulting or constructive trust must be based upon the facts at the time the land is acquired. If land is bought on credit during the marriage without any agreement at the time of the deed as to how the price is to be paid, the presumption of community is controlling and the land takes that character. The subsequent use of separate funds to pay the purchase-money debt would not change the ownership of the land;[88] it would merely give a right of reimbursement from the community in favor of the spouse whose funds were used. Furthermore, an oral agreement between the spouses at the time the debt was paid could not be effective to change the land into separate property because of the Statute of Frauds.[89] The

83. Tex. Laws 1943, c. 148, § 7, p. 232; TEX. REV. CIV. STAT. ANN. Art. 7425b-2 (Vernon, 1951).
84. See Texas Trust Act, § 2; TEX. REV. CIV. STAT. ANN. Art. 7425b-2 (Vernon, 1951).
85. See the authorities cited in note 21 *supra.*
86. Sparks v. Taylor, 99 Tex. 411, 90 S.W. 485, 6 L.R.A.(N.S.) 381 (1906).
87. 3 SCOTT, TRUSTS 2432, § 508 (1939).
88. Goddard v. Reagan, 28 S.W. 352 (Tex. Civ. App. 1894).
89. Allen v. Allen, 101 Tex. 362, 107 S.W. 528 (1908).

transaction would be classified as an attempted sale or conveyance of land from the community to the separate estate.

Where the deed by which the property is acquired reserves an express vendor's lien, however, there is a problem as to the effect of the concept that the vendor retains legal title until the lien has been discharged. In *Johnson v. Smith*,[90] decided prior to the Texas Trust Act, the Supreme Court held that an oral trust of land was enforceable when it had been declared by the vendee subsequent to the deed but contemporaneously with the discharge of an express vendor's lien, relying on the concept that the legal title does not pass to the vendee until the express vendor's lien is discharged. Using the same concept, in a case where the husband used the wife's separate funds to discharge a vendor's lien under an oral agreement between the spouses that the wife would have a separate equitable interest in the property, a court of civil appeals allowed the wife to establish *pro tanto* equitable ownership on a theory of an enforceable express trust.[91] The Trust Act would now prevent the enforcement of an oral express trust of land even if declared contemporaneously with a transfer of legal title, but it is possible that in a case similar to *Johnson v. Smith* arising out of facts occurring subsequent to the Trust Act the courts might now find that a constructive trust to prevent unjust enrichment could be justified by invoking the same title concept used in that case. But the reasoning in *Johnson v. Smith* has never been entirely consistent with the refusal to allow a purchase-money resulting trust in cases where funds of one person have been used to discharge a vendor's lien on land belonging to another;[92] and in order to avoid further disturbance from an anomalous holding, *Johnson v. Smith* should be relegated to the limbo of obsolete precedents by refusing to extend it beyond the context of express oral trusts.

The Parol Evidence Rule

Where property is conveyed during the marriage to either the husband or the wife or both, it is presumed to be community property in the absence of any recitals in the deed indicating separate ownership.[93] Frequently, however, the deed to one of the spouses will contain recitals affecting ownership. The extent

90. 115 Tex. 193, 280 S.W. 158 (1926).

91. Walkup v. Stone, 73 S.W.2d 912 (Tex. Civ. App. 1934), *error dism.*

92. Smith v. Buss, 135 Tex. 566, 144 S.W.2d 529 (1940); Oury v. Saunders, 77 Tex. 278, 13 S.W. 1030 (1890); Lusk v. Palmer, 87 S.W.2d 790 (Tex. Civ. App. 1935).

93. SPEER, LAW OF MARITAL RIGHTS IN TEXAS § 352 (3d ed. 1929).

of the effect depends upon what the recitals are and how they come to be inserted in the deed. In some cases the recitals would operate to rebut the presumption of community and raise a presumption of separate ownership.[94] In some cases the ownership of the property depends entirely on the recitals because of the applicability of the parol evidence rule.

The parol evidence rule has long been applied to a conveyance by one spouse to the other. When a deed from the husband recited that the property was conveyed to the wife "for her separate use and benefit," it was held that the recital was contractual and the parol evidence rule prevented enforcement of an oral agreement by the wife to hold title in trust for the community.[95] According to the language of the opinions, a recital in a deed from the husband that the property is conveyed to the wife as her separate property would be given the same effect.

Where the husband buys property with community funds, taking title in the wife's name through a deed which recites that the conveyance is to the wife as her separate property, there has been some difference of opinion as to the applicability of the parol evidence rule. According to the earlier authorities the parol evidence rule would not be applicable to exclude evidence of an agreement with the wife that the property would belong to the community.[96] The rule would not apply, it has been said, because the husband was not a party to the deed.[97] A different view was taken, however, in *Lindsay v. Clayman*,[98] a recent decision by the Texas Supreme Court. Where the husband was a party to the transaction, although not a party to the deed,[99] the parol evidence rule was applied to prevent proof of an oral agreement that the wife was to hold legal title in trust for the community, where the recitals of the deed inserted at the husband's direction stated that the property was conveyed to the wife as her separate property.

94. McCutchen v. Purinton, 84 Tex. 603, 19 S.W. 710 (1892).

95. McKivett v. McKivett, 123 Tex. 298, 70 S.W.2d 694 (1934); Kahn v. Kahn, 94 Tex. 114, 58 S.W. 825 (1900).

96. McCoy v. Texon Royalty Co., 124 S.W.2d 877 (Tex. Civ. App. 1939), *error dism., judgm. cor.*; see McCutchen v. Purinton, 84 Tex. 603, 604, 19 S.W. 710, 711 (1892).

97. See Pointer v. Pointer, 197 S.W.2d 504, 505 (Tex. Civ. App. 1946).

98. 151 Tex. 593, 254 S.W.2d 777 (1952).

99. The husband was a party to a written contract to buy the property, which also contained a recital that the property was to be the wife's separate property, but the court did not seem to regard that fact as decisive. The court relied upon and quoted with approval from Loeb v. Wilhite, 224 S.W.2d 343 (Tex. Civ. App. 1949), *error ref. n.r.e.*, where a similar holding was one of several grounds of decision, and the element of the husband's being a party to the contract to buy was not present in the *Loeb* case.

The holding in that case seems sound as applied to cases where both spouses are active parties to the transaction, the separate or community character of the property depends upon the intention of the spouses, and the recitals in the deed can properly be regarded as a written integration of an agreement between them as to the character of the property. But those elements are not present in all cases. Of course a spouse should not be bound by a recital of which he did not know and to which he did not consent. And even if there is knowledge and failure to object, it might be improper to regard the writing as an integration of an agreement between the spouses. For example, if the husband, using community funds under his management to buy property, has the draftsman insert in the deed a recital that the property is conveyed to the husband as his separate property, evidence that the wife knew of the recital and made no objection would probably not be sufficient to bind the wife by an application of the parol evidence rule. It could be said that she was not a party to the transaction, or that the writing could not properly be regarded as an integration of an agreement between her and her husband that the property was to be the husband's separate property.

Even where both spouses are parties to the transaction, the parol evidence rule would not prevent extrinsic evidence to show that a deed contained incorrect factual recitals. It could be shown, for example, that a deed was actually a deed of gift although it recited that a valuable consideration was being paid for the property.[100] Or a recital that separate funds had been used in buying property could be contradicted by evidence that community funds were used.[101]

Control and Management During the Marriage

Under the Texas law prior to 1913 there was unified management of all three of the marital estates. The husband had the management of his own separate property, the wife's separate property,[102] and the community property.[103] It was necessary for the wife to join in conveyances of her separate land and of the homestead,[104] and her assent was necessary to dispositions

100. Bradley v. Love, 60 Tex. 472 (1883).
101. See McCutchen v. Purinton, 84 Tex. 603, 604, 19 S.W. 710, 711 (1892).
102. TEX. REV. CIV. STAT. Art. 4621 (1911).
103. *Id.* Art. 4622.
104. It is still necessary, as a general rule, that both husband and wife join in a conveyance of the wife's separate land or of the homestead. TEX. REV. CIV. STAT. ANN. Arts. 4614, 4617, 4618 (Vernon, 1951).

of her separate personalty,[105] but the general rule was that the husband had sole management and control of all of the property.

Since he was the manager of the community, the law gave to the husband full authority to bind the community estate by incurring debts. The debts incurred by him during the marriage were normally classified as community debts,[106] although the creditor could levy upon the husband's separate property as well as upon community property.[107] The corpus of the wife's separate estate could not be reached to satisfy debts incurred by the husband,[108] although the community revenue from her property could be reached.

The giving of sole managerial power to the husband was properly accompanied by a lack of contractual power in the wife. If the husband's control of the community estate was to be effective, he had to have control over the incurring of obligations as well as over the cash expenditures. Until early in the twentieth century the wife had no power to bind herself or the husband by ordinary contracts; the only debts for which the wife could be held liable were those for the reasonable value of necessaries furnished to her for herself and her children and reasonable expenses incurred for the benefit of her separate property.[109]

The development of modern ideas as to the proper status of married women made necessary some change in the Texas law as to management of the marital estates. One change was made in 1911; a statute enacted that year provided a method by which a married woman could have her disabilities of coverture removed and be declared a *feme sole* for mercantile and trading purposes, thereby acquiring full contractual power.[110] The joinder of the husband in a petition to the district court was required, and it was necessary for the court to determine whether or not the removal of the disability would be to the wife's best interest. The statute made clear that upon issuance of the order removing the disability the wife was to have full contractual power and that her separate estate was to be liable for debts incurred by her, but did not make plain the extent to which the

105. See Bledsoe v. Fitts, 105 S.W. 1142, 1145 (Tex. Civ. App. 1907), *error ref.*

106. SPEER, LAW OF MARITAL RIGHTS IN TEXAS § 382 (3d ed. 1929).

107. See Moody v. Smoot, 78 Tex. 119, 123, 14 S.W. 285, 286 (1890).

108. Le Gierse & Co. v. Moore, 59 Tex. 470 (1883).

109. TEX. REV. CIV. STAT. Arts. 4624, 4625 (1911); Harris v. Williams, 44 Tex. 124 (1875).

110. Tex. Laws 1911, c. 52, p. 92, 15 LAWS OF TEXAS 92 (Gammel 1911).

order would be effective to give her other managerial powers over her separate estate or the community revenue produced by her property and efforts. The provisions of the 1911 statute were carried into the 1925 revision and are still in effect,[111] but the judicial decisions involving the statute have not been illuminating.[112]

A radical change in the allocation of managerial power between the spouses came in 1913. With a statute enacted that year Texas embarked on an experiment in divided management of community property.[113] One way of giving the wife an equal share in management would have been to put the community estate under the joint control of the spouses, allowing each of them an equal voice as in the case of ordinary partnerships. Instead of that Texas chose to divide the management, giving each spouse exclusive control over a part of the community estate. The division was evidently intended to be along the same natural lines that ownership is divided in the modified common law states. In addition to her separate property the wife was to manage the revenue from her property and her own earnings; the husband was to continue as manager of his separate property, the revenue from it, and his earnings.

In order to make effective the wife's exclusive control it was necessary to free the types of community under her management from liability for debts incurred by the husband. The creditors of the husband were to look only to his separate property and the part of the community estate under his management; the creditors of the wife were to look only to her separate property and the part of the community under her management.

The 1913 scheme seems basically sound. In determining the managerial authority of the spouses and the rights of third persons dealing with them, the law was to be as simple as is the determination of ownership in the non-community states. For those purposes there was to be no need to distinguish between income and principal or between income produced by property and income produced by personal efforts. It was to be comparatively easy to determine which spouse had authority to act, and

111. The statute, as amended in 1937, now appears as TEX. REV. CIV. STAT. ANN. Art. 4626 (Vernon, 1951).

112. It has even been held that the 1911 statute was intended to impose restrictions on powers the legislature did not grant to married women until 1913, apparently due to a failure to notice that the original statute antedated by two years the grant of powers contained in the 1913 statute. Hirshfeld & Co. v. Evans, 127 Tex. 254, 93 S.W.2d 148 (1936).

113. Tex. Laws 1913, c. 32, p. 61; 16 LAWS OF TEXAS 61 (Gammel 1914).

the authority was to be where the spouses and people dealing with them would normally expect it to be. The individuality of each spouse was fully recognized by the award of managerial power. At the same time the advantages of a community property system were retained by keeping unchanged the laws affecting beneficial ownership. Being equal owners of community property, the spouses would continue to have an equal interest in the financial success of the marriage and to be bound together by the knowledge that they were working together toward a common goal. They were still to be equal partners, but instead of one partnership there were to be two, one managed by the husband and one managed by the wife.

But the 1913 plan as outlined above was never quite put into effect. An important part of the plan was a grant of full contractual power to the wife, a power she would obviously need in order to be an effective manager of her separate property and the part of the community put under her control. However, the governor objected to the giving of contractual power to married women, and the bill as finally passed did not contain any express grant of contractual power.[114] That defect in the law has been partially cured by judicial decision. Considerable contractual power in married women has been derived by implication from the express grant of power to manage and control property,[115] but the decisions have not been uniformly liberal[116] and Texas married women are still handicapped as managers by serious restrictions on their contractual powers and by large areas of uncertainty and confusion in the law as to the extent of their powers.

There was also some lack of clarity in defining the part of the community estate committed to the wife's management. The types of community property that were to be liable for the wife's debts were described as "the personal earnings of the wife, and the income, rents and revenues from her separate property."[117] But in describing the types of community that were to be under the wife's exclusive control and exempt from the

114. A summary of the legislative history of the 1913 act appears in Red River National Bank v. Ferguson, 109 Tex. 287, 293, 206 S.W. 923, 926 (1918).

115. Levin v. Jeffers, 122 Tex. 83, 52 S.W.2d 81 (1932); Cauble v. Beaver-Electra Refining Co., 115 Tex. 1, 274 S.W. 120 (1925); Gohlman, Lester & Co. v. Whittle, 114 Tex. 548, 273 S.W. 808 (1925); Whitney Hardware Co. v. McMahan, 111 Tex. 242, 231 S.W. 694 (1921).

116. Grant Lumber Co. v. Jones, 139 Tex. 647, 164 S.W.2d 1019 (1942); Hirshfeld & Co. v. Evans, 127 Tex. 254, 93 S.W.2d 148 (1936).

117. Tex. Laws 1913, c. 32, p. 61, 16 LAWS OF TEXAS 61 (Gammel 1914).

husband's debts, the statute listed the wife's personal earnings and only certain varieties of income from her separate property; not all varieties of income from her separate property were included. The list included rent from the wife's separate real estate, interest on her bonds and notes, and dividends on her stock,[118] but said nothing as to interest from her separate savings account, revenue from the leasing of her separate chattels, income from her separate business, or the receipts from a sale of crops grown on her separate land. The fact that all of the revenue from the wife's separate realty or personalty was made subject to her debts strongly indicates that the listing of specific items was intended to be illustrative, not exclusive, but that question has not yet been entirely settled.

For a time there were cases holding that the listing was exclusive. In *First National Bank of Lewisville v. Davis*[119] it was held that the husband had power to mortgage cotton grown on the wife's separate land to secure a community debt incurred by him because the cotton could not be classified as "rent from the wife's real estate." In several cases the husband's creditors were allowed to reach the revenue from the wife's separate business,[120] apparently without any consideration being given to the possibility that revenue of that kind may have been put under the wife's exclusive control and exempted from the husband's debts by the provisions of the 1913 statute. In a civil appeals case it was reasoned that revenue from the wife's separate copyright could be reached by the husband's creditors because it was not included in the list of exempted items.[121]

But the recent decision in *Bearden v. Knight*[122] furnishes strong support for the opposite view. In that scholarly opinion the Supreme Court looked back to the general plan of the 1913 statute and concluded that *First National Bank of Lewisville v. Davis*[123] should be overruled. The exact holding was that all of the revenue from the wife's separate land, whether technically classifiable as rent or not, is under the wife's exclusive management and free from liability for the husband's debts. The opinion was confined to revenue from land, for that was the problem

118. *Ibid.*
119. 5 S.W.2d 753 (Tex. Com. App. 1928), overruled by Bearden v. Knight, 149 Tex. 108, 228 S.W.2d 837 (1950).
120. Hardee v. Vincent, 136 Tex. 99, 147 S.W.2d 1072 (1941); Walker-Smith Co. v. Coker, 176 S.W.2d 1002 (Tex. Civ. App. 1943), *error ref. w.o.m.*
121. Simmons v. Sikes, 56 S.W.2d 193 (Tex. Civ. App. 1932), *error dism.*
122. 149 Tex. 108, 228 S.W.2d 837 (1950).
123. 5 S.W.2d 753 (Tex. Com. App. 1928).

before the court, but there is reasoning in the opinion that would be equally applicable to revenue from personalty. Hence there is still doubt as to revenue from personalty of types not specifically listed, but it seems entirely possible that the Supreme Court will now find that the statutory listing is not exclusive but illustrative, and that the present statutes exempt from the husband's debts and commit to the wife's exclusive management all varieties of income from her separate property, real and personal.

An omission in the 1925 revision of the Texas statutes has further complicated the problem of determining the extent of the wife's managerial powers over community property. The act of 1913 expressly gave to the wife exclusive power to manage her personal earnings and the listed varieties of income from her separate property, in addition to exempting those items from the debts of the husband. In the 1925 revision the express provision giving the wife power to manage those items was omitted, although the provision exempting them from the husband's debts was retained[124] along with the provision subjecting the wife's personal earnings and the revenue from her separate property to liability for debts incurred by the wife.[125] In the text usually relied on by courts and lawyers in Texas it is concluded that the 1913 plan by which the wife was given management of part of the community estate was abandoned with the 1925 revision,[126] but there is ample internal evidence in the statutes to show that the legislature did not so intend. The exemption of the listed items from the husband's debts was continued,[127] although the only purpose of the exemption was to make effective the wife's control. The provision subjecting the wife's earnings and the revenue from her separate property to liability for her debts, which also was continued in the 1925 revision,[128] can be justified only on the ground that the wife was intended to have control over that part of the community estate. The omission in the 1925 revision can be explained in part by the attempted change in the definitions of separate property that occurred in 1917 and 1921,[129] the new definitions being carried into the 1925 revision[130] before the decision in *Arnold v. Leonard*[131] established the un-

124. TEX. REV. CIV. STAT. Art. 4616 (1925).
125. *Id.* Art. 4623.
126. SPEER, LAW OF MARITAL RIGHTS IN TEXAS § 347 (3d ed. 1929).
127. TEX. REV. CIV. STAT. Art. 4616 (1925).
128. *Id.* Art. 4623.
129. Tex. Laws 1917, c. 194, p. 436, 17 LAWS OF TEXAS 436 (Gammel 1917); Tex. Laws 1921, c. 130, p. 251, 20 LAWS OF TEXAS 251 (Gammel 1920).
130. TEX. REV. CIV. STAT. Arts. 4613, 4614 (1925).
131. 114 Tex. 535, 273 S.W. 799 (1925).

constitutionality of the attempted change. At the time the 1925 revision was prepared, it must have been thought that it would be unnecessary to give the wife express power to manage the rent from her real estate, the interest from her bonds and notes, and the dividends from her stock, because she was being given express power to manage her separate estate, and all of those items were made part of her separate estate by the new definitions which put all of the revenue from her separate property into the separate estate.[132] The omission of the express provision giving the wife power to manage her personal earnings cannot be explained in that way, but in view of the other provisions from the 1913 act that survived the revision it seems plain that the omission of that provision was inadvertent. However, in the case of *Pottorff v. J. D. Adams Co.*[133] the court of civil appeals relied upon the omission in the 1925 revision for the proposition that the wife no longer has power to manage her personal earnings. The recent decision in *Bearden v. Knight*[134] establishes that no significance is to be given the omission of the express provision giving the wife power to manage the rent from her real estate, and in view of the court's scholarly review in that opinion of the entire statutory history of the control and exemption provisions, it is possible that *Pottorff v. J. D. Adams Co.* will be overruled and the wife's managerial authority over her earnings restored to her without the necessity for an amendment of the statutes.

There is another serious problem as to whether property under the wife's management will remain under her management after a change in form. If the wife accumulates the rent from her separate estate and uses it to buy additional land, does the wife have the management of the new community land, or does it come under the husband's management? The only answer consistent with the division of management contemplated by the 1913 plan is that the new acquisition comes under the wife's management. If there is to be an estate under the wife's exclusive management, she must be able to invest and reinvest the funds of that estate without interference from the husband or his creditors. But under the present Texas authorities the answer to the question is far from clear.

The uncertainty is caused by the holding in *Strickland v.*

132. TEX. REV. CIV. STAT. Art. 4614 (1925).
133. 70 S.W.2d 745 (Tex. Civ. App. 1934), *error ref.*
134. 149 Tex. 108, 228 S.W.2d 837 (1950).

Wester.[135] In that case the Texas Supreme Court held that when the wife invests her earnings in land, the exemption from the husband's debts comes to an end and the husband's creditors can reach the land. The opinion offered no explanation for that conclusion; it was merely stated that the question had received careful consideration. Did the court give consideration to the fact that the exemption from the husband's debts was an integral part of a plan for dividing the management of the community estate between the spouses, a plan under which the wife was to have exclusive control of her personal earnings? Or was the court thinking of the exemption of the wife's earnings as something comparable to the exemption of such items as current wages and the tools of a trade? Did the court mean to imply that when the wife is given the exclusive power to manage community funds derived from certain sources, her power ends as soon as the funds are invested in other property, or did the court assume that the omission in the 1925 revision had terminated the wife's power to manage her personal earnings? The opinion leaves those questions unanswered.

In the prior case of *Hawkins v. Britton State Bank*[136] it had been held that the wife had exclusive management of hay-harvesting equipment bought with rent from her separate farm; the husband had no power to convey the equipment to his creditors in payment of debts owed by him. The fact that the rent from the wife's separate land was under her exclusive management was deemed sufficient to justify the conclusion that the equipment bought with the rent was also under the wife's exclusive management, free from the debts and control of the husband. The *Hawkins* case was not questioned in the *Strickland* case and is still a respected precedent.[137]

The *Hawkins* and *Strickland* cases are not in direct conflict. They could be reconciled by distinguishing between the wife's personal earnings and revenue from separate property, confining the *Strickland* case to situations where the wife's personal earnings are traced into other property. They could also be reconciled by confining the *Hawkins* case within narrow limits. If the wife is to manage her separate farm effectively, she must have control not only of the receipts from the operation of the farm but also of the farm equipment bought for use on the farm.

135. 131 Tex. 23, 112 S.W.2d 1047 (1938).
136. 122 Tex. 69, 52 S.W.2d 243 (1932).
137. In Bearden v. Knight, 149 Tex. 108, 228 S.W.2d 837 (1950), the *Hawkins* case was relied on as a controlling precedent.

The *Hawkins* case could be justified on the ground that giving the wife exclusive management of the hay-harvesting equipment was necessary in order to make effective the grant to her of exclusive authority to manage her separate farm. But neither way of reconciling the two cases will give full effect to the purposes of the 1913 statute. The holding in the *Strickland* case is inconsistent with the purposes of the 1913 plan and should be overruled.

Succession on Death

On the death of a spouse intestate, the decedent's half of the community property is inherited by the decedent's children or their descendants.[138] A provision that the surviving spouse is entitled to the other half appears in the statute of descent, but the survivor does not receive his half by inheritance; it is settled that each spouse owns half of the community property during the marriage and that on the death of one spouse the other simply continues to own a half interest.[139] If there are no children or descendants surviving the decedent, the decedent's half of the community is inherited by the surviving spouse.[140]

When there are children or descendants, the surviving spouse inherits one-third of the intestate's separate personalty and a life estate in one-third of the separate land.[141] If there are no children or descendants, the surviving spouse inherits all of the separate personalty and either one-half or all of the separate land, depending on whether or not the decedent leaves a surviving parent, brother, or sister.[142]

Except for certain allowances[143] and the homestead rights of a surviving spouse and minor children,[144] under Texas law each spouse has complete testamentary power over his or her half of community property and over all of his or her separate property.[145]

Division on Divorce

In Texas the court has a great amount of discretion in dividing the property of the spouses on divorce. At that time the

138. TEX. REV. CIV. STAT. Art. 2578 (1925).
139. Jones v. State, 5 S.W.2d 973 (Tex. Com. App. 1928).
140. TEX. REV. CIV. STAT. Art. 2578 (1925).
141. *Id.* Art. 2571.
142. *Ibid.*
143. As to the allowance for a year's support to the widow and minor children, see TEX. REV. CIV. STAT. ANN. Arts. 3476-3484 (Vernon, 1952). As to the allowances in lieu of homestead and other exempt property, see *id.* Arts. 3485-3495.
144. TEX. CONST. Art. 16, § 52 (1876).
145. SPEER, LAW OF MARITAL RIGHTS IN TEXAS § 315 (3d ed. 1929).

court may do more than merely determine questions of ownership and act on claims for reimbursement. According to the statute, the court can make such division of the property of the spouses as it deems just and right, subject to the limitation that title to real estate must not be divested.[146] Subject to that limitation the court can take the property of one spouse and award it to the other if the circumstances make it just to do so. The division of the community property need not be equal if the circumstances will justify awarding more than half of the community to one of the spouses.[147] The power of the court extends to the separate property of both spouses, as well as to the community property.[148]

The prohibition against divesting title to real estate is an important limitation on the divorce court's power, but the statute has been so construed as to allow the court significant power over land. The awarding to one spouse of as much as a life estate in the separate land of the other is not regarded as divesting title to real estate.[149] Furthermore, the court can impose a trust on the land of one spouse, awarding to the other a right to receive the income for life.[150]

The prohibition against divesting title to land applies to community land as well as to separate land.[151] But a partition is not a divesting of title within the meaning of the statute even though a sale is necessary to effect the partition.[152] According to some cases the divorce court may partition the community by awarding all of the community land to one spouse if the other is compensated for his or her interest with money or other assets,[153] but there is conflict, other cases holding that such a decree divests title to land in violation of the statute.[154]

It has been said that the trial court's discretion in dividing

146. TEX. REV. CIV. STAT. Art. 4638 (1925).
147. Trimble v. Trimble, 15 Tex. 19 (1855).
148. Hedtke v. Hedtke, 112 Tex. 404, 248 S.W. 21 (1923).
149. *Ibid.*
150. Keton v. Clark, 67 S.W.2d 437 (Tex. Civ. App. 1933), *error ref.*; see *Ex parte* Scott, 133 Tex. 1, 14, 123 S.W.2d 306, 313 (1939).
151. Reasonover v. Reasonover, 59 S.W.2d 887 (Tex. Civ. App. 1933).
152. Scannell v. Scannell, 117 S.W.2d 538 (Tex. Civ. App. 1938), upheld a sale of land to one of the spouses as a permissible method of effecting a partition.
153. Simons v. Simons, 23 Tex. 344 (1859); Walker v. Walker, 231 S.W.2d 905 (Tex. Civ. App. 1950); Daniel v. Daniel, 30 S.W.2d 801 (Tex. Civ. App. 1930).
154. Hartman v. Hartman, 253 S.W.2d 480 (Tex. Civ. App. 1952); Lewis v. Lewis, 179 S.W.2d 594 (Tex. Civ. App. 1944); O'Neil v. O'Neil, 77 S.W.2d 554 (Tex. Civ. App. 1934), *error dism.*

property on divorce will not be reversed on appeal in the absence of an abuse of discretion.[155] But the trial court must not act arbitrarily, and must give consideration to the property rights of both spouses. If there are no circumstances to justify a different disposition the court should award the property according to ownership, dividing the community equally between the spouses.[156]

Various factors can justify an unequal division. The financial needs of the members of the family are of the greatest importance. Permanent alimony is not allowed in Texas, but if there is enough property on hand at the time of the divorce the court can provide an effective substitute.[157] The court would usually be concerned with providing for the future support of the wife, but if the husband is the one who needs it the divorce court can provide for his support out of the wife's property.[158] If there are dependent children, their need for support can be taken into consideration in dividing the property,[159] but the court is not confined to the property on hand in making provision for the support of children under eighteen.[160] Other factors than need for support can be taken into consideration. The courts have never attempted to formulate a complete list. It is proper for the divorce court to consider the benefits that the innocent spouse would have received from a continuance of the marriage, the Supreme Court has said;[161] at least to that extent it is proper to consider who was at fault in the failure of the marriage. In one case the fact that the wife had acquired her wealth by gift from the husband was deemed significant.[162]

155. Hedtke v. Hedtke, 112 Tex. 404, 248 S.W. 21 (1923); Keton v. Clark, 67 S.W.2d 437 (Tex. Civ. App. 1933), *error ref.*

156. Reasonover v. Reasonover, 59 S.W.2d 887 (Tex. Civ. App. 1933).

157. Hedtke v. Hedtke, 112 Tex. 404, 248 S.W. 21 (1923); Keton v. Clark, 67 S.W.2d 437 (Tex. Civ. App. 1933), *error ref.*

158. Fitts v. Fitts, 14 Tex. 443 (1855).

159. Rice v. Rice, 21 Tex. 58 (1858).

160. See TEX. REV. CIV. STAT. ANN. Art. 4639a (Vernon, Supp. 1954).

161. Hedtke v. Hedtke, 112 Tex. 404, 409, 248 S.W. 21, 22 (1923).

162. Fitts v. Fitts, 14 Tex. 443 (1855).