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WHEN IS HOMESTEAD TITLE MARKETABLE?

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When a husband alone conveys homestead property to his wife and the wife later conveys it to a third person without the husband joining in the conveyance, is the title marketable? Although some Colorado attorneys do not approve titles which depend upon a conveyance of homestead property from one spouse to the other in which the other did not join, an examination of the applicable Colorado statute would seem to indicate little justification for this stand. The statute provides:[1]

> To convey or encumber a homestead, both the husband and wife must execute a conveyance of their respective interests therein. Such conveyance or encumbrance may be one instrument in writing signed by both husband and wife or by their separate instruments in writing, and no special form of acknowledgment other than the form specified by this article should be necessary . . .

Both the language of the statute itself and the court decisions, discussed hereafter, would indicate that a quitclaim deed from the husband to the wife conveys the husband's right, title, and interest in the homestead property, and the wife's subsequent conveyance to a third person conveys her interest in the property. Both have conveyed "their respective interests therein" by their "separate instruments in writing." The 1947 amendment to this section did not change the applicable part of this statute.[2]

Prior to the enactment of this statute the owner of homestead property could convey by deed absolute whether his spouse joined or not.[3] There is no Colorado authority directly in point; however, in the case of *Wise v. Thomas*,[4] the court said:

> . . . the requirement is that 'both husband and wife' must execute conveyance, failing which, as the authorities we have reviewed make plain, a conveyance . . . executed only by the wife, necessarily is ineffective and void.

Unless carefully analyzed, the language of the court is misleading. The conveyance of one spouse to a third person would clearly be valid under the statute if the other spouse subsequently executed a conveyance to the same person. In such a case the conveyance by the wife is validated by the husband's subsequent conveyance. If the wife's conveyance were *void,* it could never be validated. It is obvious that the supreme court merely meant that her conveyance was ineffective, or voidable, as long as the husband

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* Written while a student at the University of Denver College of Law.

[1] COLO. STAT. ANN., c. 40, § 119 (1935). This statute was adopted in 1927.

[2] COLO. STAT. ANN., c. 40, § 119 (1950 Supp.).

[3] Wright v. Wittick, 18 Colo. 54, 31 P. 490 (1892); Drake v. Root, 2 Colo. 685 (1875).

[4] 117 Colo. 376, 188 P. 2d 444 (1947).

did not convey his interest. The annotation to this statute in the 1950 supplement to the Colorado Statutes is likewise misleading. Nowhere in the annotation does it indicate that the husband in the *Wise* case did not convey his interest to *anyone*. It must be assumed that the language used in the *Wise* case was directed solely toward consideration of the problem there presented, and it is of little help in an attempt to solve the present problem.

AUTHORITY FROM OTHER STATES

In the absence of a Colorado case in point, decisions in other states may be of value. Authorities in most states hold that when homestead property is conveyed from one spouse to the other spouse, joinder or consent is unnecessary, and decisions in those states which declare such conveyances ineffective may be easily distinguished. An examination of the statutes of those states reveals that our statute is unique in that it permits the conveyance of the "respective interests" of the husband and wife to be executed by "their separate instruments in writing." The usual requirement is that homestead property may not be conveyed unless the conveyance is "executed and acknowledged by both husband and wife."[5] The decisions in other states construing provisions of this type clearly show this difference.[6]

In Florida, a conveyance from one spouse to the other is invalid whether the conveyance is made directly from one spouse to the other or indirectly by a deed from both husband and wife to a third person and an immediate conveyance is made from the third person to the wife.[7] The Florida decisions are based on Article 10, §1, which provides:

> § 1 . . . [The homestead] real estate shall not be alienable without joint consent of the husband and wife, when that relation exists.

The Florida law differs from our statute in that it requires *joint consent*. However, the real basis for the Florida decisions seems to be the fact that the benefits of the homestead "inure to the widow and heirs" of the husband.[8] When there were no children, a conveyance from the husband to the wife was declared effectual although the wife did not join in the conveyance.[9]

There are decisions under California law in which a conveyance or encumbrance from one spouse to the other was declared ineffective to pass title. In *Feirmuth v. Steigleman* [10] the wife mort-

[5] CALIF. CIVIL CODE, § 1242.

[6] In construing Code § 1242, the supreme court of California said that although the statute does not use the term "jointly" or "concurrently," it means that homesteads cannot be conveyed by separate instruments separately executed by husband and wife. Hart v. Church, 126 Calif. 471, 58 P. 910 (1899).

[7] Fla. Nat. Bank of Jacksonville v. Winn, 30 So. 2d 298 (Fla. 1947); Church v. Lee, 102 Fla. 478, 136 So. 242 (1931); Norton v. Baya, 102 So. 361 (Fla. 1924).

[8] FLA. CONST., Art. 10, 52.

[9] Rawlins v. Dade Lumber Co., 80 Fla. 398, 86 So. 334 (1920).

[10] 130 Calif. 392, 62 P. 615 (1900).

gaged homestead property to her husband the husband subsequently assigned the mortgage to a third person. The California court held the mortgage from wife to husband invalid. The applicable California statute provided that the homestead of a married person could not be encumbered or conveyed unless the instrument of encumbrance or conveyance were "executed and acknowledged by both husband and wife."[11] Since "both husband and wife" did not join in the mortgage, the court said the requirement of the statute had not been fulfilled; the court went on to say that since the husband could not convey to himself, the mortgage between husband and wife would be void even if "both husband and wife" had joined. An earlier California decision indicated that a deed from husband to wife of homestead property would vest legal title in the wife, but that the homestead right would still be reserved to the husband for his life.[12]

CONVEYANCE FROM ONE SPOUSE TO THE OTHER

An early Iowa decision also held that a conveyance by a husband to his wife "may have operated to vest in the wife legal title to the property. But the property continued still to be the homestead of the family", and a subsequent deed from the wife to a third person was held ineffective as against the husband's right to the homestead premises.[13] This case may also be distinguished from any arising under the Colorado statute, for the Iowa law denied the validity of a conveyance by the owner of homestead property "unless the husband and wife, if the owner is married, concur in and sign the same joint instrument".[14] Ignoring the difference in the statutory restrictions, the Iowa case is still of little weight for subsequent decisions under the same statute ignore the earlier case.[15] In *Beedy v. Finney*,[16] the Iowa court upheld the validity of a warranty deed from husband to wife of his homestead property even though the wife did not join.

In Vermont, where a husband alone quitclaimed to a third person his homestead property and the third person immediately conveyed to the wife, no title passed.[17] Of course in the Vermont case there was not a direct conveyance from husband to wife, but the main basis for distinguishing this case lies in the fact that the Vermont statute provides that the husband may not convey his homestead property "unless his wife joins in the execution and acknowledgments of such conveyance."[18]

The Illinois supreme court has said that conveyances of home-

[11] CALIF. CIVIL CODE, § 1242.
[12] Burkett v. Burkett, 78 Calif. 310, 20 P. 715 (1889).
[13] Spoon v. Van Fossen, 63 Iowa 494, 5 N. W. 624 (1880).
[14] IOWA CODE, § 1990 (1873).
[15] Beedy v. Finney, 118 Iowa 276 (1902); Harsh v. Griffith, 72 Iowa 608, 34 N. W. 441 (1887).
[16] Supra, n. 15.
[17] Ellingwood v. Ellingwood, 91 Vt. 134, 99 A. 781 (1917).
[18] VT. P. S., § 2553 (1906); P. L. VT., § 2568 (1923).

stead property between spouses without joinder are invalid.[19] In the leading case of *Kitterlin v. Mech. Mutual Life Insurance Company,*[20] the husband alone conveyed his homestead property to his wife by quitclaim deed. When the question arose whether or not the husband had violated the provision of an insurance policy that the property was not to be transferred without the consent of the insurance company, the court held that there was no violation of the restrictive provision of the insurance policy, for the deed from husband to wife was invalid. In subsequent cases the Illinois court followed this decision in construing the statute. In *Gillam v. Wright,*[21] title to the homestead premises was in the wife. She alone conveyed by quitclaim deed to the husband. When the heirs of the wife sued for partition and the heirs of the husband defended on the basis of the deed from wife to husband, the court declared the deed invalid as failing to meet the statutory requirements of joinder.

The Illinois statute, under which these decisions were rendered, provided that no conveyance of homestead property should be valid unless the conveyance were "subscribed by said householder and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged. . ."[22] The conveyance, in Illinois, must be "subscribed" and "acknowledged"; thus, separate conveyances such as are permitted in Colorado are prohibited. The law of Illinois required a specific release of the homestead right, and no waiver or release of the right of homestead "shall bind the wife unless she join in such release or waiver".[23]

Thus, cases which have held a conveyance by one spouse to the other without joinder to be ineffective are no authority for a situation arising under the Colorado law, for the statutes under which such decisions were rendered called for a strict observance of the requirement that both husband and wife must *join* in the *same* instrument. Even were these decisions considered, it is doubtful that they would be very persuasive. Decisions in other states, under similar statutes, are not in accord.

MOST STATES DO NOT HAVE STRICT REQUIREMENT OF JOINDER

The better and more logical view would seem to be that adopted by a majority of the states. In a Texas case,[24] the husband alone conveyed homestead property to the wife and child by quit claim deed. The wife subsequently conveyed the property by a warranty deed to a third person without joinder. The Texas court

[19] Barto v. Kellog, 289 Ill. 528, 124 N. E. 633 (1919); Gillan v. Wright, 246 Ill. 398, 92 N. E. 906 (1910); Lininger v. Helpenstell, 229 Ill. 369, 82 N. E. 306 (1907); Kitterlin v. Mech. Mut. Ins. Co., 134 Ill. 647, 25 N. E. 772 (1890).

[20] Supra, n. 19.

[21] Supra, n. 19.

[22] SMITH-HURD ILL. STAT. ANN., c. 52, 54.

[23] SMITH-HURD ILL. STAT. ANN., c. 30, § 26.

[24] Martin v. Barnum, 286 S. W. 550 (Tex. 1926).

held that title vested in the third person in spite of the Texas statute requiring that no homestead be conveyed without the consent of the wife evidenced by her "joining in the conveyance, and signing her name thereto, and by her separate acknowledgment . . ."[25] The reasoning of this decision is that the provision requiring joinder is applicable only in regard to conveyances to third persons, there being no reason to demand that the wife join in a conveyance to herself. The reasoning in the Texas case is similar to that used in Arkansas[26] under a similar statute.[27] In *Kindlay v. Spraker*,[28] the court quoted with approval Thompson on Homestead and Exemptions, § 473:

> The policy of these statutes, which restrain the alienation of the homestead without the wife joining in the deed, is to protect the wife and enable her to protect the family in the possession and enjoyment of a homestead, after one has been acquired by the husband. They are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever may be the form of such conveyance.

In a recent Oklahoma case,[29] the husband conveyed his homestead property to his wife without her joining. The conveyance was declared valid even though the statute provided that no deed of homestead property was valid unless it was "subscribed by both husband and wife . . ."[30]

Although the Michigan statute provides that the husband's deed to homestead property is not valid unless signed by the wife,[31] where the husband conveyed his homestead property to his wife without joinder, and the wife subsequently conveyed to a third person, the court held that the conveyances were valid, stating:[32]

> It is insisted that the deed from the husband to his wife is void, because she did not join in the deed. The statute does not prevent the husband from conveying his interest in the homestead to his wife by deed. To require a deed from herself to herself would be senseless. But the question is settled in this state against the plaintiff's contention.

In Missouri the husband is "debarred" from alienating home-

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[25] VERNON'S CIVIL STAT., Art. 1115 (1914).

[26] Polk v. Stephens, 126 Ark. 159, 189 S. W. 837 (1916); Kindly v. Spraker, 72 Ark. 228, 79 S. W. 766.

[27] § 3901, Kirby's Digest provides: "No conveyance . . . affecting the homestead of any married man shall be of any validity . . . unless the wife joins in the execution of such instrument and acknowledges the same."

[28] Supra, n. 26.

[29] Howard v. Standard Oil & Gas Co., 169 P. 2d 737 (Okla. 1946).

[30] 16 OKLA. STAT. ANN., § 4.

[31] COMP. L. MICH., c. 623, § 74 (1948).

[32] Lynch v. Doran, 95 Mich. 395, 54 N. W. 780 (1893).

stead property, and any attempted conveyance is declared "null and void" unless he and his wife jointly convey,[33] but a conveyance from husband to wife without joinder was held valid in *Hall v. Hall.*[34]

PURPOSE OF STATUTES CONSIDERED

In the construction of any statute, the general policy upon which it is based must be examined in order that the intent of the legislature be given proper effect. In the present situation, a study of the homestead statute as a whole and the decisions based on the statute are of particular value. First, it should be noted that homestead statutes are not in derogation of the common law and hence are liberally construed.[35] The general purpose of the homestead exemption is to place the designated property out of the reach of creditors so long as it is occupied as a home.[36]

This, of course, is based upon the more general policy of the state to encourage and protect the family, the institution upon which our very civilization is founded. In order further to protect the family, the legislature restricted the manner in which the homestead property might be conveyed, in order that one spouse might not be able to convey homestead property without regard to the rights of the other. It is generally required that both release their right in some manner before homestead property may be conveyed. Thus, the family home is protected against creditors from without, and treachery within. Not only is the owner protected, but also his spouse receives protection. As long as the protection which the statute is designed to give is exacted, the statute is serving its purpose. Thus, when both spouses join to convey homestead property, both knowingly release their rights therein. In the same manner, when one spouse conveys to the other, he has knowingly released his interest. There is little point in requiring the grantee to join in this conveyance for his or her interest is fully protected, the purpose of the statute has been fulfilled, and no other function remains to be served. It is a settled principle that a person cannot be a grantee and a grantor at the same time.

Was it the purpose of the statute to *prohibit* a conveyance from one spouse to the other? The requirement in some statutes that both must *join* obviously was intended to be applied when the homestead property was conveyed to a third person.[37] Joinder would be absurd when the conveyance is from one spouse to the other.

Very probably, it was precisely this reasoning that led the

[33] Mo. REV. STAT., § 608 (1929).
[34] 346 Mo. 1217, 145 S. W. 2d 752.
[35] Barnett v. Knight, 7 Colo. 365, 3 P. 747 (1884).
[36] Helkey v. Ashley, 113 Colo. 175, 155 P. 2d 143 (1945); Woodward v. People's Nat. Bank, 2 Colo. App. 369, 31 P. 184 (1892).
[37] Beedy v. Finney, *supra*, n. 15.

Illinois legislature to end the series of decisions in Illinois, insisting upon a construction of the statute clearly not intended. In 1919 an amendment was made to the statute requiring joinder when homestead property was conveyed:[38]

> . . . provided that where a conveyance is made by a husband to his wife, or by a wife . . . to her husband, such conveyance shall be effectual to pass the title expressed therein to be conveyed thereby whether the grantor in such conveyance is joined therein by such wife or husband as the case may be or not.

The view of the Illinois Courts prior to the enactment of the present statute was rejected by the Supreme Court of the United States as early as 1901. After adopting the view that when the husband conveyed homestead property to the wife, the conveyance was valid, even though a statute [39] provided that both husband and wife must join by signing the instrument of conveyance, it said:[40]

> The contrary has been held by the Supreme Court of Illinois in Kitterlin v. Mil. Ins. Co., but the reasoning of the other cases we think is the better . . .

Fortunately, in Colorado, the statute requires only that both husband and wife must convey their respective interests, and it expressly permits these conveyances to be executed separately. Thus, the problem becomes less difficult. Those few states which felt forced to declare conveyances from husband to wife ineffective without joinder did so because they could not bring themselves to go beyond the literal interpretation of statutes which made joinder an absolute necessity. Colorado may adopt the better reasoning of the other decisions without ever departing from a literal interpretation of her statute.

In the situation confronting us, the granting spouse has conveyed his interest to the other spouse; the other spouse then conveys to a third person. Both have conveyed all the interest they have in the premises. Even if the conveyance is a quit claim deed, the grantor conveys *all* his right, title and interest. The conveyances are separate, and perhaps executed at different times, but this is permissible under our statute. It would seem to make little difference whether the husband or the wife is the original grantor, for both are equally protected, and equally restricted under the statute.

A marketable title results. The problem as to marketability is, of course, the important one. Usually, for one reason or another,[41] it is fairly clear that the title is "safe." The problem arises when a prospective purchaser must be convinced of this fact.

The problem also need seldom arise where the conveyance in

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[38] SMITH-HURD ILL. STAT. ANN., c. 52, § 4; L. 1919, p. 590, § 1.
[39] ARIZ. REV. STAT., § 226 (1887).
[40] Luhrs v. Hancock, 181 U. S. 567 (1901).
[41] Abandonment which cannot be proved is probably most common.

question appears very far back in the chain of title. The seven year statute of limitations in Colorado [42] is effective even where the "color of title" relied upon is a "void" deed. Adverse possession vests title absolutely after 18 years.

But, in the interim, it is our contention that where one spouse has conveyed his or her homestead to the other, and the grantee spouse later coveys to a third person, the title is marketable.

JUNIOR BAR SPONSORS STATE WIDE LEGAL AID

At a meeting held in the Broadmoor Hotel on October 27th, the Junior Bar Section of the Colorado Bar Association gave consideration to a resolution of the Junior Bar Conference of the American Bar Association favoring promotion and organization of Legal Aid Societies and Lawyer Reference Plans.

In order to meet possible future threats of socialization of the legal profession, the American Bar Association and forward looking attorneys feel that complete legal services must be rendered to all members of our society regardless of financial status, race or creed.

The Junior Bar Section therefore adopted as its paramount function at the present time the promotion of such plans in communities where there is found to be a need for such programs. Committees were appointed by the section to study the needs of various communities throughout the state and to further consider methods of establishing Legal Aid programs and Lawyer Reference Plans for persons of limited or moderate means.

Representatives of the Junior Bar will later request hearings by Local Bar Associations as the Section plans to place no programs in operation without the prior advice and approval of the local Bar.

At this meeting the Junior Bar Section also elected John W. Patterson of Denver, Chairman, Ben T. Delahay of Colorado Springs, Vice-Chairman, and Thomas M. Smart of Denver, Secretary-Treasurer for the forthcoming year.

BOOK TRADERS CORNER

Attorneys Kempf & Icke of Montrose, Colorado offer for sale volumes 1 to 72 of Corpus Juris with annotations from 1937 to 1949. Also offered are volumes 218 to 226, inclusive, of the Pacific Reporter, Second Series.

[42] COLO. STAT. ANN., c. 40, § 143 (1935).

[43] Munro v. Eshe, 113 Colo. 19, 156 P. 2d 700 (1944); Parker v. Betts, 47 Colo. 428, 107 P. 816 (1910).