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MATRIMONIAL PROPERTY

by

*Joseph W. McKnight**

DURING the survey period important contributions have been made to the law of matrimonial property. In addition to miscellaneous commentaries on the subject,¹ the senior commentator in the field has produced a new edition of source materials.² Furthermore, the Family Law Section of the Texas Bar drafted a recodification of the statutory law which has been presented to the 60th Legislature.³ The judicial contributions, though less in volume than the academic endeavors, were by no means negligible. The courts have been concerned mainly with the examination and construction of statutes, some for the first time.

I. SEPARATE AND COMMUNITY PROPERTY DEFINED

*Tarver v. Tarver*⁴ deals with the difficulties encountered in discharging the burden of "tracing," one of the means by which property can be characterized as either separate or community. The husband and his first wife were married in 1903. The wife died intestate in 1918, leaving three minor children. At that time the net value of the community estate was about \$335,000. No administration was had of the wife's estate, and the husband continued to manage and control the property as his own, recognizing, however, that one-half belonged to his children. The husband remarried in 1921. By that time the net value of the community property of the first marriage had decreased to around \$275,000, and the assets in control of the husband continued to diminish until 1931 when all properties on hand had a net worth of \$50,000. The husband was engaged prin-

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¹ Branscomb & Miller, *Community Property and the Law of Trusts*, 20 Sw. L.J. 699 (1966); Davis, *Income Arising From Trusts During Marriage Is Community Property*, 29 TEXAS B.J. 901 (1966); Hughes, *Community Property Aspects of Profit-Sharing and Pension Plans in Texas*, 44 TEXAS L. REV. 860 (1966); McKnight, *Recodification of Matrimonial Property Law*, 29 TEXAS B.J. 1000 (1966); Newman, *Income Distributions From Trusts—Separate or Community Property?*, 29 TEXAS B.J. 449 (1966); Smith, *The Family Code Project*, 30 TEXAS B.J. 27 (1967); Comment, 17 BAYLOR L. REV. 51 (1965); Comment, 17 BAYLOR L. REV. 177 (1965); Comment, 20 Sw. L.J. 794 (1966); Note, 18 BAYLOR L. REV. 158 (1966); Note, 3 HOUSTON L. REV. 105 (1965); Note, 3 HOUSTON L. REV. 119 (1965); Note, 20 Sw. L.J. 174 (1966); Note, 19 Sw. L.J. 801 (1965); Note, 19 Sw. L.J. 835 (1965); Note, 44 TEXAS L. REV. 551 (1966); 20 Sw. L.J. 221 (1966); 20 Sw. L.J. 422 (1966).

² HUIK, *TEXAS MARITAL PROPERTY RIGHTS* (1966).

³ The Family Law Section of the Texas Bar has undertaken to prepare a modern Family Code as part of the general revision of the Texas statutes by the legislature. Smith, *The Family Code Project*, 30 TEXAS B.J. 27 (1967) (summarizing the committee's report of its work); McKnight, *Recodification of Matrimonial Property Law*, 29 TEXAS B.J. 1000 (1966).

⁴ 394 S.W.2d 780 (Tex. 1965).

cipally as an oil well drilling contractor and frequently accepted a fractional interest in a mineral deposit as consideration for drilling a well. During the first marriage a great deal of drilling equipment was accumulated which the husband continued to use in his business during the second marriage. Substantial mineral interests were acquired after 1931 through the husband's use of this equipment in drilling wells. When the second marriage was dissolved by divorce in 1960, the assets of the combined estates had increased to about \$205,000. Sometime thereafter the second wife commenced an action for a division of the community estate, and the children of the first marriage intervened to claim their share of the first community. Over the years the children had been reared and schooled out of the combined funds.

The court pointed out that article 4619⁵ creates a presumption that all property possessed by a husband and wife upon divorce is their community property and that it imposes upon one asserting otherwise the burden to prove the contrary. To discharge the burden, the complaining party must "trace" the proceeds of his property into the commingled mass, and account for them at all times thereafter. The court concluded that the children of the first marriage did not discharge their burden of tracing merely by showing the dimension of the community estate at their mother's death, the general character of the husband's subsequent dealing with the property, and the value of the property at the time of the divorce. Relying on *Noris v. Vaughan*,⁶ the court also held that the mineral interests were property of the second community even though the first community may have been entitled to reimbursement for the rental value of its drilling equipment.

Another case⁷ involved the characterization of property deeded to a wife by her parents pursuant to the parents' estate plan. In 1953 the parents executed a conveyance of a certain piece of land to each of their eight children subject to payment by each child of a \$5,000 note. The wife's deed provided that she took the land as her separate property and specified that the note was to be paid from her separate property. In 1958 the parents executed releases of the notes, and the wife's deed was recorded. After the wife's death her husband asserted that the land was community property. The jury found that the husband and wife had agreed with the wife's parents to render services as consideration for the grant. The jury also found that the \$5,000 note was paid with revenues from the land. On the basis of these findings, the trial court held that the property was community property. The appellate court reversed, holding that the findings of

⁵ TEX. REV. CIV. STAT. ANN. art. 4619 (1960).

⁶ 152 Tex. 491, 260 S.W.2d 676 (1953).

⁷ *Neff v. Ulmer*, 404 S.W.2d 644 (Tex. Civ. App. 1966) *error ref. n.r.e.*

the jury were against the great weight and preponderance of the evidence. Relying on the recital in the deed that the land was the separate property of the wife, the court followed *Smith v. Buss*⁸ and concluded that the land was part of the wife's separate property.⁹

II. DIVISION OF PROPERTY UPON DIVORCE

Fundamental to the Texas matrimonial property system is the concept that all community property is owned by the spouses in equal shares. The most striking exception to this rule is the power of a divorce court to divest either spouse's interest in the community estate as the court may deem just and right.¹⁰ Several cases considered the propriety of the exercise of the divorce court's discretion in dividing the community estate.¹¹ In only one did the appellate court set aside the division as unjust—when the divorce court divided the community property in such a way that the wife got eighty-five per cent of the community estate, including the husband's principal business.¹² In another case¹³ a seventy-two year old husband complained that the divorce court should not have included in his share of the community estate a debt owed to the community by a woman whom the husband intended to marry following the divorce. While the divorce action was pending, the husband, without his wife's consent, released the security pledged by the woman-debtor and joined her in procuring another loan on the same security. The appellate court affirmed the division made by the divorce court, characterizing the acts of the husband as a fraud on his wife.

The most interesting case dealing with the division of property upon divorce involved the rule that permanent alimony is not allowed in Texas.¹⁴ A husband and wife entered into a property settlement agreement in anticipation of a divorce. The agreement recited that during the marriage the wife had worked, thereby enabling the husband to complete the requirements for a degree in dentistry; that the education and degree in dentistry constituted a \$20,000 community asset; that the wife's share

⁸ 135 Tex. 566, 144 S.W.2d 529 (1940).

⁹ Two other cases involved characterization of property. In *Orr v. Pope*, 400 S.W.2d 614 (Tex. Civ. App. 1966), the court of appeals held that real property located in Texas to which a husband succeeded while he was a resident of a common law state was the separate property of the husband. In *Lusk v. GMAC*, 395 S.W.2d 847 (Tex. Civ. App. 1965), the court held that a car purchased by the husband in the wife's name during marriage was not the separate property of the wife unless her separate property was used to purchase the car, and such property must be clearly traced and identified.

¹⁰ TEX. REV. CIV. STAT. ANN. art. 4638 (1960).

¹¹ *Hooper v. Hooper*, 403 S.W.2d 215 (Tex. Civ. App. 1966) *error dismissed*; *Roye v. Roye*, 404 S.W.2d 92 (Tex. Civ. App. 1966); *Pickett v. Pickett*, 401 S.W.2d 846 (Tex. Civ. App. 1966).

¹² *Hooper v. Hooper*, 403 S.W.2d 215 (Tex. Civ. App. 1966) *error dismissed*.

¹³ *Roye v. Roye*, 404 S.W.2d 92 (Tex. Civ. App. 1966).

¹⁴ This rule resulted from the application of the *expressio unius est exclusio alterius* maxim to article 4639 providing for temporary alimony.

of the community estate was to be \$11,000; and that the husband would execute an \$11,000 note to be paid in installments. This settlement agreement was approved by the divorce court and was incorporated into the judgment granting the wife a divorce. On the husband's failure to pay the installments after the divorce, the wife brought suit. The trial court gave judgment for the wife. The husband appealed, contesting the jurisdiction of the divorce court to consider the value of his dental training as part of the community estate and asserting that the note was alimony. The court of civil appeals¹⁵ concluded that if the divorce court had committed error in considering the value of the husband's dental training, it could not be reached by collateral attack. Furthermore, the court pointed out that payments made under a property settlement agreement are not permanent alimony if they are referable to any property which either spouse may have owned or claimed.

III. SURVIVORSHIP AGREEMENTS

In 1840 the Congress of the Republic forbade the joint tenancy with its attendant right of survivorship,¹⁶ presumably as contrary to the community property system. In 1939 joint tenancies gained at least partial recognition when such an estate was held to be valid if arrived at by contract.¹⁷ Article XVI, section 15 of the Texas Constitution was amended in 1948 to permit a husband and wife to partition the community into the separate property of each by written instrument.¹⁸ Article 4624a prescribes the requirements as to the form and manner of execution of such partition instruments.¹⁹ In 1961 the supreme court held in *Hilley v. Hilley*²⁰ that to create a joint tenancy with right of survivorship out of community property, such property must be transmuted into separate property by partition pursuant to article 4624a prior to the agreement creating the joint tenancy. The legislature immediately responded to *Hilley* by adding the following sentence to section 46 of the Probate Code: "[A]ny husband and his wife may, by written agreement, create a joint estate out of their community property with rights of survivorship."²¹

No opinion in the field was more anxiously awaited than that of *Williams v. McKnight*,²² the first case to rule directly upon the constitutionality of section 46 of the Probate Code, as amended in 1961. A husband and

¹⁵ *Gregory v. Gregory*, 404 S.W.2d 657 (Tex. Civ. App. 1966) *error ref. n.r.e.*

¹⁶ Act of Jan. 28, 1840, § 17, 2 GAMMEL, LAWS OF TEXAS 306 (1898).

¹⁷ *Chandler v. Kountze*, 130 S.W.2d 327 (Tex. Civ. App. 1939) *error ref.*

¹⁸ TEX. CONST. art. 16, § 15 (1876).

¹⁹ TEX. REV. CIV. STAT. ANN. art. 4624a (1960).

²⁰ 161 Tex. 569, 342 S.W.2d 565 (1961).

²¹ TEX. PROB. CODE ANN. § 46 (Supp. 1966).

²² 402 S.W.2d 505 (Tex. 1966). See Note, 19 SW. L.J. 835 (1965); 20 SW. L.J. 221 (1966). For further discussion see Galvin, *Wills and Trusts*, this Survey at footnote 47.

wife deposited \$10,000 in a savings and loan association and \$10,000 in each of two banks. All of the funds came from their community funds, and thereafter nothing was added to or withdrawn from the accounts. Each of the three accounts was subject to a written survivorship agreement signed by both spouses. After the husband's death, the wife claimed the funds as her separate property, contending that she and her husband had complied with section 46. She was opposed by her husband's executor who maintained that the funds were community property. The unanimous opinion of the court was little more than a reiteration of the court's opinion in *Hilley*. Section 46 was declared unconstitutional to the extent that it authorizes spouses to create by agreement a joint tenancy with rights of survivorship out of their *community* property. A husband and wife may create a joint tenancy, but only out of their separate estates.

Though it was intimated in *Hilley* that a joint tenancy as to community property might be achieved by a contract between the spouses, the *Williams* court was apparently unwilling to look for the necessary elements of a contract in the facts before it. Indeed, even if the court had been prepared to approve such a contract, the necessary elements could not have been found. Neither was the court prepared to find a gift from the husband to the wife of his community interest, although the terms of the savings and loan agreement embodied mention of a gift. Nor would the court imply a partition from the nature of the transaction.

Though the court might have held the 1961 amendment to section 46 constitutional had it specifically provided for partition, the tone of the opinion indicates that it is unlikely that a different result would have been reached. In fact, a certain hostility can be perceived on the part of the court to the idea that spouses may change the nature of their community property. On the other hand, the court in no way indicated an intention to read too narrowly the 1948 constitutional amendment allowing partition. Indeed, within the strictures of the *Hilley* and *Williams* cases, partition of the community estate into separate property with the right of survivorship does not present insuperable problems, provided the proper formalities are observed. With respect to community property a husband and wife may enter into a partition agreement in accordance with the provisions of article 4624a, and then on the same piece of paper, enter into another agreement providing for a joint tenancy with right of survivorship.²³ The fact that a valid partition could have been achieved so easily in the *Williams* situation has provoked the most criticism of the case. The

²³ Other means of achieving the same result may be suggested. Assuming that the husband has the management, control and disposition of the particular community property sought to be dealt with, he might give the whole of it to his wife as separate property. Then the wife could give the husband an undivided one-half as separate property. The spouses could then create their joint tenancy out of the separate estate of each.

court refused to allow the spouses to do by a single step what they could have achieved in two or three. But it may be fairly inferred from the facts that the husband and wife had no real intention of performing a partition of their community estate. What the court seems to be saying is that the nature of the community estate should not be tampered with unknowingly and that a partition will be found only if the intention of the spouses is clearly expressed.²⁴ This cautious approach to partition seems particularly sound in view of the yet unexplored incidents of such a fundamental change in the nature of matrimonial property. This is particularly important from the view of creditors. What, for example, is the nature of a creditor's rights against a partitioned fund of former community property? If the creditor has a debt for which the whole of the partitioned community was liable, can he reach all, half, or none of it after partition? This is a question which the courts must soon answer. Another problem, perhaps more fundamental, is the nature of partition itself. Can a partition, by its very nature, be achieved of anything that is not in existence? Can spouses, for example, using proper formalities, partition a present fund and all funds that may be later added thereto?²⁵

Contrasted with *Williams* is the situation in which either the husband and wife together or one of the spouses and a third party purchase a federal bond. A treasury regulation provides that if either co-owner of a bond dies, the survivor will be recognized as the owner.²⁶ In 1958 the Texas Supreme Court upheld such an arrangement between a husband and wife, basing its decision on a third party contract theory and upon the supremacy of the federal regulations.²⁷ Three years later the court reversed its earlier decision, concluding that "the Federal regulations do not override our local laws in matters of purely private ownership where the interests of the United States are not involved."²⁸ The federal bond situation again came before the court in 1962. In *Free v. Bland*²⁹ the Texas Supreme Court rejected the validity of the survivorship clause only to be reversed by the United States Supreme Court on the principle of federal supremacy. The

²⁴ As a consequence of the *Williams* case the Texas Attorney General concluded that the 1965 amendment to Penal Code article 1436-1, § 24(j) (Certificate of Title Act) was also unconstitutional for the purpose of creating a survivorship-joint tenancy in a community vehicle. TEX. ATT'Y GEN. OP. No. C-735 (1966).

²⁵ The concept of partition of community property is often analogized to the notion of a gift of the community, and the old cases on gifts of community to be acquired in the future—cases decided long before the partition principle was established—are brought to bear on the not really analogous partition concept.

²⁶ Treas. Reg., 31 C.F.R. § 315.62 (1966) states, "If either co-owner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner."

²⁷ *Ricks v. Smith*, 159 Tex. 280, 318 S.W.2d 439 (1958).

²⁸ *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565 (1961).

²⁹ 369 U.S. 663 (1962).

Supreme Court held that, in the absence of fraud,³⁰ the husband was entitled to the full benefit of the contract with the federal government.

A court of civil appeals³¹ relied on *Free v. Bland* in deciding title to United States savings bonds. The husband, who had a large separate estate and a smaller community estate, purchased federal bonds payable to himself or his daughter by a previous marriage as joint tenants. On the husband's death the widow claimed a community interest in the proceeds. The court held that since there was no evidence of fraud, the bonds belonged to the daughter. The court then added rather cryptically that "it was not established that the bonds were paid for out of community funds."³²

IV. CONTRACTUAL POWERS OF MARRIED WOMEN

Prior to 1963, article 4626 provided that any married woman might have her disabilities of coverture removed by court order for mercantile and trading purposes.³³ Article 4623 protected the separate property of the husband and the spouses' community property from the payment of debts contracted by the wife except those contracted for necessaries furnished her or her children.³⁴ In 1963 both articles were repealed, and a new article 4626 was enacted.³⁵ It provides that, "A married woman shall have the same powers and capacity as if she were a femme sole, in her own name, to contract and be contracted with, sue and be sued . . . and her contracts and obligations shall be binding on her."³⁶ Seemingly unaware of the repeal of the old article 4626, some judges have continued to remove the disabilities of married women for mercantile and trading purposes, but no appellate cases have yet arisen which point up this fact.

In a court of appeals³⁷ case an action was brought against a husband and wife on a promissory note executed by them in 1964. The wife asserted that the repeal of articles 4623 and 4626 and the enactment of a new article 4626 did not make a married woman's contracts binding on her in the absence of evidence that the proceeds of the note were used for the benefit of her separate estate, or that the proceeds were used for necessities furnished to her or her children, or that her disabilities of coverture had been removed prior to the note's execution. The court held that there was no contract under the facts but by way of obiter dictum rejected the

³⁰ The fraud point was further stressed in *Yiatchos v. Yiatchos*, 276 U.S. 306 (1964), another community property case that arose in Washington.

³¹ *Wood v. Johnston*, 404 S.W.2d 678 (Tex. Civ. App. 1966) *error ref. n.r.e.*

³² *Id.* at 681.

³³ Former art. 4626, Tex. Rev. Civ. Stat. (1960).

³⁴ Former art. 4623, Tex. Rev. Civ. Stat. (1960).

³⁵ TEX. REV. CIV. STAT. ANN. art. 4626 (Supp. 1966).

³⁶ *Ibid.*

³⁷ *Kitten v. Vaughn*, 397 S.W.2d 530 (Tex. Civ. App. 1965).

wife's contention. Referring to the enactment of article 4626 and the repeal of article 4623, the court said:

These two enactments by the Legislature, one positive and one negative, make it crystal clear that the Legislature has removed all impediments previously existing to the power and authority of a married woman to contract, and to bind her separate estate, and to sue and be sued, by reason of her status as a married woman.³⁸

The pre-1963 rule was applied by the United States Supreme Court in *United States v. Yazell*.³⁹ There a husband and wife negotiated a loan from the Small Business Administration. When the note was not paid, the Government brought suit for the deficiency. The Court, noting that the agreement was signed prior to the legislative changes of 1963, allowed the wife to plead coverture as a bar to her liability. The case derives its importance from a significant and somewhat startling comment made by Mr. Justice Fortas:

Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.⁴⁰

This seems to indicate that the rationale of *Free v. Bland*⁴¹ and related cases is no longer so well-entrenched as it once was.

V. MANAGEMENT

As a general rule, neither spouse is allowed to sue the other for torts that arise during marriage. But if property rights of one are violated by the other, relief is available. In a court of appeals case,⁴² a husband, alleging fraud, brought an action against his former wife to cancel certain deeds with respect to separate and community property. The husband was illiterate, and the educated wife attended to all business affairs of the couple. A deed of trust was executed on a piece of the husband's separate property to secure notes used to purchase community realty. The notes were ultimately acquired by the wife's son by a previous marriage. After divorce proceedings were commenced, the husband continued to give the wife money to make payments on the notes. The wife led the husband to believe that she had made the payments when she had not in order that

³⁸ *Id.* at 532.

³⁹ 382 U.S. 341 (1966).

⁴⁰ *Id.* at 352.

⁴¹ 369 U.S. 663 (1962). See note 29 *supra*, and accompanying text.

⁴² *Bridges v. Bridges*, 404 S.W.2d 48 (Tex. Civ. App. 1966).

her son might foreclose the liens. The son foreclosed, and the husband brought suit. The court vested the husband's separate property in him, and that which had been community property was vested in the former spouses as co-tenants. The most striking aspect of the case is that it was the wife rather than the husband who was guilty of defrauding the other of separate and community property interests.

Section 110(e) of the Probate Code provides that a person is disqualified to act as guardian who is asserting any claim to any property adverse to the person for whom the appointment is sought.⁴³ A court of appeals case⁴⁴ involved a petition under section 110(e) to have the husband removed as guardian of his wife. Each spouse owned separate property. Three bank accounts were maintained: in one, community property from the sources of each was deposited, and both could draw on it; in another income from the separate property of the wife and the wife's separate property were deposited on which the wife and her daughter by a previous marriage could draw; and a third account on which only the husband could draw (the contents were unspecified). Just prior to becoming incompetent, the wife gave her daughter a check for \$6,000 on the first (joint) account, and with it the daughter opened an account in her own name. After being appointed as his wife's guardian and apparently in response to his wife's gift to her daughter, the husband withdrew the rest of the money from the joint account and put it in another account subject to withdrawal by himself or his son by a previous marriage. The husband brought a proceeding for an accounting, and the daughter was temporarily enjoined from spending any of the \$6,000. The daughter then brought an action to have the husband removed as his wife's guardian. In view of the proceeding for an accounting, the husband's conflict of interest is clear. But, as the husband contended, there would seem to be a similar conflict of interest on the part of the daughter. Nevertheless, the court removed the husband as guardian and appointed the daughter.

Section 157 of the Probate Code provides: "Whenever a husband or wife is judicially declared to be incompetent, the other spouse . . . acquires full power to manage, control, and dispose of the entire community estate. . . ."⁴⁵ The homestead is not mentioned, but presumably it is included in the language "entire community estate."⁴⁶ In a court of appeals case,⁴⁷ the husband sold the homestead without the joinder of the wife. Both deeds recited that the wife had not joined in the conveyance because she

⁴³ TEX. PROB. CODE ANN. § 110(e) (1956).

⁴⁴ Dobrowolski v. Wyman, 397 S.W.2d 930 (Tex. Civ. App. 1965).

⁴⁵ TEX. PROB. CODE ANN. § 157 (1956).

⁴⁶ Schmidt v. Schmidt, 403 S.W.2d 531 (Tex. Civ. App. 1966), inferentially affirms the applicability of § 157 of the Probate Code to the community homestead as well as other community property.

⁴⁷ Schmidt v. Schmidt, 403 S.W.2d 531 (Tex. Civ. App. 1966).

was of unsound mind. Children of the husband and wife filed suit to set aside the conveyance, alleging the deeds were void because the wife had never been judicially declared to be of unsound mind. Following the long line of cases stemming from the period antedating the enactment of the statute from which section 157 was developed,⁴⁸ the court held that compliance with the statute was unnecessary in order to convey good title to the homestead. If used, the statute furnishes a safeguard to a purchaser of the homestead from a couple when one is incompetent, but it does not define the exclusive method by which a valid homestead conveyance can be made.

VI. LIABILITY OF COMMUNITY UNDER THE WIFE'S CONTROL

Article 4616 provides: "Neither the separate property of the wife, her personal earnings, nor the revenue from her separate property shall be subject to the payment of debts contracted by the husband nor claims arising out of the torts of the husband."⁴⁹ *Mulcaby v. United States*⁵⁰ raised the question of whether this statute is effective to prevent the seizure of a wife's wages by the federal government to pay a tax deficiency incurred by the husband. A penalty tax⁵¹ had been assessed against the husband after a Texas corporation with which he was connected failed to pay taxes withheld from employees. Relying on section 6321 of the 1954 Internal Revenue Code and its authorization of a tax lien upon the property of the taxpayer,⁵² the Government attempted to levy upon the wife's earnings. The wife sought a permanent injunction to restrain the Government and a declaratory judgment that her earnings were not liable for the taxes assessed against the husband.

It is well settled that a state statute which merely creates an "exemption" for certain classes of property must yield to section 6321.⁵³ However, the federal lien will not attach if the state statute creates "property rights" in the wife rather than merely granting an exemption.⁵⁴ And state law, of course, determines the category into which the statute fits.

Twice before, the federal courts granted relief to a wife in analogous situations. In the 1962 case of *Helm v. Campbell*⁵⁵ the Revenue Service was enjoined from levying on the wife's wages to collect a deficiency against

⁴⁸ A full discussion of the development of the line of cases culminating in *Reynolds Mortgage Co. v. Gambill*, 115 Tex. 273, 280 S.W. 531 (1926), and some proposals for legislative reform are found in Comment, *Conveying the Homestead Without Joinder of Both Spouses*, 20 SW. L.J. 794 (1966).

⁴⁹ TEX. REV. CIV. STAT. ANN. art. 4616 (1960).

⁵⁰ 251 F. Supp. 783 (S.D. Tex. 1966).

⁵¹ INT. REV. CODE OF 1954, § 6672.

⁵² INT. REV. CODE OF 1954, § 6321.

⁵³ *United States v. Bess*, 357 U.S. 51 (1958).

⁵⁴ *Aquilino v. United States*, 363 U.S. 509 (1960).

⁵⁵ Civil No. 9043, N.D. Tex., Sept. 6, 1962.

the husband for failure to pay a cabaret tax in connection with a business in which the wife exercised no control. Although no opinion was written, findings of fact and conclusions of law were made. In the conclusions of law the court held that article 4616 is not an exemption statute but creates property rights in the wife.⁵⁶ In *Bice v. Campbell*, a 1964 case,⁵⁷ a second wife's separate personality and community property consisting of income from her separate property were relieved from seizure for delinquent taxes of the husband and his first wife. The reasoning of the court is somewhat murky, however. No Texas cases were cited. Instead, the court analogized article 4616 with a Washington law which exempts community property from liability for the separate debts of the husband or wife and concluded that the Texas statute defines a property right. The *Mulcahy* court also concluded that article 4616 creates a property right in the wife. The court cited *Bice v. Campbell* but put its principal reliance on particular language used in *Arnold v. Leonard*,⁵⁸ the all-purpose authority.

Texas cases (including *Arnold v. Leonard*) have referred to article 4616 as an exemption statute.⁵⁹ But, as has been suggested elsewhere,⁶⁰ the federal cases are not necessarily in conflict with the Texas decisions. Rather, they are directed to different purposes. Whereas article 4616 is properly referred to as an exemption statute for the ordinary private law purposes of Texas, it must be construed in a different manner for federal tax purposes. If the paramount object of the Texas statute is to vest control of certain community property in the wife, that control would be destroyed by allowing the levy of the Revenue Service to prevail. Hence, for federal tax purposes, the element of control by the wife is more significant than the husband's property interests in the exempt community through which the tax liability was initially asserted.

⁵⁶ The findings of fact and law are reported in Comment, *Federal Taxation and Community Property: The Wife's Rights In Her Earnings*, 16 SW. L.J. 643 (1962).

⁵⁷ 231 F. Supp. 948 (N.D. Tex. 1964).

⁵⁸ 114 Tex. 335, 273 S.W. 799 (1925). It is interesting that the *Mulcahy* court cited *Bice v. Campbell* with approval but in the companion case, *Mulcahy v. United States*, 251 F. Supp. 785 (S.D. Tex. 1966), rejected the Washington authority relied in *Bice*.

⁵⁹ See *Illitch v. Household Furniture Co.*, 103 S.W.2d 873 (Tex. Civ. App. 1937) *error ref.*

⁶⁰ See *supra* note 56, at 653-54.