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# COMMENTS

## HAILEY, HILLEY, AND HOUSE BILL 670—A STUDY IN PARTITION AND SURVIVORSHIP IN TEXAS COMMUNITY PROPERTY†

Lawrence R. Maxwell, Jr. and Frank W. Weathers, Jr.

### I. INTRODUCTION

In 1960 and 1961 the Supreme Court of Texas rendered two decisions in the community property area which promise to be of landmark proportions. Both of these decisions seemed to resolve troublesome areas in the Texas law of marital rights. The first, *Hailey v. Hailey*,<sup>1</sup> (by limiting the application of statutory language) resolved one of the problems arising in awards of community property upon divorce. The second, *Hilley v. Hilley*,<sup>2</sup> (by extending the restrictions of applicable statutes) affirmed traditional concepts of the unity of the community during marriage as against inter vivos agreements to change the status of marital property.

The *Hilley* decision in broad dictum<sup>3</sup> indicated a method consonant with constitutional and statutory definitions by which a joint tenancy with survivorship in community property could be created. The decision, however, acted as a catalytic agent upon the 57th Legislature which promptly enacted House Bill 670.<sup>4</sup> The bill amended Section 46 of the Probate Code<sup>5</sup> to permit husband and wife by written agreement to create a joint tenancy with survivorship. The result was to produce a new area of doubt in the realm which the *Hilley* decision had apparently quieted.

It might appear on the surface that these two decisions and the subsequent legislation have little in common. However, partition of the community is the common ground upon which they meet. *Hailey* involved involuntary partition of community realty on divorce. *Hilley* involved a voluntary prospective partition of the community estate while the community was still in existence. It is

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† A major portion of this Comment involves analysis of voluntary partition of community property in Texas. The same subject is dealt with in Wren, Recent Texas Statutes Affecting Estate Planning, 15 Sw. L.J. 479 (1961). That Article presents the practical approach, invaluable to the estate planner. This Comment presents a theoretical analysis of the impact upon the general problem which results from the unique philosophy of Texas marital law.

<sup>1</sup> 160 Tex. 372, 331 S.W.2d 299 (1960).

<sup>2</sup> 161 Tex. 569, 342 S.W.2d 565 (1961).

<sup>3</sup> *Id.* at 579, 342 S.W.2d at 571.

<sup>4</sup> Acts 1961, ch. 120.

<sup>5</sup> Tex. Prob. Code § 46 (1955).

the purpose of this Comment to explore briefly the historical, legal, and social matrix from which each of these decisions arose and to predict the effect of the recent legislation upon the latter decision.

## II. DIVISION UPON DIVORCE

Article 4638 states that

The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. *Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.*<sup>6</sup>

This provision has remained substantially unchanged since its original enactment<sup>7</sup> by the Republic in 1841.

In 1871 the Supreme Court of Texas in *Tiemann v. Tiemann*<sup>8</sup> held that an award in fee to the wife of the community homestead consisting of house and lot was ineffectual because it divested the husband of title to realty. Hence, said the court, the wife was entitled only to a life estate under such a decree. This decision was the basic lodestone to which the courts were drawn while struggling with the often conflicting poles of accomplishing "complete equity as between the husband and wife and the children, having due regard to all obligations of the spouses and to the probable future necessities of all concerned."<sup>9</sup> In attempting to satisfy the opposing interests of social policy and statutory command the supreme court subsequently construed the statute to permit the court to place separate realty of the wife in the hands of a trustee and to order the trustee to pay the income from the property to the husband, wife, and children.<sup>10</sup> The court also approved the imposition of a lien upon all of the husband's property in order to secure one-half of the community property to the wife.<sup>11</sup>

Prior to the decision in *Hailey v. Hailey*,<sup>12</sup> Texas Courts of Civil Appeals were in irreconcilable conflict in their interpretation of the divestiture provisions of Article 4638. One group of cases took a literal view of the statute's mandate. Divorce decrees awarding a

<sup>6</sup> Tex. Rev. Civ. Stat. Ann. art. 4638 (1925). (Emphasis added.)

<sup>7</sup> Act of Jan. 6, 1841, 5 Laws of the Republic 19 (Hartley 1850).

<sup>8</sup> 34 Tex. 523 (1871).

<sup>9</sup> Hedtke v. Hedtke, 112 Tex. 404, 248 S.W. 21, 22 (1923).

<sup>10</sup> Fitts v. Fitts, 14 Tex. 443 (1855). The same treatment has been accorded community property. Rice v. Rice, 21 Tex. 58 (1858).

<sup>11</sup> Simons v. Simons, 23 Tex. 344 (1859); Smith v. Smith, 187 S.W.2d 116 (Tex Civ. App. 1945).

<sup>12</sup> 160 Tex. 372, 331 S.W.2d 299 (1960).

tract of community realty exclusively to the wife,<sup>13</sup> awarding one parcel of community realty to the wife and another to the husband,<sup>14</sup> or awarding after-acquired equities in community property exclusively to the wife<sup>15</sup> were all struck down in the name of divestiture prohibition. A second group of cases turning on a more liberal interpretation reasoned that the award of one parcel of community realty to one spouse is merely a division of realty between the parties having title and was not a divestiture of title within the meaning of the statute.<sup>16</sup> Such reasoning permitted both a decree awarding a tract of community realty to the wife in satisfaction of her interest in the estate<sup>17</sup> and another decision awarding three improved lots to one spouse and two unimproved lots to the other.<sup>18</sup>

In *Hailey v. Hailey* the husband and wife owned two very similar tracts of land as community property. The husband sued the wife for divorce and for a division of the community property. The trial court granted the divorce and awarded one of the two tracts of community realty to the husband and the other to the wife. The wife challenged the validity of this partition decree on the ground that it divested the parties of title to realty in violation of Article 4638. The supreme court held that the portion of Article 4638 which prohibits divestiture of title to real estate has no application to community realty. The court reasoned that partition is not a "divestiture" but a judicial proceeding through which two or more co-owners may cause jointly held property to be divided into as many shares as there are owners.<sup>19</sup> This partition vests each co-owner with separate ownership of the particular tract allotted to him.<sup>20</sup> The deeds of partition are then said to dissolve a tenancy in common and do not operate as a "conveyance or transfer of title."<sup>21</sup>

It is easily recognized that such an argument is largely a matter of semantics. However, the justification for the result is readily found in common experience. Absent a partition at the time of divorce, the parties hold their estate as ordinary tenants in common.<sup>22</sup> It appears rather naive to expect parties in the strained rela-

<sup>13</sup> *Lewis v. Lewis*, 179 S.W.2d 594 (Tex. Civ. App. 1944).

<sup>14</sup> *Swanson v. Swanson*, 229 S.W.2d 843 (Tex. Civ. App. 1949).

<sup>15</sup> *Maisel v. Maisel*, 312 S.W.2d 679 (Tex. Civ. App. 1958).

<sup>16</sup> *Walker v. Walker*, 231 S.W.2d 905 (Tex. Civ. App. 1950); *Puckett v. Puckett*, 205 S.W.2d 124 (Tex. Civ. App. 1947).

<sup>17</sup> *Young v. Young*, 23 S.W. 83 (Tex. Civ. App. 1893).

<sup>18</sup> *Mansfield v. Mansfield*, 308 S.W.2d 80 (Tex. Civ. App. 1957) error dism. w.o.j.

<sup>19</sup> *Hudgins v. Sansom*, 72 Tex. 229, 10 S.W. 104 (1888).

<sup>20</sup> *Houston Oil Co. v. Kirkindall*, 136 Tex. 103, 145 S.W.2d 1074 (1941); *Chace v. Gregg*, 88 Tex. 552, 32 S.W. 520 (1895); *Davis v. Agnew*, 67 Tex. 206, 2 S.W. 43 (1886).

<sup>21</sup> *Houston Oil Co. v. Kirkindall*, 136 Tex. at 109, 145 S.W.2d at 1077.

<sup>22</sup> The rules of law governing co-tenancy generally control unpartitioned property.

tionship which produced divorce to hold property in common with any degree of amicability. It seems that the present construction of Article 4638, which restricts its operation concerning divestiture of title to realty to the separate property of the spouses, is one to be received with approbation. The judicial partition at time of divorce ensures an equitable division at the only time all of the facts surrounding the dissolved marital community are before the court. Undoubtedly the parties subsequent to the divorce proceeding could, as tenants in common, apply to the court for a judicial partition,<sup>23</sup> or could partition by agreement. Thus, the effect of the principal case is to prevent vexatious and expensive subsequent litigation in the first instance and to prevent the more solvent party from taking undue advantage in the second.

It may be argued that the principal case should be confined to its facts, allowing partition only of virtually identical community tracts. However, the Eastland Court of Civil Appeals, following the principal case, has upheld an award of the community homestead consisting of one acre of land and a house to the wife in fee while apparently awarding nothing to the husband.<sup>24</sup> It does not appear difficult to predict that under the decision in *Hailey v. Hailey*, any award of community property made in the trial court to either or both of the parties will be upheld as long as it can be found to do equity to the parties upon a proper finding of their needs and circumstances.

### III. DIVISION DURING MARRIAGE

The landmark case of *King v. Bruce*<sup>25</sup> held that a husband and wife could not by agreement partition their community property so as to make each half the separate property of the individual spouses. As a result of this decision, Article 16, Section 15, of the Texas Constitution was amended in 1948 to provide authority for

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Harkness v. McQueen, 207 S.W.2d 676 (Tex. Civ. App. 1947); Freeman v. Pierce, 250 S.W. 778 (Tex. Civ. App. 1922).

<sup>23</sup> Tex. Rev. Civ. Stat. Ann. art. 6082 (1925); Tex. Rules Civ. Pro. Ann. rules 756-71 (1940).

<sup>24</sup> Hellums v. Hellums, 335 S.W.2d 390 (Tex. Civ. App. 1960). This is contrary to Tiemann v. Tiemann, 34 Tex. 523 (1871), which the court inferentially overruled in Hailey v. Hailey, 331 S.W.2d at 303, saying, "It follows that we disagree with the holdings in Lewis v. Lewis and those cases following that rule." Lewis v. Lewis, 179 S.W.2d 594 (Tex. Civ. App. 1944), was a case which had followed the Tiemann doctrine. See also McElreath v. McElreath, — Tex. —, 345 S.W.2d 722, 724 (1961) (dictum).

<sup>25</sup> 145 Tex. 647, 201 S.W.2d 803, cert. denied, 332 U.S. 769 (1947). See also King v. Matney, 259 S.W.2d 606 (Tex. Civ. App. 1953) error ref. n.r.e.; Bruce v. Permian Royalty, 186 S.W.2d 686 (Tex. Civ. App. 1945) error ref. w.o.m.; McDonald v. Stevenson, 245 S.W. 777 (Tex. Civ. App. 1922) error ref.

partition by agreement, and Article 4624a<sup>26</sup> was enacted to provide the procedural requirements for the sanctioned partition. The Texas courts have insisted that the statutory provisions be followed, or the partition will be void.<sup>27</sup> The constitutional amendment and the resultant legislation, therefore, did not operate to change the general rule in Texas that the spouses cannot change the community character of property by mere agreement.<sup>28</sup>

It should be noted in addition to the two methods of partition previously mentioned, *i.e.*, by divorce decree and under Article 4624a, that community property may also be partitioned in connection with an agreement for permanent separation.<sup>29</sup> Further, Article 881a-23 was amended in 1957<sup>30</sup> so as to provide that shares or share accounts of savings and loan associations may be partitioned by formal written agreement.<sup>31</sup> Moreover, in addition to partition, community property may be converted into separate property of the spouses by a gift<sup>32</sup> from one spouse to the other. There is no question that the husband may give part or all of his share of the community to his wife, thereby converting the gift into her separate property.<sup>33</sup> It also seems that the wife can make a similar gift although there are only dicta<sup>34</sup> and the statements of two leading authorities<sup>35</sup> to support her power to do so. However, if the transfer of community property between the spouses is supported by consideration, it will fail as a gift and be held an invalid partition. For example, in the case of *Pevehouse v. Lubbock Nat'l Bank*,<sup>36</sup> a husband

<sup>26</sup> Tex. Rev. Civ. Stat. Ann. art. 4624a (1949).

<sup>27</sup> *Williams v. Williams*, 319 S.W.2d 777 (Tex. Civ. App. 1958) error dismissed; *Reed v. Reed*, 283 S.W.2d 311 (Tex. Civ. App. 1955).

<sup>28</sup> Huie, *Some Basic Principles of Texas Community Property Law*, 15 La. L. Rev. 605, 620 (1954), in *Comparative Studies in Community Property Law* 114, 130 (Charmatz & Daggett ed. 1955), citing *Cox v. Miller*, 54 Tex. 16 (1880); *Browkaw v. Collett*, 1 S.W.2d 1090 (Tex. Com. App. 1928). See also *Proetzel v. Schroeder*, 83 Tex. 684, 19 S.W. 292 (1892).

<sup>29</sup> *Speckels v. Kneip*, 170 S.W.2d 255 (Tex. Civ. App. 1942) error refused. There must be an actual separation agreement to make a valid partition. Cf. *Carter v. Barnes*, 25 S.W.2d 606 (Tex. Com. App. 1930) adopted.

<sup>30</sup> Tex. Rev. Civ. Stat. Ann. art. 881a-23 (1929), as amended, Acts 1957, ch. 445, § 1, at 1319.

<sup>31</sup> The statute now provides that a written agreement be executed by husband and wife to accomplish such a partition and that they "acknowledge the same in the manner now required by law for the conveyance of realty."

<sup>32</sup> *Southern Pac. Ry. v. Ulmer*, 286 S.W. 193 (Tex. Com. App. 1926); see Comment, 4 Sw. L.J. 218 (1950).

<sup>33</sup> *Sorenson v. City Nat'l Bank*, 121 Tex. 478, 49 S.W.2d 718 (1932).

<sup>34</sup> *King v. Bruce*, 145 Tex. 647, 201 S.W.2d 803, cert. denied, 332 U.S. 769 (1947); *Collett v. Houston & T.C.R.R.*, 186 S.W. 232 (Tex. Civ. App. 1916) error refused; cf. *Stratton v. Robinson*, 67 S.W. 539 (Tex. Civ. App. 1902) error refused, where a gift by the wife to the husband of community realty using the device of conveying it to a trustee for reconveyance to the husband was upheld.

<sup>35</sup> Huie, *Commentary on the Community Property Law of Texas* § 9 (1960); Speer, *Marital Rights in Texas* § 132 (3d ed. 1929).

<sup>36</sup> 79 S.W.2d 1107 (Tex. Civ. App. 1935).

conveyed to his wife a portion of the community property on condition that the wife relinquish her rights in the remainder of the property; the court held that the agreement was not a gift. Finally, of course, community property can be converted into separate property by will.<sup>37</sup>

Closely allied to the problem of partitioning or otherwise converting community property into separate estates by gift or devise is the problem of inter vivos survivorship agreements between husband and wife which have the effect of converting community property into separate property after the death of one of the spouses. In the past these agreements have had to be considered in the light of Article 4610<sup>38</sup> which is substantively unchanged from Section 5 of the 1840 Act.<sup>39</sup> It provides that no contract of marriage shall alter the legal order of descent. This prohibition with respect to antenuptial contracts was early (though quite artificially) extended to include agreements made *after* marriage as well.<sup>40</sup> Moreover, Section 46 of the Probate Code<sup>41</sup> (formerly Article 2580) incorporates the provisions of an Act of 1848 which abolished common-law joint tenancy with survivorship.<sup>42</sup> Fairly recently, however, this article was interpreted to abolish joint tenancy only where it would have been created by law and was construed so as not to prevent creation of joint tenancy by contract, will, or conveyance.<sup>43</sup> This interpretation was incorporated in Section 46 of the Probate Code which with new language virtually nullifies the 1848 statute.<sup>44</sup>

At the time *Hilley v. Hilley*<sup>45</sup> was before the supreme court, there were four previously decided Texas cases which were specifically directed to the problem of survivorship agreements and community

<sup>37</sup> *Weidner v. Crowther*, 157 Tex. 240, 301 S.W.2d 621 (1957).

<sup>38</sup> Tex. Rev. Civ. Stat. Ann. art. 4610 (1925).

<sup>39</sup> Act of Jan. 20, 1840, § 5, 4 Laws of the Republic of Texas 3, 5, 2 Gammel's Laws of Texas 177, 179 (1898); see Huie, op. cit. supra note 28, at 115.

<sup>40</sup> *Cox v. Miller*, 54 Tex. 16 (1880). This judicial extension of the legislative prohibition has been consistently followed down to the present time. See *Weidner v. Crowther*, 157 Tex. 240, 301 S.W.2d 621 (1957).

<sup>41</sup> Tex. Prob. Code § 46 (1955).

<sup>42</sup> Act of Mar. 18, 1848, § 12, 3 Laws of Texas 132 (Gammel 1898).

<sup>43</sup> *Chandler v. Kountze*, 130 S.W.2d 327 (Tex. Civ. App. 1939) error ref. See also *Johnson v. Johnson*, 306 S.W.2d 780 (Tex. Civ. App. 1957) error ref.; *Adams v. Jones*, 258 S.W.2d 401 (Tex. Civ. App. 1953); *Shroff v. Deaton*, 220 S.W.2d 489 (Tex. Civ. App. 1949). As to the applicability of survivorship to trusteeship see *Red River S. & W. Ry. v. Blount*, 3 Tex. Civ. App. 282, 22 S.W. 930 (1893).

<sup>44</sup> Tex. Prob. Code § 46 (1955) incorporated the language of former Art. 2580 and then added, "Provided, however, that by an agreement in writing of joint owners of property, the interest of any joint owner who dies may be made to survive to the surviving joint owner or joint owners, but no such agreement shall be inferred from the mere fact that the property is held in joint ownership." Acts 1955, ch. 55, at 88.

<sup>45</sup> 161 Tex. 569, 342 S.W.2d 565 (1961).

property.<sup>46</sup> The first was *Sbroff v. Deaton*.<sup>47</sup> In that case the court ruled that a survivorship agreement between spouses concerning a joint bank account was valid. However, the decision rested on a finding of fact that the decedent husband had made a valid gift to his surviving wife a short time before his death. Nonetheless, the court bolstered its holding with the dictum that survivorship could be created by agreement where there was no fraud or mistake. The only case cited in the opinion in support of this dictum was *Chandler v. Kountze*,<sup>48</sup> a joint ownership case which did not involve community property.

A few years later, another court of civil appeals was faced with the same fact situation in regard to postal savings certificates. In this case, *Reed v. Reed*,<sup>49</sup> the survivorship agreement was held invalid because it attempted to work a mutation of community into separate property. Subsequent to the *Reed* decision, the Texas Supreme Court decided the controversial *Smith v. Ricks*<sup>50</sup> which involved United States savings bonds purchased with community funds. The bonds named the spouses co-owners and gave sole ownership to the survivor. The majority, affirming the agreement, rested the decision on the controlling effect of the United States Treasury regulations. The court also found a third party beneficiary contract between the government and the husband for the benefit of the surviving wife. However, the question of whether similar survivorship agreements might be valid in the absence of a federal supremacy situation was not discussed.

Shortly thereafter *Pollard v. Steffens*<sup>51</sup> came before a court of civil appeals. There the appellee, an attorney, had obtained a favorable judgment on a bill of review to set aside judgment on distribution of his father's estate. He relied on mistake of law, indicating that he had agreed to the original probate judgment only because he had thought that *Chandler* and *Sbroff* were controlling, and that the *Reed* decision had indicated his mistake. Nonetheless,

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<sup>46</sup> *Edds v. Mitchell*, 143 Tex. 307, 184 S.W.2d 823 (1945), is omitted from this discussion despite the fact that it is frequently cited in this area. The case turned on the power of distribution vested in a life tenant and is thus distinguishable from the narrow point involved here.

<sup>47</sup> 220 S.W.2d 489 (Tex. Civ. App. 1949).

<sup>48</sup> 130 S.W.2d 327 (Tex. Civ. App. 1939) error ref.

<sup>49</sup> 283 S.W.2d 311 (Tex. Civ. App. 1955).

<sup>50</sup> 159 Tex. 280, 318 S.W.2d 439 (1958), noted, 13 Sw. L.J. 369 (1959). The case is erroneously reported as *Ricks v. Smith* in the Southwestern Reporter.

<sup>51</sup> 319 S.W.2d 447 (Tex. Civ. App. 1958), aff'd, — Tex —, 343 S.W.2d 234 (1961). The supreme court decided the *Pollard* case one week after the *Hilley* decision and affirmed on grounds entirely different from the basis of decision in the court of civil appeals.

the appellate court ruled that *Smith v. Ricks* was decisive and reversed and rendered against him.<sup>52</sup>

#### A. *Hilley v. Hilley*

It was in this setting that *Hilley v. Hilley* came before the court. There the husband and wife had purchased corporate stock which was issued to them jointly with provision for right of survivorship.<sup>53</sup> Upon the husband's death, his son by a previous marriage brought suit to secure his interest in the property under the law of descent and distribution. The son claimed that the property acquired with community funds could not be stripped of its community character by an inter vivos transfer providing for joint tenancy and survivorship between the spouses. The court of civil appeals held for the heir against the surviving spouse,<sup>54</sup> and the supreme court affirmed on the ground that the survivorship agreement created by purchase of stock certificates in joint tenancy with community funds is invalid as a partition of the marital community without conformity to statute; or in the alternative it contravened Article 4610 by altering the legal order of descent by inter vivos agreement.

In reaching its decision the court indicated that *Chandler v. Kountze* and *Adams v. Jones*<sup>55</sup> were inapplicable because they did not deal with community property. *Sbroff v. Deaton* was discounted because of the finding of gift in that case. It was reasoned that since the stock was held by both parties without relinquishment of control, a finding of gift could not stand. Most significantly, the court proceeded to assail the reasoning of *Smith v. Ricks* and *Edds v. Mitchell*.<sup>56</sup> It was pointed out that the third party beneficiary analysis of the *Ricks* case was merely a "mask" for a pure survivorship

<sup>52</sup> The attorney plaintiff was probably justifiably misled as to the law. He entered into the agreed judgment in the probate court in 1953 relying on *Chandler v. Kountze* and *Shroff v. Deaton*. In 1955 the Dallas Court of Civil Appeals entered its decision in *Reed v. Reed* which prompted his action in the nature of a bill of review to set aside the agreed judgment on a mutual mistake of law. The trial court gave him favorable judgment in 1956. In the appeal by the defendant to the Dallas Court of Civil Appeals, opinion was not rendered until 1958 by which time *Smith v. Ricks* had been decided by the supreme court, and the court of civil appeals held that decision to be determinative of the issue. As indicated in note 51 supra, the supreme court upheld the decision below indicating that a mistake of law not induced by fraud or misconduct of the other party is not grounds for relief in equity.

<sup>53</sup> 161 Tex. at 572, 342 S.W.2d at 566:

We assume for the purposes of this opinion that in view of the instructions given to the broker by the husband in the wife's presence, the issuance and acceptance of the stock certificates in their names as joint tenants with right of survivorship constitutes a written agreement . . . .

<sup>54</sup> 327 S.W.2d 467 (Tex. Civ. App. 1959), noted, 14 Sw. L.J. 518 (1960).

<sup>55</sup> 258 S.W.2d 401 (Tex. Civ. App. 1953). Survivorship in a joint bank account was involved; however, the co-owners were the decedent and a niece, not husband and wife.

<sup>56</sup> 143 Tex. 307, 184 S.W.2d 823 (1945); see text accompanying note 46 supra.

agreement even though a third party, the United States Government, was involved.<sup>57</sup> Hence, *Smith v. Ricks* was overruled in unmistakable terms. The only alternative was to follow "the unrealistic approach" of treating an "or" bond as being "analogous to a life insurance contract." The Texas treatment of life insurance purchased with community funds prior to the 1957 amendment<sup>58</sup> to Article 23 had been the subject of extreme confusion.<sup>59</sup> The court stated that the Texas cases<sup>60</sup> prior to that time had been able to support the holding that proceeds of insurance on the life of one spouse become the separate property of the survivor by reasoning that the insurance contract was not property and that the proceeds paid after death were not acquired during marriage. Therefore, in the absence of fraud it was separate property even if the policy insured the wife's life in favor of her husband. This was the underlying rationale of *Smith v. Ricks*<sup>61</sup> which followed *Edds v. Mitchell*. The latter had likened "p.o.d." bonds to a policy of life insurance in which the beneficiary of the policy becomes the donee beneficiary to the contract between the decedent and the company.<sup>62</sup> Since Articles 4624a and 881a-23 specifically provide a method of partition not possible prior to the 1948 constitutional amendment, the court indicated that the article must be construed to exclude other methods of partition during marriage.

The decision of the court appears to be logically correct. The decision is in accord with the concepts of the indivisibility of the community estate during marriage. As Justice Walker points out, the *Ricks* decision "seemingly presents little difficulty *provided he* [the husband] *dies first.*"<sup>63</sup> If the wife dies first, the difficulty is that the husband as manager of the community has been allowed to buy stocks and bonds with survivorship to the joint owners and has, therefore, been permitted in effect to make a gift of community property to his own separate estate. Thus, the *Hilley* decision is more consistent with the safeguards thrown up to protect

<sup>57</sup> 342 S.W.2d at 570. The court relied upon *Bank of Am. Nat'l Trust v. Parnell*, 352 U.S. 29 (1956).

<sup>58</sup> Tex. Rev. Civ. Stat. Ann. art. 23 (1957). The definition of the word "property" was amended to include life insurance policies. See Recent Casenote, 10 Sw. L.J. 326 (1956).

<sup>59</sup> *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231 (5th Cir. 1958), cert. denied, 359 U.S. 913 (1959), indicates that all of the confusion may not have been alleviated. See *Stephens & Johnson, Life Insurance in Estate Planning*, 15 Sw. L.J. 570, 603 (1961).

<sup>60</sup> See, e.g., *Warthan v. Haynes*, 155 Tex. 413, 288 S.W.2d 481 (1956), noted, 10 Sw. L.J. 326 (1956), and the cases cited therein by both the majority and the dissent.

<sup>61</sup> 318 S.W.2d at 439 (approving the rulings of the court below). The court below rested its decision on this point upon *Edds v. Mitchell*. *Smith v. Ricks*, 308 S.W.2d 941, 946 (Tex. Civ. App. 1958).

<sup>62</sup> 143 Tex. at 320, 184 S.W.2d at 830.

<sup>63</sup> 318 S.W.2d 439, 442 (1958) (dissent).

the property rights of the wife by our community property system.<sup>64</sup>

The dissent in *Hilley* argues that Section 46 of the Probate Code provides that an agreement in writing will create a valid joint ownership with survivorship and should be given equal weight with Article 4610. However, the reasoning of the majority seems better for the sake of historical legal consistency. Although it is possible that the change in the court's personnel between *Ricks* and *Hilley* brought about the change in the court's decision as much as any other factor,<sup>65</sup> it appears that the decision does not result in any actual diminution of flexibility in the management or planning of the community estate. As indicated by a dictum in the majority decision, there is nothing to prevent a statutory partition<sup>66</sup> followed by a proceeding in which the wife obtains management of her separate estate;<sup>67</sup> husband and wife can then enter into a valid survivorship agreement.

Nonetheless, the decision in *Hilley v. Hilley* stirred up considerable interest in the problem of survivorship agreements among the members of the Texas bar, and the passage of House Bill 670 has added fuel to the speculative fire.<sup>68</sup>

#### B. House Bill 670

To the language of Section 46 of the Probate Code<sup>69</sup> in force at the time of the *Hilley* decision, the 57th Legislature added the following language: "It is specifically provided that any husband and his wife may, by written agreement, create a joint estate out of their community property with rights of survivorship."<sup>70</sup> The future effect, if any, of *Hilley v. Hilley* is dependent upon the construction to be given this amendment, which took effect on May 15, 1961.

Two lines of thought concerning the effect of the amendment appear to have emerged. The first is that the amendment was de-

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<sup>64</sup> Speer, *op. cit.* supra note 35, § 150, at 203-04: "He has no right to make capricious gifts of such property, nor such disposition of it as tends to augment his separate estate to the detriment of the community."

<sup>65</sup> Justices Hickman and Garwood have retired from the bench since the *Smith v. Ricks* decision. Justice Greenhill apparently changed his position in the interim. Thus, only three justices of the original majority of six in the *Ricks* case remained to dissent in *Hilley*.

<sup>66</sup> Tex. Rev. Civ. Stat. Ann. art. 4624a (1949).

<sup>67</sup> Tex. Rev. Civ. Stat. Ann. art. 4614(d) (1957) provides that the married woman may qualify for sole management of her separate property upon proper filing with the County Clerk.

<sup>68</sup> Survivorship of Joint Tenancies in Corporation Stocks and Bank Deposits—*Hilley v. Hilley* and H.B. 670, address by John Paul Jackson, Corporation, Banking, and Business Law Section, State Bar of Texas (1961), in 24 Tex. B.J. 710 (1961).

<sup>69</sup> Tex. Prob. Code § 46 (1955).

<sup>70</sup> Acts 1961, ch. 120.

signed to be an express legislative rejection<sup>71</sup> of the *Hilley* decision and in effect an affirmance of *Smith v. Ricks*. With the traditional absence of citable legislative history in Texas, this view to be sustained must be supported by the language of the statute itself. Consequently, the proponent of this view may contend that, because the court in the *Hilley* decision stated that such an agreement would be valid only if it is sanctioned by statute, the legislature, in answer to this, specifically authorized such agreements. Others, who argue against the statute's validity, do not question what the legislature attempted to do but contend that the legislation is ineffective because it is unconstitutional.<sup>72</sup> Relying on the landmark case of *Arnold v. Leonard*<sup>73</sup> and the frequently cited *Northern Texas Traction Co. v. Hill*,<sup>74</sup> they argue that the legislature cannot create a new class of property. The effect of the amendment is to allow separate property to be created out of community property by agreement between the spouses during marriage. Thus, Article 16, Section 15, of the Texas Constitution which limits separate property to that received by gift, devise, or descent is violated.

Another view which may be suggested is that the courts will not find House Bill 670 unconstitutional, nor will they find that the result in *Hilley v. Hilley* has been impaired. It may be assumed that the court will first seek to avoid the constitutional question by traditional methods of statutory construction.<sup>75</sup> Accordingly, it may be presumed that the legislature would not have intended, in the absence of a specific declaration, to have amended other statutes pertinent to management and status of community property such as Articles 4614,<sup>76</sup> 4619,<sup>77</sup> 4621<sup>78</sup> or 4624a,<sup>79</sup> and, therefore, these statutes and the new amendment must be construed together.

Applying this methodology to the first view (that the amendment overruled *Hilley*) it would be necessary to conclude either that (1) House Bill 670 amended Articles 4619 and 4621 sufficiently to give the wife power of management over her half of the com-

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<sup>71</sup> Wren, Recent Texas Statutes Affecting Estate Planning, 15 Sw. L.J. 479 (1961).

<sup>72</sup> Jackson, *supra* note 68.

<sup>73</sup> 114 Tex. 535, 273 S.W. 799 (1925).

<sup>74</sup> 297 S.W. 778 (Tex. Civ. App. 1927) error ref.

<sup>75</sup> E.g., "Courts ought not to interpret laws so as to nullify or impair them when their language reasonably admits of a different meaning." *Spears v. City of San Antonio*, 110 Tex. 618, 223 S.W. 166, 169 (1920). "All laws in *pari materia* must be construed together." *Love v. City of Dallas*, 120 Tex. 351, 40 S.W.2d 20, 22 (1931).

<sup>76</sup> Tex. Rev. Civ. Stat. Ann. art. 4614 (1957) (wife's separate property and her power of contract and management.)

<sup>77</sup> Texas Rev. Civ. Stat. Ann. art. 4619 (1959) (community property definition).

<sup>78</sup> Tex. Rev. Civ. Stat. Ann. art. 4621 (1925) (wife's power to contract with community property).

<sup>79</sup> Tex. Rev. Civ. Stat. Ann. art. 4624a (1949) (partition).

munity property so that she could contract with her husband for its disposal<sup>80</sup> without complying with the filing requirements of Article 4614(b),<sup>81</sup> or that (2) the word "agreement" in House Bill 670 could be read to mean "partition"<sup>82</sup> so as to come within the sanction of the 1948 amendment to Article 16, Section 15, of the Constitution and be, in effect, an amendment to Article 4624a. The court will probably reject any reasoning which concludes that an amendment to Section 46 of the Probate Code also amended any of these well-established statutes governing the status of the community. It seems to follow that if the amendment contained in House Bill 670 is to receive a construction consistent with the foregoing statutes it is necessary to find that it incorporated into statute the dictum in *Hilley* which suggested that such an agreement is valid provided:

- (1) That the parties enter into a valid partition agreement under 4624a which transmutes the community property by halves into the separate property of each.
- (2) That the wife then qualify for management of her now separate estate under 4614(b) and (d) which creates in her a capacity to obligate herself contractually.

Thus the wife, armed with the capacity to enter a binding contract in regard to her separate estate, may enter into an agreement with her husband for a valid joint tenancy and survivorship without contravening the provisions of Article 4610.

If the foregoing speculation is accepted, *i.e.*, that House Bill 670 would be construed to be constitutional and found to have the effect of approving the dictum in *Hilley* as to the manner in which a valid survivorship agreement should be made, then it would appear that this bill supersedes *Hilley* only to the extent that the decision

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<sup>80</sup> The effect of these two statutes is that the wife's power to contract a community debt is limited to necessities unless joined by her husband or unless he has abandoned her for more than a year.

<sup>81</sup> This article applies to the wife's separate property only and not to the community estate. However, if the wife must make a filing with the County Clerk in order to obtain management and contract power over her personal estate, a fortiori, she should not have such power in the case of community property.

<sup>82</sup> See Tex. Rev. Civ. Stat. Ann. art. 881a-23 (1929) and text accompanying note 31 *supra*. In the case of building and loan shares the legislature specifically provided the authority for partition. In a similar statute, Tex. Rev. Civ. Stat. Ann. art. 4622 (1925), applicable to joint bank accounts where the legislature has not provided for partition, the courts have said: "The [statutory] presumption concerning separate property status of bank accounts . . . does not apply where the contest is between the spouses themselves or their successors." *Hodge v. Ellis*, 154 Tex. 341, 352, 277 S.W.2d 900, 907 (1955); see *Reed v. Reed*, 283 S.W.2d 311 (Tex. Civ. App. 1955). It seems to follow that had the legislature intended H.B. 670 to permit partition that it would have said so and insisted upon the same formality that is contained in arts. 4624a and 881a-23 which require the wife's separate acknowledgment to a partition agreement.

relied upon Article 4610. However, Justice Walker's opinion did not necessarily rest upon the provisions of Article 4610, and indeed there was no reason at all to have done so, for the definitional argument, as exemplified by the reference to *Arnold v. Leonard*, was certainly sufficient to sustain the decision.<sup>83</sup> And the same argument is just as powerful after the passage of House Bill 670 as it was before. Indeed, if House Bill 670 was intended to act solely upon that portion of the *Hilley* opinion which rested upon Article 4610, a logical explanation can be given for the placing of the amendment in Chapter II of the Probate Code which is captioned Descent and Distribution. This argument is further bolstered by the fact that the legislature *should* have amended Article 4624a if they really desired to effect a change in the result of *Hilley*. Moreover, they would have greatly increased the amendment's chances of constitutional sanction.

### C. *Free v. Bland*

The majority opinion in *Hilley* brushed aside the matter of federal regulations overriding state law. This problem was raised in *Smith v. Ricks* and is now raised by *Free v. Bland*,<sup>84</sup> an action by the surviving husband against the son of the deceased wife. The husband was the designated co-owner with his wife of certain United States Savings Bonds purchased during marriage. Treasury Department regulations make a surviving co-owner the sole and absolute owner of the bond. The son, independent executor of his mother's estate, was also the devisee of the bulk of her estate. The son claimed half of the bonds, alleging that they were community property. The court of civil appeals<sup>85</sup> held for the husband under the reasoning of *Smith v. Ricks*, and the Texas Supreme Court reversed under the reasoning of *Hilley v. Hilley*. However, the United States Supreme Court has granted certiorari<sup>86</sup> and the case is presently docketed before that court. It is certainly within the realm of possibility that the Supreme Court may follow its reasoning in *Wissner v. Wissner*<sup>87</sup> and assert the "federal supremacy" of government regulations concerning its bonds to justify reinstating *Smith v. Ricks* insofar as survivorship resulting from co-ownership of government bonds is concerned. However, there seems to be little justification<sup>88</sup> for a decision based on allowing mere administra-

<sup>83</sup> 161 Tex. at 579, 342 S.W.2d at 571.

<sup>84</sup> — Tex. —, 344 S.W.2d 435 (1961).

<sup>85</sup> 337 S.W.2d 805 (Tex. Civ. App. 1960).

<sup>86</sup> — U.S. —, 82 Sup. Ct. 50 (1961).

<sup>87</sup> 338 U.S. 655 (1950).

<sup>88</sup> 338 U.S. at 661 (Minton, J., joined by Frankfurter and Jackson, JJ., dissenting).

tive expediency<sup>89</sup> to override the established property system of a state, especially when the treasury regulation is obviously promulgated solely for that agency's convenience. Indeed, there is far less reason for such a holding than there was in *Wissner*, in which the majority of the Court could point to a strong national interest growing out of World War II and evidenced by a plain congressional mandate.<sup>90</sup>

#### IV. CONCLUSION

In summary, it would appear that House Bill 670 may well be ineffective if its purpose was to permit a husband and wife to enter into a joint tenancy and survivorship agreement by the mere purchase of a stock certificate. If the statute is not sustained constitutionally by harmonizing it with the previously existing statutes and general theory of Texas community property law (thus emasculating it at least in part), then it will probably be struck down as unconstitutional. It further appears that it would have been desirable for the Legislature to have amended or repealed Article 4610 directly rather than to have chosen to amend Section 46 of the Probate Code. Article 4610 in its present form is an anachronism and has been extended beyond any justification, either socially or historically.<sup>91</sup>

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<sup>89</sup> McKnight, Book Review, 11 Sw. L.J. 272, 274 & n. 10 (1957).

<sup>90</sup> The *Wissner* decision involved an action by the widow of a deceased army officer against his mother whom he had named as principal beneficiary of his National Service Life Insurance policy. Under California community property law the widow was successful in the state court in establishing a claim for one half of the policy proceeds both past and present. On appeal the United States Supreme Court reversed indicating that the 1940 statute creating G.I. insurance "forestalls the existence of any 'vested' right in the proceeds of federal insurance." 338 U.S. at 661. The court in support of its decision pointed to the congressional policy of affording material protection and enhancing the morale of the serviceman. 338 U.S. at 660.

<sup>91</sup> The Spanish community property system provided that the parties to a marriage contract might contract prior to marriage with respect to the character of their matrimonial property. *Fuero Juzgo*, Bk. 4, Tit. 2, Law 17; *Las Siete Partidas*, Part. 4, Tit. 11, Law 24. The wife might also renounce her community interest during marriage or after the husband's death in order to avoid liability for community debts. *Novisima Recopilacion*, Bk. 10, Tit. 4, Law 9. Thus the law of matrimonial property was given a certain flexibility. The Spanish authorities are discussed in 1 DeFuniak, *Principles of Community Property* 286-391 (1943). Article 4610 enacted in 1840 was designed to give this same flexibility, but since the law of forced heirship, Act of Jan. 28, 1840, § 13, 4 *Laws of Republic* 167 (Hartley 1850), was then in effect in Texas, the statute forbade marriage contracts that would run contrary to the law of legitime. When the forced heirship statute was repealed in 1856, Acts of 6th Leg., Spec. Sess. 5 (1856); art. 3868 *Paschal's Digest* 644 (1870); art. 2534 *Sayles' Laws* 369 (1888), it apparently did not occur to the legislature to repeal the reference to it in art. 4610. The words

and in no case shall they enter into an agreement, or make any renunciation, the object of which would be to alter the legal orders of descent, either with respect to themselves, in what concerns the inheritance of their children or posterity, which either may have by any other person, or in respect to their common children; . . .

have been read quite contrary to their original purpose and should be deleted from the

Admittedly, the day is long past when a married woman needed the guardianship of the courts otherwise extended to idiots, minors, and seamen, but even today a wife may be content to follow unquestioningly her husband's will in business and property matters. It does not seem unreasonable where the property rights of the heirs of either spouse are concerned that some small solemnity should accompany the survivorship agreement. Requiring the three-step approach of partition, wife's qualification to manage her separate property and a survivorship agreement would impose sufficient notice of the effects of the action contemplated to afford some protection to the non-initiating spouse. Such deliberation can not be achieved by a quick call to the broker's office with instructions from one or the other of the spouses that the certificates be issued with provision for joint tenancy and survivorship.

*Hailey v. Hailey* allows *involuntary* partition of community realty on divorce. *Hilley v. Hilley* is concerned with voluntary partition of the community estate during marriage or at death. In *Hilley* and related cases the court has construed Article 4624a to *limit* the means of a voluntary partition. In *Hailey* the court extended the means of involuntary partition of community realty on divorce. Although a logical inconsistency of approach may be asserted, it appears more apparent than real. Article 4624a allows voluntary partition of the *entire* community estate with judicial supervision. Article 4638 as construed in the *Hailey* case allows involuntary partition of the *entire* community estate by judicial action in rendering a divorce. Neither limits the *possibility* of partition; both, however, require the protection and supervision of the courts.

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statute. It may also be noted that since the courts have quite unjustifiably extended the statute to agreements made by spouses during marriage (see note 40 *supra.*), the legislature ought to limit Art. 4610 to ante-nuptial contracts.