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In all other respects they are to be treated as ordinary community property.²⁹ The property bought with such earnings is in *all* respects treated as ordinary community property.

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IMPROVEMENT OF MARITAL PROPERTY WITH FUNDS FROM ANOTHER ESTATE

EVERYDAY experience indicates that in many instances the legal entity erecting improvements on land is not the actual owner of the land. The legal rights and remedies to be applied to such a simple situation can be complicated. Of particular interest in community property law are the problems arising when one spouse improves the community lands, or those of the other spouse, or whose land is improved by the community. Two questions are involved: Is the title changed by the improvements? If it is not changed, does the improving estate have the right to be repaid? It should be noted that this article concerns itself only with improvements which become a part of the realty, not with movable fixtures capable of being severed from the realty without injury thereto.

²⁹ Other community property states differ as follows: 1 DE FUNIAK, *op. cit. supra*, Note 27, at §§ 66, 114, 162.

Arizona—If wife and husband are separated, wife's personal earnings are her separate property.

California—Wife's personal earnings are subject to husband's debts for necessities.

Idaho—Wife has management and control of earnings from her personal services.

Louisiana—Wife's earnings when living separately or when running a separate business are her separate property.

Nebraska—Wife has management, control and disposition of her earnings.

New Mexico—Same as Nebraska.

Oregon—Same as Nebraska.

Washington—Wife has full control over her earnings for personal services and holds them in her own right.

Michigan—Wife has right to receive, control and dispose of her earnings for personal services.

IS TITLE AFFECTED BY THE IMPROVEMENTS?

At least as early as 1858 in *Rice v. Rice*¹ Texas decided that improvements on a separate estate "vests the improvements in that spouse" whose property has been improved. Since that time the basic rule that the title to the improvement merges in the estate improved has not been departed from.² The only difficulty experienced by any Texas court was in the enigmatic case of *Maddox v. Summerlin*.³ There, the wife owned separate property on which a frame house had been constructed by community funds and labor. Judgment creditors of the husband sought to subject the value of this house to the payment of the debt. The court did not refer to the *Rice* case or any of the early cases holding that the title to improved land remained unaffected; but, noting the split of authority in other jurisdictions, limited its holding to the narrow facts involved. The court refused to allow the creditors to levy on the property unless the husband improved the property with intent to defraud his creditors, and the wife, with knowledge of such intent, participated therein. This holding is in line with the *Rice* principle; in fact, it remains the law today,⁴ but the court went further and worked out a constructive severance of land and improvements in its instructions for a new trial.⁵ One case did seem to recognize a severance doctrine,⁶ but thereafter it has been ignored and the *Rice* principle applied. The *Maddox* case has, in

¹ *Rice v. Rice*, 21 Tex. 58 (1858).

² *Kane v. Ammerman*, 148 S. W. 815 (Tex. Civ. App. 1913) *writ of error refused*; *Welder v. Lambert*, 91 Tex. 510, 44 S.W. 281 (1898); *Gleich v. Bongio*, 128 Tex. 606, 99 S. W. (2d) 881 (1937); *Morrison v. Farmer*, 147 Tex. 122, 213 S. W. (2d) 813 (1948); *Dakan v. Dakan*, 125 Tex. 305, 83 S. W. (2d) 620 (1935).

³ 92 Tex. 483, 49 S. W. 1033, *motion for rehearing overruled*, 50 S. W. 567 (1899).

⁴ *Palmer Pressed Brick Works v. Stevenson*, 185 S. W. 999 (Tex. Civ. App. 1916); SPEER, *LAW OF MARITAL RIGHTS IN TEXAS*, 470 (3d ed., 1929).

⁵ "... the house, when constructed upon the separate property of the wife, if paid for with community funds, *did not become her separate property*, but remained a part of the community estate . . . , and, being community property, it is liable, if otherwise subject to sale, to the debts of the husband." (Italics supplied.) 92 Tex. 483, 487, 49 S. W. 1033, 1035.

⁶ *Kane v. Ammerman*, 148 S. W. 815 (Tex. Civ. App. 1913) *writ of error refused*.

fact, often been cited as authority for the accepted rule that the improvements follow the title of the land.

The basis of that rule has been variously explained. Speer finds it to be based on the general common law doctrine that improvements become a part of the thing improved.⁷ The courts, however, seem more inclined to rely on the ancient rule that the title of property is moulded in its inception, and the fact that improvements are paid for with the funds of another estate does not alter its status.⁸

THE RIGHT TO BE REIMBURSED

Concluding then that title is not affected by the improvement, we would expect to find a right to be repaid given to the improving estate. That the improving estate does have such right of reimbursement was stated by the *Rice* case, and this right remains a part of Texas law,⁹ founded, it has been said, upon unjust enrichment principles.¹⁰ But the *nature* of the right to be reimbursed—its limits and application—have caused some confusion. The definitive case on that problem is *Dakan v. Dakan*,¹¹ and the basic general rule to be borne in mind is that the right or equity “is not a right, title or interest in the land as such.”¹²

In the *Dakan* case the husband's separate property was improved by both separate funds of the wife and funds of the community. At his death the wife sued the devisees under his will to enforce her right of reimbursement because of the improvements. The

⁷ 23 TEX. JUR. 95 (1932).

⁸ *John Hancock Mutual Life Insurance Co. v. Bennett*, 133 Tex. 450, 128 S. W. (2d) 791 (1939); *Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281 (1898); *Miller v. Miller*, 131 S. W. (2d) 245 (Tex. Civ. App. 1939); *White v. Heberd*, 89 S. W. (2d) 482 (Tex. Civ. App. 1936); *Aman v. Cox*, 164 S. W. (2d) 744 (Tex. Civ. App. 1942).

⁹ *E.g.*, *Dakan v. Dakan*, 125 Tex. 305, 83 S. W. (2d) 620 (1935); *John Hancock Mutual Life Insurance Co. v. Bennett*, 133 Tex. 450, 128 S. W. (2d) 791 (1939); *Ogle v. Jones*, 143 S. W. (2d) 644 (Tex. Civ. App. 1940) *writ of error refused*.

¹⁰ Note, 16 TEX. L. REV. 580 (1938).

¹¹ 125 Tex. 305, 83 S. W. (2d) 620 (1935).

¹² *Id.* at 319, 83 S. W. (2d) 620, 628; *Aman v. Cox*, 164 S. W. (2d) 744 (Tex. Civ. App. 1942); *Horn v. Sankary*, 161 S. W. (2d) 156 (Tex. Civ. App. 1942); *White v. Heberd*, 89 S. W. (2d) 482 (Tex. Civ. App. 1936).

lower court found the property not subject to equitable partition, yet fixed a lien on the lots and ordered them sold "as under execution." The Supreme Court held this to be error, reasoning that the charge for improvements was not an *in rem* right in the land; that while the courts will secure to the improving estate the amount found due it, this is only done as an incident of an equitable partition. That the charge alone is not an ordinary lien on which a simple action for debt and foreclosure may be maintained seems clear. It is not such an interest as creditors can levy on.¹³ This is not to say that a lien may never be placed upon the improved property as an incident to a full partition.¹⁴ Equity may exhaust its discretionary powers in reimbursing the improving estate. In addition to the legal lien which can be imposed as an incident to partition, the court may award specific property in fee out of the larger estate and thus a sale be avoided;¹⁵ it may divide the property unequally and fix a lien on the larger share;¹⁶ it may actually go to the extent of creating a trust of the improved estate;¹⁷ and certainly it could decree a sale and pay for the improvements out of the proceeds.¹⁸ As Justice Harvey has written:

"A very wide discretion is conferred upon trial courts in adjusting equities. . . . Mathematical exactness is not required in making the partition, and the court may take into consideration any facts and circumstances that might have a bearing upon arriving at a just and righteous settlement. . . ." ¹⁹

Under the partition statute, Article 6082,²⁰ there can be no parti-

¹³ SPEER, *LAW OF MARITAL RIGHTS IN TEXAS*, 469 (3rd ed., 1929).

¹⁴ That it can be recognized in the *Dakan* case. See also *Kalteyer v. Wipff*, 92 Tex. 673, 683, 52 S. W. 63, 68 (1899); *Sayers v. Pyland*, 139 Tex. 57, 161 S. W. (2d) 769 (1942); *Smith v. Smith*, 187 S. W. (2d) 116 (Tex. Civ. App. 1945).

¹⁵ See *Dakan v. Dakan*, 125 Tex. 305, 321, 83 S. W. (2d) 620, 629.

¹⁶ *Sayers v. Pyland*, 139 Tex. 57, 161 S. W. 769 (1942).

¹⁷ *Rice v. Rice*, 21 Tex. 58 (1858).

¹⁸ See *Sparks v. Robertson*, 203 S. W. (2d) 622, 624, writ of error refused; *Cleveland v. Milner*, 141 Tex. 120, 170 S. W. (2d) 472 (1943).

¹⁹ *Puckett v. Puckett*, 205 S. W. (2d) 124, 126 (Tex. Civ. App. 1947).

²⁰ TEX. REV. CIV. STAT. (Vernon, 1925), Art. 6082.

tion between an owner and one having no interest in the land.²¹ It would therefore follow that the holder of the mere right to reimbursement could not compel partition. Yet this conclusion would seem to apply to very few cases since the outside creditor is barred by the express rule of the *Maddox* case, and the improving spouse has his remedy at divorce²² or death²³ of the landowner. In any event, the theory of the case in pleading and proof must be equitable partition.²⁴

The amount to which the improving estate is entitled is not the actual cost of the improvements. Rather it is the enhanced value of the improved property at the time of partition,²⁵ although one case assessed the actual cost of the improvements because of equitable considerations.²⁶ The basis for the rule is said to be that as the improved estate must necessarily be limited to the title it receives as of the time of partition, so also the improving estate in equity ought to be so limited.²⁷ It would follow that if the improvements had no value at the time of partition, no right to reimbursement exists.²⁸

Certain cases do not fall within the above principles, and should be distinguished. If the spouse who improves the separate or community property intends a gift, or if the improvements are made

²¹ *Manchaca v. Martinez*, 136 Tex. 138, 148 S. W. (2d) 391 (1941); *Davis v. Agnew*, 67 Tex. 206, 2 S. W. 43, *rehearing motion overruled* 2 S. W. 376 (1886).

²² TEX. REV. CIV. STAT. (Vernon, 1925), Art. 4338.

²³ TEX. REV. CIV. STAT. (Vernon, 1925), Art. 2579.

²⁴ *Morrison v. Farmer*, 147 Tex. 122, 213 S. W. (2d) 813 (1948); *Aman v. Cox*, 164 S. W. (2d) 744 (Tex. Civ. App. 1942).

²⁵ *Dakan v. Dakan*, 125 Tex. 305, 83 S. W. (2d) 620 (1935); *Burton v. Williams*, 195 S. W. (2d) 245 (Tex. Civ. App. 1946) *writ of error refused, no reversible error*; *Puckett v. Puckett*, 205 S. W. (2d) 124 (Tex. Civ. App. 1947).

²⁶ *Tapp v. Tapp*, 134 S. W. 683 (Tex. Civ. App. 1939). It might conceivably be argued that the Supreme Court in the *Dakan* case (83 S. W. (2d) 620, 628) stated this actual cost rule which at one time had some support in the cases. To reach such a conclusion, however, would charge the court with stating two inconsistent rules in the narrow space of three sentences. The word "cost" occurs in a quotation directed at a different point; the court was not considering valuation of the right. When, in the next paragraph, the court did consider that topic it correctly used the more cumbersome "enhanced value at the time of partition."

²⁷ *Ogle v. Jones*, 143 S. W. (2d) 644 (Tex. Civ. App. 1940) *writ of error refused*.

²⁸ *O'Neil v. O'Neil*, 77 S. W. (2d) 554 (Tex. Civ. App. 1934) *writ of error dismissed*.

for the purpose of paying a debt owing to the other spouse, no right to reimbursement arises.²⁹ California raises a true presumption that a husband who improves the community or his wife's separate property with his own funds or with community funds has made a gift.³⁰ There seems to be no such presumption in Texas, and the gift must be proved.³¹ Nor are we concerned with the case of ordinary repairs on separate property even though they become a part of the realty. Since the community secures the income from separate property, probably no right to reimbursement would arise in the community for mere repairs on the separate property. The right should extend only to expenditures beyond those which are necessary to properly preserve the separate property.³²

CONCLUSION

It would seem that Texas courts have compromised the conflicting claims of the two separate estates, the community, and sometimes creditors, with a minimum of hardship on any one. The attorney who is puzzled by courts who in one breath speak of no *in rem* right being created, yet in the next use the law of co-tenancy; who sees a civil appeals court concede a "well established rule" to be in substance *contra* to its holdings,³³ should bear in mind that of necessity equitable considerations will control, and fairness in each individual case will be attempted. This overriding consideration of fairness explains the *Maddox* case. The divorced improving spouse, or at his death his estate, has his remedy at partition. True, the improving spouse may lose what slender right he has against the land if it be conveyed before partition to any

²⁹ SPEER, LAW OF MARITAL RIGHTS IN TEXAS, 470 (3d ed., 1929).

³⁰ *Dunn v. Mullan*, 211 Cal. 583, 296 Pac. 604 (1931); *Lombardi v. Lombardi*, 44 Nev. 314, 195 Pac. 93 (1921). Where the husband uses community funds to improve his own property naturally no gift is presumed absent consent by the wife. *Provost v. Provost*, 102 Cal. App. 775, 283 Pac. 842 (1929).

³¹ *Maddox v. Summerlin*, 92 Tex. 483, 49 S. W. 1033 (1899); *Collins v. Bryan*, 40 Tex. Civ. App., 88, 88 S. W. 432 (1905).

³² SPEER, LAW OF MARITAL RIGHTS IN TEXAS, 471 (3d ed., 1929); *Courrege v. Colgin*, 51 La. Ann. 1069, 25 So. 942 (1899).

³³ *Smith v. Smith*, 187 S. W. (2d) 116 (Tex. Civ. App. 1945).

purchaser (probably *bona fide* or not).³⁴ It may be question-begging to say that since essentially that right was *in personam*, that since the land is important only as another morsel to throw into the partition pot, the improving spouse has really not lost his right. Be that as it may, considering the conflicting equities of the husband and wife it would seem that they suffer little from the treatment of the Texas courts. But the honest creditors who justly seek to follow their debtor's funds find themselves denied both lien and right to compel partition. They have one sop in the exception as to fraud, but they must assume the backbreaking burden of proving (a) that the debtor spouse intended to defraud them, and further (b) that the other spouse had the same intent and participated in the fraud. A Missouri court has said:

"The circumstance that the defendants have so mingled their separate interest in the property that those interests cannot now be successfully apportioned . . . cannot now be allowed to defeat the just rights of creditors."³⁵

Therefore, confronted with this hard creditor case, with ample law furnished by the *Rice* case and the early cases involving disputes essentially between the two spouses, the court in the *Maddox* case refused to mechanically apply the law, but went as far as it could in protecting the just claims of the creditors without depriving the wife of her land. A West Virginia court which did allow the creditors to levy on the improved land went just as far in protecting the interest of the landowner.³⁶ Accordingly, while its severance doctrine has been forgotten, the *Maddox* case indicates that the ultimate consideration the courts have in mind in each given case is not mechanical application of rigid rules, but fairness in the particular case. No matter what theory, then, is the beginning

³⁴ See *Dakan v. Dakan*, 52 S. W. (2d) 1070, 1074 (Tex. Civ. App. 1932) *affirmed*, 125 Tex. 305, 83 S. W. (2d) 620 (1935).

³⁵ *Kirby v. Burns*, 45 Mo. 234, 236 (1870).

³⁶ *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. 410 (1892). The court worked out an elaborate system of proration in which the landowner and the creditors shared in the proceeds of the sale.