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Changing One Type of Marital Property into Another Type

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and until the wife elects to rescind. The rule is stated very clearly by the Supreme Court in *Pitt v. Elser*:

"If she [the wife] contract to buy on a credit, and executed a note for the price, she may or not, as she may elect, proceed with the contract, and the person contracting with her cannot refuse to carry out the agreement because she is a married woman."⁵²

If the wife is less than 21 years old and makes one of the authorized types of contracts, she apparently can not rescind on the ground of minority.⁵³

*Pitt v. Elser*⁵⁴ and other cases have held that when a wife disaffirms her voidable contract after she has partly performed, she cannot get back the consideration which she has paid. The cited case also contains a dictum that on rescinding, she must nevertheless return what she has received. This latter question seems not fully settled; probably she must under general rules return money or other property which she has received. However, such return of consideration received is not a condition precedent to her disaffirming the contract;⁵⁵ an independent suit therefor would probably lie.⁵⁶

Lee S. Bane.

CHANGING ONE TYPE OF MARITAL PROPERTY INTO ANOTHER TYPE

INTRODUCTION

THE three types of marital property are of course community property, the wife's separate property, and the husband's separate property. There are six possibilities as to changing one type to another; *viz.*, 1. Changing husband's separate property to the separate property of the wife. 2. Changing community property

⁵² 87 Tex. at 348, 28 S. W. at 518.

⁵³ TEX. REV. CIV. STAT. (Vernon's 1925) art. 4625.

⁵⁴ See note 50, *supra*.

⁵⁵ *Houston Loan and Investment Co. v. Abernathy*, 131 Tex. 601, 117 S. W. (2d) 1089, (Tex. Comm. App. 1938).

⁵⁶ See note, 17 TEX. L. REV. 218 (1939).

to the separate property of the wife. 3. Changing community property to husband's separate property. 4. Changing the wife's separate property to the husband's separate property. 5. Changing the wife's separate property to community property. 6. Changing husband's separate property to community property. These possibilities will be grouped in pairs in the following discussion.

CHANGING THE HUSBAND'S SEPARATE PROPERTY AND THE COMMUNITY PROPERTY TO THE WIFE'S SEPARATE PROPERTY

Our community property system completely ignores the old common law idea of unity of husband and wife as an impediment to the making of conveyances by one to the other. "Generally whatever may be the subject of a transfer may be passed from one spouse to the other."¹ The husband can convey all² or any³ of his separate property or his half of existing community property directly to his wife⁴ so as to make it her separate property.⁵ Trustees are not necessary,⁶ but of course the deed can be from the husband to a trustee and then to the wife if desired.⁷ In such a deed from husband to wife, there is no necessity for the wife's

¹ SPEER, LAW OF MARITAL RIGHTS IN TEXAS, p. 156 (2nd Ed., 1916).

² Green v. Ferguson, 62 Tex. 525 (1884).

³ Southern Pacific v. Ulmer, 286 S. W. 193 at 194 (Tex. Com. App. 1926) states: "Subject to the prior rights of creditors, the husband, under our law, has always had the right to give to the wife, as her separate property, any part of the community estate"; Bullock v. Englert, 125 S. W. (2d) 663 (Tex. Civ. App. 1939).

⁴ Frame v. Frame, 120 Tex. 61, 36 S. W. (2d) 152 (1931); Kahn v. Kahn, 94 Tex. 114, 68 S. W. 825 (1900); Riley v. Wilson, 86 Tex. 240, 24 S. W. 394 (1893); Story v. Marshall, 24 Tex. 306 (1859).

⁵ Breckenridge v. Coffield, 283 S. W. 310 (Tex. Civ. App. 1926) *writ of error refused*; see cases collected in 37 A.L.R. 282 *et. seq.*

⁶ Story v. Marshall, *supra*, note 4; Johnson v. Scott, 208 S. W. 671 (Tex. Civ. App. 1919) *writ of error refused*; and in Smith v. Boquet, 27 Tex. 507, 513 (1864), the court citing Story v. Marshall said: "It is also an admitted principle that a husband may make a gift or grant of the community, or his separate property to his wife, without the intervention of trustees, by a conveyance directly to her."

⁷ SPEER, *op. cit. supra*, note 1 at p. 192.

joinder or written consent⁸ even in a state where husband and wife must join in a conveyance of community property.⁹

When the husband conveys real property to his wife, whether it be his separate or community, it is presumed to be her separate property;¹⁰ therefore, no recitals that it is to be her separate property are necessary in the deed.¹¹ The act itself evidences the hus-

⁸ Griffin v. Troup, 163 S. W. (2d) 412 (Tex. Civ. App. 1942) *writ of error refused*; Cushenberry v. Profit, 153 S. W. (2d) 291 (Tex. Civ. App. 1941) *writ of error refused*; Savage v. Rhea, 33 S. W. (2d) 429 (Tex. Com. App. 1930); TEX. REV. CIV. STAT. (Vernon 1925) art. 4619 states: "During coverture the common property of husband and wife may be disposed of by husband only."

⁹ Though in Texas both husband and wife must join and she must separately acknowledge a deed of the homestead, whether it be the husband's separate property or the community property. *Gonzales v. Gonzales*, 115 Tex. 16, 273 S. W. 798 (1925); *Smith v. Elliot*, 39 Tex. 201 (1873). Nevertheless, a husband's deed directly to his wife of the homestead will be upheld without wife's joinder or separate acknowledgement. *White v. White*, 141 Tex. 328, 172 S. W. (2d) 295 (1943); *McGovern v. Woolley*, 200 S. W. 271 (Tex. Civ. App. 1918) *writ of error dismissed*; The case of *Martin v. Barnum*, 286 S. W. 550, 551 (Tex. Civ. App. 1926) reasoned thus for this holding: "The policy of the homestead law is to protect the family, the wife and children, in the enjoyment of a home, and it was not the purpose of this statute (saying that wife must join in a conveyance of homestead) to make void a conveyance thereof by husband directly to his wife and children, under which they would necessarily be as much protected as they could be if no conveyance of the homestead was made or the attempted conveyance was invalid, because of the failure of the wife to join therein. The conveyance met the approval of the wife and was accepted by her, and the family continued to reside thereon . . ."

A husband, in Arizona, cannot convey community realty without wife's joinder. A conveyance made by husband alone is void. *Cook v. Stephens*, 51 Ariz. 467, 77 P. (2d) 1100 (1938). But the case of *Schofield v. Gold*, 26 Ariz. 296, 225 Pac. 71 (1924); 37 A.L.R. 275 points out that this statute does not mean that one spouse cannot alone execute a conveyance of his or her share to the other. In joining in the conveyance to a third person, each is acting for himself and herself, and each holds the same interest in the property conveyed, so there is no reason why one, even the wife, may not convey his or her interest to other without both having to join as grantors.

¹⁰ It was said in *Story v. Marshall*, *supra*, note 4 at 308 (where husband conveyed community property directly to his wife) "There can be, in this case, no presumption, as in the case of a purchase from a stranger in the name of the wife, that funds of the community were employed in making the purchase, and therefore it is community property. But the conveyance being of community property of the parties between whom the conveyance is made, *prima facie*, the presumption must be that it was intended to change its character from community property to the separate property of the wife."

¹¹ *Lewis v. Simon*, 72 Tex. 470, 10 S. W. 554 (1889); *Forman v. Glasgow*, 219 S. W. (2d) 845 (Tex. Civ. App. 1949); and *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027, 1028 (1890), where Chief Justice Stayton said "The land in controversy came to the husband through a regular chain of transfer from the sovereignty of the soil, and he conveyed it to his wife during marriage through a deed which on its face showed that it was a gift. This made the property the separate estate of the wife, and

band's intent to make it her separate property, because the deed could ordinarily have no other meaning.¹² However, this presumption can be rebutted, when there are no express recitals in the deed showing an intent to make it the wife's separate property, by evidence that husband and wife did not intend for the land to become the wife's separate property at the time the deed was executed.¹³ But, if the deed contains express recitals to the effect that the husband intends the land to become his wife's separate property, or recitals of consideration which if moving from her would give it the character of her separate property, then these recitals show a clear intent on his part to convey the land as her separate property and parol evidence is not admissible as to the parties to the deed to show that such was not his intent¹⁴ (except on direct attack based on fraud, mistake, etc.). Therefore, such recitals are desirable from the wife's standpoint.

In order to effectively change the husband's separate realty or community realty to the wife's separate property, the title must pass by deed, judgment, or other means recognized by law, exactly the same as with transactions between parties not spouses.

there was no necessity that he should have expressed in the deed his intent so to make it. The deed executed by him made the land the separate property of the wife."

¹² *Forman v. Glasgow*, *supra*, note 11, cited *SPEER, op. cit. supra*, note 1 at p. 183. "In the absence of any evidence of intention outside of the deed of conveyance by a husband to the wife, where it was shown that no consideration passed, and that mentioned in the deed was purely nominal, our Supreme Court held that such deed must be taken as evidencing the intent, which upon its face, it imports—that is, to convey to the wife the estate of the husband in the property; . . ."

23 TEX. JUR. § 128, p. 157, 158, was cited as follows: "The effect of the husband's deed to the wife, whether the subject of the conveyance be his separate or community, is to constitute the estate the separate estate of the grantee. The instrument could have no other meaning, and this is true whether it recites that the conveyance is for the sole separate use of the grantee or not. Where no consideration passes or a mere nominal one is stated, the courts construe the transaction as evidencing an intention to donate."

¹³ *Forman v. Glasgow*, *supra*, note 11 at 847 said: "In determining effect of a deed of realty by husband to wife, the intention of the parties at the time of the taking of the deed is controlling."

¹⁴ *Nye v. Bradford*, 144 Tex. 618, 193 S. W. (2d) 165 (1946); *Davis v. Davis*, 141 Tex. 613, 175 S. W. (2d) 226 (1943); *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. (2d) 825 (1900).

Therefore, the husband cannot abandon all interest in his property, and the wife, by taking charge of it and exercising dominion over it, cannot convert it into her separate property. Abandonment of land title is not recognized in Texas.¹⁵ A mere agreement between husband and wife will not be enough; it must be some type of conveyance.¹⁶

The subject matter of a conveyance from the husband to wife must be *in esse* at the time of the purported conveyance. The spouses have no power to change, by mere advance agreement (either postnuptial¹⁷ or antenuptial¹⁸), the status of property yet to come into existence or yet to be acquired.¹⁹ However, after the property has been acquired and its status has been fixed, the husband then may convey it to his wife and it will become her separate property.²⁰ A *dictum* in *Gorman v. Cause* says that a contract by which one spouse agreed to transfer to the other his interest in community property when later acquired, would be valid. This *dictum* seems correct on principle, since the well established rule that the character of property cannot be changed before the property comes into existence, is not violated. The property would later come into existence with its status exactly the same as if there had been no contract. Furthermore, the contract would not automatically change such initial status. That status would be changed only when and if the obligor executed a conveyance of his now existing property, which of course under established rules he can do. The *Gorman* case involved an antenuptial contract, but

¹⁵ Texas Co. v. Davis, 113 Tex. 321, 254 S. W. 304 (1923); W. T. Waggoner Estate v. Sigler Oil Co., 284 S. W. 921 (Tex. Com. App. 1926).

¹⁶ Kellett v. Trice, 95 Tex. 160, 66 S. W. 51 (1902); Magee v. White, 23 Tex. 180 (1859).

¹⁷ Green v. Ferguson, *supra*, note 2; Robbins v. Robbins, 125 S. W. (2d) 666 (Tex. Civ. App. 1939); Davis v. Davis, 108 S. W. (2d) 681 (Tex. Civ. App. 1937).

¹⁸ Gorman v. Cause, 56 S. W. (2d) 855 (Tex. Comm. App. 1933) *affirmed, but not adopted by Sp. Ct.*; Chandler v. Alamo Mfg. Co., 140 S. W. (2d) 918 (Tex. Civ. App. 1940).

¹⁹ Frame v. Frame, *supra*, note 4; Strickland v. Wester, 131 Tex. 23, 112 S. W. (2d) 1047 (1938); Arnold v. Leonard, 114 Tex. 535, 273 S. W. 799 (1925).

²⁰ Robbins v. Robbins, *supra*, note 17; Frame v. Frame, *supra*, note 4; Green v. Ferguson, *supra*, note 2.

the *dictum* could apparently be applied to postnuptial contracts as well.

The conveyance from husband to wife can be for a consideration or as a gift. Consideration must be from the wife's separate property, for if it were community property, the property conveyed by the husband would become (or remain) community property by the theory of mutations.²¹

A conveyance from husband to wife of his separate or the community property will be upheld only if it does not operate in fraud of the rights of prior creditors, and subsequent bona fide purchasers.²² *Corpus Juris Secundum*²³ says: "No person can question the validity of a conveyance from husband to wife unless he was the creditor of the husband or the community before the conveyance was made²⁴ or was a subsequent purchaser without notice."²⁵

The most recent way to change community property to the separate property of the wife (and of the husband) was made possible by a 1948 amendment to the Texas Constitution, which authorizes the spouses to partition their existing community property.²⁶ This is to be done by an instrument in writing which partitions the community property into undivided shares or in severalty, which shall be the separate property of each spouse. This amendment also authorizes husband and wife to exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community

²¹ *Kohner v. Ashenauer*, 17 Cal. 579 (1861) held that a conveyance from husband to wife of community property must be done either as a gift, the husband being free from debts or liabilities, or in exchange for separate property of the wife. And unless it was so transferred it was subject to his disposition thereafter as it had been previously.

²² *Maddon v. Summerlin*, 92 Tex. 483, 49 S. W. 1033 (1899); *Lewis v. Simon*, *supra*, note 11; *Brown v. Brown*, 61 Tex. 56 (1885).

²³ 41 C. J. S. § 516, 1096.

²⁴ *Peterson v. First National Bank*, 101 Cal. App. 532, 281 Pac. 1104 (1929); *Glover v. Brown*, 32 Idaho 426, 184 Pac. 649 (1919); *Seaton v. Smith*, 186 Wash. 447, 58 P. (2d) 830 (1936).

²⁵ *Houston Oil Co. of Tex. v. Choate*, 232 S. W. 285 (Tex. Comm. App. 1921); *Glover v. Brown*, *supra*, note 24.

²⁶ TEX. CONST., Art. XVI, § 15, was amended.

property, thereby making the portion set aside to each his separate property.²⁷

CHANGING THE WIFE'S SEPARATE PROPERTY AND THE COMMUNITY PROPERTY TO THE HUSBAND'S SEPARATE PROPERTY

The Texas Courts were slow to hold that a wife could convey her separate property so as to make it the separate property of her husband, due to the dread of undue influence by the husband on the wife. At an early date the rule was established that she could not directly convey her separate property to the husband,²⁸ but it was finally decided for the first time in 1893, in *Riley v. Wilson*,²⁹ that a wife could make a gift of her separate real estate to her husband, by joining with him in a conveyance to a third party, complying fully with the law as to privy acknowledgment, and then causing such party to reconvey the land to her husband as his separate property. "By this method, she has received all the protection the law deems essential to her prudence of action and power to convey."³⁰

The court, in reaching this decision started out with the premise that in Texas, husband and wife have equal rights to take and hold property in their separate right. From here it said that if it were not for the disability of the wife to convey her land without the joinder of her husband, her power to convey to him without the intervention of a third party would be as clear as his power

²⁷ TEX. CONST., Art. XVI, § 15, as amended Nov. 2, 1948; TEX. CIV. STATS., Art. 4624a, effective May 21, 1949.

Prior to this amendment, Texas did not allow husband and wife to partition the community property during the marriage. 23 TEX. JUR. § 83, 105; *Bruce v. Permian Royalty Co.*, 186 S. W. (2d) 686 (Ct. of Civ. App. 1945) *writ of error refused W. M.*

If the spouses obtain a divorce and the decree does not include a property settlement, they become tenants in common as to the former community property, and as such either party can force a partition. *Taylor v. Catalon*, 140 Tex. 38, 166 S. W. (2d) 102 (1942).

²⁸ *Graham v. Struwe*, 76 Tex. 533, 13 S. W. 381 (1890).

²⁹ 86 Tex. 240, 24 S. W. 394 (1893).

³⁰ *Id.* at 243, 24 S. W. at 396.

Accord; *Taylor v. Hollingsworth*, 142 Tex. 158, 176 S. W. (2d) 733 (1943); *Davis v. Davis*, 141 Tex. 613, 175 S. W. (2d) 226 (1943); *Kellett v. Trice*, 95 Tex. 160, 66 S. W. 51 (1902).

to convey directly to her; but, "as she can convey only by a deed in which he joins, they cannot make a deed directly to him, for no person can contract with himself."³¹

Requiring the wife's separate acknowledgement with the privy examination protects her from any coercive influence which might be exercised by the husband or other persons; and requiring the husband's joinder protects the wife from undue influence of others in that he gives her counsel and advice.³² When the conveyance is made to the trustee with the ultimate intention of making it the husband's separate property, it is not expected that the wife will have the benefit of her husband's unbiased advice, nor is it necessary to the validity of the transaction, but she does have the protection of a privy examination and separate acknowledgement before a notary public, and as has been stated, this protection is deemed sufficient.

Since Texas law permits the wife to make a gift of her separate property to the husband in the aforesaid manner, *a fortiori* she may transfer to him for a consideration. (The consideration must, of course, be from his separate property.) The Texas courts have so held.³³

By the same reasoning and by the same method as was used in *Riley v. Wilson*, we can safely conclude that the wife may transfer her interest in the community property to her husband's separate estate. A Texas court has never held that this could not be done; however, it has been held that any attempt to change community property to separate property will be closely scrutinized

³¹ 86 Tex. at 241, 24 S. W. at 395; TEX. REV. CIV. STAT. (Vernon 1948) art. 1299 states: "The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded, and certified to in the mode pointed out in articles 6605 and 6608."

³² *Ibid.*

³³ In *Taylor v. Hollingsworth*, *supra*, note 30, at 736, the court, speaking of the wife's separate property, said: "It is true that the husband and wife, by their deed properly acknowledged, can convey property to a third person, and such third person can convey such property to the husband, either with or without consideration, although the sole purpose of the conveyance is to cause the property to become the property of the husband."

by the courts, and "if there be a doubt as to the validity of the transaction it will be resolved in favor of the community."³⁴ It has also been held that the husband cannot, by gift to himself, make the community property his separate property.³⁵

A textwriter has stated that the wife has this power to convey her interest in community property to the husband's separate estate;³⁶ and this contention is supported by a *dictum* in *Collett v. Houston*.³⁷ Two civil appeals cases directly hold that the wife has the power when a trustee is utilized. In *Stratton v. Robinson*,³⁸ the wife owned an undivided one half interest in 160 acres, the other half being community property in the husband's name. Husband and wife conveyed to a trustee, for a nominal consideration, "our undivided interest of one half," and on the same day the trustee conveyed the same described interest back to the husband. The question was, which undivided interest did the parties intend to convey to the trustee? The court acknowledged that by the method employed and the language of the deeds, they *could* have conveyed the wife's separate interest to the husband as his separate property, but concluded that they intended to change their community property interest to the husband's separate property, and that each spouse was entitled to an undivided one half interest in said land as the separate property of each.

In *Barnett v. Barnett*³⁹ the husband lent his wife \$2,000 from his separate estate in consideration of her conveying to him "all

³⁴ King v. Bruce, 197 S. W. (2d) 830 at 838 (Tex. Civ. App. 1946) *reversed on other grounds*.

³⁵ Rowlett v. Mitchell, 114 S. W. 845 (Tex. Civ. App. 1908).

³⁶ SPEER, LAW OF MARITAL RIGHTS IN TEXAS, 181 (3rd Ed. 1929) states: "The husband may convey his interest in a specific piece of community property to his wife, and likewise, the wife may convey similarly to the husband, subject only to the statutes of conveyancing, or they may make exchanges of separate property for community property or vice versa."

³⁷ 186 S. W. 232, 241 (Tex. Civ. App. 1916) *writ of error refused*, saying "the interest of either party, husband or wife (in community property), may be conveyed or donated to the other, subject to certain limitations."

³⁸ 28 Tex. Civ. App. 285, 67 S. W. 539 (1902) *writ of error refused*. This case was cited with approval, and distinguished from the case then at bar in *Davis v. Davis*, 141 Tex. 613, 175 S. W. (2d) 226 (1943).

³⁹ 206 S. W. (2d) 273 (Tex. Civ. App. 1947).

of her interest in all of the property, both real and personal, owned by the husband."⁴⁰ To do this, they joined in conveying all of the community property to a trustee with the agreement that he should immediately convey it to the husband so that the wife would have no interest in it. The court held that the conveyance to the husband through a trustee passed title to the wife's interest in the community property then in existence.

Since the husband can convey property (except homestead) without the wife's joinder, it follows that if the land is in his name, she need not join in his deed to the trustee. However, she must consent to the deed; otherwise his conveying community property so as to make it his separate property would almost certainly be fraud on her. And, of course, the most clearcut consent is her joinder. The same reasoning applies when the community property is in the wife's name, *i.e.*, the husband's deed to the trustee, with her consent, is sufficient—or she alone may convey to the trustee, with the husband's consent because community property is involved. It is possible that her deed direct to the husband would be upheld, because he, of course, would consent thereto.

Partition of existing community property (discussed under the preceding major topic) should again be mentioned as the most recent way to change community property to separate property.

CHANGING SEPARATE PROPERTY INTO COMMUNITY PROPERTY

Texas cases clearly establish the rule that the husband and wife cannot, by mere agreement whether written or oral, change separate into community property.⁴¹ This applies with equal force to

⁴⁰ *Id.* at 277.

⁴¹ *Tittle v. Tittle*, Tex., 220 S. W. (2d) 637 (1949); *Belkin v. Ray*, 142 Tex. 71, 176 S. W. (2d) 162 (1944); *Taylor v. Hollingsworth*, 142 Tex. 158, 176 S. W. (2d) 733 (1943); *Kellett v. Trice*, 95 Tex. 160, 66 S. W. 51 (1902).

States in accord:

New Mexico—"Parties cannot transmute separate into community property by the mere will of the parties," *McDonald v. Lambert*, 43 N. M. 27, 85 P. (2d) 78 (1938).

States contra:

Calif.—A written or oral agreement, just so long as there is a meeting of the minds is sufficient to transmute separate property of husband or wife into community property. *Kenney v. Kenney*, 220 Cal. 134, 30 Pac. (2d) 398 (1934); *Siberell v. Siberell*,

the separate property of either spouse.⁴² When the facts surrounding the acquisition of property are such that it becomes separate property by the terms of the statutes (and the Constitution, in the case of the wife),⁴³ then the property must remain separate property until the existence of the facts necessary under the law to effect a change. To allow a mere agreement to change separate to community would destroy the statutes defining separate property. Only through conveyances could such a change by any possibility be effectuated.

The New Mexico Supreme Court, in following the Texas decisions, said that the manner of acquisition must be such that the property is community within the meaning of the law at the time it is acquired, even if from husband or wife.⁴⁴

It has been attempted to change separate property into community property by a deed of husband's or wife's separate property to a trustee, who deeds it back to the spouses with the express purpose of converting it into community property.⁴⁵ The courts look through these purported conveyances and say that this was "merely an attempt by the agreement of husband and wife to convert that which the law made separate property of one into common property of the two."⁴⁶ The deeds are held not to be conveyances of title, but in substance the transaction is held to be only the forbidden agreement by which a change in character of title is attempted, without the existence of the facts necessary under

214 Cal. 767, 7 P. (2d) 1003 (1932); *In re Hendersons Estate*, 128 Cal. App. 397, 17 P. (2d) 786; *Vieux v. Vieux*, 80 Cal. App. 22, 251 Pac. 640; *Bias v. Reed*, 169 Cal. 33, 145 Pac. 516 (1914).

Wash.—Spouses can change separate property to community property by a written agreement, but not by oral agreement of the spouses alone. *Rogers v. Joughin*, 152 Wash. 448, 277 Pac. 988 (1929); *State ex rel. Van Moss v. Sailors*, 180 Wash. 269, 39 P. (2d) 397 (1934); *Voiz. v. Zang*, 113 Wash. 378, 194 Pac. 409 (1920).

⁴² *Tittle v. Tittle*, *supra*, note 41.

⁴³ TEX. REV. CIV. STAT. (Vernon 1925) art. 4613—Husband's separate property defined; TEX. REV. CIV. STAT. (Vernon 1925) art. 4614—Wife's separate property defined; TEX. CONST., Art. XVI, § 15.

⁴⁴ *McDonald v. Lambert*, 43 N. M. 27, 85 P. (2d) 78 (1938).

⁴⁵ *Tittle v. Tittle*, *supra*, note 41; *Kellett v. Trice*, *supra*, note 16.

⁴⁶ *Kellett v. Trice*, *supra*, note 16, at 53.

the law to effect the change.⁴⁷ Therefore the property remains separate property. This result—although it seems odd to consider two attempted conveyances as being one attempted contract—is clearly sound: there was no real consideration; therefore the transaction could not have been valid except as a gift; that would have produced separate property, not community.

However, in the very same situation, if neither the deed of the separate property to the trustee nor the deed back to husband and wife contains any expression of an agreement or intent to convert the land into community property, the transaction is not void; because the legal effect of the two deeds without consideration constitutes this property the separate property of husband and wife in undivided halves, as co-tenants.⁴⁸ The distinction is that in the former situation, the transaction is completely void, because such deeds cannot convert the land into community property, and to hold that title passed to the spouses as co-tenants would contradict the express terms of the deeds.⁴⁹ In the latter situation, where the deeds recite no intention to create community property, husband and wife by operation of law on the facts hold an undivided one-half interest each as to co-tenants, on the theory of gift to both of them from the one who owned the property at the outset.⁵⁰

In Texas, all property that husband or wife acquire after marriage by gift, devise, or descent is the separate property of the donee.⁵¹ Therefore, neither spouse can make a gift of separate property to the community, by agreement, conveyance or otherwise (nor can a third party make a gift which will be community property); a gift must by statutory definition be separate prop-

⁴⁷ *Tittle v. Tittle*, *supra*, note 41.

⁴⁸ *Belkin v. Ray*, *supra*, note 41. The Supreme Court ruled that these instruments on their face showed no intent to convert the separate property into community property and that parol evidence to show such intent is inadmissible.

⁴⁹ *Tittle v. Tittle*, *supra*, note 41.

⁵⁰ *Belkin v. Ray*, *supra*, note 41.

⁵¹ *TEX. CONST.*, art. XVI, § 15; *TEX. REV. CIV. STAT.* (Vernon 1925) arts. 4613 and 4614.

erty.⁵² "The Texas Courts reason that the definition of community property does not include gifts made to either spouse⁵³ and that the spouse named as the grantee of the gift is an individual donee, despite an expressed intent to convey to that spouse as a representative of the community."⁵⁴

A *dictum* in the *Kellett* case left open a possible way to change separate property into community when the court stated: "It may be that a purchase may be made of such separate property by the husband with community funds, so that the consideration will belong to the wife separately and the property taking its place will belong to the community estate."⁵⁵ There have been no cases directly on this point, but there seems to be no reason why the courts should not follow this *dictum*. On principle, there seems to be no policy against it. Since the wife can change her separate property to the husband's separate property, it would seem *a fortiori* that she can change her separate property to community property. The best method to do this without violating the principles already laid down, would appear to be for the spouses to join in a deed to a trustee, who would pay the wife the value of the land; then the trustee would convey to the husband in return for community money in the same amount. (The wife could probably be grantee, if the husband paid, or consented to her paying, the community money, or if under the probable meaning of *Hawkins v. Britton*

⁵² *Kellett v. Trice*, *supra*, note 16; *Shook v. Shook*, 125 S. W. 638 (Tex. Civ. App. 1910) *writ of error dismissed*, and *Benjamin State Bank v. Reed*, 139 S. W. (2d) 172, at 175 (Tex. Civ. App. 1940), where the court stated: "We recognize that separate property of husband or wife may be the subject of a gift by either to the other, but we think there is no warrant in law or logic for the proposition that the separate property of either spouse may be the subject of a gift to the community estate as something distinct from a gift to the husband or wife."

⁵³ TEX. REV. CIV. STAT. (Vernon 1936) art. 4619, excludes this property from that category.

⁵⁴ See comment, 18 TEX. L. REV. 227, 228 (1940).

⁵⁵ *Kellett v. Trice*, *supra*, note 16 at 54, 55.

The New Mexico Supreme Court in *McDonald v. Lambert*, *supra*, note 44, at 83, also indicated this possible solution when it stated as dicta that "undoubtedly separate property may be conveyed by one spouse to the other: or if community funds are used to purchase the separate property of either husband or wife, such property would become community."

State Bank,⁵⁶ she paid certain types of "special community" money.) Similarly it would seem the husband's separate property can be changed to community property. Possibly the trustee could be eliminated by the husband's direct deed to the wife, for a community consideration which he had consented for her to transfer (or which the principle of the *Hawkins* case may authorize her to transfer).

The *Tittle* case showed that the consideration had to be more than mutual promises to convey to the community to meet this dictum. Also, the consideration must be more than nominal or the transaction will be branded as a gift.⁵⁷

SUMMARY

The husband can convey community property and his separate property directly to the wife as a gift, or for a consideration from her separate estate, without the intervention of a trustee. When so done it is presumed to be her separate property and will not be set aside unless it operates in fraud of the rights of prior creditors and subsequent bona fide purchasers. The presumption is conclusive (except in a direct attack) as to parties to the deed when it expressly shows the husband's intent to make the land the wife's separate property; but it is rebuttable when these recitals are absent. The husband cannot convey community property or his separate property to the wife until it has been acquired and its status fixed by operation of law on the facts under which it was acquired. However, it seems possible that a contract (prenuptial or antenuptial) by which one spouse agrees to transfer to the other his interest in the community property when later acquired, would be valid. A recent constitutional amendment provides a method by which the spouses can partition their community property and thus change it to their separate estates.

The wife can convey her separate property, and her interest in

⁵⁶ 122 Tex. 69, 52 S. W. (2d) 243 (1932); comment, *Control and Disposition of Special Community Property*, 4 SOUTHWESTERN L. J. 88 (1950).

⁵⁷ *Bradley v. Love*, 60 Tex. 472 (1883); note on *Tittle v. Tittle*, 28 TEX. L. REV. 275 (1949).