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# COMMENTS

## CONVEYING THE HOMESTEAD WITHOUT JOINDER OF BOTH SPOUSES

by Clarice M. Davis

The Texas constitutions since 1845 have contained a provision preventing a married man from alienating the homestead without the consent of his wife.<sup>1</sup> The present provision is found in article 16, section 50, which reads "nor shall the owner, if a married man sell the homestead without the consent of the wife, given in such manner as may be prescribed by law. . . ."<sup>2</sup> In addition to the constitutional provision restraining the sale of the homestead, article 1300<sup>3</sup> provides that a married man may not sell the homestead without the consent of his wife and that such consent shall be evidenced in the manner required by articles 6605 and 6608.<sup>4</sup>

Despite these seemingly absolute constitutional and statutory provisions restricting conveyance of the homestead, articles 4617 and 4618 of the Revised Civil Statutes<sup>5</sup> and section 157 of the Probate Code<sup>6</sup> have created exceptions. These statutes provide for the transfer of the homestead without joinder where the non-joining spouse has either abandoned the marriage relationship or has become insane. Case law has extended these exceptions even further. The "abnormal circumstances"<sup>7</sup> in which a conveyance of the homestead without joinder of both spouses is allowed are examined in this Comment.

### I. ABANDONMENT<sup>8</sup>

As early as 1856, the Texas Supreme Court held that a wife could convey the community property homestead without joinder of her

<sup>1</sup> RHEA, TEXAS SEPARATE AND COMMUNITY PROPERTY, LIMITATIONS OF ACTIONS 290 (2d ed. 1938); TEX. CONST. Art. VII, § 22 (1845).

<sup>2</sup> TEX. CONST. art. 16 (1876).

<sup>3</sup> TEX. REV. CIV. STAT. ANN. art. 1300 (1962).

<sup>4</sup> TEX. REV. CIV. STAT. ANN. arts. 6605, 6608 (1960). Article 6605 provides that the acknowledgment of a married woman must be taken after she has been shown the deed, had it explained to her, and has stated apart from her husband, that she has willingly signed it and does not wish to retract it. Article 6608 provides the form for such an acknowledgment.

<sup>5</sup> TEX. REV. CIV. STAT. ANN. art. 4617 (1960); art. 4618 (Supp. 1966).

<sup>6</sup> TEX. PROB. CODE ANN. § 157 (Supp. 1966).

<sup>7</sup> HUIE, TEXAS MARITAL RIGHTS 579 (1955).

<sup>8</sup> Few cases have discussed what constitutes abandonment in any great detail. The treatment, for the most part, has been restricted to a discussion of the most obvious principle, *i.e.*, absence for a number of years. From the limited discussion available, it appears that before a spouse is considered abandoned it must be shown that the absence is not temporary, regardless of the length of the absence. Fullerton v. Doyle, 18 Tex. 3 (1856). The most sensible explanation is that it is not the physical absence of the spouse but the absence of a marital relationship which determines the capacity of one spouse to deal with the property. Webb v. Webb, 148 Tex. 405, 224 S.W.2d 868 (1949). In this case the court held valid a deed

husband when he had abandoned her. In *Fullerton v. Doyle*<sup>9</sup> the husband abandoned his wife and thereafter contributed nothing to her support. She owned no separate property, and the homestead was the couple's only community property. The abandoned wife and her three children were destitute, and to provide for her family, she contracted to sell the homestead. After making the down payment, the buyer refused to complete the sale and later sued to avoid the contract. In answering the claim that a married woman could not give good title to the property, the court stated, "The assent of the partner who abandons the home and family, and the duties and powers of the marriage relation is not requisite to the sale of the homestead."<sup>10</sup>

The decision was based on an earlier case, *Wright v. Hays*,<sup>11</sup> which involved the power of an abandoned wife to sell non-homestead community property.<sup>12</sup> The husband had been absent for five years during which time the wife had acquired some real estate which presumably was community property.<sup>13</sup> Before her husband returned, the wife transferred the property to her son by a previous marriage. There was no evidence that the husband had intended to abandon the wife permanently. Nor was there evidence that the wife was in financial need. If she had been, it could hardly be claimed that the conveyance was necessary for her support since it was a gift. Nevertheless, the court made this remarkable statement:

The default of the husband and the necessity of the wife's situation require and the law authorizes her to assume his position for the care of herself, her family, and property, and vest her with the capacity of a feme sole. His desertion and absence are the foundation of her new rights and authority . . . [H]is desertion of the wife and country vests in her the administration of such property, and confers upon her every right of control or disposition which *he could have enjoyed or exercised*, had he remained in the discharge of his duties as a husband.<sup>14</sup>

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executed by the wife to her husband *in his presence* after she had obtained an interlocutory divorce decree in California. The court held that after separation a wife could convey her separate property without joinder of her husband though he was physically present. Therefore, the question of whether separation as opposed to abandonment creates these powers of conveyance in a spouse apparently has been answered in the affirmative. *Nelkin v. Young*, 397 S.W.2d 956 (Tex. Civ. App. 1965). There is some inconsistency in this position because separation usually includes an element of voluntariness, or at least agreement, on the part of both spouses. Separation, therefore, affords the possibility of making anticipatory arrangements for the disposition of the property which is not found in the abandonment cases.

<sup>9</sup> 18 Tex. 3 (1856).

<sup>10</sup> *Id.* at 14.

<sup>11</sup> 10 Tex. 130 (1853).

<sup>12</sup> Prior to 1917 the statutes provided that during marriage the husband alone could convey the wife's separate and the community property. Tex. Acts, 1848, ch. 79, §§ 1-3, 3 GAMMEL, LAWS OF TEXAS 78 (1898).

<sup>13</sup> Tex. Acts, 1848, ch. 79, § 3, 3 GAMMEL, LAWS OF TEXAS 78 (1898), now TEX. REV. CIV. STAT. ANN. art. 4619 (1960).

<sup>14</sup> 10 Tex. at 135-36 (1853).

The similarity between the two cases is so appealing that one is tempted to accept the decision in *Fullerton* as the logical extension of the reasoning in *Wright*. However, in *Wright* the property involved was non-homestead community property, which the husband possessed power to convey. In *Fullerton* the property involved was community property homestead, which one spouse (at that time the husband) was forbidden to convey without joinder of the other.<sup>15</sup> In effect the court in *Wright* held the wife could do what the husband could do; while in *Fullerton*, the court held the wife could do what the husband, under existing constitutional and statutory provisions, was forbidden to do except with her joinder.

These two cases set the pattern for two trends which the courts have followed consistently. The first is the use of non-homestead community property cases as the basis for decisions in homestead cases with apparent disregard for the inherent dissimilarities between the two.<sup>16</sup> The second is the courts' firm commitment to the proposition that upon abandonment, the remaining spouse is endowed with the power to give good title to the homestead without obtaining the other spouse's consent to the conveyance.

After *Fullerton* the rule that an abandoned wife could make a valid conveyance of the homestead seems to have been accepted with little question. The principal area of doubt remaining was the need for showing "necessity" before the abandoned spouse obtained this power. It has been stated that the court should not "weigh in golden scales" the necessity required before the wife should possess the power to sell the community property unless the power had been used to defraud the husband.<sup>17</sup> In a case involving non-homestead property it was stated that a necessity need not exist for the wife to convey her *separate* estate when abandoned by the husband and that the necessity rule only applies to community property for the protection of the husband.<sup>18</sup> In a later case, the court concluded that even when the wife possessed the power to convey non-homestead community property due to necessity, the power was not exclusive and the abandoning husband still retained his power to convey.<sup>19</sup> In view of the limited number of cases in this area and their apparent contradictions, a definite

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<sup>15</sup> RHEA, TEXAS SEPARATE AND COMMUNITY PROPERTY, LIMITATIONS OF ACTIONS, 290 (2d ed. 1938); TEX. CONST. art. VII, § 22 (1845).

<sup>16</sup> *Wright v. Hays*, 10 Tex. 130 (1853), *Pierce v. Gibson*, 108 Tex. 62, 184 S.W. 502 (1916), and *Gilley v. Troop*, 146 S.W. 954 (Tex. Civ. App. 1912) *error ref.*, all are examples of non-homestead cases later used to justify the decision in a homestead case.

<sup>17</sup> *Zimpleman v. Robb*, 53 Tex. 274 (1880).

<sup>18</sup> *Clements v. Ewing*, 71 Tex. 370, 9 S.W. 312 (1888).

<sup>19</sup> *King v. King*, 41 Tex. Civ. App. 473, 91 S.W. 633, 635 (1906).

conclusion as to the requirement of "necessity" is virtually impossible. Suffice it to say that a conveyance made without a showing of necessity is more questionable.

In 1906 a civil appeals court faced the problem of the validity of an abandoned husband's deed to the community property homestead. Following the previous decisions empowering the wife to convey under these circumstances, the court held the deed was valid.<sup>20</sup> Later, it was held that upon abandonment, the wife could validly convey her separate property homestead.<sup>21</sup>

Thus, before the existence of any statutory provisions, both husband and wife upon abandonment were allowed to convey valid title to the community or separate property homestead without joinder. In 1917, the legislature amended article 4621 (now articles 4617 and 4618) to give the wife statutory power to convey her separate property homestead upon abandonment if she obtained a court order authorizing the transfer.<sup>22</sup> In 1957 the legislature amended these statutes to authorize the husband to exercise a similar power in respect to his separate property homestead.<sup>23</sup> In 1963 article 4618 was amended to its present form to authorize the abandoned husband or wife to convey his or her separate property homestead without first obtaining a court order authorizing the conveyance.<sup>24</sup>

The provisions of article 4617 and 4618 are expressly restricted to homestead which is the separate property of the abandoned spouse.

<sup>20</sup> *Mabry v. Kennedy*, 49 Tex. Civ. App. 45, 108 S.W. 176 (1908) *error ref.* The court did not discuss the question of necessity, but from the facts of the case it appears that the husband conveyed the property to discharge a tax lien on it.

<sup>21</sup> *Mabry v. Citizens Lumber Co.* 47 Tex. Civ. App. 443, 105 S.W. 1156 (1907) *error ref.* At this time the statutes provided that during marriage the husband alone could convey the wife's separate property. See note 12 *supra*.

<sup>22</sup> General Laws of Texas, 1917, ch. 194, §§ 1, 2.

<sup>23</sup> General and Special Laws of Texas, 1957, ch. 407, § 4, at 1234. Previously a non-statutory right was assumed to exist. TEX. REV. CIV. STAT. ANN. art. 4617 (1960):

A husband or wife who owns the homestead as separate property and who is abandoned by his or her spouse, or whose spouse becomes insane, may encumber or convey such property by applying to the District Court of the county of his or her residence. The court in term time or vacation, upon satisfactory proof that such encumbrance or conveyance would be advantageous to the interest of the husband or wife applying shall make an order granting permission to make such encumbrance or conveyance of the homestead without the joinder of the other spouse, and the married person who owns the homestead so separate property may then encumber or convey such property without such joinder.

<sup>24</sup> TEX. REV. CIV. STAT. ANN. art. 4618 (Supp. 1966):

The homestead, whether the separate property of the husband or of the wife, or the community property of both shall not be disposed of except by the joint conveyance of both the husband and the wife, except where the husband or wife is insane or has permanently abandoned the other, in which instances the husband or wife may sell and make title to any such homestead, if his or her separate property, in the manner provided in Article 1288.

Since article 4617 was not amended at the same time, articles 4617 and 4618 are in conflict with each other.

Therefore, it would seem by the rule of *inclusio unis est exclusio alterius* that community property homestead would fall within the constitutional and statutory language prohibiting alienation without joinder of both spouses.<sup>25</sup> In addition, since articles 4617 and 4618 specifically applied only to the wife from 1917 to 1957, one would think that during this period the husband alone would have been unable to convey either the community or separate property homestead. The argument in favor of these conclusions is supported by the fact that prior to 1917 the court had allowed the husband or the wife to convey community and separate property homesteads. Thus, the 1917 legislation appeared to be aimed at prohibiting married persons from conveying the homestead unless they complied with the new statutory provisions. This would have limited the possible conveyances to the separate property homestead of the wife from 1917 to 1957. After 1957 either the husband or the wife could convey the homestead under article 4617 but only if it was the separate property of the grantor. The case law, however, has produced results completely contrary to those which might be anticipated from a literal reading of the statutes and the case law preceding their passage.

The courts apparently gave little thought to the negative implications of the 1917 amendment and held that the statutes merely provided another means for a valid conveyance by an abandoned spouse—not the exclusive means.<sup>26</sup> Therefore, an abandoned spouse from 1917 until 1963 was not restricted to the provisions and procedures of article 4617 in order to convey the homestead. Rather, he or she could convey not only the separate property homestead but also the community property homestead under the powers developed by judicial interpretation prior to the statutory provisions.<sup>27</sup> Thus, the 1963 amendment to article 4618 which authorizes conveyances of separate property homestead without obtaining a court order was only a codification of the existing case law. The effect of holding that article 4617 was cumulative rather than exclusive was to allow spouses to use its procedures if they chose. But a conveyance was not void mere-

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<sup>25</sup> The constitutional provision merely prohibits the husband from conveying the homestead without joinder of his wife. However, when this provision was written, the wife had no power to convey her separate or their community property. Tex. Acts, 1848, ch. 79, §§ 1-3, 3 GAMMEL, LAWS OF TEXAS 78 (1898). In 1913, article 4621 [now articles 4617 and 4618] was amended to allow the wife to convey her separate property and at the same time, article 4621 [now articles 4617 and 4618] was also amended to read that the homestead whether community property of both or separate property of one could not be disposed of except by joint conveyance of both spouses. General Laws of Texas, 1913, ch. 32, § 1, at 62.

<sup>26</sup> Ross v. Tide Water Oil Co., 136 Tex. 66, 145 S.W.2d 1089 (1941).

<sup>27</sup> Fullerton v. Doyle, 18 Tex. 3 (1856); Mabry v. Kennedy, 49 Tex. Civ. App. 45, 108 S.W. 176 (1908) error ref.

ly because an abandoned spouse did not obtain the required court order before selling the separate or community property homestead. The result was that the obvious protections for the unwary buyer or absent spouse which were provided in the judicial procedures of article 4617 were lost.

The need for these protections is most apt to arise when there is a question as to the existence of the alleged abandonment. Normally, a spouse will not wish to convey the homestead without the joinder of the other spouse unless there has been an actual abandonment. However, under the cumulative interpretation and under the present provisions of article 4618 conveyances can be made before there is an authoritative decision on the issue of abandonment. In the absence of a prior determination, the spouse who has conveyed the homestead without obtaining the court order provided in article 4617 may later contest the validity of the deed on the ground that abandonment had not in fact occurred.<sup>28</sup> To avoid such questionable conveyances, it is only necessary to insist that any married person comply with article 4617 and obtain a court order before conveying the separate property homestead. If such procedures were required in all cases, the issue of abandonment would be settled immediately when the judge granted the order giving the abandoned spouse powers of disposition over the homestead. In this manner both the buyer and the absent spouse would be protected against the possible unauthorized action of the conveying spouse.

In summary, the case law indicates that conveyances of the homestead without joinder of both spouses seem to be possible under the following circumstances: (1) if the homestead is the separate property of the conveying spouse and a court order is obtained under the provisions of article 4617; (2) if the homestead is the separate property of the conveying spouse and no court order is obtained; (3) if the homestead is the community property and no court order is obtained.

The second and third circumstances present situations where the buyer must be particularly careful because the conveying spouse is acting upon an unadjudicated power to convey. In these cases the careful buyer would be well advised to investigate the facts of the purported abandonment to be certain that it has actually occurred. He

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<sup>28</sup> Nelkin v. Young, 397 S.W.2d 956 (Tex. Civ. App. 1965) is a good illustration. Here, the wife signed a note mortgaging the homestead, but later sued to enjoin the sale. The buyer in attempting to defend his title claimed that the prohibition against mortgaging the homestead without the joinder of both spouses did not apply because the husband and wife though married, were separated. In holding the deed invalid, the court said that even though the homestead was her separate property, the evidence did not show whether the husband and wife were permanently separated when she signed the note.

should also investigate the apparent "necessity" for the spouse to make the sale since this may be determinative of whether the power to convey exists.

## II. IMPRISONMENT

The ability of one spouse to convey good title to the homestead without joinder while the nonjoining spouse is in prison has not been litigated. However, the subject has arisen in regard to non-homestead community property. In *Slator v. Neal*<sup>29</sup> the wife sold community property while her husband was imprisoned for a felony. When the husband returned, he tried to recover the property, claiming that the wife had no power to sell. In sustaining the validity of the sale, the court said that the sentence and confinement of the husband:

is certainly incompatible with the idea of his management and control of their community property. For all practical purposes, outside of the prison, the convict is *civilter mortuus*. . . . [His confinement] certainly is equivalent to, and should be considered such an abandonment of the wife, as would authorize her to manage, control, and dispose of the common property in securing a support for herself and children.<sup>30</sup>

The reasoning in *Slator* was based on an assumption that imprisonment is equivalent to civil death or abandonment. This concept is difficult to accept since nothing prohibits a convict from executing a deed and it is obviously no problem to locate an imprisoned spouse. In addition, no statutory policy deprives an imprisoned person of his homestead rights. Furthermore, it appears that imprisonment does not constitute abandonment for divorce purposes.<sup>31</sup>

Nevertheless, in view of the court's tendency to equate non-homestead cases with homestead cases, there is every reason to suspect that a court will follow the *Slator* rationale and allow a conveyance of the community or separate property homestead without the joinder of the imprisoned spouse. This prediction is supported by the court's statement in *Reed v. Beheler*<sup>32</sup> in which the wife's conveyance of community homestead property was allowed on the basis of her imprisoned husband's insanity at the time of the conveyance. In dictum the court indicated that the husband's imprisonment would also have given the wife power to convey the homestead.

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<sup>29</sup> 64 Tex. 222 (1885).

<sup>30</sup> *Id.* at 226.

<sup>31</sup> TEX. REV. CIV. STAT. ANN. art. 4629 (Supp. 1966) clearly contemplates abandonment and imprisonment as two separate grounds for divorce by providing for abandonment in § 2 and imprisonment in § 5.

<sup>32</sup> 198 S.W.2d 625 (Tex. Civ. App. 1946).



### III. INSANITY

A further exception to the general rule requiring joinder to convey the homestead occurs when one spouse is insane.<sup>33</sup> As in the abandonment exceptions the principal problem has been whether the statutory procedures furnish the exclusive method for conveyance or whether they are merely cumulative of earlier rules.

#### A. Statutory Provisions

Prior to 1893, the statutes contained no provisions relating to the power of either spouse to control, manage, or dispose of the community property when the other spouse was insane. In that year, the legislature amended the three articles<sup>34</sup> which previously had provided only for the disposition of community property on intestacy and made them applicable to the case when one spouse became insane. If there were no surviving children, the property passed to the sane spouse.<sup>35</sup> If there were surviving children, the sane spouse could obtain management, control, and disposition over the community property without the necessity of joinder by qualifying as community admin-

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<sup>33</sup> The concept of insanity in this context unfortunately remains something of a mystery. There is little discussion in the cases regarding the symptoms or medical diagnosis of the insane's condition and the courts seem content with the mere label of insanity. In several early cases there were indications that mental illness alone was insufficient to endow the other spouse to convey the homestead. In *Gersdorff v. Torres*, 293 S.W. 560 (Tex. Comm. App. 1927), it was held that residence in an asylum alone was not proof of insanity. The decision, however, was not adopted by the Supreme Court. Later, in *Duarte v. Gutierrez*, 175 S.W.2d 480 (Tex. Civ. App. 1943), the court held that the kind of insanity which would authorize one spouse to convey without joinder of the other was a condition of the mind which is apparently permanent or at least of lengthy duration. But, in *Reed v. Beheler*, 198 S.W.2d 625 (Tex. Civ. App. 1946) the court held that the wife could execute a valid deed after the husband had been in a prison hospital mental ward for less than a year. There was little indication that any medical finding that the husband's insanity was of lengthy or permanent duration had been made. The court stated that proof of such condition could not be required since careful purchasers would be deterred from buying from the sane spouse if the conveyance could be set aside merely because the nonjoining spouse regained his sanity. Section 157 of the Probate Code speaks in terms of incompetency rather than insanity. It would seem that after this change, insanity alone would be insufficient to allow one spouse to convey unless that insanity rendered the other spouse incapable of knowing and appreciating the effect of his deed. Yet, in *Schmidt v. Schmidt*, 403 S.W.2d 531 (Tex. Civ. App. 1966) the court held that a deed executed by the husband was good because his wife was insane. There had been no adjudication of her insanity and the court does not even discuss her incompetency in relation to executing a deed.

<sup>34</sup> Tex. Acts, 1893, ch. 68, § 1, 10 GAMMEL, LAWS OF TEXAS 88 (1898). The community administration statutes were codified in 1895 under articles 2220-22 and 2236; in 1911 in articles 3593-95 and 3609; and in 1925 in articles 3662-64 and 3678. In 1955 those relating to insanity were put in § 157 of the Probate Code. Hereafter, they will be referred to as articles 3662-64 if before 1955 and as § 157 if after 1955.

<sup>35</sup> The statute also provided that if the intestate or insane spouse owned separate property, the survivor must qualify as community administrator in order to manage and dispose of the community property. This additional provision has not been pertinent in any of the homestead cases.

istrator.<sup>36</sup> In order to qualify the surviving spouse was required to file an inventory, have an appraisal of the estate made, post bond, and be judicially appointed community administrator.<sup>37</sup>

In 1955 when the Probate Code was enacted, the legislature separated the provisions for administration upon intestacy from those pertaining to insanity. Section 157, which deals with administration upon insanity, as enacted in 1955, provided for either spouse to acquire power to manage, control, and dispose of the entire community property when the other spouse was judicially declared incompetent. However, the surviving partner was first required to have an appraisal of the estate made, file an inventory, and post bond.<sup>38</sup> In 1957 these requirements were removed and the statute was amended to its present form.<sup>39</sup>

In addition to section 157, since 1917 articles 4617 and 4618 have provided that the wife can apply for a court order allowing her to convey the homestead owned as her separate property if her husband were insane.<sup>40</sup> In 1957 these statutes were amended to give the same privilege to the husband.<sup>41</sup> In 1963, article 4618 was amended to allow conveyance without a court order.<sup>42</sup>

Thus, if the statutory provisions alone are considered, the following types of conveyances, and only the following types of conveyances, should have been permitted during the various time periods:

- (1) Prior to 1893 no conveyance of the homestead without join-

<sup>36</sup> Tex. Acts, 1893, ch. 68, 10 GAMMEL, LAWS OF TEXAS 88 (1898). The use of the phrase "without joinder" clearly contemplates disposition of the homestead which ordinarily requires joinder.

<sup>37</sup> *Ibid.*

<sup>38</sup> TEX. PROB. CODE ANN. § 157 (1956).

<sup>39</sup> TEX. PROB. CODE ANN. § 157 (Supp. 1966).

Whenever a husband or wife is judicially declared to be incompetent, the other spouse, in the capacity of surviving partner of the marital partnership, thereupon acquires full powers to manage, control, and dispose of the entire community estate including the part which the incompetent spouse would legally have power to manage in the absence of such incompetency and no administration, community or otherwise, shall be necessary. Guardianship of the estate of the incompetent spouse shall not be necessary when the other spouse is competent unless the incompetent spouse owns separate property and then as to such separate property only. The qualification of a guardian of the estate of an incompetent spouse does not deprive the competent spouse of the right to manage, control and dispose of the entire community estate as provided in this Code.

There is some question as to whether "entire community" includes the homestead. Presumably it does and the courts have apparently accepted this position. Schmidt v. Schmidt, 403 S.W.2d 531 (Tex. Civ. App. 1966).

<sup>40</sup> General Laws of Texas, 1917, ch. 194, §§ 1, 2, at 436.

<sup>41</sup> TEX. REV. CIV. STAT. ANN. art. 4617 (1960).

<sup>42</sup> TEX. REV. CIV. STAT. ANN. art. 4618 (Supp. 1966). The provisions of articles 4617 and 4618 were combined in one article prior to 1925. Article 4621, Tex. Rev. Civ. Stat. (1911); article 2967, Tex. Rev. Civ. Stat. (1895); and article 2851 Tex. Rev. Civ. Stat. (1879). See notes 23-24 *supra* for the present provisions.

der of both spouses could have been possible even if one spouse were insane.

- (2) From 1893 to 1917 one spouse could convey the community homestead if there were no children and the other spouse had been declared insane. If there were children, the same spouse could convey by posting bond, having an appraisal made, and receiving a court appointment as community administrator.
- (3) From 1917 to 1955 the husband or wife could convey community homestead under the community administration provisions in (2) above, and the wife could convey her separate property homestead if she obtained the court order required in article 4617.
- (4) From 1955 to 1957 either spouse could convey community homestead under the provisions of section 157 of the Probate Code if the other spouse had been adjudicated incompetent, but the competent spouse had to post bond, have an appraisal of the estate, and provide an inventory whether or not there were surviving children. The wife could convey her separate property under the provisions of article 4617 in (3) above.
- (5) From 1957 to 1963 either spouse could convey community homestead under the provisions of section 157 without posting bond or having an appraisal. Either spouse could convey his separate property homestead under the provisions of article 4617 which require a court order.
- (6) Since 1963 either spouse can convey the community property homestead under the provisions of section 157 in (5) above. Either spouse can convey separate property homestead without a court order under the provisions of article 4618.

However, as in the abandonment provisions, the courts have not interpreted the provisions in a manner which a strict reading of the statutory language would indicate, and considerable confusion has resulted.

### B. *Judicial Interpretation*

Prior to the existence of any statutory provisions, the right of a husband to convey the homestead without joinder of an insane wife was established by *Shields v. Aultman, Miller & Co.*<sup>43</sup> There, the husband had sold the community homestead while his wife was in an insane asylum. Her guardian brought suit to regain title to the property from the owner. No adjudication of the wife's insanity had been made and no necessity was shown to justify the husband's conveyance.

<sup>43</sup> 20 Tex. Civ. App. 345, 50 S.W. 219 (1899) error ref.

Concluding that "the law never requires impossibilities,"<sup>44</sup> the court reasoned that if the husband could not sell without her joinder he could not sell at all, since she was unable to join while insane.<sup>45</sup>

The *Shields* case clearly demonstrates the continuing philosophy of the Texas courts in this area, *i.e.*, to protect the property rights of the sane spouse and his vendee. However, the insane spouse should have his homestead protected from an unwanted sale while he is unable to protect it himself. The rights of the insane spouse and his need for protection are problems which the Texas courts have rarely recognized and never attempted to solve either before or after the statutory provisions relating to insanity were provided.

*When the Spouse Has Been Adjudicated Insane* After the 1893 amendment to the community administration provisions the El Paso Court of Civil Appeals dealt with a situation similar to *Shields* but reached a contrary result.<sup>46</sup> The court held that since the husband had not qualified as community administrator, and since there were surviving children, his deed executed without his wife's joinder was void even though she had been adjudicated insane. The court explained the apparent contradiction in the two opinions by pointing out that the deed in *Shields* was executed before there was a statutory provision allowing a conveyance by the spouse of an insane, while the deed in question had been executed after these provisions were added, but without compliance with their procedures. According to the court's reasoning, the community administration procedures provided the exclusive means for the spouse of an insane to convey valid title to the community homestead. Therefore, the husband's failure to follow these procedures rendered his deed void.<sup>47</sup>

Four years later the Texas Supreme Court reversed this decision.<sup>48</sup> Although it recognized that a statutory provision had been enacted to enable the husband to acquire control over the community property upon the wife's insanity, the court held that this was not the exclusive procedure. Rather it found that the statutory provisions were only an addition to the husband's previously existing right to sell the community property, without court approval, to pay the community debts when the wife is dead or insane. The decision should have had no value as a precedent for deciding a homestead case, however, since the supreme court specifically found that the locus in quo was not

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<sup>44</sup> *Id.* at 221.

<sup>45</sup> *Shields v. Aultman, Miller & Co.*, 20 Tex. Civ. App. 345, 50 S.W. 219 (1899) *error ref.*

<sup>46</sup> *Gibson v. Pierce*, 146 S.W. 983 (Tex. Civ. App. 1912) *error granted rev.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Pierce v. Gibson*, 108 Tex. 62, 184 S.W. 502 (1916).

homestead property at the time of the conveyance.<sup>49</sup> Furthermore, if the statutory provision was merely an addition to the existing power of the husband to dispose of the property to pay debts, the decision should have had even less application to a homestead case since homestead is specifically exempt from liability for community debts.<sup>50</sup>

In the same year the Fort Worth Court of Civil Appeals stated that a husband whose wife had been adjudicated insane could give good title to the homestead owned as his separate property.<sup>51</sup> Once again, the authority of the decision is undermined by the court's holding, apparently as an afterthought, that the property in question was not homestead.<sup>52</sup>

In 1916 the same appellate court held<sup>53</sup> that a husband whose wife had been adjudicated insane had no right to sell the community homestead without joinder. The two former cases were distinguished on the basis that in both decisions the property was found to be non-homestead. To the extent that former cases held that insanity alone would authorize the husband to convey the homestead, they were considered unsound on the basis that such a conveyance would violate the constitution.<sup>54</sup> The court reasoned that because the homestead is not liable for debts, its sale can never be "necessary in a legal sense."<sup>55</sup> It was concluded that even if the purchase money had been used to pay an existing debt of the community this would not make the conveyance valid.

In 1921 the Commission of Appeals held that the wife had no power to convey community property upon her husband's insanity when there were surviving children unless she complied with the requirements of the community administrative statutes.<sup>56</sup> Thus, the Commission confirmed the decision that compliance with the community administration statutes was the only way the sane spouse

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<sup>49</sup> *Ibid.*

<sup>50</sup> TEX. CONST. art. 16, § 50 (1876).

<sup>51</sup> *Gilley v. Troop*, 146 S.W. 954 (Tex. Civ. App. 1912) *error ref.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Priddy v. Tabor*, 189 S.W. 111 (Tex. Civ. App. 1916) *error dism. by agreement.*

<sup>54</sup> The court based its opinion on *Heidenheimer v. Thomas*, 63 Tex. 287 (1885). In *Heidenheimer*, a husband and wife had executed a deed to the homestead property and the wife later tried to rescind the sale on the basis of the husband's insanity at the time of the conveyance. The buyer defended on the basis that the wife alone could make a valid conveyance if her husband was insane. In holding the deed void the court said, "We are of the opinion, however, that no such power rests in the wife of an insane person at least in reference to community property or separate property of the husband. The law provides for the appointment of guardians of the estates of persons of unsound mind and renders unnecessary the exercise of any such power by the wife." *Id.* at 291.

<sup>55</sup> *Priddy v. Tabor*, 189 S.W. 111 (Tex. Civ. App. 1916) *error dism. by agreement.*

<sup>56</sup> *Howell v. Fidelity Lumber Co.*, 228 S.W. 181, 183 (Tex. Comm. App. 1921).

could obtain control, management, and disposition of the community property.

This was seemingly the state of the law until 1926 when the Texas Supreme Court decided *Green v. Windham*.<sup>57</sup> The husband sought to cancel a deed transferring community property homestead which he had executed after qualifying as community administrator after his wife had been adjudicated insane. The court held that because the husband had complied with the statutory requirements, he possessed power to make a valid conveyance. The court indicated that the community administration statutes prescribed a "particular" method for the alienation of community property, including the homestead, by either husband or wife when the other spouse has become insane.<sup>58</sup> Although such language would seem to indicate that the procedure under article 3663 was the "particular" (*i.e.*, exclusive) method for making such a conveyance, the court added the following reasoning:

But [neither] the Constitution nor the statutes contemplated an impossibility; neither was it in contemplation that under impossible conditions the homestead, once acquired, should remain so forever or indefinitely regardless of the desires or welfare of the parties. . . . It was not the consent of the one wholly incompetent and wholly unable to give consent that was in the contemplation of the makers of the Constitution and the statutes in prescribing the conditions under which or the methods by which a homestead may be alienated.<sup>59</sup>

Moreover, the court specifically approved decisions<sup>60</sup> where the conveyance of the homestead without qualifications under article 3663 was held valid, stating that "the principles of law were the same."<sup>61</sup> This latter language seems to indicate that the community administration provisions are not the exclusive means of validly conveying the homestead without joinder of an insane spouse.<sup>62</sup> The court made no change in its position from 1926 until 1955. After 1955 the provisions of section 157 settled the problem when one spouse had been adjudicated insane.

*Cases With No Adjudication of Insanity* The question of the validity of a conveyance in the absence of an adjudication of insanity was

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<sup>57</sup> 115 Tex. 162, 278 S.W. 1101 (1926).

<sup>58</sup> *Id.* at 1102.

<sup>59</sup> *Ibid.*

<sup>60</sup> The court specifically approved *Shields v. Aultman, Miller & Co.*, 20 Tex. Civ. App. 345, 50 S.W. 219 (1899) *error ref.*, and *Gilley v. Troop*, 146 S.W. 954 (Tex. Civ. App. 1912) *error ref.*, and disapproved the decision in *Priddy v. Tabor*, 189 S.W. 111 (Tex. Civ. App. 1916) *error disp. by agreement*.

<sup>61</sup> 115 Tex. 162, 278 S.W. 1101, 1102 (1926).

<sup>62</sup> The court further indicated in dicta that the existence or nonexistence of community debts was not important to the validity of such conveyance.

raised in *Donaldson v. Meyer*<sup>63</sup> where a couple sued to cancel a joint conveyance of community property homestead on the ground that the husband was insane at the time the deed was executed. The defendant claimed that even if the husband was insane, the deed was valid since the wife had signed it and under the provisions of the community administration statutes the wife had the power to dispose of the community property upon the husband's insanity. The Texas Commission of Appeals, however, held the deed invalid and ruled that article 3662 was inapplicable because it covered only the situation where the nonjoining spouse (in this case the husband) had been *adjudicated* insane.<sup>64</sup> The reasoning of the decision provides protection for both the insane spouse and, indirectly, the buyer. If adjudication of insanity and qualification as a community administrator are required, there can be no question about the validity of deeds executed by one spouse since he or she must receive prior court approval.

*Donaldson*, however, did not settle the question. *Reynolds Mortgage Co. v. Gambill*,<sup>65</sup> a Commission case later adopted by the Supreme Court, held that neither adjudication of insanity nor qualification as community administrator was necessary before the husband had power to convey good title to the community homestead without joinder of the wife. In *Reynolds* the husband and wife had sold the homestead to their son, and by mesne conveyances the note for the purchase price had come into the hands of the mortgage company. The son defaulted on his note and the husband and wife brought suit to void their original deed, claiming the incapacity of both. The Commission found the wife insane but the husband sane at the time of the conveyance and held the deed valid. It cited as authority *Green v. Windham* (which involved a wife who had been adjudicated insane and a husband who conveyed after qualifying as community administrator); *Gilley v. Troop* (which involved non-homestead property); and *Shields v. Aultman, Miller & Co.* (which involved a conveyance made prior to the laws dealing with community administration upon insanity).<sup>66</sup>

This decision, indicating that it makes no difference whether the husband qualifies as community administrator, is difficult to understand in the face of community administration statutes requiring

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<sup>63</sup> 261 S.W. 369 (Tex. Comm. App. 1924).

<sup>64</sup> *Id.* at 371. The court specifically found that of the \$5,000 paid for the land, \$2,800 had been used by the husband and wife for necessities and that \$200 was still on hand and ordered this money to be paid back to the defendant. *Ibid.*

<sup>65</sup> 115 Tex. 273, 280 S.W. 531 (1926).

<sup>66</sup> *Id.* at 532. In discussing these three earlier cases they expressly adopt the insanity of the spouse rather than the fact that the locus in quo had been abandoned as homestead as the basis for the decision in *Gilley* and *Shields*, thus making them good precedents for homestead cases.

such qualification when there are surviving children. The opinion was based on the dicta in *Green v. Windham* that the existence of debts makes no difference in regard to the husband's power to convey the homestead upon the wife's insanity.<sup>67</sup> The reasoning in *Reynolds* apparently was that since administration is only for the purpose of paying debts and the homestead forms no part of the estate for the purpose of paying debts, administration is unnecessary when a conveyance of the homestead is involved.<sup>68</sup>

The holding seems to have occurred through the court's failure to distinguish between the two distinct purposes of the statute (*i.e.*, administration upon intestacy and administration upon insanity).<sup>69</sup> The provision for intestacy is obviously to enable the surviving spouse to continue managing the community property and pay off any debts before administration of the deceased spouse's estate is closed and the heirs take the property free of debts. If there are no debts there is no need for administration. But the provisions for administration upon insanity cannot operate in the same manner. Since the insane spouse is not dead, the property does not pass to the heirs. Nor is there a necessity for settling the estate and hence immediately satisfying creditors. The purpose of the statute, therefore, should not be for the protection of creditors, but for the protection of the insane spouse and the convenience of the sane spouse. To say as the Commission did in *Reynolds* that because there are no debts there need be no administration upon insanity is to say that because there are no creditors to protect, the insane spouse needs no protection. The result is that upon insanity a person is deprived of a right to homestead protection provided by the Constitution.

To compound this error, the Commission in *Reynolds* then held that an adjudication of insanity was unnecessary.<sup>70</sup> It was first concluded that adjudication was required only if the sane spouse wished to qualify as community administrator. The court then reasoned: (1) one was required to qualify only if there were debts; (2) the existence of debts is irrelevant when the homestead is involved; therefore, (3) in a conveyance of the homestead an adjudication of insanity is un-

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<sup>67</sup> 115 Tex. 162, 278 S.W. 1101, 1102 (1926).

<sup>68</sup> *Reynolds Mortgage Co. v. Gambill*, 115 Tex. 273, 280 S.W. 531 (1926).

<sup>69</sup> Much of the confusion involved in the community administration statutes no doubt is directly attributable to the fact that the provisions for administration upon insanity were merely added to an existing statute which dealt with administration upon intestacy. The courts treated the provisions for insanity in exactly the same manner as they had been treating the provisions for intestacy. In the new Probate Code, the provisions for intestacy and insanity have been separated and § 157 deals exclusively with insanity. This may remedy any future confusion between the two.

<sup>70</sup> *Reynolds Mortgage Co. v. Gambill*, 115 Tex. 273, 280 S.W. 531 (1926).



necessary.<sup>71</sup> The result of this dubious reasoning is the creation of an extra-statutory power in the husband to convey the community property homestead when the wife is insane, even though there has been no adjudication of insanity.<sup>72</sup> Apparently, no necessity for the conveyance need be shown. The husband or the purchaser becomes the judge of the wife's sanity, and the judicial protection which the community administration statutes should provide for an insane spouse's homestead rights is taken away.

The decision in *Reynolds* made it clear that the community administration statute is construed as being merely cumulative and that compliance is not necessary in order to convey good title. However, article 4617, providing a means for the wife to convey her *separate* property upon the insanity of the husband, appeared to be exclusive. The supreme court dispelled any such notions in *Ross v. Tide Water Oil Co.*<sup>73</sup> In *Ross* a husband and wife conveyed an oil and gas lease on the wife's separate property, which was their homestead. Later, they attempted to rescind on the ground that the husband was insane at the time he joined in the deed. The wife had not applied for the court order provided in article 4617 which would have allowed her to dispose of her separate property homestead. Nevertheless, the court held the deed valid, stating:

It has been the rule in this state beginning with *Wright v. Hay's Administrator* that joinder by the husband is unnecessary in a conveyance by the wife where the husband has permanently abandoned the wife or where the husband is insane. The rule is the same with reference to homestead which is the separate property of the wife.<sup>74</sup>

The court considered the provisions of article 4617 to be merely an additional method by which the wife could convey her separate property, and that compliance with that section and receipt of the court order provided therein were not requisite for a valid conveyance.<sup>75</sup>

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Magnolia Petroleum v. Still* was closely followed in *Higginbotham v. Fort Worth Nat'l Bank*, 172 S.W.2d 402 (Tex. Civ. App. 143) *error ref.* Here the husband and wife created a mechanic's lien against the homestead for repairs, and, upon foreclosure, they claimed the incapacity of the wife to assent to the lien as required by the Texas Constitution. The creditor conceded the wife's insanity. The court held that the lien was valid even if the wife was insane because the reasons which allowed a husband to convey the homestead without her joinder would also allow him to execute a valid lien without her joinder and that it made no difference that the wife had not been adjudicated. *Id.* at 404.

<sup>73</sup> *Ross v. Tide Water Oil Co.*, 145 S.W.2d 1089 (Tex. Civ. App. 1941).

<sup>74</sup> *Id.* at 1090.

<sup>75</sup> *Id.* at 1092. In an earlier case dealing with the wife's power to convey her separate property homestead under such circumstances the court of civil appeals came to the conclusion that the wife's power to convey without her husband's joinder was restricted to cases of necessity. *Lawson v. Armstrong*, 227 S.W. 687 (Tex. Civ. App. 1921) *error disp.* The conveyance occurred in 1911; therefore, the provisions of articles 4617 and 4618 allowing the wife to convey her separate property homestead were not available.

One year later a court of civil appeals completely razed the citadel of homestead protection in *Magnolia Petroleum v. Still*.<sup>76</sup> The husband and wife had executed a deed conveying mineral interests in community property homestead. The proceeds from the sale had been used to pay off a vendor's lien on the land, a grocery bill and medical expenses. The husband had not been adjudicated insane, the wife had not qualified as community administrator, and there were surviving children. Nevertheless, the court decided that the deed was good even though the husband was insane at the time it was executed. The court reasoned that since the husband was insane, the wife had power to convey the community homestead without his joinder; therefore, her joinder to his deed constituted a valid conveyance. The court declared that the right to convey is a right concurrent with ownership and that it is only by statute that the wife is deprived of this power during marriage. Since the law does not require the impossible, if the husband becomes insane the wife regains her power to convey. The community administration laws were considered to be cumulative of the existing right to convey the community property for the purpose of discharging a lien thereon or paying for necessities.<sup>77</sup> The court distinguished the holding in *Donaldson v. Meyer* on the grounds that there it was not shown that the sale was made to pay for necessities.<sup>78</sup> This is obviously a fallacious distinction since in *Donaldson*, the court specifically found that \$2,800 of the \$5,000 purchase price had been used for necessities.<sup>79</sup>

The court in *Magnolia* did admit that in order to get unqualified power to convey without a showing of necessity the wife would have to qualify under the community administration statutes.<sup>80</sup> This is inconsistent with *Reynolds* which specifically held that the existence of debts was immaterial to the husband's power to convey the homestead when he had not qualified under the community administration statutes.<sup>81</sup> This inconsistency caused a further conflict with article 3678 which gave the wife the same powers of control, management, and disposition of the community property upon insanity of the husband as he would have upon her insanity.<sup>82</sup>

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<sup>76</sup> 163 S.W.2d 268 (Tex. Civ. App. 1942) error ref.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Id.* at 271.

<sup>79</sup> See note 64 *supra*.

<sup>80</sup> 163 S.W.2d 268 (Tex. Civ. App. 1942) error ref.

<sup>81</sup> See note 68 *supra* and accompanying text.

<sup>82</sup> Tex. Acts., 1893, ch. 68, § 1, 10 GAMMEL, LAWS OF TEXAS 88 (1898). Former art. 3678, Tex. Rev. Civ. Stat. Ann. (1925).

The court has made no change in its position since the decision in *Magnolia*.<sup>83</sup> Therefore, upon the insanity of one spouse, the other may convey the homestead without joinder of the insane in the following ways: (1) If the homestead is the separate property of the sane spouse, that spouse may convey it without a court order or an adjudication of insanity under the provisions of article 4618. (2) If the property is the community homestead, the sane spouse may convey it after the other has been adjudicated insane under the provisions of section 157. (3) If the homestead is the community property and the other spouse is insane but has not been so adjudicated, the sane spouse may convey it with no judicial determination of power to convey or adjudication of insanity of the nonjoining spouse.

#### IV. CONCLUSION

The rules surrounding homestead protection under abnormal circumstances provide a study in confusion. The basic problem stems from the failure of the courts to hold that the statutory provisions are exclusive and mandatory. This situation can be attributed to the absence for a number of years of any statutory procedures allowing a spouse to convey the homestead in circumstances of abandonment or insanity. To fill this hiatus in the statutory law a considerable body of case law developed which at the time was necessary to fill the void. However, because the courts did not choose to regard the applicable statutes as exclusive when they finally were provided, these statutes have failed to improve the situation appreciably.

A partial solution to the problem would be to make such statutes as section 157 of the Probate Code mandatory. This would certainly preclude the kind of conveyance approved in *Reynolds Mortgage* and *Magnolia Petroleum* when injustice obviously could, and perhaps did, occur by depriving an insane spouse of homestead rights. But this would not solve the problem completely since some contingencies indicated by the case law are not covered by the statutes. Therefore, if the statutory provisions are to become mandatory, they must also be made comprehensive so that no need to resort to extra-statutory powers can exist.

The abandonment statutes provide only for the situation when the homestead is the separate property of the abandoned spouse. In most cases, however, the homestead is community property. The absence of any provision for a prior adjudication of an abandoned

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<sup>83</sup> *Schmidt v. Schmidt*, 403 S.W.2d 531 (Tex. Civ. App. 1966); *Reed v. Beheler*, 198 S.W.2d 625 (Tex. Civ. App. 1946).

spouse's power to convey the community homestead invites continuation of the judicial interpretation now established that such a conveyance is valid. Moreover, if a judicial determination of abandonment is not deemed necessary for transferring the community property homestead, it seems to follow that there is little reason to require a prerequisite finding for the conveyance of the abandoned spouse's separate property homestead since the abandoning spouse's interest in it is presumably less worthy of protection. Therefore, these statutes should be made comprehensive by enabling an abandoned spouse to receive an adjudication of his power to deal with the community property homestead. In addition, the 1963 amendment to article 4618 which allows one spouse to convey the separate property homestead upon abandonment or insanity of the other without a court order was not accompanied by a similar amendment to article 4617 which still requires a court order under the same circumstances. The resulting confusion should be corrected, preferably by combining the provisions of the two statutes and requiring a court order.

The statutory provisions regarding insanity present different problems. Since 1957 these provisions have been complete insofar as either spouse, upon the other's insanity, can be empowered by judicial action to sell the homestead whether it is separate or community property. There is, therefore, no circumstance left unmentioned which would create a necessity for extra-statutory conveyances. However, the propriety of requiring compliance with section 157 and forcing an adjudication of insanity is questionable. In the case when one spouse wishes to convey without joinder because he or she knows the other is insane, the statute is probably too rigorous because it requires an adjudication of insanity. Though modern medical thought indicates that insanity is merely an illness, there remains a certain social stigma which some people attach to having a member of one's family declared incompetent or insane. In addition, if the spouse is only incapacitated but not insane, the ordeal of adjudication would be no help to an already disturbed mind. It might be advisable, therefore, to create a procedure similar to that provided in article 4617, whereby the judge might hear the facts in a relatively informal procedure, and issue an order empowering the sane spouse to convey the homestead, if he is satisfied that the other spouse is incapacitated.

In the situation when both spouses sign the deed and later try to avoid it because of the incompetence of one, the equities on both sides are compelling and competing. On one hand, the buyer generally has no warning that anything is wrong with the deed. On the other hand,

an insane spouse is entitled to the same protection afforded any other insane person. At present when a married person is involved, the problem is that the same fact of insanity which causes the deed of an insane to be voidable also empowers his spouse to convey without joinder. Thus, when the spouses contest a conveyance by proving the insanity of one, they also prove the capacity of the other to convey alone. There is presently no way a deed to the homestead joined in by both husband and wife can be declared invalid because of insanity unless both the husband and the wife are found to be insane at the time of conveyance.

One reason for this curious result is that no distinction is made between the situation in which one spouse knows the other is insane and intends to convey the property without joinder and the situation in which both sign and one spouse is later found to have been insane. Because the sane spouse did not intend to exercise the special powers resulting from insanity of the other spouse, this "after the fact" discovery of the insanity should not be construed as making the conveyance valid. Prevention of such inadvertent use of the conveying power could be achieved by a rule that no such power exists unless the other spouse has been adjudicated insane. On the other hand, any spouse wishing to take advantage of this rule and to avoid a deed signed by both on the ground that the other was insane but not so adjudicated should have the burden of proving the other spouse's insanity at the time of the conveyance and that the sane spouse was unaware of that condition. In addition, since a deed of an insane person is only voidable, to rescind the conveyance the sane spouse should be required to do equity by returning the full purchase price to the buyer. In the case when one spouse knows that the other is insane but does not have the other spouse so adjudicated and allows the insane to join in a deed, the sane spouse should be estopped from claiming any benefit from the other's insane condition. However, in order to protect the insane spouse in such a situation, the sane spouse's deed should not be held to convey homestead rights of the insane in the property. This is the present interpretation of the effect of a deed signed by one spouse without the joinder of the other.<sup>84</sup> Since the joinder of an insane is for all practical purposes the same as no joinder, it seems entirely equitable to make the effect of a deed signed by an insane spouse, when the other spouse knows of the insane condition, the same as when one spouse conveys without the joinder of a sane spouse.

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<sup>84</sup> *Grissom v. Anderson*, 125 Tex. 26, 79 S.W.2d 619 (1935); *Marino v. Lombardo*, 277 S.W.2d 749 (Tex. Civ. App. 1955) *error ref. n.r.e.*; *Wooten v. Pennock*, 52 Tex. Civ. App. 430, 114 S.W. 465 (1909).

The conclusion is inescapable that strict compliance with the constitutional provision requiring joinder of both spouses is unrealistic when these abnormal circumstances of abandonment, imprisonment or insanity are present. But it is equally inescapable that the present methods for avoiding joinder under these circumstances are indefensible. The statutes are inadequate for both abandonment and insanity and the judicially established remedies leave the non-conveying spouse virtually unprotected.

The legislative attempts to remedy this situation seem to be moving in the direction of less formal requirements for one spouse to convey valid title to the homestead, (e.g., the 1963 amendment to article 4618). The cases, however, indicate that to give adequate protection to the rights of the conveying spouse, the non-conveying spouse, and the buyer, it is necessary to require the conveying spouse to obtain a judicial determination of his power to convey prior to the transfer. This can be accomplished only by legislation affording a procedure for such judicial determination under each abnormal circumstance and making compliance with the procedures mandatory in order to convey valid title to the homestead.