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THE WIFE'S CONTRACTS

AT common law, the wife was devoid of the power to contract. This total disability existed for the reason that in law she was treated as having no legal identity. Texas has never adopted this harsh and unreasonable rule of the common law, but has, to a large extent, regulated the wife's power to contract by statute. There is no statute at the present time which confers upon her the unlimited right to contract. She can bind herself by contract only when authorized by constitution or statute, expressly or by necessary implication.¹ She may make other contracts also; these, although not authorized, are not void but voidable.² Of course her attempted contracts may be void, but not ordinarily unless it would also be void if done by the husband. The following discussion will deal only with those types of contracts which a married woman may validly make, and to which a plea of coverture is no defense.

THE WIFE'S CONTRACTS FOR NECESSARIES

Texas in 1840, passed the first marital rights statute; it provided that a wife might contract debts for necessities during the marriage. The statute of 1848 contained a similar provision. The 1913 statute provided that the wife could contract for necessities furnished herself and children. The present statutes (1925 revision) state three times in backhanded language that she may validly contract for necessities.³ For example, Article 4621⁴ says that the community property shall not be liable for the wife's contracts except for necessities furnished herself and children. It is, therefore, established that the wife has always had express authority to contract for necessities in Texas. If she does bind

¹ 23 TEX. JUR. 199 (1932).

² *Leake v. Saunders*, 126 Tex. 69, 84 S. W. (2d) 93 (Tex. Comm. App. 1935); *Harwell v. Kitchen*, 182 S. W. (2d) 82 (Tex. Civ. App. 1944). See also note 51, *infra*.

³ TEX. REV. CIV. STAT. ANN. (Vernon 1925), art. 4613, 4621, 4623.

⁴ *Id.* art. 4621.

herself by such a contract, the statute⁵ ordinarily makes her husband liable too. Another possible situation is the wife's binding the husband without being bound herself. A third possibility is her being liable without his being bound. The test is the intention of the wife and the third party creditor; *i.e.*, on whose credit did he rely.⁶

What are necessities? This term is held to include property reasonably suited to her station in life, both economic and social.⁷ Illustrations are: the purchase of a piano and furniture, an automobile for the use of the family, clothes, food, physicians' services, dental work,⁸ and the courts have even hinted that the erection or purchase of a home by the wife may be classified as a necessary.⁹ The Texas courts also hold that the cost of services of an attorney to represent the wife in a divorce suit is a necessary.¹⁰

CONTRACTS FOR THE BENEFIT OF, AND IN THE MANAGEMENT OF, THE WIFE'S SEPARATE PROPERTY

It would be well to distinguish between the wife's power to contract in connection with the management of her separate property and her power to contract for the benefit of such property. A contract which is one of these two types will almost invariably be the other type also. Perhaps the only clear example of a management contract which is not for the property's benefit (*i.e.*, intended as a benefit, though it may eventuate otherwise) is the

⁵ *Id.* art. 4613.

⁶ See note 39, *infra*. As to what property may be subjected to the creditor in these various situations, see comment in this issue, *The Liability of Marital Property for the Contracts and Torts of Husband and Wife*.

⁷ TEX. REV. CIV. STAT. ANN. (Vernon 1925) art. 4624; *Walling v. Honnig*, 73 Tex. 580, 11 S. W. 547 (1889); *Milburn v. Walker*, 11 Tex. 329 (1854); *McKee v. Popular Dry Goods Co.*, 240 S. W. 567 (Tex. Civ. App. 1922); *Fallin v. Williamson Cadillac Co.*, 40 S. W. (2d) 244 (Tex. Civ. App. 1931); 23 TEX. JUR. 200 (1932); note 18 TEX. L. REV. 91 (1940).

⁸ 23 TEX. JUR. 200, 201 (1932), and cases therein cited.

⁹ *Bexar Building and Loan Ass'n. v. Heady*, 50 S. W. 1079 (Tex. Civ. App. 1899); *Howell v. McMurray Lumber Co.*, 132 S. W. 848 (Tex. Civ. App. 1910).

¹⁰ *McClelland v. McClelland*, 37 S. W. 350 (Tex. Civ. App. 1896); *Yager v. Bradley*, 226 S. W. 1079 (Tex. Civ. App. 1920); *Dodd v. Hein*, 26 Civ. App. 164, 62 S. W. 811 (Tex. Civ. App. 1901).

undoubtedly rare situation of a contract contemplating a lowering of the property's value to satisfy a whim of the owner; perhaps, for example, a contract to change a productive farm into a bird sanctuary. While the two types of contracts arose at different times and under different statutes, one by express provision, the other by implication, the point of principal importance today is, that both are valid. That is, the courts allow the wife to make valid contracts in relation to her separate property, both in its management and for its benefit.

By statute,¹¹ the wife is given full management of her separate property. However, there is today no express statute providing that the wife may contract and incur debts for the benefit of her separate estate. In the Act of 1848, the wife was given the right to contract for the benefit of her separate estate. This provision continued in effect until 1913, at which time it was omitted; and it was also omitted in the revision of 1925, except for a provision in a different portion of the statutes¹² that the husband must be joined when the wife is sued for expenses which she has incurred for the benefit of her separate property. This joinder statute probably preserves the wife's power to make such contracts. A recent Supreme Court case¹³ includes such contracts in an enumeration of the wife's authorized contracts.

The Supreme Court earlier, in *Levin v. Jeffers*,¹⁴ held that when the 1913 statute gave the wife the sole management of her separate property, it by necessary implication clothed her with the power to make contracts incidental to such management. Still earlier, *Gohlman, Lester and Co. v. Whittle*¹⁵ had applied the same reasoning to her contracts incidental to disposition of her separate property. These decisions recognize that since a married woman has the sole control and disposition (except for the hus-

¹¹ TEX. REV. CIV. STAT. (Vernon 1925) art. 4614.

¹² *Id.* art. 1984.

¹³ *Taylor v. Hollingsworth*, 142 Tex. 158, 176 S. W. (2d) 733 (1943).

¹⁴ *Levin v. Jeffers*, 122 Tex. 83, 52 S. W. (2d) 81 (1932).

¹⁵ *Gohlman, Lester & Co. v. Whittle*, 114 Tex. 584, 273 S. W. 808 (1925).

band's joinder as to land, stocks and bonds) of her separate property, she may contract very broadly in its behalf, much as if she were a feme sole. But the contract must concern her separate estate, and not the community even though that stood in her name.¹⁶

The courts have held that the following contracts are valid; the fee of an architect; brokerage commissions; the cost of fuel oil for her drilling rig; insurance premiums on her automobile; the fees of an attorney to protect her rights; and the price of supplies furnished her to make a crop on her separate land.¹⁷

THE WIFE'S CONTRACTS TO CONVEY OR ENCUMBER HER SEPARATE PROPERTY AND HER WARRANTIES

Of course the wife can convey her separate property without restriction except that as to land, her husband must join and she must separately acknowledge,¹⁸ and as to stocks and bonds her husband must join.¹⁹ Since a mortgage is a species of conveyance, the above rules would be expected to apply thereto; and they do expressly apply to encumbrance of the wife's land, and probably also to pledge of her stocks and bonds accompanied by indorsement.²⁰ She can convey or encumber other choses in action, and all chattels, without restriction of any sort.²¹

May the wife validly contract to convey, or to encumber, her separate property? Such contracts would certainly seem to be valid under the preceding major topic, as incidental to her power to manage and dispose of her separate property. They are held to be valid except when land is involved; then a contract which on other principles would be valid, becomes in effect voidable. The reason is, such contract must be consummated by a deed or deed of trust, which must contain the wife's separate acknowledge-

¹⁶ 23 TEX. JUR. 205 (1932); *Strickland v. Pilgrim*, 300 S. W. 215 (Tex. Civ. App. 1927); note 7 TEX. L. REV. 615 (1929)

¹⁷ 23 TEX. JUR. 204 (1932) and cases cited therein.

¹⁸ TEX. REV. CIV. STAT. ANN. (Vernon's:1925) arts. 4614, 1299.

¹⁹ *Id.*; art. 4614.

²⁰ *Ibid.* The statute speaks of a "transfer of her stocks and bonds.

²¹ *Donaldson v. Clark*, 163 S. W. (2d) 226 (Tex. Civ. App. 1942).

ment; and the last phrase thereof states that she does not wish to retract the transaction. Therefore, it is held that her deed or deed of trust is ineffective until the full completion of such separate acknowledgment, and accordingly her preceding contract to convey or to mortgage is unenforceable and voidable.

Levin v. Jeffers states:

"Any contract the validity of which is dependent upon her subsequently executing an instrument requiring her privy acknowledgment, she may repudiate at any time while the same remains executory. The reason she may do so is that the statutory acknowledgment, essential to give such contract validity, grants her the privilege of retracting it up to the time of performance."²²

Though such contract contains her separate acknowledgment, it is still voidable.²³ Somewhat the same reasoning makes voidable her contract to join in conveying the homestead where it is the husband's separate property or community property.²⁴

Does the preceding paragraph apply to the wife's stocks and bonds? No case has been found on the point. Her separate acknowledgment is not required here, but the husband's signature is necessary.²⁵ In *Texas Jurisprudence*, it is stated:

"The joint signature of the husband and wife shall be necessary to transfer of stocks and bonds belonging to her or of which she may be given control by this law.' This effectively prevents the wife from making any contracts for the transfer of stocks and bonds belonging to her, as it prescribes the exclusive way for effecting such transfer."²⁶

As to other choses in action and as to all chattels, the wife's contracts to convey or to encumber are apparently valid.²⁷

²² 122 Tex. at 87; 52 S. W. (2d) at 83.

²³ *Blakely v. Kanaman*, 107 Tex. 551, 175 S. W. 674 (1915).

²⁴ TEX. REV. CIV. STAT. (Vernon's 1925) art. 1300; 23 TEX. JUR. 255 (1932).

²⁵ See note 21, *supra*.

²⁶ 23 TEX. JUR. 228 (1932).

²⁷ *Gohlman v. Whittle*, 114 Tex. 584, 273 S. W. 808 (1925); *Becker v. Goodman-Kantz Furniture Co.*, 13 S. W. (2d) 735 (Tex. Civ. App. 1929); *General Motors Acceptance Corp. v. Merritt*, 16 S. W. (2d) 296 (Tex. Civ. App. 1929).

If the wife properly executes a deed to her separate land containing an express warranty, is she liable thereon? Such a warranty has been held not to be a necessary incident to such conveyance, and therefore (not being otherwise authorized by statute) not binding upon her,²⁸ and the rule has even been stated to preclude the implied warranties which would otherwise arise, except when a quitclaim is executed, under Article 1297.²⁹ Apart from the cases, express warranties and probably also implied ones would appear to be contracts incidental to the wife's disposition of her separate property, and therefore valid under the preceding major topic. As a practical matter, her sale of separate lands is greatly hampered and often prevented, if she cannot bind herself by warranty. The power given to her by Article 4617³⁰ to convey her separate land without the husband's joinder where he is insane or has abandoned her, seems similarly hampered if her warranties are held to be voidable. Thus on principle and from practical effect, there is a strong argument that the wife's warranties ought to be held valid. No cases have been found dealing with the wife's warranty when selling her personal property.

THE WIFE'S SURETYSHIP CONTRACTS

Part of this topic is discussed below under "The Effect of the Husband's Joinder As Binding His Wife". A fuller coverage will be found in a comment in the preceding issue of *The Southwestern Law Journal*.³¹

WIFE'S CONTRACTS IN EMERGENCY SITUATIONS

This topic is also covered by a comment in the preceding issue of this *Journal*.³²

²⁸ *Panhandle Construction Co. v. Lindsey*, 123 Tex. 613; 72 S. W. (2d) 1068 (Tex. Comm. App. 1934); *Wodkin v. Watson*, 86 Tex. 194, 24 S. W. 385 (1893).

²⁹ TEX. REV. CIV. STAT. (Vernon's 1925) art. 1297.

³⁰ *Id.* art. 4617.

³¹ Comment, *The Wife and Her Property as Surety*, 4 SOUTHWESTERN L. J. 107 (1950).

³² Comment, *The Wife's Emergency Powers*, *Id.* at 112.

THE WIFE'S CONTRACTS AS TO "SPECIAL
COMMUNITY PROPERTY

Article 4616³³ exempts four items of community property from liability for the husband's debts and torts; *viz.*, rents from the wife's separate land, interest on her notes and bonds, dividends on her stock, and her earnings. Thus for purposes of liability, a new class of community property was created, which has been called "special community property." In *Hawkins v. Britton State Bank*,³⁴ the Supreme Court held that such rents are controlled by the wife, because otherwise her control of her separate land is vitiated and it is likely that this same reasoning will lead to holdings that she controls also her interest and dividends. Thus three of the four items enumerated above are probably under the wife's control, and the *Hawkins* case possibly indicates that she also has the disposition thereof.³⁵

Since the wife's control and disposition of her separate property result in an implied power to contract with reference thereto, it is reasonably certain that her similar control of one and probably three of the above items of community property will give her a similar implied power to contract. No cases have yet appeared on this point.

LIABILITY OF THE HUSBAND ON HIS WIFE'S CONTRACTS

By statute the husband is liable for necessities furnished his wife,³⁶ however the courts have held that the wife only is liable if the tradesman chooses not to rely on the husband's credit.³⁷

³³ TEX. REV. CIV. STAT. (Vernon's 1925) art. 4616.

³⁴ *Hawkins v. Britton State Bank*, 122 Tex. 69, 52 S. W. (2d) 243 (1932); see also *Gohlman, Lester & Co. v. Whittle*, 114 Tex. 584, 273 S. W. 808 (1925); *Bobbiit, Is There More Than One Class of Community Property in Texas?*, 4 TEX. L. REV. 154 (1926).

³⁵ See comment, 4 SOUTHWESTERN L. J. 88 (1950).

³⁶ Refer also to the beginning of this article under the heading "The Wife's Contracts for Necessaries," notes 5-10, *supra*.

³⁷ *Crosby v. A. Harris & Co.*, 235 S. W. 127 (Tex. Civ. App. 1921); *Colonna v. Kruger*, 246 S. W. 707 (Tex. Civ. App. 1922); but cf. *McKee v. Popular Dry Goods Co.*, 240 S. W. 567 (Tex. Civ. App. 1922); 23 TEX. JUR. 208 (1932); 27 A. L. R. 554:

Such liability is not on the theory of agency, because true agency is always consensual, and the husband might dissent; it is a liability imposed by law, irrespective of consent.³⁸

Judge Speer believes the husband is liable on the wife's contracts for the benefit of her separate property.³⁹ One case, while expressly not so holding, indicates there is a possibility of such liability.⁴⁰ The basis for this view is the language of Articles 1984 and 1985.⁴¹

"The husband and wife shall be jointly sued for all debts contracted by the wife for necessities furnished herself or children, and for expenses which may have been incurred by the wife for the benefit of her separate property, [and]

"The husband shall be joined in suits for separate debts and demands against the wife, but no personal judgment shall be rendered against the husband."

Both statutes provide that the husband must be joined in suits against the wife. The latter statute provides that no judgment shall be rendered against him. The former says nothing whatever about judgments against the husband, but it apparently contemplates that such judgments will be rendered. (If not, the former statute would be totally redundant, for it would be totally comprehended within the wider generality of the latter statute. More important, the former statute deals with the wife's contracts for necessities, and several other statutes imply that the husband's property, and therefore he, is liable therefor.)⁴²

"The rule appears to be well settled, both at common law and under modern statutes, that if the credit for necessities furnished to the wife is given exclusively to her, the husband is not ordinarily liable therefor."

³⁸ TEX. REV. CIV. STAT. (Vernon's 1925) art. 4613, 4621, 4623, 1948. Note, 1 TEX. L. REV. 109 (1923).

³⁹ 23 TEX. JUR. 209 (1932) *citing*, Williams v. Doan, 209 S. W. 761 (Tex. Civ. App. 1919). Compare, Cauble v. Beaver Electra Ref. Co., 243 S. W. 762 (Tex. Civ. App. 1922). See discussion in SPEER, LAW OF MARITAL RIGHTS IN TEXAS, 245-246; (3rd Ed. 1929).

⁴⁰ Farm & Home Savings' & Loan Ass'n. of Missouri v. Abernathy, 129 Tex. 379, 102 S. W. (2d) 410, (Tex. Comm. of App. 1937).

⁴¹ TEX. REV. CIV. STAT. (Vernon's 1925) art. 1984, 1985.

⁴² *Id.*, art. 4613, 4621, 4623.

Thus the argument is, since the former statute's reference to the wife's contracts for the benefit of her separate property exactly parallels its reference to her contracts for necessities, it must be the legislative intention to hold the husband liable on both such types of contracts.

Whether the husband is bound on those rare contracts of hers which are not for the benefit of her separate property, but which are in furtherance of her management of such property, has never been decided. He is probably not liable.⁴³

THE EFFECT OF THE HUSBAND'S JOINDER AS BINDING HIS WIFE

There is a widespread notion that if the husband does not join with his wife, the contract will not be binding on her; and frequently there is the converse notion that if he does join, the contract will always bind her. Judge Speer dispels these erroneous beliefs as follows:

"But it is proper to say here that with her ability to contract, his [the husband's] assent has nothing to do. If she be authorized to contract in a particular instance, his assent is not required, and if she be not, his assent cannot confer the right upon her even if he joins with her in the undertaking. He would then bind himself only and not her."⁴⁴

Thus it is noticed that if the husband joins in a contract with his wife, he is a party thereto and will be bound (unless he merely joins *pro forma*); but she will be bound only if it is one of the types of contracts (discussed *supra*), which she is authorized by law to make. The only exception to the foregoing, where the husband's joinder is required to bind the wife, is her suretyship contract. Article 4623⁴⁵ provides: "The wife shall never be the joint maker of a note, or a surety, on any bond or obligation of another without the joinder of her husband with her in making

⁴³ 23 TEX. JUR. 209 (1932).

⁴⁴ SPEER, *op. cit. supra*, note 39 at 231.

⁴⁵ TEX. REV. CIV. STAT. (Vernon's 1925), art. 4623.

such contract." By implication she is thus empowered to bind herself by such a contract of suretyship if, and only if, her husband signs with her. The requirements of his joinder prevent her becoming a personal surety for him,⁴⁶ because he would then in a sense be a surety for himself. Whether the husband's joinder *pro forma* is sufficient to bind the wife, seems not to have been decided.

RESCISSION OF THE WIFE'S CONTRACTS

Generally the assent of all parties to a valid contract is essential to its rescission. However, a contract may be rescinded without the consent of the other party where it is voidable; *e.g.*, for mental incapacity, intoxication, fraud, mistake, duress or undue influence.⁴⁷ A wife, like any one else, may avoid her contracts if any of the foregoing grounds exist.⁴⁸

It is well settled in Texas that a wife's contract which does not come within the purposes authorized by statute is not void but merely voidable.⁴⁹ Thus if the wife is a party to a voidable contract, she may elect not to rescind, in which event the contract is in effect valid. She may elect to rescind, by formal or informal methods, or she may in effect do the same thing by pleading her coverture when sued thereon.⁵⁰ However, she must specially plead the defense of coverture where it does not affirmatively appear or she will be regarded as having waived it.⁵¹ Since the wife's contract is voidable only by her, the other party is bound unless

⁴⁶ *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923 (1918); *Reynolds Mortgage Co. v. Smith*, 280 S. W. 879 (Tex. Civ. App. 1926); *Butler Bros. v. Baker*, 271 S. W. 272 (Tex. Civ. App. 1925); *Bird v. Bird*, 212 S. W. 253 (Tex. Civ. App. 1919).

⁴⁷ 10 TEX. JUR. 383 (1930) and cases, and TEX. JUR. sections there cited.

⁴⁸ 23 TEX. JUR. 238 (1932); *citing*, *Jay v. Robinson*, 39 S. W. (2d) 943 (Tex. Civ. App. 1931); *Wickman v. Aldridge*, 21 S. W. (2d) 341 (Tex. Civ. App. 1929); SPEER, *op. cit. supra*, note 39 at 270.

⁴⁹ *Leake v. Saunders*, 126 Tex. 69, 84 S. W. (2d) 993 (1935); *Harris v. Ware*, 93 S. W. (2d) 598 (Tex. Civ. App. 1936); Note 17 TEX. L. REV. 217 (1939).

⁵⁰ *Pitt v. Elser*, 87 Tex. 347, 28 S. W. 518 (1894); 23 TEX. JUR. 237 (1932). SPEER, *op. cit. supra*, note 39 at 270.

⁵¹ *Phelps v. Brachitt*, 24 Tex. 236 (1859); *Gamel v. City Natl. Bank*, _____ Tex. _____, 258 S. W. 1043 (Tex. Comm. App. 1924); *Klien v. Richter*, 119 S. W. (2d) 100 (Tex. Civ. App. 1938).