1950

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Recommended Citation

Shannon Jones, The Liability of Marital Property for the Contracts and Torts of Husband and Wife, 4 Sw L.J. 186 (1950)
https://scholar.smu.edu/smulr/vol4/iss2/4

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THE LIABILITY OF MARITAL PROPERTY FOR THE
CONTRACTS AND TORTS OF HUSBAND AND WIFE

The purpose of this article is to set out, as briefly as possible, the liability of the husband’s separate property, the wife’s separate property, ordinary community property and “special” community property for the prenuptial and postnuptial debts and torts of the husband and the wife. It is assumed that the reader is familiar with the meaning of “husband’s separate property,” “wife’s separate property,” and “ordinary community property;” however, because of differences in phraseology, the term “special community property” may not be a familiar one, and so it will be defined. “Special community property” is used herein to mean the rents and revenues from the wife’s separate real estate, the interest on bonds and notes belonging to her individually, dividends on stocks individually owned by her, and her personal earnings.

For the purposes of brevity and clarity, this article will be divided into eight parts, dealing respectively with the liability of the various properties to sale under court process for the following unsecured obligations: (1) the husband’s prenuptial debts; (2) his postnuptial debts; (3) his prenuptial torts; (4) his postnuptial torts; (5) the wife’s prenuptial debts; (6) her postnuptial debts; (7) her prenuptial torts; and (8) her postnuptial torts. It is assumed, of course, that enforcement of these liabilities is sought after the marriage. All property mentioned is assumed to be non-exempt under the general exemption statutes. The statutes hereinafter discussed which impose liability on the various types of marital property create no liens, of course; liens are obtainable on such property by execution, attachment, garnishment or recording an abstract of judgment.

1. Property Liable for the Husband's Prenuptial Debts

No statute has been passed specifically covering liability for such debts, but Article 4616\textsuperscript{1} protects the wife's separate property and special community property from "debts contracted by the husband" (and from his torts). Thus the meaning of "husband" is of the highest importance; does it have its literal meaning, "the man after marriage" and then only, or does it mean "the man" at all times? A majority of Texas cases have construed the statute as applying to prenuptial as well as postnuptial debts and thus have construed "husband" as meaning "the man." Notable among these cases is \textit{Illich v. Household Furniture Co.},\textsuperscript{2} wherein the court stated:

"The statute [Art. 4616] exempts such rents [from a building owned separately by the wife] from the 'payment of debts contracted by the husband.' This language is plain and unambiguous. It is broad and makes no distinction between antenuptial and postnuptial debts. No such distinction can properly be implied."

Other cases,\textsuperscript{4} both state and federal, have agreed with the reasoning of the \textit{Illich} case.

One Commission of Appeals opinion by Judge Ocie Speer, \textit{Crim et al. v. Austin},\textsuperscript{5} reasoned that both ordinary and special community property should be liable for the husband's prenuptial debts. (It should be noted that the opinion was not adopted by the Supreme Court.) Judge Speer reasoned that nothing in the statutes indicates that the entire community is not liable for

\textsuperscript{1} \textit{TEX. REV. CIV. STAT.} (Vernon 1925) art. 4616. "Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband nor of torts of the husband."

\textsuperscript{2} 103 S. W. (2d) 873 (Tex. Civ. App. 1937) \textit{writ of error refused}.

\textsuperscript{3} \textit{Id. at 874}.


\textsuperscript{5} 6 S. W. (2d) 348 (Tex. Com. App. 1928), \textit{Judgment affirmed as recommended}; \textit{opinion not adopted}. 
such debts; in other words, that "husband" means "the married man." This argument would probably be supported by Article 4613, exempting the husband's separate property, which says "debts contracted by the wife, either before or after marriage," therefore arguably implying that the word "husband" in Article 4616, which lacks the added phrase "before or after marriage," means literally the married man only—except that such an interpretation of Article 4616 would produce the amazing implication that the wife's separate property is liable for the husband's prenuptial debts. Judge Speer also reasoned that total community liability is fairer, since decisions have held all the community property, both ordinary and special, liable for the wife's antenuptial debts (as more fully set out later in this article).

However, Article 4616 was drawn in an effort to protect the wife's half of the special community property from execution for the husband's debts, and the interpretation in the Illich case and those cases following it seems far the stronger. One reason is if "husband" in Article 4616 were interpreted literally, so as to imply that special community property is liable for his prenuptial debts, there might be an inference that the wife's separate property is liable—truly a shocking result. Another reason is, the wife receives benefit from many of the husband's debts after marriage, and little or no benefit from his debts before marriage; since the statute undoubtedly exempts special community property, emanating from the wife's property and labor, from the former debts, a fortiori it should be interpreted to exempt such property from the latter debts.

The Illich and Crim cases are very probably reconcilable, perhaps on the basis that the Crim case is right on its facts (involving situation No. 5, infra), but wrong in its dictum as to the husband's prenuptial debts. This would explain the Supreme Court's non-adoption of the Crim opinion and its refusal of writ of error in the Illich case.
Of course, the husband's separate property would be liable for his prenuptial debts. Before his marriage that property was his *only* property, and of course would have been liable for his debts. It would be most surprising if such liability did not continue after marriage. Furthermore, the inference from Article 4613's exclusions from liability is, that such property is liable for the husband's prenuptial debts. Ordinary community property is also liable, under the clear implication of Article 4616.

The writer reaches the conclusion that the husband's separate property and ordinary community property are liable for the husband's prenuptial debts, while special community property is probably not liable, and the wife's separate property is clearly not liable, under the terms of Article 4616.\(^6\)

2. Property Liable for the Husband's Postnuptial Debts

It seems that the husband's separate property and ordinary community property are also liable for the postnuptial debts of the husband. Article 4616, previously mentioned, exempts the wife's separate property and special community property from such liability, and Article 4620\(^7\) limits exceptions to community liability for "debts contracted during marriage" to those specially excepted by statute. In 1927, a Court of Civil Appeals, considering these two statutes in conjunction with one another, reached the conclusion that a crop produced on the wife's separate land, which the court treated as special community property, was not subject to the husband's postnuptial debts.\(^8\) The famous case of *Arnold v. Leonard*,\(^9\) while holding unconstitutional that part of Article 4621, R.C.S. 1911 (now Article 4616) which attempted to declare the rents and revenues of the wife's separate realty to

\(^6\) See also notes, 16 Tex. L. Rev. 579 (1938); 16 Tex. L. Rev. 110 (1937); 23 Tex. Jur. § 156; Speer, Law of Marital Rights in Texas, § 385, p. 465 (3rd ed. 1929).

\(^7\) Tex. Rev. Civ. Stat. (Vernon's 1925) art. 4620. "The community property of the husband and wife shall be liable for their debts contracted during marriage, except in such cases as are specially excepted by law."


be her separate estate, held nevertheless that the provisions rendering the rents of the wife's separate lands free from liability for debts contracted by the husband, were valid. Thus special community property, and certainly the wife's separate property, appear to be exempt from liability for the husband's postnuptial debts, while his own separate property and ordinary community property seem to be liable for the debts which he then contracts.  

3. **PROPERTY LIABLE FOR THE HUSBAND'S PRENUPTIAL TORTS**

Apparently no Texas cases to date have directly decided this point, but it would seem that the sounder view is, once again, that special community property, as well as the wife's separate property, are exempt. Remember that Article 4616 exempted special community property and the wife's separate property from "torts of the husband." Again the question presents itself as to whether the word "husband" is to be interpreted to mean "the married man" or "the man." Under the reasoning of the *Illich* case, previously cited, the statute would seem to refer to "the man," both before and after marriage. While that case was considering the subjection of special community property to a husband's antenuptial debts, the wording of the statute would seem to make the same reasoning applicable to his prenuptial torts. The court said:

"It would be unreasonable to impute to the Legislature, in the enactment of article 4616, an intention to subject the rents from the wife's separate property [this being special community property] to the payment of the husband's antenuptial debts and exempt such rents from the payment of community postnuptial debts of the husband, . . ."  

The husband's separate property is certainly liable for his premarital torts, on the same reasoning as was used in discussing his premarital debts.  

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10 See also notes, 16 Tex. L. Rev. 579 (1938); 16 Tex. L. Rev. 110 (1937); 23 Tex. Jur. § 156; Speer, *op. cit. supra*, note 6 at § 382, p. 462.  
11 103 S. W. (2d) 873, 874.  
12 See also Speer, *op. cit. supra*, note 6 at § 387, p. 468.
4. Property Liable for the Husband's Postnuptial Torts

This topic needs only scant consideration. Article 4613\textsuperscript{13} excepts the separate property of the husband from liability only for debts contracted by the wife (except for necessaries) and her torts. Article 4616, previously cited, exempts from liability for the husband's torts the separate property of the wife and special community property. Considering these articles, together with the Illich case, leads one to the conclusion that both the husband's separate property and ordinary community property are liable for his postnuptial torts. Some of the reasoning in the Crim case, previously discussed, might lead one to the conclusion that the special community property would be liable for such torts, but the plain wording of Article 4616 seems to preclude such a possibility. "Husband" certainly means the man while married, whether or not it also means the man before marriage.\textsuperscript{14}

5. Property Liable for the Wife's Prenuptial Debts

The plain wording of Article 4613 exempts the separate property of the husband from such liability ("debts contracted by the wife, either before or after marriage"), and Crane v. Robert & St. John Motor Co.\textsuperscript{15} has so held. As to special community property, it is closest akin to the wife's separate property, since it is (except her earnings) the fruits of her separate property; and the reason for exempting such property from liability for the husband's premarital debts is not present here, where the prenuptial debt is that of the wife. As to ordinary community property, Articles 4621 and 4623 probably do not present the problem

\textsuperscript{13} Tex. Rev. Civ. Stat. (Vernon's 1925) art. 4613. "All property of the husband, both real and personal, owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her marriage with him, nor for torts of the wife..."

\textsuperscript{14} See also Babcock v. Tum, 156 F. (2d) 116 (C.C.A. 9th, 1946); note, 25 Tex. L. Rev. 534 (1947); 23 Tex. Jur. §§ 160 and 254.

\textsuperscript{15} 42 S. W. (2d) 686 (Tex. Civ. App. 1931) no writ of error history.
of dual meaning of the word "wife." Both refer to her debts "except for necessaries furnished herself and children"; that probably implies that "wife" in those statutes is to be interpreted with exact literalness (though this conclusion is slightly clouded by Article 4613's phrase "except for necessaries furnished herself and children after her marriage with him," and though "wife" could mean the woman at all times, with the exceptions probably including only necessaries after marriage). Article 4620, providing for both spouses' debts after marriage, probably is not impliedly opposed to the preceding conclusion as to prenuptial debts.

Thus, assuming that "wife" means only "the married woman," the implication of Articles 4621 and 4623 is, that all the community property is liable for the wife's prenuptial debts. The Crim case so reasons, more persuasively than its similar argument as to the husband; and though this Commission of Appeals opinion was not adopted, the case is a Supreme Court holding that all the community property is liable for the wife's prenuptial debts. Dunlap v. Squires makes a similar holding. Thus the cases and the better reasoning seem to impel the conclusion that only the husband's separate property is exempt from the wife's prenuptial debts; thus the wife's separate property and both species of community property are liable therefor.

6. Property Liable for the Wife's Postnuptial Debts

Articles 4621 and 4623 must be considered together in determining such liability. Article 4621 exempts community property from the wife's debts, except for necessaries for herself and her

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16 S. W. (2d) 348, 349.
18 See also Speer, op. cit. supra, note 6 at § 384, p. 464.
19 Tex. Rev. Civ. Stat. (Vernon's 1925) art. 4621. "The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife except for necessaries furnished herself and children, unless the husband joins in the execution of the contract; provided, that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by this provision."
20 Tex. Rev. Civ. Stat. (Vernon's 1925) art. 4623. "Neither the separate property of the husband nor the community property other than the personal earnings of the wife,
children; and Article 4623 exempts the husband's separate property, plus ordinary community property, from such liability, repeating the exception as to necessaries. It is evident that Article 4621 refers only to ordinary community property, when it is read with Article 4623, and not to special community property. *Straus v. Shamblin*\(^{21}\) agrees with this conclusion, holding that only the husband's separate property and ordinary community property are exempt from the wife's postnuptial debts; and this same conclusion is reached in the *Crim* case.\(^{22}\) It is apparent, then, that the wife's property and special community property are liable for the wife's postnuptial debts when such are not incurred for necessaries for herself and her children.

The above-stated rules would of course apply to the wife's valid contracts, and also to her voidable contracts which she does not avoid.\(^{23}\)

Suppose the husband joins in the execution of the wife's contract. Article 4621 says: "The community property . . . shall not be liable for . . . contracts of the wife except for necessaries . . . unless the husband joins in the execution of the contract." This implies that "the community property"—apparently all of it—is liable if he joins; and this clearly seems to be right if he joins as a party, for then it is his contract, too, and under the rules evolved above would make all types of marital property liable. Suppose he joins merely *pro forma*; is this joining, within the meaning of the statute? This question apparently has not been settled, but the answer would appear to be, no.

The wife's contracts for necessaries are governed by Articles 4621 and 4623, which imply that the husband's separate property and all the community property are liable therefor. However, several very different situations arise, depending on the wife's in-

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\(^{22}\) 6 S. W. (2d) 348, 349.

\(^{23}\) See comment this issue. "The Wife's Contracts."
tent and that of the third party contracting with her. If their intent is to charge the husband with liability, and not the wife, it would seem that only his separate property and the ordinary community property are liable. If the parties rely on her credit alone, it would seem that only her separate property and special community property are liable. If the contracting parties look to the credit of both spouses, all separate and community property is liable.

It is possible that the wife’s contract for the benefit of her separate estate might bind the husband, too, and thereby make liable all types of marital property.24 This is squarely opposed to Article 4623, but Articles 1984 and 1985 perhaps imply this result by their similar treatment of such contracts and contracts for necessary.25

7. Property Liable for the Wife’s Prenuptial Torts

Article 4613, previously mentioned, exempts the husband’s separate property from “torts of the wife,” to which should doubtless be added the phrase “either before or after marriage” which occurs in the same sentence immediately after reference to her debts; otherwise, the astounding result might be reached that the husband’s separate property is liable here. Article 4623, while limiting the liability of the community property for the wife’s contracts, does not mention her torts; this seems to imply that all community property is liable for all of her torts, prenuptial and postnuptial. Next, let us compare this statute, dealing with the wife’s obligations, and Article 4616, dealing with the husband’s obligations. The latter statute’s mentioning his torts—including (as concluded supra) his prenuptial torts—and the former statute’s not mentioning her torts at all, add up to a powerful implication that all community property is liable for the wife’s prenuptial torts. Thus


25 See also Gohlam, Lester Co. v. Whittle, 114 Tex. 584, 273 S. W. 808 (1925); note, 11 Tex. L. Rev. 81 (1932); 23 Tex. Jur. § 157; Speer, op. cit. supra, note 6 at § 169, p. 229; § 175, p. 233; § 382, p. 462; § 384, p. 464.
there is no statutory exemption from liability for the wife's pre-marital torts except the husband's separate property.

The *Crim* case\(^{26}\) reasons with considerable force that all of the community property is liable for the wife's prenuptial torts. Thus it seems, from analysis of the statutes and apparently the only case discussing the point, that all of the community property, both ordinary and special, and also the wife's separate property, would be liable for her prenuptial torts.\(^{27}\)

8. Property Liable for the Wife's Postnuptial Torts

Article 4623, while exempting ordinary community property from the wife's postnuptial debts (except for necessaries) does not mention her torts, and therefore creates no such exemption therefrom. In accord with this reasoning, a Supreme Court case, *Seinsheimer v. Burkhart*,\(^{28}\) and several other cases\(^{29}\) hold that all the community property, both ordinary and special, is liable for the wife's postnuptial torts. The *Crim* case concurs.\(^{30}\) Judge Speer, writing again in *Texas Jurisprudence*, in discussing Article 4616 and Article 4623 comes to the same conclusion.\(^{31}\) Article 4613 still exempts the husband's separate property from such liability, and *Jackson v. Dickey*,\(^{32}\) a Commission of Appeals case, concludes that this exemption should be made. Certainly there can be little doubt that the wife's separate property is liable for her postnuptial as well as her prenuptial, torts. Thus her separate property and all community property are liable for the wife's postnuptial torts.\(^{33}\)

\(^{26}\) 6 S. W. (2d) 348, 349.

\(^{27}\) See also *Speer*, op. cit. supra, note 6 at § 387, p. 468; § 299, p. 370; § 301, p. 372; § 302, p. 373.

\(^{28}\) 122 Tex. 336, 122 S. W. (2d) 1063 (1939).


\(^{30}\) 6 S. W. (2d) 348, 349.

\(^{31}\) 23 *Tex. Jur. 192*.

\(^{32}\) 281 S. W. 1043 (Tex. Com. App., 1926) *opinion not adopted*.

\(^{33}\) See also *Babcock v. Tum*, 156 F. (2d) 116 (C.C.A. 9th, 1946); notes. 25 *Tex. L.*
CONCLUSION

Thus the basic framework of liability is uniform in all the eight situations discussed above; i.e., the husband's obligations are collectible from his separate property and ordinary community property, and the wife's obligations from her separate property and special community property. In three of the situations, there is an additional liability; viz., all of the community property, ordinary and special, is liable for the wife's prenuptial debts, her prenuptial torts and her postnuptial torts. At first thought, this differentiation seems incongruous and insupportable. Why, for example, should there be a different rule of liability for the husband's premarital obligations and the wife's? Or why should there be a difference between her debts after marriage and her torts?

First, the differences are supported (as discussed supra) by the rather clear statutory implications. The statutes present a labyrinth of negative statements; by excluding liability, in the various situations, of certain segments of the marital property, they thereby imply that all other segments are liable.

Second, the apparently haphazard differences turn out to be supported by a consistent and probably well-considered policy. As Judge Speer says in the Crim case, the principal property which many (and probably most) wives have (at least, early in marriage before they have inherited anything) is their half interest in ordinary community property—the principal item being usually the husband's salary. Therefore, if ordinary community property is exempted, the wife's liabilities will very frequently be uncollectible.

Let us test that thought by applying it to the various situations. First, the wife's prenuptial debts and torts, for which as a feme sole any property she owned and also her salary after she collected it, were liable. Suppose that (as is probably true in the great ma-
jority of cases) at marriage she had little or no property and that she was not thereafter employed for any substantial period; if ordinary community property is exempted, her prior obligees would be forestalled. Therefore, if such creditors are to be protected, the ordinary community property must be liable.

How does this compare with the husband's prenuptial debts and torts? If he has no property at marriage, he will nevertheless in almost all cases have a salary, which by the rules developed above will be liable (after he has collected it) for such obligations. Thus what seems an arbitrary distinction and discrimination proves to be essential, in probably the great majority of marriages, if the wife's premarital creditors are to have a fighting chance of collecting.

The above argument is weakened by the fact that a very large percentage of wives get jobs during the early years of marriage and thereby have special community property which would be liable. This is of accentuated importance because limitation periods on the premarital debts and torts are short; i.e., during the period when the creditors must act, there are frequently earnings of the wife which theoretically at least can be reached. An extensive special study would be prerequisite to a reliable conclusion, but the probabilities are, that the great majority of marriages are described by the preceding assumption that the wife has little or no property and little or no salary. Certainly the assumption was true when the statutes were written. Certainly the present-day trend is, as to salary, in the opposite direction, with an unprecedented number of working wives due to high living costs.

The foregoing argument (for differentiation in favor of the wife's prenuptial debts and torts) is strengthened by the holding in Strickland v. Wester,34 adopted by the Supreme Court. If property bought with the wife's earnings is (unlike the earnings) ordinary community property—which seems a correct result under Article 4616—then the wife's creditors will be further handi-

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capped unless they can reach ordinary community property. The principle of the case might even be extended to the other items of special community property.

Finally, what basis is there for a different liability for the wife's debts after marriage and her torts thereafter? The rationale as to her torts is identical with that just stated as to her prenuptial obligations: most wives' principal (or only) property is their interest in ordinary community property. As to her debts, a wife's contracts are voidable except for half a dozen authorized types. As to the voidable contracts, the theory apparently is, creditors should beware; their dealings with minors are slightly analogous. As to her authorized, valid contracts, reference is made to another article in this issue; here, in summary, it may be said that all types thereof (with a relatively few exceptional instances under one or two types) either bind the husband or exist only when she has separate property—except for emergency contracts, which very probably bind all the community property. If the husband is bound, ordinary community property and his separate property) are liable; if the wife has separate property, it and its revenues (special community property) are liable. Thus on principle there is a basis for different rules of liability for the wife's debts after marriage and her torts; and the rule (developed above) allowing a narrower liability for such debts is not unfair to creditors.

Perhaps there would be considerable strength to the argument that the wife's creditors (in the three situations discussed above) should be allowed to reach only her half of ordinary community property. If such a result were desired, this would require a basic change in the present law, probably by statute. It is somewhat

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85 See comment in this issue, "The Wife's Contracts."
86 See comment, 4 SOUTHWESTERN L. J. 112 (1950).