The Creditor and the Community In Idaho

W.J. Brockelbank

Repository Citation
W. J. Brockelbank, The Creditor and the Community In Idaho, 15 La. L. Rev. (1955)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol15/iss3/7
The Creditor and the Community
In Idaho

W. J. Brockelbank*

A great deal has been written on the assets of the community, but much less on its liabilities. In this article it is proposed to have a look at the community from the point of view of the outsider who has to do business with one or the other of its owners, the husband and wife. Since, nowadays, nearly everybody is married, this look at the outsider and the community will necessarily cover nearly every problem of collection of the average creditor.

Community property exists in only eight states.¹ No recent converts have been made. When the income tax increased to a point where it became a serious burden on the taxpayer, certain states adopted the community system as a measure of tax relief.²

But when Congress provided for the system of split income of husband and wife,³ so that the community system no longer gave a tax advantage, the states that had adopted the community system as a measure of tax relief stumbled over each other in the rush to repeal.⁴ This was probably all for the best. Those states never understood community property and if it could not be used for the intended purpose it was better not to use it at all.

Yet it is rather significant that, in the brief period when it was in force, not one of those states was convinced of any in-

---

¹ Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.
² Oregon, Oklahoma, Michigan, Pennsylvania, Nebraska, and Hawaii.
trinsic merit of the system as a solution of marital property problems. It is believed that one of the stumbling blocks to the adoption of the community system anywhere is the inadequacy of its dealing with the rights of creditors. The common law states, in the brief look they were afforded at the community system, sought a simple answer to the question: how will it operate for the ordinary creditor who must do business with one or both spouses? First, they found eight different answers and, second, each of them was complex and uncertain.

The object of the present study is not to hold up the Idaho solution of the creditor’s difficulties as the ideal solution. Nor is it expected that any converts will be made. The purpose is rather to point out the inadequacies of the system as it now exists in order that other community property states may have some basis for comparison and especially in order that we, in Idaho, may fill in some of the gaps and thus improve the situation for use by ourselves.

I

The community system comes to us from the civil law. One of the characteristics of the civil law is codification. A civilian expects and usually gets an answer to every question from the code. The common law lawyer is beginning to adopt this idea. In recent years many important subjects of the law have been codified and much that remains is covered by the Restatements. So when the merchant, who has done business with and extended credit to a married person, asks, “Where do I stand and what


6. In studying French law we “pass into a world governed by codes. . . . [A] code is supposed . . . to provide a fresh start in all those parts of the law with which it deals. . . . [I]t should be interpreted only in the light of its own provisions and definitions.” AMOS & WALTON, INTRODUCTION TO FRENCH LAW 4 (1935); BUCKLAND, ROMAN LAW AND COMMON LAW 6-14 (1936).

7. Important segments of our law have been codified. As examples one may cite the Uniform Sales Act, the Uniform Conditional Sales Act, the Negotiable Instruments Law, the Warehouse Receipts Act, the Bills of Lading Act, the Stock Transfer Act, the Partnership Act, the Limited Partnership Act, the Model Business Corporation Act, and a host of other uniform acts on particular subjects. “The center of gravity of the legal system has been shifting to legislation.” Roscoe Pound, Cacoethes Dissentiendi: The Heated Judicial Dissent, 39 A.B.A.J. 794, 795 (1953).

property is available for the payment of my claim?" he is entitled to a simple straightforward answer. Any system of law that cannot give him a simple answer is not only unsuitable for export, it is unsuitable for use at home.

To begin, we may eliminate, with a word, the consideration of the creditor's rights against the single person. These rights in Idaho do not differ materially from the rights of creditors against single persons elsewhere. Section 11-201 of the Idaho Code of 1947 provides that "all goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, are liable to execution." Particular provision is made for corporate shares and gold dust\(^9\) and debts owing to the debtor.\(^10\) The general exemption law in Idaho\(^11\) is similar to that in most states and of course the creditor expects to be subject to the statute of limitations,\(^12\) the homestead laws\(^13\) and the law of bankruptcy.\(^14\) All these provisions apply not only to single persons, but also to married persons whenever the debt is a separate debt.

But what of the community and community debts?

Before proceeding it may be well to clarify and simplify our problem by asking what are the different kinds of debts and what are the different kinds of property that may be subjected to their payment?

First, all debts are incurred either before or after marriage. Of course, antenuptial debts are subject to the above provisions concerning the debts of single persons, but the division is worthy of notice in its relation to the community because the question must be asked, how far is community property available for the satisfaction of antenuptial debts? May a person who has no property beyond what is covered by the exemption laws avoid payment by getting married? Is this escape mechanism the same for both men and women?

From another point of view, debts may be classified as arising out of contracts, torts or other obligations imposed by law. This

---

10. Ibid.
11. Id. § 11-205.
12. Id. §§ 5-201—5-240.
13. Id. §§ 55-1001—55-1304.
classification is desirable, for while the capacity of a man and woman to incur debts in each of these subdivisions is the same prior to marriage, there may be marked differences between the male and female capacity after marriage.

The contract container and the tort container are simple enough. They bring into play the whole law of contracts and torts. No elaboration is necessary. By "other obligations imposed by law" is meant a broad catch-all subdivision that will include not only the obligation to pay taxes, family support, fines and criminal penalties, but also every other obligation and especially those growing out of the field which used to be called quasi-contracts and constructive trusts, but which today, in most law schools, travels under the vocable "restitution."¹¹⁵

Finally we must divide antenuptial debts into the two classes: those incurred by the man and those incurred by the woman. There will be no difference between these two classes of debts so far as the availability of the separate property of each debtor is concerned, but each class may very well involve different treatment when it comes to the availability of community property for their satisfaction.

The above classification of antenuptial debts will hold good for the postnuptial debt, except to observe that postnuptial debts should first of all be classified as community debts and separate debts. Beyond that, we must notice again that each may grow out of a contract, a tort or other obligation imposed by law and may be incurred either by husband or the wife.

Coming now to a classification of the different kinds of property that may be subjected to the payment of each class of debt, we must first isolate the separate property of the wife and the separate property of the husband. Then comes community property. Is it necessary to subdivide further? It would greatly simplify both the learning and the practice of law if it were not. However, simplification of learning or practice is and should be of little persuasive effect in the realm of social values. The Idaho legislature of 1881 set up a special kind of community property, viz., "rents, issues and profits" of the wife's separate property and "all compensation due or owing for her personal

¹¹⁵ The term "restitution" has been given greater currency by its use in the Restatement of the Law of Restitution, Quasi Contracts and Constructive Trusts. Two valuable casebooks on the subject by Professors Patterson and Thurston are in current use in the law schools.
<table>
<thead>
<tr>
<th>TABLE I</th>
</tr>
</thead>
<tbody>
<tr>
<td>CLASSIFICATION OF DEBTS AND PROPERTY THAT MAY BE USED TO SATISFY THEM</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Incurred by H</th>
<th>Contract</th>
<th>Separate Property of W</th>
<th>Separate Property of H</th>
<th>Community Property within 11-204</th>
<th>Community Property outside 11-204</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antenuptial Debts</td>
<td>Tort</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incurred by W</td>
<td>Contract</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incurred by W</td>
<td>Tort</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incurred by W</td>
<td>Other Obligations imposed by law</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Community Debts</td>
<td>Contract</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incurred by H</td>
<td>Tort</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incurred by H</td>
<td>Other Obligations imposed by law</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Postnuptial Debts</td>
<td>Contract</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incurred by W</td>
<td>Tort</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incurred by W</td>
<td>Other Obligations imposed by law</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Separate Debts</td>
<td>Contract</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incurred by H</td>
<td>Tort</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incurred by H</td>
<td>Other Obligations imposed by law</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incurred by W</td>
<td>Contract</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incurred by W</td>
<td>Tort</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incurred by W</td>
<td>Other Obligations imposed by law</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
services" (both of which are community property in Idaho)\(^\text{16}\) and provided that this special kind of community property should be "exempt from execution against her husband."\(^\text{17}\) Thus the property available for the payments of debts must be divided into four classes: The separate property of the wife, the separate property of the husband, the special kind of community property covered by Section 11-204 and finally community property outside of Section 11-204. The above scheme of classification is set up in Table I.

Since this table gives a complete list of debts and the kinds of property available for their satisfaction, its use makes possible the testing of a given system of law for completeness and the appraisal of its over all effectiveness. It is the purpose of this article thus to test the law of Idaho.

II

We shall attempt to fill in the pigeon holes of the table by answers contained in the statutes and decisions. Let us begin with the statutes. They are meager indeed.

For purpose of reference they are set out in a footnote.\(^\text{18}\) It will be noticed that all three sections state explicitly what property is not liable. The creditor of the husband must touch neither the separate property of the wife nor the "rents, issues and profits" of the separate property of the wife nor the "compensation due or owing for her personal services."\(^\text{19}\) Neither must the antenuptial creditor of the wife touch the separate property of the husband. But as to what property is liable, there is only one statement. Section 32-911 says that the separate property of the wife is liable for "her own debts contracted before or after marriage." Beyond this there is silence.

It will be noticed that silence encompasses nearly all of the community property and nearly all of the separate property of

---

\(^\text{16. Idaho Code § 32-906 (1947).}\)

\(^\text{17. Id. § 11-204.}\)

\(^\text{18. Ibid.: "Exemption in favor of married woman. All real and personal estate belonging to any married woman at the time of her marriage, or to which she subsequently becomes entitled in her own right, and all the rents, issues and profits thereof, and all compensation due or owing for her personal services, is exempt from execution against her husband."}\)

\(^\text{19. Id. § 32-911: "Wife's liability for personal debts. The separate property of the wife is not liable for the debts of her husband, but is liable for her own debts contracted before or after marriage."}\)
the husband. Yet the separate property of the husband and the community property together will constitute just about all of the property that is owned by the average couple. This means that the creditor who seeks an answer in the statutes as to what property is available to the payment of his claim will find a statement concerning only a negligible part of the family property and this statement, so far as it goes, will tell him, not what property he may attach, but what property he may not attach.

He must conclude that as a practical matter the statutes have failed to give him information as to what he can do.

III

In view of the incompleteness of the statutes, the creditor must seek to fill in the gap from the cases. What will he find?

The Supreme Court, unlike the legislature, cannot make law ad libitum. Even to make law by the slow glacier-like process, which has given us the common law, the court must await a case. In Idaho, on the question of the availability of the different elements of property classified in Table I for the payment of the debts of the spouses, the Supreme Court has done a lot of waiting. In fact in only a very few cases has the court had an opportunity to make a decision.

First, it is not surprising to find that the cases hold that the separate property of the wife is liable for her separate debts. These may be independent decisions or cases simply enforcing Section 32-911 that "the separate property of the wife . . . is liable for her own debts contracted before or after marriage."20

That the separate property of the husband is liable for his own debts may be taken for granted. No case before the Supreme Court has ever raised the point and the legislator considered it unnecessary to state the principle in the section where for reasons of symmetry one would expect to find it (Section 32-910).

Evans v. Kroutinger and McCarthy v. Paris21 held that the separate property of the wife could not be taken by the creditors of the husband.

As to the liability of community property the simplest case


21. 9 Idaho 153, 72 Pac. 882 (1903) and 46 Idaho 165, 267 Pac. 232 (1928).
is one holding that it is available for the payment of community
debts. While no case on so simple an issue has ever been ap-
ppealed to the Supreme Court, *Gustin v. Byam* held that a wife
did not make out a case of fraud when she proved that a hus-
band, shortly before divorce, allowed what was presumably a
community creditor to satisfy his claim from community per-
sonalty.

While the rule that community property is liable for com-
munity debts needs no belaboring, what about its availability
for the payment of the separate debts of the spouses? Idaho
has arrived at the position that it is liable for the separate debts
of the husband but is not liable for the separate debts of the
wife. In the important case of *Holt v. Empey* a creditor for
the separate debt of the husband was allowed to satisfy his claim
from the community. The court did not inquire whether the
separate debt in question was antenuptial or postnuptial. It
simply held that "community real estate is liable to attachment
and execution for the debts of the husband whether incurred
for his own use or for the benefit of the community." The basis
of the decision was that there was no reason to depart from the
general rule announced in 5 Ruling Case Law 858 that commu-
nity property is liable for the separate debts, obligations and
liabilities of the husband.

In the important decision of *Hall v. Johns* in 1909, the wife
had borrowed money for her own use and benefit, and the surety
on her obligation, having been compelled to pay, sought reim-
bursement. The trial court's opinion that her husband was not
liable and that the judgment against the wife could not be
satisfied out of the common property was affirmed. The decision,
in itself, probably states present law; but several dicta of the
court would be of questionable authority today. For instance,
the court states that title to community property is in the
husband and, during the existence of the community, the wife's
interest is a mere expectancy. The contrary was held in *Kohny
v. Dunbar* in 1912.

It is uncertain whether the court in *Hall v. Johns* was of the

---

22. 41 Idaho 538, 240 Pac. 600 (1925). But a wife may make out a case
of fraud if she proves that her husband connives with another to bring a
collusive suit in order to defeat the interest of the divorce-seeking wife in
23. 32 Idaho 106, 178 Pac. 703 (1919).
24. 17 Idaho 224, 105 Pac. 71 (1909).
25. 21 Idaho 268, 121 Pac. 544 (1912).
opinion that the wife did not validly contract for want of capacity or whether having contracted, the husband and so the community was not liable therefor. In any case the court stated that the community property cannot be bound by postnuptial contracts of the wife made for the use and benefit of her own separate property and for this proposition it seemed appropriate to the court to cite a Michigan case holding that a husband is not liable for money lent to a wife. The same sort of reference to the common law to fill up gaps left by the statutes is employed in an early California case. This method ignores the whole history of community property. It may be all right to take over bodily a principle from the common law if, after an examination of the background of Spanish law from which we took the law of community property, no principle is found, but to do so unconsciously, as if a case in community property is "just another case" like those in contracts or torts or other common law subjects, is to demonstrate an ignorance of the wrench of historical continuity involved. One modern scholar has characterized this method as one of "startling obtuseness" and "erroneous" and another as "unfortunate."

The most recent case involving the possible liability of community property is Great American Indemnity Co. of New York v. Garrison. In that case a husband who was a bonded treasurer of Clearwater County, Idaho, misappropriated state funds which his surety was later obliged to pay. The suit for reimbursement was heard in the federal court on grounds of diversity of citizenship. The court sitting in Washington purported, under the Erie decision, to follow the Washington conflicts of laws rule, making Idaho law applicable as being the place where the debt arose or the place where the tort was committed. Finding no Idaho law the court said that there was no reason to suppose that the Idaho Supreme Court would apply the rule of contract debts, which makes the community liable, to the husband's torts in the face of the almost universally accepted principle that the marital community is not liable for the husband's torts. For this proposition, cases from Washington and the current encyclopedias are cited. The encyclopedias repeat the citations from Washington and all the cases from other states. The latter are

27. 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 111 (1943).
28. Id. at 439.
not uniformly in favor of immunity from liability. So one can just about say that the court, instead of applying "a universally accepted principle," is in reality applying Washington law to an Idaho tort. It is well to notice that this case, unlike the ordinary case, does not add the reasoned conviction of an additional court, for under the Erie decision the federal court does not express its own convictions but only those of the state court it happens to be following. Since the case is not binding on the Supreme Court of Idaho, it should not be taken too seriously as a monument to the eternal law of Idaho. So far as it goes and, looking only at its exact holding, we can say that there is no community liability for the tort of a married man committed in connection with his function as a public officer.

In regard to the question whether the separate property of the wife is available to satisfy a community debt, a preliminary question arises in Idaho as to the capacity of a married woman to contract. An ancient territorial statute (still in force as Section 29-101 of the Idaho Code of 1947) provided that "All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of their civil rights." The court has decided that this statute cannot be taken "to confer upon married women the right to make any and all contracts . . . and this is evident from the fact that the act with relation to the wife becoming a sole trader remains upon the statute book." The sole trader law, passed in 1875, regulated and restricted the right of a wife to do business for herself and its repeal in 1917 does not seem to have restored her general contractual capacity, if any she ever had. While her capacity is not general she has been specifically enabled to make contracts relating to her separate property, to manage and control the rents and profits thereof and the earnings for her personal services. She has general capacity to make marriage settlements and a contract entered into in a state where her common law disabilities have been removed will be enforced. The court has finally arrived at the formula that a married woman can contract in relation to her

35. Id. §§ 32-906, 32-913.
36. Id. § 32-913.
37. Id. § 32-905.
38. Meier & Frank Co. v. Bruce, 30 Idaho 732, 168 Pac. 5 (1917).
separate property, her personal services and for her own use and benefit.\(^3\)

The above limitations create a situation where it is unusual for a community debt to be incurred by the wife. However, since compensation for her personal services and the rents and profits of her separate estate fall into community, since contracts concluded in other states where her common law disabilities have been removed are enforced in Idaho and since conceivably contracts made for her own use and benefit may also be for the benefit of the community, the point may arise.

Supposing that the obstacle of the wife's incapacity is surmounted, what is the liability of the wife's separate property for a community debt? The court has erected another obstacle—this one a requirement of pleading and proof. The court has uniformly held that no recovery can be had unless it is pleaded and proved that the contract is for the use and benefit of the wife. Two cases refused, because of this lack of pleading and proof, to hold the wife liable on what very well may have been community obligations.\(^4\) But when, as in *Briggs v. Mason,*\(^4\) the complaint properly alleged that the wife specially promised to pay a certain grocery bill and that the groceries were sold for her use and benefit, the court allowed execution against the wife's separate property. Here was a contract which was indeed for her own use and benefit—for undoubtedly she consumed part of the groceries and had an interest in providing for the family—but it was also a contract that creates perhaps the most typical of community debts. The court insists on the point of pleading

\(^3\) The statement made is about as far as it is safe to go. The whole question merits a separate study. It is in crying need of legislative clarification. More detailed information may be obtained from the following cases: Vanderpool v. Bank of Hansen, 2 F.2d 877 (S.D. Idaho 1924); State ex rel. Robins v. Clinger, 72 Idaho 222, 238 P.2d 1145 (1951); Loomis v. Gray, 60 Idaho 193, 90 P.2d 529 (1939); Craig v. Lane, 60 Idaho 178, 89 P.2d 1008 (1939); Beckstead v. Gee, 58 Idaho 758, 79 P.2d 293 (1938); Pacific Acceptance Corp. v. Myers, 49 Idaho 585, 290 Pac. 404 (1930); Farnworth v. Viet, 39 Idaho 40, 225 Pac. 1023 (1924); Howell v. Martin, 36 Idaho 468, 211 Pac. 528 (1922); Overland National Bank v. Halveston, 33 Idaho 489, 196 Pac. 217 (1921); Humbird Lumber Co. v. Doran, 24 Idaho 507, 135 Pac. 66 (1913); Tipton v. Ellisworth, 18 Idaho 207, 109 Pac. 134 (1910); Bank of Commerce v. Baldwin, 14 Idaho 75, 93 Pac. 594 (1908); Edmundson v. Smith, 13 Idaho 645, 92 Pac. 842 (1907); Holt v. Gridge, 7 Idaho 416, 69 Pac. 188 (1900); Strode v. Miller, 7 Idaho 16, 59 Pac. 889 (1900); Jaeckel v. Pease, 6 Idaho 131, 53 Pac. 399 (1899); Dernham and Kaufmann v. Rowley, 4 Idaho 753, 44 Pac. 649 (1899); Bassett v. Beam, 4 Idaho 106, 36 Pac. 501 (1894).

\(^4\) Paciflo Acceptance Corp. v. Myers, 49 Idaho 585, 290 Pac. 404 (1930); Ness v. Coffer, 42 Idaho 78, 244 Pac. 145 (1925).

\(^4\) 44 Idaho 283, 256 Pac. 368 (1927).
but the question of whether separate property is liable for a community debt is, for it, unworthy of notice.

Two other cases may have some bearing on the question. In *Booth Mercantile Co. v. Murphy* the wife placed a mortgage on her separate realty in Idaho to secure payment for furniture and supplies purchased in Utah for a hotel business she was operating in Utah. The court, in allowing the creditor to foreclose, was indifferent to whether her domicile was in Utah or Idaho and whether this was a Utah or Idaho contract since a mortgage on her separate property had direct reference to her separate property. The court concluded: "In a sense it would be difficult to name a contract a married woman might make that would not in some respects inure to the benefit of the community, but that fact alone does not lessen her obligation thereon." Had this suit been for a deficiency judgment, the above language might indicate that either "her own debts contracted . . . after marriage" for which Section 32-911 renders her liable or "contracts for her own use and benefit" within the formula so constantly used by the court might be broad enough to include a community debt. However the court was careful to confine itself to the lien created by the mortgage and the statement quoted rises no further than a dictum in regard to her personal obligation or the availability of her separate property not covered by the mortgage.

In *Overland National Bank v. Halveston* the bank sued to recover on three promissory notes made by a wife, one for an assessment on corporate stock which she claimed to be community property, a second for money borrowed from the bank to cover an overdraft on the bank by her son, and a third for the same purpose plus medical attendance for herself. The first note according to the wife was a community obligation and the third one was certainly a community obligation in part (for medical attendance) and unless the bank dealt on the faith of her separate credit the second note and the remainder of the third note may also have been community obligations. The court gave judgment against her on all three notes. The court is concerned almost exclusively with her capacity to contract and at one point says "she is capable of making contracts . . . to the same extent as if she were unmarried." The court is indifferent

---

42. 14 Idaho 212, 93 Pac. 777 (1908).
43. 33 Idaho 489, 196 Pac. 217 (1921).
44. Id. at 500, 196 Pac. at 221. This may have been a slip.
to the availability of her separate property for the satisfaction of a community obligation and holds with reference to the wife's claim that the stock is community property that she is estopped to deny that it is her separate property—this, not on the basis of representations made but simply in the sense that she is barred. Of course, if she is never allowed to avoid liability by showing that the debt is a community debt, this means to the realist that her separate property is liable for community debts. In reality this case allows the separate property of the wife to be liable for a community debt but the court clouds its holding in the language of estoppel and is unwilling to face the problem and give a clear statement of what it is really doing.

It is difficult to draw any conclusion with confidence. While it is possible to cite cases where the separate property of the wife has been taken to satisfy a community debt, the court does not think in these terms. The most that can be said is that a contract which the wife has capacity to make, if properly pleaded and proved to be for her own use and benefit, may bind her separate property; for in such a case the court is willing to give personal judgment against her. The court's interest is not in the availability of the separate property but in pleading and proof that the contract is for her own use and benefit.

This being the situation, it is certain that if the community debt is not incurred by her but by her husband, her separate property is not liable.45

There are few other cases of importance. One case decides only a procedural point that the community is bound only if the husband, having been served with process, is a party to the action. The case is for the wife's slander.46 The court is careful to exclude any indication of what the result might have been had the husband been joined. Other cases merely enforce, for the benefit of creditors, the provisions of the statutes before noted.47

45. Thomas v. Young, 42 Idaho 240, 245 Pac. 75 (1926).
47. Section 32-911 to the effect that the separate property of the wife is liable for her own debts was enforced in Sassman v. Root, 37 Idaho 588, 218 Pac. 374 (1923), and Boise Ass'n of Credit Men, Ltd. v. Glenns Ferry Meat Co., 48 Idaho 600, 283 Pac. 1033 (1930). Section 32-911 to the effect that the separate property of the wife is not liable for the debts of the husband was enforced in McKeehan v. Vollmer-Clearwater Co., 30 Idaho 505, 166 Pac. 256 (1917); Bank of Orofino v. Wellman, 26 Idaho 425, 143 Pac. 1169 (1914); Baldwin v. McFarland, 26 Idaho 85, 141 Pac. 76 (1914); Holt v. Gridley, 7 Idaho 416, 63 Pac. 188 (1900); Young v. First National Bank of Hailey, 4
We set out in Table II the liabilities of the different kinds of separate and community property.

IV

This table includes only the bare bones of the statutes and the cases. It is appropriate to complete it by a few propositions that may be taken for granted and others resulting from inferences and *a fortiori* reasoning. For instance, it may be taken for granted that the separate property of the husband is liable for all his antenuptial debts arising not only out of contract but arising as well from his torts or other obligations imposed by law. The same may be said of his postnuptial separate debts.

Idaho 323, 39 Pac. 557 (1895). This result was taken for granted in Feltham v. Blunck, 34 Idaho 1, 198 Pac. 763 (1921). Section 11-204 to the effect that the "rents, issues and profits" of the separate property of the wife are "exempt from execution against her husband" was enforced in McCarthy v. Paris, 46 Idaho 165, 267 Pac. 222 (1928); Evans v. Kroutinger, 9 Idaho 153, 72 Pac. 882 (1903); Thorn v. Anderson, 7 Idaho 421, 63 Pac. 592 (1900), and Humbird Lumber Co. v. Doran, 24 Idaho 507, 135 Pac. 66 (1913) *dictum*. The provision of Section 11-204 that "all compensation due and owing [the wife] for her personal services is exempt from execution against her husband" came before the court for interpretation in McMillan v. United States Fire Ins. Co., 48 Idaho 153, 250 Pac. 220 (1929). It was held that the privilege of exemption is lost when the compensation is paid to the wife and she uses it in the purchase of other property. Edminston v. Smith, 13 Idaho 645, 92 Pac. 842 (1907), held that the wife was personally liable on her contract to pay for her own bed and board.

48. IDAHO CODE § 32:911 (1947) as applied in the cases set out in notes 46 and 47 *supra*.

49. IDAHO CODE § 32-910 (1947).

50. Id. § 11-204 as applied in the cases set out in note 47 *supra*.

51. This is the result of Holt v. Empey, 32 Idaho 106, 178 Pac. 703 (1919). The court made no distinction as to whether the debt was antenuptial or postnuptial or whether incurred for his own use or for the benefit of the community. This result may be inferred also as to community debts from Gustin v. Byam, 41 Idaho 538, 240 Pac. 600 (1925), and Pittcock v. Pittcock, 15 Idaho 47, 86 Pac. 212 (1908), and the court clearly so held in McMillan v. United States Fire Insurance Co., 48 Idaho 163, 280 Pac. 220 (1929).

52. It was taken for granted in Holt v. Empey, 32 Idaho 106, 178 Pac. 703 (1919), that the separate property of the husband would be liable for his debts—all his debts both antenuptial and postnuptial, and both community and separate. Such is also the understanding of Jacob, *The Law of Community Property in Idaho*, 1 IDAHO L.J. 1 (1931).

53. This is the result of Hall v. Johns, 17 Idaho 224, 105 Pac. 71 (1909).

54. With some misgivings the word "no" is placed here for both community and separate debts resulting from the husband's tort. It results from Great American Indemnity Co. of New York v. Garrison, 75 F. Supp. 811 (E.D. Wash. 1948). It is hard to believe that this was not a community tort. It was committed while the husband was on a job (treasurer of Clearwater County), the wages from which certainly would be community property, and the moneys misappropriated probably were spent for family expenses.

55. This is probably a safe conclusion from the fact that the court in First National Bank of Sandpoint v. Samuels, 53 Idaho 780, 27 P.2d 959 (1933), affirmed the trial court decision that a judgment for the wife's slander was not a lien on community realty.
**TABLE II**

**LIABILITIES OF THE DIFFERENT KINDS OF SEPARATE AND COMMUNITY PROPERTY RESULTING ALONE FROM THE STATUTES AND THE DECISIONS**

<table>
<thead>
<tr>
<th>Incurred by H</th>
<th>Separate Property of W</th>
<th>Separate Property of H</th>
<th>Community Property within 11-204</th>
<th>Community Property outside 11-204</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antenuptial Debts</td>
<td>Contract</td>
<td>No(^49)</td>
<td>Yes(^52)</td>
<td>No(^50)</td>
</tr>
<tr>
<td></td>
<td>Tort</td>
<td>No(^48)</td>
<td>No(^50)</td>
<td>No(^50)</td>
</tr>
<tr>
<td></td>
<td>Other Obligations imposed by law</td>
<td>No(^48)</td>
<td>Yes(^50)</td>
<td>Yes(^51)</td>
</tr>
</tbody>
</table>

| Incurred by W | Contract | Yes\(^48\) | No\(^49\) | Yes\(^50\) | No\(^50\) |
| | Tort | Yes\(^48\) | No\(^50\) | No\(^50\) | Yes\(^51\) |
| | Other Obligations imposed by law | Yes\(^48\) | Yes\(^50\) | Yes\(^51\) | No\(^50\) |

| Incurred by H | Contract | No\(^48\) | Yes\(^52\) | No\(^50\) | Yes\(^51\) |
| | Tort | No\(^48\) | No\(^50\) | No\(^50\) | Yes\(^51\) |
| | Other Obligations imposed by law | No\(^48\) | Yes\(^50\) | Yes\(^51\) | No\(^50\) |

| Incurred by W | Contract | Yes\(^48\) | No\(^50\) | No\(^50\) | Yes\(^51\) |
| | Tort | Yes\(^48\) | No\(^50\) | No\(^50\) | Yes\(^51\) |
| | Other Obligations imposed by law | Yes\(^48\) | Yes\(^50\) | Yes\(^51\) | No\(^50\) |

| Incurred by H | Contract | No\(^48\) | Yes\(^52\) | No\(^50\) | Yes\(^51\) |
| | Tort | No\(^48\) | No\(^50\) | No\(^50\) | Yes\(^51\) |
| | Other Obligations imposed by law | No\(^48\) | Yes\(^50\) | Yes\(^51\) | No\(^50\) |

| Incurred by W | Contract | Yes\(^48\) | No\(^50\) | No\(^50\) | Yes\(^51\) |
| | Tort | Yes\(^48\) | No\(^50\) | No\(^50\) | Yes\(^51\) |
| | Other Obligations imposed by law | Yes\(^48\) | Yes\(^50\) | Yes\(^51\) | No\(^50\) |
When Section 32-910 provides that the separate property of the husband is not liable for the debts of the wife contracted before marriage, it is safe to say that the draftsman meant incurred before marriage. If the husband is not to be liable for his wife’s antenuptial contracts a fortiori, he is not to be liable for her torts or other obligations imposed by law. In the same vein the husband’s separate property should not be available for the payment of the wife’s postnuptial separate debts.

The lawyer in Idaho is pretty safe in assuming that the general community property (that is, that part of it outside of the special exemption provided for by Section 11-204) is liable for all debts of the husband both antenuptial and postnuptial, and both community and separate. This is certainly the spirit of Holt v. Empey. It is the assumption of Jacob and of the bench and bar of my acquaintance. If there is any exception, it is that of a separate tort of the husband incurred while a public officer as held in the Federal District Court decision in Great American Indemnity Co. of New York v. Garrison. It is believed that this case would not be followed by the Supreme Court of Idaho. This position is strengthened by inferences from the case of McMillan v. United States Fire Insurance Co. There community property, bought with the wife’s wages, was held available for the payment of a community contract debt of the husband. It was argued that this was within the exemption provided for by Section 11-204. The court rejected the argument because, as required by Section 11-204, once the wages are paid they are no longer “due and owing.” So community property, about which no exemption argument exists, is liable for the debt of the husband. Nothing is predicated on the fact that the particular kind of debt involved arose out of contract and it is believed therefore that the general community property is liable for all debts incurred by the husband whether arising out of contract, tort or other obligations imposed by law.

This is about as far as it is safe to go on propositions that may be taken for granted and others resulting from inferences and a fortiori reasoning. The result is set out in Table III.

56. See note 51 supra.
58. 75 F. Supp. 811 (E.D. Wash. 1948).
59. 48 Idaho 163, 280 Pac. 220 (1929).
<table>
<thead>
<tr>
<th>Incurred by H</th>
<th>Contract</th>
<th>Separate Property of H</th>
<th>Community Property within 11-284</th>
<th>Community Property outside 11-284</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antenuptial</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Debits</td>
<td>Tort</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Other Obligations imposed by law</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Incurred by W</td>
<td>Contract</td>
<td>Yes</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Tort</td>
<td>Yes</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other Obligations imposed by law</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Community</td>
<td>Contract</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Debits</td>
<td>Tort</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>Other Obligations imposed by law</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Postnuptial</td>
<td>Contract</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Debits</td>
<td>Tort</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other Obligations imposed by law</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Separate</td>
<td>Contract</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Debits</td>
<td>Tort</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>Other Obligations imposed by law</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Incurred by W</td>
<td>Contract</td>
<td>Yes</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Tort</td>
<td>Yes</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other Obligations imposed by law</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>
It will be noticed that there are some gaps. It is believed that, as the matter now stands, no one can safely fill in any of the gaps. There is neither statute, decision nor a safe inference on which to rely.

At this point it may be well to make the observation that altogether too much of the law of Idaho as revealed in Tables II and III comes from the cases and from mere inference.

A serious burden is placed on business dealings when the creditor is asked to deal under the threat of a law suit to make his position certain. Adequate and precise answers should be supplied by the statutes, and the time is ripe for a committee of lawyers, bankers and businessmen to study the inadequacies of the law and, after careful study, formulate a clearly expressed policy. The proposed policy should be given wide publicity and remain for some time a target for further study and criticism. After all questions have been threshed out, then a text should be presented to the legislature for enactment.

It is not the purpose of this paper to draft such a text. That is beyond the ken of any one man. Rather it is proposed to take up and discuss the principal gaps as revealed by Table III and make some observations that might be useful in any further study undertaken. When a gap appears, it has long been the habit of both lawyers in their briefs and the court in its decisions to follow "the weight of authority." He who can count the most cases in his favor or the most states has a pretty good chance of prevailing. It is even an exaggeration, in many suits, to say that the cases are counted. What is counted is the number of citations of cases in American Jurisprudence, Corpus Juris and Corpus Juris Secundum, for outside of three or four of the larger centers there is a lack of adequate library coverage of both law reports and statutes. When it is realized that the encyclopedias cite cases for about everything they say as well as what they hold and that cases will be cited from both common law and community property states, one begins to see on what a slender thread many a case in the trial courts must hang. If this is a true description of how cases are decided, it highlights the desirability of a legislative solution.

60. Professor Jacob deplored the "want of library resources" in Idaho in his article on The Law of Community Property in Idaho, 1 Idaho L.J. 1, 121 (1931).
The first gap is the question: is community property available to the creditor for the payment of antenuptial debts incurred by the wife? We already know from the statutes that the separate property of the husband is not available for their payment and that the separate property of the wife is available. What of the availability of community property?

No Idaho case answers this question. But the Supreme Court of Idaho has decided that the separate debts of the wife contracted after marriage cannot be satisfied out of community property. Section 32-911 renders the separate property of the wife liable for debts contracted both before and after marriage, and if this fund is the only one liable for debts contracted after marriage, by the same reasoning it must be the only fund liable for debts contracted before marriage since both are equally within the section. If Hall v. Johns is to be followed, we may then expect that the Supreme Court will decide that the community is not liable.

Is this a correct interpretation of Section 32-911? The inference that, because the wife's separate property is liable, the community is not liable does not necessarily follow. In reality there is a gap. The section says the separate property is liable and says nothing about the community one way or the other. An early California court faced with this question of a gap said it must be solved "by considerations arising from the rule of the common law" and since by the common law the husband is liable for the debts of the wife contracted dum sola, he is still to be liable. But community property comes from the Spanish law and when a gap appears, reference should first be made to it under the principle that when a legislature adopts a statute from another law it impliedly adopts that other law's interpretation along with the statute.

Looking at the Spanish law we find that neither spouse is liable for the antenuptial debts of the other, but all the property of each is liable for his or her own debts. Since the wife owns a one-half interest in the community, that half is to be liable for

---

62. Id. § 11-204 as applied in the cases set out in note 47 supra.
64. Van Maren v. Johnson, 15 Cal. 308 (1860).
65. At this time in California the husband was the owner of the community and the wife had a mere expectancy. The California statute said the husband's separate property was not liable and so the community was liable as the only property of the husband not expressly exempted.
her debts, but since her share cannot be determined until dis-
solution of the community, the community is not liable during
coverture.\textsuperscript{66} Thus the decision that the community is not, during
coverture, to be liable for the antenuptial debts of the wife
follows the Spanish law and is presumably what the legislature
meant to adopt when the community system was taken over.

Admitting the above interpretation, is this solution one
which we must accept as part of our law or should it be changed
by legislative action? The reason given for the non-liability of
the community for antenuptial debts is that the community
property system has considered the well being and interests of
the family of more importance than the rights of creditors.\textsuperscript{67}
But this looks like outlawing the creditor just because he is a
creditor. After all, ours is a credit economy and before we write
the creditor off let us consider his position. In favor of a con-
trary rule Judge Speer of Texas has said that unmarried persons
who were debt-ridden could escape into marriage knowing that
their future earnings and acquisitions thenceforth could not be
reached by their antenuptial creditors.\textsuperscript{68} This reasoning is par-
ticularly forceful in states like Idaho, Louisiana and Texas where
rents and profits of separate property fall into community. It is
less so in the other community property states where they re-
main separate. Consider the case of the modern young woman
earning a good salary as a lawyers' stenographer. She rents an
apartment and buys $1000 worth of electrical equipment on
credit. Her marriage marketability in Idaho will be high. All
unwittingly her trusting creditor has supplied her with a $1000
dowry. If, like most young women, she has no separate prop-
erty, he will have to wait for the dissolution of the community
before he can collect. In the meantime the couple has used the
equipment and worn it out. And during coverture the com-
munity is being enriched by her earnings.

Here is a proper place for the legislature to act. We should
neither worship history just because it is history nor look with
hostility upon the creditor just because he is a modern phenome-
non. Even in states where rents and profits of separate property
remain separate, the ancient rule might be considered inadequate
for the wife may have no separate property at the time of
marriage and the couple can thus sponge on the creditor to the

\begin{flushleft}
\textsuperscript{66} 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 165 (1943).
\textsuperscript{67} Id. § 158.
\textsuperscript{68} SPEER, LAW OF MARRITAL RIGHTS IN TEXAS § 385 (3d ed. 1929).
\end{flushleft}
extent of the rental value of the property sold. But the case for the creditor is stronger in Idaho, Louisiana and Texas where rents and profits of separate property fall into community. In those states two solutions might seriously be considered by the legislature. First, make the entire community property available for the payment of the debt on the principle that the community, having profited from both the use of the property and the work and labor of the wife, should shoulder the burden of paying the bill or second, the community should be reachable to the extent of one-half. The second solution involves difficulties of appraisal and accounting which might render it impractical. Whatever the solution adopted, certainly this is a situation for legislative action.

VI

Another gap, which poses a number of problems, is the question of what property is available for satisfaction of community debts incurred by the wife. We have already seen that Section 32-911 makes her liable "for her own debts contracted before or after marriage," that, as to capacity, she may contract in relation to her separate property, her personal services and for her own use and benefit. Such of these contracts as create community obligations have received scant attention from the court and rather haltingly has it allowed her separate property to be liable. The whole matter should be clarified by statute.

There seems to be little reason why the wife should not be given complete contractual capacity. She already has enough for most practical purposes, but the existence of any limitation at all leads to expensive litigation. There is no evidence that the power to contract without limitation, that a wave of legislation in the early part of this century carried to women in twenty-seven jurisdictions, has led to untoward results. If the wife must keep her promise when she goes surety for a member of her family or signs an appeal bond for a friend, it may teach her a wholesome lesson of responsibility. With complete contractual capacity her separate property would be available to satisfy both separate and community debts incurred by her, and she would take her place in the marital partnership as an equal of her husband.

69. The count of jurisdictions is that of Vernier in 3 American Family Laws 35 (1935). Probably since 1935 many other jurisdictions have joined the list.

70. She is not now liable. Craig v. Lane, 60 Idaho 178, 89 P.2d 1008 (1939); Beckstead v. Gee, 58 Idaho 758, 79 P.2d 293 (1938).
There is also no adequate reason why debts arising from tort and other obligations imposed by law should not bind her separate property. This is true under present law if we are willing to interpret the word "contracted" in Section 32-911 to mean "incurred" so that it will read "the separate property of the wife . . . is liable for her own debts incurred before and after marriage." Whatever may be thought of the above propositions as a matter of policy, they should be discussed by the bar and the public and clarified by positive legislative enactment.

A more difficult question concerns the availability of community property for the payment of community debts incurred by the wife. The wife has been given the management and control of "the earnings for her personal services and the rents and profits of her separate estate." Both of these fall into community in Idaho, and both of these are declared to be "exempt from execution against her husband." By argument e contrario does this mean that these two elements of community property are not exempt from execution against the wife? Probably. This is the least that could be expected. But the matter should not be left to guesswork. The statutes should expressly so state. The question may attain considerable practical importance. Suppose a woman with some fortune and excellent earning capacity marries a man with no fortune who from incompetency is unable to earn after marriage. If the wife retains her job and invests her fortune wisely, the two elements mentioned will constitute about all the community property available to creditors. It would seem clear then that the community within Section 11-204 should be available for the satisfaction of community debts incurred by the wife.

The problem of whether community outside of Section 11-204 (that is community property generally) should be liable for community debts incurred by the wife raises questions of fundamental policy about which opinion is sure to be divided. At present our law splits the community down the middle and puts one part (the rents and profits of the wife's separate estate and earnings for her personal services) under her management and control and all the rest under his. It gives her in addition a veto power in transactions relating to community realty and the

71. IDAHO CODE § 32-913 (1947).
72. Id. § 32-906.
73. Id. § 11-204.
mortgaging of exempt property by requiring her signature.\textsuperscript{74} The fact that her part is exempt from execution against her husband under Section 11-204 would, by symmetry of reasoning, lead us to conclude that his part (that outside Section 11-204) is exempt from execution against her. This is probably the law in Idaho, although no statute or case says so.

Whether it should be the law, that is, whether the legislature in attempting to enact what is an ideal policy should alter it, presents a very difficult question. It raises the fundamental issue of whether the present division of control resulting from Sections 11-204, 32-912 and 32-913 is wise. As the law stands each spouse controls what he or she can earn and the rents and profits of his or her separate property. Whether the common kitty, which we call community property, should be under joint control\textsuperscript{75} and the debts created by one spouse be payable out of the money earned by the other depends on how much pooling marriage entails. Does the union of two hearts require the union of two purses? That it does, in all the successful marriages, is a fact of everyday life. But it is precisely in the successful marriage where rules are not needed and will not be followed. The rules are made for the moments of stress and strain\textsuperscript{76} and must exist in order that the creditor too may not be sacrificed on the altar of marital discord. Perhaps a case may clarify the problem. An outsider views \( H \) and \( W \) as an ideal and united couple. He sells one of them a bill of goods. When the bill is not paid, a second look reveals \( H \) and \( W \), battling with fang and claw, for a divorce. In picking up the pieces, for the purpose of satisfying his claim, must the creditor be careful to attach only items of property earned by the spouse who purchased or may he attach anything that is community property without regard to which spouse earned it? It comes down to this: Is the creditor entitled to say to the wife who complains that the creditor is attaching some property she has bought with her earnings or her income: “When I sold the goods to your husband you were happily married and I supposed you would allow your earnings

\textsuperscript{74} Id. §§ 32-912, 45-1102.
\textsuperscript{75} It has been suggested that measures for joint control might take over some of the rules (but not all) of the commercial partnership. Daggett, Is Joint Control of Community Property Possible?, 10 Tulane L. Rev. 589 (1936).
\textsuperscript{76} Llewellyn, Behind the Law of Divorce, 32 Col. L. Rev. 1281, 1304 (1932), states Erlich’s view to the effect that “rules for courts regarding husband and wife should be built in terms not of marriage, but of separation and divorce.”
and income to be used to pay for the goods. All the good wives I know do that.” And, is the wife entitled to reply: “You ought to grow up. You know any marriage may go on the rocks and when you sell to my husband you had better look at his income and not at mine.” The first policy favors the sale of goods and discourages divorce; the second favors cautious extension of credit, jittery marriages and easier divorce. May a wise God give wisdom to his legislature to make a wise decision.