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point, one wonders if the plaintiff in West Virginia, or Missouri, or Texas will not carry home essentially the same amount of reimbursement.

*Dean M. Gandy.*

## THE WIFE AND HER PROPERTY AS SURETY

### THE WIFE AS A PERSONAL SURETY

UNDER the system of Spanish jurisprudence followed in Texas prior to the adoption of the English common law in 1840, the wife could make no contract without the assent of her husband, since it was believed any disposition of the wife's property would be injurious to the husband because he was entitled to the use and benefits of her property.<sup>1</sup> Since ultimate benefit to the husband was the basis for this restriction, he could ratify after the act done<sup>2</sup> or his assent was presumed after a great lapse of time in which he acquiesced in the wife's action in contracting without his assent.<sup>3</sup> The contract would be upheld by the court without the husband's joinder upon proof that the contract was really advantageous to the wife's estate.<sup>4</sup>

Under the common law of England the wife could make no contract since she was by fiction merged in her husband.<sup>5</sup> Although the common law domestic system has never existed in its entirety in this state, Texas having adopted the Spanish ganancial system of property rights of husband and wife, the wife is under the same disabilities of coverture in regard to contracting and conveyancing as existed at common law except in so far as they have been modi-

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<sup>1</sup> SCHMIDT'S CIVIL LAW, Art. 482, as cited in SPEER, LAW OF MARITAL RIGHTS IN TEXAS, 224 (1929).

<sup>2</sup> Harvey v. Hill, Admr., 7 Tex. 591 (1852).

<sup>3</sup> Poor and Others v. Boyce, 12 Tex. 440 (1854); Halbert, *et al.* v. Hendrix, *et al.*, 26 S. W. 911 (Tex. Civ. App. 1894), *writ of error refused*; Perker v. Spencer, 61 Tex. 155 (1884).

<sup>4</sup> Hollis v. Francois, 5 Tex. 195 (1849); Harvey v. Hill, Admr., 7 Tex. 591 (1852).

<sup>5</sup> Wadkins v. Watson, 86 Tex. 194, 245 S. W. 385 (1893).

fied by statute.<sup>6</sup> The act of 1840 adopting the common law, but securing to the wife her separate property, did not authorize her to make any contract, except for necessities; therefore, she is *prima facie* unable to contract in any other instance and the subsequent constitutional amendments and statutes, not the common law, must be looked to for her authority to make any other contract.<sup>7</sup>

As originally drafted the amendment of 1913, which had as its purpose a grant to the wife of seemingly unlimited powers of contracting irrespective of possible advantage, stated:

"The wife may make any contract which she would be authorized to make but for her marriage, except those herein or elsewhere forbidden, and her coverture shall never be a defense in any suit or action based on such contract . . ."<sup>8</sup>

This language was followed immediately by two provisions in the identical language of the present Article 4623:

"Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property shall be subject to payment of debts contracted by the wife, except those contracted for necessities furnished her or her children. 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 such contract."<sup>9</sup>

The bill was recalled by joint resolution before it was acted upon by the governor, since it was common knowledge a veto was forthcoming, and the bill as finally passed was, in a large measure, devitalized. The power conferred upon the wife by the principal clause was stricken and only the limiting clause remained on passage. Thus what had originally been a broad grant of power with one limiting clause was passed as only a limitation. The

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<sup>6</sup> *Bradshaw v. Mayfield*, 18 Tex. 21 (1856); *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923 (1918).

<sup>7</sup> *Kavanaugh v. Brown*, 1 Tex. 481 (1846); *Wadkins v. Watson*, 86 Tex. 194, 245 S. W. 385 (1893); *Kellett v. Trice*, 95 Tex. 160, 66 S. W. 51 (1902); *Lee v. Hall Music Co.*, 119 Tex. 547, 35 S. W. (2d) 685 (1931).

<sup>8</sup> Act of March 21, 1913, Laws 33rd Legis., p. 61.

<sup>9</sup> TEX. REV. CIV. STAT. (Vernon, 1948), Art. 4623.

legislature had full authority to change the law and it is not to be presumed that they did a vain thing.<sup>10</sup> Before the act was passed the wife had no power to contract as a surety, and the limitation of a non-existent power has, by implication, authorized her, when joined by her husband, to become joint maker of a note of another or a surety upon another's bond or obligation.<sup>11</sup>

Even where the wife has complied with the statutory provisions of Article 4626,<sup>12</sup> for removal of the disabilities of coverture, the courts will probably not allow her to become surety for another without the joinder of her husband, as a *feme sole*.<sup>13</sup> It is doubtful whether the court will uphold the wife's contract of suretyship made after insanity of her husband where he does not join, especially in view of the fact that a surety contract made by the wife after abandonment by her husband without his joinder was held voidable at her election.<sup>14</sup> The court said:

"This statute is as plain as the English language can make it, and under its provisions a married woman cannot, without her husband joining

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<sup>10</sup> Red River Nat. Bank v. Ferguson, 109 Tex. 287, 206 S. W. 923 (1918).

<sup>11</sup> Lee v. Hall Music Co., 119 Tex. 547, 35 S. W. (2d) 685 (1931); Guaranty State Bank of New Braunfels v. Kuehler, et al., 114 S. W. (2d) 622 (Tex. Civ. App. 1938) writ of error refused. In Red River Nat. Bank v. Ferguson, the court said the act by implication gave the wife power to become surety for another provided her husband joined in the contract and that the maxim, *expressio unius est exclusio alterius*, had marked application and such was the only power given her by this act. This result is supported in the recent case of Tolbert, et vir. v. Standard Accident Ins. Co., ..... Tex. ...., ..... S. W. (2d) ..... (1949) where the court said that the mention of "surety" excluded any other concept and where a wife had become indemnitor for another with the joinder of her husband held her not liable, saying it was a contract he was not authorized by law to make.

<sup>12</sup> TEX. REV. CIV. STAT. (Vernon 1948), Art. 4626.

<sup>13</sup> Red River Nat. Bank v. Ferguson, 192 S. W. 1088, 1090 (1917), affirmed in 109 Tex. 287, 206 S. W. 923 (1919) without mention of this particular point, stated that under proper rules of statutory construction the wife could not make a contract of suretyship even after complying with the statutory provisions of Article 4626, since this statute providing for removal of the disabilities of coverture had already been passed at the time Article 4623 was passed and, therefore, must have been in the contemplation of the legislature at the time of passage of the subsequent article. It seems, though, that the very purpose of Article 4626 is to allow the wife to contract as a *feme sole* in those instances therein provided and surely a *feme sole* can make a contract of suretyship; but the policy of the law to protect the wife probably justifies this construction placed on the two statutes.

<sup>14</sup> First Nat. Bank of Mt. Calm v. Roller, et al., 299 S. W. 917 (Tex. Civ. App. 1927) modified on other points in 14 S. W. (2d) 834 (1929).

her, bind herself by an indorsement or by a suretyship on an obligation."<sup>15</sup>

Judge Speer says:

"The wife may contract as a surety, undoubtedly, in those cases where she is authorized by statute to contract a liability—that is to say, where the debt is for a necessary, for the benefit of her separate property, or for a liability incident to her management, control and disposition of her separate property."<sup>16</sup>

Thus he seems to say that, where the wife could validly contract without the joinder of her husband, if such contract were one of suretyship it would also be valid without the husband's joinder. It is hard to imagine such a contract but if the wife should, for instance, contract with another for necessities and agree that only the husband would be liable therefor as a principal and that she should be liable only as a surety, then it is probable that the court would uphold such contract without the joinder of her husband. Opposed to the argument made by Speer is the strong language of the statute plus the fact that the court has recognized Article 4623 as "the conferring of an original power—one with which she was not theretofore invested."<sup>17</sup> Since the power of the wife to contract in those instances mentioned by Judge Speer was well established at the time the court decided the above case, it seems probable that they also require the joinder of the husband.

Even under the Spanish law a married woman could not be a surety for her husband<sup>18</sup> and unless the statute has altered the rule the situation is still the same.<sup>19</sup> The statute says: ". . . on the bond or obligation of another . . ." Since the reasons for the rule requiring the husband's joinder in the wife's contract of suretyship for another is to induce his counsel, afford the benefit of his judgment and give the wife protection from imposition, his joinder,

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<sup>15</sup> *Id.* at 919. Other authorities are also cited herein.

<sup>16</sup> 23 TEX. JUR. 211 (1932).

<sup>17</sup> Red River Nat. Bank v. Ferguson, 109 Tex. 287, 206 S. W. 923 (1918).

<sup>18</sup> Cartwright v. Hollis, 5 Tex. 152 (1849); Shelby v. Burtis, 18 Tex. 645 (1857).

<sup>19</sup> Harris, *et al.*, v. Prince, 132 Tex. 231, 121 S. W. (2d) 983 (1938).

to have any virtue and fulfill the spirit of the requirement, must be a disinterested concurrence, free from self interest.<sup>20</sup> Thus the husband cannot be the beneficiary of her contract, since if he were the reasons for his joinder would fail. In addition, if the husband were the beneficiary of the wife's contract of suretyship he would be both principal and surety on the same debt.<sup>21</sup>

Where the wife is authorized to become a surety she is entitled to all the rights of other sureties.<sup>22</sup> Thus where she pays her principal's debt she is entitled to the right of subrogation<sup>23</sup> and to plead her discharge whenever the holder has done anything that would have the effect to release a surety.<sup>24</sup>

### THE WIFE'S PROPERTY AS SURETY

The power of a married woman to secure an obligation of another by submitting her property to liability therefor is an entirely different matter from that considered above in regard to her power to contract as a personal surety for the obligation of another.

The power given the wife to convey her real property when joined by her husband under Article 1299,<sup>25</sup> includes, necessarily, the lesser power to mortgage it in the same manner.<sup>26</sup> Therefore, she may encumber her real estate for the benefit of another's obligation when such encumbrance is accomplished in compliance with the statutory provisions, including the joinder of her husband. Thus since her power of conveyance is unlimited, she may even encumber her real property for the obligation of her husband.<sup>27</sup> By such action she incurs no personal liability. Her property occupies

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<sup>20</sup> Red River Nat. Bank v. Ferguson, 109 Tex. 287, 206 S. W. 923 (1918); SPEER, *op. cit. supra*, note 1, at 247, where this point is discussed and authorities are cited.

<sup>21</sup> *Ibid.*

<sup>22</sup> Red River Nat. Bank v. Bray, 105 Tex. 312, 148 S. W. 291 (1912).

<sup>23</sup> Where the debt is that of the husband, and the wife pays with community funds the complicated question of manner and amount of repayment is brought up.

<sup>24</sup> Benson v. Phipps, 87 Tex. 578, 29 S. W. 1066 (1895).

<sup>25</sup> TEX. REV. CIV. STAT. (Vernon, 1948).

<sup>26</sup> Red River Nat. Bank v. Ferguson, 109 Tex. 287, 206 S. W. 923 (1918); Couger v. Costello, 10 S. W. (2d) 746 (Tex. Civ. App. 1928).

<sup>27</sup> Red River Nat. Bank v. Ferguson, *supra*, note 6, and cases cited therein.