Liability of the Husband for Contractual Obligations of His Wife - Louisiana Legislation and Jurisprudence

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COMMENTS

LIABILITY OF THE HUSBAND FOR CONTRACTUAL OBLIGATIONS OF HIS WIFE—LOUISIANA LEGISLATION AND JURISPRUDENCE*

Legislation

The Louisiana legislation nowhere states that the husband is responsible for his wife's contractual obligations simply because she is his wife. He, of course, may be obligated with his consent by his wife's act as his mandatary,¹ and without his consent by her act as his gestor.² In regard to this non-consensual responsibility, the fact that he owes his wife statutory duties³ indicates an area where the principles of negotiorum gestio⁴ may have particular application. He might oblige himself also by ratifying his wife's unauthorized acts in his behalf.⁵ Finally, the husband living under community regime is responsible for his wife's obligations as a public merchant if he has consented to her engagement in this activity,⁶ and this responsibility may well imply the existence under the community regime of a broader principle of consensual liability extending to acts other than her activities as a public merchant.⁷

As a result of their marriage, the husband owes his wife certain duties. Article 119 states that he owes her "support" and article 120 provides that he "is obliged . . . to furnish her with whatever is required for the convenience of life, in proportion to his means and condition."⁸ Because he owes his wife these duties,⁹ she may be able to bind him to third parties without

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¹ LA. CIV. CODE art. 1787.
² Id. arts. 2295-2300.
³ Id. arts. 119, 120.
⁴ Id. arts. 2295-2300. See note 10 infra and discussion hereafter in text.
⁵ LA. CIV. CODE art. 3021.
⁶ Id. art. 131.
⁷ See discussion in text at notes 21-24.
⁸ LA. CIV. CODE art. 119: "The husband and wife owe to each other mutually, fidelity, support, and assistance." Id. art. 120: "The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition."
⁹ In the case of a wife with considerable separate income, there are other provisions of the Code which should be considered in determining the extent of the husband's duty. See, e.g., LA. CIV. CODE art. 2389: "If all the property of the wife be paraphernal, and she have reserved to herself the
his consent if he fails to satisfy his obligations. In this case she binds him not because she is his wife but because she is his obligee. If, for example, the husband did not supply his wife with sufficient clothing, she might purchase these articles in her husband's name, and he would be bound according to the principles of *negotiorum gestio* embodied in articles 2295-2300 of the Code.10 Under the same factual situation, the wife might even conventionally subrogate a creditor supplying these goods to her rights against the husband. This subrogation would require an express statement that she was transferring her claim against the husband and would only be possible if the husband had not provided as he is required.11

The possibility that the community of acquets and gains accords the wife power to bind her husband should be considered. Examining the specific provisions of the community contract,12 it is seen that no provision accords the wife the power to bind her husband, and under this agreement the husband owes the wife no explicit duties13 which could result in liability to a third

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10. The institution of *negotiorum gestio* recognizes the power of a person to attend to the affairs of another if the intervention is appropriate at its initiation. The fulfillment of a statutory duty should clearly meet this requirement. See PLANIOL, CIVIL LAW TREATISE nos. 2273-2283 (La. St. L. Inst. Transl. 1959). LA. CIV. CODE art. 2299 is particularly applicable: "Equity obliges the owner, whose business has been well managed, to comply with the engagements contracted by the manager, in his name; to indemnify the manager in all the personal engagements he has contracted; and to reimburse him all useful and necessary expenses."

11. LA. Civ. Code art. 2131: "By payment is meant, not only the delivery of a sum of money, when such is the obligation of the contract, but the performance of that which the parties respectively undertook, whether it be to give or to do." Id. art. 2160: "The subrogation is conventional: 1. When the creditor, receiving his payment from a third person, subrogates him to his rights, actions, privileges, and mortgages against the debtor; this subrogation must be expressed and made at the same time as the payment . . . ."

12. Id. arts. 2399-2423.

13. It is implicit in the articles on the community that the husband will bear the expenses of the marriage as he has control of all community assets including those contributed by the wife, but in the case of the wife having no separate income the community contract does not alter or make more
person discharging them in the husband's name. In addition, acts of the wife in relation to the community assets cannot subject him to liability as article 2404\(^{14}\) makes clear that only acts of the husband are to affect these assets.\(^ {15}\) There is at least one instance, however, in which the husband's liability for his wife's act is dependent upon the existence of the community regime. Article 131\(^ {16}\) explicitly states that the wife acting as a public merchant binds "her husband" as well as herself "if there exists a community of property between them." It is important to note that as contemplated in the legislation, this liability of the husband is predicated upon his consent. It is true that article 131 does not mention consent as a requisite to the husband's responsibility, but at the time of the provision's enactment in the Code of 1870, the wife could not ordinarily contract without her husband's authorization.\(^ {17}\) It is also true that this article seemingly considers his authorization irrelevant as it expressly permits the wife acting as public merchant to obligate herself "without being empowered by her husband." Examination of article 1786,\(^ {18}\) however, reveals that the legislation does in fact regard the husband's responsibility as consensual. This latter provision deals expressly with the wife's capacity to contract and states that the "authorization of the husband to the commercial contracts of the wife is presumed by law, if he permits her to trade in her own name." (Emphasis added.) Though this provision assumes that the marital power exists in fact as well as law and that the hus-

specific the husband's duty of provision under article 120. To the extent that the wife has separate income the husband's duty may be somewhat diminished. See articles 119, 2389, 2395, and 2435 in note 9 supra.

14. LA. CIV. CODE. art. 2404: "The husband is the head and master of the partnership or community of gains; he administers its effect, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife. . . ."

15. It is conceivable, however, that a factual situation might arise in which the wife could act as her husband's gestor and bind him to a third party by her action in relation to community assets.

16. LA. CIV. CODE art. 131: "If the wife is a public merchant, she may, without being empowered by her husband, obligate herself in anything relating to her trade; and in such case, her husband is bound also, if there exists a community of property between them. "She is considered as a public merchant, if she carries on a separate trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband."

17. Id. arts. 121-135, 1786, 1791.

18. Id. art. 1786: "The incapacity of the wife is removed by the authorization of the husband, or, in cases provided by law, by that of the judge. The authorization of the husband to the commercial contracts of the wife is presumed by law, if he permits her to trade in her own name; to her contracts for necessaries for herself and family, where he does not himself provide them; and to all her other contracts, when he is himself a party to them."
band can actually prohibit his wife from engaging in a separate trade if he opposes this activity, it is nonetheless clear that the husband's consent to her engagement in the trade underlies both the presumption of her contractual capacity and the imposition of his responsibility. As article 131 pertains to a wife who is in fact acting as a public merchant, its statement that the husband's authorization is unnecessary to empower her is but an application of the legal presumption of the husband's consent as provided in article 1786. Thus, there is no inconsistency in these articles, and the significance of the husband's consent should be established.

Since the passage of the Married Women's Emancipation Acts, the wife no longer needs her husband's authorization to contract, and he no longer has a legal basis to prohibit her from engaging in a separate trade; however, the legislature's decisions to accord the wife contractual capacity and to abolish the marital power were not addressed to the issue of the husband's liability for his wife's commercial contracts and cannot reasonably be considered to have altered its consensual basis. Accordingly, in a situation where the wife carries on a trade against her husband's wishes, he should be able to communicate his position to her creditors and thereby avoid responsibility.

It is possible to view article 131 as embodying a broad principle of liability having application in cases other than the wife's commercial contracts. The article imposes liability only on the husband living under a community regime for it assumes that his wife's earnings in her separate trade are community assets over which he has control as head and master of the community, and an examination of article 2404 indicates that as to third

19. Id. art. 131 (emphasis added) states: "If the wife is a public merchant, . . ."
21. Although it is poorly drafted, a 1912 amendment to article 2334 can be read as making the wife's earnings her separate property. If the wife's earnings as a public merchant were her separate property, then article 131 should be regarded as implicitly repealed, for as to her earnings the spouses would in effect be living under a regime of separation of property. In Houghton v. Hall, 177 La. 237, 148 So. 37 (1933), however, the supreme court held that Act 170 of 1912 did not alter the classification of the wife's earnings as community assets, and it continues to adhere to this position. As the court so regards these assets, it is realistic to apply article 131 as it is written, and it is for this reason that the text states that the wife's obligations as a public merchant bind her husband as well. Additionally, the broader principle of consensual liability discussed hereafter in the text might still be recognized even if her salary were not regarded as a community asset.
22. See note 14, supra.
parties these assets may be considered the husband's alone. As the husband has such a direct interest in his wife's activities as a public merchant, the law imposes responsibility for her obligations, as they are in reality as much his as hers. Recalling once more that the legislation views the husband's responsibility for these commercial contracts as a consensual one, it is possible to view the principle of liability contained in article 131 as extending to all activities of the wife which involve affairs of the husband and are conducted with his consent.

It should be noted that liability in the situation just described might also be predicated on mandate. There is, however, one essential difference in these theories of liability. Mandate, as defined in article 2985, "is an act by which one person gives power to another to transact for him and in his name, one or several affairs." (Emphasis added.) The liability recognized by article 131, on the other hand, is not dependent upon an act in the name of the husband or principal. Thus article 131 could be viewed as a legislative recognition of the principle of undisclosed agency in all cases where the wife acts for her husband with his consent, and the husband could be held liable even in situations where the obligee was unaware of his existence at the confection of the contract.

If it is permissible to regard article 131 as a basis for liability in all cases where the husband consents to his wife's conduct of his affairs, the role of another provision in article 1786 should be examined. This pertinent part states that the husband's authorization is presumed by law "to her contracts for necessaries for herself and family, where he does not himself provide them." Although this provision seems in itself no more than authorization for the wife to bind herself (and not her husband) for purchases of these items, it might be argued that this legal presumption of authorization is equivalent to actual consent of the husband to his wife's act in a matter of his concern.

23. The only requirement is that she in fact be a public merchant. See note 16, supra.

24. See Restatement (Second) of Agency § 186 (1957). The Louisiana courts have recognized undisclosed agency although this principle is not a part of the law of mandate. See Sentell v. Richardson, 211 La. 288, 29 So.2d 852 (1947).

25. See note 18, supra.

26. Article 1786 is contained in the section of the Code entitled "Of the Parties To a Contract, And of Their Capacity to Contract.

27. As the husband owes support to his wife and children (La. Civ. Code arts. 119, 227) and has control over all community assets (Id. art. 2404), provision of these items should logically be regarded as a matter of his concern.
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that he is made liable through application of the broader principle of liability embodied in article 131. This argument is not completely convincing. In the case of the wife's commercial contracts, the article states that his authorization is presumed by law if he "permits" her to trade in her own name. In the case of her contracts for necessaries, however, authorization is presumed "where he does not himself provide" these items. Thus, equation of authorization with consent in this case does not seem a necessary conclusion. Furthermore, article 1786 now applies only to the married woman under eighteen as the Married Women's Emancipation Acts\(^2\) grant full contractual capacity to married women over this age.

Finally, it is possible that there has developed a body of customary law\(^2\) concerning the power of a wife to bind her husband. Custom is not identified, however, by conjecture. Accordingly, its discussion will be restricted to those areas where its existence is reflected in the jurisprudence.

**Jurisprudence**

**The Concept of Community Liability**

In determining the husband's liability for obligations incurred by his wife, the jurisprudence often presents the issue as one of community liability and holds the husband responsible as head and master if his wife's act is found to have obligated the community.\(^30\) This analysis might be regarded as implying the existence of a community entity, for the community could not truly have obligations unless it had juridical personality.\(^31\) Careful examination of the cases, however, reveals that the courts have never regarded the community as such an entity,\(^32\) and it


\(^29\) The legislation recognizes custom as a source of law. LA. Civ. Code art. 3: "Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent."

\(^30\) *See*, e.g., the language from Rouchon *v*. Rocamora, 84 So.2d 873, 874 (La. App. Orl. Cir. 1956): "She was no more or less than the agent of the community in contracting the indebtedness. Thus, the community of acquets and gains being the debtor, the husband as its head and master must be made the defendant."

\(^31\) As assets cannot bind themselves, it is obvious that personality is necessary to incur obligations. It is also significant to note that the section of the Code dealing with parties to a contract and of capacity to contract makes reference only to persons. *See* LA. Civ. Code art. 1782.

\(^32\) Although loose language might imply the existence of an entity (*see*, e.g., note 30 *supra*), there has never been a positive assertion that such personality exists, and the fact that the jurisprudence describes the husband
is clear from the legislation that such personality does not exist. Examination of the articles on the community shows no basis or need for a concept of community liability in determining the rights of third persons against either husband or wife. Article 2403 does state that "debts contracted during the marriage enter into the partnership or community of gains," and this statement as being individually liable for community obligations also indicates that the community is not regarded as such an entity. See Tanner v. Tanner, 229 La. 399, 86 So.2d 30 (1956).

Also, a United States Court of Appeals ruled from the Louisiana jurisprudence that the community was not a legal entity. See Henderson's Estate v. Commissioner, 155 F.2d 310 (5th Cir. 1946).

33. LA. Civ. Code art. 427 explicitly accords personality to corporations and certain articles in the title "Of Partnership" might be regarded as implicit recognition of personality. See id. arts. 2818-20, 2856. There is no provision specifically according personality to the community, and article 2807 largely discards any implication of personality from analogy to partnership: "The community of property, created by marriage is not a partnership; it is the effect of a contract governed by rules prescribed for that purpose in this Code." Furthermore, article 131 is convincing evidence that the community lacks personality. This article concerns the wife acting as a public merchant and states that her obligations bind "her husband" as well "if there exists a community of property between them." In a situation where liability for the wife's act depends entirely upon the existence of the community regime it seems that the community rather than the husband would be made liable if such community liability could exist.

The jurisprudence has, however, developed a theory of liability restricted to the wife's attorney's fees which makes available only community assets. By Act 178 of 1962, the legislature recognized this development when it amended article 155 to make the separation of goods and effects produced by a judgment of separation from bed and board retroactive to the date of filing suit. The article now states that "such retroactive effect shall be without prejudice (a) to the liability of the community for the attorneys' fees and costs. . . ." Language from Tanner v. Tanner, 229 La. 399, 409, 86 So.2d 80, 83 (1956) makes clear that these attorney's fees are the only liabilities so treated and thereby indicates that this amendment should not be regarded as a recognition of community personality:

"[W]hile the language used in the opinions has occasionally been rather loose in referring to the claim for her attorney's fees as a 'community obligation or debt,' generally speaking it carries the definite implication that, in the creation of the obligation, the intention was that such claim be acquitted only out of the assets of the community."

Article 1737 of the Code was amended in 1944 to state that the wife may act "as mandatary for her husband or for the community when authorized by her husband." Similarly, article 685 of the Code of Civil Procedure states that a wife may act as the agent of her husband, or of the marital community. . . ." Article 686 of the same code provides that the husband is the proper plaintiff to enforce such a right. Similarly, La. R.S. 9:103 (1950) states that wives can bind themselves "for the benefit of their husbands or of the community between them and their husbands." All of these provisions, however, simply conform to the language of the jurisprudence and should not be regarded as changing the nature of the community regime.

34. LA. Civ. Code art. 2408: "In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects."
might well be considered a definition of a community obligation. However, it is clear that this provision defines rights only between husband and wife. As article 2807\textsuperscript{35} states, "the community of property . . . is the effect of a contract," and contracts create rights only between the contracting parties.\textsuperscript{36} Furthermore, the articles on the community are found in the title captioned "Of The Marriage Contract, And Of the Respective Rights Of The Parties In Relation To Their Property."\textsuperscript{37} This title clearly emphasizes both the contractual nature of the community regime and the fact that it concerns only the relations of the spouses to each other. Thus, article 2403 and all other provisions of the community contract are relevant to third parties only as they accord the husband and wife rights in the community assets, and the courts have consistently ruled in accordance with article 2404\textsuperscript{38} that these assets are subject to the husband's exclusive control and are available to satisfy all of his obligations contracted during the marriage.\textsuperscript{39} As there is no community entity and the community assets are affected only by acts of the husband, it seems meaningless to describe obligations contracted by the wife as separate or community in determining whether the husband is liable for them. Instead, the relevant inquiry should be whether the wife has been accorded power to bind her husband by consent or other means.

Although many decisions speak of the wife's power to obligate the community and state that the husband's personal liability results from his position as head and master of the community, these decisions in fact determine the existence of this power by examining directly the relationship between husband and wife.\textsuperscript{40} The following quotation from Nationwide Acceptance Co. v. Griffin is illustrative:

\begin{quote}
35. See note 33, supra.
36. See La. Civ. Code art. 1901: "Agreements legally entered into have the effect of laws on those who have formed them . . . ."
38. See note 14, supra.
39. These assets were formerly considered as being available for satisfaction even of his antenuptial obligations. United States Fidelity & Guar. Co. v. Green, 252 La. 227, 210 So.2d 328 (1968), noted in 29 La. L. Rev. 409 (1969), held that these assets were unavailable to these creditors but said nothing to indicate that the community assets would not be available for satisfaction of all obligations of the husband contracted during the marriage.
40. See, e. g., Hagedorn Motors, Inc. v. Godwin, 170 So.2d 779 (La. App. 1st Cir. 1964); Neiman-Marcus Co. v. Viser, 140 So.2d 762 (La. App. 2d Cir. 1962); Goldring's, Inc. v. Seeling, 139 So.2d 538 (La. App. 4th Cir. 1962); Tricketts v. Viser, 137 So.2d 424 (La. App. 2d Cir. 1962).
\end{quote}
“The large quantity of food . . . cannot be construed as a purchase of necessities for which her husband, as head and master of the community, would be responsible, for the reason that the husband is not liable for necessary supplies furnished the wife, unless he fails or refuses to furnish them himself . . . .”

Thus, in this case the court determined the husband's situation as head and master by examining his personal duty of provision defined in article 120. Such an analysis seems unnecessary, for in every case a determination of his position as head and master is no more than a restatement of his personal liability which makes available for satisfaction both his separate and the community assets.

The conclusion that the doctrine of community liability is unnecessary to a determination of the husband's responsibility for his wife's contracts is further emphasized by an examination of the doctrine's development prior to the Married Women's Emancipation Acts. Its development was underlain by three legal principles: the availability of both the husband's separate and the community assets to satisfy his obligations, the general incapacity of the wife to contract in her own name without her husband's authorization, and the disability of the wife to obligate herself for or with her husband. The effects of these latter principles were that she could incur no obligation without her husband's consent to the act and that she could bind herself solidarily with her husband only if the obligation were for her benefit. In determining whether the situation was one which permitted solidarity, the courts developed the concept of commu-

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42. See note 8 supra.
43. See Poindexter v. Louisiana & Arkansas Ry., 170 La. 521, 128 So. 297 (1930); Succession of Lamm, 40 La. Ann. 312, 4 So. 53 (1888).
44. Id.
45. La. Civ. Code art. 122: “The wife, even when she is separate in estate from her husband can not alienate, grant, mortgage, acquire, either by gratuitous or incumbered title, unless her husband concurs in the act, or yields his consent in writing.”
46. Id. art. 1780: “The incapacity of the wife is removed by the authorization of the husband, or, in cases provided by law, by that of the judge.”

47. La. Civ. Code art. 2398: “The wife, whether separated in property by contract or by judgment, or not separated, can not bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage.”
nity liability. If the debt were one properly payable from com-
munity funds as between the spouses, the wife's disability made
ineffective her attempt to bind herself with the husband for the
obligation. If, on the other hand, it were found that the obliga-
tion was for the benefit of the wife's separate property, then both
she and her husband were responsible as her disability did not
prohibit him from binding himself for her benefit.

Prior to the Married Women's Emancipation Acts, the courts
also employed the concept of community liability in determining
the effect of obligations contracted in the name of the wife alone.
In *Kennedy v. Bossiere*, the court said:

"If it is a debt of her separate estate she is bound by the
terms of her contract. If it be not such debt, then the hus-
band, who is the head and master of the community, having
power to bind it has assented to the contract by authorizing
it to be made, and he is bound when sued upon the same
. . . ."47

In other words, if the obligation were one properly chargeable
to the community as between husband and wife, his authoriza-
tion to her contract was regarded as consent to be bound himself,
and as they were both regarded as being bound by the wife's
contract, her disability to be so obligated prevented the enforce-
ment of her obligation. Although the wife's disability may not
have demanded this conclusion, application of the community
liability concept did protect the wife from abuses of the marital
power in situations where the obligation should rightfully have
been the husband's.48

In summary, the concept of community liability resulted from
the wife's disability to be bound with her husband and from the
courts' desire to protect her from abuses of the marital power.
This concept was made possible by the wife's contractual inca-
pacity. Because the husband's authorization was necessary for
the wife to bind herself, his authorization was viewed also as
consent to his own responsibility if the obligation were properly
his as between the spouses. Thus, it is seen that the concept did
not provide an additional basis of liability for the wife's contracts
but was grounded instead upon his consent to his wife's act. To-
day, as the wife has full contractual capacity without her hus-

48. *Kennedy v. Bossiere*, id., indicates that fears of such abuse were very
much a concern of the courts.
band's consent and is relieved of the disability to be obligated with her husband, the concept of community liability has no utility in analyzing the wife's power to bind her husband. On the contrary, its application assumes the existence of the husband's consent to his wife's act, and the existence of this consent would itself be a basis for his liability.

Although retention of community liability terminology has resulted in some confusion, the courts have recognized the inapplicability of the original concept and generally determine the husband's liability by examining directly his legal relationship with his wife. The situations in which he is held responsible for his wife's contracts are very limited. There is of course recognition that the wife may be authorized as her husband's mandatary and he is also held responsible for her contracts as a public merchant. These situations present little conceptual difficulty and generally involve no more than factual determinations. The courts also recognize the husband's liability in two additional instances in which the determinations are not so easily made. He is held responsible for his wife's purchases of "necess-

49. This assumes that she is over eighteen and not interdicted. See La. R.S. 9:101-105 (1950).
50. See, e.g., Dauterive v. Sternfels, 164 So. 349 (La. App. 1st Cir. 1935). Prior to the holding in Tanner v. Tanner, 229 La. 399, 86 So.2d 80 (1956) that the community was dissolved on the date of judgment, the supreme court had on several occasions held that a successful suit for separation of bed and board dissolved the community retroactively to the date of filing. In Dauterive, the court indicated that the retroactive effect of the suit would preclude community liability for the wife's medical expenses and thereby exempt the husband (who is obligated as head and master of the community) from personal liability. This analysis ignored the very basis upon which the courts have relied in holding the husband responsible for his wife's support. Article 120 prescribes the obligation of husband to wife without regard to their matrimonial regime, and the couple separated from bed and board are nonetheless married. Since its amendment in 1962, article 155 (see note 33 supra) specifically provides that the community is dissolved retroactively to the date of filing. Thus the Dauterive logic is available once again. It should be remembered, however, that it is only the community and not the husband's personal liability which the successful suit dissolves.
51. See note 40 supra.
52. See, e.g., Neiman-Marcus Co. v. Viser, 140 So.2d 762 (La. App. 2d Cir. 1962); Goldring's, Inc. v. Seeling, 139 So.2d 538 (La. App. 4th Cir. 1962).
53. There is one court of appeal decision, King v. Dearman, 105 So.2d 293 (La. App. 1st Cir. 1958), which held the husband of a public merchant liable to the wife's lessor even though the lessor had been informed from the beginning that the husband would not be responsible for the wife's debts. This holding is of course contrary to article 1786. However, the court seemed influenced by evidence that the husband had on occasion assisted his wife in her business. The Orleans Circuit Court stated in Charles Lob's Sons v. Karnofsky, 144 So. 164 (La. App. Orl. Cir. 1952), that the husband must "permit" his wife to trade in her own name before he is liable with her. The supreme court has not discussed this requirement since the enactment of the Married Women's Emancipation Acts.
saries" even without his consent, and in certain situations he is found to have ratified his wife's purchases of "non-necessaries" when he had not initially consented to these acquisitions.5

**The Husband's Liability for Necessaries**

The courts have not attempted to enumerate the "necessaries" for which the wife can bind her husband, but have stated that these items vary depending upon the husband's means and condition.5 Nor has the basis of this liability been precisely articulated. Several opinions of the courts of appeal found basis in article 1786's statement that "authorization of the husband is presumed by law . . . to her contracts for necessaries for herself and family when he does not himself provide them."5

Analyzing this provision the Orleans Court of Appeal said:

"While the law permits the wife to purchase necessaries when they are not provided by the husband, it does so on the theory that she is the agent of the husband for that purpose. . . . This authority, however, to act as the agent of the husband, is a conditional authority, and only avails in those instances where the husband himself has failed to make provision or to offer to make provision."5

This statement is representative of the explanations offered in all cases employing this article. It is this writer's opinion, however, that this article does not constitute the wife as her husband's agent but as previously suggested only serves to authorize the contractually incapacitated wife to bind herself for these items. In any event the supreme court bases the husband's liability for necessaries on article 120 which requires him to provide for his wife's convenience "in proportion to his means and condition."5

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55. See, e.g., Lamonica v. Royal Furn. Co., 197 So.2d 147 (La. App. 1st Cir. 1967); Barnes Furn. Store v. Young, 111 So.2d 519 (La. App. 1st Cir. 1959); Montgomery v. Gremillion, 69 So.2d 618 (La. App. 2d Cir. 1955).

56. E.g., D. H. Holmes Co. v. Huth, 49 So.2d 874 (La. App. Orl. Cir. 1951). This position is consistent with the duty described in LA. CIV. CODE art. 120: "[The husband is obliged . . . to furnish her with whatever is required for the convenience of life, in proportion to his means and condition."

57. See note 18 supra.


59. See text accompanying note 25, supra.

60. LA. CIV. CODE art. 120: "[The husband is obliged . . . to furnish her with whatever is required for the convenience of life, in proportion to his means and condition."
After reference to this article, the supreme court in *Schaeffer v. Trascher* said:

"[I]t follows that a husband is liable for necessaries supplied to his wife when he himself fails or refuses to supply them. . . . But the reverse of this is equally true, to wit, that the husband is not liable for supplies furnished when he himself is ready and willing to supply them."\(^6\)

The court did not, however, explain exactly the theory by which the husband’s failure of provision was translated into liability for his wife’s purchases of the necessary items.\(^6\) Several situations have been presented to the courts of appeal in which the theory was crucial. In *Keller Zander, Inc. v. Copeland*,\(^6\) the husband had informed the plaintiff’s credit manager that he would not be responsible for any purchases other than his own. His wife subsequently purchased wearing apparel, and it was charged to her account which had existed even before her marriage. Plaintiff alleged that the goods were necessaries and that the husband was therefore responsible. Although the court concluded that there had been no showing that the husband had failed to provide for his wife, it indicated that this showing would not in itself create liability.\(^6\) The court stated:

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\(^{62}\) The principles of *negotiorum gestio* provide the conceptual basis for translating the husband’s failure of provision into responsibility to the supplying creditor. Under article 2299 the wife or anyone else aware of the husband’s noncompliance might act as his gestor and purchase the items in the husband’s name. In so doing the gestor would effect a contract between the husband and the creditor thereby obligating the husband for the purchase price. Also in accordance with article 2299, a merchant knowing of the husband’s failure might himself act as gestor and supply the goods. The merchant in this situation would be entitled to indemnity under this article. *La. Civ. Code* art. 2299: "Equity obliges the owner, whose business has been well managed, to indemnify the manager in all the personal engagements he has contracted; and to reimburse him all useful and necessary expenses."


\(^{63}\) 196 So. 527 (La. App. Orl. Cir. 1940).

\(^{64}\) Assuming that a husband had informed a creditor that he would not be responsible for his wife’s purchases and that the creditor nevertheless supplied the wife with “necessary” items which the husband had failed to provide, the creditor should be able to recover the price of these items from the husband at least if the creditor had intended that the husband be bound at the time of the transaction. The Louisiana courts have never considered this situation but it seems almost certain that they would find liability in this case. The basis of liability in *Schaeffer v. Trascher*, 165 La. 315, 115 So. 575 (1938), and all other decisions discussing the issue has been the husband’s failure of provision, and in a situation where the creditor clearly intends to obligate the husband there is nothing in the jurisprudence which indicates that the courts would give effect to the husband’s denial of responsibility.
"[A]t the time the wife contracts the obligation, the creditor must have grounds to believe (1) that the purchase is for necessaries and (2) that the husband has failed or refused to provide the wife with the needs of life."\(^{65}\)

Application of the principles of *negotiorum gestio*\(^{66}\) indicates that the court's position is partially unsound. The wife's power to act as her husband's *gestor* arises because he has failed to make provision for her, not because of any belief of the creditor.\(^{67}\) Thus, the court seems incorrect in requiring that the supplying creditor be aware that the husband has failed to satisfy his obligation. However, a *gestor* binds the principal to a third party by effecting a contract between the two, and thus the requirement that the merchant extend the credit to the husband is technically valid.\(^{68}\) Actually, the requirements enumerated by the court describe the showing which would be necessary if the creditor alleged that he had himself acted as the husband's *gestor*.\(^{69}\) It is, however, to the creditor's advantage to contend that the wife acted as the husband's *gestor* because a showing that he intended to bind the husband is much less onerous than the requirements specified by the court in this case. The theory of the Copeland case was clarified in *Mathews Furniture Co., v. La Bella*.\(^{70}\) In this case the wife had purchased items of furniture totaling $168.75 during a period when the spouses were intermittently living separate and apart. The court stated that to bind the husband the creditor furnishing the articles must have done so "under the belief that he was furnishing them on the credit of the husband."\(^{71}\) However, the courts have on other occasions held that the wife has bound her husband even though the pur-


66. See note 10 supra.

67. If the husband be bound in this case it is because his wife has created a contract between him and the creditor. All that is required of the creditor is that he agree to supply the merchandise to the husband. The validity of the contract depends only on the appropriateness of the wife's intervention. See 2 Planiol, Civil Law Treatise no. 2279 (La. St. L. Inst. transl. 1959).

68. Id.

69. He would have to justify his intervention. If he can do so, he is entitled to indemnification under article 2299.

70. 44 So.2d 160 (La. App. Orl. Cir. 1950).

71. Id. at 162. A strict application of the principles of *negotiorum gestio* would require that the act be in the name of the principal if he is to be bound directly to the third person. La. Civ. Code art. 2299 states that he is "to comply with the engagements contracted by the manager, in his name."
chases were not made in the husband’s name, and in situations where the wife’s power to act for the husband is clear, it seems reasonable to presume that she has done so. Such a finding would also be consistent with the courts’ recognition of undisclosed agency and with the principle of liability contained in article 131. However, in cases where the existence of the wife’s power is questionable, it seems inaccurate to presume that she has acted for her husband when this intention is not clear. Furthermore, in the latter situation the courts’ adherence to the requirement that the credit be extended to the husband is administratively sound. Liability based on article 120 requires a determination not only of what is required for the wife’s convenience in accordance with her husband’s means and condition but also a conclusion that this duty was not fulfilled. "While these questions are easily answered in the case of everyday expenses, the upper limit of the husband’s duty is certainly difficult to define and it seems proper to avoid these determinations unless the wife has clearly acted for her husband. Assuming, however, that a creditor could prove that a wife’s purchase was one which her husband’s duty required him to provide, the creditor might have a cause of action against the husband despite his inability to recover under the Mathews requirement that the credit have been extended to the husband. If the husband can be regarded as owing his wife an obligation, then the creditor ought to be able to bring an oblique action against the husband exercising the wife’s rights against him. The husband might well be regarded as owing his wife an obligation in the situation described. First, his failure to fulfill his duty to his wife might in itself be basis to regard him as her debtor, and, second, his wife’s purchase in her own name might be viewed as an act as gestor in satisfaction of


73. See Sentell v. Richardson, 211 La. 288, 29 So.2d 852 (1947).

74. See text accompanying notes 21-24 supra.

75. This would be required by the courts’ analysis and by application of the principles of negotiorum gestio to the duty of La. Civ. Cod art. 120.


77. The Digest of 1808 contained a specific provision authorizing this action. Bk. III, tit. III, art. 66. It was not included in the Code of 1825. However, the Projet of the Code of 1825 regarded the existence of this action so fundamental as to make its inclusion unnecessary. See 1 LA. LEGAL ARCHIVES 263 (Louisiana 1937). The courts have continued to recognize the availability of the oblique action to the creditor. See, e.g., Goudeau v. Roach, 173 La. 61, 136 So. 88 (1931).
her husband's obligation. If this were found to be the case, then the husband would be obligated to reimburse his wife for her expense. Although it seems doubtful that a court would deny the creditor direct recovery against the husband if his failure of provision were clearly provable, the suggested analysis might be invoked if the courts apply the Mathews rule rigidly.

As there is undoubtedly some belief that the wife has the power to bind her husband in certain instances, it might be possible to recognize a customary mandate which would make unnecessary a showing that the husband had not provided these items if they were within the mandate. In Overton v. Nordyke, the Orleans circuit court discussed the husband's liability for his wife's medical expenses and indicated that such a mandate might exist:

"[This] liability results from an implied agency in the wife to contract for and on behalf of the husband, and, . . . so far as the general public is concerned, she has this implied authority unless . . . the husband . . . can show that he himself did furnish . . . necessaries. . . ."

Although the court indicated that the husband's provision of medical services would revoke the described mandate, it nevertheless held that "the doctor who rendered the service was justified in assuming that she was still her husband's agent for the purpose of contracting such for service" despite the fact that the husband had made arrangement for medical care in another town. Upon the facts, the decision appears correct. However, if it were unnecessary for the creditor to prove the husband's failure of provision in all cases, there would certainly be abuses to the husband. For example, a single dress of moderate cost would almost certainly be considered a necessary under the jurisprudence. However, if the customary mandate were recognized, a wife in a large city could purchase similar items at numerous stores and the husband would be bound to all of these merchants simply because his wife had pledged his credit. Furthermore, a judicial recognition of this customary mandate would

78. This is clearly provided in La. Civ. Code art. 2299. See note 10 supra.
79. See note 29 supra.
81. Id.
82. It would be difficult to argue that the husband had provided medical services as his wife's health made medical care in another city unadvisable.
require a definition of its extent, and thus the courts would still be faced with the determination of the husband's duty of provision. Also the necessaries theory is only required when the husband's liability cannot be predicated on consent, and in the case of merchants who have previously dealt with the spouses, liability beyond what is commonly regarded as "necessaries" can generally be established through mandate. This language from Goldring's, Inc. v. Seeling is illustrative:

"In view of the admission by the husband . . . that he paid former bills for purchases made by his wife, . . . the . . . issue which is determinative of the case, is whether or not the husband notified Plaintiff that he would no longer be responsible for her purchases. . . ."\textsuperscript{84}

Thus, it is seen that the regular merchants of the wife will generally be protected by the husband's consensual responsibility and need not resort to the more rigorous requirements of the necessaries theory. If then a new creditor sells a wife an item of substantial value without first acquiring the husband's consent, it does not seem unreasonable to require the creditor to prove the necessary nature of the item and the husband's failure of provision.

\textit{Ratification of Non-Necessary Purchases}

At some point in the classification, the courts conclude from the nature and expense of the wife's purchase that it is a "non-necessary" for which the husband should not be bound. Although the courts hold that such a purchase does not itself bind the husband, he is often found to have ratified the purchase. This doctrine is expressed in the following language from Montgomery v. Gremillion:

"It is well settled in Louisiana that the husband is liable for the purchases by his wife when such are not necessaries if the husband knew of the purchases and did nothing at the time to repudiate the debt and permitted the articles so purchased to be used for the benefit of the community. His responsibility arises from his silence and inaction which are circumstances showing consent and ratification."\textsuperscript{85}

\textsuperscript{84} 139 So.2d 538, 540 (La. App. 4th Cir. 1962).
\textsuperscript{85} 69 So.2d 618, 619 (La. App. 2d Cir. 1953).
Before a person is said to have ratified an obligation, it would seem necessary that it have been contracted in that person's behalf.\(^1\) The courts must then presume that the wife acts for her husband in all contracts which it finds that he has ratified, and it is apparent from the jurisprudence that nearly all of her purchases are ratifiable.\(^2\) Thus, the courts have placed the burden on the husband to voice his disapproval if he is to avoid liability for her substantial purchases. The existence of the community regime is probably the factor most responsible for this development. Because her salary is regarded as a community asset,\(^3\) the wife has, in the absence of separate income or property, no funds from which the creditor can have execution,\(^4\) and it is thus understandable that the courts are reluctant to allow a husband to benefit from her purchase without incurring liability thereby.

This practice can, however, work hardship on the husband. He cannot legally forbid his wife to make a purchase, and though her salary is legally a community asset, it is undoubtedly true that many wives determine to some extent how their salaries are spent. Thus, the wife might make a purchase which the husband opposes and yet he would be found liable for the obligation if for some reason it went unpaid.\(^5\) The husband can under the ratification theory timely communicate his objection to the creditor and thus avoid responsibility. If the husband understands that he ratifies his wife's contracts by his inaction, then this practice can at most cause the husband the inconvenience of communicating his refusal to the creditor if he disapproves. If, however, the husband does not understand the practice he may find himself liable when he had in no way anticipated this liability.

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\(^1\) If she were not acting for her husband, then there would be no basis for his liability. In order for a person to be liable under contract he must have been a party to the agreement. See *La. Civ. Code* art. 1901.

\(^2\) Mathews Furn. Co. v. La Bella, 44 So.2d 160 (La. App. Orl. Cir. 1950), states that a husband can ratify a purchase even though the creditor did not originally view the wife's act as obligating her husband.

\(^3\) See Houghton v. Hall, 177 La. 237, 148 So. 37 (1933), and the discussion in note 21 supra.

\(^4\) The community assets are not available to satisfy an obligation of the wife. *La. Civ. Code* art. 2404. This fact may encourage the courts to find ratification in situations where the wife is employed. See Lamonica v. Royal Furn. Co., 197 So.2d 147 (La. App. 1st Cir. 1967).

\(^5\) Ratification would have occurred through his silence. See quotation from Montgomery v. Gremillion in text at note 85, supra.
Wife's Liability for Acts in Her Own Name

In cases where it is determined that the wife has bound her husband by an act in her name, the question of her liability remains. In situations where the wife escapes liability, it is often said that she is not liable for a community debt.91 This explanation was legally sound prior to the enactment of the Married Women's Emancipation Acts,92 but today the wife can certainly bind herself with her husband. However, if the third party understood that the wife though acting in her name actually intended to obligate only her husband, then she was in reality only an agent of the husband and should incur no personal liability.93 In fact, during the years immediately succeeding the enactment of these provisions, it is highly probable that neither wife nor creditor considered that the wife's signature obligated her.

In the case of open accounts, there are recent opinions which hold that this is still the understanding. In Smith v. Viser,94 in an action against a wife, a petition setting forth the purchase of merchandise and praying for reservation of plaintiff's rights against the husband was held to allege the existence of a community obligation and the court sustained the wife's exception of no right of action. In the case of promissory notes, however, the supreme court recognized the wife's personal liability for her signature as early as 1931.95 Even with promissory notes, the tendency to regard a husband's debt as the "community's" rather than his own causes confusion. In Midland Discount Co. v. Robichaux96 husband and wife had bound themselves solidarily and the husband was subsequently adjudicated a bankrupt. Plaintiff alleged that defendants had misrepresented their indebtedness in obtaining the loan and that this deception should preclude the assertion of bankruptcy as a defense. Plaintiff did not, however,

93. "Where a mandatary has communicated his authority to a third person with whom he contracts, or where such third person has knowledge of the capacity in which the mandatary acts, the latter cannot be held personally liable to such third person, unless the mandatary has entered into a personal guarantee." Wilson Sporting Goods Co. v. Alwes, 21 So.2d 102, 103 (La. App. 1st Cir. 1945). This position is also supported by earlier jurisprudence. See, e.g., Barry v. Pike, 21 La. Ann. 221 (1859).
94. 117 So.2d 673 (La. App. 2d Cir. 1960).
96. 184 So.2d 93 (La. App. 4th Cir. 1966).
assert the personal liability of the wife, and she escaped judgment. Subsequent cases, however, clearly recognize the wife's liability in such a situation.

**Conclusion**

It is clear that the married woman has no power either by the fact of her marriage or through the community regime to bind her husband without his consent. Articles 131 and 1786 indicate that the existence of this consent, at least as to the husband living under the community regime, results in his liability for the obligations even if the creditor has no knowledge that the wife has acted for her husband. Thus, these articles can be viewed as a limited recognition of the principle of undisclosed agency. In this regard, it is significant that the Louisiana courts have recognized undisclosed agency not only as a principle which applies when a wife acts for her husband but also as a part of the general law of agency.

The principles of *negotiorum gestio* provide a basis by which a person may under certain circumstances obligate another without his consent. Thus, the wife like any other person might obligate her husband without his consent if her intervention in his affairs were found to have been proper. The existence of the husband's statutory duties provides an area where the principles of *negotiorum gestio* have particular application in determining the husband's responsibility for obligations incurred by the wife. Should the husband fail to provide for his wife in accordance with his duties, then the wife under these principles should be able to obligate him to a supplying creditor by contracting in his name or obligate him to indemnify her if she has instead obligated herself for the purchase. Though the courts have not expressly referred to the principles of *negotiorum gestio* in analyzing the wife's power to obligate her husband, their analysis in those cases involving the husband's liability for necessaries is certainly consistent with these principles. It should be noted, however, that the husband's duty of provision under article 120 is not restricted to those items which are regarded as necessaries. The courts have recognized this fact and have ruled in accordance with the article that the extent of the duty depends upon the husband's means and condition. Nevertheless, it is clear

97. *See, e.g.*, Commercial Credit Plan, Inc. v. Perry, 186 So.2d 900 (La. App. 1st Cir. 1966).
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that the courts are hesitant to enlarge the class of purchases for which the husband can be obligated without his consent.

The courts also employ a ratification theory in examining the responsibility of the husband who has not expressly consented to his wife's purchases. These cases have generally involved purchases of substantial or non-necessary items. In applying this theory, the courts reason that the husband ratifies by his silence or inaction his wife's purchases of items which benefit both spouses or, in the language of the courts, the community. There is apparently no requirement that the creditor have intended to obligate the husband, and the husband can thus ratify even a purchase made in the name of his wife. Though the practice seems proper in a situation where the wife actually intended to obligate her husband and he was aware of this fact, the ratification theory may work hardship in a situation where the wife has not intended to obligate her husband and the husband has regarded the obligation as being the wife's alone.

Finally, it is clear that the courts' use of terminology referring to community liability does not enhance an understanding of the basis of the husband's responsibility in those situations where he may be obligated without his consent. The concept of community liability developed during a period when the wife lacked contractual capacity, and the husband's responsibility was grounded upon his consent as evidenced by his authorization of his wife's act. Thus, today, as the wife has contractual capacity and the courts rightly determine the husband's non-consensual responsibility by examining directly the factors which give rise to his liability, it seems undesirable that this analysis be obscured with the language of a now unworkable concept.

George L. Bilbe

ELECTION LAW—THE SECRECY OF THE ABSENTEE BALLOT

The free and fair election is at the core of any democracy, and in the United States the secret ballot is a guiding principle in popular elections. The interest of the general public and the individual voter in preserving the secrecy of the ballot is great. The public interest is inherently contrary to vote buying and other election fraud. Although many of the problems involved in keeping the secrecy of a ballot intact were cured with the ad-