

IMPLIED AGENCY OF THE WIFE FOR NECESSARIES.

The principles of agency law gives rise to sufficient difficulties because it is only recently that these principles have been treated as a distinct department of the law. When, in addition, the situation is complicated by the various presumptions and technicalities which are associated with the relation of husband and wife, the results obtained, at times seem to baffle any attempt at logical or systematic statement of either branch of the law. A critical analysis of the two Ontario cases of *Robert Simpson Co. Ltd. v. Ruggles*¹ and *Beatty Bros. Ltd. v. Murphy*² may indicate some of the difficulties that still await a solution.

In the former, a wife living with her husband, applied for a credit account with the plaintiff department store. Her application for credit was made in writing and signed by her, she giving references to her banks and mentioning certain properties which she owned. The account having been opened, a rather startling quantity of dresses, gowns, hose, shoes, etc., amounting in value to about \$1,000, was purchased by the wife during a period of three months, and on her failure to pay, an action was commenced against her and her husband.

Liability was sought to be imposed on the husband, on the ground of an implied authority in the wife to pledge his credit for necessities.³ At the trial, judgment was given against the husband, the trial judge apparently being impressed by the fact that the husband, "conducting himself in the manner of a wealthy man no doubt . . . expected his wife to conduct herself in the manner of a wealthy man's wife."⁴ It cannot be doubted in view of the decisions that this is relevant to the question of what are necessities.⁵ When, however, Riddell, J.A., speaks of the duty impressed on the

¹ (1930), 65 O.L.R. 186.

² (1930), 65 O.L.R. 293.

³ "A married woman living with her husband has implied authority to pledge his credit for necessities suitable to his degree and station in life."—Lamont, J.A., in *Gebbie v. Kershaw*, [1927] 3 D.L.R. 156 at 157.

"Articles of dress are 'necessaries' for the wife which come within the authority usually entrusted to her by the husband."—Lush, Husband and Wife, 3rd ed., p. 398 and cases there cited.

⁴ McEvoy, J., in 65 O.L.R., at 188.

⁵ See for example *Seymour v. Kingscote* (1922), 38 T.L.R. 586, in which a husband living in fashionable style was held liable for his wife's dressmaker's accounts to the extent of £324, this being the remainder of a total bill of £434, the wife herself having paid off £100.

husband to support his wife, that is, to supply her with "what is strictly necessary for her support,"⁶ it is submitted there is a certain confusion as to what is meant by "agency of necessity," as well as what is included in the term necessities.⁷ As pointed out in *Lush on Husband and Wife*,⁸ "the word 'necessaries' itself is not free from ambiguity. For it bears different meanings according as the parties are living together in the usual way; or living together while the wife is deprived of the bare means of subsistence; or living apart." To speak of a wife as capable of binding her husband for the necessities here first mentioned, (i.e. when the parties are living together in the usual way), all that is meant is that a wife is presumed to have in fact, her husband's authority to pledge his credit; such presumption being based "on the supposition that wives cohabiting with their husbands ordinarily have authority to manage in their own way certain departments of the household."⁹ This presumption, being one of a "delegated" as opposed to an "inherent" power¹⁰ to bind the husband, can be rebutted in any of the ways indicated by *McCardie, J.*, in *Miss Gray, Ltd. v. Earl of Cathcart*,¹¹ just as in the case of any ordinary agency relationship. While it is true that "the husband is entitled to fix arbitrarily . . . the standard of expenditure,"¹² in the absence of such definite fixation it would appear that "the wife is presumed to have her husband's authority to pledge his credit for necessities suitable to *their* style of living":¹³ and this, even though the wife herself be possessed of substantial private means.¹⁴ While a wife having such presumptive authority is often spoken of as an "agent of necessity," this must not be confused with

⁶ 65 O.L.R. at 193.

⁷ The same judge, at p. 194, suggests that the amount of apparel bought in this case could not possibly be considered as necessary for any woman living with her husband. But compare *Seymour v. Kingscote* (*supra*, note (5)).

⁸ 3rd ed. p. 397.

⁹ *Thesiger, L.J.*, in *Debenham v. Mellon*, 5 Q.B.D. 401, affirmed in 6 App. Cas. 24.

¹⁰ *Eastland v. Burchell*, 3 Q.B.D. 432, at 435; *Gebbie v. Kershaw*, [1927] 3 D.L.R. 156; *Miss Gray, Ltd. v. Cathcart* (1922), 38 T.L.R. 162.

¹¹ (1922), 38 T.L.R. at 565; "The husband could negative liability by proving:—(1) that he expressly warned the tradesmen not to supply goods on credit; (2) that the wife was already supplied with a sufficiency of the articles in question; (3) that the wife was supplied with a sufficient allowance or sufficient means for the purpose of buying the articles without pledging the husband's credit; (4) that the husband expressly forbade his wife to pledge his credit; (5) that the order though for necessities was excessive in 'point of extent' or (having regard to the smallness of the husband's income) extravagant."

¹² *Leake on Contract*, 6th ed. 418; *Bazely v. Forder*, L.R. 3 Q.B. 562; *Miss Gray, Ltd. v. Cathcart* (*supra*).

¹³ *Halsbury's Laws of England*, Vol. 16, p. 420, quoted with approval in *Miss Gray, Ltd. v. Cathcart* (*supra*).

¹⁴ *Seymour v. Kingscote* (*supra*).

what has sometimes been referred to as a "special agency of necessity";¹⁵ and the class of "necessaries" included in each should be carefully distinguished. For example, it has been said that a husband can always withdraw or rebut any presumption of authority in a wife, up to the point of actual necessities, that is, the bare necessities of life such as food, drink, sufficient clothing for protection from the cold and the like.¹⁶ To this extent the power of the wife to pledge her husband's credit is "inherent" and not "delegated" just as in the more usual case of a wife living apart from her husband under circumstances justifying her in leaving him.¹⁷ The narrow view of necessities expressed by both Riddell, J.A., and Fisher, J.A., might lead one to believe that it was with regard to the necessities contemplated in the "special" agency situation that their definition was framed, whereas in reality that was not in question. Surely if the case stood alone as one of such purchases made by the wife of a man in as wealthy and socially prominent a position as the defendant seems to have been, it is at least arguable that they were things necessary, in the sense of suitable to the style of life he chose to lead.¹⁸ Even granting this however, another factor proved in the case seems to remove all doubts concerning any possible liability of the husband, inasmuch as all members of the Court found that he had provided his wife with a sufficient allowance whereby and within

¹⁵ McCardie, J., in *Miss Gray, Ltd. v. Catbcart* (1922), 38 T.L.R. 562, at 565.

¹⁶ See Rowlatt, J., in *Seymour v. Kingscote* (1922), 38 T.L.R. 586, at 587: "He [the husband] cannot withdraw her authority if it has the effect of leaving her unprovided for with necessities, because he is bound to provide her with necessities, and if he purports to withdraw her authority, and she is not otherwise provided for, she may pledge his credit against his will."

¹⁷ The power of a wife living apart, or who has been deserted by her husband, while an "inherent" power, not depending on any presumption of actual authority, has been held to be considerably wider in scope than this "special agency of necessity" during cohabitation. "When the husband has without cause turned his wife out of doors or by his own fault rendered it impossible for her to reside with him . . . the husband is no longer the sole judge of what is fit, but the law gives the wife in such a case, authority to pledge his credit for her *reasonable expenses*, leaving it to be determined by others, what is reasonable."—Blackburn, J., in *Bazeley v. Forder*, L.R. 3 Q.B. 562, at 564.

¹⁸ Compare for example the almost identical situation in *Seymour v. Kingscote* (*supra*), where Rowlatt, J., says: "Of course, she [the wife] could have dressed for very much less money, so far as protecting herself from the cold was concerned, but she had married a man whose family had a certain position, and she dressed in such a way that he must have approved of. . . ." This is the point taken by the trial judge in the *Ruggles* case, which received such little support from Riddell and Fisher, J.J.A.

It may be that the Canadian Courts will give a stricter interpretation to "necessaries" in this sense, than the English courts appear to do, even as there is a great discrepancy between the English and American interpretation of "necessaries suitable to the condition in life" of an infant. See 1 Williston, Contracts, sec. 241.

which she was to make any purchases necessary for the maintenance of herself. This alone disposes of any presumptive authority.¹⁹

A more serious question however, was raised by all members of the Court, when, as an additional reason for refusing to hold the husband they held that "credit was given to the wife and not to the husband."²⁰ As this point alone was the basis for discharging the husband from liability in the subsequent case of *Beatty Bros. Ltd. v. Murphy*,²¹ a comparison of both situations with the normal agency situation seems called for.

It is a well established doctrine of the law of agency, that if an agent vested with authority to bind his principal, contracts in his own name without disclosing the identity of his principal, he will be personally liable on the contract. In addition, there will be an alternative liability of the principal; the third person having the right, down to judgment, of electing which of the parties he chooses to hold by his judgment.²² It is equally well settled that even though an agent disclose that he is acting for another, naming him, the facts, or the written memorandum of the agreement, may indicate that the agent has contracted personally. In such case, the situation becomes analogous to that of the undisclosed principal, and the third party must elect between the two liabilities—the one by the form of the contract, the other by virtue of authority vested in the agent.²³ Moreover, it has been held that if a third party, knowing that the person with whom he is dealing is acting on behalf of a known principal, reduces the contract to writing, in which no mention is made of such principal, the agent appearing as the sole party in interest, that is not sufficient to constitute as a matter of law a binding election to hold the agent and release the principal.²⁴ The two liabilities still remain until some further act, such as taking judgment against one of the parties.

That being so, it seems difficult to appreciate the seeming distinction made in the two cases under discussion. In the *Ruggles* situation, the plaintiff company did, it is true, give credit to the wife after looking up her references. But is not this what is done in every case of undisclosed principal? True, they did not know

¹⁹ Cf. *Miss Gray, Ltd. v. Cathcart* (*supra*).

²⁰ As stated by Fisher, J.A., at p. 199, "I find that the contract was made with the wife and it was she to whom the plaintiff extended credit and looked for payment."

²¹ (1930), 65 O.L.R. 293.

²² *Brennen Sons v. Thompson* (1915), 33 O.L.R. 465; *Desrosiers v. The King* (1920), 60 Can. S.C.R. 105; *Moore v. Flanagan*, [1920] 1 K.B. 919.

²³ *Calder v. Dobell* (1871), L.R. 6 C.P. 486.

²⁴ *Calder v. Dobell* (*supra*).

whether she had or had not her husband's authority and in all probability never thought one way or the other about the matter. But if the presumption of authority had not been rebutted, it does not seem that the husband should be exonerated, unless a judgment were taken against the wife.²⁵ If, in order to hold the husband, the wife must expressly contract "as agent" for her husband, there seems great difficulty in understanding the discussion in cases like *Moore v. Flanagan*,²⁶ in which an unsuccessful attempt was made to hold both the husband and wife liable as contracting parties, and in which it was held the plaintiff must elect between the two before judgment, and that a judgment against one of the parties (in this case the wife), even though inadvertently obtained, barred the action against the husband. If credit had not been given the wife she was merely acting in her capacity as agent and the judgment on the contract against her should have been set aside, allowing the action to proceed against the husband.²⁷

So in *Beatty Bros. v. Murphy*,²⁸ the plaintiff sued the husband for the price of a washing machine purchased by the wife. The contract was in writing, signed only by the wife, although it appeared that the plaintiffs knew she was married. On these facts and without considering whether the wife had authority²⁹ to pledge her husband's credit, the Court dismissed the action on the ground that it appeared credit had been given the wife. Undoubtedly it had. But if the washing machine was suitable to the style of living set up by the husband, and he had not rebutted in any way the ordinary implication of authority, it would seem that the wife was acting exactly as the agent in *Calder v. Dobell*,³⁰ with authority from her principal, but in addition giving her own responsibility.

A further difficulty in the way of accepting *Beatty Bros. v. Murphy* at its face value, and which in addition would seem to affect seriously the argument presented above, is introduced by the trouble-

²⁵ *Moore v. Flanagan (supra)*.

²⁶ (*Supra*).

²⁷ *Brennen v. Thompson (supra)*, makes this distinction. Where credit is given to the agent, the right which the third person has is in the alternative. She may take one or other of the principal or agent. When credit is not given to the agent, the only basis of holding the agent is on an implied warranty of authority. Hence if a judgment is taken against an agent in the latter case it must be on that basis, and if the evidence on appeal indicates there was authority in the agent, such judgment should be set aside and the principal only, held. In the former, either are liable, and the cause of action *transit in rem judicatum* with the first judgment.

²⁸ (*Supra*).

²⁹ If the presumption of authority is not rebutted it must be equivalent to actual delegated authority. It is either authority or no authority.

³⁰ (*Supra*).

some case of *Paquin, Limited v. Beauclerk*.³¹ In that case a married woman ordered a number of dresses from the plaintiff, nothing being said on either side to indicate upon whose credit they were supplied. The plaintiffs debited the wife with the price. It was admitted by all the Law Lords that the wife had actual or, what is its equivalent, implied authority of the husband to order such goods. That being the case, the question before the House of Lords concerned the liability of the wife. It was argued on the one hand that the ordinary principles of agency should apply, that is, the wife not having disclosed that she was acting as agent for her husband, should be held liable as a contracting party with a superadded liability of the husband as undisclosed principal.³² On the other hand the Married Women's Property Act provided that the separate estate of a married woman should be available to satisfy contracts made by her, where she contracted "otherwise than as agent."³³ On the strength of this, Lords Loreburn and Macnaghten held that wherever a married woman had her husband's authority, express or implied, it was immaterial that the third party did not know she was acting for another, or even that she was married. Once granted the authority, it was impossible in their opinion to hold the wife liable at all. The other two Lords dissented and adopted the proper agency rule which requires a negation of liability by expressly contracting in the capacity of an agent. The case affords an illustration of the unsatisfactory results obtaining in a court of last resort which gives more than a single majority decision. In the result, as the opinions of Lords Loreburn and Macnaghten coincided with those of the Court of Appeal, they must be taken, for what they are worth, as the ultimate conclusion of the House of Lords.³⁴

On the basis of that decision, it does not seem to avail in the slightest that the third party gave credit to the wife at all. The deciding factor would appear to be, "Did the wife have authority, express or implied?" If so, the husband only is liable, and this presumably, irrespective of the form of contract, such as in *Beatty v. Murphy*.

³¹ [1906] A.C. 148.

³² This view was expressly adopted by Lords Robertson and Atkinson, two of the four Law Lords who heard the case. It was followed in *Reid-Welch Furniture Co. v. Macdonald*, [1928] 2 D.L.R. 608 (Alta.), where, however, the form of married women's enabling statute did not include the words referred to below, "otherwise than as agent."

³³ See this clause reproduced in R.S.O. 1927, c. 182, s. 4.

³⁴ See the comments of Lush, J., on this decision in *Lea Bridge District Gas Co. v. Malvern*, [1917] 1 K.B. 803, at 807.

On this point the two Ontario decisions, as reported, seem open to two objections, from two quite divergent viewpoints. (1) From the standpoint of agency law simpliciter, it would appear that the execution of the written memorandum by the wife, or in giving of credit to the wife, while binding herself, did not operate to discharge the husband, if the Court could find authority, actual or implied. (2) From the standpoint of the Paquin case, if the article were a necessary—which appears likely—and there was therefore authority in the wife, she could not possibly be liable and the husband alone would be held. It is not too much to hope that these seeming irreconcilable points will be cleared up by some more definite authoritative pronouncement in the future.

It is suggested that the anomaly introduced by the divided House in *Paquin v. Beauclerk*, may be explained on facts indicating that the plaintiff knew or could infer the woman was married, and so acting for her husband.³⁵ With that difficulty removed, there would be no bar to the complete application of the agency rule to the situation of husband and wife. It may be, that the safest method of procuring this result, would be to delete the offending clause from the Married Women's Property Act in Ontario, as has been done in Alberta.³⁶

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³⁵ This seems suggested in *Lea Bridge, etc. Co. v. Malvern* (*supra*), where Lush, J., says that the Court of Appeal in the *Paquin* case believed the lady to be married when the first order was given.

³⁶ See *Reid-Welch Furniture Co. v. Macdonald*, [1928] 2 D.L.R. 608.
