The Legal News.

VOL. V. APRIL 8, 1882. No. 14.

DUPUY & DUCONDU.

If the holding of the Supreme Court in this case, as it appeared in the *Legal News*, No. 10, be correct, the judgment is not as erroneous as "N. W. T." would have us believe. It does not declare that the sale of a Crown timber licence carries with it a warranty as to there being no preceding concession. It does hold that the warranty of the second deed in this particular case is binding. Nor does it seem the Court was misled by any reference to Art. 1576, C. C.

If "N. W. T." be correct that there was a new consideration for the warranty of the second deed, then he is perfectly justified in saying that the Court of Queen's Bench, and for that matter of it the Superior and the Supreme Courts too were mistaken; and we must applaud the happy accident that by a majority of one judge in the last Court of Appeal, an "injustice" was not committed, although the motive of the judgment was bad. One may be permitted, however, to doubt that so important a fact should have escaped the attention of eleven judges in a case argued by numerous and able counsel.

R.

THE SUPREME COURT BILL.

We assume that the Bill concerning the Supreme Court is in a great measure tentative: that the subject not being an easy one, a draft has been submitted for the purpose of eliciting an expression of opinion, rather than with the idea of making it law.

A preliminary objection to the Bill is that it threatens to obstruct the business of the two provincial Courts. A sixth judge was lately deemed necessary in the Court of Queen's Bench, in order that there might be a spare judge to hold the criminal terms without interfering with the sittings in appeal. Take one judge away to Ottawa, and you will immediately have a cry for a seventh judge in the Court of Queen's Bench. So, too, in the Superior Court. A seventh judge was considered necessary in Montreal, and if one be taken away for Supreme Court cases, an eighth judge will soon be asked for. This method of eking out Supreme Court deficiencies suggests the Hibernian's plan of lengthening his blanket—he proposed to cut a piece off the bottom and sew it on at the top. To mend the administration of justice in the Supreme Court, judges who have been declared by Parliament to be necessary are to be taken away from the inferior tribunals. It were surely more economical to add at once a third permanent judge from this Province to the Supreme Court. A question may also arise, whether the Dominion Parliament has a right to interfere in this manner with the organization of our Courts, and to take our judges away from their districts and from the Province.

But there are also two grave objections to the scheme considered with reference to the work of the Supreme Court itself. First, it brings judges from a court of first instance to pronounce upon the correctness of judgments rendered in appeal from that very court of first instance. This is swinging round the circle. The "judge-in-aid" may have the casting voice to reverse the unanimous judgment of the Provincial Court of Appeal, and to restore the original judgment of the court of which he is a member. The second objection is still more serious. As the "judges-in-aid" would be constantly changing, the door would be opened to dissonant interpretations of the law by the court whose function it is to fix the jurisprudence. We do not assume that precedents would deliberately be disregarded; but every one knows how easy it is to make distinctions in order to get round a decision which is believed to be wrong.

The Montreal bar, it may be added, at a meeting on Tuesday, passed a resolution, without a dissentient voice, expressing disapproval of the bill, as tending to impair confidence in the Court, and to destroy the certainty of its jurisprudence.

MORE UNSATISFACTORY RESULTS.

On page 74 of Vol. 4, we noticed a decision of the Supreme Court, in *McKay* v. *Crysler* (3 Sup. Ct. Rep. 436), overruling by a majority of one the opinion of six judges of the Ontario Courts, as well as of the two dissentients in the Supreme Court. Three prevailed over eight.

Other cases from this point of view have had almost equally unsatisfactory endings. In *Dupuy* v. *Ducondu*, the judgment of the Superior Court, unanimously confirmed in the Court of Queen's Bench (Tessier, J., not sitting), was reversed in the Supreme Court (Henry & Gwynne, J J. diss., Taschereau, J., not sitting); so that the opinion of five judges from our Province, supported by two afterwards, was overthrown by three of whom only one belonged to this Province. In *Darling & Barsalou* (4 L.N. 37) the unanimous judgment of the Court of Queen's Bench of this province has been reversed by the Supreme Court, Henry, J., dissenting. Upon a mere appreciation of evidence a divided Court reverses an unanimous Court.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, December 29, 1881.

LEFAIVRE v. BELLE, & E. CONTRA.

Adultery—Evidence.

The fact of adultery may be inferred from circumstances that lead to it, by fair inference, as a necessary conclusion. So, where it was proved that the wife (defendant) under an assumed name, had occupied the same stateroom with one B. during a voyage to Europe, and had subsequently lived with B. as his housekeeper or guest, together with other facts not rebutted in any way, pointing to a criminal relation, adultery was inferred, without direct evidence of the fact.

This was an action for separation from bed and board, on the ground of adultery of the wife, alleged to have been committed subsequent to January, 1879. There was a cross demand by the wife against the husband for a similar separation, based on the charge of drunkenness and abandonment by him of his wife. The demands were consolidated by order of court.

PER CURIAM. This trial has occupied upwards of a week of the public time, fifty-one witnesses have been examined, and the facts relied upon by the parties have been amply discussed by the able and experienced counsel retained in the case.

A short review of the facts in chronological order will serve to explain the conclusions at which the court arrives, and the court may here say that it has had no difficulty in reaching these conclusions.

Mme. Lefaivre appears to have been a woman of some attractions, to judge by the number of gentlemen who have thought it worth their while to pay her attention. How far these attentions had a criminal intent and result will shortly appear.

The parties were married in July, 1869, and have three living children, who were away from their parents at a boarding school at the dates in question. One of the friends of Mme. Lefaivre was Louis Alphonse Lesage, who was a single man, had met her at parties, was a visitor at the house, and on the 3rd April, 1879, sent her a bouquet, accompanying it by a visiting card, with these words and figures:—"Louis à Helmina, 3 Avril, '79." Asked in the witness box to explain this little act of attention, he associated it with her birthday, her birthday being May 5th, 1851.

We have next in the order of events the voyage of Mr. Lefaivre to Barbadoes for the purpose of bettering his fortunes, if an opening offered. He kept his wife in their joint domicile, and arranged with the landlord that he should not trouble Mme. Lefaivre about the rent in his absence. Mme. Lefaivre continued to occupy the house during three or four weeks after the departure of her husband. Two doors from her lived a Mr. Edmond McMahon, who was requested by Lefaivre to do any service he could to his wife in his absence. Mr. McMahon says that as he went out in the morning to his duties, he observed frequently the arrival or departure from Mr. Lefaivre's house, about 9 a.m., of Mr. W. A. Charlebois or Mr. G. W. Parent. It struck him as singular—"un peu drôle." He also mentions the receipt by his wife of a large envelope, containing another envelope for Mme. Lefaivre with a number of envelopes inside addressed to Alma Macpherson. He complained to Mme. Lefaivre of this incident, and requested that his wife should not be asked to act as an intermediary in this matter. About the same date, namely, on the 9th July, 1879, John Lewis deposes that he was in the train bound to Toronto, and, passing through the Pullman car, noticed Mme. Lefaivre in a seat by herself. He also noticed on the train, but not with Mme. Lefaivre, James

Baxter, a gentleman who occupies a prominent place in this family history. We have next the statement of Joseph Emmanuel Lamère, an employé in the Customs. He knew Mme. Lefaivre, and remembered her arrival at the hotel at Lachine, kept by his brother-in-law, O'Brien. He was boarding there with his wife. Mme. Lefaivre arrived there on Saturday evening with James Baxter, and remained there with him till Monday morning, when they returned together by the train to Montreal, occupying the same seat in the car. Lamère says that Mme. Lefaivre told him that Baxter was an American from California, to whom she was showing the sights of Montreal and its environs. On Monday she mentioned to Mr. Lamère that Baxter complained of the hotel bill. Lamère spoke to O'Brien about it, and the hotel-keeper told him that he charged them high purposely, as he did not wish to see them there again, meaning Mme. Lefaivre and Baxter.

We have next a trip by Mme. Lefaivre to Quebec, in the same month, or in August. When she left her house to go, she was called for by a gentleman in a cab, according to the testimony of Mme. Pelletier, *née* Justine Gervais, then her servant, but Mme. Pelletier could not say who it was. But another witness, Moncel, says Baxter was on board the same steamer, they were in the hotel at Quebec together, their names followed one another in the hotel register, and Moncel saw them walking arm-in-arm together in the streets of Quebec. They also occupied rooms in the hotel in the same corridor, and these rooms were opposite one another. The trip to Quebec was continued up the Saguenay in the same steamer.

We have next in order the story of John Fullum, hotel-keeper, of Coteau Landing. Mme. Lefaivre arrived there one day in October with one Harry Grange, purser on a steamer, and a single man. He remained in company with Mme. Lefaivre there an hour or more, and then took his departure. Mme. Lefaivre remained there till the following morning. Fullum saw nothing that he could find fault with in the relations of the two visitors, but he did not like the conversation between the two, and he advised Mme. Lefaivre that it would be more prudent in her to be with her relatives. In the month of October, Lefaivre, the husband, returned to Montreal, and sent a telegram to Mr. Charlebois inquiring after his wife, but they did not see one another. About the same time, Lefaivre addressed a letter to Mr. C. E. Belle, father of his wife, announcing that he returned his daughter to him. This letter bears date 14th October, 1879.

We have next a voyage taken by Mme. Lefaivre to Europe in November, 1879, by the steamer Sardinian. James Baxter was on board, and plaintiff avers that he has proved that his wife occupied the same stateroom, Nos. 23, 24, with Baxter under the name of Mr. and Mrs. Boyce. The evidence given by plaintiff is that of Susan Adams, stewardess, and Peter Roberts, stateroom steward. These persons were examined before the trial on the visit of the steamer Sardinian to Montreal in September. They were examined and cross-examined in presence of defendant's counsel, but they claimed that they should be examined at the trial. As it was, Mme. Lefaivre was not present at their examination. At the trial accordingly, the plaintiff moved that they be examined *de novo* and confronted with the defendant, and her identity with Mrs. Boyce established more surely. This motion was strenuously opposed by the counsel for Madame Lefaivre. The defendant is therefore agreed that the evidence should stand for what it is worth. The stewardess has no distinct recollection of the lady or gentleman called Mr. and Mrs. Boyce, but Peter Roberts was shown a number of photographs, and among them was one of Mme. Lefaivre, now in the record. He singled out the photograph of Mme. Lefaivre as that of Mrs. Boyce, and he had no doubt of it. He was asked why he was so certain. He gave two reasons: one was that there was in the stateroom another photograph of the same lady in what he called a burlesque —in tights—and he was so amused that he exhibited it to some of his fellow-stewards, had a laugh over it, and returned it to the stateroom. Another reason was that the inmates of the stateroom generally had their meals in the room, and Roberts was in the course of his duty required to carry them their meals several times a day. He could not identify the photograph of Mr. Baxter as the person then known as Mr. Boyce. John A. Robertson was a passenger by the Sardinian, and remembers that

Mme. Lefaivre and Mr. Baxter were passengers, and he saw them together on board, but nothing more. It is a fact that in London and Paris, Baxter and Mme. Lefaivre went to the theatre and places of amusement together, and were at the same hotel in Paris. They also returned to this country together. During the next ten months, from the end of 1879 to August, 1880, Mme. Lefaivre was a boarder with Mrs. Heavysedge. Baxter visited her there at any rate once a week, and if he called in the evening he was shown to her bedroom, because the drawing-room was occupied by the family. Mme. Lefaivre was next a boarder at Mrs. Rickens', in St. Alexander street, for several weeks. James Baxter had a bedroom there at the same time, and his room was on the same flat as hers, and no other bedroom was on the same flat.

We have next Mme. Lefaivre living through the winter of 1880-1 at No. 52 St. Urbain street, as the housekeeper or guest of James Baxter, the occupant. They went out driving together and went to the theatre together. He was a married man, but separated from his wife. His two minor children, aged respectively seven and eleven years, were with him. They played about the rooms in which were Mr. Baxter and Mme. Lefaivre, and retired about 8 or 9, after which Baxter and Mme. Lefaivre were alone. His bedroom was the common sitting room. Servants have given their testimony who were in the house at this time. They were François Charette, Mme. Charette, Sophie Charette, and Emilie Moore. Their testimony is to the same effect, that they did not like the appearance of things as regarded the relations of Mr. Baxter and Mme. Lefaivre, though no testimony has been given showing acts of familiarity between them. Sophie Charette left at the end of a month because she did not wish to serve in a house in which there was no mistress, and in which the lady was separated from her husband. Mme. Lefaivre had an auction sale of her own furniture; Baxter was present, and certain portraits were moved up to his house to hang on his walls. During this winter she was absent for some weeks at Detroit, wrote him letters of which several are produced by him, signed "Mina" or "H.L." meaning the defendant. One of them is signed "Your friend Mina;" another, "Your absent friend, Mina;" a third, "Affectionate friend, Mina." It is also in evidence that Baxter has lent her money from time to time, and two notes in his favor are shown for over $100 each. It is right here to note that on the return of Lefaivre from Barbadoes, he received through the post office two anonymous letters charging adultery against his wife. This may explain why the husband and wife did not meet at that time. A prominent witness in the case is George W. Parent. He speaks of having seen a letter from Mme. Lafaivre to Baxter about the date of her husband's return, expressing contrition and penitence, and a desire to retire to a convent. He says more than this. He had seen divers letters from her to Baxter, and they were of a decidedly amorous character. Parent in answer to a question put by the Court said that Mme. Lefaivre was Baxter's mistress. He says also that he had himself received from her letters of a similar tone, and he would not have his own wife associate with her. Mme. C. E. Belle, the stepmother of Mme. Lefaivre, mentions that she went on one occasion to the bedroom of Mme. Lefaivre at the St. Lawrence Hall, and found there a gentleman whom Mme. Lefaivre introduced to her as Mr. James. She does not know who he was, but thought at the time that it was a curious circumstance to find a gentleman in Mme. Lefaivre's bedroom.

Looking at the entirety of the above evidence, the only evidence very plainly establishing adultery on the part of the defendant, is that of the steward and stewardess of the Sardinian. Is it to be believed? The character of the witness is not attacked, and if there was any possibility of his being mistaken as to Mme. Lefaivre being the same person who was in stateroom Nos. 23, 24, the plaintiff has asked that Peter Roberts, the witness, be brought up again and confronted with Mme. Lefaivre. Why was it resisted by the counsel for the defence? The only rational conclusion is that they had nothing to gain by the confronting of the witness with the defendant—that it would only make matters worse. Again, the evidence here pointing to a criminal relation between Baxter and Mme. Lefaivre, if the evidence of Peter Roberts be untrue, why has it not been contradicted by the evidence of other stewards, or ladies or gentlemen who were pas-

sengers on this occasion by the Sardinian, and associated with Mme. Lefaivre for eight days of the passage? On an Atlantic passage, passengers have little else to do than to watch one another and make acquaintances. If Mme. Lefaivre had another room-mate, or was alone in a state-room, she had a stewardess who attended to her room. Where is she? The facts were peculiarly within her knowledge as to her associations on board the Sardinian, and the plain and positive testimony of Peter Roberts made it incumbent upon her to rebut this testimony. Upon her was the burden of proof. This rule was fully applied in *Grant* v. *Teasel* and *McShane*, garnishee, 17 L. C. Jur. 163, and in *McNamee* v. *Jones et al.*, 3 Legal News, p. 371. Starkie on Evidence, vol. 3, p. 937, says, "In general, where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a forcible inference against him." The criminality of the relations of James Baxter and Mme. Lefaivre during the voyage to Europe is abundantly proved, and this once established, the character of their relations at Mrs. Heavysedge's, Mrs. Rickens', and at No. 52 St. Urbain street, in Baxter's own residence, may easily be divined. As to the kind of evidence and the latitude required and allowed in these cases, the Court refers to 2 Bishop on Marriage, pp. 613, 614, § 613, 614, and Fraser, Husband and Wife, pp. 1152-62. 2 Greenleaf, Ev. vo. Adultery, §§ 40, 1, 2, 7. 2 Greenleaf, § 40: "The proof of this crime (adultery) is the same, whether the issue arises in an indictment, a libel for divorce, or an action on the case. The nature of the evidence which is considered sufficient to establish the charge before any tribunal, has been clearly expounded by Lord Stowell, and is best stated in his own language. "It is a fundamental rule," he observes, "that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed, that the parties are surprised in the direct fact of adultery. In every case almost, the fact is inferred from circumstances, that lead to it, by fair inference, as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights." Bishop says (§ 613): "Adultery is peculiarly a crime of darkness and secresy; parties are rarely surprised in it; and so it not only may, but ordinarily must, be established by circumstantial evidence. The testimony must convince the judicial mind affirmatively that actual adultery was committed, since nothing short of the carnal act can lay a foundation for divorce." Again (§ 614): "Courts of justice," said Lord Howell, "must not be duped. They will judge of facts as other men of discernment, exercising a sound and sober judgment on circumstances that are duly proved, judge of them."

Judgment for plaintiff.

There remains to be disposed of, the demand by the defendant that she be declared separated *de corps* from the plaintiff, on the ground of his abandonment of her, of his waste of her estate, of his idleness and drunkenness. There is no proof of his abandonment of her till the letter addressed to her father of date 14th October, 1879. The motive of the letter has been fully explained by the evidence before the Court. There is no proof of his wasting her patrimony. His idleness, if that be a well founded accusation, does not justify a demand *en séparation de corps*. There remains the charge of drunkenness. The evidence on this head is contradictory. That he has been frequently under the influence of liquor may readily be believed, and such indiscretions are far removed from a condition of notorious and habitual drunkenness, which is not proved. The defendant has been quite ready to be reconciled with her husband, which does not prove a conviction on her part that *consortium omnis vitæ* would be intolerable to her. The incidental demand is therefore dismissed.

Judah & Branchaud for the plaintiff.

Beique, counsel.

B. C. McLean for the defendant.

Piché, Q.C., and *Greenshields*, counsel.

SUPERIOR COURT.

MONTREAL, December 30, 1881.

Before TORRANCE, J.

CHAPMAN v. BENALLACK.

Malicious seizure—Probable cause—Partner leaving for foreign country.

A partner, leaving the business of the firm unsettled, departed to the United States, taking with him several hundred dollars belonging to the partnership. Held, that there was probable cause for an attachment, at the instance of the remaining partner, of the partnership effects, and an action of damages for such seizure should not be maintained.

This was an action of damages charging that defendant had maliciously and without just cause, instigated two suits and seizures by one Louis Bolduc, against him, plaintiff, one in the Circuit Court and the other in the Superior Court.

Benallack pleaded that Bolduc had been induced to take these proceedings in consequence of the representations of plaintiff's wife on one occasion in presence of defendant, and on the other in presence of one Louis Demers; that plaintiff had gone to the United States, and was not likely to return, and that he had left nothing to pay his debts; that plaintiff, on the 15th February, had caused the effects of the partnership between plaintiff and defendant to be sold by public auction, and the sale realized, with other moneys collected by plaintiff belonging to the partnership, the sum of $1,000; that said sale was made with the view of paying off the debts of said partnership; that the day after the sale, plaintiff went away to Chicago without informing defendant, and carried away with him all the money received by him excepting a small sum of money which he left with his wife; that these facts fully justified defendant in believing that plaintiff had left the country with an intent to defraud his creditors.

PER CURIAM. The parties here had been partners in the business of livery-stable keepers, and it terminated by agreement in February last, when Chapman, in whose name the business was carried on, had an auction sale of their effects. Bolduc was a creditor for $150, secured by a note indorsed by Benallack, but it was not due for two months. He also had a claim for $38.50 for work done as carriage-maker. He says that he was promised payment out of the proceeds of the sale. There was enough realized out of the sale and collection of debts to put into Chapman's pocket $750 to $900. He immediately went off to Chicago and Minneapolis with the money, but left $150 with his wife for household expenses. Both Benallack and Bolduc were angry, and Bolduc made two visits to Mrs. Chapman, one with Benallack and the second time with one Demers. Demers says that Mrs. Chapman told them in answer to inquiries made by them, that she did not know where he was, if he remembered rightly. Demers went with Bolduc as interpreter, and after the interview advised Bolduc to take a seizure against Chapman. The admissions and statements of Mrs. Chapman have been objected to as illegal, but the court has no difficulty in saying that here the wife was agent of her husband and representing him, in such a simple matter as his whereabouts;—Taylor; Ev. p. 676; see also Stephens' Digest of Evidence, Art. 17, note (b). Michael Laverty, another witness, says that Chapman met him in March, and told him that he went away to get out of Benallack's way, as he did not want to give him any money just then. Bolduc says the reason why he took the seizure against Chapman was not because of what Benallack told him, but he did so acting on his own judgment and knowledge of the facts. He said "when a man promises to pay his debts after a sale and sells his goods, and runs away, we take precautions, with such a man, without delay." It is not surprising that Bolduc and Benallack should have been incensed. Men generally are when they have recourse to coercive measures against their debtors, such as attachments founded upon affidavit.

Now, the question here is as to the probable cause for the representations of Benallack and the action of Bolduc. C. C. P. 796 says: That the provisional proceedings, like those under consideration, are "subject to a right of action by the latter (the debtor) to recover damages, upon establishing by proof against the creditor a want of probable cause." Here Benallack was debtor of Bolduc as well as Chapman, and the business had not been profitable. It was not wise—on the contrary, it was imprudent in Chapman, to leave for a foreign country, leaving the business unsettled, and carrying away several hundred dollars of the partnership money. These facts do not prove want of probable cause on the part of the creditor or partner. On the facts proved, therefore, the Court does not give damages, but holds the second plea of probable cause to have been proved, and the action is dismissed.

L. H. Davidson for plaintiff.
Cruickshank & Cruickshank for defendant.

SUPERIOR COURT.

MONTREAL, December 30, 1881.

Before TORRANCE, J.

BENALLACK v. CHAPMAN.

Action against partner—Unliquidated business.

This was an action to recover $80 alleged to have been advanced by plaintiff to defendant to buy a piece of land, and $30 value of harness belonging to plaintiff and taken by defendant. The defendant pleaded that these items fell into a partnership then existing between them and still unliquidated, and the Court was of opinion that the plea was made out.

Action dismissed.

Cruickshank & Cruickshank for plaintiff.
L. H. Davidson for defendant.

COURT OF REVIEW.

MONTREAL, December 31, 1881.

JOHNSON, RAINVILLE, JETTE, JJ.

[From S. C., Montreal.

BROWN et al. v. GUY et vir, & PROULX, plff. *par reprise d'instance.*

Wife—Necessaries supplied for use of family.

The wife, sous puissance de mari et séparée de biens, in buying necessaries for the family, is presumed to act on behalf of her husband, the head of the family, and unless such presumption be rebutted in some way, as, for example, by evidence showing that the husband is insolvent and that the duty of providing for the family devolves exclusively on the wife, she will not be held liable for the cost of such necessaries.

The inscription was from a judgment rendered by the Superior Court, Montreal, July 7, 1881 (Mackay, J.)

JOHNSON, J. There are three cases now in review before us, all of them involving questions of the liability of married women for debts contracted with tradespeople. The learned Chief Justice of the Queen's Bench, in *Hudon* v. *Marceau* (23 L.C.J., p. 45), observed that though these questions are not in themselves difficult, yet there has been some confusion, owing to the difference of facts in the different cases, and also, I might add, under our system, owing to the different ways in which the same facts sometimes present themselves to different minds. Accordingly we see that all the three cases before the Court now are dissimilar. In the case of *Brown* v. *Guy*, the question is whether a married woman *séparée de biens* can validly contract without the authority of her husband, except within the strict limits of administration of her separate estate. In the case of *Benard* v. *Bruneau* the question is whether, the husband being admittedly insolvent when the meat was furnished to the family by the plaintiff, who is a butcher, the wife is liable for a note she gave in payment. In the third case (*Claggett* v. *Lomer et vir,*) in which judgment has been given, I did not sit.

Now, with regard to *Brown* v. *Guy*, the first thing that strikes me in this case is that, if the plaintiff had not amended his declaration, by saying that the goods furnished were necessaries for the family, he might have had a stronger case, for the language of the plea might seem to import that this lady defendant bought on her own credit. She does not, however, say that she bought under her own right of separate administration. She says the contrary. The language used is that "credit was given to her by plaintiffs, in her own name, they well knowing that she was *séparée de biens.*"

This plea was filed before the plaintiff amended his declaration, and there is no denial of the fact alleged in the amendment that these things were sold for the use of the family.

The fact, then, is admitted on all hands, and there is not a word about the husband being unable to pay, but the very contrary as a matter of fact; and not only so, but there is also the express stipulation of the contract of marriage, that the husband is to supply everything —provisions for the family and apparel for his wife, etc. The Chief Justice lays down, in *Hudon* v. *Marceau*, that "*à défaut de convention, la femme même séparée de biens qui achète pour les besoins de la famille, est censée le faire pour et au nom du mari.*"

The only remaining consideration, then, would be as to the particular circumstances of the dealing between the wife and the tradesman. Is there anything to take it out of the rule—the presumption, that she is acting as *mandataire* of her husband? There is absolutely nothing that I can see. The language of the plea taken in the ordinary sense of lan-

guage means only, "these things were bought for me—for my use and consumption that is,—and the plaintiff debited them to me;" but the question is still, who was, by law, the purchaser? The law says it is the husband, unless that presumption is rebutted. As to "credit having been given," that is not only a very misleading expression, but a thing to which the other party has surely something to say, before she can be bound. If I have emphasized the reason, or one of the reasons for the apparent discrepancy between different decisions, as arising in some cases from the different appreciation of facts, I am convinced that a great deal of difficulty in our courts arises from that cause; for there are facts and facts: some facts simple in their nature are of course not susceptible of being differently understood; but to take the fact that arises here—a compound fact—made up not only of the thing alleged, *i. e.* the giving credit; but comprising all the effects of that thing—the *convention*, to use the expression in *Hudon* v. *Marceau;* if it is only meant that the tradesman gave the credit in his books—that is surely a very different thing from saying that there was a contract between both the parties, and with their consent, that the goods were not to be chargeable to the husband.

I quite admit of course that the general principle being that the husband contracts through the wife, that must suffer exception when the wife, within the limit of her separate right, stipulates that it is not to be his debt but her own; or when the law makes her liable without stipulation for necessaries which the husband is unable to pay for. But neither of those cases is the one before us. The *convention*, if there was one, must be held to have been made for the husband. The judgment is therefore reversed.

The judgment is as follows:—

"The Court etc.

"Considering that there is error in the said judgment, doth reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises;

"Considering that the action is brought to recover from the defendant Dame Marie Louise Guy, who is a married woman under coverture and separated as to property (*femme mariée sous puissance de mari et séparée de biens,*) the sum of $246.74, the price and value of merchandise being necessary for the domestic uses of the family of said female defendant and of her husband, to which she has pleaded that she is not liable as alleged;

"Considering that as *séparée de biens* from her said husband, the said defendant is only liable for debts contracted by her within the strict limits of her rights of administering her separate property;

"Considering that the necessary supplies for the family do not come within the limits aforesaid of her exclusive and separate rights, and that unless there be evidence to rebut the presumption, the wife *séparée de biens* is by law held to have acted for and on behalf of her husband who is the head of the family;

"Considering that there is nothing in this case to rebut the said presumption of law, but the contrary appears by the evidence;

"Considering that there is nothing in the evidence to show that the husband is insolvent, or that the duty of providing for the family devolved exclusively on the wife, doth dismiss the present action with costs as well of the said Superior Court as of this Court of Review against the plaintiff *par reprise d'instance.*"

T. Bertrand for plaintiff.

Barnard, Beauchamp & Creighton for defendants.

COURT OF REVIEW.

MONTREAL, December 31, 1881.

JOHNSON, MACKAY, RAINVILLE, JJ.

[From S. C., Montreal.

BENARD v. BRUNEAU et vir.

Wife—Liability for necessaries for family.

The inscription was from a judgment of the Superior Court, Montreal, March 31, 1881, (Sicotte, J.)

JOHNSON, J. In this case the liability of the wife for her own debt legally contracted is the only thing before the court. She paid for necessaries for her children—food, meat—the plaintiff being a butcher; and, of course, as her husband is admittedly insolvent, the reason of Art. 1317 C. C. applies, for it says she must bear the expense alone, if the husband has nothing, as somebody must be bound to feed the children. In this case, therefore, the judgment which condemned the wife is right, and it is confirmed.

Judgment confirmed.*

O. Augé for plaintiff.

Préfontaine & Co. for defendant.

* A similar judgment was rendered on the same day in *Claggett* v. *Lomer et vir*, Mackay, Rainville, Buchanan, JJ., confirming the judgment of the Superior Court, Montreal, July 8, 1881, Jetté, J.