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For Plaintiff.

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For Defendant.

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NOTICE OF APPEAL AND GROUNDS.

Filed March 26, 1931.

Essex County Circuit Court

GIMBEL BROTHERS, INC., a corporation, <p style="text-align: center;">vs.</p> MARY A. BARRETT,	}	<i>Plaintiff,</i>	}	<i>Action at Law.</i>	}	<i>Notice of Appeal and Grounds.</i>	10
		<i>Defendant.</i>					

To Stetson & Mapletoft, Esqs., attorneys of defendant, or to whom it may concern: 20

SIRS:

PLEASE TAKE NOTICE that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds, to wit:

1. Because the trial court erred in directing a verdict in favor of the defendant.

2. Because the trial court erred in determining that there was no testimony to make defendant personally responsible. 30

3. Because the trial court erred in determining as a matter of law that the goods purchased were necessities.

4. Because the trial court erred in determining that the husband of the defendant was liable to the exclusion of the responsibility of the defendant herself. 40

Notice of Appeal and Grounds.

5. Because the trial court erred in determining contrary to Exhibit P. 2 that there was no evidence that the defendant intended to charge her own personal estate.

10 6. Because the direction of a verdict by the trial court in favor of the defendant was contrary to the evidence.

7. Because the direction of a verdict by the trial court in favor of the defendant was contrary to law.

Respectfully yours,

SMITH & SLINGERLAND,
Attorneys of Plaintiff.

20 Service of a copy of the within Notice is hereby acknowledged this 20th day of March, A. D. 1931.

STETSON & MAPLETOFT,
Attorneys for Defendant.

30

40

SUMMONS.

The State of New Jersey to Mary
A. Barrett.

(SEAL) YOU ARE SUMMONED, to answer the
annexed complaint of Gimbel Brothers,
Inc., in an action at law in the 10
Essex County Circuit Court. And take notice
that unless you file your answer to said complaint
with the Clerk of the said Circuit Court,
at Newark, N. J., within Twenty Days after the
service upon you of this writ, and the annexed
complaint, the plaintiff may proceed in the suit,
and judgment may be entered against you.
(And see Notice endorsed hereon.)

WITNESS, WILLIAM A. SMITH, Esq., Judge of
the Circuit Court at Newark, this eighth day of 20
October, Nineteen Hundred and Thirty.

JOHN H. SCOTT,
Clerk.

SMITH & SLINGERLAND,
Attorneys.

30

40

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

COUNTY.

10	GIMBEL BROTHERS, INC., a corporation, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i> <i>Complaint.</i>
	<i>vs.</i> MARY A. BARRETT, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>		

Plaintiff Gimbel Brothers, Inc., a corporation of the State of New York, authorized to do
 20 business in the State of New Jersey, having its registered office at 763 Broad street, in the City of Newark, in the County of Essex and State of New Jersey says that:

FIRST COUNT.

1. It sues for the balance due on a certain book account, a copy of which is annexed hereto and made a part hereof.

30 Plaintiff demands judgment in the sum of Five Hundred Thirty-seven Dollars and Seventy-six Cents (\$537.76) together with interest from July 18, 1930 and costs of this suit.

SECOND COUNT.

1. On or about June 20, 1928 and at various times between that date and or about July 18, 1930 the defendant purchased from the plaintiff and the plaintiff sold and delivered to the de-
 40 fendant, certain goods and merchandise set forth

Complaint.

in the statement annexed hereto and made a part hereof and said defendant agreed to pay therefor the reasonable value thereof.

2. The reasonable value of said goods and merchandise is the sum set forth against the respective items, less the credits therein stated, leaving a total of Five Hundred Thirty-seven Dollars and Seventy-six Cents (\$537.76) as the reasonable value of said goods and merchandise, and although requested so to do, the defendant has neglected and refused to pay said sum which is still justly due and owing to the plaintiff. 10

Plaintiff demands judgment against the defendant in the sum of Five Hundred Thirty-seven Dollars and Seventy-six Cents (\$537.76) together with lawful interest thereon and costs of this suit. 20

SMITH & SLINGERLAND,
Attorneys of Plaintiff.

30

40

Complaint.

GIMBEL BROTHERS
33rd Street and Broadway
New York City
Telephone Pennsylvania 5100

MRS. STEPHEN F. BARRETT
10 377 Tillow Rd
S. Orange, N. J. 23993

Dept. No.	Date	Items	Charges	Credits	Pay Only Last Amt. in This Column
1929	June				
161	20	4 Italian Dishes	1.20		
		1 Animal .....	.85		
		1 " .....	.85		
		1 " .....	.65		
		1 " .....	.40		
48		10 Towels	3.70		
20	74	1 U. Suit.....	2.95		
		1 Pr. Hose.....	1.00		
		1 Pr. Hose.....	1.50		
		1 Belt .....	.75		
		2 Ties	1.00		
		2 Ties	1.70		
144		2 Pr. Gloves	5.90		
		1 Pr. Gloves	1.95		
156		1 Hat	9.75		
15		5 Covers	1.95		
86		1 Beach Coat.....	5.95		
		1 Bathing Suit.....	7.95		
		1 Hat	2.95		
30		3 Pr. Bathing Shoes..	2.85		
		2 Caps	1.18		
		2 Caps	1.90		
		1 Cap .....	.75		
75		1 Hat .....	.75		
72		1 Slicker	3.95		
		2 Pants	2.88		
		2 Suits	3.90		
		4 Pants	7.80		
62		2 Pins	1.00		
		1 Pin	1.00		
		4 Ties	3.80		
					84.76

Complaint.

MRS. S. F. BARRETT

Sheet No. 2

Dept. No.	Date	Items	Charges	Credits	Column
1929	June	Brought Forward			84.76
		1 Onyx Ring.....	9.75		
		1 Ring	1.95		10
51		2 Pr. Gloves.....	5.90		
140		6 Pr. Hose.....	7.90		
40		2½ Yd. Silk.....	4.95		
		4½ Yd. Silk	6.53		
136		6 Uniforms	17.70		
		4 Aprons	3.80		
		4 Aprons	1.96	145.20	
194	21	1 Lb. Almonds.....	1.39		
		1 Lb. Gum Drops....	.50		
		1 Box Fruits.....	.59		
		1 Box Fruits & Nuts..	.58		
		2 Boxes Toffee.....	.70		
16		7 Hdkfs.	8.75		20
		6 Hdkfs.	3.00		
		3 Hdkfs.	1.00		
		2 Hdkfs.	2.00		
154		Express	1.00		
154		18 Spoons .....	.59		
		2 Soap Plates.....	1.30		
		14 Fruits	4.20		
		1 May Dish.....	1.00		
		1 Bowl	1.00		
		2 Cream and Sugar...	2.00		
		18 Ft. Ice Glasses	4.50		
		12 Reflectors	1.50		
		1 Sandwich Plate....	1.00		30
16		12 Hdkfs.	2.28		
2		1 Pin	1.95		
		1 Compact	1.95		
		1 Compact	1.50		
2		1 Real Stone Ring....	1.95		
		1 Bracelet	3.95		
		1 Necklace	1.95		
194		1 Monkey .....	.89		
		1 Horse .....	.89		
		1 Cat .....	.59		
		1 Rabbit .....	.49		
		1 Toffee .....	.35		

Complaint.

10	1 Book .....	.59	
	3 Books	1.39	
138	2 Brass	4.00	
	2 Brass	2.00	
	2 Brass	2.00	
	4 Brass	1.00	
22	1 Doz. Buttons.....	.69	212.21

10

MRS. S. F. BARRETT

Sheet No. 3

Dept. No.	Date	Items	Charges	Credits	Column
1929	June	Brought Forward ..			212.21
67		8 Pr. Hose.....	3.84		
142		2 Pr. Oxfords	17.00		
		1 Pr. Sandals	8.50		
		1 Pr. Mules	3.50		
		1 Pr. Slippers	3.50		
20	23	2 Bottles Polish.....	.50		249.05
		1 Doz. Hair Nets	1.45		
		1 Box Pins .....	.45		
		1 Cushion .....	.25		
		1 Paper Pins .....	.10		
		6 Pk. Hair Pins.....	.20		
134		4 Pr. Bloomers	11.80		
		2 Pr. Pajamas	7.90		
		2 Pr. Pajamas	5.95		
182		1 Crochet Set	2.95		
		4 Camp Stools	3.00		
134		1 South Paints	5.90		
22		1 Doz. Buttons .....	.25		
30		3 Slides .....	.57		
		1 Slide .....	.49		
		6 Rings .....	.50		
		1 Buckle .....	.95		
158		1 Pitcher	3.25		
2		1 Crystal Beads	5.95		
		1 Necklace	4.95		
		1 Necklace	1.95		
68		2 Boxes Polish .....	.50		
132		1 Robe	10.95		
133		1 Pr. Pajamas	1.95		
		1 Pr. Pajamas .....	.94		
74		1 Sweat Shirt	1.00		
		3 Pr. Pajamas	3.54		
40		1 Trunks	1.00		

Pay Only
Last Amt.
in This

Complaint.

		2 Vests .....	.92	
		2 Trunks .....	.92	
		1 Pr. Hose	1.00	
		2 Belts	1.00	
		2 Trunks	1.50	
		1 Shirt	1.95	
8		2 Umbrellas	5.90	
		1 Umbrella	4.95	
134		1 Set	1.95	10
8		2 Umbrellas	5.90	
		1 Umbrella	4.95	
6		3 Belts	2.85	
16		12 Hdkfs.	2.28	
		6 Hdkfs.	1.50	
		4 Hdkfs.	1.00	
				366.31

MRS. S. F. BARRETT

Sheet No. 4

Dept. No.	Date	Items	Charges	Credits	Pay Only Last Amt. in This Column
1929	June	Brought Forward			366.31
		12 Hdkfs.	1.18		
140		3 Pr. Hose	3.75		
		1 Pr. Hose .....	.48		371.72
86		1 Bathing Suit	9.75		
		2 Pr. Bathing Shoes...	1.90		
		1 Parasol	1.95		
		1 Cap .....	.95		
		1 Cap .....	.59		
		1 Suit	2.95		
143		1 Pr. Shoes .....	.94		
		1 Pr. Slippers .....	.94		
48		1 Doz. Towels	2.40		30
		1 Cloth	1.69		
		2 Scarfs	3.00		
		6 Cloths	2.34		
		1 Doz. Cloths.....	.85		
		3 Doz. Cloths.....	.75		
		1 Doz. Cloths.....	4.50		
		1 Doz. Cloths.....	1.35		
		3 Cloths .....	.30		
		3 Cloths .....	.45		
		1 Cloth	1.00		
136		2 Uniforms	5.90		
		4 Uniforms	7.80		
		4 Aprons	3.00		40

Complaint.

	90		1 Skirt	9.75	
			1 Skirt	7.95	
	5		1 Ammonia .....	.19	
			1 Lotion	1.00	
			1 Rouge	2.00	
			1 Skin Tonic	3.75	
			1 Odorona .....	.73	
			1 Tissue .....	.40	
10			1 Comb .....	.39	
			3 Venus	3.00	
			2 Scissors	3.00	
			2 Files .....	.70	
			1 T. Paste .....	.39	
			1 T. Paste .....	.37	
			1 Book	1.39	
			1 Book	1.39	463.42
	138	24	1 Wash Boiler	4.88	
	145		1 Hat	5.95	
			1 Hat	4.75	
	147		1 Lining .....	.35	
	18		1 Triangle	2.95	
20	142		1 Pr. Shoes	10.00	492.30

MRS. S. F. BARRETT

Sheet No. 5

				Pay Only	
				Last Amt.	
				in This	
Dept.	No.	Date	Items	Charges	Credits
					Column
	1929	June	Brought Forward		492.30
			1 Pr. Shoes	6.95	
	140		1 Pr. Hose .....	.94	
	5		3 Combs .....	.75	
30	140		5 Pr. Hose	6.45	
	134		1 Slip	3.95	
	133		2 Chemise	3.90	
	133		1 Pr. Pajamas	1.94	
	747		1 Bathing Suit 86		12.33
	97	26	1 Dress	15.75	
			1 Dress	15.75	
			1 Suit	15.75	552.10
	74	27	1 B. Suit 66198.....		2.95
			1 Pr. Hose		1.50
			1 Pr. Oxfords 11332..		.94
	154	28	6 Coasters	1.50	546.71
	10		1 Book	1.88	550.09
40					

Complaint.

	July			
8	2	Cust. Underchg. 94081.	10.45	539.64
10	8	1 Book	1.88	541.52
10	9	1 Book 23526.....	1.88	539.64
10	18	1 Book 24261.....	1.88	537.76
		Balance		<u>\$537.76</u>

10

Notice to the Within Named Defendant:

In case the within Summons and Complaint are served upon you personally, then take notice that if you intend to make a defense to said action, you must file an Affidavit of Merits within ten days from the date of service thereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing thereof judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of the rule under which this note is given (P. L. 1912, p. 394, Rule 56).

20

SMITH & SLINGERLAND,
Plaintiff's Attorneys.

I hereby appoint and depute William J. Trumble to serve the within writ.

30

Witness my hand and seal this 9th day of Oct. 1930.

HARRY L. HUELSENBECK,
Sheriff.

By: Louis E. Batchelor,
Under Sheriff L. S.

40

Complaint.

Served the within Summons & Complaint, this 10th day of October, 1930 upon Mary A. Barrett, within named defendant, by leaving a true copy of same with her maid, a member of her household about the age of 14 years at her usual place of abode 277 Tillou Rd. South Orange, N. J.

10

HARRY L. HUELSENBECK,
Sheriff.

By: William J. Trumble,
Special Deputy.

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30

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AFFIDAVIT OF MERITS.

Filed October 16, 1930.

ESSEX COUNTY CIRCUIT COURT.

GIMBEL BROTHERS, a corpora- tion, vs. MARY A. BARRETT, 	}	Plaintiff, Defendant.	Action at Law. Affidavit of Merits.	10
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STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.:

MARY A. BARRETT, of full age, being duly sworn,
 on her oath says that she is the defendant in
 the above stated cause. She believes that she has
 a just and legal defense in the said action on the
 merits of the case. 20

MARY A. BARRETT.

Subscribed and sworn to before
 me this 15th day of October,
 1930. 30

WM. C. GORMLEY,
 An Attorney at Law of New Jersey.

ANSWER.

Filed October 29, 1930.

ESSEX COUNTY CIRCUIT COURT.

10	GIMBEL BROTHERS, INC., a corporation, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 0 10px;"><i>vs.</i></div> MARY A. BARRETT, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> <i>Answer.</i>
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20 The defendant, Mary A. Barrett, residing at No. 377 Tillou Road in the Village of South Orange, N. J., answering the complaint of the plaintiff says:

1. She denies the truth of the matters contained in the complaint.

FIRST DEFENSE TO FIRST COUNT.

30 2. She denies that any goods sold and delivered, as alleged in paragraph 1 of the complaint were sold to her, or upon her individual credit, or that she contracted or agreed to pay therefor out of her separate estate, or that she assumed individual responsibility for payment of any of said goods, and that she was and is married to Stephen F. Barrett and was living with him on the dates alleged in the complaint and that any goods sold and delivered by this plaintiff were necessaries for which she is not chargeable.

40 3. She alleges that if any of said goods were purchased by her at all, such purchases were

Answer.

made as the agent of her said husband, Stephen F. Barrett, and with the knowledge and consent of the plaintiff.

SECOND DEFENSE TO FIRST COUNT.

4. She alleges that the said complaint of plaintiff does not allege or disclose any cause of action against the defendant and hereby reserves her right to set up and raise at the trial of this issue the objection that said plaintiff fails to alleged or disclose any cause of action against the defendant. 10

DEFENSE TO SECOND COUNT.

FIRST DEFENSE TO SECOND COUNT.

6. She denies that any goods sold and delivered as alleged in paragraph 1 of the second count of the complaint were sold to her, or upon her individual credit, or that she contracted or agreed to pay therefor out of her separate estate, or that she assumed individual responsibility for payment of any of said goods, and that she was and is married to Stephen F. Barrett and was living with him on the dates alleged in the complaint and that any goods sold and delivered by this plaintiff were necessaries for which she is not chargeable. 20 30

7. She alleges that if any of the goods were purchased by her at all, such purchases were made as the agent of her said husband, Stephen F. Barrett, and with the knowledge and consent of the plaintiff.

SECOND DEFENSE TO SECOND COUNT.

8. She alleges that the said complaint of plaintiff does not allege or disclose any cause 40

Answer.

of action against the defendant and hereby reserves her right to set up and raise at the trial of this issue the objection that said plaintiff fails to allege or disclose any cause of action against the defendant.

10

STETSON & MAPLETOFT,
Attorneys for Defendant.

20

30

40

Notice of Motion to Strike Out Answer, &c.

tions in the separate and distinct defenses are untrue in fact and sham and/or frivolous.

10 AND TAKE FURTHER NOTICE that we shall move at the same time for the entry of a summary judgment; and that we shall rely upon the annexed affidavits of Worden E. Winne and Joseph H. Zelch to support our application.

SMITH & SLINGERLAND,
Attorneys of Plaintiff.

20

30

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Affidavit of Worden E. Winne.

ESSEX COUNTY CIRCUIT COURT.

GIMBEL BROTHERS, INC., a corporation, <p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> MARY A. BARRETT, <p style="text-align: center;"><i>Defendant.</i></p>	}	<i>Action at Law.</i> <i>Affidavit.</i>	10
--	---	--	----

STATE OF NEW YORK, }
 COUNTY OF NEW YORK. } *ss.*

WORDEN E. WINNE, of full age, being duly sworn according to law, upon his oath deposes and says that he is an Assistant Secretary of Gimbel Brothers, Inc., a corporation of the State of New York, authorized to do business in the State of New Jersey; plaintiff in the above-stated action; that he is duly authorized to make this affidavit; that annexed to this affidavit is a true copy of the entries from the original book or account of entries of said plaintiff corporation insofar as they relate to its claim against this defendant, together with a statement of all credits or allowances to which the defendant is entitled; and that five hundred thirty-seven dollars and seventy-six cents (\$537.76) the balance claimed by the plaintiff from the defendant is justly due and owing to the plaintiff from the defendant, besides interest thereon from July 18, 1930 amounting to nine dollars and seventy-five cents (\$9.75) the total amount justly due and owing to the plaintiff on said book account being the sum of five hundred forty-seven dollars and fifty-one cents (\$541.51) no part thereof having

Affidavit of Worden E. Winne.

been paid. I believe that there is no defense to this action.

WORDEN E. WINNE.

10 Subscribed and sworn to before
me, a Notary Public in and
for the City, County and State
of New York, this 1st day of
November, 1930.

MARTIN J. KEELEY,
A Notary Public in and
for the City, County
and State of New York.

20 MARTIN J. KEELEY,
Notary Public, Bronx County;
Bronx County Clerk No. 175;
Bronx County Reg. No. 3179A;
Certificate filed in N. Y. Co., Clerk No. 843;
N. Y. Co. Reg. No. 1K548;
Westchester County Clerk's Office;
Westchester County Register's Office.
Commission expires March 30, 1931.

30

40

Affidavit of Joseph H. Zelch.

the credit thereof were sold and delivered upon her order.

I believe that there is no defense to this action.

JOSEPH H. ZELCH.

10 Subscribed and sworn to before me, a Notary Public in and for the City, County and State of New York this 1st day of November, 1930.

MARTIN J. KEELEY,
A Notary Public in and for the City, County and State of New York.

20 MARTIN J. KEELEY,
Notary Public, Bronx County;
Bronx County Clerk No. 175;
Bronx County Reg. No. 3179A;
Certificate filed in N. Y. Co., Clerk No. 843;
N. Y. Co. Reg. No. 1K548;
Westchester County Clerk's Office;
Westchester County Register's Office.
Commission expires March 30, 1931.

30

40

Affidavit of Joseph H. Zelch.

GIMBEL BROTHERS Mrs. Stephen F. Barrett
 NEW YORK 377 Tillou Road
 South Orange, N. J.

Please add my name to your list of monthly
 charge customers.

Here is my signature for your records.

Signature Mary A. Barrett
 Bank on which my
 checks will be drawn

10

Savings Investment & Trust
 Co. South Orange Office.

Service of a copy of the within notice is
 hereby acknowledged this 3rd day of November,
 1930.

20

STETSON & MAPLETOFT,
 Atty of Def.

30

40

AFFIDAVIT OF MARY A. BARRETT.

Filed November 7, 1930.

ESSEX COUNTY CIRCUIT COURT.

10	GIMBEL BROTHERS, a corpora- tion, <i>Plaintiff,</i> <i>vs.</i> MARY A. BARRETT, <i>Defendant.</i>	}	<i>Action at Law. Affidavit.</i>
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20 STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

MARY A. BARRETT, being duly sworn, on her oath deposes and says:

I am the defendant in this suit and have read the affidavits of Worden E. Winne and Joseph H. Zelch submitted on the part of the plaintiff; I am not indebted to the plaintiff in the amount claimed in its complaint in this cause, or any part thereof. As appears from the complaint, all the items shown thereon are clothing, china, food, etc., and such items were purchased by me as agent of my husband, Stephen F. Barrett, for the benefit of himself, myself and our six (6) children, all of whom were and still are living with us at No. 377 *Tilou* Road, South Orange, New Jersey.

For several years past I have made purchases of merchandise from the plaintiff, for the use of my husband, myself and our children. These purchases were made as early as January, 1922, and an examination of my husband's check book

40

Affidavit of Mary A. Barrett.

discloses that on June 15, 1925, he paid the plaintiff \$65.43.

This account may have been inactive for different periods. A short time prior to June 20, 1929, I received by mail a form for use in requesting the opening of a charge account. I signed this request and mailed it to the plaintiff. I never stated to the plaintiff or to any of its representatives that I would pay for any merchandise I purchased or that the same was to be charged to me, or that I would pay for same out of my separate estate; nor have I ever requested the plaintiff to extend credit to me. I had a bank account with the South Orange Branch of the Savings Investment & Trust Company, but all the monies deposited in said account were given to me by my husband.

I have fully and fairly stated the facts of the case to my attorneys, Stetson & Mapletoft, and they have advised me, after said statement, that they believe I have a good defense to the complaint on the merits.

I always understood that my husband was responsible for the payment of the account so long as the items purchased were for household purposes. My husband knew that this account was opened and never denied me the right to purchase on his credit.

MARY A. BARRETT.

Sworn to before me this 7th
day of November, 1930.

WM. C. GORMLEY,
An Attorney at Law of New Jersey.

Affidavit of Stephen F. Barrett.

Filed November 7, 1930.

ESSEX COUNTY CIRCUIT COURT.

10	GIMBEL BROTHERS, a corpora- tion, vs. MARY A. BARRETT, 	} <i>Plaintiff,</i> } <i>Defendant.</i>	} <i>Action at Law.</i> } <i>Affidavit.</i>
----	---	--	---

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.:

20 STEPHEN F. BARRETT, being duly sworn, on his
 oath deposes and says:

I am the husband of Mary A. Barrett, the de-
 fendant in the above-named cause. I have looked
 over my bank account and find that on June 15,
 1925, I paid Gimbel Brothers, the sum of Sixty-
 five Dollars and 43 Cents (\$65.43).

All other payments on this account were made
 by my wife from monies I gave to her.

STEPHEN F. BARRETT.

30 Subscribed and sworn to before
 me this 7th day of November,
 1930.

WM. C. GORMLEY,
 An Attorney at Law of New Jersey.

REPLY.

Filed November 8, 1930.

ESSEX COUNTY CIRCUIT COURT.

GIMBEL BROTHERS, INC., a corporation, <div style="text-align: center;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> MARY A. BARRETT, <div style="text-align: center;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> <i>Reply.</i>	10
--	---	--	----

Plaintiff joins issue with the defendant on the denials contained in her answer, and denies the allegations in each of the separate defenses to both counts. 20

SMITH & SLINGERLAND,
Attorneys of Plaintiff.

30

40

ORDER.

Filed November 14, 1930.

ESSEX COUNTY CIRCUIT COURT.

10	GIMBEL BROTHERS, INC., a corporation, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 0 10px;"><i>vs.</i></div> MARY A. BARRETT, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law. Order.</i>
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20 This matter being opened to the Court by Smith & Slingerland, attorneys of the plaintiff, and it appearing that this action is based upon a book account, and that the plaintiff's motion to strike out the defendant's answer has been made and denied, and it further appearing that Stetson & Mapletoft, attorneys of the defendant, have endorsed their consent hereto,

30 It is on this 14th day of November, 1930, ORDERED that the above-entitled cause, upon which issue has been joined and notice of trial filed, be placed upon the list of causes for trial on the commercial calendar for the month of December.

WM. A. SMITH,
Circuit Court Judge.

We consent to the entry of the foregoing order.

SMITH & SLINGERLAND,
Attorneys of Plaintiff.

STETSON & MAPLETOFT,
Attorneys of Defendant.

ORDER.

Filed November 28, 1930.

ESSEX COUNTY CIRCUIT COURT.

GIMBEL BROTHERS, a corpora- tion, <i>Plaintiff,</i> <i>vs.</i> MARY A. BARRETT, <i>Defendant.</i>	}	Action at Law. Order.	10
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The plaintiff having made a motion before this Court to strike out the answer of the defendant, on the grounds stated in the notice of motion, and said motion having come on to be heard before the undersigned on November 7, 1930, and upon reading the affidavits of Worden E. Winne and Joseph H. Zelch, submitted on the part of the plaintiff, and the notice of motion of the plaintiff and the affidavits of Mary A. Barrett and Stephen F. Barrett, submitted on behalf of the defendant, and the Court having considered the matter it is on this 26th day of November, 1930,

ORDERED and ADJUDGED that the motion of the plaintiff to strike out the answer of the defendant be denied.

WORRALL F. MOUNTAIN,
 Judge.

On motion of

STETSON & MAPLETOFT,
 Attorneys for the Defendant.

Elizabeth Nolan, for Plaintiff, direct.

TESTIMONY.

ESSEX COUNTY CIRCUIT COURT.

January 13, 1931.

10

GIMBEL BROTHERS, INC.,

vs.

MARY A. BARRETT.

*Action
at Law.*

Before Hon. Newton H. Porter, J., and a jury.

For plaintiff appear Smith & Slingerland (by Elmer F. Holtz).

20

For defendant appear Stetson & Mapletoft (by William H. Osborne).

(A jury is called and sworn.)

Mr. Holtz opens for plaintiff.

Mr. Osborne opens for defendant.

ELIZABETH NOLAN, sworn in behalf of plaintiff.

30

Direct examination by Mr. Holtz.

Q By whom are you employed, Mrs. Nolan?

A Gimbel Brothers, New York.

Q What was your position with Gimbel Brothers in June, 1929? A Bookkeeper.

Q As bookkeeper were you in charge of the "B" ledger? A Yes, I was.

Q Did you have an account for a Mrs. S. F. Barrett? A I did.

40

Elizabeth Nolan, for Plaintiff, direct.

Q I show you these sheets and ask you if these are the original sheets (handing documents to witness)? A Yes.

Q What is the actual balance due upon that account? A \$537.76.

Q Will you tell us when the last purchase was made on that account? A July 2nd. 10

Q 1929? A Yes.

Mr. Holtz: I offer these in evidence.

Mr. Osborne: I object to them, because it appears that the defendant's name is Mary A. Barrett, and these are to Mrs. Stephen F. Barrett. If the plaintiff wants an admission that she was the wife of Stephen F. Barrett, we are willing to put that on the record. 20

Mr. Holtz: It appears in the defendant's affidavit that she was the wife of Mr. Stephen F. Barrett.

The Court: I shall allow the account to be marked.

(Account referred to is received in evidence and marked Exhibit P. 1.)

By Mr. Holtz. 30

Q Will you tell us how the entries come to be made in this ledger account in the name of Mrs. S. F. Barrett? A Mrs. S. F. Barrett goes into the store and she makes her purchase. The saleslady makes out the schedule—

By the Court.

Q Only testify from what you know, Mrs. Nolan, and not from hearsay. A The schedules come up into our office. 40

James H. Morrison, for Plaintiff, direct.

Q That is the practice? A Yes.

Q We are only concerned with what was done in this particular case. A The schedules that were made out to Mrs. S. F. Barrett were posted on her ledger sheet.

10 Mr. Holtz: That is all.

Cross examination by Mr. Osborne.

Q This sheet, Exhibit P. 1, shows the items that she purchased? A Yes.

Mr. Osborne: That is all.

20 JAMES H. MORRISON, sworn in behalf of plaintiff.

Direct examination by Mr. Holtz.

Q What is your position, Mr. Morrison? A At the present time, collection manager of Gimbel Brothers.

30 Q What was your position with Gimbel Brothers in June of 1929? A In June of 1929, assistant credit manager.

Q How long have you been with Gimbel Brothers? A Since July 2, 1923.

Q Are you familiar with the account of Mrs. Stephen F. Barrett? A Yes.

40 Q Will you tell us how this account came to be opened on your books? A In May and June of 1929 we obtained a list of financially responsible people from different agencies. This particular name came to us from the Credit Reporting Company of New Jersey. Conse-

James H. Morrison, for Plaintiff, direct.

quently we solicited Mrs. Stephen F. Barrett to open an account, which she did.

Q In response to that solicitation, did you receive this card (handing card to witness)? A Yes, sir.

Mr. Holtz: For the purpose of the record, may I have it noted that it is admitted that this is the signature of the defendant? 10

(Card referred to is received in evidence and marked Exhibit P. 2.)

The Witness: I may add to that, that the name of the person who was financially responsible was typed on everyone of these cards, prior to their mailing.

Mr. Osborne: I move to strike that out.

That is a volunteered statement, in the first place; and, in the second place, it has nothing to do with Mrs. Barrett. 20

The Court: And it is a conclusion. Strike it out.

Q Can you tell what this paper is (handing document to witness)? A Yes, that is acknowledging the card and telling Mrs. Barrett that we are glad to have her name, and we are looking forward to her patronage. 30

Mr. Holtz: I have served the defendant with a notice to produce the original of that letter.

Mr. Osborne: You may offer that copy in evidence.

Mr. Holtz: Then I offer this in evidence. (Same is received in evidence and marked Exhibit P. 3.) 40

James H. Morrison, for Plaintiff, cross.

Q Had you made an investigation of the financial responsibility of both Mr. and Mrs. Barrett at the time that you opened this account? A Prior to the opening of it—

Q Wait a moment. You can answer that “yes” or “no.” A Yes.

10 Q Your answer is “yes”? A Yes.

Q As a result of that investigation, in whose name was the account opened?

Mr. Osborne: I object to that. That calls for a conclusion.

The Court: I do not think it is material. Objection sustained.

Mr. Holtz: That is all.

20 *Cross examination by Mr. Osborne.*

Q You started a campaign, as I understand it, to get financially responsible people to open charge accounts; is that right? A Yes, sir.

Q That was quite an extensive campaign? A We had about 5,000 or 6,000 names in New Jersey.

Q To whom you sent out requests, requesting people to open an account there? A Yes.

30 Q You say in your letter, Exhibit P. 3, that you hope there will be a continuance as in the past? A Yes, sir.

Q Was there a former account? A There was an old account which had been inactive for a good many years.

Q You have been with Gimbel Brothers since January 2, 1923? A Yes, sir.

Q That was an old account? A Yes, sir.

40 Q That was in whose name? A Mrs. Stephen F. Barrett. But after they are inactive for a period of two or three years—

James H. Morrison, for Plaintiff, cross.

Q Never mind. You have answered the question. You were rounding up these old customers, as well as new customers? A Yes.

Q Have you brought with you any investigation of the credit of Mr. Barrett on the old account at all? A We have that on file.

10

Mr. Holtz: I do not think we ought to go into that at this time.

(Argument.)

The Court: I shall allow it.

Q (Question read.) A I believe the attorney has the papers.

(Argument.)

The Witness: What I referred to is the original card requesting the account.

20

By Mr. Holtz.

Q Is this the record you referred to (handing documents to witness)? A Yes.

By Mr. Osborne.

Q Whatever you have in the line of your investigation is here? A It is so old now—

Q I notice on the back of what I am reading that it says that bills are to be sent to 60 Beaver street. Was that Mr. Barrett's address? A Yes, sir.

30

Q I notice on another paper here, dated March 1, 1930, it says that bills are to be sent to 60 Beaver street. That was to Mr. Barrett's address? A That is his address.

Q Beaver street is in New York. That was his business address? A Yes, sir.

40

James H. Morrison, for Plaintiff, re-direct.

Mr. Holtz: I would like to have this paper marked in evidence.

(The same is received in evidence and marked Exhibit P. 4.)

10 Q As to those bills that were sent to 60 Beaver street, in whose name were they sent? A Mrs. Stephen F. Barrett. But I might add that no bills did go there.

By the Court.

Q That is what he asked you. They were not sent there? A They were not sent there.

Q How do you know that? A From our ledger records, the addressograph.

20 *Re-direct examination* by Mr. Holtz.

Q As a result of your credit investigation of Mr. Barrett, what did you do?

Mr. Osborne: I object to that.

The Court: I shall allow it.

A Our old investigation was on Mrs. Stephen F. Barrett.

30 Q You have testified before that you had a credit investigation of Mr. Barrett, in response to Mr. Osborne's question. My question is: After you investigated Mr. Barrett's credit, what did you do with reference to this account which you just testified to? A The investigation on this particular account was all on Mrs. Stephen F. Barrett.

James H. Morrison, for Plaintiff, re-direct.

By the Court.

Q So that you did not investigate Mr. Stephen F. Barrett at any time? A No, sir; only through our solicitation records, at which time we had a record of both names.

By Mr. Holtz.

10

Q Did you have any information as to Mr. Barrett's financial responsibility? A Yes, sir.

Q As the result of the information you had concerning Mr. Barrett's financial responsibility, did you make any change in the account with reference to that account carried by Mrs. Barrett?

The Court: This witness is testifying quite obviously only from hearsay. No one has objected to it. 20

He says that the records show that that account was in the name of Mrs. Barrett. He also says that the records show that Mr. Barrett was not investigated, as I understand it. He also says that the bills were never sent to Mr. Barrett, but were sent somewhere else.

30

By the Court.

Q Am I right about that? A Yes, sir.

(Argument.)

By Mr. Holtz.

Q Am I correct in my statement that you made a financial investigation of Mr. S. F. Barrett in 1929 when this new account was opened?

40

Stephen F. Barrett, for Defendant, direct.

Mr. Osborne: I object to that.

The Court: Objection sustained. That is not proper re-direct.

(Argument.)

The Court: We shall take a recess until
10 two o'clock.

(At one o'clock, P. M., the Court takes a recess until two o'clock, P. M.)

AFTER RECESS.

PLAINTIFF RESTS.

20 STEPHEN F. BARRETT, sworn in behalf of defendant.

Direct examination by Mr. Osborne.

Q I notice this account runs in June and July, 1929. At that time were you married to Mrs. Barrett, the defendant in this case? A Yes, sir.

Q You are Stephen F. Barrett? A Yes, sir.

Q And your wife is Mrs. Stephen F. Barrett? A Yes, sir.

30 Q Although she is named here as Mary A. Barrett? A Yes.

Q How long have you been married to her?

A Twenty-four years.

Q During that period have you always lived with her? A Yes.

Q Were you living with her in June and July of 1929? A Yes.

Q Have you any children? A Yes.

40 Q How many? A Six.

Stephen F. Barrett, for Defendant, cross.

Q Where did you live in 1929? A 377 Til-
lou Road, South Orange.

Q Are you living there now? A Yes.

Q What was your business in 1929? A In-
surance broker.

Q Is it your own business? A Yes.

Q Where was your business? A 60 Beaver 10
street.

Q What city? A New York City.

Q How long have you been in that business?
A 25 years or more.

Q In 1929 were you living with your wife and
with your family? A Yes.

Q Will you tell us what your net income was
during the year 1929? A About \$17,000.

Mr. Osborne: You may cross examine.

20

Cross examination by Mr. Holtz.

Q Of that \$17,000, how much did you give to
Mrs. Barrett to take care of the household ex-
penses?

Mr. Osborne: I object to that.

The Court: Objection sustained.

Q Who paid ordinarily for the goods which 30
Mrs. Barrett purchased for the household?

Mr. Osborne: I object to that.

The Court: What is the purpose of it?

Mr. Holtz : The defense here is that these
goods were necessities, that the husband had
not fulfilled his obligation to supply those
necessaries, and as a result of that the law
has implied an obligation upon him to pay

40

Stephen F. Barrett, for Defendant, cross.

for them to the exclusion of the liability of the wife.

(Argument.)

The Court: I shall allow him to answer the question.

10 Mr. Osborne: Exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q (Question read.) A I can't say the amount.

Q Can you give us an approximate amount?
A I can tell you what the allowance aimed to be, if I can't tell you the figures. It merely aimed to cover ordinary food and routine bills of that
20 sort in connection with the house, but by no means to cover department store bills of \$500 and \$600.

Q Who owns the house at 377 Tillou Road?

Mr. Osborne: I object to that.

The Court: Objection sustained.

Q Did you know that this account had been opened by your wife? A Yes.

30 Q Did you know that she purchased \$500 worth of goods a month? A Yes.

Q Did you pay anything on this account? A No.

Mr. Holtz: That is all.

Mr. Osborne: That is all. We rest, if your Honor please.

Mr. Holtz: I should like to call Mrs. Barrett.

Mary A. Barrett, for Plaintiff in Rebuttal, direct.

MARY A. BARRETT, sworn in behalf of plaintiff in rebuttal.

Direct examination by Mr. Holtz.

Q Are you the owner of the premises known as 377 Tillou Road, South Orange? 10

Mr. Osborne: I object to that.

The Court: Objection sustained. That is not rebuttal. You have produced this witness for the purpose of rebuttal. I ruled that that was an improper question to ask the husband. Therefore, there is nothing to rebut.

Mr. Holtz: Exception.

Plaintiff's counsel prays an exception to this ruling of the Court. 20

Exception noted as ground of appeal.

By Mr. Holtz.

Q In June, 1929, who was the owner of the premises 377 Tillou Road, South Orange?

Mr. Osborne: I object to that.

The Court: Objection sustained. 30

Mr. Holtz: Exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Holtz: That is all.

Defendant's Motion for Direction of a Verdict.

Mr. Osborne: I move for a direction of a verdict for the defendant, if your Honor please.

(Argument.)

10 The Court: I think the question here is a question of law. I think it is clear that the husband's primary obligation was to supply these things to his wife. Under the testimony there is nothing that takes it out of that category and makes the wife personally responsible.

The plaintiff must show that the defendant intended to bind her own estate. Otherwise, she acted as the agent of her husband, under the cases.

20 I do not think there is any question as to whether these were necessities. I think the only point is whether the contract was with the wife individually so as to cause her personally to be bound, or whether it was the husband acting through his agent, his wife.

The jury will rise, and the Court directs them to find a verdict of "no cause of action."

30 (Thereupon, the jury rose and rendered a verdict in favor of the defendant.)

Mr. Holtz: Exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

54760	}	<i>Action at Law.</i>	10
GIMBEL BROTHERS, INC., <i>Plaintiff,</i>		<i>On Verdict by a Jury.</i>	
<i>vs.</i>		<i>Judgment for Deft.</i>	
MARY A. BARRETT, <i>Defendant.</i>		<i>January 13, 1931.</i>	
		<i>Costs \$70.15.</i>	

Stetson & Mapletoft, attorneys for defendant:

20

This action was tried before Judge Newton H. Porter with a jury at the Essex Circuit Court on January 13, 1931.

The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the defendant Mary A. Barrett and against the plaintiff Gimbel Brothers, Inc.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and the defendant recover of the plaintiff costs which are taxed at Seventy Dollars and Fifteen Cents.

30

Judgment signed and entered January 13, 1931.

WILLIAM S. GUMMERE,
C. J.

Book 112, page 316, C. C. Judgments.

Clerk's Certificate.

ESSEX COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.:

10 I, JOHN H. SCOTT, Clerk of the Circuit Court
 in and for the County of Essex in the State of
 New Jersey,

Do HEREBY CERTIFY That the foregoing is a
 true and correct copy of all the pleadings in
 the case of Gimbel Brothers, Inc., plaintiff, *v.*
 Mary A. Barrett, defendant, together with a
 copy of the judgment record entered in Book
 112, page 316 of Circuit Court Judgments on
 January 13, 1931, and the same is taken from
 and compared with the original copies of all
 records and as the same now remains on the
 20 files of said court.

IN TESTIMONY WHEREOF, I have here-
 unto set my hand and affixed the of-
 (SEAL) ficial seal of said Court and County at
 Newark, N. J., this eleventh day of
 April, A. D. 1931.

JOHN H. SCOTT,
 Clerk.

30

40

STIPULATION.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

GIMBEL BROTHERS, INC., a corporation, <i>Plaintiff-Appellant,</i> <i>vs.</i>	} <i>On Appeal.</i> } <i>Stipulation.</i>	10
MARY A. BARRETT, <i>Defendant-Appellee.</i>		

It is stipulated and agreed by and between the attorneys of the respective parties hereto that this stipulation be printed in the State of Case on appeal in lieu of Plaintiff's Exhibit P. 1. 20

Plaintiff's Exhibit P. 1 is the book account annexed to and made a part of the plaintiff's complaint and appearing in the transcript as a part thereof.

SMITH & SLINGERLAND,
Attorneys of Plaintiff-Appellant.

STETSON & MAPLETOFT,
Attorneys of Defendant-Appellee. 30

*Plaintiff's Exhibits.***EXHIBIT P. 2.**

GIMBEL BROTHERS Mrs Stephen F Barrett
 NEW YORK 377 Tillou Road
 South Orange N J

10 Please add my name to your list Monthly Charge
 Customers.

Here is my signature for your records.

Signature—Mary A. Barrett

Bank on which my
 checks will be drawn

Savings Investment & Trust
 Co. South Orange Office

20

EXHIBIT P. 3.

June 11, 1929

Mrs. Stephen F. Barrett
 377 Tillou Road
 South Orange, N. J.

Dear Mrs. Barrett:

30

Thank you heartily for your cooperation and ex-
 pression of interest in setting our records in
 order, as evidenced by your very kind acceptance
 card of recent date.

We shall be delighted to keep your name on our
 list of charge patrons and shall look forward to
 serving you as often as in the past.

Very truly yours,

GIMBEL BROTHERS, INC.

BY:

MD:FE

40

*Plaintiff's Exhibits.***EXHIBIT P. 4.****APPLICATION FOR CREDIT**

No. 23993 8/10 W
 Name Mrs. Stephen F. Barrett C
 Residence 377 Tillow Rd So Orange N. J.
 Business Ins Bills to 60 Beaver St 10
 Applicant Miss Caulkins
 References S Crow Co
 R. D. P. A. R. C. A. C. R. C.
 √ √ S. 2 G.
 INSTRUCTION [] New Account DATE
 [] Change in Address
 RECORD OF [] Change in Rating
 Mar 1 1930

Name Mrs Stephen F Barrett
 Old or Present Address 377 Tillow Rd 20
 South Orange N J
 Bills etc to 60 Beaver St New York, N. Y.
 Account No. Coin No. Rating
 23993 1505 K O Sure
 Eh How Received M
 Authorized by Jno Morrison
 Master File Noted by M. G. Date 3/1/31

HOW ACCOUNT?

URGENT—Bookkeeper will please show amount 30
 owing with date of same; also amount of last
 payment. Return immediately to Credit Office.
 NAME Mrs S F BARRETT
 ADDRESS 377 Tillou South Orange
 Present Condition of Account—Inactive
 Account No. 23993 Date 6/14/24 K C Sure

Plaintiff's Exhibits.

NOTICE TO BOOKKEEPING OFFICE

Change of Address

Name Mrs. S. F. Barrett

Old Address 250 E 3rd Ave. Roselle N J

New Address 377 Tillou Rd. So Orange N J

10 Notified by per Mrs S. F Barrett

Permanent	Temporary	Summer	Business
X			

Signature Chas Rakytn

Noted in Ledger 23993—25

By M G 5/8/22

5/6/22 X

20 I am willing to have my name on your charge account books, and will probably avail myself of its privileges.

You may send the identification coin, which will be chiefly used by Mrs. S. F. Barrett.

Very truly yours,

M. Barrett.

1505

215 E. 2nd Ave.
Roselle, N. J.

30 Gentlemen:—

6/2/13

Please be advised that my address will be "Van Court Inn" Roselle, N. J. during the month of June 23993

Yours faithfully

Mrs. Stephen F. Barrett

Plaintiff's Exhibits.

NOTICE TO BOOKKEEPING OFFICE

Change of Address

Name Stephen F Barrett

Old Address 215 E 22 St Roselle N J

New Address 250 E 3 St Roselle N J

Notified by Sch X 10

Permanent Temporary Summer Business

√

Signature Holmes

Date 7/18/13 Noted in Ledger By M

20

30

40

NOTICE TO WORKMEN'S DIVISION
County of Albany

James S. ...
...
...
...
...

...

...

...

...

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

GIMBEL BROTHERS, INC., a corporation,

Plaintiff-Appellant,

vs.

MARY A. BARRETT,

Defendant-Appellee.

On Appeal.

BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

This action is brought to recover the balance due plaintiff on a certain book account. The defendant, Mary A. Barrett, is the wife of Stephen F. Barrett (Case, p. 38, l. 24, etc.). The account was opened by the plaintiff at her request on return of a printed card in the name of Mrs. Stephen F. Barrett. The defendant signed the card in her name, Mary A. Barrett (Case, p. 33, l. 7, etc.; Exhibit P. 2, Case, p. 46). The balance due on the account is \$537.76 (Case, p. 31, l. 7, etc.).

The plaintiff had previously carried an account with the defendant in 1913 and this account continued for a number of years (Exhibit P. 4, Case, pp. 47 and 48). All of the records were in the name of Mrs. S. F. Barrett and it does not appear that the defendant's husband had dealt with the plaintiff at any time. He has paid nothing on the present account (Case, p. 40, l. 32). This account was opened after an investigation of the defendant's financial responsibility (Case, p. 32, l. 35, etc.) and the defendant was advised that the account had been opened (Case, p. 33, l. 27; Exhibit P. 3, Case, p. 46).

At the close of the entire case, the defendant moved for a direction of verdict in her favor (Case, p. 42, l. 1). This motion was granted by the Trial Court (Case, p. 42, l. 27) and the plaintiff duly excepted thereto (Case, p. 42, l. 32).

The Trial Court found in substance that the defendant's husband was liable to the exclusion of her responsibility (Case, p. 42, l. 8, etc.). The plaintiff contended and now contends that the only evidence was such as to warrant the conclusion that defendant procured the credit on the strength of her individual responsibility and that it did not appear that the purchases were made upon the credit of her husband.

The appellant has specified seven grounds of appeal as follows:

1. Because the Trial Court erred in directing a verdict in favor of the defendant.
2. Because the Trial Court erred in determining that there was no testimony to make defendant personally responsible.
3. Because the Trial Court erred in determining as a matter of law that the goods purchased were necessaries.
4. Because the Trial Court erred in determining that the husband of the defendant was liable to the exclusion of the responsibility of the defendant herself.
5. Because the Trial Court erred in determining contrary to Exhibit P. 2 that there was no evidence that the defendant intended to charge her own personal estate.
6. Because the direction of a verdict by the Trial Court in favor of the defendant was contrary to the evidence.

7. Because the direction of a verdict by the Trial Court in favor of the defendant was contrary to law.

I.

The Trial Court erred in directing a verdict in favor of the defendant.

The evidence presented questions which should have been submitted to the jury. The defendant's answer alleged by way of defense that her husband and not herself was liable (Case, p. 14, l. 27, etc.). Being an affirmative defense, the burden of proof was upon the defendant. This Court has said in an opinion by Judge Hetfield in *Collins Realty Co. v. Sale, et al.*, 144 Atl. 585 (not officially reported) at page 587:

"Whenever the existence of any fact is necessary in order that a party may make out his case or establish a defense, the burden is on such party to show the existence of such facts, and if he desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts, which he asserts or denies to exist, he must prove that those facts do or do not exist in order to be entitled to relief. *Willett v. Rich*, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684."

See also *Schomer v. Hoffman*, 102 N. J. L. 347, 348; also 22 C. J. 68 and cases therein cited.

To create an implied agency on the defendant's part to bind her husband, it was essential that the purchases be shown to have been necessities. *McCreery v. Martin*, 84 N. J. L. 626, *Wanamaker v. Ulizio*, 102 N. J. L. 166, 168; *Davis v. Freeman* (not officially reported) 2 N. J. Misc. 79; *Jordan Marsh Co. v. Cohen*, 242 Mass. 245, 136 N. E. 350, and text and cited cases, 13 R. C. L. 1198, para. 230.

There was no proof that the defendant's husband had failed to supply her with sufficient goods of the nature purchased as to meet her necessary requirements. The defendant, therefore, failed to sustain her burden.

It was also a question of fact for the jury to decide whether or not the evidence sustained the plaintiff's contention that the defendant intended to bind herself. *Caldwell v. Blanchard*, 191 Mass. 489, 77 N. E. 1036; *Bell v. Rosignol* (Ga. 1915) L. R. A. 1915 D 1184; and text and cited cases, 13 R. C. L. 1200, para. 233.

This Court by Justice Trenchard said in *Barry v. Borden Farms Product Co.*, 100 N. J. L. 106 at page 108:

“Motions for non-suit and for the direction of a verdict for the defendant, for the purpose of the motions, in effect admit the truth of the evidence, and of every inference of fact that can be legitimately drawn therefrom, which is favorable to the plaintiff, but deny its sufficiency in law; and where such evidence or inference of fact will support a verdict for the plaintiff, such motions must be denied. *Weston Co. v. Benecke*, 82 N. J. L. 445.”

This case was cited with approval in *Hunke v. Hunke*, 103 N. J. L. 645 at page 648 and in *Iaconio v. De Angelo*, 104 N. J. L. 506.

It is only when the purchases are necessities that a question of implied agency arises. If a wife purchases goods which are not necessities, she cannot as implied agent, bind her husband. *McCreery v. Martin*, 84 N. J. L. 626. She herself is answerable for all purchases other than necessities unequivocally and as certainly as any other individual in the purchase of goods.

The testimony concerning the facts of liability as outlined in the beginning of this brief, together with the evidence that there was a balance of \$537.76 still due upon the account, would have supported a verdict for the plaintiff. We respectfully submit that the Trial Court erred in granting the defendant's motion for a direction of a verdict in her favor, and in not submitting the questions raised by the evidence, to the jury.

II.

The Trial Court erred in determining that there was no testimony to make defendant personally responsible.

The defendant was a married woman living with her husband during the period of time embraced in the plaintiff's account (Case, p. 38, l. 24). Upon this fact defendant rests her case. Practically the entire direct testimony of the defense was proof of this one point.

Ordinarily, the plaintiff's burden of proof is sustained by evidence of the mere purchase of the goods by the defendant. The implied promise on the purchaser's part to pay is sufficient to support the action. The plaintiff contends that until it appeared that the goods were *necessaries* and that goods of like nature had not been supplied to the defendant by her husband in sufficient quantity to satisfy her requirements, the essential facts were not shown to render applicable the presumption of law which would create the defendant in this matter an agent to bind her husband to the exclusion of her own liability. Without this presumed agency, the defendant bound only herself to pay the debt. The argument under Point IV in this brief is directed to the support of this contention.

We assume for the purpose of establishing the Trial Court's error specified in this point, that the plaintiff had the burden of proving by affirmative evidence that the defendant intended to charge herself personally. The Trial Court held that such evidence did not affirmatively appear (Case, p. 42, l. 8, etc.).

The plaintiff contends that this finding was made contrary to the following evidence: The account was opened in the defendant's name (Exhibit P. 1, Case, p. 45; Case, p. 6). The defendant knew that the account was being kept in her name inasmuch as she signed Exhibit P. 2 (Case, p. 46) requesting that her name be added to the plaintiff's list of charge customers. The signature upon this card was admittedly that of the defendant (Case, p. 33, l. 10). The defendant's husband never paid anything upon the account (Case, p. 40, l. 32) and it does not appear that the plaintiff ever dealt with him. All of the records of the plaintiff were carried in defendant's name (Exhibit P. 1, Case, p. 46; Case, p. 6; Exhibit P. 2, Case, p. 46; Exhibit P. 4, Case, p. 47). A letter (Exhibit P. 3, Case, p. 46) was sent to the defendant and apparently received by her (Case, p. 33, l. 32) in which plaintiff clearly indicated that it was opening the account with her.

The mere fact that the defendant was a married woman did not *ipso facto* create her an agent to bind her husband. *Goldstein v. Slutzsky*, 254 Mass. 501, 150 N. E. 326; *Nelson v. Gorey*, 144 Mass. 418; *McCreery v. Martin*, 84 N. J. L. 626, 628; *Harvey v. Squire*, 217 Mass. 411, 105 N. E. 355, 356; 30 C. J. 612, para. 163, at page 614.

Plaintiff respectfully submits therefore that with the evidence recited in the second preceding

paragraph, it had met the burden necessary to justify a jury in rendering a verdict against this defendant.

III.

The Trial Court erred in determining as a matter of law that the goods were necessaries.

The liability of defendant's husband is the basis of her defense. She claims to have had the right upon an implied agency to bind her husband. The very foundation of this implied agency, however, is that the goods were *necessaries*, and that her husband failed to supply them to her. Otherwise the defendant herself is responsible for her purchases.

Our Supreme Court has stated in *Davis v. Freeman*, 2 N. J. Misc. 79 (not officially reported) at page 81:

“To hold a husband responsible for goods purchased by his wife, it is necessary to show the wife's authority to make the purchase or the husband's ratification of the purchase, or that the article purchased was a necessary.”

It is only in the necessitous situation that a wife is empowered to pledge her husband's credit and thus to compel him to support her. *McCreery v. Martin*, 84 N. J. L. 626, *Wanamaker v. Ulizio*, 102 N. J. L. 166, 13 R. C. L. 1198 para. 230.

The Trial Court undertook to determine as a matter of law that the goods purchased were necessaries. This was the basis of the husband's liability on the strength of which the verdict was directed (Case, p. 42, l. 8, etc.). The law is well settled, however, that this is the province of the jury. It is a question of fact

which the jury alone has the right to determine. A succinct statement of the law in this regard is set forth in 13 R. C. L., page 1208, para. 241 from which we quote the following:

“In regard to the much vexed question as how it is to be determined in a given case whether the articles furnished were necessities, *the general rule adopted, is that it is a question of fact for the jury, unless, in a very clear case, where the court would be justified in directing authoritatively that the articles cannot be necessities. The court can only instruct the jury as to the classes of articles, which, by law, are considered as necessities; but the quantity or extent to which they have been furnished is a fact to be left to the jury, and to what amount they shall be allowed must depend on their discretion.*” (Italics ours.)

To like effect is *Wickstrom v. Peck*, 148 N. Y. S. 596, 163 App. Div. 608; *Jordan Marsh Co. v. Cohen* (1922), 242 Mass. 245, 136 N. E. 350, 24 A. L. R. 1480; *Willey v. Beach* (1874), 115 Mass. 559.

This Court has cited with apparent approbation the authority from which the foregoing excerpt was taken. In *Wanamaker v. Ulizio*, 102 N. J. L. 166, we find the following, at page 169:

“The liability of the husband extends to articles which would ordinarily be necessary and suitable in view of the rank, position, fortune, earning capacity and mode of living of the husband. 30 Corp. Jur. 601, para. 141, 13 R. C. L. 1207, para. 240. This is usually a question of fact for the jury, 13 R. C. L. 1208 para. 241.”

The Court has a right to decide that goods do not come within the class of necessities. The converse of this proposition, however, is not true. Unless the goods are obviously unnecessary, it is

for the jury alone to determine whether in the particular case they are necessities. See 13 R. C. L. 1208, para. 241.

There is nothing in this case to indicate that the goods were necessities. It was a part of the defendant's case to establish those facts upon which her affirmative defense rested. *Collins Realty Co. v. Sale, et al.*, 144 Atl. 585 (not officially reported); *Schomer v. Hoffman*, 102 N. J. L. 347, 348; 22 Corp. Jur. 68. The defendant failed, however, to introduce any evidence as to the rank, position, fortune, or mode of living of herself and her husband. Without this evidence, defendant failed to establish her defense.

The defendant, therefore, stands in the position of an ordinary debtor. Even though married, she is responsible for her debts. P. L. 1929, Chapter 71, page 109. If she has incurred debts which she can meet out of her separate estate, justice demands that she be required to pay. The fact that her husband has not sufficient independent means to satisfy her obligations, should not defeat payment of her just debts.

IV.

The Trial Court erred in determining that the husband of the defendant was liable to the exclusion of the responsibility of the defendant herself.

The defendant set up an affirmative defense which in substance alleged that defendant's husband was liable to the exclusion of her responsibility. The Trial Court erred in determining that this defense was proved.

The proof necessary to support this defense should have been equal to that which the plaintiff

would have been required to produce had the action been against defendant's husband. The nature, extent and probative value of such testimony has been passed upon by this Court in *McCreery v. Martin*, 84 N. J. L. 626, and *Wanamaker v. Ulizio*, 102 N. J. L. 166, in which Justice Black speaking for this Court states at page 168:

“The ground of the liability of the husband for necessaries furnished the wife is his neglect or failure to perform his legal duty, arising from the marriage relation, to supply his wife with necessaries, and in cases of necessity the rule constitutes her his agent with authority to pledge his credit. *Dolan v. Brooks*, 168 Mass. 350; 13 R. C. L. 1199 para. 231.”

There was no evidence of neglect or failure of the husband to perform his legal duty. There was no evidence of a necessity upon which to predicate a presumption of law constituting the defendant the agent of her husband with authority to pledge his credit. In the state of the proof on the motion for direction of a verdict in this case, the plaintiff could not have sustained a verdict against the husband had it been suing him.

Likewise the defendant had failed to establish her affirmative defense and the Trial Court erred not only in refusing to submit the question of fact to the jury, but also in determining as a matter of law, that the liability of the husband had been established in such manner as to relieve this defendant of responsibility.

The liability of a wife was passed upon by our Supreme Court in two cases, the first being *Wilson v. Herbert*, 41 N. J. L. 454 (1879). The question again arose in *Feiner, et al. v. Boynton*, 73 N. J. L. 136. In the *Wilson* case the statement of facts thereof appearing at 41 N. J. L. 461 are

essentially different from the present case. The wife there neither directed the goods to be charged to her, nor did she know that the plaintiff was so charging them.

In the *Feiner* case the defendant did not know that the goods were charged to her by the plaintiff. From the reported case, it seems apparent that there was evidence that the goods were necessities.

It is to be noted, also, that both of these cases were decided before this Court rendered its opinion in *McCreery v. Martin*, 84 N. J. L. 626.

Until, therefore, it appeared that these goods were necessities, the plaintiff had no occasion to present further proof that the defendant had pledged her individual credit for them. If the goods were not necessities, her husband could not be held responsible for them. The defendant herself having purchased the goods, would be obliged to pay for them.

Even if we assume that the goods were shown to have been necessities, the Trial Court erred in refusing to submit the case to the jury. It was for the jury to find whether or not defendant had obtained the goods on her credit. See 13 R. C. L. 1201 where it is stated as follows:

“* * * As has been said, if a tradesman furnishes goods to a wife and gives the credit to her, the husband is not liable though she was at the time living with him, *a fortiori*, he is not liable if they were living apart. *Whether credit in any case is given to the woman or her husband is a question of fact to be determined by the jury.*”
(Italics ours.)

See also *O'Connell v. Shera* (1901), 73 N. Y. S. 231, 66 App. Div. 467; *Wickstrom v. Peck*, 167 N. Y. S. 408, 179 App. Div. 855; *Caldwell v.*

Blanchard (1906), 191 Mass. 489, 77 N. E. 1036. See also cases cited in the Annotation 27 A. L. R. 554.

A married woman has now practically unlimited contractual freedom. The pertinent section of our Married Woman's Act, P. L. 1929, Chapter 71, page 109, reads as follows:

“That any married woman shall, after the passing of this act, have the right to bind herself by contract in the same manner and to the same extent as though she were unmarried, which contract shall be legal and obligatory and may be enforced at law or in equity by or against such married woman, in her own name, apart from her husband.”

That Act took effect April 9, 1929. The effect upon previous existing disabilities is evident.

If the defendant's contention be correct, a merchant is indeed upon the horns of a dilemma. In the ordinary course of trade, a sale is made to an individual who happens to be married. If the wife is without independent means, and the merchant is obliged to look to the husband for payment, he is confronted with a certain burden of proof. Our courts have stated as heretofore cited, that the merchant must prove first that the goods were necessities, and having proved that, to go further and prove that the husband had refused to supply them to his wife. If these facts are not proven, he is denied relief against the husband and told that the wife had no right to bind him. He is compelled to look to the wife for payment.

On the other hand, the wife having independent means, suit is instituted against her. Such is the situation in the present case. The husband is now glad to admit that he is responsible. Payment cannot be enforced against him. The wife

is cloaked with the defense of his dubious admission and her property rendered immune from the enforced payment of a very just debt.

The facts necessary to establish the husband's liability as stated in *McCreery v. Martin, supra*, and *Wanamaker v. Ulizio, supra*, which the defendant assumed to prove in her defense, do not appear in this case. It was therefore error for the Trial Court to grant defendant's motion for a direction of a verdict in her favor.

V.

The Trial Court erred in determining contrary to Exhibit P. 2 that there was no evidence that the defendant intended to charge her own personal estate.

Exhibit P. 2 (Case, p. 46) bears defendant's signature (Case, p. 33, l. 6, etc.). This card requested that the defendant's name be added to plaintiff's list of monthly charge customers. The defendant therefore knew that she was being charged with the goods.

Less unequivocal evidence of an intent to bind herself could hardly appear. It is improbable that the defendant could have expected other than that the goods were to be charged to her. She signed her own Christian name, Mary A. Barrett, to the card. A stronger indication that she intended to deal as a separate individual apart from her husband is inconceivable.

We refer to the authorities hereunder in Point II and Point IV in support of the contention that the Trial Court erred in finding that there was no evidence that the defendant intended to charge her own personal estate.

VI.

The direction of a verdict by the Trial Court in favor of the defendant was contrary to the evidence.

We refer to the argument and authorities under the foregoing points in the brief. The argument under Point II is especially directed to this error of the Trial Court.

VII.

The direction of a verdict by the Trial Court in favor of the defendant was contrary to law.

The only defense in this action was that the defendant's husband, and not the defendant herself, was liable. The Trial Court held as a matter of law that that defense had been sufficiently established.

Chief Justice Gummere, speaking for this Court in *McCreery v. Martin*, 84 N. J. L. 626, at page 628 said:

“A wife has no power to make a contract binding upon her husband unless upon his authority, express or implied. In cases where the authority is to be implied from the marital relationship and the cohabitations of the parties, the presumption which the law raises is based upon the obligation of the husband to supply necessaries to the wife. It may be that it is to be presumed that goods of the character of necessaries purchased by the wife on the credit of the husband are the very ones with which he was bound to supply her. But certainly this is not a presumption *juris et de jure*, and may be overcome by proof to the contrary. This duty which the law imposes upon the husband, and which he must discharge to the extent of his ability, is satisfied by a single performance. In other words, having once performed it, the law does not impose

upon him the obligation of duplicating that performance. When he has supplied his wife with those necessaries which their station in life and his financial standing entitled her to have at his hands, or has furnished her with money sufficient to enable her to purchase them for herself, he is under no obligation to pay bills incurred by her for what would have been necessaries if he had not already supplied her therewith, but which are not, in fact, such, because of the precedent supply. The husband may permit such extravagance on the part of the wife if he sees fit; but having discharged the obligation which the law imposes upon him with relation to his wife's necessaries, he is entitled to regulate her expenditures, for which he is to become responsible, by his own discretion and judgment."

The defendant failed to show that her husband was liable for these purchases. Nowhere in the case is there such evidence as our Chief Justice has said must appear, if the husband is to be held responsible.

It is significant that the defendant did not take the stand in her own defense. She was present in the court room (Case, p. 41). The defendant's husband is liable for this debt only if, by failing to support his wife, he compelled her to purchase necessaries which by law he was under a duty to supply to her. This, the plaintiff would have been obliged to prove in an action against him. If, in fact, defendant was not being properly supported by her husband, that proof should have come from herself or witnesses in her behalf. Having purchased goods for which she could pay out of her independent means, she is, by the action of the Trial Court, permitted by silence alone to avoid liability.

For the reasons stated the judgment in this case should be reversed and a new trial ordered.

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New Jersey Court of Errors and Appeals

GIMBEL BROTHERS, INC., a
corporation,
Plaintiff-Appellant,

v.

MARY A. BARRETT,
Defendant-Respondent.

On Appeal

BRIEF FOR DEFENDANT-RESPONDENT

Statement of Facts

The plaintiff in this case brought suit on a book-account, for items of clothing, housefurnishings, toilet articles, etc.

The defendant is the wife of Stephen F. Barrett, and they were living together with their six children at the time the purchases were made (Case, p. 38, fol. 24, etc.).

The trial court found in substance that the plaintiff failed to show that the defendant intended to charge herself and to bind her own estate; that the purchases were necessities; and that the obligation was primarily on the husband, and at the close of the case, on motion of the defendant, directed a verdict in her favor (Case, p. 42, fol. 10, etc.).

I

The trial court did not err in directing a verdict for defendant.

Where a husband and wife are living together, and the wife purchases articles for domestic use, the law imputes to her the character of an agent for her husband (*Wilson v. Herbert*, 41 N. J. Law 454).

The real foundation of the husband's liability in such cases is the legal duty of every husband to support his wife and supply her with necessaries suitable to her situation and his own circumstances and condition in life (*13 R. C. L., Sec. 206*, p. 1178).

Where a husband and wife are living together, the presumption is in favor of the wife's authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to her management and for articles furnished to her for her personal use suitable to the style in which the husband chooses to live (*Vusler v. Cox*, 53 N. J. Law 516).

On his direct examination (Case, p. 39, fol. 18), Stephen F. Barrett, the husband of the defendant, testified that his net income for the year during which the purchases were made was about Seventeen Thousand Dollars (\$17,000), and on cross examination (Case, p. 40, fol. 28, etc.), he testified that he knew the account had been opened and the amount of the purchases.

A married woman may contract for such articles as principal, and assume responsibility of principal debtor. But to fix upon her such a liability, it must appear *affirmatively* that she made

the purchases on her individual credit. There must be either an express contract on her part to pay out of her separate estate, or the circumstances must be such as to show clearly that she assumed individual responsibility for payment, exclusive of the liability of the husband (*Wilson v. Herbert, supra; Feiner v. Boynton*, 73 N. J. Law 136).

The Married Woman's Act (*P. L. 1929, Chap. 71*, p. 109) does not alter the rule as to the liability of the husband for necessaries purchased by his wife, if they are living together.

II

The trial court did not err in determining that defendant was not personally responsible.

It was incumbent on the plaintiff to show that it relied on the financial responsibility of the defendant, inasmuch as there was no express contract to charge her separate estate. The "Application for Credit" (Exhibit P-4, Case, p. 47) states:

"Business Ins. Bills to 60 Beaver St."

There was no contention that the defendant was in the insurance business at 60 Beaver Street, New York, and the testimony of Stephen F. Barrett, the defendant's husband (Case, p. 39, fol. 6, etc.), shows that he was in that business, at that address.

The defendant was a married woman, living with her husband. The plaintiff had the burden of proving affirmatively that the defendant made

the purchases on her individual credit, or that she expressly agreed to pay out of her separate estate.

The burden of proof in the sense of the duty of the party having the affirmative of the issue to establish the proposition at the end of the case never shifts (*Hughes v. Atlantic City &c. R. R. Co.*, 85 N. J. Law 212).

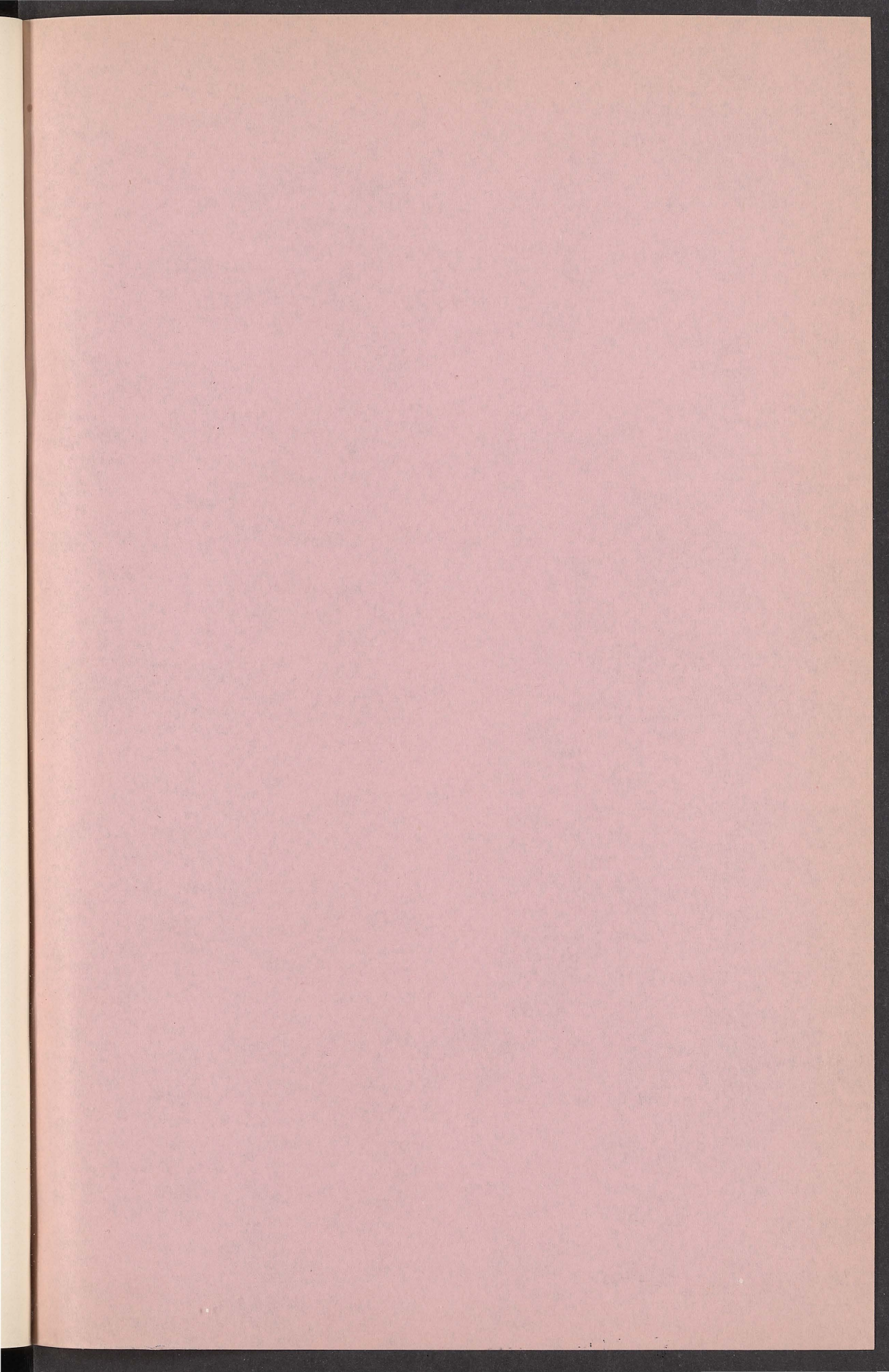
The plaintiff failed to show any express agreement on the part of the defendant, or such circumstances as to show that she assumed individual liability for payment. The plaintiff relied not on the financial responsibility of the defendant but on the financial responsibility of defendant's husband, as evidenced by the application for credit.

For the reasons stated, the judgment should be affirmed.

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On the Brief.



the purchase on her individual credit, or that she expressly agreed to pay out of her separate estate.

The burden of proof in the case of the duty of the party having the affirmative of the issue to establish the proposition at the end of the case was laid down in *Hughes v. Atlantic City & R. R. Co.*, 50 N. J. Law 212.

The plaintiff failed to show any express agreement on the part of the defendant, or such circumstances as to show that she assumed individual liability for payment. The plaintiff relied not on the financial responsibility of the defendant but on the financial responsibility of defendant's husband, as evidenced by the application for credit.

For the reasons stated, the judgment should be affirmed.

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