

[W.L.D.]
tiff before the action, to "plead the Gaming Act". The plaintiff has succeeded against the second defendant in respect of only eight out of the nine cheques, but in my opinion no adjustment to the costs is required, because the unsuccessful part of the claim was in substance a *plus petitio*, and because in any event it would have been necessary to refer to the additional documents associated therewith as part of the plaintiff's case.

The following order is made:

1. Provisional sentence against the first defendant is refused with costs but the plaintiff is given leave—
 - (i) to claim payment of his costs in the present proceedings, and
 - (ii) to reclaim any of the costs paid by him to the first defendant in respect of the present proceedings,

2. Provisional sentence is granted against the second defendant in the sum of R4,000, with interest on that sum at the rate of 6 per cent per annum from 20th January, 1967, to the date of payment, and with costs.

Plaintiff's Attorneys: *Sachs, Berman & Schneider*. Defendant's Attorney: *H. J. Orkin*.

PERROTT-HUMPHREY v. PERROTT-HUMPHREY.

(WITWATERSRAND LOCAL DIVISION.)

1967. April 4, 10. TROLLIP, J.

Husband and wife.—*Proprietary rights*.—*Claim by wife married out of community for amount expended by her in necessities for common household*.—*What must be proved under sec. 3 of Act 37 of 1953*.—*Parties married in Northern Rhodesia*.—*Emigration to Republic of S.A.*.—*Provisions of sec. 3 not applicable*.

G Because section 3 of the Matrimonial Affairs Act, 37 of 1953, was intended to alter, or perhaps supplement, the common law, a wife cannot, in terms of the proviso to the section, recover a debt paid by her unless, at the time she paid it, it was the kind of debt mentioned in the major premise of the section: that is the force and effect of the expression "any such debt". The debt must have been one (i) which had been incurred in respect of necessities for the joint household and (ii) for which both spouses were jointly and severally liable to the creditor by virtue of the section.

H In 1952 the plaintiff and the defendant were married out of community of property in Northern Rhodesia where they had established a joint household. For the first five years of the marriage the plaintiff worked and she and the defendant contributed their joint earnings to a common fund out of which all household expenses were paid. In 1960 the parties emigrated to the Republic of South Africa. In an action for restitution of conjugal rights the plaintiff sought to recover an amount being the amount disbursed by her for necessities for the joint household during the subsistence of their marriage.

Held, as at all times relevant to the plaintiff's cause of action the parties lived and were domiciled in Northern and Southern Rhodesia, that neither the parties

nor the creditors were ever subject to the provisions of section 3 of Act 37 of 1953, which was purely a South African measure. Consequently when the debts were paid the parties were not, by virtue of the section, liable for them jointly and severally, with the result that condition (ii) in the statement of law, *supra*, was never fulfilled.

A Action for restitution of conjugal rights and other relief. The facts appear from the reasons for judgment.

O. E. I. Measroch, for the plaintiff.

No appearance for the defendant.

Cur. adv. vult.

Postea (April 10th).

TROLLIP, J.: The plaintiff sues the defendant, firstly, for an order for C restitution of conjugal rights, custody of the two minor children born of the marriage and maintenance for herself and the children; and, secondly, for payment of R12,000, in terms of sec. 3 of the Matrimonial Affairs Act, 37 of 1953. The action is not defended. No difficulty arises on the claims for restitution of conjugal rights, custody and maintenance, for which the usual order will issue.

D I reserved judgment, however, on the claim for the R12,000. The basis for this claim is alleged in the particulars to the summons to be amounts disbursed by the plaintiff for necessities for the joint household during the subsistence of the marriage.

E The plaintiff's evidence can be summarised as follows: She was married out of community of property to the defendant in Northern Rhodesia, as it was then known, in 1952. They established a joint household there. For the following five years, until the first child was born, the plaintiff worked, and during that time both she and the defendant contributed their total earnings to a common fund out of which all household expenses were paid, presumably by the defendant. The defendant was then apparently not well-off financially. During that time F the earnings contributed by the plaintiff averaged about R150 per month, the total for the period of five years amounting to R9,000. Thereafter she worked again in Salisbury, Southern Rhodesia, for a period of three months, again earning about R150 per month, or R450 in all, which she again contributed to the common fund and which was G used up for the same purpose.

Thereafter in 1960 the parties migrated to the Republic of South Africa where they became domiciled. The defendant is now in a comfortable financial position.

H The plaintiff now seeks to recover R9,450 from the defendant under the provisions of sec. 3 of the Matrimonial Affairs Act. That section reads:

"A husband and wife married out of community of property shall be liable jointly and severally for all debts incurred by either spouse in respect of necessities for the joint household: Provided that if the wife pays any such debt or part thereof, she shall have a right of recourse against the husband for the full amount paid by her."

At the outset it seemed to me rather startling that the plaintiff, who had paid for household necessities, without possibly being able to re-

cover anything from the defendant while domiciled in Rhodesia, should immediately become entitled to recover such past payments from him under sec. 3 of the Matrimonial Affairs Act upon, and solely because of, their taking up residence in this country. I do not think that the A section does mean that.

The provisions of the section have altered or perhaps supplemented our common law in certain respects. Previously as between the creditor and spouses married out of community of property, only the contracting spouse was liable for and could be sued for the whole amount of the debt. The liability of the non-contracting spouse was "a controversial question", but the better view, according to Prof. Hahlo, was that he or she was liable to the creditor at most for half the debt (see Hahlo, *Law of Husband and Wife*, p. 119).

As between the spouses themselves a wife who paid the debt was previously not necessarily entitled to claim reimbursement from her husband. According to Prof. Hahlo:

... liability for household necessities depends upon whether the husband is obliged to maintain his wife, or the wife her husband. Where, as is normally the case, the husband is obliged to maintain his wife, the wife can claim reimbursement from her husband if she is compelled to pay a trader out of her own pocket for household necessities. But if the husband is out of work and without means, while the wife is in receipt of a good income, she has no such right of recourse. On the contrary, her husband, if he pays for household necessities, will be entitled to claim reimbursement from her.

Now, sec. 3 has rendered both spouses jointly and severally liable to the creditor for a debt incurred for joint household necessities. He can sue either or both of them for the full amount and if the wife pays "any such debt or part thereof", she can recover from her husband the full amount paid by her. Whether that right of recourse exists irrespective of their respective means (a query raised by Prof. Hahlo in his second edition, p. 161) need not be decided here. What is clear is that, because the section was intended to alter or perhaps supplement the common law, the wife cannot, in terms of the proviso to the section, recover the debt paid by her unless, at the time she paid it, it was the kind of debt mentioned in the major premise of the section; that is the force and effect of the expression "any such debt".

In terms of the proviso, therefore, the debt, at the time it was paid, must have been one (i) which had been incurred in respect of necessities for the joint household; and (ii) for which both spouses were jointly and severally liable to the creditor by virtue of sec. 3. The fulfilment of these conditions is fundamental to the successful right of recourse; in particular it could never have been intended that the wife could recover from the husband unless they were both initially liable jointly and severally to the creditor.

In the present case I shall assume, without deciding, in plaintiff's favour that by contributing her earnings to the common fund, she must be regarded as having thereby paid debts for joint household necessities, and that condition (i) above has therefore been fulfilled. That leaves condition (ii). At all times relevant to the plaintiff's cause of action the parties lived and were domiciled in Northern and Southern Rhodesia and the debts were contracted and paid in those countries. Consequently, neither the parties nor the creditors were ever subject to the provisions of sec. 3, which is purely a South African

When the debts were paid, therefore, the parties were not, by virtue of sec. 3, liable for them jointly and severally, so that condition (ii) was never fulfilled.

As there may be some other ground upon which the plaintiff can recover the payments from the defendant, I shall merely order absolute- A tion from the instance on this claim.

The following orders are therefore granted:

1. An order for restitution of conjugal rights; the defendant is to restore conjugal rights to the plaintiff on or before 13th May, 1967, or show cause on 24th May, 1967, why
 - (a) plaintiff should not be granted custody of the two minor B children of the marriage;
 - (b) defendant should not pay maintenance to the plaintiff at the rate of R200 per month, and R50 per child per month; and
- (c) defendant should not pay the costs of this action.
2. Absolution from the instance is granted on the plaintiff's claim C for R12,000.

Plaintiff's Attorneys: *Cliffe, Dekker & Todd.*

KENITEX AFRICA (PTY.) LTD. V. COVERITE (PTY.) LTD.
AND OTHERS.

(WITWATERSRAND LOCAL DIVISION.)

1967. May 9, 16. BEKKER, J.

Trade and trade mark.—Passing off.—Interdict proceedings in respect of.—Not necessary for applicant for interdict to establish dolus.

It is not a prerequisite to the grant of an interdict, in proceedings based upon an alleged passing off, that *dolus* be established. If a person violates the rights of another, even innocently, the latter is entitled to take steps to compel him from continuing to do so, and, if necessary, by order of Court.

Application for an interdict. Facts not material to this report have been omitted.

J. V. Lazarus, for the applicant.

A. R. Potter, for the first respondent.

M. E. King, for the second and third respondents.

Cur. adv. vult.

Postea (May 16th).

BEKKER, J.: The applicant seeks an order interdicting the respondents from applying "Kenitex" under any other name or passing "Kenitex" as any other substance or entering into or attempting to enter into any contracts with persons whereby the latter object is sought to be achieved.