

ELEPHANT TRADING COMPANY v. SMUKLER
AND TOSEWSKY.

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and the Court is now asked to permit a return to the order for restitution to be made in England.

Apart from special circumstances conjugal rights should be restored within the jurisdiction. If that is not done the Court ceases to have control of the proceedings. In *Rooth v. Rooth* (*supra*) such special circumstances were [apparently] held to exist. Plaintiff's statement that she has "urgent need to go to England," is not a special circumstance, and there is no evidence of any other.

The application is therefore refused.

Appellant's Attorney: *G. W. J. Macfarlane.*

[G. H.]

ELEPHANT TRADING COMPANY v. SMUKLER
AND TOSEWSKY.

1914. March, 5. WARD, J.

Practice.—Insolvency.—Petition for Sequestration.—Necessary Allegations.—Reference to order of Court not embodied.

A petition for compulsory sequestration dismissed, as it did not contain an allegation that the applicants were creditors of the respondents for £100, as required by sec. 7 of Law 13 of 1895.

Held, further, that reference could not be made to an order of court, not embodied in the petition, in order to supply the missing allegation.

Return day of a rule *nisi*, granted by WARD, J., on March 2nd, calling on the respondents, Aaron Smukler and David Tosewsky, to show cause why their private estates should not be finally sequestrated. A final order of sequestration had been granted against the partnership estate of the respondents by this Court on February 17th, 1914. The petition on which the provisional order of sequestration was granted in the present application contained no allegation that the applicants were creditors of the respondents. The relevant portions of the petition were as follows:—

Paragraph 1 set out who the applicants were, and paragraph 2 the respondents. Par. 3 was as follows:— "That the respondents' partnership estate was provisionally sequestrated on the 27th day of January, 1914, and a final order granted on the 17th day of February, 1914." Par. 4 set out the liabilities of the respondents. Par. 5 was as follows:—"That your petitioners have discovered from the allegations set out in the annexure hereto marked "A"

by one of the partners A. Smukler that either the partnership of A. Smukler or David Tosewsky jointly or severally are interested in certain property situate on the farm Driefontein in the mining district of Boksburg and that such property was alienated with a view to defeating the just claims of your petitioners. The respondents have therefore committed an act of insolvency." The remaining paragraphs are immaterial.

H. H. Morris, for the applicants, moved for a final order of sequestration.

No appearance for the respondent Smukler.

P. Millin, for the respondent Tosewsky: I take the preliminary point that the petition is bad in that there is no allegation that the applicants are creditors for the sum of £100, as required by sec. 7 of Law 13 of 1895. The wording of that section is the same as that of sec. 8 of the Cape Insolvency Ordinance, under which it was held in *Hoffman v. Black* (21 S.C. 23), that such an allegation in the petition was essential.

Morris, in reply: This is an application for an order amending the application for sequestration of the partnership estate. See sec. 18 of the Insolvency Law, which means that when an application is made for the sequestration of a partnership estate, the Court, without an application or petition to that effect, may grant an order sequestrating the private estates. It was unnecessary therefore for me to allege in my petition that we were creditors for £100.

[WARD, J.: But there is nothing to show that the applicants are creditors, or that they have any *locus standi*.]

Paragraph 5 of the petition mentions "The just claims of your petitioners," which is a clear indication that the petitioners are creditors. Further the order of court, sequestrating the partnership estate, which is before the Court, is between the same parties; this order must be presumed to have been rightly granted, and therefore it must be presumed that the applicants were creditors for £100.

[WARD, J.: That is evidence, but not an allegation. I did not notice that there was no allegation in the petition that the applicants were creditors, else I would not have granted the provisional order.]

I ask for leave to amend the petition by making the necessary allegation.

[WARD, J.: I cannot allow a amendment to the petition of so material a nature.]

Millin, was not called on to reply.

WARD, J.: It is quite clear that there is no allegation in the petition that the applicants are creditors of the respondents in the sum of £100, as required by sec. 7 of Law 13 of 1895, nor is there any allegation that they have any *locus standi*. It was said by Mr. *Morris* that that could be inferred from the words "Just claims of the petitioners" used in paragraph 5 of the petition; I cannot make such a deduction. "Claims" may mean merely that the applicants have a claim for damages, and in any case there is nothing to show that the claim amounts to £100. Then it was suggested that I could look at the order of court granting the final order of sequestration against the partnership estate of the respondents; that order of court, however, is not embodied in the petition, and I am not sure that if it were I could look at it. The application therefore must be dismissed as against both respondents.

Morris: How about the respondent Smukler who does not oppose?

I cannot help that; the application is dismissed as against him as well.

Applicants' Attorney: *B. Guinsberg*; Respondent's Attorney: *M. Marks*.

[G. W.]

KOHN v. KOHN.

1914. March, 19, 26. WARD, J.

Husband and Wife.—Divorce.—Forfeiture by guilty spouse.—Jewellery given after marriage.

On a decree of divorce being granted the guilty spouse is not allowed to retain any benefit derived from the marriage; this includes gifts of jewellery by the husband to the wife after marriage.

Action by the husband for (1) Divorce on the ground of the defendant's adultery; (2) Forfeiture of the benefits of the marriage in community of property; (3) The return of certain jewellery donated to the defendant by the plaintiff; (4) Costs.

The third claim only is material to this report. The evidence showed that the plaintiff had after the marriage given to the