

23/83

SUPREME COURT OF VICTORIA

MYER MELBOURNE LIMITED v CHALMERS

Gray J

16 February 1983

AGENCY – CREDIT ACCOUNT – WIFE DESERTED – WHETHER SHE CAN PLEDGE HUSBAND'S CREDIT FOR NECESSARIES.

C. were husband and wife. In 1968, they applied to Myer for credit facilities to purchase from Myer; this was granted, and goods were supplied and paid for until March 1981. Mrs C. lived with her husband until about November 1980 when he assaulted her causing substantial injury. Mrs C. consulted a solicitor after the assault, and considered leaving her husband, but decided against it. However, she left on or about 1 April 1981 being frightened to remain in the house any longer. Between 6 and 13 April 1981 Mrs C. bought \$261.98 worth of clothing from Myer and charged it to the account. On 2 April 1981, Mr C. telephoned M.'s credit control department to cancel his account; and this was followed in similar terms, by a letter from Mr C. dated 6 April 1981. As the account was not paid, Myer sued C., and on the hearing, C.'s counsel submitted that there was no case to answer on the ground that any authority Mrs C. had to pledge her husband's credit was terminated by the notice to Myer. The magistrate agreed and dismissed the complaint. On order nisi to review—

HELD: Order absolute.

(1) Where a wife is deserted by her husband and left penniless with a number of young children who require clothing, the wife has by operation of law authority to pledge the husband's credit for necessities suitable to her station in life, unless she is adequately provided for.

(2) The agency applies even in circumstances where the husband has forbidden the trader in question to deal with his wife.

GRAY J: *[After setting out the facts, His Honour continued]:* ... [5] The applicant obtained an order nisi to review the Magistrate's decision on a number of grounds. Ground 1 reads:

"That the Magistrate was wrong in holding, if he so held, that a husband could terminate his wife's agency of necessity merely by notifying the trader not to give her credit."

Ground 3 reads:

"That the Magistrate should have held that a wife is entitled to pledge her husband's credit for necessary goods supplied to her for their children if she is left without support by him without fault on her part, notwithstanding that her husband may have attempted to revoke her authority to pledge his credit."

I should have added that at the time counsel for the defendant made his submission of no case to answer he was not required by the learned Magistrate to elect whether to call evidence or not. In the result, the learned Magistrate gave his ruling on the basis of the evidence then before him. That evidence included uncontradicted and unchallenged evidence that the defendant's wife had left the home shortly prior to the purchases in question as a result of the defendant's misconduct. The evidence further showed that at that time she had no money and that the purchases were of clothing necessary for her four children.

In my opinion that evidence required the Magistrate to consider whether the applicant could take advantage of the well established common law rule which prevails in the circumstances sworn to by the wife. It has long been established that where a wife has been deserted by her husband or has been turned away by him without adequate cause, or has left him in consequence of misconduct on his part which justifies her in leaving him and she is living apart from him, she has by operation of law authority to pledge his credit for necessities suitable to her station in life unless she is adequately provided for. The agency is often referred to as an agency of necessity, but the better view is that it arises by operation of law. Further, it is well established that the

agency applies even in circumstances where the husband has forbidden the trader in question to deal with his wife.

It has been suggested in some English cases in the 1950s that the desirability of the common law rule at the present time is open to question. The rule was undoubtedly developed in the days when a wife could own no property and could not obtain credit and was, for most purposes, regarded as one with her husband. The necessity for the rule was questioned by Stable J in *JN Nabarro and Sons v Kennedy* (1955) 1 QB 577 at 579; [1954] 2 All ER 605. See also an article by Mr Hardingham in 54 ALJ p661 at 667. Notwithstanding these reservations, the rule is so clearly established that it is not open to me to do other than apply it where the necessary circumstances are established. The rule itself and the authorities upon which it is based are stated in *Bowstead on Agency*, 13th ed at p102 in Art. 40. The common law rule has been abrogated by statute in England by s41(1) of the *Matrimonial Proceedings and Property Act* 1970. Accordingly, the 13th ed of *Bowstead on Agency* is the last edition in which the common law rule is discussed.

It can be seen from the narrative of events before the Magistrates' Court that the submission to the learned Magistrate was confined to the point that the husband's notice to the trader brought the wife's agency to an end. No question was raised as to the possible access to a social security pension by the wife, nor was any question raised about the wife's entitlement, if it existed, to apply to the Family Court for a maintenance order. The argument before me ranged somewhat wider as Mr Brown, who appeared for the respondent, sought to support the Magistrate's ruling. Despite the criticism of the rule in modern times, it seems to me that there is still an area of legitimate operation in the case of a deserted wife who finds herself penniless for a period before she can take advantage of any pension entitlements.

This question is touched upon by Denning LJ in *Biberfeld v Berens* reported in (1952) 2 QB 770. At p783 Denning LJ considers the question that might arise in a period which elapses between a wife's desertion and her obtaining an order from the Courts for the maintenance. It seems to me that the common law rule cannot be said to be obsolete in the sense that the foundation for it has ceased to exist. There may well be situations where the operation of the rule is fully justified. On the evidence before the Magistrate, the situation of the wife was that of a deserted wife, left penniless, with a number of young children who required clothing.

In relation to the point taken before the Magistrate regarding the notice to the applicant, it is well settled that, because of the nature of the agency, it continues to apply, even where the husband seeks to bring it to an end by giving notice to a trader. I refer to *Bolton v Prentice* [1795] EngR 577; 93 ER 1136 and *Harris v Morris* 170 ER 635 as authority for this proposition. It is accepted by *Bowstead* as being well established in the article to which I have already referred.

For those reasons I am satisfied that the learned Magistrate was in error in giving effect to the submission of no case to answer on the ground that he did. The learned Magistrate may have been misled by an erroneous reference to the passage in *Cheshire & Fifoot* to which he was referred. It is quite clear that the paragraph in question in that text is concerned with the position which arises while the spouses are still cohabiting. In that situation, the wife's implied authority to pledge her husband's credit can be brought to an end by the giving of notice by the husband to the trader that the authority is at an end. However that may be, on the evidentiary picture before the Magistrate at the time of the submission, he was in my opinion in error in ruling that the giving of notice by the husband precluded the applicant from successfully suing the husband for the price of the goods.

As the defendant's counsel was not put to his election, it seems to be necessary to refer these proceedings back to the Magistrate. At least theoretically, it is open to the defendant to go into evidence and raise questions which may touch upon this question of Mrs Chalmers' authority. During Mrs Chalmers' cross-examination the suggestion was made that she had left the home to take up with another man. If that allegation could be made out upon evidence which was acceptable to the Magistrate, that would be a circumstance which ordinarily would tell against a finding that the wife had authority to pledge her husband's credit. In the circumstances, and for the reasons I have sought to express, I am satisfied that Grounds 1 and 3 of the order nisi have been made out and should be made absolute.