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WIFE'S RIGHT TO EJECT HUSBAND WHEN MARITAL HOME IS HER PROPERTY

Should a wife who has left her husband without justification be allowed to sue him in ejectment in an effort to evict him from the marital home, which is her own separate property? That this problem is one which often occurs today and will recur with greater frequency in the future cannot be doubted in view of the increasing divorce rate and ownership of property by married women. In *Owens v. Owens*[1] the Supreme Court of Delaware held that an erring wife could eject her husband from the marital home.

In the *Owens* case plaintiff before marriage owned certain real estate upon which she desired to build a three-unit apartment house. She contracted with the defendant, a building contractor. As the construction progressed, so did the relationship of the parties, terminating with the completion of the building and full payment in the Spring and with their marriage in the Summer. During the construction period the defendant, in anticipation of the future marriage, improved the plaintiff's property in order to make it practicable as their future abode.[2] After the marriage the parties moved into one of the apartments and established their home. Marital difficulties soon developed, and within two years the plaintiff left the apartment and began this suit in equitable ejectment[3] to evict her husband from her separately owned property. Although the plaintiff contended that she left because of cruel treatment, the trial court found that the wife was at *fault* in the separation, stating that she had no legal or practical[4] grounds for leaving her husband and that the marital difficulties were due to her "unjustified activities and accusations."[5]

The trial court held that under the Delaware Married Woman's Property Act[6] the plaintiff could not maintain her suit unless she

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[1]149 A.2d 320 (Del. 1959).

[2]Id. at 321. The Supreme Court of Delaware affirmed the trial court's finding that the improvements by the husband were not entirely in the nature of a gift to the wife, and allowed him a lien on her property for reimbursement.

[3]149 A.2d at 322, 324. The Supreme Court of Delaware reaffirmed the Delaware rule that a wife may not sue her husband at law, but may sue him in equity to enforce certain property rights. The court held that the wife had a substantive right to evict her husband and that the equity court cannot refuse to hear her case on the "clean hands" doctrine merely because she was at fault. For a similar procedural discussion see Ireland v. Ireland, 244 Pa. 489, 90 Atl. 911 (1914).

[4]143 A.2d 123, 125 (Del. Ch. 1958).

[5]Ibid.

[6]Del. Code Ann. tit. 13, § 311 (1953).

justifiably left the premises.[7] The court, in disallowing the plaintiff's suit as disruptive of the marital relationship, stated the family unity theory:

> "The cases supporting this view are based upon the reasoning that the emphasis must be on the marital domicile aspect of the problem rather than mere separate ownership. This is so because marriage contemplates that the parties will live together and consequently a rule should be adopted which favors the continuance rather than the destruction of that relationship, at least where the husband is without fault."[8]

The Delaware Supreme Court placed a liberal interpretation upon the Delaware Married Woman's Property Act and held that the guilty wife could maintain her suit,[9] stating that to hold otherwise "would be to write into our act a judicially created exception to its terms."[10] The court, doubting the wisdom of a rule preventing the wife from suing in hopes of bringing about a reconciliation and preserving the marriage unity, stated that:

> "It would hardly seem, ... even if the economic coercion of an inability to obtain possession of her own property led to the errant wife's return to cohabitation, that her return would in fact be a reconciliation based upon love and affection and thus a real preservation of the marital relationship."[11]

The court also felt that a recent statutory amendment allowing divorce without regard to fault[12] showed that it was not the intention of the legislature "to compel the continuance of a marital relationship between unwilling parties. . . ."[13]

A married woman, as the result of two well established doctrines, had almost no property rights at common law. The first was the doctrine of the husband's *jus mariti,* or estate by the marital right;[14] the

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[7]143 A.2d at 126.

[8]Ibid.

[9]149 A.2d 320 (Del. 1959).

[10]Id. at 323.

[11]Id. at 323-24.

[12]Del. Code Ann. tit. 15, § 1522 (1953), as amended, 51 Del. Laws ch. 27 (1957). This amendment allows a divorce "when husband and wife have voluntarily lived separate and apart, without any cohabitation for three consecutive years prior to the filing of the divorce action and such separation is beyond any reasonable expectation of reconciliation." The parties in the Owens case could not have availed themselves of this amendment, for at the time of this decision they had only been separated 28 ½ months.

[13]149 A.2d at 324.

[14]By virtue of the estate of the marital right, a husband acquired, at the time of and by the right of marriage, a life estate in any estate of freehold owned by his wife. The husband's estate, said to be jure uxoris (by right of the wife), was

second was the doctrine that the wife was not *sui juris* and therefore could not sue or be sued.[15] Equity developed the married woman's equitable separate estate[16] in order to circumvent the harsh principle of the husband's marital right estate, and permitted a married woman to sue even her husband with respect to her separate estate.[17] This was the state of the law until the nineteenth century and the passage of the Married Woman's Property Acts.[18] The acts vary a great deal, but generally grant married women substantial property rights with respect to their separately owned realty.[19] Many of the acts are broad in their terms, but generally they are merely narrow privileging acts

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itself a freehold estate and entitled him to the rents and profits from her land. It became a life estate of more permanent tenure upon the birth of issue and was called an estate by curtesy. Madden, Persons and Domestic Relations §§ 32-33 (1931); Moynihan, Preliminary Survey of the Law of Real Property 25 (1940); 2 Tiffany, Real Property § 484 (3d ed. 1939); 3 Vernier, American Family Laws § 167 (1935); McCurdy, Property Torts Between Spouses And Use During Marriage Of The Matrimonial Home Owned By The Other, 2 Vill. L. Rev. 447 (1957); Rapacz, Progress of the Property Law Relating to Married Women, 11 U. Kan. City L. Rev. 173 (1943). For additional discussion and cases see 26 Am. Jur. Husband and Wife § 55 (1940); 41 C.J.S. Husband and Wife §§ 21-22 (1944).

[15]At common law one spouse could not maintain an action against the other, largely due to the theory of marital unity which treated them as one in the eyes of the law. Madden, Persons and Domestic Relations § 54 (1931); 3 Vernier, American Family Laws §§ 79, 180 (1935); McCurdy, Property Torts Between Spouses And Use During Marriage Of The Matrimonial Home Owned By The Other, 2 Vill. L. Rev. 447 (1957); Note, 1 Wash. & Lee L. Rev. 89 (1939). For additional discussion and cases see 27 Am. Jur. Husband and Wife §§ 584, 599 (1940); 41 C.J.S. Husband and Wife §§ 389, 393-96 (1944).

[16]The "equitable separate estate" was created by conveying land to the wife for her sole and separate use, and such land was free from the marital right estate of her husband as well as from his legal control and use. Madden, Persons and Domestic Relations §§ 36-41 (1931); 2 Tiffany, Real Property § 485 (3d ed. 1939); 3 Vernier, American Family Laws § 167 (1935); McCurdy, Property Torts Between Spouses And Use During Marriage Of The Matrimonial Home Owned By The Other, 2 Vill. L. Rev. 447 (1957); Repacz, Progress of the Property Law Relating to Married Women, 11 U. Kan. City L. Rev. 173 (1943). For additional discussion and cases see 41 C.J.S. Husband and Wife §§ 29, 226-31, 395 (1944).

[17]See note 16 supra.

[18]The general purpose and effect of these acts has been to grant to married women the right to own and control property called their Statutory Separate Estate, and to sue and be sued at law as if they were unmarried. Madden, Persons and Domestic Relations §§ 42-43 (1931); 2 Tiffany, Real Property § 486 (3d ed. 1939); 3 Vernier, American Family Laws §§ 167-68, 179, 180 (1935); McCurdy, Property Torts Between Spouses And Use During Marriage Of The Matrimonial Home Owned By The Other, 2 Vill. L. Rev. 447 (1957); Rapacz, Progress of the Property Law Relating to Married Women, 11 U. Kan. City L. Rev. 173 (1943). For additional discussion and cases see 27 Am. Jur. Husband and Wife §§ 587-88, 599, 604 (1940); 41 C.J.S. Husband and Wife §§ 166, 232-53, 389, 393-96, 406 (1944). For an excellent discussion of the development of the wife's separate estate and her rights therein, see Wood v. Wood, 83 N.Y. (38 Sickels) 575 (1881).

[19]See note 18 supra.

which have often been strictly construed because they were in derogation of the common law. However, the modern trend has been to broaden and liberalize them, both by amendment and court decision.[20]

A number of situations can exist when the wife seeks to eject her husband. When the parties are divorced, the courts are agreed that the wife may eject her former husband.[21] Similarly, the wife may maintain her suit when the parties never used the property as their home.[22] While the wife may not eject her husband[23] in a few western states, where a statutory homestead right creates an actual estate in land, the homestead laws of most states do not affect the wife's ejectment suit.[24] The suit has been denied when the parties were living together,[25] but allowed when the parties were living apart because of the husband's fault.[26] The most difficult problem is whether a wife may sue her husband in ejectment for possession of the marital home when she is herself at *fault,* as in the *Owens* case.

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[20]Ibid.

[21]Gummison v. Johnson, 149 Minn. 329, 183 N.W. 515 (1921); Kern v. Field, 68 Minn. 317, 71 N.W. 393 (1887); Humphreys v. Strong, 141 Va. 146, 126 S.E. 194 (1925); Arp v. Jacobs, 3 Wyo. 489, 27 Pac. 800 (1891). However, the wife was refused her suit in Redfern v. Redfern, 38 Ill. 509 (1865), in which the divorce was obtained because of her adultery. For additional discussion and cases on the general subject see 26 Am. Jur. Husband and Wife §§ 116, 119-20 (1940); 2 Vernier, American Family Laws §§ 96-97 (1932). The courts granting the wife her suit have not distinguished between divorce a vinculo and divorce a mensa et thoro.

[22]The cases are few on this point. Walker v. Walker, 215 Ky. 154, 284 S.W. 1042 (1926); McKendry v. Fessler, 131 Pa. 24, 18 Atl. 1078 (1890). See McCurdy, Property Torts Between Spouses And Use During Marriage Of The Matrimonial Home Owned By The Other, 2 Vill. L. Rev. 447 (1957).

[23]Grace v. Grace, 96 Minn. 294, 104 N.W. 969 (1905); Williams v. Williams, 106 Neb. 584, 184 N.W. 114 (1921); Weatherington v. Smith, 77 Neb. 369, 112 N.W. 566 (1907).

[24]Cook v. Cook, 125 Ala. 583, 27 So. 918 (1900); Buckingham v. Buckingham, 81 Mich. 89, 45 N.W. 504 (1890). For a discussion and collection of cases on the homestead problem see 21 A.L.R. 745 (1922). Many of the cases favoring this view involved divorce and held that a divorce cuts off homestead rights. See note 21 supra.

[25]Manning v. Manning, 79 N.C. 223 (1878); Goodwin v. Goodwin, 172 Misc. 118, 13 N.Y.S.2d 894 (Sup. Ct. 1939); Marshall v. Marshall, 116 Misc. 249, 190 N.Y. Supp. 318 (Sup. Ct. 1921); Cipperly v. Cipperly, 104 Misc. 434, 172 N.Y. Supp. 351 (Sup. Ct. 1918); McKendry v. Fessler, 131 Pa. 24, 18 Atl. 1078 (1890) (dictum).

[26]McDuff v. McDuff, 45 Cal. App. 53, 187 Pac. 37 (1919); Wilkerson v. Wilkerson, 147 La. 315, 84 So. 794 (1920); Propes v. Propes, 171 Mo. 407, 71 S.W. 685 (1903); Sackman v. Sackman, 143 Mo. 576, 45 S.W. 264 (1898); Wood v. Wood, 83 N.Y. (38 Sickels) 575 (1881); Ireland v. Ireland, 244 Pa. 489, 90 Atl. 911 (1914); Heckman v. Heckman, 215 Pa. 203, 64 Atl. 425 (1906); McKendry v. Fessler, 131 Pa. 24, 18 Atl. 1078 (1890). For additional discussion and cases see 21 A.L.R. 745 (1922); 109 A.L.R. 882 (1937); 27 Am. Jur. Husband and Wife § 600 (1940). Several of the cases decided in favor of the wife do not seem to consider the fault aspect. Walker v. Walker, 215 Ky. 154, 284 S.W. 1042 (1926); Rudd v. Rudd, 318 Mo. 935, 2 S.W.2d 585 (1927).

When the language of the married Woman's Property Acts is broad[27] in granting the wife property rights and rights of action, the court allows the wife at fault to sue her husband.[28] The Virginia statute applied in *Edmonds v. Edmonds* is an example of such a broad statute.[29] In *Edmonds* the wife who was at fault[30] was suing for possession of the marital home, title to which she had acquired as a gift from her husband.[31] The Virginia Supreme Court of Appeals, in allowing the wife her suit, considered the conflict between the wife's property rights and her husband's marital rights and held that the Virginia Marred Woman's Property Act had expressly abolished the husband's marital rights in his wife's land.[32] The only right the husband still has with respect to his wife's land is the privilege to enter when she is residing thereon because of his right of access to her.[33] In response to the assertion that the wife's fault should bar her suit, the court said:

> "[It] is difficult to see how desertion by the wife of her home and husband gives the husband the right to occupy the wife's lands.... His rights are determined by the statute, and not by the fact as to whether the relations between husband and wife are friendly or unfriendly, whether they are living together or apart, or whether they separated for good cause or no cause at all."[34]

The Married Woman's Acts of some states are merely narrow privileging acts which neither expressly grant nor deny the wife specific property rights.[35] A majority of courts liberally interpret such

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[27]A broad Married Woman's Property Act is one which grants to the wife or denies to the husband specific rights in express terms. The acts are expressly liberal and leave little to court interpretation. For example, the Virginia Act specifically provides that the husband, with the exception of curtesy, shall no longer have an interst in his wife's land by the marital right. Va. Code Ann. § 55-35 (1959).

[28]Edmonds v. Edmonds, 139 Va. 652, 124 S.E. 415 (1924); accord, Humphreys v. Strong, 141 Va. 146, 126 S.E. 194 (1925); Cook v. Cook, 125 Ala. 583, 27 So. 918 (1900), based upon the Alabama Married Woman's Property Act, Ala. Code tit. 34, §§ 65, 72, 75 (1940).

[29]139 Va. 652, 124 S.E. 415 (1924). The Edmonds suit was in unlawful detainer, an action available as a substitute for ejectment to gain possession of property.

[30]Id. at 419. Even though it appeared from the facts that the wife was at fault, the Virginia Supreme Court of Appeals felt that fault was not in issue.

[31]Id. at 416.

[32]Id. at 417. The Virginia Supreme Court of Appeals indicated that the wife should win as a matter of law, thus presenting the possibility of a directed verdict in her favor in Virginia. Id. at 418-19.

[33]Ibid. The Virginia Supreme Court of Appeals said that a husband who entered upon his wife's land against her will or command when she was not occupying it was a trespasser and could be prosecuted for criminal trespass.

[34]Id. at 419.

[35]For examples of narrowly written Married Woman's Property Acts see Del. Code Ann. tit. 13, § 311 (1953); Ind. Ann. Stat. § 38-102 (1949); Mich Comp. Laws

acts and allow the erring wife to maintain her suit;[36] a minority of courts strictly construe their acts, thereby barring an ejectment suit by the wife.[37] An example of the majority view is the New York case of *Minier v. Minier*,[38] in which the court, in holding that the erring wife could maintain her suit, said that "in regard to the property, the relation of husband and wife does not affect it; as to it the parties are strangers to each other."[39]

In contrast to this liberal construction are cases such as *Kelley v. Kelley*,[40] in which the Rhode Island Supreme Court placed a strict interpretation upon its narrow statute and held that the erring wife could not sue in ejectment. The court felt that the Rhode Island Act[41] was only directory and not mandatory, stating in addition that it merely invoked a change in procedure and not in substance.[42] In so holding, the court said:

> "A literal construction of the act would authorize any proceedceeding against the husband which the wife could bring against any other person. There is nothing in the act to show an intention by the Legislature to so modify the marriage relation as to authorize an action of this character against her husband."[43]

The *Kelley* interpretation was based upon the family unity theory,[44] which is founded on the premise that the wife, if she is denied her ejectment suit, may be induced to return to her husband. This theory

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§ 557.1 (1948); N.Y. Dom. Rel. Laws §§ 50, 51, 57 (1959); R.I. Gen. Laws Ann. ch. 417, §§ 1, 14 (1938); Tenn. Code Ann. § 36-601 (1955); Tex. Rev. Civ. Stat. art. 4614 (1948); W. Va. Code Ann. §§ 4731-32 (1955).

[36] Crater v. Crater, 118 Ind. 521, 21 N.E. 290 (1889); Buckingham v. Buckingham, 81 Mich. 89, 45 N.W. 504 (1890); Minier v. Minier, 4 N.Y. (4 Lan.) 421 (Sup. Ct. 1870); Hall v. Hall, 241 S.W.2d 919 (Tenn. 1951); Bennett v. Bennett, 37 W. Va. 396, 16 S.E. 638 (1892) (dicta). See also Heard v. Heard, 272 S.W. 501 (Tex. Civ. App. 1925), which allowed a wife relief in the nature of an injunction from her husband's interference with her control of her property, while denying her a divorce. For additional discussion and cases see 21 A.L.R. 745 (1922); 109 A.L.R. 882 (1937); 27 Am. Jur. Husband and Wife § 600 (1940); 41 C.J.S. Husband and Wife § 280 (1944).

[37] Kelley v. Kelley, 51 R.I. 173, 153 Atl. 314 (1931). See also 21 A.L.R. 745 (1922); 109 A.L.R. 882 (1937); 27 Am. Jur. Husband and Wife § 600 (1940); 41 C.J.S. Husband and Wife § 280 (1944).

[38] 4 N.Y. (4 Lans.) 421 (Sup. Ct. 1870).

[39] Id. at 422.

[40] 51 R.I. 173, 153 Atl. 314 (1931). For a brief treatment of the Kelley case see Rapacz, Progress of the Property Law Relating to Married Women, 11 U. Kan. City L. Rev. (1943).

[41] R.I. Gen. Laws Ann. ch. 417, §§ 1, 14 (1938).

[42] 153 Atl. at 315.

[43] Ibid. For a recent case, mentioning Kelley but refusing to follow it, see Hall v. Hall, 241 S.W.2d 919 (Tenn. 1951).

[44] See note 40 supra. This concept also served as the basis for the trial court decision in Owens. Owens v. Owens, 143 A.2d 123 (Del. Ch. 1958).

can be used most effectively when the wife is at fault, because it can be buttressed by the "clean hands" maxim of equity. The argument was comprehensively stated in the *Kelley* case, the court saying:

> "The law favors the marital relation and the permanence of the family. The voluntary separation without consent and without justification of one spouse from the other is a legal desertion, which, if continued, is a ground for divorce. The relief sought in the case at bar consists not only of putting the wife in possession, but in expelling the husband from his wife's house, which is the lawful home of both husband and wife.... The wife still has the legal possession and also the right of occupancy if she wished to exercise it. Neither husband nor wife without lawful cause, so long as the marital relation exists, can exclude the other from the home they have established by mutual and voluntary choice."[45]

The fallacy in the family unity theory has been noted by Professor McCurdy,[46] who specifically attacked the *Kelley* case on this point. Feeling that the denial of the wife's suit may do the reverse of bringing the parties closer together, McCurdy said, "There is no reason to suppose that allowing actions causes discord more than would denying them."[47] Hence, it might be argued that the denial adds to the breach by placing an additional thorn of discord in the side of possible future harmony.

In *Owens*[48] the Delaware Supreme Court also discussed the family unity theory and rejected the trial court's argument by saying that if the denial of the suit placed an economic burden on the wife, thus compelling her return to the marriage fold, the resulting reconciliation would be forced at best and would be based on coercion rather than the "love and affection" which society and the courts have in mind.

Finally, the validity of the family unity theory is open to criticism from a practical standpoint. Almost all the cases, *Kelley* included, would allow the wife to sue if divorced.[49] Since it appears that today a divorce can be obtained if persistent effort is exerted, denying the wife's suit may serve to destroy rather than preserve the home, for the court is in effect requiring the wife to obtain a divorce in order to gain exclusive possession of her property—a result that no family unity doctrine enthusiast could possibly endorse. Also, such a delay in

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[45]153 Atl. at 315.

[46]McCurdy, Property Torts Between Spouses And Use During Marriage Of The Matrimonial Home Owned By The Other, 2 Vill. L. Rev. 447 (1957).

[47]Id. at 471.

[48]See note 11 supra.

[49]Also indicating that the wife may sue if the parties are divorced is Williams v. Williams, 106 Neb. 584, 184 N.W. 114 (1921). See note 23 supra.