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**Domestic Relations—Wife's Right to Support
While Living With Husband—Equity Jurisdiction**

Plaintiff, although continuing to reside with her husband, brought an action in equity against him for maintenance and support money. *Held*: where husband and wife are not separated and the purpose of the marriage relation is being cared out, an action in equity for support money cannot be maintained.¹

Had the plaintiff petitioned for a divorce from bed and board, a Nebraska statute² giving the court discretion to award money for support and maintenance even though no divorce is granted and, apparently, regardless of whether or not the wife is living with her husband, might have been applicable. However, in lieu of proceeding under this statute, plaintiff sought to maintain an action of an equitable nature to compel the husband to discharge his legal duty to support her in a manner in keeping with his means, position, and station in life. In bringing this suit, plaintiff relied upon the case of *Earle v. Earle*,³ which, previous to the enactment of the above-mentioned statute, had held that there was an "inherent" power in equity to grant alimony. In failing to avail herself of the statute, the plaintiff ran into the uncertainties of equity jurisdiction.

The fact that at common law matters pertaining to marriage and divorce were within the jurisdiction of ecclesiastical courts, has given rise to many vexatious problems in domestic relations. There has been a long-standing dispute as to whether or not a tribunal functioning as a court of equity possesses any of the powers in this field which

¹ *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d. 336 (1953).

² Neb. Rev. Stat. § 42-337 (Reissue 1952).

³ 27 Neb. 277, 43 N.W. 118 (1889).

historically were exercised by ecclesiastical courts. Does a district court, sitting as a court of equity, have the power, in the absence of statutory authority, to award support and maintenance to a wife? Some states hold that there is no such power unless it is given by statutes or by constitutional provisions,⁴ while other states hold that it falls within the "inherent" powers of equity.⁵

The decisions of the Nebraska Supreme Court appear to be at variance. In the *Earle* case, the Supreme Court stated, "... the authority to grant alimony grows out of the equity powers of the court." But in *Cizek v. Cizek*,⁶ the court said, "Matters pertaining to divorce, separation, and alimony were originally of ecclesiastical cognizance. But in this country they have always been regulated by statute, and we think the courts have always looked to the statute as the sources of their power."

In the *Earle* case, the court decreed that a husband whose conduct had caused his wife to leave the home was liable for maintenance and support apart from any action for divorce, and the fact that the statute then in effect specified that alimony or support could be decreed as an incident to divorce did not bar the exercise of equitable power. The court said that the wife suffered a wrong for which there should be a remedy when the husband neglected to fulfill his lawful duty to provide for his family according to his financial ability.

However, in the *Cizek* case, the court held that there was no equity power to award the husband's real estate to the wife as alimony when the statutes specifically provided that the court might decree to the wife such part of the personal estate of the husband and such alimony out of his estate as it shall deem just.⁷ The statute was exclusive in its grant of power and made no reference to any power to quiet title in real estate as an alternative. There was no independent basis for an exercise of general equity power.

⁴ *Wright v. Wright*, 350 Mo. 325, 165 S.W.2d. 870 (1942); *Schneider v. Schneider*, 312 Ill. App. 59, 37 N.E.2d. 911 (1941); *Young v. Young*, 258 App. Div. 934, 16 N.Y.S.2d. 598 (4th Dep't 1936); *Cohen v. Cohen*, 121 N.J. Eq. 299, 188 Atl. 244 (Ch. 1936); *Bucknam v. Bucknam*, 176 Mass. 229, 57 N.E. 343 (1900); *Bowman v. Worthington*, 24 Ark. 522 (1867).

⁵ *Dupont v. Dupont*, 85 A.2d. 724 (Del. Sup. Ct. 1951); *Avery v. Avery*, 236 Iowa 9, 17 N.W.2d. 820 (1945); *Wilson v. Wilson*, 198 Miss. 334, 22 So.2d. 161 (1945); *Montgomery v. Montgomery*, 183 Va. 96, 31 S.E.2d. 284 (1944); *Bliss v. Bliss*, 208 Minn. 84, 293 N.W. 94 (1940); *Radermacher v. Radermacher*, 61 Idaho 261, 100 P.2d. 955 (1940); *Haggert v. Haggert*, 22 N.D. 290, 133 N.W. 1035 (1911).

⁶ 69 Neb. 797, 107 N.W. 1012 (1906).

⁷ Now a Nebraska statute gives a court discretionary power to award the innocent party a share in the real estate of the guilty party in a decree of divorce. Neb. Rev. Stat. § 42-321 (Reissue 1952). See *Kozina v. Watkins Lumber Co.*, 146 Neb. 594, 20 N.W.2d. 606 (1945); *Lippincott v. Lippincott*, 144 Neb. 486, 13 N.W.2d. 721 (1944).

It would appear that in each case the court reached a proper result, but made a faulty generalization. The language in the two cases is inconsistent and perhaps each statement should have been qualified. The results of the two cases, however, are not inconsistent. In the *Earle* case the court went beyond the statutes in order to remedy a wrong, whereas in the *Cizek* case the court held there was no remedy in equity because of the adequate statutory remedy.

Moreover, the *Earle* case involved a situation where there is a recognized legal duty and the question was whether or not equity will implement that duty and see that it is enforced. The duty happens to arise out of the marital relation but merges into the larger problem of the over-all power of equity to compel the discharge of legal duties, particularly where the remedy at law may be inadequate.

The court, in the instant case, was faced with these conflicting theories as to the power of an equity court. It may be argued that the court's decision follows the language of the *Cizek* case, while the situation was more analogous to the *Earle* case. Assuming that the court did not intend to deny the husband's legal duty to provide for his wife according to his means, position, and station in life, but merely to withhold an assertion of equity power to compel the discharge of such duty, the question remains whether it was justified in so doing because of an adequate remedy at law.

Although the instant case denies maintenance and support to the wife, she is not without a remedy. She may complain to the county attorney that her husband is not providing proper food, clothing and shelter, and hence is guilty of a misdemeanor.⁸ She may also charge necessaries to her husband's account,⁹ a remedy in the nature of self-help. But that may be of doubtful efficacy since she takes her chances as to what are necessaries and must find a merchant who is willing to run the risk of having to resort to a law suit to collect his money from the husband.

It would seem that the husband's duty is the same whether he and his wife are apart or living under the same roof; therefore, the wife would be as entitled to a decree in one case as in the other. However, there may be a practical basis for the distinction that was not mentioned in the decision in the instant case. Where the husband and wife are separated the wife's remedy of self-help by charging necessaries is severely limited, since there is no presumption that she has authority to pledge her husband's credit.¹⁰ Moreover, when living apart, a court order requiring the husband to pay a sum for her support presumably all goes for support and maintenance, whereas if she is living

⁸ Neb. Rev. Stat. § 28-449 (Reissue 1948).

⁹ See e.g., *Acton v. Schoenauer*, 121 Neb. 62, 236 N.W. 140 (1931); *Belknap v. Stewart*, 38 Neb. 304, 56 N.W. 881 (1893).

¹⁰ *Madden*, Domestic Relations §§ 58 to 60 (1931).

under the same roof and he is paying part of the regular household expenses and is ordered to pay an additional sum an intrusion into the family is made necessary. This intrusion might result in a judicial supervision of their personal finances so that the court would have to itemize their budget and assume the role of bookkeeper.

The net result of the instant case is that separation is a condition precedent to an action for support unless such order can be obtained under existing statutes. There are practical reasons for the distinction, and the possibility that the result may encourage the wife to leave the home and thus split up the family, undesirable as that may be, perhaps is not as troublesome as would be a judicial intrusion into their private financial affairs.

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