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Property Torts between Spouses and Use during Marriage of the Matrimonial Home Owned by the Other

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PROPERTY TORTS BETWEEN SPOUSES AND USE DURING MARRIAGE OF THE MATRIMONIAL HOME OWNED BY THE OTHER.

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A MARRIED WOMAN'S property may have belonged to her at the time of marriage or it may have come to her during marriage. It may have been acquired from a source other than her husband or it may have come from him, or he may have contributed to its purchase, paid taxes, made improvements. The property may be real estate, possibly used as the matrimonial home. It may be personalty, possibly household furniture. The husband may be using the premises, or a portion thereof, for professional office or business purposes. He may be using chattels or have sold them. The wife does not wish to have the property so used and objects. Marital difficulties as such may not have arisen, or the parties may be estranged, or one may have left the other with or without justification. Similar situations may arise in respect to the wife's use of the husband's property. Are civil actions available between husband and wife to protect or recover property or to redress conduct in reference to it? Do legal concepts of ownership and of conjugal rights and duties conflict? To what extent is subordination of one concept to the other or adjustment between them required?

The question of protection and redress of property interests by civil action between husband and wife did not exist at common law. These problems began in a limited way with the equitable separate estate and have been made more general by married women's property statutes.

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I.

At common law—and it is still the law except as affected by the doctrine of the married woman's separate estate in equity or as modified or changed by legislation—marriage altered the legal position and capacities of a woman in respect to property in ways not always consistent with each other. Real estate owned by her at the time of marriage continued hers in ownership,[1] but her husband acquired by operation of law a right to the rents and profits during coverture[2] (*jus mariti*)[3] and a right to curtesy (an interest for his own life in his wife's real estate of inheritance if he survived her and issue had been born alive);[4] her chattels personal passed to the husband by operation of law;[5] her choses in action became subject to the husband's power to reduce to possession, and if so reduced during coverture, the proceeds became his exclusively.[6] A woman after marrying still had capacity to acquire property, but the husband's rights therein accrued immediately upon acquisition to the same extent as in property owned by his wife at the time of marriage.[7] He had the exclusive right to her services and earnings, whatever the nature of the services and for whomsoever performed.[8] If property was conveyed or transferred to a trustee on an ordinary trust for a married woman, or for a woman who later married, her husband acquired rights in her equitable interests analogous to his rights in her legal interest; equity followed the law.[9]

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1. Bishop v. Readsboro Chair Mfg. Co., 85 Vt. 141, 81 Atl. 454, 36 L.R.A. (n.s.) 1171, Am. & Eng. Ann. Cas. 1914 B. 1163 (1911); Robertson v. Norris, 11 Q.B.D. 916, 116 Eng. Rep. 716 (Q.B. 1848).

2. Clapp v. Stoughton, 27 Mass. (10 Pick.) 463 (1830).

3. See Hasking, *The Estate by the Marital Right,* 97 U. PA. L. REV. 345 (1949).

4. Van Duzer v. Van Duzer, 6 Paige Ch. (N.Y.) 366, 31 Am. Dec. 257 (1837); Mattocks v. Stearn, 9 Vt. 326 (1837).

5. Jordan v. Jordan, 52 Me. 320 (1864). For chattels real, see Doe dem. Roberts v. Polgrean, 1 H. Bl. 535, 126 Eng. Rep. 307 (C.P. 1791); Miles v. Williams, 1 P. Wms. 249, 258, 24 Eng. Rep. 375, 378 (Ch. 1714); Grute v. Locroft, 1 Cro. Eliz. 287, 78 Eng. Rep. 541 (K.B.).

6. Howard v. Bryan, 9 Gray (Mass.) 239 (1857); Bates v. Dandry, 2 Atk. 206, 26 Eng. Rep. 528 (Ch. 1741).

7. Beale v. Knowles, 45 Me. 479 (1858) (real estate); Commonwealth v. Davis, 63 Mass. (9 Cush.) 283 (1852) (chattels); Wells v. Tyler, 25 N.H. 340 (1852) (legacy); Carne v. Brice, 7 M. & W. 183, 151 Eng. Rep. 731 (Ex. 1840).

8. Clapp v. Stoughton, 27 Mass. (10 Pick.) 463, 469 (1830); Buckley v. Collier, 1 Salk. 114, 91 Eng. Rep. 105 (K.B. 1692); Brashford v. Buckingham, Cro. Jac. 77, 79 Eng. Rep. 65 (K.B. 1605); Prat v. Taylor, Cro. Eliz. 61, 78 Eng. Rep. 322 (Q.B. 1587).

9. But see note 25 *infra.*

A married woman had no legal capacity to convey, transfer, or devise,[10] or to contract,[11] or to sue or be sued alone.[12] For permanent injury to her freehold or to reduce to possession her choses in action, the husband joined with his wife as party plaintiff [13] (similarly, he was joined as party defendant on her antenuptial debts and for her own tortious conduct) [14] thus indicating that the substantive right (or obligation or liability) was hers. The proceeds of recovery were the husband's. (Similarly, he was liable to satisfy a joint judgment.) For injuries to his *jus mariti* or to recover rents and profits he sued in his own name in his own right.[15]

A wife's only interest in the property of her husband was her dower interest. With this exception, and with the further exception of transactions with his wife, marriage did not affect the husband's own general property and contract capacity.

It followed therefore for reasons either substantive or procedural or both that neither husband nor wife could have an action against the other.[16]

It is apparent that the concept of unity of husband and wife, often advanced as the basis of the common-law effects of marriage, explains only a few of those effects and even then it is not likely the sole explanation. This concept appears, perhaps, in the estate or tenancy by the en-

10. Concord Bank v. Bellis, 64 Mass. (10 Cush.) 276 (1872) (conveyance); Lowell v. Daniels, 68 Mass. (2 Gray) 161 (1854); Marston v. Norton, 5 N.H. 205 (1830) (will of real estate).

In England a method of conveying the wife's fee to real estate early developed: fine and recovery. See Albany Fire Ins. Co. v. Bay, 4 N.Y. 9, 12 (1850). In the United States the method that developed was a deed executed by husband and wife as joint grantors. See Manchester v. Hough, 16 Fed. Cas. 572 No. 9,005 (C.C.D.R.I. 1827), which refers to it as an example of *communis error facit jus* but a practice born of necessity.

11. Loyd v. Lee, 1 Strange 94, 93 Eng. Rep. 406 (K.B. 1795); Gregory v. Pierce, 45 Mass. (4 Met.) 478 (1842) (capacity where husband exiled or has abjured the realm).

12. Bishop v. Readsboro Chair Mfg. Co., 85 Vt. 141, 81 Atl. 454, 36 L.R.A. (n.s.) 1171, 1914 B. Am. & Eng. Ann. Cas. 1163 (1911).

13. Bishop v. Readsboro Chair Mfg. Co. *supra* note 12.

14. Hawk v. Harmon, 5 Binney 42 (Pa. 1812) (torts); Cole v. Shurtleff, 41 Vt. 311 (1868) (debt); Heard v. Stamford, 3 P. Wms. 409, 24 Eng. Rep. 1123 (Ch. 1735) (debt).

15. Clapp v. Stoughton, 27 Mass. (10 Pick.) 463 (1830); Bishop v. Readsboro Chair Mfg. Co., 85 Vt. 141, 81 Atl. 454 (1911).

16. See McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930).

Cohabitational duties were cognizable however in the ecclesiastical courts by suits for limited divorce from bed and board (*mensa et thoro*) in cases of adultery or cruelty, and by the bill for restitution of conjugal rights originally designed to compel a resumption of cohabitation where a spouse unjustifiably refused to live with the other. See McCurdy, *Divorce—A Suggested Approach with Particular Reference to Dissolution for Living Separate and Apart*, 9 VAND. L. REV. 685 (1956).

tirety,[17] and in the incapacity of husband and wife to contract *inter se* [18] and to convey and transfer property directly one to the other [19] (identity is also the explanation often given for the incapacity of either to sue the other). Indeed, the effect of marriage upon property was mostly inconsistent with the unity concept, and is referable rather to an attempt to reconcile a general attitude toward preservation of ownership and inheritance—particularly of real property—with an attitude that regarded a wife as subordinate to and merged in her husband.[20] The concept of unity or legal identity was used only when convenient.[21]

II.

By the beginning of the eighteenth century the legal position of a husband in respect to his wife's property and his uncontrolled use of his rights and powers therein were becoming increasingly intolerable to persons of large properties who desired to convey, devise or bequeath interests therein to, or settle them upon, daughters or other female relatives. For some time the unity concept had not been regarded in equity in the same way as at law.[22] Since the trust device alone would not fully accomplish restrictive purposes, eventually a bold attempt was made by settlors to achieve such purposes by inserting in the trust instrument a provision that the *res* should be held to the sole and separate use of the woman notwithstanding marriage and free from use and control by the husband. Courts of equity thereupon began to give effect to such provision, and to protect the wife in such estate against the husband as well as against his creditors in matters both of ownership and of use and control.[23] And so the anomalous doctrine of

17. Husband and wife could acquire real estate as tenants by the entirety (the husband having the right to rents and profits during marriage, the survivor having the full ownership upon the death of the other). This holding was a specie of joint tenancy but differed from it basically in theory and effect. Hoag v. Hoag, 213 Mass. 50, 99 N.E. 521 (1912); Hardenbergh v. Hardenbergh, 10 N.J.L. 42, 18 Am. Dec. 371 (Sup. Ct. 1828).

18. Bassett v. Bassett, 112 Mass. 99, 100 (1873).

19. Firebrass dem. Symes v. Pennant, 2 Wils. 254, 95 Eng. Rep. 46 (Ch. 1734). A conveyance by one spouse to the other required a conveyance by the one to a third person and a conveyance back to the other. Jewell v. Porter, 31 N.H. 34 (1855).

20. See 1 BLACKSTONE, COMMENTARIES, * 433, 435, 436.

That there was not true legal unity of person is reflected from the familiar and facetious saying that at common law husband and wife were one and the husband was that one.

21. Burdeno v. Amperse, 14 Mich. 91 (1866). See also O. Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, 15 MODERN L. REV. 133 (1952), 16 MODERN L. REV. 34, 16 MODERN L. REV. 148 (1953).

Also, in the criminal law the unity concept was not consistently applied. See MCCURDY, DOMESTIC RELATIONS 553, 759-760 (4th ed. 1952).

22. Sankey v. Golding, Cary 87, 21 Eng. Rep. 46 (Ch. 1579).

23. See Picquet v. Swan, 19 Fed. Cas. 600, No. 11131 (C.C.D. Mass. 1827); Slanning v. Style, 3 P. Wms. 334, 24 Eng. Rep. 1089 (Ch. 1734).

a married woman's separate estate in equity developed. Later the utilization of a third-person trustee frequently was omitted by a transferor or settlor, and property was transferred to or settled directly upon a woman for her sole and separate use.[24] In such cases equity regarded the husband as trustee of the particular interest he acquired, subject to the same restrictions as would apply if a third-person trustee had been employed.[25] In equity the married woman in respect to her separate estate was a feme sole having power of disposition,[26] of contracting in reference to it,[27] of acquisition directly from her husband,[28] and to sue and be sued,[29] including suits between herself and her husband.[30] To prevent the wife's voluntary disposition to the husband (often easy for him to induce) equity developed the further anomalous device of restraints both as to income (anticipation) and corpus (alienation).[31]

It has been said that the doctrine of the separate estate was conceived by the property class and given effect by courts of equity to protect heirs and next of kin of a married woman (and incidentally the woman herself);[32] and that it did not rest on a concept of equality between husband and wife in either personal or property matters, much less on a concept of equality of the sexes.[33]

24. Bennet v. Davis, 2 P. Wms. 316, 24 Eng. Rep. 746 (Ch. 1725).

25. Picquet v. Swan, 19 Fed. Cas. 600, No. 11131 (C.C.D. Mass. 1827); see Milbourn v. Ewart, 5 T.R. 381, 101 Eng. Rep. 213 (K.B. 1793) (prevents extinguishment of executory provisions of antenuptial settlement).

At a later period equity developed the doctrine of a wife's equity to a settlement to require the setting aside for her maintenance of a portion of her equitable choses subject to her husband's reduction to possession or so reduced by him. Elibank v. Montolieu, 5 Ves. Jun. 137, 31 Eng. Rep. 832 (Ch. 1801); Howard v. Moffatt, 2 Johns. R. 206, 207 (N.Y. Ch. 1816). This equity applied when the husband was not properly supporting his wife.

26. In England this *jus disponendi* was derived from ownership in equity. Taylor v. Meads, 4 DeG.J. & S. 597, 48 Eng. Rep. 1050 (R.C. 1865). There is considerable authority in the United States that treats it as a power derived from the terms of the settlement. Albany Fire Ins. Co. v. Bay, 4 N.Y. 9, 27 (1850).

27. In the United States this derives from express or implied charge. In England the reason is contractual capacity in equity. See Yale v. Dederer, 22 N.Y. 450, 78 Am. Dec. 216 (1860). But the contract does not bind the married woman personally—only separate property owned at the time the contract was made. *Ex parte* Jones, 12 Ch. D. 484, 489 (C.A. 1879).

28. Shepard v. Shepard, 7 Johns. R. 57 (N.Y. Ch.), 11 Am. Dec. 396 (1823).

29. Sankey v. Golding, Cary 87, 21 Eng. Rep. 46 (Ch. 1579).

30. Cannel v. Buckle, 2 P. Wms. 243, 244, 24 Eng. Rep. 715, 716 (Ch. 1724).

31. Jackson v. Hobhouse, 2 Mer. 483, 487, 35 Eng. Rep. 1025, 1026-1027 (Ch. 1817). It has been characterized as an anomaly on an anomaly, particularly in jurisdictions rejecting the spendthrift trust. Expressly continued by earlier Married Women's Property statutes it has more recently been abolished in England. See Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 GEO. 5, c. 30, s. 2 and Married Women (Restraint upon Anticipation) Act, 1949, 12, 13 & 14 GEO. 6, c. 78. See Rappeport, *The Equitable Separate Estate and Restraints on Anticipation: Its Modern Significance*, 11 MIAMI L.Q. 85 (1956).

32. See O. Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, 15 MODERN L. REV. 133 (1952), 16 MODERN L. REV. 34, 16 MODERN L. REV. 148 (1953) citing DICEY, LAW AND OPINION IN ENGLAND, Lecture XI (1914).

33. See O. Kahn-Freund, *supra* note 32.

The equity doctrine of the separate estate, however much a change it effected in the position of a husband in respect to his wife's property, had numerous inherent shortcomings. Her rights existed and were enforceable only in equity. The husband had a power to convey to a bona fide purchaser for value whatever legal interest he acquired and thus defeat the equity to that extent. The doctrine had no general application to services and earnings (although the husband could voluntarily make their proceeds his wife's separate property) [34]—a matter of little practical importance until much later. But perhaps the doctrine's greatest shortcoming was that it did not apply to property simply owned by a woman at the time of marriage or acquired by her during coverture. It was necessary that it come to her designated for her sole and separate use free of her husband's use and control. The utility of the device was therefore restricted in practice to persons of large or considerable fortune who were accustomed to employing solicitors. During the first half of the nineteenth century this shortcoming was increasingly regarded as irksome and discriminatory.

A few cases concerning rights of the spouses in respect to the wife's equitable separate estate which was in fact used as the matrimonial home are to be found in the English chancery reports.

In *Wood v. Wood* [35] the separate estate consisting of hotel premises and business used in part as the matrimonial home had been settled on the wife by the husband so that she might conduct the business in the same manner as if a feme sole. Absent for six months, the husband returned and acted as full owner to the embarrassment of the wife's business. An injunction was granted excluding him from the premises and from interfering with the business, the court emphasizing the "contract."

In *Green v. Green* [36] which *Wood v. Wood* had followed, it appeared that the parties were living separate and apart because of the alleged improper conduct of the husband. An injunction was granted to the wife against her husband's use and occupation of the home which was her separate estate, despite the argument that the injunction would operate as a divorce *mensa et thoro*. The Vice Chancellor expressed the opinion that if the injunction had that effect, a question which he could not determine, the husband would not be without his remedy in the ecclesiastical courts. The reference is perhaps to the bill for restitution of conjugal rights.

34. Slanning v. Style, 3 P. Wms. 334, 24 Eng. Rep. 1089 (Ch. 1734).

35. 19 W.R. 1049 (Ch. 1871).

36. 5 Hare 399, n., 67 Eng. Rep. 967 (V.C. 1840).

In *Symonds v. Hallett*,[37] while a suit by the wife for divorce was pending the husband was insisting on using the wife's separate real estate (which they had occupied as a home) but not for the purpose of consortium. An interlocutory injunction granted the wife was upheld. But Cotton, L. J., commented that on final determination ". . . it will have to be seriously considered whether the separate use, which is the creation of Court of Equity, entitles a wife to exclude her husband from the place where she is residing, and from coming there to exercise the rights he has as a husband. . . . To say that she is a feme sole is mere hypothesis and an imagination, because she has a husband, though as regards property she is to be considered as a feme sole. Expressions have been used that she is entitled to be there in all respects as a feme sole and to be protected against her husband's acts as if he were a stranger. That is very true as regards the property. But is the husband to be considered a stranger because the property is vested in her for her separate use? . . . My view is this, that the separate use was not created by a Court of Equity in any way to enable a wife to prevent the husband from exercising his rights and duties as an husband except by preserving property for her." Brett, M. R., concurred for the reason that the husband was proposing to go to the house not for the purpose of associating or living with his wife as a husband, but for the purpose of using the house as a house for himself, and expressed no opinion on the rest. Bowen, L. J., agreed for the reason that the husband "complains of not being allowed the proprietary use," and also preferred to express no opinion on the other point.

Without repudiation of consortium it would seem that the permissive use by the husband could be revoked by the wife.[38] The judges' doubt concerning a final decree may be explainable, not on the ground that the conjugal right of consortium creates a right in property or its use but rather, for the reason that a court of equity has a discretion in the recognition of or protection it will afford the separate estate. Such an estate may not be construed to mean the exclusion of consortium or created for that purpose. Or the estate being itself an anomalous creation of equity, relief may the more easily be denied for an attitude regarded as inequitable on the part of the person seeking equity. It is for this reason that marital questions as distinguished from property may be considered. Judicial discretion where equitable relief is not sought or when ownership has become the subject of statute is not necessarily the same.

37. 24 Ch. D. 346 (C.A. 1883).

38. *Cf.* Jaques v. Methodist Episcopal Church, 17 Johns. R. 548, 593 (N.Y. Ch. 1820) where the voluntary use by a wife of her separate estate for her own support was said to be "revocable at her pleasure."

III.

The first English Married Women's Property Act that was to some extent general in scope was enacted in 1870.[39] It provided that personal property coming to a married woman by intestacy and any sum of money not exceeding £200 under any deed or will (subject to their provisions) "shall belong to the woman for her separate use," that rents and profits of freehold, copyhold, or custom-hold property coming to a married woman by intestacy "shall belong to such woman for her separate use" subject to trust settlements (sections 1 through 8); and that earnings of a woman (married after the effective date of the Act) from employment sources apart from the husband "shall be deemed held and settled to her separate use." [40]

That this statute was modelled upon, and a modification of, the doctrine of equitable separate estate is shown not only by its terminology but also by its omissions. Devised real estate and specific bequests are not included probably because such devises or bequests would carry separate estate provisions if the testator so intended, and chattels personal and real property coming to a married woman other than by death are not included. But in respect to property acquisitions which are included a formal settlement for separate use is no longer necessary.

The equity model is further apparent from the provisions for property protection and redress. By section 9 it was provided that "In any question between husband and wife as to property declared by this Act to be the separate property of the wife, either party may apply by summons or motion in a summary way, either to the Court of Chancery . . . or . . . the judge of the County Court . . . and thereupon the judge may make such order . . . as he shall think fit . . . provided that any order made . . . shall be subject to appeal [in the same manner as in equity]."

It was then provided by section 11 that "A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security

39. 33 & 34 VICT. c. 93 (1870).
The Act of 1874, 37 & 38 VICT. c. 50 amended the provisions of the Act of 1870, *supra*, that dealt with the husband's liability for his wife's antenuptial debts.

40. Also in the case of any married woman, certain annuities, deposits in savings banks, bank stocks, corporation and building and loan securities "shall be deemed her separate property."

of such . . . as if such . . . property belonged to her as an unmarried woman. . . ."

The Married Women's Property Act of 1882 [41] was more comprehensive in scope and broader in treatment. By its provisions a woman married after the commencement of the Act continues to hold as her separate property all property real or personal belonging to her at the time of marriage and all such property acquired or devolving upon her during marriage (including wages or earnings from sources other than the husband), and every married woman was given the same rights as to property accruing after the commencement of the Act "as if she were a feme sole" (and powers of disposition inter vivos or by will).

Section 12 provided that every married woman "shall have in her own name against all persons whomsoever, including her husband, the same civil remedies and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. . . ." [42]

And section 17 provided that "In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court of Justice . . . or . . . to the judge of the county court . . . and the judge . . . may make such order with respect to the property in dispute . . . or may direct such application to stand over from time to time . . . in such manner as he shall think fit. . . ." [43]

In *Larner v. Larner* [44] it was held that an action will lie by a wife against her husband for return of her personal property detained by

41. 45 & 46 VICT. c. 75 (1882).

42. The proviso related to criminal proceedings: ". . . no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her; nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife."

Section 16 has a similar prohibition against criminal proceedings by a husband against his wife, but it is not in the form of a proviso.

43. The subsequent Married Women's Property Act, 1893, 56 & 57 VICT. c. 63 and the Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 GEO. 5, c. 30 do not affect the problems discussed in this paper. The Act of 1893 deals with contracts and wills. The Act of 1935 abolishes the husband's liability for his wife's antenuptial contracts and torts and her postnuptial torts, which the Act of 1882 had limited (section 14).

44. [1905] 2 K.B. 539.

him, and that section 17 does not limit section 12. Lord Alverstone, C. J., observed that an action would clearly lie for damaging the wife's property, and if so why not for detaining it; that section 17, being an amendment of section 9 of the Act of 1870, and section 12 being new, section 17 is not sufficiently strong to take away the right of action conferred by section 12. Phillimore, J., said that at first he was inclined to think that " . . . Section 12 being the enabling section, Section 17 had the effect of limiting the scope of Section 12; but I have come to the conclusion that this is not the right view," and concluded that section 12 is wide enough to include actions for recovery of all kinds of personal property. "I say nothing as to an action for the recovery of real property." Jelf, J., took a much more decided view: section 17 is simply an enabling section, and its "limited permissive right can [not] in any way cut down or restrict the meaning and effect of Section 12."

In *Shipman v. Shipman* [45] a wife alleged that conduct (cruelty) of her husband was such that the family could not live together and unless he were restrained from entering her house or otherwise interfering with her possession the value of the house would be seriously diminished and she would be obliged to sell it. It was held that the wife could have an interim injunction under section 12 although her house was used as the matrimonial home. Pollack, M. R., after observing that section 12 is in wide terms, and then referring to the earlier cases involving equitable separate estates,[46] quoted from *Symonds v. Hallett*,[47] and continued " . . . while protecting the property of a wife as a proper subject of protection, we must also regard the duties of spouses to each other. There is, however, in my opinion, evidence here of conduct by the husband which would justify the wife in resisting a suit for restitution of conjugal rights." Atkins, L. J., expressed his view that "Section 12 is very clear . . . I think there is no evidence that the value of the house would be materially diminished. . . . The rights given to a wife are much wider . . . and the question is whether she has those rights in respect to the matrimonial home against her husband. That is a matter of public importance. . . . and if a wife, without good cause, seeks to exclude her husband from the matrimonial home, she seeks to get the Court to enable her to evade a duty. . . . So perhaps, in normal circumstances . . . I think the wife

45. [1924] 2 Ch. 140 (C.A.).

46. Green v. Green, 5 Hare 399, n., 67 Eng. Rep. 967 (V.C. 1840); Wood v. Wood, 19 W.R. 1049 (Ch. 1871); Weldon v. De Bathe, 14 Q.B.D. 339 (C.A. 1884). In that case the court queried whether the husband had a right to enter the home owned by the wife against her will when she is "in sole occupation."

47. 24 Ch. D. 346 (C.A. 1883).

would have no claim. But such a right of the husband would be limited to being on the premises to enjoy the matrimonial consortium"; matrimonial misconduct of the husband would forfeit this; but, "In no circumstances would he have the right to interfere with the rights of the wife in a way detrimental to her separate property." In the view of Sargent, L. J., " . . . The remedy invoked here is a special remedy and a discretionary remedy, and I doubt whether the Court should grant an injunction if it were sought from mere caprice on the part of the wife." And Atkin, L. J., observed, "It is a remarkable thing that if a wife has, under the Act of 1882, the right which is claimed here [section 12], there is no correlative right given to the husband." [48] No reference is made to section 17 by any of the judges.

It seems clear that section 12 does not afford or allow the husband a tort action against his wife, and as a matter of statutory construction it may be doubted as an original question that section 17 was designed to apply to property owned by the husband. It is not without significance that the statute is a married women's property act. Sections 1 through 9 deal comprehensively with her own property and necessarily abolish or affect the husband's interests therein which he previously would have had. But the only express reference to the husband's own property is in section 10 (use of his monies by his wife to invest without his consent, the section also referring forward to section 17; and that section in turn referring back to section 10). It would seem that section 17 (with this exception) is dealing with controversies concerning the woman's property or that claimed to be hers that fall within sections 1 through 9 and is designed to give more expeditious protection than section 12. Moreover section 16 which prohibits criminal proceedings by husband against wife to the same extent as the proviso to section 12 not only precedes section 17 but also is not a proviso in terms to that section. The conclusion would seem to be that section 17 does not create rights or recognize interests in a woman in property admittedly that of the husband, or restrict him in respect thereto. "Either party . . . may apply" can be read to mean "apply in respect to matters coming, or claimed to be, within sections 1 through 9" and not to mean (except as to section 10) that application may be made in respect to the husband's property. Against this is the argument that section 9 of the Act of 1870 (a section similar to section 17) was expressly in

48. But this is not the only instance. A wife may maintain an action against her husband for antenuptial personal injuries, Curtis v. Wilcox [1948] 2 K.B. 474 (C.A.); but a husband has no such action against his wife, Baylis v. Blackwell, [1952] 1 All E.R. 74 (K.B.D.). *Cf.* Edwards v. Porter, [1925] A.C. 1, 38 HARV. L. REV. 1114, 20 ILL. L. REV. 80, 34 YALE L.J. 543, 2 CAMB. L.J. 250, 29 L.N. 76, 41 L.Q. REV. 125 (1926).

terms of "any question . . . as to property declared by this Act to be the separate property of the wife," and that the Act of 1882, not so restricted in terms, is entitled "An Act . . . to amend. . . . " However, for the reasons given above, this argument does not seem convincing.

In *Bramwell v. Bramwell* [49] it appeared that a husband had deserted his wife, and that they had been living in a house which he owned; also he had been paying her £1 a week under a court order for £1 12s. a week which intimated that he need pay only £1 per week as long as the wife lived in the house. In a proceeding by a husband to recover possession, the county court had held that the wife was a tenant and protected by the Rent and Mortgage Interest Restrictions Act, 1939. An appeal was allowed on the ground that the wife was not a tenant, and an order of possession should be made. Goddard, L. J., expressed the view that no action of ejectment could be brought since it sounded in tort, the proper procedure being under section 17 of the Act of 1882. This point, however, was not decided.[50]

In *Pargeter v. Pargeter* [51] in a somewhat similar situation it appeared that, matrimonial differences having arisen, husband and wife were living apart, the husband having left his wife in the home with two children after agreeing that she might remain there on condition that she looked after the children, and allowing her a weekly sum. It was held that the wife was not a tenant. The county courts had said that the action was in effect one of trespass. The judges (on appeal) expressed some doubt about what was intended to be held in *Bramwell v. Bramwell* since that was a case framed by way of an ordinary action and not as an originating application, but agreed that the matter could be raised by originating application under section 17.

In *Hutchinson v. Hutchinson* [52] the husband applied under section 17 for possession of a house owned by him and used as the matrimonial home. It appeared that his wife had obtained a judicial separation. It was held that the court had jurisdiction notwithstanding the separation, but that it would be unjust to make an order, reasoning that the husband cannot sue for ejectment or trespass or any other tort, and

49. [1942] 1 K.B. 370 (C.A.), 58 L.Q. REV. 306. An earlier case involved an application by a husband against his wife under section 17 to recover his pearl studs. The question related to which spouse owned them. An appeal was allowed because there was no evidence that the studs were in the wife's possession. Wilder v. Wilder, 56 SOL. J. 571 (1912).

50. In Miller v. Miller [1940] Sess. Cas. 56, 52 Jurid. Rev. 171, a case unaffected by the English Act of 1882, it appeared that relations between a husband and wife having become strained she left him and sought his ejectment from the matrimonial house which she owned. It was held that she could do so.

51. [1946] 1 All E.R. 570 (C.A.)

52. [1947] 2 All E.R. 792 (K.B.D.).

that his only rights are under section 17, "which does not give him the right he is now claiming, but leaves it open to the court to make such order as it thinks fit. The Court has a discretion which, of course, must be exercised judicially." Factors referred to were that the wife had behaved properly, that she was in the house, and that it would be unjust to turn her out.

Thereafter the doctrine seems to have crystallized that a deserted wife (also *semble* one justifiably living apart from her husband) whom the court would not order out of the house owned by the husband has the position of a licensee with protection on equitable principles against transferees or creditors of the husband.

In *Lee v. Lee*[53] it was said: "I do not suggest that the judge could have made an order transferring the title in the house to the wife, but he certainly had jurisdiction to protect her in her occupation of it, even to the extent of preventing the husband from disposing of it. The order confirms and protects her special right as a deserted wife to stay there—a right which has been repeatedly recognized in this court."

In *Bendall v. McWhirter*[54] it was said: " . . . Thus, the husband can no longer turn her out of the matrimonial home. She has as much right as he to stay there even though the house does stand in his name. This has only been decided in the last ten years. It started in 1942 when Goddard, L. J., said that the husband's only way of getting his wife out of the house was to make an application under s. 17 of the Married Women's Property Act, 1882. . . . and it is now settled law that a deserted wife has a right, as against her husband, to stay in the matrimonial home unless and until an order is made against her. . . . One of the most obvious necessaries of a wife is a roof over her head, and if we apply the old rule to modern conditions it seems only reasonable to hold that when the husband is the tenant of the matrimonial home the wife should have an irrevocable authority to continue the tenancy on his credit, and that when he is the owner of it she should have an irrevocable authority to stay there. . . . Her possession is not always exclusive. If the husband has only been guilty of desertion and nothing else he is entitled to come back at any time asking to be forgiven, and she is then bound to receive him. She cannot then keep him out of his house. But if he has, in addition to desertion, been guilty of cruelty or adultery, she is not bound to take him back. She can keep him out of the house. Her possession may then be quite exclusive. But, whether her possession is exclusive or not, there can

53. [1952] 1 All E.R. 1299 (C.A.).
54. [1952] 1 All E.R. 1307 (C.A.).

be no doubt that she is not a tenant of her husband. She has only a personal privilege with no legal interest in the land, and she is, therefore, only a licensee. . . . Equity demands that the successor in title [who is a purchaser or assignee with notice or without value] should be in no better position than the husband." Also "she has no legal or equitable interest in the home which she continues to occupy and in that respect is in no better position than any other licensee. On the other hand, her husband, the licensor, cannot bring proceedings against her in ejectment, for the status of matrimony prevents it.[55] He, accordingly, cannot effectively revoke her license and in this respect the wife is in a more favourable position than that of an ordinary licensee." [56]

In *Westminster Bank v. Lee* [57] it appeared that after the husband had deserted his wife he executed a charge or equitable mortgage on his house (matrimonial home) to a bank which was without notice of the desertion. It was held that the bank could oust the wife, for although her equity in the premises is more than a personal right against the husband it is not an equitable estate enforceable against a subsequent purchaser of an equitable estate for value and without notice.

The position of a husband under section 17 with respect to transferring or encumbering his own house may be thus stated: the wife is subject to a mortgage or sale made before her husband's desertion; [58] a purchaser without value or with notice of the desertion cannot oust the wife,[59] but a purchaser without notice and for value can do so; [60] she has no right under section 17 to share in the proceeds of a sale, unless the house was jointly owned; [61] and she has no right to remain after divorce.[62]

The equity of the wife which seems to stem from section 17 is not an equity in the husband's property as such because of the marriage,

55. The reference is probably to section 12.

56. In Ferris v. Weaver, [1952] 2 All E.R. 233 (Q.B.D.), the court, referring to an arrangement entered into between husband and wife, concluded ". . . that the wife was a licensee with a contractual right to remain in this [the husband's] house . . .", and, ". . . that the plaintiff bought the house with full notice of the details of this arrangement . . . not because he wanted to buy it, but simply to enable the husband to defeat a right which the husband believed the wife possessed as a result of the arrangement . . .," and held against the plaintiff purchaser and for the defendant wife.

57. [1956] 1 Ch. 7.

58. Lloyd's Bank Ltd. v. Oliver's Trustee [1953] 2 All E.R. 1443 (Ch. D); Barclay's Bank v. Bird [1954] 1 Ch. 274 (C.A.).

59. Street v. Denham [1954] 1 All E.R. 532 (Hampshire Assizes). See however Woodcock & Sons v. Hobbs [1955] 1 All E.R. 455 (C.A.).

60. Tunstall v. Tunstall [1953] 2 All E.R. 310 (C.A.).

61. Cobb v. Cobb [1955] 2 All E.R. 696 (C.A.) held error to give her less than one-half, there being no power to vary under section 17.

62. Vaughan v. Vaughan [1953] 1 All E.R. 209 (C.A.); *cf.* Fribance v. Fribance [1955] 3 All E.R. 787 (Div.).

but seems rather an "equity of desertion" [62a] and this despite the fact that there may have been no adjudication of the matter and no order made under section 17 prior to the transfer of the premises to a purchaser. Section 17 seems to be the vehicle for much litigation and to have been productive of a new interest in a husband's real estate theretofore unknown.[63]

Would the husband have a similar "equity" in respect to his wife's house? Certainly some of the reasons given for the wife's "equity" would not apply.[64]

IV.

Legislatures in the United States began enacting married women's property statutes of more than special nature and scope [65] earlier than Parliament had done in England; in several states prior to 1850.[66] A steady progression of enactments occurred during the remainder of the

62a. See Stewart v. Stewart, [1948] 1 K.B. 507 (C.A.) where an order under section 17 for possession against the wife of a flat of which the husband was tenant was affirmed. Divorce proceedings by the husband for alleged adultery were pending.

63. "As the law stands today, husband and wife face each other in matters of property like strangers. . . . Nothing is by law 'theirs,' everything is [in the absence of express agreement] either 'his' or 'hers.' Sociologists must decide whether this legal rule reflects the *mores* and ideas of the people. It is strongly suspected that it does not." O. Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife,* 15 MODERN L. REV. 133, 135 (1952). The author favors section 17, *id.* at 146.

For a general discussion of the English law see BARLOW, A CENTURY OF FAMILY LAW, 1857-1957, Chapter 9 *Gifts and Transfers Intervivos and the Matrimonial Home* (1957); Cheshire, *A New Equitable Interest in Land,* 16 MODERN L. REV. 1 (1953); O. Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife,* 15 MODERN L. REV. 133 (1952), 16 Modern L. Rev. 34, 16 Modern L. Rev. 148 (1953).

64. See Copeman v. Copeman, 103 L.J. 624 (1953) where it was held that the husband was a licensee in the flat of which his wife was tenant, and that the wife could revoke the license. After commenting that the question of ejecting the husband related only to the particular flat the judge is reported to have said, "If the husband provided a proper home elsewhere and genuinely asked the wife to join him and be maintained by him she might well have no answer but to do so."

65. Prior to the passage of more comprehensive married women's property statutes, legislation dealing with specific common-law problems had been enacted in some states, for example:

Feme sole trader acts where husbands shall go to sea leaving their wives to work for their livelihood (Pennsylvania Act 1718, PA. STAT. ANN. tit. 48, §§ 41, 61-63 (1930)).

Special acknowledgment statutes for separate examination of the wife made necessary by the practice which had grown up of joinder of husband and wife to convey the fee to the wife's real estate (South Carolina Act 1795, 5 Stat. 257; R.I. Laws 1798, sec. 7).

Restriction upon the *jus mariti* to require the husband to hold rents and profits for the benefit of his family instead of himself individually (Henderson Grocery Co. v. Johnson, 141 Tenn. 127, 207 S.W. 723 (1918) [before 1913]).

Restrictions of husband to the income of choses in action reduced to possession (Turner v. Turner, 90 Conn. 676, 98 Atl. 324 (1916) [Act of 1849]).

Injunctive relief against the husband's squandering of his wife's property (Dillingham v. Dillingham, 9 Ohio App. 248 (1917) [Act of 1846]).

66. ME. LAWS c. 117 (1844); MASS. LAWS c. 208 (1845); N.H. LAWS c. 327 (1846); N.Y. LAWS c. 200 (1848).

nineteenth century and continued into the present century, some states amending and extending their statutes several times.[67] Some of the earlier statutes, like the English Act of 1870, were confined to some of the more striking shortcomings of the equitable separate estate doctrine. As time passed matters other than acquisition and use of property (and transactions and conduct directly related thereto) were brought within statutory expansion: general capacity to contract, to transfer and convey, to make wills both of personal and real property, and to sue and be sued. The matter of services and earnings was variously dealt with.

It was recognized that even the more limited type earlier statutes had made basic changes in the position of a married woman in respect to property.

The New Hampshire law of 1846 [68] was characterized [69] as effecting "modifications of well established doctrines of equity." The great statutory change was said to make her position "legal" instead of "equitable." [70]

A more comprehensive statute in 1861 in Illinois [71] had provided that all property owned by a woman at the time of marriage and all property acquired during coverture (from any person other than her husband), shall be and remain her sole and separate property and be held, owned, possessed and enjoyed by her the same as though unmarried, but made no provision for actions. The statute was held, in *Emerson v. Clayton,*[72] to enable the woman to maintain replevin, the court saying, ". . . Such a change in the relative rights and powers of husband and wife, must, of necessity, give a different operation to the rules of law by which they are to be governed. . . . By this statute, a married woman must, since its enactment, be considered a *feme sole* in regard to her estate. . . . the act [cannot] be effective in the protection of her separate property, unless [her sole control

67. See Bryant v. Smith, 187 S.C. 453, 198 S.E. 20 (1938).

68. c. 327.

69. Batchelder v. Sargent, 47 N.H. 262 (1867). See also McCarty v. Skelton, 228 Ala. 531, 172 So. 901 (1937); Burdeno v. Amperse, 14 Mich. 91 (1866).

70. Under a Maine statute of 1844 (c.117, § 2), where no provision was made for actions, it was held in Southard v. Plummer, 36 Me. 64 (1853) that a husband could not maintain an action of trespass against a third person who had under authority of the wife entered the house (which was hers) and carried away articles of her personal property, the court reasoning "It is very evident . . . that her right of property and control over it should remain, not only against the creditors and contracts of the husband, but against the husband himself."

71. ILL. LAWS p. 143 (1861).

72. 32 Ill. 493 (1863). See also Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1953): ". . . the courts had construed the acts of 1861 and 1869 to permit a married woman to sue her husband . . . where it was necessary to protect her own property."

over it] is made to extend to suits for its recovery even against her husband. . . ." [73]

Married women's property statutes now exist in every state. In addition to providing typically that property owned by a woman at the time of marriage or acquired by her during marriage shall be and remain hers in the same manner and to the same extent as though she were unmarried,[74] most of the statutes provide generally that she may sue and be sued alone, or in her own name, or without joining the husband;[75] in some states the provision being that she may sue and be sued in respect to property.[76] Most of these statutes, however, are silent on suits between husband and wife. In a few states express provisions include or permit them.[77] In a few states such suits are

73. But *cf.* Cole v. Van Riper, 44 Ill. 58 (1867) where it was held that the married woman was given no power to convey her real estate without joinder of the husband: "The court put the case of a married woman living with her husband and children in a house owned by her together with the furnishing: literally she could forbid the husband to enter and if he did he would be a trespasser liable to her in damages ('the wife could thus divorce her husband *a mensa et thoro,* without the aid of a court of chancery') or she could forbid the use of any article of furniture,—which the legislature could not have intended. It is simply impossible that a woman married should be able to control and enjoy her property as if she were sole, without leaving her at liberty, practically, to annul the marriage tie at pleasure; and the same is true of the property of the husband, so far as it is directly connected with the nurture and maintenance of his household. The statute [1861] cannot receive a literal interpretation." *But see* Parent v. Callerand, 64 Ill. 97 (1872) where it was held that a married woman can lease her realty for the duration of coverture without her husband's joining in the lease.

74. In some states the tenancy by the entirety has been unaffected by the married women's property statutes since such a well-established device at common law is not abrogated by implication; in some states it has been held to be abrogated; and in some states it remains with some incidents changed by implication. See MCCURDY, DOMESTIC RELATIONS 554-558 (4th ed. 1952). Where permitted it has often been characterized as "anomalous," *i.e.,* inconsistent with the supplanting of the unity concept with the separate concept. See Bloomfield v. Brown, 67 R.I. 452, 25 A.2d 354, 141 A.L.R. 170 (1942); Arrand v. Graham, 297 Mich. 559, 298 N.W. 281, 136 A.L.R. 1206 (1941); Rapacz, *Progress of the Property Law Relating to Married Women,* 11 U. KAN. CITY L. REV. 173 (1942-43).

75. ALA. CODE ANN. tit. 34, § 72 (Supp. 1951); ARK. STAT. ANN. § 55-401 (Supp. 1955); CAL. CIV. PRAC. CODE ANN. § 370 (West Supp. 1956); COLO. REV. STAT. §§ 90-21, 22 (1953); CONN. GEN. STAT. § 7307 (1949); FLA. STAT. § 62.39 (1955); GA. CODE ANN. § 53-507 (Supp. 1955); IDAHO CODE § 5-304 (Supp. 1955); KAN. GEN. STAT. 60-404 (1949); KY. REV. STAT. § 404.060 (1953); LA. REV. STAT. ANN. § 9:102 (West Supp. 1955); ME. REV. STAT. ANN. c. 166, §§ 35, 38 (1954); MD. ANN. CODE *art.* 45, § 5 (Supp. 1956); MICH. STAT. ANN. § 27.657; MINN. STAT. ANN. § 519.01 (Supp. 1956); MO. ANN. STAT. § 415.250 (Supp. 1956); MONT. REV. CODES ANN. § 36-110 (1947); NEB. REV. STAT. § 25-305 (Supp. 1955); N.H. REV. STAT. § 460:2 (Supp. 1955); N.M. STAT. ANN. § 21-6-6 (Supp. 1955); N.D. REV. CODE § 14.0705 (Supp. 1953); OHIO REV. CODE ANN. § 2307.09 (Page Supp. 1956); OKLA. STAT. ANN. tit. 12, § 224 (Supp. 1956); R.I. GEN. LAWS ANN. c. 417, § 14 (1938) (see PUBLIC LAWS c. 1397 [1944]); S.D. CODE § 14.0207 (1939); TENN. CODE ANN. § 36-601 (Supp. 1956); UTAH CODE ANN. § 30-2-2 (Supp. 1955); VA. CODE ANN. § 55-36 (Supp. 1956); W. VA. CODE ANN. § 4750 (1955); WYO. COMP. STAT. ANN. § 3-604 (1945). See also TEX. REV. CIV. STAT. ANN. art. 1983 (Supp. 1956).

76. ARIZ. CODE ANN. § 25-501 (1939); see also 16 ARIZ. REV. STAT. ANN., Rules of Civ. Pro. 17(e).

77. IND. ANN. STAT. § 2-205 (Supp. 1955) (semble wife may sue husband as to property only); MISS. CODE ANN. § 452 (Supp. 1956); NEV. COMP. LAWS § 8546 (Supp. 1949) (wife may sue husband); N.Y. DOM. REL. LAW § 57; N.C. GEN. STAT.

expressly excluded [78] or restricted to suits by the wife [79] or to suits in equity. The Massachusetts statute [80] gives a married woman capacity to sue and to be sued "in the same manner as if she were sole; but this section shall not authorize suits between husband and wife." The New Jersey statute is similar.[81] In Oklahoma,[82] household furniture and dwelling are exempt from property actions between spouses and reserved for division upon dissolution of the home.[83] Oregon expressly provides that should either spouse obtain possession or control of property of the other the owner may maintain an action as if unmarried.[84]

In Massachusetts, although the position of the married woman in respect to persons other than her husband is in the matter of civil action the same as an unmarried woman (that is, she may sue either at law or in equity as appropriate to the interests to be protected), the position of the spouses *inter se* is different. The statutory provision does not "authorize suits between husband and wife." This has been construed to mean that such actions as were permitted before the statute are still permitted, in other words suits in equity. Although the property interest may in a particular case now be legal its protection against the spouse is in equity, in the same manner as if the interest in question had been equitable prior to the statute. If a husband wrongfully sells his wife's chattel to a third person, the wife would have a legal action against the third person, but only a bill in equity against the husband, and under the Massachusetts equitable separate estate doctrine this is confined to specific relief. This construction also applies to actions by a husband.[85]

§ 52-10.1 (Supp. 1955); PA. STAT. ANN. tit. 48, § 111 (1930); PA. STAT. ANN. tit. 28, § 320 (1930) (wife may sue husband to protect and recover property), Bodner v. Herly, 47 Bucks 31 (Pa. 1954), Candidi v. Candidi, 87 D. & C. 96 (Pa. 1954); WIS. STAT. § 246.075 (Supp. 1956). See also IDAHO CODE § 5-304 (Supp. 1955); S.C. CODE § 10-216 (Supp. 1956); WASH. REV. CODE §§ 26.16.150, 26.16.120, 26.16.160, 26.16.180 (Supp. 1956).

78. FLA. STAT. § 708.03 (1955) (except management of wife's property).

79. See note 77 *supra*.

80. MASS. ANN. LAWS c. 209, § 6 (Supp. 1956).

81. N.J. REV. STAT. § 37:2-5 (Supp. 1956). See Bendler v. Bendler, 3 N.J. 161, 69 A.2d 302 (1949).

82. OKLA. STAT. ANN. tit. 12, §§ 1278, 1284 (Supp. 1956).

83. Held in Bruner v. Hart, 178 Okla. 22, 62 P.2d 513 (1936) to withdraw such property from the general law.

84. ORE. REV. STAT. 108.080 (1955). See also IOWA CODE ANN. § 597.3 (Supp. 1956).

85. Gibbons v. Gibbons, 296 Mass. 89, 4 N.E.2d 1019 (1936); Giles v. Giles, 279 Mass. 284, 181 N.E. 176 (1932); Young v. Young, 251 Mass. 218, 146 N.E. 574 (1925); Ricker v. Ricker, 248 Mass. 549, 143 N.E.. 539 (1924); Bovarnick v. Davis, 235 Mass. 195, 126 N.E. 380 (1920). *Cf.* Ago v. Canner, 167 Mass. 390, 45 N.E. 754 (1897). See also Ramsey v. Ramsey, Mass. A.S. 189 (1957).

Under the comprehensive Connecticut Married Women's Statute of 1877 [86] it was reasoned that the foundation of the legal status of the husband and wife, namely, unity, was removed ". . . and a new foundation, namely, equality of husband and wife in legal identity and capacity of owning property, was laid. . . ." Although the equitable status was taken as a model, legal rights and remedies necessarily followed although not expressly provided. A wife may sue her husband at law. ". . . an Act which changes the foundation of the status necessarily involves the consequences of the new status and not those of the old, and these consequences cannot be prohibited by inference unless the inference of prohibition is necessary." [87]

Unless the provisions of the statute preclude it, it has usually been held that (apart from the question of the matrimonial home) the wife may maintain property actions and suits against the husband just as she may against one not her husband.[88] Courts that deny personal tort actions [89] as well as courts that allow them [90] usually agree that actions may be maintained between the spouses to recover property and redress torts thereto, the latter often using the property situation as refuting the argument of disturbance of domestic tranquility, or peace and harmony of the home, as a reason against actions for injuries to the person.

The matter of the matrimonial home may, however, present more troublesome problems.

When the parties are residing in accord [91] in the house owned by one or the other, no property "wrongs" have occurred. The non-

86. CONN. PUB. ACTS 211 (1877).

87. Mathewson v. Mathewson, 79 Conn. 23, 63 Atl. 285, 5 L.R.A. (n.s.) 611, 6 Ann. Cas. 1027 (1906).

88. Berdell v. Parkhurst, 58 How. Pr. 102 (N.Y. Sup. Ct., Gen. T. 1879) (action by husband for conversion); Hamilton v. Hamilton, 225 Ala. 284, 51 So.2d 13 (1950) (trover); Eddleman v. Eddleman, 183 Ga. 766, 189 S.E. 833 (1937) (husband may maintain trover); Smith v. Smith, 20 R.I. 566, 40 Atl. 417 (1898) (trover for household furniture); Bruce v. Bruce, 9 Ala. 563, 11 So. 197 (1891) (detinue); Walker v. Walker, 215 Ky. 154, 284 S.W. 1042 (1926) (wife had right of landlord where husband is tenant); Cook v. Cook, 125 Ala. 583, 27 So. 918 (1899) (recovery of realty); Craft v. American Agricultural Chemical Co., 81 Fla. 55, 87 So. 51 (1921) (wife may oust husband); Markham v. Markham, 4 Mich. 305 (1856) (at law or in equity); Peters v. Peters, 20 Del. Ch. 28, 169 A.2d 298 (1933); Masterman v. Masterman, 129 Md. 167, 98 Atl. 537 (1916) (in equity); Freitag v. Bersano, 123 N.J.Eq. 515, 198 Atl. 845 (1938); Hedlund v. Hedlund, 87 Colo. 607, 290 Pac. 285 (1930) (bill by husband for accounting).

89. See Hunter v. Livingston, 125 Ind. App. 422, 123 N.E.2d 912 (1955). See also Smith v. Smith, 61 Ore. Ad. 3, 287 P.2d 572 (1955).

90. Franklin v. Wills, 217 F.2d 899 (6th Cir. 1954); Brown v. Gosser, 262 S.W.2d 480, 43 A.L.R.2d 626 (Ky. 1953); Damm v. Elyria Lodge, 158 Ohio St. 107, 107 N.E.2d 337 (1952).

91. "When husband and wife live together in amity (a situation which is perhaps more often brought to the notice of social scientists than to that of lawyers in the course of their professional activities) what predominates is the unity of the household . . ." O. Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, 15 MOD. L. REV. 133, 135-136 (1952).

owner is not a tenant and is not in possession.[92] The presence of the one is not adverse to the other, and it may be said that each has an equal right to occupation and use, due to permission of the owner express or implied.[93]

Where disagreement occurs for whatever reason, the situation changes. The owner may have matrimonially deserted, leaving the other in fact in the house; or the non-owner may have forced the other out; or the owner may have left with matrimonial justification; or the owner may simply wish to terminate his or her permission and use the property for other purposes. Not only are questions of right involved but perhaps more troublesome, if there is the right, are questions of procedure: are technical elements necessary for ejectment present, is resort to equity the way to oust, is there some available summary proceeding, or are all such suits between husband and wife against judicial public policy in spite of changes enacted by the statutes?

In *Minier v. Minier*[94] it appeared that a husband occupied a house, purchased for his wife as a home, and refused to permit her to participate in the occupancy. The married women's statute contained no express provisions concerning suits by a wife against her husband. It was held that an action in the nature of ejectment would lie, inasmuch as the wife, since the statute, had legal title, and the proper action was at law. The court reasoned that before the statute a suit in equity might have been brought, and there is no new opportunity for litigation, since policy "already allows and provides for suits in regard to property between husband and wife; and is fraught with no such disastrous consequences to domestic peace and concord [as would action for slander or assault]." As to property "the parties are strangers to each other."[95]

In *Edmonds v. Edmonds*[96] it appeared that the wife owned a house which was a gift from the husband and occupied by them as a

92. Graham v. Graham, 202 Ala. 56, 79 So. 450 (1918); Cipperly v. Cipperly, 104 Misc. 434, 172 N.Y.S. 351 (County Ct. 1918).

93. Wehoffer v. Wehoffer, 176 Ore. 345, 156 P.2d 830 (1945); Note, 18 ROCKY MT. L. REV. 406 (1945-46) (implied consent to use without compensation although part of the wife's premises occupied as the home was used by the husband for business purposes).

94. 4 Lans. 421 (N.Y. Sup. Ct. Gen. T. 1870).

95. In Wood v. Wood, 83 N.Y. 575 (1881) premises were conveyed to a wife (not by her husband) for life, for her sole and separate use, and it was occupied as the matrimonial home. By reason of the husband's conduct the wife left. It was held that the husband does not become a tenant by will or sufferance holding over, but is more like a trespasser; if the wife has been ousted she may have ejectment even though her husband is the one who ousted her. Against the argument of the husband that it was the intention of the grantor that the land be held jointly as a homestead, the court concluded that the purpose was the contrary, "to shut out the husband from any legal or equitable interest," and that by virtue of her title the wife had sole and absolute possession.

96. 139 Va. 652, 124 S.E. 415 (1924).

home, and that the wife had deserted the husband. Her action was of unlawful detainer to recover possession of a room in the house which the husband continued to occupy. It also appeared that the husband was anxious for his wife to return. It was held that the wife could maintain her action irrespective of the husband's right to curtesy and his "marital rights,"[97] and that the wife's desertion does not entitle the husband to occupy her lands against her will, since her rights are determined by the married women's statute and not by his "marital rights": "It follows that a husband in Virginia may be a trespasser upon his wife's land whenever she is not occupying them, if he goes there against her will or her commands . . ." The court also said that the husband occupies the position of a guest upon his wife's property:[98] "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." The court remarked, however, that were the statute not express,[99] as in Virginia (then section 5134): "On grounds of public policy the inference could very well be drawn in cases where the wife's property had been set aside as a joint or family home with her consent, that she could not desert it without cause, and then taking advantage of her own wrong, turn her husband out."[100]

In *Kelley v. Kelley*,[101] actions of trespass and ejectment by a wife against her husband, it appeared that the wife had bought with a legacy a two-tenement house in which she and her husband had

97. By VA. CODE ANN. § 55-35 (1950) the wife has a right to acquire any property and dispose of it as if unmarried, provided that the husband is entitled to curtesy, ". . . but neither [her husband's] right to curtesy nor his marital rights shall entitle him to the possession or use, or to the rents, issues and profits of [his wife's] real estate during the coverture." The wife may sue and be sued as if unmarried.

98. Citing King v. Davis, 137 Fed. 222 (C.C.W.D. Va. 1905).

99. The provisions of the Virginia Code referred to in the case would seem to state in express words concerning the husband's *jus mariti* what would be necessarily implied in other statutes giving the wife use powers over her real estate.

100. Citing Manning v. Manning, 79 N.C. 293, 28 Am. Rep. 324 (1878); State v. Jones, 132 N.C. 1043, 43 S.E. 939, 61 L.R.A. 777, 95 Am. St. Rep. 688 (1903). See however the following cases which the court cited in support of the wife's rights: Cook v. Cook, 125 Ala. 583, 27 So. 918, 82 Am. St. Rep. 264 (1900); Crater v. Crater, 118 Ind. 521, 21 N.E. 290, 10 Am. St. Rep. 161 (1889); Buckingham v. Buckingham, 81 Mich. 89, 45 N.W. 504 (1890); McDuff v. McDuff, 45 Cal. App. 53, 187 Pac. 37 (1920); Minier v. Minier, 4 Lans. 421 (N.Y. Sup. Ct. Gen. T. 1870).

In Humphreys v. Strong, 141 Va. 146, 126 S.E. 194 (1925) pursuant to an antenuptial agreement the husband had conveyed a house to his wife and it was occupied by them as a marital residence. Due to alleged cruelty of the husband the wife left him and obtained a divorce. Thereafter she brought ejectment; the husband sued her to enjoin her action and to cancel the deed. It was held for the wife. The court reasoned that the result would have been the same had there been no divorce, since the "*jus mariti*" in the property no longer existed under the married women's act. "As to her property rights during coverture they are as strangers." The court does not commit itself as to what would have been the result if the wife had been guilty of desertion.

101. 51 R.I. 173, 153 Atl. 314, 74 A.L.R. 135 (1931).

already been living for some five years, and that after the purchase they had continued residing there for some thirteen years. During this time they had joined in a mortgage conveyance, and the husband had paid the mortgage interest, part of the repairs, insurance premiums, taxes, and water bills. The wife became dissatisfied with the location, and the husband refusing to move, moved elsewhere and rented out the upper tenement to a third person. After an interval she demanded rent from her husband for the lower tenement in part of which he maintained his office as a physician. Upon his refusal to pay rent the wife's actions were brought. The Rhode Island statute [102] provided that property of a woman before marriage or property that may become hers after marriage shall remain her sole and separate property free from control of her husband, and in all actions at law or in equity by or against a married woman she shall sue and be sued alone. The court had previously held that a wife could maintain an action against her husband for conversion of her personal property,[103] but not for personal injuries.[104] It was held, affirming a judgment below, that the actions of trespass and ejectment would not lie, the court saying: ". . . Marriage contemplates the living together of the husband and the wife. 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 home which is the lawful home of both husband and wife. The occupancy of the husband is not adverse to the title of his wife and is not however long continued a basis for acquiring title by possession. . . . The wife still has the legal possession and also the right of occupancy if she wishes 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." [105]

These reasons are vulnerable in respect to concepts both of ownership and of conjugal duties. As a preliminary matter it should be observed that the payment of mortgage interest, insurance premiums,

102. R.I. GEN. LAWS ANN. c. 417 (1938).
103. Smith v. Smith, 20 R.I. 556, 40 Atl. 417 (1898).
104. Oken v. Oken, 44 R.I. 291, 117 Atl. 357 (1922).
105. *Cf.* McDuff v. McDuff, 45 Cal. App. 53, 187 Pac. 37 (1920). The home had been conveyed to a wife by her husband as her separate property. Having left him, she sued for separate maintenance. Judgment was for the husband. In an action by her in the nature of ejectment the husband's contention that neither spouse could be excluded from the dwelling under sections 156 and 157 of the Civil Code was rejected: "At the time of the commencement of this action the house was not the family dwelling place . . . the husband was holding possession of the wife's separate property adversely to her as owner."

taxes, and water bills as such gives the husband no property interest, since these things would seem referable to support, and moreover would be presumed gratuitous.[106] The house therefore remains the wife's property. A refusal of a wife to have her own house used as the family dwelling is not desertion so long as she is willing to live with her husband in another house of his choice provided by him.[107] The reference to the husband's occupancy not being adverse to the wife's title seems to refer to technical requirements for ejectment, which would not be met so long as he was residing there by the wife's permission, for under those circumstances the husband is not in possession. But after the wife terminates her permission, an occupier, if he were not the husband, would be subject to ejectment or some equivalent ouster proceeding, and if the husband is not so subject it is only because he is the husband, and this reasoning therefore would seem to assume the result rather than furnish a basis for it.[108] The proposition that "mutual and voluntary choice" in respect to use of the individually owned matrimonial home is irrevocable during coverture in absence of lawful cause seems to equate the ownership power of revocation with the laws of separation and divorce. The fact that the wife has "the right of occupancy if she wishes to exercise it" and that the husband cannot lawfully exclude her does not give her the exclusive occupancy which as owner the statute seems to recognize.

What therefore would be a wife's remedy, if any? Does the case decide only that an action at law (trespass, ejectment) is not available?[109] Is a bill in equity[110] or some other proceeding pos-

106. McAllister v. McAllister, 342 Ill. 231, 173 N.E. 745, 74 A.L.R. 213 (1930).

107. A husband financially able cannot require his wife to live in his mother's home, despite her agreement with him before marriage to do so. Horkheimer v. Horkheimer, 106 W. Va. 634, 146 S.E. 614 (1929). *Cf.* Flynn v. Flynn, 272 Mich. 291, 261 N.W. 329 (1935). See also MCCURDY, DOMESTIC RELATIONS 347 (4th ed. 1952).

The husband's right to fix the domicile is no longer absolute. See Franklin v. Franklin, 190 Mass. 349, 77 N.E. 48, 4 L.R.A. (n.s.) 145, 5 Ann. Cas. 851 (1906) ("It should be exercised with some reference to the welfare of the wife."). See also MCCURDY, DOMESTIC RELATIONS 349 (4th ed. 1952).

There seems no good reason why he should have the right to fix irrevocably the domicile in his wife's separately owned house, even though she once consented to its use as the matrimonial home. See Copeman v. Copeman, *supra* note 64.

108. See Cipperly v. Cipperly, 104 Misc. 434, 172 N.Y.S. 351 (County Ct. 1918).

109. *Cf.* Cipperly v. Cipperly, *supra,* where it was held that after a wife revoked permission to occupy her premises where she and her husband had been residing (apparently because she wished to use her property differently, for an estrangement was not mentioned), the husband was not an intruder or squatter under section 2232 of the Code of Civil Procedure to be ousted by summary proceedings: "These rights [the husband's *jus mariti*] have been taken away by statute, but the marital relation remains. . . . If there is to be a separation between the parties, the law provides a way to accomplish it. The way provided is not by this proceeding." No reference was made to Minier v. Minier, 4 Lans. 421 (N.Y. Sup. Ct. Gen. T. 1870). Did the court mean that only summary proceedings were not available or that the only legal solution would be a marital separation?

110. See Plotkin v. Plotkin, 32 Del. (2 W.W. Harr.) 455, 125 Atl. 455 (Super. Ct. 1924), 19 ILL. L. REV. 371 (1925), where the action was by the husband against

sible?[111] The reasoning of the *Kelley* case would seem to exclude equitable relief as well as an action at law. May a wife sell or lease her house and let the purchaser or lessee force the husband out? In some states a valid conveyance may still require the joinder of a husband with his wife as grantor[112] (apart from reasons of curtesy or possible homestead). But even if a wife is permitted to convey by her sole deed, the result would be analogous to a forced sale and might depress the price any purchaser with reason to know that a sale is the only way a wife can get her husband out would likely be willing to pay. And a buyer or lessee might be deterred from buying an ouster suit, but if he were not, and if he should buy or lease, would not his ouster of the husband disturb family permanence just as much? These results would not seem to accord with a statute's provision that the wife's property "shall be free from control of her husband."

The reasoning of the *Kelley* case seems vulnerable also in respect to public policy. If remedy by civil action is not available and if sale or lease is impossible or undesirable and the matter is of sufficient importance or fancied importance to the parties and there are no grounds for divorce against the husband, the result would seem to be an impasse. This in turn may lead to a maritally disruptive situation (although the disagreement may not have previously reached that point), and could lead to permanent separation or perhaps end in divorce, particularly if a wife, persisting in her property attitude would be considered a deserter. Would denial of property suits therefore be effective implementation of the policy that "the law favors the marital relation and the permanence of the family"?

The domestic tranquillity objection to a civil action involves a fallacy in that it assumes that such domestic disharmony would ensue

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his wife to recover possession of personal property. The statute secured the wife's separate property and gave general power to her to sue and be sued, but contained no express provision as to suing her husband. Holding that the statute must be strictly construed as in derogation of the common law, the court held that the action would not lie, saying: ". . . but the right to sue each other strikes at the very heart of domestic relations and its effect not only upon the home ties, but upon society generally would be far reaching. For these reasons the husband and wife should not be permitted to sue each other in a court of law unless the right is expressly granted to them by the statute under which it is claimed." Does the reference to "law" include "equity"?

111. See Kashner v. Kapilow, 283 App. Div. 929, 130 N.Y.S.2d 427 (1st Dep't 1954), *aff'd*, 308 N.Y. 887, 125 N.E.2d 565 (1955) where it appeared that while the wife was occupying premises under provisions of a separation decree the husband sold the premises and thereafter continued to pay rent to the purchaser. It was held, one justice in the Appellate Division dissenting, that the purchaser took subject to the wife's rights under the separation decree, and was not entitled to proceed as landlord against the wife in statutory hold-over proceedings but without prejudice to another proceeding or action, if any, which he might be entitled to maintain.

112. See *In re* Haines' Trust Estate, 356 Pa. 10, 50 A.2d 692 (1947), 51 DICK. L. REV. 281; Cole v. Van Riper, 44 Ill. 58 (1867); White v. Wager, 25 N.Y. 328 (1862). See also MCCURDY, DOMESTIC RELATIONS 584 (4th ed. 1952).

from an action or its possibility as would threaten or cause marital disruption. If tranquillity had not already been thus seriously disturbed it is not likely that a civil action will do so. Nor is it likely that the possibility of an action being permitted will do so, or its impossibility prevent. There is no reason to suppose that allowing actions causes discord more than would denying them. For the denial of a forum may accentuate friction. The causes of any such friction lie not in the possibility of civil action, but in changes in the concepts of and in the attitudes toward the position and capacities of the married woman and in the pragmatically emotional reaction thereto of individuals.

If marital disruption has already occurred there would seem to be no convincing reason based upon preservation of tranquillity to deny a property action. If it has occurred the question should be one of support and maintenance, and, regardless of which party is at fault, not one of the right to use or occupy the other's specific property. If it should be necessary to make orders in reference to property ancillary to support it should be done in maintenance or divorce proceedings.[112a]

In *Hall v. Hall*[113] it appeared that a husband and wife having separated, and the wife having sought unsuccessfully to obtain a divorce decree, she brought an action against her husband for unlawful detainer of her real estate although it had been used as their home. A judgment overruling the husband's plea in abatement was affirmed, the court saying, citing *Kelley v. Kelley:*[114] ". . . we think the question [whether her right to possession gives her the right to oust her husband and treat him as a trespasser] is one of fact to be determined in each particular case."

The wife not being entitled to a divorce, what is the question of "fact to be determined"? And is the question to be left to a discretion which would include a general discretion to consider marital fault? If so, the opinion of the Massachusetts court,[115] where the question concerned the discretion of trial judges to consider conduct short of recrimination as a bar to divorce, seems pertinent: "In respect to divorce wide cleavages of opinion exist. . . . The divorce law has to be administered by judges whose personal opinions vary

112a. Ramsey v. Ramsey, Mass. A.S. 189 (1957).

113. 193 Tenn. 74, 241 S.W.2d 919 (1951).

114. 51 R.I. 173, 153 Atl. 314 (1931). The court had previously cited Cook v. Cook, 125 Ala. 583, 27 So. 918 (1900) as entirely in point, and Buckingham v. Buckingham, 81 Mich. 89, 45 N.W. 504 (1890) as in accord.

115. Reddington v. Reddington, 317 Mass. 760, 59 N.E.2d 775, 159 A.L.R. 1448 (1945).

as widely as do those of other people . . . . If every judge . . . were entitled to exercise discretion according to his own ideas of propriety or of public policy, the judicial branch of government . . . would become a government of men and not of laws." Relevant factors can be established and the scope of judicial discretion delineated by appellate decisions but the process could well be an empirical one, expensive in time and money to many private litigants (and might contribute to broken marriages).

Whether civil sanctioning of dissolution divorce (for causes arising during marriage) resulted in, or contributed to, the enactment of ever broader married women's statutes,[116] or whether the latter have influenced the enactment and later extensions of divorce statutes and have made legally possible a mode of marital life in respect to property matters that is promotive of frictions leading to disruption [117] are questions that probably cannot be definitely answered.[118] It would seem that both developments rest upon a common attitude of civil society, and that it is probable that each has had a not unimportant impact upon the other.

While no necessarily irreconcilable conflict should be involved between property rights and conjugal rights, if it is to be thought that there is such a conflict inherent in the concept of separate ownership of the home or that a substantial social problem exists, consideration should be given to specific legislation, which might take the form of a

116. Dissolution divorce by general law was provided for in England by the Matrimonial Causes Act, 1857, 20 & 21 VICT. c. 85, slightly expanded by the Act of 1923, 13 & 14 GEO. 5, c. 19, and much expanded by the Act of 1937, 1 EDW. 8 & 1 GEO. 6, c. 57. It was provided for in some of the United States earlier. See McCurdy, *Divorce —A Suggested Approach with Particular Reference to Dissolution for Living Separate and Apart,* 9 VAND. L. REV. 685 (1956).

117. Not only do the married women's property acts proceed on the philosophy of separate property ownership, but the common-law dower and curtesy have been widely abolished, and in many states the tenancy by the entirety is unavailable. In many states a married person has power to convey his or her property without joinder of the other spouse; and in many states a married woman is entitled to her services and earnings without legal necessity of her husband's consent.

Consider the matter of services and earnings when consent of the husband to his wife's performing work for others outside the home is not required by the statute for the wife to be entitled to such earnings, although he is still, despite the statute, entitled in law to domestic or household services. In Harmon v. Old Colony R.R., 165 Mass. 100, 42 N.E. 505, 30 L.R.A. 658 (1896) it was said: "Her right to employ her time for the earnings of money on her own account is as complete as his. . . . This may interfere with his right to and enjoyment of her society and services. But this is a consequence which the Legislature must be deemed to have foreseen and intended. . . . So far as the statutes have given to her a right to act independently of him, so far his rights and control in respect to her are necessarily abridged. . . . It is urged in argument that she may contract to devote her whole time to work which is to be performed away from his home, this amounting to a desertion. . . . But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would permit such action on her part against his consent."

118. See note 63 *supra.*

statutory marital estate in real estate used in fact as the home, which should seek to avoid delegating undefined discretion, to afford more clearly defined rights in the property of either spouse so used, to protect and encourage joint occupancy rather than to permit ouster of one by the other, and perhaps give the parties better protection against third persons than the law may now afford.