THE DESERTED HUSBAND'S RIGHTS IN RELATION TO THE MATRIMONIAL HOME

RE JACKSON AND THE CONVEYANCING ACT

The old problem of the extent to which a married woman can exercise proprietary rights she happens to have in the matrimonial home is raised in the recent New South Wales decision of *Re Jackson and the Conveyancing Act.*[1]

The reconciliation of the demand by a married woman that her own property be protected from interference by her husband with the social interest in maintaining rights of consortium between the spouses has created problems that have been solved by the courts with less regard to general principle than to the facts of each case. Thus there is still a good deal of doubt as to the availability of an action by the wife to eject her husband from the home which she owns and in which he wishes to reside for the purpose of consorting with her. In this connection the decision in *Lane v Lane*[2] should be contrasted with the remarks of Goddard L.J. in *Bramwell v Bramwell*[3] and the amplification those remarks receive at the hands of Denning L.J. in *Bendall v McWhirter.*[4]

In these later cases two distinct considerations appear to operate to prevent a wife from using her proprietary rights in this way to break up the home. One is the restriction in the Married Women's Property legislation upon the wife suing her husband for a tort, which has been taken by Goddard L.J. in the passage referred to above and by Denning J. (as he then was) in *Hutchinson v Hutchinson*[5] to prevent one spouse bringing an action in ejectment against the other, although a contrary view of the legislation has been taken in New South Wales.[6]

The other consideration is the reluctance of the court to give any assistance to an exercise of proprietary rights which has this effect, a reluctance expressly stated by Tucker L.J. in *Stewart v Stewart.*[7] That the husband may not use his proprietary rights to deprive his wife of a home is shown by *Lee v Lee.*[8] Whether, apart from the Married Women's Property Act, the wife's rights are subject to a similar restriction in respect of her husband is less clear.

The obligation on the husband of providing a matrimonial home is not shared by his wife,[9] and so, if she has a duty towards her husband in relation to the home at all, it would seem to be the negative one of not doing anything to impair the conjugal society and fellowship of the one in the other by breaking it up. This poses the problem of the extent to which the wife may exercise her proprietary rights over her own property when such exercise puts an end to the consortium or makes that consortium more difficult, and when that exercise is not for the purpose of protecting her separate property from interference by her husband, as it was, for example, in *Boyt v Boyt.*[10] This is not quite the problem dealt with in *Lane v Lane,*[11] since there the defendant had no proprietary interest in the house, and was using the marriage relationship as an excuse for

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[1] (1951) 52 S.R. (N.S.W.) 42.
[2] (1913) 13 S.R. (N.S.W.) 657.
[3] (1942) 1 K.B. 370 at 374.
[4] (1952) 2 Q.B. 466 at 475.
[5] (1947) 2 All E.R. 792 at 793.
[6] *Aaron v Aaron* (1944) 61 W.N. (N.S.W.) 93.
[7] (1948) 1 K.B. 507 at 513.
[8] (1952) 1 All E.R. 1299.
[9] *Lane v Lane,* cited *supra* n. 2 at 661 by Cullen C.J.
[10] (1948) 2 All E.R. 436.
[11] Cited *supra* n. 2.

preventing his wife from exercising the right to exclusive possession which as owner was vested in her, and which by the remedy of ejectment she could protect against him. Nor does *Symonds v Hallett*[12] directly bear on the issue, since there the husband claimed the right to go to and use the house when and as he thought fit, not for the purpose of consorting with his wife but for his own purposes—which included the removal of household effects which had been settled on her. It being an interlocutory application, no final view was expressed by the court on whether there is a right in a married woman, who is entitled to, and is living in, a house settled to her separate use, and which has been the matrimonial home, to come to a court of equity to restrain her husband at her will and pleasure from entering there. Cotton L.J. did, however, express the view[13] that equity would preserve her property for her, but would not enable her to prevent her husband from exercising his rights and duties as a husband.

Does this mean that whenever a wife seeks to exercise property rights which she may have in a way that will effectively prevent her husband from exercising his marital rights, she will be restrained by the court? Some indication of the modern approach to this question is afforded by *Re Jackson*.[14] There the wife was the registered proprietor of the matrimonial home, but had been held in other proceedings to be a trustee of the property for herself and her husband as joint tenants. She left the home contrary to the wishes of her husband, and while he continued to reside therein she made an application under s. 66G of the Conveyancing Act, 1919-1932[15] (which supersedes the old Partition Acts) for an order appointing statutory trustees for sale. The husband would not vacate the property, although he was prepared to allow the property to be sold provided he was not disturbed in his occupation of that portion in which he resided. The question for the court was whether, assuming it to have a discretion in the matter, the wife's application should be granted.

The case was not analogous to that of a husband interfering with property in which his only interest was the fact that he was married to its owner. Here the husband had an equitable joint tenancy in the property, and his wife, who had deserted him, was his trustee. Could the old principles giving protection to the wife when her husband actively interfered with her enjoyment of her separate estate be extended to cover a case where the wife was the interfering party and the husband's role was the passive one of protecting what was his? Would the court adopt the opinion of Real J. in *Lotz v Bullock*[16] that despite the Married Women's Property Acts the existence of the marriage relationship places a fetter on the exercise of each party's proprietary rights—an opinion echoed in the case of the husband by Romer L.J. in *Bendall v McWhirter*[17]—so that "when . . . a married woman . . . appropriates as a home any part of her own . . . property, that property becomes, *ipso facto*, a place to which (her husband) has a right and duty to resort", and presumably in which, if deserted, he has a right to remain? Or would the court prefer the directness of the approach typified by the remarks of Lord Normand in the Scottish Court of Session[18] that "in determining the right to occupy property as against either a tenant when the right is claimed by a person who has no title at all, or as against a proprietor when the right is claimed by a person who was a tenant and whose right to tenancy has expired, the question is to be dealt with when it arises between husband and wife in exactly the same way as when it arises between strangers"?

Hardie A.J. took the view that the wife's departure from the house did not

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[12] (1883) 24 Ch. D. 346.
[13] *Id.* at 351.
[14] Cited *supra* n. 1.
[15] 1919, No. 6—1932, No. 65.
[16] (1912) S.R. (Q.) 36 at 45-46.
[17] Cited *supra* n. 4 at 486.
[18] *Millar v Millar* (1940) S.C. 56 at 60.

put an end to its character as the matrimonial home, and summarised the considerations which carried weight with the court by saying:[19] "Having regard to the fact that the property was acquired for the purposes of a matrimonial home, and was used for those purposes by both parties up to February, 1950, and the fact that the huband claims that he is willing that his wife should return to the home and there resume married life with him, I am of the opinion that, in the exercise of my discretion, I should not make an order which would have the effect of depriving the husband and wife in the near future of the ownership of the matrimonial home." Accordingly, the wife's application was refused. In coming to this conclusion, the remarks of Tucker L.J. in *Stewart v Stewart*[20] were expressly adopted. The whole tenor of the judgment accords with the comments of Cotton L.J. already referred to; the distinction, much stressed in earlier cases, between the proprietary and the matrimonial rights of each spouse now seems less clear.

The decision in *Jackson's Case*[21] had the dual effect of protecting the husband's right to institute proceedings for restitution of conjugal rights and of furthering the policy of the law in not placing obstacles in the way of parties who might decide to effect a reconciliation and re-establish a joint matrimonial home. To this extent his Honour's view was similar to that taken in *McTavish v McTavish*[22] and *Tillack v Tillack*,[23] where deserted wives who owned their homes obtained orders that they were entitled to enjoy the sole and exclusive possession of the premises without prejudice to any rights (other than proprietary rights) of their husbands during any period when they might occupy such premises as the matrimonial home. This reservation as to non-proprietary rights squares with the statement by Hardie A.J.[24] that the only acceptable alternative to straight-out refusal of the order for sale of the house would be the insertion of a provision in the order that no sale should be made until the matrimonial rights of the parties were resolved in such a way that the order for sale could not prejudice them, whether this resolution of rights took place by the husband vacating the premises (in which event they would cease to be the matrimonial home), by a decree for dissolution of the marriage or a judicial separation, by an order under the Deserted Wives and Children Act 1901-1909 (N.S.W.)[25] (if, indeed, in view of s. 7 (3) of that Act, an order could be made), or by a separation agreement.

Six months later, in *Re Fettell*,[26] McLelland J. declined to follow *Re* Jackson,[27] but on a point of statutory interpretation only, and its importance as a decision on the law of husband and wife is not affected.

Success of the wife's application in *Re Jackson*[28] would have had the effect of ejecting the husband from the premises, since the only order for sale the court was disposed to make, if one was to be made at all, was an unconditional order. In view of the policy that decision exhibits, it would seem, if the decision in *Aaron v Aaron*[29] is finally preferred to the dicta in *Bramwell v Bramwell*[30] and *Hutchinson v Hutchinson*,[31] that one way in which a husband could protect himself against failure by his wife to acknowledge his matrimonial rights would be by appearing to an action in ejectment brought against him and pleading in

[19] (1951) 52 S.R. (N.S.W.) at 45.
[20] Cited *supra* n. 7 at 513.
[21] Cited *supra* n. 19.
[22] (1940) V.L.R. 350.
[23] (1941) V.L.R. 151.
[24] (1951) 52 S.R. (N.S.W.) at 46.
[25] 1901, No. 17—1939, No. 17.
[26] (1952) 52 S.R. (N.S.W.) 221.
[27] Cited *supra* n. 1.
[28] *Ibid.*
[29] Cited *supra* n. 6.
[30] Cited *supra* n. 3.
[31] Cited *supra* n. 5.

his defence (1) that he is the husband of the claimant; (2) that the subject property is, or was until the wife left it, their matrimonial home; and (3) that he has not, by misconduct or otherwise, in any way forfeited his matrimonial rights.

Mr. R. E. Megarry has said:[32] "It may well be that justice requires that the wife's occupation of the home should be protected in some special way; and modern ideas of sex equality may require that the right should not be exclusively feminine in gender." If this turns out to be so, the remark of Atkin L.J. in *Shipman v Shipman* that " . . . I should be reluctant to lay down a rule that a wife can treat her husband in the same way as a stranger"[33] will have a prophetic significance hardly suspected at the time.[34]

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WORK AND LABOUR OR SALE OF GOODS ?
(BROOKS ROBINSON PTY. LTD. v ROTHFIELD)

The decision of the Full Court of Victoria in *Brooks Robinson Pty. Ltd. v Rothfield*[1] has led to some confusion regarding the test to be applied in determining whether a contract is one of work and labour or one for the sale of goods within the meaning of legislation regulating the enforceability of the latter type of contract.

The appellant company had, at the respondent's request, undertaken the construction of a cocktail cabinet in accordance with blueprints prepared by an architect. All materials were to be supplied by the appellant with the exception of certain wrought iron doors and a pivot which the respondent arranged to be executed by another firm and supplied to the appellant. The cabinet was of unique design in that it was to occupy a space in a curved wall between two rooms in the respondent's home, revolving on pivots at top and bottom so that it could readily be made to serve the occupants of either of the two adjoining rooms. The whole of the work was carried out on the appellant's own premises and the cabinet, complete except for the doors which the respondent failed to supply, was assembled on the pivot ready for installation. The company was then met by the compete repudiation of the contract by the respondent, and its action, brought in the County Court to recover the sum of £91 "for work done and materials supplied at the defendant's request for the manufacture of a cocktail cabinet", was defeated. The court upheld the defence that the contract was unenforceable by reason of s. 9 of the Victorian Goods Act, 1928,[2] being for the sale of goods and wholly oral. On appeal the Full Court reversed this decision, holding that the contract was not one of sale and allowed the appellant company to recover the sum claimed on a *quantum meruit*.

For a formulation of the distinction between the two types of contract in question, Deane J., with whom Martin and Sholl JJ. concurred, thought it unnecessary to look further than the decision of the Court of Appeal in *Robinson v Graves*.[3] He quoted the now well known test of Greer L.J.[4] to the effect that the determining factor in the contract is its substance, irrespective of whether goods are in fact to be produced, provided their production is merely

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[32] "The Deserted Wife's Right to Occupy the Matrimonial Home" (1952) 68 *Law Q. Rev.* 379 at 389.

[33] (1924) 2 Ch. 140, at 146.

[34] In *Webb v Deithe* (N.S.W. Full Court, Apl. 2, 1953, unreported) a landlord was denied ejectment as against the wife of a deserting husband who, as sole lessee, had purported to surrender the lease of the matrimonial home.—*Ed.*

[1] (1951) A.L.R. 909.

[2] No. 3694.

[3] (1935) 1 K.B. 579.

[4] *Id.* at 587.