

National Provincial Bank v. Ainsworth, [1965] 2 All E.R. 472

Paul D. Temelini

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Commentary

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NATIONAL PROVINCIAL BANK v. AINSWORTH, [1965] 2 All E.R. 472 (H.L.)—HUSBAND AND WIFE—DESERTED WIFE'S RIGHT TO REMAIN IN OCCUPATION OF THE MATRIMONIAL HOME—REGISTERED LAND—OVERRIDING INTEREST—LAND REGISTRATION ACT, 1925 (15 & 16 Geo. 5, c. 25), s. 70(1) (g)—During the last decade or so there has been a series of decisions which were the embryonic and infant stages of what has come to be known as "The wife's equity in the matrimonial home". The House of Lords has in *National Provincial Bank v. Ainsworth*¹ now put an end to this incipient doctrine. Looking back over the historical development of the deserted wife's equity it can be truly said "that in matters of difficulty the more seriously they are debated and argued, the more truly they are resolved, and thereby new inventions justly avoided."²

Beginning with the decision of the English Court of Appeal in *Bendall v. McWhirter*,³ and until the present House of Lords decision, the law had been that a deserted wife could stay in the matrimonial home against her husband's wishes and against his successors in title—such as a purchaser, a mortgagee or a trustee in bankruptcy. The latter were on actual or constructive notice of her right bound to allow the wife to stay on the premises. The wife's right was a mere equity which had no legal or equitable status in the law of real property. Her right was one based on "a licence coupled with an equity". The law has been summarized by A. G. Guest in his article in the *Canadian Bar Review* on the position of the deserted wife in relation to third parties. He concisely states that, provided one concedes the deserted wife's right is here to stay,

(1) so long as the marriage subsists⁴ and she behaves herself,⁵ a deserted wife has a right to remain in the matrimonial home until such time as the court decides otherwise;⁶ (2) this right arises not upon marriage but from the fact of desertion and so is not enforceable against prior mortgagees whether legal⁷ or equitable;⁸ (3) it seems that this right would not be available against a bona fide purchaser for value without notice, but, in the absence of fraud this will rarely occur since notice of her occupation is notice of her right;⁹ (4) a person who is not a purchaser for value¹⁰ or who buys with full knowledge of the facts¹¹ stands in no better position than the husband; (5) a purchaser for

¹ [1965] 2 All E.R. 471 (H.L.).

² Coke on Littleton, L.3C.5 Sec. 377, 232b.

³ [1952] 1 All E.R. 1307 (C.A.).

⁴ *Robson v. Headland* (1948), 64 T.L.R. 596 (C.A.); *Vaughen v. Vaughen*, [1953] 1 Q.B. 672 (C.A.).

⁵ *Middleton v. Baldock*, [1950] 1 K.B. 657 (C.A.), at p. 662, *per* Evershed M.R.

⁶ "The court always has a discretion in the matter", [1955] 1 W.L.R. 152 (C.A.) at p. 156, *per* Denning L.J.

⁷ *Lloyd's Bank v. Oliver's Trustees*, [1953] 1 W.L.R. 1460 (Ch.D.).

⁸ *Barclay's Bank v. Bird*, [1954] Ch. 274 (C.A.).

⁹ *Hunt v. Luck*, [1902] 1 Ch. 428 (C.A.).

¹⁰ *Errington v. Errington*, [1952] 1 Q.B. 290 (C.A.); *Bendall v. McWhirter*, [1952] 2 Q.B. 466 (C.A.).

¹¹ *Street v. Denham*, [1954] 1 All E.R. 532 (H.C.); *Ferris v. Weaven*, [1952] 2 All E.R. 233 (H.C.).

value who takes with notice of the wife's occupancy may yet get possession if it appears he has not full knowledge¹² of the facts.¹³

The latter was the basic legal position in England until *N.P.B. v. Ainsworth*. In this case the husband and wife and four infant children of the marriage lived in a home, title of which was registered. The husband deserted his wife and left her and the children in the matrimonial home. The husband went to live with his mother. In 1958, the husband mortgaged his home to the bank. The mortgage was registered and the bank had no knowledge of the fact that the husband and wife were not living together as husband and wife. In 1959, a company was formed and it took over the husband's business and properties. The first mortgage was discharged and a new charge was registered in its place without the bank making any inquiries as to the occupation of the property. In 1961 the wife became legally separated from her husband and also obtained an order for permanent alimony, which was made on the relevant factor that the wife and children were being provided with a rent free matrimonial home. The bank now learned of the matrimonial difficulties, and as the company did not pay its debt to the bank, the bank issued a summons for possession of the mortgaged property. The wife applied for an order to set aside the conveyance of the matrimonial home by the husband to the company on the grounds that it was defeating her claim against her husband for financial aid. The conveyance was set aside and the wife applied for an order that the order for future possession to the bank be rescinded and that she stay in possession.

The legal problem involves an effort to balance matrimonial relations and real property rights. The husband and wife have certain rights between themselves. *Prima facie* each partner has a right to the other's consortium, and the wife has a further right to be maintained by her husband which consists fundamentally in the provisions of a matrimonial home.¹⁴ Lords Hodson, Upjohn and Wilberforce point out that at no time did the matrimonial law give the wife any property in the house in which she and her husband lived unless there had been such a settlement. Her status of wife gives her a personal right against her husband, and she is legally in the matrimonial home because of the latter and not because "of any contract or licence".¹⁵ Hence, the House of Lords has held that a wife is not a licensee of her husband but that she derived her right to occupy the matrimonial home because she was in fact a wife; and secondly,

¹² *Woodcock (Jess B.) and Sons Ltd. v. Hobbs*, [1955] 1 W.L.R. 152, [1955] 1 All E.R. 445 (C.A.).

¹³ A. G. Guest, *Licence of the Deserted Wife to Occupy the Matrimonial Home—Third Party Purchasers* (1955), 33 Can. Bar Rev. 609, at pp. 611, 612.

¹⁴ *Bendall v. McWhirter*, [1952] 1 All E.R. 1307 (C.A.).

¹⁵ *N.P.B. v. Ainsworth*, *supra*, footnote 1, at p. 477, *per* Lord Hodson; p. 483 *per* Lord Upjohn; and also at p. 492 *per* Lord Wilberforce where he states: "The essential point is that the wife had no right to be provided with or kept in, any particular home; her rights were not rights *in rem*, nor were they related to any particular property; they were purely personal rights against her husband, enforceable by proceeding against his person, which he could satisfy by rendering her conjugal rights, i.e. by living with her and supporting her in a suitable home."

that she had no legal or equitable interest in the matrimonial home good against third parties such as the husband's trustee in bankruptcy, or a purchaser or mortgagee from him, even with actual or constructive notice of the desertion.

This decision will certainly have far-reaching effects both in England and in Canada. In England, four areas covered by the case deserve comment: (a) the effect on the licence theory, (b) the effect on the equity theory, and (c) the relation of the decision to the Rent Restriction cases, and (d) its effect on the Land Registration Act, 1925, s. 70(1)(g)¹⁶ and the Married Women's Property Act, 1882, s. 17.¹⁷

The House of Lords has clearly stated that a wife is not a licensee of her husband.¹⁸ Lord Wilberforce emphatically concludes that "neither contractual licences nor those licences where money has been expended by the licensee . . . afford any useful analogy or basis on which to determine the character of the wife's rights".¹⁹ In fact their lordships did not consider whether contractual licences can create an equitable interest that would be binding on all except for purchasers for value without notice. Both Lord Upjohn and Lord Wilberforce seem to imply that a licensee, as in the case of *Errington v. Errington*,²⁰ might have an interest in the real property as in those cases where one spends money on another's property and thereby acquires an interest therein. It is submitted that the present case under discussion has little effect on the doctrine of licence but there are strong implications that the latter doctrine is based on weak grounds so that the House of Lords may overrule the principle that contractual licences are binding on successors in title. Their Lordships make no explicit condemnation of it. Lord Hodson at most felt that "in this field the licence cases are unhelpful,"²¹ and that the word licence was "overworked".²² This is significant since he was a member of the House who heard the *Errington* case. Lord Upjohn

¹⁶ 15 & 16 Geo. 5, c. 25.

¹⁷ 45 & 46 Vict. c. 75.

¹⁸ *N. P. B. v. Ainsworth*, *supra*, footnote 1, at p. 479, *per* Lord Hodson: "To describe a wife as a licensee, unless that overworked word is merely used to describe a person lawfully on land and not a trespasser, is not only uncomplimentary but inaccurate. She is not a person who needs any licence from her husband to be where she has a right to be as a wife"; and also Lord Upjohn at p. 485: "A wife does not remain lawfully in the matrimonial home by leave or licence of her husband as the owner of the property. She remains there because, as a result of the status of marriage, it is her right and duty so to do and, if her husband fails in his duty to remain there, that cannot affect her right to do so. She is not a trespasser, she is not a licensee of her husband, she is lawfully there as a wife, the situation is one *sui generis*."

¹⁹ *Ibid.*, at p. 496.

²⁰ [1952] 1 All E.R. 149. The facts of the case are: The licensees were husband and wife. They were in occupation of a house owned by the husband's father on the arrangement that the couple were to pay off the mortgage instalments. After the husband left the wife continued to comply with the agreement. The father died and left the house to his widow (by will) who was also his personal representative. The widow failed in her action to obtain possession of the house.

²¹ *N. P. B. v. Ainsworth*, *supra*, footnote 1, at p. 479.

²² *Ibid.*, at p. 479.

felt that the discussion concerning contractual licences was "interesting"²³ but refused to express his views as to whether an exclusive licensee might have an interest in the land. Lord Wilberforce accepts the actual decision of *Errington v. Errington* but he does not feel that the case is of "assistance as to the transmissibility of contractual licences".²⁴ In view of the latter attitudes then, it can be easily observed that the law lords are not antagonistic to the legal argument, but that they are apprehensive of it for it could lead to unforeseeable results, as it seems to have done in *Bendall v. McWhirter*. It is submitted that provided the argument is not pushed too far too quickly the doctrine will survive; otherwise, the House of Lords may deal a death blow to it.

The distinction between an equitable interest and a "mere" equity was discussed extensively by the House of Lords. Lord Upjohn stipulates that an equitable interest consists of the beneficial interests under trusts, vendor's liens, restrictive covenants, equitable mortgages and estate contracts.²⁵ The "mere equity" on the other hand, is something less definite and refers to such things as the equitable remedy of an injunction. Lord Wilberforce states:

Before a right or an interest can be admitted into the category of property, it must be defineable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. The wife's right has none of these qualities; it is characterized by the reverse of them.²⁶

In considering the wife's portion then, the essential factor is that she has no proprietary right to be provided with any particular home. Her rights are not rights *in rem* as equitable interests are; her rights are purely personal rights "against her husband, enforceable by proceeding against his person, which he could satisfy by rendering her conjugal rights, i.e. by living with her and supporting her in a suitable home".²⁷

Hence it follows that the wife can and has used the provisions of s. 17 of the Married Women's Property Act of 1882 against her husband but it does not follow that she is so entitled against his successors in title. This was so held by the law lords.

As far as the rent restriction cases are concerned they seem to have their own "special and intricate world of rent control in which

²³ *Ibid.*, at p. 489.

²⁴ *Ibid.*, at p. 497. "The Court of Appeal in that case seem to have treated it simply as one of contract and not to have focused their argument on the precise legal position of the plaintiff, i.e., whether she was the legal personal representative or the successor in title of the licensor".

²⁵ *Ibid.*, at p. 488. Further on he maintains, "I myself cannot see how it is possible for a 'mere equity' to bind a purchaser unless such an equity is ancillary to, or dependent on, an equitable estate or interest in the land. As Mr. Megarry has pointed out in (1955), 71 L.Q.R. 480, at p. 482, the reason why a mere equity can be defeated by a subsequent purchaser of an 'equitable estate' for value without notice is that the entire equitable estate passes and it is not encumbered or burdened by a mere equity of which he has no notice".

²⁶ *Ibid.*, at p. 494.

²⁷ *Ibid.*, at p. 492.

the courts have had in many directions to work out empirical solutions to prevent injustice being done".²⁸ In this series of decisions the husband's and wife's occupation has been treated as being identical so that she as a tenant benefits under the tenant's statutory protection. Lord Wilberforce deals briefly with this group of cases and he found that they were not relevant to the issue at hand although the courts have taken steps to protect deserted wives in possession in the latter area. However, it should be noted that in the present case, although some judgments of the Lords proceed on the assumption that the wife was in actual or exclusive occupation of the house, there is no decision as to whether she in fact was or was not.²⁹

Now it is necessary to turn to the Canadian scene within which the Land Registration Act and The Married Women's Property Act will be discussed. Mr. Justice Laskin has discussed the question of the deserted wife's equity in the matrimonial home in the context of Canadian case law and legislation.³⁰ He has submitted that none of the Canadian³¹ cases dealt directly with the problem of the deserted wife and third party interests such as trustees in bankruptcy, mortgagees or purchasers.

It is submitted that the deserted wife's equity doctrine in the matrimonial home has little or no relation to the Canadian scene. Since, in Ontario an "equity" is not a recognizable legal interest, it cannot be registered as an equitable interest under The Land Titles Act. The only feasible method to put it on title is by a caution, but a caution can only be used in respect of any "unregistered estates, rights, interests or equities", or by "a person interested in any way in land".³² But it is difficult to see how this would be possible, since, as Mr. Justice Laskin points out, even under the most broad minded view, the deserted wife's equity in the English cases has not even reached the level of an interest in land. This reasoning would seem to be quite logical especially since in Canada there is little in The Land Titles Act comparable to the Land Registration Act, 1925, s.

²⁸ *Ibid.*, at p. 497, per Lord Wilberforce. Such cases are: *Brown v. Draper*, [1944] 1 All E.R. 246, [1944] K.B. 309 (C.A.); *Old Gate Estate Ltd. v. Alexander*, [1949] 2 All E.R. 822, [1950] 1 K.B. 311 (C.A.); *Middleton v. Baldock*, [1950] 1 All E.R. 708, [1950] 1 K.B. 657 (C.A.); *Wabe v. Taylor*, [1952] 2 All E.R. 420, [1952] 2 Q.B. 735 (C.A.).

²⁹ *Ibid.*, at p. 481 (Lord Hodson); p. 484 (Lord Upjohn); p. 503 (Lord Wilberforce).

³⁰ B. Laskin, *The Deserted Wife's Equity in the Matrimonial Home: A Dissent* (1961-62), 14 U. Toronto L.J. 67.

³¹ Since the introduction of the English case law there have been six cases on the topic. *Carnochan v. Carnochan*, [1955] S.C.R. 669, dealt with the marriage relationship with regard to husband and wife and their possession and payment for use of the home. The cases of *Rush v. Rush* (1960), 24 D.L.R. (2d) 248 (Ont. C.A.), and *Jollow v. Jollow*, [1954] O.R. 895 (C.A.), discussed the problem in relation to a partition action between a wife and husband. *Willoughby v. Willoughby*, [1960] O.R. 276 (C.A.), dealt with the problem of a deserted husband. *Thompson v. Thompson*, [1961] S.C.R. 3, was a case based on the family assets doctrine which is based on the same judicial discretion as the deserted wife's equity.

³² The Land Titles Act, R.S.O. 1960, c. 204, ss. 76, 135.

70 (1)(g).³³ The net result is therefore that the doctrine does not exist; but if it does then under the land titles system, the interest in the land could be protected by filing a caution. Under The Registry Act,³⁴ since the interest does not arise under a specific type of instrument, there is a problem of how to protect the matrimonial home from a sale to a subsequent *bona fide* purchaser. However, the Registry Act defines "instrument" under s. 1(d) as including "every . . . instrument whereby land may be transferred, disposed of, charged, encumbered or affected in any wise, affecting land in Ontario." It is therefore conceivable that the interest is within the definition.³⁵ If it were not included, then the next best solution would be to use The Custody of Documents Act,³⁶ which provides for the deposit of any "document". The Act provides for a deposit index, and for entering notice of the deposit on the abstract affecting the land to which the deposited document pertains. The Act also specifically states that the deposit is not a registration; however, the deposit of a document under this provision could be interpreted as sufficient notice to a subsequent *bona fide* purchaser.

In addition, it is now safe to say that the deserting husband may not in his position as owner or tenant force his wife out of the matrimonial home except through an order of the court under s. 17 of the Married Women's Property Act.³⁷ The latter presumption is based on the fact that the real problem in Canada is the same as that of the English counterpart, namely what are the possibilities of wrongfully removing the wife by some other method—by the husband or by a third party. It is submitted that provided the Ontario Act's section 12 is not interpreted as a type of procedure "concealing and revealing substance," or as Lord Denning M.R. put it in his judgment in the lower court, "substantive law has a

³³ The section provides as follows: "All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject of the following overriding interests as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act (that is to say): . . . (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed, . . .".

³⁴ R.S.O. 1960, c. 348.

³⁵ *Quaere*, however, whether an instrument setting forth a wife's claim to an equity in the matrimonial home evidences an actual transfer of land so as to constitute an "instrument" within the meaning of the Registry Act, or merely states what has transpired by reason of some previous "transaction", cf. *Ontario Industrial Loan v. Lindsay*, 3 O.R. 75.

³⁶ R.S.O. 1960, c. 85.

³⁷ The Ontario legislation is The Married Women's Property Act, R.S.O. 1960, c. 229. The corresponding section is s. 12 (i): "In any question between husband and wife as to the title to or possession of property, either party . . . may apply in a summary way to a judge of the Supreme Court or at the option of the appellant irrespectively of the value of the property in dispute, to the judge of the county or district court of the county or district in which either party resides, and the judge may make such order with respect to the property in dispute and as to the costs of and consequent on the application as he thinks fit or may direct the application to stand over from time to time, and any inquiry or issue touching the matters in question to be made or tried in such manner as he thinks fit".

habit of being secreted in the interstices of procedure", then there is no reason why the Canadian courts would not follow the House of Lords decision and maintain that a third party interest has priority over any "equity" which the deserted wife may claim and that the husband's remedy is directly under s. 12 of the Act. Hence, the husband could request the court under s. 12 of The Married Women's Property Act, to make an order regarding the occupation of the matrimonial home; but it is clear that the husband's successors in title could not ask for direct relief under the Act.

The significance and substance of the present case under comment was foreshadowed by the learned trial judge's decision wherein he points out:

Her equity is not anything that can properly be described as a right in rem at all but is simply a right to appeal to the court for protection against unconscionable conduct on the part of the husband's successor in title . . . But to say that some successor in title of the husband has no higher right to possession of the house than the husband would have is one thing: to say that the wife has a correlative legal right in respect to the house is another.³⁸

Fortunately, the House of Lords has basically followed the latter view and it is quite clear now that the deserted wife's equity is more of a "personal fetter" on the husband than a substantive right of the wife.

One of the foremost pressures encouraging the emergence of the wife's equity in England was the gap left by the abolition of dower. Mr. Justice Laskin has submitted that: "In England where there is no longer any dower, and which knows neither homestead legislation nor a regime of community property, the support of the wife's equity can only be ascribed to judicial chivalry."³⁹ It is submitted that in Canada there is no such void that would lead to a "discovery" such as that of Denning M.R. In Western Canada, homestead legislation requires the husband to obtain the consent of his wife to any disposition *inter vivos* of the matrimonial home, except in unusual circumstances when an order of the court dispenses with such consent. On the death of the husband provision is made for the wife to share in her husband's realty. In Quebec, the protection afforded a wife through the rules relating to community of property seems adequate. As far as the rest of Canada is concerned, one still has the inchoate right of dower in the wife which will protect the wife from most injustices she might encounter when a husband becomes seized of a freehold of inheritance during coverture. In fact, the problem of the deserted wife's equity is really an academic question in view of the House of Lords' decision, and also in view of the infrequent cases in Canada, especially in Ontario. The lack of any overwhelming housing problem, the presence of dower and homestead legislation and the number of low rental homes subsidized by the

³⁸ *National Provincial Bank v. Hastings Car Mart Ltd.*, [1963] 2 W.L.R. 1015 (Ch.D.), at p. 1021.

³⁹ *Supra*, footnote 30, at p. 74.

federal government will definitely weigh against any Canadian doctrine of the deserted wife's equity in the matrimonial home.

A further aspect of the case, which is treated as academic in England by Lords Hodson and Upjohn, is whether proceedings could be taken between husband and wife for possession of property outside the terms of the Married Women's Property Act of 1882.⁴⁰ The latter issue was essentially based on the view that the English doctrine of the wife's equity in the matrimonial home resulted from the matrimonial obligation of support, and therefore, any action for recovery of land should fall within the Act of 1882, since a husband could not sue his wife in tort. Since the Law Reform (Husband and Wife) Act, 1962⁴¹ now allows husband and wife to sue one another in tort, the law lords treat the area superficially and academic. But in Canada, there is no comparable legislation and it has been held in *Minaker v. Minaker*⁴² (as in England) that a claim in evict a wife is the tort action of ejection and so a form of trespass; therefore, she could be evicted only by use of s. 12 of the Ontario Married Women's Property Act. Since in Ontario the spouses cannot sue each other in tort, as provided by s. 7 of The Married Women's Property Act, and since one of the results of the *Ainsworth* case is that the wife is lawfully in possession and not a trespasser, no question of tort arises. It is submitted that whether in fact the contemporary action for recovery of land is tortious in nature or not, in either case the action would have to be brought under s. 12 of the Married Women's Property Act. It is further submitted that in any event,

[s]ince this procedure is available whether a wife be deserted or not, it is difficult to see how it either yields or supports a resulting equity of a proprietary character in a wife merely because she is deserted and remains in the husband's house.⁴³

It is therefore submitted that no prospect exists of s. 12 being the source concealing and revealing substance for obtaining property rights; in view of the House of Lords' decision, the matter can be treated as academic in Ontario.

In conclusion, it is submitted that due to the pressures of the economic, political and social spheres, as well as simple expediency, the legislature will remain inactive because of the scarcity of cases in Canada, and because the Canadian courts can now use the decision of the House of Lords in *N.P.B. v. Ainsworth* as a guide. The basic question now is "how to balance the need to give the wife some temporary security (pending a permanent solution of the domestic difficulties) against the legitimate interests of a purchaser or a landlord".⁴⁴ It is undoubtedly true that the courts will in the future

⁴⁰ *Supra*, footnote 17.

⁴¹ 10 & 11 Eliz. 2 c. 48.

⁴² [1949] S.C.R. 397.

⁴⁴ Ian F. G. Baxter, *The Law of Domestic Relations 1948-1958* (1958), 36 Can. Bar Rev. 299.

be expeditious and grant the deserted wife compassion. But fortunately, this interest will not conflict with the real need to keep real property transactions in a simple straight forward form.⁴⁵

PAUL D. TEMELINI*