

May a Married Woman Sue Her Husband by Subrogation? - Gregg v. Gregg

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Family Law Commons](#)

Recommended Citation

May a Married Woman Sue Her Husband by Subrogation? - Gregg v. Gregg, 13 Md. L. Rev. 253 (1953)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol13/iss3/7>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

**MAY A MARRIED WOMAN SUE HER
HUSBAND BY SUBROGATION?**

Gregg v. Gregg¹

Appellant wife filed a bill in equity in Circuit Court No. 2 of Baltimore City for permanent alimony, counsel fees and reimbursement for sums expended by her for necessaries. A demurrer to the bill was properly sustained,² and on an amended bill, omitting the prayer for reimbursement for necessaries, she was awarded permanent alimony and counsel fees. Thereafter appellant brought this action at law against her husband in the Baltimore City Court seeking \$2,500 which she claimed to have expended for necessaries since her desertion by her husband, but before her alimony suit was filed. Appellant wife claimed this sum

¹ 87 A. 2d 581 (1952).

² *Infra*, n. 13.

had not been repaid to her although it was the husband's duty to provide for her support. Appellee husband's demurrer to this suit was sustained without leave to amend, from which ruling this appeal was taken.

The question thus presented to the Court for the first time was whether a wife, who is still a wife, may sue her husband on the theory of subrogation to recover a sum expended for necessaries purchased and paid for by her before alimony was awarded.

After a review of the Married Women's Emancipatory Acts³ the Court of Appeals held: "That statute, however, is strictly limited to contracts made *with* a husband, and we cannot extend it to contracts which the husband has with someone else, and which the wife acquires by subrogation."⁴ Thus the Court affirmed the rule that the rigorous common law disabilities of a *femme covert* still prevail to the extent of this claim. The result quite clearly is that the wife may not invoke law or equity to recover a sum expended for necessaries which the husband was under a duty in the first instance to provide but failed to do.

The common law placed the married woman in a peculiar legal position.

"Under the common law husband and wife become by marriage one person, and the entire legal existence of the woman is completely merged or incorporated in that of the husband. This fundamental principle is the foundation of the common-law theory and rules of rights, duties, and disabilities of marriage."⁵

Thus the wife alone could not sue or be sued in contract or tort. It is this disability at which the Married Women's Emancipatory Acts have been aimed. A concomitant feature of this disability was the duty imposed on the husband by common law to supply the wife with necessaries. An "agency of necessity" was the legal medium by which the common law sought to provision the disabled wife against the recalcitrant husband.⁶ The wife could contract for necessaries on her husband's credit and the law supplied the remedy by which the supplier could recover from the husband regardless of his acquiescence. Obviously a variant of this question was the one involved in the instant case,

³ Md. Code (1951), Art. 45, Secs. 5, 20.

⁴ *Supra*, n. 1, 584.

⁵ 26 Am. Jur., Husband & Wife, Sec. 3, p. 632.

⁶ *Jones v. Gutman*, 88 Md. 355, 41 A. 898 (1898); *McFerren v. Goldsmith-Stern Co.*, 137 Md. 573, 113 A. 348 (1921).

although the substantive features of a valid agency of necessity never came to the fore, inasmuch as the Court found that the wife's disability precluded recovery on that ground alone.

The Maryland Married Women's Acts, passed in 1898 and 1900, respectively, provide, *inter alia*:

"Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue upon their contracts, and also to sue for the recovery, security or protection of their property, and for torts committed against them, as fully as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract committed by them before or during their marriage, as fully as if they were unmarried; and upon judgments recovered against them, execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence, without his participation or sanction." (The Act of 1898)⁷

"A married woman may contract with her husband and may form a copartnership with her husband or with any other person or persons in the same manner as if she were a femme sole, and upon all such contracts, partnership or otherwise, a married woman may sue and be sued as fully as if she were a femme sole." (The Act of 1900)⁸

That the Act of 1898 did not abrogate the common law disabilities of the wife in relation to her husband was first established in *Furstenburg v. Furstenburg*.⁹ That suit involved a tort claim by a wife against her husband for injuries to the wife arising out of the husband's negligence. In denying relief the Court noted that the Act of 1900 clearly indicated that the Act of 1898 was not intended by the Legislature to abrogate the disabilities between a husband and wife but only those between a wife and third parties. Otherwise, the Act of 1900 would have been superfluous. In arriving at this decision the Court of Appeals was admittedly influenced by the Supreme Court's decision

⁷ Md. Code (1951), Art. 45, Sec. 5; Laws 1898, Ch. 457.

⁸ Md. Code (1951), Art. 45, Sec. 20; Laws 1900, Ch. 633.

⁹ 152 Md. 247, 136 A. 534 (1927).

in *Thompson v. Thompson* (Holmes, Hughes and Harlan dissenting)¹⁰ in which case relief was denied under similar facts under a District of Columbia statute. The Court of Appeals had occasion to reaffirm this stand in a later case where relief was denied a wife in a tort claim against a partnership of which her husband was a member.¹¹ Thus, without doubt, the present state of the law in Maryland is that a wife may not sue her husband for a tort against her person.

Equally clear by the Act of 1900 is the fact that a wife may sue on contracts made *with* her husband. The proposition "with" that appears in the act was given great stress by the court in the *Gregg* case. Mrs. Gregg's contract was not with her husband, but was rather with her supplier, and was only acquired by the wife through subrogation. Had the plaintiff purchased but not paid for the necessaries, her supplier could have recovered in an action at law against her husband if a true agency of necessity was made out.¹² Thus Mrs. Gregg ran afoul of the archaic rule of the common law by paying cash on delivery. For her mistake neither law or equity offers any apparent redress. In Mrs. Gregg's prior equity action for separate alimony she had included a prayer for recovery of the sum expended for necessaries which were the same as those on which the instant case was founded. Defendant's demurrer to the bill, because of the prayer for reimbursement for necessaries, was sustained in the equity action on the basis of *Kriedo v. Kriedo*.¹³ In that case the wife, after being divorced a vinculo and receiving custody of the child and a stipulated sum for support, sought by a bill in equity to recover sums both expended and accrued for extraordinary needs of the child while ill. The Court dismissed the action stating that the mother plaintiff was entitled to reimbursement for the amounts she has actually paid ". . . but that upon the refusal of the father to pay, the remedy is by a suit at *law* wherein he is entitled to have a jury pass upon questions of fact, including the inquiry as to whether the services were rendered, whether they were necessary, and whether the charge was a reasonable and proper one."¹⁴ In some jurisdictions it appears that a money judgment can be entered for necessaries in an equity suit.¹⁵

¹⁰ 218 U. S. 611 (1910).

¹¹ *David v. David*, 161 Md. 532, 157 A. 755, 81 A. L. R. 1100 (1932).

¹² *Supra*, n. 6.

¹³ 159 Md. 229, 150 A. 720 (1930).

¹⁴ *Ibid.*, 233. Italics added.

¹⁵ *Eller v. Eller*, 266 App. Div. 684, 40 N. Y. S. 2d 417 (1943).

It seems clear from the language in the *Gregg* case¹⁶ that the court feels fettered by its earlier construction of the Married Women's Acts. In the *David*¹⁷ case the Court, after acknowledging the grounds for the common law disability of a wife, notes ". . . that the identity of husband and wife persists in its original vigor until it has been completely dissolved by express legislative mandate, in respect to all matters which the Legislature has not expressly included within the meaning of the emancipatory statutes, . . ." In the *Gregg* case the Court states that:

" . . . these ancient theories which form a part of the common law have to be followed by us unless they have been changed by legislative action, and the clear import of the decision in the *David* case is that the emancipatory statutes must be strictly construed. The Legislature has not amended or changed this emancipatory legislation since 1931, when the *David* case was decided."¹⁸

The Court in denying relief implies some reluctance. Strict construction of these statutes, however, has generally been the rule.¹⁹

A few jurisdictions have seen fit to adopt a more liberal construction.²⁰ Notable among these was the New York case of *DeBrauwere v. DeBrauwere*²¹ relied on by appellant in the instant case. New York, in allowing the wife to recover in a similar action money expended for necessaries, did so on the ground that the New York statute completely removed the wife's disabilities. An examination of the New York statute²² reveals a slightly different choice of verbiage but, it is submitted, nothing fundamentally different from the Maryland statutes as to reason.

It is not entirely clear at common law whether the wife's disability was regarded as a substantive disability or merely a procedural one. It is clear, however, that the disability had dual ramifications. So far as the wife and third parties were concerned the wife and husband were merged into a

¹⁶ *Supra*, n. 1.

¹⁷ *Supra*, n. 11, 535.

¹⁸ *Supra*, n. 1, 583.

¹⁹ *Supra*, n. 9, 10; MADDEN ON DOMESTIC RELATIONS (1931), Secs. 42-43, p. 114.

²⁰ *DeBrauwere v. DeBrauwere*, 203 N. Y. 460, 96 N. E. 722 (1911); *Sodowsky v. Sodowsky*, 51 Okla. 689, 152 P. 390 (1915); *Bohun v. Kinasz*, 124 Conn. 543, 200 A. 1015 (1938).

²¹ *Ibid.*

²² N. Y. Domestic Relations Law, Sec. 51 (C. L. S., 1950).

single legal personality by the common law.²³ Legal title to the wife's property vested in the husband upon marriage. In regard to the husband and wife *inter sese* there was the additional consideration of preserving the tranquility and sanctity of marriage. The Supreme Court has said that to allow one of the parties to a marriage to sue the other in tort would "... open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander and libel, and alleged injuries to property of the one or the other, by husband against wife or wife against husband."²⁴ The same considerations have prevailed in contract actions. The Maryland statutes, Article 45, Sections 5 and 20 indicate a recognition by the Legislature of a difference between claims between a wife and a third party and claims between husband and wife. Section 5 has been construed to relate solely to claims between a wife and third parties. Section 20 has modified the relations between husband and wife to the extent of allowing a wife to sue on contracts made with a husband.²⁵ So far as the former proposition is concerned there is a diversity of authority as to whether at common law a wife's contracts with third persons were void or merely voidable.²⁶ So far as the latter proposition is concerned, the husband-wife setup, little authority has been found in Maryland. It has been recognized in this state that a wife, though under the common law disability to sue her husband generally, could by a bill in equity seek the protection, recovery, and security of her separate property.²⁷ No assistance can be gained from these cases in deciding whether a wife's disability is substantive or procedural.

If the wife's disability to sue her husband is not a substantive one, it would appear that after the divorce she should be allowed to sue on causes of action arising during coverture, inasmuch as the other factor before noted, i.e., domestic harmony, has been *ipso facto* removed by an a vinculo divorce. A case which may lend some support to this argument was *Barton v. Barton*,²⁸ decided by the Court of Appeals some years prior to the emancipatory acts. In that case a wife sued her deceased husband's executors in

²³ *Sezzin v. Stark*, 187 Md. 241, 255, 49 A. 2d 242 (1946).

²⁴ *Thompson v. Thompson*, *supra*, n. 10, 617.

²⁵ *Supra*, ns. 9, 11.

²⁶ 26 Am. Jur., *Husband & Wife*, Sec. 128, p. 753. Maryland held them void: *Lyell v. Walbach*, 113 Md. 574, 77 A. 1111 (1910); *Burton v. Marshall*, 4 Gill. 487 (1846).

²⁷ *Wilson v. Wilson*, 86 Md. 638, 39 A. 276 (1898); *Cochrane v. Cochrane*, 139 Md. 530, 115 A. 811 (1921).

²⁸ 32 Md. 214 (1870).

contract at law for recovery of amounts loaned before marriage and for an amount for securities loaned during the marriage on the husband's express promise to repay. The court pointed out that public policy forbade a wife suing her husband at law before the statutory changes, and only allowed suit in equity for recovery and protection of her separate property. It held, however, that since under the Maryland statute²⁹ the wife could now hold legal title to her separate property, and the husband's executors were strangers to her, there was no compelling reason for preventing the wife from suing the executors for debts owed by the husband at his death and growing out of contracts concerning her separate estate. In the course of the opinion, the court said:

"But it was also contended that a debt due by the husband to the wife for money lent before marriage, became extinguished by the marriage. At common law, such would have been the result. But the Code has changed the law in this respect, and by enacting that a woman shall hold to her sole and separate use all the property belonging to her at the time of the marriage, has the effect of preventing such a debt from being extinguished by the marriage."³⁰

In a subsequent case³¹ the administrators of a deceased wife charged the share of decedent's surviving husband with certain sums among which were sums for medical expenses and merchandise sold to the wife and paid by the administrators. The court upheld these charges against the husband's share of the wife's estate. It should be noted in regard to these two cases that the considerations of public policy against a wife suing her husband had been entirely obviated by death of one of the parties. No domestic discord would result from allowing recovery.

It is submitted that there may be compelling reasons for a determination by the Court that the disability of a wife is substantive and cannot be revived by severing the marriage. As has been noted, the wife's disability in regard to suing the husband emanates from the broad public policy to uphold marriages and hence to lessen the occasion for discord which would be caused by suit between the parties. Should it be the rule that the wife is merely disabled procedurally, and hence has a right without a remedy which

²⁹ Md. Code (1951), Art. 45, Secs. 3 and 4.

³⁰ *Supra*, n. 28, 224.

³¹ *Anderson v. Carter*, 175 Md. 540, 2 A. 2d 677 (1938).

may be transformed into a right with a remedy merely by severing absolutely the matrimonial tie, a wife disabled from recovering a substantial sum from her husband while under coverture would have a greater than usual incentive for removing that bar by divorce-a vinculo. Obviously this motivation would run counter to the legal philosophy of preserving marriage.

The question is not wholly academic. It may well have its impact in the field of Conflict of Laws. For example, New York has by a statute⁸² in 1937 granted a wife the right to sue her husband in tort. Maryland, as we have seen, has not accorded the wife this privilege. Should a tort cause of action between a Maryland domiciled husband and wife arise in New York, and be sued on in Maryland, the true nature of the wife's disability in Maryland could play a significant role in the decision. In the instant case the question of the type of disability could become important if Mrs. Gregg should later obtain an a vinculo divorce.

Regardless of whether the Court should have reached a different result, it is submitted that they could have done so without doing violence to the statute.⁸³ In an earlier Maryland case⁸⁴ the Court of Appeals clarified the law as to *future* payments to a wife or child. The *Gregg* case complements this by a clarification of a wife's right to recover from her husband for *past* expenses. From the decision we may learn that the common law disability of a wife is still a vital force to reckon with under the emancipatory acts. Judge Marbury, in closing for the Court, indicated the one avenue of approach to the problem. ". . . we cannot extend the plain words of the fifty-year-old statute to cover a case which was either not envisioned or not intended to be included at the time it was enacted. If now this omission should be repaired, it is for the Legislature, and not for us, to act."⁸⁵

⁸² N. Y. Domestic Relations Law, Sec. 57 (C. L. S., 1950).

⁸³ *Supra*, *circa*, n. 21.

⁸⁴ *Yost v. Yost*, 172 Md. 128, 190 A. 753 (1937), noted, 2 Md. L. Rev. 60 (1937).

⁸⁵ 87 A. 2d 581, 584 (1952).