

Chapter 108

Husband and Wife Relationship; Property Rights

Chapter 108

LAW REVIEW CITATIONS: For discussion of community property laws now repealed see 27 OLR 1, 40, 257, 301, 326, 335; 28 OLR 58, 61, 70, 72, 157, 210, 311, 320.

108.010

NOTES OF DECISIONS

1. In general

This section does not affect the statute of limitations period for recovery of realty by wife. *Morrison v. Holladay*, (1895) 27 Or 175, 39 P 1100; *Stubblefield v. Menzies*, (1882) 8 Sawy 4, 11 Fed 268.

This section does not abrogate the common law rule that a conveyance to husband and wife creates a tenancy by entirety. *Stout v. Van Zante*, (1923) 109 Or 430, 219 P 804, 220 P 414; *Ganoe v. Ohmart*, (1927) 121 Or 116, 254 P 203; *Myers v. Reed*, (1883) 9 Sawy 132, 17 Fed 401.

Husband and wife are subject to same civil disabilities. *First Nat. Bank v. Leonard*, (1900) 36 Or 390, 59 P 873.

This section does not change statutory rule that subsequent marriage of woman revokes her will. *Booth's Will*, (1901) 40 Or 154, 61 P 1135, 66 P 710.

This section does not bar husband's right of action for loss of consortium of his wife. *Elling v. Blake-McFall Co.*, (1917) 85 Or 91, 166 P 57.

Apart from curtesy, marriage gives husband no right to the wife's separate property. *Cary v. Cary*, (1938) 159 Or 578, 80 P2d 886, 121 ALR 1371.

This section does not authorize a wife to sue her husband for damages caused by his negligence. *Smith v. Smith*, (1955) 205 Or 286, 287 P2d 572.

Wife has no right of action for loss of consortium against husband's employer who is covered by Workmen's Compensation Law. *Ellis v. Fallert*, (1957) 209 Or 406, 307 P2d 283. *Contra*, *Biddle v. Edward Hines Lbr. Co.*, (1962) 219 F Supp 69.

The Federal Employers' Liability Act is an exclusive remedy and in lieu of claim for loss of consortium. *Kinney v. So. Pac. Co.*, (1962) 232 Or 322, 375 P2d 418.

Wife's right of action is measured by and subject to any defenses available in a husband's action for redress of the same harm. *Ross v. Cuthbert*, (1964) 239 Or 429, 397 P2d 529.

2. Rights and liabilities

A married woman may take, control and dispose of her separate real property to the same extent that her husband can of his. *Stout v. Van Zante*, (1923) 109 Or 430, 219 P 804, 220 P 414; *Ganoe v. Ohmart*, (1927) 121 Or 116, 254 P 203; *Holman v. Mays*, (1936) 154 Or 241, 59 P2d 392.

A wife may contract with her husband. In re *Edwards' Estate*, (1932) 140 Or 431, 14 P2d 274; *Perry v. Gore*, (1936) 153 Or 441, 56 P2d 1142.

Wife, as well as husband, can be held liable for unlawful occupation of another's property. *Tilton v. Barrell*, (1882) 8 Sawy 412, 14 Fed 609.

A mortgage to secure her husband's debts is a valid power of a wife. *Barrell v. Tilton*, (1886) 119 US 637, 7 S Ct 332, 30 L Ed 511.

An action for alienation of affections may be maintained by wife. *Keen v. Keen*, (1907) 49 Or 362, 90 P 147, 14 Ann Cas 45, 10 LRA(NS) 504.

A wife joining with her husband in a covenant is personally liable thereon. *Ellis v. Abbott*, (1914) 69 Or 234, 138 P 488.

The wife of the pledgor may act as agent for the pledgee, wife's civil disabilities being abolished. *Perry v. Gore*, (1936) 153 Or 441, 56 P2d 1142.

Section does not authorize recovery by wife for tortious injury to husband on high seas if vessel not owned by Oregon corporation and such right does not accrue to wife under general maritime law, law of state where corporation incorporated or the Jones Act. *Jordan v. State Marine Corp. Del.*, (1958) 257 F2d 232.

Wife may sue employer of husband for injuries caused by negligent acts of husband acting within the scope of his employment. *Kowaleski v. Kowaleski*, (1961) 227 Or 45, 361 P2d 64, 1 ALR3d 666.

FURTHER CITATIONS: *Orange Nat. Bank v. Traver*, (1881) 7 Sawy 210, 7 Fed 146; *David v. Portland Water Committee*, (1886) 14 Or 98, 12 P 174; *Ingalls v. Campbell*, (1890) 18 Or 461, 24 P 904; *House v. Fowle*, (1890) 20 Or 163, 25 P 376; *Grubbe v. Grubbe*, (1894) 26 Or 363, 38 P 182; *Henderson v. Henderson*, (1900) 37 Or 141, 60 P 597, 61 P 136, 82 Am St Rep 741, 48 LRA 766; *Taylor v. Taylor*, (1909) 54 Or 560, 103 P 524; *Runyan v. Winstock*, (1909) 55 Or 202, 104 P 417, 105 P 895; *Davison v. Davison*, (1912) 62 Or 445, 124 P 1096; *Kosciolek v. Portland Ry., Light & Power Co.*, (1916) 81 Or 517, 160 P 132; *Bosma v. Harder*, (1919) 94 Or 219, 185 P 741; *Sheard v. Ore. Elec. Ry.*, (1931) 137 Or 341, 2 P2d 916; *Hansen v. Hayes*, (1944) 175 Or 358, 154 P2d 202; *Apitz v. Dames*, (1955) 205 Or 242, 287 P2d 585; *Wolff v. DuPuis*, (1963) 233 Or 317, 378 P2d 707; *Harp v. Montgomery Ward & Co.*, (1963) 223 F Supp 781; *Smith v. Field Chevrolet Co.*, (1964) 239 Or 233, 396 P2d 200; *Schmitz v. Yant*, (1965) 242 Or 308, 409 P2d 346; *Casey v. Manson Constr. and Engr. Co.*, (1967) 247 Or 274, 428 P2d 898.

ATTY. GEN. OPINIONS: Wife's exemption from fees on her property by reason of her husband being in Armed Forces, 1940-42, p 637.

LAW REVIEW CITATIONS: 15 OLR 80; 16 OLR 43; 26 OLR 63; 27 OLR 1, 335, 342; 28 OLR 72, 77; 32 OLR 60; 47 OLR 379, 380; 48 OLR 57.

108.020

NOTES OF DECISIONS

A resulting trust may arise between husband and wife. *Lane v. Myers*, (1914) 70 Or 376, 141 P 1022, Ann Cas 1915D, 649.

This section does not abolish estates by entirety. *Ganoe v. Ohmart*, (1927) 121 Or 116, 254 P 203.

FURTHER CITATIONS: *Smith v. Smith*, (1955) 205 Or 286, 287 P2d 572.

ATTY. GEN. OPINIONS: Wife's exemption from fees on her property by reason of her husband being in Armed Forces, 1940-42, p 637.

LAW REVIEW CITATIONS: 12 OLR 109; 27 OLR 1, 6; 27 OLR 326, 327.

108.030

FURTHER CITATIONS: *Smith v. Smith*, (1955) 205 Or 286, 287 P2d 572.

108.040

NOTES OF DECISIONS

1. In general

Though the individual credit of the husband was the basis of the sale of goods purchased for family use, his wife is liable. *Watkins v. Mason*, (1883) 11 Or 72, 4 P 524.

Wife may be sued jointly or separately for family expenses and a personal judgment may be rendered against her. *Phipps v. Kelly*, (1885) 12 Or 213, 6 P 707.

An account stated by one spouse does not impose liability on the other. *Holmes v. Page*, (1890) 19 Or 232, 23 P 961.

This section does not affect the statute of limitations period for recovery of realty by wife. *Morrison v. Holladay*, (1895) 27 Or 175, 39 P 1100.

This section is for the protection of creditors only. *Taylor v. Taylor*, (1909) 54 Or 560, 103 P 524.

The duty of the husband to maintain his wife during coverture and provide family necessaries is not changed by this section. *Id.*

Wife is not liable on note of husband evidencing purchase price of household goods. *Dale v. Marvin*, (1915) 76 Or 531, 148 P 1116, Ann Cas 1917C, 557. **But see** *Black v. Sippy*, (1888) 15 Or 574, 16 P 418.

Husband is not liable on note of wife, the proceeds of which were expended for family expenses. *France v. France*, (1919) 94 Or 414, 185 P 1108.

Bankrupt's (mother's) right to reimbursement from father for expenses of supporting child cannot prevail over child's claims against father for support. *Boston v. Gardner*, (1966) 365 F2d 242.

A support decree under ORS 107.100 controls in case of a divorce. *Coastal Adjustment Bureau, Inc. v. Wehner*, (1967) 246 Or 115, 423 P2d 967.

The reimbursement of the wife was allowed where she paid family expenses incurred before her husband conveyed property to her, the conveyance being subsequently set aside. *Davis v. Davis*, (1890) 20 Or 78, 25 P 140.

2. "Expenses of the family"

A buggy used as family vehicle is a family expense. *Dodd v. St. John*, (1892) 22 Or 250, 29 P 618, 15 LRA 717.

Labor in pruning orchard on farm of husband and wife is not an "expense of the family." *Chamberlain v. Townsend*, (1914) 72 Or 207, 142 P 782, 143 P 924.

Only expenses for immediate sustenance and comfort of family are within statute; expenses incurred in business conducted by either spouse or both are not included. *Id.*

Proof of the domestic character of every article is not necessary where class of goods sold is domestic. *Meier & Frank Co. v. Mitlehner*, (1915) 75 Or 331, 146 P 796.

"Expenses of the family" should be liberally construed and the liability of wife should be at least as great as common law liability of husband. *Hansen v. Hayes*, (1944) 175 Or 358, 154 P2d 202.

Medical and funeral expenses are "expenses of the family." *Id.*

FURTHER CITATIONS: *Love v. Walker*, (1911) 59 Or 95, 104, 115 P 296; *Taylor v. Taylor*, (1914) 70 Or 510, 525, 134 P 1183, 140 P 999; *In re Idleman's Commitment*, (1934) 146 Or 13, 27 P2d 305; *Rowley v. Rowley*, (1962) 232 Or 285, 375 P2d 84.

LAW REVIEW CITATIONS: 8 OLR 99, 115; 10 OLR 388, 394; 27 OLR 1, 6, 301, 321; 28 OLR 311.

108.050

NOTES OF DECISIONS

1. In general

The separate property of wife is not subject to execution by husband's creditors. *Rugh v. Ottenheimer*, (1877) 6 Or 231, 25 Am St Rep 513; *Besser v. Joyce*, (1881) 9 Or 310; *Stubblefield v. Menzies*, (1882) 8 Sawy 4, 11 Fed 268.

This section does not affect the statute of limitations period for recovery of realty by wife. *Morrison v. Holladay*, (1895) 27 Or 175, 39 P 1100; *Stubblefield v. Menzies*, (1882) 8 Sawy 4, 11 Fed 268.

This section does not change statutory rule that subsequent marriage of woman revokes her will. *Booth's Will*, (1901) 40 Or 154, 61 P 1135, 66 P 710.

This section does not abolish estates by entirety. *Ganoe v. Ohmart*, (1927) 121 Or 116, 254 P 203.

Marriage does not give husband a right in his wife's separate property apart from curtesy. *Cary v. Cary*, (1938) 159 Or 578, 80 P2d 886, 121 ALR 1371.

2. Rights and liabilities

The property a woman has at time of marriage or afterward acquires, or the proceeds from its sale, may be held or disposed of as she pleases. *Brummet v. Weaver*, (1866) 2 Or 168; *Rugh v. Ottenheimer*, (1877) 6 Or 231, 25 Am St Rep 513; *Finlayson v. Finlayson*, (1889) 17 Or 347, 21 P 57, 11 Am St Rep 836, 3 LRA 801; *Velten v. Carmack*, (1892) 23 Or 282, 31 P 658, 20 LRA 101.

The wife has the right to mortgage her property for the payment of the husband's debts. *Moore v. Fuller*, (1877) 6 Or 272, 25 Am Rep 524; *Gray v. Holland*, (1881) 9 Or 512; *Knoll v. Kiessling*, (1886) 23 Or 8, 35 P 248; *Cross v. Allen*, (1891) 141 US 528, 12 S Ct 67, 35 L Ed 843.

Where a wife joins her husband in a mortgage on his property to secure his debt, the mortgage containing covenants on the part of both that they will pay the debt, a personal decree may be entered against her. *First Nat. Bank v. Leonard*, (1900) 36 Or 390, 59 P 873.

Wife's interest in land held by entirety can be mortgaged by her. *Howell v. Folsom*, (1900) 38 Or 184, 63 P 116, 84 Am St Rep 785.

Wife can maintain action against former husband for money collected from her separate property during coverture. *Taylor v. Taylor*, (1909) 54 Or 560, 103 P 524.

FURTHER CITATIONS: *Starr v. Hamilton*, (1867) Deady 268, Fed Cas No. 13,314; *Dick v. Hamilton*, (1867) Deady 322, Fed Cas No. 3,890; *Elliot v. Teal*, (1878) 5 Sawy 249, Fed Cas No. 4,396; *Orange Nat. Bank v. Traver*, (1881) 7 Sawy 210, 7 Fed 146; *House v. Fowle*, (1890) 20 Or 163, 25 P 376; *Campbell v. Snyder*, (1895) 27 Or 249, 41 P 659; *Sears v. Davis*, (1901) 40 Or 236, 66 P 913; *Runyan v. Winstock*, (1909) 55 Or 202, 104 P 417, 105 P 895; *Lane v. Myers*, (1914) 70 Or 376, 141 P 1022, Ann Cas 1915D, 649; *Bosma v. Harder*, (1919) 94 Or 219, 228, 185 P 741; *Smith v. Smith*, (1955) 205 Or 286, 287 P2d 572.

ATTY. GEN. OPINIONS: Effect on dower of wife's deed to husband of husband's land, and effect on dower of mortgage executed by husband alone, 1922-24, p 35; wife's exemption from fees on her property by reason of her husband being in Armed Forces, 1940-42, p 637.

LAW REVIEW CITATIONS: 27 OLR 1; 27 OLR 257, 335, 342; 28 OLR 320, 322.

108.060

NOTES OF DECISIONS

Prior to the 1969 statute abolishing curtesy and dower, such rights were included in this section, and a release of such inchoate rights to a spouse was a nullity. *House v. Fowle*, (1890) 20 Or 163, 25 P 376; *Jenkins v. Hall*, (1894) 26 Or 79, 37 P 62; *Potter v. Potter*, (1903) 43 Or 149, 72 P 702; *McCrary v. Biggers*, (1905) 46 Or 465, 81 P 356, 114 Am St Rep 882; *In re Estate of Pfifer*, (1963) 235 Or 561, 385 P2d 1007. *In re Estate of Pfifer*, supra, distinguished in *Swint v. Swint*, (1964) 238 Or 367, 395 P2d 114.

This section does not abolish estates by entirety. *Stout v. Van Zante*, (1923) 109 Or 430, 219 P 804, 220 P 414; *Ganoe v. Ohmart*, (1927) 121 Or 116, 254 P 203.

This section does not affect the statute of limitations period for recovery of realty by wife. *Morrison v. Holladay*, (1895) 27 Or 175, 39 P 1100.

A conveyance by one spouse to the other who already owns the land, does not add anything to estate previously held. *Davison v. Davison*, (1912) 62 Or 445, 124 P 1096.

A resulting trust may arise between husband and wife. *Lane v. Myers*, (1914) 70 Or 376, 141 P 1022, Ann Cas 1915D, 649.

Wife is estopped from claiming dower where in pursuance of agreement with husband to bar dower they conveyed husband's property to third party. *Callan v. W. Inv. & Hold. Co.*, (1937) 157 Or 412, 72 P2d 48.

This statute was taken from Iowa and our court follows the interpretation of the Iowa court. *In re Estate of Pfifer*, (1963) 235 Or 561, 385 P2d 1007.

FURTHER CITATIONS: *Runyan v. Winstock*, (1909) 55 Or 202, 104 P 417, 105 P 895; *Bosma v. Harder*, (1919) 94 Or 219, 228, 185 P 741, 744; *Smith v. Smith*, (1955) 205 Or 286, 287 P2d 572.

ATTY. GEN. OPINIONS: Effect on dower of wife's deed to husband of husband's land, 1922-24, p 35; effect on dower of mortgage executed by husband alone, 1922-24, p 35; wife's exemption from fees on her property by reason of her husband being in Armed Forces, 1940-42, p 637.

LAW REVIEW CITATIONS: 3 OLR 50; 27 OLR 1, 5, 257, 262, 335; 30 OLR 1.

108.070

NOTES OF DECISIONS

When authorized by the terms of this section a wife's sale deed will convey a fee simple title free from the husband's curtesy estate. *Runyan v. Winstock*, (1909) 55 Or 202, 104 P 417, 105 P 895.

FURTHER CITATIONS: *McFerron v. Trask*, (1970) 3 Or App 111, 472 P2d 847.

LAW REVIEW CITATIONS: 27 OLR 1.

108.080

NOTES OF DECISIONS

This section does not affect the statute of limitations period for recovery of realty by wife. *Morrison v. Holladay*, (1895) 27 Or 175, 39 P 1100.

The burden of proof is on the husband to prove a gift from his wife. *Cary v. Cary*, (1938) 159 Or 578, 80 P2d 886, 121 ALR 1371.

This section is not applicable where a portion of the

family residence is occupied by the husband, with the consent of the wife, for business purposes, where there has been no agreement that he should pay rent, and where his occupation is not adverse to the wife's title. *Wehoffer v. Wehoffer*, (1945) 176 Or 345, 156 P2d 830.

Wife's importunities did not constitute fraud and husband was not allowed recovery of property which he conveyed to her, but reimbursement was allowed to him for improvements made. *Finlayson v. Finlayson*, (1889) 17 Or 347, 21 P 57, 11 Am St Rep 836, 3 LRA 801.

Money lent and interest may be recovered by wife who made voluntary loan to husband. *Grubbe v. Grubbe*, (1894) 26 Or 363, 38 P 182.

FURTHER CITATIONS: *Davison v. Davison*, (1912) 62 Or 445, 124 P 1096; *Smith v. Smith*, (1955) 205 Or 286, 287 P2d 572.

LAW REVIEW CITATIONS: 3 OLR 50, 54; 27 OLR 1, 8.

108.090

NOTES OF DECISIONS

See also cases under ORS 93.180.

Prior to 1969 statute abolishing curtesy and dower rights, spouse could not convey an existing curtesy or dower estate to the other spouse. *House v. Fowle*, (1890) 20 Or 163, 25 P 376; *Davison v. Davison*, (1912) 62 Or 445, 124 P 1096. But see *Jenkins v. Hall*, (1894) 26 Or 79, 37 P 62. Husband could transfer land to wife free of estate in curtesy.

The enumeration in this section does not limit but extends the wife's power to contract with husband. *Grubbe v. Grubbe*, (1894) 26 Or 363, 370, 38 P 182.

An estate by entirety in an equitable interest in real property may be created. *Ganoe v. Ohmart*, (1927) 121 Or 116, 254 P 203.

An estate by entirety in personal property cannot be created. *Holman v. Mays*, (1936) 154 Or 241, 59 P2d 392.

Evidence showed that aged husband was incompetent to execute a deed creating a tenancy by the entireties, and that wife had not overcome presumption of undue influence arising from the wrongful use of her confidential relationship. *Legler v. Legler*, (1949) 187 Or 273, 211 P2d 233.

FURTHER CITATIONS: *Lane v. Myers*, (1914) 70 Or 376, 141 P 1022, Ann Cas 1915D, 649; *Dutton v. Buckley*, (1926) 116 Or 661, 242 P 626; *Smith v. Smith*, (1955) 205 Or 286, 287 P2d 572.

ATTY. GEN. OPINIONS: Effect on dower of wife's deed to husband of husband's land, 1922-24, p 35; effect on dower of mortgage executed by husband alone, 1922-24, p 35; wife's income interest in estate by entirety, 1942-44, p 181.

LAW REVIEW CITATIONS: 3 OLR 50, 57; 10 OLR 388; 19 OLR 60; 27 OLR 1, 8, 335, 342; 30 OLR 1, 32 OLR 254; 5 WLJ 229-251.

108.100

NOTES OF DECISIONS

The enumeration in this section does not limit but extends the wife's power to contract with husband. *Grubbe v. Grubbe*, (1894) 26 Or 363, 370, 38 P 182.

This section does not affect the statute of limitations period for recovery of realty by wife. *Morrison v. Holladay*, (1895) 27 Or 175, 39 P 1100.

Where husband signed instrument personally, the addition of his signature after wife's name has legal effect of being wife's signature by husband, her attorney in fact, especially where accompanying circumstances indicate that intent. *Temple v. Harrington*, (1918) 90 Or 295, 176 P 430.

Husband, exercising power of attorney from wife, must act for their mutual benefit. *Hodes v. Hodes*, (1944) 173 Or 267, 145 P2d 299.

Evidence established that husband procured power of attorney from wife through fraud, and conveyances depriving wife of property were set aside. *Id.*

FURTHER CITATIONS: *Smith v. Smith*, (1955) 205 Or 286, 287 P2d 572.

LAW REVIEW CITATIONS: 3 OLR 50, 54, 163, 178; 27 OLR 1, 9; 28 OLR 320, 329.

108.110

NOTES OF DECISIONS

The husband should not be required to support the children in his wife's custody if he is not at fault and the welfare of the children would not be jeopardized were the children to be returned to their father. *Haight v. Haight*, (1965) 241 Or 532, 405 P2d 622.

LAW REVIEW CITATIONS: 34 OLR 199.

108.130

CASE CITATIONS: *Noble v. Noble*, (1940) 164 Or 538, 103 P2d 293; *Kelley v. Kelley*, (1948) 183 Or 169, 191 P2d 656.

108.140

NOTES OF DECISIONS

This section does not invalidate prenuptial agreements that are not expressly authorized by it. *Moore v. Schermerhorn*, (1957) 210 Or 23, 307 P2d 483, 308 P2d 180.

This section does not impliedly prohibit prenuptial agreements as to real property. *Id.*

Validity of antenuptial agreement depends upon the circumstances of a particular case, and all circumstances will be rigidly scrutinized. *Bauer v. Bauer*, (1970) 1 Or App 504, 464 P2d 710.

The fiduciary relationship of the parties requires a full disclosure of all circumstances materially bearing on an antenuptial agreement. *Id.*

This section does not apply to antenuptial agreements which provide there shall be no alimony or support in the event of separation or divorce. *Reiling v. Reiling*, (1970) 256 Or 448, 474 P2d 327, rev'g 1 Or App 571, 463 P2d 591.

LAW REVIEW CITATIONS: 2 WLJ 172.

108.520

NOTES OF DECISIONS

Wife's share of husband's business income under community property law is business income to her. *Pierce v. United States*, (1958) 254 F2d 885.