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Action Between Spouses to Recover for Personal Torts

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NOTE

ACTION BETWEEN SPOUSES TO RECOVER FOR PERSONAL TORTS

At common law the husband and wife became one person by marriage. According to Blackstone "the very being or legal existence of the woman is suspended during the marriage, or at least incorporated in and consolidated into that of the husband under whose wing, protection and cover she performs everything."[1] As a result the wife could not sue anyone without the husband's consent and joinder. Any recovery of personal property by her would immediately vest title in him. An action between the spouses was impossible. If the husband were named as defendant he could not join as plaintiff to permit her action.[2] Since he was liable for the torts of the wife committed both before and after marriage and since he was entitled to her choses in action, a suit by her against him would place the husband in the manifestly impossible position of being liable to himself for damages.[3] This bar to an action between spouses applied to antenuptial torts of the husband as well.[4] Even after divorce the wife was not permitted to maintain an action against the husband for a personal tort committed during coverture.[5] This harsh common law doctrine was mitigated by a creation of equity known as the wife's separate estate. By means of this device equity regarded married women in relation to their separate property as if they were sole.[6] To apply this theory it was a prerequisite that the estate be expressly created by some instrument or conveyance. This could be done by agreements made before or after marriage, by gift, deed or devise. The case of *Jacques* v. *Methodist Episcopal Church*[7] involved an antenuptial agreement by which the wife conveyed her property to a trustee subject to her power to control its disposition after marriage. The New York court in deciding this case followed the view taken in England and many of the states that the wife could dispose of her separate estate without the consent of the trustee unless she was expressly restrained from so doing by the instrument creating it. Therefore an agreement affecting it would be enforced unless there was fraud or an unfair advantage taken of her. A more limited view of the wife's power to alienate her separate estate has been taken by many of the states. For example, in *Holliday* v. *Hively*,[8] a Pennsylvania case, it was held that a separate estate did not include the power of complete

[1] 1 BL. COMM. * 442.
[2] MADDEN, PERSONS AND DOMESTIC RELATIONS, 220.
[3] HARPER, TORTS, sec. 288.
[4] Henneger v. Lomas, 145 Ind. 287, 44 N.E. 462, 32 L.R.A. 848 (1896).
[5] Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906).
[6] Littleton v. Sain, 126 Tenn. 461, 150 S.W. 423, 41 L.R.A. (N.S.) 1118 (1912).
[7] 17 Johns (N.Y.) 549, 8 Am. Dec. 447 (1820).
[8] 198 Pa. 335, 47 Atl. 988 (1901).

disposition as an incident thereto but rather was limited to that given by the terms of the instrument. Since the wife had not been given the power to convey the fee in lands left her in trust under a will, she was not permitted to exercise that right. The same state refused to recognize the attempt to create such an estate unless the woman was married or in immediate contemplation of matrimony.[9]

Equity permitted actions between spouses concerning their property relations only. In *Stone* v. *Wood*[10] the husband was allowed to have a deed to his wife set aside on a showing that it was obtained by fraud. It was stated that equity would afford relief between the spouses in cases of this kind as readily as it would between other persons. The jurisdiction in equity over suits between husband and wife was extended to actions to secure her separate property, to relieve from coercion, to enforce trusts and to establish other conflicting rights, but would not apply to a suit on a simple contract for the payment of money in the absence of circumstances raising some equitable consideration.[11] In *Frankel* v. *Frankel*[12] the wife was allowed to maintain an equitable action to recover money belonging to her separate estate and obtained from her by the husband through fraud and coercion. *Woodard* v. *Woodard*[13] involved a situation where husband and wife sold certain property held by them as joint tenants. It was agreed that he would divide the proceeds with her and upon his refusal to do so equity enforced the agreement and permitted the wife to recover the property, or, if converted, to compel restitution from the husband's separate estate. Similarly, where a wife had released her dower right by joining in a mortgage to secure a debt of the husband she could enforce her rights against him by subrogation, if she paid the debt.[14] The aid of equity also has been invoked by the husband to recover insurance policies wrongfully withheld by the wife,[15] and by the wife to enforce her title to property previously conveyed to her by the husband.[16] These cases serve to illustrate the remedy afforded by equity in cases where the spouses asserted conflicting rights in property.

Under the present statutes, in force in every state, and known as the Married Women's Acts, wives are recognized as distinct legal entities with distinct legal rights in property. It was a natural step from the protection previously afforded by equity to permit one spouse to enforce his or her rights in a suitable action at law as if sole. Most states permit either the husband or wife to sue the other for injury to

[9] Appeal of Neale, 104 Pa. St. 214 (1883).
[10] 85 Ill. 603 (1877)
[11] Gahm v. Gahm, 243 Mass. 374, 137 N.E. 876 (1922).
[12] 133 Mass. 214, 53 N.E. 398 (1899).
[13] 216 Mass. 1, 102 N.E. 921 (1913).
[14] Fitcher v. Griffiths, 216 Mass. 174, 103 N.E. 471 (1913).
[15] Carpenter v. Carpenter, 227 Mass. 288, 116 N.E. 494 (1917).
[16] English v. English, 229 Mass. 11, 118 N.E. 178 (1918).

property.[17] The statutes have been construed to permit a spouse to maintain such actions as trover, detinue, replevin and ejectment. However a few states still adhere to the common law doctrine and refuse to permit any action between spouses other than those which may be brought in equity.[18] Representative of this minority view is the case of *Metzler* v. *Metzler*,[19] in which an action was brought in New Jersey by the wife to enforce a New York judgment based on a contractual relationship with the husband and obtained under the laws of that state which permitted her to bring an action based on the contract. The New Jersey court refused to enforce the judgment on the ground that equity alone could give relief on a contract of this kind when the action was brought by one spouse against the other. In another action by the wife against the administrator of her husband to enforce an agreement made by him to leave her the proceeds of his life insurance policy if she did not contest his will it was held in *Smith* v. *Coggan*[20] that the wife could not recover on the contract since it was invalid under the law of the state and that a proper showing had not been made for relief in equity.

At common law no action was permitted between the spouses for personal torts. This rule applied to negligent as well as intentional torts. The prohibition was based on the theory that to permit actions between spouses would tend to disrupt domestic peace and tranquility. An illustrative case is that of *Abbot* v. *Abbot*[21] in which the plaintiff, a divorced wife, instituted an action for assault and battery committed upon her during coverture. It was held that the action could not be maintained against the husband or those who aided him. Although the present statutes are substantially uniform in providing that a married woman shall have the right to sue and be sued as if sole, there has been a great diversity of opinion among the states as to whether or not they shall be interpreted to impose personal tort liability between the spouses. Three distinct rules have been developed. 1) The majority view adheres to the strict common law rule forbidding such actions. 2) A minority group has permitted a spouse to maintain an action for intentional tort. 3) A still smaller group has adopted constructions of the Married Women's Acts which permit husband and wife to sue one another for personal tort of any character.

The conservative position follows the federal rule of *Thompson* v. *Thompson*.[22] This was an action for assault and battery brought in the

[17] Wilkinson v. Wilkinson, 147 La. 315, 84 So. 794 (1920); Lombard v. Morse, 155 Mass. 136, 29 N.E. 205, 4 L.R.A. 273 (1891).
[18] MADDEN, PERSONS AND DOMESTIC RELATIONS, 222.
[19] 8 N.J. Misc. 821, 151 A. (2d) 847 (1930).
[20] 263 Mass. 248, 160 N.E. 799 (1928).
[21] 67 Me. 304, 24 Am. Rep. 27 (1877).
[22] 218 U.S. 611, 31 S.Ct. 111, 54 L.Ed. 1180 (1910).

District of Columbia by the wife against the husband. It was held that the action could not be maintained. The court felt that a construction permitting suit would give the statutes such a radical and far reaching change from the policy of the common law as to be outside the legislative intent. It was said that such a change should only be made by statutory language so plain and clear as to be unmistakable. In *Ewald* v. *Lane*,[23] a recent case arising in the same jurisdiction, a married woman was allowed to bring an action against those who had conspired with the husband to have a false charge of adultery made against her in a divorce action. The husband's demurrer was upheld but that of his co-defendants was overruled on the theory that the statute did allow a married woman to bring an action against those who had joined with her husband in committing a tort against her. It was reasoned that the law had removed the procedural bar to actions against the others who had wronged her, even though she could not sue the husband. Among the states which have refused to depart from the common law rule are Georgia, Iowa, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New York, Pennsylvania and Texas.[24] In a Texas case[25] the wife was not permitted to bring an action for a tort allegedly committed during coverture in spite of the fact that the husband had procured an annulment of the marriage.

In view of the strong dissent in the *Thompson* case,[26] which was a four to three decision, many states were encouraged to modify or depart from its rule. A typical case allowing recovery for an intentional injury was that of *Fiedeer* v. *Fiedeer*[27] where an action was brought by a divorced wife for damages resulting from personal injuries from a gunshot wound inflicted on her by her husband prior to the divorce. The court stated that the public policy of the state would best be served by allowing actions as a result of such brutal assaults. *Brown* v. *Brown*[28] is expressive of the attitude of the states which have permitted actions for assault and battery. Holding that it was not against public

[23] 104 F. (2d) 222 (App. D.C. 1939).
[24] In re Dolmadge's Estate, 203 Iowa 231, 212 N.W. 553 (1927); Blickenstaff v. Blickenstaff, 89 Ind. App. 529, 167 N.E. 146 (1929); Broaddus v. Wilkinson, 281 Ky. 601, 136 S.W. (2d) 1052 (1940); Palmer v. Edward, 179 La. 937, 155 So. 483 (1934); Anthony v. Anthony, 135 Me. 54, 188 Atl. 724 (1937); David v. David, 161 Md. 532, 157 Atl. 755 (1932); Lubowitz v. Taines, 198 N.E. 320 (1935); Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Patenaude v. Patenaude, 195 Minn. 522, 263 N.W. 546 (1935); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933); Willot v. Willot, 333 Mo. 896, 62 S.W. (2d) 1084, 99 A.L.R. 114 (1933); Conley v. Conley, 92 Mont. 425, 15 P. (2d) 922 (1932); Klinger v. Steffens, 17 N.J. Misc. 118, 6 A. (2d) 217 (1939).
[25] Lunt v. Lunt, 121 S.W. (2d) 445 (Texas, 1938).
[26] Note 22 *supra*.
[27] 42 Okla. 124, 140 Pac. 1022, 52 L.R.A. (N.S.) 189 (1914).
[28] 88 Conn. 42, 89 Atl. 889 (1914).

policy, the court reasoned that there would be little danger of such an action while a shred of mutual respect and affection remained between the spouses. Consequently, the court said, there would be an equal danger of public inconvenience and scandal if the spouses were left to answer assault with assault and slander with slander until finally the public peace was broken and the criminal law invoked. On similar grounds actions for intentional torts have been permitted in New Hampshire, North Carolina and South Carolina.[29] It is interesting to observe that these states now open the door to actions for negligent injury as well.[30] Colorado has joined the ranks of those states permitting recovery for negligent injury. *Rains* v. *Rains*[31] was an action by the wife for damages for injuries sustained in an automobile accident caused by the negligence of her husband, the defendant. This court felt that its statutes clearly gave the wife the right to maintain an action. The same decision has been reached in similar cases in Alabama and Arkansas.[32] Kentucky does not allow the wife to sue the husband in tort but this was held no bar to a recovery by the wife in the case of *Broaddus* v. *Wilkenson,*[33] where her action was brought against the husband's employer who was the owner of the automobile in which she was riding at the time of her injury. Recovery was permitted although the injury was a result of the negligence of the plaintiff's husband. Here it was said that the wrong was that of the master as well and recovery could be had against him even though plaintiff's action against the servant was barred. Both New York and Minnesota have permitted the wife to recover damages for injuries sustained in automobile collisions when the action was brought against the owners who had given the husbands permission to drive.[34]

Since its admission to the union in 1848 Wisconsin has been very liberal in extending the legal rights and removing the legal disabilities of married women. The argument to the effect that a statutory provision permitting a wife to proceed against her husband for personal injuries would result in a flood of litigation seems to have been disproved in this state. It was not until 1926 that the Supreme Court was called upon to determine whether or not an amendment of 1881 permitted such an

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[29] Gilman v. Gilman, 78 N.H. 4, 95 Atl. 657, L.R.A. 1916 L (1915); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920).

[30] Miltimore v. Milford Motor Co., 197 Atl. 330 (1938); Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432, 44 A.L.R. 785 (1926); Earle v. Earle, 198 N.C. 411, 151 S.E. 884 (1930); Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932).

[31] 97 Colo. 19, 46 P. (2d) 740 (1935).

[32] Roberson v. Roberson, 193 Ark. 669, 101 S.W. (2d) 961 (1937); Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932).

[33] 281 Ky. 601, 136 S.W. (2d) 1052 (1940).

[34] Miller v. J. A. Tyrholm & Co., 196 Minn. 438, 265 N.W. 324 (1936); Riemers v. Clark, 300 N.Y. Supp. 31 (1937).

action. The question was presented by the case of *Wait* v. *Pierce*,[35] an action against copartners in the garage business for injuries sustained as a result of the negligent operation of an automobile by one of their employees. Plaintiff's husband was made a party defendant on the ground that he was jointly liable. The husband's demurrer on the theory that the wife could not maintain an action against him for injuries due to his negligence was overruled. The court felt that an exception should not be read into the statute to bar actions against the husband. They believed that it did not create a new power for married women but merely restored an old one which had been lost by marriage, hence the intent of the legislature need not be expressed in clear and unmistakable terms. Such a construction was deemed not against public policy, although the court recognized the fact that many other jurisdictions do not reach the same conclusion in construing similar statutes.[36] Within a short time this position was affirmed by permitting a wife to bring an action against her husband for personal injuries sustained while riding in his car and alleged to be a result of his negligence.[37] In *Hensel* v. *Hensel Yellow Cab Co.*[38] the wife sued for personal injuries sustained while riding in a truck of the defendant, a family corporation, of which her husband, the driver, was president. The accident occurred in Ohio, which does not permit a wife to sue her husband for a tort. Since Ohio had never decided whether a married woman could bring an action of this kind against her husband's employer, recovery was allowed. The inability to sue the husband did not extend to a suit against the employer for the husband's wrongful act. Suit was also permitted in Wisconsin when the accident occurred there although both husband and wife were residents of Illinois, which would bar the action.[39]

If there were any doubt as to the Wisconsin position regarding the rights of the spouses it has been clarified by the interpretations of the statute enacted in 1921 purporting to give equal rights to women.[40] In affirming the doctrine of *Wait* v. *Pierce*,[41] the court called attention to the fact that it had been based in part on the above section, and that there had been three legislative sessions since that decision with no change by amendment. This was taken as indicative of legislative satisfaction with the construction.[42]

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[35] 191 Wis. 202, 210 N.W. 822 (1926).
[36] Note, 11 MARQ. L. REV. 55.
[37] Moore v. Moore, 191 Wis. 232, 209 N.W. 483 (1926); Grant v. Asmuth, 195 Wis. 458, 218 N.W. 834 (1928).
[38] 209 Wis. 489, 245 N.W. 159 (1932).
[39] Forbes v. Forbes, 226 Wis. 477, 277 N.W. 112 (1938).
[40] WIS. STAT. (1939) § 6.015.
[41] Note 35, *supra*.
[42] Fontaine v. Fontaine, 205 Wis. 570, 238 N.W. 410 (1931).