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# Husband and Wife-Tort Action by Wife Against Husband

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**HUSBAND AND WIFE—TORT ACTION BY WIFE AGAINST HUSBAND**—The plaintiff sustained injuries in an automobile accident while riding with her husband, the defendant. The plaintiff brings this action for damages for said injuries. The defendant interposes a demurrer to the complaint. *Held*: Demurrer sustained. *Blickenstaff v. Blickenstaff*. Appellate Court of Indiana, July 5, 1929, 167 N. E. 146.

By the fiction of the common law the husband and wife became one legal person. The legal existence of the woman was merged in that of the husband; the woman lost all legal identity by marriage. 1 Blackstone's Commentaries 442. The inability of a wife to sue her husband at common law was based on the principle that the husband and wife were one in law, and not upon the theory that the wife was under legal disability. *Barnett v. Harshbarger*, 105 Ind. 410; *Henneger v. Lomas*, 145 Ind. 287. At common law a married woman had no substantive rights. "There is not only no civil remedy but no civil right during coverture to be redressed at any time." *Phillips v. Barnett*, 1 Q. B. D. 436. It has been decided that the statute giving married women greater liberty in bringing suits merely changes the procedure, but gives no new rights. *Henneger v. Lomas, supra*. The above fiction has been broken in Indiana by the following statute: Burns' Ann. St. 1926, Sections 8738-8762, and 262. It is said that to allow a wife to sue her husband in tort is opposed to public policy. It is submitted that such a suit is no more against public policy than a divorce suit in which the entire marriage relation is exposed; and also, after a husband commits a tort on his wife the sanctity of the marriage relation, which public policy seeks to protect, has been destroyed.

"A married woman may sue alone—*First*. When the action concerns her separate property. *Second*. When the action is between herself and

her husband." Burns' Ann. St. 1926, Sec. 262. This section has been construed to mean that married women may sue their husbands when the actions concern their separate property, *Dailey v. Dailey*, 26 Ind. App. 14, but in all other cases the common law is left unchanged. *Hamm v. Romine*, 98 Ind. 177. A wife's right of action for an injury in the nature of a tort is property, it is the separate property of the wife. *Musselman v. Galligher*, 32 Iowa 383; *The C. B. & Q. R. Co. v. Dunn*, 52 Ill. 260; *Barnett v. Leonard*, 66 Ind. 422. It is submitted that this principle does not bring the present case under the above statute because that which is denied cannot be assumed, namely, that the wife does have a right of action against her husband for tort.

The following cases have held that a wife may sue her husband in tort. *Johnson v. Johnson*, 77 So. 335; *Fitzpatrick v. Owens*, 186 S. W. 832; *Brown v. Brown*, 89 A. 889; *Gilman v. Gilman*, 95 A. 657; *Fiedur v. Fiedur*, 140 P. 1022. "The foundation of legal identity has been so substantially changed that, except as disabilities have been retained, each has against the other all the rights of persons not so related." *Johnson v. Johnson, supra*. "Should a woman who has been crippled for life through the malicious assault of a brutal husband, go into court and ask for alimony for her support, there is not a court but what would award her a more liberal alimony than if she were a strong, able woman. This additional alimony would be allowed on the ground of the tort she had received at the hands of her husband. There is no difference in principle between a direct and indirect recovery for tort." *Fiedur v. Fiedur, supra*.

There is a growing inclination to construe statutes concerning married women's rights liberally, and, if possible, to give the wife a right of action in tort against her husband thereunder and not to consider it as opposed to public policy to do so. 52 L. R. A. (N. S.) 186.

J. A. B.