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## Husband and Wife-Torts-Action by Wife Against Husband for Libel

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**HUSBAND AND WIFE—TORTS—ACTION BY WIFE AGAINST HUSBAND FOR LIBEL**—P married D in 1893. In 1899 the parties separated under a deed of separation and from then on lived apart. In 1929 P saw on a tombstone in a churchyard an inscription to “Jennie (another woman) the dearly beloved wife of (defendant).” P sued D for libel. *Held*, that, though the inscription was capable of defamatory meaning, the P, by reason of sec. 12 of the Married Women’s Property Act, 1882, could not sue her husband on it, the action being for a tort and not for the protection and security of her separate property. *Ralston v. Ralston*, (1930) 2 K. B. 238.

By the common law a wife could sue her husband on apparently only one occasion, namely, if he levied a fine in her name; Co. Litt. 133, a. n. 4., and this disability continued into modern times until the rights of women were enlarged by the Married Women’s Acts. The reason why a wife could not maintain an action against her husband was that the husband and wife were one person *Phillips v. Barnet*, 1 Q. B. D. 436 (1876). The court in the principal case laid down the doctrine that under the Married Women’s Property Act, 1882, every woman shall have in her own name against all persons, including her husband, the same civil remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but that no husband or wife could sue the other for a personal tort. Remedially and Procedurally the statutes dealing with the rights of married women may be classified in seven general groups: (1) those which deal with property and are silent as to remedies (2) those which permit a married woman to sue or be sued only in respect to property which constitutes her separate estate (3) those which expressly exclude or refuse to authorize suits between husband and wife (4) those which do not permit a married woman to sue or be sued by a third person alone in her own name for personal torts (5) those which permit a married woman to sue separately for tort committed against her (6) those which in terms permit suits by and against married women as though they were *sole* (7) those which in terms permit suits between husband and wife. *McCurdy, Torts Between Persons in Domestic Relations*, 43 *Harv. L. Rev.* p. 1037. The rule reached by the weight of authority is that a married woman may sue her own husband, if necessary for the protection and security of her own separate property; but otherwise actions for a tort between husband and wife cannot be entertained. That is a wife may sue her husband in an action which under the old forms of pleading would have been trover for the recovery of her goods, or for a trespass or nuisance to

land held by her as her separate property; but she may not sue him in a civil action for a personal wrong such as assault, libel, or injury by negligence. *Pollock on Torts* (13th Ed.) p. 59; *Clark and Lindell on Torts* (8th Ed.) p. 45. *Thompson v. Thompson*, 218 U. S. 611 (Harlan, Holmes and Hughes, J. J. dissenting); *Bandfield v. Bandfield*, 117 Mich. 80; *Schultz v. Schultz*, 59 N. Y. 644; *Peters v. Peters*, 156 Cal. 32; *Keister's Adm'r v. Keister's Ex'rs*, 123 Va. 157. There is, however, a very respectable group of jurisdictions which accord to the wife an action against her husband for a personal tort, either as a result of express statutory provision, or by a liberal interpretation of general statutory provisions declaring that a married woman shall have all the rights of a *feme sole*. *Burdick on Torts* (4th ed.) p. 153; *Braun v. Braun*, 28 Conn. 42; *Gilman v. Gilman*, 78 N. H. 4; *Roberts v. Roberts*, 185 N. C. 566; *Fitzpatrick v. Owens*, 124 Ark. 167; *Fiedeer v. Fiedeer*, 42 Okla. 124; *Johnson v. Johnson*, 201 Ala. 41. The usual form of the statute gives the wife the right to sue "separately as though unmarried." Some courts have interpreted this statute as leaving the foundation of the common law marriage statute unchanged and merely providing exceptions to the necessary consequences of that status, and have held that exceptions, being contrary to the common law, are limited by the necessary import of the language defining them. *Peters v. Peters*, 42 Ia. 102; *Brandfield v. Brandfield*, 117 Mich. 80; *Schultz v. Schultz*, 89 N. Y. 644. Some courts consider such statutes as in derogation of the common law and hence to be strictly construed. *Compton v. Presson*, 28 N. J. Eq. 229. The reason for which the stronger of the more modern decisions have denied one spouse the right to maintain an action for tort against the other during coverture, has been, in the main, based upon public policy, on the theory that to permit such an action would tend to invade the holy sanctity of the home and shatter the sacred relations between husband and wife, and, therefore, for public policy's sake, such actions should not be maintained; and yet those very decisions recognize that the civil courts are open to parties seeking divorce and alimony, and that the criminal courts are open for the prosecution of either husband or wife for assault and battery. *Fiedeer v. Fiedeer*, 42 Okla. 124. The Indiana statute provides that a married woman may sue alone—(1) when the action concerns her separate property. (2) when the action is between herself and her husband: but in no case shall she be required to sue or defend by guardian or next friend except she be under the age of twenty-one years. Burns Ann. Ind. St. 1926, sec. 262. The point in question has not been adjudicated in Indiana, but married women may sue their husbands in their own names when the action concerns their separate property. *Dailey v. Dailey*, 26 Ind. App. 14; *Wilkins v. Milles*, 9 Ind. 100; *Crates v. Crates*, 118 Ind. 521. An analogous situation is where a minor child sues a parent for a personal tort. A child cannot maintain an action against its parents for tortious acts of such parent committed during the child's minority and while it is unemancipated and a member of the parents' family; the common law gave no such right of action and no statute has been enacted creating such right. *Smith v. Smith*, 81 Ind. App. 566. A recent New Hampshire case is *contra* and indicates that the law on this point and analogous situations is still in a stage of development. *Dunlap v. Dunlap*, 150 Atl. (N. H., 1913) 905.

C. F. B.