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## Husband and Wife - Torts - Husband's Right of Action against Wife

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policy and the preservation of attorney-client privilege, indicate that the judgment in the instant case should have been reversed.

GORDON O. HOBERG

HUSBAND AND WIFE — TORTS — HUSBAND'S RIGHT OF ACTION AGAINST WIFE.

— In an action by a husband against his wife for injuries sustained due to her negligent operation of a motor vehicle, the Supreme Court of Arkansas *held*, that a statute providing that every married woman shall have the right to sue and be sued as though a femme sole<sup>1</sup> gives the husband a right of action against his wife. *Leach v. Leach*, 300 S.W.2d 15 (Ark. 1957).

At common law, because of the fiction that husband and wife were one, it was held that neither spouse could maintain an action against the other sounding in tort.<sup>2</sup> Married Women's Acts have been passed in all American jurisdictions, primarily to secure to a married woman a separate legal identity and a separate legal estate in her own property.<sup>3</sup> The decisions of the appellate courts of the nation are in hopeless conflict in the results they have reached as to the effect of these acts, even when the statutory language before them has been identical or substantially so.<sup>4</sup>

The majority of American courts hold that the Married Women's Acts have left unchanged the common law rule that neither spouse could maintain an action in tort against the other.<sup>5</sup> The reasons usually given for denying the action are that statutes in derogation of the common law should be strictly construed,<sup>6</sup> public policy is against disturbing domestic tranquility,<sup>7</sup>

1. Ark. Stat. § 55-401 (1947): "Every married woman and every woman who may in the future become married, shall have all the rights to contract and be contracted with, to sue and be sued, and in law and equity shall enjoy all rights and be subjected to all the laws of this State, as though she were a femme sole; provided, it is expressly declared to be the intention of this act (section) to remove all statutory disabilities of married women as well as common law disabilities, such as the disability to act as executrix as provided by Sect. 6 of Kirby's Digest (Sect. 62-205), and all other statutory disabilities."

2. *Thompson v. Thompson*, 218 U.S. 611 (1910); *Austin v. Austin*, 136 Miss. 61, 100 So. 591 (1924); *Leonardi v. Leonardi*, 21 Ohio App. 110, 153 N.E. 93 (1925); *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 242 N.W. 526, 527 (1932) (dictum).

3. E.g., *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917).

4. *McKinney v. McKinney*, 59 Wyo. 204, 135 P.2d 940, 943 (1943) (dictum).

5. *Thompson v. Thompson*, 218 U.S. 611 (1910); Comment, 22 Yale L.J. 250 (1913); *Spector v. Weisman*, 40 F.2d 792 (D.C. Cir. 1930); *Peters v. Peters*, 156 Cal. 32, 103 Pac. 219 (1909); *Ferguson v. Davis*, 48 Del. 299, 102 A.2d 707 (1954); *Webster v. Snyder*, 103 Fla. 1131, 138 So. 755 (1932); *Eddleman v. Eddleman*, 183 Ga. 766, 189 S.E. 833, 836 (1937) (dictum); *Hjrdman v. Holmes*, 4 Ill.App.2d 779, 124 N.E.2d 344 (1955); *In re Dolmage's Estate*, 203 Iowa 231, 212 N.W. 553 (1927); *Sink v. Sink*, 172 Kan. 217, 239 P.2d 933 (1952); *Edwards v. Royal Indemnity Co.*, 182 La. 171, 161 So. 191, 193 (1935) (dictum); *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27 (1877); *Furstenburg v. Furstenburg*, 152 Md. 247, 136 Atl. 534 (1927); *Lubowitz v. Taines*, 293 Mass. 39, 198 N.E. 320 (1936); *Bandfield v. Bandfield*, 117 Mich. 80, 75 N.W. 287 (1898); *Strom v. Strom*, 98 Minn. 427, 107 N.W. 1047 (1906); *Austin v. Austin*, 136 Miss. 61, 100 So. 591 (1924); *Rogers v. Rogers*, 265 Mo. 200, 177 S.W. 382 (1915); *Conley v. Conley*, 92 Mont. 425, 15 P.2d 922 (1932); *Emerson v. Western Seed & Irrigation Co.*, 116 Neb. 180, 216 N.W. 297 (1927); *Von Laszewski v. Von Laszewski*, 99 N.J. Eq. 25, 133 Atl. 179 (1926); *Romero v. Romero*, 58 N.M. 201, 269 P.2d 748 (1954); *Kaczorowski v. Kalkosinski*, 321 Pa. 438, 184 Atl. 633, 665 (1936) (dictum); *Oken v. Oken*, 44 R.I. 291, 117 Atl. 357 (1922); *Lillienkamp v. Rippetoe*, 133 Tenn. 57, 179 S.W. 628 (1915); *Nickerson v. Nickerson*, 65 Tex. 281 (1886); *Comstock v. Comstock*, 106 Vt. 50, 169 Atl. 903 (1934); *Keister v. Keister*, 123 Va. 157, 96 S.E. 315 (1918); *Schultz v. Christopher*, 65 Wash. 496, 118 Pac. 629 (1911); *Poling v. Poling*, 116 W.Va. 187, 179 S.E. 604 (1935); *McKinney v. McKinney*, 59 Wyo. 204, 135 P.2d 940 (1943).

6. See, e.g., *McKinney v. McKinney*, *supra* note 5.

7. *Drake v. Drake*, 145 Minn. 388, 177 N.W. 624 (1920); *Longendyke v. Longendyke*, 44 Barb. 367 (N.Y. 1863); *Prosser, Torts*, § 99, 903 (1955).

trivial actions will plague the courts,<sup>8</sup> and the legislature would have clearly and explicitly given the right had it so intended.<sup>9</sup>

A substantial minority of the courts, including North Dakota, have held that the Married Women's Acts permit an action by a wife against a husband in tort.<sup>10</sup> The reasoning advanced by the minority is that the intention of the legislature is clear,<sup>11</sup> the rule that statutes in derogation of the common law should be strictly construed has become obsolescent,<sup>12</sup> public policy is a matter for the legislature and not the courts to determine,<sup>13</sup> and there is nothing to show that a flood of litigation has resulted in states which allow the action.<sup>14</sup> Most legal writers on the subject support the minority view, on the grounds that the emancipation statutes have eliminated the reasons on which the common law rule is based.<sup>15</sup>

Although there are a strong minority of the courts allowing a wife to sue her husband in tort, the question of whether the husband may have such an action against his wife has arisen only three times in these minority jurisdictions.<sup>16</sup> The two cases prior to the instant one denied such an action to the husband.<sup>17</sup> The statutes involved were not as comprehensive as the Arkansas statute, however, for they only gave the wife the right to sue as if unmarried, and not the liability of being sued as if unmarried.<sup>18</sup> The legislatures of the two states were prompt in passing statutes specifically allowing a husband the right to sue his wife in tort.<sup>19</sup>

In states having Married Women's Acts similar to the Arkansas statute<sup>20</sup> applicable in the instant case, there seems no good reason why actions

8. See *Thompson v. Thompson*, 218 U.S. 611 (1910).

9. *Thompson v. Thompson*, *supra* note 8; *Conley v. Conley*, 92 Mont. 425, 15 P.2d 922 (1932); *Furey v. Furey*, 193 Va. 72, 71 S.E.2d 191 (1952); *Keister v. Keister*, 23 Va. 157, 96 S.E. 315 (1918).

10. *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335, 337 (1917) (dictum); *Katzenberg v. Katzenberg*, 183 Ark. 626, 37 S.W.2d 696 (1931); *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740 (1935); *Brown v. Brown*, 88 Conn. 42, 89 Atl. 889 (1914); *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953); *Gilman v. Gilman*, 78 N.H. 4, 95 Atl. 657 (1915); *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920); *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 242 N.W. 526 (1932); *Fiedeer v. Fiedeer*, 42 Okla. 124, 140 Pac. 1022 (1914); *Prosser v. Prosser*, 114 S.C. 45, 102 S.E. 787 (1920); *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266, 272 (1941) (dictum); *Taylor v. Patten*, 2 Utah 2d 404, 275 P.2d 696 (1954); *Waite v. Pierce*, 191 Wis. 202, 209 N.W. 475 (1926).

11. See *Steele v. Steele*, 65 F. Supp. 329, 330 (D.C. 1946) (dictum); *Fitzpatrick v. Owens*, 124 Ark. 167, 186 S.W. 832 (1916); *Waite v. Pierce*, 191 Wis. 202, 209 N.W. 475 (1926) Noted in 11 Marq. L. Rev. 55 (1926).

12. *Steele v. Steele*, 65 F. Supp. 329 (D.C. 1946).

13. *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 242 N.W. 526 (1932); *Waite v. Pierce*, 191 Wis. 202, 209 N.W. 475 (1926).

14. See *Bushnell v. Bushnell*, 103 Conn. 583, 131 Atl. 432 (1925); *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1938).

15. *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953); *Prosser*, *Torts*, § 99 (1955); *1 Harper & James, Torts*, § 8.10 (1956); *McCurdy, Torts Between Person in Domestic Relations*, 43 Harv. L. Rev. 1030 (1930).

16. See *Leach v. Leach*, 300 S.W.2d 15 (Ark. 1957); *Scholtens v. Scholtens*, 230 N.C. 149, 52 S.E.2d 350 (1949); *Fehr v. General Accident & Life Assurance Corp.*, 246 Wis. 228, 16 N.W.2d 787 (1944), 43 Mich. L. Rev. 988 (1945), 1945 Wis. L. Rev. 463 (1945).

17. *Scholtens v. Scholtens*, 230 N.C. 149, 52 S.E.2d 350 (1949), 28 N.C. L. Rev. 109 (1949); *Fehr v. General Accident & Life Assurance Corp.*, 246 Wis. 228, 16 N.W.2d 787 (1944).

18. N.C. Gen. Stat. § 52-10 (1943); Wis. Stat. § 246.07 (1947).

19. N.C. Gen. Stat. § 52-10.1 (1951); Wis. Stat. § 246.075 (1957).

20. N.D. Rev. Code § 14-0705 (1943): "The wife after marriage has with respect to property, contracts, and torts the same capacity and rights and is subject to the same liabilities as before marriage. In all actions by or against her, she shall sue and be sued in her own name."

sounding in tort may not be maintained between spouses. The common law reason for preventing such suits has been abrogated by the statutes, and the reasoning of courts upholding the common law view seem to be lacking a sound foundation. Where jurisdictions have already allowed the wife to sue her husband in tort, it cannot logically be held that the husband does not have the same right,<sup>21</sup> unless the statute involved clearly denies him such right.

RICHARD A. RAHLFS

**INJUNCTION — ACTIONS FOR INJUNCTIONS — TAXPAYER'S RIGHT TO ENJOIN PUBLIC OFFICIAL.** — Plaintiff, a resident citizen taxpayer of the City of Los Angeles, brought this action to obtain an injunction against defendant as Chief of Police of the City of Los Angeles, to enjoin him from the illegal expenditure of public funds to conduct police surveillance by means of hidden microphones. Defendant had been installing such instruments in places of occupancy without the consent or knowledge of the property owners. The Supreme Court of California *held*, two justices dissenting, that a taxpayer can restrain a public official from expending tax money for activities which violate federal and state constitutional provisions.<sup>1</sup> *Wirin v. Parker*, 313 P.2d 844 (Cal. 1957).

The illegal expenditure of public funds can be restrained by a taxpayer under California law.<sup>2</sup> A taxpayer has a right to sue, when public money raised by taxation is being illegally spent, based upon his equitable interest in such funds and his liability to replenish the treasury when they are misappropriated.<sup>3</sup> This right will lie only where the funds being misappropriated have been raised by taxation. The taxpayer has no cause of action when the funds have been derived from the sale of municipal bonds for public improvements.<sup>4</sup>

In the absence of statutes some jurisdictions<sup>5</sup> hold that unless the taxpayer can show that he will suffer a special injury differing from that suffered by the public at large he cannot maintain this type of an action. Other jurisdictions<sup>6</sup> allow the taxpayer to bring an action even though he cannot show a special injury to himself.

The fact that the illegal expenditure may actually be a saving of tax funds is of no consequence, nor does it make a difference if the amount of the

21. *Abbott v. Abbott*, 67 Me. 304, 308 (1877) (dictum); *McKinney v. McKinney*, 59 Wyo. 204, 135 P.2d 940, 949 (1943) (dictum); *Waite v. Pierce*, 191 Wis. 202, 209 N.W. 475, 481 (1926) (dissenting opinion).

1. The court found that defendant's action is in violation of the 4th and 14th amendments to the United States Constitution and of art. 1, § 19 of the California Constitution which prohibits illegal searches and seizures.

2. Cal. Code of Civil Procedures, Title 7, § 526a. An action restraining a public officer from illegal expenditure of public funds can be maintained by a taxpayer in North Dakota, if he can show irreparable injuries and no adequate remedy at law. See *Viestenz v. Arthur Tp.*, 78 N.D. 1029, 54 N.W.2d 572 (1952).

3. *Fergus v. Russell*, 270 Ill. 304, 110 N.E. 130 (1915); *Jones v. O'Connell*, 266 Ill. 443, 107 N.E. 731 (1914).

4. *Price v. Mattoon*, 364 Ill. 512, 4 N.E.2d 850 (1936).

5. *Ibid.*; *Walldorf v. Chattanooga*, 192 Tenn. 86, 237 S.W.2d 939 (1951).

6. *Terry v. Bender*, 143 Cal. App.2d 198, 300 P.2d 119 (1956); *Barge v. Camp*, 209 Ga. 38, 70 S.E.2d 360, 364 (1952) (dictum).