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TORTS - JOINT TORTFEASORS - HUSBAND AND WIFE - TORTS BETWEEN SPOUSES - IMMUNITY OF THIRD PERSONS

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TORTS — JOINT TORTFEASORS — HUSBAND AND WIFE — TORTS BETWEEN SPOUSES — IMMUNITY OF THIRD PERSONS — Plaintiff sued defendants, including plaintiff's husband, for jointly causing a false charge of adultery to be made against plaintiff in a divorce suit. The defendants' demurrer to the complaint was sustained in the trial court as to each and all of the defendants. *Held*, that although plaintiff's husband was immune from liability, a cause of action had been made out against all the rest of the defendants, and the judgment in their favor was reversed. *Ewald v. Lane*, (App. D. C. 1939) 104 F. (2d) 222.

At common law a wife could not sue her husband for a tort,¹ nor could she sue any persons who had joined with her husband in inflicting on her

¹ 30 C. J. 954 (1923); HARPER, TORTS, § 288 (1933).

tortious injury.² This latter rule was an exception from the general rule of the common law that the immunity from suit of one joint tortfeasor, where the immunity was grounded on reasons of public policy, would not be extended to make the remaining joint tortfeasors likewise immune.³ The common-law disabilities of a married woman, including the necessity of joining her husband in all suits she maintained, have been removed by the married women statutes,⁴ so that a married woman may now sue "as if unmarried"⁵ or "as if she were sole."⁶ There is a line of authority which holds that under these statutes one spouse may sue the other for personal injuries,⁷ but the weight of authority will not allow such a suit.⁸ With the procedural bar to the wife's suit against her husband's co-tortfeasors removed by these statutes, the wife's right to sue her husband's co-tortfeasors would seem to follow as a matter of course by the application of the rule that the immunity of one joint tortfeasor, founded on reasons of public policy, will not protect or shield his co-tortfeasors.⁹ One court has achieved a contrary result,¹⁰ but that result hardly seems desirable. In cases such as the principal one, the husband's co-tortfeasors have actively inflicted a civil injury on the wife. The husband's immunity, after the enactment of the married women statutes, rests on a rule of public policy¹¹ that the courts will handle no litigation which would tend to disrupt the harmony between the spouses. Extending this cloak of immunity to the husband's co-tortfeasors would be giving them a windfall which they have done nothing to deserve, and it

² *Abbott v. Abbott*, 67 Me. 304 (1877). The reasons given were that the husband had to join with his wife in all suits, and so he would be suing here for an injury he himself had caused, and the injury must be *ad damnum ipsorum*. It should be noted, however, that although other courts suggest by way of dictum that this is the true common-law rule, there is practically no other case in point to be found.

³ At common law, where *A*, *B* and *C* jointly injure someone, *B* and *C* may be held liable even though *A* is immune, where *A* is: a policeman, *Emery v. Hapgood*, 7 Gray (73 Mass.) 55 (1856); a witness, *Rice v. Coolidge*, 121 Mass. 393 (1876); a county, *Garrett v. Haworth*, 183 Okla. 569, 83 P. (2d) 822 (1938); a state, *Crawford v. Miller*, 19 Ohio Cir. Ct. (N. S.) 421, 2 Ohio App. 244 (1913); or presumably an ambassador or a member of Congress.

⁴ For a full discussion of the types of married women statutes enacted, and some interpretations thereof, see McCurdy, "Torts between Persons in Domestic Relation," 43 HARV. L. REV. 1030 (1930), especially at pp. 1037, 1050.

⁵ 14 D. C. Code (1930), § 43; Mich. Comp. Laws (1929), § 14013.

⁶ Colo. Stat. Ann. (1935), c. 108, § 2.

⁷ *Rains v. Rains*, 97 Colo. 19, 46 P. (2d) 740 (1935); *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917); *Brown v. Brown*, 88 Conn. 42, 89 A. 889 (1914); *Gilman v. Gilman*, 78 N. H. 4, 95 A. 657 (1915); *Fiedler v. Fiedler*, 42 Okla. 124, 140 P. 1022 (1914).

⁸ The leading case is *Thompson v. Thompson*, 218 U. S. 611, 31 S. Ct. 111 (1910).

⁹ Such a result, like that in the principal case, was obtained in *Smith v. Smith*, 73 Mich. 445, 41 N. W. 499 (1889), where the husband induced the defendant to publish a libel concerning the wife.

¹⁰ *Libby v. Berry*, 74 Me. 286 (1883). The court reasoned that the married women statute of Maine did not actually give a married woman a right to sue where she and her husband could not have maintained an action at common law.

cannot seriously be argued that allowing the wife to recover in a case like the principal case will disrupt the harmony between the spouses. Some courts have been very much impressed with this reasoning, and have even allowed the wife to recover from her husband's employer or principal where the husband has inflicted a tortious injury on her while acting within the scope of his employment or agency.¹¹ This is a definite extension of liability beyond that offered by the principal case, for in such cases the defendant has not actively caused the injury, but is merely forced to assume the responsibility for the acts of another. Those cases and the principal case illustrate the modern trend away from the earlier arbitrary rule which denied recovery to married women.

¹¹ *Schubert v. August Schubert Wagon Co.*, 249 N. Y. 253, 164 N. E. 42 (1928), noted 27 MICH. L. REV. 830 (1929); *Miller v. J. A. Tyrholm & Co.*, 196 Minn. 438, 265 N. W. 324 (1936), noted 20 MINN. L. REV. 566 (1936); *Smith v. Smith*, 116 W. Va. 230, 179 S. E. 812 (1935). Contra: *Riser v. Riser*, 240 Mich. 402, 215 N. W. 290 (1927); *Maine v. James Maine & Sons Co.*, 198 Iowa 1278, 201 N. W. 20 (1924).