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INTERMARITAL TORTS

I.

INTRODUCTION

In this streamlined era of social, economic and political liberalism; this age of gradual universal emancipation from the evils of modern industry; of public recognition of labor; of increased agitation for the alleviation of child labor; of the rise of women into high economic and political positions; of revolutionary innovations in legislative and judicial forums; there are few topics relating to the law of persons that "display in their treatment a greater inconsistency, a more unsatisfactory reasoning,"[1] and a more stifling stagnation than the law which relates to the tort liability between members of a family, especially that branch which deals with the relationship and liability between husband and wife.

For a relatively short period, one might have perceived a gradual transition from the old Common Law concept of the status of married women, a short-lived application of the widely accepted legal maxim that "the function of the law is to keep pace with the needs of society". But, with the granting of freedom to married women in their property matters and contracts, the relationship between a husband and his wife lapsed into its former state of inertia and has since suffered from the pains of an arrested development. This was due partly to the notorious

1. 43 H L. REV. 1030.

ambiguity of legislative verbiage and partly to the judicial fear of changing the old order where a reliance on the legislative intent might well support a maintenance of the status quo.

Under the Common Law of England and the law of the early American colonies, the wife was practically, although not legally, a chattel in the possession of her husband; a status which became firmly rooted in the very foundations of the social and economic structure of these countries. With the rise of the industrial revolution and its changes in industrial methods, with its reallocation of population and the attendant growth of industrial centers and "big cities," there developed a marked transition in the economic and social structure of society. The creation of new and hitherto unknown industries led to the establishment of new positions, some of which by their very nature could not be capably administered by men, and others, which, due to the great demand for labor, were thrown open to women. As a result of this sudden intrusion of women into industry they were thrust into the economic limelight, and became a center of agitation, at first purely economic but then, political as well.

The married woman was caught between two diverse forces, the one, her common law status as a domestic—a mother and housewife, and the other, a direct antithesis to her former status, her new found position in the industrial world. Her gradual rise, after the industrial revolution, from her hitherto sheltered and almost ignominious existence is known to every student of history. But, the married woman was not completely appeased by her new status in industry and began to agitate for a more liberal and far reaching recognition in the eyes of the law. She was endeavoring to gain legally, the place she was winning in the economic society. In keeping with this social necessity, the courts of equity, began to recognize certain rights of women, especially those relating to her property.[2] Then, following the

2. See v. Prieaux, 3 Bro. C. C. 381; Wilson v. Wilson, 2 Haggard Con-

lead of the courts, the legislatures of the states began, in the early 1800's, to give recognition to women in the form of Married Women's Acts, which were designed to give to women, for the most part, the same rights with regard to their own contracts and their own property, as men had as to theirs. These statutes with some variations are still in force today[3] and have

sist. Rep. 203; Norris v. Hemingway, Hogg. Eccl. Rep. 4; *Ex parte* Gadsden, S. C. LAW JOUR. No. 3, p. 343; Carroll v. See, 3 Gill & Johns. 504; Misc. v. Misc., 1 Johns. Chan. Rep. 108; Denton v. Denton, *ibid* 110; Woodruff v. Clark & Apgar, 42 N.J.L. 198 (S. C. 1880); Dilts v. Stevenson, 17 N.J.Eq. 407 (Prerog. 1864); Fike v. Fike, 3 N.J. Mis. Rep. 485 (Chan. 1925); Lester v. Lester, 86 N.J.Eq. 30, 97 Atl. Rep. 170 (Chan. 1916); Hollingshead v. Hollingshead, 91 N.J.Eq. 261, 110 Atl. Rep. 19 (Chan. 1920); Demarest v. Terhune, 62 N.J.Eq. 663, 50 Atl. Rep. 664 (Chan. 1901); Trenton Banking Co. v. Woodruff, 2 N.J.Eq. 117 (Chan. 1838); Skillman v. Skillman, 15 N.J.Eq. 478 (E. & A. 1863).

3. Alabama Civil Code (1923) Vol. 4, Sec. 8264, 8267, 8268. Arizona Revised Code (1928) Par. 2174, p. 524. Arkansas Digest of Statutes (1921) p. 95. California Civil Code (1872, amended to 1927), Div. I, pt. 3T, Ch. 3, Sec. 158, 162. Colorado Compiled Laws (1921) Ch. XXV, p. 1499. Connecticut General Statutes (Rev. of 1930), Sec. 5170. Delaware Revised Code (1915), Ch. 87, Sec. 20. Dist. of Columbia Code, Ch. XXXIII, p. 336, Sec. 1155. Florida Compiled General Laws (1927), p. 1925, sec. 58-70. Georgia Code (1933), p. 746, sec. 503, 505. Idaho Compiled Statutes (1919), Civil Code, Ch. 184, sec. 4657. Illinois Revised Statutes (1931), Ch. 68, p. 1592, sec. 1, 6, 9. Indiana Statutes Annotated (1933), vol. 7, ch. 1, sec. 101, 102, 115. Iowa Code (1927), ch. 470, sec. 10446, 10448. Kansas Revised Statutes (1923), ch. 23, art. 2, sec. 202, 203. Kentucky Revised Statutes (1930), ch. 66, art. 3, Sec. 2128. Louisiana General Statutes, vol. VII, ch. 2, par. 2167, 2169, 2170, 2171. Maine Revised Statutes (1930), title 5, ch. 74, p. 1151. Maryland Annotated Code (1924), art. 45, sec. 5, p. 1694. Massachusetts General Laws (1932), vol. VII, title III, ch. 209, sec. 2, 6, p. 2639. Michigan Compiled Laws (1929), vol. 3, ch. 254, p. 4654. Minnesota General Statutes (1923), ch. 72, sec. 8618. Mississippi Code (1930), vol. 1, ch. 36, p. 949. Missouri Revised Statutes (1929), vol. 1, art. 1, ch. 20, sec. 2998, p. 889. Montana Revised Codes (1921), vol. 2, part II, ch. 6, sec. 5786, 5791, 5809, p. 35. Nebraska Comp. Statutes (1929), ch. 42, art. 2, sec. 202, p. 1035. Nevada Compiled Laws (1929), vol. 2, sec. 3373, 3379. New Hampshire Public Laws (1926), ch. 288, sec. 2, p. 1174. New Mexico Comp. Statutes (1929), ch. 68, art. 2, par. 68. New Jersey Revised Statutes, 37:2-5, 6, 13, 18. New York Cons. Laws (1930), ch. 14, art. 4, sec. 57, p. 58. North Carolina Cons. Statutes (1919), vol. 1, art. 1, ch. 51, sec. 2507, 2513. North Dakota Compiled Laws (1913), Civil Code, ch. 7, sec. 4411, p. 1060. Ohio Comp. General Code (1931), part. 2, title 6, ch. 1, sec. 7999, 8002. Oklahoma Compiled Statutes (1921), vol. 2, ch. 48, sec. 6619. Oregon Laws 1920), vol. 2, ch. 2, sec. 9759.

given to the married woman, for the most part, the right to hold property, convey property, retain the benefits of her labor, contract, and sue and be sued as a femme sole. It is strange, however, that although these acts are in general similarly worded, they have led to such diverse judicial interpretations as to cause the states of the Union to become divided into two opposing camps.

The difficulty that has surrounded these legislative enactments and made their interpretations so divergent lies in the ambiguity of their terminology. Courts, when confronted with cases involving a tort problem between spouses, were forced, in view of the lack of specific legislative statements, to determine the legislative intent. And, in doing this, they were influenced and their decisions colored by the conflict between the different conceptions of the family; by the conflict between individual and relational rights and duties, and in more recent cases, after the coming of the automobile as a universal mode of travel and transportation, by the question of liability indemnity insurance in cases involving the auto.

This inconsistency can best be crystallized by a brief glance at some of the judicial decisions on the question. The case of *Longendyke v. Longendyke*[4] decided by the courts of New York perhaps best illustrates the brief of the majority of states that has consistently upheld the common law unity even in the face of these emancipating statutes. The court, in its opinion held:

Pennsylvania Statutes Annotated (1930), title 48, ch. 3, sec. 111. Rhode Island General Laws (1923), title XXVIII, ch. 290, sec. 14. South Carolina Code of Laws (1932), vol. 1, part 1, title 5, ch. 14, sec. 400. South Dakota Revised Code (1919), vol. 1, art. 5, ch. 2, sec. 178. Tennessee Code (1932), title 4, ch. 1, art. III, sec. 8460. Texas Revised Civil Statutes (1925), vol. 1, title 73, ch. 3, sec. 4626. Utah Revised Statutes (1933)), title 40, ch. 2, sec. 4. Vermont Public Laws (1933), title 13, ch. 135, sec. 3074. Virginia Code (1930), vol. 2, ch. 207, sec. 5134. Washington Codes & Statutes (1910), vol. 2, title XLII, sec. 5925, 5926. West Virginia Code (1932), ch. 48, art. 3, sec. 4749. Wisconsin Statutes (1929), ch. 266, sec. 7. Wyoming Revised Statutes (1931), ch. 69, sec. 103.

4. 44 Barb. 366 (N.Y. 1863).

> "Better let the wife suffer in silence than to drag into the courts, the details of a stormy matrimonial venture."

And then again later in the same opinion,

> "The effect of giving so broad a construction to the Act of 1860 (to permit a suit between husband and wife for personal injuries) would be to involve the husband and wife in perpetual controversy and litigation—to sow the seeds of perpetual discord and broil—to produce the most discordant and conflicting interest of property between them and to offer a bounty or temptation to the wife to seek encroachment on her husband's property, which would not only be at war with domestic peace, but deprive her, probably, of those testamentary dispositions by her husband in her favor which he would otherwise be likely to make."

The court of Chancery in New Jersey in the case of *Von Laszewski v. Von Laszewski*[5] in keeping with the general trend of the majority, held:

> "Neither at law nor in equity can an action be maintained by a wife against her husband for personal injuries. In equity a bill filed by a wife against her husband may be maintained for the protection or restoration of her separate estate, but aside from certain relief in matrimonial causes based on fraud or want of assent in the matrimonial contract, neither in England nor in this country, except by statute, has the right of a married woman to maintain an action against her husband, either at law or in equity, been extended to the protection of personal as distinguished from property rights.

5. 99 N.J.Eq. 25, 133 Atl. Rep. 179 (Chan. 1926).

> "As to our Married Woman's Act, it is sufficient to say that in the absence of a clear manifestation of legislative intent to effect so radical a change in our longest rules in this respect, that legislative purpose should not be declared by implication."

After much agitation and a growing tide of dissents among the courts of the several states, the courts of Connecticut first broke the ties of the common law which had up to that time become firmly entrenched in our law. In *Brown v. Brown,*[6] the Supreme Court of Errors of Connecticut boldly set forth:

> "So long as there remains to the parties domestic tranquility, while a remnant is left of that affection and respect without which there cannot have been a true marriage such action (a suit between a husband and wife) would be impossible. When the purposes of the marriage relation have wholly failed by reason of the misconduct of one or both of the parties, there is no reason why the husband or wife should not have the same remedies for injuries inflicted on the other spouse which Courts give them against other persons. No greater public convenience and scandal can thus arise, than would arise if they were left to answer one assault with another and one slander with another slander until the public peace is broken and the criminal law invoked against them."

For almost six years, the courts of Connecticut stood alone in their struggle against the inconsistency of the majority holding. But in 1920 the Courts of North Carolina in the case of *Crowell v. Crowell*[7] joined the ranks of the minority by holding:

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6. 88 Conn. 42, 89 Atl. Rep. 889 (1914).
7. 180 N. C. 715, 105 S. E. 206 (1920).

> "Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability on the ground that he vowed at the altar to love, cherish and protect her. We have progressed that far in civilization and justice. Never again will the sun go back ten degrees on the dial of Ahaz. (Isaiah 38:8)."

And so we find the law, dangling between the entrenched force of conservatism and the rapidly growing forces of liberalism, demonstrating the need for a more objective solution to the problem, perhaps by the passage of uniform laws which would in unequivocal terms either grant[8] or deny[9] the demands of married women for complete emancipation by absolute freedom with respect to suits for torts to their persons.

II.

Historical Background of the Common Law Unity

The common law tenet under which the husband and wife were, on marriage, merged into a single unity in the eyes of the law has persisted for many decades as the basis of that particular phase of the law of domestic relations. This principle, however, does not represent the novel creation of the common law, but rather a step in the gradual development of the law of our civilization and finds ample basis in the history of time. Although its predecessors may have been more strict and at times even brutal in their concepts of the relationship between the spouses, yet with the passing of time and the gradual rise of

8. See Mississippi Code 1930 VI, c. 36, p. 949, sec. 1941; South Carolina Code of Laws 1932 V, p. 1, tit. 5, ch. 14, sec. 400.

9. See Massachusetts General Laws 1932,VII, tit. III, ch. 209, p. 2639, sec. 6; Pennsylvania Statutes Annotated, tit. 48 1930, ch 3, sec. 111.

civilization, one can perceive a slow change and tempering of the law in this respect. A brief glance over the pages of history will bring to light a number of more or less definite steps on which can be traced the rise of this concept of the common law.

We may look first at tribal laws that governed the early peoples that flourished in the old world, years before the promulgation of the Code of Moses and the Hebrew Jurisprudence and which are represented to us by the Code of Hammurabi,[10] the first written code of laws of which we have any record and which date back to about 2250 B.C.[11] Throughout that section of the code that deals with the domestic relationship there is an unquestionable tendency to assert the domination and ascendancy of the husband. For example, a husband who incurred a debt might hire out or sell his wife or child to pay it off;[12] he might if he so desired turn his wife loose from the bonds of matrimony,[13] although the converse was not true.[14] Even the every-

10. Hammurabi was the sixth king of the first Babylonian Dynasty.

11. This document carries us back to antiquity, to that which was once regarded as prehistoric times; to a period long antedating the promulgation of the laws of Moses. The stele, or stone, on which the laws were written contained some 282 laws of which thirty-five were erased leaving a total of 247 laws most of which have been correctly interpreted, without a doubt.

12. The Hammurabi Code—W. W. Davis—p. 57, par. 117. "If a man incur a debt and sell his wife, son or daughter for money, or bind them out to forced labor, three years shall they work in the house of their taskmaster, in the fourth year they shall be set free."

13. *Ibid*, p. 64, par. 137. "If a man have made up his mind to separate himself from a concubine who has born him children, or from his wife who has born him children, then he shall give back to that woman her dowry, and the usufruct of the field, garden, and property, so that she may bring up her children; when she shall have brought them up—she may marry the man of her choice."

P. 65, par. 138. "If a man put away his wife who has not born him children, he must give her the amount of the purchase money and the dowry which she brought from the house of her father; then he may put her away."

14. *Ibid.*, p. 66, par. 141. "If a man's wife living in his house, has made up her mind to leave that house and through extravagance run into debt, have wasted her house and neglected her husband, one may proceed judicially against her; if the husband consent to her divorce, then he may let her go her way. He shall not give her anything for her divorce. If her husband do not consent to

day conduct of the wife was regulated with an eye toward the well-being and respect of the husband.[15]

It must not be assumed however that this code had a direct bearing on the common law, since it was first brought to light and to the attention of civilization at the beginning of this century,[16] but, from the parallelisms and similarities that are evident between it and the Hebrew law, we can reach an almost unquestionable conclusion that the influence of this code of law on later jurisprudence was profound.

Then the Hebrew concept of the family as expounded by the Old Testament and the Laws of Moses has always placed the male at the head of the parental union. This may be appreciated from the fact that at the death of the father the eldest son and not the mother became the heir and sole head of the family—stepping into the shoes of the father. Whether this concept developed because of the belief of the race in monogamy, or from the circumstances in which the Hebrew people lived, surrounded by hostile tribes, causing the wife to look to her husband, the stronger member of the family for protection, or whether from the belief that the woman's only function was to be a domestic, or an inheritance from preceding civilizations, is a matter of conjecture. The fact is that the belief in the unity of the family that manifested itself in the domination of the husband has existed through these thousands of years and still persists among those peoples and has undoubtedly left its imprint on the common law attitude towards the marital relationship.

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her divorce and take another wife, the former wife shall remain in the house as a servant."

15. *Ibid.*, p. 66, par. 143. "If she be not frugal, if she gad about, is extravagant in the house, belittle her husband, they shall throw that woman into the water."

P. 63, par. 132. "If the finger have been pointed against a man's wife (if she have been suspected) but she have not been found lying with another man, she shall plunge into the river for her husband's (satisfaction)."

16. The early part of December 1901 and January 1902.

Under the Roman Law concept of the pater familias, the father was the legal and social unit[17] of the state. The head of a Roman family exercised supreme authority over his wife, his children, his children's children, and his slaves.[18] The head of the Roman family was all in all. He did not so much represent as absorb in himself the subordinate members of the family. He alone was *sui juris,*[19] i.e., had an independant will; all others were *alieni juris,* their wills were not independent, but were only expressed through their chief.[20] The *pater familias,* the head of the family was said to have the other members of the family in his power[21] and the power (the patria potestas) was the foundation of all that peculiarly characterized the Roman family. So the wife, who was in the power of the husband,[22] like all who were in the power of another could not hold or acquire property in her own name; could not make a will, for she had no property to dispose of and could not bring an action, for nothing was or could be owing to her. Though changed and modified, the *patria potestas* remained substantially a real power and was always treated as a characteristic Roman institution.[23]

Perhaps too, we may mention briefly the autocratic family government which was the first of all forms of government and

17. Institutes lib. I tit. VIII, par. 1, p. 99.

18. Institutes of Justinian, Sandars, p. 30, par. 40.

19. Roman Law, Radin, p. 106. "The members of the community who alone possessed iura in the fullest degree was the paterfamilias. He may be roughly defined as a free born adult male, whose father was dead. He was generally married, indeed if he was not, he did not, after the time of Augustus and up to Constantine, enjoy the normal iura of a paterfamilias. *It is of such a person that the legal propositions are regularly made at Roman law.*"

20. *Ibid.,* p. 31.

21. Bryce, Studies in History and Jurisprudence, 789, 791. "This power in the very early Roman law was carried to the extreme in respect to the relationship between husband and wife. For, under the hand form of marriage, the husband could, surrounded by a council of relatives, pronounce even the death sentence on his wife."

22. *Ibid.,* p. 107. "The paterfamilias enjoyed a power which was called manus when applied to his wife."

23. *Ibid.,* p. 108, par. 2.

which held that the family was the basis of the state. So the unity and preservation of the family was deemed of greatest importance and the father, the strongest member of the family and the one to whom the rest would flock for protection in time of danger, was appointed as head and given the power and in return was made responsible for the maintenance and conduct of his wife and family.

It must not be assumed that these are the only forces that had an influence on the common law concept. Undoubtedly each intervening civilzation left its mark on the next succeeding one. However, these discussed herein represent the milestones in the development of our present civilization and for that reason and to avoid a cumbersome historical discussion they were selected to portray briefly and act as a general guide for an understanding of, the foundations upon which the common law concept of the unity of husband and wife had probably been built.

III.

Common Law Status

Under the common law, marriage had the effect of blending the individuality of the wife with that of the husband, creating a single indivisible legal unity[24] both with regard to the wife's[25] civil as well as her non matrimonial rights and duties,[26] both in regard to the outside world and in regard to their relations *inter*

24. Ceruti v. Simone, 13 N.J.Misc. 466, 179 Atl. 257 (S. Ct. 1935). "Under the common law a husband and wife were deemed one person and the wife's legal identity was suspended or merged in that of her husband during the marriage relation."

25. Civil as distinguished from criminal responsibility for even at common law a wife's indivdual status before the criminal courts remained unchanged except where the crime was committed by the express or implied coercion of her busband. Goldstein v. Goldstein, 86 N.J.Eq. 351, 98 Atl. 835 (Chan. 1916), *rev'd*, 87 E. 87 N.J.Eq. 601, 101 Atl. 247 (E. & A. 1917).

se, leaving the wife almost a chattel in the hands of her husband. As for example, the husband was entitled to the possession of his wife's realty during their joint lives with remainder to the husband for life if he survived the wife and there was a child of the marriage[27] and a further remainder to the heirs of the wife in fee simple. So too the wife's personal property in possession at the time of marriage in her own right, such as money, chattels, and movables, vested immediately and absolutely in her husband.[28] The same was true as to rents and profits from the wife's lands.[29]

The courts therefore did not secure any interest of or enforce any duty of the members of a family against the world without the intervention of the father and husband[30] and so long as there was no open disturbance,[31] the courts left the adjustment of the independent interests of the members of a family, between themselves, to the husband, with the hope that he

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26. Pound, *On Domestic Relations,* 4 MICH. L. R. 176. "As distinguished from those rights and duties which may be regarded as purposes of the marriage contract such as the right to love and affection of the other spouse."

27. Dayton v. Dusenberg, 23 N.J.Eq. 110, (Ch. 1874); *In re* Riva, 83 N.J.Eq. 200, 90 Atl. 669 (Ch. 1914), abolished by P.L. 1852, p. 407, 3 C.S. 1909-10, p. 3226, par. 2; Vreeland v. Schoonmaker, 11 N.J.Eq. 12 (Prerog. 1863); Winslow v. Crocker, 17 Me. 29 (1840).

28. Jones v. Davenport, 44 N.J.Eq. 33, 13 Atl. 652 (Ch. 1867); Vreeland v. Schoonmaker, *supra* note 27; Skillman v. Skillman, 13 N.J.Eq. 403 (Chan. 1861), *aff'd,* 15 N.J.Eq. 478 (E. & A. 1863); Smith v. Vreeland, 16 N.J.Eq. 198 (Ch. 1863); Winslow v. Crocker, *supra* note 27; Jordan v. Jordan, 52 Me. 32 (1864); Morgan v. Thanes Bank, 14 Conn. 99 (1840).

29. Chancey v. Strong, 2 Post. 369 (Conn. 1796); Hoyt v. Parks, 39 Conn. 357 (1872).

30. The wife had to join to her, her husband as party plaintiff or defendant. Abol. Rev. 1877, p. 638, 3 C.S. 3235, 6 p. 11, 12a; Bristol v. Sherry, 64 N.J.Eq. 624, 54 Atl. 135 (Chan. 1903).

31. The husband for a long time was permitted to inflict moderate chastisement upon his wife. Matter of Cochrane, 8 Dowl Pr. 630 (1840).

1 Black Comm. 444. This reluctance to interfere with domestic relations and difficulties completely disappears as to other than civil proceedings with Queen v. Jackson, 1 Q.B. 671, 79 (1891).

would be restrained within proper limits by the opinion of the community.[32]

To further prevent any divisions or separations in the family and any clashing interests between husband and wife, necessitated by the belief in the family as the basis of the state and the firm belief in the indivisibility of the unity[33] the common law disqualified the wife during coverture from any business interests and from subjecting her personal estate to the claims of creditors. Although a married woman could own property in fee, her husband had an estate in it during coverture, and could use and enjoy it, its rent and profits.[34] Her chattels became by legal operation her husbands. She could not contract,[35] and her executory undertakings were void. She could not convey her fee in real property except by joining her husband with her,[36] so the

32. 38 H. L. REV. 383. Liability of one Spouse to the other for Personal Torts under the Married Woman's Acts. Note 5. "This effect of the social interest in the family as a unit to obliterate the legal identity of dependants is shown in cases denying an infant an action for an injury inflicted by its parents. Hewlette v. Geo., 68 Miss. 703, 9 S. 885; McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1902); Roller v. Roller, 37 Wash. 242, 72 Pac. 788 (1905); Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908), and Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).

These cases may be justified even today by the strong social interest in allowing parents jurisdiction over training of child, hence the right to unquestioning obedience. But even here the court ventures to adjudicate the question of reasonableness. Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903), 3 Ed. VII, c. 45, par. 3, 5, c. 67, par. 18, 21; Commonwealth v. Wormser, 260 Pa. St. 44, 103 Atl. 300 (1918).

33. Ruling Case Law P. S., p. 3491. "The common law freedom of husband from liability to wife for a tortous or negligent injury to her person does not exist merely on lack of remedy, the disability of one spouse to sue the other ones out of the very nature of the relationship and the incapacity to sue is but an incident of it."

34. Young v. Paul, 10 N.J.Eq. 401 (E. & A. 1855).

35. Abolished 3 C.S. 3226, par. 5, Rev. 1877, p. 637, amend. P. L. 1895, p. 821.

36. 3 C. S. 3238, par. 16. Hopper v. Callahan, 78 Md. 529, 28 Atl. 385; Moore v. Rake, 26 N.J.L. 574 (E. & A. 1857); Phelps v. Morrison, 25 N.J.Eq. 538 (E. & A. 1874); Perrine v. Perrine, 11 N.J.Eq. 142 (Chan. 1856); Dodge v. Ayerigy, 12 N.J.Eq. 82 (Chan. 1858); Phelps v. Morrison, 24 N.J.Eq. 195 (Chan. 1873); Rake v. Lawshee, 24 N.J.L. 613 (S. Ct. 1854); Vreeland v.

husband and wife could not convey to each other or contract with each other.[38]

On the other hand the husband had the right to select the domicile to which his wife was obliged to go; he was entitled to his wife's services and earnings whether performed at home or elsewhere, for him or anyone else[40] and he had for a long time the right to chastise his wife, as was evidenced by Blackstone in his Commentaries:[41]

> "The husband had a right to moderately chastise his wife and the courts never went behind the domestic curtains and scrutinized too nicely every family disclosure even though amounting to an assault."

And by the Mississippi Court in *Bradley v. State*,[42]

> "A husband should still be permitted to exercise the right to moderately chastise his wife in cases of great

Ryno, 26 N.J.Eq. 110 (Chan. 1872); Belford v. Crane, 16 N.J.Eq. 265 (Chan. 1863); Pentz v. Simonsen, 13 N.J.Eq. 232 (Chan. 1861); Naylor v. Field, 29 N.J.L. 287 (S. Ct. 1861).

37. Vought Ex. v. Vought, 50 N.J.Eq. 177, 27 Atl. 489 (Ch. 1884).

38. Lester v. Lester, 86 N.J.Eq. 30, 97 Atl. 170 (Ch. 1916).

39. The husband has a right to bona fide change his domicile. Heck v. Heck, 68 Ky. (5 Bish.) 670 (1869); Cutler v. Cutler, 2 Brewst. 511 (Pa. 1868); Hair v. Hair, 10 Rich. Eq. 163 (S. C. 1858); Boyce v. Boyce, 24 N.J.Eq. 588 (E. & A. 1874); Boyce v. Boyce, 23 N.J.Eq. 337 (Ch. 1873); Hunt v. Hunt, 29 N.J.Eq. 96 (Ch. 1878); Carpino v. Carpino, 2 N.J.Misc. 1121, 148 Atl. 615.

40. Prab v. Taylor, Cro. Eliz. 61 (Juv. & Dom. Rel. Ct. 1929) (1857); Brashford v. Buckingham, Cro. Jac. 77 (1606); Buckley v. Collier, 1 Salk. 144 (1701); Skillman v. Skillman, 13 N.J.Eq. 403 (Ch. 1861), *aff'd*, 15 N.J.Eq. 428 (E. & A. 1863); Tresch v. Wirtz, 34 N.J.Eq. 124 (Ch. 1881); Belford v. Crane, 16 N.J.Eq. 265 (Ch. 1863); Cramer v. Bedford, 17 N.J.Eq. 367 (Ch. 1866); May v. West Jersey & S. R. Co., 62 N.J.L. 63, 42 Atl. 163 (S. A. 1898); abolished 3 C.S. 3225, par. 4, Rev. 877, p. 637.

41. The right of a husband to chastise his wife has now ceased to be the law. Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914); State v. Buckley, 2 Harr. 552 (Del. 1838).

42. 1 Miss. (Walk.) 156 (1824).

emergency without subjecting himself to vexatious prosecutions for assault and battery resulting in discredit and shame of all parties concerned."

And in return for all these rights the husband had the duty to support, protect and maintain his wife and family.[43] This duty was clearly set out in the case of *Rea v. Durken,*[44] in which the court of Illinois held:

> "A husband, as head of the house has undoubted right to regulate his household according to his own wishes except that he may not so deny his wife the barest necessities as to make her a public charge. The duty of furnishing the wife with all articles necessary and suitable to his degree and condition of life falls on the husband and if he disregards this duty the wife may procure them of whom she pleases and her husband will be liable."[45]

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43. State v. Kelly, 100 Conn. 727, 125 Atl. 95 (1924); State v. Shays, 1 W. W. Harr. 148, 111 Atl. 909 (Del. 1920); McCoddin v. McCoddin, 116 Md. 567, 82 Atl. 554; Irwin v. Irwin, 88 N.J.Eq. 139, 102 Atl. 440 (Ch. 1917), *aff'd*, 88 N.J.Eq. 596, 103 Atl. 1052); Sobel v. Sobel, 99 N.J.Eq. 376, 132 Atl. 603 (E. & A. 1925); Miller v. Miller, 1 N.J.Eq. 386 (Ch. 1831); Furth v. Furth, 39 Atl. 128 (Ch. 1898); Bates v. Bates, 2 N.J.Misc. Rep. 400 (Chan. 1924); Van Osten v. Van Osten, 2 N.J. Misc. Rep. 897 (Chan. 1924); Parker v. Parker, 2 N.J. Misc. Rep. 1052 (Ch. 1924); *In re* Kivots Est., 256 Pa. 30, 100 Atl. 523 (1917); *In re* Moorehead's Est., 289 Pa. 542, 137 Atl. 802 (1922).

McCurdy, Cases on Persons and the Domestic Relation (1927) p. 709-735. This rule of support slightly modified in New York.

2 Kent Comm. 188. "As the husband is the guardian of the wife and is bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints on her liberty, if her conduct be such as to require it unless he renounces that control by articles of separation or it be taken away from him by a qualified divorce."

44. 55 Ill. 503.

45. Bergh v. Warren, 47 Minn. 250, 50 N.W. 77. "Necessaries in the legal sense as applied to a wife is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility or even ornament as are suitable to maintain the wife according to the estate and rank of the husband." In accord, Raynes v. Bennett, 114 Mass. 424.

The husband further was jointly liable for the voluntary torts of his wife if committed in his presence[46] or liable alone if committed through his coercion[47] except those torts that arose out of her contracts,[48] and as to crimes, if committed by his wife in his presence, with the exception of homicide, or near enough to be under his immediate control and influence, he was responsible and she excused.[49] Even torts of a femme sole as executrix or administratrix were those of her husband when she married.[50]

As to suits between the spouses, this unity was carried to the extreme,[51] even forbidding suits between husband and wife for anti-nuptial injuries.[52] The wife could not sue in her own

46. Abolished L. 1929, c. 120, par. 1, p. 205, R.S. 1937, 37:2-8. Hildreth v. Camp, 41 N.J.L. 306 (S. Ct. 1879); O'Brien v. Walsh, 63 N.J.L. 350, 43 Atl. 664 (E. & A. 1899); Emmons v. Stevans, 73 N.J.L. 349, 64 Atl. 1014 (S. Ct. 1906).

47. Since the passage of the Married Woman's Act a husband is not liable for the torts of his wife growing out of the conduct of her own business or from the management of her separate property. Harrington v. Jogmetty, 83 N.J.L. 548, 83 Atl. 880 (E. & A. 1912); Majowicz v. Magda, 2 N.J. Misc. Rep. 61 (Cir Ct. 1924). Husband is not responsible for torts of wife unless they occur during prosecution of joint enterprise; then he is jointly liable with her. Mack v. Mackiewicz, 9 N.J.Misc. 1219, 157 Atl. 113.

48. D. Wolf & Co. v. Lozier, 68 N.J.L. 103, 52 Atl. 303 (S. Ct. 1902).

49. This is a rebuttal presumption. State v. Grossman, 94 N.J.L. 301, 110 Atl. 711 (S. C. 1920), *aff'd*, 95 N.J.L. 497, 112 Atl. 892 (E. & A. 1921); State v. Martini, 80 N.J.L. 685, 78 Atl. 12 (S. C. 1910).

50. Crane v. Van Duyne, 9 N.J.Eq. 259 (Ch. 1853); see Scott v. Gamble, 9 N.J.Eq. 218 (Chan. 1852); Wood v. Chetwood, 27 N.J.Eq. 311 (Chan. 1876). Where cause of action arose prior to corrective statute, husband held liable for punitive damages for wife's tort in instituting criminal prosecution against another. C. S. Sup., par. 124, 20. Mowell v. Von Mackzisker, 109 N.J.L. 241, 160 Atl. 680 (E. & A. 1932).

51. Hobbs v. Hobbs, 70 Me. 381 (1879). "Neither party to a marriage contract can sue the other at common law while the marriage relation exists." The common law even went so far as to hold that a married woman could not be guilty of larceny of her husband's property or of arson for burning his house. Drum v. Drum, 69 N.J L. 557, 55 Atl. 86 (S. C. 1903).

52. Henneger v. Lomas, 44 N.E. 462, 145 Ind. 287 (1896). "The common law rule that marriage extinguished all rights of action in favor of the wife

name,[53] for, an injury to a wife was in essence an injury to the husband; as it deprived him of some interest such as services and earnings and increased the burden of his duties as to support. There could be no suit between them for libel and slander,[54] there could be no action for personal injury arising out of a tort,[55] there could be no action for assault and battery,[56] no action in assumpsit, on account annexed, or for replevin.[57] Even after divorce, which gave the wife full capacity to sue, could she hold her husband for a tort committed during coverture[58] or for support.[59]

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against her husband for antenuptial injuries by her husband to her person or character was founded on the principal of unity of husband and wife and not on the theory that the wife was under legal disability."

53. Barnett v. Harsberger, 105 Ind. 410, 5 N.E. 718 (1886). "While statutes remove as a general rule the disabilities of a married woman, the common law rule that a husband and wife are one still prevails." In accord. Lindsay v. Archibald, 65 Mo. App. 117 (1896); Cooper v. Whitney, 3 Hill. 95 (N.Y. 1842); *In re* Bamberry's Estate, 156 Pa. 628, 27 Atl. 405 (1893); Freitag v. Bersano, 123 N.J.Eq. 515, 198 Atl. 845 (Chan. 1938); abolished 3 C. S. p. 3235-3237, sec. III.

54. State v. Edens, 96 N.C. 693; Slayton v. State, 46 Tex. Crim. 205, 78 S.W. 1071.

55. David v. David, 161 Md. 432, 157 Atl. 755 (1932); Gray v. Gray, 87 N.H. 82, 174 Atl. 508 (1934); Metzler v. Metzler, 8 N.J. Misc. Rep. 821, 151 Atl. 847 (C. C. 1930).

56. *Supra* note 24 v. 13, p. 1064. Abbe v. Abbe, 48 N.Y.S. 25, 22 App. Div. 483 (1897). "A wife cannot recover from her husband damages for an assault and battery committed by him on her." Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27 (1877). "A wife has no cause of action against her husband for an assault or a false imprisonment committed on her, nor against persons who co-operated with him in it."

57. Hobbs v. Hobbs cited *supra* note 51. Other actions barred. Kujek v. Goldmann, 9 Misc. Rep. 34, 29 N.Y.S. 294 (1894). "A husband could not sue his wife to recover damages for deceit by which he was induced to marry her."

58. Main v. Main, 46 Ill. App. 106 (1892). "The dissolution of the marriage by divorce does not enable the wife to sue her husband for a tort committed on her during coverture."

59. Magowin v. Magowin, 57 N.J.Eq. 195, 39 Atl. 364 (1898), *rev'd*, 42 Atl. 330, 57 N.J.Eq. 322 (E. & A. 1899).

It must not be assumed that all acts between husband and wife were lawful, for some constituted crimes and some grounds for divorce or legal separation.[61] And further even the common law permitted the spouses to sue each other in a representative capacity as executor or administrator but then only in the courts of equity.[62]

Isolated examples of suits between husband and wife may be found but they are decidedly in the minority. For example a husband could sue his wife for a conversion of his property;[63] a wife was permitted to sue her husband for taking her money without her consent;[64] a wife could sue her husband for fraud with reference to property left in trust for her,[65] for deceit in inducing her to marry him,[66] and a husband was permitted to sue his wife in replevin.[67] Although these cases are individual and are rareties in the general prosecution of the law, they nevertheless will show that the common law was not so abso-

60. Lemon v. Simmons, 57 L.J.Q.B. 260 (1888); Rex v. Harrison, 1 Leach 47 (1756); Bradley v. State, 1 Miss. (Walk.) 156 (1790).

61. Barrere v. Barrere, 4 Johns. Ch. 187 (N.Y. 1819); Waring v. Waring, 2 Phill. 132 (1813); Evans v. Evans, 1 Hagg. Conn. 35 (1790).

62. Freitag v. Bersano, *supra* note 53.

63. Mason v. Mason, 66 Hun. 386, 21 N.Y.S. 306 (1892).

64. Whitney v. Whitney, 49 Barb. 19 (N.Y. 1867). "A complaint of a wife that her husband without her consent has taken money belonging to her and refused to surrender the same on demand sets forth a good cause of action."

65. Dewall v. Covenhoven, 5 Paige 581 (N.Y. 1836). "Where a husband and wife instituted an action to recover property which it is alleged the defendant held in trust for the wife and the defendant pleaded that subsequent to the commencement of the suit the husband had given a release discharging the defendant, if such release was a fraud the wife may sue her husband and trustee by her next friend."

66. Blossom v. Barnett, 37 N.Y. 434. "If by fraud and deceit a man who is incompetent to marry induced a woman to marry and cohabit with him, he is liable to her for consequent injuries in an action for deceit, if she acted in good faith, without procuring a formal annulment of second marriage." In accord. Morill v. Palmer, 68 Vt. 1; Doe v. Horn, 7 Ind. 363.

67. Berdwell v. Parkhurst, 19 Hun. 358 (N.Y. 1879). "Where a wife claims as her own and forcibly carries off property of her husband, he may maintain an action at law against her to recover it."

lutely rigid and inflexible as might appear at first blush and that at least in extreme cases the ends of justice would be served even at the expense of modifying the old established rule.

Recognition of the social implications and of the injustices to women under the common law came at a relatively early period.[68] The courts, especially the courts of Chancery, began to grant relief to women with reference, in particular, to property matters and in relatively recent times the legislatures of the several states began to supplant the activities of the courts in this respect by suitable legislation. Although the change was slow and measured there are several distinct phases or steps in the process of the alleviation of the stringent common law regulation that may be discerned and discussed. Although complete emancipation is not yet a reality, nevertheless, all indications are that it will be fully realized in the comparatively near future.

The first step in the process of emancipation of the woman came in relation to the husband's right of chastisement. At first the change from the common law right took the form of making the husband criminally responsible for unreasonable use of that right,[69] as may be gleaned from the decision of the court of Massachusetts in *Commonwealth v. McAfee.*[70]

> "If a man inflict excessive punishment, he is guilty of assault and battery and in the case of death, may be held guilty of manslaughter or murder."[70a]

68. 3 Black Comm. 87. "Blackstone recognized the wrongs and injustices to the wives but left it to the ecclesiastical courts to settle."

69. Bradley v. State, 1 Miss. 156 (1824).

70. Commonwealth v. McAfee, 108 Mass. 458, 11 Atl. 383. "In this case the court went so far as to say that a husband was not justified in beating his wife even if she was drunk and insolent."

71. State v. Buckley, 46 Har. 552 (Del. 1838); Fulgham v. State, 46 Ala. 143 (1871); State v. Oliver, 70 N.C. 60 (1874); Gorman v. State, 42 Tex. 221 (1875); Owen v. State, 7 Tex. App. 329 (1879); Lawson v. State, 15 Geo. 578, 41 S.E. 993 (1902).

And then by a series of decisions this right was completely abolished,[71] the courts going so far as to say:

> "Now technically the husband is liable criminally for every slight aassault on his wife and her person is as sacred from his violence as it is from any one else."[72]

Today the right of chastisement has completely disappeared and the spouses, are, in the eyes of the criminal law, separate and independent entities for the purposes of their acts, as if they were unmarried.

The next step came by way of the courts of Chancery, who, theoretically, always considered the husband and wife as distinct and separate persons. Through the operation of these courts in the early part of the eighteenth century, the wife gained protection for her separate estate[73] and could sue her husband or he could sue her on such matters:

> "Whenever the interests of husband and wife are conflicting, the wife is allowed to bring suit in chancery against her husband and the husband against his wife as if they were unmarried."[74]

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72. Mathewson v. Mathewson, 79 Conn. 23, 63 Atl. 285. In accord: Abbott v. Abbott, 67 Me. 304 (1877); Brown v. Brown, 88 Conn. 42; Poor v. Poor, 8 N.H. 307; State v. Dowell, 106 N.C. 722, 11 S.E. 525; Commonwealth v. McAfee, cited *supra* note 70; Giles v. Giles, 181 N.E. 176 (Mass. 1932). "Equity has jurisdiction over suits between husband and wife to secure wife's separate property rights, prevent fraud, relieve from coercion, enforce trusts, and establish other conflicting property rights."

73. "At the common law wife and husband were one person but in equity her independence was acknowledged and her power to hold her separate property recognized." Cartwright v. Hollis, 5 Tex. 152 (1849); Wood v. Wheeler, 7 Tex. 13 (1851). These decisions put Texas in line with Georgia. The case of Wilson v. Wilson, 118 S. 215 (Fla.) added another state to the growing number holding that "Equity recognizes the duality of husband and wife."

74. Porter v. Bank of Rutland, 19 Vt. 410 (1847). In accord. Snyder v.

The New Jersey court expressed its agreement with this doctrine in the case of *Ward v. McLellan*,[75] in which the court held:

> "Equity alone can give remedy on a contract between a husband and wife, whether redress is sought by the original party or by or against the legal representative of one or both of the original parties."

Equity further gave the wife the right and capacity to transfer her property and to make contracts as incidents of ownership, even with her husband.[76] In fact, any grievance between the spouses where there existed no remedy at the law could be aired before the courts of conscience—The Chancery.[77] It was the influence of these court decisions that led then to the next step. The Emancipation Acts, and lastly to the Married Women's Acts of the nineteenth century. These acts endeavored to secure to the married woman that which only the equity courts had recognized—a right to her separate estate—and to make it a legal estate; permitted her to contract, and in some cases granted complete emancipation by securing her personality with reference to others outside of her family, and, with reference to her husband permitted her to sue and be sued as if sole.

Although modeled after the holdings of the courts of equity the legislatures went much farther than their predecessors, in their legislation.

In general these statutes are worded the same. Although the greater number of them do not expressly or by necessary

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Snyder, 5 Civ. Proc. R. 267 (N.Y. 1884); McNail v. M. R. Co., 3 Tenn. Cas. 580 (1875).

75. 117 N.J.Eq. 475, 176 Atl. Rep. 571 (E. & A. 1935).

76. Bishop v. Bourgeois, 58 N.J.Eq. 417, 43 Atl. 655 (1899). "Equity is the proper forum in which to enforce a contract between husband and wife."

77. Drunker v. Drunker, 167 N.E. 638 (Mass. 1929); Higgins v. Higgins, 14 Abb. N.C. 13 (N.Y. 1883); Abramsky v. Abramsky, 261 Mo. 117, 168 S.W. 1178; Peters v. Peters, 169 Atl. 298 (Del. 1934).

implication abolish the common law legal unity, yet frequently they make such radical and extensive changes that the unity idea can no longer be made the touchstone of married women's rights or capacities. Yet on the whole, they provide that all property held as separate estate and all property real or personal owned at the time of marriage by women married after the passage of the acts and any property real or personal acquired by married women during coverture after the passage of the acts shall remain their sole and separate property, free from control of their husband and not liable for their debts.[78]

These statutes were primarily established to give women property rights, and married women now have a recognized right to enforce these property rights against their husbands at law[79] or in equity.[80] Under these statutes married women have been given relief in actions to enjoin interference with property, to keep a husband out of his wife's house, to recover property, to quiet titles, to relieve from fraud in transfer of title, to impose constructive trusts, in actions for waste, to recover rents, and in actions of partition, ejectment, forceable detainer, trespass, detinue, detention of goods, recovery of chattels, replevin and trover.[81]

The effect of these statutes was not, however, limited to property matters but was invoked in personal actions and it is in this respect that their application is of interest. For this purpose the various acts may be divided into seven divisions as follows:[82]

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78. McCurdy on Domestic Relations, p. 565. See N. J. statute, *supra* note 3.

79. Menier v. Menier, 4 Laws 421 (N.Y. 1871). For statutes, see *supra* note 3, *supra* notes 83, 84, 85, 86, 87, 88 and 89.

80. Howe v. Blandan, 21 Vt. 315 (1845); Matson v. Matson, 44 Metc. 262 (Ky. 1863); Smith v. Gorman, 41 Me. 405 (1856); Plotkin v. Plotkin, 2 W. W. Han. 455 (Del. 1924); Smith v. Smith, 133 Atl. 360 (N.J. 1926).

81. 43 H. L. R. 1038-1039.

82. *Ibid.*, p. 1043.

1. Those dealing with property and remaining silent as to remedy.[83]
2. Those that gave married women the right to sue and be sued only in respect to her separate property.[84]

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83. California Civil Code, par. 158, 62, 62, construed in Peters v. Peters, 136 Cal. 32, 103 Pac. 219 (1900); 1906 Mississippi Code, par. 2517, construed in Austin v. Austin, 100 So. 591 (Miss. 1924); Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898).

California Civil Code—1872 amended to 1927—Div. 1, Pt. 3, Title I, Ch. 3.

Sec. 162. Constitution 1849, art. XI, par. 14. All property of the wife owned by her before marriage and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without consent of her husband, convey her separate property.

Sec. 158. Either husband or wife may enter into any agreement or transaction with the other, or with any person, respecting property, which either might if unmarried; subject in transactions between themselves to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.

Michigan Compiled Laws, 1929, V 3, Ch. 254, p. 4654.

Sec. 13057. Real and personal estate of every female acquired before marriage, and all property, real and personal, which she may afterwards become entitled by gift, grant, inheritance, devise or in any other manner, shall be and remain the estate and property of such female and shall not be liable for the debts, obligations, and engagements of her husband and may be contracted, sold, transferred, mortgaged and conveyed, devised or bequeathed by her in the same manner and with the like effect as if she were unmarried. See also Revised Code Anzena 1928, par. 2174, p. 524. Arkansas Digest of Statutes, 1921, p. 95 and Constitution, 1874, art. 9, sec 7. Georgia Code, 1933, t. 53, c. 53, p. 1416, secs. 503, 505. Nebraska C. S., 1929, c. 42, art. 2, p. 1035, sec. 202. Idaho C. C., 1919, Civil Code, t. 36, c. 184, sec. 4657.

84. 1919 Iowa compiled code, par. 6601, 03, 17, 18, construed in Peters v. Peters, 42 Iowa 182 (1875).

Iowa Code, 1927, T. XXVIII, Ch. 470.

Sec. 10646. A married woman may own in her own name (right), real and personal property, acquired by descent, gift or purchase and manage, sell, and convey the same and dispose thereof by will, to the same extent and in the same manner that the husband can property belonging to him.

Sec. 10448. *Should husband or wife obtain control of property belonging to the other before or after the marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if she were unmarried.*

Delaware Revised Code, 1915, Ch. 87, T. 3052 (14 Del. Laws, ch. 550, par. 4).

Sec. 20. Any married woman may prosecute and defend suits at law or in

3. Those that expressly refuse suits betwen husband and wife.[85]

equity for the preservation and protecting of her property, as if unmarried, or may do it jointly with her husband, but he alone cannot maintain an action respecting his wife's property, and it shall be lawful for any married woman to make any and all manner of contracts necessary to be made with respect to her own property and suits may be maintained on such contracts as though the party making them was a femme sole.

Indiana Statutes Annotated, 1933, V 7, T. 38, ch. 1.

Sec. 101. All legal inabilities of married women to make contracts are hereby abolished, except as otherwise provided herein.

Sec. 102. A married woman may take, acquire and hold property, real or personal, by conveyance, gift, devise, or descent or by purchase, with her separate means or money, and the same together with all the rents, issues, income, and profits therefrom, shall be and remain her own separate property and under her control, the same as if she were unmaried. And she may in her own name, as if she were unmarried, at any time during the coverture, sell, barter, exchange, and convey her personal property; and she may also in like manner make any contract with reference to the same, but shall not enter into any executory contract to sell or convey or mortgage her real estate, nor shall she convey or mortgage the same, unless her husband join with her in such contract of conveyance or mortgage; Provided, however, that she shall be bound by an estoppal in pais like any other person.

Sec. 115. *A married woman may bring and maintain an action in her own name against any person or body corporate for damages for any injury to her person or reputation the same as if she were sole,* and the money recovered shall be her separate property and her husband in such case, shall not be liable for costs.

Florida Compiled General Laws, 1927, Div. 4, Title 2, ch. 1, art. 2, p. 1925.

Sec. 5870. *A married woman shall have the right to bring suits or actions for or concerning her real estate without joining her husband.*

Wisconsin Statute, 1929, Ch. 246.

Sec. 7. *Every married woman may sue in her own name and shall have all the remedies of an unmarried woman in regard to her separate property or business and to recover* the earnings secured to her and shall be liable to be sued in respect to her separate property or business and judgment may be rendered against her and be enforced against her and her separate property in all respects as if she were unmarried. *And any married woman may bring and maintain an action in her own name for any injury to her person or character the same as if she were sole.* She may also bring and maintain an action in her own name and for her own benefit for the alienation and loss of the affection of her husband. Any judgment recovered in any such action shall be the separate property and estate of such married woman. Nothing herein contained shall affect the right of the husband to maintain a separate action for any such injuries as are now provided by law.

4. **Those that refuse to permit a woman to sue or be sued by third persons alone in her own name for personal torts.**[86]
5. **Those letting married women sue alone for torts committed against her.**[87]

See also North Carolina Consolidated Statutes 1919, chap. 51, VI art., secs. 2507, 2513.

85. 1921 Massachusetts General Laws, c. 209, par. 6 "but this section shall not authorize suits between husband and wife." Smith v. Smith, 29 Pa. Dist. R. 10 (1919).

Pennsylvania Statutes Annotated, tit. 48, 1930, ch. 3.

Sec. 111. *Hereafter a married woman may sue and be sued civilly in all respects and in any form of action and with the same effect and results and consequences as an unmarried person; but she may not sue her husband except in a proceeding for divorce or in a proceeding to protect her separate property nor may he sue her except in a proceeding for divorce or in a proceeding to protect or recover his separate property* nor may he be arrested or imprisoned for her torts.

Massachusetts General Laws 1932, V II, tit. III, ch. 209, p. 2639.

Sec. 2. A married woman may make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole, except that she shall not be authorized to make contracts with her husband.

Sec. 6. *A married woman may sue and be sued in the same manner as if she were sole, but this section shall not authorize suits between husband and wife.*

86. Nevada Compiled Laws 1929, V. 2.

Sec. 3373. Either husband or wife may enter into any contract, engagement, or transaction with the other, or with any other person, respecting property, which either might enter into if unmarried, subject in transactions between themselves to the general rules which control actions of persons occupying relations of confidence and trust towards each other.

Sec.3379. *When a wife is living apart and separate from her husband she may sue and be sued alone.*

87. Strom v. Strom, 98 Min. 427, 107 N.W. 1047 (1906) interpreting 1894 Minnesota General Statutes, pa. 5530. *Contra,* Fiedeer v. Fiedeer, 420 Okla. 124, 140 Pac. 1022 (1914), interpreting 1910 Okla. Revised Laws, par. 3363.

Oklahoma Compiled Statutes 1921, V. 2, ch. 48.

Sec. 6619. *Women shall retain the same legal existence and legal personality after marriage and shall receive the same protection of all her rights as a woman which her husband does as a man; and for any injury sustained to her reputation, person or property, character or any natural right she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his name alone. Provided, that this* chapter shall not confer in the wife a right to vote or hold office

except as otherwise provided.

Minnesota General Statutes 1923, c. 72.

Sec. 8618. Every married woman is bound by her contract and is responsible for her torts and her property shall be liable for her debts to the same extent as if she were unmarried. She may make any contract which she could make if unmarried, and shall be bound thereby except that every conveyance and contract for the sale of her real estate shall be subject to and governed by the provisions of section 3335, Revised Laws 1905.

New York Consolidated Laws 1930, ch. 14, art. 4, p. 58 (Dom. Rel. Laws 1909)

Sec. 57. *A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation as if unmarried and she is liable for her wrongful and tortious acts.*

New Hampshire Public Laws 1926, ch. 288, p. 1174.

Sec. 2. *Every married woman shall have the same rights and remedies, and shall be subject to the same liabilities in relation to property held by her in her own right, as if she were unmarried, and may make contracts and sue and be sued, in all matters in law and in equity and upon any contract made by her, or for any wrong by her done, as if she were unmarried,* provided that authority given to make contracts shall not affect laws heretofore in force as to contracts between husband and wife, and provided also, that no contract or conveyance by a married woman as surety or guarantor for her husband, nor any undertaking by her for him or in his behalf shall be binding on her except a mortgage releasing her right of dower and homestead.

Alabama Civil Code 1923, Vol. 4.

Sec. 8264. All damages which the wife may be entitled to recover for injuries to her person or reputation are her separate property.

Sec. 8267. A wife has full legal capacity to contract as if she were sole except as otherwise provided by law.

Sec. 8268. *The wife must sue alone at law or in equity* upon all contracts made by her or with her, or for recovery of her separate property, or for injuries to such property, or for rents, income or profits or *for injuries to her person or reputation and* upon all contracts made by her, or engagements into which she enters and *for all torts committed by her she must be sued as if she were sole.*

Maryland Annotated Code 1924, art. 45, p. 1694.

Sec. 5. A married woman shall have the power to engage in any business and to contract, whether engaged in business or not and to sue upon their contracts *and also to sue for the recovery, security or protection of their property, and for torts committed against them, as fully as if they were unmarried;* contracts may also be made with them and they may also be sued separately on their contracts whether made before or during their marriage, and for wrongs committed by them independent of contract committed by them before or during marriage, as fully as if they were unmarried, and upon judgments recovered against them, execution may be issued as if they were unmarried, nor shall any husband be liable on contract made by his wife in her name nor for any tort

committed separately by her out of her presence, without his participation or sanction.

Colorado Complied Laws, 1921, Ch. XXV, p. 1499.

Sec. 5576, par. 1. The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, and proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person but her husband, including presents or gifts from her husband as jewelry, silver, table ware, watches, money, wearing apparel shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts. G.S. p. 2266, G.L. p. 1747, R.S. p. 454, P.S. 108 p. 4181.

Sec. 5577, par. 2. *Any woman may, while married, sue and be sued in all matters having relation to her property, person, or reputation,* in the same manner *as if she were sole.* G.S. p. 2268, G.L. p. 1749, R.S. p. 455.

District of Columbia, amended to 1924, Ch. XXXIII, p. 336.

Sec. 1155. Married women shall have power to engage in any business, and to contract, whether engaged in any business or not, *and to sue separately upon their* contracts and also to sue separately for the recovery, security, or protection of their property, *and for torts committed against them, as fully and freely as if they were unmarried.* Contracts may also be made with them and they may also be sued separately on their contracts, whether made before or during marriage, as fully as if unmarried, and upon judgments recovered against them execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract nor for any tort committed separately by her out of his presence without his participation or sanction. Provided, That no married woman shall have power to make any contract as surety or guarantor, or as accommodation drawer, exceptor, maker or indorser.

North Dakota Complied Laws, 1913, Civil Code, Ch. 7, p. 1060.

Sec. 4411. Either husband or wife may enter into any engagement or transaction with the other or with any other person respecting property which the other might if unmarried. *The wife after marriage has with respect to property, contracts, or torts the same capacity and rights and is subject to the same liabilities as before marriage, and in all actions by or against her she shall sue and be sued in her own name.*

South Dakota Revised Code, 1919, V. 1, Art. 5, Ch. 2.

Sec. 178. *A wife shall have and retain after marriage all civil and property rights of a single woman.* She may buy or sell, receive or convey or otherwise dispose of any real or personal property belonging to her or in which she may have an interest without joining the name of her husband except as otherwise provided in case of homestead *and for any injury to her reputation, person and property she may sue in her own name without joining her husband as party plaintiff and in like manner actions founded upon her separate contracts or torts relating to her individual property may be brought against her without joining her husband as party defendant.*

6. Those permitting suits by and against married women as if sole.[88]

88. Such provisions held only to affect adjective law but granting no substantive right.

Wyoming Revised Statutes, 1931, Ch. 69.

Sec. 103. *A woman, may, while married, sue and be sued in all matters having relation to her property, person, or reputation in the same manner as if she were sole.*

West Virginia Code, 1932, Ch. 48, Art. 3.

Sec. 4749. *A married woman may sue and be sued alone in any court of law or chancery in this state that may have jurisdiction of the subject matter, the same in all cases as if she were a single woman,* and her husband shall not be joined with her in any case, unless for reasons other than the marital relation it is proper or necessary, because of his interest or liability, to make him a party. In no case need a married woman, because of her being such prosecute or defend by a guardian or next friend.

Oregon Laws, 1920, V. 2, Ch. 2, Tit. LI.

Sec. 9759. *All laws which impose or recognize civil disabilities upon the wife which are not imposed or recognized as existing to the husband are hereby repealed;* provided that this act shall not confer on the wife the right to vote or hold office except as is otherwise provided by law and *for any unjust usurpation of her property or natural rights she shall have the same right to appeal in her own name alone to the courts of law or equity for redress that her husband has.*

Vermont Public Laws, 1933, Tit. 13, Ch. 135, p. 537.

Sec. 3074. A married woman may make contracts with any person except her husband and bind herself and her property in the same manner as if she were unmarried, *and sue and be sued as to all such contracts made by her,* either before or during coverture without her husband being joined in an action as plaintiff or defendant and execution may issue against her and be levied on her sole and separate goods, chattels and estate.

Virginia Code, 1930, V. 2, Ch. 207.

Sec. 5134. A married woman shall have the right to acquire hold, use, and control and dispose of property as if she were unmarried, and such power of use control and disposition shall apply to all property of a married woman that has been acquired by her since April 4, 1877, or shall be thereafter be acquired; provided, however, that her husband shall be entitled to curtesy in her real estate other than her equitable separate estate when the common law requisites therefor exist, and he shall not be deprived thereof by her sole act, but neither his right to curtesy nor his marital rights shall entitle him to the possession or use or of the rents, issues or profits of such real estate during the coverture, nor shall the property of the wife be subject to the rights or liabilities of the husband. A married woman may contract and be contracted with *sue and be sued in the same manner and with the same consequences as if she were unmarried,* whether the right or liability asserted by or against her shall have accrued heretofore or hereafter.

In all actions by a married woman to recover for a personal injury inflicted on her, she may recover the entire damage sustained notwithstanding the husband may be entitled to the benefit of her services about domestic affairs and no action for such service shall be maintained by the husband. A husband shall not be responsible for any liability, contract, or tort of his wife whether the contract or liability was incurred or the tort was committed before or after the marriage.

Washington Codes and Statutes, 1910, V. 2, Tit. XLII.

Sec. 5925. Every married woman shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of any property of every species and *to sue and be sued as if she were unmarried.*

Tennessee Code, 1932, Tit. 4, Ch. 1, Art. III.

Sec. 8460. *Married women are fully emancipated from any disability on account of coverture and the common law as to disabilities of married women and its effects on the rights of property of the wife is totally abrogated except* as set out in the next and subsequent section and *marriage shall not impose any disability or incapacity on a woman as to ownership acquisition or disposition of any property of any description or as to her capacity to make contracts or to do all acts in reference to property which she could lawfully do if she were not married.* But every woman now married or hereafter to be married shall have the same capacity to acquire, hold, manage, control, use, enjoy and dispose of all property, real or personal, in possession, and make any contract in reference to it and to bind herself personally *and to sue and be sued with all the rights and incidents thereof as if unmarried.*

Rhode Island General Laws, 1923, Tit. XXVII, Ch. 290.

Sec. 14. *In all actions, suits, and proceedings; whether at law or in equity by or against a married woman she shall sue and be sued alone.*

Illinois Revised Statutes, 1931, Chap. 68, p. 1592.

Sec. 1. *A married woman may in all cases sue and be sued without joining her husband with her, to the same extent as if she were unmarried,* and an attachment or judgment in such action may be enforced by or against her as if she were a single woman.

Sec. 6. Contracts may be made and liabilities incurred by a wife and the same enforced against her to the same extent and in the same manner as if she were unmarried.

Sec. 9. A married woman may own in her own right, real and personal property obtained by descent, gift, or purchase, and manage, sell, and convey the same to the same extent and in the same manner that the husband can property belonging to him.

Missouri Revised Statutes, 1929, V. 1, Art. 1, Ch. 20, p. 889.

Sec. 2998. *A married woman shall be deemed a femme sole so far as to enable her* to carry on and transact business on her own account, to contract and be contracted with, *to sue and be sued* and to enforce and have enforced against her property such judgments as may be rendered for or against her, *and may sue and be sued at law or in equity, with or without her husband being joined as a party.* Provided, a married woman may invoke all exemptions and homestead laws now

7. Those permitting suits between husband and wife [89]

in force for the protection of personal and real property owned by the head of the family, except in cases where the husband has claimed such exemption and homestead rights for the protection of his own property.

Montana Revised Codes, 1921, V. 2, Part II, Ch. 6, p. 35.

Sec. 5786. Either husband or wife may enter into any engagement or transaction with the other, or with any person respecting property, which either might, if unmarried, subject in all transactions between themselves to the general rules which control the actions of persons occupying confidential relations with each other, as defined in the provision of this code relative to trusts.

Sec. 5791. *Married woman in her own name may prosecute actions for injuries to her reputation, person, property and character or for the enforcement of any legal or equitable right and may in the like manner defend any action brought against her.*

Sec. 5809. *A married woman may sue and be sued in same manner as if sole.*

Kentucky Revised Statutes, 1930, Ch. 66, Art. 3.

Sec. 2128. A married woman may take, acquire and hold property, real or personal, by gift, devise, or descent, or by purchase and she may in her own name, as if she were unmarried, sell and dispose of her personal property. She may make contracts *and sue and be sued, as a single woman,* except that she cannot make any executory contract to sell or convey or mortgage her real estate unless her husband join in such contract, but she shall have the power and right to rent out her real estate and collect, receive, and recover in her own name the rents thereof and make a contract for the improvement thereof.

New Mexico Complied Statutes, 1929, Ch. 68, Art. 2, par. 68.

Sec. 201. Either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might if unmarried, subject in transactions between themselves to the general rules of common law which control actions of persons occupying confidential relations with each other.

Sec. 105. *A married woman shall sue and be sued as if she were unmarried.*

Kansas Revised Statutes, 1923, Ch. 23, Art. 2.

Sec. 202. A married woman while the marriage relation subsists may bargain, sell, and convey her real and personal property and enter into any contract with reference to same and in the same manner, to the same extent, and with like effect as a married man may with relation to his real and personal property.

Sec. 203. *A married woman may, while married, sue and be sued in the same manner as if she were sole and unmarried.*

See also Texas Rev. Civil Statutes, 1925, V. 1, T. 78, C. 3, sec. 4626; Utah Rev. Statutes, 1933, T. 40, C. 2, sec. 4.

89. South Carolina Code of Laws, 1932, V. 1, Pt. 1, Tit. 5, Ch. 14.

Sec. 400. *A married woman may sue and be sued as if she were unmarried.* Provided, that neither her husband nor his property shall be liable for any recovery against her in any such suit; but judgment may be executed against her sole

This division though comprehensive is too unwieldy, therefore we shall limit ourselves to the divisions of the statutes as set out in the case of *Brown v. Brown, supra.* Here it was held that the statutes are divided into two general classes:

> "Statutes leaving the foundation of the marriage status unchanged, merely providing exceptions to the necessary consequences of that statute in construing of which statute it may be held that such exceptions are limited by necessary import of the language." (This has been generally the holding of the majority of states.)
>
> "Statutes such as that of Connecticut that are held to change the foundation of the legal status of husband and wife—their legal identity." (This is the minority view.)

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and separate estate in the same manner as if she were sole. *When action is between herself and her husband she may likewise sue and be sued alone.*

Maine Revised Statutes, 1930, T. 5, Ch. 74, p. 1151.

Sec. 5. *She may prosecute and defend suits alone at law or in equity (against her husband also in property matters) either of tort or contract in her own name without the joinder of her husband, for preservation and protection of her property and personal rights or for redress of her injuries, as if she were unmarried, or may prosecute* such suits jointly with her husband and the husband shall not settle or discharge any such acttion or cause of action without the written consent of the wife. Neither of them can be arrested on such a writ of execution, nor can he alone maintain an action respecting his wife's property.

Mississippi Code, 1930, V. I, Ch. 36, p. 949.

Sec. 1940. *Married women are fully emancipated from any disability on account of coverture and the common law as to disabilities of married women and its effect on the rights of property of the wife is totally abrogated, and marriage, shall not impose any disability or incapacity on a woman as to ownership, acquisition, or disposition of property of any sort, or as to her capacty to make contracts, and do all acts in reference to property which she could lawfully do as if she were not married;* but every woman now married or hereafter to be married shall the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of all property, real and personal, in possession or expectancy and to make any contract in reference to it and to bind herself personally, *and to sue and be sued, with all the rights and liabilities incident thereto, as if she were not married.*

Sec. 1941. *Husband and wife may sue each other.*

90. 89 Atl. 889.

It is this confusion in the interpretation of the statutes and the ambiguity of their terminology that makes an appraisal difficult, for there is little in the acts to show whether the situation between the spouses remains unchanged or whether emancipation is complete in all aspects.[91] Thus it has been difficult to determine what effect these statutes have had on the common law rule that neither spouse is civilly liable for a personal tort on the other; and the attitude of the majority of the courts against full emancipation has led to cases of unjustifiable interpretations. This has been so, even in cases where, in view of statutes that expressly give married women all such rights as they would have if unmarried, fully emancipating them from all disabilities of coverture, or otherwise securing their personalities with no distinction between the two aspects of emancipation, the courts have still denied the right of the woman to sue her husband for personal torts.[92]

For example, it is difficult to reconcile the decision of the court of New Jersey in the case of *Von Laszewski v. Von Laszewski*[93] which is based on the New Jersey Married Woman's Statute, and the decision of the Connecticut courts in a similar case based on a similar statute but which reached a directly opposite conclusion.

The New Jersey Statute provides:

> "Any married woman may maintain an action in her own name and without joining her husband therein, for all torts committed against her or for her separate property in the same manner as she lawfully might if a femme sole, provided however that this act shall not be so construed as to interfere with or take away any right of action at law

91. Writers generally acknowledge this. BISHOP—MARRIED WOMEN, par. 377. SPENCER—LAW OF DOMESTIC RELATIONS, par. 292.

92. District of Columbia Code, par. 1155; 31 Statutes at Large, c. 854, par. 1374; Mississippi Constitution, par. 94; 190 New York Laws, c. 19, par. 57.

93. *Supra* note 5.

or in equity now provided for the torts above mentioned."[94]

The aforementioned case decided on the above statute stated:

> "A wife, who filed a bill in equity for damages for personal injury from her husband's negligent operation of his auto was held to have no cause of action either at law or in equity. Her equity right to file a bill to protect or restore her separate property never extended to personal as distinguished from property rights."

The court of Connecticut in the case of *Brown v. Brown*[95] on facts similar to those of the New Jersey case, and based on a statute similarly worded to that of the New Jersey statute,[96] held:

> "In view of the Married Woman's Act which had the effect of abolishing the common law unity of husband and wife. a wife could now maintain an action for false imprisonment and assault against her husband and such suit was not contrary to public policy."

In spite of the possibilities afforded by these statutes and constitutional provisions, the greater majority of the courts of the states have upheld the common law unity and found it to remain unchanged and unabrogated. In some cases a slight relaxation might be perceived from strict adherence to the common

94. *Supra* note 3.

95. 89 Atl. Rep. 891.

96. Connecticut General Statutes, Revision of 1930, V. 2, Title LV, p. 1622. Sec. 5170. Any married woman shall have the right to convey her sole and separate estate, whether real or personal, or to make any contract in relation thereto *and she may sue and be sued in relation thereto as if she were unmarried.* 1918 S. 5269, 72, 78; 1929 S. C. 58, s. 14.

law tenet in cases of willful torts,[97] but it was not until the Carolinas dared to break through the wall surrounding the common law disability, on the basis of a new attitude encouraged by the married women's acts, that a woman was permitted to sue her husband for negligent torts.[98]

It may be advantageous at this point to more fully discuss these various married women's acts and provisions and the manner in which the courts in each state, that have been called upon to adjudicate the question, have fallen into one of the groups.

The majority holding, we may say, supports in principal the disability of the wife to sue her husband for injuries due to a tortious act on his part. The courts are practically unanimous in holding that the various enabling acts will not and should not be given so broad a construction as to confer such right by implication and that such a right can exist only and by virtue of express statutory provisions setting up such a right in clear and unequivocal terms.

In a leading case[99] upholding the majority view as to the common law disability of the wife to sue her husband for a tortious act against her, the court of Iowa[100] held:

> "A married woman cannot sue her husband for assault and battery though she is authorized by statute to prosecute and defend all actions at law or in equity for the pres-

97. Woltman v. Woltman, 189 N. W. 1022 (Minn. 1922); Heyman v. Heyman, 19 Ga. App. 634, 92 S.E. 25 (1917); Newton v. Weber, 119 Misc. 240, 196, N. Y. S. (1922).

98. Roberts v. Roberts, 118 S. E. 9 (N. C. 1923).

99. 43 Iowa 182 (1875).

100. An interesting interpretation is given by this court in *In Re* Dolmage, 203 Iowa 231, 212 N. W. 553 (1927): "When any woman receives an injury caused by negligence or wrongful act of any person, firm or corporation, including municipal corporations she can recover for loss of time, medical attention and other expenses, in addition to any damage recoverable by common law. But she has no right of action for personal injury against her husband."

ervation and protection of her rights and property as if unmarried. Such provision being taken to refer to actions against parties other than the husband because of another provision permitting either husband or wife to maintain an action against the other for property or rights growing out of property." To the contention that a right of action is property the court replied that "the argument that an action might be maintained on that theory involved the assumption that a right of action existed, which was the thing undertaken to be proved."

In the same vein was the decision of the United States Courts in the case of *Thompson v. Thompson*[101] interpreting the District of Columbia code,[102] the court holding:

> "The common law relation between husband and wife was not so far modified as to give the wife a right of action to recover for damages from her husband for an assault and battery committed by him on her person by Code D. C. par. 1155 authorizing married women 'to sue separately for recovery, security, or protection of their property and for torts committed against them as fully and freely as if unmarried' "

Following this general trend in the majority of states we may list the decisions of the courts of the United States for Alaska,[103] the courts of Indiana,[104] Iowa,[105] Michigan,[106] Mon-

101. 31 S. Ct. 111, 218 U.S. 611 (1910) *aff'd* 31 App. D.C. 557, 14 Ann. Cos. 879. See also Favis v. Hope, 298 F. 727 (1928).

102. "There can be no action between husband and wife for injuries caused by negligent operation of an auto, committed by husband on wife before coverture where the action is begun but not brought to judgment before marriage." Notes v. Snyder, 4 F. (2) 426, 55 App. D. 233 (1923) "under code D.C., par. 1151, 55, either spouse may prosecute the other in an action of replevin."

103. Decker v. Kaldy, 148 F. 681, 79 CCA. 305 (Alaska 1900). "A wife cannot either before or after divorce maintain an action to recover damages from her

tana,[107] Ohio,[108] Tennessee,[109] Rhode Island,[110] Nebraska,[111]

husband for his failure to supply her with necessaries of life, or for any other act or failure of duty connected with or arising from the marital relations."

104. 89 Ind. App. 529, 167 N.E. 146 (1929). "A married woman has no cause of action against her husband for injuries in an automobile accident while driving with him."

105. The case of Heacock v. Heacock, 108 Iowa 540, 79 N.W. 353 (1899). "The code 1873, par. 2211, providing that a wife may receive wages for her own labor and sue for it and may prosecute all actions for the protection of her rights and property as if unmarried, gives her no right of action against her husband."

106. Michigan courts in interpreting the statute relating to the property of a married woman, answered in the case of Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287, the oft repeated interpretation of the emancipationists by holding: "A statute conferring on a married woman the right to bring actions in relation to her sole property in the same manner as if she were unmarried, would not be construed to give to such married woman the right of action, even by implication, against her husband for a personal tort." In accord: Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927); Riser v. Riser, 239 Mich. 182, 214 N.W. 305.

107. Kelly v. Williams 21 P. (2) 58, 1932, the court in this case held that a wife couldn't sue her husband for an injury resulting from the negligent operation by him of his automobile. See also: Conley v. Conley, 15 P. (2) 922 (1932).

108. In the case of Finn v. Finn, 190 Ohio App. 302 (1924) the court held that unless there is a special legislative provision there can be no suit between a husband and wife for injuries due to his negligence, and in the case of Leonardi v. Leonardi the court delved into the question of legislative intent and held: "In the absence of direct legislation relieving the wife of her common law disability to recover from her husband for an injury caused by his negligence it should not be presumed that the legislature intended to relieve the wife from this marital inhibition without giving the husband the same right. To give either this right would strike at the very heart of the peaceable domestic relationship of the husband and wife and further at the happiness of the home."

109. Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915). In this case the court held hat the common law rule hat one spouse cannot sue the other for a tort committed during marriage was not abrogated by its married woman's act (Shannon's Code, par. 6470 or Public Acts 1913, C. 26). Also: Raines v. Mercer, 165 Tenn. 415, 55 S.W. (2) 263 (1932); State v. Kirby, 69 S.W. 2186 (1934) holding that there can be no suit for defamatory libel; Tobin v. Gelnich, 162 Tenn. 96, 34 S.W. (2) 1058.

110. Oken v. Oken, 44 R.I. 291, 117 Atl. 357 (1922); Kelley v. Kelly, 153 Atl. 314 (R.I. 1931).

111. The court in Emerson v. Western Seed & Irrigation Co., 216 N.E. 297, held: "A statute (C.S. 1922, p. 8529) enabling a married woman to sue does not authorize a wife's suit against her husband's employer for personal injuries due to her husband's negligence where the husband is liable to his employer."

Washington,[112] New Jersey,[113] Vermont,[114] West Virginia,[115] Kentucky,[116] Florida,[117] Illinois,[118] Maine,[119] Maryland,[120] Miss-

112. The court in Schultz v. Christopher, 65 Wash. 491, 118 Pac. 629 (1911) held: "A statute abolishing all laws which impose or recognize civil disabilities in the wife which are not imposed or recognized as existing as to the husband and giving to the wife' 'for any unjust usurpation of her natural or property rights,' the same right to appeal to courts for redress and protection as her husband, does not give her the right to sue her husband for a tort against her person as neither at the common law nor under statute does the husband have such a right against his wife and the only object of the statute is to place the husband and wife on an equal footing."

113. Von Laszewski v. Von Laszewski, *supra* note 5; Sargeant v. Fedor, 130 Atl. Rep. 207. Later the law of New Jersey was peculiarly set out by the courts of North Carolina. Residents of North Carolina while driving in New Jersey were involved in an accident due to the negligent operation of the auto by the defendant, the husband. The suit was brought by the wife in North Carolina. The case is Howard v. Howard, 158 S.E. 101, 200 N C. 574 (1931) in which the court held: "The laws of New Jersey, where the injury occurred apply. And since those laws do not permit a married woman to sue for a tort committed against her without joining her husband, the wife could not sue her husband for injuries in an auto accident."

114. Comstock v. Comstock, 169 Atl. Rep. 903 (Vr. 1934).

115. Cameron v. Cameron, 162 S.E. 173 (1932).

116. Distrans Adm v. Distrans Adm, 187 Ky. 497, 219 S.W. 794 (1920); Robinson v. Robinson, 188 Ky. 49, 229 S.W. 1074 (1920).

117. In the case of Webster v. Snyder, 103 Fla. 113, 138 So. 755 (1932) the court held: "Where the plaintiff sustained injuries through negligence of the servant of the third person, her subsequent marriage to the servant or agent abates the right of action against him."

118. Illinois, in Main v. Main, 73 Ill. App. 106, upheld the majority: "Where the statute relating to the rights of married women did not by direct terms or necessary inference abrogate the rule that the wife cannot sue her husband for personal tort, an action for false imprisonment is not maintainable."

119. The court in the case of Libby v. Berry, 74 Me. 286, 43 A. 589, quoting from Hobbs v. Hobbs, held: "The act of 1876 providing that a married woman may prosecute and defend suits at law or equity, either of tort or contract, in her own name, without joinder of her husband for preservation and protection of her property and personal rights as if unmarried or may do it jointly with her husband —authorizes her only to maintain alone such actions as previously could be brought by her husband alone or by husband and wife jointly and so does not permit a suit between husband and wife."

See also Perkins v. Blethen, 107 Me. 443, 78 Atl. R. 574 (1911): "A husband's immunity from suit at law on a claim by the wife during coverture cannot

isippi[121] and Missouri.[122] The court of Minnesota[123] in the case of

be avoided by her assignment of the claim to a third person." Smith v Gorman, 41 Me. 405 (1856); Greenwood v. Greenwood, 113 Me. 226, 93 A. 360 (1915), "Neither husband nor wife can sue the other at common law while the marriage relation exists, which disability has not been removed by statute" Whiting v. Whiting, 114 Me. 382, 96 A. 500 (1916); Sacknoff v. Sacknoff, 131 Me. 280, 161 A. 669 (1932); Morrison v. Brown, 84 Me. 82, 24 A. 672 (1891); Abbott v. Abbott, 67 Me. 304.

120. Maryland was called upon to settle the question in a relatively recent case arising out of an accident due to negligent operation of an auto. In the case of Furstenburg v. Furstenburg, 152 Md. 247, 136 Atl. Rep. 534 (1927) the court held: "The statute giving the married woman the right to sue for personal tort by a separate action as if she were sole (Code Pub. Gen. Laws 1924, Art. 45, par. 5, 20) does not enable her to sue her husband for injury while riding in his auto as a guest." In accord, David v. David, 161 Md. 532, 157 Atl. Rep. 755 (1932).

121. In Austin v. Austin, 136 Miss. 61, 100 So. 591, (1924) the Mississippi court in interpreting her Constitution held: "The Constitution 1890, par. 94 and Code 1906, par. 2517, 18, emancipating married women from the Common law disabilities of coverture do not authorize actions between husband and wife." (87). In accord: Scales v. Scales, 151 So. 557; McLaurin v. McLaurin Furn. Co., 146 So. 877 (1923).

122. In Willott v. Willott, 62 S.W. 1804 (Mo. 1933) the court unequivocally states the effect of the statute on the relationship of the spouses: "The common law rule that a wife can't sue her husband in a civil action for a personal injury is not abrogated by a statute providing that a married woman may sue without joining her husband as a party, with the same force and effect as if she were sole, or by a statute providing that a married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, and to sue and be sued."

See also: Rice v. Gray, 225 Mo. App. 890, 346 S.W. 567 (1930); Abramsky v. Abramsky, 261 Mo. 117, 168 S.W. 1178; Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915); *Ex Parte* Badger, 286 Mo. 139, 226 S.W. 936 (1920); Butterfield v. Butterfield, 195 Mo. App. 37, 187 S.W. 295 (1916); Shewalter v. Wood, 186 S.W. 1127 (Mo. 1916) presents a slight modification of the strict rule: "While a husband cannot have an action against his wife for a cause arising out of the distribution of property yet either may sue the other in replevin or conversion for willful or malicious destruction of his or her property."

123. Drake v. Drake, 177 N.M. 624 (Minn. 1920) presents an interesting sidelight on the courts of that state: "Husband cannot maintain against his wife an action in equity to restrain and enjoin the commission of acts towards him which amount to nothing more than a tort or series of torts (nagging). The married woman's act was not intended to visit in either husband or wife a right of action to enjoin acts or conduct of either that amounted to only a tort."

Strom v. Strom[124] went even farther in laying down the law with reference to a suit between a wife and her husband than many of its colleagues, by holding in the decision of that case that:

> "A woman cannot even after divorce maintain an action against her former husband for an assault committed during coverture under a statute providing for and preserving the legal personality of a woman after marriage and giving her the same right of action for injuries sustained to her person in her own name as her husband has for injuries in his name"

The state of Massachusetts presents a rather peculiar situation. In the case of *Young v. Young,*[125] an early case on the question under discussion, the court seemed to turn from the common law path and hold that coverture is not a defense to fraud practiced on a husband or wife by the guilty spouse. While in a later case of *Weidman v. Weidman,*[126] the court turns back to the fold and holds:

> "A wife cannot sue at law her husband to recover a judgment debt under foreign alimony judgment. There are no exceptions to the general rule that there can be no suits between a husband and wife unless there are some equitable grounds established."

The question now remains as to whether the latter case brought Massachusetts back in line with the majority holding or whether the facts in that particular case were such as demanded such a decision from the standpoint of pure justice.

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124. 98 Minn. 427, 107 N.W. 1047.
125. 251 Mass. 218, 146 N.E. 574 (1925).
126. 174 N.E. 206 (Mass. 1931).

The New York[127] courts have almost consistently upheld the common law rule, as may be witnessed in the case of *Alward v. Alward,*[128] in which the court set out that State's position:

> "Neither code Civ. Proc. par. 150 allowing a wife in an action or special proceeding to appear, prosecute or defend alone, or with other parties as if she were single nor any other statute authorizes husband and wife to sue each other at law."

The New York courts have been called upon to adjudicate on the relationship between husband and wife and their inability to sue each other on a great number of occasions and on many aspects of the relationship and have always upheld the common law rule, denying actions for assault and battery,[129] slander,[130] and malicious prosecution.[131] Yet in a few instances

127. Shubert v. August Shubert Wagon Co., 222 N.Y.S. 115, 129 Misc. Rep. 578; Newton v. Weber, 196 N.Y.S. 113, 119 Misc. Rep. 240 (1922); Seelaw v. Seelaw, 198 N.Y.S. 4 (1923); Sargeant v. Fedor, 130 A. 207 (1925); Perlman v. Brooklyn City R. Co., 191 N.Y.S. 891, 117 Misc. Rep. 353; Ackerson v. Kibler, 246 N.Y.S. 580, 138 Misc. Rep. 695, Wadsworth v. Weber, 257 N.Y.S. 386, 143 Misc. Rep. 806.

128. 2 N.Y.S. 42, 15 Civ. Proc. Rep. 151 (1888).

129. Longendyke v. Longendyke, 44 Barb. 367: "New York Statute construed as giving no wife the right of action for assault and battery against her husband. The court held that a different construction would be contrary not only to the common law but to the spirit and content of the married women's acts the object of which was merely to preserve her separate property and it would be contrary to public law and domestic tranquility." See Abbe v. Abbe, 48 N.Y.S. 25, 22 App. Div. 484.

130. Freethy v. Freethy, 42 Barb. 641: "A statute providing that 'any married woman may bring and maintain an action in her own name for damages against any person or corporate body for any injury to her person or reputation as if she were sole,' did not give her the right to sue her husband for slander. 'Any person' is a very comprehensive term and might in a proper case include a husband, but the courts would not adopt such a construction which would make such striking innovation in the rules of the common law unless the legislature's intent is clearly manifest."

131. Lapides v. Lapides, 256 N.Y.S. 798; Allen v. Allen, 246 N.Y. 571, 159

they have allowed suits between the spouses for setting aside as fraudulent an order procured by the wife dissolving a marriage,[132] and for recovering from a deserting husband the amount expended from her separate estate by the wife for the support of herself and the children.[133]

In the case of *Schultz v. Schultz*[134] the New York court made an attempt to overrule the common law holding. The lower court in that case held:

> "The preservation of domestic tranquility between parties inclined to commit assault and battery on one another was not likely to be promoted by such a construction (denying such a suit): that such a construction resulted from too great a devotion to the rigorous rule of the common law and that the policy of the legislature relative to married women was to remove the common law disabilities." The court concluded by saying that the *"Common law on the subject has gone to the bourne from which no travellers return, where they must rest forever undisturbed by a single tear shed over their departure."*

This ruling was however overruled by the upper court. Yet it is of value, to show that the courts of New York are not completely settled on the common law rule and that the future may bring a change in their present position.

Mink v. Mink,[135] brought the courts of Pennsylvania face to face with the question of constitutionality of the statutes, a question as yet not answered by any of the states. The court there stated:

N.E. 656.

132. Baylon v. Vogel, 246 N.Y. 209, 147 Misc. Rep. 554.
133. DeBrawere v. DeBrawere, 203 N.Y. 460, 96 N.E. 722.
134. 72 Hun. 26.
135. 16 Pa. Co. Ct. 189.

> "An action for slander, brought by a married woman against her husband; held that a statute limiting the right of a married woman to sue her husband except in a proceeding for divorce, or in a proceeding to protect or recover her separate property whenever he may have deserted himself or separated himself from her without sufficient cause or may have neglected her or refused to support her, was not unconstitutional as violating the Bill of Rights, that certain rights, including that of protecting reputation, are indefeasible."

In the very early case of *Wylly v. Collins,*[136] the Georgia court, in a very significant decision held:

> "The doctrine of the bible and the common law, that a husband and wife are one has been superseded by the introduction of a new principle from the civil law that they are distinct persons, with distinct property, distinct powers over it."

But this view seems to have been limited as expressed by the very words of that court to property matters even under the Georgia married woman's acts, for, in *Heyman v. Heyman,*[137] the court at a much later date held:

> "Under Civil Code 1910 par. 2993, 94 and par. 3652, a wife cannot recover from her husband, with whom she is living in lawful wedlock, for a tort arising out of his negligence in operating an auto in which she was riding with him at the time of the injury."

136. 9 Geo. 223 (1851).
137. 19 Geo. App. 634, 92 S.E. 25 (1917).

This latter case serves either to clarify or set limitations to the earlier case of that state or to bring Georgia back into the fold of the common law supporters as to intramarital torts.

The status of the Texas courts[138] seems to be rather uncertain. Although holding strictly to the common law rule, they manifest an unquestionable tendency towards revoking it as may be witnessed in the case of *Skyes v. Speer*;[139] where the wife was "denied the right to sue her husband for a tort committed on her while the marriage relation existed," the court holding:

> "The reason for this holding is that there is no liability; not merely that the wife is incapable of having an action against her husband, for even if she should be divorced the next day after the injury is inflicted, and even if the result of the injury be perpetuated long after the time of infliction and after her rights as a femme sole have been fully restored, still she would not be allowed to recover for injuries. Adjudications sustaining this view are based on public policy which refuses to permit any liability for such conduct on the part of the husband committed under such circumstances. While the law may and does provide for criminal protection for such violence toward a wife, still there can be no civil liability."
>
> "If the law permits a husband to be held criminally responsible for an unjustifiable assault on one who it has placed under his care and protection and who for his sake has surrendered so many civil rights and given up her legal status she would otherwise have, some consideration should

138. Gowin v. Gowin, 264 S.W. 529 (Tex. 1925); Speer v. Goodnight and Skyes, 102 Tex. 451, 119 S.W. 86; Wilson v. Brown, 154 S.W. 322 (Tex. 1913); Irwin v. Irwin, 110 S.W. 1011 (Tex. 1908). But suits to protect property are allowed. Vercelli v. Provenzano, 28 S.W. (2) 316 (1930); Kelly v. Gross, 4 S.W. (2) 296.

139. 112 S.W. 442 (1911).

> permit her to recover damages for such brutality especially when sought in a proceeding after the dissolution of the marriage."

and also in the case of *Wilson v. Brown*:[141]

> "An action by a guardian of infants to recover for their use damages for the wrongful killing of their mother by her husband, the defendant, could not be maintained, for under the common law, in force in Texas on this point, a married woman could not maintain an action against her husband for damages based on a personal tort against her by him. Further, the plaintiff had no right of action even under a statute giving a right of action to any person for death when caused by the wrongful act of another, of such a character as would, if death had not ensued, enable the injured party to sue for such an injury, because the mother of the wards of the plaintiff, had she survived, could not have brought the action against her husband."

Although laying down a hard rule in such a particular case the court seems to indicate a possible inclination to take a view opposite to the common law, as in referring to the case of *Nickerson v. Nickerson*,[141] in which it was held that a husband can't sue his wife for damages for personal injuries.

The minority group, recent in origin, though very small, is nevertheless militant and expansive and gives reason to believe that it will add to its ranks many more supporters in the near future. Until the action of Connecticut in the case of *Brown v. Brown, supra,* the opposition group existed only in the minds of a few courts and was expressed solely in the dissenting opinions of a few cases, while the common law reigned supreme, un-

140. 154 S.W. 322.
141. 65 Tex. 191.

touched even by legislative measures. But, with the first step taken, many followed until today we have a group that must be recognized and considered in a study of this phase of the law of domestic relations.

In general, the minority believes that the married woman's acts should be liberally construed so as to permit the complete emancipation of women: it rejects the public policy theory for preventing suits between husband and wife; and feels that the family affairs are not aired in the courts in any worse light in a suit for damages due to personal injury resulting from a tort than they are in criminal prosecutions, actions for divorce or suits for separate maintenance or in equity.

As we have said the courts of Connecticut[142] were the first to express themselves as opposed to the rigorous common law rule in that epic decision in *Brown v. Brown*,[143] in which the court held:

> "In view of the married woman's acts which had the effect of abolishing the common law unity of husband and wife, a wife could now maintain an action for false imprisonment and assault against her husband and such suit was not contrary to public policy."

Soon after, Alabama, looking favorably at the action of the courts of Connecticut and being in sympathy with their holding set out to join them by its courts holding in the case of *Penton v. Penton*:[144]

142. Miller v. White, 62 A. 756, 78 Conn. 495; Kalamian v. Kalamian, 107 Conn. 86, 139 Atl. 635 (1927); Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925).

143. 88 Conn. 42, 89 A. 889 (1914).

144. 233 Ala. 282, 135 S. 481 (1931). In accord: Bennett v. Bennett, 24 Ala. 335, 140 S. 378 (1932); Johnson v. Johnson, 77 S. 335, 201 Ala. 41 (1917); Harris v. Harris, 211 Ala. 222, 100 S. 333 (1924); *Contra*, Dawson v. Dawson, 224 Ala. 13, 138 S. 414 (1931).

> "The Alabama Statute (Code 1928 par. 8268) allowing that the 'wife may sue alone at law or in equity on all contracts made by her, or for recovery of her separate property or for injury to such property, or for rents, incomes or profits and for all injuries to her person and reputation' allowed the wife to sue her husband for simple negligence in interfering with her operation of an auto."

The courts of Arkansas followed suit and in the case of *Katzenberg v. Katzenberg,*[145] set out that:

> "The Arkansas statute giving 'every married woman all the rights to contract, be contracted with, sue and be sued, and in law or in equity to enjoy all the rights and be subjected to all the laws of the state as if she were sole' she became wholly independent of the marital unity and can sue her husband for injuries resulting from his negligent operation of his auto."

The North Dakota[146] courts are in accord with Arkansas, having reached a similar decision in a similar case.

New Hampshire presents a peculiar situation. In the case of *Gilman v. Gilman,*[147] the court on the basis of Public Statute 1901, c. 176 par 2, permittted a wife to sue her husband for assault and battery; while in *Gray v. Gray,*[148] the courts of the same state prevented a wife from suing her husband for injuries sustained in an auto accident.

This apparent contradiction may be explained by the fact that the accident in the Gray case occurred in Maine and the

145. 183 Ark. 626, 37 S.W. (2) 96 (1931).
146. Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932).
147. 95 A. 657 (N.H. 1915).
148. 174 A. 508 (N.H. 1934).

court was evidently applying the laws of the state in which the accident occurred, and for that reason upheld a rule which she would not have done were she permitted to apply her own laws to the facts of the case.

Wisconsin, however, presents a dilemma which is quite impossible to justify. In *Fontaine v. Fontaine,*[149] the court held:

> "Under a statute that permits a married woman to bring an action in her own name for an injury to her personal character the same as if she were sole, a wife can sue her husband for an injury resulting from tortious act."

In the same year the court in another case, *Buckeye v. Buckeye,*[150] held that the common law actions which a wife had against her husband were extinguished by marriage and made no reference to the effct of the statutes on such condition. This leaves Wisconsin more or less on the fence in such a way that it is difficult to predict in which direction she will lean in the future.

The courts of Oklahoma,[151] in the case of *Fiedeer v. Fiedeer*[152] held that:

> "Under the Constitution Art. 2, par. 6, providing that courts of justice shall be open to every person and the Revised Laws 1900, par. 3363, conferring on a married woman the same rights as if she were sole, a married woman may maintain an action against her husband for injuries to her person."

The South Carolina courts are in accord with the general min-

149. 20 Wis. 570, 288 N.W. 410 (1931) also see Pierse v. Wait, 209 N.W. 475 (1926).

150. 234 N.W. 342 (1931).

151. Sodowski v. Sodowski, 51 Okla. 689, 152 Pac. 390 (1915).

152. 42 Okla. 124, 140 Pac. 1022

ority view having expressed themselves in *Prosser v. Prosser*[153] and *Pardue v. Pardue*.[154]

The North Carolina[155] courts have often been cited for their decision in *Roberts v. Roberts*.[156] The case is a milestone on the road to complete emancipation for married women. In that case the court held:

> "In view of the Compiled Statutes, par. 408, 54, 2506, 13, enacted under Constitution Art. 10, par. 6, defining and describing rights and liabilities of married women, a wife may maintain an action against her husband for personal injury caused by his negligence without regard as to whether her injuries were the result of his negligent or willful wrong.'

and in *Crowell v. Crowell*,[157] an equally important case, the court held:

> "Under Revisal 1905 (C.S. p. 454) and Laws 1913 c. 13, a wife whose husband has wrongfully infected her with a venereal disease may maintain an action for damages for personal injuries (on the basis of wanton and willful injury permanently impairing her earning capacity)."

Suits instituted by husbands against their wives for injuries inflicted by them are rare and when brought before the courts in those few instances, have been dealt with in the light that suits brought by the wife were. Of the few such cases, the one that seems to have been most cited and quoted is the case of

153. 114 S.C. 45, 102 S.E. 787 (1920).
154. 167 S.C. 129, 166 S.E. 101 (1932).
155. Graves v. Howard, 159 N.S. 594, 75 S.E. 998 (1922); Earle v. Earle, 198 N.C. 411, 151 S.E. 884 (1930).
156. 185 N.C. 566, 118 S.E. 9 (1923).
157. 180 N.C. 516, 105 S.E. 206 (1920).

Peters v. Peters,[158] a California decision, in which the court denied the husband the right to sue his wife, holding:

> "A mere statutory provision that when the action is between a married woman and her husband she may sue and be sued alone, does not give him the right to sue her for a personal tort inflicted on him by her.
>
> "A husband cannot maintain an action against his wife for injuries deliberately inflicted upon him by her act in wounding him with a gun either at common law or under statute giving her a right to separate property and permitting them to contract with each other."

And in the case of *Rice v. Gray*[159] the Missouri courts reached a like decision in a suit by a husband against his wife for conspiracy to cause his false incarceration in an insane asylum; while the courts of North Carolina still clinging to their liberal interpretations of statutes relating to this phase of the domestic relationship held in *Shirley v. Ayres*[160] that the liability for negligence is not impaired by the subsequent marriage of the female tort-feasor with the person injured.

IV.

Considerations Influencing the Courts

1. *Authority of Early Cases.*

The first real skirmish on the battle ground of personal actions between married persons came in the case of *Phillips v. Barnet,*[161] where it was held that a wife even after being di-

158. 156 Cal. 32, 103 Pac. 219.
159. 34 S.W. (2) 561 (1931).
160. 201 N.C. 5, 158 S.E. 840 (1931).
161. 1 Q.B.O. 436 (1876).

vorced from her husband cannot sue him for an assault committed on her during coverture. Blackburn, J., giving the opinion of the court said:

> "I think that this action cannot be maintained. There can be no doubt that if a wife receives bodily injury from the hands of her husband, he is liable to criminal proceedings for a felony or a misdemeanor, as the case may be; and in the case of an ordinary assault it is quite clear that the wife has a right for her protection to obtain articles of peace against her husband, and upon this and upon other occasions she is in law a separate person. But the question, whether after divorce, a husband can sue his wife or a wife sue her husband for anything that has happened during the coverture, depends upon very different considerations, not that of parties but that requirement of the law founded on the principle that husband and wife are one person. They cannot contract with or convey to each other. This unity is carried even to the criminal courts where a wife cannot be convicted of larceny if in fact she carried away her husband's goods."
>
> "The question of the effect of divorce on such actions arises under the 32nd section of the Divorce Act[162] transferring to courts jurisdiction to dissolve marriages and consider in decreeing alimony the conduct of the parties. But that section does not grant a right to sue that did not exist before."

Lush, J., in concurring with the opinion, part of which was just quoted adds:

> "Now, I cannot for a moment think that a divorce makes a marriage void ab initio; it merely terminates the

162. 20 & 21 Vict., c. 85.

relation of husband and wife from the time it is decreed, and their future rights with respect to property are adjusted according to the decision of the court in each case and so not touching preexisting rights it cannot be held to subsequently grant a right which had never existed in the past."

Immediately following that important and weighty opinion, came the expressions of one of our own courts, that of the state of Maine in the case of *Abbott v. Abbott.*[168] The question involved was very similar to that of its English predecessor. Here a wife was denied the right to bring an action, after divorce, against her former husband, for an assault committed against her during coverture, nor against persons who confederated with and assisted him in committing the assault. Peters, J., in delivering the opinion of the court after citing *Phillips v. Barnett* as authority said:

"The theory on which the present action is sought to be maintained is, that coverture merely suspends and does not destroy the remedy of the wife against the husband. But the error in the proposition is the supposition that a cause of action or right of action exists in such a case. There is not only no civil remedy but there is no civil right, during coverture to be redressed at any time. There is, therefore, nothing to be suspended Divorce cannot make that a cause of action that was not a cause of action before divorce. The legal character of an act of violence by husband upon wife and the consequences that flow from it, is fixed by the conditions of the parties at the time it is done. If there be no cause of action at the time, there can never be any."

"Still the state of the old common law serves to show

163. 67 Me. 304 (1877).

> the basis upon which the marriage relation subsisted, and we do not perceive that there has been, either by legislative enactment or by the growth of the law in adapting itself to the present condition of society, any change in that relation which can afford the wife a remedy. Marriage acts, so to speak, as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other."

It is these cases in particular that have had a marked effect on strengthening by their definite and unqualified decisions the common law unity and giving the courts a basis for maintaining the disability of the wife to sue her husband and vice-versa even in the face of liberal enabling and emancipating statutes.[164]

2. *Fear of Fraud.*

The second consideration that has motivated the courts in upholding the strict common law ruling is the fear of fraud. Such suits if permitted could not be restricted to those who seek bona fide redress and as a result might open the door to uncon-

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164. (1) Assault and battery: Peters v. Peters, *supra note* 77; Dishons Adm. v. Dishons Adm., *supra* note 116; Bandfield v. Bandfield, 117 Mich 80, 75 N.W. 287; Butterfield v. Butterfield, 195 Mo. App. 37, 187 S.W. 295; Lillienkamp v. Rippetoe, *supra* note 109; Wilson v. Barton, 283 S.W. 71 (Tenn. 1926; Speer v. Sykes, 102 Tex. 451, 119 S.W. 86 (1909); Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629 (1911). (2) Malicious prosecution: Tinkley v. Tinkley, 25 T.L.R. 264 (1909). (3) False imprisonment· Rogers v. Rogers, 265 Mo. 200, 177 S.W. (1915). (4) Fraud: Kujek v. Goldman, 9 Misc. Rep. 34, 29 N.Y.S. 294 (1894); Seelau v. Seelau, 198 N.Y.S. 41 (1923). (5) Slander: Clark v. Clark, 11 Fed. (2) 871 (4d N.Y. 1925); Freethy v. Freethy, 42 Barb. 641 (N.Y. 1865); State v. Edens, 95 N.S. 693 (1886). (6) Libel: Queen v. Lord Mayor of London, 16 Q.B.D. 772 (1866); Faris v. Hope, 298 Fed. 727 (C.C.A. 8d. 1924). (7) Negligence: Heyman v. Heyman, 19 Ga. App. 634, 92 S.E. 20 (1917); Maine v. Maine and Sons Co., 149 Iowa 1278, 20 N.W. 201 (1924); Bleckenstaff v. Bleckenstaff, 167 N.E. 146 (Ind. App. 1929); Furstenberg v. Furstenberg, *supra* note 120; Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927); Riser v. Riser, 240 Mich.

trolled plundering of the estates of deceased husbands or wives. For if such actions existed they could be carried on even after the death of the deceased spouse against his or her estate. And then also in the case of spouses who are insured, there is a great temptation for conspiracies between the husband and wife against insurance companies which would be a violation of all legal principles.

3. *Adequate Protection.*

Some courts have held in denying suits between the husband and wife for damages, that the wife has full and adequate remedies to protect herself in criminal prosecutions,[165] suits for separate maintenance and alimony,[166] divorce,[167] and writ of habeas corpus, if wrongfully detained.[168]

This argument of adequate protection in the criminal and divorce courts is completely rejected by the minority.[169] If the wife, this group maintains, can sue for a broken promise, why

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402, 215 N.W. 290 (1927); Woltman v. Woltman, 153 Minn. 217, 189 N.W. 1022 (1922); Emerson v. Western Seed & Irr. Co., 116 Neb. 180, 216 N.W. 297 (1927); VonLazewski v. VonLazewski, 99 N.J.Eq. 25, 133 A. 179 (1926); Perlman v. Brooklyn City R. R., 117 Misc. Rep. 353, 191 N.Y.S. 8919 (1921); Finn v. Finn, 19 Ohio App. 302 (1924); Leonardi v. Leonardi, 21 Ohio App. 120, 153 N.E. 93 (1925); Oken v. Oken, 44 R.I. 291, 117 Atl. 357.

165. Abbott v. Abbott, cited *supra* note 163; State v. Kankford, 6 Boyce 594, 502 A. 63 (Del. 1917). A husband may be criminally liable for an assault and battery on his wife. State v. Fulton, 149 N.S. 485, 63 S.E. 145 (1908), (slander of wife); Clarke v. State, 117 Ala. 1, 23 S 671 (1897). A husband may be guilty of murder for a death resulting from an assault and battery of his wife. Hunt v. State, 72 Ark. 241, 79 S.W. 769 (1904). Husband guilty of larceny of wife's property. Johnson v. Johnson, 89 A. 891. Wife's remedy is by criminal prosecution.

166. Phillips v. Barnet, cited *supra* note 159, p. 437.

167. *Ibid.*, p. 438.

168. Abbott v. Abbott, cited *supra* note 165.

169. Thompson v. Thompson, 218 U.S. 611 (minority dissent); Austin v. Austin, *supra* note 121.

not for a broken arm?[170] They further contend that although these remedies may prevent future wrongs they do not compensate for past injuries,[171] and there is no reason why the wife should not have the same relief, which she has against a stranger, also against her husband when he becomes a stranger, especially in view of the fact that other actions such as ejectment,[172] replevin,[173] on contract,[174] and trover[175] are permitted against a husband.

It might be noted here that the courts of New Jersey have denied the right of the wife to sue her husband in ejectment by the decision in the case of *Smith v. Smith.*[175a]

The case of *Johnson v. Johnson*[176] briefly summarizes the position of these courts in this regard. It held:

> "The wife's remedy by a criminal prosecution, or act for divorce and alimony, which in some jurisdictions are allowed to stand as her adequate remedies for wrongs described in this complaint, so far from being adequate remedies, appears to us to be illusory and inadequate, while as for the policy which would avoid the public airing of family troubles, we see no reason why it should weigh more heavily against this action than against those which the courts universally allow."

4. *Public Policy.*

Probably the most frequent and commonly used consideration in denying a wife the right of action against her husband

170. Brown v. Brown, 89 A. 891.

171. Johnson v. Johnson, 201 Ala. 41, 43, 77 S. 335, 336 (1917); Crowell v. Crowell, 180 N.C. 715, 718, 105 S.E. 206, 207 (1920).

172. Cook v. Cook, 125 Ala. 583, 27 S. 918 (1900).

173. Shewalter v. Wood, 183 S.W. 1172 (Mo. 1916).

174. Trayer v. Setzer, 72 Neb. 845, 101 N.M. 989 (1904).

175. Eshom v. Eshom, 18 Ariz. 170, 157 Pac. 974 (1916).

175a. 4 N.J. Misc. Rep. 596 (Burl. Co. C. C. 1926).

176. 201 Ala 41, 77 S. 335.

is that it would be contrary to public policy in that such suits would disrupt and destroy the peace and harmony of the family and home and that it would result in accusations for assault and battery for every slight touch that might result from a harmless family squabble, and negligence for every improperly managed home.

The most outstanding case in this respect is *Thompson v. Thompson.*[177] This case is important not only for its majority holding but for the dissent, which was one of the first and most weighty expressions by a court of an attitude destructive to the common law holding and the beginning of agitation which led to the first open decision against "the marital unity" by Connecticut. Mr. Justice Day, in delivering the opinion of the court held:

> "Apart from the consideration that the perpetuation of such atrocious wrongs affords adequate grounds for relief under the statutes for divorce and alimony, this construction would at the same time open the doors of the courts to accusations of all sorts of one spouse against the other and bring into public notice complaints for assault and slander and libel and alleged injuries to property of one or the other, by husband against the wife or wife against the husband."

The New York Courts in the case of *Longendyke v. Longendyke,*[178] went a little more deeply into the question of public policy and interest in the family, the court there saying in the course of the opinion:

> "The effect of giving so broad an interpretation to the act of 1860, would be to involve the husband and wife in

177. Cited *supra* note 169.

178. 44 Barb. 366, 368 (1863).

> perpetual controversy and litigation—to sow the seeds of perpetual discord and broil—to produce the most discordant and conflicting interest of property between them and to offer a bounty and temptation to the wife to seek encroachment on her husband's property, which would not only be at war with domestic peace, but deprive her probably, of those testamentary dispositions by her husband in her favor which he would otherwise be likely to make."

The state of Michigan also very tersely states its stand with reference to public policy in the case of *Bandfield v. Bandfield*[179] in which decision the court states:

> "The result of the wife's contention would be another step to destroy the sacred relation of man and wife and to open the door to lawsuits between them for every real and fancied wrong, suits which the common law refused on the ground of public policy."

And lastly let us look at a very short but meaningful statement by the court in the case of *Austin v. Austin*:[180]

> "Secrecy will cure many troubles of the home, while publicity will only add fuel to the flames."

This argument from public policy has never been accepted by the minority group against airing family troubles in public. It is no more scandalous, no more liable to destroy the sanctity of the home, for a wife to sue in a civil action than it is for her to testify in a divorce action or in the criminal courts touching the same subject matter. Civil cases do not necessarily reveal any more of the domestic situation nor bring the family trou-

179. 75 N.W. 287, 288 (1898).
180. 136 Miss. 65.

bles into any greater public scrutiny than do other permitted cases. It is quite evident that if such actions are necessary, if there is assault and battery in a family relation, there is no love and common interest, no domestic tranquility and therefore nothing for the courts to protect. It is only where the marriage has utterly failed that a wife needs relief and to deny her that relief which she deserves and which she has against others, and which outside of the mere fact of coverture is in the light of modern emancipation a violation of the basic common law rule that 'for every right there is a remedy'. The courts further maintain that suits for separate maintenance or for reimbursement for sums spent are far more damaging to domestic tranquility than are suits for tortious acts.

The abolition of witness disqualifications for the spouses,[181] and increased facility with which domestic troubles are brought to the criminal and family courts,[182] shows a new trend in the legal attitude towards the family and it is gross legal hypocracy to preserve the family integrity and tranquility in tort cases and let it be dragged into the mud and slime and public notice, comment and even disgrace in almost every other conceivable action.

5. *Statutory Interpretation.*

The last consideration is that of statutory interpretation and the legislative intent. The majority of the courts hold that since no such action existed at the common law the statutes must specifically create such cause of action or otherwise they could not be so liberally construed as in effect to judicially

181. 1 WIGMORE EVIDENCE, 2 ed., par. 600-603.

182. Queen v. Jackson (1891) 1 Q.B.D. 671, note 4, compare newer cases allowing wife to sue paramour in a civil action for criminal conversion though to establish her case she must prove her husband guilty of crime. Turner v. Heavrin, 182 Ky. 65, 206 S.W. 23 (1918); Oppenheim v. Kridel, 236 N.Y. 156, 140 N.E. 227 (1923).

create a right of action that never existed and that the legislature failed to create. The court in *Bandfield v. Bandfield*[183] states the proposition just advanced in quoting from the statutes of Michigan:

> "In all doubtful matters and when expression is in general terms, statutes are to receive such construction as may be agreeable to the rules of the common law in cases of that nature, for statutes are not presumed to make any changes in the common law, further or otherwise than the act expressly declares. Therefore, in all general matters the law presumes the act did not intend to make any alteration, for, if the legislative body had that design they should have expressed it in the act."

Further in the case of *Lillienkamp v. Rippetoe*[184] the court held:

> "We must assume that the legislature had in mind in the passage of the act the fundamental doctrine of the unity of the husband and wife to each other under the common law and the correlative duties of husband and wife to each other and to the well being of the social order growing out of the marriage relation, and that, if it had been the purpose of the legislature to alter these further than is indicated in the act, that purpose would have been clearly expressed or would have appeared by necessary implication."

The courts further contend that the married woman's acts were meant to protect the wife in property matters only, as witness *Longendyke v. Longendyke*:[185]

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183. 75 N.W. 287, 288 (1898); see also 99 N.J.Eq. 25.
184. 179 S.W. 628, 629 (1915).
185. 44 Barb. 366, 368 (1863).

> "It is contrary not only to the rule of common law but to the spirit and intent of married woman's acts. The object of which was to add to her property rights as a femme sole and to distinguish her property from her husband's, and not to confer rights of action upon her against him."

Likewise in *Thompson v. Thompson*[186] the court held:

> "Under these laws the wife has been empowered to control and dispose of her own property free from the constraint of the husband, and in many instances to carry on trade and to deal with other persons as though she were a single woman."

The courts also hold that the statutes did not try to create any new causes of action or give the wife superiority, but rather to create an equality between the spouses, as may be gleaned from the decision in *Austin v. Austin*:[187]

> "The statute confers on neither any right of action against the other. Its purpose was to authorize suits by husband and wife against each other where there existed a cause of action.
>
> "If suit by wife were permitted we would have a novel situation of the wife having the cause of action against her husband while the husband would have no such right against the wife."

Also witness the decision in *Thompson v. Thompson*[188] in which the court held that the statute was not intended to give a right of action against the husband, but to allow the wife in her own

186. 218 U.S. 611, 615 (1911).
187. 100 So. 591, 592 (1924).
188. Cited *supra* note 186.

name to maintain actions of tort which at common law must be jointly brought by her and her husband.

To this the minority replies that the former concept of the unity of the family under the head of the father has changed in the modern transition of social thought, from the mastery of the husband to that of complete equality among members that constitute a family unit,[189] and that in view of the gradual emancipation of women to deny such right of action would be a legal abandonment of the protection of the individuals that composed the family—a unit of the state.

The courts in recent decades have construed the married woman's acts in a new and more liberal light and have allowed such suits between husband and wife.[190] In *Roberts v. Roberts*[191] the court held:

> "By this legislation the relation which married women sustain to their husbands as well as to third parties has been materially affected. The unity of person in the strict

189. A corresponding transition took place in the Roman law. The latter form of marriage, that under *jus gentium*, left the wife absolutely independent of her husband in respect to person and property as if femme sole. 2 Bryce 790, 793. Penal actions, those involving infamia, not permitted between spouses because of the marriage relation Digest XXV 22. But either could sue other for even a negligent infringement on any interest of substance, action regarded as proceeding for reparation Digest IX 2, 27-30, XXIV 37, XXV 2, 1.

190 Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Fitzpatrick v. Owens, 124 Ark. 167, 186 S.W. 832 (1916); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923); Gilmen v. Gilmen, 78 N.H. 4, 95 A. 657 (1915); Fredeer v. Fredeer, 42 Okla. 124, 140 Pac. 1022 (1914); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920); Conn. in Mathewson v. Mathewson, 63 A. 285 (1906) construed the married woman act of 1877, 1918 Rev. Stat. as giving the wife legal identity equal to that of her husband rather than merged with it and in Marri v. Stamford St. R. Co., 79 A. 582 (1911) deprived the husband of the common law right to recover for personal injuries to the wife as causing loss of consortion on grounds that the act enabled the wife to recover for her own injuries. These two cases led inevitably to a recovery of the wife for personal injuries against her husband.

191. 118 S.E. 9, 11 (1923).

common law sense no longer exists in this jurisdiction, because many of the common law disabilities have been removed. This change relates to remedies as well as to rights."

In *Brown v. Brown*[192] the court goes into greater detail in sustaining its liberal stand:

"Such a tort gives rise to a claim for damages. Such claim is property, not in her possession, but which she may by action reduce into possession just as she might before her coverture have had an action against him for such a tort committed before that event. The husband's delict whether a breach of contract or personal injury, gives her a cause of action. Both necessarily follow from the fact that a married woman now retains her legal identity and all her property both that which she possessed at time of marriage and that acquired afterwards."

In *Gilmen v. Gilmen*[193] the court maintained:

"A statute providing that a married woman may sue and be sued on any contract made by her or for any wrong done as if she were unmarried put the husband and wife on an equality as to property, torts, and contract and that she could have an action against her husband for assault as fully as she could against anyone else."

V.

Recent Developments

A careful scrutiny of the cases cited and discussed will reveal the fact that in recent years the litigation between husband

192. 88 Conn. 42, 89 A. 889 (1914).

193. 78 N.H. 4, 95 A. 657. In accord: Fitzpatrick v. Owens, 124 Ark. 167, 186 S.W. 832; Fiedler v. Fiedler, 42 Okla. 124, 140 Pac. 1022.

and wife in the field of torts has been stimulated and increased and revolves for the most part around cases of injury due to negligent operation of automobiles.[194] This fact though it may seem to be a logical result from the gradual increase in the use of the auto as a means of transportation seems to open the door for a problem which as yet the courts have not been called upon to decide in this relationship. The problem arises not because of the fact that a tort in operating an auto is any more serious than any other tort, or that the auto increases the possibility of danger, but because it brings with it the question of liability insurance, already compulsory by legislative enactments in many states. If, then, a woman is injured while riding in an auto with her husband due to the negligent operation of that auto by him, and her husband carries liability insurance for just such occurrences, will she and should she be denied the right to recover against him. The problem as far as the minority is concerned is a simple one, for it brings no change in the situation as far as they are concerned. But the difficulty will present itself to the advocates of the common law. The wife's disability, according to them, to sue is based on the fact that she and her husband are one and that therefore in a suit against him by the wife, he would have to be both plaintiff and defendant. But when through a voluntary act, or through requirement of the legislative body of his state, a driver is forced to secure liability insurance, and a husband in so doing places the burden of liability upon the shoulders of a third party, should the wife be prevented from getting damages by a legal fiction, without which others can recover or even under which she may recover

194. Pardue v. Pardue, 167, S.C. 129, 166 S. E. 101 (1932); Fitzmaurice v. Fitzmaurice, 242 N.W. 526 (N.D. 1932); Katzenberg v. Katzenberg, 37 S.W. (2) 696 (Ark. 1931); Penton v. Penton, 135 S. 481 (Ala. 1931); Bennett v. Bennett, 140 S. 378 (Ala. 1932); Comstock v. Comstock, 169 A. 903 (Vt. 1934); Ackerson v. Kibler, 249 N.Y.S. 629, 232 App. Div. 306 (1931); Conley v. Conley, 15 Pac. (2) 922, (Mont. 1932); Kelly v. Williams, 21 Pac. (2) 58 (Mont. 1932); Scales v. Scales, 151 S. 557 (Miss. 1934).

from others, when in reality she is not suing her husband but a third person? On the other hand is it fair to the husband who pays for the protection[195] by such insurance that he be denied, in favor of the insurance company, the security which is his by operation of the policy which he procures, when the injury is to his wife, and he might, because of such injury be put to a greater expense in caring for her. Of course there is always the argument that permitting such suits will open the door to fraud by the husband and wife against the insurance company, but it appears that the injustices that might be rendered in applying the strict common law rule in such case by far outweigh the possible evils of fraud, if practiced.

The problem is not a simple one, but it may have one decided advantage when brought before the courts for decision. It presents a possible means for relaxing, equitably and justly, the rigorous common law holding and presents a potential possibility for a complete revocation of the wife's disabilities in this respect and for her complete and unquestioned emancipation.

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195. It is true that the question of whether he pays for this specific protection is an actuarial problem, based on the lasting law within the jurisdiction where the risk is calculated, yet it seems as if such protection is included in one degree or another in most insurance policies in this group.