

THOMAS *v.* PERHAM AND PERHAM.*Husband and Wife—Defamation of Character—Libel by Wife.*

A husband is still liable for his wife's tort though living apart from her under a deed of separation.

S.C.
IN BANCO.
AUCKLAND.
—
1901.
—
May 15.
—
CONOLLY, J.

THIS was an action for libel.

The female defendant, wife of the male defendant, had written and published of and concerning the plaintiff certain false and defamatory statements, for which he sought to recover the sum of £500 damages. The male defendant filed a statement of defence, alleging (*inter alia*) that a deed of separation had been executed by himself and his wife, by the terms of which he paid to her a certain sum for her maintenance, and since the execution of the deed defendant and his wife had lived separately and apart, he having had no communication with her from that time. An order of Court had been obtained directing that the point of law raised as to the husband's liability should be argued in Banco before the case came on for trial.

C. F. Buddle, for the defendant Thomas Perham :—

The point raised is a new one, and there does not appear to be any authority bearing directly upon it. The Married Women's Property Act, it is admitted, does not remove the common-law general liability of the husband for torts committed by his wife during coverture. Perham had no knowledge of his wife's actions. They have been living apart for seven years under a deed of separation which the Court would enforce in the same manner as it would enforce a decree of judicial separation. It is reasonable, therefore, to ask that in this case the deed should operate in the same way as a decree of judicial separation. Of the cases which might be relied on by the other side, *Seroka v. Kattenburg* (1) was a case in which the husband and wife were still living together. In *Earle v. Kingscote* (2) the husband's liability for his wife's torts during coverture was upheld, but in that case also they were apparently still living together; and in *Head v. Briscoe* (3), though the husband and wife were separated, there was no deed of separation. That case, moreover, was decided before the

(1) 17 Q.B.D. 177.

(3) 5 C. & P. 484.

(2) [1900] 2 Ch. 585.

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Married Women's Property Act was passed, and the reasoning of Tindal, C.J., does not now apply.

[CONOLLY, J.—Is not a husband still liable during coverture, and does not coverture simply mean during marriage?]

Stroud gives a more restricted interpretation of the term, limiting it to the time while the wife is under the power of the husband: *Stroud's Judicial Dictionary*, art. "Coverture." See also *Eversley on Domestic Relations*(1).

E. W. Burton, for the plaintiff:—

The common-law principle that a husband is liable for his wife's torts during coverture still holds good: *Seroka v. Kattenburg*(2). The general principle is not affected by the Married Women's Property Act, which is a statute passed for the relief of wives, not for the relief of husbands. The principle was sustained in *Capel v. Powell*(3). Unless a divorce has been obtained or a decree of judicial separation granted, coverture still exists, and the husband's liability continues. Section 13 of "The Divorce and Matrimonial Causes Act, 1867," is a conclusive answer to the point raised. The Married Women's Property Act enables a married woman to be sued alone, but does not relieve the husband of liability.

CONOLLY, J.:—

The cases in question are very clear, and, though in the present instance the husband has been separated from his wife for several years, nothing has been shown me to prove that the liability of a husband in this respect, which has existed from time immemorial, has been removed or modified. "The Married Women's Property Act, 1884," which merely provides that a husband need not be joined in an action by or against the wife, does not affect it: it simply leaves it optional with the plaintiff to sue the wife alone, or jointly with her husband. The provisions of "The Divorce and Matrimonial Causes Act, 1867," relating to judicial separation do not apply to this case, as here there is only separation by deed, and no decree has been obtained.

On this motion, therefore, judgment must be for the plaintiff. Costs, £10 10s.

Solicitors for the plaintiff: *Burton & Hammond* (Auckland).

Solicitors for the defendant Thomas Perham: *Menteath & Beere* (Wellington).

(1) 2nd ed. 269.

(2) 17 Q.B.D. 177.

(3) 17 C.B. N.S. 743.