Solicitors, for the appellants, *Gillott & Moir.*
Solicitors, for the respondent, *Smith & Emmerton.*

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B. L.

DAVID SYME & Co. *v.* SWINBURNE.

[HIGH COURT OF AUSTRALIA.]

AGNES BROWN AND DUNCAN BROWN . APPELLANTS; DEFENDANTS,

AND

HOLLOWAY . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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Married Women's Property Act 1890 (*Q.*) (54 *Vict. No.* 9), *sec.* 3 (2)—*Liability of husband for wife's torts—Ex contractu or ex delicto.*

BRISBANE, *Nov.* 29, 30 *Dec.* 1.

SYDNEY, *December* 18.

Griffith C.J., O'Connor and Isaacs JJ.

Agnes Brown, a married woman with separate estate, leased a furnished house from the plaintiff. She used it, as the plaintiff had done, as a private hospital. There was a covenant to keep the premises and furniture in a good state of repair and condition. During the lease Agnes Brown, in fumigating one of the rooms, set fire to the house, with the result that it and some of the furniture were consumed. The jury, in an action for breach of the covenant and negligence, in which the husband Duncan Brown was joined as a defendant, found that the fire was caused by the negligence through ignorance of Agnes Brown.

Held—(1) That the action could have been brought against the defendant Agnes Brown either on the express condition to keep in repair, or on the implied condition arising from the contract of demise not to commit waste, or on the duty not to commit waste:

(2) That the wife's negligence was not a tort pure and simple, that the action arose essentially out of contract:

(3) That since the *Married Women's Property Act* 1882, 45 Vict. c. 75 [(Queensland) 54 Vict. No. 9], a husband is not liable for his wife's torts.

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Reasoning of *Fletcher Moulton* L.J. in *Cuenod* v. *Leslie*, (1909) 1 K.B., 880, at p. 888, adopted.

APPEAL by the defendants from a judgment for the plaintiff after trial with a jury.

THE facts and the material findings of the jury are set out in the judgment of *Griffith* C.J.

A. D. Graham, for the appellants. There was no proper finding of negligence. The answers the jury gave to the questions "Was the house burnt by reason of defendant Agnes Brown setting fire to combustible material in the house?" and "Was defendant Agnes Brown guilty of negligence in her employment of the said combustible material?" were "Yes," and "Yes, through ignorance," respectively. [He referred to *Kellett* v. *Cowan* (1)].

[GRIFFITH C.J.—Reasonable care is the care which ought to be exercised by a reasonable man, and it does not matter that failure to do this is owing to ignorance.]

Even if there were sufficient evidence of negligence, it was not a pure tort, but really arose *ex contractu*: *Burnard* v. *Haggis* (2); *Jennings* v. *Rundall* (3); *Earle* v. *Kingscote* (4).

[ISAACS J. referred to *Turner* v. *Stallibrass* (5); *Walley* v. *Holt* (6).]

Even if it were a tort the defendant Duncan Brown would not be liable: See the reasonings of *Fletcher Moulton* L.J. in *Cuenod* v. *Leslie* (7), and his criticism of the decisions in *Earle* v. *Kingscote* (4), and *Seroka* v. *Kattenburg* (8).

[GRIFFITH C.J., as to not following decisions of Courts of Appeal, referred to *Ridsdale* v. *Clifton* (9); *Tooth* v. *Power* (10); *Beal, Cardinal Rules of Interpretation*, 2nd ed., p. 32.

ISAACS J. referred to *In re Beauchamp*; *Ex parte Beauchamp* (11); *Beaumont* v. *Kaye* (12); *Capel* v. *Powell* (13); *Wright* v. *Leonard* (14); *Garrard* v. *Guibilei* (15); *Wainford* v. *Heyl* (16);

(1) 1906 St. R. Qd., 116.
(2) 14 C.B.N.S., 45.
(3) 4 R.R., 680; 8 T.R., 335.
(4) (1900) 2 Ch., 585.
(5) (1898) 1 Q.B., 56.
(6) 35 L.T., 631.
(7) (1909) 1 K.B., 880, at pp. 888 *et seq.*
(8) 17 Q.B.D., 177.
(9) 2 P.D., 276, at p. 306, *per Earl Cairns.*
(10) (1891) A.C., 284, at p. 292, *per* Lord *Watson.*
(11) (1904) 1 K.B., 572.
(12) (1904) 1 K.B., 292.
(13) 17 C.B.N.S., 743.
(14) 11 C.B.N.S., 258.
(15) 11 C.B.N.S., 616.
(16) L.R. 20 Eq., 321.

In re March; *Mander* v. *Harris* (1); *In re Jupp*; *Jupp* v. *Buckwell* (2); *Butler* v. *Butler* (3); *Weldon* v. *Winslow* (4); *Scott* v. *Morley* (5).]

[Counsel also referred to *Herne* v. *Bembow* (6); *Jones* v. *Hill* (7); *In re Cartwright*; *Avis* v. *Newman* (8); *In re Arbitration between Parry and Hopkins* (9); *Barnes* v. *Dowling* (10); *Gibson* v. *Wells* (11); *Real Property Act* 1877 (Queensland) 41 Vict. No. 18; *Lush, Law of Husband and Wife*, 2nd ed., p. 290.]

O'Sullivan A.-G., and *Power*, for the respondent. There was ample evidence of negligence, and it is sufficient that Agnes Brown brought combustible material on the premises; there was waste at any rate. The main questions are whether it was a breach of contract or a tort; and if the latter, whether the husband is liable. The English cases on the point decide that he is. *Seroka* v. *Kattenburg* (12), and *Earle* v. *Kingscote* (13), lay down the law, and the remarks of *Fletcher Moulton* L.J. in *Cuenod* v. *Leslie* (14) should be disregarded.

[Counsel referred to the following cases:—*Kellett* v. *Cowan* (15); *Anderson* v. *James* (16); *White* v. *M'Cann* (17); *Paradine* v. *Jane* (18); *Filliter* v. *Phippard* (19); *Havelberg* v. *Brown* (20); *Batchelor* v. *Smith* (21); *Manchester Bonded Warehouse Co. Ltd.* v. *Carr* (22); *In re Dixon*; *Byram* v. *Tull* (23); *Sachs* v. *Henderson* (24); *Drury* v. *Dennis* (25); *Beaumont* v. *Kaye* (26); 5 *Davidson's Conveyancing Precedents*, Part I., p. 542; *Bacon's Abridgment*, vol. VIII., p. 388.

GRIFFITH C.J. referred to *Countess of Shrewsbury's Case* (27); *Greene* v. *Cole* (28); *Yellowly* v. *Gower* (29); *Liverpool Adelphi Loan Association* v. *Fairhurst* (30).

(1) 24 Ch. D., 222.
(2) 39 Ch. D., 148.
(3) 14 Q.B.D., 831.
(4) 13 Q.B.D., 784.
(5) 20 Q.B.D., 120.
(6) 4 Taunt., 764.
(7) 7 Taunt., 392.
(8) 41 Ch. D., 532.
(9) (1900) 1 Ch., 160.
(10) 44 L.T., 809.
(11) 1 Bos. & P. (N.R.), 290.
(12) 17 Q.B.D., 177.
(13) (1900) 2 Ch., 585.
(14) (1909) 1 K.B., 880, at p. 888 *et seq.*
(15) 1906 St. R. Qd., 116.
(16) 11 Gaz. L.R. N.Z., 119.
(17) 1 Ir. R., C.L., 205.
(18) Aleyn, 26; 82 E.R., 897.
(19) 11 Q.B., 347.
(20) (1905) S.A. L.R., 1.
(21) 5 V.L.R. (L.), 176.
(22) 5 C.P.D., 507.
(23) 42 Ch. D., 306.
(24) (1902) 1 K.B., 612.
(25) Yelv., 106.
(26) (1904) 1 K.B., 292.
(27) 5 Rep., 13b.
(28) 2 Saund., 228; 85 E.R., 1002.
(29) 11 Ex., 274.
(30) 9 Ex., 422.

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ISAACS J. referred to *Blackmore* v. *White* (1).]

A. D. Graham, in reply, referred to *Phillips* v. *Homfray* (2); *Batthyany* v. *Walford* (3).

Cur. adv. vult.

December 18.

GRIFFITH C.J. This is an appeal by defendants, who are husband and wife, from a judgment for the plaintiff after trial with a jury. The only question open upon the appeal to this Court is whether on the findings of the jury the plaintiff is entitled to judgment against the appellants or either of them. The respondent was the lessor, and the appellant Agnes was the lessee, of a house and furniture under an agreement for a lease which contained a stipulation that the lessee should keep the premises and furniture in a good state of repair and condition. During the term the house and furniture were destroyed by fire. The action was originally brought against the appellant Agnes alone. The statement of claim, after alleging a breach of the stipulation to keep in repair, went on to allege that the house and furniture were by reason of her negligence consumed by fire. The defendant Agnes denied all material allegations, and alleged that by mutual mistake a stipulation that she was not to be liable for loss by fire had been omitted from the agreement. After the delivery of her defence her husband was joined as a defendant in respect of the claim for negligence. He by his defence denied the alleged wrongs and misfeasances. At the trial the jury found, in answer to specific questions, that the defendant Agnes made the alleged agreement and failed to keep the house and furniture in repair, that the house and furniture were burnt by reason of her setting fire to combustible material in the house, and that she was guilty of negligence through ignorance in her employment of the combustible material. They negatived the alleged additional terms of the agreement.

On these findings judgment was entered against both defendants. The defendants appeared separately at the trial, but appeared jointly on the appeal.

For the appellant Agnes it was contended that the finding as

(1) (1899) 1 Q.B., 293. (2) 24 Ch. D., 439. (3) 36 Ch. D., 269.

to negligence was ineffective. It is sufficient to say in answer to this contention that since negligence consists in a want of reasonable care, it is quite immaterial whether the absence of reasonable care arises from want of knowledge or failure to make use of knowledge. Moreover, as she is clearly liable for her breach of the express agreement to keep the house and furniture in repair, and as the measure of damages for this breach is the same as for the alleged negligence, the issue as to negligence is immaterial so far as she is concerned. Her appeal therefore fails.

But the case against the appellant Duncan Brown rests entirely upon the claim for negligence. The respondent contends that a claim for negligence is a claim for a tort—in this case in the nature of voluntary or commissive waste—and that a husband is, notwithstanding the *Married Women's Property Act*, liable for his wife's torts. The appellant contends that since that Act a husband is no longer liable for his wife's torts, and that, even if he is, an action against a tenant for years for waste, although in form an action for a wrong, is in reality an action arising *ex contractu*, *i.e.*, from the contractual relation created by the demise. It is conceded that a husband is not liable for his wife's breaches of contract. Both these contentions deserve careful consideration. I will deal first with the point as to the effect of the *Married Women's Property Act* upon a husband's liability for wrongs committed by his wife.

Sec. 3 (2) of the *Married Women's Property Act* 1890 (Qd.), which is a verbal transcript of sec. 1 (2) of the English Act of 1882, is as follows:—

"A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and of being sued, either in contract or in tort, or otherwise, in all respects as if she were unmarried; and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered

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against her in any such action or proceeding shall be payable out of her separate property and not otherwise."

Before that Act it used to be said that a husband was liable at common law for his wife's torts committed during coverture. The authorities for this proposition were based on a passage in *Bacon's Abridgment*, "Baron and Feme" (L.): "The husband is by law answerable . . . for all her (the wife's) torts and trespasses during coverture, in which cases the action must be joint against them both: for if she alone were sued it might be a means of making the husband's property liable, without giving him an opportunity of defending himself."

On this authority it was sometimes assumed that a husband was personally liable for his wife's torts as if he had committed them himself. But this was not the law. The real nature of the liability of the husband was considered by the Court of Common Pleas in the case of *Capel* v. *Powell* (1), where *Erle* C.J. said: "Marriage does not give a cause of action against the husband. Whilst the husband lives and the relation continues, he must be joined in all actions for his wife's debts and trespasses. If the husband dies, the action goes on against the wife. If the wife dies, the action abates,—because the husband is not liable."

This passage is quoted with approval by *Cozens-Hardy* M.R in the case of *Cuenod* v. *Leslie* (2), and may be regarded as a correct statement of the law. The result was that if a person injured by a married woman could get a joint judgment against her and her husband during coverture his property was liable to be taken in satisfaction of the judgment. Otherwise he went free.

In the case of *Seroka* v. *Kattenberg* (3) the question was raised whether since the *Married Women's Property Act* the husband was still liable for his wife's wrongful acts, and it was held by *Mathew* and *A. L. Smith* JJ. that the Act had made no difference in that respect. The case does not seem to have been very fully considered. The point did not again come up for discussion in England until the year 1900, when the case of *Earle* v. *Kingscote* (4) was decided by the Court of Appeal, constituted by Lord

(1) 17 C.B. N.S., 743, at p. 747; 34 L.J. C.P., 168.
(2) (1909) 1 K.B., 880, at p. 885.
(3) 17 Q.B.D., 177.
(4) (1900) 2 Ch., 585.

Alverstone M.R. and *Rigby* and *Collins* L.JJ. The Court was invited to overrule the case of *Seroka* v. *Kattenburg* (1), but declined to do so. Lord *Alverstone* and *Collins* L.J. were of opinion that that case was rightly decided, *Rigby* L.J. doubting.

In *Cuenod* v. *Leslie* (2) the point was again brought before the Court of Appeal with a view to an appeal to the House of Lords, but the case was decided in favour of the husband on another ground. All the members of the Court, however, adverted to the point. The Master of the Rolls and *Buckley* L.J. contented themselves with saying that they were bound by the decision in *Earle* v. *Kingscote* (3), but both indicated grave doubts as to its correctness. *Fletcher Moulton* L.J., however, thought it right to state his views on the subject in a passage which I will read at length (4): —"The position of a husband prior to 1857 with regard to torts committed by his wife, either before or during coverture, was very peculiar. Strictly speaking he was not liable for them in any way, but, inasmuch as during coverture the wife could not be sued without her husband, it was necessary to join him 'for conformity,' as it was termed, and if judgment was obtained while the action was in this state it was a personal judgment against both, entailing the usual consequences. But the reason of the presence of the husband in the action and the nature of his position therein were recognized and continued effective down to judgment. If the wife died before judgment the action abated. If the husband died before judgment the action continued against the wife, and whatever the nature of the tort the husband's representatives were not liable and could not be joined. The Courts acted consistently on the principle that the husband was a defendant only because he must be made so by reason of the rule of law that the wife could not be sued alone. This is laid down with the utmost clearness in a judgment of *Erle* C.J. in *Capel* v. *Powell* (5), and the law as there stated has so far as I know never been questioned and is in accordance with all the authorities.

"But, although in a strictly legal sense a husband was not liable

(1) 17 Q.B.D., 177.
(2) (1909) 1 K.B., 880.
(3) (1909) 2 Ch., 585.
(4) (1909) 1 K.B., 880, at p. 886.
(5) 17 C.B. (N.S.), 743; 34 L.J. C.P., 168.

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for torts committed by a wife, it is evident that practically a liability for such torts could be imposed npon him by obtaining judgment in an action brought against the wife in which he must be joined for conformity. This mode of imposing a liability upon him could only be defeated by the death of one of the parties or a dissolution of the marriage before judgment, so that in practice a husband could in the great majority of cases be made to bear the consequences of a wife's torts. It became, therefore, customary to speak of a husband as being liable for his wife's torts, but this phrase, though convenient and frequently to be found in reports of cases, was never used in any sense inconsistent with that to which I have referred, and its use does not in any way imply that at any time our Courts considered that there was any personal liability in the husband until after judgment.

"The legal position of a husband towards a wife in civil matters relating to property and liability was, however, greatly modified by the Married Women's Property Acts, which are now represented, so far as the questions in the present case are concerned, by the *Married Women's Property Act* 1882. By sec. 1, sub-sec. 2, of that Act it is provided as follows:—'A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her . . .'

"My own personal view is that this language is very carefully chosen. The draftsman was perfectly aware of the status of a husband in respect of a wife's torts. He knew that the Courts had permitted him to be joined in an action brought upon a cause of action with regard to which he had no personal liability only because they were obliged to do so, since the wife could not be sued alone. He might be joined only because he must be. The draftsman therefore felt that the correct mode of putting an end to the anomaly was to remove the necessity which alone had led to it. If this necessity for the presence of the husband no longer existed, why should the Courts permit a man to be made

defendant in an action in respect of matters for which he was not liable, and where his presence was not required? That this was intended to be the meaning and effect of the section appears to me to be clear also from the provision that 'any damages or costs recovered against her in any such action or proceeding'—*i.e.*, an action or proceeding taken against her—' shall be payable out of her separate property, and not otherwise.' This makes it clear that the husband's property is no longer to be a source from which the damages or costs of an action of tort against the wife are to be satisfied.

"If I am right as to this being the construction of the sub-section, it would appear that the strict accuracy of the language used has defeated its object. The use of the word 'may,' and not 'must,' has the appearance of leaving it optional, and in the case of *Seroka* v. *Kattenburg* (1) a Divisional Court, and subsequently in the case of *Earle* v. *Kingscote* (2), this Court, has held that it is still open to a plaintiff to join the husband as defendant in an action for a tort committed by the wife. The decision is of course binding upon us, but in my opinion it is most desirable that the matter should be reviewed by the final Court of Appeal, because the present state of things is highly anomalous. I cannot believe that the *Married Women's Property Act* 1882, which drew such a clear line of separation between the husband's and wife's property and liabilities, and arranged them in other respects so fairly on the lines of separate personal responsibility, could have intended to leave such a blot on the legislation as would follow from permitting a plaintiff to recover damages from a husband in respect of torts of the wife either before or during coverture, although he was not liable for the torts or any participation in them, and was not needed as a party to the action."

I respectfully adopt the reasoning of the learned Lord Justice, which is to my mind conclusive. It is, moreover, if further support is needed, supported by critical verbal scrutiny of the language of the section. The concluding enactment is that "any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise." The phrase "such action or proceeding" is also used

(1) 17 Q.B.D., 177. (2) (1909) 2 Ch., 585.

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in the preceding member of the section, "any damages or costs recovered by her in any such action or proceeding shall be her separate property." The antecedent to the word "such" is to be found in the next preceding sentence "her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal proceeding brought by or taken against her." The words "such action or proceeding" mean, therefore, an action or legal proceeding brought by or taken against her. And an action for damages for a wrong committed by her is not the less an action or proceeding taken against her because under the old rule, expressly abrogated by the Act, her husband was a necessary party to the action. It follows that the damages and costs recovered in such action, being payable out of her separate property "and not otherwise," are not payable by the husband.

This Court is not formally bound by the decision of the Court of Appeal in *Earle* v. *Kingscote* (1), although the learned Chief Justice was no doubt right in following it. And although it is, I think, expedient that the High Court should follow decisions of the Court of Appeal under ordinary circumstances, I do not think that it ought to do so when the decision in question has been doubted and regarded as open to question by the Court itself, and when it is founded on reasoning which does not commend itself to us. If, therefore, it were necessary to rely on this point I should be prepared to decline to follow the cases of *Seroka* v. *Kattenburg* (2) and *Earle* v. *Kingscote* (1).

I pass now to the second point, which was considered by the Court in the case last mentioned. I quote from the judgment of *Collins* L.J. (3):—"I think *Byrne* J. has correctly applied the law as laid down in *Liverpool Adelphi Loan Association* v. *Fairhurst* (4) on the one hand, and *Wright* v. *Leonard* (5) on the other. Those two cases seem to me to exactly define the distinction which *Byrne* J. has made the ground of his decision in the present case. The general rule of law appears to be clear and unquestioned—that a husband is liable for his wife's fraud as well as for other torts committed by her during the coverture; I need not deal with antecedent torts. That being so, a quali-

(1) (1900) 2 Ch., 585.
(2) 17 Q.B.D., 177.
(3) (1900) 2 Ch., 585, at p. 591.
(4) 9 Ex., 422.
(5) 11 C.B. (N.S.), 258.

fication was put on that rule so far as regarded fraud or other torts embraced in contracts. It was said that where you cannot separate the fraud or other tort in respect of which you are suing from the contract, you cannot, by framing your statement of claim in the shape of tort, turn that which is essentially in its main features contract into tort so as to let in the liability of the husband where the two are inextricably mixed together. You can only treat it in point of law as a contract, and not as a tort. You cannot let in the liability of the husband by turning that which is essentially contract into tort in the mode stated. But that principle certainly does not and ought not to apply where the real substance and gist of the matter is in fact a tort and would naturally and properly be expressed as a tort, though by ingenuity it might be framed into a statement of a contract—a contract which in point of fact never really existed, but which would be alleged as an academical statement by an ingenious pleader so as conceivably to cover the circumstances of the case."

An action for waste by a tenant was in form an action for a tort, but in substance it was an action for a breach of the duty arising from the contractual relations created by the demise. An action against a common carrier for breach of his duty under the bailment for carriage might have been framed either in tort or in assumpsit on the implied contract, but in substance it was an action for breach of the obligations of the contract of bailment. So in this case the action might have been brought against the wife either on the express contract to keep in repair, or on the implied obligation arising from the contract of demise not to commit waste by burning the property, or on duty not to commit waste. But the obligation, from whatever point of view it is contemplated, is a single obligation, and the right of the lessor in respect of it is a single right, although the form of procedure for enforcing that right may be at the option of the lessor. In my judgment the question of the liability of a defendant is a matter of substance, and does not depend on a matter of form, itself dependant on the plaintiff's option. The case is, therefore, within the rule stated by *Collins* L.J. (1): "You cannot let in the liability of the husband by turning that which is essentially contract into

(1) (1900) 2 Ch., 585, at p. 592.

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tort by framing your statement of claim in the shape of tort." For this reason also, quite apart from the other, I think that the appellant Duncan's appeal must succeed.

I think, therefore, that the appeal of the appellant Agnes should be dismissed, and that of the defendant Duncan should be allowed, and that the judgment against him should be discharged and judgment entered for him with costs of action.

As to the costs of the appeal, I think that as the appellants have joined in the appeal, and one has succeeded and the other failed, there should be no order.

O'CONNOR J. Upon the findings of the jury I can see no reason to doubt that as regards Agnes Brown, the wife, judgment was rightly entered for the plaintiff. In so far as the claim is founded on contract her making of the covenant to keep the house and furniture in good repair and her failure to comply with it were established to the satisfaction of the jury. Her counsel endeavoured to establish that a clause preventing the operation of the covenant in case of fire had by mutual mistake of the parties been omitted in the agreement as drawn up. But the findings conclusively dispose of that defence. Quite irrespective of the jury's view as to Mrs. Brown's negligence, which I shall deal with in considering her husband's position, the findings against her on the claims based purely on contract are clearly sufficient to satisfy entry of judgment against her. I therefore agree that her appeal cannot be sustained. But the effect of the jury's findings on the husband's liability stand on quite a different footing. It is clear that the wife became tenant of the premises by virtue of a written contract entered into by her as a *feme sole* while living apart from her husband and in no way binding upon him, and it is conceded that, if the respondent's rights rested on contract only, the husband could not have been sued and the judgment against him could not stand. It is claimed, however, that the burning down of the house by the wife's negligence, which has been found by the jury, is a tort for which the husband may be made liable jointly with the wife, and that the judgment against him must therefore stand. In answer to that contention Mr. *Graham*, on the husband's behalf, puts forward

two propositions. First, that the express provisions of sec. 3 of the Queensland *Married Women's Property Act* 1890 relieves the husband from liability to be sued for his wife's torts in cases such as the present. Secondly, that upon the findings, as interpreted by the facts, the cause of action against the wife, though shaped in tort, was really founded on the wife's contract, and that the husband was not liable to be joined even for conformity. For the purpose of considering the first of these propositions I shall assume that the cause of action relied on was a tort entirely independent of the wife's contract. The Queensland *Married Women's Property Act* 1890 substantially follows the English *Married Women's Property Act* 1882, and sec. 3 of the Queensland Act is identical with the first section of the English Act. There are two decisions in the English Courts on the interpretation of the English Act which are, if this Court should decide to follow them, conclusive against Mr. *Graham's* contention. In *Seroka* v. *Kattenburg* (1), decided in 1886, it was held that the husband was liable to be sued jointly with his wife for a tort (in that case libel and slander) committed by her, and that sec. 1 of the *Married Women's Property Act* 1882 did not relieve him of that liability. The decision was that of a Divisional Court consisting of Mr. Justice *Matthew* and Mr. Justice *A. L. Smith*, the former expressing the view that the expression "need not be joined" used in the Act did not discharge the husband from his old liability, but were intended to give the plaintiff an option of suing husband and wife together or suing the wife alone. The Court of Appeal had to consider the same question in 1900 on appeal from *Byrne* J.: *Earle* v. *Kingscote* (2). On the hearing before that learned Judge it seems to have been agreed that *Seroka* v. *Kattenburg* (1) was to be taken as settling the meaning of the Statute, and it was upon another point that the appeal went forward. But in the Court of Appeal the interpretation of the Statute was taken into consideration. Lord *Alverstone*, then Master of the Rolls, expressed his approval of the decision in *Seroka* v. *Kattenburg* (1) and followed it. Lord Justice *Collins* took the same view, and Lord Justice *Rigby*, though doubting the correctness of the view taken by the Divisional Court in *Seroka* v. *Katten-*

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

(2) (1900) 2 Ch., 585.

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burg (1), thought it safer to follow it. During the present year the question again presented itself before the Court of Appeal in *Cuenod* v. *Leslie* (2). *Cozens-Hardy* M.R. said nothing as to the merits of the question, holding that *Earle* v. *Kingscote* (3) was binding on the Court. Lord Justice *Buckley* stated that he expressed no opinion on the point raised, but felt himself bound by the decisions in *Seroka* v. *Kattenburg* (1) and *Earle* v. *Kingscote* (3). *Fletcher Moulton* L.J., conceding that the Court of Appeal was compelled to follow *Seroka* v. *Kattenburg* (1) and *Earle* v. *Kingscote* (3), expressed at the same time his dissatisfaction with the law as laid down in those cases and the desirability of having the matter settled by the Court of final Appeal. In the course of his judgment he fully discusses the interpretation of the section, and on reasoning which is to my mind conclusive, he arrives at the opinion that sec. 1 of the *Married Women's Property Act* 1882 should not be interpreted as merely giving an option to the plaintiff in an action against the wife for her tort to join or not join the husband as he might think fit, but that it should be interpreted as freeing the husband entirely from any liability to be joined as defendant in such an action. Notwithstanding, however, that individual expression of opinion, the judgment of the Court must be taken as affirming its former decision. There are therefore now standing two decisions of the English Court of Appeal against the view of the Statute which Mr. *Graham* has put forward, a view which after full consideration of the matter I believe to be right. The question then arises to what extent, if at all, is this Court obliged under these circumstances to follow the decisions of the English Court of Appeal? In matters not relating to the Constitution this Court is, no doubt, bound in judicial courtesy by the decisions of the House of Lords, the tribunal of the highest authority in the British Empire. The Judicial Committee of the Privy Council is by Imperial Statute placed, as to matters within its jurisdiction, in effect at the head of the judicial system of every British possession outside the United Kingdom, and as to all matters within its jurisdiction we are bound by its decisions. Apart from

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

(2) (1909) 1 K.B., 880.

(3) (1900) 2 Ch., 585.

those tribunals there is no Court in the Empire whose decisions we are on any ground obliged to follow. The English Court of Appeal stands to this Court in much the same position as any other tribunal where British law is administered by Judges of high attainments, great learning and wide experience. The judgment of such a tribunal when it expresses the considered opinion of its members must always carry very great weight in the estimation of this as of every other Court in the Empire. It cannot, however, be said that the judgment of the Court of Appeal in *Cuenod* v. *Leslie* (1) does express the considered opinion of its members. Although Lord Justice *Fletcher Moulton* is the only Judge who expresses dissatisfaction with the earlier decision, it is quite evident that the other members of the Court follow it not because they approve of the reasoning, but because it is a decision by which they consider themselves bound. Under these circumstances this Court is, I think, entitled to consider the important question of law raised by Mr. *Graham* on its merits unhampered by any binding judicial authority.

Turning now to the question of law itself, I follow and wish to adopt the reasoning of Lord Justice *Fletcher Moulton* in *Cuenod* v. *Leslie* (1). The central proposition in his argument is that before the passing of the Act the husband was not in any true sense liable for his wife's torts. She was always liable for her own torts, but there was no way in which that liability could be enforced except by an action or suit against her in which her husband was joined as a party. He was joined, therefore, not because he was in any sense liable for the commission of the tort, but because her liability could not be made effective without joining him as a party. He was joined merely for conformity. Lord Justice *Fletcher Moulton* adopts that view of the law as it is laid down by *Erle* C.J. in *Capel* v. *Powell* (2), a view which, as the learned Lord Justice says, has never been questioned and is in accordance with all the authorities. Such being the sole reason for joining the husband in actions against the wife for her torts, the *Married Women's Property Act* was passed enabling the wife to be sued alone for her torts and empowering a successful plaintiff to recover his damages and costs out of her separate

(1) (1909) 1 K.B., 880. (2) 17 C.B.N.S., 743.

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property, but not otherwise. When the Statute in the same section provides that the husband need not be joined with her as defendant or be made a party to any action or other legal proceeding taken against her, it seems to me that the language used must be applied to the state of law which the Statute purported to amend. So applied, it is in my opinion fairly open to one interpretation only, consistently with its object and purpose, and that is the interpretation which relieves the husband from all liability to be made a party in actions such as that now under consideration. It would follow that in this case the husband has been improperly joined as party and that the judgment entered against him cannot stand.

I turn now to Mr. *Graham's* second proposition. It must I think be taken as settled law that where leased premises are burned down by a tenant's negligence the landlord may sue him in tort for waste unless there is in the terms of their agreement some provision to the contrary. Mr. Justice *Dennison* in *Anderson* v. *James* (1) has collected the leading authorities in a convenient form, and I can see no reason to doubt the conclusion at which he has arrived that an action will lie against the tenant at the suit of the landlord under the circumstances I have stated. The findings of the jury established that the premises in question were burnt down by the negligence of the wife during her tenancy. There can be no doubt therefore that, irrespective of her covenant to keep in repair, an action of tort would lie against her at the suit of her landlord for the damage thereby occasioned to the premises. It does not however necessarily follow that the husband can be joined as defendant in such an action. The principle upon which Mr. *Graham* relies is stated in L.J. *Collins'* judgment in *Earl* v. *Kingscote* (2) as follows:—"The general rule of law appears to be clear and unquestioned—that a husband is liable for his wife's fraud as well as for other torts committed by her during the coverture; I need not deal with antecedent torts. That being so, a qualification was put on that rule so far as regarded fraud or other torts embraced in contracts. It was said that where you cannot separate the fraud or other tort in respect of which you are

(1) 11 Gaz. L.R.N.Z., 119.

(2) (1900) 2 Ch., 585, at p. 591.

suing from the contract, you cannot, by framing your statement of claim in the shape of tort, turn that which is essentially in its main features contract into tort so as to let in the liability of the husband where the two are inextricably mixed together. You can only treat it in point of law as a contract, and not as a tort. You cannot let in the liability of the husband by turning that which is essentially contract into tort in the mode stated." If the wife had had no right on the premises the burning would have been an act of trespass, and in an action for that trespass the husband could no doubt have been joined as defendant. But in this case the defendant was not a trespasser, nor is she charged as a trespasser. She was entitled to be on the premises and to light the fire, but she owed a duty to her landlord to use reasonable care in its control and management: the breach of that duty is the negligence complained of. It was admitted on behalf of the husband that the duty ordinarily arises out of the relation of landlord and tenant apart from any stipulations of an agreement. It was contended, however, that as that relation was created in this case by the contract of the wife as *feme sole*, the neglect of her duty arising under it was a tort which could not be separated from the contract, and was therefore one in respect of which the husband could not be joined. If the contract in this case had been the letting of the premises for the ordinary purposes of a dwelling house difficulties might have arisen in maintaining such a contention. In *Sachs* v, *Henderson* (1) *Collins* M.R. points out that in many cases, where the tort consists in the breach of duty arising out of the relation of the parties to one another, the tort is none the less a tort because the relation may have been created by a contract. He instances the case of a railway contract of carriage. The relation of carrier and passenger is created by contract, but nevertheless negligence in the carrying of the passenger is clearly foundation for an action of tort. It is, however, unnecessary to consider that aspect of the matter in this case, because the letting of the premises to the wife was not merely for the ordinary purposes of a dwelling house. It is established that it had been used by the landlord as a hospital, and was leased to the tenant

(1) (1902) 1 K.B., 612.

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for the same purpose. The burning of disinfectants in rooms occupied by patients is an ordinary operation in the carrying on of a hospital. It must therefore have been within the contemplation of both parties that the burning of disinfectants in the rooms might be carried on by the tenant. It is impossible therefore to ascertain what was the duty of the female defendant, the breach of which is charged as negligence, without referring to the terms of the agreement, and applying it to the subject matter with which the parties were dealing. In other words, the jury could not determine whether the wife had been guilty of negligence or not without considering the terms of the agreement under which she held the premises, the nature of the premises, and the use of them to which the agreement referred. It is conceded that the form of the pleadings cannot be the test. The substance of the matter must be looked at, and the substance of the matter is that the Court cannot determine on the findings whether the wife committed the tort charged against her without considering the terms of her contract and the nature and use of the premises under the contract. Under these circumstances the cause of action, though in form for tort, is really and substantially for breach of contract—for breach of a contract in respect of which the wife alone was liable. It was a cause of action against the wife coming within the exemption stated by Lord Justice *Collins* in the passage I have quoted from *Earle* v. *Kingscote* (1), in other words it was a cause of action in respect of which the husband could not be joined as defendant. In my opinion therefore the husband has succeeded in establishing each of the two propositions on which his counsel has relied. On each ground independently of the other he is entitled to have the judgment against him reversed and judgment entered in his favour. To that extent the appeal must be allowed and the judgment entered must be varied accordingly.

ISAACS J. As regards the appellant Agnes Brown, no reason appears to interfere with the judgment against her. The liability of the appellant Duncan Brown depends upon whether in Queensland a husband is as such responsible for his wife's torts

(1) (1900) 2 Ch., 585, at p. 591.

and if he is, whether the destruction of the respondent's house by reason of the negligence of the appellant Agnes Brown in the circumstances appearing in the case was a tort of the kind to which such responsibility attaches.

The first question I answer in the negative, and for the reasons stated by *Fletcher Moulton* L.J. in *Cuenod* v. *Leslie* (1).

To the observations of the learned Lord Justice, which are equally applicable to the Queensland Statute, I will only add two references, a considerable distance apart, viz., *Drury* v. *Dennis* (2), and *In re Beauchamp*; *Ex parte Beauchamp* (3), both of which support the view taken in *Capel* v. *Powell* (4).

The second question I answer in the negative also. It is true that in many instances a claim may be framed at will either in tort or in contract: *Brown* v. *Boorman* (5). But there are some cases where it becomes very material to ascertain whether a cause of action rests substantially on contract or strict tort—that is, a wrong independent of contract. Where the law gives protection to any person for contractual liability, or applies a different measure of responsibility according to whether his fault is a tort or a breach of contract, it does not permit that protection to be taken away or the responsibility to be increased by mere change of form. If the cause of action is in substance one resting upon contract, or as it is sometimes termed sounding in contract, the protection or discrimination remains. This is exemplified in the case of infants, by *Jennings* v. *Rundall* (6), see particularly the judgment of *Lawrence* J., and *Green* v. *Greenbank* (7), in which *Gibbs* C.J. said, "Where the substantial ground of action rests on promises, the plaintiff cannot, by changing the form of action, render a person liable who would not have been liable on his promise." So in the case of a married woman and her husband: *Liverpool Adelphi Loan Association* v. *Fairhurst* (8); *Wright* v. *Leonard* (9), and *Earle* v. *Kingscote* (10); or where it becomes otherwise material to discriminate between a pure tort and what is really a breach of contractual obligation, as in *Chinery* v. *Viall*

(1) (1909) 1 K.B., 880, at p. 886.
(2) Yelv., 106; 80 E.R., 72.
(3) (1904) 1 K.B., at p. 581.
(4) 17 C.B.N.S., 743.
(5) 11 Cl. & F., 1.
(6) 8 T.R., 335.
(7) 2 Marsh., 485.
(8) 9 Ex., 422.
(9) 11 C.B.N.S., 258.
(10) (1900) 2 Ch., 588, at p. 591, per *Collins* L.J.

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(1); *Bryant* v. *Herbert* (2); *Kelly* v. *Metropolitan Railway Co.* (3), and *Turner* v. *Stallibrass* (4); *Walley* v. *Holt* (5).

The test appears from the cases cited to be this, if the plaintiff in order to make out his cause of action or prove his damages must rely on a particular contract, the action is regarded as substantially one resting on contract, but if he can establish his whole case without having to rely on such a contract at all, it is one of tort.

In the present case the cause of action, material to this appeal, is that Agnes Brown, being tenant of the respondent for a term of eighteen months under a written contract containing an express term that the tenant would keep the premises and furniture in good repair, the premises and furniture were destroyed by reason of Agnes Brown negligently lighting a fumigation fire. The act of lighting a fire for that purpose was quite lawful, and having regard to the nature of the premises, not only contemplated as permissible and reasonable, but in every way proper and laudable; but the method adopted was careless, and the tenant in doing a permitted act unnecessarily and improvidently caused risk which eventuated in the loss.

The question is whether that is founded on a contract or a naked tort. The mere fact that under older practice an action on the case might have been brought does not at all help to determine the matter because an action on the case could be brought for a cause of action *quasi ex contractu* as well as *quasi ex delicto*. *Assumpsit* and trover were equally actions on the case. In *Slade's Case* (6) it was held that an action on the case lies upon simple contract, as well as an action of debt. So too we cannot regard the fact of misfeasance, as distinguished from non-feasance, as affording any conclusive guide, as the cases above cited show. The test is that already stated. Apart from any express contract one way or the other there is an implied promise by the tenant arising out of the relation of landlord and tenant not to use the premises in an untenant-like manner: see *Holford* v. *Dunnett* (7), *Standen* v. *Chrismas* (8), *Morrison* v. *Chadwick* (9), *United*

(1) 5 H. & N., 288, at p. 295.
(2) 3 C.P.D., 389.
(3) (1895) 1 Q.B., 944.
(4) (1898) 1 Q.B., 56.
(5) 35 L.T., 631.
(6) 4 Rep., 92*b*.
(7) 7 M. & W., 348.
(8) 10 Q.B., 135.
(9) 7 C.B., 266.

States v. *Bostwick* (1); *Woodfall on Landlord and Tenant*, 17th ed., pp. lxiii. and 669; *Fawcett on Landlord and Tenant*, 3rd ed., p. 332.

The covenant to keep in repair was held in *Standen* v. *Christmas* (2) to stand in the way of any such implied contract, and this is supported by Lord *Blackburn* in *Doherty* v. *Allman* (3). His Lordship said:—"A case might very well arise where affirmative words involve a negative. I think myself the true construction of saying I will maintain a storehouse involves the negative—I will not pull it down."

If the act which the landlord complains of is wilful or wanton, and not reasonably referable to any permission contained in the lease, as if the tenant deliberately sets fire to the house or pulls it down, it would be a pure tort, and there might be applied the doctrine found in the cases of *Kinlyside* v. *Thornton* (4); *Marker* v. *Kenrick* (5), the latter being a case where the lessee of a mine cut away the barrier between it and an adjoining mine thereby crossing the boundary of the premises demised and swamping it with water from an adjoining mine.

But here the position is quite different. What was done was no wilful or wanton act of destruction, no improper use, no overstepping the subject matter demised, no wrongful purpose pursued, but a negligent method adopted. It seems to me that the case cannot be sustained without introducing not merely the fact of a tenancy, but the terms of it, and showing the nature of the property demised and the use to which the tenant was allowed to put it, and the acts she was permitted and expected to perform with respect to it, so as to establish the standard of care, the failure to observe which was negligence.

Whether the facts are covered by the express terms of the covenant to keep in repair, or whether they are open to an implied negative promise not to be negligent in exercising the contractual rights of user, is for this purpose immaterial; and on the whole I am of opinion this action sounds in contract throughout, and is not founded on a naked tort. I observe that *Sir*

(1) 94 U.S., at p. 66.
(2) 10 Q.B., 135.
(3) 3 App. Cas., 709, at p. 731.
(4) 2 Bl. W., 1111.
(5) 13 C.B., 188.

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Frederick Pollock in his work on *Torts*, 6th ed., p. 40, gives it as his opinion that such an action would doubtless be treated as an action of contract if it became necessary for any purpose to assign it to one or the other class.

I agree that the appeal of the husband should be allowed.

Appeal of Agnes Brown dismissed. Appeal of Duncan Brown allowed.

Solicitors, for appellants, *Atthow & McGregor.*

Solicitors, for respondent, *Bouchard & Holland.*

H. V. J.

YOUNG AND REES . . . . . APPELLANTS;

AND

QUAINE . . . . . RESPONDENT.

PEASE AND OTHERS . . . . . APPELLANTS;

AND

QUAINE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1910.

MELBOURNE, *March* 1.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Criminal law—Information—Conviction—Duplicity—No offence disclosed—Special leave to appeal to High Court—Industrial Disputes Act 1908 (*N.S.W.*) (*No.* 3 *of* 1908), *secs.* 42,* 45.

*Sec. 42 of the *Industrial Disputes Act* 1908 provides that :—

"If any person—

"(*a*) does any act or thing in the nature of a lock-out or strike, or takes part in a lock-out or strike, or suspends or discontinues employment or work in any industry ; or

"(*b*) instigates to or aids in any of the above-mentioned acts,

"he shall be liable to a penalty not exceeding one thousand pounds, or in default to imprisonment not exceeding two months :

"Provided that nothing in this section shall prohibit the suspension or discontinuance of any industry or the working of any persons therein for any cause not constituting a lock-out or strike."