THE RIGHT OF A WIFE TO SUE HER HUSBAND FOR A TORT COMMITTED AGAINST HER PERSON DURING COVERTURE

Probably with respect to no other subject has the law undergone a greater change in the last century than it has with reference to the status of a married woman—her ability to hold property, to contract, to sue and be sued, to be recognized as an entity separate and distinct from that of her husband. Whereas, in the eighteenth century her rights as an individual were less than those of a lunatic (as he could hold separate property, while she could not), today her property rights are as great as those of her husband, she may contract as freely as a feme sole, and her other rights are being constantly extended.

Before taking up in detail the subject of this article, it might be well to take a general view of the history and development of that branch of the law of which this subject forms a part.

Under the common law, the entity of the wife was regarded as absolutely merged in that of the husband. They were, in contemplation of the law, but one legal unity. Her property at the time of the marriage became his; she could contract only with his consent; she could sue or be sued only by having him joined with her as party plaintiff or defendant, and obviously, for this reason, no action was sustainable between them.[1]

The first step toward the emancipation of the wife from these disabilities came with the recognition in equity of these estates which had been settled to her sole and separate use.[2] Courts of Equity allowed a married woman to maintain a suit in her own name, and she could husband in a Court of Chancery.[3] This practice was in keeping with the policy of the chancery courts in granting a remedy whereever there was none at law.

Following this came the so-called "married women's acts," giving to the wife the same rights of property and contract that her husband had [4], and today the courts of several states seem to have gone so far as to advocate that the marital entity be disregarded for any and all purposes.

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[1] Bank of America v Banks, 101 U. S. 240.

[2] Elliot v. Waring, 17 Amer. Dec. 69; Tounes v. Durbin, 3 Metcalfe 352; 77 Am. Dec. 176.

[3] Warner v. Warner, 1 Dick. 90; Lombard v. Morse, 155 Mass. 136.

[4] Cook v. Cook, 125 Ala. 583; Reed v. Painter, 145 Mo. 341; Smith v. Smith, 20 R. I. 556; Montgomery v. Montgomery, 142 Mo. App. 481.

This article deals with the development and present state of the law respecting the right of the wife to sue her husband for damages for a tort committed by him against her person during coverture.

It follows from what was said above, that, at common law, no such action was sustainable. Not only the legal conception of the marital relation stood in the way of such a suit, but the very mode of procedure of the courts precluded such an action, as the wife had necessarily to join her husband as party with her, and, in fact, he was considered as the real party plaintiff. Obviously, with the same person both plaintiff and defendant, the action would not lie. So, for any changes in this doctrine, we must look to the "enabling statutes" mentioned above. Evidently, to ascertain the rule in any given state, the logical course would be to examine the statutes and the decisions of that state. However, these statutes are in general so similar that it is possible to treat them and the decisions rendered under them as though they were in fact identical. All the statutes are explicit as to the property and contract rights conferred, but none that I have seen have made any express provision for suits between husband and wife for purely personal torts, and in construing the effect of the statutes as to these actions, courts have arrived at various conclusions.

All through the nineteenth century and up until the year 1914, the courts uniformly held that these acts intended to give merely the rights expressly set forth, and never meant so far to recognize the separate entity of the wife as to allow her to sue her husband for a personal tort.

Quite a number of strong and well reasoned decisions lay down this rule. New York was, perhaps, one of the first states to pass one of the statutes in question.[5] In 1863, a case came up before the Supreme Court of that state, in which a woman was suing her husband for an assault, and it was held that the statute simply gave to the wife certain property rights and did not confer upon her a right of action against her husband for an assault,[6] nor for slander.[7] In 1882 the same court, acting on the theory that this rule had outgrown its usefulness, allowed a wife to recover for an assault by her husband,[8] but this decision was promptly reversed by the Court of Ap-

[5] Laws of 1862 (N. Y.) Chapter 172. (This was practically the same as the earlier statute passed in 1847).
[6] Longendyke v. Longendyke, 44 Barb. 366.
[7] Freethy v. Freethy, 42 Barb. 641.
[8] Schulz v. Schulz, 27 Hun. 26.

peals.[9] Only one case involving the point has since arisen in New York, that of *Abbe v. Abbe*,[10] decided by the Appellate Division of the Supreme Court in 1897, in which the decision of the Court of Appeals in *Schulz v. Schulz, supra*, was followed.

The United States Supreme Court has adhered to the same rule. The Court of Appeals of the District of Columbia held, in the case of *Thompson v. Thompson*,[11] that a statute permitting married women to sue separately "for torts committed against them, as fully and freely as if they were unmarried,"[12] would not permit a married woman to sue her husband for an assault during coverture, as such litigation would be "vicious in principle and contrary to sound public policy." An appeal was taken to the Supreme Court of the United States, and, two years later, the decision was affirmed.[13] Judge Day said in his opinion, "An examination of this class of legislation will show that it has gone much further in the direction of giving rights to the wife in the management and control of her separate property than it has in giving rights of action directly against the husband. In no act called to our attention has the right of the wife been carried to the extent of opening the courts to complaints of the character of the one here involved." However, in this case there was a strong dissenting opinion written by Justice Harlan, concurred in by Justices Hughes and Holmes.

Section 5530 of the Statutes of Minnesota, provided that "women shall retain the same legal personality after marriage as before marriage, and for any injury sustained to her reputation, person, property or character, or any natural right, she shall have the same right to appeal, in her own name alone, for redress and protection, that her husband has to appeal in his name alone." The Supreme Court of that state, in the oft-cited case of *Strom v. Strom*,[14] refused to allow recovery to a woman against her husband for a personal tort, holding that the purpose of the statute was merely to place husband and wife on an equality as to actions by either for injuries, and did not authorize either to bring an action against the other. A point was made by counsel for the plaintiff that the right to sue for a tort being a property right, it fell within the express terms of the statute. The

[9] Schulz v. Schulz, 89 N. Y. 644.
[10] 22 App. Div. 483.
[11] 31 App. D. C., 557 (1908).
[12] D. C. Code Sec. 1155.
[13] Thompson v. Thompson, 218 U. S. 611; 30 L. R. A. (N. S.) 1153 (1910).
[14] 98 Minn. 427; 6 L. R. A. (N. S.) 191 (1906).

court held, however, that, since at common law she had no such right against her husband, and since the statute had not expressly given her such a right, there was no property right to protect. The same rule was adopted in Michigan in the case of *Banfield v. Banfield*,[15] and in New Jersey in the case of *Drum v. Drum*.[16]

In Missouri, in two recent well-reasoned decisions, the law seems to be definitely settled that no action can be brought by a wife for a tort against her person by the husband. The case of *Rogers v. Rogers*,[17] decided in 1915, was an action for false imprisonment in having the plaintiff committed to and confined in an insane asylum. Judge Walker, in a strong opinion, held that the statute guaranteeing to married women certain rights [18] meant to give her only such contract and separate property rights as her husband had, and neither one had a right to sue the other for a personal tort. The decision in this case was followed without question by Judge Ellison of the Kansas City Court of Appeals in the very recent case of *Butterfield v. Butterfield*,[19] decided in July, 1916.

In Maine, in the case of *Abbot v. Abbot*,[20] a wife, after being divorced from her husband, sued him for assault and false imprisonment in having her committed to an insane asylum during coverture. The contention of the plaintiff was that the inability to sue her husband during coverture was due to the fact that the right of action was suspended during this period, rather than because no such right arose. The court denied the right of the wife to recover. It held that no action had ever arisen, and that divorce could not make that a cause of action which was not a cause of action before. This decision was later followed in the case of *Libbey v. Berry*,[21] the judge stating in his opinion that the statute [22] did not enable her "to maintain suits which could not have been brought in his name, either alone or as party plaintiff with her." An Illinois case in which the facts were similar to those in *Abbot v. Abbot* was decided in the same way and upon the same grounds,[23] and in Iowa, it was early decided, that

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[15] 117 Mich. 80; 40 L. R. A. 757 (1898).
[16] 69 N. J. L. 557.
[17] 265 Mo. 200.
[18] R. S. of Mo. 1909, Sec. 8304.
[19] 187 S. W. 295.
[20] 67 Me. 304 (1877).
[21] 74 Me. 286 (1883).
[22] Stat. of Mo. 1876, c. 112.
[23] Maine v. Maine, 46 Ill. App. 106, (1891).

though radical changes in the relation of husband and wife had been made by the statute, still these changes did not reach the extent of allowing the wife to sue the husband for an assault during coverture.[24]

In the case of *Lillienkamp v. Rippetoe*,[25] decided in Tennessee in 1915, it was held that, since the married woman's act was in abrogagation of the common law, it must be strictly construed, and only such changes recognized as were expressly laid down. The court said, in part, "We must assume that the legislature had in mind the passage of the act, the fundamental doctrine of the unity of husband and wife under the common law, and to 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 as indicated in the act, that purpose would have appeared by necessary implication."

In Washington, in the case of *Schulz v. Christopher*,[26] a wife sued her husband for an assault. It was held that a statute which provided that "the wife shall have the same right that the husband has to appeal to the courts in her individual name for any unjust usurpation of her natural or property rights," [27] did not authorize her to maintain this action, as the statue merely intended to give to the wife the same rights that the husband had at common law, and the husband never had such a right.

In Texas the rule is the same, though there is evident a strong inclination on the part of the courts to change it. The rule was established in 1886 in the case of *Nickerson v. Nickerson*.[28] The decision in this case was reluctantly followed in 1908 in the case of *Skyes v. Speer*,[29] and in 1913 in the case of *Wilson v. Brown*.[30] The judge says in the latter case, "The rule in *Nickerson v. Nickerson* seems to be supported by the weight of authority, and, whatever may be our views, we do not feel justified in declining to accept it as the established law of this state."

Up to the present time I have been able to find but three cases allowing recovery to the wife in the kind of actions we have been discussing. The first two, a Connecticut case and an Oklahoma case,

[24] Peters v. Peters, 42 Ia. 182 (1875).
[25] 179 S. W. 628; L. R. A. 1916 B. 881.
[26] 65 Wash. 496 (1911).
[27] Rem. and Bal. Code, Sec. 5926.
[28] 65 Texas 281.
[29] 112 S. W. 422.
[30] 154 S. W. 322.

appeared in the early part of the year 1914, and the third, a New Hampshire case, was decided in 1915.

In Connecticut, the statute provided that "neither husband nor wife shall acquire, by force of the marriage, any right to or interest in any property held by the other before, or acquired after, such marriage," and the wife "shall have power to make contracts with third persons, and to convey to them real and personal estate, as if unmarried." [31] The court in *Brown v. Brown*,[32] decided that the purpose of the statute was not merely to ameliorate the condition of the wife as to property rights, but to abolish the conception of the merger of legal identities, and to establish "a new foundation, namely, equality of husband and wife in legal identity and capacity of owning property." Under this ruling the plaintiff was allowed to recover against her husband for an assault and false imprisonment.

The Oklahoma statute provided that, "for any injuries sustained to her reputation, person, property, 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 in his own name alone." [33] Another statute abolished the former rule that statutes in derogation of the common law should be strictly construed.[34] It was held, in the case of *Fielder v. Fielder*,[35] that this required a liberal construction, and that, under such a construction, a wife should be allowed to recover for a gunshot wound inflicted by her husband.

The New Hampshire case, *Gilman v. Gilman*,[36] decided that under a statute which provided that "the wife may sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done, as if she were unmarried," [37] a wife might sue her husband for a tort, the only test being whether or not the action would lie if the marital relation were disregarded.

I believe that, in the foregoing article, I have examined practically every case that has arisen under this topic in this country. It is clear that, up until the year 1914, there was an unbroken line of authority uniformly disallowing the actions by the wife that we have

[31] Acts 1877, chap. 114.
[32] 88 Conn. 42; 52 L. R. A. (N. S.) 185.
[33] Rev. Laws 1910, sec. 3363.
[34] Rev. Laws 1910, sec. 2948.
[35] 42 Okla. 124; 52 L. R. A. (N. S.) 189.
[36] L. R. A. 1916 B. 907.
[37] Public Laws, Chap. 176, sec. 2.

been discussing; not, however, without strong dissenting opinions in several cases. Since that time, three courts have allowed the wife to recover for personal injury inflicted by the husband. Just what development the next few years will bring remains yet to be seen.

It is unsafe at all times to predict what the future development of the law on a subject will be, but, if the dissenting opinions in some of the cases, together with the actual decisions in others, are an indication of the sentiment of the courts, then I think it is safe to say that there is a growing inclination to construe the statutes liberally, and allow the wife to sue and recover damages from her husband for a tort committed against her person during coverture.

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