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TORTS—WIFE'S RIGHT TO SUE HUSBAND

Wife brought an action to recover damages from her husband for injuries alleged to be caused by his gross negligence in driving an automobile in which she was riding before their marriage. Husband filed a plea in bar denying wife's right to maintain this action because after the accident they had married. *Held;* no action lies. *Furey* v. *Furey,* 193 Va. 727, 71 S.E.2d 191 (1952).

By this decision the highest court of Virginia has committed itself to the proposition that a wife cannot maintain an action against her husband for a personal tort committed by him against her before their marriage. The court's reasoning regarding antenuptial torts is in accord with decided cases in at least twenty-one jurisdictions in the United States as to negligence between husband and wife: District of Columbia, Florida, Georgia, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, and Vermont; and in at least nine jurisdictions in the United States as to tort action between husband and wife: California, Delaware, Illinois, Kentucky, Massachusetts, Texas, Virginia, Washington, and West Virginia;[1] and represents the weight of authority given by the cases cited herein.[2]

At common law, husband and wife were one person—for the wife to sue the husband in tort would be for the husband to sue himself.[3] "Upon this principle of an union in person of husband and wife depend almost all the legal rights, duties, and disabilities that either of them acquired by marriage."[4] By the act of marriage it is alleged that the parties thereto establish a unit of society which automatically carries with it primary obligations which cannot be extinguished without reducing the estate of marriage to a mere licensed cohabitation; to allow the wife to sue the husband for a personal tort would upset the dignity and harmony of the home.

"It is perhaps idle to speculate at this late date as to how far the historical basis of this common law rule is attributable to a mixture of the Bible and medieval metaphysics, the position of the

1. 27 Geo. L. J. 696, 893 at 922 (1939).
2. McKinney v. McKinney, 59 Wyo. 204,135 P.2d 940 (1943); Patenaude v. Patenaude, 195 Minn. 523,263 N.W. 546 (1935); Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931); Spector v. Weisman, 40 F.2d 792 (App. D.C. 1930).
3. Prosser, Torts § 99, p. 898 (1941).
4. 1 Bl. Comm. 442.

father of the family in Roman law, the natural law concept of the family as an informal unit of government, or the property law of feudalism."[5] But whatever the historical basis the result was that neither spouse could maintain an action against the other for a personal or property tort whether it was committed before or during marriage;[6] and the action is not maintainable even after divorce or death of the husband.[7] Nor, by the weight of authority does the fact that the husband carried liability insurance have any bearing, partly because of fear of collusion between husband and wife, and partly because of the technical argument that the insurance company is not liable unless the insured is liable.[8]

It is generally agreed that a mere provision that a married woman may sue and be sued affects only the adjective law and that a substantive right must be found elsewhere in the statute.[9] The Supreme Court of Appeals in *Furey* v. *Furey,* interpreted § 55-36 of the Code of Virginia emancipating married women[10] as creating no substantive rights but rather as meaning that if the wife had an existing cause of action at time of suit, then she can sue in her own name. No section of the Code of Virginia gives the wife a right to sue her husband for a personal antenuptial tort.

Modern progress and thought have advanced so far as to render the fiction of law that husband and wife are one practically obsolete; it should be disregarded in this instance and a more reasonable and up-to-date view taken, which will permit a woman, though married, to maintain a personal tort action against her husband.

A considerable minority of the courts with unanimous approval of legal writers[11] have followed the dissenting opinion of Mr. Justice Harlan in *Thompson v. Thompson*[12] rejecting as specious the following arguments: (1) against public policy as tending to stir up family discord; (2) danger of fictitious and fradulent claims; (3) possibility of trivial actions for minor annoyances; (4) *stare decisis;* (5) strict construction of statutes changing common law; and (6) adequate remedy in criminal and divorce laws. They have also construed the Married Woman's Acts to permit an action

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5. 2 Bryce, Studies in History and Jurisprudence 819 (1901).
6. Prosser, Torts § 99, p. 899.
7. Henneger v. Lomas, 145 Ind. 287,44 N.E. 462 (1896).
8. Shaker v. Shaker, 129 Conn. 518, 29 A.2d 765 (1942).
9. 38 Harv. L. Rev. 383, 386 (1925).
10. Va. Code Ann. § 55-36 (1950) ("A married woman may contract and be contracted with and 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 . . .").
11. 43 Harv. Law Rev. 1030 (1930).
12. 218 U.S. 611 (1910).

by either spouse for a personal tort committed by the other, whether it be intentional or negligent in character.[13]

An interesting sidelight of *Furey* v. *Furey,* is that the husband carried the usual type of liability insurance. No mention of that fact is made in the case.[14] As heretofore stated the decision of *Furey v. Furey,* is based on sanctity of the family. But just how relieving insurance companies and putting the burden on the family, one or more of whom have just suffered a serious injury, promotes domestic bliss is beyond this writer's power to comprehend. If the engaged couple had wrongfully broken the engagement a recovery would have been allowed; if they had postponed marriage a recovery would have been allowed. Does it not seem strange indeed that the wife should be penalized because she kept her marriage contract and consumated the marriage? It has been suggested that there is too much danger of collusion in the husband-wife cases. However, it is doubtful that there is any less danger where the parties are engaged rather than married and besides, why should those innocent of collusion be punished because of a possibility that others might collude? The risk of collusion is one common to every type of insurance and is presumably taken into consideration in the process of rate-making.

An analysis of the problem presented in an Oklahoma decision leaves no worthy justification for the majority rule.[15] A legal maxim clearly applicable is, "Reason is the soul of the law, and when the reason of any particular law ceases, so should the law itself."[16] The courts holding that a wife cannot sue her husband for personal injuries do not deny that their statutes allow the wife to sue the husband for a tort against her property.[17] The result of the majority view in essence is, therefore, that the wife may sue her husband for conversion of her chattel, but cannot sue him to recover damages for the loss of an arm.

It is submitted that the minority rule allowing recovery is the better rule. Unfortunately our decisions have so committed our Supreme Court of Appeals that our only recourse to remedy this defect in our law seems to be to the legislature.[18]

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13. Courtney v. Courtney, 184 Okl. 395, 87 P.2d 660 (1938); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914).
14. Letter from plaintiff's attorney on file.
15. Courtney v. Courtney, *supra.*
16. Broom's Legal Maxims 159 (7th ed.).
17. Courtney v. Courtney, *supra.* 87 P.2d at 667.
18. For further comments see 38 Va. L. Rev. 973 (1952).