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LIABILITY OF HUSBAND FOR TORTS OF HIS WIFE

The Supreme Court of Florida in *Rogers v. Newby*¹ recently held that Section 708.08 of Florida Statutes 1949,² which confers certain rights upon a married woman with respect to her separate property, does not relieve her husband of his common law liability for her pure torts. The purpose of this Note is to examine this common law rule in the light of married women's property acts, which remove for the most part the common law disabilities of married women.

COMMON LAW

At common law a husband is liable jointly with his wife for torts committed by her either during or before coverture.³ His liability for her torts committed during coverture is restricted to "pure" torts,⁴ that is, those not connected with a contract she has undertaken

¹41 So.2d 451 (Fla. 1949).

²This provides:

"Every married woman is hereby empowered to take charge of, and manage and control her separate property, to contract and to be contracted with, to sue and be sued, and to sell . . . mortgage, use . . . her property, real and personal, and to make, execute and deliver instruments . . . of every character . . . without the joinder or consent of her husband, in all respects as fully as if she were unmarried. Every married woman, without the joinder or consent of her husband, shall have . . . all rights and powers with respect to her separate property, income and earnings, and may enter into . . . and enforce contracts . . . to the same extent . . . as if she were unmarried; provided, however, that no instrument conveying or encumbering real property . . . shall be valid without the joinder of her husband; . . . any claim or judgment against any married woman shall not be a claim or lien against such married woman's inchoate right of dower."

Miller v. Phillips, 157 Fla. 175, 25 So.2d 194 (1946), analyzes in searching fashion the dubious import of this provision as regards conveyance of realty.

Additional rights have been granted to married women in Florida: FLA. CONST. Art. 11, §1 (separate property not subject to husband's debts); FLA. STAT. §708.02 (1949) (right to separate property), §708.06 (right to earnings), §708.09 (right to make contracts with husband).

³3 HOLDSWORTH, HISTORY OF ENGLISH LAW 531 (6th ed. 1934); 2 KENT, COMM. §149.

⁴A pure tort is one ". . . not growing out of, or founded upon, or directly connected with, or a part of, or the means of effecting, a contract . . ." *Prentiss v. Paisley*, 25 Fla. 927, 7 So. 56 (1890); *Meeks v. Johnston*, 85 Fla. 248, 251, 95 So. 670, 671 (1923). A pure tort has also been defined in Florida as an act of commission, not omission. See *Ballenger v. Mark*, 115 Fla. 95, 111, 155 So. 106,

to make. The reason for this limitation is that entertainment of actions based on torts growing out of contracts would amount in practical effect to indirect enforcement of contracts into which the wife is under disability to enter; consequently at common law neither spouse is liable.⁵ As an adjunct to his liability for her pure torts, the husband, upon a plea of coverture by his wife, is a necessary party-defendant in such an action against her.⁶ His liability ceases upon dissolution of the marriage by divorce⁷ or death⁸ of the wife prior to judgment; and if he dies before judgment his estate is not liable.⁹ He alone is liable for torts committed by her under his coercion; and his mere presence during their commission raises a rebuttable presumption of coercion.¹⁰

This common law liability of the husband is of ancient origin, and the authorities are in conflict as to the reason for its existence. Some courts emphasize the common law fiction of unity of person, which renders the wife a legal nonentity.¹¹ On the other hand, it has been said that the basis of the law of husband and wife is not unity of person but the profitable relationship of guardian that the husband enjoys over the person and property of his wife.¹² Other courts draw no distinction between these two concepts but predicate the liability on a combination of the two.¹³ Still others¹⁴ find the reason to be the impossibility of an action being maintained against

112 (1934) (concurring opinion); *Banfield v. Addington*, 104 Fla. 661, 668, 140 So. 893, 901 (1932) (dissenting opinion).

⁵E.g., *Keen v. Hartman*, 48 Pa. 497 (1865).

⁶1 CHITTY, PLEADING *105.

⁷Cf. *Cuenod v. Leslie* [1909] 1 K.B. 880. See 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 531 (6th ed. 1934).

⁸*Head v. Briscoe*, 5 C. & P. 484, 172 Eng. Rep. 1064 (1833).

⁹3 HOLDSWORTH, HISTORY OF ENGLISH LAW 531 (6th ed. 1934). Survival of actions in Florida today is analyzed in Note, 1 U. OF FLA. L. REV. 260 (1948).

¹⁰4 BL. COMM. *28.

¹¹See *Banfield v. Addington*, 104 Fla. 661, 672, 140 So. 893, 898 (1932); *Bryant v. Smith*, 187 S.C. 453, 198 S.E. 20, 22 (1938). The concept of unity may well stem from *Genesis* ii, 24, ". . . and they shall be two in one flesh." Cf. 4 MIAMI L. Q. 358, 362 (1950).

¹²1 POLLOCK AND MATTLAND, HISTORY OF ENGLISH LAW 485 (2d ed. 1905).

¹³*Lane v. Bryant*, 100 Ky. 138, 37 S.W. 584 (1896); see *Martin v. Robson*, 65 Ill. 129, 136, 16 Am. Rep. 578, 585 (1872); *Claxton v. Pool*, 197 S.W. 349, 352 (Mo. 1917); *Culmer v. Wilson*, 13 Utah 129, 44 Pac. 833, 836 (1896).

¹⁴See *Price v. Clapp*, 119 Tenn. 425, 105 S.W. 864, 866 (1907); *Prentiss v. Paisley*, 25 Fla. 927, 930, 7 So. 56 (1889), as qualified by the dictum in *Meeks*

the wife without joinder of her husband.¹⁵

STATUTORY CHANGES

Statutes in more than half of the states¹⁶ and in England¹⁷ have expressly abrogated the common law rule, although usually they continue the liability of the husband when he either participates with his wife in the commission of the tort¹⁸ or would be jointly responsible with her if the marriage did not exist.¹⁹

In the absence of statutes expressly limiting the liability of the husband, some courts have considered what effect married women's property acts have on the husband's liability. Typically, such statutes grant a married woman the right to receive her earnings and to own property free from the debts and liabilities of her husband. They

v. Johnston, 85 Fla. 248, 252, 95 So. 670, 671 (1923). *But see* Banfield v. Addington, 104 Fla. 661, 672, 140 So. 893, 898 (1932). This theory dates back through a long line of cases to a statement in Drury v. Dennis, 1 Yelv. 106, 80 Eng. Rep. 72 (1608), that "... the husband shall be join'd in such case but for conformity."

¹⁵For a complete discussion of the reasons for the rule see Campbell, *Status of Married Persons in Canada*, 7 CAN. B. REV. 500 (1929).

¹⁶ALA. CODE ANN. tit. 34, §70 (1940); ARIZ. CODE ANN. §63-303 (1939); CAL. CIV. CODE §171a (1940); ILL. STAT. ANN. c. 68, §4 (Smith-Hurd 1936); IND. ANN. STAT. §38-105 (Burns 1949); IOWA CODE §597.19 (1946); KY. REV. STAT. §404.040 (1948) (liability limited to value of property received by virtue of the marriage); ME. REV. STAT. c. 153, §38 (1944); MD. ANN. CODE GEN. LAWS art. 45, §5 (1939); MASS. ANN. LAWS c. 209, §6 (1933), *Austin v. Cox*, 188 Mass. 58 (1875); MICH. COMP. LAWS §14015 (1929); MINN. STAT. §519.05 (Henderson 1945); MO. REV. STAT. ANN. §3680 (1939); MONT. REV. CODES ANN. §36-109 (1947); N.J. STAT. ANN. tit. 37:2-8 (1940); N.Y. DOM. REL. LAW §57; N.C. GEN. STAT. ANN. §52-15 (1943); N.D. REV. CODE §14-0708 (1943); OHIO GEN. CODE ANN. §8002 (Page 1938); OKLA. STAT. ANN. tit. 32, §9(1) (1937); ORE. COMP. LAWS ANN §63-208 (1940); R.I. GEN. LAWS c. 417, §§9, 12 (1938); S.D. CODE §14.0206 (1939); TEX. STAT., REV. CIV. art. 4613 (1940); UTAH REV. STAT. tit. 40, c. 2, §7 (1933); VT. STAT. §3169 (1947); VA. CODE ANN. §55-37 (1950); *Perren v. Press*, 196 Wash. 14, 81 P.2d 867 (1938); W. VA. CODE ANN. §4750 (1943).

¹⁷The Law Reform (Married Women and Tortfeasors) Act, 25 & 26 GEO. V., c. 30 (1935). See *Edwards v. Porter* [1925] A.C. 1, which interpreted the English married women's property act as not relieving the husband of liability.

¹⁸E.g., Alabama, Maryland, Rhode Island, West Virginia; for citations see note 15 *supra*.

¹⁹E.g., California, Illinois, Michigan, Missouri; for citations see note 15 *supra*.

also grant her the right to manage her separate property, to contract, and to sue and be sued as if she were a feme sole.²⁰

A slight majority of those courts that have considered the question²¹ apply the common law maxim that when the reason for a rule fails the rule itself fails, and accordingly they hold that such acts have removed the husband's liability for his wife's torts. The difficulty with this solution is that application of the maxim requires knowledge of the reason for the original establishment of the rule of liability; and this, as we have already noted, is obscure and controversial. Most courts have overcome this difficulty by taking a practical view and recognizing the broad changes, familiar to every layman, that these acts have brought about in the common law status of married women.²² On the other hand, those courts that narrowly construe the property acts and uphold the common law rule have failed to agree on grounds for doing so. Some, like the Florida Court, have recognized that the original reason for the rule is uncertain but have nevertheless concluded that it has not failed—whatever it may be;²³ others have relied on the lack of express legislative intent to abolish the rule.²⁴ Unrepealed statutes recognizing

²⁰*E.g.*, S.C. CODE ANN. §§400, 8572-8575 (1942); see note 2 *supra*.

²¹*Hageman v. Vanderdoes*, 15 Ariz. 312, 138 Pac. 1053 (1914); *Bourland v. Baker*, 141 Ark. 280, 216 S.W. 707 (1919); *Schuler v. Henry*, 42 Colo. 367, 94 Pac. 360 (1908); *Curtis v. Ashworth*, 165 Ga. 782, 142 S.E. 111 (1928); *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578 (1872); *Norris v. Corkill*, 32 Kan. 409, 4 Pac. 862 (1884); *Lane v. Bryant*, 100 Ky. 138, 37 S.W. 584 (1896); *Claxton v. Pool*, 197 S.W. 349 (Mo. 1917); *Goken v. Dallugge*, 72 Neb. 16, 99 N.W. 818 (1904); *Harris v. Webster*, 58 N.H. 481 (1878); *Gustine v. Westenberger*, 224 Pa. St. 455, 73 Atl. 913 (1908); see *Bryant v. Smith*, 187 S.C. 453, 198 S.E. 20, 22 (1938); *Wolf v. Keagy*, 33 Del. 362, 136 Atl. 520, 525 (1927); *cf. Culmer v. Wilson*, 13 Utah 129, 44 Pac. 833 (1896). *Contra: Henley v. Wilson*, 137 Cal. 273, 70 Pac. 21 (1902); *Choen v. Porter*, 66 Ind. 194 (1879); *McElfresh v. Kirkendall*, 36 Iowa 224 (1873); *Ferguson v. Brooks*, 67 Me. 251 (1877); *Morgan v. Kennedy*, 62 Minn. 348, 64 N.W. 912 (1895); *Sargeant v. Fedor*, 3 N.J. Misc. 832, 130 Atl. 207 (Sup. Ct. 1925); *Fitzgerald v. Quann*, 109 N.Y. 441, 17 N.E. 354 (1888); *Young v. Newsome*, 180 N.C. 315, 104 S.E. 660 (1920); *Fowler v. Chichester*, 26 Ohio St. 9 (1874); *Zeliff v. Jennings*, 61 Tex. 458 (1884); see *Kellar v. James*, 63 W. Va. 139, 59 S.E. 939, 940 (1907).

²²*See, e.g.*, *Schuler v. Henry*, 42 Colo. 367, 94 Pac. 360, 362 (1908); *Martin v. Robson*, 65 Ill. 129, 131, 16 Am. Rep. 578, 580 (1872).

²³*Rogers v. Newby*, 41 So.2d 451 (Fla. 1949); *cf. Henley v. Wilson*, 137 Cal. 273, 70 Pac. 21 (1902); *Zeliff v. Jennings*, 61 Tex. 458 (1884).

²⁴*See, e.g.*, *McElfresh v. Kirkendall*, 36 Iowa 224, 227 (1873); *Fowler v. Chichester*, 26 Ohio St. 9, 14 (1874).

it have prevented still other courts from abolishing it.²⁵ It is highly significant, however, that with the sole exception of Florida all jurisdictions that once narrowly construed the property acts now have express statutes overruling these judicial interpretations.²⁶

In the *Rogers* case²⁷ our Supreme Court refused to relieve the husband of liability for the pure torts of his wife in spite of our statute emancipating her in the handling of her property.²⁸ In an early case the Court had predicated the liability of the husband on the impossibility of suing the wife alone.²⁹ More recently it had stated that the husband is no longer a necessary party defendant in a tort action against his wife;³⁰ and this suggests that the reason for the husband's liability has indeed been removed. Counsel in the subsequent *Rogers* case contended that the reason for the rule no longer exists because of the statutory provision enabling a married woman to sue and be sued "... without the joinder ... of her husband, in all respects as fully as if she were unmarried."³¹ The Court rejected this argument, however, by confining the scope of the provision to actions involving the wife's separate property. Once again the common law rule is operative, and it follows logically that the husband is still a necessary party to a tort action against his wife.³²

The Court further pointed out that the reason for the rule of liability is not clear, and alluded to what it deemed the failure of the Legislature to emancipate the wife from her common law status to an extent sufficient to relieve her husband of liability for her torts. The opinion suggests that the underlying basis of the decision is this: Inasmuch as a married woman still lacks, in many instances, adequate pecuniary responsibility under present socio-economic con-

²⁵*Young v. Newsome*, 180 N.C. 315, 104 S.E. 660 (1920); see *Morgan v. Kennedy*, 62 Minn. 348, 352, 64 N.W. 912, 913 (1895).

²⁶See note 16 *supra*.

²⁷*Rogers v. Newby*, 41 So.2d 451 (Fla. 1949).

²⁸FLA. STAT. §708.08 (1949); cf. note 2 *supra*.

²⁹See *Prentiss v. Paisley*, 25 Fla. 927, 929, 7 So. 56 (1889). Contrary to what is said in *Rogers v. Newby*, this statement of the reason was not qualified until *Meeks v. Johnston*, 85 Fla. 248, 252, 95 So. 670, 671 (1923); see note 14 *supra*.

³⁰See *Cason v. Baskin*, 155 Fla. 198, 200, 20 So.2d 243, 244 (1944).

³¹See note 2 *supra*.

³²It is realized that the Court might perhaps distinguish a procedural necessity for joinder from the substantive rule of liability and might permit action against the wife without joinder of her husband.

ditions, the liability of her husband in tort actions should continue.

Since the enactment of statutes relating to married women's property, some jurisdictions have drawn a distinction between torts committed by a married woman in the use and management of her separate property and those not involving this separate property.³³ For the most part the husband has been relieved of liability for torts of the wife involving her separate property, but in some instances his liability for her other torts has been expressly reaffirmed.³⁴ The theory is that, inasmuch as he no longer has the right to manage her property, it is manifestly unjust to hold him liable for its improper management.³⁵

The Florida Supreme Court has not expressed an opinion on this differentiation. In *Greene v. Miller*,³⁶ which, however, was decided well before the enactment of the statute enabling the wife to manage her separate property,³⁷ the husband was held liable jointly with his wife for a tort involving her separate property.³⁸ The tort was not personally committed by the wife, but the negligence of a third person in operating the wife's automobile was imputed to her by applying the dangerous instrumentality doctrine.³⁹ The Court labeled

³³*Wolf v. Keagy*, 33 Del. 362, 136 Atl. 520 (1927); *Boutell v. Shellabarger*, 264 Mo. 70, 174 S.W. 384 (1915); *Quilty v. Battie*, 135 N.Y. 201, 32 N.E. 47 (1892); *Harrington v. Jagmetty*, 83 N.J.L. 548, 83 Atl. 880 (1912); *Foster v. Ingle*, 147 Tenn. 217, 246 S.W. 530 (1922); *Leros v. Parker*, 79 W. Va. 700, 91 S.E. 660 (1917); *Christensen v. McCann*, 41 Wyo. 167, 282 Pac. 1061 (1929).

³⁴E.g., *Quilty v. Battie*, *Foster v. Ingle*, *supra* note 33.

³⁵"Since the husband is left no legal right to intermeddle with the business affairs and property of the wife, it is not logical to admit him to her new sphere solely that he may pay damages for torts the wife commits therein, excluding him for all other purposes," *Boutell v. Shellabarger*, 264 Mo. 70, 174 S.W. 384, 386 (1915).

³⁶102 Fla. 767, 136 So. 532 (1931).

³⁷See note 2 *supra*.

³⁸In Florida a judgment recovered in a tort action against a married woman may be satisfied from her separate property. See *Stanley v. Powers*, 123 Fla. 359, 362, 364, 166 So. 843, 845 (1936); cf. *McGill v. Cockrell*, 81 Fla. 463, 88 So. 268 (1921); *Taylor v. Dorsey*, 155 Fla. 305, 19 So.2d 876 (1944).

³⁹1 U. OF FLA. L. REV. 286 (1948). See also *Potter v. Florida Motor Lines*, 57 F.2d 313 (S.D. Fla. 1932), in which it was held that a married woman was not contributorily negligent so as to bar her claim because her inability to contract prevented the negligence of a third person from being imputed to her through the doctrine of joint enterprise. Since married women may now contract, presumably liability can be imputed to them through application of this doctrine, and

this a pure tort⁴⁰ and placed it within the ambit of the common law rule. Imposing liability on the husband for torts that his wife does not personally commit is obviously a broad extension of the common law rule.

Now that a married woman may enter into contracts of agency, the question arises whether the husband's liability will be similarly extended to include torts committed by her agents for which she is liable only vicariously.⁴¹ Since at common law a married woman is under disability to enter into contracts of agency, neither she nor her husband is liable for torts committed by her agents.⁴² No jurisdiction, however, has considered whether the modern capacity of a married woman to bind herself by contract is fatal to the common law restriction of the husband's liability to her pure torts.⁴³ Inasmuch as this restriction arose from a logical necessity⁴⁴ no longer existent, it can at least be argued that the husband is liable even for torts arising out of his wife's contracts. This mechanical expansion of the common law concept is nevertheless unsound; since she can now enter into contracts on her own, she alone should be liable for her acts in connection therewith.

the question arises whether the husband is now liable for torts imputed to her through this contractual relationship.

⁴⁰This is the logical terminology, since the tort involved no element of contract, although some courts have said that no tort involving separate property can be a pure tort, regardless of whether it is connected with a contract, *Quilty v. Battie*, 135 N.Y. 201, 32 N.E. 47 (1892); *Boutell v. Shellabarger*, 264 Mo. 70, 174 S.W. 384 (1915).

⁴¹Even before the passage of FLA. STAT. §708.08 (1949) the Court interpreted FLA. STAT. §708.06 (1949), giving married women the right to their earnings, as according them by implication the right to hire agents, *Banfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932).

⁴²*Cf. Ferguson v. Neilson*, 17 R.I. 81, 20 Atl. 229 (1890).

⁴³In *Banfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932), a married woman was held liable for a tort, committed by her agent, which grew out of an invalid contract between her and the plaintiff, but the Court said, "It seems plain, therefore that . . . an undertaking, contractual or otherwise . . . does not make the cause of action sued on . . . a matter arising out of or connected with a contract in a legal sense, such as would relieve a married women from liability by reason thereof under the rule in the Florida cases first cited." The rule referred to is that restricting a married woman's liability to pure torts. While the husband was made a defendant in the action, the question of his liability was not passed on. See also *Ballenger v. Mark*, 115 Fla. 95, 155 So. 106 (1934), and *Doyle v. Coral Gables*, 159 Fla. 802, 33 So.2d 41 (1947).

⁴⁴See note 5 *supra*.

CONCLUSION

In virtually all jurisdictions the husband is no longer liable for any torts committed by his wife⁴⁵ other than those in which he participates while married or for which he would be liable regardless of the marriage relationship. In two states the husband is not liable for torts committed by his wife in the use of her separate property⁴⁶ but apparently remains liable for her other torts. In only one state other than Florida has the judiciary in recent years specifically reaffirmed the common law rule in its full force.⁴⁷

Whether a husband is liable in Florida for torts committed by his wife in the use of her separate property, and whether he is legally responsible for liability incurred vicariously by her, are open questions today. But there is no reason whatever for assuming that the Legislature, in granting married women new freedom to engage in business activities, intended actually to increase the sphere of her husband's responsibility for her conduct. It is certain that his common law liability for her pure torts committed during coverture continues; and presumably he is liable for torts committed by her before marriage.⁴⁸

Today the unfortunate husband in Florida, although stripped of common law control and benefits, nevertheless continues to be an insurer of his wife's conduct; he is placed in a position almost without parallel in that he must respond in damages for her misconduct without having a corresponding power to prevent it. Oddly enough, the common law did not impose this liability upon the father for the torts of his children⁴⁹—a liability that even now could be far more readily justified—but the liability as husband is perpetuated here. Its origin is not definitely known; but in any event its feudal setting has prompted practically all other jurisdictions to awake to the obvious fact that in modern times married women are largely the equals of their husbands before the law. This rule has outlived

⁴⁵No case or statute eliminating the husband's common law liability for pure torts was found in the following states: Connecticut, Idaho, Mississippi, Nevada, Tennessee, Wisconsin, Wyoming.

⁴⁶*Foster v. Ingle*, 147 Tenn. 217, 246 S.W. 530 (1922); *Christensen v. McCann*, 41 Wyo. 167, 282 Pac. 1061 (1929).

⁴⁷*See McDonald v. Senn*, 53 N.M. 198, 204 P.2d 990, 999, 1007 (1949).

⁴⁸*See* note 3 *supra*.

⁴⁹*Dempsey v. Frazier*, 119 Miss. 1, 80 So. 341 (1918).

its day and is now but a harsh anachronism. The Legislature might well consider its elimination in the light of conditions as they actually exist.

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DOWER: ESTOPPEL BY WIDOW'S ELECTION UNDER WILL

I. INTRODUCTION

The purpose of dower is to assure a means of support to a widow after the death of her husband.¹ This right has historically been highly respected; as early as 1641 Lord Chancellor Bacon stated that "... the law favored three things: Life, liberty, and dower."² This favorable attitude is still reflected in our modern decisions concerning the widow's rights under statutory substitutes for common law dower.³

The common law of England early and consistently provided that a widow did not have to elect between taking under her husband's will and taking her dower interest; it allowed her both interests in the absence of a clearly contrary intention expressed in the will of her husband.⁴ In this country also the unanimous rule in the absence of statute is that a testamentary provision for the widow of the testator is presumed to be in addition to dower, and that she may take both unless the will expresses an intention to exclude her from dower.⁵

¹E.g., *Schoellkopf v. DeVry*, 386 Ill. 39, 7 N.E.2d 757 (1937).

²BACON, *USES* 37. See *Moore v. Price*, 98 Fla. 276, 288, 123 So. 768, 772 (1929).

³*Dorsey v. Dorsey*, 224 Ala. 496, 140 So. 540 (1932).

⁴*Brown v. Parry*, 2 Dick. 685, 21 Eng. Rep. 438 (1787); *Lawrence v. Lawrence*, 3 B.P.C. 483, 1 Eng. Rep. 1448 (1717); *Hitchin v. Hitchin*, Pr. Ch. 133, 24 Eng. Rep. 64, 65 (1700), "... the devise is not to be looked upon as any recompense or bar of dower, but a voluntary gift"; 2 SCRIBNER, *DOWER* 444 (1883).

⁵*Hilliard v. Binford's Heirs*, 10 Ala. 977 (1847); *Adsit v. Adsit*, 2 Johns. Ch. 448, 7 Am. Dec. 539 (N. Y. 1817).