Washington Law Review

Volume 41 | Number 1

1-1-1966

Loss Carryovers under the 1954 Code: Rejection of the Libson Shops Doctrine

anon

to the expense, effort and anxiety of a criminal defense[42] when he has been acquitted, in a court of competent jurisdiction, of an essential element of the crime. The prosecution should not be tempted to proceed with an incompletely prepared case, knowing it will have the opportunity to try again. To allow this approach is to defeat certainty in criminal law and foster disrespect for the judicial system. Most of the problems in this and similar cases of successive prosecutions could be avoided by requiring the state to charge, in a single indictment, all offenses growing out of the same transaction.[43]

LOSS CARRYOVERS UNDER THE 1954 CODE: REJECTION OF THE *LIBSON SHOPS* DOCTRINE

Taxpayer corporation, which had sustained losses in the hardware business, entered into an agreement with two partners engaged in real estate development whereby a department of real estate development was established within the corporation. Funds needed for the department's operations were furnished by the partners through the purchase of non-voting preferred stock valued at approximately two-fifths of the total value of the corporate stock. By the terms of the agreement, ninety percent of the profits of the department were to be distributed to the preferred stockholders. Voting control of the common stock was placed in a voting trust. Thereafter, the hardware business was discontinued and the real estate department operated at a profit. In filing income tax returns, the corporation offset the past losses of the hardware business against profits of the real estate department. The Commissioner's disallowance of the loss carryover[1] was upheld by the Tax Court on the basis that there was not the continuity of business enterprise between the hardware business and the real estate development required by the so-called *Libson Shops* doctrine.[2] On appeal, the Ninth Circuit Court of Appeals reversed.

[42] See Green v. United States, 355 U.S. 184 (1957).

[43] This is the solution adopted in MODEL PENAL CODE § 1.08(2) (Tent. Draft No. 5, 1956).

[1] Net operating loss carryovers permit a form of income "averaging" by allowing a corporation to reduce taxable income in a profitable year by offsetting losses of prior years. Section 172 of the INT. REV. CODE OF 1954 provides that a net operating loss can be carried back as far as the third year preceding the loss, and offset against taxable income of those years. If this carryback does not absorb the loss the remainder may be carried forward for as many as five years. See generally Brody, *Net Operating Loss Deduction*, 34 TAXES 325, 326-38 (1956).

[2] See text accompanying note 14 *infra*.

Held: In single corporation cases involving post-1954 carryovers, the statutory restrictions provided in the Internal Revenue Code of 1954 are exclusive; when these restrictions do not apply, the *Libson Shops* doctrine may not be used to disallow the carryover. *Maxwell Hardware Co. v. Commissioner*, 343 F.2d 713 (9th Cir. 1965).[3]

Under the Internal Revenue Code of 1939 there were two basic devices for controlling carryovers. The sole statutory restriction disallowed the carryover if control of a corporation was acquired for the principal purpose of securing a tax benefit the purchaser would not otherwise have enjoyed.[4] The case law restriction was based on an interpretation of the words "the taxpayer" in the carryover provision[5] and was held to mean the corporate entity, as opposed to the shareholders, with the result that availability of the carryover depended solely upon retention of the jural entity.[6] Some modification of this strict entity approach was made in the case of statutory mergers,[7] but, at the time the 1954 Code was drafted, both statutory and judicial controls were felt to be unsatisfactory. In an attempt to base the carryover on "economic realities" instead of merely the form of the transaction,[8] Congress added sections 381 and 382. Section

[3] Discussed in Brock, *Past, Present and Future of Net Operating Loss Carryovers*, 43 Taxes 586 (1965).

[4] INT. REV. CODE OF 1939, § 129, added by ch. 63, § 128, 58 Stat. 47 (1944). Section 129 was re-enacted in the 1954 Code, without substantial change, as § 269. The Government was generally unsuccessful under § 129 because of the difficulty of proving that the principal purpose of the transaction was tax avoidance. *E.g.*, Alcorn Wholesale Co., 16 T.C. 75 (1951); WAGE, Inc., 19 T.C. 249 (1952). See generally BITTKER, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 52 (1959).

[5] INT. REV. CODE OF 1939, § 122(b)(1), added by ch. 619, § 153, 56 Stat. 847 (1942), provided, "If for any taxable year... *the taxpayer* has a net operating loss...." (Emphasis added.) The words "the taxpayer" were omitted in § 172 of the 1954 Code, which provides, "There shall be allowed as a deduction...." Legal writers have argued over the significance, if any, of the change. See, *e.g.*, Levine & Petta, *Libson Shops: A Study in Semantics*, 36 TAXES 445, 452-53 (1958); Speiller, *Acquisitions by Loss Corporations of Profitable Businesses*, 40 TAXES 22, 28 (1962); Comment, 15 WASH. & LEE L. REV. 135, 140-41 (1958).

[6] The Supreme Court adopted the entity theory in New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934). The loss corporation transferred its assets to a newly organized corporation in exchange for stock. Although the new corporation was virtually the same as the old, the Court disallowed the carryover because the two corporations "were not identical, but distinct." 292 U.S. at 441. Subsequently, carryovers were disallowed in a number of cases involving successor corporations. *E.g.*, Brandon Corp. v. Commissioner, 71 F.2d 762 (4th Cir. 1934); J. M. Smucker Co. v. Keystone Stores Corp., 12 F. Supp. 286 (W.D. Penn. 1935), *aff'd sub nom.*, Franklin v. United States, 83 F.2d 1010 (3rd Cir. 1936). The carryover could easily be preserved by making certain that the loss corporation was the survivor in a reorganization. See Comment, 69 YALE L.J. 1201, 1211 (1960). The entity theory also permitted the carryover after purchase of a loss corporation by new interests and complete change of business. Alprosa Watch Corp., 11 T.C. 240 (1948).

[7] Stanton Brewery, Inc. v. Commissioner, 176 F.2d 573 (2d Cir. 1949).

[8] S. REP. No. 1622, 83d Cong., 2d Sess. 52 (1954).

381, dealing with multiple corporation cases,[9] emphasizes the non-recognition sections of the 1954 Code, and provides that, in an acquisition of one corporation's assets by another in certain tax-free transactions,[10] the acquiring corporation shall receive the carryovers of the acquired corporation. Section 382(b) limits the carryover if the shareholders of the loss corporation retain less than twenty per cent of the stock of the acquiring corporation.[11] Section 382(a) was intended to reach single corporation cases not covered by section 269.[12] Under section 382(a), the carryover will be disallowed if fifty per cent of the voting stock of the loss corporation changes hands *and* the corporation fails to continue substantially the same business.[13] Three years after passage of the 1954 Code, the United States Supreme Court held, in *Libson Shops, Inc. v. Koehler*,[14] that when sixteen corporations had merged into the taxpayer, pre-merger losses of three of the corporations could not be offset under the 1939 Code against post-merger profits of the other corporations, because there was no "continuity of business enterprise." Although *Libson Shops* involved a merger or multiple corporation situation, lower courts subsequently extended the principle of the case to disallow carryovers in single corporation cases, arising under the 1939

---

[9] "Multiple corporation" situations are those involving some form of tax-free reorganization or merger, while "single corporation" situations are those involving purchase of assets in a taxable transaction with no change in the jural entity of the loss corporation.

[10] The transactions covered by § 381 are: liquidation of a subsidiary under § 332, unless § 334(b)(2) applies; and reorganizations under § 368(a)(1)(A), (C), (D), or (F). See generally Bittker, *op. cit. supra* note 4, at 37.

[11] Section 382(b)(1) provides that, after certain transactions, a carryforward will be reduced if:

> the stockholders (immediately before the reorganization) of... [the loss corporation] as a result of owning stock of loss corporation, own (immediately after the reorganization) less than 20 per cent of the fair market value of the outstanding stock of the acquiring corporation.

See generally Bittker, *op. cit. supra* note 4, at 64-65.

[12] S. Rep. No. 1622, 83d Cong., 2d Sess. 52 (1954).

[13] Int. Rev. Code of 1954, § 382 provides in part:

> (a)(1)(A) [If] any one or more of those persons... own a percentage of the total fair market value of the outstanding stock of such corporation which is at least 50 percentage points more than such person or persons owned at—
> (i) the beginning of such taxable year...
> (B) [If] the increase... is attributable to—
> (i) a purchase by such person or persons of such stock...
> (C) [If] such corporation has not continued to carry on a trade or business substantially the same as that conducted before any change in the percentage ownership... the net operating loss carryovers... shall not be included in the net operating loss deduction.
> ...
> (c) Definition of Stock—For the purposes of this section, "stock" means all shares except nonvoting stock which is limited and preferred as to dividends.

For an excellent analysis of §§ 381 and 382 see Comment, 69 Yale L.J. 1201, 1238-67 (1960).

[14] 353 U.S. 382 (1957), 71 Harv. L. Rev. 190 (1957), 43 Iowa L. Rev. 669 (1958).

Code.[15] The *Libson Shops* doctrine appeared, in at least some multiple corporation cases, to be superseded by section 381 of the 1954 Code.[16] In single corporation cases, the question became whether section 382(a) replaced *Libson Shops* and, along with section 269, was to be the exclusive regulator of post-1954 carryovers, a question directly considered for the first time in the principal case.

The Ninth Circuit initially noted that the result in *Libson Shops* could not be reached under the 1954 Code. The court then stated that, "by enacting the 1954 Code, Congress destroyed the precedential value of the rule of decision of *Libson Shops*. . . ."[17] Following this summary rejection of *Libson Shops*, the court proceeded with a more detailed argument. Section 382(a) was found inapplicable because the non-voting stock purchased by the partners fell outside the technical definition of "stock" given in section 382(c).[18] Similarly, section 269 did not apply because, although the partner's primary purpose in entering the transaction was tax avoidance, the partners did not acquire fifty per cent of the voting power or fair market value of the outstanding stock.[19] Relying on the legislative history of sections 381 and 382, the court found congressional intent to promote certainty by providing an objective standard governing the availability of carryovers, a policy which would be defeated by application of *Libson Shops*. Furthermore, section 382 superseded *Libson Shops* by dealing specifically and differently with the concept of continuity of business enterprise. Therefore, in single corporation cases, the statutory remedies of sections 382(a) and 269 were held by the court to be exclusive.

It should be emphasized at the outset that because the 1954 Code treats carryovers differently in multiple and single corporation cases,

---

15 Huyler's v. Commissioner, 327 F.2d 767 (7th Cir. 1964), *affirming* 38 T.C. 773 (1962); J. G. Dudley Co. v. Commissioner, 298 F.2d 750 (4th Cir. 1962); Commissioner v. Virginia Metal Products, Inc., 290 F.2d 675 (3rd Cir. 1961); Willingham v. United States, 289 F.2d 283 (5th Cir. 1961); Mill Ridge Coal Co. v. Patterson, 264 F.2d 713 (5th Cir. 1959).

16 See Sinrich, *Libson Shops—An Argument Against Its Application Under the 1954 Code*, 13 TAX L. REV. 167, 171-72 (1958).

17 343 F.2d at 716.

18 See note 13 *supra*.

19 The Commissioner argued that the ancillary agreement—establishing the voting trust and dividend provisions—showed that, in reality, the "preferred stock" was voting stock. Brief for Respondent, p. 53a. This argument was wholly unsuccessful under § 382(a), but was considered by the court under § 269. The court admitted that, had the voting trust been shown to be under the control of the partners, "the case would be different." 343 F.2d at 721. It may be that a reasonable interpretation of either § 269 or § 382(a) would have favored disallowance under one of these sections, and made discussion of *Libson Shops* unnecessary.

rejection of *Libson Shops* raises two distinct questions. First, should the doctrine be applied in single corporation transactions where sections 382(a) and 269 are technically inapplicable, but there is clear abuse of the carryover privilege? Second, should the doctrine be applied in those multiple corporation transactions omitted from section 381?[20] The Ninth Circuit was faced only with the first question, and its sweeping rejection of *Libson Shops* should be regarded as dictum insofar as it applies to multiple corporation cases.

The difference asserted by the court between the *Libson Shops* doctrine and the limitations of section 382(a) is not adequately defined, but one of two arguments seems implied.[21] First, the *Libson Shops* doctrine could be said to disallow carryovers when there is a change of business even though there is no change of ownership. Section 382(a) would then be found to supersede *Libson Shops* by adding the requirement of change of ownership. While *Libson Shops* could arguably be applied in single corporation cases in which only a change of business has occurred,[22] in fact the courts have not disallowed a carryover unless there was some change of ownership.[23] Conceivably, the Ninth Circuit failed to recognize this dual requirement of the doctrine, and thus overlooked the basically similar approach of section 382(a) and *Libson Shops*. On the other hand, the court may have been concerned with Congress' desire to provide not merely a change of business requirement, but also an objective test for determining when such change has occurred. Thus, the second interpretation of the doctrine in single corporation cases would be that *Libson Shops* requires both a change of business and of owner-

[20] Section 381 does not apply to a "type (B)" reorganization under § 368, certain insolvency reorganizations, sales of stock in pursuance of orders of the Securities Exchange Commission, recapitalizations under § 368(a)(1)(E), transfers to corporations controlled by the transferors under § 351, and divisive reorganizations. See Comment, 69 YALE L.J. 1201, 1239-40 (1960). See also Cohen, Phillips, Surrey, Tarleau and Warren, *The Internal Revenue Code of 1954: Carry-overs and the Accumulated Earnings Tax,* 10 TAX L. REV. 277, 279-80 (1955).

[21] For a general discussion of various possible interpretations of *Libson Shops,* see Comment, 69 YALE L.J. 1201, 1216-32 (1960).

[22] Because *Libson Shops* involved no change of ownership, and because there is no economic difference between survival or dissolution of the loss corporation's entity in merger or other acquisition of assets, arguably the same carryover law should apply to both situations. See Comment, 69 YALE L.J. 1201, 1228 (1960). The policy argument against such an approach is that it would discourage shareholders from shifting from an unprofitable business activity. See Becker, *Loss Carryovers and the Libson Shops Doctrine,* 32 U. CHI. L. REV. 508, 523 (1965).

[23] See cases cited in Churchill, *Net Operating Losses and the Single Corporate Taxpayer: The Lingering Specter of Libson Shops,* 2 P-H TAX IDEAS 24,431 (1964); Armstrong, *New Barriers to Utilization of Operating Losses,* 40 TAXES 867 (1960); Cornfield, *Net Operating Loss Deductions and the Continuity of Business Enterprise,* 40 TAXES 1019 (1960).

ship, but measures change of ownership by an uncertain and judge-made test. Section 382(a) would then be found to supersede *Libson Shops* by requiring a fifty per cent change of ownership of voting stock.

In defense of this line of reasoning, there is no question that *Libson Shops* has caused considerable uncertainty and confusion in the carryover area, and particularly in single corporation cases.[24] While the courts have applied the doctrine only where there has been both a change of business and of ownership, they have not explicitly stated that change of ownership is an essential element. The cases which have emphasized change of ownership do not provide any definite criteria for measuring such change.[25] The Commissioner initially argued that change of business alone would invoke the doctrine.[26] When this approach failed[27] he announced that he would rely on *Libson Shops* to disallow carryovers when there was a change of business and "more than a minor change in stock ownership,"[28] which indicated that carryovers might be denied when the ownership change was less than fifty per cent. The taxpayer might reasonably argue that this makes the test of section 382(a) an unreliable tax planning guide. By doing away with *Libson Shops*, the decision of the court in the principal case does avoid such problems, but the cost of such avoidance seems high.

Looking first at the principal case, it is apparent that the court was dissatisfied with allowing the carryover.[29] The purpose of the trans-

---

[24] See Friedman & Cuddihy, *Multiplying Cases Extend, But Do Not Clarify, Libson Rule in Loss Carryover*, 15 J. TAXATION 338 (1961).

[25] Huyler's v. Commissioner, 327 F.2d 767 (7th Cir. 1964) (24% change of ownership was "more than minor"); Mill Ridge Coal Co. v. Patterson, 264 F.2d 713 (5th Cir. 1959) (complete change of ownership); Kolker Bros., Inc., 35 T.C. 299 (1960) (46% change of ownership, carryover allowed. But court refused to hold that less than 50% change of ownership was insufficient to deny carryover). For discussion of these cases see Becker, *supra* note 22, at 518-22.

[26] Kolker Bros., Inc., 35 T.C. 299 (1960).

[27] *Ibid.*

[28] Rev. Rul. 63-40, 1963-1 CUM. BULL. 46, 48:

> [I]f there is more than a minor change in stock ownership of a loss corporation which acquires a new business, the Service may continue to test the deductibility of the carryover of the corporation's prior losses against income of the new business enterprise.

[29] Although not argued by the parties, the Ninth Circuit recommended that the Commissioner apply § 482 to disallow the carryover in similar cases arising in the future. 343 F.2d at 721. This section gives the Commissioner discretion to apporiton income when two businesses are owned or controlled by the same interests and apportionment is necessary to prevent tax evasion. Section 482 has been the Commissioner's principal weapon where transactions between two related business units are manipulated for tax purposes, such as fictitious sales, and does not seem designed to deal with carryover problems. The Commissioner has apparently adopted the Ninth Circuit's suggestion and will employ § 482 in future cases. T.I.R. 773, 657 CCH ¶ 6751 (Oct.

action was tax avoidance. The combination of factors resulted in practical control of the active business of the corporation by the partners, and in ninety per cent of the benefit of the carryover going to persons other than those who suffered the losses.[30] If neither section 269 nor section 382(a) reaches such an arrangement, and if *Libson Shops*, however interpreted, is rejected, carryovers may well become available through artful draftsmanship. Assuming such a result is unacceptable, the bases of the court's decision must be examined.

The court is correct that the legislative history of sections 381 and 382 indicates congressional desire for certainty and objectivity. But the same congressional reports cited by the court show that section 382(a) was passed because it was felt that the carryover benefit had been abused through utilization "by persons other than those who incurred the loss."[31] Further, in a report quoted in the opinion, it is stated that, "whether or not the carryover is allowed should be based upon economic realities rather than upon such artificialities as the legal form of the transaction."[32] In sum, the legislative history reveals the basic stress between the desire for clear-cut rules for the taxpayer and the need for sufficient flexibility to prevent evasion through technical manipulation. The decision in the principal case fails to strike a sound balance between these two policies.

The court's conclusion that section 382(a) necessarily supersedes *Libson Shops* is also open to question. The section does not provide affirmative relief; rather, it denies the carryover in certain situations. Thus there may be leeway for application of judicial doctrines when a transaction violates the spirit, if not the letter, of the carryover rules.[33] This line of reasoning could open the way for use of *Libson Shops* in *any* situation where it is felt the carryover should not be allowed. For example, it has been argued that the change of business requirement in single corporation cases has been given undue em-

13, 1965). A recent Tax Court decision disallowed a carryover on the basis of § 482. Pauline W. Ach, 42 T.C. 114 (1964). For a general discussion of § 482 see Hewitt, *Section 482—Reallocation of Income and Deductions Between Related Persons—Up To Date*, N.Y.U. 22d INST. ON FED. TAX 381 (1964).

[30] It has been argued that the fault in the decision in the principal case resulted from the court's failure to see that the pertinent question was whether the taxpayer was a "corporation," under § 7701(a)(1), as opposed to two corporations. Brock, *supra* note 3, at 591. Whether or not this would have been the appropriate analysis, the court proceeded on the basis that the situation was that of a single corporate taxpayer.

[31] H.R. REP. No. 1337, 83d Cong., 2d Sess. 41 (1954).

[32] 343 F.2d at 718, citing H.R. REP. No. 1337, 83d Cong., 2d Sess. 41 (1954).

[33] See Becker, *supra* note 22, at 531.

phasis, and that, even if the business is continued, the carryover should be denied every time there is a fifty per cent or greater change of ownership.[34] It seems unlikely, however, that a court would adopt any test which was radically different from the approach of section 382(a).

Before turning to the possible role of *Libson Shops* under the 1954 Code, the implications of the Ninth Circuit's dictum—to the effect that *Libson Shops* is inapplicable in all cases—must be briefly considered. Unlike section 382(a), section 381 *is* affirmative, providing that the carryover will be allowed in certain tax-free transactions unless further restricted by the twenty per cent continuity of interest requirement of section 382(b). If a transaction qualifies under section 381 it would be difficult to find any basis for applying *Libson Shops* to disallow the carryover; in such cases, *Libson Shops* is superseded.[35] But section 381 does not cover all the multiple corporation transactions in which a carryover may be valuable,[36] and, if *Libson Shops* cannot be applied to these cases, serious abuse of the carryover privilege may arise. The most obvious example is a "type (B)" reorganization under section 368.[37] It would be possible to effect a (B) reorganization, subsequently liquidate the acquired subsidiary, and utilize its carryover. Unless the court recognized that such a transaction was functionally equivalent to a "type (C)" reorganization, the only continuity of interest limitation on the transaction would be that of section 368 which may require retention of far less than twenty per cent of the stock.[38] It does not appear that the Ninth Circuit based its dictum on a thorough examination of the complexities involved in section 381, and it is doubtful that a court faced with such an issue would give weight to the conclusion.

The limitations of the statutory framework make it clear that courts face the difficult task of relating the various 1954 Code sections and providing rational controls on carryovers when the 1954 Code is inapplicable. It seems likely that the *Libson Shops* doctrine will continue to be argued. Of particular relevance for the single

---

34 *Id.* at 524-25.

35 The Commissioner has stated that he will not apply *Libson Shops* to such transactions. Rev. Rul. 58-603, 1958-2 CUM. BULL. 147; Rev. Rul. 59-395, 1959-2 CUM. BULL. 475.

36 See note 20 *supra.*

37 On (B) reorganizations, see generally BITTKER, *op .cit. supra* note 4, at 363.

38 See Comment, 69 YALE L.J. 1201, 1240 n.174 (1960). For discussion of the continuity of interest doctrine in reorganization transactions see BITTKER, *op. cit. supra* note 4, at 393-99.

corporation situations is the Commissioner's recently announced disagreement with the Ninth Circuit's decision in the principal case, and his present policy in the case of loss corporations which purchase a profitable business. The Service had indicated that it might rely on *Libson Shops* when the change of ownership was less than fifty per cent.[39] This policy has been dropped in favor of greater emphasis on the ownership test of section 382(a), and, henceforth, *Libson Shops* will not be relied upon unless there has been a fifty per cent or greater change in the "beneficial ownership" of the loss.[40] This approach attempts to insure that it is the same person who suffered the losses that benefits from the carryover, and its usefulness in the principal case is obvious.

It may be questioned, however, whether the statutory framework justifies exclusive concentration on the carryover returns of the transaction. Even if there is more than a fifty per cent change of ownership, section 382(a) allows the carryover as long as the business is continued. The purchaser may or may not pay an immediate premium for the carryover, but no examination of the amount of the benefit received will be made.[41] The requirement of fifty per cent change of voting stock itself seems undermined by sections 381 and 382(b). Unless business considerations interfere, it is as easy to acquire assets in a tax-free reorganization as in a taxable transaction,[42] and thereby retain the carryover despite an eighty per cent change of ownership. It seems unlikely that a court would require fifty per cent of the benefits of the carryover to go to the holders of twenty per cent of the stock. Aside from the difficulty of integration into the 1954 Code, such a test might be used to prevent valid business transactions. Shareholders of a loss corporation, desirous of changing to a profitable activity, may find that the only means of raising funds or acquiring other assets is to sell preferred stock.

---

[39] See note 28 *supra*.

[40] T.I.R. 773, 657 CCH ¶ 6751 (Oct. 13, 1965).

[41] It has been argued that it is contrary to the purposes of the carryover privilege to permit payment of a direct premium for the carryover. Becker, *supra* note 22, at 524. This approach apparently underlies § 382(b), which focuses solely on change of ownership in an attempt to require the loss corporation shareholders to recover their losses through a continuing interest in the corporation. Allowance of the carryover when there is complete change of ownership seems to contradict this policy. However, this possibility may not have been regarded as serious in fact because of the difficulty of producing profits from a losing concern without making substantial changes in the business.

[42] For this reason it has been argued that *Libson Shops* should be used in multiple, merger of the requirement of § 382(a) of 50% change of ownership. Becker, *supra* note 22, at 528.

Unlike the transaction in the principal case, the preferred stockholders may have no control over the management of the business. In such a situation it would not be wise to disallow the carryover simply because fifty per cent of the carryover benefits went to the new, preferred stockholders. It is clear that any satisfactory solution to such problems requires a thorough re-examination of the purpose and function of loss carryovers in tax law.

HUSBAND'S IMMUNITY FROM PERSONAL SUIT FOR TORT

Plaintiff brought an action to recover damages for injuries which were intentionally inflicted by her former husband subsequent to the initiation of divorce proceedings. The complaint alleged that defendant, with intent to kill plaintiff and in violation of a non-molestation order, repeatedly rammed plaintiff's automobile with his own. Defendant challenged plaintiff's right to sue, claiming immunity from suit by his former wife for personal tort occurring during marriage. The trial court granted judgment for defendant on the pleadings, which was affirmed on appeal. *Held:* A man is immune from suit in tort by his former wife, even though the tort was intentional and was inflicted after divorce proceedings had been initiated. *Fisher v. Toler,* 194 Kan. 701, 401 P.2d 1012 (1965).

At common law a married woman had no legal existence separate from that of her husband, and could bring no cause of action against him.[1] Married Women's Property Acts were enacted in an attempt to alleviate this common law inequity by granting the wife the right to manage her own property and to sue in her own name. For the most part, these acts do not deal explicitly with the question of personal torts between spouses.[2] A majority of courts interpret this silence as limiting the wife's right to sue her husband to property questions.[3] An increasing number of jurisdictions, however, permit recovery for some or all

---

[1] Under the medieval concept of unity, the husband and wife were "one person in law, so that the very being and existence of the woman is suspended during coverture. . . ." 2 BLACKSTONE, COMMENTARIES 889 (Lewis ed. 1898).

[2] Only New York, North Carolina, and Wisconsin provide specifically for personal tort suits between spouses. N.Y. DOM. REL. LAW § 57; N.C. GEN. STAT. § 52-10.1 (1963); WIS. STAT. § 246.075 (1955). Illinois specifically forbids tort actions between spouses. ILL. REV. STAT. ch. 68, § 1 (1953). See Annot., 43 A.L.R.2d 632 (1955).

[3] McCurdy, *Personal Injury Torts Between Spouses,* 4 VILL. L. REV. 303, 313-14 (1959). The wife's disability to sue her husband for personal tort was considered to be substantive as well as procedural, and the statutes removed only the procedural disability. *Ibid.*