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Personal Tort Actions Between Husband and Wife

equitable relief for mistake of law is by no means upon an equal footing with relief for mistake of fact.

Conclusion

The chief reason advanced by the courts for denying relief for mistake of law, when any reason is given, is that to allow such relief would result in insecurity in contractual relations and lead to a variety of other undesirable results. The prophesied evils have not been perceived in those jurisdictions where relief is permitted. That the discrimination between mistake of law and fact is unsound is apparent from the exceptions which the courts have created to mitigate the consequences of the application of the general rule, their frequent expressions of its undesirability, and the legislative attempts to eliminate it. However, the courts find themselves in the grip of *stare decisis,* with the result that they have construed remedial statutes in a manner so narrow as to defeat the legislative purpose. The distinction between mistake of law and fact, an historical accident in the law, should have no place in modern jurisprudence.[46] Since the courts can eliminate the distinction only by engrafting exceptions, its abrogation is a duty for the legislatures. Carefully drawn statutes could without a doubt achieve this result.

PERSONAL TORT ACTIONS BETWEEN HUSBAND AND WIFE.—A recent case,[1] refusing on the ground of public policy to enforce a right of action for personal injuries sustained by a husband through the negligence of his wife even though that right was enforceable in the state where it was acquired,[2] brings to the fore the prominent part played by varying ideas of public policy in extending the legal rights of married parties and exemplifies the difficulties arising in the conflict of laws on such actions.

At common law, because of the legal unity of the spouses, neither could maintain an action against the other.[3] General dissatisfaction with the appli-

46. *Cf.* Comment (1931) 45 HARV. L. REV. 336

1. Poling v. Poling, 179 S. E. 604 (W. Va. 1935).

2. The automobile accident giving rise to the cause of action occurred in Alabama, where tort actions between husband and wife are maintainable. Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917) (wilful injury); Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931) (negligent injury); Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932) (negligent injury).

3. MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 220. The unity of the spouses was often disregarded in criminal actions and in suits in chancery, however. One spouse was held incapable of committing the crimes of larceny, burglary, or arson against the other because of the legal unity of person, but murder and criminal assault by one spouse against the other were held possible despite this unity. MADDEN, *op. cit. supra* at 227. In suits regarding her equitable estate a married woman could sue in the chancery court as a *femme sole* even under the common law. Jacques v. Methodist Episcopal Church, 17 Johns. 549 (N. Y. 1820).

cation of this principle led to the widespread adoption of the Married Women's Acts which augmented the legal rights of the wife and recognized in varying degrees her legal individuality.[4] The extent to which the common law doctrine has been abrogated in each jurisdiction depends in part upon the phraseology of the particular statutes, but even more upon the constructions placed upon them as a result of the widely diverse views as to public policy.[5] On the one hand, a sincere desire to safeguard society's most vital institution, the family,[6] has given rise to some rather strong statements in judicial opinions[7] and has not infrequently worked a decided injustice on the wife through fear of setting a precedent that would prove socially harmful.[8] On the other hand, an understandable sympathy for an obviously mistreated wife has led to constructions which extend the scope of the more narrowly drawn statutes far beyond the express legislative mandate.[9]

Interpretation of the Statutes

The controlling statutes in states where the question of tort actions between spouses has been raised fall under one or more general types. Some expressly prohibit such actions.[10] Some, in their abrogation of the common law disability, deal expressly with only property and contract rights.[11] Others provide that women shall retain the same legal individuality after marriage as before[12] or that the wife shall have the same rights that her husband has.[13] Another

4. All the statutes confer on married women at least the right to own separate property. See notes 10-15, *infra*.

5. Compare Strom v. Strom, 98 Minn. 427, 107 N. W. 1047 (1906) (disallowing tort actions between spouses) and Fiedeer v. Fiedeer, 42 Okla. 124, 140 Pac. 1022 (1914) (allowing such actions), where the statutes involved were almost identical. MINN. STAT. (Mason, 1927) § 8616; OKLA. STAT. ANN. (Harlow, 1931) § 1665.

6. See Thompson v. Thompson, 218 U. S. 611, 617-618 (1910).

7. *E. g.*: "The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed—an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders." Ritter v. Ritter, 31 Pa. 396, 398 (1858).

8. Recovery was denied to the wife in the following: Thompson v. Thompson, 218 U. S. 611 (1910) (husband beat his pregnant wife); Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287 (1898) (husband deliberately infected wife with venereal disease).

9. Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914).

10. LA. CODE PRAC. (Dart., 1932) art. 105; MASS. ANN. LAWS (Lawyer's Co-op., 1933) c. 209, § 6; N. J. COMP. STAT. (1911) tit. "Married Women," § 14; PA. STAT. ANN. (Purdon, 1930) tit. 48, § 111.

11. ALA. CODE ANN. (Michie, 1928) §§ 8264, 8267, 8268, 8272; CONN. GEN. STAT. (1930) §§ 5169, 5170, 5172; FLA. COMP. GEN. LAWS ANN. (1927) §§ 5866, 5867, 5870; TEX. ANN. CIV. STAT. (Vernon, 1925) art. 4613-4618, 4621; VT. PUB. LAWS (1934) §§ 3074, 3077.

12. MINN. STAT. (Mason, 1927) § 8616; MISS. CODE ANN. (1930) § 1940; N. D. COMP. LAWS ANN. (1913) § 4411; OKLA. STAT. ANN. (Harlow, 1931) § 1665; TENN. CODE ANN. (Michie, 1932) § 8460.

13. MINN. STAT. (Mason, 1927) § 8616; OKLA. STAT. ANN. (Harlow, 1931) § 1665; WASH. REV. STAT. ANN. (Remington, 1932) § 6901; WIS. STAT. (1933) § 6.015.

group, besides enabling the wife to own property, allowed her to sue alone when the action concerned her separate property or when the action was between herself and her husband.[14] The largest group, however, simply confers upon a married woman the right to sue and be sued as a *femme sole*.[15]

Each of these types, except those expressly forbidding suits between spouses, has been diversely construed in various jurisdictions.[16] Statutes dealing in express terms only with property and contracts[17] have in some cases been held to allow actions for personal torts between the spouses on the ground that the common law unity had been totally abrogated thereby.[18] Yet statutes expressly preserving a married woman's former legal individuality[19] have sometimes been held to allow no such right of action on the ground that the intent of the legislature was not to give the wife greater rights than the husband, and the courts would imply no corresponding enlargement of the husband's common

14. The present CAL. CODE CIV. PROC. (Deering, 1931) § 370; S. C. CODE (Michie, 1932) § 400, prior to amendment. The sections as amended have never been construed as to the question at hand, but provide as follows:

CAL. CODE CIV. PROC. (Deering, 1931) § 370: "A married woman may be sued without her husband being joined as a party, and may sue without her husband being joined as a party in all actions, including those for injury to her person, libel, slander, false imprisonment, or malicious prosecution, or for the recovery of her earnings, or concerning her right or claim to the homestead property."

S. C. CODE (Michie, 1932) § 400: "A married woman may sue and be sued as if she were unmarried: *Provided,* That neither her husband nor his property shall be liable for any recovery against her in any such suit; but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole. When the action is between herself and her husband, she may likewise sue or be sued alone." Probably neither amendment will overturn the respective precedents set by the diverse constructions of the old wording. See notes 24, 25, *infra.*

15. COLO. COMP. STAT. (1921) § 5577; Del. Laws 1919, c. 197, § 16; D. C. CODE (1929) tit. 14, § 43; IND. STAT. ANN. (Burns, 1933) § 8751; IOWA CODE (1931) § 10992; MD. ANN. CODE (Bagby, 1924) art. 45, § 5; MICH. COMP. LAWS (1929) § 14014; MO. STAT. ANN. (Vernon, 1932) § 704; MONT. REV. CODES ANN. (Choate, 1921) §§ 5791, 5809; NEB. COMP. STAT. (1929) § 20-305; N. H. PUB. LAWS (1925) c. 288, § 2; N. Y. DOM. REL. LAW (1909) § 57; N. C. CODE ANN. (Michie, 1931) § 2513; OHIO GEN. CODE (Page, 1931) § 11245; VA. CODE (Michie, 1930) § 5134; W. VA. CODE (1931) c. 48, art. 3, § 19; WIS. STAT. (1933) § 246.07. WIS. STAT. (1933) §§ 6.015, 246.07 combine permission to sue as *femme sole* with the provision that the wife shall have the same rights as her husband. The Iowa statute, *supra* clearly refers to actions against parties other than the husband since another provision has been made (IOWA CODE [1931] § 10448) granting one spouse the right to maintain an action against the other to recover his or her separate property, and has been so construed. *In re* Dolmage's Estate, 203 Iowa 231, 212 N. W. 553 (1927).

16. See note 5, *supra.*

17. See note 11, *supra.*

18. Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914). *Contra:* Gowin v. Gowin, 264 S. W. 529 (Tex. Civ. App. 1924), *aff'd,* 292 S. W. 211 (Tex. Comm. App. 1927); Comstock v. Comstock, 169 Atl. 903 (Vt. 1934).

19. See note 12, *supra.*

law right.[20] A statute unqualifiedly giving the wife the same rights as her husband[21] has properly been held to confer upon neither spouse the right to sue the other in tort.[22] The type of statute allowing the wife to sue alone in actions concerning her separate property and in actions against her husband[23] has been construed to authorize tort actions between husband and wife in South Carolina,[24] but not in California.[25] Of the states having statutes granting married women the right to sue and be sued as a *femme sole*,[26] five jurisdictions have allowed tort actions between husband and wife on the ground that the common law status was totally abrogated thereby,[27] while twelve have not permitted such actions, maintaining that these statutes give the wife the right to sue alone only where formerly she had the right to sue by joining with her husband or next friend.[28]

The Public Policy Background

In the cases denying the right of action between the spouses, whether the norm of construction was that the intent of the legislature should govern or that statutes in derogation of the common law must be strictly construed, seems

20. Woltman v. Woltman, 153 Minn. 217, 189 N. W. 1022 (1922); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Tobin v. Gelrich, 162 Tenn. 96, 34 S. W. (2d) 1058 (1931). *Contra:* Fitzmaurice v. Fitzmaurice, 62 N. D. 191, 242 N. W. 526 (1932); Fiedeer v. Fiedeer, 42 Okla. 124, 140 Pac. 1022 (1914).

21. See note 13, *supra.*

22. Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629 (1911). But *cf.* Wait v. Pierce, 191 Wis. 202, 209 N. W. 475 (1926), where a similar provision, combined with another which permitted the wife to sue as a *femme sole* was construed as enabling her to sue her husband.

23. See note 14, *supra.*

24. Prosser v. Prosser, 114 S. C. 45, 102 S. E. 787 (1920). The court reasoned that suits by the wife against her husband other than suits for property must have contemplated suits for tort.

25. Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909). The court reasoned that suits other than suits for property between husband and wife referred only to suits in equity.

26. See note 15, *supra.*

27. Fitzpatrick v. Owens, 124 Ark. 167, 186 S. W. 832, *dissenting opinion,* 187 S. W. 460 (1916); Rains v. Rains, 46 P. (2d) 740 (Colo. 1935); Gilman v. Gilman, 78 N. H. 4, 95 Atl. 657 (1915); Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923); Wait v. Pierce, 191 Wis. 202, 209 N. W. 475 (1926).

28. Thompson v. Thompson, 218 U. S. 611 (1910); Plotkin v. Plotkin, 32 Del. 455, 125 Atl. 455 (Super. Ct. 1924); Henneger v. Lomas, 145 Ind. 287, 44 N. E. 462 (1896); Hobbs v. Hobbs, 70 Me. 381 (1879); Furstenburg v. Furstenburg, 152 Md. 247, 136 Atl. 534 (1927); Harvey v. Harvey, 249 Mich. 142, 214 N. W. 305 (1927); Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382 (1915); Kelly v. Williams, 94 Mont. 119, 21 P. (2d) 58 (1933); Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N. W. 297 (1927); Perlman v. Brooklyn City R. Co., 117 Misc. 353, 191 N. Y. Supp. 891 (Sup. Ct. 1921), *aff'd,* 202 App. Div. 822, 194 N. Y. Supp. 971 (2d Dep't 1922); Leonardi v. Leonardi, 21 Ohio App. 110, 153 N. E. 93 (1925); Keister's Adm'r v. Keister's Ex'rs, 123 Va. 157, 96 S. E. 315 (1918); Poling v. Poling, 179 S. E. 604 (W. Va. 1935).

to have had little bearing on the result,[29] but public policy has generally injected itself as a determining factor.[30] Disruption of the family[31] and collusion against insurance companies[32] seem to be the principal consequences feared. Yet there is much truth in the statement that marital discord comes not from the suits but from the wrongs that occasion them.[33] Moreover, one spouse is generally allowed to sue the other in regard to property[34] and no great amount of family discord has sprung therefrom, although the field is just as fertile. As for the difficulty of distinguishing the trivial from the serious wrong,[35] it would be absurd to refuse a remedy to a wife who has been shot by her husband merely because of the impossibility of setting the exact line of demarcation between assault with a shot gun and assault by an unwanted kiss. Again, there seems to be little reason for allowing actions between husband and wife when the injuries are wilful and forbidding them when the injuries are the result of negligence, a solution that has been suggested[36] but which appears never to have been followed. Moreover, when the real defendant is an insurance company, as is frequently the case when the action is for negligence, there is little danger of family disruption.[37] The alternative danger of fraud

29. Compare the result in Kelly v. Williams, 94 Mont. 119, 21 P. (2d) 58 (1933), where the intent of the legislature governs, with that in Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382 (1915), where the rule that statutes in derogation of the common law must be strictly construed is followed. In all the cases allowing the actions in question, however, this latter rule had been abrogated or was ignored. See Mathewson v. Mathewson, 79 Conn. 23, 36, 63 Atl. 285, 290 (1906).

30. Thompson v. Thompson, 218 U. S. 611 (1910); Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909); Plotkin v. Plotkin, 32 Del. 455, 125 Atl. 455 (Super. Ct. 1924); Palmer v. Edwards, 155 So. 483 (La. 1934); Abbott v. Abbott, 67 Me. 304 (1877); Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287 (1898); Drake v. Drake, 145 Minn. 388, 177 N. W. 624 (1920); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N. W. 297 (1927); Leonardi v. Leonardi, 21 Ohio App. 110, 153 N. E. 93 (1925); Oken v. Oken, 44 R. I. 291, 117 Atl. 357 (1922); Lilliencamp v. Rippetoe, 133 Tenn. 57, 179 S. W. 628 (1915).

31. See Thompson v. Thompson, 218 U. S. 611, 617-618 (1910); Drake v. Drake, 145 Minn. 388, 391, 177 N. W. 624, 625 (1920); Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 184, 216 N. W. 297, 298 (1927).

32. See Harvey v. Harvey, 239 Mich. 142, 214 N. W. 305, 306 (1927); Newton v. Weber, 119 Misc. 240, 241, 196 N. Y. Supp. 113, 114 (Sup. Ct. 1922).

33. See Brown v. Brown, 88 Conn. 42, 49, 89 Atl. 889, 892 (1914); Wait v. Pierce, 191 Wis. 202, 211, 209 N. W. 475, 480 (1926).

34. Hedlund v. Hedlund, 87 Colo. 607, 290 Pac. 285 (1930); Tresher v. McElroy, 90 Fla. 372, 106 So. 79 (1925); see *Ex parte* Badger, 286 Mo. 139, 145, 226 S. W. 936, 939 (1920); McCurdy, *Torts Between Persons in Domestic Relations* (1930) 43 HARV. L. REV. 1030, 1039.

35. *Cf.* Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905), where the court refused to allow a minor daughter to sue her father for ravishing her because of the impossibility of setting a practical line of demarcation between that and lesser assaults.

36. See the dissenting opinion in Katzenberg v. Katzenberg, 183 Ark. 626, 627, 37 S. W. (2d) 696, 697 (1931).

37. See Harvey v. Harvey, 239 Mich. 142, 214 N. W. 305, 306 (1927); Perlman v. Brooklyn City R. Co., 117 Misc. 353, 354, 191 N. Y. Supp. 891, 891 (Sup. Ct. 1921); *cf.* Lusk v.

upon the insurer does not seem to be any more insurmountable than in actions between parties other than husband and wife.[38] Debating whether or not an amicable suit by one member of the family against another merely to obtain the insurance after a *bona fide* accident is to be condemned as a "raid on an insurance company"[39] or praised as commendable solicitude for the welfare of the family,[40] will lead nowhere. If the right of action were granted, the insurance contract could be so drawn as to provide coverage for liability to outsiders only, or to include protection for the family of the insured.[41] In the long run the policyholder would pay premiums in accordance with the protection he seeks. Finally, the most convincing answer to the public policy argument would seem to lie in the fact that some ten states have allowed actions between husband and wife for personal injuries[42] and the prophesied evils have not as yet become manifest.[43]

The Conflict of Laws

It is in the conflict of laws, however, that the greatest difficulty occurs. Should the courts of a state that disallows actions for personal tort between the spouses allow such an action because it is maintainable in the state in which the event that gave rise to the cause of action took place?[44]

Lusk, 113 W. Va. 17, 166 S. E. 538 (1932), allowing a minor child to sue her parent only because the parent was protected by insurance. A restriction of this sort necessarily informs the jury of the fact that the defendant is insured, which is ordinarily inadmissible in evidence. Notes (1928) 56 A. L. R. 1418; (1931) 74 *id.* at 850. However, as a practical matter, in an amicable suit between husband and wife, the jury cannot fail to surmise that an insurance company is the real party in interest. See Pardue v. Pardue, 167 S. C. 129, 138, 166 S. E. 101, 104 (1932).

38. *E. g.*, where a guest passenger sues his insured host to recover for injuries due to the host's negligence. Yet the greatest restriction on these actions has been to confine recovery to instances of gross negligence. CONN. GEN. STAT. (1930) § 1628. Likewise actions between parent and child are prohibited only when the child is an unemancipated minor. Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929).

39. See Newton v. Weber, 119 Misc. 240, 241, 196 N. Y. Supp. 113, 114 (Sup. Ct. 1922).

40. See Lusk v. Lusk, 113 W. Va. 17, 19, 166 S. E. 538, 539 (1922).

41. Where the wife is not allowed to sue her husband for personal injuries, the husband can secure protection to her by an accident policy if he so wishes.

42. Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Fitzpatrick v. Owens, 124 Ark. 167, 186 S. W. 832 (1916); Rains v. Rains, 46 P. (2d) 740 (Colo. 1935); Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914); Gilman v. Gilman, 78 N. H. 4, 95 Atl. 657 (1915); Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923); Fitzmaurice v. Fitzmaurice, 62 N. D. 191, 242 N. W. 526 (1932); Fiedeer v. Fiedeer, 42 Okla. 124, 140 Pac. 1022 (1914); Prosser v. Prosser, 114 S. C. 45, 102 S. E. 787 (1920); Wait v. Pierce, 191 Wis. 202, 209 N. W. 475 (1926).

43. See Bushnell v. Bushnell, 103 Conn. 583, 587, 131 Atl. 432, 433 (1925), "That principle [referring to Brown v. Brown, 88 Conn. 43, 89 Atl. 889 (1914) which allowed an action for personal injuries between husband and wife] has not been questioned since, and the dangers from it which we then refused to regard as substantial have not in fact made themselves manifest."

44. The only case in which this question has been raised is Poling v. Poling, 179 S. E.

It is fundamental that if a right of action arises in one state, this right will be recognized and enforced in another state unless to enforce it is against the public policy of the forum.[45] Where not contrary to the policy of the forum, the *lex loci*[46] will govern substantive rights,[47] but the *lex fori*[48] will always control matters of procedure.[49] It seems to be undisputed that the basic right of one spouse to sue the other for personal tort is a matter of substantive law and not a question of capacity to bring suit.[50] Hence when the tortious act is performed outside the state of the forum, the right of one spouse to sue the other should be governed by the *lex loci* unless the public policy of the forum intervenes.[51]

An exact definition of public policy has not been formulated,[52] but the public policy of a state is said to be shown by its constitution, statutes, and judicial decisions.[53] It is clear, however, that neither a mere difference in the laws nor the absence of legislation in the forum such as is found in the place of the wrong will in itself render the foreign law contrary to the public policy of the forum.[54] Every statutory provision is not a matter of fundamental policy and, in searching statutes and decisions to find the policy of the law, a dis-

604 (W. Va. 1935), cited note 1, *supra*; *cf.* Metzler v. Metzler, 8 N. J. Misc. 821, 151 Atl. 847 (C. C. 1930), where the court refused to allow a suit at law on a judgment obtained by a wife against her husband in a New York action which could not have been maintained in the forum.

45. 2 BEALE, CONFLICT OF LAWS (1935) § 378.3; RESTATEMENT, CONFLICT OF LAWS (1934) §§ 384, 362.

46. The law of the place where the cause of action arose.

47. Loranger v. Nadeau, 215 Cal. 362, 10 P. (2d) 63 (1932); Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99, 120 N. E. 198 (1918).

48. The law of the place where the action is brought.

49. Singer v. Messina, 312 Pa. 129, 167 Atl. 583 (1933); Reutenik v. Gibson Packing Co., 132 Wash. 108, 231 Pac. 773 (1924); RESTATEMENT, CONFLICT OF LAWS (1934) § 585.

50. The leading case generally cited in support of this proposition is Phillips v. Barnet, 1 Q. B. D. 436 (1876) (divorced wife has no cause of action for tortious acts of husband during coverture); *cf.* Henneger v. Lomas, 145 Ind. 287, 44 N. E. 462 (1896) (right of action when marriage is void *ab initio*). See also cases cited note 51, *infra*.

51. Dawson v. Dawson, 224 Ala. 13, 138 So. 414 (1931); Gray v. Gray, 174 Atl. 503 (N. H. 1934); Howard v. Howard, 200 N. C. 574, 158 S. E. 101 (1931); Buckeye v. Buckeye, 203 Wis. 248, 234 N. W. 342 (1931).

52. See Colgrove v. Lowe, 343 Ill. 360, 362, 175 N. E. 569, 570 (1931).

53. Colgrove v. Lowe, 343 Ill. 360, 175 N. E. 569 (1931); Spaulding v. Maillet, 57 Mont. 318, 188 Pac. 377 (1920); *cf.* Straus & Co. v. Canadian Pac. Ry. Co., 254 N. Y. 407, 413, 173 N. E. 564, 566 (1930): "Therefore, when we speak of the public policy of the state, we mean the law of the state, whether found in the constitution, the statutes or judicial records." Such a definition, if followed literally, would virtually nullify all comity and the *lex fori* would always control. See Veytia v. Alvarez, 30 Ariz. 316, 329, 247 Pac. 117, 121 (1926).

54. Reilly v. Antonio Pepe Co., 108 Conn. 436, 143 Atl. 568 (1928); Walsh v. New York & N. E. R. Co., 160 Mass. 571, 36 N. E. 584 (1894); Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99, 120 N. E. 198 (1918). But see Straus & Co. v. Canadian Pac. Ry. Co., 254 N. Y. 407, 413, 173 N. E. 564, 566 (1930).

tinction must be drawn between regulative legislation and the adoption of a principle of public law.[55] Many cases support the rule that the foreign law is against public policy only if contrary to good morals and natural justice,[56] or prejudicial to the general interests of the citizens of the state of the forum,[57] or shocking to the moral sense of the community.[58]

The forum, of course, is the best judge of its own policy,[59] but, since such favorable results have been experienced where tort actions between the spouses have been permitted, there would seem to be little ground for refusing to enforce a foreign right of action between husband and wife unless the statutes in force or previous decisions in the forum clearly show a strong public policy against such suits.[60] Cases forbidding actions by a minor child against its parent would hardly seem to offer sufficient evidence of policy on the husband-wife relation,[61] for some jurisdictions have allowed actions within the forum itself between husband and wife while forbidding similar actions between parent and minor child.[62] The mere absence of authorization for such actions between the spouses,[63] due perhaps as much to inadvertence as to policy on the part of the legislature, would also seem to be insufficient ground for refusing to grant a forum, for such a refusal to enforce a right of action lawfully acquired in a

55. See Thompson v. Taylor, 66 N. J. L. 253, 258, 49 Atl. 544, 546 (1901).

56. See Northern Pac. R. R. v. Babcock, 154 U. S. 190, 198-199 (1894).

57. *Ibid.*

58. See Veytia v. Alvarez, 30 Ariz. 316, 318, 247 Pac. 117, 118 (1926).

59. 3 BEALE, CONFLICT OF LAWS (1935) 1651.

60. Thus in the states whose statutes expressly forbid tort actions between husband and wife (see note 10, *supra*) such a policy is clearly shown. Likewise in such jurisdictions as the District of Columbia, where the Married Women's Acts were narrowly construed on the grounds of public policy and the legislature has as yet rendered no disapproval by changing the wording of the statute.

61. In Poling v. Poling, 179 S. E. 604 (W. Va. 1935), the court relied on Securo v. Securo, 110 W. Va. 1, 156 S. E. 750 (1931), where a minor child was not allowed to sue its parent on the ground of public policy. The analogy is particularly weakened in West Virginia by the fact that in that state the bar against actions between parent and minor child falls when the parent is protected by insurance. Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).

62. Connecticut, North Carolina, and Wisconsin allow actions between the spouses for personal injuries. Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914); Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923); Fontaine v. Fontaine, 205 Wis. 570, 238 N. W. 410 (1931). Yet these states do not sanction such an action between parent and minor child. Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929); Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923); Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927).

63. In Poling v. Poling, 179 S. E. 604 (W. Va. 1935), the statute relative to a married woman's right to sue (W. VA. CODE ANN. [Michie, 1931] c. 48, art. 3, § 19) had not previously been construed as to this point, but is similar to statutes that have sometimes been held to give the wife a right of action against her husband for tort (see notes 15, 27, *supra*). The court held that this statute did not permit tort actions between the spouses and that this indicated a strong public policy forbidding the enforcement of such rights of action lawfully acquired elsewhere.

sister state would seem to put a greater strain upon interstate comity[64] than allowing the action would ever have placed on the family tie.

A Modern Need

Even with a more liberal attitude on the part of the courts in enforcing foreign rights of action which do not exist in the forum, the situation would be far from satisfactory. With the prevalence of automobile liability insurance today, the difficulties that arise in drafting insurance contracts because of the absence of uniformity in the laws concerning torts between husband and wife, particularly in the field of negligence, are not to be overlooked. If uniformity is to be desired, it seems certain that it should be obtained by discarding rather than re-establishing the old absolute bar against action for personal tort between the spouses. Unity of purpose certainly should characterize the marriage relation, but for the civil law to consider it a unity of person is a view that is contrary to the facts and inconsistent with the treatment of the same status in criminal law and in equity.[65] At a time when women were totally unfamiliar with the ways of business, it may have been advisable to forbid them to make contracts and to own separate property, but with the modern change in woman's position the need for such protection does not exist and has rightly been dispensed with.[66] The non-recognition of torts committed by one spouse against the other, on the contrary, is not an example of good policy, originally defensible but now outmoded. It is rather an unrealistic legal fiction adhered to because of fears which modern experience has shown to have been unwarranted from the very beginning. Insisting upon the theory of unity of person in order to preserve unity of purpose appears useless from the very fact that grounds for the legal actions feared will not arise until that unity of purpose has been destroyed.

Besides recognizing that wrongs may be committed by one spouse against the other which should entitle the injured party to damages, an equally realistic view will also perceive that protection must be given to the spouse who otherwise would be the victim of harassing petty suits by a disgruntled mate. For this reason, when personal tort actions are allowed between husband and wife, the marriage status should be a presumption of consent to many acts which would be torts if committed against a third party. In the case of divorced couples, it might be well to consider the decree of divorce as a final settlement of all the wrongs during coverture, in accord with the present law in some states.[67] Briefly, the most satisfactory solution of this confusing question would

64. See Cardozo, J., in Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99, 113, 120 N. E. 198, 202 (1918): "The fundamental policy is perceived to be that rights lawfully vested shall be everywhere maintained." See also RESTATEMENT, CONFLICT OF LAWS (1934) § 612, Comment c.

65. See note 3, *supra*.

66. See McCurdy, *loc. cit. supra* note 34, at 1036.

67. See Schultz v. Christopher, 65 Wash. 496, 501, 118 Pac. 629, 630 (1911).

be the general statutory abolition of the concept of the unity of the spouses and the authorization of all actions between husband and wife, both in regard to property and personal injuries, subject to the necessary substantive limitations upon the cause of action by way of consent implied in the relation of the parties. Until this is accomplished, a more liberal application of the principle of comity with regard to such actions would seem to be desirable.