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means of professional improvement. Perhaps legislation in this area will eventually be necessary if we are to attain such a goal. In conclusion, the following statement of the district court judge in *Michaelson v. United States* concerning the importance of this deduction to the "little" taxpayer seems appropriate:

> The importance of encouragement of individuals interested in self-improvement should not be minimized. Certainly rapid write-offs of investments in buildings, deductions for advertising and deductions for expenses in those higher brackets, are no more important to them than a smaller deduction is to one who has limited funds, as the taxpayer here.[61]

H. ARTHUR SANDMAN

Conflict of Laws—Capacity to Sue—Which Law Should Govern?

It is generally accepted that the law of the place of wrong determines whether a person has sustained a legal injury.[1] In *Shaw v. Lee*[2] this rule was applied to determine the capacity of one spouse to sue the other. Plaintiff brought suit against her deceased husband's estate alleging that while riding through Virginia in an automobile owned and operated by her husband, she was injured in a collision between the automobile and a truck, and that the collision was caused by the joint and concurrent negligence of her husband and the truck driver. At the time of the injury plaintiff and her husband were domiciled in North Carolina. The lower court sustained defendant's demurrer to the complaint and on appeal the supreme court affirmed. The court recognized that Virginia, unlike North Carolina,[3] does not permit a married woman to sue her husband for injuries negligently inflicted.

Shaw v. Lee was not a case of first impression. It reaffirmed North Carolina's previous position[4] and is in accord with the ma-

[61] 203 F. Supp. 830, 832-33 (E.D. Wash. 1961).

[1] Doss v. Sewell, 257 N.C. 404, 125 S.E.2d 899 (1962); Morse v. Walker, 229 N.C. 778, 51 S.E.2d 496 (1949); Wise v. Hollowell, 205 N.C. 286, 171 S.E. 82 (1933); 2 BEALE, CONFLICT OF LAWS § 378.2 (1935); RESTATEMENT, CONFLICT OF LAWS §§ 377-79 (1934); STUMBERG, CONFLICT OF LAWS 182 (2d ed. 1951).

[2] 258 N.C. 609, 129 S.E.2d 288 (1963).

[3] "A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried." N.C. GEN. STAT. § 52-10.1 (Supp. 1961).

[4] Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931), is practically

jority rule in this country[5]—a rule which is a product of Beach's vested rights theory.[6] More recently, however, several cases have established a trend—applauded by many writers in the field[7]—away from this mechanical application of a technical conflict of laws rule. Instead they favor a conflicts rule which is shaped with regard to the nature of the case at hand and gives more consideration to social, economic, and domestic factors. This appears to be done best, in order to stay within the existing framework for determining conflict rules, by a policy oriented method of characterization.[8] In

identical to the principal case, but there plaintiff sued her husband and not his estate. Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941), involved the reverse situation. There the husband and wife were domiciled in Ohio, where the common-law rule of family immunity was in force, and the accident occurred in North Carolina. The court refused to apply the law of the family domicile and held the wife was entitled to maintain her action.

[5] See Annot., 22 A.L.R.2d 1248 (1952).

[6] Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L. J. 656 (1918). See 2 BEALE, CONFLICT OF LAWS §§ 377.2-78.2 (1935).

The theoretic premise of vested rights is that when a case is decided with multi-state contacts, a right is enforced which vested under the law of the appropriate state. In the case of torts this is the place of the injury. The purpose is to promote uniformity, and in turn discourage forum shopping. "Its greatest virtue is its simplicity, the facility of its application. It reduces the legal mental process to a minimum because, once having determined that the matter is one of the substance, all that is left to do is to look to the place where the harmful force first took injurious effect and then to apply without distinction the substantive law there. Its universal adoption, besides bringing about uniformity, would enable the lawyer in advising his client to predict with facility and accuracy the judicial results in any situation, regardless of where suit might be brought." STUMBERG, CONFLICT OF LAWS 201 (2d ed. 1951).

[7] Bingham, *The Rise and Fall of Buckeye v. Buckeye, 1931-1959: Marital Immunity for Torts in Conflict of Laws*, 29 U. CHI. L. REV. 237 (1962); Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 U. PITT. L. REV. 397 (1954); Kelso, *Automobile Accidents and Indiana Conflict of Laws: Current Dilemmas*, 33 IND. L. J. 297 (1958); Packel, *Backward and Forward in Conflicts*, 31 TEMP. L. Q. 117 (1958). See also STUMBERG, CONFLICT OF LAWS 201-12 (2d ed. 1951), for a criticism of the place of the tort rule.

[8] Some cases also refuse to follow the place of the tort rule because the foreign law, if applied, would be contrary to the public policy of the forum. Gooch v. Faucett, 122 N.C. 270, 29 S.E. 362 (1898). See generally RESTATEMENT, CONFLICT OF LAWS § 5, comment *b* (1934).

In several cases the state of the forum and domicile has upheld the family immunity rule when the accident occurred in a state where the immunity had been abolished, on the ground that public policy of the forum forbade one spouse from suing the other. Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936); Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935). These decisions may be responsible for some obvious forum shopping by spouses who in similar situations bring

most instances the characterization determines the choice of law rule which applies, so where the court characterizes an issue in a tort action as "procedural" rather than "substantive" the law of the forum applies and not the law of the place of wrong.[9] If an issue is characterized as "contract" the law of the place of contracting may determine questions concerning the formation of the contract, while the law of the place of performance may determine questions relating to its performance;[10] and if characterized as "family law" the law of the domicile may be said to be the proper law to govern.[11]

Such a policy oriented method of characterization has been applied by a few courts to problems involving family immunity, capacity to sue, and other related issues.[12] The leading case among

their actions in the state where the accident occurred. To apply the place of the tort rule under these circumstances, as North Carolina did in Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941), does not promote uniformity, but rather encourages forum shopping.

[9] RESTATEMENT, CONFLICT OF LAWS § 585 (1934).

In Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911 (1943), plaintiff sued *A* for injuries arising out of an accident in Tennessee. *A* then sought to join *B* for contribution as a joint tortfeasor under what is now N.C. GEN. STAT. § 1-240 (1953). The common law was still in force in Tennessee where there was no right of action by one joint tortfeasor to enforce contribution from another. The court characterized the right to join for contribution as substantive, and dismissed the action against *B* under Tennessee law.

[10] RESTATEMENT, CONFLICT OF LAWS §§ 311, 358 (1934). *But see* RESTATEMENT (SECOND), CONFLICT OF LAWS § 332 (Tent. Draft No. 6, 1960), which now says the validity of a contract is determined by the law of the state with which the contract has its most *significant relationship*—which might be the state chosen by the parties, the state of the contracting, or the state where performance is to take place.

In Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 Atl. 163 (1928), a Connecticut statute provided that anyone renting a motor vehicle to another should be liable for any damage caused to any person by the operation of such vehicle while rented. The defendant rented *A* an automobile, and plaintiff was injured by *A*'s negligent operation of the automobile in Massachusetts. The court characterized this as a contract action rather than tort and applied the law of Connecticut, which was the place of contracting.

[11] See 1 BEALE, CONFLICT OF LAWS § 110.1 (1935); RESTATEMENT, CONFLICT OF LAWS § 54 (1934).

[12] Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955), applied the law of the family domicile and not the place of the tort. The court characterized the issue as one of capacity to sue and permitted the wife and her two unemancipated daughters to sue the husband and father for personal injuries sustained in an automobile accident. Bruton v. Villoria, 138 Cal. App. 2d 642, 292 P.2d 638 (1956), refused to apply California law and impute the husband's negligence to the wife. The wife sued defendant for injuries she sustained in an automobile collision between defendant and her husband in California. The court applied the law of plaintiff's domicile, where the husband's negligence would not bar her recovery. Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958), decided a wife could not sue her hus-

these is *Haumschild v. Continental Cas. Co.*,[13] involving facts substantially similar to the principal case except that the issue of capacity to sue was characterized as "family law." The plaintiff sued her husband in Wisconsin, where they were domiciled, for personal injuries sustained as a result of an automobile accident in California, but unlike the principal case the Wisconsin Supreme Court overruled its previous position[14] saying:

> We are convinced that, from both the standpoint of public policy and logic, the proper solution of the conflict-of-laws problem, in cases similar to the instant action, is to hold that the law of the domicile is the one that ought to be applied in determining any issue of incapacity to sue based upon family relationship.[15]

The social function of both the law of torts and domestic relations would be best served if the court in the principal case, like *Haumschild,* had characterized the issue as an incident of "family law" to be governed by the law of the domicile.[16] Why indeed are problems of the law of torts ordinarily decided in accordance with the law of the place of the wrong? If it is to carry out the social purpose of the law, then what is the social purpose and function of the law of torts?

The law of torts is the body of rules which indicates under what circumstances one person who has suffered a loss can shift such loss to another member of society.[17] While ordinarily a loss lies where it falls, under special circumstances one can shift his loss to another, as in the case where the other person "caused" the loss through conduct falling short of the standard *set by the community.* The com-

band in New Jersey where they were domiciled, even though the accident occurred in New York where such suits are permitted.

See also Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953), where the issue was the survival of a cause of action for personal injury after defendant's death. In Arizona, where the injury occurred, it did not survive, but in California, the defendant's domicile, it did. The court characterized this as a problem of administration of estates and applied the survival law of the forum.

[13] 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

[14] Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931), was a leading authority for the rule as applied by the principal case.

[15] 7 Wis. 2d at 137, 95 N.W.2d at 818 (1959).

[16] Ford, *supra* note 7, at 417, points out that in the civil law countries interspousal actions sounding in tort are treated primarily as incidents of the family law and governed by the law of the family domicile.

[17] Rheinstein, *Michigan Legal Studies: A Review,* 41 MICH. L. REV. 83 (1942).

munity which sets the standard should be the community where the harm will be manifested. Such considerations are the foundation of the rule that problems of tort law should be governed by the law of the place of the wrong. These same considerations should also determine the scope of the rule's application.

Therefore, in determining whether the rule should apply to such a problem as that of allowing a law suit between members of a family, it should be asked whether this is primarily a problem of shifting loss or one of regulating the relations between the members of a family. Since the two reasons most often advanced for the common law rule of family immunity are the ancient concept the husband and wife constitute in law but one person, and that to permit such suits will create family discord and disrupt family harmony,[18] it would appear that for problems of this kind the most appropriate law is that of the family domicile.[19]

In light of these considerations this writer suggests that North Carolina amend G.S. § 52-10.1 to provide that a husband and wife domiciled in North Carolina have a cause of action against each other to recover for injuries, wherever sustained, as if they were unmarried.

SAMUEL S. WOODLEY, JR.

Constitutional Law—Case or Controversy—Dismissal for Mootness

Where a decision in a case at bar will have no effect because of some intervening fact which has rendered the case moot, the United

[18] Ford, *supra* note 7, at 398, sets out the historical background and reasons for disallowing suits between spouses.

Johnson v. People's First Nat'l Bank & Trust Co., 394 Pa. 116, 145 A.2d 716 (1958), held that the doctrine of intrafamily immunity from suit by a member of the family expires upon the death of the person protected and does not extend to a decedent's estate for the reason that death terminates the family relationship and there is no longer a relationship in which the state or public policy has an interest.

[19] The court in the principal case also dismissed plaintiff's plea for recovery under North Carolina's Motor Vehicle Financial Responsibility Act of 1957 by pointing out that liability insurance protects against claims legally asserted, but does not itself produce liability. Plaintiff, however, did not contend that the presence of liability insurance should create liability, but rather contended with some merit that by allowing defendant immunity, the public policy of the state, as expressed by the vehicle responsibility act, for protecting its citizens who are injured in automobile accidents would be contravened. In North Carolina a wife who is injured by her husband's negligent operation of an automobile will have the protection of the insurance required under this act, but by denying plaintiff the same protection, because she happened to incur her injury across the state line, the insurance company is given a fortuitous windfall.