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NOTES

HUSBAND AND WIFE—EXTENT TO WHICH THE COMMON LAW CONCEPT OF THE UNITY OF HUSBAND AND WIFE AND ITS CONSEQUENCES HAVE BEEN ABROGATED IN MINNESOTA BY THE MARRIED WOMEN'S ACT AND RELATED STATUTES, EITHER EXPRESSLY OR BY NECESSARY IMPLICATION.—The status of married women in general is regarded as one of the most involved problems in private law.¹ Historically the disabilities and privileges which were the concomitants of being a married woman were largely the result of the common law concept of the legal unity of husband and wife.²

1. See 3 Holdsworth, *A History of English Law* (4th ed. 1935) 520.

2. Bracton phrased it thus: ". . . virum et uxorem qui sunt quasi unica persona, quia caro una et sanguis unus." (" . . . a husband and his wife who are as it were one person, being one flesh and one blood." Trans. by Twiss.) 4 Bracton, *De Legibus et Consuetudinibus Angliae* (Woodbine's ed. 1922) 335, f. 429b; 6 Bracton, *De Legibus et Consuetudinibus Angliae* (Twiss' trans. 1883) 392-93, Lib. 5, Tract. 5, Cap. 25, f. 429b; Co. Litt. *112; 1 Bl. Comm. *442. That the concept was not considered unqualified is evident from Story's statement about the maxim: "Upon this principle of the union of person in husband and wife depend almost all the legal rights, duties, and

Economic and social changes, which have resulted in a somewhat striking metamorphosis of the wife from a home-dwelling, glorified domestic to a person approaching "equality" with her husband, have necessitated far-reaching statutory changes and consequent interpretations of these changes by the courts. The purpose of this note is to examine how far the Minnesota Married Women's Act³ and related statutes, and the decisions thereunder, have altered the common law concept of the unity of husband and wife in Minnesota, either expressly or by necessary implication.⁴ The common law⁵ rules with respect to each section will be sketched briefly at the beginning of that section without attempting a detailed analysis of the historical origins or rationale of those rules.

I. SEPARATE LEGAL EXISTENCE

A. *At Common Law*

As a generalization subject to the inevitable exceptions,⁶ it may be stated that under the common law marriage made the husband and wife one person. In the expression of Blackstone:

"... the very being or legal existence of the woman is suspended during the marriage, or a least is incorporated and consolidated into that of the husband under whose wing, protection, and cover, she performs everything. . . ."⁷

A crucial incident of this concept determining the married woman's status was that the wife could not sue in a law court without her husband's consent and joinder, nor could she be sued without her husband being joined.⁸ This in turn resulted in a procedural difficulty as to suits between the spouses, since a husband being sued as

disabilities which either of them acquire by or during the marriage." 3 Story, *Equity Jurisprudence* (14th ed. 1918) 401. The historical bases for the rule are presented in McCurdy, *Torts Between Persons in Domestic Relation*, (1930) 43 *Harv. L. Rev.* 1030, 1035.

3. Now embodied in 2 *Minn. Stat.* 1945, c. 519.

4. The statutes, particularly 2 *Minn. Stat.* 1945, § 519.01, establishing the separate legal existence of the married woman, speak very broadly and have given rise to considerable litigation concerning their construction.

5. The common law here considered is what has been termed the "final shape" of the common law. 2 Pollock & Maitland, *The History of English Law* (2d ed. 1923) 403. The limitations of this type of treatment preclude an exhaustive analysis of the substantive law in Minnesota with respect to each of the sections considered below; the note concerns itself primarily with the changes effected in the common law as a result of the statutes considered.

6. The most obvious exception was with regard to crimes of personal violence between the spouses, where the perpetrator was subject to the law as if the marriage relationship did not exist. 3 Vernier, *American Family Laws* (1935) 162. See text to note 177 *infra*.

7. 1 *Bl. Comm.* *442.

8. See Madden, *Persons and Domestic Relations*, (1931) § 54.

defendant could not logically join his wife to sue as a plaintiff.⁹ In addition to this procedural difficulty as to parties, the concept of "oneness" itself came to be regarded as providing a substantive basis for denying an action between spouses.¹⁰

Closely related to the requirement of joinder of the husband in an action by or against the wife was the common law rule which made the husband or wife of a party to an action incompetent to testify on the other's behalf,¹¹ and the rule that made communications between husband and wife inadmissible in evidence in the absence of waiver.¹² The latter rule, dealing with the admissibility of evidence, was historically one of privilege and should be distinguished from the rule of incompetency,¹³ dealing with the competency or compellability of witnesses, though the courts frequently confuse the two and legislatures deal with both in the same statutory sections.¹⁴ The basis for the rule of incompetency was the relationship of husband and wife,¹⁵ while the basis for the broader rule of privileged communications was the public policy of preventing family dissension and unhappiness and possible perjury.¹⁶ A recognized exception to the rule of incompetency at common law was the admission of the testimony of one spouse against the other in cases of criminal acts committed by one against the other.¹⁷

B. *Under Minnesota Law*

It is on the broad language of 2 Minn Stat. 1945, § 519.01,¹⁸ which in general terms established the separate legal existence of

9. See Madden, *op. cit. supra* note 8, at 220.

10. Phillips v. Barnet, (1876) 1 Q. B. D. 436. Judge Blackburn there said: "I was at first inclined to think, having regard to the old procedure and form of pleas in abatement, that the reason why the wife could not sue her husband was a difficulty as to the parties; but I think that when one looks at the matter more closely, the objection to the action is not merely with regard to the parties, but a requirement of law founded upon the principle that husband and wife are one person." *Id.* at 438. Judge Field put it thus: "I am of the same opinion. . . . I now think it clear that the real substantial ground why the wife cannot sue her husband, is not merely a difficulty in the procedure, but the general principle of the common law that husband and wife are one person." *Id.* at 441.

11. See 2 Wigmore, Evidence (3d ed. 1940) §§ 600, 601, 603.

12. See 8 Wigmore, Evidence (3d ed. 1940) §§ 2227, 2242.

13. For a discussion of this distinction see (1936) 20 Minn. L. Rev. 693, 694; (1940) 56 L. Q. Rev. 137.

14. E.g., 2 Minn. Stat. 1945, § 595.02(1).

15. See 2 Wigmore, Evidence (3d ed. 1940) § 603.

16. See 8 *id.* § 2228; see (1940) 56 L. Q. Rev. 137, 138.

17. For a discussion of this point see (1943) 27 Minn. L. Rev. 205.

18. "Women shall retain the same legal existence and legal personality after marriage as before, and every married woman shall receive the same protection of all her rights as a woman which her husband does as a man, including the right to appeal to the courts in her own name alone for protection or redress"

the married woman, that the strongest contention has been made for an interpretation that the common law concept of the unity of husband and wife has been abrogated by implication. It will be seen that the broad construction given the statute by Mr. Justice Mitchell in *Gillespie v. Gillespie*,¹⁹ where he said:

"The obvious intent and effect of these statutory provisions is to preserve the separate legal existence of a married woman in respect to all her rights of person and property, and, to the extent necessary to the full exercise and protection of these rights, to give her in her own name all the remedies in the courts which she would have if unmarried,"

has not been followed completely in later cases, particularly as it related to the "rights of person" of the married woman.²⁰

Two important problems which arise with respect to the present status of a married woman are (1) her capacity to sue and be sued without the joinder of her husband, and (2) her capacity to be a witness, involving (a) the effect on the rule of the incompetency of a husband or wife to testify for or against the other, and (b) the related but distinct doctrine of privileged communications between husband and wife.

1. *Capacity of Married Woman to Sue and be Sued*

It is clear that to the extent that the married woman in Minnesota has certain recognized substantive rights, these rights can now be enforced in her own name under 2 Minn. Stat. 1945, § 519.01,²¹ without having her husband join in the action, thus doing away with the procedural difficulty.²² The right to proceed individually is even more expressly conferred by the terms of 2 Minn. Stat. 1945, § 540.05,²³ which also gives third parties the right to sue a married woman without joining her husband. However neither of these sections is a clear guide to the more vexing problem of what new substantive rights may, by the removal of the procedural barrier,

19. (1896) 64 Minn. 381, 383, 67 N. W. 206, 207. The statute as it then read, 2 Minn. Gen. Stat. 1894, § 5530, referred specifically to the right of appeal to the courts by the wife for injuries "to her reputation, person, property, character, or any natural right . . ." The present wording was adopted in Minn. Rev. Laws 1905, § 3605.

20. How far the doctrine of the unity of husband and wife has been abrogated with respect to the married woman's property rights, her capacity to contract, and her liability for her torts and her crimes is considered in subsequent sections.

21. See statute quoted in note 18 supra.

22. *Gillespie v. Gillespie*, (1896) 64 Minn. 381, 67 N. W. 206.

23. "In cases where the husband, except for the marriage relation, would not be a necessary party, a married woman may sue and be sued as if unmarried and without joining her husband."

have been accorded the spouses in suits inter se by the Married Women's Act.²⁴

Regarding the married woman's capacity to sue or be sued by third parties without joinder of her husband, the Minnesota court in *Spencer v. St. Paul & Sioux City R. R.*,²⁵ permitting a married woman to bring an action in her own name for trespass to her land, stated broadly that:

"Obviously, the effect of this statute is to confer upon a married woman the same absolute rights in respect to the use and enjoyment of her statutory separate property as belong to a *feme sole*, and, to the extent necessary to the full exercise and protection of such rights, she must be regarded as having a separate legal existence, distinct from and independent of her husband, and wholly unaffected by her marriage relation."²⁶

The extent to which the wife may recover for injuries resulting to other members of her family for a nuisance with respect to a home owned by her is considered below.²⁷

With respect to injuries to the wife's person by third parties, it is settled that she is allowed to sue in her own name for her injuries which are direct.²⁸ Such direct injuries for which she may recover have been held to include "loss of services as a singer."²⁹ Even where under the husband-wife relationship the husband would normally be bound to pay for his wife's hospital and medical expenses, she may herself recover "for doctor's and nurse's expenses" in a suit against the tortfeasor when she assumes the liability and pays for the expenses,³⁰ or "for medical services and

24. As the married woman's capacity to sue her husband has been interpreted differently with respect to each type of right concerned, the cases are considered separately under the succeeding sections of this note.

25. (1875) 22 Minn. 29, 32.

26. Significantly, the decision was made over the contention that the fact that the land was occupied by both husband and wife vested the cause of action in the husband. This decision was not based on an interpretation of § 540.05, but rather, by the court's reasoning, followed as an inference from 2 Minn. Stat. 1945, § 519.02, establishing the married woman's property rights. This latter statute is dealt with under Section II. PROPERTY RIGHTS—WIFE'S SEPARATE ESTATE. See note 65 *infra* and text thereto.

27. See Section II. PROPERTY RIGHTS—WIFE'S SEPARATE ESTATE. See note 84 *infra* and text thereto.

28. See *Libaire v. Minneapolis & St. L. R. R.*, (1911) 113 Minn. 517, 523, 130 N. W. 8, 10 (see note 175 *infra* and text thereto); *Mageau v. Great Northern Ry.*, (1908) 103 Minn. 290, 291, 115 N. W. 651, 652.

29. *Libaire v. Minneapolis & St. L. R. R.*, *supra* note 28. The court stated that inasmuch as no interest of her husband in her earnings as a singer appeared on the face of the complaint, any such interest should have been asserted as an affirmative defense to her right to recover for the loss thereof. *Id.* at 523, 130 N. W. at 10.

30. *Fink v. Baer*, (1930) 180 Minn. 433, 230 N. W. 888. See note 172 *infra* and text thereto.

hospital expenses" when she is living apart from her husband, not being supported by him, and has alone requested the services.³¹

2. *Capacity of the Spouse as a Witness*

The Minnesota legislature in what is now 2 Minn. Stat. 1945, § 595.02(1),³² treated together the historically separate problems³³ of the competency of a spouse to testify and of privileged communications made to one another by spouses during the marriage. This statute modifies the common law position by permitting a spouse to be examined with the consent of the other spouse in an action involving that spouse and a third party, and by permitting a spouse to testify without the consent of the other in suits between the spouses. That the Minnesota court recognizes and applies the distinction between incompetency to testify and the exclusion of privileged communications is clear from its decision in *Lockwood v. Lockwood*,³⁴ where it held a wife competent to testify in an action brought by her against third parties for alienation of her husband's affections, her testimony not relating to conversations between herself and her husband.

a. *Competency of Spouse to Testify*

Section 595.02(1) declares the requirement of consent inapplicable "... to a criminal action or proceeding for a crime committed by one against the other . . ." which provision the Minnesota court has held to be merely declaratory of and not an extension of the common law exception to the general rule of incompetency.³⁵

31. *Paulos v. Koelsch*, (1935) 195 Minn. 603, 263 N. W. 913. See note 173 *infra* and text thereto. A fuller treatment on which of the elements of the total damages for personal tort by a third party the wife can recover is given under Section IV. TORTS. See note 169 *infra* and text thereto.

32. "A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage. This exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other nor to an action or proceeding for abandonment and neglect of the wife or children by the husband . . ."

33. See notes 13 and 14 *supra* and text thereto.

34. (1897) 67 Minn. 476, 70 N. W. 784. See also *Nat. German-American Bank v. Lawrence*, (1889) 77 Minn. 282, 290, 79 N. W. 1016, 80 N. W. 363, 364, where Mr. Justice Mitchell, in considering the effect of a waiver on the issue of competency to testify, said by way of dictum, "We do not wish to be understood as meaning that the waiver or consent would extend to communications made by one spouse to the other during the marriage, where such communication was not a subject of inquiry in the direct examination. Such communications stand upon a separate, if not a different, footing, and this question is not involved in this case."

35. *State v. Armstrong*, (1860) 4 Minn. 335

Thus, the court has held in *State v. Armstrong*³⁶ and *State v. Lasher*³⁷ that a wife cannot testify against her husband without his consent in a prosecution for the crime of adultery, on the ground that such testimony was not within the exception recognized at common law. The decision in the *Armstrong* case was made over the contention that adultery of the husband was a crime against the wife within the meaning of Section 595.02(1). The court reasoned that it was not such a crime against her, since it was not directed against her person and no violence to nor abuse of her was involved.³⁸

Where, however, the third party alone was charged with adultery, the Minnesota court in *State v. Vollander*,³⁹ permitted the testimony of the injured husband as to the offense to be given before the grand jury.⁴⁰

An evidence that the court will not, without clear legislative enactment, extend the exception allowing a spouse to testify in cases of a crime against the other spouse appears from its decision in *State v. Frey*.⁴¹ There the court on the basis of statutory construction held that a wife is not a competent witness for the state in a prosecution against her husband for a crime against her committed before marriage, the court reasoning that the statute deals with acts between the parties in the marriage relation, and not with acts committed before the marriage.

b. *Privileged Communications Between Spouses*

The statute has been construed in favor of keeping communications privileged so as to exclude all private conversations between husband and wife, whether they were "confidential" or not,⁴² ex-

36. *Ibid.*

37. *State v. Lasher*, (1915) 131 Minn. 97, 154 N. W. 735.

38. *State v. Armstrong*, (1860) 4 Minn. 335, 343. For a general discussion of the competency of testimony of one spouse against the other in cases of criminal acts committed by one against the other see (1943) 27 Minn. L. Rev. 205.

39. (1894) 57 Minn. 225, 58 N. W. 878.

40. The court negated the objection that such a holding would lead to discord and dissension in the family on the ground that the public policy of this state had been declared by legislative enactment, now 2 Minn. Stat. 1945, § 617.15, providing that a complaint by the husband or wife is necessary for commencing an adultery prosecution (except when such husband or wife is insane). It would be illogical, the court reasoned, to permit the husband to make complaint but to exclude his evidence in support of it. But cf., *State v. Armstrong*, (1860) 4 Minn. 335, 343. In *State v. Lasher*, (1915) 131 Minn. 97, 98, 154 N. W. 735, (see note 37 supra and text thereto) the court declared the *Vollander* case not in point.

41. (1899) 76 Minn. 526, 79 N. W. 518.

42. *Newstrom v. St. Paul & Duluth Ry.*, (1895) 61 Minn. 78, 63 N. W. 253; *Leppla v. Minnesota Tribune Co.*, (1886) 35 Minn. 310, 29 N. W. 127.

cept where the communication from its very nature was such that it was intended to be communicated to others.⁴³ A further indication that the court construes the statute in favor of the privilege is that the death of one spouse is held not to remove the inadmissibility of all privileged communications.⁴⁴ That the court favors the prohibition against communications between husband and wife being introduced in evidence without the consent of the other spouse is also to be inferred from its extension of the privilege to actions for alienation of affections⁴⁵ and for criminal conversation.⁴⁶

II. PROPERTY RIGHTS—WIFE'S SEPARATE ESTATE⁴⁷

A. *At Common Law*⁴⁸

By marriage a woman at common law was deprived of the right to a separate legal estate, and, in general, her husband became entitled to the use and enjoyment of both the property she had at the time of the marriage and that which she acquired during coverture.⁴⁹ In the freehold estates of the wife, whether she owned them prior to marriage or acquired them during marriage, the husband had an estate which endured during the marriage and their joint lives and which he could alienate without her joinder.⁵⁰ If issue were born alive of their marriage capable of inheriting lands from the

43. See *Newstrom v. St. Paul & Duluth Ry.*, (1895) 61 Minn. 78, 83, 63 N. W. 253, 254.

44. In *re Estate of Osbon*, (1939) 205 Minn. 419, 286 N. W. 306; *Beckett v. Northwestern Masonic Aid Ass'n*, (1897) 67 Minn. 298, 69 N. W. 923; *Newstrom v. St. Paul & Duluth Ry.*, (1895) 61 Minn. 78, 63 N. W. 253. In the *Osbon* case there had also been a divorce and that fact was held not to remove the bar to admissibility.

45. *Gjesdahl v. Harmon*, (1928) 175 Minn. 414, 221 N. W. 639.

46. *Conrad v. Peloquin*, (1929) 177 Minn. 577, 226 N. W. 195.

47. The scope of this treatment of the married woman's property rights is limited to a discussion of what incidents of ownership in regard to the married woman's separate property are given her under her newly created status, and does not concern itself, except incidentally, with the question of a spouse's statutory interest in the estate of the other spouse. Estates in dower and estates by the curtesy were abolished in Minnesota by Minn. Gen. Laws 1875, c. 40, §§ 1, 5. A statutory interest was established in lieu of dower or curtesy under 2 Minn. Stat. 1945, § 525.16. Each spouse's rights in the homestead are also specifically governed by statute, 2 Minn. Stat. 1945, § 507.02, 2 Minn. Stat. 1945, § 525.145, and 2 Minn. Stat. 1945, c. 510, and are not here treated, except as they bear on the question of the wife's general capacity to convey her real estate.

48. The growth of the common law on the married woman's property rights may be found in a treatment in *Rapacz, Progress of the Property Law Relating to Married Women*, (1943) 11 U. of Kan. City L. Rev. 173. Here we are concerned only with what that author discussed as the "final shape" of the common law.

49. See *Madden, Persons and Domestic Relations* (1931), §§ 28-33.

50. See 3 *Holdsworth, A History of English Law* (4th ed. 1935) 525; 2 *Pollock & Maitland, The History of English Law* (2d ed. 1923) 403-04.

wife, the husband then had an estate for his life in all those lands as tenant by the curtesy.⁵¹ This life estate was alienable without the concurrence of the wife,⁵² but the husband could not by himself convey an estate which would outlast the marriage, or outlast his life where he became tenant by the curtesy, for the only procedure for alienating the fee was by a fine, to which both husband and wife were parties and to which the wife assented after a separate examination.⁵³ When the husband died, his wife having predeceased him, her heirs got the land.⁵⁴ On the other hand, the wife had an interest in her husband's separate property, which was inchoate on marriage and became consummate on his death. This interest was a life estate known as dower in one-third of all the lands in which her husband, during coverture, was seized of an estate of inheritance which any issue she might have would be capable of inheriting.⁵⁵ The husband could not alienate his land free of this dower interest except by the device of a fine.⁵⁶ From these rules, it is apparent that the husband was not properly speaking an owner of his wife's land but was rather a kind of profitable guardian while the marriage lasted.⁵⁷

With respect to the wife's chattels personal, however, the husband became the absolute owner, and even became the owner of her choses in action upon reducing them to possession, providing he did so while the marriage lasted.⁵⁸ The husband could freely dispose of these chattels *inter vivos* or by will⁵⁹ with the exception that the wife's necessary clothing and paraphernalia would remain to her (subject to his debts) unless he had disposed of them *inter vivos*.⁶⁰

Chattels real, however, such as a term for years or a wardship, occupied a somewhat middle ground; they could be freely alienated *inter vivos*, but would not pass under the husband's will and would go to the wife if the husband had not disposed of them during his lifetime.⁶¹

To avoid the harsh results of the common law, there developed in the courts of equity the recognition of the married woman's

51. See 3 Holdsworth, *op. cit. supra* note 50, at 185-86, 525; 2 Pollock & Maitland, *op. cit. supra* note 50, at 404.

52. See 2 Pollock & Maitland, *op. cit. supra* note 50, at 404.

53. *Ibid.*

54. See 3 Holdsworth, *op. cit. supra* note 50, at 525.

55. *Id.* at 189.

56. See 2 Pollock & Maitland, *op. cit. supra* note 50, at 404.

57. See 3 Holdsworth, *op. cit. supra* note 50, at 526.

58. *Id.* at 526-27.

59. See 2 Pollock & Maitland, *op. cit. supra* note 50, at 404.

60. *Id.* at 405.

61. See 3 Holdsworth, *op. cit. supra* note 50, at 527; 2 Pollock & Maitland, *op. cit. supra*, note 50, at 404.

separate equitable estate.⁶² By means of the equitable trust, the married woman became capable of performing legal acts in relation to her separate estate and of acting as an independent party in proceedings in chancery.⁶³

B. Under Minnesota Law

1. In General⁶⁴

The existence of a separate legal estate for married women in Minnesota is clearly spelled out in 2 Minn. Stat. 1945, § 519.02,⁶⁵ and the Minnesota court in the early case of *Spencer v. St. Paul & Sioux City R. R.*⁶⁶ gave the statute as broad an interpretation as its language demands.⁶⁷

The statute, which by its terms extends the married woman's capacity of ownership to personal and to mixed property and frees all her property from the control of her husband, represents perhaps the biggest single gain in the movement towards legal equality between the husband and wife.⁶⁸ Thus, the married woman's separate estate is so far recognized that where a husband with his wife's consent, acquired possession of her separate property, in the form of her separate earnings, it was held that the husband held such property in trust for his wife in the absence of her intent to make a gift.⁶⁹ Similarly, her ownership is such that her property is not sub-

62. See 5 Holdsworth, *A History of English Law* (2d ed. 1937) 310-15; 6 Holdsworth, *A History of English Law* (2d ed. 1937) 644-48.

63. See 5 Holdsworth, *op. cit. supra* note 62, at 314.

64. For a comparison of the married woman's interests in jurisdictions following the common law, as modified by statutes, with jurisdictions following the community property system, see Kirkwood, *Equality of Property Interests Between Husband and Wife*, (1924) 8 Minn. L. Rev. 579.

65. "All property, real, personal, and mixed, and all choses in action, owned by any woman at the time of her marriage, shall continue to be her separate property, notwithstanding such marriage; and any married woman, during coverture, may receive, acquire, and enjoy property of every description, and the rents, issues, and profits thereof, and all avails of her contracts and industry, free from the control of her husband, and from any liability on account of his debts, as fully as if she were unmarried."

66. (1875) 22 Minn. 29, 32.

67. See quotation in text to note 26 *supra*. The companion case of *Wampach v. St. Paul & Sioux City R. R.*, (1875) 22 Minn. 34, involving the same issues, expressly followed the *Spencer* case.

68. The wife's ownership of property is qualified, as is her husband's, by the existence of the spouse's statutory rights under 2 Minn. Stat. 1945, § 525.16, and the requirement, under 2 Minn. Stat. 1945, §507.02, of a joint deed for the conveyance of the real estate of either if it is to be conveyed free of the spouse's rights therein. See also 2 Minn. Stat. 1945, §507.03.

69. *In re Estate of Reifsteck*, (1936) 197 Minn. 315, 267 N. W. 259. "Where husband and wife are living together, they shall be jointly and severally liable for all necessary household articles and supplies furnished to and used by the family." 2 Minn. Stat. 1945, § 519.05. As to his wife, the

ject to confiscation by the state for unauthorized misuse by her husband when she did not have notice, knowledge, or reason to believe that her husband intended to use such property in violation of state game laws.⁷⁰ A husband's unauthorized mortgage of a team of horses belonging to his wife cannot affect her ownership.⁷¹ The property of a wife is not subject to her husband's debts.⁷²

That the consequence of the wife's property not being liable for the debts of her husband gives rise to an unhealthy opportunity to defeat the rights of creditors was recognized by the court in *Hossfeldt v. Dill*,⁷³ but regarded as inevitable. The court there upheld the lower court's submission of the question of ownership to the jury, to decide ". . . upon all the testimony, whether these transactions were in good faith, or a mere cover to protect the land and the crops from the husband's creditors."⁷⁴ The question of true ownership as between husband and wife where the rights of the husband's creditors are concerned is a question of fact, to be determined upon a fair preponderance of the evidence.⁷⁵ The ordinary principle of estoppel may operate to defeat a wife's ownership in that a wife who has acquiesced in her husband's use of her property as his own may be estopped from asserting her ownership against a chattel mortgagee of the property.⁷⁶

husband is still primarily liable for household necessities when she expects repayment of sums so expended by her. *Kosanke v. Kosanke*, (1917) 137 Minn. 115, 162 N. W. 1060.

70. *State v. One Buick Sedan Automobile*, (1943) 216 Minn. 129, 12 N. W. 2d 1.

71. *Klein v. Frerichs*, (1914) 127 Minn. 177, 149 N. W. 2.

72. 2 Minn. Stat. 1945, § 519.02. See statute quoted in note 65 supra.

73. (1881) 28 Minn. 469, 472, 10 N. W. 781, 782. The court said: "If such independent business relations of husband and wife afford unusual facilities for fraud, by means of the pretended transfer of property from one to the other, such consequence is necessarily incident to the enforcement of the statutory rights conferred upon married women." *Ibid.*

74. *Ibid.*

75. *Laib v. Brandenburg*, (1885) 34 Minn. 367, 25 N. W. 803. The problem is well stated in *Kroll v. Moritz*, (1910) 112 Minn. 270, 272, 127 N. W. 1120, 1121, where the court said: "Where husband and wife are living together and maintaining a joint home, it is inevitable that each will exercise more or less dominion over property of which, irrespective of absolute title, the family has the beneficial use; so that, when the question of title is presented, it is one of fact, which a jury is peculiarly well fitted to pass upon." *Ibid.*

76. *War Finance Corporation v. Erickson*, (1927) 171 Minn. 276, 214 N. W. 45. The court stated its position thus: "The case is that of a trusting wife who has long permitted her husband to manage as his own her property, to hold himself out to the business world as the owner of it, and who has been satisfied with that appearance of things until beset by financial reverses. Then, as to those who have relied upon the apparent condition of things, it is too late for the wife to assert her separate ownership." *Id.* at 279-80, 214 N. W. at 47.

2. *Right to the Control and Use of and the Rents and Profits from Her Separate Property*

Necessary incidents of full and complete ownership of all property, real, personal, or mixed, are the rights to use and enjoy it and to receive its rents and profits, all of which are granted the married woman in Minnesota by the language of 2 Minn. Stat. 1945, § 519.02.⁷⁷ Broad language in cases such as *Spencer v. St. Paul & Sioux City R. R.*,⁷⁸ giving the wife the same absolute right to the use and enjoyment of her separate estate as if she were sole, in *Sudbo v. Rusten*,⁷⁹ declaring the husband has no control over the wife's real property during coverture and that it is entirely free from liability for his debts, and in *Hossfeldt v. Dill*,⁸⁰ holding the wife entitled to the products from her own farm, leaves no doubt that the ownership which the married woman enjoys of her separate property is not the sterile one it was at common law with respect to realty,⁸¹ but that it carries with it the normal incidents of true ownership.

3. *Right to Redress for Tort to Her Separate Property by Third Persons*⁸²

It was early recognized that a married woman in Minnesota could recover in her own name for damages by third parties to her separate property.⁸³ That a married woman would be limited to a recovery for the loss to her own interests only, resulting from the creation of a nuisance with respect to the home occupied by the family and owned by her, was indicated by the court's language in *Friburk v. Standard Oil Co.*⁸⁴ However, in the subsequent case of *Millet v. Minnesota Crushed Stone Co.*,⁸⁵ in discussing the owner's

77. See statute quoted in note 65 supra.

78. (1875) 22 Minn. 29, 32. See note 66 supra and text thereto.

79. (1896) 66 Minn. 108, 109, 68 N. W. 513, 514.

80. (1881) 28 Minn. 469, 10 N. W. 781.

81. See note 50 supra and text thereto.

82. The wife's right to recover for tort committed against her property by her husband is considered under Section IV. TORTS. See note 140 infra and text thereto.

83. *Wampach v. St. Paul & Sioux City R. R.*, (1875) 22 Minn. 34; *Spencer v. St. Paul & Sioux City R. R.*, (1875) 22 Minn. 29. See notes 21, 23, 25, and 26 supra and text thereto.

84. (1896) 66 Minn. 277, 278-79, 68 N. W. 1090, 1091. "The fact that she was furnishing the house in which the family resided does not change the common-law rule that the husband is the head of the family, nor would it give to her the right to recover for damages to the family resulting from the nuisance. But she had a right to show the use to which she was putting her property as bearing upon the question of her own injury." *Ibid.*

85. (1920) 145 Minn. 475, 177 N. W. 641.

right to recover for any discomfort, annoyance, or illness suffered by himself or any member of his family resulting from the nuisance, the court said by way of dictum:⁸⁶

"If the wife and mother owns the property, we are of the opinion, notwithstanding a remark made arguendo in *Friburk v. Standard Oil Co.*, 66 Minn. 277, 68 N. W. 1090, that she should be allowed the same right of recovery as the husband would have had had he been the owner. This is not on the ground that in such case she is to be regarded as titular head of the family, but it seems to us to be the most practicable rule, and it avoids the necessity of more than one action."

In denying a motion for reargument, the court pointed out⁸⁷ that its language was not to be construed as vesting in one member of a family the right to enforce an action accruing to another for direct personal injuries, and adopted the rule of *United States Smelting Co. v. Sisam*.⁸⁸

From this, it is likely that the Minnesota court will consider the married woman's right to redress for injuries to her separate property by third parties co-extensive with the right the husband enjoys with respect to his property.

4. *Capacity to Alienate Her Separate Property*⁸⁹

With respect to personal property, there are no specific statutory limitations on the wife's capacity to alienate by sale or gift, free from any interest of her husband, but if she dies without having disposed of it by valid sale or gift the husband is entitled to his statutory one-third interest under 2 Minn. Stat. 1945, § 525.16(1).⁹⁰

86. *Id.* at 480, 177 N. W. at 643.

87. *Id.* at 480-81, 179 N. W. at 682.

88. (C.C.A. 8th 1912) 191 Fed. 293. ". . . the owner of a residence which is rendered inconvenient, uncomfortable and unhealthy, as a home, by a nuisance, may prove and recover the damages he suffers *himself* from the discomfort and sickness thereby inflicted upon his wife and other members of his family who live with him in his residence, although he may not, and they alone may, maintain the cause of action for the direct personal injury to themselves." *Millet v. Minnesota Crushed Stone Co.*, (1920) 145 Minn. 475, 481, 179 N. W. 682. See *Eschenbach v. Benjamin*, (1935) 195 Minn. 378, 382, 263 N. W. 154, 156.

89. Since the capacity of both husband and wife to alienate his or her separate property is now governed by statutes which treat both spouses identically, little light would be thrown on the principal question of the extent of the married woman's separate legal identity by a detailed discussion of these statutes and the decisions thereunder. The basic limitations they impose will be mentioned only to round out the picture.

90. "(1) Personal property: To the surviving spouse one-third thereof free from any testamentary disposition thereof to which such survivor shall not have consented in writing or by election to take under the will as provided by law. . . ."

With respect to real property, there are further restraints on the power of alienating it free from the interests of the other spouse under 2 Minn. Stat. 1945, § 507.02.⁹¹ It provides that the homestead cannot be mortgaged or alienated by either spouse without the signature of the other,⁹² except as to a purchase money mortgage, and requires the signatures of both spouses for the conveyance of the real estate of either, unless the conveyance or other alienation is to be subject to the statutory interest of the surviving spouse under 2 Minn. Stat. 1945, § 525.16(2).⁹³ The conveyance by either spouse of his real estate directly to the other spouse is held to be prohibited by virtue of 2 Minn. Stat. 1945, § 519.06.⁹⁴

III. CONTRACTS

A. *At Common Law*

Unlike her single sister who had full contractual capacity, the married woman at common law, with few exceptions, had no power or capacity to contract, and any attempted contracts by her would

91. "If the owner be married, no mortgage of the homestead, except for purchase money unpaid thereon, nor any sale or other alienation thereof shall be valid without the signatures of both husband and wife.

"A husband and wife, by their joint deed, may convey the real estate of either. The husband, by his separate deed, may convey any real estate owned by him, except the homestead, subject to the rights of his wife therein; and the wife, by her separate deed, may convey any real estate owned by her, except the homestead, subject to the rights of her husband therein; and either husband or wife may, by separate conveyance, relinquish his or her rights in the real estate so conveyed by the other. Subject to the foregoing provisions, either husband or wife may separately appoint an attorney to sell or convey any real estate owned by such husband or wife, or join in any conveyance made by or for the other. The minority of the wife shall not invalidate any conveyance executed by her."

92. For a discussion of this point see (1917) 2 Minn. L. Rev. 63.

93. "(2) Real property: To the surviving spouse an undivided one-third of all real property of which the decedent at any time while married to such spouse was seized or possessed, to the disposition of which by will or otherwise such survivor shall not have consented in writing or by election to take under the will. . . ." 2 Minn. Stat. 1945, § 507.03, provides that a purchase money mortgage executed by one spouse of an estate purchased by him during coverture shall not be subject to inchoate or contingent rights of the other spouse, though not joined in by such spouse.

94. *Snortum v. Snortum*, (1923) 155 Minn. 230, 193 N. W. 304. The statute reads: "No contract between husband and wife relative to the real estate of either, or any interest therein, nor any power of attorney or other authority from the one to the other to convey real estate, or any interest therein, shall be valid; but, in relation to all other subjects, either may be constituted the agent of the other, or contract with the other. In all cases where the rights of creditors or purchasers in good faith come in question, each spouse shall be held to have notice of the contracts and debts of the other as fully as if a party thereto." For a discussion of this point see (1933) 17 Minn. L. Rev. 233; (1929) 13 Minn. L. Rev. 612. This question is further treated under Section III. CONTRACTS. See note 126 *infra* and text thereto.

be not merely voidable but void.⁹⁵ In addition to this general incapacity of the wife to contract, her incapacity to sue and be sued without joinder⁹⁶ rendered impossible contracts between husband and wife. Further, existing obligations owed by the wife to the husband at the time of the marriage were merged in and cancelled by the marriage.⁹⁷

With respect to antenuptial contracts, however, the common law after the Statute of Uses permitted the parties to the marriage to make contracts by way of marriage settlements in defeat of the normal property rights, but in general they could not vary the other rights and obligations of husband and wife arising from the marriage status.⁹⁸

B. Under Minnesota Law

1. *The Wife's Contracts with Third Parties*

a. *In General*

Prior to the passage of the enactment now incorporated in 2 Minn. Stat. 1945, § 519.03,⁹⁹ it was recognized in accordance with the common law position that the married woman in Minnesota could not bind either herself or her property generally by contract.¹⁰⁰ Her general capacity to contract is now clearly recognized by the provisions of Section 519.03,¹⁰¹ limited only with respect to conveyances of her real estate and of the homestead.¹⁰² In *Sand-*

95. See Madden, *Persons and Domestic Relations* (1931) § 35; *Carpenter v. Leonard*, (1861) 5 Minn. 155, 163. Exceptions existed at common law where the husband had been banished, had abjured the realm, was a non-resident alien, or was under sentence of transportation or of penal servitude, in which cases the law looked upon the husband as civilly dead and gave the wife the right to contract. Madden, *op. cit. supra*, § 35. In equity the wife could bind her equitable separate estate by contract. Madden, *op. cit. supra*, §§ 39, 40, 41.

96. See note 8 *supra* and text thereto.

97. See 3 Story, *Equity Jurisprudence* (14th ed. 1918) 403.

98. See Madden, *op. cit. supra* note 95, § 71. For an analysis of the historical development of antenuptial contracts, see Ronken, *Antenuptial Contracts; Their Origin and Nature*, (1914) 24 *Yale L. J.* 65.

99. "Every married woman is bound by her contracts and responsible for her torts, and her property shall be liable for her debts and torts to the same extent as if unmarried. She may make any contract which she could make if unmarried, and shall be bound thereby, except that every conveyance and contract for the sale of her real estate or interest therein, shall be subject to and governed by the provisions of section 507.02."

100. See *Pond v. Carpenter*, (1867) 12 Minn. 430, 432. The court there held that the wife could charge her separate estate with the consent of her husband or by order of the district court of the county under the provisions of Minn. Rev. Stat. 1851, c. 71, § 105, but pointed out that that act did not remove the general disability to contract imposed by coverture.

101. See statute quoted in note 99 *supra*.

102. These limitations are considered in text to notes 107, 127 *infra*.

wich Mfg. Co. v. Zellmer,¹⁰³ the court in construing the statute stated:

“. . . the provisions . . . were radical and sweeping, and were intended, in respect to her contracts, to invest a married woman, not merely with the right to contract in respect to her separate property, but with all the rights and liabilities of a *feme sole*, save only as expressly excepted or reserved by the same statute.”

As a result of this contractual capacity, the wife who joins her husband in a conveyance of his real estate for the purpose only of conveying her statutory interest, must be careful of the language of the instrument, for if she joins in the covenants, she is personally liable on them.¹⁰⁴ Her capacity to bind herself personally is so far recognized that she will be held personally liable if she assumes to pay a pre-existing debt of her husband, the extension of time to her husband being regarded as supplying the requisite consideration.¹⁰⁵

This general capacity of the married woman to contract with third parties has not by implication abrogated the common law rule of presumed agency of the wife in the purchase of necessities, the court having held in *Flynn v. Messenger*¹⁰⁶ that the provisions authorizing the married woman to contract do not change the common law rule that where she is living with her husband she is presumed to have authority to act for him in supplying the ordinary wants of the household.

b. *Limitations as to Contracts Affecting Real Estate*

The inability of either spouse to convey his real estate in Minnesota free from the other spouse's statutory interest is specifically provided for by statute,¹⁰⁷ and as the statutes apply equally to both spouses, no particular light would be shed on the question of how far the married woman's legal existence is separate by a detailed

103. (1892) 48 Minn. 408, 414, 51 N. W. 379, 380. The court there held a married woman who joined with her husband in a mortgage of real estate and expressly became a party to the covenants therein was bound by the covenants as if unmarried.

104. *Security Bank of Minnesota v. Holmes*, (1897) 68 Minn. 538, 71 N. W. 699; *Sandwich Mfg. Co. v. Zellmer*, (1892) 48 Minn. 408, 51 N. W. 379. In a subsequent case involving a fraudulent contract for deed by a husband and his wife to the plaintiff, it was held that the wife would not be liable for the purchase price on rescission on the reasoning that the only purpose of her signing was to bar her statutory right. *McDermott v. Ralich*, (1933) 188 Minn. 501, 247 N. W. 683.

105. *First State Bank v. Hell*, (1938) 202 Minn. 68, 277 N. W. 276; *O'Gara, King & Co. v. Hansing*, (1903) 88 Minn. 401, 93 N. W. 307.

106. (1881) 28 Minn. 208, 9 N. W. 759.

107. See text to notes 91-94 supra for a brief discussion of the pertinent statutes.

analysis of the decisions under these statutes. Prior to a legislative change in 1907 the wife was unable to convey her real estate to a third party, even subject to her husband's interest therein, without having her husband join in the deed.¹⁰⁸ While the requirement of joinder by the husband in a conveyance of the wife's real estate was still in effect, the court in *Althen v. Tarbox*¹⁰⁹ refused to construe the general language of Minn. Gen. Laws 1887, c. 207 (now incorporated in 2 Minn. Stat. 1945, § 519.01¹¹⁰) declaring the legal personal identity of the married woman as having repealed by implication the requirement of joinder, on the ground that such could not have been the legislative intent.

These limitations on the capacity of a spouse to convey his real estate free from the rights of the other spouse embody the public policy of protecting the statutory interest of each spouse against free disposition by the other, and no disagreement can be had with the court's application of the statutes.

2. *Contracts Inter Se*

a. *Antenuptial Contracts*

The legal capacity, developed at common law,¹¹¹ in two persons contemplating marriage to fix validly by contract the rights which each should have in the property of the other during life, or the rights which the survivor should have in the property after the other spouse's decease in defeasance of the spouse's statutory share, is established by the express language of 2 Minn. Stat. 1945, § 519.08¹¹² and is recognized by decisions.¹¹³ Such agreements are, in fact, favored by the Minnesota court, but they will be set aside

108. Minn. Laws 1907, c. 123, § 1, substituted the provisions, now contained in 2 Minn. Stat. 1945, § 507.02, that ". . . the wife, by her separate deed, may convey any real estate owned by her, except the homestead, subject to the rights of her husband therein; and either husband or wife may by separate conveyance relinquish his or her rights in the real estate so conveyed by the other," for provisions in Minn. Rev. Laws 1905, § 3335, that ". . . the wife, by her separate deed, may relinquish her rights therein when so conveyed, and without such conveyance she may, by separate deed or instrument, release her dower in lands of a former deceased husband. Real estate owned by the wife shall be conveyed only by deed in which her husband joins. . . ."

109. (1892) 48 Minn. 18, 22, 50 N. W. 1018, 1019.

110. See statute quoted in note 18 supra.

111. See note 98 supra and text thereto.

112. "Nothing in this chapter shall be construed to affect antenuptial contracts or settlements." Such agreement is required to be in writing. 2 Minn. Stat. 1945, § 513.01(3) (Stat. of Frauds); 2 Minn. Stat. 1945, § 525.16(2) (see statute quoted in note 93 supra).

113. *Appleby v. Appleby*, (1907) 100 Minn. 408, 111 N. W. 305; *Desnoyer v. Jordan*, (1880) 27 Minn. 295, 7 N. W. 140.

as inequitable when the wife relies on her husband's representations and there has not been a fair disclosure of the husband's interests at the time of the making of the contract,¹¹⁴ or where in view of all the facts the wife's rights under the contract are inadequate and unconscionable.¹¹⁵ Where fairly and equitably made, antenuptial contracts in anticipation of marriage exclude the operation of law in respect to the property rights of each in so far as covered by the contract,¹¹⁶ but the capacity of parties in contemplation of marriage to alter the legal incidents of the married status apparently remains limited to their property interests. Thus, an antenuptial agreement which would make the marriage terminable by act of the parties, or which would make it effective only for a limited purpose, would be void as being contrary to public policy.¹¹⁷

With respect, then, to the legitimate subject matter of antenuptial contracts, the general legal separateness which has been given the married woman by the Married Women's Act has not operated to extend the scope of the mutual rights and duties which may legally be made the subject matter of an antenuptial contract, since the capacity to contract collided with the notion that the state is in effect a third party to the marriage contract, and that public policy will not permit the legal incidents of marriage to be altered by agreement of the parties.¹¹⁸

The related question of the effect of marriage upon a contract entered into not in contemplation of marriage arose in *Archer v. Moulton*,¹¹⁹ where the court held that a contract employing a farm hand at a specified monthly wage was not cancelled by the marriage of the parties, but remained a binding obligation on the wife, thereby abrogating the common law notion of merger and cancellation of the obligation by marriage.

b. *Postnuptial Contracts in General*

The legal capacity of husband and wife in Minnesota to contract inter se is specifically denied as regards contracts relating to the real estate of either, and specifically granted as to all other

114. *Stanger v. Stanger*, (1922) 152 Minn. 489, 189 N. W. 402. The court reasoned that the duty of disclosure results from a confidential relationship.

115. *Slingerland v. Slingerland*, (1911) 115 Minn. 270, 132 N. W. 326.

116. *Appleby v. Appleby*, (1907) 100 Minn. 408, 111 N. W. 305.

117. See *Safranski v. Safranski*, (1946) 222 Minn. 358, 362, 24 N. W. 2d 834, 836.

118. For a development of this notion (with respect to postnuptial contracts) see (1946) 32 Va. L. Rev. 407.

119. (1931) 183 Minn. 306, 236 N. W. 455, (1932) 16 Minn. L. Rev. 108.

contracts, by 2 Minn. Stat. 1945, § 519.06.¹²⁰ This statutory limitation on the right of husband and wife to contract with each other, and the judicially interposed general requirement that the contract be not opposed to public policy are brought out in *Archer v. Moulton*.¹²¹

Contracts which purport to be in satisfaction of the husband's duty to support his wife made between them when they have no intention of separating have been held void by most courts on the grounds that they violate this requirement that contracts between husband and wife conform to the general public policy of the state.¹²² The Minnesota court upholds the validity of such contracts, however, where the agreement is made *after* separation of the parties.¹²³ Such agreement between the parties is not abrogated even by subsequent divorce when the divorce decree makes no provision for the support of the wife.¹²⁴ However, the subject of alimony cannot be removed from the jurisdiction of the court in a divorce proceeding by a prior postnuptial agreement of the parties following separation, though the court may adopt as its grant of alimony the sum fixed by the contract.¹²⁵

c. *Limitations as to Contracts Affecting Real Estate*

2 Minn. Stat. 1945, § 519.06,¹²⁶ invalidating any contract between husband and wife relative to the real estate of either, has by the court's interpretation been construed to perpetuate the common law rule that a husband could not convey real estate di-

120. See statute quoted in note 94 *supra*.

121. (1931) 183 Minn. 306, 307-08, 236 N. W. 455, 456. The court said: "Among other 'equal rights' conferred upon a wife were . . . the right to contract as if unmarried, accompanied by the obligation of being bound by such contracts. She can contract with her husband as to all subjects except those relating to the real estate of either. Of course, excepted from this rule are contracts (of which the one here involved is not one) which are void because against public policy." *Ibid.* See note 119 *supra* and text thereto.

122. See (1939) 23 Minn. L. Rev. 979. The specific question of the validity of such agreements where there has been no separation has not arisen in Minnesota.

123. *Vanderburgh v. Vanderburgh*, (1921) 148 Minn. 120, 180 N. W. 999; see *Sessions v. Sessions*, (1929) 178 Minn. 75, 78, 226 N. W. 211, 212.

124. *Hertz v. Hertz*, (1917) 136 Minn. 188, 161 N. W. 402. It is to be noted that as a part of the separation agreement in this case the wife released her husband ". . . forever from any and all claims or demands arising out of the marriage relation, including her statutory rights in his estate should she survive him." *Id.* at 189, 161 N. W. at 402. The question of the validity of this was not raised. See note 128 *infra* and text thereto.

125. *Sessions v. Sessions*, (1929) 178 Minn. 75, 226 N. W. 211, modified on rearg., (1929) 178 Minn. 79, 226 N. W. 701.

126. See statute quoted in note 94 *supra*.

rectly to his wife.¹²⁷ The Minnesota court has construed strictly the language of that statute on the theory that if a result different from what the plain language of the statute commands is desirable it is a problem for the legislature, so that where only a portion of an otherwise valid separation agreement concerned itself with a binding obligation between husband and wife relative to the conveyance of real estate, the entire contract was held invalid.¹²⁸

Though the statute may be troublesome, its effect is circumvented by conveyances through third parties, which are held valid when once executed even though made in pursuance of a previously made and invalid agreement between husband and wife for such a conveyance.¹²⁹

IV. TORTS

A. *At Common Law*

At common law neither spouse could sue the other for torts committed against person or property.¹³⁰ This resulted from the fact that the wife could not sue anyone without her husband's consent and joinder—to permit the action would require joining the husband with the wife as plaintiff to sue the husband as defendant.¹³¹ A suit by a wife against her husband would have made the husband liable to himself in damages, since the husband was both liable for the torts committed by his wife before and after their marriage and was entitled to her choses in action.¹³² Suit by the wife for an

127. See note 94 *supra*. The language of the statute specifically prohibits only contracts between husband and wife relative to the real estate of either and makes no mention of conveyances, but the court in its early decisions assumed without much discussion that conveyances were thereby prohibited. See (1929) 13 Minn. L. Rev. 612 on this point and on the effect of modern statutes in general on the validity of conveyances of real property directly between husband and wife.

128. *Simmer v. Simmer, Jr.*, (1935) 195 Minn. 1, 261 N. W. 481. The court there said: "The statute invalidates a contract of any kind between husband and wife in respect to the real estate of either. That intention could not be made plainer. Husband and wife are forbidden to enter into any executory agreement with each other to join in future conveyances. . . . The intention that neither shall give the other, by agreement between the two, any interest in or control over real estate could not be made plainer than by the express prohibition that neither shall give to the other 'any power of attorney or other authority * * * to convey real estate or any interest therein.'" *Id.* at 4, 261 N. W. at 482.

129. *Jorgenson v. Minneapolis Threshing Machine Co.*, (1896) 64 Minn. 489, 67 N. W. 364.

130. See *Madden, Persons and Domestic Relations* (1931) 220. For a necessary modification of this statement with respect to the doctrine of the wife's separate estate which developed in equity, see *McCurdy, Torts Between Persons in Domestic Relation*, (1930) 43 Harv. L. Rev. 1030, 1035.

131. See *Madden, op. cit. supra* note 130, at 220. See text to note 8 *supra*.

132. See *Harper, Torts* (1933) 632.

antenuptial tort of the husband was also barred,¹³³ and subsequent divorce did not remove the disability of the wife to sue for a tort committed during coverture.¹³⁴

In suits for torts committed against third parties by the wife before marriage, though the duty was substantively the wife's, action had to be brought against the husband and wife jointly, and judgment could be enforced against the property of either, but the action existed against the wife individually if she survived her husband.¹³⁵ The husband was at common law liable for all torts committed by his wife during coverture, and she was also liable in general, except when she acted in his presence and at his command.¹³⁶

For a tort committed by a third party against the wife, the wife could not sue without being joined by her husband,¹³⁷ except as to torts committed against her separate equitable property.¹³⁸

B. Under Minnesota Law

1. *Inter Se*

a. *Liability of Spouse*

The section of the Married Women's Act establishing the wife's separate legal existence¹³⁹ does not in terms deal with the question of liability for torts *inter se*, but its language is broad enough to permit the court to have construed the statute as abrogating the common law with respect to suits between husband and wife for torts *inter se*. While the Minnesota court has held this section to preserve the married woman's legal identity to the extent that she may enforce against her husband any right affecting her separate property, the same as if he were a stranger,¹⁴⁰ thus adopting the majority rule with respect to torts by the husband affecting the

133. See Prosser, *Torts* (1941) 899.

134. *Strom v. Strom*, (1906) 98 Minn. 427, 107 N. W. 1047. It should be noted that dissolution by divorce was not possible prior to the English Reformation.

135. See 3 Holdsworth, *A History of English Law* (4th ed. 1935) 531.

136. See Madden, *op. cit. supra* note 130, §§ 64, 65. The earlier common law raised a rebuttable presumption of coercion on the part of the husband where the wife's tort was committed in his presence, and thereby made him personally liable unless the presumption was rebutted. *Id.* at 209.

137. *Id.* at 158-9. The husband got all elements of damages in such action. *Id.* at 159, 162. He, of course, got all the damages in his separate action against the tortfeasor "per quod consortium amisit." *Id.* at 161.

138. *Id.* at 157.

139. 2 Minn. Stat. 1945, § 519.01. See statute quoted in note 18 *supra*.

140. *Gillespie v. Gillespie*, (1896) 64 Minn. 381, 67 N. W. 206.

wife's separate property,¹⁴¹ it has steadfastly refused to permit an action between spouses for personal torts in a clear line of cases which indicates that the court is unlikely to change its attitude before there has been a statutory change.¹⁴²

The statute was first construed in *Strom v. Strom*¹⁴³ where it was held that an action for an assault upon the wife committed during coverture could not be brought even after divorce, on the reasoning that the statute was meant to give the wife the same rights of action in her own name as the husband had and no other or greater right, and that he never had the substantive right to sue his wife for personal tort.

The case was followed in *Drake v. Drake*¹⁴⁴ where the court refused an injunction against interference and annoyance with plaintiff-husband's business and private affairs and pointed out that it would not open up a field of litigation which was likely to disturb the tranquillity of the home¹⁴⁵ without direct legislative enactment, particularly when the divorce courts are open for redress in a proper case and when the criminal law exists.

The decision in the case of *Woltman v. Woltman*¹⁴⁶ provided further evidence that the Minnesota court considered non-liability for personal torts between husband and wife a closed question in Minnesota. The court recognized that there were varying rules in other jurisdictions, but held that the question was no longer open in Minnesota in view of the decisions in the *Strom* and *Drake*

141. For a discussion of the majority and minority viewpoints taken on this question see (1935) 19 Minn. L. Rev. 595; (1926) 11 Minn. L. Rev. 79; (1917) 1 Minn. L. Rev. 82.

142. *Karalis v. Karalis*, (1942) 213 Minn. 31, 4 N. W. 2d 632; *Kyle v. Kyle*, (1941) 210 Minn. 204, 297 N. W. 744; *Patenaude v. Patenaude*, (1935) 195 Minn. 523, 263 N. W. 546; *Woltman v. Woltman*, (1922) 153 Minn. 217, 189 N. W. 1022; *Drake v. Drake*, (1920) 145 Minn. 388, 177 N. W. 624; *Strom v. Strom*, (1906) 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N.S.) 191 and note.

143. (1906) 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N.S.) 191 and note.

144. (1920) 145 Minn. 388, 177 N. W. 624, 4 Minn. L. Rev. 538. See a discussion of the case in *McCurdy*, supra note 130, at 1045.

145. ". . . the welfare of the home, the abiding place of domestic love and affection, the maintenance of which in all its sacredness, undisturbed by a public exposure of trivial family disagreements is so essential to society, demands and requires that no new grounds for its disturbance or disruption by judicial proceedings be engrafted on the law by rule of court not sanctioned or made necessary by express legislation." *Drake v. Drake*, (1920) 145 Minn. 388, 391, 177 N. W. 624, 625.

This reasoning has been criticized on the ground that in these cases there is very little domestic peace to be preserved. *McCurdy*, supra note 130, at 1052.

146. (1922) 153 Minn. 217, 189 N. W. 1022.

cases, which were “. . . thoroughly considered and deliberately decided.”¹⁴⁷

*Patenaude v. Patenaude*¹⁴⁸ extended the doctrine so as to preclude suits between spouses for torts committed prior to marriage, on the reasoning that if Section 519.01 meant to change the common law, it would have done so whether the wrong was committed before or after marriage and, the court having previously held that there was no change with respect to torts during coverture, no change with respect to torts before marriage would be implied.¹⁴⁹

The rule was again recognized and applied so as to deny the wife recovery against a partnership for negligence committed against her by her husband, one of the partners, while he was operating a partnership automobile with the consent of his partners.¹⁵⁰

The clinching evidence that the Minnesota court considers the policy of not permitting an action between spouses for personal tort to be firmly established is *Kyle v. Kyle*,¹⁵¹ a fairly recent conflict of laws case. The court felt constrained to hold that to permit an action for personal tort between the spouses would contravene the settled public policy of the state, even though such an action was maintainable in the state of the injury.

Some indication that the court is not overly pleased with this rule, though it undoubtedly considers it fixed, was its willingness to make a distinction in the case of *Albrecht v. Potthoff*,¹⁵² in order to take that case out of the rule. That was an action by the administrator of the estate of a decedent against the husband of the sole beneficiary entitled to the proceeds of such action. The court permitted recovery on the bases that this was not an action by a wife against her husband, it being brought by the administrator, and that the tort was against a third person, not the spouse. A well reasoned dissent by Mr. Justice Stone argues plausibly that since the

147. *Id.* at 218, 189 N. W. at 1022.

148. (1935) 195 Minn. 523, 263 N. W. 546, (1936) 20 Minn. L. Rev. 227.

149. Here again, the court emphasized domestic tranquillity as a consideration of public policy saying, “Quite generally, one of the reasons why a husband or wife cannot bring suit for a personal tort against the other, during coverture at least, is that to do so would disturb and tend to disrupt the marriage and family relations, which it is the public policy of the state to protect and maintain inviolable.” *Id.* at 526, 263 N. W. at 547-48.

150. *Karalis v. Karalis*, (1942) 213 Minn. 31, 4 N. W. 2d 632.

151. (1941) 210 Minn. 204, 297 N. W. 744, 25 Minn. L. Rev. 944.

152. (1934) 192 Minn. 557, 257 N. W. 377, (1935) 19 Minn. L. Rev. 595. The writer there suggests that recovery might have been sustained as involving a property right of the wife. *Id.* at 596.

wife was the sole beneficiary, it was in effect an action between husband and wife. However, the court here expressly states that this case is one which is not within the rule and does not represent a departure therefrom.¹⁵³

The only overt criticism of the rule of the *Strom* case to come from any member of the Minnesota court is to be found in Mr. Justice Hilton's dissent, concurred in by Mr. Justice Peterson, in the case of *Kyle v. Kyle*.¹⁵⁴ He argues that the court in its subsequent decisions has ignored the broad language of Mr. Justice Mitchell in the early case of *Gillespie v. Gillespie*,¹⁵⁵ where he interpreted the purpose of the Married Women's Act to be:

"... to preserve the separate legal existence of a married woman in respect to all her rights of person and property, and, to the extent necessary to the full exercise and protection of these rights, to give her in her own name all the remedies in the courts which she would have if unmarried."

b. *Liability of Spouse's Principal*

In a considered opinion which reviewed the existing split of authority in other jurisdictions on the question of whether a spouse's principal could be liable to an injured person where the spouse guilty of the tort was immune because of the marriage relationship, the Minnesota court, in the case of *Miller v. J. A. Tyrholm & Co.*,¹⁵⁶ held that the immunity of the husband from suit in tort on the part of his wife would not inure to the benefit of the husband's principal. The argument of the contra position, that permitting such a recovery is pointless since generally the principal can recover from the agent spouse, was considered by the court but dismissed. The court chose instead to adopt what it considered the growing and modern view, basing its holding on the reasoning that the act does not lose its unlawful character by virtue of the immunity of the actor and that there is no public policy in favor of extending the husband's immunity to make his principal immune.¹⁵⁷

153. *Albrecht v. Potthoff*, (1934) 192 Minn. 557, 561, 257 N. W. 377, 378. In a later case the court again pointed out that the *Albrecht* case was not to be construed as changing the rule. *Karalis v. Karalis*, (1942) 213 Minn. 31, 33, 4 N. W. 2d 632, 633. See text to note 150 supra.

154. (1941) 210 Minn. 204, 208-13, 297 N. W. 744, 746-49.

155. (1896) 64 Minn. 381, 383, 67 N. W. 206, 207. See note 140 supra and text thereto.

156. (1936) 196 Minn. 438, 265 N. W. 324, 20 Minn. L. Rev. 566.

157. For a discussion of the majority and minority positions see (1936) 20 Minn. L. Rev. 566; (1933) 17 Minn. L. Rev. 450; (1930) 14 Minn. L. Rev. 574; (1925) 9 Minn. L. Rev. 485.

In *Karalis v. Karalis*,¹⁵⁸ however, the court held a partnership not liable for the tort of one of its members to that member's wife committed under circumstances where liability would have existed had the husband-wife relationship not been present, and distinguished the *Miller* case on the ground that there a corporation was the principal. Though logically there should be no distinction on the basis of whether the principal is a partnership or a corporation, the *Karalis* case can be justified under the wording of the applicable statute relating to the liability of members of a partnership.¹⁵⁹

2. Against Third Parties

The husband's liability for the torts of his wife against third parties is governed expressly by 2 Minn. Stat. 1945, §§ 519.03, 519.05, the language of which is clearly broad enough to abrogate the husband's common law liability for such torts.¹⁶⁰ Accordingly, the court in *Plasch v. Fass*¹⁶¹ construed Section 519.05 as having abolished the common law liability of a husband for the tort of his wife against a third party but not as precluding such liability as may arise from a valid agency relationship.¹⁶²

The court in the earlier case of *Pett-Morgan v. Kennedy*¹⁶³ had refused to infer from what is now 2 Minn. Stat. 1945, § 519.01,¹⁶⁴ that the common law liability of a husband for his wife's tort had been abrogated, but that conclusion was unavoidable under the then existing provision in 2 Minn. Gen. Stat. 1894, § 5536, reading:

"Nothing in this act shall be construed . . . to exempt a

158. (1942) 213 Minn. 31, 4 N. W. 2d 632.

159. 2 Minn. Stat. 1945, § 323.12, under which the case was decided, reads in part, ". . . the partnership is liable therefor to the same extent as the partner so acting or omitting to act."

160. Section 519.03 reads in part: "Every married woman is bound by her contracts and responsible for her torts, and her property shall be liable for her debts and torts to the same extent as if unmarried." Section 519.05 reads in part: ". . . nor shall any married man be liable for any torts, debts, or contracts of his wife, committed or entered into either before or during coverture, except for necessities furnished to the wife after marriage, where he would be liable at common law."

161. (1919) 144 Minn. 44, 174 N. W. 438; see (1920) 4 Minn. L. Rev. 73, 74.

162. In this connection it should be noted that the marriage relationship between driver and guest, as a matter of law, does not constitute the driver the agent of the guest. *Olson v. Kennedy Trading Co.*, (1937) 199 Minn. 493, 272 N. W. 381; see *Christensen v. Hennepin Transportation Co.*, (1943) 215 Minn. 394, 404, 10 N. W. 2d 406, 413.

163. (1895) 62 Minn. 348, 64 N. W. 912, 30 L. R. A. 521 and note.

164. See statute quoted in note 18 supra.

husband from liabilities for torts committed by his wife."¹⁶⁵ *Brazil v. Moran*,¹⁶⁶ decided prior to the controlling legislative enactments, was simply declaratory of the common law rule that a wife is not liable for a tort committed by her in the presence of her husband when the presumption of coercion by him is not rebutted.

3. *By Third Party Against a Spouse*

As a result of the married woman's newly created status making her responsible for her torts, the important reciprocal question arises as to whether she alone can recover, without joining her husband as plaintiff, for all items of damage resulting from a tort committed against her by a third party. 2 Minn. Stat. 1945, § 540.05,¹⁶⁷ clearly abrogates the common law requirement of joinder of the husband in a suit by the wife. 2 Minn. Stat. 1945, §§ 519.01, 519.02,¹⁶⁸ would seem to give the wife such choses in action. However, to the extent that the loss resulting from a tort against the wife is a loss to the husband, for example, a loss of his wife's services, the question remains one of judicial interpretation as to how far the general tenor of the Married Women's Act impliedly entitles only the wife to recover for all the elements of damage.¹⁶⁹

The present, incomplete law on this subject has grown by a process of judicial inclusion and exclusion. Ordinarily, the injured wife cannot recover for medical expenses because her husband is obliged to provide them for her,¹⁷⁰ and the court has permitted the husband an action to recover for the loss of the society and services of his wife and for expenses in effecting her cure.¹⁷¹ Where, however, the wife assumed the liability for, and paid for, her own medical expenses, it was held in *Fink v. Baer*¹⁷² that she might recover that element of damages. The

165. A legislative change was made in Minn. Laws 1897, c. 10, which specifically exempted the husband from liability for his wife's torts, now 2 Minn. Stat. 1945, § 519.05, and struck the provision which had retained the husband's liability from 2 Minn. Gen. Stat. 1894, § 5536, now 2 Minn. Stat. 1945, § 519.08.

166. (1863) 8 Minn. 236, 83 Am. Dec. 772 and note.

167. See statutes quoted in note 23 supra.

168. See statutes quoted in notes 18, 65 supra.

169. The common law position is discussed in note 137 supra.

170. See *Belyea v. Minneapolis, St. P. & S. S. M. Ry.*, (1895) 61 Minn. 224, 63 N. W. 627.

171. *McDevitt v. City of St. Paul*, (1896) 66 Minn. 14, 68 N. W. 178; *Skoglund v. Minneapolis Street Ry.*, (1891) 45 Minn. 330, 47 N. W. 1071. It does not appear from the reports that the wife brought any action against the defendant.

172. (1930) 180 Minn. 433, 230 N. W. 888.

Fink case was followed and extended in *Paulos v. Koelsch*,¹⁷³ where the wife suing for injuries had not lived with nor been supported by her husband for five years. She was permitted, as against the defense that the husband alone was liable for such sums, to recover hospital and medical expenses, on the rationale that she alone had requested the services and had thereby bound herself to pay for them under 2 Minn. Stat. 1945, § 519.03. The court there pointed out that no injustice existed in permitting such recovery by the wife, since recovery by her would bar any subsequent action by the husband for such damages.¹⁷⁴

It is thus apparent that in Minnesota there are still two distinct causes of action arising from a tort against a married woman, one in her for the direct injury to her person,¹⁷⁵ and the other in her husband for the consequential injuries to him from loss of her services and society and the expenses to which he has been put.¹⁷⁶

The related questions as to whether one spouse can recover from a third party for criminal conversation with, or alienation of affections of the other spouse, are discussed in (1923) 7 Minn. L. Rev. 428 and (1921) 6 Minn. L. Rev. 76.

The wife's ability to recover for torts to her separate property by third persons is considered above under Section II. PROPERTY.

V. CRIMES

A. *At Common Law*

With respect to the criminal law, considerations of social necessity dictated that the common law fiction of legal martial unity be halted short of its logical application, so that even at common law the husband and wife were criminally liable for offenses *inter se*, such as murder, manslaughter, mayhem, and aggravated assault.¹⁷⁷ The line was drawn in general so that the husband or wife was criminally liable for criminal acts committed against the other's person, but was not so liable for crimes against the other's prop-

173. (1935) 195 Minn. 603, 263 N. W. 913.

174. *Id.* at 608, 263 N. W. at 915.

175. *Libaire v. Minneapolis & St. L. R. R.*, (1911) 113 Minn. 517, 130 N. W. 8.

176. *Mageau v. Great Northern Ry.*, (1908) 103 Minn. 290, 115 N. W. 651. For a discussion of the husband's right to the wife's services see (1932) 16 Minn. L. Rev. 443.

177. See 3 *Vernier, American Family Laws* (1935) 162. Rape, however, was not among the crimes for which a husband could be guilty as a principal in the first degree since he had a legal right to sexual intercourse with his wife. *Madden, Persons and Domestic Relations* (1931) 227. He might be guilty as a second degree principal, or as an accessory, if he aided and abetted another man in raping her. *Ibid.*

erty.¹⁷⁸ It was an essential element of most of the latter crimes that there be an invasion of the possession of "another," and the common law notion effectively precluded showing the wife's individual identity,¹⁷⁹ except as to her separate estate in equity.¹⁸⁰ Thus, for example, at common law neither spouse was guilty of arson for burning the property of the other,¹⁸¹ nor for larceny of the other's goods.¹⁸²

A wife was in general criminally liable for criminal acts against third persons just as if she were a feme sole.¹⁸³ However, if the acts were committed in the presence of her husband, the common law raised a rebuttable presumption that her acts were not voluntary but rather were due to his coercion, and she was excused while he was held liable unless there was evidence rebutting the presumption.¹⁸⁴

B. Under Minnesota Law

1. Criminal Acts Against a Spouse's Person or Property

The position of the Minnesota court on the question of criminal liability for acts by one spouse against the other or against the other's property is not nearly so well settled as the analogous question with respect to torts. Cases have not arisen involving criminal acts against the person, but the public purpose embodied in the Married Women's Act would certainly require that no change be made from the general common law rule which held the spouse liable for a criminal act against the other's person.

On the question of the spouse's liability for criminal acts against the other's property, the court has held in *State v. Arnold*¹⁸⁵ that a wife could not be guilty of larceny of her husband's property under a larceny statute making "every person" liable. The court reasoned

178. See Madden, op. cit. supra note 177, § 70.

179. Id. at 226.

180. See note 63 supra.

181. See Madden, op. cit. supra note 177, at 226; 3 Vernier, op. cit. supra note 177, at 162.

182. See Madden, op. cit. supra note 177, at 226; 3 Vernier, op. cit. supra note 177, at 163.

183. See Madden, op. cit. supra note 177, at 216.

184. Id. at 216-17. Murder and treason appear to have been recognized exceptions to the rule from its inception. Id. at 217.

185. (1931) 182 Minn. 313, 235 N. W. 373, 15 Minn. L. Rev. 589. The decision has become a leading case and has drawn a considerable amount of comment and criticism. Position criticized in Note, (1940) 25 Iowa L. Rev. 351, 356-60; discussed in Note, (1941) 16 St. John's L. Rev. 78, 82-83. The latter note argues plausibly that the best rationale of the majority position as expressed in the *Arnold* case is that the criminal act is really against the state and not against the "star" witness, and that penal laws should be written in clear and unmistakable language. Ibid.

that the Married Women's Act did not change the marriage status but affected only property and contract rights, and that a new crime could be created only by express legislative enactment.¹⁸⁶ The court made no mention of its earlier decision in *State v. Roth*,¹⁸⁷ where it was held that it was arson for a husband to burn property owned jointly by himself and his wife. In the *Roth* case, the court's holding was put on the broad ground that the statutes creating the married woman's individual property rights made it necessary to say that the property was that of another person within the meaning of the arson statute.

In the subsequent case of *State v. Zemple*¹⁸⁸ the court followed the *Roth* case in again holding that the rule providing that a husband could not be guilty of arson for the burning of a dwelling house owned by his wife, when it is their joint abode, does not obtain in Minnesota. The court there pointed out an alternative basis for the decision in the arson cases under the arson statute¹⁸⁹ which made a person guilty of arson for the wilful burning of even his own property. The decision in the *Arnold* case was considered by the court but apparently limited to larceny.

From the decisions in these few cases, it is apparent that the particular wording of the statute defining the crime in each case has had and will likely continue to have an important bearing on the direction which the decisions will take.

2. Criminal Acts by the Wife Against Third Persons

The common law defense given the married woman by raising a rebuttable presumption of coercion by her husband as to criminal acts committed by her against third persons in his presence is specifically abrogated by statute in Minnesota.¹⁹⁰ Apparently no cases have as yet construed the statute but the intent would fairly admit of no other construction. The married woman today would be liable for her crimes as though she were sole.¹⁹¹

186. The decision was by a divided court, Justices Holt and Hilton dissenting.

187. (1912) 117 Minn. 404, 136 N. W. 12.

188. (1936) 196 Minn. 159, 264 N. W. 587.

189. The statute, now 2 Minn. Stat. 1945, § 621.06, reads: "To constitute arson, it shall not be necessary that another person than the defendant should have had ownership in the building set on fire."

190. 2 Minn. Stat. 1945, § 610.06. "It is no defense for a married woman charged with crime that the alleged act was committed by her in the presence of her husband."

191. The related question of the admissibility of testimony by one spouse for or against another in cases of criminal acts against third parties is considered under Section I. SEPARATE LEGAL EXISTENCE. See note 32 supra and text thereto.

CONCLUSIONS

It is apparent that most of the legal disabilities which inhered in the status of a married woman under the common law concept of the unity of husband and wife have been swept away in Minnesota by legislation and by the decisions of the court rendered in applying and construing that legislation. It is submitted that this result is quite proper in that it represents a reasonable adaptation to the type of society we have developed. Because of the advances made in our technology and because of the changed attitudes we have towards the proper place of the married woman in society, her need for the same legal capacities which her husband enjoys has become increasingly apparent. However, it cannot sensibly be maintained that *complete* "equality" or sameness in the legal capacities of a husband and a wife could or should be achieved, since certain inherent differences in the economic capacities of the husband and of the wife do exist. For example, though today it is becoming common for a married woman to be employed and thus to contribute to the family income, her ability to do so is restricted to an extent by her child-bearing function, to mention only the most obvious limitation. Nor can it be argued that the married woman should necessarily have in all respects the same legal status as has a single woman, since marriage creates a status to which the law justly attaches certain legal incidents. Thus, for example, a given act by a man which might constitute a tort against a single woman might not constitute a tort against his wife on the ground that there is a larger implied consent between married persons, in jurisdictions where suits for torts *inter se* are recognized. It is to be noted, however, that this difference goes to what constitutes the substantive nature of the tort and not to any procedural difference due to the status which a woman acquires on marriage.

The foregoing is not intended to suggest that our legislature and our court have gone as far as they ought towards granting the married woman in Minnesota the same legal capacities which her husband enjoys. It is submitted, for example, that the better view would be to hold the husband and the wife liable for torts *inter se*, subject to the substantive limitation mentioned above which would give rise to a broader implied consent, particularly in view of the fact that, as we have seen above, our court holds that a spouse can recover from the other spouse's principal for a tort against him committed by the other spouse as agent. The argument that to permit such a recovery would destroy marital peace and harmony

is, on analysis, unsound if common sense notice is taken of the fact that normally no such suit would be brought where any peace and harmony exists, except in cases where the ultimate recovery would be had against an insurance company or some other third party. Similarly, the prohibition against a conveyance of any interest in real estate directly between a husband and wife, which our court has construed the language of our statute to contain, is an anachronism which has no place in our law, since as appears above, our court has held that such a conveyance is permitted if made through a third party.

In view of the large extent to which the married woman in Minnesota has acquired new legal capacity, the question might properly be raised as to whether she ought not to be required to assume corresponding duties, paralleling those of the husband. For example, as noted above, though the rights of creditors are protected to the extent that the married woman is made jointly liable with her husband for necessities, the wife can still recover the sums she expended from the husband where it appears that she intended to get the money back. An interesting conflict could conceivably arise from the co-existing facts that a husband is still entitled to his wife's ordinary household services, and that on the other hand the wife is entitled to the fruits and avails of her labor or business. If a wife desired to be gainfully employed to the exclusion of performing her household duties, could her husband insist that she perform her household duties personally? If not, and she insisted on working, could he require her to pay a portion of the household expenses in lieu of her personal rendition of the ordinary household services? These questions are unanswered by any express statutory language or by judicial decision, probably because such a situation is normally worked out more or less amicably between husband and wife, but they suggest that possibly the wife ought to be liable proportionally for the support of the family where she is gainfully employed.

Though it may fairly be said that the common law concept of the unity of husband and wife has ceased to be of controlling importance in most practical respects in Minnesota, yet it cannot be said that the concept is dead. The foregoing demonstrates the extent to which the court has adapted the common law to the legislative changes, basic in nature, which have been made in the husband-wife relationship by the Married Women's Act and related statutes.