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Notes and Comments

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NOTES AND COMMENTS

Rescinding Memorialization Resolutions

Progress in the matter of memorializing the United States Congress to call a convention for the purpose of considering and proposing an amendment to the Constitution of the United States limiting federal income tax rates has reached the point where twenty-eight states have now adopted resolutions on the issue. Similar action by four more state legislatures will be necessary in order that there may be an unquestionable demand[1] by thirty-two states, or a number sufficient to meet the requirements of Article V of the Constitution, to put Congress in a position where it would be obliged to act.

The accelerated speed of the movement, developing in the past few years since the matter was first broached by the legislature of the State of Wyoming, seems to have caused some concern on the part of those presently in power in a few state legislatures for they would appear to be attempting to halt the rate of progress by securing the adoption of resolutions intended to rescind the favorable action taken by their states at an earlier date. Four of the twenty-eight state legislatures which had previously memorialized Congress calling for the submission of the amendment in question, to-wit: Alabama,[2] Illinois,[3] Kentucky,[4] and Wisconsin,[5] have since adopted resolutions purporting to rescind their earlier memorialization. The question has thereby been raised as to whether such rescission resolutions are null and void and of no legal effect. It is believed that such is the case for the reasons hereinafter set forth.

It is essential to keep in mind the amendatory process described in Article V of the federal constitution. That article contemplates that the Congress (a) shall, when two-thirds of both houses deem it necessary, "*propose* amendments" to the constitution; or (b), "on the *application* of the legislatures of two-thirds of the several states," shall call a convention for proposing amendments. The article further recites that the amendments, "*in either case,* shall be valid to all intents and purposes . . . when *ratified* by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof."[6]

[1] See Packard, "Legal Facets of the Income Tax Rate Limitation Program," 30 Chicago-Kent Law Review 128 (1952), particularly pp. 137-40, on the point of whether or not the necessary quorum has already been achieved.

[2] Ala. Acts 1945, p. 155.

[3] Ill. Laws 1945, p. 1797.

[4] Ky. Acts 1946, p. 720.

[5] Wis. Laws 1944-5, pp. 1126-7.

[6] Italics added. Article V contemplates that the mode of ratification shall be determined by Congress.

In view of the constitutional expression that either of these methods is to possess equal effect with the other it should be possible to compare the state memorialization method with the congressional method and thereby reach the result that what is true of the one is equally true of the other. If that comparison is proper, and no reason appears why it is not so, then it follows that what would be true of a congressional attempt to withdraw a proposed amendment which it had once submitted would likewise be true of the attempt by a state to rescind an action it had taken looking toward the same end.

Except as Congress may limit the time within which ratification may be given to one of its proposals, it is clear that Congress is without the power to withdraw a proposed amendment which it has once submitted. Professor Orfield is authority for the proposition that an attempt by Congress to withdraw a proposed amendment, after it had secured the necessary vote of two-thirds of both houses, would be a nullity. In his book on the subject of amending the federal constitution, he noted that the "question was directly raised in 1864 when Senator Anthony proposed to repeal the joint resolution submitting the Corwin amendment," and he declared the practice to be "to regard such a withdrawal as ineffectual," on the theory that each affirmative step taken in the passage of an amendment is irrevocable. If such were not the case, he wrote, "confusion would be introduced if Congress were permitted to retract its action."[7] Much the same view has been shared by Professor Burdick. In his textbook on the American Constitution, he wrote: "It seems safe to assert that Congress, having once submitted a proposed constitutional amendment to the States, cannot thereafter withdraw it from their consideration."[8]

Considering the demonstrated equality between the two methods of procuring a constitutional amendment, it is not illogical to apply the same reasoning to state action intended to rescind an application made by a state legislature for the calling of a convention to consider and propose amendments. As Professor Orfield has said, "the analogy of a state legislature's attempting to withdraw its ratification of an amendment would seem apposite."[9]

Additional proof may be found in the comparison which exists between a purported congressional withdrawal of a proposal on the one hand and a state attempt to withdraw its ratification of a proposed amendment on the other. The United States Supreme Court itself once pointed

[7] Orfield, The Amending of the Federal Constitution (University of Michigan Press, Ann Arbor, Michigan, 1942), p. 52.

[8] Burdick, The Law of the American Constitution: Its Origin and Development (G. P. Putnam's Sons, New York, 1922), p. 39.

[9] Orfield, op. cit., p. 52.

out that "proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor."[10] In that endeavor, state governments do not act on the basis of their sovereign status but under a special power conferred by the national constitution. As Judge Jameson wrote, the power to amend the constitution is not a power belonging to the states "originally by virtue of rights reserved or otherwise." As a consequence, "when exercised, as contemplated by the constitution, by ratifying, it ceases to be a power, and any attempt to exercise it again must be a nullity . . . [Once] ratified, all power is expended."[11]

That view also has the support of the eminent Professor Dodd. He has stated that the view "is incontrovertible, that a state, once having ratified, may not withdraw that ratification . . . to construe the Constitution otherwise, would be to permit great confusion in that no state in ratifying could know what the status of the amendment was if at the same time other states were permitted to withdraw. Of course, confusion would occur also in that it would be difficult to know when three-fourths of the states had ratified . . . The function of ratification seems to be one which, when once done, is fully completed and leaves no power whatever in the hands of the state legislature."[12]

The highest courts of two of the American states have achieved the same conclusion. In *Wise* v. *Chandler,*[13] the Court of Appeals of Kentucky said: "It is the prevailing view of writers on the question that a resolution of ratification of an amendment to the Federal Constitution, whether adopted by the Legislature or a convention, is irrevocable. This conclusion seems inescapable as to the action of a convention called for the purpose of acting upon an amendment. When it has acted and adjourned, its power is exhausted. Since the 'powers and disabilities' of the two classes of representative assemblies mentioned in Article V are 'precisely the same', when a Legislature, sitting, not as a lawmaking body, but as such an assembly, has acted upon a proposal for an amendment, it likewise has exhausted its power in this connection."[14] The Supreme Court of Kansas, about the same time and through the medium of the case of *Coleman* v. *Miller,*[15] declared: "It is generally agreed by lawyers, statesmen and publicists who have debated this question that a . . . ratifi-

[10] See Dillon v. Gloss, 256 U. S. 368 at 374, 41 S. Ct. 510 at 512, 65 L. Ed. 994 at 997 (1921).

[11] Jameson, A Treatise on Constitutional Conventions: Their History, Powers and Modes of Proceeding (Callaghan & Company, Chicago, 1887), §§ 579 and 581.

[12] Dodd, "Amending the Federal Constitution," 30 Yale L. J. 321 (1921), particularly p. 346.

[13] 270 Ky. 1, 108 S. W. (2d) 1024 (1937).

[14] 270 Ky. 1 at 8-9, 108 S. W. (2d) 1024 at 1028.

[15] 146 Kans. 390, 71 P. (2d) 518 (1937).

cation once given cannot be withdrawn . . . [From] historical precedents, it is . . . true that where a state has once ratified an amendment it has no power thereafter to withdraw such ratification. To hold otherwise would make article 5 of the federal constitution read that the amendment should be valid 'when ratified by three fourths of the states, each adhering to its vote until three fourths of all the legislatures shall have voted to ratify.'. . . [When] a proposed amendment has once been ratified the power to act on the proposed amendment ceases to exist."[16]

What room is there, then, for supposing that a different view should be applied to the matter of retracting a state resolution calling upon Congress for a convention to consider a proposed amendment? When a state adopts an original resolution memorializing Congress to that end, it is not exercising a sovereign power exclusively its own, nor merely legislating simply on behalf of its own people, but is engaging in a "federal" function. That fact places such activity within the exclusive domain of federal jurisdiction and completely removes the same from the pale of the state province and beyond the power of state withdrawal. The truth of this is manifest since the function of a state legislature, in memorializing Congress to call a convention for the purpose of proposing an amendment, is derived wholly from the federal constitution. It is no different, in source, than the function of Congress in proposing an amendment, or the function of a state legislature voting to ratify the same. Since the latter functions have been judicially identified as "federal functions" totally without state realm,[17] the conclusion would appear inescapable that the purported rescinding resolutions are of no effect whatever. It is submitted, therefore, that Congress should act, at the latest, when four more state legislatures vote in favor of a constitutional convention to consider the proposed income tax rate limitation amendment.

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[16] 146 Kans. 390 at 400-3, 71 P. (2d) 518 at 524-6.

[17] In Coleman v. Miller, 146 Kans. 390 at 392-3, 71 P. (2d) 518 at 520 (1937), the Supreme Court of Kansas said: "It is settled beyond controversy that the function of a state legislature in ratifying a proposed amendment to the constitution of the United States, *like the function of congress in proposing an amendment*, is a federal function derived from the federal constitution; and it transcends any limitation sought to be imposed by the people of a state. The power to legislate in the enactment of the laws of a state is derived from the people of the state, but the power to ratify a proposed amendment to the federal constitution has its source in that instrument. The act of ratification by the state derives its authority from the federal constitution, to which the state and its people alike have assented. . . . If the legislature, in ratifying a proposed amendment, is performing a federal function, it would seem to follow that ratification is not an act of legislation in the proper sense of that term. It has been so held."

Torts Between Husband and Wife

Some thirty years ago, one prominent writer in the field of family law stated: "The changes that have been effected among married people in our day . . . have left no mark on our law. The economic, intellectual and political independence of women, the breakdown of religion . . . have definitely altered the marriage relationship of the parties concerned. But the law has not kept apace. Matrimonial jurisprudence is anachronistic."[1] About the same time, another writer, when discussing the subject of tort liability between persons in the domestic relation, pointed out, as if in contrast, that the "great battleground [in law] has been the matter of torts affecting primarily the person" of those related by marriage.[2] From the standpoint of either of these views, it is proper to note that little has occurred in Illinois during the period since these men wrote to indicate the presence of any local battleground on the point. A fairly rapid succession of events within the last year, however, has disclosed that the stage of warfare has been reached here, although the eventual outcome of the struggle is yet uncertain.

What to others may have been a perplexing problem of tort liability as between the spouses[3] seems to have been resolved in this state, for many years, as being no problem at all.[4] The decision of the Illinois Supreme Court in *Welch* v. *Davis*,[5] one permitting an administrator, on behalf of a step-daughter, to sue a deceased husband's estate to recover for the wrongful death of his wife, the child's mother, surprised many lawyers and may have served to reopen a door hitherto deemed closed. When that decision led to the result attained in *Tallios* v. *Tallios*,[6] to the effect that a wife might be permitted to recover from her husband's employer for a tort committed by the husband in the course of his employment, the door seemed to have swung wide.

It was probably on the basis of the liberal trend disclosed by these

1 See Lippman, "The Breakdown of Consortium," 30 Col. L. Rev. 651-73 (1930), at p. 651.

2 McCurdy, "Torts Between Persons in Domestic Relation," 43 Harv. L. Rev. 1030-82 (1930), at p. 1041.

3 Prosser, Handbook of the Law of Torts (West Pub. Co., St. Paul, 1941), p. 897, states: "Few topics in the law of torts, in view of modern economic, social and legislative changes, display in their treatment greater inconsistency and more unsatisfactory reasoning."

4 See Main v. Main, 46 Ill. App. 106 (1891), and Garlin v. Garlin, 260 Wis. 187, 50 N. W. (2d) 373 (1951), construing the Illinois statute.

5 410 Ill. 130, 101 N. E. (2d) 547 (1951), reversing 342 Ill. App. 69, 95 N. E. (2d) 108 (1950), noted in 40 Ill. B. J. 242.

6 345 Ill. App. 342, 103 N. E. (2d) 507 (1952), noted in 40 Ill. B. J. 583. See also the later case of Kitch v. Adkins, 346 Ill. App. 342, 105 N. E. (2d) 527 (1952), where the court decided a similar fact situation without discussion of the marital immunity. Leave to appeal therein has been denied.

decisions that the plaintiff, in the most recent case of all, that of *Brandt* v. *Keller*,[7] sought to revive interest in the question of whether or not a wife might sue her husband directly to recover damages for a tort inflicted by him on her. The case was one in which the plaintiff sustained personal injuries while a passenger in the automobile being driven by the defendant, husband of the plaintiff, allegedly because of the defendant's negligence. The trial court decided against the plaintiff and dismissed her suit. The Appellate Court for the First District, on appeal from such judgment, deeming it significant that no previous case had arisen in the seventy-odd years since the adoption of a Married Women's Act,[8] affirmed the holding, saying that the Illinois statute did not grant to a married woman a cause of action against her husband for a tort committed by him against her person.

The precise question of inter-marital personal tort liability has long been before the courts of this country and has been a source of conflict and confusion. Prior to the advent of legislation on the subject, the common-law rule appears to have been uniformly accepted that neither spouse could sue the other in tort,[9] principally because of procedural difficulties inherent in the conduct of such a case. Laudable attempts by state legislatures to free married women from the yoke of their common law insignificance, generally described as Married Women's Acts, which in any way deal with this point can be divided into several distinct categories, to-wit: (1) those which expressly exclude or refuse to authorize suits between husband and wife; (2) those which permit suits by and against married women as if they were sole; and (3) those which expressly allow suits in tort between husband and wife.[10] It can readily be ascertained, therefore, that only those statutes which fall into the second group are likely to cause trouble. As these statutes do not demand either of the results attained elsewhere, the end determined turns mainly on the degree to which courts may feel the legislature intended to abrogate the common law.

One of the landmark cases in this field, that of *Thompson* v. *Thompson*,[11] a case involving a wife's suit against her husband for an assault and battery, required the Supreme Court of the United States to

[7] 347 Ill. App. 18, 105 N. E. (2d) 796 (1952).

[8] R. S. 1874, p. 576; Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, § 1 et seq.

[9] 27 Am. Jur., Husband and Wife, § 589; 30 C. J., Husband and Wife, § 317, p. 714; McCurdy, "Torts Between Persons in Domestic Relation," 43 Harv. L. Rev. 1030-82 (1930), at p. 1031.

[10] The several statutes are classified in Vernier, American Family Laws (Stanford Univ. Press, Stanford University, California, 1935), Vol. 3, § 180, and 1938 Supp., p. 180.

[11] 218 U. S. 611, 31 S. Ct. 111, 54 L. Ed. 1180 (1910), aff. 31 App. D. C. 557, 14 Ann. Cas. 879 (1908). Harlan, J., wrote a dissenting opinion concurred in by Justices Holmes and Hughes.

interpret a statute of the District of Columbia which gave married women the right to "sue separately for the recovery, security, or protection of their property; and for torts committed against them, as fully and freely as if they were unmarried."[12] The majority of that court, setting a pattern for what was to become the majority view, denied recovery on the basis that the statute, being in derogation of the common law, had to be strictly construed. The majority also set out what were to become the stock arguments used by later courts of similar mind on such matters as public policy and the sufficiency of remedies provided for married women by criminal proceedings and via the divorce court. In case their interpretation was wrong, the majority pointed out that "if the legislature wishes to abrogate [the common law view] it should do so by language so clear and plain as to be unmistakable evidence of the legislative intent."[13] The tenor of the minority view, voiced in a dissenting opinion by Justice Harlan which was concurred in by Justices Holmes and Hughes, noted that the majority were creating an exception not called for by the words of the statute but one based upon their own opinion of what public policy and the law should be rather than what the legislature had declared the law to be.

Following the Thompson case, which had spoken only on the point as it related to the domestic law of the District of Columbia, courts which were presented with the problem invariably followed the reasoning of one or the other of these opinions. The results attained, and the logic behind such results, have been viewed with disfavor by most of the eminent authors who have written on the subject as well as by some of the judges who, impelled by *stare decisis,* have reached the same result as the one they were criticizing.[14] But this criticism has not swayed the courts and recovery has been denied in cases of assault and battery,[15] malicious prosecution,[16] false imprisonment,[17] fraud,[18] slander,[19] libel,[20] and negligence.[21]

12 D. C. Code, § 1155.

13 218 U. S. 611 at 618, 31 S. Ct. 311, 54 L. Ed. 1180 at 1183.

14 The case of Gregg v. Gregg, — Md. —, 87 A. (2d) 581 (1952), provides an example of a court following tradition while at the same time criticizing its own decision. The opinion in Courtney v. Courtney, 184 Okla. 395, 87 P. (2d) 660 (1939), furnishes a comprehensive report on the division of authority.

15 Peters v. Peters, 156 Cal. 32, 103 P. 219, 23 L. R. A. (N. S.) 699 (1909); Butterfield v. Butterfield, 195 Mo. App. 37, 187 S. W. 295 (1916); Strom v. Strom, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191 (1906).

16 Allen v. Allen, 246 N. Y. 571, 159 N. E. 656 (1927).

17 Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382 (1915).

18 Seelau v. Seelau, 198 N. Y. S. 41 (1923).

19 Clark v. Clark, 11 F. (2d) 871 (1925).

20 Faris v. Hope, 298 F. 727 (1924).

21 Spector v. Weisman, 40 F. (2d) 792, 59 App. D. C. 280 (1930); Blickenstaff v. Blickenstaff, 89 Ind. App. 529, 167 N. E. 146 (1929); Willott v. Willott, 333 Mo. 896, 62 S. W. (2d) 1084, 89 A. L. R. 1114 (1933).

Since the fault is usually said to be the lack of a cause of action, it has been considered immaterial that the spouses were separated,[22] have since been divorced,[23] that the marriage was voidable and has been annulled,[24] or that one of the spouses has died and a personal representative is suing or defending.[25]

Undoubtedly the common law forbade a cause of action for a personal tort between husband and wife, basically upon the feudalistic concept of the unity between the spouses.[26] All courts agree that whatever rights a wife have must, therefore, have been given her by statute so, to the extent the Married Women's Act in the particular jurisdiction has operated to destroy this unity, there would or would not seem to be valid legal reason for denying a cause of action. Deny it, however, most courts have done,[27] some justifiably under the wording of the particular statute, others under an interpretation of wording which would seem to call for a complete emancipation of married women from the bonds of the strict and unjust common-law rule.[28]

The doctrine most often invoked to aid those courts which deny recovery is the one which provides that, in the construction of a statute, all statutes in derogation of the common law are to be strictly construed.[29] While this constructional rule is appropriate to the interpretation of statutes like the Married Women's Acts, for such statutes are certainly in derogation of the common law, it must not be forgotten that the cardinal rule in any constructional problem is one calling for a determination of the intent of the legislature,[30] no matter what type of statute may be involved. There is, however, another rule of construction which would tend to balance the one first mentioned and it requires that statutes which are remedial in character are to be liberally construed.[31] While all of the

22 Clark v. Clark, 11 F. (2d) 871 (1925).

23 Main v. Main, 46 Ill. App. 106 (1891); Abbott v. Abbott, 67 Me. 304 (1877); Speer v. Sykes, 102 Tex. 451, 119 S. W. 86 (1909).

24 Callow v. Thomas, 322 Mass. 550, 78 N. E. (2d) 637, 2 A. L. R. (2d) 632 (1948).

25 In re Dolmage's Estate, 204 Iowa 231, 213 N. W. 380 (1927). But see Welch v. Davis, 410 Ill. 130, 101 N. E. (2d) 547 (1951).

26 See authorities cited in note 9, ante.

27 Most of the cases are listed in the opinion in Courtney v. Courtney, 184 Okla. 395, 87 P. (2d) 660 (1939).

28 Austin v. Austin, 136 Miss. 61, 100 So. 591, 33 A. L. R. 1388 (1924), represents such an example.

29 Thompson v. Thompson, 218 U. S. 611, 31 S. Ct. 111, 54 L. Ed. 1180 (1910); Anderson v. Board of Education, 390 Ill. 412, 61 N. E. (2d) 562 (1945); Leonardi v. Leonardi, 21 Ohio App. 110, 153 N. E. 93 (1926).

30 Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082 (1930). See also Radin, "Statutory Interpretation," 43 Harv. L. Rev. 863-85 (1930), particularly p. 869.

31 Gray v. Bennett, 44 Mass. 522 (1842); Hasson v. City of Chester, 67 W. Va. 278, 67 S. E. 731 (1910).

Married Women's Acts are remedial in scope, some courts have disallowed tort recovery between the spouses by merely looking for the presumed intent of the legislature to the disregard of the other constructional rules. It must be said, in their favor, that in very few instances, following such a construction of a particular statute, has there been any amendment of the statute to authorize the maintenance of an action,[32] so it may be argued that these majority-view decisions represent an accurate interpretation of the intent of the legislature.

Most courts invoking the majority view, however, seem to feel a need to reinforce the construction adopted with other reasons. One purported reason is a stated belief that the allowance of such an action between the spouses would be contrary to public policy as it would, supposedly, tend to disrupt the harmony and peace of the marital relation. Although this concept was invoked quite early in the history of this struggle, as is indicated by the Michigan case of *Bandfield* v. *Bandfield*[33] where the court said "the result of plaintiff's contention would be another step to destroy the sacred relationship of man and wife, and, to open the door to lawsuits between them for every real and fancied wrong,"[34] the concept has been severely criticized. The answer of the minority is best expressed in the Oklahoma case of *Fiedler* v. *Fiedler*.[35] The court there said: "We fail to comprehend wherein public policy sustains a greater injury by allowing a wife compensation for being disabled . . . than it would by allowing her to go into a criminal court and prosecute him. . . . Nor are we able to perceive wherein the sensitive nerves of society are worse jarred by such a proceeding than they would be by allowing the parties to go into a divorce court and lay bare every act of their marriage relations in order to get alimony."[36] It might be added that there would seem to be no more of a menace to public policy in a personal tort action between the spouses than there is in a tort suit between them concerning their separate property.[37] If newspaper reports from the divorce courts are to be believed, the minority view concerning the effect on public policy would certainly seem to be the more realistic one.

The fear of a flood of litigation "for every real and fancied wrong" may also have been a restraining factor, especially with courts already

32 The change in the law of New York, for example, appears to have been generated more by the holding in Schubert v. August Schubert Wagon Co., 249 N. Y. 253, 164 N. E. 42, 64 A. L. R. 293 (1928), than by the decision in Schultz v. Schultz, 89 N. Y. 644 (1882), and the cases like it. See N. Y. Laws 1937, Ch. 669; Cahill's Cons. Laws N. Y., 1937 Supp., Ch. 14, § 57.

33 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757 (1898).

34 117 Mich. 80 at 82, 75 N. W. 287 at 288.

35 42 Okla. 124, 140 P. 1022, 52 L. R. A. (N. S.) 189 (1914).

36 42 Okla. 124 at 126, 140 P. 1022 at 1023-4.

37 Larison v. Larison, 9 Ill. App. 27 (1881).

overburdened with work. Supposing the fear to be one founded in fact, would it afford a valid reason for refusing the remedy? The mere propounding of the question operates to provide the answer, but in actual practice, in those states which have allowed one spouse to sue the other on a personal tort, there has been no report of a deluge of such actions, either real or fancied. Certainly, then, any belief that the permitting of such suits would operate to create an inherent liability for every unwarranted or undesirable touching in the course of normal family life is equally without foundation.

As most suits of this character would be likely to develop from the negligence of one spouse while operating an automobile, some of the majority opinions have also expressed a fear that the treasuries of insurance companies would become subject to constant raiding, particularly from collusive suits. The answer thereto, if not already provided by so-called "guest" statutes, lies in the fact that the law does not presume fraud but it does furnish protection against it. In any event, as the Illinois court in the Brandt case indicated, such an argument "is not relevant."[38] To say that other remedies are available also begs the question. They either fail to provide appropriate compensation or give none at all. Instead of being adequate, as was noted in the Alabama case of *Johnson* v. *Johnson*,[39] these remedies appear to be illusory at best.

It has also been urged, as the basis for a denial of recovery, that to construe a married woman's statute so as to permit suit would give rise to the inconsistency that, while a married woman would be able to sue her husband for his torts, he would be denied a reciprocal right. That situation did exist for a while in Wisconsin. The Married Women's Act of that state[40] had been construed to give a wife a cause of action against her husband in the case of *Wait* v. *Pierce*,[41] but in *Fehr* v. *General Accident Fire & Life Assurance Corporation*,[42] where the plaintiff husband had been injured by reason of the wife's negligence in driving her automobile, the court held that the statute was not designed to give the husband a cause of action, and, as he did not have one at common law, he was without a remedy. The Wisconsin legislature remedied the situation soon afterward by passing a statute giving husbands the same rights as are enjoyed by their wives.[43]

The fear of such a situation has undoubtedly led courts to reach a decision denying the wife a cause of action and at least one Minnesota

38 347 Ill. App. 18 at 30, 105 N. E. (2d) 796 at 802.
39 201 Ala. 41, 77 So. 335, 6 A. L. R. 1031 (1917).
40 Wis. Stats. 1951, § 246.07.
41 191 Wis. 202, 209 N. W. 475, 48 A. L. R. 276 (1926).
42 246 Wis. 228, 16 N. W. (2d) 987, 160 A. L. R. 1402 (1945).
43 Wis. Stats. 1951, § 246.075.

case declares that the statute of that state was intended to do no more than put married women on equal footing with men.[44] It would seem, however, that if the disability against suit lay in the unity of the spouses, and if that unity has been removed, certain legal consequences should follow, among them a cause of action for any invasion of those personal rights which are accorded to every legal being. While this line of thought has been advanced in favor of giving a married woman a cause of action in tort against her husband,[45] it has usually been overlooked in connection with the problem of the husband's equal right to sue his wife.

Although fault has been found with the conclusion and reasoning of the majority of the courts on this point, the principal fault would seem to lie at the doorstep of the legislature. The statutes presented to the judiciary for construction are, in the main, ambiguous in their handling of the particular issue, but there is nothing therein that a few well-chosen words would not correct. By the adoption thereof, the legislature could readily perform its function of declaring the pertinent public policy and could thereby remove a problem from the already overburdened shoulders of the courts.

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[44] Woltman v. Woltman, 153 Minn. 217, 189 N. W. 1022 (1922). The statute concerned stated: "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."

[45] See dissenting opinion of Ethridge, J., in Austin v. Austin, 136 Miss. 61 at 73, 100 So. 591 at 593, 33 A. L. R. 1388 (1924).