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Negligence—Conflict of Laws—Action Against Spouse for Torts in Another State

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only question involved in the *Ravenswood* case was whether the statute denying the riparian owner of the lot in an incorporated town the right to build a wharf without consent of the town council, was unconstitutional. In a later case which did not involve the public interest, the court re-affirmed the proposition that a riparian owner has the "right of access to water including a right of way to and from the navigable part."23

—Robert Merricks.

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**NEGLIGENCE — CONFLICT OF LAWS — ACTION AGAINST SPOUSE FOR TORT IN ANOTHER STATE.** — Husband sued wife in tort for personal injuries received while a passenger in an automobile owned and operated by the latter. The accident occurred in Alabama, and suit was instituted in West Virginia. Held, such actions are against the public policy of this state and cannot be maintained, although permissible in the state where the injuries were received. *Poling v. Poling.*

The early common law concept of the legal unity of husband and wife precluded tort actions between the spouses. Therefore, it was not until the general adoption of the Married Women's Property Acts3 that the problem became of real significance. Although the principal case represents the decided weight of authority, the courts are by no means in accord as to the effect of these statutes upon the common law disability.4 The divergence may be partly but certainly not entirely explainable by language variations in the respective statutes.

The tendency has been to treat the problem as primarily one of statutory construction.5 Invoking the maxim that statutes in derogation of the common law must be strictly construed, it is

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22 1 Farnham, op. cit. supra n. 5, § 67d.
23 Union Sand & Gravel Co. v. Northcott, supra n. 16, at 527.
2 McCurdy, *Torts Between Persons In Domestic Relations* (1930) 43 Harv. L. Rev. 1030, 1033.
3 For the West Virginia Statutes, see W. Va. Rev. Code (1931) c. 48, art. 3, particularly § 19, providing that "A married woman may sue and be sued,... the same in all cases as if she were a single woman . . . ."
4 The cases on this point are collected in Notes in (1924) 29 A. L. R. 1482; (1924) A. L. R. 1406; (1926) 44 A. L. R. 794; (1927) 48 A. L. R. 293; (1934) 89 A. L. R. 293.
5 See, for example, Keister v. Keister, 123 Va. 157, 96 S. E. 315 (1918), in addition to the principal case.
argued that since suits of this nature are not expressly authorized, they will not be permitted by implication. This view of the problem is unduly narrow. Undoubtedly, these “Emancipation” statutes dissolve the procedural and substantive incongruities which, at the common law, adhered to suits between husband and wife. Presently, therefore, the true inquiry is whether there is anything inherent in the marital relationship which prevents these suits.

The answer generally encountered to this inquiry is the policy of the law to preserve the domestic tranquility from disruption. The rule grounded on that policy involves certain inconsistencies and is of questionable soundness. It is highly arguable that marital discord results less from the litigation than from the wrong that occasions it, and that to deny suit is as fruitless as locking the stable after the horse has escaped. Likewise, upon this policy, no sound distinction is discoverable for distinguishing personal from property torts, yet the latter class of actions is almost universally permitted. Under the maxim, *cessante ratione legis, cessat et ipsa lex*, the disability should not continue after the marital peace has been disturbed and the parties are divorced or separated in contemplation thereof, or where the action is brought against a third person upon the theory of *respondeat superior*. Nevertheless, the majority rule is applied indiscriminately in these cases.

Upon the theory that the suit was rendered friendly by the existence of indemnity insurance, the West Virginia court has permitted an action in the analogous relationship of parent and child. In the principal case, the court escapes the difficulty of distinguishing the *Lusk* case by ignoring it, and relying on the

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8 At common law, the wife could not sue or be sued without joining her husband, who was at once liable for her torts and owner of her choses in action. Clearly, these disabilities have been removed. See *Harper, Law of Torts* (1933) § 287; *McCurdy, op. cit. supra* n. 2, at 1050.

9 For a characteristic statement of that policy, see *Thompson v. Thompson, 218 U. S. 611, 31 S. Ct. 111 (1916).*

There is also a feeling that as a practical matter the spouse has an adequate remedy in the criminal or divorce courts. *Abbott v. Abbott, 67 Me. 304 (1877).* It is difficult to see how a divorce would compensate for a negligent injury.

10 *Clark v. Clark, 11 F. (2d) 871 (S. D. N. Y. 1925).*

11 *Banfield v. Banfield, 117 Mich. 80, 75 N. W. 287 (1906); Lillian-Kamp v. Bippeto, 133 Tenn. 57, 179 S. W. 628 (1915).*

12 *Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932); commented on in (1932) 38 W. Va. L. Q. 266.*
earlier Securo case. It is doubtful whether the insurance factor should be controlling. Complete fairness to the insurer would require that liability be determined independently of the existence of the insurance contract. If suit is maintainable only where insurance actually exists, moreover, the jury will necessarily be informed that the defendant is protected. At present, the fact of insurance is inadmissible in negligence cases, being both irrelevant and prejudicial. To allow the right to sue to turn on this question, would cure the irrelevancy, without diminishing the prejudicial effect of the evidence. Here again the indemnity corporation would suffer. Similarly, the presence of insurance, regardless of the ground for permitting the action, creates a real danger of collusion between husband and wife with the insurance company as victim.

If our court has correctly determined the policy of the state, its stand on the conflicts problem finds ample authority in the Restatement of the Conflict of Laws. Briefly stated, the rule is that the law of the locus delicti will control unless contrary to the strong public policy of the forum. Certain considerations, already suggested, cast doubt upon the wisdom of enforcing such policy.

—Guy Otto Farmer.

Oil and Gas — Quasi Contractual Liability for Storage of Gas under Plaintiff’s Land. — Defendant gas company pumped a surplus supply of gas into a natural underground reservoir known to extend under plaintiff’s land. Plaintiff sued for use and occupation of her premises. Held, restoration of the gas to its natural habitat returns it to its former status analogous to that of an animal ferae naturae and terminates defendant’s ownership, wherefore he has made no use of the plaintiff’s land. Hammond v. Central Kentucky Natural Gas Co.

13 110 W. Va. 1, 156 S. E. 750 (1931); (1931) 37 W. Va. L. Q. 315.
14 This idea is developed in the comment to the Lusk case, cited supra n. 12.
16 McCurdy, op. cit. supra n. 2, at 1053.
17 A more difficult problem exists where a suit has been pursued to judgment in State A and is now sought to be enforced in State B. In Metzler v. Metzler, 8 N. J. Misc. R. 821, 151 Atl. 847 (1930), a suit to enforce a judgment of this nature was denied. "Full faith and credit" would seem to dictate the opposite result.
18 Conflict of Laws Restatement (Am. L. Inst. 1934) §§ 384, 615; for case law see Note (1935) 84 A. L. R. 1410.

1 235 Ky. 635, 75 S. W. (2d) 204 (1934); (1935) 48 Harv. L. R. 855.