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Conflict of Laws - Husband and Wife - Interspousal Immunity Determined According to Law of Domicile

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redemption;[15] (2) foreclosure by action;[16] or (3) foreclosure by advertisement.[17] Since the conditional sales contract has the "elements of a lien", the procedure in foreclosure is governed by Chapter 32-20 of the North Dakota Century Code.[18]

The writer is of the opinion that the result in the principal case is sound. However, the decision is somewhat limited in that, in order to recover a deficiency, the contract must expressly provide for it. Under certain circumstances, denying the conditional vendor the deficiency because it was not expressly provided for in the contract would lead to inequitable results. It is difficult to see why an express promise to pay the deficiency should have any more effect than an express promise to pay the purchase price.

LYNN HOGHAUG

CONFLICT OF LAWS—HUSBAND AND WIFE—INTERSPOUSAL IMMUNITY DETERMINED ACCORDING TO LAW OF DOMICILE—The plaintiff brought an action against her husband alleging his negligence caused a motor vehicle accident in Massachusetts. Both parties were domiciled in New Hampshire where a wife could maintain such an action against her husband. Under Massachusetts law she could not. The Supreme Court of New Hampshire *held* that the law of the domicile of the parties determined whether the husband was immune from liability to his wife. *Thompson v Thompson*, 193 A.2d 439 (N.H. 1963)

Interspousal immunity from suit is a common law doctrine which developed because of the unity concept of husband and wife.[1] Although Married Women's Acts have virtually abrogated that concept,[2] many states still prohibit

16. N.D. CENT. CODE § 28-29-07 (1961).
17. N.D. CENT. CODE § 28-29-08 (1961).
18. Massey-Ferguson, Inc. v. Pfeiffle, *supra* note 9, at 375.

1. Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 66 (1962) Rains v. Rains, 46 P.2d 740, 741 (Colo. 1935) Meisel v. Little, 407 Pa. 546, 180 A.2d 772, 773 (1962). See generally PROSSER, TORTS 671 (2d ed. 1955).

2. See Cramer v. Cramer, 379 P.2d 95, 96 (Alaska 1963), Brown v. Gosser, 262 S.W.2d 480, 482 (Ky. 1953) Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W 526, 529 (1932). See generally PROSSER, TORTS 672 (2d ed. 1955).

interspousal suits, contending they disrupt domestic harmony and encourage collusive suits.[3] Other states disagree with these policy arguments and allow interspousal litigation.[4] A perplexing choice of laws problem is presented when, as in the instant case, a husband and wife, domiciled in a state with one view toward interspousal immunity, have an accident in a state with the opposite view, and one of the spouses sues the other

A court confronted with the question of intra-family immunity from suit is given three choices of law:[5] (1) the law of the forum (*lex fori*), (2) the law of the place of injury (*lex loci delicti*), and (3) the law of the domicile of the parties (*lex domicili*) The courts have been almost universal in their application of the *lex loci delicti*.[6] They say[7] that capacity to sue is "substantive" and that, because a tort is involved, the prevailing torts choice of laws rule[8] applies. This view, applied to interspousal litigation, had its beginning in the 1931 case of *Buckeye v Buckeye*.[9] Writings condemning that case and the rule evolving therefrom are voluminous.[10]

A few cases have held that where the *lexi loci delicti* is repugnant to the policy of the forum, the forum will decide the question of capacity to sue according to its own law [11]

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3. *E.g.*, Bedell v. Reagan, 192 A.2d 24, 26 (Me. 1963) Pelowski v. Frederickson, 263 Minn. 371, 116 N.W.2d 701, 703 (1962) Fowler v. Fowler, 130 S.E.2d 252, 253 (Tex. 1962).

4. *E.g.*, Klien v. Klien, 58 Cal. 2d 683, 376 P.2d 70, 72 (1962), Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W 526, 529 (1932) Courtney v. Courtney, 87 P.2d 660, 668 (Okl. 1939), Borst v. Borst, 41 Wash. 2d 642, 653, 251 P.2d 149, 155 (1952).

5. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).

6. *E.g.*, LaChance v. Service Trucking Co., 215 F Supp. 159 (D.D.Md. 1963) Wolozin v. Wolozin, 149 Conn. 507, 182 A.2d 8, 9 (1962), Robinson v. Gaines, 331 S.W.2d 653 (Mo. 1960) Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943) Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288, 291 (1963).

7. *Ibid.*

8. The prevailing torts choice of laws rule is that creation of tort liability is governed by the law of the state where the injury occurred. RESTATEMENT, CONFLICT OF LAWS § 378 (1934). And that state is the state where the last event necessary to make an actor liable for the alleged tort takes place. Sestito v. Knop, 297 F.2d 33 (7th Cir. 1961). The American Law Institute has under consideration a proposal to modify the rigid rule set out in the 1934 Restatement. See RESTATEMENT (SECOND), CONFLICT OF LAWS § 370 (Tent. Draft No. 8, 1963) "(1) The local law of the state which has the most significant relationship with the occurance and with the parties determines their rights and liabilities in tort."

9. 203 Wis. 248, 234 N.W 342 (1931).

10. Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws Law and Reason Versus the Restatement*, 15 U. PITT. L.REV. 397 (1954) Hancock, *The Rise and Fall of Buckeye v. Buckeye*, 1931-1959, *Marital Immunity for Torts in Conflicts of Laws*, 29 U. CHI. L.REV. 237 (1962) Rheinstein, *Michigan Legal Studies A Review*, 41 MICH. L.REV. 83, 97 (1942) Traynor, *Is This Conflict Really Necessary?* 37 TEXAS L.REV. 657, 669 (1959).

11. Kircher v. Kircher, 288 Mich. 669, 286 N.W 120 (1939) Kyle v. Kyle,

It was not until 1955, however, that a court held that intra-family immunities should be governed by the *lex domicili.*[12] In 1959 Wisconsin[13] expressly overruled *Buckeye v Buckeye,*[14] and the instant case is an indication that other states will discard the *Buckeye* rule. The rationale of this new line of cases is that incapacity to sue because of family status presents a question of family law rather than tort law, and since questions of family law are determined according to the law of the domicile of the parties, that law applies.[15] The courts have been careful to point out that this new rule is not a rejection of the general torts choice of laws rule.[16]

While most writers would agree with the result reached in this new trend, many would use a different approach. Rather than applying artificial choice of laws rules, they advocate a forthright analysis of the underlying policies with a view toward determining which jurisdiction has the greater interest in having its policy advanced.[17]

This writer agrees with the proponents of the policy centered approach.[18]

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210 Minn. 204, 297 N.W 744 (1941) Koplik v. C.P Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958) Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936) Poling v. Poling, 116 W Va. 187, 179 S.E. 604 (1935).

12. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) "We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home." *Id.* at 426, 289 P.2d at 223.

13. Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

14. *Supra* note 9.

15. Emery v. Emery, *supra* note 5 Thompson v. Thompson, 193 A.2d 430 (N.H. 1963) Haumschild v. Continental Cas. Co., *supra* note 13. This rule has been construed to mean that when the forum state and the state of the accident are the same the law of the domicile will still be applied. Haynie v. Hanson, 16 Wis. 2d 299, 114 N.W.2d 443 (1962).

16. Thompson v. Thompson, *supra* note 15, at 441 Haumschild v. Continental Cas. Co., *supra* note 13, at 819 " the instant decision should not be interpreted as a rejection of the general rule that ordinarily the substantive rights of parties to an action in tort are to be determined in light of the law of the place of wrong."

17. *E.g.,* Hancock, *The Rise and Fall of Buckeye v. Buckeye,* 1931-1959 *Marital Immunity for Torts in Conflicts of Laws,* 29 U. CHI. L. REV. 237 (1962) Harper, *Policy Bases of the Conflicts of Laws Reflections on Rereading Professor Lorenzen's Essays,* 56 YALE L.J. 1155 (1947) Weintraub, *A Method for Solving Conflicts Problems—Torts,* 48 CORNELL L.Q. 215 (1963).

18. There is a definite trend in this country toward the policy centered approach. Some courts have already adopted a freer approach than that of the original Restatement. See *e.g.,* Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957) *cf.* Richards v. United States, 369 U.S. 1 (1961). Recently the New York Court of Appeals in Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963) explicitly adopted the proposed revision of the Restatement. See note 8 *supra.*

Although courts following the rule herein discussed will alleviate some inequities in cases falling within its narrow scope, its effect on the unjust results produced by the current rigid application of the prevailing torts choice of laws rule will be minimal.

LARRY KRAFT