RECOVERY BY A WIFE FOR INJURIES DUE TO HER HUSBAND'S TORTIOUS ACTS

At common law a wife had no right of action against her husband for torts committed upon her during coverture, and "by the earliest edicts of the courts, he had the right to strike her as a punishment for her misconduct, and her only remedy was, that 'she hath retaliation to beat him again if she dare.' "[1]

Toward the middle of the 19th century the legislatures of the various states passed statutes which were designed to emancipate married women from their common law disabilities in the courts, and to enlarge their rights with respect to property. It is the purpose of this article to examine the common law approach to the wife's right of recovery for wrongs inflicted upon her by her husband, and to discuss the effect of these statutes upon her tort actions where the common law defense of coverture is raised either by the husband or by someone claiming the defense through him.

Some Aspects of the Common Law

Various reasons have been given for the common law's position disallowing the wife's claim against her husband in tort.[2] Probably the most prevelant have been the "oneness of parties" theory and the theory of pleading that a wife could sue no one without joining her husband as plaintiff. Under common law procedure a wife was required to join her husband in any action she may have had (although it appears that in the ecclesiastical courts the wife could sue and be sued without her husband as a party).[3] Blackstone emphasized that the husband and wife were legally one,[4] but he also intimated that the disability as to civil actions between spouses rested upon a theory of procedural disability. However, in *Phillips v. Barnet*,[5] the English court discounted the procedural aspect and took the position that the reason a wife could not sue her husband for torts committed upon her

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[1] Abbott v. Abbott, 67 Me. 304, 306, 24 Am.Rep. 27, 28 (1877).

[2] It is not within the purview of this work to attempt a complete discussion of common law disability as to suits between persons in domestic relations. However, a cursory review is necessary because many of the vestiges of the common law have carried over into judicial interpretation of various legislative enactments which were designed to emancipate married women from their disabilities in the courts. For case discussion of common law disabilities and immunities, see *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266 (1941). See also McCurdy, *Torts between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930). For text discussion see PROSSER, TORTS 898 (1941).

[3] BLACKSTONE, COMMENTARIES 444 (7th ed. 1775) (this departure was apparently derived from the civil law out of which the ecclesiastical courts grew).

[4] *Id.* at 443, 444.

[5] 1 Q.B.D. 436 (1876).

during coverture was because the husband and wife were one person; that person was the husband; and her only remedy lay in an action for divorce with the hope that she might be compensated for her injury in the form of alimony.

One year after *Phillips v. Barnet* was decided, the same question arose in one of the state courts of this country. In *Abbott v. Abbott*,[6] the wife, after divorcing her husband, sued him and his joint tort-feasor for an alleged false imprisonment and battery committed during coverture. The court relied heavily upon the English decision, and, although it discussed the procedural bar to the wife's recovery, grounded its decision against the husband on the "oneness of parties" doctrine. Then, it ruled against her as to the joint tort-feasor on procedural grounds, saying in effect that because she had to join her husband in an action against the joint tort-feasor (despite the divorce), the husband would necessarily be an unwilling participant in the suit.[7]

Other effects of the common law on a wife's disability to maintain an action against her husband were present. If she married him after the tort was committed, her chose in action was reduced to his possession. In such a case, he would be both plaintiff and defendant and any recovery that she might have had, had the rule not existed, would accrue to him in the final outcome. If the wife divorced the husband and the tort was committed during coverture, the old question of oneness arose again and carried over even after the decree of divorce, the wife succeeding to just such rights as she had before the divorce was granted.[8]

Thus far the Iowa court generally has taken the common law position noted above in cases where the defense of coverture has been pleaded.[9] To what extent is this stand affected by statutes such as the Married Women's Property Act and the Iowa Wrongful Death Acts?

Effect of Statutes Designed to Emancipate Married Women

(a) The Married Women's Property Act.

One of the statutes most often asserted to remove the common law disability against tort recoveries from the husband is what is commonly referred to as the Married Women's Property Act, some

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[6] 67 Me. 304, 24 Am.Rep. 27 (1877).

[7] The procedural bar is not applicable in Iowa. IOWA CODE R.C.P. 10 (1954) permits a married woman to sue and be sued without joining her husband. See also Ewald v. Lane, 104 F.2d 222 (D. C. Cir. 1939).

[8] Abbott v. Abbott, 67 Me. 304, 24 Am.Rep. 27 (1877); Phillips v. Barnet, 1 Q.B.D. 436 (1876).

[9] Aldrich v. Tracy, 222 Iowa 84, 269 N.W. 30 (1936); *In re* Estate of Adam Dolmage, 203 Iowa 231, 212 N.W. 553 (1927); Maine v. James Maine and Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924); Peters v. Peters, 42 Iowa 182 (1875). *But cf.* Reid v. Reid, 216 Iowa 88, 249 N.W. 20 (1934) (a case arising under the workmen's compensation statute).

form of which is found in the legislation of nearly all states.[10] The Iowa statute is Code Section 597.3, which reads:

> "Should the husband or wife obtain possession or control of property belonging to the other before or after the marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried."

It should first be noted that nowhere in the statute has the legislature expressly granted or denied the right of action to the wife against the husband for tort.[11] The code section quoted clearly contemplates an action by one spouse against the other to maintain a property right "in the same manner and extent as if they were unmarried."[12] What rights qualify as "property rights"? To what extent may they be asserted against the husband?

In the early case of *Musselman v. Gallagher*,[13] an action for malicious prosecution by a married woman against a third party (not her husband), the Iowa court held that a cause of action belonging to a married woman was a property right. As it was such, she could prosecute the suit without joining her husband. Shortly thereafter the case of *Peters v. Peters*[14] arose, in which a wife sued her husband for a battery. Her lawyers argued, on the basis of the *Musselman* case, that the cause of action was a property right which, they said, could be asserted against the husband under what is now section 597.3. In response, the Iowa court agreed in part, saying that a cause of action for tort was a property right, but that mere *syllogistic* logic did not extend the right to allow suits by a married woman against her husband. The *Peters* case is the only Iowa decision which directly involves the question of direct suits between spouses for tort. The present Iowa position may be somewhat uncertain in view of the recent decisions of other courts.

Many early cases in other jurisdictions which involved direct suits between spouses and which were argued under Married Women's Property Acts follow the decision of the United States

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[10] The only state that has a statute expressly granting the wife a right of action against her husband for torts he commits upon her is New York. NEW YORK DOM. REL. LAW § 57.

[11] *Compare* Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926) (holding that a wife could maintain an action in tort against her husband by statute) *with* Fehr v. General Accident Fire and Life Ins. Corp., Ltd., 246 Wis. 228, 16 N.W.2d 787 (1944) (holding that the statute was intended to enlarge the rights of married women, and was not intended to enlarge their liabilities, therefore the husband could not sue his wife's insurer who was claiming the defense of coverture).

[12] Note also Iowa Code § 622.7 (1954), which reads as follows: "Neither the husband nor the wife shall in any case be a witness against the other except: . . . (2) In a civil proceeding one against the other."

[13] 32 Iowa 383 (1871).

[14] 42 Iowa 182 (1875).

Supreme Court in *Thompson v. Thompson*,[15] a case reaching an end result similar to that of the *Peters* case. Mrs. Thompson had sued her husband for divers assaults and batteries upon her person. The act of the District of Columbia, which was under interpretation, read in part:

> "Married women shall have power . . . to sue separately . . . for torts committed upon them as fully and freely as if they were unmarried."

The court held that this section was merely designed to eliminate the procedural bar of the common law and that such a statute in derogation of the common law should be strictly construed; a wife could sue without joining her husband, but the act did not give her a right of action against her husband. There is an indication that the holding of the *Thompson* case does not rest on firm ground, in view of some of the recent decisions which have mentioned it. In *Steele v. Steele*,[16] a case arising in the same jurisdiction, where a wife sued her husband for an assault committed after the decree of divorce but before the decree had become effective, the District Court suggested that the rule of statutory interpretation used in the *Thompson* case was obsolete, and further intimated that if the precise question were presented again to the Supreme Court, a different conclusion might result.

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[15] 218 U.S. 611 (1910). *Accord:* Spector v. Weisman, 40 F.2d 792 (D.C. Cir. 1930) (tort committed and action started but not reduced to judgment before coverture); Carmichael v. Carmichael, 53 Ga.App. 663, 187 S.E. 116 (1936) (tort committed before marriage, suit started after separation); Blickenstaff v. Blickenstaff, 89 Ind.App. 529, 167 N.E. 146 (1929); Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952) (for reasons of public policy); Lubowitz v. Taines, 293 Mass. 39, 198 N.E. 320 (1936); Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927) (statute provided that when a cause of action accrued to a married woman she could sue as though she were sole); Patenaude v. Patenaude, 195 Minn. 522, 263 N.W. 546 (1935) (public policy); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932) (wife sued husband for torts committed by his agent); Furey v. Furey, 193 Va. 727, 71 S.E.2d 191 (1952). *Contra:* Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931), *affirmed* in Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932); Roberson v. Roberson, 193 Ark. 669, 101 S.W.2d 961 (1937) (wife precluded only because she could prove no more than negligence under guest statute); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925) (reversed on other grounds); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Jernigan v. Jernigan, 236 N.C. 430, 72 S.E.2d 912 (1952); Shirley v. Ayers, 201 N.C. 51, 158 S.E. 840 (1931) (husband sued wife for negligence); Fitzmaurice v. Fitmaurice, 62 N.D. 191, 242 N.W. 526 (1932) (statute had a clause "in this state there is no common law in any case where the law is declared by the codes."); Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); Comstock v. Comstock, 106 Vt. 50, 169 Atl. 903 (1934); Fontaine v. Fontaine, 205 Wis. 570, 238 N.W. 410 (1931); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926) (holding that the statute was not the creation of a power, but the restoration of the power that the wife had as a feme sole); *cf.* Steele v. Steele, 65 F.Supp. 329 (D. D.C. 1946).

[16] 65 F.Supp. 329 (D. D.C. 1946).

In some states, where the statute involved is subject to an interpretation that would allow the claim, courts have based their denial of a cause of action on public policy.[17] They feel that the desire to preserve domestic peace and tranquility outweighs whatever may be gained by allowing the action. While the argument is one to which nearly everyone would subscribe, its use is not without opposition. It has been suggested that when a wife has been abused by her husband to the extent that she is inclined to resort to the courts, there is then little left of domestic harmony;[18] and that reasons of public policy should not be resorted to for the purpose of extinguishing a right when the objective of domestic harmony probably is no longer attainable.[19]

The fear of collusion is also expressed in some of the cases, especially where an insurance carrier may be the ultimate payor in the damage suit. Without discussing the probability of collusion, the apparent admissions against interest by the defendant-husband in some of the cases are startling.[20]

While it is not contended that the *Peters* decision and subsequent Iowa cases that have relied upon it [21] are contrary to sound reasoning, some anomalies may be worthy of note. It seems somewhat inconsistent to grant a cause of action to a wife as against her husband in cases arising in contract,[22] or involving property rights,[23] and to deny it in cases involving tort.[24] Is not domestic peace equally in jeopardy, regardless of the facts which give rise to the cause of action? However, it should be noted that the Iowa court has not found it necessary to deny the action to the wife for reasons of public policy. The denial thus far has been derived directly from an interpretation of the statutes involved. The inconsistencies are not diminished by the decision of the *Musselman* case, which clearly indicates that an action arising in tort is a property right.

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17 Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952); Drake v. Drake, 145 Minn. 388, 177 N.W. 624, 9 A.L.R. 1064 (1920) (suit to enjoin the commission of tort); Poling v. Poling, 116 W.Va. 187, 179 S.E. 604 (1935). *But cf.* Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547, 28 A.L.R.2d 656 (1951).

18 *See* Wait v. Pierce, 191 Wis. 202, 216, 209 N.W. 475, 480 (1926).

19 *See* Brown v. Gosser, 262 S.W.2d 483, 484 (Ky. 1953).

20 Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932) (a parked car rolled down a hill injuring defendant-driver's wife, and defendant testified, "I did not just forget to put the brake on, I suppose I was just taking a chance."); Fontaine v. Fontaine, 205 Wis. 570, 238 N.W. 410 (1931) (testimony given was inconsistent with defendant's statements to the insurance adjuster after the accident, and both plaintiff and defendant testified to the effect that the gravel was the deepest they had ever seen and that the defendant was driving the fastest that he had ever driven while they were riding together).

21 Aldrich v. Tracy, 222 Iowa 84, 269 N.W. 30 (1936); *In re* Estate of Adam Dolmage, 203 Iowa 231, 212 N.W. 553 (1927); Maine v. James Maine and Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924).

22 *In re* Estate of Samuel Deaner, 126 Iowa 701, 102 N.W. 825 (1905).

23 Jones v. Jones, 19 Iowa 236 (1865).

24 See, *e.g.*, Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953).

(b) The Wrongful Death Statutes.

Another statute may be asserted to remove the common law disability where death has occurred because of a tort committed by the husband. Iowa has a statute, exclusively applicable to wrongful death or injury of a woman, which reads:

> "In any action for damages because of the wrongful or negligent injury or death of a woman, there shall be no disabilities or restrictions, and recovery may be had on account thereof in the same manner as in cases of damage because of the wrongful or negligent injury or death of a man. In addition, she or her administrator for her estate, may recover for physician's services, nursing and hospital expense, and the value of her services as a wife, or mother, or both as the case may be, in such sum as the jury deems proper: provided, however, recovery for these elements of damage may not be had by the husband as such of any woman, who, or whose administrator is entitled to recover same."[25]

This section was enacted originally in 1911 and has been changed at various times throughout its history.[26] It appears today for the most part as it was enacted in 1931 by the 44th General Assembly, when it was substituted for sections 10462 and 10463 of the Code of 1927,[27] although a minor change was made in 1941.[28]

Cases arising under the Iowa statute that are pertinent to this discussion have involved plaintiffs who are not parties to the tort but who are acting as administrators or the like, and the extent to which the defense of coverture can be asserted against them. The interpretation given to the section is similar to the interpretation of the Married Women's Property Acts given in the *Thompson* case by the United States Supreme Court. As an example, consider In re *Estate of Adam Dolmage,*[29] where the husband shot his wife, then shot himself, and the action was brought by the de-

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[25] IOWA CODE § 613.11 (1954).

[26] IOWA LAWS (1911) ch. 163 § 1; IOWA LAWS (1915) ch. 294 § 1; IOWA LAWS (1931) ch. 214 § 1; IOWA LAWS (1941) ch. 297 § 1.

[27] These sections of IOWA CODE (1927) were as follows:

10462. When a woman receives an injury caused by the negligent or wrongful act of any person, firm or corporation, she may recover for loss of time, medical attendance, and other expenses incurred as a result thereof in addition to any elements of damages recoverable by common law.

10463. If such injury result in causing death, her administrator may sue and recover for her estate the value of her services as a wife or mother, or both, in such sum as the jury may deem proportionate to the injury resulting from her death, in addition to such damages as are recoverable by common law; also loss of services and expenses incurred before death, if not previously recovered.

[28] The codes from 1931 to 1941 stated the law in the form now found in the first sentence of Iowa Code § 613.11, and added: "It is the purpose of this section *to remove any common law disabilities or restrictions on women, or the rights of women,* [italics added] whether single or married, and to give them the same rights and status as are possessed by men." This second sentence, however, was superseded in 1941 by the present second sentence of the section.

[29] *In re* Estate of Adam Dolmage, 203 Iowa 231, 212 N.W. 553 (1927).

ceased wife's administrator against the husband's estate. Claimant's attorneys argued that because of what is now Code Section 4.2 [30] the statute should not be strictly construed. However, the Iowa court held that the policy expressed in Section 4.2 could not outweigh legislative intent with regard to a particular statute, and that the legislative intent in passing the then Code Section 10462 was merely to increase the scope as to damages, not to give the wife an additional cause of action against her husband.

The language of the present section is somewhat broader than that of its predecessors, which were applicable at the time of the *Dolmage* decision. Section 613.11 specifically states that "there shall be no disabilities or restrictions," and that "recovery may be had . . . in the same manner as in cases of damage because of the wrongful death or injury of a man." In comparison, Section 10462 merely gave her a right of action for injuries "caused by the negligent or wrongful act of any person, firm or corporation." The court had an opportunity to reverse its position in *Aldrich v. Tracy*,[31] a case arising when the husband killed his wife and was executed for that crime, and her administrators sued his estate. However, the court reaffirmed the position taken in *Peters v. Peters*,[32] and in the *Dolmage* case, and interpreted the statutory language "and recovery may be had in the same manner as for the wrongful or negligent injury or death of a man" to the effect that, because a man never had a right of action against his wife, she could have none against him.

Section 613.11, taken in its entirety, embraces more factors than analogous statutes of other jurisdictions. It incorporates wrongful death provisions into the same statute which gives a woman a right to sue for injury to her person where the fact of death does not occur. It also incorporates language that gives it the tenure and effect of a survival statute, independent of Section 611.20.[33] An examination of cases from some of the other jurisdictions with less broad wrongful death statutes indicates that the modern tendency is to allow an action in such situations rather

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[30] IOWA CODE § 4.2 (1954): "The rule of the common law, that statutes in derogation thereof are to be strictly construed has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

[31] 222 Iowa 84, 269 N.W. 30 (1936).

[32] 42 Iowa 182 (1875).

[33] IOWA CODE § 611.20 (1954): "All causes of action survive and may be brought notwithstanding the death of the person entitled or liable to the same."

than deny it on the basis of the common law disability.[34] However, the basis of recovery depends largely upon the statutory language.

Recovery may depend upon the interpretation of the effect of the statute. If the cause of action is considered to be derived from the deceased person, and there is a disability between the deceased person and the tort-feasor, no recovery is allowed. However, if the statute is interpreted as creating a new cause of action, instead of as being in the form of a survival statute, then recovery may possibly be had on the basis of pecuniary loss to the estate or the heirs.

In the leading Pennsylvania case of *Kaczorowski v. Kalkosinsiki,*[35] the court held that the basis for the action was derivative,[36] but that the derivation came not from the parties but from the tortious act. In this case the wife and the husband were both killed in an automobile accident. The wife's father, as administrator of her estate, brought the action for pecuniary loss to the estate and recovery was allowed by the appellate court. The court reasoned that, although the wife coud not sue her husband, and as between them the common law disabilities still existed, the administrator could maintain this action for the pecuniary loss peculiar to the estate because the marriage relation had ceased to exist.

This was also the reasoning of the Illinois court in the recent case of *Welch v. Davis,*[37] a case presenting facts similar to the

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[34] Russell v. Cox, 65 Idaho 534, 148 P.2d 221 (1944); Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547, 28 A.L.R.2d 656 (1951); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953), overruling Dishon's Administrator v. Dishon's Administrator, 187 Ky. 497, 219 S.W. 794, 13 A.L.R. 625 (1920); Albrecht v. Pothoff, 192 Minn. 557, 257 N.W. 377 (1934); Rodney v. Staman, 371 Pa. 1, 89 A.2d 313 (1952) (accident occurred in Ohio, court interprets Ohio statute and holds that it gives rise to an independent action, and therefore marital relationship is no bar to suits between executors and administrators); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663, 104 A.L.R. 1267 (1936); Morgan v. Lueck, 72 S.E.2d 825 (W.Va. 1952) (the right of action in wrongful death situations accrues to the administrator and not the heirs; fact that defendant's wife was a beneficiary of decedent did not preclude administrator from maintaining the action). *Contra:* Aldrich v. Tracy, 222 Iowa 84, 269 N.W. 30 (1936); Wilson v. Barton, 153 Tenn. 250, 283 S.W. 71 (1926); Childs v. Childs, 107 S.W.2d 703 (Tex. Civ. App. 1937); Wright v. Davis, 132 W.Va. 722, 53 S.E.2d 335 (1949).

[35] 321 Pa. 438, 184 Atl. 663, 104 A.L.R. 1267 (1936).

[36] The applicable Pennsylvania statutes, 12 PURDON PENN. STAT. §§ 1601, 1602 (1953), are as follows:

§ 1601. "Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damage be brought by the party injured during his or her life, the widow . . . , or . . . the personal representatives may maintain an action for the recoverable damages for the death thus occasioned."

§ 1602. "The persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased, and no other relatives; . . . . If none of the above relatives are left to survive the decedent, then the personal representative shall be entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death."

[37] 410 Ill. 130, 101 N.E.2d 547, 28 A.L.R.2d 656 (1951).

Dolmage and *Aldrich* cases. The husband had shot his wife and then killed himself. The wife was survived by a minor daughter by a previous marriage. Recovery under the wrongful death act of Illinois was allowed on the basis of pecuniary loss to the daughter. The court stated that the only reason for extending the common law immunities, in view of the Married Women's Property Act, was to preserve domestic peace and tranquility, and as both husband and wife were dead, that reason ceased to exist.

These cases considered that the right of action is not derived from the parties. Had the parties continued to live, no action could be maintained between them. However, after the death of the parties as a consequence of the tort, a new cause of action was created which could be maintained by the administrator.

However, in *Gardner v. Beck*,[38] the Iowa court interpreted an earlier version of Section 613.11 to include injuries and expenses therefor which precede death, and held that the section was in the nature of a survival of action statute. Therefore the action apparently is derived from the parties and not alone from the tortious act, as in the *Kaczorowski* and *Welch* cases. Out of the injury only one cause of action accrues, which goes to the injured party. In case she dies it goes to her administrator. The court has reasoned that since there is a disability between the injured wife and her tort-feasor husband, and since no new cause of action is created at her death, her administrator is subject to the same defenses as is the injured party.[39]

It would seem reasonable not to extend the argument of public policy to third persons,[40] especially so where both parties to the tort are deceased. However, thus far the Iowa court has not discussed the reasoning of the *Kaczorowski* and the *Welch* cases, that is, that the only reason for disallowing suits between spouses is to preserve domestic tranquility, and that when both spouses are dead the reason has ceased to exist. It should also be noted that the Iowa court has not found it necessary to consider reasons of public policy at all in this line of cases, but because Section 613.11 includes injuries as well as death the court would probably feel bound by the decisions in the *Gardner, Dolmage* and *Aldrich* cases if it were to consider public policy arguments.

Third Persons Not in Fiduciary Capacities

(a) Principal-Agent Relationships.

To this point we have considered the ability of the husband or his representative to assert the defense of coverture as against the injured wife or the administrator of her estate. What is the

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[38] 195 Iowa 62, 189 N.W. 962 (1923) (holding that the statute of limitations begins to run from the date of the injury and not from the date of death or date of appointment of the administrator).

[39] See, *e.g.*, *In re* Estate of Adam Dolmage, 203 Iowa 231, 212 N.W. 553 (1927).

[40] *Compare* Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935) *with* Albrecht v. Pothoff, 192 Minn. 557, 257 N.W. 377 (1934).

result when the defense is raised by a third person who is not in a fiduciary relationship, but who has acted as a master or principal of the tort-feasor husband? Although the end result has thus far been the same as in the types of cases previously mentioned,[41] the court's position is less formidable.

The case of *Maine v. James Maine and Sons Co.*[42] is illustrative of the sort of factual situation that may arise. Defendant was a corporation that employed the tort-feasor husband. Plaintiff wife was injured while riding with her husband in one of defendant's trucks at a time when the husband was within the scope of his employment. She sued the corporation; it pleaded the defense of coverture of its servant and plaintiff. The Iowa court held that the wife, in order to maintain an action against the principal, must first be able to maintain an action against the agent, and as she could not sue the husband for tort under Iowa law the conclusion followed that she was precluded from suing his principal.[43] It should be noted that the wife's attorneys did not argue the applicability of Sections 10462 and 10463 of the Code of 1924 (now Section 613.11) even though the language of the statute was "for injury caused by the wrongful or negligent act of any person, firm, or corporation." However, the court intimated that those sections did not apply. Is it possible that this omission by counsel started the court off on the wrong foot?

The Iowa court relied upon four cases in support of the *Maine* decision. These cases differed factually for in each of them the agent had been absolved from culpability by a jury—a finding in effect that the agent was not negligent, had not committed a battery, or had not acted with malice.[44] Logically then, there was

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[41] Maine v. James Maine and Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924). *But see* Reid v. Reid, 216 Iowa 882, 884, 249 N.W. 387, 388 (1933).

[42] 198 Iowa 1278, 201 N.W. 20 (1924).

[43] *Ibid. Accord:* Sacknoff v. Sacknoff, 131 Me. 280, 161 Atl. 669 (1932); Reigger v. Bruton Brewing Co., 678 Md. 518, 16 A.2d 99, 131 A.L.R. 307 (1940); Riser v. Riser, 240 Mich. 402, 215 N.W. 290 (1927); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932) (where the wife was injured while riding with her husband's agent); Emerson v. Western Seed and Irr. Co., 116 Neb. 180, 216 N.W. 297 (1927).

[44] Arnett v. Illinois Cen. Ry. Co., 188 Iowa 540, 176 N.W. 322 (1920) (the agent was absolved of personal fault in a train collision; however, the court limited the rule by saying at 546, 176 N.W. at 325, "But a verdict in favor of the servant, in a joint action against the master and such servant, relieves the former from liability only when the negligence of the servant was the sole proximate cause of the injuries complained of ."); Hobbs v. Illinois Cen. Ry. Co., 171 Iowa 624, 152 N.W. 40 (1915) (jury finding that two railroad guards were without personal fault in beating a passenger, therefore no fault could be imputed to railway); Dunshee v. Standard Oil Co., 165 Iowa 625, 146 N.W. 830 (1914) (jury found corporation liable but absolved its agents of malice; affirmed by the Supreme Court because the defect was raised for the first time on appeal); White v. International Textbook Co., 150 Iowa 27, 129 N.W. 338 (1911) (the malice of an agent could not be imputed to the principal after the jury found that the agent was without malice). Query: would the decision of the *Maine* case be different if the accident had been occasioned in part by faulty brakes? Could the corporation then claim the defense of coverture?

nothing which could be imputed to the principal. In the *Maine* case the agent's negligence was assumed by the court; there was no jury finding as to him because he had not been made a party to the suit. The Iowa court thus used precedents based on findings of no wrongdoing where the question instead was that of actual wrongdoing but by one immune from personal liability for his misconduct.

The *Maine* decision has not been followed by the more recent decisions of other jurisdictions dealing with the same problem, and now appears clearly to be a minority position.[45] The distinguishing feature apparently turns on whether the local law of agency or the local concept of legal immunity should control. In the recent case of *Broadus v. Wilkinson*,[46] the Kentucky court suggests that the question is one of immunity, and the difference lies in an immunity from liability as distinguished from a privilege of acting. If the agent has immunity from liability, the principal does not share in the immunity. If he is privileged to act, that privilege protects his principal. The husband because of reasons of public policy is immune from suits by his wife. This is a legal immunity and is not available to the principal.[47]

The leading case in opposition to the *Maine* decision is the subsequent case of *Schubert v. August Schubert Wagon Company*.[48] The New York Court of Appeals rejected the *Maine* approach, saying that it failed to distinguish between negligence and liability, and adopted the proposition there that the liability is the liability of the employer alone, and is not dependent upon or derivative from the liability of the servant. This apparently is a strict interpretation of the maxim "qui facit per alium facit per se." This approach is also followed in the recent Federal

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[45] Jones v. Kinney, 113 F.Supp. 923 (W.D. Mo. 1953); Webster v. Snyder, 103 Fla. 1131, 138 So. 755 (1932); Tallios v. Tallios, 345 Ill. App. 387, 103 N.E.2d 507 (1952); Broadus v. Wilkinson, 281 Ky. 601, 136 S.W.2d 1052 (1940); Pittsley v. David, 298 Mass. 552, 11 N.E.2d 461 (1937); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933); Mullally v. Langenberg Bros. Grain Co., 339 Mo. 582, 98 S.W.2d 645 (1936); Rosenblum v. Rosenblum, 231 Mo.App. 276, 96 S.W.2d 1082 (1936); Hudson v. Gas Consumers Ass'n, 123 N.J.L. 252, 8 A.2d 337 (1939); Cerutti v. Simone, 13 N.J.Misc. 466, 179 Atl 257 (Sup. Ct. 1935); Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928); Metropolitan Life Ins. Co. v. Huff, 48 Ohio App. 412, 194 N.E. 429 (1933), *rev'd* 128 Ohio St. 469, 181 N.E. 781 (1934); Koontz v. Messer, 320 Pa. 487, 181 Atl. 792 (1937); Poulin v. Graham, 102 Vt. 307, 147 Atl. 698 (1929); Hensel v. Hensel Yellow Cab Co., Inc., 209 Wis. 489, 245 N.W. 159 (1932); RESTATEMENT, AGENCY § 217 comment *b; see* United States v. Hull, 195 F.2d 64 (1st Cir. 1952) (rule under Federal Tort Claims Act); Miller v. J. A. Tyrolm Co., 196 Minn. 438, 265 N.W. 324 (1936) (owner's liability statute made the driver of the car the agent of the owner); PROSSER, TORTS 909 (1941).

[46] 281 Ky. 601, 136 S.W.2d 1052 (1940). See RESTATEMENT, AGENCY § 217 comment b.

[47] The dicta of the *Broadus* case which states that it is the public policy of Kentucky to maintain domestic peace and felicity and therefore direct suits between spouses cannot be maintained in tort was overruled in *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953).

[48] 249 N.Y. 253, 164 N.E. 42 (1928).

court case, *Jones v. Kinney.*[49] In that case the court stated the rule to be that if the master's liability is secondary there is no recovery to the wife, but if the master's liability is primary it should not be dependent upon such unrelated matters as "marital unity" or "marital tranquility".

In view of the pronounced recent trend, it would appear that the *Maine* case might be overruled if the question were raised again, and one Iowa precedent is suggestive of that possibility. In *Reid v. Reid,*[50] where a woman was injured while in the employ of her husband and the claim was submitted under workmen's compensation proceedings, the court indicated that all Iowa cases involving suits between spouses in the tort area might be overruled in view of the broader language added to Section 613.11 in 1931. As was noted earlier, *Aldrich v. Tracy* [51] was decided after the *Reid* decision and did not overrule but affirmed the pre-1931 position taken in the *Dolmage* [52] case. Nevertheless, the factual situation giving rise to the *Maine* case is different and the rules of agency should be given first consideration.

It should be mentioned that there is a fear among some of the authorities that to allow an action against a master or principal would open the door to circuity of action by allowing the principal to recover over against the servant.[53] Indeed, the argument is made that the family wealth would remain the same and recovery against the principal would, in effect, allow indirectly that which cannot be done directly. The fear would seem somewhat premature, however, if the view is adhered to that the principal factor of recovery over should be indemnity, not merely liability; and that there is no liability upon the part of the agent until the principal has been made to pay.[54] Furthermore, the husband himself may be judgment proof, and any recovery by the wife would be her own property, not that of her husband, so that no practical recovery over against the servant could be had.

(b) Partnerships.

What result would follow where the person sued is a partner in a business enterprise and the tort-feasor is either a partner or an agent of the partnership? Even where recovery would be allowed against the principal which is a corporation, the same result may not follow if the defendant is merely a partner or a

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[49] 113 F.Supp. 923 (W.D. Mo. 1953). See PROSSER, TORTS 909 (1941).
[50] 216 Iowa 882, 249 N.W. 20 (1934).
[51] 222 Iowa 84, 269 N.W. 30 (1936).
[52] *In re* Estate of Adam Dolmage, 203 Iowa 231, 212 N.W. 553 (1927).
[53] Maine v. James Maine and Sons Co., 198 Iowa 1278, 201 N.W. 20, 37 A.L.R. 161 (1924); Emerson v. Western Seed and Irr. Co., 116 Neb. 180, 216 N.W. 297 (1927).
[54] Broadus v. Wilkinson, 281 Ky. 601, 136 S.W.2d 1052 (1940); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933); Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928).

partnership.[55] Here again the question may be determined by first deciding whether the doctrine of legal immunities and public policy,[56] or the local law as to partnership liability [57] should prevail. If the latter proposition is prevailing, the additional problem arises as to whether the partnership is to be regarded as a legal entity, or as simply an aggregate of its members.[58]

A reasonable assumption is that the local law of partnership should prevail. The Iowa court has held that the partnership, as a firm, may be liable if any partner or agent of the firm commits a tort in the scope of partnership business.[59] There is also dicta to the effect that if one partner commits a tort he is considered the agent of the other, and the other partner can be held individually liable.[60] Because of the agency factor involved, it therefore seems probable that the Iowa partnership would have available to it the same defenses that a corporation would have if the tort-feasor were an agent of the corporation and the husband of the injured party. This probability seems strengthened because the Iowa court has been rather consistent in holding that the partnership is an entity.[61] A judgment against the partnership may be enforced against the partnership assets.[62] The situation in the case of an injured spouse suing the partnership which is her husband-tort-feasor's employer is sufficiently similar to the area of corporation liability that if the seemingly unsound decision in the *Maine* decision is overruled, partnership liability well may follow in a similar fact situation.

Effect on Insurance Carriers

Some of the writers suggest that the recent revival of tort actions between spouses, and the courts' tendency to liberalize the concepts of the common law is influenced by the advent of the automobile and the development of liability indemnity insurance.[63] As previously mentioned, one of the basic reasons for the common law disabilities was that the family wealth would remain the same. This reason, it is contended, retains little effect when it is considered that because of liability insurance the defendant will

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[55] *Compare* Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23, 101 A.L.R. 1223 (1935) (denying the wife recovery against either the partnership or her husband's partner) *with* Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928).

[56] See, *e.g.*, David v. David, 161 Md. 532, 157 Atl. 755 (1932).

[57] See, *e.g.*, Karalis v. Karalis, 213 Minn. 31, 4 N.W.2d 632 (1942).

[58] For discussion as to an unincorporated association, see *Damon v. Elyria Lodge No. 465, B.P.O.E.*, 158 Ohio St. 107, 107 N.E.2d 337 (1952).

[59] Haase v. Morton and Morton, 138 Iowa 205, 115 N.W. 921 (1908) (plaintiff sued a partnership consisting of two doctors for injuries caused by negligence in transporting her while in a hospital).

[60] *See* Hall v. Young, 189 Iowa 236, 243, 177 N.W. 694, 696 (1920).

[61] Lehman v. Napier, 101 F.Supp. 313 (S.D. Iowa 1951); Rubio Savings Bank of Brighton v. Acme Farm Products Co., 240 Iowa 547, 37 N.W.2d 16 (1949).

[62] Lehman v. Napier, 101 F.Supp. 313 (S.D. Iowa 1951).

[63] PROSSER, TORTS 898 (1941); McCurdy, *Torts between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930).

not have to pay out of his own pocket.[64] However, the position taken overlooks the idea that insurance is intended to indemnify the insured for his liabilities. The more logical approach would seem to be that the carrier's interest should not be prejudiced by the mere fact that there is a contract to idemnify liability. If there is a right at all, it should be asserted irrespective of the interests of third parties. The converse is also true—if there is no right of action, the question should not be resolved on the possibility of recovery from an insurance company.[65]

Assuming that the present position of the Iowa court is to disallow claims by one spouse against the other spouse, the discussion of liability of insurance carriers in the Iowa courts will be limited to problems that may arise even though the court retains its present position. The principal question for further discussion is this: what right does a married woman have who holds a foreign judgment against her husband for a tort committed in a foreign jurisdiction which allows suits between spouses.[66]

Where such person has an insurance policy written in Iowa the problem is complicated because Code Section 516.1 requires all insurance policies insuring legal liability to contain a provision giving a right of action against the insurance company in the event that an execution is returned unsatisfied against the insured.[67]

A solution to the question may depend upon a determination of whether the action provided for by the statute is an action in contract or one on a judgment. If it is an action in contract, the action is derivative and the injured party cannot maintain it against the insurer unless the insured could do so.[68] Therefore, the court might say, there is no liability by the insurer in an action brought by the injured person because there was no liability between the husband and the wife.[69] On the other hand, if the action is on the judgment such a defense may not be available to the insurer.

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[64] PROSSER, TORTS 907 (1941).

[65] Comstock v. Comstock, 106 Vt. 50, 169 Atl. 903 (1934).

[66] See, *e.g.*, Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953).

[67] IOWA CODE § 516.1 (1954): "All policies insuring the legal liability of the insured, issued in this state . . . shall . . . contain a provision providing that, in event an execution on a judgment against the insured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the insurer to the same extent that such insured could have enforced his claim against such insurer had such insured paid such judgment."

[68] *Cf.* Aldrich v. Tracy, 222 Iowa 84, 269 N.W. 30 (1936); *In re* Estate of Adam Dolmage, 203 Iowa 231, 212 N.W. 553 (1927); Maine v. James Maine and Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924).

[69] *Cf.* McCann v. Iowa Mutual Liab. Ins. Co. of Cedar Rapids, 231 Iowa 509, 1 N.W.2d 682 (1942); Whitney v. Employers' Indem. Corp., 200 Iowa 25, 202 N.W. 236 (1925); Fehr v. General Acc. Fire & Life Assur. Corp., Ltd., 246 Wis. 228, 16 N.W.2d 787 (1944).

One of the earlier cases applicable to the Iowa situation held that the action was on the judgment.[70] However, this was a Federal court decision prior to *Erie Railroad Company v. Tompkins.*[71] Subsequent to the *Erie* case the Iowa court indicated that the action was in contract. This was in *McCann v. Iowa Mutual Liability Insurance Company.*[72] an action upon a judgment obtained by McCann against Downey [73] for injuries arising out of an automobile accident, after the judgment was returned unsatisfied. The trial court permitted the insurance company to introduce evidence that Downey's car was driven by his son in violation of the terms of a restrictive driver's license at the time of the injury; then directed a verdict in favor of the insurance company. McCann appealed on the ground (among others) that the previous action was res adjudicata. The court held that this was not so, since this case was an action in contract and the action against Downey had been in tort; and therefore evidence as to violation of the terms of the restricted driver's license was germane to the issue of whether or not the violation fell within an exclusion clause of the insurance policy.

It would appear that the former Federal court rule that the action is on the judgment has been supplanted by the Iowa rule that it is in contract. In *Hoosier Casualty Company of Indianapolis v. Fox,*[74] the Federal court hled that the Iowa substantive law and the Iowa Rules of Civil Procedure were applicable to actions arising under Section 516.1.

Even under the Iowa "contract" theory, the wife might be able to recover from the insurance company if the court follows the doctrine applied by New Jersey in the recent case of *Clement v. Atlantic Casualty Insurance Company.*[75] In New Jersey direct actions between spouses are against public policy.[76] The accident involved in the *Clement* case happened in New York, when the plaintiff was the fiancee of the tort-feasor. She served notice of action upon him in New York, then married him and they established residence in New Jersey. A judgment was obtained in the New York proceedings but no execution was returned. New Jersey has a statute similar to Section 516.1, which requires insurance policies to carry a provision that the injured party may proceed against the insurer in the event that the insured is insolvent or bankrupt. The Company, defending, claiming that there was no writ of execution returned unsatisfied on the New York judgment, and that there had been no final determination of the

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[70] International Indem. Co. v. Steil, 30 F.2d 665 (8th Cir. 1929). See also Note, 15 IOWA L. REV. 75 (1929).
[71] 304 U.S. 64, 114 A.L.R. 1487 (1938).
[72] 231 Iowa 509, 1 N.W.2d 682 (1942).
[73] McCann v. Downey, 227 Iowa 1277, 290 N.W. 690 (1940).
[74] 102 F.Supp. 214 (N.D. Iowa 1952).
[75] 13 N.J. 439, 100 A.2d 273 (1953).
[76] Bendler v. Bendler, 3 N.J. 161, 69 A.2d 302 (1949).

defendant's inability to pay. The court reasoned that this was not an action on the judgment. If it were, it would be contrary to the public policy of New Jersey. It was an action in contract; the lex loci controlled; the tort-feasor was liable in New York; and therefore this action could be maintained upon the terms of the policy which provided for indemnity for "liability".

It therefore appears that a foreign judgment and a domestic judgment may be accorded different effects. But it must be noted that the action contemplated is not strictly an action on a judgment rendered by a court of a foreign jurisdiction, but is an action against the insurer on the terms of the policy, as granted by statute, and is maintained against a third party who is, technically speaking, not a party to the judgment.

It is difficult to predict what position the Iowa court would assume in such a case. The *McCann* result may be distinguishable on the argument that although the insured was liable for the injuries, he had lost his right to indemnity because of the exclusions in the insurance policy. It is possible, however, that the court may feel that Iowa policy is so strongly against recovery of the wife for her husband's torts that such an indirect assault upon that policy should not be allowed. However, if the reasoning of the New Jersey court in the *Clement* case is accepted, the opposite result should follow.

Conclusion

While it has been the policy of the courts in recent years to liberalize the rules in respect to the rights of married women, whether the Iowa court will follow the trend away from what has been called the majority rule (the rule that the husband is immune from action by his wife for his torts against her) remains a matter of conjecture. It must be noted that the court has not been called upon to discuss the problem since the latest amendment to Section 613.11, in 1941.[77]

It has not been the purpose of this article to consider whether the liberalization of the rule as to suits between spouses is socially desirable. At least one state legislature has recently seen fit to abrogate its court's decision expanding the area in which such suits were permitted.[78] This form of expression is the best criteria of the public policy of the state. It may be that until the Iowa legislature again acts specifically on the subject no definite conclusions can be drawn.

MILFORD G. BLACKBURN (June, 1955)

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[77] IOWA LAWS (1941) ch. 297 § 1.
[78] ILL. REV. STAT. § 68.1 (1953).