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Husband and Wife--Personal Injury to Wife in Foreign State--Wife to Bring Action in New York--Public Policy--Conflict of Laws (Mertz v. Mertz, 271 N.Y. 466 (1936))

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such as an erroneous dismissal of the jury,[14] or the mistaken release of the accused after a hearing by a magistrate, rather than on the merits of the case.[15] The plea of former jeopardy will not be available although all other prerequisites are present in cases where the jury has failed to reach a verdict,[16] where the court is compelled to adjourn before the verdict is reached,[17] where a judge or juror is taken sick or dies,[18] where a juror is disqualified,[19] or where a mistrial is declared on motion of the accused.[20] The court, following a long line of adjudicated cases in this state,[21] correctly ruled that the relator could utilize the void judgment obtained against him by the state as a basis for his plea, religiously upholding his constitutional right. It was an excellent opportunity for the Court of Appeals to impress upon the lower courts the necessity for a strict adherence to adjective law.

M. M. B.

HUSBAND AND WIFE—PERSONAL INJURY TO WIFE IN FOREIGN STATE—WIFE TO BRING ACTION IN NEW YORK—PUBLIC POLICY—CONFLICT OF LAWS.—Plaintiff sues in New York to recover for personal injuries sustained by her in Connecticut through the negligence of her husband in the operation of an automobile in which the wife was a passenger. Such actions are maintainable in Connecticut,[1] while

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[14] In New York the dismissal of the jury is governed by the CODE OF CRIM. PROC. § 428. Compare Peo. v. Warden, 202 N. Y. 138, 95 N. E. 729 (1911) (where the discharge of the jury not in accordance with § 428 and without the consent of the defendant was held to be an acquittal by operation of law) with Peo. v. Montlake, 184 App. Div. 578, 172 N. Y. Supp. 102 (2d Dept. 1918) (*held,* no acquittal, when the judge discharged the jury by necessity and the defendant did not object).

[15] Compare Peo. v. Goldfarb, 152 App. Div. 870, 135 N. Y. Supp. 62 (1st Dept. 1912), *aff'd,* 213 N. Y. 664, 17 N. E. 1083 (1914) (where a further trial was barred when the magistrate ordered the discharge of accused and a new complaint drawn up) with Peo. v. Dillon, 194 N. Y. 254, 90 N. E. 820 (1910) (where the discharge of the accused by a magistrate at a preliminary hearing was held not to be a bar to further prosecution).

[16] Peo. v. Goodwin, 18 Johns. 187 (N. Y. 1820); Peo. v. Hays, 166 App. Div. 507, 151 N. Y. Supp. 1075 (2d Dept. 1915).

[17] Peo. v. Fishman, 64 Misc. 256, 119 N. Y. Supp. 89 (1909); Peo. v. Neff, 191 N. Y. 210, 83 N. E. 970 (1908) (manifest necessity).

[18] Peo. v. Smith, 172 N. Y. 210, 64 N. E. 814 (1902) (illness of juror).

[19] Gardes v. U. S., 87 Fed. 172 (C. C. A. 5th, 1898).

[20] Peo. v. Dowling, 84 N. Y. 478 (1881); Peo. v. Palmer, 109 N. Y. 413, 17 N. E. 413 (1888); Peo. v. McGrath, 202 N. Y. 445, 96 N. E. 92 (1911) (The plea being a personal one, the constitutional privilege is deemed waived when an appeal on the case is had.).

[21] King v. Peo., 5 Hun 297 (N. Y. 1875); Peo. v. Warden, 202 N. Y. 138, 95 N. E. 729 (1911).

[1] Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914).

in New York the common-law doctrine that in marriage persons of husband and wife become merged still prevails to the extent that neither is liable for injuries wrongfully inflicted upon the other.[2] *Held,* that the New York courts will not take jurisdiction to enforce a foreign cause of action which is repugnant to the public policy of the forum. *Mertz* v. *Mertz,* 271 N. Y. 466, 3 N. E. (2d) 597 (1936).

A cause of action for personal injuries is transitory and liability follows the person and may be enforced in any forum which can obtain jurisdiction of the wrongdoer.[3] The ordinary rule, as to asserted torts, transitory in character, is that the law of the place where the injury was inflicted governs the right of action, and that the law of the forum determines the jurisdiction of the court, the capacity of the parties to sue or be sued, the remedies which are available to suitors and the procedure to be followed in the court.[4] To justify the application of the law of the forum, the rule of the foreign state must not violate the public policy of the forum.[5]

What is meant by public policy? The term is vague, loose and illusory. In the leading case of *Loucks* v. *Standard Oil Co.*[6] the public policy was perceived to be the doctrine "that rights lawfully vested shall be everywhere maintained." In the instant case the court reiterated a definition of public policy it had formerly adopted[7] from a non-conflict case,[8] *viz.,* "the law of the state whether found in the constitution, the statutes or judicial records."

Legal definitions invite and provoke criticism because they rarely prove perfectly accurate. This one is no exception to the rule. It seems questionable that the New York policy in the above mentioned non-conflict case is applicable to a conflict of laws situation,[9] for a strict literal application of the definition of public policy would abrogate completely the fundamental conflict of laws rule, by bringing every case within the exception. Thus it would logically follow that if the *lex loci* and *lex fori* clash, it would be sufficient to preclude the

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[2] Caplan v. Caplan, 268 N. Y. 445, 198 N. E. 23 (1935); see Allen v. Allen, 246 N. Y. 571, 159 N. E. 656 (1927); *cf.* Schubert v. Schubert Wagon Co., 249 N. Y. 253, 164 N. E. 42 (1928).

[3] Chicago & E. I. Ry. v. Rouse, 178 Ill. 132, 52 N. E. 951 (1899); see also Boydon v. Phil. & Reading Coal & Iron Co., 217 N. Y. 432, 111 N. E. 1075 (1916).

[4] Dorff v. Taya, 194 App. Div. 278, 185 N. Y. Supp. 174 (1st Dept. 1920).

[5] Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918) ("If aid is to be withheld here it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare. * * * They (the courts) do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonweal.").

[6] *Ibid.*

[7] Strauss & Co. v. Canadian Pacific Ry. Co., 254 N. Y. 407, 173 N. E. 564 (1930).

[8] People v. Hawkins, 157 N. Y. 1, 51 N. E. 257 (1898).

[9] RESTATEMENT, CONFLICT OF LAWS (1934), N. Y. Annotations § 612.

court from taking jurisdiction of the matter.[10] This conclusion would be contrary to the weight of authority, both of cases [11] and writers.[12]

The opinion does say that "the courts do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonweal." The court could have based its decision solely on this broader concept of public policy without attempting to reconcile it with the juridical definition.

Whether this reciprocal disability, which precludes a suit by one spouse against the other for personal injuries, would be promotive of the public welfare is a debatable question. Sound reasons have been given in support of both sides.[13]

In the instant case the court took the position that the rule of law exists by tradition and authority, that "rights may not be granted or withheld by our courts at the pleasure of the judges to suit the individual notion of expediency and fairness," and any changes must be addressed to the legislative, not the judicial branch of the government.

D. R.

LIMITATION OF ACTIONS—SECTION 16, CIVIL PRACTICE ACT—WHAT CONSTITUTES "UNITED IN INTEREST."—The plaintiff insurance company issued a life insurance policy to defendant's husband on June 13, 1930, defendant being named as beneficiary. The policy contained a one-year incontestability clause. On April 24, 1931, plaintiff brought this action to rescind the policy on the grounds of

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[10] (1931) 79 U. OF PA. L. REV. 635. "In all conflict of law cases it is obvious that there must be two conflicting rules of law, that of the foreign state and that of the forum. The rule of the foreign state is to be applied by the forum unless the public policy of the state of the forum is violated. But if the public policy of the state of the forum is conceived to be identical with its law there would never be occasion to resort to the law of the foreign state for by hypothesis the law of the foreign state is contrary to the law of the forum; it is therefore contrary to the public policy of the forum and the situation is that in which the forum will refuse to apply the foreign law."

[11] Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918) (court rejected the doctrine that in the absence of similarity of the foreign statute which created the cause of action and our own statute the action could not be maintained); see also Chicago & E. I. Ry. v. Rouse, 178 Ill. 132, 52 N. E. 951 (1899).

[12] GOODRICK, *Public Policy in the Law of Conflicts* (1930) 36 W. VA. L. Q. 156; BEACH, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE L. J. 656; BEALE, CONFLICT OF LAWS (1935) § 612. "Differences in law do not necessarily constitute a sufficient basis for a declaration that the rule of the foreign state is contrary to the strong public policy of the forum."

[13] Allen v. Allen, 246 N. Y. 571, 159 N. E. 656 (1927), Pound, J. (dissenting opinion); *Contra:* Longendyke v. Longendyke, 44 Barb. 366 (N. Y. 1863).