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Conflict of Laws - Choice of Law in Interspousal Suits

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A situation in which relief of this nature is especially valuable would be the discriminatory firing of an employee. The court could bar firing or allow the complainant to receive his salary during the injunctive period.[39] In other situations, such as discriminatory hiring practices in a new construction project, the court may enjoin the start of the project.[40] It is unlikely that a court would properly order the hiring of a new employee not chosen by the employer, however, if the employer is a repeated violator of Title VII, this remedy may be appropriate.[41]

The *Young* case marks the limit to which the federal courts can assure more meaningful remedies for discriminatory employment practices under the present statutory scheme. The remaining obstacles to a more effective anti-discrimination policy including the EEOC's lack of enforcement and investigative powers can only be changed by further legislation. Congress has refused on many occasions to act upon bills incorporating these changes,[42] and the judiciary has assumed the initiative of liberalizing the procedural scheme of Title VII. Now it is time that Congress once more assume the responsibility for further alleviating discriminatory practices in employment by passing legislation correcting the inherent weaknesses of Title VII's procedural scheme.

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CONFLICT OF LAWS—CHOICE OF LAW IN INTERSPOUSAL SUITS—The United States Third Circuit Court of Appeals has held that in an action by a woman against her former husband for injuries arising out of an automobile accident, the law of the state of the accident rather than the law of the state of domicile would be controlling on the issue of interspousal immunity.

Purcell v. Kapelski, 444 F.2d 380 (3d Cir. 1971).

Elizabeth Kapelski, a passenger in a car driven by her husband, sustained injuries in a two-car collision at a New Jersey intersection near the Pennsylvania border. At the time of the accident, they were both Pennsylvania domiciliaries. Subsequently, the couple was divorced and

39. *Developments in the Law, supra* note 22, at 1259.
40. *Id.* at 1259.
41. *Id.*
42. *See* Coleman, *Title VII of the Civil Rights Act: Four Years of Procedural Elucidation*, 8 DUQ. L. REV. 1, 30 (1969-70).

the former wife, now remarried and known as Elizabeth M. Purcell, filed a diversity action in tort in the New Jersey District Court against her former husband and the occupants of the second car. Mr. Kapelski was a California domiciliary at the commencement of the suit. On motions for summary judgment the district court found for the plaintiff against her former husband and dismissed the claim against the occupants of the second car, giving collateral estoppel effect to a prior New Jersey judgment adjudicating the husband negligent in the accident.[1] The court denied Mr. Kapelski's motion to dismiss plaintiff's action as barred by spousal immunity, but certified that such order involved a controlling question of law from which an immediate appeal should be granted. On appeal, the Third Circuit Court of Appeals upheld the holding of the district court that the plaintiff's capacity to sue her former husband in tort was governed by the law of New Jersey rather than the law of their former domicile—Pennsylvania.[2]

INTRODUCTION

The interest analysis indulged in by the court of appeals in determining how a New Jersey court would decide this case did not purport to repudiate the traditional choice of law rule that issues arising from the family relationship should be resolved by reference to the law of the state of family domicile.[3] The court reasoned that the parties' divorce and the ex-husband's shift of domicile to California, a non-immunity state,[4] effectively eliminated any domestic relations interest

1. Mary Raubert v. Marion Stanley Kapelski, Elizabeth M. Kapelski, Kathleen Laphan and Kathryn Laphan, Superior Court of New Jersey Law Division, Camden County, Docket No. L-9655-66 (1966).

2. Although New Jersey has enacted interspousal immunity into statute, N.J.S.A. 37: 2-5 (1968) the prohibition has been interpreted merely to incorporate the common law, with its inherent capacity for change, rather than to establish an independent legislative bar to such a suit. *See* Long v. Landy, 35 N.J. 44, 171 A.2d 1 (1961); by contrast, the immunity rule in Pennsylvania is both statutory and decisional. PA. STAT. ANN. tit. 48 § 111 (1967). *See* Daly v. Buterbaugh, 416 Pa. 523, 207 A.2d 412 (1964); Meisel v. Little, 407 Pa. 546, 180 A.2d 772 (1962).

3. The court designated this the *Emery-Koplik* rule since it follows the lead of two of the earlier leading cases which favored the application of domiciliary law to family law questions. Purcell v. Kapelski, 444 F.2d 380 (3d Cir. 1971), *citing* Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958) and Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218, 106 Cal. App. 202 (1955); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 169 (1971). Cases in accord with the above rule but not cited by the court include: Chowdry v. Cunningham, 297 F. Supp. 213 (E.D. Pa. 1969); Roscoe v. Roscoe, 379 F.2d 94 (D.C. Cir. 1967); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966); *but cf.*, Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967); Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966); Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303 (1964).

4. Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).

which Pennsylvania might have had at the time of the accident. There being no Pennsylvania family relationship to protect, the so-called *Emery-Koplik* rule favoring the interests of the domiciliary state was inapplicable.[5] Perhaps because of this, the majority opinion neglected to make any reference to the status of Pennsylvania law on the question of a divorcee's right to sue her former husband in tort.

Having disposed of the domiciliary interest in the outcome of the litigation, the court had no difficulty justifying the application of forum law to the parties. The court noted New Jersey's strong expression of its public policy in the landmark New Jersey Supreme Court case of *Immer v. Risko*,[6] a 1970 decision that unequivocally abolished interspousal immunity in automobile negligence cases. Even more pertinent to the disposition of the instant case was *Sanchez v. Olivarez*,[7] a 1967 decision recognizing the right of spouses to sue each other after divorce. The court also recognized several non-public policy interests of New Jersey mitigating against the imposition of immunity: (1) the deterrent value of a non-immunity rule on negligent drivers, (2) a medical creditor interest which New Jersey doctors and hospitals might have in Mrs. Purcell's recovery, and (3) the protection of a theoretical right of contribution against Mr. Kapelski in favor of any New Jersey citizens also liable to the plaintiff for her injuries. On the basis of these four factors, the court justified the application of New Jersey law.[8]

However, there is some question regarding the status of New Jersey law on the immunity question, a circumstance not easily gleaned from the text of the opinion. Plaintiff's judgment in this case implicitly required a retroactive reading of the *Sanchez* case terminating interspousal immunity upon divorce. This was done although the recent decision of the Supreme Court of New Jersey in *Darrow v. Hanover Township*[9] held that the abolishment of interspousal immunity in automobile negligence cases announced in *Immer* was prospective only. The majority justified retroactive application of *Sanchez* on the basis that, unlike *Immer*, it did not purport to make a significant change in the common law of New Jersey. Inexplicably, the court chose to treat and summarily dispose of the critical retroactivity issue by the rather cryptic utilization of a prefatory footnote to the opinion which does not even apprise the reader of *Darrow's* holding.

5. 444 F.2d at 383.
6. 56 N.J. 482, 267 A.2d 481 (1970).
7. 94 N.J. Super. 61, 226 A.2d 752 (1967).
8. 444 F.2d at 383.
9. 58 N.J. 410, 278 A.2d 200 (1971).

Analysis and Comment

It is submitted that the one aspect of the *Purcell* opinion most susceptible to criticism is the court's weak utilization of relevant authority. The court missed a golden opportunity to engage in a sophisticated bit of interest analysis based upon an unusual and provocative law-fact pattern.

The Immunity Issue

First, there exists the possibility that the court's entire choice of law reasoning in deciding not to apply domiciliary law to what appears to be a family law question is nothing but pure dicta. It has already been noted that the court failed to question the effect of divorce upon interspousal immunity under Pennsylvania law. In his dissenting opinion, Judge McLaughlin states that "under the law of that state then and now such a hard nosed claim as is presented on this appeal would not be allowed."[10]

It is not at all clear that the Pennsylvania rule is as broad and prohibitive as Judge McLaughlin suggests. The rule as generally stated holds that *during coverture* one spouse cannot maintain an action in trespass against the other spouse for personal injuries caused by the other either prior to or during the marriage.[11] This rule, based upon the policy of preserving domestic peace and felicity,[12] has been embodied into statute, and provides for two major exceptions. The first relates to suits for divorce and actions to recover separate property.[13] The second exception, relevant here, permits suit upon any cause of action by a wife who has been deserted, abandoned, or driven from her home by her husband.[14] Additionally, the Pennsylvania Supreme Court has interpreted the law in *Johnson v. Peoples First National Bank & Trust Company*[15] to permit a widow to sue her deceased husband's estate, reasoning that the husband's death terminated any relationship in which the state has an interest. The court therein characterized the

10. 444 F.2d at 384, *citing* Meisel v. Little, 407 Pa. 546, 180 A.2d 772 (1962); Chromy v. Chromy, 10 Pa. D. & C.2d 791 (C.P. Fay. Co., 1958); Ellis v. Brenninger, 71 Pa. D. & C. 583 (C.P. Montg. Co., 1950); Smith v. Smith, 14 Pa. D. & C. 466 (C.P. Northampton Co., 1930); Swaney v. Cabot, 23 Fay. L.J. 175 (1960).
11. Daly v. Buterbaugh, 416 Pa. 523, 528, 207 A.2d 412, 414 (1964).
12. *Id.*
13. Pa. Stat. Ann. tit. 48, § 111 (1967).
14. *Id.* § 114.
15. 394 Pa. 116, 145 A.2d 716 (1958).

immunity rule as a procedural bar to enforcement of a substantive cause of action against the spouse during the marital relationship.[16]

Although Pennsylvania appellate courts have not ruled upon the *Sanchez* suit-after-divorce question, in the common pleas case of *Mutschler v. Mutschler*,[17] it was held that divorce or desertion lifted the procedural bar to interspousal suit. The opinion post-dates all those cited by Judge McLaughlin, thoroughly discusses and analyzes the trend of authority, and concludes that since the reason for the immunity rule no longer existed, a deserted wife could sue her ex-husband in tort. In *Mutschler* it was particularly noted that the *Smith*[18] and *Ellis*[19] cases cited by the defendant were implicitly overruled in 1958 by the Pennsylvania Supreme Court in the *Johnson* case.[20] Judge McLaughlin, it must be pointed out, cited both *Smith* and *Ellis* as reflecting Pennsylvania law on the subject.[21]

Granted that an appellate court might construe the Pennsylvania statute strictly and limit such causes of action to an actual desertion or abandonment situation (which was pleaded by the plaintiff in *Mutschler*),[22] the fact remains that the domiciliary law in *Purcell* was in reality much more fluid than the court implied. This in itself is a potent choice of law factor mitigating in favor of the application of presumptive forum law.

The court's weakness in this area is further shown by its failure to consider *McSwain v. McSwain*,[23] the premier Pennsylvania case on choice of law in interspousal suits. *McSwain* makes it clear that Pennsylvania evinces a strong interest in the application of Pennsylvania law to the immunity status of its domiciliaries, irrespective of where the event sued upon occurred. The court rejected the deterrence and medical creditor interests of the accident state, reasoning that the former was unrealistic and the latter inapplicable to the facts at issue, since the accident resulted in immediate death.[24] This approach is in stark contrast to the rote incantation of the hypothetical deterrence, medical creditor, and contribution interests relied on by the court in *Purcell* to

16. *Id.* at 122, 145 A.2d at 719.
17. 116 P.L.J. 387 (1968).
18. Smith v. Smith, 14 Pa. D. & C. 466 (C.P. Northampton Co., 1930).
19. Ellis v. Brenninger, 71 Pa. D. & C. 583 (C. P. Montg. Co., 1950).
20. 116 P.L.J. at 390, *citing* Johnson v. Peoples First National Bank and Trust Co., 394 Pa. 116, 124, 145 A.2d 716, 720 (1958).
21. 444 F.2d at 384.
22. 116 P.L.J. 387 (1968).
23. 420 Pa. 86, 215 A.2d 677 (1966).
24. *Id.* at 96, 215 A.2d at 683.

justify the application of situs law without reference to the law of the domicile. The error of this omission is obvious. Whether the domicile has adopted a restrictive or an expansive interpretation of its immunity policy is certainly a probative factor to be weighed by the lex-loci forum in arriving at its choice of law decision.[25] This is especially true in the instant situation where there is no applicable authority in the decisional law of the forum. In defense of the court on this point, it might be argued that this approach merely reflected the lead of the recent New Jersey Supreme Court case of *Pfau v. Trent Aluminum Company*,[26] in which the playing of renvoi in the process of deciding a conflicts case under interest analysis was thoroughly rejected. Thus, the court might not be faulted for its failure to examine Pennsylvania conflicts law on this issue.

However, it is suggested that in light of the court's deficiencies in examining Pennsylvania substantive law and its failure to examine and distinguish the conflicting foreign authority on this issue, omission relative to the *McSwain* rule was probably somewhat less than purposeful. The majority failed to cite in their behalf the leading Wisconsin case of *Heath v. Zellmer*,[27] which held that domiciliary law was no longer ipso facto controlling in a family law case. On the other hand, in addition to *McSwain*, the court failed to acknowledge or distinguish *Johnson v. Johnson*,[28] which likewise held that domiciliary law was controlling for choice of law as to interspousal immunity for tort. Also, as pointed out by Judge McLaughlin, the majority neglected to refer to *Mellk v. Sarahson*,[29] the first New Jersey case to renounce the rule of lex loci delicti. In discussing interspousal immunity, *Mellk* stated that lex loci rather than domiciliary law should only be applied after "full consideration of the policies and purposes of the rules of the states in-

25. Felix, *Interspousal Immunity in the Conflict of Laws: Automobile Accident Claims*, 53 CORNELL L. REV. 406, 422 (1968); *see generally* 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 Conflict of Laws*, 29 U. CHI. L. REV. 237 (1962); for a more recent treatment, see Jayme, *Interspousal Immunity, Revolution and Counterrevolution in American Tort Conflicts*, 40 S. CAL. L. REV. 307 (1967).

26. 55 N.J. 511, 526-27, 263 A.2d 129, 136-37 (1970); *accord*, Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *see* Kay, *Comment on Reich v. Purcell*, 15 U.C.L.A. L. REV. 589 (1968); *but cf.* VON MEHREN, THE RENVOI AND ITS RELATION TO VARIOUS APPROACHES TO THE CHOICE OF LAW PROBLEM, IN XX CENTURY COMPARATIVE AND CONFLICTS LAW, 380 (K. Nadelmann, A. Von Mehren & J. Hazard eds. 1961); Seidelson, *The Americanization of Renvoi*, 7 DUQ. L. REV. 201 (1968-69).

27. 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

28. 107 N.H. 30, 216 A.2d 781 (1966).

29. 49 N.J. 226, 229 A.2d 625 (1967).

volved."[30] Whether an examination of these decisions would have altered the court's decision in the instant case is questionable, given the court's heavy emphasis on New Jersey public policy. However, their failure to do so unquestionably detracted from the quality of their conflicts analysis.

The Retroactivity Issue

There exists the added possibility that the *Purcell* court misread the status of New Jersey forum law on the immunity question. The crucial issue as framed by the court was whether the *Sanchez* holding, allowing interspousal suits upon divorce, represented a significant change in the common law of New Jersey.[31] If so, *Darrow* indicates that New Jersey would require prospective application of the lifting of the immunity and the barring of the suit in the instant case.[32] This court, Judge McLaughlin again dissenting, answered in the negative, stating that the *Sanchez* court merely purported to apply to a *new* factual situation the *existing* common law of New Jersey.[33] Therefore, they concluded that retroactive application of *Sanchez* was proper. In discussing *Sanchez*, the court in *Immer*, stated unequivocally that:

> This result was reached although at common law neither spouse could maintain a tort action against the other even when the action was brought after the marriage relationship had been terminated by separation or divorce.[34]

Even absent *Immer's* conclusive interpretation of *Sanchez*, the court's reasoning on the retroactivity issue would appear to be indefensible. It is hard to see how the *Purcell* court could have reasoned that the rationale given in *Darrow* in favor of prospective abolishment of the immunity, *i.e.*, justifiable reliance by insurance carriers and insureds in the investigation of claims and the providing of protection,[35] would be of any less weight in the *Sanchez* situation than it was in *Immer*. Especially so, it may be emphasized, when applied to Pennsylvania domiciliaries insured by Pennsylvania carriers, a state wherein immunity is the gen-

30. *Id.* at 229, 229 A.2d at 627.
31. 444 F.2d at 380.
32. Darrow v. Hanover Township, 58 N.J. 410, 278 A.2d 200 (1971).
33. *Id.*
34. 56 N.J. at 487-88, 267 A.2d at 484, *citing* Kennedy v. Camp, 14 N.J. 390, 396, 102 A.2d 595, 597 (1959); Philips v. Barnet, 1 Q.B.D. 436 (1876); 1 HARPER & JAMES, TORTS, at 644 (1956); W. PROSSER, TORTS, § 116 at 882, n.40 (3d ed. 1964).
35. 58 N.J. at 417-19, 278 A.2d at 204-205.

eral rule. The court's failure to do their homework again had the effect of transforming a no conflict situation into an actual one. A correct reading of *Sanchez* would have resulted in labeling New Jersey an immunity state for the purposes of this case. If their reading of Pennsylvania law on the subject were correct, Mrs. Purcell would have been left with no interested jurisdiction favorable to her cause and her claim would have been barred. It has already been noted, however, that the court was deficient in failing to recognize an articulated Pennsylvania interest in a divorced spouse's right of recovery. This consideration, while destroying the no conflict possibility, leaves us with a law-fact constellation easily labeled a false conflict in favor of the non-immunity approach. Once the common domicile disclaims a domestic relations interest in limiting the spouse's recovery, there can be no rational argument for imposing another state's immunity rule to bar the claim. It would therefore appear that upon careful analysis *Purcell* becomes an "easy" conflicts case, which the court unduly complicated by misinterpreting New Jersey and Pennsylvania law.

The Post-Accident Change of Domicile

A third issue barely touched upon by the court was the significance of Mr. Kapelski's shift of residence to California following the accident, and his subsequent divorce from the plaintiff. The court cites this as one factor mitigating against application of the *Emery-Koplik* rule designed to further the interests of domiciliary states in family law matters.[36] Without further comment, the majority assumed that this post-accident change merited consideration in determining state interest, even though several cases[37] and the Second Restatement[38] hold that state interest should be judged as of the date of injury. The court's summary treatment of this problem is unfortunate, both from a decisional and scholarly standpoint. There exists a separate line of authority which could have arguably supported the majority's position and provided the court with an opportunity to pioneer in choice of law analysis.

This separate line, as reflected in *Miller v. Miller*[39] and *Haines v.*

36. 444 F.2d at 383.

37. *See* Gore v. Northeast Airlines, Inc., 373 F.2d 717, 723 (2d Cir. 1967); Tierran v. Westext Transport, Inc., 295 F. Supp. 1256, 1264, n.6 (D. R.I. 1969); Reich v. Purcell, 67 Cal. 2d 551, 555, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967); Doiron v. Doiron, 109 N.H. 1, 5, 241 A.2d 372, 374-75 (1968).

38. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Ch. 7, Topic 1, Introductory Note (1971).

39. 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

Mid-Century Insurance Company,[40] holds generally that where there is no evidence of "home-shopping" or that a party will be unfairly surprised, a court should not disregard the post-accident change unless an overwhelming nexus exists between the former domicile and the issue to be determined. In *Miller* it was held that a Maine defendant who moved to New York forfeited the protection of Maine's wrongful death limitation.[41] Since a non-fatal injury would have exposed the defendant to unlimited liability in either state, the court's argument that the application of New York law was not unfair is well taken.

It is submitted that the *Miller* result unwittingly imposed by the court in the instant case was not appropriate; the Pennsylvania domiciliary interest was given too short a shrift. The court assumed that the Kapelskis' divorce destroyed the reason for the immunity, *i.e.*, the preservation of domestic peace and felicity. It seems much more persuasive, however, to argue that allowing suit after divorce provides a tortiously injured spouse with a strong incentive to terminate the marriage in the form of a large money judgment against the other spouse's insurer. Of course, the possibilities of fraud and collusion are obvious. The majority should not have rationalized away Pennsylvania's interest without reference to their law on the subject, merely on the basis of the post-accident change and their interpretation of the reason behind the Pennsylvania rule, which only by happenstance coincided with the view of the Pennsylvania court in *Mutschler*. The essential point is that on the immunity question Pennsylvania retained a lingering interest undiminished by the post-accident change. Although a shift in residence is a natural consequence flowing from a divorce, the enforcement of a *Miller* result conceivably frustrates the common domicile's immunity policy and penalizes the ex-husband in his search for greener pastures. At the very least, the *Purcell* situation deserved more consideration on this issue than was given by the court, if only because of their deviation from the Restatement position on the question, which was not even acknowledged by the court.

Conclusion

Perhaps at this point it would be better to quit beating the proverbial dead horse and examine the implications which the *Purcell* method-

40. 47 Wis. 2d 442, 117 N.W.2d 328 (1970).
41. 22 N.Y.2d at 21, 237 N.E.2d at 882, 290 N.Y.S.2d at 741.

ology precurses for future conflicts cases. Fairness initially dictates that the *Purcell* court not be judged too harshly regarding the omissions and miscitations of authority herein mentioned. Spousal immunity, retroactivity, and post-accident change in domicile are particularly thorny issues, even more so when thrust into a multi-state setting where legal issues tend to be obscured by the broad public policy interests dictated by the court's choice of law approach. The overriding theme of *Purcell*, for instance, was the propriety of a "New Jersey" result, even to the extent of not examining domiciliary law in what can very arguably be considered a "family law" case.

However, what one person may consider to be the "ostrich" approach, another may view as simply a wise instance of refusing to open Pandora's box. Perhaps it is not realistic to expect a new *Babcock v. Jackson*[42] each time a court is called upon to decide a conflicts case with a slightly new wrinkle; as the early critics of interest analysis perceptively asked, how are we going to decide future cases in the post-lex-loci era?[43] How should we formulate rules of interest analysis so that each new decision need not resemble a scholarly tome? It is submitted that *Purcell* reflects a partial answer to that question: the application of a highly plaintiff-oriented loss-distribution policy favoring recovery whenever the law of the place of injury rejects immunity.[44] Under such an approach the niceties of each state's rules on immunity are not particularly significant. Although the majority specifically limited its holding to the facts of this case, *i.e.*, divorce of the parties and a subsequent domiciliary shift by the defendant, the spirit of the opinion reflects the same "plaintiff wins" psychology which permeates Professor Felix's article on interspousal immunity, from which the above rule was taken.[45] In this regard it would have been esthetically better to have admitted such a bias rather than to have posited the holding upon the hypothetical deterrence, medical creditor and contribution interests advanced in favor of a New Jersey result. The honest and logical approach would have been to declare that in the absence of a predominantly concerned jurisdiction on

42. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *Babcock*, of course, is the landmark decision of the New York Court of Appeals which sparked the modern revolution in conflicts analysis. The New Jersey counterpart to *Babcock* is *Mellk v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967).

43. Particular reference is made to the dissenting opinion of ex-Chief Justice Bell in *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 25, 203 A.2d 796, 807 (1964). In *Griffith*, the Pennsylvania Supreme Court followed the lead of *Babcock* and rejected the rule of lex-loci in favor of an interest analysis approach to conflicts problems.

44. Felix, *supra*, note 25 at 420.

45. Robert L. Felix is an Associate Professor of Law at the University of South Carolina and a noted authority on the subject of interspousal immunity.

the immunity question by reason of the divorce, the better rule of law of New Jersey would control.[46] But the court shied away from such a frontal assault, relying instead on the traditional and supposedly objective "interest-counting" formula in coming to their decision. Perhaps this can best be explained as the natural reluctance of a federal tribunal to pioneer in areas of state concern, even though New Jersey conflicts law does not preclude the better rule of law approach.[47] But in any event, the result reached by this court was the same, perhaps the reflection of an unconscious attitude that under certain circumstances it is better to be right than good.

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46. The phraseology used is that of Professor Leflar, the most eminent of the better rule of law theorists in the conflicts area. See Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587-88 (1966); Leflar, *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 295-304 (1964).

47. 49 N.J. at 233, 229 A.2d at 629.