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THE CHANGE IN THE MEANING OF CONSORTIUM

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LAWYERS have long boasted of the flexibility of the common law, of its ability to adapt itself to the needs of changing conditions of society, of its responsiveness to sociological progress. And while eager reformers have often—and with much reason—complained that the law is laggard in its response to the needs of the people, yet it is clear that sooner or later the courts generally bring themselves into accord with "what is sanctioned by usage, or held by the prevailing morality or strong and preponderant public opinion to be greatly and immediately necessary to the public welfare."[1] This responsiveness to the needs of society, this adaptability to changing demands, necessarily results in a change in the meaning and content of legal words and phrases. It is clear that a word, meaning one certain definite thing in the fourteenth century, will mean much more in the twentieth century. To quote again from Mr. Justice Holmes, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[2] There are of course numerous instances of such change in the meaning of technical legal terms. It is the purpose of this paper to trace the change in the meaning and content of the

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[1] Mr. Justice Holmes in Noble State Bank v. Haskell (1911), 219 U. S. 104, 111.

[2] Towne v. Eisner (1918), 245 U. S. 418, 425.

term "consortium"; a term which has been variously defined,[3] but which, in general terms, includes the right of one spouse to the conjugal fellowship of the other, to the other's company, coöperation and aid in the conjugal relation.[4]

At Common Law

Under the common law, a husband's right to the consortium of his wife was clear and definite. In addition to his complete control over her property, he was entitled to her custody, her services, and her conjugal affection;[5] any interference with those rights, as by abduction of the wife, by injury to her (either intentional or negligent), or by adultery with her, gave rise to a right of action by the husband,[6] based on the injury done to "his interest in her."[7]

As to the corresponding rights of a wife to the consortium of the husband, there seems to be no authority in the early common law.[8] Two reasons are presented as accounting for such absence of authority on this point: first, that there was no right in the wife corresponding to that which clearly existed in the husband; second, that such a right existed, but could not effectively be exercised because of the procedural difficulties connected with the common law rules under which a married woman was incapable of suing except when her husband was joined as plaintiff, and under which the husband was entitled to the proceeds of any suit brought by her and him.

Blackstone thus phrases the former of those two views: "We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such

[3] "The right of the husband and wife respectively, to the conjugal fellowship, company, coöperation and aid of the other."—Bouvier.

"The companionship or society of a wife."—Black.

"Conjugal fellowship and assistance."—Anderson.

[4] See Bigaouette v. Paulet (1881), 134 Mass. 123.

[5] The third element included, of course, his exclusive right to sexual intercourse with her.

[6] See 1 Bac. Abr. 502 (Baron and Feme); 4 id. 552 (Marriage and Divorce); 3 Bl. Comm. 139, 140.

[7] 4 Bac. Abr. 552.

[8] See 16 Halsbury, Laws of England, 319, note 2.

injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury."[9]

The procedural difficulty, arising out of the two common law rules recited above, would of course be sufficient to account for the non-appearance in the reports of any suits brought by a wife to recover for the loss of her husband's consortium. In suits based on alienation of his affections or for adultery with him, he would of course be a wrongdoer along with the defendant, and would profit by his own wrong if a recovery by the wife were permitted. In cases based on the wife's damages arising out of an injury to him, he would of course have his own action against the defendant; it would be simpler to assess and award to him, in that one action, all the damages arising from the wrong, rather than to permit two actions, one by the husband and one by the wife, the proceeds of both of which would accrue to him under the rule of the common law which gave him a right to her choses in action.

Inasmuch as this procedural impediment sufficiently accounts for the absence of common-law authority on this point, it is of course difficult to argue effectively in favor of the view that the wife actually had such a right at common law, but that it was held in abeyance by the procedural impediment.[10] There is, however, one fairly cogent negative argument against the existence of such a right in the wife. Equity, recognizing the too great rigor of the common law rules giving the wife's property to the husband, developed a highly effective method of protecting the wife's property through the creation of the equitable separate estate. If there had been any definite idea that the wife's right to consortium was a valid, subsisting right, ineffective only because of a technicality of legal procedure, it seems likely that some equitable remedy, such as injunction, might have been used to

[9] 3 Bl. Comm. 142.

[10] There is a frequently quoted dictum of Lord Campbell in favor of the existence of the wife's right in Lynch v. Knight (1861), 9 H. L. Cas. 577, 589. He says: "Nor can I allow that the loss of consortium, or conjugal society, can give a cause of action to the husband alone; * * * it may be a loss which the law may recognize, to the wife as well as to the husband."

The same view is expressed by Mr. Justice Darling in Gray v. Gee (see note 14, *post*).

protect it. But no such case is found until the dawn of the present century.[11]

The situation at common law is then clear. The husband had the right to consortium, and could effectively protect it by clearly defined rights of action; the wife either did not have it or was denied the right of action to protect it.

After the Married Women's Acts

The different Married Women's Acts are almost infinitely various in their specific provisions. But they agree in their general purpose to ameliorate the disadvantageous position in which the married woman was placed by the common law. And generally they achieve that purpose, with some variations as to effectiveness, by providing (1) that a wife may hold property as her own, free from control by her husband, or subject only to a much lessened control by him; (2) that she may sue without joining him as a plaintiff, and may hold, as her own property, the proceeds of such suits; (3) that she is entitled to her own earnings. These three are of course only different elements of the general emancipation of the wife from the common law domination by her husband, and are here stated separately only because one or another is frequently relied upon as being the basis of a change from the common law rules which are briefly set out above.

One result of the Married Women's Acts was the bringing of suits to recover for loss of consortium resulting from the defendant's alienation of the affections of the plaintiff's husband. The right to bring such a suit is based on the first or the second of the elements noted above as being characteristic of the Married Women's Acts. Some courts base it on the theory that a wife's right to consortium is a property right and that she is now expressly given the right to hold property; some courts based it on the theory that a wife had

[11] Ex parte Warfield (1899), 40 Tex. Crim. 413, and Hall v. Smith (1913), 140 N. Y. Supp. 796, recognize the power of a court of equity to enjoin a defendant from continuing in a course of conduct tending to alienate the affections of plaintiff's spouse; in the latter case the injunction was refused because a proper case was not made out.

Judicial intervention in somewhat similar cases was not unknown to the practitioners of old days; the wife was entitled in the ecclesiastical courts to a decree for restitution of conjugal rights, and equity habitually enjoined—and punished—interference with its wards. Butler v. Freeman (1756), 1 Amb. 301.

had the right at common law (though incapable of enforcing it) and that the statutes empowering her to sue have now removed that incapacity.[12] At least one court holds that the right existed without any statutory enactment removing the wife's incapacity to sue, on the broad ground of equality between husband and wife.[13] A few courts hold that no right existed at common law, and that none has been conferred by the statutes, and thus deny any right to the wife. Practically every jurisdiction in America, however, now holds that a wife can sue for the alienation of her husband's affections. It is interesting to note that while this result was achieved in America several years ago, it was not until the present year that the wife's right to maintain this action was established in England. In *Gray v. Gee,*[14] Mr. Justice Darling held that such an action would lie, stating that it was the first such case that had arisen in England.

The courts took the same view of a wife's action in the nature of crim. con. to recover damages for a defendant's adultery with the plaintiff's husband. This action has been generally upheld in the American jurisdictions,[15] though there is more dissent than in the case of alienation of affections.[16] The question cannot arise in England, as the action for crim. con. was abolished in 1857.[17] In addition to recognizing these two rights of action in the wife, the courts have upheld also her right to sue in other cases where the defendant had done acts which resulted in the wife's loss of consortium. Thus, in *Flandermeyer v. Cooper,*[18] the defendant had sold morphine to plaintiff's husband, with the result that he had become insane and was confined in an asylum; the court upheld the right of the wife to sue for loss of consortium. And in *Work v. Campbell*[19] a defendant who had made wilfully false statements to a wife about her husband, as a result of which she was induced to send him away, and thus was deprived of his consortium, was held liable to the wife.

[12] In Eliason v. Draper (1910), 25 Del. 1, 5-7, many of the cases previous to the date of the decision are collected and classified.

[13] Foot v. Card (1889), 58 Conn. 1.

[14] Reported in the TIMES (Weekly Edition) for May 3, 1923. The verdict was for the defendant.

[15] See Turner v. Heavrin (1918), 182 Ky. 65, in which the cases are collected.

[16] See Kroessin v. Keller (1895), 60 Minn. 372 and the cases there cited.

[17] Matrimonial Causes Act, 1857 (20-21 Vict., Ch. 85), Sec. 59.

[18] (1912) 85 Ohio St. 327.

[19] (1912) 164 Calif. 343.

But while the courts were thus upholding the wife's right to sue for loss of consortium in such cases, where the act of the defendant was wilful and intentional, they were unanimously denying it in cases where the wife's loss of consortium was the result of defendant's negligent injury of the husband.[20] The reason given for this distinction is usually as follows: in cases of crim. con. and of alienation of affection, the husband has of course no right of action against the defendant, as he is a joint wrongdoer with the defendant. In the case of the negligent injury to the husband, however, he does have an action against the defendant, and in that action the husband can recover for his pain and suffering and for his loss of earning power, by which his ability to support his dependents is lessened. It is likely, in view of our crude method of trial, that all the damages arising out of the wrong could be as well assessed and awarded in one action as in two. As Dean Pound puts it: "If husband and wife were each allowed to sue, instead of each recovering an exact reparation, each would be pretty sure to recover what would repair the injury to both.[21]

The enlarged right of the wife under the Married Women's Acts is therefore pretty clear; she can generally sue for any intentional injury to the consortium, but cannot sue for a loss of consortium due to negligence.

How have the husband's rights been affected by such legislation? His right to his wife's conjugal affection is of course not diminished by the statutes, and he can accordingly still sue for alienation of her affections and for crim. con. His right to her earnings is now taken away by statute, so that in case of an injury to her he can no longer recover, as he could at common law, for her diminished earning capacity. He is perhaps[22] still entitled to her services in the household, and can therefore recover for an injury to her

[20] Recent cases upholding this denial of the wife's right are: Smith v. Nicholas Bldg. Co. (1915), 93 Ohio St. 101; Emerson v. Taylor (1918), 133 Md. 192; Cravens v. L. & N. R. Co. (1922), 195 Ky. 257. The earlier cases are collected in a note to Smith v. Nicholas Co., *supra*, in 14 MICH. L. REV. 689.

[21] "Individual Interests in the Domestic Relations," 14 MICH. L. REV. 177, 194.

[22] Some states seem to allow the wife to recover, in her own suit, for her diminished capacity to perform work even about the household. Colo. Spgs. etc., R. Co. v. Nichols (1907), 41 Colo. 272; Glanville v. C. R. I. & P. Ry. Co. (1923), — Iowa —, 193 N. W. 548.

ability to perform such services.[23] And of course, as he is bound to furnish necessaries to her, he can recover, from a defendant who has injured her, the cost of medical attention, etc. But is there anything else for which he may recover? At common law he certainly could recover for the loss of her society, her "company, coöperation and aid," if she were so severely injured that there was a loss of these features of the consortium. Does this right still survive to the husband, in spite of its diminution by the statute? Clearly, the great weight of authority is that it does survive,[24] but there is a respectable—and increasing—number of jurisdictions holding that after the husband's right to services is abolished by the statute there is nothing left on which an assessment of damages can be predicated;[25] that the husband, by the statutory whittling down of his common law rights over his wife, is reduced to a position of equality with her in this regard, and that if she has no right to recover for a negligent injury to the husband which results in the loss of consortium, he has no greater right in a case where she has been negligently injured. As it is put in a recent case, "The law will not attempt to fix pecuniary compensation in favor of the husband for the indirect effect which the wife's injuries may have had upon the sentimental side of the consortium."[26]

The Married Women's Acts have therefore produced the following results: the wife is almost everywhere given a right to sue for intentional interference with the consortium, as by alienation of affection, crim. con., sale of incapacitating drugs, etc., but she is denied a right to sue for loss of consortium resulting from negligent injury to the husband; the husband retains his common law right to sue for alienation of affections and for crim. con., but cannot recover for the diminution of the wife's ability to earn money, though he can still recover, in most jurisdictions, for her diminished capacity to work in the household. As to his right, clearly recognized and pro-

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[23] Blair v. Seitner Co. (1915), 184 Mich. 304.

[24] Guevin v. Manchester St. Ry. (1916), 78 N. H. 289, in which many authorities are collected.

[25] Bolger v. Boston Elev. Ry. Co. (1910), 205 Mass. 420; Marri v. Stamford St. Ry. Co. (1911), 84 Conn. 9; Blair v. Seitner Co., *supra;* Golden v. R. L. Greene Paper Co. (1922), — R. I. —, 116 Atl. 579.

[26] Golden v. R. L. Greene Paper Co., *supra.* In this case the injury to the sentimental side of the consortium consisted in the wife's lessened capacity for sexual intercourse.

tected at common law, to recover for the loss of her society, the clear weight of authority is that he retains this right of action, though a few courts, impressed by the fact that the wife is consistently denied such right and by the desirability of putting husband and wife on a basis of equality in law, have held that the husband no longer has this right.

The insistence on equality between the spouses is certainly justified, in view of the present public opinion, and such equality is certainly the end toward which the Married Women's Acts tend. But can it not be attained better by giving the right to the wife than by taking it away from the husband? Only one court has had the courage to take this step. The Supreme Court of North Carolina, in *Hipp v. Dupont & Co.*,[27] held that a wife had a right of action for loss of consortium arising out of injuries suffered by the husband because of defendant's negligence. The court considered the various reasons which have persuaded other courts to deny such a right to the wife, and held that they no longer existed, because of the Married Women's Acts, or that they were not valid.

It is difficult to avoid the conclusion reached by the North Carolina court. The husband's right to consortium at common law was protected from injury, either intentional or unintentional, and it is still protected in all cases by the great weight of authority, even since the Married Women's Acts. Why should the right of the wife be restricted to cases in which there is intentional interference by the defendant, while the husband is given the right, regardless of intent? We cannot properly invoke the principle which gives a right of action for an act done malevolently when no right of action would exist if the act were done without malice, for in cases of crim. con. and of alienation of affections there is never that active malevolence toward the plaintiff which is made the gist of the right of action. Nor is it at plaintiff which is made the gist of the right of action. Nor is it at all clear that the danger feared by Dean Pound[28] as to double recovery is any more apparent here than in many other cases. In many cases of injury to one spouse, the other spouse unmistakably suffers individual loss; a sick, lame, nervous spouse is less desirable as a companion than a spouse in normal physical condition. Perhaps the

[27] (1921) 182 N. C. 9. A note in 35 HARV. L. REV. upholds the decision of the court.

[28] See note 21, *supra*.

injury is one that is difficult to measure in pecuniary terms, but it undoubtedly is a real injury, and can certainly be as accurately measured as the injuries in cases of alienation of affection. Certainly there has been no bad result from allowing the husband to sue in such cases, and it seems better to allow the action to the wife as well, rather than to take it away from the husband merely because of a desire to make the law symmetrical.

It seems likely that the principle of equality between the spouses will gain increasing recognition by the courts, but of course it is too early even to guess whether the view of the North Carolina court or that of the New England courts will predominate. In any event, it is clear that another change is being made in the meaning of "consortium."