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NOTES

CONSORTIUM—RIGHT OF WIFE TO SUE FOR LOSS OF CONSORTIUM WHERE HUSBAND'S INJURY IS DUE TO DEFENDANT'S NEGLIGENCE.—Prior to the nineteenth century there was little confusion in the law governing causes of action arising from the marriage relationship. Today, however, there is a ceaseless struggle between those who, adhering to tradition, blindly follow precedent and those who, wishing to be reasonable, change with the nature of human affairs. The antagonism in this branch of the law is due to the married women's acts and a change in the meaning of consortium.[1] The equality of spouses would not have brought about such conflict in decisions if the courts in the very beginning had kept pace with the social changes, and recognized the rights of women which the legislatures had bestowed upon them.

To dip into history and give the common law view of consortium will give a better understanding of the problem that confronts us. By marriage the husband and wife become one person, giving to the husband complete domination over all her property. His rights also extended to her services, and conjugal society or consortium. Any interference with the husband's rights in his wife gave rise to a cause of action by the husband in trespass, *per quod consortium amisit.*

[1] Holbrook, *The Change in the Meaning of Consortium,* 22 MICH. L. REV. 1.

Since the wife alone had no standing at law, she could not maintain an action for the loss of consortium of the husband. She may have had the right to the consortium of her husband, but due to procedural rules the wife could not protect it in a court of law.[2]

Consortium may be defined as "the mutual right of the husband and wife to the society, companionship and affection of each other, and the right of the husband to the services of his wife." [3] It can readily be seen that the common law made good its boast, "for every right there is a remedy," when the husband was allowed to recover for alienation of affections,[4] criminal conversation [5] and any other injury to his wife caused by a third person whether it be negligent or wilful.[6] At the common law then the marriage relationship was marked by three distinct features: unity in person, husband and wife one person; unity in property, wife's property belonged to husband; unity in law, husband (or when wife joined with him) only could maintain a suit for an injury affecting the marital status.[7]

At the close of the nineteenth century we find a radical change has taken place, brought about by the so-called "married women's acts." The wife is no longer the slave nor the chattel of her husband. In view of the law she has become a distinct and independent person from her husband, with the right to own property, to keep her earnings and to bring actions at law or in equity without joining her husband as a necessary party.[8] Did the legislatures intend, when they made the wife *sui juris*, that she should have the same rights and remedies that belonged to her husband at common law? The problem was passed on to the courts, and from this point on the conflict began which resulted in a hopeless confusion of decisions. Judges steeped in common law traditions were prone to disregard the spirit of these laws and to read into the statutes ideas the legislature never intended to be there.

Since modern statutes and customs have changed the status of the wife, making her equal to her husband, providing for her separate estate, and allowing her to be entitled to her own earnings, some courts instead of enlarging the wife's rights as to recovery for loss of the

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2 Lynch v. Knight, 9 H. L. Cas. 577 (1861).

3 Marri v. Stamford Street R. R. Co., 78 Atl. 582 (Conn. 1911). See, also, Bigaouette v. Paulet, 134 Mass. 123 (1883), where the court defined consortium as "the right to the conjugal fellowship of the wife, to her company, cooperation and aid in every conjugal relation."

4 Adams v. Main, 3 Ind. App. 232 (1891) (On page 235 the court said that "the action for alienating a wife's affections is not based upon the loss of the wife's services, but upon the loss of the consortium.").

5 Prettyman v. Williamson, 39 Atl. 731 (Del. 1898).

6 Skoglund v. Minneapolis St. Ry. Co., 47 N. W. 1071 (Minn. 1891).

7 1 Bl. Comm. 442.

8 Harmon v. Old Colony R. R. Co., 42 N. E. 505 (Mass. 1896).

husband's consortium, have turned about and denied *in toto,* the right of the husband to recover for the loss of consortium of the wife caused by injury to her.[9] Fortunately, however, the great majority of the courts enlarged the wife's rights and kept the husband's rights as they existed at common law. They properly held that the wife, under modern law, has her separate cause of action for the invasion of her interests.[10] Except for intentional invasions of her interests, such as alienation of affection [11] and criminal conversation,[12] the right of the wife to recover for the loss of her husband's consortium generally has been denied.[13] Either the husband or wife may recover for intentional and malicious interference with the conjugal relation.[14]

The courts that have denied the right of the husband to recover for the loss of consortium caused by injury to his wife have lost sight of the meaning of consortium. At the common law it was seen that consortium included services. Now it includes only love, affection, society and comfort, consequently many courts taking this view deny the husband the right of recovery for loss that he may have sustained upon the sentimental side of the consortium.[15] The theory being that the wife may recover in her action for the loss of her earning power and ability to render domestic services. This doctrine therefore makes no provision whatsoever for compensation for loss of the sentimental elements of consortium.[16] But the reason behind the theory, that the

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9 Marri v. Stamford Street R. R. Co., *op. cit. supra* note 3; Feneff v. New York Cent. & H. R. R. Co., 89 N. E. 436 (Mass. 1909); Blair v. Seitner Dry Goods Co., 151 N. W. 724 (Mich. 1915).

10 MADDEN ON PERSONS AND DOMESTIC RELATIONS 159, and cases cited therein.

11 Nolin v. Pearson, 77 N. E. 890 (Mass. 1906); Ramsey v. Ramsey, 156 Atl. 354 (Del. 1931); Rott v. Goehring, 157 N. W. 294 (N. D. 1916); Bennett v. Bennett, 23 N. E. 17 (N. Y. 1889); Parker v. Newman, 75 So. 479 (Ala. 1917).

12 Turner v. Heavrin, 206 S. W. 23 (Ky. 1918); Oppenheim v. Kridel, 140 N. E. 227 (N. Y. 1923).

13 Nash v. Mobile & O. R. Co., 116 So. 100 (Miss. 1928); Sheard v. Oregon Electric Ry. Co., 2 Pac. (2d) 916 (Ore. 1931); Brown v. Kistleman, 98 N. E. 631 (Ind. 1912).

14 Flaudermeyer v. Cooper, 98 N. E. 102 (Ohio, 1912) (Wife recovered for loss of consortium, due to defendant selling her husband morphine after repeated protests by the wife. In an excellent decision Donahue, J., said (p. 104): "But it is the boast of the common law that 'Its flexibility permits its ready adaptability to the changing nature of human affairs.' So that whenever, either by the growth or development of society, or by the statutory change of the legal status of any individual, he is brought within the principles of the common law, then it will afford to him the same relief that it has theretofore afforded to others coming within the reason of its rules. If the wrongs of the wife are the same in principle as the wrongs of the husband, there is now no reason why the common law should withhold from her the remedies it affords to the husband."); Moberg v. Scott, 161 N. W. 998 (S. D. 1917); Holleman v. Harward, 25 S. E. 972 (N. C. 1896).

15 Golden v. R. L. Greene Paper Co., 116 Atl. 579, 21 A. L. R. 1514 (R. I. 1922).

16 Bolger v. Boston Elevated Ry. Co., 91 N. E. 389 (Mass. 1910).

wife could recover for her entire loss herself, evades the issue, for the wife does not recover for the loss her injury has caused her husband. Loss of companionship, conjugal society, mutual aid and comfort and love and affection, while it may mean everything to the spouse, means absolutely nothing to the courts. Is this to be disregarded and cast off just because the married woman is emancipated? The horror of double recovery is also used as an excuse in denying recovery; but the principle has no application where the wife recovers for the loss of her earning power or services and the husband recovers for the loss of consortium, sentimental or otherwise.[17]

The majority of courts, however, have not adopted the view expressed above, where consortium has been divided, but have adhered to the rule giving rise to a cause of action by the husband for loss of consortium or for any other expense he is put to as a result of the wrong committed by a third person to the wife resulting in injury.[18] To invade that right of the husband is a flagrant wrong and to deny recovery is an abuse of justice. So apart from intentional and malicious interference with the marriage relationship, the common law still continues to give to the husband an action for loss of consortium where negligence is the cause of the wife's injury.

Paradoxically, all of the authorities steadfastly refuse to recognize any right in the wife at common law or under married women's acts to recover for loss of consortium for negligent injury to her husband.[19] Furthermore there is no intelligent reason for refusing to recognize the right in the wife. Only one court has had the courage to break away from hide-bound precedents and allow the wife to recover for loss of consortium of her injured husband. In *Hipp v. E. I. Dupont de Nemours & Co.*[20] the plaintiff, the wife of the injured husband, alleged that while working for the defendant her husband was seriously, painfully, and permanently injured as a proximate result of the defendant's negligence, and that by reason thereof she had suffered a nervous shock, resulting in physical ailments, and that she had been deprived of the support and maintenance which her husband would have given and that she had been forced to pay various expenses for his benefit and for the maintenance of her family, and that she had been denied the

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17 Lippman, *The Breakdown of Consortium,* 30 COL. L. REV. 651.

18 Lindsey v. Kindt, 128 So. 143 (Ala. 1930); Kirkpatrick v. Metropolitan St. Ry. Co., 107 S. W. 1025 (Mo. 1908); Wright v. City of Omaha, 110 N. W. 754 (Neb. 1907) (where it was held that the City of Omaha is liable to the husband for consequential damages suffered by him in consequence of injuries to his wife caused from a defective street or sidewalk in the city).

19 Sheard v. Oregon Electric Ry. Co., *op. cit. supra* note 13; Bull v. Chicago, M. & St. P. Ry. Co., 6 Fed. (2d) 329 (W. D. Wash. 1925); Emerson v. Taylor, 104 Atl. 538 (Md. 1918); Cravens v. Louisville & N. R. Co., 242 S. W. 628 (Ky. 1922). See Annotation, 59 A. L. R. 680, for collection of cases.

20 108 S. E. 318 (N. C. 1921).

care, protection, consideration, companionship, aid and society of her husband and that her husband had brought action against the defendant and judgment had been for the defendant. The defendant demurred, and, from a judgment overruling the demurrer to the complaint, the defendants appealed. The judgment was affirmed. The question of loss of consortium was squarely before the court, and its enlightening and well-written opinion deserves comment. The court said: "If the husband could maintain an action to recover damages for torts on the wife she should be able to maintain an action on account of torts sustained by the husband. Such right of action, if it existed in favor of the husband, should exist in favor of the wife. It should be in favor of both or neither. . . ." The court points out the fact that the action of the wife is not for the injuries to the husband, but for the injury she has sustained, namely, the loss of consortium. The mere fact that the husband is no longer allowed to recover for loss of his wife's services, has not, in the majority of cases, extinguished his right to recover the loss of the companionship of his wife.[21] But as said above, no such right exists in the wife except for intentional interference. The court, being unable to find a real and valid reason for such a rule, quotes from a New York case.[22] " 'Why should the husband be allowed a recovery in cases of this character [alienation of affections] and the wife who suffers in the identical same way be denied a recovery? They stand before the same altar; they enter into the same contract.' "

It must be borne in mind that the husband was injured by the negligence of the defendants, and that the damages to the wife, while flowing from the injuries to her husband, are purely injuries to herself, and for which the husabnd has no cause of action. The wife's cause of action arises solely from the marriage contract and the nature of the relationship between the husband and wife. It no longer depends upon the fiction of loss of services, but is based upon the ground that the party bringing the action, whether husband or wife, has sustained an injury caused by the wrongful conduct of a third party. The court, in the *Hipp* case, concludes, "While the wife cannot recover for any damages for which the husband might have recovered . . . we think that she could recover for those injuries which were sustained by her, and, being personal to her, for which the husband could not have recovered in his action."

Unfortunately the *Hipp* case has been severely criticized almost to the point of being overruled by two subsequent North Carolina decisions, namely, *Hinnant v. Tide Water Power Co.*[23] and *McDaniel v. Trent Mills.*[24] The language used by the court in the *Hinnant* case fol-

21 See collection of cases in 34 L. R. A. 803; 40 L. R. A. (N. S.) 360.

22 Jaynes v. Jaynes, 39 Hun (N. Y.) 40 (1886).

23 126 S. E. 307 (N. C. 1925).

24 148 S. E. 440 (N. C. 1929).

lows: ". . . to sanction such right of recovery [by the wife] would be tantamount to the recognition of a doctrine utterly at variance with a most enlightened judicial opinion prevailing in other jurisdictions." Floundering about for a reason to sustain their narrow view they call upon the "most enlightened judicial opinion prevailing in other jurisdictions."

In *Sheard v. Oregon Electric Ry. Co.*[25] the court admits its inability to cope with the situation when it offers as a reason for denying the wife's recovery, "the law has never granted to the wife a right of action for loss of consortium sustained by a negligent act, and that must suffice as a reason for our conclusion." As Chief Justice Bond in a dissenting opinion in *Bernhardt v. Perry*,[26] aptly said, "So prone are the courts to cling to consuetudinary law, even after the reason for the custom has ceased or become a mere memory, that it has required hundreds of years to obtain the meed of justice for married women."

In a recent New York case,[27] that transcends all principles of justice and morals, the wife was denied recovery. The plaintiff's action was predicated upon the negligence of the defendant in causing physical injuries to her husband resulting in his emasculation, so that children could not be borne out of the marriage. The court said: "There are so many elements of doubt and conjecture in connection with the birth of children that it cannot be said that the wrong is the proximate cause of the loss." The dissenting opinion by Scudder, J., gives the better view; he says: "This is not an action by a wife for loss of services of her husband, but for the loss of consortium," and, again, "I do not follow the logic of the argument to the effect that a husband may sue for loss of consortium, but a wife may not. In the eyes of our law, marriage is a civil contract; its justification is procreation to preserve the family and the state. Shall it be said that one of the parties to this contract, the wife, may be deprived of its fruit through the tort of a third person without the redress accorded to the husband?"

The reason for the rule having ceased to exist, it is time that the courts abandon the common law view and place the wife's right of recovery on broader grounds consistent with the holding in the *Hipp* case, and the dissenting opinion in the *Bernhardt* and *Landwehr* cases.[28] The law should be well settled in matters arising from the domestic relation. The policy of the law should be to protect with an iron hand if necessary, the marriage relationship, the family, and the home. Is not the family the fundamental unit of the state? With state legislatures running rampant and abolishing causes of actions that pro-

25 *Op. cit. supra* note 13.

26 208 S. W. 462, 470 (Mo. 1919).

27 Landwehr v. Barbas, 270 N. Y. S. 534 (N. Y. 1934). Accord: Boden v. Del-Mar Garage, Inc., 185 N. E. 860 (Ind. 1933).

28 See, also, Clark v. Hill, 69 Mo. App. 541 (1897), *overruled*, Gambino v. Coal & Coke, 158 S. W. 77 (Mo. 1913).

tect the home and family, to whom may the injured spouse go to look for protection if not to courts? In some few states civil actions for alienation of affections, criminal conversation, seduction, and breach of promise to marry are abolished.[29] They are said to be against public policy. Against the public policy of whom, the state? But the state is made up of a large number of families. With such a statute in force, if A alienates the affections of B's wife or vice versa the injured spouses have no remedy. Are they supposed to applaud and cheer the action of the legislature and go out and steal another's mate? The digression was for the purpose of illustrating the dire consequences that will surely result if courts and legislatures do not see the monumental errors they are committing in the name of public policy when they fail to protect or interfere too much with the marital relation.

That the courts will ultimately give to the wife a right of recovery is a matter of conjecture. Many attempts have been made to persuade the courts to adopt a more liberal view and to hold that the right to sue for loss of consortium should be mutual since the equality of spouses has been recognized before the law. Does not the wife suffer the same injury from the loss of consortium as the husband? He has no greater rights than she; both share each other's love and affection, society and comfort. They are joined together in one ceremony arising from one contract. The very essence of the marriage relation is unity brought about by mutuality. The married women's acts have made her status equal to that of her husband; they have not changed the basic relationship between them. A flagrant wrong is committed every time anyone wilfully or intentionally, or negligently interferes with the rights of either spouse in each other, and it is a disgrace to the law that the remedies of husband and wife are not full, adequate, and mutual. Inasmuch as the husband has the right to sue for the loss of the consortium of the wife, there is and can be no intelligent reason why she should not possess the right to sue for the loss of the consortium of the husband. It is fitting and proper that in conclusion a passage be quoted from a modern authority on the law of torts covering the point above discussed.[30] "While the married women's statutes have removed the so-called relation of master and servant from the marital status, the fact that such relation was frequently a fiction surviving from the early law ought to induce the courts to formulate anew the principles of policy involved. When this is done, the path will be clear for the action by the wife against one who has harmed her husband and thus invaded her interest in the marital relation—an interest which is quite as real and worthy of protection as the husband's."

Anthony W. Brick, Jr.

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29 The constitutionality of the New York Statute was upheld in Fearon v. Treanor, 5 N. E. (2d) 815 (N. Y. 1937).

30 HARPER, LAW OF TORTS 566.

MORTGAGES—PRIORITY UPON FORECLOSURE OF NOTES OR BONDS SECURED BY THE SAME MORTGAGE.—Two recent decisions, one of which deals with the question of priority as between assignees or transferees of different notes or bonds secured by the same mortgage and the other deals with the question of priority as between the mortgagee-assignor and the assignee or assignees, present the ever-recurring problem of priority in the law of mortgages. In *Domeyer v. O'Connell* [1] *E.* executed to *R.* 32 promissory notes aggregating $35,000, bearing the same maturity date, and secured them by a deed to *R.* There was no priority clause in either the notes or mortgage deed. Prior to their maturity all except $6,000 of the notes were assigned by *R.* to various persons without recourse. *E.* defaulted, and the assignees filed a bill to foreclose, asking that the proceeds of the sale be applied pro rata to the payment of the notes held by all owners thereof except *R.*, and that they should take priority over as to the notes held and retained by *R.* The Supreme Court of Illinois held that the assignees and *R.* (the mortgagee) should share pro rata in the proceeds of the insufficient security. In *Metalmann v. Buchanan* [2] a mortgage was executed to secure several bonds which were payable to the mortgagee or bearer. There was no priority clause in the bonds or mortgage deed, but there was a provision in each bond that gave the holder an option to foreclose upon the default of any interest payment. The appellant was holder of three of these bonds, two of which matured prior to all of the other bonds and the third matured later than some of the other bonds. In a suit by the bondholders to foreclose the mortgage, the appellant claimed priority in the order of maturity of her bonds. The Appellate Court of Indiana held that those bonds maturing first were entitled to priority of payment.

There are three [3] different rules that have been applied in the cases dealing with the question of priority of payment of different notes or mortgages secured by the same mortgage or deed of trust, where there is no provision in the notes, bonds or mortgage for priority in case of insufficient proceeds to satisfy all of the notes or bonds and the notes or bonds are held by different assignees or transferees. (1) The pro rata rule, requiring all the assignees or transferees to share ratably in the proceeds of the mortgage security; (2) The priority of maturity rule (the first maturing are to be paid first out of the mortgaged property,—the mortgage, as to the notes or bonds, being regarded as so many successive mortgages); and (3) The priority of assignment rule (the assignee of a part of the mortgage debt is entitled to a preference to the mortgagee who retains a part of the notes or bonds, while as between the assignees themselves priority of assignment generally gives no preference, though the cases are not in harmony).

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1 4 N. E. (2d) 830 (Ill. 1936).

2 198 N. E. 460 (Ind. App. 1935).

3 3 JONES ON MORTGAGES (8th ed.) §§ 2187, 2189, 2190; Annotation, 50 A. L. R. 543, 546-575.

The pro rata rule is supported by the numerical weight of authority.[4] It has been applied without regard to the date of maturity of the notes or bonds secured by the mortgage or the dates of their assignment, in the absence of an agreement showing a contrary intention.[5] A superior equity in favor of one holder (or assignee) may give him priority over another holder (or assignee) in states applying this rule.[6]

As between mortgagee-assignor and the assignee some courts apply the rule that the assignee, by virtue of the assignment, has an equity against the mortgagee-assignor, giving him a preference, in equity, to payment out of the mortgage funds, in preference to the notes or bonds retained by the mortgagee-assignor, even though the notes assigned may fall due subsequently to those retained by the mortgagee-assignor.[7] This rule is based on the theory that as between the mortgagee-assignor and the assignee, the assignment operates as an assignment of the mortgage *pro tanto*—not *pro rata;* that is, there is an assignment of so much of the security as shall be adequate for the payment of the notes or bonds assigned.

There is some authority for the rule that an earlier maturing note or bond retained by the mortgagee-assignor has priority over a later maturing one in the hands of an assignee.[8] The fact that the mortgagee-assignor may be liable on his indorsement is not material.[9] Liability on the indorsement is personal, and it should not affect the rule. Priority is fixed by the notes or bonds themselves, under this rule. Neither is the rule subject to an exception where all of the notes or bonds may, under a provision in the mortgage, mature at the same time.[10] To make exceptions would promote uncertainty in the security market and affect the value of the notes or bonds.

The preference of the assignee over the mortgagee-assignor, in states applying the pro tanto rule, seems to be based on the theory that the debt is the principal thing and the mortgage is incidental, and an assignment of a part of the debt will draw after it its incidents, regardless of the order of maturity of the notes or bonds secured by the mortgage.[11] This principle is analogous to two others: (1) Where one who has two mortgages of equal date on the same land, and assigns

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4 Annotation, 50 A. L. R. 543, 569; 3 JONES ON MORTGAGES (8th ed.) § 2190.

5 First Nat. Bank v. Andrews, 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885 (1893); State Bank of O'Neill v. Mathews, 45 Neb. 659, 63 N. W. 930, 50 Am. St. Rep. 565 (1895).

6 Appeal of Fourth Nat. Bank, 128 Pa. St. 473, 16 Atl. 779 (1889); 22 VA. L. REV. 592.

7 Parkhurst v. The Watertown Steam Engine Co., 107 Ind. 594, 8 N. E. 635 (1886).

8 Hinds v. Mooers, 11 Iowa 211 (1860).

9 See Hinds v. Mooers, *op. cit. supra* note 8.

10 Leavitt v. Reynolds, 79 Iowa 348, 44 N. W. 567, 7 L. R. A. 365 (1890).

11 Cullen v. Erwin, 4 Ala. 452 (1842).