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HUSBAND AND WIFE — WIFE'S RIGHT TO RECOVER FOR LOSS OF "CONSORTIUM" DUE TO INJURY TO HUSBAND FROM WRONGFUL SALE OF LIQUOR — Plaintiff sued for loss of her right of consortium occasioned by the illness and death of her husband as a result of a sale of liquor by defendant in violation of a state statute.¹ Defendant demurred on the ground that there was no cause of action granted by the statute for damages flowing from such an illegal sale. *Held*, an action for injury to the wife's right of consortium was available at common law. *Swanson v. Ball*, (S. D. 1940) 290 N. W. 482.

An Ohio court has defined consortium as including the affection, solace, comfort, companionship and society incidental to the marital relationship and the services of the wife.² At common law, the marriage compact established the right of consortium in the husband and courts have justifiably protected this right against willful or negligent injury.³ The wife, however, had no legal right to the services of the husband⁴ as she became a legal nonentity at marriage,⁵ and

¹ "No licensee shall sell any intoxicating liquor . . . To any person to whom the seller has been requested in writing not to make such a sale, where such request is by . . . the husband, wife . . . of the person. . . ." S. D. Code (1939), § 5.0226 (2).

² *Smith v. Nicholas Bldg. Co.*, 93 Ohio St. 101, 112 N. E. 204 (1915). This action is to be distinguished from the statutory actions for wrongful death or for loss of means of support.

³ ". . . and it seems to be a most reasonable proposition of law that whoever willfully joins with a married woman in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct." *Holleman v. Harward*, 119 N. C. 150 at 154, 25 S. E. 972 (1896); *Elling v. Blake-McFall Co.*, 85 Ore. 91, 166 P. 57 (1917) (recovery for personal injury to wife negligently inflicted). But see *contra* cases in note 15, *infra*.

⁴ *Jaynes v. Jaynes*, 39 Hun (46 N. Y. S. Ct.) 40 (1886); 1 BOUVIER, *INSTITUTES OF AMERICAN LAW* 115-116, Nos. 277-279 (1851).

⁵ *Bassett v. Bassett*, 20 Ill. App. 543 (1886).

any rights she might have had could be enforced only by joining the husband and subject to the attendant limitations on an action by him.⁶ Yet even at common law a divided court declared that the right of consortium existed in the wife and under proper circumstances could be enforced.⁷ The course of the common law was universally altered by the Married Woman's Acts designed to place the wife on a legal parity with the husband.⁸ For the first time resort by the wife to enforcement of a right of consortium became generally practical.⁹ In view of the purpose of the legislation for the emancipation of married women,¹⁰ it seems logical that the courts should recognize a right in the wife coextensive with that of the husband, and the principal case gives substantial support to this conclusion. Courts follow this analogy and allow the wife to recover when the case involves injury caused by the willful or malicious acts of the defendant. Their language in these decisions seems to indicate that the scope of the wife's right is to be determined by the common-law scope of the husband's right.¹¹ On the other hand, when faced with a case where the injury to the wife's interest is caused by negligent acts, courts categorically deny recovery.¹² In this situation, the reasoning is that the Married Woman's Acts serve only to lift the wife's common-law disability to sue and give her no new substantive rights, and that since she could not recover for consortium at common law she has no right to enforce now.¹³ Fundamentally, this divergence in result seems un-

⁶ *Ibid.* As the husband was entitled to the sum recovered, his participation in the unlawful act was a bar to the joint action.

⁷ "Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone." Lord Campbell in *Lynch v. Knight*, 9 H. L. C. 577 at 589, 11 Eng. Rep. 854 (1861). This argument assumes a right without a remedy. See Lippman, "The Breakdown of Consortium," 30 COL. L. REV. 651 at 665 et seq. (1930).

⁸ "She now loses none of the 'rights' pertaining to natural persons, that of personal security, personal liberty and of private property, by marriage to any greater extent than does the man." *Bassett v. Bassett*, 20 Ill. App. 543 at 547 (1886).

⁹ A cause of action for alienation of affection and for criminal conversation was first accorded the wife, probably due to the public interest in morals. However, a Connecticut court was willing to extend relief here on the ground that the right was coextensive with that of the husband. *Foot v. Card*, 58 Conn. 1, 18 A. 1027 (1890).

¹⁰ "The majority view which thus gives the husband an action for a negligent injury to the wife, yet which denies a similar action to her, is logically inconsistent in view of the equality of married women. . . . Contrary statements, however, have been made by some courts in cases where there was also the probability that the marital relation would be injured if the act was done." 3 VERNIER, AMERICAN FAMILY LAWS (HUSBAND AND WIFE) 86-87 (1935). As the husband is allowed compensatory damages for injury to his right of "consortium," the wife's recovery should not be limited to punitive damages (requiring an intentional breach by defendant) as stated in the Massachusetts and Indiana cases. *Feneff v. New York Central & H. R. R.*, 203 Mass. 278, 89 N. E. 436 (1909); *Brown v. Kistelman*, 177 Ind. 692, 98 N. E. 631 (1912).

¹¹ *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N. E. 102 (1911); *Foot v. Card*, 58 Conn. 1, 18 A. 1027 (1890); *Moberg v. Scott*, 38 S. D. 422, 161 N. W. 998 (1917).

¹² *Emersonian Apts. v. Taylor*, 132 Md. 209, 103 A. 423, 5 A. L. R. 1045 at 1049 (1918); see also annotation 59 A. L. R. 680 (1929).

¹³ *Cravens v. Louisville & N. Ry.*, 195 Ky. 257, 242 S. W. 628 (1922); see

sound. In both situations the wife has suffered the same type of injury and in neither can there be reparation other than by resort to a consortium theory.¹⁴ Admittedly, there may be important policy considerations which would lead a court to deny consortium to either spouse.¹⁵ However, when recovery is allowed, it seems illogical and unfair to grant the husband a full and the wife only a partial right.

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also cases cited in note 12, *supra*. More rational grounds for the result are suggested in Pound, "Individual Interests in the Domestic Relations," 14 MICH. L. REV. 177 at 193 et seq. (1916).

¹⁴The unreasonable results of this distinction could have been avoided by a holding that the husband's rights accrued to him in his capacity as a spouse, not merely as a husband, and that therefore when the wife became a legal entity by statute she should have the same rights and receive the same protection that her marriage partner enjoyed. See Holbrook, "The Change in the Meaning of Consortium," 22 MICH. L. REV. 1 (1923).

¹⁵Where recovery for consortium is allowed, two people, the spouse directly injured and the spouse whose consortium is injured, are able to recover. Some courts have therefore denied recovery to the husband since the Married Woman's Acts took effect. *Marri v. Stamford St. Ry.*, 84 Conn. 9, 78 A. 582 (1911); *Golden v. R. L. Greene Paper Co.*, 44 R. I. 231, 116 A. 579 (1922); *Blair v. Seitner Dry Goods Co.*, 184 Mich. 304, 151 N. W. 724 (1915).