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Domestic Relations: Right of a wife to recover from her husband for personal injuries

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NOTES AND COMMENT

Domestic Relations: Right of a wife to recover from her husband for personal injuries.—The recently decided case in Wisconsin of *Wait v. Pierce*[1] has revolutionized the law regarding husband and wife in this state and has taken from the male of the species the last vestige of authority which he may have had under the yoke of matrimony.

Mathilda J. Wait brought an action for injuries to her person, against George P. Pierce and another, doing business as the Menasha Motor Car Co., wherein defendants impleaded G. E. Wait, husband of the plaintiff as party defendant and filed a crosscomplaint against him, claiming that he had caused the injuries. The husband demurred on the grounds that as husband he is not liable for injuries to his wife and cannot be joined as a defendant. Court sustained the demurrer holding that a wife cannot maintain an action against the husband for injuries sustained by reason of his negligence. On appeal, the supreme court overruled this decision. There was however a strong dissenting opinion filed by Justice Eschweiler and two associates.

The basis of the courts' decision rests largely on a statute of Wisconsin[2] providing, "any married woman may bring and maintain an action in her own name for any injury to her person or character the same as if she were sole," from which the court construes that this also includes a right of action against the husband.

That no common law right of action existed in favor of either spouse for personal injuries is unquestioned.[3] Cooley states "For a personal tort by the husband to her person or reputation, the wife can sustain no action but must rely upon the criminal law for her protection or seek relief in divorce proceedings." In various jurisdictions it has been held that statutes enabling the wife to sue and be sued as a femme sole, do not include the right of either spouse to bring a tort action against each other. However the wife is not left destitute of all recourse since both at common law and under the code she may resort to the criminal law or sue for divorce and alimony.

In *Strom v. Strom*[4] the wife brought action for assault and battery by the husband upon her person and the court holding against the wife said: "A husband cannot and never could bring an action against his wife for a personal tort committed by her against him during coverture and hence ipso facto she had no right in this respect since her rights are expressly limited by statute to the same rights which the law gives him."

The court states in *Peters v. Peters*,[5] that even though the wife was authorized by statute to prosecute and defend all actions as if un-

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[1] *Wait v. Pierce* 209 N.W. 475. (Wis.)

[2] Chap. 89 Laws 1881 and Stat. 246.01, 246.02, 246.03.

[3] Cooley on Torts (3rd Ed. p. 474).

[4] 6 L.R.A. (N.S.) 191.

[5] 156 Cal. 32, 103 P. 219, 23 L.R.A. (N.S.) 699.

married and a femme sole, this does not include a right of tort action against her husband and the fact that a provision in the statutes permitted either spouse to maintain an action against each other for property, impliedly prohibits a right of tort action. Also in *Thompson v. Thompson*[6] the court states "that even where the wife was expressly given all the rights of a femme sole, the common law relation of husband and wife was not so modified as to give her a right of action against her husband for assault and battery. Analogous decisions have been handed down in many other cases among which are *Hobbs v. Hobbs*,[7] *Abbott v. Abbott* [8] and the New York case of *Schultz v. Schultz*.[9]

It is clear that under the common law the legal identity of the wife was merged in the husband and manifestly he could not sue himself. In most other jurisdictions where a statute similar or identical to the one in Wisconsin prevails, the courts have held that as against the husband and wife has no right of tort action.

Apparently the majority opinion in this case reached its decision by a broad and liberal interpretation of the aforementioned statute conferring on married women the rights of a femme sole but our state Constitution [10] provides that "such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this Constitution, shall be and continue part of the law of this state until altered or suspended by the legislature." Now it is a firmly rooted doctrine that the common law is not to be done away with, altered or modified unless the legislature intent so to do is clearly evidenced and the use of broad and general language is not necessarily indicative of such intent, as held in *Kappers v. Cast Stone Constr. Co.*[11] In further substantiation of this point there is the Wisconsin case of *Lontsdorf v. Lontsdorf*[12] where the wife brought action for the alienation of her husband's affections and the court held that "although the statutes enabled a married woman to bring an action in her own name for injury to her person or character, such statute cannot be construed either to confer a new right for injuries resulting from enticing away the husband or to confer a right to sue for any such injuries" thus intimating that the statute was not sufficiently clear and unmistakable and consequently the common law doctrine shall take precedence.

In the majority opinion it is now contended that there is express language abolishing the common law and quite obviously the statute is ambiguous. If by a decision of this very court[13] it has been settled that the wife has no right of action against another for alienation of his affections, then a fortiore how can the same statute confer upon

[6] 218 U.S. 611, 615, 30 L.R.A. (N.S.) 1153, 31 S. Ct. 111.
[7] 70 Me. 381.
[8] 67 Me. 304, 24 Am. Rep. 27.
[9] 89 N.Y. 644.
[10] Sec. 13 Art. 14.
[11] 184 Wis. 627, 633, 200 N.W. 376.
[12] 118 Wis. 159.
[13] *Lontsdorf v. Lontsdorf* (supra).

the wife the right to bring a tort action against the husband himself? Palpably the intent of the legislature is not clear and therefore the common law should prevail.

It is an accepted tenet, that under the common law the husband had no right of action against his spouse for being one with her, he could not sue himself. The construction of the statute by the majority in this case creates new rights for the wife and hence necessarily creates new rights for the husband since the constitution guarantees equal rights for all. Now if such radical change in the law had been the intent of the legislature, it must surely have expressed itself with indisputable clearness and definiteness. This it did not do.

Undoubtedly the legislature intended to remove discriminations against married women and give them *equal* rights with their husbands before the law and consequently the statute should not be construed as creating *new* rights, which it does under the interpretation of the majority opinion since at common law neither spouse had the right to sue the other. Neither was it the intent of the legislature to open the door to increased litigation which might presumably follow for as Justice Eschweiler states: "The uninvited kiss no matter how cold and chaste, upon the non-consenting alabaster feme sole brow, is an assault and battery and substantial damages may be awarded for such."[14]

Regarding the public policy affected by this decision, it has always been recognized that while marriage is a civil contract, so far as its validity in law is concerned, yet the moment such contract is entered into, a status of an exclusive nature arises between the parties, and many of the rules applicable to contrasts are necessarily excluded from application to the marriage contract. The peace and tranquility of the conjugal relation demand that each party to a marriage forswear, certain rights which each enjoys as a sole and hence the common law has always refused to recognize tort liabilities between the members of a family.

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Automobiles: Guest and invitee; negligence, degree of care.—With the great volume of automobile cases which has of recent years kept our courts busy to capacity one might think that the law as it applies to owners and operators of motor vehicles should be quite definitely settled. To a considerable extent this is true and because of this fact comparatively few such cases are being appealed. Occasionally, however, a decision is rendered by the Wisconsin Supreme Court which materially changes the practising attorney's preconceived notions as to this branch of the law.

The liability of the owner or operator of an automobile to an invited guest in the various situations that may arise has been, and still is, somewhat in doubt. A decision of considerable importance on this phase of the law was decided by the Supreme Court on October 12, 1926.[1]

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[14] 36 Wis. 657, 17 Am. Rep. 504.

[1] *Cleary v. Eckart*, 211 N.W. (Wis.).