

Parent and Child: Tort: Right of Infant to Recover From Parent

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exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as to whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.

Thus viewed, the Sherman Law is not only a prohibition against the infliction of a particular type of public injury. It is a limitation of rights . . . which may be pushed to evil consequences and therefore restrained.

In the Standard Oil Case where, in considering the Freight Assn. Case, the court said (221 U.S.) p. 65:

"That, as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made."

H.W.I.

Parent and Child: Tort: Right of Infant to Recover From Parent.

"Honor thy father and thy mother."

If the fourth commandment was never announced by any of the writers of the common law (because no case involving a child's suit against its natural parent was ever brought before the courts of England) it was unmistakably and indelibly carved upon the tablets of Mount Sinai and by the recent case of *Wick v. Wick*,¹ firmly fixed in the jurisprudence of our commonwealth—Wisconsin. This was an action brought against the defendant by his infant child, under the age of fourteen years, to recover damages for personal injuries sustained by plaintiff as a result of an automobile accident due to the negligence of the defendant. A demurrer to the complaint was overruled, and the appeal from the order overruling the demurrer presented the question of whether an infant child may maintain an action in tort against its parent.

In answering this question in the negative, the Wisconsin Supreme Court based its decision on the dictates of the Natural Law and on considerations of public policy. Said the court:

To permit a child to maintain an action in tort against the parent is to introduce discord and contention where the laws of nature have established peace and obedience. Natural instinct condemns such proceedings as most unseemly, and the laws of society will not, to the detriment of society, defeat the benign influence of the laws of nature.

The authorities are unanimous in their condemnation of such an action by the child, with the single exception of one dissenting opinion.² The only argument in favor of sanctioning a recovery in cases like the present seems to be that on principle, there is no reason why the parent should not be subject to civil responsibility similar to that of a guardian or teacher, who, though standing *in loco parentis*, is liable for excessive punishment.³ This argument, however, is more than overcome by practical considerations of public policy, which discourage causes of action that tend to destroy parental authority and to undermine the security of the home. It would, indeed, be rendering a disservice to the child to teach it to stray from the path of rectitude, or permit its mind to be poisoned by ideas of disloyalty and dishonor.

Of course, it must not be forgotten that the child is protected against excessive punishment at the hand of the parent by the criminal laws.⁴

Diametrically opposed to the communistic theory which Russia has sought to put into practice is that of our United States which maintains the family as the social unit.

The members thereof are of the same blood, . . . bound together by the strongest natural ties. Society . . . has a deep interest in maintaining . . . the natural conception of the family unit. This imputes authority to the parent and requires obedience of the child.⁵

Nor does the nature or the magnitude of the injury done by the parent change the rule. In *Roller v. Roller*,⁶ the parent had been convicted of committing a rape on his minor daughter (plaintiff in the civil action). The cause of action was denied in the child. The court refused to let a hard case make hard law. Further, it said:

To permit a minor child to sue its father for a tortious wrong would be to allow the child to take from the parent that which is already dedicated to its support and maintenance, because the law says that a parent must provide according to his means for the support, care and maintenance of his minor children and such action would allow one minor child to gain an advantage over

¹ Not reported at this writing. Opinion filed, March 7, 1927. (Wisconsin.)

² Clark, in *Small v. Morrison*, 118 S.E. 12 (17). Cf. Cooley on Torts, 3rd Ed., pp. 40, 493; Jaggard on Torts, 462; Schouler on Domestic Relations, 3rd Ed., Sec. 275; 20 R.C.L. 63; 29 Cyc. 1663; *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664; *Smith v. Smith*, 142 N.E. 128; *Manion v. Manion*, (N.J.), 129 Atl. 431; *Hewellette v. George* (Miss.) 9 So. 885, in which the infant plaintiff couldn't sue even after separation from parent and marriage.

³ Cooley on Torts, 2nd Ed., 198. See *Clasen v. Bruhs* (Neb.), 95 N.W. 640. Allowed against aunt.

⁴ Cooley on Torts, 3rd Ed., pp. 40, 265, 294, 493.

⁵ *Wick v. Wick*, supra.

⁶ 37 Wash. 242, 79 Pac. 788.

his minor brothers and sisters at the expense of the common fund which has been dedicated to a fair and equal support of them all.

Although it is stated in *Taubert v. Taubert*,⁷ that an *emancipated* minor child has such a tort cause of action against its natural parent, that right is expressly denied in *Matarese v. Matarese*.⁸ An action upon the child's majority against the father, or on the latter's death, against his estate, would destroy the harmony of the family as surely as would a suit during minority.

Whatever may be the views of certain eminent jurists,⁹ the principles of the Natural Law are firmly imbedded in our local jurisprudence. *Wick v. Wick*¹⁰ establishes the duty of the child to serve and obey the father. The recognized reciprocal right and duty of the father to control, protect, support and to guide or educate the child were established in *Lacher v. Venus*,¹¹ in which case Eschweiler, J., said:

A natural affection between the parent and offspring, though it may be nought but a refined animal instinct and stronger from the parent down than from the child up, has always been recognized as an inherent, *natural* right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty and the pursuit of happiness, our government is formed.

Save as modified by the Legislatures of the various states, in domestic affairs the family has remained in law a self-governing entity, under the discipline and direction of the father as its head. To some extent, at least, this domestic harmony has been disrupted by our Supreme Court's interpretation of the Wisconsin Married Woman's Act,¹² in *Wait v. Pierce*,¹³ wherein it was held that the Legislature has so completely emancipated the married woman as to enable her to sue her husband in tort for personal injury growing out of his negligence. It is interesting to note in that case the dissenting opinion of Eschweiler, J., who stated that the majority opinion would result in the conclusion that a husband may likewise sue the wife, and as a necessary corollary, to permit of lawsuits by a child against a parent, or a parent against a child, because it abolishes the common-law doctrine, based as it was upon the idea of the preservation of the family and a refusing to recognize tort liabilities between its members. Happily, *Wick v.*

⁷ 103 Minn. 247.

⁸ R.I. (1925) 13 A 198.

⁹ See article by Oliver Wendell Holmes in the *Harvard Law Review*, Nov., 1918, wherein he says: "The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere." See also, the reply to this statement by the Rev. H. Noonan, in the MARQUETTE LAW REVIEW, Vol. III, p. 91.

¹⁰ *Supra*.

¹¹ 118 N.W. 613. Cited in *Natural and Inherent Rights under the Constitution*. (Dean Schoetz of Marquette School of Law) MARQUETTE LAW REVIEW, Vol. 7, p. 154 (1938).

¹² St. of 1925, 6.015; St. of 1925, 246.01-246.03; St. of 1925, 246.07; Laws of 1905, c. 17; and Constitution, art. 14, sec. 13.

¹³ 209 N.W. 475.

Wick,¹⁴ has put aside that fear by showing that the contrary conclusion is possible where the Legislature has not yet touched the filial relation. The court¹⁵ regrets that the decision in *Wait v. Pierce*¹⁶ was made necessary by statute and concedes that it did somewhat mar the symmetry and beauty of the family conception. "However, it did not destroy it" and our court is not disposed "to impair it further than is necessary to carry out apparent legislative policies."

Until a change is made "under the legislative banner" and by clear and categorical declaration our court is committed to a reliance upon the Natural Law as a basis of domestic conduct.

"Honor thy father and thy mother" is an injunction which contains as much truth today as it did under the Mosaic dispensation.*

J. P. TAUGHER, '27

Principal and Surety: Statute of Frauds; Contracts; Performance.

Plaintiff in the case of *Braasch v. Bonde*¹ advanced \$3,400 to the principal defendant for the purpose of making a down payment on the purchase of a property. On November 24, 1919, the defendant executed a note to the plaintiff for the above amount, for one year at 5 per cent interest per annum. The note in question was endorsed by the other defendants as accommodation parties. The principal defendant paid interest on the note up to November 24, 1921, at which time a new agreement was formed, whereby the note was extended, and a higher rate of interest, namely 6 per cent, subsequently 5½ per cent, was to be paid. The arrangement was made without the knowledge or consent of the accommodation parties. The note was later secured by the execution of a second mortgage on the property above mentioned.

On August 6, 1925, the plaintiff, payee of the note, brought an action to foreclose the mortgage, and asked for a deficiency judgment against the maker and the accommodation parties. The defendant contends that at the time of the extension of the original note, the payee had agreed to forbear until the time of the maturity of the first mortgage on the property which was November 24, 1925. The accommodation parties answered separately, claiming to be released by the agreement between the debtor and the plaintiff. Last payment of interest had been made in May, 1925. No payment of interest had been made for the six months to November, 1925.

The lower court found for the plaintiff, holding the maker of the note, i. e. the principal defendant, but released the accommodation

¹⁴ *Supra*.

¹⁵ *Supra*.

¹⁶ *Supra*.

* Since the above comment went to press the Supreme Court of Iowa, in *Hovey v. Dolmage, et. al.*, 212 N.W. 553, has decided that a wife may not sue her husband for personal injuries even though the statute on which the action was based (sec. 10462, Iowa Code, 1924) was one allowing any woman to recover for personal injury from *any* person, etc. The reasoning is similar to that in the dissenting opinion in *Wait v. Pierce, supra*.

¹ 211 N.W. 281,—Wis.—.