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Husband and Wife - Actions - Wife's Right to Recover from Neglient Third Party for Loss of Husband's Consortium

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guilty to the charge. It was held that such a plea admitted the charge but did not admit a lesser offense. *State v. Robinson*[8] charged the defendant with possession of narcotics and when the jury returned a verdict of guilty to addiction, the Supreme Court of Louisiana said that being guilty of addiction is not responsive to the charge of possession of narcotics and therefore the verdict should be set aside. This case was decided seven years prior to the instant case.

In North Dakota a plea of guilty may be withdrawn by the defendant at any time before sentence with the approval of the court,[9] or by the court upon its own motion.[10] At the time of pleading guilty to a different offense, the information must be amended to conform to the plea; however, this too must be done before sentence has been pronounced.[11] If the information is not questioned at the trial, it will not be held insufficient unless it is obviously defective.[12] Upon entering his plea of not guilty, the accused then waives all right to quash the information[13] except as to those obvious defects which are subject to attack by motion in arrest of judgment,[14] or by writ of error.[15]

It is submitted that the dissenting judges were correct when they stated that a plea of guilty to the offense of addiction is not responsive either to a charge of possession or a sale of a narcotic. Such a plea of guilty is a nullity, and as a consequence the sentence is void.

J. F. BIEDERSTEDT.

HUSBAND AND WIFE — ACTIONS — WIFE'S RIGHT TO RECOVER FROM NEGLIGENT THIRD PARTY FOR LOSS OF HUSBAND'S CONSORTIUM. — A wife sued for damages for loss of her husband's consortium caused by negligent operation of

8. 221 La. 19, 58 So.2d 408 (1952).

9. N.D. Rev. Code § 29-1422 (1943) "The court at any time before judgment upon a plea of guilty may permit it to be withdrawn, if judgment has been entered thereon, the court may set it aside, and, in lieu thereof, may allow a plea of not guilty, or with the consent of the states attorney may allow a plea of guilty of a lesser included offense, or of a lesser degree of the offense charged."

10. N.D. Rev. Code § 29-1416 (1943) "The defendant may plead guilty to an indictment or information of any offense, but the court may refuse to accept the plea and may order a plea of not guilty to enter of record."

11. N. D. Rev. Code § 29-1152 (1943) "The defendant and the states attorney are entitled, upon motion made either after verdict and before sentence is pronounced or the defendant is discharged, to have the indictment or information amended so as to state the particulars of the offense, as proved, in such a manner that the indictment or information without evidence aliunde, shall be such evidence of the offense charged and its particulars as to bar a subsequent prosecution for the same offense." See also *Ex parte* Bain, 121 U.S. 1 (1887) (which states that it is permissible to amend information to conform to the plea, usually on leave of the court, but an indictment can only be amended in form or substance with the consent of the grand jury).

12. Barnes v. United States, 197 F.2d 271 (8th Cir. 1952); Dickerson v. United States, 175 F.2d 440 (4th Cir. 1949).

13. In State v. Fradet, 58 N.D. 282, 225 N.W. 789 (1929) a plea of not guilty was entered to the charge set out in the information; the defendant orally moved to quash and set the information aside. It was held that any defect and irregularities which may have existed as grounds for quashing and setting the information aside were waived by the defendant.

14. N.D. Rev. Code § 29-1412 (1943) "If the defendant does not move to quash the indictment or information before he pleads thereto, he shall be taken to have waived all objections which are grounds for a motion to quash except those which are also grounds for a motion in arrest of judgment." State v. Simpson, 78 N.D. 571, 50 N.W.2d 661 (1951). For grounds for arrest of judgment see N.D. Rev. Code § 29-2502 (1943).

15. People v. Weber, 335 Ill. App. 215, 81 N.E.2d 5 (1948) (stated if an information charges no crime or is otherwise fatally defective, such defect can be taken advantage of on a writ of error whether the defendant pleads guilty or not guilty and regardless of whether or not the sufficiency of the information was in any way questioned in the trial court). *Accord,* People v. Wallace, 316 Ill. 120, 146 N.E. 486 (1925).

defendant's automobile. Defendant moved to dismiss for failure to state a cause of action. Plaintiff-wife appealed from an adverse verdict. The Supreme Court of Michigan *held,* three justices dissenting, that the wife pleaded a good cause of action. *Montgomery v. Stephan,* 101 N.W.2d 227 (Mich. 1960.

Although many jurisdictions now recognize the wife's right to use for loss of consortium resulting from an intentional tort,[1] the majority of courts in the United States will not allow a wife to sue in an action based on negligence.[2] Many reasons have been given for denying the wife recovery for loss of consortium in suits resulting from the negligence of a third party,[3] but the majority of jurisdictions allow the husband recovery in similar suits.[4]

It would seem that the reasons for allowing a husband recovery and denying recovery to the wife are only historical and based on precedent.[5] One court explicitly recognized the equality of women in modern-day life, but still denied the wife recovery solely on the ground of stare decisis.[6]

During the past decade a limited number of jurisdictions have overthrown the old common law doctrine and allowed the wife recovery.[7] Several courts have adopted the viewpoint that the Married Women's Acts, which were designed to remove the inequitable disabilities of married women, have abro-

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1. Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940); Foot v. Card, 58 Conn. 1, 18 Atl. 1027 (1889) quoted with approval in Rott v. Goehring, 33 N.D. 413, 157 N.W. 294 (1916) (wherein the tendency of modern thought on the common law relation of husband and wife is mentioned. In this North Dakota case an action for alienation of affections was supported as valid and the wife was awarded damages); Gooch v. Gooch, 112 Kan. 592, 211 Pac. 621, 622 (1923) "Lawsuits of this kind," said the court, "are known as actions for damages for alienation of affiections, but that is not necessarily the nature of the actions. They are for damages for loss of consortium."

2. Filce v. United States, 217 F.2d 515 (9th Cir. 1954); Josewski v. Midland Constructors, Inc., 117 F. Supp. 681 (D.S.D. 1953); Jeune v. Del E. Webb Const. Co., 77 Ariz. 226, 269 P.2d 723 (1954); Deshotel v. Atchison, Topeka & Santa Fe Railway Co., 50 Cal.2d 664, 328 P.2d 449 (1958); Franzen v. Zimmerman, 127 Colo. 381, 256 P.2d 897 (1954).

3. In Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950) the case summarized the reasons usually given for denying the wife the right of action as: (1) The injury to the wife is indirect and so not compensable; (2) That her injuries are too remote and consequential to be capable of measure; (3) The common law recognizes no cause of action for loss of the so-called sentimental elements of consortium and the Married Woman's Acts have given the wife no new cause of action; (4) That no cause of action for loss of consortium was ever allowed in which there was no showing of the loss of some services; (5) There might be a recovery by both husband and wife for the same damage.

4. White Star Trucking Co. v. Lomelo, 167 F.2d 880 (6th Cir. 1948); Skoglund v. Minneapolis Street Ry., 45 Minn. 330, 47 N.W. 1071 (1891); Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947).

5. See Hitaffer v. Argonne Co., 183 F.2d 811, 819 (D.C. Cir. 1950); Simeone, *The Wife's Action for Loss of Consortium,* 4 St. Louis U.L.J. 424, 430 (1957).

6. Josewski v. Midland Constuctors, Inc., 117 F. Supp. 681 (D.S.D. 1953) (Discussing Hitaffer v. Argonne Co., which allowed wife to recover for loss of consortium due to neglience) the court said: "The Hitaffer case is interesting. It could well be the beacon showing the way, based on reason, to a more modern and enlightened ruling on the rights of married women in courts of law, and providing a remedy to enforce those rights."

But South Dakota has now allowed a wife to recover in Hoekstra v. Helgeland, 98 N.W.2d 669 (S.D. 1959) for loss of consortium due to negligence of a third party.

7. Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950); Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953); Missouri Pacific Trnsportation Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Hoekstra v. Helgeland, 98 N.W.2d 669 (S.D. 1959).

This viewpoint coincides with the views expressed in many legal periodicals. See 21 Albany L. Rev. 292 (1957); 8 De Paul L. Rev. 106 (1958); 42 Iowa L. Rev. 634 (1957); 4 St. Louis U.L.J. 424 (1957); 31 Temp. L.Q. 284 (1958); 13 U. Miami L. Rev. 92 (1958); 2 Vill. L. Rev. 410 (1957).

gated the husband's common law action for loss of consortium since the wife can sue in her own name.[8] It is difficult to conclude that laws designed to repudiate the inferiority of the wife shall be construed so as to eliminate her cause of action. Here the courts are remedying the wrongful denial of a cause of action to one by denying it to the other also.[9]

There have been no decisions in North Dakota on the right of the wife to recover from a negligent third party for loss of consortium. However, *Milde v. Leigh*[10] said a personal injury to the wife, either negligently or intentionally caused, gives rise to a cause of action by the husband. And in *Rott v. Goehring*[11] and *King v. Hanson*[12]—cases where the wife was allowed damages for alienation of affection—the court maintained that statute has greatly changed the wife's rights and removed many disabilities she formerly possessed. Consequently, it seems a North Dakota court would be inclined to rule that a case brought by a wife for loss of consortium due to negligence would state a good cause of action.

SERGE H. GARRISON.

JURIES — TALESMEN OR ADDITIONAL JURORS — SELECTION AND ERROR. — The panel having been exhausted in the defendant's sodomy-murder trial, the judge ordered the sheriff to summon talesmen. The final juror, chosen from among those produced by the under-sheriff, was examined and sworn in. On the third day of actual trial, upon learning of the method of selection by the under-sheriff, the defendant moved for a mistrial on the ground that the final juror was not summoned in accordance with statute.[1] The under-sheriff testified that he telephoned officers of eight large companies requesting that employees be dispatched for jury duty. Two telephone employees went directly to the courtroom without contacting the under-sheriff. One of these was selected as the final juror. On appeal the New Jersey Supreme Court *held*, one justice dissenting, that the under-sheriff did not abuse his discretion and in any case, no showing of prejudice had been made. *State v. Sturdivant*, 155 A.2d 771 (N.J. 1959).

The practice of summoning talesmen upon default in the regular panel sprang up in common-law England and as early as the 16th century was sanctioned by statute.[2] These talesmen, or bystanders, as with regular jurors at common law were summoned by the sheriff, and this procedure is still followed unless specifically modified by statute.[3] A tales implies the making up

8. Marri v Stamford Street Ry., 84 Conn. 9, 78 Atl. 582 (1911); Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N.W. 724 (1915); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945).

9. See Montgomery v. Stephan, 101 N.W.2d 227 (Mich. 1960).

10. 75 N.D. 418, 28 N.W.2d 530 (1947).

11. 33 N.D. 413, 157 N.W. 294 (1916).

12. 13 N.D. 85, 99 N.W. 1085 (1904).

1. ". . . the sheriff or other proper officer shall forthwith summon, from among the bystanders or others, such additional number of persons qualified to serve as jurors as may be ordered by the court, and make return theerof immediately . . ." N.J.S. 2A: 74-10, N.J.S.A.

2. See 1 THOMPSON TRIALS 30 (2d ed. 1934); 3 LEWIS'S BLACKSTONE'S COMMENTARIES §§ 364-365 (1897) ". . . by virtue of the statute 35 Hen. VIII c. 6, and other subsequent statutes, the judge is empowered at the prayer of either party to award a tales de circumstantibus, of persons present in court, to be joined to the other jurors to try the cause; who are liable however to the same challenges as the principal jurors."

3. Bruce v. State, 169 Miss. 355, 152 So. 490 (1934).