[HIGH COURT OF AUSTRALIA.]

WRIGHT . . . . . APPELLANT;
PLAINTIFF,

AND

CEDZICH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1929-1930.

MELBOURNE, *Oct.* 23, 24, 1929; *Mar.* 19, 1930.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Husband and Wife—Enticing away husband—Action by wife—Consortium—Different rights in husband and wife—Tort—Married Women's Property Act 1915 (*Vict.*) (*No.* 2692), *sec.* 4—*Married Women's Property Act* 1928 (*Vict.*) (*No.* 3727), *sec.* 4.

Held, by *Knox* C.J., *Gavan Duffy*, *Rich* and *Starke* JJ. (*Isaacs* J. dissenting), that inducing a husband against the will of his wife to depart and remain absent from the home, whereby the wife loses the society, comfort, protection and support of her husband, affords her no cause of action.

Effect of sec. 4 of the *Married Women's Property Act* 1915 (Vict.) on the right of a married woman to the *consortium* of her husband considered.

Decision of Supreme Court of Victoria (Full Court): *Wright* v. *Cedzich*, (1929) V.L.R. 117, affirmed.

APPEAL from the Supreme Court of Victoria.

The appellant, Violet May Wright, brought an action for damages against the respondent, Ellen Cedzich, and by her amended statement of claim alleged:—(1) The plaintiff was at all material times and still is the wife of Edwin Marsden Wright as the defendant at all material times well knew. (2) The defendant has wrongfully persuaded, enticed and procured the said Edwin Marsden Wright unlawfully and against the will of the plaintiff to depart and remain

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absent from the home and society of the plaintiff and has wrongfully alienated his affections from the plaintiff. (3) The plaintiff has thereby lost the society, comfort and protection and has been deprived partially of the support of the said husband. The plaintiff claimed £5,000 damages. By her amended defence the respondent said:—(1) She does not admit any of the allegations contained in par. 1 of the statement of claim. (2) She denies each and every allegation contained in pars. 2 and 3 thereof. (3) She will object that the statement of claim is bad in law and discloses no cause of action against her.

The defendant took out a summons to strike out or stay or dismiss the action on the ground that the statement of claim disclosed no reasonable cause of action, and was frivolous and vexatious, or alternatively for an order that the points of law raised by the defence should be set down for hearing and disposed of at some date before trial. On the return of this summons *Lowe* J. made an order directing that the points of law raised by the pleadings be set down for hearing before the Full Court. The Full Court (*Irvine* C.J., *Mann* and *Macfarlan* JJ.) were of opinion that the cause of action disclosed by the statement of claim could not be sustained, and gave judgment for the defendant: *Wright* v. *Cedzich* (1).

From this decision the plaintiff now appealed to the High Court.

Hogan, for the appellant. The law recognizes a right in a wife to the protection and comfort of her husband as well as to his support, and any intentional invasion of that right constitutes an *injuria*. Prior to the *Married Women's Property Acts* a married woman was obliged to join her husband as co-plaintiff, and any damages recovered would go to the husband alone and none would go to the wife. This explains why there is no record of any such action prior to the *Married Women's Property Acts*. Those Acts have altered the status of married women. Sec. 4 (2) of the *Married Women's Property Act* 1915 (Vict.) enables a married woman to sue as if she were a feme sole. The basis of the American decisions is that under the provisions of sec. 4 a wife is capable of disposing of her property as if she were a feme sole. Formerly, she could not have property of any kind, and the *consortium* of her husband is

(1) (1929) V.L.R. 117.

now a matter in which she has property, and the claim is based on the property which the wife now has in the *consortium*. The real gist of the action is the loss of the comfort and society of the other spouse (*Bullen & Leake's Precedents of Pleadings*, 3rd ed., p. 340). The Courts should not refuse to recognize the right of a wife because the action is novel (*Winsmore* v. *Greenbank* (1)). A wife is entitled to more than support from her husband (*Wilkinson* v. *Wilkinson* (2)): she is also entitled to his *consortium*, the meaning of which is explained in *Tulk* v. *Tulk* (3). A right of action in the wife has been recognized in *Gray* v. *Gee* (4); *Quick* v. *Church* (5); *Johnson* v. *Commonwealth* (6), and *Westlake* v. *Westlake* (7). The existence of such a right is also maintained by the writers of text-books, such as *Eversley* on *Domestic Relations*, 4th ed., p. 154; *Halsbury's Laws of England*, vol. XVI., p. 319, par. 629 (*n*), and Supplement; *Salmond* on *Torts*, 7th ed., p. 515, and *Bishop* on *Divorce*, 1891 ed., sec. 567. The *consortium* of the husband is not of such a different nature from that of the wife's that he should be given a remedy against a person who deprives him of it, and the wife should not. The husband's action was not based on his loss of servile services of his wife. [Counsel referred to *Young* v. *Pridd* (8); *Philp* v. *Squire* (9); *Norris* v. *Seed* (10) (founded on loss of wife's company and society and not on the loss of services); *Lynch* v. *Knight* (11); *Wilton* v. *Webster* (12) (where the wife died during crim. con. proceedings and damages were awarded up to the time of her death); *Bullen & Leake's Precedents of Pleadings*, 8th ed., p. 418; *Schouler* on *Marriage and Divorce*, vol. II., pars. 1332-1333, p. 1583.]

Hudson, for the respondent. The foundation of the whole claim is the analogy to the husband's action for the loss of *consortium* of his wife; but the husband's action, whether the gist of it was loss

(1) (1745) Willes 577; 125 E.R. 1330.
(2) (1887) 13 V.L.R. 568; 9 A.L.T. 52.
(3) (1907) V.L.R. 64; 28 A.L.T. 165.
(4) (1923) 39 T.L.R. 429.
(5) (1893) 23 O.R. (Can.) 262; E. & E. Dig., vol. XXVII., p. 82.
(6) (1927) 27 S.R. (N.S.W.) 133.
(7) (1878) 32 Am. Rep. 397.
(8) (1627) Cro. Car. 89; 79 E.R. 679.
(9) (1791) Peake N.P.C. 114; 170 E.R. 99.
(10) (1849) 3 Ex. 782, at p. 791; 154 E.R. 1061, at p. 1065.
(11) (1861) 9 H.L.C. 577; 5 L.T. (N.S.) 291; 11 E.R. 854.
(12) (1835) 7 C. & P. 198; 173 E.R. 87.

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of services or aid, or the loss of *consortium*, arose out of his status and depended on his position as the head of the household, having the result that the thing called *consortium* was his if there could be property in that conception. The real gist of the husband's action was loss of something of pecuniary value, and the essence of this action was the husband's right to the wife's services and aid. This action is founded on precisely the same ideas as the husband's action of crim. con., and that action was founded on status (*Admiralty Commissioners* v. *s.s. Amerika* (1)). The action of crim. con. was technically laid in trespass though the action was in substance one upon the case (*Butterworth* v. *Butterworth* (2); *Fitzherbert's Natura Brevium*, pp. 52 (k), 89 (o); *Blackstone's Commentaries*, vol. I., pp. 442-444, and vol. III., p. 139). The relation of husband and wife was such that it gave the husband certain rights that the wife did not have (*Holdsworth's History of English Law*, vol. VIII., p. 427; *Year Book*, 9 Edw. IV., p. 51; *Chamley's Case* (referred to in *Hughes' Abridgment*, vol. I., p. 328)).

[STARKE J. referred to *Lush* on *Husband and Wife*, 2nd ed., p. 9.]

No right arises in the wife to sue for loss of *consortium* (*Atwood* v. *Atwood* (3)). *Consortium* is the personal right of the husband only, and his right is based only on his right to his wife's services (*Lynch* v. *Knight* (4)). At common law a wife had no right to sue for loss of *consortium* (*Kelley* v. *New York &c. Railroad* (5); *Duffies* v. *Duffies* (6); *Ney* v. *Ney* [*No.* 1] (7)). The wife's rights at highest cannot give rise to legal damage. The slander cases show that loss of society and comfort is not damage which the law will recognize (*Moore* v. *Meagher* (8); *Roberts* v. *Roberts* (9); *Allsop* v. *Allsop* (10), and *Chitty* on *Pleading*, 7th ed., vol. II., p. 483). [Counsel also referred to *Barham* v. *Dennis* (11); *Encyclopædia of the Laws of England*, 2nd ed., tit. "Seduction"; *Lush* on *Law of Husband and Wife*, 3rd ed., p. 12; *Bullen & Leake's Precedents of Pleadings*, 3rd

(1) (1917) A.C. 38, at pp. 44, 54.
(2) (1920) P. 126, at p. 130, 131.
(3) (1718) Prec. in Ch., p. 492, case No. 307; 24 E.R. 220.
(4) (1861) 5 L.T. (N.S.), at pp. 292, 293.
(5) (1897) 168 Mass. 308, at p. 311.
(6) (1890) 76 Wis. 374; 20 Am. St. Rep. 79, at p. 80; 2 Sid. 346.
(7) (1912) 21 Ont. W.R. 523; 3 Ont. W.N. 896; E. & E. Dig. vol. XXVII., p. 82.
(8) (1807) 1 Taunt. 39; 127 E.R. 745.
(9) (1864) 5 B. & S. 384; 122 E.R. 874.
(10) (1860) 5 H. & N. 534; 157 E.R. 1292.
(11) (1600) Cro. Eliz. 770; 78 E.R. 1001.

ed., p. 340, and *Winsmore* v. *Greenbank* (1).] *Johnson* v. *Commonwealth* (2) depends wholly on the expression that loss of *consortium* by the wife is a ground of legal damages, and that is challenged. There is no *injuria* in this case because there is no right of the wife which has been infringed by reason of her loss of *consortium*.

Hogan, in reply. There is not a single reported decision against the appellant's contention except the decision of the Full Court of Victoria. The true position is that put in *Halsbury's Laws of England*, that the loss of either services or society is sufficient to support the action. [Counsel referred to *De Alba* v. *Freehold Investment and Banking Co. of Australia* (3) and *Bennett* v. *Bennett* (4).]

[RICH J. referred to *Baker* v. *Bolton* (5), *Osborn* v. *Gillett* (6), *Admiralty Commissioners* v. *s.s. Amerika* (7) and *Jackson* v. *Watson & Sons* (8).]

The wife's right to *consortium* is the personal property of the wife, which she can own.

Cur. adv. vult.

Mar. 19, 1930.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. By her statement of claim the appellant, who is the wife of one Edwin Marsden Wright, alleged that the defendant had wrongfully persuaded, enticed and procured the said Edwin Marsden Wright unlawfully and against the will of the appellant to depart and remain absent from the home and society of the appellant and had wrongfully alienated his affections from her, whereby she lost the society, comfort and protection and had been deprived partially of the support of her said husband. The respondent pleaded that the statement of claim was bad in law and disclosed no cause of action against her. The point of law thus raised was decided by a Full Court of the Supreme Court of Victoria in favour of the respondent, and it is from that decision that this appeal is brought.

(1) (1745) Willes 577 ; 125 E.R. 1330.
(2) (1927) 27 S.R. (N.S.W.) 133.
(3) (1895) 16 A.L.T. 165.
(4) (1889) 116 N.Y. 584.
(5) (1808) 1 Camp. 493.
(6) (1873) L.R. 8 Ex. 88.
(7) (1917) A.C. 38.
(8) (1909) 2 K.B. 193.

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The same question was discussed in the Irish Exchequer Chamber and in the House of Lords in *Lynch* v. *Knight* (1), an action for slander brought by a husband and wife. In that case the husband was joined as plaintiff, but the action was treated as being in substance the action of the wife, the husband being joined for conformity. The declaration alleged that in consequence of the defamatory words the wife had been deprived of the *consortium* of her husband, and a point at issue was whether such loss constituted legal damage to the wife. In the Exchequer Chamber it was held, by majority, that the action lay, but on appeal to the House of Lords the judgment was reversed. Lord *Campbell*, Lord *Cranworth* and Lord *Brougham* thought that the loss or special damage relied on by the plaintiff was not the natural and probable consequence of the injury complained of, namely, the speaking of slanderous words. Lord *Campbell* thought that the loss of *consortium* constituted special damage because an action founded on loss of *consortium* or conjugal society would lie at the suit not only of the husband but also of the wife. Neither Lord *Brougham* nor Lord *Cranworth* found it necessary to express a decided opinion on the question whether the loss of *consortium* constituted legal damage, Lord *Brougham* being inclined to the opinion that it did not and Lord *Cranworth* being inclined to agree with Lord *Campbell* that it did. Lord *Wensleydale* based his decision wholly on the ground that an action for loss of *consortium* would not lie at the suit of a wife. In that case, as in this, it was argued that the action might be supported by analogy to the action which a husband may unquestionably maintain for an injury to the wife *per quod consortium amisit*. But Lord *Wensleydale* expressed his agreement with *Fitzgerald* B. in the view that the benefit which the husband has in the *consortium* of the wife is of a different character from that which the wife has in the *consortium* of the husband, and pointed out that the husband was entitled to the assistance of the wife in the conduct of the household and the education of his children, that this assistance resembled the service of a hired domestic, tutor, or governor, and was of material value, capable of being estimated in money, and that the loss of it might properly form the subject of an action. The next reported case in

(1) (1861) 9 H.L.C. 577; 5 L.T. (N.S.) 291; 11 E.R. 854.

which the question arose was *Gray* v. *Gee* (1), decided in 1923 by *Darling* J. at nisi prius. The learned Judge appears to have thought that if a husband might bring such an action there was no reason why a wife should not, and that the reason why such an action had never been brought before was that there had been difficulties of procedure which had been swept away by the *Married Women's Property Act* 1882—which at the time of his decision had been in force for forty years. The jury found for the defendant, and there was consequently no occasion to challenge the decision on the point of law. In *Johnson* v. *Commonwealth* (2), decided in 1927, the Supreme Court of New South Wales thought the decision in *Gray* v. *Gee* should be followed. In delivering the judgment of the Court *Ferguson* J. summed up the reasons for the decision as follows (3): " Once it is admitted, as it must be, that loss of *consortium* is an injury which the law can recognize as the basis of an action for damages, I see no reason why such an action should not be maintainable by the wife as well as by the husband." In 1920 *McCardie* J., in *Butterworth* v. *Butterworth* (4), pointed out that it was doubtful if a wife had any right of action against a woman who entices away her husband, and referred to the observation of *Lush* J. in his treatise on the *Law of Husband and Wife*, 3rd ed., at p. 13, that " the wife is under the coverture and protection of the husband, but the husband is not under the coverture or protection of the wife." It is difficult to see how the opinion of *Darling* J. that the reason why such an action had not been brought before was that there had been difficulties of procedure which had been swept away by the *Married Women's Property Act*, can be sustained. It is clear from the decision in *Lynch* v. *Knight* (5) that, if a wife had a cause of action for wrongfully enticing away her husband whereby she was deprived of his society and comfort, no difficulty in procedure stood in the way of her suing on that cause of action. No other explanation is suggested to account for the fact that there is no report of any such action having been brought by a wife before the year 1923, and in the absence of a satisfactory explanation that fact strongly supports the view that a wife has no such cause of action.

(1) (1923) 39 T.L.R. 429.
(2) (1927) 27 S.R. (N.S.W.) 133.
(3) (1927) 27 S.R. (N.S.W.), at p. 139.
(4) (1920) P., at pp. 130, 131.
(5) (1861) 9 H.L.C. 577; 5 L.T. (N.S.) 291; 11 E.R. 854.

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In our opinion the contention of the appellant that the existence of this right of action in a wife is a necessary deduction from the admitted right of action which a husband has for loss of the *consortium* of his wife is sufficiently answered by the observations of Lord *Wensleydale* in *Lynch* v. *Knight* (1), that the right of the husband in the *consortium* of his wife is entirely different in character from the right of the wife in the *consortium* of her husband, the right of the husband being of material value capable of being estimated in money while the right of the wife is no more than a right to the comfort of the husband's society and attention. Moreover, although it may not be possible to ascertain with certainty the origin of the cause of action which undoubtedly existed in a husband to recover damages for the loss of the *consortium* of his wife, there is authority for the proposition that it arose out of the status of the husband and the relation between him as head of the family and his wife (see per Lord *Parker of Waddington* in *Admiralty Commissioners* v. *s.s. Amerika* (2)). The common law has always recognized the dominion exercised by the husband over the wife, though the exact nature and extent of the dominion has changed with the development of society, and the husband's action is apparently based on an interference with such dominion. The wife has never had any such dominion over her husband.

For these reasons we are of opinion that the appeal should be dismissed.

ISAACS J. The statement of claim is substantially based on the declaration in *Winsmore* v. *Greenbank* (3). The damage alleged is that " the plaintiff thereby lost the society comfort and protection and has been deprived partially of the support of the said husband." Whatever else may be said of the statement of claim, it is not open to the objection referred to by Lord *Wensleydale* in *Lynch* v. *Knight* (4), that there is no averment of pecuniary loss. It follows therefore that the demurrer must be overruled unless it be held that, whatever the pecuniary loss to the wife may be, however directly that loss may flow from the defendant's act complained of, intentionally

(1) (1861) 9 H.L.C., at p. 598; 11 E.R., at p. 863.
(2) (1917) A.C., at pp. 44-45.
(3) (1745) Willes 577; 125 E.R. 1330.
(4) (1861) 9 H.L.C., at p. 599; 11 E.R., at p. 863.

depriving her of *consortium* without excuse or justification, she has no cause of action. Defamation imputing unchastity is now actionable *per se*. But if by any other means, however malicious, dishonest or immoral, a husband is by some person induced, reasonably it may be so far as the husband is concerned, to turn his wife out, thereby disgracing her in the eyes of the world, separating her from her children, and even reducing her to poverty, the contention on behalf of the respondent is that so far as these results are concerned she is without redress against the person maliciously, dishonestly or immorally causing her the loss and misery. The thesis of this immunity from the ordinary liability of a wrongdoer to make reparation for the injury he occasions, is that the husband's acknowledged, and, as Lord *Wensleydale* says, unquestionable right to obtain redress for wrongful deprivation of *consortium* was originally founded, and therefore theoretically still rests, on his right to physical possession of his wife, on which an action of trespass could be founded, and his property right in respect of her services in the quality of servant, and that consequently there can be no analogous right in her to redress in the converse and precisely similar case. Petruchio stated that argument so admirably as to leave nothing to be desired when he said:—

> I will be master of what is mine own:
> She is my goods, my chattels; she is my house,
> My household stuff, my field, my barn,
> My horse, my ox, my ass, my any thing;
> And here she stands, touch her whoever dare;
> I'll bring mine action on the proudest he
> That stops my way in Padua.

That was based ultimately on the mediæval doctrine that *Bentham*, about a hundred years ago, with his usual perspicacity called the "nonsensical reason—that of the identity of the two persons thus connected. Baron and Feme are one person in law. On questions relative to the two matrimonial conditions, this quibble is the foundation of all reasoning" (*Works*, vol. VII., chap. 5, p. 485). He was there dealing with the application of the doctrine to the law of evidence, but the absurdity is even more striking when carried to the length necessary for the present respondent's argument. It postulates that the "one person" is the husband, and that his is the only legal *persona*, the wife being by reason of her status the working property of that *persona*.

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In the middle of the 19th century *Maule* J. in *Wenman* v. *Ash* (1) pointed out that the unity was only "a strong figurative expression," and that "For many purposes, they are essentially distinct and different persons" as, for instance, to protect "the honour and the feelings of the husband." Why not her own? And now, well into the 20th century, amid legal and social surroundings so openly and utterly opposed to the theory relied on, that the argument cannot but shock the conscience, it devolves upon this Court to take up a position that no matter how it may be shaded off with gentle phrases, necessarily means alignment either with *Petruchio* or *Bentham*. Either the status of a wife imposes upon her a dependent lifelong servitude as a menial in her husband's house, terminable only by legal separation or by death, or else it leaves her with the independent right, now unimpeded by obstacles of procedure, to protect herself from the wrongful deprivation of her honourable rights as a wife. For myself, I cannot hesitate an instant as to the proper choice. To a suggestion that modern circumstances, including enlightened legislation, have emancipated married women from their former subordinate position, the answer is made that it is only an additional reason for denying them redress, since it also makes the husband's remedy out of date. That last view, however much I disagree with it, has at least this merit, that in effect it concedes to the two parties to the marriage status that they ought in this regard to stand in the same position, whatever that position may be. In truth, however, nothing more was needed in modern circumstances to effectuate the wife's remedy, and to place her in that respect on a level with her husband, than our improved procedural law, which has removed ancient disabilities standing in the way of asserting her rights. Those fundamental rights, so far as relevant in this case, have never changed, because they are basically entrenched in the very conception of marriage.

Before discussing the law independently it may be interesting, and it certainly is not unimportant, to observe the recent opinions of lawyers on the subject, so far as I have been able to ascertain them. The greater part are certainly not of the Petruchian order. *Lynch* v. *Knight* (2), and substantially contemporary judicial opinions

(1) (1853) 13 C.B. 836, at pp. 844-845; 138 E.R. 1432, at p. 1435.

(2) (1861) 9 H.L.C. 577; 11 E.R. 854.

on the subject, I consider specially later. In 1923 *Darling* J., in *Gray* v. *Gee* (1), affirmatively held in favour of the wife's remedy. Several learned writers on the subject have indicated either that their opinion is in the same direction, or that they treat the view adopted in the decision last quoted as in harmony with English law. I instance in order of date: (1910) *Lush* on *Husband and Wife*, 3rd ed., at p. 15; (1911) *Halsbury*, vol. XVI., at p. 319, note (c); (1926) *Eversley* on *Domestic Relations*, 4th ed., at p. 130 and pp. 152-154; (1928) *Salmond* on *Torts*, 7th ed., pp. 515, 516; (1929) *Clerk & Lindsell* on *Torts*, 8th ed., at p. 210; (1929) *Smith's Leading Cases*, 13th ed., vol. I., p. 281; (1929) *Odgers* on *Libel and Slander*, at p. 340. In 1927 the Supreme Court of New South Wales, in *Johnson* v. *Commonwealth* (2), unanimously affirmed the right of action by the wife. In the American States the overwhelming balance of judicial opinion is in the same direction. I would instance *Bennett* v. *Bennett* (3) as a powerfully reasoned decision well worth perusal in connection with Lord *Wensleydale's* judgment in *Lynch* v. *Knight* (4). In *Tinker* v. *Colwell* (5) the Supreme Court of the United States quoted and relied on a State decision in favour of a wife who had brought such an action. On the other hand, the contrary view is held in Ontario (*Lellis* v. *Lambert* (6)), and in a few of the American States. And in the case now under appeal the Supreme Court of Victoria has unanimously rejected the action.

Now, the simple ground on which the appellant's claim is, in my opinion, sustainable is one which has received very distinct enunciation in the modern law of torts, including *Lumley* v. *Gye* (7), decided before *Lynch* v. *Knight* (4). In reality, it lay for centuries at the basis of the husband's action for loss of *consortium*, and was judicially expressed and acknowledged nearly two hundred years ago. As it exists to-day it is applicable to husband and wife alike. There is no need of antiquated reasons springing from a primitive state of civilization originally impressed into service to attain justice, later abandoned in favour of better reasons, and to-day utterly repugnant

(1) (1923) 39 T.L.R. 429.
(2) (1927) 27 S.R. (N.S.W.) 133.
(3) (1889) 116 N.Y. 584.
(4) (1861) 9 H.L.C. 577; 11 E.R. 854.
(5) (1904) 193 U.S. 473, at 487.
(6) (1897) 24 A.R. (Ont.) 653.
(7) (1853) 2 E. & B. 216, at p. 217; 118 E.R. 749, at p. 750.

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to the present conditions of society. Still less is there any justification for rummaging among the ruined and abandoned structures of the past to find materials for erecting a barrier against the wife's claim for redress, when a clearly recognized principle of law admits it. It may, however, be added, the exploration rendered necessary by the objections taken will demonstrate that the materials suggested are now seen to be imaginary. The ground on which the appellant's case, in my opinion, firmly rests may be thus sufficiently marked out:—(a) the rights and obligations of persons are sometimes derived from the circumstances and from the relative positions of the parties (see *Dominion of Canada* v. *City of Levis* (1)); (b) a violation of legal right committed knowingly is a cause of action (*Rogers* v. *Rajendro Dutt* (2)), and it is a violation of legal right to interfere with contractual relations or other legal relations without sufficient cause or justification for such interference (*Quinn* v. *Leathem* (3); *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (4), and *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (5)); (c) causing a violation of the husband's marital obligations in regard to society, comfort, protection and support, is a violation of the wife's legal right and is prejudicial to her, and as on the allegations in the statement of claim, which must be taken as true, those obligations were consequently broken, the breach imports damage, and if actual pecuniary damage is necessary to be alleged, the required averment exists. In my opinion that is sufficient to end the matter. Had this been a husband's action, the principles stated would maintain his claim without controversy. But then it is said a husband has no legal obligations towards his wife but that of maintaining her, and as to that her only redress is to sue him for maintenance. True, it is said, if her obligations towards him are broken, he has various remedies, and may pursue the wrongdoer also. But she, according to the contention, is not permitted to pursue a wrongdoer; she has a right merely to sue her husband under special statutory provisions. The reasoning appears to me to fail at every point. The mutual relations of all persons in the community are regulated by the

(1) (1919) A.C. 505, at p. 513.
(2) (1860) 13 Moo. P.C. 209, at p. 241; 15 E.R. 78, at p. 90.
(3) (1901) A.C. 495, at p. 510.
(4) (1889) 23 Q.B.D. 598, at p. 614.
(5) (1908) 1 Ch. 335, at p. 369.

circumstances of to-day. To those circumstances the recognized principles of the common law apply—and assumed conditions of society that have in any case no existence now may and must be dismissed from consideration. When we see that women are admitted to the capacity of commercial and professional life in most of its branches, that they are received on equal terms with men as voters and legislators, that they act judicially, can hold property, may sue and be sued alone, may and frequently have to provide a home and maintain the family, when too, they are organized in time of national danger as virtual combatants in defence of the country, it is time, I think, to abandon the assertion that in the eye of the law they are merely the adjuncts or property or the servants of their husbands, that they have the legal duty of yielding and employing their body to their husband's will and bidding in all his domestic relations, and that all they are correlatively entitled to in return for obedience, subordination, child-bearing and domestic services is the right to receive such necessaries of life as are suitable to the husband's position in life—apparently so as to keep them in physical condition for their duties—to be specially sued for against the husband alone, if he should fail to maintain her. If someone, a paramour of her husband perhaps, by scheming or any other illicit means, succeeds in causing her husband to deprive her of her home and of his society and companionship as a husband, of access to her children, of her husband's protective presence against danger and insult, of his physical comfort and assistance in health and sickness, his reasonable participation in the family life and burden that certainly in the twentieth century the marriage union; to my mind, connotes under what is shortly called *consortium*, the common law is, in my opinion, flexible enough, strong enough and just enough by means of the principles above stated to afford her direct redress against the wrongdoer.

As I view the matter it is no mere sentimental right that is given to each spouse by the marriage union. Sentiment there should be, sincere affection, and all the eager devotion it should prompt. But there are also, as I hold, legal obligations on both sides, implied by the circumstances, status and relations of the parties, the obligations not merely of mutual fidelity but also of society, comfort, aid and

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assistance in all the vicissitudes of the united life into which the man and the woman have entered—obligations that cannot be accurately measured in money, but are real and substantial and carry temporal benefits, and the deprivation of which by a wrongdoer are quite as open to be compensated for as physical suffering, deprivation of hospitality, personal insult by defamation, or many other injuries recognized every day as legitimate grounds for compensation. When the husband is the complaining party against a man or a woman who, it may be, has deprived him of his *consortium*, these considerations are acknowledged as sound and proper. Why not also when the wife is the injured party? This is quite consistent with the natural leadership, and in most cases the decisive voice of the husband as head of the family in the management of domestic affairs. But his leadership is not that of a despot or a slave-master, and it is accompanied with mutual and correlative rights and duties which the law will recognize and enforce. I utterly reject the view that *consortium* in point of law means, on the part of the woman, her society and services (using those terms in the most unmeasured sense), and, on the part of the man, the one duty of cash remuneration in maintaining her, for which she may sue her husband directly if he fails to provide it. Sitting here, I decline to declare judicially that Australian wives occupy such a repellent position of legal and moral degradation. Legally, it is and always has been wrong. *Bishop* on *Divorce*, 6th ed., vol. I., p. 617, par. 805 a., says:— "Important as is the duty of a husband to support his wife, it is not so completely of the essence of matrimony that its performance will take away the effect of his desertion. *He owes to her his society and personal protection.*" That was so held by the Full Court in *Macdonald* v. *Macdonald* (1). In *Yeatman* v. *Yeatman* (2) Lord *Penzance* said: "A wife is entitled to her husband's society, and the protection of his name and home, in cohabitation." That this is a legal right is incontestable since its denial constitutes the matrimonial offence of desertion. As to morality, what, when stripped of technical embroidery, is the doctrine contended for in effect but legalized white slavery?

(1) (1859) 4 Sw. & T. 242; 164 E.R. 1508.

(2) (1868) L.R. 1 P. & D. 489, at p. 491.

The reason relied on in support of the demurrer in the argument before us, and so far as I can discern adopted in the judgment under appeal, is that of the small minority in the Irish Courts in *Lynch* v. *Knight* (1). *Hughes* B. said (2) :—" The *consortium* of husband and wife is, in my opinion, the right of the husband. . . . *The consortium is, as it were, the property of the husband.* . . . The loss of the *consortium* is damage accruing to the husband, and in my opinion to the husband only." *Fitzgerald* B. said (3) :—" I can find nothing in the wife's loss of her husband's society affecting her material interests, however deeply it may and must affect her feelings and her comfort, it seems to me that the loss of conjugal society is a special damage to the husband only, *who has thereby lost the society of one who is . . . considered . . . his servant.* Connection in that case involves *the relation of master and servant.* Of course, it includes much more." (The word " connection " there means the "marriage connection." See *Neeld* v. *Neeld* (4).) In my opinion the opposite view then taken by the majority—a considerable majority—of the Irish Judges was correct. The word *consortium* never connoted proprietorship of either party or the relation of master and servant. *Pigott* C.B. (5), in reasoning that seems to me convincing beyond controversy, says : " *Consortium* in its obvious meaning necessarily includes the idea of a union of two persons, each of whom is the consort of the other, and it is impossible to maintain that either has an exclusive interest, or that each has not a common interest in that community of lot which involves mutual assistance, but which does not make either the servant, in the ordinary sense of the word, of the other." *Christian* J. (6), in the course of a passage cogently reasoned but too long for transcription, says :—" It is said loss of a material kind is necessarily involved in every such case, because a wife is the servant of her husband. I am not prepared to say that is the light in which the law regards that relation." And then the learned Judge quoted the judicial decisions supporting his view. In that case, in 1860 and 1861, seven Judges of the Irish Courts took the view favourable

(1) (1864) 5 L.T. (N.S.) 291.
(2) (1861) 5 L.T. (N.S.), at pp. 292, 293.
(3) (1861) 5 L.T. (N.S.), at p. 294.
(4) (1831) 4 Hag. Ecc. 263, at pp. 265, 266 ; 162 E.R. 1442, at pp. 1443, 1444.
(5) (1861) 5 L.T. (N.S.), at p. 293.
(6) (1861) 5 L.T. (N.S.), at p. 295.

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to the wife's right of redress while two already referred to held the contrary. On appeal to the House of Lords, Lord *Campbell* L.C., referring to the ground already formulated, said (1): "If it can be shown that there is presented to us a concurrence of *loss* and *injury* from the act complained of, we are bound to say that this action lies." Then he said: "Nor can I allow that the loss of *consortium, or conjugal society*, can give a cause of action to the husband alone." He then immediately proceeds to point to a distinction essentially necessary for the proper understanding of the early authorities. He observes:—"If the special damage alleged to arise from the speaking of slanderous words, not actionable in themselves, results in *pecuniary loss*, it is a loss only to the husband; and although it may be the loss of the personal earnings of the wife living separate from her husband, *she cannot join in the action*. But the loss of *conjugal society* is not a pecuniary loss, and I think it may be loss which the law may recognize, to the wife as well as to the husband. *The wife is not the servant of the husband*, and the action for criminal conversation by the husband does *not*, like the action by a father for seduction of a daughter, rest on any such fiction as a loss of the services of the wife." Then he points at why a wife cannot maintain an action for criminal conversation against a paramour of her husband who had merely seduced him, the reason being that she does not thereby necessarily lose his *consortium*. Lord *Cranworth* said he was strongly inclined to think Lord *Campbell's* view was correct. He defined the wife's *consortium* as "the conjugal society of her husband" (2). Lord *Brougham* was "rather inclined" to think the action did not lie (3). Lord *Wensleydale* (4), even under the procedural conditions of that period, admitted "*there is a considerable doubt upon*" it, but added: "I have made up my mind that no such action will lie." I have, it needs scarcely be said, most attentively considered the reasons of the learned Lord, and weighed them all with the respect due to so great a jurist. But there were also illustrious lawyers to whose opinions his was opposed, and though

(1) (1861) 9 H.L.C., at p. 589; 5 L.T. (N.S.), at p. 296; 11 E.R., at p. 859.

(2) (1861) 9 H.L.C., at p. 595; 5 L.T. (N.S.), at p. 297; 11 E.R., at p. 861.

(3) (1861) 9 H.L.C., at p. 593; 5 L.T. (N.S.), at p. 297; 11 E.R., at p. 861.

(4) (1861) 9 H.L.C., at p. 597; 5 L.T. (N.S.), at p. 298; 11 E.R., at p. 862.

with Lord *Brougham's* by no means settled opinion on his side, Lord *Wensleydale*, even apart from his own "considerable doubt," was in a marked minority. And it is to be observed, *the question at issue was only a matter of law so far as it correctly appraised social understanding.* The fact that the case was one of first impression, I shall speak of later.

The test of analogy to the husband's action depends entirely on the meaning given to *consortium*. As to that, Lord *Wensleydale* thinks that, although in most respects dissimilar from that of master and servant, yet *in one respect* the husband's relation to the wife has a *similar* character. That respect is: "The assistance of the wife in the conduct of the household of the husband, and in the education of his children." He says it *resembles* "the services of a hired domestic, tutor or governess" (1). I must candidly admit I cannot understand it. What does "resemble" mean? *The children are hers as well as his*, a fact which appears to be entirely ignored by those who hold the opposite view. Why is her care for her own child to be considered that of his *servant*, rather than that of *a wife and a mother*, and as the natural consequence of the union into which both have entered, and of the responsibility to the child which both parents owe by every tie of nature and justice? Does she tend and watch and care for her children because she is ordered —actually or impliedly—by her husband, and does he either actually or impliedly pay her wages as for services rendered to him at his direction in so doing? I am utterly incapable of understanding the mental attitude that leads to such a conclusion. If the nature of the services expected of a wife determines the character in which she renders it, then the husband's expected daily services to his wife are equally those of a servant. To say that her services are of material value, capable of being estimated in money, may be met by saying that his presence in the house in protecting her as part of the consideration for her duties resembles that of a hired watchman, or that the assistance and comfort he gives her in her daily life "resembles" the conduct of a hired personal attendant performing the thousand acts of attention that contribute to her material wants and convenience, all being equally measurable in money. To drive

(1) (1861) 9 H.L.C., at p. 598; 5 L.T. (N.S.), at p. 298; 11 E.R., at p. 863.

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her in his car, to assist her into it and out of it, to accompany her when she visits the theatre or friends, are facts " resembling " those of a hired chauffeur or attendant; to feed and tend her when she is ill is to do acts " resembling " those of a hired nurse; to bind a wound is to act as if he were a paid medical man. But the truth is, such analogies are entirely strained and misleading, and must be brushed aside. The marriage compact, as it is reasonably and indeed necessarily understood, is a natural standing by each other in all the vicissitudes of life, and, however much some of its incidents resemble isolated events in other relations, they are all referable to the one unique category—the marriage status—and must be adjudged of in that relation. A wife's services, if analogy is permissible, are those not of a hired employee, but of a *partner* in the common undertaking. The husband may be the managing partner in many respects, but the business of life in which both parties have embarked is a life partnership, whether viewed from the individual standpoint or that of the community. With deep respect, this is the true correction of Lord *Wensleydale's* dictum. The mass of indefinable duties and rights are conveniently gathered under the one word *consortium*, and that is a word of equality, subject only to natural, not legal, diversities, and betokens not a state of despotism on the one side and submission on the other, but of honourable intercourse which neither is rightfully entitled to abridge, and with which no third person may interfere without responsibility. If that be the correct connotation of " *consortium*," it follows as a necessary legal consequence that the interference alleged here, being without lawful excuse or justification, the appellant has a right of action. That Lord *Wensleydale's* view of *consortium* was too narrow is, I venture respectfully to think, shown by many cases both before and since 1861, dealing with damages recoverable by the injured husband. Among them I would refer to *Bell* v. *Bell and Marquis of Anglesey* (1), before Sir *Cresswell Cresswell*, *Watson* B., and *Hill* J., sitting as the Full Court. There the Judge Ordinary said to the jury that they had " to consider the loss the husband has sustained by being deprived of his wife, not his pecuniary loss " (2). " It has always been considered that the only question

(1) (1859) 29 L.J. P. & M. 159; 1 Sw. & Tr. 565; 164 E.R. 861.
(2) (1859) 29 L.J. P. & M., at p. 160.

was, of the loss to the husband of the *society* of the wife " (1). And although, in deference to an unreported case mentioned, settlements were submitted to the jury, the learned presiding Judge said it must have been an exceptional case. This accords with *Buller's Nisi Prius*, p. 27, with Lord *Ellenborough's* expression, "company, society and assistance" (*Chambers* v. *Caulfield* (2)), and a number of cases conveniently collected in *Mayne* on *Damages*, 10th ed., at pp. 490-492. There is one case which, when read with two other cases therein referred to, seems to me to have special importance. I mean *Davies* v. *Solomon* (3), decided in 1871, and therefore free from the Act of 1882. That case, as well as *Roberts* v. *Roberts* (4), may be regarded as contemporary with *Lynch* v. *Knight* (5). Husband and wife sued for slander of the wife, the resultant damage laid being (a) loss of cohabitation with her husband and (b) loss of hospitality of friends. The first head is by *Blackburn* J. (with the concurrence of *Mellor* and *Hannen* JJ.) said to be "loss to the plaintiff of the *consortium* of her husband" (6). The Court on demurrer found it unnecessary to decide whether that was sufficient temporal damage, because the second head of damage, on the authority of *Moore* v. *Meagher* (7), was sufficient. But it is notable that *Blackburn* J. commenced his judgment by saying (6): "The *sole difficulty* in deciding the case is caused by the opinion of Lord *Wensleydale* in *Lynch* v. *Knight* (5)." If that sentence be read with the report of the same case in the *Law Times* (8) and the observations of *Blackburn* J. and *Crompton* J. in *Roberts* v. *Roberts* (9), it seems to me to be the proper and almost manifest deduction that *Blackburn* J. and the other learned Judges in *Davies* v. *Solomon*, if guided by their own appreciation of principles and precedent, would have overruled the demurrer on the first head of damages also, and were only restrained from doing so by their respect for an illustrious lawyer, whose opinion they thought should not be unnecessarily overruled.

(1) (1859) 1 Sw. & Tr., at 566; 164 E.R., at p. 862.
(2) (1805) 6 East 244, at 256; 102 E.R. 1280, at p. 1285.
(3) (1871) L.R. 7 Q.B. 112.
(4) (1864) 5 B. & S. 384; 122 E.R. 874.
(5) (1861) 9 H.L.C. 577; 11 E.R. 854.
(6) (1871) L.R. 7 Q.B., at p. 114.
(7) (1807) 1 Taunt. 39; 127 E.R. 745.
(8) (1871) 25 L.T. 799.
(9) (1864) 5 B. & S., at pp. 387, 388; 122 E.R., at pp. 875, 876.

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So far I have approached the question, so to speak, from the *positive* side.

But now it is also necessary, as I have said, to examine the *negative* opinion in order to test the foundations on which it is said to rest. It is true that in some ancient texts there are found statements that lend some colour to the notion that a husband has dominion over his wife and a right to the possession of her person. For instance, *Bacon's Abridgment*, Baron and Feme (B), 7th ed., vol. I., p. 693, says: "The husband hath, by law, power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner." That is a type of the so-called authorities which underlie the demurrer in this case. Now in 1891 this doctrine was challenged and came up for examination before a Court of Appeal, consisting of Lord *Halsbury* L.C., Lord *Esher* M.R. and *Fry* L.J. (*R.* v. *Jackson* (1)). Learned counsel for the husband, who claimed the right to take and hold possession of his wife against her will, certainly disclaimed reliance on the old authorities so far as castigation was concerned, but they still relied on the "dominion" and "possession" portions, just as those supporting the demurrer do to-day. To this Lord *Halsbury* (2), during the argument, offered the crushing observation which he amplified in his judgment: "Where ancient dicta, which state that a husband is entitled to imprison his wife, also state that he has a right to beat her, can they be rejected as authorities for the latter proposition without being affected as authorities for the former?" Clearly not, one would think. The whole orientation is wrong. And so in the present case. In *R.* v. *Jackson* (3) there was specifically argued "the common law right of the husband to the custody of the wife," and notwithstanding that Lord *Campbell* in *R.* v. *Leggatt* (4) had expressly ruled that the husband had no such right at common law. The Lord Chancellor in his judgment said (5):—"I confess that some of the propositions which have been referred to during the argument are such as I should be reluctant to suppose ever to have been the law of England. More than a century ago it was boldly contended that slavery existed in England; but, if

(1) (1891) 1 Q.B. 671.
(2) (1891) 1 Q.B., at p. 675.
(3) (1891) 1 Q.B., at p. 676.
(4) (1852) 18 Q.B. 781; 118 E.R. 295.
(5) (1891) 1 Q.B., at pp. 678, 679.

anyone were to set up such a conclusion now, it would be regarded as ridiculous." In view of the contention here in support of the demurrer, Lord *Halsbury* must surely be regarded as unduly optimistic. He said also: "The authorities cited for the husband were all tainted *with this sort of notion of the absolute dominion of the husband over the wife.*" Lord *Halsbury* refers to "the conjugal *consortium*" (1) clearly in the mutual sense. He says (2): "I confess to regarding with something like indignation the statement of the facts of this case, and the absence of a due sense of the delicacy and respect due to a wife *whom the husband has sworn to cherish and protect.*" And yet it is gravely said the *consortium* is all *his*, that she has no rights except that of payment that he is bound in law to respect. Lord *Esher* is no less emphatic. He says, with perfect appositeness to the contentions in this present case (3): "A series of propositions have been quoted which, if true, make an English wife the slave, the abject slave, of her husband." One of those propositions he thus quotes (4):—"It was said that by the law of England the husband has the custody of his wife. . . . I do not believe that an English husband has by law any such rights over his wife's person, as have been suggested." *Fry* L.J. was equally clear. If that case is good law—and it was a case where the husband had already obtained a decree for restitution of conjugal rights—it entirely undermines the contention with regard to the husband's rights in respect of the wife's person.

> The times have been,
> That, when the brains were out, the man would die,
> And there an end.

But, like *Banquo's* ghost, the shadows of "dominion," "*potestas*," "possession" and "servant" still stalk about as if they were living realities. For, despite *R.* v. *Jackson* (5), it has been argued with great fervour that the older supposed law as to dominion governs this case. I say "supposed" law not only because it has been definitely negatived in 1891, but because for nearly two hundred years it has been virtually abandoned as an essential basis in favour of a broader and more reasonable principle, which is practically that I have above formulated.

(1) (1891) 1 Q.B., at p. 680.
(2) (1891) 1 Q.B., at p. 681.
(3) (1891) 1 Q.B., at p. 682.
(4) (1891) 1 Q.B., at pp. 682, 683.
(5) (1891) 1 Q.B. 671.

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It is necessary to distinguish between the various actions that a husband could by the common law bring in respect of wrongs concerning his wife. For actual battery of his wife, *simpliciter*, he sued in her right, and both baron and feme had to be joined. The cause of action was personal to her, but she could not sue alone, and the damages recoverable became his. If it were alleged in such an action that the husband had loss and delay in business or, as it was expressed in Latin, "*per quod negotia ipsius infecta remanserunt*," that was not the gist of the action; it was aggravation only, and it was held that evidence of that ought not to be admitted. See *Russell* v. *Corne* (1), and s.c. in *Salkeld* (2), with the notes thereto. Also *Buller's Nisi Prius*, 7th ed., at p. 21*a*. Indeed, *Powell* J. said in that case (3): "I do not know what they mean by saying, *per quod negotia sua infecta, &c.* a woman is to comfort her husband." *Holt* C.J. said (4): "If it had been, *per quod consortium amisit*, the wife could not have been joined." The husband's action *per quod consortium amisit*, on the other hand, was brought not in the wife's right, but in that of the husband. The gist of the action was not the battery of the wife, but for "the loss and damage of the husband for want of her company and aid." It was never "*servitium*," and when the word "services" was used it had no relation to *servitium* (*Guy* v. *Livesey* (5); *Hyde* v. *Scyssor* (6)). In this action the wife could not be joined (*Russell* v. *Corne*; *Anon* (7)). Notwithstanding recovery in such an action, the wife could, after her husband's death, sue for the battery, or during his life she could join with him—so distinct were the causes of action (*Young* v. *Pridd* (8)). This law was recognized in *Smith* v. *Hixon* (9), where the *consortium* action was still considered as founded on *trespass vi et armis*. That was in 7 Geo. II. (1734). But in 1745 a new and notable departure with regard to *consortium* actions took place, the true significance of which must not be overlooked. It marks a new era for that class of action. And even more, it had, as will presently be perceived, a distinct influence

(1) (1704) 2 Ld. Raym. 1031; 92 E.R. 185.
(2) (1704) 1 Salk. 119.
(3) (1704) 2 Ld. Raym., at p. 1032; 92 E.R., at p. 186.
(4) (1704) 2 Ld. Raym., at p. 1031; 92 E.R., at p. 185.
(5) (1618) Cro. Jac. 501; 79 E.R. 428.
(6) (1619) Cro. Jac. 538; 79 E.R. 462.
(7) (1640) W. Jones 440; 82 E.R. 231.
(8) (1627) Cro. Car. 89; 79 E.R. 679.
(9) (1734) 2 Stra. 977; 93 E.R. 979.

on the master's action based on *servitium*. It appears to have led to a practice in those actions, which ultimately by the assistance of *Parke* B. definitely placed them also on a footing free from property considerations. Thus *consortium* actions led the way in modern conceptions of legal remedies. In *Winsmore* v. *Greenbank* (1) an action was brought *on the case* for enticing away and detaining the plaintiff's wife, for loss of "the comfort and society" of the wife and "her aid and assistance in his domestic affairs," &c. This was obviously not founded on any dominion or right to possession, giving rise to trespass *vi et armis*, actual or fictitious. It was founded on the general principle even then well established, and stated by *Willes* C.J. (2), that "the law will never suffer an injury and a damage without a remedy"; that the tortious act followed by damage, in that case the loss of "the comfort and assistance of his wife," made the cause of action. The objection that there was no precedent of any such action therefore failed, since it was only an instance of an action on the case and was not confined to the *brevia formata*. In declining to accede to the objection, the Court followed the *Statute of Westminster the Second* that "a writ shall be made, lest it might happen later that the Court should long time fail to minister justice to complainant." *A ruling to remember if Courts are to be living organs of a progressive community.* I may at this point refer to the same objection alluded to by Lord *Wensleydale* in *Lynch* v. *Knight* (3), and still relied on here. To begin with, it can hardly fail to be noticed that the learned Lord himself furnished a formidable answer to the objection in pointing out that as the law then stood the husband would have to join and would receive the money awarded, so that the wife could never obtain redress. Even for injury *to her own person* by battery, she could not sue alone in any case. It was only by her husband's concession that she really obtained redress. The husband had to be joined (*Chitty* on *Pleading*, 7th ed., vol. I., pp. 83, 84). It was the Act of 1882 that made damages recovered in such an action her property (*Beasley* v. *Roney* (4)). *A fortiori* for his imprisonment. Who, then, can be surprised that

(1) (1745) Willes 577; 125 E.R. 1330.
(2) (1745) Willes, at p. 581; 125 E.R., at pp. 1331, 1332.
(3) (1861) 9 H.L.C., at pp. 597, 598; 11 E.R., at pp. 862, 863.
(4) (1891) 1 Q.B. 509.

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no action was brought by a wife for a husband's admitted breach of duty when until the *Married Women's Property Act* his presence as a plaintiff was necessary ? (See *Weldon* v. *Winslow* (1); *Lowe* v. *Fox* (2); *Edwards* v. *Porter* (3).) The question has only to be asked to be answered. That, however, does not touch the existence of a good cause of action, but merely the right or power to bring it. In *Edwards* v. *Porter* (4) Lord *Sumner* said: "In the action of tort he" (the husband) "had to be joined if the action was to be properly constituted, but I do not know that the wife could compel him to sue against his will." If the husband himself were actually beaten or imprisoned, that was in itself a direct and complete cause of action in him, he alone could sue, even if his wife were incidentally assailed, the injury to her by the same act being matter of aggravation (see the notes and cases in *Salkeld* (5), at foot of *Russell* v. *Corne*). She could not in these cases be properly joined. So that we need not wonder why no precedent existed of an action for loss of *consortium* to what Lord *Sumner* in *Edwards* v. *Porter* (3) calls "the legal emancipation of the married woman." With regard to the action by a master *per quod servitium amisit*, it was for a long time rested on the notion of trespass. That, as stated in the judgment under appeal, was recognized in *Woodward* v. *Walton* (6), where it was held to be an action in trespass and not in case, contrary to the opinion of *Buller* J. Sir *Frederick Pollock*, as to this doctrine in his work on *Torts*, 13th ed., at p. 234, note, observes: "How this can be accounted for on principle I know not, short of regarding the servant as a *quasi* chattel." Still, down to 1814, in *Ditcham* v. *Bond* (7), the doctrine prevailed. At last, in 1839, as pointed out in *Pollock*, at p. 234, it was definitely settled in *Chamberlain* v. *Hazlewood* (8) that *servitium* actions, as well as *consortium* actions, could be brought in case. Lord *Abinger* C.B. and *Parke* B. had no doubt about it. *Parke* B.'s observations on *Woodward* v. *Walton* are significant. *Pollock* mentions that no other reason was given than the constant practice. But that indicates that though

(1) (1884) 13 Q.B.D. 784.
(2) (1885) 15 Q.B.D. 667.
(3) (1925) A.C. 1, at p. 41.
(4) (1925) A.C., at p. 42.
(5) (1704) 1 Salk, at p. 119; 91 E.R., at p. 112.
(6) (1807) 2 B. & P. (N.R.) 476; 127 E.R. 715.
(7) (1814) 2 M. & S. 436; 105 E.R. 443.
(8) (1839) 5 M. & W. 515; 151 E.R. 218.

no direct decision had been given declaring that case was permissible, the example set in the somewhat analogous case of *consortium* by *Winsmore* v. *Greenbank* (1) had been followed by pleaders. Lord *Abinger* indicated the abandonment of the old notion of a married woman's incapacity to consent, and *Parke* B. held firmly to the view that the *servitium* action could be brought, and that the established practice was to do so for the consequential damage.

At this point, therefore, the idea of possession of property as the fictionally necessary basis of both classes of action disappears. Nothing could more clearly demonstrate this than the case of *Howard* v. *Crowther* (2). There it was held that the right of action for seduction of a servant did not pass to the master's assignees in bankruptcy. It was argued for the defendant, sued by a bankrupt brother of the seduced girl, that the loss of services was not for the plaintiff's injured feelings, but was an injury affecting the estate—in other words, was a property right. But Lord *Abinger* C.B. said (3): "*Loss of service is only a personal inconvenience*; it does not prejudice the estate." In his judgment (4) he said it was "an injury to his personal comfort. Assignees of a bankrupt are not to make a profit of a man's wounded feelings." *Alderson* B. (4) said it was "only a personal injury." During the argument the Lord Chief Baron said (3):—"Has it ever been contended that the assignees of a bankrupt can recover for his wife's adultery . . . ? How can they represent his aggravated feelings ?" This has since been affirmed by the House of Lords, as late as *Wilson* v. *United Counties Bank Ltd.* (5)). In *De Francesco* v. *Barnum* (6) the modern principle as to *servitium* was consistently held to be applicable to all service whether that of a servant strictly so called or not. In the cases on restraint of trade the House of Lords has more than once emphasized the distinction between property and service. See, for instance, per Lord *Parker of Waddington* in *Herbert Morris Ltd.* v. *Saxelby* (7). The husband's or master's right of action, from *Winsmore* v. *Greenbank* (1) and its active influence, approximate very closely, and in

(1) (1745) Willes 577; 125 E.R. 1330.
(2) (1841) 8 M. & W. 601; 151 E.R. 1179.
(3) (1841) 8 M. & W., at p. 603; 151 E.R., at p. 1179.
(4) (1841) 8 M. & W., at p. 604; 151 E.R., at p. 1180.
(5) (1920) A.C. 102, at pp. 111, 130.
(6) (1890) 63 L.T. 514.
(7) (1916) 1 A.C. 688, at p. 709.

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principle that right of action is identical with the formulation earlier expressed.

And now, as to the wife, the law of Victoria (sec. 4 of the *Married Women's Property Act* 1915) gives her the right of suing in tort as if she were a feme sole—her husband need not be joined; and any damages recovered are her separate property. It need hardly be said that the right of suing in tort as if she were a feme sole does not preclude her from suing, say, for a libel alleging she is a negligent or extravagant wife. Reading that with *R.* v. *Jackson* (1) and the other cases cited, I am at a loss to understand why she should be unable to obtain in the King's Courts on ordinary principles, and in the ordinary way, redress for deprivation of rights which, if she is a normal wife and mother, are the most precious she possesses. For these reasons, it seems clear to me that the opinions above referred to in judicial decisions and text-books which are in favour of the wife's right of action preponderate not merely in number but also in adherence to principle and to the line of legal development. The respondent asks us to take a retrograde step into the dark ages of the law.

I may add that as to the Ontario case referred to, the decision of *Quick* v. *Church* (2), which was overruled four years afterwards, appears to me, in the light of the course the law of England has taken, much more persuasive than the appellate decision. With those cases also should be read the later case of *Sheppard* v. *Sheppard* (3), also in Ontario, where a married woman was held entitled to sue for slander causing the estrangement of her husband.

In my opinion this appeal should be allowed.

RICH J. The plaintiff, who is a married woman, delivered an amended statement of claim in which she alleged that the defendant, another woman, persuaded, enticed and procured the plaintiff's husband to withdraw from the home and the conjugal society. The question whether this statement of claim disclosed a cause of action was set down for determination before the Full Court of Victoria. The Court consisted of *Irvine* C.J., *Mann* and *Macfarlan*

(1) (1891) 1 Q.B. 671.
(2) (1893) 23 Ont. Rep. (Can.) 262.
(3) (1922) 69 D.L.R. 570.

JJ., and *Mann* J. for the Court delivered a judgment in which he held that the plaintiff had no cause of action because the mere loss of her husband's *consortium* not brought about by an act in itself wrongful affords no cause of action. The argument by which the action is supported is that a similar action can be maintained by the husband, and that his case is indistinguishable in principle from the wife's save that before the *Married Women's Property Act* she suffered a procedural disability. The correctness of this argument depends upon the nature of the principle which enables the husband to maintain an action for the loss of *consortium*. The argument assumes that the principle simply is that a spouse by virtue of the status of marriage has a right to the *consortium* of the other spouse and that this right is a right *in rem*. It is, therefore, necessary to ascertain with some precision what the husband's cause of action is and upon what it depends. This cannot be determined by uninformed reasoning *a priori* but only by an investigation of the state of the law before the *Married Women's Property Act* and the considerations upon which it depended. At the time when the legal right of the husband was established to recover damages from those who deprived him of "the comfort, fellowship, society, aid and assistance of his wife in his domestic affairs" or to the services therein of his children, the husband was considered in point of law to be the head of the household. This was in accordance with the notions which animated not merely Anglo-Saxon law but Roman law. The early stages and development of the English law are shortly described by Sir *W. S. Holdsworth*, *History of English Law*, vol. VIII., at pp. 427-430. It is instructive to see how the condition of the law stood at the end of the 13th century, because from the principles then adopted our modern law has evolved. In *Pollock and Maitland's History of English Law*, vol. II., bk. II., ch. VII., sec. 2, at pp. 403-404, it is said at p. 403:—"If we look for any one thought which governs the whole of this province of law, we shall hardly find it. In particular we must be on our guard against the common belief that the ruling principle is that which sees a 'unity of person' between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph, and may now and again lead us out of or into a

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difficulty; but a consistently operative principle it can not be. We do not treat the wife as a thing or as somewhat that is neither thing nor person; we treat her as a person. Thus *Bracton* tells us that if either the husband without the wife, or the wife without the husband, brings an action for the wife's land, the defendant can take exception to this 'for they are *quasi* one person, for they are one flesh and one blood.' But this impracticable proposition is followed by a real working principle:—'for the thing is the wife's own and the husband is guardian as being the head of the wife.' The husband is the wife's guardian:—that we believe to be the fundamental principle; and it explains a great deal, when we remember that guardianship is a profitable right."

In the later law there are many legal consequences of this view. It was petit treason when a servant slayeth his master or a wife her husband. A wife was considered to be so under the direction of her husband that she was, and still is, presumed, until the contrary be shown, to have acted under his coercion in the commission of a crime at which he was present. Further, the husband could sue in trespass for violence offered to the wife resulting in temporal damage to himself. The significance of this depends on the nature of that form of action. An action of trespass *vi et armis* lay when the wrong complained of consisted of the invasion of a right given by law of what may be called control. Trespass to the person is an invasion of personal freedom, the free control of one's self. Trespass *de bonis asportatis* to personal property and *quare clausum* to the occupation of land. The distinction between trespass and case once fundamental in personal actions was really a distinction between immediate and consequential injury. "The solid distinction is between direct or immediate injuries on the one hand, and mediate or consequential on the other" (per *Blackstone* J. in *Scott* v. *Shepherd* (1)). "The same evidence that will maintain *trespass*, may also frequently maintain case, but not *e converso*. Every action of trespass with a '*per quod*' includes an action on the case. I may bring trespass for the immediate injury, and subjoin a '*per quod*' for the consequential damages; or may bring case for the consequential damages,

(1) (1773) 2 W. Bl. 892, at p. 895; 96 E.R. 525, at p. 527.

and pass over the immediate injury" (1). The importance of this distinction as an evidence of the true nature of the husband's right to complain of loss of *consortium* will be seen from its application to the various causes of action which he had in respect of his family (using that expression to include all "famuli"). According to the 7th edition of *Chitty* on *Pleading*, (1844) vol. I., p. 150, "Actions for injuries to the relative rights of persons, as for seducing or harbouring wives, enticing away or harbouring apprentices or servants, are properly in case; and though it is now usual, and perhaps more correct, to declare in trespass *vi et armis* and *contra pacem*, for criminal conversation, and for debauching daughters or servants; yet as the consequent loss of society or service is a ground of action, the plaintiff is still at liberty to declare in case. When, however, the action is for an injury really committed with force, as by menacing, beating, or imprisoning wives, daughters, and servants, it is most proper to declare in trespass." It will be observed that wherever the person of the wife or the servant was immediately affected by the wrong done an action of trespass lay just as if the husband's own personal liberty had been invaded. This was because of his position as husband in control of the household. Where the wrong was not *vi et armis* but by procurement of the wife's or servant's voluntary act the action was in case for the consequential loss. The reason was that he was deprived of what the law gave him in virtue of this position. This distinction was well reflected in the law relating to parties. "With respect to injuries to the person of the wife during coverture, the husband and wife must join in suing. But the wrongful act, e.g., an assault upon the wife, may involve two distinct wrongs, and thus give two distinct causes of action. The first is the assault upon the wife, and the second is the damage caused thereby (through loss of service) to the husband. The husband cannot sue alone merely for the injury of the wife, but he may sue alone for the damages occasioned thereby to himself solely. On the other hand, the husband and wife cannot, in an action brought solely for the injury to the wife, claim compensation for the injury to the husband from the loss of the wife's services. In order to obtain full compensation, two

(1) (1773) 2 W. Bl., at p. 897; 96 E.R., at p. 527.

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actions used to be necessary; one by the husband and wife for the injury to the wife; another, by the husband alone for the damage caused thereby to him" (*Dicey* on *Parties*, pp. 390-391). These considerations show that the husband's right to complain of a stranger's act *per quod solamen et consortium uxoris amisit* was not given to him as one of two spouses with corresponding rights which each was entitled to vindicate against the world, but because as the husband he was entitled to maintain the freedom of his household from the invasion or impairment of strangers. There is nothing in its character to suggest that it belonged to each of the spouses. No system of law has considered that identical rights or duties could or should belong to the spouses. *Defendi enim uxores a viris, non viros ab uxoribus æquum est* (Inst., *lib.* IV., tit. 4, and see Dig., *lib.* XLVII., tit. X., sec. 2). In English law there has never been an assimilation of rights and duties of the two parties to the marriage contract. For instance, the common law imposed on the husband a duty to maintain his wife according to his estate or condition in life or to his means of supporting her. Failure in his duty gave her authority to pledge his credit for her requirements suitable to his station in life. She, on the other hand, was under no obligation to support her husband and he has no authority to pledge her credit. Doubtless these legal rules result from his position as it has been described.

Subject to exceptions presently to be mentioned, I know no instance in the history of English law in which a wife has maintained an action for the loss of her husband's *consortium*. It is ridiculous to suggest that the absence of any such instance is to be attributed to the fact that until 1883 a wife could not sue without joining her husband for conformity. No doubt it is unlikely that a husband would join with his wife in an action against his paramour. But loss of *consortium* by the enticement of a rival is only one of the many ways in which the action could arise. In every street accident in which a married man was injured, in every false imprisonment of a married man, in every battery of a married man which resulted in his disablement for any appreciable time, a wife loses his *consortium*. If there had been any ground whatever for supposing that she could have recovered damages in a separate action, can it be

doubted that the litigious enterprise of upwards of four centuries would have failed to discover it? Just as it became a common practice to bring actions by husband and wife jointly and husband alone when the wife was injured, so it would have become a commonplace for the husband's action for the wrong to him to be accompanied by their joint action for the wrong to her. In the United States, where in most jurisdictions the action has been established as a result of legislation, it is generally allowed that the action did not lie at common law. In *Clow* v. *Chapman* (1) the Court said:—"The common law gives a husband an action for damages against a third person for enticing away his wife and depriving him of her society (*Schouler* on *Husband and Wife*, sec. 64). Proof of pecuniary loss is not necessary to sustain such an action, because the action is based upon loss of the companionship and society of the wife (*Rinehart* v. *Bills* (2); *Bigaouette* v. *Paulet* (3)). The question we are now called upon to determine is, whether a wife has a corresponding action against third persons for the alienation of the affections of her husband, and depriving her of his society. It seems to be very generally held in this union that the common law gives her no such action, though this question is left in much doubt, in England, by the conflicting opinions in *Lynch* v. *Knight* (4)." The judgment proceeds to examine the divergent grounds upon which the action has been given as a result of statute. In some States it appears that the Courts have avowedly invented the action upon the supposed authority of the *Statute of Westminster the Second* on the ground that it was *in consimili casu* with the husband's action. It is not surprising that they misunderstood and misapplied a statute passed in the 13th year of Edward I., which has long since ceased to be, if it ever was, an authority to Judges to legislate. In 1883 it was repealed in England because, as the learned persons who prepared the Bill informed Parliament, it was obsolete. In Victoria it was excluded from the list of enactments kept in force by the *Imperial Acts Application Act* 1922. In Wisconsin, statutes which gave the wife an action for any injury to her person, property or

(1) (1894) 125 Mo. 101; 46 Am. St. Rep. 468, at pp. 468, 469.
(2) (1884) 82 Mo. 534; 52 Am. Rep. 385.
(3) (1883) 134 Mass. 123; 45 Am. Rep. 307.
(4) (1861) 9 H.L.C. 577; 11 E.R. 854.

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means of support, or for any injury to her person or character, were held to be insufficient to create the cause of action now under consideration. In *Duffies* v. *Duffies* (1) *Orton* J. said :—" According to common reason and the decided weight of authority, neither of these statutes gives the wife any right of action for the *consortium* of her husband. The loss of her husband's society is not an injury to her person, property, means of support, or character, and such an action cannot be forced within the terms or spirit of the statutes, by the most strained and liberal construction. Such a right of action does not exist by law, nor can it be inferred from the ameliorated and changed conditions of the wife, and her equality with her husband, produced by modern legislation in her behalf. Whatever equality of rights with her husband she may have, it is not proper to say that 'her right to the society of her husband is the same, in kind, degree, and value, as his right to her society.'" (And see pp. 81-82.) In Canada the same view has been taken, namely, neither at common law nor under the *Married Women's Property Act* will an action lie by a married woman against another woman to recover damages for alienation of her husband's affections (*Lellis* v. *Lambert* (2)). Nor is it to be supposed that the *Married Women's Property Act* has altered the relations between husband and wife by separating their personality so as to reverse the law expounded in *Phillips* v. *Barnet* (3) by *Blackburn*, *Lush* and *Field* JJ. (see *Salaman* v. *Salaman* (4)). The *Married Women's Property Act* of 1882 (in Victoria, now 1928) conferred no new rights upon the wife in this respect. It certainly enabled her to sue as a feme sole without joining her husband as a plaintiff for conformity, but it did not add to her cause of action. " I take the Act to mean exactly what it says—no more and no less. It is said that it destroys the doctrine of the common law by which there was what has been called a unity of person between husband and wife. Again I answer, I do not see why. It confers in certain specified cases new powers upon the wife, and in others new powers upon the husband, and gives them in certain specified cases new remedies against one another. But I see no reason for supposing that the Act does anything more than it

(1) (1890) 20 Am. St. Rep., at p. 86.
(2) (1897) 24 A.R. (Ont.) 653.
(3) (1876) 1 Q.B.D. 436.
(4) (1923) N.Z.L.R. 300.

professes to do, or either abrogates or infringes upon any existing principles or rules of law in cases to which its provisions do not apply" (*In re Jupp*; *Jupp* v. *Buckwell* (1); per *Wills* J. in *Butler* v. *Butler* (2), approved by *Kay* J.) As Mr. *Eversley* said in *The Law of the Domestic Relations*, 3rd ed., pp. 370-371:—"The change effected by this Act is limited to a married woman's proprietary rights, and to those alone; her matrimonial status is not affected—the common law right of the husband to her society and comfort remains; he is still the head of the family, and he it is who chooses and can change the matrimonial domicil. She is just as much bound to render him respect and regard as he is bound to support and protect her. It is when the question of property is touched that the interests of the two diverge."

The plaintiff, in answer to the views which have been expressed, relies upon the posthumous statement of the venerable Lord *Campbell* in *Lynch* v. *Knight* (3), which, she says, affirms that such a cause of action exists. It must be conceded that in many of the discussions on this subject Lord *Campbell's* dictum is treated as a statement to this effect. For instance, in *Duffies* v. *Duffies* (4), *Orton* J. said: "It is not, therefore, surprising that so great and gallant, learned and humane, a Judge and Chancellor as Lord *Campbell* should hold, in *Lynch* v. *Knight*, that the wife had the same right to the *consortium* of her husband that he had to hers, and might allege special damage for its loss, caused by defamation of her character." Nevertheless, I venture to think that his Lordship did not intend to enunciate the proposition that it was a wrongful act in itself to deprive a wife of *consortium*. A proper understanding of the law of defamation as it existed at the time of the decision is necessary to appreciate the true bearing of what Lord *Campbell* said as well as that of the observations of Lord *Cranworth* and Lord *Wensleydale*. In *Starkie's Law of Slander and Libel*, 2nd ed. (1830), vol. I., pp. 348 *et seqq.*, that law is stated as follows: "The case of words spoken of the wife admits of three varieties; 1st. Where the words are not actionable, but are attended with special damage.

(1) (1888) 39 Ch. D. 148, at pp. 152, 153.
(2) (1885) 14 Q.B.D. 831, at pp. 835, 836.
(3) (1861) 9 H.L.C., at p. 588; 11 E.R., at p. 859.
(4) (1890) 20 Am. St. Rep., at p. 82.

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2dly. Actionable *without* special damage. 3dly. Actionable *with* special damage. In the first case, the damage resulting to the husband is the sole ground of action, and the wife must *not* be joined. As, where the action is brought for calling the wife a bawd, *per quod* the husband lost his customers. And to join the wife in such a case would be bad on demurrer, in arrest of judgment, or in error. But secondly, where the words are actionable, and no special damage is laid, the wife *must* be joined, and the declaration must conclude *ad damnum ipsorum*, for there the action survives; and she must be joined in an action for any slander published of her before her marriage. But thirdly, where the words spoken of the wife are actionable, and special damage has accrued in consequence to the husband, great complexity has arisen on the question whether the wife should be joined or omitted. The difficulty, in this case, proceeds from the circumstance of two distinct causes of action being involved in one and the same transaction,—the actionable words spoken of the wife, and the special damage resulting to the husband. For the former, the husband is not entitled to damages without making his wife a party, and the cause of action survives her. In the latter case, the loss is several, and peculiar to the husband, and ought not, therefore, to be stated as the loss of both. Accordingly, where the husband has brought the action alone, it has been contended that he ought to have joined his wife in respect of the actionable words spoken of her, that at all events the action would survive to her, and therefore that the defendant would twice make compensation for the same injury. And in similar cases, when the wife has been joined, it has been argued that the joint action was improper, since the special damage accrued. From a review of the decisions upon this point, it appears, that the wife *is not barred* by the husband's action, though the special damage result from actionable words spoken of the wife, which removes the objection to a separate action, in which he alone is entitled to recover damages."

Lynch v. *Knight* (1) was decided upon demurrer. The action was for slander and brought by William Lynch and his wife Jane. The pleadings demurred to allege that the defendant had spoken words defamatory of the female plaintiff, imputing immoral conduct to

(1) (1861) 9 H.L.C. 577; 5 L.T. (N.S.) 291; 11 E.R. 854.

her, words at that date not actionable *per se*. The pleadings then alleged special damage as follows (1): "And the plaintiffs aver that from the said false, scandalous, and malicious statements of the defendant, the plaintiff William was at first led to believe, and that he did in fact believe that his wife, the plaintiff Jane, had been guilty of improper and immoral conduct before her marriage, and that her character and conduct was such as represented as aforesaid by said defendant; that he, the plaintiff William, ought not any longer to live with the plaintiff Jane as his wife; and the plaintiff William, influenced solely by the defendant's said slanders, and then believing that the statements so made by the said defendant, who was the step-brother of his wife, were true, shortly after the speaking of said matter by the defendant, and in consequence thereof, was induced to refuse, and did in fact refuse to live any longer with the plaintiff Jane as his wife, and on the contrary, the plaintiff William required the father of the plaintiff Jane, who lived in the country, to take her home to his own house, which he accordingly did; and the plaintiff Jane, in fact, thereupon left Dublin and returned to her father's house, where she resided for a considerable time, separated from her said husband. And the plaintiffs aver that such separation was solely and entirely caused by and resulted from the acts of the defendant as aforesaid." The Court of Queen's Bench in Ireland overruled the demurrer, whereupon the defendant in the action brought error to the Exchequer Chamber in Ireland, which by a majority of four to two affirmed the judgment. *Pigot* C.B. (2) considered that the special damage sufficed to give the wife an action because she was not in the position of a servant to her husband. He said: "*Consortium* in its obvious meaning necessarily includes the idea of a union of two persons, each of whom is the consort of the other, and it is impossible to maintain that either has an exclusive interest, or that each has not a common interest in that community of lot which involves mutual assistance, but which does not make either the servant, in the ordinary sense of the word, of the other. The case is thus reduced to the ordinary one, in which there is a union of injury and loss to the wife, for which

(1) (1861) 9 H.L.C., at pp. 580, 581; 5 L.T. (N.S.), at p. 292; 11 E.R., at p. 856.
(2) (1861) 5 L.T. (N.S.), at p. 293.

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the common law gives an action on the case, and for which she and her husband may sue, since she cannot sue alone, and since there is no technical reason for her not suing jointly with her husband." *Monahan* C.J. concurred. *Christian* J. stated that the objections raised by the defendant were, first, that the consequences were too remote, and, secondly, that the law does not recognize, as actionable damages, sufferings of the kind which the plaintiffs complained of. Having dealt with the question of remoteness and having decided that the consequence was not too remote, he proceeded to deal with the second question. In doing so he first gave reasons for denying that what he calls materialism is a necessary element in special damage. He then proceeds (1):—" Granted that the law will entertain the question of mental suffering as a thing to be compensated in damages, will it refuse to do so when the sufferer is a wife who has been deprived of the company and society of her husband by the act of a defamer ? If words were spoken of her which imputed some petty misdemeanour for which, if convicted of it, she might undergo a week's imprisonment, the law would give her an action—an action in her own right, prosecuted in her own name if her husband died after the injury, with his name joined for conformity if he were still alive. If words not actionable of themselves were spoken of any person but her, that person would have an action, provided they were followed by special damage. The reason why, generally speaking, she would have no action in such a case is, that almost always the special damage, if there be any, is her husband's, not hers. But here is a species of damage which, as I have shown, the law will take notice of, which is exclusively hers, of which her husband is the instrument and not the recipient." With him *Ball* J. agreed. *Hughes* B. and *Fitzgerald* B. dissented on the ground that no material or temporal damage was alleged, and they distinguish the case of the husband upon the ground that the *consortium* is as it were the property of the husband and its loss is damage accruing to the husband only. From this judgment error was brought to the House of Lords. The account of the proceedings in Ireland will show that no question arose as to the wrong but only as to the damage. In considering the question of damage the wife's right

(1) (1861) 5 L.T. (N.S.), at p. 295.

to the society of her husband whether *in rem* or *in personam* was no more in question than the plaintiffs' right to the entertainment of their friends, to tea and cakes, was in question in those cases in which its loss was held to be a sufficient special damage flowing from defamatory words to sustain an action of slander (see *Albrecht* v. *Patterson* (1)). The question simply was whether she had lost something which the law considered damage. If the argument that all damage must be temporal or material was negatived, then the plaintiff Jane would be clearly entitled to rely upon the loss of the benefits alleged in her pleading unless some positive rule of law precluded her from relying upon it. The defendant maintained that there was such a positive rule because *consortium* was an advantage exclusively belonging to the husband. The question was not whether the wife was entitled to *consortium* so that she could maintain an action for any deprivation of it, but whether she was excluded in the eye of the law from its benefits, so that the law would not recognize its actual incidents as possible subjects of legal damage. This question the House of Lords found it unnecessary to determine, because they held the damage too remote. But it is apprehended that it was to this question that Lord *Campbell* addressed the remarks often vouched in support of the present cause of action, which appear in the opinion prepared by him before his death. They are (2): "Although this be a case of the first impression, if it be shown that there is presented to us a concurrence of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium* or conjugal society can give a cause of action only to the husband. If the special damage alleged to arise from the speaking of slanderous words, not actionable in themselves, results in pecuniary loss, it is a loss only to the husband; and, although it may be the loss of the personal earnings of the wife living separate from her husband, she cannot join in the action. But the loss of conjugal society is not a pecuniary loss, and I think it may be a loss which the law will recognize, to the wife as well as to the husband. The wife is not the servant of the husband, and the action for criminal conversation

(1) (1886) 12 V.L.R. 597; 8 A.L.T. 92.

(2) (1861) 5 L.T. (N.S.), at p. 296; 9 H.L.C., at p. 589; 11 E.R., at p. 859.

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by the husband did not, like the action by a father for seduction of a daughter, rest on any such fiction as a loss of the services of the wife. The better opinion is, that a wife could not maintain or join in an action for criminal conversation against the paramour of her husband, who had seduced him. But I conceive that this rests on the consideration that, by the adultery of the husband, the wife does not necessarily lose the *consortium* of her husband, for she may, and under certain circumstances she ought, to condone, and still enjoy his society; whereas condonation of conjugal infidelity is not permitted to the husband, and, by reason of the injury of the seducer, the *consortium* with the wife is necessarily for ever lost to the husband." His explanation of the action of criminal conversation has little justification in history or in principle, but apart from this it is an extremely doubtful inference from his reference to crim. con. that he thought that in all other cases of loss of *consortium* a wife could maintain an action. It seems more probable that he meant only that the wife's loss of *consortium* was a lawful head of damage when caused by the commission of a tort. Lord *Cranworth's* statement of the late Lord Chancellor's opinion is certainly confined to this. He said (1):—"In order to sustain the judgment of the Court below, the defendants in error must maintain two propositions: first, that for slanderous words spoken of a wife, not actionable in themselves, but occasioning special damage to her by depriving her of the *consortium* or conjugal society of her husband, the husband and wife may maintain an action against the slanderer; and, secondly, that supposing such an action to be maintainable the words spoken in this case were such as might naturally occasion the wife to lose the *consortium* or society of her husband. My late deceased noble and learned friend, the late Lord Chancellor, I know entertained a strong opinion on the first point in favour of the right of action. He thought that the consequential damage arising to the wife in such a case afforded her a good ground of action, that the right of action on that ground was not confined to the husband. In the view which I take of this case I do not feel called on to express a decided opinion on this point.

(1) (1861) 5 L.T. (N.S.), at pp. 297-298; 9 H.L.C., at pp. 594-595; 11 E.R., at pp. 861, 862.

I believe your Lordships are not all agreed on it, and I will therefore only say that I am strongly inclined to think that the view taken by my late noble friend was correct." Lord *Wensleydale* stated the first question to be whether a wife can maintain an action for the loss of the *consortium* of the husband by a wrongful act of a defendant, and this he answered in the negative and placed his decision of the case on that answer. It is unnecessary to set out his reasons which, however, state in the strongest form grounds from which the conclusion reached in this judgment necessarily follow. Unfortunately, however, *Darling* J. in *Gray* v. *Gee* (1), sitting at *nisi prius*, was misled by the citation of *Lynch* v. *Knight* (2) into an unconsidered ruling that an action would lie by a wife against another woman if she induced the husband to leave his home and give up his wife. His Lordship did not embark upon any consideration of the principles upon which the action lay, and apparently did not advert to the question whether malice is a necessary ingredient as in the United States appears to be the rule. This decision and Lord *Campbell's* supposed dictum to the same effect were followed by the Supreme Court of New South Wales in *Johnson* v. *Commonwealth* (3). The Court made no independent investigation of the subject. In both cases the considered dicta of *McCardie* J. in *Butterworth* v. *Butterworth* (4) were cited, but not given effect to. They, however, correctly and succinctly state the true principle, which shows that this action is not maintainable. Nor were the observations of Lord *Sumner* in *Admiralty Commissioners* v. *s.s. Amerika* (5) brought to the attention of the Supreme Court of New South Wales.

The appeal should be dismissed with costs.

STARKE J. The plaintiff, the wife of Edwin Marsden Wright, complains that the defendant Ellen Cedzich, wrongfully persuaded, enticed and procured the said Edwin Marsden Wright, unlawfully and against the will of the plaintiff, to depart and remain absent from the home and society of the plaintiff, and wrongfully alienated his affections from the plaintiff, whereby she has lost the society,

(1) (1923) 39 T.L.R. 429.
(2) (1861) 9 H.L.C. 577; 11 E.R. 854.
(3) (1927) 27 S.R. (N.S.W.) 133.
(4) (1920) P. 126, at p. 130.
(5) (1917) A.C., at pp. 54, 55.

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comfort and protection and been partially deprived of the support of the said Edwin Marsden Wright, her husband. The defendant objects that no cause of action against her is thereby disclosed.

The books make it clear that the husband had a right of action against any person for abducting his wife, for criminal conversation with her (though this cause of action is now abolished), for assaulting her, and for enticing her away from him (2 *Co. Inst.* 434; *Bacon's Abridgment*, vol. v., "Marriage and Divorce," p. 327; *Buller's Nisi Prius*, 7th ed., p. 24A; *Guy* v. *Livesey* (1); *Hyde* v. *Scyssor* (2); *Russell* v. *Corne* (3); *Winsmore* v. *Greenbank* (4)). A modern extension was an action for personal injuries to his wife owing to the negligence of another (*Brockbank* v. *Whitehaven Junction Railway Co.* (5); *De Alba* v. *Freehold Investment and Banking Co. of Australia* (6)). Some of these forms of action were developed from the old common law action for depriving a master of his servant. They were not actions, whether brought in trespass or in case, in respect of harm done to the wife, but for the particular loss of the husband—the *consortium* of his wife. "An analogous right might of course be conceivably recognized as vested in the wife" (*Holland, Jurisprudence*, 11th ed., p. 172), and ruthless logicians may well insist that "the actual injury to the wife from the loss of *consortium* . . . is the same as the actual injury to the husband from that cause" (*Bennett* v. *Bennett* (7)). But in the case of injuries in family and domestic relations "the development of the law has," as Sir *Frederick Pollock* observes (*Torts*, 11th ed., p. 227), "been strangely halting and one-sided." "In the Middle Ages the peculiar status of wards, infants, wives and servants was very much more emphasized than it is in modern law. . . . It is in the period when these ideas were predominant that the law relating to these kinds of wrongs originated, and all through the history of this branch of the law they have made their influence felt" (*Holdsworth, A History of English Law*, vol. VIII., p. 427). And in *Blackstone's* time (*Commentaries*, vol. III., p. 142) "notice" was "only taken of the wrong done to the superior of the parties related by the

(1) (1618) Cro. Jac. 501; 79 E.R. 428.
(2) (1619) Cro. Jac. 538; 79 E.R. 462.
(3) (1704) 2 Ld. Raym. 1031; 92 E.R. 185.
(4) 1745) Willes 577; 125 E.R. 1330.
(5) (1862) 7 H. & N. 834; 158 E.R. 706.
(6) (1895) 16 A.L.T. 165.
(7) (1889) 116 N.Y., at p. 590.

breach and dissolution of either the relation itself, or at least the advantages accruing therefrom: while the loss of the inferior by such injuries was wholly unregarded." "The wife, the child, and the servant, having no legal interest in the person or property of the husband, the parent, or master, cannot support an action for an injury to them" (*Chitty* on *Pleading*, 7th ed., vol. I., p. 70). The reasons assigned for this statement of the law are somewhat artificial: the true reason is found in the status of the parties, and, so far as the husband is concerned, in his position as head of the family and the guardian and protector of his wife and children. The wife has not and never had any such position in the family: statements can be found in the books that wives are subject to the will of their husbands, that the husband hath by law power and dominion over his wife. But this archaic view must be considerably modified since *Jackson's Case* (1). Undoubtedly, however, a wife could not, at common law—subject to some exceptions—sue or be sued without her husband (*Dicey* on *Parties*, pp. 171, 196). This followed as a consequence, so it is said, from the unity of the husband and wife, or the merger of the person of the wife in that of her husband. But, however that may be, there is no suggestion in English law, so far as I have been able to discover, of any right in a married woman to sue for the loss of *consortium* of her husband, until we come to the year 1861 and the case of *Lynch* v. *Knight* (2), where the learned Lords differed on the point, and based their judgment upon another ground. Since 1861, however, the status of the wife in law has been completely changed. The doctrine of the unity of the husband and wife is practically swept away: the married woman is now capable of acquiring and holding property as if she were a feme sole, of entering into contracts and rendering herself liable to the extent of her separate property, of suing and being sued in contract and in tort as if she were a feme sole. But the husband has not been deprived of his status or relieved of his duties or liabilities. (See *Edwards* v. *Porter* (3).)

In this state of the law *Gray* v. *Gee* (4) was decided in 1923. *Darling* J. held, and so directed a jury, that a married woman had

(1) (1891) 1 Q.B. 671.
(2) (1861) 9 H.L.C. 577; 11 E.R. 854.
(3) (1925) A.C. 1.
(4) (1923) 39 T.L.R. 429.

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a right of action against another for enticing away her husband whereby she lost his *consortium*. According to the learned Judge, the difficulty hitherto had been, not that there was not the right, but that the remedy had not been devised. The case did not go to appeal, for the verdict was for the defendant. But was the learned Judge right in thinking that the difficulty at common law had been the remedy and not the right? Certainly, in most of the States of America the authorities are in favour of the view taken by *Darling* J. (*Bennett* v. *Bennett* (1) and the cases collected in *Burdick's Law of Torts*, 2nd ed., p. 277); but in other States the right of action is denied. In Canada the authorities apparently conflict (see *English and Empire Digest*, vol. XXVII., "Husband and Wife," p. 82, note). In Australia the Supreme Court of New South Wales agrees with the view taken by *Darling* J., whilst the Supreme Court of Victoria dissents. The text-books are not unanimous, though some lean to the view or cite the decision of *Darling* J. Still, in my opinion, the view taken by that learned Judge was not in accordance with the law of England. That view has its foundation in the common law doctrine that a wife could not bring an action owing to disability caused by coverture, and that a husband would not be apt to sue, for by that act he would confess that he had done wrong in leaving his wife (see *Bennett* v. *Bennett*). But that reason has no bearing upon cases in which no fault could be attributed to the husband, for example the case of personal injuries to the husband by physical violence or negligence, whereby the wife lost the *consortium* of her husband. Yet there is no trace of such an action in the books. Again, when the action of crim. con. was abolished in England, it was to the husband only that a new remedy against the adulterer was given—doubtless because the wife had no such right of action. (See *Lynch* v. *Knight* (2); *Kroessin* v. *Keller* (3).)

It is not, however, upon any such narrow ground that I rest my opinion, but rather upon the history of the law. In the old forms of action the wife was treated as in the possession of the husband, much in the same way as were his goods and chattels. The original writ was *de uxore abducta cum bonis viri*. The consent of the wife

(1) (1889) 116 N.Y. 584.
(2) (1861) 9 H.L.C. 577; 11 E.R. 854.
(3) (1895) 60 Minnesota 372; 51 Am. St. Rep. 533.

to the abduction was no answer, for this was a matter in which she could not assent, by reason of the injury to her husband, and his interest in her. (Cf. *Barham* v. *Dennis* (1).) Similarly, a master had an action for beating his servant or enticing him away, owing to his interest in the latter's labour and services, but the servant, as I have already noticed, had no cause of action against another for beating or enticing away his master. And when the action for enticing away a wife was developed from this form of action, it is clear, I think, that at common law no corresponding right was recognized in the wife. It was not because a remedy had not been or could not be devised, but because of the status or position of the husband in relation to his wife, that no such right was recognized. The *Married Women's Property Acts* do not give any such right: they merely enable the wife to sue and be sued in contract and in tort as if she were a feme sole. But to treat her as a feme sole in the case before us would be to destroy the basis of her action. In my opinion, the common law recognized a cause of action in the husband against another man for enticing away his wife, and none in the wife against another woman for enticing away her husband; and this law is not now, to use the words of Lord *Sumner* in *Admiralty Commissioners* v. *s.s. Amerika* (2), "susceptible of expansion by judicial interpretation." If the law be archaic, and not in keeping with modern development and thought, the remedy lies with the Legislature, and not with the Court, for the Court's duty is to expound, not to make, the law.

The appeal ought, in my opinion, to be dismissed.

Appeal dismissed.

Solicitor for the appellant, *J. Woolf.*

Solicitors for the respondent, *Gair & Brahe.*

H. D. W.

(1) (1600) Cro. Eliz. 770; 78 E.R. 1001.

(2) (1917) A.C., at p. 59.