JOHN ROBERT LISTER (PLAINTIFF).. APPELLANT; 1944

AND *Mar. 2, 3. *June 22.

R. N. McANULTY (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

International law—Husband and wife—Negligence—Automobile accident—Injury to wife—Action for damages by husband—Husband suing as head of community—Consorts married in Quebec without contract, but domiciled in the state of Massachusetts, U.S.A.—Separation as to property being the rule under law of that state—Right of husband to recover damages—Hospital and out-of-pocket expenses made by him

*PRESENT:—Rinfret C.J. and Hudson, Taschereau and Rand JJ. and Thorson J. *ad hoc*.

1944

LISTER v. MCANULTY.

recoverable under both laws—Damages for loss of companionship (consortium) or for loss of wife's services (servitium) not recoverable under Quebec law—Damages for probable future expenses recoverable under Quebec law, such as payment of help necessitated through wife's disability.

Where a husband, purporting to act as head of the community of property, brings an action for damages resulting from bodily injuries suffered by his wife following an automobile accident in the province of Quebec, and it appears that the consorts, though married in Quebec, without a marriage contract, had their domicile in the state of Massachusetts, in the United States of America, where separation as to property is the rule in such a case,

Held that the husband is governed, being domiciled in Massachusetts, by the laws of that state as to *his status and capacity* and all his other rights are to be determined by the laws of Quebec. The laws of Massachusetts and Quebec are both applicable, one in respect of some of the damages claimed by the husband and the other in connection with other kind of damages.

Held, also, that the husband was entitled under both laws to recover hospital and other out-of-pocket expenses made by him as a result of the accident.

Held, by a majority of the Court, that the husband was not entitled to the item of damages covering the loss of his wife's companionship (*consortium*). Hudson and Rand JJ. would have allowed an additional sum of $1,000 in compensation of such loss.

Held, further, reversing the judgment appealed from on that point, that damages for probable future expenses were recoverable by the husband under Quebec law. These expenses were alleged by the husband to have to be incurred by him for the payment of a maid, housekeeper or other kind of help that will be necessitated to help or replace appellant's wife owing to her permanent disability resulting from the accident.

Per The Chief Justice, Taschereau J. and Thorson J. *ad hoc:* These future expenses are distinguishable from damages resulting from loss of wife's services (*servitium*), which services are not recoverable under Quebec law.

Judgment appealed from (Q.R. (1943) K.B. 184) reversed.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming a judgment of the Superior Court, Errol M. McDougall (2). The appellant brought an action for damages resulting from injuries suffered by his wife following an automobile accident. The Superior Court held that the appellant had made good his demand to an amount not exceeding a tender and deposit made by the respondent and that the respondent has made good his defence as to the remainder of the appellant's claim, and consequently dismissed the appellant's action for the surplus.

(1) Q.R. (1943) K.B. 184. (2) (1940) Q.R. 78 S.C. 577

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

L. E. Beaulieu K.C. and *J. Barcelo* for the appellant.

Wm. F. MacKlaier K.C. and *Gordon Henderson* for the respondent.

The judgment of The Chief Justice and of Taschereau J. and of Thorson J. *ad hoc* was delivered by

TASCHEREAU J.—During the summer of 1938, while a passenger in an automobile owned and driven by the defendant, appellant's wife was seriously injured. She was made a complete cripple for many months, and a partial invalid for the rest of her life. The accident happened near Coaticook in the province of Quebec, and the liability of the respondent is not an issue before this Court. The question raised is purely a matter of private international law; and if decided in favour of appellant, he will be entitled to a substantially increased amount.

The appellant-plaintiff took action in the city of Montreal, and claimed the sum of $18,250.34 and, in the writ of summons he describes himself as

> John Robert Lister, manager, husband common as to property of Isabella Teresa McAnulty, both of Leominster, in the State of Massachusetts, one of the United States of America, in his capacity of head of the community existing between himself and his wife, as well as personally.

In his declaration as amended he claimed:

> (*a*) Bills for all expenses incurred for transport and treatment and also for help in the house up to the 22nd day of July, $750.34.
>
> (*b*) For sufferings endured and to be endured in the future by his wife, $2,500.
>
> (*c*) Permanent disability of the wife, covering the payment of a maid, housekeeper or any kind of help that will be necessary to help or replace plaintiff's wife, $15,000.
>
> Total, $18,250.34.

Plaintiff was ordered by judgment to furnish details as to the amount of $15,000 and the particulars furnished were as follows:

> (1) Damages suffered by plaintiff to secure a maid, housekeeper or any kind of help that will be necessary to help or replace his said wife, $10,181.
>
> (2) Companionship and assistance, $2,000.
>
> (3) For wife's permanent disability, $2,819.
>
> Total, $15,000.

1944

LISTER v. MCANULTY.

Taschereau J.

After having denied his liability, the defendant alleged in his plea, that plaintiff and his wife were married without a marriage contract, that the husband's domicile, at the time of his marriage in Montreal, was not in the province of Quebec, but in the State of Massachusetts, and that, according to the laws of that state which determined the matrimonial status of appellant and his wife, they were not common, but separate as to property, and that plaintiff has no right or title to assert or recover any damages which are personal to his wife.

It is further alleged, that plaintiff and his wife at the time of the accident were, and are still domiciled in the State of Massachusetts, and that, therefore, he and his wife are governed as to their status and capacity by the laws and statutes of the State of Massachusetts.

It would follow, if the defendant is right, that the husband could not claim on behalf of his wife the sum of $2,819 for permanent disability nor the sum of $2,500 for sufferings endured and to be endured in the future by his wife. It would also follow that plaintiff has no right to claim or recover other than the damages, if any, actually and directly suffered by him from the said accident.

Defendant also strongly denied plaintiff any right to claim or recover $2,000 for loss of companionship and assistance, and $10,181 for damages personally suffered

to secure a maid or housekeeper or any kind of help, that would be necessary to help or replace his said wife

because such items are not recoverable, under the laws of Massachusetts, which, it is alleged, must govern this case.

Without prejudice, but in order to purchase his peace, defendant tendered to plaintiff and deposited in court an amount of $1,250 and costs, in full of all claims of the plaintiff. This amount of $1,250, it is said, substantially exceeds the damages actually and directly suffered by plaintiff, and the amount which would be legally recoverable if defendant were under any legal liability to him, which liability, however, despite the tender was clearly denied.

In the Superior Court, Mr. Justice Errol M. McDougall declared the tender and deposit made by defendant good and sufficient, and dismissed plaintiff's action for the surplus, with costs. He reached the conclusion that

plaintiff was entitled only to his out-of-pocket expenses, $750.34, but that must be excluded from the amount of damages to be paid, the sum of $2,500 for pains and sufferings, and the item of $15,000 which could be claimed only by the wife.

Without accepting all the reasons given by Mr. Justice McDougall, the court of appeal came to the conclusion that there was no error in the "dispositif" of the judgment appealed from, and dismissed the appeal with costs against the appellant.

There can be no doubt in my mind that appellant's domicile was in the State of Massachusetts. He was born in Scotland, and then came to Montreal where he lived during seven years. He afterwards left that city saying that he was "tired of living there", and went to Leominster, Massachusetts, but, four years later, he came back to Montreal for the sole purpose of getting married, and immediately after returned with his wife to Massachusetts, where he has lived since for over forty years. It seems clear that the appellant had an actual residence in the State of Massachusetts, and that this fact was coupled with his intention of making that place the seat of his principal establishment. These are the legal requirements under article 80 of the Civil Code to operate a change of domicile, and I fully agree with the courts below, which have come to the conclusion that the domicile of the appellant was in the State of Massachusetts.

It is true, that in Montreal, when he married, the appellant did not go through the formalities of a marriage contract, and that under the laws of the province of Quebec, he would be common as to property with his wife and thus entitled, if domiciled in Montreal, to institute the present action, the way he did. But, under the laws of his domicile, this system of community is unknown, and separation of property exists, when there is no marriage contract. The wife is on an equal footing with her husband as to the exercise of her civil rights, and any action for personal injury must therefore be instituted by her. As a result of this, the sum of $2,500 for sufferings endured and to be endured in the future by the wife, and the sum of $2,819 for her permanent disability cannot be claimed by the

1944

LISTER v. MCANULTY.

Taschereau J.

husband, and were rightly abandoned in the court of appeal by appellant. These items are personal to the wife, and cannot belong to a community which does not exist.

The plaintiff, however, claims that he is entitled to the sum of $2,000 for loss of companionship (*consortium*) and of his wife's services (*servitium*), and that he is also entitled to claim $10,181 being the damages suffered by him to secure for the future, a maid, housekeeper or any kind of help that will be necessary to help or replace his wife. These, he says, are personal items, which were wrongly denied by the courts below, and which, even if refused by the laws of Massachusetts which have no application, are recoverable under the laws of Quebec.

The last paragraph of article 6 of the Civil Code reads as follows:

> An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons; but these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country.

The plaintiff, therefore, is governed, being domiciled in Massachusetts, by the laws of that State but only as to his *status and capacity*. All his other rights are to be determined by the laws of the province of Quebec. If the latter laws apply, appellant is clearly entitled to more than what the courts have allowed him, but if the laws of Massachusetts are to govern this case, the amount awarded seems sufficient.

The laws of Massachusetts have been explained and discussed at the trial. Mr. John E. Hannigan, of Boston, Massachusetts, a lawyer of some fifty years of practice at the Massachusetts Bar, and lecturer on damages, contracts and torts at the Law School of Boston University, has been heard as an expert on foreign law, on behalf of the respondent. The reading of his evidence leaves no doubt in one's mind, that the conception of marriage, and the reciprocal obligations arising therefrom are entirely different in Massachusetts from what they are here. He explained in a very elaborate testimony the *status* of married persons in the State of Massachusetts, and concluded, that if the present action had been instituted in the state where he lives, only the out-of-pocket expenses, made prior to the trial ($750.34), would be allowed. In view of the legal rights and obligations of hus-

band and wife, towards each other, he says that plaintiff could not claim for loss of *consortium* or *servitium,* nor for future expenses to be incurred by him for the care of his invalid wife.

The wife, since she has been emancipated, has no obligations towards her husband; she has the right to live with him, to be his companion, to enjoy his society, to share his home, but is not bound to do so. The same rule applies as to *servitium.* She is free to be a housewife or not, and to fulfill these ordinary duties, which are fulfilled in some other countries, and which flow necessarily from the status of married persons. The husband is not as of right entitled to this companionship, and to the services and assistance of his wife.

The logical legal consequence is that, whenever she suffers personal injuries, as a result of a delict or quasi-delict, of which a third party is the author, and made crippled, the husband cannot claim for loss of *servitium* and *consortium.* He has lost nothing to which he was entitled. There has been no invasion of his rights.

As to the husband's right to claim damages for future expenses, it is, according to the learned expert's views, denied in the State of Massachusetts. Although the husband, as a result of his status, is bound to care for his wife, even if he is poor and she is rich, he may claim personally only for out-of-pocket expenses, up to the time of the trial. It is practical justice, says Mr. Hannigan, that this claim should belong to the wife personally. If the husband did obtain damages on that ground, he would not hold the money in trust for his wife, but it would be his personally. The fact cannot be ignored that there are frequent divorces and terminations of marriages, which leave the wife alone, and unprotected. In support of these propositions, Mr. Hannigan has cited many authorities. It is of course within the powers of this Court to examine these authorities and to construe them, because, having been cited by the expert, they become part of his evidence. As it has been said by Sir Lyman Duff, in *Allen* v. *Hay* (1), 64 S.C.R. at page 81:

> These experts may, however, refer to codes and precedents in support of their evidence and the passages and references cited by them will be

(1) (1922) 64 S.C.R. 76, at 81.

1944

LISTER v. MCANULTY.

Taschereau J.

treated as part of their testimony; and it is settled law that if the evidence of such witnesses is conflicting or obscure the Court may go a step further and examine and construe the passages cited for itself in order to arrive at a satisfactory conclusion.

Vide also: Halsbury Laws of England, 2nd Ed., Vol. 13, at page 615:

> If, however, the witness produces any text book, decision, code, or other legal document, as stating or representing the foreign law, the court, on looking at or dealing with these books and documents, is entitled to construe them and form its own conclusion thereon. The court, in deciding on foreign law as a fact, is not bound to accept the construction put upon it by the expert, even if uncontradicted, nor is it bound to accept the decision of foreign courts as correctly setting out the law of the foreign state.

I have read with interest and care all the authorities cited, and I have reached the conclusion that a fundamental difference exists between the claim of the appellant for loss of *consortium* and *servitium,* and his claim for future expenses to be incurred by him for the care of his wife.

I have cited previously article 6 of the Civil Code. It must not be forgotten that persons domiciled outside the province of Quebec, when in the province, are governed by its laws. They remain subject to the laws of their country only as to their status and capacity.

The status of an individual is the whole of his juridical qualities, which the law takes into consideration to attach thereto legal effects. Capacity, very often the consequence of a person's status, is merely the aptitude to have and exercise rights, and accomplish juridical acts. Thus, the quality of Canadian, of major or infant, of husband or wife, of legitimate or illegitimate son, is a question of juridical status, reserved by law to the person. This is what has to be taken into account for the determination of this case. All evidence adduced beyond what is necessary to determine the status of the plaintiff, as a husband, is quite irrelevant.

As it has been said by Earl of Halsbury speaking for the Judicial Committee of the Privy Council in *De Nicols* v. *Curlier* (1).

> There is no real conflict between the learned persons who have given evidence on this question. One of them indeed, besides giving evidence as to what the French law is, upon which he is an authority

(1) [1900] A.C. 21, at 24.

entitled to respect, has also gone on to express an opinion upon how that law should be treated in this country, upon which subject he is no authority at all; and indeed such a question is not the subject of evidence at all, but pure matter of English law for English courts to decide.

Mr. Hannigan, in answer to questions put to him by respondent's solicitor, dealt not only with the status of the plaintiff as a consequence of his marriage, and his reciprocal rights and obligations as such towards his wife, but went further, and gave a very interesting but irrelevant lecture on the law of torts and damages.

The law in the province of Quebec is as stated by the Judicial Committee in *De Nicols* v. *Curlier* (1). A foreigner who is a plaintiff before our courts and prays for a relief as a result of a quasi-delict committed in Quebec, and causing injury to his wife, has to prove his status; and then, the question is not: what would he get in Massachusetts with this proven status? But rather what amount is he entitled to under the Quebec laws relating to torts and damages? Obviously, the same situation would arise in the case of a minor, domiciled in the United States, suing in damages before our courts, to claim compensation for a breach of contract executed in the province of Quebec. He would have to show that in the country of his domicile, he has the capacity to enter into a contract and to institute legal proceedings. But his right of action, and the extent of his damages would undoubtedly be determined by the laws of Quebec, and not under the laws of his domicile, which have no application whatever.

The present case must be governed by the same rules.

We know the status of the plaintiff, and what are his rights and obligations towards his wife. Underlying his status of husband there is no right to the *consortium* of his wife, nor to *servitium*. This is the principle, I think, that may be found flowing from the evidence of Mr. Hannigan, and from the authorities cited by him, and which he has fully explained. What the appellant claims he has lost, is not due him under the laws of his domicile as naturally attaching to his status. He has suffered no invasion of his rights, which is a fundamental condition to give rise to an action in damages.

The question of the right of the appellant to damages for future expenses is quite different. The evidence is clear

(1) [1900] A.C. 21.

1944
LISTER
v.
MCANULTY.
Taschereau J.

that a husband is obliged to provide for his wife, and pay all expenses that are necessary to satisfy this obligation. And this obligation exists whatever the means of the husband are, and is inherent to the quality of husband. It is truly an incident of the status of the plaintiff.

Through the injury sustained by his wife, plaintiff's rights have been affected, and an obligation has arisen for him to provide for the necessaries that are required by the condition in which his wife is now. On this point, appellant is entitled to succeed.

I do not forget that such damages are not recoverable under the laws of Massachusetts, but this Court ought not to be concerned with the views that may take other courts on the subject. The plaintiff has shown what his status is, and what are the obligations towards his wife, as a result of his quality of husband. He has satisfied the provisions of section 6 of the Civil Code, and it is now for the Quebec courts to determine what rights he has with this imported status, under the laws of Quebec. To hold otherwise would be a violation of article 6 C.C. for it would mean that a foreigner suing in Quebec, for damages that occurred in Quebec, is governed by the laws of his domicile, not only as to his status and capacity, but also as to the law of torts and damages.

This being the case, the appellant is personally entitled to damages for future expenses. The evidence is sufficient to allow this Court to assess them as the trial judge would have done, if he had come to the conclusion that plaintiff was entitled to any.

I think, taking into consideration the severity of the injury suffered by appellant's wife, the permanent incacity that will make her an invalid for life, her age, and the probable future expenses that will be incurred by appellant, that a sum of $3,000 would be fair and equitable.

The appeal should, therefore, be allowed with costs throughout, and the tender of $1,250 made by defendant should be declared insufficient. There should be judgment for $3,750.34 with interest since the date of the judgment of the Superior Court, less interest on the amount of $1,250 already paid.

HUDSON J.—The facts giving rise to the questions still in controversy between these parties are few and simple.

A husband and wife married in Quebec were domiciled in Massachusetts. The wife came to Quebec on a visit and while there was injured in an automobile accident arising through the defendant's negligence. This action for consequent damages was brought by the husband alone in a Quebec court.

At the trial the husband was awarded damages for expenses incurred for doctors' fees, nursing and so forth, but was denied his claim in respect of two other matters: (1) the loss of his wife's services; (2) the loss of *consortium*. This judgment was upheld on appeal.

We have here to consider only the quantum of damages and the two items last above mentioned.

The plaintiff's claim to damages is based on article 1053 of the Civil Code which reads as follows:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

The plaintiff himself suffered no physical injury in the accident. His loss was indirect. At one time the application of article 1053 C.C. to such a person was open to question. However, by a majority decision of this Court in the case of *Regent Taxi and Transport Co.* v. *La Congrégation des Petits Frères de Marie* (1), this was settled in the plaintiff's favour.

Where, as here, the wrong is committed in Quebec and the action is taken in a Quebec court, article 1053 C.C. applies irrespective of the domicile of the parties (except as provided in article 6 of the Code). It is said in Lafleur's Conflict of Laws, p. 198:

> When an offence or quasi-offence is committed within the Province of Quebec and the action for damages is brought before our Courts, there is no conflict, the *lex fori* and the *lex loci delicti commissi* being the same. Such a case appears to come within the meaning of art. 6 of the Civil Code, which enacts that the laws of Lower Canada relative to persons apply to all persons being therein, even to those not domiciled there (saving the exception as to laws governing status and capacity). Accordingly, if a delict is committed in this province by natives or foreigners, the law to be applied by our courts is undoubtedly our own law, and whether the law of the offending or injured party does not create civil liability in such case is immaterial.

(1) [1929] S.C.R. 650.

1944

LISTER
v.
MCANULTY.

Hudson J.

and in Johnson's Conflict of Laws, vol. III, p. 340:

> The purpose of the law of delictual responsibility is to protect individuals against wrongful acts by which they suffer loss or prejudice; to indemnify them in money damages. Article 1053 C.C. makes every person who is capable of discerning right from wrong, responsible for damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill. This is a general rule, applicable by first intention to delicts committed within the province whatever their nationality or domicile. In that sense, it is a rule designed for public safety, and is a rule of public policy.

These statements accord with the generally recognized rule of private international law.

It must be kept clearly in mind that what we must consider now is the damage to the husband, and only such damage as arises by reason of his relationship with his wife who was the immediate victim of the accident.

I have had an opportunity of reading the judgment prepared by my brother Taschereau in this case and agree with what he says as to the expenses incurred and to be incurred by the plaintiff.

It is in evidence that the plaintiff and his wife were married in Quebec and thereafter lived together in amity and mutual helpfulness for many years and with a reasonable expectation of a continuance of this happy state, until disturbed by the accident due to the fault of the defendant. As stated by Mr. Justice Prévost in the court below:

> Devant cette Cour, l'appelant reconnaît que son régime matrimonial est la séparation de biens, en vertu des lois de l'Etat du Massachusetts, où il a son domicile depuis plus de quarante ans; et il renonce à deux chefs de dommages-intérêts allégués dans son action, savoir: ceux qui se rapportent aux souffrances physiques de sa femme, et à l'incapacité permanente de celle-ci. Mais il insiste sur les deux derniers. Il dit et il a prouvé que sa femme jusqu'à la date de l'accident tenait seule sa maison, où elle excellait à tous les travaux du ménage. Désormais il lui faudra une ménagère qui lui coûtera $18.00 à $20.00 par semaine; ce qui justifie une indemnité de $10,000.00.
>
> Il dit et il a prouvé que sa femme était une charmante compagne et une épouse modèle; mais que depuis l'accident, elle est sourde, ne voit que d'un œil, souffre constamment, doit coucher sur des planches; et que pour cela elle est devenue nerveuse, irritable, taciturne, intolérante; ce qui gâte irrémédiablement sa vie conjugale, et justifie une indemnité de $2,000.00.
>
> Si l'on applique la loi du Québec, où le quasi-délit a été commis, l'appelant a droit à une indemnité; si on applique la loi du domicile de l'appelant, il n'a droit à rien.

It is hardly open to dispute that the facts here would justify an award of damages under the law of Quebec. The mutual obligations of husband and wife are set forth in articles 173, 174 and 175 C.C. as follows:

173. Husband and wife mutually owe each other fidelity, succor and assistance.

174. A husband owes protection to his wife; a wife obedience to her husband.

175. A wife is obliged to live with her husband, and to follow him wherever he thinks fit to reside. The husband is obliged to receive her and to supply her with all the necessities of life, according to his means and conditions.

Any wrongful interference by a third person with the enjoyment of the rights and privileges of either husband or wife would in my opinion be a proper subject for relief under article 1053 C.C. Recognition by law of such a right by the husband and a remedy for its breach is common throughout most of the civilized world. Under the common law in England from medieval times onwards a writ of trespass might be issued for injury done to a servant *per quod servitium amisit,* and by analogy an action lay in trespass or case for injury done to a wife or child *per quod consortium* or *servitium amisit.* At the present time such a right of action is recognized. See Salmond on Torts at p. 391:

It is a tort actionable at the suit of a husband to take away, imprison, or do physical harm to his wife, if (*a*) the act is wrongful as against the wife, and (*b*) the husband is thereby deprived of her society or services. A husband has a right as against third persons to the *consortium et servitium* of his wife, just as a master has a similar right to the *servitium* of his servant. Any tortious act, therefore, committed against the wife is actionable at the suit of her husband, if he can prove that he was thereby deprived for any period of her society or services.

It should be observed here that this remains the law, notwithstanding the so-called emancipation of women where under legislation they have been given, in both England and elsewhere, approximately equal rights with men as to property and otherwise before the law.

The common law on this subject was introduced in the United States and is still generally recognized in principle. As stated in 30 Corpus Juris at p. 961:

A personal injury to a married woman caused by the tort of a third person gives rise to two causes of action; one for her personal pain and suffering, and the other for the husband's consequential loss of her society and services and for expense incurred for medical attention and nursing.

1944

LISTER v. McANULTY.

Hudson J.

This statement is supported by reference to decisions of the courts of many states. In the case of *Fink* v. *Campbell* (1), a United States Circuit Court consisting of Taft (afterwards Chief Justice Taft), Lurton and Hammond JJ. stated the law to be as follows:

> Two entirely separate causes of action may arise from an injury to the person of a wife during the disability of coverture, one for injury to her, and the other for the damages resulting to the husband from the loss of her services and society as a consequence of the injury. Though these rights of action have their origin in the same injuries, the damages are distinct and cannot be recovered in one action.

Similar decisions were given in a number of the Canadian provinces.

It is inconceivable that the rights of a husband in Quebec are more restricted than those in common law jurisdiction.

It is claimed, however, on behalf of defendant, and it has been held by the courts below, that the plaintiff is not entitled to recover because the matrimonial domicile was in the State of Massachusetts, that the law of that state governs and no such right of action for a husband is there recognized.

In support of this view, reliance is placed upon the final paragraphs of article 6 of the Civil Code:

> An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons; but these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country.

It will be noted, however, that the preceding paragraph in article 6 C.C. provides:

> The laws of Lower Canada relative to persons, apply to all persons being therein, even to those not domiciled there; subject, as to the latter, to the exception mentioned at the end of the present article.

With respect, I am of opinion that the question here involved is not one of status within the meaning of this article. The marriage has not been dissolved or annulled. The parties are still husband and wife. The husband is still the head of the matrimonial regime and with obligations incidental thereto; for example, the maintenance of the wife and family. There is no suggestion that either husband or wife has repudiated or intends to repudiate the mutual obligations entered into by them when they were married in Quebec. What the plaintiff claims is

(1) (1895) 70 Fed. Rep. 664.

damages for the loss he has sustained through the defendant's negligence which deprives him of the services and companionsnip of his wife.

The defendant called as witness on his behalf an attorney with very wide experience in the practice of law in Massachusetts. This witness stated in effect that up until the year 1909 the husband had a right of action to recover damages for loss of *servitium* and *consortium* in that State, but after that date the courts there have constantly refused to make any such allowance. In support of his opinion he referred to a number of cases decided by the Massachusetts courts. We are justified in examining the precedents cited in support of his evidence. This was expressly stated in the case of *Allen* v. *Hay* (1). For the present law, he largely relied upon a decision of the Supreme Court of that State reported as *Feneff* v. *New York Central & Hudson River Railroad Co.* (2), which was decided in 1909. The head-note of the report is as follows:

> The right of *consortium* is a right growing out of the marital relation which the husband and wife respectively have to enjoy the society, companionship and affection of each other in their life together.
>
> A married woman cannot maintain an action for a loss of *consortium* occasioned by physical and mental injuries of her husband, which were caused by the negligence of a person from whom her husband has recovered compensation in damages. It seems that the same rule would apply in an action by a husband for a loss of *consortium* from an injury to his wife through the negligence of one from whom she has recovered damages, and that anything to the contrary is overruled.

In the course of delivering the opinion of the Court the Chief Justice stated that (p. 279):

> At the common law, the husband had a right to the labour and services of his wife, and in suing for the damages which are personal to the husband for an injury to his wife, he was permitted to recover, not only for the expenses of her care and cure, but for his loss of her labour and services and the loss of *consortium*.

And at p. 280:

> The right to the *consortium* of the other spouse seems to belong to husband and wife alike, and to rest upon the same reasons in favour of each. Since the removal of the wife's disability to sue, this is now settled in most courts by a great weight of authority.

Again on the same page:

> The wrong which may be redressed through such suits (i.e. those for alienation of affection, etc., of husband and wife) is one which has a direct tendency to deprive the husband or wife of the *consortium*

(1) (1922) 64 S.C.R. 76, at 81. (2) (1909) 203 Mass. 278.

1944

LISTER v. McANULTY.

Hudson J.

of the other spouse. No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of *consortium* alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of *consortium* is that, through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury.

Again at page 281:

> It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation to which he is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be made the subject of an action.

And in conclusion at page 282 he says:

> We are of opinion that in this class of cases there should be no recovery for loss of *consortium,* when the impairment of the powers and faculties of the plaintiff's spouse has been fully paid for in money. Indirectly, the plaintiff in such a case reasonably may be expected, through the same marital relation which gives a right of *consortium,* to be somewhat benefited by such a payment.

In passing, it should be noted that the view that the enactment of laws empowering the wife to take action in her own name altered the common law right to a separate action by the husband is in direct conflict with the accepted law in England and in Canada. In Winfield on Torts at p. 248 it is stated:

> The same wrongful act may deprive her husband of her *consortium* and do bodily harm to her. And there are two separate remedies for these two separate torts. In cases like *Brockbank* v. *Whitehaven Ry* (1), the wife can nowadays maintain an action on her own behalf. Before 1883 the law was the same except that her husband must sue for her benefit, and this action which he brought merely as her representative was entirely independent of the action which he had, *and still has,* for the loss of *consortium.*

See *Brawley* v. *Toronto Ry. Co.* (2) and the remarks of Chief Justice Meredith at the conclusion of his judgment at p. 36. Also *Swan* v. *Canadian Northern Railway Co.* (3), the remarks of Mr. Justice Stuart at p. 431.

However, the witness said that since the decision in the *Feneff* case (4) it had been universally accepted as law in Massachusetts that a husband could not get damages there in such an action. It should be noted, however, that,

(1) (1862) 7 H. & N. 834.
(2) (1919) 460 L.R. 31.
(3) (1908) 1 Alta. L.R. 427.
(4) (1909) 203 Mass. 278.

in any reports of decisions brought to the attention of this Court, there already had been another action in which the injured spouse had in the first instance secured damages. There is throughout all of these judgments a recognition of a right in the husband to the services of his wife in keeping the house and in giving companionship to her husband. What is denied is damages for a breach of this right, which are considered too remote. Now, with all respect to what has been said by others in this case, it seems to me that the remoteness of damages is not a question of status within the meaning of article 6 of the Civil Code.

In the case of *Machado* v. *Fontes* (1), it was decided by the Court of Appeal of England that

> An action will lie in this country in respect of an act committed outside the jurisdiction if the act is wrongful both in this country and in the country where it was committed, but it is not necessary that the act should be the subject of civil proceedings in the foreign country.

This case is relied upon by Dicey in his book on Conflict of Laws at pages 722 and 723 to support one of the rules he has there enunciated. It is further stated by Dicey at pages 797, 800 and 801 that the *lex fori* governs in respect of remedies.

When the husband proved a valid subsisting marriage and a right to *consortium* by the laws of Massachusetts he established his status. It then remains for the Court to decide what remedy should be awarded for a wrongful interference with this right by a third party. This should in my opinion, be decided by a Quebec Court in accordance with Quebec Laws.

I would allow the appeal and award the plaintiff for past and probable future expenses a sum of $3,000 and a further sum of $1,000 in respect of the loss of *consortium*, the amount of $1,250 already received by the plaintiff to be credited on the amount awarded and the plaintiff also to receive interest.

RAND J.—The appellant is a domiciled resident of the State of Massachusetts, U.S.A. His wife while on a visit to Quebec was, on September 9th, 1938, injured in an automobile accident through the negligence of the respondent. On September 2nd, 1939, the husband brought

(1) (1897) 2 Q.B. 231.

McANULTY. 1944 LISTER v. McANULTY. Rand J.

action in the courts of that province in which he claimed damages for: (*a*) medical, nursing, hospital and housekeeping disbursements up to July 22nd, 1939, the commencement of the action, (*b*) loss of *consortium,* (*c*) subsequent expenses including maid or housekeeper services necessary to help or replace his wife, (*d*) his wife's permanent injury and disability. Liability for the first item was admitted and no question of the right of the plaintiff under article 1053 of the Civil Code to bring the action is raised. Admittedly also, the last item, which is personal to the wife, is not recoverable. The items brought in the appeal are (*b*) and (*c*), and as can be seen, they include claims founded on both *consortium* and the duty of the husband to care for and support the wife.

The challenge to these claims is put on the ground that by the law of Massachusetts the husband has no right to recover damages for loss of *consortium* resulting from personal injury to the wife through negligence nor for expenses for medical or like services, or aid necessary to her care and comfort subsequent to the trial; he is limited to such out-of-pocket expenses incurred up to the trial: and not being recoverable under the law of the domicile, they are not by the law of Quebec proper items of damages there. Evidence of these provisions of the law of Massachusetts was given by a member of the bar of that state. The courts below upheld this contention, allowed recovery for the disbursements to July 22nd, 1939, but denied all other relief. The remedial right of the husband arising in Quebec and claimed in the courts of Quebec was treated as depending upon the law of his domicile and the question in the appeal is whether that view of the law is sound.

It is beyond controversy that, in the courts of the same jurisdiction, rights of action arising from personal wrongs are the creation of the law of the place where the tortious acts are committed. This is expressly declared by article 6 of the Civil Code. Whatever consequences are to be attached to those acts must arise by force of that territorial law. It may be, in the determination of those consequences, that resort becomes necessary to some other law for the purpose of ascertaining status or primary rights arising from it, but such a resort is only for the purpose of furnishing the basis upon which rights of action in the jurisdiction of the act may depend.

By article 1053 of the Civil Code,

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another whether by positive act, imprudence, neglect or want of skill.

Under that language, not only the immediate victim of a wrongful act, but third persons upon whose legal rights that act, through the direct injury, has trespassed, are entitled to redress. The claim here is by a third party and in order to bring himself within the article he must show that some right of his has been invaded and that damage has resulted. He is the husband and whatever primary rights he has in relation to his wife are those which arise from the marriage status; and to ascertain them we must go to the law of the domicile. Once they are ascertained there has been presented the jural material on which the law of the place must operate to create or withhold a right of action against the person whose act has brought about the damaging consequences.

We look, then, to the law of Massachusetts to discover those incidents of the marriage status which are relevant to article 1053 of the Civil Code. It is clear from the evidence that the common law right of the husband to the earnings of his wife has been abrogated. It is also clear that in an action similar to this in Massachusetts the husband would be limited in his recovery to his actual disbursements in medical care and other attention to his wife up to the time of the trial. This involves the absence of any right on the husband's part to claim damages for loss of *consortium* and all involved in that fundamental incident of marriage. But it does not mean that the husband has lost his right to *consortium*. One of the authorities upon which the evidence is supported, *Nolin* v. *Pearson* (1), distinctly holds that the wife is entitled to damages for the loss of *consortium* brought about by the wrongful enticement from home and affection of the husband and it assumes the converse right in the husband; and the existence of that right is not affected by the fact that injury to it is not always attended by compensating sanctions. In the language of the judgment:

> But he retains the unmodified right to her conjugal society, even if her refusal to recognize this right affords him no ground for an absolute divorce.

(1) (1906) 191 Mass. 283.

1944

LISTER v. MCANULTY.

Rand J.

The limitation of recovery established by the decisions cited shows beyond doubt that it results from the conflict between rights of action given to the wife under the various married women's property acts and the common law rights of the husband; but it is in fact a limiting rule of damages. As the wife under those statutes has the right to recover in one sum for the total effect upon her of the injury, there is in the view adopted nothing left for any claim of the husband. One complete recovery is permitted and on grounds of policy that recovery has been attributed to the wife. Otherwise the equivalent of her physical and mental impairment would become the property of her husband in contradiction to the provisions that she shall be entitled as if she were femme sole; and it is conceived that any damage beyond the perimeter of her own loss or injury, even an injury to the husband's interest, is too remote to be taken into account: *Feneff* v. *New York Central & Hudson River Railroad Co.* (1).

> When there is no intentional wrong the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured. Ordinarily the relation between him and others whereby they will be detrimentally affected by the impairment of his physical or mental ability makes the damage to them only remote and consequential and not a ground of recovery against the wrongdoer.
>
> * * *
>
> It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation of which he (the husband) is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be the subject of an action.

The recovery of the wife, therefore, exhausts the total liability of the wrongdoer. The only exception to this is in respect of disbursements up to the trial. In the absence of evidence to the contrary it is presumed that such outlays have been made by the husband and he is allowed to recover them; but even that is a question of fact and, if it is shown that the obligation for them was taken on by the wife, then she alone becomes entitled to recover them.

Although under Massachusetts law the common law right of the husband to the services of his wife has been

(1) (1909) 203 Mass. 278.

seriously encroached on to the extent that he cannot claim her earnings, nevertheless, as he remains under a duty to care for and support her and as that duty is complementary to his rights under the *consortium,* the incidental services arising from that home association cannot be separated from the other elements of *consortium.* That concept embodies all of the characteristics of the conjugal cohabitation which is the *fundus* of marriage: and a disturbance of the *consortium* must include an interruption of those ordinary acts by which the necessary supports to the home life are given, which, whether companionship, comfort or services, are inseparable from the body of relations of which they form a part. It may be that, for the purpose of defining the scope of a wife's recovery of damages, her capacity to work in its entirety may be segregated to her own exclusive right: but that fact is irrelevant to the content of *consortium.*

For the purposes of the law of Quebec, then, we have a claim on the part of a husband who possesses the right of *consortium* and who is under a legal duty to care for and support his wife while the marriage continues. These are the rights which in Quebec the husband complains have been violated by the wrongful act of the respondent. It is the law of Quebec and that only to which we must look for the legal consequence from those facts. It will arise from the law of personal wrongs in that province, and part of that law is the delimitation of the damages attributed to the impairment of right suffered. It was, therefore, in my opinion, a misconception of the law to be applied to import from Massachusetts the law of tort including the rule of damages to determine the rights of the appellant in Quebec.

The latter has suffered an *injuria* from the wrongful act by which his wife was injured. His right to the *consortium* and to be protected against an aggravation of his duty towards her have been violated. Under section 1053 of the Civil Code, those violations give rise to a right to damages that will reasonably compensate him for the loss he has sustained.

It is suggested by McDougall (E. M.) J., at the trial, that to hold the husband entitled to such damages in Quebec would expose the respondent to a like claim on

1944

LISTER v. McANULTY.

Rand J.

the part of the wife in Massachusetts but that, with the greatest respect, involves, I think, a confusion of the law of *status* and rights flowing from it with the law of private wrongs. It is to the law of Quebec in the latter respects to which Massachusetts would refer to ascertain the rights of action given to both husband and wife as a result of the tortious act there and as those rights limit the wife, separate as to property, to her personal injuries and suffering and do not include expenses of medical or other care, or encroach upon any loss of enjoyment of the *consortium*, which are exclusively matters of injury to the husband, a like limitation on the scope of the wife's recovery would be made by the law of Massachusetts. But whether or not Massachusetts would follow such a rule in allowing recovery for a wrong committed in another jurisdiction, we must apply in Quebec the rule which her law dictates.

The only question that might arise is whether or not the claim for future expenses, of aid and assistance for the proper care of the wife, is sufficiently alleged. Item (1) of the particulars specifies the necessity of securing

> a maid, housekeeper or any kind of help that will be necessary to help or replace his said wife.

That, I think, is a sufficient allegation of that part of the claim. All of the evidence offered on the rejected items was admitted and is now before this court, which is in as good a position as a trial judge to assess the quantum. I would allow, on the claim for care and aid, including expenses from July 22nd, 1939, the sum of $3,000 and for loss of *consortium* the sum of $1,000, together with interest from the date of the judgment at trial with proper allowance for the tender made with the defence. The appeal should, therefore, be allowed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Cartier, Barcelo, Rivard & Pelletier.*

Solicitors for the respondent: *MacDougall, McFarlane, Scott & Hugessen.*