No. 81,705

IN THE SUPREME COURT OF FLORIDA

UNITED STATES OF AMERICA,

Defendant-Appellant,

v.

LOREN DEMPSEY, ET AL.,

Plaintiff-Appellee.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR APPELLANT

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ARGUMENT

I. FLORIDA LAW DOES NOT PERMIT PARENTS TO RECOVER FOR THE LOSS OF A CHILD'S COMPANIONSHIP AND SOCIETY WHEN THE CHILD IS SEVERELY INJURED.

In this case, the parents of Loren Dempsey have received awards of over $1.5 million to compensate them for Loren's medical care and expenses, and Loren has received awards of $1 million for her pain and suffering and of over $319,000 for her projected lost earnings.[1] In addition to these awards of nearly $2.9 million, the federal magistrate awarded an additional $1.3 million to the parents "for their individual loss of their

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[1] In our opening brief, p. 5, we erroneously stated that all of these awards were made to Loren Dempsey.

child's companionship, society and affections." Opinion, p. 37, App. 55. The government is appealing only this latter award.

First, we have argued that this award was really for the parents' "pain, suffering and emotional distress" (Opinion, p. 33, App. 51) which the magistrate has recognized as uncompensable under Florida law. Cf. Opinion, pp. 36-37, App. 55, with Pretrial Order, p. 3, App. 15. Next, we have argued that, even if there is a separate damages category titled "parent's loss of companionship, society and affections," it does not apply to a tort action involving negligent physical injury to a child.

We explained in our opening brief that the 1926 case of Wilkie v. Roberts, 109 So. 225 (Fla.), like all recent Florida physical injury tort cases, held that parents may be compensated only for (1) medical expenses, and (2) "loss of a child's services and earnings, present and prospective." 109 So. at 227. Loren Dempsey's parents, as noted above, have recovered over $1.5 million under the first category. The issue here is whether they may also recover under the second category by defining "services" to include "loss of companionship, society and affections."

Wilkie appears to say that the definition of "services" cannot be stretched that far. This Court announced that an award was authorized only when a child's injury had "affected the earning capacity or ability of the injured [son] to serve the father." Id. The plaintiffs argue, however, that Wilkie does allow an award for lost consortium, pointing to this Court's reference to "[t]he father's right to the * * * companionship" of

his minor child. Appees' Br., p. 11. This view is clearly based on a misinterpretation of the Wilkie decision. For the same reason that they misinterpreted Wilkie, plaintiffs and the magistrate who decided this case also have misinterpreted dicta in Yordon v. Savage, 279 So.2d 844 (Fla. 1973) which paraphrased that reference to "companionship" in Wilkie. We note that these are the only Florida cases cited by plaintiffs that give any suggestion that recovery is permitted under their theory.

In fact, the reference to the word "companionship" in Wilkie does not actually support plaintiffs' position. This becomes clear from a review of the full Wilkie opinion and from an analysis of the paragraph in which that word appears. The word "companionship" appeared near the beginning of the Wilkie Court's legal analysis. After noting that the parent plaintiff had no statutory claim for mental pain, as he would if his son had died, the court stated the broad common law principle applicable to all parents' actions when their children had been injured:

> The father's right to the custody, companionship, services, and earnings of his minor child are valuable rights, constituting a species of property in the father, a wrongful injury to which by a third person will support an action in favor of the father. This is in addition to the right of action the child may have for the personal injury received, with the resulting pain, disfigurement, or permanent disability if such results follow. 20 R.C.L. 614

109 So. at 227. This paragraph was followed by the Court's more detailed explanation of parents' rights in negligence cases limiting parents' recovery to "pecuniary loss" from (1) the

child's reduced services and earnings, and (2) medical expenses. Two physical injury cases from other jurisdictions were cited in support of this conclusion. Id.

The statement of the common law in Wilkie, which uses the word "companionship" and which is quoted above, gives a supporting citation, "20 R.C.L. 614," which refers to an out-of-print multi-volume work titled Ruling Case Law, published in 1918. This reference (part of which is attached to this brief) explains why this Court referred to "[t]he father's right to the custody [and] companionship * * * of his minor child * * * ."

The writers of Ruling Case Law were clear that "[i]n fixing the damages the court ordinarily cannot consider mental suffering or injury to the father's feelings, or the loss of the society or companionship of the child." 20 R.C.L. 618 (emphasis added). Nonetheless, on page 614, four pages before this statement appears, Ruling Case Law refers to "[t]he father's right to the custody and companionship * * * of his minor child * * * " as a "species of property in the father, a wrongful injury to which by a third person will support an action." This sentence was repeated almost word for word by this Court in Wilkie, and later paraphrased as dicta in Yordon.

On page 614 of Ruling Case Law, the authors resolve this apparent contradiction. They state that the "species of property" to which they refer can support three sub-sets of wrongful injury cases: (1) physical injury claims, (2) allegations of enticement or wrongful persuasion of a child to

leave its father, or employing a child against its father's wishes, and (3) suits based on the seduction of a daughter. 20 R.C.L. 614. Only in the third sub-set, a claim for a daughter's seduction, or possibly in claims under the second sub-set, may a parent-claimant recover for "injury to [the parent's] feelings and paternal happiness, [which was] more important as an element of damages than the actual loss of her services." Id. This injury to parental feelings and happiness was considered to be a loss of companionship, and explains why Ruling Case Law included "custody and companionship" as a species of property at common law for some wrongful injury cases. However, it is equally clear that Ruling Case Law holds that, in physical injury tort cases, a parent may not recover for loss of a child's society or companionship. 20 R.C.L. at 618. This Court, citing Ruling Case Law in Wilkie, could likewise mention a "father's right to * * * companionship * * * of his minor child" under the common law (109 So. at 227) but assume with the Ruling Case Law authors that damages for such loss would only be possible in non-physical injury cases like those involving the seduction of a daughter.

The Yordon decision merely recognized that the Wilkie statement of the law was correct in 1973. It stated that "[i]n Wilkie v. Roberts, this Court held that the parent * * * of an unemancipated minor child, injured by the tortious act of another, has a cause of action" for losses including "loss of the child's companionship, [and] society." 279 So.2d at 846. Since this Court in Yordon was deciding whether to extend to mothers

the father's rights under the common law,[2] and was not asked to interpret the above-cited language in Wilkie in any other respect, we have argued that its comments about parental actions was merely dicta. Opening Br., p. 13. More importantly, the decision did not expand the Wilkie holding. Thus, we are not asking that the dicta in Yordon be overruled, as plaintiffs suggest (Appees' Br., pp. 14, 19), since Yordon does not state that parents can recover in a physical injury case for their loss of society and companionship with a child. Yordon merely recognizes that recovery for "loss of companionship" is possible at the common law in certain cases, presumably those discussed in Ruling Case Law, as cited in Wilkie. Contrary to plaintiffs' contentions (Appees' Br., pp. 14, 19), Yordon does not permit parental recovery in this case and is in accord with those Florida decisions denying parents any awards for loss of children's consortium. See cases cited in Opening Br., p. 14.

Plaintiffs attempt unconvincingly to explain away these post-Wilkie Florida cases rejecting a parental cause of action for loss of a child's consortium. Appees' Br., pp. 14-16.

In Youngblood v. Taylor, 89 So. 2d 503, 506 (Fla. 1956), this Court expressly noted that a father "could not recover for personal injury, pain, disfigurement or permanent disability inflicted on the child * * *" (emphasis added), and added that he

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[2] The holding of this Court in Yordon was that "the cause of action is available to either the father or the mother, or to the two parents together." This Court based its decision on the equal protection provisions of the Florida Constitution. 279 So.2d at 846 (emphasis by the Court).

could sue for "loss of the child's services and earnings and for medical expenses incurred in the treatment of the child's injuries." 89 So.2d at 506, citing Wilkie. This is, of course, the Wilkie rule which we have suggested must apply here. Plaintiffs argue that this Court should ignore its own decision. Appees' Br., p. 15. We suggest, however, that this Court's opinion explains the law as to Florida cases involving cases of "personal injury, pain, disfigurement or permanent disability inflicted on the child." 89 So.2d at 506. Since the case now before this Court is just such a case, Youngblood is relevant and should not be ignored.

In City Stores v. Langer, 308 So. 2d 621, 622 (Fla. 3d DCA), cert. dism. 312 So. 2d 758 (Fla. 1975), the Florida appellate court explained that:

> A parent can recover only his pecuniary loss as a result of injury to his minor child, and such loss [is] limited to two elements: (1) the loss of the child's services, and (2) medical expenses in effecting or attempting to effect a cure (citing Wilkie). In addition, the rule has been recognized that there can be no recovery by a parent in action for injuries to his minor child, for the suffering, pain, embarrassment and/or humiliation caused the parent by the injuries of the child.

(Emphasis added). It is difficult to understand how plaintiffs claim that the holding in this case does not address "the question of the parents' right to recover consortium damages for injury to their minor child." Appees' Br., p. 15. It appears to be directly in point in specifically rejecting the father's claim

for compensation for his suffering and pain caused by his daughter's injury. 308 So.2d at 622.

Plaintiffs also claim that Hillsborough County School Board v. Perez, 385 So. 2d 177, 178 (Fla. 2d DCA 1980), did not address the issue now before this Court. Appees' Br., pp. 15-16. However, the court of appeals in that case specifically rejected a jury verdict for a parent because that verdict was not supported by evidence of (1) loss of services to the parent, and (2) medical expenses, citing Wilkie and City Stores. The court noted that the parents would not sustain "any significant loss of services" even though the child "may have done a few minor chores around the house prior to the accident" and added that the counsel for plaintiff in that case had admitted as much at trial. 385 So.2d at 178. The court clearly did not consider any other parental loss except for medical expenses. Id.

In Brown v. Caldwell, 389 So. 2d 287, 288 (Fla. 1st DCA 1980), the court of appeals held that "A parent can only recover his pecuniary loss as the result of injury to his minor child" (emphasis added). This case also, contrary to plaintiffs' contention (Appees' Br., pp. 15-16), is directly on point.

Finally, in our opening brief, we had noted that Selfe v. Smith, 397 So. 2d 348 (Fla. 1st DCA 1981), represented an even more recent acknowledgement by a Florida courts of appeals that parental recovery is limited to "pecuniary losses of services, earnings and medical expenses." Opening Br., p. 14, n. 3, citing 397 So.2d at 350. Plaintiffs first say that Selfe is irrelevant

because it "involved the operation of the "impact rule." Appees' Br., p. 16. Although it is true that the court referred to the "impact rule" in its decision, it explained at the conclusion of that discussion:

> That fact [involving the "impact rule"], coupled with the principle that a parent's recovery for injury to his child is limited to pecuniary losses of services, earnings, and medical expenses, persuades us that in the present condition of Florida case law, notwithstanding her physical injury by the same impact, [the mother] may not recover for her anguish, as such, resulting from the child's injury.

397 So.2d at 250 (citing Youngblood, City Stores, and Brown.) It is the underlined principle, not the effect of the "impact rule," that makes Selfe significant to this litigation.

Plaintiffs argue that Selfe does not exclude a parental consortium claim since damage to society and companionship is loss of "a valuable property right" which "has pecuniary value." Appees' Br., p. 16. However, in Selfe, the court expressly stated that recovery was "limited to pecuniary losses of services, earnings, and medical expenses." 397 So.2d at 350.

Plaintiffs also attempt to garner support for a parental consortium claim from a most unlikely source -- a 1952 decision by this Court rejecting the existence of a wife's claim for loss of consortium of her husband who was negligently injured, Ripley v. Ewell, 61 So.2d 420. In Ripley, this Court, en banc, explained that changing the common law to allow wives to claim loss of consortium should best come from the Florida legislature. 61 So.2d at 423-424. While the case thus is generally supportive

of the government's position in this case, plaintiffs argue that the case recognizes that "services at common law included society and companionship, which had pecuniary value for which a father had the right to recover but a child did not." Appees' Br., p. 14. However, Ripley simply does not say this and it does not support plaintiffs' argument in this case.

The Court in Ripley had explained that "[a] father has a legal property interest in the services of his child" and likened it to "[a] master ha[ving] a form of property interest in the services of his servant." 61 So.2d at 422. The only instance it cited where recovery by a parent could be in excess of his "monetary damages," according to the Court, was "the classic example [of] the recovery permitted to the father for the seduction of his daughter" (id.), precisely the example given in 20 R.C.L. 614-15, from which we suggest that the Wilkie case derived its paternal right to "companionship." Thus, the decision in Ripley is clearly not helpful to plaintiffs.

We noted in our opening brief this Court's refusal in Zorzos v. Rosen, 467 So. 2d 305 (Fla. 1985), to recognize the analogous right of a child to be compensated for his loss of consortium when his parent is physically injured. Opening Br., pp. 14-17. We mentioned that this Court had held in Zorzos that a new cause of action, such as one allowing children to recover for loss of parental consortium, should be created by the legislature and not by Court fiat. Amazingly, plaintiffs argue that the Zorzos decision supports their position since a parent's loss of an

injured child's consortium is a "long standing element of damages" in Florida. Appees' Br., p. 19. But, as we have explained, this Court has only mentioned parental consortium in the sense recognized in the passages from Ruling Case Law cited in Wilkie. Medical expenses and loss of services and earnings are the only elements of damages traditionally available to Florida parents in negligent injury of children cases. Thus, it is plaintiffs, and not the government, who are asking this Court to create a new cause of action.

Finally, plaintiffs argue that the government is trying "to turn back the clock" on Florida's "modern" position favoring recovery of losses from any injuries "that effect [sic] the familial relationship in all its aspects." Appees' Br., pp. 20-21. This is meaningless rhetoric. If "Florida" had wanted to insure such recoveries, surely the state legislature would have made this clear after Youngblood, Hillsborough, City Stores, Brown, and Selfe. After all, the legislature took just such action after this Court's Zorzos decision. See Opening Br., p. 17. Plaintiffs also suggest that denying parents a financial recovery to compensate them for the loss of their child's companionship and society reeks of "the Dickensian era of brutal child labor." Appees' Br., p. 20. The government disagrees. Many injured relationships -- losses of friends, grandparents, grandchildren, aunts and uncles, and fiancees -- are not recognized as legally compensible. This in no way demeans the reality of the loss to those persons. It merely recognizes that

financial recovery is not always allowed as a means of assuaging pain. While recognizing that Loren's injury caused her parents much pain and sadness, the government submits that, until the Florida legislature acts, plaintiffs are denied recovery.

II. FLORIDA LAW DOES NOT PERMIT PARENTS TO RECOVER FOR THE LOSS OF THE SERVICES OF A SEVERELY INJURED CHILD ABSENT EVIDENCE OF EXTRAORDINARY INCOME PRODUCING ABILITIES.

In Section I of this brief, we discussed the issue first presented in the government's opening brief -- that the magistrate improperly awarded the parents of Loren Dempsey $1.3 million for "loss of society and affections." Opinion, p. 33, App. 51. In return, the plaintiffs argue not only that such an award was permitted under Florida law, but that the magistrate did not award enough money to the parents (Appees' Br., pp. 22-24) since it refused to compensate the parents for "services, including personal services to the parent and income which the child might earn for the direct and indirect benefit of the parent." Opinion, p. 34, App. 52.

The law in Florida, as we have explained above, is that parents of an injured child are limited to recovering their damages at common law, which are limited to "(1) [t]he loss of the child's services and earnings, present and prospective, to the end of the minority; and (2) medical expenses in effecting or attempting to effect a cure." Wilkie v. Roberts, 109 So. at 227.

As we explained in our opening brief, the common law right for parents to recover damages for their injured child's lost services has a parallel statutory right permitting parents to sue

for lost services in a wrongful death action.[3] Opening Br., pp. 18-19. We have argued that since Florida law allows parents to recover under this statutory provision only if the children have shown "extraordinary income producing abilities," the principle should be the same in injury cases governed by the common law. Id.

Plaintiffs argue in response that, in personal injury cases, this Court should recognize a parent's right to recover "amounts for food, normal shelter, or clothing" (Appees' Br., p. 23), which parents will expend on their injured children during their minority. In other words, plaintiffs ask this Court to augment the two categories of common law parental recovery (lost services and medical expenses) with a third category: normal child-raising expenses. Once again, however, our reply must be that recovery of such a novel award should be permitted, according to this Court's decision in Zorzos v. Rosen, only after the legislature has created such a right of recovery. 467 So.2d at 306.

Plaintiffs argue that "[t]he certified question and argument of the Government truly misstates [sic] the issue." Appees' Br., p. 23. We disagree. The certified question asks, in effect, whether the rule announced by this Court in Florida Dairies Co.

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[3] For example, in Youngblood, a common law injury decision, a father was permitted to "recover for loss of the child's services and earnings * * * " (89 So.2d at 506), which ended with the death of the child's minority. Citing Wilkie, 109 So. at 227. Similarly, in a statutory wrongful death action (Gresham v. Courson, 177 So.2d 33 (Fla.1st DCA 1965)), recoverable damages were defined as allowing "the father's loss of the services of his child until the child would have become 21 years of age." Id. at 37.

v. Rogers, 161 So. 85 (Fla. 1935), defining a parent's loss of compensable children's services in wrongful death actions, is equally valid in injury cases.[4] We submit that it is, since the loss of services is complete in a wrongful death action. Loss of services in an injury case must, by definition, be less than, or at most, equal to a parent's loss in a wrongful death case.

The plaintiffs suggest that this Court should allow a recovery here because the parents will have more expenses with an injured child than if their child has died. Appees' Br., p. 23. This is probably true. It is also true, however, that the government, by paying an uncontested award to Loren Dempsey of $2.8 million, is probably paying far more than if Loren had died. Neither of these facts, however, is relevant to the issue. As this Court explained in Wilkie, the only testimony material to the claim for "lost services" of an injured minor would be testimony explaining how that injury "affected [the child's] ability to serve his father, the plaintiff * * * ." 109 So. at 227. In this case, the magistrate properly found that there was no probative evidence that Loren Dempsey's services to her parents would have been such as to have justified a parental recovery. Opinion, p. 34, n. 9. That decision is in accord with Florida law and should be affirmed.

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[4] Plaintiffs complain that "extraordinary income producing abilities" is a form of lost earnings and is not lost services at all. Appees' Br., p. 24. However, the common law held that the parent had a right to his child's earnings prior to emancipation (See 20 R.C.L at 614-15), a position that was adopted by this Court in Wilkie (referring to a "father's right to the * * * earnings of his minor child * * * .") 109 So. at 227.

CONCLUSION

For the reasons given, the United States submits that the magistrate's award to Loren Dempsey's parents of $1.3 million for loss of society and affections was not in accordance with Florida law; and submits that the magistrate's refusal to award damages to the parents for lost services in the absence of evidence of extraordinary income producing abilities in the child was in accordance with the law of Florida.

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RULING CASE LAW

As developed and established by the Decisions and Annotations contained in

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AMERICAN STATE REPORTS
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usufruct.[4] But even in Louisiana, he cannot sell his child's property without the order of a judge.[5] The clothing furnished by a father for the use of his child, unless in some definite way given to the child as its own property, or unless the child has been emancipated, from which a gift might be implied, remains the property of the father, who therefore is the proper party to sue for its asportation or destruction.[6] The same ruling has been made as to money furnished to a son for his general use while in college,[7] and as to money earned and received by the son, if the father had not authorized him to control his wages or to contract for himself.[8] But in another case it was held that if the father gave his son money without specific direction as to its use, and the son bought clothing with the money, the clothing belonged to the son.[9]

Actions for Injuries to Parental Rights

24. General Survey of Topic.—The father's right to the custody and companionship, and still more clearly his right to the services and earnings, of his minor child are valuable rights, constituting a species of property in the father, a wrongful injury to which by a third person will support an action. The simplest case of this kind is that where a wrongdoer inflicts personal injuries on a minor son or daughter by which the child is rendered unable to serve the father. In such a case, in addition to the right of action which the child may have for the personal injuries received, with the resulting pain, disfigurement or permanent disability, if such results follow, the father has an action for his loss of the child's services, "quare servitium amisit." This is similar to the husband's right of action for personal injuries to the wife.[10] The enticement or wrongful persuasion of a child to leave its father, or employing a child against the father's wishes, is also a tort for which the father may have redress at law.[11] In the case of the seduction of a daughter, the same principles entitle the father to an action; but in this case the aggravated nature of the wrong makes the injury to his feelings

4. Darlington v. Turner, 202 U. S. 195, 26 S. Ct. 630, 50 U. S. (L. ed.) 992.

5. Hoyt v. Hammekin, 14 How. 346, 14 U. S. (L. ed.) 449.

6. Shoemaker v. Jackson, 128 Ia. 488, 104 N. W. 503, 1 L.R.A.(N.S.) 137; Dickinson v. Winchester, 4 Cush. (Mass.) 114, 50 Am. Dec. 760; Withey v. Pere Marquette R. Co., 141 Mich. 412, 104 N. W. 773, 113 A. S. R. 533, 7 Ann. Cas. 57, 1 L.R.A.(N.S.) 352.

7. Epps v. Hinds, 27 Miss. 657, 61 Am. Dec. 528.

8. Sequin v. Peterson, 45 Vt. 255, 12 Am. Rep. 194.

9. Dickinson v. Winchester, 4 Cush (Mass.) 114, 50 Am. Dec. 760.

10. See HUSBAND AND WIFE, vol. 13, p. 1411.

As to the analogy between the two causes of action, see Rogers v. Smith, 17 Ind. 323, 19 Am. Dec. 483; Dennis v. Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671.

This cause of action is discussed in detail in the succeeding paragraph.

11. See infra, par. 27, 29.

and paternal happiness more important as an element of damages than the actual loss of her services;[12] and the case becomes somewhat similar in practical result, though not in legal theory, to the action for alienating the affections of the wife or for criminal conversation with her.[13] If the injury sued for extends to the death of the child, it is governed by wholly different principles, because the common law refused to recognize a right of civil action for causing the death of a human being, and the existing rights of action are purely statutory, and are not based primarily on the father's right to the child's services.[14] Parents are also among the classes of persons who, by statutes in force in many of the states, are entitled to recover for damage done to their relatives by selling liquor to them.[15]

25. **Personal Injuries to Minor Child.**—For the personal injury and suffering of a child occasioned by a tort committed on it, the father cannot recover any damages, but the child must sue therefor by its guardian or next friend. The common law, with its usual disregard of sentimental considerations, affords a parent, as such, no remedy for an injury to his child. He can recover only for his pecuniary loss thereby, and his pecuniary loss includes two elements: his loss of the child's services and earnings, present and prospective to the end of the minority, and the medical expenses incurred in effecting or attempting to effect a cure.[16] If he was subjected to such expenses, he may recover them, though the child was too young to be capable of rendering any useful services.[17] The father's right of action is independent of that of the child; and the fact that the child has waived its right to sue for negligence at common law, by failing to file a claim of such right in accordance with the terms of the work-

12. See SEDUCTION.

13. See HUSBAND AND WIFE, vol. 13, pp. 1458-1497.

14. See DEATH, vol. 8, p. 719 et seq.

15. See INTOXICATING LIQUORS, vol. 15, pp. 433-435.

16. Bube v. Birmingham R., etc., Co., 140 Ala. 276, 37 So. 285, 103 A. S. R. 33; Birmingham R., etc., Co. v. Baker, 161 Ala. 135, 49 So. 755, 135 A. S. R. 118, 18 Ann. Cas. 477; Durkee v. Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; King v. Southern R. Co., 126 Ga. 794, 55 S. E. 965, 8 L.R.A. (N.S.) 544; Rogers v. Smith, 17 Ind. 323, 79 Am. Dec. 483; Larson v. Berquist, 34 Kan. 334, 8 Pac. 407, 55 Am. Rep. 249; Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013, 96 A. S. R. 475 and note, 53 L.R.A. 789; Horgan v. Pacific Mills, 158 Mass. 402, 33 N. E. 581, 35 A. S. R. 504 and note; King v. Viscoloid Co., 219 Mass. 420, 106 N. E. 988, Ann. Cas. 1916D 1170; Cowden v. Wright, 24 Wend. (N. Y.) 429, 35 Am. Dec. 633; Veon v. Creaton, 138 Pa. St. 48, 20 Atl. 865, 9 L.R.A. 814; McGarr v. National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 A. S. R. 749, 60 L.R.A. 122; Gulf, etc., R. Co. v. Redeker, 75 Tex. 310, 12 S. W. 855, 16 A. S. R. 887.

Note: 48 Am. Dec. 622-624.

In the province of Quebec, the father's recovery seems to be limited to the expenses incurred by him, and not to include compensation for loss of earning capacity. Great Northern R. Co. v. Couture, 14 Quebec K. B. 316, 7 Ann. Cas. 190.

17. Dennis v. Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671.

Note: 48 Am. Dec. 623.

men's compensation act, does not bar the father's right.[18] The father's right of action exists whether the injury was caused by an intentional act of violence, as an assault,[19] or by mere negligence of the defendant,[20] or of one who was acting in the course of the defendant's employment,[1] or by a mischievous animal kept by the defendant.[2] It exists for a malicious prosecution or false imprisonment which causes actual loss of service;[3] but not for mental suffering caused by the malicious prosecution of the plaintiff's child.[4] As a general rule, the parent does not sustain damages from the defamation of his child's character, whether that defamation be oral or written, and ordinarily therefore the parent cannot maintain an action for slander or libel against the defamer of his minor child's character.[5] In one case the right of action was held to exist where the defendant had by fraudulent misrepresentations induced the child to perform excessive labor for him, by which the child's health was injured.[6] For the wrongful expulsion of the child from school, it is held in the preponderant line of decisions that the child can sue, but not the father.[7] The question whether a father who has brought suit on behalf of his son as his next friend, and in that action has claimed and recovered damages for the loss of the child's earning capacity, is estopped afterward to recover for loss of service by suit in his own name is treated in another place.[8] Since emancipation ends the father's right to his child's services, it also terminates his right to recover for the loss of such service.[9]

18. King v. Viscoloid Co., 219 Mass. 420, 106 N. E. 988, Ann. Cas. 1916D 1176 and note.

19. Trimble v. Spiller, 7 T. B. Mon. (Ky.) 394, 18 Am. Dec. 189; Dennis v. Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671.

20. Pratt Coal, etc. Co. v. Brawley, 83 Ala. 371, 3 So. 765, 3 A. S. R. 751; Kerr v. Forgue, 54 Ill. 482, 5 Am. Rep. 146; Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013, 96 A. S. R. 475, 53 L.R.A. 789; Kennard v. Burton, 25 Me. 39, 43 Am. Dec. 249; Stehlé v. Jaeger Automatic Mach. Co., 225 Pa. St. 348, 74 Atl. 215, 133 A. S. R. 884; Gulf, etc., R. Co. v. Redeker, 67 Tex. 190, 2 S. W. 527, 60 Am. Rep. 20.

1. Chicago, etc., R. Co. v. Harney, 28 Ind. 28, 92 Am. Dec. 282.

2. Dennis v. Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671.

Note: 48 Am. Dec. 622.

3. Rogers v. Smith, 17 Ind. 323, 79 Am. Dec. 483.

Note: 48 Am. Dec. 622.

4. Sperier v. Ott, 116 La. 1087, 41 So. 323, 114 A. S. R. 587, 7 L.R.A. (N.S.) 518.

5. Hurst v. Goodwin, 114 Ga. 585, 40 S. E. 764, 88 A. S. R. 43; Pattison v. Gulf Bag Co., 116 La. 963, 41 So. 224, 114 A. S. R. 570.

Note: 45 L.R.A.(N.S.) 769-770.

6. Larson v. Berquist, 34 Kan. 334, 8 Pac. 407, 55 Am. Rep. 249.

7. Sorrels v. Matthews, 129 Ga. 319, 58 S. E. 819, 12 Ann. Cas. 404 and note, 13 L.R.A.(N.S.) 357. See SCHOOLS.

8. See JUDGMENTS, vol. 15, pp. 1022-1023.

9. McCarthy v. Boston, etc., R. Corp., 148 Mass. 550, 20 N. E. 182, 2 L.R.A. 608; Baker v. Flint, etc., R. Co., 91 Mich. 298, 51 N. W. 897, 30 A. S. R. 471, 16 L.R.A. 154.

26. Contributory Negligence; Elements of Damage.—In an action by a father to recover for his loss by an injury to his child caused by the defendant's negligence, the ordinary rules of the law of negligence are to be applied to determine the defendant's liability.[10] The defense of contributory negligence has a double application in this class of cases. If the plaintiff himself was negligent, and that negligence materially contributed to cause the injury, the elementary principles of the law of negligence will prevent his recovery.[11] And, since the father's right of action is based on an actionable wrong done to the child, if the child itself was guilty of the care proper to be required of one of its age, and that lack of care contributed to the accident, the child's negligence is said to be imputed to the father, and the father cannot recover.[12] Of course in trying the question of the negligence on the part of the child, his age and capacity is a most material element; and the trier must hold him responsible for only such degree of care as may reasonably be expected of one of his age.[13] And if the lack of care of the child was due to his exhaustion, caused by his having been kept at work by the defendant for an excessive length of time, so that he was physically unable to exercise the necessary skill and care, his negligence is no

10. Note: 49 A. S. R. 406. And see NEGLIGENCE, ante, p. 152 et seq.

11. Pratt Coal, etc., Co. v. Brawley, 83 Ala. 371, 3 So. 555, 3 A. S. R. 751; Walsh v. Loorem, 180 Mass. 18, 61 N. E. 222, 91 A. S. R. 263; Baker v. Flint, etc., R. Co., 91 Mich. 298, 51 N. W. 897, 30 A. S. R. 471, 16 L.R.A. 154; Smith v. Hestonville, etc., R. Co., 92 Pa. St. 450, 37 Am. Rep. 705; Schwenk v. Kehler, 122 Pa. St. 67, 15 Atl. 694, 9 A. S. R. 70; Westerberg v. Kinzua Creek, etc., R. Co., 142 Pa. St. 471, 21 Atl. 878, 24 A. S. R. 510 and note; Johnson v. Reading City Pass. Ry., 160 Pa. St. 647, 28 Atl. 1001, 40 A. S. R. 752; Evers v. Philadelphia Traction Co., 176 Pa. St. 376, 35 Atl. 140, 53 A. S. R. 674; Pollack v. Pennsylvania R. Co., 210 Pa. St. 634, 60 Atl. 312, 105 A. S. R. 846 and note; Norfolk, etc., R. Co. v. Groseclose, 88 Va. 267, 13 S. E. 454, 29 A. S. R. 718; Dickinson v. Stuart Colliery Co., 71 W. Va. 325, 76 S. E. 654, 43 L.R.A.(N.S.) 335; Holdridge v. Mendenhall, 108 Wis. 1, 83 N. W. 1109, 81 A. S. R. 871.

Notes: 92 Am. Dec. 275; 49 A. S. R. 406.

And see DEATH, vol. 8, pp. 782–785.

12. Kerr v. Forgue, 54 Ill. 482, 5 Am. Rep. 146; Gress v. Philadelphia, etc., R. Co., 228 Pa. 482, 77 Atl. 810, 21 Ann. Cas. 142 and note, 32 L.R.A. (N.S.) 409.

13. Pratt Coal, etc., Co. v. Brawley, 83 Ala. 371, 3 So. 555, 3 A. S. R. 751; Kerr v. Forgue, 54 Ill. 482, 5 Am. Rep. 146; Illinois Cent. R. Co. v. Slater, 129 Ill. 91, 21 N. E. 575, 16 A. S. R. 242 and note, 6 L.R.A. 418; Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 45 A. S. R. 114, 27 L.R.A. 206; Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508; Collins v. South Boston R. Co., 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675; Ihl v. Forty-Second St., etc., Ferry R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Kunz v. Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508; Evers v. Philadelphia Traction Co., 176 Pa. St. 376, 35 Atl. 140, 53 A. S. R. 674 and note; Holdridge v. Mendenhall, 108 Wis. 1, 83 N. W. 1109, 81 A. S. R. 871 and note.

Notes: 49 A. S. R. 406–433; 4 L.R.A. 126; 10 L.R.A. 654.

See NEGLIGENCE, ante, pp. 124–129.

defense.[14] If a father commits the care of the child to some other person, that person, as to the care of the child, is the father's agent, and his negligence is a defense to the father's action.[15] Though the father had been guilty of negligence in allowing the child to go on the street uncared for, yet if the child did nothing which a prudent custodian might not have permitted, the father's negligence is not contributory to the injury, and will not bar the action.[16] The father can recover only compensatory and not vindictive or punitory damages.[17] In fixing the damages the court ordinarily cannot consider mental suffering or injury to the father's feelings,[18] or the loss of the society or companionship of the child.[19] It is error to admit evidence of the plaintiff's poverty, the amount of his earnings and the size of his family.[20]

27. Enticement of Child from Parent.—Before the abolition of the tenure in chivalry, it was held as a doctrine of the common law that the abduction of his heir was an injury for which the father might maintain an action, and recover, by way of damages, the value of his right of marriage. But the damages for the abduction of the heir were restricted to the value of the marriage; and the father being no longer entitled to any such value, the taking away and marrying his heir does him no injury for which a civil action will lie on that principle; and it is now held that a parent's right of action for the abduction as well as for the physical injury of his children must be founded on the loss of their services, or for actual expenses and trouble in curing them, while minors under his roof.[1]

14. Great Northern R. Co. v. Couture, 14 Quebec K. B. 316, 7 Ann. Cas. 190 and note.

15. Pratt Coal, etc., Co. v. Brawley, 83 Ala. 371, 3 So. 555, 3 A. S. R. 751; Atlanta, etc., Air-line R. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 44 A. S. R. 145, 26 L.R.A. 553; Baker v. Flint, etc., R. Co., 91 Mich. 298, 51 N. W. 897, 30 A. S. R. 471, 16 L.R.A. 154; Gress v. Philadelphia, etc., R. Co., 228 Pa. St. 482, 77 Atl. 810, 21 Ann. Cas. 142, 32 L.R.A.(N.S.) 409 and note. And see DEATH, vol. 8, p. 785.

16. Wiswell v. Doyle, 160 Mass. 42, 35 N. E. 107, 39 A. S. R. 451.

17. Bube v. Birmingham R. Light, etc., Co., 140 Ala. 276, 37 So. 285, 103 A. S. R. 33; Durkee v. Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59. And see DAMAGES, vol. 8, p. 595.

18. See DAMAGES, vol. 8, pp. 515-516. See also Black v. Carrollton R. Co., 10 La. Ann. 33, 63 Am. Dec. 586; Sperier v. Ott, 116 La. 1087, 41 So. 323, 114 A. S. R. 587, 7 L.R.A.(N.S.) 518 and note; Cowden v. Wright, 24 Wend. (N. Y.) 429, 35 Am. Dec. 633. Contra, Trimble v. Spiller, 7 T. B. Mon. (Ky.) 394, 18 Am. Dec. 189.

19. Birmingham Ry., etc., Co. v. Baker, 161 Ala. 135, 49 So. 755, 135 A. S. R. 118, 18 Ann. Cas. 477 and note.

20. Holdridge v. Mendenhall, 108 Wis. 1, 83 N. W. 1109, 81 A. S. R. 871. See DAMAGES, vol. 8, p. 632 et seq.

1. Shoemaker v. Jackson, 128 Ia. 488, 104 N. W. 503, 1 L.R.A.(N.S.) 137; Jones v. Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98; Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341 and note; Lawyer v. Fritcher, 130 N. Y. 239, 29 N. E. 267, 27 A. S. R. 521, 14 L.R.A. 700; Howell v. Howell, 162 N. C. 283, 78 S. E. 222, Ann. Cas. 1914A 893, 45 L.R.A.(N.S.) 867; Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep.

But in this case, as in the case of seduction of a daughter, the loss of service may be slight and merely nominal,[2] and if the technical requirement of the action has been met by proof of such loss, the wounded feelings of the father, and the aggravated nature of the defendant's act, may be taken into consideration in fixing the damages.[3] If several persons conspire to abduct a child, they are each liable for any damages naturally flowing from any wrongful act of any one of them in prosecuting the common enterprise,[4] including reasonable and proper expenditures in finding and recovering possession of the child.[5] It is not a defense to such a charge that the defendant acted at the request of the child's mother, if the father's primary right of custody has not been legally terminated;[6] though that fact may be admissible to defeat a claim for aggravated or vindictive damages.[7] The action may be brought by anyone who has the actual and rightful custody of a child, standing in loco parentis, and in such a case it is no defense that the act was instigated by the father or mother who had forfeited or surrendered the custody of the child.[8] The right of a father to recover damages for the abduction or enticing away of his child may be waived or renounced, either expressly or by implication, or it may be forfeited by a neglect of his duty to maintain, protect and educate the child.[9] A parent by suing for the child's wages waives the tort, and cannot thereafter discontinue that action and maintain another for enticing away the child.[10]

28. **Wrongful Marriage of Minor Daughter.**—If one by fraudulent practices brings about the marriage of a minor daughter, but the mar-

593; Vaughan v. Rhodes, 2 McCord L. (S. C.) 277, 13 Am. Dec. 713 and note.

Note: 48 Am. Dec. 624.

2. Soper v. Igo, 121 Ky. 550, 89 S. W. 538, 123 A. S. R. 212, 11 Ann. Cas. 1171, 1 L.R.A.(N.S.) 362.

Note: Ann. Cas. 1914A 897.

3. Soper v. Igo, 121 Ky. 550, 89 S. W. 538, 123 A. S. R. 212, 11 Ann. Cas. 1171, 1 L.R.A.(N.S.) 362; Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341; Howell v. Howell, 162 N. C. 283, 78 S. E. 222, Ann. Cas. 1914A 893 and note, 45 L.R.A.(N.S.) 867; Magnuson v. O'Dea, 75 Wash. 574, 135 Pac. 640, Ann. Cas. 1915B 1230, 48 L.R.A.(N.S.) 327.

Note: 48 Am. Dec. 625.

4. Shoemaker v. Jackson, 128 Ia. 488, 104 N. W. 503, 1 L.R.A.(N.S.) 137. See generally, CONSPIRACY, vol. 5, p. 1063.

5. Rice v. Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777; Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341; Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593. See Magnuson v. O'Dea, 75 Wash. 574, 135 Pac. 640, Ann. Cas. 1915B 1230, 48 L.R.A. (N.S.) 327.

6. Rice v. Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777; Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341.

7. Rice v. Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777.

Note: Ann. Cas. 1914A 899.

8. Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Montz v. Garnhart, 7 Watts (Pa.) 302, 32 Am. Dec. 762; Magnuson v. O'Dea, 75 Wash. 574, 135 Pac. 640, Ann. Cas. 1915B 1230, 48 L.R.A.(N.S.) 327.

9. Wodell v. Coggeshall, 2 Metc. (Mass.) 89, 35 Am. Dec. 391.

Note: Ann. Cas. 1914A 898.

10. Note: Ann. Cas. 1914A 898.

riage in fact takes place and is valid by the law relating to marriage, the father cannot sue for the fraud practiced on him, since by the marriage the right to the daughter's services and companionship passes to the husband. The father's right is always subject to the contingency of the daughter's marriage;[11] and the grievance suffered by the father is therefore damnum absque injuria.[12] But a right of action may still exist for the loss of service for the time between the abduction and the marriage.[13] On the same principle, the father cannot recover against a county clerk who issued a marriage license to his daughter in violation of the statute, the error not being one which rendered the marriage void.[14] But where the father's consent to the marriage, obtained by fraud, resulted, not in a marriage, but in the carrying away and seduction of the daughter, the action for abduction and seduction will lie.[15]

29. Employment of Infant without Parent's Consent.—A tort analogous to enticing away a child is the employment of a minor to work against the will and without the consent of his father, especially if the work is dangerous. It is the general rule that a person who employs an infant without his parent's consent, and requires him to do dangerous work in the performance of which the child is injured, commits an actionable wrong, for which the employer is liable, although there is no evidence of negligence on his part. The wrong inherent in the employment makes proof of a subsequent wrong, as by negligence, unnecessary. The loss of the service is the gist of the action.[16] Knowledge of the minority of a child, employed without the parent's consent, appears to be essential to the maintenance of the action. But this may be shown by circumstantial evidence.[17] The plaintiff is not required, however, to prove that the master knew that he objected to the employment. One hires a minor at his peril; and it is his duty to know that the father is willing before he hires him, especially if the employment is dangerous.[18] But the father's

11. See supra, par. 22.

12. Jones v. Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98; Hervey v. Moseley, 7 Gray (Mass.) 479, 66 Am. Dec. 515 and note.

13. Jones v. Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98.

14. Holland v. Beard, 59 Miss. 161, 42 Am. Rep. 360.

15. Lawyer v. Fritcher, 130 N. Y. 239, 29 N. E. 267, 27 A. S. R. 521, 14 L.R.A. 700.

16. Louisville, etc., R. Co. v. Willis, 83 Ky 57, 4 A. S. R. 124; Haynie v. North Carolina Electric Power Co., 157 N. C. 503, 73 S. E. 198, Ann. Cas. 1913C 232 and note, 37 L.R.A.(N.S.) 580; Gulf, etc., R. Co. v. Redeker, 67 Tex. 190, 2 S. W. 527, 60 Am. Rep. 20, 75 Tex. 310, 12 S. W. 855, 16 A. S. R. 887; Texas, etc., R. Co. v. Brick, 83 Tex. 526, 18 S. W. 947, 29 A. S. R. 675 and note.
Note: 30 L.R.A.(N.S.) 311.

17. Hendrickson v. Louisville, etc., R. Co., 137 Ky. 562, 126 S. W. 117, 30 L.R.A.(N.S.) 311 and note; Gulf, etc., R. Co. v. Redeker, 67 Tex. 190, 2 S. W. 527, 60 Am. Rep. 20.

18. Hendrickson v. Louisville, etc., R. Co., 137 Ky. 562, 126 S. W. 117, 30 L.R.A.(N.S.) 311 and note.
Note: Ann. Cas. 1913C 235.

consent may be implied as well as express; and if the minor is employed on a continuous job, and the father permits him to continue without objection, his consent will be implied.[19] There must be evidence of some affirmative solicitation by act or conduct of the defendant in order to make him liable. After a child has voluntarily left the father's service, he cannot be enticed away from it. So where he had been put to work at railroad service by the father, and left his home, and afterward left that road and went to another without objection by the father, there was held to be no actionable enticement.[20] Where the parent consents to the employment of his infant child to do a certain kind of work, the master is liable to the parent for injuries sustained by the infant in the performance of another and more dangerous kind of work which is required by the master.[1] The mother's consent is no defense to an action by the father, if he had never abandoned or forfeited his control of the child;[2] but it has been held that a father's abandonment of his wife and children, and avoidance of the payment of alimony by flight from the state, constitute his wife his agent for the care and custody of the children, and that her exposure of one of them to danger resulting in his death is the negligence of the father, and precludes right of recovery of damages for his benefit.[3] If the father actually consented to the employment, he cannot recover for an injury resulting therefrom without negligence on the part of the defendant, although the employment was prohibited by statute.[4] The most frequent use of this doctrine is as a rebuttal to the defense of contributory negligence or the fellow servant rule. The master by wrongfully employing the minor without his father's consent assumes all the risk incident to the service; and the negligence of the minor, or his assumption of the risk, is no bar to recovery.[5] Nor is the fellow servant rule pertinent,

19. Notes: 30 L.R.A.(N.S.) 314; Ann. Cas. 1913C 235-6.

20. Kenney v. Baltimore, etc., R. Co., 101 Md. 490, 61 Atl. 581, 1 L.R.A. (N.S.) 205.

Note: Ann. Cas. 1914A 898.

1. Haynie v. North Carolina Electric Power Co., 157 N. C. 503, 73 S. E. 198, Ann. Cas. 1913C 232 and note, 37 L.R.A.(N.S.) 580; Gulf, etc., R. Co. v. Redeker, 75 Tex. 310, 12 S. W. 855, 16 A. S. R. 887.

Note: 30 L.R.A.(N.S.) 313.

2. Gulf, etc., R. Co. v. Redeker, 75 Tex. 310, 12 S. W. 855, 16 A. S. R. 887.

3. Swope v. Keystone Coal, etc., Co. (W. Va.) 89 S. E. 284, L.R.A.1917A 1128.

4. Dickinson v. Stuart Colliery Co., 71 W. Va. 325, 76 S. E. 654, 43 L.R.A. (N.S.) 335; Swope v. Keystone Coal, etc., Co. (W. Va.) 89 S. E. 284, L.R.A. 1917A 1128.

5. Louisville, etc., R. Co. v. Willis, 83 Ky. 57, 4 A. S. R. 124; Hendrickson v. Louisville, etc., R. Co., 137 Ky. 562, 126 S. W. 117, 30 L.R.A.(N.S.) 311 and note; Haynie v. North Carolina Electric Power Co., 157 N. C. 503, 73 S. E. 198, Ann. Cas. 1913C 232 and note, 37 L.R.A.(N.S.) 580; Texas, etc., R. Co. v. Brick, 83 Tex. 526, 18 S. W. 947, 29 A. S. R. 675.

since the liability of the master rests on the original wrong, and not on any subsequent negligence.[6]

V. Liabilities of Father

30. Support of Minor Children.—It has already been pointed out that, correlative to the father's right to the custody, control and earnings of his minor child, is his duty to support such child.[7] This duty is recognized and discharged even by the higher orders of the animal world, and it would seem to be prescribed as to the human father by the most elementary principles of civilization as well as of law. And yet it was held in some early American cases, supported by eminent English authority, that "there is no legal obligation on a parent to maintain his child," unless by force of some statute.[8] But this doctrine, admitted to seem startling and opposed to the innate sense of justice by the court which gave to it its first American support,[9] has been repudiated by the great majority of American courts.[10] A father of sufficient ability is bound to support his minor child, though the latter has an estate of his own.[11] The circumstances which will justify the child's guardian in repaying such expenditures to the father, or, if he is himself the father, in charging

6. Texas, etc., R. Co. v. Brick, 83 Tex. 526, 18 S. W. 947, 29 A. S. R. 675.

Notes: 30 L.R.A.(N.S.) 312; Ann. Cas. 1913C 236, 238.

7. See supra, par. 14, 19.

As to the affect of emancipation on the liability of a parent for support, see supra, par. 21.

8. Hunt v. Thompson, 3 Scam. (Ill.) 179, 36 Am. Dec. 538 and note; Hollingsworth v. Swendenborg, 49 Ind. 378, 19 Am. Rep. 687; Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499; Freeman v. Robinson, 38 N. J. L. 383, 20 Am. Rep. 399 and note.

Note: 64 Am. Dec. 279.

9. Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499.

10. Dunbar v. Dunbar, 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084; Bauman v. Bauman, 18 Ark. 320, 68 Am. Dec. 171; Ward v. Goodrich, 34 Colo. 369, 82 Pac. 701, 114 A. S. R. 167, 2 L.R.A.(N.S.) 201; Stanton v. Wilson, 3 Day (Conn.) 37, 3 Am. Dec. 255; Miller v. Wallace, 76 Ga. 479, 2 A. S. R. 48; Brown v. Brown, 132 Ga. 712, 64 S. E. 1092, 131 A. S. R. 229; Porter v. Powell, 79 Ia. 151, 44 N. W. 295, 18 A. S. R. 353, 7 L.R.A. 176 and note; Rounds v. McDaniel, 133 Ky. 669, 118 S. W. 956, 134 A. S. R. 982, 19 Ann. Cas. 326; Gilley v. Gilley, 79 Me. 292, 9 Atl. 623, 1 A. S. R. 307; Alvey v. Hartwig, 106 Md. 254, 67 Atl. 132, 14 Ann. Cas. 250, 11 L.R.A.(N.S.) 678; Spencer v. Spencer, 97 Minn. 56, 105 N. W. 483, 114 A. S. R. 695, 2 L.R.A.(N.S.) 851, 7 Ann. Cas. 901; Lufkin v. Harvey, 131 Minn. 238, 154 N. W. 1097, L.R.A. 1916B 1111; Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 A. S. R. 452; McGoon v. Irvin, 1 Pin. (Wis.) 526, 44 Am. Dec. 409; Zilley v. Dunwiddie, 98 Wis. 428, 74 N. W. 126, 67 A. S. R. 820, 40 L.R.A. 579.

11. Myers v. Myers, 2 McCord Eq. (S. C.) 214, 16 Am. Dec. 648; Johnson v. Johnson, 2 Hill Eq. (S. C.) 277, 27 Am. Dec. 72; Presley v. Davis, 7 Rich. Eq. (S. C.) 105, 62 Am. Dec. 396; Evans v. Pearce, 15 Grat. (Va.) 513, 78 Am. Dec. 635; National Val. Bank v. Hancock, 100 Va. 101, 40 S. E. 611, 93 A. S. R. 933, 57 L.R.A. 728 and note.

such expenditures in his guardian's account, have been discussed in another article.[12] The equity court which has jurisdiction over trusts also has power to order an allowance to the father for the future maintenance and education of his child; and such an order may be made, not only when the father is insolvent, but whenever he is unable to give the child an education suitable to the fortune which he enjoys or expects.[13] The practical difficulty which undoubtedly led some courts to hold that the father's duty of support was only a moral duty is as to the method of enforcement. The very similar duty of the husband to support his wife is easily enforced by imputing to her an agency to procure necessaries on his credit, if he leaves her destitute;[14] but in the case of the infant, he is legally incapable to contract, and in most cases actually unable to contract with wisdom and prudence. Criminal proceedings based on the provisions of a statute are therefore often the most available mode of enforcing the duty.[15] Such statutes have been enacted in most jurisdictions, and usually embrace failure to provide adequate medical aid;[16] and it has been held that the refusal of a parent to allow a child to undergo an operation may constitute refusal to provide adequate medical aid; and that it is a question for the jury to determine whether the failure to provide medical aid, under the evidence in each particular case, is in fact criminal.[17] To a criminal prosecution for nonsupport of a child it is no defense that the child did not suffer actual want, having been cared for by volunteers,[18] or that the father was opposed to medical treatment as a matter of religious belief.[19] Extreme neglect of the father's duty, in consequence of which the child loses its life,

12. See GUARDIAN AND WARD, vol. 12, p. 1159. And see 57 L.R.A. 728 note.

13. Watts v. Steele, 19 Ala. 656, 54 Am. Dec. 207.

14. See HUSBAND AND WIFE, vol. 13, pp. 1177, 1199-1200.

15. Gay v. State, 105 Ga. 599, 31 S. E. 569, 70 A. S. R. 68; Justice v. State, 116 Ga. 605, 42 N. E. 1013, 59 L.R.A. 601; Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118; Com. v. Acker, 197 Mass. 91, 83 N. E. 312, 125 A. S. R. 328; Stehr v. State, 92 Neb. 755, 139 N. W. 676, Ann. Cas. 1914A 573, 45 L.R.A.(N.S.) 559 and note; Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499; In re Ryder, 11 Paige Ch. (N. Y.) 185, 42 Am. Dec. 109; People v. Pierson, 176 N. Y. 201, 68 N. E. 243, 98 A. S. R. 666, 63 L.R.A. 187; Owens v. State, 6 Okla. Crim. 110, 116 Pac. 345, 36 L.R.A.(N.S.) 633, Ann. Cas. 1913B 1218; Hunter v. State, 10 Okla. Crim. 119, 134 Pac. 1134, L.R.A.1915A 564 and note, Ann. Cas. 1916A 612; Oakey v. Jackson [1914] 1 K. B. 216, 110 L. T. N. S. 41, 83 L. J. K. B. 712, 78 J. P. 87, 30 Times L. Rep. 92, 23 Cox C. C. 734, 12 L. G. R. 248, Ann. Cas. 1916A 335, 6 British Rul. Cas. 460 and note. And see CRIMINAL LAW, vol. 8, pp. 306–312.

16. See CRIMINAL LAW, vol. 8, pp. 307-8; INFANTS, vol. 14, p. 275.

17. Oakey v. Jackson [1914] 1 K. B. 216, 110 L. T. N. S. 41, 83 L. J. K. B. 712, 78 J. P. 87, 30 Times L. Rep. 92, 23 Cox C. C. 734, 12 L. G. R. 248, Ann. Cas. 1916A 335, 6 British Rul. Cas. 460 and note.

18. Hunter v. State, 10 Okla. Crim. 119, 134 Pac. 1134, L.R.A.1915A 564 and note, Ann. Cas. 1916A 612.

19. People v. Pierson, 176 N. Y. 201, 68 N. E. 243, 98 A. S. R. 666, 63 L.R.A.