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Negligence—Sale of Intoxicating Liquor to Husband Contrary to Wife's Request, Cole v. Rush, 271 P.2d 47 (Cal.1954)

the testator, while donees of non-probate property are less closely related, and that the effect of depleting the residue is to allow strangers to take free of taxation at the cost of forcing the widow and children to pay the tax upon property which is of no benefit to them.[24]

The rule adopted by the principal case that, in the absence of direction by the decedent, the federal estate tax upon non-probate property should be borne proportionately by the donees of that property, and should not be levied upon the residuary legacy, is much to be preferred over a rule depleting the benefits of the residuary legatees in order to allow a non-probate donee to escape the heavy burden of federal estate taxation. The United States Supreme Court, by pointing out that the federal statute is silent as to where the tax burden shall fall,[25] has destroyed any potency which the argument for forcing the tax load upon the residue may ever have had. The failure of those states burdening the residue to re-examine their rule in the light of judicial development and the advent of heavier taxes upon the estate is without justification.[26] Clearly, the Missouri Supreme Court reached a proper decision in apportioning the federal estate tax equitably among those benefiting from the non-probate estate.

TORTS—NEGLIGENCE—SALE OF INTOXICATING LIQUOR TO HUSBAND BY SALOONKEEPER AFTER PROHIBITORY NOTICE BY WIFE

Cole v. Rush, 271 P.2d 47 (Cal.1954)

Deceased's widow and minor children brought an action against defendant saloonkeeper to recover for the loss of decedent's comfort and support occasioned by his wrongful death. The complaint alleged defendant knew deceased was pugnacious when intoxicated and had been requested by the widow not to sell liquor to the deceased in sufficient quantity to allow him to become intoxicated, but that defendant refused to comply with this request. The complaint further alleged that deceased became inebriated after drinking liquor sold to him by the defendant and that deceased then engaged in a fight with another person, during which the deceased suffered injuries resulting in his immediate death. The trial court sustained a demurrer to the complaint. The Supreme Court of California, reversing that judgment, held that the surviving spouse and children of a decedent have a cause of action against a saloonkeeper who, with notice, sells alcoholic beverages to a husband causing him to become intoxicated, from which

24. See 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 13.54 (1942).
25. Riggs v. Del Drago, 317 U.S. 95 (1942).
26. As to the argument for levying the estate tax upon probate assets against the residuary estate, while continuing to tax non-probate beneficiaries proportionately, see Comment, 31 B.U.L. REV. 233 (1951).

condition the wife and children suffer a loss of his comfort and support.[1]

In many states, civil damage statutes allow recovery of damages from the supplier of intoxicating liquor by those who sustain injury to their person, property, or means of support by reason of the intoxication of a person.[2] The majority of such states permit a widow to recover damages for her loss of support from a saloonkeeper selling liquor to her husband, if he dies as a result of intoxication.[3] In these states, however, the statutory right of recovery is exclusive,[4] and a wife, whose case fails to fall within the statutory requirements, which may include giving prohibitory notice to the saloonkeeper,[5] will be denied recovery under common law principles on the ground that the state provides no remedy to the wife when her husband dies as a consequence of his becoming intoxicated. The reasons advanced in those states for denying relief when the statutory terms are not met are that: (1) there is no negligence in furnishing liquor to an able-bodied man;[6] or (2) the consumption of the liquor by the deceased, rather than the sale to him, was the proximate cause of any subsequent damage, and the deceased husband, by becoming intoxicated, was himself contributorily negligent, thus barring recovery for his wrongful death by the wife.[7]

In those states not having civil damage statutes, few cases involving a saloonkeeper's liability to the wife of a person injured while under the influence of intoxicating liquor have appeared in the appellate reports. In two cases having facts similar to the principal case, *Pratt v. Daly*,[8] and *Swanson v. Ball*,[9] the saloonkeeper was held liable to a wife for the loss of her husband's consortium when the saloonkeeper continued to sell liquor to the husband after the wife requested him not

1. Cole v. Rush, 271 P.2d 47 (Cal. 1954).

2. BLACK, INTOXICATING LIQUORS § 277 (1892). See 48 C.J.S., INTOXICATING LIQUORS § 431, p. 716 (1947).

3. Leading cases establishing this rule are: Emory v. Addis, 71 Ill. 273 (1874); Rafferty v. Buckman, 46 Iowa 195 (1877); Gardner v. Day, 95 Me. 558, 50 Atl. 892 (1901); Brockway v. Patterson, 72 Mich. 122, 40 N.W. 192 (1888); Fest v. Olson, 138 Minn. 31, 163 N.W. 798 (1917); Roose v. Perkins, 9 Neb. 304, 2 N.W. 715 (1879); Mead v. Stratton, 87 N.Y. 493 (1882); Healey v. Cady, 104 Vt. 463, 161 Atl. 151 (1932). *But cf.* Crist v. Klitz, 232 Wis. 567, 288 N.W. 175 (1939). *Contra:* Barrett v. Dolan, 130 Mass. 366 (1881); Davis v. Justice, 31 Ohio St. 359 (1877); Pegram v. Stortz, 31 W. Va. 220, 6 S.E. 485 (1888).

4. Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889); Dowling v. Stephan, 133 N.Y.S.2d 667 (Sup. Ct. 1954); Healey v. Cady, 104 Vt. 463, 161 Atl. 151 (1932).

5. See, *e.g.*, Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936) (wife orally requested saloonkeeper to desist instead of furnishing written notice as provided by statute).

6. Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889).

7. Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936). See Note, 130 A.L.R. 352, 358-359 (1941).

8. 55 Ariz. 535, 104 P.2d 147 (1940).

9. 67 S.D. 161, 290 N.W. 482 (1940).

to do so. Both of these cases allowed recovery by analogy to cases[10] involving the sale of habit-forming drugs to a husband after the wife had previously given prohibitory notice to the druggist. The wife, in a loss of consortium action, however, is allowed to recover only the damages she sustains because of the defendant's wrongful conduct prior to the husband's death and can not recover in such action damages for the husband's wrongful death.[11] The rationale of the two cases appears to be that the wife, by giving notice to the saloonkeeper not to sell liquor to the husband, imposes upon the bartender a duty owing to the wife to look after the welfare of his inebriate patron.[12] If the saloonkeeper, having been warned by the wife, has actual knowledge of the patron's alcoholic tendency or lack of volition to refuse drink, he negligently breaches the duty to the wife of the patron by disregarding her request and selling liquor to the husband, from which the latter becomes intoxicated. The cause of action accruing to the wife in these cases is independently based upon the invasion of those interests she has in continuing the marital relationship and in receiving all the benefits which that status confers upon her;[13] it is not derived from any cause of action which the husband, had he survived, might have instituted. Thus, if the husband had survived and sued the saloonkeeper in the principal case, he would have been denied recovery for the injuries to himself.[14]

The complainants in the principal case sought to recover damages for their loss of comfort and support occasioned by the *wrongful death* of the husband and father. This type of action, unlike a wife's suit for *loss of consortium,* is not independently based upon the invasion of the wife's interest in the marital relationship, but is derived from the civil wrong inflicted upon the deceased by the defendant.[15] Inasmuch as California does not have a civil damage act, such an action must necessarily be predicated upon its wrongful death statute.[16] But contribu-

10. Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912); Moberg v. Scott, 38 S.D. 422, 161 N.W. 998 (1917).

11. Burk v. Anderson, 109 N.E.2d 407 (Ind. 1952); Swanson v. Ball, 27 S.D. 161, 290 N.W. 482 (1940). Although the writer of the opinion in the former case believed that a wife should be accorded a remedy for her loss of consortium, he agreed with the majority of the court that her recoverable damages would be limited as they are in a husband's similar cause of action. See 41 C.J.S., HUSBAND AND WIFE § 401(5), p. 899 (1944); PROSSER, TORTS 940 (1941).

12. The duty owing to the wife by the bartender after she has given him prohibitory notice is in addition to the duty owing by the tavern owner to protect his guests from the assaults of intoxicated persons upon his premises. Leading cases on the saloonkeeper's duty to his business invitees are: Curran v. Olson, 88 Minn. 307, 92 N.W. 1124 (1903); Peck v. Gerber, 154 Ore. 126, 59 P.2d 675 (1936); Rommel v. Schambacher, 120 Pa. 579, 11 Atl. 779 (1887).

13. See PROSSER, TORTS 945-946 (1941). For a thorough discussion of the reasons why the courts should accord to the wife a remedy for her loss of consortium, as was done in the leading case of Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), see 1951 WASH. U.L.Q. 261.

14. See, *e.g.*, Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943).

15. See PROSSER, TORTS 965-966 (1941).

16. CAL. CODE CIV. PROC. § 377 (1953).

tory negligence by the deceased is a bar to an action under the latter.[17] It is submitted, therefore, that the complaint failed to state a cause of action for the wife's and children's loss of support occasioned by the wrongful death of the head of the household since the complaint revealed upon its face that the deceased was contributorily negligent.[18] Nor could the wife sue for loss of consortium since her damages would be limited to the injuries she sustained during the interim between the defendant's tortious conduct and the husband's death which, since death was immediate, would be nothing.[19] The trial court, accordingly, properly sustained the demurrer to the complaint and the Supreme Court's decision, on rehearing,[20] should be reversed.

17. See, *e.g.*, Studer v. Southern Pac. Co., 121 Cal. 400, 53 Pac. 942 (1898).
18. See, *e.g.*, Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936).
19. See note 11 *supra*.
20. On June 30, 1954, the court granted a rehearing of the case. Cole v. Rush, 271 P.2d 47 (Cal. 1954).