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Parent and Child: Action by Child for Alienation of Father's Affection

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given the insurer by the contract. Therefore the state of the forum must apply the law of the place where the contract was made.

The same reasoning seems applicable to divorce actions. In a divorce action the rights and obligations of the parties arise in the state of domicile. Any attempt to apply the law of a state other than the domiciliary state would obviously change those rights and obligations after the causes of action on which they are based have accrued. Therefore, it would seem that any attempt to apply the law of a state other than the domiciliary state to a divorce action would be a violation of due process.[18] It seems obvious that the legislature of the Virgin Islands intended the Island courts to apply their own law to divorce actions (otherwise there would be no point in attempting to attract divorce suits). Therefore, it would seem that the clause of the statute at issue violates due process of law. It should be noted, however, that this doctrine would not prevent a court having only personal jurisdiction over the parties from proceeding, provided it used the law of the domicile in deciding the case.

The decision seems to have sound sociological support. One major legal difficulty today lies in providing safety for parties who obtain migratory divorces and later remarry. Such a person may be married in one state yet a bigamist in another.[19] True, this difficulty has been partly overcome by decisions to the effect that migratory divorces granted where both parties are before the court and domicile of one party is technically litigated are entitled to full faith and credit.[20] But these decisions leave the validity of the divorce undecided, at least where a state is a party to the action in which the issue of domicile is collaterally attacked. This problem would be greatly aggravated by a holding that a divorce based only on personal service fulfills due process but is not entitled to full faith and credit. Therefore, it seems preferable to hold that domicile is requisite as a basis for jusidiction in divorce actions so long as it is requisite for full faith and credit.

John C. Arbuckle.

PARENT AND CHILD: ACTION BY CHILD FOR ALIENATION OF FATHER'S AFFECTION.—The Supreme Court of Wisconsin in *Scholberg* v. *Itnyre*[1] held that a child has no cause of action against a third party for the alienation of the affections of its parent. The child, a young lady, alleged that the paramour of her father had diverted the cash, counsel and caresses which otherwise might have been hers.

When the child was four years old, her parents were divorced. Seven years later, in 1941, her father took the defendant as his mistress and kept her until his death in 1952. The child, who had reached the age of twenty-two, then brought suit against her father's mistress for the alienation of his affections asking for damages in the sum of $100,000. The trial court held that the child had stated a good cause of action. The court relied on article 1, section 9 of the Wisconsin Constitution which provides that every person is entitled to a remedy for all injuries to person, property or character.

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[18]While it is possible today that there may be two states of domicile, such a situation usually arises where the wife migrates and establishes domicile in the state where the divorce is to be procured. It will seldom, if ever, occur that there are two states of domicile where jurisdiction over the person is sufficient to give a court, other than that of the domiciliary state, power to grant the divorce.

[19]Williams v. North Carolina (II), 325 U.S. 226 (1945).

[20]Sherrer v. Sherrer, 334 U.S. 343 (1948); Coe v. Coe, 334 U.S. 378 (1948), Johnson v. Muelberger, 340 U.S. 581 (1951).

[1]264 Wis. 211, 58 N.W.2d 698 (1953).

On appeal, the Supreme Court of Wisconsin reversed, holding that it must first be established that the plaintiff has suffered a legal injury by reason of the defendant's conduct. This, it said, is a new right, not recognized at common law, and the creation of new rights is a function of the legislature which the courts should not usurp.

Litigation involving this cause of action in the United States is of recent development. Since 1934, when the question was first raised in *Morrow* v *Yannantuono*[2] there have been approximately fifteen cases, eleven rejecting this cause of action and four allowing it. The arguments in these cases are of necessity strikingly similar. In presenting the various arguments no attempt will be made to evaluate them, in the sense of determining why the courts chose one or the other. Their presentation, rather, will be an indication of just how the courts have arrived at their apparently conflicting decisions.

In *Gleitz* v *Gleitz*,[3] the court held that an action for alienation of affections against a paramour cannot be brought by a child in the absence of legislation expressly authorizing it, since this action did not exist at common law. The court said that the early common law of family relations was dominated by the Roman doctrine of *pater familias*, under which the father was lord and master of the household and spoke for it. Under the common law all the rights of the family members were vested in the father and he alone was empowered to bring an action. This being a new right, the court held that it was therefore a question for the consideration and determination of the legislature, a function which the courts should not usurp.

However, in *Daily* v *Parker*,[4] it was held that a child does have a cause of action against her father's paramour for alienation of affections. The court said that it may recognize such a cause of action if it has not previously been denied by decision or statute, because the common law is not restricted to existing rules and must continue to expand. The courts are ever looking for precedents, but relief will not be denied because there are none.[5]

In *Morrow* v *Yannantuono* the court did not allow such a cause of action. The court said that to permit it would open our courts to a flood of litigation that would inundate them. It would mean that "everyone whose cheek is tinged by the blush of shame" would rush into court seeking damages to compensate him for physical and mental injuries occasioned by philandering. However, an Illinois court in *Johnson* v *Luhman*[6] characterized this multiplicity argument as specious. Any common law action, the court said, could be the subject of abuse if permitted to go unchecked.

In a recent California case, *Rudley* v *Tobias*,[7] the court held that an action by a child against her parent's lover is indistinguishable from an action for alienation of affections and such actions have been abolished by statute. But in *Russick* v. *Hicks*[8] the court said that this is not the traditional type of alienation of affection suit, which is based upon the right of one spouse to recover damages for the loss of consortium, conjugal society and assistance. The cause of action alleged here, the court said, is an

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[2]152 Misc. 134, 273 N.Y.Supp. 912 (1934)

[3]88 Ohio App. 337, 98 N.E.2d 74 (1951) See also Edler v. MacAlpine-Downie, 180 F.2d 385 (D.C.Cir. 1950), Garza v. Garza, 209 S.W.2d 1012 (Tex.Civ.App. 1948)

[4]152 F.2d 174, 162 A.L.R. 819 (7th Cir. 1945), POUND, THE SPIRIT OF THE COMMON LAW 183 (1921)

[5]Henson v. Thomas, 231 N.C. 173, 56 S.E.2d 432, 12 A.L.R.2d 1171 (1949)

[6]330 Ill.App. 598, 71 N.E.2d 810 (1947)

[7]84 Cal.App.2d 454, 190 P.2d 984 (1948) See also Katz v. Katz, 197 Misc. 412, 95 N.Y.S.2d 863 (1950)

[8]85 F.Supp. 281 (D.C. 1949)

action to recover damages for a direct wrong to the infant plaintiff and therefore distinguishable.

In *Miller* v. *Monsen*[9] the defendant argued that it would be extremely difficult to assess the damages and therefore the court should not recognize a cause of action for alienation of affection in the child. The court held that the assessment of damages, whether easy or difficult, is the function of the jury. If the argument that damages are too difficult to ascertain were carried to its logical conclusion, all tort actions involving damages for pain and suffering would be subject to the same criticism.

In *Scholberg* v. *Itnyre*, the principal case, the court rejected the claim that there was a cause of action in the child and said that a legislature which did not grant this right must have withheld it for good and sufficient reason. But the courts have also said that the existence of specific statutes protecting minors does not necessarily preclude the recognition of new rights,[10] and that the extension of protection to children is a recognition of the growing public policy requiring the maintenance of such a cause of action.

In *Nelson* v. *Richwagen*[11] the court stated that a child has no legal right to the personal presence and care of a parent. The law is satisfied, it said, if a parent provides support and care while absent from the child. So far as the parent is bound to support the child, the parent may be compelled to do so by other proceedings. But in the *Johnson* case[12] the court vigorously pursued this contention maintaining that children are entitled to both the tangible incidents of family life such as food, clothing and shelter, and to the intangible elements of affection, moral support and guidance from both parents. The court went on to trace the change that has taken place in the conception of family life, that it is now considered a co-operative enterprise with correlative rights and duties among all its members. The family relationship is today undoubtedly the most important relationship upon which society depends for endurance, permanence and well-being, and therefore warrants protection.

Perhaps all these reasons have some merit. They reflect the law as interpreted by the courts, based upon existing statutes and precedents which in turn reflect the public policy as expressed by the legislature. At any rate, they form some basis upon which the courts may rest their decisions.

In the four cases which allowed the action, the plaintiffs comprised a total of twelve minor children, all of whom were suffering actual physical deprivation because of their parent's defalcations, the parent in three out of the four cases being the father. In the eleven cases which rejected the action, the plaintiff in every case but one was a single individual, not necessarily a minor at the time the suit was brought, not in obvious want, and the parent who was enticed away in at least five of these cases was the mother.

The underlying problem is in its last analysis a sociological one rather than a legal one. A child has an interest in his parent's affection and company which the courts under our system of law have the power to "legalize" by recognizing a right of action for its protection.[13] Every infraction of duty owed by one member of society to another has legal and sociological elements involved and there is no respectable legal system which divides grievances into two parts, the one sociological, the other

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[9]228 Minn. 400, 37 N.W.2d 543 (1949)

[10]See note 7 *supra*.

[11]326 Mass. 485, 95 N.E.2d 545 (1950).

[12]See note 7 *supra*; also 41 ILL. L. REV. 444 (1947) for an excellent discussion of the relational interests involved.

[13]Taylor v. Keefe, 134 Conn. 156, 56 Atl.2d 768 (1947).