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Edwin W. Hadley

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INCONTINENCE THE CIVIL EFFECTS THEREOF

By Edwin W. Hadley

In ordinary language, incontinence means a lack of personal restraint, and the dictionaries say that the word is especially applied to non-restraint in sexual matters. In our legal vocabulary, the word has the latter meaning only, although its use is not as common as it was in early legal treatises. It is used in England, appearing in Mew's Digest. Its technical use is still frequent in the statutes and decisions of North Carolina, where a false charge of "incontinency" is per se a basis for an action for defamation by the wronged woman and for an action for a misdemeanor by the State.

We are not here interested in the *criminal* effects of incontinence. Out of illicit sexual relations may arise prosecutions for rape, seduction, adultery, fornication, incest, sodomy, or bestiality. The *civil* effects of incontinence are numerous, and an attempt is hereby made to group them all in one article, along with a brief discussion of each one.

A. Incontinence of Unmarried Persons.

1. If a man commits the act with an unmarried woman through a promise to marry or other trick, the woman had no action at common law, but today she has a statutory action for seduction in which substantial damages are recovered.[2] Pregnancy need not result, but if it does the damages are aggravated. This action seems fair, so long as the court is careful to keep the full burden of proof on the plaintiff. The seduction of an unmarried girl also gives an action for damages to her parent, guardian, or other person standing *in loco parentis,* and this was true at common law.[3] This action was originally based on loss of services, calling for proof rather difficult to falsify, but a modern tendency allows the lost services to be purely fictitious and in some states entirely excuses that element. At common

[1] Lucas v. Nichols, 52 N. C. 115, 118; State v. Hewlin, 128 N. C. 571, 37 S. E. 952.
[2] 35 Cyc. 1295.
[3] 35 Cyc. 1297

law and under some statutes the parent is allowed the action totally apart from any element of seduction or trick, the mere illicit relations with the girl constituting the wrong.[4] The elements of these actions for seduction are set out fully in the references here given, and the writer has no serious criticism to make. The possibility, or even probability, of trumped up evidence is not in itself an objection to an action; if it were, in many of our large cities there would be very few civil actions allowed.

2. When a man and a woman are engaged to be married, each has the right to believe that the other has been and will continue to be chaste and free from incontinence. A failure in this matter gives the other party a right to avoid the contract, unless he or she has knowingly forgiven the wrongdoer. It seems fair for the law to put this implied condition into such a fiduciary relation as the contract to marry, and the cases are all in accord.[5]

3. Under the feudal system, an unmarried female heir was in the custody of her overlord, who had to approve of her marriage in order to be sure that her husband would render fealty, and the Lord commonly received pecuniary advantages from the husband as a bribe for approval. If the female heir should be guilty of incontinence, the Lord might be unable to arrange a good marriage, so by such illicit act she was held to be excluded from her inheritance. If all of the female heirs should be guilty of incontinence, the inheritance went to the Lord as though there had been an eschaet.[6] This harsh rule did not apply to a female heir who had once been lawfully married and widowed, nor did it apply to a male heir, and the whole matter became obsolete with the collapse of the feudal system.

B. Incontinence of Married Persons.

1. If a married woman and a man other than her husband hold illicit sexual relations, the husband has a ground for a divorce action against the wife, and for a civil action for damages against the other man.[7] The latter action, known as one for "criminal conversation", has been deemed proper since early

[4] 35 Cyc. 1304.
[5] See digests and treatises for numerous cases.
[6] Glanville, Book VII, ch. XII, Legal Classic Series, p. 146.
[7] 30 Corpus Juris, 1153 et seq.; Arnold v. Wylie, 157 N. E. (Ohio) 571; 43 Ind. 429; 59 Ind. 548; 70 Ind. 519.

common law, recompensing the wronged husband for loss of services, consortium and the sole right to the body of his wife and at the same time discouraging immoral acts which might result in illegitimate children.

When a husband and another woman were guilty of incontinence, the common law gave the wife a ground for a divorce action, but took a different view on the matter of criminal conversation, and *denied* the wronged wife an action for damages against the other woman. A wife was not deemed to have an exclusive right to the person of her husband, and of course there could be no danger of his pregnancy. In his first edition, Mr. Tiffany seems to approve this philosophy[8] Other writers have strenuously attacked this double standard, and it is submitted that they are correct in deeming a wife injured civilly by the sexual defilement of her husband. In this country the weight of authority now seems to allow the wife an action for damages.[9] In an action by either spouse for criminal conversation with the other, heavy damages may be assessed, and in states where punitive damages for a tort are allowed they lie in this action by a conclusive presumption of malice. A recent case allowed the plaintiff to prove attorney's fees as an element of punitive damages,[10] a most important case because such fees are not provable as a part of costs. The mere illicit intercourse constitutes the wrong, and there need be no evidence of seduction or alienation of affections.[11]

2. A most important question raised by the incontinence of a married woman is whether it disqualifies her from her ordinary right to be appointed administratrix of the estate of her deceased husband. If she is appointed by the will, this has been held to be no ground of disqualification; but suppose she is not named and seeks appointment by the court? "A wife's statutory right to administer upon the estate of her husband cannot be regarded as absolute, even though the statute imposes no restrictions or limitations upon the right. Thus, although the statute does not in terms forbid the appointment of a non-resident

8 Tiffany, Domestic Relations, p. 81.

9 30 Corpus Juris, 1154. 32 Harvard Law Rev. 576; 129 Ind. 581. Several contrary cases are cited in texts and digests, but most of them are rather old.

10 Oskamp v. Oskamp, 152 N. E. (Ohio) 208.

11 Baltrunas v. Baubles, 154 N. E. (Ohio) 747.

administrator, yet the reason and policy of the law are against it"[12] Most statutes easily permit of this interpretation, giving the court a discretion to pass over the widow for any good cause and appoint the next of kin. In a Pennsylvania case[13] the court said that statutes entitling a widow to letters of administration "contemplate the case of a wife who lives with her husband till his death, and faithfully performs all her duties", and a wife who lived with another man in adultery was disqualified by the court. A number of cases have disqualified the incontinent wife under this philosophy, where there were both her immorality and continued desertion.[14] This writer has found no cases disqualifying a widow for mere incontinence; desertion must also exist.

A Michigan statute disqualifies a wife who, at the moment of her husband's death, is living with another man under a bigamous marriage. The Michigan Supreme Court in In re Dettman[15] held that an adultery and bigamy which had ceased some time before the husband's death did not disqualify the wife, and this may be perfectly correct on the ground that the incontinence had both ceased and been condoned; but the court went on to say that the statute is exclusive and nothing not exactly described therein will disqualify. This language seems too broad, in the face of the number and antiquity of decisions declaring that a probate court has an inherent discretion to disqualify beyond matters which a statute happens to mention, and a Michigan court should still be able to pass over a widow who has lived in uncondoned adultery without having made a bigamous marriage.

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[12] 93 Amer. Dec. 685, note.

[13] Odiorne's Appeal, 54 Pa. St. 175, 93 Amer. Dec. 683.

[14] Fleming v. Pelham (1807), 3 Hagg. Ecc. 217, 162 Reprint 1136 (wife had been adulterously absent for 24 years at time of her husband's death); Conyers v. Kitson, 3 Hagg. Ecc. 556, 162 Reprint 1262 (**semble**- court chiefly relied on fact that wife had remarried to a convicted felon); In re Creed, 6 Jur., N. S., 590; In re Munroe, 161 Cal. 10, 118 Pac. 242, Ann. Cas. 1913B 1161 (court says wife's depravity was so great as to amount to lack of integrity, and barred her on that ground); Arthur v. Israel, 15 Colo. 147, 22 Am. St. Rep. 381 (court estops wife from attacking void divorce gotten by her husband, so case may go on ground that she is disqualified because not the wife of the deceased); Nye's Appeal, 126 Pa. St. 341, 17 Atl. 618 (a very strong case, the court disqualifying the wife for mere unjustified desertion, without requiring proof of sexual infidelity although such probably existed). A few statutes give the probable court discretion to refuse appointment for immorality. Others do not give this ground, but it is to be noted that in the California case **supra** of In re Munroe the court held that sufficient immorality might be equal to lack of integrity, which latter is a universal ground for refusing to appoint one as administrator.

[15] 195 Mich. 231, 161 N. W. 836.

A California case[16] refused to disqualify a widow who had made a bigamous marriage, had an illegitimate child, and at the time of her husband's death had not seen him for forty years. The court seems far too strict in limiting its discretion, giving too much power to the language of the statute when faced by the claim of a widow who had clearly violated every marital vow and although a wife in name was not such a wife as was intended to be given preferential rights to administration. Some digests explain this case on the ground of condonation, or that the continued desertion was justified; neither of these elements are at all clear on the facts of the case, although either would generally be enough to prevent the disqualification for incontinence.

Does the incontinence and desertion of a *husband* disqualify him from being appointed administrator of his wife's estate? A negative answer is given in Coover's Appeal,[17] where the husband was adulterous, absent, and a fugitive from justice at the moment of his wife's death. The right of a husband to be appointed administrator is not made alternative in most statutes; it is almost absolute, and much stronger than that of the wife.[18] This rule, born when Man was King, seems unfair today. The disqualification of a husband in Cooper v. Maddox[19] seems to rest on a rather definite and mandatory statute.

3. Our last problem is the effect of incontinence of a spouse on the right to dower or curtesy. By an English statute,[20] a wife lost her dower if she deserted, lived in continuous adultery, and was not received back by her husband of his own free will.

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16 In re Newman, 124 Cal. 688, 57 Pac. 686, 45 L. R. A. 780.

17 52 Pa. St. 427.

18 23 Corpus Juris 1036.

19 34 Tenn. (2 Sneed) 135.

20 13 Edw. I c 34 (1285).

21 Daniels v. Taylor, 145 Fed. 169, 7 Ann. Cas. 352 (Arkansas statute, copied in Indian Terr. But a later Arkansas statute seems to have repealed this disqualification, it being missing in the Digest of 1921; and see a dictum in Estes v. Merrill, 12 Ark. 361, 181 S. W. 136, that bigamy would not bar dower). Sistare v. Sistare, 2 Root (Conn.) 468; Kantor v. Bloom, 90 Conn. 210, 96Atl. 974; Rawlins v. Buttel, 6 Del. 224; McGenra v. McGenra, 7 Del. Ch. 432, 44 Atl. 816; Gordon v. Dickison, 131 Ill. 141, 23 N. E. 439 (Statute bars adulterous husband, also); Owen v. Owen, 57 Ind. 291; Spade v. Hawkins, 60 Ind. App. 388, 110 N. E. 1010; Ferguson v. Ferguson, 153 Ky. 742, 156 S. W. 413; Wilson v. Craig, 175 Mo. 362, 75 S. W. 419; Lyons v. Lyons, 101 Mo. App. 494, 74 S. W. 467; Morello v. Cantalupo, 111 Atl. (N. J.) 255; Walters v. Jordan, 35 N C. 361, 13 Ird. L. 361, 57 Am. Dec. 558; Phillips v. Wiseman, 131 N. C. 402, 42 S. E. 861 (statute bars wife even though she had been deserted by her husband prior to her adultery); Beaty v. Richardson, 56 S. C. 173, 34 S. E. 73, 46 L. R. A. 517; Stegall v. Stegall, 2 Brock. 256, Fed. Cas. No. 13, 351 (Va. statute); Harman v. Harman, 124 S. E. (Va.) 273. Particular local statutes should be consulted.

This is still law in England, and some American states have enactments substantially copying the English statute.[21] Under these statutes it is almost always required that the adultery be continuous, and that the desertion be unjusified and still existing at the death of the husband. In Kentucky, however, in spite of a prior decision, it has been held recently that a single act of adultery without any desertion bars the widow's dower.[22] In a few states the English statute has been held to be part of our American common law.[23] In other states the adulterous wife is *not barred* from dower, on the ground that dower has been replaced by a statutory estate and the new statute does not give adultery as a limit on this estate.[24]

The discussion of the problem at hand has been confusing in most American states because of a conception that this doctrine is a creature of statute, and this bar of dower cannot exist when it is not mentioned in the statute or where there is no statute. This view appears in 19 Corpus Juris, p. 503, and an Alabama case [25] says "before the statute of Westminster 2, (13 Edw. 1) the adultery and elopement of the wife did not bar her rights". It is submitted that this conception is wholly erroneous. In the first place, a statute as early as the year 1285 should be held part of the common law in many states, by their constitutions or statutes. In the second place, the statute of Westminster 2nd merely codified a rule previously and firmly established in the common law. Britton states the rule in general terms;[26] but he requires the three elements of elopement, continued adultery and non-forgiveness, and he wrote about fifteen years after the statute under the express approval of Edward I, so he may have been relying on the statute. Glan-

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22 Ferguson v. Ferguson, 153 Ky. 742, 156 S. W. 413.

23 Cogswell v. Tibbetts, 3 N. H. 41; Heslop v. Heslop, 82 Pa. 537; Bell v. Nealy, 17 S. C. L. 312, 19 Am. Dec. 686; Henderson v. Chaires, 25 Fla. 26 (semble). Wisconsin took this view, prior to a statute of 1909. Chancellor Kent also believed the English statute to be part of our common law (4 Kent Comm., p. 53).

24 Potier v. Barclay, 15 Ala. 439 (semble); Smith v. Woodworth, 22 Fed. Cas. No. 13, 130, 4 Dill. (Iowa law); Lakin v. Lakin, 2 Allen (Mass.) 45; Littlefield v. Paul, 69 Me. 527; Pitts v. Pitts, 52 N. Y. 593; Rundle v. Van Inwegan, 9 N. Y. Civ. Pro. 328; Cooper v. Whitney, 3 Hill, 95; Reynolds v. Reynolds, 24 Wend. 193; Van Cleaf v. Burns, 118 N. Y. 554, 16 Am. St. Rep. 782 (New York followed 13 Edw. I by a statute of 1787, but changed by a statute of 1830); Bryan v. Batcheller, 6 R. I. 543, 78 Am. 454; Davis v. Davis, 167 Wis. 328, 167 N. W. 819 (stattue of 1909, prior to which 13 Edw. I was followed as common law); Nolan v. Nolan, 39 Nova Scotia 380.

25 Potier v. Barclay, 15 Ala. 439, 450. This same historical inaccuracy appears in many of the cases cited **supra**, note 24.

26 Legal Classic Series, p. 554.

ville, however, writing about 1185 A. D., one hundred years before the statute, remarks in Chap. XVII of Book VI that "if the wife should, in the lifetime of her husband, be separated from him on account of incontinence, the Woman shall not be heard upon a claim of dower". This seems early enough to allow us to call the doctrine one of the common law, but we can go back still further. The Danish law of Canute. who reigned from 1017 to 1035, had not only made the incontinent wife forfeit her property rights, but harshly declared that she became infamous and lost her nose and ears.[27] An ancient Saxon decree of Edmund, made about 943 A. D., ordered the cuckold husband to do no violence to the wife and to come to a friendly agreement, whereby the wife should give up property to him as compensation and if she had nothing then her nearest relatives should make amends for her.[28] In even earlier kingly and tribal days it was doubtless common custom, and common sense, that a wife who had failed in her marital duty should not receive the marital benefit of property.

It is therefore concluded that the incontinence of a wife, without more, barred her from dower at the very early common law, and this is the law followed in the Kentucky case cited *supra*, note 22. According to Glanville, both incontinence and desertion later became necessary, and that became the definite English law by the statute of Westminster 2nd. This latter form of the rule should be accepted as inherited and sensible common law by those states in which there is effect given to common law, and no statute should be deemed to dervogate the rule unless such intention is clear. Where dower has been abolished and a new type of estate created for a surviving wife, it is hard to see why such new estate should not be barred by an adulterous desertion also. The purpose back of such estate is to provide for a wife who has rendered wifely duties and thereby lost her chance to secure her future by embarking in trade. A wife who has been derelict in her duty, and has voluntarily looked to a paramour for her future, should not be deemed within the purpose of the statute. The common sense and fairness of the old rule was applied to the quasi-inheritance of a wife, and

27 LL. Canuti, Wilkins.
28 LL. Edm. Ed. Wilkins; Glanville, Legal Classic Series, p. 110.

should still apply thereto whether her estate is called dower or not.

If a husband was guilty of adultery, with or without desertion, this did not bar his estate by the curtesy at common law, and does not today in the absence of an express statute.[29] "Though the wife's dower is lost by her adultery, no such misconduct on the part of the husband will work a forfeiture of his curtesy".[30] In some states a husband is deprived of any estate in the property of his deceased wife, by statute, when he has been guilty of incontinence and desertion, or mere desertion.[31] It is to be hoped that such a statute will be passed in all states wherein a wife is barred from dower, as a husband who was not truly acting as such when his wife died should get no benefit from her property by setting up his husbandship.

[29] 17 Corpus Juris 434.
[30] 4 Kent Comm., p. 34.
[31] 17 Corpus Juris 434.