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PUBLIC resentment over the abuses incident to "heart balm" suits has recently culminated in sweeping legislative reform. Through the repeated efforts of a woman legislator, Indiana has abolished actions for seduction of females over twenty-one years of age, for breach of promise to marry, and for criminal conversation and alienation of affections. Almost immediately New York, and shortly thereafter Illinois, passed similar legislation, and at least ten other states are now considering analogous proposals.

The surface explanation of this unusual legislative receptivity is a reaction against the prevalence of blackmail peculiar to these actions, the incongruity of applying the damage remedy to injured feelings, and the perversion of that remedy by courts and juries to express their emotional sympathy and moral indignation. The underlying explanation is probably a realization of the failure of these actions to accomplish their original social purposes, and their non-conformity with changed *mores* concerning sex morality, the status of women, and the functions of the family. While the importance of the affectional relations of husband and wife may still justify their legal protection,[1] the social cost of such protection by means of an action for damages may exceed its worth. A proper appraisal of the new legislation requires an analysis of the origins, purposes, and application of the causes of action or remedies already abolished or threatened with extinction.

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[1] See 1 RECENT SOCIAL TRENDS 663, 700-702 (1933). On the general subject of changes in family functions, see c. 13 of the above work; see also c. 14, dealing with the present day activities of women outside the home.

I

BREACH OF PROMISE TO MARRY

Since ancient times, law and custom have attached varying significance and sanctions to the status of betrothal.[2] In England, from at least the twelfth century on, the church exercised extensive authority in the enforcement of promises to marry, based on its matrimonial jurisdiction, and more particularly on its "wide corrective jurisdiction over clergy and laity alike '*pro salute animæ*.'"[3] In the exercise of such jurisdiction the ecclesiastical courts displayed a realistic attitude, both in recognizing a variety of defenses[4] and in limiting the means of enforcement to admonition or the imposition of penance.[5]

Stretch v. Parker,[6] decided in 1638, was apparently the first case in which the common law courts undertook to enforce such promises. The question of liability was not fully considered, however, until *Holcroft v. Dickenson*,[7] decided in 1672, when the Court of Common Pleas, Chief Justice Vaughan dissenting, held such a promise actionable despite the objection that "Here is no consideration except Spiritual matter, and such whereof our law can take no notice." As to the propriety of the remedy of damages, Atkins, J., stated: "Marriage to a woman especially, is an advancement or preferment. . . . Loss of matrimony is a temporal loss." The court might well have reasoned that parties who agree to marry intend merely an engagement of honor,[8] or might have refused to enforce a promise to marry, even

[2] See 2 POLLOCK and MAITLAND, HISTORY OF ENGLISH LAW, 2d ed., 365-366 (1911). It appears that during the colonial period in this country the breach of promise action was popular even among the "best families," and the remedy sought by men and women alike. See 2 HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 200-209 (1904).

[3] 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW, 3rd ed., 614, 621 (1922).

[4] SWINBURNE, A TREATISE OF SPOUSALS, OR MATRIMONIAL CONTRACTS 238-240 (1686).

[5] SWINBURNE, A TREATISE OF SPOUSALS, OR MATRIMONIAL CONTRACTS 231-232 (1686).

[6] 1 Rolle's Abr. 22, pl. 20 (1638). *Cf.* 3 Green Bag 3 (1891). Lord Hardwicke's Act, 26 Geo. II, c. 33, sec. 13 (1753) [1 Stephen's Ecclesiastical Statutes 850], deprived the ecclesiastical courts of their jurisdiction to enforce promises to marry.

[7] Carter 233 at 234, 124 Eng. Rep. 933 at 934 (1672).

[8] See the argument in Lewis v. Tapman, 90 Md. 294, 45 Atl. 459 (1900), contrasting promises to marry with ordinary commercial contracts. And see Rose and Frank Co. v. J. R. Crompton and Brothers, Ltd., [1925] A. C. 445, reversing [1923] 2 K. B. 261, in which the court gave effect to an express proviso that an ordinary business arrangement was to be regarded merely as an engagement of honor and not legally enforceable.

though contractual, on grounds of public policy.[9] But the actual decision established the law otherwise, and from then on the common law has developed a conglomeration of rules which have for the most part failed to conform either to prevailing *mores* or to the proper limitations of the damage remedy.

Most important of the common-law rules governing the action for damages are those relating to proof of the contract, defenses, and damages. It was early decided or enacted that a contract to marry is not a "contract upon consideration of marriage" within the Statute of Frauds.[10] Most courts have also held that it is not within the clause of that statute relating to "any agreement that is not to be performed in the space of one year from the time of making it."[11] The opportunities for fraud and perjury thus presented were enhanced by decisions that the promise of either party might be inferred from circumstantial evidence alone.[12] Trial courts have been vague in their instructions on this issue, thereby permitting sentiment to play a large part in jury findings.[13] Appellate courts have been unable or unwilling to upset such findings, for the reason that the usual jury question involves mainly the relative credibility of witnesses.[14] Aside from this technical justification, appellate opinions upholding jury verdicts suggest virtually a presumption of a promise to marry from evidence of association, especially where there appears to have been intercourse between the parties.[15]

[9] The social unwisdom of forcing unwilling parties to marry probably accounts for the absence of equity cases decreeing specific performance. See 1 VERNIER, AMERICAN FAMILY LAWS 23 (1931).

[10] 29 Car. II, c. 3, sec. 4 (3) (1677). See 1 VERNIER, AMERICAN FAMILY LAWS, sec. 7 (1931).

[11] 29 Car. II, c. 3, sec. 4 (5) (1677). See 1 VERNIER, AMERICAN FAMILY LAWS, sec. 7 (1931).

[12] Hutton v. Mansell, 3 Salk. 16, 91 Eng. Rep. 664 (1795); Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77 (1818). The question of whether circumstantial evidence would suffice to support a verdict was especially important prior to 1850 because until that time parties to an action were disqualified from testifying in their own behalf, and other witnesses might not be available. See 1 WIGMORE, EVIDENCE, 2d ed., sec. 575 (1923). This rule was changed by statute throughout this country during the latter half of the nineteenth century. See Yale v. Curtis, 151 N. Y. 598, 45 N. E. 1125 (1897); 1 WIGMORE, *ibid.*, sec. 577. Georgia excepts actions for breach of promise. Ga. Code (1933), sec. 38-1606. And Maryland requires corroboration of the plaintiff's testimony in such actions. Md. Ann. Code (Bagby 1924), art. 35, sec. 4. Elsewhere in the country the plaintiff's uncorroborated testimony is sufficient to support a verdict.

[13] See JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS 44, n. 8 (1933).

[14] JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS 44, n. 8 (1933).

[15] See Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77 (1818), where the court

In the matter of defenses [16] our courts have shown an extremely narrow attitude, in striking contrast with the views of the ecclesiastical courts,[17] and even with their own interpretation of the statutory grounds for annulment or dissolution of marriage.[18] For the most part they have treated the contract in this respect like an ordinary business transaction, and have seldom inquired into the social consequences of a forced marriage to avoid an action for damages.[19] Thus, lack of affection on the part of plaintiff,[20] or mutual dislike, does not defeat the action. Even the recognized defenses, such as unchastity,[21] fraud,[22]

stated that in resolving any doubt against defendant it was vindicating his honor as a gentleman. The reasoning is analogous to the doctrine that engaged persons who have sexual intercourse are presumed thereby to have intended to convert their engagement into marriage, rather than to commit an immoral act. 2 POLLOCK and MAITLAND, A HISTORY OF ENGLISH LAW, 2d ed., 368 (1911); SWINBURNE, A TREATISE OF SPOUSALS, OR MATRIMONIAL CONTRACTS 224-227 (1686). See Cartwright v. McGown, 121 Ill. 338, 12 N. E. 737 (1887); but see Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609 (1857).

[16] See 1 VERNIER, AMERICAN FAMILY LAWS, sec. 8 (1931).

[17] SWINBURNE, A TREATISE OF SPOUSALS, OR MATRIMONIAL CONTRACTS 236-240 (1868). In addition to specific defenses, there were certain rather general grounds for dissolution which were obviously based on public policy. These were as follows: (1) "when some deadly enmity and unquenchable hatred is sprung up between the parties affianced"; (2) "when the one party is so severe and cruel as the other dare not proceed in the Match"; (3) "finally and generally, whensoever there is just and reasonable cause."

[18] There has been a marked tendency in recent legislation to require fitness of the parties for marriage, and to permit easier divorce and annulment, in recognition of the social evils of ill-considered or unsuccessful unions. Courts have displayed a similar tendency by increasingly liberal interpretations of "cruel and inhuman treatment" in divorce actions, and of "fraud" in suits for annulment. See Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63 (1903); Shonfeld v. Shonfeld, 260 N. Y. 477, 184 N. E. 60 (1933); 1 RECENT SOCIAL TRENDS 694-695, 704, 707-709 (1933).

[19] Thus, courts have concerned themselves with such technical contract defenses as "incapacity," "impossibility," or "implied conditions." Observe the attitude of Lord Mansfield as reported in Atchinson v. Baker, Peake Add. Cas. 103 at 105, 170 Eng. Rep. 209 at 210 (1796): "Lord Mansfield had held that if, after a man had made a contract of marriage, the woman's character turned out to be different from what he had reason to think it was, he might refuse to marry her without being liable to an action, and whether the infirmity was bodily or mental, the reason was the same; it would be most mischievous to compel parties to marry who could never live happily together." *Cf.* JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS 28-33 (1933), summarizing judicial and legislative treatment of forced marriage in the light of social evidence of its results. And *cf.* text at note 40, infra.

[20] A contrary view is adopted by Parks v. Marshall, 322 Mo. 218, 14 S. W. (2d) 590, 62 A. L. R. 835 (1929). *Cf.* Ewert v. Hammer, 212 Wis. 647, 250 N. W. 824 (1923). The cases are collected in a note in 62 A. L. R. 846-849 (1929).

[21] See Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132 (1908); Longmuir v. Ashbey, 113 N. J. L. 115, 172 Atl. 372 (1934), noted 12 N. Y. UNIV. L. Q. REV. 132 (1934).

[22] See Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705 (1894). The recent

illness,[23] or illegality [24] have been strictly and artificially applied.

Undoubtedly the gravest abuses have arisen in the awarding of damages,[25] to which courts have anomalously applied the tort rather than the contract rules of recovery, thereby placing the assessment of damages substantially in the discretion of the jury.[26] Under the tort rules plaintiff may recover both compensatory and exemplary damages, the latter being based on defendant's ill behavior or bad motives. In the great majority of cases plaintiff succeeds in recovering exemplary damages, on what seems to be a presumption that a man who violates his promise is acting maliciously, and that a woman who is jilted is invariably insulted or outraged.[27] The danger of oppressive verdicts under the guise of "exemplary," "vindictive," "punitive," or "aggravated" damages, which exists in ordinary actions for intentional wrongs such as assault, false imprisonment, and gross defamation is greatly magnified in breach of promise actions through the prominence of various sentimental factors.

tendency, particularly noticeable in New York, to expand the meaning of "fraud" as ground for annulment, is not evident in the cases of breach of promise. See, however, Parks v. Marshall, 322 Mo. 218, 14 S. W. (2d) 590, 62 A. L. R. 835 (1929), holding plaintiff's concealment of lack of affection constituted a defense on the ground of fraud.

[23] See discussion and cases collected in note in 33 A. L. R. 1238 (1924).

[24] A promise to marry in consideration of sexual intercourse is void on the ground of public policy. Hanks v. Naglee, 54 Cal. 51, 35 Am. Rep. 67 (1879). In fact many promises have undoubtedly been so induced. But juries are not prone to find such was the case. See, for example, Longmuir v. Ashbey, 113 N. J. L. 115, 172 Atl. 372 (1934). Hence, the cases denying recovery on this ground are rare. Consider also the rule of law holding valid a promise to marry made following divorce but within the period allowed for appeal or reconciliation. Morgan v. Muench, 181 Iowa 719, 156 N. W. 819 (1916). *Cf.* Sanctuary v. Cary, 6 R. I. Dec. 99, 153 Atl. 316 (1931). But see Haviland v. Halstead, 34 N. Y. 643 (1866).

[25] See 1 VERNIER, AMERICAN FAMILY LAWS, sec. 9 (1931); 2 SEDGWICK, DAMAGES, 9th ed., 1275 *et seq.* (1912); Brown, "Breach of Promise Suits," 77 UNIV. PA. L. REV. 474 at 480-490 (1929); 41 L. R. A. (N. S.) 840-855 (1913).

[26] POLLOCK, THE LAW OF TORTS, 13th ed., 195-196, 583-584 (1929). In several states legislation expressly places the damages "in the sound discretion of the jury." 1 VERNIER, AMERICAN FAMILY LAWS, sec. 9 (1931). See Dauphin v. Landrigan, 187 Wis. 633, 205 N. W. 557 (1925). See also Brown, "Breach of Promise Suits," 77 UNIV. PA. L. REV. 474 at 480, n. 28 (1929). As indicating that the true foundation of the action is tort and not contract, see Blattmacher v. Saal, 29 Barb. (N. Y.) 22 (1858); Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702 (1881); McQuillen v. Evans, 353 Ill. 239, 187 N. E. 320 (1933), noted 23 ILL. BAR J. 59 (1934). Tort rules seem also to be applied to the question of survival of the action. See notes, 3 So. CAL. L. REV. 346 (1929); 4 CAMB. L. J. 56 (1930).

[27] See, for a striking example, Bennett v. Beam, 42 Mich. 346, 4 N. W. 8 (1880), where this attitude was adopted in rejecting evidence of defendant's ultimate willingness to perform, offered in mitigation of damages.

Besides encouraging juries to express their moral indignation in the form of exemplary damages, appellate courts have stretched the meaning of "compensation" by allowing recovery under that head for such items as mental suffering, injury to affections, wounded pride, loss of social standing, "loss of market," and expenses incurred in preparation for marriage.[28] Although refusing to allow a separate action for seduction,[29] they have permitted proof thereof to "enhance" the usual damages.[30] Plaintiff's poverty [31] and defendant's actual and reputed wealth [32] have been allowed in evidence to increase recovery. On the other hand, in rejecting the contract rules of damages, the courts have at times disregarded collateral compensation to plaintiff by another marriage.[33] They have also ignored the value of the marital duties which plaintiff is relieved from performing,[34] although the prospective correlative rights which defendant has thus lost have been highly appraised in actions by a husband for criminal conversation or alienation of affections. Finally, in applying the tort rule that damages may be reduced by proof of provocation or of defendant's having acted in good faith,[35] they have produced the paradoxical result that a woman recovers damages for loss of a marriage which she does not want, and recovers less money for the loss of a desirable husband than of an undesirable one.[36]

In summary, the action for damages for breach of promise in its present form offers a great many opportunities for abuse. The very rules of law themselves delineate every defendant as *prima facie* a scoundrel and every plaintiff as a person of refined sensibilities and irreproachable character. The resulting threat of loss of reputation

[28] See JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS 112 (1933).

[29] See discussion infra, p. 986.

[30] Giese v. Schultz, 65 Wis. 487, 27 N. W. 353 (1886); Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132 (1908); *contra*, Wrynn v. Downey, 27 R. I. 454, 63 Atl. 401 (1906).

[31] Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936 (1883).

[32] See discussion and cases collected in Brown, "Breach of Promise Suits," 77 UNIV. PA. L. REV. 474 at 481, 486 (1929).

[33] Such at least is the implication in Ableman v. Holman, 195 Wis. 102, 217 N. W. 689 (1928). See criticism in note, 4 WIS. L. REV. 507 (1928).

[34] This may be due to the infrequency of actions brought by jilted males, although such an action will lie. Harrison v. Cage, Carthew 467, 90 Eng. Rep. 870 (1698). And see Atchinson v. Baker, Peake Add. Cas. 124, 170 Eng. Rep. 217 (1796), in which the male plaintiff was awarded £4,000 damages.

[35] POLLOCK, THE LAW OF TORTS, 13th ed., 196 (1929).

[36] See discussion and collection of cases in note, 62 A. L. R. 846-848 (1929). *Cf.* note 20, supra.

and payment of huge damages through a law suit operates to intimidate many innocent men into buying their peace. While courts continue to sanction the action, lawyers, legislators and the public generally have long opposed it.[37] It is felt that if the cause of action is to be retained in the interests of deserving plaintiffs, innocent defendants must be protected by requiring formal evidence of the promises, by widening defenses, and by limiting recovery to actual pecuniary loss or a fixed amount.[38] The preponderant opinion, however, as expressed in the recent legislation, either denies any essential merit in the cause of action, or regards its abuses as incapable of elimination without complete abandonment of the damage remedy.

By the weight of authority the damage remedy is unavailable to a jilted plaintiff for interference with the contract to marry by either a relative or stranger, regardless of "malice," in the absence of some independent wrong such as slander, libel, or duress.[39] It has been contended in support that such interference may aid in preventing undesirable marriages;[40] that the action in effect charges loss of *consortium*, which is limited to the husband-wife relationship;[41] that the interference is not the "necessary cause" of the breach, at least where the withdrawing party was over age;[42] and that to allow the action would encourage "unwarranted litigation."[43]

By analogy to alienation of affections, an action for damages and perhaps an injunction should lie against any party not privileged, such

[37] For arguments of policy for and against the action see 1 VERNIER, AMERICAN FAMILY LAWS, sec. 6 (1931).

[38] For a history of attempts in England to limit recovery to actual pecuniary loss, see White, "Breach of Promise of Marriage," 10 L. Q. REV. 135 (1894). *Cf.* the New York Assembly Bill No. 1848, limiting damages in actions for breach of promise to "actual expenses paid or incurred in contemplation of marriage." The bill passed the Assembly and was referred to the Senate Codes Committee, but was never voted on in the Senate. A similar limitation prevails in several European countries.

[39] A leading case is Ableman v. Holman, 190 Wis. 112, 208 N. W. 889, 47 A. L. R. 440 (1926), suit for conspiracy against strangers for inducing a breach of the contract; *contra*, except as to parents: Minsky v. Satenstein, 6 N. J. Misc. 978, 143 Atl. 512 (1928); Jacobs v. Schweinert, 11 N. J. Misc. 863, 168 Atl. 741 (1933), noted 21 VA. L. REV. 125 (1934).

[40] Conway v. O'Brien, 269 Mass. 425, 169 N. E. 491 (1929), action against a stranger alleging malicious inducement; *cf.* Lukas v. Tarpilauskas, 266 Mass. 498, 165 N. E. 513 (1929), noted 15 VA. L. REV. 695 (1929), action against a parent. *Cf.* note 19, supra.

[41] Homan v. Hall, 102 Neb. 70, 165 N. W. 881, L. R. A. 1918C 1195 (1917); Stiffler v. Boehm, 124 Misc. 55, 206 N. Y. S. 187 (1924). But see Guida v. Pontrelli, 114 Misc. 181, 186 N. Y. S. 147 (1921).

[42] Leonard v. Whetstone, 34 Ind. App. 383, 68 N. E. 197 (1903).

[43] Stiffler v. Boehm, 124 Misc. 55, 206 N. Y. S. 187 (1924).

as a close relative, and privilege should extend only to advice given in good faith for the welfare of an engaged party.[44] The hesitancy of courts to apply the analogy suggests a belated judicial awareness of the inappropriateness of the damage remedy or the evils incident thereto, in the case of interference with emotional relationships generally.

II

SEDUCTION [45]

At common law neither fornication nor probably seduction was regarded as a crime.[46] Likewise, the seduced woman was denied a civil action for damages,[47] on the ground that she was a "consenting party," *volenti non fit injuria*,[48] or equally at fault, *in pari delicto*.[49] Logically, the courts should have recognized the action as well-founded. The absence of an action by a *wife* against her seducer might have been explained on the ground that her damages are included in the husband's recovery for criminal conversation. Furthermore, in the latter action the male defendant is presumed to have been the aggressor, a presumption which has at least as strong a basis in fact in the sex rela-

[44] See Kujek v. Goldman, 150 N. Y. 176, 44 N. E. 773 (1896), in which the court allowed a husband to recover for the seduction of his wife occurring while they were engaged.

[45] Statutory analysis based mainly on the manuscript of VERNIER, 4 AMERICAN FAMILY LAWS, sec. 252, graciously loaned by the author.

A parent has a right of action for seduction of a minor (and within certain limits an adult) daughter. By a curious departure from the early common law, the action came to be regarded as based on loss of services, with seduction merely enhancing the damages. The real injury seems to consist of an unwarranted invasion of the domestic relations. See POLLOCK, THE LAW OF TORTS, 13th ed., 235 ff. (1929). New York, however, has recently defined seduction and abduction, in contrast with negligent injury, as "direct injuries" to the parent, allowing compensation for wounded feelings as well as punitive damages for the former, but merely compensation for loss of services and necessary expenses for the latter. Pickle v. Page, 252 N. Y. 474, 169 N. E. 650 (1930). For a statutory analysis of the parent's right of action for seduction and other injuries to the child, see 4 VERNIER, AMERICAN FAMILY LAWS, sec. 265. As to the child's action for injury to the parent, see Gostkowski v. Roman Catholic Church, 262 N. Y. 320 at 325, 186 N. E. 798 at 800 (1933), noted 19 CORN. L. Q. 108 (1933); Morrow v. Yannantuono, 152 Misc. 134, 273 N. Y. S. 912 (1934), noted 20 CORN. L. Q. 255 (1935).

[46] MILLER, HANDBOOK OF CRIMINAL LAW, secs. 137, 142 (1934).

[47] Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132 (1908); *contra*: Becker v. Mason, 93 Mich. 336, 53 N. W. 361 (1892); and see Wells v. Padgett, 8 Barb. (N. Y.) 323 (1850).

[48] Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132 (1908); Hamilton v. Lomax, 6 Abb. Pr. 142, 26 Barb. 615 (1858).

[49] Wrynn v. Downey, 27 R. I. 454, 63 Atl. 401 (1906).

tions of an unmarried woman. Again, the same courts which deny a separate action for seduction allow it to be shown in evidence in a breach of promise action, to enhance the damages for mental suffering and humiliation.[50] However, to be considered even for such limited purpose in a breach of promise action it must appear that the intercourse was induced by the defendant's promise to marry,[51] and it must further appear that the plaintiff was previously chaste.[52]

In fourteen jurisdictions, including Indiana,[53] statutes expressly permit a woman to sue for damages for seduction, if she was then unmarried. Michigan [54] and North Carolina [55] have allowed a woman to sue for seduction despite the absence of express statute, on the ground that by other statutes the legislature has treated the seduced woman as a real party in interest. Most statutes specify no age limit, but some mention a maximum of twenty years and others a minimum of twenty-one years. The statutes setting a maximum of twenty years apparently assume that beyond that age a woman is capable of exercising her own discretion. Those setting a minimum of twenty-one years apparently assume that up to that time the parent is entitled to her services, and that to permit the child a separate action will result in double recovery. The latter view ignores the damages to the daughter, which in theory are not included in the parent's recovery.

In Alaska, Oregon and Washington, the parent's judgment is stated as a bar to an action by the daughter; in Alabama the converse is the case; in Mississippi and Tennessee recovery by either bars action by the other. The explanation of these provisions is apparently the fear

[50] Giese v. Schultz, 53 Wis. 462, 10 N. W. 586 (1881). *Contra*: Wrynn v. Downey, 27 R. I. 454, 63 Atl. 401 (1906). See White, "Breach of Promise of Marriage," 10 L. Q. REV. 135 at 141 (1894), stressing the prominence of seduction in breach of promise actions, and suggesting that the question of retention of the latter action might depend on the advisability of allowing damages for seduction.

[51] "It is *seduction* by promise of marriage which justifies enhancement of damages, not merely sexual intercourse. The latter may be the result of inclination, passion, or cupidity without entitling the woman to any reward by law." Salchert v. Reinig, 135 Wis. 194 at 206, 115 N. W. 132 (1908).

[52] Salchert v. Reinig, 135 Wis. 194 at 205, 115 N. W. 132 (1908).

[53] Ind. Ann. Stat. (Burns 1933), sec. 2-214. The others are Alabama, Alaska, California, Idaho, Iowa, Mississippi, Montana, Nevada, Oregon, South Dakota, Tennessee, Utah, and Washington. See Burke v. Middlesworth, 92 Ind. App. 394, 174 N. E. 432 (1931); *cf.* Gardner v. Boland, 209 Iowa 362, 227 N. W. 902 (1929). It may be noted that this list includes none of the eastern states, Michigan, or Wisconsin. See note, 21 A. L. R. 303 at 304 (1922).

[54] Watson v. Watson, 49 Mich. 540, 14 N. W. 489 (1883); see Rabeke v. Baer, 115 Mich. 328, 73 N. W. 242 (1897). *Cf.* text at note 138, infra.

[55] Hyatt v. McCoy, 194 N. C. 25, 138 S. E. 405 (1927).

of double recovery, and the result is again to ignore the separate wrongs to the parent and daughter. In eight states, however, parent and daughter may have separate actions and recovery, raising the possibility of double liability unless the suits be consolidated. In all jurisdictions but Iowa the statute expressly allows the recovery of exemplary damages by the woman, and in California the statute confirms the parent's common law right in this respect, again raising the possibility of double liability for this important element of damages.

The statutory action for damages for seduction, or the common law action so far as it is recognized,[56] may be criticized as socially unwise and oppressive.[57] In view of its incidents of unpleasant notoriety, such an action is even less likely to be commenced by a self-respecting and innocent woman than an action for damages for breach of contract. The remedy is more likely to be abused by women of questionable character and motives, because of the lack of effective safeguards as to proof of intercourse, the inclination of juries to find that the plaintiff did not consent but was "seduced," and the tendency to assess heavy penalties for a moral infraction, in the guise of exemplary damages. There is also the danger in several states of double recovery for the same wrong, through separate suits by parent and daughter, and the assessment of exemplary damages in both suits. The social interest in the preservation of female purity and in the prevention of illegitimacy which probably motivated the statutes, seems amply safeguarded by criminal statutes penalizing rape or seduction,[58] and by legislative provisions for bastardy proceedings.

III

CRIMINAL CONVERSATION AND ALIENATION OF AFFECTIONS

While the actions of criminal conversation and alienation of affections are historically distinguishable, in their modern setting they are substantially alike both in their public and private functions. Both actions purport to compensate for a private injury judicially described

[56] See text at note 47, supra.

[57] See 4 VERNIER, AMERICAN FAMILY LAWS, sec. 253.

[58] Statutes creating criminal liability for seduction are found in thirty-five states including Illinois, Indiana, New York, Michigan, and Wisconsin, and in the District of Columbia, Hawaii, and Alaska. These statutes are probably related in their purpose to those dealing with statutory rape, soliciting a female for purposes of prostitution, or sexual intercourse between a teacher and female student. See 4 VERNIER, AMERICAN FAMILY LAWS, sec. 253.

as loss of "consortium," as well as to prevent and punish intentional [59] interference with the husband-wife relationship and the violation of accepted canons of social conduct. In both actions "malice" or "wanton conduct" is virtually presumed, and theoretically on that basis, but more often as a means of expressing emotional sympathy or moral indignation, exemplary, punitive or vindictive damages are usually assessed.

Criminal Conversation [60]

In Blackstone's time a man as head of a household, factually and legally, possessed valuable rights in the services and society of his wife, the education and nurture of his children, and the services of his domestics.[61] Correspondingly, he was charged with various duties towards the members of his household, and subject to some degree of liability for their acts.[62] For an intentional invasion of any of the rights incident to his status he was entitled to a remedy in damages. The totality of the husband's rights with reference to his wife were described by the term "consortium." Services, companionship, affection and exclusive intercourse might vary in importance in relation to particular types of wrongful interference and particular cases. In the eighteenth century apparently the usual forms of interference with a husband's interest in his wife were abduction, criminal conversation, and assault and battery,[63] all of which were intentional wrongs. The particular wrong of criminal conversation was described by Blackstone as follows: [64]

> "*Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by

[59] As a general rule no action will lie for negligence resulting in alienation of affections. See Lanyon's Detective Agency v. Cochrane, 210 App. Div. 590, 206 N. Y. S. 392 (1924); Lillegren v. Burns International Detective Agency, 135 Minn. 60, 160 N. W. 203 (1916). But see Winsmore v. Greenbank, Willes 577 at 581, 125 Eng. Rep. 1330 at 1331 (1745).

[60] For a historical treatment of the damage remedy for adultery as a substitute for the right of the husband to punish physically the offending parties see Lippman, "The Breakdown of Consortium," 30 COL. L. REV. 651 at 654 *et seq.* (1930). *Cf.* Brown, "The Action for Alienation of Affections," 82 UNIV. PA. L. REV. 472, 473 (1934), stating "It is obvious therefore that the gist of an action for criminal conversation is adultery. . . ." But see POLLOCK, THE LAW OF TORTS, 13th ed., 233-234 (1929), classifying the action as merely one of various injuries in family relations.

[61] See 3 BLACKSTONE, COMMENTARIES 138-143 (1768).

[62] 1 Rolle Abr. 2, pl. 7 (1668).

[63] 3 BLACKSTONE, COMMENTARIES 140 (1768).

[64] 3 BLACKSTONE, COMMENTARIES 140 (1768).

> an action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased or diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behavior and character; and the husband's obligation by settlement or otherwise to provide for those children, which he can not but suspect to be spurious."

In England the wife has never been permitted to maintain an action for criminal conversation.[65] In this country prior to the enactment of the Married Women's Acts in the latter half of the nineteenth century, the husband was required to join in her actions and was entitled to the proceeds of her judgments. To have allowed the wife an action would have permitted the husband to benefit by his own wrong. It was therefore concluded that the wife either had no "right" or no "remedy."[66] Following the Married Women's Acts, recognizing a change in the social status of the wife both within and outside the household, courts might have either deprived the husband of his existing action or allowed the wife a similar action without disturbing the traditional theory of the rights and duties involved. However, neither the majority of courts, in concluding that the Married Women's Acts by implication conferred a right of action on the wife, nor the minority reaching the opposite conclusion, pursued that theory, or agreed among themselves as to the gist of the action.

In *Oppenheim v. Kridel*,[67] representing the majority view, the court refers to the danger of doubt being cast upon the legitimacy of the wife's children as the "principal reason assigned in all the authorities for the protection of the husband." This reason, the court says, "may be offset by the interest which the wife has in the bodily and mental health of her children when they are legitimate." In addition to this element, the court states that the gist of the wrong, to either husband or wife, consists of interference with family tranquility, endangering the social order, and the infliction of "humiliation, disgrace, dishonor and mental suffering."

[65] See Lynch v. Knight, 9 H. L. Cas. 577 at 589-590, 11 Eng. Rep. 854 at 860 (1861), stating as the reason that the wife does not necessarily lose the consortium of her husband, for she may and perhaps should condone his act, whereas the husband is not permitted to condone the wife's act.

[66] For a discussion of this problem, which has had an important bearing on the construction of the Married Women's Acts, see Holbrook, "The Change in the Meaning of Consortium," 22 MICH. L. REV. 1 at 2 ff. (1923).

[67] 236 N. Y. 156 at 161, 165, 140 N. E. 227 (1923).

By this definition it is difficult to circumscribe the nature and extent of the injury, or to distinguish the wrong from the consequent damage. The concept of injury to the head of the household is replaced by the more abstract theory of interference with familial relationships; such interference comes to be condemned not merely as a private but as a social wrong; pecuniary loss disappears in favor of injury to feelings as the basis of compensation; and indemnity is subordinated to punishment as the motive of the damage remedy.

The Minnesota court,[68] in refusing to allow the wife an action, stresses the possibility of illegitimate offspring as the gist of the husband's action, and supports its conclusion by arguing that the wife whose husband commits adultery suffers no "disgrace," and that in any event a woman charged with adultery in all probability was not the seducer. The Maine court in denying the wife an action openly attacks the social desirability of the cause of action itself, saying: [69]

> "And an action in favor of the husband for the seduction of the wife has been regarded as of doubtful expediency. It has been abolished in England. . . . And the trials we have had in this country of such actions are not very encouraging. They seem to be better calculated to inflict pain upon the innocent members of the families of the parties than to secure redress to the persons injured. And we fear such would be the result if such actions were maintainable by wives."

In summary, it appears that the historical basis for the action of criminal conversation has been replaced by a mass of incoherent theories, universally allowing an action against a male and in most states against a female defendant who has committed adultery with plaintiff's spouse. The law conclusively presumes seduction, apparently even in the case of a female defendant. Such a presumption is obviously not true to fact any more than the opposite presumption of consent which bars an action by a female for damages for seduction. The law also conclusively presumes damage to the husband although he has shown no pecuniary loss, and has been proved insensitive to the alleged wrong, as well as lacking in character and reputation.[70] It is difficult to conceive of persons sincerely aggrieved by defendant's conduct braving the publicity of this type of law suit to redress his or her

[68] Kroessin v. Keller, 60 Minn. 372, 62 N. W. 438 (1895). Compare the argument in Lynch v. Knight, 9 H. L. Cas. 577, 11 Eng. Rep. 854 (1861).

[69] Doe v. Roe, 82 Me. 503 at 504, 20 Atl. 83 (1890).

[70] Thus, he may recover although he himself is an adulterer, or has condoned the wife's adultery, or is living apart from the wife through his fault.

injured feelings. On the other hand, it is generally believed that the threat of notoriety incident to such a suit offers a convenient medium for extortion of large sums from innocent defendants.

The chief justification for allowing the action seems to be its inhibiting effect on interference with familial relations.[71] However, there is no means to measure the success of the action in accomplishing such a result. On the contrary, as one court has recently stated,[72] misconduct of the type in question usually occurs without previous planning by the parties. Granted that the social interest in family solidarity and purity of offspring requires some legal protection, it may suffice to enforce the existing criminal laws which punish adultery, or, on behalf of the aggrieved spouse, to invoke the existing divorce laws which nearly everywhere recognize adultery as ground for dissolution. The inadequacies of these remedies may be conceded, but it is at best doubtful whether the remedy of damages is any more efficient.

Alienation of Affections[73]

Winsmore v. Greenbank,[74] decided in 1745, recognized the husband's right to an action against one who intentionally "persuaded, procured and enticed" his wife to leave the home, "*per quod consortium amisit*,"— by means of which he lost her comfort, society and assistance. *Gray v. Gee*,[75] decided in 1923, recognized the wife's action on the ground that she had always had a substantive right to consortium, and that the Married Women's Act of 1882 had removed her procedural disabilities, together with the possibility of the husband's profiting from his own misconduct.[76]

In this country the husband's action was early recognized,[77] and

[71] The retention of the action has recently been urged as a measure of policy to preserve the home, despite its obvious shortcomings. Brown, "The Action for Alienation of Affections," 82 UNIV. PA. L. REV. 472 at 505-506 (1934).

[72] See the opinion of Swift, J., in Newton v. Hardy, 149 L. T. 165 at 167-168 (1933), suggesting that people merely "drift into a situation" before they are aware of its legal implications.

[73] For an excellent review of the rules of law governing this particular action, see Brown, "The Action for Alienation of Affections," 82 UNIV. PA. L. REV. 472 (1934).

[74] Willes 577, 125 Eng. Rep. 1330 (1745).

[75] 39 T. L. R. 429 (1923). The English cases stress procuring or enticing plaintiff's spouse to leave the home. There is no decision squarely holding alienation of affections *per se* sufficient to justify an action.

[76] Accord: Place v. Searle, [1932] 2 K. B. 497 at 512-513. On the question of whether the wife at common law had no "right" or merely no "remedy," see Holbrook, "The Change in the Meaning of Consortium," 22 MICH. L. REV. 1 (1923).

[77] Louisiana still allows no action, on the grounds *inter alia* that the damages are mainly punitive, and that the interest of society in the stability of marriage should be

since the Married Women's Acts and supplementary legislation, commencing in the latter half of the nineteenth century, the wife's action has been established either by express statute or judicial construction in practically every jurisdiction which has considered the question.[78] As in the case of criminal conversation, consideration of the wife's right to an action occasioned a judicial re-examination of the rights invaded. While agreeing that the action was based primarily on loss of consortium, courts have defined the consequences variously as an injury to property, to the person, to personal rights, or to feelings.[79] While heartily endorsing the husband's action, for some time they refused to concede the wife's action, usually on technical grounds of statutory construction, but sometimes frankly on grounds of public policy. The Wisconsin court, for example, argued the danger of a multitude of actions if the wife were allowed to sue, and, in strange contrast with its usual recognition of social change, stated that a husband may be expected to yield to the temptations of daily social intercourse, to which a wife, occupied with her household duties, would not normally be subject.[80]

Once the wife's action was established, courts proceeded to develop rules which operate to remove the action from the realm of social reality. Although plaintiff must prove that defendant was the pursuer and not a mere passive recipient of attention, and in addition that he or she was "the controlling cause," [81] his burden is lightened by an unarticulated presumption, at least against a male defendant. A near relative is privileged to interfere unless acting "maliciously," that is, unless his sole motive is to injure the plaintiff, but juries have frequently found even parents to have so interfered. When defendant is a stranger, any intentional interference is actionable unless justified. Here, as contrasted with the case of a near relative, "intentional" inter-

protected not by a civil but by a criminal action. Moulin v. Menteleone, 165 La. 169, 115 So. 447 (1928). The Massachusetts cases seem to require proof of actual ill-will towards plaintiff, or adultery, in addition to deprivation of affections, to justify an action. There are similar limitations on the action in Alabama and California. See cases discussed in Brown, "The Action for Alienation of Affections," 82 UNIV. PA. L. REV. 472 at 474-475 (1934).

[78] Maine still denies the wife an action against a male defendant. Howard v. Howard, 120 Me. 479, 115 Atl. 259 (1921).

[79] See discussion in Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522 (1890).

[80] Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522 (1890). In Wisconsin, and in several other jurisdictions, "equal rights" statutes have tended to eliminate such one-sided interpretations of the common law. See, for example, Wis. Stat. 1931, § 6.015, discussed in Wait v. Pierce, 191 Wis. 202, 209 N. W. 475 (1926).

[81] Maahs v. Schultz, 207 Wis. 624, 242 N. W. 195 (1932).

ference does not depend on proof of "malice" in the sense of ill-will towards plaintiff. Legally any interference by a stranger is *prima facie* unjustified, and there are comparatively few cases in which justification has been found.

Despite the name given to the action, in law the injury includes not merely loss of affection but also services, society, and sexual intercourse, as denoted by the term "consortium." Plaintiff may usually recover without proof of adultery or the departure of the spouse from the home, and without proof of pecuniary loss.[82] Complete lack of affection, by the preponderant view, although mitigating damages, does not bar recovery, since the law presumes some affection or the possible return of affection. Even though the spouses were separated at the time of defendant's alleged interference, the possibility of reconciliation which defendant may have prevented appears sufficient to support an action. Nor does the fact that following defendant's misconduct, although not necessarily as a result thereof, the spouses have separated or obtained a divorce, generally prevent recovery for the wrong earlier accomplished.[83]

In assessing damages,[84] both in criminal conversation and in alienation of affections, the law permits the jury a wide range of discretion. While trial and appellate courts have frequently reduced verdicts on the ground that the amounts thereof indicated "passion and prejudice," [85] they have more often encouraged juries to express their emotional sentiment and moral indignation by instructions and decisions that compensatory damages may be "substantial," and that vindictive damages may be assessed to punish "malice" or to serve as an example to the community. Once the foundation of the action is laid, plaintiff may receive "compensation" for mental suffering and disgrace, which are obviously incapable of exact pecuniary appraisal, and for loss of at least household services varying in amount with the social position of

[82] MADDEN, PERSONS AND DOMESTIC RELATIONS 166 (1931).

[83] For a collection and discussion of cases upholding these views, and the cases in the negative, see Brown, "The Action for Alienation of Affections," 82 UNIV. PA. L. REV. 472 at 487-492 (1934).

[84] On this subject see Brown, "The Action for Alienation of Affections," 82 UNIV. PA. L. REV. 472 at 499-503 (1934).

[85] See Brown, "The Action for Alienation of Affections," 82 UNIV. PA. L. REV. 472 at 500 (1934). In Woodhouse v. Woodhouse, 99 Vt. 91, 130 Atl. 758 (1925), the trial court reduced a $465,000 verdict to $125,000. The writer states that the latter amount was still the largest judgment found in the reports, and cites several cases in which the final recovery ranged from $8,000 to $100,000. He also cites cases in which conversely the judgment was reversed on the ground that nominal damages were inadequate.

the spouses,[86] or for loss of support.[87] Exemplary or punitive damages theoretically depend on proof of "malice," which appears to be found almost as a matter of course in an action against a stranger, and of necessity in an action against a near relative.[88] Although exemplary damages alone cannot be granted, such damages may be assessed in substantial amounts where the compensatory damages allowed are merely nominal.[89] As a general rule, defendant's wealth and reputation for wealth, or future prospects,[90] may be considered to determine what amount is necessary to provide adequate punishment.

In summary, the action for alienation of affections, and to a considerable extent the action for criminal conversation proceed on the hypothesis of a perfectly harmonious husband-wife relationship destroyed or impaired by a malicious, scheming and seductive intruder. Even if this hypothesis were correct, the effectiveness of the damage remedy as a preventative may seriously be doubted, as the courts themselves have conceded in denying the remedy of injunction.[91] But the hypothesis is far from conforming to the life pattern, as indicated by the facts of the cases, and even by judicial opinions. As a rule, defendant becomes enmeshed with plaintiff's spouse without preconceived design. Where there is such design, juries can scarcely be expected to proceed on any objective basis to distinguish the pursuer from the pursued. Frequently the marital relationship has previously been openly disrupted, and it is safe to assume that in most cases internal disintegration has already commenced when defendant appears on the scene. An expert social scientist would scarcely undertake to designate any one cause of disorganization as "controlling" in a given case, yet the law confidently relies on the jury to make such a selection. Furthermore, the law finds no incongruity in awarding pecuniary compensation for the invasion of a relationship to which plaintiff by his previous or subsequent conduct has shown himself indifferent. Pecuniary

[86] By analogy to the rule in personal injury cases. See MADDEN, PERSONS AND DOMESTIC RELATIONS 162 (1931).

[87] Allard v. La Plain, 125 Me. 44, 130 Atl. 737 (1925).

[88] Because no action lies against a near relative unless "malice" is shown.

[89] Buteau v. Naegeli, 216 App. Div. 833, 215 N. Y. S. 823 (1926), reversing 124 Misc. 470, 208 N. Y. S. 504 (1925).

[90] See Brown, "The Action for Alienation of Affections," 82 UNIV. PA. L. REV. 472 at 502 (1934), discussing the similarity to exemplary damages in actions for breach of promise to marry.

[91] See Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929), noted 43 HARV. L. REV. 477 (1930); Moreland, "Injunctive Control of Family Relations," 18 KY. L. J. 207 (1930); Brown, "The Action for Alienation of Affections," 82 UNIV. PA. L. REV. 472 at 503-505 (1934).

loss is insignificant in comparison with injury to feelings in the element of compensation, and the award of indemnity is small in comparison with the assessment of exemplary damages. With these rules and consequences in view, an innocent defendant is easily induced to agree to a settlement through the threat of an action by a designing spouse or by both spouses acting in concert. On the whole, the action seems ill suited to remedy a private or public wrong, and strongly conducive to extortion, blackmail and public scandal.

IV

OTHER RELEVANT ACTIONS BY HUSBAND OR WIFE

The law has extended the concept of consortium to a variety of intentional injuries to plaintiff's spouse. Thus, the husband may recover for loss of consortium resulting from direct injury to the wife (for which she may also recover in her own right) by assault and battery, libel and slander, malicious prosecution, sale of habit-forming drugs, and malpractice.[92] The wife's action has been recognized in principle but thus far seldom invoked, and courts seem inclined to narrow her rights in this sphere.[93] While such actions are likely to result in excessive verdicts due to the wide range of jury discretion in assessing both compensatory and punitive damages, they are not subject to the abuses of unfounded actions and coercive settlements to the same extent as criminal conversation or alienation of affections. The actions enumerated are safeguarded by well defined requirements of proof, and since they do not imply sexual misbehavior, they lack the main attribute which causes extra-judicial settlements in the two actions specified.

The husband's action for loss of consortium through *negligent* injury of his wife was early recognized. But courts have uniformly denied the wife a similar right under the Married Women's Acts, either by redefining consortium as a right merely to services, or by stressing the danger of double liability for the same loss.[94] Presuming to equal-

[92] See MADDEN, PERSONS AND DOMESTIC RELATIONS 161, n. 75 (1931).

[93] See, for example, Anderson v. McGill Club, 51 Nev. 16, 266 Pac. 913 (1928); Boden v. Del-Mar Garage, 205 Ind. 59, 185 N. E. 860 (1932), noted 9 IND. L. J. 182 (1933).

[94] See Boden v. Del-Mar Garage, 205 Ind. 59, 185 N. E. 860 (1932). See Pound, "Interests of Personality," 28 HARV. L. REV. 343 at 362 (1915); Pound, "Individual Interests in the Domestic Relations," 14 MICH. L. REV. 177 at 194 (1916). See Holbrook, "The Change in the Meaning of Consortium," 22 MICH. L. REV. 1 at 6 (1923).

ize the positions of the spouses, courts in several jurisdictions have deprived the husband of his action.[95] The danger of abuse of the damage remedy is obviously less than in cases of intentional injury, hence the judicial *volte face* must be explained on some other basis, if at all.

V

LEGISLATION — ENACTED AND PROPOSED

Indiana,[96] New York [97] and Illinois [98] have already enacted statutes which purport chiefly to abolish the cause of action or remedy of damages for seduction, breach of promise to marry, alienation of affections, and criminal conversation. Ohio,[99] Michigan,[100] Minnesota,[101] Nebraska,[102] Oklahoma,[103] Texas,[104] Wisconsin,[105] and possibly other

[95] The leading case is Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911). *Cf.* Wis. Stat. 1933, § 331.04 (2), discussed in Cameron v. Union Automobile Ins. Co., 210 Wis. 659, 246 N. W. 420, 247 N. W. 453 (1933).

[96] Ind. Laws 1935, c. 208. The proposal passed the House of Representatives 87 to 7, and the Senate 31 to 15. In two previous sessions it had been introduced but failed to pass. The bill is commonly known as the "Nicholson Bill," having been sponsored by Mrs. Meredith Nicholson, Jr., a member of the Indiana legislature.

[97] N. Y. Laws 1935, c. 263. The Assembly vote was 146 for and 6 against the proposal; Senate, 36 to 9. This was the first session in New York in which this particular measure was introduced. Commonly called the "McNaboe Bill," after its sponsor, Senator McNaboe, it is patterned closely after the Indiana bill, and was signed by Governor Lehman on March 29, about ten days after the Indiana bill became law.

[98] House Bill 335, passed by the House 97 to 1, and on April 17 by the Senate 37 to 0. Action on the bill came too late to enable the writer to analyze its provisions in detail in the light of its common law and statutory background. Governor Horner is reported to have permitted the bill to become effective as a law on July 1, 1935, without his signature. Although inclined to veto it on the ground that he believed it unconstitutional, he refrained in view of the unanimity of legislative approval. See New York Times, May 6, 1935, p. 11.

[99] Senate Bill 192, House Bills 123, 170. The House is reported to have voted in favor of one of these measures 89 to 11. See the Milwaukee Sentinel, May 10, 1935, p. 2. The same newspaper, on May 12, at p. 11, reported bills introduced in Arizona, California, Connecticut, Idaho, Maryland, New Jersey, North Carolina, Pennsylvania, Rhode Island, and Washington.

[100] Senate Bill 274, Reg. Sess. 1935. On April 9 the bill failed by a single vote to obtain a majority in the Senate (Chicago Tribune, April 10, 1935, at p. 6) but was passed by that body on April 15. The Milwaukee Sentinel, April 17, 1935, p. 1.

[101] Senate File 1361, introduced March 25, 1935, referred to Committee on Judiciary.

[102] See the Milwaukee Sentinel, May 7, 1935, p. 1, reporting the passage of a Nebraska woman legislator's "anti-heart balm bill" by the House of Representatives by a vote of 56 to 27.

[103] Senate Bill 369.

[104] House Bill 895, reported favorably by Committee on Judiciary, April 2, 1935.

[105] Senate Bill 277, Assembly Bill 633.

states have pending substantially like legislation. Missouri [106] and, as reported, Oregon [107] have rejected similar bills. It may be assumed that the principal evils aimed at are unfounded actions, coercive settlements, and excessive verdicts. It is proposed to discuss the Indiana statute (the prototype of this legislation) in the light of the situation previously existing in that state, followed by a similar discussion of the New York and Illinois statutes, and then to comment briefly on the proposed legislation in other states.

The Indiana Statute

Previous to the recent enactment, Indiana allowed an action for damages for breach of promise to marry,[108] but would not allow an action against a third person, at least a parent, for interference with the contract.[109] It recognized an action by the husband for his damages arising out of intentional injuries to the wife, including enticement [110] or alienation of affections,[111] criminal conversation,[112] malicious prosecution,[113] and libel,[114] as well as for damages arising from negligent injury.[115] It also recognized an action by the wife for her damages arising out of intentional injuries to the husband, including enticement [116] and alienation of affections,[117] although not for damages arising out of his negligent injury.[118] By previous statute an unmarried female of any age might sue for damages for seduction;[119] and seduction under promise of marriage, of a female under twenty-one years of age and of good repute for chastity, by any male person was punish-

[106] House Bill 396, reported from the House Committee on March 1, with the recommendation that the bill should not pass.

[107] Literary Digest, April 13, 1935, p. 22.

[108] Felger v. Etzell, 75 Ind. 417 (1881).

[109] Leonard v. Whetstone, 34 Ind. App. 383, 68 N. E. 197 (1903).

[110] Higham v. Vanosdol, 101 Ind. 160 (1885).

[111] Adams v. Main, 3 Ind. App. 232, 29 N. E. 792 (1892).

[112] Van Vacter v. McKillip, 7 Blackf. (Ind.) 578 (1845).

[113] Rogers v. Smith, 17 Ind. 323 (1861).

[114] Hart v. Crow, 7 Blackf. (Ind.) 351 (1845).

[115] Citizens St. Ry. Co. v. Twiname, 121 Ind. 375, 23 N. E. 159 (1890); Indianapolis & Martinsville Rapid Transit Co. v. Reeder, 51 Ind. App. 533, 100 N. E. 101 (1912).

[116] Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389 (1891). In this case the court used language indicating strong approval of the action in general.

[117] Holmes v. Holmes, 133 Ind. 386, 32 N. E. 932 (1893). *Cf.* Boden v. Del-Mar Garage, 205 Ind. 59, 185 N. E. 860 (1933).

[118] Brown v. Kistleman, 177 Ind. 692, 98 N. E. 631 (1912).

[119] Ind. Ann. Stat. (Burns 1926), § 271.

able as a crime.[120] The parent was permitted to sue for damages for seduction or other interference with the daughter, although she was not living with or in the service of plaintiff at the time of seduction or afterwards, and there was no loss of her service.[121]

The recent Indiana law is entitled, "An Act to Promote Public Morals." Section 1 abolishes "all civil *causes of action* for breach of promise to marry, for alienation of affections, for criminal conversation, and for the seduction of any female person of the age of twenty-one years or more." (Italics ours.) Section 2 provides that no act thereafter done within or without the state shall operate to give rise to any of the above causes of action, and that no contract to marry thereafter made within the state shall operate to give rise to any cause of action for breach thereof. Section 3 prohibits the filing of or a threat to file any pleading "setting forth or seeking to recover upon any cause of action abolished by this act, whether such cause of action arose within or without this state." Section 4 prohibits the filing of or threatening to file in any court of the state, any paper identifying any person as co-respondent or participant in misconduct of the adverse party in any action for divorce, separate maintenance, annulment, or custody or care of children, unless otherwise determined by the court in its discretion, on proper motion. Section 5, relating to pleading, practice and testimony, and providing a penalty, prohibits the public revelation of the identity of the third person in such proceedings "so as to eliminate extortion and public scandal." Section 6 requires that action be commenced within sixty days after the effective date of the law on all previously occurring causes of action enumerated in section 1, and that as to any contract to marry existing at the time of such enactment, action be commenced within sixty days after breach. Section 7 declares void any instrument thereafter executed within the state in settlement of any claim or cause of action abolished or barred by the act, whether arising within or without the state, and makes the inducement to give or acceptance of anything of value in such settlement unlawful. Section 8 provides a penalty for violation of section 3, 4, or 7 by fine of $100 to $1,000, to which may be added imprisonment for one to five years, in the discretion of the court. Section 9 provides for severability, and section 10 repeals inconsistent laws, but saves all existing criminal laws of the state.

Section 1 of the statute, in abolishing "all civil causes of action for

[120] Ind. Ann. Stat. (Burns 1926), §§ 2276, 2553.

[121] Ind. Ann. Stat. (Burns 1926), §§ 272, 274.

breach of promise to marry," does not destroy the status of betrothal in fact and cannot be regarded as an attempt wholly to destroy it in law. The relationship has been described as fiduciary, and on that basis courts have developed special rules governing the economic transactions between the parties.[122] These rules may be expected to continue in force. It is more difficult to justify the survival of actions for damages or an injunction based on wrongful interference by third parties where such an action has been recognized. In so far as such actions require proof of an enforceable contract whose breach has been induced, they may be held barred by the statute. But on principle and analogy, the status of betrothal need not be supported by contract to justify recovery for "malicious" intervention.[123]

Recovery in actions for breach of promise has frequently included elements for which an independent action would be recognized on ordinary principles of tort, promissory estoppel or quasi-contract.[124] The statute should not prevent recovery for such elements, even though the establishment of the cause of action might require evidence of a promise to marry and its breach. The danger of circumventing the statute is obvious. But courts cannot escape the burden of construing legislation as sweeping as this, so as to eliminate the evils aimed at without destroying rights not considered by the legislature, whose continued existence may be important to society and to individuals.

Applying this reasoning, plaintiff might still recover special damages[125] caused by defendant's fraudulent or other wrongful conduct involving incidentally the breach of a promise to marry. For example, a female plaintiff might recover her expenditures for a trousseau,[126] or the value of a business or position abandoned at defendant's request.[127] Likewise, she might recover the value of property transferred in reliance on defendant's promise, although in a sense intended as a gift.[128]

[122] See JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS 70-77 (1933), discussing cases of antenuptial conveyances and contracts, insurable interest, etc.

[123] The most obvious analogies are the actions of a spouse or parent for wrongful interference.

[124] It should be pointed out again, however, that the action has been recognized as based on tort, and virtually all courts admittedly apply tort rules as to damages. See note 26, supra.

[125] For a discussion of "special damage" as it pertains to survival of the action, see notes in 3 So. CAL. L. REV. 346 (1929); 4 Camb. L. J. 56 (1930).

[126] See Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702 (1881).

[127] See reference supra, note 125.

[128] See Frazer v. Boss, 66 Ind. 1 (1879). But see Kramer v. Bins, 205 Wis. 562, 238 N. W. 407 (1931). See JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS 120-128 (1933), discussing cases involving title to engagement rings, etc.

It is more doubtful whether she should continue to recover on a bond conditioned on marriage,[129] since such an action is substantially the same as an action for damages for breach of promise. And perhaps she should not be permitted to recover merely for loss of other marriage opportunities,[130] since the injury could no longer be traced to any legally wrongful act on the part of defendant, nor would she have incurred any measurable pecuniary loss in reliance on his conduct.

Section 1 of the act abolishes "all civil causes of action . . . for the seduction of any female person of the age of twenty-one years or more." The probable theory behind the corresponding age limitation in the previously enacted penal statute is that beyond such age the female is presumed to be capable of protecting her virtue. Behind the new civil statute appears to be the correlative theory that an action brought by a woman over twenty-one years of age is likely to be unfounded in fact, and that the availability of such an action constitutes a means of extortion. Possibly the legislature was concerned with the additional danger of excessive verdicts based on jury passion and prejudice, aroused by the nature of the wrong, although an action for seduction of a woman under twenty-one survives the new statute.

As to women over twenty-one, who no longer have a "cause of action" for seduction, it might be contended that evidence of the seduction is still admissible to prove some independent actionable wrong, such as fraud, or to enhance the damages for such wrong. One might point to the analogy of the common law action for breach of promise to marry, in which evidence of seduction, while not constituting a separate cause of action or even a separate element of damage, is admissible and may be considered by the jury as enhancing other elements of damage, both compensatory and punitive. If it be suggested that any mention of seduction will inflame the jury and affect the verdict despite the most precautionary instructions, it might be answered that it is not so much the effect on the jury's verdict as the lack of probable foundation for actions or settlements with which the legislature was concerned. However, formerly seduction, while technically merely an incident of damage for breach of a contract, was often in fact the basis of recovery. The same would probably be true in actions nominally based on fraud. The palpable danger of defeating the legislative purpose makes it fair to conclude that evidence of seduction is inadmissible in any action by a woman over twenty-one for any purpose.

[129] See Atkins v. Farr, 1 Atk. 287, 26 Eng. Rep. 183 (1738).
[130] See Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702 (1881).

At common law and under the broad language of the earlier Indiana statute a parent could, within certain limitations, sue for damages for seduction of an adult daughter. Does the new act destroy such right of action? The language of the statute is that "all civil causes of action . . . for the seduction of any female person of the age of twenty-one years or more are hereby abolished." These words are broad enough, if literally construed, to suggest an affirmative answer to the query. But there seems to be no evidence, judging by public comment, that the evils of unfounded actions, coercive settlements, or excessive verdicts, are characteristic of the parent's action, at least to the same extent as in the action brought by the seduced woman herself. Moreover, the parent's common law action for seduction of a daughter does not depend on the existence of a cause of action in the latter, as contrasted with an action for negligent injury to the child, which is frequently held to be barred if the child is precluded by negligence or consent from maintaining a separate action.

Section 1 of the act also provides that "all civil causes of action . . . for alienation of affections, [and] for criminal conversation . . . are hereby abolished. . . ." It is highly improbable that the legislature intended to distinguish alienation of affections from "abduction" or "enticement." Assuming that the difficulties of proof and the corresponding danger of perjury or conspiracy are lessened when plaintiff's spouse actually departs from the home, nevertheless the evils of coercive settlements and excessive damages attach to both types of action, hence they would seem to fall equally within the purview of the statute. There may be special injuries now remedied by enhancing the damages for alienation of affections, abduction or enticement, which may still be deserving of relief by means of a separate suit. Such cases must be decided by the court on their special facts as they arise.

No doubt some question will be raised as to the effect of this legislation upon the continued application or extension of the concept of "consortium" to other actions for damages previously regarded as concurrent with or flowing from intentional or negligent injury to plaintiff's spouse. It cannot reasonably be supposed that the legislature meant that thenceforth neither spouse should be regarded as having any legal interest in the services, support, or society of the other, or as suffering any legal injury through their loss. It is not necessary to resort to the technical rule of statutory construction that statutes in derogation of the common law are to be strictly construed, to avoid such a result. The evils meant to be eradicated were confined to the

actions specifically proscribed. It would therefore seem to be an unwarranted perversion of language as well as a misapplication of legislative intent to extend the statute by implication to any action by a spouse for loss of consortium resulting from intentional or negligent conduct, other than criminal conversation or alienation of affections.

Sections 4 and 5 of the Indiana law, dealing with pleading, practice and testimony in actions for divorce, separate maintenance, annulment, or custody or care of children, prohibit the naming of a "co-respondent or participant in misconduct of the adverse party." Indiana recognizes seven grounds for divorce, including adultery, desertion, non-support, and cruel and inhuman treatment. It is improbable that many divorces are obtained or even sought in Indiana on the ground of adultery, for various reasons, including difficulty of proof. There appears to be no statutory provision for naming a co-respondent as a party on a suit for divorce or in any other of the proceedings specified, nor is a jury present in such proceedings.

The evils of "extortion and public scandal" would seem to arise primarily from newspaper or other publicity incident to the institution or conduct of the proceedings specified, and not from the judicial process itself. The statute reduces but does not eliminate the possibility of utilizing a threat of such publicity as a means of extortion. It may be noted that New York, which recognizes only adultery as a ground for divorce, and which permits a co-respondent to be served with a copy of the pleading of either plaintiff or defendant, has not adopted these sections. It is a fair inference that the draughtsmen of the New York bill (which was patterned after the Indiana bill) and perhaps the legislature, did not believe that their enactment would result in any appreciable benefit to the public.

The New York Statute

In New York prior to the statute, an action would lie for breach of promise to marry, but presumably not for interference by a third party.[131] A husband or wife could sue for loss of consortium through intentional injury to the spouse, including criminal conversation and alienation of affections; and a husband could sue for similar loss through negligent injury to the wife. A parent could sue for damages resulting from intentional or negligent injury to a child, including seduction. A woman had no separate civil action for damages for her seduction; however, the penal statutes made it a crime for any person

[131] See note 41, supra.

"under promise of marriage" or by means of fraudulent representation that they are married, to induce a female of previous chaste character to consent to intercourse, provided her testimony be corroborated by other evidence.[132]

The recent law amends the civil practice act by inserting a new article entitled: "Actions Against Public Policy." Section 61-a contains a declaration of public policy which stresses the annoyance and pecuniary damage caused to many innocent persons through abuse of the now prohibited remedies by unscrupulous persons, resulting in the "commission of crime" and the "perpetration of frauds." There are several important points of difference between the New York and Indiana laws, chiefly the following: (1) The Indiana law abolishes "all civil *causes of action*" while the New York law abolishes "all rights of action . . . *to recover sums of money as damage*" for the specified acts. (Italics ours.) The distinction may be of practical significance in determining whether relief other than by way of damages may be obtained in New York, as by injunction to restrain interference with the relations between engaged or married people. It may also be important as indicating that in New York excessive verdicts as well as coercive settlements and unfounded actions are included in the evils which inspire the legislation, a matter which is not clearly indicated in the language of the Indiana statute.

(2) Section 61-b of the New York law[133] abolishes "the rights of action heretofore existing to recover sums of money as damage for the alienation of affections, criminal conversation, *seduction, or breach of contract to marry*. . . ." (Italics ours.) Section 61-c, setting a sixty day limitation for actions based on previously accrued wrongs, is worded "criminal conversation, seduction *and* breach of contract to marry." (Italics ours.) No limitation as to age is specified. *Hamilton v. Lomax*,[134] decided by the supreme court in 1858, apparently the only New York case directly in point, reaches a conclusion in accord with the general view that at common law no action lies for seduction, "because the person seduced assents thereto." But in *Graham v. Wal-*

[132] N. Y. Consol. Laws (Cahill 1930), c. 41, §§ 2175-2177.

[133] "§ 61-b. Certain causes of action hereafter accruing abolished. The rights of action heretofore existing to recover sum of money as damage for the alienation of affections, criminal conversation, seduction, or breach of contract to marry are hereby abolished." Sections 61-b through 61-i correspond with the following sections of the Indiana law: 1, 6, 2, 3, 7, 8, 9, 10.

[134] 6 Abb. Pr. 142, 26 Barb. 615 (1858).

lace [135] the Appellate Division allowed a ward to sue her guardian for seduction, and suggested that there may be other cases in which recovery would be allowed, particularly where it could be shown that the woman had not consented or was not equally at fault. There is apparently no Court of Appeals decision directly in point. If the provision "abolishing" damages for seduction was not an inadvertence, what is its effect? In the absence of a considered opinion by the Court of Appeals, and in view of the opinion in *Hamilton v. Lomax*, the legislature may have assumed the existence of a cause of action for damages by the woman seduced, and intended to abolish it. On the other hand, it might reasonably be argued that the legislature believed that the only previous action for "seduction" known in New York was the parent's action for seduction of a daughter, and that the latter action must therefore be held to be abolished.

There are several reasons why the latter interpretation should not be adopted, aside from the rule that statutes in derogation of the common law should be strictly construed. The New York court originally based the parent's action in the case of seduction of a daughter, as in the case of negligent injury to a child, on the ground of loss of services, although the real damages were said to be the wounded feelings of the parent and perhaps of the family in general. However, in *Pickle v. Page*,[136] an action for abduction of a child brought by his foster parents, while the court reaffirmed the proposition that "the gravamen of an action brought by a parent for the seduction of a daughter is loss of service," it declared that both the actions for seduction and abduction are really for a "direct injury" to the parent, for which damages for wounded feelings as well as punitive damages would be awarded. It does not necessarily follow that by omitting one type of action from its prohibition the legislature intended to sanction another, but the omission may be considered in determining whether the legislation abolished that other. If the legislature may be presumed to have had before it the recent important and reasoned opinion in *Pickle v. Page*, in which the highest court of the state had treated the parent's actions for seduction and abduction as substantially the same, then it might seem that had it been intended to save one action and abolish the other, some care would have been taken to make that purpose clear.

Perhaps the most serious objection to concluding that the parent's

[135] 50 App. Div. 101, 63 N. Y. S. 372 (1900). See also Wells v. Padgett, 8 Barb. (N. Y.) 323, 325 (1850).

[136] 252 N. Y. 474, 169 N. E. 650 (1930).

action was intended to be abolished is found in the statement of policy at the commencement of the act, stressing annoyance and pecuniary damage to innocent persons. There seems to be no concerted public condemnation of the parent's action for seduction in New York, based on the complaint that such actions are frequently commenced without foundation, or that coercive settlements are frequently made. It might well be claimed that "pecuniary damage" includes exorbitant verdicts even in well founded actions, resulting from jury passion and prejudice in the guise of compensation for wounded feelings and punitive damages. But the case of seduction, once proved, except for the possibly stronger connotation of immorality, is scarcely distinguishable from the action of enticement or abduction, which the statute cannot reasonably be construed to have affected, although it proceeds on a similar theory and results in the awarding of similar damages.

Finally, in previous actions for seduction of a daughter brought by a parent there has usually been evidence of "enticement" or "abduction." If, as the cases indicate, the two causes of action are independent, a parent need only to allege abduction rather than seduction to maintain an action despite the statute. There seems less danger of an adverse ruling on such an argument than in a post-statutory action for fraud connected with breach of promise. In the past such fraud has usually been merged in the claim of breach of contract, whereas the tort of abduction has usually been asserted as an independent cause of action.

Section 61-f of the New York law, which is substantially the same as section 7 of the Indiana law, attempts to eliminate the evil of private settlements of the causes of action now abolished. The settlement of a non-existent cause of action is a contradiction in terms, but the purpose of the legislature is clear. The prohibitions of this section and the corresponding penalty in section 61-g are directed at the person who procures the execution of such a settlement, but not at the person induced to settle. Generally a party to an illegal agreement cannot recover what he has given thereunder, unless the law making the bargain illegal exists for his protection, or he is not *in pari delicto*.[137] By the declaration of policy in the New York act, one of the purposes of the act is to protect "persons wholly innocent and free from any wrongdoing" from pecuniary damage. Whether a person who pays in settlement of a claim based on breach of promise to marry, for example, is

[137] Daimouth v. Bennett, 15 Barb. (N. Y.) 541 (1853); see CONTRACTS, RESTATEMENT, IND. ANNOT. (1933), N. Y. ANNOT. (1933) §§ 598, 601, 604.

such an innocent party, or is not *in pari delicto*, may depend on the circumstances of the particular case, but if the answer is in the affirmative, then the exceptions mentioned above should apply and recovery should be allowed. In such case at least, and perhaps in every case, a suit should be available to cancel any instrument executed in settlement, particularly negotiable instruments, to prevent their coming into the hands of *bona fide* purchasers for value.

The Illinois Statute

The Illinois law combines various features of both the Indiana and New York laws. Section 1 of the original bill made it unlawful to file any pleading seeking to recover "upon any civil cause of action based upon alienation of affections, criminal conversation, *seduction or breach of contract to marry*. . . ." (Italics ours.) Since in Illinois, as in New York, there is no previous statute allowing a seduced woman to sue for damages, the effect of the bill on the parent's cause of action was not clear. However, by amendments adopted March 13, 1935, all references to "seduction" were stricken, thereby avoiding the issue. Sections 3 and 4 are substantially similar to sections 4 and 5 of the Indiana law.

Other Proposed Laws

The Minnesota bill is identical with the Illinois bill as amended. The Ohio bills likewise adopt various features of both the Indiana and New York laws, including the abolition of the cause of action for seduction, for which no previous statute nor presumably the common law of the state allowed the seduced woman an action.

Section 1 of the Michigan bill abolishes "*All civil causes of action* for alienation of affections, *criminal conversation and seduction*, and all causes of action for breach of contract to marry." (Italics ours.) Section 3 requires all actions for "alienation of affections, criminal conversation, seduction, and breach of contract to marry" previously accrued, to be commenced within sixty days after the act goes into effect. Michigan seems to allow the seduced woman an action for damages, both at common law and by liberal statutory construction.[188] Grammatical construction of section 1 suggests that seduction might be considered as enlarging or explaining criminal conversation, but section 3 apparently refers to seduction as a separate action. Hence the survival of the parent's action is, as in New York, left somewhat in doubt. It

[188] See Becker v. Mason, 93 Mich. 336, 53 N. W. 361 (1892). See note 54, supra.

may be noted also that the Michigan bill has no provision corresponding to section 7 of the Indiana law dealing with settlements, nor any provision corresponding to sections 4 and 5 of that law dealing with identification of third persons in certain legal proceedings.

The Oklahoma and Texas bills are substantially identical with the Indiana law. While no previous statute nor presumably the common law gave the seduced woman a cause of action in either state, both bills follow the Indiana law in abolishing actions "for the seduction of any female person of the age of twenty-one years or more." By negative implication this provision if enacted into law might give to a female person under twenty-one a new cause of action for seduction. Furthermore, its enactment would raise the problem of the continuance of the parent's action for seduction of an adult daughter, as discussed previously in connection with the Indiana law.

The Wisconsin assembly bill follows substantially the provisions of the Illinois bill before amendment of the latter, and purports to abolish cause of action for "seduction or breach of contract to marry." It is clearly the law in Wisconsin that a woman has no cause of action for seduction, therefore this provision if enacted into law would raise nice problems of construction for the court, particularly in determining its effect upon the parent's common law action for the seduction of his daughter. The Wisconsin senate bill follows substantially the Indiana law, including the abolition of actions for "the seduction of any female person of the age of twenty-one years or more." Just what construction this provision would receive, in view of the previous law of Wisconsin, is a matter for speculation.[139]

CONCLUSION

The new legislation destroys rights or remedies traditionally favored by courts and legislatures. There will be little regret at the passing of the action for breach of promise to marry. But there is room for an honest difference of opinion as to the actions of alienation of affections and possibly of criminal conversation, which have long been sanctioned as indemnifying private injury, preserving the family unit and punishing public offenses. There are respectable opinions to the effect that these benefits are being ignored, and that newspaper emphasis has created an illusion of universality as to the evils of un-

[139] It may be noted that this article makes no attempt to discuss constitutional or conflict of laws problems raised by the lew legislation. See Myers, "Validity of Statutes Prohibiting Breach of Promise and Alienation Suits," 2 OHIO L. REV. 146 (1935).

founded actions, coercive settlements or excessive verdicts which concededly exist in particular cases.[140]

The justification for singling out the two actions in question from various intentional injuries to feelings, and from other intentional injuries to consortium lies in their peculiar susceptibility to the abuses in question. The characteristic which distinguishes these actions is their connotation of sexual misbehavior, by reason of which emotion and moral indignation prevail over considerations of private or public injury in the assessment of damages. For the same reason the actions attract disproportionate publicity. One result of this combination of factors is to encourage unfounded claims, and another is to induce innocent defendants to enter into extra-judicial settlements. Three legislatures have presumably weighed these results against the sacrifice of meritorious claims and have abolished the actions by large majorities.

The new legislation may also be regarded as a recognition of changed social concepts of family solidarity and functions. The recent tendency has been to relax traditional legal controls by permitting suits among members of the family and by allowing easier means of divorce. The recent statutes further relax such controls by recognizing and protecting increased freedom of association between each spouse and the outside world. From this broad point of view the current legislative movement is thoroughly commendable.

[140] Several trial judges in Wisconsin, in response to an inquiry, have stated such opinions. See further, note 71, supra.