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TORTS-FAMILY RELATIONSHIP-CHILD'S RIGHT TO RECOVER FOR ENTICEMENT OF PARENT FROM HOME

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Torts—Family Relationship—Child's Right to Recover for Enticement of Parent from Home—Plaintiff, a six year old girl, sued to recover damages alleged to have been sustained as a result of defendant's enticing her mother from the family home. Plaintiff contended that as a child and member of the family she had a legally protected right to maintenance of the family relationship. Defendant answered that no tort had been committed, since no right in the plaintiff was recognized at common law and that to recognize such a right would amount to judicial legislation. From a judgment in favor of plaintiff, defendant appealed. Held, affirmed. Allowing a child a right of action against one enticing his parent from the home neither changes any rule of law nor upsets any precedent. Miller v. Monsen, (Minn. 1949) 37 N.W. (2d) 543.

Although many legal writers discuss the existence of a relational interest,1 the common law gives a child little or no remedy for interference with the parental

1 Pound, "Individual Interests in the Domestic Relations," 14 Mich. L. Rev. 177 at 185 (1916); Green, "Relational Interests," 29 Ill. L. Rev. 460 at 484 (1934); Pollock, Torts, 14th ed., 180 (1939); Prosser, Torts 937 (1941).
In line with this common law view, the child has been denied recovery for enticement of his mother from home or for alienation of her affections. In 1945, however, a case appeared allowing recovery against one who intentionally interfered with the family relationship. There has been slight recognition of the new cause of action, but it has been completely adopted in at least one other instance, and the principal case terms these two previous decisions "the better considered authorities." The decisions disapproving or ignoring these cases reiterate the common law view, but the significant fact is that prior to the last four years there was no precedent for giving the child a right of action, while, today, there appears to be a trend in the direction of the principal case. Three arguments against allowing the action are advanced by courts and various writers: (1) the action for alienation of affections is based upon the loss of "consortium," the right to which arises solely from the marriage relation and may be claimed only by the husband or wife; (2) recognition of the action opens courts to a "flood of litigation"; and (3) the new action undermines, or at least is contrary in spirit to, the recent anti-"heart balm" legislation. The only argument that merits serious consideration is the last. It is a grave question whether or not it is wise for courts to enforce the right of action in the face of recent legislation. It is submitted that

2 3 Blackstone, Comm. 143; Prosser, Torts 936 (1941).
3 Morrow v. Yannantuono, 273 N.Y.S. 912 (1934); Cole v. Cole, 277 Mass. 50, 177 N.E. 810 (1931), but cf. Coulter v. Coulter, 73 Colo. 144, 214 P. 400 (1923), where the court held that an adult was not entitled to damages for alienation of his mother's affections in absence of any allegation that he was entitled to her support.
6 Johnson v. Luhman, 330 Ill. App. 598, 71 N.E. (2d) 810 (1947). The Johnson case comes closer to a recognition that destruction of the family unit is a separate tort than does the Daily case. In the latter, loss of support was pleaded, but in the Johnson case support was being provided and the decision rests squarely on alienation of affections.
7 See note 1, supra. The courts fear that the action would open them to complaints by all who are even slightly embarrassed as a result of the enticement. Restricting the action to the number of minor children living at home at the time of the enticement, and not extending it to collateral relations, would hardly result in a "flood of litigation." The principal case allows the two other minor children similar recovery.
9 See comment in 162 A.L.R. 824 et seq. (1946). The trend seems toward further anti-"heart balm" statutes, already numbering close to twenty.
it is wise. A parent is given an action for the enticing away of his child. More persuasive than this argument, however, is the argument emphasizing the change in the family relationship. The child is the last member of the family group to gain protection of the law in his own right. A recognition of a child’s rights leads logically to the position taken by the principal case. Moreover, this basis of decision dispenses with the necessity of resorting to confusing fictions. In the absence of statutes to the contrary, the child should be given an action against an outsider enticing his parent from home.

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18 45 L.R.A. (n.s.) 867 (1913). Since it was formerly held that a parent must show actual or constructive loss of services, no corresponding loss could be shown by the child and recovery was denied in this converse situation. Prosser, Torts 916 (1941). Under what is termed the “modern rule,” no loss of services need be shown and the way is clear for the child to seek recovery for loss of companionship, the present basis of the parent's action. 72 A.L.R. 847 (1931).

14 The Daily and Johnson cases are thus decided in the belief that the common law must grow apace.

16 After the Daily case, writers justified the decision on the theory of interference by an outsider with the contractual relation. See, for example, 13 Univ. Chi. L. Rev. 375 (1946).