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## TORTS-ALIENATION OF PARENT'S AFFECTION

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TORTS — ALIENATION OF PARENT'S AFFECTION — Plaintiff, a minor child, brought a tort action against defendant for enticing her mother to desert her, thereby depriving plaintiff of support, maintenance, and maternal care and affection. The trial court sustained defendant's demurrer. On appeal, *held*, affirmed. The statutes of the state provide other means of support of the child, and he has no right of action for the deprivation of a parent's love and affection. *Nelson v. Richwagen*, (Mass. 1950) 95 N.E. (2d) 545.

The alienation of affections suit has its origin in the husband's right to the services of his wife and children.<sup>1</sup> This developed into the broader right of consortium, and with the emancipation of women became a claim of the wife

<sup>1</sup> PROSSER, TORTS §101 (1941).

as well.<sup>2</sup> Although other sentimental interests of the child have been recognized,<sup>3</sup> it is only recently that he has been granted any right to the personal presence of his parents.<sup>4</sup> Beginning with *Dailey v. Parker*,<sup>5</sup> a few courts have allowed his claim,<sup>6</sup> realizing that their holding is a change of the common law, but justifying it as (1) a belated recognition of the change in the family relationship which has resulted in relative equality for all members of the group, (2) a "filling of a gap" in the law by the use of the doctrine of "judicial empiricism" in order to keep the common law growing, and (3) a right which should not be prevented by practical difficulties in employing the remedy. However, other courts have refused to follow this lead.<sup>7</sup> While it is argued that the right to love and affection arises from the marriage contract and is only a claim of the respective spouses,<sup>8</sup> most courts do not stand upon this distinction. They refuse to extend the common law in light of the possibility of fraud and multiplicity of suits, and the difficulty of assessing damages.<sup>9</sup> In evaluating these two views, the context in which the problem arises should be kept in mind. If there is an "anti heart balm" statute which prohibits all alienation of affection suits,<sup>10</sup> the question of the child's action would seem to be settled.<sup>11</sup> However, if the statute mentions only the action of a spouse, then the problem is more difficult.<sup>12</sup> It is submitted that this right should not be granted, for the practical effect in many cases would be that the child would sue in the place of the aggrieved parent, thus subverting legislative intent.<sup>13</sup> There is no such statute in the principal case; yet the court denies the child's right, emphasizing the practical difficulties that would arise, and indicating a general judicial dislike of alienation of affections suits and a refusal to extend their coverage in absence of legislative dictate.

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Mentzer v. Western Union Telegraph Co.*, 93 Iowa 752, 62 N.W. 1 (1895) (defendant failed to inform plaintiff of his mother's death promptly); *Finley v. Atlantic Transport Co.*, 220 N.Y. 249, 115 N.E. 715 (1917) (defendant wrongfully handled the corpse of the plaintiff's parent).

<sup>4</sup> Note 1 *supra*.

<sup>5</sup> (7th Cir. 1945) 152 F. (2d) 174.

<sup>6</sup> *Johnson v. Luhman*, 330 Ill. App. 598, 71 N.E. (2d) 810 (1947); *Russick v. Hicks*, (D.C. Mich. 1949) 85 F. Supp. 281; *Miller v. Monsen*, 228 Minn. 400, 37 N.W. (2d) 543 (1949).

<sup>7</sup> Notes 8 and 9 *infra*.

<sup>8</sup> *Morrow v. Yannantuono*, 152 Misc. 134, 273 N.Y.S. 912 (1934).

<sup>9</sup> *McMillan v. Taylor*, (D.C. Cir. 1946) 160 F. (2d) 217; *Taylor v. Keefe*, 134 Conn. 156, 56 A. (2d) 768 (1947); *Rudley v. Tobias*, 84 Cal. App. (2d) 454, 190 P. (2d) 984 (1948); *Garza v. Garza*, (Tex. Civ. App. 1948) 209 S.W. (2d) 1012; *Henson v. Thomas*, 231 N.C. 173, 56 S.E. (2d) 432 (1949).

<sup>10</sup> Typical statute of this type is N.Y. Civ. Prac. Act, art. 2A, §61.

<sup>11</sup> *Katz v. Katz*, 197 Misc. 412, 95 N.Y.S. (2d) 863 (1950).

<sup>12</sup> Typical statute of this type is Mich. Stat. Ann. §§25.191-3 (1937).

<sup>13</sup> *Contra*: *Russick v. Hicks*, (D.C. Mich. 1949) 85 F. Supp. 281.