

CURRENT LEGISLATION AFFECTING BREACH OF PROMISE TO MARRY, ALIENATION OF AFFECTIONS, AND RELATED ACTIONS*

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A. INTRODUCTION

For generations the public has objected to the injustices alleged to result from actions for breach of promise to marry, seduction, alienation of affections and criminal conversation. Recently the Indiana Legislature, spurred on by a woman member, crystallized this sentiment in the form of a sweeping statute. New York and Illinois followed suit, and at present at least ten other states, including Wisconsin, are considering similar action.

The principal evils aimed at are coercive extra-judicial settlements, unfounded actions and excessive verdicts. The law of blackmail or extortion is ineffectual to remedy the first mentioned evil, since the dread of publicity which controls in the first instance prevents the issue from being raised later in any form. While the rules of pleading and proof are theoretically a sufficient safeguard against the evil of legally unfounded actions, public opinion, stressing the disproportionately few cases dismissed on the merits, holds otherwise.

Excessive verdicts are a possible danger in any action in which the jury is permitted to compensate for wounded feelings or to award exemplary damages.¹ But the actions in question are unique in their connotation of sexual misconduct, interference with familial relations, and disregard for accepted canons of social propriety. This factor aggravates the usual tendency of juries to overcompensate for injured feelings and leads them to express their emotional sympathy and moral indignation in the guise of exemplary damages. In this expression juries are encouraged rather than checked by trial and appellate courts. The opinions of the latter characterize these actions as involving typically a virtuous and outraged plaintiff and a malicious and dishonorable defendant, a picture which is often wholly discordant with the life pattern. Even in those cases in which plaintiff

¹ See Pollock, *The Law of Torts* (13th ed. 1929) 186-197.

* This paper follows substantially the second half of the author's article, *Legislative Attack on Heart Balm*, published in the May, 1935 *Michigan Law Review*. Because of similar legislation pending in Wisconsin, permission has been secured to republish this portion.—Ed.

is concededly not deserving of compassion, in view of his or her character or behavior, recovery has nevertheless been permitted on some general principle of public policy or narrow concept of property right.²

Public dissatisfaction is not limited to instances of abuse or maladministration of the judicial process, but extends to various of the hypotheses on which the rules of law themselves are based. Courts have traditionally assumed in the case of each of the actions under consideration, certain broad social purposes which are served by the damage remedy. These purposes include the preservation of family solidarity, the prevention of evils resulting from sexual promiscuity and the protection of women from male aggression. The proponents of the new legislation contend that injunctive or criminal sanctions are more appropriate to accomplish these purposes, and that in any event the damage remedy has proved its ineffectiveness as an inhibiting instrumentality. In general the courts are charged with failure to abandon their original misconceptions, or to adapt the common law to changed mores concerning the functions of the family, sexual morality and the status of women.³

The common law and statutory background of the actions under discussion has recently been presented in detail.⁴ The following discussion is limited to an analysis of the enacted and proposed legislation and some of its implications. No attempt has been made to discuss constitutional⁵ or conflict of laws problems raised by the statutes.

B. LEGISLATION—ENACTED AND PROPOSED

Indiana,⁶ New York⁷ and Illinois⁸ have already enacted statutes which purport chiefly to abolish the cause of action or remedy of

² Thus plaintiff in a breach of promise action may generally recover although she was of a quarrelsome disposition or had no affection for defendant. See Note (1929) 62 A.L.R. 846-849. A husband may recover for criminal conversation or alienation of affections although he himself was an adulterer in the first case, or affection was totally lacking in the second. See Harper, *Torts* (1933) 561; Brown, *The Action for Alienation of Affections* (1934) 82 U. of Pa. L. Rev. 472, 488.

³ See 1 *Recent Social Trends* (1933) Chaps. XIII, XIV.

⁴ See Feinsinger, *Legislative Attack on Heart Balm* (1935) 33 Mich. L. Rev. 979.

⁵ See Myers, *Validity of Statutes Prohibiting Breach of Promise and Alienation Suits* (1935) 2 Ohio L. Rev. 146.

⁶ 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.

damages for seduction, breach of promise to marry, alienation of affections and criminal conversation. Ohio,⁹ Michigan,¹⁰ Minnesota,¹¹ Nebraska,¹² Oklahoma,¹³ Texas,¹⁴ Wisconsin,¹⁵ and possibly other states,¹⁶ have pending substantially like legislation. Missouri¹⁷ and as reported, Oregon,¹⁸ 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.

(1) *The Indiana Statute*

Previous to the recent enactment, Indiana allowed an action for damages for breach of promise to marry,¹⁹ but would not allow an action against a third person, at least a parent, for interference with the contract.²⁰ It recognized an action by the husband for his

⁹ 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.

¹⁰ House Bill 335, passed by the House 97 to 1, and on April 17 by the Senate 37 to 0. Governor Horner is reported to have allowed the bill to become a law without his signature, expressing doubt as to its constitutionality. See New York Times, May 6, 1935 at p. 11.

¹¹ 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 Milwaukee Sentinel, May 10, 1935 at p. 2.

¹² Senate Bill 274. 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. Milwaukee Sentinel, April 17, 1935, p. 1.

¹³ Senate File 1361, introduced March 25, 1935, referred to Committee on Judiciary.

¹⁴ See Milwaukee Sentinel, May 7, 1935, at p. 2, 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.

¹⁵ Senate Bill 369.

¹⁶ House Bill 895, reported favorably by Committee on Judiciary, April 2, 1935.

¹⁷ Senate Bill 277; Assembly Bill 633.

¹⁸ It is reported that bills have been introduced in the following states: Arizona, California, Connecticut, Idaho, Maryland, New Jersey, North Carolina, Pennsylvania, Rhode Island and Washington. See Milwaukee Sentinel, May 12, 1935 at p. 11.

¹⁹ House Bill 396, reported from the House Committee on March 1 with the recommendation that the bill should not pass.

²⁰ Literary Digest, April 13, 1935 at p. 22.

²¹ Felger v. Etzell, 75 Ind. 417 (1881).

²² Leonard v. Whetstone, 34 Ind. App. 383, 68 N.E. 197 (1903).

damages arising out of intentional injuries to the wife, including enticement²¹ or alientation of affections,²² criminal conversation,²³ malicious prosecution²⁴ and libel,²⁵ as well as for damages arising from negligent injury.²⁶ It also recognized an action by the wife for her damages arising out of intentional injuries to the husband,²⁷ including enticement²⁸ and alientation of affections,²⁹ although not for damages arising out of his negligent injury.³⁰ By previous statute an unmarried female of any age might sue for damages for seduction;³¹ and seduction under promise of marriage, of a female under 21 years of age and of good repute for chastity, by any male person, was punishable as a crime.³² 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.³³

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 alientation 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 cause of action for breach thereof. Section 3 prohibits the filing of or a threat to file any pleading based on a cause of action abolished by this Act, whether arising within or outside the 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

²¹ *Higham v. Vanosdol*, 101 Ind. 160 (1885).

²² *Adams v. Main*, 3 Ind. App. 232, 29 N.E. 792 (1892).

²³ *Van Vacter v. McKillip*, 7 Blackf. 578 (Ind. 1845).

²⁴ *Rogers v. Smith*, 17 Ind. 323 (1861).

²⁵ *Hart v. Crow*, 7 Blackf. 351 (Ind. 1845).

²⁶ *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).

²⁷ But see *Boden v. Del Mar Garage*, 205 Ind. 59, 185 N.E. 860 (1933), noted (1933) 9 Ind. L. J. 182.

²⁸ *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.

²⁹ *Holmes v. Holmes*, 133 Ind. 386, 32 N.E. 932 (1893).

³⁰ *Brown v. Kistleman*, 177 Ind. 692, 98 N.E. 631 (1912). See *Boden v. Del Mar Garage*, 205 Ind. 59, 185 N.E. 860 (1933), cited *supra* note 27.

³¹ Ann. Ind. Stat. (Burns 1926) §271.

³² Ann. Ind. Stat. (Burns 1926) §§2276, 2553.

³³ Ann. Ind. Stat. (Burns 1926) §§272, 274.

children, unless otherwise determined by the court in its discretion, on proper motion. Section 5, relating to pleading, practice and testimony, 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 enactment 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 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.⁸⁴ These rules may be expected to continue in force. It is more difficult to justify the continued existence 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.⁸⁵

Recovery in actions for breach of promise has frequently included elements for which an independent action would lie on recognized principles of tort,⁸⁶ promissory estoppel or quasi-contract. The

⁸⁴ See Jacobs, *Cases and Materials on Domestic Relations* (1933) 70-77, discussing cases of antenuptial conveyances and contracts, insurable interest, etc.

⁸⁵ The most obvious analogies are the actions of a spouse or parent for wrongful interference with the marital or parental status.

⁸⁶ It should be pointed out that the action has been recognized as based on tort, and virtually all courts admittedly apply tort rules as to damages. As indicating that the true foundation of the action is tort and not contract, see *Blattmacher v. Saal*, 29 Barb. 22 (N.Y. 1858); *Pollock v. Sullivan*, 53 Vt. 507,

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 damages³⁷ 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,³⁸ or the value of a business or position abandoned at defendant's request.³⁹ Likewise, she might recover the value of property transferred in reliance on defendant's promise, although in a sense intended as a gift.⁴⁰ It is more doubtful whether she should continue to recover on a bond conditioned on marriage,⁴¹ 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,⁴² since the injury could no longer be traced to any legally wrongful conduct on the part of defendant, and the change of position would be voluntary.

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. Be-

38 Am. Rep. 702 (1881); *McQuillen v. Evans*, 353 Ill. 239, 187 N.E. 320 (1933); Comment (1934) 23 Ill. B. J. 59. See *Dauphin v. Landrigan*, 187 Wis. 633, 205 N.W. 557 (1925). Tort rules seem also to be applied to the question of survival of the action. See Comments (1929) 3 So. Calif. L. Rev. 346; (1929) 4 Camb. L. J. 56.

³⁷ For a discussion of "special damage" as it pertains to survival of the action, see (1929) 3 So. Calif. L. Rev. 346; and (1929) 4 Camb. L. J. 56.

³⁸ See *Pollock v. Sullivan*, 53 Vt. 507, 38 Am. Rep. 702 (1881), cited *supra* note 36.

³⁹ See reference *supra* note 37.

⁴⁰ See *Frazer v. Boss*, 66 Ind. 1 (1879). But see *Kramer v. Bins*, 205 Wis. 562, 254 N.W. 636 (1931). See *Jacobs, op. cit. supra* note 34, at 120-128, discussing cases involving title to engagement rings, etc. See New York Assembly Bill No. 1848, limiting damages to "actual expenses paid or incurred in contemplation of marriage," which passed the Assembly but was never voted on by the Senate. Several attempts have been made in England to limit recovery to actual pecuniary loss. See *White, Breach of Promise of Marriage* (1894) 10 L.Q. Rev. 135, 142.

⁴¹ See *Atkins v. Farr*, 1 Atk. 287, 26 Eng. Reprint 183 (1738).

⁴² See *Pollock v. Sullivan*, 53 Vt. 507, 38 Am. Rep. 702 (1881), cited *supra* note 36.

hind 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. However, formerly seduction, while technically merely an incident of damages for breach of 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.

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 in 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 draughtsman 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.

(2) *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.⁴³ 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 "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.⁴⁴

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 abol-

⁴³ See *Stiffler v. Boehm*, 124 Misc. 55, 206 N.Y. Supp. 187 (1924); but see *Guida v. Pontrelli*, 114 Misc. 181, 186 N.Y. Supp. 147 (1921).

⁴⁴ Consol. N.Y. Laws (Cahill 1930) c. 41, §§2175-2177.

ishes "all civil *causes of action*" while the New York law abolishes "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, such 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 Law⁴⁵ abolishes all "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*,⁴⁶ 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. Wallace*⁴⁷ 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

⁴⁵ "61-b. Certain causes of action hereafter accruing abolished. 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 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.

⁴⁶ 6 Abb. Pr. 142, 26 Barb. 615 (N.Y. 1858).

⁴⁷ 50 App. Div. 101, 63 N.Y. 372 (1900). See also *Wells v. Padgett*, 8 Barb. 323, 325 (N.Y. 1850).

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 feeling of the parent and perhaps of the family in general. However, in *Pickle v. Page*,⁴⁸ 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 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 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

⁴⁸ 252 N.Y. 474, 169 N.E. 650 (1930).

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*.⁴⁹ 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 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.

(3) *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 ac-

⁴⁹ *Daimouth v. Bennett*, 15 Barb. 541 (N.Y. 1853); see Restatement, Contracts, Ind. Annot. (1933), N.Y. Annot. (1933) §§598, 601, 604.

tion 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.

(4) *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.⁵⁰ 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 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 section 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

⁵⁰ See *Becker v. Mason*, 93 Mich. 336, 53 N.W. 361 (1892).

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 causes 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.

C. CONCLUSION

There are respectable opinions to the effect that undue newspaper publicity has caused the public to ignore the private and public benefits of the actions discussed and has given to isolated cases of abuse the appearance of universality.⁵¹ The justification for the abolition of such actions lies in the fictitiousness of their underlying assumptions, the unwillingness of courts to modify the governing rules to accord with social realities, and the ineptitude of the judicial process to prevent vicious settlements out of court.

It cannot be supposed that legislation as sweeping as that considered contains no gaps. Undoubtedly succeeding years will witness considerable litigation over the construction of the statutes and their application to novel situations. It is highly probable that the sentiment which inspired these particular statutes will produce further legislation dealing with problems in the domestic relations which for decades have caused increasing social unrest. The fate of all such legislation will depend upon the current state of public opinion, and in no small measure upon the temper of the courts.

⁵¹ Such are the opinions of several circuit judges in Wisconsin in response to a recent inquiry. The Wisconsin legislature has recently indicated its regard for "society and companionship" by providing for compensation for their loss in an action for wrongful death. Wis. Stat. (1933) §331.04 (2), discussed in *Cameron v. Union Aut. Ins. Co.*, 210 Wis. 659, 246 N.W. 420, 247 N.W. 453 (1933). See also Brown, *supra* note 2, at 505-506.