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DOMESTIC RELATIONS - STATUTORY ABOLITION OF CERTAIN CAUSES OF ACTION

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DOMESTIC RELATIONS — STATUTORY ABOLITION OF CERTAIN CAUSES OF ACTION—In response to widespread and vigorous criticism of the abuses practiced through the use of the action at law for breach of promise to marry,[1] and to a lesser extent, the actions for alienation of affections, criminal conversation, and seduction, several states enacted legislation designed to eliminate the evils complained of by abolishing some or all of those causes of action. The purpose of the present discussion is to analyze and compare the various statutes, and to indicate how they have fared in the courts; in short, to survey the whole reform program as it stands twelve years after the first statute was passed.

I

The Indiana act,[2] passed in 1935, was the first attempt at abolition of these causes of action. It was followed in rapid succession by similar legislation in Alabama, Illinois, Michigan, New Jersey, New York, and Pennsylvania.[3] Between 1936 and 1940, Colorado, Massachusetts, and California joined the list.[4] In 1941, Maine, New Hampshire, and Wyoming abolished some or all of the actions,[5] as did Nevada in 1943, and Maryland and Florida in 1945.[6]

Although minor variations exist, the legislation in Michigan, New Jersey, New York, Alabama, Colorado, Florida, and Wyoming substantially followed the pattern of the Indiana act. Briefly, that act provided, first, that causes of action for breach of promise to marry, alienation of affections,[7] criminal conversation, and seduction of a female twenty-one years of age or more were abolished; second, that it

[1] See, for example, Wright, "The Action for Breach of the Marriage Promise," 10 VA. L. REV. 361 (1924); Brown, "Breach of Promise Suits," 77 PA. L. REV. 474 (1928).

[2] Ind. Laws (1935) c. 208.

[3] Ala. Gen. Acts (1935) No. 356; Ill. Laws (1935) p. 716; Mich. Acts (1935) No. 127; N.J. Laws (1935) c. 279; N.Y. Laws (1935) c. 263; Pa. Laws (1935) No. 189, as amended by Pa. Laws (1937) No. 441.

[4] Colo. Laws (1937) c. 111; Mass. Acts (1938) c. 350; Cal. Stat. (1939) p. 1245.

[5] Me. Laws (1941) c. 104; N.H. Laws (1941) c. 150; Wyo. Laws (1941) c. 36.

[6] Nev. Stat. (1943) c. 53; Fla. Laws (1945) c. 23138; Md. Laws (1945) c. 1010. This compilation covers the statutes through 1947.

[7] The Michigan act excepted actions for alienation of affections brought against a parent, brother, sister, or person formerly in *loco parentis* to the plaintiff's spouse.

was unlawful to file or threaten to file any papers or pleadings in connection with an abolished cause of action; third, that a sixty-day statute of limitations was imposed on causes of action already accrued, and upon actions arising out of existing contracts to marry; fourth, that instruments or contracts subsequently made in settlement of an abolished action were absolutely void; fifth, that violation of the prohibitions of the act was a felony;[8] and sixth, that the various sections of the act were severable. The act also contained a declaration that the outlawed causes of action were against public policy.

The Illinois act related to causes of action for alienation of affections, criminal conversation, and breach of contract to marry. It was unique in several respects. The title of the act did not refer to the specific causes of action, but labeled it "An act in relation to certain causes of action conducive to extortion and blackmail, and to declare illegal, contracts and acts made and done in pursuance thereof."[9] The act did not, in terms, abolish the actions, but only made it unlawful to file pleadings or papers in connection therewith, and provided a penalty for violation of its terms. There was no provision in the act for severability of its sections. In other respects, the act was similar to that of Indiana. Later developments in the Illinois law will be discussed below.

The Pennsylvania act differed from that of Indiana in that no mention was made of criminal conversation and seduction. Also, in abolishing actions for alienation of affections, it excepted actions where the defendant was a parent, brother, sister, or person formerly *in loco parentis* to the plaintiff's spouse. The California act provided only that "No cause of action arises for (a) alienation of affections. (b) criminal conversation. (c) seduction of a person over the age of legal consent. (d) breach of a promise of marriage."[10] The Massachusetts act was limited to actions for breach of contract to marry, stating that such breach ". . . shall not constitute an injury or wrong recognized by law, and no action, suit, or proceeding shall be maintained therefor."[11] It also placed a limitation upon the time in which suit on an existing cause of action for breach of contract to marry could be instituted. The Maine and New Hampshire acts were substantially the same as the Massachusetts act. The Nevada statute was confined to abolition of causes of action for breach of promise to marry and alienation of affections. Except for the omission of actions for criminal conversation and seduc-

[8] The penalties varied in severity. For example, the penalty carried by the Florida act was a fine of not more than $500, or not more than six months imprisonment, or both, while the Wyoming penalty was a fine of from $1000 to $5000, or from one to five years imprisonment, or both.

[9] H.B. 335, Ill. Laws (1935) p. 716.

[10] Cal. Stat. (1939) p. 1245.

[11] Mass. Acts (1938) c. 350, § 1.

tion, it was similar to the Indiana act. The Maryland act differed from the Indiana act in that it made no mention of criminal conversation and seduction, and that in abolishing causes of action for breach of promise to marry, it excepted cases where pregnancy existed.

All of the acts expressly provided against retroactivity, except the Wyoming statute, which provided that it was retroactive insofar as constitutional provisions were not violated.[12]

2

It was to be expected that such drastic legislation would be attacked on grounds of constitutionality. The attacks followed three major lines. The most common argument was to the effect that the legislature had no power to abolish the causes of action. One basis for this contention is a clause found in many state constitutions to the effect that for every injury or wrong, there should be a remedy.[13] Another basis is a clause, also common to many constitutions, to the effect that the common law should be the law of the state until altered.[14] Still other bases for the contention are the due process clause of the Fourteenth Amendment, and as applied to breach of promise suits, the contracts clause of the Federal Constitution. The second line of attack was based on state constitutional provisions relating to titles of legislative acts.[15] The third line of attack was aimed at the penalty clauses which were commonly found in the various statutes.

The Supreme Court of Michigan was the first state court of last resort to pass upon any portion of an act of this type. Section 6 of the Michigan act abolished body execution in connection with the four causes of action with which the act dealt. *In re Landaal*,[16] a habeas corpus proceeding, held that section of the act constitutional, even as applied to writs of body execution already issued on judgments. The court said that other means of satisfying an existing judgment remained, hence the legislature could properly abolish the remedy in question. In the same case, the court considered the sufficiency of the title of the Michigan act, and held that it satisfied constitutional requirements, in that it fairly disclosed the subject matter of the act and was confined to one general subject. Two years later, in *Bean v. McFarland*,[17] a

[12] In general, see 158 A.L.R. 617 (1945), and 167 A.L.R. 235 (1947).

[13] See, for example, Art. II, § 19 of the Illinois Constitution.

[14] For example, Art I, § 14 of the New York Constitution (1938). This is a weak argument, since the same clauses provide that the legislature may alter the common law.

[15] Art. IV, § 13 of the Illinois Constitution is typical. It provides that ". . . No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. . . ."

[16] 273 Mich. 248, 262 N.W. 897 (1935).

[17] 280 Mich. 19, 273 N.W. 332 (1937).

case involving the construction of the clause permitting actions for alienation of affections against certain relatives of the plaintiff's spouse, the court held that the clause applied only to actions for alienation of affections, and had no bearing on actions for criminal conversation. The constitutionality of the act was again sustained, this time against the contention that it violated Schedule 1, section 1 of the Michigan Constitution, which provided that "The common law and the statute laws now in force . . . should remain in force until they expire by their own limitations, or are altered or repealed." The court construed this to mean that the legislature was given, by the express terms of Schedule 1, authority to abrogate or alter the common law.

The New York act first came before the court of appeals in the case of *Fearon v. Treanor*.[18] In that case, the court sustained the constitutionality of the provisions of the act that abolished causes of action for seduction and breach of promise to marry. It was reasoned that the action for seduction, being of statutory origin, could properly be abolished by the legislature. In regard to the abolition of actions for breach of promise to marry, the court based its decision on the plenary power of the legislature over the institution of marriage in all its phases. The contention was also made in this case that the act, as it applied to breaches of promise to marry, violated the contracts clause of the Federal Constitution. This contention was disposed of by pointing out that an agreement to marry was not a contract in the sense contemplated by the Federal Constitution, and thus was not within the protection of the contracts clause.[19] An appeal to the United States Supreme Court was dismissed on the ground that no substantial federal question was presented.[20] In *Hanfgarn v. Mark*,[21] the same New York court, in upholding the constitutionality of the act as applied to actions for alienation of affections and criminal conversation, applied the reasoning of the *Fearon* case, saying that these actions arose out of the marriage relationship over which the legislature had plenary power.[22] The plaintiff argued that Article I, section 16 of the New York Constitution (substantially the same as Schedule 1, section 1 of the Michigan Constitution) was violated by abolition of common law remedies. In reply to this argument, the court pointed out that by the terms of that section, the continuation of the common law in New York was subject to such alterations as the legislature saw fit to make. In both the *Fearon* case and the *Hanfgarn* case, the court declined to consider the validity of

[18] 272 N.Y. 268, 5 N.E. (2d) 815 (1936).

[19] This view is supported by Maynard v. Hill, 125 U.S. 190, 8 S.Ct. 723 (1888).

[20] 301 U.S. 667, 57 S.Ct. 933 (1937).

[21] 274 N.Y. 22, 8 N.E. (2d) 47 (1937).

[22] An appeal in the Hanfgarn case was also dismissed by the United States Supreme Court, for lack of a substantial federal question. 302 U.S. 641, 58 S.Ct. 57 (1937).

the penalty clauses of the New York act. The sixty-day limitation placed upon the bringing of actions accrued at the effective date of the New York act was held reasonable and within the constitutional power of the legislature, by an intermediate New York court in *Vanderbilt v. Hegeman.*[23]

The Indiana act came before the state supreme court in the case of *Pennington v. Stewart,*[24] a suit for alienation of affections. The plaintiff's theory in attacking the constitutionality of the act was that it left him without remedy for a violation of a property right (the affections of his wife), and that the abolition of such remedies was a denial of due process in violation of both the state and federal constitutions. In holding the act constitutional insofar as it abolished the named causes of action, the court said that the right to *consortium,* and to the affections of a spouse was not "property," and that the plaintiff had no vested right in remedies that formerly existed. The court also relied upon the plenary power of the legislature over the marriage status. In this case, the court also considered the penalty provision of the act. Reasoning that such provisions, if enforced, would prevent a test of the constitutionality of the act, it held the penalty provisions to be unconstitutional, as depriving the plaintiff of his right to test, without penalty, the validity of an act which took away a remedy formerly available to him. To hold otherwise, it appeared, would permit the legislature to insure effectiveness of its enactments regardless of their constitutionality. Relying on the severability clause in the act, the court held that the invalidity of the penalty provisions did not affect the validity of the other parts of the statute.

The Alabama statute came before the state supreme court in *Young v. Young,*[25] a case involving the construction of the terms of the act. The constitutionality of the act was not expressly discussed, but in deciding that the statute barred plaintiff's suit for alienation of affections, the court necessarily assumed that the statute was a constitutional exercise of legislative power. The Massachusetts court, in *Thibault v. Lalumiere,*[26] also upheld by implication the validity of the Massachusetts act abolishing actions for breach of promise to marry, in holding that plaintiff's tort action was in reality based on defendant's breach of a promise to marry and was thus barred by the statute. The court said that the statute abolished any right of action, whatever its form, based on such a breach. The acts in force in California, New Jersey, and Pennsylvania have not as yet come before the highest courts of those states. However, all have

[23] 157 Misc. 908, 284 N.Y.S. 586 (1935).
[24] 212 Ind. 553, 10 N.E. (2d) 619 (1937).
[25] 236 Ala. 627, 184 S. 187 (1938).
[26] 318 Mass. 72, 60 N.E. (2d) 349 (1945).

been approved by intermediate appellate courts, insofar as abolition of the causes of action was concerned.[27] The penalty provisions of the Pennsylvania and New Jersey acts were not considered.

The Illinois statute has received the most severe treatment from the courts. To a large extent, this was due to the unfortunate wording of the title of the act, set out above, which evidently expressed the attitude of the legislature more clearly than it did the contents of the act. In *People v. Mahumed*,[28] the Illinois court held invalid sections 3, 4 and 5 of the act, which prohibited and penalized the naming of a corespondent in divorce and related suits. Although the court referred to the *Pennington* case as indicating that the penalty provided by the sections in question rendered them invalid, it expressly based its decision on the grounds that the title of the act did not clearly indicate the subject matter included, and that more than one subject was included in the act, in violation of Article IV, section 13 of the Illinois Constitution.[29] Four years later, in 1946, section 1 of the act came before the court in *Heck v. Schupp*.[30] This section made it unlawful to file papers in connection with a suit for alienation of affections, criminal conversation, and breach of promise to marry. It had not been passed upon in the *Mahumed* case, in spite of the fact that the Illinois act contained no severability clause.[31] In the *Heck* case, the court held the title of the act defective as applied to section 1, thus invalidating the entire act, since sections 2 and 6 necessarily fell with the others. This time the court went further than it had in the *Mahumed* case. The opinion stated that to abolish or prohibit the use of the named causes of action would violate Article II, section 19 of the Illinois Constitution, which provided that "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation. . . ." Furthermore, it was found that the act put a premium on moral wrongs by protecting the wrongdoer from liability for his acts. The Illinois legislature, instead of attempting to revise the act, passed legislation in 1947 intended only to take the excessive profit out of suits for criminal conversation, breach of promise to marry, and alienation of affections.[32] The statutes provide that in these three actions recovery will be limited to actual damages, and that any punishment will be left to the criminal laws. They also

[27] Langdon v. Sayre, 74 Cal. App. (2d) 41, 168 P. (2d) 57 (1946); Bunten v. Bunten, 15 N.J. Misc. 532, 192 A. 727 (1937); McMullen v. Nannah, 49 Pa. D. & C. 516 (1943).

[28] 381 Ill. 81, 44 N.E. (2d) 911 (1942).

[29] Set out in note 12, supra.

[30] 394 Ill. 296, 68 N.E. (2d) 464 (1946).

[31] In Daily v. Parker, (D.C. Ill. 1945) 61 F. Supp. 701, a federal district court had, on the authority of cases in the lower courts of Illinois, sustained the sufficiency of a complaint for alienation of affections.

[32] Ill. Laws (1947) pp. 796, 800, and 1181.

bar consideration of the defendant's wealth, of the shame and humiliation of the plaintiff, or family dishonor. In view, however, of a line of cases which held invalid comparable legislation as applied to certain classes of libel suits,[33] the validity of the present Illinois legislation is not entirely free from doubt. It does appear that the legislature guarded against defects in the title of the present act.

In the states where this type of legislation is considered valid, various attempts have been made to evade the effect of the statute. Where it is clear that the form of action used is a device to circumvent the statute and violate its spirit, such attempts have been uniformly defeated.[34] However, there have been several actions of this general nature which the courts have held to be unaffected by the statutes. For example, the Alabama court, in *Henley v. Rockett*,[35] held that although the action for alienation of affections was abolished, the act did not affect other types of remedies, and a decree for the plaintiff was sustained, enjoining the defendant from alienating the affections of plaintiff's spouse. In *Friske v. Cebula*,[36] where plaintiff sought to recover money paid to defendant in contemplation of the marriage of the parties, a Pennsylvania district court held that defendant could set up plaintiff's breach of his promise to marry as a defense to the action. And in *Snyder v. Snyder*,[37] a New York court held that plaintiff could bring an action for the deceit of defendant in inducing plaintiff to enter into a putative marriage by falsely representing that he had capacity to marry. In each of the last two cases, the court considered the facts to be outside the letter of the act involved, and said that since these circumstances were not susceptible to the abuses which the legislature intended to eliminate, they were also outside the spirit of the act.[38]

The lower New York courts have not, however, been in complete agreement as to the scope of the section barring actions for breach of promise to marry. Several cases, all involving attempts to recover property given in contemplation of impending marriage, have been before those courts recently. In *Andie v. Kaplan*,[39] the New York court, in a memorandum decision, held that plaintiff's suit to recover money and jewelry given to defendant in connection with a mutual agreement to

[33] Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904); Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888). But see Osborne v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

[34] Sulkowski v. Szewczyk, 255 App. Div. 103, 6 N.Y.S. (2d) 97 (1938); AB v. CD, (D.C. N.Y. 1940) 36 F. Supp. 85, aff'd., (C.C.A. 2d, 1941) 123 F. (2d) 1017; Thibault v. Lalumiere, 318 Mass. 72, 60 N.E. (2d) 349 (1945).

[35] 243 Ala. 172, 8 S. (2d) 852 (1942).

[36] 59 Pa. D. & C. 46 (1946).

[37] 172 Misc. 204, 14 N.Y.S. (2d) 815 (1939).

[38] See also Glazer v. Klughaupt, 116 N.J.L. 507, 185 A. 8 (1936).

[39] 263 App. Div. 884, 32 N.Y.S. (2d) 429 (1942).

marry which defendant had breached was properly dismissed because it was an action based on breach of promise to marry and therefore barred by the statute.[40] Two judges dissented, saying that this was not a suit based on breach of a promise to marry, but was in the nature of an action to recover a trust fund; that to dismiss the suit was to permit unjust enrichment of the wrongdoer; and that this suit was not subject to the abuses intended to be outlawed by the act and was thus not violative of its letter or spirit. The case was affirmed without opinion by the court of appeals.[41] In *Josephson v. Dry Dock Savings Institution*,[42] involving a similar situation, the court of appeals affirmed, again without opinion, the dismissal of a suit on alternative counts of replevin and conversion. In *Unger v. Hirsch*,[43] where plaintiff sought to recover a ring given as a token of the agreement to marry, and in which he alleged a mutual rescission of the agreement, an intermediate court sustained the sufficiency of the complaint, reasoning that it was not based upon breach of a contract to marry, but was on an agreement, implied by the mutual rescission, to restore the parties to the *status quo ante*. The same reasoning was used to sustain a similar complaint in *Spitz v Maxwell*.[44] However, in *Hecht v. Yarnis*[45] and *Morris v. Baird*,[46] the suits were held properly dismissed, although the complaint in each case alleged mutual rescission of the contract to marry; the courts considered it immaterial whether the agreement was terminated by mutual consent or by a breach by one party. Because of this inconsistency in the decisions of the inferior New York courts, it is unfortunate that the court of appeals has not indicated its reasoning in this type of case.

In dealing with the conflict of laws questions created by these statutes, the courts have been primarily concerned with whether the statute established a rule of public policy for the state of the forum. Thus, in *Thome v. Macken*,[47] the California appellate court held that since the California act established that actions for alienation of affections were against the public policy of the state, comity did not require a California court to try an action for alienation of affections which arose in Oregon. In two cases,[48] however, federal courts have applied the substantive law of the state in which the action arose.

[40] See also Alberelli v. Manning, 185 Misc. 280, 56 N.Y.S. (2d) 493 (1945).
[41] 288 N.Y. 685, 43 N.E. (2d) 82 (1942).
[42] 292 N.Y. 666, 56 N.E. (2d) 96 (1944).
[43] 180 Misc. 381, 39 N.Y.S. (2d) 965 (1943).
[44] 186 Misc. 159, 59 N.Y.S. (2d) 593 (1945).
[45] (N.Y. City Ct., Spec. Term 1943) 42 N.Y.S. (2d) 596.
[46] 269 App. Div. 948, 57 N.Y.S. (2d) 890 (1945).
[47] 58 Cal. App. (2d) 76, 136 P. (2d) 116 (1943).
[48] Wawrzin v. Rosenberg, (D.C. N.Y. 1935) 12 F. Supp. 548; AB v. CD, (D.C. N.Y. 1940) 36 F. Supp. 85 (1940). But see Fahy v. Lloyd, (D.C. N.Y. 1944) 57 F. Supp. 156.

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On the whole, the legislative reform under discussion has been well received. There has been, however, some rather vigorous criticism leveled at the statutes and their underlying purpose. In *Daily v. Parker*,[49] the court quoted with approval the following language used by an Illinois superior court. "To uphold a law of this kind would be not only to ignore the plain provisions of the Constitution, but it would seem to put a premium on violation of the moral law, making those who violate that law a privileged class free to pursue a course of reprehensible conduct without fear of punishment, even to the extent of a suit for damages." Other criticisms have been to the effect that the legislation is too drastic, particularly insofar as it abolishes actions for alienation of affections against a parent, brother or sister of plaintiff's spouse, and actions for seduction when brought by a parent of the one seduced.[50] The abolition of actions for breach of promise has been the least criticized part of the reform legislation.

It is significant that within a period of ten years, sixteen states have seen fit to abolish some or all of these four causes of action. This indicates that the earlier statutes are considered worthwhile and effective; it is also evidence that the weight of public opinion is behind the program of reform.

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[49] (D.C. Ill. 1944) 61 F. Supp. 701 at 703.

[50] Feinsinger, "Current Legislation Affecting Breach of Promise to Marry, Alienation of Affection, and Related Actions," 10 WIS. L. REV. 417 (1935); 22 VA. L. REV. 205 (1935); 25 GEO. L.J. 1008 (1937).