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HEART BALM AND PUBLIC POLICY

FREDERICK L. KANE†

IN March, 1935, some noteworthy legislation affecting marriage and the family was enacted in the State of New York. So-called "heart balm" laws passed both branches of the Legislature by an overwhelming majority and were signed by the Governor.¹ A mere glance at the text of these laws will indicate their extraordinary character. A new article was inserted in the New York Civil Practice Act entitled "Actions Against Public Policy." This article includes the new sections 61-a to and including 61-i. The first two sections are the most interesting and important. Section 61-a is entitled "Declaration of Public Policy of the State" and reads as follows:

"The remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry, having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination."

Section 61-b abolishes the rights of action named in Section 61-a. Section 61-e provides that it shall be unlawful for any person either as party or attorney to start or threaten to start any action seeking to recover a sum of money upon any cause of action abolished by the new law, and Section 61-g provides that any person who violates any of the provisions of the law shall be guilty of a felony punishable by fine or imprisonment. I shall not discuss the propriety of the two latter sections. They seem to be almost unprecedented and their apparent purpose is to prevent a test of the constitutionality of the new laws. I prefer to examine the first two sections of the law which purport to destroy common law rights which have existed for centuries. Similar laws were passed within the year 1935 in several other states, notably in Illinois and in Indiana, where the wave of agitation seems to have been started by a woman legislator, culminating in the enactment in

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1. N. Y. LAWS 1935, c. 263, N. Y. CIV. PRAC. ACT (1935) §§ 61a-61i.

that state of a law not substantially unlike the New York law, but entitled "An Act to Promote Public Morals."²

In considering the wisdom or appropriateness of these laws, one is naturally led to inquire into the reasons behind such unusually sudden and drastic changes. It does not seem necessary to go at length into the history and legal basis of the various causes of action which are abolished.³ A brief description of them, however, indicating such points of similarity as may have brought about the grouping of these somewhat dissimilar rights and remedies may be of some assistance in explaining the impulse behind such sweeping legislation. The action for breach of contract to marry relates to what are commonly known as breach of promise cases, based upon alleged violations of the contract to marry or of engagement. Although theoretically either party to an engagement could recover for an unwarranted breach, cases in which the man has been plaintiff are so rare as to be negligible. The objectionable type case therefore is that in which the woman scorned, claims damages from her alleged fiancé, who may, without her knowledge of course, have been already married at the time of the alleged engagement. Frequently the plaintiff asserts that she was seduced under the promise of marriage. The mutual understanding of the parties may be inferred from conduct and circumstances.

Actions based upon alienation of affections and criminal conversation, while somewhat unlike in their legal basis, are usually coupled in one cause of action, and particularly in the objectionable type case. In such a case one spouse asserts that the right to *consortium* (embracing companionship, affection and faithfulness) has been violated by a third party. Although the action for alienation of affections may be maintained against one who is not a paramour, there being many reported cases against parents, concededly the action against the alleged paramour is the one which the new laws particularly sought to eliminate. This of course imports a wilful, malicious invasion of the plaintiff's marital rights, including enticement and adultery.

We are confronted with a real problem in trying to describe the action for seduction, referred to in the statute. From the wording of Section 61-a, namely, "seduction *and* breach of contract to marry" it might be assumed that the legislature included seduction as a constituent element of breach of promise to marry. This is inexact but understandable. Section 61-b, however, which reads "seduction, *or* breach of contract to marry" would lead to the belief that an independent cause of action was indicated. The New York statute was probably copied from

2. Ind. Laws 1935, c. 208.

3. An interesting explanation of the background of these actions will be found in Feinsinger, *Legislative Attack on "Heart Balm"* (1935) 33 MICH. L. REV. 979.

the law as proposed in Indiana. In the state of Indiana, prior to the enactment of the new law, apparently an unmarried female was permitted to sue for damages for seduction.⁴ By the laws of 1935, Indiana abolished the right of action for the seduction "of any female person of the age of twenty-one years or more."⁵ It may be that the New York Legislature, disregarding the age limitation, followed the proposed legislation in Indiana, assuming that such a right of action had existed in New York. It appears, however, that in New York the person seduced had no right to recover damages from the seducer,⁶ but that the only cause of action recognized was that of a parent for the seduction of a minor daughter.⁷ Ordinarily we should assume that the legislature had this in mind and abolished the only existent cause of action for seduction, but there are cogent reasons for believing that this was not what was intended. In the first place, whatever may have been the origin and scope of the public agitation over the alleged abuses of these causes of action, there seems to have been no resentment against parents' actions for seduction, nor do such actions seem to be contemplated in the declaration of policy in Section 61-a. At any rate, it seems that in this particular respect the law was unskillfully drafted in New York, and its lack of exactness may be an indication that the whole law was adopted without adequate consideration. It seems impossible that it could have filtered through a Judicial Council or Law Revision Commission.

The foregoing description of these causes of action at least brings out one distinguishing characteristic common to all in their allegedly objectionable types—sexual misbehavior. This is significant. To return to our inquiry: How was it possible to accomplish the adoption in several large states, so rapidly, with practically no opposition, of laws abolishing legal remedies for acts which had been for centuries regarded as violations of legal rights, and connoting sexual misconduct and breach of the accepted standards of social propriety?

The very label that was attached to the proposals helped tremendously in the gathering of momentum—"heart balm." The term was not only catchy, but it suggested an objection which has been levelled at these causes of action for years, particularly breach of promise, and which probably now is the most valid and difficult to answer, namely, that they were all based on the erroneous hypothesis that money can compensate for wounded feelings. It can safely be said, however, that this argument had very little to do with the adoption of the legisla-

4. IND. STAT. ANN. (Burns, 1933) § 2-214.

5. Ind. Laws 1935, c. 208.

6. In *Graham v. Wallace*, 50 App. Div. 101, 63 N. Y. Supp. 372 (4th Dep't 1900) recovery was permitted in an extraordinary situation.

7. Cf. *Pickle v. Page*, 252 N. Y. 474, 169 N. E. 650 (1930).

tion because the logical extension of that argument would lead to other highly favored rights and remedies.

The agitation was also aided immeasurably by a slogan which readily aroused public resentment—"It's a racket." As a matter of fact, the argument that these causes of action were used as "vehicles" of extortion and blackmail seems to have been actually directed only at actions for breach of promise, which had been referred to as "a special form of chiseling" and "a refined racket under judicial approbation."⁸ Very little judicial authority for this objection is to be found, although one case in Louisiana is cited in which a judge, referring to breach of promise suits, remarked that "such suits are not infrequently the mere instruments of extortion."⁹ Unquestionably there was some justification for the resentment over the abuse of the remedy of breach of promise to marry, but we may seriously doubt whether these abuses were as universal or as ineradicable as to necessitate the wholesale abolition of established rights and remedies.

We have evidence on all sides that the business world, particularly in the past ten years, and concurrently with the Prohibition Amendment, has been afflicted by systematized extortion—racketeering. It is just as true, however, that many legitimate demands or appeals for money have been termed "rackets" by individuals who should pay but who are unwilling to do so. The man who is too mean to respond to a deserving charity says "It's a racket" and "There ought to be a law against it." The person who has made some slight omissions in his income tax return, refers to the efforts of the field agent to check up on his return as a "racket." The point is that it is dangerous to be swept into a prejudice merely by the use of the word "racket."

Reading the editorials and comments in current newspapers and periodicals about the time of the adoption of these new laws, one would conclude that there had seldom been an actual contract of engagement to marry that was unjustifiably broken, causing damage to the offended party, or a malicious intrusion on the theretofore harmonious relationship of a husband and wife. The experience of practicing lawyers is decidedly otherwise. In concluding a recent article on this new legislation, Professor Feinsinger observed that 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."¹⁰

Further considering the matter of extortion or blackmail, we may

8. (May 1934) 32 AMER. MERCURY 47.

9. *Morgan v. Yarborough*, 5 La. Ann. 316 (1850).

10. Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions* (1935) 10 WIS. L. REV. 417, citing an opinion given by Trial Justices in Wisconsin in response to an inquiry on the subject.

assume from the declaration of policy contained in Section 61-a of the New York statute that the "grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing" occurred in cases of breach of promise where there was no actual engagement, where the circumstances would not justify an inference of an intention to marry, and where there was no seduction, or in the alienation and criminal conversation cases, where there was no actual enticement or misconduct of the erring spouse and the alleged paramour. Only in such cases would the defendant be *wholly* innocent and free of *any* wrongdoing. Many practicing lawyers who have prosecuted and defended breach of promise cases, have known of only one *wholly* innocent defendant, and that one was our dear old plump, respectable friend, Mr. Pickwick, in the action brought against him by the "unimpeachable" Mrs. Bardell, and one must conclude that even he might have been more circumspect. Their experience probably leads to the belief that the only *wholly* innocent defendants whom they have known in alienation suits were parents, and such cases are not ready instruments of extortion, and certainly did not inspire the recent agitation. If there have been any claims against the wholly blameless persons referred to in the statute, then the prosecution of actions based upon them necessitated perjury, the subornation of perjury by unscrupulous lawyers, and the availability of newspaper publicity, and it might be suggested that the enactment of this legislation destroying legal rights is a confession of the utter inability of legislatures and courts to cope with these baneful influences.

There are other rights of action and remedies which are fully as capable of being used for extortion as breach of promise and alienation of affection, and, it is rumored, have been much more prevalent and fruitful. In the field of negligence we have had the ambulance chasing racket, and also the deleterious food cases and tenement house cases, all of which are well known to insurance companies. In the supposedly more respectable fields, we have stockholders' actions which have long been termed legalized blackmail; and certainly the activities of committees and their lawyers in reorganization proceedings which have recently been so severely criticized in the federal court and in congressional investigation, have all the aspects of "chiseling" on a grand scale. If the legislature really intends to abolish every cause of action or legal proceeding which has been used by unscrupulous lawyers to exact oppressive settlements, then we shall require more than the letters of the alphabet to add to sections 61-a to 61-i of the New York Civil Practice Act. The trouble is primarily with the lawyers and the newspapers, not with the causes of action. Even an action for goods sold and delivered can be used as an instrument of extortion.

Continuing our inquiry into the reasons for the adoption of this almost unprecedented legislation, we look in vain for a background of well-considered judicial decisions. In this connection I venture to quote the words of Judge Cardozo, which are appropriate even though they may not be exactly pertinent:

"Justice is not to be taken by storm. She is to be wooed by slow advances. Substitute statute for decision, and you shift the centre of authority,—but add no quota of inspired wisdom. If legislation is to take the place of creative action of the courts a legislative committee must stand back of us at every session, a sort of super-court itself. No guarantee is given us that a choice thus made will be wiser than our own, yet its form will give it a rigidity that will make retreat or compromise impossible. We shall exchange a process of trial and error at the hands of judges who make it the business of their lives, for a process of trial and error at the hands of a legislative committee who will give it such spare moments as they can find amid multifarious demands."¹¹

We have examples of sound legislation recently in New York, following upon direct suggestions from the courts, after the questions had gone through the process of trial and error, and finally the court of last resort recommended changes by statute. The law of New York relating to annulments of marriage for mental incapacity was amended so as to permit actions by the sane spouse following a specific suggestion made by Judge Cardozo in the case of *Hoadley v. Hoadley*. The question had been the subject of conflicting decisions in the lower courts. The Court of Appeals decided that as the law stood a marriage could be annulled for mental incapacity only at the instance of the spouse of unsound mind or someone in his behalf, but made the following suggestion: "Considerations such as these may suggest an amendment of the statute that will extend the right of action."¹² Amendments to the law followed at the next session of the Legislature.¹³

Legislation with such a background has an authority which almost insures soundness. The "heart balm" laws have no such legal pedigree. A Bar Association Committee reporting on the proposed legislation, was able to cite only the Louisiana case referred to above,¹⁴ and one Rhode Island case in which the court, in a breach of promise action, ventured to say that ". . . social morality will not be promoted by relieving either sex of legal responsibility for voluntary action,"¹⁵ an observation which is at least ambiguous. Strangely enough the same Committee, in its report on criminal conversation, cited and quoted from the Appellate Division decision in the case of *Oppenheim v. Kridel*, in which the court

11. CARDOZO, *THE GROWTH OF THE LAW* (1924) 133.

12. *Hoadley v. Hoadley*, 224 N. Y. 424, 155 N. E. 728 (1927).

13. N. Y. CIV. PRAC. ACT (1920) § 1137; N. Y. DOM. REL. LAW (1928) § 7(5).

14. *Morgan v. Yarborough*, 5 La. Ann. 316 (1850).

15. *Wrynn v. Downey*, 27 R. I. 454, 465, 63 Atl. 401, 405 (1906).

had suggested that "instead of extending it [the action for criminal conversation] to cover new causes it might be wise to abolish the action."¹⁶ The report omitted to state that the Court of Appeals, in 1923, in that same case, had reversed the decision of the Appellate Division containing the above quotation, and in an opinion by Judge Crane, now Chief Judge of the Court of Appeals, concurred in by Judges Pound and Cardozo, both later Chief Judges of the same court, had virtually established the public policy of the state of New York. The Court of Appeals in the face of the attitude of the Appellate Division, after reviewing the history of the actions of criminal conversation and alienation of affections, extended the right to sue for criminal conversation to a wife.¹⁷

The opinion in the Court of Appeals decision of the *Oppenheim* case quotes freely from decisions in the case of *Colwell v. Tinker*, in the New York Court of Appeals and in the United States Supreme Court, restating and apparently endorsing such declarations as the following:

"The offense charged is a most grievous wrong against social order and society; it strikes at the foundations of the home and the legitimacy of offspring."¹⁸

Also "This is a right of the highest kind, upon the thorough maintenance of which the whole social order rests, and in order to the maintenance of the action it may properly be described as a property right."¹⁹

The New York Legislature therefore, it would seem, not only had no authority favorable to the new legislation from the Court of Appeals but had rather an expression of policy to the contrary. In a subsequent case Judge Crane said: "The policy of the State of New York, I venture to assert, is in the maintenance of marriage and morality,"²⁰ a statement which the realists and possibly the Legislature would condemn as "transcendental nonsense."²¹

There were in fact some well considered opinions definitely opposed to the abolition of these causes of action. When the question of abolishing breach of promise actions arose in England, in 1925, there was vigorous opposition, insisting that the actions must be retained, "if law and justice have any meaning" and that to abolish such a cause of action was "inconceivable."²² In March 1934, Professor Brown of Indiana University, reviewing the history and the basis of actions for alienation of

16. *Oppenheim v. Kridel*, 204 App. Div. 305, 314, 198 N. Y. Supp. 157, 165 (1st Dep't 1923).

17. *Oppenheim v. Kridel*, 236 N. Y. 156, 140 N. E. 227 (1923).

18. *Id.* at 164, 140 N. E. at 230 [quoting from *Colwell v. Tinker*, 169 N. Y. 531, 536, 62 N. E. 668, 670 (1902)].

19. *Id.* at 165, 140 N. E. at 230 [quoting from *Tinker v. Colwell*, 193 U. S. 473, 484, (1904)].

20. *Dean v. Dean*, 241 N. Y. 240, 242, 149 N. E. 844, 845 (1925).

21. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809, 821.

22. *Blackmail Within the Law* (1925) 320 LIVING AGE 361.

affections, discussed all of the objections and limitations of the remedy but concluded that: "In spite of all these and other objections . . . it is submitted that the action is still justifiable and performs a useful social function. That function is the preservation of the home. No one can doubt that the American home is by no means stable in these days, and very few would doubt that any influence, legal or otherwise, which would increase its stability is to be encouraged."²³ Professor Feinsinger of the University of Wisconsin, in May 1935, grants that "social interest in family solidarity and purity of offspring requires some legal protection" but suggests that possibly the admittedly inadequate penal laws for the punishment of adultery and the laws permitting divorce for adultery may be sufficient.²⁴

Courts had almost universally given expressions of opinion favorable to the desirability of these actions, but of course it would be contended that in this respect, as in others, the courts were suffering from precedent paralysis, and were not awake to social realities. In his more recent article, published in June 1935, Professor Feinsinger stated that, "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 propositions include preservation of family solidarity, the prevention of evils resulting from sexual promiscuity."²⁵

The Legislature also must have been confronted with a doubt of the constitutionality of these laws. No discussion of this phase of the question will be attempted here. It is reported that the Governor of at least one state refused to approve similar legislation because he considered it unconstitutional.²⁶ A writer in a recent issue of the Ohio Law Reporter, reviewing the proposed legislation prohibiting breach of promise and alienation suits, asserted that it is violative of express provisions of both state and Federal constitutions, "so as to leave those provisions devoid of meaning and without proper safeguard. To support such enactment . . . is but to prepare the stage for further legislative encroachments upon the salutary rules protecting every person in the security of his person and reputation."²⁷

The New York Legislature might have been deterred by the fact that less drastic proposals relating to breach of promise actions, had met

23. Brown, *The Action for Alienation of Affections* (1934) 82 U. OF PA. L. REV. 472, 505. Prior to this article, the same writer had recommended the complete abolition of breach of promise to marry. Brown, *Breach of Promise Suits* (1929) 77 U. OF PA. L. REV. 474, 497.

24. Feinsinger, *loc. cit. supra* note 3, at 992.

25. Feinsinger, *loc. cit. supra* note 10.

26. The progress of the legislation in various states is recorded in Feinsinger, *supra* note 3, at 997, 998, nn. 96-107.

27. Meyers, *Validity of Statutes Prohibiting Breach of Promise and Alienation Suits* (1935) 2 OHIO L. REV. 146, reprinted in N. Y. L. J., April 5, 6, 1935, at 1732, 1756.

with no success in previous sessions. One proposed bill would have required mutual promises to marry to be in writing, another would have limited the recovery in such actions to actual expenses paid or incurred in contemplation of the marriage, either of which might have been desirable and effectual. Both of these had failed of adoption, and apparently no proposal relating to actions for alienation of affections, criminal conversation or seduction had been made prior to 1935.

I do not propose to urge that we have lost any precious or sacred heritage in the abolition of the actions in question. Conceding that there were serious abuses connected at least with the actions for breach of promise to marry, wisdom might have dictated that the solution be left with the courts until we had at least some more definite statement of policy. The most serious difficulty seems to have been the use of these actions as instruments for extortion. A better solution as I have pointed out, might have been an investigation of perjury, the subornation of perjury and the use of newspaper publicity in connection with such cases. The inherent insufficiencies of these causes of action, it is submitted, might better have been left to the courts. As a matter of fact there was a well directed tendency in some decisions, extending the implied conditions of contracts to marry, the non-fulfillment of which would justify the refusal of the other party to go on with the marriage,²⁸ and in applying narrower rules of damage in all of these cases.²⁹

Summing it all up, however, it is not the immediate effect that is so serious in the destruction of these causes of action, but rather the underlying tendency involved in this legislation, of which even the legislators may have been unaware. It is the secondary consequence, the implied acknowledgment of changed social concepts, that is to be feared. Viewers with alarm are not popular these days, but having had one important change in our fundamental law foisted upon us under a smoke screen of false agitation, those who are seriously interested in the law should at least be awake to what is being done. It took us many years to be relieved of the prohibition amendment which had more to do with the moral and financial bankruptcy of the country than we even yet realize.

If the allusion seems inappropriate let me again quote from Professor Feinsinger, who in the conclusion of his article, in May 1935, reviewing the arguments for and against the new legislation, says that it may "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

28. *Gross v. Hochstim*, 72 Misc. 343, 130 N. Y. Supp. 315 (Sup. Ct. 1911).

29. *Madison v. Neuburger*, 130 Misc. 650, 224 N. Y. Supp. 461 (Sup. Ct. 1927).

between each spouse and the outside world."³⁰ Did the sponsors of the new laws in New York ever suspect that this was the objective?

This trend of thought is not new to those who have been reading any of the recent effusions of the so-called "experimentalists," and if Professor Feinsinger is correct in his observation, this new legislation is only one phase of a broad attack on legal concepts and traditions, and represents the effort of the Legislature, whether it knew it or not, to counteract "the unwillingness of courts to modify the governing rules to accord with social realities."³¹

It might be shown that the agitation for "heart balm" legislation accumulating support as it swept eastward, from newspapers, legislatures and bar association committees, because of its anti-racketeering slogan, is only one aspect of a movement to destroy the concept and ideal of marriage as an outmoded tradition, a folk-way that has grown into desuetude, together with other transcendental nonsense, such as contract, property, right, title and due process.³² To paraphrase Walter Lippmann, when the reformers of sexual conventions endanger the institution of marriage with its enduring wisdom, they lead us into unending confusion.³³ High pressure or "pell-mell" legislation, of doubtful constitutionality, has not contributed much to the solution of economic problems, and we suspect, will play little part in any constructive effort in the social order, to determine the true balance between traditional legal concepts and modern psychological and sociological theories.

30. Feinsinger, *loc. cit. supra* note 3, at 1009.

31. Feinsinger, *loc. cit. supra* note 10, at 430.

32. See Cohen, *loc. cit. supra* note 21, at 831.

Professor Llewellyn of Columbia has recently written two interesting but certainly bewildering articles analyzing the tradition of marriage in which he refers to marriage as ". . . the satisfaction of a nameless assortment of spiritual needs (being the 'master' of some house; a shoulder to cry on; a place where you can really say what's on your chest; one person you can bully; some place where you are loved, as is, and if not that, at least a somewhere where you belong. . .)." Llewellyn, *Behind the Law of Divorce* (1932) 32 *COL. L. REV.* 1281, 1294; (1933) 33 *id.* 249.

Authorities for some of the newer developments in theory and practise may be found in the very exhaustive work of Professor Albert C. Jacobs of Columbia. *JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS* (1933).

33. LIPPMANN, *A PREFACE TO MORALS* (1929) 358.