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REPORT OF
COMMITTEE ON LAW REFORM
OF THE
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
ON ACTIONS TO RECOVER DAMAGES FOR ALIENATION
OF AFFECTIONS, FOR BREACH OF PROMISE OF MAR-
RIAGE AND FOR CRIMINAL CONVERSATION.

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ACTIONS FOR BREACH OF PROMISE

The action for damages for breach of promise of marriage was developed in England by the judges, beginning in about the year 1754. At that time, by Act of Parliament 26 George II, Chapter 33, the right to obtain a decree of specific performance of a promise of marriage was abolished. It is the action as developed by the judges in England following this statute which now exists in the United States.

Under the ROMAN Law an action for breach of promise was unknown; it being considered contra bonos mores. Even a stipulation fixing beforehand the sum to be paid as a penalty in case of non-performance of the contract could not be enforced. The only penalty attached was the obligation on the party who had broken the contract to return any gifts received by way of earnest, and the infamy of such conduct and proceeding (9 CJ p. 335; Dig. 45 i, 1, 134; cf. Cod. 51, 1).

The development of the SPANISH Law on the question is shown in Claparols v. DeCastro (Ct. of First Instance, (Philippines), reported 43 Am. L. Rev. 759. The court said:

"That the early law on this subject was substantially the same both in Spain and in England."

In SPAIN, however, the Civil Code, Art. 1702, merely requires the defaulting party-

"to indemnify the other party for the expenses * * * incurred by reason of the promise."

The Court then quoted from the "Learned Spanish Commentator Manresa", as follows:

"The law does not speak of damages, and for that reason it does not authorize the wronged to seek indemnity." "It seems clear, therefore, that there has been no legislation, actual or judicial, under the Spanish system which authorizes expressly or by implication, an action for general damages for the breach of a promise of marriage."

Under the GERMAN Law --

"One who has been guilty of breach of promise of marriage is obligated not only to compensate the injured one, as well as the latter's parents and third parties who have acted in loco parentis, for expenses of obligations incurred in expectation of the marriage, but also to pay the injured one for the loss resulting from measures respecting his property or

occupation, taken in expectation of the marriage. The compensation is only to be awarded in so far as the expenses, obligations, and measures were reasonable under the circumstances." (Eichholz, and new Civil Code of Germany, 35 Am. L. Rev. 202).

Apparently, this provision of the German Law has not been subjected to the abuse made in America of the cause of action for damages for breach of promise of marriage. This fact appears to be the result less of the omission of the right to damages for alleged injured feelings, etc., from the German Code than of the refusal of the press and the public generally to consider such action "news".

The law in FRANCE on this question is similar to that of Germany.

The right of action for breach of promise has not received universal approval from the courts in the United States.

In LOUISIANA, in the case of Morgan v. Yarborough, 5 La. Ann. 316, 323, the Court said:

"In conclusion we may take occasion to observe, that this is the first time we or our predecessors have been called upon to consider an action of this kind." (viz., an action for damages for breach of promise of marriage) "It is a fact creditable to our people; and we hope that such actions may not become frequent. While we are bound, under our jurisprudence and code, to recognize the right of action, we are constrained to say that a female of refined sensibilities could scarcely bring herself to such a suit; and that the appeals which are usually made to juries in such cases, on the score of the wounded affections of the woman, can have little foundation in truth. Such suits are not infrequently the mere instruments of extortion; courts and juries should, therefore, cautiously restrict relief to cases of real injustice."

Somewhat similar convictions were expressed by the courts of MASSACHUSETTS and RHODE ISLAND in considering the question as to whether evidence of seduction might be introduced by way of aggravation of damages in actions for breach of promise of marriage. In Paul v. Frazier, 3 Mass. 71, Chief Justice Parsons, in discussing the question as to whether it would be advisable for the Legislature to give a woman a right of action for damages for her own seduction, said:

"Whether seductions will afterwards be less frequent or whether artful women may not pretend to be seduced in order to obtain a pecuniary compensation" is an open question.

In Wrynn v. Downey, 27 R. I., 454, 455 (4 L.R.A. N.S. 615), the Court said, after quoting Chief Justice Parsons' words in Paul v. Frazier, supra:

"and may not an artful woman who has had illicit relations with a man as easily pretend to have received a promise of marriage in order to recover damages for seduction? Fraud and cunning and avarice and desire are not exclusive characteristics of either sex. We may not assume that the roles of temptress and tempted as cast in the earliest recorded human tragedy, are

always inverted in the drama of modern society. It seems to us that social morality will not be promoted by relieving either sex of legal responsibility for voluntary action."

In 1932 the Committee on State Legislation of this Association reported on a Bill introduced in the Assembly (P. 2995, Int. 953 - 1932) to amend the Personal Property Law in relation to agreements required to be in writing as follows:

"Subdivision 3 of Section 31 of the Personal Property Law (the Statute of Frauds) requires certain agreements, in order to support an action upon them, to be in writing. From this requirement 'mutual promises to marry' are 'excepted'; the proposed amendment would specifically include them.

This legislation would thus require suits for breach of promise to be based on memoranda in writing. The reason is obviously the scandal attached to this class of litigation and the bad odor in which suits of this kind are largely held not only by the legal profession but by the public at large. It is generally believed that actions of this character verge on blackmail and that few self-respecting women will lend their names to proceedings of this nature.

In England and other foreign countries, prenuptial contracts and settlements are common, and a right of action for breach of promise would naturally follow. In this country such customs do not generally exist, and it may be questionable whether a breach of promise to marry should be actionable at all. In any event this amendment seems to us a step in the right direction and meets with our favor.

The foregoing represents in substance the views heretofore expressed by this Committee in regard to the substantially similar bill, 1925, No. 77.

The bill is approved."

ACTION FOR ALIENATION OF AFFECTIONS.

The action for alienation of affections is founded on loss of consortium. There need not be actual physical separation or illicit relations, but both of these elements may be proved in aggravation of damages.

While there may be some instances for a proper use of this right of action, it is safe to say that it is, as a general proposition, resorted to by unscrupulous men and women to extort money from defendants unwilling to go through a trial of the issues for fear of publicity.

The action has also been used to compel a defendant to a divorce suit to let the case go by default, to protect the co-respondent, and again when that has occurred, the judgment in the divorce suit has been used as a basis upon which to proceed against the co-respondent.

It is plain that this action is open to all the criticisms to which the action for breach of promise of marriage is subject, at least in those cases in which the plaintiff is the husband or the wife, and the action is against an alleged paramour.

The existence of the action is the basis of the old so-called "badger game."

The very occasional actions possessing merit - for example, where the married life of a young couple is broken up by over-zealous parents - do not in our opinion justify the continuance of this form of suit. In deference, however, to respectable opinion to the contrary, the Committee has limited its proposed reform to a proposal to end actions against paramours.

ACTION FOR CRIMINAL CONVERSATION.

There would seem to be little support within the modern concepts of morality for the existence of such a cause of action as this. That either spouse should be entitled to receive a payment in money because of the other's infidelity would seem to put the marriage relation on a plane so sordid as to be comparable almost to the White Slave Traffic. It is inconceivable that either a man or a woman of finer sensibilities or having any right to claim adherence to the higher ideals of human conduct should ever resort to such a suit.

The existence of the right of action in our law of course is open to the same abuse as the two actions previously referred to.

In Oppenheim v. Kridel, 204 App. Div. (1st Dept.) 305, the Court said, at p. 314:

"In passing we might observe that the action for criminal conversation has been abolished in England by The Matrimonial Causes Act, 1857 (20 and 21 Vict. Chap. 85, Sec. 59). It is an action that was never favored by the Courts and instead of extending it to cover new causes it might be wise to abolish the action."

Sec. 59 of Chap. 85, 20 and 21 Vict., reads as follows:

"LIX. After this Act shall have come into operation no action shall be maintainable in England for criminal conversation."

Your Committee accordingly recommends that the Association approve that the following Bills be enacted by the Legislature of the State of New York:

That Art. III, Sec. 31 of the Personal Property Law be amended to read as follows:

"Sec. 31. Agreements required to be in writing.
Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be had in writing and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking, * * *

3. is made in consideration of marriage or of a promise to marry."

That a new Section, to be numbered 339-a, be added to the Civil Practice Act reading as follows:

"Sec. 339-a. Limitation of proof in actions for breach of promise to marry. In an action for breach of promise to marry no damages can be awarded for anything but actual expenses paid or incurred in contemplation of the marriage."

That Section 57 of the Domestic Relations Law be amended by adding as an introductory sentence thereto the phrase "except as otherwise provided in Section 57-a, etc.", as follows:

"Sec. 57. Right of action by or against married woman for torts. Except as otherwise provided in Section 57-a, a married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved. This section does not affect any right, cause of action or defense existing before the eighteenth day of March, eighteen hundred and ninety."

That the Domestic Relations Law be further amended by adding thereto a new Section to be numbered 57-a and reading as follows:

"Sec. 57-a. No action shall be maintainable or recovery allowed for alienation of the affections of a husband or wife against a defendant who is not a parent, brother, sister or person in loco parentis of the plaintiff's spouse, or for criminal conversation."

In the event that legislation cannot be secured to accomplish the recommended reforms, at least partial relief would result from the adoption of a Rule of Court requiring that all papers in such actions should be sealed and accessible only to the parties or to their attorneys. Your Committee, accordingly, recommends, if the Legislature now in session fails to act, that actions of the character under discussion be made subject to the provisions of Civil Practice Rule 278 or a similar rule.

Dated, January 28, 1935.

Respectfully submitted,

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