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BREACH OF PROMISE TO MARRY—A RECENT TREND IN INTERPRETATION OF THE PENNSYLVANIA HEART BALM STATUTE

Miss Jones and Mr. Smith exchange mutual promises to marry. In reliance on Mr. Smith's promise, Miss Jones relinquishes her high salaried position as a newspaper reporter, buys an expensive trousseau, and exchanges with Smith an engagement ring. Two days before the wedding Smith refuses to marry Miss Jones, and refuses to return the engagement ring given him. He admits that he never intended to marry her in the first place, and that the engagement was entered into only as a means to gain publicity and fame and to injure Miss Jones' reputation. Miss Jones returned all gifts given to her by Mr. Smith.

Miss Jones promptly sues Mr. Smith in an action of trespass in the nature of trover for the return or value of the engagement ring; and in an action of trespass for the tort of fraud and deceit for recovery of the cost of the trousseau and the value of the wages lost during the months of unemployment occurring in the engagement period.

Mr. Smith relies on the Act of 1935,¹ the now famous "Heart Balm Statute," as his defense. He admits the causes of action would lie in absence of the statute, but insists that the statute bars the actions as essentially actions for breach of promise.

Such was the issue before a recent Moot Court. After hearing argument, the court held that Miss Jones could recover only the ring, in Pennsylvania. Evidently basing its opinion on authority² from decisions of courts of other states with similar statutes,³ the reasoning, briefly, was:

(1) The engagement ring was a gift given subject to an implied condition subsequent. As the condition was a marriage which never took place, Miss Jones was allowed a trespass action in the nature of trover for conversion. The significant thing is that the court believed proper interpretation of the statute would allow such an independent action arising incidentally out of a marriage promise.

(2) As to the action to recover wages and the cost of a trousseau based upon the tort of fraud and deceit, the court said, in essence, that the action was one for

¹ Act of June 22, 1935, P. L. 450, § 1 as amended June 25, 1937, P. L. 2317, § 1; 48 P. S. § 170 (Pa.).

² *Beberman v. Segal*, 6 N. J. Super. 472, 69 A.2d 587 (1949); *Gikas v. Nicholis*, N. H., 71 A.2d 785, (1950) allowing recovery of engagement rings. *A. B. v. C. D.*, 36 F. Supp. 85 (E. D. Pa. 1940), *Aff.*, 123 F.2d 1017 (3rd Cir. 1941), *Cert. denied*, 314 U. S. 691 (1941); *Sulkowski v. Szewczyk*, 255 App. Div. 103, 6 N. Y. S. 2nd 97 (1938); *Thibault v. Lalumiere*, 318 Mass. 72, 60 N. E., 2nd 349 (1945); denying actions for fraud and deceit based on fraudulent misrepresentation of defendant who never intended to marry.

³ N. Y. Civ. Prac. Act § 61; Mass., G. L. (Ter. Ed.) c 207, § 47 A. inserted by S. T. 1938, c 350 § 1.; N. J., S. A. 2:39 A-1 et seq.

breach of promise to marry and brought merely as an attempt to circumvent the statutory prohibition. Here then, the court refuses to allow an independent action arising incidentally out of a marriage promise.

Prior to 1935, there is no doubt that Miss Jones would have been allowed to maintain her action to recover an engagement ring given in contemplation of marriage. *Ruebling v. Horning*⁴ seems to be the leading Pennsylvania authority for this. Other states generally allowed such actions also.⁵ As to the trousseau and the wages, plaintiffs in the past have recovered damages for the loss of time and expense incurred in preparation for marriage and for financial or pecuniary loss such as business losses which may have resulted from the engagement or its breach.⁶ In these latter cases, however, fraud and deceit was not the basis of recovery. The damages were based on the actual loss suffered because of the broken promise and the actions were brought in assumpsit for breach of promise to marry, although they may have included elements for which independent tort actions might lie.

However, many plaintiffs were abusing this breach of promise action. The action was used more often as a method of blackmail, fraud, and oppression which led to exorbitant out-of-court settlements. Further, sordid and unfortunate love affairs were being given public recognition, a thing repulsive to public interest *per se*. Also, the action was subject to abuse of sympathetic and gullible juries who awarded excessive damages to the attractive face. The courts themselves allowed the damages of tort and not contract, thus granting exemplary damages of considerable size.⁷

Therefore, to prevent such evils, and rightly so, Pennsylvania, following in the footsteps of other states,⁸ passed the statute stating "All causes of action for breach of promise to marry are hereby abolished." The consequences of this statute have not as yet been completely clarified in this state. Would a plaintiff with a legitimate cause of action be denied recovery from a too broad interpretation of legislative intent? Would the Miss Jones of our hypothetical situation above be denied an action to recover from an admitted converter and perpetrator of fraud, such as Mr. Smith?

Among the other states with similar statutes, the New York and Massachusetts courts have expressly rejected such action. In *Sulkowski v. Szewczyk*,⁹ one of the very earliest cases to test the New York statute, it was held that an action based on fraud for false representations was barred. The plaintiff had claimed

⁴ 98 Pa. Super. 535 (1929).

⁵ Beck v. Cohen, 262 N. Y. S. 716 (1933); *Sloin v. Lavine*, 11 N. J. Misc. 899, 168 A. 849 (1933).

⁶ *Rubin v. Klemer*, 44 R. I. 4, 114 A. 131 (1921); *Vincena v. Domin* 10 D. & C. 787 (Pa.-1928); See also 11 C. J. S. 810 and cases cited there.

⁷ *Syfert v. Soloman*, 95 Cal. App. 228, 272 P. 810, (1928).

⁸ Indiana had the initial act; Ind. Laws (1935), c 208 § 1 p. 1009.

⁹ Cited note 2, *supra*.

that the defendant proposed marriage to her and in so doing had wilfully represented that he was an unmarried man when in fact he was not. The defense was that the action was based on a contract to marry and therefore prohibited. The plaintiff objected to the defense claiming that the action was not a breach of promise action because the promise to marry was void and hence nonexistent. But the court wrote:

"If plaintiff's contention be correct, then any action based upon a breach of promise to marry could be turned into an action for misrepresentation by merely alleging that the promise of marriage was a sham, made solely for the purpose of taking advantage of the plaintiff."

And in *Andie v. Kaplan*,¹⁰ where the plaintiff sought to recover \$600.00 worth of jewelry delivered to the defendant in reliance on defendant's promise of marriage, the court, without opinion, denied the complaint on the grounds that it did not state facts sufficient to constitute a cause of action. This was followed by other "engagement gift" cases in New York,¹¹ all denying recovery on the theory that the statute was an absolute bar.

The leading Massachusetts case, *Thibault v. Lalumiere*,¹² held that an action in tort for damages could not be maintained where the direct or underlying cause of the injury was the breach of a promise to marry.

Thus we see very broad interpretations of legislative meanings of "Heart Balm Statutes" in other states. Although specific reasoning for each particular case seems lacking, the significant result is that the courts, regardless of sympathy for legitimate claimants,¹³ have felt the pre-statute evils to be so susceptible to reoccurrence, so as to hold strongly against any type of relief involving, no matter how remotely, breach of marriage promise.

So far, the appellate courts have not had occasion to decide the issue in Pennsylvania. However, in 1940, the U. S. District Court, Eastern District, handed down a decision in *A. B. v. C. D.*¹⁴ which appeared to set the pattern for interpreting our statute. The court, in applying the New York statute¹⁵ as well as the Pennsylvania one, decreed that an action to recover damages resulting from an alleged fraudulent promise to marry "was essentially an action for breach of promise to marry" and covered by the statutes "notwithstanding the action sounded in fraud and deceit and was tortious in form." The decision has gone far to establish authority for the proposition that no such action as *Miss Jones'* would be permitted, and text writers,¹⁶ as well as the cases,¹⁷ point to it. Its

¹⁰ 263 App. Div. 884, 32 N. Y. S. 2nd 429, aff'd 228 N. Y. 685, 43 N. E. 2nd 82 (1942).

¹¹ 266 App. Div. 992, 45 N. Y. S. 2nd 120; aff'd. 228 N. Y. 666, 56 N. E. 2nd 96 (1944); 99 N. Y. S. 2nd 771, (1950).

¹² Cited note 2, supra.

¹³ *Morris v. Baird*, 54 N. Y. S. 2nd 779 (1945) decided on *stare decisis* alone.

¹⁴ Cited note 2, supra.

¹⁵ Cited note 3, supra.

¹⁶ 158 A. L. R. 624.

¹⁷ Cited in *Thibault v. Lalumiere*, note 2, supra.

effect obviously created a barrier to plaintiffs attempting to recover damages based on actions for fraud and deceit. Further, the scope of the decision plus the holdings of the New York courts,¹⁸ that actions for the recovery of engagement rings or other gifts given in contemplation of marriage are also barred, made the pre-act rule of *Ruebling v. Horning*¹⁹ doubtful.

Very recently, however, a new trend of thought seems to be appearing in lower court decisions in Pennsylvania. Two very recent cases involved the problem of recovery of gifts given in contemplation of marriage. The first, *Bullen v. Newweiller*,²⁰ was an action of replevin for an engagement ring. The defense, of course, was that the statute was a bar. The court, after pointing out the rule of *Ruebling v. Horning*²¹ and discussing the law of conditional gifts in general,²² said the legislature never intended the act to apply to suits of this nature. It points out that one of the evils which the statute was designed to prevent, the evil of excessive money damages, would not be present because nothing more is sought in gift cases than the return of the specific property or its value. Hence there are no excessive damages and no evil.

The court also said that the language²³ of the act itself implies that actions such as these are not barred. The court reasoned that one person at the same time may hold several distinct causes of action and may proceed on one without prejudicing his right to proceed on another, notwithstanding the causes all arise out of the same transaction. Hence, if a defendant refused to marry a plaintiff, it might well give rise to an action for breach of promise (at least before the statute) *but* at the same time give rise to a separate action for recovery of a conditional gift. Only the former action is barred, the latter is not.

Applying this reasoning to our hypothetical facts, it appears at least in Pennsylvania, if these lower court decisions are followed, that Miss Jones could recover her engagement ring or other conditional gifts in spite of the holding of *A. B. v. C. D.*²⁴ or *Andie v. Kaplan*.²⁵ Probably the recovery would be limited to instances where the donee was responsible for the breach²⁶ or where the engagement was broken by mutual consent,²⁷ the theory being that one at fault should not profit by his own wrong.

¹⁸ Reinhardt v. Schuster, 192 Misc. 919, 81 N. Y. S. 2nd 570 (1948); see also notes 10 and 11, *supra*.

¹⁹ Cited note 1, *supra*.

²⁰ 63 York L. R. 85 (1949).

²¹ Cited note 4, *supra*.

²² 38 C. J. S. 849; 92 A. L. R. 604.

²³ "All causes of action for breach of contract to marry are hereby abolished."

²⁴ Cited note 2, *supra*.

²⁵ Cited note 10, *supra*.

²⁶ Sloin v. Lavine, cited note 5, *supra*.

²⁷ Wilson v. Riggs, 267 N. Y. 570, 196 N. E. 584; See also *Ruebling v. Horning*, cited note 4, *supra*.

Now if the courts would recognize the separate cause of action in so far as conditional gifts are concerned, would they not apply the same logic to actions based on fraud and deceit? *A. B. v. C. D.* seems strongly contra, but again in *Bullen v. Neuweiller*,²⁸ the court by way of dictum and quoting from an outstanding law review article,²⁹ writes that plaintiffs ought to be able to recover special damages for defendants' fraudulent conduct involving *indirectly* breach of promise. It states that perhaps a trousseau, or cost or loss of wages, may very well be recovered.

"Recovery in actions for breach of promise has frequently included elements for which an independent action would be recognized on ordinary principles of tort, promissory estopped, or quasi-contract. The 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.*"

Thus again our Miss Jones, if the lower court reasoning is followed in appellate courts, may be able to pursue her action to recover the lost wages and the trousseau cost.

Another recent lower court case shedding light on the problem is that of *Weber v. Bittner et. al.*³⁰ The issue was whether the statute barred recovery of real property conveyed to the defendant in consideration of a marriage contract which was later breached. The action was in equity. The court allowed the action to stand, stating:

"If the judicial construction of the statute is further extended to bar other than actions for damages for breach of promise to marry, then the statute which was designed to prevent the unjust enrichment of unscrupulous persons and to avoid perpetration of frauds *could become just that* and would deprive a court of its equitable power to afford relief to one who has been deprived of her property by fraud and deceit."

Although the court relied heavily on a confidential relationship as the basis for affording relief, a liberal interpretation of the above dictum makes it apparent that the court, if faced with the problem of a plaintiff with a legitimate cause of action and without a remedy at law, would not bar her from recovery by too broad construction of the statute. The court recognized, in the case of gifts, the element of unjust enrichment.³¹ Here again, our Miss Jones, although possibly barred at law, might find her relief in equity. As to the fraud and deceit, assuming it not to be an action for breach of promise to marry, but rather a separate action, by the words of the court above, recovery perhaps would be allowed also.

²⁸ Cited note 20, supra.

²⁹ Fensinger, *Legislative Attack on Heart Balm*, 33 MICH. L. REV., 979, 1008, (1935).

³⁰ 64 York L. R. 79 (1950).

³¹ RESTATEMENT RESTITUTION, § 58 (1936).

Here then, we have two Pennsylvania decisions indicating hope for plaintiffs with a legitimate injury arising indirectly out of a marriage promise. The *Bullen* case strongly supports the actions at law while the dictum of the *Weber* case indicates that such a holding would not be so remote in equity.

Nor are these views exclusively peculiar to Pennsylvania. Other states with statutes similar to ours have recognized the danger of overemphasizing the statutory limits. At least fifteen states have adopted these statutes³² since Indiana led the way in 1935. Of these, California,³³ allowed an action for fraud and deceit; New Hampshire,³⁴ allowed recovery of an engagement ring; and New Jersey,³⁵ allowed recovery of an engagement ring. New York³⁶ and Massachusetts³⁷ have expressly rejected recovery. One statute has been declared unconstitutional,³⁸ while the writer can find no appellate cases from the remainder of states. Hence, the decisions are contradictory and authority is scant.

It is the hope of the writer that the feeling of the lower courts will be met with approval if the question is ever presented to the appellate courts in this state. The basic policy of the law has always been that every man with a legitimate cause shall have a remedy and such policy has generally been followed unless greatly impractical. It is submitted that no such impracticability would exist here. Damages could be limited to the cost of the gift or the actual loss in cases of fraud and deceit. The duty of the court would be to exercise a high degree of scrutiny, caution, and consideration to distinguish the legitimate plaintiff from the "heart balm" one. It is felt that the unjust enrichment the statute sought to prohibit reappears in the form of defendants who cloak themselves in the defense of the statute and reap the benefits of fraudulent promises and breaches thereof. Hence the very evil hoped to be prevented by the statute may be condoned thereby unless incidental actions arising out of breach of promise are allowed.

Robert G. Rose

³² Alabama, California, Colorado, Florida, Illinois, Indiana, Maine, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New York, Pennsylvania and Wyoming.

³³ *Mack v. White*, 97 Adv. Cal. App. 558, 218 P.2d 76 (1950).

³⁴ *Gikas v. Nicholis*, cited note 2, supra.

³⁵ *Beberman v. Segal*, cited note 2, supra.

³⁶ Cited notes 9, 10 and 11, supra.

³⁷ Cited note 2, supra.

³⁸ *Heck v. Schupp*, 394 Ill. 296, 68 N. E. 2nd 464 (1946).