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of a court after the entry of a general appearance, divorce decrees in another state present an exception in that, in such cases, the public is a party and the jurisdictional defect of lack of domicil cannot be waived by appearance of the parties where neither are domiciled in the divorce forum. The Supreme Judicial Court of Massachusetts, in *Cohen v. Cohen,*[22] followed the rule of the Giresi case by stating that the filing of an appearance by the defendant in a divorce suit in a state in which neither party is domiciled does not cure the jurisdictional defect. The court explained that the rule of *Davis v. Davis*[23] does not apply unless the jurisdictional facts are actually litigated even though the wife did make an appearance, file an answer and a cross complaint, and cause witnesses to appear by deposition.

Mr. Thomas Reed Powell of the Harvard Law School has suggested the following safety rules for securing a divorce under the present state of the law: "Those who wish the benefit of easier divorce laws must really live in states which have them. To be really safe, those who are newcomers should live on in those states after they have received their dispensation. If later they wish to live elsewhere, they should have some good reason for doing so, a reason that will not cast doubt on their earlier intention to make a home and dwell indefinitely in the divorcing state."[24]

A recent survey revealed that the number of divorces reached a new peak in the United States in 1946. Reno, Nevada reported 11,000 in that city alone, which surpassed the the previous record of 8,500 set in 1945.[25] Since Wyoming is one of the three states with the most lenient residence requirements for divorce,[26] it is reasonable to assume that lawyers in this state are doing a good share of the "migratory" divorce business out of which most of the legal complications evolve. There are, no doubt, many fact situations in which Mr. Powell's safety rules are too cautious; but it would seem good policy for every lawyer to explain the possible unfortunate results to his client when consulted about such cases.

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"HEART BALM" LEGISLATION AND THE CONSTITUTION

In recent years there has been wide-spread acceptance of the view that the causes of action for breach of promise to marry, seduction, alienation of affections, and criminal conversation have afforded a fertile field for blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force a settlement. Consequently fifteen states have passed what are

22. (Mass. 1946) 64 N. E. (2d) 689, 163 A. L. R. 362.
23. (1938) 305 U. S. 32, 59 Sup. Ct. 3, 83 L. Ed. 26.
24. Powell, and Repent at Leisure, (1945) 58 Harv. L. Rev. 930.
25. United Press Dispatch, Jan. 14, 1947.
26. Warren, Schouler Divorce Manual (1944) pp. 705-720.

commonly called "heart balm" acts,[1] in which fourteen of the states formally abolished the above civil causes of action, while Illinois merely made it unlawful to file or attempt to file any such actions. The nature and scope of these various acts[2] may be reviewed by reference to the Wyoming act, the pertinent provisions of which are as follows: Section 1 recites that the remedies for enforcement of actions based upon alleged alienation of affection, criminal conversation, seduction, and breach of promise to marry, having been subjected to grave abuses and such remedies having furnished vehicles for the commission of fraud, the public policy of the state will best be served by the abolition of such causes. Section 2 proceeds to abolish the recited causes of action and Section 3 provides that all contracts and instruments executed hereafter in payment or settlement of any causes of action abolished are contrary to public policy and thus void. Section 4 provides that it shall be unlawful for any person "either as a party or attorney, or an agent or other person in behalf of either, to file or serve, or to threaten to cause to be filed or served, any process or pleading, in any court of the State, setting forth or seeking to recover a sum of money upon any cause of action abolished or barred by this article, whether such cause of action arose within or without the state". Section 5 is peculiar to the Wyoming act, providing that "In so far as not violative of constitutional guarantees" the provisions of the act are to have a retroactive application and shall bar all of such actions and causes of actions now existing in all suits pending. Section 6 provides that "Any person who shall violate any of the provisions of this article shall be guilty of a felony which shall be punishable by a fine of not less than one thousand dollars . . . nor more than five thousand dollars . . ., or by imprisonment for a term of not less than one . . . year nor more than five years, or by both such fine and imprisonment, in the discretion of the Court". Section 7 declares the provisions of the act to be severable and if any provision is held invalid, such invalidity is not to affect such provisions which can be given effect.

Although the Wyoming act has never been judicially contested, similar legislation has been subjected to many constitutional objections in its battle for validity in the courts of the various states. It is the purpose of this paper to review, in the light of the Wyoming act, the decisions of the courts in other states regarding he validity of such legislation.

It has been contended that this legislation abolishing such causes of action deprives the injured person of property and rights without due process of law. In upholding the New York act as against this contention, the court in *Fearon*

1. Alabama (Ala. Code Ann. § 5693 (4)); Illinois (Ill. Rev. Stat. Ann. (Smith Hurd) 1935 c. 38, § 246); Indiana (Laws, 1935, c. 208); Michigan (Laws 1935, Pub. Acts No. 127); New Jersey (Acts 1935, c. 279); New York (Laws 1935, c. 263, § 61a); Pennsylvania (Laws 1935, c. 189); California (Stat. & Amend. to Codes, 1939, c. 128, § 2 and 3); Colorado (S. L. 1941, c. 36); Nevada (Stat. 1934, c 43); Florida (Stat. 1945, c. 23, 138 No. 624); Massachusetts (Acts and Resolves, 1938, c. 350); Maine (Laws 1941, c. 104); New Hampshire (Pub. Acts and Resolves, 1941, c. 150); Wyoming (S. L. 1941, c. 36).
2. There are some variations in the different acts. For instance the Illinois act does not include the action of seduction, while the California statute includes seduction of a person over the legal age of consent.

v. Treanor[3] held that the legislature, in dealing with the subject of marriage, has plenary power, as marriage differs from ordinary common law contracts and is subject to control and regulation of the state. In answer to the same contention in *Langdon v. Sayre*[4] the California court held that the right of action for breach of promise grew out of the marriage contract, but marriage is not a contract within the meaning of the Federal Constitution which prohibits the states from impairing the obligation of contracts. The New Jersey act was upheld in *Bunten v. Bunten*[5] on the ground that it was within the province of the legislature to abolish such causes of action in order to check the evil which they promoted, and that those members of society having a bona fide complaint must, as a member of society, conform to a law designed for the protection of society.

These acts have also been subjected to attack on the ground that they are contrary to public policy.[6] In answer to this contention the California court said, "We observe but are not seriously impressed . . . for that argument seems not to have prevailed where similar statutes have been questioned," the court citing *Thome v. Macken*[7] in which the latter court, in refusing to accept jurisdiction of a cause of action for alienation of affections, said, "Where the law-making power speaks on a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts." In upholding the Alabama legislation, the court in *Young v. Young*[8] stated that the act was carefully drawn with evident purpose and although much might be said touching the wisdom of the statute as applied to individual cases which might arise under any of the erstwhile causes of action thus stricken down, this was for legislative consideration.[9]

It was further contended by the appellant in *Langdon v. Sayre*[10] that the

3. (1936 272 N. Y. 268, 5 N. E. (2d) 815, motion for reargument denied (1937) 273 N. Y. 528, 7 N. E. (2d) 677, appeal dismissed for want of a substantial federal question (1937) 301 U. S. 667, 57 Sup Ct. 933, 81 L. Ed. 1332 rehearing denied (1937) 302 U. S. 774, 58 Sup. Ct. 6, 82 L. Ed. 600.
4. (Cal. App. 1946) 168 P. (2d) 57.
5. (1937) 15 N. J. Misc. 532, 192 Atl. 727.
6. Although the Illinois legislature expressly stated in their act that "it shall be unlawful to file" the recited causes of action, the court in Daily v. Parker, (D. C. Ill. 1945) 61 F. Supp. 701, 702, in finding the act to be in violation of the state constitution under a provision requiring a remedy for every wrong to person, property, or reputation, said, "I cannot believe that the Illinois Legislature intended to enact a law which would result in the protection of persons guilty of alienating the affections of a husband or a wife, declaring the same to be a public policy in the interest of the public welfare, and at the same time make it unlawful for an aggrieved husband or wife to seek any redress of such injury . . ."
7. (Cal. App. 1943) 136 P. (2d) 116.
8. (1938) 236 Ala. 627, 184 So. 187.
9. However, the court in Wilder v. Reno, (N. D. Pa. 1942) 43 F. Supp. 727, although refusing to enjoin the public officials from prosecuting the plaintiff in an alienation of affections suit on the ground that there was no proof of threatened prosecution, said that (1) it was the very purpose of the courts to separate the just from the unjust causes, (2) if courts can be closed against these causes of action, the same reason would close the door against litigants in all kinds of actions, for in every kind of litigation some suits are brought in bad faith, (3) if the police power is to be invoked it should be in favor of the right to maintain these actions as it acts as a restraint against the breakers of contracts and the destroyer of American homes, and (4) the closing of the doors of the courts in such cases leads to disrespect for laws and courts, discontentment and violence.
10. (Cal. App. 1946) 168 P. (2d) 57, 59.

California statute abolishing a cause of action for breach of promise to marry was unconstitutional in that it deprived her of the right to pursue and obtain happiness which is guaranteed by Article 1, Section 1 of the state constitution. The court in answer to this contention stated, "We can understand that plaintiff feels aggrieved at having failed in her pursuit of happiness, but if damages would assuage her grief, that healing agent, we think, is not one which is guaranteed to her by the Constitution."

It has been charged that the abolition of causes of action for breach of promise to marry, alienation of affections, criminal conversation, and seduction grants a special privilege or immunity to one class which is not granted to all citizens. However, the California court said that the act applied equally to all persons and dealt with no particular class. On the other hand, a federal district court in Illinois in *Daily v. Parker,*[11] after striking down such legislation as being in violation of the state constitutional provision requiring the courts to be open and providing a remedy for injury to property, person, and reputation, said by way of dictum, that to uphold a law of this kind, ". . . 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".

A provision is found in some of the state constitutions to the effect that such parts of the common law as existed before the adoption of the constitution should continue to be the law, subject to such alterations as the legislature should make concerning them. Under this provision the Appellate Division of the Supreme Court of New York in *Hanfgarn v. Mark*[12] held that the actions abolished by the New York statute existed at common law and that the legislature was without power to abolish the actions without providing a substitue. However, the New York Court of Appeals reversed this decision and upheld the act, stating that the provision did not prohibit the legislature from correcting an evil growing out of the marriage relation by altering the provisions of the common law, and that a decision to the contrary, if carried to its logical conclusion, would result in a stagnation of law.[13] The Michigan statute was upheld in *Bean v. McFarland*[14] on the theory that this retention of the common law was expressly conditioned upon the right to abrogate the same or any part thereof, and that such law might be expressly abrogated or repealed either by constitutional or statutory provisions.

The state of Indiana has a constitutional provision reading "All courts shall be open; and every man, for injury done to him in his person, property or reputation, shall have remedy by due course of law." It was contended in *Pennington v. Stewart*[15] that the Indiana act violated this provision. The court, in upholding the act, said that the word "property" in said provision could not

11. (D. C. Ill. 1945) 61 F. Supp. 701, 703.
12. (1936) 248 App. Div. 325, 289 N. Y. S. 143.
13. (1937) 274 N. Y. 22, 8 N. E. (2d) 47, appeal dismissed for want of a substantial federal question, (1937) 302 U. S. 641, 58 Sup. Ct. 57, 82 L. Ed. 498.
14. (1937) 280 Mich. 19, 273 N. W. 332.
15. (1937) 212 Ind. 553, 10 N. E. (2d) 619.

be construed to mean that the appellant has a property right to the affections of his wife, and upheld the act on the theory that as marriage is subject to the control of the legislature, the incident, the right of action for alienation of affections which grows out of that relation is necessarily under control of that body. However, the Illinois federal district court in *Daily v. Parker,*[16] in refusing to dismiss an action brought for alienation of affections and criminal conversation, said that an act which denied anyone aggrieved the right to sue in such instances seems clearly to contravene the constitution of the state, which secured to all a remedy for every wrong.

In addition to attacks on the general scope of these acts, specific provisions of this legislation have been assailed on various grounds. For instance, several of the acts have been contested as a violation of state constitutional provisions requiring that no act shall be passed embracing more than one subject, and such subject shall be expressed in the title. The Illinois Supreme Court in *People v. Mahumed*[17] declared sections 3, 4, and 5 of the Illinois act invalid because the title of the act did not fairly express the purposes disclosed by the act itself. The constitutionality of the Pennsylvania act was sustained as against this contention in *McMullen v. Nannah.*[18] A second example may be found in *Pennington v. Stewart*[19] wherein, although the court upheld the act, it did declare section 8 invalid as it denied and prohibited one from contesting the constitutionality of the act. This section provided that "any person who shall violate any of the provisions of sections 3, 4, or 7 of this act shall be guilty of a felony which shall be punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, to which may be added imprisonment for any determinate period of not less than one year nor more than five years, in the discretion of the court."

With the above background of judicial campaigns behind it, the constitutionality of the "heart balm" legislation was quite generally conceded.[20] But in May, 1946, *Heck v. Schupp*[21] appeared on the judicial horizon with startling suddenness. In this case the Illinois Supreme Court declared that the Illinois act which made it unlawful for one to file an action based upon alienation of affections, criminal conversation, or breach of contract to marry was clearly in conflict with the state constitutional provision providing 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 . . ."[22] Since many states, including Wyoming, have similar "remedy" provisions in their constitutions and in consequence of the effect of the *Heck* decision, an inquiry into this important bill of rights provision seems justified.

It has been said that this provision ". . . is one of the most sacred and essen-

16. (D. C. Ill. 1945) 61 F. Supp. 701.
17. (1942) 381 Ill. 81, 44 N. E. (2d) 911.
18. 49 Pa. D. and C. 516.
19. (1937) 212 Ind. 553, 10 N. E. (2d) 619.
20. See 158 A. L. R. 617 for annotation on this subject.
21. (1946) 394 Ill. 296, 68, N. E. (2d) 464.
22. The section was also declared unconstitutional because it was not embraced within its title.

tial of all the constitutional guarantees, and without it a free government cannot be maintained or individual liberty be preserved."[23] But the courts are not in accord as to the application of this article. For instance, in upholding the state Workmen's Compensation Act, the Montana court[24] held that the Montana provision is addressed exclusively to the courts. In other jurisdictions the provision is held to apply to all branches of government.[25] The courts also disagree as to the nature of the rights to be protected under this provision. One view is that it was intended to preserve the common-law right of action for injury to person or property, and while the legislature might change the remedy or the form of procedure, attach conditions precedent to its exercise, and perhaps abolish old and substitute new remedies, it cannot deny a remedy entirely.[26] The Oregon Automobile Guest Statute which deprived a guest of recovery against the owner or driver of the automobile for ordinary negligence was declared invalid under this view.[27] Another view, as represented by *Allen v. Pioneer Press Co.*,[28] wherein the court declared valid an act to regulate actions for libel, is to the effect that this provision requires an act to be tested by the principles of "natural justice" rather than by comparison with the rules of law, statute or common, previously in force. Under this theory the Delaware Supreme Court[29] upheld the Delaware guest statute, declaring that although a right of action for negligent injury is a fundamental and essential right, natural justice admits of a different course of conduct on the part of the host to the guest without suggestion of infringement of the fundamental rights. The latter view,[30] approximating the "reasonableness" test of the due process clause, historically seems to be sound in light of the common origin of the remedy provision and the due process clause, the Magna Charta,[31] and for the further reason that the remedy provision cannot be interpreted literally in that there clearly may not be a remedy for every injury.[32] An attempt at reconciliation of the cases construing this provision, and even the decisions of the Illinois Supreme Court,[33] discloses that the

23. Gearin v. Marion County, (1924) 110 Or. 390, 223 P. 929, 931.
24. Shea v. North-Butte Mining Co., (1919) 55 Mont. 522, 179 P. 499.
25. Mattson v. City of Astoria, (1901) 39 Or. 577, 65 Pac. 1066; Gallegher v. Davis, (Del. 1936) 183 A. 620.
26. Mattson v. City of Astoria, (1901) 390 Or. 577, 65 Pac. 1066.
27. Stewart v. Houk, (1928) 127 Or. 589, 271 Pac. 998.
28. (1889) 40 Minn. 117, 41 N. W. 936.
29. Gallegher v. Davis, (Del. 1936) 183 Atl. 620.
30. Although the Wyoming Supreme Court has not expressly committed itself to this view in its construction of Art. 1, Sec. 8 providing "All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay . . ." the effect of its decision in State v. Ross, (1924) 31 Wyo. 500, 228 Pac. 636, seems to indicate that the Wyoming court has adopted this view. After an exhaustive discussion the court upheld the act of the legislature questioned under the due process clause, and then mentioned that it was contended that the act violated the above "remedy" provision. The court, without discussion of the provision, merely added that this provision was not violated.
31. Chapter 40, which provides: "We will sell to no man, we will not deny to any man, either justice or right." Short v. Owens, (1927) 125 Okla. 66, 256 Pac. 704, 712 A. L. R. 1270; See 11 Am Jur. sec. 326, p. 1121 for discussion.
32. For example, injuries done to persons without negligence, and injuries done to one guilty of contributory negligence.
33. In Clarke v. Storchak, (1943) 38 Ill. 564, 52 N. E. (2d) 229, appeal dismissed 322 U. S. 713, 64 Sup. Ct. 1270, 88 L. Ed. 1555, the Illinois Supreme Court held that the Illinois Guest Statute which provided that "no right of action exists" in a guest

test of reasonableness of the legislation, in the final analysis, is the controlling consideration.

The penalty provision of Section 6 of the Wyoming act requires additional discussion. This provision is identical with the Indiana provision which was struck down by the Indiana court in the *Pennington* case as preventing one from contesting the validity of the act. Although, at first blush, this section clearly seems to effectuate an intent to prevent judicial review it must be considered in contemplation of its purpose and degree of its need. In an excellent article by Robert E. Hardwicke,[34] after an exhaustive review of cases involving the question of the validity of penalty provisions of legislative acts, the author concludes that the courts are more prone to say that "the case is ruled by *Ex Parte Young*"[35] than to base their decisions on the reasons behind the rule of that famous case, and that it is this kind of situation to which Mr. Justice Cardozo referred when he spoke of the "tyranny of labels". To avoid this criticism in the instant problem the courts must determine the validity of the argument that the fraudulent propensity of the "heart balm" action lies in the fear of scandal resulting from the mere bringing of the action and the consequent publicity which the mere abolishment of the causes of action will not remedy. If the argument be held to be valid, the court must then find that the penalty does not effectuate an arbitrary nor capricious prohibition of judicial review, but is one reasonably necessary to insure that violation will not be profitable.

Thus appear some of the factors to be considered in the determination of the validity of the "heart balm" acts yet judicially uncontested. The answer as to which of these factors will control may be found only in the moral, social, and political philosophies of the determining judges. But it is submitted that in this determination the sole issue is whether the legislature has properly exercised its power to remedy the abuses growing out of the vexatious litigation and its effects. An act which tends to discourage collusion and fraud in litigation and one which is reasonably adapted to that end is not in violation of the Fourteenth Amendment.[36] Since the acts in question expressly recite that its purpose is to remedy the fraudulent and collusive abuses brought about by the filing of the actions named, the decisions upholding the legislation on the ground of the legislature's plenary control over the marriage relationship seem to be unnecessary as well as unconvincing.

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unless the driver was guilty of wilfull and wanton misconduct was not in violation of the "remedy" provision and a valid exercise of the police power. The dicta of the court was to the effect that the only limitation on the legislature was that in the exercise of its police power the act must "reasonably tend to correct some evil or promote some interest of the state . . ." However, in the Heck case (discussed in the body of this paper) the court entirely refrained from discussing the provision, the court discussing "moral law" and the protection of the family relationship—the language indicating that the court felt that the act was unreasonable in any event.

34. Penalties as Affected by Good Faith Litigation, (1934) 33 Mich L. Rev. 40.
35. (1908) 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714.
36. Silver v. Silver, (1929) 280 U. S. 117, 50 Sup. Ct. 57, 74 L. Ed. 221, 65 A. L. R. 939; Naudzius v. Lahr, (1931) 253 Misc. 216, 234 N. W. 581, 74 A. L. R. 1189 (Automobile guest statutes abolishing rights of action of guest against host for ordinary negligence).