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NOTES

DOMESTIC RELATIONS: AVOIDANCE OF ANTI-HEARTBALM LEGISLATION BY THE ACTION OF FRAUD

The heartbalm actions of alienation of affections, criminal conversation, seduction and breach of promise of marriage were highly criticized because of their misuse as a means of extortion. This criticism by both press and law reviews led many states to abolish these actions. The prime target of this criticism was the action of breach of promise. When the first anti-heartbalm statutes were passed, it was predicted that these statutes might be circumvented by actions brought in fraud and/or deceit.¹ However, until the decision in *Langley v. Schumacker*,² all the courts which have construed these statutes have consistently denied relief upon such theories,³ and the rule evolved that:

"... [W]here an action stems from, or arises out of, a breach of a marriage contract, the consequences of the statute abolishing actions for such a cause may not be avoided by bringing an action in tort for fraud or deceit."⁴

While this has been the rule elsewhere, the California Supreme Court has refused to follow it. In *Langley v. Schumacker*, the court, in a 4-3 decision, held that a statute which abolished causes of action for breach of promise of marriage was not intended to abolish causes of action for fraud. Therefore, a plaintiff who alleges a promise of marriage made without any intention of performing it has stated a good cause of action.

In the *Langley* case, the plaintiff went through a marriage ceremony with the defendant, but the marriage was never consummated and she had the marriage annulled. She then sued the defendant in an action of fraud, claiming that the defendant had falsely represented his intent to marry her, to consummate the marriage, and maintain normal marital relations. The plaintiff alleged that by relying on the defendant's misrepresentation, she suffered actual damage due to loss of employment and also that she suffered intense humiliation, mental anguish and public disgrace, for which she sought exemplary damages. The defendant demurred, claiming that the plaintiff's cause of action was barred by California Civil Code section 43.5, subdivision (d) which provides that no cause of action arises for breach of promise of marriage. The defendant's demurrer was sustained and this was affirmed by the District Court of Appeal.

These facts presented three basic questions: (1) Was there a breach of promise? (2) Did the plaintiff state a cause of action for fraud? (3) Was the action

¹ Feinsinger, *Alienation of Affections and Related Actions*, 10 Wis. L. Rev. 417 (1935); Note, 30 ILL. L. REV. 764, 780 (1936).

² 46 Cal.2d , 297 P.2d 977 (1956).

³ A.B. v. C.D., 36 F. Supp. 85 (E.D. Penn. 1940), *aff'd*, 123 F.2d 1017 (3rd Cir. 1941), *cert. denied*, 314 U.S. 691 (1941); Thibault v. Lamiere, 318 Mass. 72, 60 N.E.2d 349 (1945); Sulkowski v. Szewczyk, 255 App. Div. 103, 6 N.Y.S.2d 97 (1938). The only apparent inconsistency was Snyder v. Snyder, 172 Misc. 204, 14 N.Y.S.2d 815 (1939), where the defendant by falsely representing he was single induced the plaintiff to enter into a bigamous marriage. The court held that an action in deceit would lie; that an action to recover damages for consummation of a bigamous marriage was not subject to abuse and manipulation by unscrupulous persons and therefore not within the statute prohibiting an action for breach of promise. Thus the court distinguished the case from Sulkowski v. Szewczyk, *supra*.

⁴ Annot., 158 A.L.R. 617, 624 (1945).

of fraud barred by section 43.5, subdivision (d)? The California Supreme Court confined its discussion to the last question, and held that Civil Code section 43.5, subdivision (d) was intended to abolish only causes of action based upon breach of contract. Therefore, the plaintiff's complaint, which stated a cause of action for fraud, was not barred by the code.

Since the plaintiff and defendant had gone through a marriage ceremony, how could there be a breach of promise of marriage? Because the marriage without being consummated was subsequently annulled, and an annulment is a judicial declaration that no valid marriage ever existed.⁵ The existence of certain facts at the time of the purported marriage prevents the relationship of man and wife from being established. In this respect an annulment differs from a divorce, which is the dissolution of a valid marriage.⁶ The plaintiff's annulment, then, rendered the marriage void *ab initio*. Since no marriage occurred, the defendant failed to perform his promise to marry the plaintiff, and the plaintiff would have had a cause of action for breach of promise had this action not been abolished.

The court without discussion assumed that the plaintiff had stated a cause of action for fraud. Thus the court assumed the very question before it, for if the plaintiff did not state a cause of action for fraud, the trial court properly sustained the defendant's demurrer.

Did the plaintiff state a cause of action for fraud? An unfulfilled promise cannot form the basis of an action for fraud,⁷ because the misrepresentation must be of an existing or pre-existing fact. However, an unfulfilled promise made without intent to perform can be the basis of an action for fraud.⁸ "The essence of the fraud . . . is not the breach of the promise, but the fraudulent intent not to perform."⁹ Therefore, if a promise made without intent to perform can form the basis of an action of fraud, can an unenforceable promise made without intent to perform be the basis of such an action? Upon this question the authorities are in conflict. The Restatement of Torts takes the position that an action for fraud may be based upon an unenforceable promise made without intent to perform;¹⁰ but the Restatement of Contracts¹¹ is of the opinion that such a promise may not form the basis of an action for fraud.¹² The question has not been decided by the California Supreme Court,¹³ and it was not discussed in *Langley v. Schumacker*, but California appears to be in line with that authority which does not allow an action of fraud to be based upon an unenforceable promise made without intent to perform.¹⁴ *Kroger v. Baur*,¹⁴ a decision of the California District Court of Appeals, appears to be the only case directly in point. This decision held that an unenforceable oral promise cannot form the basis of an action for fraud. The court stated:

⁵ 1 VERNIER, AMERICAN FAMILY LAW § 50 (1931).

⁶ *Ibid.*

⁷ *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984 (1889); PROSSER, TORTS § 90 (2d ed. 1955).

⁸ CALIF. CIV. CODE § 1572(4).

⁹ *Reton v. Millar*, 132 Cal.App. 708, 712, 23 P.2d 419, 420 (1933).

¹⁰ RESTATEMENT, TORTS § 530, Comment b.

¹¹ RESTATEMENT, CONTRACTS § 473, comment d.

¹² In *Bank of America v. Pendergrass*, 4 Cal.2d 258, 48 P.2d 659 (1935), the California Supreme Court held that where the parol evidence rule renders a promise unenforceable such a promise made without intent to perform cannot be used to establish the defense of fraud.

¹³ 1 WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS 158 (6th ed. 1946); Note, 36 CALIF. L. REV. 138 (1948).

¹⁴ 46 Cal.App.2d 801, 117 P.2d 50 (1941).

"If the law can thus be nullified by the transparent device of predicating a tort action upon the invalid oral promise on the ground that the promisee did not intend to perform it, then such might just as well be stricken from the statute."¹⁵

If a statute which makes an oral promise unenforceable cannot be evaded by bringing an action for fraud, then certainly a statute which makes a promise unenforceable cannot be avoided by bringing such an action. A promise of marriage is an unenforceable promise, and therefore such a promise should not form the basis of an action for fraud. Hence it would seem that the plaintiff failed to state a cause of action, and that the trial court properly sustained the defendant's demurrer.

Even assuming that the plaintiff stated a cause of action for fraud, did the statute, which abolished actions for breach of promise of marriage, abolish an action for breach of promise of marriage made without intent to perform?

The action for breach of promise in the past has been used as a means of extortion.¹⁶ Oftentimes, the promise of marriage was no more than wishful thinking on the part of a designing female. However, because of the large awards made to a "pretty" plaintiff, and the widespread publicity given the embarrassing evidence admitted, the mere threat to bring such a suit was apt to bring about a settlement.¹⁷ The decision in *Langley v. Schumacker* makes extortion possible by the simple device of alleging a promise of marriage made without intent to perform.¹⁸ True, the plaintiff, if forced to go to court, must prove the fraudulent intent as well as the promise, but an action of the type under discussion

" . . . [I]s essentially a sort in which service of the summons, or merely the threat to do so is often sufficient to cause a settlement even when there is not any merit to the alleged cause of action [T]o effect the prohibition enacted by the legislatures it will prove necessary to bar actions which though tortious in form are contractual in essence. That is, it will prove necessary to guard against resort to the action of deceit as a subterfuge and attempt to circumvent the statutory prohibition."¹⁹

According to the decision in *Langley v. Schumacker*, section 43.5, subdivision (d) was only intended to abolish causes of action for breach of contract. That is, the legislature intended to abolish only actions *ex contractu*, not *ex delicto*. Yet the action for breach of promise of marriage more closely resembles an action in tort than it does one of contract.²⁰ For example, malicious interference with the contract of another is a tort, but such interference with the contract to marry is not a tort.²¹ In this respect the action differs from the ordinary contract. Also, the

¹⁵ *Kroger v. Baur*, 46 Cal.App.2d 801, 803, 117 P.2d 50, 52 (1941).

¹⁶ 1 VERNIER, AMERICAN FAMILY LAW § 50 (1931).

¹⁷ *A.B. v. C.D.*, 36 F. Supp. 85 (E.D. Penn. 1940); *Sulkowski v. Szewczyk*, 255 App. Div. 103, 6 N.Y.S.2d 97 (1938).

¹⁸ *Ibid*

¹⁹ *A.B. v. C.D.*, 36 F. Supp. 85, 87 (E.D. Penn. 1940).

²⁰ "In cases of breach of promise . . . although the wrong arises primarily through the breaking of a contract [it] so nearly approximates that of strictly a tortious character, that the former are differentiated from actions of tort more in the degree and extent of the injury than from any actual or intrinsic distinction." *Lanigan v. Neely*, 4 Cal.App. 760, 767, 89 Pac. 441, 444 (1907). "While an action to recover damages for a breach of promise of marriage, in a technical sense, arises out of the breach of the contract obligation, it is in its essence an attempt to recover for a tortious wrong." *Reiger v. Abrams*, 98 Wash. 72, 77, 167 Pac. 76, 78 (1917). "The principal ground of damage is disappointed hope, the injury complained of is violated faith, more resembling in substance deceit and fraud, than a mere common breach of promise." *Stebbins v. Palmer*, 18 Mass. (1 Pick.) 71, 79 (1822).

²¹ 9 AM. JUR. § 18 (1937).

general rule is that actions in contract survive the death of one of the parties, while actions in tort do not. The action of breach of promise does not survive the death of one of the parties, and therefore follows the rule applicable to torts.²² Furthermore, the action of breach of promise permits recovery for injury to feelings, reputation, mental distress, and other items of a tortious character.²³ Also the tort rule permitting recovery of exemplary damages is followed, rather than the rule of contracts which permits recovery of compensatory damages only.²⁴ At common law a woman had no cause of action for her own seduction. Yet in those jurisdictions following the common law, this seduction could be pleaded in aggravation of damages in an action for breach of promise. In such a case the breach of the promise did not cause the seduction, but rather the seducer's path is paved by the promise of marriage. Seduction by such means is looked upon as a tort for which the defendant must pay. In California, prior to the passage of Civil Code section 43.5 seduction was a tort against the woman seduced. However, this seduction could be pleaded in an action for breach of promise without constituting a misjoinder of actions, for as to damages the action of breach of promise was a tort.²⁵

Breach of promise is an anomalous action it partakes both of tort and contract. Therefore a statute which abolishes the action should not be construed as abolishing only actions based upon breach of contract, but rather, these statutes should be interpreted so as to give effect to the legislative purpose.

*A.B. v. C.D.*²⁶ was a similar case of an action of fraud based upon a promise of marriage made without intent to perform. The promise of marriage was made by a Pennsylvania gentleman to a lady of New York and both these states had statutes abolishing the action of breach of promise. The Federal District Court in interpreting both these statutes found the legislative intent was to abolish actions brought in tort as well as contract. The court stated:

"[T]here is a policy enunciated by these enactments abolishing breach of promise actions which is broader than their letter. The legislatures evidently have been prompted by concern for the public morals and for the frequently innocent victims of breach of promise actions to preclude resort to the courts for relief from injury consequent to breached promises of marriage The legislatures did not intend the courts should explore the minds of suitors and determine their sincerity at the moment of proposal of marriage, but rather declared it to be the policy of the state that in the event a breach of promise occurs relief will be denied in the courts."²⁷

While the misuse of the action of breach of promise was largely responsible for its abolishment, serious doubt existed as to the wisdom of permitting such an action even when properly used.²⁸ It was argued that an action of breach of promise may have had a useful function in a society which considered a wife little more than chattel, and therefore a proper subject for a commercial contract. But classification of the engagement with ordinary commercial contracts is not in accordance with the more enlightened view of the function of the engagement. In an earlier period, marriages were arranged by the families of the prospective spouses.

²² 1 VERNIER, AMERICAN FAMILY LAW § 10 (1931).

²³ *Id.* at § 9.

²⁴ CALIF. CODE CIV. PROC. § 374, *Lannigan v. Neely*, 4 Cal.App. 760, 89 Pac. 441 (1907).

²⁵ *Lannigan v. Neely*, *supra* note 24.

²⁶ 36 F. Supp. 85 (E.D. Penn. 1940).

²⁷ *Id.* at 87.

²⁸ 1 VERNIER, AMERICAN FAMILY LAW § 6 (1931); Brockelbank, *The Nature of a Promise to Marry*, 41 ILL. L. REV. 1, 199 (1946).