CONSTITUTIONAL LAW—VALIDITY OF STATUTE ABOLISHING ACTION FOR BREACH OF CONTRACT TO MARRY—[New York].—The plaintiff, in the recent case of *Fearon v. Treanor,* brought an action for breach of promise to marry, committed after the effective date of a statute which abolished rights of action for such a breach, for alienation of affections, for criminal conversation, and for seduction. *Held;* The statute is constitutional as applied to breaches of promises to marry occurring after its enactment. Judgment for defendant upon a directed verdict, *affirmed.*[1]

Inspired by the pioneer Indiana measure abolishing the foregoing actions,[2] five other states have since adopted virtually identical legislation.[3] In regard to breach-of-promise actions, some of the reasons which influenced the Legislatures[4] and which are advanced by writers who favor their abolition, are as follows: (1) such actions are prosecuted by unscrupulous persons for their unjust enrichment and are vehicles for the commission of extortion and blackmail;[5] (2) the basis of damages is indefinite and verdicts have been excessive;[6] (3) in practical operation there is no mutuality of remedy, since juries have consistently refused to award damages in favor of men upon such causes of action;[7] (4) many circumstances which are not accepted as excuses for the non-performance of agreements to marry are grounds, in many jurisdictions, for divorce after marriage—e. g., incompatibility;[8] and (5) it is more conducive to the public interest to permit engagements to be broken without liability than to constrain recalcitrant parties to marry under the coercion of threatened breach of promise suits.[9]

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1. Fearon v. Treanor, 288 N. Y. Supp. 368 (1936); aff'd Dec. 31, 1936, — N. Y. —.

2. Laws of Ind. (1935) c. 208.

3. Laws of N. Y. (1935) c. 263, sec. 61-a-i; Laws of N. J. (1935) c. 279; Mich. Laws (1935) Public Act 127; Pa. Laws (1935) Public Act 189; Ill. Smith-Hurd Revised Statutes of 1935, c. 38, sec. 246.

4. The typical introduction to the acts is, "Declaration of public policy of state. The remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of promise 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 to the public policy of the state will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of the article is hereby declared as a matter of legislative determination." Laws of N. Y. (1935) c. 263, sec. 61-a.

5. Wright, Action For Breach Of The Marriage Promise (1924) 10 Va. L. Rev. 361; O'Brian v. Manning, 166 N. Y. Supp. 760 (1917).

6. 1 Vernier, *American Family Laws* (1931) sec. 9; Billings v. Albright, 73 N. Y. Supp. 22 (1901).

7. Brown, Breach Of Promise Suits (1929) 77 U. of Pa. L. Rev. 474, 479; 1 Vernier, supra, note 6, sec. 6 (7).

8. Brown, supra, note 7, at p. 479.

9. Mudget, *The Social Effect Upon The Family Of Forced Marriages* (1924); Richmond and Hall, *Marriage And The State* (1929) 155-162;

Doubts are expressed in various quarters as to the validity of this recent legislation.[10] It is pointed out that the power to change or abolish legal remedies is subject to the due process clause of the Federal Constitution, which guarantees to individuals "the preservation of—substantial rights to redress by some effective procedure."[11] It is well settled, however, that a person has no vested right under the due process clause in any rule of law as such, whether it be substantive or procedural.[12] The limitation which the courts have enunciated in regard to legislative alteration of remedies is that such action infringes the guaranty of due process when there are no valid considerations of general welfare or public policy justifying it.[13] In the light of increased economic opportunities afforded to women today,[14] the abandonment of the attitude of regarding jilted parties as social outcasts,[15] and the abuses which have grown up in connection with breach of promise suits,[16] the abolition of such actions would seem to be a reasonable exercise of legislative power.[17]

State constitutions commonly contain provisions to the effect that "Every man ought to find a certain remedy in the law for all injuries or wrongs he may receive in his person, property, or reputation."[18] These provisions are "intended to save jural rights which have become well established prior to the enactment of the constitution from destruction by act of legislature."[19] The decisions invalidating legislation which abolishes common law remedies, however, have been limited to instances in which the basis for such action was purely capricious and in which there was, in the eyes of

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Groves and Ogburn, *American Marriage And Family Relationships* (1928); 1 Vernier, supra, note 6, sec. 6.

10. Hibschman, Can "Legal Blackmail" Be Legally Outlawed? (1935) 69 U. S. L. Rev. 474; Note, 30 Ill. L. Rev. 764 (1935).

11. Hibschman, supra, note 10, l. c. 480, citing from Gibbes v. Zimmerman, 290 U. S. 326, 326, 54 S. Ct. 140, 78 L. ed. 342 (1933); 30 Ill. L. Rev. supra, note 10, l. c. 776.

12. Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77 (1876); Second Employer's Liability Cases, 223 U. S. 1, 50, 32 S. Ct. 169, 56 L. ed. 327 (1911); Willoughby, *Constitutional Law* (1929) sec. 1216; Silver v. Silver, 280 U. S. 117, 50 S. Ct. 57, 74 L. ed. 221 (1929).

13. In Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. ed. 254, 27 A. L. R. 375 (1921), the court held the legislative action to be "a purely arbitrary or capricious exercise of the power"; 2 Cooley, *Constitutional Limitations* (8th ed. 1927) 740; See Gibbes v. Zimmerman, supra, note 11; Crane v. Hablo, 258 U. S. 142, 42 S. Ct. 214, 66 L. ed. 514.

14. Groves and Ogburn, supra, note 9, c. 5; Schouler, *Marriage, Divorce, Separation, and Domestic Relations* (6th ed. 1921) sec. 1302.

15. Schouler, supra, note 14, secs. 1302-1303; 1 Vernier, supra, note 6, sec. 6, l. c. 28.

16. Supra, notes 4-9.

17. For this position see Note, 22 Va. L. Rev. 205 (1935); Note, 13 N. Y. L. Q. Rev. 104 (1935); Note, 5 Brooklyn L. Rev. 196 (1936).

18. Ill. Const. of 1870, art. 2, sec. 19 (there is a similar provision in most state constitutions); 1 Stimson, *American Statute Law* (1886) sec. 1003, l. c. p. 135.

19. Stewart v. Houch, 127 Ore. 589, 589, 271 Pac. 998 (1928).

the courts, no recognized public benefit accomplished.[20] The effect of these constitutional provisions hence seems to be merely to guarantee due process of law.[21] It was not the purpose of the framers of the state constitutions to burden the people with all the pre-existing common law, but to adopt only that portion which was applicable to their needs.[22] Nor was it the intent to petrify those rules which once were found useful, regardless of how oppressive changing conditions may have made them.[23] It has always been the function of the Legislature to remedy defects in the common law, and to adapt it to changing circumstances.[24] It would seem, in view of the justifying considerations noted above, that there are ample general grounds to sustain the legislation here involved.

More specifically, however, the institution of marriage is one over which the Legislature has traditionally exercised the fullest measure of control.[26] Hence the related contract to marry has always been regarded as one *sui generis* in its subjection to the legislative power.[27] It is obvious, therefore, that if the Legislature believes liability to breach of promise actions will coerce reluctant parties into undesirable marriages, it may, in the exercise of its time-honored function of protecting the institution of marriage and of guarding against social evils, completely abolish the remedy which is a responsible cause of harm.[28]

The constitutionality of abolishing the actions for criminal conversation, alienation of affection, and seduction involve other considerations, which are not at issue in the instant case.[29]

The present statute provides that the mere threat to file a suit for any of these actions subjects the prospective party litigant, all counsel participating in the case, and others who may be connected with its threatened institution, to punishment as felons.[30] Legislation which prevents litigants

20. Coleman v. Rhodes (Del., 1932) 159 Atl. 649; Stewart v. Houch, supra, note 19; see In Re Opinion of Justices, 211 Mass. 618, 98 N. E. 337 (1912), which illustrates that what is a public interest is largely a matter of judicial construction; Willoughby, supra, note 12, sec. 1132.

21. Williams v. Port Chester, 76 N. Y. Supp. (1902).

22. Hageman v. Vanderdoes, 15 Ariz. 312, 138 Pac. 1053, L. R. A. 1915 A. 491 (1916); for other cases see "Common Law," Cent. Dig. key no. 10, Dec. Dig. key no. 12.

23. Ketelson v. Stilz, 184 Ind. 702, 111 N. E. 423, L. R. A. 1918 D. 303 (1916); In Meieter v. Moore, 96 U. S. 76, 79, 24 L. ed. 826 (1877) the court said, "No doubt a statute may take away a common law right"; Supra, note 22.

24. Munn v. Illinois, supra, note 12, l. c. 113; supra, notes 22-23.

25. Supra, notes 4-9; supra, notes 14-15.

26. 1 Vernier, supra, note 6, sec. 14; Brown, supra, note 7, l. c. 476; see Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. ed. 867 (1905).

27. 1 Vernier, supra, note 6, sec. 14; Bishop v. Brittain Inv. Co., 229 Mo. 699, 129 S. W. 668 (1910).

28. This is the basis stressed in the present case, Fearon v. Treanor, supra, note 1, l. c. 373; State v. Jackson, 80 Mo. 175, 50 Am. Rep. 131 (1883); State v. Duket, 90 Wis. 272, 63 N. W. 83 (1895).

29. For articles dealing with the constitutionality of these provisions, see ops. cit. supra, note 17.

30. Laws of N. Y. (1935) c. 263, sec. 61-e, g.

through excessive penalties from testing its validity, is unconstitutional on its face, as it amounts to a denial of due process.[31] Although the valiidty of this penal provision is highly doubtful, the court could not consider it, as this was a civil action.

M. J. G.

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DECLARATORY JUDGMENTS—SUIT BY INSURER TO DETERMINE THE EXTENT OF LIABILITY AS "CASE AND CONTROVERSY."—[Federal].—The Eight Circuit Court of Appeals in adjudicating its first declaratory judgment case[1] has chosen to take a conservative view of the function of declaratory proceedings. The decision was rendered in a suit brought under the Federal Declaratory Judgments Act[2] by an insurance company against an insured to have the court render a declaratory judgment that the policy had lapsed for non-payment of premiums because the insured was not so disabled as to relieve him from further payments within the terms of the policy. In praying for a declaratory decree the petitioner pointed out that 1) the insured has not instituted any action wherein the petitioner could prove the absence of disabilities of the insured, 2) that the action on the policy will not be barred until after the running of the Statute of Limitations following the death of the insured, and 3) that because permanent disability has not been judicially determined the petitioner is compelled annually to set aside and maintain substantial reserves upon the policies. The court, with one judge dissenting, affirmed the decision of the lower court,[3] holding that the facts alleged failed to present an "actual controversy" in that it did not show that any right of the petitioner was being invaded or prejudicially affected by the alleged acts of the defendant.

The validity of declaratory actions is now well established,[4] and it is only its applicability to particular fact situations which gives rise to conflicting decisions.[5] Judges who are hostile toward any innovation bearing upon the exercise of the judicial power have been inclined to find that the facts sought to be determined do not present an "actual controversy"[6] within the meaning of Article III.[7]

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31. Ex Parte Young, 209 U. S. 123, 28 S. Ct. 441 52 L. ed. 714 (1908); Oklahoma Operating Co. v. Love, 252 U. S. 325, 337, 40 S. Ct. 338, 64 L. ed. 598 (1919).

1. Aetna Life Insurance Co. v. Haworth et al, 84 F. (2d) 695 (C. C. A. 8, 1936).
2. 48 Stat. 955, 28 U. S. C. A. sec. 400 (1934).
3. 11 F. Supp. 1016 (D. C. W. D. Mo., 1935).
4. In re Kariher's Petition, 284 Pa. 455, 131 Atl. 265 (1925); Miller v. Miller, 149 Tenn. 463, 261 S. W. 965 (1923); Nashville, etc. Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345, 77 L. ed. 730, 87 A. L. R. 1191 (1933).
5. With the instant case compare New York Life Insurance Co. v. London, 15 F. Supp. 586 (D. C. D. Mass., 1936), Travelers Ins. Co. v. Helmer, 15 F. Supp. 355 (D. C. D. Ga., 1936).
6. The opening phrase of the Federal Declaratory Judgment Act, "In cases of actual controversy" owes its origin to the since overruled decision of the Michigan Supreme Court in Anway v. Grand Rapids Ry. Co., 211