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Family Law—Anti-Heart Balm Act—Legal Sufficiency of Action for Money Damages Based on Bogus Wedding Ceremony

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Although the instant case deals solely with the standing-to-sue issue, Chief Judge Desmond's dissent forecasts an interesting dilemma. If the case would now go back to the trial court, and plaintiff is able to prove his allegations against the majority trustee, may the defense of an overriding fiduciary obligation to a trust be raised? For example, let us suppose the trier of fact finds that the majority trustee, as director of the corporation, is not acting in the best interests of the corporation. Could defendant argue that he is, however, acting in the best interests of his trust, as is his fiduciary duty, and adherence to that duty takes precedence over his fiduciary duty as a director? "Where the trustee holds sufficient shares to control actually or substantially the conduct of the corporation, he is under a duty to exercise that control for the benefit of the trust."[32] There is no public policy which precludes the owner of a majority of shares of a corporation from creating a trust, thereby giving the trustee the power to control the election of directors and the ultimate control over the affairs of the corporation.[33] It has been held that such power is an incident merely of the ownership of the stock "and unless abused"[34] will not be denied. The courts have allowed such a trustee wide areas of discretion,[35] and they have been reluctant to interfere unless he is guilty of an abuse of his discretionary powers.[36] Where the trustee exceeds the limitations of reasonable judgment in the exercise of control over the corporation, the court will intervene, either by directing him in the exercise of the power or holding him liable for its improper exercise.[37] Thus, in the instant case, to succeed plaintiff will be required below to prove that the defendant trustee has abused the discretion allotted him by the trust indenture. If defendant can show that his actions are in the best interests of the majority, the majority stockholder, he will be deemed to be acting within the realm of proper discretion.

JOHN T. O'MARA

FAMILY LAW

ANTI-HEART BALM ACT—LEGAL SUFFICIENCY OF ACTION FOR MONEY DAMAGES BASED ON BOGUS WEDDING CEREMONY

After being led to believe that the defendant intended to marry her, plaintiff participated in what she believed to be a genuine wedding ceremony. In fact,

32. 2 Scott, Trusts § 193.2 at 1462 (2d ed. 1956). *Accord*, Mudd v. Lanier, 247 Ala. 363, 24 So. 2d 550 (1945); Tapper v. Boston Chamber of Commerce, 235 Mass. 209, 126 N.E. 464 (1920). See Krasnowiecki, *Existing Rules of Trust Administration: A Stranglehold on the Trustee-Controlled Business Enterprise*, 110 U. Pa. L. Rev. 816 (1962).

33. Union Trust Co. of Springfield v. Nelen, 283 Mass. 144, 148, 189 N.E. 66, 69 (1933).

34. *Ibid.*

35. 2 Scott, Trusts § 187 (2d ed. 1956).

36. Anderson v. Bean, 272 Mass. 432, 172 N.E. 647 (1930). *Cf.* Matter of Ebbets, 139 Misc. 250, 248 N.Y. Supp. 179 (Surr. Ct. 1931).

37. *In re* Adler's Estate, 164 Misc. 544, 299 N.Y. Supp. 542 (Surr. Ct. 1937); *In re* McLaughlin's Estate, 164 Misc. 539, 299 N.Y. Supp. 559 (Surr. Ct. 1937).

it was a sham, contrived in detail by the defendant with faked papers, pretended judge and witnesses. The bogus ceremony took place in New Jersey, after which the plaintiff and defendant returned to New York City. They cohabited there as man and wife for approximately nine months. At this time plaintiff was first informed that the ceremony was a sham, having no legal effect, and that defendant planned to leave her and marry another. Both plaintiff and defendant are citizens of New York state. Plaintiff's first cause of action was brought in deceit, alleging the above facts. Defendant moved to dismiss, contending that: (1) the action was improperly brought in fraud and deceit; (2) the action should have been brought in the form of seduction and breach of promise to marry and, as such, is outlawed by the so-called Anti-Heart Balm Act.[1] The Supreme Court, at Special Term, denied the motion to dismiss. The Appellate Division reversed on the law and granted the defendant's motion.[2] The Court of Appeals, one judge dissenting without opinion, *held*, motion to dismiss denied. The action of deceit will lie where it is grounded on a putative marriage produced by a sham civil ceremony, for the harm complained of arises from the genuine belief of a change of status by the plaintiff, and not from the underlying unfulfilled promise to marry. *Tuck v. Tuck*, 14 N.Y.2d 341, 200 N.E.2d 554, 251 N.Y.S.2d 653 (1964).

Following the lead of the Indiana legislature,[3] New York passed the Anti-Heart Balm Act in 1935.[4] It specifically abolished civil causes of action for breach of promise to marry and for seduction, criminal conversation, and alienation of affection, when involving a sum of money in damages.[5] Changing mores of the community and the increased social status of women underlay the need for legislation. The number of unfounded actions, the possibility of

1. N.Y. Sess. Laws 1935, ch. 263, § 1, as amended, N.Y. Sess. Laws 1939, chs. 356, 359, (formerly N.Y. Civ. Prac. Act §§ 61-a–61-i, now N.Y. Civ. Rights Law §§ 80-84).

2. 18 A.D.2d 101, 238 N.Y.S.2d 317 (1st Dep't 1963). The Court was divided, voting 3 to 2 to reverse.

3. Ind. Ann. Stat. § 2-508 (1946). Other states with similar legislation: Alabama (Ala. Code tit. 7, § 114 (1958)); California (Cal. Civ. Code § 43.5 (1960)); Colorado (Colo. Rev. Stat. Ann. § 43-3-1 (1953)); Florida (Fla. Stat. Ann. § 771.01 (1963)); Maine (Me. Rev. Stat. Ann. ch. 112, § 91 (1954)); Maryland (Md. Ann. Code art. 75C, § 2 (1957), breach of promise to marry action abolished "except in cases wherein pregnancy exists"): Massachusetts (Mass. Ann. Laws ch. 207, § 47A (1955)); Michigan (Mich. Stat. Ann. § 25.191 (1956)); Nevada (Nev. Rev. Stat. § 41.380 (1963)); New Hampshire (N.H. Rev. Stat. Ann. § 508.11 (1955)); New Jersey (N.J. Rev. Stat. § 2A:23-1 (1937)); Pennsylvania (Pa. Stat. Ann. tit. 48, § 171 (1958)); Wyoming (Wyo. Stat. Ann. §§ 1-727–1-731 (1957)). An Illinois statute was declared unconstitutional in *Heck v. Schupp*, 394 Ill. 296, 68 N.E.2d 464 (1946). Illinois has since enacted a statute outlawing punitive damages as a part of breach of promise to marry suits (Ill. Rev. Stat. ch. 89, §§ 25-34 (1947)). A Tennessee statute, rather than abolish such causes of action, has stiffened requirements as to evidentiary proof (Tenn. Code Ann. §§ 36-701–36-706(1955)). For discussion of constitutionality and application of such statutes, see Annot., 158 A.L.R. 617 (1945), as supplemented, 167 A.L.R. 235 (1947).

4. N.Y. Sess. Laws 1935, ch. 263, § 1, as amended, N.Y. Sess. Laws 1939, chs. 356, 359 (formerly N.Y. Civ. Prac. Act §§ 61-a–61-i, now N.Y. Civ. Rights Law §§ 80-84).

5. N.Y. Sess. Laws 1935, ch. 263, § 1 (formerly N.Y. Civ. Prac. Act § 61-b, now N.Y. Civ. Rights Law § 80). In contrast, the Indiana statute abolished "all civil causes of action," rather than just "rights of action . . . to recover sums of money as damage." Ind. Ann. Stat. § 2-508 (1946).

coercive extra-judicial settlements or marriages motivated by fear of a law suit instead of love, and the excessive verdicts granted in the occasional meritorious case by both jury and court, spoke out for legislative action. The need for legal protection of the individual in his or her affectional relationships had been exceeded by the social cost of allowing such remedies.[6] From the outset, courts have been cautious not to allow any action resembling even remotely a breach of promise suit, fearing that the statute would be undermined. Consequently, suits brought on theories of assault,[7] false representation,[8] and fraud and deceit[9] have been rejected as an attempt to circumvent the prohibition of the statute. The New York Anti-Heart Balm Act specifically requires that its provisions be liberally construed.[10] Accordingly, the courts have dismissed all causes of action, where allegation or proof of either seduction or breach of promise to marry is required to sustain an action.[11] Gifts made in conjunction with a contract to marry, for instance, are not retrievable on the breach or rescission thereof,[12] although such actions would appear to lie outside the statute's policy provisions.[13]

In a leading New York case,[14] plaintiff sued in deceit alleging that the defendant, a married man, represented that he was unmarried, and that in reliance on his representation plaintiff agreed to marry him. No marriage ensued. In affirming defendant's motion to dismiss, the court emphasized that had there

6. See N.Y. Sess. Laws 1935, ch. 263, § 1, as amended, N.Y. Sess. Laws 1939, ch. 359, (formerly N.Y. Civ. Prac. Act § 61-a); Fearon v. Treanor, 272 N.Y. 268, 273, 5 N.E.2d 815, 817 (1936); see generally Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections and Related Actions*, 10 Wis. L. Rev. 417 (1935); Feinsinger, *Attack on Heart Balm*, 33 Mich. L. Rev. 979 (1935); Note, 11 Temp. L.Q. 396 (1937).

7. Thibault v. Laliumiere, 318 Mass. 72, 60 N.E.2d 349 (1945).

8. Sulkowski v. Szewczyk, 255 App. Div. 103, 6 N.Y.S.2d 97 (4th Dep't 1938).

9. A.B. v. C.D., 36 F. Supp. 85 (E.D. Pa. 1940), *aff'd*, 123 F.2d 1017 (3d Cir. 1941), *cert. denied*, 314 U.S. 691 (1941); Thibault v. Laliumiere, 318 Mass. 72, 60 N.E.2d 349 (1945); Tuck v. Tuck, 18 A.D.2d 101, 238 N.Y.S.2d 317 (1st Dep't 1963).

10. N.Y. Sess. Laws 1935, ch. 263, § 1 (formerly N.Y. Civ. Prac. Act § 61-h, now N.Y. Civ. Rights Law § 84).

11. Andie v. Kaplan, 263 App. Div. 884, 32 N.Y.S.2d 429 (2d Dep't 1942), *aff'd*, 288 N.Y. 685, 43 N.E.2d 82 (1942); Sulkowski v. Szewczyk, 255 App. Div. 103, 6 N.Y.S.2d 97 (4th Dep't 1938).

12. Mastersanti v. Mascioli, 13 A.D.2d 865, 214 N.Y.S.2d 932 (3d Dep't 1961) (real property); Brandes v. Agnew, 275 App. Div. 843, 88 N.Y.S.2d 553 (2d Dep't 1949) (real property); Morris v. Baird, 269 App. Div. 948, 57 N.Y.S.2d 890 (2d Dep't 1945), 14 Fordham L. Rev. 223 (1945) (real property); Josephson v. Dry Dock Sav. Institution, 266 App. Div. 992, 45 N.Y.S.2d 120 (1st Dep't 1943), *aff'd*, 292 N.Y. 666, 56 N.E.2d 96 (1944) (gifts); Andie v. Kaplan, *supra* note 11 (money and jewelry); see Note, 48 Cornell L.Q. 186 (1962).

13. "[These] actions . . . having been subject to grave abuses, causing extreme annoyance . . . and pecuniary damage to many persons wholly innocent . . . , and such remedies having been exercised by *unscrupulous persons for their unjust enrichment*, and . . . having furnished vehicles for the commission . . . of crime and . . . the perpetration of frauds, . . . the best interests of the people of the state will be served by . . . [their] abolition." N.Y. Sess. Laws 1935, ch. 263, § 1, as amended, N.Y. Sess. Laws 1939, ch. 359 (formerly N.Y. Civ. Prac. Act § 61-a) (emphasis added). Further, specific abolition is limited to cases where plaintiff seeks to recover ". . . *sums of money as damages* for . . . breach of contract to marry, . . ." N.Y. Sess. Laws 1935, ch. 263 § 1 (formerly N.Y. Civ. Prac. Act § 61-b, now N.Y. Civ. Rights Law § 80) (emphasis added).

14. Sulkowski v. Szewczyk, 255 App. Div. 103, 6 N.Y.S.2d 97 (4th Dep't 1938).

not been, (1) a promise to marry, and (2) a failure to keep such promise by the defendant, the action would fail on the merits. Therefore, the action was clearly based upon a breach of promise to marry and within the purview of the statute abolishing such actions.[15] Under a similar set of facts a lower court found that an action for deceit would lie, however.[16] Here, the fraud was not discovered in time, and plaintiff was induced into a bigamous marriage. The court reasoned that an action to recover damages, when a consummated marriage is involved, is neither subject to abuse or manipulation by unscrupulous persons, nor within the letter of spirit of the law.[17] The chances of intimidation by threat of an unfounded suit are slight when a marriage is a prerequisite to the action, and the danger of a coerced marriage is non-existent. The courts then have looked to the consummated marriage as the distinguishing factor. When no ceremony has been performed, the courts dismiss the action as being violative of the Anti-Heart Balm Act.[18] When a ceremony has been performed, the cause of action is sustained.[19]

The majority, in the instant case, starts with the valid premise that an action of fraud and deceit will lie in New York where the defendant induces the plaintiff to marry by fraudulently representing that he is unmarried, and analogizes the present case to such an action. Fraud, with respect to one's capacity to marry, is similar to fraud with respect to a pretended ceremony in

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15. *Id.* at 105, 6 N.Y.S.2d at 99.

16. Snyder v. Snyder, 172 Misc. 204, 14 N.Y.S.2d 815 (Sup. Ct. 1939). Although *Snyder* was not the first case to decide that fraud and deceit is a proper action when a consummated bigamous marriage is involved (see Blossom v. Barrett, 37 N.Y. 434 (1868)), it was the first case to establish clearly that this position was unaffected by the Anti-Heart Balm Act outlawing actions based on breach of promise to marry. *Accord*, Friedman v. Libin, 4 Misc. 2d 248, 157 N.Y.S.2d 474 (Sup. Ct. 1956), *aff'd*, 3 A.D.2d 827, 161 N.Y.S.2d 826 (1st Dep't 1957); Benintendi v. Benintendi, 1 Misc. 2d 474, 72 N.Y.S.2d 843 (Sup. Ct. 1947), *aff'd*, 273 App. Div. 969, 79 N.Y.S.2d 303 (2d Dep't 1948), *aff'd*, 298 N.Y. 848, 84 N.E.2d 150 (1949).

17. Snyder v. Snyder, *supra* note 16, at 205, 14 N.Y.S.2d at 816. See Note, 18 Chi.-Kent L. Rev. 198 (1940), where Snyder and Sulkowski v. Szewczyk, 255 App. Div. 103, 6 N.Y.S.2d 97 (4th Dep't 1938), are compared and contrasted. In a more recent case, a further attempt was made to show why a breach of promise to marry is not at the basis of an action when there is a consummated bigamous marriage involved: ". . . plaintiff does not here assert that the [defendant] wronged her in failing to marry her; rather, she is asserting that [defendant] wronged her in fraudulently inducing her to marry him. The plaintiff's complaint is based on what the [defendant] did do and not on what he refused to do." Friedman v. Libin, *supra* note 16, at 255, 157 N.Y.S.2d at 484.

18. Cases cited note 11 *supra*.

19. Cases cited note 16 *supra*. *But cf.*, Grunberg v. Grunberg, 199 Misc. 249, 99 N.Y.S.2d 771 (Sup. Ct. 1950); Bressler v. Bressler, 133 N.Y.S.2d 38 (Munic. Ct. N.Y.C. 1954), where the distinction made with regard to the consummated marriage ceremony cases has not met with success. Both actions were brought in tort to recover gifts given just before and immediately after a valid consummated marriage. Each action was dismissed as arising from the outlawed breach of promise to marry action (the courts viewed the marriage contract as a continuing obligation on the part of both parties, and therefore, when defendant left plaintiff, he breached his promise, and an action based on that breach could not stand). The two cases have drawn little judicial comment in New York. (In *Friedman v. Libin*, 4 Misc. 2d 248, 255, 157 N.Y.S.2d 474, 484, (Sup. Ct. 1956) the court said only: "I disagree with them.") It is interesting, however, that both cases were cited and ultimately followed in a recent California case. Boyd v. Boyd, 228 Cal. App. 2d 425, 39 Cal. Rptr. 400 (3d Dist. 1964).

that both situations require affirmative steps on the part of the defendant and both lead to equally void relationships.[20] Although a promise of marriage underlies a fraudulent ceremony (similar to the outlawed actions), the breach of such promise is not the wrong complained of in this action. The woman who is seduced under the promise of marriage knows the relationship into which she is entering. In the instant case, however, good faith of a supposed change of status led the plaintiff to believe that the subsequent cohabitation was as man and wife; whereas, this "change of status" is completely lacking in cases grounded on breach of promise alone. Finally, since the purpose of the Anti-Heart Balm Act is to eliminate fraud, the courts should not extend it by construction to assist in the perpetration of fraud and to allow exploitation of the marriage ceremony. Representing the majority of the Appellate Division,[21] Justice Eager reasoned that since the present case was within the definitional boundaries of seduction,[22] since the damages sought were identical to those sought under the outlawed breach of promise to marry action,[23] since an unfulfilled promise to marry was necessarily an element in the cause of action,[24] and since the parties did not partake in a valid marriage ceremony, the present case had all the typical earmarks of the actions outlawed by the statute. In addition, the statement of public policy,[25] interpreted in the light of the provision mandating a liberal construction,[26] makes the legislative intent to outlaw *all* such civil suits for damages unmistakable. Furthermore, the court reasoned, the legislature had in mind specific provisions of the Penal Code[27] to right the wrongs in this area of the law to the extent that they are to be righted at all. Therefore, in those instances (the present case included),[28] where defendants are subject to criminal punishment, the legislature intended the corresponding civil action to

20. N.Y. Dom. Rel. Law § 6 (a bigamous marriage is void); N.Y. Dom. Rel. Law § 11 (no marriage shall be valid unless solemnized).

21. 18 A.D.2d 101, 238 N.Y.S.2d 317 (1st Dep't 1963).

22. "By its generally accepted definition, the term 'seduction' means the act of a man in inducing a woman to commit unlawful sexual intercourse with him by means of arts, persuasions, solicitations, promises, bribes or other means, without the employment of force." 79 C.J.S. *Seduction* § 1, at 953 (1952).

23. The damages granted under a breach of promise to marry suit have traditionally been more closely related to actions *ex delicto* than *ex contractu*; however, see *McCormick on Damages*, § 111 (1935); 11 C.J.S. *Breach of Promise to Marry* § 40 (1938).

24. As no marriage took place between plaintiff and defendant in the eyes of the court, plaintiff's claim must have been based on a promise by defendant, an action for the breach of which is barred by the Anti-Heart Balm Act.

25. See note 13 *supra*.

26. N.Y. Sess. Laws 1935, ch. 263, § 1 (formerly N.Y. Civ. Prac. Act § 61-h, now N.Y. Civ. Rights Law § 84).

27. N.Y. Penal Code § 2175.

28. "A person, who under promise of marriage, or *by means of a fraudulent representation to her that he is married to her*, seduces and has sexual intercourse with an unmarried female of previously chaste character, is punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars or both." N.Y. Penal Code § 2175. Whether the New York courts would have jurisdiction over the present defendant is open to question, as the bogus wedding ceremony took place in New Jersey. That the crime could be construed to be a continuing one or one which was committed partly in New York, see N.Y. Penal Code § 1930.

be outlawed by the Anti-Heart Balm Act.[29] Justice Eager also attacked the proposition that the instant case is similar in all pertinent respects to the cases involving consummated bigamous marriages. He pointed out that: (1) The gravamen of a case involving a bigamous marriage is not the unfulfilled promise but rather the fraudulent consummation of a marriage, and (2) The solemnization of a bigamous marriage is in accordance and conformity with the law and is only void or voidable because of facts apart from the solemnization. As such, the cause of action founded on the consummated bigamous marriage cannot be freely manipulated, whereas the case involving the unrecorded bogus ceremony is still subject to the feared abuses and "legalized blackmail." Moreover, the paramount importance of the marriage institution requires that the woman should have a responsibility, as well, to see that the requirements of the law are met with respect to the licensing and solemnization.

In response to the Appellate Division decision and its factual distinction between a sham ceremony and a duly celebrated bigamous ceremony, one commentator has observed: "The plaintiff would appear to be as effectively unmarried and seduced in one case as in the other."[30] For this reason alone, it seems plaintiff should be allowed a cause of action in fraud and deceit. In an attempt to support such a holding, the Court of Appeals cited the few cases decided in other jurisdictions involving a sham ceremony.[31] They appear of little value, however, as not one of them had to face the question whether an action for fraud and deceit would lie *when confronted with a statute abolishing the heart balm remedies.*[32] This does not detract from the overall soundness of Judge Fuld's opinion, however. The instant case *is not* particularly significant when looked at for its narrow precedential value. Few cases will come before the bar with such an elaborate and imaginative set of facts. Nor does it seem probable that the gates are opened to future plaintiffs, claiming reliance on the other party's assurances as to validity of common law marriages,[33] and thereby

29. Conversely, it can be argued, if the legislature intended to withdraw civil remedies where N.Y. Penal Code § 2175 provided penal provisions, why didn't the legislature make reference to the code provision, or at least use comparable wording? To the degree that § 2175 has an effect on the Anti-Heart Balm Act, it is significant that § 2175 has no counterpart in the Proposed New York Penal Law, unless it be § 135.20 (Sexual misconduct; a class A misdemeanor).

30. Glasser, *Torts, 1963 Survey of New York State Law*, 15 Syracuse L. Rev. 339, 343 (1963).

31. Jekshewitz v. Groswald, 265 Mass. 413, 164 N.E. 609 (1929); Sears v. Wegner, 150 Mich. 388, 114 N.W. 224 (1907); Alexander v. Kuykendall, 192 Va. 8, 63 S.E.2d 746 (1951).

32. Another case cited did deal with a similar Anti-Heart Balm Statute in California. Spellens v. Spellens, 305 P.2d 628 (Cal. App. 2d Dist. 1956). (Here, it appears that the marriage was solemnized by an *official* celebrant). Plaintiff sought (1) a declaration of the validity of her marriage to the defendant by "estoppel", or (2) in the alternative, should the marriage be determined to be invalid, damages for fraud and deceit. The Appellate Court upheld her action for fraud and deceit. The holding, however, was rendered "dicta", by the California Supreme Court decision, 49 Cal. 2d 213, 317 P.2d 613 (1957), holding for plaintiff on the first ground, leaving unnecessary the question posed in the second ground.

33. A consequence alluded to by the Appellate Division majority decision: "Obviously, if this action be maintainable, then an illicit relationship entered into on the basis of a promise to marry could, be readily maneuvered by a party into an actionable status by a

withstanding a motion to dismiss. The factual distinctions between such a common law marriage case and the present case are evident, and while decision in each case would rely upon the same competing values of (1) the need for the plaintiff to be redressed, and (2) the percentage of fraudulent cases that would come about by allowing such actions, these factual distinctions should lead to a distinction of law. The present case *is* significant, however, when seen in the light of the twenty-nine year history of the Anti-Heart Balm Act. The courts appear to have bent over backward to protect the integrity of the statute in its early years, denying causes of action which only collaterally approach the traditional breach of promise suit. The instant case suggests that new stock is being taken of cases that approach the outlawed actions. The ever present fear that the statute would be undermined is virtually unwarranted. The statute has withstood the test of time and can now be viewed objectively. Specifically, cases involving suits for the return of gifts made in reliance of marriage promises,[34] at least when such promises are breached by the defendant or mutually rescinded, should be reappraised by the courts[35] or the legislature.[36] By denying relief to a party, who seeks only the return of gifts given in consideration of marriage, little social benefit is attained; in fact, ultimate harm to society would be the more probable result. Few, if any, of the elements of fraud, associated with the breach of promise suit asking for personal damages, are present when the relief sought is the return of property. Furthermore, under the present law, the remediless party is at the mercy of unscrupulous individuals. An "enriched" party can breach the promise of marriage, and openly admit fraud in doing such, without fear of action. In this respect the Anti-Heart Balm Act has become, rather than a shield to save, a sword to desecrate.

STEPHEN KELLOGG

SEPARATION AGREEMENT—INVALID WHERE PAYMENTS TO SPOUSE INDUCED DIVORCE

The parties, husband and wife, became estranged after the husband admitted his interest in another woman. Plaintiff wife at first decided to obtain a divorce, but then changed her mind and consulted counsel with a view toward

claimed reliance . . . as to the validity of a common law or other putative marriages." Tuck v. Tuck, 18 A.D.2d 101, 107, 238 N.Y.S.2d 317, 323 (1st Dep't. 1963).

34. Cases cited note 12 *supra.*

35. As the courts have "made" the law in regard to these cases (see note 13 and accompanying text), they can judicially overrule it. Few courts in other states agree with the New York court's view of the Anti-Heart Balm Act and its application to recovery of ante-nuptial gifts, *e.g.*, Pavlicic v. Vogtsberger, 390 Pa. 502, 136 A.2d 127 (1957) and its interpretation of a similar statute. See generally Annot., 72 A.L.R.2d 956 (1960); Note, 48 Cornell L.Q. 186 (1962).

36. The New York Law Revision Commission in 1947 suggested an amendment to the statute: "This article shall not be deemed to prevent a court in the proper case from granting restitution for property or money transferred in contemplation of the performance of an agreement to marry which is not performed." 1947 Report of N.Y. Law Revision Commission 225. After this amendment had passed both houses, the bill was vetoed by the Governor, without memorandum. *Public Papers of Thomas E. Dewey*, p. 286 (1947).