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Legislative Abolition of Remedies

LEGISLATIVE ABOLITION OF REMEDIES

P sued for malicious alienation of the effections of his wife. Action dismissed: statute[1] made the filing of such actions unlawful. Held:

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6. The establishment of an area of exclusive jurisdiction of the Board of Appeals would not only secure a uniformity of administrative action and purpose, but would also remove a burden from the courts to the extent that administrative appeals were successful in removing causes of grievance.
7. Administrative redress must be sought within 30 days from the date of the Building Commissioner's determination. Rules of Procedure of Board of Zoning Appeals of the City of Indianapolis, Art. I, ¶ 6.
8. If constructive notice by publication is not sufficient, actual notice might be secured by requiring applicants for building permits to send a form notice to adjacent property owners within an area of notice fixed by the Building Commissioner. McGoldrick, Grauband and Horowitz, "Building in New York City" (1944) 258.
9. Common councils pursuant to statute may declare that buildings erected in violation of the zoning ordinance are common nuisances and may be abated by injuction. Ind. Stat. Ann. (Burns, 1933) § 48-2306. See n. 5 supra.
10. Judicial review by certiorari from the board to the court is provided by statute. Ind. Stat. Ann. (Burns, 1933) § 48-2305. This provision which expressly prohibits trial de novo on certiorari, would become a dead letter if adjacent property owners, having been adversely ruled against by the board, could secure a trial de novo by applying to the court for injunction.
11. The elimination of injunctive relief would not prejudice the rights of adjacent property owners since the statute provides that on appeal to the board all work on the premises concerned shall be stayed. Ind. Stat. Ann. (Burns, 1933) § 48-2304. Also, the statute providing certriorari to the court from the board allows the court on application to stay all work until final determination of the cases is made. Ind. Stat. Ann. (Burns, 1933) § 48-2305.

1. Ill. Laws 1935, p. 716, §1: "It shall be unlawful for any person . . . to file (or) threaten to file . . . any pleading . . . seeking to recover upon any civil cause of action based upon alienation of affections, criminal conversation, or breach of contract to marry . . . "

reversed and remanded. The act is unconstitutional for inadequacy of its title.[2] Even if the title were adequate, the act would be invalid, since "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 . . . "[3] *Heck* v. *Schupp*, 68 N.E. (2d) 464 (Ill. 1946).

The act made the filing of "Heart Balm" actions unlawful but did not formally abolish the rights themselves.[4] The Illinois court, instead of ruling that the act denied due process by precluding a test of its constitutionality,[5] considered the penalty for bringing the actions only insofar as it affected the adequacy of the act's title.[6]

In declaring the act in violation of the "remedy clause," the court took a position which seems calculated to discourage the enactment of more perfect legislation in the future. The court retains the power of entertaining an action, despite a statute, if "No reason appears (to the court) why . . . such rights should not have their day in court."[7] In 1943 the same court upheld the Auto Guest Act which limited guests' right of recovery for personal injury to cases of gross negligence or wilful misconduct.[8] The court said there that the legislative exercise of police power over lives, health, property, morals, etc. is not limited by precedent. Legislation must only (1) reasonably tend to correct some evil and (2) not violate any positive mandate of the constitution.[9] It is submitted that if the "remedy clause" was not violated in that case, it was not violated by the present statute. The usual argument is that in the Auto Guest and similar statutes, the *entire* remedy was not taken away—that a remedy still remains in cases involving gross negligence or wilful misconduct. But what happened to the remedy for "ordinary" negligence? It is obvious that such a remedy existed at common law and that the statute abolished that *entire* remedy.

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2. Ill. Const. Art. IV, §13 provides in part that no act shall embrace more than one subject, which shall be expressed in the title.
3. Ill. Const. Art. II, §19. Such provisions are common in state constitutions: e.g., Ind. Const. Art. I, §12; Mont. Const. Art. III, §6; Ohio Const. Art. I, §16. Hereafter, these provisions shall be referred to as the "remedy clause."
4. Of the fourteen other states with "Heart Balm" legislation, all formally abolished the remedies. These statutes have been held constitutional. Of these, however, only New Jersey upheld the section rendering the filing of such actions unlawful. Bunten v. Bunten, 15 N.J. Misc. 532, 192 Atl. 727 (Sup. Ct. 1937).
5. The court might logically have chosen this course, considering Ex Parte Young, 209 U.S. 123 (1908) and Pennington v. Steward, 212 Ind. 553, 10 N.E.(2d) 619 (1937).
6. Considering the purpose of Art. IV, §13 (to prevent surprise and log-rolling) and the conflicting lines of cases in Illinois, the holding that the title was unconstitutional may be open to doubt. Compare People v. Hoffman, 322 Ill. 174, 152 N.E. 597 (1926) and cases cited therein, with Kasch v. Anders, 318 Ill. 272, 149 N.E. 275 (1925) and cases cited therein.
7. Principal case at p. 466.
8. Clarke v. Storchak, 384 Ill. 564, 52 N.E.(2d) 229 (1943).
9. Fenske v. Upholsterers' Internat. Union, 358 Ill. 239, 193 N.E. 112 (1934) (upholding Anti-Injunction Act) used similar reasoning.

Other states with a similar "remedy clause" have upheld compulsory vaccination laws,[10] sterilization laws,[11] prohibition laws,[12] and other statutes which take away rights, correlative duties, and the attendant remedies.[13] "Rights of property which have been created by the common law cannot be taken away without due process;[14] but the law itself, as a rule of conduct, may be changed at the will, or even the whim of the legislature . . . "[15] If the legislative invasion of personal or property rights is reasonable, necessary and just, the constitution is not violated.[16] It is submitted that the line of cases holding that the legislature cannot completely abolish an existing common law remedy can be rationalized on the ground that arbirtrary or unreasonable legislation was involved.[17] A very substantial portion of all legislation concerns subject matter not previously regulated by statute. It is essential, in order to prevent social and economic stagnation, that the legislature be permitted to regulate new fields. Numerous means are ordinarily available by which the legislature might attempt to solve social problems as they arise,[18] but the choice of means is for the legislature, not the courts. The legislature must not be shackled by judicial precedent to the extent that a constituional amendment is necessary each time it desires to effectively remedy a newly developed

10. Comm. v. Jacobson, 183 Mass. 242, 66 N.E. 719 (1903).
11. Buck v. Bell, 143 Va. 310, 130 S. E. 516 (1925).
12. Swierczek v. Baran, 324 Ill. 530, 155 N.E. 294 (1927) (upholding statute which removed right to possess liquor and the attendant right of action for conversion for its wrongful taking.)
13. E.g., Sharp v. Producers' Produce Co., 226 Mo. App. 189, 195, 47 S.W.(2d) 242, 245 (1932), saying, "There can be no question as to the power of the Legislature to take away the common law rights and remedies of the husband in regard to his wife's services. The husband has no vested right arising out of a future tort." See also People v. Title & Mtge. Co., 264 N.Y. 69, 190 N.E. 153 (1934) (upholding mortgage moratorium law).
14. Referring to retroactive laws affecting vested rights.
15. Munn v. Ill., 94 U.S. 113, 134 (1876). Statements that no person has a vested interest in any rule of the common law are common in the reported cases. See 2 Cooley, "Constitutional Limitations" (8th ed. 1927) p. 754; Black, "Constitutional Law" (4th ed. 1927) p. 592.
16. Black op. cit. supra n. 15, at 594 and 603. To illustrate the degree of protection afforded against arbitrary legislative action by this doctrine of reasonableness, compare Comer v. Age Herald Pub. Co., 151 Ala. 613, 44 So. 673 (1907), with Hanson v. Krehbiel, 68 Kan. 670, 75 Pac. 1041 (1904).
17. E.g., Mattson v. Astoria, 39 Ore. 577, 65 Pac. 1066 (1901) (charter abolishing liability of city and city officials for negligence); Stewart v. Houk, 127 Ore. 589, 271 Pac. 998 (1928) (abolishing auto guests' right of recovery for even gross negligence and wilful misconduct); Rhines v. Clark, 51 Pa. 96 (1865) (giving individual, in effect, power of eminent domain.)
18. Concerning the "Heart Balm" actions, for example, the legislature might take away punitive damages, abolish the contract theory of damages in breach of promise actions, etc. Brockelbank, "The Nature of a Promise to Marry—A Study in Comparative Law" (1946) 41 Ill. L. Rev. 199; Hibschman, "Can 'Legal Blackmail' Be Legally Outlawed?" (1935) 69 U. S. L. Rev. 474.

evil. It is not here contended that the existing "Heart Balm" legislation is perfect or even desirable,[19] but if the legislatures are not unduly restrained by the judiciary, they can remedy statutory as well as common law ills.

HABEAS CORPUS

EXHAUSTION OF STATE REMEDIES IN INDIANA

Prisoner petitioned trial court for writ of error coram nobis, alleging that his conviction after plea of guilty violated constitutional guaranties of jury trial, right to counsel, and adequate time to prepare a defense. Upon hearing, writ was denied. In attempting an appeal, the papers were delayed in the state prison or the mails, arriving with the Clerk of the Indiana Supreme Court after the 90-day appeal period had expired. On petition for writ of habeas corpus, the federal district court assumed jurisdiction. Held: on appeal, petitioner had exhausted his judicial remedies in the state courts, and the federal district court properly assumed jurisdiction although the Attorney-General of Indiana offered to waive the 90-day rule of the Indiana Supreme Court. *Williams* v. *Dowd*, 153 F. (2d) 328 (C.C.A. 7th, 1946).

The opinion makes no reference to a requirement that the petitioner exhaust his remedy of habeas corpus in the Indiana courts before petitioning the federal district court. This is consistent with the decision of the same court in *Potter* v. *Dowd*,[1] although not with the dicta that it was not to be "a holding generally, that habeas corpus in Indiana is a futile thing and need not be resorted to before coming to a federal court."[2] Federal Courts thus have recognized in practice that the writ of habeas corpus is not the appropriate remedy for a person alleged to have been illegally convicted in the Indiana courts.[3]

District courts of the United States have jurisdiction by habeas corpus to discharge from custody one being restrained in violation of the federal Constitution.[4] But as a matter of judicial policy, federal courts interfere as little as possible with prosecutions in state courts,[5] using their discretion to require a convicted prisoner to exhaust his state remedies before proceeding in the federal courts.[6] Whether the peti-

19. For some of the injustices that might and do occur under the present laws, see Scharringhaus v. Hazen, 269 Ky. 425, 107 S. W.(2d) 329 (1937), and Brockelbank, "The Nature of a Promise to Marry—A Study in Comparative Law" (1946) 41 Ill. L. Rev. 199.

1. 146 F. (2d) 244 (C.C.A. 7th, 1944).
2. Id. at 247.
3. State ex rel. Dowd v. Superior Court of LaPorte County, 219 Ind. 17, 36 N.E. (2d) 765 (1941); State ex rel. Kunkel v. LaPorte Circuit Court, 209 Ind. 682, 200 N.E. 614 (1939); Stephanson v. State, 205 Ind. 141, 179 N.E. 633 (1933).
4. Rev. Stat. § 751 (1875), 28 U.S.C.A. § 451 (1928).
5. Ex parte Royall, 117 U.S. 241 (1886).
6. Ex parte Hawk, 321 U.S. 114 (1944); Ex parte Davis, 317 U.S. 592 (1942); Davis v. Dowd, 119 F. (2d) 338 (C.C.A. 7th, 1941); Stephan-