

**Criminal Conversation and Alienation of Affections--Loss of
Action Due to "Heart Balm" Law (Hanfgarn v. Mark, 274 N.Y. 22
(1937))**

St. John's Law Review

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making the statement are usually questions of fact for the jury.¹⁴ Since *Derry v. Peek*,¹⁵ courts have encountered difficulty in formulating any one principle that would be applicable to all cases. They have decided each case on its own peculiar facts and circumstances.¹⁶

The decision in the case at bar dismissing the complaint seems justified because the statements made to the plaintiff were mere opinions since: (1) plaintiff was himself an expert in violins and could not have relied on the superior knowledge of the seller and (2) he was in a position to draw his own conclusions from the documents presented and the complexity of the instrument. On the other hand, if the buyer had no knowledge concerning violins and relied solely on the vendor's statements, *a different situation would have been presented* and it would seem that the statements would be deemed representations.¹⁷

B. B.

CRIMINAL CONVERSATION AND ALIENATION OF AFFECTIONS—LOSS OF ACTION DUE TO "HEART BALM" LAW.—Plaintiff sued to recover damages for criminal conversation and alienation of affections of his wife, the acts alleged occurring subsequent to the enactment of Article 2-A of the New York Civil Practice Act.¹ The Appellate Division of the Second Department declared the statute to be unconstitutional on the ground that the legislature cannot validly abrogate a common law action without replacing it with an adequate substitute. On appeal, *held*, reversed. Quoting substantially from the report of *Fearon v. Treanor*,² the court ruled that the legislature

¹⁴ 6 ENCYCLOPEDIA OF LAW & PROCEDURE (Pop. ed. 1909); *Marshall v. Seeley*, 49 App. Div. 433, 63 N. Y. Supp. 335 (1st Dept. 1900).

¹⁵ L. R. 14 App. Cas. 337, H. L. (1889); *KERR, FRAUD & MISTAKE* (4th ed. 1910) 397, 400.

¹⁶ *Frank v. Bradley*, 42 App. Div. 178, 58 N. Y. Supp. 1032 (1st Dept. 1899); *Benedict Co. v. McKeage*, 201 App. Div. 761, 195 N. Y. Supp. 288 (3d Dept. 1922); *Brady v. Edwards*, 35 Misc. 435, 71 N. Y. Supp. 972 (1901); *Jackson v. Collins*, 39 Mich. 557 (1878); *Hirschberg Optical Co. v. Michaelsen*, 1 Neb. 137, 95 N. W. 461 (1901); *People's Bank v. Romano*, 62 P. (2d) 445 (1936).

¹⁷ In *Powell v. Fletcher*, 45 St. R. 294, 18 N. Y. Supp. 451 (1892), it was held that where a dealer in violins is an expert and the buyer is not, a false and fraudulent opinion will make the vendor liable.

¹ N. Y. CIV. PRAC. ACT art. 2-A, § 61b: "The rights of action heretofore existing to recover sums of money as damages for the alienation of affections, criminal conversation, seduction, or breach of promise to marry are hereby abolished."

² *Fearon v. Treanor*, 272 N. Y. 268, 5 N. E. (2d) 815 (1936) (declaring constitutional that part of Section 61b abolishing remedies for seduction and breach of promise to marry).

has plenary powers in dealing with the subject of marriage,³ that marriage is not a civil contract within the meaning of the Federal Constitution,⁴ and that in the instant case the legislature has not acted arbitrarily or unreasonably but has validly exercised its police power which is above constitutional inhibitions.⁵ *Hanfarn v. Mark*, 274 N. Y. 22, 8 N. E. (2d) 47 (1937).

At early common law a wife, in relation to her husband, was regarded as a servant or dependent rather than an equal and was expected to look to him for protection against wrongs at the hands of others.⁶ The husband looked only to himself for protection against interference with the family rights, his usual remedy being the infliction of personal chastisement upon his wife.⁷ At the time, this condition was not only tolerated but condoned by the courts.⁸ Gradually, as legal principles became modified, the civil remedies for alienation of affections and criminal conversation were resorted to rather than the harsher but perhaps more efficacious remedy of personal violence.⁹ The form of the remedy was a special action on the case by the husband against one who should seduce his wife or entice her away from him,¹⁰ the ground of such action being the infliction of some one or more of the following injuries: (1) dishonor of the marriage bed; (2) loss of the wife's affections;¹¹ (3) loss of the comfort of the wife's society; (4) total or partial loss of the wife's services; and (5) the mortification and shame which always accompanies this domestic wrong. The action for seducing the wife away from the husband was by no means confined to the case of improper or adulterous relations;¹² but it extended to all cases of wrongful interference in

³ *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723 (1888).

⁴ U. S. CONST. Art. I, § 10 (prohibiting states from impairing the obligation of contracts).

⁵ *Silver v. Silver*, 280 U. S. 117, 122 Sup. Ct. 57, 58 (1929).

⁶ COOLEY, TORTS (3d ed. 1906) 464.

⁷ *State v. Rhodes*, 1 N. C. 453 (1845).

⁸ *Poor v. Poor*, 8 N. H. 307 (1836) ("when the wife is ill-treated on account of her own misconduct, her remedy is in a reform of her manners").

⁹ *Carpenter v. Commonwealth*, 92 Ky. 452, 18 S. W. 9 (1892).

¹⁰ *Ferguson v. Smethers*, 70 Ind. 519 (1880) ("Recovery may be had for loss of *consortium*, implied in crim. con., whether the intercourse is with or against her will and although no loss of service results"); *Wales v. Miner*, 89 Ind. 118 (1883) ("Where the gist of the action is crim. con. no recovery can be had for loss of service * * * unless the crim. con. is proved"); *Wood v. Matthews*, 47 Iowa 409 (1877) ("There must be proof of actual marriage to maintain the action").

¹¹ In *Heermance v. James*, 47 Barb. 120 (N. Y. 1866), an action was sustained by a husband against one who was alleged to have poisoned and prejudiced the mind of his wife against him, alienated her affections, counseled and aided her to commence proceedings for divorce, whereby she refused to recognize or receive him as her husband, though she did not abandon him.

¹² *Willis v. Bernard*, 8 Bing. 376 (C. P. 1832) ("The wife's letters or statements may be proved to show the previous state of their relations and her feelings towards her husband"); *Gilchrist v. Bale*, 8 Watts 355, 34 Am. Dec. 469 (1839); *Palmer v. Crook*, 7 Gray 418 (Mass. 1856); *Holtz v. Dick*, 42 Ohio St. 23 (1884).

the family affairs of others whereby the wife was induced to leave the husband, or so conduct herself that the comfort of the married life was destroyed.

Today this right of action no longer exists in view of the *Hanf-garn* and *Fearon* cases and the fact that the Supreme Court of the United States has recently decided that no substantial federal question is involved.¹³ Thus the constitutionality of Article 2-A may be regarded as definitely established insofar as it concerns the abolition of "heart balm" suits. "This does not mean that husband and wife are no longer entitled to mutual chastity; the statute merely takes away the right of action."¹⁴ It will be interesting to note if the courts will once more take cognizance of the remedies employed by outraged husbands during the early common law.

R. J. M.

CRIMINAL LAW—MANSLAUGHTER IN THE SECOND DEGREE—
WHAT CONSTITUTES CULPABLE NEGLIGENCE.—The defendant was indicted for manslaughter in the second degree¹ for having with culpable negligence smoked and handled a cigarette so as to set fire to a dwelling, causing the death of one of the occupants thereof. The evidence that was presented to the grand jury showed that the defendant, after drinking three bottles of beer, fell asleep while smoking a cigarette. He was later aroused by smoke and heat and ran to the street leaving his door open and failing to warn any other occupants of the premises. The defense moved to dismiss the indictment on the ground that the legal evidence received by the grand jury was insufficient to support the indictment. *Held*, motion granted, with leave to the district attorney to resubmit the case to the grand jury. Culpable negligence is something more than the slight negligence necessary to support a civil action for damages.² *People v. Hoffman*, 162 Misc. 677, 294 N. Y. Supp. 444 (1937).

The facts of the instant case presented to the court another opportunity to discuss the degree of negligence required to constitute

¹³ May 24, 1937—Supreme Court dismissed an appeal by Catherine Fearon challenging the constitutionality of Article 2-A of the Civil Practice Act; October 1, 1937—Lawrence Hanfgarn filed a petition with the Supreme Court to have Article 2-A declared unconstitutional (motion pending).

¹⁴ EDGAR AND EDGAR, LAW OF TORTS (3d ed. 1936) 148.

¹ PENAL LAW § 1052: "Such homicide is manslaughter in the second degree, when committed without a design to effect death: 3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this article, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree." (Italics supplied.)

² *People v. Angelo*, 246 N. Y. 451, 159 N. E. 394 (1927); *State v. Goetz*, 83 Conn. 437, 76 Atl. 1000 (1910).