

**Penal Provisions of the New "Heart Balm" Legislation:  
Constitutionality of Sections 61e and 61g of the New York Civil  
Practice Act**

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## PENAL PROVISIONS OF THE NEW "HEART BALM" LEGISLATION

### CONSTITUTIONALITY OF SECTIONS 61e AND 61g OF THE NEW YORK CIVIL PRACTICE ACT

THE recently enacted Article 2-A, of the New York Civil Practice Act<sup>1</sup> passed by the New York Legislature in March, 1935, purporting to abolish suits brought for the recovery of damages arising from breach of promise to marry, alienation of affections, criminal conversation, and seduction, has been the subject of constitutional controversy in several articles and a few cases considered by the courts since the passage of the Act.<sup>1a</sup> These discussions in the main have dealt with the power, or lack of power, in the legislature to abolish and prohibit all remedies for the enforcement of rights of action well established and founded in the common law. Some of these articles hold that these rights and liabilities are so guarded under state and federal constitutions, that they cannot be abolished by legislative enactment,<sup>1b</sup> while others hold

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<sup>1</sup> N. Y. CIVIL PRACTICE ACT (1935) §§ 61a to 61i, added by N. Y. Laws 1935, c. 263.

<sup>1a</sup> OHIO LAW REPORTER, April, 1935, reprinted in N. Y. L. J., April 5, 6, 1935, at 1732, 1756; (1935) 33 MICH. L. J. 979; (1935) 49 U. S. L. REV. 474; (1936) 5 FORDHAM L. REV. 63; (1936) 5 BKLYN. L. REV. 196; cases *infra* notes 2a to 2e.

<sup>1b</sup> Hibschman, *Can "Legal Blackmail" Be Legally Outlawed?* (1935) 49 U. S. L. REV. 474. After a brief inquiry into the nature and history of the actions and remedies sought to be abolished the author discusses the cases holding that all remedy cannot be abolished and distinguishes the employer's liability and workmen's compensation cases on the basis that they left an adequate remedy. He then concludes that "In the light of all these general statements of principle and of the cases cited and discussed above, though one cannot afford to be dogmatic, the conclusion seems inevitable that the legislative power to deal with remedies does not extend to the complete abolition of common-law rights and remedies. Statutory remedies may evidently be abrogated without the setting up of any substitutes, except where rights of action have already accrued, or where they existed at the time of the adoption of a state constitution and are deemed to be within the purview of its provisions relative to remedies and due process of law. But common-law rights and remedies are protected against total legislative extinction both by the Fourteenth Amendment and by the due process and remedy for every injury clauses of the respective state constitutions."

Myers, *Validity of Statutes Prohibiting Breach of Promise and Alienation Suits*, OHIO LAW REPORTER, April, 1935. A direct and definite attack on the constitutionality of this type of legislation, not considering the penal features, but only the power of the legislature to deprive one of all remedy for a breach of a duty recognized at common law. The author says: "The substantive law

that no vested rights are impaired and that the legislature is free to change or abolish any and all remedies for a wrong to be committed in the future.<sup>1c</sup>

Few if any of these authorities have discussed the force and validity of the penalties provided in the Act.<sup>2</sup> In *Hauteferuille v. Miault*<sup>2a</sup> Judge Knox felt bound to recognize the declared policy of the state as embodied in the statute and granted defendant's motion to dismiss. In *Waworzin v. Rosenberg*<sup>2b</sup> the court side-stepped the issue of constitutionality entirely by holding that the statute did not apply to a cause of action brought in the federal court, the territorial limits of which lay within New York, if the wrongful acts

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of rights and duties concerning a particular subject cannot be entirely destroyed and abrogated by the legislature under the cloak of its police power, without the body offering some adequate substitute in place of the rights destroyed—as witness the cases under the various workmen's compensation acts, which acts are police regulations of the state. The rights and duties may be increased and enlarged from what they were at common law, but to destroy an existing common-law right, or to take away all remedies for its enforcement, is to violate the express provisions of both state and federal constitutions, so as to leave those provisions devoid of meaning and without proper safeguard."

<sup>1c</sup> Legis. (1936) 5 Bklyn. L. Rev. 196, in which the author welcomes the new legislation as a recognition "at last accorded the practical inefficacy of theoretical expressions pervading the field of these actions." After a detailed study of the defects existing in the abolished remedies the author concludes with the question of constitutionality, pointing out that the authorities who question the right of the legislature to bar these remedies base their arguments on the right of a person to secure redress for a compensable injury. But says the author, "The damages secured by the actions for alienation of affections, criminal conversation and breach of promise to marry do not fall into this category. They are basically punitive damages. It seems scarcely questionable that the legislature can abolish such damages. Secondly, the particular subjects encompassed with the statute make legislative control more necessary and desirable. The state is a party peculiarly interested in the institution of marriage; so much so, that public interests overshadow private rights. Interests of morality and greater faith in our marriage institutions (which publicity of the success of the above actions has done much to undermine) dictate the control exercised in the present instance."

<sup>2</sup> Kane, *Heart Balm and Public Policy* (1936) 5 Fordham L. Rev. 66, does not consider the constitutionality of the legislation at all, but attacks its wisdom concluding that "High pressure of 'pell-mell' legislation, of doubtful constitutionality, has not contributed much to the solution of economic problems, and we suspect, will play little part on any constructive effort in the social order, to determine the true balance between traditional legal concepts and modern psychological and sociological theories."

Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions* (1935) 33 Mich. L. Rev. 979 and 10 Wis. L. Rev. 417, does not consider the constitutionality of the statutes but has a fine history and analysis of the nature of these causes of actions together with a study of the provisions of the "Heart Balm" legislation in different jurisdictions.

<sup>2a</sup> U. S. D. C., Nov. 9, 1935.

<sup>2b</sup> 12 F. Supp. 548 (E. D. N. Y. 1935).

of the defendant were committed within New Jersey. In *Vanderbilt v. Hegerman*<sup>2c</sup> the only question presented to the court was whether or not the sixty-day period of limitations set by the statute for the bringing of actions that had already accrued was reasonable. The court held that it was in "view of the purpose of the act and the presumption which prevails as to its constitutionality." The court did, however, intimate very strongly that the question as to the constitutionality of the statute so far as it related to causes of action arising subsequent to its enactment was not without grave doubt.<sup>2d</sup> The question as to the validity of the penal provisions was not raised nor did the court discuss it. And in *Hanfgarn v. Mark*<sup>2c</sup> Justice Faber held the statute unconstitutional, as far as it applied to a suit for alienation of affections, solely on the ground that the cause of action was of common law origin and "like the rights of action for libel, slander, assault and battery, negligence, or for recovery of debt, are beyond the power of the legislature to abolish utterly without supplying some reasonably adequate and efficient substitute." Here for the first time the question of the constitutionality of this statute was squarely put to the court. And for the first time we find a case which comes directly within the penal provisions of the Act, brought by an attorney and his client with courage enough and with strong enough convictions as to their respective rights to risk the threat of imprisonment, fine and, in the case of the attorney, disbarment, in order to test a statute of doubtful legality. The court in this case might well have discussed the power of the legislature to declare the bringing of such an action as this, unlawful and felonious, but the court, in a simple and direct opinion, limited itself to the discussion of the power of the legislature to abolish the remedy.

The penal provisions are found in Sections 61e and 61g. Section 61e<sup>3</sup> reads as follows:

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<sup>2c</sup> N. Y. L. J., Jan. 18, 1936, at 317.

<sup>2d</sup> "The right to life and liberty includes more than mere freedom from personal harm and actual physical restraint by the direct operation of enactments of the Legislature. A person may be deprived of life and liberty by the removal of those safeguards which restrain one individual from violating the personal rights of others." *Supra* note 2c.

<sup>2c</sup> N. Y. L. J., Feb. 29, 1936, at 1080.

<sup>3</sup> N. Y. CIVIL PRACTICE ACT (1935).

"It shall hereafter be unlawful for any person, either as a party or attorney, or an agent or other person in behalf of either, to file or serve, cause to be filed or served, or threaten to file or serve, or to threaten to cause to be filed or served, any process or pleading, in any court of the state, setting forth or seeking to recover a sum of money upon any cause of action abolished or barred by this article, whether such cause of action arose within or without the state."

Section 61g<sup>4</sup> provides:

"Any person who shall violate any of the provisions of this article shall be guilty of a felony which shall be punishable by a fine of not less than one thousand dollars, nor more than five thousand dollars, or by imprisonment for a term of not less than one year nor more than five years, or by both such fine and imprisonment, in the discretion of the court."

The legislature in all probability passed the above quoted sections for a two-fold purpose. Editorials and comments in newspapers and periodicals about the time of the passage of this Act were attacking these causes of actions as perfect instruments for "legalized blackmail."<sup>5</sup> This opinion is reflected in Section 61a wherein the legislature declares the public policy of the state.<sup>6</sup> One reason and perhaps the pri-

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<sup>4</sup> N. Y. CIVIL PRACTICE ACT (1935).

<sup>5</sup> Hibschan, *Can "Legal Blackmail" Be Legally Outlawed?* (1935) 49 U. S. L. Rev. 474. "Reading the editorials and comments in current newspapers and periodicals about the time of the adoption of these new laws, one would conclude that there had seldom been an actual contract of engagement to marry that was unjustifiably broken, causing damage to the offended party, or a malicious intrusion on the theretofore harmonious relationship of a husband and wife. The experience of practicing lawyers is decidedly otherwise." Kane, *Heart Balm and Public Policy* (1936) 5 FORDHAM L. REV. 63, 66. " \* \* \* there are respectable opinions to the effect that undue newspaper publicity has caused the public to ignore the private and public benefits of the actions discussed and has given to isolated cases of abuse the appearance of universality." Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions* (1935) 10 WIS. L. REV. 417.

<sup>6</sup> "The remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract 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

many one was, therefore, to forestall any future efforts at blackmail along these lines by unscrupulous persons who might still find the threat of one of these causes of actions, together with the attending publicity, embarrassment, humiliation and pecuniary damage, a helpful instrument for the extraction of funds from their victims, even though the cause of action itself had been abolished. The second and more apparent purpose is to prevent a test of the constitutionality of the new law.<sup>7</sup>

It is this second unexpressed but quite obvious purpose that raises grave doubts as to the constitutionality of the enactment, wholly apart from those doubts already expressed on the subject. It is this purpose which raises the very important question "Are the requirements of due process and equal protection of the laws met where the right of judicial review of a legislative enactment is absolutely forbidden or the enactment is made subject to review only on the condition that if the party who is contesting its validity is unsuccessful he shall be subject to long imprisonment, heavy fines, or both?"

An examination of the authorities will lead us to a negative answer. Magna Carta, that great guaranty of freedom, which has become incorporated in the Bill of Rights of our federal and state constitutions, provides, "We will sell to no man, we will deny to no man, nor defer right or justice."<sup>8</sup> Black in his handbook on American Constitutional Law<sup>9</sup> speaking of this guaranty of free, prompt, and effectual justice, says, "although it is but seldom violated

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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 the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination."

<sup>7</sup> Kane, *Heart Balm and Public Policy*, *supra* note 5. "Section 61e provides that it shall be unlawful for any person either as a party or attorney to start or threaten to start any action seeking to recover a sum of money upon any cause of action abolished by the new law, and Section 61g provides that any person who violates any of the provisions of the law shall be guilty of a felony punishable by fine or imprisonment. I shall not discuss the propriety of the two latter sections. They seem to be almost unprecedented and their apparent purpose is to prevent a test of the constitutionality of the new laws."

<sup>8</sup> MAGNA CARTA art. 47.

<sup>9</sup> At 561, 2 (4th ed. 1927).

by the legislature or the courts, it is one of the most important and valuable principles of freedom. \* \* \* It is violated by a statute which forbids the maintenance of an action against a trade union or an association of employers for a tortious act committed by or on behalf of such union or association. *In re Opinion of the Justices*, 211 Mass. 618, 98 N. E. 337. On the other hand this guaranty is violated by a law which imposes heavy penalties or fines or other disastrous effects on the attempt to resist, by appeal to the courts, the enforcement of a statute deemed unjust or invalid, the effect being to deter persons concerned from asserting their opposition to it in good faith and thus in effect, denying them a remedy for their injuries.”<sup>10</sup>

The leading case on the subject is that of *Ex parte Young*<sup>11</sup> holding a railroad rate statute unconstitutional which fixes penalties for disobedience of the orders of the commission by fines so enormous and imprisonment so severe as to intimidate the corporations and their officers from resorting to the courts to test the validity of the rates. The court said: “If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. \* \* \* A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right, rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may, therefore, be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.”

In *Wadley Southern R. R. v. Georgia*<sup>12</sup> the court held

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<sup>10</sup> Citing *Washington Southern Nav. Co. v. Baltimore and Phila. Steam Boat Co.*, 263 U. S. 629, 44 Sup. Ct. 220 (1924); *Florida East Coast R. R. v. The State*, 79 Fla. 66, 83 So. 708 (1920); *Atlantic Coast Line v. Wilson and Toomer Fertilizer Co.*, 89 Fla. 224, 104 So. 593 (1925); *Bonnett v. Vallier*, 136 Wis. 193, 116 N. W. 885 (1908).

<sup>11</sup> 209 U. S. 123, 28 Sup. Ct. 441 (1908).

<sup>12</sup> 235 U. S. 651, 35 Sup. Ct. 214 (1915).

a statute under which heavy penalties were imposed upon a railroad company for violation of orders of the railroad commission, void under the Fourteenth Amendment to the United States Constitution, saying that the carrier could avail itself of the right of access to the courts to test the validity of the commission's orders only at the risk of having to pay the penalties. The court, after pointing out that the methods by which the "right of judicial review are secured vary in different jurisdictions," said: "But, in whatever method enforced, the right to a judicial review must be substantial, adequate and safely available; but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law."

The principle announced in the *Young* case was reaffirmed and approved in *Missouri Pacific R. R. v. Tucker*<sup>13</sup> which case is probably more in point for our present discussion as the appeal was not from the action of an administrative board but an appeal from an enactment of the legislature. Here the court held that the imposition by statute of the liability of \$500 liquidated damages for every charge by a common carrier in excess of the rates therein fixed for the shipment of oil between points in the state, took property without due process of law by heavily penalizing an unsuccessful appeal to the courts.

To the same effect and equally in point is *State v. Crawford*<sup>14</sup> in which the court held that the imposition of a fine of not more than \$1,000 or imprisonment for not more than one year, or both, for the violation of a statute forbidding the exaction of more than five cents for one continuous ride on a street car within any city or town was unconstitutional as denying to the railroad companies due process of law and the equal protection thereof because they could only have a hearing upon the constitutionality of the statute at the risk, if mistaken, of being subject to such heavy and excessive penalties as practically to foreclose to them the right to litigate such question.

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<sup>13</sup> 230 U. S. 340, 33 Sup. Ct. 961 (1913).

<sup>14</sup> 74 Wash. 248, 133 Pac. 590 (1913).

And in *Bonnett v. Vallier*<sup>15</sup> with reference to a tenement house act, the court said that the penalties involved in the regulation were so severe as to effectively intimidate property owners from resorting to the courts for redress or defense as to their honestly supposed rights. The court held these penalties highly unreasonable and of such a nature as to render the act void, irrespective of whether its other provisions would otherwise be valid. The court further said that to penalize good-faith resistance to the enforcement of a law by judicial interference is unreasonable and indefensible from any point of view; that it denies the equal protection of the laws, violates the constitutional guaranty to every person of a certain remedy in the law for all injuries to person and property and violates every principle of civil liberty.

From the above cases and others cited therein it is seen that the aim of some legislatures to frame their enactments with such cunning adroitness and to hedge them about with such savage and drastic penalties as to make it impossible to test the validity of such statutes in the courts, save at a risk no prudent man would dare to assume, has met with very little approbation from the courts.<sup>16</sup> An apt comment

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<sup>15</sup> *Supra* note 10.

<sup>16</sup> In the case of *DeWitt v. State*, 108 Ohio St. 513, 141 N. E. 551 (1923), the court upheld the constitutionality of a provision of that state's Workmen's Compensation Act imposing heavy penalties in the case of an unsuccessful review of the award of the compensation bureau. It is to be noted, however, that five of the seven judges were of the opinion that the provision was unconstitutional, but its constitutionality was upheld by reason of a provision in the state constitution that a statute shall be upheld if more than one of the judges are of the opinion that it is constitutional. One of the main reasons for upholding such penalizing provision, given by the two judges who were of the opinion that it was constitutional, was that the entire section of which the penalizing provision was a part had been upheld by a unanimous bench in the Supreme Court of the state, in the case of *Fassig v. State*, 95 Ohio St. 232, 116 N. E. 104 (1917); but as shown by the opinion of the majority in the *DeWitt* case, the court in the *Fassig* case did not pass on the constitutionality of the penalizing provisions, nor was it necessary for it to pass upon such a question, although the counsel did raise the point in argument, in order to obtain the court's view upon a mooted question. 39 A. L. R. 1181.

And in *Rail and River Coal Co. v. Yaple*, 236 U. S. 338, 35 Sup. Ct. 359 (1915), and in *Portland R. Light and P. Co. v. Portland*, 210 Fed. 667 (1914), the constitutionality of penal provisions were upheld upon the ground that the penalties were not so excessive or unreasonable as to come within the rule laid down in the *Young* case.

And in *Towhy Bros. v. Kennedy*, 295 Fed. 462 (C. C. A. 9th. 1924), writ of error dismissed without opinion for want of jurisdiction, 265 U. S. 575, 44 Sup. Ct. 636 (1924), a penal provision providing for the addition of 12%

upon the character of this type of legislation is found in the opinion of Mr. Justice Brewer in *Cutting v. Kansas City Stock Yards Co.*<sup>17</sup> At page 100 he states: "Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon failure to make good that claim or defence the penalty for such failure either appropriates all his property or subjects him to extravagant or unreasonable loss?" And again at page 102 he says: "It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all individuals or corporations and if extreme and cumulative penalties are imposed only after there has been a final determination to the validity of the statute the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."<sup>18</sup>

If courts are so ready to overthrow and declare invalid legislative enactments which indirectly prohibit or penalize appeals to judicial bodies for their interpretation, what hope can be held out for the validity of Sections 61e and 61g of the New York Civil Practice Act which so directly and unquestionably forbid and penalize the prosecution of any of

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interest to an employee's award under the Employer's Liability Act upon an unsuccessful appeal by the employer, was held as not burdening the right to appeal as to render the provision unconstitutional. But in *Arizona Eastern R. Co. v. Head*, 26 Ariz. 259, 224 Pac. 1057 (1924), the state supreme court held the same provision a violation of the 14th Amendment, and cited with disapproval the preceding case.

And in *State ex rel. Railroad Comm. v. Oregon R. and Nav. Co.*, 68 Wash. 160, 123 Pac. 3 (1912), the court held that there was no inhibition upon a state to impose penalties for disregard of its police regulations and that the extent of the penalties was a matter entirely within the control of the legislature. The court did not suggest the effect of the penalty as discouraging appeals to the courts and the following year in *State v. Crawford*, *supra* note 14, the same court held that a heavy penalty for violation of a railroad rate statute was a denial of due process and equal protection because it practically foreclosed the right to litigate the question.

<sup>17</sup> 183 U. S. 79, 22 Sup. Ct. 30 (1901).

<sup>18</sup> Although the question was not decided, as the case was decided on another point, still the opinion of Mr. Justice Brewer is cited with approval in the Young case.

the causes of actions sought to be abolished? How else can the constitutionality of Article 2-A be determined? The courts will not answer abstract questions of law. A real controversy must be presented. Therefore a person to whom one of these causes of action accrues, if he wishes a judicial determination of the right of the legislature to abolish his remedy so long established and recognized in the common law, must prosecute his action. And at what a risk! If the court should find that the legislature has acted within its constitutional limitations then he is liable to a fine not less than \$1,000 nor more than \$5,000; or imprisonment for a term not less than one year or more than five, or both, as a common felon. But even if he be willing to take the risk he must find an attorney who is willing to take the same risk with him for not only is the interested party subject to the penalties, but the attorney, whose sworn duty it is to protect and guard his client's rights, may not seek judicial interpretation of these rights if they fall within the forbidden class without subjecting himself to the same fine and imprisonment which faces his client with the additional threat of disbarment as a felon.

Is this due process of law? Is this equal protection of the laws? Obviously, it is not. The court in *Williams v. Village of Portchester*<sup>19</sup> speaking of the rights guaranteed by the constitution says: "In view of the great purposes of government and the understanding of the framers of our constitutional system, there can be no doubt that the intent of the constitutional provisions above cited<sup>20</sup> was to guaranty to every member of the state free access to the courts and of full opportunity to have judicial determination of all controversies which might involve his rights where such rights were the outgrowth of contracts or of violated duty. The purpose sought to be accomplished was to afford protection to all rights of mankind and it is not material that we should be able to say precisely what right is violated—whether of life, liberty or property; but any encroachment

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<sup>19</sup> 72 App. Div. 505, 76 N. Y. Supp. 631 (2d Dept. 1902).

<sup>20</sup> N. Y. CONST. art. I, § 1. "No member of the State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."

N. Y. CONST. art. I, § 6. "No person shall be \* \* \* deprived of life, liberty or property without due process of law."

upon the fundamental rights of the individual was to find a certain remedy in the law." Surely the guaranties of due process require that the acts of the legislature affecting the rights of person or property shall be subject to a review by the courts and to a judicial determination as to their validity. Black, speaking of the rights guaranteed by the Fourteenth Amendment, says: "And it is unlawful to prevent or penalize the resistance of persons or corporations to laws which they may deem injurious or oppressive, by visiting them, or their attempt to do so; with such excessive and ruinous penalties or such a multiplicity of prosecutions or such danger of heavy fines or imprisonment as to intimidate them or prevent them from seeking relief in the courts; this amounts to denying the equal protection of the laws."<sup>21</sup>

From a study of the cases it is apparent that although the courts are almost unanimous in their condemnation of legislative enactments which prohibit or penalize a judicial review, they are not entirely in accord in selecting the exact provision of the constitution which is violated. Some place the violation under the due process clause, others under the equal protection, and still others under both. The apparent conflict, or better still, inconsistency of the courts, suggests that there might still be another reason not found in the exact terms or clauses of the constitutions. A search for such a reason brings us quickly and unerringly to the doctrine of "separation of powers."

This fundamental principle of American constitutional jurisprudence, accepted both by the federal and state governments, is defined by Willoughby as follows:<sup>22</sup> "\* \* \* so far as the requirements of efficient administration will permit, the exercise of the executive, legislative, and judicial powers are to be vested in separate and independent organs of government." The value of this doctrine in protecting the people from arbitrary and oppressive acts on the part of those in power has never been questioned. And although the Federal Constitution does not contain any specific dis-

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<sup>21</sup> BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW (4th ed. 1927) 567, 568.

<sup>22</sup> 3 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES (2d ed. 1929) 1616.

tributing clause<sup>23</sup> it has never been doubted but that this doctrine was intended and does govern our system of government.<sup>24</sup> The principle of separation of power is, of course, not forced upon the states by the Federal Constitution.<sup>25</sup> Practically all of the states have, however, adopted constitutions with express distributing clauses or clauses similar to that found in the Federal Constitution providing that the executive power shall be in the executive officers, the legislative power in the legislature, and the judicial power in the courts.<sup>26</sup>

The power of the courts to refuse to apply legislative acts inconsistent with constitutional provisions, cannot, at this late date be doubted. Courts are jealous of their power and do not hesitate to protect it by declaring null and void any legislative enactment that threatens to interfere with their independence. In *State v. Morrill*<sup>27</sup> the Supreme Court of Arkansas declared: "The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to the courts by the constitution.

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<sup>23</sup> Its equivalent, however, is found in the clauses which provide that "all legislative powers herein granted shall be vested in a Congress of the United States," that "the executive power shall be vested in a President of the United States of America," and that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."

<sup>24</sup> Washington in his Farewell Address said: "The spirit of encroachment tends to consolidate the powers of all governments in one, and thus to create, whatever the form of government, a real despotism."

Madison wrote in the *Federalist* (No. 47): "The accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few or many, whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

John Adams wrote (1 Works 186): "It is by balancing one of these three powers against the other two that the efforts in human nature toward tyranny can alone be checked and restrained and any degree of freedom preserved."

Hamilton wrote in the *Federalist* (No. 48): "I agree that there is no liberty if the powers of judging be not separated from the legislative and executive powers."

And Webster said: "The separation of the departments so far as practicable, and the preservation of clear lines between them is the fundamental idea in the creation of all our constitutions, and doubtless the continuance of regulated liberty depends on maintaining these boundaries."

<sup>25</sup> *Calder v. Bull*, 3 Dall. 386 (U. S. 1798). *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67 (1908), in which the court said: "We shall assume that when, as here, a State Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned."

<sup>26</sup> N. Y. CONST. art. III, § 1; art. IV, § 1; art. VI, § 1.

<sup>27</sup> 16 Ark. 384 (1855).

If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government; and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the federal and state institutions, and a favorite theory in the government of the American People."

So in the cases where the legislature has imposed heavy fines and penalties upon the right to appeal to the courts for judicial interpretation, the legislature is interfering not only with the rights of the individual, but indirectly with the power of the courts, and the courts have been quick to declare such enactments unconstitutional, and although they have based their judgment officially on the violation of some specific clause of the constitution, this thought could not be far from the judicial mind. For instance in *State ex rel. Dushek v. Watland*,<sup>28</sup> a very well considered case, in which the court correlated the cases on this subject, the court said: "In passing it may be noted that the Constitution of this state creates the same three co-ordinate departments of government, and makes the same distribution of governmental powers among such departments as does the Federal Constitution."

These courts have, however, only dealt with statutes which indirectly and subtly interfered with their power. Can there be any doubt then of the fate of the New York statute in question and similar statutes adopted in other states which directly and unquestionably forbid and make it a crime to bring an action to test their constitutionality? Surely such legislation encroaches upon the powers of the judicial department. Surely such legislation tends to draw within the legislative department all the powers of government. Surely that type of legislation tends to destroy the system of checks and balances found in our federal and state constitutions.

If the legislature can abolish the remedies for breach of promise to marry, alienation of affections, criminal conversation and seduction, and make it a criminal offense to ask for a judicial determination of its power to do so, what is to stop it from adopting the same procedure as to other com-

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<sup>28</sup> 51 N. D. 710, 201 N. W. 680 (1924).

mon law remedies both for injuries to person or property, in fact any remedy that may be abused by unscrupulous persons. For if the courts uphold the present action of the legislature, it shall certainly be a simple and expedient matter to abolish a cause of action into which any abuses have crept. Certainly this requires very little legislative ability or ingenuity and it effectively abolishes the abuses, even if in so doing it incidentally abolishes the honest and legitimate claimant's right to recompense for an injury done to him. Of course such action might be interpreted by some as a confession on the part of the legislature of its inability to cope with blackmail, perjury and fraud.

But, to return to our original thesis, if Sections 61e and 61g are declared unconstitutional, as we think they must, another interesting question arises. If the courts find these sections invalid will they declare the whole of Article 2-A invalid or will such action have no effect on the remaining provisions of the Act? The final determination of the question depends, of course, upon judicial determination, for it is the judiciary which must in final analysis interpret the legislative intent to determine whether the Act may still be enforced without the objectionable sections or whether the legislative purpose shall be so frustrated as to make the whole Act a nullity. It is interesting to note, however, that the Act in question does contain the very popular and fashionable "saving clause" so universally employed today to the effect that if any part of the Act is declared unconstitutional the remainder shall not be effected.<sup>28a</sup> This in itself is strong indication of the legislative intent.

But it is interesting to note that in the case of *Ex parte Young*<sup>29</sup> the court said: "We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and imprisonment as the result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face without regard to the insufficiency of those rates." And in *Bonnett v. Vallier*<sup>30</sup> the court said:

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<sup>28a</sup> N. Y. C. P. A. § 61h.

<sup>29</sup> 209 U. S. 123, 28 Sup. Ct. 441 (1908).

<sup>30</sup> *Supra* note 15.

“ \* \* \* where a police regulation is sought to be made effective by danger of such punishment for violations thereof and such burdens upon unsuccessful effort even to test its validity as to intimidate parties affected thereby from resorting to the courts in the matter, as to practically prohibit them from seeking any judicial remedy for supposed wrongs inflicted upon them, denies to them equal protection of the laws and renders the whole act void irrespective of whether its provisions would otherwise be valid.”<sup>31</sup>

But it is far more interesting to re-read Section 61a,<sup>32</sup> wherein the legislature has declared the public policy of the state, and to note how many of the purposes of the legislature would be frustrated by a judicial decision adverse to Sections 61e and 61g. The section declares that the causes of actions in question have been subject to “grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary loss to many persons wholly innocent<sup>33</sup> and free of any wrongdoing.” If it is no longer illegal to bring a suit or to threaten to bring a suit surely these persons shall be subject to the same annoyance, embarrassment and humiliation, and in many cases to pecuniary loss. The section further states that these remedies have “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 the public

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<sup>31</sup> The court quoted as its authority for this proposition *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441 (1908).

<sup>32</sup> *Supra* note 6.

<sup>33</sup> “Further considering the matter of extortion or blackmail, we may assume from the declaration of policy contained in Section 61a of the New York statute that the ‘grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing’ occurred in cases of breach of promise where there was no actual engagement, where the circumstances would not justify an inference of an intention to marry, and where there was no seduction, or in the alienation and criminal conversation cases, where there was no actual enticement or misconduct of the erring spouse and the alleged paramour. Only in such cases would the defendant be *wholly* innocent and free of *any* wrongdoing. Many practicing lawyers who have prosecuted and defended breach of promise cases, have known only one *wholly* innocent defendant, and that one was our dear old plump, respectable friend, Mr. Pickwick, in the action brought against him by the ‘unimpeachable’ Mrs. Bardell, and one must conclude that even he might have been more circumspect.” Kane, *Heart Balm and Public Policy*, *supra* note 5.

policy of the state that the best interests of the people of the state will be served by the abolition of such remedies." But if persons are still permitted to bring suit or to threaten to bring suit the same vehicles for the commission of crime and fraud could be just as easily found and employed by these unscrupulous persons.

HAROLD V. DIXON.