isterial or executing officer has knowledge of the facts rendering the warrant void for want of jurisdiction.[89] But where the want or excess of jurisdiction appears on the face of the warrant it affords no protection to the executing officer.[90]

WILLIAM T. CREME

BREACH OF PROMISE

ANTI-HEART BALM LEGISLATION

In an action begun in the New York courts the plaintiff sued to recover damages for the breach of the defendant's promise to marry and for seduction. The New York Court of Appeals held that the plaintiff could not recover inasmuch as the legislature, in a valid exercise of their power, had abolished these causes of action. *Fearon* v. *Treanor*, 272 N.Y. 268, 5 N.E. (2d) 815 (1936).

At the present time six states including New York (Civil Practice Act, Section 61-a *et seq* Laws 1935, c. 263) have passed what has come to be known as anti-heart balm legislation. This list includes Indiana (Ind. Laws 1935, Ch. 208), Michigan (Public Act 1935, No. 127), Pennsylvania (Pa. Laws 1935, Ch. 263), New Jersey (N.J. Stat. Ann. 1935, par. 163-411 to 163-413), and Illinois (Ill. Rev. Stat. Ch. 38, par. 58(1)-58(6), 1935). These statutes are all substantially the same in character, sec. 61-b of the New York law saying, "The rights of action heretofore existing to recover sums of money as damages for alienation of affections, criminal conversation, seduction, or breach of contract to marry are hereby abolished." The Illinois Statute is the same in this respect although it does not mention the cause of action for seduction (apparently because the legislature was fearful as to the effect this would have upon the parents' cause of action for seduction of a minor daughter). In addition, the Illinois Statute does not purport to abolish the causes of action as such; rather, it makes it unlawful and a felony to file, cause to be filed, threaten to file, or threaten to cause to be filed any pleading or papers of this sort.

The passage of these statutes had been urged for several years prior to the adoption of the first of its kind in March, 1935, by Indiana. The New York legislature advanced as the underlying reasons for the statute's passage that the actions had been made the agency for the commission of crime and the perpetration of frauds. Also, that the

[89] *People* v. *Warren*, 5 Hill (N.Y.) 440 (1843).

[90] *Sprague* v. *Birchard*, 1 Wis. 457, 60 Am. Dec. 393 (1853); *Gurney* v. *Tufts*, 37 Me. 130, 58 Am. Dec. 777 (1853); *People* v. *Warren*, *supra*, note 124; *McDonald* v. *Wilkie*, 13 Ill. 22 (1851).

remedies for the actions had been subjected to grave abuses, thereby inflicting irreparable injury on wholly innocent persons.

The case of *Fearon* v. *Treanor, supra,* is the first decision of a court of last resort as to the validity of the legislation. Prior to and at the time of the adoption of these statutes various writers expressed the opinion that such a law would be unconstitutional. Hibschman, *Can "Legal Blackmail" Be Legally Outlawed?* 69 U.S. Law Rev. 474 (1935); Meyers, *Validity of Statutes Prohibiting Breach of Promise and Alienation Suits,* 2 Ohio Op. 146 (1935). But see 3 Univ. of Chi. L. Rev. 68 (1935). The constitutional objection to such legislation is on the supposition that it violates the due process clause of the 14th Amendment to the U. S. Constitution. In addition, state constitutions have been made the bases for attacks. Most state constitutions have the same general provision that is set out in Art. I, Sec. 16 of the constitution of Ohio, namely, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Relying on provisions of this type it has been said that when the legislature takes away a common law right or cause of action it must in turn give some substitute. This contention is supported in adjudications on the so-called guest statutes. These acts were held unconstitutional at first because they went so far as totally to deprive a guest in an automobile of his cause of action for negligence against the driver. *Stewart* v. *Houk,* 127 Ore. 589, 271 Pac. 998, 61 A.L.R. 1236 (1928); *Coleman* v. *Rhodes,* 159 Atl. 649, Del. Super. (1932). Later, however, when the statutes were amended so as to allow a plaintiff a remedy where the driver had been *grossly* negligent the courts upheld their validity. *Silver* v. *Silver,* 108 Conn. 371, 143 Atl. 240, 65 A.L.R. 943 (1928), aff'd in 280 U.S. 117, 65 A.L.R. 939 (1929); *Hazzard* v. *Alexander,* 173 Atl. 517 (Del. 1934).

In the principal case the court had no trouble in upholding the abolition of the cause of action for seduction. That right of action did not exist in favor of a seduced girl at common law. *Weaver* v. *Backert,* 2 Pa. St. 80, 44 Am. Dec. 159 (1845); *Colby* v. *Thomas,* 99 Misc. Rep. 158, 163 N.Y.S. 432 (1917); *Erwin* v. *Jones,* 192 Mo. App. 326, 180 S.W. 428 (1915); *Woodward* v. *Anderson,* 9 Bush (Ky.) 624 (1873). As regards the rest of the act the court felt that the question was not free from doubt. However, it held the act to be a valid exercise of the police power, having in mind the general welfare of the public. The fact that leigslatures have always exercised very broad powers in dealing with the marital relation was probably the greatest single influencing factor in allowing this change.

Much can be said for the view taken by the New York court and its willingness to give support to a law which seems socially desirable. Mutual incompatability has never, in itself, been regarded as a sufficient excuse in the eyes of the law as to why the parties should not perform their promises to marry. Yet, as said by Prof. Schouler in 7 So. Law Rev. 65 (1882) and quoted in the principal case and also in *Goddard* v. *Westcott*, 82 Mich. 180, 46 N.W. 242 (1890), "We view the marriage engagement as a period of probation, so to speak, for both parties—their opportunity for finding one another out; and if that probation results in developing incompatability of tastes and temperament, coldness, suspicion, and incurable repugnance of one to the other, though all these matters impute no vice to either, nor afford matter for judicial demonstration, duty requires that the match be broken off."

In another respect the law, as developed, has treated the breach of a promise to marry in a light different from that of an ordinary contract. It has allowed the tort theory of damages as opposed to the contract theory to be applied. As a result, punitive damages are allowable and a properly coached plaintiff can very often secure the sympathy of the jurors and recover a sum entirely out of line with the merits of her case. *Churan* v. *Sebesta*, 131 Ill. App. 330 (1907); *Hickey* v. *Kimball*, 109 Me. 433, 84 Atl. 943 (1912); *Baumle* v. *Verde*, 150 Pac. 876 (Okla. 1915); *Stacy* v. *Dolan*, 88 Vt. 369, 92 Atl. 453, Ann. Cas. 1917A. 650 (1914). This vice has been the basis for the contention by some writers that the whole problem could be effectively solved by limiting the sum recoverable to the amount of damages actually incurred. The difficulty with this proposition is that many times it is the news value of the suit itself that is used as the device for extortion and blackmail. The suit is scandalous, and in many instances large sums can be forced from the defendant by the mere threat of an action. Innocent or guilty, the defendant is irreparably damaged. This would seem to negative the contention that a limitation on the amount of recoverable damages would solve the problem.

Statutes of the type under discussion will deprive some deserving plaintiffs of all remedy. However, when it is recalled that the marriage engagement is a *social* engagement in which the parties probably never contemplated any legal status other than marriage to obtain, this seemingly harsh result appears to be minimized. Marriage is a legal status but it follows the engagement. During the pendency of the engagement the parties generally look upon their rights and duties toward each other as purely social and entirely devoid of any legal character. And, as is so aptly emphasized by the court in the instant case, the welfare of society

in general must be viewed and if an occasional hardship occurs it is not the duty of the court to invalidate the law on that ground as long as the means adopted have a reasonable relation to the end to be attained. *In re People*, 264 N.Y. 69, 190 N.E. 153, 96 A.L.R. 297 (1934); *Nebbia* v. *People of New York*, 291 U.S. 502, 78 L. Ed. 940, 54 Sup. Ct. Rep. 505 (1933).

The Ohio legislature had before it during a recent session a bill substantially the same as the one now in effect in Indiana, 91st G. A., H.B. No. 170. This was rejected. The decision in the principal case will, no doubt, be helpful to the legislature should a similar bill be presented in the future. It seems as if the Ohio courts should have no more difficulty upholding such a law than did the New York court. The same constitutional problems that would arise here were discussed and passed upon in the principal case.

PHILIP J. WOLF

DECEIT

DECEIT — NECESSITY OF SCIENTER OR NEGLIGENCE IN ADDITION TO FALSITY

In December, 1929, the plaintiff purchased from Willis F. Walker, a farm represented to contain 87.883 acres and described in the deed as containing 87.883 acres "more or less." It had been known for years as an 88-acre farm, was on the tax duplicate as such and had been so recorded in an old atlas for the county. The plaintiff discovered after living on the premises for more than four years, that they contained 25 acres less than his grantor had supposed and brought action for damages for the deficiency. The court held that in order to recover, the purchaser must prove either actual fraud upon the part of the vendor, or that the vendor's representations were of a character which from their nature showed that he must have known them to be untrue, or that he was guilty of culpable negligence amounting to fraud. *Fillegar* v. *Walker*, 54 Ohio App. 262, Ohio Bar, March 8, 1937.

The courts in this country are not in accord as to whether the plaintiff, in order to maintain an action of deceit, must show that the false statement was made with knowledge of its falsity, or whether a false statement negligently made will constitute a basis for the action, or whether a false statement, without either scienter or negligence, will be sufficient. The majority of the states follow the view of the English case, *Peek* v. *Derry*, 14 App. Cas. 337 (1889), in holding that knowledge, by the one making the statement, of its falsity is an essential