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SHOULD 'BREACH OF PROMISE' GO?

By a Barrister

In January of this year [1951] a jury awarded the record sum of £20,000 as damages to a plaintiff in a breach of promise case. The defendant appealed against this verdict, and the matter is still under consideration by the court. The sum awarded in this case has led many people to wonder whether the action for breach of promise should remain part of our law at all.

This is an age in which women claim, and have largely achieved, equality with men, and yet men, although they have an equal right to sue for breach of promise, are not expected to do so, and have little chance of obtaining more than nominal damages.

Juries illogically take the view that although a woman may freely withdraw from an engagement a man can do so only at the risk of heavy damages. The opinion is gaining ground, however, that until the time when the marriage vows are sealed a change of heart by either party should involve no penalty whatever.

The action for breach of promise of marriage has been under continuous criticism since its introduction into our law.

Dickens's famous description in *Pickwick Papers* of the trial of *Bardell v. Pickwick*, said to be based on a similarly 'trumped-up' case against Lord Melbourne, shows clearly his contempt for the action. Pickwick is condemned to pay £750 damages, mainly through the ingenious construction placed by Serjeant Buzfuz on the 'chops and tomato sauce' notes to Mrs. Bardell.

By the rules of evidence then prevailing, Mr. Pickwick was not permitted to give his own version of the facts, an anomaly now removed from the law. Indeed, most of the defects in our legal system so scornfully attacked by Dickens have been remedied, but the action for breach of promise lingers on.

Resolution Was Carried

Another opponent of the breach of promise action was Lord Herschell, a former Lord Chancellor, who made frequent attempts to bring about its abolition. In 1879, while still a Member of the House of Commons, he succeeded in obtaining the assent of the House to a resolution proposing that the action be abolished except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such loss.

A Member summed up the view of the House by saying that the only persons who would suffer if the motion were passed would be eloquent junior counsel, needy and speculative attorneys, and the proprietors of newspapers. If he had added gold-digging plaintiffs the list would have been complete.

Although this resolution was carried by 106 votes to 65, the will of Parliament, as expressed by it, has never been put into effect.

Calling For Abolition

More recent critics of the action include the late Mr. Justice McCardie, and Sir Patrick Hastings, who remarks. in his book, *Cases in Court*: 'I suppose that circumstances may exist in which an action for breach of promise is justifiable. although, personally, I have never met them'.

The abolition of the action is again called for in it recently published volume, *The Reform of the Law*, edited by Professor Glanville Williams, where the point is emphasised that, whereas the Church insists on both parties being willing and anxious to marry at the time of the ceremony, the law commands them to go through with it whatever their state of mind and affections.

Opportunities For Wit

The end of breach of promise actions would, it is true, remove a certain amount of light relief from our courts and newspapers. Lawyers tend to regard such cases as opportunities to relax and display a wit which would be out of place in graver matters.

Mr. Justice Swift was, on one occasion, trying a case in which a boarding-house keeper sued one of her lodgers for breach of promise, the defence being that the lodger was much younger than the plaintiff, and that the plaintiff had set out to catch him and had tempted him with presents, among them some silk underwear.

The judge remarked: 'If she saw a young man she fancied, why shouldn't she tempt him with gifts? I think silk underwear would be very fetching. Tell me, Mr. Jones,' (turning to learned counsel) 'did a lady ever give you silk underwear?' Learned counsel was understood to say: no, but he lived in hope!

It is a general principle of English Law that two adults in possession of their faculties can bind themselves contractually to any future course of conduct they choose, and that the law will enforce the contract, provided it is not against public policy to do so. Defenders of the breach of promise action cite this principle in their support.

But there are many reasons for saying that it *is* contrary to public policy to enforce a promise of marriage where either party desires to withdraw. When two people agree to marry they are usually in love - in an emotional state which is exalted and strange. The judgment is unsettled and the reins of reason relaxed in the joy of prospective union. Normally, all goes well, and both parties pass into matrimony gladly and unhesitatingly.

When Love Fades

Not seldom, however, the feelings of one or other change before the wedding. The glow of love fades, and is replaced by the dull realisation of an irretrievable mistake. There is no fault in this. We cannot command love but the law, as it is now in this country, does command that the pact so lovingly entered into shall be rigorously enforced.

This can only mean, if the law is not to be flouted, that a marriage must take place with small hope of success, with dire prospects for the happiness of the children to follow, and with the probability of ultimate divorce. It is fortunate that the party whose ardour has cooled more often risks heavy

damages and withdraws before it is too late. The risk of damages varies inversely, of course, with the moral quality of the other person.

A girl who has truly loved, and feels real concern for the happiness of all parties, will meet the fact of her lover's defection with sorrow, maybe, but not with a writ. As a rule, it is only the grasping, gold-digging, type of woman who will drag her erstwhile betrothed and their past intimacy through the courts for money.

Cases of Hardship

There are, of course, exceptional cases where a girl who has been shamefully treated ought to be afforded some remedy, and an attempt is made below to suggest such a remedy.

Breach of promise cases often take up valuable hours, even days, in court for a result which may be entirely nugatory. It was so in a case which occupied the High Court for nearly a week last October, and resulted in a verdict for the plaintiff for £5,000.

This was quite useless, however, for the defendant was a young farmhand, entirely dependent on his parents, and good for scarcely one hundredth part of that huge sum. It may be said that the amount of the damages clearly demonstrated to the world on which side the right lay, but this is an empty assertion for the blackening of a young man's character can scarcely benefit the woman he has rejected.

Although high damages may prove illusory, a comparatively small amount may cause great hardship. This is shown by a case heard in April of this year at Birmingham Assizes. The plaintiff was a woman of 57 who was said to have been bedridden with paralysis since 1936 and blind as well for the past three years. The defendant, who was aged 52, had been engaged to the plaintiff from 1927 until 1947, and had, in that time, shown her continuous and devoted attention, although he could not afford to marry her and incur the responsibility of supporting a woman requiring constant medical attention. Finally, he despaired of the relationship and married someone else.

In spite of the judge's comment that there was a great deal of credit in what the defendant had done, the jury awarded £200 damages. The hardship of this, to a man recently married and earning only £5 6s. a week, is clearly very great, and quite out of proportion to any blame to be attached to him.

Engagement's Purpose

The rule that a promise to marry has the binding force of a commercial transaction means that the period of the betrothal loses much of its sociological value. It is proper that during this time the man and girl should, through increasing knowledge of one another's characters, reach a conclusion on the likelihood of their future union proving successful. That is the true purpose of the engagement period, but the law says, grimly: 'No, you must go through I with it, whatever incompatibility has been revealed'; and if this injunction is disobeyed will proceed, as one critic has expressed it, to 'weigh the ashes on the cold altar after the sacred flame has gone out'.

Again there is a grave danger that the threat of an action for damages may be used for blackmailing purposes. A fierce glare of publicity beats upon the courtroom when these actions are being tried, and many a sensitive man, and many a man in a public position, will pay up rather than have his most private emotions dissected in court. It has been estimated that for every breach of promise action which comes on for trial, nearly a hundred are privately settled, the threat of publicity having had its effect.

Some Remedy Necessary

Perhaps the only case where a legal remedy is really necessary is that of a young girl seduced under cover of a spurious promise of marriage. Our present artificial rule gives the girl's father an action where he has suffered loss of his daughter's 'services' as a result of her seduction. This rule, based on the old treatment of children as servants, should be amended so as to give the girl herself (if under the age of, say, 21) an action for damages. In the case of more mature women the view that their consent to extra-marital intimacy should rule out any remedy is probably justified.

Few modern legal systems go as far as ours in giving remedies for breach of promise of marriage. Most European countries restrict damages to actual loss incurred in wedding preparations, while in 15 States of the U.S.A. the action has been swept away by the recent 'heart-balm' legislation.

Here, in Britain, the time has surely come for the old House of Commons' resolution of 1879 to be taken out, dusted off; and, at long last, acted upon!

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