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By EDWIN W HADLEY

The action for damages for a mere breach of promise to marry was unknown to the Roman law, as well as to other contemporaneous or precedent legal systems.[1] "The betrothal, by the Roman law, creates no action to compel the entering into marriage nor for damages."[2] The broad statement contra of the note in 9 Corpus Juris 322 is inaccurate, for the broad action on contract with lenient elements of damage is very different from a restricted action compensating for actual pecuniary loss. On dissolution of the Roman *sponsalia* by mutual agreement, gifts could be mutually recovered, and if one party broke the betrothal without cause the other could keep gifts received and demand double return of gifts given to the wrongful party; but no contract action, with damages for lost expectancy, hurt feelings, etc., was allowed or thought of. In the case of *Short v. Stotts*,[3] the Indiana Court also falls into error when it says "the principle which upholds such action is as old as the principle which gives damages in any case for the breach of a contract." In no country did the early law look on a betrothal as a contract, business or otherwise; any rights in connection with it were special and peculiar, and usually were a matter for a spiritual court.

This early rule of the civil law is still followed in Austria, Germany, Italy, Spain, Switzerland, Chili, France, and other countries using other than Anglo-American law, although at intermittent times their ecclesiastical courts have punished the breaker of a betrothal by varied means in which damages were never an element. In some of these countries a civil action for seduction, or for the loss of property of a value estimable in cash, is specially allowed by statute, but there is no pretence of calling the obligation contractual and broad elements of damage are not allowed.

In Anglo-Saxon times in England, when there were no separate ecclesiastical courts, the people and the law looked on

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1 Sherman, Roman Law in the Modern World, § 459; 4 Am. and Eng. Cyc., 2nd ed., 882; 10 Law Quarterly Rev. 135.
2 MacKeldey's Roman Law 14th German ed. transl. by Dropsie, p. 411.
3 58 Ind. 29, 35.

a betrothal as a purely social matter, no court action for breach of promise being allowed as far as any records show. The actions of tort, covenant, and debt were not conceived to cover this non-business and extra-legal dispute. After the Norman conquest, and the advent of the pontificate of Pope Alexander III in 1159, separate ecclesiastical courts were created, and as part of their jurisdiction over marriage they took the power to force specific performance of the promise to marry. This innovation in England was purely spiritual; no contractual theory was pretended or thought of and no damages were given.[4] For four centuries this continental idea continued in England.

By the middle of the sixteenth century the English common law courts had developed the action of assumpsit, the efficacious remedy for breach of a simple unsealed contract. The judges were paid by the number of cases handled, so they were properly anxious to add to their jurisdiction; and their great jealousy for the ecclesiastical and Chancery courts caused them to perpetrate various robberies of actions that these courts had developed. Some unknown but ingenious jurist doubtless remarked that a betrothal consisted of an exchange of promises, that this looked very like a simple assumpsit in bilateral form, and allowed an action to some jilted creature who felt that cash was a proper cure for injured feelings. The first reported case at common law was *Stretcher v. Parker*,[5] decided in 1639, although writers concede that the action had been allowed for many years prior to that decision.[6] This jurisdictional assumption, mingling the breach of betrothal with the breach of business agreements for cattle, goods, etc., flew in the face of the whole history of this social transaction; we hope to show that it also violated the legal logic and theory of the action of assumpsit, and in time was to seriously contravene public policy.

For a time the common law and ecclesiastical courts both exercised jurisdiction over breach of promise to marry, although action in one court barred it in the other. Generally the plaintiffs chose the rich and broad damages provable in a contract action at law. 1753, Lord Hardwicke's Act ended the ecclesi-

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[4] 4 Bac. Abr. tit. "Marriage and Divorce", 530; Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 460.
[5] 1 Rolle Abr. 22.
[6] See language of the Court in **Short v. Stotts**, 58 Ind. 29.

astical jurisdiction, and the common law was fully launched on a career whose aid of the strumpet and adventuress was to be a black shame within a century.

Not only did the granting of a civil contract action inject a new feature into matrimonial engagements, but it lacks the technical requisites for an action of assumpsit.

The civil law philosophy of Savigny, followed by the works on contracts of Sir Frederick Pollock, Anson, Clarke, and others, asserts that there is no technical contract for legal cognizance unless the promissor intended an "act in the law",[7] a legal effect as distinguished from a social effect. X promises to provide you with a dinner, to go to town with you to do some shopping, or to assist you in your wooing of his daughter. X does not intend by such promises to give you any legal claim on him, so if he breaches them no court will support you in an action for damages for breach of contract. A promise to marry comes within this same category, for the state of mind of promissor and promissee is purely social and emotional. Professor Williston,[8] criticizing the writers mentioned above, says that the contract action at common law is based on the theory of consideration, which is not found in the civil law, and so the civil law philosophy described above has no place in the theory of the common law action. He alleges that it is not important to determine whether the promissor intended to effect legal or social relations, as under the doctrine of careless misleading the promissee is entitled to rely on the *apparent* state of mind of the promissor. The state of mind of the promissor, continues Williston, *is* important in connection with the *consideration* for his promise, the common law holding that nothing can function as consideration and "pay for" a promise unless it is exactly what the promissor asked for and is intended by the promissor to be the "binder" or payment for which he is exchanging his promise. Accepting the theory and logic of Professor Williston, however, a promise to marry is not demanding or thinking about anything to act as the exchange and binder for his emotional state of mind. The promissor makes extravagant avowals of deathless love and faith, whether or not the other returns the affection. The promise of the other

7 Pollock Cont., p. 2.
8 See I Will. Cont. § 21.

party is not the consideration because no consideration is asked for under the historical legal meaning of that word.

But there remains a third point. When it allowed a contract action for breach of promise to marry the common law did more than ignore the wisdom of history, did more than contravene the logic of contract actions in the common and civil laws. The broad damages provable under a complaint in assumpsit opened a door into the horrid corridor of Fraud; the aiding of the lying and adventurous threw dangerous fuel on the fire of disrespect for law; the legalizing of blackmail disregarded that public policy for general good to the greatest number which lies behind and higher than legal technicalities or history. As first proof of the bad policy of the action, let us look to the writers who have spoken after careful study of the facts of cases actually before the courts. In all six editions of his well-known work, Schouler has violently attacked the wisdom of the action,[9] stating that from his personal observations the vast majority of plaintiffs are of low character and dubious veracity. Chadman's Cyclopedia of Law calls the suit a "much-abused action". A note in 7 Harvard Law Review, 372, recommends that the action be abolished, or at least be not called a contract action and be limited to the tort recovery for actual pecuniary damages. Professor Vernier of Stanford University, one of the editors of the Journal of Criminal Law and a careful student of social problems, has voiced a similar criticism. Magazines and papers have been full of critical editorials and articles, especially since the middle of the last century when plaintiffs realized the lucrativeness of the action and began its extensive use. Lord Herschel thought that England had seen enough of this prostitution of law, and in 1879, seconded by Sir Henry James, moved in the House of Commons that the action be limited to pecuniary loss, losing his motion by a vote of 106 to 65. This and other legislative attempts have not been defeated by arguments of justice; lawyers in legislative bodies have prevented a change for the sole and selfish reason that from these vicious suits they can and do reap large profits.

Supporting the overwhelming tide of criticism are the actual facts of the cases, many of which are common knowledge. Not

9 Schouler on Marriage, Divorce, etc., 6th ed., § 1302.

long ago Evans Burroughs Fontaine, a professional dancer, claimed breach of promise against the wealthy young Whitney; presenting a child as his; but by good fortune the childless plaintiff was proved to have borrowed the child and the false action crashed, the lady being forced to fly from a charge of perjury. the older readers of this article will remember the public disgust at the legalized blackmail which was uncovered in the New York action brought by Zella Nicolaus against the wealthy and respected George Gould,[10] and in the same state the great Russell Sage had to undergo a suit by the fair Delia Keegan,[11] a profligate girl with several aliases and a record in police court. Not many weeks ago a woman filed suit against a Chicago man (wealthy, of course), alleging that his breach of promise had so damaged her feelings as to physically prostrate her; yet her feelings were not so delicate as to prevent her from posing on her bed of pain for photographers, her picture thereby being published for the chuckles of the whole reading world. This writer has heard numerous remarks on this incident, all of them tinged with ridicule for a law which aids the perjured money-grabbing of Mammon-worshiping plaintiffs. In a day when our courts are clogged, it is obvious that they should be freed of all cases of this type. Furthermore, the abolition of the contractual action for breach of promise would remove a source of serious contempt of law, such contempt being one of the most serious problems of our present American civilization.

The worst element of the action now allowed is that the broad elements of damage attaching to a contract can be proven, including that "loss of prospects" which is the gist of every action. In almost every case the defendant is rich, and the plaintiff can prove how rich he or she would become, this mercenary claim usually being camouflaged for the jury amidst touching testimony about "injured feelings" and "nervous prostrations". This legal award of loss of profits as though a business deal were involved is laughed at in our homes and brayed about in the ribaldry of the vaudeville stage. Recently an elderly millionaire was assessed $50,000 because that would have been the cash profit to an ex-dancer had she succeeded in her business

10 **Nicolaus v. Gould**, N. Y.
11 **Keegan v. Sage**, 25 N. Y. S. 78, 31 Abb. N. Ca. 54.

deal of matrimony. High Olympus must have rocked with the laughter of the gods!

If this action should be abolished, anyone really injured would still be protected. The statutory action for seduction remains. Money spent or property given over could be recovered on the theories of deceit or quasi contract, or by statute. A growing disrespect for law, a growing lightness of the attitude toward engagements and marriages, call for prompt action.